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THE PUBLIC COUNSEL CONCEPT IN PRACTICE: THE REGIONAL RAIL REORGANIZATION ACT OF 1973

THEODORE S. BLOCH * AND ROBERT JAY STEIN **

In an effort to reorganize eight insolvent railroads in the northeast quadrant of the United States into a financially sound rail system,¹ Congress enacted the Regional Rail Reorganization Act of 1973.² Recognizing the complexity of the task and the multifaceted public policy considerations to be considered during the restructuring process, the legislation provided for the establishment of a special office with power to "employ and utilize the services of attorneys and such other personnel as may be required in order properly to protect the interests of those communities and users of rail service which for whatever reasons, such as their size or location, might not otherwise be adequately represented in the course of the reorganization process as provided by this Act."³ This congressional mandate was effectuated by creation of an independent Office of Public Counsel operating within the Rail Services Planning Office of the Interstate Commerce Commission.

Since its creation, the Office of Public Counsel has identified the needs of special interest groups and has developed techniques to assure that diverse views and perspectives are represented adequately in the proceedings. Public Counsel operation requires con-

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Auth.—The entire staff of the Office of Public Counsel of the Rail Service Planning Office of the Interstate Commerce Commission, under the Directorship of A. Grey Staples, Jr., is responsible for the ideas and activities discussed in this Article. Without Mr. Staples' able direction and innovations, this Article could not have been written. Nothing contained herein should be attributed to either the Interstate Commerce Commission or the Rail Services Planning Office. Excerpts from Stein, *Public Counsel and the Federal Railroad Reorganization*, 1 ALTERNATIVES 6 (1974), appear in this Article.

1. See S. REP. No. 601, 93d Cong., 1st Sess. 7 (1973). The affected railroads are the Penn Central, Reading, Erie Lackawanna, Lehigh Valley, Central of New Jersey, Boston & Maine, Ann Arbor, and Lehigh & Hudson River. *Id.*

2. 45 U.S.C.A. §§ 701-93 (Supp. 1975).

3. *Id.* § 715(d)(2), as amended by Pub. L. No. 94-5, § 3 (Mar. 1, 1975). Previously the protection afforded communities and users of rail service by Public Counsel was limited to "... the hearings and evaluations which the office is required to conduct and perform under other provisions of this Act."

tinual reexamination of the decisionmaking process mandated by the Rail Act and of the role of special interest groups in providing constructive suggestions for reorganization. Public Counsel must search continually for ways to nurture meaningful involvement by an increasingly diverse cross section of interests.

A brief analysis of the traditional forms of representation of various interests in federal administrative decisionmaking indicates the need for innovations such as this energetic experiment with a "public" or "people's" counsel. Consideration of the functions and activities of the Office of Public Counsel illustrates the usefulness of this concept to the regulatory process.

REPRESENTATION OF SPECIAL INTERESTS BEFORE ADMINISTRATIVE DECISIONMAKERS

Federal administrative and planning agencies engage in an endless variety of hearings, rulemakings, ratemakings, adjudications, investigations, and less formalized proceedings to formulate what best serves the public interest, convenience, and necessity.⁴ These complex, prolonged factfinding processes, which form the bases for agency decisions, often require intricate legal, economic, social, and environmental analysis. The principal sources of information used in agency decisionmaking traditionally have been agency staffs and the regulated industries themselves, including their satellite systems of trade associations, suppliers, and customers.⁵ Increasingly complex issues, which create a burgeoning need for information and technical analysis upon which to base decisions, have intensified agency staff dependence upon regulated industries as the primary source of both data and critical evaluations of data. Proliferation of

4. See, e.g., Communications Act of 1934, §§ 214(a), (c), 47 U.S.C. §§ 214(a), (c) (1970); Interstate Commerce Act, § 206, 49 U.S.C. § 306 (1970). Although language varies, the decisional standard is essentially the same for each agency: to render decisions that serve not just the narrow business interests of the regulated, but also the broader public and private interests affected by or concerned with the regulated industry's conduct. See *Garner v. Teamsters Local 776*, 346 U.S. 485, 492-97 (1953); *Moss v. CAB*, 430 F.2d 891, 893 (D.C. Cir. 1970). See generally Lazarus & Onek, *The Regulators and the People*, 57 Va. L. Rev. 1069, 1071 (1971).

5. Information also is supplied by certain large interests who are immediately affected by regulatory agency decisions. In the transportation field these usually include transportation service users with a direct interest in a particular proceeding. In practice, effective user participation often is limited only to large companies employing experienced traffic management personnel. Cramton, *The Why, Where and How of Broadened Public Participation in the Administrative Process*, 60 Geo. L.J. 525, 529-30 (1972).

business records and reports and the ever-increasing sophistication of computer technology and management systems used by business have restricted greatly the independent judgment of administrative agencies in evaluating data from, and the performance of, the numerous companies they regulate. Frequently the regulated industries themselves are the only source of raw data and critical evaluation in the agency proceeding.⁶

Traditional Role of "Washington Lawyers"

Over the years, in an effort to assure competent and comprehensive representation before the federal government, regulated industries and firms have retained talented administrative lawyers to present their views and to assist in agency and congressional staff analysis of regulatory problems. Continuing need for industry to meet the growing agency demands has molded the administrative lawyer into a special type of advisor. The so-called "Washington lawyer," more than any other professional assistant, is a complete "political-legal advisor who deals with all three branches of Government" in representing the totality of his clients' interests before federal decisionmakers.⁷ The principal task of the administrative lawyer, like that of any attorney, is to advocate persuasively client interests. In administrative or regulatory matters, effective advocacy includes developing factual records to promote the client's interests in administrative proceedings, to support legislation beneficial to the client and to sustain generally a regulatory climate favorable to the client's immediate and future business interests. To provide this representation, "Washington lawyers" have developed sophisticated techniques for affecting administrative and legislative procedural processes and a comprehensive understanding of the highly specialized substantive issues that affect their clients.⁸

This participation of administrative lawyers strongly influences agency decisions. When an agency initiates a factfinding proceeding, it invites or requires the regulated companies, their creditors, associations, and suppliers to produce complex, highly technical information. Factual reports and critical evaluations are presented carefully to the agency by intelligent and articulate advocates for

6. See Lazarus & Onek, *supra* note 4, at 1074.

7. Riley, *The Challenge of the New Lawyers: Public Interest and Private Citizens*, 38 GEO. WASH. L. REV. 547, 572 (1970).

8. *Id.* at 554, 572-73.

the industry. The agency staff, traditionally without adequate resources,⁹ then uses this input to arrive at a position that, on the record, is most harmonious with the agency's concept of the "public interest." Independent staff analysis of complex technical and legal issues thus has been limited.¹⁰ Determinations of what is in the public interest, which obviously are affected by the factual record before the agency, have been grounded primarily on information submitted by capable representatives of the regulated industries, aided by networks of business contacts. "What's good for General Motors is good for America," therefore, accurately, albeit perhaps unintentionally, describes many agency decisions.

Alternative "Washington Lawyers"

In recent years, participation in the administrative process by special interests other than regulated industries has increased the variety of available information sources. New participants include those directly affected by the regulated industries as well as other individuals and organizations who, for diverse reasons, are interested in or indirectly affected by agency decisions.¹¹ This increased participation has affected some agency determinations by broadening the record upon which the agency's decisions must be based.¹² Directed to weigh all relevant factors, an agency's deliberation nonetheless is limited primarily to the record before it, and its determination thus should be influenced by the inclusion of new and varied perspectives in the record.¹³ Though not always a prerequisite

9. *Id.* at 568.

10. "Unless the [Federal Communications] Commission is to be given staff and resources to perform the enormously complex and prohibitively expensive task of maintaining constant surveillance over every licensee, some mechanism must be developed so that the *legitimate* interests of listeners can be made a part of the record which the Commission evaluates." *Office of Communication of the United Church of Christ v. FCC*, 359 F.2d 994, 1005 (D.C. Cir. 1966) (listener interests sufficient basis for standing to intervene in FCC license-renewal proceedings).

11. Gellhorn, *Public Participation in Administrative Proceedings*, 81 *YALE L.J.* 359, 360-61 (1972).

12. *Cf. Office of Communication of the United Church of Christ v. FCC*, 425 F.2d 543 (D.C. Cir. 1969); *Scenic Hudson Preservation Conf. v. FPC*, 354 F.2d 608 (2d Cir. 1965).

13. Courts have recognized that there may be many interests whose participation in administrative proceedings should be encouraged to balance the record before the agency:

[T]he role of the Commission "does not permit it to act as an umpire blandly calling balls and strikes for adversaries appearing before it; the right of the public must receive active and affirmative protection at the hands of the Commission." The Commission may reach compromises, . . . but it may not simply

for, nor a guarantee of, the validity of agency decisions, effective representation of multifarious interests increases the likelihood that decisions will reflect a broader spectrum of ideas, putting meaning into the term "public interest."¹⁴

Increased activity by special interest groups has generated a new source of aggrieved parties that, for various reasons, the traditional "Washington lawyers" have not represented;¹⁵ accordingly, this clientele has sought other advocates who, while representing their clients with the same vigor and in the same forums as the traditionalists,¹⁶ were not bound by all of the traditionalist constraints.¹⁷ New structures created to accommodate this need for representation include several operating or proposed government-sponsored models.¹⁸ One format, not yet tried on the federal level, is the

compromise between the interests of different broadcasting groups and gloss over the more fundamental public interest. . . .

If parties do not volunteer to represent the various facets of the public interest the Commission must take the initiative to seek out such parties and develop a meaningful record.

National Ass'n of Independent Television Producers & Distrib. v. FCC, 502 F.2d 249, 257-58 (2d Cir. 1974) (citations omitted). See also Office of Communication of the United Church of Christ v. FCC, 359 F.2d 994 (D.C. Cir. 1966).

14. See Cramton, *supra* note 5, at 527-30.

15. Many of these new clients lack financial resources. See Cramton, *supra* note 5, at 538. Conflicts of interest may arise not only from direct clashes between clients, such as environmentalists and businesses, but also more indirectly, as when the representation of an environmental cause in one case might set a bad precedent for a business client in another. Additional practical problems may be the lack of client sophistication, poor organization, and the impermanence of many groups. All of these factors tend to discourage representation by traditional Washington lawyers. See Riley, *supra* note 7, at 580-82.

16. Berlin, Roisman & Kessler, *Public Interest Law*, 38 GEO. WASH. L. REV. 675 (1970). These authors conclude that all lawyers must represent their clients in essentially the same manner:

How must a public interest law firm operate in order to realize the objective of assuring equal representation to the nonvested interests of the general public? Here we can and should draw upon the experience of our adversaries at the bar. The successful private Washington law firm has made it abundantly clear that full representation of a client's interests requires vigorous and usually simultaneous representation before four independent forums: the courts, administrative agencies, the legislature, and the public itself. . . . The public interest client cannot afford to respond in equal volume but it must nevertheless respond in kind.

Id. at 679.

17. There have been three primary sources of representation for nonindustry interests before federal and state administrative agencies: pro bono services by traditional law firms, foundation-supported "public interest" law firms, and a new breed of Washington law firm specializing in the representation of nonindustry interests for a fee. Each has facilitated nonindustry participation in agency decisionmaking. *Id.* at 680.

18. It has been argued that private efforts will never meet the growing need for representa-

"separate-agency" model,¹⁹ in which a special agency is created to represent particular classes of parties before administrative and planning bodies.²⁰ An alternative, the "inner-agency" model, would have a regulatory agency provide adequate resources to assure full participation in its proceedings by interests other than those that it regulates. Two principal²⁰ forms of this model are reimbursement of costs incurred in providing such representation²² and creation of a "people's," "public," or "special" counsel office within the agency.²³ The second principal form of the "inner-agency" model was the

tion by nonindustry interests before federal decisionmakers:

[D]espite this flurry of interest in representation of public interests before regulatory agencies, private efforts do not appear to be a sufficient response to the problem. There are thousands of practicing lawyers in Washington whose job it is to represent narrow interests of regulatees, but there are pitifully few who represent public or consumer interests on a regular basis. If the public is going to be represented in the decisions of Washington's regulatory apparatus on more than a token scale, affirmative government support is required.

Lazarus & Onek, *supra* note 4, at 1096.

19. The New Jersey Department of Public Advocate, a state cabinet-level office, was created in 1974 to represent citizens' interest in proceedings before a variety of state agencies, tribunals, and other decisionmaking bodies. The scope of the Public Advocate's statutory responsibility includes the representation of inmates in municipal, county, and state correctional and detention facilities and mental institutions; representation of public interests before regulatory agencies in rate matters; intervention in class actions against government agencies and private businesses; and mediation, conciliation, and other services. Ch. 27, §§ 1-51, [1974] N.J. Acts 43.

20. Suggestions for use of the separate-agency concept include the recently proposed consumer protection agencies. *E.g.*, S. 200, 94th Cong., 1st Sess. (1975); see S. REP. NO. 883, 93d Cong., 2d Sess. (1974); S. REP. NO. 792, 93d Cong., 2d Sess. (1974).

21. See Cramton, *supra* note 5, at 543-46.

22. Although reimbursement of expenses to diversify participation is not yet prevalent, the concept has gained significant prominence in recent years. See, e.g., *Wilderness Soc'y v. Morton*, 495 F.2d 1026, 1029-31 (D.C. Cir. 1974); *Natural Resources Defense Council, Inc. v. Environmental Protection Agency*, 484 F.2d 1331, 1337 (1st Cir. 1973); *Office of Communication of the United Church of Christ v. FCC*, 465 F.2d 519 (D.C. Cir. 1972); see Cramton, *supra* note 5, at 543-45; Gellhorn, *supra* note 11, at 395-97.

23. For a discussion of the history and development of the public counsel concept, see Leighton, *Consumer Protection Agency Proposals: The Origin of the Species*, 25 AD. L. REV. 269 (1973).

Each vehicle for special interest participation, whether private, foundation-supported, or government-sponsored, has its own purposes, advantages, and limitations. Collectively, however, their emergence has improved greatly the quality of special interest representation in agency proceedings. For general discussions of the advantages and disadvantages of each of these models, see Cramton, *supra* note 5, at 531-39; Halpern & Cunningham, *Reflections on the New Public Interest Law: Theory and Practice at the Center for Law and Social Policy*, 59 GEO. L.J. 1095, 1107-14 (1971); Lazarus & Onek, *supra* note 4, at 1094-1108. See generally Berlin, Rossman & Kessler, *supra* note 16; Riley, *supra* note 7.

basis for creating the Office of Public Counsel of the Rail Services Planning Office. Review of Public Counsel's operation since its inception illustrates the problems and benefits of practical application of the "inner-agency" public counsel concept.

FUNCTIONS AND ACTIVITIES OF THE OFFICE OF PUBLIC COUNSEL

The primary impetus behind passage of the Regional Rail Reorganization Act of 1973 was the widespread concern that liquidation of eight important railroads²⁴ would jeopardize the nation's economic and social well-being.²⁵ Recognizing this potential impact, Congress provided for a 17-month planning process²⁶ to restructure the railroads in reorganization into a new, financially viable rail

24. For a list of these railroads, see note 1 *supra*.

25. The Senate Commerce Committee, for example, noted the tumultuous economic implications of the railroads' liquidation:

[Their services] are not only essential to the prosperity and well-being of the people and industry in the Northeast and Midwest, but they are essential to the well-being and prosperity of the Nation as a whole. Cessation of services on the Penn Central alone would have drastic consequences throughout the United States. For example, it has been predicted that a shut-down of the Penn Central would produce a decrease in the rate of economic activity in the region of 5.2%, a decrease in the entire Nation of 4%, and a decrease in the GNP for the Nation as a whole of 2.7% after the eighth week of a shut-down.

....

The entire economy of the United States would suffer drastically if railroads in the Northeast and Midwest shut down operations. For instance, the Northeast railroads receive over 300 cars a day from the State of Alabama, over 360 cars a day from the State of Georgia, over 520 cars a day from the State of Minnesota, and over 640 cars a day from the State of California. The State of Louisiana receives over 200 cars a day by rail from the Northeast States, . . . the State of Tennessee receives over 562 cars a day, the State of North Carolina receives over 567 cars per day, and the State of California receives over 810 cars per day. A widespread rail transportation crisis in the Northeast and Midwest would most certainly precipitate economic chaos of major proportions in all these States.

S. REP. NO. 601, 93d Cong., 1st Sess. 7-8 (1973).

The significant social effects of unbridled liquidation were recognized in the enumeration by Congress of several specific social goals to be attained by the reorganization. See note 27 *infra*. For a more detailed survey of the railroad crisis in the Northeast and Midwest, see SENATE COMM. ON COMMERCE, 92D CONG., 2D SESS., THE PENN CENTRAL AND OTHER RAILROADS (Comm. Print 1972); STAFF OF HOUSE COMM. ON BANKING AND CURRENCY, 92D CONG., 1ST SESS., THE PENN CENTRAL FAILURE AND THE ROLE OF FINANCIAL INSTITUTIONS (Comm. Print 1972); SEC REPORT TO SPECIAL SUBCOMM. ON INVESTIGATIONS OF HOUSE COMM. ON INTERSTATE AND FOREIGN COMMERCE, 92D CONG., 2D SESS., THE FINANCIAL COLLAPSE OF THE PENN CENTRAL COMPANY (Subcomm. Print 1972); Loving, *The Penn Central Bankruptcy Express*, FORTUNE, Aug. 1970, at 104.

26. 45 U.S.C.A. §§ 717(c), (d), 718(a) (Supp. 1975).

system designed to meet enumerated social, economic, and environmental goals.²⁷ To achieve these goals, the Act created two interrelated federal planning bodies, the United States Railway Association (USRA)²⁸ and the Rail Services Planning Office (RSPO).²⁹

The primary responsibility of USRA, a nonprofit government corporation, is to research and analyze the multifarious public policy factors affecting the reorganization and to devise a financial structure for the new rail system.³⁰ USRA must consider the views of state and federal agencies, rail service users, and the general public to design a final system plan that designates those rail properties of the bankrupt lines to be operated by a newly created rail company known as the Consolidated Rail Corporation (Conrail), those to be sold to existing profit-making railroads or to the National Railroad

27. The specific goals to be effectuated by the Act are set forth in *id.* § 716(a)(1)-(8):

(1) the creation, through a process of reorganization, of a financially self-sustaining rail service system in the region;

(2) the establishment and maintenance of a rail service system adequate to meet the rail transportation needs and service requirements of the region;

(3) the establishment of improved high-speed rail passenger service, consonant with the recommendations of the Secretary in his report of September 1971, entitled "Recommendations for Northeast Corridor Transportation";

(4) the preservation, to the extent consistent with other goals, of existing patterns of service by railroads (including short-line and terminal railroads), and of existing railroad trackage in areas in which fossil fuel natural resources are located, and the utilization of those modes of transportation in the region which require the smallest amount of scarce energy resources and which can most efficiently transport energy resources;

(5) the retention and promotion of competition in the provision of rail and other transportation services in the region;

(6) the attainment and maintenance of any environmental standards, particularly the applicable national ambient air quality standards and plans established under the Clean Air Act Amendments of 1970, taking into consideration the environmental impact of alternative choices of action;

(7) the movement of passengers and freight in rail transportation in the region in the most efficient manner consistent with safe operation, including the requirements of commuter and intercity rail passenger service; the extent to which there should be coordination with the National Railroad Passenger Corporation and similar entities; and the identification of all short-to-medium distance corridors in densely populated areas in which the major upgrading of rail lines for high-speed passenger operation would return substantial public benefits; and

(8) the minimization of job losses and associated increases in unemployment and community benefit costs in areas in the region presently served by rail service.

28. *Id.* § 701(a).

29. *Id.* § 715(a).

30. *Id.* § 712(a).

Passenger Corporation (Amtrak), and those "suitable for other public purposes."³¹ The final plan also must designate "which rail properties of profitable railroads . . . may be offered for sale to the [Conrail] Corporation or to other profitable railroads . . ."³²

RSPO's responsibilities under the Act include helping communities and users of rail services participate in the reorganization process and ensuring that their views are given due consideration. Specifically, RSPO is authorized to establish standards essential to the reorganization effort,³³ to critique reorganization plans and recommendations prepared by the federal planners,³⁴ and to hold public hearings and otherwise to solicit, study, and evaluate the views of the public throughout the planning process.³⁵ Its organization includes sections that parallel its three functions. The Analysis and Review section is the technical department primarily responsible for in-house economic and financial analysis. Government and Industry Liaison is a public relations department responsible for press relations and governmental liaison. The Office of Public Counsel has the least well-defined yet most pervasive role, that of eliciting information and suggestions from the public. A new office within the Interstate Commerce Commission, RSPO operates under the direction of a commissioner designated by the chairman.³⁶ Although it maintains offices apart from the ICC building, retains subpoena powers independent of ICC authority,³⁷ and has a separate appropriations authorization,³⁸ it has a close working relationship with the Commission.

The Rail Act requires RSPO to employ attorneys and other personnel necessary "properly to protect the interests of . . . communities and users of rail services" in the course of reorganization proceedings.³⁹ The development of the Office of Public Counsel, created in response to that mandate, has reflected the Act's requirements as well as the idiosyncrasies of special interest group participation in the reorganization effort.

31. *Id.* § 716(c)(1).

32. *Id.* § 716(c)(2). For a time schedule of the planning process, see note 41 *infra*.

33. 45 U.S.C.A. §§ 715(d)(3), (4) (Supp. 1975).

34. *Id.* §§ 715(d)(1), 717(a)(2).

35. *Id.* §§ 715(d)(1)(2), 717(a)(2).

36. *Id.* § 715(b).

37. *Id.* §§ 713(a)-(c).

38. *Id.* § 724(b).

39. *Id.* § 715(d)(2).

Diverse individuals and organizations throughout the 17-state region⁴⁰ are affected directly by, or otherwise interested in, the Rail Act's swift restructuring process.⁴¹ In the belief that these interests have useful ideas and opinions about the region's rail service needs and problems, the Act specifically requires RSPO to "solicit, study, and evaluate the views . . . [of] Governors . . . ; mayors and chief executives of political subdivisions . . . ; shippers; the Secretary of Defense; manufacturers, wholesalers, and retailers . . . ; consumers of goods and products shipped by rail; and all other interested per-

40. "Region," as defined by section 102(13) of the Act, includes Maine, New Hampshire, Vermont, Massachusetts, Connecticut, Rhode Island, New York, New Jersey, Pennsylvania, Delaware, Maryland, Virginia, West Virginia, Ohio, Indiana, Michigan, Illinois, the District of Columbia, "and those portions of contiguous States in which are located rail properties owned or operated by railroads doing business primarily in the aforementioned jurisdictions (as determined by the [Interstate Commerce] Commission by order)." *Id.* § 702(13). The Commission delineated areas in the vicinity of Louisville, Ky., St. Louis, Mo., and Kewanee and Manitowoc, Wis., as included in the region. 39 Fed. Reg. 3605 (1974). In a later order, Milwaukee, Wis., was added.

41. The Act creates an intricate, accelerated planning process involving analysis and consideration of complex issues. There are numerous detailed technical studies required, *see* 45 U.S.C.A. §§ 712(b), 711(d), 716(a) (Supp. 1975); at least ten rulemakings, regulations, or application forms to be promulgated, *see id.* §§ 712(a)(2), 715(d)(3), 775(d)(4), 721(a)-(f), 723, 725, 762(d), 763(a)-(b), 791(e), 793; two full-scale public hearings set, *see id.* §§ 715(d)(1), 717(a)(2); and five major reports to be issued, *see id.* §§ 714(a), 715(d)(1), 717(a), 717(c), 717(d). The original timetable for accomplishing these tasks was breathtaking:

February 1974	Department of Transportation (DOT) report issued	.003
March 1974	RSPO public hearings in 17 states on DOT Report	.006
May 1974	RSPO analysis of DOT Report issued	
July 1974	RSPO regulations for rail service continuation subsidies promulgated	.011
October 1974	USRA to issue preliminary system plan for reorganization	.014
November 1974	RSPO to hold public hearings on preliminary system plan	.017
December 1974	RSPO analysis report on preliminary system plan to be issued	.020
March 1975	USRA to issue final system plan	
April 1975	ICC to issue report on final plan	
by May 1975	Congress must decide to approve or reject final plan	.027

This schedule was amended to delay the due date for USRA's preliminary system plan until February 1975, with subsequent steps postponed commensurately. Pub. L. No. 93-488, 88 Stat. 1464, *amending* 45 U.S.C.A. § 717 (Supp. 1975).

sons.”⁴² Views and opinions thus elicited are to receive due consideration by the federal planning agencies.⁴³

For a variety of reasons, however, many of these persons and groups lack the financial, legal, and technical resources necessary to assure adequate representation of their interests.⁴⁴ Recognizing these limitations, Congress required that legal and technical assistance be provided to communities and users of rail service who, “for whatever reason, such as their size or location,” might not otherwise have their interests “properly” protected in the course of the reorganization.⁴⁵ Providing this assistance is the function of the Office of Public Counsel.

Role and Organization of the Office of Public Counsel

The Office of Public Counsel’s role developed primarily in response to the express needs and desires of communities and rail service users. At the inception of the planning process no one other than the railroads, their creditors, some large shippers, and a few others had substantive information about the reorganization, access to information on changes, the funds to prepare critical legal or technical analysis of proposals, the machinery for participating in the decisional processes, or sufficient resources to assure adequate representation of their interests. It would be impossible to provide every interested party in the region with direct, personalized legal representation in the traditional, “Washington lawyer” attorney-client sense.⁴⁶ Accordingly, Public Counsel was organized to provide reorganization information, general legal assistance, and technical expertise to enable the broadest possible cross section of interested parties to present their views to the federal planners.

It was apparent that to be effective, such services required a group of “outreach” attorneys doing carefully planned field-work in close coordination with a Washington-based support staff. Public Counsel thus consists of a small permanent core staff supplemented by

42. 45 U.S.C.A. § 715(d)(1) (Supp. 1975).

43. *Id.* §§ 712(b)(4), 716(b), 717(c).

44. See note 15 *supra*.

45. 45 U.S.C.A. § 715(d)(2) (Supp. 1975).

46. The initial round of hearings involved testimony by more than 3,500 witnesses. In addition, there were more than 5,000 submissions of written material during 1974, and RSPO has developed a mailing list including more than 10,000 persons. To provide direct legal assistance to all of these people, in addition to the potentially unlimited number of “interested parties” in the expansive region covered by the Act, would be impossible.

attorneys in private practice retained to provide a variety of field services.⁴⁷ The permanent staff is responsible for monitoring the reorganization process, disseminating reorganization information, evaluating legal and technical developments and problems, organizing public hearings required by the Act, and generally assuring that the federal planners thoroughly consider the views of communities and users of rail services. The outreach attorneys primarily provide personal assistance to interested parties throughout the region by answering their questions, helping them prepare testimony or comments, and informing the permanent Public Counsel staff of their needs and interests. Each outreach attorney has been retained for approximately five days a month⁴⁸ to serve a specific geographic region.⁴⁹ Public Counsel also has retained technical consultants to provide economic, financial, accounting, and environmental analysis. These consultants prepare independent research studies, review and analyze projects commissioned by the federal planners, and provide technical assistance to Public Counsel's "clients."

Scope of Public Counsel Activities

The rail reorganization is a novel framework for implementation of the public counsel concept. Although vestiges of typical administrative agency proceedings remain in the Rail Act procedure,⁵⁰ planning and policy formulation rather than typical administrative decisionmaking is emphasized. There are no adversary parties as such in the reorganization, no adjudicatory hearings, no licensing or rate-making proceedings, and no ad hoc regulatory investigations.⁵¹ The

47. The permanent staff consists of seven lawyers and four supporting personnel. Approximately fifteen private practitioners are retained to perform various field or "outreach" services, such as conducting meetings and seminars and preparing memoranda and reports necessary to inform the public about the planning process, as well as soliciting public opinion to be channeled into the reorganization effort.

48. From April through September 1974, the outreach attorneys actually spent three to four days per month in their respective areas. During the March 1974 hearings they spent two to three weeks in the field.

49. Each of five states (Indiana, Michigan, Ohio, West Virginia, and New Jersey), was assigned one outreach attorney; three areas (Maryland, Delaware, and New England) were assigned two attorneys each; two states (Pennsylvania and New York) were assigned three each.

50. For example, the Act requires public hearings and promulgation of rules and regulations. See note 41 *supra*.

51. For a description of the typical administrative process, see K. DAVIS, *ADMINISTRATIVE LAW TREATISE* § 1.01 (1958).

Office of Public Counsel has four basic functions tailored to harmonize with RSPO planning proceedings: monitoring of the reorganization, direct exchange of information with communities and users of rail services, research and analysis of legal and technical problems, and direct participation in proceedings under the Act. Each broad category encompasses a variety of specific tasks.

1. Monitoring the Reorganization

Besides the quantity of information, reports, studies, and articles generated by the reorganization, there are daily developments on reorganization issues in various Washington agencies and departments, Congress, the courts, and the press that most interested persons cannot monitor effectively. Without current information on federal activity, those affected cannot evaluate intelligently their need to participate in the planning process. Current, accurate knowledge is fundamental to meaningful participation. The Public Counsel permanent staff attorneys fulfill this need by maintaining direct contact with the sources of pertinent information; data then can be disseminated through the outreach attorneys to interested parties. Weekly information packets provide current data to the outreach attorneys, who also meet with permanent staff members in monthly briefing sessions to discuss reorganization events and plan future work. Periodically, a Report of Public Counsel, containing current reorganization information and analysis, is prepared for individuals and groups in the region.⁵²

2. Outreach Efforts

Because monitoring of the reorganization and general distribution of current information do not alone ensure meaningful participation by interested parties, direct planning assistance is required. The outreach program, coordinated by the permanent staff and implemented by attorneys retained for field work, thus was developed not only to disseminate information but also to facilitate local input into the planning process. In the first nine months of operation, Public Counsel's outreach attorneys spent an average of five days per month in the field.⁵³ Their activities included participation in

52. The report is published approximately every two months.

53. During hearings, the outreach attorneys spend about two weeks in the field. At other times they attend meetings or workshops lasting one or two days each.

locally organized transportation conferences, meetings to brief constituents on general reorganization developments, and a variety of forums to inform specific interest groups. Two specific outreach projects are illustrative.

The Rail Act requires RSPO to conduct at least two sets of public hearings.⁵⁴ Each hearing requires extensive field activities by an outreach attorney, such as disseminating information, responding to inquiries, helping to prepare testimony, and coordinating the procedural details of the hearing. Since the first hearings in March 1974, Public Counsel has organized testimony for 32 hearings throughout the region involving over 3,500 witnesses and generating some 50,000 pages of oral and written testimony. This public comment formed an important part of RSPO's critique of the Department of Transportation (DOT) Report.⁵⁵ The entire record of these hearings has been evaluated by the Analysis and Review section of RSPO for use by USRA in planning. Local, regional, and state government officers participated in the hearings, along with an array of large and small retail, wholesale, and manufacturing firms. Other participants included individual farmers, farm cooperatives and associations, grain elevator operators and feed companies, representatives of labor and business organizations, consumer organizations, environmental and energy conservation groups, and other individuals and associations. This widespread participation led federal planners to recognize the multitude of interests that intend to be heard in an effort to influence the development of the new rail system.

Another outreach effort responded to constituents' requests concerning an RSPO rulemaking proceeding to define terms⁵⁶ in connection with determining the cost of rail subsidies in the event that service over a particular branch line is discontinued.⁵⁷ To improve public understanding of the issues, Public Counsel retained an economic consulting firm to prepare a nontechnical explanation of the complicated economic and accounting terms involved. Armed with this critique, the outreach attorneys conducted field meetings concerning the definitions, informed interested persons of the importance of these provisions, explained some of the technical con-

54. See note 41 *supra*.

55. See note 41 *supra*.

56. 45 U.S.C.A. § 715(d)(3) (Supp. 1975).

57. *Id.* § 762.

cepts, and assisted in the submission of comments to RSPO. Despite its technical nature, response to the rulemaking procedure was overwhelming: of some 350 substantive comments received by RSPO, approximately half contained suggested alterations and counterproposals to the proposed rules. Moreover, to assure that diverse detailed alternatives to the RSPO approach were filed, Public Counsel retained three separate technical consulting firms⁵⁸ to prepare counterproposals in addition to those submitted independently.

In response to strong public criticism of the proposed standards, RSPO issued a "Supplemental Notice of Proposed Rulemaking and Order" on May 29, 1974,⁵⁹ which indicated that the original proposals were likely to be altered. On July 1, 1974, however, RSPO published its final "Standards for Determining Rail Service Continuation Subsidies,"⁶⁰ which, to some objectors, contained inadequate definitions. At least forty petitions for reconsideration of the definitions were filed, and Public Counsel's permanent staff attorneys, continuing their efforts, prepared and submitted an extensive petition on behalf of their constituents with the result that some definitions were altered to accord with the recommendations advocated by Public Counsel.⁶¹

3. *Research and Analysis*

The Rail Act provides that, in addition to attorneys, RSPO shall employ "such other personnel" as are necessary properly to protect the interests of communities and users of rail services.⁶² Because the

58. These firms were Technical Associates, Richmond, Va., Public Interest Economics Center, Washington, D.C., and The Council on the Environment, New York City.

59. 39 Fed. Reg. 19362 (1974).

60. 39 Fed. Reg. 24294 (1974).

61. RSPO's standards permitted use of "apportionment formulas" derived from system-wide data for determining the "avoidable cost" attributable to a branch. 39 Fed. Reg. 24294 (1974). Virtually all interested parties, including railroads, shippers, government officials, and environmentalists, had rejected that approach in favor of direct branch line cost allocation. In its petition for reconsideration, Public Counsel urged RSPO to adopt the direct assignment of cost approach that was overwhelmingly recommended by the parties participating. Office of Public Counsel, Supplemental Petition for Reconsideration and Request for Hearing on Certain Matters, Standards for Determining Rail Service Continuation Subsidies, *Ex Parte* No. 293 (Sub-No. 2) (1974). In response to these petitions, RSPO reopened the proceeding and issued additional rules on January 8, 1975, adopting the direct-costing concept for many of the expense items used to calculate subsidy payments. 40 Fed. Reg. 1624 (1975).

62. 45 U.S.C.A. § 715(d)(2) (Supp. 1975).

complexity of issues involved in the reorganization requires the use of economists, experts in rail operation, environmental analysts, and other technical experts to protect the interests of Public Counsel's constituents, the Office of Public Counsel has retained several technical consultants to review and analyze general issues and to study problems of special importance. Technical consultants first were used in connection with rulemaking to develop a memorandum for the general public on proposed standards for determining rail service continuation subsidies.⁶³ Since then they have provided analysis and review in each phase of the rulemaking proceeding.

Another area in which Public Counsel's technical experts have proved useful is in the development of an evaluation model for branch lines. Although economies in rail operation may be achieved by consolidating operations and facilities, rehabilitating and modernizing facilities, and abandoning unprofitable lines,⁶⁴ USRA can recommend these actions only if they are advisable in light of the "anticipated economic, social, and environmental costs and benefits of each such method."⁶⁵ Financial analysis of the entire rail system has questioned the profitability of individual branch lines. Thus, the principal Department of Transportation analysis of light-density branch lines⁶⁶ focused exclusively on branch line profitability.⁶⁷ In response, shippers, communities, regional authorities, and states presented in public hearings cogent arguments to refute DOT's methodology and to question seriously many of its specific findings. For the protection of their interests, these objectors needed to do more than simply criticize the proposals of others. To help them prepare a well-organized case, using acceptable methodological analysis and hard facts, Public Counsel commissioned a team of technical consultants⁶⁸ to develop a procedure to measure the impact of branch line abandonments on the community. Their ef-

63. See notes 56-61 *supra* & accompanying text.

64. 45 U.S.C.A. §§ 712(b)(5), 717(b) (Supp. 1975).

65. *Id.* § 712(b)(5).

66. The DOT Report, issued pursuant to section 204(a) of the Act, 45 U.S.C.A. § 714 (Supp. 1975), stated that there were 15,575 miles of "potentially excess" track out of a total of 61,184 miles of track belonging to bankrupt railroads in the region. Secretary of Transportation, *Rail Service in the Midwest and Northeast Region*, 39 Fed. Reg. 5391, 5397 (1974). The Secretary of Transportation proposed that the new rail system should downgrade or eliminate these so-called "unprofitable" lines. *Id.* at 5396.

67. *Id.* at 5399-5409.

68. The group included economists, accountants, environmentalists, social planners, an engineer, and a rail operations expert.

forts produced a standardized method of measuring the qualitative and quantitative economic, employment, social, and environmental impact of branch line abandonment. An effective tool thus has been developed for competent analysis of other proposed abandonments.

Public Counsel also has retained consultants to study other special problems, such as proposed configurations for the new rail system and the alternatives available for financing Conrail.⁶⁹ Used by outreach attorneys to inform constituents and prepare for future hearings, these studies require sophisticated economic, accounting, and financial analysis to facilitate objective judgments. Also, Public Counsel has retained a small group of experts to review the technical studies of USRA, RSPO, DOT, and others, to attend technical briefing sessions, and to monitor generally the technical aspects of planning.⁷⁰ The information gathered is passed to the public through the outreach attorneys.

4. *Participation in Proceedings Under the Act*

The permanent staff of the Office of Public Counsel itself sometimes has taken positions on specific issues and participated in various proceedings to assure adequate representation of the interests of its constituents. The staff's participation in congressional hearings concerning the confirmation of the USRA board and its involvement in the Penn Central reorganization litigation illustrate such direct advocacy.

The Rail Act requires USRA to be governed by an eleven-man

69. The focus of the financial study is identification of options for including railroads and allocating funds in the region encompassed by the Act. See 45 U.S.C.A. §§ 716(e)-(i) (Supp. 1975). The configuration study examines alternative rail systems that may be considered by USRA when creating the final system plan, See *id.* §§ 716(c), (d).

70. Planners at USRA, in the Analysis and Review section of RSPO, at DOT and elsewhere coordinate numerous technical studies to aid development of the preliminary and final system plans. The complexity of these studies and their intricate interrelationships inhibit their use by communities and users of rail service. Subjects of studies made by USRA include the following: traffic forecasts; community impact of branch line abandonments; passenger service; the likelihood of Conrail's financial survival; marketing, operating, and investment problems to be faced by Conrail; and inventory and determination of rehabilitation costs. See *id.* §§ 712(b)(1)-(6).

With its limited budget, Public Counsel's few consultants, who devote about two and one-half days per week to Public Counsel work, cannot possibly review every study or attend all briefing sessions. The Office of Public Counsel has attempted, therefore, to remain informed about the general direction of the planning to enable it to undertake special independent studies as needed and as resources permit.

board of directors including a chairman and seven nongovernmental members,⁷¹ the seven nongovernmental board members to represent railroads, railroad labor, shippers, the financial community, and state and local government.⁷² Although the Act contemplated that the full board would be in operation by early 1974,⁷³ by the middle of May of that year, President Nixon had not yet submitted nominations to the Senate. USRA nevertheless had begun to hire key employees, who began to develop the focus of USRA studies and analyses. Public criticism began to mount as the planning process proceeded without the congressionally mandated safeguard of a representative board of directors. At the request of Senator Warren Magnuson, Chairman of the Senate Commerce Committee, A. Grey Staples, Jr., Director of the Office of Public Counsel, testified before the Subcommittee on Surface Transportation at the confirmation hearing of Arthur D. Lewis as Chairman of USRA.⁷⁴ Mr. Staples did not question Mr. Lewis' personal qualifications, but articulated the concern of the public and of the Office of Public Counsel that USRA was not operating in accordance with the Act and the fear that the integrity of the planning process was being undermined. The problem was resolved when, shortly after the hearings, the President suddenly nominated the full board.⁷⁵

Public Counsel also has had direct involvement in litigation. One problem emerged because, at the time of enactment of the Rail Act, the eight affected railroads were all in various stages of reorganization under section 77 of the Bankruptcy Act.⁷⁶ Although the Rail Act was designed to coordinate the reorganization of these companies, before a railroad could be included in the Act's planning process, each bankruptcy court was required to make two unusual decisions.⁷⁷ First, within 120 days after the effective date of the Act, each

71. *Id.* §§ 711(c), (d). The chairman and the nongovernmental members are to be appointed by the President, by and with the advice and consent of the Senate. *Id.*

72. *Id.* § 711(d)(3).

73. *Id.* §§ 711(a), (b), (d), (f).

74. *Hearings on Nomination of Arthur D. Lewis, to be Chairman of the Board of Directors, U.S. Railway Association, Before the Senate Comm. on Commerce*, 93d Cong., 2d Sess., Ser. 93-83, at 129-34 (1974).

75. *Washington Post*, May 31, 1974, § D, at 11, col. 1.

76. 11 U.S.C. § 205 (1970). Section 77 contains special provisions dealing with reorganization of insolvent railroads. See H.R. REP. NO. 620, 93d Cong., 1st Sess. 1 (1973).

77. Although there were separate reorganization proceedings for each railroad, Public Counsel filed its pleadings in what was by far the largest proceeding, that dealing with the Penn Central, *In re Penn Central Transp. Co.*, 382 F. Supp. 856 (E.D. Pa. 1974).

court had to determine whether the railroad under its jurisdiction was reorganizable on an income basis or whether reorganization should be accomplished according to the terms of the Rail Act.⁷⁸ Second, within 180 days from the Act's effective date, each court had to decide whether the Act itself provided a "process" which was "fair and equitable" to the estates of the railroads;⁷⁹ a negative finding would require the court to terminate the reorganization proceedings under the Rail Act.⁸⁰

Public Counsel, through the ICC, filed a brief on behalf of its constituents in the latter proceeding urging the court to consider the interests of communities and users of rail services when determining whether the Act's reorganization process was "fair and equitable":

Equity receivership would involve a piecemeal dismantling of the Debtor's property by the Court, the receiver, and to a limited degree, the ICC, without the opportunity for public participation. This outcome should be avoided not only because it contravenes Congressional intent, but also because under the Taking Clause of the Fifth Amendment, public participation is an interest which must be considered in assessing the constitutionality of due process provided by the Act to the creditors.⁸¹

Although the Penn Central bankruptcy court found the Act to be an unfair and inequitable means for reorganizing the railroad,⁸² the Special Court established by the Act⁸³ reversed that decision.⁸⁴

OBSERVATIONS AND CONCLUSIONS

The Office of Public Counsel was designed to facilitate participation by persons and groups interested in or affected by the rail restructuring of the Regional Rail Reorganization Act of 1973. By

78. 45 U.S.C.A. § 717(b) (Supp. 1975). If found reorganizable on an income basis, normal section 77 bankruptcy procedures were to be followed. *Id.*

79. *Id.* This "fair and equitable" determination concerns the general reorganization process provided by the Act, rather than the ultimate plan of reorganization. See *In re Penn Central Transp. Co.*, No. 74-8, at 37 n.28 (Special Ct., Sept. 30, 1974). The more typical "fair and equitable" determination, regarding allocation of securities by the final plan, comes at a much later stage of the Rail Act's procedure. See 45 U.S.C.A. § 743(c) (Supp. 1975).

80. 45 U.S.C.A. § 717(b) (Supp. 1975).

81. Brief for Office of Public Counsel at 3-4, *In re Penn Central Transp. Co.*, 382 F. Supp. 856 (E.D. Pa. 1974).

82. *In re Penn Central Transp. Co.*, 382 F. Supp. 856 (E.D. Pa. 1974).

83. See 45 U.S.C.A. §§ 719(b), (c) (Supp. 1975).

84. *In re Penn Central Transp. Co.*, No. 74-8 (Special Ct., Sept. 30, 1974).

providing the tools necessary to representation of the views of interested parties, the organization attempts to be a nonpartisan, objective, professionally manned vehicle for helping the public participate constructively. In the rail reorganization, this role has required continuing legal and technical analysis of a myriad of social, economic, and environmental issues, informing interested parties of the results of these analyses, creating channels through which informed, responsible local interests can offer criticism and suggestions to the planners, and guiding the efforts of communities and rail service users to ensure that their views are presented to decisionmakers at the most appropriate time and in the most effective form. This role differs from most model organizations emerging to serve persons interested in administrative decisionmaking in that Public Counsel does not attempt to represent individual interests in an attorney-client relationship comparable to the traditional "Washington lawyers." The nature of the planning process, the size of the region involved, and limitations on time and finances have precluded such a role.⁸⁵ The usefulness of the Office of Public Counsel to the public does not seem diminished by the exclusion of traditional attorney-client representation; indeed, its value may be enhanced.⁸⁶

The effectiveness of the Office of Public Counsel also must be evaluated in terms of its constructive assistance to the agency of which it is a part. In the past, most assistance given to administrators by outside interests came from the industries to be regulated since until recently these industries were almost the only interests with the resources, knowledge, and machinery for constructive participation in the administrative process.⁸⁷ Now public participation in agency proceedings such as licensing, ratemaking, rulemaking, investigations, and inquiries is expanding rapidly. The critical problem is assuring that such participation will benefit the decisionmak-

85. It would be impossible for Public Counsel's outreach attorneys to file pleadings, make appearances, sign letters, twist arms, and provide general legal service to their numerous individual and organizational constituents.

86. As long as people are informed adequately and are provided with means to present their views for consideration in the decisional process, they often can make their own persuasive and effective arguments. Public opinion has great influence on federal planners and Congressmen. Filtering that sentiment through paper pleadings and lawyerly language frequently dulls its tone and import. Thus, use of the public counsel concept simply to introduce diverse interests into administrative decisionmaking, without always stating the case for those interests, might be not only practical, but also highly desirable.

87. See notes 7-10 *supra* & accompanying text.

ing process. It is relatively easy to clog the decisional process with rambling dialogue, negative criticism, and disjointed logic, but such disjointed rhetoric, if it is the exclusive form of public involvement, only harms the administrative process.⁸⁸ Public Counsel seeks to assure more constructive participation by providing factual data and well-reasoned, well-organized testimony from a broad cross section of interested parties, thus increasing the probability that a full and credible record will be developed for the agency from these divergent, often unorganized, and frequently uninformed sources. The agency, in turn, can make decisions responsive to the abundance of special interests that public pressure requires it to consider, in the confidence that the record before it reflects the broadest available spectrum of views.

By assisting special interests to participate effectively in agency proceedings, Public Counsel improves the credibility and reliability of both government and the individual agency. Senator Vance Hartke, Chairman of the Surface Transportation Subcommittee of the Senate Commerce Committee and a major supporter of the Rail Act, made this point in a letter to George Stafford, Chairman of the Interstate Commerce Commission:

The concept of the public counsel . . . appears to be a key to the success of this special office, and an important ingredient in assuring public input into the restructuring process. It is refreshing to see so many favorable comments about the Commission from my constituents. . . . The independent office and particularly the public counsel has made a contribution not only to the restructuring of rail service in the region, but also to the confidence of the public in government itself.⁸⁹

Favorable public opinion of an agency benefits it in at least three ways. First, a greater number of responsible, knowledgeable, and capable parties will participate in agency proceedings if they believe an agency will consider their views. Second, qualified young attorneys and other professionals will be attracted to work for an agency that shows true commitment to its purposes. Third, greater confidence in an agency's overall fairness and willingness to balance

88. In many instances, citizens simply unleash their fury at agency after agency, as federal agencies have witnessed in recent years. State public utility commissions, zoning authorities, and other local, regional, and state planning and administrative bodies also are experiencing these increased pressures. See Cramton, *supra* note 5, at 536-37.

89. Letter from Senator Hartke to Chairman Stafford, Apr. 11, 1974.

the record upon which it makes its decisions leads to more general acceptance of its decisions.

Effective functioning of a public counsel office within an agency nevertheless demands three prerequisites. First, its budget must be adequate to provide a competent professional staff, independent studies, general technical and legal review of critical issues, and the continued presence of trained professionals working directly with persons desiring to participate in the proceedings. Next, a competent staff, sensitive to the needs of persons affected by the specific subject matter of the proceedings, is critical. Because public counsel's effectiveness depends upon its credibility with the people it assists, the office must be staffed with capable persons who are willing to assist divergent interests. Finally, public counsel must be insulated from the organizational and political pressures that inevitably will be brought to bear upon it. The office must be permitted to perform its functions independently if it is to promote the best interests of its constituents. Independence from internal agency pressure is imperative if public counsel is to retain the credibility essential to its effectiveness.⁹⁰ The public counsel concept clearly is not, even in its most pristine form, a panacea for assuring meaningful public participation or long-term administrative agency reform. Other organizational devices designed to assure broader public participation should continue to be developed. But the public counsel concept, properly used, can be one powerful technique to increase public participation and improve its quality.

90. It should be acknowledged publicly that the operation of the RSPO Public Counsel has been virtually free of such pressure.