

A. BACKGROUND

1. On 19.02.2018, Airports Economic Regulatory Authority of India to be called as "Authority" had issued the File. No. AERA/ 20010/ MYTP-AAI-Chennai CP-II/2016-17 (Consultation Paper No.45/2017-18) in respect of determination of aeronautical tariff of Chennai International Airport, Chennai (CIA), managed and operated by the Airports Authority of India (AAI). The Authority held its stakeholder consultation meeting on 09 March 2018, seeking a detailed written submission from its stakeholder by 12 March 2018, as extended to 16 March, 2018.

2. Member airlines of FIA were duly present during the meeting and discussed & deliberated on various issues pertaining to the Consultation Paper No.45/2017-18.

3. By way of this present submission, FIA on behalf of its member airlines submits its preliminary objections to the Consultation Paper No.45/2017-18 without any prejudice and craving to submit any additional submission as and when required.

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

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

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

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

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

B. CONTEXT OF THE CONSULTATION

5. To assist the Authority in appreciating these submissions on the CP Nos. 45 of 2017-18 ("**CP**"), FIA would like to state that the present submissions are without prejudice to our

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

- (a) In para 3.2 of the CP, it is stated that the AAI has submitted its Multi Year Tariff Plan (MYTP) submissions dated 09.03.2016 to the Authority for the second (2nd) control period. Subsequent to the announcement of National Civil Aviation Policy (NCAP), AAI made revised submissions under Hybrid Till on 18.04.2017. AAI has further revised their submission under Hybrid Till on 26.08.2017 and 04.09.2017 as part of clarifications submitted by AAI for the 2nd control period. Further, it is observed from other relevant paras of the CP that AAI has also made certain additional submissions on 08.12.2017 and 19.01.2018, 09.05.2017, 29.06.2017, 12.10.2017, 08.11.2017, 08.12.2017, 11.01.2018 and 06.03.2017.

It is not denied that FIA is not the stakeholder for determination of tariff of Chennai International Airport. FIA submits that as per a catena of judicial pronouncements, it is a well settled principal of doctrine of natural justice - '**audi alteram partem**' (meaning hear the other side), that before taking any decision/action affecting the rights and liabilities of an individual/entity, an opportunity of showing cause and to submit response thereto has to be afforded to the person whose rights and/or liabilities may be affected. This principal is further enshrined under section 13 (4) of the AERA Act, which provides that the Authority shall ensure transparency while exercising its powers and discharging its functions, inter alia:

- (a) by holding due consultations with all stakeholders with the airport;
- (b) by allowing all stake-holders to make their submissions to the authority;
- and
- (c) by making all decisions of the authority fully documented and explained.

FIA submits that it has not been provided with the copies of the additional submissions dated 18.04.2017, 26.08.2017, 04.09.2017, 08.12.2017 and 19.01.2018, 09.05.2017, 29.06.2017, 12.10.2017, 08.11.2017, 08.12.2017,

11.01.2018 and 06.03.2017__made by AAI and is accordingly unable to appreciate, assess and comprehend the facts and figures (and any comparison thereto) of the CP in its entirety and actuality. Thus, FIA hereby request that the above mentioned MYTP submissions as submitted by the AAI may be made available to all the stakeholders (including FIA) for perusal and comments so as to ensure complete transparency and to enable FIA to submit requisite and consolidated observations / comments to the present CP.

6. Pursuant to the enactment of the AERA Act, the Authority has been established to perform the functions vested under the AERA Act including Section 13 of the Act, which includes determination of tariff for aeronautical services, viz.-

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

7. '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 AAI's submissions and but has failed to provide any justification of its own or analysis for the same. In fact it appears that the Authority has failed to initiate/conduct an independent assessment or obtain an expert opinion in order to determine or conclude in a reasonable determination of such costs. It is to be noted that to ensure transparency while exercising its discharge of functions by the Authority under AERA Act it is implied obligation to produce all relevant document and make decision which are fully documented and explained. In this regard judgment of the Hon'ble Supreme Court in the case of **Ashok Leyland Ltd. vs. State of Tamil Nadu & Anr. reported as (2004) 3 SCC 1 (FB)(at Paragraph No. 94)** is noteworthy. Hon'ble Supreme Court has held that the word 'Determination' must also be given its full effect to, which pre-supposes application of mind and expression of the conclusion. It connotes the official determination and not a mere opinion or finding. The Hon'ble Telecom Dispute Settlement Appellate Tribunal ("TDSAT") has also held that determination requires application of mind in the Judgment dated 16.12.2010 in Appeal No. 3(C) of 2010 titled as **ZEE Turner Ltd. vs. TRAI & Ors. (at Paragraph No. 150).**

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

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

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

C. ISSUEWISE SUBMISSIONS

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

10. In para 2.1 it is stated that the Authority vide its Order No. 13/2010-11 dated 12.01.2011 (Airport Order) and Direction No. 5/2010/11 dated 28.02.2011 (Airport Guidelines) had issued guidelines to determine tariffs at major airports based on Single Till

mechanism. Subsequently, after the issuance of NCAP, the Authority has amended guidelines vide its Order No. 14, 2016-17 dated 12.01.2017 to determine future tariffs using Hybrid Till. It is to be noted that issuance of the policy that is NCAP cannot be used to override the statutory provision i.e. Section 13 (1) (v) of the AERA Act. Hybrid till is followed, which is in contravention to AERA tariff guidelines. In this context, the following facts are noteworthy:

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

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

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

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

- (i)** Fair Rate of Return applied to the Regulatory Asset Base
- (ii)** Operation & Maintenance Expenditure
- (iii)** Depreciation
- (iv)** Taxation
- (v)** **Revenues from services other than aeronautical services**

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

13. 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. AERA's approach of Hybrid Till for Chennai International Airport deserves to be discarded.

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

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

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

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

17. FIA therefore submits as under:

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

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

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

18. In view of the above, it is submitted without prejudice that determination of aeronautical tariff on Hybrid Till basis for the 2nd second control period would set the tone and precedent for determination of aeronautical tariff in subsequent control periods contrary to the applicable legal framework. Thus, it is submitted that Authority should discard the option of determination of aeronautical tariff on Hybrid Till and follow Single Till scrupulously.

II. **Delay In Order to incorporate "Hybrid Till"** – As submitted by FIA in para 5(a) above, it can be seen that due to the multiplicity of submissions made by AAI at different time intervals (which have also not been shared with the relevant stakeholders), there is an apparent delay in the incorporation of the Hybrid Till mechanism of determination of tariff, which are now being proposed to be made applicable from 1.04.2018 instead of 1.04.2016. This is without prejudice to the fact that FIA has been opposing the incorporation of Hybrid Till mechanism in place/substitution of Single Till mechanism for determination of tariff, as mentioned above. The delay has adversely affected the just and fair charge of aeronautical tariffs being charged to the passengers.

III. **Non- Consideration of Cargo Revenues** - In para 3.3 of the CP, it is mentioned that AAI has not considered cargo related revenues, expenses and assets in the MYTP for the 2nd control period and has also submitted that AAI Cargo Logistics and Allied Services Company Limited (AAICLAS) would file proposal for cargo tariff for 2nd control period. It is further stated that the Authority has adopted the model proposed by AAI based on AERA methodology as on 18.04.2017 and considered subsequent submissions for this consultation paper. FIA hereby

submits that, without prejudice to the right to review additional submissions of AAI, the AERA methodology dated 18.04.2017 prima facie, needs to be reviewed/revisited in light of the figures under table 5 (Aeronautical Revenue earned for the 1st control period), which provides that the cargo revenue accounted for almost twenty five percent (25) % of the total revenue during the first control period. FIA would like the Authority to kindly note that 'Cargo revenues' comes under the category of Aeronautical Revenues and accordingly used for the purposes of determination of Aeronautical Tariffs. Thus, non-consideration of the cargo revenue results into incorrect determination of Aeronautical Revenue which forms one of basis for calculating the Aeronautical Tariffs. Thus, FIA hereby submits that keeping in view section 2 (v) of AERA Act, which provides that 'Aeronautical Service' includes the service for 'the cargo facility at an airport' , the Cargo Revenues constituting almost 25% of the Aeronautical Revenues must be duly taken into account for calculation for Aeronautical Tariffs.

- IV. **Rectification of Mistake in Calculation of Accumulated Depreciation** - In para 4.6 of the CP, it is stated that the Authority noted certain calculation mistakes in the determination of the accumulated depreciation upto 01.04.2011 for various airport assets. Based on the request of the Authority to review such mistakes, the AAI vide their submissions dated 26.08.2017, 04.09.2017 and 12.10.2017 submitted the revised accumulated depreciation amounts upto 01.04.2011. It has been stated the Authority proposes to revise the accumulated depreciation upto 01.04.2011 to ₹ 458.6 cr. from ₹ 445.0 cr. as per AAI's submissions. In this regard, FIA would like to request AAI to clarify and place on record as to whether AAI auditor incorporated the calculation mistake(s) in its balance sheet and mentioned/rectified the same in AAI's audit report.

- V. **Study on Cost of Land to be made public** - In para 4.15, it is stated that AAI has taken the cost of land of ₹ 6.9 cr. in RAB. In respect of cost of land, the Authority notes that land is not a depreciable asset and if taken into RAB, the return over it has to be paid perpetually. Further, the Authority proposes to conduct a study based on which the treatment to be given to cost of land can be determined, so that appropriate return on land is given for

future land acquisition purposes. FIA submits that report for such study should be made public for consideration of all the stakeholders to ensure transparency and level playing field for all the stakeholders (including FIA). Further, it is to be considered that in the absence of any supporting documents like study reports mentioned, FIA is not in position to study the present CP in its right context and spirit. The same is a violation of the principal of natural justice and fair play which is the paramount principal of any regulatory decision by any regulator.

VI. Capital Expenditure for Second Control Period

(a) In Table 26 (Aeronautical Assets to be capitalized at CIA for 2nd control period) of para 8.1, the revised capital expenditure submitted by AAI has been provided based on the revised submissions of AAI. FIA states that it can be observed from the table that cost of both "Terminal / Other building" and "Electrical Installations" have been doubled. In para 8.17 it is stated that Authority proposed to undertake a study by technical experts to estimate the allowable expenditure for, inter alia, construction of terminal building vis.-a-vis. normative benchmarks. It is further stated that the Authority had asked AAI for detailed information on justification for exceeding the normative benchmarks, however due to lack of detailed information and in the interest of avoiding delays in fixing tariffs, the Authority proposed to determine the expenditure using the normative approach at this stage. The Authority while acknowledging the shortcomings of this approach has stated that it shall undertake a study on the reasonableness of expenditure after capitalization of the assets and make appropriate adjustments while determining tariffs for third control period. FIA submits that in view of such high quantum of increase in the capital expenditure, instead of merely relying on the normative approach, the Authority ought to commission a study by technical experts to obtain an expert opinion which shall assist the Authority in the fair and reasonable tariff determination. FIA, being one of the stakeholders, should be provided with a copy of such study report by the expert opinion to ensure transparency in such process. Further, FIA submits that the Authority is well aware of the delay in incorporation of the revised tariffs in the second control period and any further delay to commission the study on critical issues may adversely impact the determination of the tariffs for aeronautical services. Further, prior user

consultation should be undertaken by AAI before proposing any expenditure proposal to the Authority and the same should be demonstrated and justified with complete documentation before the Authority.

(b) In para 8.16, it is mentioned that the Authority requested justification from AAI for higher than normative benchmark costs for construction of terminal. AAI as per clarification dated 8.12.2017 submitted that the reason for higher than normative costs is due to inter alia to achieve GRIHA 4 star rating, GRIHA V2015 reference guide will be followed for which international standards GRIHA/LEED rated sanitary/plumbing appliances, electrical appliances, building material for core work and finishing work are proposed which includes high end international sanitary fittings. FIA submits that although AERA has accepted AAI's high cost on ground to achieve GRIHA 4 star rating, it should undertake a separate study on the cost, as sum of these items (Rs 2534.2 cr) is more than the Opening RAB (as of 1.04.2016) i.e. Rs. 1991.6. FIA reiterates its submission on para VI (a) above and submits that a study by technical experts is critical to independently arrive at justification of any high capital expenditure. Any failure to conduct an independent study by the Authority before determination of tariffs on such issues will not result in reasonable determination of Aeronautical Tariff.

(c) In para 8.23 it is mentioned that, In the 2nd control period, project works related to connectivity to metro rail to city side and provision of walkators at CIA, RET-I and RET25_1 and construction of terminal building - Phase II are proposed to be taken up. It is further stated that these require user consultation as per the Guidelines. The Authority expects AAI to provide all the required project information as part of the consultation process with users. FIA submits that Authority should allow such projects involving high costs only after user consultation has been undertaken and suggestions of all the stakeholders have been incorporated.

VII. **Reconsider the Fair Rate of Return @ 14%** - In para 11.6, it is stated that the Authority proposes to consider 'Fair Rate of Return Estimation' (FRoR) at the rate of 14% for CIA for

the 1st and 2nd control period as submitted by AAI. FIA submits that CIA is operated and managed by AAI which admittedly falls under the definition of State under Article 12 of Constitution of India. Further, CIA is not being operated by an entity which is a private entity or as a public-private partnership (PPP) project which involves a substantial private investment. Therefore, the cost of equity at 14% p.a. for State is unreasonable and without any justification. AAI being a State, is under the constitutional obligation to cater the public interest and not commercial interest. Therefore, the cost of equity of 14% pa is very high and is arbitrary.

- VIII. **Delayed application of Tariffs** - In para 14.6, it is stated that the Authority proposes to consider existing tariffs while calculating aeronautical revenues for FY 2016-17 as the revised tariffs as submitted by AAI are proposed to be applicable from 01.04.2018 onwards. FIA submits that as already seen above, due to multiplicity of submission made by AAI, the issuance of the order for the 2nd control period has been inordinately delayed. FIA submits that had the Authority initiated consultation paper with the initial submission of AAI dated 09.03.2016, revised tariff could have been applicable from 01.04.2016 instead of a delay of 2 years (i.e. now proposed to be applicable from 01.04.2018).

D ADDITIONAL SUBMISSION

19. In addition to the above submissions, it is respectfully submitted that airlines and consequently, passengers will have to bear the burden of increase in Aeronautical Tariffs as proposed by AAI and the Authority.

It is noteworthy that Airlines and passengers must not be burdened with any tariff to be collected to fund the capital investments of a private concessionaire.

20. 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.

21. FIA reiterates its submission that there is a critical relationship between passenger traffic and growth of the civil aviation sector. What would benefit both the airport operator

as well as the airlines is a reasonable and transparent passenger tariff, both direct and indirect – since then the airlines will be able to attract more passengers and the airports would benefit both through higher collection of aeronautical charges as also enhanced non-aeronautical revenue at the airports. In FIA's view, the airport should be regarded as a single business as its aeronautical and non-aeronautical revenues are intertwined.

22. 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 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'.

23. In view of the foregoing submissions, it is submitted that the Authority ought to pass reasoned order on issues mentioned above, after the stakeholders are provided with all the relevant copies of the submissions made by AAI and any study report conducted by technical experts etc. for making any additional/final submissions on this CP.

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