

# Comments of the Independent Regulatory Review Commission



## Department of Transportation Regulation #18-420 (IRRC #2922)

### Public Transportation - Sustainable Mobility

January 11, 2012

We submit for your consideration the following comments on the proposed rulemaking published in the November 12, 2011 *Pennsylvania Bulletin*. Our comments are based on criteria in Section 5.2 of the Regulatory Review Act (71 P.S. § 745.5b). Section 5.1(a) of the Regulatory Review Act (71 P.S. § 745.5a(a)) directs the Department of Transportation (Department) to respond to all comments received from us or any other source.

#### 1. **Expiration of the temporary regulation – Consistency with statute; Compliance with the regulations of the Independent Regulatory Review Commission.**

The Department states in the Preamble that:

The purpose of Chapter 427 is to implement 74 Pa.C.S. Chapter 15 (relating to sustainable mobility options), as required under 74 Pa.C.S. § 1505. **Section 1505 of 74 Pa.C.S. directed the Department to promulgate temporary regulations within 2 years of the effective date of 74 Pa.C.S. Chapter 15, by July 18, 2009, and thereafter to promulgate permanent regulations.** The Department has used the period during which the temporary regulations have been effective to test and refine the regulations to assure compliance in carrying out the purposes for which 74 Pa.C.S. Chapter 15 provides financial assistance for public transportation services and infrastructure in this Commonwealth. This proposed rulemaking is the result of that experience under the temporary regulations. (Emphasis added.)

On November 1, 2011, the Department submitted the proposed regulation showing the full text of temporary Chapter 427 with amendments. On November 12, 2011, the proposed regulation appeared in the *Pennsylvania Bulletin* in an abbreviated form, just showing the amendments.

The Department's authority to promulgate a temporary regulation states, in part:

Unless otherwise provided in this chapter, in order to facilitate the prompt implementation of this chapter, during the two-year period following the effective date of this section, the Department shall promulgate temporary regulations **which shall expire four years from the effective date of this section.** (Emphasis added.)

See 74 Pa.C.S. § 1505(b)(1).

By statute, the temporary regulations expired on July 18, 2011, prior to the submittal of the proposed regulation. In effect, there is no existing Chapter 427 to amend.

We recognize the Department's intent was to implement temporary Chapter 427 with the amendments. However, neither the Department's submittal of the proposed regulation, nor the subsequent *Pennsylvania Bulletin* publication show the addition of the full text of Chapter 427 in compliance with 1 Pa. Code § 305.1a. We recommend that the final-form regulation properly designate the addition of the full text of Chapter 427 in compliance with our regulations at 1 Pa. Code § 307.3a.

**2. Section 427.4. Local matching funds. – Clarity.**

*“Swaptions”*

Paragraph (a)(6) uses the term “swaptions.” We recommend defining this term or deleting it.

*“Schedules as required by the Department”*

Paragraphs (b)(4) and (c)(3) use the phrase “schedules as required by the Department.” This phrase is vague because the regulation is not clear regarding what is required. We recommend clarifying these provisions.

**3. Section 427.5. Procurement. – Clarity; Reasonableness.**

Subsection (b) begins with the phrase “failure to comply with any applicable requirement.” This phrase is subjective. We recommend specifying the requirements that apply.

**4. Section 427.6. Restriction on use of funds. – Clarity.**

Paragraph (a)(3) uses the phrase “State capital assistance including current or carryover PTAF, Act 3, Section 1514 Bond or Section 1517 Capital Improvement assistance.” It is not clear what the phrases “PTAF,” “Act 3,” “Section 1514 Bond” or “Section 1517 Capital Improvement assistance” refer to. For example, “Act 3” of what year? The regulation should either be amended to specify these phrases or define them.

**5. Section 427.7. Audits. – Clarity.**

*Auditing standards*

Subparagraph (a)(4)(i) requires an audit to be conducted in accordance with “auditing standards generally accepted in the United States.” How can the regulated community determine what standards apply? The Department should replace this phrase with specific standards.

*“Schedules as required by the Department”*

Subparagraph (a)(4)(v) requires an audit to include all supplemental schedules “as required by the Department.” This phrase is vague. Again, the regulation itself should state the specific requirements.

**6. Section 427.11. Data submission and verification. – Clarity.**

Subsections (a), (b) and (d) use the phrase “section 1513 operating assistance” funds or grants. The Department should either define this phrase or provide the specific citation. The same concern applies to Subsection 427.12(a)

**7. Section 427.12. Performance reviews. – Clarity.**

Paragraph (b)(2) states the Department will provide its performance review policy on its website. We request a specific website reference to this policy and an explanation of how the policy will affect the regulation. Why didn’t the Department include the process for conducting a performance review in regulation?