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Georgia Court of Appeals joins growing wave of courts rejecting local government franchise fee claims against streaming companies

by Jennifer Cotton

The Georgia Court of Appeals recently joined a host of trial and appellate courts across the country that have rejected local governments' demands for video service franchise fees from streaming service companies. *See Gwinnett County v. Netflix, Inc.*, --- S.E.2d ----, No. A22A1172, 2023 WL 2398217, at *3–8 (Ga. Ct. App. Mar. 8, 2023), *aff'g* No. 20-A-07909-10, 2022 WL 678784 (Ga. Super. Feb. 18, 2022).

Many other courts have refused to imply a right of action for local governments under similar video service statutes. *See, e.g.*, *City of Ashdown v. Netflix, Inc.*, 52 F.4th 1025 (8th Cir. 2022); *City of Reno v. Netflix, Inc.*, 52 F.4th 874 (9th Cir. 2022); *City of Maple Heights v. Netflix, Inc.*, --- N.E.3d ----, 2022-Ohio-4174 (Nov. 30, 2022); *Borough of Longport v. Netflix, Inc.*, No. CV-21-15303-SRC-MAH, 2022 WL 1617740, at *2–3 (D.N.J. May 20, 2022); *City of New Boston v. Netflix, Inc.*, 565 F. Supp. 3d 865 (E.D. Tex. 2021). Others have held the video service statutes do not apply to streaming companies in the first place. *See, e.g.*, *City of Knoxville v. Netflix, Inc.*, 656 S.W.3d 106 (Tenn. 2022); *City of Ft. Scott v. Netflix, Inc.*, No. BB-2021-CV-000166, 2022 WL 16901200 (Kan. Dist. Ct., Bourbon Cnty. Oct. 10, 2022), *appeal filed*, No. 125784 (Kan. App. Nov. 22, 2022). And some courts have rejected local governments' franchise fee claims for both reasons. *See, e.g.*, *City of Lancaster v. Netflix*, No. 21STCV01881, 2021 WL 4470939 (Cal. Super. Ct. Sept. 20, 2021); *City of Kenner v. Netflix, Inc.*, No. 814-168, 2022 WL 4101746 (La. Dist. Ct., 24th Dist. Aug. 25, 2022), *appeal docketed*, No. 22-CA-466 (La. Ct. App., 5th Cir.).

The Georgia Court of Appeals joined this wave of decisions by affirming the dismissal of local governments' claims under the Georgia Consumer Choice for Television Act, O.C.G.A. §§ 36-76-1 *et seq.* (the "Television Act"), for three reasons: (1) the local governments lacked an express or implied right of action against the streaming companies; (2) the local governments failed to allege that the streaming companies "construct[ed] or operat[ed] a network in the public rights of way" as required to trigger the obligation to pay franchise fees under the Television Act; and (3) the plaintiffs could not circumvent their lack of a right of action through their claims for declaratory judgment, injunctive relief, accounting, or unjust enrichment. *See Gwinnett County*, 2023 WL 2398217, at *3–9.

Judge Elizabeth Gobeil, writing for the Court, explained that although the Television Act provides local governments with two express causes of action for violations, neither of those causes of action applied to the local governments' claims that the streaming companies should have obtained a franchise. *Id.* at *4. Judge Gobeil also explained that Georgia courts have a longstanding presumption against implying rights of action, and the plaintiff local governments failed to overcome that presumption. *Id.* Because the defendant streaming companies did not "operate networks" in the rights-of-way, Judge Gobeil reasoned, "the obligation to obtain a franchise" was not "triggered" under the Television Act. *Id.* at *5.

And even if the streaming companies were required to obtain a state franchise, the Court held the local government plaintiffs "lack[ed] standing" to sue them for failing to do so. *Id.*

The Court of Appeals also rejected the local governments' remaining claims for declaratory judgment, injunctive relief, accounting, and unjust enrichment, agreeing with the streaming company defendants that the local governments' "lack of a right of action to enforce the TV Act against the Defendants is fatal to these additional claims." *Id.* at *6. The Court held that the local governments' declaratory judgment claim was rendered moot by recent clarifying amendments to the Television Act, and the claim failed on substantive grounds regardless "because [the Court] determined that the [local governments] lack a private right of action." *Id.* at *6–7. The claims for injunctive relief and account also failed "because the TV Act does not provide the Appellants with a cause of action," and the streaming companies could not be "unjustly enriched" by their failure to pay fees that they never owed. *Id.* at *8–9. Judge Chris McFadden joined in the lead opinion and also wrote a concurring opinion to reiterate that streaming companies had no duty to secure franchises or pay franchise fees because such companies do not construct or operate networks in the public rights-of-way. *Id.* at *9–10. (McFadden, J., concurring fully and specially).

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