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Without Prejudice

15 February 2012

To,  
Capt. Kapil Chaudhary  
Secretary  
Airports Economic Regulatory Authority of India  
AERA Building, Administrative Complex  
Safdarjung Airport  
New Delhi – 110003

OSD/II

15/2/12

**Sub: Comments & Submissions of the federation of Indian airlines (FIA) tendered in response to the Consultation paper No.32/2011-12 titled "Determination of aeronautical Tariff in respect of IGI Airport, New Delhi for the 1<sup>st</sup> Regulatory Period (01.04.2009 – 31.03.2014)"**

Dear Madam,

The FIA sincerely appreciates AERA for bringing out Consultation Paper No.32 on the above subject matter and is hereby placing on record the following submission which has been arrived solely from discussions, deliberations and past experiences of the member airlines for the kind consideration by the authority.

Enclosed is the FIA submission along with all the attachments thereto for your kind consideration.

Thanking You,

Yours Sincerely,



**Ujjwal Dey**  
Sr. Executive Officer



**Before the Hon'ble Airport Economic Regulatory Authority  
at New Delhi**

**Re: AERA's Consultation Paper No.32/2011-12**

**"Determination of Aeronautical Tariff in respect of IGI Airport, New Delhi for the 1<sup>st</sup>  
Regulatory Period (01.04.2009-31.03.2014)"**

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**Federation of Indian Airlines**

### 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.32/2011-12 dated 03.01.2012 while reserving its rights to file a more detailed response once requisite information/documents are made available.
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 for Determination of Tariff for Airport Operators) Guidelines, 2011 ("**Guidelines**");
  - (c) Regulatory jurisprudence and settled principles of law creating a level playing field to foster competition, plurality and private investments.
3. In context of CP No. 32 of 2011-12, it is respectfully submitted that the following gaps/lacunae must be addressed before concluding the present proceedings:-
  - 3.1 The Consultation Paper does not at present prudently examine or explain the reasons for accepting escalation of project cost from Rs 8,975 crores (projected by DIAL to the Ministry of Civil Aviation in October 2009) to Rs 12,857 crores (submitted by DIAL on 31.03.2010) contrary to the explicit embargo in Clause 3.1.2 of the State Support Agreement *check*.
  - 3.2 In fact, the Authority has accepted project cost of Rs 11,801.86 crores for stage 1 to Rs 12,502.86 crores for stage 2, with no clarity as to the following aspects:-
    - (a) Whether the revenue stream attributable to usage of runway, taxiway etc. has been duly factored in (reduced) before determining the project cost of DIAL?
    - (b) What does the base capex/project cost of Rs 8,975 crores comprise of and is it a prudent cost?
    - (c) Since the project was completed in time, what is the justification provided by DIAL for claiming the proposed escalation in capital cost and for AERA to accept it?
  - 3.3 Authority has not shared with the stakeholders DIAL's financial model certified by DIAL's statutory auditors, which is necessary for meeting the standards of transparency and natural justice. This is particularly so, since the Authority has gone ahead and accepted 97.25% of the claim capex (Rs. 12,502.86 crores out of Rs. 12,857 crores) based on reports of their consultants EIL and KPMG. In doing so, the Authority has failed to carry out a thorough prudence check which is an intrinsic and essential part of tariff determination under Section 13 of the AERA Act, 2008 and

Authority's own Guidelines dated 28.02.2011. The Authority is obliged under the AERA Act to ensure transparency and provide reasons for its findings.

- 3.4 All the relevant documents relied upon by DIAL and the Authority to arrive at the justifications for determining the tariff in present form have not been made available to the stakeholders.
- 3.5 The Consultation Paper appears to ignore/defeat the Single Till approach and order dated 12.01.2011<sup>1</sup> of the Authority since DF has to be a last resort while here DF is seen as an ad hoc first resort. It may be pertinent to note here that the special purpose vehicle set up by AAI and GMR, i.e., DIAL is not making losses - only one of the partners of the JV (i.e., GMR) is making losses. The other partner, AAI, has been making significant profits, ever since the privatization of the Delhi airport (as is apparent from AAI's financial statements of the last 4 years). Thus, any shortfalls, that DIAL may accrue, should ideally be funded by the partners of the JV.
- 3.6 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 acceptable<sup>2</sup>. 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.
- 3.7 For the purpose of computing depreciation, DIAL has considered average useful life of airport assets as around 20 years which is the normal useful life considered in Schedule XIV of the Companies act for capital assets. Such an approach will have an unjust inflationary impact on consumers/airlines by a front-loading of tariff, especially when, as per Consultation Paper, DIAL would also be incurring capex of Rs.48.86 crores and Rs.78.92 crores for maintaining the assets for FY 2011-12 and FY 2012-13 respectively. Infrastructure assets of airports are preserved for a significantly greater number of years. Taking a more realistic useful life of asset will have significant impact on yield per passenger:-

**If useful life of airport assets is 25 years:**

| Particulars                          | Existing | Revised | % Change |
|--------------------------------------|----------|---------|----------|
| Yield per passenger for FY13 & FY14* | 627      | 603     | 4%       |

<sup>1</sup> Order No. 13 of 2010-11

<sup>2</sup> Attachment 1: UPPCL vs. NTPC (2009) 6 SCC 235 para 63 and 65



**If useful life of airport assets is 30 years:**

| Particulars                          | Existing | Revised | % Change |
|--------------------------------------|----------|---------|----------|
| Yield per passenger for FY13 & FY14* | 627      | 582     | 7%       |

\* Yield per passenger is computed considering present value of projected revenue and traffic projection for FY13 & FY14

Depreciation should be calculated based on the term of the OMDA and SSA (60 years). The passengers should not be unduly burdened with the levy of a significant increase in DF, when the same can be spread over a period of time.

- 3.8 Authority has blindly followed Ministry of Civil Aviation ("MoCA")'s letter dated 01.01.2007 to allow cost of Rs. 350 crores on account of cost of Delhi Metro to be added to the project cost and allow it as part of aeronautical asset, especially when MoCA's said letter cannot be construed as a direction under section 42 of the AERA Act. The letter dated 01.11.2007 was issued prior to the Authority coming into existence, therefore at this stage the Authority ought to apply its mind and analyse its implications.
- 3.9 The approach in VRS treatment is far from clear and Airport Authority of India ("AAI")'s invoices for future period has not even been questioned.

**CONTEXT OF THE CONSULTATION**

4. To assist the Authority in appreciating these submissions on the Consultation Paper, members of FIA deem it necessary to place on record the following set of material facts:-
- 4.1 The airport operator/concessionaire was selected to operate, maintain and develop Delhi Airport in April, 2006 with the governing terms and conditions reflected in:-
- (a) The Operation, Management and Development Agreement ("OMDA") executed between the Airport Authority of India ("AAI") and the special purpose vehicle incorporated by the successful consortium, Delhi International Airport Limited ("DIAL") on 04.04.2006, including:-
- (i) Chapter VII shows that:-
- (1) Prior to the execution of OMDA and after a complete and careful examination, DIAL made an independent evaluation of the Airport as a whole and determined the nature and extent of difficulties, inputs, costs, risks etc that are likely to arise in the course of performing its obligations and modernizing the Airport.

- (2) DIAL shall be fully and exclusively responsible for and shall bear the financial technical and other risks in relation to the design, financing, modernization, construction, completion, commissioning, maintenance, operation, management and development of the Airport.
- (ii) Chapter XII of the OMDA provides for tariff regulation and casts obligation upon the operator to levy Aeronautical Charges as per the provisions of SSA. It further provides that the operator is free to fix the charges for non-Aeronautical services subject to the applicable law.
- (iii) Chapter XIII mandates and casts an obligation upon DIAL to arrange for **financing and/or meeting all financing requirements through suitable debt and equity contributions** in order to comply with the obligations under OMDA **including the development of Airport**. It is relevant to note that Schedule 5 and 6 define and specify the Aeronautical and non-Aeronautical services in OMDA.
- (b) State Support Agreement ("**SSA**") executed between the Ministry of Civil Aviation ("**MoCA**") and DIAL on 26.04.2006 to record the additional support to be extended by the Government of India ("**Gol**") to DIAL, including:-
  - (i) **CAPEX:**
    - (1) Clause 3.1.1 of the SSA empowered the Authority with the responsibility of certain aspects of regulation including regulation of aeronautical charges in accordance with the broad principles set out in Schedule 1.
    - (2) Clause 3.1.2 provides that the Aeronautical Charges shall be calculated as per Schedule 6, and that **such Aeronautical Charges will not be negotiated post bid** after the selection of the successful bidder and will not be altered by JVC (DIAL) under any circumstances.
    - (3) Clause 3.1.3 provided that the Gol would continue to approve the Aeronautical Charges till the Authority commences regulating such charges. This provision lapsed on 01.01.2009.
    - (4) Clause 3.3.5 makes it obligatory on the part of private airport operator to procure and maintain at its own cost all security systems and equipment (except arms and ammunitions) as required by Gol/BCAs or its designated nominees from time to time. It is the understanding of the Members of FIA that

considerable reserves would have been built into the Passenger Service fee (security component account), which calls for reduction in levy. It is submitted that the funds held by private operators in escrow account to the account of AAI should be permitted to be transferred to meet the shortfall in funding the airport modernization programme undertaken by the operator. In this manner, the funds held in PSF Security account are optimally utilized.

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

- (1) Transparency: The Authority shall adopt a transparent approach and keep all the **information documented** to enable all stakeholders to make submissions. The Authority is required to give reasoned decisions.
- (2) DIAL is entitled to impose only those charges which are consistent with the pricing principles set out in this Schedule including:-
  - Cost Reflectivity – Any charges incurred by the DIAL shall be allocated across users in a manner that is fully cost reflective and relates to facilities and services that are used by the Airport users.
  - Usage – In general Aircraft operators, Passengers and other users should not be charged for facilities and services that they do not use.

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

- (a) Section 2(a) of the Act provides for various services that are considered aeronautical service.
- (b) Section 13 (1) of the Act provides that the tariff for such aeronautical service at a major airport is to be determined by the Authority after taking into consideration various factors, being:-
  - (i) The capital expenditure incurred and timely investment in improvement of airport facilities;
  - (ii) The service provided, its quality and other relevant factors;
  - (iii) The cost for improving efficiency;

- (iv) Economic and viable operation of major airports;
- (v) Revenue received from services other than the aeronautical services;
- (vi) The concession offered by the Central Government in any agreement or memorandum of understanding or otherwise;
- (vii) Any other factor which may be relevant for the purposes of this Act.

## ISSUE-WISE SUBMISSIONS IN RESPONSE

### A. Authority is bound by AERA Act, 2008

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

- (a) Section 13(1), (2) and (4), Section 14, Section 15 and Section 16 of the AERA Act.
- (b) Relevant provisions of the OMDA dated 04.04.2006, Chapter VII, Chapter XII and Chapter XIII.
- (c) Relevant provisions of the SSA dated 26.04.2006, Para. 3.1.1, 3.1.2, 3.1.3, 3.3.5, Schedule I and Schedule VI.
- (d) Decision of the Authority to adopt the Single Till Approach with Price Cap Incentive Regulation.

6. Being a creature of statute, the Authority -

- (a) Has been empowered with several powers under the AERA Act. While exercising those powers, the Authority is obliged to ensure transparency by holding due consultations and providing reasonable opportunity to make submissions<sup>3</sup>.
- (b) Must ensure that all the documents on which the Authority is relying upon for the purposes of its decisions are made available to the stakeholders.
- (c) Must scrupulously follow the principles of natural justice and transparency - providing adequate time to make submissions on the Consultation Paper. It is pertinent to mention that:-
  - (i) The Authority took 21 months to consider DIAL's submissions (first submission was filed by DIAL on 31.03.2010 and the present Consultation Paper was issued on 03.01.2012) but it has allowed only 23 days to stakeholders to respond to the proposals of DIAL and Authority's analysis of the same.
  - (ii) On stakeholders' request seeking extension of time, the Authority allowed

<sup>3</sup> Section 13(4) of the AERA Act.

only 2 weeks to respond. It has been held by the Hon'ble Supreme Court<sup>4</sup> that *Natural justice is another name for commonsense justice. The adherence to principles of natural justice is of supreme importance than quasi-judicial body embarks on determining disputes between the parties. The first and foremost principle is what is commonly known as audi alteram partem rule. It says that no one should be condemned unheard. Notice is the first limb of this principle. It must be precise and unambiguous. It should appraise the party determinatively the case he has to meet. Time given for the purpose should be adequate so as to enable him to make his representation. In the absence of a notice of the kind and such reasonable opportunity, the order passed becomes wholly vitiated. Justice should not only be done but should manifestly be seem to be done.*

- (iii) It is pertinent to take note of the following 19 documents on which reliance has been placed by the Authority but are not available for stakeholder's perusal:-

| S. No. | Documents   | Reference  |
|--------|---|--|
| 1.     | AERA's letter (AERA/20010/DM/2010-11/838) dated 07.07.2011  | Annexure II (Colly.): DIAL's reply dated 20.07.2011  |
| 2.     | Annexure A3 to DIAL's letter dated 20.07.2011: The asset register on which classifications of the assets was based                | Annexure II (Colly.): DIAL's reply dated 20.07.2011  |
| 3.     | Annexure E to the DIAL's letter dated 20.07.2011: Model of Tariff in CD/ Print-outs of Tariff as given in CD                      | Annexure II (Colly.): DIAL's reply dated 20.07.2011  |
| 4.     | DIAL's letter(DIAL/2011-12/Fin-acc/520)   | Annexure II (Colly.): DIAL's letter dated 04.10.2011 |
| 5.     | Revised tariff model for the 5 years submitted by DIAL in view of changes in assumptions mentioned in the letter dated 04.10.2011 | Annexure II (Colly.): DIAL's letter dated 04.10.2011 |
| 6.     | McKinsey and CAPA reports as mentioned in the DIAL's letter dated 21.10.2011  | Annexure II (Colly.): DIAL's letter dated 21.10.2011 |
| 7.     | Annexure E to DIAL's letter dated 21.10.2011 enumerating the average  | Annexure II (Colly.): DIAL's letter                  |

<sup>4</sup> Attachment 2: Copy of the Judgement: Uma Nath Pandey vs. State of U.P reported as AIR 2009 SC 2375



*Submissions of FIA: Authority's Consultation Paper No.32/2011-12 titled "Determination of Aeronautical Tariff in respect of IGI Airport, New Delhi for the 1<sup>st</sup> Regulatory Period (01.04.2009-31.03.2014)"*

| S. No. | Documents   | Reference  |
|--------|---|--|
|        | dollar rate   | dated 21.10.2011   |
| 8.     | AERA's letter (No. AERA/20010/DIAL/2011-12) dated 04.11.2011  | Annexure II (Colly.): DIAL's letter dated 15.11.2011                         |
| 9.     | MoCA's letter (No. AV.20036/014/2009-AD) dated 06.10.2009   | Referred to in para 30 of the CP No. 32 of 2011-12                           |
| 10.    | Minutes of the meetings held between DIAL and AERA on 13.12.2011, 29.12.2011, 30.12.2011, 02.01.2012 and 03.01.2012 | Referred to in para 39 of the CP No. 32 of 2011-12                           |
| 11.    | MoCA's letter (No. AV.24011/001/2011-AD) dated 30.05.2011   | Referred to in para 45 of the CP No. 32 of 2011-12                           |
| 12.    | AAI's Invoice No. AAI/IGIA/DIAL/OSC/2009-10/5/165-167   | Referred to in para 138 of the CP No. 32 of 2011-12                          |
| 13.    | Copy of DIAL's email dated 30.11.2011   | Referred to in para 140 of the CP No. 32 of 2011-12                          |
| 14.    | AAI Bill No. IGIA/co-ord.cell/VRS/2011-12/91 dated 08.04.2011   | Referred to in para 140 (table under point (iii) of the CP No. 32 of 2011-12 |
| 15.    | Copy of the Rupee Facility Agreement between DIAL and ICICI bank Ltd., Axis Bank Ltd. and Banks/FIs                 | Referred to in para 225 of the CP No. 32 of 2011-12                          |
| 16.    | MoCA's letter (No. AV.24032/037/2011-AD) dated 30.12.2011   | Referred to in para 254 of the CP No. 32 of 2011-12                          |
| 17.    | Additional Clarification filed by DIAL pertaining to Details of Administrative and General Costs                    | Referred to in para 290 of the CP No. 32 of 2011-12                          |
| 18.    | MoCA letter dated 01.11.2007  | Referred to in para 127 at page 47 of 190                                    |
| 19.    | Consultant's report   | Referred to in para 21 at page 9 of CP 32/2011-12                            |

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

8. It is submitted that the Authority vide its letter dated 14.02.2012 has not accepted FIA's request for providing 17 of the documents which are missing from the Consultation Paper as mentioned therein itself or in the Annexures to the Consultation paper. The Authority has approached the request of FIA in an incorrect manner, as is evident from the following paragraphs:-

- (a) With respect to 10 documents, the Authority has provided its own import by simply citing that 'requested document does not contain any additional information for framing comments/views'. Such an approach amounts to denial of principles of natural justice. The stakeholders have a right to analyse the document on which reliance has been placed by DIAL as well as the Authority.
- (b) The Authority itself does not seem to have 3 documents and has cited 'non-availability of the same'. Without analyzing all the documents on which DIAL is relying upon, it may not be appropriate for the Authority to consider the claims of DIAL for determining aeronautical tariff.

9. It is noteworthy that the Authority, by following such approach, is accepting the figures quoted by DIAL. By doing so, the Authority is not discharging its functions as per the statute. The Authority is obliged to provide all the documents, reasoning and justification for each and every charge claimed by DIAL.

**B. Issues for consideration of the Authority**

10. In the above context, it is submitted that the present consultation process raises the following important and critical questions for consideration of the Authority:-

- (a) Whether the claim of DIAL for increase in Aeronautical Tariff is justifiable on financial/economic basis?
- (b) What was the financial model of DIAL at the time of the execution of State Support Agreement and OMDA?
- (c) What is the legal efficacy and values of the project cost submitted by DIAL at the time of bidding?
- (d) 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 check especially when there is no provision under OMDA or SSA to raise such claims arising out of escalation in project cost?
- (e) For a claimed capital/project outlay of Rs. 12502.86 crores if the airlines and indirectly/partly the passengers are to contribute Rs. 7185 crores over a period of three years (2011-2014)<sup>5</sup> as capital infusion while the operator along with AAI brings in only Rs. 5317.86 crores, why must the operator not be reduced to a minority shareholder with a representative body of the airlines/passengers being issued the relevant equity? Was such an eventuality contemplated in the competitive bidding process for PPP and airport development by the Government of India? .
- (f) Can the proposed Aeronautical tariff be considered as a fair, just or reasonable claim of DIAL in a prudent, regulated, price cap mechanism as envisaged under the Act read with the Guidelines of the Authority?

11. 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 over the 30 year tenure of the Concession, extendable to further 30 years?
- (b) Alternate means of financing including divesting equity, loans from financial institutions be explored.

<sup>5</sup> Para no. 473 at page 189 of the Consultation Paper: provides for passenger yield from FY 2011-12 to FY,2013-14

- (c) 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.
- (d) There has been about 43.25%<sup>6</sup> escalation in project cost, which seriously undermines the sanctity of the planning process of DIAL and Master Development Plan.

12. It is noteworthy 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 DIAL

13. In this context, it is noteworthy that the Appellate Tribunal for Electricity in its judgement dated 29.08.2006 in the matter of **KPTCL vs. KERC & Ors.** reported as **2007 APTEL 223** 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.** A copy of the ATE judgement is placed as **Attachment- 3** hereto.

14. It is pertinent to mention that Section 13 (1) (a) of the Act states that while determining the tariff at the major airports, the Authority shall take into 'consideration' the concessions offered by the Central Government in any agreement or memorandum of understanding or otherwise. FIA would like to reiterate that while the concessions in the OMDA are one of the relevant considerations for tariff determination under Section 13(1)(a), it does not exclude the airport in issue from regulatory supervision of the Authority or allow it to totally bypass the single till approach.

15. The Airports cannot at their whims and fancy, place reliance on the OMDA at one time and then deviate from its provisions on others solely as a matter of convenience and to extract (unfair) economic advantage.

16. To corroborate the statement, DF which has been imposed by the Delhi and Mumbai Airports does NOT emanate from the OMDA and is clearly a POST BID CONCESSION sought/claimed by the Delhi Airport to gain arbitrary commercial benefit. This is therefore against the spirit of the OMDA which the Airports are clearly and conveniently trying to deviate from, to their advantage. DF is mandated to be a last resort as per the Guidelines (para 6.8.7), Order No. 13/2011-12 dated 12.01.2011 [(para 17.5.12(f)) whereas DF has been considered as the first resort. Additionally, this also propagates the "Pre Funding" mechanism which is grossly against the "User Pays" concept and casts an Unfair Burden on the Passengers and Airlines. The FIA is therefore of the considered view that the Authority

<sup>6</sup> Para no. 79 at page 29 of the Consultation Paper

has to take a holistic view of the tariff structure applicable to Delhi Airport keeping in view the user and viability of such tariff.

### C. Single Till approach

17. It is submitted that the Single Till Approach as enshrined under Section 13(1)(a)(v) read with Section 13(1)(b) has been adopted by the Authority in its Order No. 13/2010-11 dated 12.01.2011 warrants a comprehensive evaluation of the economic model and realities of the airport – both capital and revenue elements. DIAL's approach of hybrid till deserves to be discarded.

18. It is noteworthy that neither the Authority nor DIAL has mentioned that GMR HIAL has filed an Appeal being Appeal No 8 of 2011 GMRHIAL Vs AERA & Anr on 10.02.2011 against the Authority's Order No. 13/2010-11 dated 12.01.2011. FIA is not aware of the contents of the Appeal since FIA's Impleadment Application is still pending before AERAAT. It is respectfully submitted that since Order No 13, which lays down single till approach is subject matter of challenge before AERAAT, the Authority may keep the issue of levying any charges in abeyance till the issues are resolved by AERAAT. Meanwhile, DIAL must be directed to follow single till approach (since there is no stay of Order No. 13/2011-12) in the matter of determination of aeronautical tariff as it is practical and equitable to both airports and airlines.

19. FIA therefore submits as under:

- (a) Single Till approach needs to apply to ALL airports regulated by the Authority regardless of whether it is a public or private airport or works under the PPP model and in spite of the OMDA and concession agreements.
- (b) Single Till will not hurt the investor interest and given the economic and aviation growth that is projected for India, Fair Rate of Return alone will be enough to ensure continued investor interest.

20. It is noteworthy that the Authority in its Order No. 13/2010-11 dated 12.01.2011 has laid down general 'Regulatory Philosophy and Approach in Economic Regulation of Airport Operators' to ensure transparency in the process in terms of the Act. The same should be made applicable for determination of tariff in case of DIAL as well. It is noteworthy that the said Order has also laid down 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. Hence, in view of the foregoing, consideration of Authority's parameters become pertinent for determination of DIAL's tariff. The Authority (in para 17.5.2. a) has adopted "Single Till" regulatory regime for all major airports in India.

21. The Authority in its Guidelines (para 4.3) has followed the single till approach while laying down the procedure for determination of Aggregate Revenue Requirement 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<sup>7</sup> wherein it is specifically stated that regulation under an Act, 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. Copy of the abovementioned Supreme Court Judgment is attached as **Attachment-4**. Perhaps, a desirable approach would be to have a public hearing on this issue to reconcile the overall regulatory philosophy of the Authority for Delhi and Mumbai. Elements like transition and other relevant factors for aligning the OMDA tariff to the Single Till will have to be considered in such process.

22. In the DIAL's proposed tariff, it appears that Authority has proceeded on 'dual till' approach which is against its own Order No. 13/2010-11 dated 12.01.2011. In the said order, Authority has strongly made a case in favor of the determination of tariff on the basis of 'single till'. Under the single till basis, airport charges are set with reference to the net costs of running the airport, taking into account other revenues arising at the airport i.e. non-aeronautical revenues.

Relevant extracts from Authority's Order No. 13/2010-11 dated 12.01.2011 are reproduced herein below for ease of reference:-

*"5.3. AAI, the state owned Airports Operator, presented a more nuanced position. It stated inter alia "Basic issue which concerns the tariff is the public interest at large. State Govts at times, are providing land for development/ up gradation of airports in their States, free of cost and free from encumbrances. If revenue generated from non aeronautical activities is considered while fixing the tariff, it serves the interest of State and public. However, if this revenue is taken out to subsidies other airports, there could be objections from States. Thus Single Till which helps in keeping the operational/aeronautical tariff low, would be advisable, where State Govt. Provides facilities for development and upgradation." Planning Commission also favoured adopting the single till approach to determine airport charges "as it treats airport as an integrated business and sets tariff without making any distinction between aeronautical and non aeronautical services. Single till approach comes closer to maximize welfare than the dual till approach as this approach takes all airport assets and costs into account while determining the tariff rates."*

*"5.6. The general assumption by respondents in the till debate is that non aeronautical revenues exceed the costs normally allocated to those activities, including the normal cost-of 'capital-on the allocated share of the assets employed. Secondly, the profitability of non aeronautical activities and services is much higher than that of aeronautical activities or services. For example, for seven major fully or*

<sup>7</sup> Paragraph 58 to 64 at page 639 to 641 of the Supreme Court Judgement

partially privatised airport companies in Europe, it has been found that whilst on average retail revenues account for only 13% of total revenues, they represent 41% of profits in terms of the earnings before interest, tax, depreciation and amortization (EBITDA) ratio (Credit Suisse, 2006)<sup>1</sup>. Moreover at Heathrow in 2006 the profit margin (profit as a percentage of revenues) for retail was 76% compared to 39% for airport charges and 16% for terminal property. At Gatwick the profit margin for retail was again 76% whilst both airport charges and terminal property were loss making for the airport (Competition Commission, 2007)."

"5.20. For sake of clarity, the relevant portion of Para 30 of ICAO Doc 9082/8, (2009) is reproduced below:

30. The Council also states that in determining the cost basis for airport charges the following principles should be applied:

(i) The cost to be shored is the full cost of providing the airport and its essential ancillary services, including appropriate amounts for cost of capital and depreciation of assets, as well as the costs of maintenance, operation, management and administration, but allowing for all aeronautical revenues plus **contributions from non aeronautical revenues accruing from the operation of the airport to its operators** (Emphasis added)

"5.21. Authority thus notes that ICAO's guidelines speak of "contributions from non aeronautical revenues accruing from the operation of the airport to its operators". Common reading of these words would indicate that whatever contributions from non aeronautical revenues accrue to the Airport Operators should be taken into account for determination of aeronautical charges."

"5.24. ICAO has, thus, clearly recognized that non aeronautical revenues are generated by passengers. It is also important to note that Para 7, specifically refers to Para 4. Furthermore, the guidance given by ICAO if read into the last sentence of Para 7, indicates its preference for aeronautical charges to be lower. It is, thus, clear from harmonious construction that ICAO guidelines indicate that non aeronautical revenues should be either used for funding investment needs (CAPEX) of aeronautical activities or to defray aeronautical charges."

"5.44. After taking into account all the relevant material and factors, the Authority finds that in the Indian context, single till best captures ground realities and is best suited for India."

23. In view of the foregoing observations of the Authority itself, it is submitted that the proposed tariff does not throw any light on the basis on which Authority has proceeded on dual/hybrid till. The fundamental reasoning behind 'single till' approach is that if the consumers/passengers are offered cheaper air-fares, 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 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.

24. The Authority must address itself to eliminate/minimize the moral hazard of inappropriate or excessive expenses, stranded costs/assets, drastic disallowances, uneconomic decisions and gold-plating particularly in context of the huge investments contemplated across various airports in the country where Airports (being inherently monopolistic) operate on a "Cost plus contract" and can easily pass on the cost to the Airlines (functioning in a competitive scenario) will find it inherently difficult to absorb such costs and either make it unsustainable or make air travel unaffordable.

#### **D. DIAL's monopolistic approach and 'Doctrine of Essential Facilities'**

25. It is submitted that under the competition law, an enterprise is under an obligation to extend its essential infrastructural facility at a reasonable cost. DIAL's control over IGI Airport, renders it a monopolist having control over 'essential infrastructural facility' of the airport in the city of Delhi. 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)**<sup>8</sup>. 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.

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**<sup>9</sup>. In view of the foregoing judicial precedents, it is submitted that DIAL assumes the position of a monopolist since it exercises control over IGI Airport which is a crucial infrastructural facility for a city like Delhi 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.

26. It is submitted that such enormous hike in tariff by a monopolist DIAL 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" by establishment of a Commission to, amongst other things, protect the interests of the consumers. Levy of such exponential charges by a monopolist is

<sup>8</sup> Copy of the judgment is attached hereto as Attachment 5

<sup>9</sup> Copy of the judgment is attached hereto as Attachment 6

clearly against consumer interests, and thus, is against the basic premise of competition law in India.

27. DIAL is "pricing out" the airlines with such substantial price increases. The hike in aeronautical tariff has already witnessed airlines and especially Low Cost Carriers ("LCCs") discontinued their services.

28. It is noteworthy that the facilities provided to airlines and the passengers at for instance, Terminal 1D at Delhi, are not at par with the facilities provided at Terminal 3. However, there is no difference in the airport charges that are being levied. This practice may be challenged under section 4(2)(a) of the Competition Act on account of discriminatory pricing. Further, an increase in airport charges would be even more detrimental an increase in charges would not amount to / result in the provision of better facilities / infrastructure for use either by the passengers (metro connectivity), or by the airlines.

#### **E. Direct engagement of consultants by DIAL has compromised the independence of opinions expressed by them**

29. Consultation Paper indicates that DIAL has furnished following reports/studies to support their submissions:

| Consultant         | Purpose of Engagement   | Observation by AERA  |
|--------------------|---|--|
| Jacobs Consultancy | Provided basis for terminal area allocation into aeronautical and non-aeronautical assets | Considering, only 2 years of the regulatory period are left with the Authority to commission an independent analysis of the allocation of aeronautical and non-aeronautical assets and in the absence of any other relevant basis for allocation the Authority proposes, presently, <b><i>to accept the proposal made on the basis of the Jacob's Report</i></b> |
| Jacobs Consultancy | Provided basis for allocation of the operation and maintenance costs                      | The Authority should have commissioned an independent study to assess the aspects of —efficient operating and maintenance costs and their allocation between aeronautical and non-aeronautical heads. However, considering only 2 years of the regulatory period are left, <b><i>the Authority, currently, proposes to accept the forecasts made by</i></b>      |
| Leigh Fisher       | Operating Costs benchmarking to support that DIAL's operating costs are the               |  |

|                            |   |   |
|----------------------------|---|---|
|                            | lowest and efficient amongst the airports of similar size | <b>DIAL</b>   |
| Leigh Fisher               | Determination of cost of equity of Delhi Airport          | The Authority had requested the National Institute of Public Finance and Policy (NIPFP), New Delhi to estimate the expected cost of equity for the private airports at Delhi, Mumbai, Hyderabad, Bangalore and Cochin and <b><i>has not relied on cost of equity determined by Leigh Fisher</i></b> |
| Madras School of Economics | Traffic forecast study for Delhi Airport                  | The Authority proposes to use 10 year CAGR figures <b><i><u>instead of figures projected by DIAL using report issued by MSE</u></i></b>   |

30. Aforementioned table indicates that for bifurcation of terminal assets into aeronautical and non-aeronautical assets and for determining efficient operating and maintenance costs and their allocation between aeronautical and non-aeronautical heads, the Authority has relied on Jacobs consultancy (which refers to the ratio of 90:10 for aeronautical and non-aeronautical assets) and Leigh Fisher's report. Thus, there is no clarity on the methodology and there is lack of transparency on the allocation of assets into aeronautical and non-aeronautical assets.

31. Consultation Paper mentioned that both Jacobs consultancy and Leigh Fisher have been engaged by DIAL.

32. Purpose of appointing an external consultant is to enhance the credibility of data being relied upon by obtaining written reasonable assurance from an independent source. However, such objective will not be met if such external consultant can be influenced by other parties, more specifically company managers/directors.

33. 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 DIAL which compromises the independence of opinions expressed by them

34. To bring independence and objectivity to the process, the Authority should directly engage external consultants in order to obtain reasonable assurance on the data being relied upon

35. DIAL has relied upon Jacob's Report which takes into account 90% of aeronautical



assets and 10% of non-aeronautical assets. Assuming the said ratio of 90:10 is changed to 85:15 or 75:25 then the yield per passenger will improve and tariff will come down. The tables below show that change in allocation of aeronautical and non-aeronautical assets have significant impact on present value of yield per passenger:-

**Share of aeronautical assets is 85%:**

| Particulars                          | Existing | Revised | % Change |
|--------------------------------------|----------|---------|----------|
| Yield per passenger for FY13 & FY14* | 627      | 605     | 4%       |

**Share of aeronautical assets is 75%:**

| Particulars                          | Existing | Revised | % Change |
|--------------------------------------|----------|---------|----------|
| Yield per passenger for FY13 & FY14* | 627      | 560     | 11%      |

\* Yield per passenger is computed considering present value of projected revenue and traffic projection for FY13 & FY14 and based on assumption that all the assets have been bifurcated in 90:10

It appears that in the Consultation Paper, the Authority has not considered the fact that GMR is a JV partner in most of the non-aero businesses which could impact the arm length pricing.

**F. Increase in tariff will have cascading impact**

36. 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 by DIAL (774%) and the Authority (334%). It is noteworthy that Airlines and passengers must not be burdened with any tariff to be collected to fund the capital investments of a private operator.

37. The Authority is aware that airlines have been going through difficult times with high crude oil prices. Increase in Aeronautical Tariff as proposed by the Authority (334.63%) will erode airlines capabilities to increase fares to sustain its operational capabilities.

38. The private airport operators should not be allowed to escalate the tariff beyond that prescribed in OMDA and SSA. OMDA and SSA do not provide for any escalation in Project Cost to be allowed to DIAL. Hence it is submitted that it would be unfair to allow such increase to fund the gap of the private airport operator especially after the

privatization has taken place. Any additional funding gap should be bridged through debt financing, subsidy by Government, or additional equity. It seems that increase in Aeronautical Tariff is a means to avoid any of the said options to burden passengers.

39. 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. A lot of expenditure has been undertaken to rectify the infrastructure which was handed over to DIAL by the AAI. Therefore, AAI should pay such costs or it should agree to reduce the revenue share so that the burden on the passengers could be reduced. Considering the fragile financials of the Airlines, DF will inhibit Airlines' ability to raise fares. As Airlines have suffered losses significantly in the last two years due to high ATF and recent depreciation of the rupee, there is a need for Airlines to raise fares to recoup the past losses, rather than fund the Airport development programme which is the responsibility of the Airport operator. DIAL by way of its present proposal is acting to the detriment to airlines and the passengers. The hike in aeronautical tariff has already witnessed airlines and especially Low Cost Carriers ("LCCs") discontinued their services. For e.g. – Air Asia pulled out of Hyderabad airport last year in January when the airport increased its charges. Air Asia X announced withdrawal of its services from Delhi and Mumbai airport by March end citing a steep increase in costs. Ryan Air has also pulled out of some European airports, since being an LCC, the airport passenger duty (APD) levied by some airports, was higher than its base fare. Airlines which are already bleeding will have no choice but to pass on the incremental cost to the passengers. This could make the short haul domestic air travel unviable and passengers may move to alternative modes like train travel. It has been again reported that due to the tariff hike being proposed by DIAL, the airlines are threatening to withdraw their services from Delhi airport. American Airline and Air Asia X have already withdrawn their services. With the proposed hike in DF being implemented, Delhi airport will become the most expensive airport in Asia. Copy of the said reports i.e. report dated 25.01.2012 published in Nasdaq, report dated 10.02.012 published in Business World and Report dated 01.02.2012 published in Livemint are attached hereto as **Attachment-7**.

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

in all elements of operations as well as also ensure that the entity responsible for a quality of service default bears the cost.

41. Annual concession fees / royalty is being paid by the airport operator to AAI as a part of his costs which he willingly agreed to incur to win the concession under a competitive bidding process. As such, this would have been factored in the bid financial model and must not be a source of additional risk or financial burden being transferred to users. Revenue that is earned by the airport has already factored in a fair return on investment. Subsequently, what the airport chooses to do with that revenue should not be ploughed back as a cost to the users in any form.

42. FIA reiterates its submission that there is a critical relationship between passenger traffic and growth of the civil aviation sector. What would benefit both the airport as well as the airlines is a reasonable and transparent passenger tariff, both direct and indirect – since then the airlines will be able to attract more passengers and the airports would benefit both through higher collection of aeronautical charges as also enhanced non aeronautical revenue at the airports. In our view, the airport should be regarded as a single business as its aeronautical and non-aeronautical revenues are intertwined. In this backdrop, FIA **strongly endorses the views of the Authority to follow the "Single Till" as the basis for determining airport revenue, without any carve-outs whatsoever.** It is submitted that the Single Till Approach adopted by the Authority warrants a comprehensive evaluation of the economic model and realities of the airport – both capital and revenue elements.

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

### **Specific Response to the Consultation Paper**

#### **Re: Aeronautical and Non Aeronautical Assets**

44. The Authority has not given any reasoning<sup>10</sup> in accepting DIAL's scheme of bifurcation of the assets in term of Aeronautical and Non Aeronautical assets and has accepted DIAL's proposal of dividing it as follows:-

| <b>Aeronautical Assets</b> | <b>Non Aeronautical Assets</b> | <b>Total Assets</b>   |
|----------------------------|--------------------------------|-----------------------|
| Rs. 11,840 crores          | Rs.1, 142 crores               | Rs. 12, 290.98 crores |
| 90.70%                     | 9.30%                          | 100%                  |

45. The Authority has noted that allocation of the airport assets in to Aeronautical or Non-Aeronautical categories is important in a shared (hybrid/dual) till model, as is the case in determination of tariff for IGI Airport, the cost and assets are to be allocated for

<sup>10</sup> Para 116 at page 44 of the Consultation Paper

determining the target revenue over the regulatory period. However, citing 'paucity of time' as a ground, Authority has accepted DIAL's proposals. Further, the Authority has left the exercise for truing up the allocation mix and costs at the beginning of the next regulatory control period

46. It is submitted that in the present case not only Authority has not applied its mind but indiscriminately left it 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) 880<sup>11</sup>** 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 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 same 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."*

<sup>11</sup> Copy of the judgment is attached hereto as Attachment 8

This judgment has been followed by APTEL in various other cases like **NDPL vs. Electricity Regulatory Commission** reported as **2010 ELR (APTEL) 891**<sup>12</sup>.

47. Further, 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 **Kranti Associates Private Limited & Another vs. Masood Ahmed Khan & Others** reported as **(2010) 9 SCC 496**<sup>13</sup>. 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.*

<sup>12</sup> Copy of the judgment is attached hereto as Attachment 9

<sup>13</sup> Copy of the judgment is attached hereto as Attachment 10



*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.*

*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 Harward 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".*

48. In view of the foregoing submissions, it is submitted that the Authority ought to pass reasoned order on issues like 'bifurcation of assets into aeronautical & non aeronautical' instead of leaving it for truing up to be taken up for next control period without assigning any cogent reason. It is submitted that 'merely paucity of time' cannot be regarded as a justifiable reason for not deciding the issue and accepting DIAL's proposal.

49. Further, it is submitted that assets of common nature like fire station, perimeter roads, boundary wall, sub-stations etc., should be classified as mixed assets and should be apportioned accordingly.

#### **Re: Issue of proposed increase in rate of Service Tax from 10.3% to 12-16%**

50. Attention of this Authority is invited to the scheme of levying Service Tax. Under Section 67 of the Finance Act, 1994, Service Tax is levied on the gross or aggregate amount charged by the service provider on the receiver. Rule 6(1) of the Service Tax Rules, 1994 has

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(BEFORE S.B. SINHA, L.S. PANTA AND B. SUDERSHAN REDDY, JJ.)

- a Civil Appeal No. 1110 of 2007†  
UTTAR PRADESH POWER CORPORATION  
LIMITED .. Appellant;  
*Versus*  
NATIONAL THERMAL POWER  
CORPORATION LIMITED AND OTHERS .. Respondents.  
b *With*  
Civil Appeal No. 1138 of 2007  
UTTAR PRADESH POWER CORPORATION  
LIMITED .. Appellant;  
*Versus*  
c NATIONAL THERMAL POWER  
CORPORATION LIMITED AND OTHERS .. Respondents.  
*With*  
Civil Appeal No. 1152 of 2007  
UTTAR PRADESH POWER CORPORATION  
LIMITED .. Appellant;  
d *Versus*  
NATIONAL THERMAL POWER  
CORPORATION LIMITED AND OTHERS .. Respondents.  
*With*  
Civil Appeal No. 1327 of 2007  
e UTTAR PRADESH POWER CORPORATION  
LIMITED .. Appellant;  
*Versus*  
NATIONAL THERMAL POWER  
CORPORATION LIMITED AND OTHERS .. Respondents.  
*And*  
f Civil Appeal No. 1112 of 2007  
UTTAR PRADESH POWER CORPORATION  
LIMITED .. Appellant;  
*Versus*  
NATIONAL THERMAL POWER  
CORPORATION LIMITED AND OTHERS .. Respondents.  
g Civil Appeals No. 1110 of 2007 with Nos. 1138, 1152, 1327 and  
1112 of 2007, decided on March 3, 2009  
A. Electricity — Tariff — Determination of tariff — Relevant factors —  
Operation and Maintenance expenses (O&M expenses) — Increase in, due  
to retrospective revision of salary of employees — Tariff shock — Relevance  
— Held, can be taken into consideration for revision of tariff but this is  
h

† From the Judgment and Order dated 7-9-2006 of the Appellate Tribunal for Electricity, New Delhi in Appeal No. 195 of 2005

provided that Service Tax shall be paid to the credit of the Government account in respect of the services deemed to be provided as per the rules framed in this regard.

51. Further, Service Tax is administered by the Central Excise & Service tax Commissionerates which work under the Central Board of Excise & Customs, Department of Revenue, Ministry of Finance, Government of India.

52. Airport Service was brought in the ambit of Service Tax with effect from 10.09.2004. The calculation of levying Service Tax is as follows:-

**Rate of Tax & Accounting Code:**

|                                     | Rate of Tax                    |
|-------------------------------------|--------------------------------|
| Service Tax                         | 10% of the value of services   |
| Education Cess                      | 2% of the service tax payable  |
| Secondary and Higher Education cess | 1% of the service tax payable. |
| <b>Total Service tax levied:</b>    | <b>10.3%</b>                   |

53. It is noteworthy, that Authority's proposal to change the scheme of taxation from 10.3% to 12-16% is in disregard to other service areas, where the consumer till date only pays 10.3% of the value of services. First of all the imposition of higher Service Tax is without any justification and secondly it breaks the uniformity of taxation mechanism to which consumers are attuned. Further, if at all it is to be done, it is the prerogative of the Ministry of Finance and Authority would be acting beyond its scope of powers in increasing the rate of Service Tax.

54. It is submitted that:-

- (a) There is no issue of 5 year Regulatory period from 1.4.2009 to 31.3.2014. However, proposal of increase in DF on 1.4.2013 over the proposed increase on 1.4.2012 is not acceptable. Incremental annual increase is against public interest and aviation industry. Increase in period from two (2) years to two (2) years and nine (9) months have significant impact on present value of yield per passenger:

| Particulars                          | Existing | Revised | % Change |
|--------------------------------------|----------|---------|----------|
| Yield per passenger for FY13 & FY14* | 627      | 428     | 32%      |

\* Yield per passenger is computed considering present value of projected revenue and traffic projection for FY13, FY14 and projected traffic for 9 months of FY15 considering the same growth in traffic

- (b) Project Cost should be distributed over a period normal gestation period (say 10 years) from date of commencement of full services by DIAL. The long term perspective of the project seems to be missing.
- (c) Assets of common nature like fire station, perimeter roads, boundary wall, Sub-stations etc., should be classified as Mixed Assets and should be apportioned accordingly. However, FIA is in agreement with the Authority on the fact that if any excess revenue had accrued to DIAL, in view of the present approach, the same shall be clawed back.
- (e) As per comments of Rep of Delhi Govt during the Stakeholders' Meeting, various local boards (JAL, BSES, MCD, etc) have granted subsidies to DIAL. The Authority should clarify whether the same has been incorporated or not while calculating the Operating cost.
- (f) With respect to Cute Counter Charge, it is submitted that this is additional charge to Airlines and cannot be passed on to its passengers. Hence, levy of Cute Counter charge is not reasonable at all.
- (g) Since DIAL operates in the monopolistic market, the pricing strategy shall never be market driven. However, airline fares are directly impacted by market forces. Hence, it may be proposed to cap pricing strategy for aero services as certain percentage to the airline base fare. 'Single Till' approach is highly advocated.
- (h) DIAL being a monopolist and exercising control over essential facility of airport should not be allowed to charge such exorbitant tariff and only 'reasonable charges' should be allowed to be levied.

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

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