From: Sanborn, Ben M. [bsanborn@preti.com]
Sent: Tuesday, December 05, 2006 4:27 PM
To: Arata, Kelly; ME, Connect
Subject: ConnectME Rulemaking

Reggie Palmer asked me to forward the following information regarding the requirements for renotification of Rules in conjunction with the ConnectME Rulemaking process.

During the ConnectME Advisory Board meeting a question was raised regarding whether there would be a need to re-notice the Rulemaking if the Authority was considering adopting, in whole or in part, TAM's proposed amendments. The basis for this, presumably, would be 5 MRSA s. 8052(5)(B) which states that:

"A rule may not be adopted unless the adopted rule is consistent with the terms of the proposed rule, except to the extent that the agency determines that it is necessary to address concerns raised in comments about the proposed rule, or specific findings are made supporting changes to the proposed rule. . . . If an agency determines that a rule that the agency intends to adopt is substantially different from the proposed rule, the agency shall request comments from the public concerning the changes from the proposed rule. The agency may not adopt the rule for a period of 30 days from the date comments are requested pursuant to this paragraph. Notice of the request for comments must be published by the Secretary of State in the same manner as notice for proposed or adopted rules."

It is clearly permissible for the Authority to adopt an amended Rule "to the extent that the agency determines that it is necessary to address concerns raised in comments about the proposed rule". The only way it would require a re-notification would be if the proposed amendment was "substantially different from the proposed rule". The very first sentence of the Notice of Rulemaking in this proceeding is: "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." TAM's amendments are clearly and unequivocally proposals to establish a process for reviewing and approving requests for ConnectME Authority support. While they may provide more clarity and specificity to the provisions of the proposed Rule, they never stray beyond the clear scope of the Rulemaking as embodied in the existing Notice. The whole purpose of sending a proposed Rule out for comment is to get comments which will, presumably, change the final language in the Rule.

If it was never the intent of the Rulemaking to establish guidelines for how and when to support projects through the ConnectME Authority, then perhaps TAM's comments do represent a substantial change from the proposed Rule. However, TAM would hope that it was the intent of the Authority to truly establish a process for reviewing and approving requests for ConnectME Authority support, in which case TAM's proposed amendments simply represent concerns that, in deferring to some future proceeding the development of an "application process" which will presumably contain the details of how and when

eligibility for projects is determined, the proposed Rule does not fully satisfy the requirement of the enabling legislation that the Authority carry out its duties through Rules adopted pursuant to 35-A MRSA s. 9205(3). As such, the proposed amendments embody a different approach to achieving the stated goal that the Authority could use in determining how to address TAM's concerns as a commenter in the process, not a substantial change from the proposed Rule.

-Ben Sanborn

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