



Federation of Indian Airlines

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MOST URGENT

21 June 2018

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

Kind Attention: Smt. Puja Jindal

Subject: Comments & Submission of the FIA tendered in response to the AERA CP.No.06/2018-19 titled "In the matter of determination of Aeronautical Tariff in respect of IGI Airport with respect to Base Airport Charges for the 2nd Control Period (01.04.2014-31.03.2019)"

Dear Madam,

On behalf of the member airlines, the Federation of Indian Airlines ("**FIA**") is hereby placing submissions in response to the Consultation Paper No. 06/2018-19 dated 29.05.2018 ("**the Consultation Paper**") for the period 01.04.2014 – 31.03.2019 ("**2nd Control Period**"), issued by the Airports Economic Regulatory Authority of India ("**the Authority**"). FIA also reserves its rights to file a more detailed response, if so required.

FIA appreciates the Authority's proposal to consider the issue of 10% increase in the Base Airport Charges ("**BAC**") with due weightage to the concession offered by the Government in determination of tariff. However, FIA observes that Authority's proposals and contents of the Consultation Paper may be revisited as part of the consultation process to further reduce the burden on the consumers and bring regulatory clarity.

FIA is therefore providing its comments on the Consultation Paper as attached.

Thanking You,

Your sincerely,

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, the Federation of Indian Airlines ("**FIA**") is hereby placing submissions in response to the Consultation Paper No. 06/2018-19 dated 29.05.2018 ("**the Consultation Paper**") for the period 01.04.2014 – 31.03.2019 ("**2nd Control Period**"), issued by the Airports Economic Regulatory Authority of India ("**the Authority**"). FIA also reserves its rights to file a more detailed response, if so required.

2. FIA appreciates the Authority's proposal to consider the issue of 10% increase in the Base Airport Charges ("**BAC**") with due weightage to the concession offered by the Government in determination of tariff. However, FIA observes that Authority's proposals and contents of the Consultation Paper may be revisited as part of the consultation process to further reduce the burden on the consumers, and bring regulatory clarity. FIA is therefore providing its comments on the Consultation Paper.

3. It is submitted that the following gaps/lacunae must be addressed before concluding the present proceedings:-

3.1 The issue of increase of 10% in BAC had been raised by the Airport Operator i.e. Delhi International Airport Pvt. Ltd. ("**DIAL**") before the Authority during determination of aeronautical tariff for the First Control Period (01.04.2009 to 31.03.2014). The Authority had presented its proposal and analysis on this issue in paras 30 to 38 of Consultation Paper No 32/2011-12 dated 03.01.2012 and consequently its examination and decision in paras 25.1 to 25.5 of the Tariff Order 03/2012-13 dated 20.04.2012 for Indira Gandhi International Airport, New Delhi ("**IGI Airport**") for the 1st Control Period ("**First Tariff Order**"). In the First Tariff Order, the Authority had decided against an automatic year on year increase of 10% in airport charges as the Authority felt that there was no warrant in Schedule 6 of State Support Agreement ("**SSA**") for an automatic year on year increase of 10% in airport charges from the commencement of fourth year onwards, especially when an approximately 345% increase was already being permitted by way of the First Tariff

Order. Further, the Authority keeping in view the permitted increase of the tariff by approximately 345

%, had opined that allowing a 10% year-on-year increase in the BAC, as claimed by DIAL, had become an issue of academic interest only. This decision was based after a careful consideration of the concession awarded by the Central Government, as per Section 13(1)(a) of the Airports Economic Regulatory Authority of India Act 2008 ("**AERA Act**"). In absence of any fresh reasoning provided by DIAL in its letter dated 14th December, 2017 and 22nd May, 2018 (annexed as Annexure – 1 and Annexure – 3 to the Consultation Paper) as discussed hereinafter, the issue of 10% increase in BAC merits no consideration. Accordingly, in view of the above, FIA vehemently denies the contention of DIAL in its letter dated 14th December, 2017, that the assurance in the SSA is that the aeronautical charges will, at least, be at BAC plus 10% every year.

- 3.2 In addition to the above, the Authority ought to have noted that allowing aeronautical charges equivalent to BAC + 10%, on a year-on-year basis, would be against the principles of tariff determination set by the AERA Act which provides for economic and viable operations of the airport.
- 3.3 The Authority has failed to consider that the Airline industry and consequentially the passengers/consumers have already suffered excess Aeronautical tariff from 01.01.2016 till 06.07.2017 i.e. the period when the First Tariff Order was applicable, to the tune of Rs. 3000 Crores, which is not refundable to the Airlines. Hence, any further tariff increase till tariff determination of the 3rd Control period would highly prejudice the passengers as well as the Airlines.
- 3.4 The Authority has failed to prudently examine DIAL's request for 10% increase in BAC. DIAL's submission that the aeronautical charges fixed by Authority for the 2nd Control Period have fallen below the "Base Airport Charges" stipulated in the SSA is devoid of sufficient reasoning and proper documentary support. The aeronautical charges for the 2nd Control Period are admittedly lower than that of the First Control Period. Lower aeronautical charges for the 2nd Control Period were worked out by the Authority on account of the over-recovery by DIAL in the First Control Period.

Accordingly, after taking into consideration the excess amounts collected and the recovery as per 2nd Control Period Tariff Order, the same would correspond to a recovery higher than what ought to have been allowed to DIAL in the first place, i.e. higher than BAC + 10%.

- 3.5 Additionally, permitting increase of 10% in BAC is not an economically viable option in view of rising crude oil prices coupled with depreciation of rupee. Any increase thereon would adversely impact cost structure of the airlines thereby causing disharmony in economic interest of the airport operator and airlines disrupting proper functioning of the airport. The Authority, being the Economic Regulator for the Aviation Sector, must carry out its functions by balancing the interests of all stakeholders, including passengers and airlines, and not just permit all demands raised by the Airport Operator, on an as is where is basis.

CONTEXT OF THE CONSULTATION

4. 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:-

- 4.1 The airport operator/concessionaire was selected to operate, maintain and develop Delhi Airport in April, 2006 with the governing terms and conditions reflected in:-

(a) The Operation, Management and Development Agreement ("**OMDA**") executed between the Airport Authority of India ("**AAI**") and the special purpose vehicle incorporated by the successful consortium, DIAL on 04.04.2006, including:-

- (i) Chapter XII of the OMDA provides for tariff regulation and casts obligation upon the operator to levy Aeronautical Charges as per the provisions of SSA. It further provides that the operator is free to fix the charges for non-Aeronautical services subject to the applicable law.
- (ii) Chapter XIII mandates and casts an obligation upon DIAL to arrange for financing and/or meeting all financing requirements through suitable debt and equity contributions in order to comply with the

obligations under OMDA including the development of Airport. It is relevant to note that Schedule 5 and 6 define and specify the Aeronautical and Non-Aeronautical services in OMDA.

(b) SSA executed between the Ministry of Civil Aviation ("**MoCA**") and DIAL on 26.04.2006 to record the additional support to be extended by the Government of India ("**Gol**") to DIAL, including:-

(i) CAPEX:

- (1) Clause 3.1.1 of the SSA empowered the Authority with the responsibility of certain aspects of regulation including regulation of aeronautical charges in accordance with the broad principles set out in Schedule 1.
- (2) Clause 3.1.2 provides that the Aeronautical Charges shall be calculated as per Schedule 6, and that such Aeronautical Charges will not be negotiated post bid after the selection of the successful bidder and will not be altered by JVC (DIAL) under any circumstances.
- (3) Clause 3.1.3 provided that the Gol would continue to approve the Aeronautical Charges till the Authority commences regulating such charges. This provision lapsed on 01.01.2009.

(ii) TARIFF: While fixing the tariff the Authority is required to observe the principles set out in Schedule 1. Some of the principles are as follows:-

- (1) Transparency: The Authority shall adopt a transparent approach and keep all the information documented to enable all stakeholders to make submissions. The Authority is required to give reasoned decisions.
- (2) DIAL is entitled to impose only those charges which are consistent with the pricing principles set out in this Schedule including:-
 - Cost Reflectivity – Any charges incurred by the DIAL

shall be allocated across users in a manner that is fully cost reflective and relates to facilities and services that are used by the Airport users.

- Usage – In general Aircraft operators, Passengers and other users should not be charged for facilities and services that they do not use.

4.2 Pursuant to the enactment of the AERA Act, the Authority was established on 12.05.2009 to perform the functions vested under the Act including Section 13 of the Act, which includes determination of tariff for aeronautical services, viz. -

- (a) Section 2(a) of the Act provides for various services that are considered aeronautical service.
- (b) Section 13 (1) of the Act provides that the tariff for such aeronautical service 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 this Act.

4.3 It is noteworthy that the Authority is under a bounden duty to determine the tariff in terms of:-

- (a) Section 13 of the AERA Act;

- (b) AERA (Terms and Conditions for Determination of Tariff for Airport Operators) Guidelines, 2011 ("**Guidelines**");
 - (c) Regulatory jurisprudence and settled principles of law creating a level playing field to foster competition, plurality and private investments.
- 4.4 After considering DIAL's proposal *qua* BAC, the Authority *vide* Order No.03/2010-11 dated 21.05.2010 had rejected the request made by DIAL for a 10% increase in aeronautical charges at IGI Airport, New Delhi, with effect from 03.05.2009.
- 4.5 Thereafter, the Authority issued the Consultation Paper No. 32/ 2011 – 12 titled "Determination of Aeronautical Tariff in respect of IGI Airport, New Delhi for the 1st Control Period on 03.01.2012 ("**the First Consultation Paper**"). Pursuant to the receipt of the comments from the stakeholders, the Authority issued the First Tariff Order i.e. Order 03/2012-13 dated 20.04.2012. In the First Tariff Order, the Authority considered the issue of 10% increase in BAC. After careful consideration of material on record including concession agreement, the Authority decided against permitting 10% increase in BAC.
- 4.6 Notably, several Appeals against the said First Tariff Order were filed before the Hon'ble Airports Economic Regulatory Authority Appellate Tribunal ("**Hon'ble Appellate Tribunal**"), including by FIA and DIAL. These Appeals were finally disposed of by way of Judgment dated 23.04.2018 (**DIAL Judgement**), whereby, *inter alia*, the Authority's approach re. BAC was upheld by the Hon'ble Tribunal as follows "*..Similarly, the reasons for not accepting the request for yearly 10% increase in Air Base Charges do not suffer from any error so as to require interference.*"
- 4.7 Pursuant to the completion of the 1st Control Period, the Authority sought stakeholders' comments on the Consultation Paper for the 2nd Control Period. Pursuant to the receipt of the comments from the stakeholders and due analysis, the Authority issued Tariff Order 40/2015-16 dated 08.12.2015 for the 2nd Control Period. In the 2nd Control Period Tariff Order, the earlier position as adopted by the Authority was continued.
- 4.8 Pursuant to DIAL's request, the Authority has now sought stakeholders' comments

on the Consultation Paper in the matter of determination of aeronautical charges with respect to BAC. The Consultation Paper analyses DIAL's claims of 10% increase in BAC. Based on its analysis, the Authority has proposed to permit increase of BAC by 10% till 31.03.2019, which would be subject to true up in the next control period.

III. ISSUES FOR CONSIDERATION OF THE AUTHORITY

5. 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 proposals made by the Authority in the Consultation Paper are in consonance with the provisions of the AERA Act and the relevant judicial precedents?
- (b) Whether the present Consultation Paper is contrary to the decision of Hon'ble Tribunal in the DIAL Judgement and the 2nd Control Period Tariff Order?
- (c) Whether the Authority has conducted prudence check on DIAL's claim for 10% increase in BAC along the lines of documentary proof submitted for consideration, thereby disallowing unreasonable, unfair or extravagant allowance to DIAL?
- (d) Whether the claim of DIAL for increase in BAC is justifiable on financial/economic basis?

IV. ISSUE-WISE SUBMISSIONS IN RESPONSE

A. Authority is bound by the AERA Act

6. It is submitted that the Authority has been created under Section 3 of the AERA Act to perform the functions vested in terms of Section 13 to 16 of the AERA Act. DIAL's request for increase in BAC, therefore, has to be evaluated in context of the following legal framework:-

- (a) Section 13(1), (2) and (4), Section 14, Section 15 and Section 16 of the AERA Act.
- (b) Relevant provisions of the SSA dated 26.04.2006, Schedule I, Schedule VI, and Schedule VIII.

- (c) Decision of the Authority in Order No.03/2010-11 dated 21.05.2010 *vide* which the Authority rejected the request made by DIAL for a 10% increase in aeronautical charges at IGI Airport, New Delhi, with effect from 03.05.2009.
 - (d) Decision by the Authority in the First Tariff Order, as upheld by the Hon'ble Tribunal in the DIAL Judgment in Appeal No. 6 of 2012 and batch.
7. Being a creature of statute, the Authority-
- (a) Has been empowered with several powers under the AERA Act. While exercising those powers, the Authority is obliged to ensure transparency by holding due consultations and providing reasonable opportunity to make submissions¹.
 - (b) Must ensure that all the documents on which the Authority is relying upon for the purposes of its decisions are made available to the stakeholders.
 - (c) Must scrupulously follow the principles of natural justice and transparency – providing adequate time to make submissions on the Consultation Paper. It is pertinent to mention that:-
 - (i) The Authority has not supported its reasoning of allowing BAC+10%. The Authority has merely provided calculations to demonstrate that the ARR calculated at BAC + 10% is higher than the ARR. However, the matter of BAC cannot be studied in isolation. Any proposed increase therein has to be examined holistically considering its overall impact on the tariff, including the impact of the excess aeronautical charges collected till 06.07.2017.
 - (ii) The Authority has failed to consider that DIAL's contention that aeronautical charges fixed by the Authority for the 2nd Control Period have fallen below the "Base Airport Charges" is not supported by any report or document in support of the same. The Authority has proceeded to allow DIAL's contention without examining the said contention, nor conducting any study or analysis of the same.
8. It is noteworthy that the Authority is mandated to analyse the documents and conduct prudence check to ensure balance between reasonable recovery of efficient and

¹ Section 13(4) of the AERA Act.

prudent costs while preventing usurious windfalls, viz.-

- (a) Section 13 (1)(a)(i) of the AERA Act envisages that the Authority shall consider the actual expenditure incurred.
- (b) Section 13(1)(a)(v) provides that the revenue received from services other than the aeronautical services will also be considered for determining tariff, thereby ensuring that there are no windfall profits received by any utility. It is the intention of the Statute that the Authority performs its functions properly, and follows an approach which is viable for the aviation industry.
- (c) It is submitted that prudence check is an intrinsic and essential part of the process of tariff determination as is also evident from Section 13 of the AERA Act. Any expenditure incurred by DIAL cannot be accepted by the Authority on the face of it and passed on to the consumers. The Authority is required to evaluate the claims made by DIAL and only after satisfying itself through a rigorous prudence check which involves:-
 - (i) Scrutiny of the expenditure made by DIAL and assessment of whether the same has been reasonably and properly incurred.
 - (ii) Examining the resultant benefit from the said expenditure in terms of enhanced efficiency.
 - (iii) Appraising the working parameters of the utility with the prevalent norms, benchmarks and standards.

B. Consultation Paper is contrary to the decision of Hon'ble Tribunal in the DIAL Judgement and the 2nd Control Period Tariff Order

In view of the fact that, the Hon'ble Tribunal in the DIAL Judgment upheld the decision of the Authority in respect of BAC. The relevant portion of the said DIAL Judgement is extracted below:

"..Similarly, the reasons for not accepting the request for yearly 10% increase in Air Base Charges do not suffer from any error so as to require interference..."

Also, the Authority has maintained the same conclusion in respect of BAC in the 2nd Control Period Tariff Order:

"..26.21 The above clause and the submission from DIAL requesting for a year on year permitted increase of 10% of Base Airport Charges has been analysed by the Authority during the determination of the aeronautical tariff for the first Control Period. The Authority had presented its analysis on this issue in para 30 to 38 of the Consultation Paper No. 32/2011-12 dated 03.01.2012 as well as in para 25.1 to 25.5 of Delhi Tariff Order 03/2012-13 dated 20.04.2012. The Authority had decided that "there was no warrant in Schedule 6 of the SSA for an automatic year on year increase of 10% in airport charges from the commencement of the fourth year onwards". The Authority does not find any fresh argument from DIAL and accordingly, is not persuaded to reconsider its decision....."

It is a matter of record that the DIAL has challenged the 2nd Control Period Tariff Order vide its appeal no. _____ titled as DIAL vs AERA [**Comment: JSA to confirm the details on appeal on the 2nd Control Period Tariff Order**] and the same is still pending for adjudication. Thus, upon the judicial adjudication and upholding of the issue of BAC by the Hon'ble Tribunal in respect of 1st Control Period and the same determination by the Authority on the issue of BAC during the 2nd Control Period cannot be re-opened or revisited by way of the present Consultation Paper.

Furthermore, on account of the pendency of DIAL's Appeal in respect of 2nd Control Period (though FIA is not in receipt of the paper book of the same) the issue of BAC cannot be reopened in a clandestine manner and as a back door entry.

Once the Authority has determined the issue of BAC in the 2nd Control Period Tariff Order, the same cannot be reconsidered or revisited by the Authority merely on the basis of DIAL's letters dated 14th December, 2017 and 22nd May, 2018.

C. DIAL's projections accepted without due evaluation

9. It is submitted that the Authority is a sectoral regulator. The Authority, being an expert, required to intrinsically act as an internal auditor, must not base its conclusion solely

on the submissions made by DIAL without conducting any independent analysis. Since, DIAL is controlling a public asset, the interests of the stakeholders, like the passengers, must be taken into account, prior to accepting DIAL's submissions and projections. It is further submitted that pending the submissions of the stakeholders, the Authority should consider the scenario which is beneficial to the consumers and the stakeholders, and for the healthy growth of the sector. In view of the same, it is submitted that the Authority ought not to have accepted the following based on DIAL's projections. The Authority has:-

- (a) Wrongly accepted DIAL's contention that the aeronautical charges fixed by the Authority for the 2nd Control Period have fallen below the BAC without conducting any evaluation as to its accuracy and impact analysis.
- (b) Failed to consider the economic impact of its proposal, thereby failing to take a holistic approach.
- (c) While accepting that DIAL has recovered much more than what is due to it in the 1st and 2nd Control Periods, yet erroneously proposed to allow 10 % increase in BAC. This stand is highly detrimental to the airlines and passengers who ultimately have to bear an additional burden of increase in BAC over and above an exorbitant tariff.
- (d) Ignored that DIAL being a monopolist and exercising control over essential facility of airport should not be allowed to charge according to its whims and fancies basis strict interpretation of the concession agreement ignoring the economic impact on the passengers and airlines adversely impacting the viability of the airport operations.

D. Adverse Financial Impact on Stakeholders

10. In addition to the above submissions, it is respectfully submitted that Airlines and consequently passengers will have to bear the burden of increase in BAC as proposed by DIAL and proposed to be allowed by 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 operator.

11. The Authority is aware that Airlines have been going through difficult times with high crude oil prices. Increase in BAC will erode airlines capabilities to increase fares to sustain its operational capabilities.

12. The private airport operators should not be allowed to escalate the tariff beyond that prescribed in OMDA and SSA. OMDA and SSA do not provide for an automatic increase in BAC. The increase in BAC by 10% is premised on the aeronautical tariff being lower than BAC. However, given the peculiar situation where DIAL has already recovered amounts much more than its share, on account of excess aeronautical charges as per the First Tariff Order, the 10% increase on BAC is no longer required. Hence 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 BAC is a means to avoid any of the said options, which would simply result in burdening passengers.

13. The Authority must also take into account the difficulties being faced by the Airlines and passengers before granting levies to the airport operators. A lot of expenditure has been undertaken to rectify the infrastructure which was handed over to DIAL by the AAI. Therefore, AAI should pay such costs or it should agree to reduce the revenue share so that the burden on the passengers could be reduced. Considering the fragile financials of the Airlines, increase in BAC 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 programme which is the responsibility of the Airport Operator. DIAL by way of its present proposal is acting to the detriment to airlines and the passengers. The hike in aeronautical tariff has already witnessed airlines and especially Low Cost Carriers ("**LCCs**") discontinue their services. For e.g. – Air Asia pulled out of Hyderabad airport last year in January when the airport increased its charges. Air Asia X announced withdrawal of its services from Delhi and Mumbai airport citing a steep increase in costs. Airlines which are already bleeding will have no choice but to pass on the incremental cost to the passengers. This could make the short haul domestic air travel unviable and passengers may move to

alternative modes like train travel. With the proposed hike in BAC being implemented, Delhi airport will become the most expensive airport in Asia.

14. It is noteworthy that during the current phase of modernisation of Delhi and Mumbai Airports, the operating costs of all the airlines have increased manifold, due to taxiing/holding time both on the ground and in the air, as a result of Airport congestion, due to entry of new Airlines and expansion of air services preceding enhancement of airport facilities. The cost increase has been considerable in the area of fuel burn, aircraft and engine maintenance, besides cost of flight cancellation due to delayed arrivals. Against the backdrop of the above, the Airport charges that Airlines are required to discharge, during these times need to be lower, as Airlines, in any case, are saddled with huge infrastructural bottleneck costs. There is a need to consider this and other aspects in evolving standards of performance and putting in place a system of incentives and disincentives to drive efficiency in all elements of operations as well as also ensure that the entity responsible for a quality of service default bears the cost.

15. 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, wherein the interests of the parties i.e. Airlines and the Passengers along with the Airport Operator should be harmonized to ensure proper functioning of the airport business. An unwarranted hike in BAC would adversely impact the economic interests of the Airlines and the Passengers thereby reducing their ability to facilitate/avail the services at airport. Any increase in the BAC warrants a comprehensive evaluation of the economic model and realities of the airport – both capital and revenue elements.

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

17. In view of the above, it is respectfully prayed that the Authority keeps in mind the interests/implications of/on the airlines before finalising any decision regarding increase in

BAC. DIAL's proposal, if accepted, will have an adverse economic impact on the airlines and consequently on the aviation industry.

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

19. FIA further craves liberty that the foregoing submissions are subject to its right to file an appeal against the DIAL Judgement, and any order passed thereon. Accordingly, it is humbly submitted that any reliance by FIA on the DIAL judgement is without prejudice to its right and contentions before the Hon'ble Supreme Court of India and any reliance by FIA on the said DIAL Judgment may not be treated as an admission.