

A BETTER CHOICE FOR YOU



Atlantic Broadband provides residential and business customers with advanced Internet, TV and Phone services.

atlanticbb.com • atlanticbb.com/business

Services subject to availability. Contact Atlantic Broadband for details.



August 18, 2020

Center for Digital Education

Allentown, Pa., District Buys Wi-Fi

Hot Spots for Students

Times Leader

Back to school like never before

Detroit Free Press

Four cities in Indiana are suing Netflix and other video companies, claiming that online video providers and satellite-TV operators should have to pay the same franchise fees that cable companies pay for using local rights of way.

The [lawsuit](#) was filed against Netflix, Disney, Hulu, DirecTV, and Dish Network on August 4 in Indiana Commercial Court in Marion County. The cities of Indianapolis, Evansville, Valparaiso, and Fishers want the companies to pay the cable-franchise fees established in [Indiana's Video Service Franchises \(VSF\) Act](#), which requires payments of 5 percent of gross revenue in each city.

The lawsuit is based on an unusual legal argument and doesn't seem likely to succeed. Essentially, the cities are claiming that Netflix and similar providers

[Get a text lately about an unpaid bill? Unclaimed cash? It's a scam](#)

[Los Angeles Times Democratic convention features pleas for unity and harsh attacks on Trump](#)

[Ars Technica Secret Service buys location data that would otherwise need a warrant](#)

[Bloomberg Startups Tap a New Talent Pool: Pandemic-Weary College Students](#)

[The Verge Epic says Apple threatens 'catastrophic' response in two weeks if Fortnite doesn't comply with rules](#)

[Financial Times Oracle enters race to buy TikTok's US operations](#)

[Your Erie Wolf Administration: 2020 PA Clean Energy Employment Report shows clean energy is a leading creator of quality jobs in PA](#)

[Entrepreneur 17 Major Companies That Have Announced Employees Can Work Remotely Long Term](#)

use the public rights of way simply by offering video streaming services over the Internet:

"Defendants transmit video programming to Indiana subscribers using Internet protocol and other technologies. When doing so, Defendants transmit their programming through facilities located at least in part in public rights of way within the geographic boundaries of Indiana Units, including public rights of way located within Plaintiffs' geographic boundaries. Therefore, Defendants are required by the VSF Act to pay the Plaintiffs—and all other Indiana Units in which Defendants transmit video programming through facilities located at least in part in a public right-of-way—franchise fees."

"Netflix is clearly not a cable operator"

But streaming companies don't have to build physical infrastructure in each city to offer online video, so they aren't deploying their own wires on public rights of way.

"I find it extremely unlikely this lawsuit will prevail," Harold Feld, a longtime telecom attorney and senior VP of consumer-advocacy group Public Knowledge, told Ars. "The [federal] Communications Act defines terms such as 'cable system' and 'cable operator' in physical terms."

As Feld noted, [US law defines](#) a cable system as "a facility, consisting of a set of closed transmission paths and associated signal generation, reception, and control equipment that is designed to provide cable service." Local franchising rules and fees are based on cities' authority to manage their local rights of way.

"Netflix is clearly not a cable operator" and is therefore not subject to local franchising rules, Feld said. "Furthermore, because broadband is not considered a cable service, Netflix does not offer video programming 'over a cable system,' which would be required to make it a cable operator."

Netflix, Hulu, and Disney+ are Internet-only services. Dish and DirecTV are primarily satellite operators but also offer online access. The cities' lawsuit never mentions the word "satellite" and doesn't fully explain how DirecTV and Dish use the public rights of way. "Defendants DirecTV and Dish have transformed their businesses and delivery methods over the last decade to meet the demands of the marketplace, and subscribers now access their services through facilities located at least in part in a public right of way," the lawsuit said, apparently referring to the newer, online components of the services.

Some backstory

Historically, satellite services haven't had to pay the franchise fees assessed to cable companies. "For years, cable companies have called franchise fees unfair because competitors who don't need the right of way—such as satellite-TV services or online-video services—don't have to pay cities a dime," The Colorado Sun wrote [in a 2019 article](#).

When contacted by Ars today, a spokesperson for DirecTV owner AT&T said that "DirecTV doesn't use public rights of way and isn't covered by the Indiana Video Services Franchise Act." Dish has fought efforts to impose franchise fees on satellite providers, saying on its ["Fair TV Tax" website](#) that "Requiring satellite providers to pay a Franchise Fee, or an equivalent tax, is like asking cable and telecom companies to pay for launching satellites into orbit."

Dish declined comment today. We also contacted Netflix, Disney, and Hulu, and will update this story with any responses.

City franchise revenue in decline

Even if Indiana's state court system agrees with the cities, the companies could appeal in federal court and argue that US law preempts local franchise fees on streaming companies. The Federal Communications Commission could also get involved in the legal battle, as it has done in cases involving federal preemption of local rules. We contacted the FCC today and will update this article if we get a response.

The lawsuit may have been spurred in part by cities getting less franchise revenue as TV customers switch to online video. "Records maintained by the Valparaiso clerk-treasurer show the Porter County city received \$446,000 in video franchise fees last year, \$457,000 in 2018, and \$476,000 in 2017," The Times of Northwest Indiana [wrote](#) last week.

Valparaiso city attorney Patrick Lyp told the Times, "Our case helps ensure a competitive marketplace where everyone subject to the fee pays it. The current situation is unfair to cable providers who have been following Indiana law."

The cities' lawsuit points to the broad definition of "video service" contained in Indiana's Video Service Franchises Act, which defines video service as "(1) the transmission to subscribers of video programming and other programming service: (A) through facilities located at least in part in a public right of way; and (B) without regard to the technology used to deliver the video programming or other programming service." Netflix and the other defendants should be forced to "acquire the necessary franchises, pay the required fees in the future, and compensate Plaintiffs and all other units of government for unpaid fees for past service," the lawsuit said.

[A similar lawsuit](#) was filed by the city of Creve Coeur, Missouri, in 2018. Netflix sought dismissal of Creve Coeur's case in federal court, [saying](#) that it distributes video programming "exclusively over the public Internet." The case was [remanded](#) to the Twenty-First Judicial Circuit of the State of Missouri, where it is still pending. - *Ars Technica*

