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BEFORE THE PUBLIC SERVICE COMMISSION OF UTAH

In Re:

Petition of Anderson Geneva, LLC, Ice Castle
Retirement Fund, LLC, and Anderson Geneva
Development, Inc.

:
: DOCKET NO. 11-888-01
:
: **UTAH DEPARTMENT OF**
: **TRANSPORTATION'S**
: **MEMORANDUM IN SUPPORT OF ITS**
: **MOTION TO DISMISS AND TO**
: **STRIKE THE EVIDENTIARY**
: **HEARING SCHEDULED FOR JUNE 15,**
: **2011**
:

Utah Department of Transportation (“UDOT”) submits this Memorandum in Support of its Motion to Dismiss and to Strike the Evidentiary Hearing Scheduled for June 15, 2011.

INTRODUCTION

After the Public Service Commission issued its Order dated February 7, 2011,¹ UDOT went through the emergency rule making process with Utah Administrative Code R930-5-13 to clarify that public notice is not required for temporary closures. Thereafter, UDOT permanently amended the rule through the normal rule making process. Based upon the current rule, UDOT conducted a surveillance review on February 28, 2011 and issued its Surveillance Report and Ruling on February 28, 2011. In this Surveillance Report and Ruling, UDOT ordered the temporary closure of the 400 N railroad crossing because of the addition of UTA's tracks, the lights and gates were removed and no active safety devices are currently present at the crossing. Until the recommended crossing improvements are installed and constructed, the crossing will remain closed because the existing conditions make the crossing unsafe.

In the Petition for Relief Against Unlawful Action by Utah Department of Transportation, Anderson Geneva, Ice Castle Retirement Fund and Anderson Geneva Development ("Anderson Entities") request relief that UDOT should be required to follow the Public Service Commission Order and to re-open the crossing.

During the scheduling conference held on Thursday, May 26, 2011, Administrative Law Judge Arredondo ordered that the Public Service Commission will address the issues raised in Anderson Geneva's petition on two tracks as follows: 1) the Commission will deal with compliance with its Report and Order issued on February 7, 2011 in Docket No. 09-888-01; and 2) all other remaining issues in Anderson Entities' petition. An evidentiary hearing was

¹ Union Pacific Railroad filed an appeal with the Utah Supreme Court. However, Union Pacific Railroad did not file a motion to stay or suspend the Public Service Commission's Order.

scheduled for June 15, 2011 at 9:00 a.m. to address the allegations that UDOT violated the Public Service Commission's Order.

ARGUMENT

The Public Service Commission Lacks any Subject Matter Jurisdiction for Administrative Enforcement of its Order Against UDOT

In their Petition, the Anderson Entities allege that UDOT did not comply with the Public Service Commission's Order and request the Public Service Commission to enforce its Order against UDOT. However, this Petition requests administrative enforcement that is not authorized by law. The Public Service Commission is vested with broad power and jurisdiction to supervise and regulate every public utility in the state. Utah Code Ann. Section 54-4-1. However, UDOT has jurisdiction over the safety functions delegated by the Department of Transportation Act. *Id.*

The relevant statutes granting the Public Service Commission's authority to enforce are directed to public utilities and corporations not a state agency. Because UDOT is not a public utility as defined in Utah Code Ann. Section 54-2-1(16)(a) or a corporation, Sections 54-7-20, 54-7-24 through 28 do not apply to UDOT. The Public Service Commission does not have the statutory authority to impose any penalties upon UDOT. Utah Code Ann. Section 54-7-21 also does not apply to this situation because the Petition alleges violation of an order, not the Constitution and statutes affecting public utilities.

"Subject matter jurisdiction relates to the relationship between the claim and the forum that allows for the exercise of jurisdiction." *Johnson v. Johnson*, 2010 UT 28, ¶9, 234 P.3d 1100 (citation omitted). "A lack of subject matter jurisdiction can be raised at any time and when

subject matter [jurisdiction] does not exist, neither parties nor the court can do anything to fill that void.” *Crump v. Crump*, 821 P.2d 1172, 1174 (Utah Ct. App. 1991) (quoting *Curtis v. Curtis*, 789 P.2d 717,726 (Utah Ct. App. 1990)). Because the statutes do not grant any jurisdiction to the Public Service Commission to administratively enforce its order against UDOT, the Public Service Commission cannot proceed with any administrative enforcement against UDOT. Moreover, the Court recognized that any enforcement actions needed to be filed in court instead of before the Commission. *Beehive Telephone Co. v. Public Service Commission*, 2004 UT 18, ¶ 49, 89 P.3d 131.

Therefore, UDOT respectfully requests that the Public Service Commission dismiss the portions of Anderson Entities’ Petition that request administrative enforcement of the Public Service Commission’s Order because of the lack of subject matter jurisdiction. UDOT further requests that any evidentiary hearing to enforce the Public Service Commission’s Order be stricken.

Dated this 7th day of June, 2011

Renee Spooner
Assistant Attorney General

MAILING CERTIFICATE

I hereby certify that I mailed a true and correct copy of the foregoing **UTAH DEPARTMENT OF TRANSPORTATION'S MOTION TO DISMISS AND TO STRIKE THE EVIDENTIARY HEARING SCHEDULED FOR JUNE 15, 2011**, postage prepaid, this 7th day of June, 2011, to the following:

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