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THE GENERAL ASSEMBLY OF PENNSYLVANIA

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SENATE BILL

No. 530 Session of  
2009

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INTRODUCED BY BROWNE, ERICKSON, BOSCOLA, FOLMER, ALLOWAY,  
ROBBINS, ORIE, WAUGH, PIPPY AND EARLL, MARCH 2, 2009

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REFERRED TO STATE GOVERNMENT, MARCH 2, 2009

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AN ACT

1 Prohibiting government competition with private enterprise.

2 The General Assembly of the Commonwealth of Pennsylvania

3 hereby enacts as follows:

4 Section 1. Short title.

5 This act shall be known and may be cited as the Free

6 Enterprise and Taxpayer Protection Act.

7 Section 2. Declaration of policy.

8 The General Assembly finds and declares as follows:

9 (1) Private enterprise is necessary to the health,  
10 welfare and prosperity of this Commonwealth.

11 (2) Government competes with private enterprise when it  
12 provides goods and services to the public beyond its  
13 government function.

14 (3) This act is intended to protect economic  
15 opportunities for private enterprise against unfair  
16 competition by government agencies and to enhance the  
17 efficient provision of goods and services to the public.

1 Section 3. Definitions.

2 The following words and phrases when used in this act shall  
3 have the meanings given to them in this section unless the  
4 context clearly indicates otherwise:

5 "Agency." A government agency as defined in this act.

6 "Authority." Any authority created by a government agency or  
7 agencies for a purpose other than the purpose of the agency or  
8 agencies.

9 "Commercial activity." Performing services or providing  
10 goods that can normally be obtained from private enterprise.

11 "Government agency." The State, any unit of State  
12 government, and any municipality, municipal or county authority  
13 or political subdivision. The term includes all of the  
14 following:

15 (1) An entity which is not majority-owned as private  
16 property and established under the Constitution of  
17 Pennsylvania, statute, ordinance or any other order or action  
18 by the entity or its officers.

19 (2) A State-owned and State-related university,  
20 community college and public school district.

21 "Government competition." The provision of goods or services  
22 to the public by government agencies that are essentially the  
23 same as those offered by private enterprise.

24 "Government functions." Those functions that are exclusively  
25 the prerogative of government, including operation of the agency  
26 or department, fulfillment of the legal obligations of the  
27 agency, law enforcement and the judicial system.

28 "Invited guests." Persons who enter onto a campus for  
29 educational, research or public service activity and not  
30 primarily to purchase or receive goods and services which are

1 not related to the educational, research or public service  
2 activity for which the persons enter onto the campus.

3 "Local agency." A department, office, commission,  
4 institution, board or other agency or local organization,  
5 regardless of whether moneys are appropriated to the agency,  
6 including cities, boroughs, towns, townships or any other  
7 municipal entity.

8 "Necessary services." Those services that are critical for  
9 human safety and health, including fire departments, emergency  
10 services and medical services.

11 "Private enterprise." An individual, firm, partnership,  
12 joint venture, corporation, association or any other legal  
13 entity engaging in the manufacturing, processing, sale, offering  
14 for sale, rental, leasing, delivery, dispensing, distributing or  
15 advertising of goods or services for profit.

16 "Private sector." Two or more competing privately owned  
17 companies.

18 "Public service." An activity that is normally and generally  
19 associated with community colleges and universities in this  
20 Commonwealth, a purpose or significant result of which is not to  
21 engage in competition with private enterprise.

22 "State agency." A department, office, commission,  
23 institution, board or other agency or State organization,  
24 regardless of whether moneys are appropriated to the agency.

25 "Telecommunications." Radio, telegraph, telefax, telephoto,  
26 television, cable and satellite transmission, computer, Internet  
27 and other electronic services.

28 "Utilities." Provision of electric power and water supply.

29 "Vital services." Those services that are vital to the  
30 public, including water and electric supply, sewers, garbage and

1 trash removal, recycling, streets and roads, public  
2 transportation and public transportation infrastructure, State  
3 and local correctional facilities, child care, elder care,  
4 telecommunication services which include radio, telegraph,  
5 telefax, telephoto, television cable and satellite transmission,  
6 computer, Internet and other electronic services.

7 Section 4. Government competition prohibited.

8 Government, government agencies, State-owned and State-  
9 related universities, community colleges, school districts and  
10 public authorities are prohibited from competing against private  
11 enterprise, including by intergovernmental or interagency  
12 agreement, and are prohibited from funding, capitalizing,  
13 securing the indebtedness of, or leasing the obligations of, or  
14 subsidizing, any charitable or not-for-profit institution which  
15 would use such support to compete against private enterprise.

16 Section 5. Excepted functions and services.

17 The following functions or services are excepted from the  
18 provisions of section 4:

19 (1) Government functions.

20 (2) Necessary services. Nothing in this act shall  
21 preclude a government agency or authority from utilizing  
22 private enterprise to provide necessary services.

23 (3) Vital services, to the extent such services are not  
24 available from private enterprise. In such cases, government  
25 shall make good faith efforts for private enterprise to  
26 furnish such services.

27 (4) The development, management and operation of State  
28 parks, historical monuments and hiking or equestrian trails.

29 (5) Provisions of goods and services to students and  
30 invited guests by State-owned and State-related universities,

1 community colleges and public school districts.

2 Section 6. Existing government competition.

3 (a) General rule.--In cases of government competition  
4 against private enterprise that exist on the effective date of  
5 this act, the government agency or authority may continue to  
6 engage in the competition but may not exceed the scope of the  
7 competition.

8 (b) Construction.--Nothing in this act shall be construed to  
9 preclude a government agency or authority from contracting with  
10 private enterprise to provide goods or services to the public.

11 Section 7. Financial statements.

12 (a) Maintenance.--

13 (1) In all cases of commercial activity by government  
14 agencies, annual financial statements of all income and  
15 expenses of the commercial activities shall be maintained  
16 separately and on the same basis as the financial statements  
17 of the government agencies.

18 (2) Income from monetary assets of government agencies  
19 shall not be shown as income of commercial activities but  
20 shall be shown as income of the government agencies.

21 (b) Income from government agencies.--The financial  
22 statements of commercial activities shall not include any income  
23 from government agencies. Grants shall not be included as income  
24 of the commercial activities, but shall be shown as income to  
25 the government agencies.

26 (c) Common expenses.--The financial statements of commercial  
27 activities shall include proportionate amounts of common  
28 expenses shared with government agencies, including utility  
29 costs, supplies, repair and replacement costs, insurance of all  
30 types, employee compensation, employee benefits, payroll taxes,

1 debt service and depreciation of all types.

2 (d) Audit.--The financial statements of government agencies  
3 and commercial activities shall be audited and certified as  
4 correct by a certified public accountant and auditor within 120  
5 days after the end of the annual accounting period and when  
6 certified shall be released to the public.

7 Section 8. Remedies.

8 (a) Nature of action and jurisdiction.--The civil cause of  
9 action authorized under this section shall be brought in the  
10 Commonwealth Court, which shall have jurisdiction to issue  
11 preliminary and permanent injunctive relief.

12 (b) Preliminary orders.--

13 (1) An affected person or entity may file a complaint  
14 seeking preliminary injunctive relief by alleging that a  
15 government agency is participating or planning to participate  
16 in commercial activity resulting in new competition with  
17 existing private enterprise. Upon receipt of the complaint,  
18 the court shall order a preliminary hearing, which shall not  
19 be later than 30 days from the date of the order.

20 (2) The court shall issue appropriate preliminary  
21 injunctive relief if at the preliminary hearing the plaintiff  
22 makes a prima facie showing that:

23 (i) the government agency is or is planning to  
24 participate in commercial activity;

25 (ii) that commercial activity results or will result  
26 in competition with private enterprise;

27 (iii) the government has not made a good faith  
28 effort for private enterprise to furnish vital services;  
29 and

30 (iv) the threat to private enterprise or public

1           moneys is imminent.

2           (3) The plaintiff shall not be required to show no  
3           adequate remedy at law or irreparable harm nor any other  
4           common law element applicable to obtaining preliminary  
5           injunctive relief.

6           (4) If the court finds that the government agency is  
7           participating or planning to participate in commercial  
8           activity resulting in competition with private enterprise but  
9           that preliminary injunctive relief is not warranted the court  
10          shall deny the request for preliminary injunctive relief and  
11          proceed to trial.

12          (c) Permanent injunction.--Where, after a final hearing on  
13          the merits, the court finds that a government agency is  
14          participating or planning to participate in commercial activity  
15          resulting in competition with private enterprise in violation of  
16          this act, the court shall grant permanent injunctive relief and  
17          shall issue orders as necessary to abate the government  
18          competition with private enterprise.

19          (d) Monetary damages.--The court may award actual monetary  
20          damages to the plaintiff. The plaintiff must prove actual  
21          damages by clear and convincing evidence.

22          (e) Recovery of costs.--Whenever an action for injunctive  
23          relief and damages brought under this section terminates in a  
24          settlement or judgment favorable to the plaintiff, the plaintiff  
25          shall be entitled to recover the actual costs of the suit,  
26          including reasonable attorney fees and all expenses and  
27          disbursements made by the plaintiff in bringing the action.

28          Section 30. Effective date.

29          This act shall take effect in 60 days.