

# NICHOLS, CHOI & LEE, PLLC

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ATTORNEYS AT LAW

Nonprofit  
Employment  
Administrative  
Occupational Licensing

February 1, 2019

**VIA HAND DELIVERY**

**NC Superintendent of Public Instruction**

Mr. Mark Johnson  
301 N. Wilmington Street  
Raleigh, NC 27601

**North Carolina State Board of Education**

c/o Eric A. Snider, SBE Attorney and Process Agent  
301 North Wilmington Street, Room 212  
6302 Mail Service Center  
Raleigh, NC 27699-6302

RE: Petition for Rulemaking and Declaratory Ruling.

Dear Mr. Johnson and Mr. Snider:

Our law firm represents U.S. Educational Technology Purchasing Alliance (USETPA) with regard to the enclosed Petition for Rulemaking and Petition for Declaratory Ruling.

It is unclear to my client, in light of recent litigation, whether the Superintendent or the State Board of Education has the rulemaking authority and the authority to issue a Declaratory Ruling. Therefore, out of an abundance of caution, I have filed the Petitions with both rulemaking agencies.

It is also unclear what information is required for the Petition for Rulemaking since the previous Rule, 16 N.C. Admin. Code 1A .0106 was allowed to expire.

The purpose of these Petitions is two-fold:

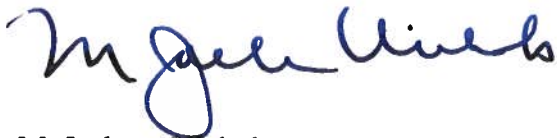
1. To request a Declaratory Ruling pursuant to N.C. Gen. Stat. §150B-4 as to whether the current procedures for awarding funds to Local Educational Agencies to purchase internet connectivity, data circuits and wireless equipment under the School Connectivity Initiative must be adopted as a rule, as defined by N.C. Gen. Stat. §150B-2(8a).
2. To request that the appropriate rulemaking agency consider the enclosed Petition for Rulemaking and determine, under N.C. Gen. Stat. §150B-20, whether it will grant or deny the rulemaking petition within 30 days of its receipt.

**North Carolina State Board of Education**  
c/o Eric A. Snider, SBE Attorney and Process Agent  
**NC Superintendent of Public Instruction**  
Mr. Mark Johnson  
February 1, 2019  
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Please let me know the appropriate agency and person with whom I should deal with regarding these two Petitions.

Sincerely yours,

NICHOLS, CHOI & LEE, PLLC

A handwritten signature in blue ink that reads "M. Jackson Nichols". The signature is written in a cursive style with a large initial "M" and a long, sweeping underline.

M. Jackson Nichols

MJN/bmr  
Encs.

*Cc via email:* Mr. John Hughes, USETPA

**US EDUCATIONAL TECHNOLOGY PURCHASING ALLIANCE**  
**PETITION FOR RULEMAKING AND PETITION FOR DECLARATORY RULING**

Pursuant to N. C. Gen. Stat. § 150B-20, the undersigned Petitioner, petitions and requests that the Superintendent of the Department of Public Instruction and/or the N.C. Board of Education (hereinafter jointly referred to as "Agency") adopt the attached proposed Rule; or, in the alternative, the Agency grant the Petition for Rulemaking and initiate the rule-making proceedings, as allowed by N. C. Gen. Stat. § 150B-20(c).

Since the Agency has allowed its former rule regarding Petitions for Rulemaking, 16 N. C. Admin. Code 1A .0106, to expire, 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 or amendment of the proposed rule(s), or the repeal of an existing 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 Agency's decisions, submits this Petition for a Declaratory Ruling pursuant to N. C. Gen. Stat. § 150B-4 that the procedures included in the proposed text, or any other procedures followed by the Agency with regard to 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). Petitioner also requests that the Agency make a determination and issue a Declaratory Ruling as to the validity of such procedures, if they have not been adopted as a "rule" in accordance with Article 2A of N. C. Gen. Stat. § 150B.

**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(c)(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 bill<sup>1</sup> 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 “Agency” has not adopted procedures to comply with this statutory requirement. Moreover, as such procedures meet the definition of a “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.

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<sup>1</sup> S. L. 2015-241 NC General Assembly

**Statement of the Effect of the Proposed Rule on Existing Rules**

Since the Agency has not adopted any Rules, policies or procedures, Petitioner submits that there is no effect on existing rules. If the Agency 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.

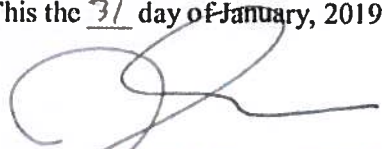
**Name & Address of the Petitioner; Aggrieved Person Status**

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 Agency decisions because it is a competitive bidding group purchasing program under N. C. Gen. Stat. § 143- 129(c)(3). It has existing contracts with numerous Local Educational Agency (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 31 day of ~~January~~, 2019.

A handwritten signature in black ink, appearing to be 'John W. Hughes IV', written over a horizontal line.

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

## **PROPOSED RULE FOR FUNDING OF SCHOOL CONNECTIVITY INITIATIVE**

(a) In order to provide an allocation of funds to a Local Education 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 NC Department of Public Instruction (DPI) and filtering for internet circuits, the Department shall:

1. Receive from the Department of Administration, Division of Purchase and Contract, written confirmation that DPI followed competitive procurement procedures in the service provider selected by the LEA;
2. Receive from the N.C. Information Technology Services written confirmation that any funding for E-Rate is in compliance 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.G.S. Chapter 143, Article 8.

History Note: Statutory Authority: SL 2007-323. Section 7.28(d); N.C. Gen. Stat. § 115C-2; N.C. Gen. Stat. § 115C-12(5).

Effective Date: JULY 1, 2019?