



KAPLAN KIRSCH ROCKWELL

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APR 4 2007

April 4, 2007

Honorable Vernon A. Williams
Surface Transportation Board
395 E Street, S.W.
Washington, DC 20423-0001

Re: *Rail Capacity and Infrastructure Requirements*, STB Ex Parte No. 671

Dear Sir:

I am enclosing an original and ten (10) copies of the Testimony of the Regional Transportation District. An additional copy is enclosed for date stamp and return to our messenger. Please note that a 3.5 inch diskette is enclosed with this document.

Sincerely,

Charles A. Spitulnik

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Enclosure

cc: All Parties of Record

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Public Record

**Before the
Surface Transportation Board**

STB EX PARTE NO. 671

RAIL CAPACITY AND INFRASTRUCTURE REQUIREMENTS

TESTIMONY OF THE REGIONAL TRANSPORTATION DISTRICT

The Regional Transportation District (RTD), a political subdivision of the State of Colorado, appreciates the opportunity to present this testimony concerning the important questions raised by the Board in this proceeding. While the transportation services RTD provides are not subject to this Board's jurisdiction, RTD interacts closely with freight railroads whose services and operations are subject to that jurisdiction. The interests of the public in the Denver region are very much impacted by any constraints on rail capacity and infrastructure. The voters of the region have spoken in support of expansion of rail-based transit alternatives as a means of reducing congestion and improving air quality in the region, and as a result, the state of the regional rail infrastructure and its ability to absorb use by passenger systems is of vital concern to us.

RTD, whose enabling act is found at Title 32, Article 9 of the Colorado Revised Statutes, provides mass transit to all of 3 counties and portions of 5 others that comprise the Denver metropolitan area, serving a population of approximately 2.5 million. RTD currently operates about 35 miles of light rail service, 11 miles of which are in shared corridor right of way with the Burlington Northern Santa Fe Railway Company ("BNSF") and Union Pacific Railroad Company ("UP"). The shared corridor light rail line began operations in 2000. In 2004 voters in the RTD authorized a \$4.7 billion capital program to add 119 miles of rail to the system. Most of this new rail network is assumed to be built in right of way owned by BNSF or UP railroad on

right of way to be purchased from them or in shared track and/or corridor arrangements. A map showing RTD's existing and projected rail-based operations is attached to these comments. Both railroads are negotiating with RTD but as a public transit provider RTD is experiencing significant challenges in attempting to obtain use of freight right of way. Liability, capacity and cost are the three key challenges with which RTD is grappling.

RTD has to date only been able to engage UP in serious negotiations for right of way acquisition. UP has been very cooperative in attempting to meet RTD's operating needs by looking to relocate its facilities to new locations and make its more centrally located property available to RTD. The cost for this however, will likely be new and upgraded replacement facilities plus value for the land RTD acquires, with ongoing reservation of limited use by UP and RTD's assumption of responsibility for environmental cleanup of yards and shops. RTD appreciates the effort and cooperation UP has put into a contemplated transaction. Moreover, RTD understands that even after relinquishing ownership of its lines, UP will be required to continue providing service to low-volume customers unless or until this Board approves the cessation of those operations. UP therefore requires ongoing operation and access on lines it is willing to sell for mass transit which means that for reliable passenger operations, additional tracks, crossovers, gates and other capital items will be required. Ongoing service requirements that do not balance an individual customers needs against an entire region's passenger service needs and the inability of mass transit providers to require any relocation, including relocation of lines, spurs or crossovers by freight carriers for use of right of way results in significant additional cost for public transit providers attempting to expand mass transit rail service. RTD believes that the calculus used by this Board for determining the best use of existing infrastructure should take the public interest in rail-based transit alternatives into account.

Liability issues have been another significant hurdle in freight rail negotiations. BNSF has refused to engage in negotiations with RTD for use of right of way if it is to be exposed to any additional risk for use of right of way by passengers. Protection from punitive damages even for its own willful and wanton conduct has been a prerequisite to negotiations. RTD has been required to seek legislative change for its state's punitive damage laws to effectively begin negotiations. It appears that RTD will in fact be able to meet this hurdle. A national solution for railroad and public transit operations that establishes uniform standards for liability and insurance requirements for passenger operations using right of way made available by freight carriers would facilitate passenger use of excess right of way or excess capacity. While the STB is an administrative rather than legislative body, RTD submits that the STB's unique understanding of the finances of the rail industry, coupled with its ability to evaluate from a neutral perspective the highest and best uses of the rail right of way in the interests of the entire public, would provide it with a unique ability to recommend a solution to the dilemma that transit providers and railroads face.

RTD submits, in addition, that the STB should consider requiring rail carriers to accommodate public passenger service needs as part of their fulfillment of the public interest on the corridors they serve. For example, where a carrier owns right of way of approximately 200 feet in width and where the freight line utilizes a double track system using 50-60 feet of that right of way, there is excess capacity that could be utilized to further the public interest in rail-based transit. Today, the freight carriers are able to place demands for capacity improvements, right of way cost, clean up and indemnification on passenger carriers because there is virtually no requirement that freight carriers make any accommodation for passenger service needs. Modern transportation and energy demands nationally and particularly in major metropolitan areas suggest that laws that address regulation of freight service should treat the interests of the

public – broadly defined to include the commuting public as well as shippers – when considering analyses of the availability and utilization of existing infrastructure. Moreover, projections of freight expansion should be publicly reported and scrutinized by this Board so that regions looking to fill the pressing need for passenger service can attain a realistic assessment of whether what appears to be unused right of way owned by freight railroads is likely to be available. Right now, nothing precludes a freight carrier from claiming a need for future expansion, and there is no objectively verifiable process in which to evaluate this claim. Reasonable accommodation for passenger service such as the shifting of track or moving crossovers should be made without freight railroad's being able to require add-ons such as new signals, grade crossings, and other capacity improvements plus top dollar right of way costs when those requests are made, simply because they can. An independent body such as the STB that has expertise in the field should be willing to evaluate the reasonableness of those claims. The STB should also consider the extent to which railroads can withhold unused right of way for additional future capacity when public passenger rail service could make immediate and intensive use of such right of way.

In sum, in determining what is fair compensation for railroads, and what capacity and service needs must be met STB should consider requiring:

- Annual public reporting of capacity expansion plans of freight railroads;
- Independent assessment of the need for retention of right of way for future capacity expansion by freight railroads;
- Determination of fair compensation for right of way where sufficient capacity exists to meet railroad safety requirements and additional tracks to be built by passenger railroads;

- Reasonable assessment of replacement facilities required to relocate railroad operations plus fair compensation in the form of improvements OR cash payment for the burden of relocation and accommodation;
- Establishment of reasonable and necessary insurance/indemnification requirements on a national level; and,
- Establishment of fair compensation/cost sharing for environmental clean up of railroad property transfer for passenger operations.

RTD submits that consideration of the foregoing factors will expand the importance of rail service for both freight and passenger needs such that the coming of the railroads in the 21st century will have no less significance that they did in the 19th century.

Thank you very much, again, for providing RTD with the opportunity to explain its views on this very important subject to this Board.

April 4, 2007

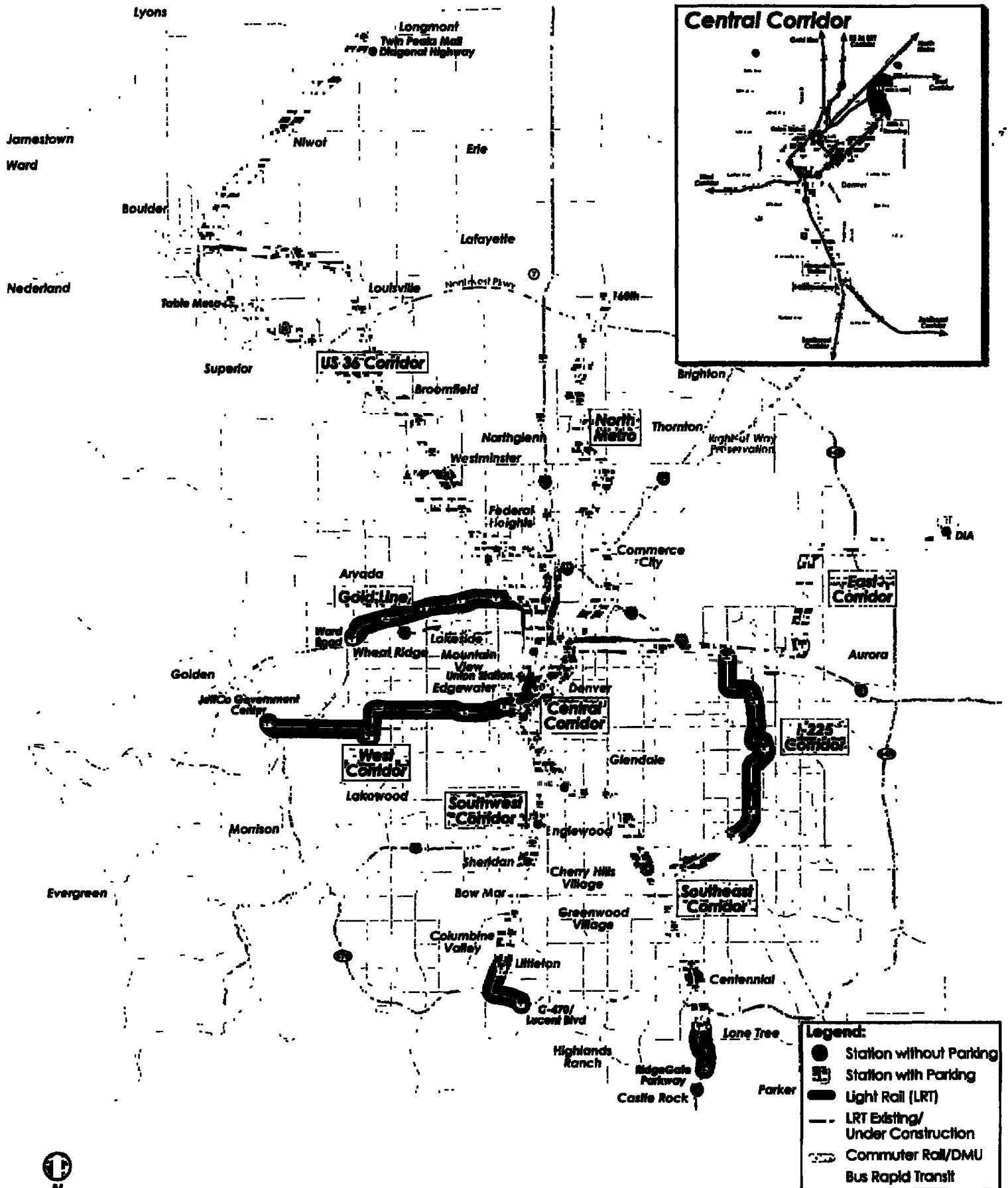
Respectfully submitted,
Regional Transportation District

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Rapid Transit Map

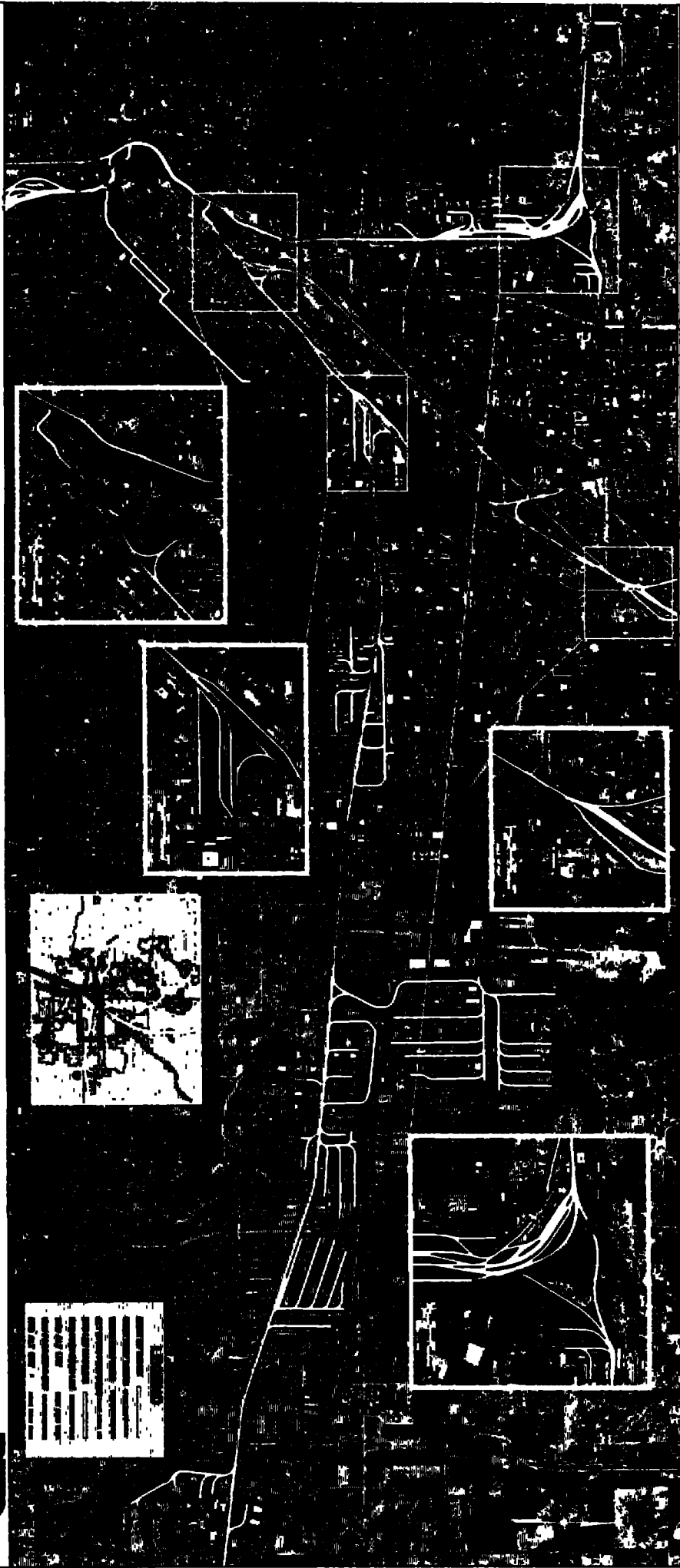


Certificate of Service

I hereby certify that I have this 4th day of April, 2007, caused to be served a copy of the foregoing Testimony of the Regional Transportation District upon all parties of record by first class mail with postage prepaid and properly addressed.

Charles A. Spitulnik
Charles A. Spitulnik

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DENVER RAIL CORRIDORS
MARCH 2007

