

BRETON, Chair; DAVIS, WILSON, THOMPSON, and ADAMS, Members

I. SUMMARY

By way of this Notice of Rulemaking, the ConnectME Authority (Authority) initiates a rulemaking to describe the operation of the Authority and to establish a process for reviewing and approving requests for ConnectME Authority support as required by 35-A M.R.S.A. Chapter 93.

II. BACKGROUND

On August 23, 2006, "The Advanced Technology Infrastructure Act" (35-A M.R.S.A. §§ 9201-9215, and 36 M.R.S.A. § 2017) (The Act) became effective. The purpose of the Act is to stimulate investment in Advanced Communications Technology Infrastructure so as to increase access to broadband and wireless services for all Maine communities, especially rural communities. The statute also authorizes the Authority to require annual contributions, up to .25 percent, to a ConnectME fund to provide the means of funding the Authority and its support of broadband development projects. In order to achieve its purpose, the Act creates the ConnectME Authority (Authority) that may adopt rules necessary or useful for carrying out any of the Authority's powers and duties. Pursuant to § 9205(3) of the Act, these rules are major substantive rules (Title 5, Part 18, Chapter 375, § 8071), meaning that they must be approved by the Legislature before they can take effect.

As stated in 35-A § 9204(2), duties of the Authority include, among others: expand the availability of broadband to residential and small business customers in

unserved or underserved areas; expand the availability of broadband with bandwidth, synchronicity, reliability and security adequate to serve business, education and enterprise consumers in unserved or underserved areas; and otherwise enhance the State's communications technology infrastructure in unserved and underserved areas.

III. DISCUSSION OF RULE PROVISIONS

A. Section 1 – Purpose

Section 1 of the proposed rule defines the purpose of the Authority and lists the 12 duties specified in the Act. They are:

1. Establish criteria defining unserved and underserved areas;
2. Enhance communications technology infrastructure;
3. Monitor wireless (cellular) coverage;
4. Expand the availability of broadband to residential and small business customers in unserved or underserved areas;
5. Expand the availability of broadband with bandwidth, synchronicity, reliability and security adequate to serve business, education and enterprise consumers in unserved or underserved areas;
6. Otherwise enhance the State's communications technology infrastructure in unserved and underserved areas;
7. Collect, aggregate, coordinate and disseminate information and data concerning communications services and advanced communications technology infrastructure in the State;
8. Track investment in advanced communications technology infrastructure;
9. Continually assess the availability of and need for advanced communications technology infrastructure in unserved or underserved areas within the State;

10. Identify and secure federal and other funding sources for broadband or wireless deployment or education;

11. Identify opportunities for coordination among providers, consumers and state and local governmental entities, including coordination with the statewide emergency radio network; and

12. Create and facilitate public awareness and educational programs to encourage the use of broadband services.

B. Section 2 – Definitions

Section 2 of the proposed rule contains definitions of terms used in the proposed rule, many of which come from the Act itself. These definitions, along with several others, are included in section 2 of the proposed rule. Several of the definitions are necessary to clarify which entities and services are subject to various provisions of the Act. The Act and the proposed rule contain commonly used terms that will have more specific meaning when used by the Authority. The definitions are crucial to determining eligibility for support under the Act.

The broadest term used in the Act is “Advanced Communications Technology Infrastructure,” which covers any communications technology infrastructure or infrastructure improvement that expands the deployment of, or improves the quality of, broadband availability or wireless service coverage.¹ All entities that provide service using Advanced Communications Technology Infrastructure must provide the Authority with certain data to allow the Authority to monitor the availability of advanced communications service in Maine.

¹ The statute says “and,” but the language of the rule was changed to “or,” in order to clarify that funded projects may improve broadband availability or improve cellular service.

“Communications Service,” which is a narrower category, means any retail wireline voice, wireline data, fixed wireless data, satellite data, or video retail service.²

A “Communications Service Provider” is any entity offering the Communications Services listed above, and any facilities-based provider of mobile wireless voice or data retail service that voluntarily submits to the Authority’s fund assessment.

Communications Service Providers are eligible to apply for financial support from the Authority. The Authority seeks comment regarding the appropriate language for the definition to ensure clarity.

“Broadband Service Provider” is a sub-category of Communications Service Provider. It is a Communications Service Provider that provides Broadband Service (also defined by the proposed rule). Broadband Service Providers are eligible to apply for financial support from the Authority. A parallel sub-category is the Mobile Communications Service Provider. A Mobile Communications Service Provider is a facilities-based provider of mobile wireless voice or data retail service. This is a separate category of providers, because providers that fall into it may or may not decide to submit the assessment and thereby become eligible for project funding from the Authority.

“Mobile Communications Service Provider” means any facilities-based provider of mobile wireless voice or data retail service and is commonly known as cellular telephone companies.

“Certificate of Qualification” means the certificate issued to an applicant by the Authority in accordance with the requirements of section 3 of the proposed Maine Revenue Service Rule No. 324 (18-125 CMR 324) as a prerequisite to applying for tax reimbursement from Maine Revenue Services in accordance with M.R.S. A. § 2017. All types of providers are eligible to apply for the proposed tax reimbursement on

² The language of the rule is somewhat different than the statute to clearly delineate types of services that would be subject to assessment.

machinery or equipment if it is used to provide service in an area determined by the Authority to eligible.

C. Section 3 – Required Filing of Data

In order to carry out its required duties, the Authority will need accurate and current data. The necessary data includes information about the technologies used in Maine as well as customer demographics. The rule, as proposed, establishes which providers must provide data, what data must be provided, and confidentiality protections for certain data.

1. FCC Form 477

Subsection 3(A) of the proposed rule requires that any entity with customers in Maine that must file a completed Form 477 with the Federal Communications Commission (FCC) must also file a completed Form 477 with the Authority.³ Form 477 is a requirement of the local telephone competition and broadband data gathering program of the FCC. It contains information concerning providers' service offerings and types of customers. This requirement has been in place at the FCC for several years. The Form 477 data and data format will provide the service type, speed, and zip codes of customers, but will not provide the exact location of customers eligible to receive service from any given provider. At a later date, the Authority may decide that more precise data is needed to determine which areas qualify for support and require more detailed filings. However, at this time the Authority believes that the FCC data strikes a fair balance between allowing the Authority to

³ The FCC considers these entities to be "broadband providers" based on their definition of "high speed service," which is: connections that deliver services at speeds exceeding 200 kilobits per second in at least one direction. Based on the initial standard for Broadband Service in section 5 of the proposed rule, many of the providers that will submit the FCC data to the Authority will not meet the threshold speed required to be considered Broadband Service Providers.

perform its duties and minimizing the burden of complying with the rule. The Authority seeks comment on the appropriateness of using this data.

2. Coverage Maps

Subsection 3(B) of the proposed rule requires that all Mobile Communications Service Providers with customers in Maine submit data to the Authority. In October 2005, in cooperation with the Maine Wireless Telecommunication Infrastructure Board (WTIB),⁴ the cellular carriers in Maine agreed to provide signal strength data to a third party which created an aggregated, statewide, -95dB signal coverage map. The proposed rule requires that Mobile Communications Service Providers submit the same type of data, at two specific signal strengths (-95 dB and -85 dB), on an annual basis. Two signal strengths are proposed to address the criticism that the 2005 data was misleading. At -95dB the signal may not be strong enough for some phones or in some weather conditions to receive the signal, thus it may indicate that coverage is better than consumers typically experience. In 2005, -95 dB signal was mapped. The addition of the -85dB data will allow the Authority to see more potential “holes” in the coverage and identify additional areas that may qualify for support. The Authority seeks comment on the appropriateness of using this data.

3. Additional Data

The objective data that the proposed rule requires will only provide a partial understanding of the status of the Advanced Communications Technology Infrastructure in Maine. In order to perform the additional duties established by the Legislature in § 9204 of the Act, more qualitative data are necessary. To that end, the proposed rule also includes subsections 3(A)(3) and 3(B)(3). Those subsections require all data filers to provide a narrative describing their services, including the

⁴ The WTIB was a subcommittee of the Telecommunication Infrastructure Steering Committee that was instrumental in developing the Act.

technical specifications, how the services are provided, and more nuanced information about their customers.

D. Section 4 – Protection of Confidential Information

The Act directs the Authority to protect any information that could compromise the security of public utility systems to the detriment of the public interest and information that is of a competitive or proprietary nature. It directs the Authority to adopt rules defining the criteria it will use to satisfy those requirements and the types of information that would satisfy the criteria. All of these confidentiality protections are included in the proposed rule in section 4. The proposed rule defines data that must be automatically protected without a motion for a protective order and provides a mechanism to petition the Authority for confidential protection. As stated in the Act, subsection 4(A)(2)(a) of the proposed rule says that the Authority will protect from public disclosure information of a competitive or proprietary nature to the minimum extent necessary. The Act also directs the Authority to protect information from any Authority members who may stand to gain a competitive advantage by having access to it.

E. Section 5 – Designation of Broadband Service and Eligible Areas

Section 5 of the proposed rule sets forth the methods to accomplish one of the primary purposes of the Act, to increase access to Broadband Service. However, “broadband” service has many different meanings today, the least of which is from the FCC, which defines broadband as being connections that deliver services at speeds exceeding 200 kilobits per second in at least one direction. The work of the Authority requires a specific definition and the definition will need to evolve over time as technology matures. Nonetheless, the proposed rule contains a definition that the Authority will use as an initial standard. In its November 2005 report, the Broadband Access Infrastructure Board recommended, among other things, that a speed of 1.5 Mbps in at least one direction should be the minimum speed to qualify as “broadband.” That standard is adopted in the proposed rule in subsection 5(A)(3). At least annually,

pursuant to the proposed rule, subsection 5(A), the Authority will revisit the standard to determine if it is still appropriate. At that time the Authority will consider criteria such as latency, jitter, and the capacity to perform certain applications when setting the standard.

Subsection 5(A)(4) of the proposed rule excludes satellite service from consideration for support and in determining eligible areas without an affirmative finding by the Authority that satellite service meets all of the broadband performance criteria. This is based on the determination included in the Telecommunications Infrastructure Steering Committee's report, that the satellite service available in Maine is generally more expensive and has excessive jitter or latency compared to broadband service available from other types of providers.

As stated in subsections 5(B) and 5(C), the Authority must designate, at least annually, unserved and underserved areas for broadband service and mobile communications service, using data under section 3 of this Chapter. The Authority may also designate these areas based on verifiable data provided by an individual or group.

As defined in the proposed rule, an unserved area is an area without broadband service or mobile communications service and in which a project to provide those services will not be completed within one year.

The proposed rule defines underserved as any geographic area where broadband service or mobile communications service exists, but where the Authority determines that the service is inadequate. In order to make the necessary determination the proposed rule contains two criteria that the Authority will consider: the broadband service that is available is provided at a price that exceeds 150% of the statewide average for reasonably similar service; or the overall capacity, reliability, or quality of the broadband service available is inadequate to meet current or projected needs for the area. The Authority seeks comment on the appropriate percentage to determine affordability.

For mobile communications service, an underserved area is any area with signal strength between -95dB and -85dB, as indicated in maps provided under subsection 3(B) of this Chapter.

For the sales and use tax reimbursement program, a Qualifying ConnectME Zone means an area that the Authority has determined to be either unserved or underserved for broadband and mobile communications service on the date of the sale of the machinery and equipment.

F. Section 6 – ConnectME Authority Support

Section 6 of the proposed rule describes how the Authority will provide support to eligible projects.⁵ Once an area is found to be unserved or underserved, it becomes an area where providers are eligible for financial support from the ConnectME fund and tax reimbursement from the State. An eligible unserved or underserved area for broadband service may create an overlap in existing broadband coverage for less than twenty percent (20%) of households in the proposed coverage area. The Authority seeks comment on the percentage level of overlap and the appropriateness of the concept.

Pursuant to section 6 of the proposed rule, eligibility for project support is determined for an applicant by showing that the applicant can satisfy two criteria. First, the applicant must contribute to the ConnectME fund and, second, the applicant must show that it would not have made the investment without the support from the ConnectME fund.⁶ The rule proposes that the Authority employ a third-party

⁵ Within 90 days of the effective date of this rule, the Authority will develop an application and application guide.

⁶ The Act also says that the Authority may not develop, acquire, fund, coordinate or otherwise undertake any project or make any grant, direct investment or loan under this chapter unless the action is taken on behalf of, in partnership with or in support of

administrator to confirm the first criterion (subsection 7(C)). The second criterion will be attested to by the applicant as a part of the application.

Similarly, pursuant to the tax rule, eligibility for the tax reimbursement is determined by a person (as defined by tax law) showing that two criteria have been met.

⁷ First, the item must be used primarily in the development of an Advanced Communications Technology Infrastructure in an unserved or underserved area. Second, the applicant must attest that it would not have made the investment without the support from the Authority. Both criteria will be attested to by the provider as a part of the application. All reimbursements made by the Bureau of Revenue Service are subject to audit.

The Act is relatively silent on the process for awarding funding to Communications Service Providers. The process in the proposed rule in subsection 6(D) is to award the funds for projects at the close of an application window. As proposed in the rule, there will be at least one 60-day window per year, and the Authority may designate additional windows at its discretion.

This approach allows the applications to be considered at the same time and therefore the Authority will make a determination of projects that deserve support by comparing the merits of all proposals. By comparing proposals against each other and confirming that the other criteria included in the rule are met (e.g., the project will service a currently unserved area), the Authority can use its limited resources to ensure the maximum benefit for Maine.

one or more communications service providers that are remitting assessments to the authority under section 9211.

⁷ See proposed Maine Revenue Service Rule No. 324 (18-125 CMR 324) regarding applying for tax reimbursement from Maine Revenues Services in accordance with M.R.S. A. § 2017.

Pursuant to section 9204(1) of the Act, Authority support for projects in the unserved or underserved area will not diminish the value of prior investment in advanced communications technology infrastructure used to provide broadband or mobile communications service within the area. The Act also requires that the Authority shall provide public notice of its intention to take any action under section 6 of the proposed rule. The Authority may not approve a project “if a service provider franchised or certificated to provide a communications service to the area submits a timely certification to the Authority that the service provider will commence within 45 days and will complete within one year the installation of sufficient advanced communications technology infrastructure to provide broadband or wireless service in a manner that would render the Authority's action unnecessary or redundant” (section 9204(5) of the Act).

When the Authority develops the application process, it will be the responsibility of existing providers in the area to make a showing that ConnectME funding will “impede,” “inhibit,” or “diminish,” since it would be administratively difficult for the Authority to make that determination.

The Authority seeks comment on the process the Authority should use to determine the legitimacy of the private investment certification and potential sanctions. For example, what should the Authority do to make sure the company completes installation within one year? What should the penalties be for not completing the private investment within one year? What authority does the Authority have to impose penalties? Should the certification be with a surety bond or irrevocable letter of credit? Should the Authority determine that the company not completing the private investment within one year as ineligible for the sales and use tax reimbursement as provided in section 2017 of the Act and/or forfeit the ability to challenge other Authority projects?

Eligible uses of funds provided under the ConnectME Fund include those activities and the provision of facilities and services as described in 35-A M.R.S.A. §§ 9204-9205. Eligible activities include the provision of such public infrastructure,

services, facilities and improvements needed to implement new broadband services, enhance existing broadband services, implement new mobile communications service, or enhance existing mobile communications service. Funds may also be used for matching requirements, “gap” financing, and grants, that may assist projects in qualifying for other sources of funding, as well as any other necessary activities that are integral and necessary for the development and deployment of a broadband or mobile communications system. Examples of eligible activities include:

1. planning services and technical assistance integral to the development of needed systems;
2. the aggregation of demand;
3. the establishment of databases and other informational and technology systems;
4. the purchase of machinery, equipment and software;
5. public facilities and services;
6. real property rehabilitation;
7. the acquisition of real property;
8. site preparation and improvements; and
9. construction

G. Section 7, ConnectME Fund⁸

To generate the funds necessary to support the Authority (both the reasonable administrative costs of the Authority (§ 9204(2)(F)) and the ConnectME Fund (§ 9211)), the Act authorizes the Authority to assess Communications Service Providers an amount not to exceed 0.25% of the instate retail revenue received from all Communications Services provided to a location in Maine by Communications Service

⁸ This is the name established by the Act to mean a nonlapsing fund administered by the Authority for the purposes of supporting the activities and projects of the authority under this chapter. (§ 9211(1))

Providers (§ 9211(2)).⁹ Specifically, that includes all wireline voice, wireline data, fixed wireless data, satellite data, video retail service, and those providers of mobile wireless voice and data¹⁰ that voluntarily choose to be assessed like the other Communications Service Providers. The Authority seeks comment on whether “provided to a location in Maine” is administratively burdensome. If so, commenters should provide alternative language, for example, “services billed to a location in Maine.”

The proposed rule (see subsection 7(B)) proposes an initial assessment at the maximum allowable level of 0.25% for all Communications Service Providers with retail revenues of at least \$12,500 per quarter and does not assess those with revenues of less than \$12,500 per quarter.¹¹ This assessment structure is the same as the State Universal Service Fund assessment and the Maine Telecommunications Access Fund (MTEAF) assessment. It was chosen because there have historically been a large number of providers with very low revenues and the administrative costs to collect the assessments from the small providers negate the revenues generated from a potential assessment.

IV. PROCEDURES FOR THIS RULEMAKING

⁹ This is the language in the proposed rule. It clarifies a provision in § 9211(2) of the Act which could be interpreted to double collect if one entity “received” and another entity “collected” revenues from the same end user. That section of the Act also states that the Assessment will be paid on “communications services provided in this State.”

¹⁰ By volunteering to pay the assessment, the wireless providers become eligible to apply for project support from the Authority.

¹¹ For purposes of funding initial activities of the Authority, Section 6 of the Act says that the Public Utilities Commission may, upon request of the Authority, transfer to the ConnectME Fund up to \$500,000 of previously collected but unallocated funds held by the commission in the universal service fund pursuant to Title 35-A, section 7104. The Authority may not request, and the Commission may not undertake any transfer of funds to the ConnectME Fund under this section until the Authority receives authorization pursuant to Title 5, section 8072 to finally adopt major substantive rules.

This rulemaking will be conducted according to the procedures set forth in 5 M.R.S.A. §§ 8051-8058. A public hearing on this matter is scheduled for 9:00 a.m., October 18, 2006, in the State House Taxation Committee Room #126, State Street, Augusta, Maine. Comments may also be filed after the hearing, no later than November 1, 2006. Comments should be submitted electronically by going to the Authority's web site (www.maine.gov/connectme) or by email to Connect.ME@maine.gov.¹² All comments will appear on the ConnectME Authority web site.

The Authority shall send copies of this Notice and the attached Rule to:

1. All persons who indicated an interest in receiving information;
2. All known Maine incumbent local exchange carriers, competitive local exchange companies, inter-exchange carriers, cellular companies, cable companies, internet service providers, and satellite service providers.
3. The Secretary of State for publication in accordance with 5 M.R.S.A. § 8053(5); and
4. Executive Director of the Legislative Council, 115 State House Station, Augusta, Maine 04333-0015 (20 copies).

¹² Persons without electronic access may mail comments to the ConnectME Authority, State House Station 1, Augusta, ME 04333.

Dated at Augusta, Maine, this 27th day of September, 2006.

BY ORDER OF THE AUTHORITY

<signed>

Daniel B. Breton, Chair

MEMBERS VOTING FOR: Breton
Wilson,
Thompson,
Adams

ABSENT: Davis