

1 **UNFAIR PUBLIC COMPETITION ACT**

2 1999 GENERAL SESSION

3 STATE OF UTAH

4 **Sponsor: Howard A. Stephenson**

5 AN ACT RELATING TO STATE AFFAIRS IN GENERAL; CREATING THE PRIVATE
6 ENTERPRISE REVIEW COMMISSION; SETTING FORTH THE INTENT OF THE
7 LEGISLATURE WITH RESPECT TO PUBLIC-PRIVATE COMPETITION; PROHIBITING
8 CERTAIN GOVERNMENT COMPETITION WITH PRIVATE ENTERPRISE; PROVIDING
9 EXCEPTIONS; AUTHORIZING THE COMMISSION TO STUDY PRIVATIZATION OF
10 GOVERNMENT ACTIVITIES AND PROPOSALS FOR ADDITIONAL PROHIBITIONS OF
11 GOVERNMENT COMPETITION; PROVIDING FOR A COMPLAINT PROCESS AND
12 REVIEW BY THE COMMISSION; AUTHORIZING CIVIL ACTIONS TO ENFORCE
13 COMMISSION RULINGS; AND REPEALING THE PRIVATIZATION POLICY BOARD.

14 This act affects sections of Utah Code Annotated 1953 as follows:

15 ENACTS:

16 **63-97-101**, Utah Code Annotated 1953

17 **63-97-102**, Utah Code Annotated 1953

18 **63-97-103**, Utah Code Annotated 1953

19 **63-97-104**, Utah Code Annotated 1953

20 **63-97-105**, Utah Code Annotated 1953

21 **63-97-106**, Utah Code Annotated 1953

22 **63-97-107**, Utah Code Annotated 1953

23 REPEALS:

24 **63-55a-1**, as enacted by Chapter 221, Laws of Utah 1989

25 **63-55a-2**, as last amended by Chapters 18, 194 and 243, Laws of Utah 1996

26 **63-55a-3**, as last amended by Chapter 18, Laws of Utah 1996

27 *Be it enacted by the Legislature of the state of Utah:*

28 Section 1. Section **63-97-101** is enacted to read:

29 **CHAPTER 97. UNFAIR PUBLIC COMPETITION ACT**

30 **63-97-101. Title.**

31 This chapter is known as the "Unfair Public Competition Act."

32 Section 2. Section **63-97-102** is enacted to read:

33 **63-97-102. Definitions.**

34 As used in this chapter:

35 (1) "Commercial activity" means performing services or providing goods which can
36 normally be obtained from private enterprise.

37 (2) "Commission" means the Private Enterprise Review Commission created in Section
38 63-97-103.

39 (3) "Competitive impact statement" means a cost analysis using uniform accounting
40 standards accepted by private enterprise to determine the total cost of the commercial activity. The
41 cost analysis shall include an analysis of the impact the commercial activity has on state and local
42 tax revenues.

43 (4) "Government agency" or "agency" means a department, office, division, authority,
44 commission, institution, board, or other agency of government, or any other governmental unit or
45 political subdivision existing in the state or any other creation of the state or political subdivision
46 of the state, regardless of whether funds are appropriated to such agency.

47 (5) "Institution of higher education" or "institution" means a college, university, or
48 community college supported by the state.

49 (6) "Private enterprise" means an individual, firm, partnership, joint venture, corporation,
50 association, or any other legal entity engaging in the manufacturing, processing, sale, offering for
51 sale, rental, leasing, delivery, dispensing, distributing, or advertising of goods or services for profit.

52 (7) "Uniform accounting standards" means an accounting method which allows
53 government agencies and institutions of higher education to identify the true and total cost of
54 supplying goods and services in the same manner as private enterprise would identify true and total
55 costs, including the following:

56 (a) labor expenses, including direct wage and salary costs, training costs, overtime, and
57 supervisory overhead;

58 (b) total employee fringe benefits and other personnel expenses;

59 (c) operating costs including vehicle maintenance and repair, marketing, advertising and
60 other sales expenses, office expenses, billing, and insurance expenses;

61 (d) real estate and equipment costs, debt service costs, and a proportionate amount of other
62 agency overhead and capital expenses including vehicle depreciation and depreciation of other
63 fixed assets such as buildings and equipment;

64 (e) contract management costs;

65 (f) the imputed tax impact of the activity if the entity were required to pay federal, state,
66 and local taxes; and

67 (g) any other cost particular to the business or industry supplying the goods or services.

68 Section 3. Section **63-97-103** is enacted to read:

69 **63-97-103. Private Enterprise Review Commission -- Members -- Terms -- Duties.**

70 (1) There is created the Private Enterprise Review Commission composed of nine
71 members.

72 (2) The governor shall appoint:

73 (a) four owners or officers of businesses located in the state;

74 (b) one administrative officer or executive director of a government agency;

75 (c) one representative from an institution of higher education;

76 (d) one representative from a political subdivision of the state; and

77 (e) two members from the general public.

78 (3) (a) Except as required by Subsection (3)(b), commission members shall serve four-year
79 terms.

80 (b) Notwithstanding the requirements of Subsection (3)(a), the governor shall, at the time
81 of appointment or reappointment, adjust the length of terms to ensure that the terms of the
82 commission members are staggered so that approximately half of the commission is appointed
83 every two years.

84 (4) (a) Each commission member shall hold office until his successor has been appointed
85 and qualified.

86 (b) When a vacancy occurs in the membership for any reason, the replacement shall be
87 appointed for the unexpired term.

88 (c) Five members of the commission are a quorum for the purpose of organizing the
89 commission and conducting the business of the commission.

90 (d) The vote of a majority of members voting when a quorum is present is necessary for
91 the commission to take action.

92 (5) (a) At the initial meeting of the commission, the commission shall select one of their
93 number to serve as chair of the commission.

94 (b) The commission shall meet at least quarterly and at the call of the chair.

95 (6) (a) (i) Members who are not government employees shall receive no compensation or
96 benefits for their services, but may receive per diem and expenses incurred in the performance of
97 the member's official duties at the rates established by the Division of Finance under Sections
98 63A-3-106 and 63A-3-107.

99 (ii) Members may decline to receive per diem and expenses for their service.

100 (b) (i) State government officer and employee members who do not receive salary, per
101 diem, or expenses from their agency for their service may receive per diem and expenses incurred
102 in the performance of their official duties from the commission at the rates established by the
103 Division of Finance under Sections 63A-3-106 and 63A-3-107.

104 (ii) State government officer and employee members may decline to receive per diem and
105 expenses for their service.

106 (7) The commission shall:

107 (a) make rules in accordance with Title 63, Chapter 46a, Utah Administrative Rulemaking
108 Act, to:

109 (i) implement the provisions of this chapter;

110 (ii) promptly hear and resolve complaints lodged under Section 63-97-105; and

111 (iii) to establish privatization standards, procedures, and requirements;

112 (b) review whether or not certain services performed by existing government agencies and
113 institutions of higher education could be privatized to provide the same types and quality of
114 services that would result in cost savings;

115 (c) hold public hearings on government competition with private enterprise, including
116 proposals to prohibit commercial activities by government agencies which compete with private
117 enterprise;

118 (d) maintain communication with and access information from, other entities promoting
119 privatization;

120 (e) prepare an annual report that contains:

- 121 (i) information about the commission's activities;
122 (ii) action taken by the commission with respect to complaints filed under Section
123 63-97-105;
124 (iii) recommendations on privatizing government services; and
125 (iv) recommendations regarding proposed legislative amendments to Section 63-97-104,
126 including additional commercial activities to be prohibited or general standards and exemptions
127 relating to the prohibition of government competition with private enterprise;
128 (f) submit the annual report to the Legislature and the governor;
129 (g) file copies of its recommendations for privatization with:
130 (i) the relevant agency head;
131 (ii) the governor's office; and
132 (iii) the Office of Legislative Fiscal Analyst for submission to the relevant legislative
133 appropriation subcommittee; and
134 (h) file copies of its proposed legislative amendments to Section 63-97-104 with the Office
135 of Legislative Research and General Counsel.
136 (8) (a) The commission may appoint advisory groups to conduct studies, research,
137 analyses, and make reports and recommendations with respect to subjects or matters within the
138 jurisdiction of the commission.
139 (b) At least one member of the commission shall serve on each advisory group.
140 (9) This chapter does not preclude any agency from privatizing any service or function
141 independently of the commission if:
142 (a) there is no statutory mandate requiring the agency to provide the service or perform the
143 function that is to be privatized; and
144 (b) any statutory provisions relating to or referencing the service or function to be
145 privatized are repealed or amended to be consistent with the privatization of the service or
146 function.
147 Section 4. Section **63-97-104** is enacted to read:
148 **63-97-104. General policy statement regarding public-private competition --**
149 **Prohibition of certain government competition with private enterprise -- Exceptions.**
150 (1) It is the general policy of the state that a government agency or institution of higher
151 education should not begin or maintain any commercial activity to provide goods or services for

152 the use of other government agencies or institutions of higher education or for public use if such
 153 goods or services can be procured from private enterprise through ordinary business channels.

154 (2) A government agency or institution of higher education, except as provided in
 155 Subsection (3), shall not engage in any of the following commercial activities:

156 § [~~(a)~~ ~~the operation of a retail pharmacy;~~]

157 [~~(b)~~] (a) § the operation of an environmental testing laboratory § EXCEPT AS PROVIDED

157a IN SUBSECTION (3) (c) § ; or

158 § [~~(c)~~] (b) § engineering consulting.

159 (3) (a) A government agency or institution of higher education is authorized to perform
 160 or provide a commercial activity listed in Subsection (2) if:

161 (i) the activity is specifically authorized by statute;

162 (ii) no private enterprise source is capable of providing the needed goods or services;

163 (iii) use of a private enterprise source would cause unacceptable delay or disruption of an
 164 essential program; or

165 (iv) the government agency or institution of higher education can provide or is providing
 166 goods or services to government agencies or institutions of higher education on a continuing basis
 167 at a lower total cost than if the goods or services were obtained from private enterprise as
 168 determined by cost comparisons as outlined in a competitive impact statement.

169 (b) An institution of higher education is authorized to perform or provide a commercial
 170 activity listed in Subsection (2) when the commercial activity is a recognized and integral part of
 171 a teaching, educational, or research program leading to a degree or certificate that supports the
 172 mission of the institution.

173 (c) Notwithstanding the provisions of Subsection (2), a government agency is authorized
 174 to provide environmental testing laboratory services § : (i) § to the Department of Environmental
 174a Quality § ; OR (ii) IN CONNECTION WITH A DRINKING WATER SUPPLY § .

175 (4) If a government agency or institution of higher education is authorized under the
 176 exception listed in Subsection (3)(a)(iv) to engage in an otherwise prohibited commercial activity,
 177 the government agency or institution of higher education shall:

178 (a) prepare a competitive impact statement relating to the commercial activity and submit
 179 the competitive impact statement to the commission;

180 (b) set a fee or charge a price for that commercial activity which shall include the true and
 181 total cost related to engaging in the activity by the government agency or institution of higher
 182 education, including:

183 (i) the fair market value of the commercial activity; and
184 (ii) the direct and indirect costs incurred in engaging in the commercial activity determined
185 by use of uniform accounting standards; and

186 (c) prepare a detailed request for proposal which will be widely disseminated within
187 segments of private enterprise which normally engage in the commercial activity in order to obtain
188 firm bids or proposals for the activity requested.

189 (5) Government agencies and institutions of higher education shall adopt and implement
190 procedures to monitor their own compliance with this chapter.

191 (6) Any health sciences center or medical center of any institution of higher education and
192 any of its departments, offices, divisions, or authorities are exempt from the provisions of this
193 section.

194 Section 5. Section **63-97-105** is enacted to read:

195 **63-97-105. Complaints.**

196 (1) (a) Any person who believes that a government agency or institution of higher
197 education has violated Subsection 63-97-104(2) may file a written complaint with the commission
198 and with the affected agency or institution stating the grounds for the complaint.

199 (b) After receiving a complaint filed under Subsection (1)(a), the commission shall review
200 the complaint at its next regularly scheduled meeting to determine whether the complaint presents
201 a good-faith claim of a violation of this chapter. If the commission determines that the claim
202 presented in the complaint is made in good faith and not for the purpose of harassment, the
203 commission shall notify the claimant and the affected government agency or institution of higher
204 education in writing of the determination and shall require the agency or institution to respond to
205 the complaint.

206 (c) Upon receipt of the notice described in Subsection (1)(b), the affected agency or
207 institution shall have 30 days to respond to the commission in writing, either admitting or denying
208 each of the allegations made in the complaint, and indicating whether remedial action will be
209 taken.

210 (d) If the affected agency or institution admits the allegations made in the complaint and
211 agrees to take remedial action, the commission shall work with the affected agency or institution
212 to ensure that appropriate remedial action is taken on a timely basis.

213 (e) If the affected agency or institution denies any of the substantive allegations made in

214 the complaint, the commission shall hold a public hearing on the complaint within 60 days of the
215 denial where all parties are afforded an opportunity to present evidence on the matter.

216 (2) After the public hearing under Subsection (1)(e), the commission shall determine
217 whether the government agency or institution of higher education is authorized to engage in the
218 commercial activity or is in violation of the provisions of this chapter.

219 (3) (a) If, after a public hearing, the commission rules in favor of the government agency
220 or institution of higher education and against the complainant, the commission may require the
221 complainant to pay the costs incurred by the commission in reviewing the complaint and
222 conducting the public hearing, not to exceed \$1,000.

223 (b) All money collected under Subsection (3)(a) shall be deposited into the General Fund.

224 (4) If a government agency or institution of higher education is found to be in violation
225 of this chapter, the commission shall take the necessary steps to terminate the commercial activity
226 and require, if appropriate, the government agency or institution of higher education to implement
227 a contract with the private sector for the activity.

228 (5) Within 30 days after the public hearing, the commission shall issue a report of its
229 findings to the complainant and the government agency or institution of higher education.

230 (6) If, under the commission's decision, the government agency or institution of higher
231 education is to terminate its commercial activity, the action shall take place under a schedule set
232 by the commission.

233 Section 6. Section **63-97-106** is enacted to read:

234 **63-97-106. Cease and desist orders.**

235 (1) If the government agency or institution of higher education fails to comply with the
236 commission's order, the commission may file an action in district court to restrain and enjoin the
237 government agency or institution of higher education from engaging in the activity.

238 (2) The attorney general's office shall provide legal support to the commission for any
239 action filed under Subsection (1).

240 Section 7. Section **63-97-107** is enacted to read:

241 **63-97-107. Staff support.**

242 The Division of Purchasing and General Services within the Department of Administrative
243 Services shall provide staff support to the commission.

244 Section 8. **Repealer.**

245 This act repeals:
246 Section **63-55a-1, Definitions.**
247 Section **63-55a-2, Privatization Policy Board -- Created -- Membership -- Operations**
248 **-- Expenses.**
249 Section **63-55a-3, Privatization Policy Board -- Duties.**

Legislative Review Note
as of 1-15-99 9:16 AM

A limited legal review of this legislation raises no obvious constitutional or statutory concerns.

Office of Legislative Research and General Counsel