

**COURT OF APPEALS
DECISION
DATED AND FILED**

April 10, 2008

David R. Schanker
Clerk of Court of Appeals

NOTICE

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Appeal No. 2007AP1589

Cir. Ct. No. 2003CV1017

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT IV**

**CHIBARDUN TELEPHONE COOPERATIVE, INC. AND
CTC TELCOM, INC.,**

PLAINTIFFS-APPELLANTS,

v.

WISCONSIN BELL, INC. D/B/A SBC,

DEFENDANT-RESPONDENT.

APPEAL from an order of the circuit court for Dane County:
STEVEN D. EBERT, Judge. *Reversed and cause remanded for further
proceedings.*

Before Dykman, Vergeront and Lundsten, JJ.

¶1 LUNDSTEN, J. Chibardun Telephone Cooperative and CTC
Telcom (collectively, "Chibardun") appeal the circuit court's order dismissing

their action against Wisconsin Bell. The circuit court concluded that it lost jurisdiction over the case under *Browne v. Milwaukee Board of School Directors*, 83 Wis. 2d 316, 265 N.W.2d 559, 267 N.W.2d 379 (1978), after the Public Service Commission issued a decision in a separate but closely related proceeding before the PSC. We conclude that *Browne*, where the circuit court deferred to an agency to decide a case, does not address the situation here, where the circuit court never deferred to the PSC but only stayed the case to see what the PSC would decide in the closely related proceeding. We therefore reverse the circuit court's order and remand for further proceedings.

Background

¶2 Chibardun is a provider of telephone exchange services. In 2003, Chibardun filed this court action against Wisconsin Bell. Chibardun alleged that Wisconsin Bell, under various applicable requirements, failed to pay Chibardun certain fees. At about the same time, a number of other telephone exchange service providers filed a complaint against Wisconsin Bell with the PSC.

¶3 For purposes of resolving this appeal, we need not specify Chibardun's allegations or the extent to which they do or do not overlap with the PSC proceeding allegations. Rather, what matters is that the parties here do not dispute that there is some overlap between Chibardun's circuit court allegations and the other telephone exchange service providers' PSC allegations.

¶4 The same year Chibardun filed suit, 2003, Wisconsin Bell moved to dismiss Chibardun's suit, arguing that the PSC had primary jurisdiction over the subject matter. The circuit court denied the dismissal motion and instead issued a stay. The court directed the parties to report at a later date on the status of the PSC's proceeding, explaining that the court would then determine whether to

revisit Wisconsin Bell's dismissal motion or to lift the stay. In a written order dated October 10, 2003, the court stated that it issued the stay "to allow the parties to present to the [PSC] for resolution the issues raised in the Complaint," and that "[b]ased on the parties' report, the Court will consider whether to extend the stay, revisit the motion to dismiss, or schedule further proceedings in this case." The parties subsequently reported back and the court lifted the stay and denied Wisconsin Bell's motion to dismiss.

¶5 The parties resumed litigating their court action. This litigation consisted primarily of filing a lengthy stipulation of facts and cross-motions for summary judgment on the merits of Chibardun's allegations.¹ The proceeding before the PSC also continued.²

¶6 In 2006, Wisconsin Bell filed a motion to dismiss based on events occurring before the PSC. Specifically, Wisconsin Bell informed the court that the PSC proceeding had been converted to a contested case. Wisconsin Bell asserted that the PSC would decide the same issues that were pending in the court action within a relatively short time frame. In essence, Wisconsin Bell argued that the circuit court should let the parties' dispute be resolved by the PSC. As an alternative to dismissal, Wisconsin Bell requested another stay.

¹ The circuit court did not resolve these cross-motions, which were pending at the time the court ordered the dismissal that led to this appeal.

² Chibardun intervened in the PSC proceeding for the limited purpose of asking the PSC to stay or to dismiss the PSC proceeding with regard to issues allegedly in common with Chibardun's circuit court action so that those issues could be resolved in the circuit court. Chibardun failed in this endeavor.

¶7 The circuit court denied Wisconsin Bell's motion to dismiss, but imposed another stay pending the PSC's decision.

¶8 The PSC issued its decision in December 2006. Based on this decision, Wisconsin Bell once again moved to dismiss. Wisconsin Bell argued that the circuit court lacked jurisdiction to proceed because it had previously "deferred" to the PSC's expertise by staying the court proceedings. This time, the circuit court granted Wisconsin Bell's motion. The court concluded that, when the PSC issued its decision, the court "lost jurisdiction" under the supreme court's *Browne* decision. Accordingly, the circuit court dismissed Chibardun's action against Wisconsin Bell. Chibardun appealed.

Discussion

¶9 The issue before us is whether the circuit court erred when it granted Wisconsin Bell's motion to dismiss. As we shall see, that question is easily resolved because the circuit court based its dismissal decision on a misreading of *Browne*. A possibly more complicated question, addressed at the end of this opinion, is what the circuit court could or should have done and, thus, what it may or should do on remand.

¶10 In the circuit court, Wisconsin Bell argued that dismissal was required under *Browne*. The circuit court agreed, explaining:

[N]ow that the PSC has addressed the issues of this dispute, the Court must grant the motion to dismiss. This Court did not lose jurisdiction when, in granting the motion to stay the proceedings, it acknowledged that the PSC was the more appropriate entity to address this case. Rather, the Court lost jurisdiction to rule on this case when the PSC actually did so.... To be entirely accurate, when this Court stayed the proceedings in anticipation of a ruling from the PSC and the PSC *then actually issued a ruling*, the Court lost jurisdiction.

¶11 Chibardun argues that *Browne* does not compel dismissal of its action. We agree, and conclude that the circuit court erred as a matter of law when it determined that, under *Browne*, it “lost jurisdiction” over Chibardun’s action once the PSC issued its decision.

¶12 Both *Browne* and the case before us involve the primary jurisdiction doctrine. Briefly stated, this doctrine provides that, when both a circuit court and an administrative agency may properly exercise jurisdiction over a dispute, the court has the discretion to decide the matter or defer to the agency. See *City of Brookfield v. Milwaukee Metro. Sewerage Dist.*, 171 Wis. 2d 400, 420, 491 N.W.2d 484 (1992). But the relevant holding in *Browne* has no application here.

¶13 In *Browne*, the circuit court exercised its discretion under the primary jurisdiction doctrine to defer to the Wisconsin Employment Relations Commission (WERC) in a case involving employee fair share dues. *Browne*, 83 Wis. 2d at 322, 323, 325-26, 327-28. The supreme court first upheld the circuit court’s discretionary deferral to WERC. *Id.* at 332-33. Next, the court held that the circuit court could not defer to WERC and at the same time retain jurisdiction for purposes of reviewing the agency’s subsequent decision under WIS. STAT. ch. 227:

In this case, as in all cases where questions of primary jurisdiction occur, both the trial court and the administrative agency have concurrent jurisdiction. The trial court may therefore retain jurisdiction until W.E.R.C. makes its factual determination concerning fair share dues....

When W.E.R.C. has determined all issues before it, both W.E.R.C. and the trial court will be precluded from any further action. The trial court may not retain jurisdiction of this case for purposes of ch. 227 review of W.E.R.C.’s decision.

Id. at 340b-41 (*on reh'g*) (citation omitted); *see also id.* at 333 n.8 (circuit court may not both defer to an agency and retain jurisdiction for purposes of ch. 227 review).³

¶14 The second *Browne* holding, including the passage quoted above, is what the circuit court here relied on to conclude that it lost jurisdiction. This reliance is misplaced. Here, the circuit court did not defer to the administrative agency. Thus, there was no issue as to whether the court could both defer to the PSC and retain jurisdiction for purposes of ch. 227 review. Rather, the proceeding before the PSC was commenced independent of the circuit court action, and the court merely stayed the action before it to see what might occur in what was a closely related agency proceeding.

¶15 Although a circuit court's decision to defer a matter to an agency might involve a stay, it is axiomatic that a stay alone is not a deferral. If the circuit court intended to defer to the PSC, it had to do more than impose a stay. We do not suggest that magic words are required, but, if the court intends to defer to the agency, at a minimum the circuit court must state words to that effect. The agency and the parties must be advised that the court is directing the parties to take their dispute to the agency to take up and resolve all or part of the matter before the court.

³ We note that the court in *Browne v. Milwaukee Board of School Directors*, 83 Wis. 2d 316, 265 N.W.2d 559, 267 N.W.2d 379 (1978), uses the term "refer" or "transfer," *id.* at 322-23, 326-30, 332-33 & n.8, while the bulk of the case law uses the term "defer." *See, e.g., City of Brookfield v. Milwaukee Metro. Sewerage Dist.*, 171 Wis. 2d 400, 411, 491 N.W.2d 484 (1992); *Butcher v. Ameritech Corp.*, 2007 WI App 5, ¶38, 298 Wis. 2d 468, 727 N.W.2d 546 (Ct. App. 2006), *review denied*, 2006 WI 61, 300 Wis. 2d 193, 732 N.W.2d 859 (No. 2005AP2355). The use of "defer," "refer," or "transfer" does not, however, affect our analysis. It is clear that, regardless of the term used in *Browne*, the decision there would have been the same.

¶16 We recognize that the court concluded that the issues in both this case and the PSC proceeding are the same, or at least substantially so. We also recognize that the parties dispute the precise relationship between the issues in the court action and the issues before the PSC. For purposes of whether *Browne* is controlling, however, this is all beside the point because the circuit court here did not defer to the PSC. Rather, the court retained the case.

¶17 In an attempt to bring this case under the purview of *Browne*, Wisconsin Bell characterizes two of the circuit court's orders as decisions to defer to the PSC. We are not persuaded.

¶18 One of the orders on which Wisconsin Bell relies is the court's 2006 stay order. Although that order refers to "primary jurisdiction," a concept discussed in *Browne*, the court's ultimate directive was unmistakably no more than a stay. The court concluded as follows in its order:

Having gotten this far in this action, the court does not wish to dismiss this action outright, ... but rather imposes a stay on this action pending the outcome of the administrative proceeding In so ruling, the court holds open the possibility that one of the parties may in the future present to the court a valid reason for judicial intervention in this action, or move the court once again to dismiss this action.

¶19 The second order on which Wisconsin Bell relies is the circuit court's 2003 stay order, granting a stay "to *allow* the parties to present to the [PSC] for resolution the issues raised in the Complaint" (emphasis added). Wisconsin Bell's attempt to characterize this order as deferring to the PSC lacks merit for at least two reasons. First, the court did not, in the order or in the hearing leading up to the order, direct the parties to take their dispute before the PSC.

Second, the circuit court went on to lift the stay a relatively short time later, and litigation on the merits of Chibardun's allegations resumed in court.

¶20 Having concluded that the circuit court dismissed Chibardun's action based on a mistaken view of the law and that the matter must be remanded to the circuit court, we turn to the question of directions on remand. On remand, the court and parties will be faced with the question of what options are available given our conclusion that the court did not previously defer to the PSC. The posture of this case differs from the published primary jurisdiction cases that the parties cite and that we have located. Those cases generally involve the question of whether a court and an agency had concurrent jurisdiction, *see, e.g., Browne v. Milwaukee Bd. of Sch. Dirs.*, 69 Wis. 2d 169, 174-75, 230 N.W.2d 704 (1975); *City Firefighters Union, Local No. 311 v. City of Madison*, 48 Wis. 2d 262, 265-66, 268-69, 179 N.W.2d 800 (1970); *Wisconsin Collectors Ass'n v. Thorp Fin. Corp.*, 32 Wis. 2d 36, 41-46, 145 N.W.2d 33 (1966); *Providence Catholic Sch. v. Bristol Sch. Dist. No. 1*, 231 Wis. 2d 159, 170-71, 605 N.W.2d 238 (Ct. App. 1999); *Wisconsin Bell, Inc. v. DOR*, 164 Wis. 2d 138, 141 n.2, 473 N.W.2d 587 (Ct. App. 1991), or whether the circuit court, as a proper exercise of discretion, should defer to an agency or retain a case when concurrent jurisdiction exists, *see, e.g., Beal v. First Fed. Sav. & Loan Ass'n*, 90 Wis. 2d 171, 197-99, 279 N.W.2d 693 (1979); *McEwen v. Pierce County*, 90 Wis. 2d 256, 271-74, 279 N.W.2d 469 (1979); *Browne*, 69 Wis. 2d at 175-77; *State v. Dairyland Power Coop.*, 52 Wis. 2d 45, 55-56, 187 N.W.2d 878 (1971); *City Firefighters Union*, 48 Wis. 2d at 269-71; *Wisconsin Collectors Ass'n*, 32 Wis. 2d at 48-49; *Butcher v. Ameritech Corp.*, 2007 WI App 5, ¶¶37-45, 298 Wis. 2d 468, 727 N.W.2d 546 (Ct. App. 2006), *review denied*, 2006 WI 61, 300 Wis. 2d 193, 732 N.W.2d 859 (No. 2005AP2355); *Providence Catholic Sch.*, 231 Wis. 2d at 171-72; *Madison*

Teachers, Inc. v. Madison Metro. Sch. Dist., 197 Wis. 2d 731, 744-47, 541 N.W.2d 786 (Ct. App. 1995); *Wisconsin Bell*, 164 Wis. 2d at 141-47.

¶21 Here, the court did not exercise its discretion to defer to the PSC, at least not in a sufficiently detailed manner, but instead chose to see what happened in an independent agency proceeding, and was then faced with what to do once the agency had decided that proceeding. As already indicated, this particular scenario appears to be uncharted territory. Consequently, we choose not to provide specific directions, but instead suggest areas of inquiry because the parties' briefs on appeal do not address the full range of potential options on remand.

¶22 If the circuit court now may and does defer to the PSC on the entire matter, must or may the court dismiss Chibardun's action? If the circuit court may but does not defer to the PSC on the entire matter, the following questions may need answers: (1) To the extent the PSC decision resolves issues raised in this court action, and the court retains the issues, must or should the circuit court give deference to the PSC decision? (2) Are there issues in this action that are not resolved by the PSC decision?⁴ (3) If there are issues not resolved by the PSC decision, and if the PSC has concurrent jurisdiction over such issues, should the circuit court exercise its discretion to defer to the PSC on those issues? In short, there appear to be multiple options available on remand, at least one of which

⁴ Although the circuit court's decision states that "the PSC has addressed the issues of this dispute," that statement is unsupported by analysis and seems to conflict with a later comment by the court in its decision that, had the court reached the parties' cross-motions for summary judgment, there "appear to be sufficiently disputed issues of fact" such that granting the motions would have been inappropriate. Moreover, the parties' briefing on appeal suggests to us that there is a legitimate dispute as to whether all of Chibardun's allegations could be resolved by reference to the PSC decision. We do not, however, weigh in on which party should prevail in that dispute.

involves the exercise of discretion. Consequently, this case does not lend itself to specific remand directions.

¶23 For the reasons above, we reverse the circuit court's order dismissing Chibardun's action against Wisconsin Bell and remand for further proceedings.

By the Court.—Order reversed and cause remanded for further proceedings.

Not recommended for publication in the official reports.