

## **Texas Legislature Close to Approving Statewide Franchising Measure**

In a major victory for the two largest phone companies, the Texas House passed significant legislation Sunday to create greater competition for the cable television industry and ultimately transfer authority for TV service from cities to state regulators.

Both Verizon and SBC plan to roll out Internet-based digital TV services this year, part of a heated battle with cable companies to offer the so-called triple play of phone, TV and Internet service through a single provider.

The legislation allows the phone companies to receive statewide franchises for their services instead of going through lengthy negotiations with individual cities.

"Consumers should have another choice if they're unhappy with their existing providers," said state Rep. Phil King, R-Weatherford, the House's leading proponent of the measure. "This bill allows more companies to provide more service to more consumers."

The House passed the bill 135-6 after a two-hour debate focused largely on whether phone companies would discriminate by targeting the most affluent customers.

Phone companies say an emerging technology shouldn't be forced to follow the same rollout requirements as cable faces now.

The legislation passed the Senate 25-3 last week but requires approval again by the upper house because of minor changes. Its passage could hinge on the progress of school finance and tax legislation, the primary purpose of the special session that ends tomorrow.

The telecommunications bill, one of the biggest business issues in Austin this year, failed to clear the regular session that ended in May.

Gov. Rick Perry added the issue to the session's agenda last week.

The legislation also allows phone companies to raise rates in the largest communities.

Once state regulators certify that adequate competition for phone service exists, rates in smaller regions can be raised.

It also allows electric utilities to deliver broadband Internet service over their power lines, a technology that's intended to bring high-speed Internet access to rural areas.

In the video provisions, the bill allows phone companies to receive statewide franchises for TV services within a month, instead of as long as 18 months that they'd need at the city level.

Cities would maintain their existing franchises with cable operators, with phone companies operating under the same franchise-fee structure until the local cable franchises expire.

Ultimately, cities would yield control over cable service to state regulators, which could receive complaints from customers but not take action against the companies.

Lawmakers cited an economist's projections that the bill would create 12,000 jobs in the state and spur US\$1.8 billion in annual investment and spending.

Steve Banta, Verizon's Southwest region president, said the company hoped to "soon bring a new option for consumers who have been held captive by cable TV companies for too long."

SBC Texas president Jan Newton said Sunday that the House passage "demonstrates that this issue continues to center on Texas consumers and the need to provide them with more choices and competitive prices in TV and entertainment."

The telecom legislation would:

- Allow phone companies to receive statewide franchises for their new TV services, bypassing city governments.
- Deregulate basic phone rates, allowing phone companies to raise prices.
- Let electric utilities deliver broadband Internet service over their power lines.

## **2nd Circuit Rejects Pop-Up Ads Infringement Claim**

The 2nd U.S. Circuit Court of Appeals has rejected a trademark infringement action brought against a company that causes "pop-up" advertisements to appear on a plaintiff's Web site.

A two-judge panel found in *1-800 Contacts Inc. v. WhenU.com* that causing pop-up ads, even ads for companies in direct competition with the business of the aggrieved plaintiff, does not amount to a "use" within the meaning of the Lanham Act.

The circuit's decision reverses that of Southern District of New York Judge Deborah A. Batts, who had granted a preliminary injunction against WhenU.com, an Internet marketing company that uses a propriety software that monitors a computer user's Internet activity and then delivers advertising compatible with that activity.

The case has been closely watched by Internet marketers and retailers, with several companies filing an amicus brief urging that Batts' decision be upheld and others, including Google and Electronic Frontier Foundation, weighing in with briefs arguing for reversal.

Plaintiff 1-800 Contacts sells contact lenses and related products by mail, telephone and over the Internet. It filed suit challenging WhenU.com's use of software called "SaveNow," that caused visitors to the 1-800 Web site to see pop-up ads for a direct competitor, Vision Direct Inc., also a named defendant in the lawsuit.

The plaintiff, which had registered the 1-800 Contacts service mark and a specific design logo built around the same name, alleged that causing pop-up ads to appear on its Web site infringed its trademarks in violation of sections 1114(1) and 1125(a)(1) of the Lanham Act.

Batts first found that the inclusion of 1-800's Web site address in SaveNow's directory was a "prohibited use" within the meaning of the act. She then turned to the pop-up ads.

"WhenU.com is doing far more than merely 'displaying' plaintiff's mark," she said. "WhenU's advertisements are delivered to a SaveNow user when the user directly accesses plaintiff's Web site - thus allowing defendant Vision Direct to profit from the goodwill and reputation in plaintiff's Web site that led user to access plaintiff's Web site in the first place."

The appeal was decided by Chief Judge John M. Walker Jr. and Judge Chester J. Straub, with the court not only reversing the grant of injunctive relief but also dismissing the trademark claims completely. The court left other claims by 1-800 intact.

#### DIFFERENT VIEWS OF 'USE'

Walker said that two other district courts, in other cases involving WhenU, have reached the opposite conclusion of Batts on the meaning of "use" under the Lanham Act.

The Eastern District of Michigan found that inclusion of Wells Fargo's trademarked Web site address in WhenU's propriety directory of keywords was not a "use" under the act. And an Eastern District of Virginia judge found that the inclusion of U-Haul's trademarked Web site address in the SaveNow directory was not a "use" because it was for a "pure machine-linking function."

Walker said the reasoning of both cases was persuasive.

He first noted that WhenU does not reproduce or display 1-800's trademarks "at all." Instead, he said, it reproduces the Web site address, "which is similar, but not identical," to the 1-800 Contacts trademark.

Moreover, he said, "it is plain that WhenU is using 1-800's Web site address precisely because it is a Web site address, rather than because it bears any resemblance to 1-800's trademark, because the only place WhenU reproduces the address is in the SaveNow directory" - which is scrambled and therefore inaccessible to the computer user and the general public.

It was important, the judge noted, that a WhenU pop-up ad cannot be triggered by the input of the 1-800 trademark by the computer user or the appearance of that trademark on a Web page accessed by the user.

And it also mattered that, "in contrast" to some of its competitors, WhenU does not disclose to its advertising clients the propriety contents of the SaveNow directory or allow them to "request or purchase specified keywords to add to the directory."

"A company's internal utilization of a trademark in a way that does not communicate it to the public is analogous to a individual's private thoughts about a trademark," he said.

Addressing the pop-up ads, Walker said the "fatal flaw" in the district court's holding was the "acceptance of 1-800's claim that WhenU's pop-up ads appear 'on' and affect 1-800's Web site."

As explained by the court, the WhenU ads appear in a separate window on the screen that is "prominently branded with the WhenU mark; they have absolutely no tangible effect on the appearance or functionality of the 1-800 Web site."

## **Telecom Industry Urges Antitrust Commission to Maintain Nation's Antitrust Laws**

On behalf of the United States Telecom Association (USTelecom), several leading antitrust experts urged a government commission recently to allow the nation's antitrust laws to continue to work and to avoid making unnecessary changes.

In response to the Antitrust Modernization Commission's call for comments, the experts, including two former Justice Department antitrust officials and a former Chair of the Federal Trade Commission, agreed that the nation's laws are working as intended and there is no need to alter antitrust laws legislatively.

"The telecom industry operates in one of the most competitive markets in the world and consumers benefit from having many choices for voice, video and data services. In the comments filed, we see a clear consensus among some of the most respected antitrust authorities in the nation that the existing laws strike an appropriate balance. The antitrust laws should not be legislatively changed to limit consumer choice," explained Jim Olson, Vice President Law and General Counsel for USTelecom.

In submitted comments, James Rill, a former Assistant Attorney General in charge of the U.S. Department of Justice's Antitrust Division, discussed the recent *Trinko* decision in which the Supreme Court unanimously ruled that violations of the Telecommunications Act are not antitrust violations. Rill's comments conclude that the *Trinko* decision "is entirely consistent with fundamental antitrust principles and strikes the right balance

between antitrust and regulation. Legislation to modify or undermine the Trinko decision is not only unnecessary but also unwarranted and unwise.”

Comments filed by Douglas Melamed, also a former Assistant Attorney General for Antitrust, and his partner, Jonathan Nuechterlein, a former Justice Department and Federal Communications Commission official, praised several recent court decisions and warned that legislative doctrine, which is harder to change than judicial doctrine, “would interfere with efficient marketplace conduct or effective antitrust intervention or both, and would thus undermine the core antitrust objectives of robust competition and efficiency.” The comments further explained that the antitrust doctrine set out in recent cases, including the Trinko decision, “is developing properly, and no legislative or regulatory intervention is needed to improve upon it.”

Former Federal Trade Commission Chairman Timothy Muris examined the role of discounts for bundled services and how consumers benefit from increased competition among providers offering such bundles. Muris stated that the history of antitrust enforcement “should give one pause about formulating aggressive rules against what is, at bottom, an important form of price competition.” He concluded that “because we value price competition so highly and because bundled discounts are such a prominent form of price competition, we should err well on the side of preserving these procompetitive benefits of lower prices.”

The final comments, filed on USTelecom’s behalf by attorneys Michael Kellogg and Aaron Panner, examined the doctrine limiting liability for carriers who file tariffs. They concluded that as long as the FCC and the states continue to require providers to file tariffs and offer services under those terms, the rule “properly balances the need to preserve regulatory authority over regulated rates, the interest in ensuring nondiscriminatory treatment of rate-payers, and the legitimate enforcement concerns underlying the antitrust laws.”