

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

In the Matter of )  
 )  
Silver Palm Communications, Inc. )  
 )  
Request for Waiver of Section 1.2109(a) )  
Final Payment Deadline for Winning Bids )  
in Auction 34 )

**ORDER ON RECONSIDERATION**

**Adopted: June 23, 2010**

**Released: June 23, 2010**

By the Chief, Wireless Telecommunications Bureau:

**I. INTRODUCTION**

1. This Order denies a request by Silver Palm Communications, Inc. (“Silver Palm”) for reconsideration of a Division-level Order declining to grant Silver Palm a waiver of the final payment deadline for licenses it won in a Commission spectrum auction.

2. Upon its failure to pay the balance due for the licenses by the deadline, Silver Palm was deemed to have defaulted and its long-form application for the licenses was dismissed as required by section 1.2109(a) of the Commission’s rules.<sup>1</sup> Silver Palm argued that the deadline and the consequences of its failure to make the remaining payment should be waived and its application reinstated because it was unaware of the deadline. In its Order denying Silver Palm’s waiver request, the Wireless Telecommunications Bureau’s Auctions and Spectrum Access Division (the “Division”) found that waiving the rule would undermine its purpose of deterring insincere bidding and preventing financially unqualified entities from unfairly acquiring licenses through the auction process.<sup>2</sup> Silver Palm now requests that we reconsider the *Division Order*. It contends that the Division erred in finding that a waiver would undermine the purpose of the rule and argues that the transfer of control of Silver Palm to a charitable foundation further supports its request.<sup>3</sup>

3. We find that Silver Palm has failed to demonstrate any error in the Division’s decision or any basis for reconsideration and therefore deny the Reconsideration Petition.

**II. BACKGROUND**

4. This matter arises from Silver Palm’s participation in Auction 34, which was an auction of licenses in the 800 MHz Specialized Mobile Radio (SMR) Service General Category Frequencies conducted in 2000. In Auction 34, the Commission made available 1,053 licenses in the 851-854 and 861-865 MHz bands.<sup>4</sup> On May 18, 2000, following a period of public comment, the Bureau released a

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<sup>1</sup> 47 C.F.R. § 1.2109(a).

<sup>2</sup> Silver Palm Communications, Inc., *Order*, 22 FCC Rcd 3344 (2007) (the “*Division Order*”).

<sup>3</sup> Silver Palm Communications, Inc., Petition for Reconsideration of Interim Default Obligations for Auction No. 34, filed March 19, 2007 (the “*Reconsideration Petition*”).

<sup>4</sup> “Auction of Licenses for 800 MHz Specialized Mobile Radio (SMR) Service General Category Frequencies in the 851-854 MHz Band Scheduled for August 23, 2000, Comment Sought on Reserve Prices or Minimum Opening Bids and Other Auction Procedural Issues,” *Public Notice*, 15 FCC Rcd 5637 (2000).

Public Notice announcing the procedures that would govern Auction 34.<sup>5</sup> Among other things, the *Auction 34 Procedures Public Notice* stated that, pursuant to the Commission's rules, winning bidders would be required to submit their down payments and properly completed long-form applications within ten business days after the release of the auction closing public notice.<sup>6</sup> The *Auction 34 Procedures Public Notice* further provided that a winning bidder that failed to make full payment would be subject to the Commission's default payment requirements.<sup>7</sup>

5. Silver Palm participated in Auction 34 and was the winning bidder for 10 licenses (the "Licenses"), having submitted net winning bids totaling \$393,000.<sup>8</sup> The *Auction 34 Closing Public Notice* required that winning bidders in Auction 34 submit their down payments and long-form applications by September 20, 2000.<sup>9</sup>

6. Silver Palm timely made the necessary down payment, bringing its deposits to \$78,600, with a remaining balance due of \$314,400. However, Silver Palm did not submit its long-form application by the September 20, 2000 deadline, doing so only on October 4, 2000. Along with its long-form application, Silver Palm requested waiver of section 1.2107(c), which provides that an applicant that fails to submit its long-form application on time, and does not establish good cause for doing so, will be deemed to have defaulted.<sup>10</sup> In support of its waiver request, Silver Palm claimed that it had submitted its long-form application after the established deadline because of inadvertence and a lack of awareness of the deadline.<sup>11</sup>

7. The Bureau's former Commercial Wireless Division granted the waiver request on April 10, 2002, finding that Silver Palm had met the standard for waiver of section 1.2107(c).<sup>12</sup> Citing Silver Palm's prior record of compliance with the auction rules and timely deposit of its down payment, the Commercial Wireless Division granted Silver Palm's waiver request and accepted its long-form application for processing.<sup>13</sup>

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<sup>5</sup> "Auction of Licenses for 800 MHz Specialized Mobile Radio (SMR) Service in the General Category Band (851-854 MHz) and Upper Band (861-865 MHz), Auction Notice and Filing Requirements for 1,053 Licenses in the 800 MHz SMR Service For The General Category Auction, Auction Rescheduled from August 23, 2000 to August 16, 2000, Minimum Opening Bids and Other Procedural Issues," *Public Notice*, 15 FCC Rcd 8868 (2000) (the "*Auction 34 Procedures Public Notice*").

<sup>6</sup> *Id.*, 15 FCC Rcd at 8901, *citing* 47 C.F.R. §§ 1.2107(b) and 1.2112(b).

<sup>7</sup> *Id.*, *citing* 47 C.F.R. § 1.2104(g)(2).

<sup>8</sup> 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).

<sup>9</sup> "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 17,162 (2000) (the "*Auction 34 Closing Public Notice*").

<sup>10</sup> 47 C.F.R. § 1.2107(c).

<sup>11</sup> ULS File No. 0000233574, Exhibit F, *citing* 47 C.F.R. § 1.2107(c). Silver Palm attached this request to its long-form application.

<sup>12</sup> Silver Palm Communications, Inc., *Order*, 17 FCC Rcd 6606 (2002).

<sup>13</sup> *Id.*

8. After completing its standard review process, the Bureau released a Public Notice on August 30, 2002, announcing that it was prepared to grant the long-form application of Silver Palm “upon the full and timely payment of the remaining balance of” its winning bids.<sup>14</sup> The *Prepared to Grant Public Notice* established a payment deadline of September 16, 2002, as well as a late payment deadline of September 30, 2002.<sup>15</sup> Silver Palm had a remaining balance due of \$314,400 at this time. The *Prepared to Grant Public Notice* explained that a winning bidder’s failure to pay the balance of its winning bid(s) by the late payment deadline would result in default and the assessment of default payments as prescribed by sections 1.2104(g) and 1.2109(a) and (c) of the Commission’s rules.<sup>16</sup> Section 1.2109(c) states 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 payments under section 1.2104(g). Section 1.2104(g) sets forth the obligations of a winning bidder that defaults on its bids.

9. Silver Palm failed to pay the remaining balance of its winning bids by the September 30, 2002 late payment deadline, causing it to default on the Licenses. Its long-form application was therefore dismissed and it became subject to a default payment. On June 23, 2004, the Division sent a letter to Silver Palm setting out its interim default payment obligations.<sup>17</sup> Pursuant to section 1.2104(g)(2) of the Commission’s rules, the Division assessed Silver Palm an interim default payment of \$11,790, which was three percent (3%) of its net winning bids of \$393,000 in Auction 34.<sup>18</sup>

10. In response to the *Interim Default Payment Letter*, Silver Palm filed its 2004 Petition.<sup>19</sup> This requested that the Division reconsider the *Interim Default Payment Letter*, reinstate Silver Palm’s application for the Licenses *nunc pro tunc*, and permit it to make a late payment of the remaining balance of its bids for the Licenses by granting a waiver of section 1.2109(a) of the Commission’s rules. Silver Palm asserted that it was a very small company that had had no knowledge of the payment deadline. The company’s owner claimed that, had Silver Palm known of the deadline, it would have been “ready to make the payment on that date.”<sup>20</sup> The 2004 Petition urged the Commission to waive the late payment deadline, maintaining that missing this deadline was less important than missing prior ones.<sup>21</sup> It also maintained that Commission precedent supported grant of a waiver in a case involving an inadvertent

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<sup>14</sup> “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 16,496 (2002) (“*Prepared to Grant Public Notice*”).

<sup>15</sup> *Id.* The *Prepared to Grant Public Notice* also established a late payment fee of five percent of the amount due.

<sup>16</sup> *Id.*; see also 47 C.F.R. §§ 1.2104(g), 1.2109(c).

<sup>17</sup> Letter from Rita Cookmeyer, Financial Policy Analyst, Auctions and Spectrum Access Division, Wireless Telecommunications Bureau, to Mr. Kent S. Foster, Silver Palm Communications, Inc., 19 FCC Rcd 10,959 (2004) (“*Interim Default Payment Letter*”).

<sup>18</sup> *Interim Default Payment Letter*, 19 FCC Rcd at 10,960. To satisfy this initial default payment obligation, the Division applied Silver Palm’s payments on deposit with the Commission. The Division informed Silver Palm that its final default payment obligation would be determined once winning bids were established for licenses covering the relevant spectrum.

<sup>19</sup> Silver Palm Communications, Inc., Petition for Reconsideration of Notice of Interim Default Payment Obligations for Auction No. 34, filed July 23, 2004 (the “2004 Petition”).

<sup>20</sup> Declaration of Kent S. Foster, Exhibit One, 2004 Petition.

<sup>21</sup> 2004 Petition at 3-4, citing Pacific Wireless Cable, Inc., *Order*, 12 FCC Rcd 9767 (1997) (“*Pacific Wireless*”); The Wireless, Inc., *Order*, 12 FCC Rcd 1821 (1997) (“*The Wireless*”).

failure to make payment.<sup>22</sup> The 2004 Petition further claimed that Silver Palm's past payment record demonstrated its qualifications as a licensee.<sup>23</sup>

11. After reviewing the 2004 Petition, the Division found that Silver Palm had not demonstrated it was a serious, financially qualified entity, emphasizing that it has never made final payment for the Licenses.<sup>24</sup> The Division further determined that Silver Palm was incorrect in suggesting that Commission precedent favored granting it a waiver due to the purportedly inadvertent manner in which it had missed the final payment deadline.<sup>25</sup> The Division therefore concluded that granting a waiver of the final payment deadline would, *inter alia*, undermine section 1.2109's purpose of preventing insincere bidding and the unfair acquisition of licenses by financially unqualified entities.<sup>26</sup>

12. Given these findings, the *Division Order* denied Silver Palm's request for a waiver of the Commission's rules and held that the outstanding debt for its interim default payment was due in full.<sup>27</sup> Following the February 16, 2007 release of the *Division Order*, Silver Palm filed the Reconsideration Petition. Silver Palm claims that granting it a waiver would not undermine the purposes of the Commission's rules and that the transfer of control of Silver Palm to a charity provides support for a waiver.<sup>28</sup> This transfer occurred following the death of Silver Palm's sole owner, Kent S. Foster, in 2006, with the Foster Charitable Foundation, Inc. (the "Foundation") receiving his full ownership interest. Silver Palm states that the Foundation is a non-profit charitable entity organized under section 501(c)(3) of the Internal Revenue Code.<sup>29</sup>

### III. DISCUSSION

13. Silver Palm seeks reconsideration of the *Division Order* based on the transfer of control of Silver Palm to the Foundation and based on alleged errors in the Division's determinations. As discussed below, we find that Silver Palm has not provided adequate grounds to warrant the grant of the Reconsideration Petition.<sup>30</sup>

14. Silver Palm maintains that we should grant the waiver because this would enable it to provide SMR service to the public, thus producing revenues for the Foundation's use.<sup>31</sup> It also argues that a grant would not benefit any individual with a controlling interest or other daily involvement with Silver

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<sup>22</sup> *Id.* at 4.

<sup>23</sup> *Id.* at 5.

<sup>24</sup> *Division Order*, 22 FCC Rcd at 3348 ¶ 13.

<sup>25</sup> *Id.* at 3348-49 ¶¶ 14-15, *citing* Hickory Telephone Company, Inc., *Order*, 12 FCC Rcd 1258 (1997) ("*Hickory*"); *The Wireless; Pacific Wireless*.

<sup>26</sup> *Id.*

<sup>27</sup> *Id.*

<sup>28</sup> Reconsideration Petition at 1-2.

<sup>29</sup> *Id.* at 3-4. The Reconsideration Petition states that Mr. Foster intended for the Foundation "to provide assistance to those that are on the forefront of the battle against cancer." *Id.* at 4.

<sup>30</sup> The Commission reviews petitions for reconsideration under 47 C.F.R. § 1.106. Reconsideration is appropriate only where the petitioner either shows a material error or omission in the original order or raises additional facts not known or existing until after the petitioner's last opportunity to present such matters. *See, e.g.,* MetroPCS Communications, Inc., *Order on Reconsideration*, 25 FCC Rcd 2209, 2213-14 ¶ 13 (2010). The *Division Order* reviewed Silver Palm's 2004 Petition under the waiver standard found in section 1.925 of the Commission's rules and found that Silver Palm had failed to meet that standard. *Division Order*, 22 FCC Rcd at 3346 ¶ 8.

<sup>31</sup> Reconsideration Petition at 8-9.

Palm at the time of the September 30, 2002 payment deadline.<sup>32</sup> We find that transfer of control to the Foundation provides no grounds for waiving the final payment deadline. Our concern that a waiver in this case would undermine the rule's purpose of deterring insincere bidding by other auction participants in the future is not mitigated by the change in control of Silver Palm. We also agree with the Division that any benefit that might be realized from waiving the final payment deadline and granting the Licenses to Silver Palm is speculative and would be outweighed by the substantial harm to the public interest of waiving the payment obligations for an entity that has not shown that it is financially qualified and willing to fulfill the obligations that serve to validate the presumption on which an award of licenses is based.<sup>33</sup> We are not persuaded that Silver Palm's asserted intent to provide service to the public and generate revenues "which would be used to fund philanthropic causes" outweighs the public interest benefit in consistent enforcement of the Commission's competitive bidding rules.<sup>34</sup> Granting a waiver in these circumstances would encourage insincere bidding in the future and increase the likelihood that future winning bidders will not be the parties that can put licenses to their most effective use, but will be the parties that are the most optimistic regarding their chances to secure a post-auction buyer, post-auction financing, or waiver relief similar to that requested by Silver Palm.<sup>35</sup>

15. Silver Palm argues that granting it a waiver would not undermine the purposes of the Commission's payment rules, because its failure to meet the final payment deadline was inadvertent and it was capable of meeting its financial obligation as of the deadline.<sup>36</sup> Silver Palm asserts that the Division erred in finding that it was not financially qualified to acquire the Licenses, claiming that the Division was incorrect to conclude that Silver Palm's failure to make its final payment, even after learning it was due, demonstrated it lacked the necessary qualifications.<sup>37</sup> Silver Palm suggests that the Division's conclusion was speculative and that it should have been based on a review of evidence concerning Silver Palm's financial condition. We disagree. The Division's determination that Silver Palm has not demonstrated that it is a serious, financially qualified entity entitled to a waiver was both sound and supported by Commission precedent.<sup>38</sup> As the Commission has previously stated, "timely payments of

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<sup>32</sup> *Id.*

<sup>33</sup> See Alpine PCS, Inc., CommNet Communications Network, Inc., GLH Communications, Inc., Inforum Communications, Inc., Lancaster Communications, Inc., Allen Leeds, TV Communications Network, Inc., Virginia Communications, Inc., *Memorandum Opinion and Order*, 25 FCC Rcd. 469, 494 ¶ 40 (2010) ("*Alpine*").

<sup>34</sup> Silver Palm's assertions of public interest benefits are similar to public interest arguments the Commission has consistently rejected in declining to grant other requests for waiver of its competitive bidding rules in other contexts. See, e.g., Southern Communications Systems, Inc., *Second Memorandum Opinion and Order*, 16 FCC Rcd 18,357, 18,361 ¶ 9 (2001) ("[E]nforcing the Commission's payment rules . . . serves the public interest better than relying on the wholly unsubstantiated possibility that [petitioner] might have provided service in its license area sooner than the successor licensees will."); AirCom Consultants, Inc., *Order on Reconsideration*, 18 FCC Rcd 1806, 1810-11 (2003) (following Commission precedent in rejecting the petitioner's argument that the down payment and default rules should be waived to provide communications services to underserved tribal lands and rural areas); Letter from Margaret W. Wiener, Chief, Auctions and Industry Analysis Division, Wireless Telecommunications Bureau, to Gregory M. Schmidt, Vice-President, Banks Broadcasting, Inc. and Jonathan D. Blake, Counsel to Banks Broadcasting, Inc., 18 FCC Rcd 10,431, 10,434-36 (2003) (rejecting claim that public interest would be served by offering unsold licenses to auction's second-highest bidder rather than re-auctioning them).

<sup>35</sup> See *Alpine*, 25 FCC Rcd at 494 ¶ 40.

<sup>36</sup> Reconsideration Petition at 5.

<sup>37</sup> *Id.* at 6.

<sup>38</sup> See, e.g., BDPCS, *Memorandum Opinion and Order*, 15 FCC Rcd 17,590, 17,597-99 ¶¶ 13-15 (2000) (citing Implementation of Section 309(j) of the Communications Act - Competitive Bidding, *Second Report and Order*, 9 FCC Rcd 2348, 2382-84 ¶¶ 195-205 (1994)); Winstar Broadcasting Corp., *Memorandum Opinion and Order*, 17 FCC Rcd 6126, 6130-32 ¶¶ 13-15 (2002).

auction obligations are the manner in which we can be assured of the financial qualifications, and thus the seriousness, of a winning bidder.”<sup>39</sup>

16. Silver Palm contends that it was not necessary for it to make final payment after learning it had missed the deadline for doing so.<sup>40</sup> It argues that the “Commission’s rules don’t instruct parties to make random payments to the Commission after they’ve missed a payment deadline.”<sup>41</sup> This argument lacks merit. The Commission’s rules clearly require winning bidders to timely make final payment and do not in any way suspend this obligation if a waiver request is filed after the payment deadline.<sup>42</sup> Silver Palm also asserts that its failure to remit the payment to the Commission after missing the deadline, without another impending deadline or a demand letter, should not have suggested any effort by it to delay or avoid its financial obligation.<sup>43</sup> However, we find that the Division properly raised this concern in light of Silver Palm’s having missed the long-form application deadline for the same reason. It appropriately expected “a financially qualified entity acting in good faith that missed one deadline due to inadvertence to be particularly diligent in avoiding missing a second.”<sup>44</sup>

17. Silver Palm contends that the Division incorrectly interpreted two decisions, which the 2004 Petition cited, as granting waivers of payment deadlines only because the petitioners had subsequently paid in full.<sup>45</sup> We disagree. The Division properly distinguished these decisions from the present matter, stating that each waiver had been granted because “the winning bidder had previously complied with Commission rules, it had made a good faith effort to pay on time, and there was no indication in the record that there had been a deliberate effort to delay payment.”<sup>46</sup> These mitigating factors do not apply to Silver Palm, which had previously failed to meet the long-form application deadline and has never submitted its final payment. It was therefore not entitled to relief from the payment deadline. Silver Palm also suggests that it was improper for the Division to rely on two other decisions in which a waiver was granted based in part upon the petitioners’ full payment, because those decisions were issued after Silver Palm’s 2004 Petition.<sup>47</sup> However, the dates of these decisions are irrelevant. They involve a Commission rule, section 1.2109, that was in effect in its present form at the

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<sup>39</sup> Abundant Life, Inc., *Memorandum Opinion and Order*, 17 FCC Rcd 4006, 4009 ¶ 8 (2002). See also Application of Delta Radio, Inc., *Memorandum Opinion and Order*, 18 FCC Rcd 16,889, 16,896-97 ¶ 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.”), *aff’d sub nom.*, Delta Radio, Inc. v. FCC, 387 F.3d 897 (D.C. Cir. 2004). We reject Silver Palm’s argument that the Division should have granted it a waiver because it was “uncontroverted” that its failure to meet the final payment deadline was inadvertent and that it had the necessary funds to make payment. See Reconsideration Petition at 6. Because the Commission’s determination of an applicant’s financial qualifications is based on the applicant’s timely payment of auction obligations, it is irrelevant that the facts Silver Palm presents pertaining to its missed final payment in an adjudicatory matter in which it is the only party may be “uncontroverted” or “unrefuted.” See Petition for Reconsideration and Motion for Stay of Paging Systems, Inc., *Memorandum Opinion and Order*, 25 FCC Rcd 4036, 4059 ¶ 75 (2010) (Commission cannot act on requests for regulatory relief based on a party’s post-hoc assertions regarding its earlier state of mind and such assertions provide no independent evidence of the validity of a petitioner’s claims).

<sup>40</sup> Reconsideration Petition at 7.

<sup>41</sup> *Id.*

<sup>42</sup> 47 C.F.R. § 1.2109(a).

<sup>43</sup> Reconsideration Petition at 7.

<sup>44</sup> *Division Order*, 22 FCC Rcd at 3349 ¶ 15.

<sup>45</sup> Reconsideration Petition at 6-7, citing *Hickory* and *The Wireless*.

<sup>46</sup> *Division Order*, 22 FCC Rcd at 3349 ¶ 14.

<sup>47</sup> Reconsideration Petition at 6-7, citing Radio Layne, LLC, *Memorandum Opinion and Order*, 22 FCC Rcd 2432 (2007), WSS, LLC, *Memorandum Opinion and Order*, 21 FCC Rcd 6635 (2007).

time of Silver Palm's actions and interpret its payment requirements in a manner consistent with decisions issued several years prior to the filing of the 2004 Petition.<sup>48</sup>

#### IV. CONCLUSION

18. We conclude that the transfer of the ownership interests in Silver Palm to the Foundation does not justify the grant of a waiver. We further find that Silver Palm has failed to demonstrate any error in the Division's denial of the 2004 Petition. We therefore deny the Reconsideration Petition.

#### V. ORDERING CLAUSE

19. Accordingly, IT IS ORDERED that, pursuant to the authority granted in sections 4(i) and 309(j) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i) and 309(j), and section 1.106 of the Commission's Rules, 47 C.F.R. § 1.106, the Petition for Reconsideration filed by Silver Palm Communications, Inc. on March 19, 2007, is DENIED. 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

Ruth Milkman  
Chief, Wireless Telecommunications Bureau

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<sup>48</sup> *Hickory* and *The Wireless* were decided in 1997.