

## **Sanction: Decision by Ofcom**

**Imposed on Neath Port Talbot Broadcasting CIC (Ofcom community radio licence number: CR005).**

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

**Consideration of Sanction against:**

Neath Port Talbot (NPT) Broadcasting C.I.C. (the "Licensee") in respect of its service Afan FM (now broadcasting as XS) ("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:**

11 December 2010 and 20 December 2010 with the exception of 17 December (the "Relevant Period")

**Decision:**

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

## **Executive Summary**

1. Afan FM now broadcasting as XS is a community radio station licensed by Ofcom to the Licensee NPT Broadcasting C.I.C. and serving young people in Neath and Port Talbot.<sup>1</sup>
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 broadcasting non-stop music without presenters and was not broadcasting any news bulletins, Ofcom conducted an investigation. The Licensee admitted that the radio service broadcast had not been compliant during the relevant period in that they had broadcast back-to-back music and little else for much of this period. 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 NPT Broadcasting.
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”)<sup>2</sup> 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 may be appropriate and sets out Ofcom’s decision on the type and level of sanction that it considers to be appropriate and proportionate in accordance with Ofcom’s Penalty Guidelines<sup>3</sup> (the “Penalty Guidelines”).
7. Ofcom’s decision on the type and level of sanction is that it would be appropriate and proportionate to impose a financial penalty of £500.00.

## **Summary of Ofcom’s Sanction Decision**

8. After considering all the evidence and the representations made to it by the Licensee, Ofcom decided that the breach was sufficiently 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.
9. Having regard to the serious nature of the breach and having regard to the Licensee’s representations and Ofcom’s Penalty Guidelines, Ofcom decided it was appropriate and

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<sup>1</sup> Afan FM was re-named as XS on 7 January 2011

<sup>2</sup> Published at: <http://stakeholders.ofcom.org.uk/binaries/broadcast/guidance/854750/statutory-sanctions.pdf>

<sup>3</sup> Published at: <http://www.ofcom.org.uk/files/2010/06/penguid.pdf>

proportionate in the circumstances to impose a financial penalty of £500.00 on the Licensee in respect of the breach (payable to HM Paymaster General).

## **Legal Framework**

### **Ofcom's duties**

10. 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**

11. 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.
12. 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.
13. 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 radio 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**

14. 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**

15. Conditions 2(1) and 2(4) in Part 2 of the Schedule to the Licensee's licence are included pursuant to section 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**

16. 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.

## **Consideration of a Statutory Sanction**

### **Details of the Breach**

17. The Licensee, NPT Broadcasting C.I.C., is a company which holds a licence to provide the radio service, Afan FM (subsequently renamed XS). The community radio service is for young people in Neath and Port Talbot in Wales and has a particular focus on those aged 11 to 25. It has been on air since April 2007. The service relies on some waged persons and volunteers to present and produce output.
18. A complaint received by Ofcom on 23 December 2010 alleged the radio station was *“...playing nothing but music. There is no news and no presenters on air. It has been the case since 11 December. I am hearing the same music and adverts every hour...”*
19. Prior to this occurrence, in telephone conversations and by email correspondence on 17 November 2010 the Licensee sought a seven week suspension from the obligation to provide the full Licensed Service in accordance with the station’s Key Commitments. Key Commitments make up the Annex referred to in Licence Conditions 2(1) and 2(4). They encapsulate the characteristics of an individual community radio service and set out the level of service that must be provided. The Licensee said such a suspension would allow the broadcaster to overhaul the studio and transmission equipment (three weeks), allow a further three weeks to train staff and one week to conduct pre-launch preparations for the new XS service.
20. The licence requires delivery of a full licensed service. This includes the Licensee fulfilling both its on-air and off-air Key Commitments as described above.
21. In cases where a Licensee notifies Ofcom of difficulties that may affect its ability to provide a fully compliant service Ofcom may be prepared, in exceptional cases and depending on the particular facts, to agree to a temporary change to the output of the Licensed Service. In doing so, Ofcom’s consideration of the matter will, in particular, balance the proposed duration of the temporary change in output with the likelihood and scale of the potential impact of any such change on the station’s target audience(s).

22. Having duly considered the particular circumstances of the Licensee's request, Ofcom informed NPT Broadcasting that it was prepared to allow a temporary suspension from the obligation to provide the full Licensed Service as required under the Licence for a period of no more than two weeks from 26 December 2010 to 7 January 2011. In authorising this temporary suspension, Ofcom's email to the Licensee of 17 November 2010 stated that the broadcaster would be expected to provide an alternative service during the two week period in question and that Ofcom was prepared to allow this to consist of non-stop music. This email also made it clear that the Licensee would be required to resume delivery of the full service at the end of the two week period (i.e. from 8 January).
23. On 23 December Ofcom received a complaint that the station was broadcasting non-stop music without presenters and was not broadcasting any news bulletins. On investigating the matter, it became apparent that the Licensee had suspended provision of the full service for an unauthorised period from 11 December to 16 December, and from 18 December to 20 December (the "Relevant Period" for the purpose of this preliminary view).
24. In accordance with Ofcom's published procedures Ofcom wrote to NPT Broadcasting inviting the Licensee to provide written representations with regard to its failure to broadcast the Licensed Service during the Relevant Period.

#### Replies from NPT Broadcasting

25. In response to Ofcom's letter to the Licensee regarding a possible breach, NPT Broadcasting wrote on 29 December with the following points set out in outline below:
  - IT failure: the broadcaster's engineer advised an overhaul but engineering/IT problems were found to be more significant on closer inspection
  - duration: from 11am 11 December to 16 December inclusive. Live 'snow' service provided on 17 December then between 18 – 20 December inclusive
  - emergency CD broadcast to advise listeners of the difficulties faced
  - station Facebook page also updated listeners (screenshot submitted)
  - same IT Failure meant that it was not possible to make off-air recordings
  - a playout music log and an audio file with continuous loop output broadcast on 15 December was provided
  - directors apologised and expressed regret for not keeping Ofcom informed.
26. In response to Ofcom's letter of 10 January 2011 a reply was received from the Licensee, dated 25 January 2011. In it the broadcaster:
  - referred to a request to switch to an automated music service for six weeks. This request was declined by Ofcom in place of a two weeks allowance to automate (26 December to 7 January)
  - reiterated the point that the IT network system had failed and that a basic playout system was used to deliver at least some output
  - explained that an engineer was required on site for eleven days to replace and upgrade the system
  - accepted they did not provide the required 12 hours per day live programming during the relevant period
  - claimed that they were compliant between 21 and 26 December

- accepted that they had failed to provide broadcast output recordings as requested by Ofcom but explained that they had offered audio “as near to recorded output as was feasible with the limited resources to hand”
- the Licensee did provide music logs and a copy of an audio file that was played in a loop.

27. On 7 February 2011, and after due consideration of the Licensee’s full 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 in relation to its failure to provide the Licensed Service during the Relevant Period. This finding was published in Ofcom’s Broadcast Bulletin 175 which may be found at:  
<http://stakeholders.ofcom.org.uk/enforcement/broadcast-bulletins/obb175/>

### **Ofcom’s Decision to impose a statutory sanction**

28. As set out in paragraph 1.10 of 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.
29. 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 provided written representations (“Written Representations”) to Ofcom on 31 October 2011 which are summarised in paragraphs 42-52 below.

### **Seriousness of the breach**

30. In accordance with paragraph 1.10 of the Sanctions Procedures as referred to above, Ofcom considers that the breach in this case was sufficiently serious to warrant the imposition of a statutory sanction for the following reasons:
31. Provision by a Community Radio Licensee of the service for which the Licence was granted is a fundamental requirement of the Licence. Ofcom has a range of duties in relation to radio broadcasting, including securing a range and diversity of local radio services which are calculated to appeal to a variety of tastes and interests, and the optimal use of the radio spectrum. These matters find expression in, or are linked to, the Licence condition requiring the provision of the specified licensed service. A failure to provide the required community radio programme outputs to the potential disadvantage of the target community, and in addition, choice for listeners is reduced.
32. In relation to the breach itself, the Finding noted that the Licensee had not been authorised in respect of the Relevant Period to provide an automated back to back music service in place of the Licensed Service and that this unauthorised suspension of the full service had lasted for eight days. The Finding expressed concern that the Licensee had failed to bring the matter to Ofcom’s attention and to inform Ofcom of engineering difficulties that had led

to the broadcaster not providing the Licensed Service as set out in its licence conditions during the Relevant Period.

33. As a result of the failure to provide the Licensed Service as specified in the Licence, the station's output was:

- not adding to the range of programmes available in the area (a statutory requirement which underpins the Licensee's Licence Conditions);
- not being in a position to serve the target community with original programmes; and
- failing to meet prescribed 'social gain' requirements of the Licence.

34. The combination of these matters led to Ofcom concluding that the breach was serious in nature.

### **Preliminary View**

35. Community radio services are defined in the Community Radio Order 2004 as having certain characteristics. The characteristics for each community radio licensee are specified in the form of Key Commitments. The Key Commitment document for each licence forms part of the broadcaster's Licence Conditions. The Key Commitments for NPT Broadcasting<sup>4</sup> are central requirements to the running of the Licensee's broadcast service. In NPT's case they include broadcasting live, typically for twelve hours per day and ensuring daytime programmes comprise 70% music and 30% speech. An additional characteristic includes the provision of social gain which itself includes the facilitation of discussion and expression of opinion, and, the provision of education or training to individuals (not employed by the broadcaster).

36. Pivotal to meeting the Licensee's conditions is the implementation in full of the broadcaster's Key Commitments. Ceasing to broadcast the full licensed service during the Relevant Period constitutes a serious breach because, live programming, the 30% speech quota and being able to meet the social gain objectives, had been replaced by predominantly back to back music.

37. It is for these reasons that this breach of Licence Conditions is regarded by Ofcom as sufficiently serious to warrant the consideration of the imposition of a statutory sanction.

38. In reaching its preliminary view Ofcom has taken into account all the evidence and factors outlined in this paper and the attached annexes. Ofcom also has had regard to the Sanctions Procedures and to the Penalty Guidelines. The sanctions available to Ofcom include a decision to impose a financial penalty, shorten or suspend the licence and/or revoke a licence. In this case a financial penalty was considered appropriate in relation to the seriousness of the breach and consistent with a precedent set when Ofcom sanctioned community radio broadcaster Voice of Africa Radio in July 2011 for not broadcasting a radio service.

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<sup>4</sup> Published at: <http://www.ofcom.org.uk/static/radiolicensing/Community/commitments/cr005.pdf>

## **Imposition of a financial penalty**

39. 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 and has also taken account of the specific factors set out at paragraph 4 of the Penalty Guidelines.

## **Factors taken into account in determining the amount of a penalty**

40. In considering the appropriate amount of a financial penalty for the breach, Ofcom has taken account of the relevant factors in accordance with Ofcom's Penalty Guidelines as set out below:

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

Failure to deliver the Licensed Service as set out in the licensee's Key Commitments e.g. "social gain" is a serious breach given the specific access and participation requirements of a community radio licence.

In this case, with the exception of some pre-recorded programmes, the service consisted only of back to back music during the relevant period, in the Licensee's words: "...a very basic music service..." The station's Key Commitments specify that 30% of daytime output should be speech comprising: interviews, audience interaction and topical features, as well as community-based programming on issues of interest and relevance to young people. Other speech content should include dedicated sports programming, news, weather and drama.

Another Key Commitment of Afan FM is that the service will be "*typically broadcasting live for at least twelve hours...on weekdays*". However, during the relevant period the Licensee failed to broadcast live programmes. Senior members of Ofcom's executive consider this to be a significant period of time to not be broadcasting live output.

In this case suspending the full service led to members of the target audience, previously identified as being underserved, not being served by Afan FM and in effect being denied relevant radio output. Where a licensed service is not being provided in accordance with the terms of the licence, the required community radio programming output cannot be delivered. These requirements/commitments also include the provision of 'social gain' (such as opportunities for discussion) and access to and participation in the radio service (volunteering opportunities, for example). This non-provision was to the potential disadvantage of the target community, and in addition, listening choice among those living in the area was reduced.

In its written representations, the Licensee disputed Ofcom's claim that the service was suspended, declaring that it was unavoidably curtailed adding that there was no evidence to suggest that the target audience was in any way not served by the service provided. The Licensee in its written representations suggested that 'social gain' requirements were a 'theoretical matter not observed by the audience'.

Ofcom maintains that where a licensed service is not being provided in accordance with the terms of the licence, as to the nature of the content, the required community radio programming output cannot be delivered and the target audience not served in the manner as specified in the Key Commitments which form part of the Licence Conditions.

*42. The duration of the contravention*

The Relevant Period lasted for nine days a duration which Ofcom executive considers serious.

The Licensee in its written representations accepted Ofcom's assessment of the duration of the contravention.

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

Following the exchange of correspondence Ofcom understands that the re-launched service XS was broadcasting in a manner compliant with NPT Broadcasting's Licence Conditions. The broadcaster has also co-operated at each step of the investigation of this case.

The Licensee in its written representations agreed with this point.

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

The licensee has not been found to be in breach of its licence conditions before this investigation.

The Licensee in its written representations agreed with this point.

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

Broadcasters replace old, less reliable equipment as a matter of course in order to maintain an adequately reliable broadcast service. Ofcom believes it is apparent, judging by the scale of equipment failure described by the Licensee that such action had not been taken and as a result led to the station management being unable to ensure the production of both live programming and speech programming in accordance with that required by the broadcaster's Key Commitments.

In its written representations, the Licensee pointed out that duplication of core equipment, while being an ideal solution, is impractical within the funding constraints imposed on community radio stations.

Ofcom is familiar with the cost of the studio equipment required to provide an adequately reliable radio broadcast service and through the annual reporting mechanism by community radio licensees, Ofcom is aware that at the time of considering the level of financial penalty this broadcaster has access to a budget surplus of such a size to enable it to ensure the ongoing production of both live and speech programming.

46. *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*

On approach, Ofcom advised the Licensee that any break from a full broadcast service for a period of longer than two weeks, would not be acceptable and declined the broadcaster's request for a seven week suspension of service (email correspondence 17 November 2010.)

The licensee suspended live programming as defined in its Key Commitments during the Relevant Period a period beyond the limited and specific period Ofcom had given its approval for. On investigation the Licensee advised Ofcom of the failure to broadcast the full licensed service was due to a failure of its IT network rendering the station unable to broadcast anything very much beyond "a very basic music service". In its written responses to the earlier consideration of a licence breach it was evident that the Licensee's senior management was aware of the contravention but did not seek to bring the radio service into compliance nor to bring the matter to Ofcom's attention.

Typically to avoid IT and engineering failures a degree of duplication of hardware is normally engineered into a studio system providing an in-built redundancy of components, in case of and to overcome equipment failure. In this case it appears to Ofcom that engineering related matters were not properly managed to prevent the contravention. Furthermore Ofcom is concerned that it took as long as it did to bring the radio service back into compliance.

In its written representations the Licensee:

- disputed the term 'suspended' as implying a voluntary decision and that the only possible alternative [apart from the one taken] was to cease broadcasting completely which from the station's viewpoint would have been severely harmful and was seen as unnecessary
- added that while the station's management was fully aware of the contravention, a combination of speed of required reaction, the necessity to get personnel on site, the bad weather experienced at the time, widespread illness and seeking to prioritise these problems; formal notification [to Ofcom] was not high on the list.
- agreed with Ofcom's point that normally studio systems are to a degree, engineered to provide built-in redundancy of components so as to avoid IT and engineering failures impacting on a radio station's ability to produce radio programmes
- maintained that a failure was of such a magnitude that 'there had been no previous indication of the possibility of failure' and cited Ofcom's "comprehension of the degree of funding, equipping and management of a community radio station" as being 'clearly flawed'
- wrote that in terms of the duration of the breach, the broadcaster achieved compliance levels 'within a few days and over a long holiday period.' The representations put this down to the work put in by directors, management, staff, volunteers and contractors.

Ofcom notes that:

- live programming as defined in the Licensee's Key Commitments had been curtailed over the relevant period. In addition Ofcom maintains that the senior management comprising three directors and a director/chairman, could reasonably be expected to be familiar at least the principal licensing terms and be aware of the requirements set out in the Licensee's Key Commitments.
- the Licensee had been in contact with Ofcom prior to the period of non-compliance but not at any point during the period of non-compliance.
- with regard to there not being any indication of the possibility of a technical failure; in the Licensee's representation 29 December 2010, NPT wrote 'When the new Board of directors assumed a duty as licensees of Afan FM, we conducted a rigorous technical inspection that uncovered a multitude of problems in relation to the station's administrative and technical infrastructure.' Ofcom concluded from this earlier representation that the Licensee had indeed received a 'previous indication of the possibility of failure.'
- the relevant period of non-compliance had not been disputed in either the breach representations or in an earlier part the Preliminary View representation, the Licensee's comment above, that compliance was achieved 'within a few days' and 'over a long public [Christmas] holiday' appears at odds with the otherwise undisputed relevant period which ran from 11 December to 20 December, with the exception of one day.

*47. 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 the heavy snow fall on 17 December and switched resources in order provide listeners on that day with a temporary information service which was produced under makeshift conditions.

In addition during the relevant period the broadcaster informed listeners and advertisers through the station's Facebook page and directly by email and through telephone calls that it was experiencing extensive technical problems. NPT Broadcasting enclosed a screenshot of its Facebook page along with its letter dated 29 December.

The Licensee did not make any representations on this matter.

*48. 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 presides over 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 2009/2010 the station's income including grants and in-kind support was greater than expenditure for both those years and that a sizable surplus was held by the regulated body. At the time of consideration of the financial penalty the Licensee still had access to this cash surplus.

A Financial Penalty of £500.00 represents a small fraction of both the annual turnover and the surplus and it is Ofcom's view that this amount may be considered to be set at an appropriate nominal level for deterrence given the scale of the broadcast operation, while being unlikely to place the Licensee in a financially precarious position, this being based on information available to Ofcom at the time of considering this case.

The Licensee did not make any representations on this matter.

#### 49. *Cooperation with this investigation*

The Licensee has cooperated with Ofcom during this investigation.

### **Precedent**

50. 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 2010<sup>5</sup>.

51. 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.

52. 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.

53. 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**

54. The Licensee felt that Ofcom was insinuating that the claim of network failure was used by the Licensee as an excuse to extend the two-week period of authorised suspension of the full service. The Licensee denied this was the case.

55. The Licensee disputed Ofcom's view that as a result of the failure to provide the Licensed Service as specified, the station's output did not add to the range of programmes available in the area and that the station was not in a position to serve the target community with

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<sup>5</sup> Published at: <http://stakeholders.ofcom.org.uk/binaries/enforcement/content-sanctions-adjudications/voice-of-africa.pdf>

original programmes. In their representations in response to the Preliminary View the Licensee said that 'the range of programmes available in the area was as normal with the sole exception of live strands' and that 'original programmes were broadcast serving the target community as normal.' As part of the original investigation Ofcom sought recordings of the station's output over the relevant period. The Licensee was unable to provide recordings of the full output, as requested by Ofcom in accordance with the requirements of its Licence. Rather, the Licensee provided only an audio file of three hours duration of back to back music with inserted station IDs. In their response to the initial breach, as published in the Breach Finding, the Licensee said that output at that time comprised 'a three-hour segment followed by a different two-hour segment and in addition several pre-recorded complete shows were inserted into the schedule'. Overall this was described by the Licensee as 'a very basic music service'.

56. Separately in the Licensee's written representations the Licensee disputed the term 'back-to-back-music' as being a 'cynical description' of what was broadcast, adding that this was the type of content 'predominantly requested by the audience.'
57. The Licensee's written representations expressed the view that as a 'remote uncaring regulator' Ofcom had disregarded 'the pivotal ethos of the service.'
58. The written representations maintained the position that this failure to broadcast a licensed radio service in accordance with its Licence Conditions was an unforeseen event and that a deterrent imposed as part of a penalty would do nothing to prevent future unforeseen circumstances.

### **Issues raised by this case**

59. Provision by a licensee of its Licensed Service is a fundamental requirement. 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.
60. 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.
61. 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 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 perhaps on a shared basis with other community radio stations where appropriate.
62. 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**

63. In summary, Ofcom considered that the Licensee's breach was serious because it had ceased to broadcast live programming and had not met the Licensee's 30% speech quota which were both specified in the Key Commitments of Licensee's Licence Conditions.
64. Ofcom also noted that during the relevant period, NPT Broadcasting was unable to meet its social gain commitments to its target community. While the Licensee requested a seven-week suspension from meeting specific licence conditions, and Ofcom agreed to two weeks, the relevant period plus the two week authorised suspension amounted to a significant period of time over which the interests of listeners were not met.
65. The breach was due to an equipment failure. Ofcom noted that through NPT's earlier written representations, the Licensee had identified that the prospect of such a failure was at least likely when it wrote that they had recently 'uncovered a multitude of problems in relation to the station's...technical infrastructure'.
66. Ofcom noted that a prompt resumption of the full broadcast programme service was not achieved.

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. Given the degree of surplus funds reportedly held by the licensee it is Ofcom's view that this amount may be considered to be set at an appropriate nominal level for deterrence, while being unlikely to place the Licensee in a financially precarious position this being based on information available to Ofcom at the time of considering this case.

67. 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 NPT Broadcasting of £500.00.

**19 December 2011**