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Mr Philip Rutnam
Permanent Secretary
Department for Transport
Great Minster House
33 Horseferry Road
London SW1P 4DR

Also being sent by email to philip.rutnam@dft.gsi.gov.uk

28th July 2016

Dear Mr Rutnam

Proposed Claim for Judicial Review

We write in relation to the Invitation To Tender (ITT) for the South Western Rail Franchise (SWRF), as published by the Department for Transport (DfT) on 30th June 2016.

This letter is a formal Letter Before Claim in accordance with the Pre-Action Protocol for Judicial Review under the Civil Procedure Rules.

THE PROPOSED DEFENDANT

Mr Philip Rutnam (Permanent Secretary, DfT)

THE CLAIMANTS

Mr David Pugh – 31 Silver Trees, Shanklin, Isle of Wight PO37 7ND

Mr Warren Drew – 7 Fir Tree Close, Shanklin, Isle of Wight PO37 7EX

DETAILS OF THE MATTER BEING CHALLENGED

We are challenging the objective set out in the recently published ITT that the next franchisee is required to “*work with the Isle of Wight Council to secure a long-term sustainable solution to the future of the Island Line during the course of the next franchise that will enable it to become a self-sustaining business*”.

In particular, we are challenging the legitimacy of the policy objective that Island Line will, during the course of the next franchise period, become a self-sustaining business.

DETAILS OF ANY INTERESTED PARTY

We consider the Isle of Wight Council to be an interested party, by virtue of the fact that this local authority is named in the ITT as a key partner for the next franchisee to work with in delivering the stated franchise objective. Furthermore, the Stakeholder Briefing Document states that the franchisee will commit “*to working with the Isle of Wight Council and other appropriate stakeholders as options are developed and assessed for the provision of future services*”. [5.80]

Specifically, we name John Metcalfe (the Chief Executive of the Isle of Wight Council). In accordance with the Pre-Action Protocol he is being sent a copy of this LBC for his information.

BACKGROUND

On 30th June 2016, the DfT published the ITT for the SWRF setting out its requirements for the next franchisee.

This included, on pages 10 and 11, the eight franchise objectives which the next franchisee would be required to meet. This included the aforementioned specific objective in relation to Island Line.

We consider that the policy articulated in this franchise objective (which reiterates the DfT's intentions in respect of Island Line as set out over the past nine months) contrasts markedly with the treatment of the rest of the South Western network insofar as no other loss-making branch line is being required to become self-sustaining.

To the contrary, franchise bidders for the rest of the South Western franchise area (which includes many loss-making branch lines) are required to provide substantial capital investment for the running of these services throughout the franchise period, and have not been required to develop other loss-making lines into self-sustaining and separate businesses.

The ITT followed a three-month public consultation launched on 12th November 2015, which concluded on 9th February 2016 with the deadline for all responses. The consultation document stated the franchise objectives, and in relation to Island Line it did so in precisely the same form of words as used in the ITT, viz:

"Work with the Isle of Wight Council to secure a long-term sustainable solution for the future of the Island Line during the course of the next franchise that will enable it to become a self-sustaining business." [page 9]

The public response to the consultation is summarised in the Stakeholder Briefing Document (published on 4th July 2016), which acknowledged that:

"...the majority of respondents were against this proposal, believing that a separate organisation would not be able to make the required investment, would not be capable of running services effectively, and that this would ultimately lead to the closure of the line". [5.74]

It is the clear intention of the DfT to treat Island Line differently to the rest of the South Western network without a substantial justification which warrants the manifest discrimination and hardship that users of the service will experience. By failing to require a reasonable level of investment and safeguard the long-term future within the franchise which the rest of the Network enjoys by virtue of the requirements of the ITT, the DfT has condemned Island Line to a period of managed decline which will deleteriously affect users.

It is absurd to imagine that a private company will invest the significant funds required to safeguard the long-term future of Island Line when the DfT has mandated the franchisee to work towards a solution that will move Island Line outside of the franchise area and therefore outside the fiscal responsibility of the eventual franchisee. This is particularly so given the need for considerable capital investment in Island Line's rolling stock and infrastructure (particularly Ryde Pier) to ensure the continued provision of a rail service as currently operating, and in accordance with the Railways Act 2005.

- 1) It is our view that the DfT has failed to take into account relevant considerations for the purposes of the ITT and that its proposals for Island Line have been made without a true understanding of the financial situation or the causes thereof. In particular, the DfT have not been able to provide a detailed picture of Island Line financials because no such details exist. In a letter to David Pugh dated 2nd February 2016, Stagecoach SWT's Finance Director (Andy

West) provided further disclosure of Island Line's financial status and in so doing highlighted that the level of detail SSWT and, by extension, the DfT have regarding Island Line is poor. We consider that the information on which the DfT determined its policy objective for a self-sustaining model for Island Line fails to take into account the likely scale of costs in securing the service's future through a separate business.

- 2) The deficiencies in the DfT's assessment of Island Line's financials became clear at a consultation event in December 2015 when the Programme Manager for the franchise bid stated (as reported at the time by local news website *On The Wight*):

"We recognise there are some questions about that data and we are, as a department, looking into that and trying to establish a true baseline of information data and to be transparent about that, so that we can all move forward on a consistent basis rather than people espousing that it's £2m, or £1m here or £1m there, we need to get to the facts so everybody can work off that at that same baseline. We need to be there before we make decisions."

This point is further illustrated by the fact that the Stakeholder Briefing Document makes clear that the franchisee will be required to establish a "...business unit for the Island Line, which will provide separate financial and operational data to inform the consideration of potential options". [5.77]

We submit that this is an entirely wrongheaded approach and is very much putting the cart before the horse. The DfT has chosen to single out Island Line for deleterious treatment in a situation where the justification for doing so is not only irrational, but where there exists no substantial or reliable evidence base for so doing.

- 3) We also submit that the DfT has failed to take into consideration:
- i. The special economic status of the Isle of Wight and its geographical status – including the role of Island Line in providing a vital connection to the mainland via the Pier Head ferry service, as an integral part of the South Western network.
 - ii. Failure to have regard for the reasons as to why Island Line ceased to be run as a micro-franchise in 2007 – when it was brought into the wider South Western Rail Franchise due to the impracticality and unviability of it being run separately.
 - iii. The implications for people falling within the provisions of the Equality Act 2010 and who make up a disproportionately high number of service users when compared to other branch lines within the franchise area.
 - iv. The lack of political will or financial resources required to make working with the Isle of Wight Council (in achieving the objective of the ITT) viable. On 2nd September 2015 and 16th March 2016, the Full Council of the Isle of Wight voted decisively against supporting the DfT's policy objective of making Island Line a separate and self-sustaining railway system.
- 4) The limited financial data that the DfT has in relation to Island Line indicates a funding deficit of circa £3m per annum (which is without taking into account substantial future infrastructure costs). Given the scale of the deficit and the economic status of the Isle of Wight (including the budgetary position of the local authority), it is irrational to suggest that it will be possible to place Island Line onto a "self-sustaining" basis (as understood on any normal interpretation of those words) without a massive and speculative capital investment that would be less fiscally responsible than the current basis of cross-investment from the more profitable parts of the South Western franchise. This is even more the case given that the rail superstructure of Ryde Pier is estimated to require investment in the region of £8m to ensure its continued operation.

- 5) The majority of rural and coastal branch lines do not “break even” and yet there is no suggestion from the DfT that these would also be required to become separate and “self-sustaining” in the same fashion as Island Line.
- 6) Moreover, it is irrational to imagine that a small, separately governed Island Line outside the franchise area would be able to deliver a better return on investment and service quality than it can under the current arrangements where it benefits from the economies of scale and expertise that come with being managed by a commercial organisation whose primary expertise is in the provision of a large rail network. Given that Island Line will require public investment / subsidy in some form, there is no rational basis to imagine that a separate organisation will be able to deliver better efficiencies than can currently be achieved under the current arrangement, and certainly not self-sustaining. If savings were possible, then clearly the current franchisee would have taken steps to implement such in accordance with the Directors’ responsibilities to its shareholders.
- 7) The requirements specified in the ITT in relation to Island Line require the cooperation of the Isle of Wight Council in order for them to be implemented. However, the Secretary of State, and, by extension, the DfT have exceeded their powers by requiring the local authority to work with the successful franchisee in pursuit of the ITT objectives.
- 8) Indeed, the objectives of the ITT require delegation to an unidentified third party that does not currently exist. In doing so, the DfT presupposes both the incorporation and cooperation of a third party, along with the delegation of the Secretary of State’s statutory responsibilities in a situation where he is not and will not be in a position to judge whether that third party is likely to successfully acquit itself of the responsibilities required by the Railways Acts.

ALTERNATIVE DISPUTE RESOLUTION

It is our strong preference for these matters to be resolved without having to resort to formal action. As our case above sets out, our principal objection relates to the policy objective that Island Line will, during the course of the next franchise period, be enabled to become a self-sustaining business.

We are therefore asking the DfT to amend its franchise objective in this regard, and to update the ITT accordingly so that the shortlisted bidders are obligated, through the base specification, to set out proposals to secure a long-term sustainable solution for Island Line that would be wholly delivered within the wider franchise model.

We request a reply to this letter within 14 days of receipt. This letter is being sent by both post and email, and is also being copied to the Treasury Solicitor.

Yours sincerely

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CC: Jonathan Jones, Treasury Solicitor – thetreasurysolicitor@governmentlegal.gov.uk
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