



STATE OF WEST VIRGINIA
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October 30, 2007

**NOTICE OF EMERGENCY RULE DECISION
BY THE OFFICE OF THE ATTORNEY GENERAL**

AGENCY: Secretary of State

RULE: Title 153 CSR Series 30, Amendments;
Use of Digital Signatures, State Certificate Authority & State Repository

DATE FILED AS AN EMERGENCY RULE: October 10, 2007

DECISION NO. 10-07

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

DARRELL V. McGRAW, JR.
ATTORNEY GENERAL

By *Dawn E. Warfield*
DAWN E. WARFIELD
DEPUTY ATTORNEY GENERAL

**EMERGENCY RULE DECISION
(ERD 10-07)**

AGENCY: Secretary of State

RULE: Title 153 CSR Series 30, Amendments;
Use of Digital Signatures, State Certificate Authority & State Repository

DATE FILED AS AN EMERGENCY RULE: October 10, 2007

The Secretary of State has filed the above amendments to an existing rule as an emergency rule.

W. Va. Code § 29A-3-15b requires the Attorney General to review all emergency rules filed by the Secretary of State after March 8, 1986. This review requires the Attorney General 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.

Following said review, the Attorney General shall issue a decision as to whether or not such an emergency rule should be disapproved [§ 29A-3-15b(a)].

- (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).

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 Attorney General shall rule in favor of procedural compliance.

The Secretary of State filed this emergency rule with supporting documents with the Secretary of State on October 10, 2007, and with the LRMRC October 10, 2007.

It is the determination of the Attorney General that the Secretary of State has complied with the procedural requirements of W. Va. Code § 29A-3-15 for adoption of an emergency rule.

- (B) Statutory Authority -- W. Va. Code § 39A-3-3 provides, in pertinent part:

(a) The Secretary of State shall propose emergency and legislative rules for promulgation in accordance with the provisions of article three, chapter twenty-nine-a of this code to establish standards and processes to facilitate the use of electronic signatures in all governmental transactions by

state agencies subject to chapter twenty-nine-a of this code. The rules shall include minimum standards for secure transactions to promote confidence and efficiency in legally binding electronic document transactions. The rules may be amended from time to time to keep the rules current with new developments in technology and improvements in secured transaction processes.

(b) The Secretary of State is designated the certification authority and repository for all governmental agencies which are subject to chapter twenty-nine-a of this code and shall regulate transactions and digital signature verifications. The Secretary may enter into reciprocal agreements with all state and federal governmental entities to promote the efficient governmental use of electronic transactions. The Secretary of State may propose legislative rules for issuing certificates that bind public keys to individuals, and other electronic transaction authentication devices as provided in this article. The Secretary of State is further authorized to contract with a public or private entity to serve as certification authority for the State of West Virginia. The certification authority may contract with persons to provide certification services. Any contract entered into must require the certification authority to meet the requirements of this article and any rules promulgated by the Secretary of State.

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

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

For the purposes of this section, an emergency exists when the promulgation of an emergency rule is necessary (1) for the immediate preservation of the public peace, health, safety or welfare, (2) to comply with a time limitation established by this code or by a federal statute or regulation, or (3) to prevent substantial harm to the public interest.

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 Attorney General that there exists a nexus between the proposal and the circumstances creating at least one of the above three emergency categories.

The facts and circumstances as presented by the Secretary of State are as follows:

The use of digital signatures has been a project of the State of West Virginia's since 1998. Digital signatures is a method to sign official documents electronically without having to affix a "wet ink" signature to a document, yet still satisfy the requirement of an actual signature on paper.

Much advancement has been made in the technology that drives digital signatures, and subsequently the state has had to change its procedures in order to adapt to those changes.

The most notable change was the introduction of a free federal program sponsored by the United States General Services Administration entitled "Access Certificates for Electronic Services" or ACES. In 2006, via legislative rule (153CSR30), the state adopted the ACES program as an option to serve as the state's repository and certificate authority in order to save thousands of dollars in startup costs.

Since that time the Department of Environmental Protection (DEP) implemented the use of digital signatures (via the ACES program) within its permit application as a pilot project in conjunction with the Secretary of State's Office and the Governor's Office of Technology (GOT). After thorough testing and review of the ACES program it became clear that many state agencies can utilize this service to become more efficient, accurate and fiscally sound in many transactional applications and most specifically those requiring financial transactions. In fact, several state agencies including the Public Employees Insurance Agency, Department of Highways and the West Virginia State Police are exploring the possibility of using digital signatures in certain applications to improve customer service by minimizing the time required to complete a transaction.

Currently the Secretary of State is responsible for not only authorizing certificate authorities but also overseeing the compliance and use of digital signatures. During the pilot project with the DEP it became evident that the Secretary of State's Office does not have the technical expertise, manpower or structure to effectively manage the technical side of the state's use of digital signatures.

This emergency rule transfers technical duties associated with implementing digital signatures from the Secretary of State's Office to the GOT. The GOT is better equipped with personnel and infrastructure to efficiently implement and manage digital signatures for any interested state agency more so than the Secretary of State's Office, and the state's Chief Technology Officer has agreed to assume this role. This rule further sets forth procedures for the Secretary of State's Office to remain as the official authorizing agency, the GOT to become the technical manager, and requirements to communicate with one another regarding the implementation and management of digital signatures. In addition, this rule allows the GOT to initiate procedures and practices to serve as its own state certificate authority and repository, subject to authorization and approval by the Secretary of State.

The Secretary of State's Office feels there is an immediate need to put these procedures in place for three reasons:

1. As stated above, the DEP is currently using digital signatures. For proper oversight and management of this already established project the GOT, not the Secretary of State, needs to have the authority as established in this rule. The Secretary of State's Office is simply not structured nor staffed to manage as major a technology initiative for the state; the GOT has agreed to assume this role.
2. Three other state agencies have already expressed interest in the use of digital signatures and are anxious to implement them. However, these agencies will need the technical assistance of the GOT in order to comply with the already established requirements of this rule (153CSR30). If this rule is not adopted as an emergency then those projects will be delayed for several months if not years.
3. In compliance with the transferal of many of the state's technology initiatives and combination of resources by the GOT, the Secretary of State's Office feels this initiative, which has the potential to affect all state agencies, must be transferred immediately so as not to further the delay the use of digital signatures in the State of West Virginia.

It is the determination of the Attorney General that this proposal qualifies under the definition of an emergency as defined in § 29A-3-15(f), to "prevent substantial harm to the public interest." In addition, the Legislature specifically authorized the promulgation of emergency rules to implement the statute by W. Va. Code § 39A-3-3(a), quoted above.

This decision shall be cited as Emergency Rule Decision 10-07 or ERD 10-07 and may be cited as precedent. This decision is available from the Secretary of State or the Attorney General's Office, and has been filed with the Secretary of State and the Legislative Rule Making Review Committee.

DARRELL V. McGRAW, JR.
ATTORNEY GENERAL

By


DAWN E. WARFIELD
DEPUTY ATTORNEY GENERAL

Entered this 30th day of October, 2007.

