

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

In the Matter of
HAZEL-TONE COMMUNICATIONS, INC.
For Consent to Assignment of Authorizations
in the Paging and Radiotelephone Service
KGC397, 152.66 MHz, Duryea, PA and
KKB412, 454.350 MHz, Hazleton, PA from
Hazel-Tone Communications, Inc. to PennSel
Communications Services, Inc.
File No. 0000024769

ORDER

Adopted: November 30, 2001

Released: December 3, 2001

By the Chief, Commercial Wireless Division, Wireless Telecommunications Bureau:

I. INTRODUCTION

1. We have before us a petition to deny (Petition) filed by Schuylkill Mobile Fone, Inc. (SMFI) against an Application for Consent to the Assignment of License filed by Hazel-Tone Communications, Inc. (Hazel-Tone), the licensee of two site-specific paging and radiotelephone service (PRS) station authorizations under call signs KGC397 and KKB412. Hazel-Tone seeks authority to assign both stations to PennSel Communications, Inc. (PennSel). For the reasons discussed below, we deny SMFI's Petition to Deny and grant the above-captioned assignment application, subject to certain terms and special conditions set forth below.

II. BACKGROUND

2. Hazel-Tone is the licensee of PRS stations KGC397 and KKB412, which are authorized to operate on various paging frequencies, including 152.66 MHz in Duryea, Pennsylvania and 454.350 MHz in Hazleton, Pennsylvania, respectively. SMFI is a co-channel licensee of PRS stations licensed to operate in an adjacent geographic area in Pennsylvania. On September 14, 1999, Hazletone filed an application to fully assign call signs KGC397 and KKB412 to PennSel. On October 22, 1999, SMFI filed a petition to

1 In this order, we refer to the licensee as Hazel-Tone Communications, Inc. (Hazel-Tone). We note that in certain pleadings Hazel-Tone has used both "Hazel-Tone" and "Hazletone."

2 See SMFI Petition to Deny, filed on November 10, 1999 (Petition); Hazel-Tone Opposition to Petition to Deny, filed November 23, 1999 (Opposition); SMFI Reply to Opposition to Petition to Deny, filed December 3, 1999.

3 Commission records reflect that Hazel-Tone is also licensed under call sign KGC397 to operate on 35.22 MHz, 72.5 MHz and 75.58 MHz at various sites in Pennsylvania, including Scranton, Hazleton, and Wilkes-Barre.

4 See Public Notice, Report No. 324, dated September 22, 1999.

deny against the assignment application.

3. In its Petition, SMFI alleges that Hazel-Tone cannot assign the two above-referenced licenses to PennSel because the licenses for certain locations and frequencies authorized under calls signs KGC397 and KKB412 automatically cancelled pursuant to Commission rules prior to the filing of the assignment application. Specifically, SMFI alleges that: 1) the authorization for 152.66 MHz in Duryea, Pennsylvania under call sign KGC397 automatically cancelled pursuant to section 22.317 of the Commission's rules⁵ for discontinuance of operation;⁶ and 2) the authorization for 454.350 MHz in Hazleton, Pennsylvania under call sign KKB412 automatically cancelled pursuant to section 1.946(c) of the Commission's rules⁷ because Hazel-Tone did not construct the station by its initial construction deadline. SMFI does not challenge the construction and operational status of other frequencies and locations associated with call signs KGC397 and KKB412. SMFI also argues that Hazel-Tone should not be permitted to assign call signs KGC397 and KKB412 for the above-referenced frequencies and locations because SMFI and Hazel-Tone entered into an interference agreement in 1994 to protect each licensee's stations from harmful interference.⁸ SMFI argues that nothing in the agreement permits Hazel-Tone to assign its stations to a third party.

4. In its Opposition, Hazel-Tone states that it has not discontinued operation on 152.66 MHz for more than 90 days and that it timely constructed KKB412.⁹ Hazel-Tone also argues that SMFI's other allegations involve a private contractual dispute that, even if enforceable, is an improper basis for a petition to deny an assignment application.¹⁰ Further, Hazel-Tone argues that the agreement includes no language prohibiting the assignment of the station and that the right to assign a Commission license is inherent in the rights conferred by a license grant.¹¹

5. On May 22, 2001, the Policy and Rules Branch (Branch) of the Commercial Wireless Division (Division) initiated an investigation into this matter by requesting further information from Hazel-Tone regarding the operational status of the above-referenced PRS stations.¹² Hazel-Tone provided responses on June 21, 2001, July 12, 2001, and July 27, 2001, respectively.¹³

⁵ 47 C.F.R. § 22.317.

⁶ See Petition at 3.

⁷ 47 C.F.R. § 1.946 (c).

⁸ See Petition at 5.

⁹ *Id.* at 5 and 8.

¹⁰ See Hazel-Tone Opposition at 4.

¹¹ *Id.* at 8.

¹² Letter from Paul D'Ari, Esq., Chief, Policy and Rules Branch, Commercial Wireless Division, to Benjamin Aaron, Esq., dated May 22, 2001 (Branch Letter).

¹⁴ Letters from Benjamin Aaron, Esq., to Donald Johnson, Esq., Policy and Rules Branch, Commercial Wireless Division, dated June 3, 2001, July 12, 2001, and July 27, 2001.

III. DISCUSSION

6. We agree with Hazel-Tone that SMFI's claim arising from a private agreement is a contractual matter between the parties.¹⁴ The Commission has determined that parties should resolve contractual disputes in court and that the Commission is not the proper forum to adjudicate these disputes.¹⁵

7. The relevant issue before us is whether assignment of the frequencies in question from Hazel-Tone to PennSel would be inconsistent with the public interest. We find that SMFI has failed to present allegations that PennSel would not be a qualified assignee such that the assignment application should be denied. SMFI's allegations regarding the construction and operational status of the stations in question are legally distinct from our public interest review in the context of an assignment application, and we will proceed with our continuing investigation into SMFI's allegations of violations of Commission rules 22.317 and 1.946(c). Accordingly, we deny SMFI's petition to deny and grant the assignment application, subject to the following terms and conditions: the authorizations for KGC397 (*i.e.* 152.66 MHz in Duryea, PA) and KKB412 (*i.e.* 454.50 MHz in Hazleton, PA) remain subject to the Commission's review of the construction and operational status of these facilities. PennSel, as the successor-in-interest to the referenced Hazel-Tone authorizations, will receive control of the licenses subject to the decision on the status of the underlying authorizations.¹⁶

IV. ORDERING CLAUSES

8. Accordingly, IT IS ORDERED that, pursuant to sections 4(i) and 309(d) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 309(d), and sections 0.331 and 1.948 of the Commission's rules, 47 C.F.R. §§ 0.331, 1.948, the Petition to Deny filed by Schuylkill Mobile Fone, Inc. against the assignment of the authorizations from Hazel-Tone Communications, Inc. to PennSel Communications, Inc. for Stations KGC312 and KKB412 IS HEREBY DENIED.

9. IT IS FURTHER ORDERED that the above-captioned Application for Consent to the Assignment of Authorizations for Stations KGC312 and KKB412 from Hazel-Tone Communications, Inc. to PennSel Communications, Inc. IS HEREBY GRANTED, subject to the condition described in Paragraph 7 of this order.

FEDERAL COMMUNICATIONS COMMISSION

William W. Kunze, Chief
Commercial Wireless Division
Wireless Telecommunications Bureau

¹⁴ We note that the record does not reflect any allegation of actual interference between the parties.

¹⁵ See In the Matter of Airtouch Communications, Inc., *Memorandum Opinion and Order*, DA 99-1200 (rel. June 22, 1999), citing *Listener's Guild, Inc. v. FCC*, 813 F.2d 465, 469 (D.C. Cir. 1987).

¹⁶ See In the Matter of Applications of Dial Page, Inc., DA 95-2379 at ¶ 34 (WTB: rel. November 22, 1995).