



**Betty Ireland**  
Secretary of State

OFFICE OF THE SECRETARY OF STATE  
STATE OF WEST VIRGINIA

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SECRETARY OF STATE

June 7, 2006

NOTICE OF EMERGENCY RULE DECISION BY THE SECRETARY OF STATE

AGENCY: Health Care Authority

RULE: Amendments, 65CSR7, Certificate of Need Rule

DATE FILED AS AN EMERGENCY RULE: May 24, 2006

DECISION NO. 5-06

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.

  
BETTY IRELAND  
Secretary of State

Building 1, Suite 157-K  
1900 Kanawha Blvd., East  
Charleston, West Virginia 25305

EMERGENCY RULE DECISION  
(ERD 5-06)

AGENCY: Health Care Authority  
RULE: Amendments, 65CSR7, Certificate of Need Rule  
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- par. 1 The Health Care Authority (HCA) 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 HCA filed this emergency rule with supporting documents with the Secretary of State May 24, 2006 and with the LRMRC May 24, 2006.
- 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-8(c) reads:

***§Agency to promulgate additional rules.***

***(a) The state agency may promulgate additional rules:***

***(1) To carry out the provisions of this article; and***

***(2) To assure hospitals' compliance with requests for information concerning rates charged for each of the twenty-five most frequently used hospital services in the state including the average semiprivate and private room rates.***

***(b) All rules shall be promulgated pursuant to chapter twenty-nine-a of this code and as***

*described herein. In addition, before adopting proposed rules the state agency shall give interested persons an opportunity to offer written comments on the rules, or any revisions thereof, which it proposes to adopt.*

*(c) Subsequent amendments and modifications to any rule promulgated pursuant to this article may be implemented by emergency rule.*

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:

In order to preserve public welfare and to prevent substantial harm to the public interest, the West Virginia HCA proposes to regulate the development, acquisition or other establishment of computed tomography (CT) and to clarify the standards for the development of diagnostic centers in the state. The rising costs of healthcare attributable to diagnostic imaging services, such as CT, are unaffordable and unsustainable. These high costs often place an insurmountable burden on businesses, uninsured or underinsured patients and the State and private payors. The uninsured and underinsured are particularly disadvantaged and often do not receive such testing because it is cost prohibitive.

Utilization of diagnostic imaging services has grown at a particularly rapid rate as evidenced by a March 2005 report to Congress by the Medicare Payment Advisory Commission (MedPAC) which concluded that volume for diagnostic imaging services has increased 15 59 20 percent from 1999 to 2003. In March 2006, MedPAC concluded that between 2003 and 2004 per capita volume for diagnostic imaging tests grew more than any other medical service.

In addition to the volume of diagnostic imaging services increasing, the proliferation of diagnostic imaging centers is a serious threat to the public welfare and the cost attributable to this proliferation will cause substantial harm to the public in the form of sky-rocketing health care costs. Currently, CT is the highest cost imaging modality not regulated by HCA and other high cost imaging procedures, such as MRI and PET are regulated. In addition, the unregulated proliferation of diagnostic imaging centers raises serious concerns about the quality of care provided. Without

regulation, CT can be offered by any hospital or physician without restriction. This leads to the duplication of services throughout the State, which in turn increases health care costs. In non regulated states, such as Ohio, the number of diagnostic imaging centers has increased by 748 percent, from 27 to 299 from 1997 to 2000. In Pennsylvania diagnostic imaging centers have increased 47 percent from 1999 to 2001.

For all these reasons, West Virginia citizens are facing a health care crisis and it is essential that an emergency rule be issued to protect the public welfare.

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). . . "preserve public peace, health, safety or welfare"

par. 14 This decision shall be cited as Emergency Rule Decision 5-06 or ERD 5-06 and may be cited as precedent. This decision is available from the Secretary of State and has been filed with the Health Care Authority, the Attorney General and the Legislative Rule Making Review Committee.

  
BETTY IRELAND  
Secretary of State

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