

Dennis M. Astill
DENNIS M. ASTILL, PC
9533 South 700 East, Suite 103
Sandy, Utah 84070
Telephone: (801) 990-4930
Facsimile: (801) 990-4931
Attorneys for Petitioners

- BEFORE THE PUBLIC SERVICE COMMISSION OF UTAH -

In Re:)
Petition of Anderson Geneva, LLC, Ice Castle)
Retirement Fund L.L.C., and Anderson)
Geneva Development, Inc.)

**PETITIONERS' RESPONSE TO
UDOT'S MOTION TO DISMISS**

Docket No.: 11-888-01

Respondent, Utah Department of Transportation's ("UDOT"), filed a Motion to Dismiss Petitioners' request for enforcement of the orders of the Commission for lack of subject matter jurisdiction. The Public Service Commission (the "Commission") not only has subject matter jurisdiction, but has the exclusive jurisdiction for resolution of disputes between UDOT and parties who are aggrieved by UDOT's actions in regard to grade crossings. Petitioners, Anderson Geneva, LLC, Ice Castle Retirement Fund L.L.C., and Anderson Geneva Development, Inc, hereby respond to the Motion to Dismiss as follows:

I. SUBJECT MATTER JURISDICTION FOR DISPUTES REGARDING RAILROAD CROSSINGS IS EXPRESSLY RESERVED TO THE COMMISSION UNDER UTAH CODE SECTION 54-4-15(4)(a).

Utah statutes Section 54-1-1 *et. seq.*, provide the Commission with broad jurisdiction and regulatory powers for regulation of public utilities and carriers. Under these section of the Code,

in one narrow instance, UDOT is provided the first level of authority for establishment and regulation of at-grade road railroad-highway crossings. It seems clear from the statutory scheme that the Legislature intended the Commission to have ultimate jurisdiction over matters regulating carriers and utilities. Thus, the Commission was granted “. . . exclusive jurisdiction for the resolution of any dispute upon petition by any person aggrieved by action of the Department pursuant to this Section . . .” (Utah Code Section 54-4-15(4)(a)). Given the broad jurisdiction of the Commission over common carriers, the broad language and “exclusive jurisdiction” language of this Section, the Commission has been granted broad authority to hear disputes regarding UDOT’s actions under Section 54-4-15.

On February 7, 2011, the Commission issued its Report and Order in regard to Docket No. 09-888-01. UDOT subsequently took action which it claims was in compliance with the Order. In fact, what UDOT did was initiate actions not in compliance with the Report and Order by changing the rules for compliance. Since the Commission retains exclusive jurisdiction to review the actions of UDOT in this context, it seems apparent that the Commission has the power and right to review the actions of UDOT with regard to this grade crossing, to review the actions of UDOT in relation to its Report and Order, and to consider whether UDOT has acted in compliance with the Report and Order.

UDOT has injected new facts and elements into the matter by adopting a new administrative rule within two days of the Report and Order being issued. By doing so, UDOT attempted to change the ground rules that were applicable during the pendency of Docket No. 09-888-01, but waited until after the Report and Order was entered to make such rule change. The Commission has the authority to consider whether UDOT has violated its Report and Order

and whether these new facts and circumstances are consistent with UDOT's rights under Utah Code Section 54-4-15.

II. THE COMMISSION CAN PURSUE SEPARATE LEGAL ACTION AGAINST UDOT IF IT FINDS THAT UDOT HAS FAILED TO COMPLY WITH ITS REPORT AND ORDER.

Petitioners concur with UDOT in that Utah Code Sections 54-7-18, et. seq., do not apply to UDOT as an agency, and orders, fines, and penalties may not be issued by the Commission against UDOT under the provisions of those Sections. However, the legislature has not left the Commission, or aggrieved parties, without remedy if UDOT fails to comply with orders of the Commission. Utah Code Section 63G-4-501, expressly allows the Commission to pursue its own actions for enforcement of its orders. It provides as follows:

63G-4-501. Civil Enforcement.

(1) (a) In addition to other remedies provided by law, an agency may seek enforcement of an order by seeking civil enforcement in the district courts.

(b) The action seeking civil enforcement of an agency's order must name, as defendants, each alleged violator against whom the agency seeks to obtain civil enforcement.

(c) Venue for an action seeking civil enforcement of an agency's order shall be determined by the requirements of the Utah Rules of Civil Procedure.

(d) The action may request, and the court may grant, any of the following:

- (i) declaratory relief;
- (ii) temporary or permanent injunctive relief;
- (iii) any other civil remedy provided by law; or
- (iv) any combination of the foregoing.

The case of Johnson v. Johnson, 2010 UT 28, 234 P.3d 1100, is cited by UDOT for the principle that subject matter jurisdiction can be raised as a defense at any point in a matter. It was a divorce case where several years after a decree was entered, a party sued to vacate the order based on subject matter jurisdiction. While the Utah Supreme Court correctly stated that one can always bring a motion to dismiss or vacate for lack of subject matter jurisdiction, other

principles may govern whether that party is successful. Petitioners do not dispute that UDOT may bring its Motion at this stage of the action.

However, Johnson also set forth the principle that if the entity hearing the matter has other jurisdictional rights, then the Utah Supreme Court would not overturn or dismiss. While it was captioned as a divorce case, in Johnson, the district court that heard the matter was a court of general jurisdiction and could hear all matters between the parties. While, the district court may not have had power to issue a divorce decree because the parties were never married, the Utah Supreme Court held that as a court of general jurisdiction, the district court certainly had the right to adjudicate the rights between the two parties who had resided together as husband and wife for nearly 30 years. Therefore, it had subject matter jurisdiction.

This matter is similar in many respects. While the Commission cannot issue an order for injunctive relief, or an order holding UDOT in contempt for failure to comply with its Report and Order, it has the general jurisdiction to consider whether UDOT has followed applicable law and rules and/or violated the Commission's Report and Order (which became the law of this case).

The Commission has power to hear evidence and issue orders in support of its previous Report and Order. The Commission also has the legal authority and power to bring an action in the district court to enforce its orders.

UDOT also cited the case of Beehive Telephone Co. v. Public Service Commission, 2004 UT 18, 89 P3d. 131, In that case, the Utah Supreme Court expressly found the power in the Commission to bring legal actions on its own behalf as an agency. It does not have to use the Attorney General's Office, although it can do so.


Pursuant to the request of Petitioners in this matter, the Commission has the power to hear the evidence of UDOT's compliance with its Report and Order and UDOT's subsequent actions in regard to the Crossing, to first of all, determine whether UDOT has failed to comply with its order or whether UDOT has taken other actions that are inconsistent with its authority and rights, and under the law of this case. Further, the Commission can then decide to bring legal action directly against UDOT pursuant to Utah Code Section 63G-4-501(1).

SUMMARY

The Commission has exclusive jurisdiction to resolve disputes by aggrieved parties against UDOT, under Section 54-4-15(4)(a). It seems axiomatic that the Commission would therefore have jurisdiction to consider the actions of the parties with regard to orders of the Commission and whether or not those actions are in compliance with such orders. The Commission has statutory authority to bring legal actions in its own name to enforce its orders against parties not in compliance, pursuant to 63G-4-501, Utah Code. The Commission has subject matter jurisdiction to hear the issues in relation to UDOT's compliance with its orders.

DATED this 17th day of June, 2011.

DENNIS M. ASTILL, PC LAW FIRM

By: 

Dennis M. Astill
Attorneys for Petitioners

Certificate of Service

I hereby certify that on the 17th day of June, 2011, a true and correct copy of the foregoing **PETITIONERS' RESPONSE TO UDOT'S MOTION TO DISMISS** was filed with the Public Service Commission electronically and by hand, and true and correct copies served to the persons and in the manner below:

Brett A. Burnett
Attorney General's Office
160 East 300 South, Fifth Floor
PO Box 140858
Salt Lake City, UT 84114-0858

- U.S. mail, first-class, postage prepaid
- Facsimile
- Hand Delivery
- Overnight courier

Reha Kamas
Union Pacific Railroad
280 South 400 West, Suite 250
Salt Lake City, Utah 84101

- U.S. mail, first-class, postage prepaid
- Facsimile
- Hand Delivery

Renee Spooner, Assistant Attorney General
4501 S 2700 West
Box 148455
Salt Lake City, Utah 84114

- U.S. mail, first-class, postage prepaid
- Facsimile
- Hand Delivery

