

Illinois Department of Transportation

Report of Ex Parte Communication in Rulemaking

“Ex parte communication’ [in rulemaking] means any written or oral communication by any person during the rulemaking period that imparts or requests material information or makes a material argument regarding potential action concerning an agency’s general, emergency, or peremptory rulemaking under the Illinois Administrative Procedure Act and that is communicated to that agency, the head of that agency, or any other employee of that agency [T]he rulemaking period begins upon commencement of the first notice period with respect to general rulemaking . . . , upon the filing of a notice of emergency rulemaking . . . , or upon the filing of a notice of rulemaking with respect to peremptory rulemaking ‘Ex parte communication’ does not include the following: (i) statements by a person publicly made in a public forum; (ii) statements regarding matters of procedure and practice, such as the format of public comments, the numbers of copies required, the manner of filing such comments, and the status of a rulemaking proceeding; and (iii) statements made by a State employee of that agency to the agency head or other employee of that agency.” (Section 5-165(b) of the Illinois Administrative Procedure Act [5 ILCS 100/5-165(b)]). Any questions regarding this requirement should be directed to the Ethics Officer.

Date of submission of this report to agency Ethics Officer: June 3, 2010

Name and job title of employee to whom the ex parte communication was made: **Joseph Shacter, Director Division of Public and Intermodal Transportation, IDOT**

Part name, Illinois Administrative Code Citation, *Illinois Register* citation, type of rulemaking (i.e., general, emergency, or peremptory) and stage of rulemaking (i.e., first notice, second notice) of the rulemaking that was the subject of the ex parte communication: **Regulations for State Operating Assistance to Downstate Areas, 92 Ill. Adm. Code 653, 34 Ill. Reg. 3208, March 12, 2010, general, first notice**

Name of person making ex parte communication, that person’s job title, company name, and date ex parte communication was made: **Laura Calderon, Executive Director, Illinois Public Transportation Association; April 26, 2010**

Was this communication written or oral? **Written (see attached letter)**

If written, attach a copy of all written communication and all written responses. If oral, summarize the nature and substance of the oral communication and identify the person, including job title, who responded to the communication and the nature of the response:

Summary of action requested or recommended by the ex parte communication:

Section of the Rule:	653.30-Definitions
Brief Description of the issue and action requested	“Complementary Paratransit Service.” The ADA requires that public transportation operators provide “complementary paratransit” service to eligible recipients within ¼ mile of any fixed route service. Since many of our operators provide this service beyond ¼ of mile, they are requesting that all “complementary paratransit service” expenses be eligible for DOAP reimbursement.
Option 1-Action by Department	“Complementary Paratransit Service” is not mentioned or addressed in the Act, nor is it required under any State law. There is nothing in the definition of “Public Transportation” that would inhibit the cost of this service to be an eligible expense. The Department will therefore delete all reference to “Complementary Paratransit Service” in the rules.

Section of the Rule:	653.30-Definitions
Brief Description of the issue and action requested	“Program of Proposed Expenditures.” The definition provided in the rule is too restrictive and does not follow Departmental guidance on the type of service that is eligible for DOAP reimbursement. IPTA is requesting that the definition be broadened to reflect current Department policy.
Action by Department:	The Department agrees with IPTA’s request and will change the definition as follows.
Revised language	“Program of Proposed Expenditures” or “POPE” means...general public transportation service benefiting the residents of the applicant.

Section of the Rule:	653.30-Definitions
Brief Description of the issue and action requested	“Territorial Boundaries.” The definition provided in the rule does not allow those service areas that have been created by intergovernmental agreements. IPTA is requesting that the definition be broadened to allow for multi-county, multi-city, county city arrangements.
Action by Department:	In discussions with the Department’s Office of Chief Counsel, it has been determined that “Territorial Boundaries” can be set by intergovernmental agreement as long as the governing boards of both parties agree by ordinance or resolution to the conditions of the agreement. As such, the Department agrees with IPTA’s request and will revise the definition as follows. In addition, the Department will add language so that no two participants can share the same area in their territorial boundaries which should diffuse any issues associated with identifying the sales tax transfers attributed to a participant.
Revised language	Territorial Boundary means: (a) the municipal boundaries of a municipal participant plus

	<p>the boundaries of any contiguous city, village, incorporated town, and/or county that has agreed by intergovernmental agreement to be included in the territorial boundaries of the municipal participant;</p> <p>(b) the county boundaries of a county participant plus the boundaries of any contiguous city, village, incorporated town, and/or county that has agreed by intergovernmental agreement to be included in the territorial boundaries of the county participant;</p> <p>(c) the boundaries of the municipalities, villages, incorporated towns, counties, and/or participating areas having created a mass transit district, plus the boundaries of any contiguous city, village, incorporated town, and/or county that has agreed by intergovernmental agreement to be included in the territorial boundaries of the mass transit district participant.</p> <p>Any boundary established by intergovernmental agreement must be approved by ordinance and/or resolution by the appropriate and requisite governing bodies and as long as establishment of such boundary is not in conflict with the Act and/or the Local Mass Transit District Act [70 ILCS 3610]. In addition, a participant cannot establish as part of its territorial boundary any area that is already included in another participant's territorial boundary.</p>
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Section of the Rule:	653.30-Definitions
Brief Description of the issue and action requested	"Public Transportation." The definition provided in the rule may be considered as more restrictive than that provided in the Act. IPTA is requesting that the definition mirror that provided in the Act.
Action by Department:	The Department agrees with IPTA's request and will revise the definition as follows.
Revised language	<p>"Public Transportation" means the transportation or conveyance of persons by means available to the general public including groups of the general public with special needs</p> <p>(1) within the urbanized area or</p> <p>(2) in the nonurbanized areas within the service area of each participant as approved by the Department, except for transportation by automobiles not used for conveyance of the general public as passengers.</p> <p>Service in a participant's service area may be provided by either (i) another eligible participant through an intergovernmental agreement, (ii) a private for-profit operator through a third party contract, or (iii) a private non-profit operator through a pass through agreement or third party contract.</p>

Section of the Rule:	653.30-Definitions
Brief Description of the issue and action requested	"Fixed Route Service." The definition provided in the rule limits service to that which is provided by "vehicles," but does not define "vehicle." IPTA is requesting that "vehicle" be defined.
Action by Department:	The Department agrees that the definition as written could be restrictive since public transportation service includes that which is provided by "light rail" and "ferry boat." The Department will change the definition as follows.
Revised language	"Fixed Route Service" means public transportation service provided on a repetitive, fixed-schedule basis along a specific route, stopping to pick up and deliver passengers to specific locations.

Section of the Rule:	653.111-Eligible Operating Expenses
Brief Description of the issue and action requested	Subsection (a) prescribes that a rebate received for an expense shall be reported as a revenue that decreases eligible expenses, not just as a revenue that decreases deficit. IPTA stated that based on the language and examples provided in the rules, this requirement is a "misguided" interpretation of the purpose of certain rebates.
Action by Department:	The Department's auditors have determined that the Department's rules are not "misguided" but that our determination of an applicable credit needs to be done on a "case by case basis" in accordance with standard accounting practices, as well as State and federal requirements. Since the rebate examples given may or may not require eligible expense to be reduced (i.e. be an applicable credit), the Department will change the provision to read as follows.
Revised language	a) Operating assistance grants will be made only for the reimbursement of eligible operating expenses. In all instances, operating expenses shall be deemed eligible to the degree that they are required for public transportation, subject to independent documentation and audit verification, consistent with State or federal program eligibility requirements, and net of all applicable credits as determined by the Department to be in accordance with standard accounting practices. Eligible operating expenses include, but are not limited to:

Section of the Rule:	653.111-Eligible Operating Expenses
Brief Description of the issue and action requested	Subsection (a)(1) caps the eligible "salary" of a grantee's employee at a level that is "equal to or less than the Secretary of the Illinois Department of Transportation." IPTA stated that limiting the level of "eligible salary" in this manner is "arbitrary" and the provision should be deleted.
Action by Department:	The Department concurs with IPTA's request and will change the provision as follows.
Revised language	1) employee wages

Section of the Rule:	653.111-Eligible Operating Expenses
Brief Description of the issue and action requested	Subsection (a)(2) limits the eligible "employee benefits" of a grantee's employee to those that are "customary and reasonable." IPTA stated that limiting the level of "employee benefits" in this manner is "ambiguous" and the provision should be deleted.
Action by Department:	The Department concurs with IPTA and will revise the provision to read as follows.
Revised language	2) employee benefits

Section of the Rule:	653.111-Eligible Operating Expenses
Brief Description of the issue and action requested	Subsection (a)(9) includes as an eligible expense those expenses associated with repairs to buildings, equipment and vehicles so long as they do not extend their useful life. IPTA contends that routine repairs do extend the useful life of assets and should be eligible.
Action by Department:	The Department agrees that the language as written is misleading in that the repairs should not extend the "useful life" of an asset when considering replacement eligibility. The Department will change the provision to read as follows.
Revised language	9) routine maintenance and repairs to buildings, equipment or vehicles that do not extend their useful life for replacement eligibility purposes.

Section of the Rule:	Section 653.112-Ineligible Operating Expenses
Brief Description of the issue and action requested	Subsection (a)(19) states that an operating expense may be determined as ineligible by the Department if it is found to be inconsistent with federal regulations and requirements. IPTA contends that the Department's method for determining an expense ineligible under these conditions could be arbitrary and capricious, and that a grantee has no appeals process by which to question the decision.
Action by Department:	The Department's Office of Chief Counsel has reviewed this request and is of the opinion that while the Act does give the Department the authority to determine the eligibility of an expense, it does not address nor give the Department the authority to implement an appeals process. Therefore, no change will be made to the rule.

Section of the Rule:	Section 653.112-Ineligible Operating Expenses
Brief Description of the issue and action requested	Subsection (a)(3) states ineligible expenses includes debt service (including principal and interest) on funds borrowed to pay for any portion of a capital asset partially funded with state capital grant funds. IPTA is asking that the rule be changed to allow, as an eligible expense, debt service on funds borrowed to pay for any portion of a capital asset acquired with the assistance of either state or federal grant funds.
Action by Department:	The Department believes that both IPTA's request and the

	Department's proposed rule are inconsistent with the Act. Therefore, the Department will change the rule as follows:
Revised language	3) debt service on capital assets acquired with the assistance of state capital grant funds provided by the State.

Section of the Rule:	Section 653.112-Ineligible Operating Expenses
Brief Description of the issue and action requested	Subsection (a)(6) references expenses associated with the "Workplace Investment Act." IPTA contends that the reference is incorrect and it should be the "Workforce Investment Act."
Action by Department:	This was an oversight and a correction will be made to the rule to reference the "Workforce Investment Act."

Section of the Rule:	Section 653.112-Ineligible Operating Expenses
Brief Description of the issue and action requested	Subsection (a)(8) and (18) reference very similar expense categories and IPTA is recommending that they be combined.
Action by Department:	The Department's position is that while the subsections represent similar but different cost categories, they can be combined for ease of understanding. Therefore, subsection (a)(18) will be deleted and subsection (a)(8) will be changed to read as follows.
Revised language	"8) travel and entertainment expense incurred in attending non-public transportation related activities;"

Section of the Rule:	Section 653.112-Ineligible Operating Expenses
Brief Description of the issue and action requested	Subsection (a)(14) states that the portion of any eligible operating expense for which a participant will receive funding from any other federal, State or local program is an ineligible expense. IPTA's position is that the Act spells out very clearly how to treat program revenues and their impact on eligible costs.
Action by Department:	The Department does not agree with IPTA's position that the Act clearly spells out how to treat program revenues, but does agree that the rule as originally written had unintended consequences. Therefore, the Department will make the following change.
Revised Language:	(14) that portion of any eligible operating expense for which the participant has or will receive reimbursement from any other federal or state capital grant program absent a specific federal or state directive allowing the capital expense to be treated as an operating expense, e.g., federal preventative maintenance expense.

Section of the Rule:	Section 653.114-Accounting and Documentation
Brief Description of the issue and action requested	Subsection (a) states that the applicants shall use the "accrual method" of accounting when determining reimbursement for operating expenses. IPTA's position is that the method of accounting currently used by applicants is not "pure accrual"

	but a "modified accrual."
Action by Department:	Based on the Department's review of the "generally accepted accounting principles (GAAP)" literature related to this topic, there appears to be no clear definition of "modified accrual." It states that any method that is not strictly an "accrual" or "cash" basis must meet "GAAP" standards. To clarify this issue, the Department will make the following change.
Revised language	"(a) Applicants shall use an accrual method of accounting in accordance with Generally Accepted Accounting Principles when"

Section of the Rule:	Section 653.114-Accounting and Documentation
Brief Description of the issue and action requested	Subsection (b) pertains to documentation requirements but does not address the use of "electronic printouts" as eligible documentation. IPTA has requested that this documentation provision be added to the rule to mirror current practice and avoid any issues in the future.
Action by Department:	The Department agrees with IPTA's position in that "electronic records" are acceptable support documentation and will change this subsection to read as follows.
Revised language	b) All expenses shall be documented by cancelled check, paid bills, invoices or purchase orders, or electronic records that clearly show.....

Section of the Rule:	Section 653.205 Approval/Disapproval of Applicant's Program of Proposed Expenditures (POPE)
Brief Description of the issue and action requested	Subsection (b)(2) requires that any proposed POPE be consistent with established comprehensive transportation plans and gave examples of the type of transportation planning documents that must included the grantee's application. IPTA asserted that the "Human Services Transportation Planning" process should not be referenced since it is not recognized as official long and short range public transportation planning document.
Action by Department:	The Department agrees with IPTA's position, but wants to retain some of the language in the event that the POPE must be included in future established rural comprehensive transportation plans. The Department's language will be changed as follows.
Revised language	"2) a finding that expenditures are being proposed for projects or purposes that are in conflict with established comprehensive transportation plans, where applicable."

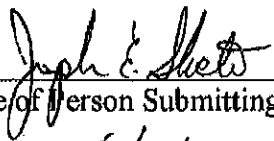
Section of the Rule:	Section 653.210-Approval of Application
Brief Description of the issue and action requested	This Section states that when a grantee's application and POPE are in compliance with the Act and the rule, the Department will enter into a grant contract for funding. IPTA's concern is that there is no timeframe for the Department to approve an application, and if the Department does not act within a specified timeframe, the application should be "automatically considered approved."
Action by Department:	A lot of ambiguity exists in the Act regarding the relationship between the POPE and full application, and the timeframe for Departmental approval. In practice, the Department cannot approve a participant's application until the annual state budget becomes law because the exact amount of the participant's appropriation is not formally approved until then. In addition, there is no statutory provision for an application to be approved "automatically" if the Department does not act within a particular timeframe. To meet the needs of the Department and be responsive to IPTA's request, the Department will change this Section as follows.
Revised language	"The Department will approve the application within 45 days of determining that all additional information requested from a participant regarding the application has been provided, that the initial or amended application, including the POPE, is in compliance with the Act and this Part, and that an appropriation sufficient to support the participant's application and POPE has been signed into law."

Section of the Rule:	Section 653.220-Grant Contract Requirements and Procedures
Brief Description of the issue and action requested	Subsection (d) states that the participant's governing body must submit a resolution or ordinance identifying the "person(s)" authorized to sign the contract and various documents. IPTA's position is that the resolution/ordinance should identify the "position(s)" of the person(s) so authorized in case of personnel changes in those "position(s)".
Action by Department:	The Department agrees with IPTA's position and will make the following change to the rule at subsection (d).
Revised language	Replace "persons" with "positions."

Name and job title of employee responding to the written or oral ex parte communication if different from the employee to whom the ex parte communication was made:

Joseph E. Shacter, Director, Division of Public and Intermodal Transportation

Any other pertinent information : _____



Signature of Person Submitting this Report

6/3/10

Date

Return completed form to: Ellen Schanzle-Haskins
Chief Counsel and Ethics Officer
Illinois Department of Transportation
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Springfield, Illinois 62764
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The Ethics Officer will require any ex parte communication in rulemaking to be made a part of the record of a rulemaking proceeding and will file this statement and any attachments with the Executive Ethics Commission.