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## North Carolina Industrial Commission

March 9, 2018

### VIA ELECTRONIC MAIL ONLY

Garth K. Dunklin, Chair  
North Carolina Rules Review Commission  
Office of Administrative Hearings  
6714 Mail Service Center  
Raleigh, NC 27699-6700  
oah.rules@oah.nc.gov

Re: Request Regarding Industrial Commission Rules Subject to the Current Round of Periodic Review of Existing Rules

Dear Mr. Dunklin:

The North Carolina Industrial Commission respectfully requests that the Rules Review Commission find that the periodic review requirements of N.C.G.S. § 150B-21.3A do not apply to Industrial Commission rules that were not adopted into the North Carolina Administrative Code pursuant to Article 2A of the North Carolina Administrative Procedure Act as of April 1, 2014. This is not a request to exempt or waive periodic review of rules that are subject to N.C.G.S. § 150B-21.3A.

Rule 26 NCAC 05 .0202(2) defines "existing rules" as rules in the North Carolina Administrative Code at the time that the schedule contained in Rule 26 NCAC 05 .0211 became effective on April 1, 2014. The Industrial Commission contends any rules in 04 NCAC 10 which had not been adopted into the Administrative Code pursuant to Article 2A of the Administrative Procedure Act (APA) as of April 1, 2014 do not qualify as "existing rules," similar to rules first adopted into the Administrative Code after April 1, 2014. Therefore, such rules are not subject to the periodic review process which begins with the report prepared according to the current schedule in 26 NCAC 05 .0211.

As you may know, the Industrial Commission was exempt from rulemaking under Article 2A until the General Assembly repealed that exemption in Session Law 2011-287. At such time, the Industrial Commission rules were contained in Chapter 10 of Title 4 of the North Carolina Administrative Code. However, those rules were not adopted pursuant to APA rulemaking procedures, but were instead promulgated pursuant to a process specific to the Industrial Commission.

The General Assembly further directed the Industrial Commission in Session Law 2011-287 to readopt all of its rules pursuant to the APA by the end of 2012 or the rules would expire. Importantly, the General Assembly directed the Commission's prior rules remain in effect until the rules were readopted in accordance with the rulemaking process of the APA became effective. (See S.L. 2011-287, Section 21(c)). In October, November, and December 2012, the Rules Review Commission reviewed and approved over 150 rules adopted by the Industrial Commission.



The entry of the rules readopted pursuant to the APA into the Administrative Code was delayed, however, because a significant number of the rules were subjected to two rounds of legislative review and additional rulemaking over the course of 2013 and 2014. The General Assembly provided in each related session law the rules in effect prior to the Industrial Commission coming under the APA would stay in effect until a new rule was adopted. (See S.L. 2013-294, Section 11; S.L. 2014-77, Section 7). After each round of rulemaking and letters of objection, the Industrial Commission consulted with the Codifier of Rules about how to phase the new rules into the Code without causing discord between the newly adopted rules and the old rules remaining in place in the interim until rulemaking was concluded. This was necessary because of the interrelated nature of the Industrial Commission's rules, including, but not limited to, internal rule references and the renumbering of several rules in the initial 2012 rulemaking.

To avoid potential unanticipated conflicts between old and new rules, a delayed effective date was requested and granted for the vast majority of the rules. As a result, the Industrial Commission rules adopted pursuant to the APA were entered into the Code on the following timeline:

- January 1, 2013 – Rules 04 NCAC 10A .0301 and 04 NCAC 10J .0101.
- July 1, 2014 – 04 NCAC 10B, 10D, 10E, 10F, 10G, 10H, and 10I.
- November 1, 2014 – All remaining rules in 04 NCAC 10A and all rules in 04 NCAC 10C.

Ultimately, all of the Industrial Commission rules in 04 NCAC 10 were adopted in accordance with the APA by the end of 2014. However, as of April 1, 2014, the operative date for this current round of the periodic review process, the only Industrial Commission rules in 04 NCAC 10 that were adopted through the administrative rulemaking process of Article 2A of Chapter 150B were 04 NCAC 10A .0301 and 04 NCAC 10J .0101. All other rules in 04 NCAC 10 effective on April 1, 2014, were the prior rules that were not subject to or adopted in accordance with Administrative Procedure Act.

For these reasons, the Industrial Commission respectfully requests the Rules Review Commission's clarification and agreement that no rules in 04 NCAC 10 other than 04 NCAC 10A .0301 and 04 NCAC 10J .0101 are "existing rules" pursuant to 26 NCAC 05 .0202(2) and only those two rules should be included in the report generated pursuant to 26 NCAC 05 .0211. The Industrial Commission does not assert its rules are not subject to N.C.G.S. § 150B-21.3A for purposes of the next decennial periodic review.

Sincerely,



Charlton L. Allen, Chairman  
North Carolina Industrial Commission



Kendall M. Bourdon, Rulemaking Coordinator  
North Carolina Industrial Commission