November 15, 2017

Via Electronic Mail

North Carolina Rules Review Commission
6714 Mail Service Center
Raleigh, NC 27699-6714

Re: **Comments of the North Carolina Automobile Dealers Association in Opposition to Temporary Rules 19A NCAC 03K .0101 and .0102, as Adopted with Changes by the Department of Transportation Division of Motor Vehicles**

Dear Ladies and Gentlemen:

On behalf of the North Carolina Automobile Dealers Association ("NCADA"), the following comments are respectfully submitted regarding the temporary Rules 19A NCAC 03K .0101 and .0102 as adopted with changes by the North Carolina Department of Transportation Division of Motor Vehicles ("Division"). NCADA respectfully opposes these temporary rules as adopted and urges the Rules Review Commission not to approve the rules.

NCADA fully understands that at this point in the temporary rulemaking process, the Rules Review Commission is limited in its review to a determination of the standards set forth in N.C. Gen. Stat. §150B-21.9. The comments and concerns noted below are likewise limited to the §150B-21.9 standards. However, NCADA would like to provide a brief statement of background on these issues as well as information on NCADA's previous comments to the Division on the temporary rules.

Background

Beginning with Session Law 2014-100, the North Carolina General Assembly first began the process of directing the Division to develop a plan and proposed schedule of fees for the performance of administrative hearings under the purview of the Division. Under that original direction, a recommended fee schedule was to be proposed to the legislature by December 1, 2014, with a final hearing fee schedule implemented no later than January 1, 2016. For various reasons a proposed hearing fee schedule was not publicly released and an extension of the fee implementation deadline to July 1, 2017, was enacted in Session Law 2015-241. In the 2017 state budget bill, Senate Bill 257 (Session Law 2017-57), an additional extension until January 1, 2018, for the implementation of the schedule of fees was enacted. It is NCADA's understanding that the adopted temporary rules 19A NCAC 03K .0101 and .0102, released for the first time on September 1, 2017, represent the first publicly released proposed fee schedule first required by Session Law 2014-100. Obviously, those individuals and entities impacted now have little time to assess and prepare for these proposed hearing fees which in many instances are exorbitant and appear to not be rationally related to the actual costs of the respective types of hearings.

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NCADA Public Hearing and Written Comments to the Division

NCADA provided comments regarding the temporary rules at the September 25, 2017, public hearing held by the Division and submitted written comments to the Division dated October 13, 2017. In the public hearing and written comments, NCADA expressed its significant concerns regarding the level of the proposed hearing fees and the manner and structure in which the fees would be charged. NCADA noted to the Division the full understanding that, in the final version of the budget bill (Session Law 2017-57), the Division was directed for the first time to fund the Hearings Unit solely from the proceeds collected from the schedule of fees.

However, NCADA noted to the Division that the amount of the various hearing fees coupled with a fee schedule structure that is weighted almost entirely toward initial hearing requests will result in the unintended consequence of creating an extensive barrier to many who wish to avail themselves of the right to seek an administrative hearing before the Division. Significant individual rights are at risk of being hindered by the level of these hearing fees. Further, NCADA noted that many of the fees on the proposed schedule do not appear to be rationally related to the actual costs of conducting the type of hearing covered and appear to greatly exceed the level of fees found in the General Court of Justice as well as in the Office of Administrative Hearings. In NCADA's comments to the Division, two types of hearings were noted as examples of the exorbitant level of hearing fees in the proposed temporary rules – 1) A $1,200.00[1] non-refundable hearing fee just to file a petition pursuant to N.C. Gen. Stat. §20-308.1 (the North Carolina Motor Vehicle Dealers and Manufacturers Licensing Law (the, "franchise law") coupled with a $600.00 non-refundable fee for any motion filed in such a proceeding; and, 2) A $200.00 hearing fee for hearings involving motor vehicle inspections mechanics and inspections stations pursuant to N.C. Gen. Stat. §20-183.8G (including instances where the underlying fine in question may be as little as $50.00).

Temporary Rules Do Not Meet the Standards Set Forth in N.C. Gen. Stat. §150B-21.9

NCADA's concerns with the temporary rules also extend to the N.C. Gen. Stat. §150B-21.9 standards for review by the Commission and, as noted above, NCADA respectfully opposes the temporary rules as adopted and urges the Rules Review Commission not to approve the rules. The temporary rules 19A NCAC 03K .0101 and .0102, as adopted, do not meet the standards set forth in N.C. Gen. Stat. §150B-21.9 for the following reasons:

- **Temporary rules not within the authority delegated to the agency by the General Assembly**

  The temporary rules do not meet the standard of N.C. Gen. Stat. §150B-21.9(a)(1) as the proposed fee schedule is not, "*within the authority delegated to the agency by the General Assembly.*" The temporary rules were adopted by the Division per the direction of Session Law 2017-57. As amended by Session Law 2017-57, Section 34.9 of Session Law 2014-100, as amended by Section 29.30A of Session Law 2015-241, provides that the Division of Motor Vehicles, "shall develop a schedule of fees to recover the costs incurred by the Hearings Unit of the Division of Motor Vehicles for the performance of administrative hearings required by law or under rules adopted

[1] This $1,200.00 petition filing fee was reduced to $600.00 in the adopted with changes version of the rules submitted by the Division.

under G.S. 20-2(b)." Further, Section 34.9 of Session Law 2014-100, as amended by Session Law 2015-241 and Session Law 2017-57, provides that,

> "The plan and proposed schedule shall address, ***at a minimum***, the following:
> (1) ***Current hearing process and recommended modifications to achieve cost efficiencies***, including proposed revisions to existing laws or rules.
> (2) ***Historical and projected funding requirements for each category of hearing performed by the Division***.
> (3) Schedule of fees and projected receipts.
> (4) Proposed processes and rules for the collection of fees and the refunding of fees for hearings initiated by the Division in which the original decision of the Division is reversed.
> (5) Implementation milestones." (Emphasis added).

The temporary rules do not appear to address the, *"current hearing process and recommended modifications to achieve cost efficiencies."* Further, the temporary rules do not appear to address the, "*historical and projected funding requirements for each category of hearing performed by the Division."* **Rather, the fee schedule included in the temporary rules appears to merely spread the purported total existing Hearings Unit costs over the various types of Division hearings and does not appear to include any modifications of the current DMV hearing process to achieve cost efficiencies or to take into account the historical and projected funding requirements for the various categories of hearings performed by the Division.**

As an example, the largest fee included in the fee schedule is the non-refundable $600.00 fee for filing a petition pursuant to N.C. Gen. Stat. §20-308.1 (the North Carolina Motor Vehicle Dealers and Manufacturers Licensing Law (the, "franchise law") [2], whether any hearing is actually held, coupled with a $600.00 fee for every motion filed in such a proceeding, apparently regardless of whether the motion would require a hearing. Many of such cases are filed by automobile dealers with the Commissioner for the purpose of preserving the dealer's rights under various laws. For example, to stay a proposed franchise termination under N.C. Gen. Stat. §20-305(6) or a proposed chargeback of warranty or incentive payments under N.C. Gen. Stat. §20-305.1. In fact, the large majority of franchise related cases filed by dealers with the Commissioner are settled by the parties on their own within six months after the initial petition has been filed, with no hearing required and with little or no involvement by either the Commissioner or the hearing officer appointed by the Commissioner.

In addition, these fees for franchise law related matters are specifically singled out with no apparent rational basis as the only fees that are non-refundable in any circumstance (temporary Rule 19A NCAC 03K .0101(h)), even though these types of administrative proceedings are often settled and are arguably the most common type of administrative proceedings to be settled before any hearing is held or any substantive work is performed, or costs are incurred by the Division. Given the level of the fees for franchise law related matters and the arbitrary requirement that in no circumstance will such an administrative petition fee or motion fee be refundable, it appears that the overall costs

[2] Again, the $600.00 franchise law related hearing petition fee is a reduction from the originally proposed $1,200.00 fee included in the originally published notice of the proposed temporary rules.

of the Hearings Unit are being artificially shifted and weighted more strongly to administrative proceedings initiated pursuant to the franchise law.

Clearly, the proposed fee schedule does not meet the standard of N.C. Gen. Stat. §150B-21.9(a)(1) as the proposed fee schedule is not, *"within the authority delegated to the agency by the General Assembly."* Again, the authority delegated to the Division by the General Assembly was to adopt a schedule of fees to recover the costs of the Hearings Unit that, ***at a minimum***, takes into account the current hearing process and recommended modifications to achieve cost efficiencies as well as the historical and projected funding requirements for each category of hearing performed by the Division. In light of the example noted above, it is does not appear that the fee schedule included in the temporary rules has addressed these minimum legislative requirements and the rule was adopted outside of the authority granted by the General Assembly. The General Assembly did not grant authority to simply adopt a fee schedule for the mere filing of administrative petitions without also addressing the minimum requirements for the fee schedule set forth in the session laws noted above.

- **Refund process for administrative hearing fees is unclear and ambiguous**

The temporary rules do not meet the standard of N.C. Gen. Stat. §150B-21.9(a)(2) as the process for the assessment and refunding of the administrative hearing fees and the schedule of fees itself is not, "*clear and unambiguous*."

The temporary rule adopted on October 31, 2017, includes a substantive change from the proposed temporary rule released on September 1, 2017. For the first time in the rulemaking process, the adopted temporary rule 19A NCAC 03K .0101(g) includes the following text (minor changes were made to this text pursuant to RRC staff's request for technical changes):

> "If on the actual date the written hearing request is postmarked or received by the Division, whichever occurs first, the applicant is not eligible for the hearing requested, the applicant shall be entitled to a refund of the hearing fee minus the processing fee listed in Paragraph (m) only if a written request to cancel the hearing is postmarked at least 3 calendar days prior to the scheduled hearing date. If the applicant is eligible for a hearing when the hearing request is post-marked or received by the Division, whichever occurs first, and the applicant later becomes ineligible for the requested hearing prior to the actual hearing, the applicant is eligible for a refund, minus the processing fee in Paragraph (m), only if the Division receives a written notice from the applicant seeking to cancel the hearing postmarked at least 10 business days prior to the scheduled hearing date."

In addition, the initial first sentence of this subsection (g) is retained in the adopted rule:

> "A hearing fee shall be non-refundable unless the Division receives a written notice from the applicant seeking to cancel the hearing postmarked at least 10 business days prior to the scheduled hearing date, except as listed in Paragraph (h) of this Rule."

This new language of the temporary rule proposes two significant substantive changes: 1) references the possibility of a hearing applicant being deemed "not eligible" for the hearing

requested; and, 2) imposes new and separate deadlines for an applicant to file a written request for cancellation of the hearing in order to receive a partial refund, depending upon whether the applicant was *"eligible"* or *"not eligible"* for the hearing at the time the hearing request is submitted. An applicant deemed "not eligible" for the hearing requested at time the request is filed has three (3) calendar days before the scheduled date of the hearing to submit a written notice to cancel a hearing request in time to receive a partial refund of the hearing fee. However, an applicant deemed to "become ineligible" for the hearing requested only after initially being deemed eligible for the hearing at the time of the request must submit a notice to cancel the hearing at least (10) business day prior to the scheduled date of the hearing.

The adopted temporary rule with the above noted substantive changes raises many important questions for hearing request applicants, including the following:

- What does it mean to be "eligible" or "not eligible" for the hearing requested?
- Does the "eligible" / "not eligible" provision of this subsection (g) apply to all hearing types listed in 19A NCAC 03K .0102?
- How and when will the determination be made regarding whether the hearing request applicant is "eligible" or "not eligible" for the hearing requested?
- How and when will the applicant be notified regarding "eligibility"?
- Why is a hearing (which must be cancelled ***by the applicant*** to receive a partial refund) even scheduled if an applicant is deemed "not eligible" for the hearing requested at the time the request is filed?
- Will the applicant be given the opportunity for a hearing regarding "eligibility" for the hearing requested if deemed "not eligible" for the hearing?
- Why does a hearing fee applicant who is "not eligible" for the hearing requested at the time of the hearing request have to pay an upfront hearing fee and why is such an applicant not entitled to a full refund?
- If an applicant for a hearing pursuant to N.C. Gen. Stat. §20-308.1 is deemed to be ineligible for the hearing requested because the matter is outside the purview of the franchise law and/or outside the jurisdiction of the Division, and thus not properly filed with the Division, is the $600.00 petition fee still non-refundable?

Again, this newly added substantive portion of the adopted temporary rules is unclear and ambiguous and does not meet the standard set forth in N.C. Gen. Stat. §150B-21.9(a)(2).

- **Provision imposing a hearing fee for motions filed pursuant to an N.C. Gen. Stat. §20-308.1 hearing matter is unclear and ambiguous**

The temporary rules do not meet the standard of N.C. Gen. Stat. §150B-21.9(a)(2) as the imposition of a hearing fee for motions filed pursuant to an N.C. Gen. Stat. §20-308.1 hearing matter is not, "*clear and unambiguous*."

Temporary rule 19A NCAC 03K .0101(b) provides that, *"The fee for **each type of hearing provided** by the Division shall be set forth in 19A NCAC 03K .0102."* (Emphasis added) Further, temporary rule 19A NCAC 03K .0102(a) provides that, *"The Division shall assess the following administrative **hearing fees**, pursuant to Rule .0101 of this Subchapter:"* (Emphasis added) However, temporary rule 19A NCAC 03K .0102(a)(17) imposes a $600.00 fee on "a party that

files a motion" in a proceeding initiated pursuant to N.C. Gen. Stat. §20-308.1, the franchise law. It is unclear and ambiguous as to the applicability of this non-refundable $600.00 per motion fee. Specifically, while the remainder of the temporary rules 19A NCAC 03K .0101 and .0102 reference fees for "hearings" and "hearing requests", it is unclear and ambiguous as to whether 19A NCAC 03K .0102(a)(17) would impose a $600.00 fee for a non-dispositive motion that would not require a hearing such as a simple motion for a continuance, extension of time, or other purely procedural matter. Again, the temporary rule 19A NCAC 03K .0102 outlines a schedule of "administrative hearing fees," yet 19A NCAC 03K .0102 purports to impose a fee per motion filed and is ***unclear as to whether the motion fee would apply to motions not requiring a hearing***. As such, this portion of temporary rule 19A NCAC 03K .0102 does not meet the standard set forth in N.C. Gen. Stat. §150B-21.9(a)(2).

- **Non-refundable fee is not reasonably necessary to implement or interpret an enactment of the General Assembly.**

  The temporary rules do not meet the standard of N.C. Gen. Stat. §150B-21.9(a)(3) as, at least a portion of the temporary rule, *"is not reasonably necessary to implement or interpret an enactment of the General Assembly."*

  As noted above, the General Assembly directed the Division to develop a schedule of fees to recover the costs incurred by the Division's Hearings Unit. Under the adopted temporary rules, the Division would permit the refund of fees paid when a hearing request is cancelled at least 10 business days prior to the scheduled hearing date.[3] The sole exception to this hearing fee refund process is for a fee for filing a petition or a motion pursuant to N.C. Gen. Stat. §20-308.1, motor vehicle franchise law related administrative proceedings. This proposed portion of the temporary rule to specifically exempt such fees from the refund process is in no way reasonably necessary to implement or interpret the enactment and direction of the General Assembly. The "cumulative effect of all rules adopted by the agency related to the specific purpose for which the rule is proposed," is to be examined in making the determination that the proposed and adopted temporary rule adheres to the standard set forth in N.C. Gen. Stat. §105B-21.9(a)(3). The cumulative effect of making such fees the sole category where no fee refund is available, **is to place a significant portion of the overall burden of the Hearings Unit's costs on this particular administrative proceeding category, which is not reasonably necessary to implement or interpret the enactment and direction of the General Assembly.**

- **Hearing fee schedule weighted entirely to initial hearing requests is not reasonably necessary to implement or interpret an enactment of the General Assembly.**

  Again, Session Law 2015-57 requires the Division to develop a schedule of fees to recover Hearings Unit costs. Also, new N.C. Gen. Stat. §20-4.03 authorizes the Division to charge a fee for an administrative hearing request. As it appears the Division has not proposed modifications to achieve cost efficiencies nor addressed the historical and projected funding requirements for each category of hearing performed by the Division in the development of an overall fee schedule

[3] As noted above, the adopted rule 19A NCAC 03K .0101(g) provides for a separate time frame for hearing cancellations when an applicant is deemed "not eligible" for the hearing requested on the actual date the request is postmarked or received by the Division, whichever occurs first.

for the Hearings Unit, it appears the Division has merely weighted the entire fee schedule to the initial filing of an administrative petition. Such a fee schedule is not reasonably necessary to implement the enactment and direction of the General Assembly and instead places an undue burden on simple petition filings. A burden which in many instances may economically prevent or at least implement a major hindrance to access to justice.

Clearly, the direction of the General Assembly to the Division was the development of an overall fee schedule that takes into account hearing process modifications to achieve cost efficiencies and that requires the Division to address at a minimum the historical and projected funding requirements for each category of hearing performed by the Division. However, the proposed fee schedule in the adopted temporary rules takes a narrower approach and merely focuses on administrative petition filing fees to cover the overall costs. Such an approach is not reasonably necessary to implement the fee schedule required by the General Assembly and is in fact unreasonable to the individuals and entities who will be paying these filing fees.

Recommendations

NCADA fully understands that the Commission is not to consider the quality or efficacy of a rule under review and must limit its review to a determination of the standards set forth in N.C. Gen. Stat. §150B-21.9. As noted above, NCADA respectfully submits these comments and concerns in opposition to the temporary rules 19A NCAC 03K .0101 and .0102, as adopted, and recommends that the statutory standards could be met by addressing the following items:

- **Expanded schedule of fees that addresses the Session Law requirements**

  As noted above, the General Assembly delegated the authority to the Division to adopt a schedule of fees to recover Hearings Unit costs that addresses, at a minimum, the current hearing process and includes recommended modifications to achieve cost efficiencies as well as addresses the historical and projected funding requirements for each category of hearing performed by the Division. NCADA has already recommended in its public and written comments to the Division that a revised schedule of fees be adopted that is more in line with the actual costs to be incurred for each respective hearing type as well as more aligned with the time that such costs will actually be incurred. Rather than applying a significant uniform initial fee to just initiate the hearing process, the complexity of each type of hearing should be considered as well as the point at which certain costs will be incurred during the duration of the administrative proceeding, in order for the schedule of fees to conform to the authority delegated to the Division by the General Assembly. For example, setting a lower initial hearing fee payable in accordance with N.C. Gen. Stat. §20-4.03, along with the imposition of possible additional fees on the fee schedule required by Session Laws 2014-100, 2015-241 and Session Law 2017-57, that takes into consideration the actual duration of the specific matter and the actual costs incurred by the Hearings Unit of the Division. As a more detailed example, NCADA included a proposed alternative fee schedule for franchise law related matters in its October 13, 2017, written comments to the Division that addresses an initial hearing or petition request, as well as fees for other elements of such proceedings. ***Through such a revised fee schedule, the temporary rule would more likely conform to the standards of N.C. Gen. Stat. §150B-21.9.***

- **Elimination of the exclusive non-refundability of franchise law related proceeding fees**

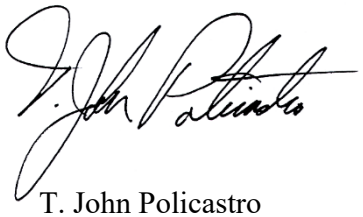
  As noted above, under the adopted temporary rules, the Division has proposed to permit the refund of hearing fees paid when a hearing request is cancelled in a timely manner. However, the temporary rules do not permit a fee refund for the filing of a petition or motion filed pursuant to N.C. Gen. Stat. §20-308.1, motor vehicle franchise law related proceedings. Again, such an arbitrary exclusion for this one type of matter is *not reasonably necessary to implement or interpret an enactment of the General Assembly*. Further, the temporary rule is *unclear and ambiguous* as to whether the fee for motions filed pursuant to an N.C. Gen. Stat. §20-308.1 proceeding would only apply to dispositive motions for which a hearing is necessary or also to non-substantive motions (e.g., motion for a continuance) as well. ***Changes to the temporary rule that would apply the hearing refund process to all DMV hearings as well as clarifying the applicability of the "per motion" fee would serve to address this issue and would more likely bring the temporary rules into conformity with the standards of N.C. Gen. Stat. §150B-21.9.***

It appears that the temporary rules process and the remaining time before the proposed effective date of these temporary rules will afford the Division with the time necessary to revise the temporary rules and the included fee schedule in order to conform to the standards of N.C. Gen. Stat. §150B-21.9.

NCADA thanks the Division of Motor Vehicles for its efforts in developing these temporary rules and stands ready to assist the Division in any revision of the temporary rules.

Thank you.

Respectfully submitted,



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David P. Ferrell
Member

November 15, 2017

Via Electronic Mail

North Carolina Rules Review Commission
6714 Mail Service Center
Raleigh NC 27699-6714

Re: **Comments of the Independent Garage Owners of North Carolina in Opposition to Temporary Rules 19A NCAC 03K .0101 and .0102**

To Whom It May Concern:

On behalf of the Independent Garage Owners of North Carolina ("IGONC"), the following comments are respectfully submitted regarding the proposed temporary rules Rule 19A NCAC 03K .0101 and .0102, as adopted with changes by the North Carolina Division of Motor Vehicles ("DMV"). IGONC represents the interests of automotive repair facilities and garages throughout North Carolina, many of which are motor vehicle inspection stations. IGONC members are concerned specifically about the hearing fees on motor vehicle inspection stations and mechanics in North Carolina. IGONC appreciates the opportunity to provide comments on these temporary rules, and requests the Rules Review Commission ("RRC") not adopt the rules.

N.C. Gen. Stat. §150B-21.9(a)(1)

These temporary rules do not met the standards set forth in N.C. Gen. Stat. §150B-21.9. First, the temporary rules are outside the authority delegated to the agency by the General Assembly. N.C. Gen. Stat. §150B-21.9(a)(1). Section 34.32(a) of Session Law 2017-57 provides that DMV is to develop a schedule of fees to recover costs incurred "…for the performance of administrative hearings required by law or under rules …" The direction from the legislature does not give DMV the authority impose non-refundable fees or to charge an administrative fee when there is no hearing held, as they purport to do in 19A NCAC 03K .0101(d) and (h). Further, the applicable session law does not give DMV the authority to charge an administrative fee as they purport to do in 19A NCAC 03K .0101(k).

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Further, Section 34.9 of Session Law 2014-100, as amended by Session Law 2015-241 and Session Law 2017-57, provides that: "The plan and proposed [hearing fee] schedule shall address, at a minimum, the following: (1) Current hearing process and recommended modifications to achieve cost efficiencies, including proposed revisions to existing laws or rules; (2) Historical and projected funding requirements for each category of hearing performed by the Division; (3) Schedule of fees and projected receipts; (4) Proposed processes and rules for the collection of fees and the refunding of fees for hearings initiated by the Division in which the original decision of the Division is reversed; and (5) Implementation milestones." The temporary rules do not appear to address the, "current hearing process and recommended modifications to achieve cost efficiencies." Further, the temporary rules do not appear to address the, "historical and projected funding requirements for each category of hearing performed by the Division." Rather, the fee schedule included in the temporary rules appears to merely spread the purported total existing Hearings Unit costs over the various types of DMV hearings and does not appear to include any modifications of the current DMV hearing process to achieve cost efficiencies or to take into account the historical and projected funding requirements for the various categories of hearings performed by the Division.

In addition, there is no rational basis for DMV to provide that some types of hearings can proceed without a payment of the hearing fee, while others cannot (Temporary Rule 19A NCAC 03K .0101(d)).

In addition, the General Assembly cannot delegate authority to an agency to act in an unconstitutional manner. A motor vehicle inspection station license and inspector license are property interests which carry certain due process protections. While inspections violations are not criminal charges, the ramifications of a violation include the potential for monetary penalties and the loss of livelihood through an inspections license suspension. Imposing any fee before such a matter is adjudicated, especially such an elevated fee (for example, DMV charging a $200 hearing fee for a violation that carries with it a $50 civil fine), in order to exercise the right to request a hearing to defend the charges appears to raise constitutional due process concerns.

N.C. Gen. Stat. §150B-21.9(a)(2)

The temporary rules are not clear and they are ambiguous. N.C. Gen. Stat. §150B-21.9(a)(2). The process for the assessment and refunding of the administrative hearing fees and the schedule of fees itself is not "clear and unambiguous." Temporary Rule 19A NCAC 03K .0101(g) establishes a process whereby if an applicant is not eligible for a hearing, they have a very short amount of time to request a refund of their hearing fee and/or file a written request to cancel a hearing, or the applicant does not receive a refund (in some cases 3 calendar days, in other cases 10 business days). This administrative rule is unclear and is ambiguous. There is no defined process for how

an applicant's hearing request is deemed "eligible or ineligible"; no detail for who will make this decision, and no requirement that the applicant will be notified by DMV. It is unclear whether this "eligible/ineligible" designation applies to all hearing types. It also begs the question why DMV would schedule a hearing if an applicant is not eligible to have a hearing. As we have discussed above, DMV does not have the authority to charge a hearing fee where no hearing is held. Applicants should be entitled to a full refund if no hearing is held. Again, this temporary rule is unclear and ambiguous and does not meet the standard set forth in N.C. Gen. Stat. §150B-21.9(a)(2).

N.C. Gen. Stat. §150B-21.9(a)(3)

The temporary rules are not reasonably necessary to implement or interpret an enactment of the General Assembly. N.C. Gen. Stat. §150B-21.9(a)(3). The direction of the General Assembly to DMV was the development of an overall fee schedule that takes into account hearing process modifications to achieve cost efficiencies and that requires DMV to address at a minimum the historical and projected funding requirements for each category of hearing performed by DMV. However, the proposed fee schedule in these Temporary Rules takes a narrower approach and merely focuses on administrative petition filing fees to cover the overall costs. Such an approach is not reasonably necessary to implement the fee schedule required by the General Assembly and is in fact unreasonable to the individuals and entities who will be paying these filing fees. The cumulative effect of making such fees the sole category where no fee refund is available, is to place a significant portion of the overall burden of the Hearings Unit's costs on this particular administrative proceeding category, which is not reasonably necessary to implement or interpret the enactment and direction of the General Assembly. A burden which in many instances may economically prevent or at least implement a major hindrance to access to justice.

IGONC thanks the Rules Review Commission for the opportunity to provide these comments and opposition to Temporary Rule 19A NCAC 03K .0101 and .0102, and we respectfully request that the Commission not adopt the rules. IGONC stands ready to assist DMV in any revision of the temporary rules.

Sincerely,

David P. Ferrell

NEXSEN|PRUET

David P. Ferrell
Member

November 15, 2017

Via Electronic Mail

North Carolina Rules Review Commission
6714 Mail Service Center
Raleigh NC 27699-6714

Re: **Carolina Lubes, Inc. - Comments in Opposition to Temporary Rules 19A NCAC 03K .0101 and .0102**

To Whom It May Concern:

On behalf of the Carolina Lubes, Inc., the following comments are respectfully submitted regarding the proposed temporary rules Rule 19A NCAC 03K .0101 and .0102, as adopted with changes by the North Carolina Division of Motor Vehicles ("DMV"). Carolina Lubes owns and operates automotive service facilities and motor vehicle inspection stations in North Carolina. Carolina Lubes appreciates the opportunity to provide comments on these temporary rules, and requests the Rules Review Commission ("RRC") not adopt the rules.

Charleston
Charlotte
Columbia
Greensboro
Greenville
Hilton Head
Myrtle Beach
Raleigh

N.C. Gen. Stat. §150B-21.9(a)(1)

These temporary rules do not met the standards set forth in N.C. Gen. Stat. §150B-21.9. First, the temporary rules are outside the authority delegated to the agency by the General Assembly. N.C. Gen. Stat. §150B-21.9(a)(1). Section 34.32(a) of Session Law 2017-57 provides that DMV is to develop a schedule of fees to recover costs incurred "…for the performance of administrative hearings required by law or under rules …" The direction from the legislature does not give DMV the authority impose non-refundable fees or to charge an administrative fee when there is no hearing held, as they purport to do in 19A NCAC 03K .0101(d) and (h). Further, the applicable session law does not give DMV the authority to charge an administrative fee as they purport to do in 19A NCAC 03K .0101(k).

Further, Section 34.9 of Session Law 2014-100, as amended by Session Law 2015-241 and Session Law 2017-57, provides that: "The plan and proposed [hearing

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fee] schedule shall address, at a minimum, the following: (1) Current hearing process and recommended modifications to achieve cost efficiencies, including proposed revisions to existing laws or rules; (2) Historical and projected funding requirements for each category of hearing performed by the Division; (3) Schedule of fees and projected receipts; (4) Proposed processes and rules for the collection of fees and the refunding of fees for hearings initiated by the Division in which the original decision of the Division is reversed; and (5) Implementation milestones." The temporary rules do not appear to address the, "current hearing process and recommended modifications to achieve cost efficiencies." Further, the temporary rules do not appear to address the, "historical and projected funding requirements for each category of hearing performed by the Division." Rather, the fee schedule included in the temporary rules appears to merely spread the purported total existing Hearings Unit costs over the various types of DMV hearings and does not appear to include any modifications of the current DMV hearing process to achieve cost efficiencies or to take into account the historical and projected funding requirements for the various categories of hearings performed by the Division.

In addition, there is no rational basis for DMV to provide that some types of hearings can proceed without a payment of the hearing fee, while others cannot (Temporary Rule 19A NCAC 03K .0101(d)).

In addition, the General Assembly cannot delegate authority to an agency to act in an unconstitutional manner. A motor vehicle inspection station license and inspector license are property interests which carry certain due process protections. While inspections violations are not criminal charges, the ramifications of a violation include the potential for monetary penalties and the loss of livelihood through an inspections license suspension. Imposing any fee before such a matter is adjudicated, especially such an elevated fee (for example, DMV charging a $200 hearing fee for a violation that carries with it a $50 civil fine), in order to exercise the right to request a hearing to defend the charges appears to raise constitutional due process concerns.

N.C. Gen. Stat. §150B-21.9(a)(2)

The temporary rules are not clear and they are ambiguous. N.C. Gen. Stat. §150B-21.9(a)(2). The process for the assessment and refunding of the administrative hearing fees and the schedule of fees itself is not "clear and unambiguous." Temporary Rule 19A NCAC 03K .0101(g) establishes a process whereby if an applicant is not eligible for a hearing, they have a very short amount of time to request a refund of their hearing fee and/or file a written request to cancel a hearing, or the applicant does not receive a refund (in some cases 3 calendar days, in other cases 10 business days). This administrative rule is unclear and is ambiguous. There is no defined process for how an applicant's hearing request is deemed "eligible or ineligible"; no detail for who will make this decision, and no requirement that the applicant will be notified by DMV. It

is unclear whether this "eligible/ineligible" designation applies to all hearing types. It also begs the question why DMV would schedule a hearing if an applicant is not eligible to have a hearing. As we have discussed above, DMV does not have the authority to charge a hearing fee where no hearing is held. Applicants should be entitled to a full refund if no hearing is held. Again, this temporary rule is unclear and ambiguous and does not meet the standard set forth in N.C. Gen. Stat. §150B-21.9(a)(2).

N.C. Gen. Stat. §150B-21.9(a)(3)

The temporary rules are not reasonably necessary to implement or interpret an enactment of the General Assembly. N.C. Gen. Stat. §150B-21.9(a)(3). The direction of the General Assembly to DMV was the development of an overall fee schedule that takes into account hearing process modifications to achieve cost efficiencies and that requires DMV to address at a minimum the historical and projected funding requirements for each category of hearing performed by DMV. However, the proposed fee schedule in these Temporary Rules takes a narrower approach and merely focuses on administrative petition filing fees to cover the overall costs. Such an approach is not reasonably necessary to implement the fee schedule required by the General Assembly and is in fact unreasonable to the individuals and entities who will be paying these filing fees. The cumulative effect of making such fees the sole category where no fee refund is available, is to place a significant portion of the overall burden of the Hearings Unit's costs on this particular administrative proceeding category, which is not reasonably necessary to implement or interpret the enactment and direction of the General Assembly. A burden which in many instances may economically prevent or at least implement a major hindrance to access to justice.

Carolina Lubes thanks the Rules Review Commission for the opportunity to provide these comments and opposition to Temporary Rule 19A NCAC 03K .0101 and .0102, and we respectfully request that the Commission not adopt the rules. Carolina Lubes stands ready to assist DMV in any revision of the temporary rules.

Sincerely,

David P. Ferrell