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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 **REPLY 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 Reply to Logan City's Brief In Support of its Petition ("**Logan City's Brief**").

ARGUMENT

I. UNION PACIFIC'S CONDUCT DOES NOT VIOLATE RULE 930-5-8. IT COMPORTS WITH FORMER AND EXISTING RULES, LEGISLATIVE HISTORY, AND PRIOR WRITTEN AGREEMENTS.

Union Pacific has attempted to negotiate with Logan City the apportionment of the costs of maintenance, as it has historically done, pursuant to the (1) Rule 930-5-8, as enacted in April 2011 and in place prior to the 2021 amendments (the "Former Rule"), (2) legislative history, (3) existing rules, and (4) prior written agreements. As more fully explained in Union Pacific's Brief, the Parties are intended to and must negotiate the apportionment of the maintenance costs.

First, the Former Rule—which governs, as explained in Union Pacific's Brief—provides that: "Responsibility for maintenance is as described in this section *unless a separate agreement applies*." UTAH ADMIN. CODE R930-5-8 (2011) (emphasis added). The plain language of the Former Rule not only intends for parties to negotiate for the allocation of maintenance costs, but it invites parties to do so.

Second, the legislative history, specifically Title 54, repeatedly charges UDOT with the responsibility of *apportioning* maintenance costs *between the railroad and local agencies*—with explicit instruction that the local agency is to pay all or part of the costs of maintenance with State funds. UTAH CODE §§ 54-4-15(1); 54-4-15.1 through 15.3. This history is carried on and reinforced by the Utah Legislature's 2022 amendments to Section 54-4-15(3)(a) which, again, states that, "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*." Utah Code § 54-4-15(3); Utah HB 181 (2022) (emphasis added). This type of allocation can only be achieved through good-faith discussions and negotiations between the Parties.

Moreover, the amendment of Section 54-4-15(3)(a) further demonstrates that Logan City's and UDOT's interpretation of the Former Rule and New Rule is plainly wrong. If the Utah Legislature had intended to require railroads to bear all maintenance costs as Logan City and UDOT assert, the Legislature would not repeatedly state that UDOT must "allocate" costs of maintenance "*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" and "*may modify the*

allocation" of maintenance costs.[1] *See* UTAH CODE § 54-4-15(3)(b)–(c); *see also* UTAH CODE § 54-4-15(3)(d); Utah HB 181 (2022) (emphasis added).

Third, the UMUTCD, which is incorporated into R930-5, and UDOT's 2015 Railroad Coordination Manual of Instruction provide that the state or local authority is responsible for the maintenance of traffic control devices, particularly if the maintenance is only for the benefit of the state or local authority, in this case, Logan City. This apportionment is, again, done through good-faith negotiations, as the Parties have done historically.

Lastly, even if the Commission were to accept Logan City's interpretation of the Former Rule, which it should not, that a separate agreement must be in place for Union Pacific to avoid paying 100% of the traffic control devices' maintenance costs, such agreements exist and would be determinative here. The 1982 Agreement and the 1983 Agreement, both executed 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). Pursuant to these agreements and under the interpretation advocated by Logan City, Logan City

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[1] Logan City argues that "Union Pacific can now request under Section 54-4-3(c) that the Department of Transportation review the standard allocation… [and] there is no indication Union Pacific has done so." This is incorrect for two reasons.

First, to state that Union Pacific has not requested UDOT to review the allocation of maintenance costs is disingenuous. Through the written comments that Union Pacific submitted to UDOT during UDOT's Public Comment Period for the Notice of Proposed Rule—Filing No. 53184; the oral comment made by Sarah Goldberg on behalf of Union Pacific at UDOT's Public Hearing on Filing No. 53184 (held on December 15, 2020); its litigation of the underlying petition; and active civil litigation with UDOT, Union Pacific has repeatedly asked UDOT to review the allocation of maintenance costs.

Second, as noted in Union Pacific's Brief, the applicable Former Rule, in conjunction with the previously described legislative history, existing rules, and manuals, has historically prescribed that parties negotiate the allocation of maintenance costs. *See* UTAH ADMIN. CODE R930-5-8 (2011) ("Responsibility for maintenance is as described in this section *unless a separate agreement applies*." (emphasis added)).

and Union Pacific are required to negotiate terms and conditions for these new traffic control devices.

Therefore, to argue that Union Pacific is "violating" Rule 930-5-8 for negotiating in good faith with Logan City for the apportionment of maintenance costs, as required by the Former Rule, legislative history, existing rules, and prior written agreements, as it has done historically, is simply wrong. Union Pacific is comporting with former and existing rules, legislative history, and prior written agreements by negotiating in good faith with Logan City for the apportionment of maintenance costs for Logan City's traffic control devices.

II. UDOT'S STATEMENTS REGARDING THE NEW RULE ARE SELF-SERVING AND WRONG.

UDOT's Notice of Proposed Rule – Filing No. 53084 (dated September 18, 2020) ("**UDOT's Notice**"), wherein UDOT proposed to amend R930-5-8(1), states that the "proposed change only clarifies existing requirements." This statement is incorrect and disregards the rule's legislative history, the incorporated materials, and the long-standing history of dealings between Union Pacific and state and local authorities, which instruct the Parties to negotiate for the apportionment of maintenance costs, as more fully described in Union Pacific's Brief. Of particular note, the Utah Legislature instructs the controlling agency to "pay all or part of the costs of the … maintenance" with available State funds. UTAH CODE § 54-4-15.1. 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 Railroad Coordination Manual of Instruction provides that 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. None of the legislative history, incorporated materials, or long history of dealings between the Parties suggests that Union Pacific is required to bear all maintenance costs for active traffic control devices that are wholly and solely beneficial to the state or local authority.

As noted in Union Pacific's Brief, Union Pacific has over 30,000 crossings in the twenty-three states in which it operates, and approximately 547 public, at-grade crossings in the State of Utah. Allocating 100% of maintenance costs to Union Pacific would be a significant change from past practice, and would impose a significant financial burden on Union Pacific.

Further, UDOT's Notice states, without any study or records to corroborate its finding, that "the proposed rule change will not lead to new [expenses or costs] to [large or small business] railroads. Historically, railroad companies have paid to maintain their crossings that affect highway authorities." This, again, is incorrect. The new rule is fundamentally attempting to shift maintenance costs—historically borne at least in part by state or local authorities—onto railroads.

Accordingly, UDOT's Notice contains statements that are self-serving and wrong and should be completely disregarded as such.

III. LOGAN CITY'S INTERPRETATION AND APPLICATION OF THE NEW RULE VIOALTES FEDERAL LAW.

As more fully explained in Union Pacific's Brief, UDOT's amendment to R930-5-8(1), making railroads fully responsible for all 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.* Logan City's interpretation of R930-5-8 is as wrong as UDOT's effort to enforce R930-5-8 in violation of federal law. 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 and those raised in Union Pacific's Brief, 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 interpret the Former Rule congruent with its incorporated documents, statutory framework and legislative intent as it has been interpreted for over a decade. Logan City's interpretation is unconstitutional and preempted by federal law.

DATED June 17, 2022.

PARSONS BEHLE & LATIMER

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CERTIFICATE OF SERVICE

I hereby certify that on this 17th day of June 2022, I caused to be e-mailed, a true and correct copy of the foregoing **REPLY OF UNION PACIFIC RAILROAD COMPANY** to:

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