

STATE OF NEW YORK
COUNTY OF ALBANY

SUPREME COURT

FRED RUCKEL, NANCY LAWSON,
JUDITH ELLIOT-BROWN, LYNNE CABLE,
WILLIAM T. BRINA and 4750 Realty, LLC

Plaintiffs,

-against-

HOWARD ZEMSKY, President and Chief Executive Officer,
Empire State Development, JEFFREY NORDHAUS,
Executive Vice President, Innovation and Broadband, Empire State Development,
and NEW YORK STATE URBAN DEVELOPMENT CORPORATION,
doing business as EMPIRE STATE DEVELOPMENT

Defendants.

In the Matter of the Application of

ALLIANCE for ENVIRONMENTAL RENEWAL, INC.,
FRED RUCKEL, NANCY LAWSON,
JUDITH ELLIOT-BROWN, LYNNE CABLE, and
4750 Realty, LLC

Petitioners,

for judgment pursuant to Article 78 of the CPLR

-against-

NEW YORK STATE URBAN DEVELOPMENT CORPORATION,
doing business as EMPIRE STATE DEVELOPMENT,

Respondent.

Case No. 1

VERIFIED
COMPLAINT

Index No.:
RJI No.:

Case No. 2

VERIFIED
PETITION

Index No.:
RJI No.:

Plaintiffs and Petitioners respectfully allege as follows:

INTRODUCTION

1. This is a hybrid lawsuit. Case No. 1 is a citizen taxpayer action pursuant to § 123-b of the State Finance Law. Case No. 2 is a proceeding pursuant to Article 78 of the CPLR.
2. In the citizen taxpayer action, plaintiffs are seeking equitable, declaratory and injunctive relief against the New York State Urban Development Corporation, doing business as Empire State Development (“ESD”). Plaintiffs maintain that the ESD is planning to spend \$500 million appropriated by the Legislature in 2015 to improve broadband access in New York State in an unauthorized and illegal manner, in excess of its regulatory authority and contrary to the Legislative intent.
3. The ESD’s “New NY Broadband Grant Program Request for Proposal Guidelines” (the Guidelines”) that ESD issued on January 8, 2016 and the “reverse auction” that ESD conducted between March 1 and April 15, 2016 will divert the monies appropriated to provide broadband access for New Yorkers without an Internet connection, to different purposes, unintended by the Legislature. A copy of the Guidelines, together with Appendix A, is annexed hereto as Exhibit A.
4. In the Article 78 proceeding, petitioners seek an order annulling and invalidating the Guidelines, and enjoining ESD from implementing them, on the grounds that the Guidelines exceed the regulatory authority of ESD, are arbitrary and capricious and an abuse of discretion. The Guidelines should also be invalidated because they constitute a “rule” within the meaning of the State Administrative Procedure Act (“SAPA”), but ESD failed to comply with the procedural requirements of SAPA in adopting them.

THE BROADBAND CRISIS AND ESD'S PLANS

5. Millions of New Yorkers do not have access to a reasonable Internet connection, which is synonymous with access to broadband. These New Yorkers are severely disadvantaged, and are precluded from fully participating in society in the same way that previous generations of citizens were cut off from the modern world because they did not have access to electric service or telephone service.
6. Without broadband, students cannot do their homework, businesses cannot function, political, cultural and social participation is severely limited, and people cannot do many of the things that are commonly accepted as a part of contemporary daily life. Families without a reasonable broadband connection cannot stream video, cannot take online courses, and cannot communicate via services such as Skype.
7. According to the Guidelines: “despite [the] urgent need for broadband, approximately 2.5 million Housing Units (HU’s) in New York State have either limited or no access to high-speed Internet, creating a digital divide between those communities with the ability to participate in the global economy, and those communities without such access. It is for this reason that Governor Andrew M Cuomo, with legislative support, established the \$500 million New NY Broadband Program...” (p.1).
8. ESD has recognized the problem and the need for remedial action. However, ESD’s plans do not address the gross inequities in broadband access throughout New York State, nor do these plans contemplate any significant expenditures to assist communities that lack access to broadband. Instead ESD intends to divert most, if not all, of the \$500 million that was appropriated by the Legislature in 2015, to a different purpose: providing a

subsidy to broadband providers and communities that already have access to broadband, while providing no assistance to those communities that desperately need it.

9. As described in detail in this petition/complaint, the Guidelines that were adopted by the ESD do not fulfill the mandate of the legislative appropriation “that priority shall be given to projects that bring high-speed Internet access to unserved areas of the state. . .” (L.2015, Ch. 54, Part C, Budget Item 930115SP). Instead, the ESD, unless enjoined, will establish its own priorities for the allocation of this money, in contradiction to the Legislative will, and in excess of the ESD’s own regulatory authority.

VENUE

10. Section 123-c (1) of the State Finance Law states that a citizen taxpayer action “shall be brought in the Supreme Court in any county where in the disbursement has occurred, is likely to occur, or is occurring, or in the county in which the state officer or employee has his or her principal office.” (emphasis added)
11. The ESD has “principal offices” in Albany County (as well as Erie County [Buffalo] and New York City [New York County]). The listed address for the Broadband Program Office, the office within ESD that is administering the program at issue for this action, is 625 Broadway, Albany, New York, within Albany County. Therefore, venue is proper in Albany County.
12. Pursuant to CPLR § 506 (b), venue for an Article 78 proceeding is proper in any county in the judicial district where the principal office of the respondent is located. Since ESD has a principal office in Albany County, venue is therefore proper in any county within the Third Judicial District, including Albany County.

PARTIES

CITIZEN TAXPAYER ACTION

Plaintiffs

13. Plaintiff Fred Ruckel is a citizen and taxpayer of the state of New York who resides at 370 East Conesville Road, Gilboa, New York.
14. Plaintiff Nancy Lawson is a citizen and taxpayer of the State of New York, who resides at 60 Scutt Road, Feura Bush, New York.
15. Plaintiff Judith Elliot-Brown is a citizen and taxpayer of the state of New York who resides at 48 Old Willowbrook Road, Surprise, New York
16. Plaintiff Lynne Cable is a citizen and taxpayer of the state of New York who resides at 24 Dunbar Hollow Road Clarksville, New York.
17. Plaintiff William T. Brina is a citizen and taxpayer of the state of New York who resides at 23 Holmes Dale, Albany, New York.
18. Plaintiff 4750 Realty, LLC is a citizen and taxpayer of the state of New York whose principal office address is 59 Kensico Drive, Mt. Kisco, New York.

Defendants

19. Defendant New York State Urban Development Corporation (“UDC”) is “a corporate governmental agency of the state, constituting a political subdivision and public benefit corporation.” § 6254 of the Unconsolidated Laws. It is currently doing business under the name “Empire State Development.” The “Governor’s Broadband Program Office” (“BPO”) is a bureau or office within Empire State Development.

20. Defendant Howard Zemsky is the President and Chief Executive Officer of Empire State Development, and is an “officer or employee of the state” within the meaning of § 123-b of the State Finance Law.

21. Defendant Jeffrey Nordhaus is the Executive Vice President for Innovation and Broadband of Empire State Development and the head of the Governor’s Broadband Program Office, a bureau or office within Empire State Development. Mr. Nordhaus is an “officer or employee of the state” within the meaning of § 123-b of the State Finance Law.

ARTICLE 78 PROCEEDING

Alliance for Environmental Renewal

22. Petitioner Alliance for Environmental Renewal (“the Alliance”) is a not-for-profit corporation, which was duly incorporated in New York State in 1993. The Alliance’s address is 60 Scutt Road, Feura Bush, New York 12067, in the Town of New Scotland, County of Albany.

23. The Bylaws of the Alliance permit the President to institute litigation on his own initiative. The President of the Alliance has authorized and directed the institution of this lawsuit, and it was also approved by the unanimous vote of the Board of Directors.

24. The headquarters of the Alliance, located in a rural location in the Town of New Scotland, lack access to high-speed Internet, and instead rely upon a wireless connection to a tower operated by Sprint, with a typical download speed of approximately 15 MB per second. The Alliance’s ability to operate, including the ability to research issues, communicate with its members, and perform other functions, has been impaired by the lack of a reliable Internet connection.

25. Members of the Alliance reside, work, and operate businesses in locations in New York State that do not have Internet access at a speed of 25 Megabytes per second download (“Mbts”), that are classified as “Unserved” by the Guidelines.
26. The Alliance has been involved in vigorous advocacy for the preservation of the environment, including issues of community preservation, since its organization. In the last year, the Alliance has been active in advocating for improved access to the Internet in rural areas.
27. The Alliance’s activities have included the filing of public comments in response to a “Request for Information” issued by the ESD (see ¶¶ 53-57 below), successful litigation of an Article 78 proceeding challenging the ESD’s denial of a request for crucial records pertaining to broadband issues under the New York State Freedom of Information Law (see ¶¶ 59-64, below), the submission of testimony to a legislative hearing (annexed hereto as Exhibit D), numerous contacts to state, county, and municipal officials, private individuals, and various not-for-profit entities to advocate for improved access to broadband.
28. For the purposes of establishing standing in the Article 78 proceeding, the Alliance for Environmental Renewal asserts the interests of its individual and corporate members, including Fred Ruckel, Judith Elliott-Brown, Nancy Lawson, Lynne Cable and 4750 Realty LLC, who do not have access to broadband, and will be adversely affected by the intended actions of ESD.
29. According to its Certificate of Incorporation, the Alliance for Environmental Renewal, Inc.’s purpose “is to oppose the degradation of the natural, human, and social environment, and to assist community groups, environmental organizations, labor unions,

and private citizens to work for the improvement of environmental and social conditions in their communities, and to enable such groups to effectively oppose abuses of corporate and institutional power.”

30. The Alliance for Environmental Renewal, both as an organization and on behalf of its members, has standing to maintain this proceeding under the criteria set forth by the New York State Court of Appeals in Douglaston Civic Associations v. Galvin, 36 N.Y.2d 1,7 (1974) because:

1) The Alliance for Environmental Renewal clearly has the capacity to assume an adversary position, as evidenced by its history of advocacy with respect to broadband issues in the last year.

2) The Alliance for Environmental Renewal’s position with respect to broadband issues is fairly representative of the community of interests of groups and individuals who are concerned about the ESD’s failure to provide for communities that presently do not have any access to broadband,

3) The issue of broadband access in unserved communities is squarely within the zone of interests, the improvement of social and environmental conditions, that the Alliance for Environmental Renewal seeks to protect, and

4) Full participating membership in the Alliance for Environmental Renewal is open to all individuals and entities that share the goal of access to broadband for unserved communities.

Other Petitioners

31. Petitioner **Fred Ruckel** is a resident of the Town of Conesville in Schoharie County. He is the Creative Director for RucksackNY, a company that develops websites, does

marketing design, social media campaigns and related activities. Together with his wife, he also operates a company called SnugglyCat Inc. that sells a product for cats called “The Ripple Rug,” that has been on the Amazon best sellers list for over 20 weeks, is also sold through a website, www.riplerug.com, and has shipped over 4000 units this year. Both of these businesses are run from Mr. Ruckel’s residence in Conesville.

32. There is no high-speed Internet access where Mr. Ruckel lives. He can only obtain access to the Internet through VisStat-Exede, at a cost of \$159.99 per month, for limited bandwidth access during business hours. Mr. Ruckel must work during “free zone” hours – between midnight and 5 A.M.

33. In order to do the work necessary for his business, Mr. Ruckel must work during the wee hours of the morning, which is obviously a very significant disruption to his life.

34. Mr. Ruckel, who moved to Conesville from New York City in 2008, would like to expand his businesses and to hire local residents. However, he cannot expand his operations until and unless he has a reasonable Internet connection.

35. As a public service, Mr. Ruckel’s company RucksackNY has built the website for the Town of Conesville. The company has also provided all of the equipment for town residents to access the Internet. However, in order to update the Town website, Mr. Ruckel needs to drive to 5 miles to the Town Hall parking lot which has WiFi access, because the limited Internet capabilities at his residence and business are simply inadequate to complete work efficiently.

36. Petitioner **Judith Elliot-Brown** is a resident of the town of Greeneville in Greene County. She runs a home-based business called Rocket Science. She works as a systems designer and frequently must download large computer files that she receives from

Architects, primarily Computer Aided Design (CAD) files. Her work also requires her to upload large computer files, to deliver her products to customers. Although her residence is only half a mile from a line owned by Mid-Hudson Cable, she can only obtain Internet access through a company called Exede via satellite, at a download speed of less than 10 Mbps (even worse when it is raining or snowing), at a cost of \$90 per month, subject to a data cap.

37. **4750 Realty, LLC** owns a commercial building, located at 4750 Route 145, Durham, New York, located in the town of Durham. The LLC was unable to obtain broadband service from either Verizon or Mid-Hudson Cable. The only way that the company could obtain broadband access, which is essential for the building's tenants and for the company's plans to expand its manufacturing activities (the company had hoped to create 25 well-paying manufacturing jobs in Durham), was to contract with a company called New York Air. New York Air provided 4750 Realty, LLC with a 50 Mbps connection, scalable to 100 Mbps, but required a \$15,000 installation fee, plus a five-year commitment at the sum of \$750 per month (\$9000 per year).
38. Since neither Time Warner nor Charter Communications have a franchise agreement with Conesville, Greenville or Durham, projects providing broadband in these towns are eligible for funding from the BPO (see ¶¶ 92-106 below). However, as the result of the Guidelines adopted by the BPO and the reverse auction conducted pursuant to those Guidelines, it is very unlikely that the BPO will fund any project that will provide broadband in these municipalities.
39. Petitioners **Nancy Lawson** and **Lynne Cable** reside in a portion of the Town of New Scotland in Albany County where it is not possible to obtain high-speed access to the

Internet. The Town of New Scotland has a franchise agreement with Time Warner, and the Public Service Commission has excluded municipalities where such franchise agreements exist from receiving broadband funding from the \$500 million appropriation. Ms. Lawson and Ms. Cable are adversely affected by the Guidelines because they will not be able to receive any benefit from the legislative appropriation to improve broadband access.

40. Petitioners Ruckel, Elliott-Brown, Cable, Lawson and 4750 Realty LLC have a special interest in the allocation of the \$500 million appropriated by the legislature, because they would potentially obtain broadband access at a speed of at least 25 MB per second if Empire State Development adopted proper rules for its distribution, and complied with the New York State Constitution. This interest is different from the public at large.

Respondent

41. Respondent **New York State Urban Development Corporation** (“UDC), doing business under the name “Empire State Development,” is “a corporate governmental agency of the state, constituting a political subdivision and public benefit corporation.” § 6254 of the Unconsolidated Laws.

FACTUAL BACKGROUND

1. The Legislative appropriation

42. The New York State Governor’s office submitted a proposed budget for the 2015- 2016 fiscal year on or about February 1, 2015 containing budget item 930115SP, which reads:

New NY broadband initiative, to support the development of infrastructure to bring high-speed internet access to unserved and underserved regions throughout the state, and to support the development of other telecommunications infrastructure; provided however **that priority shall be given to projects that bring high-speed internet access to unserved areas of the state, public**

libraries, and educational opportunity centers; provided further that the New York state urban development corporation shall submit a report before June 30, 2016 to the director of the division of the budget, the temporary president of the senate, the speaker of the assembly, the minority leader of the senate and the minority leader of the assembly detailing: (a) the total amount of public funds committed by this program annually; (b) total amount of private funds committed annually and, if applicable, the amount of such funds that has been invested by such parties; (c) the location of each area receiving investments under this program and the goals for each such area; (d) planned future investments by both public and private parties; and (e) such other information as the corporation deems necessary. (Emphasis added).

43. The legislature duly enacted this budget item as part of the budget adopted on or about April 1, 2015. The budget item was included in Chapter 54, Part C of the Laws of 2015.
44. There is nothing in the language of the budget item that refers to a goal of upgrading service at speeds to 100 MB per second download for presently served communities.
45. Furthermore, the appropriation does not contain any indication that proposals for project funding from the appropriated monies: 1) would require any matching funds from grant recipients, 2) would be awarded on the basis of a competitive process which would rank the proposals on the basis of cost efficiency, 3) that proposed funding projects would have to propose to provide service for a minimum of 2500 housing units, or 4) that proposed projects would have to comply with a variety of requirements, including a maximum cost for providing service.
46. Instead, the budget item merely states “that priority shall be given to projects that bring high-speed Internet access to unserved areas of the state, public libraries and educational opportunity centers.”

2. The Request for Information

47. On or about September 24, 2015, the BPO issued a “Request for Information (‘RFI’)” “for the purpose of preparing guidelines for the New NY Broadband Program.... [which

was] in the process of developing and finalizing implementation plans for the Program.”

A copy of the RFI is annexed hereto as Exhibit B.

48. The RFI requested comments on the BPO’s planned program. Pages 3-4 of the RFI described “important elements of the Program:”

- 1) Providing access to “most places” at a speed of at least 100 MB per second download, and 25 MB per second “in the most remote underserved and unserved parts of the State.”
- 2) “Public/private sector partnerships and a required private sector co-investment.”
- 3) “Regional, ground-up deployment planning with the help of New York State’s 10 Regional Economic Development Councils.”
- 4) “Leveraging of State-owned fiber and other assets.”
- 5) “The ability to bring high-speed Internet access to unserved areas of the State, public libraries, and educational opportunity centers.”
- 6) “Promoting affordable broadband access to both commercial and residential users.”

49. The RFI stated that it would be “expected that applicants [for funding from the \$500 million appropriated by the Legislature] would be scored subject to specific criteria including, but not limited to, the amount each applicant seeks as a financial match, proposed technology utilized, speed deployed, cost per additional home served, management capabilities, corporate financial viability, plans related to upstate rates of affordability and other community benefits, such as additional businesses or community institutions served, amongst others.” (p.8).

50. Furthermore, the RFI expressed an intention to consider a “reverse-auction’ in which each project would be awarded to qualified bidders based on the lowest-cost per additional home connected.” (p.8).
51. However, the RFI did not contain any indication that possible projects would be evaluated on the basis of the actual needs of a particular community, or that any consideration would be given to the fact that certain communities, particularly rural communities where prospective broadband users are not geographically concentrated, are hard to serve, and it has been economically unfeasible for private broadband providers to extend service to them.
52. The RFI did acknowledge that “the legislation authorizing funding for the New NY Broadband Program states that priority shall be given to projects that bring high-speed Internet you access to unserved areas of the state, public libraries and educational centers.” (p.9). Nevertheless, the RFI did not give any indication of how the BPO intended to address this priority need, and merely requested comments as to how the program might be structured to address it.

3. Alliance for Environmental Renewal comments on the RFI

53. The Alliance for Environmental Renewal submitted comments in response to the RFI. These comments were also joined by the Town of New Scotland, three Albany County legislators (Michael Mackey, Herbert W. Reilly and Douglas Bullock), two officers of the Alliance as individuals (President Peter Henner, Treasurer Nancy Lawson, as well as Board members William T. Brina and Douglas Bullock) and by New Scotland resident Lollie Hannan. These comments are annexed hereto as Exhibit C.

54. The Alliance sharply criticized the BPO's stated goal of upgrading service to 100 MB per second as contrary to the legislative intentions:

The goal of 100 MB per second and the requirement for projects to be cost-effective will frustrate and defeat any efforts to address what should be the primary goal of the legislative appropriation: the need to provide reasonable broadband access to the people who need it most.

The stated plans of the BPO, particularly the impossible promise of 100 MB per second download speeds for all New Yorkers by 2019, will not provide substantial relief for New York residents who lack broadband access. Although the BPO's slogan is "Broadband for All", it should be clear that the BPO primarily plans to upgrade broadband access for existing users, while leaving underserved and unserved communities behind. The BPO's plans will create greater disparities between those New Yorkers who are able to participate in the global economy, and those New Yorkers who will continue to be isolated from modern society in the same way that rural areas without telephone and electrical service were isolated in the 20th century.

The BPO's stated goal of 100 MB per second for all New Yorkers is the biggest obstacle to the objective of providing broadband access to all New Yorkers. Both the legislative intention and good public policy requires that the BPO's priority should be, first and foremost, to provide broadband access at some reasonable speed to everyone. Only when such access has been provided to unserved communities, should the BPO undertake the luxury of assisting with the funding of upgrades in communities that already have broadband service. This is especially true since upgrading to 100 MB per second in many areas has been and can continue to be achieved by the private sector, without governmental assistance. The BPO's intention to devote the bulk of its limited resources to such upgrades will deprive unserved communities of the monies needed to achieve even minimal broadband access.

(pps 1-2) Emphasis in original

55. The Alliance also criticized the BPO's emphasis on competition, and pointed out that an insistence that projects be economically competitive would result in the exclusion of projects designed to provide broadband for communities that desperately need broadband, but are simply not profitable for the private sector:

The second biggest obstacle is the BPO's intention to insist on "competition," and to fund only the most cost effective projects. Projects that will upgrade existing service will always be more cost-effective than projects establishing new

broadband service where it does not presently exist. Broadband service at even minimal speeds has not been provided to many areas, particularly rural areas, precisely because private-sector Internet service providers have found that it is not cost-effective to do so....

Even with a 50% match, broadband providers will still not find it profitable to install the necessary infrastructure for broadband. And even if such projects can be profitable with a 50% matching fund from the state, the intended criteria of “highest speed at lowest cost” will preclude such projects from successfully competing against projects designed to benefit areas where the cost of providing Internet service is lower because of population densities, geographical considerations, and the ability to utilize existing infrastructure.
(p.2)

56. The Alliance also argued that it was essential for the BPO to include scoring criteria recognizing the actual need of particular communities for broadband access, in order to fulfill its responsibility under the appropriation statute to give priority to unserved communities:

Item (B) (1) (i) of the Request for Information quotes the language of the legislative appropriation which “states that priority shall be given to projects that bring high-speed Internet access to unserved areas of the state, public libraries, and educational opportunity centers.” (Chapter 54, Part C, Laws of 2015). This item also requests comments on how the program can be structured to provide access to these entities in the “most cost effective manner to the State.” Although saving money is always desirable, it must be realized that the BPO also has a responsibility to ensure that access is provided to all communities, even in circumstances where there may be more “cost-effective” projects. The responsibility to provide broadband access, like the responsibility to provide electricity and telephone access in the 20th century, requires a recognition that such access must be provided to the entire population, even though it is significantly more expensive in some areas.

If the BPO is to fulfill its mission, achieve its stated goal of “Broadband for All” and comply with the legislative mandate to provide broadband for unserved communities, **it must establish criteria and methodology to fund broadband projects for communities where such projects may not be cost-effective, or, at the very least, are not as “cost-effective” as projects in communities that are better positioned to take advantage of available resources.** If the BPO fails to do so, New Yorkers, especially New Yorkers who live in rural areas which are not presently served by broadband providers will continue to fall behind other citizens of the state and their rural counterparts in other states.

(pps. 2-3) emphasis added

57. In response to a different item in the Request for Information, the Alliance criticized the plans for the “reverse auction” and reiterated the need to establish criteria based upon the actual need of a community for broadband, rather than limit the review of projects to economic competitiveness criteria:

Any ranking system for projects must include weighting factors to acknowledge the need to provide broadband service for unserved communities.

Item B (1) (c) states that the BPO intends to issue an RFP to seek bids to connect underserved and unserved areas, and that applicants for such bids will be “scored subject to specific criteria...” pertaining to the amount of matching funds sought, cost per additional home served, speed, “plans related to upstate rates of affordability and other community benefits” and other criteria. Item B (1) (d) states that the BPO is considering, as an alternative to such scoring, a “reverse auction’ in which each project would be awarded to qualified bidders based on the lowest cost per additional home connected.”

Neither of these approaches address the central problem: regardless of economic cost, there are more than 1 million people who do not have any broadband access. Any scoring system used by the BPO should reflect the fact that it is more important to have projects that provide access to previously unserved communities than it is to upgrade existing access for existing consumers. Any scoring system must also recognize the non-quantifiable benefits of providing Internet access to individuals and communities who have previously not had any Internet access whatsoever.

If an entire community lacks Internet access, its citizens are effectively disenfranchised, and its continued viability is at risk. The scoring must include weighting factors to value that risk. For example, if the entire population of a particular school district lacks Internet access, the value of providing access to that school district, and the consequences of denying Internet access to students in that school district needs to be considered. There are communities in New York State where local businesses are threatened because of the lack of good Internet connections: if, for example, the state wants to encourage tourism in the Adirondacks, it is essential to improve Internet access so that recreational facilities, restaurants and hotels can maintain websites and communicate with prospective customers by email. Again, the value of Internet access to such businesses (and the costs to both the local community and to the state as a whole as the result of lack of Internet access) should be included in any scoring system that is used to award funding for projects.

4. Other responses to the Request for Information

58. The BPO received 71 comments in response to its Request for Information. However, the BPO did not release these comments to the public, nor, upon information and belief, did the BPO respond, either privately or publicly, to any of the comments that were submitted.
59. Between October 30, 2015 and January 8, 2016, Peter Henner, president of the Alliance for Environmental Renewal and counsel for plaintiffs/petitioners in this action, attempted to ascertain the status of the BPO's plans. No new information was posted on the BPO website, and several phone calls, both from Mr. Henner, and, upon information and belief, from legislative staff members to whom Mr. Henner turned for assistance, were not returned.
60. On November 12, 2015, Mr. Henner filed a Freedom of Information Law request with the BPO, seeking access to records, most notably the responses that were submitted to the Request for Information. As of January 8, 2016, ESD had acknowledged this request, but had sent two form letters, stating that the request would be reviewed in 30 days.
61. Nevertheless, the Guidelines issued by ESD on January 8, 2016 claimed: "The RFI responses have been considered in the development of these Guidelines."
62. The Alliance for Environmental Renewal treated the actions of ESD as a "constructive denial" of its Freedom of Information Law request, filed an administrative appeal, and ultimately, on February 10, 2016, commenced an Article 78 proceeding (*Alliance for Environmental Renewal v. New York State Urban Development Corporation*, Col. Co. Index No. 9813-16) seeking access to the RFI responses.

63. On February 19, 2016, counsel for ESD delivered a DVD to Mr. Henner, with 65 of the 71 responses that ESD had received to the RFI. The remaining six responses were sent to Mr. Henner by email, after ESD completed its review of miscellaneous issues pertaining to claimed exemptions from disclosure.
64. The Article 78 proceeding was resolved by a stipulation of discontinuance, duly signed by Supreme Court Justice Mott, and filed in Supreme Court, Columbia County.
65. The comments that were submitted to the BPO in response to the RFI are attached hereto as Exhibit E (the approximately 900 pages are contained on a CD. The file “Binder” contains the 65 responses that were on the DVD given to Mr. Henner. The remaining 6 responses are on the CD as separate files).
66. Many of these comments raise the same concerns that were raised by the Alliance: the plans of the BPO to rely on a “reverse auction” to award grant monies, and the BPO’s failure to provide any mechanism to enable hard to serve rural communities to effectively compete for these grant monies, will result in the exclusion of projects that would assist presently unserved communities.

5. The BPO Guidelines and the Reverse Auction

67. On January 8, 2016, the BPO issued its “New NY Broadband Grant Program Request for Proposal Guidelines,” annexed hereto as Exhibit A. These Guidelines set forth the requirements for funding proposals for “Phase 1” of the program. According to the Guidelines:

“Phase 1 will award grant funding to applicants to provide Last-Mile services to Unserved and Underserved areas of the State. Applications for Phase I funding will be evaluated through a reverse-auction process (the Phase 1 Reverse-Auction or Reverse-Auction). The Reverse-Auction will select projects providing broadband access that require the lowest State Investment on a dollars-per-Unit served basis, based on the cost to pass a Unit....

The BPO intends to award a portion of the Program’s \$500 million appropriation to Phase I applicants, and to retain the balance of funding for future rounds. However, there is no specific maximum dollar amount attributable to Phase 1 and the BPO reserves the flexibility to award any amount, depending entirely on the quality and quantity of Phase I applications received....”

(pps 2-3)

68. The Guidelines set forth eight requirements to participate in “Phase 1” of the program, listed on page 4 of the Guidelines. Details pertaining to these requirements, under subheadings A through H are set forth in pages 4-13.

- A) “Projects must only address unserved or underserved areas,”
- B) “Applicants must provide a required co-investment,”
- C) “Projects must provide Internet speeds consistent with the Governor’s goals,”
- D) “Proposed technology solutions must conform to the Governor’s goals,”
- E) “Projects must be implemented by December 31, 2018,”
- F) “Proposed pricing structures must include a required pricing tier,”
- G) “Applicants must demonstrate suitable physical and management capabilities,”
- H) “Applicants must make a commitment to complete their projects.”

A. Projects in unserved areas

69. “Unserved areas” are defined as areas where broadband service is not available at a speed of at least 25 MB per second download. “Underserved areas” are defined as areas where broadband service is not available at a speed of 100 MB per second (i.e. speeds of between 25 MB per second and 100 MB per second. (See Guidelines, Appendix A, p. ii).

70. Upon information and belief, projects in “underserved” areas will be more cost-efficient and therefore have a lower cost per unit connected than “unserved” areas. Underserved areas are likely to have existing infrastructure to build from, and also likely to be located

in higher population density areas where it is more cost-efficient to build Internet connections.

71. The Guidelines do require separate reverse auctions for “unserved” and “underserved” areas, perhaps to avoid requiring projects for unserved areas to directly compete against projects in underserved areas, which are likely to be more cost-efficient under the BPO’s criteria. Nevertheless, since the Guidelines do not require any minimum number of awards for projects in unserved areas, it is quite possible that none of the money that has been appropriated will be used for projects in unserved communities.
72. Projects in unserved areas (as well as underserved areas) must propose to serve a minimum of 2500 units. Upon information and belief, 2500 units is roughly equivalent to a population of between 5,000 and 10,000, substantially larger than many towns in New York State. The minimum service area requirement excludes prospective applications from broadband providers who might otherwise be able to offer proposals in rural areas where the population is dispersed over many square miles.

B. Required Co-investment

73. Page 9 of the Guidelines states: “Governor Cuomo has set a goal of soliciting private sector Matching Funds for 50% of the capital needed for the Program. Consistent with that goal, applicants are encouraged to provide Matching Funds such that private investment for projects will be as high as possible, and cost to the State as low as possible. The Governor’s goal for private investment unfunded projects is 50% of total Eligible Project Costs for greater.” 10% of the applicant’s financial commitment must be in the form of “equity capital...defined as cash invested into the project by the applicant or by investors.”

74. The Guidelines ignore the fact that broadband expansion has not been possible in many currently unserved areas of New York State because it is not economically viable for private sector investors. Upon information and belief, in many, if not the overwhelming majority of unserved areas, broadband expansion will not be economically viable for private broadband providers even with the State subsidizing 50% of the cost.

C. Minimum speed of 100 MB per second

75. The Guidelines state: “The Program is designed to ensure that every New Yorker has access to high-speed broadband at Internet download speeds of at least 100 Mbps, except in the most remote areas of the state. Phase I has set download speed requirements consistent with that goal for applications addressing Unserved and Underserved areas, respectively.... Projects addressing Eligible Unserved [Census Blocks] should offer Internet download speeds of at least 100 Mbps.” (p.10).

76. Upon information and belief, it will be impossible for applicants to design or propose projects that are economically feasible that provide service at 100 Mbps in the vast majority of Unserved areas.

77. Broadband access at 100 Mbps typically requires a “wire,” either by fiber optic (FIOS), cable or Digital Subscriber Line (DSL). It is simply not economically feasible to construct such service in rural areas where low population density makes such projects prohibitively expensive.

78. The expenditure of state funds allocated for broadband access to upgrade existing servers to 100 Mbps can also be judged by the fact that a major broadband provider, Time Warner Cable, is presently advertising speeds of only up to 50 Mbps for its “Business Class.” (A copy of a widely distributed Time Warner advertising brochure is annexed

hereto as Exhibit F) Apparently, it is the intention of the BPO to subsidize broadband providers to upgrade existing service to 100 Mbps, at the expense of areas that lack any access to broadband.

79. Upon information and belief, broadband access at speeds of 100 MB per second is only viable in areas that already have an existing broadband connection, and can achieve these speeds by upgrading it.

D. Broadband technology

80. The Guidelines state: “Proposed technology solutions must be designed to meet the Program’s goals, particularly the Governor’s target download speed of at least 100 Mbps.” Two technologies are “pre-approved” 1) Fiber-to-the-Home and 2) Cable/Hybrid Fiber-Coaxial. Two other technologies, Digital Subscriber Line and Fixed Wireless may be acceptable upon a demonstration that they can meet the 100 Mbps criteria (p.10-11).
81. Once again, the Guidelines have been designed to preclude applications for funding for Unserved areas, particularly areas with a low density population where the construction of relatively expensive infrastructure for broadband is not economically viable.

E. Completion date of December 31, 2018

82. The Guidelines require that projects funded by Phase 1 be completed by December 31, 2018, the target date by which all New Yorkers are supposed to have broadband access at the speed of 100 Mbps. The Guidelines also indicate that some monies are expected to be left over after the completion of Phase 1, but, since it is explicitly stated that there are no maximum amounts for Phase 1, is not clear whether there will, in fact, be any such monies (see ¶67 above)

F. Maximum price for service

83. The Guidelines require that applicants for funding, as a condition of participation in Phase I, agree to provide service at a minimum speed of 25 MB per second download/4 MB per second upload, at a monthly rate not to exceed \$60. (p.11).
84. Although it might appear well-intentioned to impose a maximum price for service as a condition of receiving governmental funds, the practical effect is to preclude otherwise eligible applicants. Upon information and belief, the additional costs of providing service in hard to serve low density population areas, where many people may not choose to accept service, will make it difficult for broadband providers to develop proposals that will comply with the maximum price for service imposed by the Guidelines.

G. Financial and management capabilities for applicants

85. The Guidelines require that applicants for Phase I funding meet the following requirements: 1) presently operate at least one wired or wireless network with at least 500 customers, 2) submit audited Financial Statements for the past three years and signed federal state and local tax returns for the past two years, 3) if the applicant is a municipality and has a municipal bond rating, it must demonstrate an investment grade bond rating, 4) demonstrate that the project is “fully financed”, and that the applicant has cash on hand “in an amount no less than the proposed committed funding, or a commitment letter for financing in that amount,” and 5) be in good standing in the performance of any New York State contracts and in full compliance with all federal, state and local laws (pps. 12-13).
86. Upon information and belief, these requirements effectively limit the applicant pool to existing broadband providers. Although it may be proper for ESD to require that applicants meet certain criteria to show that they are responsible bidders, the criteria

listed above, particularly the requirement that the applicant presently operate a network with 500 customers and have the capability of fully financing its share of the project, effectively limits the applicant pool to the same group of business entities who have previously not been willing or able to extend broadband capability to unserved communities.

H. A nonrefundable deposit

87. The Guidelines also require an applicant to provide a deposit in the sum of \$100,000. If an applicant is selected, and refuses to enter into a contract to implement its proposed project, the \$100,000 will be nonrefundable. (pps 13-14).

The reverse auction

88. ESD received applications from March 1, 2016 through April 15, 2016. “After the Application Deadline [April 15, 2016], the Reverse-Auction will rank Qualifying Applications [i.e. those applications that meet the requirements described above] in order of requested State investment per-Units served, by [Regional Economic Development Council] Region, prioritizing the lowest-cost applications...” (Guidelines, p.16)
89. Applications will be determined, and grant money awarded solely on the basis of cost criteria. ESD does not contemplate giving any priority to unserved communities, as required by the language of the legislative appropriation, nor will any consideration be given to the fact that some communities are especially needy and have no alternative way of receiving broadband access.

Exclusion of Time Warner franchise areas from the reverse auction

90. The Guidelines also exclude three areas from Phase 1 funding: 1) housing units and businesses within existing Time Warner Cable (“TWC”) and Charter Communications

(“Charter”) franchise areas, 2) areas within Connect America Fund service territories (which may be eligible to receive federal funding for broadband expansion) and the “approximately 12 pending projects “that are already being funded through the Connect NY Broadband Grant Program and Regional Economic Development Councils (Guidelines, pps. 8-9).

91. On January 8, 2016, the same date that ESD promulgated its Guidelines, the Public Service Commission approved the merger between TWC and Charter, to create a new company, New Charter. (PSC Case No. 15-M-0388, Order Granting Joint Petition Subject to Conditions [“Order”]).
92. The approval is subject to ultimate federal approval.. The PSC’s approval was conditioned upon TWC and Charter accepting certain conditions, which the PSC characterized as “consistent with... Governor Andrew Cuomo’s commitment to broadband investments and infrastructure expansion in the State.” (Order, p.3).
93. The Guidelines characterize this order as requiring New Charter “to extend service to 150,000 or more currently unpassed housing units and businesses within...” existing franchise areas. The Guidelines further state that remaining housing units “that do not meet the Governor’s speed goals will be eligible for future rounds of program funding” after Phase 1. (Guidelines, p.8).
94. The PSC Order actually only requires New Charter “to extend its network to pass, within its statewide service territory, an additional 145,000 “unserved” (download speeds of 0-24.9 Mbps) **and “underserved”** (download speeds of 25-99.9 Mbps) residential housing units and/or businesses within four years of the close of the transaction.” (Order, p.53) (emphasis added).

95. Thus, although the Guidelines state that there will be 145,000 new connections to previously unserved homes or businesses, as the result of the PSC Order, it is possible that many of the 145,000 connections will only be upgrades of existing service to “underserved” units.
96. On February 18, 2016, TWC and Charter filed a list of municipalities in New York State where they presently have franchise agreements, and the estimated number of unpassed or unserved housing units in each municipality. This list contains the actual number of unserved housing units, and the fact that it was filed indicates that TWC and Charter know whether or not the total number of unserved housing units exceeds 145,000.
97. TWC and Charter asserted a “trade secret” claim with respect to this information, and the only document available to the public completely redacted all information.
98. On March 28, 2016, the Alliance for Environmental Renewal, together with New Scotland Town Supervisor Douglas Lagrange, plaintiffs/petitioners Douglas Bullock and Nancy Lawson, and four other individuals, filed a Freedom of Information Law request with the PSC and ESD, seeking access to the unredacted version of this information.
99. TWC and Charter filed a revised version of the list of municipalities, identifying, for the first time, the municipalities in New York State where TWC or Charter has a franchise agreement and where they will be required to extend service. However, the companies reiterated their claim of trade secret status with respect to the number of unpassed housing units in these municipalities.
100. The Alliance for Environmental Renewal disputed the characterization of the number of unpassed units as a “trade secret” and reiterated its request for this

information. Both the PSC and ESD are presently reviewing the Alliance's FOIL request.

101. Twenty-five percent of the expansion of the Time Warner/Charter Communication network is to be completed each year for four years, presumably beginning at some point in late 2016 or early 2017, and continuing until late 2020 or early 2021.
102. The Order prohibits the merged company from seeking funding from the BPO for the 145,000 premises. The Order requires the company to seek BPO funding for premises in excess of 145,000, but it appears that such funding will not be requested until the 145,000 units have been connected, which will not happen until 2020, at the earliest. Although the PSC "expects that the balance of the unserved premises in New Charter's footprint will be eligible for the BPO's Broadband 4 All Program" (Order, p.55), the \$500 million appropriated in 2015 will have long been spent by the time that units subject to the 2016 Order have been connected.
103. The PSC Order includes both "underserved" and "unserved" housing units. Since it will be cheaper for Time Warner to upgrade underserved units to 100 Mbps then it will be to run new wires to unserved units, it is likely that unserved units will be the last to be connected.
104. Furthermore, under the PSC timetable for new connections in the existing TWC and Charter, no more than half of the presently unserved units will be connected by the end of 2018 (25 % in each of 2017 and 2018), the target date for the expenditure of existing broadband funding, and the date by which everyone in New York State is supposed to have broadband access.

6. CONSEQUENCES OF THE GUIDELINES AND THE REVERSE AUCTION

105. As of the date of this petition and complaint, the BPO has not released any information about: 1) the number of applications received in the reverse auction, 2) how many of them meet the criteria to be “Qualifying Applications,” 3) the entities that may have submitted applications, or 4) released any information whatsoever regarding the process that will be used to evaluate these applications or when it will be completed.
106. Upon information and belief, very few applications were submitted to provide broadband in unserved areas. The requirements for matching funding, minimum service areas, and the limitation of applicants to existing broadband providers precluded bidders who might have had an interest in providing such service.
107. Even if such applications were received, these applications will not be able to successfully compete against applications for service for underserved areas or for areas, where existing infrastructure already exists.
108. Even though the Guidelines contemplate separate auctions for “Unserved” and “Underserved” areas, it will nevertheless be true that the applications for Underserved areas will appear far more cost-efficient and will therefore be preferable under the purely economic criteria established in the Guidelines.
109. Therefore, upon information and belief, the Guidelines and the reverse auction which has been conducted pursuant to those Guidelines will not achieve the legislative goal of providing funding for areas of the state that lack adequate broadband; instead, the legislative intent has been frustrated, and the monies that are likely to be awarded pursuant to Phase I will go to other purposes.

110. Furthermore, although 145,000 unserved or underserved housing units and businesses within the current TWC and Charter areas may eventually obtain a broadband connection or an improved broadband connection as the result of the PSC Order, their exclusion from broadband funding may well mean that no one can propose any projects to enable them to get broadband funding until at least 2020.

7. LEGAL ANALYSIS

A. The BPO intends to spend money in a manner not authorized by the Legislature.

111. Article 7, § 2 of the New York State Constitution requires the Governor to submit “a budget containing a complete plan of expenditures proposed to be made before the close of the ensuing fiscal year...”. Pursuant to this requirement, the Governor’s office submitted a proposed budget for the 2015- 2016 fiscal year on or about February 1, 2015, which included an appropriation to improve broadband access in the State, budget item 930115SP (quoted in full in ¶42 above).

112. Article 7, § 4 of the New York State Constitution states that “the legislature may not alter the appropriation bill submitted by the governor except to strike out or reduce items therein...” Consequently, the Legislature did not have the power to make any changes to the proposed language of item 930115SP.

113. Article 7, § 7 of the New York State Constitution states: “No money shall ever be paid out of the state treasury or any of its funds, or any of the funds under its management, except in pursuance of an appropriation by law... every such law making a new appropriation. . . shall distinctly specify the sum appropriated, and the object or purpose to which it is to be applied...”

114. Article 7, § 7 is implemented by statutes, particularly § 43 of the State Finance Law which mandates that “Money appropriated for a specific purpose shall not be used for any other purpose....”
115. Although the language of the appropriation bill was originally prepared by the Governor’s office, once enacted as part of Chapter 54, Part C of the Laws of 2015, the language became a statement of Legislative will and intention.
116. The appropriation bill establishes a legislative priority to provide broadband access for presently unserved areas of the state. It does not provide for, nor indicate any intention to provide monies for, the goals and priorities that have been articulated by the BPO in the last year: 1) the upgrade of service to 100 Mbps, 2) the award of monies on a “cost-effective” basis, regardless of the actual need for broadband service of a particular community 3) the requirement that monies only be awarded to existing broadband providers that meet strict eligibility requirements pertaining to minimum service areas and maximum pricing and 4) are willing and able to provide matching funding.
117. The purpose of the appropriation bill was to provide money for a specific purpose: to improve broadband access in New York State, particularly for communities that do not have it. In contrast, the Guidelines that the BPO has promulgated and the reverse auction that has been conducted by the BPO prevent the spending of the monies for the intended purpose. Instead, the money will be diverted to other purposes: subsidizing existing broadband providers to provide services not specified or intended by the legislature.

118. Consequently, the actions of the BPO violate the provisions of the New York State Constitution and the State Finance Law that prohibit the expenditure of monies for purposes that have not been authorized in an appropriation bill.

B. The BPO has exceeded its regulatory authority.

119. The BPO, an office within a public benefit corporation that is part of the executive branch, administers the broadband program pursuant to authority that has been granted by the Legislature. Upon information and belief, the Legislature cannot constitutionally pass its lawmaking functions to the BPO, and the BPO can only exercise such authority as has been properly delegated to it by the Legislature. “However facially broad, a legislative grant of authority must be construed, whenever possible, so that it is no broader than that which the separation of powers doctrine permits.” *Boreali v. Axelrod*, 71 N.Y. 2d 1, 9 (1987).

120. “A legislature may enact a general statutory provision and delegate power to an agency to fill in the details, as long as reasonable safeguards and guidelines are provided to the agency.” *Greater New York Taxi Association v. New York City Taxi and Limousine Commission*, 25 N.Y. 3d 600, 608 (2015), citing *Boreali*, 71 N.Y.2d at 10.

121. “*Boreali* ... is the touchstone for determining whether agency rulemaking has exceeded legislative fiat.” *NYC C.L.A.S.H. v. New York State Office of Parks, Recreation and Historic Preservation*, 2016 N.Y. Slip. Op. 02479, p.3 (March 31, 2016)

122. “In *Boreali*, the seminal case addressing the proper delegation of power, this Court set out four ‘coalescing circumstances’ that are non-mandatory, somewhat-intertwined factors for courts to consider when determining whether an agency has

crossed the hazy ‘line between administrative rule-making and legislative policy-making’ (71 NY2d at 11).” *Greater New York Taxi Association*, 25 N.Y.3d at 610.

123. The four *Boreali* “factors are not mandatory, need not be weighed evenly, and are essentially guidelines for conducting an analysis of an agency’s exercise of power.” Id. at

612. The factors are :

- 1) Whether the agency made its own judgments pertaining to difficult and complex choices between broad policy goals rather than simply balance costs and benefits according to existing guidelines, *New York Statewide Coalition of Hispanic Chambers of Commerce v. New York City Department of Health and Mental Hygiene*, 23 N.Y.3d 681, 698 (2014)
- 2) Whether the agency filled in details of a broad policy or “wrote on a clean slate, creating its own comprehensive set of rules without benefit of legislative guidance,” *Boreali*, 71 N.Y.2d at 13,
- 3) “Whether the legislature has unsuccessfully tried to reach agreement on the issue, which would indicate that the matter is a policy consideration for the elected body to resolve.” *Greater New York Taxi Association*, 25 N.Y. 3d at 611-612, citing *Boreali*, 71 N.Y.2d at 13,
- 4) “Whether the agency used special expertise or competence in the field to develop the challenged regulations.” *Greater New York Taxi Association*, 25 N.Y. 3d at 612, citing *Boreali*, 71 N.Y.2d at 13-14.

124. Any *Boreali* analysis is “center[ed] on the theme that it is the province of the people’s elected representatives, rather than appointed administrators, to resolve difficult social problems by making choices among competing ends. ” *Coalition of Hispanic*

Chambers of Commerce, 23 N.Y. 3d at 697, quoted at *NYC C.L.A.S.H.*, 2016 N.Y. Slip. Op. 02479, at p.5

125. On three occasions in the last two years, the Court of Appeals has conducted a *Boreali* analysis: *Hispanic Chambers of Commerce*, 23 N.Y. 3d 681 (2014), *Greater New York Taxi Association*, 25 N.Y. 3d 600 (2015), and *NYC C.L.A.S.H.* 2016 N.Y. Slip. Op. 02479 (March 31, 2016)
126. In *Hispanic Chambers of Commerce*, the Court analyzed the four *Boreali* factors to determine that the New York City Board of Health exceeded the scope of its authority in adopting a rule limiting the size of sweetened drinks. The court did not address the fourth factor, pertaining to the agency’s particular expertise, but did emphasize its conclusion that the agency had been determining “difficult, intricate and controversial issues of social policy” which constituted “lawmaking beyond its regulatory authority” under the first factor. 23 N.Y. 3d at 698-699.
127. In *Greater New York Taxi Association*, the Court conducted a similar analysis and concluded that the legislature had granted broad statutory powers to the New York City Taxi and Limousine Commission. The Court concluded that the Commission did not exceed its regulatory authority when it adopted rules about the type of taxis that could be used in New York City because the issue did not involve “difficult social problems of any nature.” 25 N.Y. 3d at 613.
128. One month ago, in *NYC C.L.A.S.H.*, the Court rejected a challenge by a pro-smoking organization to regulations adopted by a state agency that prohibit smoking in state parks. The Court found that the Legislature had articulated a policy with respect to

smoking, and that the state agency, in adopting the regulation at issue, was acting within the scope of its delegated authority.

Application of the *Boreali* criteria to the instant case

129. With respect to the first *Boreali* criterion, the BPO's Guidelines and the resulting reverse auction make several determinations with respect to policy goals for broadband expansion in New York State. These determinations not only represent major and important decisions of policy which were not set forth by the Legislature; they are determinations in direct contradiction to the Legislative mandate.
130. The clearest example is the BPO's determination to establish a policy goal of 100 Mbps for some New Yorkers while millions of New Yorkers lack any broadband access whatsoever. The Legislature did not authorize such a goal and it is contrary to the Legislative determination to make it a priority to extend broadband in unserved areas.
131. Similarly, BPO's determinations: 1) to use cost-effectiveness criteria without consideration of the actual need of communities that are hard to serve, 2) to limit applications for funding to existing broadband providers, 3) setting strict eligibility criteria for prospective bidders, 4) to require that proposals have a minimum service area of 2500 units and commit to a maximum price for service, are "difficult and complex choices between broad policy goals."
132. With respect to the second *Boreali* criterion, the BPO has created a comprehensive set of rules for its auction, and has done so without regard for the priority established by the legislature, and certainly without any legislative guidance. There is nothing to indicate that the Legislature has ever adopted a "broad policy" that would authorize the specific actions taken by the BPO.

133. It is self-evident that the legislature has not reached any agreements with respect to policy questions pertaining to the method of addressing the broadband crisis in New York State. Therefore, consideration of the third *Boreali* criterion also supports a conclusion that BPO has exceeded its regulatory authority when it may policy determinations in the Guidelines.

134. Finally, there is nothing to indicate that the BPO has any “special expertise or competence” with respect to the issue of how to provide broadband to New York State, and certainly no reason to believe that it has any particular expertise with respect to the critical policy determinations that need to be made.

**AS AND FOR A FIRST CAUSE OF ACTION
(State Finance Law 123-b)**

135. Petitioners repeat and reallege each and every allegation of all paragraphs above with the same force and effect as if set forth in full herein.

136. Section 123-b authorizes any citizen taxpayer to “maintain an action for equitable or declaratory relief or both, against an officer or employee of the state who the course of his or her duties has caused, is now causing, or is about to cause a wrongful expenditure, misappropriation, misapplication, or any other illegal or unconstitutional disbursements of state funds or state property...”

137. Defendants have conducted a reverse auction, in accordance with Guidelines that they promulgated, that will result in awards of money for purposes that were not approved by the Legislature and which were not properly appropriated by the Legislature pursuant to Article 7, § 7 of the Constitution and § 43 of the State Finance Law.

138. All such prospective expenditures are illegal and unconstitutional, and should be enjoined.

**AS AND FOR A SECOND CAUSE OF ACTION
(State Finance Law 123-b)**

139. Petitioners repeat and reallege each and every allegation of all paragraphs above with the same force and effect as if set forth in full herein.

140. The Guidelines promulgated by the Governor's Broadband Program Office, and the reverse auction that has been conducted pursuant to them, were conducted in excess of the regulatory authority granted to Empire State Development, infringe upon the jurisdiction of the New York State Legislature, and violate the separation of powers doctrine.

141. Any action taken pursuant to those Guidelines, including any prospective award of monies to applicants for funding, is unconstitutional and should be enjoined.

**AS AND FOR A THIRD CAUSE OF ACTION
(CPLR 7803 (3))**

142. Petitioners repeat and reallege each and every allegation of all paragraphs above with the same force and effect as if set forth in full herein.

143. The promulgation of the Guidelines on January 8, 2016 represented a final determination of ESD.

144. For the reasons set forth above, the Guidelines violate the State Finance Law and the New York State Constitution and the determinations made by ESD to adopt the Guidelines and to conduct a reverse auction in accordance with the Guidelines were made

in violation of lawful procedure, affected by an error of law and are arbitrary and capricious and an abuse of discretion.

**AS AND FOR A FOURTH CAUSE OF ACTION
(CPLR 7803 (3))**

145. Petitioners repeat and reallege each and every allegation of all paragraphs above with the same force and effect as if set forth in full herein.
146. UDC is an “agency” for the purposes of SAPA, pursuant to § 102 (1) of SAPA.
147. Section 102 (2) of the State Administrative Procedure Act (“SAPA”) defines a “rule” as “ (i) the whole or part of each agency statement, regulation or code of general applicability that implements or applies law, or prescribes a fee charged by or paid to any agency or the procedure or practice requirements of any agency, including the amendment, suspension or repeal thereof and (ii) the amendment, suspension, repeal, approval or prescription for the future of rates, wages, security authorizations, corporate or financial structures or reorganization thereof, prices, facilities, appliances, services or allowances therefore or evaluations, costs or accounting, or practices bearing on any of the foregoing whether of general or particular applicability.”
148. Upon information and belief, the Guidelines promulgated by ESD on January 8, 2016 meet the statutory definition of a “rule.” The Guidelines set forth the procedure and practice by which a legislative appropriation is to be administered, prescribes a fee (the \$100,000 deposit required for applicants) and certainly sets forth a prescription for practices bearing on several of the items listed in the second paragraph of the definition.
149. Section 202 of SAPA sets forth a detailed procedure for rulemaking. In brief, an agency is required to prepare a notice of proposed rulemaking which must contain

detailed information about the proposed rule, and, upon adopting the rule, must file a notice of adoption which will include an assessment of public comment and extensive detailed information about the rule and the analysis of the effects of the rule.

150. ESD did not file any notice of proposed rulemaking, nor, upon information and belief, did it ever file the Guidelines with the Secretary of State. Upon information and belief, ESD has not and is not recognizing the Guidelines as a “rule” subject to SAPA.

151. Furthermore, it should be noted that ESD not only did not summarize or respond to the public comments that were submitted in response to its Request for Information, it did not make those comments publicly available, until the Alliance for Environmental Renewal requested access to those comments pursuant to the Freedom of Information Law, and filed an Article 78 proceeding challenging ESD’s denial of that FOIL request.

152. Section 205 of SAPA explicitly authorizes an Article 78 proceeding to seek judicial review of any rule adopted under SAPA, but conditions the right to seek review upon the petitioner first requesting the agency to address the validity of the rule in question, and giving the agency 30 days to take action.

153. However, in this case, the agency, ESD, has refused to acknowledge that the Guidelines that it has promulgated constitute a “rule” and has not made any effort to comply with the procedural requirements of SAPA pertaining to rulemaking.

154. Upon information and belief, the procedural requirements of § 205 only apply when the agency describes its action as adopting a “rule;” the procedural requirements do not apply where the agency denies that its actions do, in fact, constitute rule-making and has simply ignored the rulemaking procedure required by statute.

155. In any event, since ESD does not acknowledge that it has engaged in rule-making, it would be an exercise in futility to require petitioners to make a request to ESD to address the validity of the Guidelines that it has promulgated, and it is well settled that exhaustion of administrative remedies is not required when such exhaustion would be futile. Siegel, *New York Practice*, 5th Ed. p. 992.

156. Petitioners maintain that the Guidelines constitute a rule which should be invalidated and annulled, not only because of the substantive concerns discussed above, but because of the failure to comply with the procedural requirements of SAPA.

RELIEF

Plaintiffs and petitioners seek judgment:

1. Ordering, adjudging and decreeing that Empire State Development's Guidelines and the reverse auction that was conducted pursuant to those Guidelines constitutes a plan to spend money appropriated by the New York State Legislature in a manner that was not authorized by the New York State Legislature,
2. Ordering, adjudging and decreeing that Empire State Development exceeded its regulatory authority when it adopted and promulgated Guidelines on January 8, 2016 pertaining to its plans to conduct a "reverse auction,"
3. Ordering, adjudging and decreeing that the Guidelines violate the provisions of the New York State Constitution and the State Finance Law,
4. Ordering, adjudging and decreeing that the Guidelines were adopted in violation of lawful procedure, are affected by an error of law and are arbitrary and capricious and an abuse of discretion,

5. Ordering, adjudging and decreeing that the Guidelines constitute a “rule” for the purposes of the State Administrative Procedure Act, and were adopted in violation of the procedures for rulemaking,
6. Enjoining Empire State Development from making any determinations to award any contracts, approve any proposals, or awarding any money as a result of proposals received during the reverse auction that it conducted between March 1 and April 15, 2016,
7. Imposing such additional relief , in the form of a preliminary injunction or temporary restraining order, as the court may deem necessary to restrain Empire State Development from committing acts that may be detrimental to the public interest, pursuant to § 123-e (2), pending the determination of this action,
8. Awarding a reasonable sum to plaintiffs for costs and expenses, including attorneys fees, pursuant to § 123-g (1),
9. Such other and further relief, as to the Court may seem just, proper and equitable.

DATED: May 1, 2016
Clarksville, New York

Yours, etc.,

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