

**UNFAIR PUBLIC COMPETITION ACT**

1998 GENERAL SESSION

STATE OF UTAH

**Sponsor: Howard A. Stephenson**

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AN ACT RELATING TO STATE AFFAIRS IN GENERAL; CREATING THE PRIVATE ENTERPRISE REVIEW COMMISSION; PROHIBITING GOVERNMENT COMPETITION WITH PRIVATE ENTERPRISE; PROVIDING EXCEPTIONS; PROVIDING FOR A COMPLAINT PROCESS AND REVIEW BY THE COMMISSION; AUTHORIZING CIVIL ACTIONS TO ENFORCE COMMISSION RULINGS; AND REPEALING THE PRIVATIZATION POLICY BOARD.

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

ENACTS:

- 63-95-101**, Utah Code Annotated 1953
- 63-95-102**, Utah Code Annotated 1953
- 63-95-103**, Utah Code Annotated 1953
- 63-95-104**, Utah Code Annotated 1953
- 63-95-105**, Utah Code Annotated 1953
- 63-95-106**, Utah Code Annotated 1953
- 63-95-107**, Utah Code Annotated 1953

REPEALS:

- 63-55a-1**, as enacted by Chapter 221, Laws of Utah 1989
- 63-55a-2**, as last amended by Chapters 18, 194 and 243, Laws of Utah 1996

1           **63-55a-3**, as last amended by Chapter 18, Laws of Utah 1996

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

3           Section 1. Section **63-95-101** is enacted to read:

4                           **CHAPTER 95. UNFAIR PUBLIC COMPETITION ACT**

5           **63-95-101. Title.**

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

7           Section 2. Section **63-95-102** is enacted to read:

8           **63-95-102. Definitions.**

9           As used in this chapter:

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

12           (2) "Commission" means the Private Enterprise Review Commission created in Section  
13 63-95-4.

14           (3) "Competitive impact statement" means a cost analysis using uniform accounting  
15 standards accepted by private enterprise to determine the total cost of the commercial activity. The  
16 cost analysis shall include a comparison of the impact of the commercial activity on state and local  
17 tax revenues. The private enterprise cost figures in the cost analysis shall be determined by  
18 obtaining one or more bids for performing or providing the commercial activity.

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

23           (5) "Institution of higher education" means a government-supported college, university,  
24 or community college.

25           (6) "Invited guests" means persons who enter onto a campus of an institution of higher  
26 education for an educational, research, or public service activity and not primarily to purchase or  
27 receive goods and services not related to the educational, research, or public service activity.

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

1           (8) "Public service" means an activity normally and generally associated with colleges and  
2 universities and other educational institutions in this state, a purpose or significant result of which  
3 is not to engage in competition with private enterprise.

4           (9) "Student" means a person seeking a degree or a certificate from an institution of higher  
5 education.

6           (10) "Uniform accounting standards" means an accounting method which allows  
7 government agencies and institutions of higher education to identify the true and total cost of  
8 supplying goods and services in the same manner as private enterprise would identify true and total  
9 costs, including, but not limited to, the following:

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

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

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

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

18           (e) contract management costs;

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

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

22           Section 3. Section **63-95-103** is enacted to read:

23           **63-95-103. Government competition with private enterprise prohibited -- Exceptions.**

24           (1) It is the general policy of the state that a government agency shall not start or carry on  
25 any commercial activity to provide goods or services for its own use, the use of other government  
26 agencies, or for public use if such goods or services can be procured from private enterprise  
27 through ordinary business channels.

28           (2) A government agency, except as provided in Subsection (3), shall not engage in any  
29 commercial activity including, but not limited to, the manufacturing, processing, managing, sale,  
30 offering for sale, rental, leasing, delivering, dispensing, distributing, or advertising, in whole or  
31 in part, of any goods or services to or for other government agencies or the public which are also

1 offered by private enterprise.

2 (3) A government agency is authorized to perform or provide a commercial activity when:

3 (a) the activity is specifically authorized by statute;

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

5 (c) use of a private enterprise source would cause unacceptable delay or disruption of an  
6 essential program;

7 (d) the activity is inherently related to the state's defense; or

8 (e) the agency can provide or is providing goods or services to government agencies or  
9 institutions of higher education on a continuing basis at a lower total cost than if such goods or  
10 services were obtained from private enterprise as determined by cost comparisons as outlined in  
11 the competitive impact statement relating to the specific good or service prepared under Subsection  
12 (5).

13 (4) If a government agency is authorized by law to engage in a commercial activity, the  
14 government agency shall set a fee or charge a price for that activity which shall include the true  
15 and total cost related to engaging in the activity by such government agency, including, but not  
16 limited to:

17 (a) the fair market value of the activity; and

18 (b) the direct and indirect costs incurred in engaging in the activity determined by use of  
19 uniform accounting standards.

20 (5) If a government agency engages in a commercial activity or proposes to begin a  
21 commercial activity that is not authorized under Subsection (3), the government agency shall:

22 (a) prepare a competitive impact statement to be submitted to the commission; and

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

26 (6) Government agencies shall adopt and implement procedures to monitor their own  
27 compliance with this chapter.

28 (7) Institutions of higher education shall not, unless specifically authorized by statute:

29 (a) engage in commercial activities for students, faculty, staff, and invited guests, or the  
30 general public that can be procured from private enterprise through ordinary business channels,  
31 unless, as determined by the commission, the commercial activity:

1           (i) necessitates the participation of students as a required part of an educational program  
2 in order to obtain a degree or certificate;

3           (ii) is a recognized and integral part of a teaching, educational, or research program leading  
4 to a degree or certificate; or

5           (iii) consists of on-campus activities including:

6           (A) food service;

7           (B) student housing;

8           (C) sponsoring cultural and athletic events;

9           (D) providing facilities for recreation to students, faculty, and staff;

10          (E) sales of course books and course-related supplies; or

11          (F) sale of a limited and reasonable quantity of personal items bearing the institution's  
12 insignia, which shall be incidental to the sales of textbooks and other items permitted in Subsection  
13 (7)(a)(iii)(E);

14          (b) enter competitive bidding for a commercial activity rendering any goods or services  
15 unless, as determined by the commission, the activity is performed by students and is a recognized  
16 and integral part of a teaching, educational, or research program leading to a degree or certificate  
17 from the institution of higher education rendering the goods or services;

18          (c) engage in commercial activities for or through another government agency; or

19          (d) provide for the disposal by sale of services, products, and by-products which are part  
20 of research or instruction conducted by students and faculty of the institution of higher education  
21 and leading to a student degree or certificate unless the sale is an integral part of the particular  
22 research project or instructional program or there is no other practical way of disposing of the  
23 services, products, or by-products as determined by the commission, and if the services, products,  
24 or by-products are sold at their market value using uniform accounting standards.

25          (8) In determining whether the provision of a good or service is directly related to  
26 teaching, educational, or research programs leading to a degree or certificate, the following criteria  
27 shall be considered:

28          (a) whether the provision of a good or service is necessary for the student to pursue a  
29 degree or certificate or for faculty or staff to engage in research or teaching;

30          (b) whether the good or service is a specialty good or service not generally available to the  
31 public;

1 (c) whether the price charged for the good or service reflects the direct and indirect costs  
2 and overhead costs of providing such good or service and the price in the private marketplace; and

3 (d) whether measures have been taken to ensure that the provision of goods or services  
4 pursuant to this Subsection (8) is only for students, faculty, invited guests, or staff and not the  
5 general public.

6 Section 4. Section **63-95-104** is enacted to read:

7 **63-95-104. Private Enterprise Review Commission -- Members -- Terms -- Duties.**

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

10 (2) The governor shall appoint:

11 (a) four owners or officers of businesses located in the state, one of whom shall be chosen  
12 from names recommended by the speaker of the House and one of whom shall be chosen from  
13 names recommended by the president of the Senate;

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

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

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

17 (e) one representative chosen from names recommended by the speaker of the House of  
18 Representatives; and

19 (f) one senator chosen from names recommended by the president of the Senate.

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

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

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

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

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

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

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

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

6           (6) (a) (i) Members who are not government employees shall receive no compensation or  
7 benefits for their services, but may receive per diem and expenses incurred in the performance of  
8 the member's official duties at the rates established by the Division of Finance under Sections  
9 63A-3-106 and 63A-3-107.

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

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

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

17           (c) Legislators on the committee shall receive compensation and expenses as provided by  
18 Section 36-2-2 and Legislative Joint Rule 15.03.

19           (7) The commission shall:

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

22           (i) implement the provisions of this chapter;

23           (ii) promptly hear and resolve complaints lodged under Section 63-95-105; and

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

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

28           (c) maintain communication with and access information from, other entities promoting  
29 privatization;

30           (d) prepare an annual report that contains:

31           (i) information about the commission's activities;

1 (ii) action taken by the commission with respect to complaints filed under Section  
2 63-95-105; and

3 (iii) recommendations on privatizing government services;

4 (e) submit the annual report to the Legislature and the governor; and

5 (f) file copies of its recommendations for privatization with:

6 (i) the relevant agency head;

7 (ii) the governor's office; and

8 (iii) the Office of Legislative Fiscal Analyst for submission to the relevant legislative  
9 appropriation subcommittee.

10 (8) (a) The commission may appoint advisory groups to conduct studies, research,  
11 analyses, and make reports and recommendations with respect to subjects or matters within the  
12 jurisdiction of the commission.

13 (b) At least one member of the commission shall serve on each advisory group.

14 (9) This chapter does not preclude any agency from privatizing any service or function  
15 independently of the commission if:

16 (a) the contract is expending less than \$2,000,000 of the agency budget in a fiscal year;

17 (b) as part of the contract that privatizes the function, the contractor assumes all liability  
18 to perform the privatized function;

19 (c) the agency notifies the board at least 120 days before the privatization occurs of their  
20 intent to privatize the function; and

21 (d) (i) there is no statutory mandate requiring the agency to provide the service or perform  
22 the function that is to be privatized; and

23 (ii) any statutory provisions relating to or referencing the service or function to be  
24 privatized are repealed or amended to be consistent with the privatization of the service or  
25 function.

26 Section 5. Section **63-95-105** is enacted to read:

27 **63-95-105. Complaints.**

28 (1) (a) Any person who believes that a government agency or institution of higher  
29 education has violated any provision of this chapter may file a written complaint with the  
30 commission and with the affected agency or institution stating the grounds for such complaint.

31 (b) After receiving a complaint filed under Subsection (1)(a), the commission shall review



1 the complaint at its next regularly scheduled meeting to determine whether the complaint presents  
2 a good-faith claim of a violation of this chapter. If the commission determines that the claim  
3 presented in the complaint is made in good faith and not for the purpose of harassment, the  
4 commission shall notify the claimant and the affected agency or institution in writing of such  
5 determination and shall require the agency or institution to respond to the complaint.

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

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

13 (e) If the affected agency or institution denies any of the substantive allegations made in  
14 the complaint, the commission shall hold a public hearing on the complaint within 60 days of such  
15 denial where all parties are afforded an opportunity to present evidence on the matter.

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

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

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

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

29 (6) If, under the commission's decision, the government agency or institution of higher  
30 education is to terminate its commercial activity, the action shall take place within three months  
31 of the commission's report or under a schedule set by the commission.

1 Section 6. Section **63-95-106** is enacted to read:

2 **63-95-106. Cease and desist orders.**

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

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

8 Section 7. Section **63-95-107** is enacted to read:

9 **63-95-107. Staff support.**

10 The Office of the State Auditor shall provide staff support to the commission.

11 Section 8. **Repealer.**

12 This act repeals:

13 Section **63-55a-1, Definitions.**

14 Section **63-55a-2, Privatization Policy Board -- Created -- Membership -- Operations**  
15 **-- Expenses.**

16 Section **63-55a-3, Privatization Policy Board -- Duties.**

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**Legislative Review Note**  
**as of 2-13-98 5:16 PM**

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

**Office of Legislative Research and General Counsel**