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BEFORE THE PUBLIC SERVICE COMMISSION

IN THE MATTER OF LOGAN CITY'S PETITION REQUESTING INVESTIGATION INTO UNION PACIFIC RAILROAD COMPANY'S ADMINISTRATION OF AGREEMENTS AND MAINTENANCE PROVISIONS	**LOGAN CITY'S BRIEF IN SUPPORT OF ITS PETITION** Docket No. 21-888-01

Pursuant to the stipulated scheduling established at the conclusion of the May 3, 2022, evidentiary hearing in this matter, Logan City respectfully submits this legal briefing in support its Petition.

ARGUMENT

UNION PACIFIC'S CONDUCT WITH REGARD TO THE 1400 NORTH AND 1800 NORTH CROSSINGS VIOLATES RULE 930-5-8(1).

Section 54-4-15(1) of the Utah Code provides:

> No track of any railroad shall be constructed across a public road, highway or street at grade, nor shall the track of any railroad corporation be constructed across the track of any other railroad or street railroad corporation at grade, nor shall the track of a street railroad corporation be constructed across the track of a railroad corporation at grade, without the permission of the Department of Transportation [(UDOT)] having first been secured; provided, that this subsection shall not apply to the replacement of lawfully existing tracks. The department shall have the right

> to refuse its permission or to grant it upon such terms and conditions as it may prescribe.

Utah Code § 54-4-15(1). Section 54-4-15(2) gives the UDOT "the power to determine and prescribe the manner, including . . . *the terms of* installation, operation, *maintenance*, use and protection of . . . each crossing of a public road or highway by a railroad or street railroad . . . ." Utah Code § 54-4-15(2) (emphasis added). Section 54-4-15.1 requires UDOT to "provide for the installing, *maintaining*, reconstructing, and improving of automatic and other safety appliances, signals or devices at grade crossings on public highways or roads over the tracks of any railroad or street railroad corporation in the state." Utah Code § 54-4-15.1 (emphasis added). Section 54-4-15.3 requires UDOT to "apportion the cost of the installation, maintenance, reconstruction or improvement of any signals or devices described in Section 54-4-15.1 between the railroad or street railroad and the public agency involved," "in accordance with the provisions of Section 54-4-15." Utah Code § 54-4-15.3.

UDOT promulgated Administrative Rule 930-5 to satisfy these obligations. Rule 930-5-8 governs maintenance of at-grade railroad crossings. Subsection (1) of that Rule previously provided, in relevant part:

> (1) Responsibility for maintenance is as described in this section unless a separate agreement applies.
>
> (a) The Railroad is responsible for the maintenance of all Railroad Passive Warning Devices and Active Warning Devices within the Railroad right-of-way.
>
> (b) If the Railroad has a property interest in the right-of-way, the Railroad is responsible for the maintenance of 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.

Utah Admin. Code R930-5-8(1) (2020).

On September 18, 2020, UDOT authorized a proposed amendment to Rule 930-5-8(1) designed "to clarify the Department's intent when it originally promulgated this rule in 2008." (Sept. 18, 2020, Notice of Proposed Rule – Filing No. 53084 (Logan City Ex. 11) at 1, ¶ 3.) As described in the notice, "[t]he change to Section R930-5-8 adds text to make it clear that Section R930-5-8 requires Railroads to maintain their railroad crossings through state owned right of way[1] and to pay maintenance of their railroad crossings through state owned right of way. The Department's original intent was that meaning of the phrase 'responsibility for maintenance' includes the obligation to perform and pay for the maintenance of railroad crossings." (*Id.* at 1, ¶ 4.)

On November 5, 2020, UDOT authorized an amended filing in response to informal comments received regarding the prior Notice of Proposed Rule "that made the Department realize parts of the analysis may be confusing, misleading, or inaccurate." (Nov. 5, 2020, Notice of Proposed Rule – Filing No. 53184 (Logan City Ex. 12) at 1, ¶ 3.) As described in the notice, "The Department propose[d] changing Subsection R930-5-8(1) to clarify the Railroads' and Highway Authorities' allocated responsibility for performing and paying the costs of maintenance described in Subsection R930-5-8(1) and the exception to the allocation, which is a prior signed written

[1] Rule 930-5-8 actually applies more broadly to "Crossings" (also referred to as "Highway-Rail Grade Crossings"), which are defined as "the general area where a Highway and a Railroad cross a the same level within which are included the Railroad, Highway, and roadside facilities for public traffic traversing the area." Utah Admin. Code R.930-5-3(8). "Highway" in turn defined as meaning "any public road, street, alley, lane, court, place, viaduct, tunnel, bridge, or structure laid out or erected for public use, or dedicated or abandoned to the public, or made public in an action for the partition of real property, including the area within the right-of-way." Utah Admin. Code R930-5-3(7). And, "Highway Authority" is defined as "the Department or local governmental entity that owns or has jurisdiction over a Highway." Utah Admin. Code R930-5-3(9). The reference to "state owned right of way" appears to be shorthand or an imprecise reference, as confirmed by the amended filing discussed in paragraphs 17 through 21.

agreement that changes the responsibilities." (*Id.* at 1, ¶ 4.) The "proposed change only clarifies existing requirements." (*Id.* at 2, ¶ 5(F).) The notice explains that "the proposed change may save local governments from incurring new costs to maintain railroad crossings that affect local governments' highways." (*Id.* at 1, ¶ 5(A).) It further explains that "the proposed rule change will not lead to new [expenses or costs] to [large or small business] railroads. Historically, railroad companies have paid the costs to maintain their crossings that affect highway authorities." (*Id.* at 2, ¶¶ 5(C), (D).)

The proposed amendment was adopted and enacted on March 25, 2021. Utah Admin. Code R930-5-8 (2021). The current version of Rule 930-5-8(1) provides, "Responsibility for maintenance is as described in this section unless a *prior signed written* agreement applies. *Responsibility means the obligation to perform and pay for the maintenance*." Utah Admin. Code R930-5-8(1) (2022) (emphasis to show changes).

A. Union Pacific acknowledged that it is violating Rule 930-5-8(1).

During the evidentiary hearing, Union Pacific acknowledged that it "probably [is] not complying with [Rule 930-5-8]." (Tr. at 89:3–7; 86:23–89:7.) Indeed, there is no dispute that Union Pacific has consistently insisted that Logan City contractually agree to accept responsibility for signal maintenance costs at the Crossings.

In the original proposed crossing agreement for the 1400 North Crossing, this took the form of an annual payment of $11,475.00, regardless of whether any maintenance was actually required. (Draft Crossing Agreement (Logan City Ex. 4) ¶ 16.) Although Union Pacific and Logan City discussed the issue for several months after the initial draft was exchanged, Union Pacific was unwilling to enter an agreement that did not include a perpetual maintenance fee obligation of

Logan City. (Dickinson Direct Testimony at Lines 124–68, 202–18; Dickinson Rebuttal Testimony at Lines 51–73.) With respect to the 1800 North Crossing, Union Pacific has refused to provide a draft agreement to Logan City unless the City agreed to include a provision requiring it to pay maintenance fees. (Dickinson Direct Testimony at Lines 255–60.) As Mr. Rathgeber acknowledged, this is not in compliance with Rule 930-5-8.

It appears Union Pacific may maintain there is an "agreement" or "prior signed agreement" that exempts the Crossings from Rule 930-5-8(1) in its prior and current form, respectively. Specifically, it appears Union Pacific may rely on (i) the preliminary engineering services agreement for the 1400 North Crossing (*see* Tr. at 92:18–93:10); (ii) a crossbuck and yield agreement that has not been produced (*see id.* at 87:12–21); and (iii) the Master Agreement with UDOT (*see id.* at 88:8–13). None, however, imposes an obligation on Logan City to bear the costs of signal maintenance at the Crossings.

With respect to the preliminary engineering services agreement, it appears Union Pacific relies on two provisions. First, the statement that "it is understood that if the project is constructed, if at all, at no cost to the railroad." (Preliminary Engineering Services Agreement (Logan City Ex. 1) at 2.) Setting aside that this statement is an incomplete sentence, apparently missing some words, it addresses the cost of *construction*. It says nothing of maintenance, let alone an agreement that Logan City would have a perpetual obligation to pay signal maintenance costs. The second provision on which Union Pacific appears to rely is the statement that "The Agency and the Railroad will enter into separate License, Right of Entry, Construction, and Maintenance Agreements associated with the actual construction of the project if the project is accepted and approved by the railroad." (*Id.*) But, this statement makes clear that any such agreement would

be a *separate*, forthcoming agreement contingent on Union Pacific first approving the project. It, by itself, does not purport to establish any maintenance obligations.

The second potential "separate agreement" was referenced by Mr. Rathgeber as part of his testimony during the evidentiary hearing. He testified, "I'm not 100 percent sure, but we're aware that there was a cross buck[] and stop yield program that was performed between Union Pacific and UDOT," and that he "believe[s] that agreement would apply." (Tr. at 87:17–21.) Mr. Rathgeber, however, did not have a copy of that agreement and was not aware of the "specific terms of that agreement." (*Id.*) Setting aside the fact that Union Pacific has never provided a copy of the agreement and has not offered any evidence of its terms, Mr. Rathgeber confirmed that Logan City was not a party to the agreement—it "would have been between Union Pacific and UDOT." (*Id.* at 91:7–11.) It is difficult to see how an agreement that did not involve Logan City could establish an obligation of Logan City to pay for maintenance of future, yet-to-be-installed, signal devices.[2]

Finally, it appears Union Pacific may maintain that the Master Agreement exempts the Crossings from Rule 8390-5-8(1). (*See* Tr. at 88.) As Union Pacific's own witnesses have testified, however, the Master Agreement does not apply to the 1400 North Crossing because it is not a "Section 130 Project." (Bailey Direct Testimony at Lines 23–42; Kippen Direct Testimony at Lines 45–50; Rathgeber Direct Testimony at Lines 44–67.) The same is true of the 1800 North Crossing. (*See* Tr. at 27:19–21 (explaining that the projects at issue did not have "any section 130

[2] Indeed, Mr. Rathgeber testified that Union Pacific has been responsible for maintenance costs for the two Crossings "[f]or their layout as they were historically." He explained this presumably has been the practice "since the beginning." (Tr. at 108:3–12.) This maintenance has, until now, involved only "passive maintenance signs." (*Id.* at 107:9–108:2.)

funds in them, so they were funded alone by Logan City").) Indeed, Mr. Rathgeber testified in his direct testimony that his understanding is that the Master Agreement has no relevance to this case. (Rathgeber Direct Testimony at 65–67.)

Given the Master Agreement does not govern either of the Crossings, it does not exempt the Crossings from Rule 930-5-8(1). Even if it did apply to those Crossings, however, it still would not do so. Mr. Rathgeber referenced generally a provision in the Master Agreement that "the state shall not interfere with the railroad's right to collect maintenance from the local jurisdictions." (Tr. at 88:8–13.) But, it does not appear that the Master Agreement contains any such provision.

It appears, however, Mr. Rathgeber may have been referring to the following provision:

> 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 future federal, state or local or other public funds that may become available for the maintenance of said devices[.]

(Master Agreement (Logan City Ex. 8) ¶ 6.) Under this language, a separate agreement would still be required in order for some other entity to bear the obligation of the cost of signal maintenance, presumably with that entity. There is no such separate agreement here.

B. HB 181 does not change the fact Union Pacific has violated Rule 930-5-8(1).

The Legislature's recent enactment of HB 181 does not change the fact that, for over a year, Union Pacific has been violating Rule 930-5-8(1). Nor does it render Union Pacific's continued insistence on Logan City paying for signal maintenance at the Crossings permissible moving forward.

As relevant here, HB 181 amends Section 54-4-15 to include the following new provision:

> (3)(a) The department shall allocate responsibility for the costs of

> maintenance of railroad crossings, including maintenance of safety devices and crossing materials, between the railroad and the public agency involved.
>
> (b) The department's allocation may be based on ownership and control of the right-of-way, crossing materials, signals and devices, or other factors as appropriate to protect the public safety.
>
> (c) The allocation of maintenance responsibilities for the costs of a railroad crossing shall be determined by the department unless a written request for review of the determination for a specific railroad crossing is made to the department, in which case the department shall conduct a review of the maintenance allocations for the railroad crossing, and may modify the allocation.
>
> (d) Responsibility for the costs of maintenance as determined by the department shall not be subject to modification or waiver by agreement between the railroad and the highway authority without department approval.
>
> (e) Physical maintenance and labor performed on an at-grade railroad crossing shall:
>
> (i) be reserved to the railroad;
>
> (ii) be performed by railroad employees; and
>
> (iii) comply with Code of Federal Regulations, Title 49, Transportation.

Utah Code § 54-4-15(3); Utah HB 181 (2022).

Under this newly-added provision, it is clear that the Department of Transportation has the authority to allocate responsibility for the costs of "maintenance of railroad crossings, including maintenance of safety devices and crossing materials." Again, Rule 930-5-8(1) is the mechanism by which the Department of Transportation has done so. While Union Pacific can now request under Section 54-4-3(c) that the Department of Transportation review the standard allocation as it applies to the crossings at issue and modify that allocation, there is no indication Union Pacific has done so. Even if it were to do so, Section 54-4-3(c) does not require the Department of Transportation to modify its allocation, let alone in the manner requested by the railroad.

At present, even with the enactment of HB 181, Rule 930-5-8(1) continues to govern the crossings at issue. Importantly, HB 181 makes clear that moving forward, Union Pacific and Logan City cannot waive or modify that allocation (or any future allocation by the Department)

without approval by the Department of Transportation.

CONCLUSION

Both the prior and current versions of Rule 930-5-8(1) are clear that, absent a separate agreement—which does not exist here—Union Pacific has the obligation to pay the costs of maintaining the signal devices at the Crossings. Union Pacific's insistence that Logan City nevertheless agree to do so, and to do so in the form of perpetual, annual fees, is a violation of that Rule. Logan City respectfully requests the Commission order Union Pacific to enter crossing agreements with Logan City for the Crossings that do not require Logan City to bear any responsibility for signal maintenance or the cost of signal maintenance at the Crossings.

DATED this 10th day of June, 2022.

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CERTIFICATE OF SERVICE

I hereby certify that on this 10th day of June, 2022, I served, via E-Mail, a true and correct copy of the attached **LOGAN CITY'S BRIEF IN SUPPORT OF ITS PETITION** upon the parties listed below to:

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