INSTITUTE FOR JUSTICE

February 6, 2024

VIA ALTERNATIVE ELECTRONIC FILING

Ms. Sallie Tanner
Executive Secretary
Georgia Public Service Commission
244 Washington Street, SW
Atlanta, Georgia 30334
stanner@psc.ga.gov

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

Dear Ms. Tanner:

Enclosed please find the *Post-Hearing Brief of Respondents* for filing in the above captioned matter. As required by the alternative electronic filing procedures and the Scheduling Order and Notice of Hearing filed in this case on May 18, 2023, copies will be mailed to the Commission on this date via UPS Next-Day Air, postage pre-paid.

If you have any questions, please do not hesitate to contact our office. Thank you for your attention to this matter.

Sincerely,

Cara Di Silvio

Cara Di Silvio
Paralegal

Enclosure

901 N. Glebe Road, Suite 900 Arlington, VA 22203 (703) 682-9320 (703) 682-9321 Fax
general@ij.org www.ij.org

BEFORE THE
GEORGIA PUBLIC SERVICE COMMISSION

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

POST-HEARING BRIEF OF RESPONDENTS

on behalf of the Property Owner Respondents

February 6, 2024

Grant E. McBride
Georgia Bar No. 109812
SMITH, WELCH, WEBB & WHITE,
ATTORNEYS AT LAW
2200 Keys Ferry Court
P.O. Box 10
McDonough, GA 30253
Tel.: (770) 957-3937
Fax: (770) 957-9165
gmcbride@smithwelchlaw.com

Robert B. Baker
Georgia Bar No. 033881
ROBERT B. BAKER, PC
2480 Briarcliff Road, NE, Ste. 6
Atlanta, Georgia 30329
(706) 207-5002
bobby@robertbbaker.com

William R. Maurer*
Washington Bar No. 25451
INSTITUTE FOR JUSTICE
600 University Street, Ste. 1730
Seattle, WA 98101
(206) 957-1300
wmaurer@ij.org

Elizabeth L. Sanz*
California Bar No. 340538
Renée D. Flaherty*
District of Columbia Bar No. 1011453
William Aronin*
New York Bar No. 4820031
Michael Greenberg*
District of Columbia Bar No. 1723725
INSTITUTE FOR JUSTICE
901 N. Glebe Rd., Ste. 900
Arlington, VA 22203
(703) 682-9320
bsanz@ij.org
rflaherty@ij.org
waronin@ij.org
mgreenberg@ij.org

**Admitted pro hac vice*
Counsel for Property Owner Respondents

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INTRODUCTION

Respondents[1] file this Response to the Post-Hearing Brief ("Br.") of Sandersville Railroad Company ("Sandersville" or the "Railroad"). Based on the written testimony, the four-day hearing before the Hearing Officer, and Sandersville's post-hearing brief, the Railroad has failed to meet its burden of demonstrating that its proposed condemnation of Respondents' property meets the requirements for a railroad's exercise of eminent domain under Georgia law. Respondents therefore respectfully request that the Hearing Officer enter, and the Commission adopt, an order denying Sandersville's amended petition.

The Railroad did not meet its burden for the following reasons. First, even under a deferential interpretation of the Fifth Amendment, the Railroad's proposed condemnation is not a public use. It is instead a pretextual private taking resulting in a transfer of property to identified corporate beneficiaries, a kind of taking the U.S. Supreme Court has said is impermissible. The Railroad's invocation of a public use of "providing … channels of trade"[2] is "the mere pretext of a public purpose"[3] raised late in the game by the Railroad.

This conclusion is consistent with Georgia case law. The Railroad's proposed customers do not possess any attributes recognized by Georgia courts that would link their private interests to the interests of the public—they are private industries serving private interests and the contemplated condemnation here would serve only those interests. The entirely private nature of the proposed condemnation is reflected in the Georgia Supreme Court's explicit holding that the

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[1] Respondents are R. Donald Garrett, Sr. and Sally Garrett; Leo and Georgia Briggs; Marvin Smith, Jr. and Pat Smith; William Blaine and Helen Diane Smith; Verne Kennedy Hollis, Donna N. Garrett, Herus Ellison Garrett, and Sally G. Wells; Joel and Kathy Reed; and Thomas Ahmad Lee.

[2] O.C.G.A. § 22-1-1(9)(A)(iii).

[3] *Kelo v. City of New London*, 545 U.S. 469, 477-78 (2005).

most significant business to be served by Sandersville's proposed line, "the enterprise of quarrying stone and marketing the same[,] is purely private, and one in which the public has no interest."[4]

Sandersville has also failed to meet its burden of demonstrating that it meets the statutory standards applicable to condemnations by railroads in this state. First, the Railroad has not demonstrated that the proposed line is "necessary for the proper accommodation of the business of the company."[5] The proposed line will not accommodate Sandersville's business at all—the line is entirely disconnected with, and will not serve, the existing Sandersville rail line. Moreover, as demonstrated by Respondents' expert on railroad operations, Gary Hunter, and the detailed, thorough analysis he produced, the proposed Hanson Spur is not economically feasible. In contrast to Mr. Hunter's work, the Railroad has produced no economic analysis, documents, or testimony resting on an adequate foundation of the line's costs, rates, or possible alternatives. It has not produced sufficient evidence that demonstrates that this line will be profitable, provide a return on investment, and avoid becoming a drain on the capital and resources of Sandersville's pre-existing railroad operations. While "trust us" may justify the Railroad spending millions of dollars gambling with its own money, it is not enough to justify the Railroad's taking of Respondents' property against their will. Indeed, the Railroad's failure to provide sufficient evidence alone would justify the Hearing Officer and the Commission denying the Amended Petition.

Second, the evidence adduced in this case does not demonstrate that the proposed "Hanson Spur" will "provid[e] … channels of trade," the Railroad's tardily offered justification for this project. The channels of trade by which the Railroad's customers may market their products already exist—these customers simply do not wish to spend the money to use them, preferring

[4] *Jones & Co. v. Venable*, 120 Ga. 1, 1, 47 S.E. 549, 550 (1904) (cleaned up).

[5] O.C.G.A. § 46-8-120(a)(4).

instead that Respondents bear the burden of promoting the customers' businesses. However, Respondents should not lose their land, peace of mind, and heritage so that corporations may save money on shipping. Moreover, the Railroad's reading of the term is contrary to the text, context, and history of the term.

This brief proceeds as follows. First, Respondents relate the facts relevant to the Hearing Officer and the Commission's consideration of this case. Second, Respondents present the relevant constitutional, statutory, and interpretative standards necessary for the Commission's consideration of this case. Third, Respondents discuss how the Railroad's proposed condemnation does not meet the standard for "public use" under the U.S. and Georgia Constitutions. Fourth, Respondents discuss Georgia decisions recognizing that the businesses to be served by the Hanson Spur are entirely private and not related to any interest of the public. Fifth, Respondents discuss how the Railroad has failed to meet the conditions for the exercise of eminent domain by railroads under relevant Georgia statutes.[6]

RESTATEMENT OF FACTS

This case concerns the efforts of a private railroad company to condemn Respondents' property so that it may build a rail line the Railroad alleges will serve several private companies. In the following sections, Respondents lay out the facts relevant to the Commission's consideration of whether it should permit this condemnation to go forward, including a discussion of the facts adduced during the four-day hearing before the Hearing Officer.[7]

[6] Respondents concur with, and expressly adopt, the arguments made by Intervenors No Railroad in Our Community Coalition ("Intervenors") in their post-hearing brief as if fully set out in Respondents' post-hearing brief.

[7] The Railroad's brief relies heavily on its pre-filed testimony and exhibits, and it provides little discussion of the testimony adduced on cross-examination. In that regard, while the transcript of the live testimony from the four-day hearing (excluding exhibits, closing arguments, and the discussion of the briefing schedule) runs to 928 pages, the Railroad cites to live testimony only 35 times in its 63-page post-hearing brief.

1. Respondents and Their Property.

The Railroad's post-hearing brief discusses Respondents and their properties only by relating their identities and where their property is located. *See* Br. 17. It believes Respondents' testimony about their property and what it means to them is "not legally relevant in this proceeding." Br. 28. However, the Commission must approve the proposed taking here and this requirement exists "for the protection of the condemnee's property rights[] and is a valuable safeguard against his property being improvidently taken by railroad companies." *Pickett v. Georgia, Fla. & Ala. R.R.*, 98 Ga. App. 709, 712, 106 S.E.2d 285, 287 (1958) (discussing previous version of the statute). Respondents' testimony thus lies at the heart of this proceeding. Because the Commission cannot protect Respondents' property from being improvidently taken without knowing what that property is and what it means to Respondents, they begin by discussing exactly that.[8]

The Railroad seeks to take sections of properties owned by Respondents near Sparta, Georgia. Br. 17. The condemnation the Railroad contemplates will not, as the Railroad suggests, simply deprive Respondents of small strips of land in the wilderness. In addition to the specific parcels the Railroad wishes to acquire, the taking will destroy many attributes of Respondents' remaining property. Respondents vigorously oppose this taking because they are deeply invested in the heritage, use, and enjoyment of their property. They have longstanding ties to it. They use and benefit from it, and they deeply value it.

[8] Respondents also note that the history, character, and use of the property sought to be condemned was an integral part of the Commission's consideration in the Commission's most recent decision considering whether to approve a railroad's petition for condemnation. *See* Order by Commission Reversing the Hearing Officer's Initial Decision and Denying the Petition for Condemnation, *In re: The Great Walton Railroad Co., Inc. d/b/a The Hartwell Railroad Co.'s Petition for Approval to Acquire Real Estate by Condemnation*, Docket 41607, No. 173807, 2018 WL 4154017, at *3 (Ga. Pub. Serv. Comm'n, Aug. 24, 2018).

The Smith family's properties (Parcels 6, 7, 8, 10, and 11). The Smith family has owned its land for almost a century. (Tr. 761:9.) The Smith's great-grandmother was born into slavery on the plantation that once occupied the land they now own. (Tr. 761:10.) Her son-in-law, the Smiths' grandfather, was able to purchase several hundred acres that have been in the family ever since—an exceptional success, given the significant history of land loss suffered by black farmers and families over that time. (Tr. 651:14-653:5, 761:11.) Today, the Smith family land is owned by William Blaine Smith and his wife Diane; David Mark Smith and his wife Janet; Marvin Smith, Jr. (Blaine's and Mark's cousin) and his wife Pat; and Thomas Ahmad Lee (Blaine's and Mark's nephew).[9] These are legally discrete parcels but are all physically connected. (Tr. 591:12-21 (Mark and Janet Smith Test.), 762:7-13 (Teague Test.).) The Railroad seeks to take land from parcels owned by Blaine, Marvin, and Ahmad.[10] (Tr. 459:16-460:1.)

The Smiths live and gather at their family property. (*See* Tr. 762:22-763:12 (Blaine Smith Test.); 819:11-14 (Marvin Smith Test.); 543:6-11 (Mark Smith Test.); 592:10-593:17 (Janet Smith Test.).) They farm it, timber it, and enjoy it. (*Id*.) They share its produce with local elderly residents through their private food ministry and provide produce to the Georgia Department of Public Health, which distributes it through Helping Hands Food Pantry to Hancock County. (*Id*.) They open it to neighbors for fishing and recreation. (*Id*.) They maintain and use the original Smith family "home house," and preserve old outbuildings and farm relics left over from sharecropping eras. (*Id*.) They see their land as an opportunity to build generational wealth and feel a responsibility to pass it to future generations intact, as their ancestors passed it to them. (Tr. 548:3-10, 764:5-20, 820:3-7.)

[9] Blaine, Marvin and Ahmad are Respondents in this proceeding. Mark is an Intervenor in this proceeding.

[10] The Hanson Spur will run very close to Mark and Janet's house and pond but will not cross their parcel.

The Garrett family's properties (Parcels 13 and 14). The Garrett family land has been in the family since just after the Civil War. (Tr. 891:24.) Parcel 13 is owned by Don Garrett, Sr. and his wife Sally. (Tr. 466:9-13.) Don's nieces Sally G. Wells, Donna N. Garrett, Verne Kennedy Hollis and nephew Herus Ellison Garrett own Parcel 14. (Tr. 467:9-17.) Don and Sally Garrett live on and use their family land fully; they live, garden, timber, hunt, fish, hike and gather at their properties. (Tr. 892:10-21.) No barriers exist between the various Garrett parcels. (Tr. 967:2-968:24, 974:8-14.) As Don, Sr. testified, the Garrett family land is the center of the Garrett family history. (Tr. 893:10-12.)

Sandersville wants to take acres from the two Garrett parcels. (Tr. 459:16-460:1.) The Hanson Spur will run through the middle of the parcels, cutting them in half and destroying their access to half their property. (*See* SRR Ex. 6 (map of route, bisecting multiple parcels) and Tr. 900:8-18 (describing how the train will run through a small gorge and cut off a private road).) The Garretts will only be able to access half of their property through a small crossing the railroad proposes to install. (Tr. 900:8-18.) The Railroad alleged that the Garrett parcel does not include structures (Tr. 467:3-4); but, in fact, Don, Sr. and Sally have lived, and continue to live, in their home on their property for their entire marriage (Don, Sr. has lived on his land for 72 of his 76 years). (Tr. 892:8-11.) While Don and Sally's house is on a separate tax parcel from the rest of their acreage, their property is one contiguous piece of land. (Tr. 967:14-968:24.) Their land is part of a government conservation program for planting trees and conserving soil. (Tr. 892:15-20.)

The historic Garrett home house lies on the Garrett family land. It sits on a parcel that Don, Sr. deeded to his son Don, Jr. and which is landlocked within Don, Sr.'s parcel. (Tr. 893:6-24.) The Hanson Spur will run within a few hundred yards of the Garrett home house (*Id*.), and Don, Sr. testified that he worries for Don, Jr.'s mental peace, as he is a special operations military veteran who suffers from PTSD. (Tr. 956:2-957:9.) Sally Wells' niece Taylor's home is on a parcel

landlocked by the property belonging to Sally and her siblings. The Hanson Spur will run even closer to Taylor's home than it will to the Garrett home house. (Tr. 961:18-962:1.)

Joel Reed's property (Parcel 12). Joel Reed has owned his property for 25 years. (Tr. 1007:18-23.) He lives at his home there three months out of each year. He hunts, fishes, and hikes with his sons and grandchildren there. (Tr. 1008:1-19.) He has installed several deer stands. (*Id*.) He and his wife Kathy grow timber there for sale. Joel wishes to leave the property to his sons and grandchildren as it is. (*Id*.)

The Briggses' property (Parcel 6). Leo and Georgia Briggs have owned their property for 26 years. (Tr. 855:18-19.) Like all the surrounding properties, the Briggses' property was once part of a cotton plantation. (Tr. 855:23-856:3.) The Briggses maintain the property in its natural state because they value it in its current pristine condition. (*Id.*) The Briggses do not disturb the old cotton terraces. (Tr. 855:23-856:3.) They maintain an old mule barn and a century-old sharecropper's home on the property for their historical value. (Tr. 856:1-3, 14-15) Each week, Leo is on the property, using a small hunting cabin and several permanent deer stands that he built, and he has developed food plots to nourish deer, turkey, and doves. (Tr. 856:4-9.) The Briggses also keep the property in its natural state and intend to keep it that way for themselves and future generations. (Tr. 856:20-23.)

In sum, the properties at issue in this case are not just "pasture and timberland," as the Railroad has suggested. (Tr. 44:19-20.) It is personally and uniquely valuable to Respondents. It is also not isolated strips removed from larger properties, as the Hanson Spur will cut most of Respondents' properties in half. (*See* SRR Ex. 6.) This will limit their access and use of their property. Respondents worry about noise and disruption to the peaceful environments they have nurtured. (Tr. 811:21-812:25 (Blaine Smith Test.); 959:15-963:13 (Garrett Test.); 1002:14-1004:3 (Wells Test.); 1047:16-25 (Reed Test.); 882:3-883:8 (Briggs Test.).) Most of them have children

frequently on their property, and worry about safety for themselves, their grandkids, and their visitors. (*Id*.) They are also aware that a railroad line will degrade their land. (Tr. 813:1-9, 1002:21-1004:3.) If the Commission approves the Railroad's petition, it will disrupt the lives of these individuals and damage their heritage and legacies. (Tr. 824:10-16, 849:11-850:16 (Marvin Smith Test.); 894:14-17 (Garrett Test.); 980:6-10 (Wells Test.).)

2. Sandersville and the "Hanson Spur".

Sandersville is a short line railroad company[11] currently operating ten miles of mainline track in middle Georgia, about 25 miles from Sparta and Respondents' properties. (Tr. 30:21-31:2, 94:5-7.) Its current operation is state-chartered and regulated by the Commission and the federal Surface Transportation Board ("STB"). (Tr. 70:1-6.)

Sandersville currently provides contract switching services connecting industries to the Norfolk Southern ("NS") rail system, which is a Class I[12] railroad. (Tr. 30:21-31:2.) Sandersville's current customers can access another Class I rail system owned by CSX Transportation ("CSX") by paying the fee to switch from NS to CSX. (Tr. 38:12-15.) Currently, Sandersville has no business in Sparta. (Tr. 70:15-17, 102:21-23.)

Sandersville proposes to build a completely new, 4.5-mile short line railroad it calls the Hanson Spur, which would run between the Hanson Quarry to a mainline railroad owned by CSX. Am. Pet. ¶ 2. As its name suggests, serving the Hanson Quarry is the overwhelming reason Sandersville proposes to build the Hanson Spur. In April 2022, when Sandersville began

[11] Sandersville's post-hearing brief thoroughly discusses the operations of railroads in the United States in general and in Georgia in particular. Br. 4-10. The issue before the Commission, however, is not the services railroads currently provide, but whether Sandersville's proposed line meets the constitutional and statutory standards for condemning private property in Georgia.

[12] As Mr. Tarbutton explained at the hearing, railroads are classified by revenue thresholds, and Class I railroads are "the big guys." (Tr. 67:25-68:3.)

communicating about the Hanson Spur project to the public, the Railroad said the purpose of the project was to "serve the Hanson Aggregates Quarry near Sparta." (Tr. 912 (letter from Sandersville to Respondent Garrett).) In August 2022, Sandersville told locals that the Hanson Spur project would "allow Hanson to ship approximately 500,000[13] additional tons per year from the quarry." (Tr. 917 (Sandersville's Hanson Spur fact sheet).) In August 2022, Sandersville hosted a "community meeting" in Sparta where "project leaders" from the Railroad and the Hanson Quarry, and no other industry representatives, would be available to answer questions. (Tr. 916 (letter from Sandersville to Respondent Garrett).) In September 2022, Sandersville said the Hanson Spur is "necessary" because it will "allow the Hanson Aggregates Quarry … to deliver its aggregate … product more efficiently to customers outside the region in Georgia and along the eastern U.S." (Tr. 921 (Sandersville's September 2022 Hanson Spur FAQ).) No other users of the Hanson Spur were mentioned by Sandersville in any of these communications.

To build the Hanson Spur, the Railroad seeks to obtain land from 18 private parcels, including those owned by Respondents. Am. Pet. ¶ 8. Its attempts to acquire this land without using eminent domain were heavy-handed and misleading. In spring 2022, Sandersville began sending letters to property owners.[14] (*See, e.g.*, Tr. 775, 828, 909 (first letter to property owners); 916 (letter inviting property owners to "community meeting"); 919-20 (letter following August 2022 "community meeting"); 877 and 912 (letters regarding surveying); 929-30 (letter claiming "negotiations [had] concluded").) In these letters, Sandersville said that it "required" their land for a railroad to help the Hanson Quarry "increase production." (Tr. 775, 919.) The letters explained

[13] Sandersville later reduced this number to 400,000 tons. (Tr. 130:19-131:6.)

[14] Sandersville generally sent out the same series of letters to all Respondent Property Owners. *Compare* exhibits to Respondents' pre-filed direct testimony: Tr. 774-803 (Blaine Smith); Tr. 827-846 (Marvin Smith); Tr. 864-877 (Briggs); Tr. 906-953 (Garrett); Tr. 983-999 (Wells); Tr. 1016-1043 (Reed).

that the Hanson Spur project got its name from its "end user" (the Hanson Quarry) (Tr. 929-30), did not mention any other user, and emphasized the economic benefits from the Hanson Quarry's expansion.

In these letters, Sandersville told the parcel owners that it was "authorized by law to acquire property by condemnation," notwithstanding that it still needed to obtain approval from this Commission before it could condemn anything. *See, e.g.*, Tr. 929-30, 1023.

One series of letters explained that Sandersville was "build[ing] a new railroad track to serve the Hanson Aggregates Quarry near Sparta" and it was going to begin conducting field surveys of Respondents' properties. (*See, e.g.*, Tr. 912.) Sandersville ignored Respondents' refusals and, in summer 2023, the Railroad's agents began entering and surveying Respondents' land. (Tr. 897:18-898:1, 767:11-21.) In doing so, it cut fence locks to gain access, and damaged Respondents' property.[15] (Tr. 859:5-22 (Briggs Test. describing cut fence and damage); 1011:15-1012:2 (Reed Test. describing damage).)

In August 2022, Sandersville sent a letter to the parcel owners, inviting them to a "community meeting" where engineers and executives from the Railroad and the Hanson Quarry, and no other industry representatives, would answer questions. (*See, e.g.*, Tr. 916.) The letter was accompanied by a flier that indicated that the Hanson Spur will "allow Hanson to ship approximately 500,000 additional tons per year from the quarry." (Tr. 916-17.)

[15] At the hearing, Gregory Teague, CEO of Croy Engineering, which conducted land surveying and engineering design services for the Hanson Spur project, testified that his team "only entered onto properties where we [had] property-owner permission to go on to. For the ones that we did not, we observed them from the roadway, but I had crews that did get permission to do surveying and as well as the wetlands delineation that were under my supervision." When asked whose permission he had to enter the properties, Mr. Teague responded that, to his knowledge, all the property owners had given their permission. (Tr. 497:1-7.) This contradicts the statements of several Respondents that they did not grant permission for surveyors to come onto their land.

Benjamin Tarbutton III, the president and part owner of the Railroad, personally visited the homes of Blaine and Diane Smith and Marvin and Pat Smith. (Tr. 766:6-12, 821:6-16.) From Marvin's parcel, Sandersville is seeking about seven acres of right of way for the Hanson Spur, which would orphan about 29 acres from the rest of Marvin's parcel. (Tr. 821:21-822:9.) Mr. Tarbutton offered Marvin $3,000 per acre for the land required for the right of way, and then separately offered $1,700 per acre for the land the Railroad would orphan. (Tr. 851:11-25 (Marvin Smith Test.); 840-46 (exhibits showing offers).) Put another way, Sandersville sought to devalue Marvin's land by building a railroad on it and then buy the remaining land it just devalued—all in the same transaction. (Tr. 851:11-25.)

Through an acquisition agent, Sandersville mailed landowners summary statements for "just compensation," along with proposed contracts to sell Respondents' property to the Railroad at a value Sandersville's appraisers had set. (*See, e.g.*, Tr. 1027-1037 (proposed contract and supporting documents).) None of the documents suggested that Sandersville wished to negotiate the terms and conditions of the sale, nor did they invite Respondents to negotiate. In short, these offers were more contracts of adhesion than offers over which the parties could negotiate.[16]

By the end of 2022, Respondents remained steadfast in their refusal to sell to the Railroad. Sandersville then sent a letter, signed by Mr. Tarbutton, claiming that "negotiations [were] concluded." (*See, e.g.*, Tr. 929-30.) The letter told the property owners that they could request an "administrative review" with Sandersville Railroad, "just like the State of Georgia does when it acquires property," and that, to get that "administrative review," the property owner could contact

[16] A contract of adhesion is "a standardized contract offered on a 'take it or leave it' basis and under such conditions that a consumer cannot obtain the desired product or service except by acquiescing in the form contract." *Realty Lenders, Inc. v. Levine*, 286 Ga. App. 326, 329, 649 S.E.2d 333, 336 (2007) (citation omitted). While not strictly adhesive contracts because Respondents never desired this transaction in the first instance, the Railroad's "take it or leave it" position and the imbalance in bargaining position between the two parties makes the sale agreements look very much like adhesive contracts.

Mr. Tarbutton himself. (*Id*.) In that letter, like in all communications Sandersville had produced, the only user of the Hanson Spur mentioned was the Hanson Quarry. (*Id*.)

In March 2023, Sandersville petitioned this Commission to acquire by condemnation only the property owned by Donald Garrett, Sr. Pet. for Approval to Acquire Real Estate by Condemnation.[17] In its petition, Sandersville named all the property owners who owned land that Sandersville wanted. *See* Pet. Ex. C. When many of those property owners filed for leave to intervene, Sandersville amended its petition to seek authority to condemn all their parcels. Am. Pet. for Approval to Acquire Real Estate by Condemnation ("Petition" or "Am. Pet.").[18] In the Petition, and through Mr. Tarbutton's testimony, Sandersville claimed that "despite [its] best efforts to acquire the land needed to build the Hanson Spur by negotiated sale" it has been "unable to acquire it through good faith negotiations." Am. Pet. ¶ 14. (*See also* Tr. 45:3-7.)

3. The Proposed Uses for the Hanson Spur.

When Sandersville began communicating to the public about the Hanson Spur project, the only user it promoted was the Hanson Quarry. *See generally* Section 2 above. When it filed its initial petition, for the first time, it added several additional putative customers. (Tr. 68:16-22.) In all, Sandersville has named the following private businesses as putative customers of the Hanson Spur: Heidelberg Materials (HM, which owns and operates the Hanson Quarry); Pittman Construction Company ("Pittman"); Veal Farms Transload, LLC and Revive Milling, LLC (together, "Veal Farms"); Southern Chips LLC; and "other future shippers." Am. Pet. ¶ 2. (*See also, generally,* Tr. 197-405, 1463-1513.)

[17] Doc. No. 193527, filed March 8, 2023.

[18] Doc. No. 205194, filed July 20, 2023.

None of these putative customers has signed a binding contract with Sandersville to use the Hanson Spur. (Tr. 101:19-21.) None has signed contracts with purchasers for their products they expect to ship on the Hanson Spur. (*E.g.*, Tr. 313:7-10 (Veal), 368:15-23 (HM).)

The Hanson Quarry and HM: The Hanson Quarry is owned by Heidelberg Materials ("HM"), a multinational, publicly traded corporation. (Tr. 201:9-11, 648:9-12.) The Hanson Quarry produces and ships common construction aggregates for concrete and asphalt. (Tr. 213:12-13.) It has been in operation for decades, shipping out rock to the local construction market by truck. (Tr. 202:13-16.)

The Hanson Quarry is located a few miles away from the CSX Camak line, which can connect to destinations in the Southeast—destination markets that HM wants to serve with rock from the Hanson Quarry. (Tr. 202:20-203:5.) There is a rock quarry just a few miles from the Hanson Quarry that is operated by Vulcan Materials, which currently has direct, private access to the CSX Camak line. (*See* SRR Ex. 5 (Teague Test. Ex. GT-3-01 (showing distance from Hanson Quarry to Vulcan Quarry)); Tr. 1180:7-9, 1182:11-16 (Hunter Test.).) According to Scott Dickson, President of HM Southeast Region, HM wants to compete with Vulcan. (Tr. 202:20-203:2, 204:13-21.)

Mr. Dickson testified that the Hanson Spur is not necessary for the current operation of the Hanson Quarry. (Tr. 365:19-22.) However, it will help the Hanson Quarry ship more rock, faster and farther: Currently, the Hanson Quarry ships out 250,000 to 350,000 tons per year, but it has the capacity to produce up to 700,000 tons per year. (Tr. 202:16-19.) Mr. Dickson believes that getting direct access to the CSX Camak line will help HM get an edge on competitors to be the supplier of construction aggregate materials for projects in South Carolina and Florida. (Tr. 202:21-22, 204:13-21 (competition); 214:17-215:12 (South Carolina and Florida markets).)

In the past, HM has considered building either its own rail line from the quarry to the CSX line or building a facility to transload material by truck from the quarry to CSX. (Tr. 258:1-7, 320:25-321:3.) In fact, Mr. Dickson investigated acquiring land alongside the CSX line for the purposes of building a transloading facility there. (Tr. 258:7-10; 321:5-14.) In HM's view, however, the new rail line would allow it "to expand the Sparta quarry more efficiently than it could using truck[s]."[19] (Tr. 215:9-12.) Neither Sandersville nor HM produced any documents to demonstrate the comparative economic viability of any transportation method. HM boasts that expanding the quarry will lead to eight or ten new jobs and yield other local economic benefits. (Tr. 205:2-18, 215:13-21.)

Pittman Construction: Pittman is a heavy highway construction contractor. (Tr. 221:18-19.) It operates eight asphalt plants in Georgia, with its Sparta plant located inside the Hanson Quarry on land rented from the quarry. (Tr. 222:1-8; 376:17-20.) Pittman is also a member of a liquid asphalt terminal company, APS Partners LLC ("APS"), which has a terminal facility in Lithonia, Georgia. (Tr. 222:10-14.) The Lithonia terminal facility is on the CSX rail system. (Tr. 1473:20-22.) Currently, Pittman receives liquid asphalt from oil refineries to that Lithonia terminal facility, where it is stored until it is trucked out to all the Pittman asphalt plants. (*Id*.; Tr. 262:21-263:10.) If the Hanson Spur is built, Pittman plans to build a liquid asphalt terminal facility at the Hanson Quarry. (Tr. 223:11-17, 230:5-7.) This Sparta terminal will, like the Lithonia terminal, receive liquid asphalt from oil refineries and temporarily store it. (Tr. 265:25-266:9.) Pittman claims the construction of the terminal facility will include a $1 million to $1.5 million investment

[19] Mr. Dickson testified that if the Hanson Spur is not built, HM's "business is expanding" and "large volumes" of rock will be moved by truck. (*See* Tr. 1510:13-17; 1511:12-16.) However, he gave no specifics beyond those assertions.

in equipment, resulting in "investment within the local community," additional ad valorem taxes paid to Hancock County, and "jobs for local residents." (Tr. 223:16-21, 375:25-376:16.)

Pittman does not contend the Hanson Spur would open new markets for the company. (Tr. 270:21-271:19; 373:19-25.) Rather, Pittman says the Hanson Spur's benefit would be in lower transportation costs to its Sparta asphalt plant (Tr. 1474:9-11), allowing it to better compete for business (Tr. 231:11-12). The Sparta terminal facility would also be wholly owned by Pittman (Tr. 269:19-20; 319:2-21), allowing Pittman to cut other APS members out from any liquid asphalt being shipped to Sparta. And most importantly, it would provide Pittman a "hedge against [its] commitments under contract," insulating Pittman from "the whims of the market." (Tr. 374:18-24; *see also* Tr. 381:24-382:3 ("Well, the whole point of this is to create the hedge against committed tons of asphalt. So as long as we have committed tons, we have to hedge our product. So it's part of the equation. If I've got a commitment, then I have to protect myself.").)

Veal Farms and Veal Transload: Veal Farms Transload, LLC buys, stores, and loads to rail grains and other agricultural products. (Tr. 1466:3-14.) Revive Milling, LLC buys and processes non-GMO grain into food ingredients, and then sells and transports those ingredients by rail to food producers. (*Id*.) Cale Veal, as managing member for each LLC, testified on behalf of both. (*See* Tr. 1465:2-6.) Both of Mr. Veal's companies are current customers of Sandersville; their products are trucked to the current Sandersville Railroad and are then transported over the NS rail system to destination markets served by NS. (Tr. 243:1-3.)

Mr. Veal claims that there is demand for his products in CSX-served destinations like New York City, Kentucky, and Tennessee. (Tr. 308:24-309:24, 312:1-8.) However, he has not done any market research or studies to back that up. (*See* Tr. 312:22-23 ("I don't need a study to tell me [potential customers] need to buy [my products].").) He has not obtained pricing from CSX to know whether the prices he would charge potential customers in those markets are competitive.

(Tr. 308:2-14, 313:23-314:2.) If shipping on the Hanson Spur does not turn out to be economical for his business, Mr. Veal admitted he will not use it. (Tr. 381:6-9.)

Southern Chips, LLC: Southern Chips is a wood-chip company. Its sole member is Sandersville Railroad Company. (Tr. 247:2-6, 249:7-8.) Jeffrey Custer, the company's Wood Procurement and Fiber Sales Manager, testified that while he makes the company's "day-to-day" decisions, Mr. Tarbutton is his boss. (Tr. 247:4-6, 249:12-14.)

Mr. Custer did not claim there is any problem with Southern Chips' current business. (Tr. 287:3-5.) It currently has direct access to NS (through its owner, Sandersville). (Tr. 253:16-21.) For instance, to reach Savannah, it can switch its cars from NS to CSX for $850 per car. (Tr. 379:21-23.) However, Southern Chips wants to save that money. (*Id*.) Mr. Custer claims that the opportunity to truck his products to the quarry to load on the Hanson Spur, and from the Hanson Spur to CSX "would be an improvement to [his] existing business." (Tr. 287:20-288:16.) However, Mr. Custer has not gotten price quotes for the existing direct-to-CSX transloading options in the region. (Tr. 288:18-291:22.) He also did not know where the existing CSX transloading facilities are located. (*Id*.) Mr. Custer also testified that he does not do market research. (Tr. 395:5-24.) Nevertheless, Mr. Custer testified that only a transloading facility within 25 miles—the exact distance from the existing Southern Chips mill to the future Hanson Spur—would be "viable" for Southern Chips. (Tr. 288:20-289:2.)

Other future shippers: Sandersville asserts that the Hanson Spur will serve "any other shipper on property adjacent to the Hanson Spur that wants to use Sandersville Railroad's switching services to send or receive goods on agreed terms and rates based on the nature—such as type of material being shipped and other business conditions and constraints—of the switching service requested." Am. Pet. ¶ 2. Mr. Tarbutton testified that he has three to five other potential users in mind. (Tr. 109:9-14.) Sandersville would set the private contract terms and rates for

potential shippers to take or leave. (Tr. 110:7-17.)[20] When asked what would happen if Sandersville cannot agree on terms or rates with a potential customer, Mr. Tarbutton replied, "Well, I don't know." (*See* Tr. 110:7-17.)

In sum, these putative customers can currently access the markets they say they wish to access via the Hanson Spur—but they believe the Hanson Spur will save them money, give them an edge on their competitors, and help them hedge their bets.

4. Sandersville Views the Hanson Spur as a Growth Opportunity, not as an Accommodation of Its Current Business.

In support of its petition, the Railroad has repeatedly claimed that the Hanson Spur is necessary to accommodate its business. However, the evidence it produced in support of this argument has been bare-boned and conclusory.

In its Petition, the only reasoning Sandersville offered to support its claim that the new rail line "is necessary" to its business has nothing to do with Sandersville's business: It only said that the Hanson Spur "is necessary to the business of [Sandersville] because its service is more environmentally and economically efficient than trucks," and "is necessary to serve multiple, existing companies operating at or near the Hanson Quarry as well as future industries that may utilize [its] switching services[.]" Am. Pet. ¶¶ 4, 6 & Ex. A (Sandersville's "memorandum … outlining the business necessity for the Project"). Similarly, Mr. Tarbutton only generally described how the Hanson Spur could benefit Sandersville's current and future customers. (Tr. 38:1-39:1.) In his rebuttal Testimony, Mr. Tarbutton testified that the Hanson Spur is the "best way to accommodate and grow our company's business," without explaining why. (Tr. 1486:19-22.)

[20] Respondents note that this excludes shippers of hazardous materials. In direct testimony, Mr. Tarbutton represented that Sandersville "does not and has no plans to serve customers" who haul hazardous materials. (Tr. 48:25-49:2.)

At the hearing, however, Mr. Tarbutton admitted that the Hanson Spur is not necessary for the proper accommodation of the Railroad's *current* business. (Tr. 102:10-103:1.) Instead, he testified that he believed it was necessary for the proper accommodation of Sandersville's business because it will allow the Railroad to *expand* its rail service offerings. (*Id.*; Tr. 45:15-18.)

5. Sandersville Did Not Conduct Meaningful Analyses of the Financial Viability of the Hanson Spur.

In its presentations to this Commission, Sandersville has repeatedly argued short line railroads provide important services. However, these railroads are no less vulnerable to miscalculation and failure than other ventures, a fact recognized repeatedly by the Georgia Department of Transportation. (*See* SRR Ex. 53 (Georgia State Rail Plan of the Georgia Department of Transportation 2021 ("Georgia State Rail Plan")) at 4-9 ("[S]hort line railroads [may] operate 'cast-off' lines that the former owners or lessors could not operate properly. In many cases, the former owners deferred maintenance because the lines were not profitable and did not justify significant investment."), 4-11 ("The limited traffic base on short line railroads may not generate sufficient revenues to fund needed maintenance."), 4-13 ("Data collected for this State Rail Plan suggests that a significant issue facing the Georgia short line railroads is utilization … . Railroad infrastructure is costly to maintain, so the more miles a short line operates, the more freight traffic and, hence, revenue that railroad will need to cover its costs."), and 4-14 ("The rates and levels of service provided to short line customers depend on the Class I railroads with which they interchange. Short lines could provide excellent service at competitive rates, but if the service connecting railroads is inadequate and rates uncompetitive, the short line services will not be used.").)

Small short line railroads employing a "precision service railroading" ("PSR") strategy are particularly vulnerable when traffic volume is low. *See* Georgia State Rail Plan at 4-14 ("If the

short line is small and does not provide a large volume of rail cars, this places the short line at a disadvantage within a PSR strategy."). Sandersville employs a PSR strategy (*see* Tr. 1491:1-7), which means that, if traffic on the Hanson Spur is low, Sandersville may be especially vulnerable.

Given that backdrop, Mr. Tarbutton implicitly accepted that several indicia weighing on the business feasibility of the Hanson Spur are relevant to whether building it is necessary to accommodate Sandersville's business. These include (1) the costs of the Hanson Spur project, (2) the rates Sandersville intends to charge its customers, and (3) CSX's (the connecting railroad's) level of support. (Tr. 125:2-9, 126:17-127:25.) Yet Sandersville addressed none of these issues in its Petition or in pre-filed direct testimony. (Tr. 130:10-16; *see generally* Am. Pet.; Tr. 29-41.) Only after Mr. Hunter, Respondents' railroad expert, flagged these omissions in his responsive testimony did Mr. Tarbutton address them in rebuttal. (Tr. 130:10-16) (aimed to "tak[e] Mr. Hunter to task"). Even then, Sandersville's evidence on this front was light: Mr. Tarbutton provided estimated costs to build the spur, but no indication of how those costs were generated or documents to support them. *See generally* Tr. 1477-1507. As for CSX's support, there was only a simple statement that Sandersville has "worked with [] CSXT to assure the [Hanson] Spur will [be] a win-win." (Tr. 1486:13-15.)

The hearing confirmed the uncertainty of the line's business feasibility. Mr. Tarbutton confirmed he has not consulted with management or financial consultants (Tr. 93:4-9), and has never performed an economic feasibility study of the Hanson Spur project (Tr. 145:4-12). Rather, he relies solely on his "30 years of experience in working in the short line world" and claims that "there is no need to overanalyze something that you know is going to work." (*Id.*) Yet Mr. Tarbutton's experience in constructing railroad tracks is limited to lines he added to Sandersville's existing rail network, not brand-new lines connecting with a Class I line. (Tr. 165:12-20.) And Sandersville Railroad's resources are not infinite. Sandersville is wholly owned by the Tarbutton

family; the only shareholders are Mr. Tarbutton, his two sisters, and his mother. (Tr. 139:8-12.) Sandersville maintains that the Tarbutton family plans to contribute "all the capital … to finance the construction of the Hanson Spur," no outside investment required. (Tr. 1484:9-11.) However, Mr. Tarbutton also admitted that the resources of the Tarbutton family are finite, and, like any family, the Tarbuttons could run out of money. (Tr. 140:17-141:2.)

Mr. Tarbutton agreed that, to make the Hanson Spur viable, there must be new market demand for the products of Sandersville's ostensible customers. (Tr. 99:10-14.) However, he could not point to any evidence that such demand exists, nor did he identify any contracts for purchase of goods to be shipped along the Hanson Spur. (Tr. 99:15-100:24.) He admits that he has no experience with market development for the products the Hanson Spur's proposed customers sell. (Tr. 165:3-6.) He was unaware of any New York or New England company or retailer demanding middle Georgia agricultural products. (Tr. 113:25-115:10.) He instead expressed his faith in "the natural course of business" to make things work. (*Id.*)

This lack of detailed analysis is not reassuring given that Sandersville's forecasting record already leaves much to be desired. For instance, in its Amended Petition, Sandersville claimed the Hanson Spur would yield "500,000 additional tons per year [of product moved] from the quarry" and remove 150 trucks from local roads. (Am. Pet. ¶ 3; *see also, e.g.,* Tr. 803 (Sandersville promotional fact sheet).) By his rebuttal testimony (and at the hearing), however, Mr. Tarbutton had downgraded his estimates to 400,000 tons of rock annually, and 130 trucks reduced. (Tr. 130:19-131:6, 1478:11-1479:5.) He nonetheless maintained it was not possible that any of his other predictions were similarly off-base, and that everything else he calculated is correct. (Tr. 131:20-132:6.)

6. Respondents Conduct a Feasibility Study and Demonstrate That the Line Is Not Economically Feasible.

At the end of the day, it is remarkable how little we know about the Hanson Spur. This is not just because the Railroad failed to conduct a meaningful analysis of the project. It is also because the Railroad has been unable or unwilling to produce even basic financial documents about the proposed line. Because it did not produce this information, Respondents undertook an effort to determine whether the proposed line made economic sense. The expert they hired to answer this question answered "no."

A. Sandersville Produced Scant Information About the Spur.

To determine whether this Commission should approve the Railroad's petition, this Commission, through its Hearing Officer, issued a Subpoena to Testify and Duces Tecum ("Subpoena") to Sandersville with 24 subpoenas duces tecum ("Data Requests") seeking information relating to the Hanson Spur. (Resp. Ex. 1.) The Railroad produced timely, albeit incomplete, responses along with objections, variously pointing the Commission to its witness testimony already filed, and otherwise claiming trade secret protection for nine responsive documents.[21] Respondents disputed several of the Railroad's responses, some of which included explicit refusals to produce documents. After a Commission-ordered meet and confer,[22] the parties submitted a joint statement to the Hearing Officer acknowledging resolution of some disputes, and arguments regarding remaining disputes.[23] (*See* Tr. 9:15-10:2.)

[21] *See* Sandersville Railroad's Objections and Responses to Subpoena to Testify and Duces Tecum, Doc. No. 205401, filed August 10, 2023. Respondents' attorneys and expert witness, Gary Hunter, signed a confidentiality agreement and have reviewed those documents.

[22] *See* Order Directing Parties to Meet and Confer in Good Faith Regarding Subpoena Request and Order Modifying Procedural and Scheduling Order, Doc. No. 205416, filed August 14, 2023.

[23] *See* Joint Status Report Pursuant to the Hearing Officer's August 14, 2023 Order, Doc. No. 205504, filed August 21, 2023.

During the hearing, it became clear that the Railroad had not produced documents responsive to various Data Requests. For instance, the Hanson Spur's path was developed through extensive consultation with engineering and environmental consultants. (Tr. 33:15-18.) Mr. Tarbutton admitted that such consultation would have involved "some back-and-forth" in the form of written communications, emails, letters, etc. (Tr. 73:18-25.) Those documents would have been responsive to Duces Tecum #11 (Resp. Ex. 1), but the Railroad did not produce them. There was at least one email of which Mr. Tarbutton was aware that would have fallen within the scope of Duces Tecum #18, but it was not produced. (Tr. 78:6-16.) There was a "tremendous amount of work and work product" produced "in working towards the permit application" that would have fallen within the scope of Duces Tecum #21, but the Railroad did not produce that either. (Tr. 78:18-79:12.)[24]

B. The Line Is Not Economically Feasible.

Given the lack of information provided by Sandersville, especially in its initial testimony, Respondents engaged Gary Hunter as an expert to examine the assertions made by the Railroad. Mr. Hunter has a nearly 50-year career in railroad development, operations, and business, and extensive experience with all classes of railroads, including short line railroads. He has particularly

[24] On cross examination, the Railroad faulted Respondents' expert witness, Gary Hunter, for not knowing information responsive to the Hearing Officer's requests that the Railroad had simply not provided. For instance, Mr. Hunter was asked how he knew that Sandersville had not evaluated the economic feasibility of the Hanson Spur, and why Sandersville would present a feasibility study to this Commission if feasibility is not a legal requirement for condemnation authority, when a feasibility study is exactly the information this Commission requested in Duces Tecum #19, but which the Railroad did not produce. (Tr. 1320:2-1322:14; Sandersville's Objections and Responses at 15 (Doc. 205401, filed Aug. 10, 2023).) Likewise, Mr. Hunter was asked why he did not know whether Sandersville secured permits from GDOT to cross State Highway 16, when such documents would have been responsive to Duces Tecum #22 but were not produced by the Railroad. (Sandersville's Objections and Responses at 16; Tr. 1234:21-1235:6, 1259:17-1260:17.)[25] Pre-Filed Responsive Expert Testimony of Gary Hunter, Doc. No. #205550, Ex. 1, filed August 25, 2023, and admitted with Mr. Hunter's testimony at the hearing in this matter. (*See* Tr. 1169:17-22.) This document was inadvertently excluded from the hearing transcript.

extensive experience with moving aggregates. (Tr. 1171:5-1172:17 (summary of Mr. Hunter's career and expertise); *see also* Doc. No. 205550, Ex. 1 (Mr. Hunter's CV).)[25, 26]

Mr. Hunter was surprised by the lack of analysis provided by the Railroad and testified that "[i]n all my years of experience in the rail industry, including numerous new construction projects, I have never heard of capital costs being expended like this without a detailed feasibility study." (Tr. 1174:10-13.) Such a study would typically involve interviewing potential customers, obtaining specific origins, destinations, and volumes, and obtaining specific rates from the Class I railroad involved.[27] (*See* Tr. 1177:3-1178:11 (identifying at least a dozen pieces of "minimum information" used to determine whether a rail project is feasible and that the Railroad either did not produce or develop).) In the absence of a feasibility study of any kind from the Railroad, Mr. Hunter constructed his own feasibility analysis based on the scant information in Sandersville's filings and the testimony of Mr. Tarbutton and the Railroad's other witnesses, as well as the slides the Railroad produced for the August 2022 community meeting. (*See generally* Tr. 1515-1570.) He

[25] Pre-Filed Responsive Expert Testimony of Gary Hunter, Doc. No. #205550, Ex. 1, filed August 25, 2023, and admitted with Mr. Hunter's testimony at the hearing in this matter. (*See* Tr. 1169:17-22.) This document was inadvertently excluded from the hearing transcript.

[26] The Railroad argued that Mr. Hunter is not qualified to testify as an expert, alleging that Mr. Hunter "has no direct knowledge of the Sandersville Railroad, our customers, the markets our shippers serve, or the eastern middle Georgia region or its economy." (Tr. 1485:17-20.) Of course, the Railroad does not explain how Mr. Hunter was to obtain much of this information when Sandersville did not provide it to Respondents or this Commission. In any event, Mr. Hunter has extensive experience with all classes of railroads, including short line railroads. (Tr. 1171:5-1172:17.) Mr. Hunter was engaged by the Georgia Department of Transportation to survey all 29 of Georgia's short line railroads, including Sandersville Railroad. (Tr. 1196:19-23.) As part of that project, Mr. Hunter personally talked with Mr. Tarbutton to gather information about Sandersville Railroad. (Tr. 1296:10-1297:9.) Mr. Hunter also has extensive experience with moving aggregates by rail (Tr. 1172:4-17), and his consultancy is regularly engaged to perform feasibility analyses on rail projects (Tr. 1171:7-16). In his analysis of the Hanson Spur Project, he employed the same proprietary model he employs when analyzing feasibility of his clients' projects, which model derives from his knowledge and long experience in the rail industry. (Tr. 1408:18-1409:3.)

[27] Mr. Hunter testified that, for the purpose of feasibility analysis, it is common for a Class I railroad to cooperate with prospective customers to provide rates that will be reliable for months. (Tr. 1353:2-1354:25.) Such cooperation and insight into actual rates provide "an assurance that [traffic is] actually going to move." (*Id*.)

concluded that the Hanson Spur would take decades to recover its costs and is not economically feasible. (Tr. 1198:22-1199:8.)

Mr. Hunter identified several problems with the Hanson Spur project.[28] First, Sandersville had only given one ballpark figure of $7.4 million in costs, with no detailed breakdown of component costs, which Mr. Hunter concluded was "very low"—far below the $20 million that Mr. Hunter projects. (Tr. 1178:14-1180:4.) Additionally, Mr. Hunter observed that HM is unlikely to be able to compete with the nearby Vulcan quarry. Vulcan already has 15,000 feet of track within its facility and is served directly by CSX; for the Hanson Quarry to compete, he estimates that extensive tracks able to handle two 100-car long trains would have to be built, adding to capital costs, and Vulcan's rail rate includes only CSX in its routing, while HM's will need to include CSX's rate plus the Hanson Spur's rate. (Tr. 1180:7-20, 1182:11-14.)

Rail is not a "'build it and they will come' industry." (Tr. 1181:2-5.) Even though Sandersville's witnesses have said "they would use" the Hanson Spur, they have not given traffic estimates nor committed any traffic. (*Id*.) They have not signed binding contracts with the Railroad, much less with CSX or the purported ultimate purchasers of their products.[29] Mr. Hunter concluded that the Hanson Quarry will not generate enough traffic to make the Hanson Spur feasible, estimating that 400,000 tons of aggregate[30] per year amounts to 8,000 tons per week, or 16 rail cars per day, at most. (Tr. 1181:19-24.) This is a "miniscule amount of traffic to justify constructing

[28] Respondents note that hard numbers used in Mr. Hunter's responsive testimony were gleaned by Mr. Hunter from publicly available material Sandersville had produced before it ever petitioned this Commission. The Railroad, in contrast, provided no hard numbers to this Commission in its Petition or in Mr. Tarbutton's direct testimony.

[29] Sandersville has memorandums of understanding with HM, Pittman Construction, Veal Farms Transload, Revive Milling, and Southern Chips, but they are not binding contracts. (Tr. 101:16-24.)

[30] The tonnage increase in output should the Hanson Spur be built, per Mr. Tarbutton and Mr. Dickson. (Tr. 130:24-131:6, 203:11-17.)

a new rail line." (*Id*.) Mr. Hunter concluded that the Hanson Quarry would not produce enough traffic to justify the capital required for the Hanson Spur. (Tr. 1174:7-8.)

Even the plan as stated does not make sense to Mr. Hunter. Sandersville claims one train per day will operate each way on the Hanson Spur, but with volume only amounting to 16 rail cars per day, one 60-80-car train per week is far more efficient than daily trips with few cars—to run the train daily would increase rail costs significantly, for no reason. (Tr. 1183:19-22.)

Another major issue Mr. Hunter identified is the lack of any feedback or direction from CSX, which, as the Class I carrier, will dictate the infrastructure, service, equipment, and rates. (Tr. 1183:12-14.) Sandersville has not shown anything as to CSX's commitments except to say that it is working with CSX to make the Hanson Spur a "win-win." (Tr. 1486:13-15.) Sandersville has not yet obtained interchange rates from CSX. (Tr. 166:4-22.) Mr. Tarbutton testified that Sandersville has only private contract rates with Sandersville's customers for the switching services Sandersville will provide at the Hanson Spur, "and then [Sandersville's customers] are working with CSX on that part of the rail movement." (*Id*.) However, Mr. Veal admitted he has not yet obtained pricing from CSX "[b]ecause it would be speculative at this time because it doesn't exist." (Tr. 308:10-14, 313:23-314:2.) He also pointed the finger back at the Railroad, claiming that he must "go through [Sandersville] to get those quotes" because "it's not like [he has] a direct line to a representative at CSX … without access through a short line." (Tr. 307:9-23.) Consequently, Mr. Veal does not know what his shipping cost to his preferred CSX-served destinations will be.[31] (*Id*.) Indeed, the Railroad and its putative customers did not produce any evidence that CSX had provided the customers with rates or descriptions of service.

[31] Respondents note that Mr. Custer, of Southern Chips, LLC, which is wholly owned by Sandersville, has not received rates from CSX as to destination markets, either, because "[t]hat would be handled by the short line" in a "wrapped-up rate" and he "[doesn't] handle any of that." (Tr. 295:7-296:1.)

Class I service rates are not general, but context-specific: they depend on the shipper's origin, destination, and volumes. (Tr. 1200:11-25.) When a potential shipper approaches CSX to get rates, they do not get rates to a region, like Kentucky or Tennessee. Rather, they get rates for shipping to a specific destination, point to point. (Tr. 1402:21-25.) Without this information, a shipper cannot reliably determine that a rate is competitive enough to serve its intended markets—and if rates are not competitive, traffic will not result. (Tr. 1201:1-11.) Mr. Hunter also notes that CSX will likely have to construct the siding into the new interchange tracks from its own main line, and CSX will recover its costs for doing so by either billing them back to Sandersville or charging extra in their rates for traffic off the Hanson Spur. (Tr. 1180:15-20.)

Mr. Hunter also concluded that the Hanson Spur is new railroad construction, not a spur, because it will be "serving multiple customers with an operator not currently connected to the Class I railroad (who will have separate operating authority)." (Tr. 1179:19-23.) As a new railroad, the Hanson Spur's construction would likely require the approval of the federal STB—something Sandersville never adequately discussed in its materials, and which was only discussed on cross examination of Mr. Hunter.[32] (Tr. 1200:1-10.) Though Sandersville's current operations are subject to regulation by the STB (Tr. 70:1-6), Mr. Tarbutton testified that he does not know whether providing service to multiple industries via the new Hanson Spur makes it subject to regulation by the STB (Tr. 93:12-20).

These unanswered questions as to the critical issues of rates, equipment, costs, and regulation led Mr. Hunter to conclude that Sandersville simply has not shown that the Hanson Spur is an economically feasible venture. (*See* Tr. 1198:12-21.)

[32] The implications of STB regulation are discussed in Argument Section IV.A below.

Mr. Tarbutton responded to Mr. Hunter's analysis in a 28-page rebuttal, where, for the first time, the Railroad provided some project numbers to this Commission. (*See generally* Tr. 1477-1507.) Mr. Tarbutton testified that the line's capital costs are estimated to be $15.2 million (Tr. 1492:1), and that, in any case, the Commission does not have to be concerned about whether the Hanson Spur will recover its costs or be feasible, because Mr. Tarbutton's family, which owns the Railroad, "plans to contribute all the capital to [Sandersville] to finance the construction of the Hanson Spur," even up to $20 million (Tr. 1484:9-11, 161:25). Once the capital costs are "sunk," according to Mr. Tarbutton, the Hanson Spur can continue to operate for as long as its variable costs are covered. (Tr. 1488: 9-11.) And if his variable costs are higher than expected? Mr. Tarbutton just "believe[s]" that Sandersville has "got a good handle on [its] costs" and he "feel[s] like he know[s] [his] business."[33] (Tr. 154:3-10.) When asked what would happen if the Hanson Spur were to drain capital from Sandersville's existing rail lines and harm the Railroad's ability to provide its current service, Mr. Tarbutton replied that this contingency was so improbable that he had not looked at it. (Tr. 167:8-19.)

Mr. Tarbutton also claimed that, as to the Hanson Spur project, "there's no downside risk for anyone" except Sandersville because it is taking all the risk. (Tr. 139:3-7.) He did not acknowledge that Respondents would be forced to contribute their property, their heritage, and their peace, to whatever risk that Mr. Tarbutton deemed fit to take. (Tr. 141:3-6, 151:22-25.)

To this date, Sandersville has not performed a feasibility study or provided any objective evidence that the Hanson Spur is a viable project, citing only Mr. Tarbutton's own experience in the short line world and dealing with customers. In essence, he is asking this Commission, and the

[33] Mr. Tarbutton believes this to be true even though he has not yet discussed potential rates with the Hanson Spur's potential customers, either for service on the Hanson Spur or CSX. (*See* Tr. 149:12-21.)

property owners who will lose their land, to simply take his word. As Mr. Tarbutton said, "I just … know it's going to work." (Tr. 145:17-22.)

7. Sandersville Changed the Reason for Its Proposed Condemnation from Economic Development to Opening Channels of Trade.

Economic development was Sandersville's initial, and only, justification for the Hanson Spur.[34] Long before Sandersville filed its initial petition, it promoted the Hanson Spur project to the local public promising that the Hanson Spur would "allow Hanson to ship approximately 500,000 additional tons per year from the quarry"; add 12 additional jobs; add "hundreds of thousands of dollars of sales tax revenue to enhance the budget of Hancock County and its school system," and create "[o]ver $1.5 million in annual economic impact to Hancock County." (Tr. 803, 917.) Sandersville's promotional materials said nothing of channels of trade. In its Amended Petition, Sandersville claimed the same: 500,000 additional tons of rock moved and $1.5 million in annual direct economic benefits. (Am. Pet. ¶¶ 3, 5.)

Sandersville's witnesses also emphasized the economic benefits of the Hanson Spur. Allen Haywood, the mayor of Sparta, devoted the entirety of his testimony to the economic-development benefits of the Hanson Spur, testifying that it was his "economic development opinion" that the

[34] Am. Pet. ¶ 5 ("The spur will also serve a public purpose by creating at least one and a half million dollars ($1,500,000.00) in annual direct economic benefits in Hancock County."); Am. Pet. Ex. F (January 2023 letter to R. Donald Garrett) ("[W]e must proceed with acquisition of the property required for the Project in order to complete the Project, drive economic development in Hancock County, and meet the Project milestone dates."); Tr. 34:2-3 ("The spur will also provide tremendous economic development opportunities for our customers[.]"), 36:6-7 ("[W]e are confident that the spur will serve as an engine for further economic development in Hancock County."), 909 (April 2022 letter to R. Donald Garrett) ("Over the course of this project and in the years to follow, the Sandersville Railroad and Hanson Aggregates will be making significant capital investments in Hancock County. These investments will lead to new jobs and economic activity for Hancock County and the surrounding region."), 917 (Sandersville Fact Sheet August 2022 sent to R. Donald Garrett) ("Over $1.5 million in annual direct economic impact to Hancock County"), 921 (Sandersville Fact Sheet September 2022 sent to R. Donald Garrett) ("The rail spur and expansion will create 12 new jobs paying $90,000 per year in salary and benefits on average, as well as millions of dollars in annual economic impact to the community.")

Hanson Spur would positively impact the community, particularly in the form of good-paying jobs. (Tr. 418:14-16, 434:16-19.) Mr. Dickson testified that the expansion of the Hanson Quarry will result in 8 to 10 new jobs and would benefit the local economy because HM will spend more money on local services and pay more taxes. (Tr. 205:2-18, 215:13-21.) Mr. Pittman testified that the $1 to $1.5 million investment in constructing its new terminal facility would result in ad valorem taxes for Hancock County and create two jobs. (Tr. 223:17-21, 375:25-376:2.)

For the first time it its rebuttal testimony, however, and at the hearing, Sandersville's witnesses shifted their rhetoric from promoting "economic development" to opening "channels of trade."[35] Economic development then was characterized as the inevitable result of new channels of trade. (*See e.g.*, Tr. 111:4-23 ("[A]n important part of the Hanson Spur" is "economic development"—economic development and job growth is "a direct result of the new channels of trade that we're creating with this spur."), 217 ("The Hanson Spur will be a vital new channel of trade for Heidelberg Materials and will permit us to expand … [in] an … economically efficient manner… [.]").)

As for how the Hanson Spur would provide channels of trade, Mr. Tarbutton admitted that there is nothing physically or legally preventing Sandersville's customers from reaching markets served by CSX. (Tr. 104:4-6.) Rather, they are "economically prohibited" from "reach[ing] certain

[35] *Compare* Initial Petition, Amended Petition, and Tr. 29-41 (Tarbutton Pre-Filed Direct Testimony) (zero occurrences of "channel/s of trade"), *with* Tr. 1477-1505 (Tarbutton Reb. Test.) (ten occurrences of "channel of trade"); Tr. 42-53 (Tarbutton Summary of Pre-Filed Testimony at Hearing) (six occurrences of "channel/s of trade"); *id*. ("[T]he Hanson Spur [will] serve the public interest and increase commerce and provisions of channel of trade."); and Tr. 53-193 (Tarbutton Cross Exam.) (eleven witness uses of "channel/s of trade").

The witnesses representing proposed users of the spur—Mr. Dickson, Mr. Pittman, Mr. Veal, and Mr. Custer—began using "channels of trade" language at the same time as Mr. Tarbutton. *E.g.*, Tr. 220-226 (Pittman Pre-Filed Test.) (no occurrences of "channel/s of trade"), 1472-1476 (Pittman Reb. Test.) (one occurrence), 227-231 (Pittman Summary of Pre-Filed Testimony at Hearing) (one occurrence).

markets and off takers" because of the cost of switching from NS to CSX. (Tr. 34:21-35:1, 103:25-104:3.)

ARGUMENT

I. Legal Standards.

The Railroad argues that the Commission should defer to its assertion that its proposed line is a public use, stating that "the Georgia General Assembly is the entity that determines what constitutes a 'public purpose,'" Br. 31, and the General Assembly "affirmed the legality of condemnation for" channels of trade when it passed the Landowner's Bill of Rights, Br. 36. The Railroad overstates both the constitutional and statutory standards for determinations of public use in Georgia.

Georgia's Constitution allows takings only for "public purposes," Ga. Const. art. I, § III, ¶ I, and courts—not condemners—determine what constitutes a "public purpose." *See* Ga. Const. art. I, § II, ¶ V ("Legislative acts in violation of this Constitution or the Constitution of the United States are void, and the judiciary shall so declare them."); *see also* O.C.G.A. § 22-1-2(a) ("Public use is a matter of law to be determined by the court."). Georgia courts "cannot countenance an exercise of the power of eminent domain, which the evidence establishes was undertaken with the improper intent to benefit one private, powerful entity, merely because [the condemnor] proclaimed it exercised that power for a 'public purpose.'" *Brannen v. Bulloch County*, 193 Ga. App. 151, 155, 387 S.E.2d 395, 399 (1989). While "the general rule to be followed is that a court will not substitute its judgment for that of a condemning authority, it is not substituting [the court's] opinion for [the condemner's] to recognize that [the condemner] determined what choices were available to it and made its decision based solely on what best benefited the interests of a private entity." *Id.* (cleaned up). As the Georgia Supreme Court stated over a century ago:

> Who shall decide what constitutes the public use, embraces more than lies upon the surface of the question. For, while it is delegated to the law-making power to pass primarily upon the question, this delegation is not absolutely and unconditionally given, but is made subordinate to great principles of right and justice, over which the judiciary, removed from the pressure of impulsive public opinion, holds the constitutional checks so wisely and well incorporated into the contract of the government and the governed.

Loughbridge v. Harris, 42 Ga. 500, 504 (1877).

The General Assembly also has made its view of how decision makers should approach claims of public use clear, and it is not the highly deferential approach urged by the Railroad. The power of railroads to condemn property is purely statutory and the General Assembly has conditioned that power in several ways. First, it created a condition precedent that a railroad seeking to condemn must obtain the Commission's approval. O.C.G.A. § 46-8-121 ("[T]he right of condemnation under this Code section shall not be exercised until the commission, under such rules of procedure as it may provide, first approves the taking of the property."). This requirement exists "for the protection of the condemnee's property rights, and is a valuable safeguard against his property being improvidently taken by railroad companies." *Pickett v. Ga., Fla. & Ala. R.R.*, 98 Ga. App. 709, 712, 106 S.E.2d 285, 287 (1958). If this Commission were meant to simply defer to the assertions of public use made by railroads, its approval would not be necessary to condemn private property.

Second, the General Assembly's grant of power to a railroad "[t]o build and maintain such additional depots, tracks, and terminal facilities" is limited to only those "necessary for the proper accommodation of the business of the company." O.C.G.A. § 46-8-120(a)(4).

Third, the General Assembly made railroad condemnations subject to Title 22 of the Georgia Code. O.C.G.A. § 46-8-121 ("If the real estate cannot be acquired by purchase or gift, then it may be acquired by condemnation in the manner provided in Title 22."). Since the passage

of the Landowner's Bill of Rights, 2006 Ga. L. Act 444 (H.B. 1313), this statutory section has acted to protect Georgia property owners from "perceived abuses of eminent domain." *City of Marietta v. Summerour*, 302 Ga. 645, 649-50, 807 S.E.2d 324, 328 (2017). "The text, structure, and history of the statute as a whole indicate that this statutory scheme is to protect property owners from abuse of the power of eminent domain at all stages of the condemnation process. … Its protections are meant to, among other things, 'assure consistent treatment for property owners [and] promote public confidence in land acquisition practices[.]' O.C.G.A. § 22-1-9." *Id.* at 652, 807 S.E.2d at 330. These protections "reveal[] a remedial purpose of protecting property owners against abuse of the power of eminent domain *at every stage of the condemnation process* and thereby promoting public confidence in the exercise of that power." *Id*. at 654; 807 S.E.2d at 331 (emphasis added).

Most importantly for this case, the Act manifested the General Assembly's view that *Kelo v. City of New London*, 545 U.S. 469 (2005)—relied upon heavily by the Railroad[36]—should not apply in Georgia. As the Supreme Court of Georgia explained:

> The Act appears to have been adopted largely in response to the decision of the United States Supreme Court in *Kelo v. City of New London.* In *Kelo*, the Supreme Court held that economic development qualifies as a "public use" under the Takings Clause of the United States Constitution, and therefore, a city could use its power of eminent domain to acquire private property for redevelopment by private industry. *Kelo* sparked widespread concern throughout the nation about the potential abuse of eminent domain and the limited protections afforded by the Takings Clause. Around the time of the *Kelo* decision, there also were other concerns about the misuse of eminent domain in Georgia.

City of Marietta, 302 Ga. at 650, 807 S.E.2d at 328 (cleaned up).

[36] *See, e.g.*, Br. 30-31 & nn. 57 & 59.

The General Assembly foreclosed *Kelo*'s application in Georgia in several ways. First, it mandated that condemning authorities may only use eminent domain for a "public use." O.C.G.A. § 22-1-2(a). It explicitly stated that the question of whether a use is public is a matter of law upon which "the condemnor bears the burden of proof." O.C.G.A. § 22-1-2(a). It defined the term "public use" and specifically stated that "economic development," defined as "any economic activity to increase tax revenue, tax base, or employment or improve general economic health," O.C.G.A. § 22-1-1(4), "shall not constitute a public use." O.C.G.A. § 22-1-1(9)(B). And it instructed the courts to "declare … inoperative" any law "pass[ed] … authorizing the taking of property for private use rather than for public use" "under pretext." O.C.G.A. § 22-1-3.

When interpreting these restrictions, decision makers must keep in mind a fundamental rule regarding statutes authorizing eminent domain: the power must be strictly interpreted. Again, as the Supreme Court of Georgia recently explained:

> Georgia law has always required governments to comply strictly with condemnation procedures when exercising the power of eminent domain, and the procedures listed in Section 22-1-9 are no exception. … As we explained over a century ago,
>
> > [t]he taking or injuring of private property for the public benefit is the exercise of a high power, and all the conditions and limitations provided by law, under which it may be done, should be closely followed. Too much caution in this respect cannot be observed to prevent abuse and oppression.

City of Marietta, 302 Ga. at 559-60 (cleaned up), 807 S.E.2d at 331-35.[37, 38]

In sum, while railroads may, under certain circumstances, condemn private property in Georgia, the General Assembly has restrained this power in several significant ways and tasked both the Commission and the courts with the obligation to ensure that a proposed taking is for an actual public use. (Tr. 1089:22-24 ("[T]he public use clause is meant to be extraordinary and rare. It is not meant to be something which is casual or cavalierly invoked.") (Donald J. Kochan[39] Test.).) Put another way, Georgia law seeks to protect the rights of property owners and not simply

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[37] *See also Frank v. City of Atlanta*, 72 Ga. 428, 432 (1884); *Sims v. City of Toccoa*, 256 Ga. 368, 369, 349 S.E.2d 385, 386 (1986); *Dep't of Transp. v. City of Atlanta*, 255 Ga. 124, 132, 337 S.E.2d 327, 334 (1985) ("[W]hile the procedure for condemnation under OCGA § 32-3-2 et seq. does not violate due process, the statute must be strictly conformed to by the condemning body." (citation and punctuation omitted)). *See also Thomas v. City of Cairo*, 206 Ga. 336, 338, 57 S.E.2d 192, 194 (1950) ("The power of eminent domain should never be exercised unless and until there has been a strict compliance with the provisions of the law by the condemnor."); *D'Antignac v. City Council of Augusta*, 31 Ga. 700, 710 (1861) ("[I]n proceedings by Statute authority, whereby a man may be deprived of his property, the Statute must be strictly pursued. Compliance with all its prerequisites must be shown.").

[38] Respondents note that Sandersville was also obligated to strictly comply with its duty to deal with property owners fairly and in good faith. It did not. Georgia law requires that a condemning authority make every effort to acquire property by negotiation. O.C.G.A § 22-1-9(1). Before such negotiations the condenmnor must establish an amount it believes to be just compensation, and make an offer for that full amount, and "in no event [offer] less" than a fair market value. O.C.G.A § 22-1-9(3). "In no event shall the condemnor act in bad faith in order to compel an agreement on the price to be paid for the property." O.C.G.A § 22-1-9(7).

Sandersville's aggressive tactics included mischaracterizing its powers under Georgia law by suggesting it had authority to condemn before petitioning this Commission (*e.g.,* Tr. 929-30, 1023); ignoring Respondents' refusals to grant access to their properties for surveying, cutting fences and damaging property, when it had only represented to Respondents that it wanted to build the Hanson Spur for the Hanson Quarry, not the public (*e.g.,* Tr. 897:18-898:1, 767:11-21, 859:5-22, 1011:15-1012:2); suggesting it could provide an "administrative review" "just like the state of Georgia does" (*e.g.*, Tr. 929-30); and sending Respondents adhesion-like contracts (*e.g.*, Tr. 1027-1037). Sandersville also offered less than full market value to at least one property owner, Marvin Smith, when it offered one price for acres for the railroad right of way and a different, lower price for acres the railroad would orphan. (Tr. 821:21-822:9, 851:11-25.)

[39] Respondents' expert witness Donald. J. Kochan is Professor of Law and Executive Director of the Law & Economics Center at George Mason University Antonin Scalia Law School, and an expert on the law of property and takings. (*See* Tr. 1056-1167.) Professor Kochan offered valuable testimony to provide the Commission a historic and linguistic understanding of the term "public use" as that term is used regarding the exercise of eminent domain and explained how that history and language "confirm that the point of the Takings Clauses in [the U.S. and Georgia] constitutions is to make forced transfers hard, costly, and rare, not to make them easy, cheap, and common." (Tr. 1064:7-10.)

have judges and this Commission defer to those wishing to take private property against a property owner's will.

II. The Hanson Spur Is Not a Public Use Under the Georgia or U.S. Constitutions.

As an initial point, even under *Kelo*, this proposed condemnation is not a public use.

In *Kelo*, the City of New London, Connecticut, condemned an entire neighborhood to transfer it to private developers as part of a comprehensive redevelopment plan for the city's waterfront. 545 U.S. at 474. The city's redevelopment authority claimed that the project would create jobs, increase the tax base, and revitalize the city. *Id.* at 472-73. After property owners challenged the condemnation, the U.S. Supreme Court held that economic development was enough to satisfy the Fifth Amendment's "public use" requirement. *Id.* at 490.

Kelo has been widely criticized by commentators, the public, and state legislatures across the country.[40] As discussed above, the General Assembly enacted eminent domain reform directly in response to the now-infamous decision. *See* Argument Section I. To the extent that *Kelo* even matters here, though, it is not the blank check the Railroad believes it to be. *Kelo* did not sanction all private takings. Specifically, it did not authorize pretextual takings that truly benefit identified private parties, and it did not authorize takings that do not reflect an extensive, detailed plan.

The Hanson Spur fails on both fronts. Sandersville's proposed condemnation is a pretextual taking intended to benefit only a few private parties. It also does not reflect an extensive, detailed plan. Whatever the Railroad's plans are, they cannot be classified as "extensive" or "detailed." Sandersville has thrown together an ill-conceived, entirely new business venture designed to

[40] *See generally* Timothy Sandefur, *The "Backlash" So Far: Will Americans Get Meaningful Eminent Domain Reform?*, 2006 Mich. St. L. Rev. 709; Ilya Somin, The Grasping Hand: *Kelo v. City of New London* and the Limits of Eminent Domain (rev. ed. 2016).

benefit one (and then several) private businesses. Even under *Kelo*, then, the Hanson Spur is unconstitutional.

A. The Hanson Spur is a Private Taking.

In *Kelo*, the majority clarified that the government "would no doubt be forbidden from taking … land for the purpose of conferring a private benefit on a particular private party." 545 U.S. at 477. The majority also emphasized that condemners are not "allowed to take property under the mere pretext of a public purpose, when its actual purpose was to bestow a private benefit." *Id.* at 478.[41] Sandersville seeks to take Respondents' property as a "mere pretext" so that it can "bestow a private benefit" upon itself and a handful of hypothetical customers. *Id.*

In *Kelo*, the redevelopment authority did not know who would receive the land before creating the redevelopment plan. Given that fact, the majority found that it did not make sense that the condemning authority could have been motivated to benefit a particular party. *Id.* at 478 n.6; *see also id.* at 493 (Kennedy, J., concurring). The exact opposite is true here. Sandersville seeks to condemn Respondents' land itself for the benefit of its customers. This direct taking of "*A's*" property to give to "*B*" is exactly the kind of taking the Supreme Court condemned in *Kelo*. As the Court explained, there can be no doubt that the taking is meant to "confer[] … private benefit[s] on … particular private part[ies]" and is prohibited by the Fifth Amendment. *Id.* at 477. The Railroad's customers—HM, Veal Farms, Revive Milling, Pittman Construction, and Southern Chips (and through Southern Chips, Sandersville Railroad itself)—are also a clearly defined "class of identifiable individuals," *id.* at 478, who wish to use the Hanson Spur to increase their own profits.

[41] As noted above, Georgia statutes also prohibit pretextual takings. O.C.G.A. § 22-1-3.

When specific private parties are involved, it is not enough that Sandersville makes nebulous claims about public use. "A court confronted with a plausible accusation of impermissible favoritism to private parties should treat the objection as a serious one and review the record to see if it has merit." *Id.* at 491 (Kennedy, J., concurring). The record here proves that the taking will benefit *only* Sandersville and, if they ever sign binding contracts, the Railroad's putative customers. In that regard, when asked about the benefits of the Hanson Spur, the prospective customers discussed only private benefits that would accrue to themselves, not to the public: how the line would allow them to save money, be more competitive, and even act as a hedge against rising prices. (Tr. 382-404.)

Moreover, the Railroad's putative public use here—providing channels of trade—is clearly pretextual. The Railroad did not mention this justification until it submitted its rebuttal testimony on September 28, 2023, more than sixteen months after it first contacted Don Garrett, Sr. about acquiring his property in a letter dated April 4, 2022, thirteen months after it held its public meeting on August 11, 2022, six months after it submitted its initial petition on March 8, 2023, two months after it filed its amended petition on July 20, 2023, and two months after it filed its direct testimony on July 21, 2023. Indeed, the Railroad never mentioned "channels of trade" at all in its initial petition, its amended petition, or its opening testimony. Instead, the Railroad initially focused on how the Hanson Spur would provide economic development, something that is explicitly not a public use under Georgia law. O.C.G.A. § 22-1-1(9)(B).

In sum, under *Kelo*, the Railroad's proposed condemnation is unconstitutional.

B. The Hanson Spur Does Not Reflect an Extensive, Detailed Plan.

In addition to the fact that New London had not identified a particular beneficiary of the taking in *Kelo*, the *Kelo* majority also found the fact that the government had a comprehensive redevelopment plan determinative. 545 U.S. at 484. Specifically, New London's redevelopment

authority had considered a wide variety of possible plans and uses for the city's waterfront, conducted studies, and held multiple public hearings before settling on the plan at issue in that case. 545 U.S. at 473-74; *see also* Nicole Stelle Garnett, *Planning as Public Use?*, 34 Ecology L.Q. 443, 447-48 (2007) (discussing *Kelo*'s "planning mandate" and Justice Kennedy's concurrence "suggesting that the lack of comprehensive planning might render certain takings presumptively invalid").

The *Kelo* majority thus explicitly conditioned its approval of the condemnations on "the comprehensive character of the plan [and] the thorough deliberation that preceded its adoption." *Kelo*, 545 U.S. at 484. When those elements are missing, courts reject condemnations. *See, e.g.*, *Middletown Twp. v. Lands of Stone*, 939 A.2d 331, 338 (Pa. 2007) (concluding that "evidence of a well-developed plan of proper scope is significant proof that an authorized purpose truly motivates a taking"); *Mayor & City of Baltimore v. Valsamaki*, 916 A.2d 324, 352-53 (Md. 2007) (noting absence of clear plan for the use of condemned property and contrasting with *Kelo*); *R.I. Econ. Dev. Corp. v. Parking Co., L.P.*, 892 A.2d 87, 104 (R.I. 2006) (emphasizing difference between condemnor's approach in that case and the "exhaustive preparatory efforts that preceded the takings in *Kelo*").

There is no "comprehensive" plan here, redevelopment or otherwise. *Kelo*, 545 U.S. at 484. As discussed above and in the testimony of Respondents' expert, Mr. Hunter, the Hanson Spur's supposed benefits are remote and unlikely. In contrast to detail and comprehensiveness, the Railroad has offered nothing but speculation. This is hardly the kind of "exhaustive preparatory efforts," *R.I. Econ. Dev. Corp.*, 892 A.2d at 104, that occurred in *Kelo*.

The Hanson Spur is exactly the kind of "one-to-one transfer of property, executed outside the confines of an integrated development plan," that the U.S. Supreme Court held should be viewed with a "skeptical eye." *Kelo*, 545 U.S. at 486-87 & n.17. While Georgia has explicitly

rejected *Kelo*'s holding that economic development is a permissible public use, a taking that fails to clear even that low bar cannot succeed under Georgia law.

III. The Hanson Spur's Customers Are Not Associated with the Public's Interest.

The Georgia Supreme Court has, for over a century, clearly differentiated between those industries that are sufficiently associated with the public interest to justify a condemnation for their benefit and those that are not.[42] The industries that will putatively be served by the Hanson Spur are not the kind associated with the public interest.

As noted above, the primary (and for a substantial length of time, the only) identified user of the Hanson Spur will be HM, which operates a quarry. Other purported users are a mill, a construction company, a wood-chip producer, and a company that transloads agricultural products. None of these industries is remotely connected with the public interest. The Georgia Supreme Court has specifically held that that "the enterprise of quarrying stone and marketing the same is purely private and one in which the public has no interest." *Jones & Co. v. Venable*, 120 Ga. 1, 1,

[42] The Fifth Amendment to the U.S. Constitution allows only takings for a "public use," U.S. Const. amend. V, while Georgia's Constitution allows only takings for "public purposes." Ga. Const. art. I, § III, ¶ I. Georgia courts have interpreted the two clauses coextensively. *See Diversified Holdings, LLP v. City of Suwanee*, 302 Ga. 597, 615, 807 S.E.2d 876, 891 (2017) (Peterson, J., concurring) (noting that Georgia courts "have relied primarily on federal precedents applying the Takings Clause of the Fifth Amendment to the United States Constitution"). However, the Supreme Court of Georgia has not had the opportunity to analyze its Constitution's "language, history, and context" to determine whether its "public purposes" clause might provide greater protection than the U.S. Constitution's "public use" clause. *Olevik v. State*, 302 Ga. 228, 234 n.3, 806 S.E.2d 505, 512 (2017) ("State constitutional provisions may, of course, confer greater protections than their federal counterparts, provided that such broader scope is rooted in the language, history, and context of the state provision."); *see also GeorgiaCarry.Org, Inc. v. Atlanta Botanical Garden, Inc.*, 306 Ga. 829, 844 n.12, 834 S.E.2d 27, 38 (2019) ("Although we may well interpret many of our provisions consistent with the parallel federal provisions, I have previously observed that the text and history of our Takings Clause suggest that it perhaps should not be.") (Peterson, J., concurring). Because the Supreme Court of Georgia has not directly considered whether the text and intent of the Georgia Constitution's Takings Clause provides independent and greater protections than the Fifth Amendment, Respondents specifically and explicitly preserve the right to advance this argument before any judicial tribunal in this proceeding.

47 S.E. 549, 550 (1904).[43] Similarly, the court has specifically held that "[o]ne who owns a sawmill, and is engaged in preparing lumber for market is engaged in a business in which the public is in no way interested, and a business which from its very nature is a purely private enterprise, and necessarily entered into for the purpose of private pecuniary gain." *Garbutt Lumber Co. v. Ga. & Ala. Ry. Co.*, 111 Ga. 714, 715-16, 36 S.E.2d 942, 943 (1900). *See also Loughbridge,* 42 Ga. at 505 ("We are not unaware of the fact that mills are in a general sense for the public; that their tolls are regulated by law, and the manner of rotation among customers regulated. But in our opinion such use is not, in the contemplation of the law of the land, such public use as authorizes the appropriation of private property.").

Moreover, the fact that it is a railroad seeking to condemn private property here does not insulate it from a claim that the taking is an impermissible private taking, as the Railroad seems to suggest. Br. 35-36 (citing O.C.G.A. §§ 22-1-1(9)(A) and 22-1-1(10)). The Georgia Supreme Court has explicitly held, "[I]t is not so much the character of the person exercising the right as the uses to which the object is to be applied." *Jones v. N. Ga. Elec. Co.*, 125 Ga. 618, 54 S.E. 85, 88 (1906). That is, it is the use to which the purported condemnor claims it will devote the property that controls, not the nature or identity of the condemnor itself. (*See* Tr. 1106:11-20 (simply "calling yourself a railroad doesn't automatically give you [] the power [] of eminent domain or the opportunity to be authorized to have that power." There are "threshold determinations that must be met.") (Donald J. Kochan Test.).)

[43] *Jones* concerned whether a quarry could condemn private property to obtain a private way of necessity under Ga. Const. art. I, § III, ¶ II. Having concluded that the quarry was a purely private enterprise, the court held that the legislature was empowered to enact a statute authorizing condemnation of a railroad right-of-way when necessary for the successful operation of a stone or granite quarry pursuant to this provision of the Georgia Constitution. *Jones & Co.*, 120 Ga. 1, 47 S.E. at 552. The Railroad has not claimed that the Hanson Spur constitutes a private way of necessity (because it is not), nor is the quarry the party seeking to condemn the property here. *Cf.* Br. 35 & nn.78-79; Tr. 257:14-258:10 (Mr. Dickson testifying that HM is not interested in building a railroad itself).

These principles do not lead to the conclusion that railroads can never constitutionally condemn private property in Georgia, of course, and, in fact, the court has permitted private companies, including railroads, to condemn private property so long as the condemnation supports an industry that relates in some way to the public interest. For instance, in *Hand Gold Mining Co. v. Parker*, 59 Ga. 419, 425 (1877), the Georgia Supreme Court permitted a company to condemn an easement over private land to mine gold. The court held that, while there was a benefit to the company, the public would benefit from such mining because it was "greatly in need of an increase of that constitutional currency recognized by the fathers of the republic … as being of vital importance to the welfare and permanent prosperity of the people." The court has also permitted the condemnation of private property by industries providing public services, such as light, heat, water, and power. *N. Ga. Elec. Co.*, 125 Ga. 618, 54 S.E.2d at 89-90.[44]

In sum, the Railroad and its putative customers are not the kinds of companies the Georgia courts have found to be sufficiently associated with the public interest to warrant a railroad's use of eminent domain. The Georgia Supreme Court has specifically held that private industries represented by two of Sandersville's putative customers are industries in which the public has no interest. Certainly, a company that wants a railroad line so that it may hedge against its losses on

[44] At one point, Sandersville contends that "land used for the functioning of a railroad is a public use"—full stop. Br. 40-41. It claims that land used "for the creation or functioning of public utilities" is a public use, O.C.G.A. § 22-1-1(9)(A)(ii), and "railroads" are necessarily "public utilities," Br. 40-41. That is incorrect and, if accepted, would have mandated a different result in *Great Walton*. Georgia statutes do state that the use of land for "public utilities" is a public use. O.C.G.A. § 22-1-1(9)(A)(ii). However, in defining "public utility," the General Assembly provided specific examples like those described above: "power" companies; "heat" companies; "communications" companies. Such examples are "public utilities" when they "serve[] the public." O.C.G.A. § 22-1-1(10). The definition includes "railroads," too—but in context, it is clear that railroads, like power and heat and communications companies, *can* be a public utility—provided that they "serve[] the public." *Id.*; *see, e.g.*, *Kinslow v. State*, 311 Ga. 768, 773, 860 S.E.2d 444, 449 (2021) (explaining the *noscitur a sociis* canon, which requires understanding terms "in relation to the other words in the statute" to "avoid ascribing to one word a meaning so broad that it is inconsistent with its accompanying words, 'thus giving unintended breadth' to an act of the General Assembly."). Sandersville proposes to serve, at most, a small network of private businesses, not the public, and it simply is not acting as a public utility or providing services like those provided by public utilities.

the price of oil is also not an industry that is acting for a public purpose. Nor can it be seriously argued that a construction company, a wood-chip producer, or an agricultural transloader are in any way like a company mining metal used in the national currency or companies providing light, heat, water, or power. Instead, they are private industries trying to do what private industries do: maximize their own profit. This is fine in most circumstances, but here these companies are attempting to maximize their profits at the expense of the Respondents. In doing so, they ask this Commission to endorse a naked wealth transfer from Respondents, who are individuals and families, to Sandersville Railroad and a small group of identified businesses.[45] In such instances, the default rule applies: "Private use of land acquired by a railroad through condemnation is not allowed. OCGA § 22-1-2." *Cent. of Ga. R.R. v. Ga. Pub. Serv. Comm'n*, 257 Ga. 217, 219, 356 S.E.2d 865, 866 (1987).[46] That is exactly what is occurring here and that is what Georgia law does not permit.

IV. The Hanson Spur Does Not Meet the Statutory Standards for Railroad Condemnations in Georgia.

Even if the proposed condemnation satisfied the constitutional standards, it does not meet the statutory standards for condemnations by railroads in Georgia.

First, the Railroad has not demonstrated that the Hanson Spur is "necessary for the proper accommodation of the business of the company" under O.C.G.A. § 46-8-120(a)(4). The Hanson Spur is an entirely new business that is entirely disconnected from and will not serve the existing

[45] *See* Tr. 1082:1-4 (Donald J. Kochan Test.) ("This is not a taking of necessity from private property owners to serve truly public interests and the public as a whole. Rather, this is a naked wealth transfer. This kind of private benefit outcome is precisely the kind of private-to-private coerced transfer, facilitated by the state to the advantage of a favored interest, that the Takings Clauses were designed to prevent.")

[46] As it has since the beginning of this proceeding, the Railroad suggests that Respondents' claim is that this condemnation is unconstitutional because it would not best serve a public use, an argument specifically rejected by the Georgia Supreme Court in *Cent. of Ga.*, 257 Ga. at 218-19, 356 S.E.2d at 866. To be clear, Respondents have not, and do not, argue that this condemnation does not best serve a public use. They argue, instead, that it serves *no* public use—best, secondary, or tertiary.

Sandersville Railroad. Moreover, the Railroad has manifestly failed to carry its burden on this point. It has produced close to nothing showing that this new business venture is necessary for the proper accommodation of its business.

Second, the condemnation does not "provid[e] … channels of trade" pursuant to O.C.G.A. § 22-1-1(9)(A)(iii). This condemnation simply does not provide a channel of trade—these channels already exist. There is nothing physically or legally preventing the Railroad's putative customers from accessing the markets they wish to access. Instead, the Railroad's customers just wish to have a cheaper means of accessing these pre-existing channels or otherwise reap economic benefits from a railroad that will take Respondents' land. Taking Respondents' property to further those private economic interests would contravene the General Assembly's 2006 protections against eminent domain and decades of historical public-use understandings.

A. Sandersville Has Not Met Its Burden of Demonstrating That the Hanson Spur is Necessary for the Proper Accommodation of Its Business.

The Railroad has manifestly failed to provide proof that the Hanson Spur is "necessary for the proper accommodation of the business of the company" under O.C.G.A. § 46-8-120.[47] Where the status quo is working and a condemnation will disrupt it, this Commission has found a railroad's condemnation to be not "not necessary for the proper accommodation of the business of the company." *In re: The Great Walton Railroad Co., Inc. d/b/a The Hartwell Railroad Co.'s Petition for Approval to Acquire Real Estate by Condemnation*, Docket 41607, No. 173807, 2018 WL 4154017, at *5 (Ga. Pub. Serv. Comm'n, Aug. 24, 2018). Sandersville's current business is working, and the status quo is viable, so condemnation is not necessary to accommodate Sandersville's business. Instead, the Hanson Spur is an entirely new business that the current

[47] That statute provides that railroads have the power 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." O.C.G.A. § 46-8-120(a)(4).

Sandersville business does not need (or does not need so much that it warrants the Railroad's condemnation of private property.) Further, this entirely new business is likely subject to federal approval, a prospect which Sandersville has not fully addressed, and which could derail the project. Crucially, Sandersville has not taken any steps to show this Commission—or even show itself—that the Hanson Spur project is economically feasible. In fact, it may prove harmful to the health of Sandersville's current business. A financially unsound project cannot be necessary for any business, and Sandersville has not met its burden.

1. The Hanson Spur project is an entirely new business. First, this is not accommodation of Sandersville's business—by its own admission, the Hanson Spur is not necessary for its current business. (*See* Tr. 102:10-103:1.) (Tarbutton Test.). Rather, this is an entirely new business. The Railroad admits that the Hanson Spur is entirely disconnected with and will not serve the existing Sandersville Railroad. Br. 43 ("Sandersville railroad is not currently operating in Sparta") (citing Tr. 102:21-103:2 (Tarbutton Test.)). Sandersville nonetheless claims that constructing an entirely new railroad line, miles away and disconnected from its existing rail service, is "necessary" to properly "accommodate[e]" its business. *Id.* (acknowledging Sandersville "must construct a new … line" because it "has no lines in the Sparta area"). None of the cases the Railroad cites support that proposition, however. Specifically, it claims that *City of Doraville v. Southern Railway Co.* holds "that taking land to construct 'new facilities' … to furnish the needed services both for existing industry … and anticipated future development" meets the "necessary for the proper accommodation of the business" test. Br. 37 (emphasis omitted) (citing 227 Ga. 504, 181 S.E.2d 346 (1971)). It also claims that *Tift v. Atlantic Coast Line Railroad Co.* holds that its burden is met if its project would "provide for th[e] extension of the transportation facilities of [a] railroad company so as to meet the demands of trade." Br. 37-38 (citing 161 Ga. 432, 131 S.E. 46 (1925)).

Neither case sweeps as far as Sandersville claims. In each case, the Commission approved only a modification to the *existing* facilities on the company's *existing* rail lines—not an entirely new rail-line venture disconnected from the company's extant services. *See Doraville*, 227 Ga. at 506, 181 S.E.2d at 347 (explaining that the railroad sought to "construct a new facility" to make more "swift and efficient" its shipments on the existing "main line" it had "for many years operated"); *Tift*, 161 Ga. 432, 131 S.E. at 50 (explaining that the Commission had approved condemnation for an "extension of one of [the railroad's] spur or industrial tracks which was already built and operated upon"); *see also id.* ("extension of the carrier's line").

Sandersville seeks to take Respondents' land not to improve or extend its existing line, but to construct a brand new one, unrelated to its existing services. Indeed, if the Railroad is correct, it would mean that any railroad in this state could condemn any private property within the boundaries of the state, regardless of how disconnected and distant that property may be from the railroad's existing facilities. No cases suggest that a such a new venture for an existing company can be so "necessary" to "accomodat[e]" a railroad's business as to justify the eminent-domain power. O.C.G.A. § 46-8-120(a)(4).

2. The Hanson Spur is a new line likely subject to federal regulation. Second, the fact that Sandersville's project is entirely disconnected from its existing services precludes condemnation under not just state law, but likely federal law too. All along, Sandersville has referred to its proposal as a "spur." (The word "spur" appears 171 times in its opening brief.) However, "spur" is a term of art under the STB's federal statutory power over railroads, and Sandersville's project likely does not fit the bill—it is likely a new "railroad line" instead. The distinction is significant: "Spurs" are excepted from STB regulation. 49 U.S.C. § 10906. On the other hand, a company may "construct an additional railroad line … only if the [STB] issues a certificate authorizing" that construction. *Id*. § 10901(a)(2). STB approval is far from guaranteed

and can involve years of appeals through the federal courts. *See generally, e.g.*, *Mid States Coal. for Prog. v. STB*, 345 F.3d 520, 533 (8th Cir. 2003); *Eagle County v. STB*, 82 F.4th 1152 (D.C. Cir. 2023).

Sandersville's proposal is likely a new "railroad line" requiring federal pre-approval, not a "spur." Determining whether track requires pre-approval necessitates a "case-by-case, fact-specific approach." *In re Sunflower State Indus. Ry., LLC*, 2023 WL 6140296, at *1 (S.T.B. Sept. 19, 2023). However, one factor can be dispositive: Courts often find "track is railroad line [requiring federal approval] if it extends into new territory not served by the carrier." *United Transp. Union-Ill. Leg. Bd. v. STB*, 183 F.3d 606, 613 (7th Cir. 1999) (citing *Bhd. of Locomotive Eng'rs v. STB*, 101 F.3d 718, 728 (D.C. Cir. 1996)). (*Cf.* Tr. 1199:25-1200:5, 1219:5-13 (Mr. Hunter contrasting Sandersville's line with a hypothetical track built by CSX off its own main line, which might be considered a spur).) Sandersville entirely concedes that often-dispositive point. Br. 43 ("Sandersville has no lines in the Sparta area."). If federal approval is required, no construction can occur until the railroad obtains it. 49 U.S.C. § 10901(a)(2). In fact, Sandersville ran into exactly this problem decades ago, when a federal court enjoined it from constructing an extension of its main line until it obtained federal approval. *See Gilmore v. Sandersville R.R. Co.*, 149 F. Supp. 725, 726, 729 (M.D. Ga. 1955). History is all too likely to repeat itself here, and a project that is all too likely to run into a federal court's injunction can do nothing to "accommodat[e]" Sandersville's business.

3. The Hanson Spur project is not feasible. Third, even if section 46-8-120(a)(4) encompasses an entirely new business venture several miles away from a railroad's current operations, and even if the Hanson Spur does not require STB approval or it eventually obtains that approval, Sandersville has made no positive showing that this line will do anything to accommodate its business. For whatever reason, the Railroad has produced no documents for this

Commission's review that show how much this line will cost; what rates it will be charged and what rates it will charge; what equipment obligations it will have to CSX; or what alternatives are available to it. It produced no economic analysis, either for this Commission or for itself—Mr. Tarbutton confirmed he has not consulted with management or financial consultants (Tr. 93:4-9), and has never performed an economic feasibility study of the Hanson Spur project (Tr. 145:4-12). This is such an unusual way to proceed, Mr. Hunter had never seen it before: in "all [his] years of experience in the rail industry" he has "never heard of capital costs being expended like this without a detailed feasibility study." (Tr. 1174:10-13.) An economically unviable project is not necessary to the accommodation of any business.

What little information it has produced has already shown that the Railroad is capable of badly anticipating the costs and benefits associated with this line. Specifically, it admits that its estimate of one of the biggest of those purported benefits was off by 20%. The Railroad has not even provided documents that demonstrate that it can assemble all the properties necessary to have an operating train. Without proof that they can assemble all these properties, there cannot be any use, much less a public use. Sandersville has also not produced any evidence (other than Mr. Tarbutton's bare assertion) that the Class I railroad to which Sandersville wishes to connect can or will accommodate the Hanson Spur's traffic. It has also offered no evidence that it has even sought the STB's approval (or clarified that it is exempt); its way of dealing with the looming federal-approval problem, apparently, is to ignore it and hope for the best. (Tr. 93:15-20 (Mr. Tarbutton answering "I don't know" to whether the project is subject to STB regulation).)[48]

[48] A project's business feasibility is one factor toward obtaining or being denied federal approval. *See Eagle County v. STB*, 82 F.4th 1152, 1196 (D.C. Cir. 2023) (vacating STB approval based in part on "uncertain financial viability").

In contrast, Respondents and Intervenors have produced detailed analyses demonstrating that this line is not economically feasible and will cause harm to the community living near the Hanson Spur. *See* Restatement of Facts Section 6, above (describing Mr. Hunter's detailed feasibility analysis considering Sandersville's failure to conduct anything of the sort). In response, the Railroad has provided only promises and reassurances backed by little except appeals to experience.

If the Railroad were gambling with only its own property, such a poorly thought out and barely documented proposal would be a risk only for the railroad's owners. Here, however, the Railroad is gambling with the property, well-being, heritage, health, and peace of mind of the Respondents and the Intervenors. In such circumstances, it would be manifestly unreasonable to hold that a request to just trust them is sufficient to carry the Railroad's burden to show that this line is necessary for the proper accommodation of the business of the company.[49]

[49] Sandersville and its witnesses have also highlighted purported benefits the Hanson Spur would yield in the form of (1) decreased trucks on Sparta's roads and (2) reduced carbon emissions. (*E.g.*, Am. Pet. ¶ 4; Tr. 33:19-34:1.) These considerations are not relevant to whether the Hanson Spur is "necessary" to "accomodat[e]" Sandersville's business, nor to whether it would serve a public use, and Sandersville's briefing does not suggest otherwise. Nevertheless, Sandersville and its witnesses overstate any impact these benefits would have.

Even if the Hanson Spur would slow the increase in HM's truck traffic from the Hanson Quarry (and it is unclear that it would—HM's current truck traffic serves local markets (Tr. 202:13-16), which will be untouched by the Hanson Spur, and Mr. Dickson's testimony was vague on the future increase in trucks should the Hanson Spur *not* be built (Tr. 1511:12-16), it would *increase* outbound truck traffic by Pittman (Tr. 267:9-268:19), as well as inbound truck traffic by Southern Chips and Veal Farms Transload/Revive Milling, who would need to truck their product 25 miles to reach Sparta at all (Tr. 294:12-25, 94:16-95:2).

As for carbon emissions, neither Mr. Tarbutton nor anyone in his employ calculated how much carbon the Hanson Spur would eliminate. (Tr. 95:8-20.) Nor did any Sandersville witness calculate the *increase* in atmospheric carbon that would result from constructing the Hanson Spur or from the loss of forest that the Hanson Spur would, if built, displace. (Tr. 115:13-116:2, 348:19-349:22.)

B. The Hanson Spur Will Not Provide a Channel of Trade.

The Railroad argues that the Hanson Spur meets the statutory definition of public use because it "provid[es] … channels of trade." Br. 35, 39-40 (citing O.C.G.A. § 22-1-1(9)(A)).[50] However, the Railroad does not define what this term means, nor does it cite any case law discussing what it means. Instead, its analysis consists of testimony from the Railroad and its putative customers about their desire for a cheaper and easier means to access markets they can already access. *See* Br. 39 ("[M]any business leaders in the East middle Georgia community testified that the Hanson Spur will provide them with a method of transport their products to markets *that they currently cannot get to in an efficient way.*" (emphasis added)). It is undisputed that there are no legal or physical barriers that prevent these shippers from accessing the markets they wish to access now via truck or other modes of transportation. (*See* Tr. 104:4-6.)[51]

Rather than attempt to define the term, the Railroad discusses what the term cannot mean, at least in its view. It argues that the term must include expansions of existing channels because otherwise "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." Br. 40.

This argument is wrong for several reasons. First, it ignores the statutory text. "A statute draws its meaning from its text. When we read the statutory text, we must presume that the General Assembly meant what it said and said what it meant, and so, we must read the statutory text in its most natural and reasonable way, as an ordinary speaker of the English language would." *City of*

[50] The relevant statutory text reads: "'Public use' means: … The opening of roads, the construction of defenses, or the providing of channels of trade or travel." O.C.G.A. § 22-1-1(9)(A)(iii).

[51] The Railroad lists other potential means of accessing channels of trade as "horse and buggy, foot courier, or helicopter." Br. 40. It does not mention truck, shipping, transloading on other railroads, or any other modern methods of transportation to which its putative customers already have access.

Marietta, 302 Ga. at 649, 807 S.E.2d at 328 (cleaned up). If the General Assembly wished to have the term "public use" include "expanding channels of trade" instead of "providing channels of trade," it could have done so. It did not.

Second, even if the term "provides" or "providing" were somehow ambiguous, tools of statutory construction also suggest that that the term does not encompass the expansion of existing channels of trade. Georgia courts "generally look to dictionaries and, if relevant, legal dictionaries from the time the statute was passed" to discern "the commonly understood meaning of a word in statutory text" *Raffensperger v. Jackson*, 316 Ga. 383, 395 n.14, 888 S.E.2d 483, 494 n.14 (2023). O.C.G.A. § 22-1-1(9)(A)(iii) was part of the Landowner's Bill of Rights and Private Property Protection Act of 2006, 2006 Ga. L. Act 444 (H.B. 1313); *see* Br. 36 n.83. Contemporary definitions of "provide" define the term to mean "to supply or make available." https://www.merriam-webster.com/dictionary/provide. Supplying or making something available connotates making something available that was not available previously.

Moreover, the term has been in use in Georgia eminent domain statutes since at least 1860, when the General Assembly codified the phrase in § 2201 of Part 2, Title 4 of the Code of 1860. R. H. Clark et al., The Code of the State of Georgia 426-27 (1860), *available at* https://digitalcommons.law.uga.edu/ga_code/18/. Merriam & Webster's dictionary from 1860 defines "provide" as "To procure beforehand; to get, collect, or make ready for future use; to prepare." "To procure" something "beforehand" suggests that the statute encompasses only the obtaining of a channel of trade, not an expansion of a channel of trade to which one already has access. *See* Webster et al., An American Dictionary of the English Language 883 (1860), *available at* https://tile.loc.gov/storage-services/service/gdc/gdclccn/40/02/35/86/40023586/40023586.pdf.

Another indication that this is the correct interpretation is that this term has been in Georgia eminent domain statutes for (at least) 164 years and the Railroad was unable to locate one case

where a railroad has been able to rely on it as a justification for a condemnation. *See* Br. 39-40. If railroads possess such great power to condemn property to expand channels of trade, why has no court ever held as much for more than a century-and-a-half? The fact that the Railroad cannot locate any precedent to support its reading suggests the term is not as expansive as the Railroad makes it to be.

The historical background of the term also suggests that it was designed to provide channels of trade where none existed before. In 1860, Georgia was a rural, agricultural state, significant portions of which were cut off from any form of transportation or access to markets. In such circumstances, it makes sense for the General Assembly to permit condemnors to take private property to open areas that were completely isolated from commerce. In contrast, in 2024, Georgia is a modern state, with significant transportation infrastructure available in the entire state—even to those in rural Sparta, Georgia.

The fact that the Railroad's reading has no end point drives the point home. The Railroad's view seems to be that anything providing a "method [of] transport" is a "channel of trade or travel" sufficient to condemn private property. Br. 39. However, "the statutory interpretation" of channels of trade or travel "must be informed by the nature of the [constitutional] authority it is intending to define." (Tr. 1144:22-1145:3 (Donald J. Kochan Test.).) In other words, the General Assembly's acknowledgment that "channels of trade or travel" can be a public use must be understood with background public-use principles in mind. Otherwise, any railroad track—indeed, any slab of concrete—that some private person would use to get goods to market, or even use for "travel," would justify the eminent-domain power. No one suggests a private person can use eminent domain to build a driveway across their neighbor's lawn because it would help them get to work faster—even though that would literally be a "channel of travel." (*Cf.* Tr. 1144:16-21 (Donald J. Kochan Test.) (contrasting a "channel of trade" with something better understood as a "private

estuary").) To the contrary, railroad condemnations have historically been allowed only when the railroad is "planned as a common carrier, to be used by the public generally"—when "every body who has occasion to use it may lawfully and *of right* do so."). *Hightower v. Chattahoochee Indus. R.R.*, 218 Ga. 122, 124-25, 126 S.E.2d 664, 666 (1962) (internal citation omitted) (cited at Br. 38 n.89 (emphasis added)). Sandersville has made no showing its project fits within that tradition. (*E.g.*, Tr. 48:25-49:2 (Sandersville will not serve customers with hazardous materials), 110:7-17 (Sandersville will set its own private contract rates).) Here, too, the Railroad's reading, if accepted, would have required a different result in this Commission's *Great Walton* decision.

Sandersville's reading would contravene historical public-use understandings and make the Landowner's Bill of Rights meaningless when the condemnor is a railroad. Its argument cannot be right if there is to be any protection from private entities taking private property to further their own, private economic interests. The General Assembly mandated that protection in passing the Landowner's Bill of Rights, and that mandate must be respected.

CONCLUSION

For these reasons, and the reasons presented at the hearing in this matter, Respondents respectfully request that the Hearing Officer propose, and the Commission adopt, an order denying the Railroad's amended petition in this matter.

Respectfully submitted this 6th day of February 2024.

/s/ Grant E. McBride
Grant E. McBride (GA Bar No. 109812)
SMITH, WELCH, WEBB & WHITE,
ATTORNEYS AT LAW
2200 Keys Ferry Court
P.O. Box 10
McDonough, GA 30253
(770) 957-3937
gmcbride@smithwelchlaw.com

William R. Maurer* (WA Bar No. 25451)
INSTITUTE FOR JUSTICE
600 University Street, Ste. 1730
Seattle, WA 98101
(206) 957-1300
wmaurer@ij.org

/s/ Robert B. Baker
Robert B. Baker (GA Bar No. 033881)
ROBERT B. BAKER, PC
2480 Briarcliff Road, NE, Ste. 6
Atlanta, Georgia 30329
(706) 207-5002
bobby@robertbbaker.com

Elizabeth L. Sanz* (CA Bar No. 340538)
Renée D. Flaherty* (DC Bar No. 1011453)
William Aronin* (NY Bar No. 4820031)
Michael Greenberg* (DC Bar No. 1723725)
INSTITUTE FOR JUSTICE
901 N. Glebe Rd., Ste. 900
Arlington, VA 22203
(703) 682-9320
bsanz@ij.org
rflaherty@ij.org
waronin@ij.org
mgreenberg@ij.org

Counsel for Property Owner Respondents
**Admitted pro hac vice*
Signed digitally pursuant to O.C.G.A. § 10-12-7

CERTIFICATE OF SERVICE

I hereby certify that on this 6th day of February, 2024, a copy of the foregoing *Post-Hearing Brief of Respondents* has been served via electronic mail and U.S. First-Class Mail on the following pursuant to GA. COMP. R. & REGS. 515-16-16-.02; 515-2-1-.04(4)(b), (3):

VIA Electronic Mail and U.S. First-Class Mail:

L. Craig Dowdy
Steven L. Jones
TAYLOR ENGLISH DUMA, LLP
1600 Parkwood Circle, Suite 200
Atlanta, Georgia 30339
Tel: (770) 434-6868
Fax: (770) 434-7376
cdowdy@taylorenglish.com
sjones@taylorenglish.com

Robert S. Highsmith, Jr.
Laura E. Flint
HOLLAND & KNIGHT LLP
1180 West Peachtree Street NW, Suite 1800
Atlanta, Georgia 30309
Tel: (404) 817-8500
Fax: (404) 881-0470
robert.highsmith@hklaw.com
laura.flint@hklaw.com

Paul A. Cunningham
HARKINS CUNNINGHAM LLP
1750 K Street, N.W., Suite 300
Washington, D.C. 20006-3804
pac@harkinscunningham.com

Counsel for Petitioner Sandersville Railroad Company

Robert Donald Garrett, Sr.
Sarah V. Garrett
1335 Shoals Road
Sparta, GA 31087

William Blaine Smith
Helen Diane Smith
823 Chatsworth Drive
Accokeek, MD 20607

Marvin Smith, Jr.
Patricia Smith
15500 Avery Road
Rockville, Maryland 20855

Joel Bradford Reed
Kathy Lynn Reed
5 Dogwood Lane
Chatsworth, GA 30705

Leo John Briggs
Georgia Ann Briggs
4500 Hidden Stream Drive
Loganville, GA 30052

Sally G. Wells
140 Dunn Road
Sparta, GA 31087

Donna N. Garrett
154 Lakeview Drive
Sparta, GA 31087

Verne G. Hollis
373 Hamilton Street
Sparta, GA 31087

Herus Ellison Garrett
111 Brookwood Court
Eatonton, GA 31024

Thomas Ahmad Lee
8201 Brookriver Drive, Ste 246
Dallas, TX 75247

Property Owners

Jamie Rush
Malissa Williams
Miriam Gutman
Anjana Joshi
SOUTHERN POVERTY LAW CENTER
150 E. Ponce de Leon Avenue, Suite 340
Decatur, Georgia 30030
Tel: (404) 673-6523
jamie.rush@splcenter.org
malissa.williams@splcenter.org
miriam.gutman@splcenter.org
anjana.joshi@splcenter.org

Counsel for Intervenors No Railroad in Our Community Coalition ("NROCC")

Tom Bond
Georgia Public Service Commission
244 Washington Street, SW
Atlanta, Georgia 30334
Tel: (404) 656-4501
Fax: (404) 656-2341
E-mail: tbond@psc.ga.gov

Designated Hearing Officer

Sallie Tanner
Georgia Public Service Commission
244 Washington Street, SW
Atlanta, GA 30334
Tel: (404) 656-4501
Fax: (404) 656-2341
E-mail: stanner@psc.ga.gov

Executive Secretary of the Public Service Commission

Rob Trokey
Georgia Public Service Commission
244 Washington Street, SW
Atlanta, GA 30334
E-mail: rtrokey@psc.state.ga.us

Director, Electric Unit of the Public Service Commission

Ray-Kelle Preston
Georgia Public Service Commission
244 Washington Street, SW
Atlanta, GA 30334
E-mail: rpreston@psc.ga.gov

DATED this 6th day of February, 2024.

William R. Maurer* (WA Bar No. 25451)
INSTITUTE FOR JUSTICE
600 University Street, Ste. 1730
Seattle, WA 98101
(206) 957-1300
wmaurer@ij.org

Counsel for Property Owner Respondents
**Admitted pro hac vice*
Signed digitally pursuant to O.C.G.A. § 10-12-7