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Franchise Fees and Streaming TV - Municipalities Across the Country Seek to Subject Netflix, Hulu, Amazon and Others to Franchise Fees to Offset Declining Revenue From Cable TV Providers.

A billion-dollar battle continues to play out in lawsuits pitting municipalities against providers of over-the-top ("OTT") video streaming services, like Netflix or Hulu. For decades, municipalities have raised revenues by collecting "franchise fees" from cable TV providers that needed to construct, install, or operate their facilities in public rights-of-way. More recently, however, many consumers have "cut the cord" on traditional cable TV service in favor of streaming services. That reduces cable companies' revenues, thus reducing the franchise fees they pay based on a percentage of revenues. And that hits municipalities in the bottom line. In at least 14 states, municipalities have reacted by suing OTT streaming companies, asserting that they owe franchise fees under the statewide video franchising statutes passed in many states in the 2000s to reduce entry barriers and boost video competition with cable. The stakes are high, as municipalities seek both back payments and to impose the fees going forward.

Threshold Question – Jurisdiction and Comity Abstention. A threshold issue in many of these cases is whether they can be removed to federal court. The Seventh Circuit sent one case back to Indiana state court by relying on the doctrine of comity abstention under *Levin v. Commerce Energy, Inc.*, 560 U.S. 413 (2010), reasoning that state courts were better positioned to address claims regarding local revenue collection and taxation, even when federal-law defenses were raised. *City of Fishers, Indiana v. DirecTV*, 5 F.4th 750 (7th Cir. 2021). A district court judge in Missouri remanded another case to state court on the same basis. *City of Creve Coeur, Missouri v. DirecTV,* LLC, 2019 WL 3604631 (E.D. No. Aug. 6, 2019). And the same kind of jurisdictional issue is currently pending at the Eleventh Circuit, where OTT streaming providers are challenging a Georgia district court's remand order. No. 21-13111 (11th Cir.), appealing *Gwinnet County, Georgia v. Netflix, Inc.,* 2021 WL 3418083 (N.D. Ga. Aug. 5, 2021).

Key Substantive Issues. Among the most recent cases is one brought by the City of East St. Louis against all the major streaming providers under Illinois' Cable Video and Competition Law of 2007 ("CVCL"), 220 ILCS 5/21-100 et seq. *City of East St. Louis v. Netflix, Inc.*, Case No. 3:21-cv-561 (S.D. Ill.). The case provides a good overview of the key substantive issues common to almost all these lawsuits. The Illinois statute, like many others adopted around the country in the aughts, allows cable or video service providers to obtain statewide "franchises" to provide service, which reduces barriers for entry over the typical town-by-town franchise approach for cable systems. Entities must obtain a statewide authorization if they would use the public rights-of-way to install or construct facilities for their cable or video service, as defined by statute. 220 ILCS 5/21-401(a)(1). And holders of such an authorization have to pay a franchise fee for the operation of the system. 220 ILCS 5/21-801(b) & (c).

Although East St. Louis's amended complaint brings a variety of claims, the key question is whether OTT video streaming providers are subject to the authorization requirement – and hence, more to

the economic point, subject to the franchise fee obligation. The OTT providers recently filed motions to dismiss the amended complaint, making the full range of arguments they have made in similar cases nationwide. The main positions are that:

- OTT providers do not construct, install, or operate physical facilities in the public right-of-way, and so need not obtain a statewide authorization (or pay a franchise fee);
- OTT providers do not provide "video programming" under the CVCL, in that they do not control programming in the same
- way as a typical TV broadcaster;
  OTT providers do not operate a "video system" under the CVCL because they do not operate any facility in the public right-of-way, but rather hand streaming traffic over to the internet service providers that have facilities there;
- OTT providers' service is provided via the "public internet," and therefore they fall within the statutory exemption that prevents them from being deemed video service providers under the CVCL;
- The CVCL does not authorize a private right of action by municipalities, but rather has an express enforcement mechanism through the Illinois Attorney General;
- The City's claims are preempted by the federal Cable Act, which bars local franchise fees for OTT providers; andThe City's claims are barred by the First Amendment because they would impose an authorization requirement and fee on OTT streaming video providers, which would be an unlawful prior restraint on their ability to distribute video content, a discriminatory tax (because OTT music, literature, or news providers would not face the same duties), and an excessive fee on their right to speak.

Decisions to Date. Aside from the jurisdictional decisions noted above, rulings in these cases to date fall into three categories:

Certified Question to State Court: In Ohio and Tennessee, district courts have certified questions to the state supreme courts, asking them to decide whether the OTT streaming providers are "video service providers" under the relevant state statutes (and, in Ohio, whether there is a private right of action to enforce the statutes). *City of Maple Heights, Ohio v. Netflix, Inc.*, 2021 WL 2784440 (N.D. Ohio July 2, 2021); *City of Knoxville, Tennessee v. Netflix, Inc.,* No. 3:21-cv-00544 (E.D. Tenn. Sept. 8, 2021).

Denial of Motions to Dismiss: Courts in Missouri and Indiana have denied motions to dismiss, but have yet to decide the merits of the cases. *City of Creve Coeur, Missouri v. Netflix Inc.*, No. 18SL-CC02819 (Mo. Cir. Ct. Dec. 30, 2020); *City of Fishers, Indiana v. Netflix Inc.*, No. 49D01-2008--L-026436 (Marion Sup. Ct. Jan. 18, 2022).

Merits Decisions for OTT Streaming Companies: Otherwise, in cases decided on the merits the OTT streaming companies are thus far undefeated at the trial-court level, though two decisions are on appeal (to the Ninth and Eighth Circuits). See *City of Reno, Nevada v. Netflix, Inc.,* 2021 WL 4037491, at *4-5 (D. Nev. Sept. 3, 2021) (appeal pending, 9th Cir., No. 21-16560) (OTT steaming service fell within statutory exception for service provided via the public internet; also, statute did not authorize a private right of action for municipalities); *City of Ashdown, Arkansas v. Netflix, Inc.,* 2021 WL 4497855, at *4 (W.D. Ark. Sept. 30, 2021) (appeal pending, 8th Cir., No. 21-3435) (OTT steaming service fell within statutory exception for service provided via the public internet; also, statute did not authorize a private right of action for municipalities); *City of New Boston, Texas v. Netflix, Inc.*, 2021 WL 4771537, at *5 (E.D. Tex. Sept. 30, 2021) (OTT streaming companies did not hold state-issued franchises, and so could not be subject to municipal franchise fees under Texas statute); *City of Lancaster, California v. Netflix, Inc.,* 2021 WL 4470939, at *5-12 (Cal. Super. Ct. Sept. 20, 2021) (OTT video sent over third-party internet service provider networks did not

constitute “use” of public right-of-way so as to be subject to franchise fees, and OTT companies’ content did not constitute “video programming” comparable to that provided by a television broadcast stations); *Kentucky v. Netflix, Inc.,* No. 15-CI-01117, at 12-15 (Ky. Cir. Ct. Aug. 23, 2016) (OTT companies’ content was not comparable to “programming” by a television broadcast station and so fell outside state statute). The Attorney General of Ohio also recently filed an amicus brief in *City of Maple Heights, Ohio v. Netflix, Inc.*, Case No. 2021-0864 (S. Ct. Ohio Nov. 1, 2021), urging the Ohio Supreme Court to hold that Netflix is not subject to franchise fees under Ohio’s video service law on several of the grounds mentioned above from the East St. Louis case.

What’s Next? Given the dollars at stake, it seems likely these cases will linger for some time as they work through appeals, that more will be filed in 2022, and that parallel lobbying efforts will seek to address the issue at a legislative level. TV-related franchise fees have long been a rich source of litigation as technology evolves, and this is the latest high-stakes chapter.

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