

- BEFORE THE PUBLIC SERVICE COMMISSION OF UTAH -

In the Matter of the Petition of Anderson)
Geneva, LLC, Ice Castle Retirement Fund) DOCKET NO. 11-888-01
L.L.C., and Anderson Geneva Development,)
Inc. for Relief Against Utah Department of) ORDER ON MOTION TO DISMISS
Transportation (UDOT))

ISSUED: July 20, 2011

By The Commission:

BACKGROUND

This matter is before the Commission on UDOT's Motion to Dismiss. In its June 2, 2011 Scheduling Order, the Commission stated that it will deal with the issues raised in Anderson Geneva's petition on two tracks as follows: 1) in the first track, the Commission will deal with compliance with its Report and Order (Order) issued on February 7, 2011 in Docket No. 09-888-01¹, i.e. whether UDOT complied with the Order, and if not, methods for obtaining compliance; and 2) The second track will deal with all other remaining issues in Anderson Geneva's petition. *See Scheduling Order and Notice of Hearing*, June 2, 2011,p.1. The Commission scheduled an evidentiary hearing to determine if UDOT complied with its Order and also address "methods for obtaining compliance." *Id.* UDOT filed a Motion to Dismiss, contending the Commission lacks jurisdiction to enforce its order of February 7, 2011. It

¹ In that docket, the three parties were UDOT, Anderson Geneva, and Union Pacific Railroad. The Administrative Law Judge of the Commission there issued a final Order affirming UDOT's finding that the Crossing was a public crossing. However, the Commission found that UDOT failed to follow its own rules in closing the Crossing, and to "re-open the Crossing and follow applicable Rules in determining whether it should close the Crossing." *Order*, p.24, ¶ 2. Union Pacific requested reconsideration, and a stay from the Commission. The application for reconsideration was not granted within 20 days, and therefore considered denied. *Utah Code Ann. § 54-7-15(2)(c), §63G-4-302(1)(a)*. No stay was granted. Union Pacific was the only party that appealed the final Order to the Supreme Court and it is currently pending before the high court. Therefore, as to UDOT and the petitioners, that Order is final and conclusive. *See Utah Code Ann. § 54-7-14* (providing that "[i]n all collateral actions or proceedings the order and decisions of the commission which have become final shall be conclusive.")

concluded that “because the statutes do not grant any jurisdiction to the [Commission] to administratively enforce its order against UDOT, the Commission cannot proceed with any administrative enforcement against UDOT.” *UDOT Memorandum In Support of its Motion to Dismiss*, p.4. It asked the Commission to dismiss the portions of Anderson Entities’ petition that request administrative enforcement of the Order due to lack of jurisdiction, and further asked the Commission to strike the evidentiary hearing. On June 9, 2011, the Commission did strike the scheduling order and evidentiary hearing in place pending resolution of this Motion. On June 22, 2011, the petitioners responded to the Motion to Dismiss. Petitioners pointed to Utah Code Ann. § 54-4-15 to contend the Commission still retains jurisdiction to determine if UDOT complied with its Order. *Id.* at p.2. Section 54-4-15(4)(a) states: “The commission retains exclusive jurisdiction for the resolution of any dispute upon petition by any person aggrieved by any action of the department pursuant to this section” Petitioners contend UDOT violated the Commission’s Order by adopting a new administrative rule within two days of the issuance of the Order. They contend the Commission still retains jurisdiction to determine whether UDOT properly complied with the Order.

Petitioners further contend that should the Commission find UDOT failed to comply with the Order, and even if the Commission lacks enforcement authority in its own forum, it may still seek enforcement of its order in district court pursuant to the terms of Utah Code Ann. § 63G-4-501, which allows an agency to “seek enforcement of an order by seeking civil enforcement in the district courts.” *Utah Code Ann. 63G-4-501(1)(a)*, provides for various remedies. Petitioners concluded that the Commission should deny the Motion to Dismiss and retains jurisdiction to determine UDOT’s compliance with its Order.

ANALYSIS

There is no dispute that jurisdiction lies with the Commission regarding petitioners' *new* disputes arising out of UDOT's February 28, 2011 surveillance review or thereafter, i.e. those not arising out of UDOT's alleged violation of the Commission's Order. Here the dispute lies mainly in determining whether UDOT complied with the Commission's Order. The Commission in its Order, stated: "The Commission orders as follows: UDOT's characterization of the Crossing and remainder of 400 North as public is affirmed; UDOT shall re-open the Crossing and follow applicable Rules in determining whether it should close the Crossing" The dispute between UDOT and Petitioners is whether UDOT complied with its own statutes and the Commission Order determining whether UDOT complied with its own Rules and statutes. UDOT contends that through the emergency rule-making process, it changed Utah Admin. Code R930-5-13 to clarify that public notice is not required for temporary closures. *UDOT Memorandum in Support*, p.2, and did not need to re-open the Crossing pending public notice. Petitioners contend UDOT violated the Commission's Order by taking such action, in violation of the Commission's Order to re-open the Crossing and hold public hearing. The Commission agrees with the petitioners that it is afforded broad jurisdiction to at the very least, determine whether UDOT complied with its Order. This whole dispute arose out of the petitioner's petition under this section for Commission review of UDOT's actions. The Commission has "*exclusive jurisdiction*" to resolve "*any dispute*", by "*any person aggrieved by any action of*" UDOT, including whether it complied with the Commission's order. Even if the Commission lacks jurisdiction to enforce its Order, it may still determine whether UDOT violated it. The Motion to Dismiss should be denied at this time.

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ORDER

1. The Motion to Dismiss is denied at this time;
2. The Commission will set an evidentiary hearing to determine whether UDOT complied with its Order of February 7, 2011. Following that evidentiary hearing, if the Commission determines UDOT failed to follow its Order, the Commission will dismiss the portion of the petition seeking enforcement of the Order, and commence an action in the appropriate district court to obtain enforcement of its Order;
3. Also, after that evidentiary hearing, the Commission will set another scheduling conference to schedule the second track of the resolution of the petition.

DATED at Salt Lake City, Utah, this 20th day of July, 2011.

/s/ Ruben H. Arredondo
Administrative Law Judge

Attest:

/s/ Julie Orchard
Commission Secretary
D#208102