

FILE

**Public Utilities
Commission of Ohio**

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PUCO

Memo

To: Docketing Division
From: Randall Schumacher, Supervisor, Rail Division
Cc: PUCO Legal Department
Date: 11/3/2016

Re: PUCO Case No. 16-1598-RR-STP- To add supplemental information in the matter of authorization for the Defiance County consolidation project – closures and roadway modifications.

Consolidation project 16-1598-RR-STP was selected due to its potential to eliminate 3 at-grade public crossings (142379G, 142377T, 142374X) All of these crossings have high accident risk rankings and have seen either fatal or non fatal accidents in the past 19 years. The railroad corridor is a CSX, double main, class 5 track rated for 60 mph train speeds which sees over 50 trains per day.

Staff finds that this project will significantly improve rail safety in this general area.

To accomplish this, the construction of 2 roadways will be necessary. A 1.85 mile long roadway from Jacobs Trail Road will be constructed heading southeast, parallel to and north of, the rail line. This roadway will terminate after intersecting with County Road 424. The second roadway will be a .25 mile section which will start from County Road 424, just west of the rail line and head southeast, just south of and parallel to, the rail line. It will terminate after intersecting with Ashwood Road.

This project will cost an estimated \$740,255. CSX will pay 52.4% of the total project costs not to exceed \$388,255. The PUCO, using the grade crossing protection funds, will pay 47.6% of the total project costs, not to exceed \$352,030.

Attached to this document is an aerial photograph with markings that indicates the proposed roadway locations and the 3 at-grade public crossings to be closed under this project.

Attachments:

- 1) PUCO Case#: 16-1598-RR-STP Project Map
- 2) CSX – PUCO Master Agreement

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 As Date Processed 11/4/16

PUCO Case #:16-1598-RR-STP
Project Map



LEGEND
● Crossing To Be Closed
--- Roadway
— Proposed

IN THE MATTER OF THE REQUEST FOR
A MASTER AGREEMENT FOR MODIFICATION
OF WARNING DEVICES ON THE
(RAILROAD) IN THE STATE OF OHIO

AGREEMENT NO. 17427

AGREEMENT

THIS AGREEMENT is entered into on this 3rd day of May, 2013 by and among the Ohio Rail Development Commission and the Public Utilities Commission of Ohio (hereinafter collectively referred to as the "STATE"), and CSX Transportation, ("RAILROAD"),

WITNESSETH:

WHEREAS, the Public Utilities Commission of Ohio (PUCO) has statutory authority to regulate and promote the welfare and safety of railroad employees and the traveling public pursuant to Ohio Revised Code ("ORC") §4905.04; and

WHEREAS, the Ohio Rail Development Commission (ORDC) is charged with the statutory authority under ORC §4981.03 to develop, promote, and support safe, adequate, and efficient rail service throughout the State of Ohio; and

WHEREAS, ORC §4907.471 requires the PUCO to survey all public highway-railroad grade crossings in the State of Ohio to determine the probability of crashes at each grade crossing, and to systematically provide for the modification of railroad warning devices (hereinafter referred to as "PROJECTS"); and

WHEREAS, the Transportation Equity Act for the 21st Century, and the Safe, Accountable, Flexible, Efficient Transportation Equity Act - A Legacy for Users and subsequent amendments thereto provide funding for the cost of installing warning devices to eliminate hazards at public grade crossings, which funding is administered jointly by the PUCO and ORDC pursuant to ORC §4907.476; and

WHEREAS, the parties hereto propose to facilitate the modifications identified in this AGREEMENT in accordance with the Title 23 Code of Federal Regulations ("CFR") and applicable provisions of Title 23 of the United States Code pursuant to the terms hereof; and

WHEREAS, the RAILROAD agrees to cooperate with the STATE in the implementation of PROJECTS in furtherance of the public safety; and

WHEREAS the STATE and RAILROAD will execute this AGREEMENT to specify details for the modification of warning devices at each designated grade crossing; and

WHEREAS, it is desired by the parties hereto to accomplish PROJECTS at highway-railroad grade crossing(s) and to determine and agree upon the manner of performing all such work necessary and incidental thereto, the respective responsibilities of said parties, and the proportion of the costs and expenses to be paid by each of the parties and the mode and time of payment.

NOW, THEREFORE, for and in consideration of the mutual promises and covenants contained herein, the parties agree as follows:

I. GENERAL REQUIREMENTS

The work and the construction to be performed under this AGREEMENT, including the preparation of plans, specifications and estimates and the purchase of materials shall be undertaken by the RAILROAD in accordance with plans and specifications which meet 23 CFR, the standards approved by the American Railway Engineering and Maintenance of Way and RAILROAD standards.

Identification of highway-rail grade crossings to be modified under this AGREEMENT, type of modification to be performed, and the proportion of the costs and expenses to be paid by each of the parties will be accomplished by means of a Letter Agreement ("LA") (sample form which is attached hereto as EXHIBIT A as if fully rewritten herein).

The LA and the approved plans shall constitute the scope of the project.

The RAILROAD shall be responsible for general engineering supervision of the PROJECT under the terms of this AGREEMENT, and shall prepare or cause to be prepared and submit to the STATE, for STATE and/or federal approval, complete plans, specifications and estimates for said PROJECT. Plans shall clearly show the existing facilities as well as the existing right of way, proposed right of way and centerline. The RAILROAD shall furnish such engineering services as may be necessary to install the PROJECT, subject to review and approval by the STATE.

The RAILROAD shall complete the preparation of plans within ninety (90) days or other time frame agreed to with the ORDC or PUCO in the PE authorization, and the installation of the PROJECT shall be completed within nine (9) months or other time frame agreed to with the ORDC or PUCO in the construction authorization. The RAILROAD shall be responsible for payment in a timely manner of all bills for supplies, materials, equipment, labor and other costs incurred to complete the PROJECT, and shall not permit liens or any other type of encumbrance to be placed upon all or any portion of the PROJECT installed pursuant to this AGREEMENT.

The STATE, through its authorized agents, shall have the right to inspect the crossing site prior to performance of any PROJECT work and at any stage during the installation of PROJECT at grade crossing(s).

In the event conditions or circumstances require a change in scope of the RAILROAD's work on the PROJECT as set forth in the approved plan(s) and estimate(s) the changes must be made in writing and approved by ORDC or PUCO. Should the RAILROAD request a change in the scope of work, the RAILROAD's work shall accommodate the time necessary for STATE to process the change request.

After completion of the PROJECT, the RAILROAD shall operate, maintain and renew, at its sole expense, all PROJECTs and other of its facilities constructed or changed under the terms of this AGREEMENT in good operating order. Nothing stated herein shall deny the RAILROAD the right to seek reimbursement of the costs for the maintenance and renewal of the PROJECTs and other of its facilities constructed or changed under the terms of this AGREEMENT, if such reimbursement is then provided for by Federal Highway Administration ("FHWA") regulations and/or the ORC or any other federal or state statute or regulation.

II. COST ALLOCATION AND BILLING

The allocation of costs will be determined in the LA. The total costs for the modifications borne by the STATE shall not exceed actual cost of the modifications, approved estimate and the STATE share outlined in the LA.

RAILROAD shall notify ORDC or PUCO in writing of any changes in the scope of work which are not in the approved plans and estimates and secure approval in writing of same before the work is performed.

The costs assigned to ORDC shall be satisfied through the expenditure of Federal funds administered by ORDC and subject to approval by the FHWA. In the event that delays or difficulties arise in securing necessary Federal approvals which, in the opinion of ORDC, render it impracticable to utilize Federal funds for the construction of this PROJECT, then at any time before RAILROAD is authorized to purchase or furnish the items included under this AGREEMENT, ORDC may serve formal notice of cancellation upon RAILROAD, and this AGREEMENT shall become null and void. ORDC shall reimburse RAILROAD for all eligible costs incurred on account of the modifications prior to such cancellation, including costs associated with authorized preliminary engineering for the PROJECT.

All plans, specifications, estimates of costs, acceptance of work, and procedures in general, to facilitate the construction of the safety modifications described above, shall conform in all respects to applicable Federal laws, rules, regulations, orders, and approvals applicable to Federal-Aid PROJECTs. ORDC shall reimburse RAILROAD in accordance with 23 CFR 140, Subpart I. and 23 CFR, Part 646, Subpart B or any subsequent amendments thereto, in such

amounts and form as are proper and eligible for payment from Federal-Aid highway funds. RAILROAD shall render its billings to ORDC in accordance with said rules and regulations, and RAILROAD shall also provide and furnish such itemized records of and substantiating data for such costs as may be required.

RAILROAD shall be responsible for initially paying all of its actual costs to install the modifications. RAILROAD may bill STATE no more frequently than monthly for its costs when PROJECT costs incurred during the billing period exceed \$1,000.00. RAILROAD shall submit two (2) 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 actual cost and showing details shall be submitted to ORDC within one hundred and eighty (180) days after completion of the modifications. STATE shall pay all bills within sixty (60) days after receipt thereof, except that STATE may hold a retainer on all bills not to exceed eight percent (8%) until final payment. Final payment for all amounts due RAILROAD shall be made by STATE within sixty (60) days after a final audit has been performed and approved by ORDC. The audit shall occur within 180 days of submission of RAILROAD's final bill. RAILROAD agrees to cooperate and assist, as requested, in any such audit.

III. RECORDS RETENTION AND AUDIT

RAILROAD agrees that STATE, or its duly authorized representatives, shall, during STATE normal business hours, upon reasonable notice, in accordance with RAILROAD safety rules and regulations, and accompanied by RAILROAD personnel, be permitted to examine the records and data maintained by RAILROAD related to this AGREEMENT as may be necessary to monitor RAILROAD's compliance with this AGREEMENT.

RAILROAD shall maintain all books, documents, papers, program agreements, accounting records, and other evidence pertaining to this AGREEMENT, its revenues and expenditures, and shall provide such information upon request of STATE or its designee and shall permit STATE to examine and audit those books, records, and the accounting procedures and practices of the RAILROAD relevant to this AGREEMENT. All documents and information shall be made available for review and audit at a mutually-agreeable location within the state of Ohio. The records shall be retained for three years after receipt of final payment to the RAILROAD from the STATE.

To the extent possible under applicable law, all aspects of STATES's exercise of audit rights and the results thereof, and any and all information disclosed by RAILROAD to the STATE under this AGREEMENT, shall be held confidential, and shall not be disclosed without RAILROAD's prior written consent. Nothing in this AGREEMENT shall be construed to restrict the STATE from disclosing such confidential information as required by law or by court or administrative order, provided in each case the ORDC shall timely inform RAILROAD, if legally permissible, of the request.

RAILROAD will comply with the requirements of the ODOT Railroad Audit Circulars, available at:

<http://www.dot.state.oh.us/Divisions/Finance/Auditing/Pages/RailUtilities.aspx.aspx>

IV. NOTIFICATION

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

If to RAILROAD: CSX Transportation, Inc.
Attn: Director Project Management – Public Projects
500 Water Street (J301)
Jacksonville, FL 32202

If to PUCO: Public Utilities Commission of Ohio
Railroad Division
180 East Broad Street, 4th Floor
Columbus, Ohio 43215-3793

If to ORDC: Ohio Rail Development Commission
1980 West Broad Street, 2nd Floor
Columbus, Ohio 43223

RAILROAD shall furnish notification to STATE at least five (5) working days prior to the date work is scheduled to start at the PROJECT site of the modifications so arrangements can be made for inspection. RAILROAD shall also notify STATE of any stoppage and resumption of the work activity, and the reasons therefore, and the date the PROJECT work on the modifications was completed. This requirement may be waived if agreed upon by both parties.

RAILROAD shall furnish written notification to the Local Highway Authority at least fourteen (14) working days prior to starting any work requiring the establishment of a detour for highway traffic. This requirement may be waived if agreed upon by both parties.

V. TERMINATION

Said AGREEMENT shall terminate upon the expiration of MAP-21, the present US Transportation Bill. If construction under this AGREEMENT is not completed by that date, it is the express intention of the parties to renew this AGREEMENT on each successive biennium period until such time as all work contemplated under this AGREEMENT has been satisfactorily completed. Furthermore, the parties expressly agree that the terms and conditions of this AGREEMENT shall continue to be controlling following the expiration of the then current U.S. Transportation Bill. If it appears to ORDC or PUCO that RAILROAD has failed to perform satisfactorily any requirements of this AGREEMENT, or if RAILROAD is in violation of any provision of this AGREEMENT, or upon just cause, ORDC or PUCO may terminate the AGREEMENT after providing RAILROAD with written notice, in accordance with the notice provisions of this AGREEMENT, of its failure to perform satisfactorily any requirement of this AGREEMENT (the "Notice"), which shall provide RAILROAD with a thirty (30) day period to cure any and all defaults under this AGREEMENT.

During the thirty (30) day cure period, RAILROAD shall incur only those obligations or expenditures which are necessary to enable RAILROAD to achieve compliance as set forth in the Notice. If it is determined that RAILROAD cannot cure its default, RAILROAD shall immediately cease work under this AGREEMENT, take all necessary or appropriate steps to limit disbursements and minimize costs, and 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 STATE shall deem pertinent.

If this AGREEMENT is terminated for breach or failure to satisfactorily perform, the breaching party shall reimburse the non-breaching party any of its costs not reimbursed by the STATE.

It is expressly understood by the parties that none of the rights, duties, and obligations described in this AGREEMENT shall be binding on any party until all statutory provisions of the ORC, including but not limited to ORC § 126.07 and 126.08 have been complied with, and until such time that all necessary funds are made available and forthcoming from the appropriate state agency and such expenditure of funds is approved, if necessary, by the Controlling Board of the State of Ohio pursuant to ORC §127.16, or in the event that federal funds are used, until such time that the ORDC gives RAILROAD written notice that such funds have been made available to the ORDC by the ORDC's funding source.

VI. REPRESENTATIONS AND WARRANTIES

A. RAILROAD: RAILROAD for itself, represents and warrants the following:

- (1) RAILROAD has the power and authority to enter into this AGREEMENT;

- (2) RAILROAD has the authority to carry out its obligations under this AGREEMENT; and
- (3) No personnel of RAILROAD, any subcontractor of RAILROAD, public official, employee or member of the governing body of the particular locality where this AGREEMENT shall be completed, who exercises any functions or responsibilities in connection with the review or approval of the work completed under this AGREEMENT, 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 AGREEMENT. Any person who, prior to or after the execution of this AGREEMENT, acquires any personal monetary interest, involuntarily or voluntarily, shall immediately disclose his interest to STATE in writing. Thereafter, such person shall not participate in any action affecting the work under this AGREEMENT unless the STATE 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. ORDC/PUCO: ORDC and the PUCO represent and warrant that they have the power and authority to enter into this AGREEMENT and to carry out their obligations under this AGREEMENT.

VI. OHIO ETHICS LAW REQUIREMENTS

RAILROAD affirms that it is not in violation of ORC §102.04, as that section is applicable to this AGREEMENT and RAILROAD.

VII. FALSIFICATION OF INFORMATION

RAILROAD affirmatively covenants that it has not made any false statements to STATE in the process of obtaining this grant of funds. If RAILROAD has knowingly made a false statement to STATE to obtain this grant of funds, the RAILROAD shall be required to return all funds immediately pursuant to ORC §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 ORC §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 ORC §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.

VIII. EQUAL EMPLOYMENT OPPORTUNITY

In performing this AGREEMENT, the RAILROAD shall not discriminate against any employee, applicant for employment, or other person because of race, color, religion, gender, national origin (ancestry), military status (past, present or future), disability, age (forty (40) years of age or older), genetic information, or sexual orientation. The RAILROAD will ensure that applicants are hired and that employees are treated during employment without regard to their race, color, religion, gender, national origin (ancestry), military status (past, present or future), disability, age (forty (40) years of age or older), genetic information, or sexual orientation. The RAILROAD shall incorporate the foregoing requirements of this paragraph in all of its contracts for any of the work prescribed herein (other than subcontracts for standard commercial supplies or raw materials) and will require all of its subcontractors for any part of such work to incorporate such requirements in all such subcontracts.

IX. OHIO ELECTIONS LAW

RAILROAD represents that its participation in this AGREEMENT does not violate ORC §3517.13.

X. DRUG FREE WORKPLACE

In the event that work performed pursuant to the terms of this AGREEMENT will be done while on state property, RAILROAD hereby certifies that its rules require 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.

XI. HOLD HARMLESS PROVISION

RAILROAD covenants and agrees to indemnify and hold the STATE and its 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 AGREEMENT and caused by RAILROAD's negligent, intentional, willful or wanton actions or inactions, or such actions or omissions by any subcontractors that may be hired by RAILROAD under this AGREEMENT.

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

XII. UNUSUAL CIRCUMSTANCES AFFECTING PERFORMANCE

In the event that RAILROAD cannot meet any or all of the obligations placed upon it by the terms of this AGREEMENT, (1) RAILROAD shall immediately notify STATE in writing, and (2) STATE may, at its sole discretion, make reasonable efforts to assist RAILROAD in meeting its obligations under the AGREEMENT.

If RAILROAD is unable to complete the PROJECT within the time period set forth in the Order issued by the PUCO, RAILROAD must request an extension of time to complete the PROJECT. All such requests must be submitted to the PUCO in accordance with PUCO guidelines.

XIII. COMPLIANCE WITH FEDERAL, STATE AND LOCAL LAWS AND REGULATIONS

RAILROAD agrees to comply with all applicable federal, state, and local laws in the conduct of the work hereunder. To the extent applicable, 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 RAILROAD on the performance of the work authorized by this AGREEMENT.

XIV. DISPUTE RESOLUTION

In the event the RAILROAD desires clarification or explanation of, or disagrees with, any matter concerning the AGREEMENT, 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 STATE. If the dispute cannot be resolved, and the RAILROAD has failed to comply materially with the terms and conditions of this AGREEMENT, then procedures for suspension and/or termination may be instituted as provided for under this AGREEMENT, or this matter may be submitted to a court of competent jurisdiction for final determination.

XV. NO WAIVER

No delay or omission to exercise any right or option accruing to the STATE upon any breach by RAILROAD 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 STATE. Further, if any term, provision, covenant or condition contained in this AGREEMENT 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.

XVI. CONSTRUCTION

This AGREEMENT 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.

XVII. PRIMARY ROLES AND RESPONSIBILITIES

The document, "Railroad Construction Contract Administration for Federally Funded Projects, Primary Roles and Responsibilities" is incorporated by reference as if included in this AGREEMENT in its entirety.

XVIII. BUY AMERICA

RAILROAD shall furnish steel and iron products that are made in the United States according to the applicable provisions of Federal regulations stated in 23 CFR 635.410 and State of Ohio laws, and ORC §§ 153.011 and 5525.21, and State of Ohio Department of Transportation Construction and Material Specifications, 109.09.

The RAILROAD affirms to have read and understands Executive Order 2011-12K and shall abide by those requirements in the performance of this AGREEMENT. Notwithstanding any other terms of this AGREEMENT, the STATE reserves the right to recover any funds paid for services the RAILROAD performs outside the United States for which it did not receive a waiver from the Director of the Ohio Department of Administrative Services.

XIX. FORUM AND VENUE

All actions brought against the STATE regarding this AGREEMENT shall be forumed and venued in a court of competent subject matter jurisdiction in Franklin County, Ohio.

XX. SEVERABILITY

Whenever possible, each provision of this AGREEMENT shall be interpreted in such manner as to be effective and valid under applicable law, but if any provision of this AGREEMENT 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 AGREEMENT.

XXI. ENTIRE AGREEMENT

This AGREEMENT 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.

XXII. DUPLICATE COUNTERPARTS

This AGREEMENT 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.

XXIII. CAPTIONS

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

XXIV. AMENDMENTS OR MODIFICATIONS

Any party may at any time during the term of this AGREEMENT request amendment or modification. Requests for amendment or modification of this AGREEMENT 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 AGREEMENT, then an amendment shall be drawn, approved, and executed in the same manner as this AGREEMENT.

Any revisions to this AGREEMENT shall be made in writing and agreed upon by all parties.

XXV. SUCCESSORS OR ASSIGNS

This AGREEMENT shall be binding upon the successors and assigns of the RAILROAD. It is understood that this AGREEMENT, and any subsequent amendments thereto, shall apply to crossings owned by the RAILROAD that may, in the future, become subject to the PROJECT and therefore qualify for modifications as described above.

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

CSX Transportation

By Dale W. Ophardt
Print Name Dale W. Ophardt
Assistant Vice President Engineering

Title _____

Date 4/16/13

PUBLIC UTILITIES COMMISSION OF OHIO

By Milton Orlovich
Print Name MILTON ORLOVICH

Title DIRECTOR

Date 4/30/13

OHIO RAIL DEVELOPMENT COMMISSION

By Matthew R. Dietrich
Matthew R. Dietrich, Executive Director

Date 4-22-13

APPROVED AS TO FORM WITH REGARD
TO OHIO RAIL DEVELOPMENT
COMMISSION ONLY:

Alan H. Klodell
Assistant Attorney General Alan H. Klodell

Date 5/13/13