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STATE OF NORTH CAROLINA
DEPARTMENT OF JUSTICE

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SPECIAL DEPUTY ATTORNEY
GENERAL

30 July, 2019

NC Rules Review Commission
NC Office of Administrative Hearings
1700 New Hope Church Road
Raleigh, NC 27609
By email to: OAH.rules@OAH.NC.gov

Re: USEPTA Petition for Rulemaking

Rules Review Commission:

Please find the attached Petition for Rulemaking received by the Department of Information Technology on 26 July 2019. This is delivered to the Rules Review Commission as required by NCGS 150B-20(a).

Sincerely,

s/ Richard Bradford

Richard Bradford
Special Deputy Attorney General
Department of Information Technology Services
PO Box 17209
Raleigh, NC 27609
Richard.Bradford@nc.gov

cc: M. Jackson Nichols
Counsel for Petitioner

US EDUCATIONAL TECHNOLOGY PURCHASING ALLIANCE

PETITION FOR RULEMAKING AND PETITION FOR DECLARATORY RULING

Pursuant to N.C. Gen. Stat. § 150B-20, the undersigned Petitioner, on behalf of the US Educational Technology Purchasing Alliance, hereby petitions and requests that the Department of Information Technology (hereafter "DIT" or "Department") adopt the attached proposed Rule; or, in the alternative, that the Department grant this Petition for Rulemaking and initiate the rulemaking proceedings, as allowed by N.C. Gen. Stat. § 150B-20(c).

In accordance with 9 N.C. Admin. Code 6B .1201 & .1202, Petitioner submits the following information in order to comply with applicable statutory requirements:

- (1) the text of the proposed rule for adoption or amendment (which is attached as Exhibit A);
- (2) a statement of the reasons for adoption of the proposed rule;
- (3) a statement of the effect on existing rules or orders; and
- (4) the name(s) and address(es) of the petitioner(s).

In addition, Petitioner, as an aggrieved person and a person whose rights are affected by the Department's decisions, submits in addition to its Petition for Rulemaking, this Petition for a Declaratory Ruling pursuant to N.C. Gen. Stat. § 150B-4 and in accordance with 9 N.C. Admin. Code 6B .1201 & .1202. Specifically, Petitioner requests that the Department issue a Declaratory Ruling that the procedures included in the text of the rule proposed for adoption by Petitioner, or any other procedures—whether memorialized in writing or not—followed by the Department with regard to the procurement of technology services and the use of cooperative purchasing agreements should be considered a "rule," as defined by N.C. Gen. Stat. § 150B- 2(8a), and that any procedures not promulgated as a rule be considered invalid. Petitioner requests that the Department make a determination accordingly and issue a Declaratory Ruling as to the validity of such procedures, if

said procedures have not been adopted as a “rule” in accordance with Article 2A of Chapter 150B of the North Carolina General Statutes, otherwise known as the North Carolina Administrative Procedure Act. It should be noted that the limited exemption from Chapter 150B afforded to DIT pursuant to N.C. Gen. Stat. § 150B-2(8a)l. does not apply here.

Reasons for Adoption of the Proposed Rule

Under North Carolina law, when a local government subject to Article 8, Chapter 143 of the North Carolina General Statutes decides to purchase apparatus, supplies, materials, or equipment involving the expenditure of \$30,000 or more, that local government is required by state law to follow certain statutory bidding procedures, unless a statutory exception applies. N.C. Gen. Stat. § 143-129 contains several exceptions to these bidding requirements. One of these exceptions, found in N.C. Gen. Stat. § 143-129(e)(3), allows local governments to purchase apparatus, supplies, materials, or equipment through a “competitive bidding group purchasing program” instead of following the bidding requirements in Article 8 (i.e. the Procurement Statutes).

In 2015, the N.C. General Assembly included within its Budget & Appropriations bill¹ an amendment to N. C. Gen. Stat. § 143B-1323(c)(5) which provides:

“The Department shall subject to the provisions of this Part, do all the following with respect to State technology procurement; Establish procedures to permit the State agencies and local government entities to use other cooperative purchasing agreements.”

Upon information and belief, the “Department” has not adopted procedures to comply with this specific statutory requirement. Moreover, since such procedures meet the definition of a

¹ S.L. 2015-241 N.C. General Assembly

“rule,” as defined by N. C. Gen. Stat. § 150B- 2(8a), they must be promulgated pursuant to Article 2A of N. C. Gen. Stat. § 150B.

Statement of the Effect of the Proposed Rule on Existing Rules

Since the Department has not adopted any Rules, policies or procedures, Petitioner submits that there is no effect on existing rules. If the Department contends that the proposed Rule would have an effect on existing rules, policies or procedures, then pursuant to its Petition for a Declaratory Ruling, Petitioner requests a determination of the validity of those affected rules, policies or procedures when they have not been adopted under the rulemaking procedures of Article 2A of the N. C. Administrative Procedure Act, N. C. Gen. Stat. § 150B.

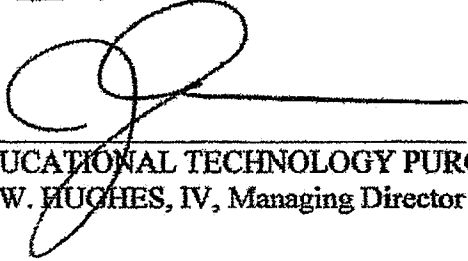
Name & Address of the Petitioner; Aggrieved Person Status

US Educational Technology Purchasing Alliance
1829 E Franklin St, Suite 800E
Chapel Hill, NC 27514
(919) 391-9558

Petitioner is an aggrieved person whose rights are affected by Department decisions because it is a competitive bidding group purchasing program under N.C. Gen. Stat. § 143-129(e)(3). It has existing contracts with numerous Local Educational Agencies (LEA) and also contracts with other local government entities. Therefore, Petitioner’s contractual and legal rights or interests, or its rights or interests properly attributable to Petitioner in a cognizable representative capacity, are both directly and indirectly at issue in the requested rulemaking proceeding,

Petitioner, US Educational Technology Purchasing Alliance, submits this Petition through
its Managing Director, John W. Hughes IV.

This the 23 day of July, 2019.

A handwritten signature in black ink, consisting of a large, stylized 'J' followed by a horizontal line and a vertical stroke that loops back to the 'J'.

US EDUCATIONAL TECHNOLOGY PURCHASING ALLIANCE
JOHN W. HUGHES, IV, Managing Director

EXHIBIT A

PROPOSED RULE FOR FUNDING OF SCHOOL CONNECTIVITY INITIATIVE

(a) In order to provide an allocation of funds to a Local Educational Agency (LEA) proposing to use the School Connectivity Initiative (SCI) funds to purchase Internet Access or wide area data circuits (WAN), by use of internet connectivity, data circuits and wireless equipment, application assistance by the North Carolina Department of Information Technology (DIT) and filtering for internet circuits, the Department shall:

1. Receive from the Department of Administrative, Division of Purchase and Contract, written confirmation that DIT followed competitive procurement procedures in the service provider selected by the LEA;
2. Receive confirmation from the appropriate State or federal agency that any funding for E-Rate complies with FCC requirements; and
3. Receive a competitive bid proposal from the service provider that was approved and accepted by the LEA.

(b) The LEA shall have sole discretion in its choice of the service provider through its use of procurement procedures, as established by N.C. Gen. Stat. Chapter 143, Article 8,

Statutory Authority: S.L. 2007-323, Section 7.23(d); N.C. Gen. Stat. § 115C-2, 115C-12(5).

CERTIFICATE OF SERVICE

I hereby certify that the foregoing Petition for Rulemaking and Petition for Declaratory Ruling was served by deposit in the U.S. Mail, postage prepaid and certified mail – return receipt requested, addressed to the Process Agent of record for the Department of Information Technology, as follows:

V. Lori Fuller
General Counsel
N.C. Department of Information Technology
P.O. Box 17209
Raleigh, NC 27619-7209

This the 23rd day of July, 2019.

NICHOLS, CHOI & LEE, PLLC



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