BEFORE THE
GEORGIA PUBLIC SERVICE COMMISSION

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

APPLICATION FOR REVIEW OF INITIAL DECISION AND REQUEST FOR ORAL ARGUMENT

of No Railroad in Our Community Coalition ("NROCC")

May 1, 2024

Jamie Rush (Ga. Bar No. 999887)
Malissa Williams (Ga. Bar No. 964322)
The Southern Poverty Law Center
150 E. Ponce de Leon Avenue, Suite 340
Decatur, GA 30030
E: jamie.rush@splcenter.org
E. malissa.williams@splcenter.org
T: (404) 673-6523

Anjana Joshi* (La. Bar No. 39020)
The Southern Poverty Law Center
201 St. Charles Avenue, Suite 2000
New Orleans, LA 70170
E: anjana.joshi@splcenter.org
T: 504-239-8685

**Admitted pro hac vice*

Counsel for Intervenor
No Railroad in Our Community Coalition

In compliance with O.C.G.A. § 50-13-17(a), Intervenor No Railroad in Our Community Coalition ("NROCC") files this Application for Review of the Initial Decision by the Hearing Officer in *In Re: Sandersville Railroad Company's Petition for Approval to Acquire Real Estate by Condemnation*, Docket No. 45045 (April 1, 2024) (the "Initial Decision") and Request for Oral Argument. NROCC hereby adopts the April 30, 2024, Application for Full Commission Review of Hearing Officer's Initial Decision, Request for Oral Argument, and Motion for Stay of Order of Property Owner Respondents ("Respondents") *in toto* and realleges all arguments established therein as if the same were set forth herein. In addition, NROCC submits the following and respectfully requests that the Georgia Public Service Commission (the "Commission") grant review, reverse the Initial Decision, and dismiss the Sandersville Railroad Company's Amended Petition for Approval to Acquire Real Estate by Condemnation.

REQUEST FOR ORAL ARGUMENT

Because of the importance of this case, the complex issues it raises, and the substantial record, NROCC respectfully requests that the Commission specially set this matter for oral argument.

FACTUAL BACKGROUND

I. Facts Established at the Hearing.

This dispute arises out of the Sandersville Railroad Company's (or "the Company") desire to use the extraordinary power of eminent domain for private gain. The Company filed the petition that is the subject of this proceeding, requesting, among other things, that the Commission approve the acquisition by condemnation of several tracts of private land owned by Respondents to build the Hanson Spur (or "the Spur") between a CSX rail line near Sparta, Georgia and the Hanson Quarry, acquired by North American gravel supplier Heidelberg

Materials.[1] The Sandersville Railroad Company considered alternative routes throughout east middle Georgia but did not produce these routes to Respondents or Intervenors. Teague Test., Tr. at 488. The Sandersville Railroad Company has been in business for 130 years and has enough capital to self-fund this spur project, even if "things go poorly." Tarbutton Test., Tr. 119–20, 157. The Company currently operates 10 miles of main line track in Washington County, Georgia, but does not operate any railroad lines in Hancock County. *Id.* at 43. Benjamin Tarbutton, III, President of the Company, confirmed that the Spur "does not accommodate [the Sandersville Railroad Company's] existing business," *see* Tarbutton Test., Tr. at 147, but rather that it would "allow Sandersville to expand its rail service offerings," Tarbutton Test., Tr. 45.

Similarly, the putative customers of the Hanson Spur admitted that the Spur is not necessary for the functioning of their businesses. *See* Dickson Test., Tr. 365–366; Pittman Test., Tr. 373; Custer Test., Tr. 377. The putative customers are Scott Dickson, President of Heidelberg Materials Southeast, which operates the Hanson Quarry; Arnie Pittman, President of Pittman Construction; Jeffrey Custer, Wood Procurement and Fiber Sales Manager for Southern Chips LLC; and Cale Veal, Sole Managing Member of Veal Farms Transload and Managing Member of Revive Milling. Heidelberg Materials and Pittman Construction are the only two businesses currently operating out of the Hanson Quarry. Tarbutton Test., Tr. at 35. The other three businesses are located about 22 to 25 miles away from the Hanson Quarry. Tarbutton Test., Tr. at 93–95. To use the Spur, these three businesses will truck their products "to the quarry and they will load railcars there" to transport them the additional 4.5 miles to access the CSXT line. *Id.* at 94–95. None of these businesses have binding contracts to use the Spur. Tarbutton Test., Tr. at

[1] *See Sandersville Railroad Petion for Approval to Acquire Real Estate by Condemnation*, Doc. No. 193527; *Amended Petition for Approval to Acquire Real Estate by Condemnation*, Doc. No. 205194.

120. The putative customers did not produce any documents, rate quotes, or any objective evidence related to the market demand of their products that would justify their use of the Spur.

The privately owned Sandersville Railroad Company has petitioned the Commission to condemn and take land in a predominantly Black county. According to the United States Census, Hancock County, Georgia, has an estimated population of 8,387 people, 67.5% of whom are Black or African American. Resp't Ex. 4. Community members describe the area surrounding the proposed Spur as a community with a mostly older and retired population. R. Clayton Test., Tr. 587. Indeed, 25.4% of the population is 65 years and older. Resp't Ex. 4. Land and homeownership are important to Hancock County residents. While the median household income is $33,946, the homeownership rate is 74.4%. Resp't Ex. 4. Eminent domain and similar policies and powers have historically been abused to target and extract land and wealth from Black communities, leading to significant loss of land in Black communities over the last century. Bailey Test., Tr. 664–665.

Respondents and Intervenors have deep, meaningful ancestral connections to Hancock County. The Smith family is illustrative of a long history of Black landownership in the County that has survived efforts and policies that are intended to take wealth and ownership from Black landowners. *See* W.B. Smith Test., Tr. 762. The Smith family's concerns about land loss and increased industry in their neighborhood, which are shared by the community at large, are well founded. Today, Black farmers own less than five million acres compared to 16 million acres in 1920. *See* Bailey Test., Tr. 65.

The Smith family's ancestor, James Blaine Smith, was a Black farmer and descendant of enslaved people who traded his harvest to buy almost 600 acres of land in the 1920s. D.M. Smith Test., Tr. 553. James Blaine Smith founded Smith Produce and sold cotton, peas, butter beans,

corn, and other crops. D.M. Smith Test., Tr. 553. His grandchildren remember him as a generous man who allowed the community to benefit from his land. D.M. Smith Test., Tr. 543. There is currently a tenant house on the Smith property, a reminder of the five or six houses that were previously on the property for Black farmworkers who worked on the farm. W.B. Smith Test., Tr. 762. Community members could purchase fresh produce that was grown on Smith land. D.M. Smith Test., Tr. 553. The descendants of James Blaine Smith have kept the land in their family with hopes of passing it down to future generations. D.M. Smith Test., Tr. 559. Almost 100 years after James Blaine Smith purchased the land, his family continues to maintain and enjoy the land, celebrating holidays, hiking, fishing, farming, and generally benefiting from their ancestor's gift. W.B. Smith Test., Tr. 806.

Respondents Joel Reed and Leo Briggs have owned their properties for decades, and plan to maintain its character and beauty for future generations. *See* Reed Test., Tr. 1045; *see also* Briggs Test., Tr. 878, 880. Similarly, Bennie and Eloise Clayton are NROCC members who have lived on Clayton Boulevard, the street named after them, since 1970.[2] Respondent Robert Donald Garrett finds value in gathering with family, gardening, hunting, and fishing on his land. Garrett Test., Tr. 955. This shared connection to community and the concerns about the threats to preserving their land ownership fostered the creation of NROCC. *See* J. Smith Test., Tr. at 565.

Intervenor NROCC is an unincorporated association that was created by the community in response to the Company's threats to take private land from community members for the proposed Hanson Spur. *See* J. Smith Test., Tr. at 565. NROCC founders Janet and David "Mark" Smith received a letter from Sandersville Railroad Company in April 2022 that indicated the

[2] *See Verified Application for Leave to Intervene of the No Railroad in Our Community Coalition*, Doc. No. 204880.

company's intent to use some of their property for the Hanson Spur. *Id.* at 574. Currently, Janet and Mark Smith's property is no longer on the proposed route, but the Smiths continue to lead NROCC on behalf of their community. *Id*. at 575.

Since its founding in July 2022, NROCC and its members have galvanized and mobilized the community by organizing monthly rallies to inform the community about the proposed railroad, recruiting new members who also oppose the rail Spur, spearheading media campaigns, attending Hancock County Commission meetings, and creating and distributing NROCC-branded yard signs. *See id.* at 566. NROCC also works to prevent new environmental burdens from plaguing the community in addition to the noise, dust, debris, and vibrations from the mining operations at the Hanson Quarry that already burden the community. *Id*. Dr. Erica Walker, NROCC's expert witness from the Community Noise Lab at the Brown University School of Public Health, confirmed NROCC's noise concerns in a study that measured sound levels at several NROCC members' homes along the proposed Spur. Walker Test., Tr. 697.

NROCC members live near or along the proposed railroad route, but that is not a requirement for membership.[3] NROCC's membership extends beyond the members who testified in the current proceedings and includes all community members who support its mission to stop the Hanson Spur.

II. Factual Findings of the Hearing Officer.

The Hearing Officer concluded that the Hanson Spur is necessary for the proper accommodation of the Sandersville Railroad Company's business and that it would serve a

[3] *See Verified Application for Leave to Intervene of the No Railroad in Our Community Coalition*, Doc. No. 204880.

public use. The Hearing Officer's conclusions were based on factual findings, including the following.

- "That the 'business of the company' is providing the transportation service of connecting industries by rail and connecting rail traffic with larger rail networks." Initial Decision at 13, 18.
- That, "[w]ithout the Spur, Sandersville Railroad cannot viably offer industries, companies, and farmers in East middle Georgia connection with and direct rail access to CSXT's system." Initial Decision at 13.
- That "there is market demand for the Spur" because "five of Sandersville Railroad's current and prospective customers testified they want the service.". Initial Decision at 13.
- That customers can already access the CSXT rail network if they pay switching charges per railcar. Initial Decision at 6.
- That "[w]hile Sandersville would not be offering its services as a common carrier, it would offer its switch services to any shipper that wants to negotiate a contract rate on mutually satisfactory terms." Initial Decision at 15.
- That "there are five customers that have entered into memoranda of understanding with Sandersville Railroad." Initial Decision at 15.
- That short line railroads in East middle Georgia do not have direct access to CSXT. Initial Decision at 16.
- That "[p]rospective customers testified that the Hanson Spur will allow them to reach markets served by CSXT and provide a new route for these companies to deliver their goods to market." Initial Decision at 16.
- That "Sandersville's Petitions did not cite to O.C.G.A. 22-1-1; however, O.C.G.A. 46-8-121, which was cited, provides that condemnation is done in the manner provided by Title 22." Initial Decision at 18.

The Hearing Officer's Initial Decision granting the Sandersville Railroad Company's petition to condemn Respondents' property and build a railroad through this historic Black community to the detriment of Respondents, Intervenors, and the community at large is not supported by the evidence or by Georgia law. The Initial Decision should be reversed, and the Company's petition should be denied.

LEGAL FRAMEWORK & STANDARD OF REVIEW

Under the Georgia Constitution, eminent domain may be exercised "for any [] public purposes as determined by the General Assembly." Ga. Const. art. I, § 3, ¶ I; *see also* O.C.G.A.

§ 22-1-3. Railroad companies in Georgia are "authorized and empowered . . . [t]o build and maintain such additional . . . tracks . . . as may be necessary for the proper accommodation of the business of the company." O.C.G.A. § 46-8-120(a)(4); *see also* O.C.G.A. § 46-8-121. However, such additional tracks must be for a public use, as enumerated by the Georgia legislature and determined as a matter of law by the courts. O.C.G.A. § 22-1-2(a). Among the enumerated "public use[s]" set forth by the Georgia legislature are "[t]he use of land for the creation or functioning of public utilities" and "the providing of channels of trade or travel." *See* Ga. Code Ann. § 22-1-1(9)(A)(ii), (iii). "The public benefit of economic development shall not constitute a public use." *See* Ga. Code Ann. § 22-1-1(9)(B). Courts must strictly construe statutes conferring the power of eminent domain, and "clear legislative authority must be shown to authorize the taking." *See State Highway Dept. v. Hatcher,* 218 Ga. 299, 302 (1962); *see also City of Marietta v. Summerour*, 302 Ga. 645, 659 (2017) (*"*Georgia law has always required governments to comply strictly with condemnation procedures when exercising the power of eminent domain."); *Shiv Aban, Inc. v. Georgia Dep't of Transp.*, 336 Ga. App. 804, 806 (2016) ("[E]minent domain statutes must be strictly construed in favor of the private landowner."). "Too much caution in this respect cannot be observed to prevent abuse and oppression." *Hatcher*, 218 Ga. at 302 (quoting *Frank v. City of Atlanta*, 72 Ga. 428, 432 (1884)).

In seeking to exercise the power of eminent domain, the Sandersville Railroad Company "shall bear the burden of proof by the evidence presented that the condemnation is for a public use as defined in Code Section 22-1-1." O.C.G.A. § 22-1-11 (emphasis added); *see also* O.C.G.A. § 22-1-2(a) ("Public use is a matter of law to be determined by the court and the condemner bears the burden of proof.").

The Georgia Public Service Commission is tasked with "the general supervision of all common carriers, . . . [and] railroad or street railroad companies," O.C.G.A. § 46-2-20(a), including the power to "prescribe rules with reference to the use, construction, removal, or change of spurtracks and sidetracks," O.C.G.A. § 46-8-21(2). Pursuant to these authorities, the Commission must approve a railroad company's use of eminent domain before it can acquire the private property of another.[4] "[T]he hearing officer will set the matter down for hearing to determine if there is a legitimate public purpose for the proposed condemnation." Ga. Comp. R. & Regs. 515-16-16-.02.

Although the hearing officer makes a recommendation, the Commission has the authority to reverse the initial decision without deference to the hearing officer. Georgia law confirms that "on review from the initial decision of the representative, the agency shall have all the powers it would have in making the initial decision and, if deemed advisable, the agency may take additional testimony or remand the case to the hearing representative for such purpose." O.C.G.A. § 50-13-17(a). Further, the Supreme Court of Georgia has opined that "the General Assembly granted agencies broader powers to review the initial decisions of one of their own agency representatives under the APA. In this regard, O.C.G.A. § 50-13-17 (a) provides that, when an agency is reviewing an initial decision of an agency representative in a contested case, the agency 'shall have all the powers it would have in making the initial decision,' which would include the power to evaluate the evidence based on its specialized knowledge, as authorized by OCGA § 50-13-15 (4)." *Vantage Cancer Centers of Georgia, LLC v. Georgia Dep't of Cmty. Health*, 898 S.E.2d 462, 472 (Ga. 2024).

[4] *See* O.C.G.A. § 46-8-121.

ARGUMENT

I. The Commission Should Reverse the Initial Decision Because it is Substantively Incorrect.

A. The Initial Decision erred by failing to construe the relevant statutory provisions strictly in favor of private landowners and by concluding, based on selective evidence and the Sandersville Railroad Company's shifting legal assertions, that the Company met its burden of proof for condemnation.

The Sandersville Railroad Company did not meet its burden of demonstrating that it has authority to build the Hanson Spur and that the Hanson Spur would serve a legitimate public use. *See* O.C.G.A. § 22-1-11. While the Initial Decision technically meets the statutory requirements for a Commission decision by setting forth the Hearing Officer's findings of facts and conclusions of law separately, *see* O.C.G.A. 50-13-17(b), the Hearing Officer's findings of facts were substantively insufficient to support the conclusions of law. As set forth in more detail below, the Initial Decision relied on some evidence while ignoring contrary evidence in the record and accepted many of the Sandersville Railroad Company's unsubstantiated arguments at face value. *See* Initial Decision at 12–16, 18.

Additionally, in interpreting the relevant statutory provisions, the Initial Decision failed to strictly construe key words consistent with the intent of the legislature to protect private property owners from those who would abuse the extraordinary power of eminent domain. *See Hatcher,* 218 Ga. at 302; *Summerour*, 302 Ga. at 659; *Shiv Aban, Inc.*, 336 Ga. App. at 806. Strict "construction ensures that the needs of the state [and private companies] are appropriately balanced against the fundamental right of private ownership." *Threatt v. Forsyth Cnty.*, 250 Ga. App. 838, 840 (2001). In failing to strictly construe the statutes in favor of affected landowners, and in applying its overly broad interpretation of the statutes to selective evidence in the record,

the Initial Decision impermissibly shifted the burden of proof from the Sandersville Railroad Company to Respondents and Intervenors.[5]

The Hearing Officer's blanket acceptance of the Sandersville Railroad Company's word as the basis of its authority to condemn private land in this historically Black community is especially concerning, given the shifting nature of the Company's purported authority and reasons for the condemnation.[6] Even if, as the Initial Decision noted,[7] the Company cited generally to O.C.G.A. § 46-8-121, which incorporates Title 22 by reference, the clear weight of the Company's allegations and evidence in its Initial and Amended Petitions was about the alleged jobs, taxes, and other benefits to residents of Sparta—all economic development activity—which Title 22 clearly states is not a permissible public use. *See* O.C.G.A. § 22-1-1(9)(B). The Sandersville Railroad Company's abrupt pivot at the hearing to offer legitimate public uses enumerated by the eminent domain statute should have been met with incredulity and

---

[5] *See* Ga. Comp. R. & Regs. 515-2-1-.01 ("In determining findings of fact or in its deliberations, the Commission will hold no presumption in favor of the position of any party, . . . and shall only give weight and credit to any party in the case as can be supported by credible evidence in the record . . . nothing in this Rule shall amend, modify or repeal in any way any burden of proof or burden of production requirements under Georgia law.").

[6] The Sandersville Railroad Company's Initial and Amended Petitions, filed on March 8, 2023, and on July 23, 2023, respectively, argued only that the Hanson Spur would bring economic benefits to Hancock County. That was the legal basis proffered by the Company to NROCC members and to the Commission for at least six months, a majority of the time the proceedings were pending before the Commission. However, on September 28, 2023—two months prior to the hearing before the Commission, and after Respondents and Intervenors pre-filed testimony and pointed out that economic development is not a legitimate public use under Georgia law—the Sandersville Railroad Company asserted that the Hanson Spur would provide channels of trade for the first time. *See* Tarbutton Rebuttal Test., Tr. at 20. Additionally, the Sandersville Railroad Company only discussed the public use of the "creation or functioning of public utility," set forth in O.C.G.A. § 22-1-1(9)(A)(ii), for the first time at the hearing.

[7] *See* Initial Decision at 18 ("Sandersville's Petitions did not cite to O.C.G.A. 22-1-1; however, O.C.G.A. 46-8-121, which was cited, provides that condemnation is done in the manner provided by Title 22.").

heightened scrutiny, especially when proffered by a private company. *See Hopkins v. Fla. Cent. & P.R. Co.*, 97 Ga. 107 (1896) ("[T]he only limitation imposed upon this power [of eminent domain] is a denial of the right, under the pretext of public necessity, to appropriate the property of one person to the private use of another."); *see also* O.C.G.A. § 22-1-3 (noting that even where the state's condemnation powers are concerned, laws should be declared inoperative if private property is taken, "under pretext of [] necessity").

The Commission should not "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 Railroad Company] proclaimed it exercised that power for a 'public purpose.'" *See Brannen v. Bulloch Cnty.*, 193 Ga. App. 151, 155 (1989). Instead, the Commission should find that "the inescapable conclusion is that although a public" railroad can be a legitimate public use for condemning private property, "the appropriation of this land for that purpose was not the true reason for the institution of the condemnation proceeding here." *Id.* The Hearing Officer's wholesale acceptance of the Sandersville Railroad Company's late and pretextual justifications for seeking to exercise the extraordinary power of eminent domain, and its reliance on the selective arguments and evidence from the Sandersville Railroad Company, erroneously flipped the Company's burden of proof.

B. The Initial Decision erred in concluding that the Hanson Spur is necessary for the proper accommodation of the Sandersville Railroad Company's business.

The Initial Decision concluded that the Hanson Spur is necessary for the proper accommodation of the Sandersville Railroad Company's business. *See* Initial Decision at 12–14. The Hearing Officer's findings and conclusions were erroneous because they relied solely on the assurances of the Company that its proposed business venture met the standards for authorization. The Initial Decision also read "necessary," "proper," and "accommodation" out of

the statute to the detriment of affected property owners, instead of construing these words in favor of private property owners as required under Georgia law. *See Botts v. Se. Pipe-Line Co.*, 190 Ga. 689, 693 (1940) ("Since the power to take private property for a public use or benefit is in derogation of the right of the citizen, statutes under which it is claimed must be strictly construed, and it is generally held that the power is not conferred unless an intention to that effect appears in clear and express terms, or by necessary implication.").

1. The Initial Decision selectively relies on the interested arguments and testimony of the Sandersville Railroad Company to support its legal conclusions.

As stated, the Hearing Officer's conclusions as to whether the Hanson Spur is "necessary for the proper accommodation of" the Sandersville Railroad Company's business are supported primarily by citations to arguments by the Company in its briefs and the lay opinion testimony of Benjamin Tarbutton, the President of the Sandersville Railroad Company. The Hearing Officer's interpretation under O.C.G.A. § 46-8-120(a)(4) is therefore improperly based on the assurances of the company that it meets this standard. Without more, this is insufficient. Moreover, it ignores contrary evidence that the Hanson Spur is not necessary nor a proper accommodation of the Sandersville Railroad Company's business. *See, e.g.,* Hunter Test., Tr. 1168–1410 (expert testimony that the project is not feasible); Tarbutton Test., Tr. at 147 (the Spur will not accommodate the Company's existing business); *id.* at 157 ("even if things go poorly" with the Hanson Spur, the Company's business will be "fine"); *id*. at 102 ("[T]he Hanson Spur is going to be an entirely new economic effort" for Sandersville Railroad Company); Sandersville Br. at 33 n. 68 ("Sandersville Railroad is not seeking to construct an extension or branch road and is instead building a brand-new spur track.").

2. The Initial Decision failed to strictly construe whether the Hanson Spur is "necessary" or a "proper" "accommodation" of the Sandersville Railroad Company's business.

In interpreting whether the Hanson Spur is "necessary for the proper accommodation of" the Sandersville Railroad Company's business, the Initial Decision virtually read the words "necessary," "proper," and "accommodation" out of the statute. In effect, the Initial Decision empowers the Sandersville Railroad Company to take the private property of others to expand its business ventures without discussing whether such business ventures are truly necessary or proper accommodations of the Company's business. *See* O.C.G.A. § 46-8-120(a)(4). The Initial Decision erred by adopting an expansive reading of these terms that failed to strictly construe them consistent with the intent of the legislature to protect private property owners. *See State Highway Dept. v. Hatcher,* 218 Ga. 299, 302 (1962); *Summerour*, 302 Ga. at 659; *Shiv Aban, Inc.*, 336 Ga. App. at 806; *Threatt*, 250 Ga. App. at 840.

The Initial Decision concluded that the Hanson Spur is necessary for the proper accommodation of the Sandersville Railroad Company's business based on two findings: (1) that the Company's business was to provide "the transportation service of connecting industries by rail and connecting rail traffic with larger rail networks," and (2) that without the Hanson Spur, the Company "cannot viably offer industries, companies, and farmers in East middle Georgia connection with and direct rail access to CSXT's system." Initial Decision at 13 (citing Tarbutton Test., Tr. at 31:16-20). The Initial Decision did not explain its conclusion that the condemnation is necessary for the proper accommodation of the Company's business within the context of applicable Georgia law or an undertaking of robust statutory interpretation. Instead, it merely accepted the Company's arguments and assurances as fact. Initial Decision at 13. This was error.

a. The Hanson Spur is not necessary for the Sandersville Railroad Company's business.

The Georgia Constitution permits the taking of property for "public purposes as determined by the General Assembly . . . [.]" Ga. Const. art. I, § 3, ¶ I(a). The General Assembly has determined that railroad companies may improve their lines through the acquisition of land through purchase or gift or by condemnation. O.C.G.A. § 46-8-121. No matter the method, the company's acquisition of private property must be necessary. First, "[a]uthority and power are granted to railroad companies to . . . hold such real estate as may be necessary for all of the purposes mentioned in Code Section 46-8-120." O.C.G.A. § 46-8-121 (emphasis added). Second, pursuant to O.C.G.A. § 46-8-120(a)(4), railroad companies may "build and maintain . . . such additional . . . tracks . . . as may be necessary for the proper accommodation of the business of the company." (emphasis added). The Initial Decision did not consider the gravity of the word "necessary" under either statute when it concluded that the Sandersville Railroad Company met its burden to condemn merely because it could not provide a brand-new service to expand its business and save companies in east Middle Georgia money without building the Hanson Spur.

The meaning of "necessary" under both statutory provisions must first be understood within the text, structure, and history of Georgia's eminent domain statutes as a whole. After the Supreme Court's decision in *Kelo v. City of New London, Conn.*,[8] the Georgia legislature swiftly moved to pass the Landowner's Bill of Rights and Private Property Protection Act. The Act codified protections for the rights of individual property owners, *see* O.C.G.A. § 22-1-15, "reveal[ing] a remedial purpose of protecting property owners against abuse of the power of

[8] 545 U.S. 469 (2005) (holding that a city's use of eminent domain in furtherance of an economic development plan was a constitutional "public use" within the meaning of the Fifth Amendment Takings Clause).

eminent domain at every stage of the condemnation process and thereby promoting public confidence in the exercise of that power," *see Summerour*, 302 Ga. at 654. The Sandersville Railroad Company claims that the Hanson Spur "will run through pasture and timberland." *See* Tarbutton Test., Tr. at 33. This is both dismissive and disingenuous, for it ignores the untold harms that the Spur will cause to landowners and residents of this quiet Black neighborhood. *See e.g.,* Kenneth Clayton Test., Tr. at 621 ("My understanding is that the spur 5 will be about 75 to 100 feet away from my house."). Any interpretation of "necessary" must bear this legislative context in mind, particularly where, as here, impacted landowners' ancestors were formerly enslaved on the very land at issue in these proceedings. *See, e.g.,* D.M. Smith Test., Tr. 553. The terms of the statutes must be construed in favor of the landowners to prevent the systemic dispossession of land, assets, and generational wealth in this historical Black community.

In construing the word "necessary" in other related contexts, courts have read a requirement of reasonableness into the eminent domain statutes, asking whether the taking of private property (and how much property) is "reasonably necessary" considering the facts and circumstances of the matter. *See, e.g., Banks v. Georgia Power Co.*, 267 Ga. 602, 604 (1997) (noting that, under O.C.G.A. § 22-3-20, the condemner is "limited to" taking an amount of private property "that is reasonably necessary under all the facts and circumstances regarding the particular matter under consideration" (quoting *Piedmont Cotton Mills v. Georgia Ry. & Elec. Co.*, 131 Ga. 129, 136 (1908))); *Hopkins v. Fla. Cent. & P.R. Co.*, 97 Ga. 107 (1896) ("If the authority permits the acquisition of as much as may be necessary, or, in still more general terms, confers the power to condemn property for the purposes of the undertaking, it will be construed to authorize the taking of so much as may be reasonably necessary under the circumstances.").

This Commission, too, has reversed the initial decision of the hearing officer in a case

where the facts and circumstances failed to demonstrate that the condemnation was necessary. In *Great Walton*, the Commission determined that a railroad company's request to condemn private property for a proposed run-around was not necessary to justify "its concomitant disruption of the status quo."[9] The Commission's focus on the facts and circumstances of the case, including alternative routes presented and the detrimental impacts it would have on the status quo, necessitated a finding that the proposed condemnation was not necessary for the accommodation of the railroad company's business, even where the company's stated purpose for building the run-around was to increase the safety of its employees and rail and vehicular traffic. The Commission should follow its own interpretive precedent and apply, at a bare minimum, a construction of "reasonably necessary" to the statute here.

As stated, the Georgia legislature requires that the authority to condemn must be "necessary for all of the purposes mentioned in Code Section 46-8-120." *See* O.C.G.A. § 46-8-121. The Sandersville Railroad Company, and the Initial Decision in adopting the Company's arguments, ignored the necessity requirement in Section 46-8-121 completely. The legislature's inclusion of the word "necessary" in this statute is significant because it applies even where a railroad company acquires private land through gift or purchase—not just through condemnation. *See* O.C.G.A. § 46-8-121 ("[a]uthority and power are granted to railroad companies to acquire by purchase or gift and to hold such real estate as may be necessary for all of the purposes mentioned in Code Section 46-8-120." (emphasis added)). The legislature's inclusion of the limiting term "necessary" demonstrates an intent to minimize damage to private landowners, regardless of how the railroad company acquires the land. Thus, even where a railroad company

[9] *Petition of the Great Walton R.R. Co., Inc. d/b/a the Hartwell R.R. Co. for Approval to Acquire Real Est. by Condemnation.*, No. 41607, 2018 WL 4154017, at *3 (Aug. 24, 2018).

is gifted private property or purchases it from a landowner willing to sell, the railroad company can only hold property "as may be necessary" for the improvement or relocation of its lines as set forth in Section 46-8-120. *See* Hopkins, 97 Ga. 107 (1896) (eminent domain statutes "and the consequent appropriation of the property of the owner to public uses, must be strictly construed, and will not be extended beyond the express words or the necessary implications of the statute conferring the power."). The Commission should construe a railroad company's power to condemn and to take private property against a property owner's will under O.C.G.A. § 46-8-121 as having—at the very least—a similar limitation minimizing harms to private landowners and conclude that the Sandersville Railroad Company has not met its burden.

Similarly, the word "necessary" under O.C.G.A. § 46-8-120(a)(4), even as modified by "for the proper accommodation of the business," must include, at the very least, a reasonableness inquiry. As in *Great Walton*, "necessary for the proper accommodation of the business," must be interpreted under a reasonableness framework in light of the facts and circumstances. Here, unlike in *Great Walton*, where the railroad company was denied the authority to condemn to address security concerns, the Sandersville Railroad Company does not seek to shore up safety or any other significant or essential facet of its business through construction of the Hanson Spur.[10] Instead, ample evidence demonstrates that the Hanson Spur would generate new business for the Company[11] in and around Hancock County. The Sandersville Railroad Company does not currently operate in Sparta and is seeking to reach outside of its current business operations to build a brand-new rail enterprise through a predominantly Black town where it has no business

[10] *See* NECESSARY, Black's Law Dictionary (11th ed. 2019) ("That is needed for some purpose or reason," "essential," "[t]hat must exist or happen and cannot be avoided," or "inevitable").

[11] Tarbutton testified that "we make a lick because we're able to see an opportunity and go after it. And that's how we make money is get to the markets quicker." Tarbutton Test., Tr. at 105.

(literally or figuratively) operating.[12] Benjamin Tarbutton, the owner of the Sandersville Railroad Company, stated that the company had been in business for 130 years, that the company had enough capital for the Spur project, and that he did not have the problem of losing money and "hadn't really given that much thought." *See* Tarbutton Test., Tr. at 105, 139–40; *see also id.* at 159–61. He also stated that the Company is "prepared to build this railroad and . . . even if things go poorly" it will be "fine;" that the Company is "still going to be able to . . . cover our variable costs" and operate its current business. Tarbutton Test., Tr. at 157. The facts and circumstances here simply do not demonstrate any reasonable necessity warranting the taking of private property to accommodate the Sandersville Railroad Company's business. Accordingly, the Company has not met its burden of showing that such an expansion of its business is "necessary" for the proper accommodation of its business within the meaning of O.C.G.A. § 46-8-120(a)(4).[13]

The Initial Decision should have construed "necessary" to mean something more than that the Sandersville Railroad Company "cannot viably offer industries, companies, and farmers in East middle Georgia" a connection to a larger rail line without the Hanson Spur. The inability of a for-profit business to expand its business at any time and in any place or manner to offer other businesses a chance to save money and generate profits simply cannot be what the legislature intended to warrant a necessary trampling of the private property rights of others. Indeed, this overly broad interpretation of "necessary" would lead to exactly the kinds of

---

[12] "[T]he Hanson Spur is going to be an entirely new economic effort" for Sandersville Railroad Company. Tarbutton Test., Tr. at 102.

[13] As the Sandersville Railroad Company has readily acknowledged, "Sandersville Railroad is not seeking to construct an extension or branch road and is instead building a brand-new spur track." Sandersville Br. at 33 n.68; *see also* Tarbutton Test., Tr. at 102 "[T]he Hanson Spur is going to be an entirely new economic effort" for Sandersville Railroad Company.

abuse of the extraordinary eminent domain power that the legislature seeks to prevent.

In sum, while it may be economically desirable to the Sandersville Railroad Company to take private land for the Hanson Spur so that it can generate additional profit for itself and for a handful of other companies—one of which Benjamin Tarbutton also owns[14]—neither the expansion of business for profit nor the desire to provide a less expensive option for other business are "necessary," within a construction of that term that considers the facts and circumstances and accommodates the legislature's mandate that the eminent domain statutes be strictly construed in favor of private property owners. *See Normandale Lumber Co.*, 14 S.E. at 883.[15] "Too much caution in this respect cannot be observed to prevent abuse and oppression." *Hatcher*, 218 Ga. at 302 (internal citations and quotation marks omitted).

i. <u>The Initial Decision ignored that the Sandersville Railroad Company's route "problem" is one of its own making and that serious alternatives to the Hanson Spur that undermine its purported necessity were presented.</u>

The Initial Decision concluded that its authority was limited to determining whether the condemnation "serves a public purpose, not whether the condemnation best serves the public interest." Initial Decision p. 17 (citing *Central of Georgia Railroad Company v. Georgia Public Service Commission*, 257 Ga. 217, 218 (1987)). The Initial Decision went on to find, however, that "no serious alternatives, other than simply not building the Hanson Spur, were presented in

[14] Southern Chips is a single-member LLC with Sandersville Railroad Company as the single member. *See* Tarbutton Test., Tr. at 178–79.

[15] *See also Great Walton*, 2018 WL 4154017, at *2–3, 5 (where safety concerns did not rise to the level of necessity); *Shiv Aban, Inc.*, 336 Ga. App. at 806; *Threatt*, 250 Ga. App. at 840.

this case." *Id.* As the Commission concluded in *Great Walton*,[16] and as the Sandersville Railroad Company acknowledged, *see* Sandersville Reply Br. at 11, the existence and availability of alternatives is directly relevant to whether a condemnation is necessary for the proper accommodation of the condemner's business.

As an initial matter, the Sandersville Railroad Company puzzlingly argues simultaneously that no other short-line railroad in east middle Georgia has access to the CSXT rail system and that there is only one viable path through the community in Sparta that the spur can take. However, the Company arbitrarily chose the Hanson Quarry as the end of its spur over other areas[17] because the land adjacent to the quarry could be developed to accommodate additional industry that would serve its rail line and line its pockets. *See* Tarbutton Test., Tr. at 45. It also stands to benefit financially in other ways from this specific route, as Benjamin Tarbutton owns Southern Chips, one of the Hanson Spur's purported customers that is located approximately 25 miles from the Spur. *See* Custer Test., Tr. at 272. Now, allegedly hemmed in by its own business decisions, the Company is crying no other viable option.[18] This claim should be met with suspicion, given that all east middle Georgia, a relatively vast expanse of area,

---

[16] *Great Walton*, 2018 WL 4154017, at *3 ("The Commission also finds and concludes that with the existence of several reasonable alternatives, the condemnation is not 'necessary for the proper accommodation of the business of the company.'").

[17] *See*, e.g., Teague Test., Tr. at 488 ("There was some other areas that were – were looked at and considered in that kind of wider green area there."). These draft routes were never produced to Respondents or Intervenors, and Mr. Teague did not recall whether they had even been produced to the Sandersville Railroad Company. *See id.* at 488.

[18] *See* Teague Test., Tr. at 476 (*"*So as we evaluated, we had a fixed point here with the transload site, the Pittman Construction, and the quarry, looking to make the connection to CSX."); *see id.* at 477 ("The other thing that was a major consideration as we looked at this was impact to existing residential areas. Again, we have a fixed point with where the quarry is and where Pittman Construction is. So there was no way to completely avoid that . . . [.]"); *see id.* at 487 (Q: Did you come up with any more than two routes? A: We looked at variations along the constraints area, but the constraints area really narrowed things in for us.").

allegedly lacks access to CSXT lines. *See* Tarbutton Test., Tr. at 35. The Sandersville Railroad Company should not be permitted to simultaneously (1) condemn private property based on a justification that it is creating a service for an entire vast underserved geographical region, (2) while intentionally selecting a route that will maximize its profits and that discriminatorily divides a Black community and extracts its wealth, and 3) claim that there are no alternative routes available. CSXT does not have any involvement with the Spur beyond coordinating a tie-in point, *see* Teague Test., Tr. at 490, and the Sandersville Railroad Company has not demonstrated that the only tie-in point to the CSX line is the one accommodating the proposed route to and from the Hanson Quarry. The contours of the proposed route to and from the Hanson Quarry was a business decision with a bottom line.

Additionally, the Hearing Officer's findings and conclusions ignored evidence of alternatives to the Hanson Spur that were proposed by Respondents and Intervenors and discarded by the Sandersville Railroad Company for illegitimate reasons. The Initial Decision fails to explain why the alternative options presented would not constitute "serious alternatives." It also fails to consider that the Sandersville Railroad Company did not provide evidence of why additional changes to the route within the corridor to and from the quarry would be impractical. *See* Teague Test., Tr. at 457 (noting that the Company's consultant "further adjusted the route to minimize the impact to the surrounding environment and community to the maximum extent practicable"). Without more, the Initial Decision improperly shifts the burden of proof from the Sandersville Railroad Company onto Respondents and Intervenors.

First, the Initial Decision acknowledged—but then immediately dismissed—evidence that a viable alternative to the Hanson Spur already exists for companies operating in east middle Georgia. Initial Decision p. 17. The Initial Decision appears to accept at face value the

companies' assertion that trucking goods is more expensive for the companies and is therefore not a serious alternative. However, the status quo of trucking goods to major rail lines is not cost prohibitive for these companies.[19] Nor are mere assertions to the contrary concluding that trucking is not a viable long-term option—without more—sufficient to carry the Sandersville Railroad Company's burden of proof with respect to the necessity of the Hanson Spur.[20]

Second, the Initial Decision ignored other alternatives that were put forth in the record and failed to explain why it concluded that these alternatives were not "serious." For example, Arnie Pittman, President of Pittman Construction Company, testified that "[o]ther parties to this proceeding have suggested that it would be viable for Pittman Construction to receive liquid asphalt at a site adjacent or in closer proximity to the CSXT rail located outside of Sparta, Georgia, near State Route 16. In other words, they suggest it is not necessary for Pittman Construction to have direct rail access to its Sparta plant." Arnie Pittman Test., Tr. at 230. Mr.

---

[19] Indeed, although the Hanson Spur would connect these companies to a larger rail line and serve as a cheaper shipping option for the companies than their current method of shipping their goods to market via truck, the service that the Sandersville Railroad Company seeks to provide several companies is not even necessary for the companies' business. *See, e.g.,* Custer Test., Tr. at 287 ("We [Southern Chip LLC] don't have a problem with the business. We are trying to get more business."); *id.* at 377 (spur is not necessary "for the current operation" of Southern Chips); Dickson Test., Tr. at 365–66 (without the spur, Heidelberg Materials "would stay in the current status"); Pittman Test., Tr. at 373 (spur is not necessary "for the current operation" of Pittman Construction Company).

[20] *See, e.g.,* Dickson Test., Tr. at 215–216 ("It is being suggested as an alternative to the Hanson Spur, and HM has looked at and ruled out as imprudent trucking aggregates for loading to rail at or near the CSXT main line, as opposed to directly to rail via the Hanson Spur. If and only if the Hanson Spur is approved will we use transloading at Sparta to begin developing new markets on the CSXT lines. That option, however, which I will refer to as a 'transload alternative,' is not economically viable as a long-term solution."); *id.* at 216 ("[A] transload alternative would be contrary to Heidelberg Materials goals of reducing CO2 emissions to net zero because it will add trucks to the road as opposed to removing them in favor of much more environmentally friendly rail transportation. Therefore, the transload alternative is not a long-term viable option to access the markets the CSXT effectively serves and can serve more efficiently than trucks.").

Pittman then went on to immediately dismiss the proposed alternative of a site closer to the CSXT line, stating:

> [t]his 'transload alternative' is not a viable option for Pittman Construction. It is highly impractical because it . . . substantially increases the overhead cost associated with the transport of liquid asphalt . . . [.] The benefit of Sandersville Railroad's switching service over the Hanson Spur from the CSXT system is what we eliminate as an expensive step in the transportation process and obviate the need for trucking inbound liquid asphalt over public roads. Lower costs will allow us to better compete for business.

Arnie Pittman Test., Tr. at 230–31 (emphasis added). The Initial Decision accepted at face value that because a company representative testified that the Hanson Spur would lower costs for his company, this option was not a viable or "serious" alternative to the Hanson Spur. That the Hanson Spur would generate maximum profits for the Sandersville Railroad Company if the route began at the Hanson Quarry, and that it would help other companies save money and/or generate greater profits from this location, is not a basis for the Commission to conclude that it is necessary.

b. The Hanson Spur is not necessary for the "proper" "accommodation" of the Sandersville Railroad Company's business.

The Initial Decision similarly reads the meaning of the words "proper" and "accommodation" out of the statute by ignoring whether the Hanson Spur is necessary for the proper accommodation of the Sandersville Railroad Company's business. The Initial Decision's interpretation of when an additional track is a proper accommodation of a company's business—namely, that the Sandersville Railroad Company's business is to "connect[] rail traffic with larger rail networks" and that the Company "cannot viably offer" that service to industry in east middle Georgia without the Hanson Spur, *see* Initial Decision at 13—is so broad that it swallows the rule.

The Hearing Officer's interpretation would permit the Sandersville Railroad Company, and indeed any other company, to undertake virtually limitless expansion and to take private property without restraint where, as here, the company merely proclaims that it is in the business of serving other companies by constructing new rail lines. The real-life impact of such an overly broad rule is that it will lead to further dispossession of land from Black families and communities whenever a company states that it is in the "business" of connecting rail traffic and decides it wants their land.

Such a rule reads "accommodation" out of the statute by making the approval of new tracks a virtual requirement whenever such a justification is set forth. *See* ACCOMMODATION, Black's Law Dictionary (11th ed. 2019) (defining "business accommodation" as "[a] commercial entity's action that is beneficial to another party but that is not legally required" (emphasis added)). This would render the Commission's oversight and approval authority virtually meaningless.[21] It is also inconsistent with the Georgia legislature's intent that the eminent domain statutes be strictly construed to protect property owners from abuses of the power of eminent domain and to promote public confidence, especially where the condemner is a private company acting for the benefit of a handful of other private companies. *See Summerour*, 302 Ga. at 654; *Shiv Aban, Inc.*, 336 Ga. App. at 806; *Threatt*, 250 Ga. App. at 840. The Initial Decision's interpretation of "proper" and "accommodation" cannot stand.

The Hearing Officer should have construed O.C.G.A. § 46-8-120(a)(4) strictly and,

[21] The Commission must approve a railroad company's use of eminent domain before it can acquire the private property of another. *See* O.C.G.A. § 46-8-121 (authorizing the exercise of eminent domain only after "the commission, under such rules of procedure as it may provide, first approves the taking of the property."); *see also* Ga. Comp. R. & Regs. 515-16-16-.01 ("O.C.G.A. §§ 46-8-120 through 46-8-124 requires Commission approval before any railroad company can file any action in the Superior Court to condemn real property for rail right-of-way or for erection of rail facilities.").

because there is ambiguity with respect to its meaning, looked to the statutory provision as a whole for context. O.C.G.A. § 46-8-120 governs "powers which [a] railroad may exercise in improvement of its lines; relocation of tracks." (emphasis added). In relation to the statute's title and the other powers set forth in the provision, which generally authorize railroad companies to make improvements to or relocate existing lines, O.C.G.A. § 46-8-120(a)(4) must be interpreted in a similar fashion to apply to a company's existing operations. *See, e.g.,* O.C.G.A. § 46-8-120(a)(1) (authorizing railroad companies to reconstruct or relocate lines or add additional main tracks); O.C.G.A. § 46-8-120(a)(3) (authority to cut trees obstructing tracks); O.C.G.A. § 46-8-120(a)(5) (authority to construct tracks connecting two or more of the company's own lines); O.C.G.A. § 46-8-120(b) (discussing limitations on changing the location of existing lines).

If the Hearing Officer's overly broad interpretation of O.C.G.A. § 46-8-120(a)(4) was allowed to stand, it would render other provisions of the statute meaningless. *See R.D. Brown Contractors, Inc. v. Bd. of Educ. of Columbia Cnty.*, 280 Ga. 210, 212 (2006) (courts are instructed "to construe [statutes] to give sensible and intelligent effect to all of [their] provisions and to refrain from any interpretation which renders any part of the statute[s] meaningless" (internal citations and quotation marks omitted)). For example, there would be no need for the General Assembly to specify that railroad companies are authorized to construct "tracks for the purpose of connecting two or more lines of railroad operated by the same company not more than ten miles apart," pursuant to O.C.G.A. § 46-8-120(a)(5), if O.C.G.A. § 46-8-120(a)(4) offered companies blanket permission to construct any kind of tracks, including spurs, anywhere it would like to create new operations, including places it does not currently engage in business.

Both the Supreme Court of Georgia and this Commission have interpreted the meaning of "proper" more narrowly and authorized the expansion of rail lines as a "proper" accommodation

of business where there is an element of necessity requiring an expansion that is appropriate within the context of the companies' existing operations. *See City of Doraville v. S. Ry. Co.*, 227 Ga. 504, 505 (1971); *Harrold Bros. v. Mayor & Council of Americus*, 142 Ga. 686 (1914) (considering the meaning of a "proper discharge of [a company's] corporate functions"); *Tift v. Atl. Coast Line R. Co.*, 161 Ga. 432 (1925); *see also* PROPER, Black's Law Dictionary (11th ed. 2019) ("belonging to the natural or essential constitution of," "[a]ppropriate, suitable, right, fit, or correct," or "[c]onforming to the best ethical or social usage").

In *City of Doraville*, the Supreme Court of Georgia held that the taking of private property was both "necessary and essential for the purpose of construction of" a proposed railroad switching yard facility "and that such construction is required for the safe and essential conduct of the applicants' business as a public carrier and for public purposes." 227 Ga. at 505. In that case, the railroad company seeking to exercise eminent domain already had an operational switching yard, but the Commission found that the yard was inadequate for its existing business. *Id.* at 506. In *Harrold Bros.*, the Georgia Supreme Court concluded that a spur track was "necessary to a proper discharge of [a railroad company's] corporate functions" where the proposed branch track ran "from one of its main lines to a lime quarry owned by a private corporation." *Harrold Bros.*, 142 Ga. 686, 83 S.E. at 535–36 (emphasis added). Similarly, in *Tift*, 161 Ga. at 432, the Public Service Commission approved a railroad company's condemnation of a public alley for "the extension of one of its spur or industrial tracks which was already built and operated upon a portion of said alley." (emphasis added).

City of Doraville, *Harrold Bros.*, and *Tift* are distinguishable from the present case for several reasons. First, unlike in *City of Doraville*, the Sandersville Railroad Company is not a

common carrier,[22] and it would operate the Hanson Spur for profit and for a handful of other private companies to make a windfall. Second, the approved accommodations in *City of Doraville*, *Harrold Bros.*, and *Tift* were essential for the proper accommodation of the companies' existing infrastructure and businesses. The railroad company in *City of Doraville* sought to expand its existing operations and the court, finding that its existing infrastructure was inadequate, determined that condemnation for a new railroad switching yard facility was necessary and essential for the railroad company's business in the area. In *Harrold Bros.*, the railroad company sought to build a spur from one of its main lines. And in *Tift*, the railroad company was approved to extend a track that was already built and operating upon a portion of the condemned land. These expansions were determined to be appropriate and considered the social usage of condemnation to take private property. *See* PROPER, Black's Law Dictionary (11th ed. 2019) ("[a]ppropriate, suitable, right, fit, or correct," or "[c]onforming to the best ethical or social usage").

By contrast, as stated, Sandersville Railroad Company does not currently operate a rail line or spur—or have any business—in Sparta and therefore does not seek to expand on or replace an existing spur that has become inadequate to properly accommodate its existing business. Nor has it stated an intention of relocating an existing line to Sparta. *See* O.C.G.A. § 46-8-120(a)(1). Instead, the Sandersville Railroad Company desires to take private property to build a brand-new spur in a brand-new location that would generate brand-new business for itself and other companies. This is not an essential, appropriate, or proper accommodation as

[22] A "common carrier" is defined as "any carrier required by law to convey passengers or freight without refusal if the approved fare or charge is paid." O.C.G.A. § 22-1-1. The Sandersville Railroad Company does not argue that it is a common carrier. *See e.g.,* Tarbutton Test., Tr. at 100.

contemplated by *City of Doraville*, *Harrold Bros.*, and *Tift*. Nor does it fit within the larger statutory context of the powers O.C.G.A. § 46-8-120 authorizes. Tarbutton testified that the Hanson Spur "does not accommodate our existing business." Tarbutton Test., Tr. at 147. The Commission should take him at his word and find that the Hanson Spur is not necessary for the proper accommodation of the Sandersville Railroad Company's business within the meaning of O.C.G.A. § 46-8-120(a)(4).

C. The Initial Decision erred in concluding that Sandersville Railroad Company intends to exercise the power of eminent domain for the public use.

Among the permissible "public use[s]" set forth by the Georgia legislature are "[t]he use of land for the creation or functioning of public utilities," *see* O.C.G.A. § 22-1-1(9)(A)(ii), and "[t]he providing of channels of trade," *see* O.C.G.A. § 22-1-1(9)(A)(iii). After erroneously concluding that the Hanson Spur is necessary for the accommodation of the Sandersville Railroad Company's business, the Initial Decision further erred by concluding that the Sandersville Railroad Company's proposed condemnation serves a legitimate "public use" both for the functioning of a public utility and providing of a channel of trade. *See* Initial Decision at 14–16. The Initial Decision's expansive reading of the statutes failed to construe them in favor of private landowners and its conclusions were based on selective evidence. This was error.

1. The condemnation will not be for the functioning of a public utility.

The Initial Decision found that, "[w]hile Sandersville would not be offering its services as a common carrier, it would offer its switch services to any shipper that wants to negotiate a contract rate on mutually satisfactory terms." Initial Decision at 15. It then noted that neither the Commission nor any published Court of Appeals decision has interpreted O.C.G.A. § 22-1-1(9)(A)(ii) or (10). Initial Decision at 15. However, "[g]iven the railroad services that

Sandersville proposes to provide with the Hanson Spur, the undersigned Hearing Officer conclude[d] that the land use would be for the functioning of a "public utility" . . . [.]" Initial Decision at 15–16. The Initial Decision's interpretation of "public utility" does not strictly construe the statute, nor is it consistent with the legislature's intent to protect them from abuses of the power of eminent domain or to shore up public faith in the eminent domain process. *See Summerour*, 302 Ga. at 654; *Shiv Aban, Inc.*, 336 Ga. App. at 806.

The Hanson Spur will not use private "land for the creation or functioning of public utilities." O.C.G.A. § 22-1-1(9)(A)(ii). The Georgia legislature defined "public utility" as:

> any publicly, privately, or cooperatively owned line, facility, or system for producing, transmitting, or distributing communications, power, electricity, light, heat, gas, oil products, water, steam, clay, waste, storm water not connected with highway drainage, and other similar services and commodities, including publicly owned fire and police and traffic signals and street lighting systems, which directly or indirectly serve the public. This term also means a person, municipal corporation, county, state agency, or public authority which owns or manages a utility as defined in this paragraph. This term shall also include common carriers and railroads.

Ga. Code Ann. § 22-1-1(10). Thus, "public utilities" can include "common carriers and railroads." O.C.G.A. § 22-1-1(10). But not all railroads, or even railroad lines, are public utilities. *See* UTILITY, Black's Law Dictionary (11th ed. 2019) (defining "public utility" as "[a] business enterprise that performs an essential public service and that is subject to governmental regulation" and as "[a] company that provides necessary services to the public, such as telephone lines and service, electricity, and water. "). Because the statute is ambiguous as to the meaning of "railroads" in this context, judicial construction is necessary. *See Shiv Aban, Inc.*, 336 Ga. App. at 806. Under the statutory canon of construction "ejusdem generis," "when a statute or document enumerates by name several particular things, and concludes with a general term of enlargement, this latter term is to be construed as being ejusdem generis [i.e., of the same kind or class] with the things specifically named, unless, of course, there is something to show that a

wider sense was intended." *Ctr. For A Sustainable Coast v. Coastal Marshlands Prot. Comm.*, 284 Ga. 736, 737–38 (2008).

Applying this principle here, the interpretation of "railroads" in the third sentence of O.C.G.A. § 22-1-1(10) must be narrowly construed as railroads of the same kind or class as the other enumerated particular things providing essential services and products to the public, including lines "producing, transmitting, or distributing communications, power, electricity, light, heat, gas, oil products, water, steam, clay, waste, storm water not connected with highway drainage, and other similar services and commodities . . . which directly or indirectly serve the public," entities that own or manage utilities, and "common carriers." Indeed, the listing of "common carriers and railroads" together in the third sentence of O.C.G.A. § 22-1-1(10) illustrates the nature of the type of railroads contemplated by the statute and undermines any argument that the legislature intended "railroads" to be interpreted in a wider sense. Instead, the inclusion of these two terms together, and in view of the statutory provision as a whole, demonstrates that the legislature intended to include as "public utilities" only railroads serving the public by providing essential services.[23]

The Initial Decision appears to accept the Sandersville Railroad Company's argument that a railroad need not serve the public to function as a public utility because "while the first sentence of O.C.G.A. § 22-1-1(10) contains the qualifier 'which directly or indirectly serve the

[23] When interpreting the meaning of "common carriers and railroads" under O.C.G.A. § 22-1-1(10), the Commission should construe these nouns together. *See Crowe v. Scissom*, 365 Ga. App. 124, 131 (2022) (noting that coordinating conjunctions like "and" join nouns or phrases and are "usually treated as a single, compounded unit"); *AFLAC Inc. v. Chubb & Sons, Inc.*, 260 Ga. App. 306, 308 n.2 (2003) ("and" is a conjunction). Like common carriers, which are "required by law to convey passengers or freight without refusal if the approved fare or charge is paid," O.C.G.A. § 22-1-1(2), the railroads contemplated as "public utilities" transmit essential services to the public, such as "communications, power, electricity, light, heat, gas, oil products, water, steam, clay, [and] waste." O.C.G.A. § 22-1-1(10).

public,' the third sentence, which addresses railroads, does not." *See* Initial Decision at 14–15 (citing Sandersville Reply Brief at 14–15 & n.49). This interpretation of O.C.G.A. § 22-1-1(10) erroneously concludes that there is no ambiguity in the statute, ignores the applicable principle of ejusdem generis, fails to construe the statute in favor of private landowners, and flips the Sandersville Railroad Company's burden of proof on its head. The Sandersville Railroad Company has offered no evidence beyond mere assurances "to show that a wider sense was intended" by the word "railroads" in the third sentence of O.C.G.A. § 22-1-1(10) than was used throughout the rest of the provision. *See Ctr. For A Sustainable Coast*, 284 Ga. at 38.

Nor can the Sandersville Railroad Company's overly broad interpretation of "public utility," as adopted by the Initial Decision, stand under Georgia case law. Georgia courts do not consider all railroad companies to be inherently public utilities, nor do they authorize all tracks proposed by railroad companies as condemnations for the functioning of a public utility. *See Dep't of Transp. v. Livaditis*, 129 Ga. App. 358, 362 (1973) ("A commercial railroad company . . . may ordinarily condemn private property for the purpose of . . . constructing a spur-track from its main line where the purpose of the spur-track is for public utility." (emphasis added)); *Bradley v. Lithonia & A.M.R. Co.*, 82 S.E. 138, 138-39 (1914) (a railroad company operating a main rail line that is "engaged in serving the public as a common carrier" may not receive authorization to build a spur track if it is not for a legitimate public use).

The Sandersville Railroad Company has not demonstrated that it will transmit any of the essential services contemplated by the statute. The provision of a cheaper way for a handful of companies to transport goods such as granite, wood chips, liquid asphalt, and agricultural

products to market[24] does not make the Sandersville Railroad Company a public utility. *See, e.g., Francis Jones & Co.*, 47 S. E. at 549-550 ("the enterprise of quarrying stone and marketing the same is purely private, and one in which the public has no interest); *Normandale Lumber Co.*, 14 S. E. 882 (tramway to be constructed by lumber company for the transportation of lumber, naval stores, and timber, and to run from its own land, across the lands of others, to the line of a railway, is a private way); *Mayor of Macon v. Harris*, 73 Ga. 428, 437 (1884) (municipality's contract with a street railway company for an industrial company to use the street railway to ship coal and other material was determined to be used for the exclusive benefit of a private corporation, and not a public use). In concluding that the Sandersville Railroad Company met its burden of demonstrating that the Hanson Spur would be for the functioning of a "public utility" within the meaning of O.C.G.A. § 22-1-1(9)(A)(ii) and (10), the Initial Decision erred.

2. The Sandersville Railroad Company will not provide a "channel of trade."

The Initial Decision further concluded that the Hanson Spur serves a legitimate public use because the Sandersville Railroad Company will provide a channel of trade within the meaning of O.C.G.A. § 22-l-1(9)(A)(iii). Initial Decision at 16. The Hearing Officer's conclusion appears to be based on the Sandersville Railroad Company's interpretation of the statute: "As Sandersville points out, the statute does not state that the channels of trade must be new, exclusive, or novel to serve a 'public use.'" *See* Initial Decision at 16 (citing Sandersville Reply Br. at 14). The Initial Decision went on to find that "neither Sandersville Railroad nor any other short line railroad in east middle Georgia has direct access to the CSXT rail system, which serves points and regions that Norfolk Southern does not, including parts of New York and New

[24] Tarbutton Test., Tr. at 181.

England" and that "[p]rospective customers testified that the Hanson Spur will allow them to reach markets served by CSXT and provide a new route for these companies to deliver their goods to market." Initial Decision at 16.

The public use of "providing of channels of trade" was not furthered defined by the legislature in statute, and the case law interpreting this statutory provision is limited. The Initial Decision's two-paragraph findings and conclusions did not engage in any meaningful legal analysis (beyond citing to one of the Sandersville Railroad Company's arguments), much less employ a strict construction of the statute in favor of private landowners or consistent with the legislature's intent to protect them from abuses of the extraordinary power of eminent domain. The Sandersville Railroad Company should not be permitted to benefit from the lack of available interpretive guidance on this statutory provision, especially where the Company proffered this alleged public use in place of its illegitimate economic development justifications so late in the proceedings.

The plain language of the statute makes clear that the Hanson Spur would not provide a channel of trade within the meaning of O.C.G.A. § 22-1-1(9)(iii). Absent any ambiguity in a statute, courts "must presume that the General Assembly meant what it said and said what it meant." *Deal v. Coleman*, 294 Ga. 170, 172 (2013). The statutory text should be read "in its most natural and reasonable way, as an ordinary speaker of the English language would" read it. *FDIC v. Loudermilk*, 295 Ga. 579, 588 (2014). The context of the words is important, and courts "may look to other provisions of the same statute, the structure and history of the whole statute, and the other law—constitutional, statutory, and common law alike—that forms the legal background of the statutory provision in question," *Zaldivar v. Prickett*, 297 Ga. 589, 591 (2015) (internal citations omitted).

The Merriam-Webster Dictionary defines "provide" as "to supply or make available (something wanted or needed)" or "to make something available to."[25] The Oxford English Dictionary defines "provide" as "[t]o supply (something) for use" or "to make available."[26] The Cambridge Dictionary defines "provide" as "to give someone something that they need."[27] Read within the context of the eminent domain statutes as a whole, and in keeping with the legislature's mandate that these statutes be strictly construed in favor of the landowner, *see Hatcher,* 218 Ga. at 302, "provide" must be construed as the supplying of something needed or not already available. The application of this construction to the facts of the present case demonstrate that the Hanson Spur is not truly needed and does not warrant condemnation.

The Initial Decision concluded that the Hanson Spur would provide a channel of trade based on a finding that "neither Sandersville Railroad nor any other short line railroad in east middle Georgia has direct access to the CSXT rail system" and that channels of trade need not "be new, exclusive, or novel to serve a 'public use.'" *See* Initial Decision at 16 (citing the Sandersville Railroad Company's arguments). The Initial Decision's overly broad interpretation of the statute lacks any indicia of a limiting principle. In effect, if allowed to stand, it would mean that any time a railroad company seeks to condemn land to lay tracks it is always providing a channel of trade so long as it is permitting a means for companies to move their goods, even if other channels of trade already exist. And in this case, it would mean that the lands of predominantly Black landowners will be taken simply because Mr. Tarbutton saw a "new

---

[25] *See* PROVIDE, Merriam-Webster Dictionary, available at https://www.merriam-webster.com/dictionary/provide.

[26] *See* PROVIDE, Oxford English Dictionary, available at https://www.oed.com/search/dictionary/?scope=Entries&q=provide.

[27] *See* PROVIDE, Cambridge Dictionary, available at https://dictionary.cambridge.org/us/dictionary/english/provide.

opportunit[y]" for business. *See* Tarbutton Test., Tr. at 34–35.

This overly broad interpretation should be met with suspicion, particularly where, as here, a short-line spur of questionable public utility is involved. The proposed Hanson Spur would be a 4.5-mile spur line. *See* Tarbutton Test., Tr. at 33. It would directly connect the Hanson Quarry on one end to the CSXT line to the northwest at the other. *See* Tarbutton Test., Tr. at 49. Only two companies currently operate out of the Hanson Quarry: Heidelberg Materials and Pittman Construction Company. *See* Tarbutton Test., Tr. at 35. Southern Chips is currently located in Sandersville, GA, approximately 25 miles away from the Hanson Spur. *See* Tarbutton Test., Tr. at 93–94. Both Veal Farm Transload and Revive Millings are similarly currently located about 22 to 25 miles from the Hanson Quarry. *See id.* at 94. These three companies will have to truck their products approximately 25 miles "to the quarry and they will load railcars there" to transport them an additional 4.5 miles to the CSXT line. *Id.* at 94–95. In between the Hanson Quarry and the CSXT line, the Hanson Spur's route will bisect or run adjacent to Respondents' and Intervenors' land, divide a historically Black community, and destroy forested area. *See* Sandersville Railroad Exhibit 5; Dickson Test., Tr. at 347.

The Initial Decision's finding "that the Hanson Spur will allow [prospective customers] to reach markets served by CSXT," *see* Initial Decision at 16, ignores the fact that companies located at the Hanson Quarry can already ship their goods over this short distance to reach CSXT by truck or other means. *See* Initial Decision at 6 (finding that customers can already access the CSXT line if they pay a switching fee but that it can be "uneconomical"). It also ignores the fact that the three companies that are not currently operating out of the Hanson Quarry could physically access the CSXT lines more directly, such as via the highway system, without first making an unnecessary stop at the Hanson Quarry to unload and reload their products. *See, e.g.,*

Sandersville Railroad Exhibit 5 (demonstrating the proximity of the "GDOT Sparta Bypass" to the CSX railway).

The unmistakable implication of the Initial Decision's factual finding is that a channel of trade warranting the taking of private property is "provided"—no matter the length or necessity of the proposed "channel," or who stands to be harmed by it and how—so long as purported customers can ship their goods to market at a cheaper rate that is better for business. *Cf. Kelo*, 545 U.S. at 521 (Thomas, J. dissenting) (noting that "extending the concept of public purpose to encompass any economically beneficial goal guarantees that these losses will fall disproportionately on poor communities"). It is also an invitation for more industry to establish itself in Sparta along the Hanson Spur line to the detriment of this predominantly Black community. *See* Tarbutton Test., Tr. at 45 ("I identified the Hanson Quarry as a potential user of such a spur and as a location for development of industries because of the land adjacent to the Quarry that could be utilized by other spur users."). Even if a rail line would permit companies to ship their goods at a cheaper rate than trucking, the creation of the Hanson Spur to transport the companies' goods the last 4.5 miles after a 25-mile trek by truck does not provide a needed channel of trade justifying the taking of private land.

The Sandersville Railroad Company argues that impacted landowners in this historically Black neighborhood—a beacon of Black land ownership in Georgia post-Emancipation—stand in the way of the public interest in opposing the Hanson Spur. Sandersville Reply Br. at 13 ("When that public interest can be obstructed by a property owner, only condemnation can clear the way."). This idea, which the Initial Decision appears to adopt through its ruling, runs counter to the Georgia legislature's intent when it responded to *Kelo* by strengthening protections for private landowners and expressly prohibiting economic development and gain as a public use

justifying condemnation. *See Summerour*, 302 Ga. at 659; *see also Kelo*, 545 U.S. at 521 (Thomas, J. dissenting) (noting that "the predictable consequence of the Court's decision [in *Kelo*] will be to exacerbate the[]" disproportionate loss of land and housing in Black and poor communities). This idea also flips the burden of proof on its head.

To remedy this error, the Commission must interpret "the providing of channels of trade" in accordance with its plain meaning and construe it strictly, consistent with the legislature's intent to protect private property owners. *See Summerour*, 302 Ga. at 654. The Sandersville Railroad Company has not met its burden to demonstrate a public use under O.C.G.A. § 22-1-1(9)(iii), or that there is "clear legislative authority . . . to authorize the taking." *See Hatcher,* 218 Ga. at 302. Under the facts presented, the Commission must conclude that the Sandersville Railroad Company has not demonstrated that it will provide a channel of trade via the Hanson Spur. The Commission should reverse the Initial Decision and deny the Sandersville Railroad Company's Petition for Approval to Acquire Real Estate by Condemnation.

II. The Sandersville Railroad Company's intentional decision to seek authority to build the Hanson Spur through a historic and predominantly Black community violates federal statutory protections.

This Commission does not have jurisdiction to hear and decide federal statutory claims. *See* O.C.G.A. § 46-2-20; O.C.G.A. § 50-13-19(a). However, Georgia law requires that such claims be presented to the Commission to preserve them for review at the Georgia Superior Court. *See* O.C.G.A. § 50-13-19; *see also Cobb Hosp., Inc. v. Dep't of Cmty. Health*, 307 Ga. 578 (2019). Although this Court does not have jurisdiction to resolve these issues, the Intervenors raise challenges to the intended condemnation action that arise under 42 U.S.C. § 1982. Section 1982 provides: "All citizens of the United States shall have the same right, in every State and Territory, as is enjoyed by white citizens thereof to inherit, purchase, lease, sell,

hold, and convey real and personal property." Section 1982 was adopted pursuant to authority granted to Congress by the Thirteenth Amendment of the U.S. Constitution, which authorizes the passage of "all laws necessary and proper for abolishing all badges and incidents of slavery in the United States." *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409, 439 (1968). Section 1982 applies to private parties and does not require state action. *Id.* at 413. The property rights enumerated in Section 1982 are among the "incidents of slavery" Congress sought to eliminate with the passage of the Thirteenth Amendment, thereby also securing "those fundamental rights which are the essence of civil freedom." *The Civil Rights Cases*, 109 U.S. 3, 22 (1883).

The Sandersville Railroad Company's use of eminent domain for the construction of a railroad spur, under the facts and circumstances presented by this case, is discriminatory in its purpose and has a disproportionate impact on a historical African American community whose landownership dates back to Emancipation. *See generally Kelo*, 545 U.S. at 521 (Thomas, J. dissenting) (describing the race discrimination and displacement of predominantly Black communities through the use of eminent domain powers). The purposeful discrimination on the basis of race to construct a railroad spur on this specific route will cause harm to this predominantly Black community's ability to inherit, sell, hold, and convey its property in violation of Section 1982.[28]

[28] *See Verified Application for Leave to Intervene of the No Railroad in Our Community Coalition*, Doc. No. 204880; *Post Hearing Brief of No Railroad in Our Community Coalition*, Doc. No. 217358; Initial Decision at 17 ("Respondents and NROCC have made a number of strong public interest arguments against the condemnation of their property including how it will damage their home life, community, and heritage.").

CONCLUSION

For these reasons, the Commission should reverse the Initial Decision and find that the Sandersville Railroad Company has demonstrated neither the authority nor the cover of "public use" to exercise the extraordinary power of eminent domain to take private land in this historic Black community for profit.

This 1st day of May, 2024.

Respectfully submitted,

/s/ Jamie B. Rush

Jamie B. Rush (Ga. Bar No. 999887)
Malissa Williams (Ga. Bar No. 964322)
SOUTHERN POVERTY LAW CENTER
150 E. Ponce de Leon Ave., Ste. 340
Decatur, GA 30030
(404) 673-6523
jamie.rush@splcenter.org
malissa.williams@splcenter.org

Anjana Joshi* (La. Bar No. 39020)
SOUTHERN POVERTY LAW CENTER
201 St. Charles Avenue, Suite 2000
New Orleans, LA 70170
(504) 239-8685
anjana.joshi@splcenter.org

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

**Admitted pro hac vice*

CERTIFICATE OF SERVICE

I hereby certify that I have served a true and correct copy of the foregoing *Post Hearing Brief of No Railroad in Our Community Coalition* via electronic mail and United States Mail with sufficient postage thereon to the following, pursuant to Ga. Comp. R. & Regs. 515-16-16-.02 and 515-2-1-.04(4)(b), (3), addressed as follows:

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
Telephone: (770)434-6868
Facsimile: (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
Telephone: (404)817-8500
Facsimile: (404)881-0470
robert.highsmith@hklaw.com
laura.flint@hklaw.cm

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

Grant E. McBride
Smith, Welch, Webb & White, Attorneys at Law
2200 Keys Ferry Court
P. O. Box 10
McDonough, Georgia 30253
Tel.: (770)957-3937
Fax: (770)957-9165
Email: gmcbride@smithwelchlaw.com

William R. Maurer
INSTITUTE FOR JUSTICE
600 University Street, Ste. 1730
Seattle, WA 98101
(206) 957-1300
wmaurer@ij.org

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

Elizabeth L. Sanz
Renée D. Flaherty
INSTITUTE FOR JUSTICE
901 N. Glebe Rd., Ste. 900
Arlington, VA 22203
(703) 682-9320
bsanz@ij.org
rflaherty@ij.org

Counsel for Property Owners

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

William Blain 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

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 31027

Thomas Ahmed Lee
8201 Brookriver Drive, Ste. 246
Dallas, TX 75247

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

Property Owners

Tom Bond
Georgia Public Service Commission
244 Washington Street SW
Atlanta, Georgia 30334
Telephone: (404)463-0882
Facsimile: (770)342-3054
E-mail: ngibson@psc.ga.gov

Designated Hearing Officer

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

Executive Secretary of the Public Service Commission

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

Director, Electric Unit of the Public Service Commission

This 1st day of May, 2024.

Respectfully submitted,

/s/ Jamie B. Rush

_____

Jamie B. Rush
Ga. Bar No.: 999887
SOUTHERN POVERTY LAW CENTER
150 E. Ponce de Leon Ave., Ste. 340
Decatur, Georgia 30030
Telephone: (404) 673-6523
Fax: (404) 221-5857
Email: jamie.rush@splcenter.org

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