

In either case, it is doubtful that the public agency would have succeeded in obtaining debt financing based on PFC revenue without approval to use PFC revenue on an approved project. Therefore, the need to accommodate the financial community's concerns over sudden termination of PFC revenue streams should be less of a concern. In any event, the FAA has a statutory duty to prevent excess collections. In these circumstances, automatic expiration prevents the continued receipt of PFC revenue by the public agency without expenditure for the purposes intended by the statute.

The final rule also provides a mechanism for stopping collection of a PFC when authority has expired. The public agency must provide a list of carriers operating at the airport and other collecting carriers remitting to the airport in the previous 12 months. The FAA will notify these carriers of the expiration and the carriers will terminate collection within 30 days of the FAA's notification.

Finally, paragraph (e) provides that if authority to impose a PFC has expired, the Administrator will not grant new approval to reimpose the PFC until the project has been implemented. This provision will assure public agencies are not able to impose a PFC indefinitely by filing successive applications for authority to impose a PFC.

§ 158.35 Extension of time to submit application to use PFC revenue. (No corresponding section in NPRM).

This section sets forth the procedures for public agency requests for extension of authority to impose PFC's before receiving approval to use PFC revenue and implementing an approved project. The final rule provides for a more expedited local consultation and FAA review process than is required for initial approvals to impose a PFC or to use PFC revenue.

Paragraph (a) specifies that the public agency must provide notice in a local newspaper at least 30 days before submitting a request to the FAA and soliciting public comments. The notice must include progress to date, a revised schedule for obtaining project approval and reasons for delay.

Following public comment, but at least 120 days before the charge expiration date, the public agency must submit the request to the Administrator accompanied by the following information: the information provided in the local notice; a summary financial report showing PFC revenue already collected plus interest and to be collected during the extension and any local funds expended for which reimbursement will be sought; a summary of any further consultation with carriers operating at the airport; and a summary of comments received in response to the local notice.

The final rule does not require further consultation with carriers before the request is submitted. The local notice and comment process will provide carriers with an opportunity to register their views. In addition, full consultation is required before submitting the application for authority to use PFC revenue. However, a public agency may always engage in additional carrier consultation if it so chooses. A summary of such consultation must be included with the request.

The Administrator will approve the application upon determining that the agency has shown good cause for the delay in applying for approval to use PFC revenue; the revised schedule is satisfactory; and further collections will not result in excessive PFC revenue. The Administrator will decide on the request and provide written notice to the public agency within 90 days after the request was received.

§ 158.57 Amendment of approved PFC (Proposed: Amendment of Approved PFC). Under the NPRM, a public agency would have followed one of three courses in requesting an amendment to an approved PFC. If the public agency wished to decrease the level of the PFC without any appreciable change in the nature or scope of the project, no consultation with air carriers and no justification would have been required. If the amendment would have increased the PFC level, resulted in an incidental change in the project scope and increased the amount of PFC revenue used on the project by less than 15 percent, the public agency would not have been required to consult with air carriers, but would have been required to justify the amendment in writing to the appropriate FAA Airports office. More extensive amendments would have required consultation and any other information requested by the Administrator. The NPRM also proposed that the Administrator's review process would provide public notice and opportunity for comment only for the most extensive category of amendments.

Comments: Over 20 commenters responded to this proposal in the NPRM. Although one finds the proposed amendment rule to be acceptable, about half of all commenters claim that it would be too burdensome and time consuming. Many add that the process proposed would adversely affect bond financing, unnecessarily delay projects, and limit the flexibility that public agencies need to deal with changing circumstances during the course of a project.

A number of commenters suggest that the criteria that would have been used to determine approval be spelled out, and that the final rule provide definitions of changes "incidental" to the project or changes

in the "scope" of the project. Several ask that the threshold for cost increases requiring carrier consultation be raised from 15 percent, as was proposed, to 25 or 30 percent. Others suggest that no approval be required for amendments unless the carriers object, and some propose that the rule require only notification to the FAA and carriers upon a decision by a public agency to amend a PFC-financed project. One feels that there should be no threshold below which carriers consultation should not be required.

Some commenters question whether the FAA can initiate or require an amendment to an approved PFC by a public agency. Others express concern that, should an application for an amendment be disapproved, it not adversely affect the original PFC, and another proposes that there be an appeal process in the event that an application to amend is disapproved. Only one commenter urges that the rule specify a more expeditious review and approval process, to be completed in 30 to 45 days. Other comments suggest that the FAA consider suspending imposition of a PFC if the amendment is inconsistent with the original project, and that approval of an amendment be categorically excluded under NEPA.

Final Rule: The FAA understands that most public agencies would like additional flexibility to modify approved projects, increase or decrease the PFC level, and otherwise respond promptly when financial or technical changes in a project are necessary. The final rule adopts a number of changes suggested by commenters which liberalize the requirements for obtaining an amendment. The requirement for FAA approval of an amendment is retained, however, to help ensure that future PFC revenue is used for eligible projects and that the costs of a PFC-financed project are limited to those which meet the "reasonable and necessary" criteria in the definition of allowable cost.

Under § 158.37(a) in the final rule, a public agency may decrease the level of PFC collected, decrease the total amount of PFC collected, or increase the total amount of PFC collected by 15 percent or less by simply notifying the collection carriers and the FAA in writing. Any new charge resulting from a change in the PFC level will be effective on the first day of a month which is at least 60 days from the date of notification to the carriers. For example, if the public agency notifies the carriers on the fourth of August that the PFC will decrease from \$3 to \$2, the effective date of that change is the first of November.

If a public agency wishes to amend an approved PFC project by increasing the PFC level, the total amount of PFC revenue collected by more than 15 percent, or by materially altering the scope of the project, it is subject to slightly more rigorous requirements. If such is the case, the agency must consult with air carriers and foreign air carriers and provide the FAA with written evidence of that consultation and the justification for the requested amendment. The Administrator may also request additional information if needed to fully evaluate the request.

If the carriers agree with the public agency's requested amendment, it will be effective 30 days after the FAA receives the application, unless notified otherwise. Any new charge resulting from the amendment will be effective on the first day of a month which is at least 60 days from the time of notification to the carriers, as discussed above. If the carriers disagree with the requested amendment, the FAA will review the information submitted, including any reasons given by air carriers for opposing the amendment. The FAA will approve or disapprove such requests within 120 days of receipt of the application, allowing for such consultation, public notice and opportunity for comment as may be appropriate.

The consultation and review procedure outlined above will also apply to any request for approval of a new class of air carrier to be designated, or modification of any previously approved class, under § 158.11.

Although a number of commenters urge that amendments be automatically approved, or that they be approved unless the carriers object, the final rule retains the option to disapprove an amendment, even though the air carriers may not oppose it. This is, in part, to protect the interests of the passengers who ultimately pay the PFC's to fund the project, and, in part, to ensure that project costs do not exceed what are considered reasonable and necessary for the accomplishment of the project.

The statute establishes the authority for the Secretary of Transportation, through the FAA, to approve or disapprove the imposition of PFC's and the use of PFC revenue; approval or disapproval of a subsequent amendment is simply an extension of that authority.

The final rule establishes no specific requirements regarding environmental, ALP or airspace studies solely related to an application to amend an approved PFC or PFC-financed project. This is largely due to distinction between approval to use PFC revenue to pay the estimated costs of a specific project and approval to use more or less revenue to cover the actual costs of that project. Such amendments would almost always be within the scope of the project as it was defined in earlier studies. If the amendment would put the project outside the scope of that definition, or constitute an essentially new project, the appropriate NEPA reviews, as well as other studies, would be mandated.

The final rule does not refer to "incidental" changes to the project, but it retains the concept, suggested in the comments, of materially altering the project "scope." This term, although it may be insufficiently

precise for some, is suggested by the joint industry commenters who would be most likely to be involved in any dispute arising over a proposed amendment. In addition, the FAA intends to apply a standard to this term which would include a quantitative increase in the project (e.g., increasing the length of a PFC-financed taxiway), but would not include amending an approved taxiway construction project to allow extension of a runway. Such changes would require that the additional project be included in a previously approved application to use PFC revenue, or that it be the subject of a newly filed application to use PFC revenue.

The final rule provides no specific appeal procedure for a public agency in the event an application for amendment, or an original application, is disapproved. The agency may, of course, refile an application at any time. The disapproval of an application for amendment will not affect the validity of any previous PFC-related approval. In addition, the final rule does not provide that disapproval of an application for an amendment result in suspension of authority to impose an approved PFC. Provisions for termination of that authority are provided in subpart E of the final rule in the event that such a course of action is necessary.

§ 158.39 Use of Excess PFC revenue. (Proposed: Use of excess PFC revenue). Because this section was geared toward concurrent approvals for imposing a PFC and using PFC revenue, it provided only for the use of excess revenue after receipt of approved PFC amounts. Accordingly, it proposed to require public agencies to notify carriers to stop collecting when PFC revenue equalled the amount of total PFC revenue approved. In addition, it specified that any excess revenue be reserved for future eligible projects. However, it did not provide a mechanism to assure that the excess revenue were used as required.

Comments: The comments generally support the NPRM's approach, although they note some concerns. A number of airport operators are concerned that tying the requirement to stop collecting PFC's to the amount of approved PFC revenue did not allow for incorrect prediction of estimated project costs. In addition, some commenters express concern that the proposed rule did not explicitly provide for the use of PFC revenue required to meet debt coverage requirements over and above payments of principal and interest.

Commenters, including the joint submission, also suggest that excess PFC revenue be used to retire existing PFC-backed bonds or to issue new bonds.

Other comments propose additional related uses for excess PFC revenue such as applying the excess revenue to the Federal share of projects undertaken by the public agency or distributing the excess to general aviation, small hub and non-hub commercial airports under AIP formula.

One commenter proposes that excess revenue be held in reserve without penalty or termination.

Final Rule: The final rule defines excess revenue in terms of approved PFC amounts in § 158.31, as described above, and in a revision to the NPRM language on use of excess revenue. Under § 158.31, the duration of authority to impose is tied to receipt of PFC revenue equal to allowable costs, not total approved PFC revenue. Excess revenue is now defined in § 158.33 as revenue, plus accumulated interest thereon, exceeding allowable project costs. When revenue collected to satisfy bond coverage requirements creates excess revenue, that revenue may be used for approved projects.

A new paragraph (c) provides for the use of accumulated revenue received before authority to impose a PFC lapsed due to failure to implement an approved project. In any case, excess PFC revenue must be used on approved projects, including retirement of existing PFC-financed debt.

Under new paragraph (d), the public agency must, within 30 days after authority to impose the PFC has terminated or expired, present to the FAA a plan for using unspent PFC revenue. If the public agency does not present the plan, or the plan is unacceptable, the Administrator will start proceedings to offset AIP entitlement funds under subpart E. The PFC statute authorizes offset of AIP entitlement funds as one means to cure excess collections. Under this provision, PFC revenue cannot be held indefinitely without penalty. To permit a public agency to do so would be contrary to the statutory intention that PFC revenue be applied to projects that enhance the safety, capacity, security, and competitiveness of the national air transportation system or that mitigate adverse noise effects of airport operation. The final rule does not provide for use of excess PFC revenue as part of the Federal share of specific grant-eligible projects or for redistribution to other airports. PFC revenues are local funds, not Federal funds. The FAA can find no basis in the statute for distributing them to other airports or for applying them to the Federal share of specific AIP projects. However, as discussed above, the FAA will start proceedings to offset apportioned Federal financial assistance as provided by the statute if the public agency does not commit to using the accumulated PFC revenue.