

A Better Way to Watch; Streaming Giants Bypass Local Municipality Cable Franchise Fees

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I hereby certify that this entry is entirely my own work and has not been previously published.

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I. INTRODUCTION

Video streaming has had a dramatic effect on home entertainment since it burst onto the scene in the 2010s.¹ Viewers have deserted cable for streaming at an ever-quickening pace.² The number of American adults who watch cable dropped precipitously from 76% in 2015 to 56% in 2021.³ Local municipalities, who derive a massive source of revenue from taxing cable companies for use of public rights-of-way, have grown increasingly uneasy.⁴ Existing state and federal laws governing cable taxes did not anticipate or provide provisions for video streaming over the Internet.⁵ Feeling their grip on local franchise fees starting to slip, local municipalities have filed numerous lawsuits over the last few years, in a last-ditch effort to protect their revenue.⁶

Thus far, streaming companies have been mostly successful in defending against suits filed by local governments, preventing them from having to cough up 5% of gross revenue in franchise fees.⁷ In Illinois, the dispute boiled over when the City of East St. Louis sued Netflix and many

¹ Alan G. Poole, Jr., *Streaming and Franchise Fees: Implications for Communications Infrastructure*, TROUTMAN PEPPER (Feb. 28, 2022), <https://www.troutman.com/insights/streaming-and-franchise-fees-implications-for-communications-infrastructure.html>.

² *Id.*

³ Elaine S. Povich, *Cities and States Find New Ways to Tax Streaming Services*, GOVERNING (Jan. 19, 2022), <https://www.governing.com/finance/cities-and-states-find-new-ways-to-tax-streaming-services>.

⁴ *Id.*

⁵ *See id.*

⁶ *Id.*

⁷ *See id.*

other streaming giants, trying to impose a cable franchise fee.⁸ Netflix’s ensuing victory was a major win for Netflix; yet it could lead to a significant loss of revenue for local Illinois government, which may restrict local government’s ability to pay for other essentials.⁹ The problem has become too big for the state legislature to ignore, but the legislature is faced with competing policy priorities: incentivizing further innovation, and funding local government.¹⁰ Ultimately however, a cure-all solution is needed to ward off a ballooning amount of potential litigation.¹¹

II. BACKGROUND

(A) *The Technology*

Video streaming, an innovative technology, rose to prominence in the 2010s.¹² Using the Internet, streaming providers send a video signal over wires owned by Internet service providers (“ISPs”), which eventually reaches consumers’ computers, televisions, and mobile devices.¹³ In return for a monthly fee, ISPs provide consumers with an Internet connection, which is necessary to access the content.¹⁴ In addition, consumers must pay a monthly subscription fee to the streaming providers for permission to download and watch

⁸ City of E. St. Louis v. Netflix, Inc., 630 F. Supp. 3d 1003, 1008 (S.D. Ill. 2022).

⁹ See Poole, *supra* note 1.

¹⁰ See *id.*

¹¹ See *id.*

¹² *Id.*

¹³ Sam Costello, *Internet Streaming: What It Is and How It Works*, LIFEWIRE, <https://www.lifewire.com/internet-streaming-how-it-works-1999513> (last updated March 30, 2023).

¹⁴ *A Guide to Internet Service Provider Fees*, UPDATER, <https://updater.com/guides/internet-provider-fees> (last updated April 4, 2022).

their videos.¹⁵ After paying the subscription fee, consumers can watch as much content as they want from the streaming provider's library of movies, television shows, and games.¹⁶

Users can access streaming content libraries via any Internet connection, which they can get not just from an ISP, but also a satellite internet provider, or even cell phone hotspot.¹⁷ Sometimes cable providers will also provide Internet access, in addition to cable.¹⁸ While some of these methods, such as satellite Internet, may not use public rights-of-way, cable providers do use public rights-of-way to provide Internet access to consumers.¹⁹ Because public rights-of-way are used, local municipalities have argued streaming giants should be subject to franchise fees when streaming content is provided through a cable provider's Internet access.²⁰ But, the cable providers are already paying franchise fees for the infrastructure, so it can be argued municipalities should not be allowed to double-dip.²¹

(B) *Policy Implications*

The emergence of streaming as a home entertainment option triggered competing legislative priorities: encouraging innovation, and funding local municipalities.²² Streaming services are an innovative technology, using existing infrastructure to provide a

¹⁵ James K. Willcox et al., *Guide to Streaming Video Services*, CONSUMER REPORTS, <https://www.consumerreports.org/electronics-computers/streaming-media/guide-to-streaming-video-services-a4517732799/> (last updated Dec. 4, 2023).

¹⁶ *Id.*

¹⁷ *Id.*

¹⁸ Povich, *supra* note 3.

¹⁹ *Id.*

²⁰ *Id.*

²¹ *See id.*

²² *See* Poole, *supra* note 1.

new service uninhibited by franchise fees.²³ If franchise fees are applied to streaming services, it may have a chilling effect on innovation, as technology creators may believe they will be unfairly taxed for new inventions.²⁴ Streaming companies believe the fees are being unfairly levied against them because the fees were intended to apply to traditional cable providers, not their new technology.²⁵ Streaming companies merely provide content over the infrastructure provided by ISPs, who already pay fees for the infrastructure.²⁶ Streaming services then, are essentially just driving down the road for which ISPs have already paid the toll.²⁷

On the other hand, local municipalities are grappling with a large loss of revenue as cable customers jump ship for streaming services, due to their convenience and lower prices.²⁸ This depletion of revenue means local municipalities have less money to allocate to other community essentials.²⁹ Municipalities are responsible for maintaining many things: roads, water lines, public housing and transportation, clean-up of pollution, etc.³⁰ If local government loses a large amount of revenue, this could impair its ability to provide these essentials.³¹

²³ *See id.*

²⁴ *See id.*

²⁵ Povich, *supra* note 3.

²⁶ *See id.*

²⁷ *See id.*

²⁸ *Id.*

²⁹ *See id.*

³⁰ *State and Local Government*, WHITE HOUSE, <https://www.whitehouse.gov/about-the-white-house/our-government/state-local-government/#:~:text=Municipalities/> (last visited Dec. 28, 2023).

³¹ *See id.*

(C) *Existing Statutes and Regulations*

There are federal laws spelling out what fees municipalities are permitted to charge cable providers to access public rights-of-way.³² The Communications Act of 1934 granted the Federal Communications Commission (“FCC”) regulatory authority over cable.³³ Then in 1984, Congress passed the Cable Communications Policy Act of 1984 (“CCPA”), which decreed that cable companies must obtain a franchise before providing cable to any specific market.³⁴ To obtain a franchise, cable companies must pay fees up to a limit set by the FCC, typically 5% of gross revenue.³⁵ The CCPA further decreed that municipalities cannot unreasonably deny franchise requests.³⁶

To supplement federal laws, Illinois passed county and municipal cable franchise laws.³⁷ The county law, 55 ILCS 5/5-1095, gives counties the power to set-up cable franchises, whereas the municipal law, 65 ILCS 5/11-42-11, allows municipalities to do the same. Cable providers can obtain a franchise under either of these laws, or their state law equivalent, the Cable and Video Competition Law of 2007 (“CVCL”).³⁸

The CVCL was passed to establish a state authorization process for franchise fees.³⁹ The CVCL, like the federal CCPA, allows franchise fees of up to 5% of a company’s gross revenue.⁴⁰

³² *The Cable Franchising Authority of State and Local Governments and the Communications Act*, EVERYCRSREPORT.COM (Jan. 3, 2020), <https://www.everycrsreport.com/reports/R46147.html>.

³³ *Id.*

³⁴ *Id.*

³⁵ *Id.*

³⁶ *Id.*

³⁷ 65 ILL. COMP. STAT. 5/11-42-11 (2007); 55 ILL. COMP. STAT. 5/5-1095 (2007).

³⁸ 220 ILL. COMP. STAT. 5/21-101.1 (2017).

³⁹ 220 ILL. COMP. STAT. 5/21 (2017).

⁴⁰ *Id.*

Although cable providers must pay fees, the CVCL gives them a more efficient process: franchisees no longer have to obtain franchises on a town-by-town basis with varying requirements, they can simply get state authorization.⁴¹ Furthermore, the CVCL provides franchisees with equal treatment, as each franchise throughout the state is treated the same as the next.⁴²

(D) *Previous Legal Disputes*

Most cable franchise fee litigation has revolved around the state law definition of “video services,” which typically has three different attributes.⁴³ First, video services must be generally considered comparable to traditional cable programming.⁴⁴ Second, video services must be provided through facilities located in a public right-of-way.⁴⁵ Third, “video services” does not typically include programming provided over the Internet.⁴⁶ Some jurisdictions, however, only adopt a combination of two of the three above attributes.⁴⁷

Municipalities usually use several specific arguments in litigation over cable franchise fees.⁴⁸ First, municipalities argue streaming services qualify as “video services” under relevant franchise fee laws, and so streaming providers should be subject to franchise fees.⁴⁹ Second, municipalities argue clauses excluding the Internet from the “video services” definition only apply to providers who provide Internet access in general, and not just video streaming.⁵⁰ Third,

⁴¹ *Id.*

⁴² *Id.*

⁴³ Poole, *supra* note 1.

⁴⁴ *Id.*

⁴⁵ *Id.*

⁴⁶ *Id.*

⁴⁷ *Id.*

⁴⁸ *Id.*

⁴⁹ *Id.*

⁵⁰ *Id.*

municipalities contend streaming services have more of a private nature compared to cable, as subscribers to streaming services pay a monthly fee, and the content is kept on private servers.⁵¹

Streaming providers, on the other hand, usually employ several different defenses.⁵² First, streaming providers argue that streaming services are not included under state law definitions of “video services” because the content is accessed via the Internet.⁵³ Second, streaming providers contend they should not have to pay franchise fees because ISPs set-up the infrastructure on public rights-of-way and already pay franchise fees, thus satisfying the obligation.⁵⁴

In recent years, there have been many lawsuits filed across the country over whether municipalities can tax streaming giants with franchise fees.⁵⁵ Streaming giants have been winning the legal disputes so far, for various reasons.⁵⁶ In Tennessee, Netflix and Hulu won a suit filed by the City of Knoxville, which alleged Netflix and Hulu were liable for franchise fees under a Tennessee law, the Competitive Cable and Video Services Act.⁵⁷ The Tennessee supreme court held that streaming services do not fall within the definition of a “video service provider,” under state law, and so the streaming giants were not liable for franchise fees.⁵⁸

The Eastern District of Texas also dismissed a case against the streaming giants, but for a different reason.⁵⁹ A group of municipalities in Texas filed a class-action suit alleging that under

⁵¹ *Id.*

⁵² *Id.*

⁵³ *Id.*

⁵⁴ *Id.*

⁵⁵ *See Federal, state courts hinder local streaming franchise fees*, GRANTTHORNTON (Feb. 23, 2023), <https://www.grantthornton.com/insights/alerts/tax/2023/salt/general/federal-state-courts-hinder-local-streaming-franchise-fees-02-23>.

⁵⁶ *Id.*

⁵⁷ *City of Knoxville v. Netflix, Inc. et al.*, S.W.3d 106, 115 (Tenn. 2022).

⁵⁸ *Id.*

⁵⁹ Gail Cole, *Cutting the cable cord cut revenue for municipalities. They want it back.*, AVALARA (Oct. 8, 2021), <https://www.avalara.com/blog/en/north-america/2021/10/cutting-the-cable-cord->

Texas Utilities Code § 66.005(a), the streaming services owe a 5% franchise fee.⁶⁰ The streaming providers argued they were not subject to the tax because they do not hold a state-issued certificate of franchise authority.⁶¹ The court agreed, ruling that streaming services are not liable for franchise fees if they do not have a state-issued certificate of franchise authority.⁶²

A California superior court also ruled against streaming providers, but for yet another reason.⁶³ The City of Lancaster, CA, filed suit to impose a 5% franchise fee on streaming providers, under the state's Digital Infrastructure and Video Competition Act of 2006.⁶⁴ The court ruled the law does not apply to streaming services because they provide content over infrastructure owned by an ISP.⁶⁵ Crucial to the court's reasoning was, "[n]either 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."⁶⁶

cut-revenue-for-municipalities-they-want-it-back.html; *City of New Bos. v. Netflix, Inc.*, 565 F. Supp. 3d 865, 870–71 (E.D. Tex. 2021).

⁶⁰ *City of New Bos.*, 565 F. Supp. 3d at 870-71.

⁶¹ *Id.*

⁶² *Id.*

⁶³ *City of Lancaster v. Netflix*, 2021 Cal. Super. LEXIS 7497, *20–26.

⁶⁴ *Id.* at *1.

⁶⁵ *Id.* at *20–26.

⁶⁶ *Id.* at *20–21.

III. ANALYSIS

(A) *Statutory Analysis of Cable Franchise Fees in Illinois*

(1) *Illinois County and Municipal Codes*

Illinois has county and municipal laws governing cable franchises.⁶⁷ Both the county and municipal laws provide that “cable television franchise” programming is subject to franchise fees.⁶⁸ Both laws define “cable television franchise” as a franchise for “community antenna television.”⁶⁹ The laws further define “community antenna television” as a facility used for television broadcasting or cable services.⁷⁰ Neither statute mentions “Internet streaming,” or even the “Internet.”⁷¹ Thus, it appears that neither the Illinois county nor municipal laws meant to charge streaming providers with cable franchise fees.

(2) *Illinois State Law*

Illinois also has a state law, the Cable and Video Competition Law of 2007 (“CVCL”), which governs the state authorization process for cable franchises.⁷² The purpose of the CVCL is to provide Illinois consumers with equal access to “cable services and video services,” and to streamline the franchise process for cable providers.⁷³ Tellingly, the purpose section of the CVCL only mentions the Internet once: “[t]he economy in the State of Illinois will be enhanced by investment in . . . cable services, and video services infrastructure . . . and Internet protocol

⁶⁷ 65 ILL. COMP. STAT. 5/11-42-11 (2007); 55 ILL. COMP. STAT. 5/5-1095 (2007).

⁶⁸ *Id.*

⁶⁹ *Id.*

⁷⁰ *Id.*

⁷¹ *Id.*

⁷² 220 ILL. COMP. STAT. 5/21 (2017).

⁷³ *Id.* at § 21-101(d), (g).

technologies.”⁷⁴ The statute does not define “Internet protocol technologies,” and never mentions that the technologies are subject to cable franchise fees.⁷⁵ Thus, the purpose section of the CVCL contains no signs of legislative intent to cover Internet streaming.⁷⁶

(a) *Eligibility*

Moving to franchise eligibility, the CVCL provides that no one can offer “video services” until they obtain a state, county, or municipal franchise.⁷⁷ They are then subject to a fee of either 5% of gross revenue, or the same amount that existing franchises pay to the local county or municipality.⁷⁸

(b) *“Video Services” Definition*

The crucial term in the CVCL, “video services,” is defined as:

(b) "Basic cable or video service" means any cable or video service offering or tier that includes the retransmission of local television broadcast signals . . . (v) "Video service" means video programming and subscriber interaction, if any, that is required for the selection or use of such video programming services, and that is provided through wireline facilities located at least in part in the public rights-of-way without regard to delivery technology, including Internet protocol technology. This definition does not include any video programming provided by a commercial mobile service provider defined in subsection (d) of 47 U.S.C. 332 or any video programming provided solely as part of, and via, service that enables users to access content, information, electronic mail, or other services offered over the public Internet.⁷⁹

⁷⁴ *Id.* at § 21-101(a).

⁷⁵ *Id.*

⁷⁶ *Id.* at § 21-101.

⁷⁷ *Id.* at § 21-801(a).

⁷⁸ *Id.* at § 21-801(b).

⁷⁹ *Id.* at § 21-201(b), (v).

Notably, this definition excludes providers who are supplying video programming over the “public Internet.”⁸⁰ Based on a plain language reading, this would appear to exclude streaming services because they are provided exclusively via an Internet connection.⁸¹ Although some cable providers sell both cable and Internet access, they are not intertwined, and are typically sold separately.⁸² Examining the 2007 statute in its entirety, there are many mentions of “cable”; but none of “Internet streaming” or similar variations.⁸³ Thus, it does not appear the legislature intended Internet streaming to be subject to cable franchise fees.⁸⁴

Shedding additional light on the subject, effective Jan. 2024, the definition of “video service” under subsection (v) was amended to include: “any video programming accessed via a service that enables users to access content, information, electronic mail, or other services offered over the Internet, including Internet streaming content.”⁸⁵ Notably, this is the first reference to streaming content in the CVCL.⁸⁶ It could be argued that because streaming was not specifically excluded from franchise fees before, it was actually included.⁸⁷ But a more plausible explanation is that because the statute previously excluded “the public Internet,” Internet streaming was excluded by extension.⁸⁸ The 2024

⁸⁰ *Id.*

⁸¹ *See id.*

⁸² Povich, *supra* note 3.

⁸³ 220 ILL. COMP. STAT. 5/21 (2017).

⁸⁴ *See id.*

⁸⁵ *Id.* at § 21-201(v).

⁸⁶ *See id.*

⁸⁷ *See id.*

⁸⁸ *See id.*

amendment solidified this idea by specifically excluding streaming services from franchise fees.⁸⁹

(B) *Case Law Analysis; City of East St. Louis v. Netflix, Inc.*

There have not been many cases in Illinois debating whether Internet streaming is subject to cable franchise fees, but the key case is *City of East St. Louis v. Netflix, Inc.*, decided by the Seventh Circuit Court of Appeals (“Seventh Circuit”).⁹⁰

(1) *Procedural History*

The City of East St. Louis (“East St. Louis”) filed suit in the United States District Court for the Southern District of Illinois (“District Court”) against Netflix and several other major streaming providers, claiming they were offering “video services” as defined by 220 ILCS 5/21-201(v), and thus owed franchise fees.⁹¹ East St. Louis lost at trial, as the District Court found that only the Illinois Attorney General can sue someone for failing to obtain state franchise authorization.⁹² Consequently, East St. Louis appealed to the Seventh Circuit.⁹³ The Seventh Circuit decided it would be more effective to rule on the merits, rather than just the issue of East St. Louis’ standing.⁹⁴

⁸⁹ *See id.*; *City of E. St. Louis v. Netflix, Inc.*, 83 F.4th 1066, 1071 (7th Cir. 2023).

⁹⁰ *City of E. St. Louis*, 83 F.4th at 1072.

⁹¹ *Id.* at 1069.

⁹² *Id.* at 1070.

⁹³ *Id.* at 1069.

⁹⁴ *Id.* at 1071.

(2) *Facts*

In recent years, streaming providers began operating successfully in the city of East St. Louis and the surrounding area.⁹⁵ On September 23, 2022, East St. Louis filed a class-action lawsuit on behalf of East St. Louis and the neighboring towns, in an effort to preserve their cable franchise fee revenue.⁹⁶ East St. Louis appealed on grounds that the CVCL requires streaming companies to pay franchise fees because streaming uses infrastructure on public rights-of-way.⁹⁷

(3) *Statutory “Video Service” Definition Dispute*

East St. Louis alleged streaming services are included within the definition of “video service” under § 5/21-201(v) of the CVCL.⁹⁸ Examining the “video service” definition from the 2007 statute and comparing it to the amended 2024 definition, the Seventh Circuit concluded that streaming services will be specifically excluded, effective Jan. 1, 2024.⁹⁹ In response, East St. Louis argued they are still entitled to damages during the time-period prior to 2024.¹⁰⁰ But the Court held that because neither East St. Louis nor the Court could find any Illinois case law including streaming services in the prior definition, streaming services are not subject to franchise fees, even pre-2024.¹⁰¹

⁹⁵ See *City of E. St. Louis v. Netflix, Inc.*, 630 F. Supp. 3d 1003, 1008 (S.D. Ill. 2022).

⁹⁶ *Id.*

⁹⁷ *City of E. St. Louis v. Netflix, Inc.*, 83 F.4th 1066, 1069 (7th Cir. 2023).

⁹⁸ *Id.* at 1071.

⁹⁹ *Id.*

¹⁰⁰ *Id.*

¹⁰¹ *Id.*

(4) *“Use” Definition Dispute*

The parties also disputed what it means to “use” a public right-of-way for communication.¹⁰² Netflix argued that sending a signal through wires owned by a third-party, who is subject to state regulation, is not “use” of a public right-of-way.¹⁰³ No one would consider a phone conversation to be subject to state regulation simply because the signal goes through wires over a public right-of-way, for example.¹⁰⁴ Whoever owns the infrastructure would be the one “using” the public right-of-way.¹⁰⁵ East St. Louis shifted the argument to property common law, arguing that Netflix’s “use” of the cables was actually a trespass on public land and thus violated property law.¹⁰⁶ But the Court held that because a phone call over public land is not a violation of state property law, neither is sending an Internet signal.¹⁰⁷ East St. Louis also did not cite any case law indicating Netflix’s “use” of the cables was trespassing.¹⁰⁸

(5) *“Resale” Definition Dispute*

Taking a different tack, East St. Louis contended that East St. Louis Municipal Code § 82-19 prohibits the “resale” of “cable video service,” defined by § 82-20 as: “[c]able television service means any and all services provided by or through the facilities of any cable television or closed-circuit coaxial cable communication system, or any microwave or similar transmission service used in connection with any cable television system or similar closed-circuit coaxial cable communication system.”¹⁰⁹ But the Court was unconvinced, holding that streaming services do

¹⁰² *Id.*

¹⁰³ *Id.*

¹⁰⁴ *Id.*

¹⁰⁵ *Id.*

¹⁰⁶ *Id.*

¹⁰⁷ *Id.*

¹⁰⁸ *Id.*

¹⁰⁹ *Id.* at 1071–72.

not resell content.¹¹⁰ The Court detailed the process: customers pay Internet service providers, who in turn provide bandwidth, allowing customers to reach arbitrary sources.¹¹¹ Customers also pay streaming providers for their content, but nothing is resold.¹¹² The Court also held streaming services are not “cable video service[s]” because streaming services are unrelated to traditional television programming.¹¹³ Streaming goes through an open-circuit, not a closed-circuit like cable television.¹¹⁴ Additionally, while some streaming companies may also offer a cable TV service, the two are priced and sold separately.¹¹⁵ Thus, the Court held Netflix and other streaming companies are not subject to cable franchise fees.¹¹⁶

III. RESOLUTION

While Illinois’ legislative solution of specifically excluding Internet streaming companies resolves the question of whether streaming providers are subject to cable franchise fees, it also has a detrimental impact on local municipality revenue.¹¹⁷ One way to make up the difference is to impose a separate fee on streaming services.¹¹⁸ Illinois has employed a similar strategy in the past, when the state lost in court while trying to tax cell phone providers for their use of public rights-of-way.¹¹⁹ Illinois then imposed a separate fee on cell phone providers.¹²⁰ A second solution may be to examine how local governments met their cost obligations prior to obtaining cable franchise

¹¹⁰ *Id.* at 1072.

¹¹¹ *Id.*

¹¹² *Id.*

¹¹³ *Id.*

¹¹⁴ *Id.*

¹¹⁵ *Id.*

¹¹⁶ *Id.*

¹¹⁷ 220 ILL. COMP. STAT. 5/21-201(v) (2017); Poole, *supra* note 1.

¹¹⁸ *See* Cole, *supra* note 59.

¹¹⁹ *Id.*

¹²⁰ *Id.*

fees, and adopt those methods in current communities. A third option is that municipalities could ask the state government to consider providing financial relief as a stop-gap measure until the municipalities' budget has been adjusted in a way that works.

IV. CONCLUSION

Local municipalities in Illinois cannot charge streaming providers with cable franchise fees, as in *City of East St. Louis*, the Seventh Circuit held streaming does not meet the CVCL's definition of "video service."¹²¹ Also, the CVCL's definition of "video service" was amended effective Jan. 1, 2024, to specifically exclude Internet video streaming from franchise fees.¹²² Still, the state legislature can help local governments make up the difference in revenue by creating a separate fee to help cover government essentials.¹²³ Alternatively, municipal governments can look at how they paid their expenses prior to having cable franchise fee revenue, and adopt similar plans. Or, municipalities might ask the state government for financial relief until they have adjusted their budgets. Thus, while municipalities are losing income due to the changing technology, they have several viable options to help recoup their losses.

¹²¹ *City of E. St. Louis v. Netflix, Inc.*, 83 F.4th 1066, 1072 (7th Cir. 2023).

¹²² 220 ILL. COMP. STAT. 5/21(v) (2017).

¹²³ See Cole, *supra* note 59.