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COMMENTARY

Anderson: Time Warner and KXAN need to act in the public's best interest

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Most businesses are free to act solely in their own interest. That's not true of Time Warner Cable and KXAN-TV; they both are legally obligated to serve the public interest.

Time Warner is still fighting a war it lost in Congress and the U.S. Supreme Court. When Congress passed the Cable Act of 1992, cable companies argued that they should be allowed to carry whatever channels they wanted. Congress disagreed; it believed the interests of viewers required that local stations be carried on cable systems. The cable industry appealed to the Supreme Court, but it lost there, too — twice.

The law that passed gives local stations two options. They can offer their programming to the cable system for free, in which case the cable company must carry it. In the jargon of the industry, that option is called "must carry."

The other option is to seek payment from the cable company for the right to carry the local station's programming. This option is called "retransmission consent," and its purpose is to induce local stations to put their programming on cable even when they think it is too valuable to be offered for free.

Eighty to 90 percent of all local stations, including almost all of the more popular local stations such as the major network affiliates, have chosen the retransmission consent option.

To encourage stations and cable operators to reach agreement, the law imposes three restrictions. The local station must declare which option it chooses, and if it opts to seek payment but can't reach agreement with the cable operator, it can't then fall back on the must-carry option. That's to prevent the station from being in a can't-lose position.

If the bargaining fails, the cable company is not allowed to replace a local network affiliate with a network affiliate from another market. That's so it won't be too easy for the cable company to reject the local station's demands.

Finally, the law requires the station and the cable company to bargain in good faith.

The purpose of all these rules is to make local stations accessible to cable subscribers.

KXAN's license requires it to serve the interests of viewers in its community. It can't do that if it withholds its programming from the many viewers who subscribe to cable.

It's impossible to know which side is being unreasonable in the Time Warner-KXAN impasse. Congress unfortunately did not require disclosure of existing or proposed retransmission consent agreements. So the public has no way of knowing what the parties are demanding or how those demands compare with what's being paid in comparable situations.

What we do know is that Time Warner is misleading the public about what's at issue, and KXAN is not telling us what we need to know.

Time Warner claims KXAN wants to charge its subscribers for something KXAN gets for free from the federal government.

That's nonsense. All KXAN gets for free from the government is its license to use the airwaves, and that's not what Time Warner wants. The cable company wants KXAN's programming, and that costs KXAN a lot. Moreover, that programming is copyrighted; that's why Time Warner has to get KXAN's consent to run it.

Time Warner implies that by seeking payment, KXAN is asking for something unauthorized and extraordinary. That's nonsense too. KXAN may be asking too much, but Congress authorized stations to demand compensation, and paying it is now the industry norm.

For its part, KXAN says it is asking only a penny per day per subscriber, but that could amount to more than \$1 million dollars a year. Without knowing what else KXAN may be seeking, we can't judge whether its demands are unreasonable. KXAN's suggestion that viewers — who are already paying substantial fees for a cable subscription that is supposed to include KXAN — should buy an antenna and a switch so they can get KXAN's over-the-air signal borders on ludicrous.


The law requires both parties to act in good faith to provide KXAN's programming to Time Warner subscribers. Neither party is fulfilling that obligation.

Anderson, a professor, specializes in media law.

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