

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

In the Matter of)
)
Silver Palm Communications, Inc.)
)

ORDER

Adopted: February 16, 2007

Released: February 16, 2007

By the Chief, Auctions and Spectrum Access Division, Wireless Telecommunications Bureau:

I. INTRODUCTION

1. In this Order, we deny a request for waiver of Section 1.2109 of the Commission's rules, 47 C.F.R. § 1.2109, filed by Silver Palm Communications, Inc. ("Silver Palm"), the winner of ten 800 MHz Specialized Mobile Radio ("SMR") licenses in Auction No. 34 (the "Licenses").¹ Silver Palm paid the required down payments on the Licenses but subsequently failed to pay the remaining balance of its winning bids by the payment deadline. Silver Palm claims that it failed to make this payment on time because it was unaware of the release of the Public Notice that announced the deadline.² Silver Palm requests a waiver of Section 1.2109(a), which requires that winning bidders pay the balance of their winning bids in a lump sum by the deadline established by public notice, and reinstatement *nunc pro tunc* of its FCC Form 601 application for the Licenses. As explained below, we find that Silver Palm has failed to show that a waiver of its final payment deadline and reinstatement of its FCC Form 601 are warranted.³

II. BACKGROUND

2. On September 6, 2000, the Wireless Telecommunications Bureau ("Bureau") issued a Public Notice announcing the close of Auction No. 34 and the winning bidders.⁴ In keeping with the

¹ Petition for Reconsideration of Notice of Interim Default Payment Obligations for Auction No. 34, dated July 23, 2004 ("Petition"). Silver Palm's request for waiver is styled as a petition seeking reconsideration of the letter in which the Auctions and Spectrum Access Division notified Silver Palm of its interim default payment obligations on the Licenses and the dismissal of the FCC Form 601 application that it had filed for the Licenses following the auction. Letter from Rita Cookmeyer, Financial Policy Analyst, Auctions and Spectrum Access Division, Wireless Telecommunications Bureau, to Kent S. Foster, Silver Palm Communications, Inc., dated June 23, 2004, 19 FCC Rcd 10959 (2004) ("*Notice of Interim Default Payment*"). The Licenses are BEA126F (Western Oklahoma, OK), BEA126FF (Western Oklahoma, OK), BEA128F (Abilene, TX), BEA129F (San Angelo, TX), BEA130F (Austin, - San Marcos, TX), BEA130FF (Austin, - San Marcos, TX), BEA134E (San Antonio, TX), BEA134EE (San Antonio, TX), BEA173B (Guam and Northern Mariana Islands), and BEA173C (Guam and Northern Mariana Islands).

² Petition at 3.

³ Because we deny Silver Palm's request for waiver of its final payment deadline and reinstatement of its FCC Form 601, we also affirm the *Notice of Interim Default Payment*'s dismissal of the application.

⁴ 800 MHz Specialized Mobile Radio (SMR) Service General Category (851-854 MHz) and Upper Band (861-865 MHz) Auction Closes, Winning Bidders Announced, *Public Notice*, 15 FCC Rcd 17162 (2000) ("*Closing Public Notice*").

Commission's rules, the *Closing Public Notice* announced that by September 20, 2000, winning bidders were required to have on deposit with Mellon Bank, the financial institution that receives payments of winning bids on behalf of the Commission, enough funds to cover all required down payments.⁵ The *Closing Public Notice* also announced that winning bidders were required to submit completed FCC Form 601 long-form applications for the licenses they had won by September 20, 2000.⁶

3. Silver Palm's net winning bids for the Licenses totaled \$393,000.⁷ The upfront payment Silver Palm had submitted to the Commission to participate in Auction No. 34 was applied toward its down payment obligation, and the company made an additional payment that brought its total deposit up to the down payment amount of \$78,600 by September 20, 2000. However, Silver Palm failed to submit its long-form application by the September 20, 2000, deadline.

4. On October 4, 2000, Silver Palm filed its long-form application and requested a waiver of Section 1.2107(c) of the Commission's rules, which provides that winning bidders will be deemed to have defaulted if they fail to timely submit the required long-form application or establish good cause for any late-filed submission.⁸ Asking the Commission to allow it to submit its long-form application after the deadline, Silver Palm claimed that it missed the long-form deadline due to inadvertence and unawareness of the deadline.⁹ On April 10, 2002, the former Commercial Wireless Division granted Silver Palm's request for waiver of Section 1.2107(c).¹⁰ The Division found that some flexibility was appropriate on the Commission's part because Silver Palm had previously complied with all filing requirements associated with Auction No. 34, had timely met its down payment requirements, and had submitted its long-form application soon after the filing deadline. Under these circumstances, the Division concluded that the post-auction licensing process had not been significantly delayed or materially adversely affected.¹¹

5. On August 30, 2002, the Bureau released a Public Notice announcing it was ready to grant Silver Palm's long-form application "upon the full and timely payment of the remaining balance" of Silver Palm's winning bids by September 16, 2002.¹² Consistent with Section 1.2109(a), the *Prepared to Grant Public Notice* also indicated that if Silver Palm failed to pay the balance of its winning bid(s) in a lump sum by the September 16, 2002, deadline, it would be permitted to pay the remaining balance by September 30, 2002, along with a late fee equal to 5 percent of the amount due.¹³ Finally, the *Prepared to Grant Public Notice* warned that "a winning bidder ... who fails to pay the balance of its winning bid(s) by the late payment deadline of September 30, 2002, will be in default and subject to applicable default

⁵ *Id.* at 17163 (citing 47 C.F.R. §§ 1.2107(b), 1.2104(g)).

⁶ *Closing Public Notice*, 15 FCC Rcd at 17167.

⁷ *Id.* at Attachment A. Silver Palm qualified as a "very small business" for a 35 percent bidding credit. For purposes of the 800 MHz SMR licenses available in Auction No. 34, a very small business was defined as an entity that, together with its affiliates and controlling interests, had average gross revenues that were not more than \$3 million for the preceding three years. 47 C.F.R. § 90.910(a).

⁸ ULS File No. 0000233574, Exhibit F (citing 47 C.F.R. § 1.2107(c)) ("Long-form Waiver Request"). This request was attached to Silver Palm's long-form application.

⁹ Long-form Waiver Request at 1.

¹⁰ Silver Palm Communications, Inc., *Order*, 17 FCC Rcd.6606 (CWD 2002) ("Long-form Waiver Order").

¹¹ *Id.* at 6607 ¶ 8.

¹² Wireless Telecommunications Bureau Announces It Is Prepared to Grant 800 MHz Specialized Mobile Radio Service (SMR) General Category (851-854 MHz) and Upper Band Auction Licenses Upon Full and Timely Payment, *Public Notice*, 17 FCC Rcd 16496, 16496 (2002) ("*Prepared to Grant Public Notice*").

¹³ *Id.* (citing 47 C.F.R. § 1.2109(a)).

payments.”¹⁴ Silver Palm did not submit the remaining balance of its winning bids by September 30, 2002, and therefore defaulted on its obligation under the Commission’s rules.¹⁵

6. On July 23, 2004, Silver Palm filed the Petition we consider here. Silver Palm contends that its failure to meet the Commission’s payment deadline “resulted wholly from inadvertence” and that it was “unaware of the release of” the *Prepared to Grant Public Notice*.¹⁶ Silver Palm asserts that its counsel at the time did not notify it of the release, nor did Silver Palm receive a copy of the public notice from the Commission.¹⁷ Additionally, Silver Palm contends that acceptance of late payment and reinstatement of its application are warranted under Commission precedent. It argues that the Commission has previously waived timely compliance with the final payment deadline where the applicant’s failure to meet that deadline was entirely inadvertent.¹⁸ Finally, Silver Palm argues that reinstatement of its long-form application would serve the public interest because it would provide service to the public more expeditiously than would be the case if the Commission reauctioned the Licenses.¹⁹

III. DISCUSSION

7. Section 1.2109(a) of the Commission’s rules requires that winning bidders pay the balance of their winning bids in a lump sum by the deadline established by public notice. If a winning bidder fails to pay the balance of its winning bid in a lump sum by that deadline, it will be allowed to make payment within ten business days after the payment deadline, provided that it also pays a late fee equal to 5 percent of the amount due. When a winning bidder fails to pay the balance of its winning bid and the late fee by the late payment deadline, it is considered to be in default on its license and subject to the applicable default payments.²⁰ Section 1.2109(c) of the Commission’s rules provides that a winning bidder that fails to remit the balance of its winning bid in a timely manner will be deemed to have defaulted, its application will be dismissed, and it will be liable for the applicable payment in 47 C.F.R. § 1.2104(g).²¹

8. To obtain a waiver of Section 1.2109(a), Silver Palm must show: (i) that the underlying purpose of the rule would not be served, or would be frustrated, by its application in this particular case, and that the grant of the requested waiver would be in the public interest; or (ii) that the unique facts and circumstances of the particular case render application of the rule inequitable, unduly burdensome, or otherwise contrary to the public interest, or that the applicant has no reasonable alternative.²² As explained below, we find that Silver Palm has failed to meet this standard.

9. The Commission’s competitive bidding rules promote a number of statutory purposes, including the development and rapid deployment of new technologies and services for the benefit of the public and the efficient and intensive use of spectrum.²³ To achieve these objectives, the rules are

¹⁴ *Id.*

¹⁵ 47 C.F.R. § 1.2109.

¹⁶ Petition at 3.

¹⁷ *Id.*

¹⁸ *Id.* at 3-5 (citing Hickory Telephone Company, Inc., *Order*, 12 FCC Rcd 1528 (WTB 1997) (“*Hickory Telephone*”), and The Wireless, Inc., *Order*, 12 FCC Rcd 1821 (WTB 1997) (“*Wireless*”).

¹⁹ Petition at 5-6.

²⁰ 47 C.F.R. § 1.2109(a).

²¹ 47 C.F.R. § 1.2109(c).

²² 47 C.F.R. § 1.925.

²³ See 47 U.S.C. § 309(j)(3). See also H.R. Rep. No. 103-111, at 253 (1993), reprinted in 1993 U.S.C.C.A.N. 378, 580 (finding that “a carefully designed system to obtain competitive bids from competing qualified applicants can (continued....)

designed to provide for an auction and licensing process that assigns licenses only to serious, financially qualified bidders that are able to use the spectrum effectively and efficiently.²⁴ As the Commission has explained, its competitive bidding rules are intended to protect the integrity of this process by ensuring that the provision of reliable service to the public is not undermined by winning bidders financially incapable of paying the amounts they bid, constructing systems, and providing service.²⁵ As the Commission has further stated, “We have determined that timely payments of auction obligations are the manner in which we can be assured of the financial qualifications, and thus the seriousness, of a winning bidder.”²⁶

10. In establishing the ten-day late payment period provided for in Section 1.2109(a), the Commission determined that ten days would “provide an adequate amount of time to permit winning bidders to adjust for any last-minute problems.”²⁷ The Commission also concluded that a lengthier late payment period “could threaten the integrity, fairness, and efficiency of the auction process.”²⁸ In establishing the requirement of a 5 percent late fee, the Commission found, *inter alia*, that such a fee would deter bidders from making late payments.²⁹

11. The default and application dismissal provisions of Section 1.2109 ensure that entities financially unable to pay their winning bids and provide service do not unfairly acquire licenses that might have been won by other auction participants. In so doing, these provisions also function to deter insincere bidding by entities that are not prepared to use the spectrum efficiently and effectively. As the Commission has stated, “the default provisions are critical for maintaining the integrity of the auction

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speed delivery of services, promote efficient and intensive use of the electromagnetic spectrum, prevent unjust enrichment, and produce revenues to compensate the public for the use of the public airwaves.”)

²⁴ Abundant Life, Inc., *Memorandum Opinion and Order*, 17 FCC Rcd 4006, 4009 ¶ 8 (2002) (“*Abundant Life IIP*”). See also Implementation of Section 309(j) of the Communications Act – Competitive Bidding, *Second Report and Order*, 9 FCC Rcd 2348, 2375 ¶ 160 (1994) (“*Second Report and Order*”); Mountain Solutions LTD, Inc., *Memorandum Opinion and Order*, 13 FCC Rcd 21983, 21990 ¶ 14 (1998), *review denied in part and dismissed in part*, *Mountain Solutions LTD, Inc. v. FCC*, 197 F.3d 512 (D.C. Cir. 1999).

²⁵ BDPCS, Inc., *Memorandum Opinion and Order*, 15 FCC Rcd 17590, 17598-99 ¶ 15 (2000) (citing *Second Report and Order*, 9 FCC Rcd at 2381 ¶ 190).

²⁶ *Abundant Life III*, 17 FCC Rcd at 4009 ¶ 8 (citing BDPCS, Inc., 12 FCC Rcd 3230, 3235 ¶ 8 (1997), *recon. denied in part and granted in part*, 12 FCC Rcd 15341 (1997)). See also In re Application of Delta Radio, Inc., *Memorandum Opinion and Order*, 18 FCC Rcd 16889, 16896-97 ¶ 19 (2003) (“Timely auction payments are the principal way we determine whether a winning bidder is financially qualified to build out the permit being auctioned.”); Licenses of 21st Century Telesis, Inc. for Facilities in the Broadband Personal Communications Services, *Memorandum Opinion and Order*, 15 FCC Rcd 25113, 25123-24 ¶ 22 (2000) (“Insisting that licensees demonstrate their ability to pay . . . is essential to a fair and efficient licensing process, is fair to all participants in our auctions, including those who won licenses in the auctions and those who did not, and fosters the promotion of economic opportunity and competition in the marketplace.”), *recon. denied*, Licenses of 21st Century Telesis Joint Venture and 21st Century Bidding Corporation for Facilities in the Broadband Personal Communications Services, *Order on Reconsideration*, 16 FCC Rcd 17257 (2001), *petition dismissed in part and denied in part*, *21st Century Telesis Joint Venture v. FCC*, 318 F.3d 192 (D.C. Cir. 2003); WSS, LLC, *Memorandum Opinion and Order*, 21 FCC Rcd 6635, 6637 ¶ 6 (WTB/ASAD 2006) (“*WSS*”) (“Prompt payment of auction obligations is an objective indicator that a winning bidder is financially able to meet its obligations and intends to provide service to the public.”).

²⁷ Amendment of Part 1 of the Commission’s Rules – Competitive Bidding Procedures, *Third Report and Order and Second Further Notice of Proposed Rulemaking*, 13 FCC Rcd 374, 429-30 ¶ 95 (1997) (“*Part 1 Third Report and Order*”).

²⁸ *Id.*

²⁹ *Id.*

process by discouraging insincere bidding and ensuring that licenses end up in the hands of those parties that value them the most and have the financial qualifications necessary to construct operational systems and provide service.³⁰ Finally, as the Commission has also explained, the default payment rules deter winning bidders from delaying payment in order to give themselves time to decide whether to accept the assignment of a license, which would also be detrimental to other bidders and the efficient and fair functioning of the auction process.³¹

12. Silver Palm has not established that the underlying purpose of the Commission's rules would not be served by enforcement of the final payment deadline, default, and application dismissal provisions of Section 1.2109 in this case. Silver Palm does not dispute that it failed to make the required payments by the deadline established under the Commission's rules but argues that its failure to do so was inadvertent. More specifically, Silver Palm states that it was unaware of the *Prepared to Grant Public Notice*.³² In a declaration submitted with the Petition, Silver Palm's president states that, had he been aware that the company was required to pay the remaining balance by September 30, 2002, it would have been ready to make the payment on that date.³³ Silver Palm further argues that its "obvious financial commitment to the SMR sector," which it claims to have demonstrated by making the previous required payments on the Licenses and timely submitting all payments associated with two other FCC auctions, leaves no doubt that it is qualified to be a Commission licensee.³⁴

13. We find, however, that Silver Palm has not shown that it was financially qualified to acquire the Licenses. Silver Palm claims to have missed the final payment deadline because it was unaware of the Public Notice that announced the deadline, but it did not submit its final payment once it became aware that the payment was due and, indeed, has never submitted this payment. Under these circumstances, its assertion that it would have been ready to make the payment on September 30, 2002, if it had been aware of the deadline is unconvincing. Furthermore, in light of the circumstances of this case, i.e., Silver Palm's failure to submit its long-form application on time combined with its subsequent failure to submit its final payment once it became aware that it was due, we find that neither Silver Palm's timely down payment nor any particular conduct in other Commission auctions is sufficient to demonstrate that it is qualified to acquire the Licenses.

14. We also disagree with Silver Palm's assertion that the instant case is similar to cases in which the Commission has granted waivers of final payment deadlines or second down payment deadlines. Silver Palm cites two cases, *Hickory Telephone* and *Wireless*, in which the Commission granted partial waivers of second down payment deadlines to auction winners that missed the deadlines inadvertently.³⁵

³⁰ Winstar Broadcasting Corp., *Memorandum Opinion and Order*, 17 FCC Rcd 6126, 6132 ¶ 15 (2002).

³¹ *Id.*

³² Petition at 2-3, 5.

³³ *Id.*, Exhibit 1 (Declaration of Kent S. Foster).

³⁴ Petition at 5.

³⁵ Petition at 4-5 (citing *Hickory Telephone*, 12 FCC Rcd 1528 (WTB 1997), and *Wireless*, 12 FCC Rcd 1821 (WTB 1997)). Prior to 1998, the Commission allowed qualified small businesses that won licenses in certain services to pay their down payments in two installments and to pay the remaining balance of their winning bids in quarterly installments over the initial term of the license. The down payment rule at issue in *Hickory Telephone* and *Wireless* was 47 C.F.R. § 90.811 (1997). The waivers granted in these cases were partial because the Commission waived the payment deadlines subject to a 5 percent late fee. In December 1997, the Commission suspended the use of installment payments and at the same time amended the final payment provisions of Section 1.2109(a) to provide for the current ten-day late payment period and 5 percent late fee for final payments. *Part 1 Third Report and Order*, 13 FCC Rcd at 397-401, 428-30 ¶¶ 38-43, 93-95. The amended rule became effective March 16, 1998. Since the amendment of the rule, a waiver of the final payment deadline has been granted in only two cases, *WSS* and *Radio Layne, LLC*, *Memorandum Opinion and Order*, DA 07-596 (rel. Feb. 7, 2007) ("*Radio Layne*"). In *WSS*, the auction winner made payment four days before the deadline but paid less than the full amount. Within days of (continued....)

In these cases, the auction winners had submitted upfront payments to participate in the auctions in question that exceeded the amounts of their down payments. They did not make their down payments because they assumed incorrectly that the Commission would retain sufficient funds from their upfront payments to cover the down payments. Upon realizing their delinquency, they submitted their down payments in full. The Commission found in each of these cases that a waiver was warranted because the winning bidder had previously complied with Commission rules, it had made a good faith effort to make payment on time, and there was no indication in the record that there had been a deliberate effort to delay payment.³⁶

15. In contrast, Silver Palm has not previously complied with all of the rules applicable to Auction No. 34, as it failed to timely file its long-form application. Silver Palm has also not demonstrated good faith by making its final payment once it became aware of its default. Moreover, we cannot find that there has been no effort on Silver Palm's part to delay making its payment. In light of its earlier claim that it missed the long-form deadline because it was unaware of a Commission Public Notice, its current assertion that it missed the final payment deadline for the same reason suggests that Silver Palm may have attempted to avoid the payment deadline. We would expect a financially qualified entity acting in good faith that misses one deadline due to inadvertence to be particularly diligent in avoiding missing a second. We need not decide, however, whether Silver Palm missed its final payment deadline because of simple negligence or because it wished to delay its payment.³⁷ Given its failure to submit its final payment at all, we cannot find that Silver Palm is financially qualified to acquire the Licenses. We therefore conclude that a waiver of Silver Palm's final payment deadline would undermine rather than serve Section 1.2109's purpose of preventing financially unqualified entities from unfairly acquiring licenses.³⁸ As a result, a waiver in this case would also undermine the rule's purpose of deterring

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discovering its error, it remitted the balance of the amount due. The Auctions and Spectrum Access Division found that WSS's partial payment ahead of the deadline and its remittance of its full payment and late fee within days of recognizing its error mitigated the concern that it might not have the capital to pay for the licenses and provide service to the public. The Division also found that there was no indication in the record that WSS's final payment shortage was part of a deliberate effort to delay its payment. *WSS*, 21 FCC Rcd at 6638 ¶ 7. In *Radio Layne*, the auction winner submitted its final payment one day late and did not pay the late fee within the late payment period because of its mistaken belief that its final payment had been received by the deadline. The Auctions and Spectrum Access Division found in light of these circumstances that Radio Layne had demonstrated its financial qualifications to be a Commission permittee and that there was no deliberate effort on its part to delay payment. *Radio Layne*, DA 07-596, at ¶ 13.

³⁶ *Hickory*, 12 FCC Rcd at 1530-31 ¶¶ 7-8; *Wireless*, 12 FCC Rcd at 1823-24 ¶¶ 7-8. In *Pacific Wireless*, another case in which a waiver of a second down payment deadline was granted, and to which Silver Palm refers, the auction winner initiated procedures to make its payment by wire transfer on the date of the deadline, and the payment was received a few days late. In light of these circumstances, the Video Services Division of the former Mass Media Bureau found that Pacific Wireless had made a good faith effort to comply with the payment deadline and that there was no indication it had sought to deliberately delay payment of the amount due. *Pacific Wireless Cable Inc.*, *Order*, 12 FCC Rcd 9767 (MMB/Video Serv. Div. 1997) ("*Pacific Wireless*").

³⁷ Silver Palm states that it did not receive a copy of the *Prepared to Grant Public Notice* from the Commission. Petition at 3. The Commission is not, however, required to send copies of such public notices to license applicants. It is every applicant's responsibility to be familiar with the Commission's rules and to monitor Commission announcements relevant to its application. Both Section 1.2109(a) and the *Closing Public Notice* had clearly put Silver Palm on notice that its final payment deadline would be established by public notice. *Closing Public Notice*, 15 FCC Rcd at 17164. Moreover, the former Commercial Wireless Division had explicitly emphasized in granting Silver Palm's request for waiver of the long-form deadline that "Silver Palm was on notice that it was responsible for complying with the Commission's processing rules." Long-form Waiver Order, 17 FCC Rcd at 6608 ¶ 9.

³⁸ Silver Palm asserts that the Commission has previously found that the timely submission of second down payments and final payments is less important in demonstrating an applicant's financial qualifications than the timely submission of upfront payments and initial down payments. Petition at 3-4 (citing *Pacific Wireless*, 12 FCC (continued...))

insincere bidding in the future.

16. We also disagree with Silver Palm's argument that reinstatement of its long-form application would serve the public interest because Silver Palm would provide service to the public more expeditiously than would be the case if the Commission reauctoned the Licenses.³⁹ Any benefit that might be realized by waiving the deadline for Silver Palm's final payment and reinstating its long-form application is speculative at best. Any such benefit is also outweighed by the harm to the public interest that would be caused by granting a waiver of payment obligations to an entity that has failed to demonstrate that it is qualified to be a Commission licensee.

IV. CONCLUSION

17. Silver Palm has failed to demonstrate that the underlying purposes of Section 1.2109 would be frustrated by its application in this instance; that unique facts or circumstances render application of the rule inequitable or unduly burdensome; or that it would serve the public interest to waive enforcement of the rule. We conclude that to grant a waiver in this case would undermine the rule's purposes of preventing financially unqualified entities from unfairly acquiring licenses and deterring insincere bidding in the future.

V. ORDERING CLAUSES

18. Accordingly, IT IS ORDERED pursuant to Sections 4(i) and 309 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i) and 309, and Section 1.925 of the Commission's Rules, 47 C.F.R. § 1.925, that Silver Palm Communications, Inc.'s Petition for Reconsideration of Notice of Interim Default Payment Obligations for Auction No. 34, dated July 23, 2004, is DENIED.

19. IT IS FURTHER ORDERED that Silver Palm Communications, Inc.'s outstanding debt for the interim default payment is due in full. If Silver Palm Communications, Inc., fails to make full payment within 31 days of the date of this Order (i.e., by March 19, 2007), the Commission will transfer the full amount of the outstanding debt to the United States Department of Treasury for debt collection.

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

FEDERAL COMMUNICATIONS COMMISSION

Margaret W. Wiener
Chief, Auctions and Spectrum Access Division

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Rcd at 9770 ¶ 8). The Commission's findings on this issue do not, however, excuse Silver Palm's failure to rectify its delinquency once it was aware of it or, indeed, to submit its final payment at all.

³⁹ Petition at 5-6.