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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**

**UNION PACIFIC RAILROAD  
COMPANY'S REPLY IN SUPPORT OF  
MOTION TO DISMISS**

Docket No. 21-888-01

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Union Pacific Railroad Company ("Union Pacific") respectfully submits this Reply in Support of Motion to Dismiss (the "Reply") pursuant to Public Service Commission Administrative Procedures Act Rule 746-1-301(2). Union Pacific submitted its Motion to Dismiss in response to the Petition and Request for Agency Action (the "Petition") filed by Logan City (the "City") in this docket on October 4, 2021. Union Pacific respectfully requests that the Public Service Commission (the "Commission") dismiss the City's Petition because the amendment to Rule 930-5-8 (the "Amended Rule") violates Utah statutory law, federal statutory and constitutional law, is subject to pending litigation in Utah State Court, and thus the Commission should not investigate Union Pacific's alleged impermissible practices and should dismiss the City's Petition.

## ARGUMENT

In reply to the City’s arguments set forth in its Reply to Union Pacific Railroad’s Response to Petition and Request for Agency Action (the “Response”), Union Pacific contends that the Commission has jurisdiction to evaluate the Amended Rule and requests that the Commission decline to take action on the City’s Petition based on related, ongoing litigation in Utah State Court.

### A. The Commission Has Jurisdiction to Evaluate the Amended Rule.

Utah Code § 54-4-1, in conjunction with § 54-4-15(4)(a), provide the Commission with jurisdiction over Union Pacific’s Motion.<sup>1</sup> Section 54-4-1 states,

The commission is hereby vested with power and jurisdiction to supervise and regulate every public utility in this state, and to supervise all of the business of every such public utility in this state, and to do all things, whether herein specifically designated **or in addition thereto, which are necessary or convenient in the exercise of such power and jurisdiction**; provided, however, that the Department of Transportation shall have jurisdiction over those safety functions transferred to it by the Department of Transportation Act.

(Emphasis added.) For its part, § 54-4-15(4)(a) provides, in relevant part, for the Commission’s “exclusive jurisdiction for the resolution of any dispute upon petition by any person aggrieved by any action of the department pursuant to this section.” Here, there is a “petition” at play, albeit filed by the City.<sup>2</sup> The dispute resulted in the Amended Rule, putting the validity of the Amended Rule, a determination required “for the resolution of any dispute” squarely within the Commission’s jurisdiction. *See* § 54-4-15(4)(a); Petition ¶¶ 24–48. Union Pacific acknowledges

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<sup>1</sup> Union Pacific acknowledges the oversight in not setting forth the basis for the Commission’s jurisdiction in its Motion, and it submits its jurisdictional statement here in reply to jurisdictional argument set forth in the City’s Response.

<sup>2</sup> Indeed, the procedural rules permit Union Pacific to “petition” for redress, however, Union Pacific did not. The operative petition here was filed by Logan City and Union Pacific’s briefing is in response to that petition—not a hypothetical petition that the City contends Union Pacific should have filed. *See* Response at 7–8.

the established case law requiring specificity in the powers granted to the Commission. *See Hi-Country Estates Homeowners Ass'n v. Bagley & Co.*, 901 P.2d 1017, 1021 (Utah 1995); *Mountain States Tel. & Tel. Co. v. Pub. Serv. Comm'n*, 754 P.2d 928, 930 (Utah 1988); *Union Pac. R.R. v. Pub. Serv. Comm'n*, 134 P.2d 469, 474 (1943). Here the specificity arises out of § 54-4-1 and § 54-4-15(4)(a) construed in conjunction with one another. Because the dispute revolves around the Amended Rule, evaluating the Amended Rule is “necessary and convenient” for the Commission to exercise its jurisdiction to “supervise and regulate” Union Pacific as a public utility. *See* Utah Code §§ 54-4-1, 54-2-1(22).

By way of summary of Union Pacific’s Motion, to evaluate the Amended Rule that is central to the City’s Petition the Commission may consider the following:

First, the Amended Rule violates the Public Utilities Act by seeking to impose upon railroads the entire cost of maintaining devices and equipment at all grade crossings in Utah, which does not square with the statutory requirement that UDOT “*apportion* the cost of the installation, maintenance, reconstruction or improvement of any signals or devices . . . *between* the railroad . . . and the public agency involved.” Utah Code § 54-4-15.3 (emphasis added). The Amended Rule further violates the Public Utilities Act in that it exempts UDOT from the statutory requirement to use State and other funds “*to pay all or part of* the cost of the installation, *maintenance*, reconstruction or improvement of any signals described in Section 54-4-15.1 at any grade crossing of a public highway or any road over the tracks of any railroad or street railroad corporation in this state.” Utah Code § 54-4-15.2 (emphasis added). The Amended Rule does not reflect the requirement that maintenance costs be apportioned between Union Pacific and the public agency involved.

Second, the Amended Rule violates the United States Constitution’s Commerce Clause because the burden imposed by the Amended Rule’s cost imposition on Union Pacific’s maintenance of crossings to facilitate interstate transportation is excessive—not fair and reasonable—in relation to any local benefit it confers.<sup>3</sup>

Third, the Amended Rule violates federal statutory law because it is preempted by 49 U.S.C. § 10501 as it imposes on the exclusive jurisdiction over “transportation by rail carriers . . . with respect to rates, classifications, rules . . . , practices, routes, services, and facilities of such carriers” and over “the construction, acquisition, operation, abandonment, or discontinuance of [tracks] or facilities” that is granted to the Surface Transportation Board. *See* 49 U.S.C. § 10501(b). Because the Amended Rule requires railroads to bear 100% of the maintenance costs associated with highway-rail crossing, despite the substantial benefits that the state and localities receive from these crossing, it intrudes on the exclusive jurisdiction of the Surface Transportation Board and is therefore preempted by 49 U.S.C. § 10501(b).

Based on these violations, Union Pacific seeks dismissal of the City’s Petition.

**B. The Commission Should Not Take Action on the City’s Petition Pending the Outcome of State Court Litigation.**

As set forth in Union Pacific’s Motion, the Commission should decline to take agency action because the legality of the Amended Rule under Utah Code is currently being addressed in the Third District Court of the State of Utah. “It is a long-standing principle of administrative law that an agency’s rules must be consistent with its governing statutes.” *Sanders Brine Shrimp v. Audit Div. of Utah State Tax Comm’n*, 846 P.2d 1304, 1306 (Utah 1993). Here, whether the

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<sup>3</sup> It is a “long-standing constitutional principle” that when a state allocates costs between a railroad and local authority for crossings, such an “allocation of costs must be fair and reasonable.” *Iowa, Chicago & E. R.R. v. Washington Cnty., Iowa*, 384 F.3d 557, 562 (8th Cir. 2004).

Amended Rule is consistent with Utah's governing statutes is currently being adjudicated in the Third District Court.

Because the Amended Rule underlying the City's Petition is involved in pending litigation, it may be futile to take agency action at this time. This futility stems from the fact that because the future of the Amended Rule is uncertain, any agency action taken pursuant to the Amended Rule runs the risk of being inconsistent with Utah's governing statutes. *See id.* It follows that the result in taking agency action on a rule, of which the future is uncertain, would be an unnecessary use of the City's resources, Union Pacific's resources, and the Commission's resources.

While the City contends that Union Pacific "has itself delayed in challenging" the Amended Rule, that is not, in fact, the case. *See* Response at 10. As set forth in Union Pacific's Motion, on November 16, 2020, during the Public Comment Period, Union Pacific submitted a comment to UDOT regarding the proposed amendments to R930-5-8. *See* Exhibit 4 to Union Pacific's Motion. This comment to UDOT expressed Union Pacific's position opposing the proposed amendments to R930-5-8. Then, following up on Union Pacific's opposition, and in the spirit of cooperation, Union Pacific sent the City a Public Highway At-Grade Crossing Agreement setting forth a proposed agreement for apportioning the costs of maintaining the traffic control signals for railroad crossings. *See* Exhibit 7 to Union Pacific's Motion. The negotiations between Union Pacific and the City continued. *See* Exhibit 8 to Union Pacific's Motion. Rather than immediately run to court or run to the Commission, Union Pacific opted to collegially "challenge" the Amended Rule through negotiations with the City. Unfortunately, the negotiations were ultimately unsuccessful.

Based on the pending litigation in Utah State Court, the uncertainty of the future of the Amended Rule, and, as it follows, the desire to preserve the parties' and the Commission's resources, Union Pacific respectfully requests the Commission to dismiss the City's Petition.

**CONCLUSION**

Based on the Amended Rule violating state statutory law as well as federal statutory and constitutional law, the Commission should dismiss the City's Petition. Alternatively, the Commission should dismiss the Petition based on the pending litigation in Utah State Court, the uncertainty of the future of the Amended Rule, and, as it follows, the desire to preserve the parties' and the Commission's resources.

Respectfully submitted this 29th day of November, 2021.

GREENBERG TRAUIG, LLP

*/s/ Anikka T. Hoidal*

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Anikka T. Hoidal

*Attorneys for Respondent Union Pacific  
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**CERTIFICATE OF SERVICE**

I certify that on this 29th day of November, 2021, I served via email a true and correct copy of **UNION PACIFIC RAILROAD COMPANY'S REPLY IN SUPPORT OF MOTION TO DISMISS** upon the parties listed below:

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