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*Attorneys for Petitioner*

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**BEFORE THE PUBLIC SERVICE COMMISSION**

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**IN THE MATTER OF LOGAN CITY'S  
PETITION REQUESTING  
INVESTIGATION INTO UNION PACIFIC  
RAILROAD COMPANY'S  
ADMINISTRATION OF AGREEMENTS  
AND MAINTENANCE PROVISIONS**

**REPLY TO UNION PACIFIC  
RAILROAD'S RESPONSE TO PETITION  
AND REQUEST FOR AGENCY ACTION**

Docket No. 21-888-01

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Union Pacific Railroad Company (UP) has filed a Response to the Petition and Request for Agency Action filed by Petitioner Logan City (the City). By its Response, UP requests the Commission to dismiss or delay any action on the City's Petition. The City submits this Reply.

As noted herein, UP's Response fails to address the substance of the City's Petition, and instead makes arguments and assertions the Commission is without jurisdiction to even address, let alone rely on to dismiss the City's Petition. UP's Response is both substantively unsupported and procedurally improper.

## REPLY TO UNION PACIFIC'S "BACKGROUND" STATEMENTS

Although UP fails to specifically address any of the factual allegations supporting the City's Petition, the City takes this opportunity to reply to UP's background statements and provide important context.

For example, UP correctly asserts that UDOT promulgated Administrative Rule 930-5 "more than a decade ago," and that for all of that time the Rule provided, in pertinent part:

Responsibility for maintenance is as described in this section unless a separate agreement applies.

The Railroad is responsible for the maintenance of all Railroad Passive Warning Devices and Active Warning Devices within the Railroad right-of-way.

Response at ¶¶ 5-6, quoting Utah Admin. Code R930-5-8(1) (2010).

However, UP fails to allege or acknowledge that on March, 13, 2013, it entered into a "MASTER AGREEMENT" with UDOT which "COVER[S] GRADE CROSSING SAFETY IMPROVEMENT PROJECTS IN THE STATE OF UTAH." The 2013 Master Agreement provides, in pertinent part:

Upon completion of the warning device installation at any particular grade crossing, the Railroad, *at its own expense* (except as herein or in any future supplement otherwise provided), *shall thereafter operate and maintain said warning devices in proper working condition*; PROVIDED, HOWEVER, that this provision shall not negate the Railroad's eligibility for any further federal, state or local or other public funds that may become available for the maintenance of said devices.

Master Agreement, attached as Exhibit A, at ¶ 8 (emphasis added).

And despite the Rule's language in 2010 that "[t]he Railroad is responsible for the maintenance," and despite UP's 2013 Agreement with UDOT that it would be responsible for maintenance of grade crossing safety improvements, UP's own exhibits demonstrate that UP has

consistently required Utah municipalities to enter into agreements dictating that the municipalities bear all maintenance costs. *See, e.g.*, Response at Exhibit 5 (At-Grade Crossing Agreement with Logan City dated August 11, 2010, requiring the City to bear all signal maintenance costs); Exhibit 6 (At-Grade Crossing Agreement with West Jordan City dated March 9, 2018, requiring the City to bear all maintenance costs).

UP's practice continued and culminated with its presentation to the City in March of 2020, after road and crossing construction had been proceeding for months, with a proposed agreement requiring the City to pay a significant annual maintenance "fee." That fee would be due regardless of any maintenance UP actually performed. *See* Petition at ¶ 30. (UP continued to insist the City pay for maintenance expenses throughout the period the parties were negotiating. *See id.* ¶¶ 36-47.)

This put the City in the position of having to agree to UP's terms, or be left with a substantially unsafe intersection. *See* Petition at ¶ 32 ("On June 29, 2020, UPRR rejected the Petitioners' request to allow construction to proceed on the project while the parties continued to negotiate the terms of the At-grade Crossing Agreement."); *see also* Utah Local Governmental Trust Letter to City Safety Manager, attached as Exhibit B ("My understanding is that this construction has been halted due to disagreements with the railroad. I highly recommend that this construction be completed as soon as possible to reduce safety risks in the area. Please let me know if there is anything I can do to help remedy the situation.").

UP's practice in turn led UDOT to adopt an emergency 120-day rule to clarify UDOT's original intent, that the railroad's "responsibility" includes the obligation to perform and pay for maintenance. *See* Petition at ¶¶ 33-35.

UP correctly alleges that during the process formally amending the Rule to clarify UDOT's original intent, UP submitted a comment opposing the amendment, which it attaches as Exhibit 4 to its Response. *See* Response at ¶¶ 14-15. However, UP fails to allege or acknowledge that despite the longstanding language and its prior Master Agreement, it had never before challenged or commented on the Rule.

As UDOT noted in its response to the comment:

... UP's comments allege the proposed changes violate state and federal law and the U.S. Constitution because they "allocate 100% of the maintenance costs of Crossings to Union Pacific." UP's comments also allege UDOT's proposed changes to R930-5-8 will "effectively end the practice of entering into construction and maintenance agreements." Neither allegation is correct.

All at-grade railroad crossings are not the same. There are various configurations of crossings and safety devices required at the different types of crossings. R930-5-8 intends to assign maintenance responsibilities to the railroad company, the highway authority, or others based on state or federal regulatory requirements. R930-5-8 does not allocate all maintenance responsibility to UP or any railroad company. R930-5-8(1)(f) assigns maintenance responsibility to the highway authority. R930-5-8(1)(g) apportions maintenance responsibility between the highway authority and the railroad. R930-5-8(1)(h)(i) assigns maintenance responsibility to the industry owning the trackage or as agreed to by the parties. Since R930-5-8 allocates maintenance responsibilities to various parties, the proposed changes to R930-5-8 do not effectively eliminate UP's ability to enter maintenance and construction contracts.

The Utah Division of Administrative Rules published the version of R930-5-8 in effect on January 1, 2010, in Bulletin Number 2010-1. UDOT effectuated R930-5-8 on February 8, 2010. UDOT cannot find comments submitted by UP discussing or objecting to the current R930-5-8 in the ten years since the initial comment period's opening. UDOT's proposed changes to R930-5-8 pertaining to maintenance obligations are not substantive. Any adverse effect the rule may have on UP has existed for more than ten years. UP has not attempted to inform UDOT that R930-5-8 negatively impacts UP for more than ten years. UP's comments regarding the proposed changes to R930-5-8 are the only comments submitted to UDOT by a railroad in more than ten years. No other railroad in Utah has claimed to be harmed by R930-5-8 or the proposed changes. UDOT disputes UP's contention that its proposed changes, intended to clarify its original intent, will have a material adverse impact on UP now.

UDOT Letter to Sarah Goldberg, attached as Exhibit C.

UP goes on to allege that “Union Pacific has a long and successful history of working cooperatively and in good faith with UDOT and local road authorities.” Response at ¶ 17. The City clearly disputes this allegation for the reasons set forth by its Petition and by this Reply. And UP made the same allegation in its Complaint against UDOT, which UDOT denied as follows:

[UDOT] denies the allegations of paragraph 13. [UDOT] avers that Plaintiff has not “worked cooperatively and in good faith with UDOT and other local road authorities in maintaining crossings within the state of Utah” and this has resulted in disputes with the cities of Logan and Delta concerning Plaintiff’s practices. [UDOT] avers that the dispute over crossing maintenance costs with the City of Logan is currently pending before the Public Service Commission. Finally, [UDOT] avers that Plaintiff has attempted to require the closure or improvement of other crossings or new cost-shifting maintenance agreements before it would allow important highway projects to move forward or safety improvements to be completed.

UDOT Answer at ¶ 13, attached as Exhibit D.

Finally, as noted above, while UP describes settlement discussions with the City, *see*, *e.g.*, Response at ¶¶ 25-26, it fails to acknowledge that despite the longstanding language of the Rule, its Master Agreement with UDOT, and the clarifying amendments established by the 2020 emergency rule in July 2020 and the finally adopted R530-5-8 in March 2021, throughout these discussions UP continued to insist that the City bear the costs of maintenance after the At-Grade crossing construction. This is precisely what led to the City’s Petition—UP’s continued insistence that the City agree to something that is contrary to R530-5-8.

## ARGUMENT

### **1. THE COMMISSION CANNOT ADDRESS UNION PACIFIC’S ARGUMENTS REGARDING THE VALIDITY OF UDOT’S ADMINISTRATIVE RULE.**

UP’s Response primarily parrots the Complaint it has filed against UDOT and argues that “[t]he Commission should dismiss the City’s Petition [with prejudice] because the Amended Rule that is central to the City’s Petition (1) violates Utah statutory law, [and] (2) violates federal statutory and constitutional law[.]” Response at 7; *see also id.* at 7-12. This argument ignores both limitations on the Commission’s jurisdiction and applicable procedural requirements.

“It is well established that the Commission has no inherent regulatory powers other than those expressly granted or clearly implied by statute.” *Hi-Country Estates Homeowners Ass’n v. Bagley & Co.*, 901 P.2d 1017, 1021 (Utah 1995) (quoting *Mountain States Tel. & Tel. Co. v. Pub. Serv. Comm’n*, 754 P.2d 928, 930 (Utah 1988)). “When a ‘specific power is conferred by statute upon a ... commission with limited powers, the powers are limited to such as are specifically mentioned.” *Id.* (quoting *Union Pac. R.R. v. Pub. Serv. Comm’n*, 103 Utah 186, 134 P.2d 469, 474 (1943)). “Accordingly, to ensure that the administrative powers of the [Commission] are not overextended, any reasonable doubt of the existence of any power must be resolved against the exercise thereof.” *Id.* (internal quotation marks omitted).

UP cites no statute which specifically provides the Commission with the power to determine whether a Rule promulgated and amended by UDOT is invalid or unconstitutional in undertaking the Commission’s responsibilities to act on the City’s Petition. Section 54-4-15(4)(a), which UP does not cite, but which might otherwise provide the Commission with jurisdiction to resolve a dispute between UDOT and a regulated utility, does not specifically confer jurisdiction over UDOT’s rulemaking authority. *See, e.g.*, Utah Code Ann. § 54-4-

15(4)(a). But such specificity is required. *See Hi-Country Estates*, 901 P.2d at 1021 (“[T]he [commission’s] powers are limited to such as are specifically mentioned.”); *see also Heber Light & Power Co. v. Utah Pub. Serv. Comm’n*, 2010 UT 27, ¶ 24, 231 P.3d 1203 (“[A]uthority to regulate governmental entities in any respect cannot be read into the statute.”).

Notably by contrast, the Utah Administrative Rulemaking Act does provide a specific process that allows a person aggrieved by an administrative rule to challenge the rule. That administrative process specifically applies to challenges asserting that the “rule violates constitutional or statutory law or the agency does not have legal authority to make the rule.” Utah Code § 63G-3-602(4)(a)(i). UP expressly brings its separately-filed complaint against UDOT pursuant to that statutory scheme for judicial review of administrative rules.

Both the lack of any applicable specific jurisdictional provision in 54-4-1, *et. al.* and the comprehensive nature of the Administrative Rulemaking Act strongly imply that the Commission has no authority to review and determine the validity of administrative rules promulgated by another entity. *See, e.g., Hi-Country Estates*, 901 P.2d at 1021 (“[T]o ensure that the administrative powers of the [Commission] are not overextended, any reasonable doubt of the existence of any power must be resolved against the exercise thereof.”).

And importantly, even if the Commission had jurisdiction to determine whether UDOT’s Amended Rule were invalid and unconstitutional in connection with the City’s Petition as UP apparently assumes, UP has failed to follow the appropriate procedural steps to allow the Commission to do so. *See, e.g., Utah Code Ann. § 54-4-15(4)(a)* (requiring a person aggrieved by UDOT action to file a “petition”). *See also R746-101-1, et seq.* (requiring a person or agency seeking a declaratory ruling by the Commission as to the “interpretation or explanation of rights,

status, interests or other legal relationships under a statute, rule or order” to file a “petition” expressly seeking such a ruling, in a specific form.).

Indeed, R746-101-2 requires a petitioner seeking such a ruling to serve a petition on “the public utility which could or would be adversely affected by a Commission ruling favorable to the Petitioner.” R746-101-2.D. Here, UDOT is the entity which could or would be adversely affected by the declaration UP requests—that R530-5-8 is invalid or unconstitutional as a basis for dismissing the City’s Petition. But, UP has not served UDOT with a petition and UDOT is not a party.

Setting aside UP’s noncompliance with applicable rules, fundamental concepts of due process (as also reflected in the Commission’s rules) would require UP to bring UDOT into this action to participate and actively defend the Rule before requesting the Commission to determine its validity as a basis for denying the City’s Petition. Indeed, in civil proceedings, Rule 24 of the Utah Rules of Civil Procedure requires that a person challenging the constitutionality of a governmental entity’s rule or administrative enactment notify the entity by serving it if the entity is not a party to the proceeding. UP has not done so.

In short, the arguments UP primarily relies on for its request that the Commission dismiss the City’s Petition are both substantively and procedurally improper and provide no basis for the relief UP requests.

**2. UNION PACIFIC PROVIDES NO COGNIZABLE REASON FOR THE COMMISSION TO DELAY ACTION ON THE CITY’S PETITION.**

UP’s “alternative” argument is that “[t]he Commission should dismiss the Petition without prejudice pending the outcome of the current litigation.” UP supports this argument solely with the assertion that “the future of the Amended Rule is uncertain.” Response at 12-13.



This argument based only upon “future” and “uncertain” events is also contrary to applicable law.

As set forth above and in the City’s Petition, the Rule’s language requiring UP to pay for maintenance has been in effect since 2010. UP agreed to be responsible for maintenance of crossing improvements in the State in a Master Agreement with UDOT in 2013. UDOT amended the applicable Rule on an emergency basis to clarify any ambiguity in July, 2020. The clarifying amendment took full effect in March, 2021. Throughout this extended period, however, UP has taken the position that municipalities, particularly including the City and Delta, must agree to be responsible for maintenance. UP has done so without asserting any challenge to the Rule—until September 24, 2021, more than a decade after the Rule first took effect, and more than a year after UDOT’s clarifying amendment.<sup>1</sup>

In similar contexts, the Utah Supreme Court has made clear that “an order issued by a court with jurisdiction over the subject matter and person must be obeyed by the parties until it is reversed by orderly and proper proceedings. This is true without regard *even for the constitutionality of the Act under which the order is issued.*” *Macris v. Sevea Int’l, Inc.*, 2013 UT App 176, ¶ 28, 307 P.3d 625 (cleaned up) (emphasis added); *cf. 2 Ton Plumbing, L.L.C. v.*

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<sup>1</sup> And as UDOT noted in its response to UP’s comment:

Any adverse effect the rule may have on UP has existed for more than ten years. UP has not attempted to inform UDOT that R930-5-8 negatively impacts UP for more than ten years. UP’s comments regarding the proposed changes to R930-5-8 are the only comments submitted to UDOT by a railroad in more than ten years. No other railroad in Utah has claimed to be harmed by R930-5-8 or the proposed changes.

*Supra* ¶ 8.

*Thorgaard*, 2015 UT 29, ¶ 23 n.16, 345 P.3d 675, 680 (“[C]ompliance with the statute is required before a party is entitled to the benefits created by the statute.”).

UP should not be heard requesting the Commission to delay ruling on the City’s Petition when UP has itself delayed in challenging the Rule on which it is based. The Commission should determine whether, for an extended period of time, UP has engaged in practices that are illegal under the unchallenged Rule, are “unjust, unreasonable, unsafe, improper, inadequate or insufficient,” and to remedy the same by order. *See* Utah Code Ann. § 54-4-7.

Finally, in support of its argument UP expressly acknowledges that any change in the Rule is “uncertain.” Indeed, as UDOT has made clear by its response to UP’s comment on the amended rule and by its Answer to the Complaint, UDOT intends to vigorously defend the Rule. That litigation, including any appeals, could take many years, and could very well be resolved in UDOT’s favor. In the meantime, the Rule is currently the law and UP continues to ignore it, while not disputing that the Commission has authority to regulate UP’s practices.

The Commission should not countenance UP’s tactics and attempts to avoid its responsibilities under the law as it currently exists by delaying the exercise of the Commission’s statutory authority.

### **CONCLUSION**

For the reasons set forth above, the City respectfully submits that Union Pacific’s Response to the City’s Petition provides no cognizable basis to dismiss the City’s Petition or to delay the Commission’s exercise of its statutory responsibilities.

DATED this 17<sup>th</sup> day of November, 2021.

SNOW, CHRISTENSEN & MARTINEAU



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LOGAN CITY ATTORNEY'S OFFICE

/s/ Craig J. Carlston

**(Signed with Permission)**

Kymber Housley  
Craig J. Carlston  
Logan City Attorney  
290 N 100 W  
Logan, Utah 84321

*Attorneys for Petitioner Logan City*

**CERTIFICATE OF SERVICE**

I hereby certify that on this 17<sup>th</sup> day of November, 2021, I served, via E-Mail, a true and correct copy of the attached **REPLY TO UNION PACIFIC RAILROAD'S RESPONSE TO PETITION AND REQUEST FOR AGENCY ACTION** upon the parties listed below to:

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Robert C. Keller

**EXHIBIT “A”**

138565

Master Agreement  
Grade Crossing Safety Improvement Projects  
**UNION PACIFIC RAILROAD COMPANY**  
UPRR Audit Number: \_\_\_\_\_

18190

*Folder # 279070*

# MASTER AGREEMENT

BETWEEN THE

**UTAH DEPARTMENT OF TRANSPORTATION**

AND

**UNION PACIFIC RAILROAD COMPANY**

COVERING

**GRADE CROSSING SAFETY IMPROVEMENT PROJECTS**

IN THE

**STATE OF UTAH**

## MASTER AGREEMENT

THIS MASTER AGREEMENT ("Agreement"), made and entered into this 6 day of March, 2013 (the "Effective Date"), by and between the **UTAH DEPARTMENT OF TRANSPORTATION** ("UDOT") and **UNION PACIFIC RAILROAD COMPANY**, a Delaware corporation ("Railroad").

### RECITALS:

**WHEREAS**, UDOT, with the aid of federal railroad safety funds supplied by the Federal Government, desires to provide for the improvement, installation, maintenance, and operation of active or passive grade crossing warning devices of various descriptions, including protective guardrails, impact attenuators bells, gates, flashing lights (hereinafter called "warning devices"), grade crossing surface improvements, illumination, pavement markings, advance warning signs, interim traffic control measures, or any combination thereof, at public highway and street grade crossings over the **Railroad's** track or tracks at various locations in the State of Utah.

In order to expedite the processing of applications for the installation or improvement of said facilities and the preparation of agreements therefore as required, it is the desire of the parties hereto to enter into a Master Agreement setting out the general terms and conditions under which said facilities shall be provided, with the understanding that supplements to this agreement will be issued covering specific individual projects.

### AGREEMENT

**IT IS AGREED**, by and between the parties hereto, as follows:

1. **SUPERSEDES PREVIOUS BLANKET AGREEMENTS, FORM OF SUPPLEMENTAL:**

It is understood and agreed by the parties hereto that this agreement will supersede the Blanket Agreement Covering Grade Crossing Warning Devices and/or Grade Crossing Surface Improvements in Utah dated December 23, 1987, UDOT Finance No. 88 2153, Railroad L.D. No. 26588 and supplements thereto.

The parties incorporate by reference 23 CFR 140, subpart I and 23 CFR 646, subpart B.

The form of the Supplemental to be prepared by UDOT and submitted to Railroad for each specific individual project shall be in the form marked as Exhibit A, attached hereto and incorporated by reference.

2. **RAILROAD COMPANY TO MAKE INSTALLATIONS:**

The **Railroad** shall, at the expense of **UDOT**, furnish all necessary labor, material, flagmen and equipment and shall install warning devices and/or surface improvements of the type and at the locations on the **Railroad's** right-of-way described in future supplements hereto, subject to the terms and conditions hereinafter set forth.

The **Railroad** shall also furnish, at the expense of **UDOT**, such detailed plans, specifications, lists of material and estimates of cost which may be required in addition to those prepared by **UDOT**. Said plans, specifications, lists and estimates shall become, by reference, a part of each supplement that may be issued hereunder.

The position of the warning devices, advance warning signs, protective guardrails and the location, width of grade crossing materials, and the adjustment of tracks, warning signs and other appurtenances at any particular crossing shall be established jointly by representatives of **UDOT** and the **Railroad** in accordance with the "Manual on Uniform Traffic Control Devices (MUTCD)". The **Railroad** will not begin installation of the warning devices or surface improvements until authorization is received from **UDOT**.

3. **PRIOR NOTIFICATION OF WORK:**

On all projects where work is performed on an actual cost basis:

A. The **Railroad** will provide forty-eight (48) hours notice, exclusive of weekends and holidays, to **UDOT's** Resident Engineer's office before performing any work covered by this agreement and any supplements hereof. If the **Railroad** experiences emergency work of its own which interrupts work on the project, it will resolve said emergency and notify the Resident Engineer's office when work will be resumed on the project. Failure of the **Railroad** to give proper notification to **UDOT's** Resident Engineer's office may result in **UDOT's** disallowance of reimbursement for that portion of the **Railroad's** unsupervised work.

B. **UDOT**, through its Resident Engineer, will keep daily records of the work performed by the **Railroad** in duplicate on a mutually acceptable form. The daily record shall be signed by **UDOT's** Resident Engineer and the **Railroad's** authorized representative. Each party shall be provided a copy of the record. When emergencies require the **Railroad's** work forces to leave a project, the record shall be resumed when work on the highway project is again commenced.

C. Before commencing any construction or other substantial work contemplated by this agreement, **UDOT** shall notify the **Railroad** of the time when such work shall commence. Notice shall be given not less than forty-eight (48) hours, exclusive of weekends and holidays, prior to the time work is to commence. **UDOT** shall cooperate with the **Railroad** in every reasonable way for the adequate protection of the **Railroad's** facilities and operations during progress of the work.

D. On projects where the work can be accurately estimated and **UDOT** and the **Railroad** have agreed to Lump Sum Payment as described in 23 CFR 140 Subpart I & 646 subpart B, there will be no requirement for daily record keeping nor for audit and reimbursement shall be made in conformance with Section 6 of this agreement. However, prior notification shall remain as in A and C above.



4. **MATERIALS USED IN WARNING DEVICES AND SURFACE IMPROVEMENTS:**

All materials used for warning devices and surface improvements shall be purchased by the **Railroad** or furnished by the **Railroad** from its company stock in accordance with the provisions of 23 CFR 140.908, Materials and Supplies and any amendments thereto which are in effect at the time of the execution of each supplement hereto.

Railroad acknowledges that this Agreement covers federal-aid projects, and Union Pacific will comply with the requirements of U.S.C. Section 313 and 23 CFR Section 635.410, Buy America requirements.

5. **STATE TO REIMBURSE RAILROAD COMPANY:**

A. For work performed by the **Railroad** on a reimbursement for Actual Cost basis, **UDOT** will pay the **Railroad** as follows:

- 1) **UDOT** shall pay to the **Railroad**, within forty-five (45) days (one hundred twenty (120) days for final billing) from receipt of the invoice the actual cost incurred by the **Railroad** in carrying out the work to be performed by the **Railroad** under the provisions of this Agreement and each supplement hereto. The invoice shall be prepared in conformity with 23 CFR 140.922. Said invoice shall be submitted by the **Railroad** within ninety days (90) days after the completion of the work performed by the **Railroad**. The **Railroad** shall send the invoices to Chief Railroad Engineer, UDOT Traffic and Safety, PO Box 143200, Salt Lake City, Utah 84114-3200. All final bills rendered by the **Railroad** and paid by **UDOT** will be subject to audit and approval by the Federal Highway Administration. Progress payments shall be made to the **Railroad** on Bills rendered by the **Railroad** during the progress of the work. All bills shall be reviewed by **UDOT's** Resident Engineer for verification of the work performed. Any work performed without proper notification to **UDOT's** Resident Engineers and for which Federal Funding is denied as a direct result of failure to provide prior notification shall be cited to the **Railroad** and deducted from the reimbursement.
- 2) Reimbursements will be made only for items fully complying with the requirements of 23 CFR 646 subpart B and 23 CFR 140 subpart I and any amendments thereto which are in effect at the time of the execution of each supplement hereto. Rental rates for any items of equipment necessary to the job and not included in the standard rates bulletin will be established with advance approval by the parties.
- 3) Reference to the Federal-Aid Grade Crossing Project Number will be indicated on all bills, correspondence and records pertaining to the project.

B. For work performed by the **Railroad** on a Lump Sum basis, **UDOT** will pay the **Railroad** as follows:

- 1) **UDOT** agrees to pay the **Railroad** a lump sum for the work performed on a project that has been undertaken as a lump sum project in accordance with the provisions of 23 CFR 140 Subpart I and 23 CFR 646.216(d)(3) and any supplements thereto, incorporated herein by reference and made a part hereof. The lump sum price for the work to be performed by the **Railroad** will be provided on a per-crossing basis, using the form of detailed estimate provided as Attachment 2 to FAPG NS 23 CFR 646B, after approval by **UDOT** and the Federal Highway Administration of the final detailed plans submitted by the **Railroad**. After obtaining the necessary approvals, completion of the work and the invoice for the lump sum, **UDOT** shall pay the lump sum invoice within forty-five (45) days from receipt of the invoice. **UDOT** may accept the **Railroad's** proposal (as indicated in the detailed estimate) to perform the work on a lump sum basis at any time within ninety (90) days of receipt of the detailed estimate. If the proposal submitted by the **Railroad** is not accepted by **UDOT** and Federal Highway Administration within ninety (90) days, the proposal shall be considered withdrawn and the **Railroad** may, at its sole option, submit a new proposal in the form of a detailed estimate to perform the work on a lump sum basis subject to acceptance by **UDOT** for ninety (90) days or extend the time within which **UDOT** may accept the original proposal. **UDOT** may accept the **Railroad's** proposal to perform the work on a lump sum basis by forwarding the **Railroad** an addendum to this Master Agreement for execution by **Railroad** officials and a written authorization for the **Railroad** to proceed with the work. If lump sum basis is used, **UDOT** will perform periodic reviews and analyses of the railroad's methods and cost data used to develop lump sum estimates.
- 2) If by some unforeseen circumstance **Railroad** flagging and inspection should exceed the detailed estimate by 20% they shall be covered by a supplement to the addendum for the lump sum agreement.
- 3) The **Railroad** shall, upon completion of the work covered in the lump sum agreement, render to **UDOT** a statement for the total lump sum amount shown in the addendum to this Master Agreement.
- 4) Reimbursement by **UDOT** of the lump sum price shall be made within forty-five (45) days of receipt of the **Railroad's** statement.

**6. MAINTENANCE AND OPERATION OF WARNING DEVICES:**

Upon completion of the warning device installation at any particular grade crossing, the **Railroad**, at its own expense (except as herein or in any future supplement otherwise provided), shall thereafter operate and maintain said warning devices in proper working condition; PROVIDED, HOWEVER, that this provision shall not negate the **Railroad's** eligibility for any further federal, state or local or other public funds that may become available for the maintenance of said devices

If said warning devices or their appurtenances installed under any supplement to this agreement are damaged, and if after a diligent effort by the **Railroad**, documented in writing, the item for damages proves uncollectible from the person or persons responsible for such damage, or in the event the **Railroad** and **UDOT** agree that Said warning devices, because of age, cannot be

maintained or by virtue of their obsolescence require replacement, then in either event the apportionment of the cost to repair or replace the warning devices shall be negotiated by the parties.

**UDOT** will not assume any liability for further damage or participate in any flagging or other costs on account of the warning devices being inoperative due to damage or replacement. If the damage to said warning devices is caused by highway traffic, **UDOT** will cooperate with the **Railroad** in determining the location and identification of the parties responsible for such damage to the extent of making accident records available to the **Railroad**.

7. **MOVING AND RELOCATION:**

If for public or **Railroad** convenience, the rearrangement of any warning device is necessitated on account of improvements for either railroad, highway, or both, and before rearrangement of said warning device is undertaken, the apportionment of the expense incidental thereto shall be determined by agreement.

8. **MAINTENANCE AND OPERATION OF CROSSING SURFACE IMPROVEMENTS:**

Upon completion of a Project, **Railroad** hereby assumes all responsibility for the Railroad Work it has agreed to perform. The **Railroad** will remain the owner of the facilities constructed by the Railroad under this Agreement, and will thereafter, at no cost to **UDOT** or jurisdictional authority, maintain the crossing material within the railroad right-of-way and two feet beyond each outside rail for crossings without concrete crossing panels or edge of concrete crossing panel. **Railroad** will not be responsible for maintenance of **UDOT's** or jurisdictional authority's facilities including, without limitation, the portions of the Road Crossing that are located beyond the area described above.

9. **DRAINAGE:**

If roadway approach paving work is included as part of the Railroad Crossing Project **UDOT** will, at its expense, design and install adequate facilities for draining the highway and its appurtenances, and shall not obstruct or interfere with existing drainage facilities or suffer or permit drainage water to flow or collect upon property of the **Railroad** because of any facilities or work of **UDOT**, and shall provide adequate passageway for the waters of any streams, bodies of water and drainage facilities (either natural or artificial, and including water from the **Railroad's** culvert and drainage facilities), so that water may not be impeded, obstructed, diverted or caused to back up, overflow or damage the property of the **Railroad** or any part thereof, or the property of others.

10. **INTERFERENCE WITH RAILROAD COMPANY OPERATIONS:**

All work of **UDOT** contemplated by this agreement, including any work of maintenance of the highway facilities or appurtenances constructed on the **Railroad's** property shall be performed and accomplished without interruption to or delay of operations of the **Railroad** or of others lawfully occupying or using the property or facilities.

UDOT shall not do, suffer or permit anything which will or may obstruct, endanger, interfere with, hinder or delay maintenance or operation of the **Railroad's** tracks or facilities, or any communication or signal lines, installations or any appurtenances thereof.

11. **INSTALLATION AND MAINTENANCE OF SIGNS, GUARDRAIL, PAVEMENT MARKINGS AND APPROACH PAVING:**

Installation and maintenance of any advance warning signs, protective guardrails, pavement markings and approach paving that may be required in any particular project shall be performed by and at the expense of UDOT or the local authority having jurisdiction over the highway right-of-way.

12. **CESSATION OF OPERATION:**

If the warning devices and surface improvements at any crossing, the subject of this agreement or any future supplement hereto, are rendered unnecessary or undesirable, or improper by closing said crossing, by relocation, by separation of grades, or improvements in crossing protection, the **Railroad** shall be released from further maintenance and obligation in connection therewith.

In the event of cessation of operation of any warning devices under the above conditions, the salvable items shall be disposed of by agreement of the parties hereto prior to said cessation of operation. UDOT and/or the Federal Highway Administration shall have the right to inspect salvageable material prior to its disposal.

13. **EACH PARTY RESPONSIBLE FOR ITS OWN ACTIONS:**

The **Railroad** and UDOT each hereby assume all responsibility for the construction and maintenance work it has agreed to perform.

14. **COMPLIANCE WITH FEDERAL-AID HIGHWAY PROGRAM:**

Installation of warning devices or surface improvements as contemplated hereunder and Federal participation in the cost thereof shall be in accordance with the provisions of 23 CFR 646, 23 CFR 140 subpart I, and the Federal Aid Program Guide NS 23 CFR 646B issued by the Federal Highway Administration, and any supplements or amendments thereto which are in effect at the time of the execution of each supplement hereto, which are incorporated herein by this reference.

In accordance with the provisions of 23 CFR 646.210(b), the **Railroad** will receive no ascertainable benefit from the installation of the warning devices or surface improvements and consequently no contribution from the **Railroad** will be required toward the cost thereof except as otherwise specifically provided in this Agreement, and any supplement hereto.

If the work by the **Railroad** under this agreement at any particular crossing is performed by other than **Railroad** forces or equipment, the provisions of the Civil Rights Act of 1964, contained in attached Appendix A, will apply and become a part of the supplement for that particular project.

**15. EXTRA WORK:**

Except as otherwise provided in Section 6 (b) for lump sum projects, in the event there are changes in the scope of the work, extra work, or changes in the planned work covered by this agreement, reimbursement therefore shall be limited to costs covered by a modification to this agreement approved in writing by **UDOT** prior to the start of work on the changes or additions.

**16. INSURANCE, UDOT PERFORMED WORK:**

On any railroad safety improvement project where **UDOT** will be performing any Work on **Railroad's** property with its own contractors, **UDOT** will require its contractor to enter into a Contractor's Right of Entry Agreement.

**AT NO TIME SHALL EITHER PERSONNEL OR EQUIPMENT BE ON RAILROAD PROPERTY OUTSIDE OF PUBLIC RIGHT OF WAY, OR BE CLOSER THAN TWENTY FIVE (25) FEET TO THE RAILROAD'S TRACK WITHOUT THE PRESENCE OF A RAILROAD FLAGMAN.**

**17. PROTECTION OF FIBER OPTIC CABLE SYSTEMS:**

Fiber optic cable systems may be buried on the **Railroad's** property. **UDOT** or its contractors shall telephone the **Railroad** at 1-800-336-9193 (a 24-hour number), to determine if fiber optic cable is buried anywhere on the **Railroad's** premises to be used by **UDOT**. If it is, **UDOT** will telephone the telecommunications company(ies) involved, arrange for a cable locator, and make arrangements for relocation or other protection of the fiber optic cable prior to beginning any work on the **Railroad's** premises.

**18. INDEMNITY**

A. In addition to the liability terms elsewhere in this Agreement, **UDOT** shall indemnify, defend and hold **Railroad** harmless against and from all third party costs, liability, and expenses whatsoever (including, without limitation, attorney fees, court costs, and expenses) arising out of any act or omission of **UDOT**, its **Contractor**, agents and/or employees, that causes or contributes to (1) any damage to or destruction of any telecommunications system on **Railroad's** property; (2) any injury to or death of any person employed by or on behalf of any telecommunications company, and/or its **Contractor**, agents and/or employees, on **Railroad's** property. **UDOT** shall not have or seek recourse against **Railroad** for any claim or cause of action for alleged loss of profits or revenue or loss of service or other consequential damage to a telecommunications company using **Railroad's** property or a customer or user of services of the fiber optic cable on **Railroad's** property. **UDOT's** obligation to indemnify the **Railroad** shall be limited by the liability caps in the Governmental Immunity Act. Nothing in this Agreement shall be construed to waive any provision of the Utah Governmental Immunity Act.

B. As used in this Section, "Railroad" includes other railroad companies using **Railroad's** property at or near the location of the Work Site and their officers, agents and employees; "Loss" includes loss, damage, claims, demands, actions, causes of action, penalties, costs and expenses of whatsoever nature, including court costs and attorneys' fees, which may result from: (i) injury to or death of persons whomsoever (including **Railroad's** officers, agents and employees, **UDOT's** officers, agents and employees, as well as any other

person) and (ii) damage to or loss or destruction of property whatsoever (including UDOT's property, damage to the roadbed, tracks, equipment, or other property of Railroad, or property in its care or custody).

C. As a major inducement and in consideration of the permission herein granted, UDOT agrees to indemnify and hold harmless Railroad from any Loss which is due to or arises from the Work performed under this Agreement, a breach of the Agreement or the failure to observe the health and safety provisions herein, or any activity or omission arising out of performance or nonperformance of this Agreement by UDOT, its employees or agents; however, that UDOT shall not be responsible to indemnify Railroad for Loss caused by the negligence of the Railroad. UDOT's obligation to indemnify the Railroad shall be limited by the liability caps in the Governmental Immunity Act. The provisions of this paragraph are not intended to create any additional rights to third parties.

**19. ASSIGNMENT:**

UDOT shall not assign this agreement or any supplement without the prior written consent of the Railroad, which approval shall not be unreasonably withheld.

**20. SUCCESSOR AND ASSIGNS:**

Subject to the preceding section, all the covenants and agreements herein contained shall inure to the benefit of and be binding upon the parties hereto, their successors and assigns.

\*\*\*\*\*

IN WITNESS WHEREOF, the parties hereto have caused these presents to be executed by the duly authorized officers as of the day and year first above written.

**RECOMMENDED FOR APPROVAL:**

By   
Chief Railroad Engineer

Date: 2-14-13

**APPROVED AS TO FORM:**

  
UDOT Counsel

Date: 2/14/2013

**UTAH DEPARTMENT OF TRANSPORTATION**

By   
Director

Date: 2-19-13

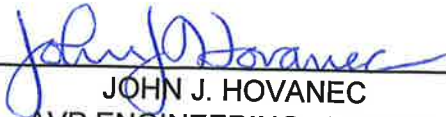
**UDOT COMPTROLLERS OFFICE:**

  
Contract Administrator

Date: 3-6-13

.....

**UNION PACIFIC RAILROAD COMPANY**

By   
JOHN J. HOVANEK  
AVP ENGINEERING - DESIGN

Date: March 4, 2013

\*\*\*\*\*

Project No. \_\_\_\_\_; \_\_\_\_\_ County  
Project Name: \_\_\_\_\_  
**UNION PACIFIC RAILROAD COMPANY**  
Milepost and Subdivision \_\_\_\_\_  
USDOT No. \_\_\_\_\_  
CID No. \_\_\_\_\_ PIN \_\_\_\_\_

**EXHIBIT A**

**UNION PACIFIC RAILROAD COMPANY**

**SUPPLEMENTAL AGREEMENT**

**Contract to Master Agreement UDOT Finance No. \_\_\_\_\_**

**Dated \_\_\_\_\_**

**THIS CONTRACT**, made and entered into this \_\_\_\_\_ day of \_\_\_\_\_, 20\_\_\_\_\_, by and between the **UTAH DEPARTMENT OF TRANSPORTATION**, hereinafter referred to as "**UDOT**" and **UNION PACIFIC RAILROAD COMPANY**, a Registered Corporation in the State of Delaware, hereinafter referred to as the "**Company**",

The parties hereto entered in to a **MASTER AGREEMENT** dated \_\_\_\_\_, **UDOT** Finance No. \_\_\_\_\_. All the terms of said **MASTER AGREEMENT** remain in full force and effect unless otherwise specified herein.

**NOW THEREFORE**, it is agreed by and between the parties hereto as follows:

1. The **Company** will perform the following described work in accordance with the terms and conditions of the **MASTER AGREEMENT**.

USDOT NO. \_\_\_\_\_, \_\_\_\_\_ (Location) \_\_\_\_\_

UPRR Required improvements include:

- \_\_\_\_\_ (Description of Work) \_\_\_\_\_
- \_\_\_\_\_
- \_\_\_\_\_

2. Prior to proceeding with the work covered herein, the **Company** is required to contact Eric Cheng, Chief Railroad Engineer; Telephone Number 801-965-4284, email [echeng@utah.gov](mailto:echeng@utah.gov), to arrange for daily record keeping.
3. All billings are to be submitted to Chief Railroad Engineer, Utah Department of Transportation, 4501 South 2700 West, Box 143200, Salt Lake City, UT 84114-3200.
4. The estimated cost of the work covered by this **Contract** for crossing USDOT No. \_\_\_\_\_ is shown in an estimate prepared by the **Company** in the amount of \$ \_\_\_\_\_, details of which are marked **EXHIBIT A**, attached hereto and thereby made a part hereof.

**TOTAL ESTIMATED REIMBURSEMENT TO THE COMPANY IS \$ \_\_\_\_\_**



Project No. \_\_\_\_\_; \_\_\_\_\_ County

Project Name: \_\_\_\_\_

**UNION PACIFIC RAILROAD COMPANY**

Milepost and Subdivision \_\_\_\_\_

USDOT No. \_\_\_\_\_

CID No. \_\_\_\_\_ PIN \_\_\_\_\_

Note: The above is an estimate only. Final payment to the **Company** will be based on actual costs incurred as determined upon completion of construction.

5. Upon signature and return of this **Supplemental Agreement** to **UDOT**, the **Company** is authorized to proceed with the work covered herein.

**IN WITNESS HEREOF**, the parties hereto have caused these presents to be executed by their duly authorized officers as of the day and year first above written.

**RECOMMENDATION FOR APPROVAL:**

**UTAH DEPARTMENT OF TRANSPORTATION**

By: \_\_\_\_\_  
Chief Railroad Engineer

By: \_\_\_\_\_  
Director, Traffic and Safety Division

Date: \_\_\_\_\_

Date: \_\_\_\_\_

**APPROVED AS TO FORM:**

**UDOT COMPTROLLER'S OFFICE:**

The Utah State Attorney General's Office has previously approved all paragraphs in this Agreement as to form.

By: \_\_\_\_\_  
Contract Administrator

Date: \_\_\_\_\_

\*\*\*\*\*

**ATTEST:**

**UNION PACIFIC RAILROAD COMPANY,**  
A Corporation of the State of Delaware.

By: \_\_\_\_\_

By: \_\_\_\_\_

Title: \_\_\_\_\_

Title: \_\_\_\_\_

Date: \_\_\_\_\_

Date: \_\_\_\_\_

(IMPRESS SEAL)

**EXHIBIT “B”**

**UTAH LOCAL GOVERNMENTS TRUST**

55 South Highway 89, North Salt Lake, UT 84054  
o 801.936.6400 t 800.748.4440 f 801.936.0300 www.utahtrust.gov



Brody Parker  
Safety Manager  
Logan City  
P. O. Box 527  
Logan, UT 84323-0527

July 27, 2020

Brody,

I recently visited the extended street construction site in Logan City from 1000 North to 1800 North on 600 West street. This extensive construction has produced significant impacts to traffic flow which result in serious safety hazards. During daily high traffic flow periods the construction area causes traffic backing for several blocks in multiple directions, sometimes leaving traffic exposed to rail traffic without an exit should a train pass. Congestion can lead to increased traffic accidents and construction incidents. Please see attached photo.

My understanding is that this construction has been halted due to disagreements with the railroad. I highly recommend that this construction be completed as soon as possible to reduce safety risks in the area. Please let me know if there is anything I can do to help remedy the situation.

A handwritten signature in blue ink, appearing to read "Jason Watterson", with a long horizontal line extending to the right.

Jason Watterson, CIH, CHMM, ARM-P  
Loss Prevention Consultant  
435.213.6869

**EXHIBIT “C”**

STATE OF UTAH  
OFFICE OF THE ATTORNEY GENERAL



SEAN D. REYES  
ATTORNEY GENERAL

Spencer E. Austin  
Chief Criminal Deputy

Ric Cantrell  
Chief of Staff

Melissa A. Holyoak  
Solicitor General

Brian L. Tarbet  
Chief Civil Deputy

March 23, 2021

Sarah Goldberg  
Greenberg Traurig, LLP  
Attorneys at Law  
222 South Main Street, 5th Floor  
Salt Lake City, Utah 84101

Subject: Union Pacific Railroad's Comments on Proposed Amendment to Utah Admin. Code R930-5-8; Filing No. 53184

Dear Ms. Goldberg:

This letter responds to the above-referenced comments by Union Pacific Railroad (UP) received by the Department of Transportation (UDOT) on January 7, 2021. UDOT disagrees with UP's remarks as they misrepresent the purpose and likely result of UDOT's proposed changes to Utah Admin. Code Rule R930-5-8 (R930-5-8).

UDOT's proposed changes to R930-5-8 do three things: 1) The proposed changes define responsibility as the obligation to perform and pay for maintenance, 2) require agreements to reallocate responsibility to be made before a maintenance project begins, and 3) require the agreements to be in writing. UP's comments allege the proposed changes violate state and federal law and the U.S. Constitution because they "allocate 100% of the maintenance costs of Crossings to Union Pacific." UP's comments also allege UDOT's proposed changes to R930-5-8 will "effectively end the practice of entering into construction and maintenance agreements." Neither allegation is correct.

All at-grade railroad crossings are not the same. There are various configurations of crossings and safety devices required at the different types of crossings. R930-5-8 intends to assign maintenance responsibilities to the railroad company, the highway authority, or others based on state or federal regulatory requirements. R930-5-8 does not allocate all maintenance responsibility to UP or any railroad company. R930-5-8(1)(f) assigns maintenance responsibility to the highway authority. R930-5-8(1)(g) apportions maintenance responsibility between the highway authority and the railroad. R930-5-8(1)(h)(i) assigns maintenance responsibility to the industry owning the trackage or as agreed to by the parties. Since R930-5-8 allocates maintenance responsibilities to various parties, the proposed changes to R930-5-8 do not effectively eliminate UP's ability to enter maintenance and construction contracts.

UDOT R930-5 Admin Record 000015

The Utah Division of Administrative Rules published the version of R930-5-8 in effect on January 1, 2010, in Bulletin Number 2010-1. UDOT effectuated R930-5-8 on February 8, 2010. UDOT cannot find comments submitted by UP discussing or objecting to the current R930-5-8 in the ten years since the initial comment period's opening. UDOT's proposed changes to R930-5-8 pertaining to maintenance obligations are not substantive. Any adverse effect the rule may have on UP has existed for more than ten years. UP has not attempted to inform UDOT that R930-5-8 negatively impacts UP for more than ten years. UP's comments regarding the proposed changes to R930-5-8 are the only comments submitted to UDOT by a railroad in more than ten years. No other railroad in Utah has claimed to be harmed by R930-5-8 or the proposed changes. UDOT disputes UP's contention that its proposed changes, intended to clarify its original intent, will have a material adverse impact on UP now.

Based on the above, UDOT intends to effectuate the proposed changes to R930-5-8 before the end of business Thursday, March 25, 2021. If you have questions, please contact me directly at (801) 891-3315.

Respectfully,



---

James W. Palmer, A.A.G

jwp/lle

cc: Carlos M. Bracerias, P.E.  
Linda T. Hull  
Teri Anne Newell  
Lisa Jeppeson Wilson  
Kris T. Peterson

**EXHIBIT “D”**

MARK E. BURNS (#06706)  
STEVEN F. ALDER (#00033)  
Assistant Attorneys General  
SEAN D. REYES (#7969)  
Utah Attorney General  
160 East 300 South, 5<sup>th</sup> Floor  
P.O. Box 140857  
Salt Lake City, Utah 84114-0857  
Telephone (801) 366-0353  
[markburns@agutah.gov](mailto:markburns@agutah.gov)  
[stevealder@agutah.gov](mailto:stevealder@agutah.gov)  
*Attorneys for Defendant*

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**IN THE THIRD JUDICIAL DISTRICT COURT  
IN AND FOR SALT LAKE COUNTY, STATE OF UTAH**

---

UNION PACIFIC RAILROAD COMPANY,  
a Delaware Corporation,

Plaintiff,

vs.

UTAH DEPARTMENT OF  
TRANSPORTATION, a Utah State Agency,

Defendant.

**ANSWER**

Civil No. 210905204

Judge Patrick Corum

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Defendant Utah Department of Transportation (hereinafter, “UDOT” or “Defendant”), by and through its undersigned counsel, submits this Answer to the claims and allegations of Plaintiffs’ Complaint (“Complaint”), according to the paragraph numbering in the Complaint. Any allegation not specifically admitted is denied.

**FIRST DEFENSE**

Plaintiffs’ Complaint and each paragraph thereof fails to state a claim upon which relief can be granted and should therefore be dismissed pursuant to Rule 12(b)(6) of the Utah Rules of Civil Procedure.



## **SECOND DEFENSE**

Answering specifically the allegations of Plaintiffs' Complaint, the defendant admits, denies and alleges as follows:

### **INTRODUCTION<sup>1</sup>**

1. Defendant denies the allegations in Paragraph 1.

### **PARTIES**

2. Defendant admits the allegations in Paragraph 2.
3. Defendant admits the allegations in Paragraph 3.

### **JURISDICTION AND VENUE**

4. Defendant admits the allegations in Paragraph 4.
5. Defendant admits the allegations in Paragraph 5.
6. Defendant admits the allegations in Paragraph 6.

### **FACTUAL AND LEGAL ALLEGATIONS**

7. Defendant admits the allegations in Paragraph 7.
8. The allegations of Paragraph 8 quote part of a statute, Utah Code § 54-4-15.1, which speaks for itself and is the best evidence of its contents. Defendant admits the quoted language is contained in the statute and avers the quoted language is qualified by the phrase "as prescribed in this act..." which incorporates by reference Defendant's "power to determine and prescribe the

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<sup>1</sup>The numbered paragraphs of this Answer correspond to the numbered paragraphs of Plaintiff's Complaint. The Complaint's headings are reproduced solely for the Court's convenience; Defendant does not intend them to form any substantive part of its Answer. To the extent the headings make substantive allegations, Defendant denies those allegations. Defendant does not waive any defensive theory or agree to or admit that Plaintiff's headings are accurate, appropriate, or substantiated. When a textual sentence is followed by a citation, the sentence and its accompanying citation are referred to as one sentence.

manner, including ... the terms of maintenance, use and protection of ... each crossing of a public road or highway by a railroad ....” and other relevant provisions. Utah Code § 54-4-15(2).

9. The allegations of Paragraph 9 paraphrase and quote part of a statute, Utah Code § 54-4-15.2, which speaks for itself and is the best evidence of its contents. Defendant admits the quoted language is contained in the statute and avers the quoted language is qualified by the introductory phrase: “The funds provided by the state for purposes of this act shall be used in conjunction with other available money, including money received from federal sources....” Any allegations contrary to the language, meaning, and context of the complete statute are denied.

10. The allegations of Paragraph 10 paraphrase and quote part of a statute, Utah Code § 54-4-15.3, which speaks for itself and is the best evidence of its contents. Defendant admits the quoted language is contained in the statute and avers the quoted language is prefaced by the phrase: “The Department of Transportation, *in accordance with the provisions of Section 54-4-15....*” Any allegations contrary to the language, meaning, and context of the complete statute are denied.

11. Defendant admits the allegations in Paragraph 11.

12. Defendant admits the allegations in Paragraph 12 and avers other parts of Utah Admin. Code R930-5, as well as other state and federal law, also “govern[] maintenance of at-grade railroad crossings.”

13. Defendant denies the allegations of paragraph 13. Defendant avers that Plaintiff has not “worked cooperatively and in good faith with UDOT and other local road authorities in

maintaining crossings within the state of Utah” and this has resulted in disputes with the cities of Logan and Delta concerning Plaintiff’s practices. Defendant avers that the dispute over crossing maintenance costs with the City of Logan is currently pending before the Public Service Commission. Finally, Defendant avers that Plaintiff has attempted to require the closure or improvement of other crossings or new cost-shifting maintenance agreements before it would allow important highway projects to move forward or safety improvements to be completed.

14. Defendant lacks knowledge or information sufficient to form a belief as to the truth of the allegations of Paragraph 14, and therefore denies the same.

15. The allegations of Paragraph 15 quote part of Division of Administrative Rules (DAR) Filing No. 53084 (Notice of Proposed Rule), which speaks for itself and is the best evidence of its contents. Defendant admits the quoted language is contained in the Notice. Defendant admits the filing proposed an amendment to Utah Admin. Code R930-5, that it was authorized by Carlos M. Braceras on September 18, 2020, and that DAR published the proposed changes on October 15, 2020.

16. The allegations of Paragraph 16 quote part of DAR Filing No. 53084 (Notice of Proposed Rule authorized September 18, 2020), which speaks for itself and is the best evidence of its contents. Defendant admits the quoted language is contained in the Notice.

17. The allegations of Paragraph 17 quote part of DAR Filing No. 53184 (Notice of Proposed Rule authorized November 5, 2020), which speaks for itself and is the best evidence of its contents. Defendant admits the quoted language is contained in the Notice. Defendant avers that the filing corrected summary language on the cover sheet that stated the amendment only applied to “crossings through *state owned right of way.*” Compare DAR Filing No. 53084

(Notice of Proposed Rule), Section 4 (emphasis added) *with* DAR Filing No. 53184 (Notice of Proposed Rule), Section 4.

18. The allegations of Paragraph 18 quote part of DAR Filing No. 53184 (Notice of Proposed Rule authorized November 5, 2020), which speaks for itself and is the best evidence of its contents. Defendant admits the quoted language is contained in the Notice.

19. The allegations of Paragraph 19 quote and combine different parts of DAR Filing No. 53184 (Notice of Proposed Rule authorized November 5, 2020), which speaks for itself and is the best evidence of its contents. Defendant admits the quoted language is contained in the Notice.

20. Defendant admits DAR Filing No. 53184 states “Comments on the rule will be accepted until: December 31, 2020” but deny the comment period for that filing started on September 21, 2020, because it was not authorized by Defendant until November 5, 2020. Defendant avers that DAR Filing No. 53184 was published in the December 1, 2020 edition of the Utah State Bulletin and by operation of law the comment period on DAR Filing No. 53184 started on that day. *See* Utah Code § 63G-3-301(11)(a) (“Following the publication date, the agency shall allow at least 30 days for public comment on the rule.”). Defendant avers the comment period on DAR Filing No. 53084 was open until November 16, 2020, but that filing lapsed. Defendant admits the comment period on DAR Filing No. 53184 ended on December 31, 2020.

21. Defendant admits Plaintiff mailed and e-mailed a letter containing comments on DAR Filing No. 53184 dated December 28, 2020, and that UDOT administration received the mailed letter on January 7, 2021. Defendant admits Plaintiff previously delivered a letter dated

November 16, 2020, to UDOT regarding proposed amendments to Rule 930-5-8, that the letter is attached as Exhibit D to the Complaint, and that the letter was submitted during the comment period for lapsed DAR Filing No. 53084.

22. Defendant admits the quoted letter from Plaintiff's counsel included the quoted statements and legal conclusions in Paragraph 22. The quoted letter from Plaintiff's counsel in Paragraph 22 paraphrases, partially quotes from, or otherwise characterizes the proposed amendment to Utah Admin. Code R930-5-8, which speaks for itself and is the best evidence for its contents and effect.

23. Defendant admits the allegations in paragraph 23 as to public crossing maintenance agreements but denies the amended rule will affect all types of public crossing agreements, including without limitation new agreements that are consistent with unchanged portions of the rule and other applicable law.

24. Defendant admits the quoted letter from Plaintiff's counsel included the statements and legal conclusions in Paragraph 24 but deny the legal effect of the rule as alleged by Plaintiff and also deny the rule prohibits consideration of all other factors bearing on maintenance costs, some of which are specified in unamended parts of the rule or other applicable law.

25. Defendant denies the allegations in paragraph 25.

26. Defendant admits the quoted letter from Plaintiff's counsel included the statements and legal conclusions in Paragraph 26. The quoted letter from Plaintiff's counsel in Paragraph 26 paraphrases, partially quotes from, or otherwise characterizes the proposed amendment to Utah Admin. Code R930-5-8, which speaks for itself and is the best evidence for its contents and

effect. To the extent a further response is deemed required, Defendant denies the allegations in Paragraph 26.

27. Defendant admits the quoted letter from Plaintiff's counsel included the statements and legal conclusions in Paragraph 27. The quoted letter from Plaintiff's counsel in Paragraph 27 paraphrases or otherwise characterizes the proposed amendment to Utah Admin. Code R930-5-8, both of which speak for themselves and are the best evidence of their contents. Any allegations contrary to the language, meaning, and context of the proposed rule change are denied. To the extent a further response is deemed required, Defendant denies the allegations in Paragraph 27.

28. Defendant denies the allegations in paragraph 28.

29. Defendant admits the allegations in Paragraph 29 to the extent that allegation is based on maintenance rather than the construction or improvement of Section 130 crossings.

30. In response to the allegations of paragraph 30, Defendant admits it enacted an amendment to Utah Admin. Code R930-5-8 pursuant to applicable law after receiving Plaintiff's counsel's letter, that the amendment became effective on March 25, 2021, and that a copy of the effective rule is attached as Exhibit E to the Complaint.

31. Defendant admits the allegations in Paragraph 31.

32. Defendant denies the allegations in Paragraph 32.

33. Defendant denies the allegations in Paragraph 33.

34. Defendant denies the allegations in Paragraph 34.

35. Defendant denies the allegations in Paragraph 35, but admit the cited cases contain the quoted language. Defendant avers that the word apportion is also defined in other ways such

as “to divide and assign according to a plan; allot.” *See* American Heritage Dictionary of the English Language.

36. Defendant denies the allegations in Paragraph 36.

37. Defendant denies the allegations in Paragraph 37.

38. Defendant denies the allegations in Paragraph 38.

39. Defendant denies the allegations in Paragraph 39.

40. Defendant denies the allegations in Paragraph 40.

41. Defendant denies the allegations in Paragraph 41.

42. Defendant admits the authorities referenced in Paragraph 42 contain the quoted language but deny those cases have application here.

43. Defendant admits certain aspects of railroad transportation have been subject to state regulation but deny the United States Supreme Court has “frequently invalidated” such efforts, particularly where the subject matter involves the matters at issue in this case.

44. Paragraph 44 paraphrases and quotes part of an 8<sup>th</sup> Circuit federal case, which speaks for itself and is the best evidence of its contents. Defendant avers that the case determined the state law at issue was not preempted, that the case involved the replacement and construction of bridges rather than maintenance, and that the court acknowledged, in a crossing *improvement* situation, the application of a state law “to a particular bridge project must be consistent with the *long-standing constitutional principle that State and local governments may require railroads to pay for the cost of railway-highway bridges ‘made necessary by the rapid growth of the communities,’ but ‘such allocation of costs must be fair and reasonable.’”*

45. Defendant lacks knowledge or information sufficient to form a belief as to the allegations of Paragraph 45, and therefore denies the same.

46. Defendant lacks knowledge or information sufficient to form a belief as to the allegations of Paragraph 46, and therefore denies the same.

47. Defendant denies the allegations in Paragraph 47. Defendant avers that the amended rule preserves the division of maintenance responsibilities set forth in the original rule. Allegations contrary to the language, meaning, and context of the amended rule are denied.

48. Defendant denies the allegations in Paragraph 48 and further denies that the amended rule has the effect of an “across-the-board imposition of 100% of the costs to maintain these [547] at-grade public crossings...”. Allegations contrary to the language, meaning, and context of the rule are denied.

49. Defendant denies the allegations in Paragraph 49.

50. Defendant denies the allegations in Paragraph 50.

51. Defendant admits the first sentence in Paragraph 51 and that the cases cited in the remainder of the paragraph include the quoted or partially quoted language. Defendant avers that the first quotation includes the following language in the next sentence: “But the STB has recognized that federal preemption under the ICCTA *‘does not completely remove any ability of state or local authorities to take action that affects railroad property. To the contrary, state and local regulation is permissible where it does not interfere with interstate rail operations, and localities retain certain police powers to protect public health and safety.’*” *Emerson v. Kansas City S. Ry. Co.*, 503 F.3d 1126, 1132–33 (10th Cir. 2007). Defendant avers that the second



quoted case involved idling trains causing pollution, not the maintenance of railroad crossings. *Ass'n of Am. Railroads v. S. Coast Air Quality Mgmt. Dist.*, 622 F.3d 1094 (9th Cir. 2010).

52. Defendant admits the partially quoted language in Paragraph 52 exists in 49 U.S.C. § 10501(b) and the cited case. Defendant avers the statutory quotation omits key qualifying language that regarding the jurisdiction of the Surface Transportation Board (STB) over “the remedies provided in this part with respect to” the subject matter referenced in Paragraph 52. Defendant denies the STB has jurisdiction here and avers that no part of the statutory language quoted or elsewhere in the Interstate Commerce Commission Termination Act (ICCTA) addresses public highway crossing maintenance issues.

53. Defendant admits the cases cited include the partially quoted language (one involving a removal-fill law that required a state permit and the other which held the ICCTA did not expressly preempt tort claims) but deny that the STB has jurisdiction and that the ICCTA applies here.

54. Defendant admits the case cited includes the partially quoted language but deny that the STB has jurisdiction and that the ICCTA applies here.

55. Defendant denies the allegations in Paragraph 55. Defendant avers that the amended rule preserves the division of maintenance responsibilities set forth in the original rule. Allegations contrary to the language, meaning, and context of the amended rule are denied.

56. Defendant denies the allegations in the first sentence in Paragraph 56 concerning the STB’s jurisdiction. Defendant avers that the amended rule preserves the division of maintenance responsibilities set forth in the original rule and is authorized by Utah Code § 54-4-15(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 a public road or highway by a railroad or street railroad, and of a street by a railroad or vice versa....”). Allegations contrary to the language, meaning, and context of the amended rule and its authorizing statute are denied.

57. Defendant denies the allegations in Paragraph 57 specifically including the claim that the amended rule “intrude[s] on [a] uniform federal regulatory regime....”.

58. Defendant denies the allegations in Paragraph 58.

59. Defendant denies the allegations in Paragraph 59.

60. Defendant denies the allegations in Paragraph 60. Defendant avers that the amended rule preserves the division of maintenance responsibilities set forth in the original rule.

Allegations contrary to the language, meaning, and context of the amended rule are denied.

61. Defendant denies the allegations in Paragraph 61. Defendant avers that the amended rule preserves the division of maintenance responsibilities set forth in the original rule.

Allegations contrary to the language, meaning, and context of the amended rule are denied.

62. Defendant admits that DAR Filing No. 53184 includes the quoted statement. Defendant avers that the amended rule preserves the division of maintenance responsibilities set forth in the original rule. Allegations contrary to the language, meaning, and context of the amended rule are denied.

63. Defendant admits the allegations in Paragraph 63.

64. The allegations in the first sentence of Paragraph 64 states legal conclusions to which no response is required. Defendant denies its action amending the rule lack substantial evidence. Defendant avers that the amended rule preserves the division of maintenance responsibilities set

forth in the original rule. Allegations contrary to the language, meaning, and context of the amended rule are denied.

65. Defendant denies the allegations in Paragraph 65.

### **AFFIRMATIVE DEFENSES**

Pursuant to Rule 8(c) of the Utah Rules of Civil Procedure, UDOT sets forth the following affirmative defenses and reserves the right to assert additional affirmative defenses if their existence is established through discovery or investigation.

#### **First Affirmative Defense**

Plaintiff's claims improperly seek to abrogate and abolish UDOT's statutory authority to "determine and prescribe the manner . . . and the terms of installation, operation, maintenance, use and protection . . . 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...."

#### **Second Affirmative Defense**

By requiring UDOT to maintain a rule that allows Plaintiff to regularly create an "exception by agreement," the rule allows Plaintiff to shift Plaintiff's maintenance obligations to local governments and illegally force the inclusion of terms in those agreements that conflict with other provisions of law such as Defendant's statutory authority to "alter or abolish any such crossing...."

NOW WHEREFORE, UDOT having fully answered each and every allegation in Plaintiff's Complaint, and set forth its affirmative defenses to the relief requested, asks that the Court:

1. Declare Utah Admin. Code R930-5-8, as amended, is valid, supported by substantial evidence,<sup>2</sup> and does not violate state or federal statutory, regulatory, or constitutional law; and
2. Grant UDOT such further relief as is just and appropriate.
3. In the alternative, remand the matter to UDOT for further fact-finding and/or rulemaking in accordance with Utah Code § 63G-2-602(4)(c) and (d).

DATED this 28<sup>th</sup> day of October, 2021.

SEAN D. REYES  
Utah Attorney General

/s/ Mark E. Burns  
MARK E. BURNS  
STEVEN F. ALDER  
Assistant Attorneys General  
*Attorneys for Defendant*

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<sup>2</sup> In accordance with Utah Code § 63G-3-602(3)(b)(iii), the administrative record of the rule is filed herewith as Exhibit A in a contemporaneous electronic filing.

**CERTIFICATE OF SERVICE**

I certify that on October 28, 2021, I filed the foregoing **ANSWER** with the Court using the Utah State Court's electronic filing system which served notification to the following:

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