- BEFORE THE PUBLIC SERVICE COMMISSION OF UTAH -

In the Matter of Union Pacific Railroad's Petition for Relief against the Utah Department of Transportation (UDOT)	)	DOCKET NO. 09-888-01
	)	REPORT AND ORDER

ISSUED: February 7, 2011

SYNOPSIS

Pursuant to Utah Code Ann. 54-4-15(4), the Commission finds that there is substantial evidence for UDOT's determination that the Crossing is a public crossing. The Commission further finds that UDOT failed to follow its own Rule in closing the Crossing, and such action was arbitrary and capricious. The Crossing shall be reopened and UDOT shall follow its Rules in determining whether the Crossing should be closed.

BACKGROUND

The Crossing

This dispute concerns a railroad crossing where 400 North in Vineyard (a.k.a. Vineyard Road) crosses the Union Pacific Railroad Company (UPRR)[1] right of way (ROW) (Crossing). The Crossing lies partly on, and adjacent to, property formerly owned by the Geneva Steel manufacturing plant, in what is now the Town of Vineyard, Utah County, Utah. Anderson Geneva, LLC, Ice Castle Retirement Fund, LLC, and Anderson Geneva Development, Inc. (Anderson Entities) now own and manage that property. Vineyard owns and maintains Vineyard Road. UPRR owns the ROW.

The UPRR ROW runs generally in a north-south direction,[2] about perpendicular to the 400 North road that runs generally from east to west[3], from Utah Lake, across Geneva

[1] There is no dispute that UPRR's predecessor, the Denver and Rio Grande Western Railroad (D&RGW), acquired the ROW by deed dated 1881 from a private property owner.
[2] Tr. Vol.I, p.14.

Road and to what is now State Street in Orem, Utah. *See generally Union Pacific Railroad (UPRR) and Utah Department of Transportation (UDOT) Joint Trial Exhibits 132-134.* Part of Vineyard Road currently runs generally from south to north along the western boundary of the UPRR ROW and then veers west, following the section line towards Utah Lake. *See e.g. Tr. Vol.2, p.38, Anderson Entities Exhibits. 22, p.2 ("East Lake and Geneva Industrial Business Park"),UPRR/UDOT Joint Exhibits 133-135.*

The 1942 Resolution

There is no dispute that UPRR's predecessor, the Denver and Rio Grande Western Railroad (D&RGW), acquired the ROW by deed dated 1881 from a private property owner. There is no deed making the Crossing a public road or crossing, and although it is unclear how 400 North first became an authorized public crossing of the UPRR ROW, *Tr.Vol.2,p.20*,[4] there is no dispute that prior to August 3, 1942, the Crossing was conclusively a public road and a public crossing[5]—in addition to the portion of 400 North that ran east from the Crossing towards what is now the Orem State Street. On that date, the County Commissioners of Utah County (Utah County) passed a Resolution and Order (1942 Resolution) vacating portions of 400 North lying within the boundaries of the steel plant. Utah County gave title to property lying on the north and east sides of the Crossing to the Defense Plant Corporation (a quasi-public corporation owned by the United States of America), for the purposes of constructing a steel

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[3] Id.

[4] In any event, Mr. Barney stated recognized that the lack of a deed would likely have little bearing here, that such a fact would not be uncommon, and that public roads may come into being in various ways, including by public use. *Tr.Vol.2, p.242, ll.6-25, p.243, ll.1-15.*

[5] The parties stipulated to this fact. *See Tr. Vol.1, p.14, ll.7-12.*(UPRR Counsel Mr. Pickett to Anderson Geneva Counsel Mr. Astill: Q:"I will ask counsel to correct me if I get this wrong, but I believe that the parties have stipulated that prior to the 1942 action by the county commissioners that we agree that this was a public road and a public crossing."" A: "Yes."

plant—what later became known as Geneva Steel. Although the public roads within the boundaries of the steel plant were vacated, the actual Crossing and 400 North from the eastern boundary of the ROW and running west, was not vacated as the following witnesses testified:

- Kent Barney, a licensed surveyor employed by Northern Engineering[6] testified that based on the "val" map[7], *see UPRR/UDOT Joint Exhibit 132,134,* the county road would not have been vacated by the 1942 Resolution. *Tr. Vol. 2, pp.240-241*;
- Jim Marshall, manager of special projects for UPRR[8], testified that Utah County "vacated everything on the east side of the [Union Pacific] right of way" *Tr. Vol.1, p.15, ll.1-15*;
- Jerry Grover, current site engineer for the Anderson Entities,[9] testified that the 1942 Resolution did not vacate the public crossing. *Tr.Vol.2, p.338, ll.14-23;*
- William Clark[10] testified he plotted the 1942 Resolution, *see UPRR/UDOT Joint Exhibits 134, and Tr. Vol.2. p.15, ll.8-23*. He testified that the east boundary of the UPRR ROW was the edge of the 1942 Resolution vacation line, *Tr.Vol.2, p.70, ll.8-13,* anything north of the section line[11] was vacated, *Id. at ll.14-17, and UPRR/UDOT Exhibit 134,* and that anything south [of the section line] within the Railroad corridor and continuing to the west was not vacated. *Id. at ll. 18-21, p.71, ll.1-11*[12]*;*

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[6] Tr. Vol.2, p.229, 23-25.
[7] "A val map is a map that was created to show what the Railroad owns . . . and [] this map and dimensions were created to, to know what the Railroad owned. How much acreage they owned. ["Val"] stands for . . . evaluation." *Tr. Vol.2, p.27, ll.18-25, p.28, ll.1-6. See UPRR/UDOT Joint Exhibit 132, Tr.Vol.2, p.28, ll.1-12*.
[8] Tr. Vol.1, pp. 11-12.
[9] Mr. Grover is a licensed professional civil and structural engineer, formerly employed by Geneva Steel, and former Utah County Commissioner (with responsibility for road construction and railroad crossing in the County). Tr. Vol.II, p.336-337.
[10] Mr. Clark is a licensed land surveyor with Psomas Engineering. *Tr. Vol.2. p.5.*
[11] See Tr. Vol.2, p.11-12, where Mr. Clark explains a "section line"
[12] See also Tr. Vol.2, p.78, ll.20-25.

- Mr. Clark also testified that the 1942 Resolution vacated lands within the steel plant, "excepting lands that run northerly and in a southerly direction and located west of said meander line and which road begins at the SW corner and terminates at the NW corner of the property first above described;" *Tr. Vol.2, p.80-81*;
- Mr. Clark further testified regarding the specific location of the public road and crossing at the time of the 1942 Resolution. Mr. Clark, stated that the 1927 D&RGW val map filed with Utah County[13] showed the center line of the public road was at least 34.6 feet south from the vacating line established by the 1942 Resolution. *Id.* Clark said that for Utah County to have vacated any part of the public road that existed, the north half of the road would have needed to be at least 30 feet wide (the whole road needing to be 60 feet wide). *Tr. Vol.2, p.87.* Clark then testified that the 1927 D&RGW val map centerline of the Crossing located on the railroad was "incontrovertible." *Tr. Vol.2,pp. 55-56.* Clark further testified that the 1927 County road depiction on the val map shows the road as approximately 50 feet wide. *Tr. Vol.2, p.40,* which support the contention that the entire road was not vacated by the 1942 Resolution.

Even after the 1942 Resolution, the Crossing was still recognized as public. No later than July 16, 1943, the Crossing was still recognized as public by a public entity, i.e. the Public Service Commission. UPRR's predecessor, D&RGW, applied to the Commission for permission to cross 400 North (what the application identified as a public highway) as it upgraded the railway. As the Commission noted in its findings, D&RGW itself recognized the 400 North road crossing the ROW was an authorized public crossing, i.e. "a public highway."

[13] See Tr. Vol.2, pp.57-60, UPRR/UDOT Joint Exhibits 135, and Anderson Entities Exhibit 22.

See Tr. Vol. 2, p.364, ll.3-15, UPRR/UDOT Joint Trial Exhibits 75-76. Additionally, the State Road Commission, in a July 20, 1943, memorandum recognized the crossing as a public highway. *Tr. Vol. 2, p.365, ll.15-25, p.366, p.367, ll. 1-10.* Later, UPRR itself petitioned the Commission for permission for a "line into Bunker feed on Geneva Road." *Tr.Vol. 2, p.368, ll.8-9.* Although the construction did not specifically deal with the 400 North crossing, the blueprints attached to the UPRR Amended Application identified the crossing as a public highway. *Tr. Vol. 2, p.368-369; UPRR/UDOT Joint Exhibits 85*. Vineyard continues to accept the Crossing as public.

Current Location of the Crossing and Public Road

Despite the fact that the County never formally abandoned the Crossing, at least a portion of the Crossing and what is left of 400 North presently lie over the land vacated by the 1942 Resolution. *Tr. Vol.2. pp. 41-43, Tr. Vol.2. p.41, Tr.Vol.2, pp. 41-44, UPRR/UDOT Joint Exhibits 133-135.* However, there are two possible explanations for the current placement of the public road and Crossing. The first explanation is that a reconfiguration placed the public road and Crossing where they are now. Sometime in the early 1970s, the angle and location of the Crossing was reconfigured, *Tr. Vol.1. p.18, ll.7-13, p.35, p.131, p.132.* Once the public road and Crossing were reconfigured, there were some changes in the road:

- The original crossing angle was altered from something less than a 90 degree angle to "something closer to a 90-degree angle to the tracks", *Tr. Vol.1, p.133, ll.20-23;*
- The road would come through the UPRR ROW but not completely reach the eastern boundary of the UPRR ROW[14], *Tr. Vol.2. pp. 41-43; Tr.Vol.2, p.117, ll.19-22;*

[14] The UPRR ROW and railroad corridor are essentially synonymous. *Tr. Vol 2, p.14.*

- The reconfiguration moved the road almost completely off the public ROW, *Tr. Vol.2. p.41,* and Crossing almost entirely off the ROW, *Tr.Vol.2, pp. 41-44, UPRR/UDOT Joint Exhibits 133-135.*

The County was involved in discussions about reconfiguring the Crossing, as reflected in the minutes of the County Commissioners. *See UPRR/UDOT Joint Exhibits 158.* The suggestion of moving the Crossing some 600 feet to the north never materialized, however. *See Tr. Vol.1, p.35-36, p.134, ll.21-25.* Although, Mr. Marshall testified there is evidence the UPRR, the County, and the steel plant were involved in talks concerning the reconfiguration, *Tr. Vol.1, p.23, ll.13-25,* he also admits he "cannot tell" if UDOT was involved, *Tr. Vol.1, p.135, ll.1-3,* nor whether the changes were made by the steel plant alone. *Tr.Vol.I, p.132.* Although Mr. Marshall initially testified that the County Commissioner minutes do not indicate that the Crossing was public, *Tr. Vol.1, p.23, ll.19-25,* he also admits that though the reconfiguration might make the Crossing safer, reconfiguration would not change "the usage" of the Crossing, i.e. would not change whether it is public or private. *See Tr. Vol.1, p.135, ll.8-20.* There is not substantial evidence to find the County formally abandoned its ROW with the configuration, even if it did participate in the reconfiguration. In fact, Mr. Marshall admitted that neither UPRR nor its predecessor, D&RGW, ever went through a process to close the public crossing or what remained of 400 North after the 1942 Resolution. *Tr. Vol.1, p.95, ll. 24-25, p.96, ll.1-4.*

A second possible explanation for the current location of the public road and Crossing is the actual shifting of the road and Crossing. Some witnesses recognized that it would not be uncommon for the road to have shifted over 80 years or so. For example, Mr. Barney

stated that it would not be uncommon for a road to shift over time. *Tr.Vol.2, p.241, ll. 24-25, p.242, ll.1-3.*

There is no conclusive evidence that the road-as it currently exists—is how it was at the time of the 1942 Resolution. *See Tr. Vol.2, p.115, ll.2-9, see also Tr. Vol.2, p.113, ll.17-25.* But despite the lack of evidence showing precisely where the road actually was at the time of the 1942 Resolution, witnesses agree the County did not abandon the Crossing or the road. *See Tr.Vol.2, p.81, ll.14-25, p.82, ll.1-14; Tr.Vol.2, p.339, ll.16-25, p.340,ll.1-16.*[15] For example, Mr. Barney testified that he saw no evidence that the 1942 Resolution "would have vacated the public road that crossed over the Railroad right-of-way in this location" nor any evidence that the "public road crossing over into the north, north of the section line." *Tr.Vol.2, p.240, ll.19-15, p.241, ll.1-8.* Witnesses Clark and Grover agreed that the County would need the 400 North road remaining on the west side of the vacation line (and lying along the UPRR ROW) in order to maintain access to the lake, *Tr.Vol.2, p.81, ll.14-25, p.82, ll.1-14; Tr.Vol.2, p.339, ll.16-25, p.340,ll.1-16,* and did not vacate the remaining portion of 400 North and the Crossing.

Procedural Background

In January 2009, the Utah Department of Transportation's (UDOT) Chief Railroad Engineer, Eric Cheng determined the Crossing was a private crossing. *See Anderson Entities' Statement of Undisputed and Disputed Facts and Pre-hearing Position Brief, Exhibit 14, ¶6.* The Anderson Entities and Vineyard complained to UDOT and UTA that the public notices issued regarding the Crossing were defective because they identified 4000 North in Vineyard, and not 400 North. *See id. at ¶¶1-2.* Nonetheless, UDOT continued to maintain the

[15] See also background above, regarding the testimony of witnesses Barney, Marshall, Clark, and Grover, the 1942 Resolution and preservation of the Crossing.

Crossing was private. The Anderson Entities petitioned the Commission for relief[16], while at the same time it and Vineyard attempted to present evidence to UDOT the Crossing was public. In a letter issued February 25, 2009, UDOT reversed its determination designating the Crossing as private and decided to conduct another surveillance review "based upon the Crossing being public because of the [Federal Railroad Administration (FRA)] inventory listing[17] this crossing as public and Resolution and Order passed by the Utah County Board of County Commissioners in 1942. At this point, UDOT considers this crossing as public . . . ." *See Anderson Entities' Statement of Undisputed and Disputed Facts and Pre-hearing Position Brief, Exhibit 15.* Additionally, UDOT had reviewed the 1942 Resolution and found that, based in part on the 1942 Resolution, the Crossing was public. *See Tr.Vo.2, ¶133, ll.1-22.*[18] Because UDOT reversed its first determination finding the Crossing was private, the Anderson Entities asked the Commission to dismiss the petition for relief in Docket No. 09-999-05. Thereafter, however, UDOT did not conduct a surveillance review as it stated it would in its February 25, 2009 letter, *Tr. Vol.2., p.134, ll.5-10.* In a July 13, 2009 letter, UDOT also stated it would be closing the Crossing temporarily, stating the Crossing was unsafe. *See Anderson Entities' Statement of Undisputed and Disputed Facts and Pre-hearing Position Brief, Exhibit 16.* It gave no basis for the temporary closure except to refer the parties to Utah Code Ann. §54-4-15. UDOT made a

[16] This dispute initially commenced before the Commission in Docket No. 09-999-05, with the Anderson Entities bringing the petition for relief.

[17] The FRA maintains a "data base . . . for the National Highway-Rail Crossing Inventory Data File" to "provide information to Federal, State and local governments as well as the railroad industry for the improvement of safety at highway-rail crossings." *See UPRR/UDOT Joint Exhibits 17, ¶¶1.1, 1.2.* It is essentially an inventory of highway-rail crossings in the United States, with site-specific information pertaining to each crossing, including whether the crossing is private or public. *See id.*

[18] Mr. Cheng stated: "[T]he city presented information of the [1942 Resolution]. And then we thought that this is a true document and it show it didn't vacate the, the crossing . . . We accept . . . the Vineyard City's presentations and we feel, okay, so we'll rule it as a public."

distinction between temporary and permanent closures, and stated that because the closing of the Crossing was only temporary, it did not need to follow Utah Admin. Code R.930-5-14. *See e.g. UDOT Post-hearing Brief, ¶ 3.* It again stated it would conduct a surveillance review. *See Anderson Entities' Statement of Undisputed and Disputed Facts and Pre-hearing Position Brief, Exhibit 16.* The Anderson Entities objected to the closure without the proper process per Utah Admin. Code R.930-5-7, -14. *See id., Exhibit 17.* On August 7, 2009, the Anderson Entities discovered that UDOT conducted a surveillance review not to reconsider the temporary closure, but to discuss the process for the closure. On August 12, 2009, UPRR filed its petition for relief against UDOT. UPRR asked the Commission to determine that UDOT improperly characterized the Crossing as public, that the Crossing be designated as private, and that the Crossing be ordered closed. *See UPRR Petition for Relief, p.3.*

This matter arose because of pending changes in the railroad crossings in connection with the Utah Transit Authority's Commuter Rail South project (FrontRunner). There is no dispute that as FrontRunner expands to Utah County, and runs through the Crossing and Vineyard Road, train traffic is expected to significantly increase, from 8-20 trains a day to 60-66 trains per day. *See e.g. UPRR Pre-hearing Position Statement, p.3., and Anderson Entities' Statement of Undisputed and Disputed Facts and Pre-hearing Position Statement, p.10, ¶ 34.*

After a period of discovery and following continuances of the hearing date, the Administrative Law Judge (ALJ) of the Commission held a hearing on August 17-18, 2010. Reha Kamas and David M. Pickett represented UPRR. Renee Spooner, assistant attorney

general, represented UDOT. Dennis Astill represented the Anderson Entities. David Church represented Vineyard.

UDOT'S DESIGNATION OF THE CROSSING

Standard of Review

The Utah Administrative Procedures Act (UAPA) provides that "if a statute . . . permit[s] parties to any adjudicative proceeding[19] to seek review of an order by the agency or by a superior agency, the aggrieved party may file a written request for review within 30 days after issuance of the order . . . ." *Utah Code Ann. § 63G-4-301(1)(a).* Section 54-4-15(4) states "The commission retains exclusive jurisdiction for the resolution of any dispute upon petition by any person aggrieved by any action of the department (UDOT) pursuant to this section." *Utah Code Ann. § 54-4-15(2).* UDOT took action to alter or abolish a crossing, and in doing so determined the legal rights or other legal interests of the parties. UPRR filed its petition for relief with the Commission within 30 days of UDOT's July 13, 2009 letter finding the Crossing was public.

Although UCA 54-4-15(4) does not explicitly contain the standard of review the Commission should use when reviewing UDOT's actions, Utah Code Ann. § 63G-4-102 gives the Commission guidance. Although that section refers to how an appellate court decides whether to grant relief to a person seeking judicial review, the UAPA also states it is "applicable to every agency of the state" and agency "action that determines the legal rights, duties . . . or other legal interests of an identifiable person[20] . . . ." *Utah Code Ann.63G-4-102(1)(a).* As a

[19] "'Adjudicative proceeding' means an agency action or proceeding described in Section 63G-4-102." *Utah Code Ann. § 63G-4-103(1)(a).*

[20] A person includes a group of individuals, partnership, corporation, association, political subdivision, etc. *UCA § 63G-4-103(1)(g).*

"superior agency"[21], the provisions of the UAPA are applicable here and the Commission uses its provisions to guide its review.

UDOT's Finding that the Crossing is Public

UDOT's determination that the Crossing was public is a factual determination. Utah Code Ann. § 63G-4-303(4)(g) states:

> 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: . . . 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;

Therefore, the Commission must find that there is substantial evidence for UDOT's finding. *See First Nat'l Bank v. County Bd. of Equalization*, 799 P.2d 1163, 1165 (Utah 1990) (explaining that the "whole record" should be reviewed to determine whether the agency's action is "supported by substantial evidence").

UDOT is given the authority 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 one railroad by another railroad or street railroad, and of a street railroad by a railroad and of each crossing of a public road or highway by a railroad or street railroad, and of a street by a railroad or vice versa, and to alter or abolish any such crossing, to restrict the use of such crossings to certain types of traffic in the interest of public safety . . . .

Utah Code Ann. §54-4-15(2). With this explicit grant of authority over railroad crossings of public roads or highways, UDOT has an implied grant of authority necessary to carry out its duties, that is, to determine whether a crossing is public or private in the first place. *See Basin Flying Service v. Public Service Comm'n,* 531 P.2d 1303,1305 (Utah 1975) (holding that a

[21] As defined in Utah Code Ann. § 63G-4-103(1)(j), a "superior agency" means "an agency required or authorized by law to review the orders of another agency."

"regulatory body which is created and derives its powers and duties from statute has no inherent regulatory powers, but only those which are expressly granted, or which are clearly implied as necessary to the discharge of the duties and responsibilities imposed upon it.")

When determining whether a crossing is public or private UDOT is constrained in part by engineering standards. As to engineering standards, Mr. Cheng agreed that some of the engineering standards UDOT uses in making its determinations are: 1) the Highway-Rail Crossing Inventory Instructions and Procedures Manual (FRA Manual), *UPRR/UDOT Joint Exhibits 16-69, Tr.Vol.2,p.178,ll.24-25,p.179,ll.1-23*; 2) Private Highway-Rail Grade Crossing Safety Research and Inquiry report (Report), *UPRR/UDOT Joint Exhibits 70-71, Tr.Vol.2, p.179, ll.24-25, p.180, ll.1-8*; and 3) the Manual on Uniform Traffic Control Devices for Streets and Highway (MUTCD), *Tr.Vol.2, p.180, ll.9-12, See also Utah Code Ann. §41-6a-301*. Mr. Cheng recognized that the "MUTCD and the FRA standards" were "engineering safety guidelines." *Tr.Vol.2, p.183, ll.3-14*.

Per the Report, "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" The MUTCD

> defines a public highway-rail grade crossing as any intersection between a public roadway and railroad. The roadway on either side of the crossing must be a public roadway and railroad. The roadway on either side of the crossing must be a public roadway, i.e. under the jurisdiction of, and maintained by, a public authority and open to the 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.

UPRR/UDOT Joint Exhibits 71. The FRA Manual defines a "public crossing" as

> 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

FRA Manual at 1-5. The CFR defines "maintenance" means "preservation of the entire highway, including surfaces, shoulders, roadsides, structures, and such traffic control devices as are necessary for its safe and efficient utilization." 23 CFR §460.2(d). The FRA Manual also states:

> In general, a roadway across a railroad track 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.'

FRA Manual at 1-6. The FRA Manual further states:

> A private crossing is one that is on a private roadway which may connect to part of the general system of public streets and highways but is not maintained by a public authority. Usually, it is a crossing where the property on both sides or at least one side of the railroad tracks is private property. It may also be on a roadway that is publicly owned but which is either restricted or not intended for use by the general public. Private crossings are generally intended for the exclusive use of the adjoining property owner and the property owner's family, employees, agents, patrons, and invitees. Crossings are classified as private where the normal need or use is for residential, farm, recreation/cultural, industrial or commercial activities.

FRA Manual at 1-7.

If viewing these engineering standards alone without considering the statutory and other legal provisions governing abandonment of public thoroughfares, it would seem the Crossing would be private. For example, the Crossing would not meet the MUTCD's provision that either side of a crossing be a public roadway, given that only one side is public. Also, the FRA Manual reiterates that in order for the Crossing to be public, both approaches to the Crossing must be open to the public and also maintained by the County or some other public authority. When viewing these standards

and applying them to the Crossing and 400 North, it would tend to show the Crossing is private, as contended by UPRR.

However, despite Mr. Cheng opining that the Crossing was private, when considering solely engineering standards, *Tr.Vol.2. p.181, ll.2-14*, he also recognized that focusing solely on engineering standards would lead to a different conclusion than if one looked at the legal issues surrounding the Crossing. *Tr.Vol.2, p.194, ll.8-21.* He recognized that there was an apparent conflict between the two when he said "the Railroad's evidence and the City's evidence are just conflicting. That's why we are all here arguing this . . . . So we just don't know. It just appears to be conflicting." *Tr.Vol.2, p.193, ll.24-25, p.194, ll.1-4.* But Mr. Cheng agreed that UDOT is constrained not only by engineering standards, but also by state law governing the Crossing. *Tr.Vol.2, p.193, ll.6-17,p.194, ll.13-21.*[22]

When viewing the law governing the abandonment of public crossings, and even the language of the applicable engineering standards, there is substantial evidence showing the Crossing is public. This is true despite any reconfiguration, lack of maintenance or public use, or even the placement of barricades across the Crossing. Vineyard and the Anderson Entities both cited to statutes and case law that plainly support the principle that: "all public highways, streets, or roads once established shall continue to be highways, streets ROW roads, until abandoned or vacated *by order* of a *highway authority* having jurisdiction *or by other competent authority*." *Utah Code. Ann. § 72-5-105(1)* (emphasis added). As further cited by the Anderson Entities, a

[22] The Commission recognizes Mr. Cheng, at the hearing, said UDOT determined the Crossing was public as a "compromise" between the parties' various interests, *Tr.Vol.2, pp. 141-143, 161*, seeming to suggest that no standards were used. This assertion, however, contradicts the February 25, 2009 letter which UDOT issued wherein in explicitly stated its finding was based in part on the 1942 Resolution. Mr. Cheng, at the hearing, further reiterated that UDOT relied on the 1942 Resolution in making its determination, and not just a mere desire to compromise without regard to any evidence or standards.

"public highway can only be abandoned by an order of the county commissioners or other competent authority . . . ." *Clark v. Erekson*, 341 P.2d 424, 426 (Utah 1959) (citing to UCA § 27-1-3 (1953), predecessor for UCA § 72-5-105 (2011)). "Section 72-5-105 plainly provides that a public highway remains a highway until the proper authorities order it 'abandoned or vacated.'" *Culbertson v. Board of County Comm'rs*, 2001 UT 108. However the Crossing came to be a public crossing, the parties stipulated that by the time of the 1942 Resolution granting certain lands and roads to the steel plant, the Crossing was undoubtedly public, and likely had been since at least 1927. There is no dispute that since the 1942 Resolution, there has been no other formal vacation by any competent highway authority or by the County, or any other competent authority. There is also no evidence disputing that neither UPRR nor its predecessor, D&RGW, ever went through a process to close the public crossing or what remained of 400 North after the 1942 Resolution. Further, witnesses Barney, Marshall, Clark, and Grover all agreed that the east side of the UPRR ROW was the edge of the vacation line, that the portion of the Crossing lying within the UPRR ROW was not vacated, and that the portion of 400 North lying on the west side of the UPRR ROW was not vacated. There is substantial evidence that the Crossing continues to be a public crossing.

The Crossing is public despite the reconfiguration. In *Heber City Corp. v. Simpson*, 942 P.2d 307 (Utah 1997), fn. 12, the Supreme Court reversed a district court's decision declaring that a public highway was not public. The high Court stated: "The fact that the road has not been used since 1989 does not change its status as a public highway. In *Western Kane County Special Service District No. 1 v. Jackson Cattle Co.*, 744 P.2d 1376, 1377-78 (Utah 1987), we held that a highway which had been dedicated and abandoned to the public by the

public's use of it 'from 1919 until 1931, when the highway *was relocated* and public use of the . . . road stopped,' still maintained its status as a public highway though half a century had passed since the road was used by the public (emphasis added)." There is no dispute the Crossing and a portion of the 400 North were reconfigured sometime in the 1970s. There is insufficient evidence to determine whether the County was involved in the reconfiguration or whether it was solely reconfigured by the steel plant and the UPRR. The evidence is also not clear as to the width of the 400 North road remaining after the 1942 Resolution. There is no doubt the road and Crossing, *as they presently lie*, are either entirely or partly within the land that was vacated. They lie almost completely off the public ROW. This relocation could have been a result of the reconfiguration or the road simply shifting over time. But even if the County had participated in the reconfiguration, its participation in the reconfiguration did not lead to abandonment or vacation without any formal order vacating the Crossing or the remainder of the road. Even if the road shifted over time, and then shifted a portion of the road and Crossing over the section line and within the area that was vacated, that change did not come as a result of a formal order of the County or other competent authority. Therefore, despite the fact the Crossing and portion of 400 North lie were reconfigured or shifted on the land previously abandoned, they were not abandoned or vacated originally by the 1942 Resolution, and were not abandoned or vacated by formal order thereafter. Therefore, its current placement has no effect on the legal nature of the Crossing today. UPRR's contention that the Crossing's "relocation away from the former public ROW" interrupted public use, *UPRR Post-hearing Position Statement, p.9*, is not correct. Its citation to language in *Wasatch County v Okelberry*, that "an overt act that is intended by a property owner to interrupt the use of a road . . . restarts' the running of the required ten-year

period under the Dedication Statute," *Id. at* ¶ *6*, applies to how a private owner interrupts a public thoroughfare from becoming such through dedication. It is not an exception to Section 72-5-105 nor does it allow vacation or abandonment by any means other than formal vacation by a competent authority. Section 72-5-105 "make(s) no allowance for any other type of abandonment or vacation" except by order. *Fries v. Martin,* 2006 UT App 514, ¶8. Our high Court has reiterated "the language of [section 72-5-105] to require *strict compliance* with statutory procedures to effect an abandonment or vacation of a public road by the government." *Wasatch County v. Okelberry*, 2006 UT App 473, ¶26 (emphasis added).

Even assuming as true UPRR's evidence that there has been a lack of public use or maintenance by any authority, this would still not change the Crossing's public nature. "[U]nder Utah law, [a public highway] could not cease to be held for public use *by mere abandonment or nonuse* because real property designated as public use can only cease to be such by formal vacation. . . ." *Fries,* 2006 UT App 514 at ¶8. Therefore, property dedicated for public use is considered to be held for public use even if the county does not use it for that purpose, and the formal vacation rule applies. Even if there was no maintenance, that would not vacate or abandon the Crossing and remainder of 400 North. In *Henderson v. Osguthorpe,* 657 P.2d 1268, 1270, even where public property was "never . . . developed as a road and remain[ed] *essentially in its natural state, covered by trees and shrubs*" (emphasis added), the Court still held that the property designated for public use was subject to the formal vacation rule and was not vacated absent formal order. The County could not have abandoned or vacated the Crossing or the remainder of 400 North simply by nonuse or by lack of maintenance, even assuming those facts are true. The Crossing remained dedicated for public use, even though it was not being used

as such, and remains public until a competent authority abandons or vacates those public thoroughfares by formal order.

The placement of jersey barricades, the gate and other barriers across the Crossing did not change its public nature. By placing those barriers over the Crossing, no party gained some kind of "adverse possession" of the Crossing and 400 North, nor "interrupted" its public nature. In *Clark v. Erekson*, 341 P.2d 424, (Utah 1959), the Court found that a private landowner, who had placed encroachments, which included buildings, fences, and trees, over a public thoroughfare for about thirty years, still acquired no rights overt the public thoroughfare. It explicitly stated that a "public highway can only be abandoned by an order of the county commissioners or other competent authority . . . ." *Id. at 425-26.* In fact, in *Memmott v. Anderson*, 642 P.2d 750 (Utah 1982), the Court there even noted that the City's placement *of a barricade* across the road does not change the public status of the road absent a formal vacation or abandonment. The placement of barricades, fencing, or gates did not change the nature of the public thoroughfares in this matter.

Finally, even if there is no evidence that the Crossing and ROW was deeded, but only made public through dedication, this does not change the nature of the Crossing. "The formal vacation rule applies regardless of whether property was actually used by the public or simply designated for public use in a particular dedication." *Fries, 2006 UT App at ¶ 9.* The Crossing is public and so are all public thoroughfares remaining after the 1942 Resolution.

Though these pronouncements of statutory and case law might seem to conflict with engineering standards, as Mr. Cheng opined, they do not. The MUTCD and FRA Manual allow for such occurrences as this Crossing at issue. For example, the MUTCD states that if one

approach to a crossing is not a public roadway, it is "typically"—not always, classified as a private crossing. Additionally, the FRA Manual also allows for instances where both approaches to a crossing are not publicly maintained, by saying that "in general" these crossings are private—but again, not always. The FRA Manual also explicitly states that if a public authority accepts a crossing as public it is public. Here, the Commission accepted and found the Crossing was public in two separate proceedings involving the D&RGW and the UPRR as noted previously. The State Road Commission considered the Crossing as public in 1943. Finally, Vineyard considers the Crossing a public crossing.[23] This result seemingly leaves the Crossing and what is left of 400 North as a bit of an oddity—a public thoroughfare that crosses into private property. Mr. Cheng admitted, however, that he was aware of at least one other crossing in Salt Lake County that extends into private property. *Tr.Vol.2.p.193.* The engineering standards do recognize exceptions to even general guidelines.

The Commission notes the FRA database inventory also listed the Crossing as a public at-grade crossing from about 1970 until 2009. *Anderson Entities Exhibit 7.* However, more than one witness testified about the mistakes made in private/public categorization, the piecemeal process for entering information in the database, allegations regarding lack of oversight for the input of information, and inaccuracies regularly contained in the database. *See e.g. Tr.Vol.1, p.73-75, Tr.Vol.2, p.136, ll.6-25, p.137,p.138,p.164.*[24] In any case, Mr. Cheng admitted that the FRA database inventory was not to be consulted for a determination of legal rights. *Ttr.Vol.2, p.171,ll.8-11*. Therefore, without more certainty regarding the information

[23] Vineyard adopted a Master Road Plan in 2008 shows the Crossing as part of Vineyard's roadway plan. *See Anderson Entities' Exhibit 19*.

[24] In fact, Mr. Marshall said the FRA database inventory was only 50% accurate, while Mr. Cheng opined it was 5-10% inaccurate. *See Tr.Vol.2, p.136.*

listing the Crossing as public in the database, the fact that the database listed the Crossing as public would not alone present sufficiently reliable evidence of its character.

The Commission finds there is substantial evidence the Crossing is public, together with remaining portions of 400 North.

UDOT'S CLOSING OF THE CROSSING

Standard of Review

Utah Code Ann. § 63G-4-303(4)(h)(ii) states that the Commission may grant relief to the Anderson Entities and Vineyard if the Commission determines that UDOT's actions in closing the Crossing were "contrary to a rule of the agency." UDOT admits it did not follow its own rule in closing the crossing and in not providing a surveillance review. It claims it did not do so because the closing of the crossing was only temporary, and not permanent. It claims its interpretation of its Rule should be given deference and that the Closing remain closed. It argues that "requiring public notice for temporary closures would negatively impact UDOT's ability to perform maintenance or emergency work, and that any such "could not be performed until the notice was given . . . ." *UDOT's Supplemental Post-hearing Brief,* p.4.

When UDOT is interpreting its own rule, the Commission grants UDOT's interpretation an intermediate standard of deference, *Semeco Industries, Inc. v. Utah State Tax Comm'n,* 849 P.2d 1167 (Utah 1993) (Durham, J., dissenting) (explaining the standards of review of agency actions under the UAPA scheme); *see Cf. Bradshaw v. Wilkinson Water Co.,* 2004 UT 38, ¶ ¶ 8,32 *and Westside Dixon Assocs., LLC v Utah Power and Light Co.*, 2002 UT 31, ¶ 7, and accept UDOT's interpretation of its Rule so

long as the interpretation is "reasonable and rational." *R.O.A. General, Inc. v. UDOT,* 966 P.2d 840, 842 (Utah 1998). Administrative rules are interpreted like statutes, with the Commission focusing first on the plain language of the Rule. *Sierra Club v. Air Quality Board,* 2009 UT 76. UDOT cannot simply ignore the specific language of its Rule. *R.O.A. General, Inc.*, 966 P.2d at 842 (holding that "administrative regulations are presumed to be reasonable and valid and cannot be ignored or followed by the agency to suit is own purposes. Such is the essence of arbitrary and capricious action."). If it declines to follow its Rule, it must demonstrate a reasonable and rational basis for the departure from its Rule. *See Union Pacific R.R. v. Auditing Div.*, 842 P.2d 876, 879 (Utah 1992).

The Closure of the Crossing

UDOT's enabling statutes authorize it to "close or restrict travel on a highway[25] under their jurisdiction due to construction, maintenance work, or emergency." *Utah Code Ann. 72-6-114.* Additionally, UDOT is given the authority to

> determine and prescribe the manner, including the particular point of crossing, and the terms . . . operation, maintenance, use and protection . . . crossing of a public road . . . by a railroad or street railroad, . . . and to alter or abolish any such crossing, to restrict the use of such crossings to certain types of traffic in the interest of public safety . . . .

Utah Code Ann. §54-4-15(2).

UDOT, like other regulatory agencies, is given authority to prescribe rules by which its enabling statutes will be implemented. In this case, UDOT had Utah Admin. Code

[25] *See Utah Code Ann. § 72-1-102(7)*

R930-5-7, and -14 in place[26] to implement, in part, Utah Code Ann. § 72-6-114 and Utah Code Ann. §54-4-15. R930-5-7 states in part:

> The Department shall have a program for the identification of highway/railway crossings for improvement. Crossings may be identified for improvement upon recommendation from the diagnostic/surveillance review team or by formal finding of the department. . . . The Department shall consider all recommendations made by the team members, and input received from the public at large before issuing final orders for the improvement of grade crossings. . . . the Team reviews railroad crossings when requested by local agencies or when railroad traffic is proposed to significantly increase."

The Rule also lists who comprises the diagnostic/surveillance review team. *Utah Admin. Code R930-5-7(2).*

Utah Admin. Code R930-5-14 deals with the closure of public crossings. It states in part:

> Public notification is required when the Department is considering proposal to close public streets at crossings . . . addition of tracks at crossings, or construction of new public at-grade crossings. The Department shall advertise a notice of its intended action in a newspaper of general circulation, and if available, a newspapers of local circulation in the area affected . . . . The notice shall identify the project, briefly describe the changes proposed, . . . and contain general information relating to the proposed action[27]

The plain language of the Rule makes no explicit distinction between temporary and permanent closures.

The Commission finds that UDOT failed to follow its Rules, failed to provide a reasonable and rational basis for its departure from its Rule, and must follow the procedures for closing the Crossing. UDOT claims that if the Commission were to

[26] R930-5-14 was repealed after this dispute commenced.

[27] The Rule also states UDOT may waive the requirement for public notice. However, UDOT may only waive that requirement "provided all parties affected concur in writing with the action proposed." Parties affected include railroads, state, county city, boards or commissions, and "private persons or directly affected." [sic] There is no evidence of such a written agreement here.

not adopt UDOT's interpretation of its Rule, it would "negatively impact UDOT's ability" to close the Crossing for emergency purposes. This is incorrect. As pointed out by the Anderson Entities, UDOT has in place Rules governing emergency orders which would govern the emergency closing of this Crossing. That Rule, Utah Admin. Code R907-1-14, entitled "Emergency Orders", provides for specific factual bases for using such an order, limitations on scope, and provisions for the issuance of the order. If the proper prerequisites are met, that Rule allows UDOT to close the Crossing "without notice and hearing in accordance with applicable law." *Utah Admin. Code R907-1-14.* Therefore, UDOT's attempt to evade its Rule by establishing some exception to R907-1-14, is improper and does not serve as a reasonable and rational basis to ignore the requirements of R930-5-7, and -14.

UDOT further argues that if the Commission does not accept its interpretation, it would inhibit UDOT's ability to close the Crossing in cases of maintenance and construction. This is also incorrect. UDOT still has the ability to close Crossings or public thoroughfares if it finds the need, but must follow its own process for doing so. Rule R930-5-7 and -14—both drafted by UDOT, implement the method by which UDOT will close or improve crossings or other public thoroughfares. The plain language of the Rules make no distinction between temporary and permanent closure. The plain language of the Rule require certain actions by UDOT before closing the Crossing, temporarily or permanently. UDOT's own rules require it to take recommendations from the diagnostic/surveillance review team before issuing final orders for improvement, such as closing or removing a Crossing. It failed to implement this surveillance review team in this instance. It was required to take input from the public at large

before closing the Crossing. It failed to do so. This failure came because it failed to follow another Rule, requiring it to issue public notice of the Crossing. It incorrectly identified the 4000 North crossing in Vineyard for closing, which is a non-existent crossing, instead of properly identifying the 400 North crossing in Vineyard. Its Rules require the diagnostic/surveillance team to review railroad crossings when requested by local agencies. Here Vineyard requested such a review, but no such review was conducted. Additionally, despite the fact that train traffic is expected to significantly increase with the addition of the FrontRunner project, UDOT failed to have a diagnostic/surveillance review team review the Crossing, gather information and reports, establish requirements, initiate appropriate action, obtain data, and issue orders as required by applicable Rules. *See Utah Admin. Code R.930-5-7.* Accordingly, the Commission finds UDOT must re-open the Crossing and follow the applicable Rules before making a decision on whether to close it.

ORDER

The Commission orders as follows:

1. UDOT's characterization of the Crossing and remainder of 400 North as public is affirmed;
2. UDOT shall re-open the Crossing and follow applicable Rules in determining whether it should close the Crossing;
3. Pursuant to Sections 63G-4-301 and 54-7-15 of the Utah Code, an aggrieved party may request agency review or rehearing of this Order by filing a written request with the Commission within 30 days after the issuance of this Order. Responses to a request for agency review or rehearing must be filed within 15 days of the

filing of the request for review or rehearing. If the Commission does not grant a request for review or rehearing within 20 days after the filing of the request, it is deemed denied. Judicial review of the Commission's final agency action may be obtained by filing a petition for review with the Utah Supreme Court within 30 days after final agency action. Any petition for review must comply with the requirements of Sections 63G-4-401 and 63G-4-403 of the Utah Code and Utah Rules of Appellate Procedure.

DATED at Salt Lake City, Utah, this 7th day of February, 2011.

/s/ Ruben H. Arredondo
Administrative Law Judge

Approved and confirmed this 7th day of February, 2011, as the Report and Order of the Public Service Commission of Utah.

/s/ Ted Boyer, Chairman

/s/ Ric Campbell, Commissioner

/s/ Ron Allen, Commissioner

Attest:

/s/ Julie Orchard
Commission Secretary
G#70952