

ISTATE OF NEW MEXICO
OFFICE OF THE ATTORNEY GENERAL



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July 19, 2022

The Honorable Michael Padilla
New Mexico State Senator
D-Bernalillo-14
PO Box 67545
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Re: Opinion Request – Legality of a 501(c)(12) Cooperative to Receive State and Federal Funding for the Development and Operation of Fiber-Optic Broadband Networks

Dear Senator Padilla,

You have requested an Attorney General opinion regarding whether a cooperative organized under the New Mexico Cooperative Association Act, NMSA 1978, §§ 53-4-1 to -45 (“CAA”), and meeting the requirements for tax exempt status of Internal Revenue Code Section 501(c)(12),¹ may lawfully receive state and federal funding for the purpose of purchasing, owning, and maintaining broadband infrastructure assets. We understand that the Cooperative, to be governed by an independent Board of Directors, would recruit and maintain members that would receive and/or provide broadband infrastructure, including “Community Anchor Institutions” such as schools, libraries, museums, and others; municipalities; tribes; educational institutions; carriers; last-mile internet service providers (ISPs); and other stakeholders. The Cooperative would maintain no employees, but rather would contract with a for-profit operating company to service, maintain, and upgrade the network as well as market and sell the services under the supervision of the Board of Directors.

Based on our examination of the relevant constitutional, statutory and case law authorities, as well as the information available to us at this time, we have identified two legal barriers to your proposed approach. However, we would first like to suggest a potential solution.

As you correctly note in your letter, the Connect New Mexico Act does permit “entities created by a joint powers agreement pursuant to the Joint Powers Agreement Act” to receive state grants from the Connect New Mexico Fund for broadband infrastructure projects. NMSA 1978, § 63-9K-6(B)(5). The Joint Powers Agreement Act explicitly contemplates using such agreements for the

¹ 26 U.S.C. § 501(c)(12) (2019)

“acquisition, construction or operation of a revenue-producing facility[.]” NMSA 1978, § 11-1-4(G), and further allows a “board constituted pursuant to the agreement” to administer or execute the agreement, NMSA 1978, § 11-1-5(A). This administering board “shall be considered under the [Act] as an entity separate from the parties to such agreement.” § 11-1-5(B). Our research has identified at least one New Mexico entity created pursuant to a joint powers agreement and used for the purposes you specify in your letter—REDINet, which is a middle-mile “high-speed, open access, community broadband network located in Northern New Mexico,” owned and operated “by a consortium of local and tribal governments.”² We hope this information about a local solution already in place is helpful in your efforts to bridge the significant broadband gap in our State.

With respect to the California model you have identified, it appears it may not be transferrable to New Mexico. First, under the CAA, no governmental entity—whether state, local, or tribal—may become a member of a cooperative. Section 53-4-23, titled *Eligibility and Admission to Membership*, provides that “[a]ny natural person, association, incorporated or unincorporated group organized on a cooperative basis, or any nonprofit group shall be eligible for membership in an association[.]”³ Under the rules of statutory construction, “the plain language of a statute is the primary indicator of legislative intent,” and New Mexico courts will “give the words used in the statute their ordinary meaning unless the legislature indicates a different intent[.]” *High Ridge Hinkle Joint Venture v. City of Albuquerque*, 1998-NMSC-050, ¶ 5, 126 N.M. 413, 970 P.2d 599 (internal quotations and citation omitted). None of the terms used in the list provided in Section 53-4-23 can be interpreted as applicable to governmental entities. *See* NMSA 1978, § 12-2A-2 (“Unless a word or phrase is defined in the statute or rule being constructed, its meaning is determined by its context, the rules of grammar and common usage.”); *see also* NMSA 1978, § 12-2A-20(A)(1) (“the meaning of a word or phrase may be limited by the series of words or phrases of which it is a part”); *compare and contrast with Wolinsky v. New Mexico Corrections Dept.*, 2018-NMCA-071, ¶ 13, 429 P.3d 991 (holding that the term “person,” defined under applicable law and in relevant part as including “any legal [] entity,” included the State). As such, no *public* Community Anchor Institution or any other state, local, municipal, or tribal governmental entity may become a member of the Cooperative you envision.

Second, because a cooperative incorporated under the CAA may not be comprised of public entities, it necessarily follows that any state funds received by such Cooperative would need to satisfy the requirements of the New Mexico Anti-Donation Clause, Const. Art. 9, § 14.⁴ Therefore, at present,⁵ no New Mexico public funds may be provided to such Cooperative in the form of

² Redinetnm.org/about-us (last visited 05/24/2022).

³ The CAA refers to cooperatives as “associations.” *See* NMSA 1978, § 53-4-1(A) (defining “association” as “a group enterprise legally incorporated hereunder[.]”).

⁴ “Neither the state nor any county, school district or municipality, except as otherwise provided in this constitution, shall directly or indirectly lend or pledge its credit or make any donation to or in aid of any person, association or public or private corporation[.]”

⁵ Of course, this would change should New Mexico voters approve the amendment to the Anti-donation Clause contained in House Joint Resolution 1 (2022).

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grants or other funding in the absence of adequate consideration. As you accurately note in your letter, this limitation applies to *state* funds only, and does not apply to any federal funds that are merely “channeled” through a state entity.⁶ As you also correctly note, however, any funds appropriated to the Connect New Mexico Fund may only be distributed to governmental entities and entities created pursuant to a joint powers agreement, presumably because of the Anti-Donation Clause. *See* § 63-9K-6(B).

Please be advised that this opinion is a public record, not subject to the attorney client privilege. As such, we may provide copies to the public. If this office may be of further assistance, or if you have any questions regarding this opinion, please do not hesitate to contact our office.

Sincerely,



Olga M. Serafimova
Senior Civil Counsel

⁶ As to the legality of such Cooperative receiving federal funds, we are unable to provide an opinion, because each federal program has unique requirements that must be complied with.