BEFORE THE
GEORGIA PUBLIC SERVICE COMMISSION

Sandersville Railroad Company Hancock County, Georgia **In re: Sandersville Railroad Company's Petition for Approval to Acquire Real Estate by Condemnation**	Docket No.: 45045

OBJECTIONS TO AND MOTION TO STRIKE PRE-FILED DIRECT AND REBUTTAL TESTIMONY OF BENJAMIN J. TARBUTTON, III

on behalf of the Property Owner Respondents

October 16, 2023

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"In administrative hearings, the rules of evidence as applied in the trial of nonjury civil actions shall be followed, subject to special statutory rules or agency rules as authorized by law." O.C.G.A § 24-1-2(4). Pursuant to the Georgia Code of Evidence, O.C.G.A §§ 24-1-1 *et seq.*, Property Owner Respondents[1] hereby object to and move to strike the Pre-Filed Direct and Rebuttal Testimony of Benjamin J. Tarbutton, III, set forth below, for the reasons stated:

Direct Testimony

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9	1	9	20	Relevance
10	1	11	1	Lack of Foundation, Speculation, Improper Legal Conclusion
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Rebuttal Testimony

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11	2	11	11	Lack of Foundation

[1] Robert Donald Garrett, Sr., and Sarah Veazey Garrett; William Blaine Smith and Helen Diane Smith; Marvin Smith, Jr., and Patricia Smith; Leo John Briggs and Georgia Ann Briggs; Joel Bradford Reed and Kathy Lynn Reed; Donna N. Garrett; Herus Ellison Garrett; Sally G. Wells; Verne Kennedy Hollis; and Thomas Ahmad Lee.

13	1	14	13	Speculation
17	12	18	5	Lack of Foundation
18	7	19	7	Lack of Foundation
19	9	19	16	Speculation, Relevance
20	12	21	7	Improper Legal Conclusion
23	4	23	18	Relevance, Speculation
24	1	24	5	Lack of Foundation
25	9	25	18	Improper Legal Conclusion
25	19	26	5	Speculation
26	3	26	n.32	Lack of Foundation
26	7	27	6	Improper Legal Conclusion
28	6	28	14	Lack of Foundation, Relevance, Speculation, Improper Legal Conclusion

Mr. Tarbutton is the President of Petitioner Sandersville Railroad Company. Test. 2:4–5. Mr. Tarbutton's testimony describes Sandersville's business and shortline railroads, Test. 2:18–4:22, offers unsupported opinions on the "state of the economy" in East Middle Georgia, Test. 5:1–9, describes the Hanson Spur, Test. 5:11–8:20, discusses whether the Hanson Spur will haul hazardous materials, Test. 9:1–20, offers legal conclusions about whether the Hanson Spur is "necessary for the proper accommodation of the business of" Sandersville, Test. 10:1–11:1, and offers unsupported expert opinions about whether shipping by rail is "environmentally friendly," Test. 11:3–6. Mr. Tarbutton's rebuttal testimony corrects certain portions of his direct testimony regarding the number of trucks the Hanson Spur will allegedly take off the road, Reb. Test. 1:11–3:1, "clari[fies]" the alleged purpose of the Hanson Spur, Reb. Test. 3:3–4:4, offers unsupported and irrelevant opinions about why it is "important to the State of Georgia to continue to open channels of trade," Reb. Test. 4:6–6:12, offers impermissible legal conclusions about the "pertinen[ce]" of economic feasibility to these proceedings, Reb. Test. 6:14–7:16, and responds to Gary Hunter's direct testimony, Reb. Test. 7:18–28:17.

Property Owner Respondents object to and move to strike Mr. Tarbutton's testimony on the bases of form, relevance, lack of foundation, hearsay, speculation, and improper legal conclusions.[2] Additionally, Property Owner Respondents object to and move to strike the entirety of Mr. Tarbutton's testimony on the grounds that Property Owner respondents were not allowed to depose him before the November 27, 2023 hearing in this matter. *See* O.C.G.A. § 50-13-13(a)(6) (providing for "the taking of testimony by deposition").

Relevance

Evidence is relevant where it has "any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be

[2] Much of Mr. Tarbuttton's testimony, and in particular his rebuttal testimony, consists of improper lay witness testimony under O.C.G.A. § 24-7-701(a) because it is not based on his own perception, is not helpful to a clear understanding of a fact at issue, and is based on specialized, technical knowledge that is properly the subject of expert witness testimony. *See* Reb. Test. 4:8–6:12 (testimony not based on personal perception regarding the importance of "Georgia to continue to open channels of trade"); Reb. Test. 11:2–11 (specialized testimony not based on personal perception regarding the "well-known economics of railroads"); Reb. Test. 26:3 n.32 (specialized testimony regarding whether the Hanson Spur is permissible under current federal constitutional law); Reb. Test. 28:6–14 (specialized testimony regarding whether denying Petitioner's request will result in regression "to the dark ages of hyperregulation which led to the bankruptcy of many of the nation's largest railroads"). Had SRC wished to introduce expert testimony on these topics, it could have done so pursuant to O.C.G.A. § 24-7-702, which would have required SRC to provide the "facts or data" underlying this testimony and establish the "reliable principles and methods" used by the witness. O.C.G.A. § 24-7-702(b). Indeed, the purpose of the rule against lay witnesses providing specialized testimony was to eliminate the risk that parties would evade the reliability requirements for expert witnesses "through the simple expedient of proferring an expert in lay witness clothing." *United States v. Henderson*, 409 F.3d 1293, 1300 (11th Cir. 2005) (cleaned up) (discussing similar federal rule). In exactly the scenario the rule was designed to avoid, SRC sidesteps the reliability requirements for expert testimony by offering a lay witness who testifies to things he has not established he has seen on several topics in which he has no expertise. As such, this testimony is inadmissible because it lacks foundation, and the Hearing Officer should strike it. *See Monroe v. Hyundai Motor Am., Inc.* 270 Ga. App. 477, 478, 606 S.E.2d 894, 896 (2004) (holding that, to have probative value, a lay opinion "must be based upon a foundation that the witness has some knowledge, experience or familiarity" on the topic on which the testimony is offered (cleaned up)). At the very least, even if the Hearing Officer does not strike this testimony, she should give it little weight.

without the evidence." O.C.G.A. § 24-4-401. "Evidence which is not relevant shall not be admissible." O.C.G.A. § 24-4-402. Mr. Tarbutton's testimony regarding how Sandersville "give[s] back to the community" is irrelevant. Test. 4:8–22. Whether "the Railroad and [Mr. Tarbutton] strive to give back civically and philanthropically to [their] hometown, county, and state" has nothing to do with whether the Hanson Spur is for a public purpose or necessary for the proper accommodation of Sandersville's business. Test. 4:21–22.

Mr. Tarbutton's testimony about "the state of the economy in East Middle Georgia" is also irrelevant. Test. 5:1–9. *See also* Test. 6:2–5 ("The spur will also provide tremendous economic development opportunities . . . ."). Under Georgia law, eminent domain may not be used to obtain property for the purpose of economic development. *See* O.C.G.A. § 22-1-1(9)(B) ("The public benefit of economic development shall not constitute a public use."). Whether the Hanson Spur will lead to economic development in Sparta, Hancock County, Washington County, or anywhere else in Georgia is not relevant because Sandersville Railroad cannot take people's property for economic development. Likewise, Mr. Tarbutton's rebuttal testimony about why it is "important to the State of Georgia to continue to open channels of trade," is irrelevant to these proceedings. Reb. Test. 4:6–6:12. *See also* Reb. Test. 3:3–4:4.

Mr. Tarbutton's testimony about whether hazardous materials will be hauled over the spur is also irrelevant to whether the Hanson Spur is for a public purpose or necessary for the proper accommodation of Sandersville's business. Test. 9:1–20.

Finally, Mr. Tarbutton's speculation about the personal motivations and desires of Property Owner Respondents' experts, Gary Hunter and Donald Kochan, are irrelevant to these proceedings. Reb. Test. 19:9–16; 25:19–26:5; 28:6–14.

Lack of Foundation

"A witness may not testify to a matter unless evidence is introduced sufficient to support a finding that the witness has personal knowledge of such matter." O.C.G.A. § 24-6-602. Lay witness opinion testimony is admissible only if it is based on something the witness perceived, helpful for determining a fact at issue, and "not based on scientific, technical, or specialized knowledge within the scope of" O.C.G.A. § 24-7-702. Additionally, expert opinion testimony is permissible only where the witness is qualified as an expert under the requirements of O.C.G.A. § 24-7-702 (expert testimony).

Mr. Tarbutton offers no evidence for why he is personally qualified to opine about the state of the economy in East Middle Georgia (Test. 5:1–9) or whether shipping by rail is "environmentally friendly" (Test. 11:3–6). *See also* Test. 5:19–6:1. Mr. Tarbutton has not established that he is an expert on the environmental effects of railroads or the economics of rural Georgia communities, and he is not qualified to testify about those matters.

Mr. Tarbutton's rebuttal testimony regarding the "important[ce]" of opening "channels of trade" in Georgia also lacks foundation. Reb. Test. 4:6–6:12. Mr. Tarbutton has not established that he is an expert economist. He offers no evidence but reports which are not part of the record in this case (*see* "hearsay" below). Reb. Test. 4:14–6:12.

Mr. Tarbutton also testifies about whether "Pittman Construction's requirements [can] be met by transloading from CSXT at Sparta." Reb. Test. 17:12–18:5. Mr. Tarbutton is not qualified to testify about another company's business. Arnie Pittman is in the best position to testify about the needs of Pittman Construction. Likewise, Mr. Tarbutton discusses whether transloading would meet the needs of Veal Farms. Reb. Test. 18:7–19:7. Mr. Tarbutton is equally unqualified to discuss Veal Farms' business needs.

Finally, Mr. Tarbutton asserts that "CSXT supports the project" and has "been working closely with" Sandersville on the Hanson Spur. Reb. Test. 24:1–5. Mr. Tarbutton provides no evidence for this statement, such as who Sandersville has worked with at CSXT or any documents reflected their collaboration on the Hanson Spur.[3]

Speculation

A "witness's testimony in the form of opinions or inferences shall be limited to those opinions or inferences which are [r]ationally based on the perception of the witness." O.C.G.A. § 24-7-701. Mr. Tarbutton offers no evidence for his assertions that the Hanson Spur "will serve multiple industries" (Test. 5:17–18), that "numerous other companies and industries" have "commit[ted] to using the spur" (Test. 7:9–10), and that "the spur will serve as an engine for further economic development in Hancock County (Test. 8:6–7). Mr. Tarbutton has provided no contracts or other proof that the Hanson Spur will serve any customers. Mr. Tarbutton makes similar unsupported assertions in his rebuttal testimony without offering any evidence in support. Reb. Test. 13:1–14:13; 23:4–18.

Finally, Mr. Tarbutton impermissibly speculates about the personal motivations and desires of Property Owner Respondents' experts, Gary Hunter and Donald Kochan. Reb. Test. 19:9–16; 25:19–26:5; 28:6–14. Mr. Tarbutton's testimony that Mr. Hunter wants to "go back to the dark ages of hyperregulation" and that "[d]oing so would likely assure no new railroads will ever again

[3] In addition to large portions of Mr. Tarbutton's testimony lacking foundation, the question contained at Reb. Test. 8:1–9 also lacks foundation. It is also leading and compound. It also assumes facts not in evidence, contains legal argument, and erroneous legal conclusions. *See* O.C.G.A. § 24-6-611. Mr. Tarbutton is the testifying witness, not his attorneys. The Hearing Officer should strike this inappropriate attempt to brief legal issues via a paragraph-long argument masquerading as a question.

be built in Georgia with private capital," is completely unsupported speculation. Reb. Test. 28:6–14.

Improper Legal Conclusions

Mr. Tarbutton's testimony is peppered with impermissible legal conclusions. He testifies that the Hanson Spur is "necessary for the proper accommodation of the business of" Sandersville. Test. 10:1–11:1. *See also* Reb. Test. 6:14–7:16; 20:12–21:7; 25:9–18; 26:7–27:6; 28:6–14. Whether the Hanson Spur is "necessary for the proper accommodation of the business of the company" is an improper legal conclusion because it is a statutory requirement for use of eminent domain by railroads under O.C.G.A. § 46-8-120(a)(4). The "pertinen[ce]" of "economic feasibility to the Georgia Public Service Commission's decision here" is also a legal issue upon which Mr. Tarbutton is not qualified to testify. Reb. Test. 6:14–7:16; 20:12–21:7; 26:7–27:6. Mr. Tarbutton is not an attorney and cannot offer his opinion on whether Sandersville's activities conform with Georgia law.

Finally, Mr. Tarbutton offers commentary on Property Owner Respondents' expert, Donald Kochan's, legal scholarship. Reb. Test. 25:15–18. Mr. Tarbutton is unqualified to testify about whether Professor Kochan "advocates an entirely different meaning of 'public use' from the one his published writings recognize is now the law." Reb. Test. 25:15–18.

Hearsay

"Hearsay means a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." O.C.G.A. § 24-8-801. "Hearsay shall not be admissible[.]" O.C.G.A. § 24-8-802. Mr. Tarbutton references reports that are not part of the record in this case. Reb. Test. 4:14–6:12. Those reports are hearsay and cannot be offered to prove the truth of the matter asserted.

Form

Lay witness opinion testimony is admissible only if it is based on something the witness perceived, helpful for determining a fact at issue, and "not based on scientific, technical, or specialized knowledge within the scope of" O.C.G.A. § 24-7-702. The question at page 8, lines 1–9 of Mr. Tarbutton's rebuttal testimony, *see* supra footnote 3, is not a question eliciting facts based on personal knowledge, but instead a leading question that assumes facts not in evidence and elicits improper lay opinion testimony and legal conclusions.

Property Owner Respondents respectfully request that the entirety of Mr. Tarbutton's testimony be stricken or, in the alternative, those portions described in the chart on pages 2 and 3. If Mr. Tarbutton's testimony is not stricken, Property Owner Respondents respectfully request that the Hearing Officer give such testimony little weight. Property Owner Respondents reserve all other objections to Mr. Tarbutton's testimony pending the hearing and cross-examination.

Respectfully submitted, this 16th day of October, 2023.

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CERTIFICATE OF SERVICE

I hereby certify that on this 16th day of October, 2023, a copy of the foregoing *Objections to and Motion to Strike Pre-Filed Direct and Rebuttal Testimony of Benjamin J. Tarbutton, III* has been served via electronic mail and U.S. First-Class Mail on the following pursuant to GA. COMP. R. & REGS. 515-16-16-.02; 515-2-1-.04(4)(b), (3):

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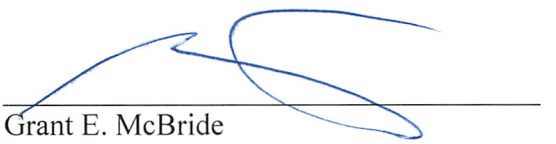
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