

## **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,<sup>1</sup> 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

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<sup>1</sup> 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.<sup>2</sup>

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,<sup>3</sup> and the role of Deputy Commissioners is “indisputably judicial in nature.”<sup>4</sup> Judges have broad inherent authority to see that courts are run efficiently and properly and that litigants are treated fairly.<sup>5</sup> 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.”<sup>6</sup> 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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<sup>2</sup> 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>.

<sup>3</sup> Hanks v. Southern Pub. Util. Co., 210 N.C. 312, 186 S.E. 252 (1936).

<sup>4</sup> Sherwin v. Piner, — F. Supp. 2d —, 2003 U.S. Dist. LEXIS 26855 (E.D.N.C. July 21, 2003).

<sup>5</sup> 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>.

<sup>6</sup> 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.<sup>7</sup> 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.<sup>8</sup> 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,<sup>9</sup> 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.<sup>10</sup> 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,<sup>11</sup> for an average hourly cost of \$57.75.

Special Deputy Commissioners receive an annual salary of \$62, 915.<sup>12</sup> 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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<sup>7</sup> 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.

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

<sup>9</sup> N.C. Gen. Stat. § 97-78(a) (2017); State Pay Database, *supra* note 8.

<sup>10</sup> 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.

<sup>11</sup> 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.

<sup>12</sup> 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.<sup>13</sup> 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.<sup>14</sup> 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.

<sup>13</sup> State Pay Database, *supra* note 8.

<sup>14</sup> *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](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.<sup>15</sup> 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,<sup>16</sup> 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.<sup>17</sup> 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.<sup>18</sup> Among these implied powers is the ability to regulate

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<sup>15</sup> See *supra* note 1.

<sup>16</sup> Court Reporters, Bureau of Labor Statistics, <https://www.bls.gov/ooh/legal/court-reporters.htm#tab-1>.

<sup>17</sup> For further discussion, see *supra* note 7. See also *supra* section 2(b).

<sup>18</sup> See discussion of courts' implied powers, *supra* at section 2(a).

courtroom behavior, at the discretion of each individual court.<sup>19</sup> 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.<sup>20</sup> Other districts are less specific, granting judges general power to control their courtrooms.<sup>21</sup> 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.<sup>22</sup>

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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<sup>19</sup> 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/ncsc276.pdf?6uUEcDdzWCjtxreC.1oHIUBAU0XrmKN>. In practice, individual lower courts often adopt supplementary rules covering everything from verbal forms of address to court attire.

<sup>20</sup> 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”).

<sup>21</sup> 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).

<sup>22</sup> 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.Z32ctTIGCcXptlnRATat4c4> (“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.<sup>23</sup> 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,<sup>24</sup> 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.<sup>25</sup> 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,<sup>26</sup> for an average hourly cost of \$57.75.

Special Deputy Commissioners receive an annual salary of \$62, 915.<sup>27</sup> 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

<sup>23</sup> Pay Database, *supra* note 8.

<sup>24</sup> N.C. Gen. Stat. § 97-78(a) (2017); Pay Database, *supra* note 8.

<sup>25</sup> 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.

<sup>26</sup> 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.

<sup>27</sup> 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.<sup>28</sup> 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.<sup>29</sup> 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.<sup>30</sup> 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-

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<sup>28</sup> Pay Database, *supra* note 8.

<sup>29</sup> *Hours of Work and Overtime Compensation*, *supra* note 14.

<sup>30</sup> *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 than 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.<sup>31</sup> 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,<sup>32</sup> 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 decreased 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.<sup>33</sup>

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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<sup>31</sup> See *supra* note 1.

<sup>32</sup> See full discussion of commission staff salaries, *supra* at 2(c)(1) and 3(c)(1).

<sup>33</sup> 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.~~

~~(e) 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(e)(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.*