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Stakeholder comments on the Consultation Paper (CP) No. 10/2015-16 Dated 16.03.2016 for Determination of Aeronautical Tariff in respect of CSIA, Mumbai for Second Control Period 01.04.2014 – 31.03.2019

Though we had sought extension of time vide our email and letter each dated 14th April 2016, we have not received any response till now. Therefore, by way of abundant caution we are submitting our comments today being the last day for stakeholders comments as per the subject Consultation Paper (CP) No. 10/2015-16 dated 16.03.2016.

We may, at the outset, point out that Lufthansa German Airlines has vide appeal no. 12 of 2013 challenged the tariff order dated 15.01.2013 for the First Control Period (01.04.2009 – 31.03.2014) in respect of CSI Airport, Mumbai on the grounds inter alia that the calculation of the project cost and the aeronautical tariff in terms of the principles in the schedule I of SSA and OMDA is contrary to the provisions of Section 13(1) (a) of the AERA Act, that stakeholder consultation and sharing of information regarding the strategy and approach of MIAL to development of the CSIA mandated under the Consultation protocol has not been carried out by MIAL, that sharing of the complete information and documents submitted by MIAL is essential for a meaningful and effective consultation with airport users, that inclusion of services like ground handling, cargo defined as Aeronautical services under

AERA Act as non aeronautical is contrary to the provisions of the AERA Act and formulation of the tentative views by the Authority on the basis of its unilateral meetings/discussions with MIAL alone to the exclusion of other stakeholders is in violation of the well settled principles of natural justice.

Appeals filed by Lufthansa German Airlines as well as by other International and Domestic Airlines challenging the tariff order dated 15.01.2013 are pending adjudication before the AERA Appellate Tribunal. Many issues raised in the said appeal are thus common to the issues arising in the present CP in respect of CSI Airport, Mumbai.

We would, therefore, urge AERA to defer its decision on the CSIA airport tariff determination for the 2nd Control Period pending adjudication of the appeals by the AERA Appellate Tribunal.

It appears that MIAL only pointed out the challenge filed by it to the Tariff order dated 15.01.2013 and there is no whisper of the challenge by the airlines to the said order. This anomaly has arisen as no other stakeholder was included in the process of formulation of the tentative views by the authority.

ISSUES AMONGST OTHERS ARE AS UNDER:

1. **APPLICABLE FRAMEWORK FOR DETERMINATION OF TARIFF NOT DETERMINED**

- To achieve the object of ensuring a level playing field, AERA is mandated to determine tariff for all major airports in terms of Section

13(1)(a). Sub clause (a) lays down the factors to be taken into consideration for determining the tariff. Tariff may be different for different airports on account of any or all considerations in Sub clause (a) (i) to (vi) of Section 13(1). AERA is mandated to follow a uniform policy in terms of applying the principles of tariff determination as stated in Sub Clause (a) for all airports. Tariff structure can complete one of the factors mentioned in (i) to (vi) of Section 13(1)(a) to the exclusions of the rest is not permissible in law. Provisions of OMDA and SSA cannot override the provisions of the statute.

- Act makes no exception to the applicability of the mandate in sub clause (a). Though Legislature was conscious of existence of OMDA and SSA in respect of MIAL, yet it did not recognize the pre dominance thereof and/or carve out any exception to the applicability of Section 13(1)(a). AERA being a creature of the statute is bound to Act within the four corneas thereof.
- On the contrary, the provisions of the SSA itself were made **"subject to the applicable law"**. Refer Cl.3.1.1 and Schedule I of SSA which says principles therein will be observed by AERA subject to applicable law. The mandate of the statute shall therefore prevail.
- AERA had itself adopted the Single till approach vide the Guidelines, 2011 framed by the Authority under section 15 of the AERA Act for determination of Aeronautical Tariff and further noted the inconsistencies in paras 3.16 and 3.17 of the said Guidelines. AERA was obligated to address itself to the issue qua impact of the covenants of the SSA on tariff determination. Infact, in the CP dated 3.1.2012 for the 1st Control Period, AERA observed that SSA should be reconciled with the provisions of the Act. Therefore, adoption of shared till approach contrary to and

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inconsistent with not only the provisions of the AERA Act but the Guidelines, 2011 which have a statutory force is wholly erroneous and unsustainable in law.

- No modification to the said guidelines has been carried out with respect to the Mumbai and Delhi airports and the guidelines are binding for all major airports.
- MIAL entered into OMDA and SSA being fully aware of a new regulatory authority-AERA and a new regime of tariff determination in the offing. MIAL therefore estopped from claiming any right contrary to the statute.
- The principles of Tariff fixation in Schedule I to SSA being inconsistent and/or contrary to the mandate in sub clause (a) of Clause (1) of Section 13 of AERA Act. Adoption of the methodology of tariff calculation as per Schedule I of SSA negates/does violence to the other considerations listed in sub clause (a) particularly (v).
- Reading principles of tariff fixation and methodology provided in Schedule I into clause (vi) of Sub Clause (a) of Section 13 (1) of the Act is erroneous.
- Provisions of AERA Act do not bind AERA to provisions of any agreement nor circumscribe its process of tariff determination.
- Well settled principle of law that public interest shall prevail over private interest. Interest of an individual even if affected cannot have the potential of taking over public interest having an impact on the socio economic drive of the country.

2. NO STAKEHOLDER CONSULTATION

- After MIAL submits its MYTP on 26.12.2013- X factor +68.11%, AERA indulges in series of discussions only with MIAL to the exclusion of the other stakeholders. Revised MYTPs are submitted vide 05.08.2014 and 08.09.2014 with revised X factor +78.03 % and +104.82% respectively.
- AERA sought further clarifications from MIAL on its MYTP revisions but views of other stakeholders not solicited. Voluminous comments were submitted by MIAL. AERA was obligated to ensure that MIAL engaged consultation with airport users before taking any decision in respect of the projects undertake/to be undertaken. Some crucial outcomes of these meetings/ consultations between AERA & MIAL on additional submissions and information provided by MIAL were:
  - changes in the assumption of date for the new tariff from 01.11.2014 to 01.01.2016 and finally to 01.05.2016.
  - Manifold increase in the X factor from +68.11%, to +78.03 % to +104.82% .
  - Audited Account sought and examined in consultation with MIAL only.

- Clause 3.2 of Guidelines required AERA to analyse and put the tariff proposal for stakeholders consultation. Meaningful stakeholder consultation is therefore essential before the formulation of its views by AERA. Unilateral meetings and deliberations on MYTP with MIAL does not amount to stakeholder consultation.

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- Further, for a meaningful and constructive response from stakeholders it is imperative for which complete information/ documents is necessarily to be provided to other stakeholders .
- Section 13(4) envisages "due consultations". All stakeholders should be included in the meetings/discussions/ presentations with MIAL. Consultation is not complete or effective before the parties thereto make their respective points of view known to the other or others and discuss and examine the relative merits of their views.
- No AUCC has been formed till date as mandated under Appendix I of the Guidelines, 2011 for effective consultation between the airport operators and airport users. Guidelines mandate consultation for major projects of Rs. 50 crores or above. Reliance on OMDA for consultation for major projects of Rs. 100 crores or above is contrary to the guidelines formulated by the authority itself and having a statutory force under Section 15 of the AERA Act.
- AERA overlooked the lack of and/or complete absence of consultation at the Master Plan and/or Major Development Plan Stage between the operator and the stakeholders/airport. OMDA itself obligated MIAL to include in the Master Plan the outcome of consultations with users in the Master Plan. Article 8.3 of OMDA sets out the obligation of MIAL to prepare a MP for the airport that would set out the proposed development for the entire airport, planned over a twenty year horizon. Further, Article 8.3.7 therein clarifies that all developments (Aeronautical Assets, Non-Aeronautical Assets, Transfer Assets & Non Transfer Assets) at the airport shall be as per the then existing MP. It also provides that no development that is not envisaged in the MP shall be permitted to be undertaken by the private airport operator. Further, all

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Aeronautical and Non-Aeronautical developments at the airport ought to comply with the then existing MP. The MP is also required to incorporate target dates for completing the construction of individual facilities. The failure to meet such allotted target dates entitles AAI to impose liquidated damages on MIAL.

- No copy of the MP or even the updated Master Plan has been provided to the airport users by MIAL.
- Tentative decisions of AERA vide the present Consultation Paper are based on unilateral discussions with MIAL alone.
- Stakeholder meeting held on 16th March, 2016 was a post decisional hearing. It was not possible for all stakeholders to submit their views on hundreds of documents submitted by MIAL with their Tariff proposal in the course of one meeting on a Consultation Paper which is an outcome of discussions and meetings between the Authority and MIAL over a period of over 2 years. A single meeting held on 16th March, 2016 can by no stretch of imagination constitute **"due consultation"** as envisaged under Section 13(4) of AERA Act.
- Authority is obligated to guide and ensure that the consultation protocol for the effective consultation between the airport operator and the users is duly complied with.

3. NEW PROJECTS IN THE 2ND CONTROL PERIOD WITHOUT STAKEHOLDER CONSULTATION

- Even the new projects aggregating to Rs. 1,448 crores to be undertaken by MIAL as mentioned in its tariff proposal dated 26.12.2013 for 2nd Control Period are a unilateral decision of MIAL. The same were

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required to be referred to the AUCC and put up for stakeholder consultation as to their justification, options, impact on tariff and quality of service, funding, etc. before being included in the Tariff proposal.

- The alleged stakeholder meetings held subsequently on 05.03.2014 and 23.06.2016 much after the MIAL submitted its MYTP proposal for the 2nd Control Period vide application dated 23.12.2013 do not subscribe to the consultation protocol envisaged under the Guidelines/ OMDA .

4. AERONAUTICAL AND NON-AERONAUTICAL REVENUE

- As per the Single Till methodology that has been adopted by AERA itself vide Guidelines, 2011, in terms of the mandate of the AERA Act the revenue of aeronautical and non-aeronautical services ought to be considered as a whole and not in part.
- Further, AERA held in its order dated 15.01.2013 to commission an independent study on the allocation of aeronautical and non-aeronautical assets and take corrective action as may be necessary at the commencement of the next control period from 1st April, 2014. However, no such execrcise has been undertaken by AERA and in the present CP also it has chosen to continue with its earlier approach of classification as well as apportionment of asssets.
- Classification of ground handling services, hangar rent, terminal charges, cargo, cute charges etc. as non aeronautical services/ assets is contrary to the definition of aeronautical services in terms of Section 2(a) of the AERA Act.
- No reliance can be placed on the OMDA for classifying assets/services as aeronautical and/or non aeronautical.

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- AERA ought to have taken into consideration the higher ratio of the revenue generated from non aeronautical assets which constitute a meagre 13% of the total assets as per the allocation by AERA itself. This flaw vitiates the whole basis of ARR determination for target revenue.
- There is under exploitation of the non aeronautical areas
- Challenge to the classification as per earlier tariff order dated 15.01.2013 is pending adjudication before AERA AT.
- Details/ clarification sought by AERA with respect to the break up of entire area of new Terminal T2 for asset allocation not provided by MIAL. Refer para 4.14,.

5. DELAY IN RAISING FUNDS BY MIAL

- MIAL has admitted delay on its part in monetizing of the land bank, available with it, to raise funds for cross subsidizing the aeronautical cost/ charges. Major source of revenue is being ignored to serious prejudice of the airport users.
- There is no attempt on part of MIAL to infuse equity as obligated under Article 13.1 (a) of OMDA.
- The debt of MIAL has not altered even though the Project cost has nearly doubled. This itself establishes that MIAL has ensured that it does not get affected by the financial risks of the project. Despite increase in the project cost from Rs. 12,069.80 crores to 12,630.00 crores, there is no commensurate increase in Equity/ RSD/ Debt by MIAL.

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- MIAL is adopting inefficient practices and not managing its assets/ funds as per best practices to minimize the losses. The airport users cannot be burdened with the cost of inefficient planning and execution by MIAL .

6. AERA having held that delay in capitalization of the new terminal was on account of improper planning and coordination (Refer para 5.27). Yet AERA proceeds to allow part of the expenses without imposing LD on MIAL.

7. MIAL has dropped certain allowed projects aggregating to Rs. 180 cores which formed part of the allowed Project Cost determined by the authority for 1st Control Period. This reflects inefficient/improper planning on part of MIAL in initial inclusion of the same. The airport users were unnecessary burdened with the costs of the dropped projects and it was unjust enrichment for MIAL.

In any case, MIAL could not have taken a decision to drop any part of the projects without consultations with stakeholders/ airport user and / or without prior approval of AERA.

AERA ought to have put LD on MIAL for not having completed the dropped projects.

8. There is no mandate in the AERA Act for the Authority to delegate any of its functions under Section 13 of the Act or any part thereof to the Ministry of Civil Aviation (MoCA) and/or the Airport Authority of India (AAI). The objective of the Act was to divest the AAI/ Central Government of its power to determine tariff and vest it unto the AERA , an independent authority.

9. AERA cannot seek advice of MoCA or AAI as sought with respect the land lease revenue from commercial area being non transfer assets or not (Refer para 3.57). Any advise/ direction by AAI or MoCA would tantamount to interfering with the independent exercise of the powers by the authority.

Similarly, decision of MoCA that levy of DF in respect of the two metro stations is essential, tantamounts to usurping the powers of AERA and/or interfering with the independent exercise of its power by the authority.

10. Authority ought to have independently verified and assessed costs submitted by MIAL towards capital and revenue expenditure, operational, staff salary etc. and the methodology adopted vis a vis their genuineness and reasonableness.

11. Neither the Guidelines, 2011 nor the SSA permits the MIAL to include the works in progress (WIP) and/or the works not capitalized in the calculation of the Aggregate Revenue Requirement.

12. AERA ought not to take any decision awaiting the information/ clarification sought from MIAL in respect of-Reference is invited to paras

13. Increase in the outstanding dues recoverable from the airlines amounting to Rs. 457 crores has resulted in increase in the operational costs and same has a direct impact on the tariff calculation. MIAL ought to have taken timely steps to make the recoveries. The writing off of the bad debts is a reflection of the inefficiency in its operations on the part of MIAL and MIAL cannot be rewarded/ compensated for same.

14. No costs can be allowed to MIAL when the authority has specifically observed that that MIAL should take steps to control/optimise such costs/expenses. Refer paras 3.42

15. We seek leave of the Authority to add, amend or modify the comments.

It is, therefore, most humbly requested that the Authority may be pleased to defer its decision on the subject Consultation Paper dated 15th March,2016

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pending the adjudication of the appeals in respect of the determination of aeronautical tariff for the 1st Control Period by the AERA AT.

In case the authority decides to proceed further with the determination of the tariff, a personal hearing may be granted to us before the authority takes any final decision on the Consultation Paper dated 16th March, 2016.

Yours Sincerely

Lufthansa German Airlines

Sarika Gandhi

Manager Corporate & Business Functions

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