



MEMORANDUM

TO: Transportation Commission
FROM: Scott Richrath, Chief Financial Officer
DATE: June 19, 2014
SUBJECT: High Performance Transportation Enterprise (HPTE) Transportation Commission Loan

Purpose:

This memo provides information regarding prior Transportation Commission loans issued to HPTE in order to support a request to issue a new loan for Fiscal Year 2015.

Action Requested:

The Transportation Commission is being asked to consider the attached loan agreement between HPTE and the Colorado Department of Transportation.

Background:

The interest-bearing Transportation Commission loans have been issued on an annual basis to assist HPTE with administrative functions. The interest rate of the requested loan is based on the approved State Infrastructure Bank rate, which is recommended to be set at 2.75% for the first half of Fiscal Year 2015.

HPTE currently has an outstanding Transportation Commission loan balance of \$4,060,892, which consists of loans dating back to Fiscal Year 2003, including loans assumed by HPTE when the Colorado Tolling Enterprise was abolished in 2009. Principal payments totaling \$4,939,108 have been made by HPTE to the Transportation Commission in prior Fiscal Years.



Options for Transportation Commission Consideration:

Option 1: Do not approve the loan

Option 2: Request a revision of the loan amount

Option 3: Approve the issuance of a new loan per the attached loan agreement

Staff Recommendation/Decision Request:

In order to support HPTE’s mission of aggressively pursuing more innovative and efficient means of financing of projects that improve safety, capacity, and accessibility of the transportation system in Colorado; the Department recommends that the Transportation Commission approve the issuance a new loan for Fiscal Year 2015.

Decision Request:

HPTE respectfully requests that the Transportation Commission disburse the budgeted \$1,000,000 loan from the State Highway Fund to the HPTE administrative fund.

If you have questions regarding this loan, please do not hesitate to contact me at (303) 757-9793 or by email at scott.richrath@state.co.us.



LOAN AGREEMENT AND PROMISSORY NOTE

This LOAN AGREEMENT, made this _____ day of _____, 2014, by and between the State of Colorado for the use and benefit of THE COLORADO DEPARTMENT OF TRANSPORTATION, herein after referred to as "CDOT", and the COLORADO HIGH PERFORMANCE TRANSPORTATION ENTERPRISE, hereinafter referred to as the "Enterprise."

FACTUAL RECITALS:

1. The Colorado Department of Transportation, hereinafter referred to as "CDOT," is an agency of the State of Colorado; and
2. The Transportation Commission of Colorado is the budgetary and policy making body for CDOT with all powers and duties granted by the General Assembly pursuant to C.R.S. 43-1-106; and
3. The Colorado High Performance Transportation Enterprise, hereinafter referred to as the "Enterprise," was authorized and created pursuant to C.R.S. 43-4-806; and
4. The Enterprise has requested a loan from CDOT in the amount of \$1,000,000.00 to pay a portion of its FY2015 operating costs and expenses in connection with the formation and operation of the Enterprise until sufficient revenues, including without limitation legally available proceeds of revenue bonds issued by the Enterprise, in excess of expenditures become available and the Enterprise can re-pay the loan; and
5. C.R.S. 43-4-806(4) authorizes the Transportation Commission to transfer money from the state highway fund to the Enterprise's statewide transportation enterprise operating fund to defray expenses of the Enterprise and provides that, notwithstanding any state fiscal rule or generally accepted accounting principle to the contrary, such a transfer shall be treated as a loan and shall not be considered a grant for purposes of TABOR.
6. The Transportation Commission has approved the loan request and authorized CDOT to make a loan to the Enterprise in the amount of \$1,000,000.00; and
7. Authority exists in the law and funds have been budgeted, appropriated and otherwise made available and a sufficient unencumbered balance thereof remains available for the loan amount in Fund 400; and
8. This Agreement evidences a loan in the amount of \$1,000,000.00 from CDOT to the Enterprise; and

9. This Agreement is executed under the authority of Sections 29-1-203, 43-1-110, and 43-4-806(4) C.R.S., as amended.

NOW, THEREFORE, IT IS HERBY AGREED THAT:

I. LOAN TERMS:

A. CDOT shall hereby disburse the entire \$1,000,000.00 from an appropriate account to the Enterprise's statewide transportation enterprise operating fund for the operating costs and expenses of the Enterprise. The loan disbursement shall be made to the Enterprise by means of a financial instrument or transfer acceptable to CDOT.

B. The term of the loan agreement shall be from the date this Agreement is signed by the State Controller, as evidenced by the date first appearing above, until full payment of the loan principal and the interest thereon is received by CDOT.

C. The Enterprise shall repay to CDOT the principal amount of the loan, and the interest on the unpaid principal balance of the Loan.

D. The loan to the Enterprise shall bear interest at a rate of 2.75 percent (2.75%) on the unpaid balance compounded annually which is the current interest rate established by the Transportation Commission for the State Infrastructure Bank on the date that the loan is disbursed. The rate shall be fixed for the term of the loan, and interest shall begin to accrue from the date of the loan disbursement.

E. As the Enterprise receives sufficient revenues, including without limitation, legally available proceeds of revenue bonds issued by the Enterprise, in excess of expenditures, the Enterprise shall repay the loan and all accrued interest. Although interest is accruing, the Enterprise shall not be responsible for loan payments until such revenues are available. Loan payments of both principal and interest shall be made payable to the Colorado Department of Transportation, and sent to its cash receipts office at 4201 East Arkansas Avenue, Rm. 212, Denver, CO 80222, or to such other place or person as may be designated in writing from time to time by CDOT. Payments shall be due as provided in Sections II.B. and II.D. below.

F. The Enterprise shall have the option to prepay all or a portion of the loan principal without prepayment penalty at any time(s) if it so chooses.

II. PROMISSORY NOTE:

A. For value received, the Enterprise hereby promises to pay to the order of the Colorado Department of Transportation, and send to its cash receipts office at 4201 East Arkansas Avenue Room 212, Denver, Colorado 80222, or to such other place or person as may be designated in writing by CDOT, the principal

sum of \$1,000,000.00 with interest thereon and from the date hereof as hereinafter set forth.

B. This note shall bear interest at the rate of 2.75 percent (2.75%) per annum on any unpaid balance. The principal and interest shall be payable in out of the proceeds of revenue bonds issued for a toll road project undertaken by the Enterprise if so permitted by the bond covenants, out of unrestricted revenues of the Enterprise, or from other reimbursements received by the Enterprise. The date and schedule for such payments of principal and accrued interest shall not be fixed in time or manner except as provided in II.D. below.

C. This note is not assumable without the written consent of CDOT. The Enterprise shall have the option to prepay all or a portion of the loan principal without penalty. The Enterprise waives demand, presentment, protest, and notice.

D. If payment is not received by CDOT when such bond proceeds, revenues, or reimbursements are made available to the Enterprise, the Enterprise shall be in default of this Agreement, unless the Enterprise has prior written approval to defer the re-payment of the loan. In the event of default, CDOT shall have all rights and remedies available at law or in equity, and such other remedies as provided herein. The rate of interest for payment on which the Enterprise is in default hereof shall be ten percent (10%) over the effective rate described above, computed from the date of any default to the date of cure.

E. The Enterprise shall use the loan amount of \$1,000,000.00 only for operating expenses of the Enterprise until such time as the Enterprise issues revenue bonds for a toll project or has sufficient unrestricted revenues.

F. The Enterprise shall, at all times during the execution of this Agreement, comply with all applicable federal and State laws as they currently exist and may hereafter be amended.

III. REMEDIES IN THE EVENT OF DEFAULT

A. Upon the Enterprise's default in the performance of any covenant or agreement contained in this Agreement, and upon notice to the Enterprise and failure by the Enterprise to cure within thirty (30) days thereof, CDOT, at its option, may: (a) terminate the loan commitment herein and take such other steps associated with such termination as are set forth in Section IV; (b) declare the entire principal amount of the loan then outstanding immediately due and payable; (c) take any other appropriate legal action.

B. Notwithstanding the exercise of any of the remedies above, the Enterprise shall not be relieved of liability to CDOT for any damages sustained by CDOT by virtue of any breach of this Agreement by the Enterprise.

IV. GENERAL PROVISIONS:

A. All federal and state statutes, regulations, specifications, administration checklists, directives, procedures, documents, and publications that are specifically identified and/or referenced in this Agreement, together with all exhibits and attachments and addenda to this Agreement, are incorporated herein by this reference as terms and conditions of this Agreement as though fully set forth.

B. Neither the commitment of CDOT funds to the Enterprise through this Agreement nor any other security or debt financing instrument issued or executed in connection with the loan to the Enterprise shall constitute a commitment, guarantee, or obligation of the United States.

C. This Agreement may be terminated as follows:

(a) Termination for Cause. If, through any cause, the Enterprise shall fail to fulfill, in a timely and proper manner, its obligations under this Agreement, or if the Enterprise shall violate any of the covenants, agreements, or stipulations of this Agreement, CDOT shall thereupon have the right to terminate this Agreement for cause by giving written notice to the Enterprise of its intent to terminate and at least thirty (30) days opportunity to cure the default or show cause why termination is otherwise not appropriate. In the event of termination, the Enterprise shall return any funds that have been disbursed to the Enterprise as part of the loan and any accrued interest thereon within 45 days of the date of termination. Notwithstanding above, the Enterprise shall not be relieved of liability to CDOT for any damages sustained by CDOT by virtue of any breach of the Agreement by the Enterprise.

(b) Termination for Convenience. CDOT may terminate this Agreement at any time CDOT determines that the purposes of the distribution of funds under the Agreement would no longer be served by the Enterprise. CDOT shall effect such termination by giving written notice of termination to the Enterprise and specifying the effective date thereof, at least twenty (20) days before the effective date of such termination.

(c) Termination Due to Loss of Funding. The parties hereto expressly recognize that the loan is made to the Enterprise with funds which are available to CDOT for the purposes of making a loan to the Enterprise, and therefore, the Enterprise expressly understands and agrees that all its rights, demands and claims to a loan arising under this Agreement are contingent upon availability of such funds to CDOT. In the event that such funds or any part thereof are not available to CDOT, CDOT may immediately terminate or amend this Agreement.

D. This Agreement is subject to such modifications as may be required by changes in federal or State law, or their implementing regulations. Any such required modification shall automatically be

incorporated into and be part of this Agreement on the effective date of such change as if fully set forth herein. Except as specifically provided otherwise herein, no modification of this Agreement shall be effective unless agreed to in writing by both parties in an amendment to this Agreement that is properly executed and approved in accordance with applicable law.

E. To the extent that this contract may be executed and performance of the obligations of the parties may be accomplished within the intent of the Agreement, the terms of this Agreement are severable, and should any term or provision hereof be declared invalid or become inoperative for any reason, such invalidity or failure shall not affect the validity of any other term or provision hereof. The waiver of any breach of a term hereof shall not be construed as a waiver of any other term, or the same term upon subsequent breach.

F. This Agreement is intended as the complete integration of all understandings between the parties. No prior or contemporaneous addition, deletion, or other amendment hereto shall have any force or effect whatsoever, unless embodied herein by writing. No subsequent novation, renewal, addition, deletion, or other amendment hereto shall have any force or effect unless embodied in a written contract executed and approved pursuant to the State Fiscal Rules.

G. Except as herein otherwise provided, this Agreement shall inure to the benefit of and be binding upon the parties hereto and their respective successors and assigns.

H. It is expressly understood and agreed that the enforcement of the terms and conditions of this Agreement, and all rights of action relating to such enforcement, shall be strictly reserved to the parties hereto, and nothing contained in this contract shall give or allow any such claim or right of action by any other or third person on such Agreement. It is the express intention of the parties that any person or entity other than the parties receiving services or benefits under this Agreement be deemed to be an incidental beneficiary only.

I. The Enterprise shall maintain all books, documents, papers, accounting records and other evidence pertaining to any costs incurred, and if requested by CDOT, make such materials available to CDOT for three years from the execution date of this Agreement.

J. This Agreement shall not be deemed valid until the Controller of the State of Colorado or such assistant as he may designate shall have approved it.

K. Financial obligations of the State of Colorado payable after the current fiscal year are contingent upon funds for that purpose being appropriated, budgeted, and otherwise made available.

L. No term or condition of this contract shall be construed or interpreted as a waiver, express or implied, of any of the immunities, rights, benefits, protection, or other provisions for the parties, of the

Colorado Governmental Immunity Act, Section 24-10-101 et seq. C.R.S. or the Federal Tort Claims Act, 28 U.S.C. 2671 et seq. as applicable, as now or hereafter amended.

M. The Enterprise agrees to comply with the letter and the spirit of all applicable state and federal laws respecting discrimination and unfair employment practices.

N. The laws of the State of Colorado and rules and regulations issued pursuant thereto shall be applied in the interpretation, execution, and enforcement of this Agreement. Any provision of this Agreement, whether or not incorporated herein by reference, which provides for arbitration by any extra-judicial body or person or which is otherwise in conflict with said laws, rules, and regulations shall be considered null and void. Nothing contained in any provision incorporated herein by reference which purports to negate this or any other special provision in whole or in part shall be valid or enforceable or available in any action at law whether by way of complaint, defense, or otherwise. Any provision rendered null and void by the operation of this provision will not invalidate the remainder of this contract to the extent that the Agreement is capable of execution.

O. At all times during the performance of this Agreement, the Enterprise shall strictly adhere to all applicable federal and state laws, rules, and regulations that have been or may hereafter be established.

P. The signatories aver that to their knowledge, no employee of the State of Colorado has any personal or beneficial interest whatsoever in the service or property described herein.

Q. Notwithstanding any provision hereof, all financial obligations herein of the Enterprise payable after the current fiscal year, including, without limitation, repayment of the principal amount of the loan evidenced hereby, payment of interest thereon, and payment of any damages, penalty interest, or any other financial obligations in the event of a default by the Enterprise, shall be made solely from the revenues of the Enterprise and are contingent upon funds for that purpose being appropriated, budgeted, and otherwise made available by the Board of the Enterprise, acting in its capacity as the governing body of the Enterprise (in such capacity, the "Enterprise Board").

IN WITNESS WHEREOF, the parties hereto have executed this Agreement the day and year first above written.

STATE OF COLORADO
JOHN HICKENLOOPER, Governor

By _____
Executive Director
DEPARTMENT OF TRANSPORTATION

Robert Jaros, CPA, MBA, JD
State Controller

By _____
Department Controller

APPROVED:
JOHN SUTHERS
Attorney General

By _____
Assistant Attorney General

ATTEST: (SEAL)

COLORADO HIGH PERFORMANCE
TRANSPORTATION ENTERPRISE

By _____

By _____
Director

**Transportation Commission of Colorado
June 19, 2014**

**Resolution Number TC-XXXX
Approving a Loan for Operating Expenses to HPTE**

WHEREAS, the Transportation Commission is charged with formulating the general policy with respect to the management, construction and maintenance of public highways and other transportation systems in the State; and

WHEREAS, the Transportation Commission promulgates and adopts all budgets for the Colorado Department of Transportation (CDOT) and state transportation programs; and

WHEREAS, the High Performance Transportation Enterprise (HPTE) was authorized and created pursuant to C.R.S. 43-4-806 as a government-owned business, a TABOR exempt enterprise and a division of CDOT charged with aggressively pursuing innovative means of financing surface transportation projects; and

WHEREAS, although the I-25 express lanes generated excess revenue for HPTE, such revenue is restricted and not available for payment of HPTE's operating expenses; and

WHEREAS, revenue from the US 36 Managed Lanes will not be available to HPTE for some time due to expenditures related to establishing the concession agreement and HPTE therefore has no unrestricted revenues available to pay for on-going operating expenses; and

WHEREAS, C.R.S. 43-4-806(4) authorizes the Transportation Commission to transfer money from the state highway fund to HPTE to defray expenses of HPTE and provides, notwithstanding any state fiscal rule or generally accepted accounting principle to the contrary, such a transfer shall be treated as a loan and shall not be considered a grant for purposes of TABOR; and

WHEREAS, the Transportation Commission recognizes and respects the legal principle that it cannot bind future Transportation Commissions with respect to budgetary and policy decisions, recognizes it cannot agree, in advance, to allocate and transfer state highway funds to the HPTE in future years for operating expenses and agrees that any decision as to whether or not to allocate and transfer such funds to the HPTE shall be made by the Transportation Commission, in its sole discretion, in the year in which the transfer occurred.

NOW THEREFORE BE IT RESOLVED, the Transportation Commission of Colorado approves and authorizes CDOT entering into a Loan Agreement to provide funds for HPTE's operating expenses in the total amount of \$1 million, which total amount shall incur interest at the rate charged by the State Infrastructure Bank on the effective date of the loan. Such funds are anticipated to be sufficient to cover HPTE's operating expenses for FY2015 with future HPTE operating expenses funding requests to be considered by the Transportation Commission, in its sole discretion, in the year in which HPTE's operating expense loan is requested.