THE OKLAHOMA BAR
Journal
Volume 90 — No. 8 — 4/20/2019

Court Issue

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THE OKLAHOMA BAR
Journal

Volume 90 – No. 8 – 4/20/2019

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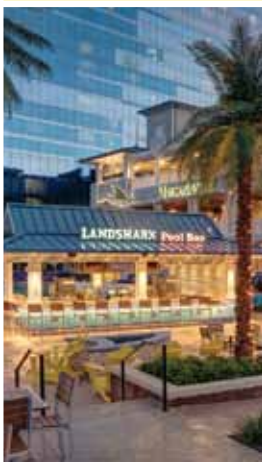

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NOTICE OF JUDICIAL VACANCY

The Judicial Nominating Commission seeks applicants to fill the following judicial office:

Justice of the Supreme Court
District One

The vacancy will be created by the retirement of the Honorable John F. Reif effective April 30, 2019.

To be appointed to the office of Justice of the Supreme Court, an individual must have been a qualified elector of the applicable Supreme Court Judicial District, as opposed to a registered voter, for one year immediately prior to his or her appointment, and additionally, must have been a licensed attorney, practicing law within the State of Oklahoma, or serving as a judge of a court of record in Oklahoma, or both, for five years preceding his/her appointment.

Application forms can be obtained on line at www.oscn.net, click on Programs, then Judicial Nominating Commission or by contacting Tammy Reaves at (405) 556-9300. Applications must be submitted to the Chairman of the Commission at the address below **no later than 5:00 p.m., Friday, April 26, 2019. If applications are mailed, they must be postmarked by midnight, April 26, 2019.**

Mike Mordy, Chairman
Oklahoma Judicial Nominating Commission
Administrative Office of the Courts
2100 N. Lincoln Blvd., Suite 3
Oklahoma City, Oklahoma 73105

Oklahoma Bar Association

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2019 OK 17

RE: Reinstatement of Certificate of Certified Shorthand Reporters

SCAD-2019-28. Monday, April 8, 2019

ORDER

The Oklahoma Board of Examiners of Certified Shorthand Reporters has recommended to the Supreme Court of the State of Oklahoma that the certificate of each of the Oklahoma Certified Shorthand Court Reporters named below be reinstated as these reporters have complied with the continuing education requirements for calendar year 2018 and/or with the annual certificate renewal requirements for 2019, and have paid all applicable penalty fees.

IT IS HEREBY ORDERED that, pursuant to 20 O.S., Chapter 20, App. 1, Rules 20 and 23, the certificates of the following court reporters are reinstated from the suspension earlier imposed by this Court:

Name & CSR #	Effective Date of Reinstatement
Regina Goldsmith, CSR # 908	March 21, 2019
Laurie Hoyt, CSR # 547	March 20, 2019

DONE BY ORDER OF THE SUPREME COURT IN CONFERENCE this 8TH day of April, 2019.

/s/ Noma D. Gurich
CHIEF JUSTICE

ALL JUSTICES CONCUR.

2019 OK 18

In re: Amendments to Rule 3 and Rule 4 of the State Board of Examiners of Certified Shorthand Reporters, 20 O.S. 2011, ch. 20, app. 1

No. SCAD-2019-30. Monday, April 8, 2019

ORDER

Rule 3 and Rule 4 of the State Board of Examiners of Certified Shorthand Reporters, 20 O.S. 2011, ch. 20, app. 1, are hereby amended as shown on the attached Exhibit "A." Rules 3 and 4 with the amended language noted are attached as Exhibit "B". The amended rules shall be effective April 12, 2019.

DONE BY ORDER OF THE SUPREME COURT IN CONFERENCE THIS 8TH DAY OF APRIL, 2019.

/s/ Noma D. Gurich
CHIEF JUSTICE

ALL JUSTICES CONCUR.

EXHIBIT A

Rules of the State Board of Examiners of Official Shorthand Reporters
Title 20, Chapter 20, App. 1
Rule 3. Eligibility.

a) Every candidate who seeks to be examined for enrollment as a certified shorthand reporter shall:

1) Prove to the satisfaction of the Board that he/she is:
i) of legal age;
ii) meets the requisite standards of ethical fitness; and
iii) has at least a high school education, or the equivalent thereof.

This information shall be furnished to the Board by a sworn, notarized affidavit;

2) Prove to the satisfaction of the Board that he/she possesses a minimum level of court reporting proficiency which would allow the applicant to meet the examination requirements established in Section 1503(B)(1) of Title 20. An applicant may satisfy such requirements by obtaining verification through a court reporting school official of the applicant's level of proficiency, as outlined by the test application; by passing a preliminary proficiency examination, which has been approved by the Board; or by proving that the applicant has previously held any state or national shorthand reporting certificate or license;

3) Submit to the Secretary of the Board, or a designee, a properly completed application form provided by the Board, accompanied by such evidence, statements or documents as required by the Board, including an examination fee receipt from the Clerk of the Supreme Court showing payment of the fees required by the Board and approved by the Supreme Court;

4) Declare that he/she is a writer of shorthand by one of the accepted methods set forth

in Section 1503(D) of Title 20 of the Oklahoma Statutes; and

5) Provide such additional proof as may be required by the Board to establish that the candidate meets the requirements set forth in Section 1503 of Title 20 of the Oklahoma Statutes.

b) Academic dishonesty during the examination process will result in the applicant's disqualification, and the applicant may not take the examination again for two (2) years from the date of the examination at which the applicant was disqualified.

c) A candidate who has previously failed an examination may be re-examined at any subsequent regular examination upon giving the Board notice via the standard application, and payment of the applicable examination fee as set by the Board and approved by the Supreme Court. The examination fee will be forfeited if the candidate fails to appear for the examination, or fails to complete the examination, unless an exception is granted by the Board.

Rules of the State Board of Examiners of Certified Shorthand Reporters
Title 20, Chapter 20, App. 1
Rule 4. Test Requirements.

a) The examination for enrollment as a certified shorthand reporter shall consist of the following:

1) Testimony and Proceedings Skills Examination – A two-voice question-and-answer dictation of testimony at two hundred (200) words per minute for five (5) minutes. Speaker designations such as "Q" and "A" will not be read nor counted as words, but must be appropriately indicated in the transcript. One (1) hour will be given for the transcription of the question-and-answer dictation.

2) Literary Materials Skills Examination – A five-minute dictation of literary material at one hundred eighty (180) words per minute. One (1) hour will be given for the transcription of the literary dictation.

3) The Oklahoma Written Knowledge Test – A written knowledge test of not less than twenty-five (25) multiple choice questions relating to the Oklahoma law and court rules, duties of certified shorthand reporters, and general court procedure. This section of the examination will be administered in forty-five (45) minutes. Applicants will be provided with the study aids from which the test questions will be taken.

b) Candidates may take one or both of the skills examinations at any regularly scheduled examination. A candidate who has successfully completed either of the skills examinations may retain the credit for that portion of the examination for two (2) years from the date passed, and will not be required to retake that portion of the examination during the two (2) year period.

c) Candidates may take the Oklahoma Written Knowledge Test at any regularly scheduled examination. Proof of minimum proficiency shall not be required for candidates taking only the Oklahoma Written Knowledge Test. A candidate who has successfully completed the Oklahoma Written Knowledge portion of the examination may retain the credit for that portion of the examination for two (2) years from the date passed, and will not be required to retake that portion of the examination during the two (2) year period.

d) A candidate who provides proof of passing the Registered Professional Reporter Examination of the National Court Reporters Association, or an equivalent test as authorized by the Supreme Court, is eligible for enrollment without taking the skills examinations described in paragraphs a(1) and a(2) of this Rule. The applicant must, prior to certification, pass the Oklahoma Written Knowledge portion of the examination, and meet all other applicable eligibility requirements.

EXHIBIT B

Rules of the State Board of Examiners of Official Shorthand Reporters
Title 20, Chapter 20, App. 1
Rule 3. Eligibility.

a) Every candidate who seeks to be examined for enrollment as a certified shorthand reporter shall:

1) Prove to the satisfaction of the Board that he/she is:

i) of legal age;

ii) meets the requisite standards of ethical fitness; and

iii) has at least a high school education, or the equivalent thereof.

This information shall be furnished to the Board by a sworn, notarized affidavit;

2) Prove to the satisfaction of the Board that he/she possesses a minimum level of court reporting proficiency which would allow the applicant to meet the examination requirements established in Section 1503(B)(1) of Title 20. An applicant may satisfy such requirements by obtaining verification through a court reporting school official of the applicant's level of proficiency, as outlined by the test application; by passing a preliminary proficiency examination, which has been approved by the Board; or by proving that the applicant has previously held any state or national shorthand reporting certificate or license;

3) Submit to the Secretary of the Board, or a designee, a properly completed application form provided by the Board, accompanied by such evidence, statements or documents as required by the Board, including an examination fee receipt from the Clerk of the Supreme Court showing payment of the fees required by the Board and approved by the Supreme Court;

4) Declare that he/she is a writer of shorthand by one of the accepted methods set forth in Section 1503(D) of Title 20 of the Oklahoma Statutes; and

5) Provide such additional proof as may be required by the Board to establish that the candidate meets the requirements set forth in Section 1503 of Title 20 of the Oklahoma Statutes.

b) Academic dishonesty during the examination process will result in the applicant's disqualification, and the applicant may not take the examination again for two (2) years from the date of the examination at which the applicant was disqualified.

c) A candidate who has previously failed an examination may be re-examined at any subsequent regular examination upon giving the Board notice via the standard application, and payment ~~in full~~ of the applicable examination fee as set by the Board and approved by the Supreme Court. ~~The examination fee must be paid for each examination taken by a candidate, regardless of the candidate's failure to pass a prior examination or any portion thereof.~~ The examination fee will be forfeited if the candidate fails to appear for the examination, or fails to complete the examination, unless an exception is granted by the Board.

Rules of the State Board of Examiners of Certified Shorthand Reporters
Title 20, Chapter 20, App. 1

Rule 4. Test Requirements.

a) The examination for enrollment as a certified shorthand reporter shall consist of the following:

1) Testimony and Proceedings Skills Examination – A two-voice question-and-answer dictation of testimony at two hundred (200) words per minute for five (5) minutes. Speaker designations such as "Q" and "A" will not be read nor counted as words, but must be appropriately indicated in the transcript. One (1) hour will be given for the transcription of the question-and-answer dictation.

2) Literary Materials Skills Examination – A five-minute dictation of literary material at one hundred eighty (180) words per minute. One (1) hour will be given for the transcription of the literary dictation.

3) The Oklahoma Written Knowledge Test – A written knowledge test of not less than twenty-five (25) multiple choice questions relating to the Oklahoma law and court rules, duties of certified shorthand reporters, and general court procedure. This section of the examination will be administered in forty-five (45) minutes. Applicants will be provided with the study aids from which the test questions will be taken.

b) Candidates may take one or both of the skills examinations at any regularly scheduled examination. A candidate who has successfully completed either of the skills examinations may retain the credit for that portion of the examination for two (2) years from the date passed, and will not be required to retake that portion of the examination during the two (2) year period. ~~There will be no reduction in examination fee for any applicant retaining credit for either skills portion of the examination.~~

c) Candidates may take the Oklahoma Written Knowledge Test at any regularly scheduled examination. Proof of minimum proficiency shall not be required for candidates taking only the Oklahoma Written Knowledge Test. A candidate who has successfully completed the Oklahoma Written Knowledge portion of the examination may retain the credit for that portion of the examination for two (2) years from the date passed, and will not be required to retake that portion of the examination during the two (2) year period. ~~There will be no reduction in examination fee for any applicant retain-~~

~~ing credit for the written knowledge portion of the examination.~~

d) A candidate who provides proof of passing the Registered Professional Reporter Examination of the National Court Reporters Association, or an equivalent test as authorized by the Supreme Court, is eligible for enrollment without taking the skills examinations described in paragraphs a(1) and a(2) of this Rule. The applicant must, prior to certification, pass the Oklahoma Written Knowledge portion of the examination, and meet all other applicable eligibility requirements.

2019 OK 19

IN RE: FEE SCHEDULE FOR THE STATE BOARD OF EXAMINERS OF CERTIFIED SHORTHAND REPORTERS

SCAD-2019-32. Monday, April 8, 2019

ORDER

PURSUANT TO the provisions of 20 O.S. § 1506, the Court hereby approves and authorizes the attached Fee Schedule for the State Board of Examiners of Certified Shorthand Reporters. This schedule shall become effective April 12, 2019 and it shall supersede the Fee Schedule issued on November 12, 2009 by administrative order No. SCAD-2009-98.

DONE BY ORDER OF THE SUPREME COURT IN CONFERENCE THIS 8TH day of APRIL, 2019.

/s/ Noma D. Gurich
CHIEF JUSTICE

ALL JUSTICES CONCUR.

	FEE SCHEDULE	
Examination Fee – Oklahoma Resident *(Exam parts may be taken separately)*	Skills – Testimony & Proceedings (Q&A)	$60.00
	Skills – Literary Materials	$60.00
	Written Knowledge Test	$30.00
	TOTAL FOR COMPLETE EXAM	**$150.00**
Examination Fee – Non-Resident *(Exam parts may be taken separately)*	Skills – Testimony & Proceedings (Q&A)	$85.00
	Skills – Literary Materials	$85.00
	Written Knowledge Test	$30.00
	TOTAL FOR COMPLETE EXAM	**$200.00**
Application for Admission by Reciprocity • Qualified applicants may be enrolled without taking skills examinations • Fee includes one Oklahoma Written Knowledge Test		$150.00
Annual Certificate Renewal Fee		$30.00
Delinquent Payment Fee • Assessed for failure to renew certificate on or before February 15		$100.00
Continuing Education Penalty Fee • Assessed for failure to obtain the requisite number of continuing education hours on or before December 31 of the year in which they are required		$100.00
Continuing Education Suspension Fee • Charged to any court reporter whose certificate has been suspended for failure to earn the required number of continuing education hours, to submit a completed compliance report, and/or to pay any applicable continuing education penalty fee on or before February 15		$100.00
Retired Status Reinstatement Fee		$100.00

2019 OK 20

In Re the Marriage of: Matthew L. Antini, Appellee, v. Angela M. Antini, Appellant.

No. 115,002. April 9, 2019

ON CERTIORARI TO THE COURT OF CIVIL APPEALS, DIVISION I

¶0 In this writ of habeas corpus action brought under the Uniform Child Custody Jurisdiction and Enforcement Act ("UCCJEA"), Okla. Stat. tit. 43, §§ 551-101 through 402 (2011), prevailing party appeals trial court's order denying prevailing party's motion for attorney fees and costs. The court held that attorney fees can only be awarded to a party who has retained and paid for legal counsel and declined to address prevailing party's request for transcription costs. The Court of Civil Appeals affirmed the trial court's holding regarding attorney fees but reversed the holding regarding transcription costs. We find that the intent of the Legislature in enacting the UCCJEA was not to except entities rendering legal services at no cost to the clients. Accordingly, Appellant is entitled to reasonable and necessary expenses including attorney fees borne by her counsel, Legal Aid Services of Oklahoma.

CERTIORARI PREVIOUSLY GRANTED; COURT OF CIVIL APPEALS OPINION VACATED; TRIAL COURT ORDER REVERSED AND REMANDED WITH INSTRUCTIONS.

Kade A. McClure, Richard J. Goralewicz, Legal Aid Services of Oklahoma, Inc., Oklahoma City, for Appellant.

Joe K. White, Duncan, OK, for Appellee.

Colbert, J.

¶1 At issue is whether Okla. Stat. tit. 43, § 551-312 of the Uniform Child Custody Jurisdiction and Enforcement Act ("UCCJEA") requires a court to award prevailing party attorney fees to entities rendering legal services to clients at no cost. We answer in the affirmative.

I. FACTUAL AND PROCEDURAL HISTORY

¶2 Appellant, Angela M. Antini, and Appellee, Matthew L. Antini, are the biological parents of two minor children. In November 2013, the parties were granted a Judgment of Divorce in the State of New York. In it, the court awarded Appellant physical custody over the children with the parties sharing joint legal custody. Appellee was granted visitation rights and ordered to pay child support.

¶3 In 2013, prior to the entry of the Judgment of Divorce, Appellant moved with the children from New York to Maine. In April 2014, Appellee picked the children up in Maine for visitation but transported them to Oklahoma and, despite Appellant's requests and her subsequent trip to Oklahoma to recover the children, Appellee refused to return them. On May 19, 2014, after it became apparent that Appellee was not going to return the children, Appellant registered the New York divorce decree as a foreign judgment in a Maine court and filed a motion for contempt against Appellee on May 21, 2014. The court ordered Appellee to appear with the children. However, Appellee did not do so and the Maine court found Appellee in contempt on September 24, 2014. Appellee ignored an offer to purge his contempt by returning both children by September 26, 2014, and Appellee never returned the children to Maine. Because of this failure to return the children, the Maine court issued a bench warrant for Appellee.

¶4 On December 16, 2014, Appellee filed a petition in the District Court of Stephens County, State of Oklahoma, to register the New York divorce decree in Oklahoma and asked the court to assume custody jurisdiction. Appellee's petition did not reference the registration of the New York Decree in Maine nor the contempt proceedings in Maine. In response, Appellant filed a special appearance in the trial court objecting to the registration of the New York final judgment of divorce and also filed a petition and application for a writ of habeas corpus requesting custody of the minor children. On March 17, 2015, the court found that "pursuant to the Oklahoma Uniform Child Custody Jurisdiction and Enforcement Act, 43 O.S. §§ 551-201 et. seq. the [S]tate of Oklahoma has no jurisdiction in this matter and that this action should be dismissed." Maine retained child custody jurisdiction and ordered the return of the children to Appellant. The Oklahoma court also denied and dismissed the petition to register the New York decree in Oklahoma.

¶5 On April 21, 2015, Appellant filed a pro se motion to modify custody in the Maine court, requesting sole custody of the children and granting Appellee supervised visitation.

Appellee responded with an answer and counterclaim on May 7, 2015, but then failed to appear before the Maine court. The Maine court then granted Appellant's motion and ruled it had exclusive and continuing jurisdiction over the children. No appeal of the Maine court's decision was entered and the decision is now final under Maine law.

¶6 On April 29, 2015, Appellee filed in the Oklahoma court a Motion to Reconsider the March 17, 2015, decision, denying and dismissing Appellee's motion to register the New York judgment in Oklahoma and granting custody of the minor children to Appellant. That motion was heard on April 14, 2016, and the court issued its decision denying the motion and dismissing the petition.

¶7 Subsequently, Appellant filed a Motion for Costs and Attorney's Fees pursuant to Okla. Stat. tit. 43, § 551-312, a fee-shifting statute within the UCCJEA. That section mandates that a court award to the prevailing party

> necessary and reasonable expenses incurred by or on behalf of the party, including costs, communication expenses, attorney's fees, investigative fees, expenses for witnesses, travel expenses, and child care during the course of the proceedings, unless the party from whom fees or expenses are sought establishes that the award would be clearly inappropriate.

In the motion, counsel sought payment of prevailing party attorney fees and reimbursement of costs for transcripts. The court denied her motion, finding, as a matter of law, that attorney fees can only be awarded under the UCCJEA to a party who has retained counsel and personally paid for their services. That is, Appellant's counsel was not entitled to a reasonable attorney fee merely because Appellant was represented by Legal Aid Services of Oklahoma, Inc. The court further denied Appellant's request for transcription costs reasoning that the issue of costs for transcription of a default modification of divorce decree hearing in Maine should be decided in Maine.

¶8 Appellant appealed. On appeal, the Court of Civil Appeals affirmed the district court as to the claim for attorney's fees but reversed and remanded on the issue of transcription costs. In so doing, the court held that "[w]ithout . . . guidance, either from the Legislature or the Oklahoma Supreme Court, Okla. Stat. tit. 43, § 551-312 (2011) does not statutorily mandate attorney fee awards to prevailing parties when the prevailing party receives free legal services." But, the court further held that because the transcription of the hearing in Maine was vital to the Oklahoma trial court's determination that it lacked jurisdiction, Appellant should be awarded the transcription cost pursuant to § 551-312. Appellant sought certiorari review.

II. STANDARD OF REVIEW

¶9 The issue presented in this case is one of statutory interpretation. Statutory interpretation presents a question of law which this Court reviews under a de novo standard. Corbeil v. Emricks Van & Storage, 2017 OK 71, ¶ 10, 404 P.3d 856, 858; Brown v. Claims Mgmt. Res. Inc., 2017 OK 13, ¶ 10, 391 P.3d 111, 115. In conducting de novo review, this Court possesses plenary, independent, and non-deferential authority to examine the lower tribunal's legal rulings. Corbeil, 2017 OK 71, ¶ 10, 404 P.3d at 858.

¶10 At issue is whether Okla. Stat. tit. 43, § 551-312 (2011) excepts a class of attorneys from recovering prevailing party attorney fees for services rendered at no cost to their client. To answer this question, this Court must interpret and give ordinary meaning to the plain language of a statute while balancing the Legislature's intent. Statutory interpretation and ascertaining Legislative intent present questions of law which this Court reviews de novo. See Samman v. Multiple Injury Trust Fund, 2001 OK 71, ¶ 8, 33 P.3d 302, 305; see also Baptist Med. Ctr. v. Pruett, 1999 OK CIV APP 39, ¶ 11, 978 P.2d 1005, 1008 ("Matters involving legislative intent present questions of law which are examined independently and without deference to the trial court's ruling.").

III. DISCUSSION

A. The plain language of Okla. Stat. tit. 43, § 551-312 (2011) requires the trial court to award to a prevailing party a reasonable attorney fee, without regard to whether or not the cost of the representation was passed onto the client.

¶11 Oklahoma follows the "American Rule" which states generally that the cost of litigation is borne distinctly by each litigant and that the court is without authority to assess attorney fee awards without statutory authority to do so. Fulsom v. Fulsom, 2003 OK 96, ¶ 8, 81 P.3d 652, 655 (citations omitted). Fee-shifting statutes are

strictly construed because of the "chilling" effect the statutes have on access to courts. Id. Thus, proper application of § 551-312 requires that we ascertain the Legislature's intent when the UCCJEA was enacted. State v. Tate, 2012 OK 31, ¶ 7, 276 P.3d 1017, 1020.

¶12 Legislative intent is presumed to be expressed in the statute's text, and, where the language of the statute is plain and unambiguous, the court will not supplant its own interpretation in its place. Arrow Tool & Gauge v. Mead, 2000 OK 86, ¶ 15, 16 P.3d 1120, 1125. "The [w]ords and phrases of a statute are to be understood and used not in an abstract sense, but with due regard for context, and they must harmonize with other sections of the Act." Tate, 2012 OK 31, ¶ 7, 276 P.3d at 1020. Section 551-312 is a fee-shifting statute and must be interpreted according to its own terms. State ex rel. Dep't of Transp. v. Norman Indus. Dev. Corp., 2001 OK 72, ¶ 17, 41 P.3d 960, 965-66. Moreover, "courts should not read into a statute exceptions not made by the Legislature." Seventeen Hundred Peoria, Inc. v. City of Tulsa, 1966 OK 155, ¶ 14, 422 P.2d 840, 843 (citation omitted). When a legislature intends for an exception to exist within a statute, it is free to do so, and when the language used is broad and comprehensive and no exception is made, it is conclusive evidence that no exception is intended. City of Chickasha v. O'Brien, 1915 OK 813, ¶ 15, 159 P. 282, 284.

¶13 The UCCJEA has been adopted by 49 states, including Oklahoma, to prevent forum shopping schemes and to combat interstate custody disputes. Summarily, the purposes of the UCCJEA are to: (1) avoid jurisdictional competition in child custody cases; (2) promote cooperation with the courts of other states; (3) discourage the use of the interstate system for the same; (4) deter abductions of children; (5) avoid relitigation of custody decisions of other states in this State; and (6) facilitate the enforcement of custody decrees of other states. Okla. Stat. tit. 43, § 551-101, Official Comment (2011); see also, Uniform Child Custody Jurisdiction Act (1968) § 1. Article Three of Oklahoma's UCCJEA ("Enforcement") includes § 551-312, which provides in its entirety:

> A. The court **shall** award the prevailing party, including a state, necessary and reasonable expenses incurred by or **on behalf of** the party, including costs, communication expenses, attorney's fees, investigative fees, expenses for witnesses, travel expenses, and child care during the course of the proceedings, unless the party from whom fees or expenses are sought establishes that the award would be clearly inappropriate.
>
> B. The court may not assess fees, costs, or expenses against a state unless authorized by laws other than this act.

(emphasis added).

¶14 The word "shall" expresses a command or a mandatory directive creating an unequivocal right that leaves no discretion with the court to deny it. Sooner Builders & Invs., Inc. v. Nolan Hatcher Constr. Servs., L.L.C., 2007 OK 50, ¶ 17, 164 P.3d 1063, 1069 (citing Macy v. Freeman, 1991 OK 59, ¶ 8, 814 P.2d 147, 153; Forest Oil v. Okla. Corp. Comm'n, 1990 OK 58, ¶ 27, 807 P.2d 774, 787). The party that receives "the greatest affirmative judgment" is the prevailing party. Am. Superior Feeds, Inc. v. Mason Warehouse, Inc., 1997 OK CIV APP 43, ¶ 4, 943 P.2d 171, 173-74. The plain meaning of "prevailing party" refers to the stronger or more victorious party. Sooner Builders & Invs., Inc., 2007 OK 50, ¶ 17, 164 P.3d at 1069 (citing Buckhannon Bd. & Care Home, Inc. v. W. Va. Dep't of Health & Human Res., 532 U.S. 598, 603 (2001)). Similarly, as a legal term of art, "prevailing party" means the successful party who has been awarded relief on the merits of his or her claim. Id. "The language 'reasonable attorney's fees, costs, charges and expenses' places the amount of money which the prevailing party has a right to recover within the discretion of the court . . . to decide what are reasonable amounts for attorney fees and expenses expended or incurred by the prevailing party." Id.

¶15 Applying this guidance, the term "shall" in § 551-312 does not leave the decision of whether to award fees to the trial court's discretion. It is a mandate which unequivocally recognizes the right of the prevailing party under the UCCJEA to receive reasonable fees and costs incurred during litigation. Here, Appellant was unquestionably the prevailing party because she was granted relief on the merits of her claim by regaining the custody of her children at the habeas corpus/custody hearing and by ultimately obtaining the dismissal of Appellee's petition to register the New York Final Judgment of Divorce in Oklahoma. Though the burden would typically be upon the non-moving party to demonstrate that the fee-shift would be "clearly inappropriate,"[1] the amount of fees and costs requested

by Appellant is not at issue. Rather, it's whether fees must be granted in the first instance. With that understood, the only question left to be determined is the meaning of "on behalf of" within the phrase "necessary and reasonable expenses incurred by or on behalf of the party." Specifically, whether counsel can recoup expenses and necessary and reasonable costs incurred on behalf of their prevailing client.

¶16 Although "on behalf of" has not been interpreted by this Court in this context, the Tenth Circuit Court provides guidance in United States v. Frazier, holding that "the phrase 'on behalf of' means: (1) as a representative of; or (2) in the interest or aid of." 53 F.3d 1105, 1112 (10th Cir. 1995). The Black's Law Dictionary's definition of "behalf" resembles the Tenth Circuit's interpretation: "on behalf of means in the name of, on the part of, as the agent or representative of." Behalf, Black's Law Dictionary (10th ed. 2014).

¶17 It goes without question that legal representation comes at a cost. Nor can it be questioned that, attorneys who represent but do not pass the cost of representation onto their clients, are the client's representative and act in the client's best interest. Whether this service is paid for by the client, by the public, or not at all has no effect on this inquiry. Consequently, it becomes apparent that "on behalf of" discloses legislative intent that fees must be awarded even where the party did not pay for the legal services. Ruling otherwise would render the phrase "on behalf of" superfluous, something this Court declines to do. Odom v. Penske Truck Leasing Co., 2018 OK 23, ¶ 36, 415 P.3d 521, 532 (citations omitted).

¶18 In enacting the UCCJEA, the Oklahoma Legislature did not distinguish between legal entities or services that pass on their expenses to their clients or those that do no pass on these expenses. We construe the absence of such a carve-out exception is a meaningful omission. O'Brien, 1915 OK 813, ¶ 15, 159 P. at 284. If the Legislature wanted such an exception to exist they would have explicitly included one. It is not up to this Court to read such an exception into the statute and there is no indication from the Legislature that such an exception was so intended. Because the Oklahoma district court, in this case, did read an exception into the statute, the order of the Oklahoma district court was in error.

B. Today's holding aligns with the jurisprudence of other courts that have interpreted statutes that are similar to § 551-312.

¶19 Although this Court has not ruled squarely on this issue, the clear trend among state and federal courts is to award attorney fees even when the prevailing party did not directly pay for the representation. The Nevada Supreme Court in Miller v. Wilfong expressed several rationales for awarding prevailing party attorney fees when that party is represented at no charge. See, Miller v. Wilfong, 121 Nev. 619, 119 P.3d 727. The Miller Court found that in family law disputes, "one partner has often created or contributed to the other partner's limited financial means" and that in those cases, "if fees are not awarded to pro bono counsel, a wealthier litigant would benefit from creating conditions that force the other party to seek legal aid." Id. at 729-30. The Alaska Supreme Court ruled likewise in an action brought under the UCCJEA in Vazquez v. Campbell, 146 P.3d 1 (Alaska 2006). The Vazquez Court rejected the notion that fees are only "incurred" if the prevailing party pays their attorney and held that "clients receiving free legal services may recover attorney's fees." Id. at 3. Other courts have ruled similarly in domestic disputes. See, Beeson v. Christian, 594 N.E.2d 441, 443 (Ind. 1992) (holding that public policy would be undermined if a party must be personally obligated to pay fees before the court could order them reimbursed); Henriquez v. Henriquez, 413 Md. 287, 299, 992 A.2d 446, 454 (refusing to insert language into fee-shifting statute that would require parties to pay counsel before being awarded fees); Healdsburg Citizens of Sustainable Solutions v. City of Healdsburg, 206 Cal.App.4th 988, 993, 142 Cal. Rptr.3d 250, 254 (1st Dist. 2012) (awarding attorney fees where legal services were provided at no personal expense to the client).

¶20 The Official Comment to § 551-312 states that the section is derived from the International Child Abduction Remedies Act ("ICARA"), 42 U.S.C. § 11607(b)(3).[2] Several courts have applied § 11607(b)(3) to award attorney's fees in the pro bono posture and, though this Court is not bound by the federal courts' pronouncements on a state law question, Johnson v. Ford Motor Co., 2002 OK 24, ¶ 26, 45 P.3d 86, 95, their decisions are instructive.

¶21 In Cuellar v. Joyce, the Ninth Circuit awarded attorneys' fees to a prevailing party

that was represented for free. 603 F.3d 1142 (9th Cir. 2010). There, the defendant abducted his and the plaintiff's child and fled from Panama to America. Id. at 1143. The plaintiff petitioned for the return of her child pursuant to the Hague Convention on the Civil Aspects of International Child Abduction (and its implementing statute, ICARA). Id. The Ninth Circuit ordered the child returned and the plaintiff petitioned for an award of attorneys' fees. Id. The court granted the petition, holding that "[f]ee awards serve in part to deter frivolous litigation," and to deny fees to counsel working for free would "encourage abducting parents to engage in improper . . . tactics . . . when the [opposing party] is represented by pro bono counsel." Id. Other courts have applied § 11607(b)(3) similarly. See, e.g., Salazar v. Maimon, 750 F.3d 514, 520 (5th Cir. 2014); Menoza v. Silva, 987 F. SupP.2d 910, 917 (N.D. Iowa 2014); Wasniewski v. Grzelak-Johannsen, 549 F. SupP.2d 965, 971 (N.D. Ohio 2008); Saldivar v. Rodela, 894 F. SupP.2d 916, 927-28 (W.D. Tex. 2012); Antunez-Fernandes v. Connors-Fernandes, 259 F. SupP.2d 800, 816-17 (N.D. Iowa 2003); Larrategui v. Laborde, No. 2:2013cv01175, 2014 WL 2154477 (E.D. Cal. May 22, 2014); Aguilera v. De Lara, No. 2:2014cv01209, 2014 WL 4204947, at *2 n.1 (D. Ariz. Aug. 25, 2014).

¶22 Federal courts ruling on issues outside the realm of child custody issues also align with our decision today. In 1996, the Tenth Circuit in Martinez v. Roscoe awarded attorney's fees to a publicly funded legal aid program "perceiv[ing] no reason to distinguish between attorneys who are paid by a party and attorneys who are paid with public funds." 100 F.3d 121, 124. The court further noted that the purpose of the award of attorney fees (in that case) was to "sanction [the] defendants" and that compelling them to pay plaintiff's fees "serve[s] that purpose," and further cited many cases upholding fees for legal service providers: Rodriguez v. Taylor, 569 F.2d 1231, 1244-46 (3d Cir. 1977); Torres v. Sachs, 538 F.2d 10, 12 (2d Cir. 1976); New York Gaslight Club, Inc. v. Carey, 447 U.S. 54, 70 n.9 (1980); and Blum v. Stenson, 465 U.S. 886, 894-95 (1984).

¶23 Expanding the Martinez ruling, the Third Circuit in Rodriguez noted that "[a]ssessing fees against defendants in all circumstances [including those in which plaintiffs were represented by publicly funded legal providers] may deter wrongdoing in the first place." Rodriguez, 569 F.2d at 1245; see also Cornella v. Schweiker, 728 F.2d 978, 986-87 (8th Cir.1984) ("If attorneys' fees to pro bono organizations are not allowed in litigation against the federal government, it would more than likely discourage involvement by these organizations in such cases, effectively reducing access to the judiciary for indigent individuals."); Hairston v. R & R Apartments, 510 F.2d 1090, 1092 (7th Cir.1975) (awarding fees to pro bono counsel under 42 U.S.C. § 3612(c), the Fair Housing Act's fee-shifting provisions).

¶24 Finally, our holding today is in line with United States Supreme Court jurisprudence. In Blum v. Stenson, the United States Supreme Court laid out the policy as follows:

> It is also clear from the legislative history that Congress did not intend the calculation of fee awards to vary depending on whether plaintiff was represented by private counsel or by a nonprofit legal services organization. The citations to Stanford Daily and Davis make this explicit. In Stanford Daily, the court held that it "must avoid . . . decreasing reasonable fees because the attorneys conducted the litigation more as an act of pro bono publico than as an effort at securing a large monetary return." 64 F.R.D. 680, 681 (1974).
>
> In Davis, the court held:
>
> In determining the amount of fees to be awarded, it is not legally relevant that plaintiffs' counsel … are employed by … a privately funded non-profit public interest law firm. It is in the interest of the public that such law firms be awarded reasonable attorneys' fees to be computed in the traditional manner when its counsel perform legal services otherwise entitling them to the award of attorneys' fees.

465 U.S. 886, 894-95 (1984) (citation omitted). We join those courts today.

C. If § 551-312 were held to exclude attorneys rendering legal services to clients at no cost, many Oklahomans would lose court access.

¶25 Article II of the Oklahoma Constitution states: "The courts of justice of the State shall be open to every person, and speedy and certain remedy afforded for every wrong and for every injury to person, property, or reputation; and right and justice shall be administered without sale, denial, delay, or prejudice." Okla.

Const. art. II, § 6. This premise guides our decision today.

¶26 A party's right to court access is paramount. We recognized the need for a process to provide legal services to low income Oklahomans. Yet, attainment of such a vital service would not be possible without the work of our publicly funded legal groups who work to represent the indigent.

¶27 Litigation, whether privately or publicly funded, is never free. And, nothing saps a legal service provider's resources more than a high volume of litigated cases. But, when faced with this dilemma of balancing a high volume need and a legal provider's limited resources, that provider must pick and choose between numerous clients-all whom have the right to seek relief in the courts of justice. See Okla. Const. art. II, § 6.

¶28 The stakes are even higher in an action brought under the UCCJEA. Child custody and the sanctity of Oklahoma families would ultimately be at stake if we held otherwise. Without the fear of fee-shifting, parties would file frivolous lawsuits, and abductors, whereas here, would not be held accountable[3] if the aggrieved parent could not afford representation and courts woefully denied reasonable attorney fees merely because the provider rendering the service did not pass the litigation cost on to the indigent client.

¶29 Finally, the irony of holding otherwise is apparent in the present nature of attorney fee awards. In Hamilton v. Telex Corp., we held that attorneys representing themselves pro se could recover fees as the prevailing party. 1981 OK 22, ¶ 16, 625 P.2d 106, 109. Given our concepts of justice, it would be an unjust and unfair world in which attorneys serving their own self-interest could recover their fees, while those attorneys achieving meaningful court access for their clients do not.

IV. CONCLUSION

¶30 The plain language of Okla. Stat. tit. 43, § 551-312 (2011) mandates the award of a reasonable attorney's fee to the prevailing party and the award of reasonable and necessary costs incurred by or on behalf of the party. The phrase "on behalf of" discloses legislative intent that these awards are not limited to private counsel, but also extends to those providing legal services at no cost to indigent clients. Accordingly, to the award of attorney's fees, the district court's order is reversed and this matter is remanded for a determination and award of a reasonable attorney's fee.

¶31 We further hold that the transcription costs borne by Appellant are necessary and reasonable expenses and fall squarely within the purview of § 551-312. The decision on whether a transcript should be taxable in a given case must be made by the court with first-hand knowledge of the proceedings. Here, the transcript was submitted as evidence in the Oklahoma court proceeding and provided a comprehensive basis of Appellant's jurisdictional argument to dismiss the Oklahoma Petition to Register Foreign Judgment. This evidence was not only useful, but critical to the court's determination that it lacked jurisdiction. The district court's ruling to the contrary was in error.

CERTIORARI PREVIOUSLY GRANTED; COURT OF CIVIL APPEALS OPINION VACATED; TRIAL COURT ORDER REVERSED AND REMANDED WITH INSTRUCTIONS.

CONCUR: Gurich, C.J., Winchester, Edmondson, Colbert, Reif, Combs, Darby, JJ.

CONCUR IN JUDGMENT: Wyrick, V.C.J. and Kauger, J.

I concur in judgment, and concur in all parts of the opinion, except for Part III.C.

Colbert, J.

1. Okla. Stat. tit. 43, § 551-312 (2011) Official Comment; see also, 22 U.S.C. § 9007

2. 42 U.S.C. § 11607(b)(3) has been re-codified at 22 U.S.C. § 9007(b)(3).

3. Okla. Stat. tit. 43, § 551-101 (Official Comment) (Stated purpose of the UCCJEA).

2019 OK 21

IN THE MATTER OF THE APPLICATION OF MEDICINE PARK TELEPHONE COMPANY FOR FUNDING FROM THE OKLAHOMA UNIVERSAL SERVICE FUND MEDICINE PARK TELEPHONE COMPANY, Appellants, v. OKLAHOMA CORPORATION COMMISSION and STATE OF OKLAHOMA, Appellees.

Case No. 115,453. April 16, 2019

APPEAL FROM OKLAHOMA CORPORATION COMMISSION CAUSE NO. PUD 201500444

Bob Anthony, Chairman; Dana Murphy, Vice Chairman; and Todd Hiett, Commissioner.

¶0 Medicine Park Telephone Company appeals the Oklahoma Corporation Commission's denial of its application for reimbursement from the Oklahoma Universal Services Fund for reasonable investments and expenses incurred in providing primary universal service to its customers. We find that the Commission's wholesale denial of the reimbursement of any of the requested funds is in error and vacate the Commission's ruling and remand with directions.

ORDER OF THE OKLAHOMA CORPORATION COMMISSION REVERSED AND REMANDED WITH INSTRUCTIONS.

William H. Hoch, Melanie Wilson Rughani, Crowe & Dunlevy, P.C., Oklahoma City, Oklahoma, and Ron Commingdeer, Kendall W. Parrish, Ron Commingdeer & Associates, Oklahoma City, Oklahoma, for Appellants.

Michele Craig, Deputy General Counsel, Oklahoma Corporation Commission, Oklahoma City, Oklahoma, for Appellees.

Nancy M. Thompson, Oklahoma City, Oklahoma, for Sprint Communications Company, L.P., Sprint Spectrum L.P. and Virgin Mobile USA, L.P.

Jack G. Clark, Jr., Clark, Wood & Patten, P.C., Oklahoma City, Oklahoma, for Verizon.

WINCHESTER, J.:

¶1 The issue before this Court is whether the Oklahoma Corporation Commission ("the Commission") erroneously withheld funding to be provided to Medicine Park Telephone Company ("Medicine Park") pursuant to the provisions of the Oklahoma Universal Service Fund ("OUSF"), 17 O.S.Supp.2016, § 139.106. For the reasons set forth herein, we find that Medicine Park is entitled to the requested funding.

STATUTORY BACKGROUND

¶2 In 1996, the U.S. Congress passed the federal Telecommunications Act, 47 U.S.C. §§ 151 *et seq.*, in part, to promote a policy of universal service that would provide telecommunications services to consumers all over the country, including "those in rural, insular, and high cost areas." The Act seeks to provide access to services that are "reasonably comparable to those services provided in urban areas and that are available at rates that are reasonably comparable to rates charged for similar services in urban areas." 47 U.S.C. § 254(b)(3). The Oklahoma Legislature followed suit with its own, complementary Oklahoma Telecommunications Act of 1997 (the "Act"). 17 O.S.2011 and Supp.2016, §§ 139.101 *et seq.*

¶3 Under the state and federal Acts, certain telecommunications providers known as "carriers of last resort" are required to provide, without discrimination, telephone service to any customer requesting it. *See* 47 U.S.C. § 201; 17 O.S.Supp.2016, §139.106. In addition, the provider must offer the requested services at reasonable and affordable rates in line with those offered in more urban areas even if serving such customers would not be economically sustainable. *See* 47 U.S.C. § 202; 47 U.S.C. § 254(b)(3), (g), (i). The purpose of the legislation was to provide affordable and quality primary universal services to all despite the challenges of its accessibility.

¶4 In an effort to defray the costs of delivering phone service in rural, more remote areas, the federal and state Acts each established a fund to help support eligible service providers. Within Oklahoma's Act, the Legislature created the OUSF to help pay for reasonable investments and expenses incurred by "eligible local exchange telecommunications service providers" in providing primary universal services to customers in rural and high-cost areas "at rates that are reasonable and affordable." *See* 17 O.S.Supp.2016, § 139.106(A), (B), and (G).

¶5 The OUSF generally provides that an eligible provider "may request funding from the OUSF as necessary to maintain rates for primary universal services that are reasonable and affordable." 17 O.S.Supp.2016, § 139.106(G). The OUSF is funded by a charge paid by certain telecommunications carriers that have revenues as defined in Section 139.107. *See* 17 O.S.Supp.2016, §§ 139.106(D) and 139.107.[1]

¶6 The Commission's rules governing the process for obtaining funding from the OUSF are set out in OAC 165:59, Part 9 and are overseen by the Administrator of the Commission's Public Utilities Division ("PUD"). Under the rules, upon receipt of a request for OUSF funding, the OUSF Administrator reviews the request and, if appropriate, reimburses the provider consistent with the Act. OAC 165:59-7-1(d) and OAC 165:59-3-62(g). Requests for Subsection (G)'s "as necessary" distributions are evaluated

through a detailed study and analysis of the "costs of providing primary universal services" as well as potential revenue. 17 O.S.Supp. 2016, § 139.106(H). The process of providing such detailed studies and demonstrating their effect on rates has made Subsection (G) requests for funding time-consuming and expensive.[2]

¶7 The Commissioners are free to approve or reject any determination by the OUSF Administrator. Under the rules, if no one objects to the Administrator's determination, an order approving the funding request is issued by the Commission. OAC 165:59-3-62(j). If, however, a party is not satisfied with the OUSF Administrator's determination, the party may file a request for reconsideration by the Commission and the matter is set for hearing. OAC 165:59-3-62(h) and (i). The Commission is the ultimate arbiter of the issues. *See, Cameron v. Corporation Com 'n*, 1966 OK 75, ¶29, 414 P.2d 266, 272 (on appeal from an oil and gas spacing order, the Court noted that regardless of whatever weight the Commission may attach to an examiner's report, "the Commission is the final arbiter of the issues"). *See also, State ex rel. Cartwright v. Southwestern Bell Telephone Co.,* 1983 OK 40, ¶32, 662 P.2d 675, 681 (quoting *Cameron*).

¶8 The Commission, by a 2-1 vote, denied reimbursement. Commissioner Dana Murphy, dissenting in each of these companion cases, has stated that although she may not agree with the need for the fund, she feels she must uphold the Legislature's will as long as the fund exists.[3]

¶9 In 2014, the Commission denied a request for OUSF funding from Dobson Telephone Company. *See Dobson Telephone Co. v. State ex rel. Okla. Corporation Comm.*, 2017 OK CIV APP 16, 392 P.3d 295. Dobson sought reimbursement, under 17 O.S.Supp.2016 (K)1)(b), for costs incurred to relocate its telephone facilities as required by the city of Oklahoma City for a street-widening project. Because the request had been issued by the city, and not the county commission or ODOT, the Commission narrowly interpreted the statute and concluded that the Fund was not authorized to pay for such relocation costs.

¶10 The Court of Civil Appeals found that the Commission's interpretation of the statutory language defeats the purpose of the Fund and is contra to the legislative intent to defray increased costs incurred by eligible telecommunications service providers resulting from government action, no matter the originating government entity. *Dobson Telephone Co. v. State ex rel. Okla. Corporation Comm.*, 2017 OK CIV APP 16, ¶21, 392 P.3d 295, 305. The Commission's Order was vacated and the matter was remanded for further proceedings consistent with the Court of Civil Appeals opinion. *Dobson Telephone Co. v. State ex rel. Okla. Corporation Comm.*, 2017 OK CIV APP 16, ¶23, 392 P.3d 295, 305. This Court approved the case for publication.

FACTUAL BACKGROUND

¶11 Medicine Park provides telecommunications services to customers in a rural area of southwestern Oklahoma. Pursuant to 17 O.S. Supp.2016, § 139.106(G), Medicine Park submitted an application to the Commission for an "as necessary" reimbursement from the OUSF. The company indicated that it had incurred a revenue deficiency as a result of the growing expense of maintaining its service obligations to its customers, combined with the added costs of continued compliance with Federal Communications Commission (FCC) mandates. Medicine Park indicated that it calculated its funding request, in conformance with Subsection (H)(1) of the OUSF, using its most recent annual cost study, which was based on its calendar year 2014 financial data. To avoid substantially raising its customers' rates, Medicine Park asked for a lump-sum reimbursement from the OUSF of $1,046,188.00, for calendar year 2014, and a monthly recurring amount of $87,182.33, payable beginning January 1, 2015.

¶12 Medicine Park's application went through several rounds of review and supplementary submissions to PUD. The Administrator initially recommended denial of Medicine Park's request for funding stating there was insufficient documentation upon which to base its decision. Thereafter, Medicine Park filed a Request for Reconsideration and supplied the requested, additional information to PUD. Sprint and Verizon (collectively hereafter "Sprint") entered appearances in the case to contest Medicine Park's entitlement to the requested funding. On May 13, 2016, based on the information provided to date, the Administrator filed an Amended Determination in which he recommended a lump sum of $135,935.00 and a recurring monthly amount of $11,327.89. Sprint filed a Request for Reconsideration of the Determination arguing against any funding.

¶13 On May 31, 2016, Medicine Park filed its Second Request for Reconsideration and reduced the amount of its requested funding to $671,373 for 2014 and a recurring monthly amount of $55,947. Shortly thereafter, the company again provided additional information to PUD, including the direct testimony of Medicine Park President, Edward E. Hilliary. According to Medicine Park, this testimony was filed to more clearly reflect how Medicine Park's investments and expenses were incurred.

¶14 On July 14, 2016, PUD filed testimony of its Regulatory Manager, James L. Jones, and of David G. Winter, an expert regulatory consultant whom PUD hired to perform an independent examination of Medicine Park's application. At that time, Mr. Winter recommended a slightly increased amount of funding in the amount of $145,696.49 for 2014 support, and $12,141.27 in recurring support thereafter. Mr. Jones agreed with Mr. Winter's assessment and PUD expressly determined that Medicine Park's rate for primary universal services was reasonable and affordable.

¶15 On August 15, 2016, after considering the testimony of Mr. Hilliard, both Mr. Jones and Mr. Winter filed supplemental testimony and exhibits, respectively. Following the in-depth review of Medicine Park's application and supporting testimony, including a review of all documentation by a neutral, independent consulting firm hired by PUD, the PUD Administrator ultimately recommended that Medicine Park receive a lump-sum payment of $309,016.90 for calendar year 2014, and monthly recurring payments of $25,751.41, to begin January 1, 2015. Despite the recommendation from the PUD Administrator and the outside consulting firm independently hired by PUD to assist in the process, the Commission rejected the Administrator's final determination. By a vote of 2-1, following a two-day hearing on the merits, the Commission denied Medicine Park's application in full. The Commission found that Medicine Park included requests for reimbursement of expenses and investments that were not incurred entirely for the provision of primary universal services, that the Administrator did not determine whether Medicine Park's rates for primary universal services were reasonable and affordable, that the company did not seek alternative funding, and that recurring funding should not be awarded. As a result, Medicine Park filed this appeal seeking review of the Commission's order and we retained jurisdiction.

STANDARD OF REVIEW

¶16 This Court's review of decisions of the Commission is governed by the Oklahoma Constitution, article 9, § 20, which states as follows, in relevant part:

> The Supreme Court's review of appealable orders of the Corporation Commission shall be judicial only, and in all appeals involving an asserted violation of any right of the parties under the Constitution of the United States or the Constitution of the State of Oklahoma, the Court shall exercise its own independent judgment as to both the law and the facts. In all other appeals from orders of the Corporation Commission the review by the Supreme Court shall not extend further than to determine whether the Commission has regularly pursued its authority, and whether the findings and conclusions of the Commission are sustained by the law and substantial evidence.

Okla. Const. art. 9, § 20.

¶17 The issue in this appeal concerns the Commission's legal interpretation of the OUSF statute and the alleged arbitrary and capricious denial of funding in violation of the Oklahoma Constitution. Constitutional implications as well as statutory interpretation require us to review this case *de novo. Cox Oklahoma Telecom, LLC v. State ex rel. Oklahoma Corp. Comm'n*, 2007 OK 55, ¶9, n.17, 164 P.3d 150, 156. Under the *de novo* standard of review, the Court has plenary, independent and non-deferential authority to determine whether the trial tribunal erred in its legal rulings. *Cox Oklahoma Telecom, LLC v. State ex rel. Oklahoma Corp. Comm'n*, 2007 OK 55, ¶9, n.16, 164 P.3d 150, 156; *Neil Acquisition v. Wingrod Investment Corp.*, 1996 OK 125, ¶5, 932 P.2d 1100, 1103; *Fanning v. Brown*, 2004 OK 7, ¶8, 85 P.3d 841, 845.

¶18 This Court has found that the Commission's power "must be exercised only within the confines of its limited jurisdiction as provided by the Oklahoma Constitution" and state statute.[4] *Pub. Serv. Co. v. State ex rel. Corp. Comm'n,* 1997 OK 145, ¶23, 948 P.2d 713, 717. The Commission's "power to regulate is not unfettered." *Pub. Serv. Co. v. State ex rel. Corp. Comm'n, 1*996 OK 43, ¶21, 918 P.2d 733, 738.

DISCUSSION

¶19 In support of its decision to disallow any funding to Medicine Park, two of the three members of the Commission found that Medicine Park: (1) included expenses that were not related to primary universal services as set forth in the OUSF statutory provisions; (2) failed to substantiate the reasonableness and necessity of its claimed expenses; (3) did not first seek alternative funding or substantiate the reasonableness of its rate for primary service; and (4) failed to show the propriety of recurring funding under the OUSF provisions.

¶20 Medicine Park contends that the Commission's complete denial of funding disregards the very purpose of the OUSF to ensure the availability of affordable telephone service to customers in rural and high cost areas where, absent the subsidies, their provision would be cost-prohibitive. Medicine Park argues the Commission: (1) too narrowly interprets the OUSF statute; (2) erroneously imposed an alternative funding requirement on Medicine Park contrary to the OUSF statute; (3) incorrectly denied Medicine Park's request for recurring funding; and (4) erred in finding the 2016 amendments to 139.106(D) are not retroactively applicable here.[5]

¶21 Medicine Park asserts that the process for reimbursement under Subsection (G) can be time-consuming and extremely expensive. It sought OUSF funding due to the growing expense of maintaining service obligations to its residential and business customers, combined with the added cost of continued compliance with FCC mandates which resulted in a revenue deficiency.

¶22 Medicine Park filed its application for funding pursuant to Section 139.106 (G)(1) and (2) of the Act. Subsection (G) provides that an eligible provider may request funding "as necessary to maintain rates for primary universal services that are reasonable and affordable." 17 O.S.Supp.2016, § 139.106 (G). The Commission does not dispute that Medicine Park is an eligible provider. The statute further states, in part, that such funding **"shall be provided"** to eligible providers for the following:

> (1) To reimburse eligible local exchange telecommunications service providers for the reasonable investments and expenses not recovered from the federal universal service fund or any other state or federal government fund incurred in providing universal services;
>
> (2) Infrastructure expenditures or costs incurred in response to facility or service requirements established by a legislative, regulatory, or judicial authority or other governmental entity mandate.

17 O.S.Supp.2016, § 139.106 (G)(1) and (2) (emphasis added).[6]

¶23 In paperwork submitted with its application for funding, Medicine Park indicated that because it is operating at a revenue deficiency, it must receive increased revenues in order to continue to provide adequate and reliable regulated telephone service and earn a fair and reasonable rate of return on its investment devoted to intrastate regulated public utility business. Without OUSF funding, the company indicated it would be forced to increase the rates of its customers. Medicine Park calculated its funding request according to its most recent annual cost study which was based on 2014's calendar year financial data. It compiled the information in conformance with Subsection (H)(1) which provides the procedure by which an eligible service provider must identify and measure the costs of providing primary universal services when seeking OUSF funding. 17 O.S.Supp.2016, § 139.106(H)(1).[7]

¶24 Medicine Park urges that 17 O.S.Supp.2016, § 139.106(G) mandates a distribution of OUSF funds to an eligible service provider who requests funding, as Medicine Park did here, "as necessary to maintain rates for primary universal services that are reasonable and affordable." Medicine Park states that its request covered eligible costs used in the provision of primary universal services as that term is broadly defined in the Act:

> "Primary universal service" means an access line and dial tone provided to the premises of residential or business customers which provides access to other lines for the transmission of two-way switched or dedicated communication in the local calling area without additional, usage-sensitive charges, including:
>
> a. a primary directory listing,
>
> b. dual-tone multifrequency signaling,
>
> c. access to operator services,
>
> d. access to directory assistance services,

e. access to telecommunications relay services for the deaf or hard-of-hearing,

f. access to nine-one-one service where provided by a local governmental authority or multijurisdictional authority, and

g. access to interexchange long distance services.

17 O.S.Supp.2016, § 139.102 (35).[8] The statutory definition expressly includes several services that are used for both intrastate and interstate services, such as access to operator services, access to directory assistance services, access to directory assistance services, and access to interexchange long distance services within the scope of available services to be funded by the OUSF. Thus, the Commission has too narrowly interpreted the costs recoverable under the OUSF.

¶25 Medicine Park's cost study, prepared in conformance with Subsection (H)(1), and in accordance with FCC rules, allocated out of its study all non-regulated costs and then further separated costs between interstate and intrastate jurisdictions. Using this method allowed Medicine Park to isolate intrastate costs which were used in the provision of primary universal services and are the specific costs for which the company stated it was requesting OUSF recovery. The Administrator, and the independent expert, after reviewing the entirety of Medicine Park's documentation and information, reduced Medicine Park's recovery even further to ensure only validly incurred expenses and/or investments were reimbursed.

¶26 The primary question regarding Medicine Park's entitlement to the funds, requested under Subsection (G)(1) and (2), concerns whether the funds were for (1) reasonable investments and expenses not recovered elsewhere, and/or (2) infrastructure costs incurred as a result of facility or service requirements. The Commission argues that the words "request funding necessary to maintain rates that are reasonable and affordable" require it to make "relative comparisons, exercise critical judgment, weigh relevant factors, and make judgment calls." However, the plain language of the statute simply requires the Commission, through the Administrator, to verify through review of the provider's application and supporting documentation, that the monies sought by the provider were incurred in the furtherance of providing reasonable primary universal services. 17 O.S.Supp.2016, § 139.106 (B) and (G).

¶27 After conducting a thorough review of all of Medicine Park's supporting documents, exhibits, and testimony, the PUD Administrator and Mr. Winters, the expert regulatory consultant for the independent consulting firm hired by PUD, each separately concluded that Medicine Park was entitled to some amount of OUSF reimbursement. Briefing filed by PUD in the proceedings below indicated that because Medicine Park pursued funding pursuant to Subsection (G), the Administrator had to consider and determine whether Medicine Park's rate for primary universal service was reasonable. In reaching his determination that the request, as modified, was reasonable, the Administrator testified that he "had to review all books and records of Medicine Park to determine whether the revenues of Medicine Park are sufficient, when unreasonable expenses are removed, to maintain rates for primary universal service that are reasonable and affordable." Without such a review, the Administrator maintained that he could not have reached his decision. Further, the Administrator specified that he restricted his recommendation to allow only for funding of costs and expenses associated with primary universal service. Likewise, Mr. Winters reached the same conclusion. While both witnesses approved an amount less than Medicine Park requested, they each agreed that their final recommendation constituted a reasonable amount that would allow the company to continue to provide reasonable and affordable service to its customers. Despite finding Medicine Park's rate for primary universal services "reasonable and affordable," the two-member majority of the Commission rejected the PUD Administrator's findings, without any supported basis and contrary to the very purpose of the OUSF.

¶28 The Commission's argument that Medicine Park was required to seek alternative funding is not well-taken. In its application, Medicine Park provided information to the Commission that included revenues received by Medicine Park from the Oklahoma High Cost Fund. The Administrator properly excluded these funds from his recommendation. Medicine Park did not receive funding from any other source that would be the subject of an exclusion.

¶29 Additionally, PUD asserts that "even if Medicine Park mistakenly receives funding

from the OUSF for a cost for which it has already received funding, then the double funding will be recovered by the OUSF," pursuant to OAC 165:59-3-62(d). This agency rule provides: "If a provider receives funding from alternative funding sources for an investment or expense already reimbursed by the OUSF, the provider shall refund the double collection to the OUSF by either reducing a prospective funding request from the OUSF by an equivalent amount or remitting cash payment to the OUSF. Under no circumstances will double recovery be allowed." OAC 165:59-3-62(d). Thus, the Commission's fear of double recovery from alternative funding is not realistic.

¶30 Finally, the Commission ignored the Administrator's specific recommendation for recurring funding stating that such funding is not available when there is no showing of ongoing revenue needs. The Administrator and Mr. Winters both recommended recurring funding as the revenue needs for Medicine Park were documented to be ongoing. Nothing in the statute or Commission rules limits recovery to a single past period where a continued need exists and we decline to impose such a condition here.[9]

CONCLUSION

¶31 Although the Commission is not bound by the Administrator's recommendation, we find that the record reflects ample evidence with which to support the Administrator's determination. The Administrator, the independent expert hired by PUD to provide a neutral investigation, and one dissenting Commissioner all agreed that Medicine Park was entitled to funding, albeit at a reduced rate of its initial request. The Commission's wholesale denial of any funding was in error. Where an eligible provider has followed the statutorily-established process and submitted valid, supporting documentation, OUSF funding is required when such funding is needed to ensure the availability of primary universal service at rates that are reasonable and affordable. We find the Commission has misinterpreted the language and requirements of the OUSF Act and, as such, we vacate the order of the Commission and remand the cause for further proceedings consistent with this opinion.

ORDER OF THE OKLAHOMA CORPORATION COMMISSION VACATED AND REMANDED.

CONCUR: GURICH, C.J., KAUGER, WINCHESTER, EDMONDSON, and DARBY, JJ.

CONCURRING SPECIALLY (by separate writing): COMBS, J.

NOT PARTICIPATING: COLBERT, AND REIF, JJ.

COMBS, J., concurring:

¶1 I concur in the majority opinion but write separately to emphasize the audacity of the Commission's blanket denial of Appellant's, Medicine Park Telephone Company, application. The legislature established a process by which a rural provider with limited resources is allowed to be reimbursed from the Oklahoma Universal Service Fund (OUSF) when the rural provider meets increased costs in fulfilling a mandate to provide reliable and affordable telephone service to Oklahomans in remote and underserved areas. The Commission's majority all but ignored the evidence presented ostensibly because of a fundamental disagreement with the Oklahoma Universal Service Fund.[1] This is nothing more than an attempt to further disenfranchise rural Oklahoma from basic telephone services.

¶2 Additionally, I would not have allowed Verizon and its related entities and Sprint Communications Company and its related entities to participate in this proceeding below or on appeal. Both Verizon and Sprint are participating based upon their opposition to the funding provided by the Oklahoma Universal Service Fund to rural Oklahoma providers. Neither of these companies had any substantive rights at the time they joined these proceedings.[2]

WINCHESTER, J.:

1. Section 139.107 provides, in part:
A. The Oklahoma Lifeline Fund (OLF) and the Oklahoma Universal Service Fund (OUSF) shall be funded in a competitively neutral manner not inconsistent with federal law by all contributing providers. The funding from each contributing provider shall be based on the total intrastate retail Oklahoma Voice over Internet Protocol (VoIP) revenues and intrastate telecommunications revenues, from both regulated and unregulated services, of the contributing provider, hereinafter referred to as assessed revenues, as a percentage of all assessed revenues of the contributing providers, or such other assessment methodology not inconsistent with federal law. VoIP services shall be assessed only as provided for in the decision of the Federal Communications Commission, FCC 10-185, released November 5, 2010, or such other assessment methodology that is not inconsistent with federal law. The Commission may after notice and hearing modify the contribution methodology for the OUSF and OLF, provided the new methodology is not inconsistent with federal law.
B. The Corporation Commission shall establish the OLF assessment and the OUSF assessment at a level sufficient to recover costs of administration and payments for OUSF and OLF

requests for funding as provided for in the Oklahoma Telecommunications Act of 1997. The administration of the OLF and OUSF shall be provided by the Public Utility Division of the Commission. The administrative function shall be headed by the Administrator as defined in Section 139.102 of this title. The Administrator shall be an independent evaluator. The Administrator may enter into contracts to assist with the administration of the OLF and OUSF.

17 O.S.Supp.2016, § 139.107. "Contributing provider" as that term is used in § 139.107 means "providers, including but not limited to providers of intrastate telecommunications, providers of intrastate telecommunications for a fee on a non-common-carrier basis, providers of wireless telephone service and providers of interconnected Voice over Internet Protocol (VoIP). Contributing providers shall contribute to the Oklahoma Universal Service Fund and Oklahoma Lifeline Fund." 17 O.S.Supp.2016, § 139.102 (8).

2. In an effort to help defray certain costs and shorten the time to receive reimbursement, in limited circumstances, the OUSF offers funding to smaller providers serving rural areas through a much less tedious process. *See* 17 O.S.Supp.2016, § 139.106 (K). There are six additional cases, made companions to the case herein, in which the providers sought funding under Subsection (K). In Case Nos. 116,193, 116,194, 116,214, 116,215, 116,421, and 116,422, the Commission, by a vote of 2-1, denied each of those requests.

3. In the Subsection (K) companion cases, which we also decide today, Commissioner Murphy wrote, in dissent, stating that she didn't believe the majority decision "comports with the Oklahoma Legislature's intent to, in part, provide support to small, rural carriers who have experienced increases in costs as a result of changes required by governmental acts and with the Legislative policy to preserve and advance universal services."

4. The Oklahoma Constitution, art. 9, Section 18 specifies that the Commission has:

> the power and authority and [is] charged with the duty of supervising, regulating and controlling all transportation and transmission companies doing business in this State, in all matters relating to the performance of their public duties and their charges therefor, and of correcting abuses and preventing unjust discrimination and extortion by such companies; and to that end the Commission shall, from time to time, prescribe and enforce against such companies, in the manner hereinafter authorized, such rates, charges, classifications of traffic, and rules and regulations, and shall require them to establish and maintain all such public service, facilities, and conveniences as may be reasonable and just, which said rates, charges, classifications, rules, regulations, and requirements, the Commission may, from time to time, alter or amend.

5. Medicine Park argued that under recently amended 17 O.S. Supp.2016, § 139.106(D)(5), "the failure of the Commission to issue a final order within 30 days from the date of the request for reconsideration meant that Medicine Park's application for OUSF funding was now deemed approved on an interim basis." We disagree with Medicine Park that the provisions of the amended statute are applicable herein. Because we find the amended statute is not purely procedural, its application should be deemed prospective. *Barnhill v. Multiple Injury Trust Fund*, 2001 OK 114, ¶16, 37 P.3d 890, 898. Regardless, our ruling today makes this issue moot.

6. We have interpreted the use of the word "shall" by the Legislature "as a legislative mandate equivalent to the term 'must', requiring interpretation as a command." *Minie v. Hudson*, 1997 OK 26, ¶7, 934 P.2d 1082, 1086.

7. Subsection (H) provides, *in toto*:

> H. In identifying and measuring the costs of providing primary universal services, exclusively for the purpose of determining OUSF funding levels under this section, the eligible local exchange telecommunications service provider serving less than seventy-five thousand access lines shall, at its option:
>
> 1. Calculate such costs by including all embedded investments and expenses incurred by the eligible local exchange telecommunications service provider in the provision of primary universal service, and may identify high-cost areas within the local exchange area it serves and perform a fully distributed allocation of embedded costs and identification of associated primary universal service revenue. Such calculation may be made using fully distributed Federal Communications Commission parts 32, 36 and 64 costs, if such parts are applicable. The high-cost area shall be no smaller than a single exchange, wire center, or census block group, chosen at the option of the eligible local exchange telecommunications service provider; or
>
> 2. Adopt the cost studies approved by the Commission for a local exchange telecommunications service provider that serves seventy-five thousand or more access lines; or
>
> 3. Adopt such other costing or measurement methodology as may be established for such purpose by the Federal Communications Commission pursuant to Section 254 of the federal Telecommunications Act of 1996.

17 O.S.Supp.2016, § 139.106 (H).

8. Further, the term "access line," as used in the definition of primary universal services, means "the facilities provided and maintained by a telecommunications service provider which permit access to or from the public switched network or its functional equivalent regardless of the technology or medium used." 17 O.S.Supp.2016, § 139.102(1).

9. Medicine Park further argues that the Commission had previously allowed recurring reimbursements in previous cases to other providers. The Administrator's recommendation for recurring payments would appear to support this interpretation.

COMBS, J., concurring:

1. Appellant's Brief in Chief at 1, January 29, 2018, states "Commissioner Bob Anthony has repeatedly spoken out against the law [17 O.S. § 139.101 *et seq.*], even going so far as to ask the Legislature, in writing, to repeal it." He stated the Fund is a bad program that should be repealed. Tr. at 30-31, June 26, 2014, Ok. Sup. Ct. Case No. 113,362. The record also shows the statute was not supported by the Commission. ROA, at 224. Commissioner Murphy, however, dissented against the denial of the request for OUSF funding.

2. HB 2616 (2016) amended 17 O.S. § 139.106 (D) by including in the term "affected party," "any service provider that pays into the OUSF." This bill became effective on May 9, 2016, almost two months after Verizon and Sprint had filed entries of appearance in the underlying case. The Commission's final order noted it had earlier determined "the amendments in House Bill 2616 adding 17 O.S. §139.106 (D) (5) do not apply to the instant Cause." Final Order Denying Request for OUSF Funding at 12.

2019 OK 22

MEDICINE PARK TELEPHONE COMPANY, Appellant, v. STATE OF OKLAHOMA EX REL. OKLAHOMA CORPORATION COMMISSION, Appellee.

Case No. 116,193. April 16, 2019

APPEAL FROM OKLAHOMA CORPORATION COMMISSION CAUSE NO. PUD 201600457

Dana Murphy, Chairman; Todd Hiett, Vice Chairman; and Bob Anthony, Commissioner.

¶0 Medicine Park Telephone Company appeals the Oklahoma Corporation Commission's denial of its application for reimbursement from the Oklahoma Universal Services Fund for reasonable investments and expenses incurred in providing primary universal service to its customers. We find that the Commission's wholesale denial of the reimbursement of any of the requested funds is in error and vacate the Commission's ruling and remand with directions.

ORDER OF THE OKLAHOMA CORPORATION COMMISSION REVERSED AND REMANDED WITH INSTRUCTIONS.

William H. Hoch, Melanie Wilson Rughani, Crowe & Dunlevy, P.C., Oklahoma City, Oklahoma, and Ron Commingdeer, Kendall W. Parrish, Ron Commingdeer & Associates, Oklahoma City, Oklahoma, for Appellant.

Michele Craig, Deputy General Counsel, Oklahoma Corporation Commission, Oklahoma City, Oklahoma, for Appellee.

Nancy M. Thompson, Oklahoma City, Oklahoma, for Sprint Communications Company, L.P., Sprint Spectrum L.P. and Virgin Mobile USA, L.P.

Jack G. Clark, Jr., Clark, Wood & Patten, P.C., Oklahoma City, Oklahoma, for Verizon.

WINCHESTER, J.,

¶1 The issue before this Court is whether the Oklahoma Corporation Commission ("the Commission") erroneously withheld funding to be provided to Medicine Park Telephone Company ("Medicine Park") pursuant to the provisions of the Oklahoma Universal Service Fund ("OUSF"), 17 O.S.Supp.2016, § 139.106. For the reasons set forth herein, we find that Medicine Park is entitled to the requested funding.

STATUTORY BACKGROUND

¶2 In 1996, the U.S. Congress passed the federal Telecommunications Act, 47 U.S.C. §§ 151 *et seq.*, in part, to promote a policy of universal service that would provide telecommunication services to consumers all over the country, including "those in rural, insular, and high cost areas." The Act seeks to provide access to services that are "reasonably comparable to those services provided in urban areas and that are available at rates that are reasonably comparable to rates charged for similar services in urban areas." 47 U.S.C. § 254(b)(3). The Oklahoma Legislature followed suit with its own, complementary Oklahoma Telecommunications Act of 1997 (the "Act"). 17 O.S.2011 and Supp.2016, §§ 139.101 *et seq.*

¶3 Under the state and federal Acts, certain telecommunications providers known as "carriers of last resort" are required to provide, without discrimination, telephone service to any customer requesting it. *See* 47 U.S.C. § 201; 17 O.S.2011 and Supp.2016, §§ 101 *et seq.* In addition, the provider must offer the requested services at reasonable and affordable rates in line with those offered in more urban areas even if serving such customers would not be economically sustainable. *See* 47 U.S.C. § 202; 47 U.S.C. § 254(b)(3), (g), (i). The purpose of the legislation was to provide affordable and quality primary universal services to all despite the challenges of its accessibility.

¶4 In an effort to defray the costs of delivering phone service in rural, more remote areas, the federal and state Acts each established a fund to help support eligible service providers. Within Oklahoma's Act, the Legislature created the OUSF to help pay for reasonable investments and expenses incurred by "eligible local exchange telecommunications service providers" in providing primary universal services to customers in rural and high-cost areas "at rates that are reasonable and affordable." *See* 17 O.S.Supp.2016, § 139.106 (A), (B), and (G).

¶5 The OUSF generally provides that an eligible provider "may request funding from the OUSF as necessary to maintain rates for primary universal services that are reasonable and affordable." 17 O.S.Supp.2016, § 139.106 (G). The OUSF is funded by a charge paid by certain telecommunications carriers that have revenues as defined in Section 139.107. *See* 17 O.S.Supp.2016, §§ 139.106 (D) and 139.107.[1]

¶6 The Commission's rules governing the process for obtaining funding from the OUSF are set out in OAC 165:59, Part 9 and are overseen by the Administrator of the Commission's Public Utilities Division ("PUD"). Under the rules, upon receipt of a request for OUSF funding, the OUSF Administrator reviews the request and, if appropriate, reimburses the provider consistent with the Act. OAC 165:59-7-1(d) and OAC 165:59-3-62(g). Requests for Subsection (G)'s "as necessary" distributions are evaluated through a detailed study and analysis of the "costs of providing primary universal services" as well as potential revenue. 17 O.S.Supp.2016, § 139.106 (H). The review process for claims submitted under Subsection (G) can be time-consuming and tedious, often resulting in a significant delay in receipt of any funds.[2] As a result, the Legislature provided a mechanism within the Act that would allow providers in the rural areas quicker access to mandatory payments in certain, limited circumstances. *See* 17 O.S.Supp.2016, § 139.106(K).

¶7 Subsection (K)(1)(a) mandates that, if "a Federal Communications Commission order, rule or policy" has the effect of "decreas[ing] the federal universal service fund revenues of an eligible local exchange telecommunications service provider," that provider "shall recover the decreases in revenues from the OUSF." 17 O.S.Supp.2016, § 139.106 (K)(1)(a). Similarly, Subsection (K)(1)(b) provides that, if changes required by "federal or state regulatory rules, orders, or policies" reduce the revenues or increase the costs to an eligible local exchange telecommunications service provider, then that provider "shall recover the revenue reductions or cost increases from the OUSF." 17 O.S.Supp. 2016, § 139.106 (K)(1)(b). Under Subsection (K), distributions from the OUSF "shall not be conditioned upon any rate case or earnings investigation by the Commission," but, instead, should be paid in an amount equal to the increase in costs or reduction in revenues. 17 O.S.Supp.2016, § 139.106 (K)(2).

¶8 The Commissioners are free to approve or reject any determination by the OUSF Administrator. Under the rules, if no one objects to the Administrator's determination, an order approving the funding request is issued by the Commission. OAC 165:59-3-62(j). If, however, a party is not satisfied with the OUSF Administrator's determination, the party may file a request for reconsideration by the Commission and the matter is set for hearing. OAC 165:59-3-62(h) and (i). The Commission is the ultimate arbiter of the issues. *See, Cameron v. Corporation Com 'n*, 1966 OK 75, ¶29, 414 P.2d 266, 272 (on appeal from an oil and gas spacing order, the Court noted that regardless of whatever weight the Commission may attach to an examiner's report, "the Commission is the final arbiter of the issues"). *See also, State ex rel. Cartwright v. Southwestern Bell Telephone Co.*, 1983 OK 40, ¶32, 662 P.2d 675, 681 (quoting *Cameron*).

¶9 The Commission, by a 2-1 vote, denied reimbursement. Commissioner Dana Murphy, dissenting in each of these companion cases, has stated that although she may not agree with the need for the fund, she feels she must uphold the Legislature's will as long as the fund exists. She dissented to the denial of Medicine Park's request stating that because she didn't believe the majority decision "comports with the Oklahoma Legislature's intent to, in part, provide support to small, rural carriers who have experienced increases in costs as a result of changes required by governmental acts and with the Legislative policy to preserve and advance universal services."

¶10 In 2014, the Commission denied a request for OUSF funding from Dobson Telephone Company. *See Dobson Telephone Co. v. State ex rel. Okla. Corporation Comm.*, 2017 OK CIV APP 16, 392 P.3d 295. Dobson sought reimbursement, under Subsection (K)1)(b) of the OUSF, for costs incurred to relocate its telephone facilities as required by the city of Oklahoma City for a street-widening project. Because the request had been issued by the city, and not the county commission or ODOT, the Commission narrowly interpreted the statute and concluded that the Fund was not authorized to pay for such relocation costs.

¶11 The Court of Civil Appeals found that the Commission's interpretation of the statutory language defeats the purpose of the Fund and is contra to the legislative intent to defray increased costs incurred by eligible telecommunications service providers resulting from government action, no matter the originating government entity. *Dobson Telephone Co. v. State ex rel. Okla. Corporation Comm.*, 2017 OK CIV APP 16, ¶21, 392 P.3d 295, 305. The Commission's Order was vacated and the matter was remanded for further proceedings consistent with the Court of Civil Appeals opinion. *Dobson Telephone Co. v. State ex rel. Okla. Corporation Comm.*, 2017 OK CIV APP 16, ¶23, 392 P.3d 295, 305. This Court approved the case for publication.

FACTUAL BACKGROUND

¶12 The FCC created a program called Local Switching Support (LSS), which was paid from the federal Universal Service Fund. LSS was available to rural incumbent carriers serving fewer than 50,000 lines and was designed to help such carriers recoup some of the high fixed costs of providing telephone service, and particularly local switching service, in areas with fewer customers. On January 1, 2012, the FCC eliminated this LSS support. *See* USF/ICC Transformation Order (FCC 11-161). The FCC did not, however, eliminate the legal requirement that Medicine Park and other carriers of last resort continue to provide such services.

¶13 The OUSF mandates that, "in the event of a federal communications commission order, rule or policy, the effect of which is to decrease the federal universal service fund revenues of an eligible local exchange telecommunications service provider, the decrease in revenue shall be recovered from the OUSF." 17 O.S.Supp.2016,

§106.139(K)(1)(a). After its federal LSS support was eliminated by FCC order, Medicine Park submitted an application for reimbursement to recover this loss of revenue under Section 106.139 (K)(1)(a); specifically, $102,648 for 2014 and $8,554 per month beginning January 2015.

¶14 The PUD Administrator conducted a thorough review of Medicine Park's application. He ultimately recommended approval of $102,629 for the year 2014 and $8,552.42 per month thereafter, having disallowed $419.00 of the requested lump sum and $1.58 from the requested monthly recurring amount due to a lack of supporting documentation. Various other telecommunications companies, including Sprint, Virgin Mobile, and Verizon (collectively hereafter "Sprint") filed a request for reconsideration, requesting denial of any reimbursement.

¶15 An evidentiary hearing before an ALJ followed and Medicine Park presented testimony from John Harris, Managing Partner of Telcom Advisory Group. Harris testified that his group prepared and reviewed relevant information such as cost studies, accounting records and other confidential, financial materials, all of which support the figures requested in Medicine Park's application for reimbursement. Further, the PUD Administrator, who had reviewed all documents on site, was made available for further questions and cross-examination. After considering all the facts and evidence presented, the ALJ denied Sprint's requests for reconsideration and recommended approval of Medicine Park's application, adopting the amounts as recommended by the Administrator.

¶16 Despite the ALJ's recommendation, the Commission issued an order denying Medicine Park's request for reimbursement. The Commission concluded that there was no dispute that Medicine Park was an eligible service provider qualified for reimbursement, or that it had suffered a reduction in federal universal service fund revenues as a result of the FCC order to eliminate the LSS. Nevertheless, the Commission ruled that Medicine Park was not entitled to any funding because the company had made the confidential and proprietary information supporting its application available for onsite review, rather than filing it with the Commission as a matter of public record.

¶17 Additionally, the Commission would not issue the reimbursement because Medicine Park "failed to prove, and no determination was made as to, whether Medicine Park's rates for primary universal services are reasonable and affordable," or "that the requested funding is necessary to enable Medicine Park to provide primary universal services at rates that are reasonable and affordable." Medicine Park appealed, requesting that the Commission's denial be reversed. We retained the matter and made it a companion to Case Nos. 115,453, 116,194, 116,214, 116,215, 116,421 and 116,422.

STANDARD OF REVIEW

¶18 This Court's review of decisions of the Commission is governed by the Oklahoma Constitution, article 9, § 20, which states as follows, in relevant part:

> The Supreme Court's review of appealable orders of the Corporation Commission shall be judicial only, and in all appeals involving an asserted violation of any right of the parties under the Constitution of the United States or the Constitution of the State of Oklahoma, the Court shall exercise its own independent judgment as to both the law and the facts. In all other appeals from orders of the Corporation Commission the review by the Supreme Court shall not extend further than to determine whether the Commission has regularly pursued its authority, and whether the findings and conclusions of the Commission are sustained by the law and substantial evidence.

Okla. Const. art. 9, § 20.

¶19 The issue in this appeal concerns the Commission's legal interpretation of the OUSF statute and the alleged arbitrary and capricious denial of funding in violation of the Oklahoma Constitution. Constitutional implications as well as statutory interpretation dictate our *de novo* review of this case. *Cox Oklahoma Telecom, LLC v. State ex rel. Oklahoma Corp. Comm'n*, 2007 OK 55, ¶9, n.17, 164 P.3d 150, 156. Under the *de novo* standard of review, the Court has plenary, independent and non-deferential authority to determine whether the trial tribunal erred in its legal rulings. *Cox Oklahoma Telecom, LLC v. State ex rel. Oklahoma Corp. Comm'n*, 2007 OK 55, ¶9, n.16, 164 P.3d 150, 156; *Neil Acquisition v. Wingrod Investment Corp.*, 1996 OK 125, ¶5, 932 P.2d 1100, 1103; *Fanning v. Brown*, 2004 OK 7, ¶8, 85 P.3d 841, 845.

¶20 This Court has found that the Commission's power "must be exercised only within the confines of its limited jurisdiction as provided by the Oklahoma Constitution" and state statute.[3] *Pub. Serv. Co. v. State ex rel. Corp. Comm'n,* 1997 OK 145, ¶23, 948 P.2d 713, 717. The Commission's "power to regulate is not unfettered." *Pub. Serv. Co. v. State ex rel. Corp. Comm'n*, 1996 OK 43, ¶21, 918 P.2d 733, 738.

DISCUSSION

¶21 Under the OUSF, eligible telecommunications providers serving fewer than 75,000 access lines are entitled to recover a decrease in revenues if such loss was caused by an FCC law. 17 O.S.Supp.2016, § 139.106(K).[4] It is undisputed that Medicine Park is an eligible provider under the Act. It is further undisputed that Medicine Park incurred a loss due to an FCC order. The Act mandates that where an FCC "order, rule or policy" has the effect of "decreas[ing] the federal universal service fund revenues of an eligible local exchange telecommunications service provider," such provider "shall recover the decreases in revenues from the OUSF." 17 O.S.Supp.2016, § 139.106(K)(1)(a). According to the Act's plain language, Medicine Park was entitled to receive reimbursement from the OUSF for its losses.

¶22 In support of the decision to deny Medicine Park's requested funding, the Commission's majority found that Medicine Park failed to produce sufficient evidence into the record. Despite acknowledging that its Administrator reviewed Medicine Park's application and conducted an on-site audit of Medicine Park's confidential financial information and documentation, the Commission ignored the Administrator's, as well as the ALJ's, finding that the documents provided by Medicine Park supported approval of the application. The Commission complained that it was limited to a mathematical review as many of the documents relied on by the Administrator were reviewed at Medicine Park's place of business and were either not made publicly available or had redacted information due to the confidential nature of the documents.

¶23 Medicine Park points out that up until the filing of these companion cases, the Commission had for years previously accepted the Administrator's review of confidential documents on site. Medicine Park maintains that they should not be penalized for the Commission's option not to take advantage of the opportunity to review, or even request to review, any of the confidentially-redacted documents. Medicine Park also cites cases supporting the proposition that long-standing actions or interpretations by an agency will not be idly cast aside without proper notice to affected parties. *See, e.g., Oral Roberts Univ. v. Okla. Tax Comm'n,* 1985 OK 97, ¶10, 714 P.2d 1013, 1015 (Courts are reluctant to overturn long standing construction where parties having great interest in such construction will be prejudiced by its change); *Big Horn Coal Co. v. Temple,* 793 F.2d 1165, 1169 (10th Cir. 1986) ("Agencies are under an obligation to follow their own regulations, procedures, and precedents, or provide a rational explanation for their departures.").

¶24 The Administrator agreed with Medicine Park that the standard procedure followed by the Commission had always been for an applicant to fill out a Commission-approved form and make confidential information supporting its application available for the Commission to review on-site. He offered that this practice occurred not only in OUSF cases, but in numerous other Commission matters. We find the Commission was not entitled to discount Medicine Park's entire application merely because the documents the Administrator inspected and relied upon for his approval were not publicly filed of record before the Commission.

¶25 Medicine Park argues, and the Commission does not dispute, that the Commission's own rules and long-standing practices encouraged applicants to retain its confidential supporting materials on site, making such materials available for review and inspection as needed to support an application. In fact, Commission rule, OAC 165:59-3-72(d), specifically contemplates that "documentation not contained in the public record and not filed in the cause" may nevertheless be "relied upon by the OUSF Administrator in approving or denying an application." The Administrator disclosed that the Commission does not even have procedures in place that would allow it to handle "the responsibility or liability" of receiving such confidential materials.

¶26 Medicine Park filed an application, completed by using a Commission-issued form, which certified that as a result of an FCC order it experienced a loss of federal universal service fund revenues in the amount of $102,648 for 2014, and a projected monthly loss of $8554 going forward. The company presented the tes-

timony of an independent witness who reviewed all of Medicine Park's pertinent, confidential materials, and who confirmed the validity of the requested amounts. The Administrator also reviewed the confidential materials and agreed that Medicine Park's application and documentation supported the relief requested, as nominally modified by the Administrator to a lump sum of $102,629 and $8552.42 monthly. The ALJ likewise agreed with both the independent witness and the Administrator that Medicine Park's application and offered materials supported approval thereof. Despite these findings, the Commission unexpectedly faulted Medicine Park for failing to publicly submit its confidential materials when documents of such a nature have not been typically filed with the Commission, nor required. Such flawed reasoning should not support a denial of the application herein.

¶27 Additionally, for the first time in these companion cases, the Commission interpreted Subsection (K) to impose a finding that Medicine Park's rates for primary universal services are reasonable and affordable pursuant to Subsection (B) and that the requested funding is necessary to maintain such reasonable and affordable rates. As mentioned, *supra*, § 139.106(K)(1)(a) plainly provides that where a provider incurs revenue losses due to an FCC law, order or policy, the provider SHALL recover the cost increase from the OUSF. *See* 17 O.S.Supp.2016, § 139.106(K)(1)(a). There is no mention of a condition that the applicant must prove that its rates are reasonable and affordable nor is there a requirement to find the reimbursement necessary to maintain such rates. To the contrary, § 139.106(K)(2) specifically states that an application's approval "shall not be conditioned upon any rate case or earnings investigation by the Commission." 17 O.S.Supp. 2016, § 139.106(K)(1)(b). We are not inclined to add requirements to a statute that the Legislature chose not to impose. *See Pentagon Acad., Inc. v. Indep. Sch. Dist. No. 1 of Tulsa Cty.*, 2003 OK 98, ¶19, 82 P.3d 587, 591 ("It is not the function of the courts to add new provisions which the legislature chose to withhold."); *Minie v. Hudson*, 1997 OK 26, ¶12, 934 P.2d 1082, 1087 ("This Court may not, through the use of statutory construction, change, modify or amend the expressed intent of the Legislature.").

¶28 Medicine Park contends that the Commission's complete denial of funding disregards the very purpose of the OUSF to ensure the availability of affordable telephone service to customers in rural and high cost areas where, absent the subsidies, their provision would be cost-prohibitive. We agree. The Commission ignores the plain language of the Act and attempts to impose new conditions not required by the Act, nor supportive of its purpose. Generally, applicants who filed under Subsection (K) could expect a quick reimbursement after approval by the Administrator that the application had followed the statutory process. The Commission's review of a Subsection (K) application would only arise if an outside entity filed a Request for Reconsideration of the Administrator's determination. Where no such reconsideration request is filed, the Administrator's approval would typically trigger a Commission order granting the applicant's request.

¶29 The Commission majority's aversion to the OUSF legislation has no bearing on the validity of an applicant's request for funding. We agree with the dissenting Commissioner that it is our duty to uphold legislation as it is enacted whether we agree with the policy behind such legislation or not. We agree with the findings of the Administrator and ALJ herein.

CONCLUSION

¶30 Although the Commission is not bound by the Administrator's recommendation, we find that the record reflects ample evidence with which to support the Administrator's determination. The Administrator, as well as the dissenting Commissioner, both agreed Medicine Park was entitled to reimbursement of the losses it incurred as a result of the FCC order decreasing federal funding. The Commission's wholesale denial of Medicine Park's request was in error. Accordingly, we vacate the order of the Commission and remand the cause for further proceedings consistent with this opinion.

ORDER OF THE OKLAHOMA CORPORATION COMMISSION VACATED AND REMANDED.

CONCUR: GURICH, C.J., KAUGER, WINCHESTER, EDMONDSON, and DARBY, JJ.

CONCURRING SPECIALLY (by separate writing): COMBS, J.

NOT PARTICIPATING: COLBERT, AND REIF, JJ.

COMBS, J., concurring:

¶1 I concur in the majority opinion but write separately to emphasize the audacity of the Commission's blanket denial of Appellant's, Medicine Park Telephone Company, application. The legislature established a process by which a rural provider with limited resources is allowed to be reimbursed from the Oklahoma Universal Service Fund (OUSF) when the rural provider meets increased costs in fulfilling a mandate to provide reliable and affordable telephone service to Oklahomans in remote and underserved areas. The Commission's majority all but ignored the evidence presented ostensibly because of a fundamental disagreement with the Oklahoma Universal Service Fund.[1] This is nothing more than an attempt to further disenfranchise rural Oklahoma from basic telephone services.

WINCHESTER, J.,

1. Section 139.107 provides, in part:
   A. The Oklahoma Lifeline Fund (OLF) and the Oklahoma Universal Service Fund (OUSF) shall be funded in a competitively neutral manner not inconsistent with federal law by all contributing providers. The funding from each contributing provider shall be based on the total intrastate retail Oklahoma Voice over Internet Protocol (VoIP) revenues and intrastate telecommunications revenues, from both regulated and unregulated services, of the contributing provider, hereinafter referred to as assessed revenues, as a percentage of all assessed revenues of the contributing providers, or such other assessment methodology not inconsistent with federal law. VoIP services shall be assessed only as provided for in the decision of the Federal Communications Commission, FCC 10-185, released November 5, 2010, or such other assessment methodology that is not inconsistent with federal law. The Commission may after notice and hearing modify the contribution methodology for the OUSF and OLF, provided the new methodology is not inconsistent with federal law.
   B. The Corporation Commission shall establish the OLF assessment and the OUSF assessment at a level sufficient to recover costs of administration and payments for OUSF and OLF requests for funding as provided for in the Oklahoma Telecommunications Act of 1997. The administration of the OLF and OUSF shall be provided by the Public Utility Division of the Commission. The administrative function shall be headed by the Administrator as defined in Section 139.102 of this title. The Administrator shall be an independent evaluator. The Administrator may enter into contracts to assist with the administration of the OLF and OUSF.

17 O.S.Supp.2016, § 139.107. "Contributing provider" as that term is used in § 139.107 means "providers, including but not limited to providers of intrastate telecommunications, providers of intrastate telecommunications for a fee on a non-common-carrier basis, providers of wireless telephone service and providers of interconnected Voice over Internet Protocol (VoIP). Contributing providers shall contribute to the Oklahoma Universal Service Fund and Oklahoma Lifeline Fund." 17 O.S.Supp.2016, § 139.102 (8).

2. Companion Case No. 115,453 involves a request for funds under Subsection (G) while the remaining six, companion cases, including the instant matter, involve requests brought under Subsection (K), set forth more fully herein. Those cases, also decided today, are Case Nos. 116,194, 116,214, 116,215, 116,421, and 116,422.

3. The Oklahoma Constitution, art. 9, Section 18 specifies that the Commission has:

> the power and authority and [is] charged with the duty of supervising, regulating and controlling all transportation and transmission companies doing business in this State, in all matters relating to the performance of their public duties and their charges therefor, and of correcting abuses and preventing unjust discrimination and extortion by such companies; and to that end the Commission shall, from time to time, prescribe and enforce against such companies, in the manner hereinafter authorized, such rates, charges, classifications of traffic, and rules and regulations, and shall require them to establish and maintain all such public service, facilities, and conveniences as may be reasonable and just, which said rates, charges, classifications, rules, regulations, and requirements, the Commission may, from time to time, alter or amend.

4. Subsection (K) of the Act provides *in toto*:
   K. 1. Each request for OUSF funding by an eligible ILEC serving less than seventy-five thousand access lines shall be premised upon the occurrence of one or more of the following:
   a. in the event of a Federal Communications Commission order, rule or policy, the effect of which is to decrease the federal universal service fund revenues of an eligible local exchange telecommunications service provider, the eligible local exchange telecommunications service provider shall recover the decreases in revenues from the OUSF,
   b. if, as a result of changes required by existing or future federal or state regulatory rules, orders, or policies or by federal or state law, an eligible local exchange telecommunications service provider experiences a reduction in revenues or an increase in costs, it shall recover the revenue reductions or cost increases from the OUSF, the recovered amounts being limited to the net reduction in revenues or cost increases, or
   c. if, as a result of changes made as required by existing or future federal or state regulatory rules, orders, or policies or by federal or state law, an eligible local exchange telecommunications service provider experiences a reduction in costs, upon approval by the Commission, the provider shall reduce the level of OUSF funding it receives to a level sufficient to account for the reduction in costs.
   2. The receipt of OUSF funds for any of the changes referred to in this subsection shall not be conditioned upon any rate case or earnings investigation by the Commission. The Commission shall, pursuant to subsection D of this section, approve the request for payment or adjustment of payment from the OUSF based on a comparison of the total annual revenues received from the sources affected by the changes described in paragraph 1 of this subsection by the requesting eligible local exchange telecommunications service provider during the most recent twelve (12) months preceding the request, and the reasonable calculation of total annual revenues or cost increases which will be experienced after the changes are implemented by the requesting eligible local exchange telecommunications service provider.

17 O.S.Supp.2016, § 139.106 (K).

COMBS, J., concurring:

1. Appellant's Brief in Chief at 1, January 29, 2018, states "Commissioner Bob Anthony has repeatedly spoken out against the law [Oklahoma Universal Service Fund], even going so far as to ask the Legislature, in writing, to repeal it." He stated the Fund is a bad program that should be repealed. Tr. at 30-31, June 26, 2014, Ok. Sup. Ct. Case No. 113,362. The Brief also states other members of the Commission have expressed their displeasure with the law. Commissioner Murphy, however, dissented against the denial of the request for OUSF funding.

2019 OK 23

MEDICINE PARK TELEPHONE COMPANY, Appellant, v. STATE OF OKLAHOMA EX REL. OKLAHOMA CORPORATION COMMISSION, Appellee.

Case No. 116,194. April 16, 2019

APPEAL FROM OKLAHOMA CORPORATION COMMISSION CAUSE NO. PUD 201600458

Dana Murphy, Chairman; Todd Hiett, Vice Chairman; and Bob Anthony, Commissioner.

¶0 Medicine Park Telephone Company appeals the Oklahoma Corporation Commis-

sion's denial of its application for reimbursement from the Oklahoma Universal Services Fund for reasonable investments and expenses incurred in providing primary universal service to its customers. We find that the Commission's wholesale denial of the reimbursement of any of the requested funds is in error and vacate the Commission's ruling and remand with directions.

ORDER OF THE OKLAHOMA CORPORATION COMMISSION REVERSED AND REMANDED WITH INSTRUCTIONS.

William H. Hoch, Melanie Wilson Rughani, Crowe & Dunlevy, P.C., Oklahoma City, Oklahoma, and Ron Commingdeer, Kendall W. Parrish, Ron Commingdeer & Associates, Oklahoma City, Oklahoma, for Appellant.

Michele Craig, Deputy General Counsel, Oklahoma Corporation Commission, Oklahoma City, Oklahoma, for Appellee.

Nancy M. Thompson, Oklahoma City, Oklahoma, for Sprint Communications Company, L.P., Sprint Spectrum L.P. and Virgin Mobile USA, L.P.

Jack G. Clark, Jr., Clark, Wood & Patten, P.C., Oklahoma City, Oklahoma, for Verizon.

WINCHESTER, J.,

¶1 The issue before this Court is whether the Oklahoma Corporation Commission ("the Commission") erroneously withheld funding to be provided to Medicine Park Telephone Company ("Medicine Park") pursuant to the provisions of the Oklahoma Universal Service Fund ("OUSF"), 17 O.S.Supp.2016, § 139.106. For the reasons set forth herein, we find that Medicine Park is entitled to the requested funding.

STATUTORY BACKGROUND

¶2 In 1996, the U.S. Congress passed the federal Telecommunications Act, 47 U.S.C. §§ 151 *et seq.*, in part, to promote a policy of universal service that would provide telecommunication services to consumers all over the country, including "those in rural, insular, and high cost areas." The Act seeks to provide access to services that are "reasonably comparable to those services provided in urban areas and that are available at rates that are reasonably comparable to rates charged for similar services in urban areas." 47 U.S.C. § 254(b)(3). The Oklahoma Legislature followed suit with its own, complementary Oklahoma Telecommunications Act of 1997 (the "Act"). 17 O.S.2011 and Supp.2016, §§ 139.101 *et seq.*

¶3 Under the state and federal Acts, certain telecommunications providers known as "carriers of last resort" are required to provide, without discrimination, telephone service to any customer requesting it. *See* 47 U.S.C. § 201; 17 O.S.2011 and Supp.2016, §§ 101 *et seq.* In addition, the provider must offer the requested services at reasonable and affordable rates in line with those offered in more urban areas even if serving such customers would not be economically sustainable. *See* 47 U.S.C. § 202; 47 U.S.C. § 254(b)(3), (g), (i). The purpose of the legislation was to provide affordable and quality primary universal services to all despite the challenges of its accessibility.

¶4 In an effort to defray the costs of delivering phone service in rural, more remote areas, the federal and state Acts each established a fund to help support eligible service providers. Within Oklahoma's Act, the Legislature created the OUSF to help pay for reasonable investments and expenses incurred by "eligible local exchange telecommunications service providers" in providing primary universal services to customers in rural and high-cost areas "at rates that are reasonable and affordable." *See* 17 O.S.Supp.2016, § 139.106 (A), (B), and (G).

¶5 The OUSF generally provides that an eligible provider "may request funding from the OUSF as necessary to maintain rates for primary universal services that are reasonable and affordable." 17 O.S.Supp.2016, § 139.106 (G). The OUSF is funded by a charge paid by certain telecommunications carriers that have revenues as defined in Section 139.107. *See* 17 O.S.Supp.2016, §§ 139.106 (D) and 139.107.[1]

¶6 The Commission's rules governing the process for obtaining funding from the OUSF are set out in OAC 165:59, Part 9 and are overseen by the Administrator of the Commission's Public Utilities Division ("PUD"). Under the rules, upon receipt of a request for OUSF funding, the OUSF Administrator reviews the request and, if appropriate, reimburses the provider consistent with the Act. OAC 165:59-7-1(d) and OAC 165:59-3-62(g). Requests for Subsection (G)'s "as necessary" distributions are evaluated through a detailed study and analysis of the "costs of providing primary universal services" as well as potential reve-

nue. 17 O.S.Supp.2016, § 139.106 (H). The review process for claims submitted under Subsection (G) can be time-consuming and tedious, often resulting in a significant delay in receipt of any funds.[2] As a result, the Legislature provided a mechanism within the Act that would allow providers in the rural areas quicker access to mandatory payments in certain, limited circumstances. *See* 17 O.S.Supp.2016, § 139.106(K).

¶7 Subsection (K)(1)(a) mandates that, if "a Federal Communications Commission order, rule or policy" has the effect of "decreas[ing] the federal universal service fund revenues of an eligible local exchange telecommunications service provider," that provider "shall recover the decreases in revenues from the OUSF." 17 O.S.Supp.2016, § 139.106 (K)(1)(a). Similarly, Subsection (K)(1)(b) provides that, if changes required by "federal or state regulatory rules, orders, or policies" reduce the revenues or increase the costs to an eligible local exchange telecommunications service provider, then that provider "shall recover the revenue reductions or cost increases from the OUSF." 17 O.S.Supp. 2016, § 139.106 (K)(1)(b). Under Subsection (K), distributions from the OUSF "shall not be conditioned upon any rate case or earnings investigation by the Commission," but, instead, should be paid in an amount equal to the increase in costs or reduction in revenues. 17 O.S.Supp.2016, § 139.106 (K)(2).

¶8 The Commissioners are free to approve or reject any determination by the OUSF Administrator. Under the rules, if no one objects to the Administrator's determination, an order approving the funding request is issued by the Commission. OAC 165:59-3-62(j). If, however, a party is not satisfied with the OUSF Administrator's determination, the party may file a request for reconsideration by the Commission and the matter is set for hearing. OAC 165:59-3-62(h) and (i). The Commission is the ultimate arbiter of the issues. *See, Cameron v. Corporation Com 'n,* 1966 OK 75, ¶29, 414 P.2d 266, 272 (on appeal from an oil and gas spacing order, the Court noted that regardless of whatever weight the Commission may attach to an examiner's report, "the Commission is the final arbiter of the issues"). *See also, State ex rel. Cartwright v. Southwestern Bell Telephone Co.,* 1983 OK 40, ¶32, 662 P.2d 675, 681 (quoting *Cameron*).

¶9 The Commission, by a 2-1 vote, denied reimbursement. Commissioner Dana Murphy, dissenting in each of these companion cases, has stated that although she may not agree with the need for the fund, she feels she must uphold the Legislature's will as long as the fund exists. She dissented to the denial of Medicine Park's request stating that because she didn't believe the majority decision "comports with the Oklahoma Legislature's intent to, in part, provide support to small, rural carriers who have experienced increases in costs as a result of changes required by governmental acts and with the Legislative policy to preserve and advance universal services."

¶10 In 2014, the Commission denied a request for OUSF funding from Dobson Telephone Company. *See Dobson Telephone Co. v. State ex rel. Okla. Corporation Comm.*, 2017 OK CIV APP 16, 392 P.3d 295. Dobson sought reimbursement, under Subsection (K)1)(b) of the OUSF, for costs incurred to relocate its telephone facilities as required by the city of Oklahoma City for a street-widening project. Because the request had been issued by the city, and not the county commission or ODOT, the Commission narrowly interpreted the statute and concluded that the Fund was not authorized to pay for such relocation costs.

¶11 The Court of Civil Appeals found that the Commission's interpretation of the statutory language defeats the purpose of the Fund and is contra to the legislative intent to defray increased costs incurred by eligible telecommunications service providers resulting from government action, no matter the originating government entity. *Dobson Telephone Co. v. State ex rel. Okla. Corporation Comm*., 2017 OK CIV APP 16, ¶21, 392 P.3d 295, 305. The Commission's Order was vacated and the matter was remanded for further proceedings consistent with the Court of Civil Appeals opinion. *Dobson Telephone Co. v. State ex rel. Okla. Corporation Comm.*, 2017 OK CIV APP 16, ¶23, 392 P.3d 295, 305. This Court approved the case for publication.

FACTUAL BACKGROUND

¶12 The FCC created a program called Interstate Common Line Support (ICLS), which was paid from the federal Universal Service Fund. ICLS was available to, among others, rural incumbent carriers and was designed to help such carriers recoup some of the high fixed costs of providing telephone service in areas with fewer customers while also ensuring that their subscriber line charges remained affordable to their customers. Effective January 1, 2012,

the FCC changed its rules to limit the operations expenses that may be included in an ICLS calculation. The FCC did not, however, eliminate the legal requirement that Medicine Park and other carriers of last resort continue to provide such services.

¶13 The OUSF mandates that, "in the event of a federal communications commission order, rule or policy, the effect of which is to decrease the federal universal service fund revenues of an eligible local exchange telecommunications service provider, the decrease in revenue shall be recovered from the OUSF." 17 O.S.Supp.2016, §106.139(K)(1)(a). After its federal ICLS support was eliminated by FCC order, Medicine Park submitted an application for reimbursement to recover this loss of revenue under § 106.139 (K)(1)(a); specifically, $60,707.00 for 2014 and $5,058.92 per month beginning January 2015.

¶14 The PUD Administrator conducted a thorough review of Medicine Park's application and ultimately recommended approval of the amounts as requested. Various other telecommunications companies, including Sprint, Virgin Mobile, and Verizon (collectively hereafter "Sprint") filed a request for reconsideration, requesting denial of any reimbursement.

¶15 An evidentiary hearing before an ALJ followed and Medicine Park presented testimony from John Harris, Managing Partner of Telcom Advisory Group. Harris testified that his group prepared and reviewed relevant information such as cost studies, accounting records and other confidential, financial materials, all of which support the figures requested in Medicine Park's application for reimbursement. Further, the PUD Administrator, who had reviewed all documents on site, was made available for further questions and cross-examination. After considering all the facts and evidence presented, the ALJ denied Sprint's requests for reconsideration and recommended approval of Medicine Park's application, adopting the amounts requested by Medicine Park and recommended by the Administrator.

¶16 Despite the ALJ's recommendation, the Commission issued an order denying Medicine Park's request for reimbursement. The Commission concluded that there was no dispute that Medicine Park was an eligible service provider qualified for reimbursement, or that it had suffered a reduction in federal universal service fund revenues as a result of the FCC order to eliminate the ICLS. Nevertheless, the Commission ruled that Medicine Park could not recover any funding because the company had made the confidential and proprietary information supporting its application available for onsite review, rather than filing it with the Commission as a matter of public record.

¶17 Additionally, the Commission would not issue the reimbursement because Medicine Park "failed to prove, and no determination was made as to, whether Medicine Park's rates for primary universal services are reasonable and affordable," or "that the requested funding is necessary to enable Medicine Park to provide primary universal services at rates that are reasonable and affordable." Medicine Park appealed, requesting that the Commission's denial be reversed. We retained the matter and made it a companion to Case Nos. 115,453, 116,193, 116,214, 116,215, 116,421 and 116,422.

STANDARD OF REVIEW

¶18 This Court's review of decisions of the Commission is governed by the Oklahoma Constitution, article 9, § 20, which states as follows, in relevant part:

> The Supreme Court's review of appealable orders of the Corporation Commission shall be judicial only, and in all appeals involving an asserted violation of any right of the parties under the Constitution of the United States or the Constitution of the State of Oklahoma, the Court shall exercise its own independent judgment as to both the law and the facts. In all other appeals from orders of the Corporation Commission the review by the Supreme Court shall not extend further than to determine whether the Commission has regularly pursued its authority, and whether the findings and conclusions of the Commission are sustained by the law and substantial evidence.

Okla. Const. art. 9, § 20.

¶19 The issue in this appeal concerns the Commission's legal interpretation of the OUSF statute and the alleged arbitrary and capricious denial of funding in violation of the Oklahoma Constitution. Constitutional implications as well as statutory interpretation dictate our *de novo* review of this case. *Cox Oklahoma Telecom, LLC v. State ex rel. Oklahoma Corp. Comm'n*, 2007 OK 55, ¶9, n.17, 164 P.3d 150, 156. Under the *de novo* standard of review, the Court has plenary,

independent and non-deferential authority to determine whether the trial tribunal erred in its legal rulings. *Cox Oklahoma Telecom, LLC v. State ex rel. Oklahoma Corp. Comm'n*, 2007 OK 55, ¶9, n.16, 164 P.3d 150, 156; *Neil Acquisition v. Wingrod Investment Corp.*, 1996 OK 125, ¶5, 932 P.2d 1100, 1103; *Fanning v. Brown*, 2004 OK 7, ¶8, 85 P.3d 841, 845.

¶20 This Court has found that the Commission's power "must be exercised only within the confines of its limited jurisdiction as provided by the Oklahoma Constitution" and state statute.[3] *Pub. Serv. Co. v. State ex rel. Corp. Comm'n*, 1997 OK 145, ¶23, 948 P.2d 713, 717. The Commission's "power to regulate is not unfettered." *Pub. Serv. Co. v. State ex rel. Corp. Comm'n,* 1996 OK 43, ¶21, 918 P.2d 733, 738.

DISCUSSION

¶21 Under the OUSF, eligible telecommunications providers serving fewer than 75,000 access lines are entitled to recover a decrease in revenues if such loss was caused by an FCC law. 17 O.S.Supp.2016, § 139.106(K).[4] It is undisputed that Medicine Park is an eligible provider under the Act. It is further undisputed that Medicine Park incurred a loss due to an FCC order. The Act mandates that where an FCC "order, rule or policy" has the effect of "decreas[ing] the federal universal service fund revenues of an eligible local exchange telecommunications service provider," such provider "shall recover the decreases in revenues from the OUSF." 17 O.S.Supp.2016, § 139. 106(K)(1)(a). According to the Act's plain language, Medicine Park was entitled to receive reimbursement from the OUSF for its losses.

¶22 In support of the decision to deny Medicine Park's requested funding, the Commission's majority found that Medicine Park failed to produce sufficient evidence into the record. Despite acknowledging that its Administrator reviewed Medicine Park's application and conducted an on-site audit of Medicine Park's confidential financial information and documentation, the Commission ignored the Administrator's, as well as the ALJ's, finding that the documents provided by Medicine Park supported approval of the application. The Commission complained that it was limited to a mathematical review as many of the documents relied on by the Administrator were reviewed at Medicine Park's place of business and were either not made publicly available or had redacted information due to the confidential nature of the documents.

¶23 Medicine Park points out that up until the filing of these companion cases, the Commission had for years previously accepted the Administrator's review of confidential documents on site. Medicine Park maintains that they should not be penalized for the Commission's option not to take advantage of the opportunity to review, or even request to review, any of the confidentially-redacted documents. Medicine Park also cites cases supporting the proposition that long-standing actions or interpretations by an agency will not be idly cast aside without proper notice to affected parties. *See, e.g., Oral Roberts Univ. v. Okla. Tax Comm'n,* 1985 OK 97, ¶10, 714 P.2d 1013, 1015 (Courts are reluctant to overturn long standing construction where parties having great interest in such construction will be prejudiced by its change); *Big Horn Coal Co. v. Temple*, 793 F.2d 1165, 1169 (10th Cir. 1986)("Agencies are under an obligation to follow their own regulations, procedures, and precedents, or provide a rational explanation for their departures.").

¶24 The Administrator agreed with Medicine Park that the standard procedure followed by the Commission had always been for an applicant to fill out a Commission-approved form and make confidential information supporting its application available for the Commission to review on-site. He offered that this practice occurred not only in OUSF cases, but in numerous other Commission matters. We find the Commission was not entitled to discount Medicine Park's entire application merely because the documents the Administrator inspected and relied upon for his approval were not publicly filed of record before the Commission.

¶25 Medicine Park argues, and the Commission does not dispute, that the Commission's own rules and long-standing practices encouraged applicants to retain its confidential supporting materials on site, making such materials available for review and inspection as needed to support an application. In fact, Commission rule, OAC 165:59-3-72(d), specifically contemplates that "documentation not contained in the public record and not filed in the cause" may nevertheless be "relied upon by the OUSF Administrator in approving or denying an application." The Administrator disclosed that the Commission does not even have procedures in place that would allow it to

handle "the responsibility or liability" of receiving such confidential materials.

¶26 Medicine Park filed an application, completed by using a Commission-issued form, which certified that as a result of an FCC order it experienced a loss of federal universal service fund revenues in the amount of $60,707 for 2014, and a projected monthly loss of $5,058.92 going forward. The company presented the testimony of an independent witness who reviewed all of Medicine Park's pertinent, confidential materials, and who confirmed the validity of the requested amounts. The Administrator also reviewed the confidential materials and agreed that Medicine Park's application and documentation supported the relief requested. The ALJ likewise agreed with both the independent witness and the Administrator that Medicine Park's application and offered materials supported approval thereof. Despite these findings, the Commission unexpectedly faulted Medicine Park for failing to publicly submit its confidential materials when documents of such a nature have not been typically filed with the Commission, nor required. Such flawed reasoning should not support a denial of the application herein.

¶27 Additionally, for the first time in these companion cases, the Commission interpreted Subsection (K) to impose a finding that Medicine Park's rates for primary universal services are reasonable and affordable pursuant to Subsection (B) and that the requested funding is necessary to maintain such reasonable and affordable rates. As mentioned, *supra*, § 139.106(K)(1)(a) plainly provides that where a provider incurs revenue losses due to an FCC law, order or policy, the provider SHALL recover the cost increase from the OUSF. *See* 17 O.S.Supp.2016, § 139.106(K)(1)(a). There is no mention of a condition that the applicant must prove that its rates are reasonable and affordable nor is there a requirement to find the reimbursement necessary to maintain such rates. To the contrary, § 139.106(K)(2) specifically states that an application's approval "shall not be conditioned upon any rate case or earnings investigation by the Commission." 17 O.S.Supp. 2016, § 139.106(K)(1)(b). We are not inclined to add requirements to a statute that the Legislature chose not to impose. *See Pentagon Acad., Inc. v. Indep. Sch. Dist. No. 1 of Tulsa Cty.*, 2003 OK 98, ¶19, 82 P.3d 587, 591 ("It is not the function of the courts to add new provisions which the legislature chose to withhold."); *Minie v. Hudson*, 1997 OK 26, ¶12, 934 P.2d 1082, 1087 ("This Court may not, through the use of statutory construction, change, modify or amend the expressed intent of the Legislature.").

¶28 Medicine Park contends that the Commission's complete denial of funding disregards the very purpose of the OUSF to ensure the availability of affordable telephone service to customers in rural and high cost areas where, absent the subsidies, their provision would be cost-prohibitive. We agree. The Commission ignores the plain language of the Act and attempts to impose new conditions not required by the Act, nor supportive of its purpose. Generally, applicants who filed under Subsection (K) could expect a quick reimbursement after approval by the Administrator that the application had followed the statutory process. The Commission's review of a Subsection (K) application would only arise if an outside entity filed a Request for Reconsideration of the Administrator's determination. Where no such reconsideration request is filed, the Administrator's approval would typically trigger a Commission order granting the applicant's request.

¶29 The Commission majority's aversion to the OUSF legislation has no bearing on the validity of an applicant's request for funding. We agree with the dissenting Commissioner that it is our duty to uphold legislation as it is enacted whether we agree with the policy behind such legislation or not. We agree with the findings of the Administrator and ALJ herein.

CONCLUSION

¶30 Although the Commission is not bound by the Administrator's recommendation, we find that the record reflects ample evidence with which to support the Administrator's determination. The Administrator, as well as the dissenting Commissioner, both agreed Medicine Park was entitled to reimbursement of the losses it incurred as a result of the FCC order decreasing federal funding. The Commission's wholesale denial of Medicine Park's request was in error. Accordingly, we vacate the order of the Commission and remand the cause for further proceedings consistent with this opinion.

ORDER OF THE OKLAHOMA CORPORATION COMMISSION VACATED AND REMANDED.

CONCUR: GURICH, C.J., KAUGER, WINCHESTER, EDMONDSON, and DARBY, JJ.

CONCURRING SPECIALLY (by separate writing): COMBS, J.

NOT PARTICIPATING: COLBERT, AND REIF, JJ.

COMBS, J., concurring:

¶1 I concur in the majority opinion but write separately to emphasize the audacity of the Commission's blanket denial of Appellant's, Medicine Park Telephone Company, application. The legislature established a process by which a rural provider with limited resources is allowed to be reimbursed from the Oklahoma Universal Service Fund (OUSF) when the rural provider meets increased costs in fulfilling a mandate to provide reliable and affordable telephone service to Oklahomans in remote and underserved areas. The Commission's majority all but ignored the evidence presented ostensibly because of a fundamental disagreement with the Oklahoma Universal Service Fund.[1] This is nothing more than an attempt to further disenfranchise rural Oklahoma from basic telephone services.

WINCHESTER, J.,

1. Section 139.107 provides, in part:

> A. The Oklahoma Lifeline Fund (OLF) and the Oklahoma Universal Service Fund (OUSF) shall be funded in a competitively neutral manner not inconsistent with federal law by all contributing providers. The funding from each contributing provider shall be based on the total intrastate retail Oklahoma Voice over Internet Protocol (VoIP) revenues and intrastate telecommunications revenues, from both regulated and unregulated services, of the contributing provider, hereinafter referred to as assessed revenues, as a percentage of all assessed revenues of the contributing providers, or such other assessment methodology not inconsistent with federal law. VoIP services shall be assessed only as provided for in the decision of the Federal Communications Commission, FCC 10-185, released November 5, 2010, or such other assessment methodology that is not inconsistent with federal law. The Commission may after notice and hearing modify the contribution methodology for the OUSF and OLF, provided the new methodology is not inconsistent with federal law.
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> B. The Corporation Commission shall establish the OLF assessment and the OUSF assessment at a level sufficient to recover costs of administration and payments for OUSF and OLF requests for funding as provided for in the Oklahoma Telecommunications Act of 1997. The administration of the OLF and OUSF shall be provided by the Public Utility Division of the Commission. The administrative function shall be headed by the Administrator as defined in Section 139.102 of this title. The Administrator shall be an independent evaluator. The Administrator may enter into contracts to assist with the administration of the OLF and OUSF.

17 O.S.Supp.2016, § 139.107. "Contributing provider" as that term is used in § 139.107 means "providers, including but not limited to providers of intrastate telecommunications, providers of intrastate telecommunications for a fee on a non-common-carrier basis, providers of wireless telephone service and providers of interconnected Voice over Internet Protocol (VoIP). Contributing providers shall contribute to the Oklahoma Universal Service Fund and Oklahoma Lifeline Fund." 17 O.S.Supp.2016, § 139.102 (8).

2. Companion Case No. 115,453 involves a request for funds under Subsection (G) while the remaining six, companion cases, including the instant matter, involve requests brought under Subsection (K), set forth more fully herein. Those cases, also decided today, are Case Nos. 116,193, 116,214, 116,215, 116,421, and 116,422.

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> the power and authority and [is] charged with the duty of supervising, regulating and controlling all transportation and transmission companies doing business in this State, in all matters relating to the performance of their public duties and their charges therefor, and of correcting abuses and preventing unjust discrimination and extortion by such companies; and to that end the Commission shall, from time to time, prescribe and enforce against such companies, in the manner hereinafter authorized, such rates, charges, classifications of traffic, and rules and regulations, and shall require them to establish and maintain all such public service, facilities, and conveniences as may be reasonable and just, which said rates, charges, classifications, rules, regulations, and requirements, the Commission may, from time to time, alter or amend.

4. Subsection (K) of the Act provides, *in toto*:

> K. 1. Each request for OUSF funding by an eligible ILEC serving less than seventy-five thousand access lines shall be premised upon the occurrence of one or more of the following:
>
> a. in the event of a Federal Communications Commission order, rule or policy, the effect of which is to decrease the federal universal service fund revenues of an eligible local exchange telecommunications service provider, the eligible local exchange telecommunications service provider shall recover the decreases in revenues from the OUSF,
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> b. if, as a result of changes required by existing or future federal or state regulatory rules, orders, or policies or by federal or state law, an eligible local exchange telecommunications service provider experiences a reduction in revenues or an increase in costs, it shall recover the revenue reductions or cost increases from the OUSF, the recovered amounts being limited to the net reduction in revenues or cost increases, or
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> c. if, as a result of changes made as required by existing or future federal or state regulatory rules, orders, or policies or by federal or state law, an eligible local exchange telecommunications service provider experiences a reduction in costs, upon approval by the Commission, the provider shall reduce the level of OUSF funding it receives to a level sufficient to account for the reduction in costs.
>
> 2. The receipt of OUSF funds for any of the changes referred to in this subsection shall not be conditioned upon any rate case or earnings investigation by the Commission. The Commission shall, pursuant to subsection D of this section, approve the request for payment or adjustment of payment from the OUSF based on a comparison of the total annual revenues received from the sources affected by the changes described in paragraph 1 of this subsection by the requesting eligible local exchange telecommunications service provider during the most recent twelve (12) months preceding the request, and the reasonable calculation of total annual revenues or cost increases which will be experienced after the changes are implemented by the requesting eligible local exchange telecommunications service provider.

17 O.S.Supp.2016, § 139.106 (K).

COMBS, J., concurring:

1. Appellant's Brief in Chief at 1, January 29, 2018, states "Commissioner Bob Anthony has repeatedly spoken out against the law [Oklahoma Universal Service Fund], even going so far as to ask the Legislature, in writing, to repeal it." He stated the Fund is a bad program that should be repealed. Tr. at 30-31, June 26, 2014, Ok. Sup. Ct. Case No. 113,362. The Brief also states other members of the Commission have expressed their displeasure with the law. Commissioner Murphy, however, dissented against the denial of the request for OUSF funding.

2019 OK 24

DOBSON TELEPHONE COMPANY d/b/a McLOUD TELEPHONE COMPANY, Appellant, v. STATE OF OKLAHOMA EX REL. OKLAHOMA CORPORATION COMMISSION, Appellee

Case No. 116,214. April 16, 2019

APPEAL FROM OKLAHOMA CORPORATION COMMISSION CAUSE NO. PUD 201600493

Dana Murphy, Chairman; Todd Hiett, Vice Chairman; and Bob Anthony, Commissioner.

¶0 Dobson Telephone Company d/b/a McLoud Telephone Company appeals the Oklahoma Corporation Commission's denial of its application for reimbursement from the Oklahoma Universal Services Fund for expenses incurred when it was ordered by the State Department of Transportation to relocate its telephone lines within the public right-of-way of a State construction project. We find that the Commission's wholesale denial of the reimbursement of the requested funds is in error. The Commission's ruling is hereby vacated and the matter is remanded with directions to approve the requested funding.

ORDER OF THE OKLAHOMA CORPORATION COMMISSION REVERSED AND REMANDED WITH INSTRUCTIONS.

William H. Hoch, Melanie Wilson Rughani, Crowe & Dunlevy, P.C., Oklahoma City, Oklahoma, and Ron Commingdeer, Kendall W. Parrish, Ron Commingdeer & Associates, Oklahoma City, Oklahoma, for Appellant.

Michele Craig, Deputy General Counsel, Oklahoma Corporation Commission, Oklahoma City, Oklahoma, for Appellee.

Nancy M. Thompson, Oklahoma City, Oklahoma, for Sprint Communications Company, L.P., Sprint Spectrum L.P. and Virgin Mobile USA, L.P.

WINCHESTER, J.,

¶1 The issue before this Court is whether the Oklahoma Corporation Commission ("the Commission") erroneously withheld funding to be provided to Dobson Telephone Company d/b/a McLoud Telephone Company ("Dobson") pursuant to the provisions of the Oklahoma Universal Service Fund ("OUSF"), 17 O.S.Supp.2016, § 139.106. For the reasons set forth herein, we find that Dobson is entitled to the requested funding.

STATUTORY BACKGROUND

¶2 In 1996, the U.S. Congress passed the federal Telecommunications Act, 47 U.S.C. §§ 151 *et seq.*, in part, to promote a policy of universal service that would provide telecommunication services to consumers all over the country, including "those in rural, insular, and high cost areas." The Act seeks to provide access to services that are "reasonably comparable to those services provided in urban areas and that are available at rates that are reasonably comparable to rates charged for similar services in urban areas." 47 U.S.C. § 254(b)(3). The Oklahoma Legislature followed suit with its own, complementary Oklahoma Telecommunications Act of 1997 (the "Act"). 17 O.S.2011 and Supp.2016, §§ 139.101 *et seq.*

¶3 Under the state and federal Acts, certain telecommunications providers known as "carriers of last resort" are required to provide, without discrimination, telephone service to any customer requesting it. *See* 47 U.S.C. § 201; 17 O.S.2011 and Supp.2016, §§ 136 and 138. In addition, the provider must offer the requested services at reasonable and affordable rates in line with those offered in more urban areas even if serving such customers would not be economically sustainable. *See* 47 U.S.C. § 202; 47 U.S.C. § 254(b)(3), (g), (i). The purpose of the legislation was to provide affordable and quality primary universal services to all despite the challenges of its accessibility.

¶4 In an effort to defray the costs of delivering phone service in rural, more remote areas, the federal and state Acts each established a fund to help support eligible service providers. Within Oklahoma's Act, the Legislature created the OUSF to help pay for reasonable investments and expenses incurred by "eligible local exchange telecommunications service providers" in providing primary universal services to customers in rural and high-cost areas "at rates that are reasonable and affordable." *See* 17 O.S.Supp.2016, § 139.106 (A), (B), and (G). The OUSF generally provides that an eligible provider "may request funding from the OUSF as necessary to maintain rates for primary universal services that are reasonable and affordable." 17 O.S.Supp.2016, § 139.106 (G). The OUSF is funded by a charge paid by certain telecommunications carriers that have reve-

nues as defined in Section 139.107. *See* 17 O.S.Supp.2016, §§ 139.106 (D) and 139.107.[1]

¶5 The Commission's rules governing the process for obtaining funding from the OUSF are set out in OAC 165:59, Part 9 and are overseen by the Administrator of the Commission's Public Utilities Division ("PUD"). Under the rules, upon receipt of a request for OUSF funding, the OUSF Administrator reviews the request and, if appropriate, reimburses the provider consistent with the Act. OAC 165:59-7-1(d) and OAC 165:59-3-62(g). Requests for Subsection (G)'s "as necessary" distributions are evaluated through a detailed study and analysis of the "costs of providing primary universal services" as well as potential revenue. 17 O.S.Supp.2016, § 139.106 (H). The review process for claims submitted under Subsection (G) can be time-consuming and tedious, often resulting in a significant delay in receipt of any funds.[2] As a result, the Legislature provided a mechanism within the Act that would allow providers in the rural areas quicker access to mandatory payments in certain, limited circumstances. *See* 17 O.S.Supp.2016, § 139.106(K).

¶6 Subsection (K)(1)(a) mandates that, if "a Federal Communications Commission order, rule or policy" has the effect of "decreas[ing] the federal universal service fund revenues of an eligible local exchange telecommunications service provider," that provider "shall recover the decreases in revenues from the OUSF." 17 O.S.Supp.2016, § 139.106 (K)(1)(a). Similarly, Subsection (K)(1)(b) provides that, if changes required by "federal or state regulatory rules, orders, or policies" reduce the revenues or increase the costs to an eligible local exchange telecommunications service provider, then that provider "shall recover the revenue reductions or cost increases from the OUSF." 17 O.S.Supp.2016, § 139.106 (K)(1)(b). Under Subsection (K), distributions from the OUSF "shall not be conditioned upon any rate case or earnings investigation by the Commission," but, instead, should be paid in an amount equal to the increase in costs or reduction in revenues. 17 O.S.Supp.2016, § 139.106 (K)(2).

¶7 The Commissioners are free to approve or reject any determination by the OUSF Administrator. Under the rules, if no one objects to the Administrator's determination, an order approving the funding request is issued by the Commission. OAC 165:59-3-62(j). If, however, a party is not satisfied with the OUSF Administrator's determination, the party may file a request for reconsideration by the Commission and the matter is set for hearing. OAC 165:59-3-62(h) and (i). The Commission is the ultimate arbiter of the issues. *See, Cameron v. Corporation Com 'n*, 1966 OK 75, ¶29, 414 P.2d 266, 272 (on appeal from an oil and gas spacing order, the Court noted that regardless of whatever weight the Commission may attach to an examiner's report, "the Commission is the final arbiter of the issues"). *See also, State ex rel. Cartwright v. Southwestern Bell Telephone Co.*, 1983 OK 40, ¶32, 662 P.2d 675, 681 (quoting *Cameron*).

¶8 The Commission, by a 2-1 vote, denied reimbursement. Commissioner Dana Murphy, dissenting in each of these companion cases, has stated that although she may not agree with the need for the fund, she feels she must uphold the Legislature's will as long as the fund exists. She dissented to the denial of Medicine Park's request stating that because she didn't believe the majority decision "comports with the Oklahoma Legislature's intent to, in part, provide support to small, rural carriers who have experienced increases in costs as a result of changes required by governmental acts and with the Legislative policy to preserve and advance universal services."

¶9 In 2014, the Commission denied a request for OUSF funding from Dobson Telephone Company. *See Dobson Telephone Co. v. State ex rel. Okla. Corporation Comm.*, 2017 OK CIV APP 16, 392 P.3d 295. Dobson sought reimbursement, under Subsection (K)1)(b) of the OUSF, for costs incurred to relocate its telephone facilities as required by the city of Oklahoma City for a street-widening project. Because the request had been issued by the city, and not the county commission or ODOT, the Commission narrowly interpreted the statute and concluded that the Fund was not authorized to pay for such relocation costs.

¶10 The Court of Civil Appeals found that the Commission's interpretation of the statutory language defeats the purpose of the Fund and is contra to the legislative intent to defray increased costs incurred by eligible telecommunications service providers resulting from government action, no matter the originating government entity. *Dobson Telephone Co. v. State ex rel. Okla. Corporation Comm.*, 2017 OK CIV APP 16, ¶21, 392 P.3d 295, 305. The Commission's Order was vacated and the matter was remanded for further proceedings consistent with the Court of Civil Appeals opinion. *Dobson Telephone Co. v. State ex rel. Okla. Corporation Comm.*, 2017

OK CIV APP 16, ¶23, 392 P.3d 295, 305. This Court approved the case for publication.

FACTUAL BACKGROUND

¶11 Dobson provides telecommunications services to customers in rural areas of Oklahoma, serving fewer than 75,000 access lines. On October 17, 2011, the Oklahoma Department of Transportation (ODOT) sent a letter to Dobson ordering the relocation of certain telephone lines within a public right-of-way of an ODOT, highway construction project along State Highway 62, in Lincoln County. Dobson moved the lines as requested for a net total of $95,430.46, after accounting for limited ODOT funding in the amount of $7,606.13. Dobson then filed an application with the Commission, under Subsection (K)(1)(b), for reimbursement of this amount from the OUSF using a form created by the Commission and following the same process as other companies when seeking an OUSF refund.

¶12 Dobson made detailed, confidential information regarding the project's costs available for inspection to the Commission's OUSF Administrator. This included information regarding the costs incurred, invoices for engineering, equipment and supplies, and internal employee timesheets and wages. The Administrator reviewed Dobson's application, inspected the confidential information during multiple on-site visits, and ultimately approved a reimbursement for Dobson in the amount of $95,417.92. A nominal amount of $12.54 was disallowed due to a lack of supporting invoices.

¶13 Various competitor telephone companies, collectively known as Sprint for purposes of this appeal, objected and filed a Request for Reconsideration on March 8, 2017. A hearing was held before an ALJ, where the evidence was briefed and summarized, additional testimony was taken, and the objecting parties were permitted to cross-examine witnesses – including the Administrator – and present evidence or argument to the contrary. The ALJ agreed that Dobson was an eligible provider,[3] that the facilities in question were used in the provision of primary universal services, and that the expenses incurred by Dobson were as a result of a state government mandate. On April 13, 2017 the ALJ found that the Administrator correctly determined the reasonable and just amount for the facility relocations.

¶14 Thereafter, the Commission voted, 2-1, to deny Dobson's request. The two-person majority found that Dobson's request was not sufficiently supported by evidence as the confidential information reviewed by its Administrator was not included in the record before the Commission. The Commission further determined that Dobson failed to prove that the expenditures at issue were necessary to provide primary universal services at a reasonable and affordable rate. Finally, the Commission stated that it was without sufficient information to determine whether the expenses were incurred only for primary universal services.

¶15 Dobson appealed, requesting that the Commission's denial be reversed. We retained the matter and made it a companion to Case Nos. 115,453, 116,193, 116,194, 116,215, 116,421 and 116,422

STANDARD OF REVIEW

¶16 This Court's review of decisions of the Commission is governed by the Oklahoma Constitution, article 9, § 20, which states as follows, in relevant part:

> The Supreme Court's review of appealable orders of the Corporation Commission shall be judicial only, and in all appeals involving an asserted violation of any right of the parties under the Constitution of the United States or the Constitution of the State of Oklahoma, the Court shall exercise its own independent judgment as to both the law and the facts. In all other appeals from orders of the Corporation Commission the review by the Supreme Court shall not extend further than to determine whether the Commission has regularly pursued its authority, and whether the findings and conclusions of the Commission are sustained by the law and substantial evidence.

Okla. Const. art. 9, § 20.

¶17 The issue in this appeal concerns the Commission's legal interpretation of the OUSF statute and the alleged arbitrary and capricious denial of funding in violation of the Oklahoma Constitution. Constitutional implications as well as statutory interpretation dictate our *de novo* review of this case. *Cox Oklahoma Telecom, LLC v. State ex rel. Oklahoma Corp. Comm'n*, 2007 OK 55, ¶9, n.17, 164 P.3d 150, 156. Under the *de novo* standard of review, the Court has plenary, independent and non-deferential authority to

determine whether the trial tribunal erred in its legal rulings. *Cox Oklahoma Telecom, LLC v. State ex rel. Oklahoma Corp. Comm'n*, 2007 OK 55, ¶9, n.16, 164 P.3d 150, 156; *Neil Acquisition v. Wingrod Investment Corp.*, 1996 OK 125, ¶5, 932 P.2d 1100, 1103; *Fanning v. Brown*, 2004 OK 7, ¶8, 85 P.3d 841, 845.

¶18 This Court has found that the Commission's power "must be exercised only within the confines of its limited jurisdiction as provided by the Oklahoma Constitution" and state statute.[4] *Pub. Serv. Co. v. State ex rel. Corp. Comm'n,* 1997 OK 145, ¶23, 948 P.2d 713, 717. The Commission's "power to regulate is not unfettered." *Pub. Serv. Co. v. State ex rel. Corp. Comm'n,* 1996 OK 43, ¶21, 918 P.2d 733, 738.

DISCUSSION

¶19 Under the OUSF, eligible telecommunications providers serving fewer than 75,000 access lines are entitled to recover increases in costs as a result of changes to facilities that are required by state or federal law. 17 O.S.Supp. 2016, § 139.106 (K).[5] It is undisputed that Dobson is an eligible provider under the Act. It is further undisputed that Dobson was required by ODOT to relocate its lines, causing it to incur an increase in costs. The Act's plain language mandates that where changes are "required by existing or future federal or state regulatory rules, orders, or policies or by federal or state law," and such changes cause an eligible provider to experience an increase in costs, the provider "**shall recover**" such "cost increases from the OUSF." 17 O.S.Supp.2016, § 139.106 (K)(1)(b) (emphasis added). We have interpreted the use of the word "shall" by the Legislature "as a legislative mandate equivalent to the term 'must', requiring interpretation as a command." *Minie v. Hudson*, 1997 OK 26, ¶7, 934 P.2d 1082, 1086. Thus, under the express provisions of the Act, Dobson was entitled to receive reimbursement from the OUSF for these cost increases.

¶20 In support of its decision to deny Dobson's requested funding, the Commission's majority found that Dobson failed to produce sufficient evidence into the record. Despite acknowledging that its "Administrator was afforded, and took advantage of, the opportunity to perform a 'review of the Application, contractor's invoices, internal invoices, construction drawings, pre-engineering plans, work orders, plans and maps, timesheets, reimbursement checks, contracts, responses to data requests, relevant Oklahoma Statutes,' its own administrative rules regarding the OUSF," the Commission ignored both the Administrator's and the ALJ's findings that the documents provided by Dobson supported its request for funding. The Commission complained that it was limited to a mathematical review as many of the documents relied on, and reviewed by, the Administrator occurred on site at Dobson's place of business and were not made publicly available due to the confidential nature of the documents.

¶21 Dobson points out that up until the filing of these companion cases, the Commission had for years always accepted the Administrator's review of confidential documents on site. Dobson maintains that they should not be penalized for the Commission's option not to take advantage of the opportunity to review, or even request to review, any of the confidentially-redacted documents. Dobson also cites cases supporting the proposition that long-standing actions or interpretations by an agency will not be idly cast aside without proper notice to affected parties. *See, e.g., Oral Roberts Univ. v. Okla. Tax Comm'n,* 1985 OK 97, ¶10, 714 P.2d 1013, 1015 (Courts are reluctant to overturn long standing construction where parties having great interest in such construction will be prejudiced by its change); *Big Horn Coal Co. v. Temple*, 793 F.2d 1165, 1169 (10th Cir. 1986) ("Agencies are under an obligation to follow their own regulations, procedures, and precedents, or provide a rational explanation for their departures.").

¶22 The Administrator testified that the standard procedure followed by the Commission had always been for an applicant to fill out a Commission-approved form and make confidential information supporting its application available for the Commission to review on-site. This occurred not only in OUSF cases, but in numerous other Commission matters. We find the Commission was not entitled to disregard Dobson's application merely because the documents the Administrator inspected and relied upon for his approval were not publicly filed of record before the Commission.

¶23 Dobson argues, and the Commission does not dispute, that the Commission's own rules and long-standing practices encouraged applicants to retain confidential supporting materials on site, making such materials available for review and inspection as needed to support an application. In fact, Commission

rule, OAC 165:59-3-72(d), specifically contemplates that "documentation not contained in the public record and not filed in the cause" may nevertheless be "relied upon by the OUSF Administrator in approving or denying an application." The Administrator disclosed that the Commission does not even have procedures in place that would allow it to handle "the responsibility or liability" of receiving such confidential materials.

¶24 Dobson filed an application, completed by using a Commission-issued form, which certified that as a result of an ODOT mandate to relocate its facilities it incurred an increase in costs in the amount of $95,430.46, after subtracting the ODOT reimbursements. The company presented the testimony of a company witness who reviewed all of Dobson's pertinent, confidential materials, and who confirmed the validity of the requested amounts. The Administrator also reviewed the confidential materials and agreed that Dobson's application and documentation supported the relief requested, as nominally modified by the Administrator to a lump sum of $95,417.92. The ALJ agreed with the Administrator that Dobson's application and offered materials supported approval thereof. Despite these findings, the Commission unexpectedly faulted Dobson for failing to publicly submit its confidential materials when documents of such a nature have not been typically filed with the Commission, nor required. Such flawed reasoning should not support a denial of the application herein.

¶25 Additionally, for the first time in these companion cases, the Commission interpreted Subsection (K) to impose a finding that Dobson's rates for primary universal services are reasonable and affordable pursuant to Subsection (B) and that the requested funding is necessary to maintain such reasonable and affordable rates. As mentioned, *supra*, § 139.106(K)(1)(b) plainly provides that where a provider incurs increased costs due to a state law, order or policy, the provider SHALL recover the cost increase from the OUSF. *See* 17 O.S.Supp.2016, § 139.106(K)(1)(b). There is no mention of a condition that the applicant must prove that its rates are reasonable and affordable nor is there a requirement to find the reimbursement necessary to maintain such rates. To the contrary, § 139.106(K)(2) specifically states that an application's approval "shall not be conditioned upon any rate case or earnings investigation by the Commission." 17 O.S.Supp.2016, § 139.106(K)(1)(b). We are not inclined to add requirements to a statute that the Legislature chose not to impose. *See Pentagon Acad., Inc. v. Indep. Sch. Dist. No. 1 of Tulsa Cty.*, 2003 OK 98, ¶19, 82 P.3d 587, 591 ("It is not the function of the courts to add new provisions which the legislature chose to withhold."); *Minie v. Hudson*, 1997 OK 26, ¶12, 934 P.2d 1082, 1087 ("This Court may not, through the use of statutory construction, change, modify or amend the expressed intent of the Legislature.").

¶26 Dobson contends that the Commission's complete denial of funding disregards the very purpose of the OUSF to ensure the availability of affordable telephone service to customers in rural and high cost areas where, absent the subsidies, their provision would be cost-prohibitive. We agree. The Commission ignores the plain language of the Act and attempts to impose new conditions not required by the Act, nor supportive of its purpose. Generally, applicants who filed under Subsection (K) could expect a quick reimbursement after approval by the Administrator that the application had followed the statutory process. The Commission's in-depth review of a Subsection (K) application would only arise if an outside entity filed a Request for Reconsideration of the Administrator's determination. Where no such reconsideration request is filed, the Administrator's approval, after a proper statutory review, would typically trigger a Commission order granting the applicant's request.

¶27 The Commission also criticized the fact that the relocated lines were used for services not related to primary universal services. The Commission maintains that Dobson should have allocated the cost of the project between such services. Dobson argues that a request for reimbursement under Subsection (K) does not require any such cost allocation nor has the Commission ever required one in previous Subsection (K) matters.

¶28 Subsection (K) plainly provides that where a provider incurs cost increases due to a state law or order, the provider SHALL recover the cost increase from the OUSF. 17 O.S.Supp. 2016, § 139.106(K)(1)(b). There is no mention of a requirement for cost allocation and we are not inclined to impose such requirement now. The Commission again ignores the plain language of the Act and attempts to impose new conditions not required by the Act, nor supportive of its purpose.

¶29 Dobson contends that the Commission's complete denial of funding disregards the very purpose of the OUSF to ensure the availability of affordable telephone service to customers in rural and high cost areas where, absent the subsidies, their provision would be cost-prohibitive. We agree. The Commission majority's disapproval of the policy behind the OUSF legislation has no bearing on the validity of an applicant's request for funding. We agree with the dissenting Commissioner that it is our duty to uphold legislation as it is enacted.

CONCLUSION

¶30 Although the Commission is not bound by the Administrator's recommendation, we find that the record reflects ample evidence with which to support the Administrator's determination. The Administrator, the ALJ, and the dissenting Commissioner, all agreed Dobson was entitled to reimbursement of the increased costs it incurred as a result of ODOT's mandate to relocate the telephone lines. The Commission's wholesale denial of Dobson's request was in error. Accordingly, we vacate the order of the Commission and remand the cause for further proceedings consistent with this opinion.

ORDER OF THE OKLAHOMA CORPORATION COMMISSION VACATED AND REMANDED.

CONCUR: GURICH, C.J., KAUGER, WINCHESTER, EDMONDSON, and DARBY, JJ.

CONCURRING SPECIALLY (by separate writing): COMBS, J.

NOT PARTICIPATING: COLBERT, AND REIF, JJ.

COMBS, J., concurring:

¶1 I concur in the majority opinion but write separately to emphasize the audacity of the Commission's blanket denial of Appellant's, Dobson Telephone Company d/b/a/ McCloud Telephone Company, application. The legislature established a process by which a rural provider with limited resources is allowed to be reimbursed from the Oklahoma Universal Service Fund (OUSF) when the rural provider meets increased costs in fulfilling a mandate to provide reliable and affordable telephone service to Oklahomans in remote and underserved areas. The Commission's majority all but ignored the evidence presented ostensibly because of a fundamental disagreement with the Oklahoma Universal Service Fund.[1] This is nothing more than an attempt to further disenfranchise rural Oklahoma from basic telephone services.

WINCHESTER, J.,

1. Section 139.107 provides, in part:
   A. The Oklahoma Lifeline Fund (OLF) and the Oklahoma Universal Service Fund (OUSF) shall be funded in a competitively neutral manner not inconsistent with federal law by all contributing providers. The funding from each contributing provider shall be based on the total intrastate retail Oklahoma Voice over Internet Protocol (VoIP) revenues and intrastate telecommunications revenues, from both regulated and unregulated services, of the contributing provider, hereinafter referred to as assessed revenues, as a percentage of all assessed revenues of the contributing providers, or such other assessment methodology not inconsistent with federal law. VoIP services shall be assessed only as provided for in the decision of the Federal Communications Commission, FCC 10-185, released November 5, 2010, or such other assessment methodology that is not inconsistent with federal law. The Commission may after notice and hearing modify the contribution methodology for the OUSF and OLF, provided the new methodology is not inconsistent with federal law.
   B. The Corporation Commission shall establish the OLF assessment and the OUSF assessment at a level sufficient to recover costs of administration and payments for OUSF and OLF requests for funding as provided for in the Oklahoma Telecommunications Act of 1997. The administration of the OLF and OUSF shall be provided by the Public Utility Division of the Commission. The administrative function shall be headed by the Administrator as defined in Section 139.102 of this title. The Administrator shall be an independent evaluator. The Administrator may enter into contracts to assist with the administration of the OLF and OUSF.

   17 O.S.Supp.2016, § 139.107. "Contributing provider" as that term is used in § 139.107 means "providers, including but not limited to providers of intrastate telecommunications, providers of intrastate telecommunications for a fee on a non-common-carrier basis, providers of wireless telephone service and providers of interconnected Voice over Internet Protocol (VoIP). Contributing providers shall contribute to the Oklahoma Universal Service Fund and Oklahoma Lifeline Fund." 17 O.S.Supp.2016, § 139.102 (8).

2. Companion Case No. 115,453 involves a request for funds under Subsection (G) while the remaining six, companion cases, including the instant matter, involve requests brought under Subsection (K), set forth more fully herein. Those cases, also decided today, are Case Nos. 116,193, 116,194, 116,215, 116,421, and 116,422.

3. For purposes of this appeal, it is not disputed that Dobson is an eligible local exchange provider providing primary services to its customers per the Act. 17 O.S.Supp.2016, § 139.106.

4. The Oklahoma Constitution, art. 9, Section 18 specifies that the Commission has:

   the power and authority and [is] charged with the duty of supervising, regulating and controlling all transportation and transmission companies doing business in this State, in all matters relating to the performance of their public duties and their charges therefor, and of correcting abuses and preventing unjust discrimination and extortion by such companies; and to that end the Commission shall, from time to time, prescribe and enforce against such companies, in the manner hereinafter authorized, such rates, charges, classifications of traffic, and rules and regulations, and shall require them to establish and maintain all such public service, facilities, and conveniences as may be reasonable and just, which said rates, charges, classifications, rules, regulations, and requirements, the Commission may, from time to time, alter or amend.

5. Subsection 139.106 (K) of the Act provides *in toto*:
   K. 1. Each request for OUSF funding by an eligible ILEC serving less than seventy-five thousand access lines shall be premised upon the occurrence of one or more of the following:
   a. in the event of a Federal Communications Commission order, rule or policy, the effect of which is to decrease the federal universal service fund revenues of an eligible local exchange telecommunications service provider, the eligible local exchange telecommunications service provider shall recover the decreases in revenues from the OUSF,

b. if, as a result of changes required by existing or future federal or state regulatory rules, orders, or policies or by federal or state law, an eligible local exchange telecommunications service provider experiences a reduction in revenues or an increase in costs, it shall recover the revenue reductions or cost increases from the OUSF, the recovered amounts being limited to the net reduction in revenues or cost increases, or

c. if, as a result of changes made as required by existing or future federal or state regulatory rules, orders, or policies or by federal or state law, an eligible local exchange telecommunications service provider experiences a reduction in costs, upon approval by the Commission, the provider shall reduce the level of OUSF funding it receives to a level sufficient to account for the reduction in costs.

2. The receipt of OUSF funds for any of the changes referred to in this subsection shall not be conditioned upon any rate case or earnings investigation by the Commission. The Commission shall, pursuant to subsection D of this section, approve the request for payment or adjustment of payment from the OUSF based on a comparison of the total annual revenues received from the sources affected by the changes described in paragraph 1 of this subsection by the requesting eligible local exchange telecommunications service provider during the most recent twelve (12) months preceding the request, and the reasonable calculation of total annual revenues or cost increases which will be experienced after the changes are implemented by the requesting eligible local exchange telecommunications service provider.

17 O.S.Supp.2016, § 139.106 (K).

COMBS, J., concurring:

1. Appellant's Brief in Chief at 1, January 26, 2018, states "Commissioner Bob Anthony has repeatedly spoken out against the law [Oklahoma Universal Service Fund], even going so far as to ask the Legislature, in writing, to repeal it." He stated the Fund is a bad program that should be repealed. Tr. at 30-31, June 26, 2014, Ok. Sup. Ct. Case No. 113,362. The Brief also states other members of the Commission have expressed their displeasure with the law. Commissioner Murphy, however, dissented against the denial of the request for OUSF funding.

2019 OK 25

DOBSON TELEPHONE COMPANY d/b/a McLOUD TELEPHONE COMPANY, Appellant, v. STATE OF OKLAHOMA EX REL. OKLAHOMA CORPORATION COMMISSION, Appellee.

Case No. 116,215. April 16, 2019

APPEAL FROM OKLAHOMA CORPORATION COMMISSION CAUSE NO. PUD 201600513

Dana Murphy, Chairman; Todd Hiett, Vice Chairman; and Bob Anthony, Commissioner.

¶0 Dobson Telephone Company d/b/a McLoud Telephone Company appeals the Oklahoma Corporation Commission's denial of its application for reimbursement from the Oklahoma Universal Services Fund for expenses incurred in relocating facilities to accommodate the construction of an Oklahoma Department of Transportation highway project. We find that the Commission's wholesale denial of the reimbursement of any of the requested funds is in error. The Commission's ruling is hereby vacated and the matter is remanded with directions to approve the funding.

ORDER OF THE OKLAHOMA CORPORATION COMMISSION REVERSED AND REMANDED WITH INSTRUCTIONS.

William H. Hoch, Melanie Wilson Rughani, Crowe & Dunlevy, P.C., Oklahoma City, Oklahoma, and Ron Commingdeer, Kendall W. Parrish, Ron Commingdeer & Associates, Oklahoma City, Oklahoma, for Appellant.

Michele Craig, Deputy General Counsel, Oklahoma Corporation Commission, Oklahoma City, Oklahoma, for Appellee.

Nancy M. Thompson, Oklahoma City, Oklahoma, for Sprint Communications Company, L.P., Sprint Spectrum L.P. and Virgin Mobile USA, L.P.

WINCHESTER, J.,

¶1 The issue before this Court is whether the Oklahoma Corporation Commission ("the Commission") erroneously withheld funding to be provided to Dobson Telephone Company d/b/a McLoud Telephone Company ("Dobson") pursuant to the provisions of the Oklahoma Universal Service Fund ("OUSF"), 17 O.S.Supp.2016, § 139.106. For the reasons set forth herein, we find that Dobson is entitled to the requested funding.

STATUTORY BACKGROUND

¶2 In 1996, the U.S. Congress passed the federal Telecommunications Act, 47 U.S.C. §§ 151 *et seq.*, in part, to promote a policy of universal service that would provide telecommunication services to consumers all over the country, including "those in rural, insular, and high cost areas." The Act seeks to provide access to services that are "reasonably comparable to those services provided in urban areas and that are available at rates that are reasonably comparable to rates charged for similar services in urban areas." 47 U.S.C. § 254(b)(3). The Oklahoma Legislature followed suit with its own, complementary Oklahoma Telecommunications Act of 1997 (the "Act"). 17 O.S.2011 and Supp.2016, §§ 139.101 *et seq*.

¶3 Under the state and federal Acts, certain telecommunications providers known as "carriers of last resort" are required to provide, without discrimination, telephone service to any customer requesting it. *See* 47 U.S.C. § 201; 17 O.S.2011 and Supp.2016, §§ 136 and 138. In addition, the provider must offer the requested services at reasonable and affordable rates in

line with those offered in more urban areas even if serving such customers would not be economically sustainable. *See* 47 U.S.C. § 202; 47 U.S.C. § 254(b)(3), (g), (i). The purpose of the legislation was to provide affordable and quality primary universal services to all despite the challenges of its accessibility.

¶4 In an effort to defray the costs of delivering phone service in rural, more remote areas, the federal and state Acts each established a fund to help support eligible service providers. Within Oklahoma's Act, the Legislature created the OUSF to help pay for reasonable investments and expenses incurred by "eligible local exchange telecommunications service providers" in providing primary universal services to customers in rural and high-cost areas "at rates that are reasonable and affordable." *See* 17 O.S. Supp.2016, § 139.106 (A), (B), and (G). The OUSF generally provides that an eligible provider "may request funding from the OUSF as necessary to maintain rates for primary universal services that are reasonable and affordable." 17 O.S.Supp.2016, § 139.106 (G). The OUSF is funded by a charge paid by certain telecommunications carriers that have revenues as defined in Section 139.107. *See* 17 O.S. Supp.2016, §§ 139.106 (D) and 139.107.1

¶5 The Commission's rules governing the process for obtaining funding from the OUSF are set out in OAC 165:59, Part 9 and are overseen by the Administrator of the Commission's Public Utilities Division ("PUD"). Under the rules, upon receipt of a request for OUSF funding, the OUSF Administrator reviews the request and, if appropriate, reimburses the provider consistent with the Act. OAC 165:59-7-1(d) and OAC 165:59-3-62(g). Requests for Subsection (G)'s "as necessary" distributions are evaluated through a detailed study and analysis of the "costs of providing primary universal services" as well as potential revenue. 17 O.S.Supp.2016, § 139.106 (H). The review process for claims submitted under Subsection (G) can be time-consuming and tedious, often resulting in a significant delay in receipt of any funds.[2] As a result, the Legislature provided a mechanism within the Act that would allow providers in the rural areas quicker access to mandatory payments in certain, limited circumstances. *See* 17 O.S.Supp.2016, § 139. 106(K).

¶6 Subsection (K)(1)(a) mandates that, if "a Federal Communications Commission order, rule or policy" has the effect of "decreas[ing] the federal universal service fund revenues of an eligible local exchange telecommunications service provider," that provider "shall recover the decreases in revenues from the OUSF." 17 O.S.Supp.2016, § 139.106 (K)(1)(a). Similarly, Subsection (K)(1)(b) provides that, if changes required by "federal or state regulatory rules, orders, or policies" reduce the revenues or increase the costs to an eligible local exchange telecommunications service provider, then that provider "shall recover the revenue reductions or cost increases from the OUSF." 17 O.S.Supp. 2016, § 139.106 (K)(1)(b). Under Subsection (K), distributions from the OUSF "shall not be conditioned upon any rate case or earnings investigation by the Commission," but, instead, should be paid in an amount equal to the increase in costs or reduction in revenues. 17 O.S.Supp.2016, § 139.106 (K)(2).

¶7 The Commissioners are free to approve or reject any determination by the OUSF Administrator. Under the rules, if no one objects to the Administrator's determination, an order approving the funding request is issued by the Commission. OAC 165:59-3-62(j). If, however, a party is not satisfied with the OUSF Administrator's determination, the party may file a request for reconsideration by the Commission and the matter is set for hearing. OAC 165:59-3-62(h) and (i). The Commission is the ultimate arbiter of the issues. *See, Cameron v. Corporation Com 'n*, 1966 OK 75, ¶29, 414 P.2d 266, 272 (on appeal from an oil and gas spacing order, the Court noted that regardless of whatever weight the Commission may attach to an examiner's report, "the Commission is the final arbiter of the issues"). *See also, State ex rel. Cartwright v. Southwestern Bell Telephone Co.*, 1983 OK 40, ¶32, 662 P.2d 675, 681 (quoting *Cameron*).

¶8 The Commission, by a 2-1 vote, denied reimbursement. Commissioner Dana Murphy, dissenting in each of these companion cases, has stated that although she may not agree with the need for the fund, she feels she must uphold the Legislature's will as long as the fund exists. She dissented to the denial of Medicine Park's request stating that because she didn't believe the majority decision "comports with the Oklahoma Legislature's intent to, in part, provide support to small, rural carriers who have experienced increases in costs as a result of changes required by governmental acts and with the Legislative policy to preserve and advance universal services."

¶9 In 2014, the Commission denied a request for OUSF funding from Dobson Telephone Company. *See Dobson Telephone Co. v. State ex rel. Okla. Corporation Comm.*, 2017 OK CIV APP 16, 392 P.3d 295. Dobson sought reimbursement, under Subsection (K)1)(b) of the OUSF, for costs incurred to relocate its telephone facilities as required by the city of Oklahoma City for a street-widening project. Because the request had been issued by the city, and not the county commission or ODOT, the Commission narrowly interpreted the statute and concluded that the Fund was not authorized to pay for such relocation costs.

¶10 The Court of Civil Appeals found that the Commission's interpretation of the statutory language defeats the purpose of the Fund and is contra to the legislative intent to defray increased costs incurred by eligible telecommunications service providers resulting from government action, no matter the originating government entity. *Dobson Telephone Co. v. State ex rel. Okla. Corporation Comm.*, 2017 OK CIV APP 16, ¶21, 392 P.3d 295, 305. The Commission's Order was vacated and the matter was remanded for further proceedings consistent with the Court of Civil Appeals opinion. *Dobson Telephone Co. v. State ex rel. Okla. Corporation Comm.*, 2017 OK CIV APP 16, ¶23, 392 P.3d 295, 305. This Court approved the case for publication.

FACTUAL BACKGROUND

¶11 Dobson provides telecommunications services to customers in rural areas of Oklahoma, serving fewer than 75,000 access lines. On October 14, 2011, the Oklahoma Department of Transportation (ODOT) sent a letter to Dobson ordering the relocation of certain telephone lines within a public right-of-way of an ODOT, highway construction project along SH-102 and US-62 in Lincoln County. Dobson relocated its facilities as requested for a total cost of $231,618.67. After accounting for two separate reimbursement payments from ODOT in the amounts of $13,566.72 and $185,847.86, and a $10,079.21 reduction for betterment, Dobson filed an application with the Commission under the Subsection (K)(1)(b) of the Act for reimbursement of $22,124.88 from the OUSF. Dobson filed its Application on a form created by the Commission and followed the same steps it, and other companies like it, has always undertaken when seeking an OUSF refund.

¶12 Dobson made detailed, confidential information regarding the project's costs available for inspection to the Commission's OUSF Administrator. This included information regarding the costs incurred, invoices for engineering, equipment and supplies, and internal employee timesheets and wages. The Administrator reviewed Dobson's application, inspected the confidential information and ultimately approved a reimbursement for Dobson in the amount of $21,794.27. It disallowed $330.61 due to a lack of supporting invoices.

¶13 Various competitor telephone companies, collectively known as Sprint for purposes of this appeal, objected and filed a Request for Reconsideration on May 11, 2017. A hearing was held before an ALJ, where the evidence was briefed and summarized, additional testimony was taken, and the objecting parties were permitted to cross-examine witnesses – including the Administrator – and present evidence or argument to the contrary. The ALJ upheld the Administrator's recommendation, agreeing that Dobson was an eligible provider,[3] that the facilities in question were used in the provision of primary universal services, and that the expenses incurred by Dobson were as a result of a state government mandate.

¶14 On June 15, 2017, the Commission voted, 2-1, to deny Dobson's request. The two-person majority found that Dobson's request was not sufficiently supported by evidence as the confidential information reviewed by its Administrator was not included in the record before the Commission. The Commission further determined that Dobson failed to prove that the expenditures at issue were necessary to provide primary universal services at a reasonable and affordable rate. Finally, the Commission stated that it was without sufficient information to determine whether the expenses were incurred only for primary universal services.

¶15 Dobson appealed, requesting that the Commission's denial be reversed. We retained the matter and made it a companion to Case Nos. 115,453, 116,193, 116,194, 116,214, 116,421 and 116,422.

STANDARD OF REVIEW

¶16 This Court's review of decisions of the Commission is governed by the Oklahoma Constitution, article 9, § 20, which states as follows, in relevant part:

> The Supreme Court's review of appealable orders of the Corporation Commission shall be judicial only, and in all appeals in-

> volving an asserted violation of any right of the parties under the Constitution of the United States or the Constitution of the State of Oklahoma, the Court shall exercise its own independent judgment as to both the law and the facts. In all other appeals from orders of the Corporation Commission the review by the Supreme Court shall not extend further than to determine whether the Commission has regularly pursued its authority, and whether the findings and conclusions of the Commission are sustained by the law and substantial evidence.

Okla. Const. art. 9, § 20.

¶17 The issue in this appeal concerns the Commission's legal interpretation of the OUSF statute and the alleged arbitrary and capricious denial of funding in violation of the Oklahoma Constitution. Constitutional implications as well as statutory interpretation dictate our *de novo* review of this case. *Cox Oklahoma Telecom, LLC v. State ex rel. Oklahoma Corp. Comm'n*, 2007 OK 55, ¶9, n.17, 164 P.3d 150, 156. Under the *de novo* standard of review, the Court has plenary, independent and non-deferential authority to determine whether the trial tribunal erred in its legal rulings. *Cox Oklahoma Telecom, LLC v. State ex rel. Oklahoma Corp. Comm'n*, 2007 OK 55, ¶9, n.16, 164 P.3d 150, 156; *Neil Acquisition v. Wingrod Investment Corp.*, 1996 OK 125, ¶5, 932 P.2d 1100, 1103; *Fanning v. Brown*, 2004 OK 7, ¶8, 85 P.3d 841, 845.

¶18 This Court has found that the Commission's power "must be exercised only within the confines of its limited jurisdiction as provided by the Oklahoma Constitution" and state statute.[4] *Pub. Serv. Co. v. State ex rel. Corp. Comm'n*, 1997 OK 145, ¶23, 948 P.2d 713, 717. The Commission's "power to regulate is not unfettered." *Pub. Serv. Co. v. State ex rel. Corp. Comm'n*, 1996 OK 43, ¶21, 918 P.2d 733, 738.

DISCUSSION

¶19 Under the OUSF, eligible telecommunications providers serving fewer than 75,000 access lines are entitled to recover increases in costs as a result of changes to facilities that are required by state or federal law. 17 O.S.Supp. 2016, § 139.106(K).[5] It is undisputed that Dobson is an eligible provider under the Act. It is further undisputed that Dobson was required by ODOT to relocate its lines, causing it to incur an increase in costs. The Act mandates that where changes are "required by existing or future federal or state regulatory rules, orders, or policies or by federal or state law," and such changes cause an eligible provider to experience an increase in costs, the provider "**shall recover**" such "cost increases from the OUSF." 17 O.S.Supp.2016, § 139.106(K)(1)(b) (emphasis added). We have interpreted the use of the word "shall" by the Legislature "as a legislative mandate equivalent to the term 'must', requiring interpretation as a command." *Minie v. Hudson*, 1997 OK 26, ¶7, 934 P.2d 1082, 1086. Thus, under the express provisions of the Act, Dobson was entitled to receive reimbursement from the OUSF for these cost increases.

¶20 In support of its decision to deny Dobson's requested funding, the Commission's majority found that Dobson failed to produce sufficient evidence into the record. Despite acknowledging that its "Administrator was afforded, and took advantage of, the opportunity to perform a 'review of the Application, contractor's invoices, internal invoices, construction drawings, pre-engineering plans, work orders, plans and maps, timesheets, reimbursement checks, contracts, responses to data requests, relevant Oklahoma Statutes,' its own administrative rules regarding the OUSF," the Commission ignored both the Administrator's and the ALJ's findings that the documents provided by Dobson supported its request for funding. The Commission complained that it was limited to a mathematical review as many of the documents relied on, and reviewed by, the Administrator occurred on-site at Dobson's place of business and were not made publicly available due to the confidential nature of the documents.

¶21 Dobson points out that up until the filing of these companion cases, the Commission had for years previously accepted the Administrator's review of confidential documents on site. Dobson maintains that they should not be penalized for the Commission's option not to take advantage of the opportunity to review, or even request to review, any of the confidentially-redacted documents. Dobson also cites cases supporting the proposition that long-standing actions or interpretations by an agency will not be idly cast aside without proper notice to affected parties. *See, e.g., Oral Roberts Univ. v. Okla. Tax Comm'n*, 1985 OK 97, ¶10, 714 P.2d 1013, 1015 (Courts are reluctant to overturn long standing construction where parties having great interest in such construction will be prejudiced by its change); *Big Horn Coal Co. v.*

Temple, 793 F.2d 1165, 1169 (10th Cir. 1986) ("Agencies are under an obligation to follow their own regulations, procedures, and precedents, or provide a rational explanation for their departures.").

¶22 The Administrator agreed with Dobson that the standard procedure followed by the Commission had always been for an applicant to fill out a Commission-approved form and make confidential information supporting its application available for the Commission to review on-site. He offered that this practice occurred not only in OUSF cases, but in numerous other Commission matters. We find the Commission was not entitled to discount Dobson's entire application merely because the documents the Administrator inspected and relied upon for his approval were not publicly filed of record before the Commission.

¶23 Dobson argues, and the Commission does not dispute, that the Commission's own rules and long-standing practices encouraged applicants to retain confidential supporting materials on site, making such materials available for review and inspection as needed to support an application. In fact, Commission rule, OAC 165:59-3-72(d), specifically contemplates that "documentation not contained in the public record and not filed in the cause" may nevertheless be "relied upon by the OUSF Administrator in approving or denying an application." The Administrator disclosed that the Commission does not even have procedures in place that would allow it to handle "the responsibility or liability" of receiving such confidential materials.

¶24 Dobson filed an application, completed by using a Commission-issued form, which certified that as a result of an ODOT mandate to relocate its facilities it incurred an increase in costs in the amount of $22,124.88, after subtracting the ODOT reimbursements. The company presented the testimony of a company witness who reviewed all of Dobson's pertinent, confidential materials, and who confirmed the validity of the requested amounts. The Administrator also reviewed the confidential materials and agreed that Dobson's application and documentation supported the relief requested, as nominally modified by the Administrator to a lump sum of $21,794.27. The ALJ agreed with the Administrator that Dobson's application and offered materials supported approval thereof. Despite these findings, the Commission unexpectedly faulted Dobson for failing to publicly submit its confidential materials when documents of such a nature have not been typically filed with the Commission, nor required. Such flawed reasoning should not support a denial of the application herein.

¶25 Additionally, for the first time in these companion cases, the Commission interpreted Subsection (K) to impose a finding that Dobson's rates for primary universal services are reasonable and affordable pursuant to Subsection (B) and that the requested funding is necessary to maintain such reasonable and affordable rates. As mentioned, *supra*, § 139.106(K)(1)(b) plainly provides that where a provider incurs increased costs due to a state law, order or policy, the provider SHALL recover the cost increase from the OUSF. *See* 17 O.S.Supp.2016, § 139.106(K)(1)(b). There is no mention of a condition that the applicant must prove that its rates are reasonable and affordable nor is there a requirement to find the reimbursement necessary to maintain such rates. To the contrary, § 139.106(K)(2) specifically states that an application's approval "shall not be conditioned upon any rate case or earnings investigation by the Commission." 17 O.S.Supp.2016, § 139.106(K)(1)(b). We are not inclined to add requirements to a statute that the Legislature chose not to impose. *See Pentagon Acad., Inc. v. Indep. Sch. Dist. No. 1 of Tulsa Cty.,* 2003 OK 98, ¶19, 82 P.3d 587, 591 ("It is not the function of the courts to add new provisions which the legislature chose to withhold."); *Minie v. Hudson,* 1997 OK 26, ¶12, 934 P.2d 1082, 1087 ("This Court may not, through the use of statutory construction, change, modify or amend the expressed intent of the Legislature.").

¶26 Dobson contends that the Commission's complete denial of funding disregards the very purpose of the OUSF to ensure the availability of affordable telephone service to customers in rural and high cost areas where, absent the subsidies, their provision would be cost-prohibitive. We agree. The Commission ignores the plain language of the Act and attempts to impose new conditions not required by the Act, nor supportive of its purpose. Generally, applicants who filed under Subsection (K) could expect a quick reimbursement after approval by the Administrator that the application had followed the statutory process. The Commission's in-depth review of a Subsection (K) application would only arise if an outside entity filed a Request for Reconsideration of the Administrator's determination. Where no

such reconsideration request is filed, the Administrator's approval, after a proper statutory review, would typically trigger a Commission order granting the applicant's request.

¶27 The Commission also criticized the fact that the relocated lines were used for services not related to primary universal services. The Commission maintains that Dobson should have allocated the cost of the project between such services. Dobson argues that a request for reimbursement under Subsection (K) does not require any such cost allocation nor has the Commission ever required one in previous Subsection (K) matters.

¶28 Subsection (K) plainly provides that where a provider incurs cost increases due to a state law or order, the provider SHALL recover the cost increase from the OUSF. 17 O.S.Supp. 2016, § 139.106(K)(1)(b). There is no mention of a requirement for cost allocation and we are not inclined to impose such requirement now. The Commission again ignores the plain language of the Act and attempts to impose new conditions not required by the Act, nor supportive of its purpose.

¶29 Dobson contends that the Commission's complete denial of funding disregards the very purpose of the OUSF to ensure the availability of affordable telephone service to customers in rural and high cost areas where, absent the subsidies, their provision would be cost-prohibitive. We agree. The Commission majority's disapproval of the policy behind the OUSF legislation has no bearing on the validity of an applicant's request for funding. We agree with the dissenting Commissioner that it is our duty to uphold legislation as it is enacted.

CONCLUSION

¶30 Although the Commission is not bound by the Administrator's recommendation, we find that the record reflects ample evidence with which to support the Administrator's determination. The Administrator, the ALJ, and the dissenting Commissioner, all agreed Dobson was entitled to reimbursement of the increased costs it incurred as a result of ODOT's mandate to relocate the telephone lines. The Commission's wholesale denial of Dobson's request was in error. Accordingly, we vacate the order of the Commission and remand the cause for further proceedings consistent with this opinion.

ORDER OF THE OKLAHOMA CORPORATION COMMISSION VACATED AND REMANDED.

CONCUR: GURICH, C.J., KAUGER, WINCHESTER, EDMONDSON, and DARBY, JJ.

CONCURRING SPECIALLY (by separate writing): COMBS, J.

NOT PARTICIPATING: COLBERT, AND REIF, JJ.

COMBS, J., concurring:

¶1 I concur in the majority opinion but write separately to emphasize the audacity of the Commission's blanket denial of Appellant's, Dobson Telephone Company d/b/a McCloud Telephone Company, application. The legislature established a process by which a rural provider with limited resources is allowed to be reimbursed from the Oklahoma Universal Service Fund (OUSF) when the rural provider meets increased costs in fulfilling a mandate to provide reliable and affordable telephone service to Oklahomans in remote and underserved areas. The Commission's majority all but ignored the evidence presented ostensibly because of a fundamental disagreement with the Oklahoma Universal Service Fund.[1] This is nothing more than an attempt to further disenfranchise rural Oklahoma from basic telephone services.

WINCHESTER, J.,

1. Section 139.107 provides, in part:
   A. The Oklahoma Lifeline Fund (OLF) and the Oklahoma Universal Service Fund (OUSF) shall be funded in a competitively neutral manner not inconsistent with federal law by all contributing providers. The funding from each contributing provider shall be based on the total intrastate retail Oklahoma Voice over Internet Protocol (VoIP) revenues and intrastate telecommunications revenues, from both regulated and unregulated services, of the contributing provider, hereinafter referred to as assessed revenues, as a percentage of all assessed revenues of the contributing providers, or such other assessment methodology not inconsistent with federal law. VoIP services shall be assessed only as provided for in the decision of the Federal Communications Commission, FCC 10-185, released November 5, 2010, or such other assessment methodology that is not inconsistent with federal law. The Commission may after notice and hearing modify the contribution methodology for the OUSF and OLF, provided the new methodology is not inconsistent with federal law.
   B. The Corporation Commission shall establish the OLF assessment and the OUSF assessment at a level sufficient to recover costs of administration and payments for OUSF and OLF requests for funding as provided for in the Oklahoma Telecommunications Act of 1997. The administration of the OLF and OUSF shall be provided by the Public Utility Division of the Commission. The administrative function shall be headed by the Administrator as defined in Section 139.102 of this title. The Administrator shall be an independent evaluator. The Administrator may enter into contracts to assist with the administration of the OLF and OUSF.

17 O.S.Supp.2016, § 139.107. "Contributing provider" as that term is used in § 139.107 means "providers, including but not limited to pro-

viders of intrastate telecommunications, providers of intrastate telecommunications for a fee on a non-common-carrier basis, providers of wireless telephone service and providers of interconnected Voice over Internet Protocol (VoIP). Contributing providers shall contribute to the Oklahoma Universal Service Fund and Oklahoma Lifeline Fund." 17 O.S.Supp.2016, § 139.102 (8).

2. Companion Case No. 115,453 involves a request for funds under Subsection (G) while the remaining six, companion cases, including the instant matter, involve requests brought under Subsection (K), set forth more fully herein. Those cases, also decided today, are Case Nos. 116,193, 116,194, 116,214, 116,421, and 116,422.

3. For purposes of this appeal, it is not disputed that Dobson is an eligible local exchange provider providing primary services to its customers.

4. The Oklahoma Constitution, art. 9, Section 18 specifies that the Commission has:

> the power and authority and [is] charged with the duty of supervising, regulating and controlling all transportation and transmission companies doing business in this State, in all matters relating to the performance of their public duties and their charges therefor, and of correcting abuses and preventing unjust discrimination and extortion by such companies; and to that end the Commission shall, from time to time, prescribe and enforce against such companies, in the manner hereinafter authorized, such rates, charges, classifications of traffic, and rules and regulations, and shall require them to establish and maintain all such public service, facilities, and conveniences as may be reasonable and just, which said rates, charges, classifications, rules, regulations, and requirements, the Commission may, from time to time, alter or amend.

5. Subsection 139.106(K) of the Act provides *in toto*:

> K. 1. Each request for OUSF funding by an eligible ILEC serving less than seventy-five thousand access lines shall be premised upon the occurrence of one or more of the following:
> a. in the event of a Federal Communications Commission order, rule or policy, the effect of which is to decrease the federal universal service fund revenues of an eligible local exchange telecommunications service provider, the eligible local exchange telecommunications service provider shall recover the decreases in revenues from the OUSF,
> b. if, as a result of changes required by existing or future federal or state regulatory rules, orders, or policies or by federal or state law, an eligible local exchange telecommunications service provider experiences a reduction in revenues or an increase in costs, it shall recover the revenue reductions or cost increases from the OUSF, the recovered amounts being limited to the net reduction in revenues or cost increases, or
> c. if, as a result of changes made as required by existing or future federal or state regulatory rules, orders, or policies or by federal or state law, an eligible local exchange telecommunications service provider experiences a reduction in costs, upon approval by the Commission, the provider shall reduce the level of OUSF funding it receives to a level sufficient to account for the reduction in costs.
> 2. The receipt of OUSF funds for any of the changes referred to in this subsection shall not be conditioned upon any rate case or earnings investigation by the Commission. The Commission shall, pursuant to subsection D of this section, approve the request for payment or adjustment of payment from the OUSF based on a comparison of the total annual revenues received from the sources affected by the changes described in paragraph 1 of this subsection by the requesting eligible local exchange telecommunications service provider during the most recent twelve (12) months preceding the request, and the reasonable calculation of total annual revenues or cost increases which will be experienced after the changes are implemented by the requesting eligible local exchange telecommunications service provider.

17 O.S.Supp.2016, § 139.106(K).

COMBS, J., concurring:

1. Appellant's Brief in Chief at 1, January 26, 2018, states "Commissioner Bob Anthony has repeatedly spoken out against the law [Oklahoma Universal Service Fund], even going so far as to ask the Legislature, in writing, to repeal it." He stated the Fund is a bad program that should be repealed. Tr. at 30-31, June 26, 2014, Ok. Sup. Ct. Case No. 113,362. The Brief also states other members of the Commission have expressed their displeasure with the law. Commissioner Murphy, however, dissented against the denial of the request for OUSF funding.

2019 OK 26

DOBSON TELEPHONE COMPANY, Applicant/Appellant, v. STATE OF OKLAHOMA EX REL. OKLAHOMA CORPORATION COMMISSION, Respondent/Appellee.

Case No. 116,421. April 16, 2019

APPEAL FROM OKLAHOMA CORPORATION COMMISSION CAUSE NO. PUD 201700040

Dana Murphy, Chairman; Todd Hiett, Vice Chairman; and Bob Anthony, Commissioner.

¶0 Dobson Telephone Company appeals the Oklahoma Corporation Commission's denial of its application for reimbursement from the Oklahoma Universal Services Fund for expenses incurred when it was ordered by the State Department of Transportation to relocate its telephone lines within the public right-of-way of a State construction project. We find that the Commission's wholesale denial of the reimbursement of the requested funds is in error. The Commission's ruling is hereby vacated and the matter is remanded with directions to approve the requested funding.

ORDER OF THE OKLAHOMA CORPORATION COMMISSION REVERSED AND REMANDED WITH INSTRUCTIONS.

William H. Hoch, Melanie Wilson Rughani, Crowe & Dunlevy, P.C., Oklahoma City, Oklahoma, and Ron Commingdeer, Kendall W. Parrish, Ron Commingdeer & Associates, Oklahoma City, Oklahoma, for Appellant.

Michele Craig, Deputy General Counsel, Oklahoma Corporation Commission, Oklahoma City, Oklahoma, for Appellee.

Nancy M. Thompson, Oklahoma City, Oklahoma, for Sprint Communications Company, L.P., Sprint Spectrum L.P. and Virgin Mobile USA, L.P.

WINCHESTER, J.,

¶1 The issue before this Court is whether the Oklahoma Corporation Commission ("the Commission") erroneously withheld funding to be provided to Dobson Telephone Company ("Dobson") pursuant to the provisions of the Oklahoma Universal Service Fund ("OUSF"), 17 O.S.Supp.2016, § 139.106. For the reasons set forth herein, we find that Dobson is entitled to the requested funding.

STATUTORY BACKGROUND

¶2 In 1996, the U.S. Congress passed the federal Telecommunications Act, 47 U.S.C. §§ 151 *et seq*., in part, to promote a policy of universal service that would provide telecommunication services to consumers all over the country, including "those in rural, insular, and high cost areas." The Act seeks to provide access to services that are "reasonably comparable to those services provided in urban areas and that are available at rates that are reasonably comparable to rates charged for similar services in urban areas." 47 U.S.C. § 254(b)(3). The Oklahoma Legislature followed suit with its own, complementary Oklahoma Telecommunications Act of 1997 (the "Act"). 17 O.S.2011 and Supp.2016, §§ 139.101 *et seq*.

¶3 Under the state and federal Acts, certain telecommunications providers known as "carriers of last resort" are required to provide, without discrimination, telephone service to any customer requesting it. *See* 47 U.S.C. § 201; 17 O.S.2011 and Supp.2016, §§ 136 and 138. In addition, the provider must offer the requested services at reasonable and affordable rates in line with those offered in more urban areas even if serving such customers would not be economically sustainable. *See* 47 U.S.C. § 202; 47 U.S.C. § 254(b)(3), (g), (i). The purpose of the legislation was to provide affordable and quality primary universal services to all despite the challenges of its accessibility.

¶4 In an effort to defray the costs of delivering phone service in rural, more remote areas, the federal and state Acts each established a fund to help support eligible service providers. Within Oklahoma's Act, the Legislature created the OUSF to help pay for reasonable investments and expenses incurred by "eligible local exchange telecommunications service providers" in providing primary universal services to customers in rural and high-cost areas "at rates that are reasonable and affordable." *See* 17 O.S. Supp.2016, § 139.106 (A), (B), and (G). The OUSF generally provides that an eligible provider "may request funding from the OUSF as necessary to maintain rates for primary universal services that are reasonable and affordable." 17 O.S.Supp.2016, § 139.106 (G). The OUSF is funded by a charge paid by certain telecommunications carriers that have revenues as defined in Section 139.107. *See* 17 O.S.Supp.2016, §§ 139.106 (D) and 139.107.[1]

¶5 The Commission's rules governing the process for obtaining funding from the OUSF are set out in OAC 165:59, Part 9 and are overseen by the Administrator of the Commission's Public Utilities Division ("PUD"). Under the rules, upon receipt of a request for OUSF funding, the OUSF Administrator reviews the request and, if appropriate, reimburses the provider consistent with the Act. OAC 165:59-7-1(d) and OAC 165:59-3-62(g). Requests for Subsection (G)'s "as necessary" distributions are evaluated through a detailed study and analysis of the "costs of providing primary universal services" as well as potential revenue. 17 O.S.Supp.2016, § 139.106 (H). The review process for claims submitted under Subsection (G) can be time-consuming and tedious, often resulting in a significant delay in receipt of any funds.[2] As a result, the Legislature provided a mechanism within the Act that would allow providers in the rural areas quicker access to mandatory payments in certain, limited circumstances. *See* 17 O.S.Supp.2016, § 139.106(K).

¶6 Subsection (K)(1)(a) mandates that, if "a Federal Communications Commission order, rule or policy" has the effect of "decreas[ing] the federal universal service fund revenues of an eligible local exchange telecommunications service provider," that provider "shall recover the decreases in revenues from the OUSF." 17 O.S.Supp.2016, § 139.106 (K)(1)(a). Similarly, Subsection (K)(1)(b) provides that, if changes required by "federal or state regulatory rules, orders, or policies" reduce the revenues or increase the costs to an eligible local exchange telecommunications service provider, then that provider "shall recover the revenue reductions or cost increases from the OUSF." 17 O.S.Supp. 2016, § 139.106 (K)(1)(b). Under Subsection (K), distributions from the OUSF "shall not be conditioned upon any rate case or earnings investigation by the Commission," but, instead, should be paid in an amount equal to the increase in costs or reduction in revenues. 17 O.S.Supp.2016, § 139.106 (K)(2).

¶7 The Commissioners are free to approve or reject any determination by the OUSF Administrator. Under the rules, if no one objects to the Administrator's determination, an order approving the funding request is issued by the Commission. OAC 165:59-3-62(j). If, however, a party is not satisfied with the OUSF Administrator's determination, the party may file a request for reconsideration by the Commission

and the matter is set for hearing. OAC 165:59-3-62(h) and (i). The Commission is the ultimate arbiter of the issues. *See, Cameron v. Corporation Com 'n*, 1966 OK 75, ¶29, 414 P.2d 266, 272 (on appeal from an oil and gas spacing order, the Court noted that regardless of whatever weight the Commission may attach to an examiner's report, "the Commission is the final arbiter of the issues"). *See also, State ex rel. Cartwright v. Southwestern Bell Telephone Co.*, 1983 OK 40, ¶32, 662 P.2d 675, 681 (quoting *Cameron*).

¶8 The Commission, by a 2-1 vote, denied reimbursement. Commissioner Dana Murphy, dissenting in each of these companion cases, has stated that although she may not agree with the need for the fund, she feels she must uphold the Legislature's will as long as the fund exists. She dissented to the denial of Medicine Park's request stating that because she didn't believe the majority decision "comports with the Oklahoma Legislature's intent to, in part, provide support to small, rural carriers who have experienced increases in costs as a result of changes required by governmental acts and with the Legislative policy to preserve and advance universal services."

¶9 In 2014, the Commission denied a request for OUSF funding from Dobson Telephone Company. *See Dobson Telephone Co. v. State ex rel. Okla. Corporation Comm.*, 2017 OK CIV APP 16, 392 P.3d 295. Dobson sought reimbursement, under Subsection (K)1)(b) of the OUSF, for costs incurred to relocate its telephone facilities as required by the city of Oklahoma City for a street-widening project. Because the request had been issued by the city, and not the county commission or ODOT, the Commission narrowly interpreted the statute and concluded that the Fund was not authorized to pay for such relocation costs.

¶10 The Court of Civil Appeals found that the Commission's interpretation of the statutory language defeats the purpose of the Fund and is contra to the legislative intent to defray increased costs incurred by eligible telecommunications service providers resulting from government action, no matter the originating government entity. *Dobson Telephone Co. v. State ex rel. Okla. Corporation Comm.*, 2017 OK CIV APP 16, ¶21, 392 P.3d 295, 305. The Commission's Order was vacated and the matter was remanded for further proceedings consistent with the Court of Civil Appeals opinion. *Dobson Telephone Co. v. State ex rel. Okla. Corporation Comm.*, 2017 OK CIV APP 16, ¶23, 392 P.3d 295, 305. This Court approved the case for publication.

FACTUAL BACKGROUND

¶11 Dobson provides telecommunications services to customers in rural areas of Oklahoma, serving fewer than 75,000 access lines. On May 3, 2016, the Oklahoma Department of Transportation (ODOT) sent a letter to Dobson ordering the relocation of certain telephone lines within a public right-of-way of an ODOT, highway construction project on US-283, in Roger Mills County. Dobson moved the lines as requested for a sum total of $55,032.54. Dobson filed an application with the Commission under the Act's subsection (K)(1)(b) for reimbursement of this amount from the OUSF. Dobson filed its Application on a form created by the Commission and followed the same steps it, and other companies like it, has always undertaken when seeking an OUSF refund.

¶12 Dobson made detailed, confidential information regarding the project's costs available for inspection to the Commission's OUSF Administrator. This included information regarding the costs incurred, invoices for engineering, equipment and supplies, and internal employee timesheets and wages. The Administrator reviewed Dobson's application, inspected the confidential information and ultimately approved a reimbursement for Dobson in the amount of $54,766.71. It disallowed $265.83 due to a lack of supporting invoices and/or accounting in Dobson's documents.

¶13 Various competitor telephone companies, collectively known as Sprint for purposes of this appeal, objected and filed a Request for Reconsideration on May 11, 2017. A hearing was held before an ALJ, where the evidence was briefed and summarized, additional testimony was taken, and the objecting parties were permitted to cross-examine witnesses – including the Administrator – and present evidence or argument to the contrary. The ALJ agreed that Dobson was an eligible provider,[3] that the facilities in question were used in the provision of primary universal services, and that the expenses incurred by Dobson were as a result of a state government mandate. Despite the Administrator's recommendation, and her apparent agreement therewith, the ALJ indicated she was bound by recent Commission rulings in similar cases, made companions hereto, and recommended a denial of Dobson's request.

¶14 Thereafter, the Commission voted, 2-1, to deny Dobson's request. The two-person majority found that Dobson's request was not sufficiently supported by evidence as the confidential information reviewed by its Administrator was not included in the record before the Commission. The Commission further determined that Dobson failed to prove that the expenditures at issue were necessary to provide primary universal services at a reasonable and affordable rate. Finally, the Commission stated that it was without sufficient information to determine whether the expenses were incurred only for primary universal services.

¶15 Dobson appealed, requesting that the Commission's denial be reversed. We retained the matter and made it a companion to Case Nos. 115,453, 116,193, 116,194, 116,214, 116,215, and 116,422.

STANDARD OF REVIEW

¶16 This Court's review of decisions of the Commission is governed by the Oklahoma Constitution, article 9, § 20, which states as follows, in relevant part:

> The Supreme Court's review of appealable orders of the Corporation Commission shall be judicial only, and in all appeals involving an asserted violation of any right of the parties under the Constitution of the United States or the Constitution of the State of Oklahoma, the Court shall exercise its own independent judgment as to both the law and the facts. In all other appeals from orders of the Corporation Commission the review by the Supreme Court shall not extend further than to determine whether the Commission has regularly pursued its authority, and whether the findings and conclusions of the Commission are sustained by the law and substantial evidence.

Okla. Const. art. 9, § 20.

¶17 The issue in this appeal concerns the Commission's legal interpretation of the OUSF statute and the alleged arbitrary and capricious denial of funding in violation of the Oklahoma Constitution. Constitutional implications as well as statutory interpretation dictate our *de novo* review of this case. C*ox Oklahoma Telecom, LLC v. State ex rel. Oklahoma Corp. Comm'n*, 2007 OK 55, ¶9, n.17, 164 P.3d 150, 156. Under the *de novo* standard of review, the Court has plenary, independent and non-deferential authority to determine whether the trial tribunal erred in its legal rulings. *Cox Oklahoma Telecom, LLC v. State ex rel. Oklahoma Corp. Comm'n*, 2007 OK 55, ¶9, n.16, 164 P.3d 150, 156; *Neil Acquisition v. Wingrod Investment Corp.*, 1996 OK 125, ¶5, 932 P.2d 1100, 1103; *Fanning v. Brown,* 2004 OK 7, ¶8, 85 P.3d 841, 845.

¶18 This Court has found that the Commission's power "must be exercised only within the confines of its limited jurisdiction as provided by the Oklahoma Constitution" and state statute.[4] *Pub. Serv. Co. v. State ex rel. Corp. Comm'n,* 1997 OK 145, ¶23, 948 P.2d 713, 717. The Commission's "power to regulate is not unfettered." *Pub. Serv. Co. v. State ex rel. Corp. Comm'n*, 1996 OK 43, ¶21, 918 P.2d 733, 738.

DISCUSSION

¶19 Under the OUSF, eligible telecommunications providers serving fewer than 75,000 access lines are entitled to recover increases in costs as a result of changes to facilities that are required by state or federal law. 17 O.S.Supp. 2016, § 139.106(K).[5] It is undisputed that Dobson is an eligible provider under the Act. It is further undisputed that Dobson was required by ODOT to relocate its lines, causing it to incur an increase in costs. The Act mandates that where changes are "required by existing or future federal or state regulatory rules, orders, or policies or by federal or state law," and such changes cause an eligible provider to experience an increase in costs, the provider "**shall recover**" such "cost increases from the OUSF." 17 O.S.Supp.2016, § 139.106(K)(1)(b) (emphasis added). We have interpreted the use of the word "shall" by the Legislature "as a legislative mandate equivalent to the term 'must', requiring interpretation as a command." *Minie v. Hudson*, 1997 OK 26, ¶7, 934 P.2d 1082, 1086. Thus, under the express provisions of the Act, Dobson was entitled to receive reimbursement from the OUSF for these cost increases.

¶20 In support of its decision to deny Dobson's requested funding, the Commission's majority found that Dobson failed to produce sufficient evidence into the record. Despite acknowledging that its "Administrator was afforded, and took advantage of, the opportunity to perform a 'review of the Application, contractor's invoices, internal invoices, construction drawings, pre-engineering plans, work orders, plans and maps, timesheets, reimbursement checks, contracts, responses to data requests, relevant Oklahoma Statutes,' its

own administrative rules regarding the OUSF," the Commission ignored the Administrator's finding that the documents provided by Dobson supported its request for funding.[6] The Commission complained that it was limited to a mathematical review as many of the documents relied on, and reviewed by, the Administrator occurred on-site at Dobson's place of business and were not made publicly available due to the confidential nature of the documents.

¶21 Dobson points out that up until the filing of these companion cases, the Commission had for years previously accepted the Administrator's review of confidential documents on site. Dobson maintains that they should not be penalized for the Commission's option not to take advantage of the opportunity to review, or even request to review, any of the confidentially-redacted documents. Dobson also cites cases supporting the proposition that long-standing actions or interpretations by an agency will not be idly cast aside without proper notice to affected parties. *See, e.g., Oral Roberts Univ. v. Okla. Tax Comm'n*, 1985 OK 97, ¶10, 714 P.2d 1013, 1015 (Courts are reluctant to overturn long standing construction where parties having great interest in such construction will be prejudiced by its change); *Big Horn Coal Co. v. Temple,* 793 F.2d 1165, 1169 (10th Cir. 1986) ("Agencies are under an obligation to follow their own regulations, procedures, and precedents, or provide a rational explanation for their departures.").

¶22 The Administrator agreed with Dobson that the standard procedure followed by the Commission had always been for an applicant to fill out a Commission-approved form and make confidential information supporting its application available for the Commission to review on-site. He offered that this practice occurred not only in OUSF cases, but in numerous other Commission matters. We find the Commission was not entitled to discount Dobson's entire application merely because the documents the Administrator inspected and relied upon for his approval were not publicly filed of record before the Commission.

¶23 Dobson argues, and the Commission does not dispute, that the Commission's own rules and long-standing practices encouraged applicants to retain its confidential supporting materials on site, making such materials available for review and inspection as needed to support an application. In fact, Commission rule, OAC 165:59-3-72(d), specifically contemplates that "documentation not contained in the public record and not filed in the cause" may nevertheless be "relied upon by the OUSF Administrator in approving or denying an application." The Administrator disclosed that the Commission does not even have procedures in place that would allow it to handle "the responsibility or liability" of receiving such confidential materials.

¶24 Dobson filed an application, completed by using a Commission-issued form, which certified that as a result of an ODOT mandate to relocate its facilities it incurred an increase in costs in the amount of $55,032.54. The company presented the testimony of a company witness who reviewed all of Dobson's pertinent, confidential materials, and who confirmed the validity of the requested amounts. The Administrator also reviewed the confidential materials and agreed that Dobson's application and documentation supported the relief requested, as nominally modified by the Administrator to a lump sum of $54,766.71. The ALJ – although declining to recommend approval – likewise agreed with both the independent witness and the Administrator that Dobson's application and offered materials supported approval thereof. Despite these findings, the Commission unexpectedly faulted Dobson for failing to publicly submit its confidential materials when documents of such a nature have not been typically filed with the Commission, nor required. Such flawed reasoning should not support a denial of the application herein.

¶25 Additionally, for the first time in these companion cases, the Commission interpreted Subsection (K) to impose a finding that Dobson's rates for primary universal services are reasonable and affordable pursuant to Subsection (B) and that the requested funding is necessary to maintain such reasonable and affordable rates. As mentioned, *supra*, § 139.106(K)(1)(b) plainly provides that where a provider incurs increased costs due to a state law, order or policy, the provider SHALL recover the cost increase from the OUSF. *See* 17 O.S.Supp.2016, § 139.106(K)(1)(b). There is no mention of a condition that the applicant must prove that its rates are reasonable and affordable nor is there a requirement to find the reimbursement necessary to maintain such rates. To the contrary, § 139.106(K)(2) specifically states that an application's approval "shall not be conditioned upon any rate case or earnings investigation by the Commission." 17 O.S.Supp.2016, § 139.106(K)(1)(b). We are

not inclined to add requirements to a statute that the Legislature chose not to impose. *See Pentagon Acad., Inc. v. Indep. Sch. Dist. No. 1 of Tulsa Cty.*, 2003 OK 98, ¶19, 82 P.3d 587, 591 ("It is not the function of the courts to add new provisions which the legislature chose to withhold."); *Minie v. Hudson*, 1997 OK 26, ¶12, 934 P.2d 1082, 1087 ("This Court may not, through the use of statutory construction, change, modify or amend the expressed intent of the Legislature.").

¶26 Dobson contends that the Commission's complete denial of funding disregards the very purpose of the OUSF to ensure the availability of affordable telephone service to customers in rural and high cost areas where, absent the subsidies, their provision would be cost-prohibitive. We agree. The Commission ignores the plain language of the Act and attempts to impose new conditions not required by the Act, nor supportive of its purpose. Generally, applicants who filed under Subsection (K) could expect a quick reimbursement after approval by the Administrator that the application had followed the statutory process. The Commission's in-depth review of a Subsection (K) application would only arise if an outside entity filed a Request for Reconsideration of the Administrator's determination. Where no such reconsideration request is filed, the Administrator's approval, after a proper statutory review, would typically trigger a Commission order granting the applicant's request.

¶27 The Commission also criticized the fact that the relocated lines were used for services not related to primary universal services. The Commission maintains that Dobson should have allocated the cost of the project between such services. Dobson argues that a request for reimbursement under Subsection (K) does not require any such cost allocation nor has the Commission ever required one in previous Subsection (K) matters.

¶28 Subsection (K) plainly provides that where a provider incurs cost increases due to a state law or order, the provider SHALL recover the cost increase from the OUSF. 17 O.S.Supp. 2016, § 139.106(K)(1)(b). There is no mention of a requirement for cost allocation and we are not inclined to impose such requirement now. The Commission again ignores the plain language of the Act and attempts to impose new conditions not required by the Act, nor supportive of its purpose.

¶29 Dobson contends that the Commission's complete denial of funding disregards the very purpose of the OUSF to ensure the availability of affordable telephone service to customers in rural and high cost areas where, absent the subsidies, their provision would be cost-prohibitive. We agree. The Commission majority's disapproval of the policy behind the OUSF legislation has no bearing on the validity of an applicant's request for funding. We agree with the dissenting Commissioner that it is our duty to uphold legislation as it is enacted.

CONCLUSION

¶30 Although the Commission is not bound by the Administrator's recommendation, we find that the record reflects ample evidence with which to support the Administrator's determination. The Administrator, as well as the dissenting Commissioner, both agreed Dobson was entitled to reimbursement of the increased costs it incurred as a result of ODOT's mandate to relocate the telephone lines. The Commission's wholesale denial of Dobson's request was in error. Accordingly, we vacate the order of the Commission and remand the cause for further proceedings consistent with this opinion.

ORDER OF THE OKLAHOMA CORPORATION COMMISSION VACATED AND REMANDED.

CONCUR: GURICH, C.J., KAUGER, WINCHESTER, EDMONDSON, and DARBY, JJ.

CONCURRING SPECIALLY (by separate writing): COMBS, J.

NOT PARTICIPATING: COLBERT, AND REIF, JJ.

COMBS, J., concurring:

¶1 I concur in the majority opinion but write separately to emphasize the audacity of the Commission's blanket denial of Appellant's, Dobson Telephone Company, application. The legislature established a process by which a rural provider with limited resources is allowed to be reimbursed from the Oklahoma Universal Service Fund (OUSF) when the rural provider meets increased costs in fulfilling a mandate to provide reliable and affordable telephone service to Oklahomans in remote and underserved areas. The Commission's majority all but ignored the evidence presented ostensibly because of a fundamental disagreement with the Oklahoma Universal Service Fund.[1]

This is nothing more than an attempt to further disenfranchise rural Oklahoma from basic telephone services.

WINCHESTER, J.,

1. Section 139.107 provides, in part:

A. The Oklahoma Lifeline Fund (OLF) and the Oklahoma Universal Service Fund (OUSF) shall be funded in a competitively neutral manner not inconsistent with federal law by all contributing providers. The funding from each contributing provider shall be based on the total intrastate retail Oklahoma Voice over Internet Protocol (VoIP) revenues and intrastate telecommunications revenues, from both regulated and unregulated services, of the contributing provider, hereinafter referred to as assessed revenues, as a percentage of all assessed revenues of the contributing providers, or such other assessment methodology not inconsistent with federal law. VoIP services shall be assessed only as provided for in the decision of the Federal Communications Commission, FCC 10-185, released November 5, 2010, or such other assessment methodology that is not inconsistent with federal law. The Commission may after notice and hearing modify the contribution methodology for the OUSF and OLF, provided the new methodology is not inconsistent with federal law.

B. The Corporation Commission shall establish the OLF assessment and the OUSF assessment at a level sufficient to recover costs of administration and payments for OUSF and OLF requests for funding as provided for in the Oklahoma Telecommunications Act of 1997. The administration of the OLF and OUSF shall be provided by the Public Utility Division of the Commission. The administrative function shall be headed by the Administrator as defined in Section 139.102 of this title. The Administrator shall be an independent evaluator. The Administrator may enter into contracts to assist with the administration of the OLF and OUSF.

17 O.S.Supp.2016, § 139.107. "Contributing provider" as that term is used in § 139.107 means "providers, including but not limited to providers of intrastate telecommunications, providers of intrastate telecommunications for a fee on a non-common-carrier basis, providers of wireless telephone service and providers of interconnected Voice over Internet Protocol (VoIP). Contributing providers shall contribute to the Oklahoma Universal Service Fund and Oklahoma Lifeline Fund." 17 O.S.Supp.2016, § 139.102 (8).

2. Companion Case No. 115,453 involves a request for funds under Subsection (G) while the remaining six, companion cases, including the instant matter, involve requests brought under Subsection (K), set forth more fully herein. Those cases, also decided today, are Case Nos. 116,193, 116,194, 116,214, 116,215, and 116,422.

3. For purposes of this appeal, it is undisputed that Dobson is an eligible local exchange provider providing primary services to its customers.

4. The Oklahoma Constitution, art. 9, Section 18 specifies that the Commission has:

> the power and authority and [is] charged with the duty of supervising, regulating and controlling all transportation and transmission companies doing business in this State, in all matters relating to the performance of their public duties and their charges therefor, and of correcting abuses and preventing unjust discrimination and extortion by such companies; and to that end the Commission shall, from time to time, prescribe and enforce against such companies, in the manner hereinafter authorized, such rates, charges, classifications of traffic, and rules and regulations, and shall require them to establish and maintain all such public service, facilities, and conveniences as may be reasonable and just, which said rates, charges, classifications, rules, regulations, and requirements, the Commission may, from time to time, alter or amend.

5. Subsection 139.106(K) of the Act provides *in toto*:

K. 1. Each request for OUSF funding by an eligible ILEC serving less than seventy-five thousand access lines shall be premised upon the occurrence of one or more of the following:

a. in the event of a Federal Communications Commission order, rule or policy, the effect of which is to decrease the federal universal service fund revenues of an eligible local exchange telecommunications service provider, the eligible local exchange telecommunications service provider shall recover the decreases in revenues from the OUSF,

b. if, as a result of changes required by existing or future federal or state regulatory rules, orders, or policies or by federal or state law, an eligible local exchange telecommunications service provider experiences a reduction in revenues or an increase in costs, it shall recover the revenue reductions or cost increases from the OUSF, the recovered amounts being limited to the net reduction in revenues or cost increases, or

c. if, as a result of changes made as required by existing or future federal or state regulatory rules, orders, or policies or by federal or state law, an eligible local exchange telecommunications service provider experiences a reduction in costs, upon approval by the Commission, the provider shall reduce the level of OUSF funding it receives to a level sufficient to account for the reduction in costs.

2. The receipt of OUSF funds for any of the changes referred to in this subsection shall not be conditioned upon any rate case or earnings investigation by the Commission. The Commission shall, pursuant to subsection D of this section, approve the request for payment or adjustment of payment from the OUSF based on a comparison of the total annual revenues received from the sources affected by the changes described in paragraph 1 of this subsection by the requesting eligible local exchange telecommunications service provider during the most recent twelve (12) months preceding the request, and the reasonable calculation of total annual revenues or cost increases which will be experienced after the changes are implemented by the requesting eligible local exchange telecommunications service provider.

17 O.S.Supp.2016, § 139.106(K).

6. The ALJ likewise believed that Dobson was an eligible provider who had provided sufficient documentation to receive OUSF funding. Nevertheless, the ALJ deferred to the Commission rulings in the prior companion cases and recommended denial of the requested funds.

COMBS, J., concurring:

1. Appellant's Brief in Chief at 1, March 6, 2018, states "Commissioner Bob Anthony has repeatedly spoken out against the law [Oklahoma Universal Service Fund], even going so far as to ask the Legislature, in writing, to repeal it." He stated the Fund is a bad program that should be repealed. Tr. at 30-31, June 26, 2014, Ok. Sup. Ct. Case No. 113,362. The Brief also states other members of the Commission have expressed their displeasure with the law. Commissioner Murphy, however, dissented against the denial of the request for OUSF funding.

2019 OK 27

DOBSON TELEPHONE COMPANY, Appellant, v. STATE OF OKLAHOMA EX REL. OKLAHOMA CORPORATION COMMISSION, Appellee.

Case No. 116,422. April 16, 2019

APPEAL FROM OKLAHOMA CORPORATION COMMISSION CAUSE NO. PUD 201700041

Dana Murphy, Chairman; Todd Hiett, Vice Chairman; and Bob Anthony, Commissioner.

¶0 Dobson Telephone Company appeals the Oklahoma Corporation Commission's denial of its application for reimbursement from the Oklahoma Universal Services Fund for expenses incurred when it was ordered by the State Department of Transportation to relocate its telephone lines within the public right-of-way of a State construction project. We find that the Commission's wholesale denial of the reimbursement of the requested funds is in error. The Commission's ruling is hereby vacated

and the matter is remanded with directions to approve the requested funding.

ORDER OF THE OKLAHOMA CORPORATION COMMISSION REVERSED AND REMANDED WITH INSTRUCTIONS.

William H. Hoch, Melanie Wilson Rughani, Crowe & Dunlevy, P.C., Oklahoma City, Oklahoma, and Ron Commingdeer, Kendall W. Parrish, Ron Commingdeer & Associates, Oklahoma City, Oklahoma, for Appellant.

Michele Craig, Deputy General Counsel, Oklahoma Corporation Commission, Oklahoma City, Oklahoma, for Appellee.

Nancy M. Thompson, Oklahoma City, Oklahoma, for Sprint Communications Company, L.P., Sprint Spectrum L.P. and Virgin Mobile USA, L.P.

WINCHESTER, J.,

¶1 The issue before this Court is whether the Oklahoma Corporation Commission ("the Commission") erroneously withheld funding to be provided to Dobson Telephone Company ("Dobson") pursuant to the provisions of the Oklahoma Universal Service Fund ("OUSF"), 17 O.S.Supp.2016, § 139.106. For the reasons set forth herein, we find that Dobson is entitled to the requested funding.

STATUTORY BACKGROUND

¶2 In 1996, the U.S. Congress passed the federal Telecommunications Act, 47 U.S.C. §§ 151 *et seq*., in part, to promote a policy of universal service that would provide telecommunication services to consumers all over the country, including "those in rural, insular, and high cost areas." The Act seeks to provide access to services that are "reasonably comparable to those services provided in urban areas and that are available at rates that are reasonably comparable to rates charged for similar services in urban areas." 47 U.S.C. § 254(b)(3). The Oklahoma Legislature followed suit with its own, complementary Oklahoma Telecommunications Act of 1997 (the "Act"). 17 O.S.2011 and Supp.2016, §§ 139.101 *et seq*.

¶3 Under the state and federal Acts, certain telecommunications providers known as "carriers of last resort" are required to provide, without discrimination, telephone service to any customer requesting it. *See* 47 U.S.C. § 201; 17 O.S.2011 and Supp.2016, §§ 136 and 138. In addition, the provider must offer the requested services at reasonable and affordable rates in line with those offered in more urban areas even if serving such customers would not be economically sustainable. *See* 47 U.S.C. § 202; 47 U.S.C. § 254(b)(3), (g), (i). The purpose of the legislation was to provide affordable and quality primary universal services to all despite the challenges of its accessibility.

¶4 In an effort to defray the costs of delivering phone service in rural, more remote areas, the federal and state Acts each established a fund to help support eligible service providers. Within Oklahoma's Act, the Legislature created the OUSF to help pay for reasonable investments and expenses incurred by "eligible local exchange telecommunications service providers" in providing primary universal services to customers in rural and high-cost areas "at rates that are reasonable and affordable." *See* 17 O.S.Supp.2016, § 139.106 (A), (B), and (G). The OUSF generally provides that an eligible provider "may request funding from the OUSF as necessary to maintain rates for primary universal services that are reasonable and affordable." 17 O.S.Supp.2016, § 139.106 (G). The OUSF is funded by a charge paid by certain telecommunications carriers that have revenues as defined in Section 139.107. *See* 17 O.S.Supp.2016, §§ 139.106 (D) and 139.107.[1]

¶5 The Commission's rules governing the process for obtaining funding from the OUSF are set out in OAC 165:59, Part 9 and are overseen by the Administrator of the Commission's Public Utilities Division ("PUD"). Under the rules, upon receipt of a request for OUSF funding, the OUSF Administrator reviews the request and, if appropriate, reimburses the provider consistent with the Act. OAC 165:59-7-1(d) and OAC 165:59-3-62(g). Requests for Subsection (G)'s "as necessary" distributions are evaluated through a detailed study and analysis of the "costs of providing primary universal services" as well as potential revenue. 17 O.S.Supp.2016, § 139.106 (H). The re-view process for claims submitted under Subsection (G) can be time-consuming and tedious, often resulting in a significant delay in receipt of any funds.[2] As a result, the Legislature provided a mechanism within the Act that would allow providers in the rural areas quicker access to mandatory payments in certain, limited circumstances. *See* 17 O.S.Supp.2016, § 139.106(K).

¶6 Subsection (K)(1)(a) mandates that, if "a Federal Communications Commission order,

rule or policy" has the effect of "decreas[ing] the federal universal service fund revenues of an eligible local exchange telecommunications service provider," that provider "shall recover the decreases in revenues from the OUSF." 17 O.S.Supp.2016, § 139.106 (K)(1)(a). Similarly, Subsection (K)(1)(b) provides that, if changes required by "federal or state regulatory rules, orders, or policies" reduce the revenues or increase the costs to an eligible local exchange telecommunications service provider, then that provider "shall recover the revenue reductions or cost increases from the OUSF." 17 O.S.Supp. 2016, § 139.106 (K)(1)(b). Under Subsection (K), distributions from the OUSF "shall not be conditioned upon any rate case or earnings investigation by the Commission," but, instead, should be paid in an amount equal to the increase in costs or reduction in revenues. 17 O.S.Supp.2016, § 139.106 (K)(2).

¶7 The Commissioners are free to approve or reject any determination by the OUSF Administrator. Under the rules, if no one objects to the Administrator's determination, an order approving the funding request is issued by the Commission. OAC 165:59-3-62(j). If, however, a party is not satisfied with the OUSF Administrator's determination, the party may file a request for reconsideration by the Commission and the matter is set for hearing. OAC 165:59-3-62(h) and (i). The Commission is the ultimate arbiter of the issues. *See, Cameron v. Corporation Com 'n*, 1966 OK 75, ¶29, 414 P.2d 266, 272 (on appeal from an oil and gas spacing order, the Court noted that regardless of whatever weight the Commission may attach to an examiner's report, "the Commission is the final arbiter of the issues"). *See also, State ex rel. Cartwright v. Southwestern Bell Telephone Co.*, 1983 OK 40, ¶32, 662 P.2d 675, 681 (quoting *Cameron*).

¶8 The Commission, by a 2-1 vote, denied reimbursement. Commissioner Dana Murphy, dissenting in each of these companion cases, has stated that although she may not agree with the need for the fund, she feels she must uphold the Legislature's will as long as the fund exists. She dissented to the denial of Medicine Park's request stating that because she didn't believe the majority decision "comports with the Oklahoma Legislature's intent to, in part, provide support to small, rural carriers who have experienced increases in costs as a result of changes required by governmental acts and with the Legislative policy to preserve and advance universal services."

¶9 In 2014, the Commission denied a request for OUSF funding from Dobson Telephone Company. *See Dobson Telephone Co. v. State ex rel. Okla. Corporation Comm.*, 2017 OK CIV APP 16, 392 P.3d 295. Dobson sought reimbursement, under Subsection (K)1)(b) of the OUSF, for costs incurred to relocate its telephone facilities as required by the city of Oklahoma City for a street-widening project. Because the request had been issued by the city, and not the county commission or ODOT, the Commission narrowly interpreted the statute and concluded that the Fund was not authorized to pay for such relocation costs.

¶10 The Court of Civil Appeals found that the Commission's interpretation of the statutory language defeats the purpose of the Fund and is contra to the legislative intent to defray increased costs incurred by eligible telecommunications service providers resulting from government action, no matter the originating government entity. *Dobson Telephone Co. v. State ex rel. Okla. Corporation Comm.*, 2017 OK CIV APP 16, ¶21, 392 P.3d 295, 305. The Commission's Order was vacated and the matter was remanded for further proceedings consistent with the Court of Civil Appeals opinion. *Dobson Telephone Co. v. State ex rel. Okla. Corporation Comm.*, 2017 OK CIV APP 16, ¶23, 392 P.3d 295, 305. This Court approved the case for publication.

FACTUAL BACKGROUND

¶11 Dobson provides telecommunications services to customers in rural areas of Oklahoma, serving fewer than 75,000 access lines. On September 30, 2014, the Oklahoma Department of Transportation (ODOT) sent a letter to Dobson ordering the relocation of certain telephone lines within a public right-of-way of an ODOT, highway construction project on State Highway 33, in Roger Mills County. Dobson moved the lines as requested for a net total of $29,166.55, after accounting for limited ODOT funding in the amount of $4,761. Dobson then filed an application with the Commission, under Subsection (K)(1)(b), for reimbursement of this amount from the OUSF using a form created by the Commission and following the same process as other companies when seeking an OUSF refund.

¶12 Dobson made detailed, confidential information regarding the project's costs available for inspection to the Commission's OUSF Administrator. This included information re-

garding the costs incurred, invoices for engineering, equipment and supplies, and internal employee timesheets and wages. The Administrator reviewed Dobson's application, inspected the confidential information and ultimately approved a reimbursement for Dobson in the amount of $28,817.23. It disallowed $349.32 due to a lack of supporting invoices.

¶13 Various competitor telephone companies, collectively known as Sprint for purposes of this appeal, objected and filed a Request for Reconsideration on May 11, 2017. A hearing was held before an ALJ, where the evidence was briefed and summarized, additional testimony was taken, and the objecting parties were permitted to cross-examine witnesses – including the Administrator – and present evidence or argument to the contrary. The ALJ agreed that Dobson was an eligible provider,[3] that the facilities in question were used in the provision of primary universal services, and that the expenses incurred by Dobson were as a result of a state government mandate. Despite the Administrator's recommendation, and her apparent agreement therewith, the ALJ indicated she was bound by recent Commission rulings in similar cases, made companions hereto, and recommended a denial of Dobson's request.

¶14 Thereafter, the Commission voted, 2-1, to deny Dobson's request. The two-person majority found that Dobson's request was not sufficiently supported by evidence as the confidential information reviewed by its Administrator was not included in the record before the Commission. The Commission further determined that Dobson failed to prove that the expenditures at issue were necessary to provide primary universal services at a reasonable and affordable rate. Finally, the Commission stated that it was without sufficient information to determine whether the expenses were incurred only for primary universal services.

¶15 Dobson appealed, requesting that the Commission's denial be reversed. We retained the matter and made it a companion to Case Nos. 115,453, 116,193, 116,194, 116,214, 116,215, and 116,421.

STANDARD OF REVIEW

¶16 This Court's review of decisions of the Commission is governed by the Oklahoma Constitution, article 9, § 20, which states as follows, in relevant part:

> The Supreme Court's review of appealable orders of the Corporation Commission shall be judicial only, and in all appeals involving an asserted violation of any right of the parties under the Constitution of the United States or the Constitution of the State of Oklahoma, the Court shall exercise its own independent judgment as to both the law and the facts. In all other appeals from orders of the Corporation Commission the review by the Supreme Court shall not extend further than to determine whether the Commission has regularly pursued its authority, and whether the findings and conclusions of the Commission are sustained by the law and substantial evidence.

Okla. Const. art. 9, § 20.

¶17 The issue in this appeal concerns the Commission's legal interpretation of the OUSF statute and the alleged arbitrary and capricious denial of funding in violation of the Oklahoma Constitution. Constitutional implications as well as statutory interpretation dictate our *de novo* review of this case. *Cox Oklahoma Telecom, LLC v. State ex rel. Oklahoma Corp. Comm'n,* 2007 OK 55, ¶9, n.17, 164 P.3d 150, 156. Under the *de novo* standard of review, the Court has plenary, independent and non-deferential authority to determine whether the trial tribunal erred in its legal rulings. *Cox Oklahoma Telecom, LLC v. State ex rel. Oklahoma Corp. Comm'n*, 2007 OK 55, ¶9, n.16, 164 P.3d 150, 156; *Neil Acquisition v. Wingrod Investment Corp.,* 1996 OK 125, ¶5, 932 P.2d 1100, 1103; *Fanning v. Brown*, 2004 OK 7, ¶8, 85 P.3d 841, 845.

¶18 This Court has found that the Commission's power "must be exercised only within the confines of its limited jurisdiction as provided by the Oklahoma Constitution" and state statute.[4] *Pub. Serv. Co. v. State ex rel. Corp. Comm'n,* 1997 OK 145, ¶23, 948 P.2d 713, 717. The Commission's "power to regulate is not unfettered." *Pub. Serv. Co. v. State ex rel. Corp. Comm'n,* 1996 OK 43, ¶21, 918 P.2d 733, 738.

DISCUSSION

¶19 Under the OUSF, eligible telecommunications providers serving fewer than 75,000 access lines are entitled to recover increases in costs as a result of changes to facilities that are required by state or federal law. 17 O.S. Supp.2016, § 139.106(K).[5] It is undisputed that Dobson is an eligible provider under the Act. It is further undisputed that Dobson was required by ODOT to relocate its lines, causing it to incur

an increase in costs. The Act mandates that where changes are "required by existing or future federal or state regulatory rules, orders, or policies or by federal or state law," and such changes cause an eligible provider to experience an increase in costs, the provider "**shall recover**" such "cost increases from the OUSF." 17 O.S.Supp.2016, § 139.106(K)(1)(b) (emphasis added). We have interpreted the use of the word "shall" by the Legislature "as a legislative mandate equivalent to the term 'must', requiring interpretation as a command." *Minie v. Hudson*, 1997 OK 26, ¶7, 934 P.2d 1082, 1086. Thus, under the express provisions of the Act, Dobson was entitled to receive reimbursement from the OUSF for these cost increases.

¶20 In support of its decision to deny Dobson's requested funding, the Commission's majority found that Dobson failed to produce sufficient evidence into the record. Despite acknowledging that its "Administrator was afforded, and took advantage of, the opportunity to perform a 'review of the Application, contractor's invoices, internal invoices, construction drawings, pre-engineering plans, work orders, plans and maps, timesheets, reimbursement checks, contracts, responses to data requests, relevant Oklahoma Statutes,' its own administrative rules regarding the OUSF," the Commission ignored the Administrator's finding that the documents provided by Dobson supported its request for funding.[6] The Commission complained that it was limited to a mathematical review as many of the documents relied on, and reviewed by, the Administrator occurred on-site at Dobson's place of business and were not made publicly available due to the confidential nature of the documents.

¶21 Dobson points out that up until the filing of these companion cases, the Commission had for years previously accepted the Administrator's review of confidential documents on site. Dobson maintains that they should not be penalized for the Commission's option not to take advantage of the opportunity to review, or even request to review, any of the confidentially-redacted documents. Dobson also cites cases supporting the proposition that long-standing actions or interpretations by an agency will not be idly cast aside without proper notice to affected parties. *See, e.g., Oral Roberts Univ. v. Okla. Tax Comm'n,* 1985 OK 97, ¶10, 714 P.2d 1013, 1015 (Courts are reluctant to overturn long standing construction where parties having great interest in such construction will be prejudiced by its change); *Big Horn Coal Co. v. Temple,* 793 F.2d 1165, 1169 (10th Cir. 1986) ("Agencies are under an obligation to follow their own regulations, procedures, and precedents, or provide a rational explanation for their departures.").

¶22 The Administrator agreed with Dobson that the standard procedure followed by the Commission had always been for an applicant to fill out a Commission-approved form and make confidential information supporting its application available for the Commission to review on-site. He offered that this practice occurred not only in OUSF cases, but in numerous other Commission matters. We find the Commission was not entitled to discount Dobson's entire application merely because the documents the Administrator inspected and relied upon for his approval were not publicly filed of record before the Commission.

¶23 Dobson argues, and the Commission does not dispute, that the Commission's own rules and long-standing practices encouraged applicants to retain its confidential supporting materials on site, making such materials available for review and inspection as needed to support an application. In fact, Commission rule, OAC 165:59-3-72(d), specifically contemplates that "documentation not contained in the public record and not filed in the cause" may nevertheless be "relied upon by the OUSF Administrator in approving or denying an application." The Administrator disclosed that the Commission does not even have procedures in place that would allow it to handle "the responsibility or liability" of receiving such confidential materials.

¶24 Dobson filed an application, completed by using a Commission-issued form, which certified that as a result of an ODOT mandate to relocate its facilities it incurred an increase in costs in the amount of $29,166.55, after subtracting an ODOT reimbursement of $4761.00. The company presented the testimony of a company witness who reviewed all of Dobson's pertinent, confidential materials, and who confirmed the validity of the requested amounts. The Administrator also reviewed the confidential materials and agreed that Dobson's application and documentation supported the relief requested, as nominally modified by the Administrator to a lump sum of $28,817.23. The ALJ – although declining to recommend approval – likewise agreed with both the independent witness and the Administrator that Dobson's application and offered materials supported approval thereof. Despite

these findings, the Commission unexpectedly faulted Dobson for failing to publicly submit its confidential materials when documents of such a nature have not been typically filed with the Commission, nor required. Such flawed reasoning should not support a denial of the application herein.

¶25 Additionally, for the first time in these companion cases, the Commission interpreted Subsection (K) to impose a finding that Dobson's rates for primary universal services are reasonable and affordable pursuant to Subsection (B) and that the requested funding is necessary to maintain such reasonable and affordable rates. As mentioned, *supra*, § 139.106(K)(1)(b) plainly provides that where a provider incurs increased costs due to a state law, order or policy, the provider SHALL recover the cost increase from the OUSF. *See* 17 O.S.Supp.2016, § 139.106(K)(1)(b). There is no mention of a condition that the applicant must prove that its rates are reasonable and affordable nor is there a requirement to find the reimbursement necessary to maintain such rates. To the contrary, § 139.106(K)(2) specifically states that an application's approval "shall not be conditioned upon any rate case or earnings investigation by the Commission." 17 O.S.Supp.2016, § 139.106(K)(1)(b). We are not inclined to add requirements to a statute that the Legislature chose not to impose. *See Pentagon Acad., Inc. v. Indep. Sch. Dist. No. 1 of Tulsa Cty.*, 2003 OK 98, ¶19, 82 P.3d 587, 591 ("It is not the function of the courts to add new provisions which the legislature chose to withhold."); *Minie v. Hudson*, 1997 OK 26, ¶12, 934 P.2d 1082, 1087 ("This Court may not, through the use of statutory construction, change, modify or amend the expressed intent of the Legislature.").

¶26 Dobson contends that the Commission's complete denial of funding disregards the very purpose of the OUSF to ensure the availability of affordable telephone service to customers in rural and high cost areas where, absent the subsidies, their provision would be cost-prohibitive. We agree. The Commission ignores the plain language of the Act and attempts to impose new conditions not required by the Act, nor supportive of its purpose. Generally, applicants who filed under Subsection (K) could expect a quick reimbursement after approval by the Administrator that the application had followed the statutory process. The Commission's in-depth review of a Subsection (K) application would only arise if an outside entity filed a Request for Reconsideration of the Administrator's determination. Where no such reconsideration request is filed, the Administrator's approval, after a proper statutory review, would typically trigger a Commission order granting the applicant's request.

¶27 The Commission also criticized the fact that the relocated lines were used for services not related to primary universal services. The Commission maintains that Dobson should have allocated the cost of the project between such services. Dobson argues that a request for reimbursement under Subsection (K) does not require any such cost allocation nor has the Commission ever required one in previous Subsection (K) matters.

¶28 Subsection (K) plainly provides that where a provider incurs cost increases due to a state law or order, the provider SHALL recover the cost increase from the OUSF. 17 O.S.Supp. 2016, § 139.106(K)(1)(b). There is no mention of a requirement for cost allocation and we are not inclined to impose such requirement now. The Commission again ignores the plain language of the Act and attempts to impose new conditions not required by the Act, nor supportive of its purpose.

¶29 Dobson contends that the Commission's complete denial of funding disregards the very purpose of the OUSF to ensure the availability of affordable telephone service to customers in rural and high cost areas where, absent the subsidies, their provision would be cost-prohibitive. We agree. The Commission majority's disapproval of the policy behind the OUSF legislation has no bearing on the validity of an applicant's request for funding. We agree with the dissenting Commissioner that it is our duty to uphold legislation as it is enacted.

CONCLUSION

¶30 Although the Commission is not bound by the Administrator's recommendation, we find that the record reflects ample evidence with which to support the Administrator's determination. The Administrator, as well as the dissenting Commissioner, both agreed Dobson was entitled to reimbursement of the increased costs it incurred as a result of ODOT's mandate to relocate the telephone lines. The Commission's wholesale denial of Dobson's request was in error. Accordingly, we vacate the order of the Commission and remand the cause for further proceedings consistent with this opinion.

ORDER OF THE OKLAHOMA CORPORATION COMMISSION VACATED AND REMANDED.

CONCUR: GURICH, C.J., KAUGER, WINCHESTER, EDMONDSON, and DARBY, JJ.

CONCURRING SPECIALLY (by separate writing): COMBS, J.

NOT PARTICIPATING: COLBERT, AND REIF, JJ.

COMBS, J., concurring:

¶1 I concur in the majority opinion but write separately to emphasize the audacity of the Commission's blanket denial of Appellant's, Dobson Telephone Company, application. The legislature established a process by which a rural provider with limited resources is allowed to be reimbursed from the Oklahoma Universal Service Fund (OUSF) when the rural provider meets increased costs in fulfilling a mandate to provide reliable and affordable telephone service to Oklahomans in remote and underserved areas. The Commission's majority all but ignored the evidence presented ostensibly because of a fundamental disagreement with the Oklahoma Universal Service Fund.1 This is nothing more than an attempt to further disenfranchise rural Oklahoma from basic telephone services.

WINCHESTER, J.,

1. Section 139.107 provides, in part:

A. The Oklahoma Lifeline Fund (OLF) and the Oklahoma Universal Service Fund (OUSF) shall be funded in a competitively neutral manner not inconsistent with federal law by all contributing providers. The funding from each contributing provider shall be based on the total intrastate retail Oklahoma Voice over Internet Protocol (VoIP) revenues and intrastate telecommunications revenues, from both regulated and unregulated services, of the contributing provider, hereinafter referred to as assessed revenues, as a percentage of all assessed revenues of the contributing providers, or such other assessment methodology not inconsistent with federal law. VoIP services shall be assessed only as provided for in the decision of the Federal Communications Commission, FCC 10-185, released November 5, 2010, or such other assessment methodology that is not inconsistent with federal law. The Commission may after notice and hearing modify the contribution methodology for the OUSF and OLF, provided the new methodology is not inconsistent with federal law.

B. The Corporation Commission shall establish the OLF assessment and the OUSF assessment at a level sufficient to recover costs of administration and payments for OUSF and OLF requests for funding as provided for in the Oklahoma Telecommunications Act of 1997. The administration of the OLF and OUSF shall be provided by the Public Utility Division of the Commission. The administrative function shall be headed by the Administrator as defined in Section 139.102 of this title. The Administrator shall be an independent evaluator. The Administrator may enter into contracts to assist with the administration of the OLF and OUSF.

17 O.S.Supp.2016, § 139.107. "Contributing provider" as that term is used in § 139.107 means "providers, including but not limited to providers of intrastate telecommunications, providers of intrastate telecommunications for a fee on a non-common-carrier basis, providers of wireless telephone service and providers of interconnected Voice over Internet Protocol (VoIP). Contributing providers shall contribute to the Oklahoma Universal Service Fund and Oklahoma Lifeline Fund." 17 O.S.Supp.2016, § 139.102 (8).

2 .Companion Case No. 115,453 involves a request for funds under Subsection (G) while the remaining six, companion cases, including the instant matter, involve requests brought under Subsection (K), set forth more fully herein. Those cases, also decided today, are Case Nos. 116,193, 116,194, 116,214, 116,215, and 116,421.

3. For purposes of this appeal, it is not disputed that Dobson is an eligible local exchange provider providing primary services to its customers.

4. The Oklahoma Constitution, art. 9, Section 18 specifies that the Commission has:

> the power and authority and [is] charged with the duty of supervising, regulating and controlling all transportation and transmission companies doing business in this State, in all matters relating to the performance of their public duties and their charges therefor, and of correcting abuses and preventing unjust discrimination and extortion by such companies; and to that end the Commission shall, from time to time, prescribe and enforce against such companies, in the manner hereinafter authorized, such rates, charges, classifications of traffic, and rules and regulations, and shall require them to establish and maintain all such public service, facilities, and conveniences as may be reasonable and just, which said rates, charges, classifications, rules, regulations, and requirements, the Commission may, from time to time, alter or amend.

5. Subsection 139.106(K) of the Act provides *in toto*:

> K. 1. Each request for OUSF funding by an eligible ILEC serving less than seventy-five thousand access lines shall be premised upon the occurrence of one or more of the following:
>
> a. in the event of a Federal Communications Commission order, rule or policy, the effect of which is to decrease the federal universal service fund revenues of an eligible local exchange telecommunications service provider, the eligible local exchange telecommunications service provider shall recover the decreases in revenues from the OUSF,
>
> b. if, as a result of changes required by existing or future federal or state regulatory rules, orders, or policies or by federal or state law, an eligible local exchange telecommunications service provider experiences a reduction in revenues or an increase in costs, it shall recover the revenue reductions or cost increases from the OUSF, the recovered amounts being limited to the net reduction in revenues or cost increases, or
>
> c. if, as a result of changes made as required by existing or future federal or state regulatory rules, orders, or policies or by federal or state law, an eligible local exchange telecommunications service provider experiences a reduction in costs, upon approval by the Commission, the provider shall reduce the level of OUSF funding it receives to a level sufficient to account for the reduction in costs.
>
> 2. The receipt of OUSF funds for any of the changes referred to in this subsection shall not be conditioned upon any rate case or earnings investigation by the Commission. The Commission shall, pursuant to subsection D of this section, approve the request for payment or adjustment of payment from the OUSF based on a comparison of the total annual revenues received from the sources affected by the changes described in paragraph 1 of this subsection by the requesting eligible local exchange telecommunications service provider during the most recent twelve (12) months preceding the request, and the reasonable calculation of total annual revenues or cost increases which will be experienced after the changes are implemented by the requesting eligible local exchange telecommunications service provider.

17 O.S.Supp.2016, § 139.106(K).

6. The ALJ likewise believed that Dobson was an eligible provider who had provided sufficient documentation to receive OUSF funding. Nevertheless, the ALJ deferred to the Commission rulings in the prior companion cases and recommended denial of the requested funds.

COMBS, J., concurring:

1. Appellant's Brief in Chief at 1, March 6, 2018, states "Commissioner Bob Anthony has repeatedly spoken out against the law [Oklahoma Universal Service Fund], even going so far as to ask the Legislature, in writing, to repeal it." He stated the Fund is a bad program that should be repealed. Tr. at 30-31, June 26, 2014, Ok. Sup. Ct. Case No. 113,362. The Brief also states other members of the Commission have expressed their displeasure with the law. Commissioner Murphy, however, dissented against the denial of the request for OUSF funding.

Opinions of Court of Criminal Appeals

2019 OK CR 5

JONAS JORGE CONROY-PEREZ, Appellant, -vs- THE STATE OF OKLAHOMA, Appellee.

No. F-2017-559. Thursday, April 4, 2019

SUMMARY OPINION

LUMPKIN, JUDGE:

¶1 Appellant, Jonas Jorge Conroy-Perez, appeals from the acceleration of his deferred judgment and sentencing in Case No. CF-2014-182 in the District Court of Washita County, by the Honorable Christopher S. Kelly, Associate District Judge. On August 20, 2015, Appellant entered a negotiated plea of guilty to Harboring a Fugitive From Justice, and judgment and sentencing was deferred for two years until August 17, 2017, pursuant to rules and conditions of probation.

¶2 On February 11, 2016, the State filed an application to accelerate Appellant's deferred sentencing alleging he violated probation by (1) having new felony charges filed for Knowingly Concealing Stolen Property in the District Court of Washita County; and (2) by failing, refusing and neglecting to pay his "Prosecution Reimbursement fees to the District Attorney's Office." On May 30, 2017, the hearing on the application to accelerate was held before Judge Kelly.

¶3 At the hearing, the State presented the testimony of Brittani Brice ("Brice"), a victim/witness coordinator for the Washita County District Attorney's Office. Brice testified that in August of 2015 Appellant had been ordered to pay $960.00 in District Attorney supervision fees; Appellant made a payment of $80.00 on January 15, 2016, as his only payment; and thus his current balance was $880.00. On cross-examination, Brice testified that she had not checked on and was not testifying about Appellant's financial condition, only that he owes $880.00. After Brice's testimony, the State rested.[1]

¶4 Appellant testified in his own defense. Appellant said he had not worked since June 11, 2015, when he was in a vehicle wreck while working for a television and appliance company. Appellant testified he was on worker's compensation and could not work because he needed arm surgery and because of a pending worker's compensation settlement. On cross-examination, Appellant acknowledged his accident occurred about one and one-half months before he entered his plea in this case and he knew about his medical issues and his worker's compensation issues when he entered the plea agreement. After his testimony, Appellant rested.

¶5 In closing, the State argued that, while it was understandable Appellant wasn't working because of his pending surgery and pending worker's compensation settlement, he still had the responsibility to make required payments. The State also noted Appellant agreed to make the payments after his accident. The State asked that Appellant be convicted and sentenced to a term of five years, with all but the first ninety days suspended. Counsel for Appellant argued the evidence showed he is willing and wants to work but can't because of his physical disability caused by the accident.

¶6 After hearing the arguments, Judge Kelly stated that, having reviewed the evidence and testimony, Appellant had violated his rules and conditions of probation and his deferred judgment would be accelerated to a term of ten years with DOC, with all time suspended except for the first ninety days.

¶7 Appellant filed this appeal asserting four propositions of error:

PROPOSITION I:

MR. CONROY-PEREZ WAS DENIED DUE PROCESS AND A FAIR HEARING WHEN HIS SENTENCE WAS ACCELERATED FOR VIOLATING A CONDITION OF PROBATION THAT WAS NOT ORDERED.

PROPOSITION II:

THE TRIAL COURT ABUSED ITS DISCRETION BY ACCELERATING MR. CONROY-PEREZ'S SENTENCE BASED SOLELY ON FINANCIAL REASONS.

PROPOSITION III:

APPELLANT WAS DENIED THE EFFECTIVE ASSISTANCE OF COUNSEL TO WHICH HE WAS ENTITLED UNDER THE

6TH AND 14TH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND ART. II, §§ 7 AND 20 OF THE OKLAHOMA CONSTITUTION.

PROPOSITION IV:

UNDER THE FACTS OF THIS CASE, A SENTENCE OF TEN YEARS IS EXCESSIVE.

ANALYSIS

¶8 In Proposition I, Appellant claims he was never ordered to pay prosecution reimbursement fees to the District Attorney's Office, as alleged in the State's application to accelerate his deferred sentencing, and therefore he was denied due process by being accelerated for his failure to pay supervision fees to the District Attorney's Office. Appellant's rules and conditions of probation state that he shall "Pay $40.00 per month **District Attorney's Probation Fee . . . EACH MONTH OF PROBATION."** (O.R. 40-41, emphasis in original). The rules and conditions do not differentiate as to whether they are prosecution reimbursement fees or supervision fees. Even if the fees were described as supervision fees during the sentencing hearing, Appellant had clear notice that he had been ordered to pay $40.00 per month in probation fees to the District Attorney's office throughout the term of his probation.

¶9 An application to revoke probation "must allege facts with such clarity that the defense is able to determine what reason is being submitted as grounds for revocation, enabling preparation of a defense to the allegation." *Lennox v. State,* 1984 OK CR 22, ¶ 6, 674 P.2d 1146, 1148-49. Appellant is correct that his application to accelerate alleges he failed to pay prosecution reimbursement fees to the District Attorney's office. However, the application sufficiently alleges Appellant's failure to pay probation fees to the District Attorney's office as the reason being submitted as grounds for acceleration of his deferred sentencing and, as shown in the analysis of Proposition II, enabled Appellant to prepare a defense to the allegation. Proposition I is denied.

¶10 In Proposition II, Appellant claims his judgment and sentencing was accelerated solely because of his inability to pay fees. Appellant contends that the District Court erred when it made no findings concerning his ability to pay the fees.

¶11 When the State seeks to revoke probation based upon a failure to make payments, the State has the burden to prove by a preponderance of the evidence that the probationer has failed to make the required payments. *McCaskey v. State*, 1989 OK CR 63, ¶ 4, 781 P.2d 836, 837 (citing *Bearden v. Georgia*, 461 U.S. 660, 103 S.Ct. 2064, 76 L.Ed.2d 221 (1983)); see also Winbush v. State, 2018 OK CR 38, 433 P.3d 1275. Once the State has met this burden, the burden shifts to the probationer to show that the failure to pay was not willful, or that Appellant has made a good faith effort to make restitution. *Id.* If the probationer presents evidence to show non-payment was not willful, the hearing court must make a finding of fact regarding the probationer's ability to pay. *Id*.

¶12 In this case, the State proved that Appellant failed to make required payments of $40.00 per month on District Attorney probation fees, and was $880.00 in arrears on those payments. In defense, Appellant testified he had not been able to work throughout the term of his probation due to a work related vehicle accident. Appellant testified he could not make the required payments because he needed arm surgery and because of a pending worker's compensation settlement. The District Court accelerated Appellant's deferred judgment and sentencing stating only that Appellant violated his rules and condition of probation, and that the decision was made after review of the evidence and testimony presented.

¶13 We find the Appellant in this case presented evidence indicating that his failure to pay District Attorney probation fees was not willful, and that such evidence was sufficient to require further inquiry and findings by the District Court. *McCaskey*, 1989 OK CR 63 at ¶ 4, 781 P.2d at 837. We find the District Court erred by revoking Appellant's probation without making findings regarding his ability to pay. *Id.* The District Court's acceleration of Appellant's deferred judgment and sentencing must be reversed, and the matter remanded for further proceedings, including a determination of whether Appellant showed that his failure to pay the District Attorney probation fees was not willful, and whether he had made sufficient good faith efforts to make the payments.

¶14 In Proposition III, Appellant claims his counsel was ineffective for failing to recognize and assert the error alleged in Proposition I, concerning prosecution reimbursement fees versus supervision fees. To establish a claim of ineffective assistance of counsel, Appellant must first show that his counsel's performance

was deficient, and then he must show the deficient performance prejudiced the defense. *Bland v. State*, 2000 OK CR 11, ¶ 112, 4 P.3d 702, 730-31 (citing *Strickland v. Washington*, 466 U.S. 668, 687, 104 S.Ct. 2052, 2064, 80 L.Ed.2d 674 (1984)). Because there is no error in Proposition I, Appellant hasn't shown his counsel's performance was deficient or that his defense was prejudiced. Proposition III is denied.

¶15 Appellant's Proposition IV regarding excessiveness of his sentence is moot because of the resolution of Proposition II. Moreover, the proper method of raising an excessive sentence claim after acceleration of a deferred sentence is by a motion to withdraw plea and petition for writ of certiorari. *Hausle v. State*, 2017 OK CR 5, ¶¶ 5-6, 394 P.3d 1278, 1280; *Whitaker v. State*, 2015 OK CR 1, ¶¶ 6-12, 341 P.3d 87, 89-90.

DECISION

¶16 The order of the District Court of Washita County accelerating Appellant's deferred judgment and sentencing in Case No. CF-2014-182 is **REVERSED** and the matter is **REMANDED** to the District Court for further proceedings. Pursuant to Rule 3.15, *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch.18, App. (2019), the **MANDATE** is **ORDERED** issued upon the filing of this decision.

AN APPEAL FROM THE DISTRICT COURT OF WASHITA COUNTY, THE HONORABLE CHRISTOPHER S. KELLY, ASSOCIATE DISTRICT JUDGE

APPEARANCES IN THE DISTRICT COURT

Robert S. Keith, Attorney at Law, P.O. Box 1494, Clinton, OK 73601, Counsel for Defendant

Brooke Gatlin, Assistant District Attorney, Washita County Courthouse, 111 East Main Street, Counsel for the State

APPEARANCES ON APPEAL

Nancy Walker-Johnson, Appellate Defense Counsel, P.O. Box 926, Norman, OK 73070, Counsel for Appellant

Mike Hunter, Attorney General of Oklahoma, Diane L. Slayton, Assistant Attorney General, 313 N.E. 21st Street, Oklahoma City, OK 73105, Counsel for the State

OPINION BY: LUMPKIN, J.
LEWIS, P.J.: Concur
KUEHN, V.P.J.: Dissent
HUDSON, J.: Concur
ROWLAND, J.: Concur

KUEHN, V.P.J., DISSENTING:

¶1 Appellant owed $880 in District Attorney Supervision fees, and the District Attorney filed an Application to Accelerate his deferred sentence. Interestingly, the State also alleged newly committed offenses as additional grounds for accelerating Appellant's sentence, but it never introduced evidence of those offenses at the hearing.[1] As I have warned before: "To revoke an Appellant at a revocation proceeding by presenting only evidence of failure to pay without any evidence of willfulness, instead of presenting evidence in support of the more serious violation of committing new crimes, is a dangerous and inappropriate procedure to adopt." *Winbush v. State*, 2018 OK CR 38, 433 P.3d 1275 (Kuehn, J., dissenting, at ¶ 4). Accelerating Appellant's probation in full, due solely to unfulfilled financial obligations, was an abuse of discretion under these facts and the law. I dissent.

¶2 I continue to hold that the trial judge must inquire into a probationer's ability to pay before imprisoning him or her solely for nonpayment of fines, costs or assessments. *Winbush*, (Kuehn, J., dissenting) (citing *Bearden v. Georgia*, 461 U.S. 660, 103 S. Ct. 2064, 76 L.Ed.2d 221 (1983).[2] But even if an acceptable judicial inquiry had been made into Appellant's ability to pay or alternatives to incarceration, the judge also erred in not making a detailed finding, on the record, that his inability to pay was willful. Nevertheless, Appellant did what *Winbush* requires him to do: present evidence that his failure to pay was not willful. He presented evidence that he was on worker's disability, was not working, and needed arm surgery that he could not afford. The Majority acknowledges that the Appellant presented evidence on the issue, but only sees this as sufficient to warrant "*further inquiry*" by the court before making a formal finding on the issue.

¶3 Further inquiry is unnecessary. After the guidance provided in *Winbush*, the trial court has nothing more to ask. Both parties presented their evidence, and the judge made his decision. Although the judge should have made a finding of willfulness on the record, it is obvious from his decision to accelerate that he found Appellant's evidence unpersuasive; and again, there were no alleged probation viola-

tions to consider except failure to pay fees. Remand for further proceedings is simply inviting the trial court to make a finding that would not be supported by the record. All paths led to Rome, and our appellate review turns on whether an abuse of discretion occurred.

¶4 The State presented evidence of non-payment. Appellant presented evidence that he did not have the money to pay, and that the money he did have was disability proceeds. It is illegal for the State to collect money from a defendant to pay fines and fees from his government assistance for disability.[3] What more could Appellant do to establish that his failure to pay was not willful? Does the Majority hope the State will somehow disprove the defense testimony by allowing the record to be reopened? We already know the judge is not to inquire. Appellant received 90 days in jail and felony conviction, and went from two years of probation to ten years, all without one graduated sanction or any alternatives to payment.

¶5 An "abuse of discretion" is a clearly erroneous conclusion and judgment, one clearly against the logic and effect of the facts presented. *Neloms v. State*, 2012 OK CR 7, ¶ 35, 274 P.3d 161, 170. I believe the trial court abused its discretion here, and would vacate the trial court's order to accelerate the deferred sentence.

LUMPKIN, JUDGE

1. The State presented no evidence on the alleged probation violation of having new felony charges filed in the District Court of Washita County for Knowingly Concealing Stolen Property.

KUEHN, V.P.J, DISSENTING:

1. The State abandoned the more serious probation violations by asking the court to dismiss those new non-violent felony charges on November 30, 2016.

2. *See also Spann v. State*, Case No. RE-2017-706, (unpub. Nov. 8, 2018) (Kuehn, J., concurring in result); *Bailey v. State*, Case No. RE-2016-875, (unpub. May 3, 2018) (Kuehn, J., concurring in result); *Cotton v. State*, Case No. RE-2016-193, (unpub. Jan. 18, 2018) (Kuehn, J., concurring in part/dissenting in part); *Black v. State*, Case No. RE-2018-134, (unpub. Nov. 29, 2018) (Kuehn, J., concurring in result); *Sherman v. State*, Case No. RE-2016-642, (unpub. July 12, 2018) (Kuehn, J., dissenting).

3. Under the Social Security Act, 42 U.S.C. § 407(a), "none of the moneys paid" as part of a Social Security benefit "shall be subject to execution, levy, attachment, garnishment, or other legal process, or to the operation of any bankruptcy or insolvency law." In *Philpott v. Essex County Welfare Board*, 409 U.S. 413, 415-17, 93 S.Ct. 590, 592-93, 34 L. Ed.2d 608 (1973), the United States Supreme Court held that Social Security funds were protected from claims by state governments. Oklahoma has not made a specific ruling regarding the protection of Social Security funds from payment of criminal fines, fees and costs. However, based on this Supreme Court ruling, many other courts have held that states cannot order individuals to pay legal financial obligations, such as fines, fees and costs, from Social Security benefits. *See In re Lampart*, 856 N.W.2d 192 (Mich.App. 2014); *State v. Eaton*, 99 P.3d 661 (Mont. 2004). These courts have ruled that legal financial obligations, such as criminal fines, fees and costs, count as "other legal process" under 42 U.S.C. § 407(a). Additionally, in *Wash. State Dep't of Soc. & Health Servs. v. Guardianship Estate of Keffeler*, 537 U.S. 371, 385, 123 S.Ct. 1017, 1025, 154 L.Ed.2d 972 (2003), the Supreme Court explained that "other legal process" is a process where "some judicial or quasi-judicial mechanism, though not necessarily an elaborate one, by which control over property passes from one person to another in order to discharge or secure discharge of an allegedly existing or anticipated liability."

Most recently, the Washington Supreme Court found that all legal financial obligations, not just restitution, are subject to § 407(a) when the defendant's only assets and income are from social security disability. *City of Richland v. Wakefield*, 380 P.3d 459 (Wash. 2016). In *Wakefield*, the defendant's only income was SSDI benefits and food stamp assistance, yet the trial court ordered installment payments. In reversing the trial court's decision, the court held that "federal law prohibits courts from ordering defendants to pay [legal financial obligations] if the person's only source of income is social security disability." *Id.* ¶ 29 at 466. Like *Eaton* and *Lampart*, the *Wakefield* court found that ordering fine payments from an individual whose sole income is SSDI violates § 407(a) because the order is a judicial mechanism by which the defendant's Social Security income is transferred to another in payment of a liability. Id. 465-66. Accordingly, the court concluded that the state was prohibited from ordering payment against the defendant. *Id.*


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Judicial Nominating Commission Elections: Nomination Period Opens

THE SELECTION OF qualified persons for appointment to the judiciary is of the utmost importance to the administration of justice in this state. Since the adoption of Article 7-B to the Oklahoma Constitution in 1967, there has been significant improvement in the quality of the appointments to the bench. Originally, the Judicial Nominating Commission was involved in the nomination of justices of the Supreme Court and judges of the Court of Criminal Appeals. Since the adoption of the amendment, the Legislature added the requirement that vacancies in all judgeships, appellate and trial, be filled by appointment of the governor from nominees submitted by the Judicial Nominating Commission.

The commission is composed of 15 members. There are six non-lawyers appointed by the governor, six lawyers elected by members of the bar, and three at large members, one selected by the Speaker of the House of Representatives; one selected by the President Pro Tempore of the Senate; and one selected by not less than eight members of the commission. All serve six-year terms, except the members at large who serve two-year terms. Members may not succeed themselves on the commission.

The lawyer members are elected from each of the six congressional districts as they existed in 1967. (As you know, the congressional districts were redrawn in 2011.) Elections are held each odd-numbered year for members from two districts.

2019 ELECTIONS

This year there will be elections for members in Districts 3 and 4. District 3 is composed of 22 counties in the south and southeastern part of the state. District 4 is composed of 12 counties in the central and the southwestern part of the state, plus a portion of eastern Oklahoma County. (See the sidebar for the complete list.)

Lawyers desiring to be candidates for the Judicial Nominating Commission positions have until Friday, May 17, 2019, at 5 p.m. to submit their Nominating Petitions. Members can download petition forms at www.okbar.org/jnc. Ballots will be mailed on June 7, 2019, and must be returned by June 21, 2019, at 5 p.m.

It is important to the administration of justice that the OBA members in the Third and Fourth Congressional Districts become informed on the candidates for the Judicial Nominating Commission and cast their vote. The framers of the constitutional amendment entrusted to the lawyers the responsibility of electing qualified people to serve on the commission.

OBA PROCEDURES GOVERNING THE ELECTION OF LAWYER MEMBERS TO THE JUDICIAL NOMINATING COMMISSION

1. Article 7-B, Section 3, of the Oklahoma Constitution requires elections be held in each odd numbered year by active members of the Oklahoma Bar Association to elect two members of the Judicial Nominating Commission for six-year terms from Congressional Districts as such districts existed at the date of adoption of Article 7-B of the Oklahoma Constitution (1967).

2. Ten (10) active members of the association, within the Congressional District from which a member of the commission is to be elected, shall file with the Executive Director a signed petition (which may be in parts) nominating a candidate for the commission; or, one or more County Bar Associations within said Congressional District may file with the Executive Director a nominating resolution nominating such a candidate for the commission.

3. Nominating petitions must be received at the Bar Center by 5 p.m. on the third Friday in May.

4. All candidates shall be advised of their nominations, and unless they indicate they do not desire to serve on the commission, their name shall be placed on the ballot.

5. If no candidates are nominated for any Congressional District, the

Board of Governors shall select at least two candidates to stand for election to such office.

6. Under the supervision of the Executive Director, or his designee, ballots shall be mailed to every active member of the association in the respective Congressional District on the first Friday in June, and all ballots must be received at the Bar Center by 5 p.m. on the third Friday in June.

7. Under the supervision of the Executive Director, or his designee, the ballots shall be opened, tabulated and certified at 9 a.m. on the Monday following the third Friday of June.

8. Unless one candidate receives at least 40 percent of the votes cast, there shall be a runoff election between the two candidates receiving the highest number of votes.

9. In case a runoff election is necessary in any Congressional District, runoff ballots shall be mailed, under the supervision of the Executive Director, or his designee, to every active member of the association therein on the fourth Friday in June, and all runoff ballots must be received at the Bar Center by 5 p.m. on the third Friday in July.

10. Under the supervision of the Executive Director, or his designee, the runoff ballots shall be opened, tabulated and certified at 9 a.m. on the Monday following the third Friday in July.

11. Those elected shall be immediately notified, and their function certified to the Secretary of State by the President of the Oklahoma Bar Association, attested by the Executive Director.

12. The Executive Director, or his designee, shall take possession of and destroy any ballots printed and unused.

13. The election procedures, with the specific dates included, shall be published in the *Oklahoma Bar Journal* in the three issues immediately preceding the date for filing nominating resolutions.

NOTICE

Judicial Nominating Commission Elections Congressional Districts 3 And 4

Nominations for election as members of the Judicial Nominating Commission from Congressional Districts 3 and 4 (as they existed in 1967) will be accepted by the Executive Director until 5 p.m., Friday, May 17, 2019. Ballots will be mailed June 7, 2019, and must be returned by 5 p.m. on June 21, 2019.

District No. 3
Atoka
Bryan
Carter
Choctaw
Coal
Cotton
Garvin
Haskell
Hughes
Jefferson
Johnston
Latimer
LeFlore
Love
Marshall
McCurtain
Murray
Pittsburg
Pontotoc
Pushmataha
Seminole
Stephens

District No. 4
Caddo
Cleveland
Comanche
Grady
Greer
Harmon
Jackson
Kiowa
McClain
Oklahoma (Part)*
Pottawatomie
Tillman
Washita

*Part of Oklahoma County
Including:
Choctaw
Harrah
Luther
Midwest City
Newalla
Nicoma Park
Spencer
South of 89th Street

Calendar of Events

April

23 **OBA Access to Justice Committee meeting;** 11:30 a.m.; Oklahoma Bar Center, Oklahoma City with videoconference; Contact Rod Ring 405-325-3702

24 **OBA Immigration Law Section meeting;** 11:00 a.m.; Oklahoma Bar Center, Oklahoma City with videoconference; Contact Lorena Rivas 918-585-1107

25 **OBA Professionalism Committee meeting;** 4 p.m.; Oklahoma Bar Center, Oklahoma City with teleconference; Contact Linda G. Scoggins 405-319-3510

26 **OBA Professional Responsibility Commission meeting;** 9:30 a.m.; Oklahoma Bar Center, Oklahoma City; Contact Gina Hendryx 405-416-7007

May

2 **OBA Lawyers Helping Lawyers Discussion Group;** 6 p.m.; Office of Tom Cummings, 701 NW 13th St., Oklahoma City, OK 73012; RSVP to Jeanie Jones 405-840-0231

3 **OBA Alternative Dispute Resolution Section meeting;** 12 p.m.; Oklahoma Bar Center, Oklahoma City with teleconference; Contact Clifford R. Magee 918-747-1747

7 **OBA Government and Administrative Law Section meeting;** 4 p.m.; Oklahoma Bar Center, Oklahoma City with teleconference; Contact Melissa L. Blanton 405-521-6600

10 **OBA Estate Planning, Probate and Trust Section meeting;** 12 p.m.; Oklahoma Bar Center, Oklahoma City with videoconference; Contact A. Daniel Woska 405-657-2271

14 **OBA Legislative Monitoring Committee meeting;** 12 p.m.; Oklahoma Bar Center, Oklahoma City with teleconference; Contact Angela Ailles Bahm 405-475-9707

15 **OBA Family Law Section meeting;** 11:30 a.m.; Oklahoma Bar Center, Oklahoma City with videoconference; Contact Amy E. Page 918-208-0129

OBA Indian Law Section meeting; 12 p.m.; Oklahoma Bar Center, Oklahoma City with teleconference; Contact Wilda Wahpepah 405-321-2027

16 **OBA Diversity Committee meeting;** 12 p.m.; Oklahoma Bar Center, Oklahoma City with teleconference; Contact Telana McCullough 405-267-0672

17 **OBA Board of Governors meeting;** 10 a.m.; Oklahoma Bar Center, Oklahoma City; Contact John Morris Williams 405-416-7000

OBA Lawyers Helping Lawyers Assistance Program Committee meeting; 12 p.m.; Oklahoma Bar Center, Oklahoma City; Contact Hugh E. Hood 918-747-4357 or Jeanne Snider 405-366-5466

OBA Juvenile Law Section meeting; 3:30 p.m.; Oklahoma Bar Center, Oklahoma City with videoconference; Contact Tsinena Thompson 405-232-4453

18 **OBA Young Lawyers Division meeting;** 10 a.m.; Oklahoma Bar Center, Oklahoma City; Contact Brandi Nowakowski 405-275-0700

21 **OBA Bench and Bar Committee meeting;** 12 p.m.; Oklahoma Bar Center, Oklahoma City with teleconference; Contact David B. Lewis 405-556-9611 or David Swank 405-325-5254

31 **OBA Professional Responsibility Commission meeting;** 9:30 a.m.; Oklahoma Bar Center, Oklahoma City; Contact Gina Hendryx 405-416-7007

2019 OK CIV APP 22

IN THE MATTER OF: CORY DUANE BECK, Plaintiff/Appellee, vs. MICHELLE CANNON, Respondent, and DANNY MICHAEL CRESSWELL, Intervenor/ Appellant.

Case No. 116,187. March 11, 2019

APPEAL FROM THE DISTRICT COURT OF TULSA COUNTY, OKLAHOMA

HONORABLE STEPHEN R. CLARK, TRIAL JUDGE

AFFIRMED

Megan D. Martin, Becki A. Murphy, MURPHY FRANCY, PLLC, Tulsa, Oklahoma, for Plaintiff/Appellee

Blake M. Feamster, MOYERS MARTIN LLP, Tulsa, Oklahoma, for Intervenor/Appellant

JANE P. WISEMAN, VICE-CHIEF JUDGE:

¶1 Danny Michael Cresswell appeals a trial court decision denying his motion to dismiss this paternity action. We are asked in this appeal to address whether this was error. After review, we affirm the trial court's decision.

FACTS AND PROCEDURAL BACKGROUND

¶2 Cory Duane Beck filed a petition for paternity determination on June 26, 2013, alleging he was the natural father of EWB, born in March 2009. EWB's mother, Michelle Christine Cannon, also signed the petition. Beck stated that he and EWB resided in Sand Springs and Cannon resided in Broken Arrow. He asserted Cannon did not dispute his fatherhood of EWB and genetic test results showed he cannot be excluded as EWB's biological father. He asked the trial court to enter orders determining he is EWB's natural father, authorizing the State of Oklahoma to amend EWB's birth certificate to list him as EWB's natural father, and ordering that EWB's birth certificate be amended to correct his name.

¶3 A temporary order, filed July 25, 2013, indicated Beck and Cannon entered into an agreement for joint custody of EWB, with Beck receiving visitation every Friday from 6:00 p.m. through Monday at 9:00 a.m. and alternating holidays. The court ordered Beck to pay $48.47 per month for child support.

¶4 On October 11, 2013, the trial court filed a "Decree of Paternity and Order of Custody, Visitation and Child Support." The order noted Beck and Cannon appeared *pro se* and approved the terms of the decree. The court found it had jurisdiction over the parties and the minor child and that Beck is the child's biological father as determined by DNA testing. The court adjudicated Beck as EWB's father and ordered EWB's birth certificate amended to identify Beck as his father. The court awarded Beck and Cannon joint custody of EWB, with Cannon having primary physical custody. The joint custody plan provided Beck would have visitation every Friday after school until "Monday morning at school" and Cannon would have visitation every Monday after school through "Friday morning at school." The joint custody plan also set out a holiday visitation schedule. The trial court ordered Beck to pay child support in the amount of $48.47 per month.

¶5 On August 4, 2014, Beck filed a motion to modify custody and child support alleging a change of condition. He asserted EWB "has been residing with [Beck] and [Cannon] 50/50 visitation (2/2/3) since May 30, 2014." He alleged EWB "has been enrolled in Sand Springs Public Schools under [Beck's] address" and EWB "had excessive absences and tardiness at school last year during [Cannon's] time."

¶6 On September 16, 2016, Cannon filed a motion to vacate alleging that, at the time of EWB's birth, she was married to Cresswell. She alleged Cresswell is EWB's presumptive father, has parental rights, and is a necessary party to the proceedings. She claimed Beck did not timely bring his paternity action because he waited more than 4 years to establish paternity.

¶7 In his response and amended response, Beck alleged Cresswell executed a denial of paternity on February 24, 2011.

¶8 Cresswell filed a special appearance on October 24, 2016, "as a necessary third-party pursuant to 10 O.S. § 7700-607." A week later,

Cresswell filed a motion to dismiss alleging that "the relief requested fails to state a claim upon which relief can be granted because the relief requested is time barred pursuant [to] 10 O.S. § 7700-607." He alleged he married Cannon in January 2003 and EWB was born in March 2009. Cresswell was listed as EWB's father on his birth certificate. He alleged he executed a denial of paternity "[o]n February 24, 2011, while mobilized with the military in Fort Dix, New Jersey, based upon the knowledge that he was not the biological father of [EWB], without being represented by counsel, and without any understanding that he had any legal rights to [EWB]." Cresswell's and Cannon's divorce decree from September 13, 2011, "indicated that there were no children of the marriage." However, Cresswell said he has maintained a relationship and regularly exercised visitation with EWB. He alleged it was not until after EWB turned four years-old that Beck filed his petition for paternity. Cresswell claimed Beck did not execute an acknowledgement of paternity (AOP) before filing his petition. Cresswell argued that his denial of paternity (DOP) is not valid without a valid acknowledgement of paternity from Beck. He asserted, therefore, that he is still the presumed father of EWB. He further asserted that the trial court did not have jurisdiction because Beck failed to bring an action to determine paternity within two years of EWB's birth.

¶9 Cresswell also filed a "Special Motion to Intervene as of Right," which the trial court granted.

¶10 In his response to the motion to dismiss, Beck stated that he and Cannon both signed an AOP. Cannon dated her signature October 22, 2009, but Beck dated his signature October 22, 2011. Beck alleged that in the petition for divorce, Cresswell stated, "There were no children born to or adopted by the Parties" and the divorce decree also provides no children were born of Cannon's and Cresswell's marriage. Beck noted that the decree of paternity entered on October 11, 2013, granted him visitation every weekend, but after the paternity decree was entered, he "ended up having physical custody of the minor child at least half of the time." According to Beck, after he filed a motion to modify the decree in August 2014, Cannon "changed her legal position, suddenly arguing that the minor child had a presumed father that was not noticed of the proceedings and requesting the paternity, custody, and child support orders be vacated as a result."

¶11 Beck asserted Cresswell was not a presumed father at the time the action was filed because Beck had signed and filed an AOP and Cresswell had signed a DOP before EWB turned two years-old. He further argued Cresswell is equitably estopped from asserting paternity based on the position he took in his divorce petition. Beck also asserted it is not in EWB's best interest to dismiss the paternity action.

¶12 Cresswell asserted that, because Beck did not execute the AOP until October 22, 2011, which was after EWB turned two, the DOP and AOP are not valid.

¶13 A hearing on Cresswell's motion to dismiss was held on May 1, 2017. Cresswell testified EWB was born during his marriage to Cannon and EWB's last name on his birth certificate was originally Cresswell. Cannon and Cresswell were divorced in 2011. Neither party was represented by or consulted with an attorney in the divorce proceedings. Cresswell learned that he was not EWB's biological father in late August or September 2010. He testified he executed a DOP in January or February 2011. When asked why he executed the DOP, he stated: "Mr. Beck was going to take responsibility of the child. Michelle Cannon also wanted him to be the father, and I thought that, since he was the biological father, that he would be responsible." He claimed he did not know until after he executed the DOP that he had "rights to the child." He was never served a petition in the paternity case. Cresswell stated he has ongoing visitation and consistent contact with EWB.

¶14 On cross-examination, Cresswell testified that he stated in the petition for divorce that no children were born of the marriage because he understood at the time that no children were born of the marriage. He also made a declaration to the court in the divorce proceedings that no children were born of the marriage. When he was asked if he knew "all along" that the paternity action was pending, he replied, "Yes." Cresswell has not and does not pay child support for EWB, and EWB does not call Cresswell "Dad."

¶15 Beck testified he had a paternity test performed when EWB was 15 months-old, and he is EWB's biological father. He pays child support for EWB, and EWB calls him

"Dad." Cresswell voluntarily sent him the DOP which Cresswell executed within the first two years of EWB's life. When he questioned Cresswell about why he was going to claim paternity of the child, Cresswell told him "he wanted to work as a mediator between [Beck] and [Cannon] because we couldn't get along on the benefit of [EWB] and what's best for [EWB]."

¶16 On cross-examination, Beck stated that Cannon "said from the beginning" he was EWB's biological father, but he did not have definite proof until 15 months later after a DNA test. Beck's signature on the AOP is dated October 22, 2011. Beck did not file the DOP with DHS after Cresswell sent it to him.

¶17 Cannon testified that she also led the court in the divorce case to believe there were no children born of her marriage with Cresswell. She did not object to EWB's last name being changed to Beck, and she filed the paternity action jointly with Beck. According to Cannon, Cresswell was well aware the "paternity action was going on." She agreed that in the paternity action, she "swore under penalty of perjury then that Mr. Beck was the father of the child." She has been receiving child support from Beck since 2013. Cannon testified she could not have signed the AOP on October 22, 2009, but she did sign it.

¶18 On cross-examination, Cannon testified the date appearing on her AOP signature was wrong because she and Beck "weren't even discussing this in October of 2009." She said she did not intend to mislead the court about paternity, and she did not serve Cresswell notice of the paternity action.

¶19 Cresswell testified he first saw the legal documents "fairly shortly after they were officially filed" because Cannon had him "look at them before for her." Cresswell stated: "My assumption at the time was that the paternity issue had already been resolved, so, again, I'm not a lawyer, but my understanding was just simply a custody thing, and that Mr. Beck had already taken care of the paternity portion of it." Although he was aware of the name change shortly after it occurred, he did not vocalize an objection after he knew of the name change, the custody determination, or the paternity action. He did not tell Beck he wanted to be EWB's dad. Cresswell stated that when the paternity action was filed, he had no idea he had any legal rights to custody of EWB.

¶20 The trial court announced its decision on May 3, 2017. The court made findings that we now summarize and quote. EWB was born on March 28, 2009. On February 24, 2011, Cresswell executed his DOP and filed for divorce from Cannon on August 19, 2011. "In the petition and in the decree, [Cresswell] alleged that no children were born of this marriage." Beck executed the AOP on October 22, 2011. On June 23, 2013, Beck and Cannon filed a joint petition for paternity. On October 11, 2013, Beck and Cannon filed an agreed decree of paternity that established joint custody, set child support, set a visitation schedule, and provided EWB's last name should be changed to Beck. Beck had already been added to EWB's birth certificate as his father. Although Cresswell was aware of the paternity action, he did not receive legal notice of the proceedings.

¶21 The court found that the issues presented in this case are resolved by 10 O.S. §§ 7700-304, 7700-305. The court concluded:

> Section 7700-304 provides that acknowledgements and denials need not be executed simultaneously, and that neither is valid until both are executed.
>
> By executing the denial of paternity, [Cresswell] reserved his option to withdraw his denial. [Cresswell] has never requested that the denial be withdrawn. Had it been withdrawn prior to [Beck's] execution of the acknowledgement, then [Cresswell] would have had a legal position to claim to be the presumed father.
>
> Section [7700-305] provides that if a denial is executed by the presumed father, then when a valid acknowledgement is executed, the execution of the acknowledgement makes the denial valid. And the combination of the two is equivalent to an adjudication of the nonpaternity of the presumed father ([Cresswell] in this instance), and discharges him from all rights and duties of the child.

¶22 The court found that Cresswell "is not the presumptive father and has no rights with regard to the minor child." The court denied Cresswell's motion to dismiss and also denied Cannon's motion to vacate. The trial court filed an order on June 14, 2017, granting Cresswell's motion to intervene, granting a hearing on the motion, denying his motion to dismiss, and denying Cannon's motion to intervene.

¶23 Cresswell appeals.

STANDARD OF REVIEW

¶24 Cresswell's motion to dismiss was titled "Motion to Dismiss Pursuant to 10 O.S. § 7700-607," which addresses limitations of actions and states, "Except as otherwise provided in subsection B of this section, a proceeding brought by a presumed father, the mother, or another individual to adjudicate the parentage of a child having a presumed father shall be commenced not later than two (2) years after the birth of the child."[1] 10 O.S.2011 § 7700-607(A). Therefore, Cresswell's motion to dismiss was based on his assertion the claim was barred by the statute of limitations.

¶25 "'A statute-of-limitations issue ordinarily presents a mixed question of fact and law.'" *Volkl v. Byford*, 2013 OK CIV APP 73, ¶ 4, 307 P.3d 409 (quoting *Sneed v. McDonnell Douglas,* 1999 OK 84, ¶ 9, 991 P.2d 1001). However, where the "matter was presented as a motion to dismiss . . . the standard of review before the court is *de novo." Volkl*, 2013 OK CIV APP 73, ¶ 4 (citing *Hayes v. Eateries, Inc.*, 1995 OK 108, ¶ 2, 905 P.2d 778).

ANALYSIS

¶26 The Oklahoma Uniform Parentage Act provides, "A man is presumed to be the father of a child if . . . [h]e and the mother of the child are married to each other and the child is born during the marriage." 10 O.S.2011 § 7700-204 (A)(1). "A presumed father may sign a denial of his paternity." 10 O.S.2011 § 7700-303. The denial, however, is only valid if the following requirements are met:

> 1. An acknowledgment of paternity signed, or otherwise authenticated, by another man is filed pursuant to Section 20 of this act;
>
> 2. The denial is in a record, and is signed, or otherwise authenticated, under penalty of perjury;
>
> 3. The presumed father has not previously:
>
> a. acknowledged his paternity, unless the previous acknowledgment has been rescinded pursuant to Section 15 of this act or successfully challenged pursuant to Section 16 of this act, or
>
> b. been adjudicated to be the father of the child; and
>
> 4. The denial is signed not later than two (2) years after the birth of the child.

(Footnotes omitted.) Cresswell admitted he signed a DOP on February 24, 2011, and that he sent the DOP to Beck. Thus the DOP was executed within two years of EWB's birth on March 28, 2009. After he signed the DOP, Cresswell represented in his divorce proceedings that no children were born of his marriage with Cannon.

¶27 Beck then signed an AOP on October 22, 2011. Title 10 O.S.2011 § 7700-304 provides in relevant part:

> A. An acknowledgment of paternity and a denial of paternity may be executed separately or simultaneously. If the acknowledgment and denial are both necessary, neither is valid until both are executed.
>
> B. An acknowledgment of paternity or a denial of paternity may be signed before the birth of the child.
>
> C. Subject to subsection A of this section, an acknowledgment of paternity or denial of paternity takes effect on the birth of the child or the execution of the document, whichever occurs later.

(Emphasis added.) Pursuant to the terms of § 7700-304, the AOP took effect on the execution of the document, which was October 22, 2011. We agree with the trial court that Cresswell's DOP became valid after Beck executed his AOP. We further agree with the trial court that the combination of the AOP and DOP was "equivalent to an adjudication of the nonpaternity of the presumed father ([Cresswell] in this instance), and discharges him from all rights and duties of the child." Further indication that Cresswell thought his rights and duties to EWB were discharged was Cresswell's assertion in his petition for divorce that "[t]here were no children born to or adopted by the Parties" and that he paid no child support for the child.

¶28 Cresswell asserts on appeal: Cresswell is the "presumed father of the Minor Child because . . . the Acknowledgement of Paternity is void." Pursuant to 10 O.S. § 7700-302(B)(1), "[a]n Acknowledgement of Paternity shall be void . . . unless a denial of paternity . . . is filed with the State Department of Health, Division of Vital Records." (Emphasis omitted.) The full text of § 7700-302(B) states: "An acknowledgment of paternity shall be void if it: 1. States

that another man is a presumed father, unless a denial of paternity signed or otherwise authenticated by the presumed father is filed with the State Department of Health, Division of Vital Records." 10 O.S.2011 § 7700-302. This provision appears to conflict in part with § 7700-304(C), which provides, "an acknowledgment of paternity or denial of paternity takes effect on the birth of the child or the execution of the document, whichever occurs later."

¶29 In *Bates v. Copeland,* 2015 OK CIV APP 30, 347 P.3d 318, this Court concluded an AOP executed by the mother and the purported biological father of a child was not void but voidable where the two signed an AOP that incorrectly stated the mother was not married at the time of conception or birth. The purported biological father filed an action to determine paternity. *Id*. ¶ 1. The mother's husband "filed a Notice of Another Action Pending, *i.e.*, the action for dissolution of the marriage, and Motion to Stay proceedings in the paternity action." *Id*. ¶ 6. Husband later filed a motion to vacate the AOP and a motion to dismiss the paternity proceeding, which the trial court granted. *Id*. ¶¶ 6, 8.

¶30 The purported biological father argued on appeal "that the AOP he and Mother executed, where they falsely stated Mother was not married at the time of conception, is, at best, voidable under 10 O.S. § 7700-302(C), not void under 10 O.S. § 7700-302(B)." *Id*. ¶ 9. Section § 7700-302(C) provides: "An acknowledgment of paternity is voidable if it falsely denies the existence of a presumed, acknowledged, or adjudicated father of the child." 10 O.S.2011 § 7700-302. The Court noted,

> "[A]n act declared to be void by statute which is *malum in se* or against public policy is utterly void and incapable of ratification, but an act or contract so declared void, which is neither wrong in itself nor against public policy, but which has been declared void for the protection or benefit of a certain party, or class of parties, is voidable only and is capable of ratification by the acts or silence of the beneficiary or beneficiaries . . . such an act or contract is valid until voided, not void until validated, and it is subject to ratification and estoppel.'" (Citations omitted.)

Id. n. 1. The Court of Civil Appeals found that the mother's husband was the child's presumed father. *Id*. ¶ 15.

> [The] presumption of paternity cannot be displaced absent either (1) an adjudication of his non-paternity by a court of competent jurisdiction (a) in an action for divorce as permitted by 43 O.S. §109.2, or (b) as mandated by §7700-204(B), in a timely commenced action under 10 O.S. §7700-607, or (2) a timely, validly executed and filed denial of paternity as prescribed by 10 O.S. §7700-303 and §7700-305(B).

Id. The Court found no trial court error in vacating the AOP executed by the mother and purported biological father. *Id.* ¶ 18.

¶31 This case differs from *Bates* in that Cannon and Beck executed the AOP indicating Mother was married at the time of conception or birth and Cresswell executed the DOP. The only thing alleged not to have been done here that was required by statute was Beck's failure to file the AOP, with an attached DOP, with the State Department of Health, Division of Vital Records.

¶32 The fact that Cresswell's and Cannon's divorce decree states there were no children born of the marriage is not determinative of the issue before us. In *Clark v. Edens*, 2011 OK 28, ¶ 7, 254 P.3d 672, the Supreme Court noted: "A pleading or other representation that informs the court that there are no children of the marriage simply removes such issues from determination." The Court concluded: "A finding in a divorce decree that there are no children of the marriage would not necessarily resolve the parties' relationship to an undisclosed child born during the marriage and subject to the statutory presumption of paternity." *Id*.

¶33 Also important to our analysis here is the *Clark* Court's acknowledgement that "the parents are not the only parties affected by the presumption of paternity." *Id*. ¶ 11. The presumption of paternity "is a matter of public policy intended for the benefit and protection of children 'born during the marriage.'" *Id.; see also Stevens v. Griggs*, 2013 OK CIV APP 104, ¶ 1, 362 P.3d 662 (stating the Oklahoma Uniform Parentage Act "unequivocally states a strong public policy intended to benefit and protect the parentage of children born during a marriage"). The *Clark* Court instructed: "A right based on a statute that contains provisions founded upon public policy cannot be waived by a private party, if such waiver thwarts the legislative policy the statute was designed to effectuate." *Clark,* 2011 OK 28, ¶ 11. The statute

protected EWB as intended because Beck acknowledged paternity after Cresswell executed a DOP and Beck assumed his parental duties. Keeping in mind the strong public policy served by the statute, this is a situation in which the AOP and DOP should be viewed as voidable, not void.

¶34 Title 10 O.S.2011 § 7700-305 provides:

> A. Except as otherwise provided in Sections 15 and 16 of this act, a valid acknowledgment of paternity signed by both parents is equivalent to an adjudication of paternity of a child and confers upon the acknowledged father all of the rights and duties of a parent.
>
> B. Except as otherwise provided in Sections 15 and 16 of this act, a valid denial of paternity by a presumed father when executed in conjunction with a valid acknowledgment of paternity is equivalent to an adjudication of the nonpaternity of the presumed father and discharges the presumed father from all rights and duties of a parent.

(Footnote omitted.)

¶35 Beck's alleged failure to file the AOP and DOP cannot serve as a basis for dismissing the paternity action more than three years after the trial court entered its decree of paternity. First, Cresswell admitted he executed the DOP and sent it to Beck. Beck and Mother voluntarily and jointly executed an AOP. Cresswell claims Beck's failure to file the document with the State Department of Health voids the AOP and DOP. We disagree with Cresswell that any error in this regard automatically made the AOP and DOP void; at best, they would be considered voidable at any point before the trial court entered the decree of paternity. It is undisputed that Cresswell made no attempt to withdraw his DOP and that he never held himself out to be EWB's father or paid child support for him. Cresswell admitted he had actual knowledge of the paternity proceedings and that he looked at the legal documents "fairly shortly after they were officially filed." Although Cresswell knew the paternity action was ongoing, he did not claim that his DOP was invalid before the entry of the trial court's decree of paternity, and instead waited more than three years after the decree was entered to file his motion to dismiss. Even if the AOP and DOP were not valid, the trial court entered a decree of paternity in a proceeding of which Cresswell had actual knowledge. After *de novo* review of this case, we conclude the trial court did not err in denying Cresswell's motion to dismiss the paternity proceeding.

¶36 We further conclude Cresswell's statute of limitations defense was not timely raised. Although he admitted he had actual notice of the paternity action, he waited three years to file a motion to dismiss the proceedings. In fact, he waited to file his motion to dismiss until well after the order establishing paternity had been entered. Cresswell cites no statute or case law that supports his attempt to dismiss a claim based on a statute of limitations defense after a final order, in this case an order establishing paternity, has been entered.

CONCLUSION

¶37 Finding no error, we conclude, as the trial court did, that Cresswell's motion to dismiss should be denied, and we affirm that decision.

¶38 **AFFIRMED**.

BARNES, P.J., and THORNBRUGH, J. (sitting by designation), concur.

JANE P. WISEMAN, VICE-CHIEF JUDGE:

1. Title 10 O.S. § 7700-607 was amended in 2014, but the quoted portion of the statute remains unchanged. In his motion to dismiss, Cresswell argued that the subsection added to § 7700-607 by the 2014 amendment does not apply in this case.

Legal Aid Services of Oklahoma, Inc.
presents

A SPRING SEMINAR FOR OKLAHOMA ATTORNEYS

Tuesday, May 7, 2019

Conference Center, OSU Tulsa, 700 North Greenwood, Room 150
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AGENDA

8:30 a.m.	Registration
9:00 - 9:50	"How to Handle a Family Law Case if the Opposing Party is Unrepresented," Family Law Attorneys with Legal Aid Services
9:50-10:05	BREAK
10:05-10:55	"The Impact of Taxes on Low-Income Clients" Brette Gollihave, Legal Aid Services
10:55 - 11:10	BREAK
11:10 – 12:00	"The Challenges of Unrepresented Litigants/Ethical Duties if Unrepresented Litigant is Involved in Your Case" OBA Ethics Counsel Joseph Balkenbush
12.00 – 1:00	LUNCH (on your own)
1:00 – 1:50	"Criminal Law for Civil Lawyers" Shena Burgess, Smiling, Smiling & Burgess
1:50 – 2:00	BREAK
2:00 – 2:50	"A Review of ICWA Guardianship Law and Procedures" C. Steven Hager at Oklahoma Indian Legal Services, Inc.
2:50-3:00	BREAK
3:00 – 4:00	"The Best and Worst Way to Interact With Pro Se Litigants" Judge Lara Russell, Rogers County, Judge Stephen Clark, Tulsa County, and Judge Terry Bitting, Tulsa County

Disposition of Cases Other Than by Published Opinion

COURT OF CRIMINAL APPEALS
Thursday, March 28, 2019

RE-2017-923 — Decarlo Terrell Mitchell, Appellant, appeals from the revocation of his ten year suspended sentence in Case No. CF-2001-4533 in the District Court of Oklahoma County, by the Honorable Ray C. Elliott, District Judge. AFFIRMED. Opinion by: Lewis, P.J.; Kuehn, V.P.J., concurs; Lumpkin, J., concurs; Hudson, J., concurs; Rowland, J., concurs.

F-2017-1158 — Jason Brady Sain, Appellant, was tried by jury for the crimes of Count 1, first degree rape; Count 2, kidnapping; and Count 3, domestic abuse, all after former conviction of two or more felonies in Case No. CF-2016-338 in the District Court of Grady County. The jury returned a verdict of guilty and set punishment at life imprisonment on Counts 1 and 3, and twenty years imprisonment on Count 2. The trial court sentenced accordingly and ordered the sentences served consecutively. From this judgment and sentence Jason Brady Sain has perfected his appeal. The judgment and sentence is AFFIRMED. Opinion by: Lewis, P.J.; Kuehn, V.P.J., concurs; Lumpkin, J., concurs in results; Hudson, J., concurs; Rowland, J., concurs.

C-2017-648 — Denisa Dawn Duvall, Petitioner, entered a negotiated plea of no contest to Count 1, domestic assault and battery in the presence of a minor, a misdemeanor in the District Court of Kay County, Case No. CM-2018-136. The Honorable David R. Bandy, Associate District Judge, accepted the plea and ordered a two-year deferred sentence under terms, including one year of DA supervision, up to fifty-two (52) weeks of domestic violence counseling, random urinalysis testing, and various costs and fees with payments deferred for six months. Duvall filed a *pro se* motion to withdraw the plea that included a request for an attorney. The district court denied the motion to withdraw plea after an evidentiary hearing wherein Duvall again appeared *pro se*. There is no record indicating whether she was offered counsel as requested, nor is there evidence of a waiver of right to counsel. The trial court appointed counsel to help Duvall timely file the instant appeal. The Petition for writ of certiorari is GRANTED, the trial court's order denying Duvall's motion to withdraw plea is REVERSED, and this cause is REMANDED to the District Court for a new hearing on Duvall's motion to withdraw plea pursuant to the guidelines set forth in the opinion. Opinion by: Lewis, P.J.; Kuehn, V.P.J., concurs; Lumpkin, J., concurs; Hudson, J., concurs; Rowland, J., concurs.

Thursday, April 4, 2019

RE-2017-484 — Jermaine Thrash, Appellant, appeals from the revocation of his ten year suspended sentence in Case No. CF-2005-4341 in the District Court of Oklahoma County, by the Honorable Michele D. McElwee, District Judge. AFFIRMED. Opinion by: Kuehn, V.P.J.; Lewis, P.J., concur; Lumpkin, J., concur; Hudson, J., concur; Rowland, J., concur.

F-2017-970 — Angelica C. Coats, appeals from the acceleration of her deferred judgment and sentencing in Case No. CF-2012-445 in the District Court of Mayes County, by the Honorable Rebecca J. Gore, Special Judge. AFFIRMED. Opinion by: Lumpkin, J.; Lewis, P.J., Concur; Kuehn, V.P.J., Dissent; Hudson, J., Concur; Rowland, J., Concur.

RE-2017-964 — On May 19, 2004, Appellant Antonio Depew Rhone, represented by counsel, entered a guilty plea to Count 1, Robbery with a Firearm and Count 2, Kidnapping in in Oklahoma County Case No. CF-2003-4985. Rhone was sentenced to twenty (20) years, for Count 1 with all but the first twelve (12) years suspended, and ten (10) years for Count 2, the sentences to be served concurrently. On July 19, 2016, the State filed an Application to Revoke Rhone's suspended sentence alleging numerous probation violations, including the commission of several new offenses. On July 10, 2017 the District Court of Oklahoma County, the Honorable Timothy R. Henderson, District Judge, revoked Rhone's suspended sentence, and on September 5, 2017, ordered the suspended sentence revoked in full. The revocation of Rhone's suspended sentence in Oklahoma County Case No. CF-2003-4985 is AFFIRMED. Opinion by: Hudson, J.; Lewis, P.J.,

Concurs; Kuehn, V.P.J., Concurs in Results; Lumpkin, J., Concurs; Rowland, J., Recuses.

F-2017-1259 — On March 13, 2017, Appellant Houston Everett Matthew Davis, represented by counsel, entered a guilty plea to Count I, Possession of a Controlled Dangerous Substance (after former conviction of two or more felonies), Count 2, Unlawful Possession of Drug Paraphernalia, and Count 3, Driving with Suspended License in Lincoln County Case No. CF-2016-222. Sentencing was deferred pending Davis's completion of the Pottawatomie County Drug Court program. On August 9, 2017, the State filed an Application to Terminate Davis from Drug Court. On November 21, 2017, the Honorable Cynthia Ferrell Ashwood, Associate District Judge, terminated Davis's Drug Court participation and sentenced him as specified in his plea agreement. From this judgment and sentence Davis appeals. Davis's termination from Drug Court is AFFIRMED. Opinion by: Rowland, J.; Lewis, P.J., concurs; Kuehn, V.P.J., concurs; Lumpkin, J., concurs; Hudson, J., concurs.

F-2018-145 — On June 23, 2015, Appellant Troy Wadell Davis, represented by counsel, entered a guilty plea to Count 1, Possession of a Controlled Dangerous Substance (Cocaine) in Oklahoma County Case No. CF-2015-4280. Sentencing was deferred for five (5) years, subject to terms and conditions of probation. On March 27, 2017, Davis's Case No. CF-2015-4280 was transferred to the Oklahoma County Drug Court Program along with his new Oklahoma County Case No. CF-2017-316, wherein Davis was charged with Possession of a Controlled Dangerous Substance (Cocaine). Sentencing in both cases was deferred pending Davis's completion of the Oklahoma County Drug Court Program. On January 17, 2018, the State filed an Application to Terminate Davis from Drug Court participation alleging multiple violations. On January 30, 2018, at the conclusion of the hearing on the State's application, the Honorable Geary L. Walke, Special Judge, terminated Davis's Drug Court participation and sentenced him as specified in his plea agreement. From this judgment and sentence Davis appeals. Davis's termination from Drug Court is AFFIRMED. Opinion by: Lumpkin, J.; Lewis, P.J., Concur; Kuehn, V.P.J., Concur; Hudson, J., Concur; Rowland, J., Concur.

F-2017-952 — Jerry Don Battenfield, Appellant, was tried by jury for two counts of child sexual abuse of a child under age twelve (12) in Case No. CF-2016-147 in the District Court of Craig County. The jury returned a verdict of guilty and recommended as punishment thirty years imprisonment and a $5,000.00 fine on each count. The trial court sentenced accordingly and ordered the sentences to be served consecutively. From this judgment and sentence Jerry Don Battenfield has perfected his appeal. The Judgment and Sentence of the District Court is AFFIRMED. Opinion by: Lewis, P.J.; Kuehn, V.P.J., concurs in results; Lumpkin, J., concurs; Hudson, J., concurs; Rowland, J., concurs.

F-2017-849 — Samuel Cosby, Appellant, was tried by jury for the crime of assault and battery with a deadly weapon in Case No. CF-2015-6696 in the District Court of Oklahoma County. The jury returned a verdict of guilty and set punishment at life imprisonment. The trial court sentenced accordingly. From this judgment and sentence Samuel Cosby has perfected his appeal. The Judgment and Sentence of the District Court is AFFIRMED. Opinion by: Lewis, P.J.; Kuehn, V.P.J., concurs in results; Lumpkin, J., concurs; Hudson, J., concurs; Rowland, J., concurs.

C-2018-489 — Petitioner Mario Donsheau Cherry entered blind pleas of guilty to First Degree Manslaughter, After Former Conviction of Two or More Felonies (Count II); Causing an Accident Resulting in Great Bodily Injury, After Former Conviction of Two or More Felonies (Count III); Leaving the Scene of an Accident with Personal Injury, After Former Conviction of Two or More Felonies (Count V); Leaving the Scene of a Collision Without Stopping (Count VI); Resisting Arrest (Count VII) ; and Driving While License Suspended (Count IX) in the District Court of Oklahoma County, Case No. CF-2016-4278. The pleas were accepted by the Honorable Bill Graves, District Judge, on February 23, 2018. Sentencing was continued until April 5, 2018. On that date, the trial court sentenced Petitioner to life in prison in Counts II, III and V; and one (1) year in each of Counts VI, VII, and IX. The sentences in Counts II and III were ordered to run consecutive. The remaining sentences were ordered to run concurrently to the sentences in Counts II and III. On April 12, 2018, Petitioner, represented by counsel, filed an Application to Withdraw Plea of Guilty. At a hearing held on May 4, 2018, Judge Graves denied the motion to withdraw. From this judgment and sentence Mario Donsheau Cherry has perfected his appeal. The Pe-

tition for a *Writ of Certiorari* is DENIED. The Judgment and Sentence of the District Court is hereby AFFIRMED. Opinion by: Lumpkin, J.; Lewis, P.J., Concur; Kuehn, V.P.J Concur; Hudson, J., Concur; Rowland, J., Recuse.

F-2017-1103 — Jose Jonathan Rivera-Chavez, Appellant, was tried by jury for the crime of first degree murder in Case No. CF-2017-59 in the District Court of Tulsa County. The jury returned a verdict of guilty and set punishment at life imprisonment without the possibility of parole. The trial court sentenced accordingly. From this judgment and sentence Jose Jonathan Rivera-Chavez has perfected his appeal. The Judgment and Sentence of the District Court is AFFIRMED. Opinion by: Lewis, P.J.; Kuehn, V.P.J., concurs; Lumpkin, J., concurs; Hudson, J., concurs; Rowland, J., concurs.

F-2017-911 — On August 26, 2009, Appellant Jason O'Neal Sims, represented by counsel, entered guilty pleas to two counts of Second Degree Burglary in Beckham County Case Nos. CF-2009-194 and CF-2009-226. Sims was sentenced to twenty-one (21) years for each count, with all but the first eight (8) years suspended. The sentences were ordered to be served concurrently. On April 29, 2014, the State filed an Application to Revoke Sims's suspended sentences, alleging Sims committed the new offense of Possession of a Controlled Substance in the Presence of a Minor and Within 1000 feet of a School as charged in Beckham County Case No. CF-2014-186. On July 11, 2014, Sims entered a guilty plea in Case No. CF-2014-186. Sentencing was deferred in all three cases pending Sims completion of the Beckham County Drug Court Program. On July 13, 2017, the State filed an Application to Terminate Sims from Drug Court. On August 30, 2017, the Honorable Doug Haught, District Judge, terminated Sims's Drug Court participation and sentenced him as specified in his plea agreement. From this judgment and sentence Sims appeals. Sims's termination from Drug Court is AFFIRMED. Opinion by: Hudson, J.; Lewis, P.J., Concur; Kuehn, V.P.J., Concur; Lumpkin, J., Concur; Rowland, J., Concur.

Thursday, April 11, 2019

F-2017-1038 — Zacary Craig Anderson, Appellant, was tried and convicted at a bench trial, in Case No. CF-2014-3823, in the District Court of Oklahoma County, of Child Neglect. The Honorable Michele D. McElwee, District Judge, sentenced Appellant to twenty years imprisonment and ordered credit for time served. From this judgment and sentence, Zacary Craig Anderson has perfected his appeal. The Judgment and Sentence of the District Court is AFFIRMED. Appellant's Application for Evidentiary Hearing on Sixth Amendment Claims is DENIED. Opinion by: Hudson, J.; Lewis, P.J., Concurs; Kuehn, V.P.J., Concurs; Lumpkin, J., Concurs; Rowland, J., Concurs.

F-2017-1189 — Lawrence Raymond Silver, Jr., Appellant, was tried by jury for the crime of Solicitation for First Degree Murder in Case No. CF-2017-41 in the District Court of Pottawatomie County. The jury returned a verdict of guilty and set punishment at thirty-seven years. The trial court sentenced accordingly. From this judgment and sentence Lawrence Raymond Silver, Jr. has perfected his appeal. AFFIRMED. Opinion by: Rowland, J.; Lewis, P.J., concurs; Kuehn, V.P.J., concurs; Lumpkin, J., concurs in part and dissents in part; Hudson, J., concurs.

F-2017-1214 — Appellant, Marco Antonio Hernandez, was tried by jury and convicted of Trafficking in Illegal Drugs (Methamphetamine) (Count 1) and Unlawful Possession of a Controlled Drug with Intent to Distribute (Marijuana & Cocaine) (Count 2), After Former Conviction of Two or More Felonies and Unlawful Possession of Drug Paraphernalia (Count 4) in District Court of Tulsa County Case Number CF-2015-6346. The jury recommended as punishment imprisonment for life and a $25,000.00 fine in Count 1; imprisonment for life in Count 2; and incarceration in the county jail for one year and a $1,000.00 fine in Count 4. The trial court sentenced Appellant in accordance with the jury's recommendation and ordered that the sentences run consecutively. From this judgment and sentence Marco A. Hernandez has perfected his appeal. The Judgment and Sentence of the District Court is hereby AFFIRMED. Opinion by: Lumpkin, J.; Lewis, P.J., Concur in part dissent in part; Kuehn, V.P.J, Concur in part dissent in part; Hudson, J., Concur in part dissent in part; Rowland, J., Concur.

F-2017-1104 — Joseph Johnson, Appellant, was tried by jury for the crime of first degree murder in Case No. CF-2016-5475 in the District Court of Tulsa County. The jury returned a verdict of guilty and set punishment at life imprisonment without the possibility of parole. The trial court sentenced accordingly. From this judgment and sentence Joseph Johnson has perfected his appeal. The Judgment and

Sentence is AFFIRMED. Opinion by: Lewis, P.J.; Kuehn, V.P.J., concurs in results; Lumpkin, J., concurs; Hudson, J., concurs; Rowland, J., concurs.

ACCELERATED DOCKET
Thursday, April 4, 2019

S-2018-950 — The Appellant, the State of Oklahoma, appealed to this Court from an order entered by the reviewing judge, the Honorable Jill C. Weedon, Associate District Judge, affirming an adverse ruling of the magistrate, the Honorable Ryan D. Reddick, Associate District Judge, which sustained Appellee Jerry Lee Niles Jr.'s demurrer to the evidence and motion to dismiss the charge of Manslaughter in the First Degree, while engaged in the commission of a misdemeanor, in Case No. CF-2018-76 in the District Court of Garfield County. AFFIRMED. Opinion: Kuehn, V.P.J.; Lewis, P.J., concur; Lumpkin, J., concur; Hudson, J., specially concur; Rowland, J., concur.

COURT OF CIVIL APPEALS
(Division No. 1)
Wednesday, April 3, 2019

117,049— The Leslie Family Trust: Gregg Glass, Trustee of The Leslie Family Trust, Plaintiffs/Appellants, v. Sandridge Exploration and Production, LLC; Chesapeake Exploration, LLC; Lloyd Pool Operating; Lloyd Pool Operating, LLC; Janice Chloe Munn; Geneva Nadine Munn; Donna Jean Cooper; Janice Deann David and Donna Christie Cooper, Trustees of the Donna Jean Copper Living Trust dated 10/03/1995; and Martha Vincent Bielby, Defendants/Appellees. Appeal from the District Court of Alfalfa County, Oklahoma. Honorable Loren E. Angle, Trial Judge. This appeal arises from a dispute regarding mineral interests claimed by Petitioner/Plaintiff Leslie Family Trust (the Trust). The Trust sought a declaratory judgment that certain oil and gas interests held by Respondent/Defendant Lloyd Pool Operating, LLC (Lloyd Pool), and others (collectively "Defendants") had expired and reverted to the Trust. During the suit, Defendant Sandridge Exploration and Production, LLC (Sandridge), filed for bankruptcy, and the Trust dismissed Sandridge with prejudice. Lloyd Pool moved for dismissal of the Trust's remaining claims due to failure to join Sandridge as an indispensable party, which the trial court granted. We affirm. Opinion by Buettner, J.; Goree, C.J., concurs in result, and Joplin, P.J., concurs.

116,648— In Re the Marriage of Webster, BreAnn Webster, Petitioner/Appellee, v. Christopher Webster, Respondent/Appellant. Appeal from the District Court of Tulsa County, Oklahoma. Honorable Stephen R. Clark, Judge. Respondent/Appellant Christopher D. Webster (Husband) appeals the trial court's order terminating joint custody and awarding sole custody of the parties' child to Petitioner/Appellee BreAnn Webster (Wife). Husband argues the trial court abused its discretion and denied Husband due process because, according to Husband, he was not given notice or an opportunity to be heard before the trial court terminated joint custody. The record s s the trial court entered its order following four days of hearings, held over the course of four months, at which Husband was present and represented by counsel. Oklahoma trial courts may terminate joint custody any time it is in the child's best interests to do so. We find no abuse of discretion and AFFIRM. Opinion by Buettner, J.; Goree, C.J., and Joplin, J., concur.

Thursday, April 11, 2019

116,742 — Danny James Sharp, Petitioner, v. Homeland Stores, Inc. Own Risk and Workers' Compensation Commission, Respondents. Appeal from the Workers' Compensation Commission En Banc. Claimant seeks review of that portion of an order of the Workers' Compensation Commission denying his claim for compensation due to an alleged injury to his left shoulder. He contends the denial is in view of the evidence. We affirm the Commission's order as not contrary to law nor clearly erroneous in view of the reliable, material, probative and substantial competent evidence. Opinion by Goree, C.J.; Joplin, C.J., and Buettner, J., concur.

116,934 — Wisdom Ministries, Inc., Plaintiff/Appellee, v. Alex Portelli, Defendant/Appellant. Appeal from the District Court of Tulsa County, Oklahoma. Honorable Daman H. Cantrell, Judge. Defendant/Appellant Alex Portelli appeals the denial of his motion to vacate default judgment entered against him in an action for indebtedness filed by Plaintiff/Appellee Wisdom Ministries, Inc. (WMI). The trial court granted default as sanction for Portelli's failure to appear for the pre-trial conference. Portelli sought to vacate the default judgment eight months later, complaining WMI failed to file a motion or give notice before default. The district court rule allowing default judgment as a sanction for failure to appear at a pre-trial conference is a specific rule that does not re-

quire a motion or notice. We Reverse and Remand For Further Proceedings. Opinion by Buettner, J.; Goree, C.J., and Joplin, P.J., concur.

(Division No. 2)
Wednesday, March 27, 2019

117,150 — Rick Beck, Petitioner, v. Cactus Drilling Co., LLC; Zurich American Insurance Co.; and The Workers' Compensation Court of Existing Claims, Respondents. Proceeding to Review an Order of the Workers' Compensation Court of Existing Claims, Hon. Carla Snipes, Trial Judge. Claimant seeks review of a lower court that awarded him permanent partial impairment (PPI) benefits but, according to Claimant, designated an erroneous accrual date for those benefits. The order in question set what appears to be two contradictory accrual dates for the PPI benefits in this matter, without explaining the legal or factual grounds for that determination. It is impossible to determine from the order why the trial court felt it necessary to set an "accrual date" at all, or what legal theory the court relied upon in making the apparently contradictory factual findings that it did. As such, the order is not sufficiently specific for this Court to ascertain the crucial facts and law on which the order is based. We therefore vacate the order and remand this cause for further proceedings. VACATED AND RE-MANDED FOR FURTHER PROCEEDINGS. Opinion from the Court of Civil Appeals, Division II by Thornbrugh, J.; Fischer, P.J., and Goodman, J., concur.

117,453 — Christopher W. Brooks, Plaintiff/Appellant, v. State of Oklahoma ex rel. Department of Public Safety. Appeal from an Order of the District Court of Oklahoma County, Hon. Geary L. Walke, Trial Judge, sustaining the revocation of Plaintiff's driver's license by the Oklahoma Department of Public Safety. Plaintiff's sole contention on appeal is that the trial court abused its discretion and exceeded its authority in granting State's motion for continuance on the day of trial after a key witness failed to appear, even though State failed to submit an affidavit pursuant to 12 O.S.2011 § 668. Plaintiff incorrectly assumes that the continuance was granted pursuant to § 668, and, consequently, mistakenly relies on *Thomas v. State ex rel. Dep't of Public Safety*, 1993 OK CIV APP 78, 858 P.2d 113. The record before us is consistent with the granting of a motion for continuance pursuant to § 667, and Plaintiff does not otherwise complain of error in the trial proceedings or of any issues involved in providing for a speedy trial. We find the delay of the trial setting was reasonable and minimal; that the continuance of the trial date upon the motion of State was properly considered pursuant to 12 O.S.2011 § 667; and that the grant of the continuance over Plaintiff's objection was within the sound discretion of the court. As such, we reject Plaintiff's claim that we must set aside the trial court's order sustaining the revocation of Plaintiff's license. AFFIRMED. Opinion from the Court of Civil Appeals, Division II, by Thornbrugh, J.; Fischer, P.J., and Goodman, J., concur.

Monday, April 15, 2019

115,967 (Companion to Case No. 116,217) — Andrew Hale and Keri Hale, Individually and as Parents and Next Friends of Henry Hale, a minor child, Plaintiffs/Appellants, v. HCA Health Services of Oklahoma, Inc., d/b/a OU Medical Center; HCA, Inc.; OU Physicians, d/b/a OU Physicians for Women's Health; Katherine Smith, M.D., Individually; Elisa Crouse, M.D., Individually; Landon Lorentz, M.D., Individually, Defendants, and Dawn Karlin, C.N.M., Individually, Defendant/Appellee. Appeal from an Order of the District Court of Oklahoma County, Hon. Bryan C. Dixon, Trial Judge, granting summary judgment to Dawn Karlin, C.N.M. (Midwife). The issue before this Court is whether the actions of Defendant Dawn Karlin, CNM (Midwife), are subject to the Oklahoma Governmental Tort Claims Act (OGTCA), 51 O.S.2011, §§ 151 through 172. Midwife alleged that at the time of the incident, she was an employee of the University of Oklahoma Health Sciences Center, whose salary, insurance, and retirement benefits were paid by the University. She therefore claims she cannot be sued as an individual, but is subject to the provisions of the OGTCA. The trial court held Midwife was subject to the OGTCA and dismissed her from the suit. Plaintiffs argue that Midwife was providing medical services akin to those provided by physicians. Therefore, Plaintiffs argue, if physicians providing medical services are not subject to the OGTCA, neither should Midwife's actions be within the OGTCA. We reject this argument because these provisions clearly exclude from the ambit of the OGTCA only those acts of physicians delivering medical care. By definition, Midwife is not a physician, and was at the time of the delivery, an employee of the University of Oklahoma Health Sciences Center (UOHSC). UOHSC is an integral part of the University of

Oklahoma. The University of Oklahoma's government is vested in the Board of Regents, and is a political subdivision for purposes of the OGTCA. Midwife's acts while an employee of the UOHSC are within the scope of her employment, and therefore subject to the terms and requirements of the OGTCA. The trial court's determination that Midwife is subject to the OGTCA is correct. Summary judgment was therefore correct and is affirmed. AFFIRMED. Opinion from Court of Civil Appeals, Division II, by Goodman, J.; Fischer, P.J., and Thornbrugh, J., concur.

(Division No. 3)
Friday, March 29, 2019

116,264 — 71st Midway, LLC, an Oklahoma Limited Liability Company, Plaintiff/Appellee, vs. City of Broken Arrow, Oklahoma, a Municipal Corporation, Defendant/Appellant. Appeal from the District Court of Wagoner County, Oklahoma. Honorable Dennis Shook, Judge. Defendant/Appellant, City of Broken Arrow (City), appeals from the district court's order enjoining City from enforcing the A-1 zoning ordinance on real property owned by Plaintiff/Appellee, 71st Midway, LLC (Midway). Midway sought to change the zoning classification on its property from A-1 (agricultural) to RS-3 (residential, higher-density). The district court found Midway's proposed use of the property for RS-3 was consistent with City's comprehensive plan and that City's decision to retain the A-1 zoning was arbitrary and capricious. The district court enjoined City from enforcing the A-1 zoning and ordered City to amend its ordinances and maps to s the requested RS-3 zoning. After reviewing the record, we find the district court's judgment is against the clear weight of the evidence and REVERSE. Opinion by Bell, J.; Mitchell, P.J., and Swinton, J., concur.

116,303 — In the Matter of the Protest to the Denial of the Sales Tax Refund for Prog Leasing, LLC: Prog Leasing, LLC, Appellant, vs. State of Oklahoma, ex rel. Oklahoma Tax Commission, Appellee. Appeal from the Oklahoma Tax Commission. Honorable Jay L. Harrington, Administrative Law Judge. Appellant Prog Leasing, LLC seeks review of an order of the Oklahoma Tax Commission that denied, in part, Prog Leasing's application for a sales tax refund. Prog Leasing challenges the Commission's interpretation that a non-resident is required to have a sales tax permit to qualify for the resale exemption allowed by 68 O.S. 2011 § 1357(3). We have reviewed the record and the detailed legal analysis by the ALJ, and find the Commission's order adopting the ALJ's findings, conclusions and recommendations, adequately explains its decision. The Commission's order denying Prog Leasing's refund claims is AFFIRMED under Okla.Sup.Ct.R. 1.202(d). *See also Linear Films, Inc. v. State ex rel. Oklahoma Tax Com'n*, 1994 OK CIV APP 20, 876 P.2d 301(applying Rule 1.202(d) to appeal of OTC order). Opinion by Swinton, J.; Mitchell, P.J., and Bell, J., concur.

116,831 — Tiffany Bourque and Frederick Karol, on Behalf of Themselves and a Class of Similarly Situated Persons, Plaintiffs/Appellees, vs. David Stanley Dodge, LLC and Ally Financial, Inc., Defendants/Appellants, and David A. Stanley, an Individual; David R. Stanley, an Individual; Beth Stanley, an Individual; Brent Stanley, an Individual; Shane Downs, an Individual; Tony Reasner, an Individual; and Jennifer Ray, an Individual, Defendants. Appeal from the District Court of Oklahoma County, Oklahoma. Honorable Thomas E. Prince, Judge. Defendants/Appellants David Stanley Dodge, LLC and Ally Financial, Inc. (collectively Defendants) appeal from an order denying their motion to compel arbitration and to strike class action allegations. Defendants argue that the trial court erroneously denied their motion to compel arbitration because the arbitration clause at issue is valid and enforceable, improperly applied the law of constructive fraud, and improperly failed to strike the class allegations. Plaintiffs/Appellees Tiffiany Bourque and Frederick Karol argue that the evidence established constructive fraud, and therefore the trial court properly denied Defendants' motion to compel arbitration. We AFFIRM the trial court's order. Opinion by Swinton, J. Bell, J., concurs; Mitchell, P.J., dissents.

116,859 — Melani G. Hill, Petitioner, vs. Goodwill Industries of Duncan, CompSource Mutual Insurance Company, and The Workers' Compensation Court of Existing Claims, Respondents. Proceeding to Review an Order of a Three-Judge Panel of the Workers' Compensation Court of Existing Claims. Petitioner Melani G. Hill (Claimant) appeals from an order of a three-judge panel of the Workers' Compensation Court of Existing Claims, which affirmed the trial court's order finding Claimant was not permanently totally disabled (PTD) as a result of an injury Claimant sustained while working for Respondent Goodwill Industries of Dun-

can. We find the decision is against the clear weight of the evidence. We REVERSE AND REMAND. Opinion by Mitchell, P.J.; Bell, J., and Swinton, J., concur.

117,181 — Michael Albertson, an individual, Plaintiff/Appellant, vs. United Parcel Service, Inc., a corporation, Defendant/Appellee. Appeal from the District Court of Tulsa County, Oklahoma. Honorable Mary F. Fitzgerald, Judge. Plaintiff/Appellant Michael Albertson appeals from the trial court's order granting Defendant/Appellee United Parcel Service, Inc.'s (UPS) motion to dismiss for failure to state a claim upon which relief may be granted. After *de novo* review, we find Albertson has sufficiently stated a premises liability claim against UPS. We REVERSE AND REMAND FOR FURTHER PROCEEDINGS. Opinion by Mitchell, P.J.; Bell, J., and Swinton, J., concur.

117,258 — In the Matter of R.V., Deprived Child: State of Oklahoma, Petitioner, vs. Raelyn Thomas and Justin East, Respondents, and Shelby Williams, Intervenor/Appellee, and Paula Renee Waitt, Intervenor/Appellant. Appeal from the District Court of Seminole County, Oklahoma. Honorable Timothy L. Olsen, Judge. R.V., an allegedly deprived Indian child, was initially placed in foster care with Intervenor/Appellant Paula Renee Waitt. Waitt is not related to R.V. but has an Indian foster home licensed by DHS. After paternity was established, Intervenor/Appellee Shelby Williams, R.V.'s second cousin once removed, requested placement. The trial court ordered that placement be changed to Williams based on the Indian Child Welfare Act (ICWA) placement preferences. Waitt appeals from the trial court's placement order and the denial of her Motion to Reconsider. We find no error in the trial court's determination that Williams is R.V.'s extended family member and, as a result, the preferred placement under ICWA. There is not clear and convincing evidence of good cause to depart from the order of preferences. Therefore, the trial court did not abuse its discretion by denying Waitt's Motion to Reconsider. We AFFIRM. Opinion by Mitchell, P.J. Bell, J., concurs; Swinton, J., concurs in result.

Tuesday, April 2, 2019

116,640 — Jonathon Cruz, Scott Bender, Konark Ogra, Ben Bbosa, Joseph Neil Squire, Derek Ley, Jennifer Holland, Martin Bolin, Christi Lynn McLelland, Cecil Down, Lori Blevins, Brad Carmack, Lucy Henshaw, Taylor Linden, Dana Jiles, Carlos Adair, Chuck Cash, Christina Stovall, Terry Young, Garrett Allen Pierce, Lindsey Rae Pierce, Moses Thompson, Hana Thompson, Cash CJ Stevenson, Krysta Lauren Stevenson, Michael Ethridge, Robert Darden, Steven Turpin, and Ronald Shaw, Plaintiffs/Appellants, vs. Johnson Matthey Inc., d/b/a Tracero, a foreign corporation, The University of Tulsa, a not-for-profit Oklahoma corporation, Chevron USA, Inc., a foreign corporation, Chase Environmental Group, Inc., a foreign corporation, and China Institute of Atomic Energy, a foreign corporation, Defendants/Appellees. Appeal from the District Court of Tulsa County, Oklahoma. Honorable Mary F. Fitzgerald, Trial Judge. Plaintiffs/Appellants appeal from the trial court's order dismissing their claims arising from exposure to Cesium 137, a radioactive substance, against Defendants/Appellees Johnson Matthey Inc. d/b/a Tracero, The University of Tulsa, Chevron USA, Inc., Chase Environmental Group, Inc., and China Institute of Atomic Energy. We find the doctrine of judicial estoppel does not bar Plaintiffs' claims. We decline to expand existing tort law to recognize subcellular damage as an injury and medical monitoring as a common law remedy. We find Plaintiffs have sufficiently stated a claim upon which relief may be granted for negligence, gross negligence, negligent infliction of emotional distress, and nuisance. ever, we find Plaintiffs have failed to state a claim for trespass. The order of the trial court is AFFIRMED IN PART, REVERSED IN PART AND REMANDED FOR FURTHER PROCEEDINGS. Opinion by Mitchell, J.; Swinton, P.J., and Goree, V.C.J., concur.

(Division No. 4)
Wednesday, March 27, 2019

116,936 — Javier Hernandez-Contreras, Petitioner, vs. Multiple Injury Trust Fund and The Workers' Compensation Court of Existing Claims, Respondents. Proceeding to review an order of a three-judge panel of the Workers' Compensation Court of Existing Claims, Hon. Michael W. McGivern, Trial Judge, denying Claimant's claim against the Multiple Injury Trust Fund (MITF). Claimant asserts the three-judge panel's decision is against the clear weight of the evidence. Claimant's own testimony s s he spends numerous hours each week working in his wife's flea market business and he derives income from that work. He not only helps with sales at the booth on the weekends, but attends auctions to find items to sell, and

then cleans and repairs them. When Claimant left his employment, he filed for unemployment benefits and represented that he was able and willing to work. Based on these facts, we conclude the three-judge panel's decision that Claimant is not permanently totally disabled is not against the clear weight of the evidence. Although it is clear that Claimant has many physical limitations, he has for the past three or four years helped his wife in her business, his work was not sporadic, temporary, or unusual and the work he performed could not be considered just light work. The three-judge panel's decision that Claimant is not permanently totally disabled is not against the clear weight of the evidence, and we sustain the decision of the Workers' Compensation Court of Existing Claims. SUSTAINED. Opinion from the Court of Civil Appeals, Division IV, by Wiseman, V.C.J.; Barnes, P.J., and Rapp, J., concur.

Friday, March 29, 2019

117,058 — Scott Hockenberry, Plaintiff/Appellee, v. Michelle Beth Kalas, Defendant/Appellant. Appeal from the District Court of Comanche County, Hon. Gerald F. Neuwirth, Trial Judge. Defendant (Ms. Kalas) appeals from the trial court's Order addressing motions in two consolidated cases which attempt to invoke the Oklahoma Citizens Participation Act, 12 O.S. Supp. 2014 §§ 1430-1440 (OCPA). The first motion was filed by Ms. Kalas in a protective order proceeding she initiated. Her OCPA motion was filed in response to Plaintiff (Mr. Hockenberry) filing a motion for attorney fees in that proceeding. The second OCPA motion was filed in response to Mr. Hockenberry filing a petition alleging, among other things, a claim of defamation against Ms. Kalas. Because Mr. Hockenberry's application to the court for attorney fees in the protective order proceeding does not fall within the scope of the OCPA, we conclude the trial court properly dismissed Ms. Kalas's OCPA motion filed in response to Mr. Hockenberry's motion for attorney fees. Upon denying the motion for attorney fees – a decision which Mr. Hockenberry does not appeal – the trial court properly concluded that no further matters remained pending in relation to the protective order proceeding, a proceeding which had previously been dismissed by Ms. Kalas. As to the second OCPA motion, Mr. Hockenberry voluntarily dismissed his petition, and we conclude the trial court properly concluded this voluntary dismissal was effective and eliminated the court's jurisdiction to consider the merits of the second OCPA motion. Therefore, we affirm. AFFIRMED. Opinion from Court of Civil Appeals, Division IV, by Barnes, P.J.; Wiseman, V.C.J., and Rapp, J., concur.

Monday, April 1, 2019

116,677 — Royal Hot Shot Investments, Inc., Judy R. Carr, and Johnny R. Carr (Substituted Parties for Kiefer Production Company, LLC), Plaintiffs/Appellants, Kiefer Production Company, LLC, Appellant, v. Stuart Douglas Keeton and Steven L. Keeton, Co-Trustees of The Noma L. Rongey Trust and The Noma L. Rongey Revocable Trust Dated May 21 1992; and Stuart Douglas Keeton and Steven Lee Keeton, Co-Personal Representatives of the Estate of Noma L. Rongey, Defendants/Appellees. The Plaintiffs, Royal Hot Shot Investments, Inc. ("Royal") and Judy R. Carr ("Carr"), joined by Kiefer Production Company, LLC, the entity whose records were subpoenaed, ("KPC"), appeal the trial court's Order denying their motion to quash the subpoena *duces tecum* issued to KPC by the defendants. The Defendants are Stuart Douglas Keeton and Steven L. Keeton, co-trustees of the Noma L. Rongey Trust and the Noma L. Rongey Revocable Trust, dated May 21, 1992, and Stuart Douglas Keeton and Steven Lee Keeton, co-personal representatives of the Estate of Noma Lee Rongey ("Noma"). Plaintiffs and KPC also appeal an Order to place Noma in "pay status" to receive cash payments from KPC. This is a case where the questions are whether Noma Rongey, or her Trust, is the member of Kiefer Production Company, LLC, and, if Noma, what are her status and rights due to her incapacity. The fact that the trial court's rulings on these issues are subject to revision by the trial court, as well as review on appeal, make any Opinion by this Court potentially an advisory opinion. This Court finds that the matter of the subpoena *duces tecum* must be returned to the trial court in order to assess the implications, if any, resulting from Noma's death and to give the parties and the trial court the opportunity to resolve whether there should be any limitations on the scope and extent of the discovery. The trial court's denial of the request for findings of fact and conclusions of law is affirmed. AFFIRMED IN PART, AND RENDITION OF FURTHER OPINION DENIED AND CAUSE REMANDED TO THE TRIAL COURT FOR FURTHER PROCEEDINGS. Opinion from

Court of Civil Appeals, Division IV, by Rapp, J.; Barnes, P.J., and Wiseman, V.C.J., concur.

117,166 — State of Oklahoma ex rel. Department of Human Services, Petitioner/ Appellee, v. Sundai Ekokotu, a/k/a Sunny Tito Ekototu, Respondent/Appellant. Appeal from an Order of the District Court of Oklahoma County, Hon. Sheila Stinson, Trial Judge. Sundai "Sunny" Ekokotu (Ekokotu) appeals an Order entered on his petition to vacate a dismissal of his cause. This Order modified the original order from a dismissal with prejudice to dismissal without prejudice and otherwise denied the petition to vacate. Ekokotu maintains that the trial court actually entered an order *nunc pro tunc* and that such orders cannot be utilized to correct error. Here the dismissal was with prejudice. Although Ekokotu is generally accurate in his discussion of *nunc pro tunc*, he has two obstacles to relief under this argument. First, the trial court's Journal Entry states that the judgment is "modified" and the concept of *nunc pro tunc* is not mentioned. Second, the statutes authorize the trial court to modify judgments, which is what the trial judge did. Thus, Ekokotu is in error when he argues that the trial court had to either confirm the prior judgment entirely or vacate it entirely. Ekokotu's contentions about lack of notice of the motion to dismiss and the hearing on the motion are not supported by the Record. The motion to dismiss contains the notice of setting pursuant to Local Rule 11 and a certificate of mailing to Ekokotu. After review of the Record and Briefs, this Court concludes that the trial court had the authority to modify the previous judgment and did so. This modification inured to the benefit of Ekokotu. The trial court's denial of further relief has not been s n to be an abuse of discretion or contrary to law. Therefore, the judgment of the trial court is affirmed. AFFIRMED. Opinion from Court of Civil Appeals, Division IV, by Rapp, J.; Wiseman, V.C.J., and Barnes, P.J., concur.

Tuesday, April 2, 2019

117,104 — In Re the Marriage of: Braley, Rebekah Braley, Petitioner/Appellee, v. Cole Braley, Respondent/Appellant. Appeal from the District Court of Woodward County, Hon. Don A. Work, Trial Judge. The trial court Respondent, Cole Braley (Father), appeals that part of the Order Modifying Decree of Divorce which denied Father's claim against the Petitioner, Rebekah Braley (Mother), for child support. In this case, Father appeals the trial court's denial of his request for child support for the approximately four-year period while the case was pending on his Motion to Modify Custody and Child Support. This Court has reviewed the parties' arguments and the relevant evidence. The judgment of the trial court is not against the clear weight of the evidence. Therefore, the judgment denying Father's motion to modify to require Mother to pay child support and related child expenses is affirmed. In her Brief, Appellee requested appeal-related costs and attorney fees. The request does not comply with Okla.Sup.Ct.R.1.14, 12 O.S. Supp. 2018, App. 1, and is therefore denied. AFFIRMED. Opinion from Court of Civil Appeals, Division IV, by Rapp, J.; Barnes, P.J., and Wiseman, V.C.J., concur.

Thursday, April 4, 2019

116,329 — J. Patrick Carter, RZ Industries, Inc., an Oklahoma corporation, and MPF Industries, LLC, an Oklahoma limited liability company, Plaintiffs/ Appellees, vs. Richard L. Caudle, Brian Wernimont, and Madison Machine Companies, Inc., a Wyoming corporation, Defendants/Appellants. Appeal from an order of the District Court of Tulsa County, Hon. Jefferson D. Sellers, Trial Judge. Defendants Richard L. Caudle, Brian Wernimont, and Madison Machine Companies, Inc. appeal a trial court judgment entered after non-jury trial in favor of Plaintiffs J. Patrick Carter, RZ Industries, Inc., and MPF Industries, LLC. Plaintiffs sued Defendants for fraud/deceit, conversion, tortious interference with contract, tortious interference with business opportunity, and breach of fiduciary duty. After a non-jury trial, the trial court entered its extensive, detailed 44-page findings of fact and conclusions of law. After reviewing the record, we conclude Defendants failed to s trial court error in assessing liability or awarding damages. The trial court's decision is supported by competent evidence and we affirm its judgment. AFFIRMED. Opinion from the Court of Civil Appeals, Division IV, by Wiseman, V.C.J.; Barnes, P.J., and Rapp, J., concur.

117,552 — Citibank, N.A., Plaintiff/Appellee, v. Renee M. Nelson, Defendant/Appellant. Appeal from the District Court of Tulsa County, Hon. Kirsten Pace, Trial Judge. In this action by Plaintiff/Appellee Citibank, N.A. to recover for past due amounts on a credit card account, Defendant/Appellant Renee M. Nelson appeals from the trial court's grant of summary judgment to Citibank. Citibank filed a motion for summary judgment and brief in support to

which it appended a card agreement, an affidavit of Citibank's custodian of records with respect to accounts owned by Citibank, and a copy of Ms. Nelson's account statement s ing a past due balance of $3,594.37, in addition to interest and late fees. Though given numerous extensions of time to conduct discovery and to respond to Citibank's motion, Ms. Nelson failed to respond. From our review of the record on appeal, the uncontroverted facts s that charges in the amount of $3,594.37 were made and past due on Ms. Nelson's account, along with interest and late fees; thus, the uncontroverted facts s Ms. Nelson is indebted to Citibank on that account under the terms of the card agreement. Based on our review of the record on appeal and the applicable law, we conclude no issues of material fact remain and the trial court properly granted summary judgment to Citibank as a matter of law. Accordingly, we affirm. AFFIRMED. Opinion from Court of Civil Appeals, Division IV, by Barnes, P.J.; Wiseman, V.C.J., and Rapp, J., concur.

Friday, April 5, 2019

117,286 — RJRK, LLC, an Oklahoma limited liability company, Plaintiff/ Appellee, vs. Reginal Stafford a/k/a Reginal J. Stafford and Deborah Stafford a/k/a Deborah A. Stafford, Defendants/Appellants, and The Occupants, if any, of 319 S.W. 23rd Street, Oklahoma City, Oklahoma, and the Occupants, if any, of 114 S.W. 23rd Street, Oklahoma City, Oklahoma, Defendants. Appeal from an order of the District Court of Oklahoma County, Hon. Richard C. Ogden, Trial Judge. Reginal Stafford and Deborah Stafford appeal an order sustaining RJRK, LLC's motion for summary judgment and foreclosing mortgage liens. The issue presented is whether the trial court erred in concluding RJRK was entitled to judgment as a matter of law. Defendants do not submit any evidence of fraud. They admit they executed documents. They do not deny receiving the proceeds of the loan, they do not claim that RJRK did not have the right to enforce the note, and they raise no question that the note has been transferred or sold. No material facts remain in dispute, leading us to the same conclusion the trial court reached, that RJRK is entitled to judgment as a matter of law. Finding no error, we affirm the summary judgment entered by the trial court. AFFIRMED. Opinion from the Court of Civil Appeals, Division IV, by Wiseman, V.C.J.; Barnes, P.J., and Rapp, J., concur.

117,560 — Sherri D. Hatchel, Plaintiff/Appellant, v. Leah Hocker, Defendant/Appellee. Appeal from the District Court of Garfield County, Hon. Tom L. Newby, Trial Judge. In this personal injury case arising from an automobile accident, Plaintiff appeals from the trial court's grant of summary judgment to Defendant upon its determination that the two-year statute of limitations barred Plaintiff's negligence claim. Plaintiff asserts on appeal material issues of fact remain concerning the date the accident occurred. Fundamentally, some evidence has been presented at the summary judgment stage in this case in support of the conclusion that the lawsuit was filed within two years of the accident. Although substantial evidence has also been presented contradicting this conclusion, the trial court may not weigh the evidentiary materials at the summary judgment stage. We, therefore, conclude the trial court erred as a matter of law in determining that the uncontroverted evidence demonstrates the statute of limitations bars Plaintiff's claim. Accordingly, we reverse and remand for further proceedings. REVERSED AND REMANDED FOR FURTHER PROCEEDINGS. Opinion from Court of Civil Appeals, Division IV, by Barnes, P.J.; Wiseman, V.C.J., and Rapp, J., concur.

Monday, April 8, 2019

117,368 (Companion with Case No. 116,299) — In the Matter of the Estate of Rhodena L. Thornton, Deceased, and In the Matter of the Estate of William H. Thornton, Deceased, Pamela Louise Brown, Appellant, vs. Teresa Hand, Appellee. Appeal from an order of the District Court of Osage County, Hon. B. David Gambill, Trial Judge, denying Appellant Pamela Louise Brown's "motion to vacate journal entry on personal representative's objection to settlement report and contract of employment of David L. Smith." A review of the record s s Attorney Smith was provided proper service of the orders, and when given an opportunity during the hearing on the motion to vacate, he provided no explanation, argument or other proof to the court as to the specified service violated statutory service provisions. We see no abuse of discretion in the trial court denying the motion to vacate on this basis. Although the trial court "sustained the objection" of the personal representative and ordered Smith to deposit the settlement proceeds with the court by a certain date without deducting his attorney fees, costs and/or other expenses, it also ordered him to appear for a determination on

such fees and costs, which, based on the record before us, has not yet occurred. It appears the trial court agreed with Hand that the proceeds should be paid into court in full, but rather than denying Smith's entitlement to fees and expenses, it expressly set a hearing to determine those fees, costs and expenses. The trial court could not have "sustained the objection" to awarding fees and costs at all and, in the same breath, then set those matters for hearing three weeks later. We take the trial court at its word when it ordered the settlement proceeds paid into court to be subject to the court's future disposition after a hearing on Smith's request for attorney fees, costs and expenses. Until the trial court makes this determination, we have no decision to review on this question, and we cannot address the merits of the attorney fees and costs argument for the first time on appeal. Although we affirm the trial court's denial of Brown's motion to vacate, we remand for the trial court to determine Smith's attorney fees, costs and expenses. AFFIRMED AND REMANDED FOR FURTHER PROCEEDINGS. Opinion from the Court of Civil Appeals, Division IV, by Wiseman, V.C.J.; Barnes, P.J., and Rapp, J., concur.

115,628 — In the Marriage of: Sharon Keenan, Petitioner/Appellee, v. John Andrew Keenan, Respondent/Appellant. Appeal from an Order of the District Court of Tulsa County, Hon. Tammy Bruce, Trial Judge. Respondent, John Andrew Keenan, (Husband) appeals a trial court Journal Entry of Judgment awarding Petitioner, Sharon Keenan, (Wife) support alimony and dividing the marital property in this divorce action. The trial court is vested with wide discretion in dividing property and awarding alimony. *McLaughlin v. McLaughlin,* 1999 OK 34, ¶ 18, 979 P.2d 257, 262. This Court finds the trial court did not abuse its discretion in its award of support alimony. This Court further finds the trial court's property division is inequitable and is remanded to the trial court for an equitable division of the marital property. This Court also finds the trial court did not err in allowing introduction of Husband's deposition taken in the Florida action. AFFIRMED IN PART, REVERSED IN PART AND REMANDED WITH INSTRUCTIONS. Opinion from Court of Civil Appeals, Division IV, by Rapp, J.; Wiseman, V.C.J., and Thornbrugh, J. (sitting by designation), concur.

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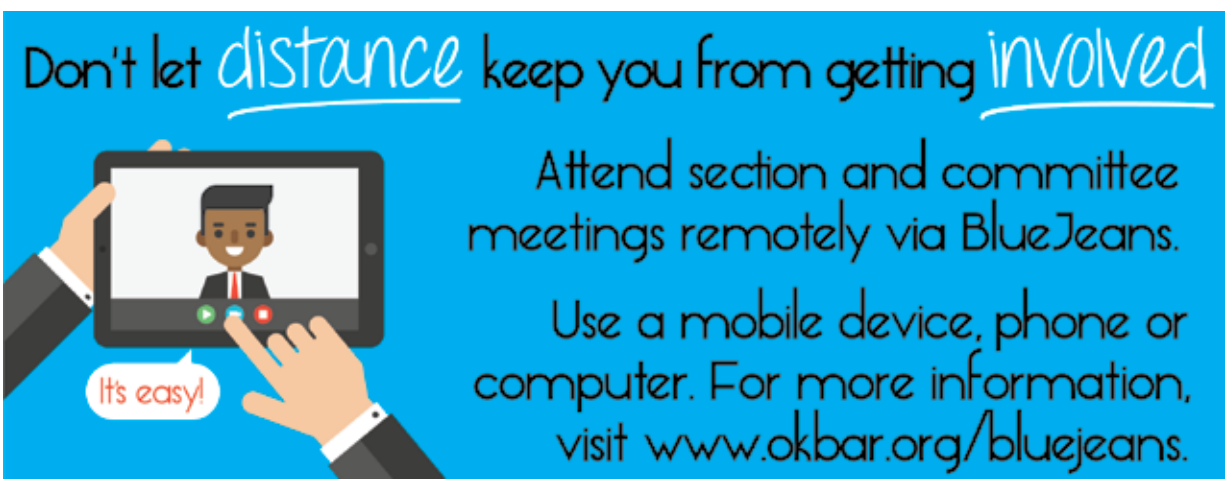

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Family Law
General Education
General Practice
Health Law
Immigration Law
Indian Law
Insurance Law
Labor & Employment Law
Law Office Management and Law Practice Management & Technology
LGBTQ
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Marijuana / Cannabis
Mental Health
Military/Veterans
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Real Property
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...AND MORE!

WEBCAST ENCORES

April 25 @ 11 a.m.
#METOO: Sexual Harassment in the Workplace
(6 total credit hours)

April 27 @ 9 a.m.
Legal Updates 2018 Day One
(6 total credit hour)

April 28 @ 11 a.m.
Legal Updates 2018 Day Two
(6 total credit hour/ including 1 hours of ethics)

April 29 @ 9:30 a.m.
Intro & Legal Tech Tips, Tricks & Apps
(2 total credit hours)

April 29 @ 11:15 a.m.
iPractice on the iPad: How iPads Can Be Used Effectively in a Law Practice
(1 total credit hour)

April 29 @ 12:30 p.m.
How to Manage Your Workload, Tasks & Time
(1 total credit hour)

April 29 @ 1:30 p.m.
Microsoft Word Power tips for Legal Users
(1 total credit hour)

April 29 @ 2:30 p.m.
Microsoft Office 365: You Probably Have No Idea What You're missing
(1 total credit hour)

April 30 @ 9 a.m.
It's Time for a Change: Much Better Methods for Drafting Complex Legal Documents
(1 total credit hour)

April 30 @ 10 a.m.
Addressing Security With Your Clients (Ethics)
(1 Total Credit Hour; 1 of which can be used towards Ethics)

April 30 @ 11:30 a.m.
How to Protect Yourself and Preserve Confidentiality When Negotiating Instruments (Ethics)
(1 Total Credit Hour; 1 of which can be used towards Ethics)

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April 23 @ Noon
Technical Fouls: Even Minor Ethics Violations Can Have Major Consequences
Presented by: Legal Humorist Sean Carter

April 27 @ 10 a.m.
The 2019 Ethy Awards
Presented by: Legal Humorist Sean Carter

May 1 @ Noon
The Ties That Bind: Avoiding Inappropriate Entanglements in the Practice of Law
Presented by: Legal Humorist Sean Carter

May 7 @ Noon
The Truth, The Whole Truth and Nothing But the Truth: The Ethycal Imperative for Honesty in Law Practice
Presented by: Legal Humorist Sean Carter

CLE webinars.com

April 30 @ 11 a.m.
Retain Your Clients: A Roadmap to Effective, Ethical Client Service
Presented by: CLESeminars.com

May 1 @ 11 a.m.
Me Too: Sexism, Bias, and Sexual Misconduct in the Legal Profession
Presented by: CLESeminars.com

May 3 @ 11 a.m.
Overcoming Procrastination: How to Kick the Habit
Presented by: CLESeminars.com

May 8 @ 11 a.m.
Rock-n-Roll Law Intellectual Property/Copyright Series: The Exclusive Rights (and Revenue) You Get With Music
Presented by: CLESeminars.com

To register go to: www.okbar.org/cle

ALL OF YOUR REQUIRED 12 HOURS OF MCLE CREDIT CAN BE RECEIVED BY LISTENING TO AN AUDIO WEBCAST.

UPCOMING AUDIO SEMINARS

Tuesday, April 23
Mother Nature & Leases: Drafting Issues to Protect Against Storm & Other Damage
(1 total credit hour/includes no ethics credit)

Friday, April 26
Undue Influence and Duress in Estate Planning
(1 total credit hour/includes no ethics credit)

Tuesday, April 30
Ethical Issues for Small Law Firms: Technology, Paralegals, Remote Practice & More
(1 Total Credit Hour; 1 of which can be used towards Ethics)

Thursday, May 2
MAC Clauses in Business Transactions
(1 total credit hour/includes no ethics credit)

Friday, May 3
The Law of Background Checks: What Clients May/May Not 'Check
(1 total credit/includes no ethics credit)

Tuesday, May 7
Incentive Compensation in Businesses, Part 1
(1 total credit/includes no ethics credit)

Wednesday, May 8
Incentive Compensation in Businesses, Part 2
(1 total credit/includes no ethics credit)

Friday, May 9
Drafting Demand Letters
(1 total credit/includes no ethics credit)

Tuesday, May 14
2019 Trust and Estate Planning Update
(1 total credit/includes no ethics credit)

To register go to: www.okbar.org/CLE