[TENTATIVE] RULINGS/ORDERS

City of Lancaster v. Netflix et al., Case No.: 21STCV01881

Defendant Defendants Hulu, LLC and Netflix, Inc.'s Demurrers are SUSTAINED, with 30 days leave to amend.

Plaintiff's Requests for Judicial Notice are GRANTED (except for the truth).

Nonappearance case management review is set for October 29, 2021, 8:30 AM, Department 9.

I. INTRODUCTION

This is a putative trade regulation class action. Plaintiff City of Lancaster alleges that Defendants Netflix, Inc. (Netflix) and Hulu, LLC (Hulu) provide video services throughout California using broadband wireline facilities located at least in part in public rights-of-way. Under the Digital Infrastructure and Video Competition Act of 2006 (DIVCA), Plaintiff claim that Defendants must pay a video service provider fee of up to 5% of their gross income derived from providing video service in each city, county, or joint powers authority in California.

On January 15, 2021, Plaintiff filed its complaint asserting the following causes of action: (1) failure to pay video service provider fee (Public Utility Code § 5840); and (2) declaratory relief.

On May 20, 2021, Netflix and Hulu filed the pending demurrers to Plaintiff's complaint.

II. DISCUSSION

A. Applicable Law

"[A] demurrer tests the legal sufficiency of the allegations in a complaint." Lewis v. Safeway, Inc. (2015) 235 Cal.App.4th 385, 388. A demurrer can be used only to challenge defects that appear on the face of the pleading under attack or

from matters outside the pleading that are judicially noticeable. See Donabedian v. Mercury Insurance Co. (2004) 116 Cal.App.4th 968, 994 (in ruling on a demurrer, a court may not consider declarations, matters not subject to judicial notice, or documents not accepted for the truth of their contents). For the purpose of ruling on a demurrer, all facts pleaded in a complaint are assumed to be true, but the reviewing court does not assume the truth of conclusions of law. Aubry v. Tri-City Hospital District (1992) 2 Cal.4th 962, 967.

B. Requests for Judicial Notice

Plaintiff requests judicial notice of the following documents:

- Exhibit 1: An order filed on December 30, 2020 in the Circuit Court of St. Louis, Missouri in the case City of Creve Coeur v. Netflix, Inc. et al., case no. 18SL-CC02819; and
- Exhibit 2: A document filed in the United States District Court for the District of Massachusetts in the case National Association of the Deaf et al. v. Netflix, Inc., case no. 3:11-cv-30168-MAP.

Courts may take judicial notice of court records, but not of the truth of matters asserted in such documents if those matters are reasonably disputable. Evid. Code, § 452(d); Fremont Indemnity Co. v. Fremont General Corp. (2007) 148 Cal.App.4th 97, 113. Pursuant to Evidence Code § 452(d), the Court will take judicial notice of Exhibits 1 and 2, but not of the truth of any reasonably disputable matters contained in the documents.

C. Meet and Confer

Netflix's attorney Robert C. Collins attests that on April 14, 2021, and May 15, 2021, his firm met and conferred with Plaintiff's counsel before filing Netflix's pending demurrer on May 20, 2021. Code Civ. Proc., § 430.41(a). Such meet and confer occurred more than five days before the demurrer was filed. Code Civ. Proc., § 430.41(a)(2).

Hulu's attorney Ryan S. Benyamin attests that on April 14, 2021, he met and conferred with Plaintiff's counsel before filing Hulu's pending demurrer on May 20, 2021. Similarly, such meet and confer occurred more than five days before the demurrer was filed.

D. DIVCA Provides Local Entities Limited Private Rights of Action, Which Do Not Apply to This Dispute.

"Whether [a statute] provides . . . plaintiffs a private right of action is a pure question of law that does not turn on disputed facts or evidence." Noe v. Superior Court (2015) 237 Cal.App.4th 316, 336. "A violation of a state statute does not necessarily give rise to a private cause of action. [Citation.] Instead, whether a party has a right to sue depends on whether the Legislature has "manifested an intent to create such a private cause of action" under the statute. [Citation.]" Lu v. Hawaiian Gardens Casino, Inc. (2010) 50 Cal.4th 592, 596. "Such legislative intent, if any, is revealed through the language of the statute and its legislative history." Id.

> A statute may contain "'clear, understandable, unmistakable terms,'" which strongly and directly indicate that the Legislature intended to create a private cause of action. [Citation.] For instance, the statute may expressly state that a person has or is liable for a cause of action for a particular violation. [Citations.] Or, more commonly, a statute may refer to a remedy or means of enforcing its substantive provisions, i.e., by way of an action. [Citations.] If, however, a statute does not contain such obvious language, resort to its legislative history is next in order. [Citations.]

Lu, 50 Cal.4th at 597.

1. DIVCA's Provides No Express Private Right of Action

The Court begins with DIVCA's statutory language. The parties dispute whether Public Utilities Code § 5860(i) provides for a private right of action by Plaintiff against Netflix and Hulu. With respect to underpayment of franchise fees, Section 5860(i) states, "[e]ither a local entity or the holder may, in the event of a dispute concerning compensation under this section, bring an action in a court of competent jurisdiction." From its plain language, Section 5860(i) clearly provides a private right of action to Plaintiff—"a local entity"—with respect to disputes with a franchise holder over underpayment of franchise fees.

As Hulu correctly notes, Section 5860(i) provides only for a limited private right of action. First, any private right of action Plaintiff has under Section 5860(i) is limited to

disputes with actual franchise holders. Non-franchise holders are not required to pay DIVCA franchise fees, and thus no dispute over underpayment of franchise fees would ever arise. Plaintiff concedes that Hulu does not hold a state franchise under DIVCA. Complaint, ¶ 19.

Section 5860(i)'s plain language expressly limits any private right of action to "a dispute concerning compensation under this section." In its complaint, Plaintiff alleges that Hulu failed to pay the required franchise fee. Complaint, ¶ 22. However, as noted above, Plaintiff concedes that Hulu does not hold a franchise. Plaintiff also seeks to compel Hulu to comply with DIVCA by applying for and obtaining such a franchise. Yet Section 5860(i) does not contemplate any private right of action apart from "dispute[s] concerning compensation." No language in the Section 5860(i) authorizes a local entity to bring an action compelling a non-franchise holder to apply for a state franchise under DIVCA or to comply with its requirements.

Elsewhere, DIVCA provides for limited private rights of action. For example, Public Utilities Code § 5870 provides that a state franchise holder must designate a sufficient amount of its network capacity to public, educational, and governmental access (PEG) channels. If a dispute under Section 5870 arises, then:

> A court of competent jurisdiction shall have exclusive jurisdiction to enforce any requirement under this section or resolve any dispute regarding the requirements set forth in this section, and no provider may be barred from the provision of service or be required to terminate service as a result of that dispute or enforcement action.

Pub. Util. Code, § 5870(p).

In addition, Section 5890 prohibits franchise holders from "redlining," or discriminating against customers based on income. Section 5890(i) expressly contemplates a private right of action as to violations:

> If a court finds that the holder of the state franchise is in violation of this section, the court may immediately terminate the holder's state franchise, and the court shall, in addition to any other remedies provided by law, impose a fine not to exceed 1 percent of the holder's total gross revenue

> of its entire cable and service footprint in the state in the full calendar month immediately prior to the decision.

Furthermore, Section 5900 requires state franchise holders to comply with state and federal laws governing customer service and privacy standards. Pub. Util. Code, § 5900(a). Local entities may enforce Section 5900 by setting penalties, notifying franchise holders of any material breach, and collecting penalties. Pub. Util. Code, §§ 5900(d)-(g). If a dispute under Section 5900 arises, the statute expressly provides for a private right of action:

> (h) Any interested person may seek judicial review of a decision of the local entity in a court of appropriate jurisdiction. For this purpose, a court of law shall conduct a de novo review of any issues presented.
>
> (i) This section shall not preclude a party affected by this section from utilizing any judicial remedy available to that party without regard to this section. Actions taken by a local legislative body, including a local franchising entity, pursuant to this section shall not be binding upon a court of law. For this purpose, a court of law shall conduct de novo review of any issues presented.

Pub. Util. Code, §§ 5900(h), (i).

Thus, Sections 5870, 5890, and 5900 expressly provide for limited private rights of action against franchise holders for PEG channel, redlining, and customer service and privacy disputes. As these statutes apply only to franchise holders, non-franchise holders Netflix and Hulu need not comply. In addition, none of these sections expressly authorizes actions to compel a non-franchise holder (1) to apply for a state franchise or (2) to comply with DIVCA's requirements.

"[W]hen the Legislature want[s] to limit the remedies available in a private enforcement action . . . it clearly [knows] how to do so." Donovan v. Poway Unified School Dist. (2008) 167 Cal.App.4th 567, 595 (discussing Gov. Code § 11139). In light of the foregoing, it appears that the Legislature restricted the private rights of action under Sections 5860, 5870, 5890, and 5900 to (1) actions against DIVCA state franchise holders for disputes regarding (2) underpayment of

franchise fees, designation of PEG channels, redlining, and customer service and privacy, respectively.

Although DIVCA limits local entities' private rights of action, the statute also grants exclusive enforcement rights to the Public Utilities Commission (PUC). In 2006, AB 2987 enacted DIVCA, the primary provisions of which are codified at Public Utilities Code § 5800 et seq. Legis. Counsel's Dig., Assem. Bill No. 2987 (2005-2006 Reg. Sess.) Stats. 2006, c. 700 (A.B. 2987), § 3. AB 2987 also enacted Public Utilities Code § 444, which addresses defaults in payment of state franchise fees under DIVCA.

Unlike Sections 5860, 5870 and 5900, Section 444 is directed not solely at franchise holders, but more generally at "video service provider[s]" under DIVCA as defined in Section 5830(t). Pub. Util. Code, § 444(a). If a video service provider defaults on its franchise fees, the PUC "may suspend or revoke the state franchise of the video service provider or order the video service provider to cease and desist from conducting all operations subject to the franchising authority of the commission." Pub. Util. Code, § 444(a) (emphasis added). Thus, Section 444 expressly contemplates a situation where a video service provider does not already hold a state franchise. In such a situation, the PUC may, in the alternative, order a video service provider to "to cease and desist from conducting all operations subject to the franchising authority" of the PUC.

Section 444 also expressly provides that "[t]he [PUC] may bring an action, in its own name or in the name of the people of the state, in any court of competent jurisdiction, for the collection of delinquent fees estimated under this article, or for an amount due, owing, and unpaid to it, as shown by report filed by the commission, together with a penalty of 25 percent for the delinquency." Pub. Util. Code, § 444(d). Thus, from the plain language of Section 444, the Legislature knew how to authorize a private right of action against a "video service provider" that is subject to DIVCA but that may not yet hold a state franchise. Section 444(d) also clearly grants only the PUC – and not local entities – a right of action against non-franchise holding video service providers subject to DIVCA's requirements. In other words, under a plain reading of the relevant statutory provisions, only the PUC can bring an action to compel non-franchise holders such as Netflix and Hulu to comply with the DIVCA. Plaintiff's contentions to the contrary do not persuade.

Relevant case law supports this conclusion. Each of the DIVCA cases reviewed by the Court involved a local entity suing a DIVCA franchise holder. See, e.g., Comcast of Sacramento I, LLC v. Sacramento Metropolitan Cable Television Commission (9th Cir. 2019) 923 F.3d 1163 (local entity sued franchise holder); Sacramento Metropolitan Cable Television Commission v. Comcast Cable Communications Management, LLC (E.D. Cal. 2020) 507 F.Supp.3d 1226 (same); City of Del Mar v. Time Warner Cable Enterprises, LLC (S.D. Cal., Aug. 28, 2017) 2017 WL 3705833 (same); County of Los Angeles v. Time Warner NY Cable LLC (C.D. Cal., July 3, 2013) 2013 WL 12126774 (same); accord City of Glendale v. Marcus Cable Associates, LLC (2015) 235 Cal.App.4th 344 (same); City of Glendale v. Marcus Cable Associates, LLC (2014) 231 Cal.App.4th 1359 (same). Plaintiff cited no authority holding that a local entity may sue a non-franchise holder for non-compliance with DIVCA.

2. No Implied Private Right of Action in DIVCA.

Plaintiff contends that DIVCA provides for an implied private right of action. Not so. "A private right of action may inhere within a statute, otherwise silent on the point, when such a private right of action is necessary to achieve the statute's policy objectives." Mabry v. Superior Court (2010) 185 Cal.App.4th 208, 217. For example, "the presence of a comprehensive administrative means of enforcement of a statute" may suggest "no private right of action to enforce a statute." Id. at 218 (citing Moradi-Shalal v. Fireman's Fund Ins. Companies (1988) 46 Cal.3d 287 (holding no private right of action under Insurance Code provision where statutory scheme and legislative history provide only for administrative enforcement)).

> If the Legislature intended a private right of action, that usually ends the inquiry. If the Legislature intended there be no private right of action, that usually ends the inquiry. If we determine the Legislature expressed no intent on the matter either way, directly or impliedly, there is no private right of action [citation], with the possible exception that compelling reasons of public policy might require judicial recognition of such a right. [Citations.]

Animal Legal Defense Fund v. Mendes (2008) 160 Cal.App.4th 136, 142. In short, courts will only find an implied private right of action if (1) the statute is silent as to direct or implied

private rights, and (2) compelling public policy reasons require a court to do so.

Here, DIVCA statutory provisions expressly allow local entities such as Plaintiff limited private rights of action as to disputes concerning (1) underpayment of franchise fees; (2) designation of PEG channels; (3) income discrimination against customers; (3) customer service and privacy. Pub. Util. Code, §§ 5860(i), 5870(p), 5890(i), 5900(h), (i). Public Utilities Code § 444 also expressly grants the PUC sole authority to compel a non-franchise holding "video service provider" to comply with DIVCA's statutory requirements.

Accordingly, because "the Legislature expressly intended [these] private rights of action," the inquiry ends here: the Court may not find an implied private right of action if the Legislature has already provided express private rights of action. Mendes, 160 Cal.App.4th at 142. Nor has Plaintiff provided any compelling policy reasons for extending to local entities the PUC's authority to compel compliance with DIVCA. Contrary to Plaintiff's contentions, this holding does not lead to "the absurd and bizarre result that a video service provider . . . that fail[s] to comply with the law are immune." Opposition to Hulu Demurrer at 11. Plaintiff's hypothetical misses the mark. As Section 444 clearly states, the PUC may sue to compel non-franchise holding video service providers to comply with DIVCA.

3. DIVCA Does Not Apply to Netflix or Hulu.

a. Netflix and Hulu Do Not "Use" the Public Right-of-Way Under DIVCA.

Netflix and Hulu contend that DIVCA does not apply because they do not own or operate infrastructure in any public rights-of-way. The Court agrees.

> The "touchstone" of statutory interpretation is the probable intent of the Legislature. [Citation.] When interpreting a statute, "'we must ascertain legislative intent so as to effectuate the purpose of a particular law.' [Citation.]" [Citation.] Our first step in determining that intent "is to scrutinize the actual words of the statute, giving them a plain and commonsense meaning." [Citation.]

Sampson v. Parking Service 2000 Com, Inc. (2004) 117 Cal.App.4th 212, 223.

> [a] franchise agreement is granted by a governmental agency to enable an entity to provide vital public services with some degree of permanence and stability, as in the case of franchises for utilities. [Citation.] Examples of franchises granted by local governments in California are gas and electric utility franchises [citation] and cable television franchises [citations].
>
> [¶] A franchise is a grant of a possessory interest in public real property, similar to an easement. [Citations.]

Santa Barbara County Taxpayer Assn. v. Board of Supervisors (1989) 209 Cal.App.3d 940, 949.

DIVCA expressly states:

> It is the intent of the Legislature that a video service provider shall pay as rent a franchise fee to the local entity in whose jurisdiction service is being provided for the continued use of streets, public facilities, and other rights-of-way of the local entity in order to provide service. The Legislature recognizes that local entities should be compensated for the use of the public rights-of-way and that the franchise fee is intended to compensate them in the form of rent or a toll, similar to that which the court found to be appropriate in Santa Barbara County Taxpayers Association v. Board of Supervisors for the County of Santa Barbara (1989) 209 Cal. App. 3d 940.

Pub. Util. Code, § 5810(b) (emphasis added).

The complaint does not allege that Netflix or Hulu owns or operates any facilities located in the public rights-of-way. Instead, Plaintiff contends that DIVCA applies to Netflix and Hulu because their subscribers obtain content through the network of their Internet Service Provider (ISP), which is located in the public rights-of-way. Complaint, ¶ 17.

DIVCA defines "public rights-of-way" as "the area along and upon any public road or highway, or along or across any of the

waters or lands within the state." Pub. Util. Code, § 5830(o). A "network" means "a component of a facility that is wholly or partly physically located within a public right-of-way and that is used to provide video service, cable service, voice, or data services." Pub. Util. Code, § 5830(l). "'Franchise' means an initial authorization, or renewal of an authorization, issued by a franchising entity . . . [for] the construction and operation of any network in the right-of-way capable of providing video service to subscribers." Pub. Util. Code, § 5830(f). "The local entity shall allow the holder of a state franchise under this division to install, construct, and maintain a network within public rights-of-way under the same time, place, and manner as the provisions governing telephone corporations under applicable state and federal law." Pub. Util. Code, § 5885(a).

Netflix contends that under DIVCA, "streaming of video content is not subject to the act unless the provider of content, not an unrelated third-party, owns or operates the facilities that occupy the public rights-of-way." Netflix Demurrer at 14. Similarly, Hulu contends that DIVCA is "unambiguous as to the intended targets of the franchise—providers who construct and operate their own networks in the rights-of-way." Hulu Demurrer at 11.

In support, Netflix cites Section 5830(f), which defines a DIVCA "franchise" as authorizing "the construction and operation of [a] network in the right-of-way capable of providing video service to subscribers." Netflix also cites Section 5885(a), which provides that "[t]he local entity shall allow the [franchise holder] to install, construct, and maintain a network within public rights-of-way." However, these statutory provisions merely authorize a franchise holder to construct and operate a network in a public right-of-way. These provisions do not mandate that only video service providers who construct and operate networks in public rights-of-way can hold DIVCA franchises. Indeed, the plain language of Sections 5830(f) and 5885(a) is permissive. Under DIVCA, a franchise holder may—but is not required to—construct and operate a network within public rights-of-way.

As Plaintiff notes, DIVCA applies to video service providers "without regard to delivery technology, including Internet protocol or other technology." Pub. Util. Code, § 5830(s). The plain language of DIVCA also suggests that DIVCA applies to video service providers who deliver video programming through third-party networks. Pub. Util. Code, § 5840(q)(2)(B)

(contemplating video service providers who "leas[e] access to a network owned by a local entity").

Netflix also cites Section 5860(d), which defines "gross revenues" as "all revenue actually received by the holder of a state franchise . . . that is derived from the operation of the holder's network to provide cable or video service within the jurisdiction of the local entity." Under DIVCA, a franchise holder must pay a state franchise fee that is a percentage of a franchise holder's gross revenues. Pub. Util. Code, § 5860(b). However, Section 5860(d) merely specifies that the state franchise fee is a percentage of gross revenues derived from operation of its network to provide cable or video service. Presumably, under the plain language of Section 5860(d), one could imagine a situation where a franchise holder has not yet constructed and begun to operate its network. In such a case, gross revenues and the state franchise fee would be zero.

Netflix and Hulu further rely on AT&T Communications of the Southwest, Inc. v. City of Austin, Tex. (W.D. Tex. 1997) 975 F.Supp. 928, vacated as moot sub nom. AT&T Communications of Southwest, Inc. v. City of Austin (5th Cir. 2000) 235 F.3d 241; AT & T Communications of the Southwest, Inc. v. City of Dallas, Tex. (N.D. Tex. 1998) 52 F.Supp.2d 756, vacated as moot sub nom. AT&T Communications of the Southwest, Inc. v. City of Dallas, Tex. (5th Cir. 2001) 243 F.3d 928; and Bell Atlantic-Maryland, Inc. v. Prince George's County, Md. (D. Md. 1999) 49 F.Supp.2d 805, vacated sub nom. Bell Atlantic Maryland, Inc. v. Prince George's County, Maryland (4th Cir. 2000) 212 F.3d 863. However, as Plaintiff correctly notes, each of these cases was subsequently vacated. As such, these cases are only persuasive at best and may lack any precedential value at all. City of Santa Monica v. Stewart (2005) 126 Cal.App.4th 43, 52 fn.2 ("The Vista decision has been vacated and does not legally exist even as an unreported, nonbinding trial court decision.").

In addition, City of Austin, City of Dallas, and Prince George's County are factually and legally distinguishable. Those cases concerned the activities of telecommunications service providers and examined whether different local ordinances could be applied in light of Section 253 of the federal Telecommunications Act of 1996. 47 U.S.C. § 253(c) ("Nothing in this section affects the authority of a State or local government to manage the public rights-of-way or to require fair and reasonable compensation from telecommunications providers, on a competitively neutral and nondiscriminatory basis, for use of public rights-of-way on a nondiscriminatory

basis, if the compensation required is publicly disclosed by such government.").

Netflix's reliance on In the Matter of: Entm't Connections, Inc. (1998) 13 F.C.C. Rcd. 14277 (ECI) has merit. In ECI, the issue was whether ECI qualified for the private cable exemption of 47 U.S.C. § 522(c), which provides that "a facility that serves subscribers without using any public rights of way" does not constitute a "cable system" under the Telecommunications Act of 1996. Id., ¶ 62. The FCC ruled that because "ECI's signal moves across public rights-of-way to reach its subscribers does not by itself render ECI the operator of a cable system." Id. Noting that "[i]t is Ameritech, not ECI, that uses the rights-of-way," the FCC reasoned:

> Because Ameritech possesses the authority to operate in the right-of-way and to transmit ECI's, or other video distributors', signals, we conclude that the underlying premise tying the franchise requirement to the use of public rights-of-way is not present in ECI's circumstances, and that requiring ECI to obtain a franchise would be needlessly duplicative. As discussed above, a cable operator's construction in and use of public rights-of way is an important factor, and advantage, underlying the Communication Act's requirement that all cable operators be franchised. ECI engages in neither of these activities, relying on Ameritech's authorization, construction and maintenance of its right-of-way facilities. We cannot conclude that ECI's mere interaction with Ameritech's authorized facilities in the public right-of-way is the type of use to which Congress spoke in defining what constitutes a cable system.

Id. (emphasis added). The Seventh Circuit Court of Appeals affirmed ECI, reasoning:

> We think it likely that when the average person thinks of the construction of a cable system, he thinks of the installation of cables, either on poles or underground. That this sort of construction is highly intrusive on local governments is a large part of the reason for the local franchising requirement. . . .
>
> [¶] In ECI's system, construction of a cable system over the public right-of-way is not necessary.

> Ameritech had previously constructed its supertrunking system. It seems incontrovertible that in some important and historical sense of the word, it is reasonable to conclude that ECI has not "used" the public right-of-way.

City of Chicago v. F.C.C. (7th Cir. 1999) 199 F.3d 424, 433 (emphasis added).

In opposition, Plaintiff contends that Netflix and Hulu operate "a network (its video servers), which are a component of a facility (the infrastructure through which Netflix[/Hulu] delivers its content to subscribers), that is located in public rights-of-way, and is used to provide video service (Netflix's[/Hulu's] programming)." Opposition to Netflix Demurrer at 5; see also Opposition to Hulu Demurrer at 5; Complaint, ¶¶ 1, 11-15, 17.

However, like ECI, neither Netflix nor Hulu constructed or asked for the construction of the ISP networks delivering its service to subscribers. Netflix and Hulu do not control where the ISPs' network cables lines go or how its signal travels over the ISPs' network. Under DIVCA, the Legislature intended the franchise fee to compensate local entities for "the continued use of streets, public facilities, and other rights-of-way of the local entity in order to provide service." Pub. Util. Code, § 5810(b).

Thus, just as ECI's use of Ameritech's system did not constitute "use" under the Telecommunications Act, the Court holds that Netflix's and Hulu's use of ISP networks does not constitute "use" under DIVCA. To hold otherwise and require Netflix and Hulu to obtain a franchise – in addition to whatever franchises are held by the owners and operators of the ISP networks – would, as the FCC determined in ECI, be "needlessly duplicative." ECI, 13 F.C.C. Rcd. 14277, ¶ 62. If Netflix and Hulu were required to obtain a DIVCA franchise to deliver their services, then Plaintiff could presumably seek to require Disney Plus, Peacock, HBO Max, and Amazon Prime Video to also obtain DIVCA franchises. Under Plaintiff's reading of DIVCA, numerous franchise holders could "use" a single public right-of-way, and local entities would be allowed to collect a 5% franchise fee from each franchise holder. Such an interpretation would result in a financial windfall for local entities that the Legislature did not intend.

Furthermore, as Hulu notes, Plaintiff's interpretation of DIVCA cannot be squared with its plain language. Plaintiff interprets the phrase "provided through facilities" in isolation. Pub. Util. Code, § 5830(s) ("Video service" means video programming services . . . provided through facilities located at least in part in public rights-of-way without regard to delivery technology, including Internet protocol or other technology."). The Court, however, must interpret DIVCA as a whole. "'If possible, significance should be given to every word, phrase, sentence and part of an act in pursuance of the legislative purpose.'" Phelps v. Stostad (1997) 16 Cal.4th 23, 32. "A court must, where reasonably possible, harmonize statutes, reconcile seeming inconsistencies in them, and construe them to give force and effect to all of their provisions." Hough v. McCarthy (1960) 54 Cal.2d 273, 279. Plaintiff's interpretation of "provided through facilities" cannot be harmonized with the rest of the statute. DIVCA defines the franchise as the authorization "that authorizes the construction and operation of any network in the right-of-way." Pub. Util. Code, § 5830(f). Plaintiff's interpretation creates an inconsistency: Netflix and Hulu would be required to obtain a "construction and operation" franchise even though Netflix and Hulu do not construct or operate facilities in the rights-of-way. Plaintiff points to Section 5840(i)(1) requiring that the franchise contain a "grant of authority to provide video service" itself, but this just expands the inconsistency. Under Plaintiff's view, Section 5840(i)(1) would conflict with Section 5830(f), which still defines the franchise in terms of "construction and operation" of a network.

If Plaintiff is right about DIVCA, then the following provisions in the statute would need to be revised to resolve inconsistencies or result in surplusage:

Statutory Provision	**Inconsistency Requiring Revision**
Section 5810(a)(1)(C). "The Legislature finds and declares . . . [t]o promote competition, the state should establish a state-issued franchise authorization process that allows market participants to use their networks and systems to provide video, voice, and broadband services to all residents of the state."	The underlined phrase would need to be revised to cover franchise holders who do not own or operate networks.
Section 5840(q)(2)(B). "[T]he local entity may set a franchise fee for access to the network different from the franchise fee charged to a video	The statutory language expressly contemplates a separate franchise fee for access to an existing network, as

service provider for access to the rights-of-way to install its own network."	opposed to a franchise fee for installing a network.
Section 5860(d). "'[G]ross revenues' means all revenue actually received . . . that is derived from the operation of the holder's network to provide cable or video service within the jurisdiction of the local entity."	The underlined phrase would need to be revised to cover franchise holders who do not own or operate networks. Otherwise, franchise holders who do not operate their own networks would not generate any "gross revenues" as defined by DIVCA.
Section 5870(a). "The holder of a state franchise shall designate a sufficient amount of capacity on its network to allow the provision of the same number of public, educational, and government access (PEG) channels, as are activated and provided by the incumbent cable operator"	The underlined phrase would need to be revised to cover franchise holders who do not own or operate networks.
Section 5870(h). "Where technically feasible, the holder of a state franchise and an incumbent cable operator shall negotiate in good faith to interconnect their networks for the purpose of providing PEG programming."	The underlined phrase would need to be revised to cover franchise holders who do not own or operate networks.

In opposition, Plaintiff cites Section 5840(q)(2)(B). That provision does not support Plaintiff's interpretation. The provision makes clear that, as to lessees, a local entity "may set a franchise fee for access to the network different from the franchise fee charged to a video service provider for access to the rights-of-way to install its own network." Pub. Util. Code, § 5840(q)(2)(B). Any fee charged for accessing the local entity's network is different from DIVCA's franchise fee "charged to a video service provider for access to the rights-of-way to install its own network." Thus, DIVCA's franchise fee does not apply to the lease scenario.

To the extent that DIVCA's statutory language is ambiguous as to "use" of public rights-of-way, the legislative history reveals that the Legislature intended DIVCA to apply primarily to video service providers who build their own facilities and networks in the rights-of-way. The amendment introduced in February 2006 noted that the bill "would require [the] local agencies to permit the installation of networks by holders of state-issued authorizations[.]" Benyamin Decl., Exh. 2 at 2, Legis. Counsel's Dig., Assem. Bill 2987 (2005-06 Reg. Sess.). Moreover, an April 2006 hearing of the Assembly Committee on Utilities and Commerce clarified that the franchise "grants the provider permission to use the public rights-of-way needed to

install the necessary video infrastructure." Benyamin Decl., Exh. 1 at 4, Hearing on A.B. 2987 Before Chair Lloyd E. Levine of Assembly Committee on Utilities and Commerce, 2005-06 Reg. Sess.

At every stage of the legislative process, members of the Legislature conveyed that the targets of the franchising scheme were the companies that actually constructed and operated within the rights-of-way. Benyamin Decl., Exh. 3 at 3-4, Utilities & Commerce, Assembly Third Reading on A.B. 2987 ("[s]ome of the potential new entrants argue that this provision forces them to build their infrastructure in a manner that is uneconomical for them"); Benyamin Decl., Exh. 4 at 1, Utilities and Commerce Committee, Assembly Republican Bill Analysis on A.B. 2987 (Nunez), Cable and Video Service (statute requires "local entities to allow state-authorized cable and video providers to install and maintain their networks within public rights-of-way"); Benyamin Decl., Exh. 5 at 2, California Public Utilities Commission, Analysis of A.B. 2987 (Nunez), as amended June 22, 2006 ("[c]able companies provide video and broadband services over their coaxial cable networks"); id. ("[c]ompanies must first obtain a local franchise authorizing them to begin construction and must obtain the Rights of Way to build the network").

b. Netflix and Hulu Do Not Provide Video Programming Under DIVCA.

Netflix contends that on-demand services such as Netflix and Hulu are not "video service providers" that provide "video programming" under DIVCA. The Court agrees. DIVCA defines a "video service provider" as "an entity providing video service." Pub. Util. Code, § 5830(t). "Video service" is defined as "video programming services . . . provided through facilities located at least in part in public rights-of-way without regard to delivery technology, including Internet protocol or other technology." Pub. Util. Code, § 5830(s). "Video programming" under DIVCA means "programming provided by, or generally considered comparable to programming provided by, a television broadcast station, as set forth in Section 522(20) of Title 47 of the United States Code." Pub. Util. Code, § 5830(r).

DIVCA does not define "programming." "A fundamental canon of statutory construction is that, unless otherwise defined, words will be interpreted as taking their ordinary, contemporary, common meaning." Perrin v. United States (1979) 444 U.S. 37, 42. The ordinary and common meaning of

"programming" includes "[t]he choosing, arrangement, or broadcasting of radio or television program[s]; (also) such program[s] collectively." Oxford English Dict. [online] (December 2020), available at https://www-oed-com.ezproxy.lapl.org/view/Entry/ 152232?result=2&rskey=uQf31g&.

Applying this common meaning of "programming" to similar statutory language, a Kentucky Circuit Court held that Netflix's content is not comparable to broadcast television or cable service:

> Netflix does not provide a multichannel video programming service. Netflix's streaming service does not provide content in a multichannel format; Netflix's streaming service does not include the concept of channels. Netflix's content is not linear or sequential programming; the customer selects what to view and when. Netflix does not deliver live content; the customers cannot view sports, news, weather or award shows. Netflix uses algorithms to preselect content for its customers, on an individual basis, based on previously viewed or expressed preferences. This is a vast departure from the linear programming model of traditional cable or broadcast televisions services . . . . Contrary to traditional television services, using Netflix enables the customer to craft an entirely unique and personal profile and viewing experience.

Exh. 1 to Netflix Demurrer, Finance and Administration Cabinet, Commonwealth of Kentucky Department of Revenue v. Netflix, Inc. (Ky. Cir. Ct., Aug. 23, 2016) at 14. At the time, the relevant Kentucky statute defined "multichannel video programming service" as "programming provided by or generally considered comparable to programming provided by a television broadcast station and shall include but not be limited to: (a) Cable service; (b) Satellite broadcast and wireless cable service; and (c) Internet protocol television provided through wireline facilities without regard to delivery technology[.]" Ky. Rev. Stat., § 136.602(8) (eff. until June 26, 2019).

In opposition, Plaintiff cites City of Creve Coeur v. Netflix, Inc. et al. (Mo. Cir. Ct., Dec. 30, 2020, No. 18SL-CC02819). Kim Decl., Exh. 1. In Creve Coeur, the plaintiff sought to compel Netflix and Hulu to comply with Missouri's Video Services Providers Act (VSPA) and pay associated fees to Missouri municipalities. Creve Coeur, ¶ 11. Contrary to the

Kentucky statute at issue in Finance and Administration Cabinet, VSPA defines "video service" as "the provision of video programming provided through wireline facilities located at least in part in the public right-of-way without regard to delivery technology, including internet protocol technology whether provided as part of a tier, on demand, or a perchannel basis." Mo. Rev. Stat. § 67.2677 (emphasis added). Based on VSPA's more-expansive definition—which expressly contemplates "on demand" services such as Netflix and Hulu—the Creve Coeur court held that "[t]he 'on demand' language in the VSPA makes inapplicable the Kentucky court's reasoning that streaming services' nonlinear programming, lack of live content, and absence of channels differentiated streaming services from programming provided by a television broadcast station." Creve Coeur, ¶ 21.

Here, DIVCA's definition of "video service" is more like the former Kentucky statute than VSPA. Unlike VSPA, DIVCA's definition of "video service" does not include "on demand" services such Netflix and Hulu. Absent DIVCA's express inclusion of on demand services in the definition of "video services," the Court finds the reasoning of the Kentucky Circuit Court in Finance and Administration Cabinet to be more persuasive. Because Netflix's and Hulu's services are "on demand," they are not live, linear, channelized, scheduled, or programmed. As such, they are not "comparable to programming provided by . . . a television broadcast station[.]" Pub. Util. Code, § 5830(r).

Also, Section 5830(r)'s express reference to 47 U.S.C. § 522(20) also supports the position that Netflix and Hulu do not provide traditional broadcast television "video programming." Like Section 5830(r), 47 U.S.C. § 522(20) defines "video programming" as "programming provided by, or generally considered comparable to programming provided by, a television broadcast station." 47 U.S.C. § 522(13) defines "multichannel video programming distributor" 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[.]" However, 47 U.S.C. § 522(12) defines "interactive on-demand services" as "a service providing video programming to subscribers over switched networks on an on-demand, point-to-point basis, but does not include services providing video programming prescheduled by the programming provider[.]" (Emphasis added.)

Section 522(12)'s definition of "interactive on-demand services" expressly excludes services providing prescheduled video programming, such as television broadcast stations. Thus, from the plain language of Section 522(12), Congress clearly knows how to differentiate between television broadcast stations and interactive on-demand services such as Netflix and Hulu. The existence of Section 522(12) also suggests Congress' intent to state that interactive on-demand services without prescheduled video programming are not "generally considered comparable to programming provided by . . . a television broadcast station." 47 U.S.C. § 522(20).

Plaintiff asserts that the FCC "held that video distributed over the Internet qualifies as 'video programming.'" Notice of Proposed Rulemaking, In the Matter of Promoting Innovation & Competition in the Provision of Multichannel Video Programming Distribution Services (2014) 29 F.C.C. Rcd. 15995, ¶ 16. However, the FCC's decision focused primarily on 47 U.S.C. § 522(13)'s definition of "multichannel video programming distributor" (MVPD) Id., ¶ 13. Specifically, the FCC proposed to interpret MVPD "to mean all entities that make available for purchase, by subscribers or customers, multiple streams of video programming distributed at a prescheduled time." Id. The FCC recognized several categories of Internet-based video service offerings, including (1) "Subscription Linear," which refers "to Internet-based distributors that make available continuous, linear[] streams of video programming on a subscription basis" (id. (footnote omitted)); and (2) "Subscription On-Demand," which refers:

> to Internet-based distributors that make video programming available to view on-demand[] on a subscription basis, allowing subscribers to select and watch television programs, movies, and/or other video content whenever they request to view the content without having to pay an additional fee beyond their recurring subscription fee. This category includes Amazon Prime Instant Video, Hulu Plus, and Netflix.

Id. (emphasis added, footnote omitted).

The FCC's primary goal in its Notice of Proposed Rulemaking was to "seek comment on [its] tentative conclusion that entities that provide Subscription Linear video services are MVPDs as that term is defined in the [Telecommunications] Act because they make multiple channels of video programming available for

purchase." Id., ¶ 14. The FCC also sought comment on "whether any of the other categories of Internet-based distributors of video programming identified above fall within the statutory definition of an MVPD." Id. Significantly, as to "Subscription On-Demand" and other Internet-based video services, the FCC opined:

> [b]ecause these other Internet-based distributors of video programming either (1) make programming available for free, and not "for purchase" as required by the definition of an MVPD, or (2) do not provide prescheduled programming that is comparable to programming provided by a television broadcast channel,[] we believe they fall outside the statutory definition.

Id. (emphasis added). Thus, contrary to Plaintiff's position, the FCC also distinguishes between traditional television broadcast stations and services such as Netflix and Hulu, which do not provide prescheduled programming.

Finally, Plaintiff points out that in other litigation, Netflix admitted that it provides video programming comparable to that of a television broadcast station. Kim Decl., Exh. 2, National Association of the Deaf et al. v. Netflix, Inc. (D.Mass. May 29, 2012, case no. 3:11-cv-30168-MAP), at 15. Netflix responds that the National Association of the Deaf case settled and therefore has no precedential value. Netflix Reply at 9 fn.4. In any event, Plaintiff does not contend that Netflix should be judicially estopped based on its position in National Association of the Deaf.

c. DIVCA's "Public Internet" Exception Does Not Apply to Netflix or Hulu.

Netflix and Hulu also maintain that DIVCA's public Internet exception applies to them. Because the Court holds that DIVCA does not apply to Netflix or Hulu, the Court need not address whether the exceptions under Public Utilities Code § 5830(s) apply to Netflix or Hulu.

d. DIVCA's Notice Provisions Are Not Applicable.

As discussed above, DIVCA does not apply to Netflix or Hulu. As such, the Court need not address whether Plaintiff, Netflix or Hulu failed to comply with any of DIVCA's notice provisions.

e. The Court Declines to Rule on Whether DIVCA Violates the Internet Tax Freedom Act.

Netflix and Hulu contend that DIVCA directly conflicts with the Internet Tax Freedom Act (IFTA). However, because the Court holds that DIVCA does not apply to Netflix or Hulu, the Court need not presently address whether DIVCA violates the IFTA.

4. The Court Declines to Rule on Any Constitutional Questions.

Both Netflix and Hulu contend that Plaintiff's attempt to apply DIVCA to Netflix and Hulu violates the California and federal constitutions. Generally, duly enacted statutes are presumed to be constitutional. Lockyer v. City and County of San Francisco (2004) 33 Cal.4th 1055, 1086. "Unconstitutionality must be clearly, positively, and certainly shown by the party attacking the statute, and we resolve doubts in favor of the statute's validity." Copley Press, Inc. v. Superior Court (2006) 39 Cal.4th 1272, 1302.

"Under the canon of constitutional avoidance, a court should avoid deciding unnecessary constitutional issues." Publius v. Boyer-Vine (E.D. Cal. 2017) 237 F.Supp.3d 997, 1021 fn.16 (citing Ashwander v. Tennessee Valley Authority (1936) 297 U.S. 288, 348 ("When the validity of an act of the Congress is drawn in question, and even if a serious doubt of constitutionality is raised, it is a cardinal principle that this Court will first ascertain whether a construction of the statute is fairly possible by which the question may be avoided." (Internal quotations and citation omitted.)). The constitutional avoidance doctrine generally applies only where "there is a viable alternate, nonconstitutional ground to reach the same result." Arizona Dream Act Coalition v. Brewer (9th Cir. 2017) 855 F.3d 957, 963.

The Court need not rule on constitutional issues now. Because the Court's statutory interpretation is that DIVCA does not apply to Netflix or Hulu, the Court need not rule on whether DIVCA as-applied to Netflix or Hulu violates the California or federal constitutions, or whether federal law preempts DIVCA. Prince George's County, Maryland, 212 F.3d at 865-866 (trial court erred when it decided constitutional question of preemption without first considering dispositive state law questions).

5. Primary Jurisdiction Doctrine

Netflix asks that if the Court overrules its demurrer, the Court should invoke the primary jurisdiction doctrine and refer this action to the PUC. Because the Court sustains Netflix's and Hulu's demurrers, the Court need not address Netflix's primary jurisdiction doctrine argument now.

E. Declaratory Relief

Based the foregoing, Plaintiff's fails to state sufficient facts to constitute its first cause of action for violation of DIVCA. Plaintiff's second cause of action for declaratory relief is derivative of its first cause of action. Accordingly, because Plaintiff's first cause of action fails, Plaintiff's derivative second cause of action for declaratory relief also fails.

F. Leave to Amend

"Liberality in permitting amendment is the rule, if a fair opportunity to correct any defect has not been given." Angie M. v. Superior Court (1995) 37 Cal.App.4th 1217, 1227. "[H]owever, leave to amend should not be granted where, in all probability, amendment would be futile." Vaillette v. Fireman's Fund Ins. Co. (1993) 18 Cal.App.4th 680, 685.

The Court has not previously granted Plaintiff leave to amend so the Court will grant leave at this time.

III.
CONCLUSION

Based upon the foregoing, the Court orders that:

1) Defendant Defendants Hulu, LLC and Netflix, Inc.'s Demurrers are SUSTAINED, with 30 days leave to amend.

2) Plaintiff's Requests for Judicial Notice are GRANTED (except for the truth).

3) Nonappearance case management review is set for October 29, 2021, 8:30 AM, Department 9.

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CLERK TO GIVE NOTICE TO ALL PARTIES.

IT IS SO ORDERED.

DATED: September 20, 2021

YVETTE M. PALAZUELOS

YVETTE M. PALAZUELOS
JUDGE OF THE SUPERIOR COURT