

No. 1987-29

## AN ACT

HB 365

Amending the act of June 21, 1937 (P.L.1969, No.389), entitled "An act relating to nonprofit cooperative corporations organized to engage in rural electrification, providing for the organization, consolidation and dissolution of such corporations; prescribing the qualification for membership therein; conferring certain rights, powers, duties and immunities upon them and their officers and members; prescribing the conditions on which such corporations may exercise their powers; providing for the inclusion of certain existing cooperative or nonprofit corporations and associations within the provisions of this act; conferring powers, and imposing duties on certain State departments, commissions and officers; fixing fees; conferring the right of eminent domain; prohibiting the use of certain terms in the corporate names of other corporations; exempting such corporations from excise taxes; imposing on them a license fee; and exempting such corporations from the jurisdiction of the Pennsylvania Public Utility Commission, and from the provisions of the Securities Act," further providing for directors' liability and indemnification.

The General Assembly of the Commonwealth of Pennsylvania hereby enacts as follows:

Section 1. The act of June 21, 1937 (P.L.1969, No.389), known as the Electric Cooperative Corporation Act, is amended by adding sections to read:

**Section 23.1. Directors' Liability.—(a) Standard of care and justifiable reliance.—**

**(1) Director as fiduciary.—A director of a corporation organized under this act shall stand in a fiduciary relation to the corporation and shall perform his duties as a director, including his duties as a member of any committee of the board upon which he may serve, in good faith, in a manner he reasonably believes to be in the best interests of the corporation and with such care, including reasonable inquiry, skill and diligence, as a person of ordinary prudence would use under similar circumstances. In performing his duties, a director shall be entitled to rely in good faith on information, opinions, reports or statements, including financial statements and other financial data, in each case prepared or presented by any of the following:**

**(i) One or more officers or employes of the corporation whom the director reasonably believes to be reliable and competent in the matters presented.**

**(ii) Counsel, public accountants or other persons as to matters which the director reasonably believes to be within the professional or expert competence of such person.**

**(iii) A committee of the board upon which he does not serve, duly designated in accordance with law, as to matters within its designated authority, which committee the director reasonably believes to merit confidence.**

**A director shall not be considered to be acting in good faith if he has knowledge concerning the matter in question that would cause his reliance to be unwarranted.**

(2) *Consideration of factors.*—*In discharging the duties of their respective positions, the board of directors, committees of the board and individual directors may, in considering the best interests of the corporation, consider the effects of any action upon employes, upon suppliers and customers of the corporation and upon communities in which offices or other establishments of the corporation are located, and all other pertinent factors. The consideration of those factors shall not constitute a violation of subsection (a)(~~2~~).*

(3) *Presumption.*—*Absent breach of fiduciary duty, lack of good faith or self-dealing, actions taken as a director or any failure to take any action shall be presumed to be in the best interests of the corporation.*

(b) *Personal liability of directors.*—

(1) *General rule.*—*Whenever the bylaws of a corporation, ratified by the member-owners, so provide, a director of a corporation shall not be personally liable for monetary damages as such for any action taken, or any failure to take any action unless:*

(i) *the director has breached or failed to perform the duties of his office under subsection (a); and*

(ii) *the breach or failure to perform constitutes self-dealing, willful misconduct or recklessness.*

(2) *Exception.*—*The provisions of this subsection shall not apply to:*

(i) *the responsibility or liability of a director pursuant to any criminal statute; or*

(ii) *the liability of a director for the payment of taxes pursuant to local, State or Federal law.*

*Section 23.2. Indemnification.*—(a) *Third party action.*—*Unless otherwise restricted in its bylaws, 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 representative of the corporation, or is or was serving at the request of the corporation as a representative of another corporation, partnership, joint venture, trust or other enterprise, against expenses, including attorney 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 or 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 interests of the corporation, and, with respect to any criminal action or proceeding, had reasonable cause to believe that his conduct was unlawful.*

(b) *Derivative actions.*—*Unless otherwise restricted by its bylaws, 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 right of the corporation to procure a judgment in its favor by reason of the fact that he is or was a representative of the corporation, or is or was serving at the request of the corporation as a representative of another corporation, partnership, joint venture, trust or other enterprise against expenses, including attorney 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 for negligence or misconduct in the performance of his duty to the corporation unless and only to the extent that the court of common pleas of the county in which the registered office of the corporation is located 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 common pleas or such other court shall deem proper.*

*(c) Mandatory indemnification.—Notwithstanding any contrary provision of its articles or bylaws, to the extent that a representative of a corporation has been successful on the merits or otherwise in defense of any action, suit or proceeding referred to in subsection (a) or (b) or in defense of any claim, issue or matter therein, he shall be indemnified against expenses, including attorney fees, actually and reasonably incurred by him in connection therewith.*

*(d) Nonexclusivity and supplementary coverage.—*

*(1) General rule.—The provisions of subsections (a), (b) and (c), or any other provisions of law providing for indemnification or advancement of expenses applicable to any corporation organized under this act, shall not be deemed exclusive of any other rights to which a person seeking indemnification or advancement of expenses may be entitled under any bylaw, agreement, vote of members or directors or otherwise, both as to action in his official capacity and as to action in another capacity while holding that office. Any corporation may create a fund of any nature, which may, but need not be, under the control of a trustee, or otherwise secure or insure in any manner its indemnification obligations, whether arising under or pursuant to this section or otherwise.*

*(2) When indemnification is not to be made.—Indemnification pursuant to subsection (d)(1) shall not be made in any case where the act or failure to act giving rise to the claim for indemnification is determined by a court to have constituted willful misconduct or recklessness.*

*(3) Grounds.—Indemnification pursuant to subsection (d)(1) under any bylaw, agreement, vote of members or directors or otherwise may be granted for any action taken or any failure to take any action and may be made whether or not the corporation would have the power to indemnify the person under any other provisions of law except as provided in this section and whether or not the indemnified liability arises or arose from any threat-*

*ened, pending or completed action by or in the right of the corporation. Such indemnification is declared to be consistent with the public policy of this Commonwealth.*

*(e) Procedure for effecting indemnification.—Unless ordered by a court, any indemnification under subsection (a) or (b) shall be made by the corporation only as authorized in the specific case upon a determination that indemnification of the representative is proper in the circumstances because he has met the applicable standard of conduct set forth in such section. Such determination shall be made:*

*(1) 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*

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

*(3) by such other body as may be provided in the bylaws; or*

*(4) by the members.*

*(f) Payment of expenses.—Expenses incurred by an officer, director, employe or agent in defending a civil or criminal action, suit or proceeding may be paid by the corporation in advance of the final disposition of such action, suit or proceeding upon receipt of an undertaking by or on behalf of such person to repay such amount if it shall ultimately be determined that he is not entitled to be indemnified by the corporation.*

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

*(h) Power to purchase insurance.—Unless otherwise restricted in its bylaws, a corporation shall have power to purchase and maintain insurance on behalf of any person who is or was a representative of the corporation, or is or was serving at the request of the corporation as a representative 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. Such insurance is declared to be consistent with the public policy of this Commonwealth.*

*(i) Application to surviving or new corporations.—For the purposes of this section, references to “the corporation” include all constituent corporations absorbed in a consolidation, merger or division, as well as the surviving or new corporations surviving or resulting therefrom, so that any person who is or was a representative 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 surviving or new corporation as he would if he had served the surviving or new corporation in the same capacity.*

Section 2. This act shall take effect immediately.

APPROVED—The 9th day of July, A. D. 1987.

ROBERT P. CASEY