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
APPEARANCES

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

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EXHIBITS

IDENTIFIED ADMITTED
(Cammarano) Exhibit Number 1 . . . . . . . . 3 3
(Cammarano) Exhibit Number 2 . . . . . . . . 3 3
(Note: Due to the hearing being recorded remotely, audio quality may be affected.)

PROCEDINGS

CHAIR BADDOUR: Good afternoon. We are on the record. Today is June 10th, 2021 and it is 2:02 PM.
I’m Philip Baddour Chair of the North Carolina Industrial Commission. In compliance with the requirements of Chapter 138A-15(e) of the State Government Ethics Act, I’ll remind all members of the Commission of their duty to avoid conflict of interest under Chapter 138A. I’ll also inquire as to whether there’s any known conflict of interest to the matter coming before the Commission at this time. Hearing none, we will proceed. This is a North Carolina Industrial Commission public hearing on proposed permanent rulemaking. Today’s public hearing is being held via teleconference only due to the COVID-19 pandemic and in light of public health and safety concerns. The purpose of this hearing is to receive comments from the public regarding a proposed permanent adoption of one rule as published in the April 15, 2021 North Carolina Register. A written comment period for the proposed permanent rule adoption continues – continues to be open through the close of business on June 14, 2021. Please note that
sending an email to Gina Cammarano, Rulemaking Coordinator, is a preferred method of submitting written comments to the Commission. I would ask each of the other Commissioners to please identify himself or herself by name beginning with Vice-Chair Griffin and followed by Commissioner Loutit, Commissioner Goodman, Commissioner Gillen, and Commissioner Taylor.

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

COMMISSIONER LOUTIT: Commissioner Christopher Loutit present by telephone.

COMMISSIONER GOODMAN: Commissioner Ken Goodman present by telephone.

COMMISSIONER GILLEN: Commissioner Jim Gillen present by telephone.

COMMISSIONER TAYLOR: Commissioner Wanda Taylor present by telephone.

CHAIR BADDOUR: The first speaker at today’s public hearing will be Gina Cammarano followed by any members of the public who wish to speak. Ms. Cammarano, please state your name, position and for whom you work.

GINA CAMMARANO

MS. CAMMARANO: My name is Gina Cammarano and I’m
the Rulemaking Coordinator for the North Carolina Industrial Commission.

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

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

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

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

MS. CAMMARANO: Sure. So the rule that is the subject of this proposed rulemaking is 11 NCAC 23E.0302 and we’re proposing to adopt this rule as a permanent rule. Previously, we adopted emergency and temporary versions of this rule, and the purpose of this rule is to give the Commission the
ability to waive or vary the requirements of our rules if they’re not in conformity with an existing emergency order or directive of the Chief Justice of the North Carolina Supreme Court. And with regard to relevant timelines and APA requirements, the Commission has followed the permanent rulemaking procedures of the Administrative Procedure Act in proposing this rulemaking. Specifically, the proposed rule for permanent adoption was filed with a notice of text to the Office of Administrative Hearings on March 22nd, 2021. It was then published in the April 15th, 2021 issue of the North Carolina Register. And on that same date, April 15th, 2021 the Industrial Commission published a notice of this proposed permanent rulemaking on its website with a link to the proposed rule and fiscal note and we also emailed a notice of this proposed permanent rulemaking with the proposed rule and fiscal note to the Industrial Commission’s Rules Listserv. And copies of the proposed permanent rule and fiscal note were also provided to the North Carolina League of Municipalities, the North Carolina Association of County Commissioners and the Fiscal Research Division of the General Assembly prior to the publication of the rule in the North Carolina Register. And the
public written comment period for this proposed permanent rule began on April 15th, 2021 and ends at 5:00 PM on June 14th, 2021.

CHAIR BADDOUR: All right. Thank you. We will now hear from members of the public, if any, who wish to address the Commission. I don’t believe we have any members of the public with us today, but let me just check to be sure. Is there anyone from the public who wishes to address the Commission today? All right. Seeing none, thank you all for participating in this public hearing. Again, our written comment period for the proposed permanent rule adoption continues to be open through the close of business on June 14, 2021. Written comments should be submitted to Gina Cammarano by email if possible. Ms. Jones, please include in the transcript of this public hearing the materials submitted as Exhibits 1 and 2. The hearing is now adjourned. The time is 2:07 PM. Let’s go off the record.

(WHEREUPON, THE HEARING WAS ADJOURNED.)

RECORDED BY MACHINE

TRANSCRIBED BY: Kelly K. Patterson, Graham Erlacher and Associates
STATE OF NORTH CAROLINA
COUNTY OF GUILFORD

CERTIFICATE

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

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

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

My commission expires on December 3, 2023.

Kelly K. Patterson
NOTARY PUBLIC

GRAHAM ERLACHER & ASSOCIATES
3504 VEST MILL ROAD - SUITE 22
WINSTON-SALEM, NORTH CAROLINA 27103
336/768-1152
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

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 (>= $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
Statutory Authority: G.S. § 97-80; 130A-425(d); 143-166.4; 143-296; 143-300.

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.
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;
Permanent Rule Eff. ____________.