Vicki M. Baldwin, USB 8532
PARSONS BEHLE & LATIMER
201 South Main Street, Suite 1800
Salt Lake City, Utah 84111
Telephone: 801.532.1234
Facsimile: 801.536.6111
VBaldwin@parsonsbehle.com

Attorneys for Union Pacific Railroad Company

BEFORE THE UTAH 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.	Docket No. 21-888-01 **LEGAL BRIEF OF UNION PACIFIC RAILROAD COMPANY**

Pursuant to the Utah Public Service Commission's (the "**Commission**") request for briefing at the May 3, 2022, hearing in the above-referenced proceeding, Union Pacific Railroad Company ("**Union Pacific**") respectfully submits this Legal Brief.

INTRODUCTION

On May 3, 2022, the Commission held a hearing to consider Logan City's Petition Requesting Investigation into Union Pacific Railroad Company's Administration of Agreements and Maintenance Provisions ("Petition"). Though not stated succinctly, Logan City's Petition essentially asks that the Commission determine that Union Pacific, not Logan City, should be responsible for performing and paying all the maintenance costs resulting from Logan City's upgrades to the highway crossings at 1400 North 600 West and 1800 North 600 West.

This investigation includes whether the amendments to Rule 930-5-8 of the Utah Administrative Code (enacted in March 2021) (the "**New Rule**") have any bearing on the issue at hand and whether the previous Rule 930-5-8 (enacted in April 2011 prior to the 2021 amendments) (the "**Former Rule**") can be interpreted to impose this responsibility for payment of maintenance exclusively on Union Pacific. The answer to both those questions is no.

In addition, the attempt to impose full responsibility for maintenance costs onto Union Pacific violates the Commerce Clause of the United States Constitution and the federal ICC Termination Act.

BACKGOUND

Union Pacific has over 30,000 crossings in 7,800 communities and works cooperatively and collaboratively with the road authorities and other agencies in the twenty-three states in which it operates. It has an active project list of around 3,000 public projects in its 32,000-mile network. There are approximately 547 at-grade public crossings throughout the state of Utah, which exist for the benefit of local communities through which Union Pacific operates. Union Pacific maintains the surfacing and vegetation control at these crossings. Union Pacific also bears the cost to repair or replace damaged or destroyed traffic control devices at its crossings when it is unable to identify the party who caused the damage (in cases where the party is identified, Union Pacific seeks reimbursement from the damaging party). Dir. Test. P. Rathgeber 9:176-182.

As noted by Mr. Dickinson in the hearing of May 3, 2022, Union Pacific bought the rights-of-way relevant in this case from the county in the 1890s. Hr'ing Trans. 109:1-8 (May 3, 2022). This is supported by the Agreements of 1983 and 1982 between Union Pacific and Logan

City attached to the Direct Testimony of Paul Rathgeber, wherein Union Pacific agreed to allow Logan City to use and maintain, and later upgrade and improve, "existing public roads across the property and over the tracks of" Union Pacific. Dir. Test. P. Rathgeber Ex. UP (PR-2), UPRR Co., Agreement 133728 ("1982 Agreement") at 1; UPRR Co., Supplement to Agreement 133728 ("1983 Agreement") at 1. Accordingly, in the instant case, Logan City wants to use Union Pacific's property for the benefit of motorists in Logan City's community and surroundings. This puts Logan City in the position comparable to a licensee of Union Pacific, making Logan City responsible for any improvements it wishes to make (with Union Pacific's permission) on Union Pacific's property.

Agreements between Union Pacific and road authorities and other agencies must be fair and reasonable. Traffic control devices are for the benefit of motorists and pedestrians and aid in traffic flow; they do not provide any benefit to Union Pacific. In fact, the disproportionate or unreasonable apportionment of costs to Union Pacific results in forcing Union Pacific to subsidize its competition, *i.e.*, trucks hauling loads that could otherwise be shipped via rail. *See, e.g.*, *Nashville, C & St. L. R. Co. v. Waters*, 294 US 405, 423 (1935) (finding that the highway/railway improvement projects were primarily intended to benefit the state's highway transportation system, including motor carriers and trucking companies who directly compete with the railroad). This is not fair and reasonable.

Furthermore, these traffic control devices belong to Logan City. Union Pacific allows, pursuant to a license, Logan City to place its traffic control devices on Union Pacific's property and Logan City should be responsible for the devices' maintenance costs. If the crossing was closed, the devices would be returned to Logan City; Union Pacific has no use for them.

The Agreements between Union Pacific and Logan City of 1982, 1983 and 2010 demonstrate that it was common practice for the parties to come to a separate agreement on the responsibility of the costs of maintenance for the grade crossing signals associated with public road at-grade crossings. Dir. Test. P. Rathgeber Ex. UP (PR-1) Art. 11 ("The City agrees to reimburse the Railroad the cost of future maintenance of the automatic grade-crossing protection within thirty (30) days of the City's receipt of billing."); Ex. UP (PR-2), 1982 Agreement at 2 ("The Railroad Company, at its expense, shall maintain the crossing between the rails and two feet outside the rail. . . . [Logan City] shall, at its sole expense, maintain the public roadway at the locations shown."); 1983 Agreement at Section 2. ("It is understood that, if traffic in the future over the Roadway should, by State or local authority, require automatic signal warning devices, *such warning devices shall be installed under the terms and conditions to be negotiated and agreed upon by the parties hereto.*" (emphasis added)). This also supports the interpretation of and practice under the Former Rule to allow separate agreements to be entered into by the parties to determine the terms of maintenance costs.

Similarly, in the instant case, Union Pacific presented Logan City with several options for dealing with the maintenance costs and had made it clear upfront that "if the project [was] constructed," it would be "at no cost to the railroad." Dir. Test. T. Dickinson, Ex. 1 at 2. Along these lines, and pursuant to past practice, Union Pacific proffered its Public Highway At-Grade Crossing Agreement ("C&M Agreement") to Logan City on or about March 19, 2020. Dir. Test. T. Dickinson 5:97-98. This agreement proposed a fixed cost of $11,475.00 to be paid annually by Logan City to enable Union Pacific to maintain Logan City's traffic control devices that Logan City wishes to install on Union Pacific's property. Dir. Test. T. Dickinson Ex. 4 Section

16. After receiving feedback from Logan City, on May 1, 2020, Union Pacific proposed that either Logan City or the Utah Department of Transportation ("UDOT") could agree to reimburse Union Pacific for actual annual maintenance costs. Dir. Test. T. Dickinson, Ex. 5 at 1. Logan City refused and instead resorted to changing the applicable rules.

Statutory Framework, Utah Titles 54 and 68

Under Title 54, UDOT may "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(1) (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).

The State provides funds to be used, in conjunction with other available 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).

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 (emphasis added).

Section 68-3-3 provides that "unless the provision is expressly declared to be retroactive," the "provision of the Utah Code is not retroactive." UTAH CODE § 68-3-3.

Utah Administrative Code R930-5

Over a decade ago, in April 2011, UDOT promulgated R930-5 governing the maintenance of at-grade railroad crossings. The Former Rule provided:

> (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) (emphasis added).

Under the Former Rule, Union Pacific worked cooperatively and in good faith with UDOT and other local road authorities in maintaining crossings within the state of Utah. As demonstrated above, Union Pacific frequently entered into agreements with state and local road authorities regarding each party's maintenance obligations, including the allocation of costs.

On March 25, 2021, UDOT adopted and enacted amendments to R930-5 (promulgating the New Rule) that provides: "Responsibility for maintenance is as described in this section *unless a prior signed written agreement applies*." UTAH ADMIN. CODE R930-5-8(1) (2021).

Pursuant to the unchanged R930-5-3(7), which defines "Highway" as a "public road… dedicated or abandoned to the public," and R930-5-3(9), which defines the "Highway Authority" as the Department or local governmental entity that owns or has jurisdiction over a Highway,"

the public crossing at issue (located at 1400 N 600 W, Logan City, Utah)[1] (the "**Crossing**") is a Highway governed by Logan City, the Highway Authority.

Materials Incorporated into R930-5-2

Administrative Rule R930-5-2 provides that certain "federal law, state law, federal agency manuals, association standards and UDOT technical requirements are *incorporated by reference*[.]" UTAH ADMIN. CODE R930-5-2 (2021) (emphasis added). This includes "23 CFR 655 'Traffic Operations' (2009) 'Manual of Uniform Traffic Control Devices (MUTCD)' (2003, with revisions 1 and 2 incorporated, dated 2007)[.]" *Id.* at R930-5-2(3). The Utah Manual on Uniform Traffic Control Devices (**UMUTCD**), states in relevant part, as follows:

> The responsibility for the … maintenance … of traffic control devices shall rest with the public agency or the official having jurisdiction, or, in the case of private roads open to public travel, with the private owner or private official having jurisdiction.

UMUTCD, SECTION 1A.07 – RESPONSIBILITY FOR TRAFFIC CONTROL DEVICES (2009 ed. 2011) at 2.

The Railroad Coordination Manual of Instructions from the Utah Department of Transportation, states in relevant part, as follows:

> **3.2.5 FUNDING AUTHORIZATION AND APPORTIONMENT OF COSTS**
>
> …
>
> When a Highway Authority widens a Highway, the Highway Authority will fund all improvements including, but not limited to passive and active warning devices, Crossing material, and other improvements as ordered by the UDOT Chief Railroad Engineer in consultation with the Diagnostic Team.

[1] This also applies to the crossing at 1800 N 600 W.

> UDOT will evaluate each Crossing project to determine the extent to which, if any, the Crossing projects benefits the respective parties. If a Crossing project is determined not to benefit a party, the party will not be required to participate in the funding.

UTAH DEP'T OF TRANSP., RAILROAD COORDINATION MANUAL OF INSTRUCTIONS, CHAPTER 8: MAINTENANCE COORDINATION (2015) at 21 (bold in original). A true and correct copy was admitted at the May 3, 2022, hearing. Hr'ing Trans. 16:7-16.

ARGUMENT

I. THE NEW RULE DOES NOT APPLY RETROACTIVELY.

The new language in Utah Administrative Code R930-5-8(1), as amended in 2021, does not apply to the instant situation. Courts must generally "reconcile two seemingly contradictory" canons of law. *Landgraf v. USI Film Products*, 511 U.S. 244, 264 (1994). On the one hand, "a court is to apply the law in effect at the time it renders its decision." *Id.* (*quoting Bradly v. School Bd. Of Richmond*, 416 U.S. 696, 711 (1974) (internal citations omitted)). On the other hand, courts must accept that "[r]etroactivity is not favored in the law"[2] and "administrative rules will not be construed to have retroactive effect unless their language requires this result." *Id.* (*quoting Bowen v. Georgetown Univ. Hospital*, 488 U.S. 204, 208 (1988)).

To determine whether a statute or rule applies retroactively, courts must generally engage in a three-part inquiry. *Landgraf*, 511 U.S. at 280. First, did Congress (or the state legislature) expressly prescribe the statute's proper reach? If it has, courts must follow their express

---

[2] "Anti-retroactive principles" are deeply embedded within the Supreme Court's jurisprudence as well as within the Constitution. *Landgraf*, 511 U.S. at 266 (citing Article I, § 10, cl. 1 (prohibiting States from passing another type of retroactive legislation or laws impairing the Obligation of Contracts); Fifth Amendment's Takings Clause (preventing Legislature and other government actors from depriving persons of vested property rights and just compensation); Article I, §§ 9–10 (prohibiting legislatures from singling out disfavored persons and meting out summary punishment for past conduct); Due Process Clause (protecting the interests of fair notice and repose that may be comprised by retroactive legislation)).

instructions. *Id.* Second, if Congress (or the state legislature) has not spoken clearly, would applying the statute or rule retroactively impair the rights a party possessed when he acted, increase a party's liability for past conduct, or impose new duties with respect to transactions already completed? If it would, courts must avoid applying the rule retroactively. *Id.* Third, is there congressional or legislative intent in favor of applying the statute retroactively? If there is not, the court should not apply the rule retroactively. *Id.*

Logan City strikes out on the first prong. The Utah law expressly provides that "unless the provision is expressly declared to be retroactive," the "provision of the Utah Code is not retroactive." UTAH CODE § 68-3-3. The Administrative Code in turn provides that, if there is "any conflicting provision," the "Utah Administrative Procedure Act… or any other federal, state statute, or federal regulation shall supersede[.]" UTAH ADMIN. CODE R907-1-20. Under the relevant sections of the Utah Administrative Code, there are no rules indicating that the Commission can or should apply any of the administrative rules retroactively. Even if there were, it would conflict with and be superseded by Utah Code § 68-3-3. The rule at issue—Rule 930-5-8 of the Utah Administrative Code—does not have explicit language making it retroactive and cannot be made retroactive. Accordingly, based on Section 68-3-3 of the Utah Code and R907-1-20 of the Utah Administrative Code, the rule should not be interpreted as retroactive.

Even if there was ambiguity as to the first prong, which there is not, the Commission should not apply the New Rule retroactively because it would impair Union Pacific's right to contract with Logan City and other local governments as it has in the past, it would certainly increase Union Pacific's liability for conduct that has passed (due to Logan City), and it would impose new duties on Union Pacific on transactions already completed (again, due to Logan

City). Applying the New Rule retroactively, despite these impositions, would run afoul of the Supreme Court's jurisprudence and the U.S. Constitution.

Furthermore, there is no legislative intent favoring the application of Rule 930-5-8 retroactively. To the contrary, the plain language of the rule indicates that the rule is forward-facing. The Former Rule provided that: "Responsibility for maintenance is as described in this section *unless a separate agreement applies*." The New Rule provides that: "Responsibility for maintenance is as described in this section *unless a prior signed written agreement applies*." The New Rule is not to be interpreted as revoking previously entered upon agreements. Without legislative intent favoring the retroactive application of the New Rule, the Commission should not interpret or apply the New Rule retroactively. For all those reasons, the Commission should not interpret or apply the New Rule retroactively to the issue at hand.[3]

Prior to the enactment of the regulation amendments, between 2016 and 2020 Logan City and Union Pacific negotiated, in what Union Pacific believed was good faith, the terms of a series of agreements where Logan City would pay Union Pacific moneys in consideration and in exchange for Union Pacific to grant Logan City "the right to construct, *maintain* and repair the Roadway over and across the Crossing Area." Dir. Test. T. Dickinson Ex. 4 at §2. The New Rule adopted in 2021 has no bearing on these negotiations.

II. THE UTAH DEPARTMENT OF TRANSPORTATION'S AND LOGAN CITY'S INTERPRETATION OF THE FORMER RULE IS INCORRECT.

UDOT and Logan City claim that the New Rule was enacted to "clarify" the Former Rule. However, this is incorrect and unsubstantiated. The Former Rule was clear, substantiated

[3] This also applies to the retroactive application of the recent railroad crossing maintenance amendments under House Bill 181 of the Utah 2022 Legislative Session. That statute should not be applied retroactively to the issues in this case.

by its incorporated documents, congruent with the statutory framework, and systematically applied for over a decade. UDOT and Logan City's interpretation of the Former Rule is patently incorrect because it is incongruent with other existing rules.

It is a well-established canon of law that, in interpreting a rule, it must be interpreted in congruence with other existing rules. ANTONIN SCALIA & BRYAN A. GARNER, READING LAW: THE INTERPRETATION OF LEGAL TEXTS 180 (2012) (describing the "harmonious-reading canon" as "[t]he provisions of a text should be interpreted in a way that renders them compatible, not contradictory."); VALERIE C. BRANNON, CONG. RSCH. SERV., R45153, Statutory Interpretation: Theories, Tools, and Trends (2022) (citing ESKRIDGE ET AL., CASES AND MATERIALS ON LEGISLATION AND REGULATION: STATUTES AND THE CREATION OF PUBLIC POLICY 1198 (5th ed. 2014) ("Avoid interpreting a provision in a way that is inconsistent with the overall structure of the statute or with another provision or with a subsequent amendment to the statute or with another statute enacted by a Congress relying on a particular interpretation." (citations omitted); *Lindh v. Murphy*, 521 U.S. 320, 336 (1997) (favoring reading that "accords more coherence" to the disputed statutory provisions)).

First, the legislative history of the Former Rule does not support and is incongruent with UDOT and Logan City's interpretation. The Utah Legislature enacted Title 54 charging UDOT with the responsibility of apportioning maintenance costs between the railroad and the local government. UTAH CODE § 54-4-15(1). 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

(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). The State even provides funds to be used, in conjunction with other available 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). Clearly, the Utah Legislature's intent was for UDOT to promulgate a rule whereby the public agency shared, if not entirely bore, the responsibility of maintenance costs. To that end, UDOT rightly promulgated the Former Rule allowing parties to enter into a separate maintenance cost agreement and the New Rule runs afoul with all of the existing practices, norms, rules, and statutes in place.[4]

Also, the legislative history of the New Rule is not determinative of the interpretation of the intent of the Former Rule. It is the legislative history at the time a rule is promulgated that is of importance. The self-serving statements made at the time the New Rule was adopted have no bearing on the intent of the Former Rule when it was adopted. Thus, the claims that the New Rule was changed "to clarify the Department's intent when it originally promulgated this rule," (Utah State Bulletin, Vol. 2020, No. 16, at 83 § 4 (Aug. 15, 2020)) has no bearing on the actual

[4] Note that the New Rule is currently being challenged in the Third Judicial District Court for the County of Salt Lake, State of Utah for its unconstitutionality. *See* Civil No. 210905204.

intent of the Former Rule when it was adopted; it is merely evidence that UDOT wanted to create a certain impression of legislative history.

Second, the UMUTCD and the UDOT's 2015 Manual—which are incorporated into R930-5—do not support and are inconsistent with UDOT's and Logan City's interpretation of the Former Rule. The UMUTCD provides that "[t]he responsibility for the … maintenance … of traffic control devices shall rest with the public agency or the official having jurisdiction[.]" UMUTCD, SECTION 1A.07 – RESPONSIBILITY FOR TRAFFIC CONTROL DEVICES (2009 ed. 2011) at 2. The 2015 UDOT Manual provides that the railroad should only be charged if the maintenance is only for the benefit of the railroad. UTAH DEP'T OF TRANSP., RAILROAD COORDINATION MANUAL OF INSTRUCTIONS, CHAPTER 8: MAINTENANCE COORDINATION (2015) at 21. Thus, to say that the Former Rule supports the railroad bearing the costs of maintenance is patently incorrect because it is incongruent with the existing rules as well as the rule's legislative history. As such, Logan City's proposed interpretation of the Former Rule is clearly erroneous.

III. EVEN IF LOGAN CITY'S INTERPRETATION OF THE FORMER RULE IS ACCEPTED BY THE COMMISSION, LOGAN CITY'S PRIOR SIGNED WRITTEN AGREEMENTS WOULD GOVERN.

Logan City has taken the position that the Former Rule requires a prior written, signed agreement to be in place in order for a railroad to avoid being responsible for 100% of the costs of maintaining traffic control devices. Even if the Commission were to agree with this position, earlier agreements between Logan City and Union Pacific exist and would be determinative here.

The 1982 Agreement and the 1983 Agreement, both prior written signed agreements between Logan City and Union Pacific, provide: "It is understood that, if traffic in the future over the Roadway should, by State or local authority, require automatic signal warning devices, *such warning devices shall be installed under the terms and conditions to be negotiated and*

agreed upon by the parties hereto." 1982 Agreement at § 2 and 1983 Agreement at § 2 (emphasis added). Therefore, pursuant to these agreements and under the interpretation advocated by Logan City, Logan City and Union Pacific are required to negotiate terms and conditions for the new traffic control devices.

IV. THE NEW RULE AND LOGAN CITY'S INTERPRETATION OF THE FORMER RULE VIOLATE FEDERAL CONSTITUTIONAL AND STATUTORY LAW.

UDOT's amendment to R930-5-8(1), making railroads fully responsible for crossing maintenance costs, violates (a) the Commerce Clause of the U.S. Constitution and (b) the federal ICC Termination Act, or ICCTA, 49 U.S.C. § 10101 *et seq.*

A. The New Rule Violates the Commerce Clause of the U.S. Constitution.

Rail transportation is an inherently interstate activity. Thus, "the courts long have recognized a need to regulate railroad operations at the federal level." *City of Auburn v. United States*, 154 F.3d 1025, 1029 (9th Cir. 1998); *see Friberg v. Kansas City S. Ry.*, 267 F.3d 439, 442 (5th Cir. 2001) ("The regulation of railroad operations has long been a traditionally federal endeavor, to better establish uniformity in such operations and expediency in commerce."); S. REP. NO. 104-176, at 6 (1995) (emphasizing the need for a "nationally uniform system of economic regulation" of railroads). Indeed, railroads are subject to one of "the most pervasive and comprehensive of federal regulatory schemes." *Chicago & N.W. Transp. Co. v. Kalo Brick & Tile Co.*, 450 U.S. 311, 318 (1981).

Even so, states have often tried to regulate certain aspects of railroad transportation. The Supreme Court has "frequently invalidated" such efforts. *Id.* For example, the Court struck down an Arizona law that imposed a maximum train length of fourteen passenger cars or seventy freight cars. This state regulation violated the Commerce Clause. *S. Pac. Co. v. State of Ariz. ex*

rel. Sullivan, 325 U.S. 761, 769 (1945). In striking down the Arizona law, the Court observed that national uniformity in such regulation "is practically indispensable to the operation of an efficient and economic railway system." *Id.* at 772. The Court has since emphasized that the Commerce Clause is "a self-executing limitation on the power of the States to enact laws imposing substantial burdens on such commerce." *South-Cent. Timber Dev., Inc. v. Wunnicke*, 467 U.S. 82, 87 (1984); *see Pike v. Bruce Church, Inc.*, 397 U.S. 137 (1970).

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).

The New Rule imposes upon Union Pacific responsibility for all future maintenance at all of these crossings, across the entire state of Utah. UDOT's across-the-board imposition of 100% of the cost to maintain these crossings imposes a substantial burden on the flow of interstate commerce and is not fair or reasonable. Thus, the New Rule and Logan City's interpretation of the Former Rule are unconstitutional.

The burden imposed by the New Rule's cost imposition on Union Pacific's maintenance of crossings to facilitate interstate transportation is excessive in relation to any local benefit it confers to Union Pacific, and therefore it violates the Commerce Clause. Accordingly, the Commission should find that neither the New Rule nor Logan City's interpretation of the Former Rule can prevail because they violate the Commerce Clause of the United States Constitution.

B. The New Rule Violates 49 U.S.C. § 10501.

Congress enacted the ICCTA in 1995 to abolish the Interstate Commerce Commission

and empower its successor, the Surface Transportation Board (STB), to regulate rail transportation in the United States. 49 U.S.C. § 10501. "Congress's purpose in passing the ICCTA was to establish an exclusive Federal scheme of economic regulation and deregulation for railroad transportation." *Emerson v. Kansas City S. Ry.*, 503 F.3d 1126, 1132 (10th Cir. 2007); H.R. REP. NO. 104-311, 96 (1995), *reprinted* in 1995 U.S.C.C.A.N. 793, 808 (ICCTA sought "'to implement a [f]ederal scheme of minimal regulation for this intrinsically interstate form of transportation"). Through the ICCTA, "Congress intended to preempt a wide range of state and local regulation of rail activity." *Ass'n of Am. R.R. v. S. Coast Air Quality Mgmt. Dist.*, 622 F.3d 1094, 1097 (9th Cir. 2010).

To that end, Congress gave the STB 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." 49 U.S.C. § 10501(b). Apart from certain narrow exceptions, ICCTA's remedies are "exclusive and preempt the remedies provided under Federal or State law." *Id.* "It is difficult to imagine a broader statement of Congress's intent to preempt state regulatory authority over railroad operations." *City of Auburn*, 154 F.3d at 1030 (citation omitted).

The ICCTA thus expressly preempts state and local laws that intrude on the STB's exclusive jurisdiction, "regardless of the context or rationale." *Emerson*, 503 F.3d at 1130 (citation omitted). There are "two broad categories of state and local actions" that are expressly preempted by the ICCTA: (1) "any form of state or local permitting or preclearance that, by its nature, could be used to deny a railroad the ability to conduct part of its operations or to proceed

with activities that the Board has authorized"; and (2) "state or local regulation of matters directly regulated by the Board—such as the construction, operation, and abandonment of rail lines[.]" *Id.* (citation omitted). In other words, state or local laws that intrude on the STB's exclusive jurisdiction "have the effect of managing or governing rail transportation" and are thus preempted. *Oregon Coast Scenic R.R. v. Oregon Dep't of State Lands*, 841 F.3d 1069, 1077 (9th Cir. 2016) (quoting *Ass'n of Am. R.R.*, 622 F.3d at 1097).

A state or local regulation is also "impliedly" preempted, or preempted "as applied," if it "would have the effect of preventing or unreasonably interfering with railroad transportation." *Emerson*, 503 F.3d at 1133 (citation omitted). UDOT's New Rule requires railroads to bear 100% of the maintenance costs associated with highway-rail crossings, despite the substantial benefits that the state and localities receive from those crossings. This statewide imposition of all crossing maintenance costs on railroads like Union Pacific constitutes economic regulation of rail transportation and thus intrudes on the exclusive jurisdiction of the STB in this area.

UDOT's amendment to R930-5-8(1) has the effect of managing and governing Union Pacific's maintenance of crossings. The New Rule also imposes an unreasonable burden on railroad operations and interstate commerce. If every state or locality were able to impose a similar requirement on each railroad operating within its jurisdiction, the resulting burden on interstate rail operations would be substantial. Union Pacific has over 30,000 crossings in the twenty-three states in which it operates and must retain the ability to negotiate agreements on a case-by-case basis. Each crossing has a unique design, geometry, and traffic control device arrangement. States cannot intrude on the uniform federal regulatory regime in this way.

Accordingly, the Commission should find that the New Rule and Logan City's interpretation of the Former Rule are invalid because they are preempted by 49 U.S.C. § 10501(b).

CONCLUSION

For all the foregoing reasons, the Commission should deny Logan City's request to apply the New Rule retroactively. The Commission should recognize the Former Rule as the applicable rule and should interpret the Former Rule congruent with its incorporated documents, statutory framework, legislative intent, and as has been interpreted for over a decade. Logan City's interpretation is unconstitutional and preempted by federal law.

DATED June 10, 2022.

PARSONS BEHLE & LATIMER

/s/ Vicki M. Baldwin
Vicki M. Baldwin

Attorneys for Union Pacific Railroad Company

CERTIFICATE OF SERVICE

(Docket No. 21-888-01)

I hereby certify that on June 10, 2022, I caused to be e-mailed, a true and correct copy of the foregoing **LEGAL BRIEF OF UNION PACIFIC RAILROAD COMPANY** to:

ASSISTANT ATTORNEYS GENERAL
Patricia Schmid
pschmid@agutah.gov
Justin Jetter
jjetter@agutah.gov
Robert Moore
rmoore@agutah.gov

OFFICE OF CONSUMER SERVICES
Michele Beck
mbeck@utah.gov
Alyson Anderson
akanderson@utah.gov

DIVISION OF PUBLIC UTILITIES
Chris Parker
chrisparker@utah.gov
William Powell
wpowell@utah.gov
Madison Galt
mgalt@utah.gov
dpudatarequest@utah.gov

LOGAN CITY
Kymber Housley
Kymber.housley@loganutah.org
Craig J. Carlston
Craig.carlston@loganutah.org
Robert C. Keller
rck@scmlaw.com
Dani Cepernich
dnc@scmlaw.com

/s/ Michelle Orton-Brown