

SUBMISSIONS ON BEHALF OF THE FEDERATION OF INDIAN AIRLINES

1. On behalf of its member airlines, FIA is hereby placing submissions in response to the Consultation Paper No.16/2012-13 dated 23.08.2012 ("CP No. 16/2012-13") with respect to "Multi Year Tariff Proposal and Annual Tariff Proposal in respect of Chennai International Airport, Chennai ("CIA, Chennai") for the 1st Control Period (2011-12 to 2015-16)" submitted by Airports Authority of India ("AAI").
2. At the outset, it is noteworthy that the Authority is under a bounden duty to determine the tariff in terms of:-
 - (a) Section 13 of the Airports Economic Regulatory Authority of India, Act, 2008 ("AERA Act");
 - (b) AERA (Terms and Conditions of Determination of Tariff of Airport Operators) Guidelines, 2011 ("AERA Guidelines") dated 28.02.2011;
 - (c) Regulatory jurisprudence and settled principles of law.
3. In the context of CP No. 16 of 2012-13, it is respectfully submitted that the following gaps/lacunae must be addressed by the Authority before concluding the present proceedings:-
 - (a) The Consultation Paper does not at present prudently examine or explain the reasons for accepting escalation of project cost from Rs. 2,015 crores to Rs. 2,862.71 crores. There is almost 42% increase in the project cost from the figures approved by Ministry of Civil Aviation ("MoCA").
 - (b) By leaving the project cost to be trued up, Authority is indirectly allowing AAI to further escalate the project cost without realizing that existing 42% escalation in project cost is way extra than what MoCA had approved.
 - (c) It is settled position of law that future consumers cannot be burdened with additional costs as there is no reason as why they should bear the brunt. Such quick-fix attitude is not acceptable¹. As such, the approach in the Consultation Paper does not appear to deal with the present economic realities and interests of consumers while proposing the tariff in its present form. Authority being a creature of statute is under a duty to balance the interest of all the stakeholders and consumers, which it is mandated to do under the AERA Act.

¹Annexure-1: UPPCL Vs. NTPC reported as (2009) 6 SCC 235 Para 63 and 65

- (d) Authority has proposed the determination of tariff for 5 years commencing from 2011-12. Therefore, Authority's proposal for tariff determination is retrospective, which is impermissible. In this regard, reliance is placed on Hon'ble Supreme Court's judgment in **Binani Zinc Ltd. Vs. Kerala State Electricity Board & Others** reported as **(2009) 11 SCC 244²**, wherein the Hon'ble Supreme Court has held that *"It is only after the Regulatory commission is constituted that it will be the sole authority to determine the tariff"*. Thus, there tariff cannot be determined retrospectively.
- (e) In respect of the future projections, the Authority is cognizant of the fact that expenditure partly Includes inflation e.g. in case of Salary and Wages (Dearness Allowance). It is submitted that considering, WPI of 6% has been separately considered, all the expenditure should be delinked from inflation and accordingly Annual Revenue Requirement ("ARR") needs to be adjusted.

ISSUES FOR CONSIDERATION OF THE AUTHORITY

I. Process Issues

- 4. A perusal of the CP No. 16/2012-13 points out that Authority has:
 - (a) Not appointed its own Auditor/Consultant as per Section 14 of the AERA Act.
 - (b) Not undertaken the exercise of 'Determination' or given reason for its consideration towards various airport charges.
 - (c) Not directed AAI to conduct User Consultation in respect of major capital projects.
 - (d) Left almost all the components of aeronautical tariff for 'Truing Up'.

A. *Re: Appointment of Auditor by the Authority*

5. It is submitted that the Authority ought to carry out its own assessment for determination of aeronautical tariff. The purpose of appointing an independent and external consultant is to enhance the credibility of data being relied upon by obtaining written reasonable assurance from an independent source. It is submitted that in addition to technical competence, independence is the most important factor in establishing the credibility of the opinion. In current scenario, all the external consultants have been directly engaged by AAI which compromises the independence of opinions expressed by them.

6. It is submitted that under Section 14(b) and Section 14(c) of the AERA Act, Authority is empowered to engage its own consultants or direct any of its officers or employees to make an inquiry in relation to the affairs of any service provider. There is nothing on record which shows that AAI has engaged any such Consultant of its own.

²Annexure-2: Binani Zinc Ltd. Vs. Kerala State Electricity Board & Others reported as (2009) 11 SCC244

B. Re: 'Determination' by the Authority

7. 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 increase in various charges (for instance FTC, Landing Charges, Parking Charges, etc.) but has failed to provide any justification or analysis for the same.

8. It is submitted that Section 13(1)(4)(c) of the AERA Act mandates that any decision by the Authority must be 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 and Anr.** reported as (2004) 3 SCC 1 (FB) (at Para 94)³ 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.⁴ The Hon'ble TDSAT has also held that determination requires application of mind in the Judgment dated 16.12.2010 in Appeal No. 3(C) of 2010 titled as **ZEE Turner Ltd. Vs. TRAI & Ors. (At Para 150)**⁵.

9. It is submitted that Authority has proposed to:

- (a) Levy User Development Fee ("UDF")
- (b) Increase Fuel Throughput Charges ("FTC")

However, Authority has not provided any reason for considering either introducing levy of UDF, the purpose of UDF, justification of UDF at the rate of Rs. 165 per domestic embarking passenger and Rs. 667 per International embarking passenger or 5% increase in FTC.

10. It is submitted that order passed by an administrative authority, affecting the rights of parties, must be a speaking order supported with reasons. Attention is invited to the judgment of the Hon'ble Supreme Court in the case of **Krantl Associates Private Limited &**

³Annexure-3: **Ashok Leyland Ltd. Vs. State of Tamil Nadu and Anr.** reported as (2004) 3 SCC 1 (FB)

⁴Oxford Advanced Learners Dictionary of current English (Eighth Edition), 2010

"Determine: 1. to discover facts about something; to calculate something exactly SYN establish: ~ an inquiry was set up to determine the cause of accident. 2. To make something happen in a particular way or be of a particular type: Age and experience will be determining factors in our choice of candidate, upbringing plays an important part in a person's character. 3. To officially decide and/arrange sth: a date of for a meeting is has yet to be determined. 4. To decide definitely to do something: They determined to start early"

Black's Law Dictionary (Eighth Edition)

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

⁵Annexure-4: Judgment dated 16.12.2010 in Appeal No. 3(C) of 2010 titled as **ZEE Turner Ltd. Vs. TRAI & Ors.**

Another Vs. Masood Ahmed Khan & Others reported as (2010) 9 SCC 496⁶. The Hon'ble Supreme Court's findings are reproduced below for ease of reference:

"51. Summarizing the above discussion, this Court holds:

- a. In India the judicial trend has always been to record reasons, even in administrative decisions, if such decisions affect anyone prejudicially.
- b. A quasi-judicial authority must record reasons in support of its conclusions.
- c. 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.
- d. Recording of reasons also operates as a valid restraint on any possible arbitrary exercise of judicial and quasi-judicial or even administrative power.
- e. Reasons reassure that discretion has been exercised by the decision maker on relevant grounds and by disregarding extraneous considerations.
- f. Reasons have virtually become as indispensable a component of a decision making process as observing principles of natural justice by judicial, quasi-judicial and even by administrative bodies.
- g. Reasons facilitate the process of judicial review by superior Courts.
- h. The ongoing judicial trend in all countries committed to rule of law and constitutional governance is in favour of reasoned decisions based on relevant facts. This is virtually the life blood of judicial decision making justifying the principle that reason is the soul of justice.
- i. Judicial or even quasi-judicial opinions these days can be as different as the judges and authorities who deliver them. All these decisions serve one common purpose which is to demonstrate by reason that the relevant factors have been objectively considered. This is important for sustaining the litigants' faith in the justice delivery system.
- j. Insistence on reason is a requirement for both judicial accountability and transparency.
- k. If a Judge or a quasi-judicial authority is not candid enough about his/her decision making process then it is impossible to know whether the person deciding is faithful to the doctrine of precedent or to principles of incrementalism.

⁶Annexure-5: Kranti Associates Private Limited & Another Vs. Masood Ahmed Khan & Others reported as (2010) 9 SCC 496

l. Reasons in support of decisions must be cogent, clear and succinct. A pretence of reasons or 'rubber-stamp reasons' is not to be equated with a valid decision making process.

m. It cannot be doubted that transparency is the sine qua non of restraint on abuse of judicial powers. Transparency in decision making not only makes the judges and decision makers less prone to errors but also makes them subject to broader scrutiny. (See David Shapiro in Defence of Judicial Candor (1987) 100 Harvard Law Review 731-737).

n. Since the requirement to record reasons emanates from the broad doctrine of fairness in decision making, the said requirement is now virtually a component of human rights and was considered part of Strasbourg Jurisprudence. See (1994) 19 EHRR 553, at 562 para 29 and Anya v. University of Oxford 2001 EWCA Civ 405, wherein the Court referred to Article 6 of European Convention of Human Rights which requires, "adequate and intelligent reasons must be given for judicial decisions".

o. In all common law jurisdictions judgments play a vital role in setting up precedents for the future. Therefore, for development of law, requirement of giving reasons for the decision is of the essence and is virtually a part of "Due Process".

11. In view of the foregoing submissions, it is submitted that the Authority ought to undertake the exercise of 'Determination' by application of mind and pass reasoned order on any issue and the increase in aeronautical tariff as proposed by AERA in the present consultation process should not be given effect to.

C. User Consultation should be undertaken by the Airport Operators

12. The Authority had in its AERA Guidelines stated that the Airport Operator shall undertake user consultation with Airport Users Consultative Committee (AUCC) on major capital projects planned at the airport. The major capital projects shall be defined as capital investment projects that may represent more than 5% of the value of the Regulatory Assets Base ("RAB") at the beginning of the control period or Rs.50 crores, whichever is the lower amount.

13. AAI has not undertaken the User Consultation and has stated that the work on the Project (Modernisation and Expansion of the CIA) commenced well before the Authority's AERA Guidelines on the User Consultation came into force and the project at the CIA, Chennai already had the approval of the Competent Authority. However, AAI has conveyed that capital projects in future will be undertaken as per the Authority's user consultation protocol. Further, AAI has clarified that the work on the Project (Modernisation and

Expansion of the CIA) commenced with the approval of the Competent Authority much before the Authority's Airport Guidelines on the user consultations came into force. Thus, AAI has not conducted the User Consultation.

14. First of all, in the CP No. 16/2012-13, Authority has not specified the 'Competent Authority', which has approved the Project (Modernisation and Expansion of the CIA). This aspect is relevant since, AAI has not conducted the User Consultation on the strength of its approval from the 'Competent Authority'.

15. It is submitted that the project is yet to be completed⁷ and AERA Guidelines are in place since 28.02.2011. Therefore, AAI ought to have undertaken a User Consultation process instead of only relying upon prior approval of the 'Competent Authority'.

D. True-up exercise should be conducted sparingly by the Authority

16. In the present CP No. 16/2012-13, the tariff plan is subject to truing up in next control period with respect to following variables:

- (a) Project Cost
- (b) RAB, Roll Forward RAB and depreciation
- (c) Traffic Forecast
- (d) Non Aero Revenue
- (e) Operation and Maintenance expenditure
- (f) Taxation

17. It is submitted that in the present case not only Authority has not applied its mind but indiscriminately left aforementioned components for future in the garb of truing up exercise during next control period. In this context, judgment of APTEL in the case of **BSES Rajdhani Power Limited Vs. Delhi Electricity Regulatory Commission** reported as **2009 ELR (APTEL) 880⁸** is extracted below:

"116. Before parting with the Judgment we have to remind the Commission of the observations in our Judgment in Appeal No. 265 of 2006, 266 of 2006 and 267 of 2006 in the case of North Delhi Power Ltd. v. Delhi Electricity Regulatory Commission in which we said the following:

Before parting with the Judgment we are constrained to remark that the Commission has not properly understood the concept of truing up. While considering the Tariff Petition of the utility the Commission has to reasonably anticipate the Revenue

⁷ Para 4.9 @ Pg. 12 of CP No.16/2012-13

⁸Annexure-6: BSES Rajdhani Power Limited Vs. Delhi Electricity Regulatory Commission reported as 2009 ELR (APTEL) 880

required by a particular utility and such assessment should be based on practical considerations. ...The truing up exercise is meant (sic) to fill the gap between the actual expenses at the end of the year and anticipated expenses in the beginning of the year. When the utility gives its own statement of anticipated expenditure, the Commission has to accept the same except where the Commission has reasons to differ with the statement of the utility and records reasons thereof or where the Commission is able to suggest some method of reducing the anticipated expenditure. This process of restricting the claim of the utility by not allowing the reasonably anticipated expenditure and offering to do the needful in the truing up exercise is not prudence.

117. All projections and assessments have to be made as accurately as possible. Truing up is an exercise that is necessarily to be done as no projection can be so accurate as to equal the real situation. Simply because the truing up exercise will be made on some day in future the Commission cannot take a casual approach in making its projections. We do appreciate that the Commission intends to keep the burden on the consumer as low as possible. At the same time one has to remember that the burden of the consumer is not ultimately reduced by under estimating the cost today and truing it up in future as such method also burdens the consumer with carrying cost.

This judgment has been followed by APTEL in various other cases like NDPL Vs. Delhi Electricity Regulatory Commission reported as 2010 ELR (APTEL) 891⁹.

18. In view of the foregoing, it is submitted that Authority should not leave everything to true up and attempt to make all the projections and assessments as accurately possible on the basis of available data.

II. Material issues for tariff determination

19. It is submitted that the present consultation paper raises *inter alia* the following important and critical questions for consideration of the Authority:-

- (a) Whether the claim of AAI for increase in Aeronautical Tariff is justifiable on financial/economic basis?
- (b) Under what circumstances, when and to what extent can such diversion in project cost be permitted to be revised without complying with the requirements of prudence?
- (c) Is levy of UDF permissible under the relevant law? If so, for what purposes can levy of UDF be termed justifiable?

⁹Annexure-7: NDPL Vs. Delhi Electricity Regulatory Commission reported as 2010 ELR (APTEL) 891

- (d) Is Authority's reliance only on AAI's data for determining following is justifiable:-
- (i) Operating Expenditure is one of the major components for determining ARR?
 - (ii) Non-aeronautical revenue i.e. revenue generated from services other than aeronautical services?
- (e) Can the proposed Aeronautical tariff be considered as a fair, just or reasonable claim of AAI in a prudent, regulated, price cap mechanism as envisaged under the Act read with the AERA Guidelines of the Authority?

ISSUE-WISE SUBMISSIONS IN RESPONSE

A. Escalation in Project Cost should not be allowed

20. Project cost of Rs.2,862.71 crores (Rs.2,015 crores for Modernization and Expansion of CIA and associated works and additional capex of Rs.847.71 crores) is under consideration in the present consultation for the purpose of the current tariff determination.

21. As per the CP No. 16/2012-13, project cost aggregating to Rs 847.71 crores include Rs. 311.71 crores towards reconstruction of taxiways and parallel taxi tracks for main runway etc and Rs. 536 crores toward cargo facilities up gradation. However, the CP No. 16/2012-13 does not mention about any approval from MoCA for such additional capex of Rs.613 crores. However, the CP No. 16/2012-13 does not mention about any approval from MoCA for such additional capex of Rs 847.71 crores.

22. FIA has done a comparison between the increase in capex from the original sanctioned amounts between IGI Airport, Delhi and CIA, Chennai. It is noteworthy that on the basis of cost per square meter of built up area, it seems that check on project cost at CIA, Chennai is suffering from the same infirmities which was noticed in the case of escalated project cost at IGI Airport, Delhi. In fact, in case of CIA, the project cost per square metres is 29% more than that of IGI Airport, Delhi. Following table demonstrates the said comparison:-

TABLE-1

Particulars	
IGI Airport, Delhi	
Terminal -3 and Associated Building (Rs. in crores)	6693
Area (sq metres)	543321
Cost per sq metres (Rs)	123,187
Chennai International Airport	
Project cost for Modernisation and Expansion of CIA comprising domestic and International terminal building, elevated corridor and allied works including consultancy, extension of runway and construction of a bridge on the Adyar	2015

river (Rs in crores)	
Area (sq metres)	127000
Cost per sq metres (Rs)	158,661
Variation From IGI Airport, Delhi	-29%

23. Further a comparison of capex per square meter between NSCB International Airport, Kolkata and Chennai International Airport reveals 36% difference in capex per square meter.

TABLE-2

Particulars	NSCBIA, Kolkata	Chennai International Airport	Variance %
Area (New)	198,692	127,000	64%
Domestic	119,741	67,700	
International	78,951	59,300	
CAPEX for New Terminal Building (INR Million)	23,250	20,150	
Cost per Sq. mts.	117015	158,661	36%

24. It is submitted that capex is the most critical factor in determination of aeronautical tariff. Hence, it is critical that a good industry benchmark with respect to optimal capex per square meter⁵ is established by the Authority. Any spend over and above should be absorbed by the airport operator as part of its business risk.

24. Without prejudice to the above, it is respectfully submitted that even if the claim be treated as valid and admissible, the Authority must consider and decide as to:-

- (a) Whether any capital investment so made must not go into the Regulatory Asset Base and be secured through return on equity/return on capital employed?
- (b) Prudence check on each claim of capex must be done along the lines of the established accounting standards and practices which would disallow unreasonable, unfair or extravagant expenditure.
- (c) There has been about 42% escalation in project cost, which raises question on the issue of cap on project cost. Such revision of the project cost should be strictly scrutinized by the Authority instead of merely placing its reliance on submissions of AAI.

26. Being a creature of statute, the Authority is mandated to analyze the documents and

conduct prudence check to ensure balance between reasonable recovery of efficient and 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 and timely investment in improvement of airport facilities.
- (b) 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 AAI cannot be accepted by the Authority on the face of it and passed on to the consumers directly or indirectly. The Authority is required to evaluate the claims made by AAI and only after satisfying itself through a rigorous prudence check which involves:-
 - (i) Scrutiny of the expenditure made by AAI 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.

27. In view of the foregoing, it is submitted that for any increase in cost, the Authority is mandated to conduct prudence check and it is vital to scrutinize each and every claim made by AAI.

28. In this context, it is noteworthy that the Appellate Tribunal for Electricity in its judgment dated 29.08.2006 in the matter of KPTCL Vs. KERC &Ors. reported as 2007 APTEL 223¹⁰ has clearly held that utilities are free to decide their plans of investment for improvement of system or expansion to meet the demand including upgradation and maintenance for a better and quality supply. It is the commercial decision of the utility and its source to raise funds which falls within the domain of the utility. It is at a later stage that the Commission/Regulator shall undertake a prudent check and if deem fit allow the claim. In appropriate cases, the Regulator may disallow such cases of utility and it is for the utility to bear the brunt of such investment and it cannot pass it on to consumers.

B. Re: Levy of User Development Fee ("UDF")

¹⁰Annexure-B: KPTCL Vs. KERC &Ors. reported as 2007 APTEL 223
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29. Authority has proposed to levy UDF on the basis of AAI's Annual Tariff Proposal ("ATP"). It is noteworthy that UDF is being introduced on the embarking passengers w.e.f 01.01.2013 in the following manner¹¹:

- (a) Per Domestic Departing Passenger- Rs. 165.00
- (b) Per International Departing Passenger-Rs.667.00

30. Authority has introduced absolutely new stream of revenue in favour of AAI, which is not envisaged under the Airport Authority of India Act, 1994 ("AAI Act") or AERA Act.

31. It is a settled position of law that any levy or compulsory exaction which is in the nature of tax/cess cannot be levied without a statutory foundation/charging section, as laid down in a catena of judgements by the Hon'ble Supreme Court. It is well settled principle of law that no tax, fee or any compulsory charge can be imposed by any bye-law, rule or regulation unless the statute under which the subordinate legislation is made specifically authorises the imposition. There is no room for intendment.

32. In view of the foregoing, it is submitted that:-

- (a) AERA Act nowhere provides for provision of determination or levy of UDF on passengers.
- (b) Authority in the present CP No. 16/ 2012-13 has not deliberated upon the rationale for levying UDF. It is submitted that Authority is bound under Section 13(4)(c) of the AERA Act to fully document and explain its decision.
- (c) Further, there is also no evidence that Authority has undertaken the exercise of determining the amount of UDF as there is no basis for levy Rs. 165 and Rs. 667 towards UDF on embarking domestic and international passengers respectively.

33. It is also noteworthy that UDF is recovered from each traveling passenger through the air ticket as a component of the price of such air ticket and the same is payable by the airlines to the Airport Operator. It is reiterated that any increase on fees payable directly by passengers ultimately affects the interests of airlines. It is submitted that any passenger is concerned with the total cost of his travelling and not with the specific break-up of charges. Such enhancement in the cost of the air ticket not only works as a deterrent for the prospective traveler but also reduces the ability of the airlines to recover its costs and thus affecting the business interests *inter alia* of airlines and aviation industry.

C. Re: Fuel Throughput Charges ("FTC")

34. The Authority had vide Order No. 07/2010-11 dated 04.11.2010, in the matter of suo

¹¹Para 14.4.6 @ Pg. 39 of CP No. 16/2012-13

moto revision of FTC by the Airport Operators had approved the FTC at CIA, Chennai (from Rs.1,390.31 to Rs.1,459.83 @ 5% increase as per contractual terms) with effect from 01.04.2010, on an ad hoc basis.¹²

35. In relation to the 5% increase in FTC by the Authority, it is submitted that there is no cost basis analysis for allowing 5% increase in FTC.

36. It is submitted that the Authority ought to examine:-

- (a) The impact of FTC enhancement since the cost of the fuel constitutes around 40% of operating cost of an airline.
- (b) The impact of failure of the AAI to provide any justification for the revision in FTC. Since at the Airports the Fuel suppliers are already paying and loading exorbitant land rentals for locating fuel facility on to airlines. In addition to such land rentals, the AAI are allowed to charge FTC with no cost basis.
- (c) AAI has only provided the land and access to the Oil Companies. The cost of land is recovered separately through the rentals. Therefore, it is the value of concessions which would have to be considered while fixing the FTC.
- (d) FTC is an impost not on the Oil Companies but on the airlines. Thus, in the form of FTC the airlines face a cost impost as the airlines cannot avoid purchasing fuel at locations with FTC, which is being charged by the AAI over and above the normal lease rental.

37. It is further submitted that considering that Authority's Order No.07/2010-11 dated 04.11.2010 is pending adjudication before the Airports Economic Regulatory Authority Appellate Tribunal ("AERAAT") in Appeal No. 5/2012 (MIAL Vs. AERA & Others), it would be better if any decision regarding FTC should be taken pursuant to the outcome of the said Appeal.

D. Re: Non-Aeronautical Revenue

38. AAI has submitted revenue generated through Non-Aeronautical Services or services other than aeronautical services by applying the growth rate to historical revenues and establishing the relationship with available commercial area. In the CP No. 16/2012-13, Authority has noted that the past growth of non-aeronautical revenue may not serve either

¹²Appeal No. 5/2010 (MIAL vs. AERA & Ors.) is pending before AERAAT on the issues revision in Fuel Throughput Charges at CSIA, Mumbai, in which FIA is a party. Though in our knowledge the revision in Fuel FTC w.r.t CIA, Chennai has not been challenged but any legal outcome on principle from the said Appeal may impact all the airport operators.

as a benchmark or guide in making the forecast. This is because the new terminal at CIA, Chennai is about more than 3 times the existing terminal.

39. The Authority has proposed that for the first control period it may consider the forecast of non-aeronautical revenue provided by AAI for determination of tariffs and true up the actual receipts from non aeronautical revenue while determining tariffs for the next control period. Hence, the Authority considered that for the first control period it may consider the forecast of non-aeronautical revenue provided by AAI as indicated above for determination of tariffs and true up the actual receipts from non aeronautical revenue while determining tariffs for the next control period

40. It is submitted that in the present consultation process, AAI has projected non-aeronautical revenue at merely 23% of total revenue during control period, whereas a quick glance at airports like Changi Airport, Singapore; Hong Kong International Airport, etc. reveals that said airports are earning approximately 60% of their total revenues arising out of services other than non-aeronautical services.

41. It is submitted that Authority should reasonably estimate or appoint a Consultant to determine revenue from new premises as it may not be appropriate to burden the airlines and passengers with higher tariff in this control period and provide relief for the same in subsequent period.

E. Re: Depreciation

42. It has been stated that AAI is following the straight line method for depreciation and the depreciation rate applied to various assets is as per AAI's approved accounting policy considering the useful life of the assets. The salient aspects of AAI's depreciation policy areas under:

- (a) Method of Depreciation –Straight Line Method.
- (b) Additions to Fixed Assets:-Depreciation to be provided for full year irrespective of month of installation/completion.
- (c) No depreciation to be provided in the year the asset is disposed off/retired from active use.
- (d) Residual value for each asset to be taken as Re. 1 balance to be provided by way of depreciation as per prescribed rates.

43. In this regard it is observed that the AAI's accounts are maintained as per the provisions of the Section 28 (1) of the AAI Act.

44. As per Clause 5.3.3 of the AERA Guidelines, the minimum residual value of the asset shall be considered as 10% and depreciation shall be allowed up to maximum of 90% of the original cost of the asset on straight line method.

45. Authority has noted that AAI's Depreciation Policy is not in accordance with its Order No. 13/2010-11 dated 10.01.2011 ("Airport Order") and AERA Guidelines. However, Authority has ignored its own AERA Guidelines and proposed to follow AAI's Depreciation Policy and the depreciation calculated in accordance thereof for the purpose of determination of tariffs for aeronautical services at CIA, Chennai since:

- (a) AAI is a statutory body established under the AAI Act. The Board of AAI has approved the Depreciation policy that has been adopted by AAI.
- (b) AAI's format of accounts have been formulated in consultation with the C&AG, who also conduct audit of the books of accounts of AAI as mandated under the AAI Act.
- (c) The C&AG has not commented adversely on the depreciation methodology adopted by AAI. Further, accounts of the AAI, certified by the C&AG, together with the audit report are laid before the Parliament.

46. Authority should determine the depreciation as per Airport Order and Airport Guidelines for the purpose of computing ARR as it is settled position of law that the statutory authority is bound by its own Regulations/Guidelines¹³.

47. It is noteworthy that by employing AAI's proposed rate of depreciation (10-12%) on its assets translates into accounting life of assets to only 8-10 years. It is submitted that assets of an airport have long useful life and usually last for 30 years. Hence, the Authority should spread out the useful life of the assets over a period of 30 years, which would reduce the target revenues by approximately Rs.201.88 crores in FY 2012-13 and over a period of 5 years the target revenues would be reduced by Rs.734.71 crores. It is noteworthy that though CP No. 16/2012-13 mentions that AAI has proposed a depreciation rate as 10-12% but a simple division of depreciation by RAB gives us a higher number. It may be noted that AAI at CIA, Chennai mentions depreciation of Runways over a period of 7 years only, whereas FIA understands that Changi Airport, Singapore¹⁴ is depreciating it over 30 years and Beijing Capital International Airport over 40 years¹⁵. Following table demonstrates the impact of depreciation due to application of useful life of assets at CIA, Chennai.

TABLE-3

Computation of impact considering useful life of asset as 30 years

¹³Annexure-9: PTC Vs CERC reported as (2010) 4 SCC 603

¹⁴ Annexure-10: Copy of the Annual Report of Changi Airport

¹⁵ Annexure-11: Copy of the Annual Report of Beijing Capital International Airport

Computation of impact considering useful life of asset as 30 years						
	Tariff Year					(Rs In crore)
	1	2	3	4	5	
Particulars	2011-12	2012-13	2013-14	2014-15	2015-16	Total
Opening RAB	343.52	847.42	2,412.44	2,919.63	2,960.46	
Additions - WIP	522.04	1,615.21	590.47	134.99	-	
Depreciation @ 3%	18.14	50.19	83.28	94.16	96.19	341.96
Closing RAB	847.42	2,412.44	2,919.63	2,960.46	2,864.27	
Average RAB	595.47	1,629.93	2,666.03	2,940.04	2,912.36	
A Reduction in depreciation	106.18	235.47	255.79	256.09	248.67	1,102.20
B Increase in Average RAB	53.09	223.93	469.54	725.48	977.86	
C Impact of increase RAB on return on equity @ 15% (B X 15%)	7.96	33.59	70.43	108.82	146.68	367.49
Net impact of change in useful life to 30 years (A - C)	98.22	201.88	185.36	147.27	101.99	734.71
Assumptions:						
1	Method of depreciation - Straight Line Method					
2	Useful life of the asset is considered as 30 years. Hence, depreciation considering 10% residual value would be 3%					
3	Additions during the year are depreciated @ 50% assuming additions in mid of financial year					
4	All figures are in INR crores					

48. In this regard it is submitted that depreciation-methodology (of using accounting life of assets) being presently considered by Authority is erroneous and ignores the reality that such an approach will have an unjust inflationary impact on passengers/airlines by front loading of tariff. Presently, the Authority is considering only the accounting life of assets (8-10 years) instead of considering the useful life of assets (at least 30 years). Such reduced accounting life of assets compared to useful life would result in artificial increase in the depreciation charge and would have an adverse impact of increasing the tariff in the initial years.

F. Re: Weighted Average Cost of Capital ("WACC") - Fair Rate of Return ("FRoR")

49. AAI had engaged KPMG to determine the FRoR for its airport operation business. KPMG has worked with the assumption that the gearing ratio and cost of debt for the airport operation business at each airport of AAI is the same as that for AAI as a whole. In this regard, following is noteworthy:-

- (a) **Gearing Ratio:** The Gearing is the level of an entity's debt compared with its equity component and is calculated as $\text{Gearing} = \text{Debt} / (\text{Debt} + \text{Equity})$. AAI has assumed that future capital funding requirement will be met in similar Debt-Equity proportion

for AAI as a whole at the current levels and projected the expected gearing to be 8.84%

- (b) **Cost of Equity:** Using the Capital Asset Price Model (CAPM), KPMG in its report determined cost of equity as 15.64%.
- (c) **Cost of Debt:** Weighted average cost of existing debt of AAI is 8.03% and KPMG In its report has assumed that AAI will be able to raise the incremental debt requirement in the first control period on similar terms.

50. On applying the above mentioned values of various parameters to the FRoR methodology prescribed by AERA, KPMG determined the FRoR for AAI's airports operations business as 14.96% or 15% p.a.

51. Authority noted that vide its letter AV. 24032/037/2011-AD dated 12.03.2012, the MoCA forwarded report of SBI Capital Market Ltd (i.e. SBI Caps) in the matter of "Fair Rate of Return of Equity for Indian Airport Sector". On comparing reports and from analysis, the Authority observed following issues in computation of FRoR by KPMG:

- (a) For determining Asset Beta to compute Cost of Equity, the comparator set is only restricted to developing/emerging countries, however, such an approach is not appropriate and a wider set of airports may provide a more meaningful basis for estimation of Asset beta as advised by NIPFP, in the matter of determination of aeronautical charges at CIA, Chennai.
- (b) Based on its own framework, the Authority has also noted that average Asset Beta for CIA, Chennai can be taken at 0.61 as against 0.92 considered by KPMG.
- (c) The Authority notes that the higher WACC value is also on account of preponderance of equity in the capital structure of AAI. However, if the actual debt-equity ratio of CIA, Chennai (i.e. average outstanding debt of Rs.274 crores and average equity of Rs.2,155 crores giving actual D/E Ratio of 12.76%) specifically is taken into account the calculation yields a WACC of 13.96% or say 14%.

52. Evidently, though the Authority has noted that WACC/FRoR of around 14% is proper in view of its approach and calculations, but it has still allowed FRoR of 15%. The Authority is of the view that in the first control period, some allowance should be given for the uncertainties in estimation of different parameters, hence, WACC of 15%, as proposed by AAI, is reasonable for this control period and provides for sufficiently generous allowance for such uncertainty in estimation. FIA is opposed to any such relaxation to AAI and the Authority must examine it in detail before allowing such high WACC/FroR

53. It is noteworthy that the Authority is also mindful of the fact that current Debt Equity ratio of the CIA, Chennai is not efficient and in order to moderate aeronautical charges,

effort needs to be made to move towards efficient debt-equity ratio with higher proportion of debt. However, Authority is of the view that moving towards the efficient debt equity structure would take time and hence, this Issue would be revisited at the time of tariff determination for the next control period and make appropriate decisions. It is submitted that in case airport is not efficiently managing their Debt Equity ratio to reduce cost of capital, airlines and passengers should not be penalized for the same

54. Further, it is to be noted that the Authority had indicated in its Order No. 03/2012-13 dated 20.04.2012 ("MYT Tariff Order of DIAL") that the proportion of debt of around 60% in the capital structure could be regarded as an efficient means of finance. FIA notes that WACC/FRoR for IGI Airport was determined as 10.33% per annum, hence, 50% higher WACC in case of CIA, Chennai airport is not justifiable. Return on RAB, computed from WACC, has significant weightage in computing ARR of the Airport. Reducing WACC from 15% to 10.33% in CIA, Chennai will reduce ARR by 14%. It is pertinent to note that higher RAB with higher WACC has a significant compounding impact on the aeronautical tariff.

55. It is pertinent to note that that for calculating WACC/FRoR, though the Authority has arrived at the figure of 14% but has allowed 15%. Thus, Authority has accepted KPMG's proposal in spite of finding loopholes in Asset Beta as determined by KPMG. It is submitted that for the difference of 1% in WACC/FRoR on this scale would unnecessarily increase the Aeronautical Tariff. In view of the foregoing, it is submitted that considering assumptions taken by KPMG w.r.t Asset Beta and gearing ratio are not appropriate, Authority should re-compute the WACC after appropriate adjustments.

G. Re: Operation and Maintenance Expenditure

56. Authority has considered all the expenses forecasted by AAI subject to following adjustments in other miscellaneous expenditure:

- (a) The expenditure – to the extent it relates to the payment of interest on long term debt –factored in the expenditures has been deducted there from.
- (b) In case of electricity and water charges – no increase in number of units has been allowed

57. Authority is of the view that for determining tariff only efficient operating and maintenance costs should be considered. In this regard, Authority has noted that the C&AG is the auditor of all the accounts of AAI – including the expenditures incurred and Audit Report of the C&AG is not only on the mathematical accuracy of accounts or their incurrence in accordance with the set procedure, but also on the propriety of such expenditure. Considering this, Authority has proposed to accept the historical figures as

provided by AAI for present and even for future projections, Authority has accepted most of the projections as submitted by AAI.

58. It is submitted that operating expenditure is one of the major component for determining ARR. Hence, the Authority should evaluate these expenses in detail rather than primarily relying on projections provided by AAI.

59. Further, it is submitted that Authority should establish some optimal operating benchmarks be laid down for the airports to keep operations efficient e.g. opex per passenger or per landing. The same can be based on some model efficient airports. In absence of such a benchmark, there is no check and balance mechanism to ensure that passengers are not bearing extra cost on account of non- efficient operations

60. It is noteworthy that in respect of the future projections, the Authority is cognizant of the fact that expenditure partly includes inflation e.g. in case of Salary and Wages (Dearness Allowance). It is submitted that considering, WPI of 6% has been separately considered, all the expenditure should be delinked from inflation and accordingly ARR needs to be adjusted.

H. Re: Quality of Service

61. Authority has considered the issue of specifying a transition period for implementation of the scheme of quality of service measurement and determination of any rebates as relevant for CIA, Chennai. In this regard, Authority has proposed a period of one year from the date of tariff determination for AAI to appropriately align their processes/ procedures and make any other required interventions.

62. Further, the Authority has proposed that in the current determination of aeronautical tariff(s) for CIA, Chennai, a period of about two years of the first control period have already elapsed and given the transition period of one year, for implementation of the above scheme would be applicable only from the fourth tariff year of the Control period i.e., 2014-15. Accordingly, the Authority has noted that it will be possible to calculate the rebate for the year 2014-15 only in the tariff year t+2, viz., In 2016-17, which is the first tariff year of the next control period.

63. In this regard, it is submitted that Authority has noted that the Project (Modernisation and Expansion of the CIA) will be completed and commissioned in forthcoming months. Thus, it is submitted that for such transition, Authority should not grant one year to AAI and limit it to not more than 2 months as benefit of any rebates arising out of implementation of the scheme of quality of service measurement to the consumers of CIA, Chennai would not be available for almost a year. It is submitted that denial of such benefit for one year would not be in the interest of airlines.

I. Re: Landing Fee

64. It is submitted that Authority has proposed minimum Landing Fee of Rs. 5000/-per landing. It is submitted that though the Minimum rate has been prescribed, but for proper regulation, maximum bracket should also be prescribed by the Authority.

J. Re: 'Doctrine of Infrastructural Essential Facilities'

65. It is submitted that under the competition law, an enterprise is under an obligation to extend its essential infrastructural facility at a reasonable cost. AAI's control over CIA, Chennai renders it a monopolist having control over 'essential infrastructural facility' of the airport in the city of Chennai and the southern region of the country. The requirement of access to essential facility was first articulated by the Supreme Court of United States of America in **United States Vs. Terminal Railroad Assn**, reported as **224 U.S. 383 (1912)**. Under the principles of access to essential facility, the following four factors must be proven:-

- (a) Control of the essential facility by a monopolist;
- (b) A competitor's inability practically or reasonably to duplicate the essential facility;
- (c) The denial of the use of the essential facility to a competitor; and
- (d) The feasibility of providing the essential facility to competitors.

66. Further, it is submitted that to seek access to essential facility, the asset in question also must not be available from other sources or capable of duplication by the firm seeking access. Reliance is placed on the case of **Apartment Source of Philadelphia Vs. Philadelphia Newspapers**, reported as **1999 WL 191649**.

67. In view of the foregoing judicial precedents, it is submitted that AAI assumes the position of a monopolist since it exercises control over CIA, Chennai which is a crucial infrastructural facility for a city like Chennai and southern region of country due to its political and economic significance at both national and international levels. Airport is an essential facility, and thus, per this doctrine, the monopolist should not be allowed to charge an exorbitant price for accessing his facility.

68. It is submitted that such enormous hike in tariff by a monopolist AAI may be viewed as 'abuse of its dominance' and accordingly liable under Section 4 of the Competition Act, 2002 ("**Competition Act**"). Further, the Competition Act promulgates the "economic development of the country" amongst other things, protect the interests of the consumers.

69. In view of the foregoing, it is submitted that the Authority is mandated to prevent any opportunity which lead to the abuse of monopolistic power by the airports and that stand in the way of effective economic regulation.

K. Increase in Aeronautical Tariff should be kept in check

70. Following revision in the tariff(s)(excluding taxes/any levies) proposed by AAI is pending consideration by the Authority and are subject matter of discussion in CP No. 16/2012-13:

- (a) Increase of 118% in International landing charges and 48% in Domestic landing charges w.e.f 01.11.2012.
- (b) Minimum Landing Fee of Rs. 5,000/-per landing for all flights except training flights operated by Flying Clubs.
- (c) Uniform increase of 83% in parking and housing charges.
- (d) PSF (Security) proposed to be continued at the existing rates i.e. Rs 130/-per departing pax.
- (e) Passenger Service Fees (PSF): No increase is proposed in current PSF (Facilitation) rate i.e. Rs 77/ per embarking passenger. From 01.01.2013 this PSF (Facilitation) is proposed to be merged with proposed UDF levy.
- (f) Introduction of User Development Fees w.e.f 01.01.2013 –
 - (i) Per Domestic Departing Passenger- Rs. 165.00 and
 - (ii) Per International Departing Passenger-Rs.667.00
- (g) As per the understanding with the Oil Companies the FTC have been proposed by AAI to be increased by 5% per annum. For FY 2012-13, revision in rates is proposed to be effective from 01.11.2012 from existing Rate Rs. 1459.83 per Kilolitre to proposed rate Rs 1532.82 per Kilolitre.
- (h) For the ensuing tariff years 2013-14 onwards in the current control period, annual escalation @ 6 % p.a. w.e.f. 1st April of each tariff year proposed on Landing, Housing, Parking and UDF.

71. In addition to the above submissions, it is respectfully submitted that airlines and consequently passengers will have to bear the burden of increase in Aeronautical Tariff as proposed in the CP No. 16/2012-13.

72. The Authority is aware that airlines have been going through difficult times. Increase in various components of Aeronautical Tariff as proposed by the Authority will erode airlines capabilities to increase fares to sustain its operational capabilities. It is pertinent to note that the Authority must also take into account the difficulties being faced by the airlines and passengers before granting levies to the airport operators. As Airlines have suffered losses significantly in the last two years due to high ATF and recent depreciation of the rupee,

there is a need for Airlines to raise fares to recoup the past losses, rather than fund the Airport development program which is the responsibility of the Airport operator.

CONCLUSION

73. It is submitted that since the determination of aeronautical tariff of various major airports is evolving, It would be relevant if a standard benchmarking with respect to optimal capex per square meter and opex per passenger/landing is established by the Authority. This would be useful for all the Stakeholders while examining the various tariff proposals.

74. There is a need for guidance to the industry by the Regulator so that norms for operation are determined for the industry based on the technology, industry performance and in order to ensure optimum utilisation of assets with efficient and economic operation. Normative level can be determined by the Regulator on the basis of Benchmarking.

75. The purpose behind using a benchmarking approach is that to the extent that a utility is more efficient than the industry or is able to achieve higher rates of productivity changes, it will retain these benefits forever. Thus, the advantage of using a benchmark is that it creates an Incentive for an enterprise to be more efficient. The purpose behind using a benchmarking approach is that to the extent that a utility is more efficient than the industry or is able to achieve higher rates of productivity changes, it will retain these benefits forever. Thus the advantage of using a benchmark is that it creates an incentive for an enterprise to be more efficient. Further, it is emphasised that the Authority is bound by its AERA Guidelines and various Orders.

76. 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. It is submitted that the Authority must balance the interest of airlines and the passengers which is of paramount importance for the aviation industry.

77. In view of the above, it is respectfully prayed that FIA is opposed to the increase in Aeronautical Tariff without conducting prudence check and appointing its own independent auditor. The Authority must keep in mind the interests/implications of/on the airlines before finalizing any decisions regarding increase in Aeronautical Tariff and other charges.