

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

In the Matter of)	
)	File No.: EB-FIELDWR-16-00020978
Ondas de Vida, Inc.,)	NAL/Acct. No.: 201732900003
Licensee of FM Translator Station K256BS,)	FRN: 0014400279
Palmdale, California)	Facility ID: 138849
)	

MEMORANDUM OPINION AND ORDER

Adopted: August 6, 2020

Released: August 6, 2020

By the Chief, Enforcement Bureau:

I. INTRODUCTION

1. The Commission expects spectrum licensees to operate within the parameters specified in their licenses and set forth in the applicable service rules. If they are unable to do so, licensees must seek the Commission’s approval to operate with altered parameters. When licensees fail to comply with these two obligations, they risk causing harmful interference to other licensees. Likewise, stations operating at variance from their authorizations degrade the accuracy of the license databases that the Commission uses to ensure that it is maximizing use of increasingly congested spectrum. Accordingly, the Commission takes seriously cases in which a licensee engages in “self-help” by modifying a station’s operating parameters without providing notice to, or seeking the approval of, the Commission.

2. In furtherance of those objectives, we deny the Petition for Reconsideration (Petition) filed by Ondas de Vida, Inc. (ODV),¹ the licensee of FM Translator Station K256BS, Palmdale, California (Station), seeking reconsideration of the *Forfeiture Order* issued by the Enforcement Bureau (Bureau).² In the *Forfeiture Order*, the Bureau imposed a forfeiture of \$12,000 against ODV for operating the Station at power levels that exceeded the values specified on the Station’s license and permitted under the Commission’s rules, in violation of the Communications Act of 1934, as amended (Act),³ and the Commission’s rules.

3. Upon review of the Petition and the entire record, we find no basis for reconsideration. Reconsideration is appropriate only when the petitioner either demonstrates a material error or omission in the underlying order or raises additional facts not known or not existing until after the petitioner’s last opportunity to present such matters.⁴ ODV’s Petition fails to present facts or arguments warranting

¹ Any entity that is a “Small Business Concern” as defined in the Small Business Act (Pub. L. 85-536, as amended) may avail itself of rights set forth in that Act, including rights set forth in 15 U.S.C. § 657, “Oversight of Regulatory Enforcement,” in addition to other rights set forth herein.

² *Ondas de Vida, Inc.*, Forfeiture Order, 33 FCC Rcd 8010 (EB 2018) (*Forfeiture Order*); Ondas de Vida, Inc., Petition for Reconsideration, Sept. 3, 2018 (Petition) (on file in EB-FIELDWR-16-00020978).

³ 47 U.S.C. §§ 151, *et seq.*

⁴ See 47 CFR § 1.106(c); *EZ Sacramento, Inc.*, Memorandum Opinion and Order, 15 FCC Rcd 18257, 18257, para. 2 (EB 2000) (*citing WWIZ, Inc.*, Memorandum Opinion and Order, 37 FCC Rcd 685, 686 (1964), *aff’d sub. nom. Lorain Journal Co. v. FCC*, 351 F.2d 824 (D.C. Cir. 1965), *cert. denied*, 383 U.S. 967 (1966)); see also *Ely Radio, LLC*, Memorandum Opinion and Order, 27 FCC Rcd 7608, 7610, para. 6 (EB 2012) (articulating the standard of review for Petitions for Reconsideration).

reconsideration. We therefore find that the Bureau properly decided the matters raised and deny ODV's Petition.

II. BACKGROUND

4. On April 27, 2017, the Bureau issued the *Notice of Apparent Liability for Forfeiture* to ODV, proposing a \$12,000 forfeiture for ODV's apparent violation of section 301 of the Act and sections 1.903(a) and 74.1235(e) of the Commission's rules.⁵ In the *Notice*, the Bureau found that, on two separate occasions, ODV operated the Station at power levels that exceeded those specified on the Station's license.⁶ On May 25, 2017, ODV, through counsel, responded to the allegations contained in the *Notice*.⁷ In the Response, ODV argued that the proposed forfeiture should be reduced or cancelled because (a) the Bureau should have alerted ODV of the violations before issuing the *Notice*;⁸ (b) the Station was entitled to operate at a higher transmitter output power than specified on the face of its license;⁹ and (c) ODV was a thinly funded, non-profit entity.¹⁰ On August 7, 2018, after considering and rejecting ODV's arguments in the Response, the Bureau issued the *Forfeiture Order* imposing a \$12,000 penalty.¹¹

5. On September 3, 2018, ODV filed the Petition, in which it made three arguments for rescission of the *Forfeiture Order*. ODV first repeated two arguments that it had made in the Response: that the Bureau should have provided some sort of notice before issuing the *Notice*,¹² and that operating the Station at a higher transmitter power output than was specified on its license was a permissible, good-faith effort to operate at its authorized effective radiated power.¹³ ODV then raised a new argument: that the Bureau erred by not granting a downward reduction of the forfeiture based on ODV's history of compliance.¹⁴ In the Petition, ODV also admitted that, following damage to the Station's antenna, it intentionally increased the Station's transmitter power in an effort to continue operating at the Station's authorized effective radiated power.¹⁵ ODV acknowledged that, in retrospect, it should have followed established procedures—filing an application for special temporary authority or an application to modify the Station's license—to obtain Commission approval to increase the Station's transmitter power output.¹⁶

⁵ The *Notice* and *Forfeiture Order* include more complete discussions of the facts and history of this case and are incorporated herein by reference. See generally *Ondas de Vida, Inc.*, Notice of Apparent Liability for Forfeiture, 32 FCC Rcd 3192 (EB 2017) (*Notice*); *Forfeiture Order*.

⁶ See *Notice*, 32 FCC Rcd at 3192-93, paras. 2-3.

⁷ *Ondas de Vida, Inc.*, Petition for Reconsideration, May 25, 2017 (Response) (on file in EB-FIELDWR-16-00020978). Although ODV captioned its Response as a "Petition for Reconsideration," we treated it as a response to the *Notice* because the *Notice* was not a final Enforcement Bureau decision, but rather a notice of apparent liability for forfeiture. See 47 CFR § 1.106 (stating that an aggrieved party may file a Petition for Reconsideration of only "final actions taken pursuant to delegated authority . . ."); see also 47 CFR § 1.80(f)(3) (setting forth the response process for a notice of apparent liability); *Notice*, 32 FCC Rcd at 3195, para. 14 (providing ODV with 30 days to respond to the *Notice*).

⁸ Response at 4, para. 6.

⁹ *Id.* at 3, para. 4.

¹⁰ *Id.* at 2, para. 2.

¹¹ *Forfeiture Order*, 33 FCC Rcd at 8011-13, paras. 6-7 (additional notice not required), para. 8 (modification required prior Commission approval), para. 9 (no basis for downward reduction).

¹² Petition at 7, para. 10.

¹³ *Id.* at 3, para. 4.

¹⁴ *Id.* at 6, paras. 8-9.

¹⁵ *Id.* at 3, para. 4.

¹⁶ *Id.* at 4, para. 4.

III. DISCUSSION

6. The Bureau issued a forfeiture in this case in accordance with section 503(b) of the Act,¹⁷ section 1.80 of the Commission's rules,¹⁸ and the Commission's *Forfeiture Policy Statement*.¹⁹ When we assess forfeitures, section 503(b)(2)(E) 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."²⁰ We have fully considered the Petition, which includes a variety of legal and factual arguments, but we find none of them persuasive. We therefore affirm the \$12,000 forfeiture assessed in the *Forfeiture Order*.

A. We Again Reject ODV's Lack of Notice and Good Faith Compliance Arguments

7. Section 1.106(p)(3) of the Commission's rules²¹ authorizes the Bureau to dismiss arguments that it has previously considered and rejected. In the Petition, ODV asserted that the Bureau was obligated to provide notice before issuing the *Notice* proposing a monetary forfeiture²² and that the unauthorized modification of the Station's transmitter power output was a permissible means of self-help to enable it to operate at its authorized effective radiated power.²³ ODV raised both arguments in its Response to the *Notice*, and the Bureau considered and rejected both arguments in the *Forfeiture Order*.²⁴ Accordingly, the Bureau dismisses both arguments as repetitive under section 1.106(p)(3).

8. We also reject both arguments on their merits. ODV is mistaken that it was somehow entitled to additional warning before the Bureau could issue the *Notice*.²⁵ As the Bureau noted in *Missouri RSA No. 2 Partnership*, "[n]othing in the Communications Act or the Commission's Rules entitles a licensee to an opportunity to correct a violation prior to the issuance of a [Notice of Apparent Liability for Forfeiture]."²⁶ ODV also asserts that section 0.111(a)(19) of the Commission's rules, which states that one function (of many) of the Bureau is to "[e]ncourage cooperative compliance efforts[.]"²⁷

¹⁷ 47 U.S.C. § 503(b).

¹⁸ 47 CFR § 1.80.

¹⁹ *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).

²⁰ 47 U.S.C. § 503(b)(2)(E).

²¹ 47 CFR § 1.106(p)(3).

²² Petition at 7, para. 10. Although the Petition cited, for the first time in this proceeding, section 0.111(a)(19) of the Commission's rules to support its argument that the Bureau was somehow obligated to provide some form of notice to ODV before issuing the *Notice*, we view the reference to section 0.111(a)(19) of the Commission's rules as an amplification of the argument that ODV made in the Response and not a new argument for purposes of section 1.106(p)(3) of the Commission's rules. *See, e.g., WKMJ Radio Live the People Station, Inc.*, Memorandum Opinion and Order, 31 FCC Rcd 4306, 4307, para. 3 (2016) (rejecting petitioner's assertion that it was raising a new argument where the argument "does no more than repeat, re-characterize, or expand arguments already made, considered, and rejected.").

²³ *Id.* at 3, para. 4.

²⁴ *See supra* para. 4.

²⁵ Petition at 7, para. 10.

²⁶ *Missouri RSA No. 2 Partnership d.b.a Alltel*, Forfeiture Order 18 FCC Rcd 12653, 12654, para. 6 (EB 2003) (*Missouri RSA Forfeiture Order*); *see also Fabrice Polynice North Miami, FL, Harold Sido and Veronise Sido North Miami, FL*, Forfeiture Order, 33 FCC Rcd 6852, 6858-59, paras. 16-18 (2018); *Radio X Broadcasting Corporation, Bayamon, Puerto Rico*, Memorandum Opinion and Order, 19 FCC Rcd 18690, 18692, para. 7 (EB 2004) (following *Missouri RSA Forfeiture Order*), *review denied*, Memorandum Opinion and Order, 21 FCC Rcd 12209 (2006).

²⁷ *See* 47 CFR § 0.111(a)(19).

somehow requires the Bureau to provide licensees with notice and an opportunity to cure observed violations before proposing a monetary forfeiture.²⁸ ODV cites no authority—nor are we aware of any—supporting its novel interpretation of section 0.111(a)(19) of the Commission’s rules. Accordingly, we reject the notion that section 0.111(a)(19) of the Commission’s rules permits (to borrow from the *Missouri RSA Forfeiture Order*) a licensee to “sit back and await Commission findings of violation before taking appropriate steps to ensure compliance with Commission rules.”²⁹

9. We also reject ODV’s reinterpretation of the Act to create a “good faith” compliance efforts exclusion from the statutory definition of “willful.” 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.³⁰ Thus, under a plain reading of the Act, we need not reach the issue whether ODV was acting in good faith because in the Petition, ODV admits to the conscious and deliberate acts of “estimating that an output power of 7.5 watts was necessary to operate with an effective radiated power of 10 watts” and increasing the transmitter power output consistent with that belief.³¹ Further, this was not a situation in which, following damage to the Station’s antenna, ODV had no other means of complying with the Commission’s rules. Indeed, the Petition identifies the correct response when an FM translator licensee needs to increase its transmitter power output to achieve its authorized effective radiated power: seek a modification of the station’s license or special temporary authority.³² Finally, we observe that where the Commission has examined a licensee’s good faith compliance efforts, it has done so in the context of a downward adjustment of a forfeiture and not to assess a licensee’s liability in the first instance.³³ Accordingly, we find that ODV willfully violated the Act and the Commission’s rules, as set forth in the *Forfeiture Order*, and we reject ODV’s arguments to the contrary.

B. ODV is Not Entitled to a Downward Reduction Based on its History of Compliance

10. ODV’s argument that it is entitled to a downward adjustment based on its history of compliance is procedurally barred under section 1.106(c) of the Commission’s rules.³⁴ To start, in its Response to the *Notice*, ODV did not seek a downward reduction based on its purported history of

²⁸ Petition at 7, para. 10.

²⁹ *Missouri RSA Forfeiture Order*, 18 FCC Rcd at 12654, para. 6.

³⁰ 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. . . . The definition[] [is] intended primarily to clarify the language in sections 312 and 503, and [is] consistent with the Commission’s application of [the] term[]”); *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).

³¹ Petition at 3, para. 4.

³² *Id.* at 4, para. 4 (“perhaps [ODV] should have requested either a license modification or special temporary authority to operate with an increased [transmitter power output] . . .”).

³³ *See, e.g., Infinity Radio Operations, Inc.*, Order on Review, 22 FCC Rcd 9824, 9829, para. 16 (2007) (stating that “corrective measures before the licensee is notified of an investigation are not necessarily sufficient to avoid enforcement action”), *citing Mid-Missouri Broadcasting, Inc.*, Notice of Apparent Liability for Forfeiture, 19 FCC Rcd 22900, 22902-03, para. 8 (EB 2004) (stating that post-violation compliance efforts, while laudable, “are not relevant to our determination of [an] appropriate forfeiture amount.”).

³⁴ 47 CFR § 1.106(c) (stating that a petition for reconsideration relying on new facts or arguments “may be granted only” when the petitioner satisfies the conditions of section 1.106(c)(1) (changed circumstances since the last opportunity to present such matters to the Commission or facts or arguments unknown to the petitioner until after the last opportunity to present such matters to the Commission) or (c)(2) (consideration of new facts or arguments is “required in the public interest”).

compliance.³⁵ As such, ODV's assertion that the Bureau erred in not granting such a reduction is precisely the sort of argument that must be procedurally dismissed because ODV had the opportunity to request a downward reduction of the forfeiture in its Response to the *Notice*, yet did not.³⁶ Likewise, ODV fails to assert or otherwise demonstrate that the public interest would be served by considering ODV's argument at this stage of the proceeding.³⁷ Accordingly, by operation of section 1.106(c) of the Commission's rules,³⁸ we must dismiss the portion of the Petition seeking a downward reduction based on ODV's purported history of compliance.

11. We also reject this argument on the merits. ODV states that the *Forfeiture Order* imposes the first forfeiture in its otherwise "unblemished" tenure as a Commission licensee.³⁹ While this action may be ODV's first *monetary* sanction, we note that, under applicable precedent, we also consider non-monetary sanctions when considering a licensee's history of compliance.⁴⁰ Viewed in the context of applicable precedents, we disagree that ODV has an "unblemished" history of compliance.⁴¹

IV. CONCLUSION

12. Based on the record before us and in light of the applicable statutory factors, we affirm our conclusion 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 exceeding the levels authorized under the Station's license. We further affirm our decision not to cancel or reduce the \$12,000 forfeiture.

³⁵ See Response at 2, para. 2 (only seeking a downward reduction of the *Notice*'s proposed forfeiture on the basis of the station's financial condition).

³⁶ See 47 CFR § 1.106(c)(1).

³⁷ See 47 CFR § 1.106(c)(2).

³⁸ 47 CFR § 1.106(c).

³⁹ Petition at 6, para. 9.

⁴⁰ See *Tidewater Communications, LLC*, Order on Review, 25 FCC Rcd 1675, 1678-79, para. 11 (2010) (affirming the Bureau's rejection of a request for a downward reduction based on a history of compliance where a prior monetary forfeiture was cancelled but the underlying notice of violation survived).

⁴¹ See *Ondas de Vida Network, Inc. Licensee of Station K284CD*, Notice of Violation (EB 2017), <https://docs.fcc.gov/public/attachments/DOC-343773A1.pdf> (operating from unauthorized location and with excessive power); *Ondas de Vida, Inc., Licensee of Radio Station K205DZ*, Notice of Violation (EB 2009), <https://docs.fcc.gov/public/attachments/DOC-292674A1.pdf> (antenna orientation and overpowered). If viewed outside the narrow types of violations at issue in this proceeding, ODV's description of its compliance history as "unblemished" begins to strain credulity. See *Ondas de Vida, Inc., Licensee of Station K212GC*, Notice of Violation (EB 2013), <https://docs.fcc.gov/public/attachments/DOC-321205A1.pdf> (interference to another licensee); *Ondas de Vida Network, Inc., Licensee of Station K212GC*, Notice of Violation (EB 2013), <https://docs.fcc.gov/public/attachments/DOC-318539A1.pdf> (interference to another licensee); *Ondas de Vida Network, Inc., Licensee of Station K234BS*, Notice of Violation (EB 2013), <https://docs.fcc.gov/public/attachments/DOC-324209A1.pdf> (unauthorized modification of transmission facility); *Ondas de Vida, Inc., Licensee of Radio Station K205DZ*, Notice of Violation (EB 2011), <https://docs.fcc.gov/public/attachments/DOC-311101A1.pdf> (antenna orientation); *Ondas de Vida Network, Inc., Licensee of Radio Station KODV(FM)*, Notice of Violation (EB 2010), <https://docs.fcc.gov/public/attachments/DOC-299874A1.pdf> (EAS violations); *Ondas de Vida, Inc., Licensee of Radio Station K205DZ*, Notice of Violation (EB 2007), <https://docs.fcc.gov/public/attachments/DOC-276660A1.pdf> (antenna orientation).

V. ORDERING CLAUSES

13. Accordingly, **IT IS ORDERED** that, pursuant to section 405 of the Act and section 1.106 of the Commission's rules, the Petition for Reconsideration filed by Ondas de Vida, Inc. is hereby **DISMISSED**, or in the alternative, **DENIED**.⁴²

14. **IT IS FURTHER ORDERED** that, pursuant to section 503(b) of the Act and sections 1.80 of the Commission's rules,⁴³ Ondas de Vida, Inc. **IS LIABLE FOR A MONETARY FORFEITURE** 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.⁴⁴

15. 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 date of this Memorandum Opinion and Order.⁴⁵ 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.⁴⁶

16. Payment of the forfeiture must be made by credit card, ACH (Automated Clearing House) debit from a bank account using the Commission's Fee Filer (the Commission's online payment system),⁴⁷ or by wire transfer. The Commission no longer accepts forfeiture payments by check or money order. Below are instructions that payors should follow based on the form of payment selected:⁴⁸

- Payment by wire transfer must be made to ABA Number 021030004, receiving bank TREAS/NYC, and Account Number 27000001. A completed Form 159 must be faxed to the Federal Communications Commission at 202-418-2843 or e-mailed to RROGWireFaxes@fcc.gov on the same business day the wire transfer is initiated. Failure to provide all required information in Form 159 may result in payment not being recognized as having been received. When completing FCC Form 159, enter the Account Number in block number 23A (call sign/other ID), enter the letters "FORF" in block number 24A (payment type code), and enter in block number 11 the FRN(s) captioned above (Payor FRN).⁴⁹ For additional detail and wire transfer instructions, go to <https://www.fcc.gov/licensing-databases/fees/wire-transfer>.
- Payment by credit card must be made by using the Commission's Fee Filer website at <https://apps.fcc.gov/FeeFiler/login.cfm>. To pay by credit card, log-in using the FRN captioned above. If payment must be split across FRNs, complete this process for each FRN. Next, select "Pay bills" on the Fee Filer Menu, and select the bill number associated with the NAL Account—the bill number is the NAL Account number with the first two digits excluded—and then choose the "Pay by Credit Card" option. Please note that there is a \$24,999.99 limit on credit card transactions.
- Payment by ACH must be made by using the Commission's Fee Filer website at <https://apps.fcc.gov/FeeFiler/login.cfm>. To pay by ACH, log in using the FRN captioned above. If payment must be split across FRNs, complete this process for each FRN. Next,

⁴² 47 U.S.C. § 405; 47 CFR § 1.106.

⁴³ 47 U.S.C. § 503(b); 47 CFR § 1.80.

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

⁴⁵ 47 CFR § 1.80.

⁴⁶ 47 U.S.C. § 504(a).

⁴⁷ Payments made using the Commission's Fee Filer system do not require the submission of an FCC Form 159.

⁴⁸ For questions regarding payment procedures, please contact the Financial Operations Group Help Desk by phone at 1-877-480-3201 (option #6), or by e-mail at ARINQUIRIES@fcc.gov.

⁴⁹ Instructions for completing the form may be obtained at <http://www.fcc.gov/Forms/Form159/159.pdf>.

select “Pay bills” on the Fee Filer Menu and then select the bill number associated to the NAL Account—the bill number is the NAL Account number with the first two digits excluded—and choose the “Pay from Bank Account” option. Please contact the appropriate financial institution to confirm the correct Routing Number and the correct account number from which payment will be made and verify with that financial institution that the designated account has authorization to accept ACH transactions.

17. 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, S.W., Room 1-A625, Washington, D.C. 20554.⁵⁰ Questions regarding payment procedures should be directed to the Financial Operations Group Help Desk by phone, 1-877-480-3201, or by e-mail, ARINQUIRIES@fcc.gov.

18. **IT IS FURTHER ORDERED** that a copy of this Memorandum Opinion and 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

Rosemary C. Harold
Chief
Enforcement Bureau

⁵⁰ See 47 CFR § 1.1914.