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SUPERIOR COURT OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF LOS ANGELES

CITY OF LANCASTER, CALIFORNIA individually and on behalf of all others similarly situated,

Plaintiff,

v.

NETFLIX, INC. and HULU, LLC,

Defendants.

Case No. 21STCV01881

CLASS ACTION

DEFENDANT NETFLIX, INC.'S REPLY IN SUPPORT OF DEMURRER TO PLAINTIFF'S COMPLAINT

Assigned to: Yvette M. Palazuelos

HEARING:
Date: August 27, 2021
Time: 10:00 AM
Dept.: 9

Action Filed: January 15, 2021
Trial Date: None Set

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SUMMARY OF THE ARGUMENT

Plaintiff has not alleged that Defendant Netflix, Inc. ("Netflix") physically occupies the public rights-of-way. This indisputable fact alone is dispositive of Plaintiff's Complaint. Indeed, Plaintiff's opposition ("Response") confirms that the Digital Infrastructure and Video Competition Act of 2006, Cal. Pub. Util. Code § 5800 *et seq.* ("DIVCA"), does not apply to Netflix. Netflix's Demurrer ("Demurrer") should be sustained for each of the following independent reasons:

- ***First***, DIVCA does not grant Plaintiff a private right of action.
- ***Second,*** DIVCA does not extend to Netflix's Internet-based streaming services because: (1) Netflix does not install, use, maintain, or control any assets in the public rights-of-way; (2) Netflix does not offer "video programming"; and (3) DIVCA specifically exempts Netflix's services because they are provided over the public Internet.
- ***Third***, as applied, Plaintiff's action violates the California Constitution, which prohibits the imposition of new taxes without voter consent.
- ***Fourth***, as applied, DIVCA violates the First and Fourteenth Amendments of the U.S. Constitution, by impermissibly and discriminatorily restricting free speech.
- ***Fifth***, if DIVCA could be interpreted to cover Netflix, it would be preempted by federal law limits on the ability of local franchise authorities to impose fees on companies like Netflix.
- ***Sixth***, Plaintiff's application of franchise fees violates the Internet Tax Freedom Act.
- ***Finally***, even if the Complaint stated a claim, the primary jurisdiction doctrine calls for deferring to California's Public Utilities Commission ("PUC").

I. NETFLIX'S DEMURRER SHOULD BE SUSTAINED

A. Plaintiff Does Not Have a Private Right of Action.

Plaintiff concedes that DIVCA § 5860(i) is the only section that allows Plaintiff any enforcement right. Resp. to Hulu's Demurrer at 10. That right, however, is limited to the right to "examine the business records of a holder of a state franchise," and Plaintiff concedes that Netflix does not hold a franchise. Compl. ¶ 19. This limitation is appropriate and consistent with the purpose of DIVCA; it respects the PUC's role as "the sole franchise authority" (DIVCA

§ 5840(a)) and allows local entities limited enforcement rights only after that authority has been exercised. Plaintiff cannot pursue even the limited right of enforcement granted to it by the California legislature, and the Court cannot infer a broader right of action than the legislature expressly granted (*see* Hulu's Demurrer at 17).

B. DIVCA Does Not Apply to Netflix.

1. Netflix Does Not Own, Operate, Use, or Occupy Assets In the Public Rights-of-Way.

DIVCA was enacted in 2006 to allow facilities-based Internet service providers ("ISPs") like Verizon, and telephone companies like AT&T, to compete with cable companies without needing to negotiate a franchise agreement with each municipality in which the provider operated.[1] The compromise reached by the California legislature was to allow these providers to obtain state franchises that authorized "the construction and operation of any network in the right-of-way," while permitting local municipalities to exercise their traditional police powers to manage city streets. DIVCA § 5830(f).

Unlike Verizon, AT&T, other ISPs, and cable companies, Netflix does not own, operate, use, or occupy assets in the public rights-of-way and does not deliver or provide its video content to its customers. Instead, Netflix members, using their own personal devices, connect to the Internet through their ISPs to request content, and an ISP (not Netflix) delivers that content to the user over the ISP's facilities. *Kentucky v. Netflix*, No. 15-CI-01117 (Ky. Cir. Ct. Aug. 23, 2016) at 12-15, attached as Exhibit 1 to Demurrer; Compl. ¶ 17; Resp. at 3. This fact is not in dispute. Plaintiff, however, contends that a franchise is necessary not only to own or operate the facilities through which video service is provided, but also "to provide video service." Resp. at 4 (citing DIVCA § 5840(i)(1)). While Plaintiff tries to divorce the concept of "providing video service" from the use of the public rights-of-way, DIVCA expressly limits "video service"[2] to services "provided through facilities located at least in part in public rights-of-way." DIVCA § 5830(s).

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[1] This was the rationale for the reference in DIVCA § 5830(s) to "Internet protocol or other technology," referring to both Verizon's "FiOS" technology as well as to AT&T's "U-Verse" technology. *See* Clifford Holliday, "*FiOS vs. U-Verse,*" *http://www.bbpmag.com/2010mags/aug-sep10/BBP_Aug2010_FiosVSUverse.pdf* (August/September 2010).

[2] As explained below, Netflix does not provide "video service."

Plaintiff also ignores DIVCA § 5840(i)(2), which provides that the franchise fee itself "***is in exchange for***" the "authority to ***use*** the public rights-of-way . . . ***in the delivery*** of video service." (emphasis added). DIVCA thus creates an express link between using the public rights-of-way and the franchise fee.

The Federal Communications Commission ("FCC") and federal courts around the country have routinely and uniformly held that franchise fees cannot be imposed in circumstances such as these because there is no requisite ***use*** of the right-of-way. *See, e.g., City of Chicago v. FCC*, 199 F.3d 424, 432-33 (7th Cir. 1999) (signal moving across leased cables did not constitute "use" of the public rights-of-way), *cert. denied sub nom.*, 531 U.S. 825 (2000); *AT&T Commc'ns of the Southwest, Inc. v. City of Austin,* 975 F. Supp. 928, 942-43 (W.D. Tex. 1997) (a carrier's connectivity to a *third-party* network in the rights-of-way did not constitute "use" of the rights-of-way), *vacated as moot*, 235 F.3d 241 (5th Cir. 2000); *AT&T Commc'ns of the Southwest, Inc. v. City of Dallas,* 52 F. Supp. 2d 756, 760-62 (N.D. Tex. 1998) (wireless provider was not "using" the rights-of-way by handing off calls to other carriers), *vacated as moot*, 243 F.3d 928 (5th Cir. 2001); *Bell Atl.-Md., Inc. v. Prince George's County,* 49 F. Supp. 2d 805 (D. Md. 1999) (unless company "physically impacts the public rights-of-way by installing, modifying, or removing telecommunications lines and facilities, it is not 'using' the rights-of-way" and is not subject to a franchise fee), *vacated & remanded,* 212 F.3d 863 (4th Cir. 2000).[3]

Oddly, Plaintiff cites DIVCA § 5840(q)(2)(B) for the proposition that DIVCA applies to the delivery of video programming "through third-party wireline facilities" (Resp. at 4) when, in fact, it supports Netflix's position that physical access is required:

> [I]f the video service provider is leasing access to a network owned by a local entity, the local entity may set a franchise fee for access to [the local entity's] network different from the franchise fee charged to a video service provider ***for access to the rights-of-way to install its own network***.

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[3] Plaintiff points to *Time Warner Entertainment Co., L.P. v. FCC*, 93 F.3d 957 (D.C. Cir. 1996) to support its position that municipalities have the authority "to regulate use of the public rights-of-way for video distribution" (Resp. at 8), but the court in that case explained that franchises are required for physical occupancy of the rights-of-way: "[b]ecause [the cable system's] cables must be laid in public rights-of-way and easements, cable operators must secure the necessary permits from local governments. Thus, their operations must be franchised." 93 F.3d at 962.

Plaintiff does not allege that Netflix is leasing Plaintiff's network and, as explained above, Netflix is not accessing the rights-of-way to install its own network. DIVCA thus does not apply to the Netflix service.

2. Netflix's Streaming Service Is Not "Video Programming."

DIVCA also does not apply to Netflix for the separate and independent reason that Netflix's service is not "programming provided by, or generally considered comparable to programming provided by, a television broadcast station" as required by DIVCA § 5830(r). Demurrer at 16-17. While Plaintiff argues that virtually *all* video content is covered by DIVCA, regardless of how the service is delivered, as long as the "quality" of the service is comparable to broadcasting (Resp. at 6), DIVCA does not mention signal quality at all. Plaintiff ignores the statutory text entirely, relying instead on a statement by the FCC that "improvements in streaming technology" enable streaming video to be "comparable" to television programming under 47 U.S.C. § 522(20). Resp. at 6 (citing Notice of Proposed Rulemaking, *In the Matter of Promoting Innovation & Competition in the Provision of Multichannel Video Programming Distribution Servs.*, 29 FCC Rcd. 15995, ¶ 16 (2014)). The FCC, however, reached that conclusion in an unrelated context—examining sources of authority to impose federal "net neutrality" requirements on ISPs—which has nothing to do with whether streaming services should be subject to state franchising requirements.[4] Even if the ***technical quality*** of Netflix's content is comparable to broadcast television, the Netflix service is not comparable to television broadcast programming with respect to either content or scheduling, which are the key characteristics of broadcast television. *Kentucky v. Netflix*, at 13-15.

3. Netflix's Services Are Excluded Because Netflix's Content Is Only Available Over the Public Internet.

DIVCA excludes 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***." DIVCA § 5830(s) (emphasis added). Even if Netflix's content constitutes

[4] Plaintiff also cites to an unrelated dispute involving Netflix's obligations regarding accessibility for the deaf community (Resp. at 6), which had nothing to do with franchise fees and was settled.

"video programming" (which it does not), it is provided ***by the ISP*** "as part of, and via" the ISP's "service that enables users to access content, information, electronic mail, or other services offered over the . . . Internet." Plaintiff's alternative argument that Netflix's services are not offered over the "public" Internet because the services are only offered to paying subscribers also fails. What makes the Internet "public" is that Internet access services are *available* to the public. *See In re Appropriate Framework for Broadband Access to the Internet over Wireline Facilities,* 20 FCC Rcd. 14986 (2005) (adopting principles that "encourage broadband deployment and preserve and promote the open and interconnected nature of the public Internet"); 47 U.S.C. § 332 (distinguishing "commercial mobile service" and "private mobile service" based on whether the service is available to a substantial portion of the public); *In re Protecting and Promoting the Open Internet*, 30 FCC Rcd. 5601, ¶ 363 (finding that "broadband Internet access service providers offer broadband Internet access service 'directly to the public'"). That content is password-protected or encrypted, stored on private servers, or made available only to individuals with a subscription does not remove it from the public Internet. Paying to watch the JetHawks at the Lancaster Municipal Stadium, by analogy, does not make it any less "public." The "public" Internet exception in DIVCA thus applies.

C. As Applied, Plaintiff's Action Violates the California Constitution.

A charge is not a nontax "fee" under article XIII C unless it is both fixed in an amount that is "no more than necessary to cover the reasonable costs of the governmental activity," and "the manner in which those costs are allocated to a payor bear a fair or reasonable relationship to the payor's burdens on, or benefits received from, the governmental activity." *City of San Buenaventura v. United Water Conservation Dist.*, 3 Cal. 5th 1191, 1214 (2017). While Plaintiff claims that the franchise fee is excluded from Article XIII C of the California Constitution because the fee is "rent" for the "use" of public rights-of-way, it did not and cannot allege that Netflix occupies the public rights-of-way. *See generally,* Compl. Netflix does not use any public rights-of-way (*supra* Section I.B.1) and Plaintiff does not allege that Netflix imposes any costs on Plaintiff (and it does not). The exception to Article XIII C for the use or rental of government property, thus, does not apply.

Plaintiff argues that Article XIII C § 2 only prohibits local governments from "imposing, extending, or increasing" any general or special taxes without voter approval, and the California legislature and not Lancaster is *imposing*, *extending*, or *increasing* the franchise fee in this case. Plaintiff's position has been rejected in *Sacramento Metro. Cable Television Comm'n v. Comcast Cable Commc'ns Mgmt., LLC*, 2020 WL 7425346 (E.D. Cal. Dec. 18, 2020). The court explained that while DIVCA authorizes localities to establish fees, it does not impose fees or mandate that localities do so. *Sacramento*, 2020 WL 7425346 at *4.

D. As Applied, DIVCA Violates the First Amendment and Fourteenth Amendments to the U.S. Constitution for Multiple Reasons.

DIVCA, as applied by Plaintiff, violates core First Amendment principles that protect speakers like Netflix from discriminatory treatment and prior restraints on speech. *See* Demurrer at 18-20; Hulu's Demurrer at 13-14.

First, Plaintiff's assertion that "this case does not involve a burden on speech at all" (Resp. at 8) is wrong because the franchise fee Plaintiff seeks to impose burdens not only the distribution of works protected by the First Amendment but also the affordability to California residents who access them, because franchise fees can be passed on to subscribers. *See Preferred Commc'ns. Inc. v. City of Los Angeles*, 754 F.2d 1396, 1406 (9th Cir. 1985); *Simon & Schuster, Inc. v. Members of the New York State Crime Victims Bd.*, 502 U.S. 105, 117 (1991) (taxing a percentage of speech-derived income is a financial burden that disincentives speech).[5]

Second, Plaintiff's failure to allege that Netflix owns or operates any facilities in the public rights-of-way is conclusive with respect to the First Amendment. DIVCA, as applied by Plaintiff, would treat Netflix and Hulu differently than other speakers that also do not install or operate facilities in the public rights-of-way. Plaintiff claims that Netflix and Hulu are required to receive prior approval from the PUC before they can offer video content in Lancaster (Compl. ¶ 18) but

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[5] Plaintiff's cases rejecting First Amendment challenges to franchise fees paid by cable operators *that install networks in the public rights-of-way* recognize that such fees implicate speech. *See, e.g.*, *Pac. Bell Tel. Co. v. City of Walnut Creek*, 428 F. Supp. 2d 1037, 1051 (N.D. Cal. 2006) (applying intermediate scrutiny); *Telesat Cablevision, Inc. v. City of Riviera Beach*, 773 F. Supp. 383, 407 (S.D. Fla. 1991) (finding city had "provid[ed] adequate evidence that its fee approaches the reasonable market value of the rental of its rights-of-way").

Plaintiff does not seek to impose this restraint on other similarly situated speakers, such as those that do not provide video content (such as Spotify and Audible) and those that provide video content other than video programming (such as YouTube and The New York Times, which offers video reporting). Compl. ¶ 18. Plaintiff provides *no* justification for this prior restraint and differential treatment. Instead, Plaintiff's First Amendment defense is limited almost exclusively to a vague reference to "government regulatory authority over public property," citing a laundry list of government-property cases (Resp. at 9) that stand only for the unremarkable, undisputed and irrelevant proposition that "the First Amendment does not guarantee access to property simply because it is owned or controlled by the government." *U.S. Postal Serv. v. Council of Greenburgh Civic Ass'ns*, 453 U.S. 114, 129 (1981). The government may impose franchise fees in exchange for placing assets in public rights-of-way, but Netflix does *not* have any assets in the public rights-of-way. *See, e.g., Preferred Commc'ns. Inc.*, 754 F.2d at 1406 (First Amendment limits franchising authority where there is no justification based on city's legitimate interests in "control[ling] the number of times its citizens must bear the inconvenience of having its streets dug up") (internal quotations omitted).

Third, Plaintiff is likewise incorrect that DIVCA, as applied by Plaintiff, is content-neutral. Plaintiff singles out speakers whose content is allegedly "comparable to" broadcast television and does not seek to burden the free speech rights of other speakers whose video, audio, or written content is not "comparable to" broadcast television, but is disseminated using the same technology (*i.e.*, is requested by the subscriber and delivered by ISPs over the ISPs' existing infrastructure). This kind of content-based discrimination is squarely prohibited by the First Amendment. In *Cincinnati v. Discovery Network,* 507 U.S. 410 (1993), for example, a city sought to ban the use of news racks to distribute "commercial" material on public property while continuing to permit the distribution of "noncommercial" speech. The city justified the content-based ban based, in part, on the need to reduce the "visual blight" caused by too many news racks. The court, however, held that the distinction between commercial and noncommercial speech "bears no relationship whatsoever" to the desire to improve the city's esthetics. *Id.* at 424. So too here. DIVCA, as applied by Plaintiff, would distinguish between content that is comparable to broadcast television

and content that is not, even though both types of content allegedly "use" the public rights-of-way in the same way. This content-based distinction violates the First Amendment. *See id.* at 424-26.

Fourth, the First Amendment and Fourteenth Amendment's Due Process Clause protect "speakers . . . from arbitrary and discriminatory enforcement of vague standards." *Nat'l Endowment for the Arts v. Finley*, 524 U.S. 569, 588 (1998). DIVCA, as applied, violates this principle because it sets forth a standard that: (1) does not adequately put entities subject to DIVCA on notice; and (2) "lends itself to selective enforcement against unpopular causes," as Plaintiff seeks to do here by singling out Hulu and Netflix. *See NAACP v. Button*, 371 U.S. 415, 435 (1963). Contrary to Plaintiff's assertion in its Response at 11, Netflix's conduct does not "plainly fall[] within the scope of DIVCA." *See supra* Section I.B.1. Plaintiff's approach also leaves not just other streaming service providers, but also all other Internet content providers, guessing as to whether DIVCA might be applied to them. This sort of breadth and uncertainty is not permitted, because vague laws touching on expression create an "impermissible risk of discriminatory enforcement." *Gentile v. State Bar of Nev.*, 501 U.S. 1030, 1051 (1991); *see also NAACP* 371 U.S. at 432 ("[S]tandards of permissible statutory vagueness are strict in the area of free expression."); *Finley*, 524 U.S. at 588. The Supreme Court has "repeatedly rejected the argument that discriminatory … treatment is suspect under the First Amendment only when the legislature *intends* to suppress certain ideas." *Reed v. Town of Gilbert*, 576 U.S. 155, 168 (2015) (internal quotations omitted) (emphasis added). By singling out just two speakers, Plaintiff violates the First Amendment's prohibition on discrimination. *See, e.g., Menotti v. City of Seattle*, 409 F.3d 1113, 1146-48 (9th Cir. 2005) (city may not enforce law against only some speakers).

E. Federal Law Preempts Imposing Franchise Fees On Netflix.

Even if DIVCA *did* impose franchise fees on Netflix (which it does not), that regime would be preempted by federal law. Fatally, Plaintiff fails to allege that Netflix owns or operates any facilities in the rights-of-way. Netflix therefore cannot be charged franchise fees under federal law. *See* Demurrer at 14-16. The primary case on which Plaintiff relies shows why: in *City of Dallas v. FCC*, the court rejected a preemption theory that would prevent localities from imposing a fee on "open video systems" ("OVS"), because such preemption would take away a "power

traditionally exercised by … local government[s]." 165 F.3d 341, 347 (5th Cir. 1999). Plaintiff ignores, however, that the scope of that power is limited: localities can manage rights-of-way by deciding who has "an enforceable right of access." *Id.* at 345, 348; *accord* Third Report and Order, *In the Matter of Implementation of Section 621(a)(1) of the Cable Commc'ns Policy Act of 1984 As Amended by the Cable Television Consumer Prot. & Competition Act of 1992*, 34 FCC Rcd. 6844 ¶ 84 (Aug. 2, 2019). Holding an "enforceable right of access" means the right to *physically occupy* public rights-of-way. That was the case in *City of Dallas,* 165 F.3d at 345 (OVS operators construct their systems located in public rights-of-way) and in *Pac. Bell Tel. Co. v. City of Walnut Creek,* 428 F. Supp. 2d 1037 (N.D. Cal. 2006) (considering telecommunications carrier's "right to access the [public rights-of-way] to install, upgrade and maintain its facilities"). But it is *not* the case here: Plaintiff offers no authority supporting its novel theory that local franchise authority extends to video content providers that have no direct interaction with public rights-of-way when their content is *delivered by an ISP via the ISP's facilities* in the rights-of-way.

The 1984 Cable Act both "'defin[es] ***and limit[s]*** the authority that a franchising authority may exercise through the franchise process.'" *City of Dallas*, 165 F.3d at 348 (quoting H.R. Rep. No. 98-934, at 19 (1984)). The legislative history, the structure of DIVCA, and binding FCC orders make clear that the federal regime limits local franchise authority. The federal statutory "bargain" justifying franchise fees does not apply because Netflix does not "operate facilities in the local rights-of-way." Third Report and Order ¶ 84. Plaintiff's argument that the FCC's Third Section 621 Order cannot preempt contrary state law was recently rejected by the Sixth Circuit in *City of Eugene v. FCC*, 998 F.3d 701 (6th Cir. 2021). The Court explained that "a franchising authority cannot require payment of an information-services fee as a condition of obtaining a franchise under § 541(b)(1)," and "states and localities [may] not 'end-run' the [Communications] Act's limitations by . . . accomplish[ing] indirectly what franchising authorities are prohibited from doing directly." *Id.* (quoting Third Section 621 Order ¶ 81)). Imposing fees on Netflix based solely on its relationship with ISPs *that cannot be subject to fees* would do exactly that.

F. As Applied, DIVCA Violates the Internet Tax Freedom Act ("ITFA").

As applied, Plaintiff imposes a discriminatory tax on electronic commerce in violation of ITFA. In *Performance Mktg. Ass'n v. Hamer*, 998 N.E.2d 54, ¶¶ 5-10 (Ill. 2013), for example, the state taxed retailers that used online marketing but did not tax retailers that used non-electronic marketing. The court found this different treatment to be discriminatory, in violation of ITFA, and invalid on preemption grounds. *Id.* at ¶ 23. Plaintiff similarly violates ITFA by seeking to impose a tax on Netflix's electronic commerce but not on other comparable services like movie theatres or movie and television-series rental services like Redbox.

G. In the Alternative, This Court Should Refer the Case to the PUC.

Resolution of the claims for franchise fees requires resolution of the predicate issue of whether Netflix is required to obtain a franchise at all. While Plaintiff claims that the PUC "does not have legal capacity" to determine whether Netflix is required to obtain a franchise (Resp. at 14-15), the legislature designated the PUC "the sole franchising authority," meaning that the PUC has the authority to determine who ought to receive a franchise. Nor is it the case, as Plaintiff claims, that the PUC's role is "ministerial." Resp. at 15. "[T]he PUC is not an ordinary administrative agency, but a constitutional body with broad legislative and judicial powers." *Wise v. Pac. Gas & Elec. Co.*, 91 Cal. Rptr. 2d 479, 484 (Cal. Ct. App. 1999). Further, the primary jurisdiction doctrine applies here because allowing the PUC to determine whether Netflix is subject to DIVCA enhances court decision-making and efficiency by allowing courts to take advantage of administrative expertise, and helps assure uniform application of regulatory laws. *Farmers Ins. Exch. v. Superior Ct.*, 826 P.2d 730, 739 (Cal. 1992). *See also, Wise*, 91 Cal. Rptr. 2d at 484.

II. CONCLUSION

For all these reasons, and the reasons stated in Netflix's Demurrer, Netflix's Demurrer should be sustained without leave to amend. Netflix also joins in the arguments articulated in Defendant Hulu's Reply to Plaintiff's Opposition to Hulu, LLC's Demurrer.

Dated: July 8, 2021

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