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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)	JOINT SUPPLEMENTAL POST
Department of Transportation)	HEARING BRIEF OF VINEYARD
)	TOWN AND ANDERSON ENTITIES
)	REGARDING STANDARDS OF
)	REVIEW
)	
)	DOCKET NO. 09-888-01

Vineyard Town, and Anderson Geneva, LLC, Ice Castle Retirement Fund L.L.C., and Anderson Geneva Development, Inc. (collectively "Anderson entities"), jointly submit this Supplemental Post-Hearing Brief Regarding Standards of Review for decisions made by UDOT.

Pursuant to the Interim Order for Supplemental Post-Hearing Briefing, Vineyard Town and Anderson entities submit this post-hearing brief to address the specific issues, (1) the standard of review the Commission should follow in resolving disputes arising out of an action of UDOT; and (2) the deference the Commission should give UDOT as UDOT interprets its own rules or enable statutes. The Commission specifically requested analysis over what deference should be given when UDOT purports to distinguish between so-called "temporary closures" or "permanent closures".

POINT 1. IN ALL AGENCY ACTIONS, COURTS OR APPELLATE AUTHORITIES SHOULD GRANT NO DEFERENCE TO AN AGENCY IN ITS INTERPRETATION OF LAW ABSENT A SPECIFIC GRANT OF DISCRETION IN AN ENABLING STATUTE.

- A. If an agency is provided a grant of discretion in an enabling statute by the Legislature, the appellate authority should give the agency deference in its interpretation of the statute where deference is granted, such that the decision of the agency must be reasonable and rational in light of the language and intent of the statute.

The case of Semeco Industries, Inc. v. Utah State Tax Commission, 849 P.2d 1167 (Utah 1993), is a rather uninteresting case which, in the majority decision, makes no statement as to what standard of review should be applied in an administrative action. The majority decision merely agrees with the decisions of the Tax Commission. However, the dissent provided by Justice Durham provides an excellent treatise on the standards of review of agency actions post-UAPA (Utah Administrative Procedures Act), Utah Code Annon. §§ 63-46(b)-1 to -22. (now 636-4-101, et. seq.) Although the original UAPA has been amended and recodified, the relevant section discussed by Justice Durham §63-46(b)-16) has been replaced by § 63-G-4-403 and in all respects is the same as previous section. The applicable provision of § 63-G-4-403(4) are as follows:

(4) 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.

Pursuant to the discussion of Justice Durham, for appeals regarding matters governed under subsections (4)(a) through (4)(f), the standard for review is “correction of error”, meaning no deference is given to the agency for the exercise of agency discretion. For allegations of error with regard to subsections (4)(g) and (4)(h), the standard of review is “reasonable and rational”. As highlighted by Justice Durham, this is the same as the so-called intermediate standard referred to in prior case law. According to Justice Durham, all the review standards from pre-UAPA case law have been altered because the legislation has been construed to in part modify and codify the standards of review. As authority for these statements, the following cases are cited by Justice Durham, Questar Pipeline v. Tax Commission, 817 P.2d 316 (Utah 1991); Savage Industries v. Tax Commission, 811 P.2d 664 (Utah 1991); Bennion v. ANR Production Co., 819 P.2d 343 (Utah 1991); Morton International, Inc. v. Auditing Division, 814 P.2d 581 (Utah 1991).

With regard to § 63-G-4-403(4)(g), Justice Durham cites First National Bank of Boston v. Salt Lake County Board of Equalization, 799 P.2d 1163 (Utah 1990), in which it was held that the reviewing court should “consider the evidence that supports the . . . factual findings and the evidence that detracts from the findings.” at 1165. That case now requires that an agency’s findings of fact must be supported by substantial evidence and the court must determine if the findings of fact as applied to the law are reasonable and rational. Conclusions based on the evidence must be supported by substantial evidence based on the record as a whole.

In the Morton case, the phrase “intermediate deference” was determined to no longer be an appropriate standard solely because the agency has expertise or experience regarding an issue. The abuse of discretion standard or the intermediate standard is only appropriate under § 63-G-4-

403(4)(h)(i) when the agency is exercising discretionary powers delegated to it by statute.

Justice Durham's interpretation of subsection (4)(h)(ii) requires the intermediate standard or the reasonable and rational test in considering an agency's failure to follow its own rules. The rationale is that courts should uphold agency rules if they are reasonable and rational; therefore, courts should also uphold reasonable and rational departures from agency rules. However, if there is a departure, the agency must demonstrate a fair and rational basis for the departure from the rule. This shifts the burden of persuasion from the petitioner, as is often the case, and requires the agency itself to demonstrate the reasonableness and rationality of its departure from the rule.

Justice Durham further interpreted the phrase "arbitrary and capricious" in subsection (4)(h)(iv) as meaning that the agency must act reasonably and rationally, the same as all other provisions of subsection (4)(h).

The following points will apply the foregoing standards and demonstrate conclusively whether or not UDOT has met the requirements outlined by Justice Durham and the case law cited in Semeco. Although Justice Durham was writing a dissent, her reference to the case law supporting her analysis remains determinative and instructive in applying the law. (For ease of the Administrative Law Judge, the Semeco case and others cited herein are attached.)

POINT 2. THE DECISION OF UDOT THAT THE CROSSING IS A PUBLIC CROSSING MUST BE REVIEWED UNDER THE REASONABLE AND RATIONAL TEST.

Section 54-4-15, Utah Code, provides at subparagraph (1) that ". . . no track of a railroad may be constructed across a public highway without the permission of the Department of Transportation . . . upon such terms and conditions as it prescribes." Subparagraph (2) provides,

The Department shall have the power to determine and prescribe the manner, including the particular point of crossing, and the terms of installation, operation, maintenance, use, and protection of . . . each crossing of a public road or highway by a railroad . . ., and to alter or

abolish any such crossing, to restrict the use of such crossings . . .

Subparagraph (3) provides,

Whenever the Department shall find the public convenience and necessity demand the establishment, creation or construction of a crossing of a street or highway over, under or upon the tracks or lines of any public utility, the Department may by order, decision, rule or decree require the establishment, construction or creation of such crossing, and such crossing shall thereupon become a public highway and crossing.

Using the rules outlined by Justice Durham in Semeco, it seems clear that UDOT has been given discretionary authority to grant highway crossings to railroads, establish a new public crossing, and by implication, to determine whether a public crossing exists. In examining the statute to determine whether discretionary authority was granted to UDOT, we find in subparagraph (1) the phrase “upon such terms and conditions as it prescribes” is an express grant of discretion to UDOT. In subparagraph (3), phrases such as “whenever the Department shall find” and “the Department may, by order, decision, rule or decree require” are grants of discretion. In subparagraph (2), phrases such as “shall have power to determine and prescribe”; “terms of installation, operation”; and “to restrict use” grant discretionary authority. Because the discretion of UDOT is implicit and explicit in these provisions, based upon the rules outlined in Semeco, UDOT’s decision that the “crossing” is a public crossing can only be overturned if UDOT’s decision is not rational and reasonable, or there was not substantial evidence.

As has already been demonstrated in Vineyard Town and Anderson entities Joint Post-Hearing Brief (“Joint Post-Hearing Brief”), there is substantial evidence to support the finding that a public crossing exists, there is sufficient law to support the existence of a public crossing, and that public convenience and necessity require a public crossing. A review of pages 5-11 of the Joint Post-Hearing Brief shows that the public crossing existed in 1942 and continued thereafter, and that all parties to this matter, including the Petitioner, Union Pacific, treated it as such until this proceeding was initiated.

Based on the foregoing case law, the decision of UDOT confirming the existence of a public crossing was reasonable and rational. The evidence and law provided to UDOT in the first instance, and to the Commission, support UDOT's decision as being reasonable and rational. The Commission should affirm UDOT's decision.

POINT 3. IN CONSIDERING THE FAILURE OF UDOT TO CONDUCT A SURVEILLANCE REVIEW, THE STANDARD OF REVIEW REQUIRES THAT THE AGENCY DECISION MUST BE "REASONABLE AND RATIONAL", UNLESS THE COMMISSION IS IN AS GOOD A POSITION AS UDOT TO INTERPRET THE RULES. IN THE LATTER CASE THE STANDARD OF REVIEW IS "CORRECTION OF ERROR" AND NO DEFERENCE IS GIVEN TO THE AGENCY.

For matters clearly within the statutory and regulatory framework in which UDOT has been given discretion, the standard of review for UDOT's interpretation of its rules is whether or not the interpretation and decisions of UDOT are "reasonable and rational". However, when the Commission is in as good a position as the agency to review the plain language of the Statute or Rule, no deference need be given to UDOT.

A. UDOT Abused its Discretion by Ignoring Rule R930-5-7.

Rule R930-5-7 was violated by UDOT when UTA proposed to UDOT to construct new rail over the Crossing and no surveillance review was done. It was also violated by UDOT when Vineyard Town and Anderson entities requested a surveillance review. It was further violated in several other substantive provisions which are relevant to the decision made to close the Crossing.

Rule R930-5-7 provides in relevant parts, the following:

R930-5-7(1) provides at line 15 ". . . the Team [*referring to the Diagnostic Surveillance Review Team*] reviews railroad crossings when requested by local agencies or when railroad traffic is proposed to significantly increase".

R930-5-7(4)(a) imposes duties on the Chief Railroad Engineer (i) to notify members of

the Surveillance Review Team to attend a review; (ii) to conduct reviews and issue reports within two weeks of the review; (iii) to establish requirements for alignments and signals (active and passive signals); (iv) to initiate all Notices of Intended Actions for railroad projects; and (v) to obtain the necessary field data.

R930-5-7(4)(d), requires the local agency (*Vineyard Town*) to provide traffic volumes, proposed road construction, the approved road master plan for the town, and other pertinent data, as a part of the Surveillance Review.

R930-5-7(5) provides further that when a new railroad is to cross a highway, “the Department will consider the new crossing in conformance with § 54-4-15, Utah Code. Public notice will be made in conformance with R930-5-14.” Additionally, it is required under that same subsection that all of the costs of any required improvements be made by the new railroad.

The language of the foregoing sections is mandatory language. UDOT admits that the surveillance review was not performed in this instance.

Using the Semeco analysis and other cases cited herein and therein, we acknowledge that UDOT has discretion to interpret its own regulations. However, the Supreme Court has ruled that where the provisions of a statute are clear on their face, no deference is given to the agency. See LPI Services v. Utah Labor Commission, 2009 UT 41; 215 P.3d 135 (Utah 2009) and Union Pacific R.R. v. Auditing Div., 842 P.2d 876 (Utah 1992). The Court has also plainly stated that administrative rules are interpreted in the same manner as statutes. In Sierra Club v. Air Quality Board, 2009 UT 76; 226 P.3d 719 (Utah 2009), the Supreme Court stated

We review administrative rules in the same manner as statutes, focusing first on the plain language of the rule . . . [omitting citation]. In our inquiry, we seek to give effect to the intent of the body that promulgated the rule. When such intent is not clear from the plain language, we may rely on the administrative history of the rule to guide our interpretation.

Id at page 725.

Applying the above rules, the decision of UDOT to ignore its own rule and fail to conduct a surveillance review cannot be supported. The plain language of the Rule simply requires the action. UDOT did surveillance reviews of all other crossings in regard to the UTA Commuter Rail South project. It has failed and refused to do so in this instance. This is not an instance such as was found in LPI Services v. Labor Commission, or Union Pacific v. Tax Commission, supra, where the court found two reasonable interpretations of statute and rule and therefore affirmed the interpretations of the agencies. Here, the language is plain. There is only one reasonable interpretation of the Rules. The surveillance review was required and UDOT failed and refused to perform a review.

While agencies may have some discretion to depart from their rules, the departure from the rule must be reasonable and rational. This means that the agency must offer some reasonable and rational explanation. See Semeco, where Judge Durham's dissent discussed provision of 4(h)(iii) of UAPA. There she concludes that the agency has the burden of persuasion to establish a reasonable basis where it departs from its own rules.

Where no explanation is given by UDOT for failing to conduct the surveillance review, it follows there is no reasonable and rational basis for the decision. This is especially true where a closure of a public road is being considered, or new railroad tracks are being added to a crossing. Having the quantitative and qualitative analysis of the crossing, the changes necessary for the addition of tracks, the traffic volumes, the type and quality of road, etc., are all provided as a part of the surveillance review. The rule clearly contemplates the importance of obtaining all of this information in making decisions regarding a crossing. It cannot be considered reasonable or rational to refuse to conduct a surveillance review and thereby avoid gathering information that is crucial to decision making with regard to the Crossing.

Considering the foregoing rules with the evidence, The Court must consider Joint Exhibits 119 and 120 offered by UDOT and Union Pacific. The Exhibit acknowledges that Surveillance Reviews were conducted with regard to many other railroad/highway crossings. The letter describes the specific construction requirements of UTA with regard to improvements to be made at all such crossings on the Commuter Rail South project. The failure to conduct a Surveillance Review in this instance was arbitrary and capricious and no amount of deference to the agency can to support UDOT's actions.

B. The “correction of error” standard of review applies with regard to interpretation of subsections R930-5-7(5) and R930-5-14.

Rules R930-5-7(5) and R930-5-14(1), Utah Administrative Code, each contain language requiring public notice be given in certain events. Under subsection R930-5-7(5), when new railroad tracks are being considered over a public highway, notice to the public must be given pursuant to Utah Code 54-4-15, and under Rule R930-5-14. Subsection Rule R930-5-14 provides in pertinent part that public notification is required when “the Department is considering proposals to close public streets at crossings, the removal of tracks at crossings, the addition of tracks at crossings . . .” The Rule further states that upon request, a public hearing will be required. It has been shown that requests were made by Vineyard Town and Anderson entities to conduct a surveillance and to provide public notice. UDOT ignored those requests without explanation.

UDOT now argues that the language of R930-5-14 requires public notice and hearing only if the proposal to close the public road is “permanent” and not “temporary”. UDOT acknowledges that there is no language in the Rule to differentiate temporary closings from permanent closings. Instead, it argues that deference should be given to interpret it's rules. However, UDOT has offered no explanation for its failure to provide public notice in regard to

UTA's proposed addition of new railroad tracks over the Crossing. UTA proposes to add new tracks over the Crossing, drastically changing the dimensions and Crossing geometry, and adding up to 80 new high speed trains per day. This compares to 8-20 freight trains per day operating at 50 miles per hour.

(1) UDOT's "Temporary Closing" Rule Amounts to More than a Mere Interpretation of its Rules; It is the Creation of a New Material Exception to the Rule. While we can agree that generally UDOT has reasonable discretion to interpret its rules and even depart from its rules when there is a reasonable and rational basis for the departure, where the plain meaning of the Rule can be discerned by the reviewing appellate authority, no deference is given to the agency and therefore, the Commission must review the Rule based on its plain meaning. Further, if the plain meaning of the Rule can be discerned from the language of the Rule, no further rules of interpretation need be utilized (See LPI, supra).

In LPI, supra, the Court was considering two separate and reasonable interpretations of the phrase "other work reasonably available", in the context of work being available to an applicant for worker's compensation benefits. The Court in that case affirmed the Commission's interpretation where the language was ambiguous and there were two reasonable interpretations of the statute.

Since the Commission is in as good a position as UDOT to read and interpret the Rules, no deference need be given to UDOT. No reading of the plain language of the Rules cited above gives any consideration for "temporary" closings. Further, no reading of the Rules can justify a failure of notice where new railroad tracks are being added to the Crossing.

The Commission must review the Statute and Rule in consideration of legislative intent and the substantial rights of the parties. The parties rights, concerns and interests may be summarized as follows:

UDOT CONCERNS:

- 1) the agency tasked by the legislature with safe operation, opening and closing of crossings.
- 2) adoption of and compliance with reasonable engineering standards in construction of crossings.
- 3) proper maintenance and operation of crossings.
- 4) determining and providing for adequate transportation needs for communities as they affect or are affected by crossings.
- 5) proper and reasonable railroad operations where travel over or across public roads is necessary.

UNION PACIFIC INTERESTS

- 1) safe travel at crossings.
- 2) costs to maintain signals and equipment at crossings.
- 3) efficient operation of trains.
- 4) liability to motorists and pedestrians at crossings.
- 5) avoidance of delays or obstructions to train travel.

VINEYARD TOWN

- 1) reasonable access and safe travel through the community.
- 2) avoidance of obstructions for motorists and pedestrians.
- 3) access to specific parcels of land or structures.
- 4) safe travel at crossings.
- 5) liability and risk to motorists and pedestrians at crossings.
- 6) maintenance requirements for roads, signs and signals at crossings.

PUBLIC AT LARGE AND VINEYARD RESIDENTS AND LANDOWNERS

- 1) reasonable access and safe travel through the community.
- 2) avoidance of obstructions for motorists and pedestrians.
- 3) access to specific parcels of land or structures.
- 4) safe travel at crossings.
- 5) risks to motorists and pedestrians at crossings.
- 6) maintenance requirements imposed on members of the public.

The foregoing are probably only a few of the most important considerations. However, they are illustrative of the important concerns of each entity that must be considered. The Rules were adopted to consider the foregoing interests of all of the parties. What UDOT now argues for is a special exception to Rule R930-5-14 and R930-5-7, apparently to be applied to this

Crossing only. In other words, rules that have been in existence for many years without a specific exception for temporary closings is now being created by UDOT for this case, without being subject to the rule making process.

(2) A Special Exception to the Rule for This Case is Unnecessary.

The only basis offered by UDOT for its temporary closure exception is concern over safety at the Crossing. UDOT alleges that because it has responsibility for safety of Crossings, it has power to “temporarily” close them if they are deemed unsafe. Without addressing the merits of this claim, we look first to UDOT Rules to see if these concerns are otherwise addressed.

Rule R907-1-14 Emergency Orders, Utah Administrative Rules, provides emergency powers to UDOT to temporarily close roads in emergency circumstances. R907-1-14 provides as follows:

R907-1-14. Emergency Orders.

Emergency orders will be issued in accordance with the following guidelines: notwithstanding the other provisions of these Rules, the Director or any member of the Transportation Commission is authorized to issue an emergency order without notice and hearing in accordance with applicable law. The emergency order shall remain in effect no longer than until the next regular meeting of the Transportation Commission, or such shorter period of time as shall be prescribed by statute.

(1) Prerequisites for Emergency Order. The following must exist to allow an emergency order:

- (a) The facts known to the Director or Commission member or presented to the Director or Commission member show that an immediate and significant danger to the public health, safety, or welfare exists; and
- (b) The threat requires immediate action by the Director or Commission member.

(2) Limitations. In issuing its Emergency Order, the Director or Commission member shall:

- (a) Limit its order to require only the action necessary to prevent or avoid the danger to the public health, safety, or welfare;
- (b) Issue promptly a written order, effective immediately, that includes a brief statement of findings of fact, conclusions of law, and reasons for the Director or Commission member's utilization of emergency adjudicative proceedings;
- (c) Give immediate notice to the persons who are required to comply with the order; and
- (d) If the emergency order issued under this section will result in the continued infringement or impairment of any legal right or interest of any party, the Director shall commence a formal adjudicative proceeding before the Director in accordance with

R907-1.

As set forth above, there are several prerequisites. First, only the Director may issue such an order. Second, if an order is issued, it must be limited in scope. Third, there must be a written order with a statement of findings of fact, conclusions of law, and reasons for the order. Finally, the Director must commence a formal adjudicative proceeding if there is an impairment of legal rights or interests. If UDOT in fact believed there was an exigent circumstance which required an immediate closure of the Crossing to protect the public safety, the process has been established under this Rule. It is also instructive to note that UDOT recently adopted a significant re-write of R930-5-1, et.seq. The provisions for notice are now found in subsection R930-5-13. The provisions for notice are not materially changed and there is no exception for temporary closing of crossings.

The Commission must read the rules regarding crossings, together with other rules governing UDOT and its roadway responsibilities, and emergency road closures. The closure of a crossing constitutes a road closure. R907-1-14 assumes discretionary emergency powers to UDOT for temporary closures of roads; and UDOT has not adopted any special “temporary” closure exceptions in R930-5-7 and -14. It must be presumed that UDOT was aware that it already had a rule governing temporary emergency road closures and therefore felt no need to adopt a temporary road closure exception to its rules in Section R930-5.

None of the rules were complied with by UDOT. The Commission’s standard of review is “correction of error”. The Commission must reverse the order for temporary closure as an abuse of discretion by UDOT, and remand the matter to UDOT for proper notice and hearing.

POINT 4. THE FAILURE TO FOLLOW AGENCY RULES GOVERNING PROCEDURAL DUE PROCESS IS A MATTER OF GENERAL LAW AND THE STANDARD OF REVIEW IS “CORRECTION OF ERROR”, WITH NO DEFERENCE GIVEN TO THE AGENCY.

As a general proposition, where questions of general law are at issue, no deference is

given to the agency. In Tollman v. Salt Lake County Attorney, 818 P.2d 23 (Utah App. 1991), the Court held that questions of due process were matters for the Court to decide without deference to the agency.

Rules R930-5-7 and -14 contain procedural rules. To close a public road/railroad crossing, UDOT must give notice to the public and hold hearings if requested. To allow new railroad tracks to cross a public road, UDOT must give notice to the public and hold hearings if requested. While the hearings may be informal, the requirement for notice and hearings cannot be ignored. In Tollman, *supra*, and Department of Community Affairs v. Utah Merit System Council, 614 P.2d 1259 (Utah 1980), procedural and evidentiary errors occurred in the process of administrative hearings, which errors were sufficiently serious to constitute due process violations. Procedural rules of the agency were ignored. The Courts in those cases refused to allow deference to the agency because due process is a matter of general law. The Court in both instances ordered that the cases be remanded to the agency for re-hearing.

In this instance, UDOT refused to even provide notice and opportunity for hearing. If procedural and evidentiary matters at a hearing are sufficiently serious to be due process violations, the failure to provide notice and conduct a hearing, even after requested, is even more serious.

Pursuant to Rule R907-1-14, to issue an emergency order to close a road, the Director of the Department (not Eric Cheng), must make findings of fact and conclusions of law, and immediately initiate a formal hearing process within the Department. Again, these procedural due process requirements were not met, forcing Vineyard Town and Anderson Entities to initiate these proceedings.

Without notice and opportunity to be heard, UDOT has closed a public road and taken apparent action to allow construction of new railroad tracks at a public crossing. This case is far

worse than Tollman or Department of Community Affairs, or similar cases cited herein. In those cases the parties were at least afforded hearings and notices of their rights were given. In this instance, UDOT simply failed and refused to abide by the mandatory language of its rules and procedures and refused to follow any due process requirements. Based upon due process requirements, the Commission must reverse the order for temporary closure and remand the matter to UDOT to provide public notice, Surveillance Review, and hearings if requested.

POINT 5. WHEN CONSIDERING THE FACTS TO SUPPORT ITS DECISIONS, THERE MUST BE SUBSTANTIAL EVIDENCE AND THE CONCLUSIONS DRAWN FROM THE FACTS MUST BE REASONABLE AND RATIONAL. UDOT'S ALLEGATIONS OF SAFETY CONCERNS AND ITS CONCLUSIONS TO SUPPORT A DECISION FOR TEMPORARY CLOSURE ARE NOT SUPPORTED BY SUBSTANTIAL EVIDENCE AND ARE NOT REASONABLE.

Without a scintilla of quantitative analysis, and without following its own rules and procedures, UDOT has alleged safety of the Crossing to justify its exercise of discretion to “temporarily” close the Crossing. While UDOT’s concern for safety at the Crossing is laudable, and Vineyard Town and Anderson entities support efforts to provide a safe crossing, the actions of UDOT are not reasonable and rational under the standard of law. Without regard to procedural due process, the evidence before us is not substantial and does not support the conclusion that safety issues require the Crossing to be closed. There must be “substantial evidence” to support the decision of the agency and the conclusions drawn therefrom must be reasonable and rational.

A review of the operative facts here does not support an emergency order under UDOT Rule R907-1-14. The relevant, and undisputed, facts are as follows:

1. Eric Cheng, Chief Railroad Engineer for UDOT first became aware of the crossing, and actually visited the crossing, prior to April 4, 2008 (Transcript vol 2, p. 126, ln 17-25; p. 127, ln 1-4) (see also UDOT/UP Joint Exhibits, 119 and 120—UDOT ltr 4/4/08).

2. Prior to February 25, 2009, Mr. Cheng acknowledges meeting at the Vineyard Town offices and visiting the Crossing. (Transcript vol 2, p. 133, ln 5-17).

3. After the meeting at Vineyard Town, and prior the July 13, 2010 letter from Mr. Cheng, ordering a temporary closure, Mr. Cheng met separately with UP and UTA at the Crossing. (Transcript vol 2, p. 134, ln 7-25).

4. Mr. Cheng stated in his testimony as the basis for UDOT's decision to temporarily close the Crossing "that because U.P. has a liability issue, they (UDOT) could take out the liability by closing it. We don't deal with risk." (Transcript vol 2, p. 143, ln 17-25; p. 144, ln 1). The risk referred to was not a safe crossing risk, but liability risk to U.P. by having an at grade crossing in its path.

5. Mr. Cheng made no effort to analyze the physical conditions that existed at the Crossing, other than to stand at the Crossing and observe that there was a fence on the east boundary of the Crossing. Mr. Cheng was unaware that a road existed on the east side of the Crossing because he did not go in and observe it. (Transcript vol 2, p. 200, ln 20-23).

6. Mr. Cheng did not measure the distance from the right-hand turn on the road to the edge of the rail or the edge of the crossing arms. (Transcript vol 2, p. 204, ln 4-9).

7. Scott Hendricks, a professional engineer with 15 years of traffic engineering experience presented a report and testified to engineering and MUTCD safety standards that applied to the Crossing. His report clearly delineated the quantitative and qualitative analysis he conducted at the Crossing and the clear engineering and railroad safety standards he applied in coming to his conclusions with regard to the Crossing.

8. Mr. Hendricks considered the 60 year safety record for the Crossing as being informative.

9. Mr. Cheng on the other hand reflected that 60 years of safe operation was no

indication of a safe crossing.

To be fair, Mr. Cheng testified at length about theories applicable to the Crossing. He also stated that all crossings are inherently unsafe. But without the quantitative analysis, it is difficult to put any meat on the bones of a theory. Although much was said in testimony by Mr. Cheng and Mr. Marshall about the MUTCD standards which define public highway/railroad crossings, neither Mr. Marshall nor Mr. Cheng made any quantitative analysis of the Crossing, and made no attempt to apply MUTCD engineering standards to the Crossing.

To summarize from the foregoing, for at least 15 months after Mr. Cheng observed the conditions at the Crossing, he did nothing and did not express alarm. Mr. Cheng issued a letter on February 25, 2009, making the decision that the Crossing was a public crossing, but he continued to be unalarmed and failed to analyze the Crossing for any exigent safety concerns. Mr. Cheng conducted no quantitative analysis of the Crossing and made no analysis under MUTCD engineering standards. He was unaware that a roadway existed on the east side of the Crossing because he failed to conduct a Surveillance Review. He was unaware of any traffic counts for the Crossing for the same reasons.

The most benevolent view of Mr. Cheng's fact-finding would be to consider his visits to the Crossing as a "drive-by" analysis. Admittedly he is experienced. But Exhibits 119 and 120 described above, make it clear that much more consideration was put into other highway crossings. Nevertheless, his drive-by analysis of the Crossing was offered as sufficient to substantiate the temporary closure of the Crossing. It is unclear when, after more than 15 months, Mr. Cheng decided the Crossing was so dangerous it must be closed.

This is not "substantial evidence". If not, then the conclusions of UDOT cannot be considered reasonable and rational. In First National Bank of Boston v. Salt Lake County Board of Equalization, 799 P.2d 1163, 1165 (Utah 1990), the Court held that subsection (4)(g) (UAPA)

required the reviewing court to "consider both the evidence that supports the . . . factual findings and the evidence that detracts from the findings." The Court explained that substantial evidence "is that quantum and quality of relevant evidence that is adequate to convince a reasonable mind to support a conclusion." *Id.*

Unfortunately at this point, we have no idea what factual findings were relied on by UDOT since it failed to hold any hearing or provide findings of fact or conclusions of law. If we can judge by the testimony offered at the hearing, there was no quantitative analysis of the Crossing. The most that can be said in favor of UDOT's analysis is that Mr. Cheng observed at one point the Crossing with a gate and "no trespassing" sign on the east boundary of the Crossing, and at another time he observed an open gate but did not know what was beyond the east boundary of the Crossing, and he failed to inquire. It took more than 15 months for Mr. Cheng to decide that the Crossing was sufficiently dangerous to close. Of course, this was after UTA installed new track and removed signals necessary to render the Crossing safe. These facts, along with the inherent danger of all crossings were sufficient for UDOT.

On the other hand, Mr. Hendricks did a quantitative analysis of the Crossing. He measured all of the relevant distances and engineering questions. He considered and measured site distances, angles of view, merging of traffic, signals and warning devices at the crossing, considered all aspects of the Crossing, applied MUTCD engineering standards and principles; and not surprisingly, arrived at different conclusions and recommendations for safety enhancements, to bring the Crossing up to current standards. He testified that the Crossing was not unsafe at the time (at least prior to installation of the new UTA railroad tracks).

If there were sufficient concerns within UDOT to justify an emergency order, then it seems odd that there was no decision to close the Crossing for more than 15 months after the first noted observations by Mr. Cheng. Mr. Cheng also admitted that the decision for temporary

closure was to avoid Union Pacific's liability risk concerns for the Crossing, in other words he was trying to make Union Pacific happy by closing the Crossing, since the public crossing issue was decided against it.

Based on the standard of review, the Commission must consider the evidence for and against the conclusions of UDOT and determine if the evidence was sufficient to support the decision. Since UDOT ignored all procedural requirements and failed to conduct a Surveillance Review, this is a difficult assignment for the Commission. The very procedures that Mr. Cheng ignored in this instance, Rules R930-5-7, R930-5-14, and for emergencies, R907-1-14, would have supplied all of the information that is required for UDOT to make a reasonable and rational decision with regard to the safety issues at the Crossing. In that process, quantitative measurements for engineering purposes would have been made at the Crossing. MUTCD engineering standards would have been applied. Vineyard Town and its citizens, most notably Anderson entities, could have contributed to that analysis.

Instead, UDOT considered only the drive-by analysis of Mr. Cheng. This is clearly insufficient to meet the substantial evidence required by law. The testimony of Mr. Cheng at the Commission hearing was a reiteration of his drive-by analysis. The only legally sufficient information at the hearing was the evidence presented by Mr. Hendricks. UDOT spent much time on the issue of whether a crossing is public or private and ignored its duty to perform analysis on the Crossing itself.

Based on the standards articulated by the Utah Supreme Court, the facts utilized by UDOT in arriving at a decision to temporarily close were not sufficient. Therefore, UDOT's decision based on the application of facts to law (ignoring all of the due process arguments) was not supported by substantial evidence and was not reasonable or rational. The Commission should reverse the order to temporarily close the Crossing, and remand the matter to UDOT to

conduct the appropriate reviews based on the Rules cited above.

CONCLUSION

1. Public Crossing. The Commission should affirm UDOT's decision that the Crossing is a public crossing. The standard of review for decisions of UDOT in this instance is whether or not the decision was reasonable and rational. UDOT's decision is supported by law and by substantial evidence. Utah Code §54-4-15 granted authority to UDOT to create, close, and regulate public highway/railroad crossings. UDOT was granted the discretion to interpret the statute and to provide rules and procedures for these activities. Because UDOT has the power to create public at-grade crossings, by inference, it has the power to determine if they already exist. Where there is substantial law and substantial evidence to support the decision of UDOT, the Commission should affirm UDOT's decision.

2. Temporary Closure. The Utah Legislature granted UDOT discretionary authority under Utah Code §54-4-15, to regulate railroad/highway crossings. UDOT adopted Administrative Rules with regard to crossings in the form of R930-5-1, et. seq. In this matter, Rules R930-5-7 and R930-5-14 specifically apply. In addition, UDOT adopted Rule R907-1-14 to govern emergency orders for road closures. The standard of review of a UDOT decision in regard to railroad crossings is to grant deference to the agency unless the statute or rules are plain and unambiguous and can be interpreted just as easily by the appellate authority. If the rules or statutes are plain and unambiguous, then the standard of review is "correction of error" and no deference is granted to the agency.

A. UDOT Abused its Discretion by Ignoring Rules R930-5-7 and -14 Under the Correction of Error Standard. The plain language of subsections R930-5-7 and -14 is clear and unambiguous. The standard of review in such instances is "correction of error" and no deference is given to the agency in interpretation. The Rules are mandatory and although

requests were made for UDOT to comply with its Rules, UDOT failed and refused to do so. In the meantime, UDOT ordered a temporary closure of a public road, allowed new railroad tracks to be placed at a public road crossing, conducted no Surveillance Review for these activities, and provided no notice to the public as required by the rules. This was an abuse of discretion and the order for temporary closure should be reversed. The matter should be remanded to UDOT to require first, that no further construction of new rail be allowed at the Crossing; second, that a Surveillance Review be conducted as required by the Rules; and third, that notice to the public be given as required by law.

B. UDOT Abused its Discretion by Ignoring Rule R907-1-14 Under the Correction of Error Standard. Rule R907-1-14 grants power to the Director of UDOT to issue an emergency order to close a highway. Because the language of this Rule is plain and unambiguous, the “correction of error” standard should apply and no deference is given to UDOT in interpreting the Rule. The Director or members of the Transportation Commission have the sole authority to issue such an emergency order. Eric Cheng, as Chief Railroad Engineer has no such authority. The provisions of R907-1-14 were not followed in issuing the order for temporary closure of the Crossing. The Commission should reverse the order for temporary closure and remand the matter to UDOT to require that it follow its procedures to conduct Surveillance Reviews and other procedures set forth in the rules.

C. UDOT Abused its Discretion by Denying Due Process to Vineyard Town and Anderson Entities Under the Correction of Error Standard. Questions of due process are matters for the Commission to decide without deference to the agency. Rules R930-5-7(5) and -14, and portions of R907-1-14 are procedural rules. To close a road, UDOT must give notice to the public and hold hearings if requested. To allow new railroad tracks to cross a public road, UDOT must give notice to the public and hold hearings if requested. To temporarily close a

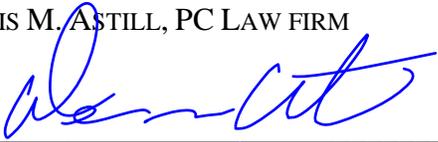
road, the Director of UDOT must issue a temporary order with findings of fact and conclusions of law, provide notice to the affected parties, and immediately initiate a formal hearing process within UDOT. While all hearings may be somewhat informal, the requirement for public notice and opportunity for hearing cannot be ignored. The failure to provide mandatory public notice of certain actions to be taken, the failure to conduct mandatory Surveillance Reviews to support actions to be taken by UDOT, and the failure of UDOT to conduct hearings upon request, or to initiate hearings by the Director are fatal due process flaws. The Commission should reverse the order for temporary closure of the Crossing, order all work to construct new railroad tracks at the Crossing to cease, and remand the matter to UDOT for the conduct of the mandatory Surveillance Review pursuant to Rules, publication of notice to the public, and conduct of public hearings as required by Rules. The Commission should order that if UDOT believes there is imminent danger to the public at the Crossing, then the Director should issue an order pursuant to UDOT Rules.

D. Decisions of UDOT Must be Supported by Substantial Evidence and Must be Reasonable and Rational Considering All Facts and Issues. The standard of review for factual matters and conclusions based on the facts is first, whether there is “substantial evidence” to support the decision, and based on the substantial evidence, the decision is reasonable and rational. The facts presented to support UDOT’s decision to close the Crossing were insufficient and therefore UDOT’s conclusions were not reasonable and rational. The Commission should reverse the order for temporary closure of the Crossing, order all work to construct new railroad tracks at the Crossing to cease, and remand the matter to UDOT for the conduct of the mandatory Surveillance Review pursuant to Rules, publication of notice to the public, and conduct of public hearings as required by Rules. The Commission should order that if UDOT believes there is imminent danger to the public at the Crossing, then the Director should issue an order pursuant

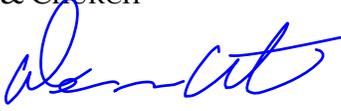
to UDOT Rules.

DATED this 24th day of November, 2010.

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By: /s/ 
With the Permission of David L. Church
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Certificate of Service

I hereby certify that on the 24th day of November, 2010, a true and correct copy of **JOINT SUPPLEMENTAL POST HEARING BRIEF OF VINEYARD TOWN AND ANDERSON ENTITIES REGARDING STANDARDS OF REVIEW** 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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