

Department for **Transport**

Mr Ethan Wilson
Email

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Our Ref: F0006192

10th March 2010

Dear Mr Wilson

Freedom of Information Act enquiry F0006192

Thank you for your email of 9th February 2010.

I refer to your request for information about the receipt of revenue support by First Capital Connect ("FCC") and what support has been paid over the last five years. I am dealing with it under the terms of the Freedom of Information Act 2000.

FCC's franchise commenced on 1 April 2006, and, in accordance with paragraph 4.1 of Schedule 8.1 (Franchise Payments) to the Franchise Agreement, they were only eligible for Revenue Support from 1 April 2009. Therefore we can confirm that no Revenue Support payments were due or paid under the Franchise Agreement up to that date.

FCC was eligible for Revenue Support from 1 April 2009. However, the total amount of Revenue Support that is payable in any Financial Year is calculated at the end of any such Year in which Revenue Support has been paid, based on the Annual Financial Statements. This is set out in paragraph 4.8 and 4.9 of Schedule 8.1 (Franchise Payments) to the Franchise Agreement. As the Revenue Support Reconciliation Adjustment has not yet taken place for the Financial Year commencing April 2009, DfT is unable to provide an accurate Revenue Support figure payable for that period.

Schedule 8.1 of the Franchise Agreement has been annexed to this document at Annex B for your information.

If you are unhappy with the way the Department has handled your request or with the decisions made in relation to your request you may complain within two calendar months of the date of this letter by writing to the Department's Information Rights Unit at:

Zone D/04
Ashdown House
Sedlescombe Road North
Hastings
East Sussex TN37 7GA
E-mail: FOI-Advice-Team-DFT@dft.gsi.gov.uk

Please see attached details of DfT's complaints procedure and your right to complain to the Information Commissioner.

If you have any queries about this letter, please contact me. Please remember to quote the reference number above in any future communications.

I would like to apologise for the delay in responding to your request for information. As you are aware the Freedom of Information Act requires the department to reply promptly and no later than the twentieth working day following date of receipt of a request. On this occasion we have failed to meet the statutory 20 working day deadline. We are taking steps to avoid a recurrence.

Yours sincerely,



PP · Patrick Ruddy
Franchise Manager

SCHEDULE 8.1

Franchise Payments

1. FRANCHISE PAYMENTS

1.1 The Franchise Payment for any Reporting Period shall be an amount equal to

$$\text{£FP} = \text{PFP} - \text{RS}_{\text{hA}} - \text{RS}_{\text{hRA}} + \text{RS}_{\text{uA}} + \text{RS}_{\text{uRA}} + \text{TAA} + \text{SCA} + \text{FRPP} + \text{NRR08/09}$$

where:

£FP means the Franchise Payment for that Reporting Period;

PFP means $\left(\frac{\text{RPD}}{\text{FYD}} \times \text{AFP} \right)^2$

where:

RPD means the number of days in that Reporting Period;

FYD is equal to 365 or, if February 29 occurs during the Franchisee Year in which that Reporting Period falls, 366; and

AFP means the Annual Franchise Payment for the Franchisee Year in which that Reporting Period occurs, as determined in accordance with Schedule 8.2 (*Annual Franchise Payments*);

RS_{hA} means the amount of any Revenue Share Adjustment to be made on that Reporting Period's Payment Date;

RS_{hRA} means the amount of any Revenue Share Reconciliation Amount to be paid on that Reporting Period's Payment Date;

RS_{uA} means the amount of any Revenue Support Adjustment to be made on that Reporting Period's Payment Date;

RS_{uRA} means the amount of any Revenue Support Reconciliation Amount to be paid on that Reporting Period's Payment Date;

TAA means any Track Access Adjustment to be made on that Reporting Period's Payment Date;

SCA means any Station Charge Adjustment to be made on that Reporting Period's Payment Date; *and*

FRPP means the Final Reporting Period Payment to be determined in accordance with paragraph 6.³

⁴*NRR07/8 means an amount equivalent to the amount received by the Franchisee from Network Rail in that Reporting Period by way of Network Rail Rebate in respect ⁵of the relevant year ending*

² DATE OF CHANGE 4/3/2009

³ Insert change text wef 26/05/06

⁴ Date of change 1/4/2008

on 31 March 2009. For this purpose, "Network Rail Rebate" and "relevant year" have the meaning given to them in the Track Access Agreement.⁶

1.2 Where a Franchisee Year starts or ends during a Reporting Period, £FP and PFP shall be determined as if references in paragraph 1.1 to a Reporting Period were to each of the separate sections of two such Reporting Periods which fall either side of such Franchisee Year start or end, and the Franchise Payment for such Reporting Period shall be the sum of £FP as determined for each such section of such Reporting Period.

1.3 The parties agree that:

- (a) each of £FP, RShRA, RSuA, RSuRA, TAA and SCA, may be a positive or negative number;
- (b) where £FP is a positive number, the Secretary of State shall pay that amount to the Franchisee on the Payment Date for that Reporting Period; and
- (c) where £FP is a negative number, the Franchisee shall pay the corresponding positive amount to the Secretary of State on the Payment Date for that Reporting Period.

2. PAYMENT OF FRANCHISE PAYMENTS

2.1 The Secretary of State shall notify the Franchisee, no less than seven days prior to the end of each Reporting Period, of the amount of the Franchise Payment payable in respect of that Reporting Period.

2.2 Each such notification shall set out in reasonable detail how the Franchise Payment has been calculated.

2.3 The Payment Date for a Reporting Period shall be the last business day of that Reporting Period.

2.4 Each Franchise Payment shall be payable by the Franchisee or, as the case may be, the Secretary of State in the amount notified by the Secretary of State in accordance with paragraph 2.1 on the Payment Date of the Reporting Period to which it relates.

2.5 Each Franchise Payment shall be made:

- (a) by automatic electronic funds transfer in pounds sterling to such bank account in the United Kingdom as the payee of such payment may have previously specified to the payer in writing; and
- (b) so that cleared funds are received in that account on or before the due date for payment.

2.6 If either party disputes the amount of a Franchise Payment, the dispute shall be resolved in accordance with the Dispute Resolution Rules but shall not affect the obligation of either party to pay a Franchise Payment notified in accordance with this paragraph 2.

2.7 If either party fails to pay any amount to the other party on its due date, it shall in addition pay interest on such amount at the Interest Rate, calculated on a daily basis, from the due date for payment to the date on which payment is made.

2.8 If the amount of any Franchise Payment is agreed or determined to be incorrect and:

⁵ DATE OF CHANGE 4/3/2009

⁶ Insert change text wef 21/02/07

- (a) either party has made a payment to the other party which is greater than it would have made if the amount of the Franchise Payment had been correct, then the recipient shall repay the excess within three business days of the agreement or determination; or
- (b) either party has made a payment to the other party which is less than it would have made if the amount of the Franchise Payment had been correct, then the payer shall pay the amount of any shortfall to the payee within three business days of the agreement or determination,

together, in each case, with interest on the amount payable at the Interest Rate, calculated on a daily basis from the date on which the Franchise Payment was paid until the date on which such excess amount or shortfall is paid.

3. REVENUE SHARE

Entitlement to Revenue Share Adjustments

3.1 A Revenue Share Adjustment shall be made in accordance with paragraphs 3.2, 3.3 and 5.4 in respect of any Franchisee Year if the Annual Management Accounts for that Franchisee Year disclose Revenue for that Franchisee Year as exceeding Target Revenue by more than the percentage prescribed for this purpose in the Franchise Agreement for that Franchisee Year.

Amount of Revenue Share Adjustments

3.2 Each Revenue Share Adjustment in respect of any Franchisee Year, shall be determined by reference to:

- (a) the Revenue disclosed in the Annual Management Accounts for that Franchisee Year;
- (b) Target Revenue for that Franchisee Year; and
- (c) the following formula:

$$RS_{hA} = (A \times X\%) + (B \times Y\%)$$

where:

RS_{hA} is the Revenue Share Adjustment for that Franchisee Year;

A is the amount of Revenue for that Franchisee Year which is:

- (a) greater than the percentage of Target Revenue prescribed for this purpose in the Franchise Agreement; and
- (b) less than or equal to the percentage of Target Revenue prescribed for this purpose in the Franchise Agreement;

X is the percentage prescribed for the purpose in the Franchise Agreement;

B is the amount of Revenue for that Franchisee Year which is greater than the percentage of Target Revenue prescribed for this purpose in the Franchise Agreement; and

Y is the percentage prescribed for the purpose in the Franchise Agreement.

Revenue Share Adjustment Date

3.3 Each Revenue Share Adjustment in respect of any Franchisee Year shall be payable by the Franchisee and, subject to paragraph 5, be made to the Franchise Payment payable on the next Revenue Share Adjustment Date.

Revenue Share Reconciliation Amount

3.4 After each Franchisee Year, the Secretary of State shall, following receipt by the Secretary of State of the Annual Financial Statements in respect of that Franchisee Year, calculate the Revenue Share Reconciliation Amount in accordance with paragraph 3.5.

3.5 The Secretary of State shall calculate the Revenue Share Reconciliation Amount in accordance with the following formula:

$$RShRA = RShA_{(FS)} - RShA$$

where:

$RShRA$ is the Revenue Share Reconciliation Amount for any Franchisee Year;

$RShA_{(FS)}$ is the Revenue Share Adjustment determined in the manner set out in paragraph 3.2 but by reference to the Annual Financial Statements (instead of the Annual Management Accounts) for that Franchisee Year; and

$RShA$ is the Revenue Share Adjustment (if any, or if there was none, nil) for that Franchisee Year determined pursuant to paragraph 3.2.

Revenue Share Reconciliation Date

3.6 Any Revenue Share Reconciliation Amount shall be payable by the Secretary of State or the Franchisee (as the case may be) and, subject to paragraph 5, be applied to the Franchise Payment payable on the next Revenue Share Reconciliation Date.

Meaning of Revenue for the purposes of paragraph 3

3.7 For the purposes of this paragraph 3 only, the amount of Revenue that may be compared with Target Revenue from time to time shall exclude any Revenue that is wholly attributable to:

- (a) Additional Passenger Services operated with additional rolling stock funded by Additional Rolling Stock Investment; and/or
- (b) commission receivable by the Franchisee from other Train Operators in respect of sales of tickets for their railway passenger services sold by the Franchisee through Additional Call Centres.

Additional Investment

3.8 The Franchisee shall be entitled to notify the Secretary of State before making any Additional Investment. In so notifying, the Franchisee shall provide full details of the investment contemplated, together with the reasons why it considers that such investment constitutes Additional Investment.

3.9 To the extent that the Franchisee makes any Additional Investment without first notifying the Secretary of State, then any Revenue accruing from any related Additional Passenger Services or commission accruing from the Additional Call Centre Investment (as the case may be) shall be included in the amount of Revenue that may be compared with Target Revenue for the purposes of this paragraph 3.

3.10 Within 28 days of receipt of any notice given in accordance with paragraph 3.9, the Secretary of State shall notify the Franchisee whether or not he considers that the investment constitutes Additional Investment, providing reasons for the decision.

Accounting for Revenue attributable to Additional Investment

3.11 In respect of any Franchisee Year, the Franchisee shall demonstrate to the Secretary of State the amount (if any) of accrued Revenue that the Franchisee believes falls within paragraph 3.7(a) and/or (b) by:

- (a) separately accounting for those amounts in any accounts or statements required pursuant to Schedule 13 (*Information and Industry Initiatives*); and
- (b) providing such other information as the Secretary of State reasonably requires.

3.12 The Secretary of State shall reasonably determine in accordance with established industry procedures (including those prescribed in the Ticketing and Settlement Agreement), where applicable, the amount of accrued Revenue that is attributable to the activities referred to in paragraphs 3.7(a) and/or (b).

4. REVENUE SUPPORT

Entitlement to Revenue Support Adjustments

4.1 A Revenue Support Adjustment shall be made in accordance with paragraphs 4.2, 4.5 to 4.7 (inclusive) and 5.4 in respect of any Reporting Period which starts after the *third*⁷ anniversary of the Start Date if:

- (a) subject to paragraph 4.2, the Management Accounts for that Reporting Period disclose cumulative, year to date Revenue up to the end of that Reporting Period as being less than 98 per cent. of Target Revenue for that corresponding, year to date period; and
- (b) within seven days of delivery to the Secretary of State of the Management Accounts for such Reporting Period, the Franchisee requests that a Revenue Support Adjustment be made by the Secretary of State.

4.2 If any Revenue Support Adjustment is made in respect of any Reporting Period that starts during the Franchisee Year in which the *third*⁷ anniversary of the Start Date occurs, any such Revenue Support Adjustment shall be made by reference to:

- (a) the cumulative Revenue for the period from the first Reporting Period that starts after the *third*⁷ anniversary of the Start Date up to the end of the Reporting Period in respect of which such Revenue Support Adjustment is to be made; and
- (b) the cumulative Target Revenue for those Reporting Periods.

4.3 If:

- (a) the conditions specified in paragraph 4.1 are met in respect of any Reporting Period prior to the *third*⁷ anniversary of the Start Date; and
- (b) the deficit is directly attributable to one or more Force Majeure Events,

then, subject to paragraph 4.4, the Franchisee may claim a Revenue Support Adjustment in accordance with paragraph 4.1 notwithstanding the fact that the claim arises prior to the *third*⁷ anniversary of the Start Date.

⁷ Insert change text wef 26/05/06

4.4 If and to the extent that the deficit referred to in paragraph 4.3 is directly attributable to a Force Majeure Event arising as a result of industrial action (howsoever caused and of whatever nature) then the Franchisee shall not be eligible for any Revenue Support Adjustment and the provisions of paragraph 1.1 of Schedule 8.3 (*Miscellaneous Payment Provisions*) shall apply.

4.5 If a Revenue Support Adjustment is requested and made pursuant to paragraphs 4.1 to 4.3 (inclusive) in any Reporting Period in any Franchisee Year, a further Revenue Support Adjustment shall be made (whether or not requested) in accordance with paragraphs 4.6 and 4.7 in each subsequent Reporting Period that falls wholly within that Franchisee Year.

Amount of Revenue Support Adjustments

4.6 Each Revenue Support Adjustment in respect of any Reporting Period, shall be determined by reference to:

- (a) subject to paragraph 4.2, the cumulative, year to date Revenue up to the end of that Reporting Period, reported in the latest Management Accounts referred to in paragraph 4.1;
- (b) the Target Revenue for the year to date; and
- (c) the following formula:

$$RS_{uA} = RS_{uE} - PRS_{uA}$$

where:

RS_{uA} is the Revenue Support Adjustment for that Reporting Period;

RS_{uE} is the cumulative Revenue Support Adjustment entitlement for the year to date, determined by reference to the following formula:

$$RS_{uE} = (A \times 50\%) + (B \times 80\%)$$

where:

A is the amount by which cumulative, year to date Revenue up to the end of that Reporting Period is:

- (a) less than 98 per cent. of Target Revenue; and
- (b) equal to or greater than 94 per cent. of Target Revenue,

for the year to date; and

B is the amount by which cumulative, year to date Revenue up to the end of that Reporting Period is less than 94 per cent. of Target Revenue for the year to date; and

PRS_{uA} is the cumulative net Revenue Support Adjustments (if any) made in any previous Reporting Periods in the same Franchisee Year as such Reporting Period.

Revenue Support Adjustment Date

4.7 Each Revenue Support Adjustment in respect of any Reporting Period shall be payable by the Secretary of State or the Franchisee (as the case may be) and, subject to paragraph 5, made to the Franchisee

Payment payable on the Revenue Support Adjustment Date (or, in the case of further Revenue Support Adjustments made pursuant to paragraph 4.5, on each subsequent Payment Date).

Revenue Support Reconciliation Amount

4.8 After each Franchisee Year in which any Revenue Support Adjustment has been made, the Secretary of State shall, following receipt by the Secretary of State of the Annual Financial Statements in respect of that Franchisee Year, calculate the Revenue Support Reconciliation Amount in accordance with paragraph 4.9.

4.9 The Secretary of State shall calculate the Revenue Support Reconciliation Amount in respect of any Franchisee Year in accordance with the following formula:

$$RS_{u}RA = RS_{u}A_{(FS)} - PRS_{u}A$$

where:

$RS_{u}RA$ is the Revenue Support Reconciliation Amount for that Franchisee Year;

$RS_{u}A_{(FS)}$ is the Revenue Support Adjustment for that Franchisee Year determined in accordance with the following formula:

$$RS_{u}A_{(FS)} = (A \times 50\%) + (B \times 80\%)$$

where:

A is the amount by which Revenue for that Franchisee Year as reported in the Annual Financial Statements is:

- (a) less than 98 per cent. of Target Revenue; and
- (b) equal to or greater than 94 per cent. of Target Revenue,

for that Franchisee Year; and

B is the amount by which Revenue for that Franchisee Year as reported in the Annual Financial Statements is less than 94 per cent. of Target Revenue for that Franchisee Year; and

$PRS_{u}A$ is the sum of each Revenue Support Adjustment determined pursuant to paragraph 4.6 in respect of any Reporting Period in that Franchisee Year.

Revenue Support Reconciliation Date

4.10 The Revenue Support Reconciliation Amount shall be payable by the Secretary of State or the Franchisee (as the case may be) and, subject to paragraph 5, applied to the Franchise Payment payable on the Revenue Support Reconciliation Date.

Revenue Support Adjustment and Additional Passenger Services⁸

4.11 For so long as a Revenue Support Adjustment is to be made in accordance with this paragraph 4, then the Franchisee shall not be entitled, without the prior consent of the Secretary of State, to take any

⁸ Date of change 14/7/2008

steps to operate any new Additional Passenger Services over and above those it is already operating, including:

- (a) seeking or exercising any new Additional Timetable Development Rights in accordance with paragraph 12.1 of Schedule 1.1 (*Service Development*);
- (b) procuring new rolling stock vehicles in accordance with paragraph 13.2(a) of Schedule 1.1; and
- (c) proposing to Network Rail the addition of any new Additional Passenger Service in accordance with paragraph 5.2 of Schedule 1.2 (*Operating Obligations*).

Revenue Support Adjustment where Franchisee is in Contravention of its Performance Obligations

4.12 If a Revenue Support Adjustment is to be made in accordance with this paragraph 4 in circumstances where the Franchisee is failing to perform its obligations in contravention of any Breach Performance Level, then the provisions of Schedule 15.1 (*Reletting Provisions*) and, notwithstanding that the last 12 or 13 months of the Franchise Period have not commenced at such time, the provisions of Schedule 15.2 (*Last 12 or 13 Months of Franchise Period*) shall apply.

5. FINAL FRANCHISEE YEAR

Revenue Share

5.1 Any Revenue Share Adjustment and/or Revenue Share Reconciliation Amount to be made in respect of the final Franchisee Year shall be determined in accordance with paragraphs 3.2 and 3.6 respectively but shall be paid within 30 days of the Secretary of State giving written notice to the Franchisee of the amount of such Revenue Share Adjustment and/or Revenue Share Reconciliation Amount.

Revenue Support

5.2 Any Revenue Support Adjustment and/or Revenue Support Reconciliation Amount which:

- (a) is to be made in respect of the final Franchisee Year; and
- (b) has not been made during the Franchise Period,

shall be determined in accordance with paragraphs 4.6 and 4.9 respectively but shall be paid within 30 days of the Secretary of State giving written notice to the Franchisee of the amount of such Revenue Support Adjustment and/or Revenue Support Reconciliation Amount.

Annual Financial Statements

5.3 If the Franchisee fails to provide the Annual Financial Statements for the final Franchisee Year within three Reporting Periods of the expiry of the final Franchisee Year pursuant to paragraph 3.7 of Schedule 13 (*Information and Industry Initiatives*), the Secretary of State shall be entitled (but not obliged) to determine:

- (a) any Revenue Share Adjustment in accordance with paragraph 3.2;
- (b) any Revenue Share Reconciliation Amount in accordance with paragraph 3.5;
- (c) any Revenue Support Adjustment in accordance with paragraph 4.6; and/or
- (d) any Revenue Support Reconciliation Amount in accordance with paragraph 4.9,

but by reference to any relevant information available to the Secretary of State at the time of such determination, including any information contained in the latest cumulative, year to date Management Accounts or in the Annual Management Accounts.

Target Revenue

5.4 If the Franchise Agreement terminates early, Target Revenue shall be pro-rated for the year of termination.

6. FINAL REPORTING PERIOD PAYMENT⁹

6.1 The Final Reporting Period Payment for each Reporting Period other than the last Reporting Period of the Franchise Term shall be nil.

6.2 The Final Reporting Period Payment in respect of the last Reporting Period of the Franchise Term shall be an amount calculated as follows:

$$FRPP = PMC \times \{180 - n\} \div 180$$

where

FRPP means the amount of the Final Reporting Period Payment;

PMC means the costs incurred by the Franchisee in connection with the merger of the Franchise Sections as envisaged in paragraph 12 (Franchise Sections) of Schedule 16 (Pensions) which it would not have incurred in the absence of any such merger, with those costs off-set against the Profit Share in accordance with paragraph 5 of Appendix 13 to the Franchise Agreement; and

n means the number of months elapsed between the date on which the costs reflected in the *PMC* were incurred by the Franchisee and at the end of the Franchise Term.

⁹ Insert new text wef 26/05/06

Your right to complain to DfT/and the Information Commissioner

You have the right to complain within two calendar months of the date of this letter about the way in which your request for information was handled and/or about the decision not to disclose all or part of the information requested. In addition a complaint can be made that DfT has not complied with its FOI publication scheme.

Your complaint will be acknowledged and you will be advised of a target date by which to expect a response. Initially your complaint will be re-considered by the official who dealt with your request for information. If, after careful consideration, that official decides that his/her decision was correct, your complaint will automatically be referred to a senior independent official who will conduct a further review. You will be advised of the outcome of your complaint and if a decision is taken to disclose information originally withheld this will be done as soon as possible.

If you are not content with the outcome of the internal review, you have the right to apply directly to the Information Commissioner for a decision. The Information Commissioner can be contacted at:

Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF