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Federation of Indian Airlines

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05 May 2017

भारतीय विमानपत्तन आर्थिक विनिमायक प्राधिकरण
सफदरजंग एयरपोर्ट, नई दिल्ली-110003
प्राप्त
डायरी नं: 7051
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5/5/2017

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To,
The Chairperson,
Airports Economic Regulatory Authority of India (AERA),
AERA Building, Administrative Complex,
Safdarjung Airport,
New Delhi-110003.

Kind Attention: Shri S. Machendranathan, IAS

**Subject: Comments & submissions of the FIA tendered in response to the AERA CP.
No.07/2016-17 – Determination of Aeronautical Tariffs in respect of Trivandrum
International Airport for the Second Control Period (01.04.2016-31.03.2021)**

Dear Sir,

As your kind self would be aware that the member airlines of FIA were duly present during the meeting and raised objections on various issues pertaining to the Consultation Paper No.7/2016-17. In addition to sharing their views/inputs during the meeting, a request for an extension of two weeks was also sought from the Authority towards the written submission and were allowed an extension till 05 May 2017.

The FIA is grateful for the extension allowed by the authority and on behalf of its member airlines submits its response to the Consultation Paper No.7/2016-17 without any prejudice and craving to submit any additional submission as and when required.

For and on behalf of Federation of Indian Airlines,



Ujjwal Dey
Associate Director

A. BACKGROUND

1. On 28.03.2017, Airports Economic Regulatory Authority to be called as "Authority" had issued the File. No. AERA/ 20010/ MYTP/ AAI-TVM/ CP-II/2016-17/Vol.I (Consultation Paper No.7/2016-17) in respect of determination of aeronautical tariff of Trivandrum International Airport, Thiruvananthapuram (TVM), who has been developing, maintaining and operating the airport. The Authority held its stakeholder consultation meeting on 20 April 2017, seeking a detailed written submission from its stakeholder by 28 April 2017. FIA wrote requesting the Authority to extend the deadline and the deadline was extended to 05 May 2017.

2. Member airlines of FIA were duly present during the meeting and raised objections on various issues pertaining to the Consultation Paper No.7/2016-17. In addition to sharing their views/inputs during the meeting, FIA on behalf of its member airlines hereby submits its preliminary objections to the Consultation Paper No.7/2016-17 without any prejudice and craving to submit any additional submission as and when required.

3. At the outset, it is noteworthy that the Authority is under a bounden duty to determine the tariff in terms of:-

(a) Statutory provisions laid under the of the Airports Economic Regulatory Authority of India, Act, 2008 ("AERA Act");

(b) AERA (Terms and Conditions for Determination of Tariff for Airport Operators) Guidelines, 2011 ("AERA Guidelines");

(c) 'Airports Economic Regulatory Authority of India (Terms and Conditions for Determination of Tariff for Services Provided for Cargo Facility, Ground Handling and Supply of Fuel to the Aircraft) Guidelines 2011' ("CGF Guidelines"); and

(d) Regulatory jurisprudence and settled principles of law creating a level playing field to foster competition, plurality and private investments in the civil aviation sector.

B. CONTEXT OF THE CONSULTATION

4. To assist the Authority in appreciating these submissions on the CP No. 7 of 2016-17 ("CP"), FIA would like to state that the present submissions are without prejudice to our right

**FIA's submission towards the Authority's Consultation Paper No. 07/2016-17 titled
"Multi Year Tariff Proposal for Determination of Aeronautical Tariffs in respect of Trivandrum International Airport
for the Second Control Period (01.04.2016 - 31.03.2021)"**

and contentions, reserving FIA's right to submit additional submissions/objections at later stage and subject to the following: -

5. Pursuant to the enactment of the AERA Act, the Authority has been established to perform the functions vested under the AERA Act including Section 13 of the Act, which includes determination of tariff for aeronautical services, viz.-
- (a) Section 2(a) of the AERA Act defines aeronautical services.
 - (b) Section 13 (1)(a) of the AERA Act provides that the tariff for such aeronautical services at a major airport is to be determined by the Authority after taking into consideration various factors, being:-
 - (i) The capital expenditure incurred and timely investment in improvement of airport facilities;
 - (ii) The service provided, its quality and other relevant factors;
 - (iii) The cost for improving efficiency;
 - (iv) Economic and viable operation of major airports;
 - (v) Revenue received from services other than the aeronautical services;
 - (vi) The concession offered by the Central Government in any agreement or memorandum of understanding or otherwise;
 - (vii) Any other factor which may be relevant for the purposes of the AERA Act.
6. 'Determination' by the Authority:

Section 13(1)(a) of the AERA Act requires the Authority to 'determine' the tariff for aeronautical services. Any 'determination' by a statutory authority must clearly show the application of mind and analysis carried out by the Authority. However, in the present case, the Authority has proposed to allow various expenditures like Operating Expenditure, General Capital Expenditure, Tariff Rate Card, etc. merely on the basis of TVM's submission but has failed to provide any justification of its own or analysis for the same. In this regard judgment of the Hon'ble Supreme Court in the case of Ashok Leyland Ltd. vs. State of Tamil Nadu & Anr. reported as (2004) 3 SCC 1 (FB) (at Paragraph No. 94) is noteworthy. Hon'ble Supreme Court has held that the word

'Determination' must also be given its full effect to, which pre-supposes application of mind and expression of the conclusion.

It connotes the official determination and not a mere opinion or finding. The Hon'ble Telecom Dispute Settlement Appellate Tribunal ("TDSAT") has also held that determination requires application of mind in the Judgment dated 16.12.2010 in Appeal No. 3(C) of 2010 titled as **ZEE Turner Ltd. vs. TRAI &Ors. (at Paragraph No. 150)**.

Section 13(1)(4)(c) of the AERA Act mandates that any decision by the Authority must be fully documented and explained.

To the dismay of the Stakeholders (including airlines), the Authority vide the present Consultation Paper has *simplicitor* accepted TVM's claims without conducting its own independent financial study and prudence check or commissioning experts.

It is regrettable that the Authority in the year 2012 i.e. at the time of issuance of DIAL Tariff Order (No.3/2012-13) had decided to commission its own experts has failed to do so till now.

Authority ought to follow Single Till Model for determination of Aeronautical Tariff

7. Hybrid till is followed, which is in contravention to AERA tariff guidelines. In this context, the following facts are noteworthy:

8. It is noteworthy that in a matter pending adjudication before the Hon'ble Airports Economic Regulatory Authority Appellate Tribunal ("AERAAT"), MoCA had submitted by way of its Counter-Affidavit that the Authority is an independent regulator and suggestions of Government of India/ MoCA are not legally binding on it. Further, it has submitted that MoCA has no role to play with respect to determination of aeronautical tariff. The Authority being a party to the said matter is aware of the contents of MoCA's Counter Affidavit in the said matter.

9. It is submitted that Single Till is premised on the following legal framework being:

(a) Section 13(1)(a)(v) of AERA Act envisages that while determining tariff for aeronautical services, the Authority shall take into consideration revenue received from services other than the aeronautical services.

(b) Clause 4.2 of AERA Guidelines recognizes Single Till approach which sets out the following components on the basis of which ARR will be calculated:-

(i) Fair Rate of Return applied to the Regulatory Asset Base

(ii) Operation & Maintenance Expenditure

(iii) Depreciation

(iv) Taxation

(v) **Revenues from services other than aeronautical services**

(c) AERA in its Single Till Order has held that "*Single Till is most appropriate for the economic regulation of major airports in India*".

10. It is submitted that determination of aeronautical tariff warrants a comprehensive evaluation of the economic model and realities of the airport – both capital and revenue elements. TVM's approach of Hybrid Till deserves to be discarded.

11. In the Single Till Order, Authority has strongly made a case in favor of the determination of tariff on the basis of 'Single Till'. It is noteworthy that the Authority in its *inter alia* Single Till Order has:

(a) Comprehensively evaluated the economic model and realities of the airport – both capital and revenue elements.

(b) Taken into account the legislative intent behind Section 13(1)(a)(v) of the AERA Act.

(c) Concluded that the Single Till is the most appropriate for the economic regulation of major airports in India.

(d) The criteria for determining tariff after taking into account standards followed by several international airports (United Kingdom, Australia, Ireland and South Africa) and prescribed by ICAO.

12. The Authority in its AERA Guidelines (Clause 4.3) has followed the Single Till approach while laying down the procedure for determination of ARR for Regulated Services. In this respect, the matter must be dealt with by the Authority considering the ratio pronounced by the Constitutional Bench in the Hon'ble Supreme Court Judgment in PTC vs. CERC reported as (2010) 4 SCC 603 (please ref: Paragraph Nos. 58 to 64 at Page Nos. 639 to 641). wherein it is specifically stated that regulation under an enactment/statute, as a part of regulatory framework, intervenes and even overrides the existing contracts between the regulated entities inasmuch as it casts a statutory obligation on the regulated entities to align their existing and future contracts with the said regulations.

13. The fundamental reasoning behind 'Single Till' approach is that if the consumers/passengers are offered cheaper air-fares on account of lower airport charges, the volume of passengers is bound to increase leading to more foot-fall and probability of higher non-aeronautical revenue. The benefit of such non aeronautical revenue should be passed on to consumers/passengers and that can be assured only by way of lower aeronautical charges. It is a productive chain reaction which needs to be taken into account by the Authority.

14. FIA therefore submits as under:

(a) Single Till Model ought to be applied to ALL the airports regulated by the Authority regardless of whether it is a public or private airport or works under the PPP model and in spite of the concession agreements as the same is mandated by the statute.

(b) Single Till is in the public interest and will not hurt the investor's interest and given the economic and aviation growth that is projected for India, Fair Rate of Return (FRoR) alone will be enough to ensure continued investor's interest.

(c) MoCA's view(s) with respect to any issue at best can be considered as that of a Stakeholder and by no means are binding to Authority's exercise of determination of aeronautical tariff as is admitted by MoCA itself before the AERAAT.

15. In view of the above, it is submitted without prejudice that determination of aeronautical tariff on Hybrid Till basis for the first control period has set the tone and precedent for determination of aeronautical tariff in subsequent control periods contrary to the applicable legal framework. Thus, it is submitted that Authority should discard the option of determination of aeronautical tariff on Hybrid Till and follow Single Till scrupulously from the Second Control Period onwards.

*FIA's submission towards the Authority's Consultation Paper No. 07/2016-17 titled
"Multi Year Tariff Proposal for Determination of Aeronautical Tariffs in respect of Trivandrum International Airport
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C. ISSUEWISE SUBMISSIONS

| | Para | Comments / Observation |
|---|---|--|
| 1 | Table 1 | International Traffic is higher than the domestic Traffic. |
| 2 | Para 3.1, 3.2 and 4.18 AERA order 15/2015-16 Para 4.2 | <p>AERA vide its order 15/2015-16 dated 17.04.2015 had decided to continue existing tariffs on ad-hoc basis and advised AAI to submit MYTP for the 2nd control period well in time.</p> <p>It may kindly be noted that AAI has submitted its proposal on 29.02.2016 (10 months from the order) and further AERA allowed AAI to resubmit the MYTP under hybrid till on 29.11.2016 (additional 9 months from first submission) post release of NCAP (June, 2016). AERA circulated this Consultation Paper on 28.03.2017 (4 months from revised submission). This can be treated as an <u>intentional delay</u>, allowing AAI to move from Single Till to Hybrid Till. AERA vide Para 4.18 proposes to determine the present value of the shortfall in the 1st control period as of 1 April, 2016 instead of 1 April, 2017.</p> <p>Going with the same logic which AERA might have thought in determining the present value of the shortfall as on 1 April, 2016 – AERA should also determine the tariff under Single Till for 2nd control period as on date of 1 April, <u>2016 NCAP was not released.</u></p> |
| 3 | Table 5 and 1 | In table 5, point 3.1 Domestic PSC (FC) for 2012-13 to 2014-15. There is reduction in the revenues under PSF (FC), however, as per Table 1 number of Domestic Pax flown were almost same. |
| 4 | Table 6 and Para 4.18 | Table indicates calculation as per AAI of the shortfall for the 1 st control period. In this table only aeronautical revenues |

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| | | (calculated in table 5) are deducted from ARR, while non-aeronautical revenues are ignored. Further, had the submission been made within the time from the order date, the future value of the shortfall (i.e. Rs 350.72 crores) would not be so high. AERA proposes to consider the present value of shortfall as on 1 April, 2016 instead of 1 April, 2017. |
| 5 | Para 4.12 and Table 8, 9, 23 & 24 | <p>AERA has revised depreciation rate and excluded Land from RAB. If table 9 is observed Rs 8.36 crores was ONLY reduced from the initial RAB while there is huge difference in the depreciation amount calculated by AERA (Rs 104.13 crores) and as mentioned by AAI (Rs 258.15).</p> <p>This has resultant into higher average RAB.</p> <p>Average RAB as per AAI – Rs 223.09 crores</p> <p>Average RAB as per AERA – Rs 358.82 crores</p> <p>The high average RAB also impacted opening RAB for the 2nd control period. Also, the impact of increase in the average RAB needs to be examined.</p> |
| 6 | Para 4.21 and Table 13 & 9 | <p>AERA agrees to consider the tax calculation as submitted by AAI. But while doing so it has ignored the revised calculation of Depreciation mentioned in table 9. Impact of depreciation as per table 9 on tax calculation needs to be examined.</p> |
| 7 | Table 16 & 17 and Para 5.5 & 5.8 | <p>AERA proposes to adopt 14% growth rate for domestic passenger traffic based on 10-year CAGR, while it proposes 4% growth rate for international ATM for 2nd control period as per the projections submitted by AAI. AERA <u>cannot pick and choose</u> growth rate from CAGR for domestic and from AAI for international traffic. It may kindly be noted that TRV is has high</p> |

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| | | international traffic as compared to the domestic traffic. Therefore, choosing lower traffic growth of 4% as proposed by AAI and not 9% as per CAGR, AERA has not applied practical logic. |
| 8 | Proposal 6b | AERA should share the timelines of the study and likely date of the report. |
| 9 | Table 29 | Depreciation on additional assets (point E) for years 2017-18 is higher than the aero additional assets (point B), while depreciation of additional is almost same to the aero assets. Further there is still depreciation on additional assets although aero additional assets is NIL. |
| 10 | Table 30 | AERA for year 2017-18 has increased the aero additional assets without any justification and still allowed depreciation on additional assets although aero additional assets is NIL |
| 11 | Table 32 | AERA has accepted growth rate as proposed by AAI at a flat rate of 10%. AERA needs to reconsider the same. |
| 12 | Table 45 | AERA has accepted all the tariffs proposed by AAI. It has removed PSF(FC) and introduced UDF. |
| 13 | Para 16.7 | AERA has also accepted annual increase in UDF, Landing Charges and Fuel Throughput charges. It may kindly be noted that these tariffs are determined to achieve target revenue calculated on cost plus basis method. Any annual increase is allowing higher rate of return, which is unjustifiable specially under the scenario where there is a double digit pax growth rate. |