



# Federal Aviation Administration

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## Memorandum

Date: September 8, 2006

From: Barry L. Molar, Manager, Airports Financial Assistance Division  
<original signed by>

To: Manager, All Regional Airports Division Managers and AMA-620

Prepared by: Joe Hebert, Manager, Financial Analysis and Passenger Facility Charge Division,  
APP-500  
Sheryl Scarborough, Management and Program Analyst, APP-510

Subject: PFC Update, PFC 50-06

Attention: PFC Contacts

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**PFC 06-50.1. Detailed basis of cost information, new project certifications, and changes to the Final Agency Decision.** In 2003, the Village of Bensenville, Elk Grove Village, and City of Park Ridge near Chicago appealed a final agency decision approving collection and use of passenger facility charges for tasks needed to prepare an environmental impact statement (EIS) for the proposed O'Hare Modernization Program. The FAA limited its approval of the PFC to tasks needed to prepare the EIS, specifically withholding approval for construction or land acquisition costs and design work beyond what the FAA determined necessary to prepare the EIS. On July 27, 2004, the US Court of Appeals, District of Columbia Circuit, issued its decision. The Court found that the FAA had not adequately demonstrated that it had reviewed the cost estimates for the EIS project nor properly determined that the PFC approval would generate only that revenue necessary to fund the approved EIS project. In simple terms, the FAA's records did not support its findings in its decision.

As you know, the FAA is required by statute, specifically 49 USC Sec. 40117(d), to make a determination that the amount and duration of the proposed passenger facility fee will or will not result in revenue (including interest and other returns on revenue) that is not more than the amount necessary to finance the specific project. In *Village of Bensenville, et al. v. Federal Aviation Administration*, the Court was not satisfied with the FAA's record documenting its finding. The Court states that "the FAA made not one finding regarding the necessity of over \$110 million to prepare an EIS for the modernization program...such a simple recitation of the statutory standard neither

satisfies the statute...nor assures us that the agency's decision is rational...the FAA cannot simply declare its "expertise"; it must exercise that expertise and demonstrate sufficiently that it has done so else we have nothing to review much less defer to." *Village of Bensenville, et al. v. Federal Aviation Administration*, 376 F.3d 1114, 1122 (D.C. Cir. 2004).

As a result of the Court's decision in this case, several meetings have been held within the Department of Transportation to determine what actions should be taken to modify the FAA's PFC processing in this case and in future cases. The conclusion is that three changes are needed to the processing of regular PFC applications.<sup>1</sup> The first change involves the information that public agencies are required to provide in PFC applications. The second change involves the Attachment B form and the Application Recommendation Form. The final change involves the Final Agency Decisions issued for PFC approvals. These changes are effective immediately and must be applied to all applications submitted on or after the date of this update letter. These changes have been applied to recent decisions issued by Headquarters, but not to decisions issued by Regional offices. This was done simultaneously with developing the guidance for use by Airports field offices prior to their implementation of the changes.

#### Change 1:

Public agencies will be required to provide detailed basis of cost information (beyond what is currently provided in the Attachment B form) for each project (as required by Part 158) that proposes PFC funding in excess of \$10,000,000. This detailed information should, at a minimum, provide detail regarding the cost of each major project component. Ideally, this information will consist of the document(s) the public agency used to determine the amount shown in item 14 of Attachment B (Financing Plan). It is the FAA's intention for the public agency to use existing information rather than creating new documents and analysis (emphasis added). The public agency should also clearly indicate whether the information is based on conceptual design or feasibility studies, construction design, contract, appraisal, or actual costs. The FAA's authority for requiring public agencies to submit detailed basis of cost information is found in §158.25(b)(16) which states that the public agency must provide "Such additional information as the Administrator may require," in the application.

The \$10 million threshold is based in part on the fact that the FAA has a great deal of experience and knowledge regarding projects under \$10 million through its administration of the Federal grant programs but has less experience with large scale projects. However, while we are setting a \$10,000,000 threshold for requiring public agencies to submit this information, ADO's and RO's may, at their discretion, request detailed basis of cost information for projects below \$10,000,000. For example, if

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<sup>1</sup> Decisions processed under the non-hub pilot program are not subject to these new requirements for several reasons. First, most pilot program projects have either existing or planned AIP funding and these grants involve an FAA review of the costs. Second, most pilot program projects request less than \$10 million in PFC funding authority. Third, the 30-day pilot program processing period does not provide enough time for the FAA to review detailed cost estimates for multiple projects.

comments are submitted by the carriers, the public that question the costs, or if during the FAA's review the FAA has questions regarding the cost of the project, detailed basis of cost information would clarify issues. This detailed basis of cost information requirement for each project above \$10,000,000 will be added to the Attachment B form and instructions.

#### Change 2:

In addition, a new "for FAA use" review block will be added to the end of the Attachment B form. This review block states that the FAA reviewer has examined basis of cost information for the project and has concluded that the amount approved is reasonable and will not result in excess PFC revenue. The conclusion is based on the information supplied by the airport and the reviewer's knowledge and experience with airport projects. The review block will also include a comment area where the reviewer should indicate if the approved amount is different from the amount requested and the reason that an amount other than that requested is being approved. The statement is required for all projects (emphasis added), not just those above \$10,000,000. This finding is designed to meet the statutory requirement. However, as noted for projects under \$10 million in PFC, detailed basis of cost information discussed above is not a routine prerequisite for completion of the review block. The FAA reviewer may rely on the same considerations that the reviewer would use to recommend an estimated cost for a comparable Airport Improvement Program-funded project. [See interim Memo to File cost review form, Attachment 1.]

Each Attachment B form will need to be signed by the FAA official who actually reviewed the basis of cost information and determined that the request is reasonable and will not result in excess PFC revenue. That may mean that the various Attachment B cost statements in an application are signed by different reviewing officials. For example, the ADO's planner may review the adequacy of the scope and cost of a master plan or environmental assessment. Thus, that individual should sign as the reviewing official for that project. Similarly, a project manager/engineer may review a runway rehabilitation project. Where ADOs operate under the "generalist" concept, one person may review all projects. Again, the person reviewing the basis of cost information should use the comment space provided to indicate any recommendation that the approved amount, be different from that requested and any reasons for recommending a different amount.

A statement regarding the duration of collection for the application will be added to the Application Recommendation form. This statement will be signed by the person in the ADO or RO who totaled the PFC amount approved and determined the duration of collection. (This person may be different than the person or persons who reviewed the costs of individual projects.) Also, anyone determining the duration of collection for PFC decisions should be reminded that the FAA cannot approve a duration that is longer than that requested by the public agency. [See interim Memo to File, Attachment 2.]

In accordance with Paperwork Reduction Act requirements, changes to the existing forms require coordination with several offices. This coordination has begun, but is not yet complete. We will send out a notice to all regions when the revised forms have been posted on the web. In the interim, you may send this update letter to your public agencies to inform them of the detailed basis of cost information requirement. In addition, we have developed two interim statement “memos to file” for use until the revised forms are issued. These memos to file, once completed, should be kept in the PFC application folder, along with the basis of cost information or other documents upon which they are based. A separate project statement should be completed for each project in the application, but you can include all the project statements needed in one memo. Again, the “FAA comments” section therein should be used to explain any difference between the amount to be approved and the amount requested by the public agency. One “duration of collection” statement should be completed for the entire application. The “FAA comments” section therein should be used to explain any differences between the FAA’s decision and the public agency’s request on the duration of collection statement.

### Change 3:

Changes to the Final Agency Decision involve additional language in some of the standard text sections as well as several changes to each project determination finding.

These changes are designed to strengthen the FAD and meet the statutory requirements while demonstrating agency expertise. While not all changes are listed herein, the highlights include changes in the “Calculation of PFC Level” section, and “Project Determination” section. Examples are terminal projects which contain both eligible and ineligible work, but where the cost of the ineligible work has not been specified; certain projects seeking PFC impose authority, but which require environmental disclosures prior to FAA approval for use; and security projects. In addition to the changes to the Basis of Eligibility there are changes to language in the Determination section, such as significant contribution; objective; and proposed sources of financing.

Attachment 1 to this update letter is the Memo to File for project certification required for each project in the application. Attachment 2 is the Memo to File for the duration of collection certification for the application. Attachment 3 provides revised FAD templates (9 different scenarios).

Please contact Sheryl Scarborough at 202-267-8825 if you have any questions.

Attachments