

## LEGAL MEMORANDUM

**TO:** Anita Milanovich, General Counsel to the Governor

**From:** J.B. Lorenzo

**Date:** February 8, 2022

**Subject:** **Question** - Eligibility of municipalities, local governments for internet funding, as per Mon. Code Ann. §90-1-601, et seq., House Bill 632, Mon. Code Ann. § 2-17-603, Montana Constitution, Article XI, Part XI, Section 4, “*General Powers*” and Section 6 “*Self-Government Powers*” and Mon. Code Ann §7-6-2527, et al.

### SUMMARY

Pursuant to SB 297, codified as Mon. Code Ann. §90-1-601, et seq., proposed projects for funding can only be submitted by an eligible provider as defined in the code referenced herein as MCA, §90-1-601, et seq. Local governments may be eligible for funding, so long as the local government partners with an eligible provider who then applies. Local governments can only partner with a provider that would submit a proposal as a joint effort, pursuant to MCA, §90-1-601, et seq.

### ANALYSIS

The status of local governments as eligible provider is embedded in the codification of the legislation of Senate Bill 297, herein cited as MCA, §90-1-601, et seq. The definition of an eligible provider is set as follows in MCA, §90-1-601, et seq.

#### **Section 2. Definitions.**

..... (4) “*Eligible provider*” means an entity that:

.....(a) has authorization to do business in the state; and

.....(b) has demonstrated that it has the technical, financial, and managerial resources and experience to provide broadband service or other communications service to customers in the state. [emphasis added]

The definition of *eligible projects* is set as follows in MCA, §90-1-601, et seq., Sec 4.:

**Section 4. Eligible projects.** (1) An *eligible provider* may be awarded funding under this section for a project in a project area that, as of the date the proposal is filed, . . . “[emphasis added]

The definition of *eligible provider* is set as follows in MCA, §90-1-601, et seq. Sec 5.:

**Section 5. Eligible proposals.** “Eligible providers who submit responsive proposals: . . .

(2) . . . Priority will be given to the *eligible provider* who contributes the largest percentage of costs from its own funds. *Local* and tribal *governments, in partnership with an eligible provider* may provide funding for broadband infrastructure projects consistent with the provisions of [section 1 through 9] except that such funds may not be counted toward the minimum 20% matching amount from a provider.

(3) may only be a nongovernment entity with demonstrated experience in providing broadband service or other communications services to end-user residential or business customers in the state.

It is reasonable to assume that a local government despite being involved in providing broadband services in its community, being authorized to do business in the state (*See Montana Constitution, Article XI, Part XI, Section 4, “General Powers” and Section 6 “Self-Government Powers” and Mon. Code Ann §7-6-2527, et al., “Taxation- Public Governmental Purposes”*), and being able to provide services to its citizens and having the financial, technical, and managerial resources to deliver services to its residents, remains not eligible to apply for ARPA-21 sec. 602 broadband funding by virtue of MCA, §90-1-601, et seq.

As a side note, House Bill 632, in addressing the Communications Advisory Commission, mentions local governments as needing to submit “matching funds” for it to be awarded. *See* HB 632, Sec.9, (3).

**HB 632, “Section 8. Communications advisory commission.** (1) There is an American Rescue Plan communications advisory commission. . .”

**Section 9. Appropriation for communications projects.** (1) There are federal funds received pursuant to the American Rescue Plan Act of 2021, Public Law 117-2, appropriated to the office of budget and program planning and allocated to the department of commerce for the fiscal year beginning July 1, 2020, for communications projects. . .”

(2) Communication projects are those related to broadband infrastructure, including cell towers, or public safety, if eligible.

(3) For projects awarded with these funds, a *local government or private entity* must provide matching funds.” [emphasis added]

However, that mention in HB 623 does not qualify as a making local government eligible to apply for broadband funds. The anecdotal point of local governments ineligibility for ARPA-21 broadband funds as per MCA, §90-1-601, et seq., is underscored by the nuance of Mon. Code Ann

§2-17-603, titled as “*Government competition with private internet services providers prohibited -- exceptions.*” as follows:

- (1) Except as provided in subsection (2)(a) or (2)(b), an agency or political subdivision of the state may not directly or through another agency or political subdivision be an internet services provider.
- (2) (a) An agency or political subdivision *may act as an internet services provider* if:
  - (i) no private internet services provider is available within the jurisdiction served by the agency or political subdivision; or
  - (ii) the agency or political subdivision provided services prior to July 1, 2001.
- (b) An agency or political subdivision may act as an internet services provider when providing advanced services that are not otherwise available from a private internet services provider within the jurisdiction served by the agency or political subdivision....”
- (c) providing funding for broadband service infrastructure projects consistent with the provisions of Chapter 401, Laws of 2021. [emphasis added]

By the definition provided in MCA, §90-1-601, et seq., Section 2. Definitions. . . . (4) “*Eligible provider*” means an “entity”. Local governments are not termed as an “entity” but rather a public governmental body and is clearly not eligible. A local government is not an “entity” deemed eligible under MCA, §90-1-601, et seq. An “entity” is distinguishable from what is termed a “local government”. Furthermore, a local government providing internet services to its constituents, remains not eligible for ARPA-21 Sec. 602 broadband funds and can only benefit from those funds if it partners with an eligible provider to submit an eligible project pursuant to MCA, §90-1-601, et seq.

## CONCLUSION

The inclusion of Mon. Code Ann 2-17-603, §90-1-601, et seq., HB 632, Mon. Code Ann §7-6-2527, et al., and the Montana Constitution, Article XI, Part XI, Sections 4 and 6, in the analysis does not avail local governments as being eligible to apply for ARPA-21 Sec. 602 broadband funds pursuant to SB 297, codified as MCA, §90-1-601, et seq. The mere inference of “matching” funds in HB 632 also does not make local governments eligible for ARPA-21 Sec. 602 broadband funds. Local governments can only benefit from ARPA-21 Sec. 602 broadband funds so long as they partner with a broadband provider as defined by MCA, §90-1-601, et seq.

Finally, in accord with MCA, §90-1-601, et seq. Section 5. Eligible proposals. “Eligible providers who submit responsive proposals: . . . (3) may only be a nongovernment entity . . .”