The Next Streaming Wars:
Local Taxation of Online Streaming Services

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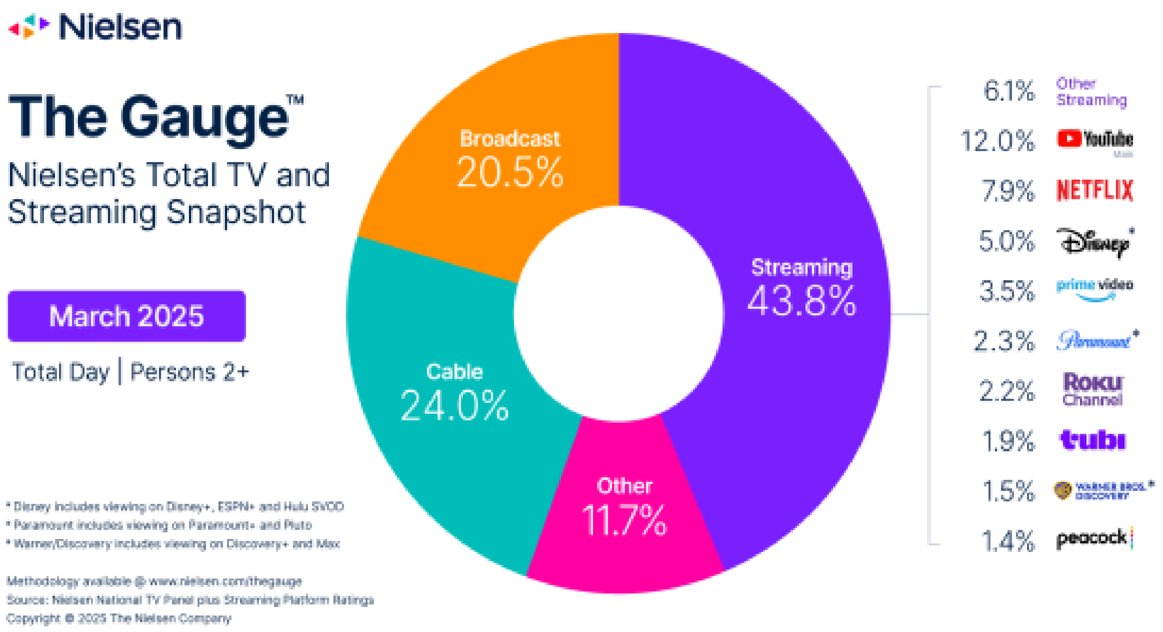
The Rise of Streaming Video

2005 – 65 million households use cable television

- 2007 – Netflix
- 2008 – Free Hulu
- 2010 – Subscription Hulu
- 2015 – YouTube Premium
- 2018 – ESPN+
- 2019 – Disney+ and Apple TV+
- 2020 – Max (as HBO Max)
- 2021 – Paramount+

2023 – 35 million households use cable television



https://www.nielsen.com/news-center/2025/the-gauge-march-madness-lifts-cable-streaming-competition-grows-as-seasonal-trends-take-effect

Video Users Taxes

- Many cities tax the use of cable television services.
- Some cities have adopted more modern taxes on the use of **video services** or **communications services** (including video).

- *Disney Platform Distribution Inc. v. City of Santa Barbara*
  - Santa Barbara issued assessments holding various online streaming services liable for failing to collect its Video Users Tax.
  - The Superior Court upheld the assessments.
  - The case is before the Second District Court of Appeal (B342211).

The Right Text in the Ordinance

Cable Users Tax

There is imposed a tax upon every person in the City **using cable television service**.

Video Users Tax

There is imposed a tax upon every person in the City using **video services**.

Video Services. **Video programming** and any and all services related to the providing, recording, delivering, use or enjoyment of "video programming" (including origination programming and **programming using Internet Protocol**, e.g., IP-TV and IP-Video) using one or more channels by a "video service supplier," **regardless of the technology used to deliver, store or provide such services** ....

What is a "Channel"?

- Online streaming companies claim that tax ordinances with the word "channel" only apply to **facilities-based** video services.
  - Facilities-based video services are services where a single company provides video programming and the "transmission path" used to deliver videos to subscribers.
  - Video streaming companies rely, in part, on internet service providers to deliver videos.

- *Video Services*. **Video programming** and **any and all** services related to the **providing**, recording, **delivering**, use **or** enjoyment of 'video programming' ….
- *Video Service Supplier*. Any person, company, or service which provides or sells **one or more channels of video programming**, or provides or sells **the capability to receive one or more channels of video programming**, … **whether or not public rights-of-way are utilized** in the delivery of the video programming ….
  - Multi-channel video programming services, direct broadcast satellite services, multi-channel multipoint distribution services, and "IP-TV" and "IP-Video" don't fit this mold.

Enforceability

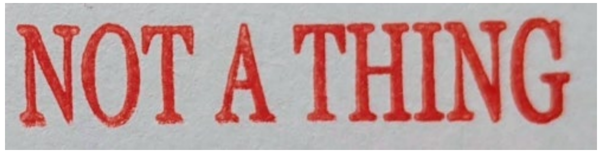
Once an ordinance is adopted, ***<u>can the tax actually be enforced</u>***?

- **State Law Issues**
  - Bradley-Burns Act
  - Proposition 218
  - Public Utilities Code Section 799
- **Federal Law Issues**
  - Internet Tax Freedom Act
  - Commerce Clause
  - First Amendment

The Bradley-Burns Act NOT A THING

- The State imposes sales and use taxes on purchases of tangible personal property. (Rev. & Tax. Code § § 6051, 6201.)
- The Bradley-Burns Act allows cities to impose their own sales and use taxes, to be administered by the CDTFA, if the tax is identical to the State's sales and use taxes. (Rev. & Tax. Code § 7202(h).)
- The Bradley-Burns Act does not limit the ability of cities to impose "<u>**any other substantially different tax**</u> ...." (Rev. & Tax. Code § 7203.5)
- Video users taxes apply to the use of a service, not to the use of tangible personal property, and so are substantially different.

Proposition 218



- All taxes must be approved by voters. (Cal. Const. art. XIIIC, § 2(b), (d).)
- Some online streaming companies argue that cities must hold a new vote if they begin enforcing a video users tax after a lengthy delay.
- No new vote is needed so long as "the methodology for maximum recovery of local taxes … remain[s] constant …." (*AB Cellular LA, LLC v. City of Los Angeles* (2007) 150 Cal.App.4th 747, 763-64.)

Practice Tip:

Many ordinances have language stating that changes in administrative guidance and enforcement do not require a new vote.

Public Utilities Code Section 799

- Cities must send written notices to service suppliers when they enact or amend a utility users tax ordinance. (Pub. Util. Code § 799(a)(5)-(6).)
- Notices must be sent according to procedures established by the service provider. This implies that no notice is required if the service supplier has failed to establish and communicate a notice procedure.
- The Court in the Santa Barbara dispute held that notice is not required when companies enter the market after the ordinance is adopted.

Practice Tip:

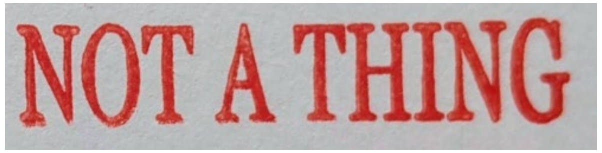
Section 799 notices may be necessary if an ordinance was adopted recently.

Internet Tax Freedom Act

- The Internet Tax Freedom Act prevents cities from imposing "discriminatory taxes" on internet services. (ITFA §§ 1101(a), 1105(2).)
- There is little case authority. But courts have generally required a strict similarity between the offline and online services being compared.
  - *Labell v. City of Chicago* (Ill. App. 2019) 147 N.E.3d 732, 749.
- Some online streaming companies claim that their services must be taxed in the same way that rentals of physical media are taxed.
  - This would hurt most online streaming companies.
  - ***Is renting a DVD at the video store "similar" to purchasing a subscription to an online streaming service?***

Commerce Clause

- The Commerce Clause requires a tax that is **fairly apportioned** and a **substantial nexus** between a city and the taxed activity.
- Online streaming companies claim that video users taxes are not fairly apportioned because subscribers who pay a city's tax may watch videos outside of the city. However, partial usage of a video service within the city by a customer with a city billing address is sufficient.
  - *Oklahoma Tax Commission v. Jefferson Lines, Inc.* (1995) 514 U.S. 175, 188-89.
- Nexus rule may prevent cities from compelling online streaming companies to collect a tax unless they do enough business in the city.
  - 200 in-city transactions or $100,000 in annual in-city revenue is enough.

First Amendment 

- Taxation of speech is allowed if a tax is not directed at, and does not present the danger of suppressing, particular ideas.
  - *Leathers v. Medlock* (1991) 499 U.S. 439, 453.
- If a tax is "content neutral" and part of a broader tax scheme that doesn't target a small number of speakers, it should be fine.
- A tax is "content based" if it treats speakers differently based on the topic discussed or the idea or message expressed.
  - Most video users taxes contain provisions stating that tax applies regardless of the content of the videos offered.

Enforcement

- **Option 1:** Bring litigation and ask the court to compel an online streaming company to collect the video users tax.
  - This option is rarely utilized and only yields prospective relief.
- **Option 2:** Initiate assessment proceedings to hold an online streaming company liable for the uncollected amounts, interest, and penalties.
  - Cities have the power to impose liability on a company that fails to collect tax.
  - Liability is not for the uncollected taxes, per se, but rather for a debt, or damages, in an amount equivalent to the tax that should have been collected.

Practice Tip: Make sure your utility user tax ordinance has a robust administrative process.

Next Time On ....

General Taxes on Property Related Services

- Article XIIID, section 6 of the California Constitution limits fees for property related services such as water, sewer, and garbage service.
  - "[A]ny levy other than an ad valorem tax, a special tax, or an assessment, imposed by an agency upon a parcel or upon a person as an incident of property ownership, including a user fee or charge for a property-related service."
- Article XIIID, section 3 prohibits general taxes "upon any parcel of property or upon any person as an incident of property ownership ...."
- ***Are "general" utility users taxes on the use of water, sewer, and garbage services prohibited by these provisions?***
  - *Wyatt v. City of Sacramento* (2021) 60 Cal.App.5th 373
  - *Lejins v. City of Long Beach* (2021) 72 Cal.App.5th 303
  - *Beck v. City of Canyon Lake* (Fourth District Court of Appeal, D083322)

Taxing Electricity Users with Solar Panels

- Electricity users with solar panels receive a credit for the energy they provide to the grid in a system that is sometimes called “net metering.” **Should providers calculate utility user tax on gross or net electricity charges?**

- **What about self-generated electricity?** Some modern utility user tax ordinances apply to electricity produced for “self-use,” based on the value the electricity.

Details of Solar Billing Plan Charges

06/01/2024–06/30/2024 (30 billing days)
Service for: 1234 MAIN STREET
Service Agreement ID: 1234567890
Rate Schedule: E-ELEC Electric Home
Enrolled Programs: Solar Billing Plan

06/01/2024–06/30/2024

Energy Produced			
Peak	150.505051 kWh	@ $0.13260	$19.96
Part Peak	98.989899 kWh	@ $0.11263	$11.15
Off Peak	250.505051 kWh	@ $0.09928	$24.87
Energy Export Credits Applied[1]		@ prices vary	-$55.98
Energy Delivered			
Peak	150.505051 kWh	@ $0.13534	$20.17
Part Peak	98.989899 kWh	@ $0.13322	$13.06
Off Peak	250.505051 kWh	@ $0.13271	$33.24
Energy Export Credits Applied[1]		@ prices vary	-$16.69
Other Charges, Credits, and Taxes			
Base Services Charge		@ $0.49281	$15.28
Non-Bypassable Charges	495.000000 kWh	@ $0.03034	$15.02
Energy Export Bonus Credits Applied		@ $0.0176	-$23.60
Energy Commission Tax			$0.11
City of Monterey Utility Users Tax (2.00%)			$1.00
Solar Billing Plan Charges			**$57.59**

https://www.pge.com/assets/pge/localized/en/docs/clean-energy/solar/pge-solar-billing-plan-guide.pdf

Tax Apportionment and Remote Work

- The Commerce Clause requires that business license taxes be apportioned if a company conducts business in multiple jurisdictions. The most common formula compares payroll, property, and sales within the jurisdiction to total payroll, property, and sales.

$$\frac{\frac{Local\ Payroll}{Total\ Payroll} + \frac{Local\ Property}{Total\ Property} + \frac{Local\ Sales}{Total\ Sales}}{3} \times \text{Gross Receipts} = \text{Tax Due}$$

- Calculating payroll was easy when everyone worked in the office.
- ***But where do remote workers work?***
    - Primary working location
    - Convenience of the employer rule
    - Apportion days worked in each jurisdiction
    - Base of operations (Rev. & Tax. Code § 25133)