

## **Decision by the Ofcom Broadcasting Sanctions Committee**

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### **Voice of Africa Radio Ltd for breach of Licence Conditions 2(1) and 2(4)**

#### **Consideration of Sanction against:**

Voice of Africa Radio Limited (the "Licensee") in respect of its community radio service Voice of Africa Radio ("VoAR") - CR070

#### **For:**

Breach of the Licensee's Community Radio Licence in respect of:

Condition 2(1) in Part 2 of the Schedule:

The Licensee shall provide the Licensed Service specified in the Annex for the licence period

and

Condition 2(4) in Part 2 of the Schedule:

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

#### **Between:**

December 2010 and January 2011

#### **Decision:**

To impose a financial penalty (payable to HM Paymaster General) of **£1,000.00**

## **Background Summary**

1. VoAR is a community radio station serving the African community in Newham, East London and was broadcast on 94.3 MHz until 25 February 2011 and has since been broadcasting on 94.0 MHz<sup>1</sup>.
2. VoAR's licence includes conditions requiring it to provide the licensed service and maintain the character of the licensed service throughout the licence period.
3. The analysis of Ofcom's spectrum monitoring, which was set out in the Ofcom engineer's technical report dated 24 January 2011, established that radio programmes were not broadcast by the Licensee on its allocated frequency for a number of days between 18 December 2010 and 1 January 2011. The Licensee's transmitter was found to be emitting a signal without modulation i.e. carrier only. In accordance with its published procedures, Ofcom found this to be in breach of conditions 2(1) and 2(4) in Part 2 of the Schedule to the community radio licence for VoAR.
4. The Ofcom executive referred this breach to the Chair of the Broadcasting Sanctions Committee ("the Committee") and the Chair, in turn, accepted it for consideration of a statutory sanction.

## **Summary of Committee's Decisions**

5. The Committee held a hearing on 4 July 2011 at which representatives of the Licensee made oral representations.
6. After considering all of the evidence and representations made to it, the Committee decided the Licence Breach was so serious that a financial penalty should be imposed. The Committee then also considered the level of the fine to be imposed, in accordance with Ofcom's most recent Penalty Guidelines, which were published on 13 June 2011<sup>2</sup>.
7. 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. In particular, the Committee was concerned about the adequacy of the Licensee's arrangements for gaining access to the transmission. 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 should have been.
8. Having regard to the seriousness of the breach, and having regard to the Licensee's representations and Ofcom's Penalty Guidelines, the Committee decided that it was appropriate and proportionate in the circumstances to impose a financial penalty of **£1,000.00** on Voice of Africa Radio Ltd.

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<sup>1</sup> VoAR has also been given approval for a power increase from 50 Watts to 200 Watts (an increase of 6dB).

<sup>2</sup> <http://www.ofcom.org.uk/about/policies-and-guidelines/penalty-guidelines/>

## **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 electromagnetic spectrum (section 3(2)(a) of the 2003 Act).

### **The Broadcasting Act 1990**

10. Section 106(1) of the Broadcasting Act 1990 (as amended) (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. Where Ofcom has determined that a licensee is in breach of its licence, Ofcom may commence the sanctions proceedings set out in sections 110 or 111 of the 1990 Act (Annex 4 to this document). Under the former, Ofcom may impose on the licensee a financial penalty on the holder of a community radio licence of up to £250,000. Under section 110, Ofcom may also shorten the licence by up to two years, suspend the licence for up to six months, or decide to revoke the licence under section 111 of the 1990 Act.

### **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) of the Order which specifies characteristics of community radio services. 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. Condition 2(1) in Part 2 of the Schedule to the licence states that: "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 states 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." Both conditions are included pursuant to sections 106(1) and 106(2) of the 1990 Act.

## **Relevant procedures and applicable penalties**

15. Ofcom's published procedures for the consideration of statutory sanctions in broadcasting or other licence-related cases (December 2009) ("the Procedures") are the relevant procedures in relation to sanctions cases commenced prior to 1 June 2011 (the date on which Ofcom's new procedures came into effect). The Procedures explain the process Ofcom will normally follow in such cases when considering the determination of a sanction against a broadcaster.
  
16. The statutory sanctions available to Ofcom include a decision to impose a financial penalty; shorten the duration of the licence; or revoke a licence. In the case of a financial penalty, the maximum fine for community radio licensees under section 110 of the Broadcasting Act 1990 is £250,000.

## **Licence Condition Breaches**

17. Having taken into account the representations of the Licensee, the Ofcom Executive recorded a breach on 25 January 2011 of Conditions 2(1) and 2(4) in Part 2 of the Schedule to the Licence for failure to broadcast the Licensed Service in accordance with the requirements of the Licence. This breach finding was published in Ofcom's Broadcast Bulletin 7 February 2011 and may be found at:  
<http://stakeholders.ofcom.org.uk/binaries/enforcement/broadcast-bulletins/obb175/issue175.pdf>

## **Referral by the Ofcom Executive to the Chair of the Committee**

18. As explained in the Procedures the imposition of a statutory sanction on a broadcaster is a serious matter. Ofcom may, following due process, impose a sanction if it considers that a broadcaster has seriously, deliberately, repeatedly or recklessly breached a Licence requirement.<sup>3</sup>
  
19. The consideration of a sanction follows a decision by the Ofcom Executive that a broadcaster has breached a Licence requirement. Under the Procedures, a case will normally be referred by the Executive to the Chair of the Broadcasting Sanctions Committee for consideration of the imposition of a statutory sanction when the Ofcom Executive considers that a broadcaster has seriously, deliberately, repeatedly or recklessly breached a relevant requirement. Before deciding to refer a case to the Committee, the Ofcom Executive may, at its discretion, invite a broadcaster to submit further representations on a case or any information required from the broadcaster to assist the understanding of the case or if it is necessary to ensure the process is fair.
  
20. The Ofcom Executive, having recorded and published a breach of the Licence on 25 January 2011 as noted under the heading Licence Condition Breaches (above) informed the Chair of the Committee in April 2011 of its recommendation that the

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<sup>3</sup> <http://stakeholders.ofcom.org.uk/broadcasting/guidance/complaints-sanctions/procedures-statutory-sanctions/>

breach was sufficiently serious to warrant referral to the Committee for consideration of the imposition of a statutory sanction.

21. After considering all the material presented to him the Chair of the Committee informed the Executive that he considered a sanction was appropriate in this case and, accordingly that the case should be referred to the Committee.

### **Referral to the Broadcasting Sanctions Committee**

22. In accordance with paragraph 18 of the Procedures, the Chair of the Committee wrote to the Licensee on 11 April 2011 (the "Provisional Decision") stating that he regarded the breaches as serious and that, having regard to all the factors, his Provisional Decision was that it was appropriate and proportionate to impose a financial penalty. The Licensee was invited to make written representations on the Provisional Decision in advance of an oral hearing.

### **The Licensee's written representations in respect of the provisional decision**

23. The Licensee did not submit written representations on the Provisional Decision.

### **The Hearing**

24. The Committee held a hearing to consider this case on 4 July 2011. The CEO of VoAR and a VoAR assistant attended. Before being given an opportunity to make oral representations to the Committee, the Licensee was advised that, in accordance with the Procedures, whilst the Committee would give due consideration to the provisional view put forward by the Chair, it was not bound by the Provisional Decision. The Licensee was then invited to make oral representations to the Committee before the Committee put questions to the attendees.
25. The Licensee presented four key points (i) that on certain dates between 18 December and 1 January the radio station had been broadcasting; (ii) that for periods when the station was off air the Licensee had been unable to access the transmitter site where an equipment failure had occurred; (iii) the Licensee believed that incoming interference from unlicensed broadcasters had impacted upon VoAR's signal and this had exacerbated the situation; and (iv) the Licensee appealed for pardon against the statutory sanction set out in the Chair's Provisional Decision, stating that the breach, which was not intentional, was unprecedented in the history of the service and the Licensee had done all it could to restore the service. The Licensee expressed concern that a financial penalty at the level that had been provisionally recommended by the Chair "will be the demise of Voice of Africa Radio".
26. In respect of point (i), the Committee sought clarification over inconsistencies between the Licensee's initial response to Ofcom in January 2011, when it had been asserted that the service was off-air for only a few hours, and subsequent statements in which the Licensee admitted that the station had been off air between 16 and 24 December 2010 and had experienced further technical difficulties which required another visit to the transmission site on 29 December. In the oral representation the Licensee asserted that there had been two occasions during the period of the breach finding when engineering problems had caused the station to go off-air between 16-24 December and between 27-29 December. The Licensee explained that these problems were rectified when they were able to gain access to

the transmitter site on 24 December and on 29 December. Interference from an illegal broadcaster had necessitated a further visit to the transmission site on 4 January 2011.

27. In respect of point (ii) the Licensee drew attention to the transmitter site access arrangements that were in place with the local authority who controlled access to the site. The Licensee reiterated the difficulties in getting access to the site; the Licensee was unable to visit at their “whims and caprices” and was not able to gain access unless they are accompanied by an official from the council. Gaining access involved persistent phone calls to the council and could sometimes take up to two weeks. This made it difficult to carry out maintenance and repairs promptly and was the reason why the station had been off-air between 16 and 24 December and why it took another two days to get the station back on air after further problems were experienced on 27 December. Indeed, when they did gain access on the 24<sup>th</sup> they were given only 30 minutes and so “were not able to do anything”. Consequently, within 42 hours the signal went off again. The Licensee also explained that they had to pay a call-out fee of £200 each time a council official has to go out to the site and that for VoAR this was a significant financial outlay.
28. With regard to point (iii) the Licensee placed great emphasis on incoming interference from unlicensed broadcasters on adjacent frequencies – in particular from three “mighty pirate stations”. As a result, the Licensee explained, VoAR’s coverage is very, very limited. Indeed, they had to make a further visit to the site on 4 January because of interference with their signal. The Licensee said that apparently “some pirate stations are using the site.” The Licensee added that not a single day would pass without VoAR getting interference from broadcasters which “dominated the frequency”. However, this was not backed up by the evidence from Ofcom’s spectrum monitoring report, confirmed at the hearing by the Ofcom Manager of Broadcast Radio who had carried out the monitoring and was in attendance to answer any questions on the technical findings. He explained that no interference was found during the period in question on the two channels immediately on either side of VoAR’s frequency of 94.3 MHz. This meant that the frequency was clear. Notwithstanding this, the Licensee maintained in its oral representations to the Committee that pirate stations have dominated the frequency of 94.0 MHz.
29. The fourth point put to the Committee by the Licensee was that a financial penalty would “not be easy for a small station [like us] to cope with.” VoAR was a very small station with a small income; all its staff are volunteers and the station was already struggling to maintain the Licence. The Licensee told the Committee that a financial penalty at the level that had been provisionally recommended by the Chair “will be the demise of Voice of Africa Radio”. The Licensee appealed to the Committee to pardon VoAR.

### **The Committee’s Deliberations**

#### **Imposition of a statutory sanction**

30. The Committee took into account all the evidence presented by the Executive and all of the representations made by the Licensee. The Committee also had regard to the Procedures and to Ofcom’s Penalty Guidelines.
31. In his Provisional Decision the Chair had noted the small scale nature of community radio stations generally, and VoAR specifically, along with a funding model

dependant on grants. The most recent statutory accounts year ended 31 December 2009, submitted by the Licensee show a total turnover of £50,699 before cost of sales and other costs, during which financial period the company reported a loss of £10,550.

32. Before going on to consider in detail the level of such a financial penalty, the Committee considered the maximum level of penalty which might be imposed in respect of the breach. Under 110(3) of the Broadcasting Act 1990, the maximum level of financial penalty that can be imposed on a community radio service is up to £250,000.

### **Penalty guidelines**

33. Under section 392 of the Communications Act Ofcom is required to prepare and publish a statement containing the guidelines it proposes to follow when setting the amount of any statutory penalty. Following its recent consultation, Ofcom published a statement setting out revised guidelines on 13 June 2011. Accordingly, and having decided in all the circumstances that in this case it was appropriate to impose a financial penalty, the Committee took account of the Penalty Guidelines in considering what level of penalty would be appropriate and proportionate to the breach that had occurred.

### **Factors taken into consideration in determining the amount of the penalty**

34. Having taken account of all the evidence and the Licensee's representations, the Committee considered that the breach of the requirement in Condition 2(1) and 2(4) in Part 2 of the Schedule to the Licence to provide the licensed service and to ensure 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 was serious.
35. In particular, the Committee was concerned by the prolonged period of time it took to gain access to the transmitter site and the time it took before the Licensee was able satisfactorily to remedy the fault in the transmission system. Further, the Committee felt that such lengthy resolution was not helped by the Licensee's initial attempts during Ofcom's investigation of the issues to deny that the station had been off-air for as long as it subsequently admitted.
36. In considering whether or not to impose a statutory sanction the Committee took into account all the evidence presented by the Executive and all of the representations made by the Licensee. The Committee also had regard to the Sanctions Procedures and to Ofcom's Penalty Guidelines, including the fact that the central objective of imposing a penalty is deterrence.
37. The Committee began by considering which penalties were available to them, namely to impose a financial penalty, shorten, suspend or revoke the licence. After considering all of the evidence and representations made to it, the Committee decided the Licence Breach was so serious that a financial penalty should be imposed. Having regard to the Penalty Guidelines, the Committee then went on to consider what level of penalty was appropriate and proportionate.

### *Seriousness of the contravention*

38. The Committee noted VoAR's oral representations that it would not have been in VoAR's interest to go off air and the Licensee's frustration at not being able to secure a prompt resumption of the broadcast service, despite its stated attempts to do so. However the failure to broadcast a licensed service for the duration specified was considered by the Committee to amount to a serious breach.
39. In particular, the Committee had regard to the following factors: The Licensee occupies a broadcast radio frequency which is a scarce resource nationally and of particular scarcity in London. The Licensee was a successful applicant in a competitive licensing process where other applicants who were unsuccessful in their bids were unable to realise their broadcasting plans. Ofcom has a statutory duty to ensure optimal use for wireless telegraphy of the electro-magnetic spectrum (section 3(2)(a) of the 2003 Act) and, therefore, it is incumbent on Ofcom to ensure that the Community Service which VoAR has undertaken to provide is provided in accordance with the terms of its licence. A key commitment of VoAR is that the service "will typically be live for at least 10 hours per day". However, the Licensee failed to broadcast programmes on its assigned frequency on at least 10 days during the period under review and, in all probability, longer according to Ofcom's monitoring report. This meant that none of the required community radio programme output was provided as required under the Licensee's key commitments (e.g. social gain of listeners in the community and access to and participation by them in the service).
40. The Committee further noted separate licence obligations requiring the Licensee to ensure access to its transmission system for Ofcom engineers and others to make essential transmission related adjustments. In this connection paragraph 1.5 of the Ofcom Site Engineering Code for Analogue Radio Broadcast Transmission Systems (the Technical Code) specifies: "...it is the Licensee's responsibility to ensure, in context, adequate monitoring of critical transmission parameters, and to provide either for the signal to be switched off or to be transferred to a compliant system in the event of drift or other failure". Licence Condition 2(3) requires the Licensee to comply with the Technical Code.

### *The duration of the contravention*

41. The Committee noted that the breach recorded against VoAR, by the Licensee's own admission spanned two periods from 16-24 December and 27-29 December 2011, a duration of ten days. Ofcom's technical report using averaged data from 30 October to 22 January suggests a longer period i.e. from 18 December to 1 January. Taking into account the technical evidence from the monitoring report, the Committee concluded that there was every likelihood that the duration of the contravention was longer than the 10 days admitted by the Licensee.

### *Any gain (financial or otherwise) made by the regulated body as a result of the contravention*

42. The Committee considered that the Licensee could not be expected to gain in financial or other terms with regard to this breach and noted the oral representations of the Licensee that going off-air "will not serve our purpose, will not make us richer, but rather poorer, than we are".

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

43. The Licensee had worked within the arrangements that existed with the local authority to gain access to the transmission site in order to remedy the breaks in transmission that had occurred. The Committee was concerned that a licensed transmission was allowed to take place without sufficiently immediate access. The Licensee's obligations in the Technical Code (see paragraph 40 above) indicate that ready access to authorised persons should be available as a matter of course. In view of these licence obligations and the contravention that had occurred, the Committee was concerned about the adequacy of the current arrangements going forward and wishes to stress that it expects VoAR to take steps to ensure it is able to gain prompt access to the transmitter site to take appropriate action in any future emergency.

*Whether the regulated body in breach has a history of contraventions (repeated contraventions may lead to significantly increased penalties)*

44. The Committee noted that this contravention was the first recorded instance of the station going off-air since it had launched on 94.3 MHz. In terms of the Licensee's history of compliance, a previous breach had been recorded against the Licensee in September 2010 for failure to provide Ofcom with annual reports. The Breach read: Despite repeated requests for this information, Voice of Africa Radio and [REDACTED] have not, to date, supplied their annual reports. As a consequence of this serious and continuing licence breach, Ofcom is putting these licensees on notice that their present contravention of their licences is being considered for the imposition of a statutory sanction. The Committee noted with some concern that the manner in which the Licensee had responded to Ofcom's investigation in the present case had not been as cooperative as it should have been. The Licensee had taken time to respond to Ofcom's enquiries and had not been forthcoming in admitting to the seriousness of the breach, having initially claimed that the station had only been off-air for a few hours on a single day.

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

45. The Committee noted that the Licensee had failed to ensure sufficiently prompt resumption of the broadcast programme service when technical problems had caused the station to go off-air. In particular, the Committee was concerned about the adequacy of the Licensee's arrangements for gaining access to the transmission site.

*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*

46. The Committee heard how the contravention occurred as a result of equipment failure and this was aggravated as a result of the Licensee being unable to gain access to the site from where the equipment is kept. This was not an intentional or reckless contravention, but it was exacerbated by the inadequacy of the

arrangements for gaining access to the transmitter and the consequent delay in rectifying the equipment failure.

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

47. As the above paragraphs explain, the process to rectify the fault with the equipment was not timely, nor was the Licensee's cooperation with Ofcom's investigation of the contravention.

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

48. The Committee considered the following factors:

- a. Firstly with regard to the breach, consideration was given in terms of the size of any financial penalty to the seriousness and in particular:
  - i. the period of time during which VoAR was not broadcasting its licensed programme service;
  - ii. the degree to which VoAR was unable to meet its social gain commitments as specified in the licence, and,
  - iii. the inadequate arrangements in place to access the transmission system.

This led the Committee to consider a financial penalty.

- b. Taking into account the scale of the regulated body, the Committee noted the Licensee's representations about the size and income of the station being small and that it was struggling to maintain the Licence. The Committee noted from the broadcaster's accounts that VoAR's published annual turnover for the year ending December 2009 was £50,699 during which financial period the company reported a loss of £10,550.

## **Precedent**

49. The Committee considered that there was no relevant previous case where Ofcom had imposed a statutory sanction in relation to a failure to broadcast a licensed radio service.

## **Conclusion**

50. In summary, the Committee 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 gain access to satisfactorily remedy a fault in the transmission system. The Committee felt that such a lengthy resolution was not helped by the Licensee's initial attempts to deny that the station was not broadcasting the programme service to the extent finally established.

51. The Committee also noted that during these periods VoAR was unable to meet its social gain commitments.

52. The Committee accepted that it would not have been in the Licensee's interests to go off air, but also 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 their appointed transmission engineering contractor or the local authority, the owner of the site.
53. The Committee 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 the penalty must be sufficient to ensure that it will act as an effective incentive to compliance.
54. Taking into account all of the above and having regard to Ofcom's Penalty Guidelines, the Committee decided that in all the circumstances it was appropriate and proportionate to impose a financial penalty on VoAR of **£1,000.00**.

### **Ofcom Broadcasting Sanctions Committee**

28 July 2011