
21st January 2009



DAA Response to the Commission for Aviation Regulation's consultation on the decisions of the Aviation Appeal Panel

1. INTRODUCTION

1.1 DAA welcomes the opportunity to participate in the consultation on the decisions of the 2008 Aviation Appeal Panel (**Appeal Panel** or **Panel**). DAA hereby submits its views in relation to the issues referred back to the Commission for Aviation Regulation (**CAR** or **Commission**) in DAA's appeal and Ryanair's appeal.

1.2 As requested by the Commission, DAA has limited itself to providing cogent arguments in response to each of the grounds of appeal referred to the Commission by the Appeal Panel.

1.3 DAA submits that two over-riding principles arise from the decisions of the Appeal Panel:

- (a) CAR must transparently state its reasoning. In this response, DAA has sought to remind the Commission of the facts and arguments presented during the process leading up to the Interim Determination so as to assist the Commission in setting out its reasoning in a transparent manner.
- (b) CAR must not simply state that it adopts its consultants' views over the views of DAA. It must state why it is doing so. This sets a clear marker that the Commission must have due regard to the evidence put forward by the regulated entity and should only disregard that evidence if it can be shown to be incorrect. Simple claims by other parties based on superficial analysis cannot be considered an adequate basis for disregarding expert DAA evidence.

1.4 DAA makes the following submission in relation to the grounds of appeal referred back in the Ryanair appeal:

- (a) As the Commission is aware, the procedure followed by the Panel under which the four appeals were conducted in isolation from each other means that this consultation is the first opportunity DAA has had to comment on the matters raised in Ryanair's appeal.
- (b) DAA is disappointed that it was not afforded an opportunity to comment on Ryanair's submission before the Panel as it feels that this would have clarified the information and arguments put forward by Ryanair¹ and this could have avoided the referral of these matters back to the Commission.
- (c) More particularly, DAA considers that the approach followed by the Appeal Panel in the Ryanair appeal is arguably unlawful as the Appeal Panel has taken a decision which adversely affects the interests of DAA without having allowed DAA the right to be heard in that procedure. DAA understands that the legislation allows the Appeal Panel to establish its own procedure but takes the view that such discretion cannot be interpreted in a way that would deny the fundamental right of DAA to be heard in a procedure in which an adverse decision is taken against it.

¹ To illustrate the approach being adopted by Ryanair in this process, it is worth noting that in its submission Ryanair has again stated that Pier C cost €150M, while DAA has repeatedly informed the Commission and airport users that this cost is incorrect.

- (d) Whatever the Commission's view on the legality of the process, DAA submits that the Commission (as the direct recipient of the Appeal Panel decisions) plays a crucial role in ensuring that DAA's views (as expressed during the Interim Determination procedure and re-iterated in this document) are correctly balanced against those of Ryanair, bearing in mind the above principles of transparency of reasoning and weight of evidence.
- (e) Indeed, DAA understands that these considerations most likely formed the rationale of the Commission when it declined to, as the Appeal Panel put it, "*vigorously ... defend its decision*". It is clear that the Commission is now in a superior position to the Appeal Panel having access to the views of Ryanair and DAA. To allow the arguments of Ryanair to go unchallenged at this final stage of the procedure would go against natural justice and would, indeed, expose the Commission's decision to further legal challenge.

1.5 Based on the above, DAA therefore submits that the Commission must treat the evidence of Ryanair with caution and must contextualise the apparent support of the Appeal Panel for the views of Ryanair bearing in mind that the Appeal Panel did not have access to the counter-evidence of DAA.

2. AIRPORT CAPACITY

2.1 In the Ryanair appeal, the Panel referred the following matters back to the Commission:

(a) The assessment of capacity at Terminal 1 at Dublin Airport

(b) The consequential assessment of the required capacity for a second terminal

2.2 These items are inter-related insofar as they concern the capacity of Dublin Airport and, for this reason, they will be discussed together. DAA notes that the Panel calls for a detailed and transparent analysis of the capacity of Terminal 1, the consequential capacity for a second terminal and for the Commission to clearly state its conclusions.

2.3 DAA was surprised at the suggestion of the Appeal Panel that the Commission may have considered the capacity of T1 and T2 in isolation. The issues of the capacity of T1 and the sizing of T2 were intrinsic to the development of the T2 programme review and approval from the very beginning. The evidence available to the Commission shows that the combined capacity of T1 and T2 Phase 1 will be approximately 32 mppa. The capacity of T1 was deemed to 18-20 mppa after the construction of T1X. T2 (first phase) will add capacity which will allow the airport to process an additional 11-12 mppa.

2.4 In order to allow the Commission to take an informed decision, DAA has, in this section responded to the arguments of Ryanair by re-iterating the submissions and evidence put to the Commission during the course of the Interim Determination. As noted above, DAA has not before now had the opportunity to respond to Ryanair's arguments and submits that the Commission must take due account of DAA's position in taking its decision.

2.5 DAA would preface its detailed discussion by noting that there is a basic inconsistency in Ryanair's position regarding capacity on the Eastern campus. Ryanair vehemently opposes the DAA T2 proposal as it alleges that the combined T1/T2 capacity will exceed LAP limits. However it appears to have no difficulty in continuing to support, even during the appeal process (see page 18 of Appeal Panel Report) an earlier T2 proposal (with 10mppa capacity), which on the basis of its own declaration of T1 capacity as 26mppa would also be in breach of the limits which Ryanair suggests are mandatory under the LAP. This clearly shows that Ryanair's approach is disingenuous in relation to these issues.

2.6 Ryanair has repeatedly confused the capacity of T1 with the number of passengers currently being processed. The fact that T1 processed 21.6mppa in 2006 does not mean that this is the design capacity of the terminal. The Commission has acknowledged that T1 is operating at an inferior level of service. This inferior level of service reflects the fact that the number of passengers currently being processed greatly exceeds T1's design capacity as evidenced by the fact that elements of the system have in recent years become extremely stressed at peak times and particularly during the summer season. This in turn leads to a lower level of service in the terminal.

2.7 The existing T1 simply cannot deliver a consistent, reliable and acceptable experience for the travelling public with current levels of traffic. Furthermore, the lack of resilience in T1 constitutes a significant risk factor in the case of non-scheduled events (delays, weather, higher than normal aircraft load factors, surface access problems etc.).

2.8 In implementing CIP2006, DAA has proposed to ensure that both T1 and T2 provide a level of service equivalent to IATA Level of Service standard C. IATA is the representative body for the airline industry representing over 240 airlines comprising 94% of scheduled international air traffic. Standard C is generally regarded as the minimum acceptable standard for a terminal facility. According to the IATA, such a standard involves providing "*a good level of service (with) conditions of stable flow, acceptable delays and good levels of comfort*". Indeed IATA recommends Level C Service as "*the minimum design objective, as it denotes good service at a reasonable cost.*"²

2.9 T2 will provide the ability to reliably maintain level of service standards as well as accommodate future growth and furthermore will significantly increase both the service level proposition and resilience in T1.

2.10 In fact, capacity at T1 or any terminal is not a fixed attribute. It may (and does) change if the conditions driving the capacity change. For example, the level of passenger security screening required in 1999 is only a fraction of that required currently (as a result of, inter alia, the fallout from the events of September 11th 2001 including the new EU airport security rules relating to hand baggage and liquids). As a result, spatial requirements for security processing and queuing are much higher today. Similarly, the size of aircraft operated in Dublin Airport has also significantly increased since 1999 (circa 50%), which applies further pressure to check in and security on a flight by flight basis. This means that facilities that were capable of processing passengers at an agreed level of service in 1999 are currently inadequate and subject to significant overcrowding and congestion.

² IATA Airport Development Reference Manual

2.11 As a result, taking into account current conditions, DAA estimates that after the necessary facilities upgrade, which includes the proposed Terminal 1 extension (which is primarily a retail development which supports the new Pier D and existing Pier A facilities), combined with optimum use of the facility by operators, the capacity of T1 will be in the region of 18-20mppa with an appropriate level of service.

2.12 The astonishing suggestion that the capacity of T1 could be considered to be 26mppa has previously been discussed at the oral hearing by the Arup capacity expert Regine Weston. While capacity is often quoted in annual passengers, demand and level of service are really about the peak hour of a planning day schedule. It should be noted that this is not the single busiest day in the year but rather a representative busy day. The approach to converting peak hour demand to annual used by Ryanair is flawed in that capacity is not the same as throughput. The DAA uses the well-recognised 95% busy day (a BAA standard) at the appropriate design service standard for capacity design purposes. Interchanging throughput with capacity results in the illogical conclusion that a facility which has been castigated as being excessively congested by passengers and many airlines (including Ryanair) is now suggested as being capable of accommodating an additional three million passengers. It also follows that the current throughput in T1 is not the appropriate starting point for estimating the size of T2.

2.13 The capacity of T1 when extended will not therefore be 26mppa. In fact, the combined capacity of T1 and T2 Phase1 will be approximately 32mppa.

2.14 As DAA has previously outlined for the Commission³ it should be noted that DAA has been obliged to invest significant resources in T1 even prior to the opening of T2 in order to improve the passenger experience in the airport from the poor levels experienced in recent years due to congestion. A number of extremely significant investments were completed (e.g. Area 14, Departures concourse reconfiguration, Temporary Boarding Gates, Pier D). This, in addition to the deployment of large numbers of Terminal Services Agents to manage queues actively at key points within the terminal, have meant that the DAA has managed to accede to repeated airlines requests for additional capacity by increasing the capacity of several of the key operational areas. It is important to recognise that this, however, does not mean that the DAA has been able to address all of the congestion problems in circulation and retail areas, or deal with seating shortages in some key areas. These aspects of the way in which capacity has been added have not been specifically considered by the capacity review of T1, but these same areas impact significantly on the overall T1 passenger experience. This approach to dealing with congestion is, of necessity, a fire-fighting approach rather than a holistic approach. Such an approach means that capacity dimensions are not developed in a holistic and synchronised manner.

2.15 In addition, even where capacity has been provided in a particular functional area, because of the manner in which airlines and ground handlers operate, we may not be able to use all of this capacity to its maximum extent. Thus, for example, the addition of Area 14 certainly adds check-in capacity to the airport, but may not assist in reducing queues for Ryanair or US carriers, as the capacity is not in the area which these airlines/handlers are able and/or willing to use. This is particularly an issue in a building where there have been extensive modifications to add capacity in particular areas to remedy localised congestion problems. In this regard, IATA planning standards are not sensitive or fine enough to evaluate the effect of the

³ DAA Response to SRI No 2/2007

specific building constraints of a particular terminal (e.g. check-in in two discrete areas). This is not normally an issue, since such planning standards are more commonly used in describing a new building development rather than in re-defining the standards in a building which has been extensively modified.

2.16 Thus, to address the deficiencies which currently obtain and are likely to exist in the future in T1 even after T2 has been opened, it would be necessary to modify T1 once there is adequate headroom in the building. Only then would it be possible to remedy some of the configurational deficiencies which are at present difficult to address due to the current throughput levels and to ensure that service standards would be consistent between terminals and throughout T1. Such modifications could, in fact, reduce the capacity of T1 from current levels, depending on the exact modifications made.

2.17 Terminal capacity is normally discussed in terms of busy hour throughput rather than an annual number, for reasons which have extensively discussed with CAR. The relationship between busy hour and annual is a complex one, as we have also discussed. It is the DAA view that, once T1 has been reconfigured, the annual throughput at an appropriate service standard will be in the region 18-20mppa.

The delay in the provision of a second runway

2.18 As previously discussed with the Commission, the design year for T2 was 2013, at which time R2 was planned to be operable. In other words, when T2 was set to reach capacity, R2 would be available. Ryanair is suggesting that CAR failed to properly account for the fact that the runway would not be operable when T2 is opened. CAR did consult on this point in the interim review draft decision. In the DAA's response to that paper, the DAA pointed out that ARUP had separately carried out a detailed airport wide gating study and an airfield simulation exercise which confirmed that the airside capacity of the airport is capable of supporting the demand forecast for the airport throughout the planning period, subject to execution of the airfield development programme as outlined in the CIP.

2.19 Since Dublin Airport became slot co-ordinated, airlines have filed for slots at a given time and have been rescheduled due to terminal restrictions. Therefore lack of terminal capacity has affected airline operations. The scale of the operational and financial implications of attempting to deliver both a second terminal and a parallel runway at the same time means that it is a most unusual occurrence at airports.

The Local Area Plan

2.20 Despite the suggestions to the contrary in the course of the range of discussions on this issue, Fingal Council has clarified that the LAP was never intended to apply a maximum capacity figure of 30M onto the Eastern Campus. Rather the LAP indicated that once a throughput of approximately 30mppa is reached the next tranche of capacity will have to be considered

2.21 This was specifically noted during the An Bord Pleanála Oral hearing into T2, as verified in the Inspector's report following the An Bord Pleanála hearing as his report states that *"During the hearing (and responding to the inspector's questions) the planning authority explained... The reference in the LAP to 30mppa was an approximate figure, and there was no cap in the (LAP) objectives... They maintained throughout the hearing that they accepted the proposal as put before them, to facilitate up to 35mppa."*

2.22 Furthermore, An Bord Pleanála's decision in relation to T2 was issued subsequent to the Commission's Final Decision on airport charges so no passenger limits contained therein could possibly have been considered by the Commission in reaching its Interim Determination.

2.23 It is also worth noting that the basis on which ABP made its comments on the Eastern Campus capacity related to the inadequacy of current ground transport standards, and indeed it suggested that DAA could apply for planning permission to exceed this 32mppa limit at a future time (e.g. if a Metro link to the airport led to a considerable improvement in transportation to and the airport).

Record of the Commission's consideration of T1 capacity

2.24 DAA sets out below the occasions on which the Commission has considered the capacity of T1:

- (a) In CP6/2004 the Commission stated in Section 5.2.3 "*Independent Studies of Capacity and Operational Efficiency at Dublin Airport*" that it had engaged two independent consultants to consult on this basis.
- (b) As early as September 2004, the Commission's consultants WHA published its approach to the consideration of the capacity at Dublin Airport, entitled "*Technical Summary of the Methodology to be used for the assessment of the current handling Capacity at Dublin Airport.*"
- (c) As part of the Draft Determination in 2005, the Commission's consultants WHA published a document entitled "*Assessment of the 2003/4 Handling capacity at Dublin Airport*", which dealt in a specific chapters with Terminal capacity, and concluded that the current terminal capacity was 19-20 mppa, and that based on the forecast of the time, the existing terminal capacity would be exceeded in 2006/7. It is worth noting that traffic subsequently exceeded the forecast of the time.
- (d) In Annex 8 of the Determination CP3/2005 "Rowson and Hynes Review of the Capital Programme 2005", the Commission noted that

WHA's assessment of the current handling capacity of Dublin Airport involved extensive dialogue with DAA. DAA expressed concern over the capacity assessment methodologies in a detailed submission to the Commission and WHA has responded in detail to the criticisms and comments. We recognise that debate about different methodological approaches is never 'black and white' and that experts are liable to disagree on approaches and assumptions. We note, however, that WHA's capacity output assessments are comparable, and remarkably close in a number of cases, to those put forward by DAA. We have reviewed where the differences lie and taken a cautious approach to our capital expenditure needs assessment where the differences might be material. As well as considering DAA's views in detail, we felt it was also necessary to address them at an overall level based on the three main components of WHA's assessment of Dublin airport's capacity – airside, landside and terminals.

- (e) DAA responded in detail both to the initial and final WHA reports on capacity at Dublin airport in order to highlight its deep concerns at the methodology employed by WHA/IMR despite the fact that the ultimate conclusions of the final WHA report in relation to T1 capacity were, in fact, broadly in line with

the DAA analysis. . One of the main issues that arose between the DAA and WHA was agreeing on how one should move from hourly to annual capacity.

- (f) Prior to the interim review, the Commission commissioned consultants, Jacobs, to undertake a Dublin Airport Capacity Review⁴. In the process of agreeing that Dublin Airport should be slot co-ordinated, it highlighted a number of issues with the terminal capacity⁵. For example:
- (i) “There are likely to be capacity issues that justify active management and temporary facilities on the concourses, at security and Pier A immigration...” (p.70).
 - (ii) “During the peak period the space per person in the pre-check-in circulation area drops to below 2.3m² for 36% of the time. Under the parameters set out in this report, the circulation space should be declared at capacity if the space requirements are not met for more than 20% of the peak period” (p 29)
- (g) This report clearly demonstrated some of the outstanding issues regarding the level of service in T1. Jacobs proposed some solutions to the infrastructural deficits present in the terminal and suggested that pro-active management of passenger flows could also help to address the serious capacity deficiencies in T1.
- (h) Thus it is clear that the Commission considered the issue of the capacity of T1 in the course of the development of the last Determination.

Record of the Commission’s consideration of T2 size and capacity

2.25 DAA sets out below the occasions on which the Commission has considered the capacity of T2:

- (a) In the report of consultants RRV attached as Report No. 4 to the Draft Interim Review Decision, RRV stated that one of the tasks that it had been tasked with was to consider

A review of the DAA terminal sizing calculations and verification for internal consistency based on stated parameters. This assumes an early meeting with DAA and that relevant information is made available in a timely manner:

- A high level view of the capacity that could be obtained from the proposed T2 with a less peaky busy hour based on different assumptions;
- An initial high level estimate of an alternative terminal size based on lower busy hours using approximate Size/Busy Hour ratios;

- (b) In its draft decision CP5/2007, the Commission noted that RRV had been tasked with considering “*what is the appropriate capacity of the T2 terminal*”, and it has summarised the results of this analysis on page 95 in a section entitled “*Assessment of T2 capacity - summary of key findings*”

⁴ Dublin Airport Capacity Review, Final Report, December 2006. Jacobs consultancy

⁵ Dublin Airport Capacity Review, Final Report, December 2006. Jacobs consultancy.

- (c) DAA strongly challenged many of the assumptions in the RRV reports, and outlined its own approach fully in its responses to the draft Determination and Interim Determination.
- (d) The Commission's consultants IMR in its report "*High Level analysis of DAA's investment plans: key issues*" of February 2007 discusses its views of the capacity of T2.
- (e) In CP6/2007, the Commission discussed its view on the sizing of T2 specifically in the section "*Commission's Proposals for the Recovery of Allowed Capital Expenditure*" and in Annex 2 there was further discussion of its consultants response to DAA's comments on the Commission's draft reports, which involved consideration of all of the issues raised. Specifically in this section, the Commission stated that it had specifically made an upward adjustment to the Box 2 threshold in the light of the fact that "*the Commission's estimate of T1 capacity was based on studies conducted prior to recent capacity-enhancing projects in the terminal referred to by Ryanair.*"
- (f) The information outlined above conclusively shows that the Commission did consider the issue of the sizing of T2, specifically in relation to the points raised by Ryanair with the Appeal Panel, despite the fact that the Commission did not respond directly to the points raised by Ryanair during the Appeal process.
- (g) Furthermore, in addition to the detailed discussions on these issues held between the DAA, airlines and the Commission, there were additional exchanges of information and discussion of these issues during the course of the Oral Hearing into the T2 project, held on April 16th 2007, which was attended by the Commission. DAA would specifically direct the Commission to the oral evidence submitted by the Arup capacity expert Regine Weston, and remind the Commission of the discussions held between the various parties in the course of the Oral Hearing.
- (h) The references above have outlined the numerous instances in which there has been as discussion on the specific issues regarding T1 and T2 capacity which were the subject of the referral by the Appeal Panel. It is important to note that DAA has expressed its serious reservations and deep concerns about a range of aspects of the various references cited, and that DAA's views in this regard are unaltered.

2.26 Based on the above, DAA submits that the Interim Determination does not require any variation in order to comply with the Ryanair Appeal Panel decision. All that is required is that the Commission reasons its decision properly in the light of the above.

3. THE “CORRECT” SIZING OF TERMINAL 2

3.1 In the DAA Appeal, the Panel referred back to the Commission the assessment of:

(c) the “correct” sizing of the Terminal 2

3.2 In DAA’s appeal, the Panel has specifically provided that the Commission should take account of and demonstrate that it has taken account of the factors put forward by DAA regarding the flawed analysis carried out by RRV. It is clear that the Commission cannot simply conclude on the basis of its own consultants’ work that T2 is “over-sized”, it must objectively and transparently explain why the DAA evidence on the size of T2 is inaccurate.

3.3 DAA refers to the information already provided to the Commission during the Interim Review and the evidence put forward during the appeal procedure, as well as correspondence relating to Statutory Requests for Information⁶ To assist the Commission in reviewing its Interim Determination in light of the findings of the Panel, DAA sets out below a summary of the relevant submissions and evidence.

- (a) Based on the above information on the sizing of T1, the issue of over-sizing of T2 does not arise.
- (b) DAA believes that it has demonstrated that the evidence upon which the Commission based its conclusion that T2 is oversized was flawed and it calls on the Commission to re-assess the information available to it at the time when the Interim Determination was made. DAA’s submissions during the appeal panel process may be of assistance to the Commission in carrying out this review.
- (c) To ensure that its assessment of the appropriate size for its second terminal was undertaken in the most professional and robust manner, DAA engaged renowned airport planning experts Arup. Such expertise and experience was deemed to be necessary in order to assist in the development of an airport development programme which would be capable of meeting the challenging requirements of passengers and specifically to address the capacity problems at Dublin Airport. A 12 month review involved detailed interactions with the airport’s key users concerning their growth plans and an extremely detailed specification was developed. The data presented by DAA and its advisors was developed in line with best practice in airport planning on a global basis and is predicated on the many years of experience of the team of consultants which DAA employed in order to ensure that the case would be well-developed.
- (d) T2 has been designed to ensure that the airport as a whole can process expected passenger growth at an acceptable level of service. Terminal sizing must reflect both opening demand as well as consider how rapidly this demand is expected to grow. The terminal size is usually set midway along

⁶ DAA Response of 22/12/2006 to a range of forecasting queries raised by Bridin O’Leary in a letter dated 7/12/2006; DAA/Arup Presentation to the Commission of 5/10/2006.

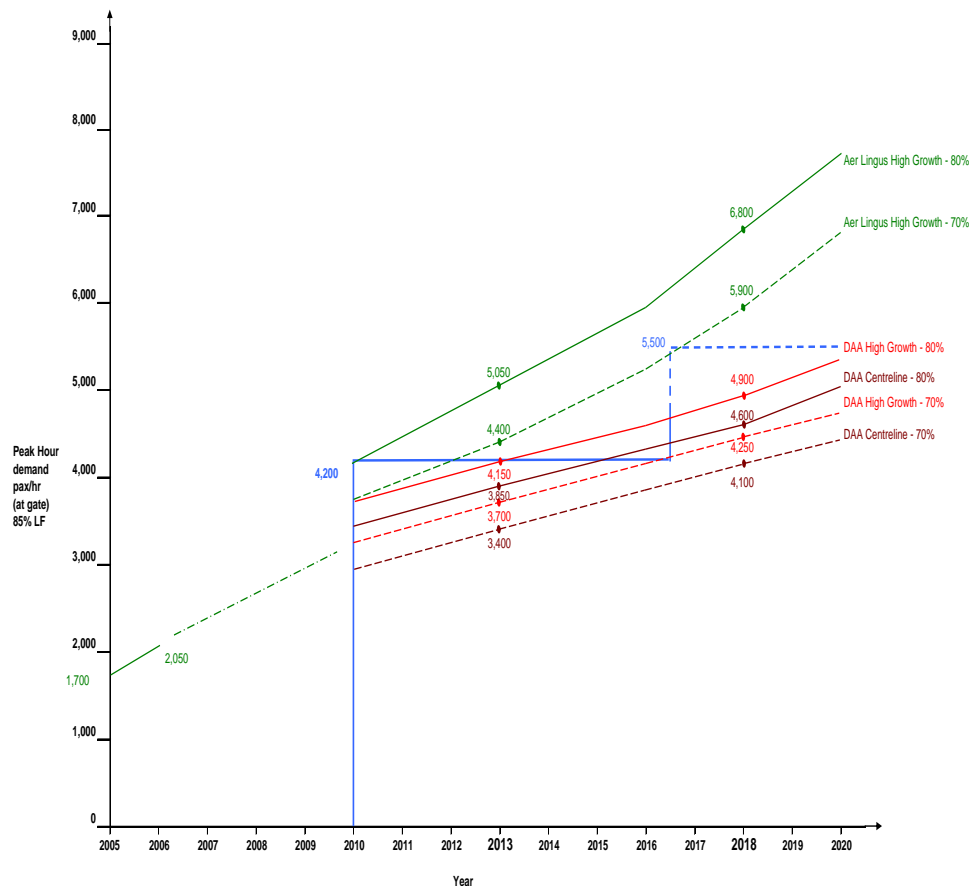
the demand curve for a specific terminal lifetime, so that for a number of years demand will be below the planning capacity (*i.e.*, there will be a higher level of service than the target), and for a number of years demand will exceed the planning capacity (*i.e.*, there will be a lower level of service than the target). In this context, a range of growth scenarios were developed by DAA and Arup on the basis of input from prospective T2 tenants regarding their future plans and facilities requirements, and a design planning hour of 4200 was developed.

- (e) If airport capacity were delivered on a “just in time” basis, there would be a constant series of relatively small capacity development projects underway. However, given the complex nature and scale of airport development, this would neither be a practical nor cost-efficient manner of delivering large scale capacity. Hence a key decision for an airport is how much headroom is required.
- (f) DAA notes that the Appeal Panel concluded that DAA had failed to demonstrate that there were *economies of scale associated with building T2 with excess capacity* but this is inaccurate. DAA has previously outlined how extending a facility is inherently more expensive than constructing a facility with appropriate headroom as part of a major project. The cost of building work would be higher as the work is more disjointed and the economies of scale which would be achieved on a substantial project would be lost. DAA estimates that these cost drivers could add a premium of 15-20% to the future building works even before inflation is taken into account. It was clearly stated that it was on this basis and following full consideration that DAA took the view that the correct balance had been achieved in constructing a Phase 1 terminal building of 75,000 sq m.
- (g) The planning year for T2 is 2013, although it is due to open in 2010. As the timescale for delivery of additional capacity at an airport is typically in the range of two-three years, and it is not in the best interests of the airlines, airport authority or the travelling public to be in a constant state of construction, it is common in well-designed airport to plan to the midpoint of a 5-6 year horizon. That means that when T2 opens, for a few years, it will experience a level of service better than C, for the design year (2013) it will operate at its design level of service and, it will then decline to a lower level of service until additional capacity is provided (expected 2018). Thus the current timing of the runway is compatible with the expectation that T2 will reach its planning standard in 2013
- (h) The simplistic approach to terminal size analysis adopted by the Commission’s consultants has been consistently challenged by DAA. The “design by ratio” approach is incapable of replacing the best-in-class approach advocated by DAA and its consultants and summarised above. Many of the problems identified by DAA can be ascribed to the lack of consultation between the Commission’s consultants and DAA. The first opportunity offered to DAA to examine and comment on the consultants’ work was after publication of their draft reports, which led inevitably to a confrontational interaction. Specifically, the Commission’s consultants have incorrectly identified the 95% busy hour, as well as making other errors, which means that its analysis and review is predicated on a fundamentally flawed

basis, and hence the Commission's conclusions regarding the over-sizing of T2 are not robustly founded.

- (i) The appropriate size of T2 is also a function of the profile of traffic at the airport, as discussed in detail by Regine Weston at the Oral Hearing in relation to T2, during which she explained that the market airline market share at Dublin airport is dominated by two airlines – Ryanair with 40% and Aer Lingus with 37%. The other airlines combined have a total market share of 23%. Airlines normally wish to localise all operations within one terminal where possible for logistical efficiency reasons.
- (j) Since the residual traffic apart from the two major airlines comprises just 23%, moving the “other” airlines to Terminal 2 would not provide the necessary headroom in Terminal 1 for an appropriate Level of Service. Thus the only practical options are to move either Aer Lingus or Ryanair and based on the market share at the time, the terminal had to be sized to accommodate at least 37% of the total traffic.
- (k) It is worth pointing out that the question of whether T2 could or should be reduced in scale was specifically discussed in the Inspector's report following the An Bord Pleanála hearing in which the Inspector stated that *“I do not consider a condition as suggested by the Ryanair team to restrict Terminal 2 to 10mppa to be appropriate or realistic, given the market share of the two dominant airlines, and the considerable public expenditure involved in planning and construction of a terminal facility.”*
- (l) In Ryanair's submission, it frequently notes that CAR's consultants (VML) believes that T2 was oversized by 40% to 56%. It should be noted that the 56% figure is derived from calculating the size of a terminal for 11.4m passengers based on the operational profile of all airlines except for Aer Lingus. This may have some academic interest but since all airlines except for Aer Lingus already exceeded 11.4m passengers in 2006 (around 13.9m passengers), this quantity has little practical use when studying the capacity of T2. Reducing the airlines in this non-Aer Lingus group so that they could fit into an 11.4m capacity terminal would change the operational profile of this group and thus, using the new operational profile, VML would have got a different (bigger) size for T2. Simply put, VML should never have analysed the size of T2 (sized at 11.4m passengers annually) based on this non-Aer Lingus subset
- (m) The DAA noted in its submission to the Appeal Panel that VML made mistakes calculating the 40% figure also. Fixing these errors would have increased the size of T2 calculated by VML by between 13% and 16%. Aer Lingus supported the plans for T2 as meeting its requirements for efficient capacity expenditure. Because one airline has vigorously opposed the plans for T2, this support from other airlines should not be overlooked when validating that the size of the terminal as appropriate.

3.4 DAA has already provided to the Commission and to airline users in the Gateway 2 document the basis on which the design busy hour was constructed, which is summarised below.



- (a) Three forecast scenarios were examined to determine the extent of traffic to be accommodated in Terminal 2 for opening Phase 1 and a subsequent Phase 2 – DAA Centreline, DAA High Growth and Airline Growth Strategy. As noted, in order to allow for some growth at a reasonable level of service after opening, the initial phase is sized to accommodate traffic projected for 2013. Similarly, the second phase is sized for traffic projected for 2018 although the actual timing of this phase may be adjusted depending on how demand emerges over time.
- (b) For Terminal 2, the key forecast parameters for terminal sizing are the number of Dublin-based aircraft and the percentage of those departing in the morning peak hour. The number of Dublin based aircraft differs for each of the three forecasts. In addition, two proportions of the based aircraft departing in the peak hour were considered, 70% and 80%. 70% is the percentage of Aer Lingus' based fleet departing in the peak hour currently. 80% was considered a reasonable sensitivity case given the current percentage and the operating imperative to launch as many of the based aircraft in the early morning period as possible.
- (c) For the Airline Growth Strategy case, the 5% to 10% range in the annual growth of the A320 fleet has been simplified to the midpoint at 7.5%. For 2013, taking the average of all the forecasts and applying a +/- range of 5% yields an expected peak hour departures demand of between 3,885 and 4,294. Taking the midpoint in this analysis gives a value of 4,144, which was rounded up to 4,200.

3.5 It is clear from the preceding sections that the approach adopted by DAA in developing the appropriate size for T2 was robust and in line with best practice. It therefore was not appropriate that the Commission did not accept the approach presented by DAA and instead opted to accept advice based on a superficial and flawed analysis by its consultants, without explaining its reasoning in so doing.

3.6 The Panel said that it is concerned that “*permitting what may be a greatly oversized Terminal 2 does not facilitate the efficient and economic development of Dublin Airport and might give rise to a risk of financial viability of the DAA*”. In response to this, DAA notes that (i) as per the above, T2 is not oversized; and (ii) the Panel seems to have misunderstood the consequences of any decision not to remunerate DAA for T2. The point at which DAA was in a position to revise the size of T2 has long passed – due to the timing of the Aviation Action Plan. It would be the failure of the Commission to remunerate DAA for T2 that would endanger DAA’s financial viability.

3.7 In the above circumstances, DAA believes that the Interim Determination requires amendment to take account of the correct sizing of T2 as per the evidence submitted by DAA during the course of the Interim Review.

4. CONTINGENCY COSTS

4.1 In the DAA Appeal, the Panel referred back to the Commission:

(e) the decision to exclude €25 million in respect of contingency costs in reaching its determination;

4.2 As set out above, the approach of the Commission in relation to the DAA grounds of appeal require that the Commission must not accept the views of its own consultants over those of DAA’s consultants without clearly explaining why it is doing so – i.e., the Commission should only depart from the expert view of DAA’s consultants where the relevant findings can be shown to be inaccurate. The Panel clearly states that the Commission should not have accepted the views of its consultant in respect of contingency costs over those of DAA without clearly stating why it prefers one view over the other. This was particularly so in circumstances where the government appointed independent verifier had accepted the €25 million contingency and the RV report suggested that an independent review of its tentative conclusion be carried out.

4.3 DAA refers to the information already provided to the Commission during the Interim Review and the evidence put forward during the appeal procedure. To assist the Commission in reviewing its Interim Determination in light of the findings of the Panel, DAA sets out below a summary of the relevant evidence.

4.4 In its Interim Review Decision, CAR reduced the allowed project contingency costs for T2 by €25 million on the basis that if DAA’s full projected contingency costs were allowed this would result in contingency costs in excess of 20% of construction costs, an amount considered too high.

4.5 The Commission’s opinion in this regard was informed by work commissioned from the firm of consultants RR&V. RR&V concluded that the T2 contingency cost provision projected by the DAA “*appears to be relatively high*” they suggested that a

typical level of cost contingency would be a 15% margin in the early design stage falling to 10% for the construction phase. However this view was not substantiated with reference to airport or other relevant examples of an appropriate scale.

4.6 DAA believes that RR&V did not provide the Commission with an appropriate basis upon which to reject the detailed analysis provided by DAA and its experts that fully supported the level of contingency allocated to the T2 project. DAA outlined this position to the Commission in response to its draft decision CP5/2007⁷.

4.7 DAA upholds the view previously outlined to CAR that its consultants employed a best in class scientific approach to enable them to establish a meaningful, quantitative, risk based contingency to underpin the cost estimates for the T2 project.

4.8 DAA's consultants conducted a range of risk workshops, attended by a multi-disciplinary team of project management, design, operations and construction experts and chaired by an expert in the use of statistical methods for quantification of project related risks. The project contingency was computed based on the 80th percentile derived from the application of a Monte-Carlo simulation model. The assessment was independently reviewed and assessed by DAA's Programme Management Team – Turner and Townsend. DAA supplied full facts about the process undergone in addition to the project's detailed risk register to RRV. DAA received no queries in respect of this information from CAR or RRV.

4.9 Discounting / disallowing an element of the T2 cost plan, which is the product of a proposition that:

- (a) had been developed to planning stage following 8 months of detailed assessment and value engineering;
- (b) comprised a range of inter-related major projects which had been the subject of detailed constructability studies which reflected the unique nature of the site, the critical path requirements, project interdependencies and operational impact assessment; and
- (c) had been subjected to a comprehensive quantitative risk assessment which reflects the unique and specific attributes of the development environment at Dublin Airport.

is unreasonable and inappropriate, and totally ignores the challenges and complexities of the programme in question.

4.10 DAA's contingency provision for T2 is in line with international precedent, for example in its regulatory review of the BAA London airports, the UK Competition Commission recommended⁸ and the CAA accepted a 25% contingency uplift for all capital expenditure projects planned for the fifth quinquennium. Similarly the UK Office of Rail Regulation has accepted a contingency allowance of 20%⁹.

⁷ DAA Response to Draft Decision Interim Review of 2005 Determination on Maximum Levels of Airport Charges at Dublin Airport. CP6/2007 21st June 2007 Pages 43-44.

⁸ Competition Commission A Report on the Economic Regulation of the London Airports companies (Heathrow Ltd and Gatwick Ltd) page 49 Appendix F page 35.

⁹ Office of Rail Regulation, "Periodic Review 2008: Draft Determinations", June 2008 page 152.

4.11 Based on the above, DAA submits that the Interim Determination requires amendment to ensure the inclusion of the €25 million contingency costs in the RAB.

5. AIRFIELD PROJECTS

5.1 In the DAA Appeal, the Panel referred back to the Commission:

(f) the decision to exclude certain airfield projects costs in the determination under appeal;

5.2 In this regard, the Panel provided clear guidance to the Commission that the sum of €4 million in respect of airfield projects could not be excluded without transparent reasoning. As above, it is clear that the Commission cannot simply substitute the views of DAA with those of others without showing clearly why DAA's reasoning is erroneous.

5.3 DAA refers to the materials provided to the Commission during the Interim Review process and the Appeal Process. To assist the Commission DAA also reiterates the evidence as to why all costs should be included and submits that the Interim Determination requires amendment to ensure inclusion of all airfield costs.

5.4 In its Interim Review Decision CP6/2007, CAR failed to provide any apparent reasoning or justification to support its deduction of €4 million from the capital expenditure allowance for DAA airfield projects. DAA can only speculate that this decision related back to a revision of CAR's earlier proposal contained in its draft decision CP5/2007 where it included a reduction of €17 million in the allowance for airfield projects. The apparent basis for this original reduction was the Commission's consultants RRV's conclusion that there appeared to be significantly greater value to be obtained at the tender stage for certain airfield projects. This was due to the fact that tender costs were returned were below the benchmark average for one specific airfield project and the assumption that this was a trend that was likely to continue.

5.5 DAA responded to the draft decision by providing further information to discount this assumption¹⁰. CAR subsequently revised its draft decision to take account of this additional evidence. DAA believes that there is no basis upon which to continue to reduce its allowable capital expenditure for airfield projects by €4 million in its final Decision and that this exclusion was simply an oversight.

5.6 It is therefore appropriate that CAR vary its Interim Review Decision to reinstate this €4 million capital expenditure into the RAB in accordance with the findings of the Aviation Appeal Panel.

¹⁰ DAA Response to Draft Decision Interim Review of 2005 Determination on Maximum Levels of Airport Charges at Dublin Airport. CP6/2007 21st June 2007 Pages 47-49.

6. CAPITAL EXPENDITURE IN BOX 1 AND BOX 2

6.1 In the Ryanair Appeal, the Appeal Panel referred back to the Commission:

(d) the consideration of the appropriate T2 associated projects capital expenditure which should be included in Box 1 or Box 2;

(g) the consequential appropriation of capital expenditure into Box 1 and Box 2, particularly the treatment of Pier E as either part of Box 1 or 2;

(h) the remuneration of Box 2

6.2 DAA considers it appropriate to consider the above grounds of appeal together.

Preliminary comments

6.3 DAA has already put its views regarding the two-box approach and the use of triggers on record and it does not intend to repeat its views here. Instead (and in accordance with the scope of the current consultation), DAA will limit itself to commenting on the specific issues referred back to the Commission.

6.4 In referring the above grounds back to the Commission for review, the Panel put forward its own conclusion that there should be no remuneration of capital in respect of Box 2 until the trigger of 33 mppa has been reached. Clearly, it is the role of the regulator and not an Appeal Panel to reach such a conclusion. DAA also notes that the Panel arrived at this conclusion on the basis of one-sided argument and that, in particular, DAA (a party adversely affected by the finding) was not given the opportunity to comment on the views put forward by Ryanair.

6.5 As per DAA's submission above, DAA considers that the Commission must treat the arguments put forward by Ryanair with caution and use the opportunity of the current review to correctly balance the views of Ryanair against the submissions and evidence put forward by DAA.

6.6 The importance of this need to correctly balance the view of DAA is underlined by the serious consequences that would flow for DAA as a result of any downward adjustment in the level of expected remuneration in the middle of a regulatory period.

6.7 The Commission previously stated and recently reiterated¹¹ that it would need "*a very strong reason to move away from what is set out*" in relation to the remuneration of T2 and the structure of the Box 1/Box 2 model. DAA submits that the one-sided views of the Appeal Panel which were based on the arguments of Ryanair, with no opportunity for DAA to counter-argue, cannot constitute a strong enough reason for the Commission to move away from the existing format of remuneration in the Interim Decision. More particularly, DAA's sustainable financial viability would be adversely affected by the uncertainty that such an adjustments to the existing level of remuneration would create. The Commission is statutorily bound to consider the

¹¹ Meeting with Standard and Poor's on the 5th December 2008

impact such a downward adjustment might have on DAA's sustainable financial viability. In further detail:

- (a) DAA's credit profile and ability to access optimal, long term, un-covenanted debt finance is affected by lack of clarity in the regulatory process. The consistent practice of regulators in other jurisdictions has been to review investment plans before they are finalised to determine if they will be allowed into the RAB. That allows the operator to build the facility after the decision on the RAB has been taken which also allows it to fund that expenditure, since otherwise the financial markets will be loath to advance financing for a project that might not be remunerated.
- (b) Other parties to the regulatory contract also recognise the necessity to act in a consistent manner in relation to the remuneration of investment and the potential adverse consequences of not doing so. For example, Aer Lingus in its response to CP1/2007 noted as follows "*it is obvious that it would be completely irresponsible of CAR to arbitrarily change the amounts allowed for the development of T2 in the middle of the construction process...it is essential for the regulatory system to have credibility with all interested parties, including the providers of finance to the DAA.*"
- (c) In his judgment in the Judicial Review, Mr. Justice Clarke pointed out that "*if decisions have to be made against an unclear regulatory framework then that can only mitigate against financial viability.*"¹²

DAA's financial viability

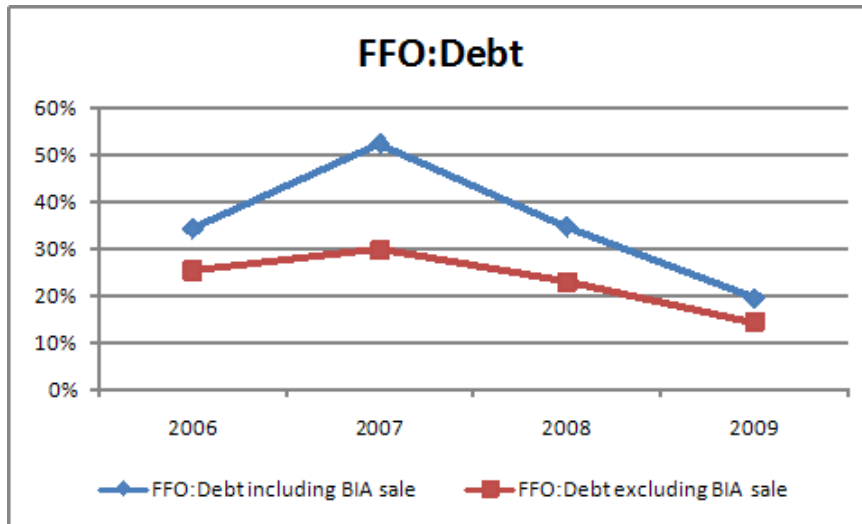
6.8 It is the understanding of DAA that the Commission's approach to the allocation of capital expenditure in Box 1 and Box 2 was informed by a consideration which included – in addition to the views of Ryanair – the financial viability of DAA as well as the Ministerial Directions of the Minister of Transport. Against this background, and without prejudice to DAA's views on the two-box approach, DAA considers that the matters referred back to the Commission in the Ryanair appeal do not require any amendment to the Interim Determination. Rather, all that is required to meet the standards of the legislation is for the Commission to reason its conclusions more transparently.

6.9 To assist the Commission in its reasoning, DAA sets out below what it understands may have informed the Commission's view:

- (a) The counter-balancing impacts of different elements of the building blocks (additional capex, pax numbers, SFV etc.) as quoted in Section 6.19.8 of the Decision. It is worth noting that reopening any single element of the decision further would necessarily require a reconsideration of the consequential need for change in the others.
- (b) Given the trajectory in DAA's financial ratios, a change in the appropriation of capital expenditure by way of increasing the size of Box 2 would not have facilitated the Commission in meeting its statutory obligation to enable DAA to operate and develop Dublin Airport in a sustainable and financially viable manner.

¹² Ryanair v Commission for Aviation Regulation [2008] IEHC 98 (11 April 2008), para. 9.8.

- (c) DAA's financeability position and the fact that DAA's improved FFO:Debt ratio and the subsequent decision by S&P to take DAA off negative outlook came about following the improvement in DAA's finances that resulted principally from the reduction in group debt levels arising from the sale of DAA's holding in Birmingham Airport, an asset which was never part of the regulated till. Without that sale, the FFO:debt ratio would almost certainly have breached the S&P guideline boundary. The graph below illustrates the FFO:Debt ratios that would be pertinent in the absence of the asset sale and illustrate that without it DAA's ratios would currently be below the level required by the rating agencies. This situation would have been further exacerbated had CAR decided to push a greater level of expenditure into Box 2.



Pier E

6.10 The Panel has suggested that CAR should consider afresh whether the facilities proposed for Pier E, in particular, suffer from the same over-sizing (assuming same to exist) as Terminal 2.

6.11 The Panel stated that it did not share the view of the Commission that the DAA's response to the Interim Decision was persuasive, however DAA was not afforded an opportunity to persuade it. In fact, this conclusion was reached following a review of the Ryanair case in isolation. To assist the Commission, DAA sets out below the salient issues:

- (a) DAA understands that CAR's rationale for Box 2 was that a certain element of the T2 project was allegedly oversized and was not immediately required to meet airport users' demand requirements. However this premise is not relevant in relation to the Pier E project which is not in any way oversized. It would therefore be inappropriate for any capital expenditure relating to Pier E and its enabling works to be diverted to Box 2.
- (b) DAA submitted in its response to the Interim Review Draft Decision that the Airport Gating Study¹³ which was prepared over the course of six months by

¹³ DAA Airportwide Gating, 2007-2010 Results, Ove Arup & Partners Ltd, 2006

consultants that are expert in this area and provided to CAR as part of the CIP submission, had illustrated that there was an acute shortage of gate served stands at Dublin Airport. The Gating Study indicated that this contact stand shortage would continue right up to the opening of Pier E with a significant number of wide-body aircraft and first departures having to be gated on remotes. This would mean a sizeable bussing operation to bring passengers to these gates, which users are opposed to on cost grounds.

- (c) This lack of contact stands significantly constrains the ability of Dublin Airport to meet the needs of its airline users. Pier E capacity is therefore fully required to satisfy existing and forecast demand.
- (d) Furthermore, the BAH Report on Operating Costs prepared for the Commission's 2005 Determination indicated the scale of towing at Dublin Airport, particularly in the morning peak. This leads to significant added operational complexity for ATC, DAA and the airlines, and can contribute to increased airline delays. Such impacts will also be reduced once Pier E is opened.
- (e) In its final Interim Review Decision CP6/2007, CAR concurred with DAA that there was no justification for the inclusion of any element of the €157 million capital expenditure relating to Pier E in its two Box approach.

6.12 DAA believes that no further evidence has been established during the Aviation Appeal Panel process requiring a revision of CAR's Interim Review Decision to appropriate Pier E into Box 2. Indeed in the period since the Determination the Commission's decision in relation to the requirement for Pier E has been verified as users have requested that DAA retain the Temporary Boarding Facility (which was originally supposed to close when Pier D became operational) until Pier E is constructed because existing demand for contact stands cannot be satisfied without additional infrastructure. The Commission should therefore confirm its decision in respect of the exclusion of Pier E from Box 2.

7. DEPRECIATION

7.1 DAA notes that the Panel's findings on depreciation in the DAA Appeal were not specifically included in the Commission's consultation document. DAA notes that this does not relieve the Commission of the duty to review the Interim Decision as per the Panel's findings. The Panel specifically provided that, to the extent that the Commission uses a unitised method of depreciation "*it should ensure that the adoption of such an approach does in fact deliver the profile expected by the Commission*". The Panel also provided that the unitised approach "*should be confined to projects which are clearly T2 associated projects*".

7.2 The above findings will necessarily entail an amendment to the Interim Determination and DAA sets out below information to assist the Commission in undertaking this.

- (a) In its response to the draft Interim Review Decision, DAA expressed its concerns to CAR regarding the methodology it proposed to use in relation to

the implementation of a unitised approach to depreciation of T2 projects¹⁴. It is clear that, contrary to the Commission's stated intention¹⁵, the application will mean that passengers will not pay the same rate for the whole period of the asset life.

- (b) CAR's calculation appears to be based on an estimate of the incremental passengers above the assumed "comfortable capacity" level for T1. The result is that costs per total passenger will in fact increase over time, to the point where total capacity estimated by the Commission is reached, and will reduce thereafter. DAA believes that the Commission's proposed application produces a peaked charge per passenger rather than a flat profile as anticipated and intended.
- (c) The Commission can address this unintended outcome, by basing the calculation of unitised depreciation on the total passenger numbers at the airport. This approach would be appropriate given that the opening of T2 will deliver benefits to all passengers at the airport, providing both additional capacity in T2 and an alleviation of congestion in T1. It will also allow for a more even spread of the depreciation charge across all future passengers in line with CAR's stated objective.
- (d) DAA also refers to the list of projects previously provided to CAR as part of the company's response to CP6/2007¹⁶. These projects were incorrectly identified as being T2 associated projects for the purpose of applying unitisation to depreciation charges. In fact, the projects concerned are either not associated with T2 or they are required to support the wider airport development programme as they relate to the provision of utilities and services, which support airside and T1 enhancements in addition to T2 and the piers. There is therefore no justification for applying a unitised depreciation charge to these highlighted projects.
- (e) DAA therefore requests that CAR vary its Interim Review Decision so as to correct its methodological approach to the implementation of a unitised depreciation charge for T2 projects and to limit the application of unitisation to projects which are T2 associated projects in accordance with the recommendations of the Aviation Appeal Panel. To the extent that the depreciation methodology and application should be reviewed in the next Determination, it may be possible to make the necessary amendments at that stage and signal this in the response to the Appeal Panel.

¹⁴ DAA Response to Draft Decision Interim Review of 2005 Determination on Maximum Levels of Airport Charges at Dublin Airport. CP6/2007 21st June 2007 Pages 59-63.

¹⁵ "Unit cost-basis – whereby allowed investment costs are recovered equally across all forecast airport users" page 105 CP5/2007. Also described in the Commission's presentation to DAA Board on 11 June as "Depreciate T2 on a unit cost basis – Share the costs of T2 equally across all future passengers".

¹⁶ DAA Response to Draft Decision Interim Review of 2005 Determination on Maximum Levels of Airport Charges at Dublin Airport. CP6/2007 21st June 2007 Pages 62-63.

8. CONCLUSION

8.1 DAA submits that the above makes it clear that:

- (a) In relation to the Ryanair appeal, no change is required to the Interim Determination. In order to comply with the decision of the Appeal Panel, the Commission must state its conclusions more transparently. Given the one-sided process followed by the Panel, it is incumbent on the Commission to now ensure that the evidence of DAA is correctly balanced against the arguments of Ryanair;
- (b) In relation to the DAA appeal, the Commission must amend the Interim Determination having shown due regard to the evidence put forward by DAA.
- (c) DAA also makes the following closing remarks:
 - The airport charges for 2009 have already been set and DAA is required to comply with the price cap for the period. If the Commission decides to vary its decision with the implication that a four year adjustment will be required to be made in the remaining nine months to the end of the year this would introduce a significant discontinuity in charges levels and result in disruption to DAA and to airport users. In this context, if CAR decides to make any adjustments to the prevailing price cap it should explicitly allow for any related over/under recovery to be carried forward into the next regulatory price control period.
 - DAA welcomes the fact that the Panel cited the Ministerial Direction of April 2007 and believes that this underlines the importance that must be attached to such directions. The Commission must comply with Ministerial Directions and must ensure that, in complying with its statutory functions, it ensures that it meets the requirements of the Ministerial Direction.
 - DAA notes that the Appeal Panel suggests that there would be merit in a meeting at which DAA, Ryanair and the Commission (together with their respective consultants) would discuss the differences between their views on the capacity of Terminal 1. While DAA would make itself available for any meeting that the Commission considers appropriate, DAA submits that such a meeting: (i) is not required; (ii) has no foundation in the legislation; and (iii) would, in fact, amount to a breach of the legislation insofar as the Panel suggests that a meeting involving only a single party who have in fact declared that they have no interest in utilising T2. The task of the Commission is to assess and transparently reason its decision based on the evidence available to it. The important guiding principle is that the Commission must not simply adopt its consultants' views over the views of DAA and it is not necessary to organise a meeting in this regard.