

Sanction: Decision by Ofcom

Imposed on BBA Media Ltd (Ofcom community radio licence number: CR072).

For the failure to broadcast a licensed radio service in accordance with its Licence Conditions.

**Consideration of
Sanction against:**

BBA Media Ltd (the "Licensee") in respect of its service Westside Radio ("the Licensed Service")

For:

Breach of Licence Conditions 2(1) and 2(4) in Part 2 of the Schedule to the community radio licence held by the Licensee in respect of the Licensed Service ("the Licence")

Between:

31 January to 21 March 2011 (the "Relevant Period")

Decision:

To impose a financial penalty (payable to HM Paymaster General) of £500.00.

Executive Summary

1. Westside Radio is a community radio station licensed by Ofcom to the Licensee BBA Media Ltd serving the multicultural community living in Southall, west London, with a particular focus on young people in the area.
2. Under the Licence the Licensee is required to provide the Service and maintain the character of the Service throughout the licence period.
3. Following a complaint that the Licensed Service was not broadcasting an audio signal Ofcom commenced an investigation. The Licensee admitted that the radio service had not been compliant throughout much of February when a programme service had not been provided. Subsequently the Licensee provided an automated 'sustaining service' that did not meet the requirement to provide typically 12 hours per day of live output. In accordance with its published procedures, Ofcom found the Licensee to be in breach of conditions 2(1) and 2(4) in Part 2 of the Schedule to the community radio licence held by BBA Media.
4. Condition 2(1) requires that: *"The Licensee shall provide the Licensed Service specified in the Annex for the Licence Period."* Condition 2(4) requires that: *"The Licensee shall ensure that the Licensed Service accords with the proposals set out in the Annex so as to maintain the character of the Licensed service throughout the Licence Period."*
5. In accordance with Ofcom's Procedures for the consideration of statutory sanctions in cases of a breach of broadcast licence conditions ("the Sanctions Procedures"¹) Ofcom has considered whether the breach is sufficiently serious as to warrant the imposition of a statutory sanction on the Licensee.
6. This paper sets out Ofcom's decision, having taken into account all of the relevant material, that a sanction is appropriate and that it would be appropriate and proportionate to impose a financial penalty of £500.00.

Summary of Ofcom's Sanction Decision

7. After considering all the evidence and the representations made to it by the Licensee, Ofcom decided that the breach was so serious that a financial penalty should be imposed in accordance with Ofcom's Procedures for the consideration of statutory sanctions in breaches of broadcast licenses (the "Sanctions Procedures"). Ofcom also considered the level of fine to be imposed, in accordance with Ofcom's Penalty Guidelines.
8. Having regard to the serious nature of the breach and having regard to the Licensee's representation and Ofcom's Penalty Guidelines, Ofcom decided it was appropriate and proportionate in the circumstances to impose a financial penalty of £500 on the Licensee in respect of the breach (payable to HM Paymaster General).

¹ Published at: <http://stakeholders.ofcom.org.uk/binaries/broadcast/guidance/854750/statutory-sanctions.pdf>

Legal Framework

Ofcom's duties

9. In discharging its functions, Ofcom's principal duties are to further the interests of citizens in relation to communications matters and the interests of consumers under section 3(1) of the Communications Act 2003 ("2003 Act") and to secure a number of other matters including the optimal use for wireless telegraphy of the electro-magnetic spectrum (section 3(2)(a) of the 2003 Act).

The Broadcasting Act 1990

10. Section 106(1) of the Broadcasting Act 1990 (the "1990 Act") provides that a licence shall include such conditions as appear to Ofcom to be appropriate for securing that the character of the licensed service is maintained during the period for which the licence is in force.
11. Section 106(2) of the 1990 Act provides that a licence shall include conditions requiring the licence holder to secure that the licensed service serves so much of the area or locality for which it is licensed to be provided as is for the time being reasonably practicable.
12. If Ofcom is satisfied that a licensee has failed to comply with any condition of the licence or with any direction given by Ofcom, Ofcom may decide to impose a sanction in accordance with sections 110 or 111 of the 1990 Act. Under the former, Ofcom may require a community licensee to pay a financial penalty of up to £250,000. Alternatively, Ofcom may decide to shorten the licence by up to two years or it may suspend the licence for up to six months. Under section 111, Ofcom has the power to revoke a licence if it is satisfied that the licensee is failing to comply with any condition of the licence or any direction given by Ofcom, and that failure is such that, if not remedied, it would justify revocation.

Community Radio Order 2004

13. Article 3(1) (b) of the Community Radio Order 2004 (the "Order") provides that a community radio service must be provided in order to deliver "social gain". Social gain is defined in article 2 as the achievement of the four objectives set out in paragraph (2) of that article together with the achievement of any other objectives of a social nature, which may include those listed in paragraph (3). Included in paragraph (2) is the objective of the provision of sound broadcasting services to individuals who are otherwise underserved by such services.

Relevant Licence Conditions

14. Conditions 2(1) and 2(4) in Part 2 of the Schedule to the Licensee's licence are included pursuant to sections 106 of the 1990 Act as described above. These conditions state:
 - Condition 2(1) contained in Part 2 of the Schedule to the Licence:
"The Licensee shall provide the Licensed Service specified in the Annex for the licence period."
 - Condition 2(4), contained in Part 2 of the Schedule to the licence:

“The Licensee shall ensure that the Licensed Service accords with the proposals set out in the Annex so as to maintain the character of the Licensed Service throughout the licence period.”

Penalty Guidelines

15. In determining the amount of any financial penalty to be imposed Ofcom must have regard to its penalty guidelines issued under section 392 of the 2003 Act (“Penalty Guidelines”).

Consideration of a Statutory Sanction

Details of the Breach

16. The Licensee BBA Media Ltd. is a company which holds a licence to provide a radio service, Westside Radio. The community radio service is for the multicultural community living in Southall, west London with a particular focus on young people in the area. It has been on air since September 2007. The service relies mostly on volunteers to present and produce output.
17. In a complaint received by Ofcom on 25 February 2011 the complainant alleged that they had “...*noticed dead air on 89.6 (Westside Radio’s frequency) each day (23 and 24 February) ...[and] also noticed they were on dead air on another occasion a week or so ago.*”
18. Prior to that occurrence the Licensee had been in correspondence with Ofcom in December 2010 regarding the possibility of moving the studios and transmission site. By mid-January the licensee advised Ofcom that a studio move had been settled upon.
19. Ofcom wrote to BBA Media on 25 February asking for the Licensee’s comments and reminding the Licensee that failure to provide the service set out in the station’s Key Commitments was a breach of Licence Conditions. In a telephone conversation with the broadcaster’s station manager on 28 February the Licensee confirmed to Ofcom that before that date Westside Radio had not been broadcasting for a number of weeks and that the station was now transmitting a ‘sustaining’ service.
20. Ofcom then wrote back to the Licensee on 28 February indicating that it appeared to Ofcom that BBA Media was not delivering the required Character of Service set out in the service’s Key Commitments. Subject to any representations that it might make in response, the Licensee was in breach, therefore, of the following two Licence Conditions:
 - Condition 2(1) contained in Part 2 of the Schedule to the Licence:
“The Licensee shall provide the Licensed Service specified in the Annex for the licence period.”
 - Condition 2(4), contained in Part 2 of the Schedule to the licence:
“The Licensee shall ensure that the Licensed Service accords with the proposals set out in the Annex so as to maintain the character of the Licensed Service throughout the licence period.”
21. In accordance with Ofcom’s published procedures Ofcom’s letter of 28 February explained that Ofcom was considering whether to make a determination that the Licensee was in

breach of its Licence as set out above. Before doing so, however, Ofcom was providing BBA Media with an opportunity to provide written representations about the matters referred to and, in particular, with the opportunity to explain how, if at all, BBA Media considered it was complying with the obligations in Conditions 2(1) and 2(4).

Reply from the licensee

22. In its response of 28 February 2011, the Licensee made the following representations:

- The radio station had to vacate its premises by 31 January due to expiry of the lease
- A search for suitable premises had been fruitless and an extension to the duration of the existing lease was not possible
- Although subsequently suitable premises had been identified the lease was not due to be signed until 4 March
- In the meantime, the Licensee had planned to make arrangements to provide an automated service, using a PC, set up in the offices of a local company
- However, at the last minute this solution was no longer possible. The Licensee explained that it looked into several other options but that ultimately none proved viable with the result that the station was forced off air
- The Licensee advised Ofcom that it had established an automated service by 26 February
- The Licensee apologised noting that it realised it should have informed Ofcom of the problems the station had faced
- The broadcaster set out a timetable for signing the lease, gaining access to the new premises, installing the station's studio and ancillary equipment and the resumption of a compliant radio service. The latter by 1 April 2011.

23. On 21 March 2011 and after due consideration of the Licensee's representations, Ofcom reached a finding that the Licensee was in breach of Licence Conditions 2(1) and 2(4) in Part 2 of the Schedule to its licence. This was published in Ofcom's Broadcast Bulletin 178 which may be found at: <http://stakeholders.ofcom.org.uk/binaries/enforcement/broadcast-bulletins/obb178/obb178.pdf>

Ofcom's Decision to impose a statutory sanction

24. As set out in the Sanctions Procedures the imposition of a statutory sanction against a broadcaster is a serious matter. Ofcom may, following due process, impose a sanction if it feels that a broadcaster has seriously, deliberately, repeatedly or recklessly breached a relevant requirement.

25. In this case, Ofcom issued a preliminary decision ("Preliminary View"), that the Licensee had seriously breached its Licence Conditions and that a statutory sanction should be imposed. Ofcom sent a copy of the Preliminary View to the Licensee on 11 October 2011, indicating that it was minded to impose a financial penalty of not less than £500. The

Licensee was given the opportunity to provide written representations on the Preliminary View. The Licensee did not to provide any written representations on the Preliminary View.

Seriousness of the breach

26. Ofcom considers that the breach in this case was sufficiently serious to warrant the imposition of a statutory sanction for the reasons set out below:
27. The station's Key Commitments² are based on promises made by the broadcaster in its original application for the licence and require that the service comprises typically 65% music and 35% speech and is live, typically, for 12 hours per day. As was stated in the Finding, provision by a licensee of its Licensed Service is the fundamental purpose for which a community radio licence is granted. It also facilitates Ofcom in carrying out its duty to secure a range and diversity of local radio services that are calculated to appeal to a variety of tastes and interests and its duty to ensure the optimal use of the radio spectrum. Any failure by a community radio licensee to broadcast its licensed service is, therefore, a serious matter. Such a failure is all the more serious if it persists for a substantial period of time.
28. In this case, the Licensee failed to provide any service whatsoever for the best part of a month (31 January until 25 February) and subsequently provided an automated 'sustaining service' that did not meet the requirement to provide typically 12 hours per day of live output, for example. As a result listeners in the Southall and west London area did not receive a community radio service that was capable of meeting the Key Commitment promises made, for a further period of more than 20 days.
29. Further, despite being in correspondence with Ofcom from late December 2010 up until mid-January 2011 regarding the possibility of a studio and a transmission site move, the Licensee made no attempt to inform Ofcom of the problems that arose nor did it seek authorisation from Ofcom to broadcast a sustaining service as a temporary substitute. Indeed, the matter only came to Ofcom's attention following receipt of a complaint from a member of the public that the station had gone off-air.
30. For all the above reasons, Ofcom considers the breach to be sufficiently serious to warrant the consideration of the imposition of a statutory sanction.

Imposition of a financial penalty

31. Ofcom's Penalty Guidelines state that "Ofcom will consider all the circumstances of the case in the round in order to determine the appropriate and proportionate amount of any penalty. The central objective of imposing a penalty is deterrence. The amount of any penalty must be sufficient to ensure that it will act as an effective incentive to compliance, having regard to the seriousness of the infringement." Ofcom has taken full account of the need to ensure that any penalty acts as a deterrent.

² <http://www.ofcom.org.uk/static/radiolicensing/Community/commitments/cr072.pdf>

Factors taken into account in determining the amount of a penalty

32. In considering the appropriate amount of a financial penalty for each of the breaches, Ofcom took account of relevant factors in accordance with Ofcom's Penalty Guidelines, as set out below:

33. *The degree of harm, whether actual or potential, caused by the contravention, including any increased cost incurred by consumers or other market participants*

For the reasons already given above, failure to deliver the Licensed Service in accordance with the Key Commitments is a serious breach given the specific social gain and access and participation requirements of a community radio licence.

In this case failing to provide the Licensed Service at all or in accordance with the Key Commitments led to the target audience, the multicultural community living in Southall and surrounding areas, being denied relevant radio output and, in particular, the 'social gain' objectives of the Licence (such as opportunities for discussion) and access to and participation in the radio service (volunteering opportunities, for example). Furthermore, listening choice for those living in the area was reduced.

34. *The duration of the contravention*

The Relevant Period during which the Licensed Service was off-air or not being provided in accordance with the Key Commitments lasted from 31 January until 21 March, the date of the Finding. It is most likely that the breach continued until 1 April, a period overall of two months. This was a substantial period.

35. *Any steps taken for remedying the consequences of the contravention*

The Licensee had identified new premises from which to broadcast but was delayed in installing studio equipment. Quite possibly prompted by Ofcom in its email 25 February, the Licensee returned to the air with an automated 'sustaining' service the following day but this was without authorisation from Ofcom. As stated above, the failure to deliver a compliant service continued in all probability for a further month until 1 April 2011.

36. *Whether the regulated body in breach has a history of contraventions*

This is the first time the licensee has been found to be in breach of its licence conditions.

37. *Whether in all the circumstances appropriate steps had been taken by the regulated body to prevent the contravention*

From time to time broadcasters may need to move to new premises, such as on expiry of an old property lease. However, it is incumbent on the broadcaster to ensure it is able, nevertheless, to continue throughout to provide the Licensed Service in accordance with the requirements of the Licence. The broadcaster made attempts to make alternative arrangements in order to deliver a 'sustaining' service but, as noted previously, the Licensee failed to approach Ofcom in relation to the matter, although it did later

acknowledge that it should have informed Ofcom of the issues it faced. Further, the 'sustaining' service, when it was eventually provided, failed to meet the Key Commitments.

38. *The extent to which the contravention occurred intentionally or recklessly, including the extent to which senior management knew, or ought to have known, that a contravention was occurring or would occur*

The Licensee appears not to have intentionally allowed the contravention to occur, but the licensee would have known of the inevitability of the contravention occurring as the lease expiry date drew closer. In its representations, the Licensee put the contravention down to the effects of "a series of unfortunate outcomes" in its dealings with outside organisations. In the weeks leading up to the contravention the Licensee had been in correspondence with Ofcom regarding the possibility of a studio and a transmission site move but had made no attempt to inform Ofcom about the problems that arose nor to seek authorisation from Ofcom to broadcast a sustaining service as a temporary substitute. The matter did not come to Ofcom's attention until it received a complaint from a member of the public that the station was not broadcasting.

39. *Whether the contravention in question continued, or timely and effective steps were taken to end it, once the regulated body became aware of it*

The Licensee reacted to an email from Ofcom and commenced an automated service the following day. This Licensee nevertheless remained in contravention of the Licence because the broadcaster was unable to broadcast live programmes in accordance with the Key Commitments throughout the relevant period. As noted previously, the broadcaster failed to seek permission from Ofcom to temporarily deviate from those conditions.

40. *The extent to which the level of penalty is proportionate, taking into account the size and turnover of the regulated body*

In common with the large majority of community radio stations, the Licensee is a very small scale operation and is dependent on grants in addition to advertising sales. It provides a community radio service with limited income. In a report to Ofcom the broadcaster informed Ofcom that for the years 2008/09 and 2009/10 the station's income including grants was greater than expenditure for both those years and that including in-kind support there was a surplus. In this context, a Financial Penalty of £500.00 represents a comparatively small fraction of the licensee's annual turnover and as such was considered to be an appropriate and proportionate amount having regard to the seriousness of the breaches and the need to ensure that it will act as an effective incentive to future compliance.

41. *Cooperation with this investigation*

The Licensee has cooperated with Ofcom during this investigation.

Precedent

42. On 4 July 2011, Ofcom determined the case of Voice of Africa Radio a community radio station in East London which failed to provide a programme service to the transmitter over two periods in December 2010³.
43. Voice of Africa Radio was found to be in breach of its Licence Conditions. The breach being considered serious was referred to the Ofcom Broadcasting Sanctions Committee, in accordance with procedures in place at that time, for consideration of the imposition of a statutory sanction.
44. In summary, the Committee accepted that while it would not be in the Licensee's interests to go off air, the broadcaster had nonetheless failed to ensure sufficiently prompt resumption of the broadcast programme service when technical problems had caused the station to go off-air. Ofcom had particular concerns about the adequacy of the Licensee's arrangements for gaining access to transmission equipment. The Committee was also concerned with the manner in which the Licensee had responded to Ofcom's investigation, which was not as cooperative as it ought to have been.
45. For these reasons, and having regard to the seriousness of the breaches Ofcom considered it was appropriate and proportionate in the circumstances of that case to impose a financial penalty of £1,000 on Voice of Africa Radio Ltd.

Other issues raised by the Licensee in its Written Representations

46. The Licensee chose not provide written representations to the Preliminary View.

Issues raised by this case

47. Provision by a licensee of its Licensed Service is the fundamental purpose for which a community radio licence is granted. It also facilitates Ofcom in carrying out its statutory duty to secure a range and diversity of local services that are calculated to appeal to a variety of tastes and interests and its duty to ensure optimal use of the radio spectrum.
48. When a licence is awarded undertakings made by the successful applicant in relation to the amount of time allocated to broadcasting live, together with other the Key Commitments including the ratio of speech to music are incorporated into the licence and become conditions of the Licensed Service and the licensee is accountable for ensuring that they are complied with.
49. Ofcom recognises that many community radio services may rely on grants and are staffed by volunteers often working part time. Nevertheless, licensees are reminded that community broadcasters have a responsibility to serve their local communities by providing their licence service at all times in accordance with the Key Commitments. Ofcom expects

³ Published at: <http://stakeholders.ofcom.org.uk/binaries/enforcement/content-sanctions-adjudications/voice-of-africa.pdf>

licensees to have adequate arrangements in place for this purpose, including suitable risk and recovery plans and investing in or having access to appropriate back-up equipment.

50. Nevertheless, Ofcom remains sympathetic to the challenges faced by community broadcasters in particular and, as described in the earlier paragraphs, may consider in exceptional circumstances, agreeing to a temporary suspension of specific licence conditions, if appropriate, to assist a broadcaster in the event of unforeseen circumstances. However community broadcasters are reminded of the absolute need, in all circumstances, to contact Ofcom's community radio team as soon as any such issues arise. The failure in this case of the broadcaster to contact Ofcom about the issues that arose was a material factor in Ofcom's decision to impose a financial penalty.

Conclusion

51. In summary, Ofcom considered that the Licensee's breach was serious because of the prolonged period of time during which the Licensee was not providing a programme service. This failure was due to the Licensee's inability to secure in good time suitable premises from which to make programmes for broadcast whilst with the knowledge that there was a requirement to vacate the existing premises because the lease was due to expire at a predetermined date.
52. Ofcom also noted that during the relevant period, and in all likelihood for some considerable time after that period BBA Media was unable to meet its social gain commitments to its target community.
53. Ofcom accepted that it would not have been in the Licensee's interests to go off air, but noted that prompt resumption of the broadcast programme service was not achieved. This was due to the Licensee not having in place adequate arrangements with regard to premises.
54. Ofcom took the view that although the regulated body was a small scale broadcast operation, the breach was nonetheless serious and that a financial penalty should be imposed and that the amount of penalty must be sufficient to ensure that it will act as an incentive to compliance.
55. Taking into account all of the above and having regard to Ofcom's Penalty Guidelines, Ofcom decided that it was appropriate and proportionate to impose a financial penalty on BBA Media of £500.00.

19 December 2011