

Act 438 of the 1989 Regular Session.

Act 438

SB424

By: Senator Hopkins

"AN ACT TO AMEND ARKANSAS CODE TITLE 23, CHAPTER 17, SUBCHAPTER 2 CONCERNING INDEMNIFICATION OF DIRECTORS OF RURAL TELEPHONE COOPERATIVES AND TO ESTABLISH GENERAL STANDARDS OF CONDUCT FOR DIRECTORS; TO ALLOW THE BOARD OF DIRECTORS TO TAKE ACTION BY MEANS OTHER THAN A MEETING OF DIRECTORS; TO PROVIDE STANDARDS CONCERNING CONFLICT OF INTEREST TRANSACTIONS INVOLVING DIRECTORS; AND FOR OTHER PURPOSES."

BE IT ENACTED BY THE GENERAL ASSEMBLY OF THE STATE OF ARKANSAS:

SECTION 1. Arkansas Code Title 23, Chapter 17, Subchapter 2 is hereby amended by adding sections to read as follows:

"23-17-238. (A) A corporation shall have power to indemnify any person who was or is a party or is threatened to be made a party to any threatened, pending, or completed action, suit, or proceeding, whether civil, criminal, administrative, or investigative (other than an action by or in the right of the corporation) by reason of the fact that he is or was a director, officer, employee, or agent of the corporation or is or was serving at the request of the corporation as a director, officer, employee, or agent of another corporation, partnership, joint venture, trust, or other enterprise, against expenses (including attorneys' fees), judgments, fines, and amounts paid in settlement actually and reasonably incurred by him in connection with such action, suit, or proceeding if he acted in good faith and in a manner he reasonably believed to be in or not opposed to the best interests of the corporation, and, with respect to any criminal action or proceeding, had no reasonable cause to believe his conduct was unlawful. The termination of any action, suit, or proceeding by judgment, order, settlement, conviction, or upon a plea of nolo contendere or its equivalent, shall not, of itself, create a presumption that the person did not act in good faith and in a manner which he reasonably believed to be in or not opposed to the best interest of the corporation, and, with respect to any criminal action or proceeding, had reasonable cause to believe that his conduct was unlawful.

(B) A corporation shall have power to indemnify any person who was or is a party or is threatened to be made a party to any threatened, pending, or completed action or suit by or in the right of the corporation to procure a judgment in its favor by reason of the fact that he is or was a director, officer, employee, or agent of the corporation, or is or was serving at the request of the corporation as a director, officer, employee, or agent of another corporation, partnership, joint venture, trust, or other enterprise against expenses (including attorneys' fees) actually and reasonably incurred by him in connection with the defense or settlement of such action or suit if he acted in good faith and in a manner he reasonably believed to be in or not opposed to the best interests of the corporation and except that no indemnification shall be made in respect of any claim, issue, or matter as to which such person shall have been adjudged to be liable to the corporation unless and only to the extent that the court of chancery or the court in which such action or suit was brought shall determine upon application that, despite the adjudication of liability but in view of all the circumstances of the case, such person is fairly and reasonably entitled to indemnity for such

expenses which the court of chancery or such other court shall deem proper.

(C) To the extent that a director, officer, employee, or agent of a corporation has been successful on the merits or otherwise in defense of any action, suit, or proceeding referred to in (A) and (B) of this subsection, or in defense of any claim, issue, or matter therein, he shall be indemnified against expenses (including attorneys' fees) actually and reasonably incurred by him in connection therewith.

(D) Any indemnification under (A) and (B) of this subsection (unless ordered by a court) shall be made by the corporation only as authorized in the specific case upon a determination that indemnification of the director, officer, employee, or agent is proper in the circumstances because he has met the applicable standard of conduct set forth in (A) and (B) of this subsection. Such determination shall be made:

(i) By the board of directors by a majority vote of a quorum consisting of directors who were not parties to such action, suit, or proceeding; or

(ii) If such a quorum is not obtainable, or, even if obtainable a quorum of disinterested directors so directs, by independent legal counsel in a written opinion; or

(iii) By the members.

(E) Expenses incurred by an officer or director in defending a civil or criminal action suit or proceeding may be paid by the corporation in advance of final disposition of such action, suit, or proceeding upon receipt of an undertaking by or on behalf of such director or officer to repay such amount if it shall ultimately be determined that he is not entitled to be indemnified by the corporation as authorized in this section. Such expenses incurred by other employees and agents may be so paid upon such terms and conditions, if any, as the board of directors deems appropriate.

(F) The indemnification and advancement of expenses provided by or granted pursuant to the other subsections of this section shall not be deemed exclusive of any other rights to which those seeking indemnification or advancement of expenses may be entitled under any bylaw, agreement, vote of members or disinterested directors, or otherwise, both as to action in his official capacity and as to action in another capacity while holding such office.

(G) A corporation shall have power to purchase and maintain insurance on behalf of any person who is or was a director, officer, employee, or agent of the corporation, or is or was serving at the request of the corporation as a director, officer, employee, or agent of another corporation, partnership, joint venture, trust, or other enterprise against any liability asserted against him and incurred by him in any such capacity, or arising out of his status as such, whether or not the corporation would have the power to indemnify him against such liability under the provisions of this section.

(H) For purposes of this section, references to "the corporation" shall include, in addition to the resulting corporation, and constituent corporation (including any constituent of a constituent) absorbed in a consolidation or merger which, if its separate existence had continued, would have had power and authority to indemnify its directors, officers, and employees or agents, so that any person who is or was a director, officer, employee, or agent of such constituent corporation, or is or was serving at the request of such constituent corporation as a director, officer, employee, or agent of another corporation, partnership, joint venture, trust, or other enterprise, shall stand in the same position under the provisions of this section with respect to the resulting or surviving corporation as he would have with respect to such constituent corporation if its separate existence had continued.

(I) For purposes of this section, references to "other enterprises" shall include employee benefit plans; references to "fines" shall include any

excise taxes assessed on a person with respect to an employee benefit plan; and references to "serving at the request of the corporation" shall include any service as a director, officer, employee, or agent of the corporation which imposes duties on, or involves services by, such director, officer, employee, or agent with respect to an employee benefit plan, its participants, or beneficiaries; and a person who acted in good faith and in a manner he reasonably believed to be in the interest of the participants and beneficiaries of an employee benefit plan shall be deemed to have acted in a manner "not opposed to the best interests of the corporation" as referred to in this section.

(J) The indemnification and advancement of expenses provided by, or granted pursuant to, this section shall, unless otherwise provided when authorized or ratified, continue as to a person who has ceased to be a director, officer, employee, or agent and shall inure to the benefit of the heirs, executors and administrators of such person.

23-17-239. (a) A director shall discharge his duties as a director, including his duties as a member of a committee:

- (1) in good faith;
- (2) with the care an ordinarily prudent person in a like position would exercise under similar circumstances; and
- (3) in a manner he reasonably believes to be in the best interests of the corporation.

(b) In discharging his duties a director is entitled to rely on information, opinions, reports or statements, including financial statements and other financial data, if prepared or presented by:

- (1) one (1) or more officers or employees of the corporation whom the director reasonably believes to be reliable and competent in the matters presented;
- (2) legal counsel, public accountants, engineers, or other persons as to matters the director reasonably believes are within the person's professional or expert competence; or
- (3) a committee of the Board of Directors of which he is not a member if the director reasonably believes the committee merits confidence.

(c) A director is not acting in good faith if he has knowledge concerning the matter in question that makes reliance otherwise permitted by section (b) of this section unwarranted.

(d) Unless the articles of incorporation or bylaws provide otherwise, action required or permitted by this chapter to be taken at a board of directors' meeting may be taken without a meeting if the action is taken by all members of the board. The action must be evidenced by one (1) or more written consents describing the action taken, signed by each director, and included in the minutes or filed with the corporate records reflecting the action taken.

(e) Action taken under this section is effective when the last director signs the consent, unless the consent specifies a different effective date. A consent signed under this section has the effect of a meeting vote and may be described as such in any document.

(f) (1) A conflict of interest transaction is a transaction with the corporation in which a director of the corporation has direct or indirect interest. A conflict of interest transaction is not voidable by the corporation solely because of the director's interest in the transaction if any one of the following is true:

- (A) the material facts of the transaction and the director's interest were disclosed or known to the board of directors or a committee of the board of directors and the board of directors or committee authorized, approved, or ratified the transaction; or

(B) the material facts of the transaction and the director's interest were disclosed or known to the members entitled to vote and they authorized, approved, or ratified the transaction; or

(C) the transaction was fair to the corporation.

(2) For purposes of this section, a director of the corporation has an indirect interest in a transaction and it should be considered by the board of directors of the corporation if:

(A) another entity in which he has a material financial interest of in which he is a general partner is a party to the transaction; or

(B) another entity of which he is a director, officer, or trustee is a party to the transaction.

(3) For purposes of this (1)(A) of this subsection, a conflict of interest transaction is authorized, approved, or ratified if it receives the affirmative vote of a majority of the directors on the board of directors (or on the committee) who have no direct or indirect interest in the transaction, but a transaction may not be authorized, approved, or ratified under this section by a single director. If a majority of the directors who have no direct or indirect interest in the transaction vote to authorize, approve, or ratify the transaction, a quorum is present for the purpose of taking action under this subsection. The presence of, or a vote cast by, a director with a direct or indirect interest in the transaction does not affect the validity of any action taken under (1)(A) of this subsection if the transaction is otherwise authorized, approved, or ratified as provided in that subsection.

(4) For purposes of (1)(B) of this subsection, a conflict of interest transaction is authorized, approved, or ratified if it receives the vote of a majority of the members entitled to vote under this subsection. Proxies voted under the control of a director who has a direct or indirect interest in the transaction, and proxies voted under the control of an entity described in (2)(A) of this subsection, may not be counted in a vote of members to determine whether to authorize, approve, or ratify a conflict of interest transaction under (1)(B) of this subsection. The vote of those members, however, is counted in determining whether the transaction is approved under other sections of this chapter. A majority of the members, whether or not present, that are entitled to vote on the transaction under this subsection constitutes a quorum for the purpose of taking action under this section."

SECTION 2. All provisions of this act of a general and permanent nature are amendatory to the Arkansas Code of 1987 Annotated and the Arkansas Code Revision Commission shall incorporate the same in the Code.

SECTION 3. All laws and parts of laws in conflict with this act are hereby repealed.

SECTION 4. EMERGENCY. It is hereby found and determined by the General Assembly that the Arkansas Business Corporation Act, enacted in 1987 establishes general standards for directors, defines director conflict of interest and permits directors to conduct meetings through the use of any means of communication; and that the Arkansas Business Corporation Act does not apply to a corporation organized for the purpose of engaging in telephone service; and that the adoption of standards for directors, the defining of director conflict of interest and the authority for directors to conduct meetings through the use of any means of communication would be in the best interest of the membership of a corporation organized for the purpose of engaging in telephone service; therefore, an emergency is hereby declared to exist and this act, being necessary for the immediate preservation of the public peace, health, and safety shall be in full force and effect from and

after its passage and approval.

APPROVED: March 9, 1989

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