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- BEFORE THE PUBLIC SERVICE COMMISSION OF UTAH -

In the Matter of Union Pacific Railroad's Petition for Relief against the Utah Department of Transportation	)	**JOINT POST-HEARING REPLY BRIEF FOR VINEYARD TOWN AND ANDERSON ENTITIES'**
	)	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 Reply Brief as follows:

ARGUMENT

POINT 1. A PUBLIC ROAD CANNOT BE ABANDONED BY LACK OF USE OR BY INTERVENING ACT OF A LANDOWNER

Once a public highway has been established, whether by dedication or by use, it is the same. The highway then belongs to the public and is owned by the public. Except by proceeding through a strict statutory abandonment process, no acts of governments or third parties can abandon or eliminate a highway.

The parties stipulated at the beginning of the Hearing that the Crossing was part of a

public highway until 1942. The highway had been established under Utah Code Ann. § 72-5-104(1) and its predecessor sections. The language of the predecessor sections was similar to the current Section 72-5-104. Section 72-5-104(1) provides that a public highway is ". . . dedicated to use of the public when it has been continuously used as a public thoroughfare for a period of ten years." Subsection 104(3) will become more important later in this section. There it provides that the scope of the public is that which is reasonable and necessary to ensure the safe travel of the public.

Utah Code Ann. § 72-5-105 provides a statutory process whereby a public highway, once established, can be abandoned. The process is strict and requires a specific act of abandonment by the highway authority having jurisdiction. In 1942, Utah County had jurisdiction over this public highway. The best evidence established by Kent Barney and William Clark conclusively shows that the public highway over the railroad property was never abandoned. The cases interpreting this statute (and former laws similar in nature) are uniform. The public interest is in maintaining its highways unless a public notice has been given and opportunity for the public to be heard has occurred. Thus, if the procedure is not followed, no abandonment can occur. *See* Section "Applicable Law" in the Vineyard/Anderson Entities Joint Pre-Hearing Brief , citing the statutes and relevant case law.

In its post hearing brief, UP introduces a new argument by citing Okelberry v. Wasatch County, 2006 UT App. 473, 153 P.3d 756, for the proposition that an interruption in use of a public highway will terminate the public use. UP argues that after there was a change in the angle of the Crossing in the early 1970's, a new period of use began and UP, as a private landowner, reclaimed the original public highway right of way. UP's reliance on Okelberry is misplaced.

The Okelberry court was addressing the issue of whether a public use had been

established, not what happens once a public right of way has been established. In other words, the court did not address the issue of abandonment. The Okelberry case is distinguished factually and legally from the case at hand. The argument in Okelberry was simply whether sufficient facts existed to establish the original public road. The court correctly stated that when considering whether a highway was established, an interruption in the public use by a private landowner can interrupt the creation of the public highway. In this instance, a public highway had already been established and all parties stipulated to that fact.

Accordingly, we must reject any argument by UP that a landowner can interrupt or take back a public highway once it has been established. Regardless of the change in location of the Crossing, the original highway was established, and remains established, as a public highway.

POINT 2. THE ALTERATION OF THE CROSSING TO RENDER IT SAFER WAS A REASONABLE CONTINUATION OF USE OF THE PUBLIC HIGHWAY.

The parties in this matter all agree that in the early 1970's, the angle of the Crossing was modified to make the Crossing safer. Mr. Marshall testified that this modification should not change whether the Crossing was a public crossing or a private crossing. Further, the change in angle of the Crossing was a minor deviation from the original easement. By the testimony of Mr. Clark, witness for UP, and by Mr. Barney, witness for Vineyard Town and Anderson Entities, it was agreed that at least half of the area included within the new crossing configuration was part of the original public highway.

Mr. Marshall's testimony and public documents also support that Utah County (the highway authority) and D&RGW (UP's predecessor) obviously consented to the change in location in order to make the angle of the Crossing safer.

When an easement or public highway has been established or dedicated, and it is modified slightly for the convenience of the parties, a party landowner who consents to the

change is estopped from later asserting that there is no established right of way. In this instance, D&RG&W clearly participated in the change. Signals had to be moved, new signalization equipment installed, and new improvements over the tracks installed, in order to change the angle of the Crossing. Additionally, the public roadway on the west side of the Crossing and the approach on the east side both had to be modified. Now 37 years later, UP asserts that there is no public right of way.

Although direct case law on public highways could not be located, the case of Bolton, et al. v. Murphy, et al., 41 UT 591, 127 P. 335 (1912) is very instructive. There, the plaintiffs were asserting a prescriptive easement over the lands of the defendants. An easement by prescription must be established by continuous use for more than 20 years (as compared to the 10-year period for public use). The evidence showed that at a point in time after the easement had been established by prescription, one of the landowners made a request to deflect the road around a railroad grade that was being constructed. The deflection was slight. Another slight change in the travel track was made approximately 10 years later. The Utah Supreme Court held that these two changes came within a rule laid down in the earlier case of Thompson v. Madsen, 29 UT 326, 81 P. 160, where the court stated,

> . . . the defendants will not now be allowed to close the new or substituted alley without first restoring the old one; and the fact that such grant was oral matters not, if on the faith of it rights have been acquired or relinquished and acted upon.

Bolton at 600.

This case is also similar to the case of Sullivan v. Condas, 76 UT 585, 290 P. 954 (1930), *aff'd*, wherein the trial court found that as early as 1873 a public roadway had existed. Patent to land was issued to the predecessor of the plaintiffs in 1906. Plaintiffs came into ownership of the land in 1922 and 1924. The court stated,

> the right of way having been established over public lands by a public

> user, the predecessors of the plaintiff when the plaintiff was issued to them, and the plaintiffs when they acquired their interest in and to the lands, took them subject to the easement in favor of the public unless it was thereafter extinguished by operation of the state law, which was not done.

Id. at 12.

D&RGW owned the railroad right of way since the late 1800's. Either before or after its acquisition of the right of way, a public highway was established across the railroad right of way. At some point in the early 1970's a minor deviation to the public highway location across the railroad right of way was made to create a safer crossing. For 37 years, D&RGW and UP made no objection to the location of the Crossing or the persons using the Crossing. No facts have been established by UP indicating that either D&RGW or UP ever objected to or blocked use of the Crossing (the public highway) from 1942 through 2008. For a period of 37 years after the Crossing angle was changed no objection was made. The change was made to render the Crossing safer and clearly fell within the statutory authority for the safe public use under Utah Code Ann. § 75-5-104(3). Even if it did not, 37 years of use by the public would re-establish a public highway.

On the question of public use, UP continues to urge that because the road crosses into private property, it cannot be a public road. This is nonsense. This is unsupported by law or fact. There are many instances of public roadways that end at private property. UP continues to assert that only business invitees used the public highway into the Geneva steel property. Assuming for the moment this is accurate, invitees to Geneva would still constitute "public" to UP. In other words, invitee status to a business owner does not mean the traveler was an "invitee" to another landowner over whose land they cross. Anyone using the Crossing for the last 80 years was a member of the public as between UP and the traveler.

UP continues to interject engineering safety standards to create a legal use standard, but

Utah law does not support this interpretation. The MUTCD or the FRA rules on what constitutes a public or private crossing have no application in determining public highway status in the State of Utah.

POINT 3. UP HAS FAILED TO MARSHAL EVIDENCE TO SUPPORT A REVERSAL OF THE UDOT DECISION.

While UP has cited several instances of favorable evidence and testimony for its case, it has failed to marshal evidence to overturn the decision of UDOT declaring the Crossing as a public crossing.

In Ostermiller v. Ostermiller, 2010 UT 43, 233 P.3d 489, the Utah Supreme Court enumerated its standards for marshaling evidence in support of an appeal. The court stated,

> to challenge a factual finding, an appellant must first marshal all of the evidence in support of the finding and then demonstrate that the evidence is legally insufficient to support the finding even when viewing it in a light most favorable to the court below. To properly marshal the evidence, the challenging party must temporarily remove its own prejudices and fully embrace the adversary's position; he or she must play the devil's advocate. In doing so, appellants must present the evidence in a light most favorable to the district court and not attempt to construe the evidence in a light favorable to their case. Appellants cannot merely present carefully selected facts and excerpts in support of their position. Nor can they simply restate or review evidence that points to an alternate finding or finding contrary to the trial court's finding of fact.

Id. at 494 *(internal quotation marks and citations omitted).*

UP made no effort to marshal the evidence and did exactly what the Ostermiller court advised against. UP took carefully selected facts and excerpts from the record in support of its own position. It made no effort to look at the whole of the evidence in a light most favorable to the determination of UDOT. On the other hand, at Point 2 of the Vineyard Town/Anderson Entities Post-Hearing Brief, the evidence was marshaled both in support of and against the decision of the UDOT that the Crossing is a public crossing.

Regardless of the selective facts cited by UP, there are substantial facts supporting the

decision of UDOT. It is not the responsibility of the respondent to marshal the facts. Nevertheless, the respondents have, in fact, done so and there is substantial evidence to support the decision of UDOT that the Crossing is a public crossing.

POINT 4. UDOT HAS FAILED TO MARSHAL EVIDENCE IN SUPPORT OF ITS DECISION FOR TEMPORARY CLOSURE OF THE CROSSING

UDOT continues to use unknowns as its basis for temporary closure of the Crossing. UDOT states at page 2 of its Post-Hearing Reply Brief, "once the pertinent information is available, UDOT will conduct a surveillance review in compliance with its rule for determination of the necessary safety improvements and the Crossing will be open." While this presents some hope to Vineyard Town and Anderson Entities, that UDOT will at some point comply with its own administrative rules, the information UDOT lacks is the very information intended to be obtained from a surveillance review. Consider the five crossings in Lehi to which Mr. Hendricks testified. These crossings have similar geometry and similar concerns with the lack of stacking area, lack of adequate approach distances, and the new frequency of trains. Using UDOT's logic with regard to these crossing should have resulted in temporary closures because the visual evidence made the crossings less safe and UDOT knew nothing about Lehi's plans, traffic counts, future growth, future change to roads, or other needs with regard to the crossings. In other words, UDOT by observation could not have known the following:

- how many cars currently traveled the crossing?
- how many cars would cross in the future based on anticipated growth? (all cities have master plans).
- what changes could be made to the current crossing in order to improve safety?
- what was the past use of the crossing and would that use continue for the near or long term?

All of these questions are to be answered by a surveillance review.

In its brief effort to justify its failure to follow procedure, UDOT cites at pages 3 and 4 of its Post-Hearing Brief the testimony of Mr. Cheng and Mr. Hendricks with regard to the safety

problems at the Crossing. What is omitted from those citations is that the testimony related to the safety concerns created by UTA's addition of new tracks. Again, that is the express purpose of requiring a surveillance review and the opportunity for input by Vineyard Town and neighboring landowners as provided under Utah Administrative Rules Section R930-5-7 and 14.

UDOT attempts to argue that immediate safety concerns justify a temporary closure but its order of temporary closure, is not *temporary*. The order requires unspecified improvements before the Crossing can be opened. Further, it ignores the evidence that for 37 years, the Crossing was operated without accident. To Mr. Cheng, this is unimpressive. To Mr. Cheng, any crossing is a dangerous crossing. To allow Mr. Cheng to issue an order of that level of without notice, without surveillance team input, or public hearing on request reflects the reason for administrative rules—it is unfair, it is arbitrary, and it is capricious. Contrary to the assertions of UDOT in its Post-Hearing Reply Brief at page 4, Mr. Hendricks did not testify that the hearing was unsafe. His testimony was that the Crossing was safe.

As to the weight of that testimony, it must be remembered that Mr. Cheng has been UDOT's Chief Railroad Engineer for only 2½ years, while Mr. Hendricks, on the other hand, has been a traffic engineer and involved in engineering crossings for more than 15 years. Mr. Cheng visited the site but his visit was restricted to looking at the Crossing with the fence closed. He did not know there was a road beyond the fence and he made it clear he did not care. If a closed fence was a concern, he could have spoken to Vineyard Town and Anderson Entities. Instead, ignoring administrative law and procedure, Mr. Cheng unilaterally issued an order for closure. On its face and according to Utah law, this is unreasonable. It is the very definition of arbitrary and capricious.

CONCLUSION

The Public Service Commission sits in the same position as a court of appeals with

regard to UDOT's decision. It should affirm the decision of UDOT that the Crossing is a public crossing. UP has failed to marshal evidence or find supporting law to overturn the decision of UDOT. Because UDOT did not follow its procedures in ordering a temporary closure, the case should be remanded to UDOT to conduct a surveillance review based on circumstances prior to construction by UTA and the Commission should order that the Crossing be reopened. If any improvements are necessary to make the Crossing safe based on UTA's new rail improvement, then UTA should be required to pay the costs of those improvements.

DATED this 29th day of September, 2010.

DENNIS M. ASTILL, PC LAW FIRM

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With the Permission of David L. Church
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Certificate of Service

I hereby certify that on the 29th day of September, 2010, a true and correct copy of **JOINT POST-HEARING REPLY 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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