

**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

**REPLY BRIEF OF RESPONDENTS TO SANDERSVILLE RAILROAD COMPANY'S
OPPOSITION TO APPLICATIONS FOR FULL COMMISSION REVIEW, REQUESTS
FOR ORAL ARGUMENT, AND MOTION FOR STAY OF ORDER**

on behalf of the Property Owner Respondents

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INTRODUCTION

Sandersville believes that the Commission is a rubber stamp. In its view, the Commission plays no real role in reviewing a railroad's request to use eminent domain. It believes that anytime a railroad company wants to take private property to build a railroad, Georgia law requires that the Commission bless that taking—no other questions asked. In that way, Sandersville does not seriously dispute that its evidentiary showing as to whether the Hanson Spur will serve the public, and as to whether it will succeed as a long-term business concern, was inadequate. According to Sandersville, it needed to make virtually no evidentiary showing at all.

Sandersville is wrong. The requirement that a railroad condemnation be “necessary for the proper accommodation of the business of the company,” and that it serve a “public use,” are real constraints that the courts and the legislature have instructed must be taken seriously. That, in turn, means viewing the evidence carefully to decide whether Sandersville has met its burden to affirmatively demonstrate that it meets those two statutory tests for taking private property.

It has not. Rather than showing that the Hanson Spur proposal is necessary for Sandersville's business, the evidence shows that the project would be a new venture, entirely disconnected from Sandersville's business. Rather than showing that Sandersville's idea will properly accommodate its business, the record lacks evidence that the Hanson Spur will do what Sandersville says it will—there is no evidence that the project is economically viable, that it has cooperation from CSXT, or that Sandersville is taking its federal approval obligations seriously. And rather than showing that the Hanson Spur would serve a public use, the evidence shows that it, at best, would serve only those that Sandersville, in its private business judgment, deems appropriate. Sandersville bears the burden of having answers to these problems, and it did not meet that burden. Sandersville thus failed to meet the statutory eminent-domain requirements.

If the Commission disagrees, it should, at a minimum, stay its order until appellate review has concluded. Novel issues predominate over this docket. This case presents the first opportunity for either the Commission or the courts to interpret the outer bounds of Georgia’s new statutory definition of “public use”—and, if necessary, for the courts to decide whether the Commission’s interpretation of that statutory definition conflicts with the federal or state constitutions’ Takings Clauses. Before Sandersville irreparably damages Respondents’ properties—some of which have been in Respondents’ families for generations and all of which carry deep emotional value—it is imperative that the courts be able to carefully review the novel issues presented here. A single court disagreeing with Sandersville on a single issue would require construction to stop, but the damage will have already been done. By contrast, a brief delay would yield no irreparable harm to Sandersville nor damage to the public interest. A stay of any condemnation order is warranted.

DISCUSSION

I. Sandersville has not met its burden under any—much less all—of the statutory constraints it must meet for taking private property.

Sandersville believes that, to take private property, it needed to show only that it is a railroad company that wants to build a railroad. Its briefing confirms that, in its view, it did not need objective, independent, or substantive evidence that the Hanson Spur will do what the Petition said it will or that it would serve the public. *See* Opp. 8-11, 13-16 (describing these as “extra-statutory factors”). That is incorrect. That evidence directly bears on whether taking Respondents’ property is truly “necessary” to “proper[ly] accomodat[e]” Sandersville’s business and whether it will serve a “public use.” O.C.G.A. §§ 46-8-120(a)(4), 22-1-1(9). The Commission should reject Sandersville’s unsupported, boundless interpretation of the eminent-domain power to ensure that the Commission and the courts play a role in reviewing the

legitimacy of attempted condemnations, as the General Assembly intended. Carefully reviewing the evidence shows that Sandersville has not met its burden under either of the statutory tests it needed to meet.

A. Neither the Commission nor the courts have adopted Sandersville’s implausibly liberal interpretation of the statutory standards—and the Commission’s doing so would decimate private property rights.

Railroads must meet two statutory constraints before the Commission can authorize eminent domain. First, the project must be “necessary for the proper accommodation of the business of the company.” O.C.G.A. § 46-8-120(a)(4). Second, the project must serve a “public use” under O.C.G.A. § 22-1-1(9). Failure on either test requires denying the Petition.

The Initial Decision adopts Sandersville’s invitation to effectively neuter those standards to the point that they provide no constraint at all. In Sandersville’s view, satisfying those tests requires showing only that (1) it is a railroad company and (2) the reason it wants to take private land is to build railroad tracks. Its reading is that, because railroad companies are in the railroad business, a railroad company’s desire to build a new railroad must be “necessary” for the “proper accommodation” of its business. Next, Sandersville claims that railroads are “public utilities”—so, because “public utilities” are statutorily defined as public uses, taking land to build a railroad is *always* a “public use,” regardless of the nature of the project and no matter whether the railroad would serve the public. And even if that is incorrect, Sandersville contends that railroad projects are always “channels of trade or travel” and thus a “public use”—again, no matter who it serves. In Sandersville’s world, the Commission is *only* allowed to ask: Does a railroad company want to build a railroad? If yes, the Commission must “approve[] the taking of the property,” no other questions asked. *See* O.C.G.A. § 46-8-121. In short, Sandersville interprets the railroad-condemnation statutes so broadly that satisfying them requires virtually no showing at all (which, not coincidentally, is exactly what Sandersville has made in this proceeding).

In that world, questions like “is this project financially feasible for the company to build and for its customers to use?” and “does it have cooperation from the railroad with which it needs to connect?” are irrelevant to whether the project is necessary to accommodate the railroad’s business. Asking whether Sandersville has done its homework to ensure the operation will not be halted by federal licensing issues, under that reading, is similarly irrelevant. And, Sandersville contends, looking to whether the project would be open to the public—that is, whether anyone may use it as-of-right—is likewise an inappropriate consideration in deciding whether it is a *public* use. Having narrowed the statutory test to ask simply whether a railroad company wants to build a railroad, Sandersville explains, all these problems with its proposal are simply “extra-statutory factors.” Opp. 14.

Sandersville’s unrestrained reading of Georgia’s eminent-domain constraints is not just wrong, but implausible. It cites no cases exploring the meaning of “necessary for the proper accommodation of the business of the company,” no cases exploring the meaning of “providing ... channels of trade or travel,” and no cases exploring its theory that the General Assembly intended to make all railroads public uses. (For its part, the Initial Decision cites no such cases, either.) Sandersville’s interpretation is based on its own say-so, not precedent.¹ As best we can tell, there *are* no such cases. The Commission is tasked here with deciding what meaning to ascribe to these statutory words for the first time.

The Commission is not writing on an entirely blank slate, however. Over and over, courts have mandated “that statutes conferring the power of eminent domain must be strictly

¹ Sandersville’s filings with the Commission provide additional reason to question its say-so statutory interpretation. Neither Sandersville’s Petition that began this proceeding, nor its operative Amended Petition, even mentioned Georgia’s statutory definition of public use, O.C.G.A. § 22-1-1(9), nor any of the types of public uses permitted by that statute. That choice was curious, because “[n]otwithstanding any other provisions of law,” no “condemning authority shall use eminent domain unless it is for public use” as defined by Section 22-1-1. *See* O.C.G.A. § 22-1-2(a).

construed.” *E.g., State Highway Dep’t v. Hatcher*, 218 Ga. 299, 302, 127 S.E.2d 803, 806 (1962). That narrow-construction requirement has only strengthened since the General Assembly enacted the “Landowner’s Bill of Rights and Private Property Protection Act of 2006” in response to “concerns about the misuse of eminent domain in Georgia.” *City of Marietta v. Summerour*, 302 Ga. 645, 649-50 & n.1, 807 S.E.2d 324, 328 & n.1 (2017). The framers’ “intended effect” for those reforms was “that courts will look *more carefully*” to ensure “the bona fides of public use” have “be[en] *demonstrated affirmatively* in court.” Jody Arogeti et al., *General Provisions and Condemnation Procedure: Provide a Comprehensive Revision of Provisions Regarding the Power of Eminent Domain*, 23 Ga. St. U. L. Rev. 157, 184 & n.234, 192 & n.305 (2006) (emphases added). Indeed, the Commission’s own eminent-domain regulations—which require the hearing officer to “determine” if the asserted public purpose is “legitimate”—appear to require a careful look at the evidence. Ga. Comp. R. & Regs. 515-16-16-.02.

Under Sandersville’s proposed test, there is hardly anything at which the Commission must look, and hardly anything railroads must demonstrate affirmatively. Its test allows the Commission to glance at just two checkboxes: Is the petitioner a railroad company? And do they say they intend to take private land to do something that resembles a railroad? That cannot be a “strictly construed” reading of statutes requiring the project to be necessary, to properly accommodate the business, and to be a public use. Under a “careful” examination of the record, evidence of the amount of planning put into a project must be relevant to whether the project is “necessary” for the petitioner’s business. Evidence of a project’s minimal chance for economic success—and of its strong chance for being stalled or prohibited by federal licensing problems—must be relevant to whether the project will “properly accommodate” the petitioner’s business. And evidence of the closed-off nature of a project’s potential users must be relevant to whether the project will serve a “public” use. The General Assembly enacted a sweeping reform package

intending that condemning parties must “affirmatively demonstrate” that evidence and that “courts will look more carefully” at it. A careful look at the evidence here shows that Sandersville has not proved its proposed Hanson Spur project is “necessary for the proper accommodation” of its business, nor that it will serve a public use.

B. Sandersville has not shown that the Hanson Spur project is necessary to properly accommodate its business, as required by O.C.G.A. § 46-8-120.

Sandersville urges (and the Initial Decision held) that because Sandersville’s business consists of “providing the transportation service of connecting industries by rail,” Sandersville’s bare testimony that the Hanson Spur will suit that purpose makes the project “necessary” for the “proper accommodation” of Sandersville’s business. Initial Decision 12-13; *see* Opp. 19. That is incorrect for two reasons. First, the proposed Hanson Spur is a new venture, disconnected from Sandersville’s existing business. There is no Commission or judicial precedent that such a detour from a railroad’s existing business can be necessary to accommodate its business. Second, to be “necessary” for the “proper accommodation” of Sandersville’s business, a project must be likely to further Sandersville’s business in reality—that is, it must actually be likely to do the things Sandersville’s Petition states it will do. Because the evidence instead shows that the Hanson Spur is not economically viable and is all too likely to be preempted by federal approval issues, Sandersville fell short of its burden on that score.

1. The proposed Hanson Spur has nothing to do with Sandersville’s business as it stands. Sandersville seeks to take Respondents’ land, not to improve or extend its existing infrastructure, but to construct a bespoke rail line miles away from its existing business, connecting with a Class I railroad with which it has never connected before. *See* Tr. 102-03 (Sandersville does not “operate any facilities or services in Sparta” and the Hanson Spur would “be an entirely new economic effort”). Simply, Sandersville wants Respondents’ property so it can begin a brand-new

venture—not to “accommodat[e]” the business it has. By failing to fit within O.C.G.A. § 46-8-120(a)(4)’s dictates, that alone sinks Sandersville’s petition.

Precedent confirms that understanding. In the three briefs it has filed since the Hearing, Sandersville has not once cited a case in which the Commission granted a railroad eminent-domain power for a venture entirely disconnected from its existing business. Rather, the cases all reflect a longstanding practice to grant the eminent-domain power only when necessary to accommodate a railroad’s business as it presently exists. That was true in *Tift v. Atlantic Coast Line Railroad Co.*, 161 Ga. 432, 131 S.E. 46, 50 (1925) (Commission 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”). It was true in *City of Doraville v. Southern Railway Co.*, 227 Ga. 504, 506, 181 S.E.2d 346, 347 (1971) (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”* (emphasis added)). And it was true in the case Sandersville cites most often of all, *Georgia Public Service Commission v. Central of Georgia Railroad*, where the railroad sought to condemn land “to replace [its] existing rail yard.” 179 Ga. App. 415, 415, 346 S.E.2d 568, 569 (1986), *rev’d*, 257 Ga. 217, 356 S.E.2d 865 (1987).

The Initial Decision remarks that “[w]ithout the [Hanson] 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 13. That is not Sandersville’s business, however. It has no current business with CSXT, and it never has. At base, then, the Hanson Spur does not accommodate Sandersville’s “business.” O.C.G.A. § 46-8-120(a)(4). For that reason, Sandersville’s petition to condemn property for a brand-new venture must be denied.

2. Even if the Commission forges new ground and accepts Sandersville’s interpretation—that the statute contemplates projects necessary to accommodate entirely new

business ventures—Sandersville has not met its burden of showing its proposal will properly accommodate its newfound desire to connect with CSXT. The evidence shows instead that the project is poorly thought-out: It is far too likely to be economically infeasible, torpedoed by the lack of CSXT’s participation, derailed by federal approval issues, or all of the above. A project with so little homework done—one with so little evidence that it will do what its proponents say it will—cannot be necessary for, or properly accommodate, any business.

a. First, the evidence fails to show that the Hanson Spur project is feasible as a long-term business concern. Start with the cost to construct it. Mr. Tarbutton stated that the costs of the project factored into his conclusion that the project was necessary to accommodate Sandersville’s business. Tr. 125. But Sandersville provided its estimated costs to construct the Hanson Spur extremely late in the game—only after an expert witness’s testimony called the proposal’s economic infeasibility to Sandersville’s attention—and Sandersville did not hint at how those costs were generated nor any documents to support them. *See generally* Tr. 1477-1507. Sandersville admitted it has not performed an economic-feasibility study for the Hanson Spur proposal, whether through outside consultants or internally. Tr. 93, 145. Mr. Tarbutton instead relies solely on his “30 years of experience in working in the short line [railroad] world”—experience that does not include building brand-new lines like this one. Tr. 145. Put differently, the “experience” in which Mr. Tarbutton expects the Commission to place its trust is not *relevant* experience.

Mr. Tarbutton conceded at the Hearing, too, that the level of cooperation from CSXT—the Class I railroad to which Sandersville intends to connect the Hanson Spur—factors into whether the Hanson Spur is necessary to accommodate Sandersville’s business. Tr. 127. Sandersville did not provide any evidence about CSXT’s cooperation with the Hanson Spur idea. No one affiliated with CSXT testified in support of the project. Mr. Tarbutton’s vague assertion

that Sandersville is “working with” CSXT is the only testimony on that point. Tr. 126-27. There are no binding or even contingent contracts between Sandersville and CSXT. Tr. 101. Without CSXT’s participation, the Hanson Spur cannot move any traffic anywhere.

Mr. Tarbutton also acknowledged that shipping rates affect whether the Hanson Spur is necessary to properly accommodate Sandersville’s business. Tr. 125. Rates determine whether customers will ship goods on the railroad, and a sufficient customer base is necessary for a short-line railroad to work. *See* Respondents’ Post-Hearing Br. 18-19 (recounting rate- and underutilization-related reasons for why short-line railroads fail or underperform, as documented in Georgia Department of Transportation’s State Rail Plan). The “shipper” witnesses supporting Sandersville said they would use the Hanson Spur. But they have not given any estimates of their traffic, much less committed any traffic. Tr. 1181. There are no binding or contingent contracts between the shippers and Sandersville nor between the shippers and CSXT (which would purportedly haul the shippers’ products after receiving them from the Hanson Spur). Tr. 101. The shippers have not obtained even contingent rates or descriptions of service from CSXT to know whether pricing would be competitive. *E.g.*, Tr. 308, 313-14; *see also* Tr. 1353-54 (explaining that large railroads will give contingent rates for potential customers). In fact, Sandersville and the Hanson Spur’s would-be customers disagree about who is responsible for procuring rates from CSXT for CSXT’s portion of the shipments. *Compare* Tr. 166 (Tarbutton testifying that the customers “are working CSX on that part of the rail movement”), *with* Tr. 295-96, 307 (Mr. Custer and Mr. Veal explaining their understanding that obtaining rates from CSXT is Sandersville’s job). Despite the customers’ oral assertions, Mr. Tarbutton could not point to any evidence of demand for any of the would-be customers’ products in the markets the Hanson Spur would open. Tr. 99-100, 113-15.

Indeed, one telling fact regarding the unreliable nature of the shippers' commitment to this project is Sandersville's representation that, should this Commission stay the effective date of an order granting Sandersville's petition, "Sandersville could ... lose its committed customers." Opp. 32. Given that the shippers' "commitment" here is apparently so fickle that it may not endure even a short, entirely foreseeable delay, it is hard to see how such an unpredictable business venture can be "necessary" to accommodate Sandersville's business.

In that regard, Respondents do not, as Sandersville suggests, contend that the statutory test requires an inquiry into "whether the [condemnation] is necessary for the businesses of [Sandersville's] customers." *Contra* Opp. 14 n.58. But a railroad project cannot be necessary for the proper accommodation of a railroad business unless customers will use it to keep it viable. Sandersville has not demonstrated sufficient evidence that its proposal is viable in the long run. Respondents' industry expert, Gary Hunter, explained that in "all [his] years of experience in the rail industry"—nearly 50 years' worth—he has "never heard of capital costs being expended like this without a detailed feasibility study." Tr. 1174. After conducting a feasibility study of his own, Mr. Hunter's experience led him to conclude that the Hanson Spur idea is not economically feasible. *See* Respondents' Post-Hearing Br. 22-26.

To be sure, Mr. Tarbutton testified that his family has sufficient resources to *fund* the Hanson Spur's construction. Tr. 1484. The Initial Decision accepted that. Then the Initial Decision continued: Sandersville "has shown that it is reasonably expected to have cash flow sufficient to continue [the Hanson Spur] as an ongoing concern." Initial Decision 13-14. Sandersville did no such thing. It produced no study of the Hanson Spur's economic feasibility—the company performed no such study—nor any other relevant financial information. Sandersville instead asks the Commission to simply put faith in Mr. Tarbutton's word. Tr. 145 ("I

just—I know it’s going to work.”). Bearing the burden of proof requires more—especially when Mr. Tarbutton acknowledged that the resources available to Sandersville are finite. Tr. 139-41.²

Sandersville could have avoided this by showing the Commission its work—the industry-standard “minimum information” used to determine whether a railroad project is feasible.³ Tr. 1174, 1177-78 (Mr. Hunter’s description of the kind of “feasibility study” he has “never” seen omitted from new railroad construction projects like this one). Sandersville declined to do so, Tr. 93, 145, as is its right. Sandersville can make its own business decisions. The decision to use the sovereign power to take private property, however, requires more: It requires evidence that taking property is necessary to properly accommodate the business. Sandersville cannot plausibly assert that a project for which there is zero evidence of economic sustainability is “necessary for the proper accommodation” of a for-profit business. O.C.G.A. § 46-8-120(a)(4).

b. Sandersville’s showing was also inadequate on another concern bearing on whether the Hanson project will operate as a going concern: its licensure status with the federal Surface Transportation Board. At the Hearing, Mr. Tarbutton testified that he did not know whether the proposed Hanson Spur would be subject to the STB’s licensing authority. Tr. 93. Given that the STB regulates Sandersville’s existing operations, Tr. 70, and Mr. Hunter raised concerns over Sandersville’s lack of STB approval for the Hanson Spur well before the Hearing, Tr. 1176, Mr. Tarbutton’s confusion on that question is noteworthy. To state the obvious, a project derailed from operation by federal licensing issues cannot “properly accommodate” any business.

² As far as Sandersville might consider compensating for the unprofitability of a constructed Hanson Spur by cutting away from its present-day services, it very well may need separate authority from the Commission to do just that. *Cf.* O.C.G.A. § 46-8-120(b) (“[N]o railroad company shall be authorized so to change the location of an existing line as to leave off of the line of railroad to be operated by it any of the passenger or freight stations now existing under the same without the express approval of the commission.”).

³ In its most recent filing, Sandersville disparages this industry-standard minimum information as “phantom documents.” Opp. 15 n.63. This appears to confirm that Sandersville possesses no documents tending to support Mr. Tarbutton’s belief that the project Sandersville asks the Commission to bless is an economically viable one.

To be clear, it is highly likely that the proposed Hanson Spur *is* subject to the STB’s licensing regulations. Railroad construction requires 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)). Sandersville has conceded repeatedly that Sandersville’s operations “are nonexistent near Sparta,” the proposed location of the Hanson Spur. Opp. 25.

For its part, the Initial Decision does not dispute that Sandersville is likely subject to the STB’s licensing regime. Initial Decision 13. Nor does it dispute that Sandersville could face a lengthy battle against serious headwinds in winning the STB’s approval, *id.*; much of the industry-standard minimum information about the feasibility of a railroad-construction project that Sandersville failed to produce in this proceeding is required to win the STB’s approval. *See, e.g., Eagle County v. STB*, 82 F.4th 1152, 1196 (D.C. Cir. 2023) (vacating STB approval based in part on “uncertain financial viability”).⁴ Rather, the Initial Decision held (and Sandersville continues to urge) that because the STB’s approval is premised on a different test—the STB uses a “public interest, not public purpose” test—“the potential of a future STB proceeding is not determinant here.” Initial Decision 13; Opp. 24-25 & n.112. This misses the point. Of course, Sandersville must show its taking would serve a public purpose. *See* Part I.C., below. But it must *also* prove that the project is “necessary for the proper accommodation of [its] business.” O.C.G.A. § 46-8-120(a)(4). A project that cannot legally operate due to STB licensing issues cannot “properly accommodate” any business. *Cf.* Initial Decision 13 (“A project that is not possible or is doomed to fail may not be ... necessary to accommodate a business.”).

⁴ Among the STB’s reasons for analyzing “the financial feasibility of the project” is “to protect ... the affected communities from needless disruptions and environmental impacts if the applicant were to start construction” but not ultimately “provide the proposed service.” *Great Lakes Basin Transp., Inc.*, Docket No. FD 35952, 2017 WL 3835978, at *4 (S.T.B. Aug. 30, 2017).

Sandersville has not done sufficient homework to answer even whether its project is subject to federal regulation, Tr. 70, much less shown how it plans to ultimately win the federal government's approval.

c. Sandersville protests that these practical concerns with the Hanson Spur's viability are "extra-statutory factors." Opp. 14. Neither Respondents nor the Commission, it insists, "have purview to second guess the plain statutory meaning" of O.C.G.A. § 46-8-120(a)(4). Opp. 20. Sandersville, however, "cite[s] no authority" (to use a phrase Petitioner uses extensively) saying the Commission should *not* consider serious practical concerns with a proposal in assessing that inquiry. In fact, the Commission's regulations—which tell the Hearing Officer to "determine if there is a *legitimate* public purpose for the proposed condemnation," Ga. Comp. R. & Regs. 515-16-16-.02 (emphasis added)—suggest it is a requirement to assess whether the project for which condemnation is sought will actually do what its proponents say it will.

The evidence detailed above precludes a finding that it will. Against all the holes Respondents have pointed out, Sandersville can point only to Mr. Tarbutton's say-so. Tr. 45 (Mr. Tarbutton testifying that the project "is necessary for the proper accommodation of [Sandersville's] business because it will allow Sandersville to expand its rail service offerings"); Tr. 145 ("I just—I know it's going to work."). The very case Sandersville cites to establish the preponderance-of-evidence standard in its opposition, *Hart v. Walker*, held that the appellant's oral testimony alone—without documentary support—was not sufficient to establish his assertions by a preponderance of the evidence. 347 Ga. App. 582, 583-84, 820 S.E.2d 206, 208 (2018) (cited at Opp. 9 & nn.31-32). Far from Mr. Tarbutton's say-so being "unrebutted," moreover (Opp. 22), Respondents have shown that Sandersville's proposal is undeveloped, speculative, and out-of-step with industry-standard planning. Sandersville's haphazard planning

and I-don't-knows fall short of meeting its burden to prove that the project is “necessary for the proper accommodation” of its business. O.C.G.A. § 46-8-120(a)(4).

C. Sandersville has not shown that the Hanson Spur project will serve a “public use” as required by O.C.G.A. § 22-1-1.

If the Commission agrees that Sandersville did not meet its burden to show that taking Respondents’ property is necessary to properly accommodate Sandersville’s business, the Commission need go no further. If it does not agree, however, Sandersville still must prove that taking Respondents’ property will serve a “public use,” as defined in O.C.G.A. § 22-1-1(9). *See* O.C.G.A. § 22-1-2(a) (“Notwithstanding any other provisions of law,” no “condemning authority shall use eminent domain unless it is for public use.”). The General Assembly created this “public use” definition with the Landowner’s Bill of Rights and Private Property Protection Act of 2006, and the Commission has never interpreted it. Sandersville contends its proposal meets two permissible public uses: “[t]he use of land for the ... functioning of [a] public utility,” and the “provid[ing] [of] channels of trade.” *Opp.* 25-29; *Initial Decision* 14-16. The *Initial Decision*’s acceptance of those arguments failed to strictly construe the eminent-domain power, omitted crucial statutory context, and excused Sandersville’s light evidentiary showing. It was, accordingly, an error, and the Commission should reverse.

1. Sandersville argues that its proposal to take private land to build a railroad is a public use, foremost, because Sandersville is a railroad. That circularity follows, it claims, because the definition of “public utility” in O.C.G.A. § 22-1-1(10) “include[s] ... railroads.” It thus reads that definition to hold that all railroads are necessarily public utilities at all times and under all circumstances. And because the use of land for public utilities is a “public use,” the argument goes, then all railroads are public uses—no matter whether they serve the public. *Opp.* 26-27; *Initial Decision* 14-15 (accepting the argument).

The argument proves too much. The full definition provides useful context:

“Public utility” means 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.

O.C.G.A. § 22-1-1(10). The first (long) sentence explains that entities producing, transmitting, or distributing specific commodities, traditionally subject to heavy regulation, are included—but only when they “serve the public.” The second sentence explains that people or government entities which *own* the entities producing, transmitting, or distributing those commodities and serving the public are also included. Given that context, the most natural reading of the third sentence is to clarify that the “common carriers and railroads” which transmit or distribute those commodities and “serve the public” are also “include[d].” Faced with an exceedingly broad interpretation or a reasonable, narrower read like this one, the rule “that statutes conferring the power of eminent domain must be strictly construed” requires the narrower rule. *See Hatcher*, 218 Ga. at 302; *Kinslow v. State*, 311 Ga. 768, 774, 860 S.E.2d 444, 449 (2021) (explaining the interpretive prohibition on “‘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”); *Tibbles v. Teachers Ret. Sys. of Ga.*, 297 Ga. 557, 558, 775 S.E.2d 527, 529 (2015) (“The common and customary usages of the words are important, but so is their context.”).

After all, Georgia courts have for decades limited railroads’ condemnation power to projects that serve the public—those “to be used by the public generally,” where “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). It defies belief that, in adopting the

“Landowner’s Bill of Rights and Private Property Protection Act,” the General Assembly intended to jettison that rule for one making it *easier* for railroads to take private property. *See Summerlin v. Ga. Pines Cmty. Servs. Bd.*, 286 Ga. 593, 594, 690 S.E.2d 401, 402 (2010) (“The General Assembly is presumed to enact all statutes with full knowledge of the existing condition of the law and with reference to it.”); *see also* Initial Decision 14-15 (noting that even literal statutory language cannot control if the result would produce “absurdity”). Sandersville’s rule would produce exactly such an absurdity. A rule where all railroads are public uses would allow Sandersville to build railroad tracks on private property for any reason at all—even for its own, private use. And if being a railroad per se establishes public use, at what is there for the courts or the Commission to look “more carefully”? Or for the railroad to “demonstrate affirmatively”? *See* p. 5, above (recounting framers’ intent of General Assembly’s 2006 reforms); *cf. Cent. of Georgia R.R.*, 257 Ga. at 218 (describing the Commission’s role, even before the 2006 reforms, as “provid[ing] scrutiny as to the public or private nature of the use of the land involved”). Being a railroad is not enough; it has never been.

Properly construed, Sandersville’s proposal falls far short of being a public utility. For one thing, only one of Sandersville’s five purported customers—Pittman Construction, with its liquified natural gas—intends to ship one of O.C.G.A. § 22-1-1(10)’s enumerated commodities on the Hanson Spur. But Pittman intends to use the Hanson Spur, not to “serve the public,” but to create a personal “hedge” against “the whims of the market.” Tr. 374, 381-82. The remaining possible customers—a quarry, a wood-chip producer, and a company transloading agricultural products—are private interests only. *See, e.g., Francis Jones & Co. v. Venable*, 120 Ga. 1, 47 S.E. 549, 550 (1904) (“[Q]uarrying stone and marketing the same is purely private, and one in which the public has no interest.”); *Garbutt Lumber Co. v. Ga. & Ala. Ry. Co.*, 111 Ga. 714, 36

S.E. 942, 943 (1900) (“[P]reparing lumber for market[] is ... a business in which the public is in no way interested, and a business which from its very nature is a purely private enterprise ...”).

Even more to the point, Sandersville openly admits that it will not “serve the public.” Its brief in Opposition here makes explicit that the Hanson Spur, even if built, would not operate as a “common carrier.” Opp. 12. It will instead offer its services only to those with whom it can “negotiate contract rates.” *Id.*; Tr. 35, 109-10, 181-82 (Mr. Tarbutton testifying to this). Sandersville has already identified particular customers (those shipping materials it views as hazardous) with whom it does not intend to do business. Tr. 37, 191-92 (“[W]e do not serve and have no plans of serving customers that require the hauling of hazardous materials.”). As for any other potential customer with whom Mr. Tarbutton cannot come to agreeable terms, he testified he did not know what the result would be. Tr. 110 (“Q. You—you reference terms and rates in this statement. Who sets those terms and rates? A. We do.”). This is far short of the requirement that “every body who has occasion to use it may lawfully and of right do so.”⁵

2. Sandersville’s argument that the Hanson Spur is a public use because it will provide a “channel[] of trade or travel” fares no better. The argument is that Sandersville will create a channel of trade by “allow[ing] East middle Georgia shippers and receivers to connect to CSXT’s network and expand their trade into previously inaccessible CSXT-served [m]arkets” through “more economic means.” Opp. 28. The first problem is that, factually, the record does not bear this out. The record lacks evidence of CSXT’s involvement or cooperation. It lacks evidence of CSXT’s providing estimated rates for the shippers to evaluate. It lacks evidence of

⁵ At one point, Sandersville proclaims that if the Hanson Spur would not meet the definition of “public utility,” then it “need not prove that [the requested] condemnation serves a ‘public use’ and need only satisfy the ‘necessary for the proper accommodation of the business of the company’ test.” Opp. 27 n.126. That is plainly incorrect. The General Assembly has mandated that *all* condemnations must serve one of the “public uses” in O.C.G.A. § 22-1-1(9). *See* O.C.G.A. § 22-1-2(a) (“Notwithstanding any other provisions of law ... neither this state nor any political subdivision thereof nor any other condemning authority shall use eminent domain unless it is for public use.”)

agreement between Sandersville and the shippers as to who is responsible for obtaining those rates. It lacks evidence of even informal agreements between the shippers and their supposed customers in the CSXT-served markets Sandersville says is so crucial to open. Indeed, one shipper concedes he does not intend to use the Hanson Spur to “trade” at all, but merely to ship his own product from one terminal facility to another, to better “hedge” against “the whims of the market.” Tr. 374, 381-82. A railroad line cannot be a “channel of trade” without sufficient evidence that it will “legitimate[ly]” be used for trade. Ga. Comp. R. & Regs. 515-16-16-.02.

Even if Sandersville’s witnesses provided a more concrete showing, to be a “public use,” a “channel[] of trade or travel” must be available to the public. That statutory phrase must be understood against background, historically understood public-use principles. *Tibbles*, 297 Ga. at 558 (“The common and customary usages of the words are important, but so is their context.”); *Summerour*, 302 Ga. at 649 (“For context, we 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.”); *see also* Tr. 1144-45 (Professor Kochan explaining that “the statutory interpretation” of channels of trade or travel “must be informed by the nature of the [constitutional] authority it is intending to define”).⁶ Those historically understood principles include those articulated in cases like

Hightower: To be a public use, a channel of trade or travel must be one which “every body who

⁶ This mirrors the arguments premised on both the U.S. and Georgia Constitutions’ Takings Clauses that Respondents have presented throughout this Docket. While “an administrative agency cannot declare laws to be unconstitutional, the agency may take account of constitutional considerations in deciding whether and how to enforce challenged statutes.” *Ga. Dep’t of Hum. Servs. v. Addison*, 304 Ga. 425, 433, 819 S.E.2d 20, 27 (2018); *contra* Opp. 26 (incorrectly asserting that the Commission is not “permitted to second guess the General Assembly’s interpretation of governing [c]onstitutional law”). Both the federal and state Takings Clauses prohibit condemnation when the “actual purpose [is] to bestow a private benefit” to identified parties and when the would-be condemnor lacks a “comprehensive” plan from “thorough deliberation.” Respondents’ Post-Hearing Br. 36-38 (collecting cases). Sandersville’s showing in this docket reflects both of those defects. Respondents additionally preserve their argument that the Georgia Constitution’s “public purpose” provision imposes greater constraints on the eminent-domain power than the U.S. Supreme Court’s interpretation of the Fifth Amendment’s Public Use Clause. *See* Respondents’ Post-Hearing Br. 39 n.42.

has occasion to use it may lawfully and of right do so.” 218 Ga. at 124-25. Sandersville’s plan simply does not fit the bill. Sandersville has identified only a handful of customers, close within its orbit, who have stated they intend to use the proposed Hanson Spur. One of those customers is a wholly owned subsidiary of Sandersville itself. Tr. 247, 249. Sandersville has foreclosed an entire category of shippers. For anyone else who might wish to use the Hanson Spur, they must simply hope that Sandersville will work with them to set private, one-off rates and terms.

The Initial Decision did not grapple with this argument. Initial Decision 16; *cf.* Respondents’ Post-Hearing Br. 51-52 (presenting the argument). Nor does Sandersville do so now. Sandersville does, however, propose a limiting principle: To qualify for eminent domain, the channel “must permit trade as well as transport.” Opp. 29. That is no limiting principle at all, however. Sandersville’s reading would still permit eminent domain, for instance, if a homeowner wants to build a roadway across his neighbor’s backyard, solely for his private use, so long as it permits him to bring the tomatoes he grows in his garden to the weekend farmers’ market more efficiently. That is, after all, a channel of trade—but it is not a public one. Sandersville’s desire to take Respondents’ private property to help its small network of private contractors cut the cost of selling their goods is (as Professor Kochan testified) better viewed as a “private estuary” than a public “channel of trade.” Tr. 1144; *cf.* Respondents’ Post-Hearing Br. 13-17 (recounting evidence that Sandersville’s “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”).

*

Respondents do not, as Sandersville contends, “bemoan the fact” that a “private” entity is “seeking to exercise [the] condemnation power[.]” *Contra* Opp. 29 n.136. Private entities, courts have held, may condemn property—but they may do so only for “public” uses. As detailed above, Sandersville has proposed no such thing. Its plan at best reflects an intent to “improve general

economic health,” as it emphasized in its Amended Petition and Mr. Tarbutton’s Initial Testimony. *See* Respondents’ Post-Hearing Br. 28-29, 33. At worst, its plan reflects “a naked wealth transfer” from private, mostly elderly individuals to a few private, well-connected businesses—which “the Takings Clauses were designed to prevent.” Respondents’ Post-Hearing Br. 42 & n.45 (quoting Tr. 1082). Even worse, the evidence shows a plan that is uniquely bare among plans of its kind, so Sandersville has not met its burden of showing that the project is necessary to properly accommodate its business. The Commission should therefore deny the Petition.

II. Respondents have not waived any of their arguments.

Sandersville’s Opposition brief contains scattered accusations that Respondents and Intervenors made “new arguments” in their Applications for Full Commission Review—arguments which, Sandersville says, are “waived.” Opp. 8, 26 & n.119. Yet Sandersville provides no specificity about which arguments it has in mind.

Respondents have not waived any of their arguments. In every brief, Respondents have argued that the Hanson Spur project is not necessary for the proper accommodation of Sandersville’s business and provided extensive reasons for why. Respondents’ Post-Hearing Br. 43-48; Respondents’ Application 12-15; Part I.B., above. In every brief, Respondents have argued that the Hanson Spur project would not serve a “public use,” as defined by O.C.G.A. § 22-1-1(9). Respondents’ Post-Hearing Br. 41 & n.44, 49-52; Respondents’ Application 16-17; Part I.C., above. Sandersville’s “waiver” gestures are most concretely aimed at “constitutional challenges,” Opp. 26 n.119, but Respondents’ argument that adopting Sandersville’s position would violate the state and federal constitutions’ Takings Clauses has been presented in each of Respondents’ briefs, too. Respondents’ Post-Hearing Br. 35-42; Respondents’ Application 18-20; pp. 18-19 & n.6, above; *see also* Respondents’ Response to Amended Petition 10-11, Doc. #205399, filed Aug. 10, 2023 (raising these defenses). Extensive argument on these points is

sufficient to preserve them. Even absent extensive briefing, however, the very case Sandersville cites (Opp. 26 n.119) for the idea that these arguments are waived explicitly holds that a party's constitutional argument need "not" be "extensive" to preserve it. *See Cobb Hosp., Inc. v. Dep't of Cmty. Health*, 357 Ga. App. 358, 362, 364, 850 S.E.2d 831, 835, 836-37 (2020) (holding that a due-process concern mentioned only in a single parenthetical case citation was not waived).

Nor is there any preservation issue with either Respondents' contention that the Hearing Officer allowed Sandersville too light a burden of proof or Respondents' request for a stay of the Commission's final order (if the Commission rules against them). These issues did not become issues until the Hearing Officer ruled for Sandersville in the Initial Decision—in the process, allowing Sandersville to avoid its burden of proof and, as a result, subjecting Respondents' property to potentially imminent condemnation. Respondents did not need to preserve argument on issues until they became issues. *See State v. Thackston*, 289 Ga. 412, 417, 716 S.E.2d 517, 521 (2011) (explaining that preserving an issue does not require parties to "anticipate" errors a court might make). In any event, Respondents have consistently argued that Sandersville has failed to provide sufficient evidence to support its Petition. Tr. 537-38; Respondents' Post-hearing Br. 42-43 ("failed to carry its burden"); Respondents' Application 4-9, 11-17.

III. At a minimum, the Commission should stay its decision until the Georgia courts have weighed in on these open questions about the breadth of Georgia's eminent-domain statutes.

A. Respondents' Application (at 22-26) establishes why a stay is warranted. *See Green Bull Ga. Partners, LLC v. Register*, 301 Ga. 472, 473, 801 S.E.2d 843, 845-46 (2017) (discussing the four factors for issuing a stay). *First*, Respondents are likely to succeed on the merits, even if the Commission adopts the Initial Decision. As detailed above, statutory-interpretation issues of first impression predominate over this docket. Neither the courts nor the Commission have construed the "public use" definition the General Assembly adopted in 2006, nor outlined what

kind of evidentiary showing is needed to show whether a project is necessary to properly accommodate a railroad company's business, nor charted how the federal and state constitutions' Public Use clauses interact with those statutory standards. Given the novelty of the issues, Respondents very likely may win on any of the statutory or constitutional issues presented here.

Second, Respondents would suffer irreparable injury absent a stay. People very well may move out of their homes and their community to avoid Sandersville's construction affecting their lives. *See* Respondents' Application 23-24 (describing the harms that would follow). Moreover, "[I]and, under Georgia law" is so "unique" that "when an interest in land is threatened with harm ... such harm is deemed to be irreparable to the unique character of the property interest, i.e., money damages are not adequate compensation to protect the interest harmed." *Focus Ent. Int'l, Inc. v. Partridge Greene, Inc.*, 253 Ga. App. 121, 127, 558 S.E.2d 440, 446 (2001). That is especially true for unique land. Consider the Smith parcels, belonging to Respondents Blaine and Diane Smith, Marvin and Pat Smith, Thomas Ahmad Lee, and Intervenor David Mark and Janet Smith. The Smiths' great-grandmother was born into slavery on the plantation that once occupied the land they now own; after her son-in-law, Blaine and Marvin's grandfather, managed to buy it in the early-twentieth century, it has been passed down and preserved by the family ever since. Respondents' Post-Hearing Br. 5. They "feel a responsibility to pass it to future generations intact, as their ancestors passed it to them." *Id.* Money cannot compensate for the loss of emotional attachments to land like theirs and the damage to this property that Sandersville proposes will be significant.

Third, and in contrast, neither Sandersville nor its customers would suffer irreparable harm from a stay pending appeal. There are no time-sensitive contracts riding on the Hanson Spur's prompt completion. There are, in fact, no contracts of any kind regarding the Hanson Spur—whether binding or contingent—among Sandersville, CSXT, Sandersville's putative

customers, or any of its putative customers' customers. Both Sandersville and its putative customers are operating their existing businesses perfectly adequately without the Hanson Spur.

Last, the public interest favors a stay. The public has no interest in allowing to take effect an order that the courts very well may overturn on appeal. Indeed, the public—through its elected representatives—enacted the “Landowner’s Bill of Rights and Private Property Protection Act of 2006” so that “courts will look more carefully” at the legality of condemnations before allowing private property to be taken. *See* Part I.A., above. This case presents the first opportunity for the courts to carefully examine the limits of the “public use” definition the General Assembly enacted. They should have the chance to do so before Sandersville irreparably harms Respondents’ property.

B. Sandersville’s arguments against a stay are meritless. It *first* argues that Respondents would not suffer irreparable harm without a stay because, under O.C.G.A. § 22-1-2(c)(1), Sandersville would have to reconvey the property it took from Respondents “if the property is not put to public use” within five years. *Opp.* 31. That misses the point: A stay pending appeal protects Respondents’ interest in their property *right now* in case the courts on appeal forge a different path from the Commission. As Sandersville says, without a stay, it would “begin eminent domain proceedings in the Hancock County Superior Court” as soon as the Commission allows it to. *Id.* It would presumably begin constructing a railroad on the property it takes from Respondents as soon as it can. If even one court on appeal disagreed with the Commission’s interpretation of the statutes and the evidence, however, Sandersville’s work would need to come to a halt and the property returned to Respondents with all deliberate speed. The harm Sandersville would have done to Respondents’ unique land in that scenario and the time Sandersville would have deprived Respondents of it—including the harm done to Respondents’ emotional attachment to it—is “irreparable.” *Focus Ent.*, 253 Ga. App. at 127.

Second, Sandersville says that a stay “would harm ... its ability to complete the project quickly and affordably.” Opp. 32. It is unclear why that matters given that there are no relevant contracts, binding or contingent, that might be breached if the Hanson Spur is delayed. Sandersville’s fear about constructing the Hanson Spur “affordably,” moreover, is a monetary consideration—precisely the opposite of “irreparable” harm. *Cf. Focus Ent.*, 253 Ga. App. at 127 (describing irreparable harm as that for which “money damages are not adequate compensation.”).⁷

Finally, Sandersville explains that a stay is not in the public interest because “the establishment of channels of trade and public utilities serves the public interest.” Opp. 32. That argument assumes its conclusion. The reason to grant a stay is to allow the courts to interpret those terms for the first time and decide whether Sandersville met its burden to show that its proposal satisfies that interpretation—without the risk that an appellate court holds that the Commission’s interpretation was erroneous only *after* Sandersville began construction and irreparably harmed Respondents’ property. A stay would not “delay” the Commission’s order “indefinitely.” *Contra* Opp. 32. A stay would pause condemnation only until the courts have had their say. The only thing that would delay Sandersville’s plans “indefinitely” is the Commission or the courts declining to adopt Sandersville’s boundless interpretation of Georgia’s eminent-domain statutes and constitutional constraints.

⁷ We do not suggest that costs Sandersville may incur in the form of, for example, additional attorneys’ fees for litigating an appeal are compensable as damages. They are not, and Sandersville does not argue that they are. Sandersville remarks that Respondents “have not made a showing that they have the means to compensate” for whatever monetary “losses” Sandersville may incur from a stay. Opp. 32. Whether that vaguely threatening observation is or is not true, it is not relevant to the analysis for whether to issue a stay, and Sandersville itself does not even suggest as much.

CONCLUSION

For these reasons, and the reasons laid out in Respondents' and Intervenors' post-hearing briefs and Applications for Full Commission Review, Respondents respectfully request that the Commission grant review, reverse the Initial Decision, and dismiss Sandersville's Amended Petition. Alternatively, if the Commission grants the Petition, Respondents respectfully request that the Commission stay its final order pending appellate review.⁸

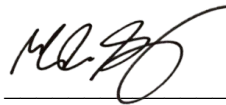
Respectfully submitted this 20th day of June 2024.

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Signed digitally pursuant to O.C.G.A. § 10-12-7

⁸ Respondents also adopt in full the arguments contained in the Reply in Support of Full Commission Review filed on this date by Intervenors No Railroad in our Community Coalition.

CERTIFICATE OF SERVICE

I hereby certify that on this 20th day of June 2024, a copy of this *Reply Brief of Respondents to Sandersville Railroad Company's Opposition to Applications For Full Commission Review, Requests For Oral Argument, and Motion For Stay of Order* has been served via electronic mail and U.S. First-Class Mail on the following pursuant to GA. COMP. R. & REGS. 515-16-16-.02; 515-2-1-.04(4)(b), (3):

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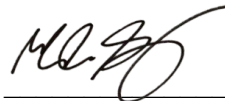
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