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- BEFORE THE PUBLIC SERVICE COMMISSION OF UTAH -

In the Matter of Union Pacific Railroad's)	
Petition for Relief against the Utah)	ANSWER, COUNTER-PETITION,
Department of Transportation)	CROSS-PETITION AND
)	THIRD PARTY PETITION
)	
)	
)	
)	DOCKET NO. 09-999-11

The answering parties hereunder are Anderson Geneva, LLC, Ice Castle Retirement Fund L.L.C., and Anderson Geneva Development, Inc. (collectively "Anderson entities"), owners and managers of the property which was the former Geneva Steel manufacturing plant located in Vineyard, Utah, and the Town of Vineyard (herein collectively "Vineyard Parties").

ANSWER

Vineyard Parties answer the Petition of Union Pacific Railroad Company ("UP") as follows:

1. Admit.
2. Admit.
3. Denied for the reason that the document speaks for itself and is not determinative of the matters at issue herein.

4. Denied.
5. Denied.
6. Admit that areas east of the Crossing were used by the Geneva Works employees and business invitees, but all other allegations contained in allegation 6 are denied. The public regularly used the Crossing and used the area east of the Crossing.
7. Denied. While it is admitted that traffic is reduced, the characterization is inaccurate and incomplete. Further, current use does not affect the fact that it is a public right of way.
8. Denied. For a period of time the Geneva Steel, LLC, placed a fence at the east side of the Crossing during the period of bankruptcy. The fence has been removed at the date of this Answer.
9. Denied for the reason that the allegation mischaracterizes the actions and activity at the Crossing and the Geneva Works property.
10. Denied for the reason that the allegation mischaracterizes and misstates the activity at the Crossing, the nature of the Crossing and the definitions set forth in the Railway Highway Grade Crossing Handbook and the Handbook speaks for itself.
11. Denied for the reason that the allegation misstates the law and mischaracterizes actions of public agencies.
12. Denied for the reason that it misstates the facts of historical maintenance at the Crossing and mischaracterizes the legal determinations required for the designation of a public highway Crossing.
13. Denied for the reason that the database speaks for itself. Further, the parties responsible for the characterization of crossings in general are Utah Department of Transportation ("UDOT") and UP. Such parties designated the Crossing as a public at grade Crossing and redesignated and affirmed it as such during the entire period of use.
14. Admitted in part to the extent that UDOT issued a decision classifying the Crossing as a public crossing. All other allegations therein are denied.
15. Denied for the reason that the UDOT decision speaks for itself.
16. Denied for the reason that the allegation describes facts not under the control of Petitioner UP and projects acts that have not yet occurred.
17. Denied for the reason that UP has no knowledge of the intent of Vineyard Parties, and for the reason that it mischaracterizes the result of possible development activity. While an

increase in traffic may occur compared to present day activity, when compared with the activity and traffic while Geneva Works was in operation, it may be insignificant or could even be less.

18. Denied for the reason that a determination has already been made by UDOT, the agency having authority to make such determination.

AFFIRMATIVE DEFENSES

First Affirmative Defense

The Petition of UP should be denied because it fails to state a claim upon which relief can be granted.

Second Affirmative Defense

The Petition of UP should be denied by reason of accord and satisfaction. UP has already acknowledged and admitted the Crossing is a public highway crossing.

Third Affirmative Defense

The Petition of UP should be denied for the reason that UP has brought this claim in bad faith. UP has already admitted in pleadings before this Commission that the Crossing is a public highway crossing.

Fourth Affirmative Defense

The Petition of UP should be denied by reason of laches. UP has acknowledged the Crossing was a public highway crossing for more than 60 years in public records.

Fifth Affirmative Defense

The Petition of UP should be denied by reason of estoppel. UP has acknowledged the Crossing was a public highway crossing for more than 60 years in public records.

Sixth Affirmative Defense

The Petition of UP should be denied by reason of *res judicata*. UP and UDOT have acknowledged the Crossing was a public highway crossing in previous hearings before this Commission and the Commission has found that the Crossing is a public crossing.

Seventh Affirmative Defense

The Petition of UP should be denied by reason of waiver. UP has acknowledged the Crossing was a public highway crossing for more than 60 years in public records and hearings before this Commission and has waived its rights to claim otherwise.

WHEREFORE, the Commission should deny the Petition of UP and the determination of UDOT that the Crossing is a public crossing should remain effective without change.

COUNTER-PETITION AND THIRD PARTY PETITION

Vineyard Parties hereby enter their Counter-Petition against UP and Third Party Petition against Union Pacific Railroad Company ("UP") and Utah Transit Authority ("UTA"), and for cause of action alleges as follows:

1. This Counter-Petition relates to that at-grade railroad crossing located at approximately 400 North and Vineyard Road, Town of Vineyard, Utah County, State of Utah (the "Crossing").
2. Upon information and belief, UP owns and operates a railroad company with railroad cars passing at the Crossing.
3. Upon information and belief, UTA has acquired certain rights from UP wherein UTA may construct additional rail facilities at the Crossing which may increase rail traffic at the Crossing. It further appears from public pronouncements and activity near the Crossing that UTA is constructing additional rail facilities at or near the Crossing.
4. UTA has failed and refused to construct improvements at the Crossing similar to improvements made at other public crossings, which improvements, if made, would cause the Crossing to meet all safety concerns of the parties.
5. UDOT, acting for the benefit of Utah Transit Authority ("UTA"), recently provided notices regarding the possible change or improvement to certain railroad crossings in Utah County in connection with the Commuter Rail South project being undertaken by UTA.
6. The notices provided for the benefit of UTA were defective in that they identified 4000 North in Vineyard, Utah.
7. No further notices have been provided by UTA in relation to the Crossing and in regard to improvements to crossings made by UTA.
8. Correspondence and notice was sent to UDOT, UTA and U.P. from the Petitioners regarding the actions of UDOT and UTA.
9. The Town of Vineyard, a Utah municipal corporation, owns and maintains Vineyard Road and the public road which extends over the Crossing.
10. Anderson entities own the Geneva Property east of the public road at the Crossing and the Anderson entities, prior owners of the Geneva Property, and the general public have continuously used the Crossing as a public at grade crossing without obstruction or hindrance for more than 90 years.

11. On information and belief, the Crossing was continuously used from 1942 to the present for access to the Geneva Property by the public and the prior owners of the Geneva Property as a public at grade crossing, without obstruction or hindrance.

12. On information and belief, the Crossing was continuously used as a public at grade crossing by the public in general and by owners of lands in the vicinity, without objection or hindrance from a date earlier than 1922, through and including 1942, when the Geneva Property was acquired by the United States Government for the construction of a steel plant.

13. 400 North Street at Vineyard Road, the public road which extends to and through the Crossing to the western boundary of the Geneva Property, has never been abandoned by any public agency or municipality which owned or maintained the public roadway.

14. The Crossing is paved, and is owned and maintained by Town of Vineyard and provides public road access to the Geneva Property.

15. The Crossing currently and historically has active crossing lights, signal bells, crossing arms and railroad crossing signs. Historical information indicates that rail crossing signs existed at the Crossing, with flashing lights since before 1943.

16. The Crossing is the only crossing and access to and through the Geneva Property for a nearly 3 mile length of the UP right of way. The Crossing is a necessary and vital public access within the Town of Vineyard and from the Geneva Property. The loss of this access may constitute inverse condemnation by UP, UDOT and UTA.

17. 400 North Street in Vineyard, Utah, is master-planned as a primary through-road on the Town of Vineyard approved Road Master Plan and the Town of Vineyard General Plan map. As such the public at grade Crossing is a necessary and vital part of the Vineyard Town transportation structure.

18. Vineyard Town acknowledges that 400 North Street and the Crossing is a public street, and under Section 72-3-104 (4) of the Utah Code, Vineyard Town exercises sole jurisdiction and control of the public roadways within the municipality.

19. The Crossing has been designated as a public crossing on the U.S. DOT Crossing Inventory of Information from the inception of this registry in January 1, 1970, to the present. The U.S. DOT Crossing Inventory continues to reflect the Crossing as a public at grade crossing as of this date.

20. A determination has been made by UDOT that the Crossing is a public crossing, after considering all evidence available to the parties, pursuant to that decision letter issued on July 13, 2009 (the "Determination").

21. Since the Determination UP has placed jersey barriers at the entry to the Crossing.

22. Since the Determination, upon information and belief, UTA has directed its engineers and contractors to design and construct improvements at the Crossing as if it was a closed Crossing and without respect to the fact that it is a public crossing.

23. Upon information and belief, UTA has constructed major and significant improvements to benefit other public crossings but refuses to construct such improvements over and around the Crossing.

24. As part of the Determination, UDOT ordered the temporary closure of the Crossing, but failed to state its basis for the temporary closure, and stated an indeterminate standard for the cure of the temporary closure.

25. To make a Determination UDOT is required to do the following:

- a. Provide notice to all parties having an interest in the Determination.
- b. Conduct an inspection of the Crossing using personnel qualified to conduct the inspection, including engineers, technicians, traffic engineers, and engineers from the local jurisdiction.
- c. Consider opinions and information from all stakeholders.
- d. Make a Determination based on public safety and need.

26. During the conduct of the inspection leading to the decision for temporary closure, upon information and belief, UDOT failed and refused to conduct the inspections and make the Determination in the following ways, among others:

- a. Current traffic activity and historical traffic patterns and activity was not considered.
- b. Public and private need was not considered.
- c. No input was sought from the local jurisdiction or adjacent private landowners.
- d. There was apparent bias in the process.
- e. There was apparent discussion without all parties present.
- f. The parties conducting the site inspection announced the decision on site without any review and expressed anger, frustration and threatened to tear out facilities immediately without any further consideration.

27. Upon information and belief the only safety concern expressed in relation to the temporary closure of the Crossing was that the gate and fence on the Geneva Property was too close to the Crossing, which might cause a circumstance where a vehicle might turn into the Crossing and have to stop while still on the railroad tracks.

28. Acting on the foregoing information, the safety concern has been removed and there is no longer a gate or fence at the edge of the Crossing.

29. UDOT has failed and refused to provide any additional information regarding the temporary closure decision.

30. Upon information and belief, the actions of UDOT, UP and UTA were based on an apparent prior determination for the sole purpose of benefitting UP and UTA so that UP and UTA could avoid costs and expenses required to upgrade the Crossing.

24. The Commission has jurisdiction conferred by Utah Code section 54-4-15(4)(a) to receive this petition for relief.

25. Vineyard Parties are aggrieved by the actions of UP, UDOT, and UTA.

26. The actions of the UDOT, UP and UTA engineers was not based on facts or circumstances relating to the Crossing, but instead was based on bias, desire of UP to close the Crossing, and the desire of UTA to avoid the expense of improvements to the public crossing.

WHEREFORE, Vineyard Parties request relief as follows:

1. The Commission confirm the finding of UDOT that the Crossing is a public at-grade crossing, and that public convenience and necessity demand its maintenance and protection.

2. The Commission order UDOT, UP, UTA and other affected parties to protect and maintain the Crossing as a public at-grade railroad crossing.

3. The Commission order UTA to construct all improvements reasonable and necessary for the Crossing as a public crossing, the same as all other public crossings being improved by UTA as a part of its Commuter Rail project.

4. The Commission provide such other and further relief as may be appropriate.

CROSS-PETITION AGAINST UDOT

Vineyard Parties hereby enter their Cross-Petition against UDOT, and for cause of action alleges as follows:

1. Vineyard Parties hereby adopt by reference the facts alleged in the Counter-Petition and Third Party Petition as if fully alleged herein.

2. The Determination involved an inspection by personnel of UDOT, UP, UTA, and allowed for the Town of Vineyard's engineer to attend the inspection.

3. The only safety concern articulated by UP, UDOT, and/or UTA was in relation to the fence on the east side of the Crossing.

4. The fence has been removed and a turn-around area created for those using the Crossing by mistake, thus eliminating any safety concerns.

5. UDOT should be required to review its temporary closure and re-open the Crossing.

WHEREFORE, Vineyard Parties request relief against UDOT as follows:

1. For an order requiring UDOT to consider all facts and circumstances regarding the current use of the Crossing and to re-open the Crossing.
2. For an order lifting the temporary closure.
3. For such other and further relief as may be appropriate.

DATED this 20th day of November, 2009.

DENNIS M. ASTILL, PC LAW FIRM

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By: _____
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CERTIFICATE OF SERVICE

I hereby certify that on the 20th day of November, 2009, a true and correct copy of the foregoing Answer, Counter-Petition, Cross-Petition, and Third Party Petition were served to the persons and in the manner below:

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