RRC STAFF OPINION

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

AGENCY: Industrial Commission

RULE CITATION: 11 NCAC 23B .0206

RECOMMENDED ACTION:

Approve, but note staff's comment

X Object, based on:

Lack of statutory authority

Unclear or ambiguous

Unnecessary

X Failure to comply with the APA

Extend the period of review

COMMENT:

Staff recommends objection to this Rule for failure to comply with the APA. This is because the Office of State Budget and Management has withdrawn its certification that the fiscal note is correct regarding the availability of State funds. This certification is established pursuant to G.S. 150B-21.4(a), which states:

§ 150B-21.4. Fiscal and regulatory impact analysis on rules.

(a) State Funds. - Before an agency publishes in the North Carolina Register the proposed text of a permanent rule change that would require the expenditure or distribution of funds subject to the State Budget Act, Chapter 143C of the General Statutes, it must submit the text of the proposed rule change, an analysis of the proposed rule change, and a fiscal note on the proposed rule change to the Office of State Budget and Management and obtain certification from the Office of State Budget and Management that the funds that would be required by the proposed rule change are available. The fiscal note must state the amount of funds that would be expended or distributed as a result of the proposed rule change and explain how the amount was computed. The Office of State Budget and Management must certify a proposed rule change if funds are available to cover the expenditure or distribution required by the proposed rule change.

Amanda J. Reeder
Commission Counsel
Issued December 4, 2018

Pursuant to G.S. 150B-21.4(a), the Office of State Budget and Management ("OSBM") certified the fiscal note on August 9, 2018. A copy of the approved fiscal note is attached to this Staff Opinion. The agency published this Rule in the September 17, 2018 Register. When it was published, the Rule was noticed as affecting State funds. Pursuant to G.S. 150B-21.2(f), the agency was required to accept comments on the Rule text and the fiscal note. During the comment period, other State agencies submitted comments that disputed the fiscal note and stated that the amendment would lead to higher costs for the agencies, thus leading to a higher expenditure of State funds than addressed in the approved fiscal note.

The agency closed its 60-day comment period on Thursday, November 15, 2018. The agency adopted the Rule on Monday, November 19, and submitted the Rule for RRC review the following day, November 20.

On Tuesday, November 27, OSBM rescinded the certification, stating that based upon the public comments, it was no longer able to certify that sufficient State funds would be available to implement the amendments. (The email is attached.) Staff notes that the email does not state that OSBM determined that there were not sufficient funds, simply that OSBM could not be certain that the funds are available based upon a review of the comments.

Staff notes that this appears to be the first time this situation has occurred. The requirement that an agency take comments on its fiscal note was added to the APA in 2011 in S.L. 2011-398 (attached). That law added language in G.S. 150B-21.2(e) that the agency must accept comments on the fiscal note at the public hearing. S.L. 2011-398 also added language in G.S. 150B-21.2(f) that the agency had to take written comments on the fiscal note during the 60-day comment period. It also added the requirement that prior to adoption, the agency had to review the fiscal note again and "consider any public comments received in connection with the proposed rule or the fiscal note." [G.S. 150B-21.2(g)]

Staff is aware that G.S. 150B-21.4(a), (b), and (c) all require preparation of a fiscal note <u>prior</u> to publication in the Register. In this instance, the agency had published the Rule in the Register for the comment period and adopted it before OSBM rescinded the certification. Finally, staff notes that G.S. 150B-21.4(c) states:

> (c) Errors. - An erroneous fiscal note prepared in good faith does not affect the validity of a rule.

Staff is not representing that the fiscal note was not prepared in good faith. An argument could be made that OSBM lost its jurisdiction over the fiscal note either after the initial certification or after adoption by the agency. In addition, there is an argument that the only method to invalidate a rule using the fiscal note is if the agency was not acting in good faith. Staff's recommendation is not to "invalidate" the Rule, but to instead object to it. The agency can remedy the objection by using the comments received regarding the fiscal note to address the new fiscal note and then republish.

Staff notes that there is no clear guidance within the APA regarding the effect comments on the fiscal note will have. However, ultimately, staff believes that by adding the requirements in 2011 that agencies take comment on their fiscal note, the General Assembly intended for those comments to be able to have an effect. If the comments are left solely within the agency's discretion to determine whether they impact the fiscal note, there is no recourse for commenters. G.S. 150B-21.2(h) has a provision wherein if requested, the agency must respond in writing why it adopted the rule as it did

and why the agency "rejected any arguments made or considerations urged against the adoption of the rule." There is no reciprocal requirement in the APA for comments regarding the fiscal notes.

Staff believes that the need for an effect in response to public comments is particularly important in this instance, where State funds are being affected. State funds are the only funds within a fiscal note that require OSBM certify the funds are in fact available for the rule change. There is no certification requirement by any entity for expenditures of local funds or when the rule creates a substantial economic impact. Staff believes that the certification requirement for State funds was put into place to prevent the creation of unfunded mandates of State funds by agencies. An individual agency may be able to determine based upon comments that its fiscal note is accurate or inaccurate; however, only OSBM has the ability to certify the availability of State funds.

Given the facts presented in this review, staff believes that because OSBM has rescinded the certification based upon comments received, the agency has failed to comply with the APA in that the required certification is no longer met. Therefore, staff recommends objection to this Rule for failure to comply with the APA.

Amanda J. Reeder
Commission Counsel
Issued December 4, 2018

Regulatory Impact Analysis
Hearings

Agency:	North Carolina Industrial Commission
Contact:	Ashley Snyder – (919) 807-2524
Proposed New Rule Title:	Hearings
Rule(s) Proposed for Amendment:	Rule 11 NCAC 23B .0206 (see proposed rule text in Appendix 1)
State Impact:	Yes
Local Impact:	No
Private Impact:	No
Substantial Economic Impact:	No
Statutory Authority:	N.C. Gen. Stat. § 143-296; 143-300

Introduction/Background:

On January 1, 1989, the Commission implemented Rule 04 NCAC 10B .0202 to regulate the course of Commission hearings and the issuance of notice and various writs and subpoenas. Such guidelines ensure timely proceedings, fair participation of all parties and witnesses, and equal access to justice. Rule 04 NCAC 10B .0202 was recodified as Rule 04 NCAC 10B .0206 effective April 17, 2000 and recodified again as Rule 11 NCAC 23B .0206 effective July 1, 2018.

The Commission proposes to amend Rule 11 NCAC 23B .0206, increasing the Commission's flexibility to schedule hearings in a timely fashion.

Proposed Rule Changes and Their Estimated Impact:

The proposed rule additions and changes include the following:

1. Amendment of hearing rules to allow telephone- or video-conferences – 11 NCAC 23B .0206(a)

    a. Description of baseline situation:

    In its current form, Rule 11 NCAC 23B .0206(a) simply describes the Commission's power, on its own motion, to order a hearing, rehearing, or pre-trial conference of any tort claim in dispute.

    b. Description of proposed changes:

    The proposed amendments to this rule grant the Commission discretion to conduct pre-trial conferences, or any hearing in which the plaintiff is currently incarcerated at the time of the hearing, by telephone- or video-conference. This

new additional language largely mirrors current Rule 11 NCAC 23B .0207(a)(1)–(3) which is presently proposed for repeal.

c. Economic impact:

(1) Costs to the State through the Commission

- The costs to the State through the Commission are *de minimus*. The Commission presently conducts telephone- or video-conferences under Rule 11 NCAC 23B .0207(a)(1)– (3).

(2) Costs to the State as an employer:

- The costs to the State as an employer are *de minimus*. State employees from the North Carolina Department of Justice (NCDOJ) and the Department of Public Safety (DPS) presently facilitate and participate in telephone- or video-conferences under Rule 11 NCAC 23B .0207(a)(1)–(3).

(3) Costs to private sector:

- The costs to the private sector are *de minimus*. While the proposed 11 NCAC 23B .0206(a) is intended to cover all Commission hearings, the majority of telephone- and video-conferences involve inmate torts,[1] as demonstrated by the language in current Rule 11 NCAC 23B .0207(a)(1)–(3). Inmate tort hearings typically involve only a hearing officer, a self-represented inmate, State employees from NCDOJ and the DPS, and a court-reporter under contract with the Commission.

(4) Benefits to the State through the Commission:

- The State will benefit from the unification of all rules governing Commission hearings under one rule, providing clarity to all parties. Additionally, through utilizing telephone- and video-conferences, the State will continue to save the cost of transporting inmates and Commission and NCDOJ personnel to and from various correctional facilities and hearing locations.

(5) Benefits to the public and private sector:

- Through the Commission's use of telephone- and video-conferences, the public and private sectors will continue to benefit from the timely administration of justice and the ability to forego costly in-person hearings

[1] In FY 2017-2018, the Commission received 678 tort claims: 481 were by inmates (71%) and 197 by non-inmates (29%).

on certain issues. In inmate tort cases, the public and private sectors will benefit from the decreased risk of violence, formerly created by placing multiple state employees in close proximity to sometimes-violent inmates during in-person hearings.[2]

2. Amendment of hearing rules to allow the Commission to conduct hearings beyond the businesses hours of the Commission – 11 NCAC 23B .0206(a)

   a. Description of baseline situation:

      In its current form, Rule 11 NCAC 23B .0206 only requires the Commission to hold hearings in a "location deemed convenient to witnesses and the Commission," without reference to the time of such hearings. By implication, hearings may be understood to occur within Commission businesses hours, 8:00 am to 5:00 pm as set by Rule 11 NCAC 23B .0101.

      Despite this implication, Industrial Commission hearings are not bound by regular business hours. The Commission is a special or limited tribunal possessing the powers and incidents of a court,[3] and the role of Deputy Commissioners is "indisputably judicial in nature."[4] Judges have broad inherent authority to see that courts are run efficiently and properly and that litigants are treated fairly.[5] Such power is "'not derived from any statute but aris[es] from necessity; implied, because it is necessary to the exercise of all other powers. It is indispensable to the proper transaction of business.'"[6] The ability to regulate courtroom hours is among these implied powers.

   b. Description of proposed changes:

      The proposed amendment to this rule recognizes the Commission's inherent authority to set the time of its hearings to promote the timely administration of justice and to hear any scheduled hearings to completion unless recessed, continued, or removed by the Commission. The Commission wishes to codify this inherent power, placing all parties before the Commission on notice.

      The Commission presently requires extended hours because, in addition to its usual docket of cases, in Fiscal Year 2018-2019, the Commission is currently processing approximately 525 pending inmate tort cases. This requires the

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[2] For an recent account of occasional inmate violence, see, e.g., Ames Alexander, Colin Warren-Hicks & Ron Gallagher, *A day after brutal attack on prison manager, 2 more officers assaulted at NC prison*, THE NEWS & OBSERVER (updated June 20, 2018, 07:01 PM) https://www.newsobserver.com/news/local/article213451649.html.
[3] Hanks v. Southern Pub. Util. Co., 210 N.C. 312, 186 S.E. 252 (1936).
[4] Sherwin v. Piner, — F. Supp. 2d —, 2003 U.S. Dist. LEXIS 26855 (E.D.N.C. July 21, 2003).
[5] *See generally*, Michael Crowell, *Inherent Authority*, NORTH CAROLINA SUPERIOR COURT JUDGES' BENCHBOOK (UNC School of Government 2015), https://benchbook.sog.unc.edu/general/inherent-authority.
[6] Ex parte McCown, 139 N.C. 95, 103 (1905) (quoting Cooper's Case, 32 Vt. 257 (1859)).

Commission to hear an above-average number of inmate tort cases each month.[7] The Commission builds its dockets from the parties' own estimate of required hearing time, scheduling several cases to be heard consecutively on a given day. However, the eccentricities of any given case may necessitate additional time, requiring hearing officers to maintain hearings past business hours, within reasonable limits, so that all scheduled parties may receive a full and fair hearing.

c. Economic impact:

(1) Costs to the State through the Commission:

- Some hearings may run past regular business hours, necessitating overtime compensation for Commission staff. Commission hearings are presided over by Commission officers, none of whom are subject to usual State overtime compensation policies. In lieu of pay, Commission officers working more than 40 hours per week receive "overtime compensation time" at a 1:1 ratio for each additional hour worked. Commission officers may subsequently use these accrued hours in lieu of paid vacation time.

  Commissioners receive an annual salary is $128,215.[8] Assuming an annual average of 2,000 work hours, the State incurs an average hourly cost of $64.11 per Commissioner. The Commission Chairman receives an additional $1,500 annually,[9] yielding a salary of $129,715 and an adjusted average hourly cost of $64.86.

  Deputy Commissioners receive an average annual salary of $100,232.05.[10] Assuming an annual average of 2,000 work hours, the State incurs an average hourly cost of $50.12 per Deputy Commissioner. The Chief Deputy Commissioner receives an annual salary is $115,494,[11] for an average hourly cost of $57.75.

  Special Deputy Commissioners receive an annual salary of $62, 915.[12] Assuming an annual average of 2,000 work hours, the State incurs an average hourly cost of $31.46 per Special Deputy Commissioner.

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[7] In order to reduce the number of pending inmate tort cases, the Commission must not only hear all newly-filed cases, but also hear a number of cases which have been previously continued. The Commission estimates that, at its current pace, it will have significantly reduced its number of pending cases by late 2018 and that, consequently, requiring extended hearing hours will not be a common occurrence by the time an amended Rule .0206 takes effect.

[8] *Look Up Salaries of State Government Workers*, NEWS & OBSERVER (2018), https://www.newsobserver.com/news/databases/state-pay/ (hereinafter State Pay Database).

[9] N.C. Gen. Stat. § 97-78(a) (2017); State Pay Database, *supra* note 8.

[10] Because Deputy Commissioners receive varying salaries based on years of experience, the current Deputy Commissioners' publicly listed salaries have been averaged. N.C. Gen. Stat. § 97-78(b)(b3)(1)–(5) (2017); State Pay Database, *supra* note 8.

[11] The Chief Deputy Commissioner's salary is set at 90% of a Commissioner's salary. N.C. Gen. Stat. § 97-78(b)(b2) (2017); State Pay Database, *supra* note 8.

[12] State Pay Database, *supra* note 8.

- Additionally, the Commission annually contracts with private court-reporting companies to provide court-reporters at hearings and to generate hearing transcripts. However, the current terms of these contracts require that court-reporters attend *all* hearings on their assigned days, regardless of the number. Therefore, the Commission does not foresee any cost increases during the current Fiscal Year. And, as the present number of pending inmate tort cases is projected to be substantially reduced by late 2018, the Commission does not anticipate cost increases in future years as a direct result of the proposed amendment.

(2) Costs to the State as an employer:

- Some hearings may run past regular business hours, necessitating overtime compensation for State employees. In matters before the Commission, the State is represented by NCDOJ attorneys. Any overtime costs will vary depending on the salary of the NCDOJ attorney in each case. However, as an example of estimated costs, inmate tort cases are handled by Assistant Attorneys General from the NCDOJ's Tort Claims Section. The current annual salary for these particular Assistant Attorneys General is $67,545.[13] Assuming an annual average of 2,000 work hours, the State incurs an average hourly cost of $33.77 for each Assistant Attorney General. The State's standard overtime rate is either (1) 1½ times the employee's regular hourly rate or (2) a relative compensatory time off on the basis of 1½ times time amount of time worked.[14] Using either overtime compensation method, a Commission hearing which runs overtime would therefore cost the State $50.66 per hour per Assistant Attorney General, respectively.

- Commission hearings involving inmates require the assistance of the Department of Public Safety (DPS) at various North Carolina correctional facilities. DPS staff members escort inmates to-and-from the designated hearing room at each facility and also operate the necessary telecommunications equipment to connect with off-site hearing officers and State-employed defendants. Although DPS staff are State employees, correctional centers are 24-hour facilities and some staff should be on-hand at all times to facilitate hearings. Additionally, these DPS staff are already required to facilitate hearings, and—as most hearing dockets involve communications with multiple facilities over the course of the day—the Commission believes little to no additional work will be required of any one facility. This proposed amendment should not alter the amount of work, only the timing of the work.

[13] State Pay Database, *supra* note 8.
[14] *Hours of Work and Overtime Compensation*, STATE HUMAN RESOURCES MANUAL (Salary Administration, Sept. 7, 2017), https://files.nc.gov/ncoshr/documents/files/Hours_of_Work_and_Compensation_Policy.pdf.

(3) Costs to private sector:

- The costs to the private sector are *de minimus*. While the proposed 11 NCAC 23B .0206(a) is intended to cover all Commission hearings, the majority of cases this proposed amendment addresses are inmate tort hearings.[15] These hearings typically involve only a hearing officer, a self-represented inmate, State employees from NCDOJ and the DPS, and a court-reporter under contract with the Commission. The hearing schedules for other types of tort claims are currently running smoothly and the Commission does not anticipate major scheduling changes affecting these cases at this time.
- As explained above, the Commission annually contracts with private court-reporting companies to provide court-reporters at hearings and to generate hearing transcripts. For every extra hour a court reporter must remain at a hearing that continues due to extended hours, the private court-reporting companies will bear an opportunity cost of $26.50,[16] the median hourly pay for a court reporter.

(4) Benefits to the State through the Commission:

- In Fiscal Year 2018-2019, the State can expect a reduced number of pending inmate tort cases as the Commission is temporarily increasing the overall number of inmate cases heard monthly.[17] This will benefit the State in the long-term by decreasing the Commission's average docket size and associated costs.

(5) Benefits to the public and private sector:

- This proposed amendment will allow the Commission flexibility in setting its docket and promote the timely administration of justice.

3. Amendment of hearing rules to allow the Commission to mandate continuous attendance of all parties at hearings unless released by the Commission – 11 NCAC 23B .0206(b)

   a. Description of baseline situation:

   In its current form, Rule 11 NCAC 23B .0206 does not explicitly require continuous attendance of all parties at hearings.

   As discussed previously, the Industrial Commission possesses all the implied powers of a court.[18] Among these implied powers is the ability to regulate

[15] *See supra* note 1.
[16] Court Reporters, Bureau of Labor Statistics, https://www.bls.gov/ooh/legal/court-reporters.htm#tab-1.
[17] For further discussion, see *supra* note 7. *See also supra* section 2(b).
[18] See discussion of courts' implied powers, *supra* at section 2(a).

courtroom behavior, at the discretion of each individual court.[19] The Commission is an independent tribunal, but a review of other North Carolina trial courts is instructive. The Commission hears cases in Raleigh and other cities throughout North Carolina, and the local court rules in these cities take different approaches. Some court districts—including the Tenth Judicial District (Wake County) where the majority of Commission hearings occur—mandate the courtroom presence of parties.[20] Other districts are less specific, granting judges general power to control their courtrooms.[21] Others, without expressly requiring attendance, impose penalties for a party's failure to appear, including but not limited to dismissal of a case for a plaintiff's absence or a default judgment for plaintiff for a defendant's absence.[22]

b. Description of proposed changes:

The proposed amendment to this rule recognizes the Commission's inherent authority to require attorneys and unrepresented parties to remain in the hearing room throughout the hearing, until released by the Commission. This rule would mirror the practice of the Tenth Judicial District. The Commission has recently dealt with parties leaving a hearing without permission and now wishes to codify its inherent power, placing parties in future cases on notice.

Please note this section of the analysis overlaps with the previous section. Sometimes, the issue of continued attendance at hearings arises when the hearing continues past 5:00 PM.

c. Economic impact:

(1) Costs to the State through the Commission:

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[19] The North Carolina Supreme Court has promulgated *General Rules of Practice for the Superior and District Courts Supplemental to the Rules of Civil Procedure* which require "courtroom decorum," without mandating courtroom attendance. 276 N.C. 735 (1970), https://www.nccourts.gov/assets/documents/pdf-volumes/ncsct276.pdf?6uUEcDdzWCjtxreC.1oHIUBAU0XrmKN_. In practice, individual lower courts often adopt supplementary rules covering everything from verbal forms of address to court attire.

[20] *See, e.g.*, *R. 17.4 Courtroom Presence*, LOCAL RULES FOR CIVIL SUPERIOR COURT, TENTH JUDICIAL DISTRICT, NORTH CAROLINA (last revised Nov. 13, 2015), https://www.nccourts.gov/assets/documents/local-rules-forms/112.pdf?XAxLgDJvtvgbp9SN0U8SfgoejNvF4gmF ("Counsel for each party and the presiding judge shall remain in the courtroom throughout the course of a trial").

[21] The Commission hears cases in Wilmington which lies within the Fifth District. *See, e.g.*, *Rule 16.1 Delegation of General Authority*, LOCAL RULES FOR THE DISTRICT COURTS OF THE FIFTH JUDICIAL DISTRICT (adopted Nov. 10, 2000), https://www.nccourts.gov/assets/documents/local-rules-forms/38.pdf?keIbWIdeM7sILU0tuyzMNZG5IUWwKjwi ("all judges . . . may open and operate such courtroom sessions *as may be appropriate* to dispose of all pending matters in the most expeditious manner.") (emphasis added).

[22] The Commission hears cases in Asheville which lies within the Twenty-Eighth District. *See, e.g.*, *Rule 3: Calendar Calls*, CASE MANAGEMENT PLAN AND LOCAL RULES OF CIVIL PROCEDURE FOR THE DISTRICT COURT DIVISION, 28TH JUDICIAL DISTRICT (NOV. 14, 2005), https://www.nccourts.gov/assets/documents/local-rules-forms/842.pdf?.jXzz0kx.Z32ctTlGCcXptlnRATat4c4 ("Attorneys or pro se litigants who do not appear or otherwise communicate as required by these rules will have their case subject to being dismissed by the Court.").

- Some hearings may run past regular business hours, necessitating overtime compensation for Commission staff. Commission hearings are presided over by Commission officers, none of whom are subject to usual State overtime compensation policies. In lieu of pay, Commission officers working more than 40 hours per week receive "overtime compensation time" at a 1:1 ratio for each additional hour worked. Commission officers may subsequently use these accrued hours in lieu of paid vacation time.

  Commissioners receive an annual salary is $128,215.[23] Assuming an annual average of 2,000 work hours, the State incurs an average hourly cost of $64.11 per Commissioner. The Commission Chairman receives an additional $1,500 annually,[24] yielding a salary of $129,715 and an adjusted average hourly cost of $64.86.

  Deputy Commissioners receive an average annual salary of $100,232.05.[25] Assuming an annual average of 2,000 work hours, the State incurs an average hourly cost of $50.12 per Deputy Commissioner. The Chief Deputy Commissioner receives an annual salary is $115,494,[26] for an average hourly cost of $57.75.

  Special Deputy Commissioners receive an annual salary of $62, 915.[27] Assuming an annual average of 2,000 work hours, the State incurs an average hourly cost of $31.46 per Special Deputy Commissioner.

- Additionally, the Commission annually contracts with private court-reporting companies to provide court-reporters at hearings and to generate hearing transcripts. However, the current terms of these contracts require that court-reporters attend *all* hearings on their assigned days, regardless of the number. Therefore, the Commission does not foresee any cost increases during the current Fiscal Year. And, as the present number of pending inmate cases is projected to be substantially reduced by late 2018, the Commission does not anticipate cost increases in future years as a direct result of the proposed amendment.

(2) Costs to the State as an employer:

- Some hearings may run past regular business hours, necessitating overtime compensation for State employees. In matters before the Commission, the State is represented by NCDOJ attorneys. Any overtime costs will vary

[23] Pay Database, *supra* note 8.
[24] N.C. Gen. Stat. § 97-78(a) (2017); Pay Database, *supra* note 8.
[25] Because Deputy Commissioners received varying salaries based on years of experience, the current Deputy Commissioners' official listed salaries have been averaged. N.C. Gen. Stat. § 97-78(b)(b3)(1)–(5) (2017); Pay Database, *supra* note 8.
[26] The Chief Deputy Commissioner's salary is set at 90% of a full Commissioner's salary. N.C. Gen. Stat. § 97-78(b)(b2) (2017); Pay Database, *supra* note 8.
[27] Pay Database, *supra* note 8.

depending on the salary of the NCDOJ attorney in each case. However, as an example of estimated costs, inmate tort cases are handled by Assistant Attorneys General from the NCDOJ's Tort Claims Section. The current annual salary for these particular Assistant Attorneys General is $67,545.[28] Assuming an annual average of 2,000 work hours, the State incurs an average hourly cost of $33.77 for each Assistant Attorney General. The State's standard overtime rate is either (1) 1½ times the employee's regular hourly rate or (2) a relative compensatory time off on the basis of 1½ times time amount of time worked.[29] Using either overtime compensation method, a Commission hearing which runs overtime would therefore cost the State $50.66 per hour per Assistant Attorney General, respectively.

- Commission hearings involving inmates require the assistance of the Department of Public Safety (DPS) at various North Carolina correctional facilities. DPS staff members escort inmates to-and-from the designated hearing room at each facility and also operate the necessary telecommunications equipment to connect with off-site hearing officers and State-employed defendants. Although DPS staff are State employees, correctional centers are 24-hour facilities and some staff should be on-hand at all times to facilitate hearings. Additionally, these DPS staff are already required to facilitate hearings, and—as most hearing dockets involve communications with multiple facilities over the course of the day—the Commission believes little to no additional work will be required of any one facility. This proposed amendment should not alter the amount of work, only the timing of the work.

(3) Costs to private sector:

- The costs to the private sector are *de minimus*. While the proposed 11 NCAC 23B .0206(a) is intended to cover all Commission hearings, the majority of cases this proposed amendment addresses are inmate tort hearings.[30] These hearings typically involve only a hearing officer, a self-represented inmate, State employees from NCDOJ and the DPS, and a court-reporter under contract with the Commission. The Commission has not experienced significant difficulties with parties in other types of cases and does not anticipate this proposed amendment will affect private parties at this time.

(4) Benefits to the State through the Commission:

- This proposed amendment is designed to promote the timely administration of justice and to minimize the costs of needlessly-

[28] Pay Database, *supra* note 8.
[29] *Hours of Work and Overtime Compensation*, *supra* note 14.
[30] *See supra* note 1.

protracted or postponed cases. In Fiscal Year 2018-2019, the Commission is currently processing approximately 525 pending inmate tort cases, further increasing its docket size. The ability to mandate the attendance of parties is paramount to maintaining such a fast-paced schedule.

(5) Benefits to the public and private sector:

- Codifying a brightline rule allows the Commission to discipline violating parties. This proposed amendment will promote the timely administration of justice and allow the Commission to hold parties accountable for their actions.

4. Amendment of hearing rules to allow the Commission discretion in ordering a telephone- or video-conference in cases involving property damage of less than five hundred dollars ($500.00) – 11 NCAC 23B .0206(d)

a. Description of baseline situation:

In its current form, Rule 11 NCAC 23B .0206 *requires* the Commission to order a *telephonic* hearing in cases involving property damage of less than five hundred dollars ($500.00).

b. Description of proposed changes:

The Commission is proposing two amendments to the current rule. The first proposed amendment adds discretionary language—changing "shall" to "may"—to grant the Commission flexibility in ordering a hearing in cases involving property damage of less than five hundred dollars ($500.00). The second proposed amendment adds the option of a video-conference hearing to reflect technological advances.

c. Economic impact:

(1) Costs to the State through the Commission

- The costs to the State through the Commission are *de minimus.* The first amendment grants the Commission flexibility in ordering hearings in certain cases, rather that always requiring a hearing. It may decrease costs, but cannot increase them. The second amendment merely acknowledges technological advances.

(2) Costs to the State as an employer:

- The costs to the State as an employer are *de minimus*. The same State employees facilitate, oversee, and participate in this class of hearings

regardless of their frequency. Likewise, these employees will use the existing telephone- or video-conference technology.

(3) Costs to private sector:

- The costs to the private sector are *de minimus*. While the proposed 11 NCAC 23B .0206(a) is intended to cover all Commission hearings, the majority of cases this proposed amendment addresses are inmate tort hearings.[31] Inmate tort hearings typically involve only a hearing officer, a self-represented inmate, State employees from NCDOJ and the DPS, and a court-reporter under contract with the Commission.

(4) Benefits to the State through the Commission:

- The State will benefit through the Commission due to increased flexibility, potentially saving the State the costs of unordered hearings. As previously stated,[32] the State would ordinarily incur the following average hourly costs:
    - $64.86 for the Commission Chairman,
    - $64.11 per Commissioner,
    - $57.75 for the Chief Deputy Commissioner,
    - $50.12 per Deputy Commissioner, and
    - $31.46 per Special Deputy Commissioner.

(5) Benefits to the public and private sector:

- Through the Commission's use of telephone- and video-conferences, the public and private sectors will continue to benefit from the timely administration of justice and the ability to forego costly in-person hearings on certain issues. Parties will benefit from deceased transportation costs to-and-from the hearing site. Video-conference technology confers several added benefits over older telephonic conferences, including an enhanced simulation of an actual courtroom and an improved ability to better judge the credibility of parties and witnesses from visual cues. In inmate tort cases, the public and private sectors will benefit from the decreased risk of violence, formerly created by placing multiple state employees in close proximity to sometimes-violent inmates during in-person hearings.[33]

5. Amendment of hearing rules to allow the Commission discretion in cancelling or delaying hearings due to inclement weather or natural disaster – 11 NCAC 23B .0206(e)

    a. Description of baseline situation:

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[31] *See supra* note 1.
[32] See full discussion of commission staff salaries, *supra* at 2(c)(1) and 3(c)(1).
[33] For a recent account of occasional inmate violence, see, e.g., Alexander, Warren-Hicks & Gallagher, *supra* note 2.

In its current form, Rule 11 NCAC 23B .0206 requires the Commission to cancel or delay hearings when proceedings before the General Courts of Justice are cancelled or delayed due to inclement weather or natural disaster.

b. Description of proposed changes:

The proposed amendments to this rule insert discretionary language—adding "Unless otherwise ordered by the Commission"—to allow the Commission flexibility in unusual weather conditions. The Commission hears cases all across North Carolina and regional conditions often vary. However, mirroring the General Courts of Justice in the county in which a Commission hearing occurs remains the default rule.

c. Economic impact:

(1) Costs to the State through the Commission:

- The costs to the State through the Commission are *de minimus.* While the proposed amendment would grant the Commission flexibility in its emergency closing practices, any business before the Commission would continue upon reopening.

(2) Costs to the State as an employer:

- The costs to the State as an employer are *de minimus.* While the proposed amendment would grant the Commission flexibility in its emergency closing practices, any business before the Commission would continue upon reopening.

(3) Costs to private sector:

- The costs to the private sector are *de minimus*. Private parties to hearings before the Commission would be subject to the same inclement weather or natural disasters under either the old or new policy. As for inmate tort hearings, these typically involve only a hearing officer, a self-represented inmate, State employees from NCDOJ and the DPS, and a court-reporter under contract with the Commission.

(4) Benefits to the State through the Commission:

- The Commission will benefit from additional flexibility in its operating procedures, allowing it to deviate from the practice of local General Courts of Justice during inclement weather or natural disaster, as needed.

(5) Benefits to the public and private sector:

- The public and private sector will benefit from the Commission's additional flexibility. Hearings and other public business could proceed, avoiding undue delay, if the Commission judges that inclement weather or natural disaster will not impact its operations. Conversely, the Commission could unilaterally suspend its operations if adverse weather in some region(s) of North Carolina render travel to an unaffected hearing site unsafe, e.g. regional winter snowstorms barring transit to Raleigh.

Summary of Aggregate Impact:

Based on the monetized costs and benefits cited above, the Commission estimates the proposed rule amendments will amount to minor short-term increases in overtime costs to Commission and state employees, due to the number of pending inmate tort cases. However, as these cases are scheduled to be heard by late 2018, these costs will no longer exist by the time the proposed amendments take effect. The substantive effect of these the proposed amendments will be to codify some of the Commission's inherent powers and increase operational flexibility in future cases.

APPENDIX I

Rule 11 NCAC 23B .0206 is proposed for amendment as follows:

11 NCAC 23B .0206 HEARINGS

(a) The Commission may, on its own motion, order a hearing, rehearing, or pre-trial conference of any tort claim in dispute. The Commission shall set the date, time, and location of the hearing, and provide notice of the hearing to the parties. Within the Commission's discretion, any pre-trial conference, as well as hearings of claims in which the plaintiff is incarcerated at the time of the hearing, may be conducted via videoconference or telephone conference. The date and time of the hearing shall not be limited by the business hours of the Commission. Where a party has not notified the Commission of the attorney representing the party prior to the mailing of calendars for hearing, notice to that party constitutes notice to the party's attorney. Any scheduled hearings shall proceed to completion unless recessed, continued, or removed by Order of the Commission.

(b) When an attorney is notified to appear for a pre-trial conference, motion hearing, hearing, or any other appearance the attorney shall, consistent with ethical requirements, appear or have a partner, associate, or other attorney appear. Counsel for each party or any party without legal representation shall remain in the hearing room throughout the course of the hearing, unless released by the Commission.

(c) A motion for a continuance shall be allowed only by the Commissioner or Deputy Commissioner before whom the case is set in the interests of justice or to promote judicial economy.

(d) In cases involving property damage of less than five hundred dollars ($500.00), the Commission may, upon its own motion or upon the motion of either party, order a videoconference or telephone conference hearing on the matter.

(e) Unless otherwise ordered by the Commission, in the event of inclement weather or natural disaster, hearings set by the Commission shall be cancelled or delayed when the proceedings before the General Courts of Justice in that county are cancelled or delayed.

(f) Unless otherwise ordered or waived by the Commission, applications for issuance of a writ of *habeas corpus ad testificandum* requesting the appearance of witnesses incarcerated by the North Carolina Division of Adult Corrections, shall be filed in accordance with the rules of this Subchapter, with a copy to the opposing party or counsel, for review by the Commission in accordance with G.S. 143-296.

~~(b) The Commission shall set a contested case for hearing in a location deemed convenient to witnesses and the Commission, and conducive to an early and just resolution of disputed issues.~~

~~(c) The Commission may issue writs of habeas corpus ad testificandum in cases arising under the Tort Claims Act. Requests for issuance of a writ of habeas corpus ad testificandum shall be sent to the Docket Section of the Commission if the case has not been set on a calendar for hearing. If the case has been set on a hearing calendar, the request shall be sent to the Commissioner or Deputy Commissioner before whom the case is set.~~

~~(d) The Commission shall give notice of a hearing in every case. A motion for a continuance shall be allowed only by the Commissioner or Deputy Commissioner before whom the case is set in the interests of justice or to promote~~

~~judicial economy. Where a party has not notified the Commission of the attorney representing the party prior to the mailing of calendars for hearing, notice to that party constitutes notice to the party's attorney.~~

~~(e) In cases involving property damage of less than five hundred dollars ($500.00), the Commission shall, upon its own motion or upon the motion of either party, order a telephonic hearing on the matter.~~

~~(f) All subpoenas shall be issued in accordance with Rule 45 of the North Carolina Rules of Civil Procedure, with the exception that production of public records or hospital records as provided in Rule 45(c)(2), shall be served upon the Commissioner or Deputy Commissioner before whom the case is calendared, or upon the Docket Section of the Commission should the case not be calendared.~~

~~(g) In the event of inclement weather or natural disaster, hearings set by the Commission shall be cancelled or delayed when the proceedings before the General Court of Justice in that county are cancelled or delayed.~~

History Note: *Authority G.S. 143-296; 143-300;*
Eff. January 1, 1989;
Recodified from 04 NCAC 10B .0202 Eff. April 17, 2000;
*Amended Eff. **** **, ****; July 1, 2014; January 1, 2011; May 1, 2000.*

Burgos, Alexander N

Subject: FW: Approval - 11 NCAC 23B .0206, Hearings

From: Hollis, Carrie <carrie.hollis@osbm.nc.gov>
Sent: Tuesday, November 27, 2018 12:57 PM
To: Snyder, Ashley B <ashley.snyder@ic.nc.gov>; Henderson, Meredith <Meredith.Henderson@ic.nc.gov>
Cc: Masich, Molly <molly.masich@oah.nc.gov>; McGhee, Dana <dana.McGhee@oah.nc.gov>; Grozav, Anca <Anca.Grozav@osbm.nc.gov>; Reeder, Amanda J <amanda.reeder@oah.nc.gov>; Walker, Kristin L <kristin.walker@osbm.nc.gov>; Anderson, Ann M <ann.anderson@osbm.nc.gov>; Honnold, Meagan <meagan.honnold@osbm.nc.gov>
Subject: RE: Approval - 11 NCAC 23B .0206, Hearings

Good Afternoon,

Based on information provided by the Department of Public Safety (DPS) and the Department of Justice (DOJ) during the public comment period, the Office of State Budget and Management (OSBM) has determined that sufficient state funds may not be available to implement the Industrial Commission's proposed amendments to rule 11 NCAC 23B .0206. OSBM would be happy to work with the Industrial Commission, DPS, and DOJ to identify potential solutions to address the expenditure required by the rule change before the Commission implements the amendments.

Before an agency publishes proposed rules in the North Carolina Register, G.S. 150B-21.4(a) requires the agency to obtain a certification from the OSBM that the funds are available to implement a proposed rule that would require the expenditure or distribution of state funds. During the review process of a fiscal note, OSBM works with the rulemaking agency to ensure that the impacts of proposed regulatory changes are identified and quantified to the extent possible. In doing so, OSBM relies on the agency's assessment of how the processes and activities of the implementing agency and the regulated community will differ under the current and the proposed rules.

OSBM reviewed and approved the Industrial Commission's fiscal note for the proposed changes to rule 11 NCAC 23B .0206 and certified the availability of state funds for rule implementation on August 9th, 2018. See the attached email below.

During the public comment period, DPS and DOJ provided additional information to the Industrial Commission and to OSBM that identified how the proposed rule amendments would allow the Commission to change the current procedures for scheduling and conducting inmate tort claim hearings and pre-trial conferences and enumerated how such changes could affect the agencies' allocation of resources. OSBM's legal counsel confirmed that the proposed rule amendments would likely grant the Industrial Commission new ability to enforce such procedural changes.

The Industrial Commission's determination that these rule amendments are necessary suggests that the Commission contemplates some change in practice compared to the current regulatory baseline. However, the magnitude of the rule amendments' impact on these agencies is dependent upon the associated change in the frequency, location, manner, and timing of hearings scheduled under the Industrial Commission's revised rules. The magnitude of the impact on DPS and DOJ may also vary over time as the Commission would have the ability to change the frequency, location, manner, and timing of hearings in the future without further rule amendments.

Based on this new information, OSBM is unable to certify that sufficient state funds are available to implement the proposed rule amendments. The precise short- and long-term impact of the proposed rule changes on state funds is uncertain, but OSBM is concerned that changes from current practice could require more resources than are currently available to DPS and DOJ.

Regards,
-Carrie Hollis

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919 807 4757 office
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E-mail correspondence to and from this address may be subject to the North Carolina Public Records Law (GS 132) and may be disclosed to third parties by an authorized state official.

From: Hollis, Carrie
Sent: Thursday, August 9, 2018 2:09 PM
To: Snyder, Ashley B <ashley.snyder@ic.nc.gov>; Henderson, Meredith <Meredith.Henderson@ic.nc.gov>
Cc: Molly Masich (molly.masich@oah.nc.gov) <molly.masich@oah.nc.gov>; McGhee, Dana <dana.McGhee@oah.nc.gov>; Grozav, Anca <Anca.Grozav@osbm.nc.gov>
Subject: Approval - 11 NCAC 23B .0206, Hearings

OSBM has reviewed the Industrial Commission's proposed changes to rule 11 NCAC 23B .0206 in accordance with G.S. 150B-21.4 and with E.O. 70 from 10/21/2010 as amended by E.O. 48 from 4/9/2014. The fiscal note is approved for publication. Please ensure that the state government impact is included in the Notice of Text.

The .pdf file of rule impact analysis (attached) will be posted on our website at the following URL (please allow for some time):
https://files.nc.gov/ncosbm/documents/files/IC_2018-08-09f.pdf
Please post this link on your agency's website to ensure compliance with G.S. 150B-19.1(c)(5).

Please let me know if you have any questions.
-Carrie

Carrie Hollis
Economic Analyst
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Email correspondence to and from this address may be subject to the North Carolina Public Records Law and may be disclosed to third parties by an authorized state official.

GENERAL ASSEMBLY OF NORTH CAROLINA
SESSION 2011

SESSION LAW 2011-398
SENATE BILL 781

AN ACT TO INCREASE REGULATORY EFFICIENCY IN ORDER TO BALANCE JOB CREATION AND ENVIRONMENTAL PROTECTION.

The General Assembly of North Carolina enacts:

PART I. RULE MAKING

SECTION 1. G.S. 150B-18 reads as rewritten:

"**§ 150B-18. Scope and effect.**

This Article applies to an agency's exercise of its authority to adopt a rule. A rule is not valid unless it is adopted in substantial compliance with this Article. An agency shall not seek to implement or enforce against any person a policy, guideline, or other nonbinding interpretive statement that meets the definition of a rule contained in G.S. 150B-2(8a) if the policy, guideline, or other nonbinding interpretive statement has not been adopted as a rule in accordance with this Article."

SECTION 2. Article 2A of Chapter 150B of the General Statutes is amended by adding three new sections to read:

"**§ 150B-19.1. Requirements for agencies in the rule-making process.**

(a) In developing and drafting rules for adoption in accordance with this Article, agencies shall adhere to the following principles:

(1) An agency may adopt only rules that are expressly authorized by federal or State law and that are necessary to serve the public interest.

(2) An agency shall seek to reduce the burden upon those persons or entities who must comply with the rule.

(3) Rules shall be written in a clear and unambiguous manner and must be reasonably necessary to implement or interpret federal or State law.

(4) An agency shall consider the cumulative effect of all rules adopted by the agency related to the specific purpose for which the rule is proposed. The agency shall not adopt a rule that is unnecessary or redundant.

(5) When appropriate, rules shall be based on sound, reasonably available scientific, technical, economic, and other relevant information. Agencies shall include a reference to this information in the notice of text required by G.S. 150B-21.2(c).

(6) Rules shall be designed to achieve the regulatory objective in a cost-effective and timely manner.

(b) Each agency subject to this Article shall conduct an annual review of its rules to identify existing rules that are unnecessary, unduly burdensome, or inconsistent with the principles set forth in subsection (a) of this section. The agency shall repeal any rule identified by this review.

(c) Each agency subject to this Article shall post on its Web site when the agency submits the notice of text for publication in accordance with G.S. 150B-21.2 all of the following:

(1) The text of a proposed rule.

(2) An explanation of the proposed rule and the reason for the proposed rule.

(3) The federal certification required by subsection (g) of this section.

(4) Instructions on how and where to submit oral or written comments on the proposed rule.

(5) Any fiscal note that has been prepared for the proposed rule.

The agency shall maintain the information in a searchable database and shall periodically update this online information to reflect changes in the proposed rule or the fiscal note prior to adoption.

(d) Each agency shall determine whether its policies and programs overlap with the policies and programs of another agency. In the event two or more agencies' policies and programs overlap, the agencies shall coordinate the rules adopted by each agency to avoid unnecessary, unduly burdensome, or inconsistent rules.

(e) Each agency shall quantify the costs and benefits to all parties of a proposed rule to the greatest extent possible. Prior to submission of a proposed rule for publication in accordance with G.S. 150B-21.2, the agency shall review the details of any fiscal note prepared in connection with the proposed rule with the rule-making body, and the rule-making body must approve the fiscal note before submission.

(f) If the agency determines that a proposed rule will have a substantial economic impact as defined in G.S. 150B-21.4(b1), the agency shall consider at least two alternatives to the proposed rule. The alternatives may have been identified by the agency or by members of the public.

(g) Whenever an agency proposes a rule that is purported to implement a federal law, or required by or necessary for compliance with federal law, or on which the receipt of federal funds is conditioned, the agency shall:

(1) Prepare a certification identifying the federal law requiring adoption of the proposed rule. The certification shall contain a statement setting forth the reasons why the proposed rule is required by federal law. If all or part of the proposed rule is not required by federal law or exceeds the requirements of federal law, then the certification shall state the reasons for that opinion.

(2) Post the certification on the agency Web site in accordance with subsection (c) of this section.

(3) Maintain a copy of the federal law and provide to the Office of State Budget and Management the citation to the federal law requiring or pertaining to the proposed rule.

"**§ 150B-19.2. Review of existing rules.**

(a) The Rules Modification and Improvement Program. – The Rules Modification and Improvement Program is established to conduct an annual review of existing rules. The Office of State Budget and Management (OSBM) shall coordinate and oversee the Rules Modification and Improvement Program. The OSBM shall invite comments from the public on whether any existing rules, implementation processes, or associated requirements are unnecessary, unduly burdensome, or inconsistent with the principles set forth in G.S. 150B-19.1. Comments must identify a specific rule or regulatory program and may include recommendations regarding modifying, expanding, or repealing existing rules or changing the rule review and publication process. The OSBM shall direct each agency to conduct an internal review of its rules as required by G.S. 150B-19.1(b) and to forward a report of its review to the OSBM. The OSBM shall assemble and evaluate the public comments and forward any comments it deems to have merit to the appropriate agency for further review. Agencies shall review the public comments and prepare a report on whether any of the recommendations contained in the comments have potential merit and justify further action. Agencies shall submit a report of their findings to the OSBM by January 31 of each year. The OSBM shall publish an annual report by April 30 of each year summarizing all public comments and resulting actions taken or planned.

(b) The OSBM shall establish a single Web portal dedicated to receiving public comments and tracking agency progress on reforming rules.

"**§ 150B-19.3. Limitation on certain environmental rules.**

(a) An agency authorized to implement and enforce State and federal environmental laws may not adopt a rule for the protection of the environment or natural resources that imposes a more restrictive standard, limitation, or requirement than those imposed by federal law or rule, if a federal law or rule pertaining to the same subject matter has been adopted, unless adoption of the rule is required by one of the following:

(1) A serious and unforeseen threat to the public health, safety, or welfare.
(2) An act of the General Assembly or United States Congress that expressly requires the agency to adopt rules.
(3) A change in federal or State budgetary policy.
(4) A federal regulation required by an act of the United States Congress to be adopted or administered by the State.
(5) A court order.

(b) For purposes of this section, "an agency authorized to implement and enforce State and federal environmental laws" means any of the following:

(1) The Department of Environment and Natural Resources created pursuant to G.S. 143B-279.1.
(2) The Environmental Management Commission created pursuant to G.S. 143B-282.
(3) The Coastal Resources Commission established pursuant to G.S. 113A-104.
(4) The Marine Fisheries Commission created pursuant to G.S. 143B-289.51.
(5) The Wildlife Resources Commission created pursuant to G.S. 143-240.
(6) The Commission for Public Health created pursuant to G.S. 130A-29.
(7) The Sedimentation Control Commission created pursuant to G.S. 143B-298.
(8) The Mining Commission created pursuant to G.S. 143B-290.
(9) The Pesticide Board created pursuant to G.S. 143-436."

SECTION 3. G.S. 150B-21(f) is repealed.

SECTION 4. G.S. 150B-21.1(a3) reads as rewritten:

"(a3) Unless otherwise provided by law, ~~at least 30 business days prior to adopting a temporary rule,~~ the agency shall:

(1) ~~Submit~~ At least 30 business days prior to adopting a temporary rule, submit the rule and a notice of public hearing to the Codifier of Rules, and the Codifier of Rules shall publish the proposed temporary rule and the notice of public hearing on the Internet to be posted within five business days.
(2) ~~Notify~~ At least 30 business days prior to adopting a temporary rule, notify persons on the mailing list maintained pursuant to G.S. 150B-21.2(d) and any other interested parties of its intent to adopt a temporary rule and of the public hearing.
(3) Accept written comments on the proposed temporary rule for at least 15 business days prior to adoption of the temporary rule.
(4) Hold at least one public hearing on the proposed temporary rule no less than five days after the rule and notice have been published."

SECTION 5. G.S. 150B-21.2 reads as rewritten:

"**§ 150B-21.2. Procedure for adopting a permanent rule.**

(a) Steps. – Before an agency adopts a permanent rule, the agency must comply with the requirements of G.S. 150B-19.1, and it must take the following actions:

(1) Publish a notice of text in the North Carolina Register.
(2) When required by G.S. 150B-21.4, prepare or obtain a fiscal note for the proposed rule.

(3) Repealed by Session Laws 2003-229, s. 4, effective July 1, 2003.

(4) When required by subsection (e) of this section, hold a public hearing on the proposed rule after publication of the proposed text of the rule.

(5) Accept oral or written comments on the proposed rule as required by subsection (f) of this section.

(b) Repealed by Session Laws 2003-229, s. 4, effective July 1, 2003.

(c) Notice of Text. – A notice of the proposed text of a rule must include all of the following:

(1) The text of the proposed rule.

(2) A short explanation of the reason for the proposed ~~rule.~~ rule and a link to the agency's Web site containing the information required by G.S. 150B-19.1(c).

(3) A citation to the law that gives the agency the authority to adopt the rule.

(4) The proposed effective date of the rule.

(5) The date, time, and place of any public hearing scheduled on the rule.

(6) Instructions on how a person may demand a public hearing on a proposed rule if the notice does not schedule a public hearing on the proposed rule and subsection (e) of this section requires the agency to hold a public hearing on the proposed rule when requested to do so.

(7) The period of time during which and the person to whom written comments may be submitted on the proposed rule.

(8) If a fiscal note has been prepared for the rule, a statement that a copy of the fiscal note can be obtained from the agency.

(9) The procedure by which a person can object to a proposed rule and the requirements for subjecting a proposed rule to the legislative review process.

(d) Mailing List. – An agency must maintain a mailing list of persons who have requested notice of rule making. When an agency publishes in the North Carolina Register a notice of text of a proposed rule, it must mail a copy of the notice or text to each person on the mailing list who has requested notice on the subject matter described in the notice or the rule affected. An agency may charge an annual fee to each person on the agency's mailing list to cover copying and mailing costs.

(e) Hearing. – An agency must hold a public hearing on a rule it proposes to adopt if the agency publishes the text of the proposed rule in the North Carolina Register and the agency receives a written request for a public hearing on the proposed rule within 15 days after the notice of text is published. The agency must accept comments at the public hearing on both the proposed rule and any fiscal note that has been prepared in connection with the proposed rule.

An agency may hold a public hearing on a proposed rule and fiscal note in other circumstances. When an agency is required to hold a public hearing on a proposed rule or decides to hold a public hearing on a proposed rule when it is not required to do so, the agency must publish in the North Carolina Register a notice of the date, time, and place of the public hearing. The hearing date of a public hearing held after the agency publishes notice of the hearing in the North Carolina Register must be at least 15 days after the date the notice is published. If notice of a public hearing has been published in the North Carolina Register and that public hearing has been cancelled, the agency shall publish notice in the North Carolina Register at least 15 days prior to the date of any rescheduled hearing.

(f) Comments. – An agency must accept comments on the text of a proposed rule that is published in the North Carolina Register and any fiscal note that has been prepared in connection with the proposed rule for at least 60 days after the text is published or until the date of any public hearing held on the proposed rule, whichever is longer. An agency must consider fully all written and oral comments received.

(g) Adoption. – An agency shall not adopt a rule until the time for commenting on the proposed text of the rule has elapsed and shall not adopt a rule if more than 12 months have

elapsed since the end of the time for commenting on the proposed text of the rule. Prior to adoption, an agency shall review any fiscal note that has been prepared for the proposed rule and consider any public comments received in connection with the proposed rule or the fiscal note. An agency shall not adopt a rule that differs substantially from the text of a proposed rule published in the North Carolina Register unless the agency publishes the text of the proposed different rule in the North Carolina Register and accepts comments on the proposed different rule for the time set in subsection (f) of this section.

An adopted rule differs substantially from a proposed rule if it does one or more of the following:

(1) Affects the interests of persons who, based on the proposed text of the rule published in the North Carolina Register, could not reasonably have determined that the rule would affect their interests.

(2) Addresses a subject matter or an issue that is not addressed in the proposed text of the rule.

(3) Produces an effect that could not reasonably have been expected based on the proposed text of the rule.

When an agency adopts a rule, it shall not take subsequent action on the rule without following the procedures in this Part. An agency must submit an adopted rule to the Rules Review Commission within 30 days of the agency's adoption of the rule.

(h) Explanation. – An agency must issue a concise written statement explaining why the agency adopted a rule if, within 15 days after the agency adopts the rule, a person asks the agency to do so. The explanation must state the principal reasons for and against adopting the rule and must discuss why the agency rejected any arguments made or considerations urged against the adoption of the rule. The agency must issue the explanation within 15 days after receipt of the request for an explanation.

(i) Record. – An agency must keep a record of a rule-making proceeding. The record must include all written comments received, a transcript or recording of any public hearing held on the rule, any fiscal note that has been prepared for the rule, and any written explanation made by the agency for adopting the rule."

SECTION 6. G.S. 150B-21.4 reads as rewritten:

"**§ 150B-21.4. Fiscal notes on rules.**

(a) State Funds. – Before an agency publishes in the North Carolina Register the proposed text of a permanent rule change that would require the expenditure or distribution of funds subject to the State Budget Act, Chapter 143C of the General Statutes it must submit the text of the proposed rule ~~change~~ change, an analysis of the proposed rule change, and a fiscal note on the proposed rule change to the ~~Director of the Budget~~ Office of State Budget and Management and obtain certification from the ~~Director~~ Office that the funds that would be required by the proposed rule change are available. The Office must also determine and certify that the agency adhered to the principles set forth in G.S. 150B-19.1. The fiscal note must state the amount of funds that would be expended or distributed as a result of the proposed rule change and explain how the amount was computed. The ~~Director of the Budget~~ Office of State Budget and Management must certify a proposed rule change if funds are available to cover the expenditure or distribution required by the proposed rule change.

(a1) DOT Analyses. – In addition to the requirements of subsection (a) of this section, any agency that adopts a rule affecting environmental permitting of Department of Transportation projects shall conduct an analysis to determine if the rule will result in an increased cost to the Department of Transportation. The analysis shall be conducted and submitted to the Board of Transportation before the agency publishes the proposed text of the rule change in the North Carolina Register. The agency shall consider any recommendations offered by the Board of Transportation prior to adopting the rule. Once a rule subject to this subsection is adopted, the Board of Transportation may submit any objection to the rule it may

have to the Rules Review Commission. If the Rules Review Commission receives an objection to a rule from the Board of Transportation no later than 5:00 P.M. of the day following the day the Commission approves the rule, then the rule shall only become effective as provided in G.S. 150B-21.3(b1).

(b) Local Funds. – Before an agency publishes in the North Carolina Register the proposed text of a permanent rule change that would affect the expenditures or revenues of a unit of local government, it must submit the text of the proposed rule change and a fiscal note on the proposed rule change to the Office of ~~the Governor~~ State Budget and Management as provided by G.S. 150B-21.26, the Fiscal Research Division of the General Assembly, ~~the Office of State Budget and Management,~~ the North Carolina Association of County Commissioners, and the North Carolina League of Municipalities. The fiscal note must state the amount by which the proposed rule change would increase or decrease expenditures or revenues of a unit of local government and must explain how the amount was computed.

(b1) Substantial Economic Impact. – Before an agency publishes in the North Carolina Register the proposed text of a permanent rule change that would have a substantial economic impact and that is not identical to a federal regulation that the agency is required to adopt, the agency ~~must obtain a fiscal note for the proposed rule change from the Office of State Budget and Management or~~ shall prepare a fiscal note for the proposed rule change and have the note approved by ~~that Office.~~ the Office of State Budget and Management. The agency may request the Office of State Budget and Management to prepare the fiscal note only after, working with the Office, it has exhausted all resources, internal and external, to otherwise prepare the required fiscal note. If an agency requests the Office of State Budget and Management to prepare a fiscal note for a proposed rule change, that Office must prepare the note within 90 days after receiving a written request for the note. If the Office of State Budget and Management fails to prepare a fiscal note within this time period, the agency proposing the rule change ~~may~~ shall prepare a fiscal note. A fiscal note prepared in this circumstance does not require approval of the Office of State Budget and Management.

If an agency prepares the required fiscal note, the agency must submit the note to the Office of State Budget and Management for review. The Office of State Budget and Management ~~must~~ shall review the fiscal note within 14 days after it is submitted and either approve the note or inform the agency in writing of the reasons why it does not approve the fiscal note. After addressing these reasons, the agency may submit the revised fiscal note to that Office for its review. If an agency is not sure whether a proposed rule change would have a substantial economic impact, the agency ~~may~~ shall ask the Office of State Budget and Management to determine whether the proposed rule change has a substantial economic impact. Failure to prepare or obtain approval of the fiscal note as required by this subsection shall be a basis for objection to the rule under G.S. 150B-21.9(a)(4).

As used in this subsection, the term "substantial economic impact" means an aggregate financial impact on all persons affected of at least ~~three million dollars ($3,000,000)~~five hundred thousand dollars ($500,000) in a 12-month period. In analyzing substantial economic impact, an agency shall do the following:

(1) Determine and identify the appropriate time frame of the analysis.

(2) Assess the baseline conditions against which the proposed rule is to be measured.

(3) Describe the persons who would be subject to the proposed rule and the type of expenditures these persons would be required to make.

(4) Estimate any additional costs that would be created by implementation of the proposed rule by measuring the incremental difference between the baseline and the future condition expected after implementation of the rule. The analysis should include direct costs as well as opportunity costs. Cost

estimates must be monetized to the greatest extent possible. Where costs are not monetized, they must be listed and described.

(5) For costs that occur in the future, the agency shall determine the net present value of the costs by using a discount factor of seven percent (7%).

(b2) Content. – A fiscal note required by subsection (b1) of this section must contain the following:

(1) A description of the persons who would be affected by the proposed rule change.

(2) A description of the types of expenditures that persons affected by the proposed rule change would have to make to comply with the rule and an estimate of these expenditures.

(3) A description of the purpose and benefits of the proposed rule change.

(4) An explanation of how the estimate of expenditures was computed.

(5) A description of at least two alternatives to the proposed rule that were considered by the agency and the reason the alternatives were rejected. The alternatives may have been identified by the agency or by members of the public.

(c) Errors. – An erroneous fiscal note prepared in good faith does not affect the validity of a rule."

SECTION 7. G.S. 150B-21.11 reads as rewritten:

"**§ 150B-21.11. Procedure when Commission approves permanent rule.**

When the Commission approves a permanent rule, it must notify the agency that adopted the rule of the Commission's approval, and deliver the approved rule to the Codifier of ~~Rules, and include the text of the approved rule and a summary of the rule in its next report to the Joint Legislative Administrative Procedure Oversight Committee.~~Rules.

If the approved rule will increase or decrease expenditures or revenues of a unit of local government, the Commission must also notify the Governor of the Commission's approval of the rule and deliver a copy of the approved rule to the Governor by the end of the month in which the Commission approved the rule."

SECTION 8. G.S. 150B-21.12(d) reads as rewritten:

"(d) Return of Rule. – A rule to which the Commission has objected remains under review by the Commission until the agency that adopted the rule decides not to satisfy the Commission's objection and makes a written request to the Commission to return the rule to the agency. When the Commission returns a rule to which it has objected, it must notify the Codifier of Rules of its ~~action and must send a copy of the record of the Commission's review of the rule to the Joint Legislative Administrative Procedure Oversight Committee in its next report to that Committee~~action. If the rule that is returned would have increased or decreased expenditures or revenues of a unit of local government, the Commission must also notify the Governor of its action and must send a copy of the record of the Commission's review of the rule to the Governor. The record of review consists of the rule, the Commission's letter of objection to the rule, the agency's written response to the Commission's letter, and any other relevant documents before the Commission when it decided to object to the rule."

SECTION 9. G.S. 150B-21.16 is repealed.

SECTION 10. G.S. 150B-21.17(a) reads as rewritten:

"(a) Content. – The Codifier of Rules must publish the North Carolina Register. The North Carolina Register must be published at least two times a month and must contain the following:

(1) Temporary rules entered in the North Carolina Administrative Code.

(1a) The text of proposed rules and the text of permanent rules approved by the Commission.

(1b) Emergency rules entered into the North Carolina Administrative Code.

~~(2) Notices of receipt of a petition for municipal incorporation, as required by G.S. 120-165.~~

(3) Executive orders of the Governor.

(4) Final decision letters from the United States Attorney General concerning changes in laws that affect voting in a jurisdiction subject to section 5 of the Voting Rights Act of 1965, as required by G.S. 120-30.9H.

~~(5) Orders of the Tax Review Board issued under G.S. 105-241.2.~~

(6) Other information the Codifier determines to be helpful to the public."

SECTION 11. G.S. 150B-21.18 reads as rewritten:

"**§ 150B-21.18. North Carolina Administrative Code.**

The Codifier of Rules must compile all rules into a Code known as the North Carolina Administrative Code. The format and indexing of the Code must conform as nearly as practical to the format and indexing of the North Carolina General Statutes. The Codifier must publish printed copies of the Code and may publish the Code in other forms. ~~The Codifier must keep the Code current by publishing the Code in a loose-leaf format and periodically providing new pages to be substituted for outdated pages, by publishing the Code in volumes and periodically publishing cumulative supplements, or by another means.~~ The Codifier may authorize and license the private indexing, marketing, sales, reproduction, and distribution of the Code. The Codifier must keep superseded rules."

SECTION 12. G.S. 150B-21.21(b) reads as rewritten:

"(b) Exempt Agencies. – ~~Notwithstanding G.S. 150B-1, the North Carolina Utilities Commission must submit to the Codifier of Rules those rules of the Utilities Commission that are published from time to time in the publication titled "North Carolina Utilities Laws and Regulations." The Utilities Commission must submit a rule required to be included in the Code within 30 days after it is adopted.~~

Notwithstanding ~~G.S. 150B-1,~~<u>any other provision of law,</u> an agency ~~other than the Utilities Commission~~ that is exempted from this Article by ~~that statute~~<u>G.S. 150B-1 or any other statute</u> must submit a temporary or permanent rule adopted by it to the Codifier of Rules for inclusion in the North Carolina Administrative Code. These exempt agencies must submit a rule to the Codifier of Rules within 30 days after adopting the rule."

SECTION 13. G.S. 150B-21.23 is repealed.

SECTION 14. G.S. 150B-21.26 reads as rewritten:

"Part 5. Rules Affecting Local Governments.

"**§ 150B-21.26. ~~Governor~~ <u>Office of State Budget and Management</u> to conduct preliminary review of certain administrative rules.**

(a) Preliminary Review. – At least ~~30~~<u>60</u> days before an agency publishes in the North Carolina Register the proposed text of a permanent rule change that would affect the expenditures or revenues of a unit of local government, the agency must submit all of the following to the ~~Governor~~<u>Office of State Budget and Management</u> for preliminary review:

(1) The text of the proposed rule change.

(2) A short explanation of the reason for the proposed change.

(3) A fiscal note stating the amount by which the proposed rule change would increase or decrease expenditures or revenues of a unit of local government and explaining how the amount was computed.

(b) Scope. – The ~~Governor's~~ preliminary review of a proposed permanent rule change that would affect the expenditures or revenues of a unit of local government shall include consideration of the following:

(1) The agency's explanation of the reason for the proposed change.

(2) Any unanticipated effects of the proposed change on local government budgets.

findings and recommendations to the Environmental Review Commission no later than February 1, 2012.

SECTION 60.(e) This section is effective when this act becomes law and applies to permits that are issued on or after July 1, 2011.

SECTION 61. The Secretary of Environment and Natural Resources shall develop a uniform policy for notification of deficiencies and violations for all of the regulatory programs within the Department of Environment and Natural Resources. In developing the notification policy, the Secretary shall establish different types of notification based on the potential or actual level of harm to public health, the environment, and the natural resources of the State. The Secretary shall also review the notification policies of the United States Environmental Protection Agency and the environmental regulatory programs of other states. The Secretary shall report on the development of the notification policy to the Environmental Review Commission and the Joint Select Regulatory Reform Committee no later than October 1, 2011. The Secretary shall implement the uniform notification policy no later than February 1, 2012.

SECTION 61.1. The Office of Administrative Hearings shall evaluate the use of mediated settlement conferences under G.S. 150B-23.1 and shall develop a plan to expand the use of mediation in the contested case process. The Office of Administrative Hearings shall report its findings and recommendations to the Joint Legislative Regulatory Reform Committee by February 1, 2012.

SECTION 61.2. S.L. 2011-13 is repealed.

SECTION 61.3. G.S. 66-58 is amended by adding a new subsection to read:

"(m) Any person, firm, or corporation who or which is injured or suffers damages as a result of a violation of this section may maintain an action in the Wake County Superior Court for injunctive relief against any unit, department or agency of the State government, or any division or subdivision of the unit, department or agency, or any individual employee or employees of the unit, department or agency, in his or her, or their capacity as employee or employees, who or which has committed a violation. In a proceeding under this subsection, the court shall determine whether a violation has been committed and enter any judgment or decree necessary to remove the effects of any violation it finds and to prevent continuation or renewal of the violation in the future. Upon a judicial finding that any contract or contractual obligation is in violation of this section, such contract or contractual obligation shall be null and void. Any person, firm, or corporation who or which believes that a proposed activity will be in violation of this section may request a declaratory judgment under G.S. 1-253 or injunctive relief or both, notwithstanding the fact that such activity has not been commenced."

SECTION 61.4. If House Bill 200, 2011 Regular Session, becomes law, then G.S. 95-14.2, 106-22.6, and 143B-279.16, as amended by Section 13.11B of that bill are repealed.

SECTION 62. If any provision of this act is held invalid by a court of competent jurisdiction, the invalidity does not affect other provisions of this act that can be given effect without the invalid provision.

SECTION 63. Sections 2 through 14 of this act become effective October 1, 2011, and apply to rules adopted on or after that date. Sections 15 through 55 of this act become effective January 1, 2012, and apply to contested cases commenced on or after that date. With regard to contested cases affected by Section 55.2 of this act, the provisions of Sections 15 through 27 of this act become effective when the United States Environmental Protection Agency approvals referenced in Section 55.2 have been issued or June 15, 2012, whichever occurs first. Unless otherwise provided elsewhere in this act, the remainder of this act is effective when it becomes law.

In the General Assembly read three times and ratified this the 18th day of June, 2011.

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

s/ Thom Tillis
Speaker of the House of Representatives

VETO Beverly E. Perdue
Governor

Became law notwithstanding the objections of the Governor, 2:07 p.m. this 25th day of July, 2011.

s/ Denise Weeks
House Principal Clerk

Rule 11 NCAC 23B .0206 is amended with changes as published in 33:06 NCR 578 as follows:

11 NCAC 23B .0206 HEARINGS

(a) The Commission may, on its own motion, order a hearing, rehearing, or pre-trial conference of any tort claim in dispute. The Commission shall set the date, time, and location of the hearing, and provide notice of the hearing to the parties. Within the Commission's discretion, any pre-trial conference, as well as hearings of claims in which the plaintiff is incarcerated at the time of the hearing, may be conducted via videoconference or telephone ~~[conference.]~~ conference in lieu of an in-person hearing. ~~[The date and time of the hearing shall not be limited by the business hours of the Commission.]~~ Where a party has not notified the Commission of the attorney representing the party prior to the mailing of calendars for hearing, notice to that party constitutes notice to the party's attorney. Any scheduled hearings shall proceed to completion unless recessed, continued, or removed by Order of the ~~[Commission.]~~ Commission, and shall not be limited by the business hours of the Commission.

(b) When an attorney is notified to appear for a pre-trial conference, motion hearing, hearing, or any other appearance the attorney shall, consistent with ethical requirements, appear or have a partner, associate, or other attorney appear. Counsel for each party or any party without legal representation shall remain in the hearing room throughout the course of the hearing, unless released by the Commission.

(c) A motion for a continuance shall be allowed only by the Commissioner or Deputy Commissioner before whom the case is set in the interests of justice or to promote judicial economy.

(d) In cases involving property damage of less than five hundred dollars ($500.00), the Commission may, upon its own motion or upon the motion of either party, order a videoconference or telephone conference hearing on the matter.

(e) Unless otherwise ordered by the Commission, in the event of inclement weather or natural disaster, hearings set by the Commission shall be cancelled or delayed when the proceedings before the General Courts of Justice in that county are cancelled or delayed.

(f) Unless otherwise ordered or waived by the Commission, applications for issuance of a writ of *habeas corpus ad testificandum* requesting the appearance of witnesses incarcerated by the North Carolina Division of Adult Corrections, shall be filed with the Commission ~~[in accordance with Rule .0104 of this Subchapter,]~~ with a copy to the opposing party or counsel, for review by the Commission in accordance with G.S. 143-296.

~~(b) The Commission shall set a contested case for hearing in a location deemed convenient to witnesses and the Commission, and conducive to an early and just resolution of disputed issues.~~

~~(c) The Commission may issue writs of habeas corpus ad testificandum in cases arising under the Tort Claims Act. Requests for issuance of a writ of habeas corpus ad testificandum shall be sent to the Docket Section of the Commission if the case has not been set on a calendar for hearing. If the case has been set on a hearing calendar, the request shall be sent to the Commissioner or Deputy Commissioner before whom the case is set.~~

~~(d) The Commission shall give notice of a hearing in every case. A motion for a continuance shall be allowed only by the Commissioner or Deputy Commissioner before whom the case is set in the interests of justice or to promote judicial economy. Where a party has not notified the Commission of the attorney representing the party prior to the mailing of calendars for hearing, notice to that party constitutes notice to the party's attorney.~~

~~(e) In cases involving property damage of less than five hundred dollars ($500.00), the Commission shall, upon its own motion or upon the motion of either party, order a telephonic hearing on the matter.~~

~~(f) All subpoenas shall be issued in accordance with Rule 45 of the North Carolina Rules of Civil Procedure, with the exception that production of public records or hospital records as provided in Rule 45(c)(2), shall be served upon the Commissioner or Deputy Commissioner before whom the case is calendared, or upon the Docket Section of the Commission should the case not be calendared.~~

~~(g) In the event of inclement weather or natural disaster, hearings set by the Commission shall be cancelled or delayed when the proceedings before the General Court of Justice in that county are cancelled or delayed.~~

History Note: *Authority G.S. 143-296; 143-300;*
Eff. January 1, 1989;
Recodified from 04 NCAC 10B .0202 Eff. April 17, 2000;
Amended Eff. July 1, 2014; January 1, 2011; May 1, 2000;
Recodified from 04 NCAC 10B .00206 Eff. June 1, 2018;
Amended Eff. January 1, 2019.