

Resolution – HPTE # 164

**Approving HPTE March 3, 2015, special meeting minutes
March 18, 2015, regular meeting minutes**

BE IT RESOLVED, that the March 3, 2015, special meeting minutes and March 18, 2015, regular meeting minutes attached hereto, are hereby approved by the High Performance Transportation Enterprise Board of Directors.

Signed as of April 15, 2015

Sharon Williams
Secretary, HPTE Board of Directors

DRAFT

RECORD OF PROCEEDINGS

MINUTES OF A SPECIAL PLANNING MEETING OF THE BOARD OF DIRECTORS OF THE HIGH PERFORMANCE TRANSPORTATION ENTERPRISE (HPTE)

Held: Tuesday, March 3, 2015; 10:00am

CDOT Headquarters Auditorium, 4200 E. Arkansas Avenue Denver, Colorado

A Special Planning 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	
	Doug Aden (Excused)	Trey Rogers	

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

Chair Gagen outlined the reasons to come together for this special planning meeting: take action on a proposed toll rate and penalty schedule for the I-25 and US 36 Express Lanes, as well as take public comment. Chair Gagen went on to add the tolling proposal being discussed is ONLY related to the managed lanes of US 36 and the existing managed lanes that exist on I-25.

Director Remarks: Director Cheroutes thanked the HPTE Board and went on to speak in length about Plenary Roads Denver (PRD), the concessionaire managing the I-25 and US 36 Express Lanes, is proposing the new rates to provide a reliable travel time for Express Lane drivers and RTD, and to help recover costs from processing License Plate Tolls (LPT) and toll evasion. Also, the proposed rates encourage drivers to use an Express Toll pass, which will reduce costs. Plenary has proposed two rate increase new toll rates for the existing I-25 Express Lanes, 16 Toll Rates for US 36 Express Lanes Phase 1 Pecos Street to 88th Street in Louisville/Superior), which will open mid-summer 2015 New Civil Penalty to serve as a stronger deterrent against toll evasion. Director Cheroutes went on to add, HPTE selected PRD as the concessionaire for the US 36 Express Lanes project. This summer, Phase 1 of the project (Pecos Street to 88th Street in Louisville/Superior) will open. Currently, PRD is operating and maintaining the I-25 Express Lanes. He went on to add, the use of toll pricing during peak travel times reduces delays, manages congestion and maintains reliable travel times. Express Lanes currently span seven miles on I-25, between downtown Denver and US 36, and are being built on I-25 in both directions to 120th Avenue and on US 36 to Boulder. Both Express Lanes corridors are scheduled to open later this year. Additionally, CDOT is planning Express Lanes in major mobility corridors across Colorado including I-70 through east Denver and in the mountains, and C-470 – as a way to effectively manage traffic congestion. To use any Colorado Express Lanes, you will need an Express Toll account and pass. The Switchable HOV Transponder is the only pass that allows you to choose the carpool option and use the lanes for free.

Director Reiff thanked the HPTE Board and Director Cheroutes. Director Reiff noted, there are a variety of grounds for the HPTE Board to reject a request from Plenary, the first one is non-compliance of the proposal with requirements of the agreement itself; could you discuss the compliance of the proposal with agreement.

Director Cheroutes went on to state, compliance with the agreement would mean, for example, the toll being proposed were in furtherance of the goals of the project which were to keep the lane congestion free during peak periods and there is no basis in my judgement for invoking that particular exception.

Director Reiff went on to say, in that regard, Plenary has submitted all the information required or the staff has required to give us advice on this. Director Reiff went on to add that a letter was received from Counsel from some Plaintiff's that claim that we did not get the required information from Plenary, could that be addressed.

Director Cheroutes went on to add that Plenary's proposal needs to meet very specific requirements, which are set in the contract, we carefully examined the contract to include those specifics in the proposal.

Executive Director Shailen Bhatt expressed the need, that as a clarification, does the agreement have traffic and speed data that justify the increase.

Director Chertoues went on to state, that is difficult to get traffic and speed data for the managed lanes not open, at which currently we don't have. He went to add the Plenary will address this in the proposal. For I-25 we do have the traffic and speed data. What is being proposed today is the need to keep consistent traffic free flowing. He went to add, we have an agreement with RTD to give them priority in the managed lanes to keep the buses flowing and this is another factor that will dictate the pricing for the managed lanes.

Presentation by
Plenary Roads
Denver:

Terry Ostrom, from Plenary Roads of Denver, whom is responsible for design and construction of the US 36 corridor. He went on to state, I'm before the HPTE Board today to request an increase in the tolls for the I-25 managed lanes, an increase in the LPT surcharge and to propose base toll rates for US 36 portion of Phase I US 36 and the proposed base LPT surcharge rates for US 36. When determining what the toll rate should be we had some considerations, first being the goals of the project, there are numerous goals stipulated in the contract, but three specifically that address toll rates. Reliable travel times for busses, maintained predetermined bus travel times and third goal to provide transportation choices to HOV and Non-HOV users. He went on the add that the toll revenue is used to repay financing costs necessary to develop, design, construct as well as the operating and maintenance of the managed lane portions of I-25 and US 36. This includes two free general purpose lanes and one tolled express lane in each direction of US 36 as well as a bike path along the corridor. Ostrom, went to add the tolls are the only contractual mechanism we have to regulate traffic volume in the express lanes. Consideration when establishing toll rates was Plenary utilizes a traffic and revenue analysis to help determine optimal toll rate that will achieve Project goals as well as repay Project financing costs. Recovery of toll transaction costs and uncollectable tolls and bad debt as well as incentivize conversion from LPT to AVI, manage traffic volume to ensure bus travel times and for the toll not exceed \$13.91, Boulder – Denver (indexed).

HPTE Director Cheroutes probed Terry Ostrom to inform the HPTE Board about how does your organization decide what is an appropriate rate to be able to maintain free flow in the managed lane.

Terry Olstom, stated PRD has traffic volumes and speeds we collect on I-25, there are devices on the roadways that determine the traffic, so we measure traffic. We provide the information to HPTE and the Board routinely, but we also look at the traffic on feeder route. He went on to add that, our consultant collects that information, the projected growth rates, where the employment opportunities are along the corridor, from that we estimate how people are going to utilize US 36, once the Project is completed. Then PRD determines what the optimum toll rate where we can guarantee bus travel times but still collect enough revenue to service the debt.

Director Gilliland inquired about the frequency of when PRD adjust toll rates.

Terry Ostrom, stated we can ask the HPTE Board to consider an adjustment randomly, we are thinking along with the other Colorado toll roads is on an annual basis.

Amy Ford, CDOT's Communication Director, went on to express, anyone can use Express Lanes, and there are simply different ways to travel them. A traveler can choose to travel For free as a carpooler with either one or two passenger. By transit on either priority buses or Bus Rapid Transit who can travel the corridor, or by paying a toll as a single occupant vehicle and travelers are never forced to pay a toll and can always choose to travel in the adjacent free general purpose lanes. Express Lanes on I-70 West in the mountains will not include a "free" policy for HOV vehicles given that a majority of vehicles traveling in the corridor typically have more than one passenger. She went on to use any

Colorado Express Lanes, you will need an Express Toll account and pass. The Switchable HOV Transponder is the only pass that allows you to choose the carpool option and use the lanes for free. If you choose not to use a pass, you will be billed through a License Plate Toll. A bill will be sent to the registered owner of the vehicle and you will pay a higher toll rate based on how far you travel in the Express Lane.

Director Marostica reminded the audience participation is welcome during public comment, and that each presentation is limited to 3 minutes per speaker.

Public Comment:

Daniel Schroder, went on to state that he uses the toll lanes on a regular basis at the cross of I-25 and US 36. The problem I see is the rates increase and the road diminishes. He went on to add if this is part of the contract those fees are to cover the maintenance of the road, it's not happening and for me to pay a five dollars and bounce down the road, but now to hear of another toll increase is completely frustrating. One of the benefits of raising the toll rates was maintenance of the road which is not happening. Mr. Schroder, went on to add, that he didn't realize that an option was the switchable transponder, I see more people avoid toll then use it, so if we can't enforce the law with the state patrol, how can we do it with the switchable transponder. Also, revenue lost on the LPT, why are we doing that, as you know CDOT has a budget shortfall, why not delete LPT, if we are missing out over 30% of the revenue and the additional cost.

Director Cheroutes went on to express it's not specifically about LPT's, most states that run Express Lane projects do not permit LPT, it's a great deal of people whose opinion feel that they can ride in those lanes without a sticker and are willing to be charged for their indiscretion. The end result is less revenue for Plenary and HPTE, I will conclude in the next few year we will re-visit that policy. The discrepancy about maintenance causes reservation, I would like for PRD to respond to the maintenance issues. Plenary is required by its contract to maintain those lanes at a high performance level, the maintenance of the road is essential and will need to be addressed.

Terry Ostrom, from PRD, stated within the contract we have criteria of the quality of the lanes on I-25 and US 36, the maintenance of I-25 is scheduled for the new asphalt (milling fill) to be done over the summer time. The expansion joints on the bridges starts next week and continue throughout the summer and the 20th street bridge, will receive a polyester overlay which will commence next summer as well and we are obligated to maintain the lanes until the duration of our contract. Collecting tolls via an Express Toll Pass is digital and efficient and guarantees that a person doesn't evade paying a toll. Tracking and collecting tolls through license plate readers is more costly and cumbersome. The new rates reflect the cost difference of administering these two toll payment methods. New civil penalty to serve as a stronger deterrent against toll evasion, the penalty will increase from \$46 to \$250. Plenary is contractually obligated to maintain the roads they manage. They'll be putting in roughly \$8 million to fix up I-25 in the next year or so. CDOT says Plenary can manage the roads better than it can.

They also include calculations based on toll evasion, as there are individuals who choose to cheat the system by not paying their license plate bill. The new rates and fees also provide drivers with an incentive to secure an Express Toll Pass, while still providing drivers a choice if they don't want to create a an Express Toll account.

Chair Gagen, stated to Terry Ostrom, when PRD took over the maintenance responsibility for I-25.

Terry Ostrom went to state, as part of the U.S. 36 arrangement, Plenary Roads Denver assumed operations and maintenance responsibilities for the I-25 Express Lanes since March 7, 2014.

Alex Ariniello, Director of Public Works for the town of Sterling, Colorado, expressed his concern for US 36 Phase I and II, will another tolling point and request become apparent for Phase II. He went to further seek clarification, adding the memo presented wasn't clear, from specific times and day tolls vary, will that be rectified or is this the dynamic based on volumes in the managed lanes.

Director Cheroutes went on to add, the changes that will be seen on the I-25 Express Lanes during peak hours show clearly why setting up an Express Toll account will give commutes significant savings.

Terry Ostrom, went on to add, traffic analysis, my opinion believe if the dynamic tolling is not reasonable for about 7 years. So what we've proposed is time of day assuming the growth along the corridor stays in line with our projection. Dynamic Tolling means algorithm, the toll is calculated from congestion. He went on to add that a system is being designed for dynamic tolling.

Former CU-Boulder political science professor, Thad Tecza, says one of the reasons he stopped working there is because the commute became such a pain As they continued to build along the way it became more and more congested until it was in fact an intolerable drive. The fee is just too high in his opinion. He says it is not something the working class is going to be able to afford and will create classes among drivers. Clearly what the Department of Transportation has decided is that since the people have chosen not to increase taxes, they are going to do what they want to do in spite of the people by building toll lanes.

Chair Gagen thanked the public for their comments and participation and closed public comment. The HPTE Board did receive a letter from attorney Karen Hammer and the letter is attached to these minutes.

Adoption of Revised Toll Schedule for I-25 Managed Lanes and Proposed toll Schedule for US 36 Managed Lanes and Approval of Increased Civil Penalty for I-25 and US 36 Managed Lanes
Resolution #159:

Vice Chair Kathy Gilliland moved approval for Resolution 159, upon second by Director Rogers, Resolution 159, Adoption of Revised Toll Schedule for I-25 Managed Lanes and Proposed toll Schedule for US 36 Managed Lanes and Approval of Increased Civil Penalty for I-25 and US 36 Managed Lanes was approved.

Director Marostica moved to propose an amendment to Resolution 159. My amendment will substitute the first resolved clause of the proposed Resolution 159. The amendment, "Now therefor be it resolved: The High Performance Transportation Enterprise Board of Directors hereby adopts the user-fee rates for the I-25 Managed Lanes Phase I set for the in the Revised Toll Schedule effective March 16, 2015, deferring action on the user-fee rated for the US 36 Express Lanes Phase 1 set forth in the Revised Toll Schedule until additional public outreach has been conducted."

Motion by Director Marostica, upon second by Director Rogers, approval of Amendment Resolution 159.

Director Rogers, went to note a reference was made to adopt the user fee rates for I-25 and US 36 Lanes Phase I. Perhaps the attention was not to adopt the rates for US 36 Lanes Phase I, it a typo.

Director Marostica, went on to add, due to typo he will revise and re-read the Amendment proposed to Resolution 159. He went on to say "Now therefor be it resolved: The High Performance Transportation Enterprise Board of Directors hereby adopts the user-fee rates for the I-25 Managed Lanes Phase I set for the in the Revised Toll Schedule effective March 16, 2015, deferring action on the user-fee rated for the US 36 Express Lanes Phase 1 set forth in the Revised Toll Schedule until additional public outreach has been conducted." He thanked Director Rogers on the clarification.

Chair Gagen, went on to note there are two resolved sections within the proposed resolution, we are only amending one of them, assuming the amendment is approved, the HPTE Board will act on the original Resolution with the Amendment, which in term will affect the Civil Penalties for I-25 and US 36 Managed Lanes.

Director Cheroutes went on to comment about the public outreach of opening of Phase I in 30 - 90 days. We will be conducting Townhall meetings along with Telephone Townhalls. We want to communicate and saturate the public with this information.

Director Rogers went on to say, concern has been raised about taking action on Resolution 159, is that we are doing this on a work day, during work hours. Question one is can we address that concern in

the structuring of the additional public outreach. The 2nd concern is that we are dealing with a road that moves between Boulder and North end of town and were conducting a meeting here in the South part of town, can we address that concern as well.

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

DRAFT

HAMMER

LAW

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

Barbara K. Brown, Ph.D.
Sr. Strategy Advisor (not a lawyer)

**3773 Cherry Creek Drive, North
Suite 575
Denver, CO 80209
303.204.4447
hammer@hammer-law.com**

March 3, 2015

DELIVERED VIA EMAIL

High-Performance Transportation Enterprise
Board of Directors

RE: Proposed Toll and Penalty Schedule

In prior written and oral communications, this firm has provided public comment on earlier versions of the toll and penalty schedule that were proposed by Plenary for approval at HPTE Board meetings last September 2014 and January 2015. All such prior comments are incorporated herein by reference.

The comments made herein or otherwise incorporated by reference are not intended to be exhaustive and no waiver is made by the failure to include any particular fact, law, or issue herein.

PAST PROPOSALS BY PLENARY FOR TOLL INCREASES

Each time Hammer-Law has raised objections on behalf of Cliff Smedley to the proposed toll increases by Plenary, the proposed schedules were removed from the Board agenda. The comments we made on those occasions have not been addressed in the March proposal nor have such deficiencies been rectified.

The September 2014 proposed toll rates are inexplicably different from those proposed for the March 3, 2015 Board meeting. In September, Plenary sought “~\$145,000” additional revenue over a six-month time period. Plenary estimates that the March 2015 proposal would provide it with \$178,321.90 of additional revenue in six months above that currently collected for I-25.

Plenary also does not explain why it is entitled to an additional \$145,000 over six months. Nor does Plenary explain why its requested increase in revenues is now approximately 23% higher than its proposal in September 2014.

The HPTE Board was scheduled to consider yet another proposal from Plenary in January 2015, but that proposal has not yet been disclosed to the public. Today, the HPTE Board still has not taken the steps legally required before the Board may take legally effective action on a proposed toll and penalty schedule.

LITIGATION UPDATE

As the HPTE Board is aware, I have been experiencing health issues that have interfered with this firm's moving forward at the pace required under standard Court rules on the lawsuit filed in federal court on behalf of Mr. Smedley. Because Mr. Smedley determined that he would not be able to find substitute counsel for this extremely complex case within the time period requested by the Court, he voluntarily chose to seek dismissal of the case without prejudice.

The Court issued an order permitting such dismissal in a manner that permits Mr. Smedley to refile his lawsuit at a more convenient time. The Court has not at any point ruled on the merits of this case.

I bring this to your attention in case the HPTE Board has not been adequately advised of the legal significance of this recent development in such litigation. The issues raised by Mr. Smedley have not been resolved and his claims remain intact.

When HPTE was considering making changes to its logo and changing its name, HPTE staff falsely advised the HPTE Board in meetings at which I was personally present that HPTE is not part of the Colorado State government. Former CDOT director Don Hunt personally advised the HPTE Board that HPTE is definitely a part of the Colorado State government and part of CDOT.

The issues raised in Mr. Smedley's litigation remain very relevant to the action proposed by the HPTE Board's for its special meeting on March 3, 2015. HPTE and its Board remain constrained by existing Colorado law and the United States Constitution.

FAILURE TO PUBLISH PROPOSED NOTICE OF RULEMAKING IN THE COLORADO REGISTER

The Colorado Administrative Procedure Act (APA) – both by its terms and as construed by the Colorado Supreme Court – clearly establishes that no state agency can engage in rulemaking without complying with the terms thereof. HPTE engages in rulemaking when it sets or changes toll rates and related user fees. The HPTE Board has already explicitly acknowledged on the public record that it must comply with the APA.

The APA requires HPTE to take various steps prior to adopting toll rates. One of these requirements is to publish notice of proposed rulemaking in the Colorado Register at least twenty days prior to meeting to consider the proposed schedule. HPTE has failed to make such publication to date. Therefore, any action taken without complying with the APA will be legally ineffective.

ONGOING CONSTITUTIONAL VIOLATIONS BY THE HPTE BOARD OF DIRECTORS

The disclosures by Plenary relating to the proposed toll schedule before the Board today and the purported justifications asserted therein are so legally deficient that they cannot form the basis for a reasonable decision-making process by the HPTE Board. The attempt to adopt the proposed schedule on March 3, 2015, exceeds HPTE’s permitted scope of power under Colorado law and under the Constitution, including, without limitation, violating due process rights of those who will be required to pay tolls to use Colorado’s managed lanes.

The requirement that the Board of Directors – and each Director as an individual – follow reasonable processes and make decisions on a reasonable, non-arbitrary basis is **clearly established law**. The failure to follow such clearly established due process constraints on HPTE’s powers involves directly each individual Director who votes today to approve the proposed schedule. You are each now on written notice that the effects of your acts – as Board members and as individuals – is to violate the Constitutional rights of Mr. Smedley and other Coloradoans who use I-25 and US 36.

The information provided to the public in connection with the proposed schedule is legally insufficient and cannot form the basis for reasonable action thereon. Hammer-Law has previously provided public comment that prior

versions of the proposed toll schedule gave no explanation of how the specific toll rates and penalties proposed therein were derived. This remains true in the current proposed schedule. Although the HPTE Board withdrew prior versions of the proposed schedule from consideration and purportedly required additional information from Plenary Roads Denver, the information presented to date remains legally insufficient and the concerns previously raised remain unaddressed.

By way merely of example and without limitation, we bring to your attention the following current deficiencies:

1. Under the terms of the alleged (and legally ineffective) contract between Plenary and HPTE, every proposed change in toll rates must include a disclosure of the formula upon which the proposed toll and penalties are based. Plenary has not yet made this disclosure.

Instead, Plenary asserts that it is not required to make this disclosure because the formula does not rely on a “software” algorithm. However, the alleged contract requires the disclosure of the formula for setting tolls regardless of whether the formula is contained in software and regardless of whether the formula is being changed. Any formula that is the basis for the proposed tolls and penalties must be disclosed to the public and must be described in Plenary’s written proposal for establishing or changing rates.

Plenary asserts that its proposal is “consistent with the current regime,” but fails to describe what such regime is and also fails to describe what changes have occurred that would make the specific toll and penalty rates requested reasonable under the circumstances. From the limited information provided by Plenary and HPTE to the public, Plenary simply wants to make more money.

Plenary operates a monopoly over I-25 and US 36 managed lanes – property owned by the public. The rates charged for the use of this property are not allowed to fluctuate at the whim of Plenary. HPTE sold the public on using a public-private partnership on the basis that Plenary would take all revenue risks associated with the project. Plenary has offered no evidence that its requests for toll increases on I-25 or the setting of initial toll rates for US 36 are reasonably related to the costs and circumstances relevant to the highways to which such tolls and charges relate.

2. The establishment of a penalty for driving without a transponder on the managed lanes has never been duly authorized by the HPTE Board. Nor is any specific justification offered at this time that ties the precise penalty being

charged to vehicles that will be using license plate tolling to any specific dollar amount of increased cost associated with license plate tolling. Plenary admits that it simply doesn't want Colorado drivers to use managed lanes without a transponder.

Since it is not legally able to force drivers to use a transponder, Plenary instead seeks to make driving without a transponder unaffordable to many Coloradoans. Plenary has offered no evidence that demonstrates that *any* penalty for license plate tolling serves a *legitimate* purpose that has been duly authorized by the Colorado legislature or the residents of Colorado. Plenary has offered no evidence that demonstrates the appropriateness of the specific level of penalties Plenary currently proposes for license plate tolling.

3. Plenary states that inflation is one reason it should be permitted to charge higher toll rates. However, the proposed toll schedule does not disclose any specific rate of inflation that would justify toll increases.

Plenary also refers generally to traffic congestion to justify toll rates it seeks to pocket in the form of revenue. However, congestion levels have been dropping over the years according to data provided by the Colorado Department of Transportation. Plenary provides no specific congestion data in its proposal and makes no attempt whatsoever to connect the specific dollars it wishes to put in its pocket to any demonstrable or any specifically quoted anticipated changes in congestion that will benefit the public.

4. Plenary falsely understates the percentage increase drivers without transponders will be required to pay to use the managed lanes. Therefore, the information provided by Plenary and HPTE to the public is inherently misleading. For example, Plenary states that the percentage increase for license plate tolling for weekday northbound drivers on I-25 between 5:00 AM and 6:00 AM is 17% - the actual change in rates charged such drivers is over 38% when the license plate tolling surcharge is included. During the hours of 7:15 AM and 8:15 AM, Plenary asserts an increase in tolls of 4%, yet the actual increase in rates charged under license plate tolling is over 25%.

5. Plenary has not explained what *public* purpose is served by charging tolls for use of the managed lanes at non-peak periods such as on weekends or on weekdays between 5:00 AM and 6:00 AM.

6. HPTE's custom is to notify the public of the current meeting agenda for its Board on the webpage entitled "Current HPTE Board Meeting Agenda." As of late evening on March 2, 2015, this webpage does not even reflect that a

meeting will occur on March 3, 2015, much less disclose the actual agenda therefore. At a minimum, such failure violates Colorado's Sunshine Laws.

CONCLUSION

The foregoing list reflects only examples of problems and deficiencies in Plenary's current proposed schedule and the HPTE Board's proposed action. The Board is required to have a reasonable basis upon which to evaluate the *specific* rates Plenary seeks the HPTE Board to approve today. No reasonable basis for such evaluation has been disclosed to the public.

HPTE would be exceeding its authority if it approves the proposed toll schedule currently before it. HPTE is required to follow due process before making any changes to existing toll rates and related charges or before establishing new rates and charges.

Because Plenary has failed to provide the HPTE Board with information necessary for the Board to make a reasonable and non-arbitrary decision, Plenary has not established even under the terms of the alleged Concession Agreement itself that Plenary is entitled to the specific toll rates and related charges it seeks to impose on the public.

Any attempt to approve the proposed toll schedule will be legally ineffective on March 3, 2015 because of the legal deficiencies described herein.

These written comments are offered without waiving the right to make public comment in person during the applicable HPTE Board meeting on this subject.

Regards,

/s/

Karen A. Hammer

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 27th. 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 21st. 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.
Sr. Strategy Advisor (not a lawyer)

**3773 Cherry Creek Drive, North
Suite 575
Denver, CO 80209
303.204.4447
hammer@hammer-law.com**

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