

agency to carry out a statement of work is required. For property acquisition, implementation is defined as beginning the title search, surveying or appraisal for a significant portion of the property to be acquired.

One-way trip and round trip. One of the most difficult issues in this proceeding has been finding a way to meet the statutory limitation of collecting no more than two PFC's per one-way trip and two in each direction of a round trip. Most trips can be identified as one-way or round trips as those terms are commonly understood, however, about 15 percent of trips cannot. These include open-jaw trips (those that have identifiable outbound and return legs but that have different origin and termination points) and other trips. The NPRM incorporated an earlier airport trade association suggestion that the one-way trip be defined according to a "four-hour rule." It would have specified that after each scheduled stop between flights of more than four hours, a new one-way trip would start.

The joint submission and other commenters state that this proposed definition is inappropriate and difficult to use. Instead, the joint submission recommends the rule provide for collection of PFC's at the first four airports, regardless of whether the trip meets the ordinary understanding of "round trip." In the alternative, the joint submission requests the PFC be collected at the first two and last two airports imposing PFC's. According to the commenters, these systems, particularly the first alternative, would be easier and less costly for the carriers to implement.

While sympathetic to these concerns, the FAA is bound by the statutory language, which clearly prohibits the collection of more than two PFC's on a one-way trip and more than two in each direction on a round trip.

Therefore, the final rule defines a round trip as a trip where the passenger's itinerary terminates at the origin point. Other trips are considered one-way trips. This would include open jaw trips, as well as trips meeting the commonly understood meaning of one-way. On a one-way trip the carrier would collect PFC's for the first two enplaning airports imposing PFC's. On a round trip, the carrier would collect PFC's at the first two and last two enplaning airports where PFC's are imposed. This assures that PFC's will be collected from passengers on both directions of a round trip and not more than four charges will be made. The suggestion of collecting at the "first four" airports imposing a PFC could result in three or four charges on a one-way trip, contrary to the statutory requirement.

Passenger enplaned. As proposed in the NPRM, "passenger enplaned" would have included passengers on board international flights that transit an airport within the continental United States for nontraffic purposes as is provided in the Airport and Airway Improvement Act of 1982 (AAIA). This category of passenger is excluded from the definition in the final rule. Without this change, passengers that transit an airport on a technical stop, such as for refueling or customs inspection, would be liable for payment of any PFC imposed at that airport. Such stops, however, are not shown on the passenger's ticket, a requirement for collection of the PFC. Additionally, the passenger is not "enplaned" at that airport as that term is generally interpreted.

State. The NPRM did not include a definition of State. This new definition has been added to the final rule to clarify that all territories and possessions of the United States that control commercial service airports may impose a PFC. Under the rule, a State is defined to include the District of Columbia, Puerto Rico, the U.S. Virgin Islands, the Northern Mariana Islands, the Trust Territory of the Pacific Islands and Guam.

Unliquidated PFC revenue. The NPRM did not include a definition of this term and a number of commenters were unclear about what this term meant. The term is defined as PFC revenue received by the public agency but not yet used on approved projects.

§ 158.5 Authority to Impose PFC's. (Proposed Authority to Impose PFC's) As proposed, this section would have permitted a public agency controlling a commercial service airport to impose a \$1, \$2 or \$3 PFC on passengers enplaned at the airport. It also would have prohibited states or political subdivisions of states not controlling such airports from imposing a PFC.

Comments. Some commenters recommend a uniform fee of \$3, arguing the cost of programming automated systems would be as much as 24 percent less if only one amount were permitted to be collected. They also claim that there is a limited space on the automated ticket stock for individual PFC charges. The commenters also suggest the rule would be less confusing to the travelling public. However, some smaller airports indicate that they would not impose the maximum allowed PFC amount if they could impose a lesser amount.

Final Rule. While the FAA recognizes the merit of these arguments, statutory language clearly permits airports to impose PFC's of \$1, \$2 or \$3. Therefore, this section is unchanged from the NPRM. However,

while the ticket will be required to indicate each PFC airport, only the total amount of PFC's collected must be shown on the ticket. This change should eliminate some of the burden on carriers of collecting a variable charge.

§ 158.9 Limitations. (Proposed: Limitation regarding passengers of air carriers receiving essential air service compensation). As proposed, this section would have prohibited the imposition of a PFC only on specific flights to an essential air service (EAS) point for which compensation was being paid. In addition, it would have required the compensated carrier to notify other carriers of these individual flights.

Comments: Several comments request the prohibition on PFC collection for these flights be removed, thereby allowing PFC's to be collected from all passengers enplaning at an airport imposing a PFC. The commenters also ask that if the limitation is retained, the Department of Transportation should provide a monthly list of those carriers compensated and the flight to EAS airports for which compensation is paid. Comments also point out carriers cannot always designate the specific flights for which EAS compensation is paid.

Final Rule: The statute clearly prohibits airports from collecting PFC's on flights to EAS points over routes for which EAS compensation is paid. However, it is not possible to distinguish which flights by that carrier on a particular route are compensated. Therefore, the final rule, § 158.9(a), states that no PFC may be imposed on any flight to the eligible point (EAS airport) by a carrier serving a route for which EAS compensation is paid to that carrier. Thus, in response to the comments, the final rule does not require compensated carriers to identify individual flights as those for which compensation has been received. However, a public agency may impose a PFC on passengers enplaned on any flight to an EAS point that operates over a route for which no subsidy is paid. This includes service over the subsidized route by a carrier not receiving EAS compensation in addition to service over other routes by any carrier.

In addition, the final rule is modified to eliminate the requirement that EAS carriers provide notice of compensated service. The FAA will make available a monthly list of carriers and airports receiving essential air service compensation.

A new § 158.9(b) is added to the final rule. This provision prohibits a public agency from requiring a foreign airline with no service to the United States to collect a PFC. This subject is addressed further in the discussion of § 158.47.

§ 158.11 Public agency request not to require collection of PFC's by a class of air carriers or foreign air carriers. This section was not in the NPRM, but was added following consideration of the comments received. The NPRM would have required all air carriers and foreign air carriers to collect a PFC and would have required public agencies to consult with all such carriers at the airport.

Comments: Numerous comments request that particular classes of persons or carriers not be subject to PFC's. These include military and government personnel traveling on official business, passengers of on-demand air taxi operators, all international passengers, all charter passengers, persons traveling on "frequent flyer" discount fares and others. Some of these suggestions were proposed solely for the convenience or financial benefit of the commenting party, while others are based on concerns that the cost of collection to both the carrier and the public agency would outweigh any benefits of the PFC revenue derived by the public agency.

The joint submission recommends public agencies be given discretion to impose PFC's on passengers traveling on carriers in any class accounting for one percent or less of total enplanements at the particular airport.

Final Rule: The FAA believes the proposal in the joint submission provides a reasonable cut-off point, and it forms the basis for the final rule. The FAA notes that the PFC will be a local charge, generating local revenue to be used locally. However, to ensure that public agencies designate classifications accurately, reasonably and without arbitrary or discriminatory effect, the final rule requires public agencies to obtain FAA approval of any class of carriers not required to collect a PFC.

Thus, while air taxis, for instance, may not make up 1 percent of the enplanements at large hub airports, that class may provide the majority of enplanements at smaller airports. Therefore, it would be unfair to these smaller airports to categorically exclude this type of operator.

Section 158.11 allows public agencies to determine what classes account for less than one percent of the airport's enplanements and to exclude them from the initial notice and consultation requirements under § 158.23. However, the public agency must formally request that particular classes of carriers

not be required to collect PFC's as part of its application for authority to impose the PFC or as part of the amendment procedure. Since this request would be an essential part of the PFC application, disapproval by the Administrator of the proposed class would require the public agency to engage in reconsultation with all carriers operating at the airport and subsequent application.

Therefore, it may be prudent for the public agency to proceed with caution in preparing to submit the first such application. FAA Airports offices may be able to provide informal assistance in designating appropriate classes, but this assistance should not be relied on as an approval with respect to any request or class.

§ 158.13 Use of PFC revenue. (Proposed: Use of PFC revenue.) As proposed, this section would have permitted the use of PFC's to pay the total cost of eligible projects and to pay debt service on bonds or other indebtedness incurred to carry out PFC-eligible projects. However, debt service was not otherwise defined.

The NPRM would not have allowed a public agency to use PFC revenue to finance the local matching share for projects receiving AIP funds. The FAA's intent was to ensure that PFC revenue would be used to supplement other sources of local airport construction funds rather than replace them.

Comments: The latter proposal drew a great deal of criticism, including a letter from several members of Congress arguing that Congress intended that PFC's be used as the local share for AIP projects. In particular, small airports argue such a prohibition would eliminate their ability to implement AIP projects; this, they claim, would defeat the intent of this program to enhance the capacity of the national airspace system.

Airports and the financial community also request that reimbursable debt service be further defined. Bond financing costs should also be eligible. A final comment in this area urges that the rule prohibit a public agency from imposing additional user charges to help pay the costs of a PFC-financed project.

Final Rule: PFC revenue may be used to meet the non-federal share of projects funded under the AIP. The FAA recognizes the special problems that smaller airports may have in generating local matching funds and that PFC revenue may be a necessary source for the local match. The FAA intends to maximize the funds available to enhance safety, capacity, security and competitiveness under the PFC statute, and the FAA has been persuaded that this change in the final rule will accomplish this objective.

The FAA also is mindful that PFC revenue is local revenue. Historically, the FAA has not defined permissible and impermissible sources of local matching revenue under the AIP. Finally, the FAA notes that the statute is silent on the availability of PFC revenue for the local match.

This section also provides for the use of PFC revenue for bond associated debt service and financing costs. To further enhance the value of PFC revenue streams as support for debt financing, § 158.13(b)(2) of the final rule permits PFC revenue to be commingled with the airport's general revenue stream when required by bond documents. However, the correct proportion of the bond proceeds (or an equal amount) must be used for approved projects and any excess collections over annual debt service or other financing costs must be used on approved projects or to retire existing PFC-financed debt. Also, under § 158.13(c), public agencies may combine PFC revenue and federal grant funds to accomplish an approved project. This provision is unchanged from the NPRM.

Section 158.13(e) expressly requires a public agency to obtain FAA approval to use PFC revenue before the public agency may expend PFC revenue. Thus, if a public agency wants to use PFC revenue to fund environmental studies and other planning activities before receiving full project approval, it will have to identify these formulation activities as a separate project or projects for use of PFC revenue. Otherwise, it could be reimbursed for costs incurred for these activities once it obtained project approval. More information on this two-step application process can be found in § 158.25.

The final rule does not prohibit the imposition of additional user charges to help pay for the costs of a PFC-financed project. The statute prohibits a public agency from including the PFC portion of the cost of any project in its rate base. However, a public agency may establish user fees to recoup the costs of operating and maintaining any such facilities, as well as any financial contribution not covered by PFC's or the AIP.

§ 158.15 Project eligibility. (Proposed: Project eligibility) As proposed, this section specified the kinds of projects that could be funded by PFC revenue and the objectives these projects must achieve to receive approval for use of PFC revenue. Eligible projects, by statute, are those that preserve or enhance the safety, capacity or security of the national air transportation system, reduce airport noise or mitigate airport noise impacts or enhance competition among air carriers. In addition, PFC financing would have

been available for AIP-eligible airport development and planning projects, AIP-eligible terminal development, airport noise compatibility planning as described in 49 U.S.C. 2103(b), noise compatibility measures eligible for Federal assistance under 49 U.S.C. 2104 and public use, revenue and non-revenue passenger enplanement or deplanement areas and related facilities. The NPRM also provided examples of non-eligible categories of facilities, including all concessions, car rental facilities, restaurants and parking garages.

Comments: Several commenters question whether off-airport ground transportation projects are eligible. Smaller airports also request that concession facilities, including car rental and parking facilities, be eligible for PFC financing.

Final Rule: The text of the rule has not been changed from the NPRM in any material way. However, ground transportation projects are eligible if the public agency acquires the right-of-way and any necessary land. Ownership is also necessary for project eligibility under the AIP. In this case, under the statute, PFC eligibility is identical to AIP eligibility. The final rule does not set any eligibility restrictions on the mode of transportation for airport access projects, nor does it impose any requirements on the geographical proximity of the project to the airport. These issues will be reviewed on a case-by-case basis as part of the Administrator's review and approval of an application to use PFC revenue.

Concession facilities are not eligible under the final rule for two reasons. First, such facilities are not AIP-eligible. Second, while gates and related areas are eligible projects, the FAA finds no basis for expanding the definition of eligibility to include concession spaces in these areas. Third, these facilities do not appear to increase the safety, security or capacity of the national air transportation system or increase airline competition, as required by the statute.

Subpart B

This subpart specifies the procedures to be followed and the supporting documentation to be submitted to the FAA by public agencies applying for authority to impose a PFC. It also describes the procedures and criteria that would be used by the FAA in reviewing applications to impose a PFC.

(Proposed § 158.23 Requirements prior to submission of applications.) The NPRM proposed the requirement that airport layout plan, airspace and environmental studies be completed and approved prior to submission of an application for a PFC by a public agency. The concept of such prerequisites for all PFC's drew criticism from over 40 respondents, especially the airport community. Many argue that the statute does not limit approval of authority to impose a PFC to only those situations where a project is ready to be implemented. Rather, they assert, a public agency should be authorized to collect for a major project, or slate of projects, that are nominally eligible but are still in the planning stage.

The majority of these commenters suggest that completion of all or some of the proposed prerequisites be deferred until the public agency submits an application to use its PFC revenue. Others argue that these requirements should not be applicable to imposition of a PFC or to implementation of PFC-financed projects.

An important consideration in this regard is the degree to which approval to impose a PFC irrevocably commits the FAA or a public agency to a course of action on a proposed project. If approval to impose a PFC is equivalent to such a commitment, the FAA's approval could be a major Federal action requiring a review under the National Environmental Policy Act of 1969 (NEPA), and it would be necessary to complete all environmental studies prior to such approval. Therefore, the FAA sought comments in the NPRM on whether the approval of an application to impose a PFC would be a major Federal action under NEPA or, alternatively, whether such approvals are outside the scope of NEPA.

Two respondents provide particularly helpful comments in this regard. They cite applicable court rulings and draw meaningful comparisons between these decisions and the approval of authority to impose a PFC separately from approval to use PFC revenue on a specific project. Following further analysis, the FAA has concluded that, with clear requirements for meaningful alternatives available to the proposed project and adequate safeguards on the expenditure of PFC revenue prior to approval, approval to impose a PFC would not ordinarily be a major Federal action within the meaning of NEPA. Rather, in most cases the approval would be categorically excluded from the requirement for an environmental assessment or statement. Environmental reviews would, however, be required before approval is given for use of PFC revenue to finance a project under the same procedures as are currently applicable to AIP or locally financed projects subject to FAA approval.

Although about one out of six respondents commenting on this issue concurred with the method set forth in the NPRM, the FAA agrees with the views of the majority that prior completion of environmental,

ALP and airspace studies is not required for an application to impose a passenger facility charge. Accordingly, the final rule provides a procedure under which a PFC may be imposed prior to the completion of such studies.

The FAA recognizes the danger cited by some commenters that, in extraordinary circumstances, mere approval to impose a PFC may as a practical matter, commit the FAA or a public agency to a course of action or may otherwise influence future Federal decisions. If the FAA believes that danger to exist in a particular case, it will not approve an application to impose a PFC unless the appropriate environmental reviews have been completed.

In addition, the procedures for consultation, application, review and approval set forth in the NPRM are modified in the final rule to accommodate applications submitted for the authority to impose a PFC, either before or with an application to use PFC revenue on an approved project.

Several commenters propose various ways to streamline the process for notice, consultation, application, review and approval. Most involve submission of a comprehensive slate of projects in the form of a master plan or capital program. One airport authority proposes a completely different process based on that concept with abbreviated periods for consultation and review. The FAA may, in some cases, be able to complete its required notice and review processes in less than the 120 days permitted by the statute. However, because of complexity or opposition, there are likely to be many applications that will not be able to be fully evaluated in less than the full 120-day period.

The FAA has attempted to adopt the spirit of the comments that urge a more streamlined, less complicated, process in obtaining approval to impose a PFC and to use the revenue remitted by carriers. Many of the suggestions were accepted and resulted in revisions in the final rule. Readers familiar with the NPRM will note substantial change throughout this section. Not all the comments were adopted, however, and the reasons are given in the discussion of each section below.

§ 158.23 Consultation with air carriers and foreign air carriers. (Proposed: § 158.25 Consultations with air carriers and foreign air carriers.) This section in the NPRM would have required that, to the extent possible, a public agency provide notice to all air carriers and foreign air carriers currently operating at the airport. It specified the items to be included in such a notice, time limits for acknowledgement by air carriers of receipt of the notice, meeting requirements, and it established that the carriers must certify agreement or disagreement with the proposed projects.

Comments: Airports and airport organizations argue for relaxed notice and consultation requirements. Some recommend that air taxi operators be exempt from the notice procedure required of public agencies, and others urge a like exemption for charter operators because, by definition, they serve the airport on an irregular basis. A few endorsed the requirement in the NPRM that all carriers be notified and consulted. A number of commenters point out that a public agency's cost for consultation could easily exceed the amount of PFC revenue collected for some air carriers that enplane small numbers of passengers. The joint submission also suggests that attempts to coordinate and require collection of PFC's below some threshold of enplanements would be uneconomic. New § 158.11 was developed in response to their suggestions in this regard.

Final Rule: The FAA weighed the comments requesting relief from notice to and consultation with all air carriers and concluded that the relief sought is warranted. Accordingly, § 158.23(a) has been modified to reflect the provision in § 158.11 that allows public agencies to request such relief with respect to any class of air carrier enplaning less than one percent of all passengers enplaned at the airport. The information about any such class of carrier is now included in § 158.23(a)(3) of the final rule. The Administrator's decision granting or denying such a request is discussed below under § 158.29.

Public agencies should note, however, that FAA approval or disapproval of the request will occur only in conjunction with the approval or disapproval of an application to impose a PFC under § 158.29. The Administrator must ensure that any relief to a class is reasonable, not arbitrary and not discriminatory. If the request is approved under that section, carriers in the named class or classes would not be required to collect the PFC. If the request is not approved, the public agency will have to undertake new consultations with carriers, including the class or classes which were named in the original application.

A few commenters recommend that consultation be limited to "major operators" at the airport. While this approach would seem to address the carriers serving most of the passengers enplaned at an airport, and, therefore, could comply with the spirit of the consultation requirement, the term itself is difficult to define. There is no agreed-upon level of activity that would serve to divide "major operators" from other operators at an airport; in addition, the same carrier may be considered "major" at one airport, but not at another. Therefore, the FAA has not adopted this suggestion.

Other commenters believe that no airline consultation is necessary, that consultation could be satisfied by mailing all project information to carriers in lieu of a meeting, or that consultation should not be