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- BEFORE THE PUBLIC SERVICE COMMISSION OF UTAH -

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	)	<b>ANDERSON ENTITIES' STATEMENT</b>
In the Matter of Union Pacific Railroad's	)	<b>OF UNDISPUTED AND DISPUTED</b>
Petition for Relief against the Utah	)	<b>FACTS AND PRE-HEARING</b>
Department of Transportation	)	<b>POSITION BRIEF</b>
	)	
	)	<b>DOCKET NO. 09-888-01</b>

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Anderson Geneva, LLC, Ice Castle Retirement Fund L.L.C., and Anderson Geneva Development, Inc. (collectively "Anderson entities"), by and through their legal counsel hereby submit their statement of undisputed and disputed facts and pre-hearing position paper as follows:

**STATEMENT OF THE CASE**

Since the early 1920's, a public at-grade railroad crossing (herein the "Crossing") exists over the main freight rail line owned by Union Pacific Railroad Company ("UPRR") at the approximate location of 400 North Vineyard Road, in Vineyard, Utah. In 1942, the Defense Plant Corporation acquired approximately 1500 acres for the purpose of constructing a steel making plant to aid in the production of steel for use in defense applications during World War II. Although public roads within the boundaries of the steel plant were vacated at the time of the purchase of the plant site, the Crossing was not closed and continued to be used. The Crossing was not included within the boundaries of the steel plant.

At all time since the early 1920's, the Crossing was classified and used as a public at-

grade crossing in all public and private documents. The Crossing is included in part of the Vineyard Town road masterplan as a major collector road. There are no other railroad crossings in Vineyard Town without traveling nearly 2 miles in either direction from the Crossing.

In 2008, UPRR, in conjunction with Utah Transit Authority (“UTA”), unilaterally decided to re-classify the Crossing as a private crossing, to the detriment and damage of the Anderson Entities and Vineyard Town. UPRR induced UDOT and UTA to treat the Crossing as a private crossing to be closed.

At the request and urging of the Anderson Entities and Vineyard Town, Utah Department of Transportation (“UDOT”) conducted a legal review of the Crossing status and determined that it indeed was a public at-grade crossing. However, without conducting a required engineering “Surveillance Review” of the Crossing, UDOT ordered the Crossing to be temporarily closed. Anderson Entities and Vineyard Town protested this decision and requested that UDOT conduct a Surveillance Review according to its administrative rules. UDOT refused to do so.

UPRR appealed the decision of UDOT that the Crossing was a public crossing. Anderson Entities and Vineyard Town appealed the decision of UDOT to temporarily close the Crossing and opposed UPRR’s appeal. Anderson Entities and Vineyard Town have also petitioned the PSC to direct that UTA make all improvements to the Crossing that UTA is making to comparable crossings in its Commuter Rail South rail project.

This Brief is filed in support of the Petition of Anderson Entities and Vineyard Town, appealing the temporary closure, and in opposition of the Petition of UPRR which appealed the finding of UDOT that the Crossing is a public Crossing.

### **STATEMENT OF UNDISPUTED FACTS**

The following constitutes a listing of undisputed facts relevant to this dispute:

1. From the early 1920’s until early 2009, the Crossing was considered a public

crossing by all parties interested in the Crossing. This is shown in the following governmental and private entity maps recorded in Utah County and federal government filings:

a. The Crossing was shown as a public rail Crossing in the 1922 USGS map created in cooperation with Utah County and the U.S. Reclamation Service. [AE-Ex1]

b. The Crossing was shown as a public rail Crossing in the 1922-1925 USGS map created in cooperation with Utah County and the U.S. Reclamation Service, showing surveys in 1922 and 1925. [AE-Ex 2]

c. Denver & Rio Grande Railroad filed with the Utah County Recorder, on June 30, 1919 (corrected to December 31, 1927), a map which shows a “County Road” crossing the tracks at 400 North and identifies it as a “Highway Crossing” and also identifies a cross-buck “Crossing Sign” as being present at the crossing. [AE-Ex 3]

d. A “Road Map of Utah County, Utah Showing County & State Roads”, 1930, shows the 400 N. Crossing at the tracks and classifies it as an all-weather road. [AE-Ex 4]

e. A “General Highway Map, Utah County, Utah” January 1, 1937, prepared by the Utah State Road Commission in cooperation with the U.S. Department of Agriculture, Bureau of Public Roads, shows the 400 N. Crossing at the tracks and classifies it as a Bituminous Surfaced Road. [AE-Ex 5]

f. In the Book “Our Vineyard Heritage A Wellspring of Tradition and Change, 1899-1999” published by Vineyard Town there is shown the following maps:

Map 1 – “The Settlement of Vineyard Community, 1900’s”. This map shows 400 N. crossing the railroad track.

Map 21 – “Vineyard Community Prior to the Coming of Geneva Steel, 1940”. This map shows 400 N. crossing the railroad track.

[AE Ex 6]

g. Utah Department of Transportation and Union Pacific Railroad separately filed reports as part of the U.S. Department of Transportation, Crossing Inventory Information

database, with the original classification beginning as of 1974 (with an effective date of January 1, 1970, and updated on December 2, 1988, July 15, 1994, April 1, 1998, and April 1, 1999).

The original report classifying the Crossing, and all updates retained the classification of “Public at Grade”. The database continued to show the Crossing as Public At Grade as of January 29, 2009. [AE-Ex 7]

2. On August 3, 1942, in relation to the acquisition of the Geneva Plant property by the U.S. Government, the Utah County Commission abandoned all public roadways within the Geneva plant property boundaries. The Utah County Commission did not abandon the Crossing which was a public Highway. It only abandoned the area lying within the boundaries of the Geneva steel plant property. [AE-Ex 8]

3. After the plant was acquired by the U.S. Government, and after all public roads were abandoned by Utah County, the Public Service Commission specifically recognized the Crossing as a public road crossing.

a. On August 7, 1943 a finding of the Public Service Commission, in Case No. 2710 was referenced in a letter from Theodore E. Thain, acting Secretary of the Public Service Commission, to Farnsworth & Van Cott, attorneys for D.& R.G.W.R.R. Co. This letter conveyed two certified copies of a Commission Report and Tentative Order. The Tentative Order recites that an application by the Denver and Rio Grand Western Railroad Company (“D.& R.G.W. Railroad”) was filed with the Commission on July 16, 1943, and recites several findings in relation to the application. The relevant finding in relation to the Crossing is found under the fifth paragraph of the Findings, which states that the main line of the railroad near Geneva, Utah County, Utah, crosses certain county roads and state highways. The applicant was proposing to construct a second main track near the Geneva property and parallel to the main track. The importance of the application was that the second main track, when constructed,

would make an at-grade crossing across each of the stated highways. One of those crossings is described as follows:

. . . a[t] county highway crossing to Geneva plant at m.p. 708 plus 995 feet, on section line between Sec. 8 and 17, Twp. 6 South, R. 2 E., Utah County, at a point approximately 2700 feet west from the northeast corner of said Sec. 17.”

[AE-Ex 9]

b. The crossing referred to above is the Crossing at 400N and Vineyard Road. The Tentative Order also referenced a blueprint that was attached to the application. As a part of the filing, D.& R.G.W. Railroad made representations to the Public Service Commission that it considered the Crossing as a public highway and a public crossing, and this finding concurs with the representation.

c. UPRR is the successor in interest to D.&R.G.W. Railroad.

d. In relation to the above matter before the Commission, on July 20, 1943 a memo was filed by State of Utah Road Commission, wherein reference was made again to the railroad track being proposed which would “cross eight highways six of which are designated as County roads . . .”, confirming that the Utah Road Commission (predecessor to UDOT) also agreed that the Crossing was a public road crossing. [AE-Ex 9]

e. A Report (attached to above-referenced Tentative Order) from Utah County (Robert L. Wilson, Utah County Surveyor) also confirms the public crossing status. Mr. Wilson refers specifically to the project and makes a specific recommendation with regard to the Crossing. Therein he states, “Highway crossing 708 +995’, Entrance into Steel Plant. Visibility clear. Highway grade should be raised on west side.” [AE-Ex 9]

f. Blueprints attached as part of the foregoing Tentative Order confirmed that the Crossing was part of the crossings which were recognized as public crossings under the order of the Commission. [AE-Ex 9]

4. In another 1943 petition with the Public Service Commission, Case No. 2714,

filed by Union Pacific Railroad Company (as the successor in interest to D.& R.G.W. Railroad), a service spur was being applied for which would cross State Road U-114. The importance of this document is found in the State Highway map attached as a part of the Amended Application bearing the signature block of W.W. Anderson, Chief Design Engineer for the State Road Commission of Utah. This was dated April 1943. The second page of the map shows a State Road map with various highway crossings by the railroad clearly marked. It is therein shown that the Crossing is reflected as a highway crossing and bears a highway crossing signal. Also shown on that map are hatch marks which appear to mark the private property lines adjacent to the public highway and adjacent to the railroad right of way, internal to the Geneva property.

[AE-Ex 9]

5. The foregoing 1943 applications were filed with the Public Service Commission over a year after the abandonment of any public roads within the Geneva property by Utah County. As reflected in the above two matters, D.& R.G.W. Railroad, UPRR, UDOT, Utah County, and the Utah Public Service Commission all recognized the Crossing into the Geneva property as a public crossing.

6. At some point in time UTA acquired from UPRR the right to use the westerly portion of the UPRR railroad right of way for purposes of future rail service for its commuter rail system.

7. UTA announced that it would construct a new south commuter rail system from Salt Lake City to south Provo, Utah. In connection with its Commuter Rail South Project, UTA and UDOT provided notices to the public regarding UTA's plans to improve various public at-grade rail crossings approximately October 13, 2008. Public comments were to be provided to Eric Cheng at UDOT. No notice was given to any persons regarding the Crossing at 400 North, Vineyard Road. [AE-Ex 10]

8. On its website regarding its intended improvements and modifications to various rail crossings, UTA referred to a crossing known as the 4000 North crossing. By reviewing the website, Petitioner Anderson Entities discovered that the 4000 North crossing was in fact referring to the Crossing at 400 North Vineyard Road, Vineyard, Utah. [AE-Ex 11]

9. The reference to the 4000 North crossing indicated that the crossing was to be closed. [AE-Ex 11]

10. Soon after discovering the inaccurate reference and the intent to close the Crossing, by letters dated December 31, 2008, legal counsel for Anderson Entities objected to UTA, and to UDOT to the intended closure of the Crossing. [AE-Ex 12]

11. By letter dated January 20, 2009, Vineyard Town made similar objections to the proposed closure of the Crossing. [AE-Ex 13]

12. On February 12, 2009, Anderson Entities petitioned the Commission for an order setting aside the apparent decision of UDOT, UPRR and UTA that the Crossing was private and would be closed. [AE-Ex 14]

13. On February 25, 2009, UDOT legal counsel advised Anderson Entities that the Crossing was indeed considered public and that a further review of the Crossing would be conducted by UDOT, allowing all parties to submit further information. [AE-Ex 15]

14. Based on the February 25, 2009 decision of UDOT, the original petition to the Public Service Commission was dismissed by Anderson Entities as being moot.

15. On July 13 2009, by letter to the parties hereto, UDOT made a final decision that the Crossing was a public crossing, but ordered a temporary closure. No basis was stated in the letter in support of the temporary closure. [AE-Ex 16]

16. Prior to the July 13, 2009 letter, no engineering surveillance review (pursuant to Utah Statute and Administrative Rule R930-5-1, *et.seq.*) was conducted by UDOT.

17. On August 7, 2009, objection was made to UDOT by Anderson Entities regarding the temporary closure without proper process. [AE-Ex 17]

18. Subsequent to the August 7, 2009 letter, Anderson Entities learned that a surveillance team met on site on August 6, 2009, without notice to Anderson Entities, to review the Crossing, not to consider whether the temporary closure was to be reconsidered, but instead, to consider how the closure would be accomplished.

19. On August 12, 2009, UPRR petitioned the Commission for relief from the finding of UDOT that the Crossing was a public crossing. [AE-Ex 18]

20. On September 1, 2009, UDOT responded to the request of Anderson Entities, denying its request to reconsider the temporary closure of the Crossing. [AE-Ex 19]

21. November 19, 2009, Anderson Entities responded to the Petition of UPRR with the Commission, and appealed the decision of UDOT for temporary closure. UTA was added as a party to the matter by Anderson Entities, for its refusal to install or require to be installed improvements similar to improvements made by UTA to all other public crossings as part of its Commuter Rail South Project.

22. In early 2010, UPRR placed jersey barriers on the west side of the railroad crossing, closing the public road and eliminating access to the Crossing, and removed crossing gates and flashing lights, making the Crossing unsafe and unusable.

23. From the early 1920's to early 2010, when UPRR blocked the public road and crossing, the Crossing has been used continuously as a public road and public crossing.

24. UDOT failed to follow its own regulatory procedures for closure of the Crossing.

25. Without authority from UDOT or Vineyard Town, in late 2008, UPRR filed a change in status to the Crossing with the U.S. Department of Transportation, unilaterally modifying the Crossing status in the database maintained by the U.S. DOT Federal Railroad

Administration, to that of a private at grade crossing. To the best knowledge of Anderson Entities, this filing status has not been re-designated since the July 13, 2009 decision of UDOT, holding that the Crossing was in fact a public crossing.

26. The 400 North roadway is shown in the Vineyard Town Road Masterplan as a major collector road. [AE-Ex 20]

27. In 2007, Vineyard town approved a new Town Masterplan for the Geneva property which reflects that the Geneva property could have as many as 27,000 residents and over 3 million square feet of office, industrial and retail uses as the property is built out. [AE-Ex 21]

28. If the Crossing is closed there is no access in Vineyard Town across the rail for a distance of over 4 miles.

29. The nearest railroad crossing by road from the Crossing is approximately 1.3 miles south. The next nearest crossing to the north is 2.7 miles away.

30. Vineyard Town has declared that the 400 North roadway across the railroad tracks is a public roadway and no abandonment was made of the public roadway.

31. The obligation to maintain an accurate and complete inventory of railroad crossings is the joint obligation of the State of Utah (UDOT) and the affected railroad company (UPRR). The inventory of crossings must be updated every 5 years. (See, Instructions and Procedure Manual - Federal Railway Administration, National Highway-Rail Crossing Inventory Data File. [AE-Ex 22]

32. The Manual on Uniform Traffic Control Devices which is referred to in the Utah Administrative Code clearly states that a public roadway can consist of a public road over a railroad crossing providing entry into private lands, particularly where the local municipality acknowledges that the approach and crossing are part of a public road. [AE-Ex 23]

33. UTA is adding additional tracks at the Crossing reducing the area in which vehicles may safely approach the Crossing.

34. UTA has suggested that it will operate 60-80 trains/day over the Crossing.

35. UTA is providing significant improvements to other public crossings on the Commuter Rail South project.

36. UDOT has required UTA to install improvements to all other public crossings along its Commuter Rail South project, including projects similar in configuration to the Crossing.

37. UDOT has not required UTA to install improvements at the Crossing and UTA has refused to install comparable improvements to the Crossing.

#### **DISPUTED FACTS**

1. The attached maps prepared by Northern Engineering (engineers employed by Anderson Entities) establish that the Crossing was not included within the Geneva property boundaries that were abandoned by Utah County. [AE-Ex 24]

2. Improvements to the Crossing made in the early 1970's were made in cooperation with Utah County, which continued to recognize the Crossing as a public road. [AE-Ex 25]

3. Continued use of the Crossing as a public road after the 1942 abandonment by Utah County, reaffirmed or reestablished the Crossing as a public road.

4. Until the beginning of the UTA Commuter Rail South Project, UPRR has at all times treated and considered the Crossing as a public crossing.

5. Until the beginning of the UTA Commuter Rail South Project, UDOT has at all times treated and considered the Crossing as a public crossing.

6. UDOT failed to follow its own procedures and rules in making the determination that there should be a temporary closure of the Crossing.

7. UDOT has never conducted a proper surveillance of the Crossing to determine safety issues or safety factors.

9. The Crossing was safe and utilized for over 60 years safely by thousands of people.

10. Except for the addition of new railroad tracks and additional rail traffic by UTA, there would be no need for safety improvements at the Crossing.

11. The sole basis for requiring a temporary closure of the Crossing, or improvements at the Crossing is that UTA has constructed new rail, changing the approach distances to the tracks, and UTA is proposing to operate numerous trains each day at the Crossing.

12. No use of the public road at the Crossing by Anderson Entities or the Town of Vineyard would substantiate a need for improvements at the Crossing for a substantial period of time.

13. The failure of UTA to construct improvements to the Crossing has created an unsafe condition at the Crossing.

### **ARGUMENT**

#### **POINT 1. THE CROSSING IS A PUBLIC ROAD ESTABLISHED BY USE IN THE EARLY 1900'S.**

While we continue to refer to this matter as a dispute over a railroad crossing, the Crossing is nothing more than a public road which was established by use in the early 1900's. The road happens to be crossed by, or runs across a set of railroad tracks. It is unclear which was there first, the road or the tracks. But no one has ever doubted that this was a public road. Because there does not appear to be a dedication of a roadway, this road must have been established by public use.

Section § 72-5-104, Utah Code Annotated ("UCA"), provides as follows:

(1) A highway is dedicated and abandoned to the use of the public when it has

been continuously used as a public thoroughfare for a period of ten years.

(2) The dedication and abandonment creates a right-of-way held by the state in accordance with Sections 72-3-102, 72-3-104, 72-3-105, and 72-5-103.

(3) The scope of the right-of-way is that which is reasonable and necessary to ensure safe travel according to the facts and circumstances.

The multitude of maps and exhibits attached as part of the fact statement is illustrative of the fact that the State of Utah, Utah County, Bureau of Reclamation, Denver & Rio Grand Railroad Company (the predecessor of UPRR), and UPRR have all considered the road which “crosses” the railroad tracks at the Crossing to be a public road. In fact, the landowner’s intent, or the intent or action of government, is not necessary to the establishment of a public road. All that is necessary is the use. See: Thurman v. Byram, 626 P.2d 447 (Utah 1981); Leo M. Bertagnole, Inc. v. Pine Meadow Ranches, 639 P.2d 211 (Utah 1981).

It is noteworthy that the Town of Vineyard considers the Crossing as part of its public road system and includes this road in its road masterplan.

**POINT 2. THE ABANDONMENT OF PUBLIC ROADS WITHIN THE GENEVA PROPERTY DID NOT ABANDON THE PUBLIC ROAD AT THE CROSSING.**

On August 3, 1942, Utah County abandoned all public roads within the Geneva Property in order to allow the Defense Plant Corporation to construct the steel plant without being impaired by public roadways within the property. UPRR claims that this abandonment included the Crossing. Not only was it not abandoned, the subsequent use of the Crossing more firmly established the Crossing as a public road.

The legal description for the abandonment by Utah County is provided at AE-Ex 8. Our exhaustive search of public and private documents established only one document which provides accurate survey point locations for the Crossing. This is the map identified as AE-Ex 3, filed with Utah County by D&RG Railroad Company on June 30, 1919 (corrected to December 31, 1927), which provides a railroad station location describing the width and length, and

location of the Crossing. Exhibit AE-Ex 24 accurately depicts the location of the Crossing based on the railroad map. Exhibit AE-Ex 24 is certified by Northern Engineering to provide an accurate depiction of the location of the Crossing in relation to the property boundaries and the abandonment area. The Crossing is clearly outside the abandonment area.

Once established, a highway may not be abandoned without proper procedures and must show exactly the area that is being abandoned. At Section § 72-5-105(UCA) it is stated at paragraph (1) “All **public** highways, streets, or **roads** once established shall continue to be highways, streets, or **roads** until abandoned or vacated by order of a highway authority having jurisdiction or by other competent authority.” See also Clark v. Erekson, 9 Utah 2d 212, 341 P.2d 424 (1959).

**POINT 2A. EVEN IF ABANDONED, SUBSEQUENT USE BY THE PUBLIC REESTABLISHED A PUBLIC ROADWAY.**

UPRR has asserted that the abandonment ordinance adopted by Utah County in 1942, included the Crossing. There is no basis for the assertion, since the map of its own predecessor clearly shows otherwise. Regardless of that, the Crossing continued to be used on a daily basis by thousands of people, without restriction, from 1942 until early 2010. In the early 1970’s, the Crossing was improved by changing the angle of the Crossing, with the cooperation and financial support of Utah County and the prior Geneva property owners (See AE-Ex 25). The Crossing continued to be used thereafter without restriction by UPRR.

As set forth in Point 1, a public road may be established by use. In this instance, whether abandoned or not, the use was continuous for more than 10 years after the abandonment, and again, for more than 10 years after the change in location. The use did not change after the act of abandonment, was unrestricted by UPRR, and the approach road continued to be maintained and improved by Utah County or Vineyard Town. No one denies that the public freely used the Crossing during the entire period of operation of the Geneva plant (1942-2001). What is more,

UPRR and UDOT filed documents to show the Crossing in the Federal Railroad Administration database over a period of more than 30 years showing that the Crossing was “Public at Grade”. If UPRR did not believe it to be so, it could have shown something different. It did not.

There is only one reason that UPRR and UTA now would like to consider this Crossing as a private crossing. It is pure economics. UPRR does not want to maintain the Crossing now that there is not a large industrial user at the property using millions of dollars a year in services from UPRR. UTA does not want to construct improvements to the Crossing costing over a million dollars if it doesn't have to. Neither of these is a basis for suddenly and unilaterally decided that a roadway used by the public for over 60 years can be eliminated.

**POINT 3. UPRR AND UTA SHOULD BE PROHIBITED FROM CLAIMING THAT THE CROSSING IS NOT A PUBLIC ROAD BY VIRTUE OF RES JUDICATA.**

The legal status of the Crossing as a public road has already been adjudicated in proceedings brought by UPRR before this Commission. In 1943, UPRR and its predecessor in interest admitted to this Commission that the Crossing was a public road. Of course then it was in the railroad's financial interest to do so—it was improving the freight service to the steel plant. Merely because of the passage of time and a change in its needs, UPRR cannot now deny the existence of the public road before this Commission.

Where the Commission has acted in its capacity as adjudicator of rights and actions of regulated parties, has conducted hearings or received evidence and made findings, if the same parties return to the Commission and claim rights or facts in contradiction of those established rights, the doctrine of *Res Judicata* exists to prevent that action. In Utah Department of Administrative Services v. Public Service Commission, 658 P.2d 601, 1983 Utah LEXIS 940 (Utah 1983), the Utah Supreme Court affirmed that this Commission had the right and duty, in the interest of judicial economy, to utilize the principle of *Res Judicata* to decide issues in cases

where those issues and parties had already litigated the facts and law. The Court in that case cited as authority the following cases: United States v. Utah Construction & Mining Co., 384 U.S. 394, 421-22, 86 S. Ct. 1545, 16 L. Ed. 2d 642 (1966); Bowen Trucking, Inc. v. Public Service Commission, Utah, 559 P.2d 954, 957 (1977); Mulcahy v. Public Service Commission, 101 Utah 245, 254-56, 117 P.2d 298, 302 (1941); Philadelphia Electric Co. v. Borough of Lansdale, 283 Pa. Super. 378, 424 A.2d 514, 521 (1981). See generally, 2 K. Davis, *Administrative Law Treatise* §§ 18.02, 18.08 (1958).

In this instance, in two separate filings with this Commission in 1943, Denver & Rio Grande Railroad and UPRR each filed petitions with the Commission to approve certain actions which affected this Crossing and the public road it represents. In each matter, the Petitions, supporting evidentiary filings, and Findings of the Commission, expressly recognized that the Crossing was a public road. In addition, the other parties to the Petition, State Road Commission of Utah, and Utah County, filed supportive evidence all recognizing that the Crossing was part of a public road. While neither was a fully litigated proceeding, for our purposes it has the same effect. The facts were stipulated and agreed by all parties to the hearing. All parties acknowledged that the Crossing was a public road.

Simply because facts are stipulated is no reason for the tribunal to reason that *Res Judicata* should not apply. To hold otherwise, would imply that if parties stipulate to facts in litigation, those facts, and the tribunal's findings related to those facts do not have the same weight as litigated facts. That can't be seriously contended by anyone. The U.S. Supreme Court acknowledged that orders by consent or stipulation have the same effect as those fully litigated. See Pope v. United States, 323 U.S. 1, 12, 89 L. Ed. 3, 65 S. Ct. 16 (1944).

In this instance, the parties to this matter, UPRR and its predecessor Denver & Rio Grande Railroad Company, UDOT and its predecessor State Road Commission of Utah,

Vineyard's predecessor in interest to the roads Utah County, UTA and its predecessor UPRR, and the Anderson Entities predecessor in interest, the Defense Plant Corporation, were all present and represented in the prior matters. These parties are now bound by their respective filings and findings of this Commission and may not now attempt to dispute a matter that was central to those prior petitions. The issue of whether or not the Crossing is a public road has been decided and findings made by the Commission. As a result, this matter should be dismissed and the decision of UDOT finding that the Crossing is a public road should stand. UPRR should be required to immediately file new documents with the FRA notifying it that it was mistaken and that this Crossing continues to be a public at grade crossing.

**POINT 4. UPRR AND UTA SHOULD BE ESTOPPED FROM DENYING THE EXISTANCE OF A PUBLIC CROSSING.**

For over 60 years, every person associated with the Geneva property and the Crossing treated the Crossing as a public road. The multitude of maps and exhibits attached to this brief and filed in this matter, petitions with this Commission, and all publicly filed records of UPRR and UDOT referred to this Crossing as a public at grade crossing. In short, a public road.

In 1972, the Federal Railroad Administration established a national inventory system for all highway-rail crossings. The Railroads were actually hired by the FRA to perform the work of creating the inventory. Under the Federal Aid Highway Act of 1973, the States were required to participate in this inventory system (see Introduction at AE – Ex 22). Under the Instructions and Procedures for this inventory system, UPRR and UDOT have a duty to support this system, and each have filed documents in support of that national inventory system, beginning in 1974 (see AE – Ex 7). Each has affirmatively stated the Crossing is a public at grade crossing. After 24 years of filing documents in the inventory system and 67 years after filing documents with this Commission stating otherwise, UPRR has changed its mind. Thankfully, UDOT is not so fickle. UDOT instead determined that it could not unilaterally change its institutional mind after so

much history, and after so much investment by public and private individuals, and in light of the enormity of the public record surrounding this Crossing. UPRR now seeks to rewrite that history.

In Point 3 we have shown that UPRR and its predecessor asserted over 67 years ago in front of this very Commission that the Crossing is a public road. For 26 years UPRR has had the duty to create and update the national crossing inventory data file. The inventory system is not without purpose. It is to support a system where crossing status and accident data can be collected for purposes of evaluating safety and consideration of upgrades (see Introduction, AE-Ex 7). Thus, if UPRR is allowed to simply state that its earlier characterizations were mistaken and change the designation, this inventory system is worthless. Its statutory obligations do not allow for such a cavalier attitude.

Utah courts have long recognized the concept of estoppel as an equitable remedy to avoid injustice. The rule in Utah was stated as follows:

Equitable estoppel is bottomed upon the notion that, when one person makes representations to another which warrant the latter in acting in a given way, the one making such representations will not be permitted to change his position when such change would bring about inequitable consequences to the other person, who relied on the representations and acted thereon in good faith. \* \* \* The representations made must be in themselves sufficient to warrant the action taken, and their sufficiency is a judicial question. It is not enough that the person who heard them deemed that he was warranted in acting as he did; the language used ought of itself to furnish the warrant. One man might consider himself warranted in acting upon representations wholly insufficient to move a more careful and prudent person.

J.T. Fargason Co. v. Furst, 287 F. 306, 310 (8th Cir. 1923), cited in the following Utah cases:

Farmers & Merchants Bank v. Universal C. I. T. Corp., 4 Utah 2d 155, 289 P.2d 1045, 1048 (1955); Grover v. Garn, 23 Utah 2d 441, 464 P.2d 598 (1970).

In Migliaccio v. Davis, 120 Utah 1, 232 P.2d 195 (1951), it was further stated:

Equitable estoppel or estoppel in pais is the principal by which a party who knows or should know the truth is absolutely precluded, both at law and in equity, from

denying or asserting the contrary of, any material fact, which, by his words or conduct, affirmative or negative, intentionally or through culpable negligence, he has induced another, who was excusably ignorant of the true facts and who had a right to rely upon such words and conduct, to believe and act upon them thereby, as a consequence reasonably to be anticipated, changing his position in such a way that he would suffer injury if such denial or contrary assertion were allowed.

Id. Quoting rule from 19 Am. Jur., page 634, Sec. 34.

UPRR stands before this Commission asking it to ignore the affirmative representations of UPRR from 1943 until this controversy arose in early 2009. It has continuously described and treated the Crossing as a public at grade crossing. During that time, the Geneva steel plant was operated for over 60 years, using the Crossing freely as a public crossing. Geneva Steel, LLC, relied on this information in marketing the land after it filed bankruptcy in 2001. Contractors who purchased scrap from the Bankruptcy Trustee relied on this public crossing for access during the demolition of the Geneva plant. Vineyard Town has relied on the Crossing in developing its Town Master Plan and its Master Road Plan, as a critical access through its Town. Anderson Entities purchased land in reliance on these facts in December of 2005, spending over \$46 Million for the acquisition of the Property, and investing over \$5 Million in environmental remediation, master plans, road plans, development plans and infrastructure planning and investment. From 2005 until late 2010, Anderson Entities used the Crossing freely, with no restriction and no notice from UPRR or UDOT that they intended anything else. There was no reason for anyone to doubt that the Crossing was a public road. There was no valid way for either Geneva Steel, Vineyard Town, the past Geneva owners, the Anderson Entities, or any other person to know or even consider that the Crossing was something other than a public crossing. The only public record documents were maintained by UPRR and UDOT.

This case fits squarely within the doctrine of equitable estoppel. Although there were no direct contractual dealings between UPRR and Anderson Entities or Vineyard Town, the direct and indirect effect of UPRR's actions is the same. When public and private entities are required

by law to provide information for a public database which must be relied on by other public and private entities, there is a contract between the public at large and the parties responsible for the information. When UPRR appears before this Commission in any matter and represents something to be factual, this Commission and anyone interested in the matter have a right to rely on that fact unless disputed in the matter. UPRR is a neighboring land owner with Anderson Entities. It was obvious to all that for 67 years the Crossing was a public road and UPRR never once said anything different, and on many occasions affirmed it was true.

UPRR, and by implication UTA, must be estopped from denying that this Crossing is a public road. UPRR should be required to immediately file new documents with the FRA notifying it that it was mistaken and that this Crossing continues to be a public at grade crossing. UTA should be made to improve this Crossing the same as it improves all other similar crossings.

**POINT 5. UDOT WAS ARBITRARY AND CAPRICIOUS IN ITS FAILURE AND REFUSAL TO FOLLOW ITS OWN PROCEDURES BY NOT CONDUCTING SURVEILLANCE REVIEWS AND BY ORDERING A TEMPORARY CLOSURE WITHOUT DUE PROCESS.**

There was some initial confusion at UDOT regarding the status of this Crossing. The Chief Railroad Engineer apparently relied on some misleading information from UPRR and initially ignored notice requirements and surveillance review requirements. That may have led UDOT to some initial errors in how it handled its initial notices and actions on this Crossing. However, after the confusion was resolved, and after repeated requests for UDOT to conduct its Surveillance Review of the Crossing according to applicable administrative rules, it failed and refused. This is the essence of the phrase “arbitrary and capricious”. No governmental agency can simply disregard its own rules to suit its own purposes.

In the case of State of Utah v. Merit System Council, 614 P.2d 1259; 1980 Utah LEXIS 991 (Utah 1980), the Supreme Court reviewed the determination of an administrative agency

where it was alleged that it had failed to follow its own rules and procedures. The Courts response was unequivocal. There it stated “administrative regulations are presumed to be reasonable and valid and cannot be ignored or followed by the **agency** to suit its own purposes. Such is the essence of arbitrary and capricious action. Without compelling grounds for not following its **rules**, an **agency** must be held to them.” *Id. at 1263.* , citing Bess v. Park, 144 Cal.App.2d 798, 301 P.2d 978 (1956); Augustin v. Barnes, 41 Colo.App. 533, 592 P.2d 9 (1978); State v. Parham, Okla., 412 P.2d 142 (1966); and Lumpkin v. Dept. of Social & Health Services, 20 Wash.App. 406, 581 P.2d 1060 (1978).

The appropriate remedy for this failure to act is to remand the matter back to UDOT to conduct its business according to its rules. The matter must be reviewed based on the circumstances at the time. But here are a few of the facts that should result in a change in UDOT’s actions:

(1) For a period of over 60 years the Crossing was used with only one known accident (circa 1970, with safety improvements made then to mitigate any hazard) with thousands of people using the Crossing daily.

(2) After the shut-down of the Geneva plant the traffic over the Crossing was even lighter. It will take years of development to create traffic equivalent to that generated during the operation of the steel plant.

(3) Upon review by qualified engineers, there were few safety suggestions with respect to the Crossing.

(4) UTA will be adding significant traffic at the Crossing. Suggestions have been made that it could add 60-80 trains each day.

(5) Adding the UTA tracks to the Crossing has materially reduced the sight line, traffic stacking areas and limited the ability to maneuver into the Crossing.

(6) UTA improvements will cause a potentially unsafe condition at the Crossing.

(7) At comparable crossings UTA has been required by UDOT and UPRR to install significant safety improvements.

(8) UDOT has refused to require UTA to install comparable safety improvements at the Crossing.

(9) UTA has refused to make comparable improvements to the Crossing.

UDOT's refusal to follow its own procedures in this instance was arbitrary and capricious. We don't need to speculate why, but there are some serious consequences to its failure. Instead, without hearing, notice, findings, or opportunity for input from any person other than UPRR and UTA, UDOT has ordered the Crossing temporarily closed and ordered that Vineyard Town and Anderson Entities provide substantial upgrades and improvements before it can be reopened. This contrary to rule and requirements of UDOT in every instances.

**POINT 5A. RATIONALE FOR UTAH ADMINISTRATIVE RULES R930-5, ET.SEQ.**

Highways are critical to land ownership, land use and transportation needs of the public in general. Railways are critical to our nation's flow of goods nationally and locally. Both are necessary and both must be protected. Highways and railways frequently interact in urban land settings. UDOT is charged with the responsibility for granting railroad crossings, monitoring them for safety, requiring upgrades or improvements and even closing them under appropriate circumstances. See UCA 54-4-15. This charge is not intended to give UDOT unfettered discretion. Instead, because highways and transportation are so critical to so many people, it must act within carefully constructed rules and procedures to balance the interests of all parties and provide for the relative safety of our highways. In this light, Utah Administrative Rules, Section 930-5 was adopted to regulate activity with respect to highways with rail crossings (herein Section 930-5, et.seq. is referred to as the "Rules").

**POINT 5B. R930-5-14 REQUIRES UDOT TO GIVE NOTICE TO THE PUBLIC BEFORE ACTIONS ON PUBLIC CROSSINGS.**

The balancing of interests described above is evident in the Rules at Section R930-5-14. There public notice is required whenever UDOT is considering proposals to close public streets at crossings, add tracks at crossings or construct new at-grade crossings. Specific requirements are set forth therein to publish notice at least twice with opportunities and times set forth to receive protests or comments from affected stakeholders and the public. Public hearings are required upon request.

UDOT failed in its responsibilities in this public notice requirement in at least two instances. First, the original notice given by UTA and UDOT, notifying the public at large of its intentions to modify multiple crossings did not include a notice in regard to this Crossing (see AE-Ex 9). It also did not comply with the literal terms of notice stated in the Rules. Second, after protest was made, neither UDOT nor UTA made any effort to cure this defect in notice. Instead, time was spent to determine whether the Crossing was public or private; but once that decision was made, no new notice of the intent to construct improvements or modify the Crossing was given as required by the Rules. Thus, UTA and UDOT are currently acting without authority and UTA is being allowed to construct new railroad tracks at the Crossing without any comment or protest.

The second instance of failure to follow its procedures occurred on July 13, 2009 (see AE-Ex 9). In its notification letter, UDOT correctly stated that it had decided the Crossing was indeed a public road crossing. However, it further **ordered** that the Crossing would be temporarily closed, without hearing, without notice or opportunity to be heard. By letter dated August 7, 2009, Anderson Entities and Vineyard Town requested an opportunity to be heard and to protest this decision. The UDOT response was to deny this request and affirm its decision. Instead, UDOT simply moved forward on August 6, 2009, to conduct a review to determine how

to close the Crossing. Even this step should have allowed protest. None was allowed even after protest.

In all instances, there was no notice given by UDOT and after protest, no notice or opportunity to be heard was given.

**POINT 5C. UDOT FAILED TO CONDUCT A PROPER SURVEILLANCE REVIEW.**

Another failure of UDOT to follow the Rules comes from Section R930-15-7. There, a process and method is described to create a “surveillance team” made up of representatives from UDOT, the railroad company, local government, and on occasion the local school district. The job of the surveillance team is to create a venue to discuss options and alternatives for safety improvement. In the words of the Rule, “UDOT **must** consider input from all team members, **and the public**” (pursuant to Section R930-5-14). This team is to conduct these reviews whenever there are significant changes in highway traffic patterns, or when railroad traffic will be significantly increased. This was simply not done. Obviously UTA is going to significantly increase railroad traffic. No proper surveillance was done, and no consideration was given to public input. In fact, UDOT’s performance is so poor, no findings have been made, no basis for its decisions have been given and one is left to simply wonder why it made its decisions. This is the essence of arbitrary and capricious. Again, UDOT ignored the protests of Anderson Entities and Vineyard Town.

**POINT 5D. THE ORDER FOR TEMPORARY CLOSURE SHOULD BE OVERTURNED BECAUSE THERE IS NO SUBSTANTIAL EVIDENCE TO SUPPORT THE CONCLUSION THAT THE CROSSING WAS UNSAFE.**

For over 60 years the Crossing was used with only a single accident. During its peak use, the Crossing was used 3,000 to 4000 times per day without incident. Only one accident is known to have occurred at the Crossing, which resulted in safety improvements in the early 1970’s. After the shut down of the Geneva steel plant in 2001, daily use of the Crossing was

obviously reduced. It will take several years of new development to occur within Vineyard Town before those levels of use are equaled or exceeded. Yet, UDOT's Chief Railroad Engineer found that the Crossing was unsafe and needed to be closed. He further ordered that Vineyard Town must construct millions of dollars of improvements before it could be re-opened.

Because UDOT failed to follow its own procedures for a Surveillance Review, no information was obtained through the normal process to help Vineyard Town or Anderson Entities to understand what unsafe conditions were present. Through discovery no evidence was provided to support the findings of the Chief Railroad Engineer. While the Commission might normally provide some deference to UDOT if it had substantial evidence to support its actions, in this instance, there is no substantial evidence. In fact, as far as we know there is no evidence at all to support these conclusions. Thus, this Commission should provide no deference to UDOT and we request that the Commission overturn the decision of UDOT and order that the Crossing be reopened immediately.

**POINT 5E. TO THE EXTENT IMPROVEMENTS ARE REQUIRED AT THE CROSSING, UTA IS REQUIRED TO CONSTRUCT THE IMPROVEMENTS.**

Where new railroad traffic is being created by UTA, the Rules clearly require that UTA bear the full burden of all improvements to the Crossing. In fact, this is what UDOT has required in all other instances along the corridor of the Commuter Rail South project. R930-5-7(5) requires that where a new railroad crosses an existing highway,

. . . the Department **will** consider the new crossing in conformance with Section 54-4-15. Public notice will be made in conformance with R930-5-14, Notice of Intended Action. If approved, the required separation or railroad warning devices, and any pavement work at the crossing **shall not be considered to be of benefit to the road user and 100 percent railroad participation shall be required.** The determination as to the separation of type of warning devices shall be according to the classification and traffic volume of the highway crossed and the predicted traffic hazard and as recommended by the Surveillance Team.

Because of the initial confusion on the status of the Crossing, UTA was apparently given

a pass on improvements to this Crossing. No evidence has been taken by the Chief Railroad Engineer as to the road classification, traffic hazards or any improvements. In fact, in direct contradiction to this Rule, he has ordered that future improvements must be constructed by Vineyard Town and Anderson Entities.

The violation of the Rules is obvious, blatant, continuing, and after protest no effort has been made to remedy these violations. This is arbitrary and capricious. In fact, it speaks of bias and intent that is so extreme one questions whether a fair review can be had within the UDOT group responsible for this activity. This Commission must remand this matter to UDOT for correction of these deficiencies, or, because of the extreme nature of the violations and obvious bias that seems present by UDOT, the Commission should expand the scope of this hearing to allow evidence to be presented by Vineyard Town and Anderson Entities, obtain the input that was ignored by UDOT and its non-existent Surveillance Team, and make a decision based on the Rules and law. This Commission should reverse the closure order and require the Crossing to be opened immediately. This Commission should also order UTA to make safety improvements to the Crossing at its own expense as it has done at comparable crossings, and to maintain the Crossing accessible and open for use, as it has done at comparable crossings.

### **CONCLUSION**

1. The Commission should affirm the decision of UDOT that the Crossing is a public road. Anderson Entities and Vineyard Town, and their predecessors are entitled to continued use of the Crossing as a public road at 400 North and Vineyard Road, Vineyard Town, Utah. The evidence is overwhelming that a public road and public crossing has existed from at least the early 1920's with continuous use until the Crossing was unlawfully blocked by UPRR in 2010.

2. The Commission should affirm the decision of UDOT based on Res Judicata.

UPRR fully litigated the fact that the Crossing is a public crossing in 1943 in two different cases before this Commission. UPRR made representations to this Commission that the Crossing was a public road and crossing. These representations were supported and affirmed by UDOT, and Utah County. Nothing has occurred since that date to change the status of the Crossing.

3. The Commission should affirm the decision of UDOT based on equitable estoppel. For over 24 years UPRR has represented to the State of Utah, Geneva Steel, Utah County, the public, and the Federal Railroad Administration, that the Crossing is a public at grade crossing. To allow UPRR to change that position now would be manifestly unjust and will substantially damage and prejudice the rights of Vineyard Town and Anderson Entities. Vineyard Town is a town that is impeded by rail and adequate crossings are necessary. The Crossing is included in Vineyard Town's road and development master plans. Without this Crossing, you must travel over 4 miles within the Town boundaries before you can cross the railroad tracks. Anderson Entities have invested nearly \$60 million in redevelopment of the former Geneva steel plant, relying on the Crossing as a material part of its transportation and development plans. Vineyard Town and Anderson Entities' reliance on the representations of UPRR was reasonable and UPRR should not be allowed to change its position now.

4. The Commission should reverse the decision of UDOT ordering the temporary closure of the Crossing. UDOT failed to follow the applicable Administration Rules in rendering its order. It failed to provide notice of any intent to change the Crossing. It failed to complete the required Surveillance Review of the Crossing. It failed to include Vineyard Town in a Surveillance Review team. It failed to allow protest or input when decisions were made. It has allowed work to proceed by UTA at the Crossing without following its own rules and procedures. UDOT has acted arbitrarily and capriciously in its failure to abide by its own governing rules. This Commission should sanction UDOT and order the Crossing reopened

immediately at the expense of UDOT.

5. The Commission should overturn UDOT's order to temporarily close the Crossing, and further overturn ordering that Vineyard Town and Anderson Entities construct improvements to the Crossing costing millions of dollars before re-opening the Crossing. The Crossing was used for over 60 years, with thousands of trips per day being accomplished with only a single accident. That one accident resulted in safety modifications and upgrades to the Crossing in the early 1970's. The Crossing was safe without the changes by UTA. There is no evidence to support the conclusions of UDOT that the Crossing was unsafe. While the Commission may give deference to the administrative agency where it has substantial evidence to support its findings, where no substantial evidence exists for the findings of UDOT, the Commission must overturn the temporary closure order.

6. The Commission should order UDOT and UTA to construct safety improvements at the Crossing which are comparable to improvements made at other public crossings for purposes of the UTA Commuter Rail South project. By ordering the temporary closure of the Crossing, and by failing to follow its own rules and procedures, UDOT has allowed UTA to construct railroad tracks at the Crossing and to destroy safety devices at the Crossing rendering it unsafe. Utah Administrative Rules R930-5-7, 14 and 15, make it clear that UTA should be required to make all improvements to the Crossing to render it safe, and UTA should maintain the Crossing so that is useable and available for use during construction, the same as at all other public crossings.

DATED this 29<sup>th</sup> day of June, 2010.

DENNIS M. ASTILL, PC LAW FIRM

By: 

Dennis M. Astill

*Attorneys for Anderson Entities*

**Certificate of Service**

I hereby certify that on the 29<sup>th</sup> day of June, 2010, a true and correct copy of **ANDERSON ENTITIES' STATEMENT OF UNDISPUTED AND DISPUTED FACTS AND PRE-HEARING POSITION BRIEF** was mailed in electronic and paper formats to the Public Service Commission with hard copies served to the persons and in the manner below:

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