

To: New Jersey Law Revision Commission
From: Carol Disla-Roa, Legislative Fellow
Re: Cable Television Act and Municipal Right of Action to Collect Fees – N.J.S. 48:5A-1 et seq.
Date: April 8, 2024

MEMORANDUM

Project Summary

The Cable Television Act (“CTA”), N.J.S. 48:5A-1 et seq., was enacted in 1972 “to regulate cable television companies.”¹ Among other objectives, the Legislature sought “to secure a desirable degree of uniformity in the practices and operations of cable television companies” within state municipalities and “to protect the interests of those municipalities.”^{2, 3}

The Board of Public Utilities (“BPU”) is vested with the “authority to regulate cable television companies, generally and the[] rates, services and operations, in the manner and in accordance with the policies” of the CTA.⁴ Pursuant to N.J.S. 48:5A-51(c), “the BPU ‘may institute a civil action in the Superior Court for... relief’” against a cable company or anyone that “has violated, intends to violate, or will violate any provisions of” the CTA.⁵ Additionally, “the Legislature empowered the BPU to ‘have [the] full right, power, authority[,] and jurisdiction’ to enforce the CTA” pursuant to N.J.S. 48:5A-9.⁶

In *Borough of Longport v. Netflix, Inc.*, the United States Court of Appeals for the Third Circuit examined whether the CTA implies a right of action for municipalities to enforce the fee provision where the Legislature has not conferred an express right of action.⁷ The Court relied on

¹ *Borough of Longport v. Netflix, Inc.*, 94 F.4th 303, 305 (3d Cir. 2024) (quoting N.J. STAT. ANN. § 48:5A-2(b) (West 2024)).

² See E-Mail from Commissioner Bernard W. Bell, NJLRC, to Laura C. Tharney, Executive Director, NJLRC (Mar. 4, 2024, 9:05 AM EST) (on file with NJLRC) [hereinafter “Bell E-mail”].

³ *Borough of Longport v. Netflix, Inc.*, 94 F.4th at 305 (quoting N.J. STAT. ANN. § 48:5A-2(c) (West 2024)) and at n.3 (“The Legislature noted six objectives for this regulation.... The other five include:

(1) to promote adequate, economical and efficient cable television service to the citizens and residents of [New Jersey], (2) to encourage the optimum development of the educational and community-service potentials of the cable television medium, (3) to provide just and reasonable rates and charges for cable television system services without unjust discrimination, undue preferences or advantages, or unfair or destructive competitive practices, (4) to promote and encourage harmony between cable television companies and their subscribers and customers, ... and ([5]) to cooperate with other states and with the Federal Government in promoting and coordinating efforts to regulate cable television companies effectively in the public interest”

(quoting N.J. STAT. ANN. § 48:5A-2(c) (West 2024)) (alteration in original)).

⁴ *Id.* (quoting N.J. STAT. ANN. § 48:5A-2(d) (West 2024)).

⁵ *Id.* at 306 (quoting N.J. STAT. ANN. § 48:5A-51(c) (West 2024)) (internal quotations omitted).

⁶ *Id.* (quoting N.J. STAT. ANN. § 48:5A-9 (West 2024)).

⁷ *Id.* at 307.

factors established by the U.S. Supreme Court in *Cort v. Ash* to determine “whether an implied right of action exists,” and concluded that “municipalities have no private right of action.”⁸

Statutes Considered

N.J.S. 48:5A-9 provides in relevant part that:

The [BPU], which is empowered pursuant to P.L.1972, c. 186 (C.48:5A-1 et seq.) to be the local franchising authority in this State, and the director under the supervision of the board, shall have full right, power, authority and jurisdiction to:

- a. Receive or initiate complaints of the alleged violation of any of the provisions of P.L.1972, c. 186 (C.48:5A-1 et seq.) or of any of the rules and regulations made pursuant to P.L.1972, c. 186 (C.48:5A-1 et seq.) or of the terms and conditions of any municipal consent or franchise granted pursuant to P.L.1972, c. 186 (C.48:5A-1 et seq.);
- b. Supervise and regulate every ...[cable television] company operating within this State and its property, property rights, equipment, facilities, contracts, certificates and franchises so far as may be necessary to carry out the purposes of P.L.1972, c. 186 (C.48:5A-1 et seq.), and to do all things, whether herein specifically designated or in addition thereto, which are necessary or convenient in the exercise of such power and jurisdiction;
- c. Institute all proceedings and investigations, hear all complaints, issue all process and orders, and render all decisions necessary to enforce the provisions of P.L.1972, c. 186 (C.48:5A-1 et seq.), of the rules and regulations adopted thereunder, or of any municipal consents issued pursuant to P.L.1972, c. 186 (C.48:5A-1 et seq.);
- d. Institute, or intervene as a party in, any action in any court of competent jurisdiction seeking mandamus, injunctive or other relief to compel compliance with any provision of P.L.1972, c. 186 (C.48:5A-1 et seq.), of any rule, regulation or order adopted thereunder or of any municipal consent or franchise issued thereunder, or to restrain or otherwise prevent or prohibit any illegal or unauthorized conduct in connection therewith.⁹

N.J.S. 48:5A-51(c) provides in relevant part that:

Whenever it shall appear to the board that any person has violated, intends to violate, or will violate any provisions of this act or any rule, regulation or order duly promulgated

⁸ *Id.* (citing *Jarrell v. Kaul*, 123 A.3d 1022, 1029 (N.J. 2015) (citing *Cort v. Ash*, 422 U.S. 55, 78 (1975))); *Id.* at 310.

⁹ N.J. STAT. ANN. § 48:5A-9 (West 2024) (emphasis added).

hereunder, the [BPU] may institute a civil action in the Superior Court for injunctive relief and for such other relief as may be appropriate in the circumstances, and the said court may proceed in any such action in a summary manner.¹⁰

Background

In *Borough of Longport v. Netflix, Inc.*, two New Jersey municipalities (the Borough of Longport and the Township of Irvington) brought an action in the United States District Court for the District of New Jersey on behalf of a putative class of all state municipalities.¹¹ The municipalities alleged that video streaming services Netflix and Hulu “failed to pay them the franchise fees required under the CTA.”¹²

The CTA permits cable television companies to seek two kinds of authorization from the BPU.¹³ The first is “franchise” authorization, which allows the company to operate within a specific municipality so long as the company receives that municipality’s consent.¹⁴ The second authorization is “system-wide franchise” which allows a company to “operate a cable television system in any location” within the state and does not require municipality consent.¹⁵

N.J.S. 48:5A-30 requires cable companies “to make annual franchise payments in each municipality in which they own or operate cable systems and provide cable services in the amount of two percent of the ... gross revenues received from the provision of cable services in that municipality.”¹⁶ In this case, the municipalities sought to enforce the franchise payment provision on their own, outside of the BPU.¹⁷

Defendants Netflix and Hulu “moved to dismiss for failure to state a claim under Rule 12(b)(6) of the Federal Rules of Civil Procedure.”¹⁸ The District Court granted the motions to dismiss, after concluding “that the municipalities...[had] no private right of action under the CTA.”¹⁹ The Third Circuit affirmed²⁰ and declined the municipalities’ request to certify the question to the New Jersey Supreme Court on the grounds that the question was “not unclear.”²¹

Analysis

The United States Court of Appeals for the Third Circuit considered whether the municipalities had a private right of action, pursuant to the CTA, to enforce the franchise payment

¹⁰ N.J. STAT. ANN. § 48:5A-51(c) (West 2024).

¹¹ *Longport*, 94 F.4th at 306.

¹² *Id.*

¹³ *Id.* at 305.

¹⁴ *Id.* (citing N.J. STAT. ANN. § 48:5A-2(d) (West 2024); N.J. STAT. ANN. § 48:5A-3(q) (West 2024)).

¹⁵ *Id.* at 305-06 (citing N.J. STAT. ANN. § 48:5A-3(r) (West 2024); N.J. STAT. ANN. § 48:5A-9 (West 2024)).

¹⁶ *Id.* at 306 (citing N.J. STAT. ANN. § 48:5A-30(a)-(d) (West 2024)).

¹⁷ *Id.*

¹⁸ *Id.*

¹⁹ *Id.*

²⁰ *Id.* at 310.

²¹ *Id.* at 307, n.17.

provision.²² Since the municipalities did “not dispute that the CTA confers no express right of action,” the appeal turned on whether the CTA implied such a right.²³

The Court emphasized that “[a] plaintiff must have a private right of action to bring a claim to enforce a statute[,]” but “[i]f a legislature fails to provide a private right of action expressly, courts may determine whether it did so implicitly.”²⁴ New Jersey courts use the factors identified by the United States Supreme Court in *Cort v. Ash* to make such a determination, pursuant to which they consider:

(1) whether the plaintiff is “one of the class for whose []special benefit the statute was enacted”; (2) whether there is any evidence that the Legislature intended to create a private cause of action under the statute; and (3) whether implication of a private cause of action in this case would be “consistent with the underlying purposes of the legislative scheme.”²⁵

The *Longport* Court limited its discussion to the second and third factors, finding that both weighed heavily against the implication of a private right of action, so consideration of the first factor was not necessary.²⁶

Regarding the second factor, the municipalities argued that the legislature did not expressly delegate the “sole and exclusive” authority to bring actions to the BPU.²⁷ Finding “no evidence that the Legislature intended to create a private right of action for municipalities,” the Third Circuit rejected their argument.²⁸

First, the Court noted that under N.J.S. 48:5A-9(c), the Legislature expressly conferred “all” enforcement authority on the BPU.²⁹ The word “all” is found in subsection (c) four times: “The [BPU] ... shall have full right, power, authority, and jurisdiction to ... [i]nstitute *all* proceedings and investigations, hear *all* complaints, issue *all* process and orders, and render *all* decisions necessary to enforce the provisions of [the CTA.]”³⁰ Based on the definition of the word “all,” the Court concluded that the BPU had the sole authority for “the entire extent of enforcement proceedings.”³¹ The Court noted that “[i]f the municipalities shared the authority of the BPU to

²² *Id.*

²³ *Id.*

²⁴ *Id.* (citing *In re State Comm’n of Investigation*, 527 A.2d 851, 853-54 (N.J. 1987); *Jarrell*, 123 A.3d at 1029 (citing *Cort*, 422 U.S. at 78)).

²⁵ *Id.* (citing *Jarrell*, 123 A.3d at 1029-30) (internal quotations omitted).

²⁶ *Id.* at 308, n.24.

²⁷ *Id.*

²⁸ *Id.*

²⁹ *Id.*; N.J. STAT. ANN. § 48:5A-9(c) (West 2024); *See generally City of Reno v. Netflix, Inc.*, 52 F.4th 874, 878 (9th Cir. 2022) (“In vesting enforcement of the [act] in state agencies, the [l]egislature seems to have deprived local governments of enforcement powers intentionally”).

³⁰ *Id.* (quoting N.J. STAT. ANN. § 48:5A-9(c) (West 2024)) (alteration in original) (internal citations omitted).

³¹ *Id.* (citing *All*, MERRIAM-WEBSTER DICTIONARY (2023) (“the whole amount, quantity, or extent of”).)

enforce the CTA's provisions by instituting proceedings, then the BPU would no longer hold 'all' enforcement authority. It would hold some, or even most—but not all.”³²

Second, the Court stated that “[i]f ‘the Legislature has expressly created specific remedies,’ the New Jersey Supreme Court requires that courts ‘hesitate to recognize another unmentioned remedy.’”³³ “[B]ecause the Legislature included an express right of action for the BPU,” the *Longport* Court hesitated to recognize a remedy not mentioned by the Legislature.³⁴

Next, regarding the “underlying purposes of the legislative scheme[,]” the Court concluded that the municipalities failed to show that the Legislature had an intent to create a private right of action under the CTA.³⁵ The municipalities argued that, “taken as a whole, the CTA demonstrates legislative intent that municipalities have power to enforce their rights to collect mandatory fees.”³⁶ The Court stated that “[b]ecause one of the purposes of the CTA is to ensure uniformity throughout the municipalities, it would be inconsistent with that purpose to permit individual municipalities to enforce the CTA's provisions.”³⁷ The Court added that allowing individual municipalities a private right of action would run afoul of the CTA’s purpose, since “there would exist an enforcement scheme with nonuniform decisions concerning which providers to sue, when to sue them, and what damages to seek.”³⁸

Lastly, the Court rejected the municipalities’ argument that Paragraph 11 of Article IV, § 7 of the New Jersey Constitution allowed for their implied private right of action under the municipal power of “necessary or fair implication.”³⁹ The Court reasoned that “[g]iven that ‘municipal action cannot run contrary to statutory ... law,’ Paragraph 11 cannot be interpreted to provide municipalities with statutory enforcement authority that would directly conflict with the statute.”⁴⁰

Accordingly, the Court held that “the CTA plainly vests all enforcement authority in the BPU.”⁴¹

Pending Bills

There are no bills pending that involve N.J.S. 48:5A-9 or N.J.S. 48:5A-51(c).

³² *Id.*

³³ *Id.* at 307 (citing *Jarrell*, 123 A.3d at 1030 (quoting *Jalowiecki v. Leuc*, 182 N.J.Super. 22 (N.J. Super. Ct. App. Div. 1981))).

³⁴ *Id.* at 308.

³⁵ *Id.* at 307 (citing *Jarrell*, 123 A.3d at 1029-30) (internal quotations omitted); *Id.* at 309.

³⁶ *Id.* at 308-09.

³⁷ *Id.* at 309; N.J. STAT. ANN. § 48:5A-2(c) (West 2024).

³⁸ *Id.*; *See generally City of Ashdown v. Netflix, Inc.*, 52 F.4th 1025, 1028 (8th Cir. 2022) (“The [act]’s clear intent to create uniformity across the state would be undermined if individual municipalities possessed authority to bring enforcement suits independently of the state body charged with enforcement”).

³⁹ *Id.* (citing N.J. Const. art. IV, § 7, ¶ 11.)

⁴⁰ *Id.* at 310 (citing *Fraternal Ord. of Police, Newark Lodge No. 12 v. City of Newark*, 244 N.J. 75, 93 (2020) (quoting *Union Cty. Bd. of Chosen Freeholders v. Union Cty. Park Comm'n*, 41 N.J. 333, 339 (1964))).

⁴¹ *Id.*

Conclusion

Staff seeks authorization to engage in additional research and outreach to determine whether the Cable Television Act would benefit from modification to make explicit the Legislature’s intent regarding whether municipalities have a private right of action to enforce franchise fees as discussed in *Borough of Longport v. Netflix*.⁴²

⁴² See Bell Email, *supra* note 2. The Conclusion above uses the standard general language requesting authorization to proceed. When he brought this potential project to the attention of Staff, however, Commissioner Bell said that he “would not contemplate a project which merely clarified the CTA in a manner consistent with the Third Circuit opinion. Rather, the Commission should seek to apprise the New Jersey Legislature of *Borough of Longport v. Netflix* and recommend that the Legislature revise the statute to make explicit its intent with regard to a right of action by municipalities to collect franchise fees.”