



Federation of Indian Airlines

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15 November 2016

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

Kind Attention: Shri S. Machendranathan, IAS

Subject: Comments & submissions of the FIA tendered in response to the AERA CP. No.01 /2016-17 - In the matter of aligning certain aspects of AERA's Regulatory Approach with the provisions of the NCAP-2016 approved by the Govt of India, New Delhi: 5th Oct, 2016

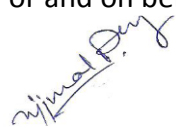
Dear Sir,

The Federation of Indian Airlines (FIA) an integral Stakeholder under the AERA Act sincerely appreciates AERA for undertaking the stakeholder consultation w.r.t above-mentioned CP with all the Stakeholders on 08 November 2016 and FIA took this opportunity to register few key concerns for authority's kind consideration.

- *Whether the proposals made in the CP are in consonance with the provisions of the AERA Act 2008 and the AERA Guidelines, 2011 dated 28.02.2011?*
- *Whether the Authority has rightly considered adopting Hybrid Till as its Regulatory Approach for all Airports in the country, contrary to its own Regulatory Philosophy as put in place vide Order No. 13/2010-11 dated 12.01.2011 ("**Single Till Order**")?*
- *Whether the Authority has conducted a detailed study of the impact and adverse effects of adopting the Hybrid Till approach for all Airport?*
- *Whether any comprehensive cost-data analysis of the airports has been undertaken by the Authority to set out the proposed norms?*

Further to the above-mentioned points, FIA is hereby placing on record the following detailed response (enclosed) which has been arrived solely from discussions, deliberations and past experiences of the member airlines for the kind consideration by the authority.

For and on behalf of Federation of Indian Airlines,


Ujjwal Dey
Associate Director

SUBMISSIONS ON BEHALF OF THE FEDERATION OF INDIAN AIRLINES

I. INTRODUCTION

1. On behalf of the member airlines, Federation of Indian Airlines ("**FIA**") is hereby placing submissions in response to the Consultation Paper No.1/2016-17 dated 05.10.2016 ("**the Consultation Paper**") issued by the Airports Economic Regulatory Authority ("**the Authority**") while reserving its rights to file a more detailed response once requisite information/documents are made available.

2. FIA notes that the Authority proposes to:-

- (a) Adopt "Hybrid Till" for determination of tariffs for Airport Operators under the Price-cap Model from the Second Control Period; and
- (b) The true up for the First Control Period shall be done on "Single Till" basis unless there is any direction from the Government of India to the contrary.

FIA observes that certain proposals and contents of the Consultation Paper may be revisited as part of the consultation process to reduce the burden on the consumers, and bring regulatory clarity. FIA is therefore providing its comments on the Consultation Paper.

II. ISSUES FOR CONSIDERATION OF THE AUTHORITY

3. It is submitted that the present consultation process raises the following important and critical questions for consideration of the Authority:-

- (a) Whether the proposals made by the Authority in the Consultation Paper are in consonance with the provisions of the Airports Economic Regulatory Authority of India Act 2008 ("**AERA Act**") and the AERA (Terms and Conditions for Determination of Tariff for Airport Operators) Guidelines, 2011 dated 28.02.2011 ("**AERA Guidelines**")?
- (b) Whether the Authority has rightly considered adopting Hybrid Till as its Regulatory Approach for all Airports in the country, contrary to its own Regulatory Philosophy as put in place vide Order No. 13/2010-11 dated 12.01.2011 ("**Single Till Order**")?

- (c) Whether the Authority has conducted a detailed study of the impact and adverse effects of adopting the Hybrid Till approach for all Airport?
- (d) Whether any comprehensive cost-data analysis of the airports has been undertaken by the Authority to set out the proposed norms?

III. ISSUE-WISE SUBMISSIONS IN RESPONSE

Re. Single Till approach

4. It is submitted that the Single Till approach 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 inter alia sets out those revenues from services other than aeronautical services will be taken into account for determination of aeronautical tariff.
- (c) Authority in its inter alia Single Till Order has:-
 - (i) Comprehensively evaluated the economic model and realities of the Airport – both capital and revenue elements;
 - (ii) Taken into account the legislative intent behind Section 13(1) (a) (v) of the AERA Act;
 - (iii) Concluded that the Single Till is the most appropriate for the economic regulation of major Airports in India;
 - (iv) 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; and
 - (v) The Single Till approach was further recommended pursuant to a detailed study, following White Paper No. 01/2009-2010 and Consultation Paper No. 03/2009-2010 whereby the Normative

Regulatory Approach and Philosophy to be followed by the Authority was developed.

It is submitted that the Single Till Approach as enshrined under Section 13(1)(a)(v), read with Section 13(1)(b), had been adopted by the Authority in its Order No. 13/2010-11 dated 12.01.2011 pursuant to a comprehensive evaluation of the economic model and realities of the airport – both capital and revenue elements. Based on the said fact alone, the approach of Hybrid Till deserves to be discarded.

5. Considering the foregoing, and the fact that the Appeal is pending before the Appellate Tribunal, the Authority ought to also have made a reference to the Single Till Approach in the Consultation Paper. While in the case of Delhi and Mumbai Airports, the Concession Agreements provide for Hybrid/Shared Till and therefore the same would have to be accordingly adjudicated by the AERAAT; with respect to the remaining airports in the country, Single Till would necessarily have to be adopted in terms of the prevalent statutory framework.

6. It is submitted that FIA on innumerable occasions has stated that increase in aeronautical tariff may decrease the passenger traffic. Accordingly, the Single Till Approach, which is beneficial to the consumers, be adopted to encourage air travel, which may result in increased passenger traffic.

7. For computing Aeronautical tariff for an airport, the regulatory till to be adopted is of great significance. There are broadly three approaches to arrive at aeronautical tariff viz. “Single Till”, “Dual Till” and “Hybrid/Shared Till”. The International Air Transport Association (“*IATA*”) defines ‘Single Till’ as the pricing mechanism wherein all airport activities, including aeronautical and commercial, are taken into consideration when determining airport tariff.

8. The aforesaid approach is in contrast with the Dual Till principle, wherein only aeronautical activities are taken into consideration when determining tariff. Hence, tariff derived using the Single Till approach is lower than any tariff as determined under the Dual Till approach, as non-aeronautical revenues are fully subsidised under Single Till.

9. The third approach is a mixed approach for determination on aeronautical

tariff, known as the “Hybrid/Shared Till” approach. As per the Consultation Paper No. 1 of 2016-17, the Authority plans to implement the Hybrid Till approach across airports in India. Under this approach, a regulator takes into account only a part (usually 25-30%) of the revenue from non-aeronautical activities while determining airport tariffs. The Hybrid/Shared Till approach allows an airport operator to retain a percentage of non-aeronautical revenues, which include turnover from retail shops, long-term concessions given to the entities like duty-free shop operators in the terminal building, and car parking charges.

10. From the foregoing, it is evident that the Single Till approach treats airport as an integrated business and sets tariff without making any distinction between aeronautical and non-aeronautical services. Single Till approach comes closer to maximising welfare, than the Dual or Hybrid/Shared Till approaches, as it takes all airport assets and costs into account while determining the tariff rates. The merits of the Single Till approach were in fact discussed in detail in the Single Till Order passed by the Authority while deciding the Regulatory Philosophy and Approach in Economic Regulation of Airport Operators.

12. Under a Single Till approach, airport charges are likely to lead towards more economically efficient outcomes, because it enables the sharing of profits generated by complementary commercial activities. As Dual Till and Hybrid/Shared Till lead to higher tariff, they are not in the best interests of users and passengers.

Re. Hybrid Till inconsistent with the AERA Act and AERA Guidelines

13. As already submitted herein above, Single Till approach is enshrined in the AER Act itself. Section 13 of the AERA Act provides for the functions of the Authority. As per Section 13 (1) (a) (v), while determining tariff for aeronautical services, the AERA Act mandates that AERA consider the non-aeronautical activities as well. The said provision reads as follows:-

13. Functions of Authority—(1) The Authority shall perform the following functions in respect of major airports, namely:—

(a) to determine the tariff for the aeronautical services taking into consideration—

(i) *the capital expenditure incurred and timely investment in improvement of airport facilities;*

...

(v) *revenue received from services other than the aeronautical services;*
.....”

It is evident from the foregoing that Section 13(1)(a)(v) provides that non-aeronautical services/ revenue i.e. revenue from duty free shops, restaurants, hotels, etc. has to be taken into account while determining tariff under Section 13(1)(a). Such non-aeronautical revenue will off-set the cost of services towards aeronautical revenue.

14. On the other hand, “Hybrid/Shared Till” as proposed to be adopted by the Authority allows only partial offsetting. Therefore, “Single Till” is the most appropriate method for economic regulation of major airports in India.

15. It is further relevant to note that Clause 4.2 of AERA Guidelines also recognises the Single Till approach and sets out the components on the basis of which Aggregate Revenue Requirement will be calculated viz.:-

- (a) Fair Rate of Return applied to the Regulatory Asset Base
- (b) O & M Expenditure
- (c) Depreciation
- (d) Taxation
- (e) ***Revenue from services other than aeronautical services***

The Authority, in proposing to adopt the Hybrid Till, would be acting in contravention to not only Section 13(1)(a)(v) of AERA Act but also the Para 4.2 of the AERA Guidelines. Hence, the Authority bound to give primacy to the AERA Guidelines.

16. The Single Till approach 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. 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. MoCA's views with respect to any issue, including the applicable regulatory till, 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 Appeals pending adjudication.

17. It is also relevant to note that in context of the AERA Guidelines and the Single Till Order, the Authority had issued:-

- (a) White Paper No.1/2009-10 dated 22.12.2009 titled as 'Regulatory Objectives and Philosophy in Economic Regulation of Airports and Air Navigation Services' listing out certain major issues impacting formulation of a regulatory philosophy. The said White Paper highlighted various issues relating to economic regulation of airports; air navigation services; and cargo, ground handling and fuel supply services. The White Paper provided stakeholders an opportunity to consider the issues highlighted therein and submit evidence-based feedback, comments and suggestions.
- (b) Consultation Paper No.03/2009-10 dated 26.02.2010 titled as 'Regulatory Philosophy and Approach in Economic Regulation of Airport and Air Navigation Services' listing out the major issues impacting formulation of its regulatory philosophy and approach and laying out its rationale for the positions/approach it intended to take. The objective was also stated to provide a further opportunity to stakeholders to make relevant submissions to the Authority before it finalises its 'Regulatory Philosophy and Approach'. In this context a Stakeholders Meeting was also held on 16.03.2010, which was attended by representative of FIA as well as its member airlines. Another meeting was conducted between the Authority and various Airport Operators on 18.01.2011 before issuing the Airport Order.

It was in fact in this backdrop that the Authority had thereafter issued the Single Till Order on 12.01.2011 thereby laying down the regulatory approach applicable to all

major airports i.e. adoption of the Single Till approach and the AERA Guidelines on 28.02.2011.

Re. Single Till approach recognised and accepted as per international norms

18. It is further relevant to note that international organisations such the International Civil Aviation Organisation (“**ICAO**”) and IATA support the Single Till approach as being the fairest mechanism for charging users.

19. As per IATA, Single till is an acknowledgment of the symbiotic and essential relationship between airports and airline users. Airlines bring passengers to the airport and as the primary users should share the benefits from the non-core activities. Airports are built specifically for aviation purposes and priority must be given to airline activity and passenger facilitation. It is further pertinent to note that the Single Till approach eliminates the need for difficult detailed cost and asset allocation between aeronautical and commercial tills. Single Till approach incentivises and allows airports to increase retail and commercial revenues, while decreasing charges to airline users.

20. It is submitted that even as per ICAO Policies, Single Till is the most favoured approach. As per ICAO Document No. 9082/7 titled ‘ICAO’S Policies on Charges for Airports and Air Navigation Services’, in determining the cost basis for airport charges, one of the principles to be applied is that the cost to be shared should be the full cost of providing the airport and its essential ancillary services, including appropriate amounts for cost of capital and depreciation of assets, as well as the costs of maintenance, operation, management and administration, but allowing for all aeronautical revenues plus contributions from non-aeronautical revenues accruing from the operation of the airport to its operators.

Re. No independent study conducted and non-application of mind by the Authority

21. It is further submitted that the Authority while formulating its ‘Regulatory Philosophy and Approach in Economic Regulation for Airports’ qua ‘Single Till’ vs ‘Dual Till’ as prescribed in the Single Till Order had carried out an economic study, cost date analysis, sought inputs from stakeholders and technical consultants, held

consultations and discussions before arriving at a conclusion. In fact, the Authority had taken inputs and cost analysis from PwC and Deloitte in the Single Till Order.

22. In the instant case, with Consultation Paper No. 1 of 2016-17, it is evident from the language of the Consultation Paper that the change in regulatory philosophy from Single Till to Hybrid Till is being done in a superficial manner, purportedly in compliance with the National Civil Aviation Policy 2016 and only on the perfunctory grounds of bringing about consistency in the till mechanism in India. It is submitted that:-

- (a) Firstly, the Authority is not bound by the directions given by the Government, unless the same are issued in terms of Section 42 of the AERA Act, and that too in the interest of the sovereignty and integrity of India, the security of the State, friendly relations with foreign States, public order decency or morality; and
- (b) Secondly, even if the Authority is keen to bring about such consistency, logically the minority should be aligned to the majority, which in this case implies that the Hybrid Till approach which is being followed at only four airports in India should be changed to the Single Till approach which is being followed at all remaining airports in India, and not vice versa.

23. It is submitted that the Authority has not provided any details or reasoning in the Consultation Paper in support of adoption of Hybrid Till, nor any study has been conducted or commissioned pertaining to any economic study or cost data analysis of the same. In this regard, it is relevant to note that:-

- (a) The Authority has been created under Section 3 of the AERA Act to perform the functions vested in terms of Section 13. The AERA Act requires the Authority to analyse all documents and information and conduct a prudence check to ensure reasonable and efficient recovery of costs while performing its functions as a statutory regulator.
- (b) The Authority is mandatorily required to function within the four corners of the AERA Act. In this regard, the following judgments of the Supreme Court

may be noted, wherein it has been specifically been held that a statutory authority is bound to act within the four corners of the statute establishing it:-

- (i) N.C. Dhoundial v. Union of India, reported as (2004) 2 SCC 579 at para 14; and
- (ii) Kranti Associates Private Limited & Anr. vs. Masood Ahmed Khan & Ors.: (2010) 9 SCC 496 at para 47.

(c) Reliance is also placed on the judgment of Supreme Court in the case of ***Cellular Operators Association & Others vs. Union of India & Others*** [(2003) 3 SCC 186 at para 33], wherein the Hon'ble Supreme Court has categorically carved out the role of the sectoral regulators to "*act like an internal audit*".

24. It is evident from Consultation Paper No. 1 of 2016-17 that the Authority has failed to discharge its duty and function as a statutory regulatory by proposing to adopt the Hybrid Till approach without any cogent reason or evidence in support of the same.

25. With regard to the statement in the National Civil Aviation Policy 2016, it is submitted that from a bare perusal of the same, it is evident that it is not a direction in terms of Section 42 of the AERA Act. In view of the admitted position that no directions were issued by MoCA under Section 42 of the AERA Act for implementing the provisions of NCAP 2016, there is no mandate on the Authority to adopt the Hybrid Till approach, and that too without conducting any fresh study or analysis of the same. Under section 13 (4) of AERA Act, AERA is required *to ensure transparency while exercising its powers and discharging its functions*. In fact, the Authority had conducted a detailed study at the time of issuing the Single Till Order, wherein it was found that the Single Till approach is best suited for the Indian context.

26. Even assuming, though not admitting that the Hybrid Till approach may be considered in the Indian context, the Authority would still be required to conduct a detailed study before proposing the same. Being a statutory regulator, the Authority is required to apply its mind or call upon information, i.e. economic study, cost date analysis, expert views etc. before coming to any decision. No documentation has been shared by the Authority to show that there has been any application of mind in its

163rd meeting held on 10.08.2016. Therefore, even the genesis of Consultation Paper is defective and contrary to law.

27. In view of the foregoing, FIA submits that the Authority ought not to adopt the Hybrid Till approach, and continue with the Single Till approach which is best suited in the Indian context. FIA craves liberty to expand its submissions on the Single Till Approach, if the Authority so desires.

Dated: November _____, 2016