

A. BACKGROUND

1. On 26.06.2013, Authority had issued the Consultation Paper No.14/2013-14 ("CP No.14/2013-14") in respect of determination of aeronautical tariff of Kempegowda International Airport (Earlier Bengaluru International Airport), Bengaluru, which has been developed and being maintained and operated by Bangalore International Airport Limited ("BIAL"). On behalf of its member airlines, Federation of Indian Airlines ("FIA") had submitted its detailed Written Submissions under its cover letter dated 19.09.2013 in response to the CP No.14/2013-14. On 24.01.2014, Consultation Paper No.22/2013-14 ("CP No.22/2013-14") has been issued as an addendum to the CP No.14/2013-14. In the said CP No.22/2013-14, it has been revealed that on 19.08.2013, BIAL had submitted to the Authority, its Multi Year Tariff Proposal ("MYTP") under the Single Till, Dual Till and Shared Revenue till mechanism. Following the Shared Till model, BIAL has submitted its MYTP on the basis that where 30% of Gross Revenues from Non-Aeronautical Services has been set off from the Aggregate Revenue Requirement ("ARR") computed for the Aeronautical services, without taking into account the costs associated with providing these Non-aeronautical services.

2. Furthermore, in the CP No.22/2013-14, it has revealed that in response to CP No.14/2013-14, Ministry of Civil Aviation ("MoCA") has in its letter dated 24.09.2013 suggested Shared Till approach be adopted as MoCA felt that the requirement of capital for the expansion during the current control period would be difficult to be met under Single Till approach. Therefore 40% of gross revenue generated by BIAL from Non-Aeronautical Services may be reckoned towards subsidizing aeronautical charges.

3. On 10.02.2014, a Stakeholders Consultation meeting was organized by the Authority, which was duly attended by the representatives of FIA. During the meeting, it was pointed out that various links to the documents *inter alia* the revised submissions of BIAL are apparently uploaded on the website which is not accessible. After this was pointed out in the Stakeholder Consultation, the links were made accessible. On accessing the annexures/documents uploaded on the website, on 13.02.2014, FIA requested the Authority for extension of time to submit its Written Submission as the annexures/documents were voluminous and perusal was a time consuming exercise. The said request was accepted on 17.02.2014 (the last date of filing) and the date was extended to 28.02.2014.

4. It is submitted that the present submissions may be read along with the FIA's Written Submissions dated 19.09.2013 in response to CP No.14/2013-14 for the purpose of determining the aeronautical tariff of BIAL. FIA is submitting its revised submissions as the

Authority's Proposals to various issues have undergone several changes by way of the present Consultation Paper. In the context of BIAL's revised submissions on Shared Till basis, Authority ought to have ignored such submission of BIAL and followed the Single Till model as the Single Till model is the most appropriate model for Indian scenarios as per Authority's Order No. 13/2010-11 dated 12.01.2011.

5. 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) Order No. 13/2010-11 dated 12.01.2011 ("**Single Till Order**") in the matter of Regulatory Philosophy and Approach in Economic Regulation of Airport Operators;
- (d) '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
- (e) 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

6. To assist the Authority in appreciating these submissions on the CP Nos. 14 and 22 of 2013-14, members of FIA deem it necessary to place on record the following set of material facts:-

- 6.1 Under the Concession Agreement (Clause 5.2), BIAL has been guaranteed exclusivity by Government of India ("**Gol**") as no new or existing airport shall be permitted by Gol to be developed as, or improved or upgraded into an international or domestic airport within an aerial distance of 150 kilometers of the Kempegowda International Airport for 25 years from the date of its opening.
- 6.2 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.

6.3 'Determination' by the Authority:

- (a) 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 BIAL's submissions and 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)¹ is noteworthy. Hon'ble Supreme Court has held that the word 'Determination' must also be given its full effect to, which presupposes application of mind and expression of the conclusion. It connotes the official determination and not a mere opinion or finding.² The Hon'ble

¹Annexure F-1: Ashok Leyland Ltd. vs. State of Tamil Nadu and Anr. reported as (2004) 3 SCC 1 (FB)

²Oxford Advanced Learners Dictionary of current English (Eighth Edition), 2010

"Determine: 1. to discover facts about something; to calculate something exactly SYN establish: ~ an inquiry was set up to determine the cause of accident. 2. To make something happen in a particular way or be of a particular type: Age and experience will be determining factors in our choice of candidate, upbringing plays an important part in a person's character. 3. To officially decide and/arrange sth: a date of for a meeting is has yet to be determined. 4. To decide definitely to do something: They determined to start early"

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)³**.

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

6.4 To the dismay of the Stakeholders (including airlines), the Authority vide the present Consultation Paper has *simplicitor* accepted BIAL's claims (including the inputs of BIAL's consultants) without conducting its own prudence check or commissioning experts. In the CP No. 14/2012-13 and present CP No. 22/2013-14, the Authority has accepted BIAL's submissions and indicated that the tariff is subject to truing up in next control period with respect to following components:-

- (a) Asset Allocation
- (b) Future Capital Expenditure
- (c) Cost of Debt
- (d) Operating Expenditure
- (e) Taxation
- (f) Non-aeronautical revenue
- (g) Traffic forecast
- (h) Working Capital Interest Expenditure
- (i) WPI Index

6.5 The following table indicates the experts engaged by BIAL and whose views have been as it is accepted by the Authority:

TABLE A: List of Consultants engaged y BIAL

S. No.	Consultant engaged by BIAL	Particulars
1.	BSR & Company	Assets Allocation
2.	BSR & Company	Operating Expenditure
3.	Engineers India Limited ("EIL") (EIL was appointed by AAI, which is 13%	Capital Expenditure

Black's Law Dictionary (Eighth Edition)

"Determination: A final decision by a court or administrative agency < the court's determination of the issue"

³**Annexure F-2:** TDSAT's Judgment dated 16.12.2010 in Appeal No. 3(C) of 2010 titled as ZEE Turner Ltd. vs. TRAI &Ors.

<p><i>Written Submissions of FIA: Authority's Consultation Paper Nos.14/2013-14 & 22/2013-14 titled "Determination of Aeronautical Tariffs in respect of Kempegowda International Airport for the 1st Regulatory Period (01.04.2011-31.03.2016)"</i></p>

S. No.	Consultant engaged by BIAL	Particulars
	shareholder of BIAL. Hence cannot be termed as independent opinion)	
4.	Landrum & Brown	Traffic Projections

7. 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.

8. It is also noteworthy that though the Authority has stated in the CP No.22/2013-14 that on 19.08.2013, BIAL has submitted its revised MYTP-2013 and Business plans under Single Till, Dual Till and Shared Revenue Till. However, in the CP No.22/2013-14, Authority has indicated that BIAL has not:

- (a) Firmed up the Real Estate Business Plan. In absence of Real Estate Business Plan, the land that is in excess of airport requirements and BIAL wishes to commercially exploit, cannot be determined. Hence,
 - (i) Such land value has not been reduced from RAB by the Authority.
 - (ii) Cash flows from monetisation of land and real estate deposits are not considered which could have been used as source of financing the funding gap.
 - (iii) Interest free real estate deposits have not been factored which would have impacted determination of Fair Rate of Return ("FRoR").
 - (iv) Excess land could also have been used for Non-aeronautical activities and such non-aeronautical revenues would have reduced the Target Revenue to be achieved from aeronautical charges.
- (b) As per Paragraph No. 14.12 of the CP No.22/2013-14, the ICT charges (proposed to be collected) has not been factored in the business plan and accordingly has not been factored in by the Authority while computing ARR. Hence, it is submitted that the Authority should obtain the details of these charges from BIAL and accordingly include the same in computing the ARR as the same would result in reduction in target revenue

It is beyond reasonable understanding as to how the Business Plan of BIAL can be taken into account when the crucial elements of its operations and undertakings have not been firmed up and included for tariff determination.

9. In the CP No.14/2013-14 (Paragraph No.1.20), Authority had indicated that the Concession Agreement, State Support Agreement ("SSA") and the Land Lease Agreement paved the way for BIAL to achieve Financial Close by June, 2005 and the construction work commenced thereafter. However, as per both the CP No.14/2013-14 and the CP No.22/2013-14, Financial Close was not achieved for future expansion of Rs. 4,027 crores as there is funding gap due to inability of BIAL's shareholder to infuse additional equity. It is glaring as in absence of Financial Close, there is no certainty to the expansion plans of the airport and the provisions for financing such expansion. Such uncertainties by the Authority are contrary to established regulatory practice and exercise of tariff determination.

C. ISSUES FOR CONSIDERATION OF THE AUTHORITY

10. In the above context, it is submitted that the present consultation process raises the following important and critical questions for consideration of the Authority:-

- (a) Whether the claim of BIAL for increase in aeronautical tariffs is justifiable on legal, financial/economic basis?
- (b) What was the business and financial model of BIAL at the time of the execution of Concession Agreement⁴ and State Support Agreement⁵ ("SSA")?
- (c) What is the commercial/financial/economic impact of BIAL's failure to firm up its Real Estate Business Plan and in the facts of the case, should the consumers be made to suffer in the current control/regulatory period?
- (d) What is the legal basis for adopting 40% Shared Till Model for determination of aeronautical tariff of Kempegowda International Airport, Bengaluru?
- (e) Can the Authority overlook the prevalent legal framework and determine the aeronautical tariff on any other model besides Single Till?
- (f) Can the late submission of relevant information for determination of aeronautical tariff by BIAL be ignored which has essentially diminished the effective control period to 24 months from 5 years (60 months)?
- (g) Should tax savings in cost of debt be not factored for the purpose of reducing Weighted Average Capital Cost ("WACC")?
- (h) Is it justified to forecast the future capital expenditure, operating expense, non-

⁴Dated 05.07.2004 entered into between Ministry of Civil Aviation (Government of India) and BIAL.

⁵Dated 20.01.2005 entered into between Government of Karnataka and BIAL

aeronautical revenue, traffic projections and working capital interest without evaluating the same in detail?

- (i) Can the acceptance of various claims of BIAL without any independent analysis by the Authority is justifiable in view of Sections 13 and 14 of the AERA Act, 2008?
- (j) Can the proposed aeronautical tariffs (increase of 76% to 160% on aeronautical charges)⁶ be considered as a fair, just or reasonable claim of BIAL in a prudent, regulated, price cap mechanism as envisaged under the AERA Act read with the AERA Guidelines?
- (k) Should BIAL be allowed to claim the enhanced project cost which is on the higher side than the indicative past cost of construction of other Airports Terminals at Chennai, Kolkata, Cochin, Goa etc.?

D. ISSUEWISE SUBMISSIONS

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

11. FIA had welcomed Authority's proposal to determine the tariff on Single Till model in CP No.14/2013-14. However, in the CP No.22/2013-14, Authority has proposed to follow the Shared Till model for the current control period.

12. In this context, the following facts are noteworthy:

- (a) By way of the Public Notice No. 6/2013-14 dated 19.08.2013, that BIAL had proposed to approach the Authority with a separate MYTP modeled on 30% Shared Till basis. At this juncture itself, the Authority should not have allowed repeated revised BIAL's submissions⁷ as it has led to delay in determination of aeronautical tariff which eventually tantamounts to burdening the airlines and passengers with increased aeronautical tariff. The revision from CP No. 14/2013-14 to CP No.22/2013-14 has reduced the recovery period by a substantial margin of 8-9 months and the overall tariff determination exercise is delayed by 36 months.
- (b) MoCA in its response to the CP No.14/2013-14 suggested that Shared Till approach be adopted i.e.,40% of Gross revenue generated by BIAL from non-aeronautical services may be reckoned towards subsidising aeronautical charges and the UDF.

⁶Annexure F-3: A comparative chart indicating the percentage change in existing aeronautical charges vis-à-vis proposed aeronautical charges.

⁷ First submission was filed by BIAL on 31.07.2011. Thereafter, submissions have been revised/updated several times.

The aforesaid facts indicate that the Authority had not proposed Shared Till but Single Till in view of the applicable legal framework in the CP No.14/2013-14. In the context of MoCA's said letter, it is submitted that the Authority being an independent statutory auditor ought to act within the four corners of the law and not on the basis of suggestions of MoCA. It is noteworthy that in a matter pending adjudication⁸ 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.

13. 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*".

14. 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. BIAL's approach of Dual Till or Shared Till deserves to be discarded.

15. 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

⁸Appeal No.6/2012: FIA vs. AERA & Others: FIA's Challenge to DIAL Tariff Order (No.3/2012-13)

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.

16. 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 603⁹ 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.

17. 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.

18. It is to be noted that Authority has indicated that part of the Non-aeronautical revenue which would remain in the hands of BIAL under 40% Shared Revenue Till would be used by BIAL for Capital Expenditure which is required towards airport expansion during the current control period. However, during the Stakeholders Consultation Meeting held on 10.02.2014, representatives of BIAL objected to such condition (on using this revenue only for capex) being put for treatment of its Non-Aeronautical revenue. It may be noted that until 27.02.2014, Minutes of the Stakeholders Meeting has not been uploaded on the website of AERA. Without prejudice, it is submitted that determination of aeronautical tariff on Shared Till basis for the first control period would set the tone and precedent for

⁹ Annexure F-4: PTC vs. CERC reported as (2010) 4 SCC 603 (Paragraph Nos. 58 to 64 at Page Nos. 639 to 641).

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 Shared Till and follow Single Till scrupulously.

19. 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 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.

In view of the above, it is submitted that the Authority ought to determine the aeronautical tariff of Kempegowda International Airport on Single Till model as the first tariff determination will not only set the precedent but also create erroneous signal to the Stakeholders of the privatized airports and yet to be privatized airports.

II. Re. Capital Expenditure claimed by BIAL

II.A. Authority should ensure that the project cost is in check and gold plating is avoided

20. The Authority in the CP No.22/2013-14 has noted that the cost of construction of T1A and associated works appear to be high compared with the indicative past cost of construction of other Airports Terminals at Chennai, Kolkata, Cochin, Goa etc. It is submitted that though there may be marginal deviations owing to the specification and design elements but Authority should not allow the cost which are attributable to gold-plating by BIAL to keep the project-cost in check. It is noteworthy that project cost is taken into account for determination of aeronautical tariff by way of RAB factor. Therefore, any cost which is not mandatory or beyond the pre-determined scope of work should be disallowed. As per the CP No.14/2013-14 (Paragraph No.1.21), the total project cost has been revised from Rs. 1411.79 crores to Rs. 2470.29 crores. Further, the BIAL has indicated to expansion of the airport for an estimated amount of Rs.4,027 crores.

II.B. BIAL's inordinate delay in firming up Real Estate Business Plan

21. Government of Karnataka ("GoK") has given 4008 acres of land to BIAL on lease which, as per Clause 4.2 of the Land Lease Agreement can be used for inter alia "improving the commercial viability of the Project". No details are provided about usage of such land parcel. BIAL has submitted that it has yet not firmed up the Real Estate Business Plan to monetize the land in excess of Airport requirements. BIAL's inability to firm up the Real Estate Business Plan has not been backed by substantial rationale. It appears that Real Estate Business Plan has not been planned/provided to avoid the regulatory assessment by the Authority which in turn helps BIAL to project higher tariffs:-

- (a) **Regulatory Asset Base**-In absence of Real Estate Business Plan, the land that is in excess of airport requirements and BIAL wishes to commercially exploit, cannot be determined. Hence, such land value has not been reduced from RAB by the Authority.
- (b) **Financial Close for future expansion**– As per the CP No.14/2013-14, Financial Close was not achieved for future expansion of Rs. 4,027 crores as there is funding gap due to inability of BIAL's shareholder to infuse additional equity. As per the CP No. 22/2013-14, funding gap still persists as BIAL's shareholders have confirmed their inability to infuse additional equity and Real Estate Business Plans have not been firmed up yet. In absence of Real Estate Business Plan, cash flows from monetisation of land and real estate deposits are not considered which could have been used as source of financing the funding gap.
- (c) **Determination of Fair Rate of Return ("FRoR")** –As the Real Estate Business Plan is not firmed up, interest free real estate deposits have not been factored which would have impacted determination of FRoR. Also, Authority without its own independent exercise of determination has assumed the gearing ratio at 70% only on the basis of BIAL's submission that the Financial Close has been achieved. This approach of the Authority is not acceptable as the FRoR determined in this approach remains tentative. The entire exercise cannot be undertaken on 'tentative' basis.
- (d) **Non-aeronautical revenue** –Excess land could also have been used for Non-aeronautical activities and resulting non-aeronautical revenues would have reduced the Target Revenue to be achieved from aeronautical charges.

22. It is submitted that the Authority should stipulate the time limit within which BIAL has to submit its Real Estate Business Plan for commercial exploitation of land so that it can be appropriately factored in determining aeronautical tariffs (including UDF) for the control period. The impact of non-monetisation of land or the lack of Real Estate Business Plan is discussed in detail in the succeeding paragraphs.

II.B.1 Determination of RAB

23. The Authority has provided, in Clause 7.7 of the Single Till Order and Clause 5.2.4 of AERA Guidelines, that it will *make an adjustment in respect of any land associated with an asset excluded from the scope of RAB by reducing from RAB the value of such land being the higher of (i) prevailing market value of such land, or (ii) book value of such land.* As per the CP No. 14/2013-14, to which CP No.22/2013-14 is an addendum, it is understood that the Authority has also proposed to commission experts to independently determine and review the market value in respect of such land. It is submitted that the Authority ought to commission an expert study for determination of fair value of the land, so that it could have been deducted from RAB. BIAL's failure to market/monetise the land cannot work to BIAL's own advantage. The benefit of awarding land to BIAL ought to have been made available to the Stakeholders including the passengers.

24. As per Paragraph No. 6.20 and Proposal No. 4 (a)(i) of CP No.22/2013-14, for the purpose of commercial exploitation of excess land, BIAL has undertaken construction activity of only one hotel which is also under arbitration. , The Authority has proposed not to reduce market value of Hotel land from RAB. Also, as per CP No.14/2013-14, BIAL had submitted that it has not yet firmed up the Real Estate Business Plan with respect to monetization of the lands, hence the fair market value of the land that it wishes to commercially exploit should not be reduced from RAB. In the CP No.22/2013-14 (at Paragraph No. 6.7), BIAL has reiterated that neither real estate activity nor investment is envisaged as the Real Estate Business Plan has not yet been firmed up and no investment has been made as on date. Hence, real estate business scenario has not been considered by BIAL even in its revised MTYP which is reflected in the CP No.22/2013-144 and BIAL's approach has been accepted by the Authority

25. The Authority, while standing on its view of land value adjustment, has not made any land value adjustment which is in contravention of the AERA Guidelines (Clause 5.2.4) and Single Till Order (Clause 7.7 of Single Till Order) and implies huge burden on passengers and airlines. Such a casual approach by the Authority contrary to its own Single Till Order and the AERA Guidelines is unacceptable.

II.B.2. Re. Financial Close ure for future expansion

26. As per the CP No.14/2013-14, BIAL is undertaking a substantial expansion of the airport on the cost estimate of Rs. 4,027 crores for which the equity contribution is a pre-requisite¹⁰ as the entire expansion cannot be funded by debt. Hence, the Authority has assumed a Debt -Equity ratio of 70:30, which implies an equity requirement of Rs. 649 crores as per the table below:-

TABLE B: Recomputed Capital financing model based on the revised Yield¹¹

S. No.	Particulars	(Rs. Crores)					
		FY12	FY13	FY14	FY15	FY16	Total
A	Capex cost including Interest During Construction	293	803	780	539	1,611	4,027
C	Debt	-	799	582	22	1,381	2,783
D	Internal Resource Generation	293	4	199	23	75	594
E	Additional Equity Financing	-	-	-	495	155	649
F=C+D+E	Means of financing	293	803	780	539	1,611	4,027

27. The CP No.22/2013-14 does not provide capital financing model based on revised capex cost and sources of financing such revised cost of capex. However, as per the CP 14/2013-14 and Paragraph No.10.9 of the CP No.22/2013-14, BIAL's shareholders¹² have expressed their inability to bring in additional equity which would result in a funding gap depending on the additional loan that BIAL can mobilize from the lenders. Despite of funding gap, BIAL has not firmed up its Real Estate Business Plan since 5 years of airport operations and 8 years of Land Lease Agreement. Since, BIAL has not submitted any concrete proposals for bridging the funding gap through monetization of land, real estate deposits or any other instrument, the aeronautical tariffs (including UDF) cannot be determined for capex funding and the whole exercise is reduced to determining estimates. Leaving almost every element of tariff for truing up is contrary to the established regulatory jurisprudence.¹³ Hence, the aeronautical tariffs determined by the Authority in the CP No. 22/2013-14 is on the basis of the hypothetical assumption that the Financial Close for future expansion has been achieved and this approach of the Authority is not acceptable as the

¹⁰ Acknowledged by the Authority in CP 22.

¹¹ Based on Table 135 at Page No. 290 of the CP No. 14/2013-14

¹² GoK's letter dated 26.08.2013 in response to CP 14/2013-14

¹³ The submission on using the tool of truing-up to be used sparingly is detailed in paragraph Nos. 107 to 109

UDF determined under this approach is merely tentative. The Authority would appreciate that passenger base in an airport is dynamic. It would be impossible to refund any amount if such recovery of UDF is later found to be unnecessary. It is submitted that Authority should direct BIAL to raise the required funds through debt and equity at the earliest to finance the expansion of Airport Project and not unnecessarily burden the passengers.

II.B.3. Re. Determination of FRoR

28. Since BIAL has not finalised Real Estate Business Plan yet, interest free real estate deposits has not been factored for determination of FRoR. In case, the interest free real estate deposits is factored, this would reduce overall FRoR and would result in lower return on RAB to BIAL and lower aeronautical tariffs. Also, Authority has assumed the gearing ratio at 70% on the basis of hypothetical assumption that the Financial Close has been achieved despite the fact that BIAL's shareholders have expressed their inability to infuse additional equity and this gearing ratio might change significantly depending upon final source of funding. Hence, this approach of the Authority is not acceptable as the FRoR determined in this approach is tentative. Therefore, Authority ought to have directed BIAL to firm up its Real Estate Business Plan and provided accurate sources of revenue to correctly identify and determine the Target Revenue and FRoR.

III. Regulatory Period and Recovery of ARR ought to be determined prospectively

29. In the CP No.14/2013-14, the Authority had tentatively decided the tariff for the 5 years control period starting from 01.04.2011 which is likely to come into effect from 01.10.2013. In the CP No.22/2-13-14, Authority has not clearly indicated as to from what prospective date the aeronautical tariff will come into effect. However, Authority has indicated in Table No.62 of the CP No.22/2013-14 to reckon the date of 01.04.2014 in its computation of UDF. It does not indicate the effective date of aeronautical tariff.

30. It is submitted that in determining the tariff in the year 2014 for the control period of 01.04.2011 to 31.03.2016, the Authority will be compressing the recoverable period of legitimate 60 months to merely 24 months.

31. The Authority is overlooking that the BIAL has caused inordinate delay in submitting its tariff proposals (thereafter revising the proposal from time to time) and relevant information for determination of aeronautical tariff which has:

- (a) Diminished the effective Control Period to 24 months from 5 years (60 months);

(b) Led to exponential increase (76% to 160% on a component to component basis) in aeronautical tariffs of Kempegowda International Airport with the past charges of last 48 months recoverable in the next 24-26 months from the future passengers and consumer. This approach is unacceptable as it would increase the operational expenditure of the airlines and render its operations economically unviable. It is noteworthy that airlines cannot recover such past-cost from its passengers who have travelled in the period gone by.

32. It is settled position of law that future consumers cannot be burdened with additional costs as there is no reason as why they should bear the brunt. Such quick-fix attitude is not acceptable. As such, the approach in the CP No. 14/2013-14 and CP No.22/2013-14 does not appear to deal with the present economic realities and interests of consumers while proposing the tariff in its present form. Authority being a creature of statute is under a duty to balance the interest of all the stakeholders and consumers, which it is mandated to do under the AERA Act. Authority's proposal for tariff determination for the period of 5 years and compressing the recovery in 2 years is imprudent and detrimental to the interests of Stakeholders including the airlines and the passengers.

IV. Depreciation up to 100% is contrary to the AERA Guidelines

33. As per the AERA Guidelines (Clauses 5.3.1 and 5.3.3), depreciation is allowed up to a maximum of 90% of the original cost of the asset on straight line basis. BIAL had followed the said Guideline in its depreciation calculation (Table No.22, Paragraph No.10.3 of CP No.14/2013-14) in its MYTP-2012. However, in the CP No.14/2-13-14, the Authority had recomputed the depreciation up to 100% of the value of the asset based on the assumption that no compensation will be received towards the value of the net block of assets upon transfer of the airport upon completion of term. Consequent to the changes proposed by the Authority in the CP No.14/2013-14, BIAL in its revised MYTP-2013, has also computed depreciation on assets without taking any salvage value (refer Paragraph No, 6.4 of CP No.22/2013-14). The Authority has also proposed to accept this methodology adopted by BIAL [refer Proposal No.4 (a) (iv)] in the CP No.22/2013-14.

34. Considering depreciation up to 100% value would result in an artificial increase in the depreciation charge and thereby have an adverse impact of increasing the tariff. Authority should consider 10% residual value as mentioned in the Clause 5.3.3 of the AERA Guidelines. FIA's sensitivity analysis indicate that reduction in depreciation rate from 100% to 90% will reduce ARR by Rs.53 crores and Rs. 47 crores under Single Till and 40% Shared

Till respectively (approximately 2% of Total ARR in both the cases).¹⁴

V. Authority is statutorily mandated to scrutinize the claims of BIAL

35. It is submitted that the Authority is statutorily mandated under Sections 13 and 14 of the AERA Act to scrutinize each claim/projection of the Airport operator/service provider (in the present case BIAL) instead of merely accepting such claims. If required, the Authority can even engage consultants or experts to perform such exercise on its behalf. However, simply accepting the claims/projections of BIAL reflects casual approach of the Authority. It is noteworthy that in the CP No. 14/2013-14 and also on CP No. 22/2013-14, Authority has proposed to accept most of the claims/forecast of BIAL with respect to:

- (a) Assets Allocation
- (b) Allocation of Expenditure
- (c) Future Capital Expenditure of BIAL to be capitalized during review period
- (d) Operating Expenditure
- (e) Traffic Projections
- (f) Working capital loan and interest *vis-à-vis* working capital requirements
- (g) Assessment of Non-aeronautical revenue

V.A. Re. Assets Allocation

36. In the CP No.14/2013-14, the Authority has accepted BIAL's allocation of assets (approximately 82% : 18%) submitted in its MYTP-2012 and had considered the same for the purpose of computation of ARR under Dual Till . Authority in the CP No. 22/2013-14 (Paragraph No.4.8) has noted that report submitted by BIAL is from BSR & Company and not from KPMG. The Authority however, has referred to this report of BSR & Company as "KPMG Report" since BIAL has in its MYTP-2013 submission termed it as "KPMG Report". FIA however has deemed it proper to refer to the report in question as BSR Report. In its MYTP-2013, BIAL has revised its submission with respect to asset allocation on the basis of BSR Report on "***agreed upon procedures related to the Statement of allocation of fixed assets into Aeronautical and Non-Aeronautical***" and the allocation was increased towards Aeronautical assets (approximately 91% : 9%) and the same is beneficial for airport operator (BIAL in the present case) in case of the Hybrid Till/Shared Till.

¹⁴ Tabulated Chart indicating the impact of reduction in depreciation rate from 100% to 90% is annexed hereto and marked as **Annexure F-5**.

37. It is to be noted that as per Paragraph No. 4.14 of CP No.22/2013-14, the Authority has noted that BSR & Company appear to have merely carried out a check of the principles / methodology already established by BIAL for asset and cost allocation and have only validated the same with the financials and not carried out any independent study to classify the assets between aeronautical and non-aeronautical services. We understand from Paragraph No.4.18 of the CP No.22/2013-14 that the Authority has recomputed the asset allocation percentage submitted by BIAL. However, the Authority has accepted BIAL's submission with respect to asset allocation for Apron Extension and Airfield related maintenance expenditure. Also, in the CP No.22/2013-14, the Authority has made upward revisions to the allocation of Opening RAB and Terminal 1 Expansion proposed in CP No. 14/2013-14 (which was based on BIAL's submission in MYTP-2012) which has resulted in increase in asset allocation towards aeronautical assets.¹⁵ Hence, the Authority has essentially relied on basic assumptions of BIAL for the purpose of computing allocation of assets into Aeronautical and Non-Aeronautical.

38. It is submitted that the Authority ought to conduct/commission its own study not accept BIAL's submission on as it is basis. The Authority has been contemplating to commission its own study since April, 2012 when it first issued the DIAL Tariff Order (No.3/2012-13). It is regrettable that the Authority has yet again adopted the stance of commissioning its independent study at a later date. It is to be noted that in the Appeals¹⁶ pending before the Hon'ble AERAAT, the issues pertaining to engagement of consultants/experts by the Authority instead of placing absolute reliance on consultants engaged by the airports operators have been raised and are pending adjudication.

39. It is submitted that purpose of appointing an independent external consultant is to enhance the credibility of data being relied upon by obtaining written reasonable assurance from an independent source. However, such objective will not be met if such external consultant can be influenced by other parties. In addition to technical competence, independence is the most important factor in establishing the credibility of the opinion. To bring independence and objectivity to the process, the Authority should directly engage external consultants in order to obtain reasonable assurance on the data being relied upon.

¹⁵Tabulated Chart depicting the Asset allocation ratio as per CP No.14/2013-14 and CP No. 22/2013-14 is annexed hereto and marked as **Annexure F-6**.

¹⁶Appeal No.6/2012 titled 'Federation of Indian Airlines vs. AERA & Others' against the AERA's Order No.03/2012-13 (DIAL Tariff Order)

Appeal No.5/2013 titled 'Federation of Indian Airlines vs. AERA & Others' against the AERA's Order No.29/2012-13 (MIAL DF Order)

Appeal No.11/2013 titled 'Federation of Indian Airlines vs. AERA & Others' against the AERA's Order No.32/2012-13 (MIAL Tariff Order)

40. Without prejudice, it is submitted that allocation of the airport assets between Aeronautical or Non-Aeronautical categories is critical under Shared Till approach, hence, the same should be carried out on the basis of independent assessment conducted/commissioned by the Authority rather than merely adopting broad view on the basis of assumptions/submissions of BIAL. It is the settled position of law that the sectoral regulators *inter alia* act like an internal audit and while doing so, they may, interfere with the existing rights of the licensees¹⁷. Also, it has been judicially recognised that regulator in balancing the interests of utilities and interests of consumers is not bound by the reports of the auditors of the utilities.¹⁸ Further, the Authority has left the exercise for truing up the allocation mix at the beginning of the next regulatory control period. It is submitted that the Authority ought to pass reasoned order on issues like 'bifurcation of assets into aeronautical & non aeronautical' instead of leaving it for truing up to be taken up for next control period without assigning any cogent reasons.

41. FIA has computed Target Revenue for change due to share of aeronautical vis-à-vis non-aeronautical assets. Without prejudice, it is submitted that the Sensitivity analysis indicates that if ratio of aeronautical to non-aeronautical expenditure changes to:

- (a) 70:30, then the Target Revenue will reduce by 14%;
- (b) 82:18 (allocation ratios proposed by the Authority in the CP No.14/2013-14), then the Target Revenue will reduce by 5%.¹⁹

V. B. Re. Allocation of Expenditure

42. In the CP No.14/2013-14, the Authority has accepted BIAL's allocation of expenditure (approximately 80% : 20%) submitted by way of its MYTP-2012 and had considered the same for the purpose of computation of ARR under Dual Till. In its MYTP-2013, BIAL has revised its submission with respect to expenditure allocation on the basis of BSR Report on '**Agreed upon procedures related to the Statement of allocation of operating expenses into Aeronautical and Non-Aeronautical**' and the allocation has been increased towards aeronautical expenditure (approximately 90% : 10%) and the same is beneficial for BIAL under the proposed Shared Till approach.

¹⁷ **Cellular Operators Association & Others vs. Union of India & Others** reported as (2003) 3 SCC 186,

¹⁸ **West Bengal Electricity Regulatory Commission vs. C.E.S.C. Ltd. & Others** reported as (2002) 8 SCC 715 (FB) (Paragraph No. 95),

¹⁹ For details regarding the Sensitivity Analysis depicting the impact of Target Revenue due to change in ratio of allocation of assets, refer to **Annexure F-7**.

*Written Submissions of FIA: Authority's Consultation Paper Nos.14/2013-14 & 22/2013-14 titled
"Determination of Aeronautical Tariffs in respect of Kempegowda International Airport for the 1st Regulatory
Period (01.04.2011-31.03.2016)"*

43. As per Paragraph No. 4.15 of the CP No. 22/2013-14, the Authority has noted that BIAL's auditor namely, BSR & Company has not carried out any evaluation on the estimate of the percentage allocable to aeronautical and non-aeronautical services and the scope of work performed by BSR & Company was not to carry out a detailed independent evaluation of the BIAL's estimate of allocation of expenditure but a restricted one of validating the numbers based on the inputs of BIAL.

44. As per the Paragraph No. 4.28 the CP No. 22/2013-14, the Authority has requested BIAL to provide the detailed breakup of the costs identified towards aeronautical and non-aeronautical services and same has not been provided yet. For the purpose of computation of ARR under Shared Till in CP No.22/2013-14, the Authority has accepted BIAL's submissions with respect to expenditure allocation in spite of:

- (a) Acknowledging that BSR Report cannot be considered as an independent evaluation; and
- (b) Non-availability of detailed breakup of costs identified towards aeronautical and non-aeronautical services.

45. Acceptance of BIAL's submission by the Authority has resulted in increase in allocation towards Aeronautical expenditure in the CP No. 22/2013-14 as compared to the CP No.14/2013-14. Expenditure allocation ratio as per CP No. 22/2013-14 and CP No.14/2013-14 are depicted below:

TABLE C: Expenditure allocation ratio as per CP No. 22/2013-14 and CP No.14/2013-14

Aeronautical and non-aeronautical expenses as provided in the CP No.14/2013-14						
Reference to Table Nos. 88 & 89 on Page 155 of CP No. 14/2013-14 (BIAL MYTP)						
Particulars	FY12	FY13	FY14	FY15	FY16	Total
Aeronautical OPEX	157	229	217	281	321	1,205
Non-Aeronautical OPEX	42	46	57	74	85	304
Total OPEX	200	275	275	355	405	1,509
Percentage to Total OPEX						
Aeronautical OPEX	79%	83%	79%	79%	79%	80%
Non-Aeronautical OPEX	21%	17%	21%	21%	21%	20%
Aeronautical and non-aeronautical expenses as provided in the CP No.22/2013-14						
Reference to Table Nos. 41 & 42 on Page No. 78 of CP No. 22/2013-14 (BIAL MYTP)						
Particulars	FY12	FY13	FY14	FY15	FY16	Total
Aeronautical OPEX	180	248	238	313	360	1,340
Non-Aeronautical OPEX	19	22	27	34	40	142

**Written Submissions of FIA: Authority's Consultation Paper Nos.14/2013-14 & 22/2013-14 titled
"Determination of Aeronautical Tariffs in respect of Kempegowda International Airport for the 1st Regulatory
Period (01.04.2011-31.03.2016)"**

Total OPEX	199	270	265	348	399	1,481
Percentage to Total OPEX						
Aeronautical OPEX	90%	92%	90%	90%	90%	90%
Non-Aeronautical OPEX	10%	8%	10%	10%	10%	10%

46. In the CP No.22/2013-14, the Authority has proposed to commission an independent study to assess the reasonableness of the expenditure allocation. However, the Authority has not thrown any light on the status of independent study i.e. the agency appointed, time frame in which the report is to be submitted, etc. Also, the Authority has proposed to true up the allocation expenditure between Aeronautical and Non-Aeronautical services based on cost accounting principles.

47. FIA has computed Target Revenue with respect to change in allocation of aeronautical vis-à-vis non-aeronautical expenditure. Without prejudice, it is submitted that sensitivity analysis indicates that if ratio of aeronautical to non-aeronautical expenditure changes to 80:20 (as per the CP No.14/2013-14), Target Revenue will reduce by 5%.²⁰

48. It is submitted that allocation of the operating expenditure in to Aeronautical or Non-aeronautical categories is important exercise towards the determination of aeronautical tariff in a Shared Till model, hence the same should be done on the basis of independent study rather on the financial reporting system of BIAL. The Authority has left the exercise for truing up the allocation mix and costs on basis of cost accounting principles. It is submitted that the Authority ought to commission for independent study for determining the reasonableness of allocation ratios and pass reasoned order (on basis of that study) on issues like 'bifurcation of expenditures into aeronautical and non-aeronautical instead of leaving it for truing up without assigning any cogent reasons.

V.C. Re. Future Capital Expenditure

49. Future capital expenditure of BIAL to be capitalised during the control period pertains to two categories:

- (a) Additional capital expenditure – for expansion projects; and
- (b) General capital expenditure – for maintenance of existing assets.

As per the Paragraph No.5.45.1 of the CP No.22/2013-14, Authority has proposed to consider actual capital expenditure incurred during FY 2011-12 and FY 2012-13 (as per audited financial statements) and has accepted BIAL's projection with respect to future

²⁰ A detailed computation sheet is annexed hereto and marked as **Annexure F-8**.

capital expenditure for the remaining three years of control period subject to shifting the maintenance capital expenditure proposed during FYs 2013-14 to 2014-15. Also, the Authority has proposed to commission an independent study on the reasonableness of the cost incurred and capitalized by BIAL and to carry out adjustments, if any, by truing up the RAB for current control period at the time of determination of tariff of next control period. Following table depicts the breakup of future capital expenditure proposed by the Authority to be added to RAB:

TABLE D: Revised Capital Expenditure Projects proposed to be added to RAB during the current control period as per Authority²¹

Project	Date of Capitalisation	Base Cost & Charges (Rs. in Crores)	Financing Allowance (Rs. in Crores)	Total Cost (Rs. in Crores)
Terminal 1 Expansion	31.03.2014	1,338	174	1,512
Other Projects	31.03.2014	38	12	49
Apron Extension	31.03.2014	111	23	135
Expansion Projects Capitalised (A)		1,487	209	1,696
Maintenance Capex Projects	31.03.2012	15	-	15
	31.03.2013	23	-	23
	31.03.2014	0	-	0
	31.03.2015	340	-	340
	31.03.2016	62	-	62
Maintenance Capital Expenditure (B)		439	-	439
Total Capitalisation (A)+(B)		1,926	209	2,135
<i>Maintenance capital expenditure for 2011-12 and 2012-13 given net of disposals</i>				
<i>* Earlier proposed to be capitalised by 30.09.2013</i>				

V.C.1. Additional capital expenditure – Expansion projects

50. As per Paragraph Nos. 5.19 and 5.23 of the CP No.22/2013-14, Authority has proposed to take the completion cost indicated by BIAL as allowable project cost as the same is based on engineering consultant workings. It is to be noted that:-

- (a) At the total cost of approximately Rs. 1,512 crores and total area of approximately 85,000 square meters, cost per square meter of Terminal-1 expansion is approximately Rs.1,78,000. It is noteworthy that such average cost per square per meter is 50% higher than cost per square meter of Terminal-2 of CSI Airport,

²¹ Table No. 12 at Page 47 of CP No. 22/2013-14 (BIAL MYTP)

Mumbai, being operated by the Mumbai International Airport Limited ("MIAL") which is ~ Rs. 1,16,000 per square meter.²²

- (b) In the Paragraph No. 5.22 of the CP No.22/2013-14, the Authority has noted that the cost of construction of T1A and associated works appears to be high as compared with the indicative past cost of construction of other Airport terminals e.g. Kolkata, Chennai, Goa, etc.

It is submitted that the Project Cost to be allowed should be in accordance with the independent study rather than placing reliance on BIAL's submissions. Meanwhile Terminal-1 expansion cost should be added to RAB on basis of benchmark costs of other airports and to be true up according to the findings of the study rather than making additions of higher costs (as per BIAL's submission) to RAB at the time of tariff determination and truing up at later stage.

As per the Table D above, the financing allowance with respect to Terminal-1 expansion of Rs. 174 crores has been allowed by the Authority. However the same was Rs.147 crores in the CP No. 14/2013-14. The incremental financing allowance is due to delay in capitalization from 30.09.2013 (proposed in the CP No. 14/2013-14) to 31.03.2014. The Authority has accepted incremental financial allowance of Rs. 27 crores which has resulted in higher additions to RAB. It is to be noted that CP No. 22/2013-14, does not contain any details for allowing this increment. Further, there is one year delay in capitalization of Apron Extension and two years delay in other projects. It is submitted that Authority should look into this aspect to avoid the inflationary impact on the aeronautical tariff to avert burdening the passengers due to delay in capitalization by BIAL.

V.C.2. General capital expenditure -Maintenance of existing assets

51. In the CP No.22/2013-14, maintenance capex of Rs. 439 crores has been considered by the Authority as against BIAL's submission of Rs. 432 crores. It is submitted that the Authority should scrutinize the incremental capex before adding it to RAB. Maintenance capital expenditure of Rs. 402 crores projected by BIAL to be incurred in 2014-15 and 2015-16 are allowed by the Authority despite the fact that the Authority:

- (a) Has requested BIAL to review the maintenance capital expenditure projections; and
(b) Does not have complete list of the key costs.

²² As per Authority's Order No.32/2012-13, Terminal-2 of CSI Airport, Mumbai was constructed at total cost of Rs.5,083 crores and total area is 4,39,512 square metres, resulting in per square meter cost of approximately Rs.1,16,000/-.

(c) Has noted that approximately 42 crores proposed by BIAL towards strengthening of Airfield pavement should have been carried out as part of initial project itself.

52. As per the Paragraph No. 9.12 of the CP No.14 /2013-14, the Authority has assumed that the overall business plan of BIAL would have been approved by the Board of the company and that the expenditures proposed would be in line with the long term requirements of the airport, which is a casual approach for determining the future capital expenditure and the same assumption is being followed in the CP No.22/2013-14. It is submitted that rather than relying completely on BIAL's submissions, the Authority should conduct an independent technical evaluation and an in-depth scrutiny of:-

(a) Future capital expenditure (both expansion capital expenditure and maintenance capex) and

(b) Financing allowance (projected and incremental) as submitted by BIAL.

53. Without prejudice, it is submitted that the, sensitivity analysis indicates that if the cost of BIAL's Terminal-1 expansion is computed in accordance with per square meter cost of Terminal-2 expansion of MIAL, there is reduction in the Target Revenue by 8% and 7% under Single Till and 40%-Shared Till respectively.²³ It is submitted that FIA has even challenged the project cost of MIAL²⁴ which is pending adjudication before Hon'ble AERAAT.

V.D. Authority ought to independently scrutinise the Operating Expenditure claimed by BIAL

54. As per Proposal No.12 (i) of CP No. 14/2013-14, the Authority has included BIAL's projection for FY 2011-12 and FY 2012-13 with actual operating expenditure as per audited financial statements and for remaining three years of control period, it has accepted BIAL's submissions. No change in the operating expenditure has been proposed by the Authority in the CP No.22/2013-14 except utilities wherein the cost is net off with the utilities revenue accordingly the cost is reduced to the extent of the revenue.²⁵

55. As per clause 5.4.2 of AERA Guidelines, while reviewing forecast of operating expenditure the Authority has to assess:

²³ Detailed computation of reduction in Target Revenue if cost per square meter applicable to Terminal-2 of MIAL is applied to Terminal-1 of BIAL is annexed hereto and marked as **Annexure F-9**.

²⁴ Vide its Appeal No.5/2013 (FIA vs. AERA & Others) and Appeal No.11/2013 (FIA vs. AERA & Others)

²⁵ Revised table as per CP No.22/2013-14 (both for Single Till and Share Till) has been annexed as **Annexure F-10**.

- (a) Baseline operation and maintenance expenditure based on review of actual expenditure indicated in last audited accounts and check for underlying factors impacting variance over the preceding year; and
- (b) Efficiency improvement with respect to such costs based on review of factors such as trends in operating costs, productivity improvements, cost drivers as may be identified, and other factors as maybe considered appropriate.

It seems that the Authority has not carried out any independent review in order to evaluate the efficient expenditure related to FY 2011-12 and FY 2012-13 and rather considered the BIAL's submissions in this regard.

56. Further, with regard to projected expenses from FY 2013-14 to FY 2015-16 in the CP No.14/ 2013-14, the Authority had accepted the basis for majority of the key expenses (like concession fees, general administration costs, etc.) as forecasted by BIAL and has made certain modifications with respect to some of the key operating expenses (i.e. personnel expenses and operation & maintenance expenses) without considering past trends, productivity improvements, cost drivers. The Authority has maintained its view with respect to the operating expenditure in the CP No.22/2013-14.

57. It is discernible that 19 % and 31% year on year increase has been proposed by the Authority in FY 2013-14 and FY2014-15 respectively due to terminal expansion. However no technical evaluation has been done to ascertain the impact of terminal expansion on operating expenses. It is pertinent to note that BIAL has included additional headcount expense starting from FY 2012-13. The Authority should have evaluated the efficient utilization of current headcount in order to justify the additional need for the headcount.

58. Also, it has been noted that BIAL has incurred loss of approximately Rs 6.4 crores on disposal of assets and it is glaring that the Authority has considered the same as part of operating expenditure. It is submitted that the Authority should provide the rationale for including the said loss since the depreciation charge on such asset is already included in determining ARR.

59. It is noteworthy that Operating expenditure is one of the major components for determining ARR (approximately 53% of ARR in Single Till approach and 46% of ARR in case of Shared Till). Hence, the Authority should have evaluated these expenses in detail rather than broadly relying on projections and basis provided by BIAL. It is submitted that the approach of the Authority for reviewing the operating expenditure is not in line with provision of the AERA Guidelines and in order to assess efficient operating expenditure, the Authority should conduct independent study.

60. **Issue of Truing up of Operating Expenditure:** As per Proposal No.12 (iii) of the CP No.14/2013-14 and as per Truing up for Proposal No.11 (a) (i) of CP No.22/2013-14, the Authority has considered the proposal of BIAL to true up operating expenditure based on the actual costs incurred by BIAL during the current control period, at the beginning of the next control period. In this regard, following points are noteworthy:

- (a) As per the AERA Guidelines, the Authority has to assess efficient operating and maintenance costs. It is submitted that Authority is cognizant of the fact that price cap determination would lead to the efficiency as BIAL would make efforts to contain the costs within prescribed price cap. However, the Authority in CP 14/2013-14 has proposed to accept BIAL's proposal to true up expenditure stating that *"this being the first control period and the price cap regime is in the evolution stage, there may not be ready comparisons available to benchmark the costs"*. The same view has been maintained by the Authority in the CP No. 22/2013-14 and hence, there is no price capping in the operating expenditure which does not incentivize operators for efficient and prudent expenditure. .
- (b) The Kempegowda International Airport, Bengaluru has already completed 5 years of operations. Hence, benchmarking the costs should not be difficult for the Authority. It is submitted that rather than truing up, price cap should be mandated by the Authority for each of the operating expenditures depending on the evaluation of past trends, cost drivers, productivity movements, future expansions; otherwise the airport operator (BIAL in the present case) would not make palpable efforts to contain the costs. This would lead to additional burden on the passengers for the next control period.

61. **Bad Debts:** As per Proposal No. 11 (a)(iii) of the CP No.22/2013-14, the Authority had included the bad-debts of approximately Rs. 48 crores (dues from Kingfisher Airlines) written off by BIAL in FY 2012-13. These bad debts were also allowed by the Authority in CP 14/2013-14 considering it as one of event and also has proposed to consider the bad debts actually written off as part of operating expenditure subject to comments from Stakeholders. In absence of details, it is not clear as to what steps have been taken by BIAL to recover the amount of Rs. 48 crores from the Kingfisher Airlines. It is submitted that the Authority should ensure that bad debts have been actually written off as irrecoverable in the accounts of the BIAL.²⁶ The Authority should not allow such losses to be recovered

²⁶ Annexure F-11: Catholic Syrian Bank Ltd. vs. Commissioner of Income Tax, Thrissur, reported as (2012) 3 SCC 784 (FB)

through operating expenditure as it will burden the consumers (airlines as well as the passengers). It is submitted that *arguendo* (without conceding) if such bad debts are to be considered, it should not be allowed to be recovered in remaining period of the present control period but should be recovered over 5 years period (one full control period).

V.E. *Traffic projections submitted by BIAL has been accepted by the Authority without conducting any independent study*

62. The airport operator is required to submit traffic forecasts as part of the MYTP submissions and that the Authority reserves the right to review such forecast assumptions, methodologies and processes and to determine the final forecast to be used for the determination of tariffs.

63. As per the CP No. 14/2013-14, BIAL had submitted traffic study by Landrum & Brown ("L&B") as requested by the Authority. The Authority found that the final traffic projections of BIAL are more or less in line with L&B study. Therefore, it has accepted the projections of BIAL in the CP No. 14/2013-14 as is for the period FY 2013-14 to FY 2015-16 without conducting any independent study. However, it must be emphasized here that the BIAL engaged L&B to conduct the traffic study and the Authority had used this study to benchmark the traffic projections of BIAL which is a clear case of conflict of interest. This also implies that L&B traffic projections cannot be considered to be an independent study. As per the CP No.22/2013-14, BIAL has revised its projections in MYTP-2013 which are in line with projections except cargo accepted by Authority in CP No.14/2013-14. The Authority has again accepted BIAL's projections and proposed the same in CP 22/2013-14 without conducting independent study. The Authority should take note of this fact and conduct/commission its own assessment of traffic forecasts as the same are the base for determining ARR and UDF.

V.F. *Working capital loan and interest vis-à-vis working capital requirements*

64. BIAL has submitted that working capital facility to be availed from FY 2013-14 at the interest rate of 14%. As per Clause 5.4.3 of the AERA Guidelines '*the Authority shall review and assess the levels of projected working capital requirements and shall consider cost of working capital loans as deemed appropriate*'. Authority noted in the CP No.14/2013-14 that working capital loan has been sanctioned to BIAL at interest rate of Bank PLR minus 1% (i.e. 13.5% as SBI PLR is 14.5%) but the facility has not been availed yet. Authority also stated in Paragraph No. 16.8 of CP No.14/2013-14:

"... while there may be requirement to avail a working capital facility, as proposed by BIAL, as the facility has not been available by BIAL as yet, the details of the same and the actual quantum of loan that may be availed by BIAL is not clear. Hence this

**Written Submissions of FIA: Authority's Consultation Paper Nos.14/2013-14 & 22/2013-14 titled
"Determination of Aeronautical Tariffs in respect of Kempegowda International Airport for the 1st Regulatory
Period (01.04.2011-31.03.2016)"**

expenditure, while may be allowed based on the projections made by BIAL, will require truing up based on the actual facility availed, Interest rate on the loan and the actual cost paid."

Also, as per Paragraph No. 12.4 of CP No.22/2013-14, the Authority has proposed to include the working capital requirements as submitted by BIAL in the model for the purposes of payment of interest on the same as a revenue expenditure and the actual interest paid by BIAL on Working Capital would alone be taken into account at the time of truing up during the next control period.

65. It is evident that in absence of the details and quantum of the working capital loan (still to be provided by BIAL²⁷) the Authority has not been able to assess the level of working capital requirements and has considered working capital interest of Rs. 27 crores and Rs. 24 crores for Single till and Shared Till respectively on basis of the projections made by BIAL (as per tables below), however, this approach of the Authority is not in line with AERA Guidelines. As per clause 5.4.3 of the AERA Guidelines, the Authority shall review and assess the levels of projected working capital requirements and shall consider cost of working capital loans as deemed appropriate.

66. As per table below, the rate of interest on the facility in Single Till is higher by 1 per cent as compared to Shared Till. The rationale of the same has not been provided by the Authority in the CP No.22/2013-14.

TABLE E: Working Capital Interest computed by Authority²⁸

Under Single Till				
Particulars	FY14	FY15	FY16	Total (Rs. in Crores)
	Single till			
Working capital facility balance	50	65	75	
Interest considered as part of ARR	7	9	11	27
Interest %	14%	14%	14%	
Under Shared Till				
Particulars	FY14	FY15	FY16	Total (Rs. in Crores)
Working capital facility balance	50	65	76	
Interest considered as part of ARR	6	8	10	24
Interest %	13%	13%	13%	

²⁷ Neither AERA nor BIAL has provided any reason for not providing such details.

²⁸ Extracts of Table Nos. 37 and 38 on Page No. 75

67. Authority's acceptance of BIAL's projection of the working capital requirements is contrary to the AERA Guidelines (Clause 5.4.3), which requires the Authority to make its own assessment. It is submitted that the Authority should not consider the working capital interest of Rs. 27 crores merely on the basis of BIAL's projections without assessing the working capital requirements in the garb of truing up of the same during the next control period.

V.G. Re. Evaluation of Non-aeronautical Revenue

68. As per the Proposal No.12 (a)(iv) in CP No.22/2013-14, the Authority has proposed to consider actual non-aeronautical revenue for FY 2011-12 and FY 2012-13 (as per audited financial statements) and projections for the balance three years period as per the table as under:-

TABLE F: Recomputed revenue for Non-Aeronautical services as proposed by the Authority

As per the Table No. 45 on Page 84 of CP No. 22/2013-14									(Rs. in Crores)
Nature	Particulars	FY12	FY13	FY14	FY15	FY16	Total	% of Total	Remarks
Aviation concessionaries	Cargo	-	-	-	-	-	-	-	Proposed as aeronautical revenue in the CP No.22/2013-14
	Fuel Throughput Charges	-	-	-	-	-	-	-	Proposed as aeronautical revenue in the CP No.22/2013-14
	Flight Catering	5	6	6	7	7	30	3%	BIAL's MYTP-2012 submission accepted as proposed in the CP No. 14/2013-14
	Ground Handling	-	-	-	-	-	-	-	Proposed as aeronautical revenue in the CP No.22/2013-14
	(A)	5	6	6	7	7	30	3%	
Other Non-aeronautical revenue	Retail	29	34	39	47	55	203	23%	BIAL's submission as per MYTP 2013 is accepted
	Advertising and Promotion	34	37	33	37	45	186	21%	BIAL's submission as per MYTP 2013 is accepted
	Rent and Land Lease	26	27	27	40	46	165	18%	CPI based increase proposed by Authority in CP 22

*Written Submissions of FIA: Authority's Consultation Paper Nos.14/2013-14 & 22/2013-14 titled
"Determination of Aeronautical Tariffs in respect of Kempegowda International Airport for the 1st Regulatory
Period (01.04.2011-31.03.2016)"*

As per the Table No. 45 on Page 84 of CP No. 22/2013-14									(Rs. in Crores)
Nature	Particulars	FY12	FY13	FY14	FY15	FY16	Total	% of Total	Remarks
									on BIAL's submission
	Landside Traffic	23	29	32	36	41	162	18%	CPI based increase proposed by Authority in CP 22 on BIAL's submission
	Food & Beverage	13	14	16	19	23	86	10%	BIAL's submission as per MYTP 2013 is accepted
	Information, Communication and Technology charges	-	-	-	-	-	-	-	Proposed as aeronautical revenue in the CP No.22/2013-14
	Utility Charges	-	-	-	-	-	-	-	Proposed to be net off against utility expenses in CP No. 22/2013-14
	Others	2	2	-	-	-	4	0.4%	
	(B)	126	143	147	179	210	806	90%	
Interest income	Interest on Cash (C)	23	10	14	13	4	64	7%	5% interest on cash balance has been considered by AERA
	Total (D) = (A)+(B)+(C)	154	159	167	199	221	900	100%	
	YoY change in Total		3%	5.5%	19%	11%			
	40 % of (D) above for purpose of cross subsidization in case of Shared Till	62	63	67	79	89	360		

Also, BIAL's proposal of truing up the revenue based on actual revenue of control period while determining tariffs for the next control period has been accepted.

69. The Authority has considered mere increase of approximately 19% and 11% increase in FY 2014-15 and FY 2015-16 respectively in spite of the fact that the terminal expansion is scheduled to be completed in FY 2013-14. Authority should reasonably estimate or appoint a consultant to determine revenue from new premises as it may not be appropriate to burden the airlines and passengers with higher tariff in this control period

70. In the CP No.22/2013-14 (Paragraph No.14.7), with respect to revenue from Retail, Food and beverage and Advertising & Promotion the Authority has accepted the BIAL's submission as per its MYTP-2013 and no detailed evaluation has been made by the

Authority to consider the impact of terminal expansion, inflationary increase and real increase while projecting these non-aeronautical revenues. As per Paragraph No.14.9 of the CP No.22/2013-14, with respect to revenue from Rent and Landslide traffic, the Authority has considered CPI based increase in per-pax revenue in terms of BIAL's submissions. Hence, the real increase has not been factored under the said heads. Hence, it is submitted that the Authority should reasonably estimate real increase and consider the same in projecting these Non-aeronautical revenues.

71. As per Paragraph No. 14.12 of the CP No.22/2013-14, the ICT charges (proposed to be collected) has not been factored in business plan by BIAL and accordingly, has not been factored in by the Authority while computing ARR. Hence, it is submitted that the Authority should obtain the details of these charges from BIAL and include the same in computing the ARR as the same would result in reduction of the Target Revenue.

72. In both CP No.14/2013-14 and CP No.22/2013-14, the Authority has considered nominal interest @ 5% p.a. on the cash balance, however the rationale / basis for 5% rate has not been mentioned. It is submitted that the justification and reasonable analysis should be provided for considering such a nominal rate of interest.

73. It is noteworthy that Non-aeronautical revenue is one of the major components for determining ARR (approximately 32% of ARR in Single Till and 12% in 40%- Shared Till). Thus, it is imperative that the Authority should have evaluated in detail rather than broadly relying on projections and submissions of BIAL. In this regard, Authority should conduct or commission its own independent study with respect to impact on revenue from terminal expansion, inflationary increase and real increase.

74. As noted above, in CP No. 22/2013-14, the Authority has proposed 'Shared Till' approach which is against its own Single Till proposal in CP No.14/2013-14. However, FIA has carried out sensitivity analysis to understand the impact of change in share of Non-aeronautical revenue on Target Revenue. Without prejudice, it is submitted that the analysis indicates that if the 50-% Shared Till is followed instead of 40%-Shared till, then the Target Revenue will reduce by 3%.²⁹

²⁹ Tabulated Chart detailing impact of change in Non-aeronautical revenue from 40% to 50% Target Revenue is annexed hereto and marked as **Annexure F-12**.

VI. Authority's consideration of Net Block as on 31.03.2011 as Initial/Opening RAB is contrary to the AERA Guidelines

75. As per Clause 5.4.3 of AERA Guidelines for inclusion of an asset into Initial RAB, the Authority has to consider not just the original cost of fixed asset as indicated in the last audited accounts, but also assess the cost by considering evidence of :-

- (a) Competitive procurement for investments of more than 5% of the opening RAB of the first tariff year;
- (b) Investment, which was made in accordance with the approved plan; and
- (c) Investment (if any), over and above the approved investments, was necessary for providing better services or on account of requests from users or stakeholders.

76. As per Paragraph No. 10.24 of the CP No. 14/2013-14, the Authority has considered the "Net Block" as per the audited financial statements of BIAL for the year ended 31.03.2011 as the Initial RAB. In the CP No.22/2013-14 (at Paragraph No.6.10), Authority has also taken note of the final report by Engineers India Limited ("EIL") titled "Construction of International Airport facilities at Devanahalli, Bangalore by BIAL". In this context, it is noteworthy that EIL was commissioned by the Airports Authority of India ("AAI"), which is a 13% Shareholder in BIAL. Therefore, this exercise has been carried out by the Authority without independently assessing the cost of assets by considering the evidences of competitive procurement and such other aspects as may be necessary to judge the appropriateness of such an investment as per the AERA Guidelines. Such approach adopted by the Authority is in contravention of the methodology prescribed in the AERA Guidelines for valuation of Initial RAB.

77. Authority's casual approach is also highlighted by the fact that while accepting the Net Block as Initial RAB, Authority assumed that:

- (a) As BIAL is a Board Management Company with the Chief Secretary of GoK as the Chairman of the Board, expenditure incurred in acquiring the assets would have been approved by the Board; and
- (b) The initial project has been commissioned long back in 2008.

78. Thus, it is hereby requested that the Authority should ensure that only the fair costs (rather than historical costs) are taken into consideration and BIAL is remunerated only such investments/costs which have incurred in accordance with accepted business practices. In this regard, Authority ought to commission an independent study for valuation of Initial RAB in accordance with the AERA Guidelines.

VII. Analysis of Increase in various building blocks (Return on RAB, Operating Expenditure and Depreciation) under 40%-Shared Till Model

79. FIA has analysed key building blocks (Return on RAB, Operating Expenditure and Depreciation) under Single Till/Dual Till as proposed in CP No.14/2013-14 and compared these blocks as proposed in CP No.22/2013-14 (both under Single Till and Shared Till). Following table depicts the comparison of key building blocks under the CP No. 14/2013-14 and the CP No.22/2013-14 (Under both the Tills) and change in each of the building block and its impact on ARR:

TABLE G: Comparison of Key Building Blocks in CP No.14/2013-14 & CP No. 22/2013-14³⁰

	Particulars	CP No. 14/2013-14			CP No. 22/2013-14			Increase/(Decrease) (Rs. in Crores)	
		Allocation Ratio	Single Till (A)	Dual Till (B)	Allocation Ratio	Single Till (C)	Shared Till (D)	Single Till (C)-(A)	Shared Till (D)-(B)
A	Return on Average RAB	RAB Ratio 82%:18%	1,338	1,098	RAB Ratio 88%:12%	1,256	1,111	(82)	13
B	Depreciation	RAB Ratio 82%:18%	890	736	RAB Ratio 88%:12%	883	795	(7)	59
C	Operating Expenditure	80%:20%	1,510	1,205	90%:10%	1,481	1,340	(29)	135
Impact on ARR in CP No. 22/2013-14 with respect to these blocks								(118)	207

80. It is to be noted that Return on RAB, Depreciation and Operating Expenditure under Single Till in CP No. 22/2013-14 have collectively declined by Rs. 118 crores as compared to CP No.14/2013-14 under Single Till. However, there is increase in these blocks by Rs. 207 crores under Shared Till in the CP No.22/2013-14 as compared to the CP No.14/2013-14. Thus, it is clear that the allocation ratios proposed in CP No.22/2013-14 tilts in favour of BIAL as a result of which benefit of reduction aggregating to Rs. 118 crores in the said building blocks under Single Till in CP No.22/2013-14 is not being passed on proportionately in case of the Shared Till approach. In fact, there is addition aggregating to Rs. 207 crores in these blocks in case of Shared Till approach under CP No.22/2013-14 as *inter alia* evident from the following

- (a) **Return on Average RAB:** Decline in Return on RAB by **Rs. 82 crores** under the Single Till is primarily due to reduction in WACC from 11.82% in CP 14 to 11.71% in the CP No.22/2013-14 and marginal reduction in RAB. On the contrary, Return on RAB is

³⁰Reference from Table No. 123 and Table No. 124 of CP No. 14/2013-14 & Table No. 55 and Table No. 56 of CP No. 22/2013-14

increased by Rs.13 crores in case of Shared Till in the CP No.22/2013-14 due to increase in Asset allocation ratio from 82% to 88% for the aeronautical assets.

- (b) **Depreciation:** Decline in depreciation by Rs. 7 crores under Single Till is primarily due to marginal reduction in RAB. On the contrary, depreciation is significantly increased by Rs. 59 crores in case of 40%-Shared Till in the CP No.22/2013-14 due to increase in asset allocation ratio from 82% to 88% for aeronautical assets.
- (c) **Operating Expenditure:** Decline in operating expenditure by Rs.29 crores under Single Till is primarily due to netting off utilities revenue from the expenditure. Hence, on gross basis there is no reduction in expenditure in the CP No.22/2013-14. On the contrary, there is significant increase of Rs. 135 crores under the 40%-Shared Till as reflected in the CP No.22/2013-14 due to change in allocation ratio from 80% to 90% with respect to aeronautical expenditure.

VIII. Levy of User Development Fee at Kempegowda International Airport has no statutory basis

81. In the CP No.14/2013-14, Authority had proposed to allow UDF on embarking passengers based on the Clause 10.2 read with Clause (iii) of Schedule 6 of the Concession Agreement. The same is reproduced below for ease of reference:

“(iii) User Development Fee (UDF) (domestic and international):

*BIAL will be allowed to levy UDF w.e.f. Airport Opening Date, duly increased in the subsequent years with inflation index as set out hereunder, from embarking domestic and international passengers, for the provision of passenger amenities, services and facilities and the UDF will be used for the **development, management, maintenance, operation and expansion** of the facilities at the Airport.”*

82. As per Paragraph No. 22.17 of the CP No. 22/2013-14, the Authority has indicated the financial impact of different regulatory approaches on the ARR as well as the resultant aeronautical tariffs and UDF. While calculating the UDF, the Authority proposes to accept the Landing, Parking and Housing Charges (LPH) as submitted by BIAL which according to FIA is proposed to be increased ranging between 76% to 160%. As per Paragraph No. 22.18, the Authority is of view that 40%-Shared Revenue strikes a proper balance between the requirement of funds for the Capital Expansion and keeping the user charges at reasonable level. Hence, the Authority has proposed 40%-Shared Revenue Till approach for the purpose of tariff determination.

83. As per the Proposal No. 20 (a) (iv) of the CP No.22/2013-14, the Authority has calculated that the difference between the UDF collected under 40% Shared Revenue Till and Single Till during the remaining part of current control period is currently estimated at Rs. 160 crores. Further, as per Authority this represents the transfer of resources from the passengers to BIAL to facilitate the expansion of airport facilities by BIAL. Hence, the Authority has proposed to allow utilization of UDF towards capital expenditure for the airport expansion.

84. It is to be noted that Clause 6.8.5 of AERA Guidelines in no uncertain terms provides that UDF is a revenue enhancing measure to allow FRoR to the Airport Operator. It is not clear as on what basis the Authority has proposed to levy UDF at Kempegowda International Airport for the purpose of development and expansion work undertaken in the past. In a long term PPP project, it remains unclear as to how the Authority can allow the funding to be borne by the tax payers, whereas the equity holders are in control of the assets. It is imperative to note that inability to fund the project or any other reason for lack of funds cannot lead to the detriment of the consumers at large. It is well recognised regulatory position that the Regulator may disallow cases of utility where investments are prudent though recognising that such investments are their internal matter. It is for the utility to bear the brunt of such wrong investments and it cannot pass it on to consumers.³¹

85. It may be noted that the Authority is allowing the tariff increase as proposed by BIAL and UDF. It may be clarified as to how, in the tariff determination exercise, is UDF coming into picture? If at all, there is a claim for UDF, BIAL should approach by way of a separate petition. It may be noted that neither AAI Act, Aircraft Act, nor AERA Act nowhere provide for provision of determination or levy of UDF on passengers. Authority neither in the CP No. 14/2013-14 nor in the CP No.22/2013-14 has deliberated upon the rationale for levying UDF. According to FIA, there is no need to levy UDF and burden the passengers unnecessarily.

86. It is submitted that Authority is bound under Section 13(4)(c) of the AERA Act to fully document and explain its decision. The Authority must explain the reason of allowing levy of UDF by BIAL.

87. It is noteworthy that the Hon'ble Supreme Court in the judgment of **Consumer Online Foundation vs. Union of India & Others** reported as (2011) 5 SCC 360³² has

³¹ **Annexure F-13:** KPTCL vs. KERC and Others reported as 2007 ELR (APTEL) 223

Annexure F-14: Mula Pravara Electric Co-operative Society Ltd. vs. Maharashtra Electricity Regulatory Commission and Others 2008 ELR (APTEL) 135

³²**Annexure F-15:** Consumer Online Foundation vs. Union of India & Others reported as (2011) 5 SCC 360

categorically noted that there can be no contractual relationship between the passengers embarking at an airport and the airport operator with regard to the up-gradation, expansion or development of the airport which is to be funded or financed by charges being levied on the passengers. Those passengers who embark at the airport after the airport is upgraded, expanded or developed will only avail the facilities and services of the upgraded, expanded and developed airport. Similarly, there can be no contractual relationship between the airport operator and passengers embarking at an airport for establishment of a new airport in lieu of the existing airport or establishment of a private airport in lieu of the existing airport. Thus, it is submitted that in the absence of such contractual relationship, the liability of the embarking passengers to pay UDF has to be based on a statutory provision. At this juncture, it is to be noted that UDF has no statutory foundation and at Kempegowda International Airport has been levied and further proposed to be levied on the basis of Concession Agreement.

88. In fact, the UDF which is being levied at the Kempegowda International Airport towards development and expansion of the airport facilities is in the nature of cess or tax. It is settled position of law that any levy or compulsory exaction which is in the nature of tax/cess cannot be levied without a statutory foundation/charging section, as laid down in a catena of judgements by the Hon'ble Supreme Court. It is submitted that no tax, fee or any compulsory charge can be imposed by any bye-law, rule or regulation unless the statute under which the subordinate legislation is made specifically authorises the imposition. There is no room for intendment.

89. It is also noteworthy that UDF is recovered from each traveling passenger through the air-ticket as a component of the price of such air-ticket and the same is payable by the airlines to the airport operator (BIAL in the present case). It is reiterated that any increase on fees payable directly by passengers ultimately affects the interests of airlines. It is submitted that any passenger is concerned with the total cost of his travelling and not with the specific break-up of charges. Such enhancement in the cost of the air-ticket not only works as a deterrent for the prospective traveler but also reduces the ability of the airlines to recover its costs and thus, affecting the business interests *inter alia* of airlines and aviation industry.

IX. Tax savings should have been considered for determining Cost of Debt

90. As per Proposal No. 7 of the CP No. 14/2013-14, cost of debt for the control period has been considered as follows:

- (a) **FY 2011-12 and FY 2012-13** -To consider the actual cost of Rupee Term Loan and ECB Loan, paid by BIAL, for FY-2011-12 and FY-2012-13 towards the cost of debt for FY 2011-12 and FY 2012-13
- (b) **FY 2013-14 to FY 2015-16** - To true-up the cost of debt for the current control period with actual values (determined as weighted average rate of interest for the individual tranches of loan drawn within the control period) subject to the ceiling of 12.50% for the Rupee Term Loan and 10.15% for the ECB Loan.

Authority has maintained its view on cost of debt in CP No.22/2013-14 and has reiterated the same vide the Proposal No.6 therein.

91. In both the CP No.14/2013-14 and CP No.22/2013-14, Authority has not provided a breakup of the Rupee Term Loan and ECB Loan over the historic period and forecast period to calculate the actual cost of debt. Cost of debt is the effective rate that a company pays on its current debt post adjustment for tax savings. However, based on aforementioned decision taken by the Authority and review of consultation paper, it appears that cost of debt has not been adjusted for any tax savings. Post adjustment of such tax savings (assuming tax rate at 30%) in cost of debt, FRoR will reduce from 11.71% to 9.63%. It is submitted that the Authority should factor such tax saving for computing FRoR of BIAL. As per FIA's sensitivity analysis, reduction in FRoR from 11.71% to 9.63% will reduce ARR by 8% in Single Till and by 7% in 40% Shared Till.³³

X. Re. Security deposit received from Bangalore Airport Hotels Limited ("BAHL")

92. In the CP No.22/2013-14, BIAL has submitted that "a framework agreement for design, construction and operation of Business Hotel Facility at BIAL was entered into with EIH Limited and L&T Limited on 16.11.2006". The consortium incorporated a joint venture Company namely Bangalore Airport Hotels Limited ("BAHL") under the Companies Act, 1956. In this regard, it is reflected from both the CP No.14/2013-14 and the CP No.22/2013-14 that BIAL had received interest free security deposit of Rs. 76.5 crores from BAHL in December, 2006 and had received interest of Rs. 43 crores on this deposit till 31.03.2013 out of which, Rs. 6.89 crores per annum has been received in FY 2011-12 and FY 2012-13.

93. On 14.11.2008, AAI issued a no-objection certificate with a height clearance of 30.36 meters only, as against the proposal of the consortium for 45 meters. The consortium then expressed its inability to continue to develop and operate and sought certain additional

³³ Tabulated Chart detailing the impact of change in FRoR on ARR is annexed hereto and marked as Annexure F-16.

concession from BIAL or for a settlement of cost incurred and this is currently under dispute and under arbitration proceedings.

94. As per the Paragraph No. 6.20 and Proposal No. 4 (a)(i) of the CP No. 22/2013-14, the Authority has proposed not to carry any adjustment to RAB on account of monetization of land owing to the development of the Hotel during the current control period. It is submitted that such proposal (No.4(a)(i) of the CP No.22/2013-14) is not in accordance with the land value adjustment as prescribed by Clause 7.7 of the Single Till Order and Clause 5.2.4 of AERA Guidelines wherein the market value of the land on which Hotel is developed needs to be reduced from RAB. In the CP No. 14/2013-14 (Paragraph No. 10.16), the Authority indicated its view on the land value adjustment prescribed in the AERA Guidelines. Thus, it is submitted that the same approach should be adopted in case of the adjustment of RAB on account of monetization of land owing to the development of Hotel.

95. As per the Proposal No. 4(a)(v) of the CP No.22/2013-14, Authority has proposed to not take the interest free security deposit of Rs. 76.5 crores and the interest on the same of Rs. 43 crores (including Rs. 6.89 crores per annum received in FY 2011-12 and FY 2012-13) for the purpose of tariff determination during current control period, pending final outcome of the arbitration proceedings. However, at the same time, as per the Paragraph No. 13.10 of the CP No.22/2013-14, the Authority has included the cost that has been / may be incurred towards negotiating and handling this agreement, along with cost of arbitration, legal fee etc. in the operating expenditure as submitted by BIAL in its MYTP. It is glaring that Authority has accepted such expenses even though the details of such expenditure has not been provided by BIAL. The Authority has indicated that upon submission of the details by BIAL, the Authority would adjust the same at the time of issuing the tariff order or at the time of determination of tariff of next control period in case the details are not available at the time of the proposed order. The Authority for purpose of determining ARR has adopted contrary approach with respect to Hotel project by exclusion of security deposit & interest income and inclusion of legal expenses. Moreover, its affect in pre-control period cannot be undermined either. It is submitted that the Authority ought to include the security deposit & interest income and with respect to the expenses:

- (a) Timeline should be prescribed by the Authority for submission of details of expenses, as passengers cannot be penalized for delay made by BIAL and
- (b) The same should be excluded from operating expenditure while computing ARR.

The aforementioned treatment of interest income, legal expenses, security deposit and land by the Authority in its proposals would lead to higher tariff and additional burden on customers during the present control period.

96. The Authority for purpose of determining ARR has adopted contrary approach with respect to Hotel project by proposing to exclude the security deposit and interest income and including of expenses related thereto. Moreover, its affect in Pre-control period cannot be undermined either.

97. It is submitted that Authority ought to:

- (a) Include the Security Deposit received from BAHL and interest income; and
- (b) Prescribe timeline for submission of details of expenses, as passengers cannot be penalized for delay made by BIAL; and
- (c) Exclude the expenses should be excluded from operating expenditure while computing ARR.

XI. Re. Exclusion of Pre-control Period Losses in current control period for the purpose of determining ARR

98. In the CP No. 14/2013-14, Authority had proposed to include the Pre-control Period losses of Rs.18.29 crores (present value of Rs.33.17 crores as on 31.03.2011) for the period from 24.05.2008 to 31.03.2011. FIA in its written response had questioned the reasonableness of including such Pre-control period losses *inter alia* on the basis that levying such Pre-control Period losses in current control period would unreasonably burden the prospective passengers travelling from 01.10.2013. However, in the CP No.22/2013-14, the Authority has proposed to not to consider Pre-control period shortfall for the purpose of determination of Aeronautical Tariffs for the current control period. It is pertinent to note that Authority in its CP No.22/2013-14 has clearly noted that for the period 2009-10 and 2010-11, BIAL has not posted any losses in its Profit and Loss statements.

99. In this regard, FIA welcomes Authority's final proposal to not include the Pre-control period losses claimed by BIAL. It is settled position of law that future consumers cannot be burdened with the past burdens of the utility.³⁴

XII. Treatment of Revenue from Aeronautical services as Aeronautical Revenue is in the right direction in terms of legal framework

100. In the CP No. 14/2013-14, Authority had noted that cargo service and ground-handling are aeronautical services and had contemplated that revenue arising from cargo

³⁴ Annexure F-17: UPPCL vs. NTPC (2009) 6 SCC 235 (Paragraph Nos. 63 and 65)

service and ground-handling will be treated as aeronautical, if the services are being provided by BIAL itself and Non-aeronautical if the services have been concessioned out to the third parties. In the CP No.22/2013-14, the Authority seems to have reconsidered and proposed that revenue from Cargo Facility, Ground Handling and Into Plane services (provided by third party concessionaires) accruing to BIAL as aeronautical revenue for determination of tariffs of aeronautical services for the current control period. FIA welcomes the approach of the Authority in view of the prevalent legal framework which does not distinguish between the treatment of revenue received from the aeronautical services being provided by the airport operator (BIAL in the present case) or the by third party concessionaires. FIA further appreciates Authority's proposal to consider the Fuel Throughput Fee revenue from fuel farm service concessioned out by BIAL as aeronautical revenue in the hands of BIAL.

XIII. Re. Treatment of Independent Services Providers ("ISPs")

101. In the CP No.14/2013-14, Authority had sought the view from the Stakeholders whether ISPs providing services related cargo, ground-handling, fuel throughput, etc. should be treated as agents of BIAL or third party concessionaires. In this context, FIA had submitted *inter alia* that Authority has laid down the CGF Guidelines with the intent to regulate tariff(s) of ISPs on stand-alone basis and not as agents of the airport operator (in the present case BIAL). The CGF Guidelines still hold the ground as far as determination of tariff(s) of aeronautical services of ISPs are concerned and has not been set aside under any legal proceedings.

102. Now in the CP No.22/2013-14, it is stated that BIAL in its subsequent submissions dated 06.09.2013 has accepted that the CGF Service providers are not its agents. The Authority has also noted that BIAL in its letter has stated that "*As long as the service providers render the services within the framework of SPRH agreement, such service provider has freedom to operate its business and carry out the provisioning of services independently. Hence they are not agents as understood under legal parlance*". The Authority on reading the relevant clauses of the SPRH agreements felt that apart from the "legal parlance" CGF concessionaires cannot be regarded as agents of BIAL even in a financial sense in as much as BIAL does not appear to have made any payments in terms of reimbursement of costs etc. to the CGF Service providers for the services provided by them. The Authority, therefore, has proposed to consider the CGF Service providers as Independent Service Providers (ISPs) and treat them as such.

103. In the event of CGF service providers being treated as ISPs, it will be within the purview of Authority's jurisdiction to determine the tariff of such CGF service providers within the regulatory framework.

XIV. Re. BIAL's monopolistic approach and 'Doctrine of Essential Facilities'

104. It is submitted that under the competition law, an enterprise is under an obligation to extend its essential infrastructural facility at a reasonable cost. BIAL's control over Kempegowda International Airport renders it a monopolist having control over 'essential infrastructural facility' of the airport in the city Bangalore.³⁵ The requirement of access to essential facility was first articulated by the Supreme Court of United States of America in United States vs. Terminal Railroad Assn, reported as 224 U.S. 383 (1912)³⁶. Under the principles of access to essential facility, the following four factors must be proven:-

- (a) Control of the essential facility by a monopolist;
- (b) A competitor's inability practically or reasonably to duplicate the essential facility;
- (c) The denial of the use of the essential facility to a competitor; and
- (d) The feasibility of providing the essential facility to competitors.

105. It is submitted that to seek access to essential facility, the asset in question also must not be available from other sources or capable of duplication by the firm seeking access. Reliance is placed on the case of Apartment Source of Pennsylvania vs. Philadelphia Newspapers, reported as 1999 WL 191649³⁷. In view of the foregoing judicial precedents, it is submitted that BIAL assumes the position of a monopolist since it exercises control over Kempegowda International Airport which is a crucial infrastructural facility for a city like Bangalore due to its financial and economic significance at both national and international levels. Airport is an essential facility, and thus, per this doctrine, the monopolist should not be allowed to charge an exorbitant price for accessing its facility.

106. It is submitted that such enormous hike in tariff by a monopolist BIAL may be viewed as 'abuse of its dominance' and accordingly liable under section 4 of the Competition Act, 2002 ("**Competition Act**"). The Competition Act promulgates the "economic development of the country" by establishment of a Commission to, amongst other things, protect the interests of the consumers. Levy of such exponential charges by a monopolist is clearly

³⁵ This fact is highlighted by the fact that under the Concession Agreement, BIAL has been guaranteed exclusivity to operate an airport in the city of Bangalore.

³⁶ **Annexure F-18:** United States of America in United States vs. Terminal Railroad Assn, reported as 224 U.S. 383 (1912)

³⁷**Annexure F-19:** Apartment Source of Pennsylvania vs. Philadelphia Newspapers, reported as 1999 WL 191649

against consumer interests, and thus, is against the basic premise of competition law in India.

XV. Re: True-up exercise

107. In the CP No. 14/2012-13 and present CP 22/2013-14, the tariff plan is subject to truing up in next control period with respect to following components:

- (a) Asset Allocation
- (b) Future Capital Expenditure
- (c) Cost of Debt
- (d) Operating Expenditure
- (e) Taxation
- (f) Non-aeronautical revenue
- (g) Traffic forecast
- (h) Working Capital Interest Expenditure
- (i) WPI Index

108. It is submitted that in the present case Authority should not leave aforementioned components for future in the garb of truing up exercise during next control period. In this context, judgment of APTEL in the case of **BSES Rajdhani Power Limited vs. Delhi Electricity Regulatory Commission** reported as **2009 ELR (APTEL) 880**³⁸ is extracted below:

"116. Before parting with the Judgment we have to remind the Commission of the observations in our Judgment in Appeal No. 265 of 2006, 266 of 2006 and 267 of 2006 in the case of North Delhi Power Ltd. v. Delhi Electricity Regulatory Commission in which we said the following:

Before parting with the Judgment we are constrained to remark that the Commission has not properly understood the concept of truing up. While considering the Tariff Petition of the utility the Commission has to reasonably anticipate the Revenue required by a particular utility and such assessment should be based on practical considerations. ...The truing up exercise is meant (sic) to fill the gap between the actual expenses at the end of the year and anticipated expenses in the beginning of the year. When the utility gives its own statement of anticipated expenditure, the Commission has to accept the same

³⁸Annexure F-20: BSES Rajdhani Power Limited vs. Delhi Electricity Regulatory Commission reported as 2009 ELR (APTEL) 880

except where the Commission has reasons to differ with the statement of the utility and records reasons thereof or where the Commission is able to suggest some method of reducing the anticipated expenditure. This process of restricting the claim of the utility by not allowing the reasonably anticipated expenditure and offering to do the needful in the trueing up exercise is not prudence.

117. All projections and assessments have to be made as accurately as possible. Trueing up is an exercise that is necessarily to be done as no projection can be so accurate as to equal the real situation. Simply because the trueing up exercise will be made on some day in future the Commission cannot take a casual approach in making its projections. We do appreciate that the Commission intends to keep the burden on the consumer as low as possible. At the same time one has to remember that the burden of the consumer is not ultimately reduced by under estimating the cost today and trueing it up in future as such method also burdens the consumer with carrying cost."

The said judgment has been followed by APTEL in various other cases like NDPL vs. Electricity Regulatory Commission reported as 2010 ELR (APTEL) 891³⁹.

109. In view of the foregoing, it is submitted that Authority should not leave everything to true up and attempt to make all the projections and assessments as accurately possible on the basis of available data.

XVI. Discrepancies in the CP No.14/2013-14 and CP No.22/2013-14:

110. It is striking that no detailed tariff model has been made available in both the CP No. 14/2013-14 and CP No.22/2013-14. Absence of adequate information makes it difficult to verify the proposals made by the Authority. Following are some instances where information is not adequately provided or discrepancies are noticeable:-

- (a) **Cost of debt:** The CP does not provide the breakup of the rupee term loan and ECB loan over the historic period and forecast period to calculate the actual cost of debt.
- (c) **Key Operating expenses:** The Authority has not provided the details of the basis which operating expenses like Personnel expenses, Operation & Maintenance, Concession Fees and OMSA fees has been computed and considered for determining ARR.
- (d) **Non-aeronautical Revenue items:** No details have been provided for computing the CPI base increase under select Non Aero revenue heads in both CP No.14/2013-14 and CP No.22/2013-14.

³⁹Annexure F-21: NDPL vs. Delhi Electricity Regulatory Commission reported as 2010 ELR (APTEL) 891

(e) **Delay in tariff fixation burdening passengers:** There is an inordinate delay in tariff fixation which has diminished the effective Control Period to 24 months from 60 months leading to burdening of future passengers with past period losses.

111. In addition to the above submissions, it is respectfully submitted that airlines and consequently, passengers will have to bear the burden of increase in Aeronautical Tariffs as proposed by BIAL and the Authority. It is noteworthy that Airlines and passengers must not be burdened with any tariff to be collected to fund the capital investments of a private concessionaire.

112. The Authority is aware that airlines have been going through difficult times with high prices of crude oil. Increase in aeronautical tariff as proposed by the Authority will erode airlines capabilities to increase fares to sustain its operational capabilities. It is submitted that it would be unfair to allow such increase to fund the gap of the private airport operator especially after the privatization has taken place. Any additional funding gap should be bridged through debt-financing, subsidy by Government, or additional equity. It seems that increase in aeronautical tariff is a means to avoid any of the said options to burden the passengers.

113. It is pertinent to note that the Authority must also take into account the difficulties being faced by the airlines and passengers before granting levies to the airport operators. Considering the fragile financials of the Airlines, UDF will inhibit Airlines' ability to raise fares. As Airlines have suffered losses significantly in the last two years due to high ATF and recent depreciation of the rupee, there is a need for Airlines to raise fares to recoup the past losses, rather than fund the Airport development program which is the responsibility of the airport operator. BIAL by way of its present proposal is acting to the detriment to airlines and the passengers.

114. Annual concession fee is being paid by the BIAL to Gol as a part of its costs which it willingly agreed to incur to win the concession under a competitive bidding process. As such, this would have been factored in the bid financial model and must not be a source of additional risk or financial burden being transferred to users. Revenue that is earned by the airport has already factored in it a fair return on investment.

115. FIA reiterates its submission that there is a critical relationship between passenger traffic and growth of the civil aviation sector. What would benefit both the airport operator as well as the airlines is a reasonable and transparent passenger tariff, both direct and indirect – since then the airlines will be able to attract more passengers and the airports would benefit both through higher collection of aeronautical charges as also enhanced non-

aeronautical revenue at the airports. In FIA's view, the airport should be regarded as a single business as its aeronautical and non-aeronautical revenues are intertwined. In this backdrop, FIA endorses the "Single Till" as the basis for determining airport revenue, **without any carve-outs whatsoever**. It is submitted that the Shared Till Model adopted by the Authority in the CP No.22/2013-14 ought to be discarded. The Authority must bear in mind the interest of airlines and the passengers which is of paramount importance for the aviation industry.

116. It is submitted that order passed by an administrative authority, affecting the rights of parties, must be a speaking order supported with reasons. It is well settled position of law⁴⁰ that:

- (a) Reasons ought to be recorded even by a quasi-judicial authority.
- (b) Insistence on recording of reasons is meant to serve the wider principle of justice that justice must not only be done it must also appear to be done as well.
- (c) Recording of reasons also operates as a valid restraint on any possible arbitrary exercise of judicial and quasi-judicial or even administrative power.
- (d) Insistence on reason is a requirement for both accountability and transparency.
- (e) Reasons in support of decisions must be cogent, clear and succinct.
- (f) A pretence of reasons or 'rubber-stamp reasons' is not to be equated with a valid decision making process.
- (g) Requirement of giving reasons is virtually a part of 'Due Process'.

117. In view of the foregoing submissions, it is submitted that the Authority ought to pass reasoned order on issues *inter-alia* like 'bifurcation of assets and expenditure' 'allowance of operating expenditure', 'allowance of future capital expenditure', etc.

118. In view of the above, it is respectfully prayed that the Authority keeps in mind the interests of the airlines and civil aviation sector before finalizing any decisions regarding increase in Aeronautical Tariffs and other charges. BIAL's proposal, if accepted, will have cascading impact on the airlines and consequently, on the civil aviation industry.

⁴⁰Annexure F-22: Kranti Associates Private Limited & Another vs. Masood Ahmed Khan & Others reported as (2010) 9 SCC 496