



Office of the Secretary of State
Building 1, Suite 157-K
1900 Kanawha Blvd., East
Charleston, West Virginia 25305

Natalie E. Tennant
Secretary of State
State of West Virginia

Telephone: (304) 558-6000
Toll Free: 1-866-SOS-VOTE
Fax: (304) 558-0900
www.wvsos.com

September 9, 2009

NOTICE OF EMERGENCY RULE DECISION BY THE SECRETARY OF STATE

AGENCY: Division of Tourism

RULE: Amendment, 144CSR1, Direct Advertising Grants Program

DATE FILED AS AN EMERGENCY RULE: July 30, 2009

FILED
2009 SEP -9 PM 5:08
OFFICE WEST VIRGINIA
SECRETARY OF STATE

DECISION NO. 19-09

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 cursive script, reading "Natalie E. Tennant".

NATALIE E. TENNANT
Secretary of State

EMERGENCY RULE DECISION
(ERD 19-09)

AGENCY: Division of Tourism
RULE: Amendment, 144CSR1, Direct Advertising Grants Program
FILED AS AN EMERGENCY RULE: July 30, 2009

- par. 1 The Division of Tourism (Division) has filed the above amendments to an existing 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 Division filed this emergency rule with supporting documents with the Secretary of State July 30, 2009 and with the LRMRC July 30, 2009.
- par. 7 It is the determination of the Secretary of State that the Division 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 §5B-2-12 reads:

There is hereby continued in the State Treasury the special revenue fund known as the Tourism Promotion Fund created under prior enactment of section nine, article one of this chapter.

(a) The Legislature finds that a courtesy patrol program providing assistance to motorists on the state's highways is one of the most beneficial methods to introduce a tourist visiting the state of the state's hospitality and good will. For that reason, four million seven hundred thousand dollars of the moneys deposited in the fund each year shall be deposited

in a special revenue account in the State Treasury to be known as the Courtesy Patrol Fund. Expenditures from the fund shall be used solely to fund the courtesy patrol program providing assistance to motorists on the state's highways. Amounts collected in the fund which are found, from time to time, to exceed funds needed for the purposes set forth in this subdivision may be transferred to other accounts or funds and redesignated for other purposes by appropriation of the Legislature.

(b) If there are funds remaining after the distribution required in subdivision (a) of this section, a minimum of five percent of the moneys deposited remaining in the fund each year shall be used solely for direct advertising for West Virginia travel and tourism: Provided, That no less than twenty percent of these funds be expended, with the approval of the Director of the Division of Natural Resources, to effectively promote and market the state's parks, state forests, state recreation areas and wildlife recreational resources. Direct advertising means advertising which is limited to television, radio, mailings, newspaper, magazines, the internet and outdoor billboards or any combination thereof.

(c) The balance of the moneys deposited in the fund shall be used for direct advertising within the state's travel regions as defined by the commission. The funds shall be made available to these districts beginning the first day of July, one thousand nine hundred ninety-five, according to legislative rules authorized for promulgation by the Tourism Commission.

(d) All advertising expenditures over twenty-five thousand dollars from the Tourism Promotion Fund require prior approval by recorded vote of the commission. No member of the commission or of any committee created by the commission to evaluate applications for advertising or other grants may participate in the discussion of, or action upon, an application for or an award of any grant in which the member has a direct financial interest.

par. 9 It is the determination of the Secretary of State that the Division 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 Division are as follows:

Due to decreases in funding for the Direct Advertising Grants Program, the West Virginia Division of Tourism seeks an emergency rule to amend eligible

expenditures immediately in order to sustain adequate funding to prevent substantial harm to the public interest particularly during the fourth quarter of 2009 and early 2010.

Facts and Circumstances:

Fact - The Direct Advertising Grants Program receives approximately \$10 million in funding per year for direct advertising to attract visitors to the state of West Virginia.

Fact - \$4.7 million of that \$10 million is now earmarked for the West Virginia Courtesy patrol

Fact - The program funds, which are generated by video slot machines at the state's four racetrack/casinos, are diminishing due to video lottery and gaming legislation passed in neighboring states.

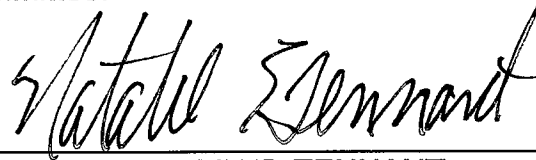
Fact - Revenue into the Direct Advertising Grants Program fund has declined 16% over the last two fiscal years.

Fact/Circumstance - If the proposed amendment is not granted as an emergency rule, numerous tourism businesses who match these funds with their own dollars to promote tourism to the state will be left with little or no means to promote adequately at a time when the competition from contiguous states for each visitor dollar is increasing, and West Virginia is in a prime position to capitalize on travelers taking vacations closer to home due to economic concerns.

Fact - If changes are delayed, the impact to the tourism industry could be devastating not only for the present, but a lack of funds could place businesses in a position of trying to play catch-up from lost business and market share for years to come.

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). . . "prevent substantial harm to the public interest"

par. 14 This decision shall be cited as Emergency Rule Decision 19-09 or ERD 19-09 and may be cited as precedent. This decision is available from the Secretary of State and has been filed with the Division of Tourism, the Attorney General and the Legislative Rule Making Review Committee.



NATALIE E. TENNANT
Secretary of State

Entered _____

OFFICE OF THE SECRETARY OF STATE
WEST VIRGINIA

2009 SEP -9 PM 5:08

FILED



FILED

2009 AUG 27 PM 3: 56

OFFICE WEST VIRGINIA
SECRETARY OF STATE

August 27, 2009

Ms. Ashley Summitt, General Counsel
West Virginia Secretary of State's Office
Building 1, Suite 157-K
1900 Kanawha Blvd., East
Charleston, West Virginia 25305

Dear Ashley,

Thank you for the opportunity to submit additional information regarding the urgent nature of the Emergency Rule for the Division of Tourism's Direct Advertising Grants Program.

As we discussed, spring is the most crucial time of year for advertising to attract tourists to the state. Spring advertising directly impacts visitation during summer and fall seasons, and if visitor numbers are down it will affect the economic impact for that year and potentially years to come. As an example, the State of Colorado's summer resort segment dropped from first place among all states to 17th (revenue loss of over \$2 billion annually) due to the elimination of their state tourism budget. As I'm sure you're aware, today's economy does not allow for any state to relax their efforts to attract visitors – especially since West Virginia is in a position to capitalize on being perceived as a state that offers a great deal of value for each visitor dollar.

The Direct Advertising Grants Program requires that all dollars matched by tourism destinations be approved in advance of any expenditure. The program offers three funding levels – One for projects over \$20,000, and two small programs for projects up to \$10,000. Large applications have quarterly deadlines, while smaller applications have 45-day deadlines based on when the applications are submitted, which makes them more easily accessible for small businesses.

Due to quarterly deadlines for the large applications and the need to advertise in the crucial spring timeframe, we receive the majority of requests for funding in the fourth quarter of the year, with awards being made in December. For December 2008, we received 31 large applications totaling \$5.2 million for projects primarily beginning on January 1, 2009. The \$5.2 million was covered only with the help of carry-over from the previous year, which has been depleted.

Anna Plantz
Page 2
August 27, 2009

By December of this year projections indicate there will only be \$3.2 million in the fund to cover the projected \$5+ million in applications crucial for Spring.

The Emergency Rule request will ensure that we have an additional dollars projected to reach \$1.6 million to help cover this deficit in December. Should we be required to wait until the end of the Legislative Session, the changes would not be manifested until the June award cycle due to the quarterly deadlines. This would be not only well beyond the critical time for advertising, but, without the changes now – funding in all 2010 award cycles will also be adversely affected.

The changes do not affect any media that will be allowed in the program. Applicants will still be able to place newspaper, magazine, television, radio, internet, and billboard advertising. The adjustments primarily limit Production Expenses, and Postage to allow more coverage of direct advertising at this extremely critical time.

If the Emergency Rule is not approved, there will also be an extreme budget shortfall in funding for small businesses who submit their projects at the beginning of the year, due to the shorter 45-day deadlines for those categories.

Once again, thank you for all your consideration. Please let me know if you need additional information.

Sincerely,


Anna Plantz