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Sequence Number: 07-06-16
Rule ID(s): 6218-6219
File Date (effective date): 7/1/16
End Effective Date: 12/28/16

Emergency Rule Filing Form

Emergency rules are effective from date of filing for a period of up to 180 days.

Agency/Board/Commission:	Health Services and Development Agency
Division:	N/A
Contact Person:	Jim Christoffersen, General Counsel
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Rule Type:

Emergency Rule

Revision Type (check all that apply):

Amendment

New

Repeal

Statement of Necessity:

Pursuant to T.C.A. § 4-5-208, the Health Services and Development Agency (Agency) is authorized to promulgate emergency rules in the event that the rules are required by an enactment of the general assembly within a prescribed period of time that precludes utilization of the rulemaking procedures described elsewhere in T.C.A. Title 4, Chapter 5, for the promulgation of rules.

Chapter 1043 of the Public Acts of 2016 ("Act") amended the Tennessee Health Services and Planning Act of 2002, T.C.A. § 68-11-1601, *et seq.* (CON statute), which amendments included the elimination of certain activities from the state's certificate of need (CON) requirement and the significant portion of fee revenue generated by those applications annually. The Act requires the agency to develop quality standards and enforce annual reporting requirements on such standards for applications approved after July 1, 2016, while providing no funding for such activities. The Act requires the agency to be fiscally self-sufficient, which means no longer receiving monies from the General Fund above fees generated by CON applications. The Act requires the agency to prescribe fees in an amount that provides for the cost of administering the implementation and enforcement of the CON statute by the agency, and adjust fees as necessary to provide that the account is fiscally self-sufficient. The agency will revisit the fees in the future, and lower them if more revenue is generated than is necessary to provide that the account is fiscally self-sufficient.

David Thurman and other representatives from the Department of Finance and Administration have confirmed that the agency must look at cost-cutting measures and raise fees to provide for the cost of administering the implementation and enforcement of the CON program by the agency, and this must be done expeditiously to generate sufficient revenue to fund the agency's FY 16/17 budget in compliance with the Act. Cost-cutting measures are being undertaken, and should save approximately \$160,000 per FY. However, this leaves approximately \$1.14 million to be raised from an anticipated 36 or less applications per FY, approximately half of which are anticipated to be "minimum fee" applications. Basic math dictates that fees must escalate significantly to comply with the requirements of the Act.

The Act shall take effect on July 1, 2016, which does not provide adequate time for the rulemaking procedures

described elsewhere in T.C.A. Title 4, Chapter 5, for the promulgation of rules. Due to the length of time necessary to complete the rulemaking process to promulgate rules adjusting the agency's fees, these emergency rules are required in order for the agency to comply with the enactment of the legislature and to ensure that the agency has the necessary resources to implement the Act and the rest of the Tennessee Health Services and Planning Act of 2002. The agency will promptly conduct a rulemaking hearing to consider comments on the adoption of these as permanent rules.

Rule(s) Revised (ALL chapters and rules contained in filing must be listed here. If needed, copy and paste additional tables to accommodate multiple chapters. Please make sure that ALL new rule and repealed rule numbers are listed in the chart below. Please enter only ONE Rule Number/Rule Title per row)

Chapter Number	Chapter Title
0720-10	Certificate of Need Program – Scope and Procedures
Rule Number	Rule Title
0720—10—.03	Standard Procedures for Certificate of Need

Chapter Number	Chapter Title
0720-13	Rules of Procedure for Hearing Contested Cases
Rule Number	Rule Title
0720—13—.02	Contested Cases Before Administrative Judges Sitting Alone

(Place substance of rules and other info here. Please be sure to include a detailed explanation of the changes being made to the listed rule(s). Statutory authority must be given for each rule change. For information on formatting rules go to http://tn.gov/sos/pub/Rulemaking%20Guidelines_July2014.pdf)

Amendments

Paragraph (5) of Rule 0720—10—.03 Standard Procedures for Certificate of Need is deleted in its entirety and substituted with the following:

- (5) Examination Filing Fee.
- (a) The amount of the initial fee shall be equal to \$5.75 per \$1,000 of the estimated capital expenditure involved, but in no case shall this fee be less than \$15,000 nor more than \$95,000.
 - (b) Any unpaid balance of litigation costs previously assessed against the applicant or any related entity of the applicant by the Tennessee Health Services and Development Agency may be offset against any filing fees paid. An application will not be deemed complete until the full filing fee, as well as such off set amounts, are paid in full.
 - (c) A final fee will be determined upon The Agency's receipt of the final project report. The amount of the final fee shall be the difference between the initial fee and the total fee based on actual final project costs, as such fee is calculated based on \$5.75 per \$1,000 of project costs, but in no case shall the total fee be less than \$15,000 nor more than \$95,000.

Authority: T.C.A. §§ 4—5—208; 68—11—1605; 68—11—1606, 68—11—1607; and 2016 Tenn. Pub. Acts Ch. 1043.

Paragraph (2) of Rule 0720—13—.02 Contested Cases Before Administrative Judges Sitting Alone is deleted in its entirety and substituted with the following:

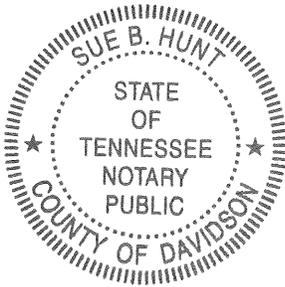
- (2) In all cases, whether heard by an Administrative Judge sitting alone, or by the full Agency, the petitioner and other parties with the exception of The Agency shall bear the cost for all court reporters and transcriptions, and charges billed to the Agency for the Administrative Judge's work/time; in a contested case where the petition is dismissed, whether voluntarily or involuntarily, the petitioning party or parties shall be considered a "losing party" under TCA 68-11-1610. The original transcript and one copy of the transcript for each member of The Agency shall be provided to The Agency by the other parties, if the case is to be reviewed by the full Agency.

Authority: T.C.A. §§ 4—5—208; 4—5—314; 68—11—1605; 68—11—1609; 68—11—1610; and 2016 Tenn. Pub. Acts Ch. 1043.

* If a roll-call vote was necessary, the vote by the Agency on these rules was as follows:

Board Member	Aye	No	Abstain	Absent	Signature (if required)
D. Lynn Johnson	x				
James L. Wright	x				
Robert S. Doolittle				x	
Corey Ridgway	x				
Joe Grandy	x				
Thom Mills	x				
Charlotte C. Burns	x				
Martin D. Fleming	x				
Keith Gaither	x				
Lisa Jordan	x				
Jaclyn Harding				x	

I certify that this is an accurate and complete copy of an emergency rule(s), lawfully promulgated and adopted.



Date: 6/29/16

Signature: Melanie M. Hill

Name of Officer: Melanie M. Hill

Title of Officer: Executive Director

Subscribed and sworn to before me on: June 29, 2016

Notary Public Signature: Sue B. Hunt

My commission expires on: **My Commission Expires**
May 8, 2017

All emergency rules provided for herein have been examined by the Attorney General and Reporter of the State of Tennessee and are approved as to legality pursuant to the provisions of the Administrative Procedures Act, Tennessee Code Annotated, Title 4, Chapter 5.

HERBERT H. SLATTERY III
Herbert H. Slattery III
Attorney General and Reporter

July 1 2016
Date

RECEIVED
 2016 JUL -1 PM: 10
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Filed with the Department of State on: 7/1/16

Effective for: 180 *days

Effective through: 12/28/16

* Emergency rule(s) may be effective for up to 180 days from the date of filing.

Tre Hargett

Tre Hargett
Secretary of State

Impact on Local Governments

Pursuant to T.C.A. §§ 4-5-220 and 4-5-228 “any rule proposed to be promulgated shall state in a simple declarative sentence, without additional comments on the merits of the policy of the rules or regulation, whether the rule or regulation may have a projected impact on local governments.” (See Public Chapter Number 1070 (<http://state.tn.us/sos/acts/106/pub/pc1070.pdf>) of the 2010 Session of the General Assembly)

The rule should not have a projected impact upon local governments.

Additional Information Required by Joint Government Operations Committee

All agencies, upon filing a rule, must also submit the following pursuant to T.C.A. § 4-5-226(i)(1).

- (A) A brief summary of the rule and a description of all relevant changes in previous regulations effectuated by such rule;

The rule raises the filing fee for a certificate of need application from \$2.25 per \$1,000 of the estimated capital expenditure involved to \$5.75 per \$1,000 of the estimated capital expenditure involved, the minimum filing fee from \$3,000 to \$15,000, and the maximum filing fee from \$45,000 to \$95,000. It also clarifies that the agency may recoup certain costs in contested cases that are voluntarily dismissed.

- (B) A citation to and brief description of any federal law or regulation or any state law or regulation mandating promulgation of such rule or establishing guidelines relevant thereto;

Tenn. Pub. Acts Ch. 1043; T.C.A. §§ 68—11—1605; 68—11—1607, 68—11—1610

- (C) Identification of persons, organizations, corporations or governmental entities most directly affected by this rule, and whether those persons, organizations, corporations or governmental entities urge adoption or rejection of this rule;

CON applicants and litigants

- (D) Identification of any opinions of the attorney general and reporter or any judicial ruling that directly relates to the rule or the necessity to promulgate the rule;

N/A

- (E) An estimate of the probable increase or decrease in state and local government revenues and expenditures, if any, resulting from the promulgation of this rule, and assumptions and reasoning upon which the estimate is based. An agency shall not state that the fiscal impact is minimal if the fiscal impact is more than two percent (2%) of the agency's annual budget or five hundred thousand dollars (\$500,000), whichever is less;

Tenn. Pub. Acts Ch. 1043 eliminates approximately half of the agency's revenue, while requiring the agency to adjust fees to become self-sufficient. This requires the agency to look at budget cuts and adjust fees to cover the rest of its \$1.2 million budget.

- (F) Identification of the appropriate agency representative or representatives, possessing substantial knowledge and understanding of the rule;

Melanie Hill, Executive Director, and Jim Christoffersen, General Counsel

- (G) Identification of the appropriate agency representative or representatives who will explain the rule at a scheduled meeting of the committees;

Melanie Hill, Executive Director, and Jim Christoffersen, General Counsel

- (H) Office address, telephone number, and email address of the agency representative or representatives who will explain the rule at a scheduled meeting of the committees; and

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(615) 741-2364
Melanie.hill@tn.gov
jim.christoffersen@tn.gov

- (I) Any additional information relevant to the rule proposed for continuation that the committee requests.

**RULES
OF
TENNESSEE HEALTH SERVICES AND DEVELOPMENT AGENCY**

**CHAPTER 0720-10
CERTIFICATE OF NEED PROGRAM – SCOPE AND PROCEDURES**

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0720—10—.01	Private Professional Practice Exemption
0720—10—.02	Activities Requiring Notification — Miscellaneous Provisions
0720—10—.03	Standard Procedures for Certificate of Need
0720—10—.04	Emergency Certificate of Need
0720—10—.05	Consent Calendar
0720—10—.06	Expiration, Revocation, and Modification of Issued Certificates

0720—10—.03 STANDARD PROCEDURES FOR CERTIFICATE OF NEED.

(5) Examination Filing Fee.

- (a) The amount of the initial fee shall be equal to ~~\$5.75~~ 2.25 per \$1,000 of the estimated capital expenditure involved, but in no case shall this fee be less than ~~\$15,000~~ 3,000 nor more than ~~\$95,000~~ 45,000.
- (b) Any unpaid balance of litigation costs previously assessed against the applicant or any related entity of the applicant by the Tennessee Health Facilities Commission or the Tennessee Health Services and Development Agency may be offset against any filing fees paid. An application will not be deemed complete until the full filing fee, as well as such off set amounts, are paid in full.
- (c) A final fee will be determined upon The Agency's receipt of the final project report. The amount of the final fee shall be the difference between the initial fee and the total fee based on actual final project costs, as such fee is calculated based on ~~\$5.75~~ 2.25 per \$1,000 of project costs, but in no case shall the total fee be less than ~~\$15,000~~ 3,000 nor more than ~~\$95,000~~ 45,000.

**RULES
OF
TENNESSEE HEALTH SERVICES AND DEVELOPMENT AGENCY**

**CHAPTER 0720-13
RULES OF PROCEDURE FOR HEARING CONTESTED CASES**

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0720—13—.01	General Procedures for Contested Cases
0720—13—.02	Contested Cases Before Administrative Judges Sitting Alone
0720—13—.03	Agency Review of Initial Orders
0720—13—.04	Declaratory Orders

0720—13—.02 CONTESTED CASES BEFORE ADMINISTRATIVE JUDGES SITTING ALONE.

- (2) In all cases, whether heard by an Administrative Judge sitting alone, or by the full Agency, the petitioner and other parties with the exception of The Agency shall bear the cost for all court reporters and transcriptions, and charges billed to the Agency for the Administrative Judge's work/time; in a contested case where the petition is dismissed, whether voluntarily or

involuntarily, the petitioning party or parties shall be considered a “losing party” under TCA 68-11-1610. The original transcript and one copy of the transcript for each member of The Agency shall be provided to The Agency by the other parties, if the case is to be reviewed by the full Agency. ~~Other costs of the proceeding, including the Administrative Judge's costs shall be assessed by The Agency in accordance with T.C.A. §§ 68—11—1609 and 68—11—1610.~~