

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554**

In the Matter of)

NRJ TV HOUSTON LICENSE CO., LLC)

v.)

DIRECTV, LLC)

Must-Carry Complaint Regarding Carriage of)
KUBE-TV, Baytown, TX)

CSR -

To: Office of the Secretary
Attn: Chief, Media Bureau

MUST-CARRY COMPLAINT

NRJ TV Houston License Co., LLC (“NRJ”), licensee of full-power commercial television station KUBE-TV, Baytown, Texas (Facility ID No. 70492) (“KUBE-TV” or the “Station”), by its attorneys and pursuant to Sections 76.7, 76.61, and 76.66(b)(1) of the Commission’s rules,¹ hereby files this must-carry complaint against DirecTV, LLC (“DirecTV”) for refusing to carry the signal of KUBE-TV in the Houston Designated Market Area (the “DMA”) as of [REDACTED], upon the expiration of the existing retransmission consent agreement governing DirecTV’s carriage of KUBE-TV.²

¹ 47 C.F.R. §§ 76.7, 76.61, 76.66(b)(1).

² The instant request is timely under the FCC’s rules. Although DirecTV continues to carry the signal of KUBE-TV pursuant to the existing retransmission consent agreement, on October 24, 2014, DirecTV informed NRJ that it was denying NRJ’s request for mandatory carriage. Pursuant to Section 76.66(m) of the Commission’s Rules, a broadcast station must file a complaint with the Commission within 60 days after the satellite carrier “either implicitly or explicitly denies a television station’s carriage request.” 47 C.F.R. § 76.66(m)(6).

I. KUBE-TV Is Entitled to Carriage In The DMA

As a television broadcast station licensed to the DMA, KUBE-TV is entitled to carriage by DirecTV. Under the local-into-local provisions of Section 338 of the Communications Act and the corresponding FCC rules, a satellite carrier that carries at least one local television broadcast signal in a DMA pursuant to the statutory copyright license must carry, upon request, the signals of all television broadcast stations within that local market, as long as the stations deliver a good quality signal to the satellite carrier's designated receive facility.³ Section 338 incorporates the definition of a "television broadcast station" set forth in Section 325(b) of the Communications Act: "an over-the-air commercial or noncommercial television broadcast station licensed by the Commission under subpart E of part 73 of title 47, Code of Federal Regulations, except that such term does not include a low-power or translator television station."⁴ Section 338 incorporates the definition of "local market" set forth in Section 22(j) of the Copyright Act: "the designated market area in which a station is located . . . as determined by Nielsen Media Research [currently The Nielsen Company] and published in the 1999–2000 Nielsen Station Index Directory and Nielsen Station Index United States Television Household Estimates or any successor publication."⁵

As reflected in the FCC's Consolidated Database System, and not disputed by DirecTV, KUBE-TV is a "television broadcast station" under Sections 338 and 325(b) of the Communications Act.

³ 47 U.S.C. § 338; 47 C.F.R. § 76.66.

⁴ See 47 U.S.C. §§ 338(k) & 325(b)(7).

⁵ See 47 U.S.C. § 338(k); 17 U.S.C. § 122(j).

Moreover, DirecTV does not dispute that The Nielsen Company has assigned KUBE-TV to the Houston Designated Market Area. DirecTV carries several television broadcast signals in the DMA, including that of KUBE-TV, pursuant to the statutory copyright license.⁶

Finally, KUBE-TV delivers a good quality signal to DirecTV's local receive facility. As noted above, DirecTV currently carries the signal of KUBE-TV, and DirecTV never has contended that KUBE-TV does not deliver a good quality signal to DirecTV's local receive facility.

Accordingly, KUBE-TV is entitled to mandatory carriage by DirecTV.

II. NRJ Properly Requested Mandatory Carriage

NRJ has fully complied with the procedures for electing mandatory carriage for the three year election cycle beginning January 1, 2015. Pursuant to Section 76.66(c) of the Commission's rules, a broadcast television station must request carriage by October 1st of the year preceding the new election cycle.⁷ Section 76.66(d) of the FCC's rules sets forth the procedure for a broadcast television station to request mandatory carriage.⁸ The election must be sent, in writing, by certified mail to the satellite carrier's principal place of business.⁹ It should include: the station's call sign, the name of the appropriate station contact person, the station's community of license, the station's DMA assignment, and the election of mandatory carriage.¹⁰

⁶ See DirecTV, Local Channels Availability for Zip Code 77001, http://www.directv.com/DTVAPP/packProg/localChannels.jsp?assetId=cms_local_channels&_requestid=504474 (last visited Dec. 14, 2014), attached hereto as Exhibit A.

⁷ 47 C.F.R. § 76.66(c)(4).

⁸ *Id.* § 76.66(d).

⁹ *Id.* § 76.66(d)(i).

¹⁰ *Id.* § 76.66(d)(ii).

On September 19, 2014, NRJ sent, via certified mail, its election letter for KUBE-TV to Ms. Julia Dai at DirecTV's principal place of business.¹¹ The letter included all of the information required by Section 76.66(d) of the FCC's rules. The letter acknowledged that DirecTV currently carries KUBE-TV pursuant to a retransmission consent agreement, and specified that, consistent with that agreement, mandatory carriage was to "take effect on [REDACTED], immediately upon expiration of the current April 1, 2010 Retransmission Consent Agreement."

The U.S. Postal Service confirmed, by delivery receipt, that it delivered the letter to DirecTV on September 24, 2014.¹²

III. DirecTV Has Failed to Fulfill Its Mandatory Carriage Obligations

By denying NRJ's request to carry the signal of KUBE-TV in the DMA, DirecTV is in violation of its mandatory carriage obligations.¹³ Under Section 76.66(d) of the Commission's Rules, within thirty (30) days of receiving NRJ's carriage request, DirecTV was obligated to notify KUBE-TV either: (i) that it would carry the station pursuant to the must carry election; or (ii) that it would not carry KUBE-TV along with the reasons for such decision.¹⁴ On October 24, 2014, DirecTV sent an unsigned letter to NRJ stating:

Please be advised that KUBE-TV is covered under a retransmission agreement with DIRECTV dated as of April 1, 2010 ("Agreement"), therefore, DIRECTV

¹¹ See Letter from Robert G. Andrews to Julia Dai (Sept. 19, 2014), attached hereto as Exhibit B ("KUBE-TV Election Letter").

¹² See U.S. Postal Service Return Receipt, attached hereto as Exhibit C.

¹³ See 47 C.F.R. § 76.66(b).

¹⁴ See *id.* § 76.66(d)(iv).

denies your request for mandatory carriage. However, we will continue to carry KUBE - TV, pursuant to the terms of the Agreement.¹⁵

The DirecTV Denial Letter failed to provide a proper basis for denying carriage of KUBE-TV as of [REDACTED]. The sole basis offered by DirecTV for denying KUBE-TV's mandatory carriage request is the existence of a retransmission consent agreement governing the carriage of KUBE-TV. However under established precedent, the FCC will recognize as valid a timely mandatory carriage request for the remainder of an election cycle in which an existing retransmission consent agreement is scheduled to expire.¹⁶ Although the Commission has recognized that a broadcast television station *can* make its election for a future cycle as part of its retransmission consent agreement,¹⁷ such is not the case here. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]¹⁸ Therefore, because NRJ has not previously made an election for the 2015-2017 election cycle, its mandatory carriage election was both appropriate and valid, and DirecTV has no basis for denying such election.

¹⁵ See Letter from DirecTV to KUBE-TV (Oct. 24, 2014), attached hereto as Exhibit D (the "DirecTV Denial Letter").

¹⁶ In the DBS Must Carry Order on Reconsideration, the Commission clarified that: "if a broadcast station has a retransmission agreement that extends into and terminates during an election cycle, the station—at the end of its contract term with the carrier—will not be entitled to demand must carry if it has not elected must carry by the required date." See *Implementation of the Satellite Home Viewer Improvement Act of 1999: Broadcast Signal Carriage Issues, Order on Reconsideration*, 16 FCC Rcd. 16544 ¶ 63 (2001). Conversely, a station that timely elects mandatory carriage shall be entitled to carriage upon expiration of the existing agreement.

¹⁷ See *Radio Perry, Inc. (WPGA-TV, Perry, Georgia) v. Cox Commc'ns. Inc.*, Memorandum Opinion and Order, 26 FCC Rcd. 16392 ¶ 7 (MB 2011) (citing *Cablevision Systems Corp.*, Memorandum Opinion and Order, 12 FCC Rcd 13121 at ¶12 (CSB 1996)).

¹⁸ See Retransmission Consent Agreement, attached hereto as Exhibit E.

REDACTED FOR PUBLIC INSPECTION

On December 2, 2014, in a final effort to avoid the need for FCC intervention, NRJ's outside counsel sent to DirecTV a letter explaining why DirecTV's denial was improper.¹⁹ DirecTV responded on December 11, 2014. Rather than reversing its improper denial of KUBE-TV's mandatory carriage election and acknowledging, as required by Section 76.66(d)(iv), that it will carry KUBE-TV, DirecTV merely reiterated that: "Until the expiration of the Agreement, DIRECTV will continue to carry KUBE-TV, in accordance with Section 338 of the Communications Act of 1934 and the Federal Communications Commission's Rules."²⁰ Accordingly, DirecTV continues to deny that it is obligated to carry KUBE-TV, notwithstanding NRJ's timely and proper election of mandatory carriage.

¹⁹ See Letter from Ari Meltzer, counsel for NRJ, to DirecTV (Dec. 2, 2014), attached hereto as Exhibit F.

²⁰ See Letter from DirecTV to Ari Meltzer, counsel for NRJ (Dec. 11, 2014), attached hereto as Exhibit G.

IV. Conclusion

KUBE-TV is legally entitled to mandatory carriage by DirecTV in the DMA effective [REDACTED], and has done everything required to secure such carriage. Nevertheless, DirecTV has, without a proper basis, denied such carriage. NRJ therefore requests that the Commission order DirecTV to maintain carriage of KUBE-TV in the DMA by confirming that KUBE-TV has mandatory carriage rights upon the expiration of the existing retransmission consent agreement.

Respectfully submitted,

NRJ TV HOUSTON LICENSE CO., LLC

By: 
Ari Meltzer

of
WILEY REIN LLP
1776 K Street, N.W.
Washington, D.C. 20006
Tel. (202) 719-7000

Its Attorney

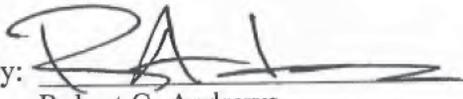
December 18, 2014

REDACTED FOR PUBLIC INSPECTION

DECLARATION OF ROBERT G. ANDREWS

I, Robert G. Andrews, hereby declare as follows:

1. I am Senior Vice President of NRJ TV SF License Co, LLC.
2. I have reviewed the foregoing Must-Carry Complaint and attached Exhibits and certify under penalty of perjury that, to the best of my knowledge, information, and belief formed after reasonable inquiry, they are well grounded in fact and warranted by existing law, or a good faith argument for the extension, modification or reversal of existing law, and not interposed for any improper purpose.

By: 

Robert G. Andrews
Senior Vice President
NRJ TV SF License Co, LLC
722 S. Denton Tap Road, Suite 130
Coppell, TX 75019

December 18, 2014

CERTIFICATE OF SERVICE

I, Ari Meltzer, hereby certify that on this 18th day of December 2014, I caused copies of the foregoing "Must-Carry Complaint" to be mailed via first-class postage prepaid mail to the following:

DIRECTV
Local-Into-Local
2060 E. Imperial Highway, Mail Stop N321
El Segundo, CA 90245


Ari Meltzer

EXHIBIT A

Search Movies, Shows, Products, Support

Why DIRECTV?

Packages

Equipment & Features

News

Get special offers

Local Channels Availability

Local Channels Lookup

More than likely, we have your local channels! Enter your ZIP Code to find out if we carry your local channels in your area:

Zip Code:

77001

Yes! Local channels are available in your area: **Houston TX 77001** We have provided a complete list of local stations and channel numbers below.

Order DIRECTV

Sign up now for a package that includes your local channels.

High-definition (HD) local channels from DIRECTV are also available in your area. To receive them you will need an HD system

Available Channels

Network	Affiliate	Local Channel #	3-Digit Channel #	HD Channel
NBC	KPRC			

PBS	KUHT
CBS	KHOU
ABC	KTRK
MNT	KTXH
FOX	KRIV
CW	KIAH
UNI	KXLN
TMO	KTMD
ION	KPXB
AZA	KYAZ
IND	KUBE
IND	KZJL
UMA	KFTH

Standard Local Channels: Most can receive these local channels using any DIRECTV® System. Certain select markets will require an MPEG-4 capable receiver. If you are eligible to receive local channels from us and don't have the correct equipment now, when you upgrade your receiver online, we will match the proper receiver for your market.

Locals: Eligibility based on service address. Not all networks available in all markets.

HD Locals: Eligibility based on service address. DIRECTV Slimline dish required in some markets to receive HD local networks delivered by DIRECTV. H20 or HR20 model DIRECTV HD Receiver and HD or HD-ready television set required to display HD programming from DIRECTV.

Programming, pricing, terms and conditions subject to change. Hardware and programming sold separately.

We're Social

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Follow @DIRECTV

8+1 28k

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Please note that our business name is "DIRECTV" --- not "Direct TV" or "DirectTV." Businesses that use the terms "Direct TV" or "DirectTV" may not be authorized DIRECTV dealers.

EXHIBIT B

REDACTED FOR PUBLIC INSPECTION

**NRJ TV Houston License Co, LLC
722 S. Denton Tap Road, Suite 130
Coppell, TX 75019**

September 19, 2014

CERTIFIED MAIL – RETURN RECEIPT REQUESTED

Ms. Julia Dai
DIRECTV
2230 E. Imperial Highway
El Segundo, CA 90245

Re: Must-Carry Election
KUBE-TV, Baytown, TX

Dear Ms. Dai:

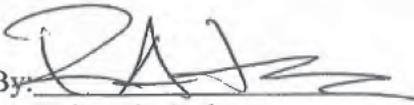
Pursuant to Section 338 of the Communications Act of 1934, and Section 76.66 of the Rules of the Federal Communications Commission (FCC), this letter provides notice to you that NRJ TV Houston License Co., LLC, licensee of television station KUBE-TV, Baytown, TX, located in the Houston Designated Market Area, elects mandatory carriage for the three-year election cycle commencing January 1, 2015 and ending December 31, 2017, with such carriage pursuant to this exercise of must carry rights to take effect on [REDACTED], immediately upon the expiration of the current April 1, 2010 Retransmission Consent Agreement. We request that you continue to carry KTNC on Channel 57 on the digital tier.

The contact person for this matter is David Pulido at 978-886-4263 or by email at david@titanbroadcast.com. The address for purposes of receiving official correspondence is the above referenced address.

We look forward to providing service to your subscribers.

Sincerely,

NRJ TV HOUSTON LICENSE CO, LLC

By: 
Robert G. Andrews
Senior Vice President

cc: Station Public Inspection File
David Pulido

EXHIBIT C

REDACTED FOR PUBLIC INSPECTION

SENDER: COMPLETE THIS SECTION	COMPLETE THIS SECTION ON DELIVERY
<ul style="list-style-type: none"> ■ Complete items 1, 2, and 3. Also complete item 4 if Restricted Delivery is desired. ■ Print your name and address on the reverse so that we can return the card to you. ■ Attach this card to the back of the mailpiece, or on the front if space permits. 	<p>A. Signature <input type="checkbox"/> Agent <input type="checkbox"/> Addressee</p> <p><i>X</i> </p> <p>B. Received by (Printed Name) C. Date of Delivery</p> <p><i>L. THOMAS</i> <i>9/24/14</i></p> <p>D. Is delivery address different from item 1? <input type="checkbox"/> Yes If YES, enter delivery address below: <input type="checkbox"/> No</p>
<p>1. Article Addressed to:</p> <p><i>Ms. Julia DAI DIRECTV 2230 E IMPERIAL HWY EL SEGUNDO, CA 90245</i></p>	<p>3. Service Type</p> <p><input type="checkbox"/> Certified Mail® <input type="checkbox"/> Priority Mail Express™ <input type="checkbox"/> Registered <input type="checkbox"/> Return Receipt for Merchandise <input type="checkbox"/> Insured Mail <input type="checkbox"/> Collect on Delivery</p>
<p>2. Article Number (Transfer from service label)</p>	<p>4. Restricted Delivery? (Extra Fee) <input type="checkbox"/> Yes</p>
<p>7014 1200 0000 3198 1153</p>	
<p>PS Form 3811, July 2013 Domestic Return Receipt</p>	

U.S. Postal Service™
CERTIFIED MAIL™ RECEIPT
(Domestic Mail Only; No Insurance Coverage Provided)

For delivery information visit our website at www.usps.com

OFFICIAL USE

Postage	\$	\$0.49	
Certified Fee		\$3.30	
Return Receipt Fee (Endorsement Required)		\$2.70	
Restricted Delivery Fee (Endorsement Required)		\$0.00	
Total Postage & Fees	\$	\$6.49	

Sent To *DIRECTV KUBE/KWC*

Street, Apt. No.; or PO Box No. *Delivered Sept 24, 2014*

City, State, ZIP+4

EST 98T 98TE 0000 0000 0000 4104

PS Form 3800, August 2006 See Reverse for Instructions

EXHIBIT D



Via FedEx (202) 719-7467

December 11, 2014

KUBE-TV
c/o Wiley Rein LLP
1776 K Street NW
Washington, DC 20006
Attn: Ari Meltzer

Re: **KUBE-TV (DMA: Houston, TX)**

We are in receipt of your letter requesting mandatory carriage for KUBE-TV in the Houston, TX local market.

Please be advised that KUBE-TV is covered under a retransmission agreement with DIRECTV dated as of April 1, 2010 ("Agreement"). Until the expiration of the Agreement, DIRECTV will continue to carry KUBE-TV, in accordance with Section 338 of the Communications Act of 1934 and the Federal Communications Commission's Rules.

Technical questions and those related to the local receive facility can be forwarded by email to Locals-Technical@directv.com.

General correspondence should be directed to Locals-Business@directv.com or:

DIRECTV
Local-Into-Local
2260 E. Imperial Highway, Mail Stop N321
El Segundo, CA 90245

Sincerely,

DIRECTV

Exhibit E Submitted Subject
To Request For Confidentiality

EXHIBIT F



1776 K STREET NW
WASHINGTON, DC 20006
PHONE 202.719.7000
FAX 202.719.7049

7925 JONES BRANCH DRIVE
McLEAN, VA 22102
PHONE 703.905.2800
FAX 703.905.2820

www.wileyrein.com

December 2, 2014

Ari Meltzer
202.719.7467
ameltzer@wileyrein.com

VIA E-MAIL AND OVERNIGHT MAIL

DIRECTV LLC
Attn: Local-Into-Local Elections.
2260 E. Imperial Highway
El Segundo, CA 90245
Locals-Business@directv.com

Re: Denial of Mandatory Carriage
KUBE-TV (Fac ID No. 70492), Baytown, Texas

To whom it may concern:

Our firm represents NRJ TV Houston License Co., LLC ("NRJ"), licensee of KUBE-TV (Fac ID No. 70492), Baytown, Texas ("KUBE"). I am writing in regard to your letter dated October 24, 2014, responding to NRJ's timely request for mandatory carriage of KUBE for the three year election cycle commencing on January 1, 2015 (the "Election Letter"). The Election Letter specified that carriage pursuant to the exercise of must carry rights would commence "on [REDACTED] immediately upon the expiration of the current April 1, 2010 Retransmission Consent Agreement." In your letter, you indicated that DIRECTV will continue to carry KUBE pursuant to the existing Retransmission Consent Agreement (the "Agreement"), but that, as a result, DIRECTV was denying NRJ's request for mandatory carriage.

NRJ is entitled to mandatory carriage upon the expiration Agreement under both the terms of the Agreement and the policies of the Federal Communications Commission ("FCC" or "Commission") governing retransmission consent agreements that extend into an election cycle.

[REDACTED]

[REDACTED] NRJ's mandatory carriage election for the upcoming cycle is appropriate, therefore, to enable KUBE to assert its must carry rights in the event the Agreement terminates and is not renewed during the 2015-2017 cycle.

In addition to DIRECTV's contractual obligations, DIRECTV's continued carriage of KUBE also is required under the FCC's established rules and procedures. In the *DBS Must Carry Order on Reconsideration*, the Commission clarified that: "if a



DIRECTV LLC
December 2, 2014
Page 2

broadcast station has a retransmission agreement that extends into and terminates during an election cycle, the station—at the end of its contract term with the carrier—will not be entitled to demand must carry if it has not elected must carry by the required date.¹ Conversely, by electing mandatory carriage within the timeframe required for the 2015-2017 cycle, NRJ has made a valid election of mandatory carriage, effective upon the expiration of the Agreement.

In consideration of the foregoing, NRJ hereby demands confirmation from DIRECTV, as required by Section 76.66(d)(iv) of the FCC's rules,² that DIRECTV will honor KUBE's mandatory carriage election immediately upon the expiration of the Agreement. **If we do receive this confirmation on or before December 12, 2014, NRJ will have no choice but to pursue its legal remedies against DIRECTV in a court of law and/or before the FCC.**

Please feel free to contact me if you wish to discuss this matter.

Sincerely,

A handwritten signature in cursive script, appearing to read "Ari Meltzer".

Ari Meltzer

3808443.1

¹ *Implementation of the Satellite Home Viewer Improvement Act of 1999: Broadcast Signal Carriage Issues*, Order on Reconsideration, 16 FCC Rcd. 16544 ¶ 63 (2001)

² 47 C.F.R. § 76.66(d)(iv).

EXHIBIT G



Via FedEx (978-886-4263)

October 24, 2014

KUBE-TV
722 S. Denton Tap Road, Suite 130
Coppell, TX 75019
Attn: David Pulido

Re: KUBE-TV (DMA: Houston, TX)

We are in receipt of your letter requesting mandatory carriage for KUBE-TV in the Houston, TX local market.

Please be advised that KUBE-TV is covered under a retransmission agreement with DIRECTV dated as of April 1, 2010 ("Agreement"), therefore DIRECTV denies your request for mandatory carriage. However, we will continue to carry KUBE -TV, pursuant to the terms of the Agreement.

Technical questions and those related to the local receive facility can be forwarded by email to Locals-Technical@directv.com.

General correspondence should be directed to Locals-Business@directv.com or:

**DIRECTV
Local-Into-Local
2260 E. Imperial Highway, Mail Stop N321
El Segundo, CA 90245**

Sincerely,

DIRECTV



1776 K STREET NW
WASHINGTON, DC 20006
PHONE 202.719.7000
FAX 202.719.7049

7925 JONES BRANCH DRIVE
MCLEAN, VA 22102
PHONE 703.905.2800
FAX 703.905.2820

www.wileyrein.com

December 18, 2014

Ari Meltzer
202.719.7467
ameltzer@wileyrein.com

BY HAND

Marlene H. Dortch, Secretary
Federal Communications Commission
Office of the Secretary
445 12th Street, SW
Room TW-A325
Washington, DC 20554

Re: CSR - _____
NRJ TV Houston License Co., LLC v. DirecTV, LLC
Request for Confidential Treatment – Confidential Attachment

Dear Ms. Dortch:

On behalf of NRJ TV Houston License Co., LLC (“NRJ” or the “Licensee”), licensee of full-power commercial television station KUBE-TV, Baytown, Texas (Facility ID No. 70492), please find attached an unredacted version of NRJ’s Complaint (the “Complaint”) in the above-referenced proceeding. Pursuant to Sections 0.457(d) and 0.459 of the Commission’s Rules, NRJ hereby requests that the Commission withhold from public inspection, and accord confidential treatment to, the information marked as Confidential in the attached Complaint and Exhibit E thereto.

The following information is provided pursuant to Section 0.459(b) to demonstrate that the confidential information submitted herein must be treated as confidential.

(1) *Identification of the specific information for which confidential treatment is sought.* Confidential treatment is sought for the portions of the Complaint referencing the text of a retransmission consent agreement dated April 1, 2010 by and between TTBG LLC, predecessor in interest to NRJ, and DirecTV, Inc., predecessor to DirecTV, LLC (the “Confidential Information”).

(2) *Identification of the Commission proceeding in which the information was submitted or a description of the circumstances giving rise to the submission.* The Confidential Information relates to the must-carry complaint captioned *NRJ TV Houston License Co., LLC v. DirecTV, LLC*.



Marlene H. Dortch, Secretary

December 18, 2014

Page 2

(3) *Explanation of the degree to which the information is commercial or financial, or contains a trade secret or is privileged.* The Confidential Information includes commercially sensitive information that may be withheld from public disclosure under FOIA Exemption 4, including the terms of a confidential business agreement that governed the transmission consent of KUBE-TV. The Commission has long recognized that, for purposes of Exemption 4, “records are ‘commercial’ as long as the submitter has a commercial interest in them.” *Robert J. Butler*, 6 FCC Rcd 5414, 5415 (1991) (citing *Pub. Citizen Health Research Group v. F.D.A.*, 704 F.2d 1280, 1290 (D.C. Cir. 1983); *Am. Airlines v. Nat’l Mediation Bd.*, 588 F.2d 863, 868 (2d Cir. 1978)). In this regard, Complaint contains commercially information which may be withheld under FOIA Exemption 4 and Section 0.457(d).

(4) *Explanation of the degree to which the information concerns a service that is subject to competition.* The Confidential Information directly relates to the highly competitive businesses of television broadcasting and MVPD carriage thereof. NRJ is but one of a number of companies in these highly competitive businesses.

(5) *Explanation of how disclosure of the information could result in substantial competitive harm.* Disclosure of the Confidential Information would result in substantial competitive harm to NRJ and DirecTV. This information would be of immeasurable value to other companies in the broadcasting and MVPD businesses seeking to compete against NRJ. The D.C. Circuit has found parties do not have to “show actual competitive harm” to justify confidential treatment. *Pub. Citizen Health Research Grp.*, 704 F.2d at 1291 (quoting *Gulf & Western Indus. v. U.S.*, 615 F.2d 527, 530 (D.C. Cir. 1979)). Rather, “[a]ctual competition and the likelihood of substantial competitive injury’ is sufficient to bring commercial information within the realm of confidentiality.” *Id.*

(6) *Identification of any measures taken by the submitting party to prevent unauthorized disclosure.* The agreement expressly forbids the public disclosure of the Confidential Information by either party. Moreover, NRJ does not release the proprietary commercial business information included with the Complaint in the normal course of business and maintains strict internal processes to ensure that such information is protected from public disclosure.

(7) *Identification of whether the information is available to the public and the extent of any previous disclosure of the information to third parties.* NRJ



Marlene H. Dortch, Secretary
December 18, 2014
Page 3

has not and will not make the Confidential Information submitted herein available to the public. Moreover, the Confidential Information is subject to a confidentiality agreement, that prevents its disclosure to third parties except under very limited circumstances.

(8) *Justification of the period during which the submitting party asserts that material should not be available for public disclosure.* NRJ requests that the material for which it requests confidentiality be protected indefinitely. At no time would NRJ, in the normal course of business, provide this information to the public.

(9) *Any other information that the party seeking confidential treatment believes may be useful in assessing whether its request for confidentiality should be granted.* Public release of the proprietary commercial business information submitted herein would harm NRJ's position in the highly competitive broadcast business. The information would be of immeasurable value to competitors of both NRJ and DirecTV.

For the foregoing reasons, NRJ requests that the Confidential Information be treated as confidential and withheld from public inspection.

Respectfully Submitted,

A handwritten signature in blue ink, appearing to read "Ari Meltzer".

Ari Meltzer