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- BEFORE THE PUBLIC SERVICE COMMISSION OF UTAH -

In the Matter of Union Pacific Railroad's)	JOINT POST-HEARING BRIEF FOR VINEYARD TOWN AND ANDERSON ENTITIES'
Petition for Relief against the Utah)	
Department of Transportation)	
)	
)	DOCKET NO. 09-888-01

Vineyard Town, represented by David L. Church, and Anderson Geneva, LLC, Ice Castle Retirement Fund L.L.C., and Anderson Geneva Development, Inc. (collectively "Anderson entities"), represented by Dennis M. Astill, hereby submit their Joint Post-Hearing Brief as follows:

STATEMENT OF THE CASE

From the earliest maps of Utah County highways, beginning in the early 1920's, a public roadway has been shown to exist at approximately 400 North in Vineyard, Utah, which ran west to Utah Lake and east to Geneva Road and what is now State Street in Orem, Utah. The 400 North highway crosses railroad tracks that are now owned by Union Pacific Railroad Company ("UPRR") at the approximate location of 400 North and Vineyard Road, in Vineyard, Utah (the "Crossing"). Although disputed in the early stages of this matter, on the date of the Hearing,

UPRR and Utah Department of Transportation (“UDOT”) stipulated with Anderson entities and Vineyard Town that the 400 North highway was, in fact, a public highway, thereby making the Crossing a public crossing prior to actions taken in 1942 by the Utah County Commission.

In 1942, the Defense Plant Corporation (a quasi-public corporation owned by the United States of America) acquired approximately 1500 acres near the Crossing for the purpose of constructing a steel making plant to aid in the production of steel for use during World War II. In support of the construction of the steel making plant, Utah County abandoned and vacated all public roads that were encompassed within the legally described boundaries of the steel plant by Resolution dated August 3, 1942 (the “1942 Resolution”). Although public roads within the boundaries of the steel plant were vacated at that time, Vineyard Town and Anderson entities contend the Crossing was not vacated and continued to be used at all times thereafter. The Crossing was not included within the boundaries of the steel plant.

From approximately 1970 until late 2008, all public records controlled or established by UDOT and UPRR, and its predecessor Denver & Rio Grande Western Railroad Company (“D&RGW”), classified the Crossing as a public at-grade crossing and referred to the road across the Crossing as a public highway. The Crossing has been included as part of the Vineyard Town Road Masterplan as a major collector road and is part of the development masterplan of Vineyard Town and Anderson entities. There are no other railroad crossings in Vineyard Town for a distance of two miles in either direction from the Crossing, thereby severely limiting access to several thousand acres of land in Vineyard Town.

In late December 2008, UPRR unilaterally attempted to re-classify the Crossing as a private crossing to the detriment and damage of the Anderson entities and Vineyard Town. Contemporaneous with this action, UDOT, UPRR, and Utah Transit Authority (“UTA”) were conducting surveillance reviews of other crossings between Salt Lake City and Provo, Utah, to

determine appropriate improvements to highway-rail crossings for purposes of the Commuter Rail South project being pursued by UTA. By virtue of representations of UPRR to UDOT, UDOT initially treated the Crossing as a private crossing and failed to conduct a proper engineering surveillance of the Crossing and failed to advise Vineyard Town or Anderson entities of its intent to close the Crossing. In fact, UDOT and UTA misidentified the Crossing as being located at “4000 North” even though they were advised this was incorrect.

At the request and urging of Anderson entities and Vineyard Town, UDOT took a second look at the status of the Crossing and determined that it was indeed a public at-grade crossing and agreed to do a proper surveillance review. However, without conducting a surveillance review of the Crossing, UDOT then ordered the Crossing to be temporarily closed, and has since removed asphalt and other improvements at the Crossing and put up barriers, rendering it unusable at the present time.

UPRR appealed UDOT’s decision that the Crossing was a public crossing. Anderson entities and Vineyard Town now appeal the decision of UDOT to temporarily close the Crossing and oppose the UPRR appeal. Anderson entities and Vineyard Town have also petitioned the Public Service Commission (the “Commission”) to direct that UDOT require UTA to make all improvements to the Crossing that are being made to all crossings in UTA’s Commuter Rail South project.

A formal hearing was conducted on this matter on August 17 and 18, 2010 (“Hearing”). This brief is filed in support of Anderson entities and Vineyard Town’s appeal of, the temporary closure and in opposition to the appeal of UPRR.

POINT 1. THE STANDARD OF REVIEW OF THE PUBLIC SERVICE COMMISSION

The standard of review of the Commission is that it should overturn UDOT’s decision only if it determines that the findings are so without foundation that they must be considered

arbitrary and capricious, or if the Commission determines that UDOT failed to follow its own established procedure in arriving at its decision.

UDOT has been given authority to “alter or abolish” any crossing of a public road by a railroad pursuant to Section 54-4-15(2), Utah Code Annotated. In this instance, UDOT exercised that authority by first, determining that the Crossing was a public crossing rather than a private crossing (AE Ex. 15, Eric Cheng Letter to Dennis Astill - 2/25/09) and this decision was again reaffirmed by UDOT by letter dated July 13, 2009, from Eric Cheng to Dennis Astill (AE Ex.16).

If a party is affected by a decision of UDOT regarding a railroad crossing, the Commission has been given jurisdiction over disputes. Utah Code Annotated, §54-4-15(4)(A), gives the Commission “exclusive jurisdiction for the resolution of any dispute upon petition by any person aggrieved by any action of UDOT” in closing a railroad crossing. While this Section does not enumerate the standard of review, the Commission has faced this issue before and has adopted a standard.

In The Matter of an Appeal to 1 Road Closure in Draper, Docket No. 05-999-02 (2005 Utah PUC Lexis 102, the Commission reviewed this issue and stated:

We should not substitute our judgment for the findings of the Department (meaning UDOT) but should overturn UDOT’s decision only if we determine that those findings are so without foundation that they must be considered arbitrary and capricious, or if we determine that UDOT failed to follow its own established procedures in arriving at its decision. *Id* at page 11.

As will be shown in the following points, UDOT’s decision that the Crossing is a public crossing was fully supported by the evidence introduced at the Hearing of this matter. What will also be shown is that in rendering its decision to close the Crossing, albeit temporarily, UDOT failed to follow its own established procedures.

POINT 2. SUBSTANTIAL EVIDENCE SUPPORTS THE DECISION OF UDOT THAT THE CROSSING IS A PUBLIC CROSSING

The overwhelming evidence in front of UDOT when it made its decision, and which was provided to the Commission at the Hearing, shows that the decision of UDOT was fully supported by substantial evidence. In fact, the only evidence provided at the Hearing contrary to UDOT's decision was the testimony of Jim Marshall, UPRR engineer, and Eric Cheng, UDOT Chief Railroad Engineer, who, as engineers, decided that because there is private property on one side of the Crossing, the Crossing cannot be a public crossing. Their personal decisions are not supported by their predecessors-in-interest, under law, or by the engineering standards which they cited.

In its pre-hearing brief, UPRR made numerous claims it was unable to prove at the Hearing. First, it claimed that the 1942 Resolution adopted by the Utah County Commission abandoned all or part of the public roadway and crossing. This was not shown to be the case. In fact, UPRR's own expert, Mr. William Clark, testified that the original County roadway would have had to exceed 60 feet in width before any part of the public roadway would have been abandoned by virtue of the County vacating ordinance.

Although lengthy and confusing references were made to the Manual of Uniform Traffic Control Devices ("MUTCD"), and the Federal Railroad Administration Instructions and Procedures Manual for its Highway-Railroad Crossing Inventory ("FRA"), by Jim Marshall and Eric Cheng, their assertions were not supported by the actual documents of the MUTCD or FRA.

A. There is Substantial Evidence to Support the Decision of UDOT that the Crossing is a Public Crossing.

After all documents and testimony were received, the evidence in favor of UDOT's decision that the Crossing is a public crossing can be summarized as follows:

1. The parties stipulated that the prior to the adoption of the 1942 Resolution, the

public roadway at 400 North was a public highway and the Crossing was a public crossing.

2. The legal description provided in the 1942 Resolution vacated any public roads east of the railroad right-of-way and north of the section line which runs adjacent to the 400 North roadway. (AE Ex. 8 & 22, UPRR Ex. 135).

3. In filings and decisions with the Commission in 1943 (after the 1942 Resolution), both D&RGW and UPRR acknowledged that the Crossing was a public highway crossing. (AE Ex. 9).

4. The FRA database Inventory listing, a national database that is maintained solely by UDOT and UPRR and/or D&RGW, listed the Crossing as a public at-grade crossing from 1970 until 2009 (AE Ex. 7).

5. While Mr. Marshall believes the FRA database is only 50% accurate (Transcript vol. 1, p. 160), he also could not testify about the actions of his predecessors at UPRR or the actions of D&RGW prior to April 1999, when he took his current position. Mr. Marshall also acknowledged that FRA database entries could have been accurate but it was his opinion that it should have been designated differently. (Transcript vol. 1, pp. 209-212).

6. Mr. Marshall had no knowledge of who was driving into the steel plant property over the many years that the plant operated and had no knowledge of who maintained the roadway and Crossing into the plant. (Transcript vol. 1, pp. 100-101).

7. Mr. Marshall admitted that D&RGW initially listed the Crossing as a public crossing and was not aware of what his predecessors at UPRR thought, only that he did not believe it should have been designated as public. (Transcript vol. 1, p. 119-121).

8. Although UPRR has owned the D&RGW track which constitutes the Crossing since 1998, and it has all of the D&RGW records, no records could be located by UPRR relating to the Crossing. (Transcript vol. 1, p. 132).

9. A maintenance agreement was executed between UDOT and D&RGW in 1939, but neither Mr. Marshall nor Mr. Cheng were aware of this maintenance agreement for this public crossing. The Agreement refers to the Crossing as a public crossing and assigns maintenance responsibilities to UDOT and D&RGW. (AE Ex. 27; Transcript vol. 1, p. 173).

10. Although Mr. Marshall characterizes the FRA database as only being 50% accurate, Eric Cheng, Chief Railroad Engineer for UDOT testified that it is only 5-10% inaccurate. (Transcript vol. 2, p. 136).

11. Mr. Marshall acknowledged that under the FRA guidelines for determining whether a public crossing exists, if Vineyard Town accepted the Crossing as public, then it would be a public crossing. (Transcript vol. 1, pp. 176-178).

12. UPRR acknowledged changes were made to the Crossing between 1970 and 1972, but admitted it has no knowledge of what participation D&RGW had in those changes. Mr. Marshall admitted that the Crossing was made safer by virtue of the changes. Further, he admitted that the safety changes would not change the character of the Crossing from a public to a private crossing. (Transcript vol. 1, p. 133).

13. At least four change filings have been made with the FRA database since 1970; one by D&RGW, one by UPRR, and two by UDOT, all of which characterized the Crossing as a public at-grade crossing. (AE Ex. 7; Transcript vol. 1, pp. 157-169).

14. Although UPRR merged with D&RGW in 1998 or 1999, neither railroad company ever made any effort to change the FRA database, or close or restrict activity at the Crossing until December 4, 2008. (Transcript vol. 1, pp. 94-95).

15. Only UDOT and the railroad company can change the FRA database. (AE Ex. 21; Transcript vol. 1, p. 95).

16. Vineyard Town has adopted a Master Road Plan dated November 24, 2008, which

shows the Crossing as part of the roadway plan. (AE Ex. 19).

17. Vineyard Town accepts the Crossing as a public highway and public crossing, and has never abandoned the Crossing. (Pleadings and Proffer of Vineyard Town).

18. The FRA guidelines to determine whether a crossing is public state that if the City accepts the crossing as public, then it is a public crossing. (AE Ex. 21, p. 1-6; Transcript vol. 1, pp. 176-178).

19. On February 25, 2009, UDOT determined the Crossing was public and invited the parties to submit any additional information. (AE Ex. 15).

20. On July 17, 2009, UDOT reaffirmed its decision that the Crossing was a public crossing based on all information submitted by the parties. (AE Ex. 16).

21. Eric Cheng admitted he originally assumed the Crossing was private after talking with Mr. Marshall without looking at the FRA database or making any other inquiries. Once he received available information, he made a decision that it was a public crossing. (Transcript vol. 2, pp. 132, 137).

22. Mr. Marshall acknowledged that in determining the status of a crossing, the FRA guidelines are really just a guideline for engineers in order to design appropriate signalization and are not a legal determination of the Crossing. (Transcript vol. 1, pp. 176-178).

23. Although UPRR contended that county and town records did not reflect that maintenance was performed by Utah County or Vineyard Town, UPRR was unable to provide any evidence as to who performed the maintenance on the Crossing between 1942 and the present. (Transcript vol. 1, pp. 280).

24. Jerry Grover, a professional Civil Engineer, testified that at least two asphalt layers on the adjacent public road through the Crossing also ran continuously and from the across the Crossing, and over the east approach into Geneva, and therefore, must have been laid

by Utah County and/or Vineyard Town. (Transcript vol. 2, pp. 345-349).

25. Jim Marshall simply assumed the Crossing was a private crossing because there was a sign and gate on the Geneva site but had no personal knowledge. (Transcript vol. 1, p. 48).

26. Although UDOT ruled that the Crossing was public, Eric Cheng continued to assert his personal opinion that the Crossing should have been designated private because there was a fence and gate on the Geneva side at the Crossing. Mr. Cheng admitted that he had never explored the other side nor did he know if there was a roadway on the other side of the Crossing. (Transcript vol. 2, p. 200).

27. Although the testimony was somewhat confusing, UPRR alleged that the 1942 Resolution vacated the County road. In fact, they failed to establish this. Instead, the facts show the County did not vacate the County road which crossed the railroad property. This is shown by the following:

(a) William Clark, expert witness for UPRR, affirmed that the 1927 D&RGW VAL map filed with Utah County showed the center line of the County road was at least 34.6 feet south from the vacating line established by the 1942 Resolution. (AE Ex. 22; Transcript vol. 2, p. 58).

(b) Mr. Clark testified that in order to vacate any part of the County road that existed in 1927 and 1942, the north half of the road would have to be at least 30 feet wide (making the entire road 60 feet wide). (Transcript vol. 2, p. 87).

(c) Mr. Clark testified that the 1927 D&RGW VAL map centerline of the Crossing located on the railroad was “incontrovertible”. (Transcript vol. 2, pp. 55-56).

(d) Mr. Clark testified that the 1927 County road depiction on the VAL map shows the road as approximately 50 feet wide. (Transcript vol. 2, p. 40).

(e) The 1999 County Section Corner Map (AE Ex. 25) shows the current road

being south of the Section line, contrary to the exhibits prepared by Mr. Clark. Mr. Clark testified that the County survey points were very accurate. (AE Ex. 25; Transcript vol. 2, pp. 92, 93).

(f) Professional Surveyor, Kent Barney testified that based on the VAL map, the 50 foot County road would not have been vacated by the 1942 Resolution. (Transcript vol. 2, p. 241).

(g) Mr. Barney testified that it would not be uncommon for a road to shift locations between 1919 and 2010, over 80 years. (Transcript vol. 2, pp. 241-244).

(h) Mr. Barney testified that there was evidence of a former roadway which was south of the current roadway. (Transcript vol. 2, pp. 244-245).

(i) Mr. Barney observed that the next section corner which is west of the Crossing shows the current roadway being south of the section line, indicating further that the current roadway could have shifted north over time. (Transcript vol. 2, p. 258).

28. The Crossing was altered in the early 1970's for safety reasons. Mr. Marshall agreed that the character of the road would not change just because the Crossing was made safer. (Transcript vol. 1, p. 135).

29. Mr. Marshall was unaware whether or not there was a public right-of-way on the east side of the Crossing. (Transcript vol. 1, p. 112).

30. Mr. Cheng admitted there was a crossing extending into private property in Salt Lake County, indicating that similar instances of crossings do occur. (Transcript vol. 2, p. 193).

31. Mr. Grover testified that during his period of employment at the Geneva plant in 1990-95, and subsequently for more than 12 years, whenever he used the Crossing or passed the Crossing, it was open to travel by the public. In fact, he personally used the Crossing as a member of the public. (Transcript vol. 2, pp. 350-355).

32. Referring to AE Ex. 33, Mr. Grover testified that Interpretive Letter I-44, published by the Federal Highway Administration and interpreting the MUTCD, stated that in questions 2 and 3, a public crossing can exist where a public highway extends into private property, similar to the Geneva property. (Transcript vol. 2, pp. 377-380).

B. There is Little Evidence to Support a Finding that the Crossing was a Private Crossing

Compared to the overwhelming evidence supporting a finding of a public crossing, there was little, if any, evidence to support a decision that the Crossing is a private crossing. The evidence adduced by UPRR was as follows:

1. Mr. Clark prepared a map which overlaid the section line over an aerial map depicting the location of the current Crossing and roadway, which shows the section line bisecting the Crossing. This is based on the current location. (AE Ex. 22; Transcript vol. 2, p. 43).

2. Mr. Clark testified that depictions on the railroad VAL map show the section line bisecting the public highway to some extent. (AE Ex. 3; Transcript vol. 2, pp. 76-78).

3. Mr. Clark, in walking the area west of the current Crossing location and Vineyard Road, found no evidence of a roadway which existed south of current centerline alignment. (Transcript vol. 2, p. 135 or 35, said different on each tape).

4. Mr. Marshall and Mr. Cheng insisted that the definition of a public road under the MUTCD or FRA clearly required that this Crossing be classified as a private road or private crossing. (Transcript vol. 1, pp. 54-64; Transcript vol. 2, pp. 126-148; UPRR Ex. 154 & 119).

5. UPRR alleged, but provided no evidence, that Utah County and Vineyard Town had no records of performing maintenance on the Crossing.

C. UPRR Has Failed to Establish that There is No Substantial Evidence for the Decision of UDOT

Despite the personal beliefs of Jim Marshall and Eric Cheng, as engineers for UPRR and UDOT, respectively, the overwhelming evidence substantiates the decision by UDOT that the Crossing is a public crossing. Neither Mr. Marshall nor Mr. Cheng was able to testify as to the decisions and actions taken by their predecessors at D&RGW and UDOT in the 1943 proceedings before the Commission and in public record filings (FRA database) which consistently and continuously characterized the Crossing as a public crossing. Utah County and/or Vineyard Town have obviously maintained the Crossing as the asphalt overlays show. Vineyard Town has accepted the Crossing a public crossing and the road as a public road. While it may not meet the definition of a “typical” crossing in some guidelines, in all definitions, if a jurisdiction accepts a crossing as public, then it is public.

UPRR was unable to show that the Crossing was vacated, and in fact, the testimony of its surveyor, Mr. Clark, established that the roadway was not vacated and it could have been as much as 60 feet wide before the 1942 Resolution would have vacated any portion of the original public highway.

The Crossing was altered or updated to make it safer with the participation and knowledge of all parties, and both UPRR and UDOT agree that this alteration would not change the character of the Crossing.

Based upon the foregoing, UDOT’s decision that the Crossing is public must be affirmed.

POINT 3 THE PUBLIC ROADWAY COMPRISING THE RAILROAD CROSSING WAS NOT ABANDONED BY UTAH COUNTY

Once established, a public highway cannot be abandoned without proper procedures and must show exactly what area is being abandoned. Clark v. Erekson, 9 Utah 2d 212, 341 P.2d 424 (1959) cites correctly that “all public highways, streets, or roads once established shall continue to be highways, streets, or roads until abandoned or vacated by order.” Section 72-5-105, Utah Code Annotated (predecessor sections had essentially the same language).

As set forth above, there has been no evidence provided by UPRR that the roadway was abandoned. On the contrary, although a slight change and alteration in the Crossing location was made, this was done with the participation and consent of all parties, thus maintaining the same character of the roadway.

POINT 4 UPRR SHOULD BE PROHIBITED FROM CLAIMING THAT THE CROSSING IS NOT A PUBLIC ROAD BY VIRTUE OF RES JUDICATA

As set forth in Point 3 of the Anderson entities pre-hearing brief, the legal status of the Crossing as a public highway and public crossing has already been adjudicated in proceedings brought by UPRR before this Commission. No evidence presented at the Hearing has modified this conclusion.

In 1943, D&RGW was proposing to add a second track adjacent to the existing track at the Crossing. This directly impacted the traffic and function of the Crossing. D&RGW acknowledged that it was a public highway crossing and received input from UDOT (at that time State Road Commission) and from Utah County as to what improvements should be made to the Crossing. While that was done in 1943, nothing has happened in the meantime to change that conclusion. UPRR acquired the track and right of way from D&RGW, and UPRR was also a petitioner to the Commission in 1943. In its Petition to the Commission, UPRR also showed the Crossing as a public highway crossing. UPRR cannot now deny what it knew to be true in 1943.

No witness called by UPRR provided any information which could differentiate between the decisions in 1943 and the current circumstances. In those prior filings, this Crossing was being affected and this Crossing was recognized as a public highway.

Based upon the legal authorities cited in our pre-hearing brief, *res judicata* should apply and the Commission should order the Crossing is and should remain a public crossing.

POINT 5 UPRR SHOULD BE ESTOPPED FROM DENYING THE EXISTENCE OF A PUBLIC CROSSING

From the earliest railroad maps of record (1919, updated in 1927)(Record, AE Ex. 3) and the earliest public road maps for Utah County (AE Ex. 1, 2, 4, & 5), the 400 North roadway and the Crossing over the D&RGW railroad tracks were recognized as a public highway and public crossing. UPRR and/or UDOT, or their predecessors, have acknowledged and fostered this belief for over 80 years in public and private actions. The record of this can be seen in the following documents:

1. 1919 (corrected to December 31, 1927) D&RGW VAL map (AE Ex. 3).
2. 1939 Public Crossing Agreement between UDOT and D&RGW (AE Ex. 27).
3. 1943 Commission filing, wherein documents filed by D&RGW and related public entities recognized the public highway at the Crossing (AE Ex. 9).
4. 1943 Commission filing, wherein documents filed by UPRR and related entities recognized the public highway at the Crossing (AE Ex 9).
5. 1970 filing by D&RGW with the FRA Inventory listing of public crossings designating the Crossing as a public at-grade crossing (AE Ex 7).
6. 1988 filing by UDOT with the FRA of a crossing change reflecting a continuation of the Crossing as a public at-grade crossing (AE Ex. 7).
7. 1994 filing by D&RGW with the FRA of a crossing change reflecting a continuation of the Crossing as a public at-grade crossing (AE Ex. 7).
8. 1998 filing by UPRR with the FRA of a crossing change reflecting a continuation of the Crossing as a public at-grade crossing (AE Ex. 7).
9. 1999 filing by UDOT with the FRA of a crossing change reflecting a continuation of the Crossing as a public at-grade crossing (AE Ex. 7).

Until December 5, 2008, no representative of UDOT or UPRR ever suggested to anyone that the Crossing was anything other than a public at-grade crossing. At that time, Bill Ince, a

direct report employee to Jim Marshall unilaterally filed an updated USDOT/AAR Crossing Inventory form for the State of Utah. The sole change in the form was to designate the Crossing a private crossing. (AE Ex. 30).

On the other hand, the former Geneva Steel operators, the public at large, Utah County, and Vineyard Town relied upon the fact that this was a public at-grade crossing. Utah County and/or Vineyard Town maintained the Crossing with asphalt overlays over the years (Transcript vol. 2, pp. 344-349). In November 2008, Vineyard Town adopted a Master Road Plan which included the Crossing as part of its major collector streets. (AE Ex. 19). The Road Plan is also part of an overall Masterplan for the property (AE Ex. 20). The elimination of a public crossing at this location would create a 4-mile stretch of land with no access across the railroad tracks, which would severely limit development rights and access to services. (AE Ex. 26).

UPRR acknowledges that it can find no records of D&RGW's activity and no internal records relating to the Crossing. (Transcript, vol. 1, p. 132). UPRR acknowledges that D&RGW had responsibility for the initial filing and updating of the FRA Inventory. (Transcript vol. 1, pp. 166). UPRR was not even aware of the 1939 Crossing Agreement. (Transcript vol. 1, p. 173).

In fact, until Jim Marshall decided the Crossing was not a public crossing, no one even considered this; and even that decision was made without accurate information. Mr. Marshall did not check with Vineyard Town and did not know Vineyard Town acknowledged the Crossing as public, and that this was one of Vineyard Town's public roads. (Transcript vol. 1, pp. 176-178). Mr. Marshall did not follow the procedure for updating the FRA Inventory by submitting the update form in December 2008 to UDOT, and allowing UDOT to submit the update. (Transcript vol. 1, pp. 151-156). Mr. Marshall went so far as to advise Mr. Cheng that the Crossing was private even though Mr. Marshall was fully aware the FRA showed a different status. (Transcript vol. 2, pp. 132).

As provided in Anderson entities' pre-hearing brief, the case of Migliaccio v. Davis, 120 Utah 1, 232 P.2d 195 (1951), is directly on point. Based upon the actions of its predecessors and its own actions, UPRR knew or should have known the Crossing was vital to Vineyard Town and nearby landowners and that it had been used for over 80 years. UPRR and its predecessors fostered the belief—at least as far back as 1927 and continuing until December 4, 2008—that this was a public crossing. UPRR and its predecessor have never tried to restrict travel at the Crossing. The traveling public, Vineyard Town, Utah County, and Anderson entities will all be substantially and irreparably harmed by any attempt to re-characterize this Crossing.

UPRR, and by implication its successor, UTA, must be estopped from denying this Crossing is a public crossing. UPRR should be required to immediately file corrected documents with the FRA that the Crossing continues to be a public at-grade crossing. UDOT should be ordered to participate in this filing to avoid any irreparable harm.

POINT 6 UDOT WAS ARBITRARY AND CAPRICIOUS IN ITS FAILURE AND REFUSAL TO FOLLOW ITS OWN PROCEDURES

There was initial confusion at UDOT regarding the status of the Crossing. Eric Cheng acknowledged that he did no research on the Crossing but spoke with Jim Marshall at UPRR, and relied on his representation that the Crossing was a private crossing. (Transcript vol. 2, pp. 132). Mr. Cheng also acknowledged that the public notice information that UTA published with regard the Crossing was inaccurate, identifying the Crossing as 4000 North. (Transcript vol. 2, p. 140).

While these circumstances may have led UDOT to initial errors in its handling of the Crossing, the confusion was corrected and on February 25, 2009, UDOT knew this was a public crossing. (AE Ex. 15). In fact, in its letter dated February 25, 2009, to legal counsel for Anderson entities, Mr. Cheng states:

. . . UDOT will conduct another surveillance review on this crossing based

upon the crossing being public This review shall be performed in accordance with Utah Administrative Code R930-5-7. Consequently, Union Pacific Railroad, Utah Transit Authority, the Town of Vineyard, and Anderson Geneva will be involved in this review with UDOT. These parties will have the opportunity to provide any documentation concerning the crossing for this review. As part of the review, a meeting will be held at the site of the railroad crossing.

(AE Ex. 15).

Point 5 of Anderson entities' pre-hearing brief has already provided a statement of the laws with regard to procedure. However, it will be helpful to restate a small portion of that information in this brief. As stated in the case of State of Utah v. Merit System Council, 614 P.2d 1259; 1980 Utah LEXIS 991 (Utah 1980), the Supreme Court 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 other cases.

This Commission has likewise adopted this standard of review as set forth above in Point 1. Based on the evidence adduced at the Hearing, UDOT failed to follow its own administrative regulations in the following manner:

1. Notice. Utah Administrative Rules Section R930-5-14(1) requires notice be published, a hearing provided on request, and opportunity for public input. Based on the UDOT notice, the municipality then notifies land owners and the public. This is more fully set forth in Point 5B of the pre-hearing brief. The notice provided by UDOT was defective. Examination of the notices published by UTA (not UDOT) referred to a crossing at 4000 North in Vineyard. It did not list the Crossing as a potential closure. (AE Ex. 26, Report of Scott Hendricks, conclusion 1; Transcript vol. 2, p. 269, 270). Mr. Cheng acknowledged that the Crossing was not accurately identified. (Transcript vol. 2, p. 140). No new notice was published or given to the public or nearby property owners as required under Administrative Rules at Section R930-5-

14(1).

When asked why he did not give notice before the temporary closure as required by Administrative Rules Section R930-5-14(1), Mr. Cheng testified that it was not necessary because the closure was temporary. (Transcript vol. 2, p. 155). Even a cursory reading of this Section shows no basis for this interpretation. There is no reference to “temporary” or “permanent” closures as part of the Administrative Rules. Although Mr. Cheng uses the word “temporary” in his July 13, 2009, letter, it is a complete closure until unspecified upgrades are installed. (AE Ex. 16).

2. Diagnostic/Surveillance Review Team. As set forth in Anderson entities’ pre-hearing brief, Point 5C, Section R930-5-7(1) and (2) require that a diagnostic surveillance team be established when “railroad traffic is proposed to significantly increase”. The diagnostic team is comprised of the Chief Railroad Engineer for the Department, a representative of the railroad company, a representative from the local government agency, and possibly others. The diagnostic team makes recommendations on changes to improve safety at a crossing. (AE Ex. 26, Report of Scott Hendricks, conclusion 2; Transcript vol. 2, p. 274, 279-280).

Although UDOT’s February 25, 2009, letter stated a surveillance review would be conducted, Mr. Cheng and others admitted it never took place. (Transcript vol. 2, p. 134). No representative of Vineyard Town participated in any surveillance review. (Transcript vol. 1, p. 175; vol. 2, p. 128).

Instead of following procedure, Mr. Cheng on July 13, 2009, issued an order to temporarily close the Crossing, citing unspecified safety reasons. (AE Ex. 16). On August 7, 2009, a letter from Anderson entities protested this decision to temporarily close the Crossing, citing many specific reasons for keeping the Crossing open. (AE Ex. 17). Paraphrasing, these included:

- (a) for many years the Crossing had been utilized without accident;
- (b) during the 4-year ownership by Anderson entities, there had been no accidents;
- (c) there had been no surveillance review resulting in a finding of any safety issues;
- (d) the requirement that the Crossing remained closed until Vineyard Town provides improvements to a level required in its Road Master Plan was without basis because no surveillance had been conducted;
- (e) in earlier meetings, Mr. Cheng had acknowledged there had been no safety review of the Crossing;
- (f) the Crossing constitutes a vital access point for Anderson entities and for Vineyard Town;
- (g) any improvements would be unnecessary for the current level of use and for uses anticipated for an extended period of time; and
- (h) the only result of the temporary closure would be to shift costs from UTA to Vineyard Town and Anderson entities.

The protest of this decision was denied by UDOT's legal counsel by letter dated September 1, 2009. (AE Ex. 18). In examining the letter, it is clear counsel misunderstood the purpose of the August 6, 2009 surveillance review, which was not a surveillance review to examine the Crossing, but was conducted solely to consider how best to close the Crossing.

Scott Hendricks provided a report and testified about safety issues at the Crossing. Mr. Hendricks had carefully examined the Crossing and computed dimensions and other considerations as required under MUTCD (AE Ex. 26). Mr. Cheng, on the other hand, did not examine the Crossing prior to his order for temporary closure, or examine it for any of the safety

issues. (Transcript vol. 2, p. 200, 203-204).

Mr. Hendricks compared the geometry of crossings in Lehi City, Utah to the Crossing. Mr. Hendricks suggested various types of mitigation which would alleviate the concerns of Mr. Cheng and which were being used at these other crossings. (AE Ex. 26, conclusion 4; Transcript vol. 2, p. 286-292). Mr. Hendricks expressed surprise that no one spoke with Vineyard Town regarding its needs for the roadway. (Transcript vol. 2, pp. 283-284).

Although Mr. Cheng expressed several objections to the safety of the current Crossing design, from 1972 until the plant closed in 2001, with nearly 4000 cars per day traveling across the Crossing, there were no accidents. Mr. Cheng's current objections to the safety issues relate solely to the fact that any crossing creates hazards. Mr. Cheng's further objections to spending public monies to improve a crossing (which is being affected by new rail) without knowing what was needed at the crossing is based solely on his failure to conduct a surveillance review. If a surveillance review was conducted, the needs and requirements of Vineyard Town would have been considered. The following references to Mr. Cheng's testimony make this abundantly clear:

(a) Transcript vol. 2, p. 128, referring to surveillance report, UPRR Ex. 119. Testimony indicates that no representatives participated in that surveillance review.

(b) Transcript vol. 2, p. 134, Mr. Cheng admitted there was no surveillance review, although he went to the site with UPRR and UTA, and did not meet with Vineyard Town or Anderson entities to discuss safety issues.

(c) Transcript vol. 2, pp. 145-146, Mr. Cheng testified that he did not know what to recommend by way of crossing improvements because he did not know what the city needed.

(d) Transcript vol. 2, p. 190, Mr. Cheng admitted that he did not know what

the city requirements would be because he never asked the city.

Based on the actions taken with regard to the Lehi street crossings as compared by Mr. Hendricks, this could involve new, expensive signalization, street barriers, land acquisitions, and other unknown improvements—all at the expense of Vineyard Town. Further, by virtue of the temporary closure, asphalt has been removed by UDOT or UPRR, and actual new street improvements will now be required. Where there was an operating and existing crossing for the last 80 years, there is no crossing today.

All of this is contrary to the requirements of the Administrative Rules, Section R930-5-7(5). Where a new railway is being constructed (the new UTA Commuter Rail South), Section - 7(5) requires UTA to construct all improvements, which would include asphalt and roadway improvements as well as signalization. In addition, as stated under subsection 7(5), if there is new railway to be installed at a crossing, public notice of this intended action by itself must be given under R930-5-14. Since the public notice with regard to the Crossing failed, UDOT must be ordered to start over. UDOT and UTA must be ordered to re-open the Crossing, cease work on the Crossing, and re-initiate the administrative process.

To avoid repeating arguments already made, the Commission is referred to Points 5 and sub-points 5A-5E of Anderson entities pre-hearing brief for additional points and authorities.

POINT 7 APPLICATION AND REFERENCES TO MUTCD OR FHWA DEFINITIONS OF A PUBLIC CROSSING ARE IN ERROR AND CANNOT BE FOUND IN THE REFERENCE DOCUMENTS THEMSELVES.

In the UPRR Pre-Hearing Responsive Brief, and during the Hearing, much was said and made of the MUTCD, the FHWA, FRA and other engineering reference sources for definitions of what is or is not a “public highway-rail crossing”. While reference to these sources may be helpful in general for engineers to make initial judgments on improvements to be made to public highway - rail crossings, or which crossings might qualify for federal highway funds, these

documents do not purport to be reference materials for definitive legal determinations. Even if they do not constitute legal standards, but are simply engineering resources, the standards and definitions were frequently misstated and misused by UPRR and UDOT in testimony from their engineers, Mr. Marshall and Mr. Cheng. The following explanation is intended to provide a sufficient reference to understand the actual definitions from the MUTCD, FHWA and FRA.

Utah Administrative Rules R930-5-1, and -4, effective when this matter arose, incorporate by reference the MUTCD (2003), AASHTO (2004), “Guidance for traffic control devices at Highway/Railway Grade Crossings, FHWA (2000), Preemption of traffic signals near railroad crossings, Institute of Traffic Engineers (ITE) (2004), 23 CFR 646 “Railroads” (2005), and 23 CFR “Highway Safety Improvement Program” (2005). No reference is made to the FRA Instructions and Procedures Manual for the Highway-Rail Crossing Inventory.

A. Definition of Public Highway-Rail Crossing in MUTCD. A definition of public highway-rail crossing (“crossing”) was promulgated in UPRR Pre-hearing Responsive Brief and was offered as definition of a crossing by UPRR in testimony. This definition stated “The MUTCD defines a public roadway as any road or street under the jurisdiction of and maintained by a public agency and open to public travel. If either approach to a crossing does not qualify as a public roadway, then the crossing is typically classified as a private crossing regardless of whether the crossing is open to public travel or provides public access.” Unfortunately, this definition is not found anywhere in the MUTCD. In fact, this definition is found in a report titled “Private Highway-Rail Grade Crossing Safety Research and Inquiry, Final Report (May 2008)”. This report is a “...summary of the private highway-rail grade crossing safety inquiry conducted by the United States Department of Transportation Federal Railroad Administration and the Volpe Center. The safety inquiry consisted of a series of public meetings to solicit oral commentary on the safety of the nation’s private highway-rail grade crossings, a docket for

electronic comment submission, a panel discussion at the Transportation Research Board's annual meeting, and other activities as described in the table of contents." *Taken from the Abstract, Section 13 of the report.*

Thus, the report is nothing more than a compilation of public comments and panel discussion about private crossings. The definition cited by UPRR is found in the Executive Summary, with identical language found in the Introduction. But this definition is not found in the MUTCD. In fact, the definition comes from Section 10 of the Report which is quoted verbatim below:

10 Summary of Public Comments

A wealth of information was solicited from private crossing stakeholders and the general public during the course of the safety inquiry. Although many different topics were discussed, certain topics recurred frequently. Areas of particular interest and need for further consideration are listed as follows:

- Private crossing definition:

10.1 Private Crossing Definitions

A clear, national definition of private crossings is not currently available. Most authorities apply the MUTCD's definition of a public roadway to determine whether a crossing is a public crossing. *The MUTCD defines a public roadway as any road or street under the jurisdiction of and maintained by a public agency and open to public travel. If either approach to a crossing does not qualify as a public roadway, then the crossing is typically classified as a private crossing* regardless of whether the crossing is open to public travel or provides public access. (italics and underlining added)

As will be seen below, you cannot find the foregoing definition cited above for a crossing in the MUTCD. In fact, the applicable MUTCD(2003 Edition) definitions for purposes of crossings are as follows:

Section 1A.13 Definitions of Words and Phrases in This Manual Standard:

The following words and phrases, when used in this Manual, shall have the following meanings:

32. Highway—a general term for denoting a public way for purposes of travel by vehicular travel, including the entire area within the right-of-way.

33. Highway-Rail Grade Crossing—the general area where a highway and a railroad's right-of-way cross at the same level, within which are included the railroad tracks, highway, and traffic control devices for highway traffic traversing

that area.

59. Public Road—any road or street under the jurisdiction of and maintained by a public agency and open to public travel.

65. Roadway—that portion of a highway improved, designed, or ordinarily used for vehicular travel and parking lanes, but exclusive of the sidewalk, berm, or shoulder even though such sidewalk, berm, or shoulder is used by persons riding bicycles or other human-powered vehicles. In the event a highway includes two or more separate roadways, the term roadway as used herein shall refer to any such roadway separately, but not to all such roadways collectively.

67. Road User—a vehicle operator, bicyclist, or pedestrian within the highway, including persons with disabilities.

Nothing set forth in the MUTCD even remotely resembles the definition cited above in the Report or reported by UPRR or its witnesses. The Report is a compilation of public comment, and the definition cited appears to have been derived anecdotally. Stating it is from the MUTCD was careless and inaccurate. It should also be remembered that the Report has not been adopted by reference by the Utah Administrative Rules. On the other hand, the FHWA, along with the MUTCD are incorporated by reference. The FHWA published an Interpretation Letter (2004) to assist parties in deciding what constitutes “public travel” (See AE Exhibit 33).

There it states:

1. Some roads open to public travel are privately owned. Does the manual apply to these roads? The MUTCD does not apply unless States have adopted legislation to require traffic control devices on their private roadways open to the public to be in conformance with the MUTCD. The last paragraph of MUTCD Section 1A.07 addresses the subject of roads that are privately owned and also open to the public. The MUTCD encourages States to adopt a legislative code similar to Section 15-116 of the Uniform Vehicle Code which indicates that traffic control devices intended to regulate, warn, or guide traffic shall not be installed unless the devices conform with the State manual and the MUTCD. At present, there are 17 States with such laws.

2. Does public travel include the access ways and parking lots of shopping centers? Yes, public travel would include the access ways and parking lots of shopping centers. States should address these specific locations in their State codes and statutes.

3. Does public travel include the access ways, travel ways and parking lots of other facilities open to the public (e.g., office parks)? Yes, office parks could also be included in the definition of a private property open to public travel. The decision to include certain locations such as office parks in the legislative code is

made at the State and local level. (Emphasis added).

It is also important to note that in the 2003 edition of MUTCD, the definition of Highway was changed. The 1971 Edition of MUTCD provided the definition of Highway as follows:

12. Highway (or Street) – The entire width between the boundary lines of every way, publicly maintained, when any part thereof is open to the use of the public for purposes of vehicular travel.

B. FHWA Definition of Crossing. The FHWA RAILROAD-HIGHWAY GRADE CROSSING HANDBOOK, Revised Second Edition, August 2007, was the applicable reference source at the time this matter arose. The definition in the Handbook for a crossing is as follows:

Private crossing. A highway-rail grade crossing that is not a public highway-rail grade crossing, such as grade crossings that are on privately-owned roadways utilized only by the owner's licensees and invitees.

Public crossing. A highway-rail grade crossing that is on a roadway or a pathway under the jurisdiction of and maintained by a public authority and open to the traveling public.

(FHWA Railroad-Highway Grade Crossing Handbook, page 223)

C. FRA Instructions and Procedure Manual. Although not expressly adopted by Utah Administrative Rules, the FRA Highway Inventory Instructions and Procedures Manual defines a crossing as follows:

1.0 Introduction

1.5 Definitions of Highway-Rail Intersections

For purposes of the Inventory only, the following definitions apply:

A. Public Crossing.

A *public crossing* is the location where railroad tracks intersect a roadway which is part of the general system of public streets and highways, and is under the jurisdiction of and maintained by a public authority and open to the general traveling public.

Public crossings can be at-grade or grade separated. If they are at-grade, usually both highway approaches are maintained by a public authority, **or the public authority accepts the responsibility for the roadway maintenance.**

1. Discussion

A crossing shall be classified as public if, and only if, the roadway is deemed a *public road* in accordance with 23 CFR Part 460.2. In general, a roadway across

railroad for which both approaches are maintained by a public authority and which is open to the public is considered a “public” crossing. These are roadways that are part of the general system of public streets and highways. **Some jurisdictions accept a crossing as “public” when only one approach is publicly maintained. If a public authority accepts a crossing as “public,” it is a public crossing.** All others are considered “private”.

Conclusion. Although many phrases, definitions and comments were thrown around by witnesses, the definitions above are the definitions used in Utah pursuant to R930-5-1, et.seq. Although Mr. Marshall and Mr. Cheng personally believe that no crossing can be a public crossing if it has private property on one approach, their belief is not consistent with the definitions specifically adopted by MUTCD or FHWA and interpretations by the FHWA.

POINT 8 THE MUTCD, FHWA AND FRA ARE CLEARLY ENGINEERING RESOURCE DOCUMENTS AND HAVE NO LEGAL EFFECT ON WHETHER A CROSSING IS PUBLIC OR PRIVATE.

While discussions about the definition of a public crossing in MUTCD, FHWA or FRA are interesting exercises, those resources by their own terms are strictly engineering resources. MUTCD and FHWA resources have been adopted and promulgated for one purpose only: to establish a standard by which highway-rail crossings will be designed for the safety of the traveling public.

A. MUTCD as Legal Standard. As to the appropriateness of utilizing the MUTCD as a legal standard for determining a public versus private crossing, one need only look to the MUTCD itself. Citing from the 2003 edition (please note that the bold language in the citation from the MUTCD is the actual Standard):

INTRODUCTION

The Standard, Guidance, Option, and Support material described in this edition of the MUTCD provide the transportation professional with the information needed to make appropriate decisions regarding the use of traffic control devices on streets and highways. The material in this edition is organized to better differentiate between Standards that must be satisfied for the particular circumstances of a situation, Guidances that should be followed for the particular circumstances of a situation, and Options that may be applicable for the particular circumstances of a situation. Throughout this Manual the headings

Standard, Guidance, Option, and Support are used to classify the nature of the text that follows. Figures, tables, and illustrations supplement the text and might constitute a Standard, Guidance, Option, or Support. The user needs to refer to the appropriate text to classify the nature of the figure, table, or illustration.

Standard:

When used in this Manual, the text headings shall be defined as follows:

1. Standard—a statement of required, mandatory, or specifically prohibitive practice regarding a traffic control device. All standards are labeled, and the text appears in bold type. The verb shall is typically used. Standards are sometimes modified by Options.

2. Guidance—a statement of recommended, but not mandatory, practice in typical situations, with deviations allowed if engineering judgment or engineering study indicates the deviation to be appropriate. All Guidance statements are labeled, and the text appears in unbold type. The verb should is typically used. Guidance statements are sometimes modified by Options.

3. Option—a statement of practice that is a permissive condition and carries no requirement or recommendation. Options may contain allowable modifications to a Standard or Guidance. All Option statements are labeled, and the text appears in unbold type. The verb may is typically used.

4. Support—an informational statement that does not convey any degree of mandate, recommendation, authorization, prohibition, or enforceable condition. Support statements are labeled, and the text appears in unbold type. The verbs shall, should, and may are not used in Support statements.

Section 1A.09 Engineering Study and Engineering Judgment

Standard:

This Manual describes the application of traffic control devices, but shall not be a legal requirement for their installation. (Emphasis by underlining added by parties)

**PART 8. TRAFFIC CONTROLS FOR
HIGHWAY-RAIL GRADE CROSSINGS**

Section 8A.01 Introduction

Standard:

The traffic control devices, systems, and practices described herein shall be used at all highway-rail grade crossings open to public travel, consistent with Federal, State, and local laws and regulations.

In addition to the 2003 MUTCD standard itself, the FHWA issued Interpretation Letter 8-66(I)-Traffic Gates on Public Streets which stated: Please be advised that the MUTCD itself describes the application of traffic control devices and is used to determine the conformity, not legality of the use of traffic control devices. (Emphasis added by parties by underlining).

By its own terms, MUTCD does not intend to be legally binding or set a legal standard. It is intended for engineering use and “is used to determine the conformity, not legality of the use

of traffic control devices.”

B. FHWA. The State of Utah has incorporated by reference the Railroad-Highway Grade Crossing Handbook, (FHWA) (August 2007) as a standard reference under R930-5-2 (10) of the Utah Administrative Rules. Its use as a legal standard is not appropriate. In the Handbook itself, its use is clarified as follows:

RAILROAD-HIGHWAY GRADE CROSSING HANDBOOK, Revised Second Edition, August 2007 (pg. 18)

I. Overview

D. Legal Considerations Regarding Highway-Rail Grade Crossings

1. Background

Highway and railroad engineers and employees are becoming increasingly involved in matters that were previously of interest only to attorneys. Today, it is incumbent upon staffs of state highway departments, local transportation agencies, railroads, and transit operators to become aware and keep abreast of legal issues in general and the legal elements surrounding their design, maintenance, and operational practices in particular.

This discussion of legal considerations in the administration and management of highway-rail grade crossings is a very basic discussion of an increasingly complex subject. It is not meant to interpret the law or to establish guidelines. It is intended only to alert transportation agencies and rail operators to the possible consequences of failure to maintain and safeguard the highway-rail grade crossing. The particular legal aspects of a specific action or legal problem should be discussed with an attorney.

Any reference to the Handbook as a legal standard is expressly outside the scope of the Handbook itself. It was not intended as a legal reference and expressly advises engineers and administrators to look outside the Handbook and to legal counsel for a determination of legal issues such as whether a crossing is public or private.

C. FRA Instructions and Procedures Manual for Highway-Rail Crossing Inventory. The FRA Highway-Rail Inventory and its Manual were created for purposes of establishing a national inventory that interested parties can rely on to view information about public highway-rail crossings and accident information. The State of Utah has not incorporated this manual by reference, either in statute or administrative rules. However, it is often referred to and appears to

be utilized by parties who have responsibility for maintenance of the Inventory. The Manual is very specific in its statement that the document is ONLY to be used for purposes of the Inventory:

1.0 Introduction

1.5 Definitions of Highway-Rail Intersections

For purposes of the Inventory only, the following definitions apply: (*Emphasis added by parties*).

It appears to have been anticipated that persons involved in maintaining the database would begin using the definitions for something other than the Inventory. The cautionary language is extremely helpful in making sure no one begins to rely on the definitions for purposes of defining legal rights.

Conclusion: While reference is freely made to MUTCD, FHWA Handbook, and the FRA Manual for definitions, those documents by their own terms restrict their use to engineering standards and inventory filing standards. There is no basis in law for using the definitions therein as guidance for determining public or private roadways. A public road is determined under Utah law. The roadway which is at issue in this case has been a public highway since the early 1920's at the least. It continued to be recognized as such by UPRR and UDOT for over 80 years. Until Jim Marshall for UPRR looked at this Crossing in 2008, no one thought it was anything other than a public highway-rail crossing. Mr. Marshall has been the railroad engineer in charge of crossings since 1999. His predecessors appear not to have shared his opinions about this Crossing. Eric Cheng has only been the Chief Railroad Engineer for 2 ½ years. Likewise, his predecessors, and the management at UDOT do not share his personal opinions about this Crossing. In each instance, Mr. Marshall and Mr. Cheng are ignoring the plain language of the MUTCD, FHWA Handbook and the FRA Manual. Nevertheless, these resources should not be used to create a legal standard to define a crossing.

CONCLUSION

1. The Commission should affirm the decision of UDOT that the Crossing is a public road and a public crossing. The decision of UDOT was not arbitrary and capricious and was based on sufficient evidence. The facts and law are overwhelming in support of this conclusion.

2. The Commission should affirm the decision of UDOT based on *Res Judicata*. UPRR cannot deny that the issue of whether the Crossing is a public crossing was fully litigated in 1943 in two different cases before this Commission. D&RGW and UPRR, in two unrelated matters, made representations to this Commission that the Crossing was a public highway and a public 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. A public highway was acknowledged to exist by D&RGW in its own maps in 1927, and possibly as early as 1919. In 1939, UDOT and D&RGW entered into a Crossing Agreement. In 1943, D&RGW and UPRR each represented to this Commission that this was a public highway and public crossing. In 1970, D&RGW represented to the FRA (and all agencies and individuals that access the database) that this was a public crossing. In 1998, this was affirmed by UDOT. In 1994, it was once again affirmed by D&RGW. In 1998, this was affirmed by UPRR itself. In 1999, it was once again affirmed by UDOT. Thus, for over 80 years UPRR, or its predecessor, has represented to the State of Utah, Vineyard Town, Utah County, the traveling public, land owners near the Crossing, and the FRA (for the last 30 years) that the Crossing is a public at grade crossing. To allow UPRR to argue now that all who came before were mistaken would be manifestly unjust and will irreparably harm the rights of the traveling public, Vineyard Town and Anderson entities. Vineyard Town is a municipality

impeded by rail and adequate crossings are necessary. The Crossing is included in Vineyard Town's road and development master plans. Without the Crossing, you must travel over 4 miles within Vineyard Town boundaries to gain access across the railroad tracks. Anderson entities have invested nearly \$60 million to date in redevelopment of the former Geneva steel plant, relying on the Crossing as a material part of its transportation and development plans. Vineyard Town's and Anderson entities' reliance on the representations of UPRR and UDOT 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's failure to follow its own administration rules is arbitrary and capricious on its face. 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 or the Anderson entities in any Surveillance Review or comments with regard to the closure. It failed to allow protest or input when decisions were made. UDOT went onsite with UTA and UPRR to discuss safety issues and excluded all other affected parties. UDOT has allowed work to proceed by UTA at the Crossing without following its own rules and procedures. UDOT has authorized UPRR, UTA, or others to remove pavement belonging to Vineyard Town and construct barriers to the Crossing. UDOT has acted arbitrarily and capriciously in its failure to abide by its own governing rules. The Commission should remand this matter to UDOT to follow its own rules; to conduct a proper review; to provide adequate public notice after the review is completed; and to order the Crossing remain open until appropriate procedures have been followed.

5. The Commission should further order UDOT to require UTA to provide improvements to the Crossing as necessary pursuant to Administrative Rules Section R930-5-7(5). In regard to new rail traffic at the Crossing, public notice must be given under Rules at

R930-5-14, and the Commission should order UDOT to follow these procedures.

DATED this 15th day of September, 2010.

DENNIS M. ASTILL, PC LAW FIRM

By:  _____

Dennis M. Astill
Attorneys for Anderson Entities

BLAISDELL & CHURCH

By: /s/  _____

With the Permission of David L. Church
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Certificate of Service

I hereby certify that on the 15th day of September, 2010, a true and correct copy of **JOINT POST-HEARING BRIEF FOR VINEYARD TOWN AND ANDERSON ENTITIES** 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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