SUBJECT: Allowing telecom providers to make certain service offerings at any time

COMMITTEE: Regulated Industries — committee substitute recommended

VOTE: 5 ayes — King, Hunter, Baxter, Crabb, Guillen

0 nays

2 absent — Turner, Wolens

WITNESSES: For — Brad Denton, Texas Telephone Association; Carl Erhart, Verizon Southwest; Timothy Leahy and Jan Newton, SBC Communications Inc.; Rosa Walker, Texas AFL-CIO, United Labor Legislative Committee; *(Registered, but did not testify:)* Jose Camacho, Valor Telecom; Jose Estrada, Currie Hallford, Maria Jimenez, Becky Moeller, Xavier Olivarez, Gloria Parra, Luz Riley, Yvette Romeros, Mark Tedford, D.L. Willis, Communication Workers of America; Cindy Fitch, Communication Workers of America, Dallas Area Coalition of Labor Union Women; Cammie Hughes, Texas Statewide Telephone Cooperative Inc.; Ben Watson, Sprint

Against — Michael Jewel, AT&T; Gary Nuttal, Sage Telecom of Texas; Howard Siegel, Logix Communications; *(Registered, but did not testify:)* Jamie Luby, MCI Worldcom

On — Becky Klein, Public Utility Commission

BACKGROUND: The Texas Public Utility Regulatory Act, as revised in 1995, and the federal Telecommunications Act of 1996 mandated that monopoly power in local-exchange telephone service established by government regulation be ended and the market opened to competition. These two laws required incumbent local telephone service providers to allow new companies seeking to enter the market to connect with their networks of telephone lines, switches, and other infrastructure in order to provide local service. Additional legislation in 1999 increased the flexibility of incumbents in pricing and packaging telecommunications services and ensured customer choice and protections.

In the competitive telecommunications market, a "win-back" offer is a service offering (usually a lower price) made by a provider in response to a former customer's recent switch to a new provider. A "retention" offer is a service offering to a customer who has accepted a competitor's offer and is in the process of switching to the new provider's service.

In April 2002, the Public Utility Commission (PUC) began a rule-making proceeding to address win-back or retention offers by incumbent telecommunications service providers. The proposed rule would prohibit an incumbent provider from making a win-back or retention offer to a former or current customer for 30 days following the request by the new provider for the incumbent to switch the customer's service.

The 77th Legislature enacted SB 393 by Carona and Shapleigh, establishing the Uniform Electronic Transactions Act. The act includes a no-call list for consumers who wish to avoid receiving unsolicited telemarketing telephone calls.

DIGEST:

CSHB 1542 would specify that a telecommunications provider could not offer a discount or other form of pricing flexibility that was unreasonably preferential, prejudicial, or discriminatory.

The bill would allow a telecommunications provider to make an offer based on a reasonable business purpose at any time, including an offer to a customer in response to a competitor's offer or in response to a former customer's acceptance of a competitor's offer. The price of an offer would have to comply with statutory requirements prohibiting predatory pricing. A telecommunications provider making an offer would have to comply with the Uniform Electronic Transactions Act.

The bill would take effect September 1, 2003.

SUPPORTERS SAY:

CSHB 1542 would clarify that incumbent telecommunications providers may make service offers at any time in competitive efforts to win back or retain customers from competitors. These marketing practices are part of the "back and forth" nature of competition in the telecommunications market. For instance, an incumbent provider may attempt to persuade a customer that recently had switched to a competitor's service to return by offering the

customer his or her former service at a lower price. Such practices benefit consumers by encouraging lower prices and greater choice.

A proposed PUC rule, however, would discourage competition by imposing an arbitrary 30-day waiting period on incumbent providers. The proposed rule would restrict marketing activities at the very time consumers were shopping for competitive offers. Moreover, it would apply this restriction only to incumbent providers, leaving other competitors free to make offers at any time. The bill would make it clear that PUC does not have the authority to restrict win-back or retention offers by incumbent providers.

The attorney general has filed comments opposing the proposed rule, stating that it would not be an effective means of combating anti-competitive practices and simply would add a regulatory burden. Moreover, the Federal Communications Commission has stated that win-back campaigns are consistent with federal law and not anti-competitive.

The bill would bolster the competitive market for telecommunications services in Texas by ensuring that all providers were operating under the same set of rules. With hundreds of providers competing for customers in Texas, the proposed rule would apply only to about four companies. Good public policy should not handicap one competitor in favor of another. Imposing a restriction on win-back or retention offers would create an artificial barrier to competition and hinder the ability of some companies to reach costumers. Consumers are best served by a free market in which any provider can market a lower-priced service at any time.

The bill would specify that incumbent providers could not engage in predatory pricing practices, such as offering a service at a price below its long-run cost. Moreover, the bill would specify that an incumbent could not market these offers by telephone to customers who had enrolled in the state's no-call list.

OPPONENTS SAY:

This bill would preempt PUC's jurisdiction to restrict anti-competitive marketing practices by incumbent providers, such as SBC, Verizon, Sprint, and Valor. The telecommunications market still is in the early stages of competition, and incumbent providers continue to exhibit market power. In fact, competitive providers' market-share growth has showed a sharp

downward trend over the past two years. In order to gain customers and increase market share, a competitive provider must devote a large portion of its resources to persuading customers to switch. Targeted or niche marketing practices, such as win-back and retention offers, by incumbent providers undercut a new provider's ability to compete in the market. Without adequate competition, customers will face less choice and higher prices for services.

The bill would eliminate PUC's ability to make a factual determination about whether win-back and retention offers were anti-competitive and instead substitute a broad legislative decision validating such practices. PUC is the best entity to make this determination because it has the expertise and resources to investigate market abuses. Unfortunately, this bill would preclude the agency's ability to restrict such practices if they were found to be anti-competitive.

Other states have enacted or are investigating the enactment of similar regulations to restrict win-back or retention offers. Ohio has implemented a 30-day waiting period, giving customers an opportunity to interact with a new provider for at least one billing cycle. About 15 other states are in the process of investigating or implementing restrictions on win-back and retention offers. While other states are able to address the anti-competitive nature of such practices, the bill would preclude Texas from acting to address this concern.

NOTES:

The committee substitute modified the bill as introduced by specifying that a win-back or retention offer could be made at any time and specifying the statutory requirements prohibiting predatory pricing with which an offer must comply.

The companion bill, SB 732 by Brimer, passed the Senate by voice vote on April 22 and was reported favorably, without amendment by the House Regulated Industries Committee on April 25, making it eligible to be considered in lieu of HB 1542.