

Agenda Item: Regular Board Meeting Minutes of July 15, 2015  
**RECORD OF PROCEEDINGS**

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**MINUTES OF THE REGULAR MEETING OF THE BOARD OF DIRECTORS OF THE  
HIGH PERFORMANCE TRANSPORTATION ENTERPRISE (HPTE)**

Held: Wednesday, July 15, 2015; 12:00pm

4201 E. Arkansas Ave, Denver, CO 80222

The regular 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  
Kathy Gilliland, Vice Chair Gary Reiff  
Trey Rogers

Chair Gagen called the meeting to order @12:00pm in Room 225: Roll call was taken to establish a quorum, and it was noted that the absence of Board Director Smith was excused, and that a Transportation Commission appointed position is currently vacant.

Director's Report: HPTE Director Michael Cheroutes noted Transportation Commissioner Shannon Gifford was in attendance, adding that she is likely to replace former Commissioner Aden on the HPTE Board. He said this month's agenda is very full, and described HPTE efforts to fulfill the Legislative Audit recommendations and said that a schedule and monthly reports are in place for all process improvements. A consultant is completing work on a P3 program manual which is a key component of the recommendations.

Attorney Karen Hammer of Hammer Law submitted written comments regarding HOV policies that will be included as part of these minutes. Senator Jones requested making the switchable HOV transponders available for free, and asked that alternatives be explored. HPTE Director Cheroutes said the provision of the transponders carries a fiscal impact of \$1.5 million, and asked the Board for their input. The Board was in agreement that additional exploration of alternatives for providing the transponders was not necessary.

HPTE Director Cheroutes updated the Board on the communications outreach in advance of the opening of US 36, noting the flurry of activity with new accounts and transponders. Board Director Reiff said he still thinks the difference in the license plate toll rate differentials between US 36 and the I-70 Mountain Express Lane rates is a concern and needs to be addressed.

Interim CFO Maria Sobota will update the Board on the HPTE financial liability analysis, resulting from the transfer of Transportation Commission loans to the former Colorado Tolling Enterprise (CTE) prior to the establishment of HPTE. He said that a \$2 million transfer is not on the HPTE books, and that the staff is working with the Attorney General's office and the State Controller to resolve the issue. Ms. Sobota will come to the Board in August with a recommendation for action. HPTE Director Cheroutes noted that Board Director Smith is of the opinion that there is no direct obligation to the HPTE in the matter.

The I-70 Mountain Express Lane toll rate range discussion will begin today, with the intention to allow time to get information out to affected stakeholders and obtain their input. There was discussion about the scope of affected stakeholders, with Chair Gagen noting it is not just Clear Creek County residents but mostly Front Range users and the larger resorts, including Vail and Breckenridge. HPTE communications manager Megan Castle said it is likely that one or more telephone town halls will be held, with the purpose of including the right audience. Staff will come to the Board next month with an update on communications and toll rate range analysis.

The Board will also consider the first FY16 budget supplement, which takes into account a true-up of a payment to TIFIA for Phase 1 of US 36. The commonly understood payment amount of \$650,000 has been adjusted upward to correct the financial consultants' miscalculation. The Resolution before the Board needs to be amended to include this higher amount.

CDOT Executive Director Shailen Bhatt described the possibility of a Federal government shutdown at the end of this month, and how that will affect crucial transactions.

Also on the agenda is a four-party agreement for the late handover of US 36 Phase 1 to Plenary. CDOT contractor Ames-Granite Joint Venture was delayed in meeting the completion of work on this project, delaying the commencement of tolling services, which created a compensation event whereby HPTE is obligated to pay Plenary damages. Ames-Granite has agreed to pay Plenary this amount, which is about \$3,386 per day beginning July 1.

HPTE Director Cheroutes said an intergovernmental agreement with the City and County of Denver regarding drainage and right-of-way issues (among others) for the I-70 East project is complete and awaiting Board approval. He noted the negotiations were lengthy and intense, and that the primary parties are satisfied with the outcome. Mr. Cheroutes also noted that the evaluation of SOQ's from qualified consulting teams for the project is nearing completion, that there are five solid submittals, and he expects a shortlist of three or four teams. He underscored the need for confidentiality during this process.

Meeting Break  
(12:50):

The Regular Board meeting moved from Room 225 to the Auditorium.

Chair Gagen  
reconvened the  
meeting at 1:00 in  
the Auditorium:

The Board reconvened and roll was called to re-establish a quorum. All directors except Ms. Smith were present.

Consent Agenda:  
Approving May  
Minutes Resolution  
#171 and Approving  
June Minutes  
Resolution #172:

Upon a motion by Board Director Reiff and second by Board Director Marostica, the Consent Agenda was approved by all present.

Public Comment:

Ms. Karen Hammer of Hammer Law spoke about the July 22, 2015, opening of US 36 Phase 1 Express Lanes and the statute requiring unrestricted HOV access to the lanes. She said requiring a switchable transponder was not in accordance with statute, and noted a similar law in California that had to be amended. She also submitted written comments which are attached to these minutes for the record.

Director's Report:

HPTE Director Michael Cheroutes noted a heavy agenda, and briefly discussed activity at the recent Transportation Legislative Review Committee, and a request to allow citizens to acquire switchable transponders at no cost. He noted the significant fiscal impacts of this and said that 90,000 transponders have been ordered at the cost of \$15 each.

OPMD Report:

OPMD Director Brett Johnson said his team is busy evaluating statements of qualifications from five teams for the I-70 East Project. The IGA with the City and County of Denver is poised for signature. A Level 3 Traffic and Revenue Analysis on C-470 is expected in mid-August. The anticipated design competition for the I-70 Mountain Corridor is on hold until further data from the performance of the I-70 Mountain Corridor Express Lane becomes available.

Communications  
Report:

HPTE communications manager Megan Castle described current activity to support the tolling count down on US 36, focusing on grass roots outreach, advertising, earned media and social media.

ExpressToll has opened 50,000 new accounts recently, which is a record for them. Activity will continue a few weeks past opening. Chair Gagen acknowledged the great amount of work that has gone into the communications effort.

- HPTE Liability Update: Interim CFO Maria Sobota described the analysis in the Board packet, and said the status of a \$2 million transfer to the former CTE is still in question. She said her office is working with the Attorney General and State Controller on the matter, and that she will bring a recommendation back to the Board for possible action in August.
- PPSL Toll Rate Range Discussion: OMPD project manager Peter Kozinski described the unique attributes of the I-70 Mountain Corridor Express Lane project, and said the primary purpose of the project is to manage congestion during peak travel times. The lanes must operate well, requiring some flexibility in operations. The Board has the authority to establish a range of tolls which can be implemented in a quasi-dynamic fashion, based on real-time needs. He said in August he will present some guidelines to accomplish this and a recommendation on a toll rate range. Public outreach and input will be under way in September, and a recommendation for action will be presented to the Board in October. The PPSL is expected to be operational in December of this year.
- Approving Note Registrar for PPSL Loan Resolution #173: HPTE operations manager Nick Farber described this as a housekeeping measure to relieve the registrar administrative burden of the PPSL loan on HPTE by approving the appointment of Zions Bank in that role. Upon a motion by Board Director Rogers and second by Board Director Gilliland, Resolution #173 was approved by all present.
- Approving First FY16 Budget Supplement Resolution #174: HPTE budget analyst Piper Frode outlined specific changes to Funds 536 and 537 resulting from project needs and legal services. HPTE Director Cheroutes noted the Fund 536 line for a TIFIA Phase 1 principal payment has increased from the \$650,000 in the cover memo to \$762,383.62, which is due to TIFIA on Monday. The Resolution needs to reflect that change. Upon a motion by Vice Chair Gilliland to approve Resolution #174 as amended to include the budget revision distributed at the meeting and second by Board Director Marostica, Resolution #174 was approved by all present as amended.
- Approving the Four-Party Settlement Agreement for US 36 Phase 1 Resolution #175: HPTE Director Cheroutes said the agreement waives liquidated damages by CDOT against Ames-Granite for the late completion of US 36 Phase 1, in exchange for Ames-Granite paying Plenary Roads Denver (PRD) \$74,502.56 in settlement of amounts owed by HPTE under the Concession Agreement. Upon a motion by Board Director Rogers and a second by Vice Chair Gilliland, Resolution #175 was approved by all present.
- Approving IGA with CDOT, CBE and the City and County of Denver for the I-70 East Project Resolution #176: CDOT project manager Tony DeVito described the Agreement and mutual benefits for the parties concerning drainage, fill dirt, and a fixed unit cost per acre for needed project right-of-way. This agreement received authorization of the City of Denver on July 6, 2015. Board Director Reiff said Mr. DeVito, staff and the Executive Director did an outstanding job working through the complexities of this agreement. Upon a motion by Board Director Reiff and second by Vice Chair Gilliland, Resolution #176 was approved by all present.
- Executive Session: Chair Gagen moved that the Board enter into Executive Session pursuant to Section 24-6-402(3)(b)(I), C.R.S., for the purpose of discussing matters related to an individual's employment, as requested by the employee (script attached to these minutes). The motion was seconded by Board Director Rogers, and following an affirmative vote by all Board Directors present, , constituting at least two-thirds of the entire membership of the Board, entered Executive Session at 1:55 p.m. The members of the public were excused.
- The Board exited Executive Session at 2:08 p.m. and invited members of the public to return.
- Other Business: None.
- Adjournment: There being no further business to come before the Board, the meeting was adjourned.

# HAMMER

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# LAW

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

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July 15, 2015

## **VIA EMAIL**

High Performance Transportation Enterprise

PUBLIC COMMENT: OBJECTION TO HOV UNAUTHORIZED  
RESTRICTIONS OF ACCESS

This letter does not constitute legal advice to the High Performance Transportation Enterprise (HPTE), its Board, or any other entity or member of the public.

HPTE has previously announced to the public that it will require drivers of high occupancy vehicles (HOV) to use a switchable transponder in order to retain their rights to toll-free HOV use of the managed lanes of I-25 and U.S. 36. HPTE has stated that this new restriction on toll-free HOV use will go into effect on July 22, 2015.

HPTE does not have the legal authority to impose the announced package of switchable transponder restrictions on HOV drivers.

The rights of HOV drivers were established by statute in 1999. C.R.S. § 42-4-1012(1)(b)(IV). The statute explicitly protected the rights of HOV drivers to “unrestricted access” to the managed lanes:

(IV) The department shall structure a variable toll or fee to ensure a level of service C and unrestricted access to the lanes at all times by eligible vehicles, including buses, carpools, and EPA certified low-emitting vehicles with a gross vehicle weight rating over 10,000 pounds.

To date, the legislature has not authorized HPTE to restrict HOV drivers’ toll-free use of the managed lanes by any means. Therefore, HPTE’s attempt to

require the use of a switchable transponder and the payment of a \$35 fee is legally invalid and unenforceable.

In fact, HOV drivers are the only category of users of the managed lanes for which HPTE requires a switchable transponder. HOV drivers are also the only category of managed lane users who are required to pay a fee for their transponders – both toll-paying drivers and motorcyclists receive transponders for free.

Like the Colorado legislature, California's legislature had previously granted HOV drivers the right to "unrestricted access" to California managed lanes. The California legislature had to amend these statutory rights in order to permit the state to impose the requirement that HOV drivers use a transponder to be eligible for toll-free use of the managed lanes.

I will not take the time today to address why the burdens imposed on HOV drivers are unreasonable because such comments are premature at this time. Until the Colorado legislature amends the current statute granting HOV users unrestricted access to managed lanes, HPTE is not legally permitted to impose any restrictions on HOV use, including the restrictions that HPTE has announced will take effect on July 22, 2015.

Until HPTE is legally authorized to require HOV drivers to use switchable transponders in order to drive toll-free on the managed lanes, HPTE does not have the legal right to impose a toll for HOV use of these lanes without a switchable transponder.

What does this mean? By way merely of example, I have the legal right to drive an HOV vehicle on the managed lanes on July 22, 2015 without purchasing a switchable transponder and without being required to pay a toll.

I again stress that this letter provides public comment only and does not constitute legal advice upon which any other person can rely.

Regards,

/s/  
Karen A. Hammer  
Principal

Revised Attachment A: Amended HPTE FY2016 Fund 536 Budget

<b>Final Fiscal Year 2016 Budget</b>		
Statewide Transportation Enterprise Special Revenue Fund (C.R.S. 43-4-806(3)(a)) 536		
Expenses by Corridor	Estimated FY16 Revenues	Estimated FY16 Expenses
<b>US 36 Managed Lanes (Cost Center T8620-536)</b>		
Estimated Amount of FY 2015 of Funds for Carry Forward	\$ 280,278	
<b>Fiscal Year 2016 Revenue</b>		
Transponder Revenue	\$ 450,000	
Express Lanes Advertising Reimbursement from Plenary	\$ 70,000	
Interest Earnings	\$ 200,000	
Annual Concessionaire Management Fee	\$ 401,413	
Operations and Maintenance Reserve Reimbursement	\$ 630,000	
<b>Total US 36 FY16 Available Revenue</b>	<b>\$ 2,031,691</b>	
<b>Fiscal Year 2016 Expenses</b>		
CDOT Staff Costs		\$ (15,000)
Legal Services		\$ (158,650)
Project Oversight		\$ (401,413)
Miscellaneous Fees		\$ (31,500)
Annual Audit		\$ (5,100)
Attorney General Fees		\$ (30,000)
Transponder Processing		\$ (15,000)
TIFIA Fees		\$ (12,500)
TIFIA Phase 1 Principal Payment		\$ (762,384)
<b>Total US 36 FY16 Estimated Expenses</b>		<b>\$ (1,431,547)</b>
<b>US36 Remaining Balance</b>		<b>\$ 600,144</b>
<b>I-25 North Managed Lanes (Cost Center T8630-536)</b>		
<b>Total I-25 N FY16 Available Revenue</b>		
<b>Total I-25 N FY16 Estimated Expenses</b>		
<b>I-25 N Remaining Balance</b>		
<b>I-70 West PPSL Lanes (Cost Center T8640-536)</b>		
<b>Total I-70 W PPSL FY16 Available Funds</b>	<b>\$ 689,750</b>	
<b>Fiscal Year 2016 Expenses</b>		
PPSL Loan Interest Payment		\$ (689,750)
<b>Total I-70 W PPSL FY16 Estimated Expenses</b>		<b>\$ (689,750)</b>
<b>I-70 W PPSL Remaining Balance</b>		
<b>Total Fund 536 FY16 Revenues</b>	<b>\$ 2,721,441</b>	
<b>Total Fund 536 FY16 Expenses</b>	<b>\$ (2,121,297)</b>	
<b>Remaining Unbudgeted Funds</b>		<b>\$ 600,144</b>

CYNTHIA H. COFFMAN  
Attorney General  
DAVID C. BLAKE  
Chief Deputy Attorney General  
MELANIE J. SNYDER  
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CONFIDENTIAL ATTORNEY-CLIENT COMMUNICATION

EXECUTIVE SESSION SCRIPT

(July 15, 2015 Regular Meeting of the HPTE Board of Directors)

1. Turn recorder on.
3. Motion to enter executive session (in open session).

*This is Tim Gagen, Chair of the High Performance Transportation Enterprise Board of Directors. It is July 15, 2015, and the time is [TIME]. The HPTE Board of Directors is convened for its regular July 2015 Board meeting.*

*I now move that the Board enter into executive session pursuant to Colorado Revised Statutes Section 24-6-402(3)(b)(I) to discuss matters related to an individual's employment, as requested by the employee.*

*Do I have a second?*

Seconded by: \_\_\_\_\_

Call for discussion

Vote - All in favor say AYE

Opposed?

NOTE: Need 2/3 vote of entire membership of board. (5 votes)

*The motion passes by a 2/3 vote of the Board. The Board will convene in executive session, the public is excused. [IF APPLICABLE: If you are a member of the public and are participating telephonically, please hang up.]*

NOTE: Give public time to exit and close the door and/or hang up.

4. **Restate basis of executive session –**



5. **Conduct Executive Session**

*Discuss personnel matters.*

NOTE: Confine discussion to the topic announced. Discussion in executive session shall not include:

- discussions concerning any member of the Board;
- appointment of a person to fill the office of a member of the Board;
- discussion of personnel policies that do not require discussion of matters personal to particular employees.

6. **Exit executive session.** (No motion needed.)

*This is Tim Gagen and it is now [TIME]. We have concluded the executive session and will be inviting the public to return and will turn the recorder off.*

7. **Invite the public to return and turn the recorder off.**

8. **Engage in further discussion where appropriate. Entertain motions where appropriate.**