

Senator Howard A. Stephenson proposes to substitute the following bill:

UNFAIR PUBLIC COMPETITION ACT

1998 GENERAL SESSION

STATE OF UTAH

Sponsor: Howard A. Stephenson

5	L. Alma Mansell	LeRay McAllister	Millie M. Peterson
6	Craig L. Taylor	John P. Holmgren	Robert C. Steiner
7	Howard C. Nielson	L. Steven Poulton	Ed Mayne
8	Robert M. Muhlestein	Craig A. Peterson	Mike Dmitrich
9	R. Mont Evans	Leonard M. Blackham	Blaze D. Wharton
10	Alarik Myrin		

11 AN ACT RELATING TO STATE AFFAIRS IN GENERAL; CREATING THE PRIVATE
 12 ENTERPRISE REVIEW COMMISSION; PROHIBITING CERTAIN GOVERNMENT
 13 COMPETITION WITH PRIVATE ENTERPRISE; PROVIDING EXCEPTIONS;
 14 AUTHORIZING THE COMMISSION TO STUDY PRIVATIZATION OF GOVERNMENT
 15 ACTIVITIES AND PROPOSALS FOR ADDITIONAL PROHIBITIONS OF GOVERNMENT
 16 COMPETITION; PROVIDING FOR A COMPLAINT PROCESS AND REVIEW BY THE
 17 COMMISSION; AUTHORIZING CIVIL ACTIONS TO ENFORCE COMMISSION
 18 RULINGS; AND REPEALING THE PRIVATIZATION POLICY BOARD.

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

20 ENACTS:

- 21 **63-95-101**, Utah Code Annotated 1953
- 22 **63-95-102**, Utah Code Annotated 1953
- 23 **63-95-103**, Utah Code Annotated 1953
- 24 **63-95-104**, Utah Code Annotated 1953
- 25 **63-95-105**, Utah Code Annotated 1953
- 26 **63-95-106**, Utah Code Annotated 1953

1 **63-95-107**, Utah Code Annotated 1953

2 REPEALS:

3 **63-55a-1**, as enacted by Chapter 221, Laws of Utah 1989

4 **63-55a-2**, as last amended by Chapters 18, 194 and 243, Laws of Utah 1996

5 **63-55a-3**, as last amended by Chapter 18, Laws of Utah 1996

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

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

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

9 **63-95-101. Title.**

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

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

12 **63-95-102. Definitions.**

13 As used in this chapter:

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

16 (2) "Commission" means the Private Enterprise Review Commission created in Section
17 63-95-4.

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

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

27 (5) "Institution of higher education" or "institution" means a government-supported
28 college, university, or community college.

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

1 profit.

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

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

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

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

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

14 (e) contract management costs;

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

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

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

19 **63-95-103. Private Enterprise Review Commission -- Members -- Terms -- Duties.**

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

22 (2) The governor shall appoint:

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

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

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

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

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

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

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

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

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

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

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

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

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

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

18 (6) (a) (i) Members who are not government employees shall receive no compensation or
19 benefits for their services, but may receive per diem and expenses incurred in the performance of
20 the member's official duties at the rates established by the Division of Finance under Sections
21 63A-3-106 and 63A-3-107.

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

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

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

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

31 (7) The commission shall:

- 1 (a) make rules in accordance with Title 63, Chapter 46a, Utah Administrative Rulemaking
2 Act, to:
- 3 (i) implement the provisions of this chapter;
4 (ii) promptly hear and resolve complaints lodged under Section 63-95-105; and
5 (iii) to establish privatization standards, procedures, and requirements;
- 6 (b) review whether or not certain services performed by existing government agencies and
7 institutions of higher education could be privatized to provide the same types and quality of
8 services that would result in cost savings;
- 9 (c) hold public hearings on government competition with private enterprise, including
10 proposals to prohibit commercial activities by government agencies which compete with private
11 enterprise;
- 12 (d) maintain communication with and access information from, other entities promoting
13 privatization;
- 14 (e) prepare an annual report that contains:
- 15 (i) information about the commission's activities;
16 (ii) action taken by the commission with respect to complaints filed under Section
17 63-95-105;
- 18 (iii) recommendations on privatizing government services; and
19 (iv) recommendations regarding proposed legislative amendments to Section 63-95-104,
20 including additional commercial activities to be prohibited or general standards and exemptions
21 relating to the prohibition of government competition with private enterprise.
- 22 (f) submit the annual report to the Legislature and the governor; and
23 (g) file copies of its recommendations for privatization with:
- 24 (i) the relevant agency head;
25 (ii) the governor's office; and
26 (iii) the Office of Legislative Fiscal Analyst for submission to the relevant legislative
27 appropriation subcommittee.
- 28 (8) (a) The commission may appoint advisory groups to conduct studies, research,
29 analyses, and make reports and recommendations with respect to subjects or matters within the
30 jurisdiction of the commission.
- 31 (b) At least one member of the commission shall serve on each advisory group.

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

3 (a) there is no statutory mandate requiring the agency to provide the service or perform
4 the function that is to be privatized; and

5 (b) any statutory provisions relating to or referencing the service or function to be
6 privatized are repealed or amended to be consistent with the privatization of the service or
7 function.

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

9 **63-95-104. Prohibition of certain government competition with private enterprise**
10 **-- Exceptions.**

11 (1) It is the general policy of the state that a government agency or a institution of higher
12 education should not start or carry on any commercial activity to provide goods or services for the
13 use of other government agencies or institutions of higher education or for public use if such goods
14 or services can be procured from private enterprise through ordinary business channels.

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

17 (a) the operation of a retail pharmacy; or

18 (b) the operation of an environmental testing laboratory.

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

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

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

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

25 (iv) the activity is inherently related to the state's defense; or

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

30 (b) An institution of higher education is authorized to perform or provide a commercial
31 activity listed in Subsection (2) when the commercial activity is a recognized and integral part of

1 a teaching, educational, or research program leading to a degree or certificate.

2 (4) If a government agency or institution of higher education is authorized under one of
3 the exceptions listed in Subsection (3) to engage in an otherwise prohibited commercial activity,
4 the government agency or institution of higher education shall:

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

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

10 (i) the fair market value of the commercial activity; and

11 (ii) the direct and indirect costs incurred in engaging in the commercial activity determined
12 by use of uniform accounting standards; and

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

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

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

19 **63-95-105. Complaints.**

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

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

30 (c) Upon receipt of the notice described in Subsection (1)(b), the affected agency or
31 institution shall have 30 days to respond to the commission in writing, either admitting or denying

1 each of the allegations made in the complaint, and indicating whether remedial action will be
2 taken.

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

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

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

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

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

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

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

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

26 **63-95-106. Cease and desist orders.**

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

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

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

2 **63-95-107. Staff support.**

3 The Purchasing Division of the Department of Administrative Services shall provide staff
4 support to the commission.

5 Section 8. **Repealer.**

6 This act repeals:

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

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

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