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- BEFORE THE PUBLIC SERVICE COMMISSION OF UTAH -  
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In the Matter of Union Pacific Railroad's	)	<b>JOINT MEMORANDUM IN OPPOSITION TO UNION PACIFIC RAILROAD COMPANY'S PETITION FOR REHEARING AND STAY</b>
Petition for Relief against the Utah	)	
Department of Transportation	)	
	)	
	)	
	)	
	)	DOCKET NO. 09-888-01

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Vineyard Town, and Anderson Geneva, LLC, Ice Castle Retirement Fund L.L.C., and Anderson Geneva Development, Inc. (collectively "Anderson entities"), jointly submit this Memorandum in Opposition to Union Pacific Railroad Company's ("UPRR") Petition for Rehearing and Stay.

**POINT 1. UPRR'S PETITION FOR REHEARING SHOULD BE DENIED BECAUSE IT RAISES ISSUES FOR THE FIRST TIME ON APPEAL.**

After nearly two years of arm wrestling between the parties, UPRR now raises for the first time in its Petition for Rehearing, the issue of whether or not UDOT has any right to regulate this Crossing. This is the first time UPRR has suggested this legal theory. Bringing a

new legal theory to this matter violates public policy and a history of judicial decisions which prohibit raising a new factual or legal issue on appeal. The time to raise this issue was at the initial proceedings with Utah Department of Transportation (“UDOT”), before it made its decision that the Crossing was a public crossing.

The Public Service Commission (“Commission”) is the intermediate appellate authority to challenge a decision of UDOT in respect to railroad crossings over public roads (Section 54-15-7, Utah Code). UDOT conducted an informal inquiry and made its decision on the information and evidence presented by the parties. UDOT received the evidence and legal theories of the parties prior to making its decision. UPRR maintained this was a private crossing, but at no time did UPRR raise the question whether UDOT had authority to render a decision regarding this Crossing.

This Commission received the appeal of UPRR and Anderson entities on certain issues. The principle issue complained of by UPRR was whether or not the Crossing was a public or private crossing. The Commission allowed supplemental evidence to be heard and heard all legal issues and theories surrounding the decision of UDOT. Again, UPRR at no time raised this issue before the Commission. As the initial appellate authority, the Commission was restricted to the decisions and issues brought before UDOT which conducted its informal process pursuant to Administrative Rules governing UDOT.

The case of Franklin Fin. v. New Empire Dev. Co., 659 P.2d 1040, 1044 (Utah 1983) is definitive authority on this issue. The high court there stated “However, it is axiomatic that matters not presented to the trial court may not be raised for the first time on appeal. *e.g.*, Shayne v. Stanley & Sons, Inc., Utah, 605 P.2d 775 (1980); [\*8] Edgar v. Wagner, Utah, 572 P.2d 405 (1977).” Id. at 1044.

The case of Mel Trimble Real Estate v. Monte Vista Ranch, 758 P.2d 451 (Utah Ct. App 1988), further explained that this preclusion of new issues included issues of law, citing Zions First Nat'l Bank v. National Am. Title Ins. Co., 749 P.2d 651, 654 (Utah 1988) (rule applies even where facts are not disputed and issue raised is one of law); Bangerter v. Poulton, 663 P.2d 100, 102 (Utah 1983); James v. Preston, 746 P.2d 799, 801 (Utah Ct. App. 1987); Ebbert v. Ebbert, 744 P.2d 1019, 1023 (Utah Ct. App. 1987).

Finally, Franklin, *supra*, stated, “Generally, issues raised for the first time in post-judgment motions are raised too late to be reviewed on appeal”, citing, McKittrick v. McKittrick, 520 P.2d 1058 (Colo. Ct. App., 1974); Williams v. Town of Silver City, 84 N.M. 279, 502 P.2d 304 (N.M. Ct. App. 1972); State Bank v. Sylte, 162 Minn. 72, 202 N.W. 70 (1925); 4 C.J.S. Appeal & Error § 243 (1957). Franklin, *supra*, at 1045. Thus, failure to raise this issue at the outset of the case with UDOT, and certainly on appeal to the Commission, precludes UPRR from raising the issue now in a post-trial motions.

This Petition is not timely and must be denied. UPRR has always maintained that the Crossing was a private crossing, and thus was charged with knowledge of this legal theory. The decision of the Commission did not interpose new facts. Thus, UPRR was required to bring its legal objections to UDOT’s authority over the Crossing in the initial proceedings before UDOT. As a matter of judicial economy and public policy, UPRR’s attempt to raise a new legal issue which was not raised in proceedings before UDOT, is barred. This is especially true now after all issues were heard before the Commission, in a significantly expanded format, and UPRR failed to raise the issue.

**POINT 2. UDOT HAS AUTHORITY TO REGULATE ALL PUBLIC ROAD CROSSINGS AND TO DETERMINE WHICH CROSSINGS ARE PUBLIC OR PRIVATE.**

Although UPRR is correct in referring to Utah law granting UDOT discretionary authority to regulate all railroad crossings of public roads, UPRR's reading of the Statute is overly restrictive, and ignores the background of factual and legal authority over the Crossing that was established by UDOT and the Commission. Even if the Commission could allow hearing on this issue, UPRR is incorrect and their assertions fail on the merits.

Section 54-5-15(2) and (3) provides as follows:

(2) 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 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 and is vested with power and it shall be its duty to designate the railroad crossings to be traversed by school buses and motor vehicles carrying passengers for hire, and to require, where in its judgment it would be practicable, a separation of grades at any such crossing heretofore or hereafter established, and to prescribe the terms upon which such separation shall be made and the proportions in which the expense of the alteration or abolition of such crossings or the separation of such grades shall be divided between the railroad or street railroad corporations affected, or between such corporations and the state, county, municipality or other public authority in interest.

(3) Whenever the department shall find that 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.** (emphasis added).

UPRR ignores the language allowing UDOT to "alter" a crossing, and further ignores the authority of UDOT to establish a new public crossing. Under this discretionary authority given to UDOT, in the totality of facts established in this matter, UDOT, and the Commission have found that the Crossing began as a public crossing, and as altered, continued as a public crossing. As the Commission and UDOT established, the Crossing began as a public crossing and there was no abandonment by public authorities of the Crossing as a public highway. UDOT and the

Commission acknowledge that the location of the Crossing shifted. The shift in location could have resulted from alteration with the cooperation of the stakeholders (obviously with the consent and cooperation of UPRR's predecessor - D&RGW Railroad Co., and Geneva Steel), or altered by a shift in the road over time. UDOT, in either case, had the authority to declare that the altered Crossing remained a public crossing.

If UDOT has authority to establish a new crossing and to alter a crossing, it most certainly has the discretionary authority to determine under the totality of facts that the Crossing remained or continued as a public crossing. Thus, the Commission's finding, that "Therefore, its current placement (speaking of the Crossing) has no effect on the legal nature of the Crossing today." (Report and Order, p. 16), is legally and factually correct. The Commission, on appeal of the UDOT decision found that there was substantial evidence to support the facts and circumstances that the Crossing was public, and it was not an abuse of discretion by UDOT to recognize the altered Crossing continued as a public crossing. See Semeco Industries, Inc. v. Utah State Tax Commission, 849 P.2d 1167 (Utah 1993), and First National Bank of Boston v. Salt Lake County Board of Equalization, 799 P.2d 1163 (Utah 1990), (cited in Joint Post-Hearing Supplemental Brief of Anderson Entities and Vineyard Town). If there is substantial evidence, and UDOT's decision was reasonable and rational, there is no basis for a change in the decision.

While we contend that the Commission, may have misstated the factual finding that the road and Crossing "... are entirely or partially within the land that was vacated" (demonstrative exhibits of the surveyors provided by both parties established that in the worst case, the current Crossing was partially within the area abandoned by Utah County as established by the railroad VAL map), it does not matter. UDOT found that there was substantial evidence that supported

the Crossing, once established, was public, and continued to be public even though it may have been altered to make it more safe. Testimony of UPRR's own engineer, Jim Marshall, and UDOT's engineer Eric Cheng acknowledged that this alteration or shift of the Crossing did not necessarily affect whether the Crossing remained a public crossing.

The proper standard of review was applied and there is no basis for reversal of the decision.

**POINT 3. THE COMMISSION CORRECTLY DETERMINED THAT UDOT'S DECISION, BASED ON THE FACTS AND LAW WAS RATIONAL AND REASONABLE.**

UPRR asserts, at its Point 2, the unusual argument that the Commission ought to substitute federal railroad engineering standards describing what constitutes a "typical" railroad crossing for governing state law. This proposition ignores and vitiates clear Utah law on how public roads are established and how those same roads are abandoned. It likewise ignores the proper role of the Commission in this instance; that is, to determine whether there was substantial evidence for the decision (there was) and whether the decision was reasonable and rational (it was).

UPRR cites no legal authority for this supposed re-weighing of the law and facts. The Commission rightly determined that the standard of review in this matter was to determine that there was substantial evidence for the decision, and that the decision was rational and reasonable (Report and Order, page 11). UPRR would have the Commission replace its own weighing of evidence, and more importantly, would have the Commission re-make the law to reflect that the engineering standards should outweigh Utah Statutes and case law in determining the status of a crossing. The extension of this request to its extreme is obvious. As safety standards change, substantial public property and access rights could be lost, without consideration of the effect on

the traveling public or property owners who utilize the crossing. This would create too much uncertainty and litigation on many crossings would no doubt result. This is not the law, nor would such a law be reasonable as it is applied statewide or nationwide.

UPRR makes no claim that the Commission was wrong in finding there was substantial evidence for the decision of UDOT. UPRR makes no claim that the decision of UDOT was not reasonable and rational. Without this claim, there is no basis for a rehearing.

**POINT 4. UPRR’S REQUEST FOR A STAY IS INAPPROPRIATE WHERE NO APPEAL IS PENDING AND THE COMMISSION LACKS POWER AND JURISDICTION TO ISSUE A STAY. SECTION 54-7-17 OF THE UTAH CODE PROVIDES THAT THE REVIEWING COURT HAS JURISDICTION TO ISSUE A STAY.**

The unsuccessful party in litigation will nearly always prefer that the decision against them be stayed and avoided as long as possible. However, this discounts the fact that both parties are impacted by a judgment, and the successful party should have some priority in moving forward based on a litigation decision. UPRR ignores the continuing harm to Anderson Entities and Vineyard Town and complains solely of its nominal costs of improvement. It also fails to consider the incremental increases in cost if improvements are not made to the Crossing now before UTA Commuter Rail traffic begins running.

UPRR has misapplied the provisions of 63G-4-405. By requesting a stay under this Section, UPRR is placing the Commission in the position of the “Agency”. This request for stay, if at all applicable should have been made to UDOT before, or immediately after, the appeal to the Commission. The Commission in this instance acts as the appellate authority for UDOT, not the “Agency” as that term is used in the Utah Statute. UPRR did not avail itself of this remedy and cannot now do so.

Section 63G-4-405 also requires that the agency issuing the order must have authority to

issue a stay of execution on any order rendered. 64G-4-405 (1) states: “(1) Unless precluded by another statute, the agency may grant a stay of its order or other temporary remedy during the pendency of judicial review, according to the agency's rules.” The Commission has adopted no rules for issuance of a stay because that power has been precluded by another statute.

Section 54-7-17, Utah Code precludes the Commission from issuing a stay, and instead requires that the appellate court should be the entity that grants a stay. This Section provides in applicable part the following:

(1) A petition for judicial review does not stay or suspend the operation of the order or decision of the commission.

(2) (a) The court may stay or suspend, in whole or in part, the operation of the commission's order or decision after at least three days' notice and after a hearing.

(b) If the court stays or suspends the order or decision of the commission, the order shall contain a specific finding, based upon evidence submitted to the court and identified by reference, that:

(i) great or irreparable damage will result to the petitioner absent suspension or a stay of the order; and

(ii) specifies the nature of the damage.

(3) (a) The court's order staying or suspending the decision of the commission is not effective until a supersedeas bond is executed, filed with, and approved by the commission (or approved, on review, by the court).

(b) The bond shall be payable to the state, and shall be sufficient in amount and security to insure the prompt payment by the party petitioning for the review of:

(i) all damages caused by the delay in the enforcement of the order or decision of the commission; and...

(c) Whenever necessary to insure the prompt payment of damages and any overcharges, the court may order the party petitioning for a review to give additional security or to increase the supersedeas bond.

The decision of the Commission may only be stayed after an appeal is filed, and only after the Court determines that it would be appropriate; and then only after an evidentiary hearing, allowing both sides to raise probative issues, and a determination by the Court and Commission of an appropriate supersedeas bond and filing of the bond with the Court. UPRR cannot subvert that process here by petition to the Commission.

The foregoing statute is similar to Rule 62 of the Utah Rules of Civil Procedure. It places the burden on the appellant, requires an appropriate bond, an evidentiary hearing to determine the damage to the successful litigant, and includes consideration of compensatory damages and attorney fees in deciding the issue on appeal. See Taylor Nat'l, Inc. v. Jensen Bros. Constr. Co., 641 P.2d 150 (Utah 1982), holding that the successful party in litigation is entitled to immediate enforcement unless the Court, under Rule 62, can find a legally sufficient reason to stay enforcement during an appeal.

In balancing the interests of UPRR vs. Vineyard Town and Anderson Entities, it must be remembered that for nearly two years, the Crossing has been closed. This eliminated a key highway access to the Anderson Entities land. This also called into question the road masterplan for Vineyard Town and the Anderson Entities land. As a consequence, design and planning for development has been delayed. Anderson Entities have a pending sale to Utah Valley University which could be delayed, or the sale could be lost entirely if this roadway is not available.

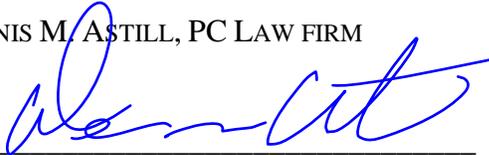
In addition, the UTA Commuter Rail is presently being constructed at the Crossing. If enforcement of the Commission's decision is delayed or stayed during an appeal, the cost of construction of improvements will no doubt increase substantially. Today, improvements to the rail can be done with little impediment and at a much lower cost because contractors are only dealing with 7-20 freight trains per day at the Crossing. When the Commuter Rail begins to run the cost of improvements could easily increase from the present estimates of \$250,000 (estimates by Jim Marshall during the Commission hearings), to \$1.0-2.0 Million (estimates stated by UTA personnel at the UDOT Surveillance Review meeting cited by UPRR). The minimal costs to UPRR of restoring less than 50 linear feet of asphalt roadway on the east portion of the Crossing should not be a consideration in comparison to the larger harm. Besides, UTA bears the larger

share of costs to improvements to the Crossing (*i.e.*, signals, extension of road, intersection changes, etc.), and UTA has elected not to participate in these proceedings (although noticed and clearly a party), and they have not requested any stay.

UPRR's request for a stay of enforcement of the order of the Commission is not well taken. UPRR must follow statutory procedure and file its appeal, if it intends to do so, and request relief from the appellate court, after notice and hearing, and determination of an appropriate bond. The Commission should deny any request for a temporary stay.

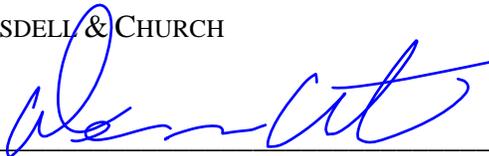
DATED this 24<sup>th</sup> day of March, 2011.

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With the Permission of David L. Church  
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**Certificate of Service**

I hereby certify that on the 24<sup>th</sup> day of March, 2011, a true and correct copy of **JOINT MEMORANDUM IN OPPOSITION TO UNION PACIFIC RAILROAD'S PETITION FOR REHEARING AND STAY** 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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