BEFORE THE
GEORGIA PUBLIC SERVICE COMMISSION

In Re: Sandersville Railroad Company's Petition For Approval to Acquire Real Estate by Condemnation	**Docket No.: 45045**

POST-HEARING BRIEF OF SANDERSVILLE RAILROAD COMPANY

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Sandersville Railroad Company ("Sandersville Railroad"), a corporation owning and operating a railroad in the State of Georgia, files this Hearing Brief under the direction of the Hearing Officer in the above-styled docket. Sandersville Railroad, via its Amended Petition for Approval to Acquire Real Estate by Condemnation (the "Petition")[1] seeks approval from the Georgia Public Service Commission (the "Commission") to acquire by condemnation certain real property in unincorporated Hancock County, Georgia more particularly described in the Petition.

The Commission should approve Sandersville Railroad's Petition to acquire the land necessary to build a railway Spur because the Sandersville Railroad has the statutory and constitutional authority under Georgia law to condemn land for a public purpose that is necessary for the proper accommodation of its business. Sandersville Railroad's business is transporting the goods of small businesses, industries, and farmers and connecting those customers with larger rail networks. The construction of the Spur will serve a public purpose because it will open a new channel of trade for the underserved businesses of East middle Georgia and because it will use land for the functioning of the railroad. And, nothing Respondents and Intervenors put forth—neither unsupported legal theories nor specious "feasibility" musings—changes this inescapable conclusion.

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[1] Amended Petition for Approval to Acquire Real Estate by Condemnation, *In re: Sandersville Railroad Company; Hancock County, Georgia Acquisition*, Docket 45045, Document 205194 (July 20, 2023).

I. Background

A. Overview of the National Railroad Network and the role of short line railroads

Railroads are in the business of providing transportation. (T. 1216:12-17 (Hunter Testimony)).[2] That business has long been determined to be vested with the public interest.[3] There are almost 140,000 miles of interconnected main and branch line railroad tracks in the U.S.[4] These lines constitute the national "Freight Railroad Network."[5] Spur lines also comprise a significant role in the Freight Railroad Network, switching cars to and from shippers and receivers seeking transportation over that network. (*E.g.*, T. Ex. 53 (Georgia State Rail Plan of the Georgia Department of Transportation ("Georgia State Rail Plan") at 2-1, 2-7, 2-34, 4-14, 5-31 to 5-32, 5-39).

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[2] *Cf. Laurel Sand & Gravel, Inc. v. CSX Transp., Inc.*, 704 F. Supp. 1309, 1324–25 (D. Md. 1989), *aff'd*, 924 F.2d 539 (4th Cir. 1991) (noting that CSX is in the business of providing rail transportation service rather than the business of renting its tracks). Courts have long-recognized that railroads provide a vital national transportation service similar to this nation's highways. *See e.g.*, *White River Tpk. Co. v. Vermont Cent. R. Co.*, 21 Vt. 590, 594 (1849) ("[A] rail road is an improved highway, and that property, taken for its use by authority of the legislature, is property taken for the public use, as much as if taken for any other highway; and that the legislature may delegate its powers to a rail road corporation, to take private property for public use in the construction of their rail road, as well as to a turnpike corporation to take the like property for the public use in the construction of a turnpike road.").

[3] This proposition has been long established in federal and state law. For example, the Pacific Railway Act of 1862 authorized the construction of Union Pacific and Central Pacific Railroads, the purpose of which was to "promote the public interest and welfare." The Pacific Railway Act of 1862, § 18, 12 Stat. 489 (1862). Under 49 U.S.C. § 103(c), the Federal Railroad Administration must consider public safety as its highest priority and must carry out all railroad safety laws. In 1879, recognizing the public interest in railroads, Georgia became one of the first states to establish a regulatory agency to oversee railroad passenger and freight rates, services, and operations, the Georgia Public Service Commission. *E.g.*, *FAQs*, GEORGIA PUBLIC SERVICE COMMISSION, https://psc.ga.gov/faqs (last accessed January 16, 2024).

[4] *The Freight Rail Network*, U.S. DEPARTMENT OF TRANSPORTATION FEDERAL RAILROAD ADMINISTRATION, https://railroads.dot.gov/rail-network-development/freight-rail-overview (last accessed January 16, 2024); *Freight Rail Facts & Figures*, AMERICAN ASSOCIATION OF RAILROADS, https://www.aar.org/facts-figures (last modified October 19, 2023).

[5] *The Freight Rail Network*, U.S. DEPARTMENT OF TRANSPORTATION FEDERAL RAILROAD ADMINISTRATION, https://railroads.dot.gov/rail-network-development/freight-rail-overview (last accessed January 16, 2024).

The Freight Rail Network carries approximately 28% of freight movement by ton-miles[6] and 40% of long-distance freight movement by ton-miles,[7] handled in the U.S.

In Georgia, there are 4,684 miles of railroad track, 4,061 miles of which are privately owned; the remaining 623 miles are owned by the Georgia Department of Transportation, the Georgia State Properties Commission, or the Georgia Ports Authority. (T. Ex. 53 (Georgia State Rail Plan) at 2-1). That network carries 15% of Georgia's total tonnage of freight, the rest being carried by truck, water, air, pipeline and other modes of transportation (*Id.*, at 1-11). A spur is a secondary track that connects with a main track to provide rail access to industrial areas. The U.S. Surface Transportation Board ("STB")[8] has established three classifications of railroads based on their revenue levels.[9] Class I railroads are the major trunk lines of the national Freight Railroad Network, operating around 86,000 miles of line throughout the country[10] and accounting for around 67% of freight rail mileage and 94% of revenue in

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[6] *Id.*

[7] *See Freight Rail Facts & Figures*, *supra* n.4.

[8] Railroad transportation over the national Freight Railroad Network is federally regulated by the STB, which has exclusive jurisdiction over transportation by rail carriers that are part of the interstate rail network. 49 U.S.C. § 10501(b)(1). Although the STB does not have authority "over construction, acquisition, operation, abandonment, or discontinuance of spur . . . tracks," 49 U.S.C. § 10906, STB retains its exclusive jurisdiction, 49 U.S.C. § 10501(b)(2). "When sections 10906 and 10501(b)(2) are read together, it is clear that Congress intended to remove [STB] authority over the entry and exit of those auxiliary tracks, while still preempting state jurisdiction over them, leaving the construction and disposition of [them] entirely to railroad management." *Port City Properties v. Union Pac. R. Co.*, 518 F.3d 1186, 1188 (10th Cir. 2008) (quoting *Cities of Auburn and Kent, WA -- Petition for Declaratory Order*, STB Finance Docket No. 33200, 1997 WL 362017 at *7 (STB served July 2, 1997)).

[9] As of 2017, the classifications of the freights according to revenue are: Class I freights with $447,621,226 or more; Class II with less than $447,621,226 but more than $35,809,698; Class III (often called short line) with $35,809,698 or less. American Short Line and Regional Railroad Association, "Short Line and Regional Railroad Facts and Figures," inside front cover (rept. Dec. 2019) (2017).

[10] *Id.* at 20.

the railroad industry.[11]

The Class I railroads, of which there are six (6) in North America[12] and the Class II railroads, of which there are twenty-one (21) in the U.S.,[13] are primarily wholesale major line carriers, with business models designed to handle large volumes of freight efficiently. They gather freight of larger shippers from their own branch lines and spurs. But shippers of relatively small volumes of freight are often not served directly by the Class I and Class II railroads because they do not originate enough volume to align with the business models of those railroads: direct point to point transportation of large volumes of goods.

Class III railroads, including switching and terminal railroads,[14] fill the gap between the need for large volumes to optimize the efficiency of the trunk line railroads and the limited volumes shipped by small business. The Class III railroads, of which

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[11] *Freight Rail Facts & Figures, supra n.4.*

[12] These railroads are CSX Transportation, Canadian National Railway Company, Canadian Pacific Kansas City, BNSF Railway, Norfolk Southern Railway, and Union Pacific Railroad.

[13] *Class 2 "Regional" Railroads (USA)*, ADAM BURNS, https://www.american-rails.com/regionals.html (last revised October 10, 2023). These railroads are Alabama and Gulf Coast Railway, Alaska Railroad, Buffalo and Pittsburgh Railroad, Central Oregon and Pacific Railroad, Evansville Western Railway, Florida East Coast Railway, Great Lakes Central Railroad, Indiana Rail Road, Iowa Interstate Railroad, Kansas & Oklahoma Railroad, Long Island Rail Road, Missouri and Northern Arkansas Railroad, Montana Rail Link, New York, Susquehanna and Western Railway, Paducah and Louisville Railway, Providence and Worcester Railroad, Portland and Western Railroad, Rapid City, Pierre and Eastern Railroad, Reading Blue Mountain and Northern Railroad, Wisconsin and Southern Railroad, and Wheeling and Lake Erie Railway. **There are no Class II Railroads operating in Georgia.** (T. Ex. 53 (Georgia State Rail Plan) at 2-1).

[14] 49 CFR § 1201 ("All switching and terminal companies, regardless of their operating revenues [are] designated Class III carriers."); Railroad Dictionary, "Short Line," CSX, https://www.csx.com/index.cfm/about-us/company-overview/railroad-dictionary/?i=S (last visited Jan. 5, 2024).

there are about six hundred (600) nationwide,[15] feed traffic to the Class I and Class II railroads. As of 2016, they operate nearly 47,500 miles.[16] These "short line" railroads can more efficiently and economically provide the line haul and switching services that are required by small shippers.[17] Class III railroads have annual carrier operating revenues of roughly $40 million or less and typically operate over smaller territory as compared to Class I or II railroads (T. Ex. 53 (Georgia State Rail Plan) at 1-9).

Only two Class I railroads serve most states east of the Mississippi: CSX Transportation Company, Inc. ("CSXT")[18] and Norfolk Southern Railway Company ("Norfolk Southern").[19] (T. 38:3–6 (Tarbutton Testimony), T. Ex. 53, at 1-9)). There are twenty-nine (29) Class III railroads that operate in Georgia (T. Ex 53, at 2-7). The Georgia Department of Transportation ("GDOT") has determined, and Respondents' expert, Mr. Hunter, has affirmed that "[s]hort lines provide crucial transportation connections to businesses throughout Georgia. These connections provide access to raw materials and global markets." (T. 1276:11-16 (Hunter Testimony) Ex. 53, at 2-7)).

The efficiency and attention of short line railroads is what makes them a vital

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[15] *Short Line Overview*, American Short Line and Regional Railroad Association, https://www.aslrra.org/advocacy/short-line-overview/#:~:text=Short%20lines%20are%20small%2C%20entrepreneurial%20businesses%2C%20with%20most,III%20railroads%20by%20the%20Surface%20Transportation%20Board.%201 (last accessed January 16, 2024).

[16] *Id.*

[17] *Cf. Class Exemption for the Acquisition & Operation of Rail Lines Under 49 U.S.C. 10901*, 1 I.C.C.2d 810, 813 (I.C.C. Dec. 19, 1985).

[18] CSXT has annual revenues greater than $14 billion. CSX Transportation, "CSX 2022 Annual Report," at 6 (Feb. 15, 2023).

[19] Norfolk Southern has annual revenues greater than $12 billion. Norfolk Southern, "Norfolk Southern 2022 Annual Report," at 2 (Feb. 1, 2023).

segment of the nation's transportation network. Despite their smaller size, short line railroads play an integral role in both state and national economies. Georgia's 29 short line railroads "often provide 'last mile' service, supplying service into and out of customer locations and connecting these customers to the broader U.S. railroad network through connections with Class I railroads." (T. Ex. 53 at 4-1). Short line connections provide customers access to raw materials and channels of trade that enable shippers/customers to reach global markets. (T. Ex. 53 at 2-1, 2-7.)

Georgia's short lines often serve rural areas and help "boost rural economies, providing an inexpensive transportation option for transporting raw materials and other goods into and out of these locations." (T. Ex. 53 at 4-13). Georgia's short lines "help to improve safety, reduce emissions and reduce wear and tear on Georgia's roads and bridges by diverting freight from the highway network." (*Id.*).[20] Further, short lines provide benefits that Class I railroads cannot. "Short line railroads have lower cost structures and can provide services and operate rail lines that would be unprofitable for Class I railroads to provide." (T. Ex. 53 at 4-10). Short lines can also better establish and maintain relationships with customers. (*Id.*) And, their lower traffic density means "less infrastructure is required for shippers to safely enter and exit the rail line." (*Id.*) Finally, short lines often "interchange with multiple Class I railroads, thus providing their customers with more choices and better competitive options . . . boost[ing] the

[20] As GDOT has additionally noted, "[r]ail costs per ton-mile are less than truck costs for longer rail moves, generally, making rail a more cost-effective choice for longer-distance shipments. (T. Ex. 53 (Georgia State Rail Plan) at 1-13).

desirability of industrial sites on these rail lines." (T. Ex. 53 at 4-11).

B. The Sandersville Railroad, East middle Georgia, and the Hanson Spur

Sandersville Railroad is a state-chartered, Class III short line railroad company that has been reliably and successfully serving farmers and industries in East middle Georgia since 1893. (T. 30:20-21 (Tarbutton Testimony)). Currently, Sandersville Railroad operates between Sandersville, GA and Tenille, GA. (T. 30:21-31:2 (Tarbutton Testimony)). Throughout its generations of operation, the Sandersville Railroad has connected East middle Georgia industries, businesses, and farmers with the national Freight Railroad Network. (T. 42:23-25 (Tarbutton Testimony)). It does so by providing rail transportation services so its customers can ship on Norfolk Southern's rail system. (T. 30:18-31:2 (Tarbutton Testimony)). The railroad operates 10 miles of mainline track and an additional 25 miles of spurs. (T. 30:21-22 (Tarbutton Testimony)); (T. Ex. 53 at 2-10).

1. The need for a short line railroad connection to CSXT in East middle Georgia.

Many industries, businesses, and farmers in East middle Georgia do not have access to the CSXT rail network because they do not have sufficient volumes of shipments to be served directly by CSXT and there is no shortline railroad in the area that connects to CSXT. (T. 1467:8-9 (Veal Testimony)). This results in economic inefficiencies for society and Sandersville Railroad's current and prospective customers because there are areas or markets throughout the country that CSXT (and, for that matter, Norfolk Southern) serves exclusively or most efficiently. (*E.g.*, T. 1467:14-17

(Veal Testimony)). Moreover, fees and expenses required to move a shipment over Norfolk Southern and then switch that shipment to CSXT to reach a point exclusively or best served by CSXT can make the shipment prohibitively expensive for smaller industries, businesses, and customers. (*E.g.*, T. 1467:10-17 (Veal Testimony)). East middle Georgia industries, businesses, and farmers are thus effectively excluded from reaching these markets by rail because "there is no shortline railroad connected to the CSXT system in . . . East middle Georgia." (T. 1467:8-9 (Veal Testimony)).

Recognizing this need and inefficiency in the channels of trade to and from East middle Georgia, the Sandersville Railroad has proposed to construct and operate a spur track to provide an efficient connection to the CSX network for these unserved and underserved customers. This spur track (the "Hanson Spur") will connect a rock quarry (the "Hanson Quarry") located on Shoals Road, Southeast of Sparta, Georgia, and owned by Heidelberg Materials ("HM")[21] to CSXT's rail network vial CSXT's Camak subdivision, which runs between Camak, Georgia near Interstate 20 and Milledgeville, Georgia, while generally paralleling Georgia State Route (i.e., Highway) 16. (T. 33:12-14 (Tarbutton Testimony); T. 453:15-22 (Teague Testimony)). "The Hanson Spur will also have a pullback track on the other side of Shoals Road." (T. 453:22-454:1 (Teague Testimony)).

[21] "Heidelberg Cement acquired the shares of Hanson PLC in the fall of 2007. The two entities in North America were merged under the local brand names into Lehigh Hanson Inc. Local quarries retained their original brand names. The Sparta Quarry was under the Hanson name. So, it is colloquially referred to as the "Hanson Quarry." At HM, we call the Hanson Quarry the Sparta Quarry. On January 1, 2023, Lehigh Hanson consolidated all of its North American brands under the brand Heidelberg Materials. We are the same company, just a new brand name." (T. 201:7-13 (Dickson Testimony).

2. The route and operation of the proposed Hanson Spur

The Hanson Spur's route was chosen after extensive consultation with Croy Engineering, which created the best route after considering constraints such as the surrounding watercourses, regulated wetlands and floodplains, a neighboring environmental conservation area, resident feedback, existing residential structures, Georgia Power transmission lines, a Verizon Wireless cell tower, and American Railway Engineering and Maintenance-of-Way Association ("AREMA") design guidelines. (T. 455:14-458:18 (Teague Testimony)). Croy also consulted an environmental expert, CorBlu, to minimize or eliminate any impacts to regulated wetlands resources, potential archeological resource sites, and potential habitat for threatened or endangered species. (T 457:14-21 (Teague Testimony)). The proposed route was presented at a public meeting in Sparta and Sandersville Railroad made adjustments to the route based on the public comments received at that meeting to the extent feasible within applicable engineering constraints. (T 457:8-15 (Teague Testimony)). Additionally, Sandersville Railroad has been working with CSXT on the Hanson Spur. (T. 49:14-15 (Tarbutton Testimony)). Sandersville Railroad will also build facilities along the Hanson Spur at or near the Hanson Quarry that will permit transloading, which is the loading and unloading of goods between rail car and truck. (T. 48:10-14 (Tarbutton Testimony)).

The distance between the proposed spur rail line and any structure (whether residential or a just storage building) on the Parcels that contain a right-of-way required for the Hanson Spur (each a "Project Parcel" and, collectively, the "Project

Parcels") varies from 1,141 feet to 2,048 feet (T 459:16-460:1, Table 1 (Teague Testimony)). In a forested or farmland area, such as the parent tracts of the Project Parcels, a person can walk approximately 2.5 feet per second. (T. 461:4-5 (Teague Testimony)). Therefore, for a person in such a setting to walk 1,141 feet would take over 7.5 minutes and to walk 2,048 feet would take over 13.5 minutes. (*See id.*) Most of the parent tracts that the Project Parcels are part of "d[o] not have an existing residential structure located on them. The ones that d[o], [were] not listed as a primary residence[s] [with the County Tax Assessor subject to a real estate ad valorem] . . . homestead exemption." (T. 480:6-12 (Teague Testimony)).

Sandersville Railroad operates its main line railroad between Sandersville and Tenille, Georgia. (*See* T. 30:21-31:2 (Tarbutton Testimony)). As Mr. Tarbutton noted in his testimony:

> On the Hanson Spur, Sandersville Railroad will operate as a private switch carrier. In this more limited scope of operation, Sandersville Railroad will offer its switch services to any shipper that wants to negotiate a contract rate on mutually satisfactory terms. By operating in this manner, Sandersville Railroad can most efficiently facilitate carriage [for shippers and receivers] to and from the Hanson Spur by CSXT [and the national Freight Railroad Network].

(T. 1501:14-18 (Tarbutton Testimony)). Sandersville Railroad expects its new switching service will provide one round trip per day on the new spur, Monday through Friday during daylight hours. (T. 48:19-21 (Tarbutton Testimony)). The train will run at less than 20 miles per hour and will haul aggregates, woodchips, liquid asphalt, and

agricultural products.[22] (T. 48:19-49:2 (Tarbutton Testimony)).

Sandersville Railroad will self-fund the entire construction of the Hanson Spur. (T. 49:11-12 (Tarbutton Testimony)). Although construction will entail high capital costs, "once [the spur] is built those costs will be sunk and the variable costs of fuel, labor and maintenance will be covered by the revenue of its customers." (T. 50:6-9 (Tarbutton Testimony)). Sandersville Railroad is committed to the project and after almost 150 years of experience and multiple years of cost assessments, is confident that the project will succeed. (T. 50:13-24 (Tarbutton Testimony)).

The Hanson Spur requires eighteen (18) Project Parcels, each of which are 200 feet wide.[23] Sandersville Railroad has agreed to construct, at the railroad's expense, an at-grade crossing for any landowner that retains land on both sides of the spur's right of way.[24]

C. Procedural history and the Petition

To acquire the strips of right of way required for the Hanson Spur (i.e., the Project Parcels), Sandersville Railroad employed processes and procedures that complied with Georgia law and generally mirrored those utilized by the Georgia Department of Transportation.[25] For instance, Sandersville Railroad employed a

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[22] Sandersville Railroad does not serve or have plans to serve customers that require the hauling of hazardous materials. (T. 0037:3–5 (Tarbutton Testimony)).

[23] Amended Petition for Approval to Acquire Real Estate by Condemnation, *In re: Sandersville Railroad Company; Hancock County, Georgia Acquisition*, Docket 45045, Document 205194 (July 20, 2023), at ¶ 8.

[24] *Id.*

[25] *E.g.*, Amended Petition for Approval to Acquire Real Estate by Condemnation, *In re: Sandersville Railroad Company; Hancock County, Georgia Acquisition*, Docket 45045, Document 205194, at ¶¶ 15-

specialized right of way acquisition firm to contact, introduce the Hanson Spur to, and negotiate with the owners of property from which right of way would need to be acquired. (See T. 55:2-5 (Tarbutton Testimony)). And, Sandersville Railroad itself reached out to and tried to connect with property owners and the community, through a community meeting and personal meetings. (T. 55:9-1; T. 186:13-187:6 (Tarbutton Testimony)).

Sandersville Railroad acquired or has written or verbal agreement to acquire several Project Parcels.[26] However, after months of attempting to acquire the Project Parcels by negotiated sale or good faith negotiations, on March 8, 2023, Sandersville Railroad filed with the Commission a Petition for Approval to Acquire Real Estate by Condemnation (the "Initial Petition").[27] The Initial Petition named as a Respondent Mr. R. Donald Garrett, Sr. ("Mr. Garrett") and sought authority for Sandersville Railroad to acquire by condemnation Project Parcel 13, a strip of right of way from the larger real property of Mr. Garrett.[28] The right-of-way required on Project Parcel 13 is 2.11 acres, 460 feet long and 200 feet wide. (T. 466:17-22 (Teague Testimony)). This

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16, & n.3 (July 20, 2023); *See e.g.*, Barnett, Rhonda, Jones, Ruthie, *et al*., *Acquisition Guide of Local Public Agencies and Sponsors, Georgia Local Government*, Georgia Department of Transportation (2008), available at: https://www.dot.ga.gov/PartnerSmart/Public/Documents/AcquisitionGuide_2008_10-23-08.pdf (last accessed January 15, 2024); *See e.g.*, Process & Procedure, Right-of-Way Acquisition, Office of Right of Way, State of Georgia, Department of Transportation, at Chapter 5 (October 2020), available at https://www.dot.ga.gov/PartnerSmart/Documents/ROW/ROW%20Policies%20and%20Procedures/Ch%205%20Acquisition.pdf (lasted accessed January 15, 2024).

[26] Amended Petition for Approval to Acquire Real Estate by Condemnation, *In re: Sandersville Railroad Company; Hancock County, Georgia Acquisition*, Docket 45045, Document 193527, at ¶ 9.

[27] Petition for Approval to Acquire Real Estate by Condemnation, *In re: Sandersville Railroad Company; Hancock County, Georgia Acquisition*, Docket 45045, Document 193527 (March 8, 2023).

[28] *Id*.

represents 2.63 percent of the total land owned by Mr. Garrett. (T. 479:21-22 (Teague Testimony)). The Initial Petition only sought to acquire Project Parcel 13 because, at that time, Mr. Garrett was the only property owner Sandersville Railroad deemed not to be amenable to further negotiations.[29]

On June 20, 2023, certain owners (the "Intervening Respondents" and collectively, with Mr. Garrett, the "Respondents") of other real estate from which 200'-wide strips of the right of way (*i.e.*, Project Parcels) were required for the spur line intervened in this docket. The Intervening Respondents are:

> (1) Mr. Leo J. Briggs and Ms. Georgia A. Briggs (the "Briggs"), owners of Project Parcel 6;
>
> (2) Mr. Marvin Smith, Jr. ("Mr. M. Smith"), owner of Project Parcel 7;
>
> (3) Mr. William Blaine Smith and Ms. Helen Diane Smith (the "Smiths"), owners of Project Parcel 8, 10, & 11;
>
> (4) Mr. Verne Kennedy Hollis, Ms. Donna N. Garrett, Mr. Herus Ellison Garrett, and Ms. Sally G. Wells (the "Parcel 14 Owners"), owners of Project Parcel 14;
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> (5) Mr. Joel Reed ("Mr. Reed"), owner of Project Parcel 12; and
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> (6) Mr. Thomas Ahmad Lee ("Mr. Lee"), owner of Project Parcel 18.[30]

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[29] *See* Amended Petition for Approval to Acquire Real Estate by Condemnation, *In re: Sandersville Railroad Company; Hancock County, Georgia Acquisition*, Docket 45045, Document 193527, at n. 3 (July 20, 2023).

[30] *See* Verified Application for Leave to Intervene of Leo Briggs, I*n re: Sandersville Railroad Company; Hancock County, Georgia Acquisition*, Docket 45045, Document 204862 (June 20, 2023); Verified Application for Leave to Intervene of Marvin Smith, Jr., *In re: Sandersville Railroad Company*; *Hancock County, Georgia Acquisition*, Docket 45045, Document 194318 (May 2, 2023); Verified Application for Leave to Intervene of William Blaine Smith, *In re: Sandersville Railroad Company*; *Hancock County, Georgia Acquisition*, Docket 45045, Document 194317 (May 2, 2023); Verified Application for Leave to Intervene of Mr. Verne Kennedy Hollis, *In re: Sandersville Railroad Company; Hancock County, Georgia Acquisition*, Docket 45045, Document 204864 (June 20, 2023); Verified Application for Leave to

In their Applications for Leave to Intervene, the Intervening Respondents opposed the Initial Petition, expressing their desire to retain possession of their full parcels and not convey to Sandersville Railroad, absent condemnation, the right of way (i.e., Project Parcels) from their respective real properties required for the Hanson Spur,[31] and requesting that they be entered into this matter as parties, "with full rights of participation . . . on all issues of law and fact."[32]

Based on their intervention, their opposition to the Hanson Spur stated therein,

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Intervene of Ms. Donna N. Garrett, *In re: Sandersville Railroad Company; Hancock County, Georgia Acquisition*, Docket 45045, Document 204858 (June 20, 2023); Verified Application for Leave to Intervene of Mr. Herus Ellison Garrett, *In re: Sandersville Railroad Company; Hancock County, Georgia Acquisition*, Docket 45045, Document 204859 (June 20, 2023); Verified Application for Leave to Intervene of Ms. Sally G. Wells, *In re: Sandersville Railroad Company; Hancock County, Georgia Acquisition*, Docket 45045, Document 204861 (June 20, 2023); Verified Application for Leave to Intervene of Joel Bradford Reed and Kathy Lynn Reed, *In re: Sandersville Railroad Company; Hancock County, Georgia Acquisition*, Docket 45045, Document 204860 (June 20,, 2023); and Verified Application for Leave to Intervene of Thomas Ahmad Lee, *In re: Sandersville Railroad Company; Hancock County, Georgia Acquisition,* Docket 45045, Document 204863 (June 20, 2023).

[31] *See* Verified Application for Leave to Intervene of Leo Briggs, *In re: Sandersville Railroad Company; Hancock County, Georgia Acquisition*, Docket 45045, Document 204862 ¶¶ 6, 25 (June 20, 2023); Verified Application for Leave to Intervene of Marvin Smith, Jr., *In re: Sandersville Railroad Company; Hancock County, Georgia Acquisition*, Docket 45045, Document 194318 ¶¶ 5-6 (May 2, 2023); Verified Application for Leave to Intervene of William Blaine Smith, *In re: Sandersville Railroad Company*; Hancock County, Georgia Acquisition, Docket 45045, Document 194317 ¶¶ 5-7 (May 2, 2023); Verified Application for Leave to Intervene of Mr. Verne Kennedy Hollis, *In re: Sandersville Railroad Company*; Hancock County, Georgia Acquisition, Docket 45045, Document 204864 ¶¶ 9-10 (June 20, 2023); Verified Application for Leave to Intervene of Ms. Donna N. Garrett, *In re: Sandersville Railroad Company*; Hancock County, Georgia Acquisition, Docket 45045, Document 204858 ¶¶ 9-10 (June 20, 2023); Verified Application for Leave to Intervene of Mr. Herus Ellison Garrett, *In re: Sandersville Railroad Company*; Hancock County, Georgia Acquisition, Docket 45045, Document 204859 ¶¶ 9-11 (June 20, 2023); Verified Application for Leave to Intervene of Ms. Sally G. Wells, *In re: Sandersville Railroad Company*; Hancock County, Georgia Acquisition, Docket 45045, Document 204861 ¶¶ 9-10 (June 20, 2023); Verified Application for Leave to Intervene of Joel Bradford Reed and Kathy Lynn Reed, *In re: Sandersville Railroad Company*; Hancock County, Georgia Acquisition, Docket 45045, Document 204860 ¶¶ 5-7 (June 20, 2023); and Verified Application for Leave to Intervene of Thomas Ahmad Lee, *In re: Sandersville Railroad Company*; Hancock County, Georgia Acquisition, Docket 45045, Document 204863 ¶¶ 5-8 (June 20, 2023).

[32] *See, e.g.*, Verified Application for Leave to Intervene of Leo Briggs, *In re: Sandersville Railroad Company; Hancock County, Georgia Acquisition*, Docket 45045, Document 204862 "Request for Relief" (June 20, 2023).

and prior refusal to engage in negotiations regarding Sandersville Railroad's acquisition of their respective Project Parcels, on July 20, 2023, Sandersville Railroad filed the Amended Petition seeking to acquire by condemnation the Project Parcels owned by the Intervening Respondents.[33]

The Project Parcels Sandersville Railroad seeks to acquire are for the Intervening Respondents are:

(1) Project Parcel 6:	200 feet wide by 3,170 feet long, which is approximately 6.95% of the Briggs' current larger parcel;
(2) Project Parcel 7:	200 feet wide by 1,105 feet long, which is approximately 4.89% of Mr. M. Smith's current parcel;
(3) Project Parcel 8, 10, and 11:	200 feet wide by 2,466 feet long, which is approximately 7.02% of the Smiths' current parcels;
(4) Project Parcel 14:	200 feet wide by 674 feet long, which is approximately 3.85% of the Parcel 14 Owners' current parcel;
(5) Project Parcel 12:	200 feet wide by 1,024 feet long, which is approximately 5.72% of Mr. Reed's current parcel; and
(6) Project Parcel 18:	200 feet wide by 421 feet long, which is approximately 3.06% of Mr. Lee's current parcel.

(T. 462:3-469:3 (Teague Testimony)).

On June 21, 2023, an ad hoc "No Railroad in Our Community Coalition"

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[33] *See* Amended Petition For Approval To Acquire Real Estate By Condemnation, Docket 45045, Document 205194 (July 20, 2023), ¶¶ 22-23, 28-29, 36-37, 42-43, 48-49, 54-55, & n.3.

(the "Coalition") intervened to oppose the Petition.[34] The coalition purports to consist of Melanie Benson, Bennie Clayton, Eloise Clayton, Kenneth Clayton, David Mark Smith, Janet P. Smith, Betty Lamar, James Lamar, and Elizabeth Scott.[35] None of these opponents own property that would be required for the Hanson Spur.[36]

On March 24, 2023, a hearing officer (the "Hearing Officer") was assigned[37] and on May 18, 2023, a Procedural and Scheduling Order and Notice of Hearing (the "PSO") was entered, and thereafter amended, requiring (1) Sandersville Railroad to pre-file direct testimony; (2) other parties to file responsive testimony; and (3) Sandersville Railroad to pre-file rebuttal testimony.[38] Sandersville Railroad, the Respondents, and the Coalition filed purported expert and non-expert testimony.[39] Sandersville Railroad

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[34] Verified Application for Leave to Intervene of the No Railroad in Our Community Coalition, *In re: Sandersville Railroad Company; Hancock County, Georgia Acquisition*, Docket 45045, Document 204880 (June 21, 2023).

[35] *Id*.

[36] *See e.g.,* Amended Petition For Approval To Acquire Real Estate By Condemnation, Docket 45045, Document 205194 (July 20, 2023).

[37] Order Assigning Hearing Offcer, *In re: Sandersville Railroad Company; Hancock County, Georgia Acquisition*, Docket 45045, Document 193751 (March 24, 2023); *see also* Order Substituting Hearing Officer, *In re: Sandersville Railroad Company; Hancock County, Georgia Acquisition*, Docket 45045, Document 216474 (Nov. 27, 2023).

[38] Procedural and Scheduling Order, *In re: Sandersville Railroad Company; Hancock County, Georgia Acquisition*, Docket 45045, Document 194511 (May 18, 2023); Order Amending Procedural and Scheduling Order to Extend Hearing Dates, *In re: Sandersville Railroad Company; Hancock County, Georgia Acquisition*, Docket 45045, Document 215838 (Oct. 2, 2023).

[39] On July 21, 2023, Sandersville Railroad pre-filed direct testimony of Benjamin J. Tarbutton, III. *In re: Sandersville Railroad Company; Hancock County, Georgia Acquisitio*n, Docket 45045, Document 205196, Allen R. Haywood, *In re: Sandersville Railroad Company; Hancock County, Georgia Acquisition*, Docket 45045, Document 205197, Arnie Pittman, In re: Sandersville Railroad Company; Hancock County, Georgia Acquisition, Docket 45045, Document 205198, Cale Veal, *In re: Sandersville Railroad Company; Hancock County*, *Georgia Acquisition*, Docket 45045, Document 205199, Gregory D. Teague, *In re: Sandersville Railroad Company, Hancock County, Georgia Acquisition*, Docket 45045, Document 205200, Jeff Custer, *In re: Sandersville Railroad Company; Hancock County, Georgia Acquisition*, Docket 45045, Document 205201, and Scott Dickson, *In re: Sandersville Railroad Company; Hancock County, Georgia Acquisition*, Docket 45045, Document 205202.

also filed rebuttal testimony for three of its witnesses, Messrs. Tarbutton, Dickson, and Pittman.[40]

An evidentiary hearing (the "Hearing") was held before the Hearing Officer on November 27, 28, 29, and 30, 2023. At the Hearing, all the above-referenced testimonies were admitted over various objections.

On August 25, 2023, Respondents pre-filed testimony for Donald J. Kochan, *In re: Sandersville Railroad Company; Hancock County, Georgia Acquisition*, Docket 45045, Document 205548 (Aug. 25, 2023) and Gary Hunter, *In re: Sandersville Railroad Company; Hancock County, Georgia Acquisition*, Docket 45045, Document 205550 (Aug. 25, 2023). On September 25, 2023, Respondents filed the Pre-Filed Responsive Testimony of Marvin Smith, Jr., *In re: Sandersville Railroad Company; Hancock County, Georgia Acquisition,* Docket 45045, Document 205542, the Pre-Filed Responsive Testimony of Bradford Reed, *In re: Sandersville Railroad Company; Hancock County, Georgia Acquisition,* Docket 45045, Document 205543, the Pre-Filed Responsive Testimony of Thomas Ahmad Lee, *In re: Sandersville Railroad Company; Hancock County, Georgia Acquisition,* Docket 45045, Document 205544, the Pre-Filed Responsive Testimony of William Blaine Smith, *In re: Sandersville Railroad Company; Hancock County, Georgia Acquisition,* Docket 45045, Document 205545, the Pre-Filed Responsive Testimony of Donald Garrett, Sr., *In re: Sandersville Railroad Company; Hancock County, Georgia Acquisition*, Docket 45045, Document 205546, and the Pre-Filed Responsive Testimony of Leo Briggs, I*n re: Sandersville Railroad Company; Hancock County, Georgia Acquisition,* Docket 45045, Document 205547.

On August 28, 2023, The Coalition pre-filed testimony for Dr. Conner Bailey*, In re: Sandersville Railroad Company; Hancock County, Georgia Acquisition*, Docket 45045, Document 205553 (Aug. 28, 2023) and Dr. Erica Walker, *In re: Sandersville Railroad Company; Hancock County, Georgia Acquisition*, Docket 45045, Document 205581 (Aug. 30, 2023). On September 28, 2023, The Coalition filed the Direct Testimony for Bennie Clayton, *In re: Sandersville Railroad Company; Hancock County, Georgia Acquisition,* Docket 45045, Document 205553, Commissioner Randolph Clayton, *In re: Sandersville Railroad Company; Hancock County, Georgia Acquisition,* Docket 45045, Document 205553, Elizabeth Scott, *In re: Sandersville Railroad Company; Hancock County, Georgia Acquisition,* Docket 45045, Document 205553, Janet Smith *In re: Sandersville Railroad Company; Hancock County, Georgia Acquisition,* Docket 45045, Document 205553, Kenneth Clayton, *In re: Sandersville Railroad Company; Hancock County, Georgia Acquisition,* Docket 45045, Document 205553, Mark Smith, *In re: Sandersville Railroad Company; Hancock County, Georgia Acquisition,* Docket 45045, Document 205553, and Melanie Benson, *In re: Sandersville Railroad Company; Hancock County, Georgia Acquisition,* Docket 45045, Document 20555.

[40] On September 28, 2023, Sandersville Railroad filed rebuttal testimony for Benjamin J. Tarbutton III, *In re: Sandersville Railroad Company; Hancock County, Georgia Acquisition*, Docket 45045, Document 205820, Scott Dickson, *In re: Sandersville Railroad Company; Hancock County, Georgia Acquisition*, Docket 45045, Document 205821 and Arnie Pittman, *In re: Sandersville Railroad Company; Hancock County, Georgia Acquisition*, Docket 45045, Document 205821.

II. Uncontested facts established at the hearing

In addition to the facts set forth in Sections I(A) and I(B) above, testimony at the Hearing[41] established uncontroverted facts regarding the business of Sandersville Railroad as well as the purpose and future users of the Hanson Spur.

Providing services so industries can ship on larger railroad lines, such as Norfolk Southern's rail system, is the essence of Sandersville's rail transportation business. (T. 31:20 (Tarbutton Testimony)). Sandersville Railroad carries Kaolin, "forestry products, timber and wood chips, agricultural products, and refined products, such as plastic pellets and lumber" on its main rail line, and interchanges four times a day with Norfolk Southern in Tennille, Georgia, 3 miles south of Sandersville. (T. 31:9-13 (Tarbutton Testimony). By providing those interchange services, Sandersville Railroad offers local industries access to Norfolk Southern's rail network. (T. 30:21-31:2 (Tarbutton Testimony)).

Neither Sandersville Railroad nor any other short line railroad in East middle Georgia has direct access to the CSXT rail system, which serves points and regions that Norfolk Southern does not, including parts of New York and New England. (T. 34:19–21, 38:17-21 (Tarbutton Testimony)). To access the CSXT rail network via Norfolk Southern and Sandersville Railroad, customers must pay charges per railcar to switch between those two Class I railroads that "often make transportation by rail

[41] This testimony includes pre-filed direct and rebuttal testimony as well as testimony given as summations of pre-filed testimony and in response to cross-examination and questions of the Hearing Officer.

uneconomical; and, in many cases, leave local industries, companies, and farmers unable to reach certain markets and off takers." (T. 34:19-35:1; 103:15-104:3 (Tarbutton Testimony)). The Hanson Spur would provide these customers with direct access to CSXT's rail line and its network without the added and frequently prohibitive cost of switching charges. (T. 35:2–4; 45:18–23).

Five companies have appeared in this proceeding expressing their support of the spur and their interest in using the spur to reach broader markets through the CSXT rail line. These companies also stated that they have entered into memoranda of understanding with Sandersville Railroad regarding their future use of the spur. Those companies are: HM, Pittman Construction, Revive Milling, Veal Farms, and Southern Chips.[42] (T. 48:3-9; 100:12-15). The owner of the Hanson Quarry, "HM[,] is an international supplier of heavy construction materials" with operations in 50 countries. (T. 199:15 (Dickson Testimony)). It is "leading producer of cement and cementitious product (i.e., concrete mixtures.") (T. 199:17-18 (Dickson Testimony)). The president of the Southeast Region of the United States for HM, Scott Dickson ("Mr. Dickson") testified on behalf of HM to support the Hanson Spur. (T. 198:4-5 (Dickson Testimony)).

At the Hanson Quarry, HM provides construction aggregates to producers of hot-mix asphalt, which is used in the paving of roads and other surfaces, suppliers of ready-

[42] Three of the companies, Revive Milling, Veal Farms, and Southern Chips actually approached Sandersville Railroad about establishing direct access to CSXT before the Hanson Spur project began to come to fruition. (T. 0108:4-15 (Tarbutton Testimony)).

mix concrete, and general contractors. (T. 200:17-19 (Dickson Testimony)). Because of its distance to industrial and urban centers and the fact that truck transportation is only cost-efficient within a limited range, the Hanson Quarry is underutilized. (T. 202:16-19 (Dickson Testimony)). The Hanson Spur will permit HM to deliver its construction aggregates via CSXT to markets it could not otherwise feasibly reach. (T. 203:1-3 (Dickson Testimony)). HM has customers in markets served by CSXT to which HM will ship aggregates using the Hanson Spur. (*See e.g.*, T. 325:8-326:9 (Dickson Testimony)). HM prefers rail "transportation" to reach its customers, "because it is more cost effective and environmentally friendly (in terms of CO2 production) than shipping by truck." (T. 203:3-5; T. 343:16-344:12 (Dickson Testimony)).

The Hanson Spur will allow the Hanson Quarry to expand its operation and hire eight to ten additional employees with an average pay of "$90,000 per year, inclusive of overtime, with good benefits." (T. 205:2-5 (Dickson Testimony)). This expansion will also result in approximately $6,000,000 in capital improvements at the Hanson Quarry, which will create additional ad valorem taxes for Hancock County. (T. 205:14-18 (Dickson Testimony)). The expansion of the Hanson Quarry will also benefit nearby residents because the expansion will move quarry operations further away from residential structures and HM will construct a berm between the quarry and those residences. (T. 207:1-12; 215:22-216:4 (Dickson Testimony)).

Co-located at the quarry is a regional asphalt plant of Pittman Construction Company ("Pittman Construction"), which desires to use the Hanson Spur. (T. 222:2-6, T. 223:4-8 (Pittman Testimony)). On behalf of Pittman Construction, Mr. Louie Arnold

("Arnie") Pittman, III testified in support of the Hanson Spur. (T. 221:4-5 (Pittman Testimony)). Pittman Construction is a "full-service heavy highway construction contractor" offering "asphalt paving, concrete, and grading services and construct[ion] [service for] all components of highways except bridges, which are typically constructed by specialized firms." (T. 221:18-21 (Pittman Testimony)).

The Hanson Spur will permit Pittman Construction to ship liquid asphalt[43] by rail directly to its asphalt plant co-located at the Hanson Quarry. (T. 223:11-13 (Pittman Testimony)). To accomplish the same shipment via truck, Pittman would have to heat the asphalt, transload it onto a truck, and then heat it again to move the asphalt off the truck and onto a railcar. (*Id.*). The Hanson Spur will permit Pittman Construction to ship liquid asphalt by rail directly to its asphalt plant co-located at the Hanson Quarry. (T. 223:11-13 (Pittman Testimony)). Thus, constructing the Hanson Spur will create a new shipping route from Pittman Construction's suppliers (i.e., oil refineries) to the company's Sparta Plant. (*Id.*). This new shipping route will reduce the "need to ship liquid asphalt to [a liquid-asphalt terminal facility that Pittman Construction co-owns in] Lithonia . . . and then ship it by truck on local roads to" the Hanson Quary. (T. 223:12-14 (Pittman Testimony)).

Pittman Construction's use of the Hanson Spur will require it to construct a liquid asphalt terminal facility at the Hanson Quarry at an estimated cost of $1 million

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[43] Liquid Asphalt is the "glue or 'binder' that is mixed with aggregate (from, for instance, the Hanson Quarry) to create asphalt for road construction. (T. 222:22-223:1 (Pittman Testimony)). Liquid asphalt is a highly viscous liquid or semi-solid, unless artificially heated. (T. 229:03-08 (Pittman Testimony)).

to $1.5 million dollars. (T. 223:16-18 (Pittman Testimony)). This investment will increase *ad valorem* tax revenue of Hancock County and Pittman Construction may need to expand its employment base and create jobs for local residents. (T. 223:18-21 (Pittman Testimony)). Mr. Pittman acknowledged, during cross examination, that Pittman Construction required a short line railroad to provide it and other companies like it with direct access to the CSXT rail system; it could not feasibly provide itself it a connection to the CSXT rail system. (T. 257:20-258:7 (Pittman Testimony)).

Sandersville Railroad will also build facilities along the Hanson Spur at or near the Hanson Quarry that will permit transloading, which is the loading and unloading of goods between rail car and truck. (T. 48:10-14 (Tarbutton Testimony)). Other East middle Georgia businesses have also expressed that their interest in using the Hanson Spur to transload goods to rail to ship to markets exclusively or best served by the CSXT rail network. Mr. Cale H. Veal ("Mr. Veal") testified on behalf of two of those other customers who will ship goods using the Hanson Spur—Revive Millings, LLC ("Revive Millings") and Veal Farms Transload, LLC ("Veal Farms"). (T. 1465:4-6 (Veal Testimony)).

"Veal Farms Transload buys, stores, and loads to rail grains and other agricultural products for its own and its customers' uses." (T. 1466:5-6 (Veal Testimony)). "Revive Milling buys and processes grain into food ingredients, such, as starches, and then sells and transports those refined ingredients by rail to food producers." (T. 1466:6-8 (Veal Testimony)). The Hanson Spur will permit customers of both businesses to reach markets that are not directly served by the Norfolk Southern

rail system. (T. 1466:17-22 (Veal Testimony)).[44] The efficiencies of the Hanson Spur will allow Revive Millings to deliver non-GMO food ingredients to food producers at competitive prices compared to GMO food ingredients. (T. 299:1-7 (Veal Testimony)).

Mr. Veal, a managing member of these companies, testified that Class I railroads do not serve smaller companies, industries, and farmers "because they don't have enough volume." (T. 303:15-16, T. 304:19-307:23 (Veal Testimony)). But, with the Hanson Quarry and the combined "volume of the rock quarry" and goods of other users, these smaller, local companies, industries, and farmers are "able to capitalize on that . . . by being able to get food ingredients [and other goods] more economically to an end user." (T. 303:17-22 (Veal Testimony)). The lack of a viable rail trade route for these companies to reach markets served by CSXT is "a major infrastructure problem in" the United States. (T. 303:22-24 (Veal Testimony)). The Hanson Spur, thus, provides a new route for these companies to deliver their goods to market.

Southern Chips LLC ("Southern Chips") is in the business of "provid[ing] paper quality wood chips to paper mills throughout the southeast United States and beyond . . . almost exclusively by rail." (T. 247:20-22 (Custer Testimony)). It will use the spur

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[44] For example, the Hanson Spur will permit Veal Farms Transload to transport High Erucic Acid Rapeseed ("HEAR") to Trenton, Kentucky, the location of the only crush facility for HEAR in the country. (T. 1468:1-6 (Veal Testimony)). HEAR is used to produce high erucic acid, an essential ingredient in biodegrable plastics. (T. 1468:3-5 (Veal Testimony)). Due to the increase in extreme winter weather events in Kentucky and states north of Georgia which "resulted in substantial failures of HEAR crops," demand for Georgia-grown HEAR is increasing rapidly. (T. 1468:7-11 (Veal Testimony)). And, Veal Farms Transload is the largest supplier in Alabama, the Carolinas, and Georgia of HEAR to that facility. (T. 1468:5-6 (Veal Testimony)). HEAR is trucked to Trenton, Kentucky because it is not viable to ship by rail with the switching costs between the Norfolk Southern and CSXT systems. (T. 1468:12-14 (Veal Testimony)).

to deliver wood chips on the CSXT rail system and "reach new markets for our products at a lower cost to our customers." (T. 248:7-11 (Custer Testimony)). "Southern Chips Mr. Jeffrey Lamar Custer ("Mr. Custer"), the Wood Procurement and Fiber Sales Manager of Southern Chips, testified on behalf of Southern Chips and in support of the Hanson Spur. (T. 247:4-6 (Custer Testimony)). Mr. Veal has responsibility for the day-to-day operations and strategic business decisions of Southern Chips. (T. 249:12-14 (Custer Testimony)). Mr. Custer testified that CSXT "provides service to more than 80 pulp and papermills" via a trade route that is not available to Southern Chips: direct shipments on the CSXT rail system. (T. 249:21-250:5 (Custer Testimony)). Three to five other customers that did not testify in this proceeding have also indicated their interest in utilizing the Hanson Spur if constructed. (T. 149:5-11 (Tarbutton Testimony)).

In 2019, the Georgia General Assembly created a Commission on Freight and Logistics to "to study [Georgia's] freight and logistics network in the state," find ways to move freight more efficiently, and to spur economic growth and job creation. (T. 47:10-12 (Tarbutton Testimony) (discussing Rep. Kevin Tanner and Sen. Brandon Beach, et al., Georgia Commission on Freight & Logistics, *Report Submitted pursuant to 2019 House Resolution 37, available at: https://www.house.ga.gov/Documents/CommitteeDocuments/2019/Freight_and_Logistics/Final_Report_Freight_and_Logistics.pdf*)). After an analysis of the transportation and logistical issues facing Georgia, the Commission on Freight and Logistics concluded that rail moves goods more efficiently than the trucking industry, which faces driver shortages, congestion issues, and infrastructure challenges.

(T. 47:12-25 (Tarbutton Testimony)). The Hanson Spur will permit Sandersville Railroad to realize these benefits of rail transportation by providing a new channel of trade. (T. 104:11-25 (Tarbutton Testimony)).

Thus, the Hanson Spur will connect regional shippers, who are unserved or underserved by rail, via a local switching operation to every point and every shipper and receiver on the CSXT network. (T. 1480:11-14; T. 367:15-17 (Tarbutton Testimony) (The Hanson Spur "is a new pathway to market.")). The Hanson Spur will provide a new avenue of commerce for farmers, businesses, and industries in East middle Georgia. To accomplish this, 4.5-miles of 200 foot wide right of way will be required to construct the Hanson Spur. (T. 104:11-105:01 (Tarbutton Testimony)).

III. Argument

In this brief, the Petitioner addresses the testimony given in the Hearing that bears (or appears to bear) on the Commission's determination whether to grant the Petition. The Petitioner, however, does not address some or all the direct testimony of the objecting landowners regarding the deeply held personal value they attach to their properties.[45] Petitioner appreciates that opposition to condemnation and respects the

[45] Neither party contests that the sole issue in this proceeding is whether the Hanson Spur serves a public purpose, although the Respondents may argue for a change in the test Georgia courts have established for that issue. *Central of Georgia Railroad*, 257 Ga. at 219, 356 S.E.2d at 866; *See infra* Section III(B). If the Commission authorizes Sandersville Railroad to exercise the power of eminent domain, then Sandersville Railroad will initiate various *in rem* actions in Hancock County Superior Court to acquire the Project Parcels the subject of this proceeding. *E.g.*, O.C.G.A. § 22-1-5 ("Except in cases of extreme necessity and great urgency, the right of eminent domain cannot be exercised without first providing for just compensation to the owner for the interference with his exclusive right."); O.C.G.A. § 22-1-6 ("If a person who is authorized to exercise the power of eminent domain cannot by contract procure the property or the easement, right of way . . . or other interest sought to be condemned,

personal values and testimony of the objecting landowners. However, even though those personal values are not in dispute, they are not legally relevant in this proceeding.

The Constitution of the United States authorizes the state of Georgia to exercise its power of eminent domain to authorize condemnation for a public use.[46] Georgia's Constitution authorizes condemnation for a public purpose.[47] In this context, the terms "public use" and "public purpose" are synonymous.[48] Both constitutions sanction the exercise of a state's eminent domain power to authorize condemnation of private property for use by a private entity, so long as it is for a public purpose.[49]

Georgia has explicitly granted railroads the authority (subject to the review of

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the person may take or damage the property or interest upon paying or tendering to the owner thereof just and adequate compensation."). In such a case, the property owner (i.e., the "condemnee") is entitled to recover damages, the measure of which is the fair market value of the property acquired by the condemnor and the consequential damages less the consequential benefits, if any, to the remaining property of the property owner. *E.g.*, *State Highway Department v. Weldon*, 107 Ga. App. 98, 99, 129 S.E.2d 396, 397 (1962); *Wright v. MARTA*, 248 Ga. 372, 283 S.E.2d 466 (1998). Much of the Respondents' and Intervenors' testimony focuses on issues of consequential damages that are more properly addressed in the superior court actions in which the value of the taking, not the public use of the taking, will be the issue at hand. For that reason, Sandersville does not devote argument in this brief to those issues. However, Sandersville Railroad welcomes the opportunity to ensure that the owners of the rights of way required for the Hanson Spur are compensated fully in compliance with the constitutional mandate for just and adequate compensation.

[46] U.S. CONST. Art. IV, Sec. 4 ("The United States shall guarantee to every State in this Union a Republican Form of Government . . ."; U.S. CONST. amend. V ("nor shall private property be taken for ***public use***, without just compensation.") (emphasis added).

[47] GA. CONST. Art. I, Sec. 3, Para. I(b) ("private property shall not be taken or damaged for ***public purposes*** without just and adequate compensation being first paid.") (emphasis added). It is also relevant to note that Georgia, after adopting the U.S. Constitution in 1789, did not include an equivalent of the Takings Clause in its state constitution until it ratified its 1861 Constitution, which used the language of "public use" rather than "public purpose." *See* GA. CONST. art. I, ¶ XXI (1861). Georgia adopted the "public purpose" language for its Takings Clause when it ratified its 1877 Constitution. *See* GA. CONST. Art. I, Sec. 3, Para. I (1877).

[48] *Infra* Section III(A) at n.55.

[49] *See infra* Section III(G)2.

this Commission)[50] to condemn property for a railroad to "build . . . such additional . . . tracks . . . as may be necessary for the proper accommodation of the business of the company."[51] That grant reflects a legislative decision that the public interest in the continued development of railway transportation systems outweighs the competing public interest in the protection of private property rights. For that reason, the question of which interest prevails has been answered by the legislature and is not before this Commission. Petitioner, therefore, in recognition of the Georgia legislature's determination, does not address the testimony of the opposing landowners and supporting citizens regarding their personal objections to the Petition.

Similarly, much of the testimony of the Respondents and the Intervenors addresses a myriad of other issues other than "whether the condemnation serves a public purpose" by, for instance, "providing . . . channels of trade or travel."[52] Instead, their testimony discusses whether the Hanson Spur, in their myopic view, "'best serves' the public interest," which as discussed *infra*, is an improper inquiry.[53]

Respondents also attempt to frame the public purpose of the Hanson Spur as economic development, which, as also discussed *infra*, is an independent purpose of condemnation not authorized under Georgia law.[54] Indeed, when the Respondents counsel asked the President of the Sandersville Railroad, Mr. Tarbutton, if the "public

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[50] O.C.G.A. § 46-8-121.
[51] O.C.G.A. § 46-8-120(a)(4).
[52] *Central of Georgia Railroad*, 257 Ga. at 219, 356 S.E.2d at 866; O.C.G.A. § 22-1-1.
[53] *Central of Georgia Railroad*, 257 Ga. at 219, 356 S.E.2d at 866.
[54] *See* O.C.G.A. § 22-1-1(9)(B) ("[t]he public benefit of economic development shall not constitute a public use.").

use" of the Hanson Spur is the economic development it may spur, Mr. Tarbutton reiterated that the "public use" of the Hanson Spur is "through [its opening of] channels of trade." (T. 98:24-99:4 (Tarbutton Testimony)). Although the "end result" of that development "is more jobs," Mr. Tarbutton reiterated that the Hanson Spur benefits the public "through channels of trade." (T. 99:03-4 (Tarbutton Testimony)). Although economic development may be an added benefit of the development of the Hanson Spur, it is not the public use at issue here.[55]

A. "Public Use" and "Public Purpose" under the U.S. and Georgia Constitutions

The U.S. and Georgia Constitutions each authorize condemnations. But the language of the two constitutions differs: the U.S. Constitution authorizes condemnation for a public use, whereas the Georgia Constitution authorizes it for a public purpose.[56] Though the Fifth Amendment and the Georgia Constitution use different language, the Supreme Court of the United States of America (the "U.S. Supreme Court") has clarified that these terms are synonymous: "when this Court began applying the Fifth Amendment to the States at the close of the 19th century, it embraced the broader and more natural interpretation of public use as 'public purpose.'"[57]

Before the U.S. Supreme Court adopted a broad understanding of a "public use"

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[55] In fact, the Mayor of the City of Sparta testified on behalf of the Hanson Spur because of the economic benefits of the Spur, such as an increased number of jobs at the Hanson Quarry and the possibility of bringing more industry to the City. (T. 421:2-5; 426:4-10 (Haywood Testimony)).
[56] U.S. CONST., Amend. V; GA. CONST. Art. I, Sec. III, Para. I (1983).
[57] *Kelo v. City of New London, Conn.*, 545 U.S. 469, 480 (2005).

as a "public purpose," the Courts understood the "public use" language to be limited, requiring a taking to be put into actual use by the public.[58] But the U.S. Supreme Court "'long ago rejected any literal requirement that condemned property be put into use for the [general] public,'"[59] as "it proved to be impractical given the diverse and always evolving needs of society."[60]

To account for these diverse interests, the U.S. Supreme Court adopted a policy of deference to the legislature regarding the determination of a "public use" or "public purpose:" "Without exception, [the U.S. Supreme Court's] cases have defined [the 'public purpose'] concept broadly, reflecting [its] longstanding policy of deference to legislative judgments in this field."[61] This deference is also accorded to the state legislatures, as "the fact that a state legislature, and not the Congress, made the public use determination does not mean that judicial deference is less appropriate."[62] Therefore, the Georgia General Assembly is the entity that determines what constitutes a "public purpose" that allows for a lawful condemnation.[63] Though the Georgia Constitution of 1983 does not explicitly define the term "public purpose," the General Assembly has provided several definitions of "public purposes" or "public use" that pertain to this proceeding, as discussed in the following section.

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[58] *See, e.g., Missouri Pacific Railway Co. v. Nebraska*, 164 U.S. 403 (1896).
[59] *Kelo*, 545 U.S. at 479 (quoting *Hawaii Hous. Auth. v. Midkiff*, 467 U.S. 229, 244 (1984)).
[60] *Id.* at 480.
[61] *Id.*
[62] *Midkiff*, 467 U.S. at 244.
[63] *Id.*

B. The test for railroad condemnations under Georgia law

Railroads provide a vital public transportation service. The State of Georgia has codified the importance of railroads by empowering them to acquire real estate, construct roads, regulate their services, and survey private property.[64] Under Georgia law, the corporate authority and powers of "[a]ny railroad company owning or operating a railroad in this state" include, among other things:[65]

> (1) To reconstruct its lines or tracks, to build one or more additional main tracks, to relocate any line or portions of a line, and to build, as a substitute for trestles, embankments upon which tracks may be laid or to widen cuts where necessary for proper construction or maintenance [the "Mainline Power"];
>
> (2) For obtaining gravel and other material, to take as much land as may be necessary for the purpose of construction, operation, and maintenance of such road [the "Material Acquisition Power"];
>
> (3) To cut any trees that may be in any danger of falling on the tracks or obstructing the right of way, making compensation therefor as provided by law [the "Right of Way Maintenance Power"];

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[64] *See* O.C.G.A. § 46-8-100; *see e.g.*, *Harrold Bros. v. Americus*, 142 Ga. 686, 688, 83 S.E. 534, 535 (1914) ("A railroad company is a public institution, and to effectuate the public purpose for which it was created it is given the right of eminent domain. Not only may it exercise this right in the building of its main line, but also in the construction of sidings, turnouts, and other tracks necessary to a proper discharge of its corporate functions. It will hardly be denied that switch-tracks and sidings designed to facilitate the passage of trains, or to permit the receiving and delivery of freight at its station, are for public uses . . . [And,] [w]here a railroad company constructs a spur track under conditions where the public are not excluded from its use, or denied equal rights to use it, the mere fact that it is actually only used by one or two individuals does not negate the public character of the use.").

[65] Railroads also have, for instance, the powers set forth in O.C.G.A. § 46-8-100, including the right to condemn property without Commission approval for their mainline. O.C.G.A. § 46-8-100(4) (Giving railroads the power "[t]o lay out its road, not exceeding in width 200 feet, and to construct the same, and, for the purpose of cuttings and embankments and for obtaining gravel and other material, to take as much land as may be necessary for the proper construction, operation, and security of said road; and to cut down any trees that may be in danger of falling on the track or obstructing the right of way, making compensation therefor as provided by law.").

> (4) **To build and maintain such additional depots, tracks, and terminal facilities as may be necessary for the proper accommodation of the business of the company** [the "Additional Facilities Power"]; and
>
> (5) To construct, maintain, and operate tracks for the purpose of connecting two or more lines of railroad operated by the same company not more than ten miles apart [the "Track Connection Power"].[66]

To facilitate its exercise of these enumerated statutory purposes, the General Assembly also granted railroads the "right of condemnation" if "real estate cannot be acquired by purchase or gift" and if "the [C]omission, under such rules of procedure as it may provide, . . . approves the taking of the property."[67]

The Commission's proceeding required under O.C.G.A. § 46-8-121 is defined by Georgia statute, regulation, and caselaw.[68] Under Georgia law, all condemnations must be for a public use.[69] "Public use is a matter of law to be determined by the court and the condemnor bears the burden of proof."[70] The Commission's inquiry is limited to a determination of whether the "condemnation . . . serve[s] a legitimate public purpose"

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[66] O.C.G.A. § 46-8-120(a) (emphasis added). Railroad companies were first empowered with the rights outlined in the Mainline Power (subsection (4) above), the Additional Facilities Power (subsection (4) above), and the Tack Connection Power (subsection (5) above) in the 1914 version of this statute, which has been amended only once since then, to add the Material Acquisition Power (subsection (2) above) and the Right of Way Maintenance Power (subsection (3) above) of the statute. 1914 Ga. Laws p. 144 § 1; 1957 Ga. Laws, p. 403, § 1; *E.g.*, *City of Doraville v. Southern Railway Company*, 227 Ga. 504, 181 S.E.2d 346 (1971).

[67] O.C.G.A. § 46-8-121; Ga. Comp. R. & Regs. 515-16-16-.01.

[68] In Sandersville Railroad's closing argument, the Hearing Officer asked about O.C.G.A. § 46-8-123. (T. 1455:12-1456:9 (Sandersville Railroad Closing)). This statute is inapplicable here because Sandersville Railroad is not seeking to construct an extension or branch road, and is instead building a brand-new spur track. The relevant authorities regarding the meaning of the "proper accommodation of the business of the company" are discussed *infra.*

[69] Ga. Const. 1983 Art. I, Sec. III, Para. I; O.C.G.A. § 22-1-2(a).

[70] O.C.G.A. § 22-1-2(a).

or use.[71] Notably, "[t]he Commission, in ruling on the propriety of a condemnation of property by a railroad for the purpose of expansion and improvement, should seek to determine whether the condemnation serves a public use, not whether the condemnation 'best serves' the public interest."[72] As explained by the Supreme Court of Georgia,

> [i]f the purpose of the Commission's review was to determine the best site for railroad expansion, then the review should logically cover expansion on land acquired by the railroad through gift and purchase as well as condemnation. The review does not extend to such expansion . . . **[T]he review is intended to provide scrutiny as to the public or private nature of the use of the land involved.**[73]

This inquiry asks only whether the use of the Project Parcels is a public use or, in other words, a public purpose.[74] The Commission's review does not extend to the property of the Respondents that is not being sought to be acquired by condemnation and, therefore, does not extend to the property of the Intervenors.[75] As the Supreme Court reasoned "[t]he application of the review process to land [sought to be] acquired through condemnation and not to land acquired through gift or purchase" or land not sought to be acquired in this proceeding "supports the position that the review is intended to provide scrutiny as to the public or private nature of the use of the land involved" in this proceeding.[76]

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[71] Ga. Comp. R. & Regs. 515-16-16-.02.
[72] *Cent. of Georgia R.R. v. Georgia Pub. Serv. Comm'n*, 257 Ga. 217, 218, 356 S.E.2d 865, 866 (1987).
[73] *Id.* at 219, 356 S.E.2d at 866 (emphasis added).
[74] *Id.*
[75] *Id.*
[76] *Id.*

The General Assembly and Georgia courts have defined public purpose and public use for eminent domain actions. Under O.C.G.A. § 22-1-1(9)-(10), "[p]ublic use" means, among other things, "(i) [t]he possession, occupation, or use of the land by the general public or by state or local governmental entities; (ii) [t]he use of land for the creation or **functioning of public utilities," which for this definition includes railroads**; and "(iii) The opening of roads, the construction of defenses, or **the providing of channels of trade or travel** . . . ."[77] Additionally, the General Assembly has recognized that rights of way for mines and quarries, in and of themselves, without any other users, serve a public use for which railroad and other rights of way can be condemned.[78] Specifically, persons and business entities engaged in certain mining, quarry, or refining activities are permitted to condemn land for rights of way for any railroad, turnpike, roadway, pipeline, or powerline need to successfully operate such a pipeline.[79]

However, "[t]he public benefit of economic development shall not constitute a public use," except in the case of a local government seeking to remedy blight.[80] This

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[77] O.C.G.A. § 22-1-1(9)(A), (10) (emphasis added). For the purposes of this definition, "public utility" includes railroads. *Id*. § 22-1-1(10).

[78] O.C.G.A. § 44-9-70 ("Any person or [business entity] . . . engaged in the business of mining iron, copper, gold, co, or any other metal or mineral [or] quarrying marble, granite, or any other stone [among other activities] and who needs a right of way for a railroad, turnpike, or roadway; an easement for pipelines or powerlines; or a common road across the lands of others in order to operate his business successfully may obtain a right of way" by eminent domain subject to paying just and adequate compensation.). This statute belies the argument of the Respondents made at the Hearing that HM is the only user of the spur (which arguments they make despite the four other companies that proffered testimony in support of the spur) and, therefore, the spur does not serve a public purpose. **In direct contradiction to their argument, the General Assembly has given HM the power to condemn the right of way necessary for the Hanson Spur.**

[79] *Id*.

[80] O.C.G.A. § 22-1-15.

statute was passed in 2006 as the Landowner's Bill of Rights and Private Property Protection Act (the "Landowner's Bill of Rights") in reaction to the U.S. Supreme Court's decision in *Kelo v. City of New London, Connecticut*,[81] in which the Supreme Court affirmed the constitutionality of eminent domain for economic development.[82] In this context the Georgia General Assembly passed the Landowner's Bill of Rights "to provide for the comprehensive revision of provisions regarding the power of eminent domain" and "to provide for a public use requirement for exercising the power of eminent domain."[83] In doing so, the Georgia General Assembly protected private property in the state from condemnation for economic development purposes and **affirmed the legality of condemnation** for "the providing of channels of trade or travel" and "the functioning of" railroads.[84]

Thus, in the post-*Kelo* era of Georgia eminent domain law, to obtain Commission permission to condemn property for a spur, a railroad must show that the railroad is (1) acting within its enumerated powers outlined in O.C.G.A. § 46-8-120; and (2) the condemnation serves a public purpose, such as those outlined in O.C.G.A. § 22-1-1(9).[85]

C. The development of the Hanson Spur is necessary for the proper accommodation of the business of the Sandersville Railroad and opens channels of trade.

Sandersville Railroad is in the business of "connect[ing] industries by rail" and

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[81] 545 U.S. 469 (2005)
[82] *Kelo*, 545 U.S. 469, 469.
[83] Landowner's Bill of Rights And Private Property Protection Act, 2006 Georgia Laws Act 444 (H.B. 1313).
[84] O.C.G.A. § 22-1-1 (9)(A)(ii), (9)(A)(iii), (10).
[85] *See also Central of Georgia Railroad*, 257 Ga. 217, 356 S.E.2d 865 (1987); *City of Doraville v. Southern Railway Company*, 227 Ga. 504, 181 S.E.2d 346 (1971).

connecting "rail traffic with larger railroad networks." (T. 31:16–20 (Tarbutton Testimony)). The development of a spur line to connect the Hanson Quarry, an industrial aggregate mine, and other customers at or adjacent to the quarry with the CSXT rail network, a larger railroad network, will clearly advance the business of Sandersville Railroad. The Commission has long recognized that constructing switching yards, "additional depots, tracks, and terminal facilities" to service existing and future industries is "necessary for the proper accommodation" for the business of a railway. For instance, in its decision, which on appeal to Supreme Court of Georgia was styled as *City of Doraville v. Southern Railway Company*,[86] the Commission found that taking land to construct "new facilities . . . to furnish the needed services both for existing industry[,] those known to be moving in the area[, and] **anticipated future development**" is "required for the safe and essential conduct of the applicants' business as a public carrier and for public purposes."[87] As early as 1925, the Supreme Court of Georgia noted that "[i]t is competent for the state, acting through its Public Service Commission, to provide for this extension of the transportation facilities of the

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[86] 227 Ga. 504, 181 S.E.2d 346 (1971). After the Commission ruled in favor of the railway, the City appealed the Commission's order and petitioned the Superior Court for an injunction to prevent construction of the railroad switching yard facility within the corporate limits. *See City of Doraville v. S. Ry. Co*., 227 Ga. 504 181 S.E.2d 346 (1971). The Superior Court held that where the Commission, acting under state law, granted to a railroad authority to condemn specific property within city limits for necessary expansion of railroad's facilities to serve the public, the municipality in which the railroad's proposed facilities were to be erected did not have the power to prohibit use of such property for purpose authorized by the Commission. *Id*. at 504. On appeal, the Superior Court's decision was affirmed by the Supreme Court of Georgia. *Id*. at 511.

[87] Application of Southern Railway Company and the Atlanta and Charlotte Air Line Railway Company for Permission and Approval to Institute Condemnation Proceedings for the Purpose of Acquiring Certain Property in DeKalb and Gwinnett Counties, Georgia, Docket 690-R, Document 19499, at *6, 7 (May 29, 1970) (emphasis added).

railroad company so as to meet the demands of trade," because it is the business of a railway to provide transportation routes for industries to ship their goods.[88] The Supreme Court of Georgia has also affirmed the Commission's decision to approve a railroad condemnation where the only existing customer was a partially constructed pulpwood plant.[89]

The proposed Hanson Spur will allow Sandersville Railroad to provide "needed" transportation "services" to the existing industries (such as those operating at the Hanson Quarry, HM and Pittman Construction) and future industries of Hancock County (such as Veal Farms Transload, Revive Millings, and Southern Chips). Such a service is a Commission-recognized necessity for the proper accommodation of railway business.[90] As testified by the Railroad's President, Mr. Tarbutton, Sandersville Railroad is in the business of connecting industries to rail and other larger rail networks. (T. 31:16–20 (Tarbutton Testimony)).

The Hanson Spur will allow Sandersville Railroad to "meet the demands of trade" by "opening up access to markets that [Sandersville Railroad's] customers currently don't have access to." (T. 99:5-9 (Tarbutton Testimony)). Because Sandersville Railroad is in the business of connecting industries to larger rail networks and has new business opportunities requiring the Hanson Spur, constructing that track to connect industries, businesses, and farmers to a larger rail network is

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[88] *Tift v. Atl. Coast Line R. Co.*, 161 Ga. 432, 131 S.E. 46, 50 (1925); *See also* O.C.G.A. § 22-1-1(9)(A)(iii).
[89] *Hightower v. Chattahoochee Indus. R.R.* , 218 Ga. 122, 124, 126 S.E.2d 664, 666 (1962).
[90] *City of Doraville*, 227 Ga. at 506-507, 181 S.E.2d at 348.

"necessary" for the "proper accommodation" of its business.

D. The Hanson Spur will provide new "channels" of trade for businesses in Hancock County and East middle Georgia.

The General Assembly has determined that "providing channels of trade" is a public good and a "public use" of condemned land.[91] The Hanson Spur will "provid[e] channels of trade" for the industries, businesses, and farmers of East middle Georgia. Mr. Tarbutton testified that the Spur would serve "multiple industries located and adjacent to the Hanson Quarry." (T. 33:17–18 (Tarbutton Testimony)). As described in detail above, many business leaders in the East middle Georgia community testified that the Hanson Spur will provide them with a method to transport their products to markets that they currently cannot get to in an efficient way. (T. 396:24-397:4 (Dickson Testimony); T. 400:14-20 (Veal Testimony); T. 400:24-401:2 (Custer Testimony); T. 203:2-6 (Pittman Testimony) (testifying that the Hanson Spur rail "will allow us to connect [an] under-utilized quarr[y] with under-served markets as efficiently as possible" and increase production of the Hanson Quarry)). In fact, Cale Veal, sole managing member of Veal Farms Transload and a managing member of Revive Millings, testified about the "logistical hurdles" and "underserved nature" of southern agriculture, and that southern farmers "need every supply line made available." (T. 400:9-13 (Veal Testimony)).

Respondents and Intervenors may argue that there are other channels by which

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[91] O.C.G.A. § 22-1-1(9)(A).

customers of the Hanson Spur can deliver their goods to the markets best or exclusively served by CSXT, but such an argument, if it were valid, would swallow the rule. In other words, if the Commission's review extended to the question of whether the proposed spur provided an exclusive or unprecedented channel of trade, no railroad condemnation would be granted because an opponent could always argue that another theoretical way to deliver those goods exists, regardless of whether or not it is practically or economically viable. Under such a test, the theoretically ability to deliver goods by horse and buggy, foot courier, or helicopter, for example, would suffice to defeat a railroad condemnation seeking to provide a channel of trade. Clearly, such a result is absurd.

Thus, there is no factual dispute that the development of the Hanson Spur will provide a new channel of trade to the East middle Georgia region and will therefore serve a public purpose and public use.

E. The Hanson Spur will serve a public use as it will be a use of land for the functioning of the railroad.

The General Assembly has declared that land used for the functioning of a railroad is a public use.[92] In addition to providing that a "public use" includes "providing . . . channels of trade or travel,"[93] O.C.G.A. § 22-1-9 defines "public use" to include "[t]he use of land for the creation or functioning of public utilities."[94] Under that same section,

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[92] O.C.G.A. § 22-1-9(9)(A)(iii). ("'Public use' means [among other things] . . . [t]he use of land for the creation or functioning of public utilities."); O.C.G.A. § 22-1-1(10) ("'Public utility' . . . include[s] common carriers and railroads.").
[93] O.C.G.A. § 22-1-1(9)(A)(iii).
[94] O.C.G.A. § 22-1-1(9)(A)(ii).

"public utilities" includes, among other things, "common carriers and railroads."[95] Land that is "necessary for the proper accommodation" of the railroad's business will inherently be "use[d] . . . for the creation or functioning of a" railroad.[96] Thus, the test under this statutory definition of "public use" involves only one question: whether the land sought to be condemned is "necessary for the proper accommodation" of the railroad's business because, if it is, it will be "use[d] . . . for the creation or functioning" of the railroad.[97]

As noted above, the Hanson Spur is necessary for proper accommodation of the business of Sandersville Railroad. Therefore, Sandersville Railroad has satisfied the bright line test under Georgia law for the exercise of eminent domain by railroads. Thus, in addition to serving a public purpose because it will provide channels of trade, the Hanson Spur will serve a public purpose because it will use land for the functioning of Sandersville Railroad.

F. Properly construed, the Commission's decision in *Great Walton* does not support Respondent's opposition.

The Respondents may argue that the Commission's most recent railroad condemnation decision, *In re: The Great Walton Railroad Company, Inc., d/b/a The Hartwell Railroad Company's Petition for Approval to Acquire Real Estate by*

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[95] O.C.G.A. § 22-1-1(10).
[96] O.C.G.A. §§ 22-1-1(9)(A)(ii), 46-8-121.
[97] O.C.G.A. §§ 22-1-1(9)(A)(ii), 46-8-121.

Condemnation ("*Great Walton*"),[98] established binding precedent by determining whether the railroad's proposal "best served" the public interest, rather than by determining whether the proposal served a public use as a proper accommodation of the railroad's business. On that basis, Respondents may urge the Commission to review the Petition under a "best served" standard rather than under the statutory standard the Commission applied in *Great Walton*. But application of any "best served" standard here would be contrary to law.

In *Great Walton*, the railroad sought to condemn a small strip of land on a Church's property to build a "runaround" to facilitate operations at the only shipper location served by its existing track.[99] The railroad contended the condemnation was warranted because the proposed runaround was "necessary for the proper accommodation of its business of providing railroad service."[100] The Commission determined that the railroad's proposal did not meet the General Assembly's "proper accommodation" standard.

Although the Commission's decision contained procedural history recitations and dicta noting that the proposed condemnation would merely enhance the railroad's existing service to the sole customer on the line and that the Church was historic and used its property to serve "the general public," the Commission's holding was based on

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[98] Order by Commission Reversing the Hearing Officer's Initial Decision and Denying the Petition for Condemnation, *In re: The Great Walton Railroad Company, Inc., d/b/a The Hartwell Railroad Company's Petition for Approval to Acquire Real Estate by Condemnation*, Docket 41607, Document 173807 (Aug. 24, 2018).
[99] *Id.* at 2.
[100] *Id.* at 1.

the railway's failure to meet the "proper accommodation" test.[101] The existence of four alternative railroad routes for the runaround[102] "compelled" the Commission to decide that the condemnation was not "necessary" under the statutory "proper accommodation" requirement.[103]

Here, however, there is no question whether the Hanson Spur is "necessary" to accommodate Sandersville's Railroad's business of providing rail transportation as a switching carrier to and from the Hanson Quarry. The record shows there is no reasonable alternative to the Hanson Spur to provide the channel of trade to and from the CSXT network sought by Sandersville Railroad's present and prospective customers or alternative land for the functioning of Sandersville Railroad's business. First, Sandersville railroad is not currently operating in Sparta. (T. 102:21-103:2 (Tarbutton Testimony)). Therefore, Sandersville Railroad has no lines in the Sparta area. (T. 102:21-103:2 (Tarbutton Testimony)). It must construct a new spur line, the Hanson Spur, to serve those customers. (*See* T. 104:17-105:1 (Tarbutton Testimony), T. 454:16-22 (Teague Testimony)). Thus, unlike the railroad in *Great Walton*, when constructing the Hanson Spur, Sandersville Railroad cannot (1) continue operations on its current tracks, or (2) use its existing land or right of way to build a similar spur.

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[101] *Id.* at 3.

[102] Those alternatives were: (1) [c]ontinuation of operations that have been preferred by the Railroad for at least the past 10 years;" (2) "[d]evelopment of a runaround at a site of a former spur rail line that is located about 2,000 feet west of the Quality Industries facility, within existing railroad right of way (ROW);" (3) "[d]evelopment of a run around at a site of a former spur rail line that is located about 2,500 feet west of the Quality Industries facility, within existing Railroad ROW;" and (4) "utilization of existing track at the Airline rail facility owned and operated by the Railroad." *Id.*

[103] *Id.* at 3.

Instead, Sandersville Railroad must construct a new spur line to accommodate its rail transportation business, and that plan does not have any reasonable alternatives.

In addition, the Spur's proposed route has no reasonable alternatives.[104] The proposed route is designed to connect CSXT's Camak line near Highway 16 east of Sparta and the Hanson Quarry, Pittman Construction, and the transload facilities of Revive Millings, Veal Farms Transload, Southern Chips, and others. Many factors constrained the route, including elevation requirements (rails cannot exceed 1.5% in grade under AREMA design standards) and engineering standards, Two Mile Creek (regulated by the Georgia Environmental Protection Department), the Creek's floodplain (regulated by the Federal Emergency Management Authority and the U.S. Army Corps of Engineers), the Vulcan quarry to the north, the wetlands of the Little Ogeechee River to the south, Georgia Power Transmission lines running north/south,

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[104] Even if there were alternatives to the route of the Hanson Spur, Georgia court have long recognized that "[w]here a railroad company [or any entity] has the right to condemn private property, it has large discretion in the selection of a location for its right of way." *Piedmont Cotton Mills v. Georgia Railway and Electric Company*, 131 Ga. 129, 134-35, 62 S.E. 52, 54 (1908) ("The railroad company has the authority in the first instance to judge of the matter as to how much land should be taken . . . . The mere fact that another location would be equally as feasible, practicable, and desirable would not of itself be sufficient to force the company to change to such location and abandon the location selected . . . ."); *Miles v. Brown*, 223 Ga. 557, 559, 156 S.E.2d 898, 900 (1997) ("With regard to the determination of whether property is 'necessary,' much discretion is vested in the condemnor to determine the necessity for the taking and to select the particular property to be condemned." (quoting *Sweat v. Georgia Power Company*, 235 Ga. 281, 284, 219 S.E.2d 384, 387 (1975)); *see also Morningside-Lenox Park Association*, Inc. v. State Highway Department, 224 Ga. 344, 347, 161 S.E.2d 859, 861(1968) ("The mere fact that one location would be equally as feasible, practicable and desirable as another location would not be sufficient to force the State Highway Department to change or abandon the location selected.") (citing *Piedmont Cotton Mills*, 131 Ga. at 136, 62 S.E. at 55 ("The word 'necessary' is not meant to be used in the sense of 'indispensable.'")).

And, such "discretion will not be interfered with or controlled by the courts unless it is shown that the condemning authority acted in bad faith or beyond the powers conferred upon it by law. *Sweat*, 235 Ga. at 284, 219 S.E.2d at 387.

and a Verizon Tower. (*E.g.,* T. Exhibit 5, Preliminary Rail Constraints Map; T. 473:12-476:12; 477:24-479:04 (Teague Testimony)). The route also reflected Sandersville Railroad's efforts to avoid residential structures while protecting ponds located on the Smith Parcels. (T. 480:7-12, 484:7-15 (Teague Testimony)).

These constraints "really narrowed things" for the engineers—they only found one corridor for the route that met the constraints once Georgia Power prescribed the path through its transmission lines. The southern limits of that route would have run between the Smiths' ponds, and therefore the northern route through the corridor was chosen. (T. 487:16-488:13 (Teague Testimony)).

There are no other rail routes to CSXT that are economical for East middle Georgia farmers, businesses, and industries. (T. 242:24-243:18 (Veal Testimony); T. 253:22-254:14 (Custer Testimony), T. 378:4-379:23 (Custer Testimony)). No other short line railroad has proposed a line from the Hanson Quarry to the CSXT line outside of Sparta. (T. 70:25-71:3 (Tarbutton Testimony)). And neither the owners of the Hanson Quarry nor CSXT have proposed to build a spur or a transload facility in Sparta. (T. 71:4-12 (Tarbutton Testimony)).

The hypothetical and uneconomical direct-to-CSXT transload option that Respondents' witnesses pontificate about is not an alternative to the Hanson Spur. The record here establishes there are no reasonable transportation alternatives, including the Respondents' hypothetical transload option, to the Hanson Spur to provide access to the CSXT rail system for HM, Pittman Construction, and the transload customers. Business leaders whose companies support the Spur—because it will strengthen their

businesses and enhance the benefits they provide their customers—testified that alternatives such as trucking their goods to a transload facility at the CSXT line, are cost prohibitive, inefficient, and not economical. (*See* T. 230:18-231:5 (Pittman Testimony) (explaining that the transload alternative is "highly impractical," "redundant," and would not be pursued), T. 1473:15-1474:19 (Pittman Testimony) (explaining same and that Pittman Construction "would not expect to engage in long-term business relations with Sandersville Railroad if the Railroad could not offer direct switching services at [Pittman Construction's] Sparta Plant."); T. 402:4-21 (Veal Testimony) (discussing why transloading is not economical to ship Veal Farms agricultural goods); T. 397:1-4 (Dickson Testimony) (stating that HM "cannot economically reach Canadys" or "Jacksonville, Florida," markets without the Hanson spur); T. 1509:21-1511:16 (Dickson Testimony) (explaining in detail why, as compared to the Hanson Spur, "a transload facility from truck to rail is a far less desirable long term, and likely unviable, transportation option for HM"); T. 403:10-22 (Custer Testimony) (testifying that it would be "impossible" to transload directly to rail in order to reach CSXT)).

In summary, nothing in *Great Walton* supports Respondents' opposition to the Hanson Spur. As a matter of law, it did not establish whether the proposed condemnation "best served" the public interest. Instead, the Commission determined that the proposed route was not necessary because there were alternative routes for the runaround that could reasonably accommodate the railroad's business. Here, there is no question that the Hanson Spur is necessary to accommodate Sandersville

Railroad's business and that there are no reasonable alternatives to its proposed route.

G. The claims asserted by the Respondent and Coalition "experts" are neither relevant nor meritorious.

1. The Testimony of Mr. Hunter

Petitioners contend that the testimony of Respondent's nominal expert, Mr. Hunter, does not qualify as expert opinion but only as testimony as to fact.[105] Whatever his standing as a witness, however, he provides no viable support for Respondent's opposition to the Petition.

Mr. Hunter argues that the Commission should deny Sandersville Railroad's petition because (1) the Hanson Spur is not a financially feasible project; (2) the promised public benefits of the Hanson Spur are illusory; and (3) reasonable alternatives to the Hanson Spur exist. (T. 1172:21-1174:19, 1198:12-21 (Hunter Testimony)). None of these arguments offered by Mr. Hunter are relevant to the Commission's task in this proceeding: to determine whether the Hanson Spur meets the statutory criteria for condemnation. *See supra* at Section III(B). Even if these considerations could be relevant, Mr. Hunter's testimony failed to demonstrate they should be of concern here.

Mr. Hunter's principal claim is that the Hanson Spur, in his opinion, is not a financially feasible project, and therefore cannot be a public use, as "[t]he 'public use' test for condemnation is not met if the project is not even feasible." (T. 1174:12-13

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[105] Sandersville Railroad Company's Objections to Pre-Filed Responsive Testimony, *In re: Sandersville Railroad Company; Hancock County, Georgia Acquisition*, Docket 45045, Document 216045 (Oct. 16, 2023), at 7-8

(Hunter Testimony)). Mr. Hunter is not a lawyer, (T. 1302:20-21 (Hunter Testimony)), and therefore his extensive testimony suggesting feasibility is a prerequisite to any public use determination (a legal test) should be disregarded. More important, neither Respondent's counsel nor witnesses, including Mr. Hunter and Dr. Kochan (discussed below), provide authority for this purported legal requirement. Nor could they.

As the U.S. Supreme Court has made clear: it is "only the taking's purpose, and not its mechanics . . . that matters in determining public use."[106] Any requirement for a party to demonstrate even "to a reasonable certainty" that the expected public benefits to a condemnation will "actually accrue" would represent a "departure from [the Court's] precedent."[107] And "where the exercise of the eminent domain power is rationally related to a conceivable public purpose, the [U.S. Supreme Court] has never held a compensated taking to be proscribed by the Public Use Clause [of the Fifth Amendment]." *Midkiff*, 467 U.S. at 241. Thus, any holding by the Commission that Sandersville Railroad did not meet its burden to show that the Hanson Spur would serve a *legitimate* public purpose on the grounds that it failed to show it would be feasible, (T. 1321:15-23 (Hunter Testimony)), would be inconsistent with the U.S. Supreme Court's holdings in *Midkiff* and *Kelo*.

In addition, Georgia law does not contain a feasibility requirement. Instead, it implicitly rebuffs such a notion. O.C.G.A. § 22-1-2(c)(1) provides: "[I]f property acquired

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[106] *Kelo,* 545 U.S. at 482 (quoting *Hawaii Hous. Auth. v. Midkiff*, 467 U.S. 229, 244 (1984)). The Respondents' counsel was also the condemnee's counsel in *Kelo*.
[107] *Id. a*t 487–488.

through the power of eminent domain from an owner fails to be put to a public use within five years, the former property owner may apply to the condemnor . . . for reconveyance or quitclaim of the property to the former property owner or for additional compensation for such property."[108] For a taking to be "considered to have been put to a public use" a condemnor must expend a "substantial good faith effort . . . to put such property to public use . . . notwithstanding the fact that the project may not have been completed."[109] The right of a condemned property owner to either reclaim their land or obtain additional compensation if the property is not put to a public use within five years after the condemnation demonstrates that Georgia law recognizes that the right to condemn a project does depend on proof of feasibility.

Even if a showing of feasibility were required to obtain condemnation authority, Mr. Hunter's testimony contradicts his conclusion that the Hanson Spur is not financially feasible. Mr. Hunter does not contest that, once constructed, a railroad will be operated if its revenues will cover its variable costs. (T. 1349:9-18 (Hunter Testimony); *see also* T. 12:3-7 (Tarbutton Testimony)).[110] Nor does he disagree that it need only make more annual revenue than its variable costs to be paying off its sunk capital costs. (T. 12:18-20 (Tarbutton Testimony)). Further, any failure to pay off those

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[108] O.C.G.A. § 22-2(c)(1).
[109] *Id.*
[110] Mr. Hunter's principal concern regarding feasibility is that, in the long-term, Sandersville Railroad will not be able to make a return on its investment. (T. 1205:16-1206:19 (Hunter Testimony)). However, Mr. Tarbutton has already stated that Sandersville Railroad is funding the entire project out of pocket, (T. 0120:4-18, 0139:3-7, 0145:14-15, 0146:20-0157:11 (Tarbutton Testimony)), so capital costs are not a concern for the long-term viability of the spur.

sunk costs is suffered only by the investor and not by the public or the railroad's customers. (T. 141:3-10, 167:3-16 (Tarbutton Testimony)). As such, to show "feasibility," (as Mr. Hunter, but not Georgia law, requires), Petitioner need only demonstrate that the operator of the Hanson Spur would earn enough profit from the Hanson Spur to cover its variable costs to assure it would be available to provide channels of trade. (*Id.*).[111]

Mr. Dickson testified that HM projects that it will ship 400,000 tons of aggregate on the Hanson Spur. Mr. Hunter opined that 400,000 tons would equate to 67 carloads per week (T. Ex. 50 (Errata of Exhibit 3 to Mr. Hunter's Pre-filed Testimony, at 39) or 3484 carloads per year (T. Ex. 50 at 6, 24, 44) based on a railcar holding a maximum of about 114 tons per load (T. Ex. 50 at 17; T. 1184:1 (Hunter Testimony)). Mr. Hunter projects that Sandersville Railroad's variable costs on the Hanson Spur will be approximately $250,000 in 2024 (T. Ex. 50 at 6, 24, 44) and that it will be able to charge no more than $1.09 per ton, or $124 per carload. (T. Ex. 50 at 23).[112] Under Mr. Hunter's analysis, this means that Sandersville Railroad can anticipate an annual revenue of $432,016 in 2024, which is well above the level of variable costs he identified (T. Ex. 50

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[111] Looking at feasibility from another perspective, Hearing Officer Bond inquired at the hearing whether a proposal by a bankrupt company to condemn a property for railroad use would meet the test for the Commission to authorize condemnation. (T. 1449:21-1450:5). Counsel for Petitioner answered, "for there to be an accommodation of a business [that requires condemnation], you've got to have a business." (T. 1450:6-13). In this case, the record shows that the Petitioner, Sandersville Railroad, is a long established successful railroad business, *see supra* Section I(B); (T. 0159:16-0160:2 (Tarbutton Testimony), and has the means to make the capital investment required to construct the Hanson Spur, *supra* n.105..

[112] Sandersville Railroad does not endorse any of Mr. Hunter's numbers. Given that five companies intend to use the Hanson Spur, Sandersville Railroad anticipates a greater number of annual carloads and anticipates charging higher rates than Mr. Hunter's purported "maximum" rate per ton.

at 6, 24, 44), and this is true for every year that Mr. Hunter projected.[113] Even if the Commission were to accept Mr. Hunter's test, his "feasibility study" provides no support for the notion that the Hanson Spur will not attract sufficient revenues to serve its public purpose.

Mr. Hunter's argument that the Commission should deny Sandersville Railroad's petition because the benefits of the Hanson Spur are illusory fails for many of the same reasons as his feasibility argument. The U.S. Supreme Court's rejection of a requirement to demonstrate that a proposed project's benefits will "actually accrue" and Georgia law's provision that all that is required is a "substantial good faith effort" to put the condemnation to public use demonstrate that Sandersville Railroad does not have to show that the benefits of the Hanson Spur are real.[114] However, as explained in Section III(D) and Section III(E) *supra* Sandersville Railroad has shown that the public benefits of the Hanson Spur are not illusory.

Finally, Mr. Hunter argued that the Commission should reject Sandersville Railroad's petition because reasonable alternatives to the Hanson Spur exist. Mr. Hunter did not testify that there were proposed alternatives to the Hanson Spur that would provide direct rail service between CSXT and the Hanson Quarry. He also did

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[113] As a rule of thumb, GDOT (and industry watchers, a group that Mr. Hunter holds himself to be among (T. 1216:8-9 (Hunter Testimony)) identify that "[i]f a short line handles 100 revenue carloads per mile or more [per year], it is likely this railroad will be able to cover all long-term maintenance requirements and be profitable." (T. Ex. 53 at 4-13). As Mr. Hunter agreed during the Hearing, Sandersville Railroad will be operating well above that rule of thumb threshold on the Hanson Spur. (T. 1292:9-1293:12 (Hunter)).

[114] *See supra* n.103 and accompanying text.

not testify that any of his proposed alternatives would make the Spur unnecessary for the proper accommodation of Sandersville Railroad's rail transportation business. He limited his reasonable alternatives analysis to speculative inferences regarding the requirements of prospective shippers and Hancock County, neither of which is the Sandersville Railroad. Even in *Great Walton*, the Commission did not look to alternative transportation available to the railroad's sole customer; instead, the Commission looked at the railroad's alternatives.[115] Mr. Hunter's speculation regarding shipper and community options is irrelevant to the Commission's determination.

Mr. Hunter's speculative opinions also do not withstand scrutiny. His testimony that transloading to CSXT is a better transportation option for HM and Pittman Construction than the Hanson Spur is simply wrong. (T. 1187:21-1188:15 (Hunter Testimony)). The record shows the Hanson Spur will allow HM to move goods at lower cost while maximizing the efficiency of the quarry, minimizing noise impact through the construction of berms and moving HM's crushing mill further from residences, and realizing the environmental benefits of rail service. (T. 50:25-51:9 (Tarbutton Testimony); T. 371:17-372:3 (Dickson Testimony); T. 397:1-4 (Dickson Testimony) (stating that HM "cannot economically reach Canadys" or "Jacksonville, Florida," markets without the Hanson spur); T. 1509:21-1511:16 (Dickson Testimony) (explaining in detail why, as compared to the Hanson Spur, "a transload facility from

[115] *See supra* Section III(F).

truck to rail is a far less desirable long term, and likely unviable, transportation option for HM")).

By contrast, Mr. Hunter did not show that his "alternative" of transloading at a location adjacent to the CSXT line near Sparta, GA, met the service and other requirements of the shippers who hope to use the Hanson Spur. Nor, having failed to make any inquiry into the business requirements of those shippers before offering testimony, could he have done so. (T. 1240:1-1242:15 (Hunter Testimony)). More importantly, all those shippers testified that they would not find transloading directly to CSXT to be a satisfactory business alternative to the Hanson Spur. *See supra* III(F).[116]

2. The Testimony of Dr. Kochan

Respondents' witness Dr. Kochan argued that inherent in the definition of public use is the requirement of use by the "full public". (T. 1106:25-1107:3, T. 1126:20-23 (Kochan Testimony); *see also* T. 1073:17-1074:4 (Kochan Testimony) ("the public **at large** must have a potential to benefit" for a taking to qualify as for public use) (emphasis added)). He also maintained that any use which serves to benefit a "discrete set of private interests" cannot be a public use. (T. 1129:18-24 (Kochan Testimony)).

[116] Mr. Hunter also suggests that Hancock County or Sparta may have alternatives to the Hanson Spur for economic development (T. 1186:13-1187:20 (Hunter Testimony)), but his suggestions are merely hypothetical, unsupported by any facts or related analysis (T. Ex. 50 at 46-47) (demonstrating that Mr. Hunter conducted no analyses to support his assertions). More important, they are irrelevant. Sandersville Railroad contends there will be collateral economic development advantages arising from the development of the Hanson Spur but those advantages or the lack thereof cannot determine whether the Petition meets the requirements of Georgia condemnation law.

Dr. Kochan advocated an interpretation of "public use" defined by these notions, but admitted that these notions do not directly come from any case law, statute, or regulation, as they are his summary of the law. (T. 1126:20-25; T. 1131:17-1132:14 (Kochan Testimony)). This summary, however, mischaracterizes the governing law and contradicts Dr. Kochan's prior published recognition that the law today is not what he advocated in his testimony at the Hearing.

The governing law is that (1) use by the "full public" is not required for a public use determination; and (2) benefits to private interests do not preclude public use. Dr. Kochan's "full public" test was rejected explicitly by the U.S. Supreme Court over a century ago,[117] and Dr. Kochan has recognized this in his academic literature.[118]

As for the benefits that may accrue to private interests from a condemnation, the U.S. Supreme Court has stated that "the mere fact that property taken outright by eminent domain is transferred in the first instance to private beneficiaries does not condemn that taking as having only a private purpose,"[119] and "[q]uite simply, the government's pursuit of a public purpose will often benefit individual private

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[117] *See, e.g., supra* n.56-57 and accompanying text; *Mt. Vernon-Woodberry Cotton Duck Co. v. Alabama Interstate Power Co.*, 240, U.S. 30, 32 (1916) ("The inadequacy of use by the general public as a universal test is established."); *Rindge Co. v. Los Angeles County*, 262 U.S. 700, 707 (1923) ("It is not essential that the entire community, nor even any considerable portion, should directly enjoy or participate in an improvement in order to constitute a public use.").

[118] *See "Public Use" and the Independent Judiciary: Condemnation in an Interest-Group Perspective*, 3 Tex. Rev. L. & Pol. 49, 68–69 (1998) ("In 1916, the Court explicitly rejected the 'use by the public test'").

[119] *Midkiff*, 467 U.S. at 243–44. Accordingly, Dr. Kochan was forced to recognize in his academic writings that "[a]ctual 'use' by the public . . . has no place in the modern public use standard." *See* "*Public Use" and the Independent Judiciary: Condemnation in an Interest-Group Perspective*, 3 TEX. REV. L. & POL. 49, 75 (1998).

parties."[120] The U.S. Supreme Court has also recognized that "[t]he public end may be as well or better served through an agency of private enterprise than through a department of government—or so the Congress might conclude."[121]

In addition to advocating for public use criteria that have no legal basis, Dr. Kochan does not adequately engage the law governing this proceeding.[122] He makes repeated reference to the Framers' intent behind the Takings Clause in the Fifth Amendment but does not recognize that the U.S. Supreme Court requires deference to state legislatures in condemnation matters.[123] Deference to the legislature here would require engaging with Georgia law, which explicitly defines what constitutes as public use.[124] Dr. Kochan, who is not a Georgia lawyer, made no effort to interpret Georgia's Constitution,[125] statutes,[126] regulations, or case law[127], instead relying on 18th century

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[120] *Kelo*, 545 U.S. at 485.
[121] *Berman v. Parker*, 348 U.S. 26, 33–34 (1954).
[122] Dr. Kochan does not refer to the U.S. Supreme Court's landmark decision in *Kelo* regarding the modern courts' interpretation of the phrase "public use" other than Justice Thomas' **dissenting** opinion. *See* (T. 1070:24-1071:7 (Kochan)).
[123] *See supra* Section III(A). Yet Dr. Kochan in his article, *The [Takings] Keepings Clause: An Analysis of Framing Effects from Labeling Constitutional Rights*, 45 Fla. St. U. L. Rev. 1021, 1067 (2018)), recognizes this requirement (as articulated in *Kelo*) of deference to legislative judgments.
[124] *See supra* Section III(B).
[125] As evidence of his cavalier interpretation of the Georgia Constitution—the text of which he referenced only once in passing, (T. 1067:3-6 (Kochan Testimony))—Dr. Kochan failed to recognize that the state of Georgia has had ten constitutions since it became the fourth state to ratify the U.S. Constitution. LaVerne Hill & Melvin Hill, *Georgia Constitution*, NEW GEORGIA ENCYCLOPEDIA, https://www.georgiaencyclopedia.org/articles/government-politics/georgia-constitution/ (last modified Sept. 29, 2020). In that time, Georgia has amended its Takings Clause several times, one of the most notable being the swap from the "public use" language it adopted in 1861 to the current "public purpose" language it adopted in 1877. *See supra* n.45. Any comprehensive analysis of term "public use" in Georgia condemnation law would have included reference to these constitutional amendments.
[126] In fact, as pointed out by Sandersville Railroad counsel at the hearing, there is no reference to Title 22 of the Georgia code at all in any of Dr. Kochan's pre-filed testimony, including the statute defining "public use" under Georgia law. *See* (T. 1104:1-1105:2; 1117:15-21 (Kochan Testimony)).
[127] Dr. Kochan admitted he did not discuss any Georgia appellate caselaw. (T. 1118:25-1119:16 (Kochan Testimony)).

dictionaries to define the term "public use." (T. 1072:23-1074:7 (Kochan)).

Defending his position not to include citations to specific Georgia law, Dr. Kochan claims that he did not want to write a legal brief. (T. 1120:7-14 (Kochan)). But, his omissions allowed him to make sweeping statements about purportedly applicable law without citing a single Georgia statute or case that is relevant to this proceeding. (T. 117:11-1119:16 (Kochan Testimony)). His legal omissions demonstrate that his position is contrary to law. His testimony's purpose—to "address the historic and linguistic understanding of the term 'public use,'" (T. 1064:7 (Kochan))—is based on anachronistic law and his personal legal preferences. His views have no precedent in Georgia law or the U.S. Constitution. Dr. Kochan's testimony has no relevance, therefore, to the Commission's determining whether the Petition satisfies the requirements laid down by the Georgia legislature.

The only question before the Commission is whether the proposed condemnation meets Georgia's requirements.[128] Dr. Kochan improperly invites the Commission to rewrite Georgia's constitution and its statutes.

Dr. Kochan's testimony is intended to support the ideological crusade of the Institute for Justice to make new federal constitutional law.[129] Respondents seek the

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[128] *See supra* Section III(B). Had Dr. Kochan addressed the governing Georgia law, he would have been forced to recognize that the Hanson Spur, by providing a channel of trade to access the national rail network, and accommodating the business of the Sandersville Railroad, will serve a public purpose as defined by the Georgia Assembly's criteria for authorizing condemnation.

[129] Although Dr. Kochan claims he is not challenging the facial constitutionality of O.C.G.A. 22-1-1, which defines public use as "the providing of channels of trade or travel," he was unable to describe a railway taking that would meet his test for "public use" under the constitution. (T. 1120:24-1121:16; T. 1136:20-1137:7 (Kochan Testimony) ("I don't think I can come up with a hypothetical standard for what,

application of a new law based on a discarded notion of public use, not the application of existing law. But this academic crusade is not germane to the Commission's task: determining whether the Hanson Spur serves a public purpose or public use, as those terms have been defined by Georgia's appellate courts.

Even if it were relevant to this proceeding, Dr. Kochan's alternative to the law also makes no practical sense. If Respondents mean to exclude privately-owned utilities from using the powers of condemnation, most railroad, communications, and energy production and transportation enterprises in the U.S. would be precluded from expanding their facilities where private landowners would not sell to permit such expansion.[130]

With the possible exception of public roads, parks, and other facilities generally open to the public,[131] there are no means of communication, transportation, energy generation or transmission, that are not limited geographically, economically,

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you know, the exact parameters of what would meet the test")). Dr. Kochan even stated that even if "every quarry, every farmer, and every pulp mill chipping wood shipped on the Hanson Spur," the development of the Spur would not necessarily serve a public purpose. (T. 1157:22-25 (Kochan Testimony)).

[130] Dr. Kochan's testimony demonstrates how far afield Respondents wish to go to support their theories regarding private ownership and public use. Dr. Kochan contends that if Amazon were authorized by a state law to use condemnation authority to build a privately owned road to one of its warehouses that road would not be a public use, even though access to the warehouse would establish a channel of trade for hundreds, or even thousands, of companies. (T. 1133:12-1134:18; 1148:4-13; 1152:22-25 (Kochan Testimony)). But, as interesting as that hypothetical might be, it does not have relevance here, where Georgia has authorized condemnation by privately owned railroads when the condemnation meets a public purpose narrowly defined by the legislature.

[131] Dr. Kochan claims that a "true" channel of trade requires "access among the entire public to use this channel," which he analogizes to "a highway in which . . . traffic is going that creates this channel." (T. 1147:24-1148:3 (Kochan Testimony)). Dr. Kochan disregards that accessing a public road requires owning a vehicle, paying for a driver's license, insurance, and taxes, which means that even a public road is only a possible exception to his and Respondents' proposed "public use" test.

functionally, or by regulation to a limited segment of the population.[132] Few, if any segment of the public may use the services of any public or private electric utility, for example, without paying for those services. The same is true for customers of gas utilities, private railroads, and telecommunications companies. Yet many, if not all, of these companies, publicly and privately owned, depend on condemnation authority to secure property – especially linear rights of way – essential to their provision of services to those who can provide that compensation.

3. The Testimony of Dr. Walker

The Testimony of Dr. Erica Walker should be given no weight in this proceeding because her testimony does not address the legal standards relevant to the Commission's decision in this proceeding: whether the condemnation would provide channels of trade or would be necessary for the proper accommodation of the Sandersville Railroad.[133] Rather, the testimony of Dr. Walker provides merely her subjective opinion regarding how the sound and noise of the train would affect the community.

Dr. Walker's flawed and hastily prepared analysis does not support her subjective opinion that "the noise from operation of an active rail line will be

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[132] When asked to imagine a rail service that meets the burden of his test, Dr. Kochan could only point to "long-range rail" that engages "a diverse set of goods and diverse set of companies." (T. 1135:23-1136:3 (Kochan Testimony)). Under Dr. Kochan's test, a short line railroad serving a few customers in a local region would not withstand scrutiny. See (T. 1137:1-1138:7 (Kochan Testimony)). However, short line railroads are essential for ensuring that the Class I railroads are carrying those goods and serving those companies. *See supra* Section I(A). The impossibility of meeting a standard akin to Dr. Kochan's inchoate and crabbed notion of "public use" is the reason the U.S. Supreme Court explicitly rejected it over a century ago. *See supra* Section III(A).

[133] *See supra* Section III(B).

overwhelming to the residents of Sparta." (T. 697:19-22 (Walker Testimony)). Dr. Walker's analysis is flawed in many ways but most fatally by making the mistake of using the sound of a mainline Class I train that goes through what is apparently her hometown in Mississippi as a proxy for the short line Class III train used by Sandersville Railroad. (T. 694:3-4; T. 694:8-10; T. 717:24-718:1; T. 724:15-23 (Walker Testimony) (In response to the question "[D]id you do any analysis to determine whether the type of train that is proposed here is anywhere close to the Class [I] train that runs through Mendenhall, Mississippi?": "So, no. We just measured in Mendenhall . . . ."). Dr. Walker's analysis did not account for any difference in the engine size of the locomotive of the Class I railroad in Mendenhall and the engine size of the locomotive of Sandersville Railroad, a Class III railroad. (See T. 733:17-21 (Walker Testimony)). Similarly, her analysis did not account for any difference in the speed of the locomotive of the Class I railroad in Mendenhall and the speed of the locomotive of Sandersville Railroad on the Hanson Spur. (T. 726:15:24; 728:16-19; *See* T. 733:17 (Walker Testimony)). Even though Dr. Walker sent people to Sparta, Georgia to record sound levels in the community she didn't ask them to drive 25 miles further to Sandersville Railroad to record the sound levels of the actual train used by Sandersville Railroad. (T. 0724:1-8 (Walker Testimony)).

Dr. Walker's analysis also does not address or compare the sound or noise of the alternative to the rail spur—the increased noise of tractor trailers from the Hanson Quarry roaring down the roads of the community to carry products to market. (*E.g.*, T. 703 (Walker Testimony)). Sandersville Railroad expects to handle by rail the

equivalent of 130 truckloads per day, but Dr. Walker fails to provide any analysis of the sound or noise caused by the truck traffic that would exist without the Hanson Spur. (*Id.*). Her analysis also fails to provide any analysis of the improvement of sound or noise level in the community when, because of the development of the Hanson Spur the Quarry moves its operation further away from homes and installs berms to reduce sound level from both quarry and railroad operations. (*See* T. 728:5-13 (Walker Testimony)). Dr. Walker also failed to account for the sound level of activities currently pursued by the residents in the community—bird hunting, 12-gauge shotgun: 155-165 dB; Deer hunting at sunrise or sunset, 30-30 rifle: 156 dB; and timber harvesting, chain saw: 100 dB. (T. 729:4-731:14 (Walker Testimony)). All of these sounds in the community are much greater than the sound of a Class I train (95.0 dB at a maximum) (T. 703, Table 1 (Walker Testimony)), let alone a smaller, thereby quieter, short line train easing down a spur one round trip a day.

Although Dr. Walker attempts to deflect her failure to analyze the sound level of these existing activities by stating that the participants "are volunteering to participate in those activities" (T. 729:16-22 (Walker Testimony)), this is a red herring, because the sounds caused by the individuals "volunt[arily]" "participat[ing] in those activities" can be heard through the community by people who did not choose to participate. (T. 729:25-730:2). Dr. Walker's subjective conclusion that the sound or noise of a slow-moving train "will be overwhelming" to the community lacks foundation and her testimony has no bearing on the issue to be decided by the Commission in this proceeding.

4. The Testimony of Dr. Bailey

The testimony of Dr. Conner Bailey is also not relevant to the Commission's proper inquiry in this proceeding. Dr. Bailey's testimony discusses his personal doubts regarding the benefit of the Hanson Spur to the business interests that testified on behalf of the Spur and benefits to the economy of Hancock County. None of these doubts are relevant to the Commission's decision.[134] (*See, e.g.*, T. 0667:25-14 (Bailey Testimony) (stating his testimony does not discuss "public use," "the opening or continuation of channels of trade," or the "functioning of public utilities." (T. 667:25-14 (Bailey Testimony)).

First, Dr. Bailey argues that the development of the Hanson Spur is superfluous because Veal Farms Transload and Revive Milling will have to truck their goods to the Hanson Spur to access the CSXT rail network and could just as easily truck their goods directly to CSXT instead. But Mr. Veal testified under oath that the Hanson Spur would benefit his business, and that he could not transload his goods directly onto CSXT because there is not a truck scale there and "we can't justify putting a truck scale at a small transload facility." (T. 387:2-3; 402:2-16 (Veal Testimony)).

Dr. Bailey also discusses his doubts regarding the economic benefits of the Spur to the people of Hancock County. But, as previously discussed, the definition of public

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[134] In fact, Dr. Bailey even testified that "if the rail spur was to be constructed, then that is a new channel" of trade. (T. 698:25-669:1; *see also* (T. 669:22-25 (Building a -- I think a 'channel of trade' must be a term of art for lawyers. It -- would it create a new means for Heidelberg Materials to move material? Yes.")); T. 670:20-671:2 (stating that landowners constrained by the costs of truck transport would have a new market for their timber if a rail line opened) (Bailey Testimony)).

use for condemnations as defined in O.C.G.A. § 22-1-1(10) explicitly excludes "economic development," and as discussed *supra*, economic development is an added benefit of the Hanson Spur, but not its public purpose.[135] Dr. Bailey's unwarranted skepticism regarding the economic benefits of the Hanson Spur is not relevant to the Commission's decision regarding whether the Hanson Spur "provides a channel of trade" to East middle Georgia, which it undeniably does.[136]

Dr. Bailey's testimony also discusses the history of Black land ownership in the South. (T. 649:2-650:12; T. 651:14-653:10 (Bailey Testimony)). He testifies at length about the significant land loss by Black farmers and property owners over the past 100 years,[137] due to "predatory legal practices associated with heirs property," discriminatory lending by the U.S. Department of Agriculture and commercial lenders, "and other discriminatory practices." (T. 652:1-7 (Bailey Testimony)). These practices were reprehensible. However, as acknowledged by Dr. Bailey, there are no facts in this proceeding that indicate any discriminatory intent by Sandersville Railroad.

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[135] O.C.G.A. § 22-1-1(9)(B) ("The public benefit of economic development shall not constitute a public use."); *see supra* (intro to Section III).

[136] Dr. Bailey begins his testimony by outlining the economic challenges facing Hancock County, including poverty and low educational qualifications among its workforce. (T. 646:22-647 (Bailey Testimony)). And, although Dr. Bailey acknowledges that eight to ten new jobs with average compensation of $90,000 a year would be generated by the development of the Hanson Spur, "in [his] opinion, this small number of jobs is insufficient as a public good to justify property takings through eminent domain." (T. 656:1-4 (Bailey Testimony)). Luckily for the underemployed population of Hancock County, Dr. Bailey's "opinion" about what is or is not a public good is not the test for "public use" that this Commission should apply in this case.

[137] Dr. Bailey's testimony actually says the land loss of the past "10 years," but the context of the sentence indicates this was likely a typographical error. (T. 651:14-17 (Bailey Testimony)).

IV. Conclusion

Based on the above and the evidence presented at the evidentiary hearing, Sandersville Railroad respectfully requests that the Commission grant its Amended Petition and authorize it to acquire by condemnation the real property in unincorporated Hancock County more particularly described in the Amended Petition.

This 16th day of January 2024.



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BEFORE THE

GEORGIA PUBLIC SERVICE COMMISSION

In re: Sandersville Railroad Company; Hancock County, Georgia Acquisition	**Docket No.: 45045**

CERTIFICATE OF SERVICE

I certify that I have this day served a copy of the foregoing **Post-Hearing Brief of Sandersville Railroad Company's** upon the following persons by causing electronic copies of the same to be transmitted to each party that has supplied a valid email address and upon all other parties via first class mail with adequate postage affixed thereon and deposited in the United States Mail addressed as follows:

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