

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

In the Matter of
Ondas de Vida, Inc.,
Licensee of FM Translator Station K256BS,
Palmdale, California
File No.: EB-FIELDWR-16-00020978
NAL/Acct. No.: 201732900003
FRN: 0014400279
Facility ID No. 133849

FORFEITURE ORDER

Adopted: August 6, 2018

Released: August 7, 2018

By the Regional Director, Region Three, Enforcement Bureau:

I. INTRODUCTION

1. We impose a penalty of \$12,000 against Ondas de Vida, Inc., (OdV), the licensee of FM Translator Station K256BS, Palmdale, California (Station), for operating the Station at power levels that exceeded the values specified in the Station’s license and permitted under the Commission’s rules, in violation of the Communications Act of 1934, as amended (Act), and the Commission’s rules. The Enforcement Bureau (Bureau) previously proposed a \$12,000 forfeiture against OdV on April 27, 2017.1 In response, OdV argues that the NAL is based on factual errors.2 After reviewing the NAL Response, we find no reason to cancel, withdraw, or reduce the proposed penalty, and we therefore assess the \$12,000 forfeiture the Bureau previously proposed.

II. BACKGROUND

2. On April 11, 2016, the Los Angeles Office issued a Notice of Violation advising OdV that its operation of the Station violated Section 1.903(a) of the Commission’s rules by operating with an effective radiated power (ERP) exceeding the value printed on the Station’s license.3 On April 29, 2016, OdV submitted a response to the NOV, stating that it had temporarily used a higher-power transmitter while its transmitter was out for repairs and further stating that “[w]e received the repaired transmitter in March and thanks to the help of the FCC inspector we are operating in full compliance with the FCC license.”4 As stated in the NAL, on May 10, 2016, the agent returned to the Station to verify the Station’s compliance with its licensed operating parameters.5 Upon inspection, the agent determined that the Station’s transmitter continued to operate at a transmitter power output (TPO) of 7.5 Watts, which, based

1 Ondas de Vida, Inc., Licensee of FM Translator K256BS, Palmdale, California, Notice of Apparent Liability for Forfeiture, 32 FCC Rcd 3192 (EB 2017) (NAL).

2 Ondas de Vida, Inc, Petition for Reconsideration, May 25, 2017 (NAL Response) (on file in EB-FIELDWR-16-00020978).

3 Ondas de Vida, Inc., Notice of Violation (EB 2017) (NOV) (on file in EB-FIELDWR-16-00020978).

4 Letter from Hector Manzo, President, Ondas de Vida, Inc. (Apr. 29, 2016) (NOV Response) (emphasis added) (on file in EB-FIELDWR-16-00020978).

5 NAL, 32 FCC Rcd at 3193, para. 5.

on the agent's calculations, yielded an ERP of 33.7 Watts, both of which exceed the parameters printed on the Station's license.⁶

3. On February 21 and 22, 2017, an agent returned to the Station and observed that it was operating with a TPO that exceeded the value set forth in its license.⁷ Accordingly, on April 27, 2017, the Bureau issued the *NAL*, finding that OdV had apparently violated Section 301 of the Communications Act of 1934, as amended (Act) and Sections 1.903(a) and 74.1235(e) of the Commission's rules and proposing a monetary forfeiture of \$12,000.⁸ As described in the *NAL*, an agent from the Los Angeles Office determined that the Station was operating with a TPO and an ERP exceeding the values specified in its license (0.005 kW TPO and 0.010 kW ERP).⁹

4. On May 25, 2017, OdV, through counsel, filed a "Petition for Reconsideration" of the *NAL*, in which it argued that the proposed forfeiture should be reduced or cancelled because: (a) the Bureau should have provided notice of its May 10, 2016, measurements before issuing OdV the *NAL*; (b) the Station was entitled to operate at a higher TPO than specified on its license to achieve its authorized ERP; and (c) OdV is a thinly-funded, non-profit entity.¹⁰

III. DISCUSSION

5. The Bureau proposed a forfeiture in this case in accordance with Section 503(b) of the Communications Act of 1934, as amended (Act),¹¹ Section 1.80 of the Commission's rules,¹² and the Commission's *Forfeiture Policy Statement*.¹³ When we assess forfeitures, Section 503(b)(2)(E) of the Act requires that we take into account the "nature, circumstances, extent, and gravity of the violation and, with respect to the violator, the degree of culpability, any history of prior offenses, ability to pay, and such other matters as justice may require."¹⁴ As discussed below, we have fully considered OdV's responses to the *NAL*, but find them unpersuasive. We therefore affirm the \$12,000 forfeiture proposed in the *NAL*.

A. OdV Was Not Entitled to a Second NOV

6. We reject OdV's assertion that the Bureau erred by issuing the *NAL* without first issuing a second NOV to apprise OdV of the results of the agent's May 10, 2016, observation of the Station.¹⁵ OdV states: "[i]t seems clear to [OdV] that the FCC agent had an obligation to notify it in the event he believed the operation was non-compliant to allow [OdV] to investigate and correct the situation."¹⁶ OdV cites no authority establishing such a legal obligation. Simply put, such obligation does not exist. Rather, issuance of the *NAL* in response to OdV's failure to correct the violations specified in the NOV was

⁶ *Id.*

⁷ *NAL*, 32 FCC Rcd at 3193, para. 6.

⁸ *Id.* at 3194-95, paras. 10-11.

⁹ *Id.* These values are equivalent to 5.0 Watts TPO and 10.0 Watts ERP.

¹⁰ See *NAL* Response. Consistent with Section 1.80(f)(3) of the Commission's rules, we will treat OdV's "Petition for Reconsideration" as a response to the *NAL*. See 47 CFR § 1.80(f)(3); see also *Life on the Way Communications, Inc.*, Forfeiture Order, 30 FCC Rcd 2603, 2604, para. 3, n. 8 (EB 2015).

¹¹ 47 U.S.C. § 503(b).

¹² 47 CFR § 1.80.

¹³ *The Commission's Forfeiture Policy Statement and Amendment of Section 1.80 of the Rules to Incorporate the Forfeiture Guidelines*, Report and Order, 12 FCC Rcd 17087 (1997) (*Forfeiture Policy Statement*), *recons. denied*, Memorandum Opinion and Order, 15 FCC Rcd 303 (1999).

¹⁴ 47 U.S.C. § 503(b)(2)(E).

¹⁵ *NAL* Response at 3 - 4, para. 5.

¹⁶ *Id.*

consistent both with the Commission's rules¹⁷ and Bureau precedent.¹⁸ Indeed, we were not required to issue an NOV at all, let alone a second NOV, prior to issuing the *NAL*.¹⁹

7. We likewise reject the argument that, because it lacked notice of the Bureau's February 21, 2017, measurement of TPO and calculation of ERP, OdV's conduct cannot be considered "willful" under Section 503(b)(3).²⁰ This argument is inconsistent with both the *NAL* and the statute. In the *NAL*, the Bureau expressly states that, for purposes of the February 21, 2017, observations, we "rely on the evidence collected . . . only for our conclusion that OdV appears to have exceeded the applicable TPO limit."²¹ Moreover, the Bureau calculated the proposed forfeiture based on operating power levels that exceeded *either* the TPO or the ERP specified in the Station's license.²² In this context, prior notice of the Bureau's calculation of ERP is not what made OdV's behavior willful. Rather, it was OdV's decision to set its transmitter to operate with a TPO of 7.5 Watts that was "willful"—and, thus, the basis for the forfeiture—under Section 503(b)(3) of the Act.²³

B. OdV Was Required to Obtain Authority to Operate at an Increased TPO.

8. We reject OdV's assertion that its operation at a TPO of 7.5 Watts, rather than its authorized TPO of 5.0 Watts, was appropriate because "[OdV] believed in good faith that the TPO of 7.5 [W]atts was necessary due to the damage to the antenna to achieve the authorized ERP of 10 [W]atts and it had not been informed to the contrary by the FCC agent following his May 10, 2016 visit."²⁴ OdV's assertion is flawed in two respects. First, the "responsibility for compliance with the terms of [a station's]

¹⁷ See 47 CFR § 1.89(a) (stating that, while an NOV is needed in the context of a license revocation, suspension, or cease and desist proceeding, an NOV "may be combined with [an NAL]").

¹⁸ See, e.g., *Bay Broadcasting Corp.*, Forfeiture Order, 15 FCC Rcd 13613, 13614-15, para. 5 (EB 2000) (involving an NAL that addressed violations occurring subsequent to the issuance of an NOV).

¹⁹ *Fabrice Polynice North Miami, FL, Harold Sido and Veronise Sido North Miami, FL*, Forfeiture Order, FCC 18-101, paras. 16-17 (Jul. 19, 2018).

²⁰ NAL Response at 4-5, para. 7.

²¹ *NAL*, 31 FCC Rcd at 3193, para. 6, n. 6.

²² *Id.* at 3195, para. 11 (providing, "OdV operated the Station in excess of one or both of the power limits [(i.e., ERP or TPO)] specified on its license, in apparent violation of Section 301 of the Act and Sections 1.903(a) and 74.1235(e)" of the Commission's rules).

²³ Section 503(b) of the Act provides that any person who willfully or repeatedly fails to comply substantially with the terms and conditions of any license, or willfully or repeatedly fails to comply with any of the provisions of the Act or of any rule, regulation, or order issued by the Commission thereunder, shall be liable for a forfeiture penalty. 47 U.S.C. § 503(b). Section 312(f)(1) of the Act defines "willful" as the "conscious and deliberate commission or omission of [any] act, irrespective of any intent to violate" the law. 47 U.S.C. § 312(f)(1). The legislative history to Section 312(f)(1) of the Act clarifies that this definition of willful applies to both Sections 312 and 503(b) of the Act, and the Commission has so interpreted the term in the Section 503(b) context. H.R. Rep. No. 97-765, 97th Cong. 2d Sess. 51 (1982) ("This provision [inserted in Section 312] defines the terms 'willful' and 'repeated' for purposes of section 312, and for any other relevant section of the act (e.g., Section 503) As defined[,] . . . 'willful' means that the licensee knew that he was doing the act in question, regardless of whether there was an intent to violate the law. 'Repeated' means more than once, or where the act is continuous, for more than one day. Whether an act is considered to be 'continuous' would depend upon the circumstances in each case. The definitions are intended primarily to clarify the language in Sections 312 and 503, and are consistent with the Commission's application of those terms"); see, e.g., *S. Cal. Broad. Co.*, Memorandum Opinion and Order, 6 FCC Rcd 4387, 4388, para. 5 (1991), *recons. denied*, 7 FCC Rcd 3454 (1992).

²⁴ NAL Response at 4, para. 6.

license rests solely and exclusively with the licensee.”²⁵ Thus, OdV’s obligation to operate the Station at its authorized TPO is independent of any notice from the Commission. Second, Section 74.1235(e) obligates OdV to operate the Station at a TPO that does not exceed 105% of the Station’s authorized TPO.²⁶ However, the agent observed OdV operating the Station at 150% of its authorized TPO. To the extent that OdV believed that it needed to operate the Station with a TPO of 7.5 Watts to achieve its authorized ERP,²⁷ OdV should have either sought a modification of the Station’s license or requested special temporary authority to operate at an increased TPO. It did neither. We therefore reject OdV’s assertion that, absent authorization from the Commission, it is entitled to operate the Station with a TPO that exceeds 105% of its authorized TPO.

C. OdV Provides No Basis to Reduce the Forfeiture on the Basis of its Inability to Pay.

9. In the NAL Response, OdV states that it “relies entirely upon public support” to operate the Station, and that “it has been a financial struggle for [OdV] to operate” the Station.²⁸ The *NAL* states that, in order for the Commission to consider a request to reduce or cancel a proposed forfeiture, OdV must submit certain financial documentation to demonstrate its inability to pay. Here, OdV provided no financial documentation to support its statements about its financial condition. Accordingly, we find no basis to reduce the forfeiture.

IV. CONCLUSION

10. Based on the record before us and in light of the applicable statutory factors, we conclude that OdV willfully and repeatedly violated Section 301 of the Act and Sections 1.903(a) and 74.1235(e) of the Commission’s rules by operating the Station at power levels in excess of its authorization. We decline to cancel or reduce the \$12,000 forfeiture proposed in the *NAL*.

V. ORDERING CLAUSES

11. Accordingly, **IT IS ORDERED** that, pursuant to Section 503(b) of the Act,²⁹ and Section 1.80 of the Commission’s rules,³⁰ Ondas de Vida, Inc., **IS LIABLE FOR A MONETARY FORFEITURE** in the amount of Twelve Thousand Dollars (\$12,000) for willfully and repeatedly violating Section 301 of the Act and Sections 1.903(a) and 74.1235(e) of the Commission’s rules.³¹

12. Payment of the forfeiture shall be made in the manner provided for in Section 1.80 of the Commission’s rules within thirty (30) calendar days after the release of this Forfeiture Order.³² If the forfeiture is not paid within the period specified, the case may be referred to the U.S. Department of Justice for enforcement of the forfeiture pursuant to Section 504(a) of the Act.³³

13. Payment of the forfeiture must be made by check or similar instrument, wire transfer, or credit card, and must include the NAL/Account Number and FRN referenced above. Ondas de Vida, Inc.,

²⁵ See, e.g., *Hemmingford Media, Inc.*, Forfeiture Order, 14 FCC Rcd 2940, 2941-2 (CIB 1999) (citing *Empire Broadcasting Corp.*, Memorandum Opinion and Order, 25 FCC 2d 68 (1970)); see also *Vearl Pennington and Michael Williamson, Morehead, Kentucky*, Notice of Apparent Liability for Forfeiture, 32 FCC Rcd 4206, 4210, para 12 (2017) (citing *Hemmingford Media, Inc.*).

²⁶ 47 CFR § 74.1235(e).

²⁷ NAL Response at 3, para. 4.

²⁸ NAL Response at 2, para. 2.

²⁹ 47 U.S.C. § 503(b).

³⁰ 47 CFR § 1.80.

³¹ 47 U.S.C. § 301; 47 CFR §§ 1.903(a), 74.1235(e).

³² *Id.*

³³ 47 U.S.C. § 504(a).

shall send electronic notification of payment to Matthew L. Gibson at matthew.gibson@fcc.gov, with a copy to field@fcc.gov, on the date said payment is made. Regardless of the form of payment, a completed FCC Form 159 (Remittance Advice) must be submitted.³⁴ When completing the Form 159, enter the Account Number in block number 23A (call sign/other ID) and enter the letters “FORF” in block number 24A (payment type code). Below are additional instructions that should be followed based on the form of payment selected:

- Payment by check or money order must be made payable to the order of the Federal Communications Commission. Such payments (along with completed Form 159) must be mailed to the Federal Communications Commission, P.O. Box 979088, St. Louis, MO 63197-9000, or sent via overnight mail to U.S. Bank – Government Lockbox #979088, SL-MO-C2-GL, 1005 Convention Plaza, St. Louis, MO 63101.
- Payment by wire transfer must be made to ABA Number 021030004, receiving bank TREAS/NYC, and Account Number 27000001. To complete the wire transfer and ensure appropriate crediting of the wired funds, a completed Form 159 must be faxed to U.S. Bank at (314) 418-4232 on the same business day the wire transfer is initiated.
- Payment by credit card must be made by providing the required credit card information on FCC Form 159 and signing and dating the Form 159 to authorize the credit card payment. The completed Form 159 must then be mailed to Federal Communications Commission, P.O. Box 979088, St. Louis, MO 63197-9000, or sent via overnight mail to U.S. Bank – Government Lockbox #979088, SL-MO-C2-GL, 1005 Convention Plaza, St. Louis, MO 63101.

14. Any request for making full payment over time under an installment plan should be sent to: Chief Financial Officer – Financial Operations, Federal Communications Commission, 445 12th Street, SW, Room 1-A625, Washington, DC 20554.³⁵ Questions regarding payment procedures should be directed to the Financial Operations Group Help Desk by telephone, 1-877-480-3201, or by e-mail, ARINQUIRIES@fcc.gov.

15. **IT IS FURTHER ORDERED** that a copy of this Forfeiture Order shall be sent by first class mail and certified mail, return receipt requested, to Hector Manzo, President, Ondas de Vida, Inc., P.O. Box 94, Victorville, California, 92393, and to Jeffrey D. Southmayd, Esq., Southmayd & Miller, 4 Ocean Ridge Boulevard South, Palm Coast, Florida, 32137.

FEDERAL COMMUNICATIONS COMMISSION

Lark Hadley
Regional Director, Region Three
Enforcement Bureau

³⁴ An FCC Form 159 and detailed instructions for completing the form may be obtained at <http://www.fcc.gov/Forms/Form159/159.pdf>.

³⁵ See 47 CFR § 1.1914.