RRC STAFF OPINION

PLEASE NOTE: THIS COMMUNICATION IS EITHER 1) ONLY THE RECOMMENDATION OF AN RRC STAFF ATTORNEY AS TO ACTION THAT THE ATTORNEY BELIEVES THE COMMISSION SHOULD TAKE ON THE CITED RULE AT ITS NEXT MEETING, OR 2) AN OPINION OF THAT ATTORNEY AS TO SOME MATTER CONCERNING THAT RULE. THE AGENCY AND MEMBERS OF THE PUBLIC ARE INVITED TO SUBMIT THEIR OWN COMMENTS AND RECOMMENDATIONS (ACCORDING TO RRC RULES) TO THE COMMISSION.

AGENCY: Industrial Commission

RULE CITATION: 04 NCAC 10J .0103

RECOMMENDED ACTION:

X Approve, but note staff's comment

Object, based on:

Lack of statutory authority

Unclear or ambiguous

Unnecessary

Failure to comply with the APA

COMMENT:

The Industrial Commission was exempt from rulemaking under Article 2A of G.S. 150B until the General Assembly repealed that exemption in Session Law 2011-287. The Industrial Commission acted to adopt rules in accordance with that law. In its October, November, and December 2012 meetings, the RRC reviewed over 150 rules adopted by the Industrial Commission and ultimately approved them all.

In December 2012, the RRC approved Rule 04 NCAC 10J .0101, General Provisions. This was the only Rule in Subchapter 10J, Fees for Medical Compensation. This Rule did not receive ten letters of objection and was not subject to legislative review; it went into effect January 1, 2013. The RRC approved this Rule again in March 2014 after the agency amended it; the amendment became effective July 1, 2014.

In Session Law 2013-410, Section 33 (Page 5 of the Tab), the Industrial Commission was directed to base the fee schedules for maximum physician and hospital fees upon the applicable Medicare payment methodologies. The Industrial Commission was also told to periodically review the fee schedule. Session Law 2013-410 stated that in setting the Medicare methodology for physician and hospital fee schedules, the Industrial Commission was exempt from the certification requirements of G.S. 150B-19.1(h) and the fiscal note requirement of G.S. 150B-21.4.

In February 2015, the RRC approved rules submitted by the Industrial Commission. The agency separated Rule 10J .0101 into three separate rules, effective April 1, 2015. At that time, Rule 10J .0101 was amended to only include general guidelines for the fee schedule. Rule 10J .0102 set fees for professional services. Rule 10J .0103 set the fees for institutional services.

Amanda J. Reeder
Commission Counsel

As amended in 2015, Rule 04 NCAC 10J .0103 set the fee schedule for institutional services. Before the adoption of the Rule, that schedule was contained in Rule 10J .0101, Paragraph (d). Rule 10J .0103 was not a restatement of Paragraph (d), but set a different rate schedule. In the December 2016 temporary amendment, the agency stated that the reimbursement rate was 67.15% of billed charges prior to April 1, 2015. In the adoption of Rule .0103, effective April 1, 2015, the rate was set to an annually decreasing scale, and would be 200% of the Medicare ASC facility-specific amount beginning January 1, 2017.

In late 2015, Surgical Care Affiliates, LLC, requested that the Industrial Commission issue a declaratory ruling invalidating Rule 10J .0103 to the extent that it set rates for ambulatory surgical centers. The agency issued a declaratory ruling denying the request to find the rule invalid. The matter was appealed to Wake County Superior Court. In a Wake County Superior Court decision issued August 9, 2016, the Court declared that Paragraphs (g) and (h) of Rule 10J .0103 were invalid, finding that the fiscal note exemption in Session Law 2013-410 did not extend to ambulatory surgical centers. The Court found that the amendment of Rule 10J .0101 was also invalid to the extent that it removed the fee schedule for ambulatory surgical centers from that Rule in Subparagraphs (d)(3), (5), and (6).

In response to the August 9, 2016 Order, the agency sought and was awarded a stay while an appeal was pending at the North Carolina Court of Appeals. In addition, the agency moved to amend the Rule through temporary measures.

At its December 2016 meeting, the RRC approved the Rule as a temporary rule for entry into the NC Administrative Code. After that approval, pursuant to G.S. 150B-21.1(c), aggrieved persons filed an action for declaratory judgment in Wake County Superior Court, challenging the appropriateness of temporary rulemaking by the agency. In a decision issued on March 21, 2017, (Page 9 of the Tab), the Wake County Superior Court determined that temporary rulemaking was not required under the circumstances, as the stay would suffice to preserve the status quo. The amendments added during the temporary rulemaking process were removed from the NC Administrative Code. The Industrial Commission appealed this ruling and the appeal is currently pending at the NC Court of Appeals.

The Industrial Commission moved forward with permanent rulemaking for this Rule. The Rule language presented for RRC review today is a verbatim restatement of the temporary rule that was approved during the December 2016 meeting. Staff notes that it is within the Industrial Commission's authority to set these fees in permanent rulemaking, and as set forth in this Staff Opinion, the agency has amended its rules several times to do so.

Therefore, staff recommends approving this Rule as a permanent Rule.

04 NCAC 10J .0103 is amended as published in 31:24 NCR 2440 as follows:

04 NCAC 10J .0103 FEES FOR INSTITUTIONAL SERVICES

(a) Except where otherwise provided, maximum allowable amounts for inpatient and outpatient institutional services shall be based on the current federal fiscal year's facility-specific Medicare rate established for each institutional facility by the Centers for Medicare & Medicaid Services ("CMS"). "Facility-specific" rate means the all-inclusive amount eligible for payment by Medicare for a claim, excluding pass-through payments. An institutional facility may only be reimbursed for hospital outpatient institutional services pursuant to this Paragraph and Paragraphs (c), (d), and (f) of this Rule if it qualifies for payment by CMS as an outpatient hospital.

(b) The schedule of maximum reimbursement rates for hospital inpatient institutional services is as follows:

(1) Beginning April 1, 2015, 190 percent of the hospital's Medicare facility-specific amount.

(2) Beginning January 1, 2016, 180 percent of the hospital's Medicare facility-specific amount.

(3) Beginning January 1, 2017, 160 percent of the hospital's Medicare facility-specific amount.

(c) The schedule of maximum reimbursement rates for hospital outpatient institutional services is as follows:

(1) Beginning April 1, 2015, 220 percent of the hospital's Medicare facility-specific amount.

(2) Beginning January 1, 2016, 210 percent of the hospital's Medicare facility-specific amount.

(3) Beginning January 1, 2017, 200 percent of the hospital's Medicare facility-specific amount.

(d) Notwithstanding the Paragraphs (a) through (c) of this Rule, maximum allowable amounts for institutional services provided by critical access hospitals ("CAH"), as certified by CMS, are based on the Medicare inpatient per diem rates and outpatient claims payment amounts allowed by CMS for each CAH facility.

(e) The schedule of maximum reimbursement rates for inpatient institutional services provided by CAHs is as follows:

(1) Beginning April 1, 2015, 200 percent of the hospital's Medicare CAH per diem amount.

(2) Beginning January 1, 2016, 190 percent of the hospital's Medicare CAH per diem amount.

(3) Beginning January 1, 2017, 170 percent of the hospital's Medicare CAH per diem amount.

(f) The schedule of maximum reimbursement rates for outpatient institutional services provided by CAHs is as follows:

(1) Beginning April 1, 2015, 230 percent of the hospital's Medicare CAH claims payment amount.

(2) Beginning January 1, 2016, 220 percent of the hospital's Medicare CAH claims payment amount.

(3) Beginning January 1, 2017, 210 percent of the hospital's Medicare CAH claims payment amount.

(g) Notwithstanding Paragraphs (a) through (f) of this Rule, the maximum allowable amounts for institutional services provided by ambulatory surgical centers ("ASC") shall be based on the ~~Medicare ASC reimbursement amount determined by applying the most recently adopted and effective Medicare Payment System Policies for Services Furnished in Ambulatory Surgical Centers and Outpatient Prospective~~ most recently adopted and effective Medicare Hospital Outpatient Prospective Payment and Ambulatory Surgical Center Payment ~~System~~ Systems reimbursement formula and ~~factors~~ factors, including all Hospital Outpatient Prospective Payment and Ambulatory Surgical Center Payment Systems Addenda, as published annually in the Federal Register and on the CMS website at https://www.cms.gov/Medicare/Medicare-Fee-for-Service-Payment/HospitalOutpatientPPS/index.html ~~("the~~

~~Medicare ASC facility-specific amount").~~ ("the OPPS/ASC Medicare rule"). An ASC's specific Medicare wage index value as set out in the OPPS/ASC Medicare rule shall be applied in the calculation of the maximum allowable amount for any institutional service it provides. ~~Reimbursement shall be based on the fully implemented payment amount in Addendum AA, Final ASC Covered Surgical Procedures for CY 2015, and Addendum BB, Final ASC Covered Ancillary Services Integral to Covered Surgical Procedures for 2015, as published in the Federal Register, or their successors.~~

(h) The schedule of maximum reimbursement rates for institutional services provided by ambulatory surgical centers is as follows:

~~(1) Beginning April 1, 2015, 220 percent of the Medicare ASC facility-specific amount.~~

~~(2) Beginning January 1, 2016, 210 percent of the Medicare ASC facility-specific amount.~~

~~(3) Beginning January 1, 2017, 200 percent of the Medicare ASC facility-specific amount.~~

(1) A maximum reimbursement rate of 200 percent shall apply to institutional services that are eligible for payment by CMS when performed at an ASC.

(2) A maximum reimbursement rate of 135 percent shall apply to institutional services performed at an ASC that are eligible for payment by CMS if performed at an outpatient hospital facility, but would not be eligible for payment by CMS if performed at an ASC.

(i) If the facility-specific Medicare payment includes an outlier payment, the sum of the facility-specific reimbursement amount and the applicable outlier payment amount shall be multiplied by the applicable percentages set out in Paragraphs (b), (c), (e), (f), and (h) of this Rule.

(j) Charges for professional services provided at an institutional facility shall be paid pursuant to the applicable fee schedules in Rule .0102 of this Section.

(k) If the billed charges are less than the maximum allowable amount for a Diagnostic Related Grouping ("DRG") payment pursuant to the fee schedule provisions of this Rule, the insurer or managed care organization shall pay no more than the billed charges.

(l) For specialty facilities paid outside Medicare's inpatient and outpatient Prospective Payment System, the payment shall be determined using Medicare's payment methodology for those specialized facilities multiplied by the inpatient institutional acute care percentages set out in Paragraphs (b) and (c) of this Rule.

History Note: *Authority G.S. 97-25; 97-26; 97-80(a); S.L. 2013-410;*
Eff. April 1, ~~2015.~~ 2015;
Amendment Eff. November 1, 2017.

GENERAL ASSEMBLY OF NORTH CAROLINA
SESSION 2013

SESSION LAW 2013-410
HOUSE BILL 92

AN ACT TO MAKE TECHNICAL CORRECTIONS TO THE GENERAL STATUTES AND SESSION LAWS, AS RECOMMENDED BY THE GENERAL STATUTES COMMISSION, AND TO MAKE ADDITIONAL TECHNICAL AND OTHER CHANGES TO THE GENERAL STATUTES AND SESSION LAWS.

The General Assembly of North Carolina enacts:

PART I. TECHNICAL CORRECTIONS RECOMMENDED BY THE GENERAL STATUTES COMMISSION

SECTION 1. The title of Article 9 of Chapter 7A of the General Statutes reads as rewritten:

"Article 9.
District Attorneys and ~~Judicial~~ Prosecutorial Districts."

SECTION 2. G.S. 13-1 reads as rewritten:

"**§ 13-1. Restoration of citizenship.**

Any person convicted of a crime, whereby the rights of citizenship are forfeited, shall have such rights automatically restored upon the occurrence of any one of the following conditions:

(1) The unconditional discharge of an inmate, of a probationer, or of a parolee by the ~~Division of Adult Correction of the Department of Public Safety;~~ agency of the State having jurisdiction of that person or of a defendant under a suspended sentence by the court.
(2) The unconditional pardon of the offender.
(3) The satisfaction by the offender of all conditions of a conditional pardon.
(4) With regard to any person convicted of a crime against the United States, the unconditional discharge of such person by the agency of the United States having jurisdiction of such person, the unconditional pardon of such person or the satisfaction by such person of a conditional pardon.
(5) With regard to any person convicted of a crime in another state, the unconditional discharge of such person by the agency of that state having jurisdiction of such person, the unconditional pardon of such person or the satisfaction by such person of a conditional pardon."

SECTION 3.(a) G.S. 14-17(a) reads as rewritten:

"(a) A murder which shall be perpetrated by means of a nuclear, biological, or chemical weapon of mass destruction as defined in G.S. 14-288.21, poison, lying in wait, imprisonment, starving, torture, or by any other kind of willful, deliberate, and premeditated killing, or which shall be committed in the perpetration or attempted perpetration of any arson, rape or a sex offense, robbery, kidnapping, burglary, or other felony committed or attempted with the use of a deadly weapon shall be deemed to be murder in the first degree, a Class A felony, and any person who commits such murder shall be punished with death or imprisonment in the State's prison for life without parole as the court shall determine pursuant to G.S. 15A-2000, except that any such person who was under 18 years of age at the time of the murder shall be punished ~~with imprisonment in the State's prison for life without parole.~~in accordance with Part 2A of Article 81B of Chapter 15A of the General Statutes."

SECTION 3.(b) G.S. 15A-1340.17(c) reads as rewritten:

"(c) Punishments for Each Class of Offense and Prior Record Level; Punishment Chart Described. — The authorized punishment for each class of offense and prior record level is as specified in the chart below. Prior record levels are indicated by the Roman numerals placed

registered mail, certified mail, or in a manner provided by G.S. 1A-1, Rule 4(j)(1)d. The Board may reinstate an expired license upon the showing of good cause for late payment of fees, upon payment of said fees within 60 days after expiration of the license, and upon the further payment of a late penalty of twenty-five dollars ($25.00). After 60 days after the expiration date, the Board may reinstate the license for good cause shown upon application for reinstatement and payment of a late penalty of fifty dollars ($50.00) and the renewal fee. The Board may require all licensees to successfully attend and complete a course or courses of occupational instruction funded, conducted or approved or sponsored by the Board on an annual basis as a condition to any license renewal and evidence of satisfactory attendance and completion of any such course or courses shall be provided the Board by the licensee."

SECTION 32.5.(i) G.S. 93D-12 reads as rewritten:

"**§ 93D-12. License to be displayed at office.**

Every person to whom a license, apprenticeship certificate, or sponsor registration is granted shall display the same in a conspicuous part of his office ~~wherein the fitting and selling of hearing aids is conducted,~~ where the person conducts business as a hearing aid specialist or shall have a copy of such license certificate, or registration on his person and exhibit the same upon request when fitting or selling hearing aids outside of his office."

SECTION 32.5.(j) G.S. 93D-15 reads as rewritten:

"**§ 93D-15. Violation of Chapter.**

Any person who violates any of the provisions of this Chapter and any person who holds himself out to the public as a ~~fitter and seller of hearing aids~~hearing aid specialist without having first obtained a license or apprenticeship registration as provided for herein shall be deemed guilty of a Class 2 misdemeanor."

SECTION 33.(a) Industrial Commission Hospital Fee Schedule:

(1) Medicare methodology for physician and hospital fee schedules. – With respect to the schedule of maximum fees for physician and hospital compensation adopted by the Industrial Commission pursuant to G.S. 97-26, those fee schedules shall be based on the applicable Medicare payment methodologies, with such adjustments and exceptions as are necessary and appropriate to ensure that (i) injured workers are provided the standard of services and care intended by Chapter 97 of the General Statutes, (ii) providers are reimbursed reasonable fees for providing these services, and (iii) medical costs are adequately contained. Such fee schedules shall also be periodically reviewed to ensure that they continue to adhere to these standards and applicable fee schedule requirements of Chapter 97. In addition to the statewide fee averages, geographical and community variations in provider costs, and other factors affecting provider costs that the Commission may consider pursuant to G.S. 97-26, the Commission may also consider other payment systems in North Carolina, other states' cost and payment structures for workers' compensation, the impact of changes over time to Medicare fee schedules on payers and providers, and cost issues for providers and payers relating to frequency of service, case mix index, and related issues.

(2) Transition to direct billing. – Pursuant to G.S. 97-26(g) through (g1) and applicable rules, the Commission shall provide for transition to direct claims submission and reimbursement for medical and hospital fees, including an implementation timeline, notice to affected stakeholders, and related compliance issues.

(3) Expedite rule-making process for fee schedule. – The Industrial Commission is exempt from the certification requirements of G.S. 150B-19.1(h) and the fiscal note requirement of G.S. 150B-21.4 in developing the fee schedules required pursuant to this section."

SECTION 33.(b) G.S. 97-26 reads as rewritten:

"**§ 97-26. Fees allowed for medical treatment; malpractice of physician.**

(a) Fee Schedule. – The Commission shall adopt by rule a schedule of maximum fees for medical ~~compensation, except as provided in subsection (b) of this section,~~compensation and shall periodically review the schedule and make revisions.

The fees adopted by the Commission in its schedule shall be adequate to ensure that (i) injured workers are provided the standard of services and care intended by this Chapter, (ii)

providers are reimbursed reasonable fees for providing these services, and (iii) medical costs are adequately contained.

The Commission may consider any and all reimbursement systems and plans in establishing its fee schedule, including, but not limited to, the State Health Plan for Teachers and State Employees (hereinafter, "State Plan"), Blue Cross and Blue Shield, and any other private or governmental plans. The Commission may also consider any and all reimbursement methodologies, including, but not limited to, the use of current procedural terminology ("CPT") codes, diagnostic-related groupings ("DRGs"), per diem rates, capitated payments, and resource-based relative-value system ("RBRVS") payments. The Commission may consider statewide fee averages, geographical and community variations in provider costs, and any other factors affecting provider costs.

(b) Hospital Fees. – Each hospital subject to the provisions of this ~~subsection~~ section shall be reimbursed the amount provided for in this ~~subsection~~ section unless it has agreed under contract with the insurer, managed care organization, employer (or other payor obligated to reimburse for inpatient hospital services rendered under this Chapter) to accept a different amount or reimbursement methodology.

~~Except as otherwise provided herein, payment for medical treatment and services rendered to workers' compensation patients by a hospital shall be a reasonable fee determined by the Commission and adopted by rule. Effective September 16, 2001, through June 30, 2002, the fee shall be the following amount unless the Commission adopts a different fee schedule in accordance with the provisions of this section:~~

~~(1) For inpatient hospital services, the amount that the hospital would have received for those services as of June 30, 2001. The payment shall not be more than a maximum of one hundred percent (100%) of the hospital's itemized charges as shown on the UB-92 claim form nor less than the minimum percentage for payment of inpatient DRG claims that was in effect as of June 30, 2001.~~

~~(2) For outpatient hospital services and any other services that were reimbursed as a discount off of charges under the State Plan as of June 30, 2001, the amount calculated by the Commission as a percentage of the hospital charges for such services. The percentage applicable to each hospital shall be the percentage used by the Commission to determine outpatient rates for each hospital as of June 30, 2001.~~

~~(3) For any other services, a reasonable fee as determined by the Industrial Commission.~~

The explanation of the fee schedule change that is published pursuant to G.S. 150B-21.2(c)(2) shall include a summary of the data and calculations on which the fee schedule rate is based.

A hospital's itemized charges on the UB-92 claim form for workers' compensation services shall be the same as itemized charges for like services for all other payers.

…."

SECTION 36.(a) G.S. 115D-67.2(b) reads as rewritten:

"(b) The Advisory Board shall consist of 14 ~~members:~~members as follows:

(1) The President of Gaston College, who shall serve ex ~~officio;~~officio.

(2) ~~Four~~ Two members who are residents of North Carolina appointed by the ~~North Carolina Manufacturers Association, Inc.;~~National Council of Textile Organizations.

(2a) Two members appointed by the Southern Textile Association, Inc.

(3) Two members appointed by the board of the North Carolina Center for Applied Textile Technology ~~Foundation;~~Foundation.

(4) Two members appointed by the board of trustees of Gaston ~~College;~~College.

(5) Three members appointed by the State Board of Community ~~Colleges;~~Colleges.

(6) One member appointed by the dean of the College of Textiles at North Carolina State ~~University; and~~University.

(7) The Director of the Manufacturing Solutions Center at Catawba Valley Community College who shall serve ex officio as a nonvoting member.

The appointing entities shall attempt to appoint members who are distributed geographically throughout the State; members representing large and small companies; and members from

…."

PART IV. EFFECTIVE DATE

SECTION 48. Except where otherwise provided, this act is effective when it becomes law.

In the General Assembly read three times and ratified this the 26th day of July, 2013.

s/ Philip E. Berger
President Pro Tempore of the Senate

s/ Thom Tillis
Speaker of the House of Representatives

s/ Pat McCrory
Governor

Approved 10:52 a.m. this 23rd day of August, 2013

FILED

STATE OF NORTH CAROLINA

COUNTY OF WAKE

IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION
17-CVS-00144

NORTH CAROLINA AMBULATORY SURGICAL CENTER ASSOCIATION, SURGICAL CARE AFFILIATES, LLC, AND COMPASS SURGICAL PARTNERS, LLC

Plaintiffs,

v.

NORTH CAROLINA INDUSTRIAL COMMISSION,

Defendant.

ORDER GRANTING SUMMARY JUDGMENT

This matter came before the Court on March 16, 2017 upon Plaintiffs North Carolina Ambulatory Surgical Center Association, Surgical Care Affiliates, LLC, and Compass Surgical Partners, LLC's (collectively "Plaintiffs") Motion for Summary Judgment against Defendant North Carolina Industrial Commission ("the Commission"). On January 4, 2017, Plaintiffs filed a Complaint for Declaratory Judgment seeking to have declared invalid a temporary rule adopted by the Commission that amends 04 NCAC 10J .0103. In their Complaint, Plaintiffs contend that the Commission's temporary rule is invalid because it does not comply with the criteria and standards for temporary rulemaking set forth in the North Carolina Administrative Procedure Act and because it is in violation of the Separation of Powers Clause in the North Carolina Constitution.

The temporary rule challenged by Plaintiffs amended 04 NCAC 10J .0103 to change the schedule of reimbursement to ambulatory surgical centers in workers' compensation cases. The Commission's temporary rule had an effective date of January 1, 2017. As justification for this temporary rule, the Commission cited the effects of the August 9, 2016 Decision in *Surgical*

Care Affiliates, LLC v. North Carolina Industrial Commission, No. 16-CVS-00600 (Wake County Superior Court). In its Statement of Findings of Need for a Temporary Rule, the Commission cites N.C. Gen. Stat. § 150B-21.1(a)(5), which permits the immediate adoption of a temporary rule when it is required by a recent court order. The August 9, 2016 Decision in *Surgical Care Affiliates* was appealed by the Commission to the North Carolina Court of Appeals and a stay order to preserve the status quo was entered on September 2, 2016.

Plaintiffs bringing this action for declaratory judgment are persons aggrieved. As providers of ambulatory surgical center services and an association whose members are providers of ambulatory surgical center services, Plaintiffs are directly affected substantially by the Commission's temporary rule. N.C. Gen. Stat. §§ 150B-2(6), 150B-21.1(c). Under N.C. Gen. Stat. § 150B-21.1(c), this Court has jurisdiction over Plaintiffs' action for declaratory judgment.

On February 6, 2017, Plaintiffs filed a Motion for Summary Judgement, seeking summary judgment in their favor on the three claims included in their declaratory judgment action. After a review and consideration of the pleadings and other filings with the Court, the briefs of by Plaintiffs and Defendant, and the arguments of counsel, this Court concludes that there are no genuine issues of material fact on Plaintiffs' First Claim and Plaintiffs are entitled to judgment in their favor as a matter of law.

Plaintiffs' First Claim

In their First Claim, Plaintiffs contend that the Commission failed to demonstrate that the August 9, 2016 Decision in *Surgical Care Affiliates* of Superior Court Judge Paul C. Ridgeway requires the immediate adoption of a temporary rule. For this reason, Plaintiffs contend that the

Commission did not have statutory authority to adopt the amendment to 04 NCAC 10J .0103 as a temporary rule.

There are no genuine issues of material fact on Plaintiffs' First Claim. The August 9, 2016 Decision in *Surgical Care Affiliates* does not require the immediate adoption of a temporary rule by the Commission.

Citing the affidavit of Andy Ellen, the Commission states in its Memorandum in Opposition to Plaintiffs' Motion that Judge Ridgeway considered whether the Commission could engage in temporary rulemaking in lieu of the stay requested by the Commission. However, Judge Ridgeway decided to enter a stay to preserve the status quo pending the Commission's appeal to the North Carolina Court of Appeals. Judge Ridgeway's entry of a stay order is further support for this Court's conclusion that the immediate adoption of a temporary rule by the Commission is not required.

The Commission failed to meet the requirements of N.C. Gen. Stat. § 150B-21.1(a) in adopting the temporary rule, and its actions in amending 04 NCAC 10J .0103 are without statutory authority. The Commission's temporary rule is invalid because it has not been adopted in substantial compliance with Article 2A of the North Carolina Administrative Procedure Act. N.C. Gen. Stat. § 150B-18.

Plaintiffs' Second and Third Claims

At the March 16, 2017 hearing Plaintiffs abandoned their Motion for Summary Judgment on their Second Claim, conceding that there are genuine issues of material fact on this claim. Therefore, this Court denies the Motion for Summary Judgement on Plaintiffs' Second Claim.

In their Third Claim, Plaintiffs contend that the Commission's adoption of the temporary rule violates the Separation of Powers Clause of the North Carolina Constitution, N.C. Const.

Art. I, § 6. It is not necessary for this Court to reach the merits of Plaintiffs' constitutional claim because of the conclusion that summary judgment should be granted on Plaintiffs' First Claim that the Commission failed to meet the statutory criteria for adopting a temporary rule. Therefore, this Court declines to rule on the Third Claim.

It is therefore **ORDERED, ADJUDGED, and DECREED THAT:**

1. Plaintiffs' Motion for Summary Judgment on its First Claim for Relief is GRANTED. The Commission's amendment of 04 NCAC 10J .0103 is invalid and of no effect.

2. Based upon Plaintiffs' concession that there are genuine issues of material fact on Plaintiffs' Second Claim for Relief, summary judgment on Plaintiffs' Second Claim is DENIED.

3. Plaintiffs and Defendant shall pay their own costs.

This the 21st day of March 2017

G. Bryan Collins, Jr.
Superior Court Judge

Certificate of Service

THIS IS TO CERTIFY that a copy of the foregoing Order was served upon the following parties and persons by mailing a copy thereof by postage prepaid, first class mail or by otherwise approved delivery addressed as follows:

Renee J. Montgomery
Parker Poe
PO Box 389
Raleigh, NC 27602

Amar Majmundar
Special Deputy Attorney General
Attorney General's Office
9001 Mail Service Center
Raleigh, NC 27699-9001

This 22nd day of March, 2017.

Samantha L. Cockerell
Trial Court Coordinator