

**COURT OF APPEALS
DECISION
DATED AND FILED**

April 16, 1998

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

NOTICE

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No. 97-1516

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT IV**

**AMERITECH ADVANCED DATA SERVICES OF WISCONSIN,
INC.,**

PETITIONER-APPELLANT,

V.

PUBLIC SERVICE COMMISSION OF WISCONSIN,

RESPONDENT-RESPONDENT.

APPEAL from an order of the circuit court for Dane County:
GEORGE NORTHRUP, Judge. *Reversed and cause remanded with directions.*

Before Eich, C.J., Dykman, P.J., and Vergeront, J.

VERGERONT, J. Ameritech Advanced Data Services of Wisconsin, Inc. (AADS) appeals from a trial court order that affirmed the Public Service Commission's order denying AADS certification as a telecommunications reseller. AADS argues that federal law enacted after the PSC entered its order, the

Telecommunications Act of 1996, 47 U.S.C. § 151 *et seq.* (Supp. 1997), preempts the PSC's order and prohibits the PSC from denying certification to AADS. AADS seeks remand to the PSC with directions to certify AADS as a reseller and identify reasonable conditions of certification consistent with 47 U.S.C. § 253(b). We conclude that 47 U.S.C. § 253(a) and (b) preempt state law and therefore any PSC order in response to AADS's application for certification must comply with those federal provisions. Because the PSC has yet to consider the application of 47 U.S.C. § 253(a) and (b) to AADS's application, we reverse the trial court's order and direct the trial court to remand the matter to the PSC on terms that we describe below.

The facts pertinent to this appeal are undisputed. AADS is an affiliate of Wisconsin Bell, Inc. (WBI), a telecommunications utility under Chapter 196, STATS. Both AADS and WBI have Ameritech Corporation as a common parent. AADS applied on May 21, 1993, to be certified as an alternative telecommunications utility under § 196.203, STATS. This statute requires certification by the PSC before any entity may operate as an alternative communications utility. AADS asked to be certified as a reseller of telecommunications, one of the defined types of alternative telecommunications utilities. *See* § 196.01(1d)(c), STATS. A reseller purchases telecommunications services from a utility, repackages them, and "resells" them to the consumer. AADS intended to resell to consumers the transmission services it would purchase from WBI and other telecommunications providers in the state. These resold telecommunications services would be unified with AADS's specialized data switches to provide "bundled" broadband data telecommunications services. WBI filed a related petition requesting approval of an Affiliated Interest Agreement

between WBI and AADS, which set the terms of AADS's purchase of transmission capacity from WBI.

After investigation and hearing, the PSC issued a decision and order on September 1, 1995, denying reseller certification to AADS and dismissing WBI's petition as moot. The PSC found that certifying AADS, even with certain conditions AADS had agreed to that addressed the concerns of AADS's competitors, would pose significant risks to the public interest because of the impact on the telecommunications infrastructure commitment made by WBI. WBI voluntarily elected price regulation under § 196.196, STATS. On September 1, 1994, when it did so, WBI became obligated to file a required infrastructure investment commitment plan. The legislative purpose behind allowing this election upon the specified conditions, the PSC stated, was to permit utilities like WBI to "become more vigorous competitors through the opportunity to introduce new services based on new infrastructure investment, accompanied by greater pricing and profit freedoms." The PSC found that if it certified AADS, AADS rather than WBI would become the developer of the next generation of switching technology. This would not be in the public interest, the PSC concluded, because WBI serves nearly two-thirds of the access lines in Wisconsin, and it needs to develop that technology in order to adequately serve its customers.

After AADS filed a petition for judicial review of the PSC's decision and order but before the trial court issued its decision, Congress enacted the Telecommunications Act of 1996. This is codified at 47 U.S.C. § 151 *et seq.* (Supp. 1997). The purpose of this act is to foster rapid competition in the local telephone service market and to end the monopoly of local providers. *AT&T Communications v. City of Austin*, 975 F. Supp. 928, 933-34, (W.D. Tex. 1997). The pertinent section of the legislation, 47 U.S.C. § 253, provides:

Removal of barriers to entry. (a) In general. No State or local statute or regulation, or other State or local legal requirement, may prohibit or have the effect of prohibiting the ability of any entity to provide any interstate or intrastate telecommunications service.

(b) State regulatory authority. Nothing in this section shall affect the ability of a State to impose, on a competitively neutral basis and consistent with section 254 of this section, requirements necessary to preserve and advance universal service, protect the public safety and welfare, ensure the continued quality of telecommunications services, and safeguard the rights of consumers.

(c) State and local government authority. Nothing in this section affects the authority of a State or local government to manage the public rights-of-way or to require fair and reasonable compensation from telecommunications providers, on a competitively neutral and nondiscriminatory basis, for use of public rights-of-way on a nondiscriminatory basis, if the compensation required is publicly disclosed by such government.

(d) Preemption. If, after notice and an opportunity for public comment, the Commission determines that a State or local government has permitted or imposed any statute, regulation, or legal requirement that violates subsection (a) or (b) of this section, the Commission shall preempt the enforcement of such statute, regulation, or legal requirement to the extent necessary to correct such violation or inconsistency. ...

Before the trial court, AADS argued that the court should remand the case to the PSC because 47 U.S.C. § 253 preempted the order denying certification. The trial court decided not to remand on this ground because it concluded that the issue of preemption could only be resolved by the procedure established in 47 U.S.C. § 253(d)—that is, in a procedure before the Federal Communications Commission (FCC). The trial court concluded that state statutes gave the PSC the authority to deny certification, that denial was not arbitrary and capricious, and denial was supported by substantial evidence. It therefore affirmed the PSC order, and AADS appeals.

The issues we consider on this appeal are: (1) Does the FCC have the exclusive jurisdiction to decide whether the PSC's order denying AADS's reseller certification is preempted by 47 U.S.C. § 253(a) and (b)? (2) If this court may decide that question, should it? (3) If it should, do those federal provisions preempt state law? (4) If they do, what is the appropriate remedy? In resolving these issues, we are reviewing the decision and order of the PSC, not the decision of the trial court. *See American Family Mut. Ins. Co. v. DOR*, 214 Wis.2d 576, 579, 571 N.W.2d 710 (Ct. App. 1997). The interpretation of a statute presents a question of law, which generally we review de novo. *American Family*, 214 Wis.2d at 580, 571 N.W.2d at 713. While the courts may give varying degrees of deference to an agency's interpretation of a statute in particular circumstances, *see id.*, none of those circumstances are present. We are not reviewing a decision of the PSC that interpreted 47 U.S.C. § 253, and more importantly, this is a federal statute and the PSC has no expertise in interpreting and applying it. *See id.* at 583 n.6, 571 N.W.2d at 714. We therefore interpret 47 U.S.C. § 253 independently from both the trial court and the PSC.

Although the PSC argued in its brief that the FCC had the exclusive jurisdiction to decide whether the PSC's order was preempted by 47 U.S.C. § 253, at oral argument PSC's counsel conceded that this position was too broad. We understand the PSC's position as expressed at oral argument to be that, although we may decide this issue, we may also defer to the FCC under the doctrine of primary jurisdiction. Because we are left with some uncertainty whether the PSC was asking us to defer to the FCC, we address that issue.

Nothing in the plain language of 47 U.S.C. § 257(d) indicates that Congress intended to confer on the FCC the exclusive jurisdiction over claims that an order of a state agency violates 47 U.S.C. § 257(a) and (b). *AT&T*, 975 F.

Supp. at 938. The doctrine of primary jurisdiction is a judicially created doctrine under which a court may, in its discretion, dismiss or stay a suit pending the resolution of some or all the issues by an agency that, under an established regulatory scheme has been charged with resolution of such issues. *Id.* See also *Madison Teachers, Inc. v. Madison Metro. Sch. Dist.*, 197 Wis.2d 731, 745-46, 541 N.W.2d 786, 792 (Ct. App. 1995). Application of the doctrine of primary jurisdiction in this case presumes that 47 U.S.C. § 257(d) was established as a means for parties to bring claims arising under 47 U.S.C. § 257(a) and (b) before the FCC rather than simply a procedure permitting the FCC of its own accord to raise and adjudicate preemption issues. See *id.* at 938-39.

Assuming without deciding that under the doctrine of primary jurisdiction deferral to the FCC to resolve conflicts between 47 U.S.C. § 257(a) and (b) and state agency orders would be appropriate in certain circumstances, we conclude that this is not one. The issue of the impact of the newly enacted federal statute arose after AADS filed a petition for judicial review of the PSC's order in state court. This question presents a straightforward issue of statutory construction that does not involve issues requiring the FCC's special expertise. See *AT&T*, 975 F. Supp. at 939. Deferral to the FCC by requiring AADS to initiate a procedure under 47 U.S.C. § 257(d), assuming it may do so, would unnecessarily delay review of the PSC's order. We therefore turn to the question of whether 47 U.S.C. § 253(a) and (b) preempt state law.

The PSC argued in its brief that the prohibition of 47 U.S.C. § 253(a) does not preempt state law because of 47 U.S.C. § 253(d). We are uncertain whether, in abandoning its argument that 47 U.S.C. § 253(d) provides the exclusive means of resolving preemption disputes, the PSC is also abandoning

its argument that 47 U.S.C. § 253(a) does not preempt state law. We therefore address this issue.

Express preemption of state law by federal law occurs when Congress considered the issue of preemption and included in the enacted legislation a provision explicitly addressing that issue, and when that provision provides a reliable indication of congressional intent with respect to state authority. *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 517 (1992). 47 U.S.C. § 253(a) expressly forbids “state or local statute or regulation, or other state or local legal requirement,” from “prohibit[ing] or hav[ing] the effect of prohibiting the ability of any entity to provide any interstate or intrastate telecommunications service.” The scope of this preemption, however, is limited by 47 U.S.C. § 253(b) which expressly does not preempt state regulatory authority insofar as it “impose[s], on a competitively neutral basis and consistent with section 254 of this section, requirements necessary to preserve and advance universal service, protect the public safety and welfare, ensure the continued quality of telecommunications services, and safeguard the rights of the consumers.”¹ We conclude that Congress considered the question of preemption and explicitly addressed it in 47 U.S.C. § 253(a) and (b). Thus, the significant preemption question here is not whether 47 U.S.C. § 253(a) and (b) preempt state law; rather, it is: what is the scope of the preemption? See *AT&T*, 975 F. Supp. at 939-40 (issue before that court was the scope of preemption of state or local regulations under 47 U.S.C. § 253 (a) and (b)).

¹ 47 U.S.C. § 253(c) also reserves another area for state and local government authority, but that is not involved on this appeal.

At oral argument, counsel for PSC acknowledged that the PSC's order under review did prohibit AADS from providing service as a reseller. However, the PSC contends that the order "falls outside of" 47 U.S.C. § 253 because it was based on WBI's voluntary election of price regulation and the accompanying commitment to invest and develop its infrastructure. Therefore, the PSC contends, it is not a "legal requirement" within the meaning of 47 U.S.C. § 253(a). The PSC, however, devotes one page in its brief to this argument, and cites no authority for this interpretation of 47 U.S.C. § 253. At oral argument, PSC's counsel analogized this argument to equitable estoppel, but did not develop it further. There are serious deficiencies in this argument. WBI made the price election and commitment, not AADS. The PSC has presented no reasoned argument and no authority why 47 U.S.C. § 253(a) and (b) do apply to an order barring one entity from providing a telecommunications service on the ground that it would then be more likely that an affiliate would be less inclined to honor prior commitments. We hold that the PSC order does not "fall outside" 47 U.S.C. § 253(a) because of WBI's voluntary election of price regulation.

PSC asks that if we decide that 47 U.S.C. § 253 is applicable, we remand the matter to the PSC to permit it to consider what conditions it may impose on AADS consistent with 47 U.S.C. § 253(b). We conclude that remand is appropriate. However, we consider it premature to order the PSC to certify AADS as a reseller, as AADS requests. Rather, we are persuaded that the better approach is to order a remand without any conditions except that the PSC reconsider AADS's application in light of 47 U.S.C. § 253(a) and (b). *See Westel-Milwaukee Co. v. Walworth County*, 205 Wis.2d 244, 253, 556 N.W.2d 107, 110 (Ct. App. 1996) (remanding entire matter to agency with directions to reevaluate

application to construct cellular phone towers in light of Telecommunications Act of 1996).

AADS asked at oral argument that the PSC be directed to issue a decision and order within sixty days of remand to comply with a PSC procedure in effect at the time the order under review was entered. According to AADS, that procedural requirement is no longer in effect. The PSC, on the other hand, asks that it have at least sixty days from the issuance of an order on a related matter, which, the PSC estimates, would give the PSC until October 1, 1998, to issue an order after remand in this case. We have considered both the legitimate desire of AADS to have a prompt decision after remand, especially given the amount of time that has already passed since it filed its request for certification, and the legitimate need for the PSC to have the opportunity for further fact-finding and proceedings, if necessary, and for coordination with related matters. We decline to impose a deadline for the PSC's order after remand because we do not have sufficient information to determine what is a reasonable deadline. We expect, of course, that the PSC will proceed expeditiously to conduct any necessary proceedings and to issue an order in response to AADS's application.

In conclusion, we reverse the order of the trial court and remand to the trial court with directions that it remand to the PSC. The trial court's order should direct the PSC to reconsider AADS's application for certification as a reseller in light of 47 U.S.C. § 253(a) and (b).

By the Court.—Order reversed and cause remanded with directions.

Not recommended for publication in the official reports.

