

INDIANA COMMERCIAL COURT

STATE OF INDIANA))SS: COUNTY OF MARION)	)	IN THE MARION SUPERIOR COURT 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.	)	

FILED
January 18, 2022
CLERK OF THE COURT
MARION COUNTY
SW

ORDER DENYING ALL DEFENDANTS' PENDING MOTIONS TO DISMISS

This matter comes before the Court on Defendants, Netflix, Inc. ("Netflix"), Disney DTC LLC ("Disney"), Hulu, LLC ("Hulu"), DirecTV, LLC ("DirecTV"), Dish Network Corp. ("DISH Corp."), and Dish Network L.L.C. ("DISH L.L.C") (collectively "Defendants"), Motions to Dismiss claims brought by 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. Defendants each filed their own Motions to Dismiss and Amended Motions to Dismiss, and Plaintiffs provided a consolidated response.

A hearing on this matter was held on November 15, 2021. Defendants presented their defenses as part of a consolidated argument. Having been fully briefed on the issues, the Court finds now as follows:

PERTINENT ALLEGED FACTS¹

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 service² 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, “DISH”) offer video content to Indiana subscribers using internet protocol and other technologies. (Complaint, ¶¶ 5, 6).
5. Netflix states that it offers video programming³ that is “comparable to similarly-focused US domestic cable networks.” (Complaint, ¶ 26).

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 meant 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 definition should apply for the use of the term “video service” throughout the Statement of Facts section.

³ The Court clarifies that the Court relies on this statement meant that Defendants are providing video programming generally and not that the Court has concluded for this motion that the Defendants are providing

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).

10.

B. Defendants’ actions at issue

11. 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 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).

“video programming” under the definition used in the VSF. This definition should apply for the use of the term “video service” throughout the Statement of Facts section.

12. 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).

13. 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).

14. 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).

15. 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).

16. 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

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

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).

17. 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).

II. STATUTES APPLICABLE TO THIS MOTION

18. 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.

19. 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).

20. VSF Act defines “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.

21. The VSF requires a person who offers video service in Indiana to pay a quarterly “franchise fee” to each Unit included in its service area. Ind. Code § 8-1-34-24.

22. The VSF defines “franchise” as “an initial authorization, or a renewal of an authorization, that:

(1) is issued by the commission under this chapter after June 30, 2006;
and

(2) authorizes the construction or operation of a video service system in a designated service area in Indiana.

Ind. Code Ann. § 8-1-34-4

23. The VSF defines “Holder” as “a person that holds a certificate issued by the commission under this chapter after June 30, 2006”. Ind. Code § 8-1-34-6.

24. The VSF defines “video service system” as:

(a)... a system, consisting of a set of transmission paths and associated signal generation, reception, and control equipment, that is designed to provide video service directly to subscribers within a community. The term includes the:

(1) optical spectrum wavelengths;

(2) bandwidth; or

(3) other current or future technological capacity; used to provide the video service.

(b) The term does not include a system that transmits video service to subscribers without using any public right-of-way.

Ind. Code § 8-1-34-15.

III. STANDARDS ON MOTION TO DISMISS

“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

Plaintiffs have brought claims against all Defendants seeking a declaration that Defendants are subject to the VSF and must comply with all attendant obligations associated with the statute, including the payment of franchise fee to the municipalities where the Defendants operate. Plaintiffs further seek an accounting of all franchise fees currently owed by Defendants to Plaintiffs. Plaintiffs ask that Defendants be enjoined from operating in Indiana until Defendants comply with the requirements on the VSF.

Each Defendant has filed briefs, amended briefs, and replies outlining their reasons why Plaintiffs' Complaint should be dismissed. Several of the arguments overlap, and at the hearing in the matter, the Defendants provided a joint presentation of the arguments to the Court. For simplicity's sake, the Court's analysis for each issue should be treated as broadly applying to all motions.

The Defendants have raised several specific objections at the Motion to Dismiss stage. Defendants have argued 1) Plaintiffs cannot bring VSF claims before this Court; 2) the VSF does not apply to the services provided by Defendants 3) Plaintiffs' claims are preempted by federal law, and 4) Plaintiffs' claims are unconstitutional on their face. The Court will address each in turn.

A. Whether the Plaintiffs have the right to bring their claims before the Court

Defendants have challenged the Plaintiffs' right to bring their claims under the VSF to this Court. Defendants have asked the Court to dismiss Plaintiffs' case on the grounds that the VSF provides no private right of enforcement to Plaintiffs. Defendants also argue that this case must be dismissed because Plaintiffs must first raise its VSF claims before the Indiana Utility Regulatory Commission ("IURC").

Alternatively, to the extent that Plaintiffs have properly brought their claims before this Court, Defendants ask that the Court refer this matter to the IURC under the primary jurisdiction doctrine and dismiss this case.

i. Whether Plaintiffs have a right of enforcement under the VSF

The Defendants first argue that Plaintiffs' VSF claims must be dismissed because the VSF provides the Plaintiffs no right of enforcement to bring their claims.

“A private party cannot bring suit for a statutory violation unless the statute provides for a private right of action.” *Doe v. Ind. Dep’t of Child Servs.*, 81 N.E.3d 199, 202 (Ind. 2017). To determine whether a private right of action exists, Indiana courts look for evidence of clear legislative intent to create such a right. *Id.* In the absence of any clear direction in the statute, a trial court may determine if an implied right of enforcement exists based on the language in the statute. An implied right of action does not exist if the statute “(1) primarily protects the public at large and (2) contains an independent enforcement mechanism.” *Doe*, 81 N.E.3d at 202.

The Defendants argue that Plaintiffs have no express or implied right to sue Defendants for compliance with the VSF. First, Defendants argue that Plaintiffs have no express right to enforcement because the VSF contains no provision that explicitly authorizes Units such as the Plaintiffs to bring such suits against streaming companies.

Defendants also maintain that Plaintiffs have no implied right to sue under the VSF. The Defendants contend that both factors are present here. Defendants argue that the VSF meets the first prong because it was intended to primarily protect the public at large by ending the local franchise system, whereby companies had to negotiate separate arrangements with each municipality served, and replacing it with a streamlined regulatory process administered at the state level through the IURC. Defendants argue that the VSF’s provisions permit the IURC to investigate and ensure franchise holders pay the required statutory amounts satisfying the independent enforcement mechanism prong. See, e.g., Ind. Code § 8-1-34-16(a)(1). Defendants further argue that the VSF precludes Units like Plaintiffs from imposing additional requirements on franchise holders, *id.* § 8-1-34-16(a)(2), or regulating non-holders of

franchise licenses at all. *Id.* When a statute expressly provides one enforcement mechanism, courts may not engraft another. *Doe*, 81 N.E.3d at 204. Defendants posit that the VSF cannot be read in such a manner to include an implied right of enforcement for Plaintiffs. Because Plaintiffs lack any express or implied basis for bringing claims under the VSF, Defendants conclude that Plaintiffs' claims must be dismissed on the grounds that Plaintiffs have no right to sue under the statute.

In response, Plaintiffs assert that both the Indiana Declaratory Judgment Act (IDJA) and VSF provide Plaintiffs the right to sue Defendants.

The IDJA states in relevant part:

"Any person ... whose rights, status, or other legal relations are affected by a **statute**, municipal ordinance, contract, or franchise, may have determined any question of construction or validity arising under the instrument, **statute**, ordinance, contract, or franchise and obtain a declaration of rights, status, or other legal relations thereunder."

See Ind. Code § 34-14-1-2 (emphasis added).

Plaintiffs contend that their action is own seeking to determine rights affected by the VSF, which places their claims within the purview of the IDJA and thus, Defendants' claims fall within the bounds of the IDJA.

Plaintiffs additionally dispute Defendants' arguments that the VSF does not provide any private right of enforcement. Plaintiffs argue that the VSF was not enacted to protect the general public because it specifically benefits Units. Further, to the extent that the VSF has any built-in enforcement mechanisms, Plaintiffs maintain that the mechanisms were specifically enacted and allow Units such as Plaintiffs to employ it. See Ind. Code § 8-1-34-24(c) (allowing Unit to obtain judicial review of an IURC determination whether a franchise fee has been properly calculated); Ind. Code § 8-1-

34-16(b)(1)(C)(ii) (allowing Unit to enforce ordinances and regulations pertaining to a franchise holder's "use of public rights-of-way in the delivery of video service").

Plaintiffs conclude that under both the IDJA and the VSF, they have the right to file suit in this Court to demand Defendants comply with the VSF.

Upon review, the Court finds that the Plaintiffs do have a right to bring an action seeking to enforce the VSF against Defendants in this Court. A plain reading of the IDJA clearly contemplates that a party should be bring a case to determine the extent of a party's rights under a statute in situations where the moving party would be entitled to redress. Here, Plaintiffs have provided a sufficient showing that determining whether Defendants are subject to the VSF and whether they must pay franchise fees to Plaintiffs present issues that can be resolved by the Court via declaratory relief. Absent any guidance preventing Plaintiff from proceeding on this basis, the Court finds that Plaintiffs have established the minimum grounds to proceeding on their declaratory judgment claims.

For these reasons, the Court finds that Plaintiffs have a right to bring their action against Defendants under the VSF and IDJA.

ii. Whether Plaintiffs must first exhaust administrative remedies before proceeding

Defendants have argued that this Court lacks subject matter jurisdiction to hear Plaintiffs' claims because Plaintiffs have failed to exhaust their available administrative remedies with the IURC prior to filing this lawsuit.

"If a party fails to exhaust administrative remedies, the trial court lacks subject matter jurisdiction." *Turner v. City of Evansville*, 740 N.E.2d 860, 861-62 (Ind. 2001). *Id.* at 861-62. "Where such an administrative remedy is readily available, filing a

declaratory judgment action is not a suitable alternative.” *Advantage Home Health Care, Inc. v. Ind. State Dep’t of Health*, 829 N.E.2d 499, 503 (Ind. 2005).

Defendants argue that since the IURC is the body in charge of regulating franchise license holders, see Ind. Code § 8-1-34-16, Plaintiffs must first seek relief before the IURC before bringing their claims to this Court. The IURC has the capability to conduct fact-finding proceedings and issue rulings on matter of controversy. See, e.g., Ind. Code § 8-1-34-16(a)(1). Defendants contend then that Plaintiffs’ required course of action was to first seek a ruling on whether the VSF applies to Defendants before bringing any claims to this Court. Defendants conclude that since the IURC already has authority over franchise arrangements under the VSF, Plaintiffs first must bring the matter before the IURC to make a determination before they can seek relief in this Court. Because Plaintiffs have not done so, Defendants ask that this case be dismissed.

In response, Plaintiffs contend that the VSF does not require Plaintiffs to first seek a determination from the IURC before filing an action for declaratory judgment. Plaintiffs note that the dispute resolution section, Ind. Code § 8-1-34-24(c), specifically concerns disputes between the Unit and the franchise holder over the amount of the franchise fee owed. Plaintiffs distinguish their claims as seeking to answer the question of whether the Defendants must obtain a franchise license at all rather than a dispute over the calculation of fees owed, which would be within the established purview of the IURC. Plaintiffs contend that whether the VSF applies to Defendants is “question of law for the courts.” *IDEM v. Twin Eagle LLC*, 798 N.E.2d 839, 844–45 (Ind. 2003), which the IURC cannot answer. Further, the IURC cannot issue the kind of declaratory relief

necessary to make this determination. *U.S. Steel Corp. v. NIPSCO*, 482 N.E.2d 501, 506 (Ind. Ct. App. 1985).

Upon review, the Court agrees with Plaintiffs. There is no explicit procedural requirement in the VSF calling for the Plaintiffs to first seek a determination from the IURC on whether Defendants must apply for a franchise at all. The VSF dispute resolution provisions appear to apply specifically when there is a dispute between a Unit and an established franchise holder. There is no guidance on what to do when the Unit believes a company is providing video service without a franchise. Without a clear requirement to exhaust remedies in the statute, the Court cannot find that Plaintiffs' Complaint must be dismissed for lack of subject matter jurisdiction. Instead, the Court finds that Plaintiffs have availed themselves of the proper remedy of seeking a declaratory judgment on whether the VSF applies.

iii. Whether the case should be referred to the IURC under the primary jurisdiction doctrine.

Finally, Defendants have alternatively argued that the Court should dismiss this case because the IURC has primary jurisdiction over this matter.

The Indiana Supreme Court, in citing a description of the doctrine from the United States Court of Appeals for the Seventh Circuit, stated that a primary jurisdiction analysis is necessary:

when a claim is cognizable in a court but adjudication of the claim 'requires the resolution of issues which, under a regulatory scheme, have been placed within the special competence of [an] administrative body; in such a case, the judicial process is suspended pending referral of such issues to the administrative body for its views.

Austin Lakes Joint Venture v. Avon Utils., 648 N.E.2d 641, 645 (Ind. 1995) (citing *Hansen v. Norfolk & Western Ry. Co.*, 689 F.2d 707, 710 (7th Cir. 1982)). Primary

jurisdiction and exhaustion of remedies are related but significantly different doctrines. *Austin Lakes*, 648 N.E.2d at 646.

To determine whether the trial court has jurisdiction, “the court should examine each issue presented by the case. If at least one of the issues involved in the case is within the jurisdiction of the trial court, the entire case falls within its jurisdiction.” *Austin Lakes*, 648 N.E.2d at 646. “Where at least one of the issues or claims is a matter for judicial determination or resolution, the court is not ousted of subject matter jurisdiction by the presence in the case of one or more issues which arguably are within the jurisdiction of an administrative or regulatory agency.” *Id.*

If the trial court finds that it does have subject matter jurisdiction, then the trial court analyzes the claims to determine whether they are in the purview of a regulatory agency. *Austin Lakes*, 648 N.E.2d at 646. If so, the trial court determines whether to refer certain issues in the case to the regulatory agency for determination. *Id.* (referencing *United States v. Philadelphia Nat’l Bank*, 374 U.S. 321, 353, 10 L. Ed. 2d 915, 83 S. Ct. 1715 (1963)).

In determining whether the primary jurisdiction doctrine applies, the Supreme Court articulated that there would be certain instances where its invocation is mandatory while other instances are left to the trial court’s discretion. *Austin Lakes*, 648 N.E.2d at 646. Where an issue requires an exhaustion of remedies, the trial court must invoke the doctrine. *Id.* at 647. In instances where there is no exhaustion requirement or any clear requirement to refer an issue to a regulatory agency, the trial court must determine whether the regulatory agency has any authority over the issue at all. *Id.* The primary

jurisdiction doctrine would not apply because there is nothing to refer to a regulatory agency. *Id.*

The Supreme Court identified a third type of fact pattern where an issue raised by a case could be resolved either by the trial court or the regulatory body. *Austin Lakes*, 648 N.E.2d at 647. In these instances, it is up to the trial court's discretion whether to refer an issue under the primary jurisdiction doctrine. *Id.* The trial court must consider:

- (i) what sort of facts will arise and whether the kind of factfinding involved will be within the special competence and expertise of an administrative body, and
- (ii) to what degree uniformity in the regulatory scheme is desirable and to what degree a court decision might affect the uniformity of a regulatory scheme.

Id.

Defendants have argued that the primary jurisdiction doctrine should be invoked to allow the IURC to make the initial determination of whether Defendants are required to apply for franchises under the VSF and pay the resulting franchise fees to Plaintiffs. Defendants note that the IURC has the sole franchising authority for companies that provide "video service" in Indiana, Ind. Code § 8-1-34-16(1), bringing the issues within the special competence of the IURC. Defendants argue that the desire to maintain the uniformity of the regulatory scheme envisioned by the VSF also favors referring this case to the IURC to avoid an unlawful interpretation of the VSF that could affect the uniformity of administration of Indiana "video service" and impact a substantial number of persons. Additionally, Defendants have requested that the Court refer any calculation of franchise fees owed to the IURC, given that the VSF gives the IURC authority to

determine the amount of gross revenue in the event of a conflict between the Unity and franchise holder. Ind. Code § 8-1-34-24(c).

Upon review, the Court finds that dismissal under the primary jurisdiction doctrine would be inappropriate. The Court has already held that there is no exhaustion requirement under the VSF which Plaintiffs must follow but generally agrees with Defendants that the issues raised by Plaintiffs involve concerns that would certainly fall within the expertise of the IURC, namely the provision of “video service” and maintenance of public right-of-ways. As stated, however, the VSF provides no clear mechanism for Plaintiffs to raise their concerns before the IURC unlike other states have in their laws that parallel the VSF. Defendants are not franchise holders at this time, so Plaintiffs cannot impel the Defendants in front of the IURC to resolve dispute over gross revenue under Ind. Code § 8-1-34-24(c). The Parties must address the threshold question on whether the VSF applies to Defendants at all, and the IDJA provides that mechanism for Plaintiffs to seek a determination. There is no clear authority either by statute or case law precluding Plaintiffs from seeking its declaratory relief

On the face of the VSF, it would be premature to dismiss Plaintiffs claims when Plaintiff has pleaded an actionable declaratory judgment claim seeking whether the VSF applies to Defendants. The existence of a possible viable claims against Defendants which this Court has the authority to adjudicate and rule upon makes dismissal and referral to the IURC under primary jurisdiction grounds inappropriate at this time.

For these reasons, the Court denies Defendants’ Motions to Dismiss on the grounds that the Court lacks jurisdiction to adjudicate Plaintiffs’ claims.

B. Whether the VSF applies to Defendants based on the statutory language

Having addressed Defendants' arguments regarding the Court's ability to hear this case, the Court will address Defendants' specific contentions on the applicability of the VSF to their streaming services based on the VSF's statutory language.

Defendants have concluded that the statutory language of the VSF indicates on its face that the statute was never meant to apply to Defendants. Defendants maintain that their streaming services provide programming that is materially different than that of traditionally regulated companies both in terms of content and the manner in which it reaches customers.

i. Whether Defendants provide "video service"

First, the Parties dispute whether any of the Defendants provide a "video service," which would make them subject to the VSF. As stated, the VSF requires that "a person who seeks to provide video service in Indiana after June 30, 2006, shall file with the [IURC] an application for a franchise." Ind. Code Ann. § 8-1-34-16.

The VSF defines "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(a) (emphasis added). To determine whether a company provides "video service," the service must meet the requirements set by the VSF.

a. Whether Defendants provide video programming or “other programming service” as defined under the VSF.

To provide “video service” under the VSF, Defendants must provide “video programming and other programming service.” Defendants object that their streaming services cannot be considered either “video programming” or “other programming service” under the VSF’s definition.

First, those firms that were considered to be providing “video service” under the VSF are those which transmit content “to subscribers of video programming and other programming service....” Ind. Code § 8-1-34-14(a). The VSF defines “video programming” as “programming provided by, or generally considered comparable to programming provided by, a television broadcast station.” Ind. Code § 8-1-34-13 (citing 47 U.S.C.S. § 522(20)). The VSF defines “other programming service” as “information that a provider makes available to all subscribers generally.” Ind. Code § 8-1-34-9.

Defendants first object that their streaming services are not “video programming” as defined by the VSF because their content is distinguishable from that which is provided by or comparable to a television broadcast station. Among the differences is that television broadcast stations generally provide content on a set schedule transmit scheduled content, whereas the Defendants’ streaming content is “on-demand” and does not provide “live programming” such as sports, news, or award shows. This distinction was highlighted by the Kentucky Board of Tax Appeals and Kentucky Circuit Court to find on-demand streaming services provided by Defendant Netflix to be completely different from traditional cable or broadcast television. *See Kentucky v. Netflix*, EX. 1, at 6, 15.

In response, Plaintiffs argue that the extent to which the Defendants' services map to comparable broadcast television requires considering facts outside of the pleading and constitutes an inappropriate inquiry at the Motion to Dismiss stage. Alternatively, Plaintiffs maintain that Defendants' streaming content at least meets the standard of "comparable" to traditional broadcast stations. The FCC has "held that video distributed over the Internet qualifies as 'video programming.'" *Notice of Proposed Rulemaking in MB Docket No. 14-261, I/M/O Promoting Innovation & Competition in the Provision of Multichannel Video Programming Distrib. Servs.*, 29 FCC Rcd. 15995, 16002, ¶ 16 & n.35 (2014). Having established that Internet-distributed programming can be considered "video programming" under § 522(20), Plaintiffs maintain that the streaming content as alleged in the Complaint coupled with Defendants' own characterizations of their programming meet the "comparable" to broadcast television standard. By way of example, Defendants stream several programs which originally aired on or can be found on traditional television broadcast stations. At least some of Defendants have started offering live channels as well. (See Plf. Opposition to Motion to Dismiss, p. 7 n.6). Ultimately, to the extent that such an inquiry is appropriate at the motion to dismiss stage, Plaintiffs contend that the substance of the content provided by Defendants is sufficiently comparable to traditional broadcasts to meet the VSF's definition of "video programming."

Defendants also argue that dismissal is appropriate because Defendants do not provide the "other programming service" as defined in the VSF necessarily to be considered transmitting "video service" under the VSF.

The VSF defines “other programming service” as “information that a provider makes available to all subscribers generally.” Ind. Code § 8-1-34-9. Notably, this provision applies specifically to “Providers.”

The VSF defines “other programming service” as “information that a provider makes available to all subscribers generally.” Ind. Code § 8-1-34-9. “Provider,” as used in the VSF, “refers to a multichannel video programming distributor” (“MVPD”), which is defined as “a **person such as, but not limited to, a cable operator, a multichannel multipoint distribution service, a direct broadcast satellite service, or a television receive-only satellite program distributor**, who makes available for purchase, by subscribers or customers, **multiple channels** of video programming.” Ind. Code § 8-1-34-11 (citing 47 U.S.C.S. § 522 (13)).

Defendants raise another argument that only multichannel video programming distributors (“MVPD”) provide the kind of “video service” governed by the VSF.

Defendants maintain that since they are not MVPDs because they do not provide multiple channels of content or meet the requirements to be considered an MVPD. In support, Defendants direct the Court to the Kentucky Circuit Court’s determination that Netflix did not meet the Kentucky statutory definition of MVPD. (See *Kentucky v. Netflix*, Ex. 1, p. 14). Defendants conclude they cannot be subject to the VSF because they are not MVPDs that are capable of providing “other video programming” as defined in the VSF

In response, Plaintiffs maintain that Defendants’ “other video programming” defense cannot support dismissal. First, Plaintiffs note that the franchise fee in the VSF specifically applies to “Holders” of franchises as specifically defined under the VSF, not

“Providers” or MVPDs, so Defendants’ objection based on “other programming service” is irrelevant. To the extent it is relevant, Plaintiffs contend there is case law establishing that Defendants can be treated like MVPDs that are subject to the VSF. See e.g., *I/M/O Promoting Innovation*, 29 FCC Rcd. at 16000-01, ¶ 13 (concluding that “the statutory definition of MVPD includes certain Internet-based distributors of video programming,” including Netflix and Hulu specifically); *Promoting Innovation & Competition*, 2015 WL 167341, 80 FR at 2089 (concluding that satellite companies who offer over-the-top (or “OTT”) services “would be MVPD services” and not direct broadcast satellite providers because “that service does not use the providers’ satellite facilities, but rather relies on the Internet for delivery”). Plaintiffs note that the FCC concluded that Congress intended “to define ‘MVPD’ in a broad and technology-neutral way to ensure that it would not only cover video providers using technologies that existed in 1992, but rather be sufficiently flexible to cover providers using new technologies such as Internet delivery.” *Promoting Innovation and Competition*, 2015 WL 167341, 80 FR at 2082. In sum, Plaintiffs maintain that there is no requirement that a company be an MVPD to be subject to the VSF, but even if so, Defendants can at least be considered “Providers” or MVPDs at this stage of litigation that provide “other programming service” under the VSF.

Upon review, the Court finds that Defendants can be considered to provide “video programming” and “other programming service” at this stage of litigation.

With respect to “video programming,” the Court finds that Plaintiffs’ allegations meet the minimal pleading standards to establish that Defendants provide content comparable to a tradition broadcast television station for the purposes of surviving the pending motions to dismiss. The Complaint establishes that Defendants have held out

that they provide programming “comparable to similarly-focused US domestic cable networks,” “live and on-demand programming,” and programming with a variety of original feature-length films, documentaries, live-action, and animated series.” (¶¶ 26-28). At the very least, these allegations regarding the factual descriptions of the Defendants’ streaming content, which the Court must accept as true at this point, satisfy the minimal pleading threshold that Defendants provide “video programming” because this programming appears to be comparable to what can be found on traditional broadcast programming. To the extent that Defendants provide programming that is sufficiently different, that is an inquiry to be taken up at later stage in proceedings when the Court has the ability to look beyond the pleadings and assess provided factual designations.

Second, as for whether Defendants can possibly provide “other programming service” under the VSF, the Court again finds that the analysis tips in Plaintiffs’ favor at this stage.

First, Plaintiffs are correct that the VSF does not specifically state that “holders” of franchises are required to be “Providers” under the statutory definition provided. To the extent that failing to require Defendants to be deemed MVPDs would be reading the VSF to invalidate the definition of “Provider,” there is also a sufficient basis to consider Defendants MVPDs at this stage of proceedings. Whether Defendants may be considered MVPDs currently remains an unanswered question of law, but Plaintiffs pleadings do establish that Defendants provide video programming to customers and subscribers. Whether the video programming can be considered “multi-channel” or if the Defendants can be likened to “a cable operator, a multichannel multipoint distribution

service, a direct broadcast satellite service, or a television receive-only satellite program distributor” are factual disputes that would require considering additional evidence outside the scope of the pleadings regarding Defendants’ services to determine. At this point, there remains the possibility that Defendants could be considered MVPDs that provide multi-channel programming, making dismissal on these grounds inappropriate.

While further evidence may clarify and prove counter to this Court’s finding, at present, the Court cannot conclude that the Defendants are exempted from the VSF based on the nature of the video programming they provide.

b. Whether Defendants’ video programming moves through facilities located at least in part in a public right-of-way

Defendants also argue that dismissal is warranted because that they do not operate their streaming services through any facilities located in the public right-of-way as required to be subject to the VSF.

First, Defendants dispute that they operate through “facilities” located in Indiana. “Facilities” is not defined in the VSF, so Defendants argue that “facilities” must be understood using the definition of “franchise” under the VSF. Pursuant to Ind. Code § 8-1-34-4, the “franchise” under the VSF “authorizes the **construction or operation** of a **video service system** in a designated service area in Indiana.” (emphasis added). Defendants maintain then that they cannot be subject to the VSF because they neither construct or operate any facilities nor does their service constitute a “video service system”

1. Whether Defendants must be planning to “construct or operate” “facilities” to be subject to the VSF

Defendants argue that mere operation of their video programming does not satisfy the “construction or operation” requirement of obtaining a “franchise” under the VSF. In support, Defendants direct the Court to an FCC ruling has determined that a company subject to franchise fees companies must either construct a video service system or otherwise display a control over the “facilities” that is more than transmitting streaming services over already-existing systems does not constitute operation of a facility. See *In the Matter of: Entm’t Connections, Inc.*, 13 F.C.C. Rcd. 14277, 14307 (1998), see also *City of Chicago v. FCC*, 199 F.3d 424, 433 (7th Cir. 1999). Because Defendants do not and have no intention to construct or operate any “facilities,” Defendants maintains that Plaintiffs have no basis to require Defendants to apply for a “franchise” under the VSF.

In response, Plaintiffs argue that Defendants are impermissibly reading a construct/ operate requirement into the VSF that is not applicable at the Motion to Dismiss stage. The VSF requires that anyone providing “video service” apply for a “franchise” without any regard to whether the company plans to construct or operate any facilities.

At this stage of proceedings, the Court agrees with Plaintiffs. The VSF requires that all companies intending to provide video service in Indiana must apply for a franchise. “Video service” as defined in the operative section of the VSF, requires only that the programming be transmitted through facilities in the right-of-way, not just facilities owned and operated by the presumptive franchise holder. Defendants have inferred that since the “franchise” definition under the VSF to allow companies to construct or operate “facilities,” there must be some component of construction or

operation of facilities in the right of way in order to require Defendants to apply for such “franchises.” While the Court understands this argument, there is insufficient context at this point for the Court to find that the VSF necessarily means that companies need only apply for “franchises” when they intend to construct or operate their own “facilities.” Based on the plain language of the statute, the requirement to apply for a “franchise” is present whenever a company seeks to provide, “video service,” and the “video service” definition does not place an ownership or operation requirement over the facilities that transmit the programming.

This is not to say that Plaintiffs are absolutely correct that Defendants need not be involved in the construction or operation of the “facilities” to be required to apply for a “franchise” under the VSF, only that the plain reading of the statute indicates that it may be possible that Defendants are required to so seek the “franchise.” This places Plaintiffs’ pleaded claims into the realm of what is possible; therefore, this Court finds that dismissal on the grounds that Defendants did not construct or operate any “facilities” in Indiana would be inappropriate at this time.

2. Whether Defendants are operating a “video service system” as a matter of pleading

Defendants also argue that they are not operating any “video service system” and thus cannot be subject to the VSF. The “franchise” under the VSF grants the holder to “an initial authorization ... that ... authorizes the construction or operation of a **video service system** in a designated service area.” Ind. Code § 8-1-34-4. (emphasis added). Citing Ind. Code § 8-1-34-15, Defendants note that the VSF’s definition of a “video service system” requires it be “designed to provide video service **directly** to subscribers within a community” and does not apply to any system not using the public right-of-way.

(emphasis added). Defendants contend that the programming services provided by Defendants cannot constitute a “video service system” because Defendants do not provide service directly to subscribers. Defendants direct the Court to an FCC ruling that states providing programming through facilities constructed by other ISPs does not construe direct service. *In the Matter of Sky Angel U.S., LLC*, 25 FCC Rcd 3879, 3883 (2010). (“[An internet streamer does not] provide its subscribers with a transmission path; rather, it is the subscriber’s Internet service provider that provides the transmission path.”). Defendants note that the typical “video service system” as contemplated by the VSF is cable television, where the company constructs physical lines and connects to its customers through intentionally directed wiring. Since Defendants’ programming services do not connect to Defendants’ customers “directly” in this manner,” Defendants maintain that they are not subject to the VSF and thus Plaintiffs’ claims should be dismissed.

In response, Plaintiffs direct the court to other portions of Ind. Code § 8-1-34-15 that suggest that the VSF is to apply to “video service systems” beyond what has been advocated by Defendants. In addition to providing direct service to consumers, a “video service system” under the VSF “includes the: (1) optical spectrum wavelengths; (2) bandwidth; or (3) **other current or future technological capacity** [] used to provide the video service.” (emphasis added). Plaintiffs maintain that on the face of the statute, the VSF has built-in capacity to apply to technologies which reach customers through other means beyond traditional cable connections. Plaintiffs argue, then, Defendants may be considered as operating a “video service system” under the guise of “future

technological capacity” and that dismissal based on Defendants’ narrow reading of “video service system” would be inappropriate.

The Court again finds in favor of Plaintiffs on this issue. The Court finds that the plain language of the VSF regarding “video service systems” provides for the possibility that an applicant for a franchise may connect with customers directly through technologies that were not contemplated at the time the most recent version of the VSF was passed in 2006. The Plaintiffs have alleged in their Complaint that Defendants provide video programming through “internet protocol and other technologies.” (Complaint, ¶¶ 6, 25). The VSF does not provide explicit requirement as to what constitutes a “direct” connection to consumers, so it remains possible at this stage of proceedings that Defendants’ streaming services do directly reach customers in a manner that would qualify as a “video service system” under the VSF.

3. Whether Defendants are transmitting through the public right-of-way

Defendants also challenge Plaintiffs’ VSF claims on the grounds that the Defendants’ services do not use the public right-of-way.

To provide “video service” and “video service system” under the VSF, some use of the public right-of-way is required. See Ind. Code § 8-1-34-14, -15.

Defendants argue that their programming only passes through existing infrastructure and thus cannot be considered accessing the public right-of-way. Defendants maintain that in order to be considered to have passed through the public right-of-way, they must have established some permanent fixture within that right-of-way, such copper or fiber optic transmission cables. Several cases from around the country support this definition. A California court adopted this position and held that

Defendants Netflix and Hulu could not be considered to operate in the public right-of-way because they did not control, own, or ask for the construction of the Internet service provider (“ISP”) networks over which their programming travelled. (California Video Franchise Decision (Ex. 2) at 13). The FCC similarly held: use” as excluding “mere interaction with . . . authorized facilities in the public right-of-way.” *In the Matter of: Entm’t Connections, Inc.*, 13 F.C.C. Rcd. 14277, 14307 (1998). The Seventh Circuit has similarly reasoned that “use” of the rights-of-way generally involves “installation of cables, either on poles or underground” which “is highly intrusive on local governments.” *City of Chicago v. FCC*, 199 F.3d 424, 433 (7th Cir. 1999). Because Defendants do not have to place any permanent fixtures within the public right-of-way, Defendants conclude that their programming cannot be considered to pass through the public right-of-way under the VSF.

In response, Plaintiffs again argue that Defendants are inferring additional elements of a claims under VSF that are not found in the statutory language. To qualify as accessing the public right-of-way under the VSF, Plaintiffs contend that they need only allege that Defendants transmit their programming “through facilities located at least in part in a public right-of-way” Ind. Code § 8-1-34-14(a)(1)(A). Plaintiffs maintain that their Complaint satisfies this requirement. (See Compl. at ¶¶ 6, 14, 29-31.). The VSF imposes no further requirement that the providers of video service must also transmit their programming over their own lines in the public right-of-way; Defendants need only transmit programming over facilities in the public right-of-way.

The Court again agrees with Plaintiffs and finds that because there is no established requirement in the VSF that Defendants programming travel over

permanent fixtures that Defendants placed in the public right-of-way, there remains a possibility that Defendants' video service travels through the public right-of-way and may constitute "video service" under the VSF. The facts alleged in the Complaint establish that that Defendants' video programming travels to customers through existing infrastructure that allows customers to access the programming through a variety of a different sources (TV, videogame system, computer, etc.). This existing infrastructure is located in the public right-of-way. Without any binding authority stating otherwise, the Court infers from these alleged facts that the Defendants are providing programming through paths which travel at least in part in the public right of way. In addition, the VSF's definition of "video service" includes language where the definition applies regardless of what technology is used to transmit the service. Ind. Code § 8-1-34-14(a)(1)(B). At this Motion to Dismiss stage, the Court finds that the allegation that the Defendants' video services reach customers on a medium that touches infrastructure in the public right-of-way is sufficient to satisfy that element of "video service" at the pleading stage.

In summary, the Court finds that Plaintiffs' Complaint satisfies the minimal pleading standards to raise a potential claim under the VSF. Plaintiffs have established that Defendants are persons that possibly provided "video service" to Units in Indiana and thus are required to apply for a "franchise" under the VSF given the specific wording of the statute and the dearth of binding authority that informs how the VSF applies to steaming services provided by Defendants. For these reasons, the Court DENIES Defendants' Motions to Dismiss on the grounds that the VSF does not apply to Defendants based on statutory language.

The Court also DENIES Defendants' Motions to Dismiss based on the arguments that the VSF does not apply to them because they are not currently "holders" of a "franchise" under the statute's terms. This case concerns whether Defendants must apply for a "franchise," and that question remains unsettled at this point.

C. Whether federal law bars Plaintiffs claims

Defendants have also sought dismissal of Plaintiffs' Complaint on the ground that Plaintiffs' suit seeking a declaration of the status of Defendants under the VSF is preempted by federal law and constitutes an impermissible tax on internet services. The Court will address each argument in turn.

i. Preemption under federal law

Defendants argue that even if they could be subject to the VSF, the VSF would be preempted by existing federal law

The 1984 Cable Act permits localities to seek franchise fees from companies providing cable services but explicitly preempts local governing units from charging additional fees unrelated to the expenses offset by the franchise fee. For example, the FCC ruled that an additional fee imposed by Eugene, OR for broadband services against cable companies providing the service over the same cable lines constituted an impermissible fee under the Cable Act. *Implementation of Section 621(a)(1) of the Cable Commc'ns Pol'y Act of 1984 As Amended by the Cable Television Consumer Prot. & Competition Act of 1992*, 22 F.C.C. Rcd. 5101, 5155 ¶ 121 (Mar. 5, 2007).

Defendants argue that Plaintiffs' claims must fail as preempted by the Cable Act. Defendants maintain that in order to subject Defendants to franchise fees under the

VSF, Defendants must be treated like cable companies. As a result, Defendants would be subject to the 1984 Cable Act. Since Plaintiffs then would be seeking to impose additional fees beyond what is permitted under the Cable Act, Plaintiffs' claims must be dismissed as preempted under the Cable Act.

In response, Plaintiffs have argued that the affirmative defense raised by Defendants regarding federal preemption under the Cable Act is inappropriate at the Motion to Dismiss stage and should not be considered. Additionally, Plaintiffs argue that the Cable Act applies specifically to the cable industry and does not apply to Defendants.

Upon review, the Court agrees with Plaintiffs that this argument is premature to determine at this stage and that Plaintiffs' claims are not immediately preempted. The Court agrees there is a question as to whether the Cable Act is meant to circumscribe franchise fees imposed by the VSF against companies like Defendants which are not already providing cable services as was the case in the 2007 FCC decision referenced by Defendants. The Court to this point has found that the VSF potentially requires any company that provides "video service," not just traditional cable companies, to apply for a "franchise." There is no clear guidance binding on this Court that the federal Cable Act necessarily preempts application of regulatory schemes like the VSF against companies such as Defendants. At this stage of proceedings, the Court finds no basis that the Cable Act necessarily preempts Plaintiffs' claims.

Also, to the extent that Plaintiffs' claims must be dismissed due to a failure to allege that Defendants are cable operators, the Court denies this argument. Plaintiffs' claims are based on the statutory definitions used by the VSF, and failure to make

allegations to satisfy definitions under the Cable Act are irrelevant at this stage of proceedings.

As this case proceeds and the Court has the greater leeway to assess the evidence to which Defendants provide “video service,” the Court’s decision may change. For now though, Plaintiffs’ claims cannot be dismissed as preempted by the Cable Act.

ii. Whether dismissal under Internet Tax Freedom Act is appropriate

Defendants argue that the nature of the franchise fees imposed by the VSF are actually taxes directly exclusive to providers of content, which are barred under the Internet Tax Freedom Act (“ITFA”).

A tax under ITFA includes “[1] any charge imposed by any governmental entity for the purpose of generating revenues for governmental purposes, and [2] is not a fee imposed for a specific privilege, service, or benefit conferred.” 47 U.S.C. §151 (note), § 1105(8).

Defendants argue that Plaintiffs’ claims should be dismissed because any franchise fee owed to Plaintiffs under the VSF would necessarily be a tax because Defendants do not impose any cost on municipalities and any fees collected would be solely for generating revenues for Plaintiffs.

The Court denies Defendants’ Motion to Dismiss on these grounds. Determining whether any franchise fees potentially awarded to Plaintiffs actually constitute taxes is outside the scope of the Motion to Dismiss. Hypothetically, if Defendants were to owe any franchise fees, the Court would need to examine the nature of the fees to determine the extent to which they are necessary for maintaining the Unit’s infrastructure. This

inquiry necessitates a weighing and considering of evidence to determine then whether the VSF's franchise fees would be impermissible taxes under the ITFA. Because the Court cannot look at such outside evidence at this stage of proceedings, dismissing Plaintiffs' claims under the ITFA would be inappropriate.

For these reasons, the Court DENIES Defendants' Motions to Dismiss based on federal preemption and the ITFA.

D. Whether Plaintiffs' claims should be dismissed for violating the United States and Indiana Constitutions

Defendants also seek complete dismissal of Plaintiffs' Complaint on the grounds that the relief sought by Plaintiffs violates provisions of the United States Constitution and Indiana Constitution.

Providers of video service "engage in and transmit speech" and are therefore speakers under the First Amendment. *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 636 (1994).

Defendants argue that Plaintiff cannot obtain relief from Defendants under the VSF because doing so would trigger substantial constitutional issues. First, applying the VSF in this manner would discriminate between video providers by excusing solely mobile video providers from any franchise fee but imposing such fees on services that rely also on broadband infrastructure such as Defendants. Defendants argue this would have the effect of government favoring one type of speech over the other. Were the VSF applied to all video content providers, Defendants argue that this application of the VSF would become unconstitutionally vague as it would apply to nearly every video account that operates at all over the Internet. Finally, should this case proceed only against the five Defendants, Defendants argue that such an application of the VSF

would constitute an attempt by government actors to “pick and choose” winners and losers in the video streaming market, which is an unconstitutional use of government powers. *Perry Educ. Ass’n*, 460 U.S. at 55.

In addition, Defendants have also alleged that the VSF would require Defendants to carry public, educational, and governmental (“PEG”) channels as part of obtaining a “franchise.” Ind. Code §§ 8-1-34-25, -26, -27. Defendants contend that applying the VSF would be an unconstitutional imposition on the content of Defendants’ speech

In summary, Defendants argue that any manner which the Plaintiffs would be allowed to proceed against Defendants under the VSF would prove ultimately unconstitutional, so the claims should be dismissed now.

In response, Plaintiffs argue that Defendants constitutionality concerns are not proper bases for dismissal or ripe for determination. Plaintiffs note that fees such as those imposed by the VSF have been held valid under the First Amendment. Plaintiffs contend that they are not seeking to restrict any speech by Defendants; they are only seeking to collect the reasonable fees associated with Defendants transmitting speech over the public right-of-way. As for the purported PEG requirements, Plaintiffs note that the VSF states that the IURC or Unit *may* require a “franchise” holder to show PEG channels. Since the IURC has not yet made any decision on Defendants’ “franchise” applications nor has any Plaintiff demanded that any Defendant offer PEG programming, that issue is not ripe. Plaintiffs maintain that the VSF is content-neutral and only applies to companies who seek to transmit over the public right-of-way; therefore, its application to Defendants is constitutional. Plaintiffs dispute that the VSF is unconstitutionally vague since many of Defendants’ competitors have complied with it

since it was enacted in 2006, and Plaintiffs argue that nothing in their complaint supports a defense that Plaintiffs are specifically targeting Defendants to benefit other entities in the video content market. Finally, Plaintiffs argue that Defendants are not excused from failing to comply with the VSF at this point under the Due Process Clause because they have been on notice of the existence of the VSF since they began operating in Indiana and have the opportunity to be heard in this litigation.

The Court finds that dismissal on constitutional grounds would not be appropriate at this time. There is no basis in the Complaint to find that the VSF does not apply neutrally to all entities which transmit “video service” in the public right-of-way and seeks only to recoup acceptable fees associated with operating in the public right-of-way. Further, determinations of whether the VSF’s franchise fees constitutes an unconstitutional burden on speech or are not fairly applied require analyzing evidence that is not before the Court at this stage in litigation. In contrast, the opinions favorably cited by Defendants on the constitutional questions were largely issued after the motion to dismiss stage, even following hearings where fact finding was required. See, e.g., *Lamar Advantage GP Co., L.L.C. v. City of Cincinnati*, 2021-Ohio-3155, ¶ 12. To the extent Defendants have any Due Process concerns, Defendants are at present in a venue through which they can, and have, articulated their defenses against the proposed deprivations of their earnings.

In summary, the Court finds no basis to dismiss Plaintiffs’ Complaint on constitutional grounds.

ORDER

For these reasons, the Court hereby DENIES Defendants' Motions to Dismiss in their entirety.

SO, ORDERED, ADJUDGED AND DECREED this 18th day of January 2022.



Hon. Heather A. Welch, Judge
Marion Superior Court 1
Indiana Commercial Court

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Counsel of record