INDIANA COMMERCIAL COURT

STATE OF INDIANA	)	IN THE MARION SUPERIOR COURT
	)SS:	
COUNTY OF MARION	)	CAUSE NO. 49D01-2008-PL-026436

CITY OF FISHERS, INDIANA;	)
CITY OF INDIANAPOLIS, INDIANA;	)
CITY OF EVANSVILLE, INDIANA;	)
and CITY OF VALPARAISO, INDIANA;	)
on behalf of themselves and all others	)
similarly situated,	)
	)
Plaintiffs,	)
	)
v.	)
	)
NETFLIX, INC.; DISNEY DTC LLC;	)
HULU, LLC; DIRECTV, LLC;	)
DISH NETWORK CORP.;	)
and DISH NETWORK L.L.C.;	)
Defendants.	)

ORDER GRANTING JOINT MOTION TO DISMISS OF DEFENDANTS NETFLIX, INC., DISNEY DTC LLC, HULU, LLC, AND DIRECTV, LLC

Comes now this matter before the Court on Defendants, Netflix, Inc. ("Netflix"), Disney DTC LLC ("Disney"), Hulu, LLC ("Hulu"), DirecTV, LLC ("DirecTV") (collectively "Defendants"), Joint Motion to Dismiss of Defendants Netflix, Inc., Disney DTC LLC, Hulu LLC, and DirecTV LLC ("Motion to Dismiss").

Defendants filed the Motion to Dismiss on February 9, 2024. Plaintiffs, City of Fishers, Indiana, City of Indianapolis, Indiana, City of Evansville, Indiana, and City of Valparaiso, Indiana on behalf of themselves and all others similarly situated (collectively "Plaintiffs"), filed an Opposition to Defendants' Joint Motion to Dismiss and Dish's Amended Motion to Dismiss ("Opposition") on March 11, 2024. Plaintiffs also filed a Notice of Challenge to Constitutionality of Statute on March 11, 2024. Defendants filed a Reply Brief in Support of their Joint Motion to Dismiss for Failure to State a Claim ("Reply") on April 10, 2024. Also on April 10, 2024, the State

of Indiana filed a Notice of Intervention in this matter. The State of Indiana filed its operative Amended Brief in Opposition to Plaintiffs' Constitutional Claims on May 3, 2024. Plaintiffs filed a Response to the State of Indiana's Amended Brief in Opposition to Plaintiffs' Constitutional Claims on May 15, 2024.

A hearing on this matter was held on May 20, 2024. Having been fully briefed on the issues, the Court finds now as follows:

I. PERTINENT ALLEGED FACTS[1] AND PROCEDURAL HISTORY

A. Parties

1. The Indiana Video Service Franchises Act ("VSF Act"), Ind. Code. § 8-1-34-1 et seq., states that persons offering "video service" in Indiana must apply for a franchise from the Indiana Utility Regulatory Commission and pay franchise fees to cities and other units of government.

2. Plaintiffs, The City of Fishers, Indiana ("Fishers"); The City of Indianapolis, Indiana ("Indianapolis"); The City of Evansville, Indiana ("Evansville"); and The City of Valparaiso, Indiana ("Valparaiso") are Units, as defined by Ind. Code §§ 8-1-34-12 and 36-1-2-23 and have been at all times during the preceding ten years. (Complaint, ¶¶ 9-12).

3. Plaintiffs receive franchise fees from traditional cable companies and other persons offering video service[2] pursuant to the VSF Act. (Complaint, ¶ 13).

4. Defendants, ("Netflix"), Disney DTC LLC ("Disney DTC"), Hulu, LLC ("Hulu"), DIRECTV, LLC ("DIRECTV"), and DISH Network Corp. and Dish Network L.L.C. (together,

[1] Facts taken directly from complaint when possible. Modifications have been made to excise legal conclusions and other statements which may not be considered as part of a Motion to Dismiss.
[2] The Court clarifies that the Court relies on this statement to mean that Defendants are providing video service generally and not that the Court has concluded for this motion that the Defendants are providing "video service" under the definition used in the VSF. This understanding should apply for the use of the term "video service" throughout the Statement of Facts section.

"DISH") offer video content transmit video content to Indiana subscribers using internet protocol and other technologies. (Complaint, ¶¶ 5, 6).

5. Netflix states that it offers video programming[3] that is "comparable to similarly-focused US domestic cable networks." (Complaint, ¶ 26).

6. Hulu similarly claims that its video programming is a viable alternative to cable and broadcast television. As one of Hulu's executives recently put it in a Hulu press release, "Hulu is the complete TV experience for consumers, offering both live and on-demand programming and more consumer choice than ever before." (Complaint, ¶ 27)

7. According to Disney DTC's press release, its Disney+ service offers "commercial-free programming with a variety of original feature-length films, documentaries, live-action, and animated series and short-form content." (Complaint, ¶ 28)

8. Netflix, Hulu, and Disney DTC each transmit their video programming to subscribers in Indiana Units through facilities located at least in part in a public right-of-way. (Complaint, ¶ 29).

9. Defendants DIRECTV and DISH have transformed their businesses and delivery methods over the last decade to meet the demands of the marketplace, and subscribers now access their services through facilities located at least in part in a public right-of-way. (Complaint, ¶ 30).

B. Plaintiffs' rationale for seeking license fees under the VSF Act

10. Defendants have been, and are now, providers of video service throughout Indiana, but they have not complied with the VSF Act's requirements. Plaintiffs seek to require Defendants

[3] The Court clarifies that the Court relies on this statement to mean that Defendants are providing video programming generally and not that the Court has concluded for this motion that the Defendants are providing "video programming" under the definition used in the VSF. This understanding should apply for the use of the term "video service" throughout the Statement of Facts section.

to acquire the necessary franchises, pay the required fees in the future, and compensate Plaintiffs and all other units of government for unpaid fees for past service. (Complaint, ¶ 1).

11. Plaintiffs allege that Defendants transmit their programming through facilities located at least in part in public rights-of-way within the geographic boundaries of Indiana Units, including public rights-of-way located within Plaintiffs' geographic boundaries. Plaintiffs contend that Defendants have not applied for a franchise or paid franchise fees to Indiana Units ("Unit") means county, municipality, or township in violation of the VSF. Ind. Code Ann. § 8-1-34-12 (citing Ind. Code Ann. § 36-1-2-23). (Complaint, ¶ 7).

12. Indiana Units are entitled to franchise fees from persons transmitting video programming through facilities located in the public right of way pursuant to the VSF, Ind. Code § 8-1-34-24, (Complaint, ¶ 23).

13. Defendants offer programming that is comparable to that provided by television broadcast stations and other providers of video programming.[4] Defendants transmit that programming directly to subscribers located within the geographic boundaries of Indiana Units. (Complaint, ¶ 24).

14. Subscribers view Defendants' video programming using devices—including, inter alia, smart televisions, streaming media players like Xbox, PlayStation, Roku, or Apple TV, desktop and laptop computers, and set-top boxes—that have software enabling them to receive Defendants' video programming. When a subscriber wants to watch Defendants' video programming, the companies transmit the video programming to the subscriber via internet protocol and other technologies. (Complaint, ¶ 25).

[4] Meets the definition of "video programming" set forth in Ind. Code § 8-1-34-13; 47 U.S.C.S. § 522(20).

15. Like traditional cable companies and others offering video service in Indiana who have obtained franchises and paid fees, each of the Defendants charges subscribers a fee to access their video programming. Defendants thus earn gross revenues from transmitting video programming to subscribers through facilities located at least in part in a public right-of-way. (Complaint, ¶ 31).

16. Plaintiffs conclude that Defendants have failed to comply with the VSF Act by failing to apply for and obtain a franchise, as required by Ind. Code § 8-1-34-16, by failing to determine quarterly gross revenues from their transmission of video service under the VSF Act, as required by Ind. Code § 8-1-34-23, and by failing to pay franchise fees to Plaintiffs and other class member Units, as required by Ind. Code § 8-1-34-24. (Complaint, ¶ 32).

C. Relevant procedure history

17. The Court initially denied previous motions to dismiss from all Defendants on January 18, 2022.

18. On June 10, 2022, the Court denied Defendants' various motions to reconsider but granted a request to certify the Court's prior order denying the motions to dismiss for interlocutory appeal.

19. On August 12, 2022, the Indiana Court of Appeals informed the Parties that it would accept jurisdiction over the certified order for an interlocutory appeal.

20. On May 4, 2023, Governor Holcomb signed HB 1454 into law, which included amendments to key provisions of the VSF Act that were reviewed as part of the motions to dismiss.

21. On June 13, 2023, the Court of Appeals issued its ruling on the interlocutory appeal. While the Court of Appeals affirmed that this Court properly held subject matter jurisdiction over this matter, the Court of Appeals vacated this Court's prior dismissal orders and instructed this

Court to conduct further proceedings to determine what impact, if any, HB 1454 would have on the motions to dismiss.

II. STATUTES APPLICABLE TO THIS MOTION

22. Under Ind. Code § 8-1-34-24, Units are entitled to receive a franchise fee from persons transmitting video programming through facilities located at least in part in a public right-of-way.

23. Under the VSF, "a person who seeks to provide video service in Indiana after June 30, 2006, shall file with the commission an application for a franchise. Ind. Code § 8-1-34-16(b).

24. Under the prior version of the statute, the VSF Act defined "video service" as

> (1) the transmission to subscribers of video programming and other programming service:
>
> (A) through facilities located at least in part in a public right-of-way; and
>
> (B) without regard to the technology used to deliver the video programming or other programming service; and
>
> (2) any subscriber interaction required for the selection or use of the video programming or other programming service."

Ind. Code § 8-1-34-14.

25. HB 1454 included an amendment to Ind. Code § 8-1-34-14 which redefined "video service" to mean:

> (1) the transmission to subscribers of video programming and other programming service **by a video service provider**:
>
> (A) through facilities located at least in part in a public right-of-way; and
>
> (B) without regard to the technology used to deliver the video programming or other programming service; and
>
> (2) any subscriber interaction required for the selection or use of the video programming or other programming service.
>
> **(b) The term does not include:**

(1) commercial mobile service (as defined in 47 U.S.C. 332);
(2) direct to home satellite service (as defined in 47 U.S.C. 303(v)); or
(3) video programming accessed via a service that enables users to access content, information, electronic mail, or other services offered over the Internet, including digital audiovisual works (as defined in I.C. 6-2.5-1-16.3)

(Plf. Ex. A, HB 1454)(amendments in **bold**).

26. As stated, Plaintiffs challenge the constitutionality of these amendments to the term "video service" as enacted under HB 1454.

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III. STANDARDS ON MOTION TO DISMISS

Since the previous orders on dismissal have been vacated, this proceeding remains a motion to dismiss under Ind. Trial Rule 12(B)(6) for failure to state a claim for damages. "A motion to dismiss under Trial Rule 12(B)(6) tests the legal sufficiency of the plaintiff's claim, not the facts supporting it. A dismissal under Trial Rule 12(B)(6) is improper unless it appears to a certainty on the face of the complaint that the complaining party is not entitled to any relief." *Marion County Circuit Court v. King*, 150 N.E.3d 666, 671 (Ind. Ct. App. 2020) (citations omitted). The Court "may only dismiss if the plaintiff would not be entitled to recover under any set of facts admissible under the allegations of the complaint." *Parsley v. MGA Family Grp., Inc*., 103 N.E.3d 651, 654 (Ind. Ct. App. 2018). The Plaintiffs must "plead the operative facts necessary to set forth an actionable claim." *Trail v. Boys & Girls Clubs of Nw. Ind*., 845 N.E.2d 130, 135 (Ind. 2006) (citation omitted)

The Court takes the pleaded facts to be true and considers "the allegations in the light most favorable to the nonmoving, drawing every reasonable inference in that party's favor." *King*, 150 N.E.3d at 671. While a court must accept as true all well-pleaded allegations contained in the complaint, it "need not accept as true conclusory, non-factual assertions or legal conclusions."

Richards & O'Neil, LLP v. Conk, 774 N.E.2d 540, 547 (Ind. Ct. App. 2002) (emphasis added). A court is not required to accept as true "allegations that are contradicted by other allegations or exhibits attached to or incorporated in the pleading." *Morgan Asset Holding Corp. v. CoBank, ACB*, 736 N.E.2d 1268, 1271 (Ind. Ct. App. 2000) (citations omitted).

IV. DISCUSSION

The Court of Appeals has asked the Court to reassess this renewed motion to dismiss in light of the recently enacted HB 1454.

Defendants maintain that HB 1454 emphatically eliminates Plaintiffs' VSF Act claims while still maintaining that the claims should still be dismissed under the old version of the Act. The State of Indiana provided argument in favor of upholding the constitutionality of HB 1454. In response, Plaintiffs have challenged the constitutionality of the amended portions of the VSF Act enacted under HB 1454 and maintain that the Court should not consider those provisions and reaffirm the initial ruling.

HB 1454 presents the Court additional new sub-issues to determine the amendments are constitutional as well as the larger question of whether Plaintiffs' VSF Act claims should be dismissed. The Court must determine the constitutionality of HB 1454.If HB 1454 is deemed constitutional, the Court must determine whether Plaintiff's claims survive. If HB 1454 is deemed unconstitutional, the Court must then assess whether to reaffirm its prior denials of Defendants' motion to dismiss in light of the subsequent proceedings in this matter since the Court's initial denial nearly two-and-a-half years ago.

The Court will first address the constitutionality of HB 1454. The Court's findings as to that issue will inform its subsequent analysis on whether to grant the pending motion to dismiss.

A. Whether HB 1454 is constitutional

Courts review the constitutionality of enacted legislation by "examining the language of the text in the context of the history surrounding its drafting and ratification, the purpose and structure of our constitution, and case law interpreting the specific provisions." *Ind. Gaming Comm'n v. Moseley*, 643 N.E.2d 296, 298 (Ind. 1994) (referencing *State Election Bd. v. Bayh*, 521 N.E.2d 1313 (Ind. 1988)). As a starting point, courts "presumi[e] the constitutionality of statutes challenged under sections 22 and 23." *Ind. Gaming Comm'n*, 643 N.E.2d at 300. The burden to rebut this presumption is upon any challenger, and all reasonable doubts must be resolved in favor of an act's constitutionality. *In re Tina T.*, 579 N.E.2d 48, 56 (Ind. 1991) (citing *Miller v. State*, 517 N.E.2d 64, 71 (Ind. 1987) (citations omitted)). When a statute can be construed to support its constitutionality, such construction must be adopted. *Id.*

The Plaintiffs have raised three challenges to the constitutionality of HB1454 under different sections of the Indiana Constitution. First, Plaintiffs have argued that HB 1454 did not consist of a "single subject" in violation of Article IV, Section 19. Plaintiffs have also argued that HB 1454 is unconstitutional "special legislation" that relates to local government fees in violation of Article IV, Section 22 and is otherwise improperly applied legislation under Article IV, Section 23. First, we determine whether the law is general or special.

For challenges under Article IV, Section 19, the Court must determine whether HB 1454 fits the constitutional requirement that legislation be limited to a single subject. "Article IV, Section 19 was included in the Indiana Constitution to protect the legislative process against political log-rolling, 'where legislators combine two unrelated bills, each without sufficient support to pass on its own, in order to accumulate the requisite number of votes to pass both.'" *Hoovler v. State*, 689 N.E.2d 738, 741 (Ind. Ct. App. 1997). "The single subject provisions of the Constitution and the

enrolled act rule are designed to promote fair practice in legislating without much judicial intervention." *Bayh v. Ind. State Bldg. & Constr. Trades Council*, 674 N.E.2d 176, 179 (Ind. 1996).

For challenges under Article IV, Sections 22 & 23, the Court determines whether HB 1454 is general or special legislation. "[I]f the law is general, we decide whether it is applied generally throughout the state; but if the law is special, we decide whether the law is nevertheless constitutionally permissible. *City of Hammond v. Herman & Kittle Props.*, 119 N.E.3d 70, 82 (Ind. 2019) (citations omitted).

The Court will address these challenges in turn.

i. *Whether HB 1454 meets the "single subject" requirement*

The Court will first address Plaintiffs' challenge to HB 1454 under Article IV, Section 19.

Plaintiffs argue that HB 1454 violates Article IV, Section 19 of the Indiana Constitution as it involves legislation consisting of several different, unrelated areas of public policy that cannot be reasonably understood to satisfy the "single subject" requirement. In addition to the VSF Act, Plaintiffs point out that HB 1454 also includes provisions that apply to, *inter alia*, construction and repair contracts by state educational institutions (Plf. Ex. A, § 10), tax exemptions for funeral homes, (*Id.* § 21), 529 savings accounts (*Id.* § 65), and establishment of residential housing development programs. (*Id.* § 182). Plaintiffs also note that the applicable legislation concerning the VSF Act consists of only one half-page of the total hundreds of pages comprising HB 1454. Plaintiffs argue that the present situation constitutes the kind of impermissible "log-rolling" that Article IV, Section 19 exists to prevent.

In support, Plaintiffs direct the Court to the cases; *State ex rel. Ind. Real Estate Comm'n v. Meier*, 190 N.E.2d 191 (Ind. 1963) and *State ex rel. Pearcy v. Criminal Court of Marion County, Division One*, 274 N.E.2d 519 (Ind. 1971). In *Maier*, the Indiana Supreme Court deemed a bill

regulating real estate brokers, salespersons, and auctioneers in violation of the "single subject" rule, finding that auctioneers were part of a distinct occupation that necessitated its own legislation separate from the one that covered real estate brokers and salespersons. 190 N.E.2d at 193. Similarly, in *Pearcy*, the Indiana Supreme Court declared a bill that included provisions related to penal employees and length of sentencing unconstitutional under Article IV, Section 19 because those subjects were too disparate to be considered to satisfy the "single subject" rule. 274 N.E.2d at 522. Using these cases to define the parameters of what constitutes an acceptable "single subject," Plaintiffs argue that HB 1454, which combines legislation amending the VSF Act with other, highly disparate provisions involving college savings accounts and local economic development, violates the "single subject" rule under Article IV, Section 19 as articulated by the *Maier* and *Pearcy* Courts. Plaintiffs, therefore, have asked the Court to strike the provision amending the VSF Act from HB 1454.

In response, Defendants argue that HB1454 meets the constitutional requirements of Article IV, Section 19 as presently understood under Indiana law because all of the enactments under HB 1454 broadly relate to the subject of local government finance. Defendants note that that different policy areas can be grouped under a "single subject" in a bill as long as "any reasonable basis for the grouping together" exists. *Dague v. Piper Aircraft Corp.*, 275 Ind. 520, 531, 418 N.E.2d 207, 214 (1981) (citations omitted). The basis need only show "some rational unity between the matters embraced in the act." *Loparex, LLC v. MPI Release Techs, LLC*, 964 N.E.2d 806 (Ind. 2012). Further, "in considering the validity of an act under [Section 19], a very liberal interpretation is to be applied, with all doubts resolved in favor of the legislation's validity." *Dague*, 275 Ind. at 531.

Defendants argue that that VSF Act provision does relate to the other subjects of HB 1454 on the grounds of "local government finance." The VSF Act amended relates to license fees which

local government units can collect. Other provisions, while involving areas outside of telecommunications or utilities, still relate to local government finance. For example, economic development subjects and education savings accounts involve changes to revenue collection that have an impact on local governmental unit budgets.

Defendants challenge Plaintiffs' reliance on *Maier* and *Peacey* because they relied on an old version of Article IV, Section 19 which required the subject of any bill to be referenced in the title of the bill. For example, in *Maier*, real estate salesmen and brokers were listed in the title of the bill while auctioneers were not. 190 N.E.2d at 194. Since the *Maier* Court determined that an ordinary person would not have known the bill related to real estate auctioneers when the title only mentions salespersons and brokers led the Court to declare the section unconstitutional. *Id.* That title requirement no longer exists in Article IV, Section 19, so there is similarly no requirement that all subjects of a bill must be immediately apparent to ordinary persons based on the reading of the title. Defendants contend this evolving understanding in the common law indicates that Indiana courts favor a more permissible understanding of what can qualify as a "single subject" for the purpose of Article IV, Section 19 analysis.

Defendants argue that the case law on this issue since 1974 would support holding HB 1454 to have been enacted constitutionally. For instance, the *Dague* Court upheld a law that related both to general operations in Indiana courts as well as specific changes to the Indiana Products Liability Act. 275 Ind. at 532, 418 N.E.2d at 215. Following the *Dague* precedent, the Indiana Supreme Court in *Ind. State Teachers Ass'n v. Bd. of Sch. Comm'rs* found that a bill concerning the state budget and collective bargaining rights of public teachers qualified as relating to a "single subject" under the present understanding of Article IV, Section 19. 679 N.E.2d 933, 935 (Ind. Ct. App. 1997). Defendants also note that subjects such as whether the Indiana Department of Child Services

is financially liable for placement of a juvenile is party of the same "single subject" of the state budget and local appropriations such that their inclusion in a bill did not violate Article IV, Section 19. In summary, Defendants argue the provisions concerning the VSF Act related to HB 1454's single subject of local government and finance and thus cannot be found to violate Article IV, Section 19.

Upon review, the Court agrees with Defendants. It is apparent based on the case law that, while Article IV, Section 19 is not a dead letter, it has been applied far more liberally to uphold the constitutionality of bills since its amendment in 1974. The Court finds the subjects in HB 1454, while disparate in their areas of application, do largely fall under the subject of local government finance as they relate the revenue collection and expenditures of local government units. This includes the amendments to the VSF Act, which address the question of whether local governments are able to collect license fees from companies like the Defendants. The Court is sympathetic to Plaintiffs' argument that it is logically possible for any collection of legislative prerogatives to be collected under a "single subject" if one were to apply an abstract-enough subject designation, e.g., "Laws that have to do with money" or "Laws that do not have to do with money." The Court, however, does not find that the outcome of this issue depends on such a broad reading of HB 1454 as provisions do all at least reasonably relate to the subject of local government finance. While this basis may be more loosely connected to certain provisions of HB 1454 than others, this Court must follow binding precedent that upheld the constitutionality of bills where the provisions are united by a single subject, even where that connection is more tenuous to with respect to certain subjects than others. *See, e.g., Ind. State Teachers Ass'n*, 679 N.E.2d at 935.

ii. *Whether HB 1454 violates Article IV, Section 22 or Section 23*

The Court now addresses Plaintiffs constitutional challenges under Article IV, Sections 22 and 23. First, the Court must determine if the applicable provision of HB 1454 is a special or general law. If it is general, then the Court will determine whether it is being applied as a general law. If it is special, the Court will then address whether it fits an exception for an acceptable special law. If HB 1454 constitutes a special law related to the collection of fees, it would be impermissible under Article IV, Section 22.

a. Whether HB 1454 construes a general or special law.

"A statute is 'general' if it applies 'to all persons or places of a specified class throughout the state.'" *City of S. Bend v. Kimsey*, 781 N.E.2d 683, 689 (Ind. 2003) (citing Black's Law Dictionary 890 (7th ed. 1999). A statute is "special" if it "pertains to and affects a particular case, person, place, or thing, as opposed to the general public." *Id.* To determine whether a piece of legislation is "general" or "special, the Court looks to both the language of the statute as well as the context and circumstances of its passage to determine its status. *See, e.g., State v. Hoovler*, 668 N.E.2d 1229, 1234 (Ind. 1996).

Plaintiffs argue that the VSF Act amendments in HB 1454 constitute a special law that does not apply to the general public. "A special law is one which … operates on or over a portion of a class instead of all of the class …." *Ulrich v. Beatty*, 216 N.E.2d 737, 746 (Ind. Ct. App. 1966) (*en banc*). Plaintiffs argue that HB 1454 creates two classes of video service providers: those whose viewers access their programming through the internet and those whose viewers access the programming through alternative means. Plaintiffs also note that HB 1454 was passed intending only to apply to video service providers like Defendants who make up the first category, supporting the finding that HB 1454 is a special law. Plaintiffs contend that video service providers like Defendants that do not currently pay licensing and other video service providers that do pay

licensing fees are ultimately all video service providers. Plaintiffs argue that HB 1454 is a special law that seeks to benefit certain video services companies while excluding other video service companies.

In response, Defendants argue that the VSF Act amendments in HB 1454 should be treated as a general law rather than a special law. Defendants note that HB 1454 applies throughout the state and has no geographic restriction hat would make it a special law. Defendants contrast HB 1454 from other laws that were subject to be special laws despite applying general language. For example, both in *State v. Hoovler*, 668 N.E.2d 1229, 1233 (Ind. 1996), and *State ex rel. Atty. Gen. v. Lake Super. Ct.*, 820 N.E.2d 1240, 1252 (Ind. 2005), the Indiana Supreme Court found that laws were written with population requirements such that the laws in question could only apply to Tippecanoe and Lake Counties respectively, the Indiana Supreme Court held the laws to be special laws. In *City of Hammond v. Herman & Kittle Props., Inc.*, the Indiana Supreme Court held that a law on rental property registration fees written to exclude application to Bloomington and West Lafayette was also a "special law" that implicated Article IV, Section 23. 119 N.E.3d 70, 78 (Ind. 2019). Defendants maintain HB 1454 does not have any exemptions as written that would limit or exempt its application to any portion of the state, so it is a "general law."

Upon review, the Court agrees with Defendants and finds that HB 1454 is a general rather than specific law because it applies uniformly throughout the state. HB 1454 does not limit its application to any portion of the state. Instead, it applies to all service providers no matter where in the state they are. There is no unique aspect of the services provided or right-of-ways governed by the VSF Act amendments would suggest that HB 1454 was passed to apply only to video service providers within a specific geographic area.

There does not appear to be a significant dispute over geographic applicability. Rather, Plaintiffs' primary argument appears to be that HB 1454 is a special law because it creates and applies only to a specified class of video service providers who operate solely through the internet rather than through a traditional cable or telecom company that was previously bound to pay licensing fees. The Court finds, however, that case law does not support finding that an application to only certain companies within the video service industry does not render HB 1454 a special law. For example, the *Ulrich* Court, citing the Indiana Law Encyclopedia, clarified that "'The fact that a statute exempts from its operation certain classes does not render it local or special, as long as the classification is not unreasonable or arbitrary.'" 216 N.E.2d at 746 (citing 26 Ind. Law Encyc., Statutes, § 24, p. 244). Based on a review of the linage and circumstances of HB 1454's passage, the Court cannot find that the distinction between internet video service providers that did not have to obtain a license to operate verses other video service providers to be unreasonable or arbitrary. The pervious version of the VSF Act was passed in 2007.

As recognized during the briefing and issuance of the prior order denying Defendants' initial Motion to Dismiss, 2007 was a far different world in terms of consuming media and accessing internet content. In the intervening seventeen years, smartphones and other devices have allowed customers to access video content in several new ways which were unknown at the time of enacting the prior version of the VSF Act. Given the presumption of constitutionality, the Court finds that it would not be unreasonable or arbitrary for the General Assembly to enact updated legislation to answer the question of whether the VSF Act applies to streaming platforms to account for new technologies that either did not exist or had not yet proliferated as of 2007. While the timing of this legislation does appear to coincide with the events of this matter, litigation can often raise new public policy issues or make existing policy issues more salient in the public consciousness. A

timely update on the VSF Act language to account for issues brough by the proliferation and consumption of internet- based content seems wholly appropriate, even if the resolution of the open question ultimately favors one party over the other.

For these reasons, the Court finds that HB 1454 is a general rather than a specific law.

b. Whether HB 1454 applies generally throughout the state

As stated above, the Court finds that HB 1454 applies throughout the state of Indiana and does not limit to or exempt from application any portion of Indiana. The Court, therefore, finds that HB 1454 should be considered a constitutional general law.

c. Whether Article IV, Section 22 or Article IV, Section 23 are implicated by HB 1454

Because HB 1454 is a general rather than specific law, HB 1454 does not violate either Article IV, Sections 22 or 23 because those sections apply only to special laws. The Court, therefore, need not engage in further analysis of whether HB 1454 would be permissible under either Section 22 or Section 23 to uphold its constitutionality.

B. Whether HB 1454 requires dismissal of Plaintiffs' claims

Having found the relevant portions of HB 1454 to be constitution, the Court will address the impact of those amendments to Plaintiffs' claims on remand as instructed by the Court of Appeals.

The key provision of HB 1454 amended the VSF Act's definition of "video service" to exclude from the Act's definition of "video service" any "video programming accessed via a service that enables users to access content, information, electronic mail, or other services offered over the Internet, including digital audiovisual works (as defined in I.C. 6-2.5-1-16.3)." (Plf. Ex. A, HB

1454). In other words, this "Internet Exclusion" would exempt parties who provide video programing that is accessed over the internet. This would include all of the Defendants in this matter. The General Assembly also made this amended apply retroactively, making its effective date July 1, 2006.

Based on the plain language of this amendment, the Court finds Plaintiffs' VSF Act claims must now fail under T.R. 12(B)(6) because the relief sought by Plaintiffs cannot be obtained in light of the passage of HB 1454. Each of the Defendants in this case provide what the Court inferred to be "video programming" for the purposes of the previous T.R. 12(B)(6) motion that is accessible through the internet. In light of the Internet Exclusion amendment, this type of "video programming" cannot be considered "video service" under the VSF Act. The effective date of the Internet Exclusion begins before any of Defendants' streaming platforms existed, eliminating any possible claim for unpaid license fees that Plaintiffs could have incurred at any point. Plaintiffs' VSF Act claims against Defendants must therefore be dismissed.

When the Court last addressed this question, the VSF Act lacked any language to foreclose license fee claims for Plaintiffs. The Court held that Plaintiff's claims could then proceed because the General Assembly had not indicated whether companies providing video programming through the internet should be exempt from paying any licensing fees, so further litigation on the issue was warranted. Since then, the General Assembly has provided a clean answer on whether municipalities should be able to collect license fees from companies that provide internet-accessible content in their areas, and the answer is a resounding "No." This answer from the General Assembly does appear to align with what legislatures in jurisdictions around the country have found with regard to assessing licensing fees against streaming companies. The Court draws no further conclusions about what these amendments say about the General Assembly's beliefs with respect to

what the overall purpose of the VSF Act should be or if only companies that lay telecom lines into the ground can be subject to licensing fees because the plain language added into the statute is sufficient to defeat Plaintiffs' claims without any further review of the circumstances of policy reasons behind their passage.

C. Whether the VSF Act ever permitted Plaintiffs to seek license fees from Defendants

As part of their briefing, the Defendants renewed arguments that the VSF Act never applied to Defendants because Defendants could never have built or operated a video service system.

Because the Court already found for Defendants on this motion in light of the amendments set forth in HB 1454, the Court need not revisit these arguments.

ORDER

In light of the passage of HB 1454 and instructions on remand, the Court hereby GRANTS Defendants' Motion to Dismiss.

SO ORDERED, ADJUDGED AND DECREED this 18th day of June, 2024.

Hon. Christina Klineman
Marion Superior Court 1
Indiana Commercial Court

Distribution:

Counsel of record