

**COURT OF APPEALS
DECISION
DATED AND FILED**

August 18, 1999

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See § 808.10 and RULE 809.62, STATS.

No. 98-1765

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT II**

**COCHRAN, FOX & CO., INC., C.F. COMMUNICATIONS
CORP., AMERICOM, INC., WISCONSIN PAY TELEPHONE
ASSOCIATION, INC., TERRENCE S. FOX AND JEFFREY
G. FROST,**

PETITIONERS-RESPONDENTS,

v.

PUBLIC SERVICE COMMISSION,

RESPONDENT-CO-APPELLANT,

AT&T COMMUNICATIONS OF WISCONSIN, INC.,

RESPONDENT-APPELLANT.

APPEAL from an order of the circuit court for Winnebago County:
BRUCE K. SCHMIDT, Judge. *Reversed.*

Before Nettesheim, Anderson and Wilk, JJ.¹

PER CURIAM. AT&T Communications of Wisconsin, Inc. and the Public Service Commission (PSC) have appealed from a circuit court order determining that the PSC has either express or implied authority under ch. 196, STATS., to address a petition filed by Cochran, Fox & Co., Inc. and several other individuals and entities (Cochran).² The circuit court reversed the PSC's decision determining that it lacked authority to grant the relief requested in the petition and remanded the matter to the PSC for a decision on the merits. We conclude that the PSC correctly determined that it lacked jurisdiction to review the petition. We therefore reverse the circuit court's order.

In its petition, Cochran requested that the PSC set compensation for "dial-around" telephone service for the period between August 27, 1992, and November 6, 1996.³ Dial-around telephone service occurs when a pay telephone customer routes his or her telephone call to a telecommunications provider with which the pay telephone owner does not have a contract for compensation. The PSC issued an order denying the petition on the ground that it did not have the statutory authority to grant the relief requested. While not specifying any statutory basis for its conclusion, the circuit court held that the PSC had either express or

¹ Circuit Judge S. Michael Wilk is sitting by special assignment pursuant to the Judicial Exchange Program.

² In their entirety, the petitioners-respondents are Cochran, Fox & Co., Inc.; C.F. Communications Corp.; Americom, Inc.; Wisconsin Pay Telephone Association, Inc.; Terrence S. Fox and Jeffrey G. Frost.

³ Compensation was requested only for this limited period because the Federal Communications Commission issued an order setting compensation for dial-around service after November 6, 1996.

implied authority under ch. 196, STATS., to grant the dial-around compensation requested by Cochran.⁴

AT&T disputes Cochran's standing to pursue this appeal. We will assume arguendo that standing exists and proceed to address whether the PSC had jurisdiction to consider Cochran's petition.

We review the PSC decision and order directly, using the same standard of review as the circuit court but owing no deference to the circuit court's conclusions. *See Citizens' Util. Bd. v. Public Serv. Comm'n*, 211 Wis.2d 537, 543-44, 565 N.W.2d 554, 558 (Ct. App. 1997). Because this case deals with the scope of the PSC's authority and jurisdiction to decide an issue, a question of law is ultimately presented which we review de novo. *See Jocz v. LIRC*, 196 Wis.2d 273, 290-91, 538 N.W.2d 588, 593 (Ct. App. 1995). However, underpinning this question of law are certain factual questions which involve the PSC's expertise, particularly as to the question of whether a pay telephone constitutes transmission equipment and property within the meaning of § 196.04(1)(a)1, STATS. When a legal question is intertwined with factual determinations or when the administrative agency's experience, technical competence and specialized knowledge aid the agency in its interpretation and application of the law, we give great weight to the agency's determination. *See Sauk County v. Wisconsin Employment Relations Comm'n*, 165 Wis.2d 406, 413, 477 N.W.2d 267, 270 (1991). Consequently, to the extent factual questions are involved in determining

⁴ The circuit court held that the PSC also had authority to grant a request for tariff sharing made by Cochran. However, as discussed by the PSC and AT&T in their briefs, and conceded by Cochran in its brief, Cochran is no longer pursuing this request. Consequently, we need not address this matter further, and our mandate reversing the circuit court's order also reverses the circuit court's ruling remanding the tariff issue to the PSC for a determination on the merits.

whether the PSC had jurisdiction and authority to investigate and resolve Cochran's petition, we will give deference to the PSC's resolution of those questions.

The PSC is a "creature of the legislature." *See Wisconsin Pub. Serv. Comm'n v. Wisconsin Bell, Inc.*, 211 Wis.2d 751, 754, 566 N.W.2d 496, 498 (Ct. App. 1997). It has only such powers as the legislature expressly confers upon it or those that are necessarily implied by ch. 196, STATS., the statute under which it operates. *See Wisconsin Pub. Serv. Comm'n*, 211 Wis.2d at 754, 566 N.W.2d at 498. Any reasonable doubt as to the existence of an implied power should be resolved against the exercise of such authority.⁵ *See id.* at 756, 566 N.W.2d at 499.

The PSC concedes that some disparity existed in the way private pay telephone providers were compensated in the past. However, based upon our review of its statutory authority, we agree with the PSC's conclusion that it has no express authority to address the matter, nor is such authority necessarily implied from the statutes under which it operates. Although Cochran's claim for compensation has an element of fairness to it, this fact alone does not permit this court to conclude that authority to address the matter is necessarily implied in the statutes under which the PSC operates.

⁵ In reversing the PSC's order, the circuit court appeared to reverse this standard, stating that "legislation hasn't kept up with the dramatic change in technology" and that there was a need for someone or some agency to oversee it. The circuit court stated that "if there's not express statutory authority, there certainly should be found to be implied authority within Chapter 196 for the Public Service Commission to become involved in these types of situations." The tentativeness of the circuit court's decision and its inability to identify a statutory basis for the PSC's exercise of jurisdiction is, in effect, an acknowledgment that no jurisdiction exists. While we recognize the circuit court's concerns, those concerns do not provide a basis for finding that jurisdiction exists.

Pursuant to § 196.01(1d)(b), STATS., pay telephone service providers are defined as a type of “alternative telecommunications utility.” Alternative telecommunications utilities are exempt from PSC regulation under ch. 196, STATS., except to the extent the PSC determines that the public interest requires that one or more provisions of that chapter be imposed on them. *See* § 196.203(3)(a), STATS.

Pursuant to § 196.203(3)(a), STATS., the PSC adopted WIS. ADM. CODE § PSC 169.01, which provides:

The purpose of this chapter is to set forth the procedure by which pay telephone service providers are qualified and the statutes to which they are subject.

WISCONSIN ADM. CODE § PSC 169.04 lists the sections of ch. 196, STATS., to which pay telephone service providers are subject, but does not include any statute concerning rate regulation.

Cochran contends that it is seeking compensation, not review of a rate, and that the PSC therefore had authority to act on its petition under either § 196.04, STATS., or § 196.37(2), STATS. Its reliance on both statutes is misplaced.

Section 196.04(1), STATS., provides:

(b) *Transmission equipment and property access.* (1) Any person who owns transmission equipment and property shall permit, for reasonable compensation, the use of the transmission equipment and property by any public utility or telecommunications provider if public convenience and necessity require such use and if the use will not result in irreparable injury to any owner or user of the transmission equipment and property or in any substantial detriment to the service to be rendered by the owner or user.

Section 196.04(2), STATS., provides that if there is a failure to agree upon compensation for the use of transmission equipment and property under subsec. (1), application may be made to the PSC, which may investigate and prescribe reasonable compensation.

Cochran contends that pay telephone service providers are persons who own transmission equipment and property and therefore must permit the use of that property and equipment by public utilities and telecommunications providers within the meaning of § 196.04(1)(b)1, STATS. The PSC rejected this argument after determining that pay telephones do not constitute transmission equipment and property.

A pay telephone service provider is a person who owns or leases a pay telephone located on property owned or leased by that person and who otherwise does not offer any telecommunications service directly or indirectly to the public. *See* § 196.01(4m), STATS. Section 196.04(1)(a)1, STATS., defines “transmission equipment and property” as “any conduit, subway, pole, tower, transmission wire or other equipment on, over or under any street or highway.”

Applying the rule of *ejusdem generis*, the PSC determined that a pay telephone is not “other equipment” within the meaning of § 196.04(1)(a)1, STATS. Under this rule, where a general term commencing with the word “other” is preceded by a series of specific terms, the general term is viewed as being limited to items of the same type or nature as those specifically enumerated. *See Rath v. Two Rivers Community Hosp., Inc.*, 160 Wis.2d 853, 860, 467 N.W.2d 150, 153 (Ct. App. 1991). The specific terms must have a common element defining the class to which the general term is to be restricted. *See id.*

The common element which links the specific terms in § 196.04(1)(a)1, STATS., is that they are all types of equipment used to transmit signals or services, providing point-to-point interconnection of electrical and telecommunication services. By including the phrase “on, over or under any street or highway,” the statute further restricts the meaning of the specific terms to types of structural transmission equipment along or under public rights of way.

In contrast, a pay telephone is terminal equipment from which a person makes a telephone call. It is attached to a public network at the end of a telephone access line. It may be located on private or public premises, depending upon the type of property owned or leased by the pay telephone service provider. It thus fails to satisfy the required common elements of providing point-to-point interconnection of telecommunication services and of being in, over or under the public right of way.

Because the PSC’s determination that pay telephones do not constitute transmission equipment or property involves the use of its technical expertise and experience, we defer to that determination. However, even if we were to review this issue giving no deference to the PSC, we would agree with its conclusion that a pay telephone does not constitute transmission equipment or property as defined in the statutes.

A right to compensation under § 196.04(1)(b)1, STATS., is also limited to situations where transmission equipment or property is used “by any public utility or telecommunications provider.” The use for which Cochran seeks compensation occurs when a customer, or end-user, places a call from a private pay telephone. The customer is clearly not a public utility. In addition, under § 196.01(8p), STATS., a telecommunications provider is a person who provides

telecommunications services, and thus does not include the end-user placing a telephone call. While Cochran argues that the telecommunications providers who benefit when a dial-around call is placed should be deemed constructive users of the pay telephones and compelled to pay compensation for the use, it cites no legal authority for this argument, nor can the statutes be construed to express such a legislative intent. The PSC therefore properly determined that it had no authority to provide relief to Cochran pursuant to § 196.04.

The PSC also properly determined that it lacked authority to grant relief under § 196.37(2), STATS. Section 196.37(2) provides:

If the commission finds that any measurement, regulation, practice, act or service is unjust, unreasonable, insufficient, preferential, unjustly discriminatory or otherwise unreasonable or unlawful, ... the commission shall determine and make any just and reasonable order relating to a measurement, regulation, practice, act or service to be furnished, imposed, observed and followed in the future.

We agree with the PSC that Cochran is attempting to construe this provision much too broadly. Section 196.37, STATS., is not self-executing. It provides remedial powers following a PSC investigation in situations where jurisdiction and authority to investigate rates and practices exists. This limitation is clearly set forth in § 196.37(1), which provides for remedies if the PSC finds a rate, toll, charge or schedule to be unjust or unreasonable “after an investigation under this chapter or ch. 197.” Although § 196.37(2) does not contain the same quoted language, it sets forth the same type of remedial powers in situations where the PSC finds “any measurement, regulation, practice, act or service” to be unjust or unreasonable. Like § 196.37(1), it cannot be considered separately from the PSC’s authority and jurisdiction under the remainder of ch. 196, STATS., and

cannot be construed to create new, additional and undefined jurisdiction to award compensation.

As a final matter, Cochran also argues that the actions of the PSC constitute a “taking” of its property, entitling it to relief under Article I, Section 13 of the Wisconsin Constitution, which provides that “[t]he property of no person shall be taken for public use without just compensation therefor.” This argument fails because the PSC has taken nothing from Cochran. Any injury to Cochran arises from the choices made by pay telephone users concerning methods of making telephone calls, not from any attempt by the PSC to take property for public use.

By the Court.—Order reversed.

This opinion will not be published. *See* RULE 809.23(1)(b)5, STATS.

