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December 27, 2016

NOTICE OF EMERGENCY RULE DECISION BY THE SECRETARY OF STATE

AGENCY: Health Care Authority

RULE: New Rule, 65-32, Certificate of Need Rule

DATE FILED AS SECOND EMERGENCY AMENDMENT: December 16, 2016

DATE FILED AS FIRST EMERGENCY AMENDMENT: August 23, 2016

DATE ORIGINALLY FILED AS AN EMERGENCY RULE: June 8, 2016

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OFFICE OF THE SECRETARY OF STATE

DECISION NO. 22-16

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.

NATALIE E. TENNANT
Secretary of State

EMERGENCY RULE DECISION
(ERD 22-16)

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- par. 1 The Health Care Authority (HCA) has filed the above emergency amendment to an existing 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 HCA filed this emergency rule with supporting documents with the Secretary of State December 19, 2016 and with the LRMRC December 19, 2016.
- par. 7 It is the determination of the Secretary of State that the HCA 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 §16-2D-5 reads:

§16-2D-4. Rule-making Authority.

(a) The authority shall propose rules for legislative approval in accordance with the provisions of article three, chapter twenty-nine-a of this code, to implement the following:

- (1) Information a person shall provide when applying for a certificate of need;***
(2) Information a person shall provide when applying for an exemption;

- (3) Process for the issuance of grants and loans to financially vulnerable health care facilities located in underserved areas;*
- (4) The required information in a letter of intent;*
- (5) Process for an expedited certificate of need;*
- (6) Determine medically underserved population. The authority may consider unusual local conditions that are a barrier to accessibility or availability of health services. The authority may consider when making its determination of a medically underserved population designated by the federal Secretary of Health and Human Services under Section 330(b)(3) of the Public Health Service Act, as amended, Title 42 U.S.C. §254;*
- (7) Process to review an approved certificate of need; and*
- (8) Process to review approved proposed health services for which the expenditure maximum is exceeded or is expected to be exceeded.*
- (b) The authority shall propose emergency rules by December 31, 2016, to effectuate the changes to this article.*
- ©) All of the authority's rules in effect and not in conflict with the provisions of this article, shall remain in effect until they are amended or rescinded.*

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

HB 4365, effective June 10, 2016, mandates the Health Care Authority to promulgate emergency rules to effectuate the purpose of this legislation by December 31, 2016- §16-2D-4(b). This is one of the rules mandated by this legislation.

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). . . as mandated by the Legislature

par. 14

This decision shall be cited as Emergency Rule Decision 22-16 or ERD 22-16 and may be cited as precedent. This decision is available from the Secretary of State and has been filed with the Health Care Authority.



NATALIE E. TENNANT
Secretary of State

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