

**COURT OF APPEALS
DECISION
DATED AND RELEASED**

JULY 2, 1996

NOTICE

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(1), STATS.

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No. 95-3167

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT IV**

WISCONSIN STATE TELEPHONE ASSOCIATION,

Petitioner-Appellant,

v.

**PUBLIC SERVICE COMMISSION OF
WISCONSIN, AT&T COMMUNICATIONS,
SCHNEIDER COMMUNICATIONS, INC.,**

Respondents-Respondents.

APPEAL from a judgment and an order of the circuit court for Dane County: GEORGE NORTHRUP, Judge. *Affirmed.*

Before Cane, P.J., LaRocque and Myse, JJ.

LaROCQUE, J. The Wisconsin State Telephone Association (WSTA) appeals a judgment and an order concluding that it lacks standing to seek judicial review of a Public Service Commission order that requires local telephone exchange carriers to remove restrictions on the resale of certain packages of telecommunications services from their public tariffs. The circuit court held that the order injured members of WSTA, but that WSTA lacked standing because its members' interest is not protected by law.

WSTA argues that the order violates its members' protected interest established by § 196.50(1)(b)2, STATS., to a PSC hearing and relief of its members' other legal obligations.¹ We conclude that this statute does not apply because the PSC order at issue did not grant a certificate, license, permit or franchise. Alternatively, WSTA argues that the order violates its members' protected interest to limit the use of business line services as a substitute for access service established by § 196.219(3)(j), STATS.² We conclude that this statute does not create a protected interest from PSC action because it

¹ Section 196.50(1)(b), STATS., provides in relevant part:

(b)2. ... [T]he commission may not grant any person a certificate, license, permit or franchise to own, operate, manage or control any plant or equipment for the furnishing of local exchange service in a municipality, if there is in operation under an indeterminate permit a public utility engaged in similar service in the municipality under an indeterminate permit, unless any of the following conditions is met: ...

....

d. The commission, after investigation and opportunity for hearing, finds that public convenience and necessity requires the delivery of service by the applicant, in which case the holder's obligation to be the provider of last resort is eliminated.

² Section 196.219(3)(j), STATS., provides in part:

A telecommunication utility may not do any of the following with respect to regulated services:

....

(j) Restrict resale or sharing of services, products or facilities, except basic local exchange service other than extended community calling, unless the Commission orders the restriction to be lifted. *A telecommunications utility that has 150,000 or less access lines in use in this state may limit the use of extended community calling or business line and usage service within a local calling area as a substitute for access service, unless the commission orders the limitation to be lifted.* (Emphasis added.)

The parties do not dispute that some of WSTA's members are small local exchange carriers (LECs) with 150,000 or less access lines.

unambiguously allows the PSC to limit the members' ability to limit resale. Therefore, we affirm the judgment and the order.³

BACKGROUND

WSTA is a voluntary association of companies that provide telecommunications services in Wisconsin. Many of WSTA's members are Local Exchange Carriers (LECs). Smaller LECs, those with 150,000 or fewer access lines in Wisconsin, are the monopoly service providers for every local exchange customer in their respective franchise territories. *See* § 196.50(2), STATS.

The dispute in this case involves the PSC's approval of a package of telecommunications services named CENTREX for resale. CENTREX is offered to LECs' business customers and allows the customers to combine and use a variety of telephone features and lines for outside and interoffice calling.⁴

³ After completion of filing briefs for this case, the PSC informed us that the case may be moot due to the enactment of The Telecommunications Act of 1996, Pub. L. 104-104, 110 Stats. 56. The provisions created by the Act in 47 U.S.C. §§ 251 and 253 are relevant to the duty of all providers of local exchange service to provide resale of their services. WSTA does not agree that the federal Act makes this appeal moot. After a teleconference with the parties on the matter, we decided to proceed with the appeal as it was originally presented to us.

⁴ In a departmental correspondence, the PSC defined CENTREX as follows:

CENTREX service combines local service with a number of special features, including custom calling features, distinctive ring patterns for calls originated and terminated at the same customer premises, and free calling between a customer's stations. CENTREX provides both a local loop and local switching. CENTREX functions by dedicating a partitioned portion of a local exchange carrier's (LEC) central office switch to the typical large customer's in-house needs.

According to another PSC departmental correspondence "CENTREX is a trademark, owned by the Regional Bell Operating Companies ... for a central-office-based service which provides the same functions as a private branch exchange." The same service is offered by other independent local exchange carriers under a variety of names. As used in this opinion, CENTREX refers to the generic service.

A "reseller" can resell services throughout the state that the PSC has approved for resale and has no specific service territory or guaranteed customers. Section 196.01(9), STATS.

Resellers purchase CENTREX from LECs in bulk and, therefore, cheaper than other CENTREX customers. The reseller then repackages the service and resells it to an LEC's present or potential customers. Because CENTREX does not provide long distance service, a reseller must also purchase "access" to tie CENTREX to long distance.⁵ A staff analysis contained in a departmental correspondence of the PSC concluded that if CENTREX is resold, "LECs will continue to collect revenue from their local customers, albeit through the reseller rather than directly, and possibly at slightly reduced levels."

The PSC issued a notice inviting comments to a staff proposal to remove prohibitions restricting CENTREX resale. Although some commenting telecommunications companies, including some WSTA members, supported the staff proposal, WSTA as an entity opposed allowing resale. The PSC approved CENTREX resale in a letter order. WSTA petitioned for rehearing of the PSC's order. The PSC denied WSTA's petition. WSTA appealed the letter order and the denial of its petition for rehearing to the Dane County Circuit Court, which consolidated the two appeals. The PSC, AT&T, and Schneider Communications, Inc., moved to dismiss the petitions for lack of standing. The trial court dismissed the petitions on the grounds that WSTA's claimed injury, the loss of revenue from increased competition, was unprotected by law.

DISCUSSION

The issue of standing is a question of law that we decide independently. *State Public Intervenor v. DNR*, 184 Wis.2d 407, 415, 515 N.W.2d 897, 901 (1994). When evaluating a motion to dismiss in a ch. 227, STATS., proceeding, we assume the allegations are true and we entitle the allegations to a liberal construction in favor of the petitioner. *WED v. PSC*, 69

⁵ Resellers can purchase access in two ways. First, a reseller can pay for actual time used, measured in "minutes of use." Alternatively, a customer can pay a fixed monthly charge for special, private access.

Wis.2d 1, 8, 230 N.W.2d 243, 247 (1975). Further, the law of standing is to be construed liberally. *Id.* at 13, 230 N.W.2d at 249.

Section 227.53, STATS., allows any person aggrieved by an agency decision to seek judicial review of that decision.⁶ Section 227.01(9), STATS., defines "[P]erson aggrieved" as "a person or agency whose substantial interests are adversely affected by a determination of an agency." Wisconsin courts use a two-part test to determine whether a party meets this definition and thus has standing. The party seeking review must establish that, first, it sustained an alleged injury due to an agency decision and, second, that the injury is to an interest "which the law recognizes or seeks to regulate or protect." *Public Intervenor*, 184 Wis.2d at 416, 515 N.W.2d at 901. "Thus, we examine a specific statute to determine standing rather than consider all interests of the petitioner." *MCI Telecommun. Corp. v. PSC*, 164 Wis.2d 489, 493, 476 N.W.2d 575, 577 (Ct. App. 1991).

Assuming without deciding that WSTA members suffered an alleged injury from the loss of revenue they will suffer as a result of competition from resellers,⁷ we must determine whether the law protects the members' right to be free from competition. "There is no property right to engage in a business free of competitors. However, if a statute indicates an intent to protect a competitive interest, an injured competitor has standing to seek to require compliance with the statute." *Id.* at 496, 476 N.W.2d at 578 (citations omitted). WSTA claims that §§ 196.50(1)(b) and 196.219(3)(j), STATS., indicate an intent to protect its members' competitive interest in the resale of CENTREX.

I

⁶ Section 227.53(1), STATS., provides "Except as otherwise specifically provided by law, any person aggrieved by a decision specified in s. 227.52 shall be entitled to judicial review thereof as provided in this chapter."

⁷ The respondents argue that WSTA was not injured and that it does not have associational standing to represent its members. We will not address these issues because our holding that WSTA's injury is not protected at law is dispositive of the appeal. *See Sweet v. Berge*, 113 Wis.2d 61, 67, 334 N.W.2d 559, 562 (Ct. App. 1983) (if decision on one point disposes of appeal, appellate court will not decide other issues raised).

WSTA argues that § 196.50(1)(b)2, STATS., indicates an intent to protect LECs from competition in the sale of CENTREX. That section requires the PSC to hold a hearing and to relieve WSTA members of their obligation to be the provider of last resort if the PSC grants an applicant "a certificate, license, permit or franchise to own, operate, manage or control any plant or equipment for the furnishing of local exchange service"⁸ See *supra* note 1.

The respondents counter that this section does not indicate an intent to protect LECs from the resale of CENTREX because the resellers have not been granted a "certificate, license, permit or franchise." Section 196.01(9), STATS., defines a "reseller" as a telecommunications utility that resells services "which have been *approved* for reselling by the commission." (Emphasis added.) The respondents conclude that § 196.50, STATS., does not protect WSTA members' interest to be free from resale competition because "approval" does not constitute a "certificate, license, permit or franchise." WSTA responds that the PSC's approval of the resale of CENTREX constitutes either a "license" or a "certificate."

WSTA relies on the definition of license in § 227.01(5), STATS. That section defines a license as "all or any part of an agency permit, certificate, approval, registration, charter or similar form of permission required by law" WSTA argues that this definition includes PSC approval to resell CENTREX. We reject WSTA's argument because the definitions in § 227.01 unambiguously apply only to ch. 227.⁹ Therefore, the definition of "license" in § 227.01(5) does not apply to ch. 196, STATS.

Chapter 196, STATS., does not specifically define license. We conclude that the term is ambiguous. A statutory term is ambiguous if reasonably well-informed persons could understand it in more than one way. See *Falk v. Falk*, 158 Wis.2d 184, 188, 462 N.W.2d 547, 548 (Ct. App. 1990). One could reasonably interpret the term "license" broadly, like the definition

⁸ The legislature has mandated that all LECs provide service to any entity that requests service within its service area. This requirement is known as the "provider of last resort obligation." See § 196.219(3), STATS.

⁹ Section 227.01(5), STATS. provides in part: "*In this chapter:* ... 'License' includes" (Emphasis added.)

provided by § 227.01(5), STATS. However, one could also reasonably interpret license to mean a formal, individualized authorization in the form of a license. We adopt the latter definition.

Section 196.50(1)(b)2, STATS., applies when the PSC grants any person a "certificate, license, permit or franchise." If we were to interpret license broadly, it would render "certificate," "permit" and "franchise" surplusage because those terms are included in the broad definition of license. A statute should be construed so as not to render any portion or word surplusage. *In re Angel Lace M.*, 184 Wis.2d 492, 506, 516 N.W.2d 678, 681 (1994).

Using our definition, we conclude the PSC did not grant the resellers a license. The PSC lifted a broad-based restriction on reselling; it did not grant formal, individualized authorization.

We also conclude that the PSC did not grant the resellers a certificate by allowing them to resell CENTREX. Resellers are "[a]lternative telecommunications utilit[ies]" (ATUs). Section 196.01(1d), STATS. Pursuant to § 196.50(2)(a), STATS., "[a]lternative telecommunications utilities shall be certified under s. 196.203." Section 196.203, STATS., regulates the procedure the PSC and the ATU must follow for the ATU to become certified, i.e., obtain a certificate, to commence service as an ATU. WSTA does not allege that § 196.203 procedures were followed. Further, the PSC order does not allow any ATUs to commence service; it merely allows existing ATUs to expand their service. Therefore, the PSC's approval of CENTREX for resale does not constitute granting the resellers a certificate.

In 1993 Wis. Act 496 § 50, the legislature redirected the PSC's primary regulatory focus in telecommunications from the control of providers to serving the public's needs for adequate telecommunications at reasonable and just prices. For example, in that Act, the legislature created § 196.03(6), STATS., which provides in part: "In determining a reasonably adequate telecommunications service or a reasonable and just charge for that telecommunications service, the commission shall consider at least the following factors in determining what is reasonable and just, reasonably adequate, convenient and necessary, or in the public interest: (a) Promotion and preservation of competition " Our conclusion fosters increased competition

in the telecommunications industry because a finding of public convenience and necessity is not required each time the PSC approves a service for resale.¹⁰

II

Next, WSTA argues that § 196.219(3)(j), STATS., indicates an intent to protect its small members from competition in the resale of CENTREX. That section provides that small LECs "may limit the use of extended community calling or business line and usage service within a local calling area as a substitute for access service, unless the commission orders the limitation to be lifted."¹¹

We reject WSTA's argument. LECs only have the right to limit the use of services "unless the commission orders the limitation to be lifted." Assuming without deciding that CENTREX is a "business line and usage service" that acts as a "substitute for access service," the statute does not indicate an intent to protect WSTA members from the PSC's power to lift any limitations on use.¹²

¹⁰ A letter to the PSC from an LEC supporting CENTREX resale stated:

In an increasingly complex telecommunications environment, it is very difficult for any company to be all things to all consumers. The additional competition that CENTREX resale brings forth serves to enhance most customer solutions, generally brings better customer service and brings lower prices to most customers.

¹¹ Section 196.01(1b), STATS., defines "[a]ccess service" as "the provision of switched or dedicated access to a local exchange network for the purpose of enabling a telecommunications provider to originate or terminate telecommunications service."

¹² The respondents also argue that CENTREX is not a "business line and usage service," that CENTREX is not a "substitute for access service," and that § 196.219(3)(j), STATS., only allows small telephone companies to limit the use, but not the resale, of services. If we accepted any of these arguments, the statute would not give WSTA members a legally protected interest to limit CENTREX resale. However, we do not address these arguments because even if we accept WSTA's premise, the statute does not create a legally protected interest because it unambiguously gives the PSC the power to lift the limitation.

WSTA argues that the PSC can only order the limitation to be lifted for a service "which the PSC believes acts as a substitute for access service," citing § 196.219(3)(j), STATS. We disagree. Per a plain reading of the statute, no such requirement exists. Other sections of ch. 196 require the PSC to make a finding or a determination before taking action, *see, e.g.*, §§ 196.203(1m) and 196.50(2)(d), STATS. The Legislature would have explicitly required the PSC to make a determination or finding before lifting the limitation if the Legislature adjudged it was necessary to do so.

CONCLUSION

We conclude that WSTA lacks standing because any injury its members suffered resulting from the PSC order is not protected by the law. The alleged injury is not protected under § 196.50(1)(b)2, STATS., because the PSC did not grant the resellers a "certificate, license, permit or franchise." Section 196.219(3)(j), STATS., does not provide WSTA members any legally protected rights against PSC actions because that section unambiguously allows the PSC to remove all rights the section confers to small LECs.

By the Court. – Judgment and order affirmed.

Not recommended for publication in the official reports.