No. 125,352

IN THE COURT OF APPEALS OF THE STATE OF KANSAS

BLUE VALLEY TELE-COMMUNICATIONS, INC., et al.,
Appellants,

v.

KANSAS CORPORATION COMMISSION,
Appellee.

SYLLABUS BY THE COURT

1.

The party challenging the validity of an agency's action bears the burden of proving such invalidity under K.S.A. 77-621(a)(1).

2.

Appellate courts exercise the same statutorily limited review of the agency's action as does the district court, as though the appeal had been made directly to the appellate court. K.S.A. 77-601 et seq.

3.

The appellate court does not extend deference to an agency's statutory interpretation.

4.

The Fifth Amendment to the United States Constitution prohibits the taking of private property for public use without just compensation. The protections of the Takings Clause apply to the actions of state and local government entities through the Fourteenth Amendment to the United States Constitution.

5.

The government regulation of privately owned utilities can diminish the utilities' value to a degree creating a constitutionally compensable taking.

6.

The guiding principle in utility cases has been that the Constitution protects utilities from being limited to a charge for the property serving the public which is so unjust as to be confiscatory.

7.

The burden of proving that the taking is confiscatory is on the party asserting the takings claim.

8.

The mere reduction of a utility's profit or rate of return by some unproven amount does not, without more, establish an unconstitutional taking.

9.

Statutory interpretation presents a question of law over which appellate courts have unlimited review.

10.

The most fundamental rule of statutory construction is that the intent of the Legislature governs if that intent can be ascertained. An appellate court must first attempt to ascertain legislative intent through the statutory language enacted, giving common words their ordinary meanings. Only if the statute's language or text is unclear or ambiguous does the court use canons of construction or legislative history to construe the Legislature's intent.

Appeal from Shawnee District Court; THOMAS G. LUEDKE, judge. Opinion filed April 21, 2023. Affirmed.

Mark Doty and *Thomas E. Gleason Jr.*, of Gleason & Doty, Chtd., of Ottawa, and *Colleen R. Jamison*, of Jamison Law, LLC, of Tecumseh, for appellants.

Brian G. Fedotin, general counsel and special assistant attorney general, of Kansas Corporation Commission, for appellee.

Before COBLE, P.J., HILL and ATCHESON, JJ.

COBLE, J.: To date, the Kansas Universal Service Fund (KUSF) has been subsidizing rural local exchange carriers—local landline telephone companies—for roughly 25 years. Because rural local exchange carriers (RLECs) operate in rural areas of our state where their costs of investment often exceed their returns, the KUSF subsidizes RLECs. In this case, a group of RLECs challenges the constitutionality of K.S.A. 66-2008(e)(3), which places a $30 million cap on annual support from the KUSF.

Though the $30 million KUSF cap has been in effect since 2013, the cap was not reached until 2021. Recognizing the subsidies were nearing this threshold, the Kansas Corporation Commission (KCC) applied the statutory cap by prorating KUSF disbursements to RLECs as required by statute. But the RLECs argue that implementing this $30 million cap amounts to an unconstitutional taking in violation of the Fifth and Fourteenth Amendments to the United States Constitution because the RLECs will not be able to earn their state-prescribed rate of return on their investments.

On our review, however, we find that some undefined diminished profit—the amount of which is unclear because the RLECs did not provide that evidence—does not alone amount to an unconstitutional taking. In fact, the United States Supreme Court and

Kansas courts have held as much. We, then, affirm the KCC's orders implementing the statutory cap.

FACTUAL AND PROCEDURAL BACKGROUND

A thorough discussion of the history of the telecommunications industry and its evolution and regulation can be found in earlier opinions from this court, and it is unnecessary to delve into those details here. See, e.g., *Bluestem Telephone Co. v. Kansas Corporation Comm'n*, 52 Kan. App. 2d 96, 363 P.3d 1115 (2015) (examining the KCC's order changing the way in which the RLECs would receive support from the KUSF in light of a new order from the Federal Communications Commission and subsequent state statutory amendments); *Citizens' Utility Ratepayer Bd. v. Kansas Corporation Comm'n*, 264 Kan. 363, 956 P.2d 685 (1998) (addressing challenges to KCC's orders implementing the Kansas Telecommunications Act).

Regulatory context

Broadly, the Federal Telecommunications Act of 1996 was passed by Congress to "deregulate the telecommunications industry, open local and long distance telecommunications markets to competition, and ensure universal telephone service for all citizens at affordable rates." *Citizens' Utility Ratepayer Bd.*, 264 Kan. at 369. The 1996 Act required the federal government to establish "universal service funds" to ensure consumers in high-cost areas, such as remote and rural areas, receive services at rates comparable to consumers in lower-cost, competitive market areas. *Bluestem Telephone Co.*, 52 Kan. App. 2d at 98.

So long as they were consistent with the federal regulations, states were allowed to adopt their own universal service mechanisms, and Kansas passed its own Kansas Telecommunications Act (KTA) in 1996. Under this Act, each RLEC in this case

operates under traditional rate of return regulations and is designated as a carrier of last resort pursuant to K.S.A. 66-2009. Because these RLECs operate under traditional rate of return regulations and are designated as carriers of last resort, they must be prepared to provide service to anyone in their geographical area.

As required by the KTA, the KCC established the KUSF and was tasked with implementing the fund. *Citizens' Utility Ratepayer Bd.*, 264 Kan. at 370. The KUSF receives contributions from all eligible telecommunications providers, as defined by 47 C.F.R. 9.3, and the amount of those contributions are assessed yearly based on each provider's intrastate retail revenues. K.S.A. 66-2008(a). The KUSF then makes distributions to qualifying RLECs so that the RLECs may achieve their rate of return.

This case is about whether there is a proper statutory limit to those KUSF distributions set forth in K.S.A. 66-2008(e)(3). This 2013 amendment to the KTA implemented an annual cap on KUSF subsidies. The statute outlines:

> "Notwithstanding any other provision of law, the total KUSF distributions, not to include KUSF support for Kansas lifeline service program purposes, pursuant to K.S.A. 66-2006, and amendments thereto, made to all local exchange carriers operating under traditional rate of return regulation pursuant to K.S.A. 66-2005(b), and amendments thereto, *shall not exceed an annual $30,000,000 cap*. In any year that the total KUSF support for such carriers would exceed the annual cap, each carrier's KUSF support shall be proportionately based on the amount of support each such carrier would have received absent the cap. A waiver of the cap shall be granted based on a demonstration by a carrier that such carrier would experience significant hardship due to force majeure or natural disaster as determined by the commission." (Emphasis added.) K.S.A. 66-2008(e)(3).

After its adoption in 2013, the $30 million cap had not been reached until the KCC began studying the assessment rates for KUSF Year 24.

Procedural history

Two orders from the KCC form the basis of this appeal. In 2019, the KCC opened Docket No. 20-GIMT-086-GIT to determine the KUSF Year 24 assessment rate, which would be effective from March 1, 2020, through February 28, 2021. Through this proceeding, KCC Staff (Staff) first raised the idea that the $30 million statutory cap outlined in K.S.A. 66-2008(e)(3) could be reached in the upcoming fiscal year. Staff stated that it would implement the cap by prorating support to RLECs, so the support did not exceed $30 million.

Although a group of RLECs sought to sever or defer issues related to the K.S.A. 66-2008(e)(3) cap from the rate proceeding to allow all parties to examine the cap issues in more detail, they did not object to the proposed 9.40% KUSF assessment rate. The RLECs sought an evidentiary hearing on the statutory cap issues but the KCC found such a hearing unnecessary, given the agreement on the assessment rate and the clear language of K.S.A. 66-2008(e). In its Order Adopting KUSF Assessment Rate of January 23, 2020, the KCC found that because "the Legislature ha[d] spoken" and "resolv[ed] any dispute over how to implement the statutory cap," there was "no need for the [KCC] to address implementation of the statutory cap." But this order left implementation of the cap for a later date.

The RLECs filed a petition for reconsideration and clarification taking issue with the KCC's finding that K.S.A. 66-2008(e) superseded their rights to recover their costs under traditional rate of return regulation. The KCC denied the petition and directed Staff to file a Report and Recommendation (R&R) identifying the month the cap would need to be implemented, the prorated KUSF support reduction for each RLEC, and the prorated monthly KUSF support distribution to each RLEC.

Staff filed the R&R several months later, stating they anticipated the KUSF disbursements would exceed the $30 million cap beginning in February 2021. The R&R included a list showing the prorated KUSF support each RLEC would receive. Staff recommended that the KCC implement the reduction to an RLEC's KUSF support for the months of January and February 2021, to be paid to the RLECs in February and March 2021, to try to minimize the impact to the RLECs. The monthly KUSF support reductions ranged from $163 up to $161,562.

Before the KCC adopted the Staff's recommendation, the RLECs requested a briefing schedule on legal issues and an evidentiary hearing on factual issues. The RLECs argued that imposition of the statutory cap would deprive them of the "reasonable opportunity to recover their respective intrastate embedded costs, revenue requirements, investments and expenses previously approved and authorized by the [KCC]." This deprivation, the RLECs argued, constituted a "taking of property for public purpose without just compensation, contravening the Fifth and Fourteenth Amendments to the Constitution of the United [S]tates." The RLECs also argued that Staff's assertion that any loss attributable to the cap could be recovered through other means was factually inaccurate. KCC Staff disputed this, contending the comments cited by the RLECs came from earlier proceedings, and there were no identified disputed facts in Staff's October 2020 R&R.

The KCC scheduled an evidentiary hearing but limited the scope of the hearing to determining whether Staff's calculations were correct, even though it acknowledged that the RLECs were not contesting Staff's calculations. The RLECs objected to the limited scope of the evidentiary hearing, arguing again that there was a dispute over whether the RLECs could recover the lost KUSF revenue through other means. The RLECs petitioned for reconsideration of the KCC's decision to limit the scope of the evidentiary hearing.

Staff and the RLECs each filed briefs on the application of K.S.A. 66-2008(e)(3). The RLECs also submitted written testimony from Douglas Meredith, the Director of Economics and Policy of a telecommunications consulting firm. Meredith explained how utilities operate under rate of return regulation, and how the KUSF "make[s] up the difference so the utility will have the opportunity to achieve its state-prescribed rate of return." Meredith believed that, to implement the statutory cap, the KCC had a responsibility to provide other opportunities to the RLECs to earn their prescribed rate of return.

Meredith next reviewed the potential sources of revenue for RLECs and explained why he did not think that "separate, effective and reasonably available sources of revenue" existed to offset the loss of KUSF support. He addressed the decline of access revenues and the problems with raising local exchange rates and rates for call management services.

Staff moved to strike almost all of Meredith's testimony on the basis that it did not address Staff's calculations and, thus, went beyond the limited scope of permissible evidence in the case. The RLECs reasserted their position that the issue of whether they had adequate, alternative sources of revenue bore directly on the legality of the KCC's order accepting the plan to prorate KUSF funds. They requested a continuance of the scheduled evidentiary hearing so they could conduct discovery on the issue.

The case proceeded to an evidentiary hearing during which the KCC considered the RLECs' motion for reconsideration, the RLECs' motion for continuance, and Staff's motion to strike. The KCC denied the motion to strike and the motion for continuance. Because it did not strike Meredith's testimony and because it allowed Meredith to testify at the hearing, the KCC also denied the motion for reconsideration as moot. The hearing proceeded to argument and testimony. Sandy Reams, the Staff member who performed the calculations in the R&R, testified briefly. The RLECs did not cross-examine her. The

RLECs submitted Meredith's pre-filed written testimony and then the KCC cross-examined him.

In his written testimony, Meredith said that the cap on KUSF support would force RLECs to "provide service to the public at a loss." When the KCC asked him at the hearing to clarify what he meant by "loss," Meredith explained that the companies were not actually operating at a loss in the sense that their equity return was negative. They could still profit, they just had diminished returns. Meredith described it as a loss because the RLECs' diminished returns were "less than the prescribed rate of return of the company." While Meredith testified generally that RLECs would not achieve their rate of return, he had no specific information regarding the degree to which any RLEC would fall short of its rate of return. Additionally, he testified that "most rate of return companies in the country have rate of returns that are less than their prescribed rate of return."

Following the hearing, on January 14, 2021, the KCC issued an Order Enacting Pro-Rata Reductions in KUSF Support as Mandated by K.S.A. 66-2008(e). This is one of the orders forming the basis of the RLECs' present appeal. In the order, the KCC noted that it has no authority to disregard K.S.A. 66-2008(e). The RLECs' concerns, the KCC said, were best addressed by the Legislature. Additionally, the RLECs offered only speculation that they could not achieve their authorized rate of return through alternative sources—the RLECs did not support the speculation with any studies or empirical data. The KCC concluded by authorizing a pro rata reduction of the RLECs' annual KUSF support as calculated in Staff's R&R.

The next week, the KCC issued an order adopting the next year's assessment, the KUSF Year 25 assessment rate in Docket No. 21-GIMT-095-GIT. The RLECs also appeal from this order. As with the order setting the Year 24 assessment rate, the Year 25

order stated the KCC's intent to again prorate disbursements from the KUSF because of the statutory cap.

The RLECs sought reconsideration of both the January 14, 2021 Order Enacting Pro-Rata Reductions in KUSF Support As Mandated by K.S.A. 66-2008(e) and the January 21, 2021 Order Adopting KUSF Year 25 Assessment Rate and Affordable Rates; Adopting Methodology for KUSF High-Cost Support Cap Implementation. The KCC denied both petitions for reconsideration.

The RLECs petitioned the Shawnee County District Court for judicial review of the KCC decisions ordering pro rata reductions in KUSF support and implementing the KUSF statutory cap. The RLECs challenged the KCC's orders on several bases. First, they argued that by imposing the statutory cap, the KCC violated the RLECs' right to operate under traditional rate of return regulation by removing one source of revenue without identifying an alternative source of revenue. This action, the RLECs argued, constituted a taking in violation of the Fifth and Fourteenth Amendments to the United States Constitution.

The RLECs further argued that the statutory cap also violated their statutory rights by conflicting with three other statutory clauses in the KTA: K.S.A. 66-2005(b), requiring RLECs to choose between traditional rate of return regulation and price cap regulation; K.S.A. 66-2008(e)(1), stating that KUSF support can only be modified as a direct result of changes in the factors enumerated within the subsection; and K.S.A. 66-2009(a), providing that a local exchange carrier serving as the carrier of last resort "shall be entitled to recover the costs of serving as carrier of last resort." Both parties submitted briefs and participated in oral argument before the district court issued its decision.

The district court denied the RLECs' Petition for Judicial Review. The district court accepted the premise that "any reduction in the KUSF funds received by a RLEC is

a reduction to the already established reasonable rate of return." However, the district court found that a mere reduction in profit did not rise to the level of being a confiscatory taking for Fifth Amendment purposes. The court also found that application of the statutory cap would not contradict K.S.A. 66-2005(b), K.S.A. 66-2008(e)(1), or K.S.A. 66-2009(a).

The RLECs appeal.

DID THE DECISION TO IMPLEMENT THE $30 MILLION STATUTORY CAP ON RECOVERY FROM THE KUSF CONSTITUTE AN UNCONSTITUTIONAL TAKING?

On appeal, the RLECs continue with the same argument that they have presented throughout the life of the case: that implementing the statutory cap found in K.S.A. 66-2008(e)(3) is an unconstitutional taking under the Fifth and Fourteenth Amendments to the United States Constitution. The RLECs assert that they are entitled to a reasonable opportunity to earn a fair rate of return as determined by the KCC. The RLECs maintain that a taking occurred because KUSF support was reduced without providing the RLECs with other opportunities to earn their fair rate of return.

It is worth noting that, in addition to the pure takings argument, the RLECs contend that there is no opportunity to make up the compensation lost by reduction of the KUSF monies. Although the district court made contradictory findings on this topic, ultimately it ruled on the grounds that diminished profits do not equate to a confiscatory taking. Thus, the KCC was not required to provide guaranteed sources of revenue for the RLECs to make up the reduction. Our analysis proceeds under the assumption that there are not reasonable alternative sources of revenue available to the RLECs. Because we ultimately find the district court was correct that "diminution of profit has not been legally defined as confiscatory either in law or common sense," then it is unnecessary to address whether there are alternative sources of revenue.

Guiding legal principles

The RLECs challenge the KCC's decisions under the Kansas Judicial Review Act (KJRA), K.S.A. 77-601 et seq. See also K.S.A. 66-118a(b) (providing that judicial review of KCC decisions in non-rate cases shall be in accordance with K.S.A. 77-609). As the parties challenging the validity of the KCC's action, the burden of proving such invalidity is on the RLECs. K.S.A. 77-621(a)(1). The KJRA outlines the specific grounds on which a court may set aside an agency determination, including errors of law, unsupported factual findings, and constitutional defects. K.S.A. 77-621(c). Appellate courts exercise the same statutorily limited review of the agency's action as does the district court, as though the appeal had been made directly to the appellate court. *Bd. of Cherokee County Comm'rs v. Kansas Racing & Gaming Comm'n*, 306 Kan. 298, 318, 393 P.3d 601 (2017).

Because the RLECs assert that the statutory cap in K.S.A. 66-2008(e)(3) is unconstitutional, our standard of review is well established:

> "We review the constitutionality of a statute as a question of law and apply a de novo standard of review. The constitutionality of a statute is presumed, and all doubts must be resolved in favor of the validity of the statute. Before the statute may be stricken, it must clearly appear to violate the constitution. This court must construe the statute as constitutionally valid if there is any reasonable way to do so. [Citations omitted.]" *Tolen v. State*, 285 Kan. 672, 673, 176 P.3d 170 (2008).

This court does not extend deference to an agency's statutory interpretation. *Hanson v. Kansas Corp. Comm'n*, 313 Kan. 752, 762, 490 P.3d 1216 (2021).

Because the primary argument advanced by the RLECs is one alleging unconstitutional taking, we examine the legal parameters involved. The Fifth Amendment prohibits the taking of private property for public use without just compensation. U.S. Const. amend. V. The protections of the Takings Clause apply to the actions of state and

local government entities through the Fourteenth Amendment to the United States Constitution. See *Palazzolo v. Rhode Island*, 533 U.S. 606, 617, 121 S. Ct. 2448, 150 L. Ed. 2d 592 (2001). Although the Takings Clause is usually encountered when the government physically seizes private property, such as real estate, for public use, the government regulation of privately-owned utilities can diminish their value to a degree creating a constitutionally compensable taking. *Twin Valley Telephone, Inc. v. Kansas Corporation Comm'n*, No. 115,284, 2016 WL 3366024, at *4 (Kan. App. 2016) (unpublished opinion) (citing *Duquesne Light Co. v. Barasch*, 488 U.S. 299, 307-08, 109 S. Ct. 609, 120 L. Ed. 2d 646 [1989]; *Kansas Gas & Electric Co. v. Kansas Corporation Comm'n*, 239 Kan. 483, 488-90, 720 P.2d 1063 [1986]; *Kansas City Power & Light Co. v. Kansas Corporation Comm'n*, 52 Kan. App. 2d 514, 542-44, 371 P.3d 923 [2016]).

Given the partially private, partly public status of utility companies' property, their regulation leads to a "distinct and sometimes arcane application of Fifth Amendment takings jurisprudence." *Twin Valley Telephone*, 2016 WL 3366024, at *5 (citing *Duquesne Light Co.*, 488 U.S. at 307). But the guiding principle in utility cases "has been that the Constitution protects utilities from being limited to a charge for their property serving the public which is so 'unjust' as to be confiscatory. [Citation omitted.]" *Duquesne Light Co.*, 488 U.S. at 307. The burden of proving that the taking is confiscatory is on the RLECs. *Lincoln Gas & Elec. Light Co. v. City of Lincoln*, 223 U.S. 349, 357, 32 S. Ct. 271, 56 L. Ed 466 (1912).

Analysis

A review of both United States Supreme Court and Kansas caselaw demonstrates that the district court correctly held that a reduction in profit does not amount to a confiscatory taking under the Fifth Amendment. We start our review with one of the seminal rate cases in Fifth Amendment jurisprudence, *Duquesne Light Co.*, 488 U.S. 299, which involved concepts like the present case.

Lessons from Duquesne Light Co.

In *Duquesne Light Co.*, Duquesne Light Company (Duquesne) and Pennsylvania Power Company (Penn Power), along with several other Pennsylvania electric utilities, embarked on a joint venture to construct seven nuclear generating units. Due to intervening events, plans to build four of the units were cancelled. It was undisputed that "the expenditures were prudent and reasonable when made." 488 U.S. at 301. Duquesne had invested over $34 million, and Penn Power had invested over $9.5 million at the time the projects were cancelled. The Pennsylvania Public Utility Commission (PUC) allowed the companies to recoup their expenditures over a 10-year period by increasing their rates. About a month before Duquesne's rate proceeding closed, Pennsylvania enacted a law that prohibited the PUC from including the costs of constructing or expanding facilities in a utility's rate until such time as the facility is used and useful in service to the public. The Pennsylvania Office of the Consumer Advocate moved for reconsideration of the PUC's order allowing the rate increases based on the change in state law. Upon reconsideration, the PUC affirmed its original rate order. The Commonwealth Court of Pennsylvania affirmed but the Pennsylvania Supreme Court reversed. The utilities appealed to the United States Supreme Court, which granted review.

The Supreme Court rejected the utilities' argument that implementing the new law constituted a taking for Fifth Amendment purposes. The Supreme Court noted that the total effect of denying plant amortization would only reduce Duquesne's annual revenue by 0.4% and Penn Power's by 0.5%. Even though denying the utilities the ability to amortize their costs would set a lower rate of return on equity, "[t]he overall impact of the rate orders [was] not constitutionally objectionable." 488 U.S. at 312.

Here, the RLECs argue that they are "constitutionally entitled to an opportunity to access revenue as a whole from all available sources sufficient to meet their state-determined revenue requirements." But *Duquesne Light Co.* demonstrates that this is not

the case. Both Duquesne and Penn Power received less than their anticipated rate of return when the new Pennsylvania law was applied to them. This was constitutionally permissible because the total effect of the rate order was not unjust or unreasonable. The United States Supreme Court found in *Duquesne Light Co*. that a reduction in profit is not always confiscatory.

Throughout this litigation, the RLECs have also stressed that they made investments in reliance on laws that ensure a reasonable rate of return and that it is unfair to make "after-the-fact state-mandated reductions to RLECs' established rate of return, with no available mechanism to avoid the effect of the statute." But in *Duquesne Light Co.*, the Supreme Court applied a Pennsylvania law that was not even enacted until after the utilities had made their investments. And although it was not reached until 2021, the statutory cap in K.S.A. 66-2008(e)(3) is not new but has been Kansas law since 2013.

Finally, though there is some evidence in this case that the RLECs will experience diminished profits, no specific numbers or other concrete evidence were provided as to the magnitude of the lost profits. There is no evidence that the losses are greater or less than those shown in *Duquesne Light Co*. In the evidence presented in the appellate record, we only know that the 2021 losses in the amount of KUSF subsidies ranged from $163 to $161,562, not how those losses would affect each RLEC's bottom line. The RLECs have not supported their claim that the loss is of such a magnitude that it is unconstitutional. As in *Duquesne Light Co.*, "[n]o argument has been made that these slightly reduced rates jeopardize the financial integrity of the companies, either by leaving them insufficient operating capital or by impeding their ability to raise future capital." 488 U.S. at 312. Similarly, there has been no demonstration that the "rates are inadequate to compensate current equity holders for the risk associated with their investments . . . ." 488 U.S. at 312.

Kansas caselaw supports the KCC's findings

Our own Kansas courts have also rejected several of the arguments the RLECs advance in this case. One of the issues in *Bluestem Telephone Co.* was whether the KCC erred in finding that KUSF support for RLECs operating under a traditional rate of return model could be less than a carrier's "'embedded costs, revenue requirements, investments and expenses.'" 52 Kan. App. 2d at 120 (quoting K.S.A. 2014 Supp. 66-2008[e][1]). The KCC had found "that the starting point for calculating KUSF support would be the carrier's embedded costs, etc." but that RLECs were not entitled to recover all their embedded costs from the KUSF. 52 Kan. App. 2d at 120.

This court rejected the RLECs' argument that a prior case "mandate[d] that KUSF be paid to *fully* fund an RLEC's embedded costs." 52 Kan. App. 2d at 122. As in this case, the RLECs argued "that the [KCC]'s current interpretation violates the concept of traditional rate-of-return ratemaking to the point of constituting a taking of the RLECs' property." 52 Kan. App. 2d at 123. But a panel of this court rejected that argument, stating:

> "We are unpersuaded by this argument as it appears to be based upon a faulty premise. While the KTA permitted LECs to choose between price-cap and rate-of-return regulation, the KTA was not premised on the standard monopolistic models of other utility settings. The KTA, like the 1996 Act, was designed to improve competition, not preserve existing monopolies. This court has long recognized that the Commission has authority to determine whether expenses, debt-to-equity ratios, and other cost components are prudently incurred or determined.
>
> "The policies of the KTA, like that of the federal statute, are consumer-focused to ensure that Kansans have access to first-class telecommunications infrastructure at an affordable price, that consumers realize the benefits of competition, that the range of services are comparable in urban and rural areas, and that consumers are protected from practices inconsistent with the public interest, convenience, and necessity. K.S.A. 66-2001. By focusing on encouraging competition, the principles of truly 'traditional' rate-of-

> return ratemaking are not as rigid in the telecommunications industry. The RLECs confuse the requirement that KUSF provide sufficient support for universal service within a market in which telephone service providers compete for customers, which federal law mandates, with a guarantee of economic success for all providers; the latter guarantee conflicts with the federal and state focus on encouraging competition. [Citations omitted.]" 52 Kan. App. 2d at 123-24.

Ultimately, this court found that because the RLECs failed to show how the KCC took any action that compensated them less than required by the KTA, the RLECs' "challenge to the [KCC]'s rulings regarding reimbursement for their reasonable embedded costs and revenue requirements is not ripe for adjudication." 52 Kan. App. 2d at 124.

Even more pertinent is this court's decision in *Twin Valley Telephone*, which occurred against the backdrop of changing federal regulations and reductions to federal subsidies for rural telecommunications providers. Twin Valley provided traditional telephone service to rural customers and operated under traditional rate of return regulation. As a result of federal changes, Twin Valley lost a specific federal subsidy. And, in 2013 the Kansas Legislature amended "the statutes governing the KUSF to significantly curtail the allocation of those monies to make up for lost federal subsidies." 2016 WL 3366024, at *2. When Twin Valley asked the KCC to authorize a payment of $856,627 from the KUSF to make up for the lost federal subsidy, the KCC denied its request and Twin Valley appealed.

This court noted that K.S.A. 2015 Supp. 66-2008(e)(2) clearly precluded the relief sought by Twin Valley because the statute explicitly stated that KUSF support could not "be used to offset any loss of federal universal service fund support for such carrier." K.S.A. 2015 Supp. 66-2008(e)(2). Among other arguments, Twin Valley claimed that the KCC's denial of its request "amount[ed] to a taking of property without just compensation in violation of the Fifth Amendment to the United States Constitution." 2016 WL

3366024, at *4. The parties did not dispute that 7.26% would be a reasonable rate of return for Twin Valley, and the denial of Twin Valley's request for a subsidy would result in a rate of return of only 4.64%.

The *Twin Valley Telephone* court "assume[d] [without finding as much] Twin Valley could not enhance its rate of return to investors by cutting costs or increasing prices." 2016 WL 3366024, at *5. Like the RLECs in this case, Twin Valley "speculated that a price increase would prompt many customers to seek alternative telecommunications services, presumably from wireless providers." 2016 WL 3366024, at *5. This court "question[ed] whether the denial of a subsidy could be considered a constitutional taking without direct, substantive evidence—if only in the form of well-grounded expert testimony—that alternative business practices to either cut costs or increase revenues would be ineffective in achieving a reasonable rate of return for investors." 2016 WL 3366024, at *5. Regardless of these evidentiary concerns, the court found that "Twin Valley's approach remains constitutionally infirm." 2016 WL 3366024, at *6. The court explained:

> "Twin Valley essentially argues that a KCC order resulting in any rate of return for a regulated business less than what has been determined to be 'the reasonable rate' amounts to a compensable constitutional taking. That broadly framed argument is legally untenable, and we reject it. Twin Valley has not argued that the difference between the reasonable rate of return defined in this case and the lower rate of return the company will realize without the enhanced KUSF subsidy is of such a magnitude as to create a government taking. Nor has Twin Valley advanced some legal test or economic formula for determining when a deviation from an established rate of return amounts to a taking requiring compensation. So Twin Valley effectively says any shortfall between the projected actual rate of return and the determined reasonable rate of return violates the Takings Clause." 2016 WL 3366024, at *6.

The court examined *Duquesne Light Co.* and its predecessor, *Federal Power Comm'n v. Hope Natural Gas Co*., 320 U.S. 591, 602, 605, 64 S. Ct. 281, 88 L. Ed. 2d 333 (1944), outlining "a 'constitutional range of reasonableness' within which state regulatory agencies may act." *Twin Valley Telephone*, 2016 WL 3366024, at *6 (quoting *Duquesne*, 488 U.S. at 310, 312). And, the Kansas Supreme Court has also emphasized this "zone of reasonableness" standard when evaluating KCC orders. *Twin Valley Telephone*, 2016 WL 3366024, at *7 (citing *Kansas Gas & Electric Co*., 239 Kan. at 488-91). The court concluded that Twin Valley's evidence fell short of establishing a confiscatory taking and that its rate of return still fell within a range of reasonableness. *Twin Valley Telephone*, 2016 WL 3366024, at *7.

We find the analysis in *Twin Valley Telephone* ultimately persuasive. As did Twin Valley, the RLECs here essentially argue any shortfall between their projected rate of return—minus the reduced subsidy—and the determined reasonable rate of return creates a government taking. But the mere fact that the RLECs will lose profits, in and of itself, is not enough to establish a constitutional taking. The RLECs have simply not shown that their loss of profits, without evidence of the precise loss and resulting effect on their bottom lines, falls outside the range of reasonableness such as to be considered unjust and thus confiscatory. See *Twin Valley Telephone*, 2016 WL 3366024, at *6 (citing *Permian Basin Area Rate Cases*, 390 U.S. 747, 770, 88 S. Ct. 1344, 20 L. Ed. 2d 312 [1968]). Nor have the RLECs presented "some legal test or economic formula for determining when a deviation from an established rate of return amounts to a taking requiring compensation." *Twin Valley Telephone*, 2016 WL 3366024, at *6. In fact, here the RLECs submitted no evidence to show what their projected rate of return would be—thereby producing even less evidence than in the *Twin Valley Telephone* case, where the court could compare the projected 4.64% rate anticipated with the 7.26% agreed to be a reasonable rate at that time.

In sum, RLECs provide no support for the proposition that K.S.A. 66-2008(e)(3) creates an unconstitutional taking by simply reducing the RLECs' rate of return by an unknown amount.

DID THE KCC'S DECISION TO IMPLEMENT THE $30 MILLION STATUTORY CAP ON RECOVERY FROM THE KUSF VIOLATE OTHER KANSAS STATUTES?

The RLECs also argue that imposition of the statutory cap violates three other statutory mandates. They claim the cap violates: K.S.A. 66-2005(b), requiring RLECs to choose between traditional rate of return regulation and price cap regulation; K.S.A. 66-2008(e)(1), stating that KUSF support can only be modified as a direct result of changes in the factors enumerated within the subsection; and K.S.A. 66-2009(a), providing that a local exchange carrier serving as the carrier of last resort "shall be entitled to recover the costs of serving as carrier of last resort."

Guiding legal principles

Statutory interpretation presents a question of law over which appellate courts have unlimited review. The most fundamental rule of statutory construction is that the intent of the Legislature governs if that intent can be ascertained. An appellate court must first attempt to ascertain legislative intent through the statutory language enacted, giving common words their ordinary meanings. Only if the statute's language or text is unclear or ambiguous does the court use canons of construction or legislative history to construe the Legislature's intent. *In re Joint Application of Westar Energy and Kansas Gas and Electric Co.*, 311 Kan. 320, 328, 460 P.3d 821 (2020).

Analysis

Although we briefly examine each statute individually, we note at the outset that K.S.A. 66-2008(e)(3) states that it applies "[n]otwithstanding any other provision of law." This language is neither unclear nor ambiguous, and we must give the clause its common meaning. See Black's Law Dictionary 1281 (11th ed. 2019) (defining "notwithstanding" as "[d]espite; in spite of"). So, by the clear language of the statute, even if there were a conflict with any of the other statutes identified by the RLECs, the Legislature still intended for K.S.A. 66-2008(e)(3) to apply in spite of any conflict.

K.S.A. 66-2005(b)

K.S.A. 66-2005(b) requires local exchange carriers to "elect traditional rate of return regulation or price cap regulation." The RLECs argue that the statutory cap violates this statute "by reducing a utility's opportunity to earn one source of revenue without an equally available opportunity for other compensation and without a factual determination of record that the utility's revenue requirement should be modified." RLECs assert that they have "made extensive investments and incurred substantial continuing costs in reliance on the form of state regulation made available to, and elected of right by, the RLECs." By changing the relevant regulations by implementing the statutory cap on KUSF support, the RLECs argue, the Legislature has post facto changed the rules under which the RLECs elected to operate. This introduces uncertainty into the industry and adversely impacts investors.

As established herein, the State can take actions that result in a lower rate of return for RLECs without offending the RLECs' constitutional rights. Additionally, Meredith testified that "most rate of return companies in the country have rate of returns that are less than their prescribed rate of return." Further, it is not clear how a statutory cap on KUSF support "violat[es] the RLECs' statutory right of election of traditional rate of

return regulation." RLECs are free to continue operating under rate of return regulation, they must simply do so with the understanding that any KUSF support to RLECs is capped at $30 million.

The RLECs' argument is more of a policy argument than a legal argument. "Where the legislature declares the public policy and there is no constitutional impediment, the question of the wisdom, justice, or expediency of the legislation is for the legislature and not for the courts." *Bolz v. State Farm Mut. Ins. Co.*, 274 Kan. 420, 424, 52 P.3d 898 (2002). This court explored the policy underlying the Kansas Telecommunications Act, K.S.A. 66-2001 et seq., in *Bluestem Telephone Co.*, 52 Kan. App. 2d 96, and described it as focused on consumers and encouraging competition. If the RLECs believe their policy concerns are more important, they must convince the Legislature of that and not this court.

K.S.A. 66-2008(e)(1)

Next, the RLECs argue that imposition of the statutory cap violates K.S.A. 66-2008(e)(1), which provides:

> "For each local exchange carrier electing pursuant to K.S.A. 66-2005(b) . . . to operate under traditional rate of return regulation, all KUSF support, including any adjustment thereto pursuant to this section, shall ensure the reasonable opportunity for recovery of such carrier's intrastate embedded costs, revenue requirements, investments and expenses, subject to the annual cap established pursuant to subsection (e)(3). Any modification of such support shall be made only as a direct result of changes in those factors enumerated in this subsection." K.S.A. 66-2008(e)(1).

The RLECs highlight the language in the statute that says that KUSF support can only be modified as a result of changes in the factors enumerated in the subsection—intrastate embedded costs, revenue requirements, investments, and expenses. They argue

that adjusting KUSF support based on the statutory cap is not one of these expressed factors.

But the RLECs' argument ignores the plain language of the statute. It is true that KUSF support is determined by a carrier's intrastate embedded costs, revenue requirements, investments, and expenses. But once that calculation is made, the support is explicitly "subject to the annual cap established pursuant to subsection (e)(3)." K.S.A. 66-2008(e)(1). When considered as a whole, the plain language of the statute indicates that the KUSF cap applies.

Although the RLECs begin their argument by stating that K.S.A. 66-2008(e)(1) conflicts with K.S.A. 66-2008(e)(3), they later suggest that the statutory cap on KUSF support does not conflict with K.S.A. 66-2008(e)(1) as long as "an effective and sufficient additional source of replacement revenue is made available." This argument is based on the premise, rejected above, that the Takings Clause requires the State to provide some other source of compensation, and the RLECs provide no authority for the idea that the State is required to provide a substitute for capped KUSF subsidies. Accordingly, it does not provide a basis for reversal of the KCC's decision.

K.S.A. 66-2009(a)

Finally, the RLECs argue that the statutory cap conflicts with K.S.A. 66-2009(a). This statute says:

> "(a) Local exchange carriers . . . shall serve as the carrier of last resort in their exchanges and shall be eligible to receive KUSF funding. . . . The local exchange carrier serving as the carrier of last resort shall remain the carrier of last resort and shall be entitled to recover the costs of serving as carrier of last resort." K.S.A. 66-2009(a).

The RLECs assert that "full recovery of new costs is impossible under the KUSF cap."

The RLECs presented no evidence to show that they are unable to recover the costs of serving as the carrier of last resort. Again, they only argued they would realize less profit. As the district court succinctly held: "The RLECs conflate costs with profit," and we agree.

Affirmed.