

Before the
 Federal Communications Commission
 Washington, D.C. 20554

In the matter of)
)
 Application of David L. Miller and Infrastructure) File No. 0004806497
 Networks, LLC for *De Facto* Transfer Spectrum)
 Leasing Arrangement)

ORDER

Adopted: November 18, 2011

Released: November 18, 2011

By the Deputy Chief, Mobility Division, Wireless Telecommunications Bureau:

1. *Introduction.* We have before us an application seeking Commission approval of a *de facto* transfer spectrum leasing arrangement from David L. Miller (“Miller”) to Infrastructure Networks, LLC (“Infrastructure”) involving two licenses in the 700 MHz Lower Band (Blocks A and B).¹ Also before us are three filings on behalf of Texas Energy Network LLC (“Texas Energy”) raising concerns that the proposed *de facto* transfer spectrum leasing arrangement would conflict with a court injunction issued by the District Court of Harris County, Texas,² and two responsive filings on behalf of Infrastructure.³ For the reasons stated below, we reject the arguments made by Texas Energy and grant the above-referenced *de facto* transfer spectrum leasing application.

2. *Discussion.* As noted above, Miller proposes to lease to Infrastructure the spectrum associated with two 700 MHz Lower Band licenses located in the Odessa-Midland, TX and Amarillo, TX Economic Areas.⁴ The applicants state that the proposed spectrum leasing arrangement will allow Infrastructure “to provide advanced network access services, including wireless broadband services, to customers in the areas in which it will serve” and to provide such access to “areas where no such service

¹ Application of David L. Miller and Infrastructure Networks, LLC for *De Facto* Transfer Spectrum Leasing Arrangement, File No. 0004806497 (filed July 27, 2011) (“Application”). The application appeared on public notice on August 3, 2011. See Wireless Telecommunications Bureau Assignment of License Authorization Applications, Transfer of Control of Licensee Applications, and De Facto Transfer Lease Applications, and Designated Entity Reportable Eligibility Event Applications Accepted for Filing, *Public Notice*, Rpt. No. 7041 (rel. Aug. 3, 2011) (“*Public Notice*”).

² Letter from Jack Richards, Keller and Heckman LLP, counsel for Texas Energy Network LLC, to Marlene H. Dortch, Secretary, Federal Communications Commission, File No. 0004806497 (filed Aug. 29, 2011) (“Texas Energy August 29, 2011 Letter”); Letter from Thomas B. Magee, Keller and Heckman LLP, counsel for Texas Energy Network LLC, to Marlene H. Dortch, Secretary, Federal Communications Commission, File No. 0004806497 (filed Sept. 30, 2011) (“Texas Energy September 30, 2011 Letter”); Letter from Thomas B. Magee, Keller and Heckman LLP, counsel for Texas Energy Network LLC to Marlene H. Dortch, Secretary, Federal Communications Commission, File No. 0004806497 (filed Oct. 29, 2011) (“Texas Energy October 29, 2011 Letter”).

³ Letter from Patrick J. Whittle and Nguyen T. Vu, Bingham McCutchen LLP, counsel for Infrastructure Networks, LLC, File No. 0004806497 (filed Sept. 8, 2011) (“Infrastructure September 8, 2011 Letter”); Letter from Patrick J. Whittle and Nguyen T. Vu, Bingham McCutchen LLP, counsel for Infrastructure Networks, LLC, File No. 0004806497 (filed Oct. 13, 2011) (“Infrastructure October 13, 2011 Letter”).

⁴ Application, Description of Transaction and Statement of Public Interest.

currently exists.”⁵ The application was placed on public notice on August 3, 2011, with any petitions to deny due by August 17, 2011.⁶

3. The first Texas Energy letter regarding the proposed spectrum leasing arrangement was filed on August 29, 2011. The Texas Energy August 29, 2011 Letter asserts that the proposed spectrum leasing arrangement “apparently violates the Permanent Injunction [issued by the District Court of Harris County].”⁷ This letter also specifically “requests that the Commission dismiss the pending application as contrary to law.”⁸ The second Texas Energy letter asserts that the first letter was not a petition to deny but only intended to advise the Commission of the court injunction on the basis that the court order might be relevant to the Commission’s “determination of whether the grant of the Infrastructure Networks’ application is in the public interest.”⁹ This letter additionally states that “[Texas Energy] believes that the Commission should request, and make publicly available, a copy of the spectrum lease between Infrastructure Networks and David L. Miller and other information as it may deem appropriate.”¹⁰ The third and final Texas Energy letter states that the company’s “August 29, 2011 letter was filed to inform the Commission about a Permanent Injunction issued in a Texas District Court against a principal of Infrastructure Networks that appears relevant to Infrastructure Networks’ application. [Texas Energy] did not request a copy of the lease and so obtaining the lease was not an objective at all, much less the sole objective.”¹¹

4. Infrastructure asserts that the Texas Energy objection should be “rejected as late-filed, procedurally defective, meritless, and contrary to long-standing Commission precedent.”¹² In particular, Infrastructure argues that: (1) the Commission’s rules do not provide for the filing of an informal objection;¹³ (2) Texas Energy’s initial filing was submitted outside the 14-day petition to deny period specified by section 1.9030(e)(1)(iii) of the Commission’s rules;¹⁴ (3) the Texas Energy August 29, 2011 Letter fails to include specific allegations of fact necessary to support a petition to deny and is not supported by an affidavit of a person or persons with personal knowledge thereof, as required by section 1.939(d);¹⁵ and (4) Texas Energy is improperly asking the Commission to inject itself into a commercial dispute of the type that the Commission usually refuses to address in the licensing context.¹⁶

5. *Discussion.* We agree with Infrastructure that Texas Energy did not timely file its initial pleading regarding the proposed spectrum leasing arrangement. Section 1.9030(e)(1)(iii) is quite clear that any petition to deny must be filed within 14 days of the public notice of the application, or by August 17. While the Texas Energy August 29, 2011 Letter may not have been titled a “petition to deny,” it did request that the Commission dismiss the pending Miller-Infrastructure spectrum leasing application. Even

⁵ *Id.*

⁶ See *Public Notice*, *supra* note 1; 47 C.F.R. § 1.9030(e)(1)(iii).

⁷ Texas Energy August 29, 2011 Letter at 1.

⁸ *Id.*

⁹ Texas Energy September 30, 2011 Letter at 1.

¹⁰ *Id.* at 2.

¹¹ Texas Energy October 29, 2011 Letter at 1.

¹² Infrastructure September 8, 2011 Letter at 1.

¹³ *Id.*

¹⁴ *Id.*, citing 47 C.F.R. § 1.9030(e)(1)(iii).

¹⁵ *Id.* at 2, citing 47 C.F.R. § 1.939(d).

¹⁶ *Id.* 2-3.

if we consider the Texas Energy filings as something other than a purported petition to deny, we conclude that these submissions were untimely. On this basis alone, we could dismiss the Texas Energy filings.

6. We nonetheless proceed to address the significance of Texas Energy's claims that somehow the Harris County, Texas District Court Permanent Injunction attached to the Texas Energy August 29, 2011 Letter is relevant to our regulatory consideration of the proposed *de facto* transfer spectrum leasing application. We agree with Infrastructure that the determination whether or not the proposed spectrum leasing arrangement complies with the court injunction is a matter for the court and not the Commission. The Commission has repeatedly held that it will not insert itself into the private commercial affairs of parties, including court litigations relating to such affairs.¹⁷ The state courts in Texas have the jurisdiction to determine whether the proposed spectrum leasing arrangement complies with the terms and requirements of the Permanent Injunction. We thus reject Texas Energy's assertions that somehow the Commission should become involved in evaluating the compliance of the *de facto* transfer spectrum leasing arrangement with a court order, and deny its requests for relief.

7. With the denial of Texas Energy's filings, there are no objections to Commission grant of the Application. We have reviewed the Application and its exhibits, and find that grant of the Application would serve the public interest. We accordingly will grant the Application.

8. Accordingly, IT IS ORDERED that, pursuant to section 4(i) of the Communications Act of 1934, as amended, 47 U.S.C. § 154(i), and section 1.9030(e)(1)(viii) of the Commission's rules, 47 C.F.R. § 1.9030(e)(1)(viii), the filings of Texas Energy are denied;

9. IT IS FURTHER ORDERED that, pursuant to section 4(i) of the Communications Act of 1934, as amended, 47 U.S.C. § 154(i), and section 1.9030 of the Commission's Rules, 47 C.F.R. § 1.9030, the application filed by David L. Miller and Infrastructure Networks for Commission approval of a *de facto* transfer spectrum leasing application, File No. 0004806497, IS GRANTED.

10. This action is taken under delegated authority pursuant to sections 0.131 and 0.331 of the Commission's Rules, 47 C.F.R. § 0.131, 0.331.

FEDERAL COMMUNICATIONS COMMISSION

Katherine M. Harris
Deputy Chief, Mobility Division
Wireless Telecommunications Bureau

¹⁷ See, e.g., Applications of Vodafone AirTouch, Plc and Bell Atlantic Corporation *et al.* For Consent to Transfer Control or Assignment of Licenses and Authorizations, *Order on Further Reconsideration*, 17 FCC RCd 10998, 11000 ¶ 6 (2000); Pueblo MSA Limited Partnership, *et al.*, 15 FCC Rcd 5439, 5441 (2000).