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Public Utilities Commission of
Ohio

Memo

PUCO

To: Docketing Division

From: Bonnie J Johrendt, Grade Crossing Planner

Date: June 11, 2007

RE: W&LE Grade Crossing, PUCO Case No. 07- 700 -RR-STP,
West Market Street/SR 18/6.19, City of Akron, Summit County

Attached is a copy of the Subsidy Stipulation outlining the warning device upgrade project at the above-mentioned location. Please, assign a case number in this matter; docket this document and record the parties of record.

A suggested case coding and heading would be as follows:

PUCO Case No. 07- 700 - RR - STP --

In the matter of a request for the upgrade of the warning devices at the Wheeling & Lake Erie grade crossing at West Market Street/SR 18/6.19 (002-121E), City of Akron, Summit County.

The Commission's rail staff has reviewed this document, and has determined it to be in order. It is, therefore, recommended that the Commission's legal staff proceed with an Entry adopting this Subsidy Stipulation and directing W&LE to file the plans and estimates for this project within 90 days and an in-service deadline of 12 months.

This is to certify that the images appearing are an accurate and complete reproduction of a case file document delivered in the regular course of business.
Technician Am Date Processed 6/11/07

Docketing Division
Page Two
June 11, 2007

Parties of record will be:

RAILROAD: Mr. Dan Reinsel
Signals & Communication
Wheeling & Lake Erie
100 East First Street
Brewster, Ohio 44613
330-767-3401 FAX 330-767-3273
E-mail: dreinsel@wlerway.com

CITY: Department of Public Service
Akron Engineering Bureau
Attn.: Ms. Christine Jonke, P.E.
166 S. High Street, Room 701
Akron, Ohio 44308-1652

C: PUCO Legal
File

IN THE MATTER OF A REQUEST FOR THE
UPGRADE OF THE WARNING DEVICES AT
THE WHEELING & LAKE ERIE GRADE
CROSSING, WEST MARKET STREET/SR 18-
6.19 (002-121E), CITY OF AKRON, SUMMIT
COUNTY

CASE NO.

SUBSIDY STIPULATION

THIS SUBSIDY STIPULATION is entered into on this 6 day of June 2007 by and among the staff of the Public Utilities Commission of Ohio ("PUCO"), City of Akron ("City"), and the Wheeling & Lake Erie Railway Company. ("Railroad").

WITNESSETH:

WHEREAS, Rule 4901-1-30 of the Ohio Administrative Code provides that any two or more parties to a proceeding may enter into a written or oral stipulation concerning the issues presented in such proceeding; and

WHEREAS, the PUCO has statutory authority to regulate and promote the welfare and safety of railroad employees and the traveling public pursuant to Ohio Revised Code Section 4905.04; and

WHEREAS, the PUCO is responsible for evaluating public highway-railroad grade crossings to determine the need for upgrading the warning devices and apportioning the cost thereof pursuant to Ohio Revised Code 4907.471;

WHEREAS, the PUCO is responsible for the administration and implementation of the State Grade Crossing Protection Fund pursuant to help defray the public's share of the cost to upgrade the warning devices at Ohio's Highway-railroad grade crossings;

WHEREAS, the parties hereto propose to facilitate the upgrade identified in this Subsidy Stipulation in accordance with the Federal Aid Policy Guide ("FAPG") and applicable provisions of Title 23 of the United States Code pursuant to the terms hereof; and

WHEREAS, all parties hereto declare it to be in the public interest to grant their consent to the PUCO to facilitate the installation of active warning devices at the subject highway-railroad grade crossing in accordance with plans, specifications, and estimates to be approved by the PUCO;

WHEREAS, the Railroad, the PUCO, and the City without making any admission of any kind, desire to provide for the upgrade of active warning devices (Project) at the subject highway-railroad grade crossing:

WHEREAS, the parties hereto propose the PUCO issue an Order, directing the completion of this Project pursuant to the terms of this Subsidy Stipulation;

WHEREAS, the parties hereto believe this Subsidy Stipulation to be reasonable and entitles careful consideration by the PUCO;

NOW THEREFORE, the parties hereto agree as follows:

1. The upgrade of the active warning devices at the identified highway-railroad grade crossing shall be accomplished and completed within approximately 12 months of the date the PUCO issues an Order adopting the terms of this Subsidy Stipulation.
2. The cost of this Project shall be apportioned as between the City (as the governmental entity having jurisdiction over the subject roadway where this Project is to be completed), the PUCO and the Railroad, as follows:

<i>Grade Crossing</i>	<i>Railroad</i>	<i>City of Akron</i>	<i>PUCO/State</i>
<i>Market Street SR 18-6.19 (002-121E)</i>	<i>on going maintenance</i>	<i>25% of Total</i>	<i>75% of Total</i>

The PUCO has agreed to provide funds from the State Grade Crossing Protection Fund, pursuant to Ohio Rev. Code 4907.472, to cover that portion of this Project cost to be borne by the State of Ohio proposed above. The actual respective dollar amount, which the Railroad, the City, and the PUCO shall bear, will be based upon the actual cost approved by the PUCO and incurred by the Railroad for this Project.

The City shall, within 30 days of the adoption of this Subsidy Stipulation, certify in writing the authority to share in this Project cost as described herein. Such certification shall include a resolution duly authorized and passed by the City Council that authorizes participation in this Project. The PUCO shall have no obligation to expend funds hereunder until the City has submitted documentation in proper form as described in this section.

The Railroad shall be responsible for initially paying all of their actual cost to upgrade the active warning devices identified above. However, the PUCO (75%) and the City (25%) shall be legally bound to reimburse the Railroad upon proper application by the Railroad, consistent with the terms of this Subsidy Stipulation and in accordance with all applicable state regulations.

The Railroad shall provide documentation as a result of a bid selection process; the bids explicitly address all costs associated with this grade crossing installation project including any percentage mark up and administrative or overhead rates. All plans, specifications, estimate of cost, acceptance of work, and procedures in general, to facilitate the construction of the safety upgrade described above, shall conform in all respects to federal laws, rules, regulations, orders, and approvals applicable to State Aid projects.

The Railroad may bill the PUCO and the City monthly or periodically for its cost when cost exceed \$1,000.00. The Railroad shall submit three (3) copies of its bill and in accordance with said rules and regulations as they have been issued or as thereafter may be supplemented or revised. A final bill covering the actual cost and showing all details shall be submitted to the PUCO and City within ninety (90) days after completion of, this project, the PUCO and City shall pay all bills within sixty (60) days after receipt thereof, except that the PUCO may hold a retainer on all bills not to exceed eight percent (8%) until final payment. The PUCO and the City shall make final payment for all amounts due the Railroad within sixty (60) days after a final audit has been performed and approved by the PUCO. The Railroad agrees to cooperate and assist, as requested, in any such audit. At any time during normal business hours upon three (3) days written notice and as often as the PUCO and the City may deem necessary and in such a manner as not to interfere with the normal business operations, the Railroad shall make available to the PUCO and the City, for examination, and to appropriate state agencies or officials, all of its records with respect to matters covered by this Subsidy Stipulation including, but not limited to, records of personnel and conditions of employment and shall permit the PUCO and the City to audit, examine and make excerpts or transcripts from such records. In the event of a controversy as to the eligibility for reimbursement of any charges claimed against the Project, as set in this Subsidy Stipulation, the decision of the PUCO regarding the same should be final.

No work requiring reimbursement under this Subsidy Stipulation shall be commenced by the parties until all of the following have occurred: (1) this Subsidy Stipulation shall have been adopted by the PUCO; (2) all financial obligations of the PUCO, as provided for in this contract, are subject to the provisions of Section 126.07 of the Ohio Revised Code and shall not be valid and enforceable unless funds are appropriated by the Ohio General Assembly and encumbered by the PUCO; (3) the Railroad has been notified by the PUCO to proceed with construction of the upgrade. Work on this upgrade shall commence within 30 days of the occurrence of event (1), (2) and (3) described herein. Buying and assembling of materials shall be construed as compliance with the foregoing thirty (30) day provisions. Said work shall be pursued diligently by Railroad until completed.

The City shall furnish advance warning signs and pavement markings as specified in the Manual on Uniform Traffic Control Devices (MUTCD) and shall assume all cost to maintain such signage and markings in the future. The City also agrees to arrange for the installation of curbing, the relocation, rearrangement or alteration of all utilities of any nature, which are located on public right-of-way, and which will affect by or interfere with the construction of the said Project. Said installation, relocation, rearrangement or alteration will be done at such time as requested by the PUCO and will be performed solely at the expense of the City or Utilities and at no cost to this Project or the Railroad.

NOTIFICATION

All notices, consents, demands, requests and other communications which may or are required to be given by the Railroad pursuant to this Stipulation shall be in writing and shall be deemed duly given if personally delivered, sent by facsimile, sent by e-mail, sent by United States mail, registered or certified, return receipt requested, postage prepaid, to the addresses set forth below or to such other address as the other party hereto may designate in written notice transmitted in accordance with this provision.

PUCO: Public Utilities Commission of Ohio
 Transportation Department
 Railroad Section - Bonnie Johrendt
 180 East Broad Street
 Columbus, Ohio 43215-3793
 (614) 466-0435 FAX (614) 995-5535
 Bonnie.Johrendt@puc.state.oh.us

CITY: Ms. Christine Jonke, P.E.
 Project Manager
 Department of Public Service
 Akron Engineering Bureau
 166 South High Street, Room 701
 Akron, Ohio 44308-1652
 (330) 375-2015 FAX (330) 375-2288
 AkronEngineering@ci.akron.oh.us

The Railroad shall furnish notification to the PUCO and the City at least five (5) working days prior to the date work is scheduled to start at the project site so arrangements can be made for inspections.

The Railroad shall also notify the PUCO and the City of any stoppage and resumption of the work activity, and the reasons thereof, and the date this project is completed.

The Railroad shall furnish notification to the City at least fourteen (14) working days prior to starting any work requiring the establishment of a detour for highway traffic.

The Railroad shall notify the PUCO of any changes in the scope of work, cost overruns, materials, etc., which are not in the approved plans and estimates and secure approval of it before the work is performed.

The Railroad shall notify the PUCO to arrange for inspections before the upgrade is placed into service.

TERMINATION

Said Subsidy Stipulation shall terminate at the end of the present biennium, June 30, 2007. If construction covered under this Subsidy Stipulation is not completed by that date, it is the expressed intention of the parties to renew this Subsidy Stipulation on each successive biennium period until such time as all work contemplated under this Subsidy Stipulation has been satisfactorily completed. If it appears to the PUCO that the Railroad or the City has failed to perform satisfactorily any requirements of this Subsidy Stipulation, or if the Railroad or the City is in violation of any provision of this Subsidy Stipulation, or upon just cause, the PUCO may:

(a) Terminate this Subsidy Stipulation after providing the Railroad or the City with written notice, in accordance with the notice provisions of this Subsidy Stipulation, of its failure to perform satisfactorily any requirement of this Subsidy Stipulation (the "Notice"), which shall provide the railroad or the City with a thirty (30) day period to cure any and all defaults under this Subsidy Stipulation; or

(b) Immediately terminate this Subsidy Stipulation. During the thirty (30) day cure period, the Railroad or the City shall incur only those obligations or expenditures, which are necessary to enable the Railroad or the City to achieve compliance as, set forth in the Notice. If it is determined that the Railroad or the City cannot cure its default, the Railroad or the City shall immediately cease work under this Subsidy Stipulation, take all necessary or appropriate steps to limit disbursement and minimize cost, and the Railroad or the City shall provide a report, as of the date of receipt of the Notice, setting forth the status of the work completed, the cost of the work completed and such other information as the PUCO shall deem pertinent.

This Subsidy Stipulation and any renewal thereof is subject to the determination by the PUCO that sufficient funds and the authority to spend funds have been provided by the Ohio General Assembly to the PUCO for the purposes of this Subsidy Stipulation and to the certification of funds by the Office of Budget and Management as required by the Ohio Revised Code, Section 126.07. If PUCO determines that sufficient funds have not been appropriated for the purposes of this Subsidy Stipulation, or if the Office of Budget and Management fail to certify the availability of funds, this Subsidy Stipulation shall be terminated.

REPRESENTATIONS AND WARRANTIES

A. RAILROAD: The Railroad represents and warrants the following:

- (1) The Railroad has the power and authority to enter into this Subsidy Stipulation; and
- (2) The Railroad has the authority to carry out its obligations under this Subsidy Stipulation; and
- (3) No personnel of the Railroad, any subcontractor of the Railroad, public official, employee or member of the governing body of the particular locality where this Subsidy Stipulation shall be completed, who exercises any functions or responsibilities in connection with the review or approval of the work completed under this Subsidy Stipulation, shall prior to the completion of said work, voluntarily or involuntarily acquire any personal monetary interest, direct or indirect, which is incompatible or in conflict with the discharge or fulfillment of his functions or responsibilities with respect to the completion of the work contemplated under this Subsidy Stipulation. Any person, who, prior to or after the execution of this Subsidy Stipulation, acquires any personal monetary interest, involuntarily or voluntarily, shall immediately disclose his interest to the PUCO in writing. Thereafter, such person shall not participate in any action affecting the work under

this Subsidy Stipulation unless the PUCO determines that, in light of the personal monetary interest disclosed his participation in any such action would not be contrary to the public interest.

B. PUCO: PUCO represents and warrants that it has the power and authority to enter into this Subsidy Stipulation and to carry out its obligations under this Subsidy Stipulation.

OHIO ETHICS LAW REQUIREMENTS

Railroad affirms that it is not in violation of Ohio Revised Code § 102.04, as that section is applicable to this Subsidy Stipulation and the Railroad.

FALSIFICATION OF INFORMATION

The Railroad and the City affirmatively covenant that it has made no false statements to the PUCO in the process of obtaining this grant of funds. If the Railroad or the City have knowingly made a false statement to the PUCO to obtain this grant of funds, the Railroad and the City shall be required to return all funds immediately pursuant to Ohio Revised Code Section 9.66(C) (2) and shall be ineligible for any future economic development assistance from the State, any state agency or a political subdivision pursuant to O.R.C. Section 9.66(C) (1). Any person who provides a false statement to secure economic development assistance may be guilty of falsification, a misdemeanor of the first degree, pursuant to O.R.C. Section 2921.13(D)(1), which is punishable by a fine of not more than One Thousand Dollars (\$1,000) and/or a term of imprisonment of not more than six (6) months.

EQUAL EMPLOYMENT OPPORTUNITY

Pursuant to Ohio Revised Code Section 125.111, the Railroad agrees that the Railroad, any subcontractor, and any person acting on behalf of the Railroad or subcontractor, shall not discriminate, by reason of race, color, religion, sex, age, disability, national origin, or ancestry against any citizen of this state in the employment of any person qualified and available to perform the work under this Subsidy Stipulation. The Railroad further agrees that the contractor and any subcontractor shall not, in any manner, discriminate against, intimidate, or retaliate against any employee hired for the performance of work under this Subsidy Stipulation on account of race, color, religion, sex, age, disability, national origin or ancestry. The Railroad represents that it has a written affirmative action program for the employment and effective utilization of disadvantaged persons and will file a description of that program and a progress report on its implementation, annually, with the Ohio Civil Rights Commission and the minority business development office.

DRUG FREE WORKPLACE

In the event that work performed pursuant to the terms of this Subsidy Stipulation will be done while on state property, the Railroad hereby certifies that all of its employees, while working on state property, will not purchase, transfer, use or possess illegal drugs or alcohol or abuse prescription drugs in any way.

HOLD HARMLESS PROVISION

The Railroad covenants and agrees to indemnify and hold the City, the PUCO and their agents and employees harmless from and against any loss, claim, cause of action, damages, liability (including, without limitation, strict or absolute liability in tort or by statute imposed), charge, cost or expense (including, without limitation, counsel fees to the extent permitted by law), predicated on personal injury or death, or loss of or damage to property, and arising from any work performed pursuant to this Subsidy Stipulation and caused by the Railroad's negligent, intentional, willful or wanton actions or inactions, or such actions or omissions by any subcontractors that may be hired by the Railroad under this Subsidy Stipulation.

In case any action involving any work covered by this Subsidy Stipulation is brought by or against any party or parties, said party or parties shall promptly notify the other party or parties of such action.

PUCO ORDER

The Parties hereto agree that this Subsidy Stipulation does not represent any admission of liability on the part of any party hereto, nor does it necessarily reflect the positions that the parties would have taken had this case been litigated before the PUCO. If the PUCO rejects all or any part of this Subsidy Stipulation, any party may, in writing submitted within ten days of the PUCO'S Order, elect to withdraw its consent to the agreement, in which event this Subsidy Stipulation shall be deemed a nullity, and shall not constitute any part of the record in this proceeding. This Subsidy Stipulation shall not be used for any purpose whatsoever by any party hereto, in any other proceeding.

The undersigned respectfully join in recommending that the PUCO issue an Order approving and adopting this Subsidy Stipulation in accordance with the terms set forth herein.

This Subsidy Stipulation may be executed in one or more counterparts, each of which shall be deemed to be a duplicate original, but all of which taken together shall be deemed to constitute a single agreement.

UNUSUAL CIRCUMSTANCES AFFECTING PERFORMANCE

In the event that the Railroad or the City cannot meet any or all of the obligations placed upon it by the terms of this Subsidy Stipulation, (1) the Railroad or the City shall immediately notify the PUCO in writing, and (2) the PUCO may, at its sole discretion, make reasonable efforts to assist the Railroad or the County/City in meeting its obligations under this Subsidy Stipulation. Any revisions to this Subsidy Stipulation shall be made in writing and agreed upon by all parties. Any such revision must be approved and adopted by an Order issued by the PUCO. If the Railroad is unable to complete this Project and activate the automatic warning devices within the time period set forth in the Order issued by the PUCO, the Railroad must request an extension of time to complete this Project and activate the devices. All such requests must be submitted to the PUCO in writing and must include a statement setting forth the reasons prompting the request and the time within which the project will be completed. The PUCO's attorney may grant extensions for up to 30 days. Any request for an extension in excess of 30 days will be considered and decided by the PUCO's commissioners. No request for an extension of time to complete a project will be considered unless it is received prior to the completion date previously established by the PUCO and unless the reasons for the request are clearly set forth therein.

COMPLIANCE WITH FEDERAL, STATE AND LOCAL LAWS AND REGULATIONS

The Railroad and the City agree to comply with all applicable federal, state, and local laws in the conduct of the work hereunder. The Railroad accepts full responsibility for payments of all unemployment compensation, insurance premiums, workers' compensation premiums, all income tax deductions, social security deductions, and any and all other taxes or payroll deductions required for all employees engaged by the Railroad on the performance of the work authorized by this Subsidy Stipulation.

DISPUTE RESOLUTION

In the event the Railroad or the City desires clarification or explanation of, or disagrees with, any matter concerning this Subsidy Stipulation, or the interpretation or application of any and all federal or state statutes, rules, regulations, laws or ordinances, the matter must be submitted in writing to the PUCO. After review and consultation with the Railroad or the City, the PUCO shall decide the matter. If the dispute cannot be resolved, the Railroad or the City may file a petition or request with the PUCO for formal resolution of the matter in dispute. Any appeal from the decision of the PUCO rendered in response to a petition or request as filed above, must be in accordance with Rule 4901-1-35, Ohio Administrative Code.

NO WAIVER

No delay or omission to exercise any right or option accruing to Grantor upon any breach by the Railroad or the City shall impair any such right or option or shall be construed to be a waiver thereof, but any such right or option may be exercised from time to time and as often as may be deemed necessary by the PUCO.

Further, if any term, provision, covenant or condition contained in this Subsidy Stipulation is breached by either party and thereafter such breach is waived in writing by the other party, such waiver shall be limited to the particular breach so waived and shall not be deemed to waive any other breach hereunder.

CONSTRUCTION

This Subsidy Stipulation shall be governed by the laws of the State of Ohio as to all matters, including but not limited to, matters of validity, construction, effect and performance.

FORUM AND VENUE

All actions regarding this Subsidy Stipulation shall be forumed and venue in a court of competent subject matter jurisdiction in Franklin County, Ohio.

SEVER ABILITY

Whenever possible, each provision of this Subsidy Stipulation shall be interpreted in such manner as to be effective and valid under applicable law, but if any provision of this Subsidy Stipulation is held to be prohibited by or invalid under applicable law, such provision shall be ineffective only to the extent of such prohibition or invalidity, without invalidating the remainder of such provisions of this Subsidy Stipulation.

ENTIRE STIPULATION

This Subsidy Stipulation and its exhibits and any documents referred to herein constitute the complete understanding of the parties and merge and supersede any and all other discussions, agreements and understandings, either oral or written, between the parties with respect to the subject matter hereof.

CAPTIONS

The captions in this Subsidy Stipulation are for the convenience of reference only and in no way define, limit or describe the scope or intent of this Subsidy Stipulation or any part hereof and shall not be considered in any construction hereof.

AMENDMENTS OR MODIFICATIONS

Any party may at any time during the term of this Subsidy Stipulation request amendment or modification. Requests for amendment or modification of this Subsidy Stipulation shall be in writing to the other parties and shall specify the requested changes and the justification for such changes. All parties shall then review the request for modification. Should the parties all agree to modification of the Subsidy Stipulation, and then an amendment shall be drawn, approved, and executed in the same manner as this Subsidy Stipulation.

IN WITNESS WHEREOF, the parties hereto have caused this Subsidy Stipulation to be executed as of the date and year set forth below.

**WHEELING & LAKE ERIE
RAILWAY COMPANY**

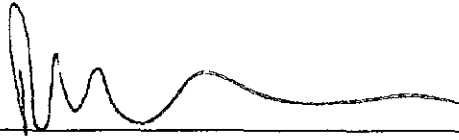
By _____

Print Name: _____

Title: _____

Date: _____

CITY OF AKRON

By _____

Print Name: Richard A Marolla

Title: Service Director

Date: 5-24-07

**STAFF OF THE PUBLIC UTILITIES
COMMISSION OF OHIO**


By: _____

Robert E. Marvin, Director, Transportation Department

Date: _____

IN WITNESS WHEREOF, the parties hereto have caused this Subsidy Stipulation to be executed as of the date and year set forth below.

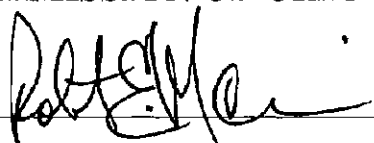
**WHEELING & LAKE ERIE
RAILWAY COMPANY**

By 
Print Name: W. A. Callisan
Title: President
Date: 4/23/07

CITY OF AKRON

By _____
Print Name: _____
Title: _____
Date: _____

**STAFF OF THE PUBLIC UTILITIES
COMMISSION OF OHIO**

By: 
Robert E. Marvin, Director, Transportation Department
Date: 6/7/07