

On February 26, 2021, Defendants filed separate motions to dismiss asserting, inter alia, that they do not provide “video service[s]” under Tenn. Code Ann. § 7-59-303(19), and, therefore, are not subject to the requirements of the CCVSA. Specifically, Defendants contend that (1) they do not provide “video programming” as defined in Tenn. Code Ann. § 7-59-303(18); (2) they do not own or operate facilities within the public rights-of-way; and (3) their services fall within the exclusion for services offered over the public Internet.

In response, the City contends: (1) Defendants’ video content qualifies as “video programming” under Tenn. Code Ann. § 7-59-303(18), because they provide the same types of shows, movies, and other content as television broadcast networks; (2) Defendants provide their video content “through wireline facilities located, at least in part, in the public rights-of-way” under Tenn. Code Ann. § 7-59-303(19), and whether they own or operate such facilities is irrelevant; and (3) Defendants’ services do not fall within the exclusion found in Tenn. Code Ann. § 7-59-303(19), because their content is not offered over the public Internet and, even if it is, they do not provide video content *as part of* a service.

II. STANDARD FOR CERTIFICATION OF A QUESTION OF LAW

This Court may certify a question of state law to the Supreme Court of Tennessee when the question is “determinative of the cause” and “there is no controlling precedent in the decisions of the Supreme Court of Tennessee.” Tenn. Sup. Ct. R. 23, § 1. “The decision whether or not to utilize a certification procedure lies within the sound discretion of the district court.” *Transamerica Ins. Co. v. Duro Bag Mfg. Co.*, 50 F.3d 370, 372 (6th Cir. 1995) (citing *Lehman Bros. v. Schein*, 416 U.S. 386, 391 (1974)). Generally, district courts should not turn to certification “every time an arguably unsettled question of state law” arises. *Pennington v. State Farm Mut. Auto. Ins. Co.*, 553 F.3d 447, 450 (6th Cir. 2009) (quoting *Pino v. United States*, 507 F.3d 1233, 1236 (10th Cir. 2007)). Yet, certifying a question is warranted if “the question is new and state law is unsettled”

and the district court cannot “see a reasonably clear and principled course[.]” *Id.* (citations omitted). When properly invoked, certification can “save time, energy, and resources and helps build a cooperative judicial federalism.” *Lehman Bros.*, 416 U.S. at 391.

The Court notes that Tennessee state courts have a strong interest in interpreting state legislative enactments and the legislature has a strong interest in establishing public policy within the state. *See Griffin v. Shelter Mut. Ins. Co.*, 18 S.W.3d 195, 200 (Tenn. 2000) (“the determination of public policy is primarily a function of the legislature and the judiciary determines public policy [only] in the absence of any constitutional or statutory declaration”) (citation omitted). In contrast, the Court has a minimal interest in declaring the public policy of Tennessee. Indeed, “[s]tate courts, not federal courts, should be the final arbiters of state law” in our federalist system. *Ameritox, Ltd. v. Millennium Lab'ys, Inc.*, 803 F.3d 518, 540 (11th Cir. 2015) (citations and quotations omitted). The value of comity—allowing Tennessee state courts to address in the first instance the issue of Tennessee statutory law—weighs in favor of certifying this important question to the Supreme Court of Tennessee. *See Arizonans for Official English v. Arizona*, 520 U.S. 43, 79 (1997) (noting that a “federal tribunal risks friction-generating error when it endeavors to construe a novel state Act not yet reviewed by the State's highest court”).

III. APPLICATION

Resolution of this case pivots on whether Defendants are “video service providers” under the CCVSA. *See* Tenn. Code Ann. § 7-59-304(a)(1) (providing that video service providers must obtain a local or state-issued franchise before providing video service in Tennessee municipalities or counties). The Act defines “video service” as “the provision of video programming through wireline facilities located, at least in part, in the public rights-of-way without regard to delivery technology, including Internet protocol technology or any other technology.” Tenn. Code Ann. § 7-59-303(19). However, the definition excludes “video programming provided as part of, and via,

a service that enables end users to access content, information, electronic mail or other services offered over the public Internet.” *Id.* If Defendants’ services do not fall within the definition of “video service” or if their services meet the statutory exclusion, the City’s complaint is subject to dismissal in its entirety. Thus, this question is determinative of the cause.¹

Additionally, Tennessee law on the question of whether streaming service providers, such as Defendants, provide video programming “as part of, and via, a service that enables end users to access content...or other services offered over the public Internet” is not only unsettled but remains untouched. There is no precedent in the decisions of the Supreme Court of Tennessee or any other Tennessee state court on the issue. Considering the lack of available guidance and the potential state-wide effect this case will have, the Court finds that certification is appropriate. Accordingly, the Court certifies the following question to the Supreme Court of Tennessee, pursuant to Rule 23:

Whether Netflix and Hulu are video service providers, as that term is defined in the relevant provision of the CCVSA, Tenn. Code Ann. § 7-59-303(19).

IV. CONCLUSION

For the reasons stated above, the Court **CERTIFIES** the question of law contained herein to the Supreme Court of Tennessee. Because the resolution of this issue will impact the outcome of the pending Motions to Dismiss [Docs. 31, 35] and the case as a whole, it is hereby **ORDERED** that Defendants’ motions shall be **HELD IN ABEYANCE** and this matter shall be **STAYED** until the Supreme Court of Tennessee issues a written opinion or an order declining to answer the certified question.

Pursuant to Tennessee Supreme Court Rule 23, Section 4, the Clerk is **DIRECTED** to serve copies of this Certification Order upon all counsel of record in this matter and file with the

¹ The Defendants have raised other constitutional questions regarding the enforceability of this provision, but those do not address the question before the Court based on the Defendants’ motions to dismiss.

Clerk of the Supreme Court of Tennessee in Nashville this Certification Order under the seal of this Court along with proof of service.

Although none of the parties have moved for certification, the Court hereby **DESIGNATES** Defendants Netflix, Inc. and Hulu, LLC as the moving parties for purposes of certification. The parties and their counsel of record appear below:

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SO ORDERED:

s/ Clifton L. Corker
United States District Judge