ORDINANCE NO. 54-15

AN ORDINANCE AUTHORIZING THE MAYOR TO EXECUTE A SUBSIDY STIPULATION AGREEMENT BETWEEN THE PUBLIC UTILITIES COMMISSION OF OHIO, THE WHEELING AND LAKE ERIE RAILWAY COMPANY AND THE OHIO RAIL DEVELOPMENT COMMISSION, RELATIVE TO THE INSTALLATION OF GATES AND FLASHERS AT THE WEST SMITH RAILROAD CROSSING.

WHEREAS: The PUCO determined that lights and gates are warranted and shall be installed at the West Smith railroad crossing, on West Smith between Commerce Drive and Lake Road; and

WHEREAS: The agreement has three parties, the City of Medina, the Public Utilities Commission of Ohio (PUCO), the Ohio Rail Development Commission (ORDC), and the Wheeling and Lake Eric Railway (Wheeling) with allocation of project costs as follows: Railroad (Wheeling) – 10%, ORDC – 25%, and PUCO – 65%.

NOW, THEREFORE, BE IT ORDAINED BY THE COUNCIL OF THE CITY OF MEDINA, OHIO:

SEC. 1: That the Mayor is hereby authorized and directed to execute a Subsidy Stipulation Agreement between the Public Utilities Commission (PUCO), the Wheeling and Lake Erie Railway Company (W&LE), the Ohio Rail Development Commission, and the City of Medina relative to the installation of gates and flashers at the West Smith railroad crossing.

SEC. 2: That a copy of the Subsidy Agreement is marked Exhibit A, attached hereto, and incorporated herein.

SEC. 3: That it is found and determined that all formal actions of this Council concerning and relating to the passage of this Ordinance were adopted in an open meeting of this Council, and that all deliberations of this Council and any of its committees that resulted in such formal action, were in meetings open to the public, in compliance with the law.

SEC. 4: That this Ordinance shall be in full force and effect at the earliest period allowed by law.

PASSED: April 27, 2015

SIGNED: John M. Coyne, III
President of Council

ATTEST: Kathy Patton
Clerk of Council

APPROVED: April 28, 2015

SIGNED: Dennis Hanwell
Mayor

ORD. 54-15
Exh. A

BEFORE THE
PUBLIC UTILITIES COMMISSION OF OHIO

In the Matter of a Request for the Installation of Active Warning Devices at the Wheeling & Lake Erie Railway Company Grade Crossing, DOT#002-078B, Smith Road in Medina, Ohio.	:	Case No. ____-_____-RR-STP

SUBSIDY STIPULATION

THIS SUBSIDY STIPULATION ("Subsidy Stipulation") is entered into on this 28th day of April, 2015 by and among the Public Utilities Commission of Ohio Railroad Staff ("PUCO "), Wheeling & Lake Erie Railway Company ("Railroad'), Ohio Rail Development Commission ("ORDC"), and the City of Medina, Ohio ("LHA").

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 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 PUCO is responsible for evaluating public highway railroad grade crossings to determine the need for upgrading the warning devices and apportioning the costs thereof pursuant to ORC§ 4907.471;

WHEREAS, the PUCO is responsible for the administration and implementation of the State Grade Crossing Protection Fund pursuant created under ORC§ 4907.472 to help defray the public's share of costs to install or modernize warning devices at Ohio's highway railroad grade crossings;

WHEREAS, the parties hereto propose to facilitate the upgrade identified in this Subsidy Stipulation in manner approved by the PUCO/ORDC in accordance with the Federal Aid Policy Guide and applicable provisions of Title 23 of the United States Code pursuant to the terms hereof; and

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

WHEREAS, the parties hereby declare it to be in the public interest that they jointly and fully participate in this Subsidy Stipulation to facilitate the upgrade in accordance with plans, specifications, and estimates to be approved by the PUCO Staff and the ORDC.

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

Article I. PURPOSE

The Subsidy Stipulation is a joint collaboration by the Railroad, the ORDC, the LHA, and the PUCO Staff to promote the health and safety of the traveling public who are required to travel through this public highway-railroad grade crossing in Medina, Ohio.

Article II. PROJECT

A. The project work to be completed shall include the following upgrade ("Project"):

Grade Crossing #	Location	Nature of Upgrade
002-078B	Smith Road City of Medina Medina County	Lights and Gates

B. The Project shall be completed within 12 months from the date of the PUCO order adopting this Subsidy Stipulation. The parties agree to comply with the terms of the Subsidy Stipulation and the PUCO order adopting the Subsidy Stipulation.

Article III. ALLOCATION OF PROJECT COSTS

A. The costs of the Project shall be apportioned as between the ORDC, the PUCO and the Railroad, as follows:

Grade Crossing	*Railroad*	*ORDC*	*PUCO*
Smith Road (002-078B)	10% plus maintenance	25%	65%

B. The Railroad shall be responsible for initially paying all of the actual costs to upgrades of the warning devices identified above. However, the PUCO and the ORDC shall be legally bound to reimburse the Railroad for the above-mentioned amounts upon proper application by the Railroad, consistent with the terms of this Subsidy Stipulation and in accordance with all applicable state regulations. In no event shall ORDC be bound to reimburse the Railroad for an amount in excess of $60,000 of the total Project cost. However, if the Railroad anticipates that the Project costs will be higher than expected, then the Railroad may notify ORDC in writing, prior to incurring any such additional expenses, and provide ORDC with a revised estimate of the total Project costs as well as the revised amount of ORDC's prospective allocated portion for consideration of payment by ORDC.

C. The LHA shall, within 30 days of the adoption of this Subsidy Stipulation, certify in writing to the PUCO the authority to participate in this Project as described herein. The PUCO shall have no obligation to expend funds hereunder until the LHA have submitted documentation in proper form as described in this section.

D. The PUCO has agreed to provide funds from the State Grade Crossing Protection Fund, pursuant to ORC§ 4907.472, to cover that portion of the upgrade cost to be borne by the PUCO proposed above. The actual respective dollar amount, which the Railroad, the ORDC, and the PUCO shall bear, will be based upon the actual cost noted in the plans and estimates to be approved by the PUCO Staff/ORDC and incurred by the Railroad for this Project.

E. 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 shall render billings to the PUCO Staff and the ORDC in accordance with said rules and regulations, and shall provide and furnish such itemized records of and substantiating data for such cost that may be required.

F. The LHA shall furnish advance warning signs and pavement markings as specified in the Manual on Uniform Traffic Control Devices and shall assume all costs to maintain such signage and markings in the future at each of the subject grade crossings. The LHA shall arrange for 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 relocation, rearrangement or alteration will be done at such time as requested by the PUCO Staff and will be performed solely at the expense of the utility and at no cost to this Project or the Railroad.

Article IV. BILLING

A. The Railroad may bill the PUCO and ORDC monthly or periodically for its costs when costs 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 costs and showing all details shall be submitted to the PUCO Staff and the ORDC, within ninety (90) days after completion of each project, the PUCO Staff and the ORDC 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 Staff and the ORDC 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 Staff and the ORDC. 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 Staff and the ORDC 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 Staff and the ORDC 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 Staff and the ORDC 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, all parties agree to work in good faith with the other parties to resolve the controversy. After attempting to resolve any dispute regarding this Subsidy Stipulation, if the parties are still unable to resolve their dispute, any party shall have the right to seek enforcement of the terms of the Subsidy Stipulation by the PUCO. The decision of the PUCO regarding this dispute is final.

B. No Project activity reimbursable under this Subsidy Stipulation, including, without limitation, preliminary engineering, shall be commenced until all of the following have occurred: (1) this Subsidy Stipulation shall have been approved and the Railroad directed to submit plans and estimates by the PUCO; (2) all financial obligations of the PUCO and ORDC, as provided for in this Stipulation are subject to the provisions of ORC§ 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 Staff or the ORDC; and, (3) the Railroad has been notified by the PUCO Staff to proceed with construction of the Project work. Work on the improvements shall commence within 30 days of the occurrence of events (1), (2), and (3) described herein. Said work shall be pursued diligently by the Railroad until completed.

Article V. NOTIFICATION

All notices, consents, demands, requests and other communications which may or are required hereunder by the Railroad shall be in writing and shall be deemed duly given if personally delivered or sent by facsimile and confirmed by telephone 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.

RAILROAD:

Wheeling & Lake Erie Railroad
Tim Andrews
Signal & Communication Supervisor
100 E. First Street
Brewster, OH 44613
(330) 767-7255
tandrews@wlerwy.com

PUCO:

Public Utilities Commission of Ohio
Jill Henry
Rail Specialist
Transportation Department, Rail Division
180 East Broad Street
Columbus, Ohio 43215-3793
(614) 466-0435
(614) 995-5535 (fax)
jill.henry@puc.state.oh.us

ORDC:

Ohio Rail Development Commission
Cathy Stout
Safety Section Manager
1980 West Broad Street
Mail Stop 3140
Columbus, Ohio 43223
(614) 644-0286
(614) 728-4520 (fax)
catherine.stout@dot.state.oh.us

City:

City of Medina
Patrick Patton
City Engineer
132 North Elmwood Ave.
P.O. Box 703
Medina, Ohio 44258-0703
330-725-8861
330-722-9045 (fax)
ppatton@medinaoh.org

Article VI. TERMINATION

This Subsidy Stipulation shall terminate at the end of the present biennium, June 30, 2015. 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/ORDC that the Railroad, or the LHA have failed to perform satisfactorily any requirements of this Subsidy Stipulation, or if the Railroad, or the LHA are in violation of any provision of this Subsidy Stipulation, or upon just cause, the PUCO/ORDC may:

A. Terminate the Subsidy Stipulation after providing the Railroad or the LHA 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 LHA with a thirty (30) day period to cure any and all defaults under this Subsidy Stipulation; or

B. Immediately terminate the Subsidy Stipulation. During the thirty (30) day cure period, the PUCO, the ORDC, the Railroad, or the LHA shall incur only those obligations or expenditures that are necessary to enable the Railroad or the LHA to achieve compliance as, set forth in the Notice. If it is determined that the Railroad or the LHA cannot cure its default, the Railroad shall immediately cease work under this Subsidy Stipulation, take all necessary or appropriate steps to limit disbursements and minimize cost, and the Railroad 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/ORDC shall deem pertinent.

Article VII. 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 contemplated 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/ORDC: PUCO/ORDC represents and warrants that they have the power and authority to enter into this Subsidy Stipulation and to carry out their obligations pursuant to the terms of this Subsidy Stipulation.

C. LHA represents and warrants that it is authorized to enter into this Stipulation and to carry out its obligations as delineated herein.

Article VIII. RECORD KEEPING

During performance of this Subsidy Stipulation and for a period of three years after its completion, the Railroad shall maintain auditable records of all work performed under and charges pertaining to this Stipulation and shall make such records available to the PUCO as the PUCO may reasonably require.

Article IX. RIGHTS TO DATA

The PUCO shall have unrestricted authority to reproduce, distribute and use (in whole or in part) any reports, data or materials prepared by the Railroad pursuant to this Stipulation.

Article X. FALSIFICATION OF INFORMATION

The Railroad and the LHA affirmatively covenant that neither has made any false statements to the PUCO and the ORDC in the process of obtaining this grant of funds. If the Railroad and/or the LHA has/have knowingly made a false statement, the Railroad and the LHA 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.

Article XI. EQUAL EMPLOYMENT OPPORTUNITY

In performing this Subsidy Stipulation, 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 (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 (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.

Article XII. DRUG FREE WORKPLACE

For any work under this Subsidy Stipulation that is performed on government property, the Railroad shall enforce its policy that its employees, while engaged in such work, shall not purchase, transfer, and use or possess illegal drugs or alcohol or abuse prescription drugs in any way.

Article XIII. HOLD HARMLESS PROVISION

The Railroad covenants and agrees to indemnify and hold the LHA, the ORDC, 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.

Article XIV. COMPLIANCE WITH FEDERAL, STATE AND LOCAL LAWS AND REGULATIONS

The signatory parties agree to comply with all federal, state and local laws, rules, regulations, and auditing standards, which are applicable to their performance under this Stipulation.

Article XV. BUY OHIO/BUY AMERICAN PROVISIONS; OFFSHORE OUTSOURCING PROVISION:

The Railroad shall use its best efforts to purchase goods from other companies doing business in the State of Ohio, for the purpose of performing work under this Subsidy Stipulation. Further, in the performance of the work contemplated under this Subsidy Stipulation, the Railroad and all contractors, subcontractors, material men, or suppliers, shall use only such unmanufactured articles, materials, and supplies as have been mined or produced in the United States, and only such manufactured articles, materials, and supplies as have been manufactured in the United States substantially all from articles, materials, or supplies mined, produced, or manufactured, as the case may be, in the United States. The Railroad affirms to have read and understands Executive Order 2011-12K and shall abide by those requirements in the performance of this Subsidy Stipulation. Notwithstanding any other terms of this Subsidy Stipulation, the PUCO and the ORDC reserve 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.

Article XVI. ENTIRETY OF AGREEMENT

This Subsidy Stipulation and its exhibits and any documents referred to herein constitute the entire agreement of the parties and supersede any and all other discussions, agreements and understandings, either oral or written, between the parties with respect to the subject matter hereof. This Subsidy Stipulation shall not be modified, amended, or supplemented, or any rights herein waived, unless specifically agreed upon in writing by the parties. A waiver by any party of any breach or default by the other party shall not constitute a continuing waiver by such party of any subsequent act in breach of or in default hereunder.

Article XVII. CAMPAIGN CONTRIBUTIONS

The Railroad hereby certifies that all applicable parties listed in Division (I)(3) or (J)(3) of ORC§ 3517.13 are in full compliance with Divisions (I)(1) and (J)(1) of ORC§ 3517.13.

Article XVIII. AMENDMENTS OR MODIFICATIONS

Neither this Subsidy Stipulation, nor any rights, duties, nor obligations hereunder, may be assigned or transferred, in whole or in part, by any signatory party, without the written consent of the PUCO and the ORDC.

Article XIX. DEBARMENT

The Railroad represents and warrants that it is not debarred from consideration for contract awards by the Director of the Department of Administrative Services, pursuant to either ORC§'s 153.02 or 125.25. If this representation and warranty is found to be false, this Subsidy Stipulation is void *ab initio* and the Railroad shall immediately repay to the PUCO and the ORDC any funds paid under this Subsidy Stipulation.

Article XX. HEADINGS

Section headings contained in this Subsidy Stipulation are inserted for convenience only and shall not be deemed a part of this Subsidy Stipulation.

Article XXI. GOVERNING LAW

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.

Article XXII. PARTIAL INVALIDITY

A judicial or administrative finding, order, or decision that any part of this Subsidy Stipulation is illegal or invalid shall not invalidate the remainder of the Subsidy Stipulation.

Article XXIII. DUPLICATE COUNTERPARTS

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.

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

On behalf of the City of Medina, Ohio:

By: Dennis Hanwell

Dennis Hanwell
[Print Name]

Title: Mayor

Date: 4-28-15

On behalf of the Public Utilities Commission of Ohio :

By: _____

_____

Title: Director of Transportation

Date: _____

On behalf of Wheeling & Lake Erie Railway Company:

By: _____

_____
[Print Name]

Title: _____

Date: _____

On behalf of the Ohio Rail Development Commission:

By: _____

_____
[Print Name]

Title: _____

Date: _____

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

_____
Assistant Attorney General Alan H. Klodell

Date: _____