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Does Missouri's Video Service Providers Act Apply to Streaming Services? Netflix Argues No.

BY [KAYLA EPSTEIN](#)/ ON SEPTEMBER 27, 2018



In August of this year the City of Creve Coeur, the named party in a class action, filed an action against the video streaming services Netflix and Hulu for failing to comply with the Video Services Providers Act, which was enacted by the state of Missouri in 2007.^[1] The Act enables a “franchise entity,” such as a town, to collect a fee from video service providers that were previously authorized by the public commission.^[2] The plaintiffs in this suit are at minimum 40 Missouri municipalities.^[3] This month Netflix responded with a motion to dismiss for failure to state a claim.^[4] Netflix contends that the service they provide does not fall under the purview of what the statute is meant to regulate.^[5] The motivation for the lawsuit is clear: less money is coming in from the existing authorized video service providers due to the fact that more people are switching over to using such services, and that loss is not being made up for because the streaming services are not paying any fee to the municipalities. According to the petition for declaratory judgment and other relief, by not paying such fees, the political subdivisions in Missouri are being “deprive[d] . . . of much-

needed revenue.”[\[6\]](#) Whether or not Netflix is correct in believing the statute does not apply to their services, and whether or not the municipalities are actually entitled to that, comes down to reading and interpreting the actual statute at the center of the action.

§67.2679 of the Act not only describes the motivation behind the legislation, but also details the procedure governing implementation.[\[7\]](#) § 67.2679(3) states, “[n]o person shall commence providing video service or commence network in any area until such person has obtained a state-issued video authorization.”[\[8\]](#) This authorization is only issued after it is ensured by the person applying that they meet certain enumerated criteria.[\[9\]](#) The terms, “person,” “video service authorization holder,” “applicant,” and, importantly, “video service provider,” are seemingly used interchangeably throughout this section of the statute.[\[10\]](#) However, in § 67.2679, which specifically authorizes a municipality’s ability to collect the fee that is so important here, only the term “video service provider” is used to describe the entity that the fee can be collected from.[\[11\]](#) Therefore, based on that section, it appears you would need to be considered a “video service provider” in order for this fee to be imposed.

This definition of “video service provider” is the basis of Netflix’s argument.[\[12\]](#) The definition of “video service provider” in both the State and Creve Coeur laws is “any person that distributes *video service* through a video service network *pursuant to a video service authorization*”[\[13\]](#) (emphasis added). Netflix argues they are actually dependent on providing a video service and are authorized because they are considered a video service provider, and thus eligible to have the fee imposed.[\[14\]](#) Due to the fact that there is a specific dispute over the definition of “video service,” I will first briefly discuss the argument surrounding authorization. Netflix’s argument is simple: even if Netflix were to apply for authorization, they could not successfully obtain it because they literally cannot meet certain requirements that are listed.[\[15\]](#) Reading the plain language of the definition, it would appear that Netflix’s argument is correct. Netflix can never act pursuant authorization because they cannot be authorized. However, the court does not necessarily have to accept that interpretation. They can look beyond the language of the statute. If the court believes the statute was still meant to apply to streaming services like Netflix, the way “video service provider” is defined could not be an automatic loss for the Missouri municipalities.

§67.2679 of the state statute provides, “Purpose statement – preemption of regulation of video services – state-issued video services authorization required, procedure.”[\[16\]](#) This state statute appears to use the term interchangeably with many other terms. More specifically, the state statute doesn’t use the term “video service provider” when saying who has to apply in § 67.2679(3).[\[17\]](#) Therefore, even though the specific section on the actual fee only mentions “video service provider,” it is possible that in looking at the entirety of the statute, one may not accord significant weight to such exclusive use. In the alternative, the exact opposite could be perceived because this term is singled out over the others and repeated use was chosen for a reason. The bottom line is that there is still room to interpret and disagree despite Netflix’s strong argument regarding the meaning and significance of “video service provider.”

The plaintiff does not even address the issue of whether or not the defendant is actually a “video service provider.” Instead, the plaintiff relies on the definition of “video service” and argues that because the defendants are required to pay the fee because they are providing a video service within the meaning of the statute.^[18] Netflix acknowledges the definition of “video service” but argues that the exception within the definition specifically excludes Netflix’s service. The statute defines video service as “the provision of video programming provided through *wireline facilities located at least in part in the public right-of-way* without regard to delivery technology, including internet protocol technology whether provided as part of a tier, on demand, or a per-channel basis.”^[19] (emphasis added). The plaintiff’s petition explains the process that is required to use Netflix. It is made clear that neither streaming service actually provides a customer direct public internet access.^[20] As a result, customers use their “internet-connected device” to send a request to a third-party internet-service provider when a customer wants to watch content. The third party internet-service provider then forwards the request to the streaming services’ internet servers.^[21] The third-party providers typically provide broadband internet service that are dependent on “wireline facilities located in the public right-of-way,” just like what is described in the definition of video service.^[22] Thus, the plaintiff argues Netflix falls within the scope of the statute because the streaming service is provided in a method explicitly stated in the statute.

However, the exception in the video service definition provides that the definition does not include “...any video programming provided solely as part of and via a service that enables users to access content, information, electronic mail, or other services offered over the public internet.”^[23] Netflix argues that they fall directly into the exception as their services are those that are offered over the public internet. On the other hand, Creve Coeur provides no direct explanation and simply states in their petition that the services provided by Netflix do not fall into this exception.^[24] This again appears like a clear-cut victory for Netflix when looking at the plain meaning of the statute. Their streaming services are exclusively available through the public internet, even though they do not provide that internet themselves. It does not seem likely that the statute was intended to exclude services over the public internet only if the provider of such services was also the entity providing access to the internet. However, it is ultimately up to the judge to decide if Netflix is excluded as a matter of law. If the judge does grant Netflix’s motion for summary judgment, the state of Missouri would have to amend their law in order to account for the ever-developing technology that is causing them to lose what was once steady income to the municipalities.

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[1] Eriq Gardner, *Netflix Tells Court It Isn't a Video Service Provider*, The Hollywood Rep.: Thr Esq (Sept. 13, 2018), <https://www.hollywoodreporter.com/thr-esq/netflix-tells-court-it-isnt-a-video-service-provider-1143229>.

[2] Mo. Rev. Stat. § 67.2679 (2018); *see also* Gardner, *supra* note 1.

[3] Matt Bernardini, *Netflix Seeks to End Mo. Cities' Bid to Charge Streaming Cos.*, Law 360 (Sept. 14, 2018, 5:15 PM), <https://www.law360.com/media/articles/1082834/netflix-seeks-to-end-mo-cities-bid-to-charge-streaming-cos->.

[4] Memorandum of Law in Support of Defendant Netflix, Inc.'s Motion to Dismiss Pursuant to Fed. R. Civ. P. 12(b)(6) at 1, *City of Creve Coeur, Mo. v. Netflix Inc., et al* (E.D. Mo. 2018) (No. 4:18-cv-01495).

[5] Gardner, *supra* note 1.

[6] Petition for Declaratory Judgment and Other Relief at 1, *City of Creve Coeur, Mo. v. Netflix Inc., et al* (E.D. Mo. 2018) (No. 4:18-cv-01495).

[7] Mo. Rev. Stat. § 67.2679 (2018).

[8] Mo. Rev. Stat. § 67.2679(3) (2018).

[9] *Supra* note 7.

[10] Mo. Rev. Stat. § 67.2679(8) (2018).

[11] *Supra* note 7.

[12] *Supra* note 6.

[13] *Id.*

[14] *Id.*

[15] *Id.* at 9-10 (explaining that one of these requirements is to broadcast emergency alerts, but such alerts are not capable of being sent through the internet).

[16] *Supra* note 8.

[17] *Id.*

[18] Memorandum of Law in Support of Defendant Netflix, Inc.'s Motion to Dismiss Pursuant to Fed. R. Civ. P. 12(b)(6) at 7-9, *City of Creve Coeur, Mo. v. Netflix Inc., et al* (E.D. Mo. 2018) (No. 4:18-cv-01495).

[19] Mo. Rev. Stat. § 67.2677(14) (2018).

[20] *Supra* note 13 at 7-8.

[21] *Id.*

[22] *Id.*

[23] *Supra* note 17.

[24] *Supra* note 6.