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**BEFORE THE WASHINGTON STATE UTILITIES AND TRANSPORTATION  
COMMISSION HEARINGS BOARD**

CITY OF SPOKANE VALLEY, a municipal  
corporation,

Complainant,

v.

UNION PACIFIC RAILROAD COMPANY  
(aka UPRR)

Respondent.

DKT. NO. TR-210814  
TR-210809

CITY OF SPOKANE VALLEY'S  
MOTION TO STRIKE PREFILED  
REBUTTAL TESTIMONY OF UNION  
PACIFIC RAILROAD COMPANY

**I. INTRODUCTION**

1. The City of Spokane Valley, by and through its attorneys of record Quinn N. Plant and Aziza L. Foster of Menke Jackson Beyer, LLP, hereby moves to strike the Rebuttal Testimony of Ellis May and the Rebuttal Testimony of Peggy Ygbuhay. Staff supports this motion.

**II. RELIEF REQUESTED**

2. The UTC should strike the Rebuttal Testimony of Ellis May and the Rebuttal Testimony of Peggy Ygbuhay.

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**III. STATEMENT OF FACTS**

3. On October 25, 2021, the City filed a petition to modify the protective and warning devices at an at-grade public road crossing over Barker Road, USDOT #662526C.<sup>1</sup> The City also filed a complaint pursuant to RCW 81.04.110 for a declaratory ruling that maintenance costs of the modified protective and warning devices that are the subject of the petition must be prospectively borne by UPRR.<sup>2</sup> The UTC consolidated these matters.<sup>3</sup>

4. A pre-hearing conference involving the City, UPRR, and Staff was held on January 13, 2021. The UTC issued a pre-hearing conference order setting the dates for discovery, the pre-filing of testimony, and the administrative hearing.<sup>4</sup>

5. Pursuant to the pre-hearing conference order, the City was to submit its direct testimony by March 22, 2022.<sup>5</sup> UPRR and the Staff were required to submit response testimony by April 12, 2022.<sup>6</sup> All parties were to submit rebuttal/cross answering testimony by April 26, 2022.<sup>7</sup>

6. The City submitted its direct testimony of Gloria Mantz, Robert Lochmiller, and Brett Johnson on March 22, 2022.<sup>8</sup> UPRR submitted<sup>9</sup> response testimony of Ellis May

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<sup>1</sup> *City of Spokane Valley v. Union Pacific Railroad Co.*, Docket TR-210809, Petition to Modify Warning Devices at Highway-Railroad Crossing (Oct. 25, 2021).

<sup>2</sup> *City of Spokane Valley v. Union Pacific Railroad Co.*, Docket TR-210814, Complaint (Oct. 25, 2021).

<sup>3</sup> *City of Spokane Valley v. Union Pacific Railroad Co.*, Docket TR-210809 and TR-210814, Consolidating Dockets; Denying Motion to Dismiss; Prehearing Conference Order; Notice of Hearing (Jan. 24, 2022).

<sup>4</sup> *Id.*

<sup>5</sup> *Id.*

<sup>6</sup> *Id.*

<sup>7</sup> *Id.*

<sup>8</sup> *City of Spokane Valley v. Union Pacific Railroad Co.*, Docket TR-210809 and TR-210814, Prefiled Testimony of Gloria Mantz (Mar. 22, 2022); *City of Spokane Valley v. Union Pacific Railroad Co.*, Docket TR-210809 and TR-210814, Prefiled Testimony of Robert

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3 and Peggy Ygbuhay on April 12, 2022.<sup>10</sup> The City submitted rebuttal testimony on April  
4 26, 2022.<sup>11</sup> That same day, UPRR submitted testimony styled as "rebuttal," but actually  
5 responding to the direct testimony of the City pre-filed on March 22, 2022.<sup>12</sup> Staff has not  
6 submitted any testimony.  
7

#### 8 **IV. STATEMENT OF ISSUES**

9 7. Should the UTC strike untimely response testimony submitted by UPRR on  
10 April 26, 2022?

#### 11 **V. ARGUMENT**

12 8. The rebuttal testimony of Ellis May and Peggy Ygbuhay submitted by UPRR  
13 on April 26, 2022, actually responds to direct testimony of Gloria Mantz, Robert Lochmiller,  
14 and Brett Johnson pre-filed on March 22, 2022. The testimony UPRR improperly  
15 characterizes as "rebuttal" could, and should, have been filed as response testimony on April  
16 12, 2022, as required by the pre-hearing conference order.  
17

18 9. The UTC established a procedural schedule setting forth when each party's  
19 testimony became due. Pursuant to this schedule, UPRR was required to file testimony in  
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21 Lochmiller (Mar. 22, 2022); *City of Spokane Valley v. Union Pacific Railroad Co.*, Docket  
22 TR-210809 and TR-210814, Prefiled Testimony of Brett Johnson (Mar. 22, 2022).

23 <sup>9</sup> UPRR emailed the testimony to the City on April 12, 2022. However, UPRR submitted  
24 the testimony after 5pm, therefore it was not considered "filed" with the UTC until April 13,  
25 2022.

26 <sup>10</sup> *City of Spokane Valley v. Union Pacific Railroad Co.*, Docket TR-210809 and TR-  
27 210814, Prefiled Testimony of Ellis May (Apr. 23, 2022); *City of Spokane Valley v. Union*  
28 *Pacific Railroad Co.*, Docket TR-210809 and TR-210814, Prefiled Testimony of Peggy  
29 Ygbuhay.

30 <sup>11</sup> *City of Spokane Valley v. Union Pacific Railroad Co.*, Docket TR-210809 and TR-  
210814, Rebuttal Testimony of Gloria Mantz (Apr. 26, 2022).

<sup>12</sup> *City of Spokane Valley v. Union Pacific Railroad Co.*, Docket TR-210809 and TR-  
210814, Rebuttal Testimony of Ellis May (Apr. 26, 2022); *City of Spokane Valley v. Union*  
*Pacific Railroad Co.*, Docket TR-210809 and TR-210814, Rebuttal Testimony of Peggy  
Ygbuhay (Apr. 26, 2022).

CITY OF SPOKANE VALLEY'S  
MOTION TO STRIKE-3

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3 response to the City’s direct testimony by April 12, 2022. UPRR also had the opportunity to  
4 cross-answer any testimony submitted by Staff, assuming Staff submitted testimony.

5           10.     Instead of filing a proper cross-answer, of which there could not be in this  
6 case due to Staff not submitting any testimony, UPRR instead submitted a second response  
7 to the City’s direct testimony, improperly labeled “rebuttal,” on April 26, 2022.  
8

9           11.     However, all UPRR did was submit additional testimony in response to the  
10 City’s direct testimony. For example, Ellis May was asked “In her prefiled testimony,  
11 Gloria Mantz offered that UP delays caused phase two of the Project to be split into two  
12 additional phases. Do you know why this delay occurred?”<sup>13</sup> And Peggy Ygbuhay was  
13 asked “In his prefiled testimony, Brett Johnson indicated that federal funds are being used to  
14 upgrade the Barker Road Crossing. Do you know what type of federal funds these are?”<sup>14</sup>  
15

16           12.     These are questions, and testimony in response to those questions, that UPRR  
17 had the opportunity to ask and respond to through their response testimony on April 12,  
18 2022. In fact, that is exactly where UPRR should have made its responses to the City’s  
19 direct testimony. In responding to the City’s direct testimony during through their rebuttal  
20 testimony, UPRR has denied the City an opportunity to respond.

21           13.     Therefore, UPRR’s testimony submitted on April 26, 2022 is properly  
22 classified as response testimony. However, UPRR's response testimony was due two weeks  
23 earlier, on April 12, 2022. The response testimony submitted by UPRR on April 26, 2022,  
24 and improperly labeled as "rebuttal" testimony, is untimely and should be stricken to the  
25 extent it responds to the City’s direct testimony.  
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28 <sup>13</sup> *City of Spokane Valley v. Union Pacific Railroad Co.*, Docket TR-210809 and TR-  
210814, Rebuttal Testimony of Ellis May (Apr. 26, 2022)

29 <sup>14</sup> *City of Spokane Valley v. Union Pacific Railroad Co.*, Docket TR-210809 and TR-210814,  
Rebuttal Testimony of Peggy Ygbuhay (Apr. 26, 2022).

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**VI. CONCLUSION**

14. For the foregoing reasons, the UTC should strike the Rebuttal Testimony of Ellis May and the Rebuttal Testimony of Peggy Ygbuhay.

15. Should the UTC not strike the Rebuttal Testimony of Ellis May and the Rebuttal Testimony of Peggy Ygbuhay, the UTC should allow the City to submit oral surreply at the hearing on the merits on May 10, 2022.

DATED this 28th day of April, 2022.

MENKE JACKSON BEYER, LLP

*s/Aziza L. Foster*  
KENNETH W. HARPER, WSBA # 25578  
QUINN N. PLANT, WSBA # 31339  
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*Attorneys for Complainant/Petitioner  
City of Spokane Valley*

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**CERTIFICATE OF SERVICE**

I certify, under penalty of perjury, under the laws of the State of Washington, that on this day, I caused to be served a true and correct copy of the foregoing document by the method indicated before, and addressed to the following:

<p>Washington Utilities &amp; Transportation Commission</p>	<p><input checked="" type="checkbox"/> <a href="http://efiling.utc.wa.gov/form">efiling.utc.wa.gov/form</a></p>
<p>Jeff Roberson Assistant Attorney General Office of the Attorney General Utilities and Transportation Division P.O. Box 40128 Olympia, WA 98504-0128 (360) 664-1188</p>	<p><input type="checkbox"/> U.S. Mail, postage prepaid <input type="checkbox"/> Facsimile <input checked="" type="checkbox"/> E-Mail: <a href="mailto:jeff.roberson@utc.wa.gov">jeff.roberson@utc.wa.gov</a> <input type="checkbox"/> Via Hand Delivery</p>
<p>Ellis Mays 3017 Douglas Boulevard Suite 300 Roseville, CA 95661 (916) 774-7165 <i>(Contact for Union Pacific Railroad)</i></p>	<p><input type="checkbox"/> U.S. Mail, postage prepaid <input type="checkbox"/> Facsimile <input checked="" type="checkbox"/> E-Mail: <a href="mailto:emays@benesch.com">emays@benesch.com</a> <input type="checkbox"/> Via Hand Delivery</p>
<p>Josephine S. Jordan Union Pacific Railroad 1400 Douglas Street, MS 1580 Omaha, NB 68179 (402) 544-4554 <i>(Counsel for Union Pacific Railroad)</i></p>	<p><input type="checkbox"/> U.S. Mail, postage prepaid <input type="checkbox"/> Facsimile <input checked="" type="checkbox"/> E-Mail: <a href="mailto:jjordan1@up.com">jjordan1@up.com</a> <input type="checkbox"/> Via Hand Delivery</p>
<p>Rachel Tallon Reynolds Jean Y. Kang 1111 Third Avenue, Suite 2700 Seattle, Washington 98101 (206) 436-2020 <i>(Counsel for Respondent)</i></p>	<p><input type="checkbox"/> U.S. Mail, postage prepaid <input type="checkbox"/> Facsimile <input checked="" type="checkbox"/> E-Mail: <a href="mailto:Rachel.Reynolds@lewisbrisbois.com">Rachel.Reynolds@lewisbrisbois.com</a> <a href="mailto:Jean.Kang@lewisbrisbois.com">Jean.Kang@lewisbrisbois.com</a> <input type="checkbox"/> Via Hand Delivery</p>

Dated in Yakima, Washington, this 28th day of April, 2022

s/Janet L. Rose  
JANET L. ROSE