

STATE OF NORTH CAROLINA

BEFORE THE NORTH CAROLINA INDUSTRIAL COMMISSION

JUNE 10, 2021

PUBLIC HEARING BEFORE THE FULL COMMISSION

REGARDING

PROPOSED PERMANENT RULEMAKING IN

SUBCHAPTER 11 NCAC 23E.0302

GRAHAM ERLACHER & ASSOCIATES  
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WINSTON-SALEM, NORTH CAROLINA 27103  
336/768-1152

A P P E A R A N C E S

COMMISSIONERS:

Philip A. Baddour, III, Chair  
Myra L. Griffin, Vice-Chair  
James C. Gillen, Commissioner  
Kenneth L. Goodman, Commissioner  
Christopher C. Loutit, Commissioner  
Wanda B. Taylor, Commissioner

I N D E X

<u>SPEAKERS:</u>	<u>PAGE</u>
Gina Cammarano . . . . .	2

E X H I B I T S

	<u>IDENTIFIED</u>	<u>ADMITTED</u>
(Cammarano) Exhibit Number 1 . . . . .	3	3
(Cammarano) Exhibit Number 2 . . . . .	3	3

1 (Note: Due to the hearing being recorded remotely, audio  
2 quality may be affected.)

3 P R O C E E D I N G S

4 CHAIR BADDOUR: Good afternoon. We are on the  
5 record. Today is June 10<sup>th</sup>, 2021 and it is 2:02 PM.  
6 I'm Philip Baddour Chair of the North Carolina  
7 Industrial Commission. In compliance with the  
8 requirements of Chapter 138A-15(e) of the State  
9 Government Ethics Act, I'll remind all members of the  
10 Commission of their duty to avoid conflict of interest  
11 under Chapter 138A. I'll also inquire as to whether  
12 there's any known conflict of interest to the matter  
13 coming before the Commission at this time. Hearing  
14 none, we will proceed. This is a North Carolina  
15 Industrial Commission public hearing on proposed  
16 permanent rulemaking. Today's public hearing is being  
17 held via teleconference only due to the COVID-19  
18 pandemic and in light of public health and safety  
19 concerns. The purpose of this hearing is to receive  
20 comments from the public regarding a proposed  
21 permanent adoption of one rule as published in the  
22 April 15, 2021 *North Carolina Register*. A written  
23 comment period for the proposed permanent rule  
24 adoption continues - continues to be open through the  
25 close of business on June 14, 2021. Please note that

1 sending an email to Gina Cammarano, Rulemaking  
2 Coordinator, is a preferred method of submitting  
3 written comments to the Commission. I would ask each  
4 of the other Commissioners to please identify himself  
5 or her - herself by name beginning with Vice-Chair  
6 Griffin and followed by Commissioner Loutit,  
7 Commissioner Goodman, Commissioner Gillen, and  
8 Commissioner Taylor.

9 VICE-CHAIR GRIFFIN: Vice-Chair Myra Griffin  
10 present by telephone.

11 COMMISSIONER LOUTIT: Commissioner Christopher  
12 Loutit present by telephone.

13 COMMISSIONER GOODMAN: Commissioner Ken Goodman  
14 present by telephone.

15 COMMISSIONER GILLEN: Commissioner Jim Gillen  
16 present by telephone.

17 COMMISSIONER TAYLOR: Commissioner Wanda Taylor  
18 present by telephone.

19 CHAIR BADDOUR: The first speaker at today's  
20 public hearing will be Gina Cammarano followed by any  
21 members of the public who wish to speak.

22 Ms. Cammarano, please state your name, position and  
23 for whom you work.

24 GINA CAMMARANO

25 MS. CAMMARANO: My name is Gina Cammarano and I'm

1 the Rulemaking Coordinator for the North Carolina  
2 Industrial Commission.

3 CHAIR BADDOUR: Do you have exhibits that you  
4 would like to place into the record of today's public  
5 hearing?

6 MS. CAMMARANO: Yes. I have Exhibit 1 which is a  
7 copy of the notice of text of the Proposed Permanent  
8 Rule Adoption that was published in the April 15<sup>th</sup>,  
9 2021 *North Carolina Register*. And I have Exhibit 2  
10 which is a copy of the approved fiscal note for the  
11 Proposed Permanent Rule 11 NCAC 23E.0302.

12 (Exhibit Numbers 1 and 2 are  
13 identified for the record and  
14 admitted.)

15 CHAIR BADDOUR: Thank you. Would you please state  
16 the rule that is the subject of this proposed  
17 permanent rulemaking and give us a brief overview of  
18 the rulemaking and any other information that you deem  
19 relevant?

20 MS. CAMMARANO: Sure. So the rule that is the  
21 subject of this proposed rulemaking is  
22 11 NCAC 23E.0302 and we're proposing to adopt this  
23 rule as a permanent rule. Previously, we adopted  
24 emergency and temporary versions of this rule, and the  
25 purpose of this rule is to give the Commission the

1 ability to waive or vary the requirements of our rules  
2 if they're not in conformity with an existing  
3 emergency order or directive of the Chief Justice of  
4 the North Carolina Supreme Court. And with regard to  
5 relevant timelines and APA requirements, the  
6 Commission has followed the permanent rulemaking  
7 procedures of the Administrative Procedure Act in  
8 proposing this rulemaking. Specifically, the proposed  
9 rule for permanent adoption was filed with a notice of  
10 text to the Office of Administrative Hearings on March  
11 22<sup>nd</sup>, 2021. It was then published in the April 15<sup>th</sup>,  
12 2021 issue of the *North Carolina Register*. And on  
13 that same date, April 15<sup>th</sup>, 2021 the Industrial  
14 Commission published a notice of this proposed  
15 permanent rulemaking on its website with a link to the  
16 proposed rule and fiscal note and we also emailed a  
17 notice of this proposed permanent rulemaking with the  
18 proposed rule and fiscal note to the Industrial  
19 Commission's Rules Listserv. And copies of the  
20 proposed permanent rule and fiscal note were also  
21 provided to the North Carolina League of  
22 Municipalities, the North Carolina Association of  
23 County Commissioners and the Fiscal Research Division  
24 of the General Assembly prior to the publication of  
25 the rule in the *North Carolina Register*. And the

1 public written comment period for this proposed  
2 permanent rule began on April 15<sup>th</sup>, 2021 and ends at  
3 5:00 PM on June 14<sup>th</sup>, 2021.

4 CHAIR BADDOUR: All right. Thank you. We will  
5 now hear from members of the public, if any, who wish  
6 to address the Commission. I don't believe we have  
7 any members of the public with us today, but let me  
8 just check to be sure. Is there anyone from the  
9 public who wishes to address the Commission today?

10 All right. Seeing none, thank you all for  
11 participating in this public hearing. Again, our  
12 written comment period for the proposed permanent rule  
13 adoption continues to be open through the close of  
14 business on June 14, 2021. Written comments should be  
15 submitted to Gina Cammarano by email if possible.  
16 Ms. Jones, please include in the transcript of this  
17 public hearing the materials submitted as Exhibits 1  
18 and 2. The hearing is now adjourned. The time is  
19 2:07 PM. Let's go off the record.

20 (WHEREUPON, THE HEARING WAS ADJOURNED.)

21 RECORDED BY MACHINE

22 TRANSCRIBED BY: Kelly K. Patterson, Graham Erlacher  
23 and Associates

1 STATE OF NORTH CAROLINA

2 COUNTY OF GUILFORD

3 C E R T I F I C A T E

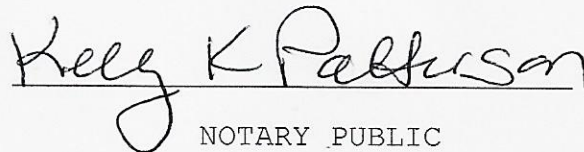
4 I, Kelly K. Patterson, Notary Public, in and for the  
5 State of North Carolina, County of Guilford, do hereby  
6 certify that the foregoing five (5) pages prepared under my  
7 supervision are a true and accurate transcription of the  
8 testimony of this trial which was recorded by Graham  
9 Erlacher & Associates.

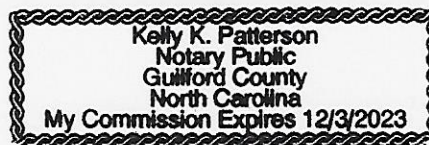
10 I further certify that I have no financial interest in  
11 the outcome of this action. Nor am I a relative, employee,  
12 attorney or counsel for any of the parties.

13 WITNESS my Hand and Seal on this 17th day of June  
14 2021.

15 My commission expires on December 3, 2023.

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NOTARY PUBLIC





**TITLE 11 – DEPARTMENT OF INSURANCE**

*Notice is hereby given in accordance with G.S. 150B-21.2 that the Industrial Commission intends to adopt the rule cited as 11 NCAC 23E.0302.*

**Link to agency website pursuant to G.S. 150B-19.1(c):** <https://www.ic.nc.gov/proposedpermE302.html>

**Proposed Effective Date:** August 1, 2021

**Public Hearing:**

**Date:** June 10, 2021

**Time:** 2:00 p.m.

**Location:** Via Teleconference Only. Call-in Number: 1-888-363-4735; Access Code: 4465746

**Reason for Proposed Action:** *The Industrial Commission (hereinafter "Commission") has deemed it necessary to permanently adopt the rule cited as 11 NCAC 23E.0302 to ensure that the Commission has the ability to waive or modify the provisions of any of its rules to bring its rules in conformity with an emergency Order or directive of the Chief Justice of the North Carolina Supreme Court in the interests of justice or to protect the public health or safety.*

**Comments may be submitted to:** Gina Cammarano, 1240 Mail Service Center, Raleigh, NC 27699-1240; phone (919) 807-2524; email [gina.cammarano@ic.nc.gov](mailto:gina.cammarano@ic.nc.gov)

**Comment period ends:** June 14, 2021

**Procedure for Subjecting a Proposed Rule to Legislative Review:** If an objection is not resolved prior to the adoption of the rule, a person may also submit written objections to the Rules Review Commission after the adoption of the Rule. If the Rules Review Commission receives written and signed objections after the adoption of the Rule in accordance with G.S. 150B-21.3(b2) from 10 or more persons clearly requesting review by the legislature and the Rules Review Commission approves the rule, the rule will become effective as provided in G.S. 150B-21.3(b1). The Commission will receive written objections until 5:00 p.m. on the day following the day the Commission approves the rule. The Commission will receive those objections by mail, delivery service, hand delivery, or facsimile transmission. If you have any further questions concerning the submission of objections to the Commission, please call a Commission staff attorney at 919-431-3000.

**Fiscal impact. Does any rule or combination of rules in this notice create an economic impact? Check all that apply.**

- State funds affected
- Local funds affected
- Substantial economic impact ( $\geq$  \$1,000,000)
- Approved by OSBM
- No fiscal note required

**CHAPTER 23 - INDUSTRIAL COMMISSION**

**SUBCHAPTER 23E – ADMINISTRATIVE RULES OF THE INDUSTRIAL COMMISSION**

**SECTION .0300 – RULES OF THE COMMISSION**

**11 NCAC 23E.0302      EMERGENCY ORDERS AND DIRECTIVES OF THE CHIEF JUSTICE OF THE NORTH CAROLINA SUPREME COURT**

(a) This Rule applies to all matters within the authority and jurisdiction of the Commission and to all Subchapters of the Commission's rules.

(b) In the interests of justice or to protect the public health or safety, the Commission may waive or modify any portion of its rules in order to bring them in conformity with an emergency Order or directive of the Chief Justice of the North Carolina Supreme Court that is in effect. The Commission shall consider the following factors in determining whether to grant the waiver or modification:

- (1) the necessity of waiving or modifying the rule; and
- (2) the impact of waiving or modifying the rule on the regulated parties and on the Commission.

If the Commission waives or modifies a rule to bring it into conformity with any emergency Order or directive of the Chief Justice of the North Carolina Supreme Court, the Commission shall post a notice of the waiver or modification of the rule on its website unless the waiver or modification is case-specific and not generally applicable to the regulated public. For a waiver or modification that is case-specific and not generally applicable to the regulated public, the Commission shall notify the parties in the case of the waiver or modification via an order of the Commission.

(c) During any period that an emergency Order or directive of the Chief Justice of the North Carolina Supreme Court authorizes the taking of oaths and verifications outside the presence of a notary public, the Commission shall accept any pleading, motion, petition, supporting affidavit, or other document with an affirmation or representation not attested to before a notary public so long as the subscriber affirms the truth of the matter to be verified by an affirmation or representation in substantially the same language as that allowed by the emergency Order or directive of the Chief Justice of the North Carolina Supreme Court.

(d) Any waiver or modification made pursuant to this Rule shall only remain in effect during the duration of any emergency Order or directive of the Chief Justice of the North Carolina Supreme Court upon which that waiver or modification is based.

*History Note: Authority G.S. 97-80; 130A-425(d); 143-166.4; 143-296; 143-300;  
Emergency Adoption Eff. November 6, 2020;  
Temporary Adoption Eff. January 29, 2021;  
Eff. August 1, 2021.*

**Regulatory Impact Analysis**  
**Emergency Orders and Directives of the Chief Justice of the North Carolina Supreme Court (11 NCAC 23E .0302)**

Agency:	North Carolina Industrial Commission
Contact:	Gina Cammarano – (919) 807-2524
Rule Proposed for Adoption:	11 NCAC 23E .0302 (see proposed rule text in Appendix 1)
State Impact:	Yes
Local Impact:	Yes
Private Impact:	Yes
Substantial Economic Impact:	No
<i>Statutory Authority:</i>	<i>G.S. § 97-80; 130A-425(d); 143-166.4; 143-296; 143-300.</i>

**Background and Purpose of Proposed Permanent Rule Adoption:**

In response to the COVID-19 pandemic, the Chief Justice of the North Carolina Supreme Court began issuing emergency orders and directives as early as April of 2020. To date, the issuance of these emergency orders and directives has continued.

Some of the provisions of the Chief Justice’s various emergency orders and directives are applicable to cases within the jurisdiction of the Industrial Commission. Additionally, some of the Industrial Commission’s rules contain provisions that require a waiver or modification in order to bring the Industrial Commission’s rules in conformity with the Chief Justice’s emergency orders and directives.

The adoption of this rule is necessary because the Industrial Commission does not have any other rule in place that specifically allows the Commission to waive or modify any portion of its rules on its own initiative in all cases. Under its currently-existing permanent waiver rules, the Commission may waive a rule on its own initiative only in cases where the employee is not represented by counsel. Additionally, the currently-existing permanent waiver rules appear to contemplate waivers only on a case-by-case basis.

While it is presumed that the COVID-19 pandemic will not last forever, there are future emergencies (such as other pandemics, natural disasters, and terrorist attacks) that may arise and result in the issuance of emergency orders and directives by the Chief Justice of the North Carolina Supreme Court and which would affect Industrial Commission cases and necessitate a waiver or modification of Industrial Commission rules in order to bring the Commission’s rules in conformity with the Chief Justice’s emergency orders and directives. Having this permanent rule in place will allow the Industrial Commission to promptly and

appropriately respond to any such future emergency orders and directives in the interests of justice or to protect the public health or safety.

It should be noted that there are safeguards built into Rule 11 NCAC 23E .0302, which put limits on the Industrial Commission's ability to waive or modify the provisions of its rules. First, the rule waiver or modification is limited to one that brings the Industrial Commission rule in conformity with an existing emergency order or directive of the Chief Justice, and the rule specifically provides that any waiver or modification shall only remain in effect during the duration of the emergency order or directive upon which that waiver or modification is based. Second, the rule specifically requires the Industrial Commission to consider the following factors in determining whether to waive or modify its rules: (1) The necessity of waiving or modifying the rule; and (2) The impact of waiving or modifying the rule on the regulated parties and on the Commission.

It also should be noted that the rule contemplates waivers or modifications that are generally applicable to the regulated public, as well as waivers or modifications that are only specific to a particular case and not generally applicable to the regulated public. For the waivers or modifications that are generally applicable to the regulated public, the rule requires the Commission to post a notice of the waiver or modification on its website so that the regulated public is aware of the waiver or modification. If, however, a case-specific waiver or modification is made by the Commission under this rule (one which would not be generally applicable to the regulated public), then the Commission is not required to post a notice on its website but is required to notify the parties in that case of the waiver or modification via a Commission order.

By way of background, the Industrial Commission initially adopted emergency rule 11 NCAC 23E .0302, which was approved by the Codifier of Rules and became effective November 6, 2020. Thereafter, the Commission adopted temporary rule 11 NCAC 23E .302 on January 7, 2021, and on January 21, 2021 the Rules Review Commission approved this temporary rule with technical corrections. The temporary rule went into effect on January 29, 2021, and it was published in the February 15, 2021 North Carolina Register.

### **Summary of Aggregate Impact:**

It is not possible to quantify the economic impact of this rule adoption with any certainty since the impact of any given rule waiver or modification will depend on the nature, duration, and severity of the emergency situation that necessitated the Chief Justice's emergency order or directive.

Generally speaking, however, one of the main benefits of the rule adoption is to allow access to the legal system for cases within the Industrial Commission's

jurisdiction in times when normal administrative and quasi-judicial processes and functions are not allowed or are not feasible.

For example, paragraph (c) of this proposed rule allows a party to file a document with the Commission that is not attested to before a notary public during any period that an emergency order or directive of the Chief Justice of the North Carolina Supreme Court authorizes the taking of oaths and verifications outside the presence of a notary public, so long as the subscriber of the statement affirms the truth of the matter to be verified by an affirmation or representation in substantially the same language as that allowed by the emergency order or directive of the Chief Justice. Without this rule, parties would be unable to file certain documents with the Industrial Commission that need to be notarized under the Commission's rules without having the documents notarized. This would put the parties in the difficult position of either not pursuing the filing of the documents or taking on public health risks to do so.

Other similar provisions of Industrial Commission rules that could need to be waived or modified in the future if necessitated by an emergency order or directive of the Chief Justice would be provisions pertaining to in-person Industrial Commission appearances, mailing requirements, and deadlines and timelines. As with the notarization example, allowing the Industrial Commission to waive or modify its rules with regard to these types of provisions would ensure access to the legal system for Industrial Commission cases during times when normal administrative and quasi-judicial functions are not allowed or feasible.

Another benefit of this rule is that it gives the Industrial Commission the ability to quickly and appropriately respond to emergency orders and directives of the Chief Justice in the interests of justice or to protect the public health or safety. Without this rule, the Commission potentially would have to go through emergency and temporary rulemaking every time a new emergency arose.

On the flip side, giving the Industrial Commission more flexibility to act quickly by waiving or modifying portions of its rules without formal rulemaking is a potential cost to the regulated parties. However, this cost is greatly minimized by the safeguards that are built into this rule, namely the fact that any waiver or modification can only be done to bring the rule in conformity with an existing emergency order or directive of the Chief Justice of the North Carolina Supreme Court (and can only remain in effect during the duration of that emergency order or directive), and the fact that the Industrial Commission must consider two factors- the necessity and the impact- before waiving or modifying any rule.

## APPENDIX 1

### 11 NCAC 23E .0302      **EMERGENCY ORDERS AND DIRECTIVES OF THE CHIEF JUSTICE OF THE NORTH CAROLINA SUPREME COURT**

(a) This Rule applies to all matters within the authority and jurisdiction of the Commission and to all Subchapters of the Commission's rules.

(b) In the interests of justice or to protect the public health or safety, the Commission may waive or modify any portion of its rules in order to bring them in conformity with an emergency Order or directive of the Chief Justice of the North Carolina Supreme Court that is in effect. The Commission shall consider the following factors in determining whether to grant the waiver or modification:

(1) the necessity of waiving or modifying the rule; and

(2) the impact of waiving or modifying the rule on the regulated parties and on the Commission.

If the Commission waives or modifies a rule to bring it into conformity with any emergency Order or directive of the Chief Justice of the North Carolina Supreme Court, the Commission shall post a notice of the waiver or modification of the rule on its website unless the waiver or modification is case-specific and not generally applicable to the regulated public. For a waiver or modification that is case-specific and not generally applicable to the regulated public, the Commission shall notify the parties in the case of the waiver or modification via an order of the Commission.

(c) During any period that an emergency Order or directive of the Chief Justice of the North Carolina Supreme Court authorizes the taking of oaths and verifications outside the presence of a notary public, the Commission shall accept any pleading, motion, petition, supporting affidavit, or other document with an affirmation or representation not attested to before a notary public so long as the subscriber affirms the truth of the matter to be verified by an affirmation or representation in substantially the same language as that allowed by the emergency Order or directive of the Chief Justice of the North Carolina Supreme Court.

(d) Any waiver or modification made pursuant to this Rule shall only remain in effect during the duration of any emergency Order or directive of the Chief Justice of the North Carolina Supreme Court upon which that waiver or modification is based.

*History Note: Authority G.S. 97-80; 130A-425(d); 143-166.4; 143-296; 143-300;  
Emergency Rule Eff. November 6, 2020;  
Temporary Rule Eff. January 29, 2021;  
Permanent Rule Eff. \_\_\_\_\_.*