

Decision by the Ofcom Broadcasting Sanctions Committee

More FM Ltd (formerly One Gold Radio Ltd) for breach of Licence Condition 2(3) contained in Part 2 of the Schedule and breach of Licence Condition Part 2 of the Annex the Technical Specification

**Consideration
of Sanction against:**

More FM Ltd (the "Licensee") in respect of its local commercial radio service Total Star – Bridgwater and West Somerset (AL260)

For:

Breach of the Licensee's local commercial radio Licence in respect of:

Condition 2(3):

The Licensee shall ensure that the provisions of the Technical Code are observed in the provision of the Licensed Service to the extent such provisions apply to him.

and

Part 2 of the Annex: The Technical Specification - containing the specific technical parameters for the Licensee's transmitting site.

Between:

October 2010 and 2 December 2010

Decision:

To reduce the period for which the Licence is to be in force by a period of twelve months, bringing forward the expiry date to 3 July 2012.

Background Summary

1. More FM Ltd, formerly One Gold Radio Ltd, operates a local radio service Total Star – Somerset. It is a local commercial radio station licensed by Ofcom to serve Bridgwater and West Somerset using three transmitters, one located near the coastal town of Minehead. While this service operates using three transmitters the service is not licensed to serve the wider county of Somerset which would include the towns of Taunton and Weston-super-Mare.
2. Ofcom's field engineers took measurements and visited the Minehead transmission site and reported that a new transmitter and antenna array had been installed, without consultation with Ofcom – itself a breach of the Code - and that the station was transmitting a directional high powered signal several times greater than that permitted under the terms of the Licence. This created a risk to the safety of members of the public which Ofcom's Senior Radio Monitoring Broadcast Engineer described as being of "major concern". Ofcom's field engineers also found other transmission related irregularities.
3. The Licensee was found in breach of two of its Licence Conditions outlined in paragraphs 9 and 10 below. In accordance with Ofcom's Procedures for the consideration of statutory sanctions in broadcasting or other licence-related cases¹ the Ofcom executive referred the breach to the Chair of the Broadcasting Sanctions Committee (the "Chair"). The Chair accepted the breach for consideration of a statutory sanction.

Summary of Committee's Decisions

4. The Committee held a hearing on 4 July 2011 at which representatives of the Licensee made oral representations. Having considered the evidence on which the Chair had relied in reaching his Provisional Decision, the Committee was presented with new evidence during the course of the hearing relating to the circumstances of the breach. It was clear from this new evidence that the breach had resulted from a severe loss of control on the part of the Licensee over the management of the service.
5. After giving due consideration to all of the evidence and representations made to it, the Committee concluded that the magnitude of the breach was so serious, the risk to the public of such concern, and the management failure so troubling that a significant sanction should be imposed. Taking into account all the circumstances of the case and the size and turnover of the Licensee, the Committee decided that an appropriate and proportionate sanction was to reduce the period for which the Licence remains in force.
6. In summary, the Committee was greatly concerned by the considerable scale of the breach, the length of time for which it continued, the extent to which the safety of members of the public was put at risk by the excessive field strength close to the mast where the public may have access and the grave recklessness of the Licensee whose failure to maintain control of its service fell far below the standards required of a Licence holder.

¹ http://stakeholders.ofcom.org.uk/binaries/broadcast/guidance/complaints-sanctions/complaints_sanctions.pdf

7. Having regard to the serious and reckless nature of the breach, the Licensee's representations, the remaining period of the Licence (2 years) and Ofcom's most recent Penalty Guidelines, which were published on 13 June 2011², the Committee decided that it was appropriate and proportionate in all the circumstances to reduce the period for which More FM's licence is to be in force by a period of twelve months, bringing forward the expiry date by one year. Shortening the Licence to this extent had the effect of halving the remaining term of the Licence and reflected both the serious and reckless nature of the breach and the need for an effective deterrence and incentive to future compliance.

Legal Framework

The Broadcasting Act 1990

8. Section 87(1)(b) of the Broadcasting Act 1990 provides for local radio licences to include conditions enabling Ofcom to supervise and enforce technical standards in connection with the provision of the Licensed Service.

Relevant licence conditions

9. Licence condition 2(3) contained in Part 2 of the Schedule (General Conditions) states: "The Licensee shall ensure that the provisions of the Technical Code are observed in the provision of the Licensed Service to the extent such provisions apply to him."
10. Part 2 of the Annex to the Bridgwater and West Somerset local commercial radio licence (the "Technical Specification") outlines the specific technical parameters for the relevant transmitting site, which the Licensee is required to adhere to in its provision of the Licensed Service.

Relevant procedures and applicable penalties

11. 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 broadcasters.
12. The statutory sanctions available to Ofcom include a decision to impose a financial penalty; shorten the duration of the licence; suspend or revoke a licence. In the case of a financial penalty, the maximum fine for local radio licensees under section 110 of the Broadcasting Act 1990 is £250,000 and Ofcom may reduce the period for which the Licence is to be in force by a specified period not exceeding two years.

Licence Condition Breaches

13. Having taken into account the representations of the Licensee, the Ofcom Executive on 23 February 2011 recorded a breach of Condition 2(3) in Part 2 of the Schedule to the Licence, which requires adherence to Ofcom's Technical Code, and a "very serious" breach of the Technical Specification in Part 2 of the Annex to the Licence.

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

This finding was published on the Ofcom Broadcast Bulletin Issue 177, 7 March 2011.³

Referral by the Ofcom Executive to the Chair of the Committee

14. 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.
15. 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.
16. The Ofcom Executive, having recorded and published a breach of the Licence on 23 February 2011 as noted in paragraph 13 above, informed the Chair of the Committee in April 2011 of its recommendation that the breaches were sufficiently serious to warrant referral to the Committee for consideration of the imposition of a statutory sanction.
17. 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

18. 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 both serious and reckless and that, having regard to all the factors his Provisional Decision was that it was appropriate and proportionate to shorten the duration of the Licence. 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

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

The Hearing

20. The Committee held a hearing to consider this case on 4 July 2011. The Managing Director of the Licensee Richard Evans and Operations Consultant Jon Waters attended ("the Licensee's representatives"). Before making their oral representations to the Committee, the Licensee's representatives were advised that, in accordance with the Procedures, whilst the Committee would give due consideration to the

³ <http://stakeholders.ofcom.org.uk/binaries/enforcement/broadcast-bulletins/obb177/issue177.pdf>

provisional view put forward by the Chair, it was not bound by the Provisional Decision. In addition to making oral representations, the Licensee's representatives also made available further brief documentation which the Committee accepted for consideration.

21. The Licensee's representatives made submissions on three grounds: (i) the misplaced trust in a fellow director of the broadcast operation, (ii) being unclear over the status of ownership of the radio asset, and (iii) discovering only after investigation, prompted by Ofcom's intervention, the intent behind the overpowering of the Minehead site radio signal.
22. In respect of ground (i), they drew attention to the trust the company's owners had, they said, regrettably placed in the senior manager who was responsible at the time. They highlighted how the working relationship had broken down and how subsequently all links had been severed between the individual and the company, the holder of the Bridgwater and West Somerset Licence. The Licensee's representatives gave a number of examples of low levels of co-operation which they said first occurred in the early stages of their working relationship with the relevant senior manager during the Summer of 2010. They claimed the individual had deceived fellow shareholders and suggested that he had adopted a cavalier approach towards compliance with the Licence. These points were re-iterated in the brief handed out to members of the Committee. The Licensee's representatives suggested that this was one of the reasons why the owners of the station were not aware of the occurrence of the breach.
23. In respect of ground (ii) the owners had entered into negotiations to sell the Bridgwater and West Somerset Licence to the management of the station (including the relevant senior manager). In September 2010 the company agreed to sell the station and the relevant senior manager was charged with brokering the sale and concluding the transfer of the Licence, in accordance with Ofcom's transfer requirements, to the new owners. In their oral representations to the Committee, the Licensee's representatives underlined the point that the Licensee had been led to believe that the Licence had been legally transferred by the December date when Ofcom's engineers attended the Minehead site. Consequently, they had been under the mistaken belief at the time of Ofcom's investigation, that the breach had taken place at a time when they were no longer operating the service.
24. However, the Licensee's representatives accepted that they had been wrong and that, contrary to what they had been told, neither the Licence nor ownership of the station had been transferred. This meant that the Licensee remained the holder of the Licence for the Bridgwater and West Somerset sound service and that a "substantial and deliberate" breach had occurred under their watch and, they said, "quite rightly, we've been penalised for this". However, whilst they admitted and took full legal responsibility for the contravention, the Licensee's representatives stressed that the owners had not been aware of what was happening and would have never knowingly sanctioned such a breach of the Licence.
25. With regard to ground (iii) upon notification from Ofcom of the breach, the station owners investigated how the overpowering of the transmitter had occurred. The station's formal response to Ofcom had stated that the engineering contractor "was clearly not fully aware of the requirements to Ofcom when he installed the new transmitter". However, the Licensee's representatives stated that they had learnt that the contractor had been explicitly requested to install a transmission system engineered specifically to broadcast to a much wider area. At the oral hearing the Licensee's representatives claimed that at the time the Licensee had no knowledge

of the matters relating to the breach – having “no idea” why the transmitter was broadcasting at such high power and having “no idea” what the “game plan” was of the former relevant senior manager and being “led astray” by him.

26. The Licensee’s representatives explained that the station had learnt from the experience and was now moving forward. Having dismissed the relevant senior manager, they had just launched the new company name and were in the process of selling the station.

The Committee’s Deliberations

Imposition of a statutory sanction

27. 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.
28. In his Provisional Decision the Chair had noted that often small stations such as this face a challenge to return profits consistently to shareholders. Evidence from unaudited accounts submitted by the Licensee for the period to December 2010 showed the station trading at a loss and Ofcom was aware that the Licensee had been in administration more than once in the last three years. Taking these factors into account, the Chair had been concerned when considering his Provisional Decision about the potential disruption to provision of the service that a financial penalty could cause, both in terms of its negative impact on listeners and those employed by the station. Being mindful of these potential consequences, the Chair had put forward a provisional view that an appropriate sanction would be to shorten the duration of the Licence.
29. During the course of the oral hearing, new evidence came to light relating to the circumstances of the breach. It was clear from this new evidence that the breach had resulted from a severe and troubling loss of control on the part of the Licensee over the management of the service. This compounded an already serious breach which involved a dangerous and unprecedented level of overpowering that was the greatest ever recorded by Ofcom. Considering the matter afresh, and taking all the circumstances into account, the Committee decided that a significant sanction should be imposed and that the level of sanction should reflect both the serious and reckless nature of the breach and act as an effective deterrence and incentive to compliance. Taking into account the size and turnover of the Licensee, the Committee decided that an appropriate and proportionate sanction was to reduce the period for which the Licence remains in force.
30. Before going on to consider in detail the amount by which it was appropriate and proportionate to reduce the period of the Licence, the Committee considered the maximum period by which it might be shortened. Under 110(1)(b) of the Broadcasting Act 1990, Ofcom may reduce the period for which the Licence is to be in force by a period not exceeding two years.

Penalty guidelines

31. Under section 392 of the Communications Act Ofcom is required to prepare and publish a statement containing the guidelines it proposes to follow in determining the amount of any statutory penalty. This is the first case in which Ofcom has considered reducing the period for which a licence is to be in force. Although the Penalty Guidelines relate specifically to the imposition of a financial penalty, Ofcom considers that it is appropriate to apply the same criteria by analogy when sanctioning a broadcaster by shortening the period of a licence. Ofcom's practice, therefore, will be to take its Penalty Guidelines into account when determining what reduction to the licence period is appropriate and proportionate to the contravention.
32. 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 reduce the period for which the Licence is to be in force, the Committee took account of the Penalty Guidelines in considering what period would be an appropriate and proportionate period by which to reduce the term of the Licence in relation to the breach that had occurred.

Factors taken into consideration in determining the appropriate period by which the Licence should be shortened

33. Having taken account of all the evidence and the Licensee's representations, the Committee considered that the breach of the requirement in Condition 2(3) in Part 2 of the Schedule to the Licence to adhere to Ofcom's Technical Code, and the breach of the technical parameters set out in the Technical Specification in Part 2 of the Annex was serious and reckless.
34. In particular, the Committee was greatly concerned by the considerable scale of the contravention, the length of time for which it continued, the extent to which the safety of members of the public was put at risk and the grave recklessness of the Licensee whose failure to maintain control of its service fell far below the standards required of a Licence holder.

The seriousness of the contravention

35. The Committee noted from the Ofcom engineer's Technical Report that the scale of the unauthorised power increase was the greatest ever recorded by Ofcom with regard to a sound broadcasting service (ten times the power allowed under the terms of the Licence). The extent to which the broadcast radio transmission system exceeded the technical parameters was also greater than any other case dealt with by Ofcom. Further, a full broadcast radio installation was undertaken without any attempt to consult Ofcom.
36. The only case of overpowering that has resulted in a sanction being applied on any broadcaster was in September 1998 when Medway FM (now KMFM) was found in breach of its Licence Conditions under Ofcom's predecessor, the Radio Authority, for overpowering its radio signal. The station had been found to be broadcasting a 120 watts signal instead of its permitted 50 watts and overpowering by between 3dB and 5 dB. By contrast, in the present case, Total Star Radio's output was measured to be in excess of 30kW – an overpowering by some 10dB.

The duration of the contravention

37. This breach continued for some two months until Ofcom intervened, and was part of a deliberate plan to broadcast to a significantly wider coverage area than permitted under the Licence. The Committee concluded that it was reasonable to deduce that without intervention from Ofcom's engineers, the Licensee would have continued to broadcast in breach of the Licence.

The degree of harm

38. The Committee was concerned about the extent to which the safety of members of the public was put at risk. The high RF field strength close to where the public may have access, was described by Ofcom's field engineers as being of "major concern". Close proximity to high field strengths can cause damage to human health. This potential for harm was considered by the Committee to be a troubling and reckless action carried out by the Licensee.

The extent to which the contravention occurred intentionally or recklessly, including the extent to which senior management knew, or ought to have known about it

39. As has been noted above, the Committee was presented with new evidence during the course of the hearing which, by the Licensee's own admission, revealed that the contravention, a deliberate action to benefit from a stronger radio signal covering a wider area, had resulted from a severe loss of control on the part of the Licensee over the management of the service.

40. It was of fundamental concern to the Committee that such a serious and reckless breach could have occurred, and that it lasted for so long, without the knowledge of the owners of the Licence. Indeed, they had placed such a degree of trust in the senior management of the station that the Licensee was not even aware that it still held the Licence.

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

41. There was no evidence of gain being made but the Committee considered that the Licensee's move into breach was a deliberate attempt to serve a wider coverage area to gain listeners and to increase appeal among a wider pool of advertisers. This would have had been to the detriment of other broadcasters legitimately licensed to serve areas adjacent to the Licensee's Measured Coverage Area.

Any steps taken for remedying the consequences of the contravention

42. The Licensee's representatives advised the Committee that once control over the Licensed Service had been re-asserted they had employed the services of suitably qualified persons to look after radio frequency engineering and other aspects of the broadcast operation to ensure compliance in the future.

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

43. In October 2010 One Gold Radio was found to be in breach of its licences for Bridgwater, Bath and Swindon. The regulated body had failed to fulfil their

commitment to broadcast local news hourly as specified in each station's Character of Service. Broadcast Bulletin 168, 25 October 2010.⁴

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

44. Although the breach was admitted, the Licensee's representatives claimed the Licensee had been unaware of the activities that led to it and accepted that they had lost effective managerial control over the day to day broadcast operations of the station.

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

45. The nature of this breach was such that upon intervention by Ofcom, remedial action was taken to bring the radiated signal back into compliance.

The extent to which the level of penalty is proportionate

46. The Committee considered the following factors:

- a. Firstly with regard to the breach, consideration was given to:
 - i. the seriousness of the breach, defined by the scale of the overpowering in comparison with any other such case that has resulted in a sanction being imposed;
 - ii. the failure to control the operational aspects of a licensed radio service, and,
 - iii. the recklessness of the breach that was likely to cause harm to members of the public.
- b. This led the Committee to consider that the period of the Licence should be reduced by a substantial amount. In terms of the level of reduction, the Committee took into account the remaining period of the Licence, which was two years.

Precedent

47. There being no directly relevant precedent under Ofcom, the Committee considered the only case of overpowering that has resulted in any type of sanction being applied, as a point of reference. In the case of Medway FM, the Radio Authority fined Medway FM £5,000. Given the seriousness of the breaches currently under consideration, the Committee considered, therefore, that this precedent provided a basis for shortening the Licence by a substantial period.

Conclusion

⁴ <http://stakeholders.ofcom.org.uk/enforcement/broadcast-bulletins/obb168/>

48. In summary, the Committee considered that the Licensee's breach was of such considerable scale that it constituted a licence contravention of great seriousness. It noted in particular that by its deliberate actions intended to cover a much wider broadcast area than that for which the station was licensed, the risk of harm to members of the public had not been taken into account.
49. The Committee further considered that over a period of months, during which time the breach occurred, the Licensee had lost control of the licensed radio service. The Committee found this grave failure to maintain control of its service fell far beneath the standards required of a licence holder.
50. Taking into account the remaining period of the Licence, which was due to expire on 3 July 2013, the Committee considered that a reduction of twelve months to the period for which the Licence is to be in force would be a significant penalty against More FM. The Committee considered this was an appropriate and proportionate penalty given the seriousness and recklessness of the breach and the need for an effective deterrence and incentive to compliance.

Ofcom Broadcasting Sanctions Committee

28 July 2011