

MINUTES OF THE REGULAR BOARD OF DIRECTORS OF THE  
**HIGH PERFORMANCE TRANSPORTATION ENTERPRISE (HPTE) (Room 225 and HQ Auditorium)**

Held: Wednesday, March 18, 2015; 12:00

4201 E. Arkansas Ave, Denver, CO 80222

A meeting of the Board of Directors of the HPTE was convened in accordance with applicable statutes of the State of Colorado, with the following Directors present:

Attendance:	Tim Gagen, Chair	Don Marostica	Brenda Smith
	Kathy Gilliland, Vice Chair	Gary Reiff(excused)	
	Doug Aden	Trey Rogers	

Chair Gagen calls the regular meeting to order @12:00pm in Room 225

Roll call was taken to establish a quorum, and it was noted that Director Reiff was excused.

General Discussion

The HPTE Board engaged in discussion of matters relating to subsequent agenda items, upcoming projects, and administrative and budget matters.

Director Cheroutes reported on the following:

Director Cheroutes, he went on to add, a report from the State Legislative Auditors, concerning findings and recommendations, that was conducted from a yearlong study, from the procurement of the US 36 project. The HPTE staff and CDOT auditors have cooperated with the legislative Auditors in the producing of the draft audit report. Director Cheroutes reported to the Board, the legislative auditors concluded the US 36 project to be an overall value to the State, which will be included in the audit report.

Director Cheroutes went to inform the HPTE Board, that he is seeking authority for FTE position, an addition to the HPTE staff, it involves some preliminary steps along with getting an increase in salary cap, with all the projects becoming apparent, HPTE needs the extra help to accomplish our goals. AAG Kathy Young, has hired a replacement for Counsel.

Director Cheroutes informed the Board about February Preliminary Budget to actual Statement. Fund 536, we ask for allocation, which is part of the Resolution today and in Fund 537, our operating budget will reflect a positive balance for year end.

Director Cheroutes went on to inform the Board that Megan Castle from communication will be giving an update about the progression of public outreach on the toll rate increases and surcharge fee's, making sure we are consistent with our transparency efforts.

Director of Communications, Amy Ford noted on public outreach, a telephone Townhall and a public open house will be conducted for opportunities regarding Express Lanes Education and HOV dual switchable transponders, as well as the rates for HOV drivers utilizing the corridors. The media we conducted last month was intentional to start conversations and introduce the tolling rates.

Executive Director Shailen Bhatt went on to add that he has never seen a toll increase that was comprehended. He went on to say this is part of the communications strategies. In recent conversations, we want to be more transparent and over communicate to the public by saturating information to the public.

Vice Chair Kathy Gilliland went on the express telephone Townhalls are just a great way to get information to the public. It gives the public a chance for Q & A for a more broad understanding.

Director Cheroutes went on to inform the Board that several Resolutions will be considered authorizing Tolling Services Agreement E-470, PRD and HPTE, regarding US 36. This is initially PRD providing Tolling Services Agreement outside the road to a private sector. Making sure the cost model they were proposing was fully compensatory to E-470. CDOT/HPTE needs to continue to work with E-470 to produce a cost structure and a performance structure to benefit all parties. He went on to add, the Tolling Service Agreement is still in place as far as the terms.

Director Cheroutes went on to say to the Board the last item in review is Resolution 161, approving encumbrance of I-25 revenue continuing in Fund 536 for US 36 advertising and transponder purchase.

Meeting Break  
(12:45)

Regular Board meeting moved from Room 225 to the Auditorium.

Chair Gagen reconvened the regular meeting @12:55pm in the Auditorium. convened the regular meeting

Board reconvened and roll was called to re-establish a quorum after a short break. All directors present with the exception of Director Reiff.

Approval of minutes  
Resolution #160:

Vice Chair Gilliland moved approval of the February 18, 2015, meeting minutes, and attaching to them an email from Karen Hammer to Mike Cheroutes, without accepting or acknowledging the contents of that email. Upon a second by Director Smith, the minutes were approved by all present.

Public Comment @  
1:10pm:

No Public Comment, but the Board had received a letter from attorney Karen Hammer and the letter is attached to these minutes.

Director's Report:

Director Cheroutes went on to note on March 30, 2015, The Office of the State Auditor's will release the audit report on HPTE's US 36 P3 project, where it will examine processes and the value of the project, to the Legislative Audit Committee. In May of 2015, HPTE will present to the Board a revisited matter The Express Lanes toll rates proposed by Plenary Roads Denver (PRD) (the concessionaire managing the I-25 and US 36 Express Lanes). Director Cheroutes went on to add, the HPTE Board asked for additional public outreach to be conducted on the US 36 Express Lanes Phase 1 toll rate schedule before a decision on the rates would be made.

OMPD Report:

Program Development Engineer Peter Kozinski, thanked the HPTE Board and spoke about the on-going efforts of I-70 PPSL contract, informing the HPTE Board an agreement was reached with the contractor's to have the work come to remain on schedule and come to fruition by fall of this year. He went to add toll equipment will be installed on the I-70 corridor, in hopes of opening next winter ski season. He briefly discussed the continuation of I-25 and US 36 Toll Express Lanes segment two is progressing along; Phase three is still in search of additional sources to cover its estimated funding gap. Peter Kozinski informed the Board the C-470 is progressing forward as well, Louis Berger is still in continuance of working on the level 3 traffic and revenue study. He went on to add the TIFIA letter went out on that project, which will start the initial formal process with the Federal Highway Administration (FHWA). HPTE/OMPD continue to refine the project to look for the best value opportunities. CDOT held an Industry Forum for the I-70 East Corridor Project on March 11-12, 2015 at the National Western Complex in Denver, Colorado. He went on to add the Industry Forum was an opportunity to showcase the proposed I-70 East Project, explore creative approaches to project development, and seek early input from attendees on procurement design and cost saving ideas. Because the I-70 East Project is one of the largest transportation projects in the country, the Forum attracted a wide array of participants including global contractors and developers, engineering and design firms, investors and lenders and local, DBE, and specialty contractors. At the Forum, one-on-one meetings were conducted, along with

RFQ's, the release for RFQ's will be released in the following week. The Statement of Qualification's would be due in the June.

Director Aden went to note he has been absent from the HPTE Board monthly meeting and went on to inquire has there been anymore revenue forecast issued by the Governor's office. My purpose is I remain concerned that the conversation around this project continues to assume it's a done deal and wearing my Commission hat it is not. Maybe the majority of the Commission feels it is; there is a funding gap and we shouldn't lose sight of that.

Chair Gagen went on to state, he is hearing up in the mountain corridor the project seems to being drawing interest of when I-70 might open and operate, two common questions from the public and visitors and locals is when is the construction going to get done, how often is the toll lane going to operate. We need to address those questions with more public outreach for the communities. Most of the public isn't informed on this.

Peter Kozinski went on to add that the public outreach will ducktail from CDOTS/HPTE Communications Department of on-going public outreach efforts, to roll out the general conversations of how these types of plans are used and it accessibility.

Vice Chair Gilliland went on to express for Peter Kozinski to elaborate on Phase 3 from the North I-25 project, that it isn't waiting for funding to start, it will go a certain distance we don't have quite enough to complete to Highway 7, but can you elaborate on that.

Peter Kozinski, went on to say, that is what remains in flux at this point is how we are going to be able to stretch those dollars.

US 36 Express Lanes Project:

Megan Castle went on to comment about the HPTE outreach and on-going efforts, informing the Board Director Cheroutes traveled over to the Colorado City and County Management Association as a guest speaker on February 27<sup>th</sup>. Also the Wheatridge Business Alliance, where I-70 East Project and Express Lanes Education was in discussion. He also attended the Industry Forum for I-70 East Project, which was also a success. HPTE will host a telephone town hall meeting on Thursday, April 16, and a public meeting on Tuesday, April 21, both with Representatives from HPTE, CDOT and Plenary Roads Denver to provide information to the public on the US 36 Express Lanes and the proposed toll rates. She went on to inform the Board about the Education Ad Campaign will focus to educate motorist on US 36 (Phase I and II), I-25 North and I-70 West and how to retrieve and use the HOV switchable transponders.

Director Rogers went to state that even with a month out start, will we give the public impression to know they will need a transponder and receive it in the time of opening. He went on to say can you go over the schedule for the Townhalls and the outreach process to the public.

Megan Castle went on to say, the telephone town hall meeting on Thursday, April 16, and a public meeting on Tuesday, April 21<sup>st</sup>. We will post this information on our website, media advisory and through social media. She went on to add the US 36 Telephone Townhall is for an hour. Thursday, April 16, 7-8 p.m and Tuesday, April 21, 6:30-8 p.m. She went to add the technology behind the Telephone Townhall allows us to see how many public participants we have and how many participants are in queue with questions.

Director Aden went on to note that he thinks we should receive more public input and opportunity for the public to comment and ask questions. He went on to express an hour for the Telephone Townhall may not be sufficient enough for public feedback.

Procurements of Consulting Services:

Nicholas Farber went on to say, because of upcoming work on C-470 and I-25. RFP for transaction counsel, which request proposals from qualified legal firms interested in providing transactional services to HPTE. The services include advising HPTE on P3's transactions, providing Disclosure Counsel services along with Bond and Disclosure. HPTE will select a pool of up to four (4) qualified firms for this work. He

went on to say that by selecting qualified firms, HPTE is not guaranteeing a specific amount of work and specific tasks will be assigned to the selected firms through task orders.

Piper Frode went on to present to the HPTE Board an informal overview of the CDOT FY2016 Annual Budget process and outlines FY2016 revenue sources and budget allocation that have been identified for HPTE. She went on to add the staff will return in April with detailed budgets for Fund 536 and 537 for Board approval.

Encumbrance of I-25 Revenue Continuing in Fund 536 and US 36 Advertising program and Transponder Purchase  
Resolution #161:

Director Cheroutes went on to update the Board about the progress being made to identify the budget for purchase of switchable transponders and express lanes advertising costs, these expenses are consuming HPTE Budget and are not currently part of the Fund 536.

Director Rogers went on to say that in the Agenda we have the cost of the transponders at \$1.3m, and \$1.175m in the Resolution, make sure the numbers mirror.

Piper Frode indicated to the Board it was a typo.

Vice Chair Gilliland moved approval of Resolution 161, Encumbrance of I-25 Revenue Continuing in Fund 536 and US 36 Advertising program and Transponder Purchase. Upon a second by Director Rogers, the minutes were approved by all present.

US 36 Tolling Services Agreement among E-470, HPTE and Plenary Roads Denver  
Resolution #162:

Director Cheroutes went to note to the Board this one of the two tolling service agreements we are asking for approval today. He went on to add that a long term public services agreement, which is a concession term by which E-470 agreed to provide collection enforcement, administrative services and back office services to Plenary at a fluctuating cost due to a schedule set forth in a tolling service agreement. If we terminate this contract without cause we will owe E-470 liquidated depreciation cost reimbursement, which is set forth and payable in the agreement in the first five (5) years, giving E-470 protection.

Director Marostica moved approval of Resolution 162, Approving US 36 Tolling Services Agreement between HPTE, Plenary Roads Denver, LLC, and E-a470 Public Highway Authority covering the US 36 concession Project. Upon a second by Director Aden, the minutes were approved by all present.

Master Tolling Service Agreement between E-470 and HPTE  
Resolution #163:

Director Rodgers moved approval of Resolution 163, Master Tolling Service Agreement between E-470 and HPTE. Upon a second by Director Smith, the minutes were approved by all present.

Chair Gagen went on to note in other business, Director Marostica, Rogers and myself are to not be present for HPTE's April Board meeting next month.

Adjournment:

There being no further business to come before the Board, the meeting was adjourned.

# HAMMER --- LAW

**Karen A. Hammer, J.D., LL.M.**  
Principal

**Barbara K. Brown, Ph.D.**  
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March 18, 2015

**VIA EMAIL**

High Performance Transportation Enterprise  
Attn: Sharon Williams, Secretary of Board

Dear HPTE Board and Staff:

This letter provides partial comments on matters on the Board's agenda for March 18, 2015, without waiver and with full reservation of rights to comment at our convenience and that of our clients. These comments are made on behalf of all those who are directly or indirectly effected by the Board's proposed actions today.

**ENCUMBRANCE OF I-25 REVENUES FOR U.S. 36 PURPOSES**

HPTE has failed to comply with the terms of Colorado's Administrative Procedure Act in setting toll rates for I-25. Therefore, these tolls have not been duly authorized. In order for HPTE to encumber the I-25 revenues, HPTE must represent and warrant to other parties that it has duly authorized the imposition of such tolls and that it is entitled to receive and dispose of such revenue. HPTE cannot lawfully provide such a representation and warranty because such statement is not true in fact.

The public has not been provided with any documentation or detailed information regarding the terms of the proposed encumbrance, including, without limitation, the party that will receive the security interest in I-25 toll revenues. Therefore, HPTE has not yet complied with Colorado's Sunshine Laws on this issue. The Board cannot effectively authorize the encumbrance without making such disclosures in advance, pursuant to the Sunshine Laws.

In addition, according to HPTE Director Michael Cheroutes, the proposed Tolling Services Agreement between HPTE, E-470 Public Highway Authority (E-470) and Plenary Roads Denver LLC (Plenary) specifically directs E-470 to remit all toll revenues from I-25 directly to Plenary. HPTE has not explained to the public how revenues remitted to Plenary can be encumbered by HPTE, who has attempted to contract away the right to receive such revenues.

HPTE assured the public that Plenary would bear all financial risk associated with I-25 and U.S. 36 after execution of the Concession Agreement. HPTE has not provided any justification to the public about why HPTE should be spending any money (much less \$1.1 million) on advertising campaigns that will benefit Plenary. Nor has HPTE disclosed how much money HPTE proposes to spend on such advertising – only an estimate of the total amount that will be split according to an unstated formula among HPTE, Colorado’s Department of Transportation (CDOT) and Plenary.

### PURCHASE OF TRANSPONDERS

According to the very limited disclosures made in advance of today’s HPTE Board meeting, HPTE plans to purchase transponders for use on both I-25 and U.S. 36. However, the alleged requirement that any users of either I-25 or U.S. 36 managed lanes use transponders in order to use the HOV lanes or use transponders in order to avoid penalties for license plate tolling has not been properly authorized by the HPTE Board. Hammer-Law has previously provided public comment on this topic and incorporates all such comments herein.

HPTE cannot reasonably justify spending any revenues on purchase of dual switchable transponders on the basis of false assumptions that HOV users can be forced to use such transponders to access the HOV lanes. No adequate justification has been provided the public about why HOV users who currently use or who are legally permitted to use HOV lanes without such requirement will be forced to participate in the express toll program regardless of whether HOV users intend to ever use toll lanes.

Requiring HOV drivers to use transponders obtained in advance of such HOV use substantially burdens and may eliminate the opportunity for users to spontaneously make carpooling decisions. The transponder effectively precludes toll-free use of the HOV lanes by those who have not anticipated the need or interest in obtaining a transponder, eliminating access to the HOV lanes by such users on a toll-free basis. However, the primary beneficiary of the managed lanes was always intended to be and remains the HOV user, under Colorado statute.

On behalf of all users of the HOV lanes and potential users of the HOV lanes, I provide you with notice that the requirement of transponder use for toll-free access to the HOV lanes has not been duly authorized and therefore is not legally effective. Such requirement cannot be imposed, nor may HPTE impose any toll, fee, or penalty on vehicles with two riders (driver plus passenger) on HOV lanes for failing to obtain and/or use a transponder.

HPTE cannot properly authorize spending funds today on the purchase of transponders and then later attempt to justify the requirement that non-toll payers must use the transponders because HPTE has already invested in them.

HOV lane users with two occupants in their vehicles remain entitled to use HOV lanes without the imposition of the substantial deterrence of requiring advance planning and financial cost of obtaining transponders. HPTE may also not discriminate against out of state drivers who are entitled to use the HOV lanes but would not have obtained transponders before making their out of state travel plans.

Please let me know if you have any questions.

Regards,

/s/

Karen A. Hammer  
Principal