The Tennessee Supreme Court held that video streaming services, such as Netflix and Hulu, do not provide "video service" described within the Competitive Cable and Video Services Act, are not required to obtain a franchise, and do not have to pay franchise fees to local municipalities. *City of Knoxville v. Netflix, Inc.*, No. M2021-01107-SC-R23-CV, 2022 Tenn. LEXIS 418, 2022 WL 17099921 (Tenn. Nov. 22, 2022).

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In *City of Knoxville v. Netflix, Inc.*, the Tennessee Supreme Court answered the certified question from the United States District Court for the Eastern District of Tennessee: "Whether Netflix and Hulu are video service providers, as that term is defined in the relevant provision of [the Competitive Cable and Video Services Act], Tenn. Code Ann. § 7-59-303(19)." Under Tennessee law, the Supreme Court held that Netflix and Hulu are not video service providers under the meaning of the Act because they provide online video programming to users through the physical infrastructure owned and operated by third party internet service providers (ISPs). The certified question was answered "no": these streaming services are not video service providers —and

accordingly, they are not required to seek a franchise or pay a franchise fee.

The City of Knoxville sued Netflix and Hulu in the United States District Court for the Eastern District of Tennessee, asserting that the streaming services should pay franchise fees because they utilize public rights of way when providing video services, and requested a declaratory judgment "on behalf of a putative class of all Tennessee municipalities and counties in which Netflix or Hulu has subscribers." Knoxville presented that the streaming services are "video service providers" defined in the Competitive Cable and Video Services Act (the "Act")—and therefore must apply for a franchise and pay the respective franchise fee to the cities where the right of way is being used. *See* Tenn. Code Ann. § 7-59-303. Netflix and Hulu filed motions to dismiss, maintaining they do not provide "video services" under the Act. The District Court

stayed the case as the Tennessee Supreme Court accepted the certified question.

Under the Competitive Cable and Video Services Act enacted in 2008, an entity "seeking to provide cable or video service over a cable system or video service network facility" must obtain a franchise. § 7-59-304(a)(1)–(2). This franchise authorizes the cable or video service provider to build and operate facilities "within the public rights-of-way used to provide cable or video service." § 7-59-303(8). In the Act, "video services" is defined 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 . . . ." § 7-59-303(19). But excluded from the definition of "video service" is "any 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.*

The act then requires that a state-issued franchise pay a franchise fee. § 7-59-306(a). This franchise fee is calculated from the holder's gross revenue from their cable or video service inside a city or county, and it is paid to the relevant locality. § 7-59-306(c)(1). The fee is connected to the "physical occupation of public rights-of-way in specific localities," and serves as compensation as municipalities cannot impose other taxes or fees for that occupation. § 7-59-306(i).

With the rise of video streaming services such as Netflix and Hulu, many subscribers have cut the cord and abandoned their cable subscription. Yet unlike cable, these new streaming services have not obtained franchises—instead they rely upon third-party internet service providers to deliver their content to the viewer. Knoxville contends that

these services should pay franchise fees because they are providing video programming and do so through the wireline facilities located within the public right of way. Netflix and Hulu countered, stating they do not provide "video service" because they do not directly own, build, or operate any of the wireline facilities the third-party ISPs use to deliver their digital content.

The Supreme Court agreed with Netflix and Hulu and concluded they are not video service providers under the Act. Noting that "in the absence of statutory definitions, [the Court gives] the words of the statute their 'natural and ordinary meaning,'" the Court determined that under the Act, "an entity provides 'video service' if it engages in the 'provision of video programming through wireline facilities, located at least in part, in the public rights-of-way." *Ellithorpe v. Weismark*, 479 S.W.3d 818, 827 (Tenn. 2015) (quoting *Johnson v. Hopkins*, 432 S.W.3d

840, 848 (Tenn. 2013)); § 7-59-303(19). There was no dispute that the content was distributed over wireline facilities located in the public right of way, but rather if the use of third-party ISP facilities embodied the "provision of video programming through wireline facilities" within the Act. Knoxville's contention that wireline facilities include facilities "owned, constructed, and operated by another entity" was based upon a reading a section of the Act referred "to 'wireline facilities' without limitation to those . . . owned, constructed, or operated by the provider." *See id.* Netflix and Hulu argue that reading the statute in that manner disrupted a statutory scheme focused on the physical occupation of the right of way.

After considering the Act as a whole, the Court provided two features which clarify that wireline facilities must be directly operated by the video service provider. First, the Act "expressly contemplates that

the entities required to obtain a franchise will be those that actually construct and operate the facilities in the public rights-of way that are used to provide video service." This is based on the Act defining a franchise as: "authorization to construct and operate a cable or video service provider's facility within the public rights-of-way used to provide cable or video service." § 7-59-303(8). The Act also requires a certificate which must contain two authorizations: "one to 'provide cable or video service' and another 'to construct, maintain and operate facilities through . . . any public rights-of-way." § 7-59-305(e)(1)-(2). Second, the Act directly connects payment of the franchise fee with "physical occupation of the public rights-of-way." The Court pointed at the language of the statute, where the franchise fee acts as compensation for the presence and occupation of a locality's right of way—and where an entity does not occupy that right of way—it does not owe the locality compensation,

need a franchise, or owe a franchise fee. *See* § 7-59-306(a)(1)(A); § 7-59-306(i).

The Court looked to a 2019 report by the Tennessee Advisory Commission on Intergovernmental Relations (TACIR) discussing the effects of cord cutters on municipal revenue in Tennessee, wherein the Commission's fiscal predictions were based upon the view that video streaming services did not require franchises because they did not utilize their own infrastructure on a public right of way. *See* TENN. ADVISORY COMM'N ON INTERGOVERNMENTAL REL., LOCAL GOVERNMENT REVENUE IN TENNESSEE AND THE EVOLVING MARKET FOR CABLE TELEVISION, SATELLITE TELEVISION, AND STREAMING VIDEO SERVICES 2, 32, 59 (2019), https://perma.cc/9AUQ-J3GK. It was also found that other states have similar statutes, and trial courts have consistently agreed that the video service provision in their respective legislation does

not include transmitting content through third-party facilities. *See, e.g.*, *Gwinnett Cnty. v. Netflix, Inc.*, No. 20-A-07909-10, 2022 WL 678784, at *6–7 (Ga. Super. Ct. Feb. 18, 2022). And the Court's interpretation is akin to administrative and judicial interpretations of similar statutory schemes. *See, e.g.*, *City of Chi. v. FCC*, 199 F.3d 424, 429–33 (7th Cir. 1999).

While Knoxville relied upon a Missouri trial court ruling that "use of another entity's wireline facilities to deliver video programming to the end-user may qualify as a provision of video service under a similar statute," the opinion considered if the plaintiff had sufficient facts to survive a motion to dismiss, and it failed to provide an impactful analysis of the phrase "provision . . . through wireline facilities' in the statutory definition of 'video services." *See City of Creve Coeur v. Netflix, Inc.*, No. 18SL-CC02819, ¶ 15 (Mo. Cir. Ct. Dec. 30, 2020). Knoxville's

additional interpretive arguments also failed, with the court returning to an overall contextual reading of the statute. Though Knoxville raised the issue that the popularity of content providers such as Netflix and Hulu have required ISPs to expand their capacity in public rights of way, and thus municipalities are owed greater compensation, the Court found that to be a policy argument for the Tennessee General Assembly. *See Mooney v. Sneed*, 30 S.W.3d 304, 308 (Tenn. 2000)

This decision casts a firm answer in a rapidly expanding area of law and economic importance. Tennessee is the first appellate court to decide on this issue, and it is likely that others will follow in short time. Attorneys should be aware that judicial trends in interpretation of this Act and similar statutes signal that video service providers such as Netflix and Hulu will not be required to seek franchises or pay franchise fees. With the ongoing economic transformation from cable to online

content streaming, this business model will only expand in the coming years. From this decision, it appears that Tennessee municipalities must act politically and work with the legislature to either adjust the statute and its definition of a "video service provider," or create new legislation to counterbalance the decrease in cable video service provider franchise fees with an increasing use of public rights of way.