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2012 MAY 24 PM 1:08

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May 24, 2012

NOTICE OF EMERGENCY RULE DECISION BY THE SECRETARY OF STATE

AGENCY: WEST VIRGINIA Broadband Deployment Council

RULE: New Rule, 208CSR1, Broadband Deployment Grants Program

DATE FILED AS AN EMERGENCY RULE: May 14, 2012

DECISION NO. 6-12

Following review under W. Va. Code §29A-3-15a, it is the decision of the Secretary of State that the above emergency rule is **approved**. A copy of the complete decision with required findings is available from this office.

A handwritten signature in black ink, reading "Natalie E. Tennant".

NATALIE E. TENNANT  
Secretary of State

EMERGENCY RULE DECISION  
(ERD 6-12)

AGENCY: West Virginia Broadband Deployment Council  
RULE: New Rule, 208CSR1, Broadband Deployment Grants Program  
FILED AS AN EMERGENCY RULE: May 14, 2012

- par. 1 The West Virginia Broadband Deployment Council (Council) has filed the above new rule as an emergency rule.
- par. 2 W. Va. Code §29A-3-15a requires the Secretary of State to review all emergency rules filed after March 8, 1986. This review requires the Secretary of State to determine if the agency filing such emergency rule: 1) has complied with the procedures for adopting an emergency rule; 2) exceeded the scope of its statutory authority in promulgating the emergency rule; or 3) can show that an emergency exists justifying the promulgation of an emergency rule.
- par. 3 Following review, the Secretary of State shall issue a decision as to whether or not such an emergency rule should be disapproved [§29A-3-15a].
- par. 4 (A) Procedural Compliance: W. Va. Code §29A-3-15 permits an agency to adopt, amend or repeal, without hearing, any legislative rule by filing such rule, along with a statement of the circumstances constituting the emergency, with the Secretary of State and forthwith with the Legislative Rule-Making Review Committee (LRMRC).
- par. 5 If an agency has accomplished the above two required filings with the appropriate supporting documents by the time the emergency rule decision is issued or the expiration of the forty-two day review period, whichever is sooner, the Secretary of State shall rule in favor of procedural compliance.
- par. 6 The Council filed this emergency rule with supporting documents with the Secretary of State May 14, 2012 and with the LRMRC May 14, 2012.
- par. 7 It is the determination of the Secretary of State that the Council has complied with the procedural requirements of W. Va. Code §29A-3-15 for adoption of an emergency rule.
- par. 8 (B) Statutory Authority -- W. Va. Code §31-15C-9(a) reads:

*§31-15C-9. Development of guidelines and application for funding assistance; emergency rule-making authority.*

*(a) In order to implement and carry out the intent of this article in type 2 and type 3 unserved areas, the council shall promulgate emergency rules pursuant to the provisions of section fifteen, article three, chapter twenty-nine-a of this code to develop comprehensive, uniform guidelines for use by the council in evaluating any request by a project sponsor for funding assistance to plan, acquire, construct, improve or otherwise*

*develop a broadband deployment project in a type 2 or type 3 unserved area. The guidelines shall include the following factors: (1) The cost-effectiveness of the project; (2) the economic development benefits of the project; (3) the availability of alternative sources of funding that could help finance the project, including, but not limited to, private grants or federal funding and the efforts undertaken to obtain such funding; (4) if the project requires the construction of a network, the applicant's ability to operate and maintain such network; (5) the degree to which the project advances statewide broadband access and other state broadband planning goals; (6) the proposed technologies, bandwidths, upstream data rates and downstream data rates; (7) the estimated date the project would commence and be completed; (8) how the proposed project compares to alternative proposals for the same unserved area with regard to the number of people served, the amount of financial assistance sought, and the long-term viability of the proposed project; and (9) any other consideration the council deems pertinent.*

par. 9 It is the determination of the Secretary of State that the Council has not exceeded its statutory authority in promulgating this emergency rule.

par. 10 (C) Emergency -- W. Va. Code §29A-3-15(f) defines "emergency" as follows:

*(f) For the purposes of this section, an emergency exists when the promulgation of a rule is necessary for the immediate preservation of the public peace, health, safety or welfare or is necessary to comply with a time limitation established by this code or by a federal statute or regulation or to prevent substantial harm to the public interest.*

par. 11 There are essentially three classes of emergency broadly presented with the above provision: 1) immediate preservation; 2) time limitation; and 3) substantial harm. An agency need only document to the satisfaction of the Secretary of State that there exists a nexus between the proposal and the circumstances creating at least one of the above three emergency categories.

par. 12 The facts and circumstances as presented by the Council are as follows:

This rule establishes a framework of the process of application, review, awarding and administration of grants for the promotion, deployment, and buildout of broadband network services in areas of West Virginia that do not currently have high-speed, broadband access. The Broadband Deployment Council is authorized under the provisions of West Virginia Code §31-15C-1 et seq., to determine what areas of the state are currently without service and require assistance to obtain such service. The Council is then tasked with the assessment of proposals to facilitate the expansion of, and the demand for, broadband network technologies. Section 2 of the rule defines terms pertinent to the rule.

Section 3 outlines provisions for confidentiality of proprietary information and of other information for which a claim of confidentiality may be made. This section describes how the Council will evaluate claims of confidentiality and notify applicants of such determinations. This section also explains the consequences for improper disclosure of material that is deemed to be confidential.

Section 4 sets out the scope and process for the categorization of areas based upon the availability of broadband network services within each area, entities who may be eligible to apply for grants for broadband deployment, and the information that is required to be provided in applications for grants. This section also explains the manner in which an entity may challenge the Council's determination of network availability in a particular area.

Section 5 describes the public notice that is to be given when the Council receives an application for a grant to deploy broadband services in any unserved area.

Section 6 describes the Council's process for evaluating applications for grants, including the criteria by which the applications will be evaluated. Since two types of grants may be awarded -grants for deployment of broadband networks and grants for the promotion of the use of broadband networks -this section provides the criteria for each type of grant. This section outlines the areas in which the Council has discretion as well as limitations on the awards that may be granted.

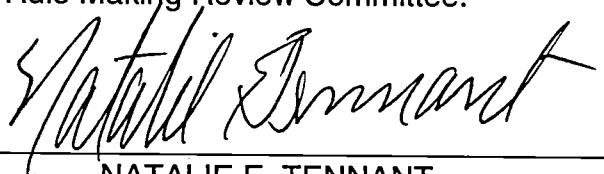
Section 7 provides for the means of handling potential conflicts of interest for members of the Council and references to the Code's specific provision for conflicts of interest.

Section 8 describes requirements that must be met by grantees as prerequisites to receiving a grant award. This includes the signing of a grant agreement, compliance with state and federal wage laws, and the creation of a dedicated account for receipt of grant funds.

Section 9 sets out the documentation, record-keeping, and audit requirements for grant recipients for the duration of the grant period and it prohibits the commencement of work on grant projects until the approval of the grant agreement.

par. 13 It is the determination of the Secretary of State that this proposal qualifies under the definition of an emergency as defined in §29A-3-15(f). . . "immediate preservation of public peace, health, safety or welfare" "federal statute" and "prevent substantial harm to the public interest"

par. 14 This decision shall be cited as Emergency Rule Decision 6-12 or ERD 6-12 and may be cited as precedent. This decision is available from the Secretary of State and has been filed with the West Virginia Broadband Deployment Council, the Attorney General and the Legislative Rule Making Review Committee.



NATALIE E. TENNANT  
Secretary of State

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