Environmental
Quality

PAT McCRORY
Governor

DONALD R. VAN DER VAART
Secretary

SAM M. HAYES
General Counsel

September 20, 2016

Via Hand Delivery

Mr. Roy Cooper
Attorney General
North Carolina Department of Justice
Old Education Building
114 W. Edenton Street
Raleigh, North Carolina 27602

Re: Request for guidance regarding recent gasoline supply interruption and issues surrounding excessive pricing

Dear Attorney General Cooper,

This letter is a request for your assistance to provide practical guidance in addressing the recent significant interruption in gasoline supply to North Carolina, as a result of the Colonial Pipeline disruption in Alabama. In requesting your assistance, the North Carolina Department of Environmental Quality offers its legal staff and resources to aid you in providing this practical guidance.

As you are aware, on September 16, 2016, pursuant to Governor McCrory's Executive Order 101, the prohibition against excessive pricing during states of disaster, states of emergency, or abnormal market disruptions, as provided in N.C. Gen. Stat. § 75-37 and § 75-38, was triggered. Executive Order 101 was necessary to respond to the gasoline supply shortage caused by the Colonial Pipeline disruption in Alabama and to protect North Carolinians from unreasonably excessive gas prices while ensuring an uninterrupted supply of fuel that is essential for the health, safety and economic well-being of North Carolina consumers, businesses and visitors.

We were informed during State Emergency Response Team briefings that a number of retail service stations have expressed concern that they could be investigated simply as a result of purchasing gasoline on the wholesale market at a significantly increased price and selling this gasoline at a higher consumer retail price to recover the increase in costs incurred. These concerns are in large part due to the ambiguity and potential conflict in paragraph (a) of N.C. Gen. Stat. § 75-38, which states:

> In determining whether a price is unreasonably excessive, it shall be considered whether:
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> (1) The price charged by the seller is attributable to additional costs imposed by the seller's supplier or other costs of providing the good or service during the triggering event.
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> (2) *The price charged by the seller exceeds the seller's average price in the preceding 60 days before the triggering event.* If the seller did not sell or rent or offer to sell or rent the goods or service in question prior to the time of the triggering event, the price at which the goods or service was generally available in the trade area shall be used as a factor in determining if the seller is charging an unreasonably excessive price.
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> (3) The price charged by the seller is attributable to fluctuations in applicable commodity markets; fluctuations in applicable regional, national, or international market trends; or to reasonable expenses and charges for attendant business risk incurred in procuring or selling the goods or services.

N.C. Gen. Stat. § 75-38(a) (2016) (emphasis added). The lack of an introductory clause or conjunctive, or disjunctive connector (e.g. "and" "or") in the articulated list above gives rise to potential ambiguity. Based on current consumer supply projections and wholesale market prices, the retail station owners are expecting to pay significantly more for gasoline, a cost they generally pass on to their retail consumers. If these retail stations pass on these costs to consumers – even if the station owners forgo any profit – they will likely be charging a price that "**exceeds the seller's average price in the preceding 60 days before the triggering event**." If the above factors are read in the disjunctive, it is possible that these retail gasoline stations could be found to have violated the excessive pricing statute purely under factor (2) above.

Given the unique set of facts that have given rise to the interruption of gasoline supply in this State, we are requesting that your Office provide further clarification of how it will interpret N.C. Gen. Stat. § 75-38 and the factors that will be considered before an investigation of a particular retail station is triggered. In making this request, we offer the following possible interpretation that could provide a rebuttable presumption that excessive pricing does not occur under the following conditions:

> If the profit margin for a retail gasoline station after the triggering event does not exceed the average profit margin in the preceding 60 days before the triggering event, then there would be a rebuttable presumption that excessive pricing did not occur.

This interpretation would give meaning to all three statutory factors. Retail gasoline stations could readily maintain wholesale purchase records (per shipment) as well as records of sales (price and volume) and make these available to your Office upon request.

Providing clarification and interpretation of this statute as it applies specifically to retail gasoline stations will help strike the proper balance of, first and foremost, protecting North Carolinian retail consumers while at the same time providing retail gasoline stations sufficient guidance to make informed decisions. Moreover, such an interpretation would ensure that your Office can direct its resources and its focus on bad faith retail sellers, who should be prosecuted to the fullest extent under the law. This will protect retail consumers from predatory pricing while ensuring that the supply of gasoline from retail stations is available at market prices during this period of interrupted gasoline supply.

Please contact me as soon as possible to coordinate our legal resources to address this concern.

Sincerely,

for
Sam M. Hayes