

Stricken language would be deleted from and underlined language would be added to law as it existed prior to the 82nd General Assembly.

State of Arkansas

As Engrossed: S2/17/99 S2/22/99

82nd General Assembly

A Bill

Regular Session, 1999

SENATE BILL 419

By: Senator Hopkins

For An Act To Be Entitled

"AN ACT TO CLARIFY THE USE OF THE TERMS 'COOPERATIVE' AND 'CORPORATION' IN CERTAIN PARTS OF THE RURAL TELECOMMUNICATIONS COOPERATIVE ACT; AND FOR OTHER PURPOSES. "

Subtitle

"AN ACT TO CLARIFY THE USE OF THE TERMS 'COOPERATIVE' AND 'CORPORATION' IN CERTAIN PARTS OF THE RURAL TELECOMMUNICATIONS COOPERATIVE ACT. "

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

SECTION 1. Arkansas Code 23-17-238 is amended to read as follows:

"23-17-238. Indemnification of directors, officers, employees, or agents - Insurance.

(a)(1) A ~~corporation~~ cooperative 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~~ cooperative, by reason of the fact that he is or was a director, officer, employee, or agent of the ~~corporation~~ cooperative or is or was serving at the request of the ~~corporation~~ cooperative as a director, officer, employee, or agent of another corporation, partnership, joint venture, trust, or other enterprise, against judgments, fines, expenses, including attorneys' fees, and amounts paid in settlement actually and reasonably incurred by him in connection with such action, suit, or

1 proceeding, if he acted in good faith and in a manner he reasonably believed
2 to be in, or not opposed to, the best interests of the ~~corporation~~ cooperative
3 and, with respect to any criminal action or proceeding, had no reasonable
4 cause to believe his conduct was unlawful.

5 (2) The termination of any action, suit, or proceeding by
6 judgment, order, settlement, conviction, or upon a plea of nolo contendere or
7 its equivalent, shall not, of itself, create a presumption that the person did
8 not act in good faith and in a manner which he reasonably believed to be in or
9 not opposed to the best interest of the ~~corporation~~ cooperative and, with
10 respect to any criminal action or proceeding, had reasonable cause to believe
11 that his conduct was unlawful.

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

32 (c) To the extent that a director, officer, employee, or agent of a
33 ~~corporation~~ cooperative has been successful on the merits or otherwise in
34 defense of any action, suit, or proceeding referred to in subsections (a) and
35 (b) of this section, or in defense of any claim, issue, or matter therein, he
36 shall be indemnified against expenses, including attorneys' fees, actually and

1 reasonably incurred by him in connection therewith.

2 (d) Any indemnification under subsections (a) and (b) of this section,
3 unless ordered by a court, shall be made by the ~~corporation~~ cooperative only
4 as authorized in the specific case upon a determination that indemnification
5 of the director, officer, employee, or agent is proper in the circumstances
6 because he has met the applicable standard of conduct set forth in subsections
7 (a) and (b) of this section. Such determination shall be made:

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

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

14 (3) By the members.

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

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

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

36 (h) A ~~corporation~~ cooperative shall have power to purchase and maintain

1 insurance on behalf of any person who is or was a director, officer, employee,
2 or agent of the ~~corporation~~ cooperative, or is or was serving at the request
3 of the ~~corporation~~ cooperative as a director, officer, employee, or agent of
4 another corporation, partnership, joint venture, trust, or other enterprise,
5 against any liability asserted against him and incurred by him in any such
6 capacity, or arising out of his status as such, whether or not the ~~corporation~~
7 cooperative would have the power to indemnify him against such liability under
8 the provisions of this section.

9 (i)(1) For purposes of this section, references to:

10 (A) 'The ~~corporation~~ cooperative' shall include, in
11 addition to the resulting ~~corporation~~ cooperative, and constituent
12 corporation, including any constituent of a constituent, absorbed in a
13 consolidation or merger which, if its separate existence had continued, would
14 have had power and authority to indemnify its directors, officers, and
15 employees or agents, so that any person who is or was a director, officer,
16 employee, or agent of such constituent corporation, or is or was serving at
17 the request of such constituent corporation as a director, officer, employee,
18 or agent of another corporation, partnership, joint venture, trust, or other
19 enterprise, shall stand in the same position under the provisions of this
20 section with respect to the resulting or surviving ~~corporation~~ cooperative as
21 he would have with respect to such constituent corporation if its separate
22 existence had continued;

23 (B) 'Other enterprises' shall include employee benefit
24 plans;

25 (C) 'Fines' shall include any excise taxes assessed on a
26 person with respect to an employee benefit plan; and

27 (D) 'Serving at the request of the ~~corporation~~ cooperative'
28 shall include any service as a director, officer, employee, or agent of the
29 ~~corporation~~ cooperative which imposes duties on, or involves services by, such
30 director, officer, employee, or agent with respect to an employee benefit
31 plan, its participants, or beneficiaries.

32 (2) A person who acted in good faith and in a manner he
33 reasonably believed to be in the interest of the participants and
34 beneficiaries of an employee benefit plan shall be deemed to have acted in a
35 manner 'not opposed to the best interests of the ~~corporation~~ cooperative' as
36 referred to in this section."

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2 SECTION 2. Arkansas Code 23-17-239 is amended to read as follows:

3 "23-17-239. Standards of conduct for directors - Actions taken without
4 board meeting - Conflicts of interest.

5 (a) A director shall discharge his duties as a director, including his
6 duties as a member of a committee:

7 (1) In good faith;

8 (2) With the care an ordinarily prudent person in a like position
9 would exercise under similar circumstances; and

10 (3) In a manner he reasonably believes to be in the best
11 interests of the ~~corporation~~ cooperative.

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

15 (1) One (1) or more officers or employees of the ~~corporation~~
16 cooperative whom the director reasonably believes to be reliable and competent
17 in the matters presented;

18 (2) Legal counsel, public accountants, engineers, or other
19 persons as to matters the director reasonably believes are within the person's
20 professional or expert competence; or

21 (3) A committee of the board of directors of which he is not a
22 member, if the director reasonably believes the committee merits confidence.

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

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

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

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

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

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

13 (C) The transaction was fair to the ~~corporation~~
14 cooperative.

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

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

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

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

35 (4) For purposes of subdivision (1)(B) of this subsection, a
36 conflict of interest transaction is authorized, approved, or ratified if it

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

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13 SECTION 3. All provisions of this act of a general and permanent nature
14 are amendatory to the Arkansas Code of 1987 Annotated and the Arkansas Code
15 Revision Commission shall incorporate the same in the Code.

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17 SECTION 4. If any provision of this act or the application thereof to
18 any person or circumstance is held invalid, such invalidity shall not affect
19 other provisions or applications of the act which can be given effect without
20 the invalid provision or application, and to this end the provisions of this
21 act are declared to be severable.

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23 SECTION 5. All laws and parts of laws in conflict with this act are
24 hereby repealed.

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27 /s/ Hopkins
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