

Streaming and Franchise Fees: Implications for Communications Infrastructure

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The advent of video streaming services has diminished revenues local governments collect from cable video franchise fees. In response, many local governments scrutinized the laws and regulations authorizing the collection of these fees. Some concluded that streaming providers should pay the fees and should have been paying the fees for some time. Many have sued Netflix, Hulu, and other video streaming services for these franchise fees. The controversy behind the application of franchise fees to streaming services underscores the need to carefully tailor laws and regulations to a clear, reasonable purpose so that the next development in technology doesn't create a multimillion-dollar problem for innovative businesses.

Background

In the cable video industry, local governments typically collect a fee equal to 5% (or less) of the gross revenue of cable or video service provided using public right-of-way. The basis for this fee is usually compensation for the video provider's use of the public right-of-way to construct, maintain, and operate the infrastructure necessary to deliver video programming to consumers. However, most franchise fee laws read and operate like a revenue producing tax. Federal law still authorizes this compensations scheme. 47 USC § 542, part of the FCC statutes limiting regulation of cable television by localities, permits localities to charge a franchise fee based on gross revenues no greater than "5 percent of such cable operator's gross revenues derived in such period from the operation of the cable system to provide cable services."

Localities retain wide latitude in setting terms and conditions of access. Many states introduced a statewide video franchising regime to increase certainty for cable operators, in some cases going as far as preempting local regulation altogether. Some states also modernized cable television regulations to cover forms of video programming other than channel-based cable (such as video on demand) so that cable television providers would not sidestep cable regulations altogether.

But technology, as it tends to do, outpaced regulation. The rise of streaming services started the cord-cutting trend. By the mid-2010s, streaming profits soared, and video franchise fees declined. From the perspective of a local government losing franchise revenue, it may have appeared that streaming services were exploiting an unjust loophole to video franchising requirements. Many governments sued.

The Litigation

The cases against streaming services for video franchise fees typically share the following attributes:

- Plaintiffs allege streaming services qualify as “video service” (or similar terms) subject to the franchise fee under state law;
- State law defines video service broadly (to capture updates in technology), but excludes services provided as part of or through a service which enables users to access content, information, electronic mail or other services that are offered via the public internet;
- Defendants typically argue, among other things:
 - Streaming services are excluded as services offered via the public internet;
 - Streaming services are too dissimilar to video programming to fall under the franchise laws; and/or
 - Streaming services are not covered by franchise laws because the internet provider, not the streaming service, uses the public right-of-way.
- Some state laws preclude private rights of action in favor of regulation by the state utilities commission, state attorney general, or other regulatory entity.

Definition of a Video Service

The cases we have tracked to date involve statutes with broad definitions of video service subject to a franchise fee. The statutory language in Arkansas provides a good example for how a state might define “video service”:

(15)(A) “Video service” means the delivery of video programming to subscribers in which:

(i) The video programming is generally considered comparable to video programming delivered to viewers by a television broadcast station, cable service, or digital television service, without regard to the technology used to deliver the video service, including Internet protocol technologies; and

(ii) The service is provided primarily through equipment or facilities located in whole or in part in, on, under, or over any public right-of-way.

(B) “Video service” includes cable service and video service delivered by a community antenna television system but excludes video programming:

(i) Provided to persons in their capacity as subscribers to commercial mobile service as defined in 47 U.S.C. § 332(d), as it existed on January 1, 2013; or

(ii) 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;^[i]

This definition contains three key attributes: (1) the video service must be generally considered comparable to traditional video programming, (2) the service must be provided through facilities located in public right-of-way, and (3) the definition does not include video programming which is provided “as part of and via a service” enabling users to access content or service over the public internet.

Statutes in the following states also share the three attributes described above:

- Georgia ([Code Ann. § 36-76-2 \(West\)](#)). Note, in the 2022 session of the Georgia legislature recently proposed Senate Bill 529 would exclude all digital audiovisual works delivered over the internet (including streaming) from the definition of “video service.”

- California ([Pub. Util. Code § 5830 \(West\)](#))
- Nevada ([Rev. Stat. Ann. § 711.141 \(West\)](#))
- Ohio ([Ohio Rev. Code. Ann. § 1332.21\(j\) \(2007\)](#))
- Texas ([Util. Code Ann. § 66.002\(9\) \(West\)](#))

Many state video service statutes have a combination of attributes 1 (generally comparable), 2 (provided in part over public ROW), and 3 (internet exception), but do not contain all attributes.

- Illinois: does not contain attribute 1 ([220 Ill. Comp. Stat. Ann. § 5/21-201\(v\) \(West 2017\)](#)).
- Indiana’s statute contains attributes 1 and 2, but no internet exclusion (3). ([Code Ann. § 8-1-34-14 \(West\)](#)).
- Kansas contains attributes 2 and 3, but no explicit requirement that video service be “generally considered comparable to traditional programming” (1). ([Stat. Ann. § 12-2022\(j\) \(West 2020\)](#))
- Louisiana’s statute contains attributes 2 and 3, but no explicit requirement that video service be “generally considered comparable to traditional programming” (1). ([Stat. Ann. § 45:1363\(14\) \(2008\)](#))
- Missouri: No internet exception, and contains unusually broad language. (“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.” [Rev. Stat. § 67.2677\(14\)](#) (emphasis added).)
- New Jersey: contains only attribute (1) [J. Stat. Ann. § 48:5A-3\(v\) \(West 2006\)](#).
- Tennessee: contains only attributes (2) and (3), but does contain a reference to “video programming” which could be read to include only services generally comparable to television broadcast and similar services. [Code. Ann. § 7-59-303\(19\) \(West 2017\)](#).

Many courts have seized on the limitation that any video service must be similar to traditional cable television programming. As explained in a thorough opinion by the court in *City of Lancaster v. Netflix*, , No. 21STCV01881, 2021 WL 4470939 (Cal. Super. Sep. 20, 2021), this language tends to mean the service must include channels with temporally linear programming, which streaming service typically does not include. However, over time cable television began to include more advanced service like on-demand programming. At least one state included reference to on-demand programming (but none of the other attributes described above), which may allow a court to conclude streaming services are video programming. See *City of Creve Coeur, Missouri v. Netflix, Inc. et al.* (Mo. Cir. Ct., Dec. 30, 2020, No. 18SL-CC02819) (allowing plaintiffs to survive motion to dismiss). Several courts have certified this question to the relevant state supreme court.^[ii]

Other courts may focus on the public internet exception. On the one hand, regulating internet service, and services accessed through the internet, in the United States ranges from politically unviable to legally prohibited. As such, it’s no surprise that most of the state statutes analyzed so far expressly exclude internet-based services from the ambit of video franchise fee laws. On the other hand, states and local governments rightfully hope to avoid situations where services which have all attributes of cable television (including the use of local right-of-way to deliver service) escape regulation simply because the provider uses the public internet in some way.

The typical internet exclusion contemplates services which provide access to the internet generally, but could be read to include any services which use the internet to provide content. Plaintiffs like those in *City of Ashdown, Arkansas v. Netflix, Inc.* argue that the internet exclusion only applies to services which allow access to content over the internet as opposed to services which provide *only* video, look and act more like what we expect cable television to act like today, and only happen to require an internet connection to function. Plaintiffs also focus on

the private nature of the streaming service (*i.e.*, a subscription is required, typically the service does not also serve as a means of accessing other internet services, and typically the content is stored on private servers) to argue the internet exception does not apply.^[iii]

Nevertheless, many courts have determined that the state legislature intended to exclude streaming services whenever the internet exception language is present, as described in the Arkansas and Nebraska cases above. The Arkansas and Nebraska courts rejected plaintiffs' narrow reading suggesting that streaming services do not qualify for the exception because the video is the entire service.

Whether Hulu provides more services than stream videos—as Hulu argues—is immaterial. Nevertheless, Plaintiff's argument suggests the Court read "any" as "all" video content, but that simply is not the statutory language, and the Court declines to read it as so. . . . As such, Plaintiff's argument that Defendants' video content is the "entire" and not "part of" the services provided, and therefore not excluded, does not persuade the Court to agree that Defendants are video service providers.

City of Reno, Nevada v. Netflix, Inc., No. 320CV00499MMDWGC, 2021 WL 4037491, at *4 (D. Nev. Sept. 3, 2021) (see also *City of Ashdown, Arkansas v. Netflix, Inc.*, No. 4:20-CV-4113, 2021 WL 4497855 (W.D. Ark. Sept. 30, 2021).

Another Issue: Exclusion of Private Remedy

Streaming providers have often successfully argued that state law vests jurisdiction over franchise fee disputes in a regulatory body such as the state public utilities commission. In these states, we expect to see either proceedings in those state public utilities commissions to answer the overall policy question of whether streaming services are (and should be) included within state video franchising regimes, legislative changes, or both.

- Arkansas: The court in *City of Ashdown, Arkansas v. Netflix, Inc.*, No. 4:20-CV-4113, 2021 WL 4497855 (W.D. Ark. Sept. 30, 2021) concluded that Ark. Code Ann. § 23-1-104 vests exclusive jurisdiction with the Arkansas PSC.
- California: The court in *City of Lancaster v. Netflix*, No. 21STCV01881, 2021 WL 4470939 (Cal. Super. Sep. 20, 2021) held the DIVCA provides no private right of action because the DIVCA provides the California PUC express jurisdiction to enforce unpaid franchise fees, provides no express provision for a court to enforce the same, and in other contexts does provide limited court remedies. Failure of the legislature to provide an express remedy for unpaid franchise fees, the court held, indicated the intent to place jurisdiction solely with the PUC. at *4.
- Georgia: Subject to litigation. The United State District Court in the Northern District of Georgia remanded such a case to state court on August 5, 2021. *Gwinnett Cty., Georgia v. Netflix, Inc.*, No. 1:21-CV-21-MLB, 2021 WL 3418083 (N.D. Ga. Aug. 5, 2021).
- Illinois: Currently litigated. *City of East St. Louis v. Netflix Inc. et al.*, 3:21-cv-00561 (S.D. Ill.).
- Indiana: Currently litigated, but remanded to state court. *City of Fishers, Indiana v. DIRECTV*, 5 F.4th 750 (7th Cir. 2021).
- Missouri: Subject to ongoing litigation. Note: "The public service commission shall have the exclusive authority to authorize any person to construct or operate a video service network or offer video service in any area of this state." Mo. Ann. Stat. § 67.2679 (West). But Mo. Ann. Stat. § 67.2711 provides that "[i]n the event a video service provider is found by a court of competent jurisdiction to be in noncompliance with the requirements of sections 67.2675 to 67.2714, the court shall issue an order to the video service provider directing a cure for such noncompliance within a specified reasonable period of time."

- Nevada: *City of Reno, Nevada v. Netflix, Inc.*, No. 320CV00499MMDWGC, 2021 WL 4037491, at *5 (D. Nev. Sept. 3, 2021).
- Texas: *City of New Bos., Texas v. Netflix, Inc.*, No. 5:20-CV-00135-RWS, 2021 WL 4771537 at *5 (E.D. Tex. Sept. 30, 2021).

Internet Tax Freedom

Another argument that defendants have made, but to our knowledge has gone untested, is that assessing a franchise fee on a streaming service violates the 1998 Internet Tax Freedom Act (ITFA) Pub. L. No. 105–277, § 1100 *et al*, 112 Stat. 2681–719 (codified as amended at 47 U.S.C. § 151 (2018)). The IFTA prohibits states and their political subdivisions from imposing “new” taxes on internet access services or multiple or discriminatory taxes on electronic commerce. The prohibition does not include any taxes imposed prior to the effective date of the IFTA, so this argument may only apply to modernized video franchising laws and regulations. This argument will test the technical as well as legal prowess of courts facing the question, which from a policy standpoint seems more suited to a public utilities commission to decide.

Implications for Streaming and Communications Infrastructure

This litigation may not solve the underlying issues leading to disputes. Local governments may continue to see declining revenues, leading to further attempts to find revenue. These attempts will likely include lobbying efforts at the state and federal levels to seek updates in relevant laws and regulations. The failure of laws and regulations to keep up with technology is subject to active scrutiny in several other areas, including right-of-way compensation and regulation generally, how low-income access to communications is funded, and others. Players in the streaming and infrastructure spaces need a well-rounded approach which includes state and local government relations, regulatory compliance, and the awareness and strategic use of the tools federal law offers.

If state legislatures act, it will be important to identify the purpose franchise fees truly serve and tailor regulation accordingly. A primary reason for video franchise fees is to compensate local governments for use of its public right-of-way and for the costs of managing and administering said right-of-way. Where an internet provider already takes responsibility for use of a locality’s right-of-way, seeking additional fees from separate uses of the wires is an unnecessary double recovery. However, few, if any, of the laws cited in this article expressly limit the reach of franchise fees to this purpose. As a result, these franchise fee laws read more like a revenue producing tax and may even be intended to serve as a source of revenue independent of costs. It’s possible that this controversy with streaming services may force state governments to affirm (or deny) the revenue component of franchise fees as a true driving force behind local franchise fees. A less fortunate, but still likely, result is that state legislatures sidestep this analysis and simply update regulations to address the issues as we see them today and allow governments and communications companies to sort out the next controversy that hinders government/infrastructure relations.

[i] Ark. Code Ann. § 23-19-202 (West) (emphasis added)

[ii] In *City of Knoxville, Tennessee v. Netflix, Inc. et al*, Case No. 3:20-CV-00544 (E.D. Tenn. 2021), the Eastern District Court of Tennessee asked the Tennessee Supreme Court to certify the following question: “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).” In *City of Maple Heights, Ohio v. Netflix, Inc. & Hulu, LLC*, Case No. 2021-0864 (N.D. Ohio 2021), the Northern District Court of Ohio asked the Ohio Supreme Court to certify two questions: “(1) Whether Netflix and Hulu are video service providers under Ohio law” and “(2) Whether Maple Heights can sue Netflix and Hulu to enforce Ohio’s video service provider provisions.”

[iii] Plaintiffs in *Gwinnett Cty., Georgia v. Netflix, Inc.*, No. 1:21-CV-21-MLB, 2021 WL 3418083 (N.D. Ga. Aug. 5, 2021) argued that because streaming services offer content solely through private infrastructure, the “public” internet exception cannot apply.

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