

Associated Projects. Given that it was agreed by all users that additional gate served stands were required at Dublin Airport, DAA submitted to CAR that, given the demand, no overcapacity was envisaged for the Pier E facility and it would be required even in the absence of T2. CAR accepted this argument and removed Pier E from the Box 1/Box 2 formula. However it continued to apply a unitised depreciation approach for the project which is inconsistent and inappropriate. Furthermore, some of the projects included in the T2 Associated Projects grouping are either not connected to T2 or are required to support the full development programme. Therefore DAA believes they should not be incorporated in the unitisation process but depreciated on a straight line basis. Appendix 4 provides details of the projects concerned and gives reasons why these projects should not be subject to the unitised approach to depreciation.

6.40.9 DAA estimated that the effect of the introduction of the unitisation approach to depreciation in relation to T2 and its associated projects was a reduction of more than €1 in the average per passenger price cap in the period 2010-2014 when compared with the use of conventional depreciation. DAA believed that the introduction of this unitisation approach to depreciation of capital costs would also add considerably to the degree of risk experienced by the company going forward and therefore it believed it ran contrary to the Commission's statutory objective to enable a sustainable and viable Dublin Airport.

6.40.10 DAA submitted that the foregoing demonstrated

“that the use of a unitised method of depreciation was based on flawed understanding of its impact and that its use threatens to undermine the ability of DAA to develop Dublin Airport in a sustainable and financially viable manner.

DAA submits that the Panel should direct the Commission to re-assess its policy on depreciation in light of the specific submissions made by

DAA in the course of the Interim Review Procedure and the impact of a unitised method of depreciation on DAA's ability to develop Dublin Airport in a sustainable and financially viable manner. Specifically the Panel should recommend that, if unitisation is retained, Pier E and the projects inappropriately associated with T2 should be excluded and treated in accordance with a straight line approach. To avoid distortion of the outcome intended by the Commission, the Panel should also recommend that the calculation is based on total airport passengers."

6.41.1 In its response the Commission summarised the DAA approach as:-

The DAA have sought a referral of the Commission's use of unitised depreciation for the following reasons:

- *The Commission's approach will not deliver the charges profile envisaged by the Commission. Unit depreciation should be based on all passengers.*
- *Backloading of charges has significant implications for DAA's finance risk and overall financability.*
- *Pier E and some T2 associated projects should be excluded from unitised depreciation.*
- *The introduction of unwarranted complexity in the regulation process.*
- *Implemented by CAR without consideration of impact on DAA's remuneration or rates paid by passengers.*

and addressed each in turn.

6.41.2 With respect to the charges profile, it asserted:-

“While the charges profile can vary according to whatever approach to depreciation is adopted, in present value terms the DAA is only ever remunerated for the original capital outlay. The question here is one of whether the DAA receives more of the T2 revenues in the early years of T2-usage, as opposed to later years. The approach adopted by the Commission was to allow the DAA to collect more revenues in the later years, in line with projected passenger growth at the airport and therefore greater T2-usage.

The charges profile created by the unitised depreciation approach will vary depending on the choice of the demand threshold at which it is determined passengers begin to benefit from T2. The DAA argues that all passengers benefit equally from T2, therefore this threshold should effectively be zero. One view submitted by a user (Ryanair) was that T2 was not actually required until annual passengers at the airport exceeded 25 million. In other words, T1 could cope with up to 25 million passengers per annum, before T2 was even likely to be required.

The Commission was aware of the profile of charges that arise from its choice of thresholds and presented the charges profile to DAA and to users at a series of workshops held during the consultation process. The thresholds were finalized after the receipt of reasoned submissions from the DAA and users (mainly Ryanair), as summarized above. These submissions were made after the Commission provided the DAA with its full financial model, as well as a scaled down “ready reckoner” to airport users. Both the full model and the ready reckoner generated the charges profile identified by DAA.

6.41.3 With respect to backloading charges, the Commission stated:-

The Commission was aware of this issue and referred to it in CP1/2007 (February 2007, Exhibit 2) when discussing possible depreciation approaches (see Section 3.3). The Commission also refers the Panel to statements it made in the final decision of the Interim Review regarding the commitment of the Commission in future to decisions it makes today. These views are set out in Section 3.5 of the CP6/2007 (July 2007, Exhibit 11), in particular pages 43 to 45. Page 22 of the final decision also highlights the Commission's approach that in considering any changes to remunerating capex it would be conscious not to create cash-flow difficulties for the DAA.

It must be noted that despite the DAA's assertion of the risks associated with backloading, the DAA has proceeded with CIP2006. The board of the DAA opted to undertake the investment programme in the full knowledge of the associated risks. The Commission presented its approach to depreciation to the board of the DAA in July 2007 and the Commission refers the Panel to this presentation (attached as Exhibit 23).

6.41.4 With respect to the assertion that Pier E and some T2 associated projects should be excluded from unitised depreciation the Commission stated:-

The DAA made this point previously as part of its response to the draft decision (attached as Exhibit 24). Despite the DAA submissions, the Commission's response was to continue with the proposed unitisation approach for all projects related to the T2 build, i.e. including Pier E and T2 associated projects. The motivation for this decision is outlined in the final decision paper on the Interim Review (CP6/2007, Exhibit 11), specifically pages 22-23. In addition, the following documents informed the Commission's thinking:

- *February 2007 – CP1/2007 (Exhibit 2), Consultation on Dublin Airport Charges following the Capital Investment*

Programme 2006 – 11-16.

- *May 2007 – CP5/2007 (Exhibit 8), Draft Decision of Interim Review – Section 6.2, pages 74-76.*

6.41.5 With respect to the DAA assertion that there was an unwarranted introduction of complexity in the regulation process the Commission stated:-

“The Commission denies that the unitisation approach introduces unwarranted complexity. The Commission is entitled to decide whichever approach to depreciation it feels is appropriate, as guided by its statutory duties under the Act. As outlined on pages 75 and 76 of the draft Decision Paper on the Interim Review (CP5/2007, May 2007, Exhibit 8), there is a range of precedents for adopting a unitised (or back-loaded) approach to remunerating capex in a regulated setting. For example, at Amsterdam-Schipol airport, where, by law, the remuneration of capex in excess of €100m follows such an approach.”

6.41.6 With respect to the DAA assertion that the decision was implemented by the Commission without consideration of the impact on DAA’s remuneration or rates paid by passengers, the Commission stated:-

The level of consideration given to these issues is evident from the discussion of post-2010 charges in CP5/2007 (May 2007, Exhibit 8) and presentations given by the Commission to the DAA, the DAA board and airlines (Presentation to AOC, attached as Exhibit 28).

While there is no reference to post-2010 charges in CP6/2007 (July 2007, Exhibit 11), the decision not to discuss charges for the next determination in that document was made based on a consideration of submissions by Ryanair and the DAA and the DAA’s financial advisers in response to CP5/2007 (May 2007, Exhibit 11 – see DAA and

Ryanair response to CP5/2007, Exhibits 24 and 25 respectively (page 10 in the Ryanair response)).

6.41.7 The Commission drew the Panel's attention to the Affidavit of Vincent Harrison already referred to where the following was stated:-

para 20 and 56

"Rather than using straight-line depreciation, the capital costs of T2 and associated projects will be subject to a unit cost approach to depreciation.

Moreover, the Commission has not made any "commitment" to accelerate depreciation, but rather indicated "a willingness to accelerate depreciation profiles" should DAA encounter financial difficulties" [emphasis added].

and asserted:

Here the DAA appears to have no issue with the unitised approach to depreciation and are aware of the Commission's proposed stance on accelerated depreciation should the need arise.

6.42 In its response to the Commission's response, DAA asserted that the Commission had not addressed in any material way *"the core argument of this ground of appeal which is how the use of this unitisation approach backloads the remuneration of depreciation charges and that the profile the Commission intended to deliver is not what results from its implementation of a unitised method of depreciation."*

6.43 It gave examples of the emphasis placed by the Commission on the assertion that the unitized approach to depreciation would result in costs being recovered equally from all forecast airport users and asserted that this was not how the decision would operate in practice. It asserted that the Commission's proposal produced a peaked charge per passenger rather than a flat profile. It reiterated its submission that it would be more

reasonable for the Commission to base its calculation on total passenger numbers at the airport and asserted that *“this is the only approach that delivers the result of a smoothed effect on the total cap as intended by the Commission.”* It asserted *“the Panel should therefore require CAR to amend its calculations to deliver its stated intention.”*

6.44 In addition, DAA asserted that the Commission had erred in applying unitised depreciation to the project set out in its appeal and that the Commission had carried forward that error as the projects identified by DAA had nothing to do with T2.

6.45 It reiterated its submission that unitised depreciation increased DAA’s finance risk and introduced unwarranted complexity in the regulation process. With respect to the latter, it characterised the Commission’s response that it was entitled to decide whichever approach to depreciation it felt was appropriate as *“entirely inadequate”*.

6.46 It complained that the Commission had not considered the impact on DAA’s remuneration or rates paid by passengers by the introduction of unitised depreciation and asserted that its position had always been consistent. In this respect it rejected the interpretation put upon the Affidavit of Vincent Harrison by the Commission.

Inappropriate approach to financial projections

6.47.1 DAA asserted that the Commission had adopted an inappropriate approach to financial projections. It asserted that it would show that

- the Commission has unreasonably “cherry-picked” in relation to the updated projections of DAA [traffic forecast numbers] with the consequence that DAA is penalised for downsides without any benefit from upsides; and
- the Commission undertook this approach without providing appropriate reasoning.

6.47.2 DAA gave as the background to this ground of appeal that the Commission, in CP9/2006 (at page 18) *“when setting out the parameters and basis for its interim*

review of the 2005 Determination, ... acknowledged that it may be required to update its regulatory assumptions to take account of revised financial projections:

“It may also be necessary to recognise other material consequences for operating costs, commercial revenues or other model inputs if they arise directly from the revised plans for the capital programme, and if evidence of the materiality of these consequences are before the Commission.”

6.47.3 It complained that in its final Decision, the Commission chose to only take account of a **single** element of the DAA’s revised 2006 financial projections (i.e., the revised traffic forecast) whereas no evidence had been provided to show how the Commission took account of the material consequences arising from changes in forecast operating expenditure, or commercial revenues arising from the 2006 capital investment programme.

6.47.4 DAA contended that:-

If it was the case that the Commission decided to change its stated approach to its treatment of financial data in its interim review then it would have been more appropriate for it to take on board the actual updated net opex information provided by DAA rather than making assumptions about it based on an extrapolation of its 2005 analysis using the revised 2006 traffic numbers.

In particular, this extrapolation did not take account of the company’s revised operating forecasts which specifically identified increasing operating costs in relation to the following areas

- *New security regulations introduced in 2006 resulting in a requirement for additional security staffing over the levels previously forecast in 2005;*

- *Increased passenger volumes prior to completion of T2 resulting in increased congestion, and requiring increased customer service staff above forecast 2005 levels up to 2009*
- *Increased retail space above 2005 levels requiring additional retail staff*
- *Increased estimated area for T2 from c50k sqm in 2005 to c75k sqm which will result in an additional step increase in fixed costs such as insurance and rates*
- *Other facilities cost increases as a result of increased area and more detailed T2 design, including additional maintenance staff, cleaning costs of increased area and additional energy costs.*

Similarly, the Commission did not adjust for emerging differences in relation to its commercial revenue assumptions:

- *the Commission assumptions from 2005 regarding higher rates of growth in commercial revenues than DAA's projections at the time have resulted in a gap between DAA's forecast revenues and those of the Commission which has increased year on year, this has been further increased by applying revised passengers to these assumptions without reviewing the validity of the original analysis;*
- *the Commission has applied the revised traffic forecast numbers to its 2005 commercial revenue assumptions without taking account of its treatment of the T1X project where it is assumed that the higher revenues from increased passenger numbers are to be used to offset the costs associated with this T1X project;*
- *the retail revenue assumptions have not been reviewed by the Commission in light of the negative impact of increased security measures on retail performance.*

6.47.5 DAA expressed itself as particularly concerned that the Commission continued to rely on the assessments of commercial revenue made at the 2005 review, reiterating mistakes previously criticised by the 2006 Appeal Panel which noted that the Commission had estimated growth in revenues in a “somewhat simplistic and mechanistic manner” and had “overemphasised the link between commercial revenues and passenger growth”.

6.47.6 DAA believed that the decision by the Commission to adopt revised traffic forecasts was evidence of an inappropriate approach where the Commission “cherry-picked” the updated trends identified that allowed no change in the price cap while failing to take account of assumptions that would have increased its level. DAA believed that the Commission did not follow its own guidelines as set out in CP9/2006

“as it failed to adjust for material consequences arising from changes in forecast operating expenditure, or commercial revenues arising from the 2006 capital investment programme.”

6.47.7 DAA contended that this was not in accordance with the Commission’s statutory objective to enable a sustainable and financially viable Dublin Airport.

6.47.8 DAA complained that the Decision lacked any coherent reasoning for the failure of the Commission to use DAA’s updated projections for net operating expenditure assumptions.

“The absence of any clear reasoning is further highlighted by the inconsistent treatment of traffic forecasts and the fact that the Commission did not follow its own guidance on the need to update its determination of price caps on the basis of material consequences for operating costs that arise directly from the CIP.”

6.47.9 DAA contended that the Commission was in breach of statutory objectives. As a result DAA submitted that,

“in referring the decision back to the Commission for review, the Panel should advise that:

- the Commission has not provided sufficient reasons for its failure to include all updated projections;*
- the Commission has acted in a selective manner by ignoring the impact of the updated projections for net operating expenditure assumptions but incorporating updated traffic forecasts. This selective approach is inconsistent with incentive-based regulation; and*
- the Commission has not balanced the interests of DAA with that of other stakeholders. Instead, the Commission seems to have been motivated by the desire to keep charges low (in the interests of users) rather than focusing on all its statutory objectives.*

and that

For all the above reasons, the Panel should direct the Commission to review the way in which it incorporates updated projections so as to avoid a selective approach to the various inputs of its price cap determination. Moreover, the Commission should be directed to ensure that it acts in a way that appropriately safeguards the interests of DAA and enables DAA to develop Dublin Airport in a sustainable and financially viable manner.

6.48.1 In its response the Commission summarised the DAA complaint as being *“that the Commission focused only on additional passengers and not revised operating expenditure (opex) and commercial revenue forecasts in coming to its final decision on the Interim Review.”*

6.48.2 It drew the attention of the Panel to Section 7 of CP6/2006 (September 2006, attached as Exhibit 26) and Section 3.3 of CP9/2006 (December 2006, attached as Exhibit 27)

both of which, it contended, discussed the Commission's views regarding the potential scope of the Interim Review.

"In both of these documents, the Commission stresses that, given the impact on incentives of any review, it is important to keep the focus of the Interim Review on the grounds on which it was initiated in the first instance [page 16, CP9/2006, December, 2007, Exhibit 27]. That is, the Commission's initial view was that a potential Interim Review would only relate to aspects of the determination that had changed significantly (capital expenditure in CIP2006) and the underlying causes of that change (revised passenger forecasts). The Commission indicated clearly in CP6/2006 (September 2006, Exhibit 26) that the revised capex programme (CIP) and the revised passenger forecasts underlying such were likely to come within the scope of the Interim Review.

6.48.3 The Commission pointed out that:

CP6/2006 also indicated the Commission's view that, for the reasons summarised above, the underlying methodology it used at the 2005 Determination to project opex and commercial revenues that is the extent to which either total opex or commercial revenues change as total passenger numbers change – would not be considered as part of the Interim Review.

and that

The DAA responded to the Commission's consultation on the scope for the Interim Review (attached as Exhibit 31) and stated that it agreed with the Commission's proposed scope – it is worth quoting in full from the DAA's response:

"Given the changing security environment and the

potential related impacts on retail revenues and other changes in operating costs, it is possible that exceptional circumstances may arise justifying a further Interim Review. However, it would be inadvisable for this review to include any of the regulatory variables other than the capital expenditure parameter as signalled by the Commission in its 2005 Determination.

In this context, DAA contends that the scope of the review should be the replacement of the May 2005 Capital Investment Programme with the 2006 Capital investment Programme in the context of the 2005 Determination. This is appropriate given that the requirement for the 2006 Capital Investment Programme arose as a result of the exceptional circumstances outlined above.”

6.48.4 The Commission submitted that:

“at this stage, it is somewhat inconsistent of the DAA to ask the Panel to direct the Commission to consider certain factors (i.e. the nature of the relationship between capex, passenger forecast, opex and commercial revenues) in an Interim Review, which it itself agreed as far back as September 2006 should not be the subject of the review itself.”

6.48.5 The Commission drew the attention of the Panel

“to the fact that, with respect to opex at least, the vast majority of the DAA’s projected changes, which it claims the Commission ignored, occur once T2 is actually open and operational, that is after the end of the current price control period, that is to say, once the current airport charges price cap expires and is replaced (from January 1, 2010).

The Commission indicated both in the Draft and Final Decisions on the Interim Review that such opex projects, along with all of the regulatory building blocks – e.g. post-2009 capex, commercial revenues, return on capital – would form part of the consultation on the post-2009 price cap.”

6.48.6 The Commission was unclear as to what exactly the DAA would wish to happen in referring such grounds back to the Commission following the appeal. The Commission queried whether DAA felt there was a significant financing risk introduced as a result of the Commission’s decision.

6.49 In its response to the Commission’s response DAA alleged that the Commission has miscast the substance of DAA’s argument. *“DAA is not appealing that the Commission failed to update the operating expenditure and commercial forecasts per se, but rather that the Commission took an inappropriate “mixed bag” approach to financial projections”.*

6.50 It stated that it was accurate to record that DAA had submitted that the scope of the review should be the replacement of the 2005 CIP with the 2006 CIP. *“However, it is now apparent this is not the approach which the Commission followed. The Commission took the uplift from incorporating higher passenger numbers in to the financial projections, but ignored the implications for operating expenditure and commercial revenues of the 2006 CIP. Accordingly, it is entirely disingenuous for the Commission to imply that the scope of the interim review somehow prevented it from taking account of the net opex.”*

6.51 DAA complained that the Commission had not provided reasoning for its practice of penalising DAA for downsides without any allowing any benefit for upsides, in particular in relation to passenger forecasts which affected all of the building blocks, not just the denominator. It stated *“It is axiomatic that if one projection should have been part of the review, all resulting knock on projections should also be taken into account.”*

6.52 It rejected the assertion that the vast majority of projected changes to opex came about when T2 was open.

6.53 It asserted that *“It would have been possible for CAR to have retained its original 2005 methodology in relation to projecting opex and commercial revenues, but within that framework it could have made the relevant adjustment to opex and commercial revenues in line with the 2006 capital investment programme.”*

6.54 It submitted *“Accordingly DAA submits that for all the reasons set out above sufficient grounds exist under this heading for the Appeal Panel to refer the decision back to the Commission for review.”*

The Decision increases regulatory risk for DAA

6.55.1 DAA submitted that the Commission had introduced a series of policy measures and stipulations and adopted an approach to its work which had the combined effect of increasing the business risk profile of DAA going forward. These included:

- The decision to adopt new policy measures going forward which have the effect of reducing the remuneration requirement in the short term - two box approach, price triggers, unitisation approach to depreciation;
- The lack of evidence of the Commission having properly considered representations made to it by DAA regarding a range of important issues.

6.55.2 DAA asserted that:-

Within its Decision, the Commission has also reflected in the RAB and financability assessments the potential for lower capital expenditure costs in the assessment of contingency for a range of projects. It has also continued to highlight the possible introduction of peak or differential pricing for future regulatory periods without giving any indication as to how it might envisage implementing these policies or assessing what practical effects they might have. Indeed at a cursory

level peak hour pricing in which prices are higher in congested periods is inconsistent with the Commission's decision to implement unitisation and the two box method, both of which seek to smooth out prices."

6.55.3 It submitted:-

"that these new measures have added considerably to the risk experienced by the company without any corresponding change in the regulated cost of capital. DAA therefore believes that these measures create long run disincentives for investment and do not allow for the fulfilment of the Commission's statutory obligation to ensure a sustainable and viable Dublin Airport."

6.55.4 DAA asserted:-

"In making its Decision, the Commission appears to be inclined to accept adjustments which impact negatively on airport charges while simultaneously rejecting or ignoring arguments and adjustments that would be likely to provide the company with a charges uplift. Systematic acceptance of possible upsides while ignoring possible downsides would not be an acceptable approach to business planning in any commercial organization. This approach has the potential to be extremely damaging for the company."

6.55.5 DAA complained that:-

"The Commission's approach to regulation continues to be characterised by a willingness to adopt the findings of its consultants to the detriment of DAA, even where these consultant reports are based on brief, high level analyses. For example, in arriving at its proposals the Commission has depended on the work undertaken for it by consultants RRV. The timeline afforded to RRV to conduct their

review, did not remotely compare with the longer more detailed process undergone by DAA's advisers to arrive at their recommendations. In this context, we believe that the arguments relied on to support the proposed reductions to the capex programme and the implementation of a Box 1/Box 2 approach to the remuneration of T2 based on RRV's sizing analysis, are inappropriate and should be revisited."

6.55.6 DAA contended that

"The Commission also failed to adequately investigate the reasons for differences between its consultants recommendations and DAA'S own projections, which were based on vastly more detailed analysis than that carried out by the Commission's consultants."

and that

"in reviewing its 2005 Determination, the Commission should have ensured that it adopted a more balanced approach to risk, incorporating possible downsides as well as upsides in its analysis of possible outcomes. This approach would have allowed the Commission to protect the interests of existing and prospective users while facilitating the continued financial viability of DAA. This would therefore have ensured that the Commission fulfilled its statutory objective"

6.55.7 DAA contended that:-

the Panel should request the Commission to review its Decision on the basis that its process introduced unwarranted levels of regulatory risk. In doing so the Panel could encourage the Commission to promote economic efficiency and fulfil its statutory objective by taking actions that are likely to reduce regulatory risk. Specific recommendations

should include:

- *ensuring that, if it decides to use projections or forecasts that are materially different from DAA's, this decision is based on detailed and robust evidence rather than, for example, high level benchmarks or consultancy studies that have been hampered by a lack of time or resources. Where there appears to be a difference of opinions between DAA and the Commission's consultants (for example, over the appropriate size of Terminal 2), the Commission should make strenuous efforts to resolve these differences during the course of its work, where possible before publishing either its proposals or the consultants' final report;*
- *providing as much specific detail as possible about its proposals, and especially those (such as unitised depreciation) that have significant implications for future control periods. A clear description will reduce the amount of regulatory discretion required in future price reviews, and clarify DAA's likely exposure to different types of risk:*
- *ensuring that it has fully examined the practical implications of its proposals (for example, for trigger pricing or differential pricing), and taken full account of the impact of increased complexity. The Commission should have confidence both that its proposals can be implemented in practice without causing unexpected difficulties or giving rise to unintended consequences, and also that they will have a material and positive impact on economic efficiency; and*
- *ensuring that the different decisions that it takes during each review are internally consistent, and also that it adopts a more consistent approach to regulation over time.*

6.56.1 In its response the Commission noted:-

“that since the publication of the final decision on the Interim Review, the following events have occurred:

- *The DAA has awarded over €1bn in contracts for CIP 2006 projects including over €700m for T2 and T2-related projects.*
- *The DAA has indicated its intention to embark on a programme of investment in a €4bn project called “Dublin Airport City”, to take place over a period of 15 – 20 years, with funding to be secured from a range of sources.*
- *In December, 2007, the DAA was taken off “negative outlook” by Standard & Poor’s (S&P), and had its Single-A credit rating re-affirmed. One factor in the S&P’s decision was the “an improved regulatory environment and the publication of an Interim Review decision on airport charges for Dublin Airport [that has] removed significant uncertainties regarding future revenues and investment levels” [page 2, Ratings Direct: Dublin Airport Authority plc ,January 25, 2008, attached as Exhibit 29].*
- *In July 2008, the DAA raised €600m in a Bonds Issue listed on the Irish Stock Exchange. This occurred at a time when global credit conditions meant that this was just the third ten-year Eurobond issue to take place in the year to July 2008 – the other two being from Siemens (€1bn Eurobond) and France Telecom (€2bn Eurobond), companies whose annual turnover exceeds DAA’s by a factor of at least ten. Newspaper reports at the time indicated that the issue was oversubscribed with strong interest from ten European countries.*

- *The DAA's FFO: Debt ratio (Funds from Operations) – a measure employed by S&P to assess the operating performance of rated companies and their ability to finance debt obligations – has improved significantly since the time of the Interim Review and during 2007 to 2009 is projected by the DAA to be between 20% and 52%. That is, well above the threshold level of 15% targeted by DAA to maintain an investment grade credit-rating.”*

6.56.2 It also noted that:-

“the reference to the Interim Review in the DAA's 2007 Annual Report (attached as Exhibit 30), where, on page 7, it states that:

“The Group is pleased to report that its credit rating was affirmed at “A” by Standard & Poor's, after a number of years on negative outlook. The outcome was supported by signals from the Commission for Aviation Regulation (CAR) regarding future pricing levels at Dublin Airport, which will safeguard key DAA financial ratios.”

On page 16 of same, the DAA also states:

“The Group is pleased to report that its credit rating was affirmed at “A” by Standard & Poor's, after a number of years on negative outlook. The outcome was supported by signals from the Commission for Aviation Regulation (CAR) regarding future pricing levels at Dublin Airport, which will safeguard key DAA financial ratios.”

and concluded:-

“DAA’s assertion of increased regulatory risk is inconsistent with the events described above. Furthermore, the Commission is somewhat unsure as to what issue actually underpins DAA’s desire to have a referral in the context of Ground 5, or what action it envisages the Commission should take.”

6.56.3 The Commission also drew the Panel’s attention to the following paragraphs in the Affidavit of Vincent Harrison already referred to:

Para 16

“Such clarification must be viewed in light of the fact that DAA is obliged to implement the Aviation Action Plan and in order to do so must be in a position to finance its investments. Accordingly, in DAA’s view, the statutory objectives set out in the 2001 Act obliged the Commission to consider the economic reality facing DAA in attempting to deliver CIP2006. Uncertainty about future regulatory commitment has a very strong impact on DAA’s ability to raise finance. Investors funding long life assets desire clarity about economic regulatory policy beyond the very short term and such clarity (or any lack thereof) therefore impacts on DAA’s ability to operate and develop Dublin Airport in a sustainable and financially viable manner. Specifically, it impacts on its ability to raise the long term finance necessary in the current regulatory period.”

Para 27

“If the Commission were prevented from acting consistently with good regulatory practice by having regard to the importance for all airport users of providing clarity and predictability in relation to regulatory policy, DAA would be left to commit to expenditure in the absence of an acceptable degree of certainty as to the level and timing of any remuneration. Indeed, giving such guidance is regarded as good

regulatory practice worldwide. For example, the British Civil Aviation Authority which regulates the level of airport charges at BAA's London airports every five years pursuant to a similar statutory framework to the Commission gives 10 year guidance (i.e. spanning two regulatory periods)."

Para 28-30

"As noted above, DAA's credit profile and ability to access optimal, long term, uncovenanted debt finance are seriously affected by any lack of clarity as to the regulatory approach to the recovery of capital investment into the future. Indeed, greater visibility on future regulatory policy has been encouraged by the ratings agencies and uncertainty regarding regulatory policy has been cited by Standard & Poor's as one reason why DAA's credit rating has retained a negative outlook.

Moreover, maintaining a strong investment grade credit rating is fundamental to DAA's ability to raise the necessary finance for T2 and the remainder of CIP2006.

In light of all of the above, the provision of guidance is simply consistent with good regulatory practice."

Para 57

"... The provision of guidance to DAA (and its investors), particularly in circumstances where the investments mandated by the Government's Aviation Action Plan have an economic life spanning several regulatory periods is nothing other than good regulatory policy."

6.56.4 The Commission asserted:-

"The DAA position here speaks to the need for and value of both

clarity and guidance as to future policy for the purposes of securing an appropriate credit rating and for the comfort of the financial markets. This contrasts with the opportunity they now seem to take to say that the measures adopted by the Commission increased their risk position in relation to disincentives for investment.”

6.57 In its response to the Commission response, DAA asserted that the Commission’s response did not in any way address the merits of DAA’s ground of appeal. *“Instead the Commission has attempted to divert the attention of the Appeal Panel to matters extraneous to the question of whether the decision reflects the statutory duties of the Commission.”*

6.58 DAA then considered all of those matters which had been put forward by the Commission. The Panel does not set those out here since the Panel does not take into account matters which occurred after the date of the Determination. The response of the Commission therefore is not relevant to the consideration of the Panel and, necessarily therefore, neither is the response to that position.

6.59 In addition, DAA asserted that the DAA’s position on the Judicial Review as expressed in the Affidavit of Vincent Harrison was in response to claims by Ryanair that the Determination contained commitments as to how the Commission would treat expenditure and future Determinations. DAA asserted *“this is wholly different to the question of whether the Decision reflects an appropriate level of regulatory risk bearing in mind the statutory objectives of DAA.”*

6.60 DAA concluded its submissions by stating that it welcomed the opportunity to participate in the Appeal Panel process in relation to the Decision. It asserted that:

“Enabling a positive investment environment requires a balanced approach. DAA is proceeding with its investment plans in the expectation that the Commission will adopt a more balanced approach in future decisions. In particular, ... DAA would welcome the opportunity for this process to be used in a way that will ensure

appropriate balance between various interests for Dublin Airport, such interests being apparent from the legislation and the Government policy documents described. For example:

- *the Government: which has indicated (most explicitly in the Aviation Action Plan and the Ministerial Direction) that it wishes to see the severe capacity constraints at Dublin Airport remedied in the very near future. The development of Dublin Airport is not just essential for the current and future travelling public but also for the development of the Irish economy as a whole. DAA is concerned that the Commission has not afforded sufficient weight to the Government's policy and to the mandates that the Commission ensure that the price cap review will allow DAA to deliver T2;*
- *the current and prospective users: DAA is mindful of its obligations to consult with users and DAA's consultation process for CIP 2006 was approved by the independent verifier. DAA considers that the Commission, in its Decision, has often been too deferential to current users who often seem to have a particular agenda to drive low costs whatever the consequences for the development of Dublin Airport;*
- *DAA: as an independent company charged with the operation and management of Dublin Airport. DAA is concerned that the Decision does not provide an appropriate framework to enable DAA to develop Dublin Airport in a sustainable and financially viable manner. Of particular concern in this regard are the absence of appropriate incentives for DAA (i.e., the consistent tendency towards just down-side adjustments) and the overall increasing of regulatory risk for DAA."*

6.61 DAA submitted that:

“The Decision does not reflect the Commission’s obligation to keep regulatory restrictions at a minimum and does not reflect the objectives to facilitate the efficient and economic development and operation of Dublin Airport meeting the requirements of current and prospective users while also enabling Dublin Airport to operate and develop in a sustainable and financially viable manner. In referring the decision back to the Commission for review, DAA also requests that the Panel takes on board the specific recommendations made in this document.”

7. THE APPEAL HEARING

- 7.1 DAA was represented at the appeal hearing by Oliver Cussen, Deputy Chief Executive of DAA; Vincent Harrison, Director of Strategy and Regulation; Miriam Ryan, Manager of Strategy and Regulation; and Ray Gray, Chief Financial Officer.
- 7.2 The Commission was represented by Commissioner Guiomard; John Spicer, Head of Economics; and Patricia Lamb, Head of Legal Affairs.
- 7.3 Mr. Cussen emphasised that the legislative mandate of DAA is commercial, i.e. it must generate sufficient revenue in excess of costs to allow it to invest in the development of airport infrastructure.
- 7.4 He emphasised that government policy objectives in relation to Dublin Airport Authority are set down in its statement of strategy: to facilitate the provision of additional terminal runway and pier capacity at Dublin Airport required to cater for continuing passenger growth; and the Aviation Action Plan of 2005 which mandated DAA to achieve two objectives in infrastructure immediately: Pier D by 2007 and a second terminal by 2009. He referred to the 2007 Direction to the Commission that the Commission take due and manifest account of government policy in the public interest there be a second terminal fully operational by 2009. The Government, in pursuit of those proposals, had the benefit of an independent verifiers report from Boyd Creed & Sweet.

- 7.5 Mr. Cussen summarised the DAA's case on the basis that the interim review was based on a flawed methodological approach; the absence of appropriate procedural safeguards to ensure feedback from key stakeholders was taken on board; the introduction of new policy measures without proper or sufficient consultation; the introduction of a more interventionist regulatory strategy and model leading to increased uncertainty risk and ambiguity; insufficient deference to government policy in relation to the necessary provision of infrastructure and the independent validation process; and the systematic increasing of risk for the Dublin Airport Authority. He concluded by saying that the decision in the view of the DAA *"flies in the face of CAR's statutory objectives and should therefore be referred back to the Commission"*.
- 7.6 Mr. Harrison then presented the DAA's appeal in respect of the introduction of new approaches to the remuneration of capital expenditure and particularly the relationship of that to an assessment of the appropriate size of Terminal 2. He contended that the Commission's consultants in undertaking a desk top review of the very comprehensive analysis undertaken by DAA had made two separate and significant errors in their approach. One was a data error in relation to the actual data used being incorrect in a series of tables that were used to arrive at one conclusion. The other was a methodological error that led to an error in fact in terms of the result.
- 7.7 He demonstrated the two errors by way of powerpoint presentation and submitted that correcting either of the errors would have brought the scale of Terminal 2 to a level where a two box approach would have been unwarranted and inappropriate.
- 7.8 The first of the errors was in relation to determining the appropriate size to deal with the departing peak passengers. He suggested that the Commission's consultants had used the wrong data resulting in the movements per hour or the passengers per aircraft movement was incorrect, resulting in a 16% variation in terms of result.
- 7.9 The second error related to the calculation of the "busy hour" rate. He contended that the Commission's analysis equated to a 92% busy hour (as opposed to a 95% busy

hour being appropriate). He contended that this error had a 13% differential in terms of appropriate sizing. He contended that the Commission in its response to the appeal had continued to misrepresent the issue as a failure on behalf of the DAA to justify providing a facility with significant overcapacity. In the submission of the DAA Box 1 and Box 2 were unwarranted because there was no significant overcapacity provided in the first place and it was a matter of error that led the Commission to this conclusion. He contended that the alternative argument of the DAA that economies of scale arose through providing sufficient facility in one go had been ignored by the Commission. In addition, the Commission had not given adequate weight to government policy and the independent verification report which addressed costs and sizing.

- 7.10 With respect to the disallowance of contingency costs by the Commission, Mr. Harrison emphasised that the project involved the procurement not as a simple single contract, but as a multiple package basis for the procurement of different elements of the terminal with an aggressive timetable to meet government requirements. He emphasised that the contingency costs had been independently verified. He complained that the RR&V review was admittedly by people who were not experts in the area and he characterised it as ultimately an unqualified second guessing on the level of appropriate contingency.
- 7.11 He reiterated the written submission with respect to customs and border protection and airfield projects.
- 7.12 He complained that the Commission's decision to exclude these specific capital expenditure items was based on erroneous assumptions and information and no proper reasoning was given for the exclusion of capital to the total value of €38 million in the Determination.
- 7.13 He complained that it was inappropriate to use unitised depreciation and that its introduction significantly increased the complexity of the regulatory framework and the risk to DAA's business in terms of deferral of revenue. He sought to demonstrate that the methodology used by the Commission didn't generate the profile which the

Commission thought it generated. In his submission if unitised depreciation was introduced it should be calculated over the total passenger base in Dublin Airport and not just those physically within Terminal 2. Further, unitised depreciation should not have been used in respect of €107 million worth of projects which were not related to Terminal 2. Those projects, he submitted, should be subject to standard straight line depreciation.

- 7.14 His submission was that the Panel should refer the decision back to the Commission on the basis that the radical new approach which was introduced was unwarranted and did not come at an appropriate time and that it was based on a flawed application.
- 7.15 He submitted that the Commission had erred in arriving at its conclusion not to increase the price cap because it had ignored operating costs and retail revenues and the costs of capital impact of the higher risk and the changes in methodology. In his submission the Commission had been inconsistent in that it had a selective approach to the components of the building blocks which it adjusted which had the net result of generating a no change result from the interim review.
- 7.16 He submitted that the Panel should refer the decision back to the Commission on the basis that the Commission failed to appropriately reflect the revised financial projections provided to them in their totality and adopted an inconsistent approach in ignoring negative impacts on operating costs and other assumptions while adopting positive impacts due to updated traffic forecasts.
- 7.17 Mr. Ray Gray then addressed the overall increase in risk for DAA emerging from the interim decision. Mr. Gray submitted that the methods which had been adopted by the Commission, such as the two box approach, regulatory triggers and factors like that did have a real impact on the risk within the business and cited the view of Standard & Poor's. Mr. Gray pointed out that the Commission's response to this assertion had been to draw attention to subsequent events and to assert that subsequent events were inconsistent with the assertion made by DAA. He referred to the realisation of assets by DAA, which had maintained the Standard & Poor's rating in the absence of increased remuneration and delayed revenue. He referred to other

commercially sensitive matters which it is not proposed to set out here because they have no effect upon the ruling of this Panel. In truth, most of them occurred after July, 2007 and cannot be taken into account by the Panel.

- 7.18 In summing up this Ground of Appeal Mr. Harrison stated that DAA asked the Appeal Panel to refer the decision back to the Commission on the basis that an unbalanced approach was taken in relation to risk, incorporating upsides but not downsides, and that the approach adopted generally in relation to financability was inconsistent with the requirement to enable DAA to operate Dublin Airport in a sustainable and financially viable manner.
- 7.19 In summing up Mr. Cussen complained that the Commission failed to explore or provide reasoning for differences between its consultant's projections (which the Commission adopted) and the DAA's projections, particularly in cases where errors had been indicated in analysis.
- 7.20 Commissioner Guiomard responded on behalf of the Commission. He stated that the object of the Commission was to provide incentive regulation which disinclined regulators to hold interim reviews. He reminded the Panel of the building blocks approach to give a price cap per passenger. He stated:

"In this framework the key decisions that we had to make in the interim review were twofold. First, whether, and if so, how much to allow of the costs of the company's capital investment budget, which as we all know was of an amount of some €1.2 billion. If these assets in part or in total were added to the regulatory asset base there would be consequences for the capital allowance, consequences for the depreciation charge and, therefore an impact on future price caps. Secondly, to the extent that we did allow costs to be added to the regulatory assets, in what fashion, at what time and according to what methodology to allow the company to recover the costs of those investments over the life of the assets."

- 7.21 He stressed that if matters were to be referred back to the Commission he would wish that they be as clear as possible as he thought that in some instances the parties appeared to be appealing points that even if they were to come back to the Commission and even if the Commission were to conclude that the Appellant was correct, those changes wouldn't necessarily lead to a change in the existing price cap or in the commitments made in the interim review about future capital expenditure.
- 7.22 He stated *"I would add that, as we have explained in correspondence with the Panel, I believe that we are unable to engage in debating the merits of our decision, given the need on the part of the Commission to make a final decision on anything that the Panel might send back to us subsequently in a manner that is unbiased and that is perceived by all to be unbiased. We consider that the best way we can help the work of the Commission is to ensure that the Panel has a comprehensive knowledge of how and where in the challenged decision we dealt with these matters and what our rationale for doing so was and where it may be found."*
- 7.23 Commissioner Guimard referred the Panel to the consultation process engaged in in respect of the introduction of triggers. He rejected the assertion of the DAA that the two box approach was a flawed policy when applied to investment and a disregard of government policy and of economies of scale. With respect to economies of scale, he contended that DAA had not provided evidence about economies of scale and that there was an obligation on the DAA if it wanted to offer arguments of that kind to provide such evidence.
- 7.24 He rejected the assertion that the Commission had disregarded government policy and instanced the fact that government policy explicitly provided for regulatory engagement. He referred to the fact that Mr. Justice O'Sullivan had been satisfied that it was entirely proper for a regulatory office to scrutinise investment plans in the way that the Commission had done.
- 7.25 He addressed the assertion that there had been unjustified second guessing of the DAA's experts and an ignoring of the independent verifier. He asserted that regulation was not a bilateral matter and that the Commission had taken account of

not just the DAA's views but of third parties' as well.

- 7.26 With respect to the DAA's own justification for the size of T2 he referred the Panel to Exhibit 18 in the material provided to the Panel, being "T2 – Gateway 2". He stated that that document did not justify an investment plan on the scale proposed by DAA and suggested that there were two sets of opportunities for DAA to come forward and further elaborate on the material, but that they did not do so. In those circumstances the Commission had obtained consultancy advice itself and those consultants had doubts as to the sizing calculation of the DAA.
- 7.27 He stated that taking all of these matters into account, the Commission had allowed the lion's share of the cost of the project into the RAB but had applied triggers and two box treatment so that the risk that the size of the building would prove to be too large relative to user need would be shared. He asserted that *"so far from the triggers or the two box treatment disregarding the statutory objective, those elements, along with the others and the full package of the decision ... constitute a package designed by the Commission to meet the three statutory objectives"*.
- 7.28 With respect to the Boyd Creed & Sweet independent verification, he stated that that company had confirmed that they had not assessed the optimal size of T2 and that on foot of confirmation that that was so the Commission had asked Rogerson Reddan to engage in the exercise. The Commission had published the Rogerson Reddan Report and there was an opportunity for the DAA to come back and express views on the intention of the Commission. He contended that there was no second guessing and stated *"Fundamentally our problem was there was nothing to second guess or not enough information to second guess to start with in the first case. Certainly there was no ignoring of Boyd Creed & Sweet."*
- 7.29 He contended that the package was not unduly interventionist. It did not constitute exclusively downward treatment of the positions put to the Commission by the DAA.
- 7.30 With respect to the exclusion of capital costs, Commissioner Guiomard asserted that there was a detailed reasoned basis for that to be found in the consultancy reports that

had been published by the Commission and in the decision itself.

- 7.31 He defended the introduction of unitised depreciation which had been flagged in the first substantive paper on the review and contended that the Commission had not disregarded viability or sustainability of the company's finances. Indeed the Commission had said that the extent to which unitised depreciation could be introduced would depend on the cash flow and financial position of the company.
- 7.32 With respect to the fourth and fifth grounds put forward by DAA, Commissioner Guiomard was not entirely clear as to what the DAA expected the Commission to do in the event that the matters were sent back to the Commission.
- 7.33 Commissioner Guiomard contended that the Commission had in the interim review confirmed that the review would be narrow.
- 7.34 After publishing the draft Determination the Commission had met with DAA and with its financial advisers and with Standard & Poor's and had taken into account the request that they modify the draft Determination with a view to reassuring investors and having a credit rating which allowed the company to go ahead and undertake its borrowing plans. He contended that the Commission did make modifications to the text of the decision to reflect what had been requested of it at that time.
- 7.35 On behalf of DAA Mr. Cussen responded to Commissioner Guiomard's response. He contended that the Commission had not either in its written submission or in the oral presentation negated the specific grounds advanced by DAA for referring the matter back to the Commission.
- 7.36 Mr. Harrison commented that the Commission had not dealt with the detail of the grounds that DAA had made and in particular had not engaged with the demonstrated errors in the approach by the Commission's consultants. He stated:

"We have presented those errors to demonstrate procedural problems with the approach adopted by CAR with regard to each of these areas.

In particular in relation to ground 1, the specific errors that we demonstrated in relation to sizing were not addressed in any manner in the presentation. The specific request that we would be making in relation to ground 1, for clarity, is to remove the Box 2 approach due to the inappropriate sizing and to allow the full remuneration of the terminal in one facility. Again, we believe that the conclusions that were arrived at to produce a Box 2 approach emerged from a very limited review, which involved a single meeting with the DAA on the subject of sizing. And in his presentation Cathal referred to economies of scale and, again, I think that just refers back to the inappropriate logic that started due to the fact that the analysis was subject to error. It led to an inappropriate conclusion that the facility was too large and then an assumption on behalf of the Commission that some logic would be provided to demonstrate economies of scale or rationale for overcapacity. I think that was all based on a flawed assumption in the first place with regard to sizing.

Turning to the second matter. The general logic of the response appears to be that the awarding of 96% rather than 100% is a demonstration that there was a comprehensive approach. The issue that we are raising in relation to each of the three projects is a matter of reasoning. We do not believe that there were adequate reasons given in relation to each of the three allowances. Again for clarity our contention would be that the three project costs that were reduced should be added back to the remuneration basis.”

- 7.37 He contended that the Commission had not addressed the contention of the DAA that the profile that was intended by the introduction of unitised depreciation did not actually work out and did not turn out from the application within the decision.
- 7.38 He contended that the Commission’s response did not explain why projects that are completely unrelated to Terminal 2 had been included in the unitised methodology and he requested the Panel to refer back to the Commission the exclusion of those

projects.

- 7.39 Mr. Gray sought to bring clarity to the request made of the Panel in respect of grounds 4 and 5 of the DAA Appeal and stated:

“We were looking for charges to increase in 2007, as opposed to signals about increases in a Regulatory Asset Base within the building block that CAR refers to, one of the building blocks, some three years later. It is about compensating for additional risk and additional investment. It is about funding investment from the start, as would be the case, for example, for Terminal 5 and BA, and not to defer significant revenue into the future and on an uncertain and risk increasing manner and not to rely on unregulated gains. That is what is being requested.”

8. THE DECISION OF THE APPEAL PANEL

- 8.1 It is clear from the Determination itself and from the Commission’s response to the Appeal of the DAA that the sizing of T2 gave rise to the production of the new approach to the remuneration of capital expenditure by introducing the two boxes.
- 8.2 It is clear that absent the decision that T2 was oversized, the Commission would not have introduced a two box approach.
- 8.3 It is appropriate therefore that the approach of the Commission to the proposed size of T2 as proposed by the DAA be carefully scrutinised, as same involves the objectives set out at Section 33(1)(a), (b) and (c) of the 2001 Act.
- 8.4 It is true that the RR&V Report (both the first Report and the second Report) suggested that T2 was significantly oversized. DAA has argued that the conclusions of RR&V were reached on foot of data input errors and methodological errors. While the Panel is not convinced that the DAA is correct in this respect, at the oral hearing the Commission, in effect, ignored the submissions of the DAA and dealt only with the process of the Determination, not the substance of same.

- 8.5 In those circumstances the Panel is not in a position to uphold the decision of the Commission and rather considers that there are sufficient grounds by reference to section 33 of the 2001 Act to refer the decision in relation to the Determination back to the Commission for review of the issue of the correct sizing of T2. The Commission should take account of, and demonstrate that it has taken account of, the allegations of the DAA and must state clearly and transparently what it regards as the appropriate size of T2. In this respect it is the Panel's view that it is not sufficient for the Commission to simply state that it adopts its consultants' views over the views of the DAA. It must state why this is so.
- 8.6 If the Commission comes to the conclusion that T2 is significantly oversized, the Panel finds no fault with the two box approach to the remuneration of capital expenditure. The panel is of the view that the DAA has failed to demonstrate that the two box approach is inappropriate to lumpy investment projects or that there are economies of scale associated with building T2 with excess capacity.
- 8.7 The Panel observes that the issue of the unitised approach to depreciation is a method of depreciation which the Commission is "*minded to prefer*" over straight line depreciation but that "*the Commission will only introduce same gradually and with consultation*". In the circumstances it does not appear appropriate for this Panel to express a concluded view on same. Rather that will be a matter for a future Determination. However, the Panel expresses the tentative view that in principle the adoption of such a method of depreciation is unexceptional and that the Commission is entitled to adopt same. Before doing so, however, the Commission should ensure that the adoption of such an approach does in fact deliver the profile expected by the Commission. Further, the Panel believes that the unitised approach should be confined to projects which are clearly T2 associated projects.
- 8.8 Insofar as capital costs are concerned, the Panel notes that the independent verifier for the Government approved the costing of T2. That review included an acceptance of the contingency proposed. The Commission's consultants expressed a tentative view that the contingency was too high. It is not clear to the Panel why the Commission

opted for its consultants' approach over that of the DAA and the Government appointed independent verifier, as same is not clearly stated in the Determination. The Commission did not address the point at all at the oral hearing. In the circumstances the Panel returns for review by the Commission the exclusion of €25 million in respect of the contingency. It is the view of the Panel that the Commission must clearly state why it prefers one view over the other in reaching a conclusion on the allowance or disallowance of the cost. The Panel notes that the RR&V Report does suggest that a further independent review would be appropriate.

- 8.9 The Panel is not satisfied by the DAA that there was any flaw in the approach of the Commission to the disallowance of €9 million in respect of the cost of customs and border protection. The Panel is of the view that if the DAA wishes to have capital expenditure approved, it must provide all relevant detail. It did not do so in respect of this expense and the Commission was entitled to take the view that if the DAA did not provide the information it was not entitled to the expense.
- 8.10 With respect to the exclusion of €4 million in respect of airfield projects, the Panel finds that there is no transparent reasoning for changing the reduction from €17 million in the interim decision to €4 million in the Determination under appeal. The matter was not addressed by the Commission at the oral hearing and in the circumstances the Panel cannot uphold the exclusion of this sum. The Commission should clearly state why the sum is excluded (if upon review it decides to exclude it).
- 8.11 The Panel has not been satisfied by the DAA that the Commission adopted an inappropriate approach to financial projections and observes that the DAA did not, when invited by the Commission in its written submissions to do so, identify exactly what should be referred back to the Commission. Furthermore, it is clear that the interim review was conducted on the basis that the only variables from the 2005 Review which would be looked at would be CAPEX and passenger numbers. It would therefore have been inappropriate for the Commission to have also considered issues of opex and commercial revenues.
- 8.12 The Panel excludes from its consideration evidence put before it by the Commission

as to the subsequent conduct of the DAA which the Commission claimed tended to support the proposition that the regulatory risk was not significantly increased for the DAA and certainly did not affect its financability.

- 8.14 The Panel does not believe that the DAA approach to the Judicial Review supports the contention of the Commission that the DAA has been inconsistent in its approach to the Determination. It is clear that the Judicial Review was approached on the basis that the Determination could not be appealed and the evidence by Affidavit was addressed to matters which were relevant to the disposal of the Judicial Review but are not simply transposable to the appeal process.

Signed: 

PAUL GARDINER
Chairman


NIALL GREENE


ALAN DOHERTY

Dated the 23rd day of December 2008.