



**Federation of Indian Airlines**

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5 August 2013

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

**Kind Attention: Capt. Kapil Chaudhary**

**Subject: Comments & submissions of the Federation of Indian Airlines (FIA) tendered in response to the Consultation Paper No. 09/2013-14 "Determination of Aeronautical Tariffs in respect of RGI Airport, Hyderabad for the 1<sup>st</sup> Regulatory Period (01.04.2011 – 31.03.2016)**

Dear Madam,

FIA submits that the AERA CP.No.09/2013-14 dated 21.05.2013 for "*Determination of Aeronautical Tariffs in respect of RGI Airport, Hyderabad for the 1<sup>st</sup> Regulatory Period (01.04.2011-31.03.2016)*" will have long lasting financial impact on the member airlines. FIA, thereby request AERA to kindly take a note of its submission and fix the Aeronautical Tariffs in line with the need of the hour.

FIA also respectfully crave leave to file any additional/supplementary response, if required at a later date.

FIA is hereby placing on record its submission for your kind consideration. The submission has been arrived solely from discussions, deliberations and past experiences of the member airlines for the kind consideration by the authority.

Thanking you,

With best regards,

  
Ujjwal Dey  
Associate Director



**FIA's Written Submission in response to  
CP No.09/2013-14 titled "Determination of Aeronautical Tariffs in respect of RGI Airport,  
Hyderabad for the 1<sup>st</sup> Regulatory Period (01.04.2011-31.03.2016)"**

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## **SUBMISSIONS ON BEHALF OF THE FEDERATION OF INDIAN AIRLINES**

1. On behalf of its member airlines, Federation of Indian Airlines ("FIA") is hereby placing submissions in response to the Consultation Paper No.09/2013-14 ("CP No.09/2013-14/Consultation Paper") dated 21.05.2013 for determination of aeronautical tariffs in respect of Rajiv Gandhi International Airport, Shamshabad, Hyderabad ("RGI Airport"), which has been developed and is being operated and managed by Hyderabad International Airport Limited ("HIAL")<sup>1</sup>.

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

### **A. CONTEXT OF THE CONSULTATION**

3. To assist the Authority in appreciating these submissions on the Consultation Paper, members of FIA deem it necessary to place on record the following set of material facts:-

3.1 Under the Concession Agreement (Clause 5.2), HIAL has been guaranteed exclusivity by Government of India ("GoI") as no new or existing airport shall be permitted by GoI to be developed as, or improved or upgraded into an international or domestic airport within an aerial distance of 150 kilometers of the RGI Airport for 25 years from the date of opening of the RGI Airport.

3.2 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 which provides for various services that are considered aeronautical
- (b) Section 13 (1)(a) of the AERA Act provides that the tariff for such aeronautical

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<sup>1</sup> Presently known as GMR Hyderabad International Airport Limited

Submissions of FIA: Authority's Consultation Paper No.09/2013-14 titled "Determination of Aeronautical Tariffs in respect of RGI Airport, Hyderabad for the 1<sup>st</sup> Regulatory Period (01.04.2011-31.03.2016)"

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.

3.3 '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 GHIAL'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 Para 94)<sup>2</sup> is noteworthy. Hon'ble Supreme Court has held that the word 'Determination' must also be given its full effect to, which pre-supposes application of mind and expression of the conclusion. It connotes the official determination and not a mere opinion or finding.<sup>3</sup> The Hon'ble Telecom

<sup>2</sup>Annexure F.1: Ashok Leyland Ltd. vs. State of Tamil Nadu and Anr. reported as (2004) 3 SCC 1 (FB)

<sup>3</sup>Oxford 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 hos yet to be determined. 4. To decide definitely to do something: They determined to start early"*

Black's Law Dictionary (Eighth Edition)

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

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 Para 150)<sup>4</sup>.

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

3.4 No consistency has been maintained in the document, for the purpose of computing pre-control period losses. Further, cargo and ground handling income has been treated as aeronautical, however, the same has been considered as non-aeronautical for tariff determination in current period (refer para 4.10 of the present Consultation Paper)

## **B. ISSUES FOR CONSIDERATION OF THE AUTHORITY**

4. 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 HIAL for increase in Aeronautical Tariff is justifiable on legal, financial/economic basis?
- (b) What was the business and financial model of HIAL at the time of the execution of Concession Agreement<sup>5</sup> and State Support Agreement<sup>6</sup> ("SSA")? –
- (c) Is the levy of User Development Fee ("UDF") on the passengers to meet the losses suffered during the Pre-control Period is justifiable in context of the prevalent legal framework?
- (d) Can the late submission of relevant information for determination of aeronautical tariff by HIAL be ignored which has essentially diminished the effective control period to 31 months from 5 years i.e. 60 months?
- (e) Can the revenue generated out of aeronautical services in terms of Section 2(a) of the AERA Act be treated as non-aeronautical revenue?
- (f) Can the asset allocation by HIAL be allowed without Authority's independent exercise in this regard?

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<sup>4</sup>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.

<sup>5</sup>Dated 20.12.2004 entered into between Ministry of Civil Aviation and HIAL.

<sup>6</sup>Dated 29.09.2003 entered into between Government of Andhra Pradesh through Transports, Roads and Buildings (Ports) Department and HIAL

*Submissions of FIA: Authority's Consultation Paper No.09/2013-14 titled "Determination of Aeronautical Tariffs in respect of RGI Airport, Hyderabad for the 1<sup>st</sup> Regulatory Period (01.04.2011-31.03.2016)"*

- (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 operating expenses and non-aeronautical revenue without evaluating the same in detail?
- (i) Can the acceptance of various claims of HIAL 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 (escalation of 40% to 400% on component to component basis)<sup>7</sup> be considered as a fair, just or reasonable claim of HIAL in a prudent, regulated, price cap mechanism as envisaged under the AERA Act read with the AERA Guidelines?

5. Without prejudice to the above, it is respectfully submitted that even if the claim of HIAL with respect to the Pre-control period losses be treated as valid and admissible, the Authority must consider and decide:-

- (a) What was the Return on Equity claimed by HIAL during the FY 2008-09 and 2009-10?
- (b) What was the scheme of regulatory approval granted to HIAL for levy of aeronautical tariffs in the FYs 2008-09 and 2009-10?
- (c) What was the Business Model adopted by HIAL during the FY 2008-09 and 2009-10 which led to allegedly such huge losses?
- (d) Whether any shortfall during the Pre-control period should not be borne by HIAL, especially in absence of any scrutiny by the Authority?

It is submitted that that prudence check on each claim must be done along the lines of the established accounting standards and practices which would disallow unreasonable, unfair or extravagant expenditure or shortfall in revenue.

### **C. ISSUEWISE SUBMISSIONS**

#### ***1. Inclusion of Pre-control Period Losses in current control period for the purpose of determining target revenue is fallacious***

6. In the present Consultation Paper, Authority has proposed to include the Pre-control Period losses of Rs.260.68 crores (present value of Rs.333 crores as on September 1, 2013) for the three year period from April, 2008 to March, 2011. Levying such Pre-control Period losses in current control period would unreasonably burden the prospective passengers

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<sup>7</sup>Annexure F-3: A comparative chart indicating the percentage change in existing aeronautical charges vis-à-vis proposed aeronautical charges.

travelling from September 1, 2013. In this context, Authority ought to consider the following issues:

- (a) What is the legal basis for inclusion of such Pre-control period losses?
- (b) When the regulatory period is being computed from 01.04.2011 to 31.03.2016, how does the question arise of inclusion of losses prior to such control period?
- (c) Under what circumstances, whether legally/economically/financially, can the present consumers (including passengers or airlines) be burdened with the past burden of the utility?
- (d) Has the Authority verified the losses as claimed by HIAL?
- (e) Is there any legal basis for allowing the carrying cost (Rs.73 crores) over and above the Pre-control Period losses to the detriment of passengers/consumers?

7. Increasing such Pre-control Period losses from Rs.260.68 crores to Rs.333 crores in order to bring it to the present value on 1.09.2013 would entail an additional burden of Rs. 73 crores on passengers and airlines. Carrying costs on past losses to hike the prospective tariff is untenable and Authority ought to discard this proposal.

8. A perusal of the Consultation Paper No. 07/2010-11 dated 23.09.2010 and Order No.06/2010-11 dated 26.10.2010 indicates that UDF was allowed to HIAL merely by placing reliance on the Concession Agreement and without analysing the legal and economic impact of such levy on passengers/consumers. It is also glaring that earlier Ministry of Civil Aviation and later Authority allowed the levy of UDF without conducting any prudence check exercise and was solely based on HIAL's submissions.

9. It is pertinent to note that in the Stakeholders' Meeting conducted on 29.09.2010 in context of the Consultation Paper No.07/2010-11, FIA had submitted as to how the HIAL (the airport operator) should endeavour to enhance its share of non-aeronautical revenues and leverage the non-aeronautical to bring down the aeronautical tariffs.

10. It is to be noted that the regulatory period already stands diminished to almost 31 months and loss of Pre-control Period losses for 2008-2011 would translate into allowing exaction of money from present consumers for the alleged losses suffered by HIAL almost 5 years ago. It is settled position of law that future consumers cannot be burdened with the past burdens of the utility<sup>8</sup>.

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<sup>8</sup> Annexure F-4: UPPCL vs. NTPC (2009) 6 SCC 235 (Para 63 and 65)

*Submissions of FIA: Authority's Consultation Paper No.09/2013-14 titled "Determination of Aeronautical Tariffs in respect of RGI Airport, Hyderabad for the 1<sup>st</sup> Regulatory Period (01.04.2011-31.03.2016)"*

**II. Re.: Assets and Revenue of Wholly Owned Subsidiaries of HIAL**

11. In the present Consultation Paper, it is mentioned that as per the audited balance sheets of HIAL for FY 2011-12, HIAL has the following subsidiary companies viz:-

- (a) Hyderabad Menzies Air Cargo Private Limited
- (b) GMR Hyderabad Aerotropolis Limited
- (c) GMR Hyderabad Airport Resource Management Limited
- (d) Hyderabad Airport Security Services Limited
- (e) GMR Hyderabad Aviation SEZ Limited
- (f) GMR Hyderabad Multiproduct SEZ Limited
- (g) GMR Hotels and Resorts Limited
- (h) Hyderabad Duty Free Retail Limited
- (i) Asia Pacific Flight Training Academy Limited
- (j) GMR Airport Handling Service Company Limited

12. In the Consultation Paper, it has been revealed that HIAL has three (3) wholly owned subsidiaries, namely (a) GMR Hyderabad Aviation SEZ Limited; (b) GMR Hotels and Resorts Limited; and (c) Hyderabad Duty Free Retail Limited. HIAL's stake in other companies has not been revealed in the Consultation Paper. Authority has considered HIAL as a stand-alone entity without any consolidation with its subsidiaries and accordingly, for the purpose of computing aeronautical tariff has not included the revenue and assets of any of the three aforementioned wholly owned subsidiaries (except revenue share from Duty Free)

13. It is noteworthy that out of the land parcel of 5,450 acres, available with HIAL, the land being used for aeronautical purposes is 3,950 acres and that to be used for non-aeronautical purposes is 1,500 acres

14. It is noteworthy that the Authority, for the purposes of the calculation of aeronautical tariff presented in this Consultation Paper, has not subtracted the value of the lands on which the Hotel & Resorts and SEZ are being constructed by HIAL's wholly owned subsidiaries from the RAB and requested stakeholders' opinion in this regard. Without prejudice, it is submitted that if the Authority decides to exclude the revenue of the wholly owned subsidiaries like GMR Hyderabad Aviation SEZ Limited and GMR Hotels & Resorts Limited, then it must also exclude the market value of land on which such assets (Hotel and SEZ) have been constructed for the purpose of computing RAB.



*Submissions of FIA: Authority's Consultation Paper No.09/2013-14 titled "Determination of Aeronautical Tariffs in respect of RGI Airport, Hyderabad for the 1<sup>st</sup> Regulatory Period (01.04.2011-31.03.2016)"*

15. It is noteworthy that HIAL has been granted long term lease of such huge parcel of land, which has been acquired under Land Acquisition Act, 1894 to construct the RGI Airport at a concessional rate. It seems that HIAL has sub-leased the land on which Hotel and SEZ are constructed at very low rate, understandably as GMR Hyderabad Aviation SEZ Limited and GMR Hotels & Resorts Limited are its wholly owned subsidiaries. However, undeniably GMR Hyderabad Aviation SEZ Limited and GMR Hotels & Resorts Limited are deriving economic benefits which would be proportionate to the market value of land on which such Hotel and SEZ have been constructed. In other words, it is HIAL which has been granted the concession of the land parcel. By creating the wholly owned subsidiaries and sub-leasing at low rates, HIAL is channeling out the revenue stream while allowing wholly owned subsidiaries to operate on a location, which is commercially highly valuable. Hence, the market value of land on which Hotel and SEZ are constructed should be subtracted from RAB, which in effect will bring down the aeronautical tariffs.

***III. Single Till approach proposed to be followed by Authority for tariff determination is in the right direction***

16. FIA welcomes Authority's proposal to determine the tariff on Single Till model. However, in order to fully appreciate the merits of Single Till model, it is imperative that HIAL's income from all the sources including its dividend from its subsidiaries is included to cross-subsidize the aeronautical tariff. This is in line with Guideline No. 5-6.2 of the AERA's Guidelines. It is to be noted that TDSAT's Judgment<sup>9</sup> dated 30.08.2007 on which HIAL has been placing reliance from time to time to contend that dividend receivable by an utility should not be included, has been set aside by Hon'ble Supreme Court in the case of **Union of India vs. Association of Unified Telecom Service Operators** reported as **(2011) 10 SCC 543**.

17. 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) Para 4.2 of AERA Guidelines recognizes Single Till approach which sets out the following components on the basis of which Aggregate Revenue Requirement ("ARR") will be calculated :-
  - (i) Fair Rate of Return applied to the Regulatory Asset Base

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<sup>9</sup>Annexure F-5: TDSAT's Judgment dated 30.08.20087 in Association of Unified Telecom Service Providers of India vs. Union of India & Ors.

- (ii) Operation & Maintenance Expenditure
  - (iii) Depreciation
  - (iv) Taxation
  - (v) ***Revenues from services other than aeronautical services***
- (c) AERA in its Single Till Order (issued in January 2011) has held that "*Single Till is most appropriate for the economic regulation of major airports in India*".

18. 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. HIAL's approach of Dual Till deserves to be discarded.

19. In the Single Till Order, Authority has strongly made a case in favor of the determination of tariff on the basis of 'Single Till'. Under the Single Till basis, airport charges/aeronautical tariff are set with reference to the net costs of running the airport, taking into account other revenues arising at the airport i.e. non-aeronautical revenues.

20. It is noteworthy that the Authority in its *inter alia* Single Till Order has:

- (a) Comprehensively evaluated the economic model and realities of the airport – both capital and revenue elements.
- (b) Taken into account the legislative intent behind Section 13(1)(a)(v) of the AERA Act.
- (c) Concluded that the Single Till is the most appropriate for the economic regulation of major airports in India.
- (d) The criteria for determining tariff after taking into account standards followed by several international airports (United Kingdom, Australia, Ireland and South Africa) and prescribed by ICAO.

21. The Authority in its AERA Guidelines (para 4.3) has followed the Single Till approach while laying down the procedure for determination of ARR for Regulated Services. In this respect, the matter must be dealt with by the Authority considering the ratio pronounced by the Constitutional Bench in the Hon'ble Supreme Court Judgment in PTC vs. CERC reported as (2010) 4 SCC 603<sup>10</sup> wherein it is specifically stated that regulation under an Act, 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.

22. The fundamental reasoning behind 'Single Till' approach is that if the consumers/passengers are offered cheaper air-fares, the volume of passengers is bound to

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<sup>10</sup> Annexure F-6: PTC vs. CERC reported as (2010) 4 SCC 603 (Paragraph 58 to 64 at page 639 to 641).

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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 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.

23. FIA therefore submits as under:

- (a) Single Till Model ought to be applied to ALL 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.

**IV. Levy of User Development Fee at RGI Airport is legally untenable**

24. Authority has 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):*

*HAL 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."*

A perusal of the relevant clause of the Concession Agreement reflects that UDF has been conceptualised as means of not only as a revenue enhancing measure but also to meet the capital expenditure incurred in developing and expansion of the airport.

25. 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 Fair Rate of Return to the Airport Operator. It is not clear as on what basis the Authority has proposed to levy UDF at RGI Airport for the purpose of development and expansion work undertaken in the past. The Concession Agreement cannot be relied upon to allow levy of UDF (a revenue enhancing measure) in view of the expressed provisions of AERA Guidelines. It is settled position of law that regulations override the prior contractual arrangements.

26. Further, in a long term PPP project, it remains unclear as to how the Authority can allow the funding to be borne by the unsuspecting rate payers, whereas the equity holders are in control of the assets. It is imperative to note that the lack of diligent contracting, supervision and reporting, if any, by HIAL, cannot lead to the detriment of the consumers at large. It is well recognised regulatory position that utilities are free to decide their plans of investment for improvement of system or expansion to meet the demand including upgradation and maintenance for a better and quality supply. In appropriate cases, the Regulator may disallow such cases of utility and it is for the utility to bear the brunt of such investment and it cannot pass it on to consumers.<sup>11</sup>

27. 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 360<sup>12</sup> has 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 UDF. 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 RGI Airport has been levied and further proposed to be levied on the basis of Concession Agreement.

28. In fact, the UDF which is being levied at the RGI 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. Further, 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.

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<sup>11</sup> Annexure F-7: KPTCL vs. KERC and Others reported as 2007 ELR (APTEL) 223

Annexure F-8: Mula Pravara Electric Co-operative Society Ltd. vs. Maharashtra Electricity Regulatory Commission and Others 2008 ELR (APTEL) 135

<sup>12</sup> Annexure F-9: Consumer Online Foundation vs. Union of India & Others reported as (2011) 5 SCC 360

**Submissions of FIA: Authority's Consultation Paper No.09/2013-14 titled "Determination of Aeronautical Tariffs in respect of RGI Airport, Hyderabad for the 1<sup>st</sup> Regulatory Period (01.04.2011-31.03.2016)"**

29. In view of the foregoing, it is submitted that:-
- (a) Neither AAI Act, Aircraft Act, 1934 nor AERA Act nowhere provide for provision of determination or levy of UDF on passengers.
  - (b) Authority in the present Consultation Paper has not deliberated upon the rationale for levying UDF. It is submitted that Authority is bound under Section 13(4)(c) of the AERA Act to fully document and explain its decision.

30. 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 (HIAL 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.

**V. Regulatory Period ought to be determined prospectively**

31. In the present consultation, the Authority has tentatively decided the tariff for the 5 years control period starting from 01.04.2011 which is likely to come into effect from 01.09.2013. As such, the Authority will be determining the tariff, retrospectively from 01.04.2011 exceeding its jurisdiction.

32. The Authority is overlooking that the HIAL has caused inordinate delay in submitting the details of project cost and relevant information for determination of aeronautical tariff which has:

- (a) Diminished the effective Control Period to 31 months from 5 years;
- (b) Led to exponential increase in aeronautical tariff (40% to 400% on a component to component basis) of RGI Airport with the past charges of last 29 months recoverable in the next 31 months from the future passengers and consumer including the airlines. This approach is unacceptable as it would increase the operational expenditure of the airlines and rendering its operations economically unviable.

33. As noted above, Authority has proposed to allow HIAL to recover the Pre-control period losses to the tune of Rs. 333 crores under the Single Till Model by adding the same to the ARR of HIAL thereby stretching the present tariff prior to 01.04.2011. There seems to be no legal or regulatory basis for:-

- (a) Firstly, to allow the alleged losses suffered by HIAL prior to the control period;
- (b) Secondly, to allow the carrying costs of Rs 73 crores (for period 1.4.2011-1.09.2013) on alleged losses.

It is submitted that levying such Pre-control period losses in current control period would unreasonably burden the passengers travelling from September 1, 2013 to March 31, 2016

34. 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 Consultation Paper 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 is retrospective, which is legally invalid.

**VI. Depreciation up to 100% is contrary to the AERA Guidelines**

35. HIAL has calculated 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. This is in contravention of the AERA Guidelines (Para 5.3.3) which allows depreciation to be calculated to the extent of 90% of the assets. 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. It is submitted that Authority should consider 10% residual value of the assets for computing depreciation as mentioned in the AERA Guidelines. As per data provided in the Consultation Paper, considering depreciation up to 90% only would bring the Target revenue by 1%. The same is tabulated as under:-

**TABLE-1**

Particulars	
Yield per passenger	
-As per the Base Model-90% depreciation of RAB	861.99
-As per the Base Model-100% depreciation of RAB	867.23
<b>Net Impact- (A)</b>	<b>-5.24</b>
<b>Net Impact %</b>	<b>(1%)</b>
Number of Pax (in crores)*- (B)	4.93
<b>Net Impact on PV of Target Revenue (Rs. in Crores)- (A X B)</b>	<b>(25.85)</b>
<b>% Impact on PV of Target Revenue</b>	<b>(1%)</b>

*\*No. of pax are determined in the above table by dividing YPPas determined by authority with PV of target revenue*

**VII. Re. Tax savings has not been considered for determining Cost of Debt**

36. It is submitted that tax savings has not been considered for the purpose of determining cost of debt. As per Authority's proposal, 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 HIAL.
- (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 8.00% for the ECB Loan.

However, the present Consultation Paper does not provide a breakup of the rupee term loan and ECB loan over the historic period and forecast period to calculate the actual cost of debt.

37. It is noteworthy that cost of debt is the effective rate that a company pays on its current debt post adjustment for tax savings. However, based on aforementioned proposal of the Authority and review of Consultation Paper, it appears that cost of debt is not adjusted for any tax savings. **Post adjustment of such tax savings (assuming tax rate at 30%) in cost of debt, WACC will reduce from 10.68% to 8.39%.** It is submitted that Authority should factor such tax saving for computing WACC of HIAL. It is submitted that reduction in WACC from 10.69% to 8.39% will reduce target revenue by 11% (and will reduce the present value of Target Revenue by 17%). The analysis is tabulated as under on the basis of information provided in the Consultation Paper:

**TABLE-2**

Particulars	FY12	FY13	FY14	FY15	FY16	Total	Change	(% Change)
A.Regulatory Base	1,958	1,864	1,787	1,723	1,673			
B. WACC	8.39%	8.39%	8.39%	8.39%	8.39%			
C. Return on capital Employed	164	156	150	145	140	756	(206)	(21%)
D.OM- Efficient Operation & Maintenance cost	234	255	272	294	323	1,379	-	-
E. Depreciation	105	106	107	87	83	488	-	-
F. Corporate tax	9	26	11	13	26	85	-	-
G. Share of Revenue from	(178)	(194)	(178)	(199)	(224)	(973)	-	-

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Particulars	FY12	FY13	FY14	FY15	FY16	Total	Change	(% Change)
Revenue Share Assets								
<b>H. Target Revenue (C+D+E+F+G)</b>	<b>334</b>	<b>349</b>	<b>363</b>	<b>339</b>	<b>349</b>	<b>1,734</b>	<b>(208)</b>	<b>(11%)</b>
Discounted Target Revenues @8.39%	390	376	360	311	295			
Pre control period losses			147.52					
<b>Total Present Value of target Revenue</b>	<b>1,880</b>							<b>(17%)</b>
# of Pax (in cr)*	4.93							
YPP	380.99							
% change in YPP	(17%)							

*\*No. of pax are determined in the above table by dividing YPPs determined by authority with PV of target revenue*

In the stakeholders' meeting, it was informed that vanilla approach has been followed due to which interest has been considered for the purpose of computing tax. However, no computations are available in the CP to substantiate this fact"

**VII. General Operating Expenditure and non-aeronautical revenue have been forecasted without evaluating the commercial and financial terms in detail.**

38. In the CP No. 09/2013-14, General Operating Expenditure and non-aeronautical revenue have been forecasted without evaluating the commercial and financial terms in detail. Review of the Consultation Paper indicates that Authority has made the proposals without getting into commercial and financial details of the forecasted numbers and has based its proposal on very broad assumptions for the purpose of determining forecasted General Operating Expenditure and non-aeronautical revenue. For instance:

(a) Re. Operating Expenses:

For the purpose of projecting operating costs/expense for balance control period, real increase in operating costs for HIAL for FY 2011-12 and FY 2010-11 comes to approximately 3.35% and 1.48% respectively. Further, average real increase for the period FY 2009-10 to FY 2011-12 has been computed by the Authority which comes out to be 2.42%. Hence, Authority has considered an increase of 3.0% for computing projected operating expenses, over the calculated average increase of 2.42% would provide for some generic allowance for uncertainties.



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(b) Re. Non-aeronautical Revenue:

Non-aeronautical Revenue for FY 2013-14 to FY 2015-16 has been proposed by considering a 'year on year' (YoY) escalation of 5% and passenger growth rate, on total non-aeronautical revenue (minus the interest income) in FY 2012-13.

39. It is submitted that Operating Expenses (71%) and Non-aeronautical Revenue (50%) are *inter alia* the major components for determining Target Revenue. Thus, the Authority ought to evaluate these components in detail by evaluating commercial and financial details of each expense and income/revenue head.

**VIII. Revenue from Cargo service ought to be treated as Aeronautical Revenue**

40. In the present Consultation Paper, Authority has noted that cargo service is an aeronautical service and the assets pertaining to the cargo services are in the books of HIAL. It is astounding that in one breath Authority has contemplated that revenue arising from assets which are being shown in the books of HIAL and pertaining to cargo service will be treated as aeronautical and yet the revenue receivable by HIAL from cargo service (an aeronautical service in terms of Section 2(a) of the AERA Act) will be treated as non-aeronautical revenue under both Single Till and Dual Till models.

41. As per Section 2(a)(v) of the AERA Act, that aeronautical service *inter alia* means any service provided for the cargo facility at an airport. A bare reading of the statutory provision reflects that nowhere the AERA Act provides that treatment of a service is dependent on factors like treatment/handling of assets or whether it is being provided by the airport operator or is being outsourced by it. Thus, irrespective of any such interpretation as put forward by the Authority, cargo service ought to be treated as an aeronautical service and revenue arising out of it should be treated as aeronautical revenue.

42. FIA is conscious /aware that Authority has proposed to follow the Single Till Model for determination of aeronautical tariffs at RGI Airport. Thus, the proposal to treat the revenue arising from cargo services as non-aeronautical revenue won't materially affect the inclusion of revenue for determination of the Target Revenue. However, treatment of revenue arising from aeronautical service contrary to the statutory mandate, irrespective of the Till to be followed, is crucial for precedential value in the sector.

**IX. Re. Fuel farm Service**

43. Authority has noted that Airlines are presently making use of the fuel farm services at RGI Airport, Hyderabad and they would have entered into agreements with the fuel farm service provider, wherein the tariffs would have been indicated to the airlines. AERA is not aware of any reasonable objections from the users of fuel farm services (Clause 6 of CGF

Guidelines). Thus, in view of the reasonableness of these agreements, AERA has proposed to determine the tariffs for fuel farm service provided by HIAL at RGI Airport, Hyderabad under light touch approach.

**X. Allowing Inflation at various levels has multiplier impact on Tariff**

44. In the Consultation Paper, for the purpose of forecasting operating expenses Authority has included WPI at 6.5% over and above increase in real terms at 3.0% on items where WPI is relevant. Further as per Proposal No.17 of CP No. 09/2013-14, it appears that HIAL is also considering an inflationary increase in the proposed Yield Per Passenger ("YPP") for the balance years of the current control period. Since inflation has been considered on YPP and operating expense is one of the components to determine YPP. Therefore, in order to avoid manifold impact of inflation, it is submitted that all the expenditure should be delinked from inflation.

**XI. Re. HIAL's monopolistic approach and 'Doctrine of Essential Facilities'**

45. It is submitted that under the competition law, an enterprise is under an obligation to extend its essential infrastructural facility at a reasonable cost. HIAL's control over RGI Airport renders it a monopolist having control over 'essential infrastructural facility' of the airport in the city Hyderabad.<sup>13</sup> 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)<sup>14</sup>. 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.

46. Further, 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 191649<sup>15</sup>. In view of the foregoing judicial precedents, it is submitted that HIAL assumes the position of a monopolist since it exercises control over RGI Airport which is a crucial infrastructural facility for a city like Hyderabad due to its

<sup>13</sup> This fact is highlighted by the fact that under the Concession Agreement, HIAL has been guaranteed exclusivity to operate an airport in the city of Hyderabad.

<sup>14</sup> Annexure F-10: United States of America in United States vs. Terminal Railroad Assn, reported as 224 U.S. 383 (1912)

<sup>15</sup> Annexure F-11: Apartment Source of Pennsylvania vs. Philadelphia Newspapers, reported as 1999 WL 191649

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.

47. It is submitted that such enormous hike in tariff by a monopolist HIAL may be viewed as 'abuse of its dominance' and accordingly liable under section 4 of the Competition Act, 2002 ("Competition Act"). Further, 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 against consumer interests, and thus, is against the basic premise of competition law in India.

***XII. Authority should conduct/commission its own study for assessing the claims of HIAL***

48. Consultation Paper indicates that HIAL has furnished following reports/studies to support their submissions:

- (a) M/s. Jacob's Consultancy providing basis of assets allocation and cost of equity at the RGI Airports
- (b) Madras School of Economics providing forecast for traffic growth.

FIA appreciates that Authority has discarded M/s. Jacob's Consultancy Report determining cost of equity. However, it is regrettable that Authority has placed accepted the report of M/s. Jacob's Consultancy Report for assets allocation.

49. It is noteworthy that purpose of appointing an 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, more specifically company managers/directors. 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.

50. It is submitted that the Authority ought to conduct/commission its own study for allocation of assets and not accept HIAL'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

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the Appeals<sup>16</sup> pending before the Hon'ble Airports Economic Regulatory Authority Appellate Tribunal, 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.

51. Similarly, Authority should independently scrutinise the claims of HIAL with respect to Operating Expenditure (71% of the HIAL's claim towards ARR).

**XIII. Re: True-up exercise**

52. In the present CP No.09/2012-13, the tariff plan is subject to truing up in next control period with respect to following variables:

- (a) Asset Allocation
- (b) General Capital Expenditure
- (c) Cost of Debt
- (d) Operating Expenditure
- (e) Taxation
- (f) Non-aeronautical revenue
- (g) Traffic forecast

53. 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<sup>17</sup> 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*

<sup>16</sup>Appeal 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)

<sup>17</sup>Annexure-F-12: BSES Rajdhani Power Limited vs. Delhi Electricity Regulatory Commission reported as 2009 ELR (APTEL) 880

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*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 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 truing up exercise is not prudence.*

117. All projections and assessments have to be made as accurately as possible. Truing 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 truing 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 truing it up in future as such method also burdens the consumer with carrying cost."

This judgment has been followed by APTEL in various other cases like NDPL vs. Electricity Regulatory Commission reported as 2010 ELR (APTEL) 891<sup>18</sup>.

54. 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.

#### **XIV. Discrepancies in CP No.09/2013-14:**

55. It is very striking that **no detailed tariff model has been available in the present Consultation Paper.** 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) **Tax computation:** Tax charge used by the Authority in determining TR (Table 96 and 97 CP No. 09/2013-14) substantially differs with submission made by HIAL. No calculation has been made available by the Authority.
- (b) **Number of passengers:** The Consultation Paper does not provide details of number of used to calculate the YPP.

<sup>18</sup>Annexure- F-13: NDPL vs. Delhi Electricity Regulatory Commission reported as 2010 ELR (APTEL) 891

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- (c) **Cost of debt:** The Consultation Paper 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.
- (d) **Existing Yield per passenger is not available:** In absence of the same, increase in YPP cannot be determined.
- (e) **Discrepancy in Non-Aeronautical revenue of FY12:** Total Non-Aeronautical revenue of Rs. 178.4 crores considered by Authority for FY 2011-12 (as per Table 87 of CP No. 9 of 2013-14) is not matching with aggregate of Revenue mentioned in Table Nos. 71 to 81 and Table 83 and the tables mentioned in paragraph Nos. 17.2.4 and 17.3.4 of the Consultation Paper.

56. 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 Tariff as proposed by HIAL and the Authority (40% to 400% on a component to component basis). 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.

57. 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.

58. 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. HIAL by way of its present proposal is acting to the detriment to airlines and the passengers.

59. Annual concession fee is being paid by the HIAL 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

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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. Subsequently, what the airport chooses to do with that revenue should not be ploughed back as a cost to the users in any form.

60. 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 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 our view, the airport should be regarded as a single business as its aeronautical and non-aeronautical revenues are intertwined. In this backdrop, FIA strongly endorses the views of the Authority to follow the "Single Till" as the basis for determining airport revenue, without any carve-outs whatsoever. It is submitted that the Single Till Model adopted by the Authority warrants a comprehensive evaluation of the economic model and realities of the airport – both capital and revenue elements.

61. The Authority must bear in mind the interest of airlines and the passengers which is of paramount importance for the aviation industry.

62. Further, 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 law<sup>19</sup> 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'.

63. In view of the foregoing submissions, it is submitted that the Authority ought to pass

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<sup>19</sup>Annexure F-14: Kranti Associates Private Limited & Another vs. Masood Ahmed Khan & Others reported as (2010) 9 SCC 496

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reasoned order on issues *inter-alia* like 'basis of exclusion or inclusion of revenue from wholly owned subsidiaries', 'adding Pre-control Period losses into ARR', etc.

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

FIA craves liberty to make additional submissions at a later stage, if necessary.