

Reha Kamas, #8487
Union Pacific Railroad Company
280 South 400 West, Suite 250
Salt Lake City, UT 84101
Telephone: (801) 212-3985
Facsimile: (801) 212-3978

Attorneys for Union Pacific Railroad Company

BEFORE THE PUBLIC SERVICE COMMISSION OF UTAH

In the matter of Union Pacific Railroad's
Petition for Relief against the Utah Department
of Transportation

**Union Pacific Railroad Company's
Supplemental Submission Regarding
Standard of Review**

Docket No. 09-888-01

Petitioner, Union Pacific Railroad Co. ("Union Pacific"), by and through counsel of record, respectfully submits this Supplemental Submission Regarding Standard of Review, pursuant to the Utah Public Service Commission's (the "Commission") October 20, 2010, Interim Order.

ARGUMENT

Union Pacific limits its response to the scope of the Commission's jurisdiction and discretion to review the decision of the Utah Department of Transportation ("UDOT") that the railroad-grade crossing at 400 North in Vineyard, Utah (the "Crossing"), is public. Union Pacific does not comment on whether UDOT is owed deference with respect to its interpretation of rules that might relate to temporary closure of railroad crossings, or with respect to its decision that the Crossing was unsafe.

1. *Under the Legislature’s Broad Grant of Jurisdiction and Discretion, the Commission Has Authority to Determine If UDOT’s Decision Was Correct*

The relevant statutory grant of jurisdiction and discretion to the Commission is broad and without exception and supports a *de novo* standard of review. The state appellate courts have jurisdiction to review “all final agency action resulting from formal adjudicative proceedings.” Utah Code Ann. § 63G-4-403. When a decision of the Commission resulting from a formal adjudicative proceeding is appealed, the Utah Administrative Procedures Act (“UAPA”) provides that:

The appellate court shall grant relief only if, on the basis of the agency’s record, it determines that a person seeking judicial review has been substantially prejudiced by any of the following:

- (a) the agency action, or the statute or rule on which the agency action is based, is unconstitutional on its face or as applied;
- (b) *the agency has acted beyond the jurisdiction conferred by any statute;*
- (c) the agency has not decided all of the issues requiring resolution;
- (d) *the agency has erroneously interpreted or applied the law;*
- (e) the agency has engaged in an unlawful procedure or decision-making process, or has failed to follow prescribed procedure;
- (f) the persons taking the agency action were illegally constituted as a decision-making body or were subject to disqualification;
- (g) *the agency action is based upon a determination of fact, made or implied by the agency, that is not supported by substantial evidence when viewed in light of the whole record before the court;*
- (h) the agency action is:
 - (i) *an abuse of the discretion delegated to the agency by statute;*

- (ii) contrary to a rule of the agency;
- (iii) contrary to the agency's prior practice, unless the agency justifies the inconsistency by giving facts and reasons that demonstrate a fair and rational basis for the inconsistency; or
- (iv) otherwise arbitrary or capricious.

Id. (emphasis added).

The standard of review that would be applied by an appellate court on appeal sheds some light on the scope of the Commission's decision making power under Section 54-4-15 of the Utah Code. As the UAPA makes clear, the Commission must act within the jurisdiction and discretion conferred upon it by statute. Further, it must correctly interpret and apply law, and its factual findings must be supported by substantial evidence.

First, the Commission must act within the jurisdiction and discretion conferred upon it by the applicable statute. In this case, the applicable statutory grant of jurisdiction and discretion to the Commission is broad. Under Section 54-4-15 of the Utah Code, the Commission "retains exclusive jurisdiction for the resolution of any dispute upon petition by any person aggrieved by any action of the department [of transportation] pursuant to this section" This is broad language that does not include any exceptions or limitations. It indicates the intent of the Legislature to grant to the Commission all power and authority necessary to resolve any dispute brought by a person aggrieved by an action of UDOT.

Second, the Commission must correctly and consistently interpret and apply law. This requirement necessarily implies that the Commission has the power to make legal conclusions. There is no indication in Section 54-4-15 that the Commission should defer to UDOT's conclusions of law. Thus, the Commission has the power to determine the proper legal standards

that should be applied to resolve the instant dispute, and to interpret and apply those standards, without regard for any legal conclusions UDOT may have made.

In deciding that the Crossing is public, UDOT did not apply or interpret any of its own rules. Instead, testimony at the hearing showed that UDOT agrees that the standards and guidelines set forth by Union Pacific are the appropriate standards and guidelines that should be followed to determine whether the Crossing is private or public. These standards and guidelines were not promulgated by UDOT, or by the Legislature for UDOT's interpretation and application. Therefore, any question as to whether UDOT's interpretation of its own rules should be given deference is not applicable to the decision whether the Crossing is private or public.

Finally, the Commission's factual findings must be supported by substantial evidence in the record before the Commission. Importantly, this requirement is focused on the facts in the record created by the proceedings before the Commission, including the hearing. It is not focused on the facts as found by the agency whose decision the Commission is reviewing. Accordingly, the plain language of the UAPA makes clear that the Commission has authority to hear evidence and to make findings of fact based on substantial evidence in the record. There is no indication that the Commission is obligated to defer to the factual determinations of the agency whose decision is being reviewed. Thus, in this case, the Commission is not obligated to defer to any factual determinations UDOT made in the course of deciding that the Crossing is public.

Under the UAPA, then, within the scope of the jurisdiction and discretion granted to it by the Legislature, the Commission's decision will not be overturned if it correctly and consistently interprets and applies law, and if its factual findings are supported by substantial evidence in the

record. Because Section 54-4-15 contains no exceptions or limitations, there is no support for the conclusion that the Commission owes deference either to UDOT's legal determinations or to its factual determinations. Instead, under Section 54-4-15, the Commission has the power and authority necessary to resolve disputes.

The Commission's decision In the Matter of an Appeal to I Road Closure in Draper appears to be the authority most closely on point. That decision addressed a railroad-grade crossing closure. It did not, however, consider the effect of the precise grant of jurisdiction and discretion contained in Section 54-4-15, or the light shed on the Commission's authority by the UAPA. In its decision, the Commission noted separate standards of review urged by the opposing parties. The Commission rejected the proposed "arbitrary and capricious" standard of review and applied a "reasonable and rational" standard of review. Report & Order, Docket No. 05-999-02 at 5 (May 27, 2005).

After the further research ordered by the Commission, Union Pacific believes that the Commission has authority to determine whether UDOT's decision that the Crossing is public was *correct*. Aside from the Commission's decision in the Draper crossing closure case, there appears to be no support for a more limited interpretation of the Commission's authority. Likewise, there appears to be no support for the conclusion that the Commission owes any degree of deference to UDOT. However, with due respect for the Commission's own precedent, it appears that, if a *de novo* standard is not applied, no more deferential standard than the "reasonable and rational" standard should be. In other words, while the Draper decision constitutes some authority for application of a "reasonable and rational" standard of review, there is no support for the more deferential "arbitrary and capricious" standard of review, since that standard was rejected in the Draper decision.

2. *Under Any Standard of Review, UDOT's Determination that the Crossing Is Public Should Be Reversed*

The Commission should reverse UDOT's decision no matter what standard of review it applies. UDOT's determination that the Crossing is public is neither correct nor reasonable and rational.

UDOT's decision that the Crossing is public is not legally correct. The Utah Supreme Court held in *Bamberger Electric R. Co. v. Public Utilities Commission of Utah* that "the real test of whether a roadway or crossing is private or public consists in that any one of the public having the right of passage may compel its remaining open and unobstructed." 204 P. 314, 319 (Utah 1922). It is undisputed that the public road on the east, or Geneva, side of the Crossing was vacated and abandoned in 1942. Trans. Vol. II at 19. After that time, the Crossing was not open to the *general* public, but was used as an access to private commercial property. See Union Pacific's Post-hearing Position Statement, Section A(1); Trans. Vol. II at 163. UDOT's decision that the Crossing is public, therefore, fails the "real test." Since 1942, no member of the public has had the right to compel the road into the Geneva plant site to remain open and unobstructed.

This is made clear by the undisputed fact that the property has been fenced and has had a gate at the entrance bearing a "No Trespassing" sign that has been locked at various times. UP/UDOT Joint Ex. 154. UDOT's Chief Engineer, Eric Cheng, testified, referring to the photo at UP/UDOT Joint Ex. 154, "I think everyone would agree with me, if you see this, you know this is a private crossing. And based on my prior knowledge, if the road goes to a private property, it's a private crossing." Trans. Vol. II at 129. This conclusion is consistent with the *Bamberger* case.

Further, UDOT's decision was not reasonable and rational. Mr. Cheng testified that the standards set forth by Union Pacific are the appropriate, applicable standards that should be

applied to determine whether the Crossing is public or private. Trans. Vol. II at 179-80. Mr. Cheng further testified that application of the relevant standards leads to the conclusion that the Crossing is *private*. Trans. Vol. II at 129, 131, 164. It is undisputed that UDOT's decision that the Crossing is public was not based on application of any standards. Instead, the decision was the product of an effort to find a compromise that would address the disparate interests of Union Pacific, the Town of Vineyard, and Anderson Geneva. Trans. Vol. II at 143, 165-66, 181. A decision contrary to applicable standards made for political exigency is not reasonable and rational and cannot stand.

CONCLUSION

The Commission should determine whether UDOT's decision that the Crossing is public was correct. However, under any standard of review, UDOT's decision, which is contrary to applicable standards, should be reversed.

DATED this 24th day of November, 2010.

Reha Kamas
Attorneys for Union Pacific

Certificate of Service

I hereby certify that on the 24th day of November, 2010, a true, correct and complete copy of the foregoing was served upon the following attorneys in the manner indicated below:

Dennis M. Astill	<input type="checkbox"/>	U.S. Mail
Dennis M. Astill, PC	<input type="checkbox"/>	Hand Delivered
9533 South 700 East, Suite 103	<input checked="" type="checkbox"/>	E-mail
Sandy, UT 84070	<input type="checkbox"/>	Facsimile
<i>Counsel for Anderson Geneva</i>	<input type="checkbox"/>	No Service
David L. Church	<input type="checkbox"/>	U.S. Mail
Blaisdell and Church	<input type="checkbox"/>	Hand Delivered
5995 Redwood Road	<input checked="" type="checkbox"/>	E-mail
Salt Lake City, UT 84123	<input type="checkbox"/>	Facsimile
<i>Counsel for Town of Vineyard</i>	<input type="checkbox"/>	No Service
Bruce Jones	<input type="checkbox"/>	U.S. Mail
UTA	<input type="checkbox"/>	Hand Delivered
3600 South 700 West	<input checked="" type="checkbox"/>	E-mail
Salt Lake City, UT 84119-4122	<input type="checkbox"/>	Facsimile
<i>Counsel for UTA</i>	<input type="checkbox"/>	No Service
Renee Spooner, Assistant General Attorney	<input type="checkbox"/>	U.S. Mail
4501 South 2700 West	<input type="checkbox"/>	Hand Delivered
Box 148455	<input checked="" type="checkbox"/>	E-mail
Salt Lake City, UT 84114	<input type="checkbox"/>	Facsimile
<i>Counsel for UDOT</i>	<input type="checkbox"/>	No Service
