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# RAIL PUBLIC COUNSEL AUTHORIZATION

GOVERNMENT

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## HEARING

BEFORE THE

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### SUBCOMMITTEE ON

### TRANSPORTATION AND COMMERCE

OF THE

### COMMITTEE ON

### INTERSTATE AND FOREIGN COMMERCE

### HOUSE OF REPRESENTATIVES

### NINETY-FIFTH CONGRESS

### FIRST SESSION

ON

### H.R. 5798

A BILL TO AMEND THE INTERSTATE COMMERCE ACT TO  
AUTHORIZE APPROPRIATIONS FOR THE OFFICE OF RAIL  
PUBLIC COUNSEL FOR FISCAL YEAR 1978

APRIL 5, 1977

### Serial No. 95-6

Printed for the use of the  
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## RAIL PUBLIC COUNSEL AUTHORIZATION

TUESDAY, APRIL 5, 1977

HOUSE OF REPRESENTATIVES,  
SUBCOMMITTEE ON TRANSPORTATION AND COMMERCE,  
COMMITTEE ON INTERSTATE AND FOREIGN COMMERCE,  
*Washington, D.C.*

The subcommittee met at 10 a.m., pursuant to notice, in room 2237, Rayburn House Office Building, Hon. Fred B. Rooney, chairman, presiding.

Mr. ROONEY. This morning, we will have hearings on H.R. 5798.

H.R. 5798 amends the Interstate Commerce Act to authorize \$1 million to be appropriated for the Office of Rail Public Counsel for fiscal year 1978. This office was originally established by Congress in the Regional Rail Reorganization Act of 1976 to assure that all communities and users of rail services, regardless of size or location, be adequately represented during the reorganization process of the bankrupt railroads in the Northeast.

Reportedly, the office was very successful. Therefore, Congress decided that it was important that the office be continued so as to insure that the public was represented in the future decisions affecting railroad policy. Provision for the establishment of an independent office named the Office of Rail Public Counsel was included in the Railroad Revitalization and Regulatory Reform Act of 1976.

The act provided that the President was to appoint a Director within 60 days. Unfortunately, this appointment was not made by the President. Chairman John Moss and I wrote President Ford twice pointing out the importance of a timely appointment, but these appeals were to no avail.

I understand, however, that President Carter plans on making an appointment soon. This is very encouraging. It is regrettable that the Public Counsel was precluded from partaking in many of the important matters that came up during the past year since we passed the 4-R Act. Nevertheless, there remains a number of important decisions that must be made soon which he should be involved in. Moreover, it is certainly not too late as there will be continuing issues of concern to the Public Counsel.

Without objection, the text of H.R. 5798 will be placed in the record at this point.

[The text of H.R. 5798 follows:]



95TH CONGRESS  
1ST SESSION

# H. R. 5798

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## IN THE HOUSE OF REPRESENTATIVES

MARCH 30, 1977

Mr. ROONEY introduced the following bill; which was referred to the Committee on Interstate and Foreign Commerce

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## A BILL

To amend the Interstate Commerce Act to authorize appropriations for the Office of Rail Public Counsel for fiscal year 1978.

1       *Be it enacted by the Senate and House of Representa-*  
2       *tives of the United States of America in Congress assembled,*  
3       That section 27 (6) of the Interstate Commerce Act (49  
4       U.S.C. 26b (6) ) is amended—

5               (1) by striking out “and” immediately after  
6       “1976,”; and

7               (2) by inserting immediately before the period at  
8       the end thereof the following: “, and not to exceed  
9       \$1,000,000 for the fiscal year ending September 30,  
10       1978”.

I



Mr. ROONEY. Our first witness today is the Honorable Charles L. Clapp.

**STATEMENT OF HON. CHARLES L. CLAPP, ACTING CHAIRMAN, INTERSTATE COMMERCE COMMISSION, ACCOMPANIED BY HON. A. DANIEL O'NEAL, COMMISSIONER; JOHN P. KRATZKE, ACTING MANAGING DIRECTOR; ROBERT L. OSWALD, SECRETARY; AND MARK L. EVANS, GENERAL COUNSEL**

Mr. CLAPP. I am pleased to be here as Acting Chairman of the Interstate Commerce Commission to comment on a proposed authorization for the Office of Rail Public Counsel for fiscal year 1978.

The Commission has long considered the concept of a public counsel a valid one and, indeed, almost 75 years ago, in 1903, used a public counsel in the development of issues in its investigations.

In 1914, the Commission contracted with Louis Brandeis to serve as public counsel in the so-called *Five Percent* case, 31 ICC, 351, probably its best known use of a public counsel. From 1961 to 1964, the Commission unsuccessfully sought funds in its budget to establish an economic counsel. The concept was revived again in 1973 when the Commission appointed a special projects counsel to represent the public in ex parte 270, Investigation of the Railroad Freight Rate Structure, and related proceedings.

In 1974, as part of the Regional Rail Reorganization Act of 1973, Congress established a public counsel function in the Commission's Rail Services Planning Office to assist the public in development of a plan to restructure the railroads in the northeast. In 1975, the Commission was in the vanguard of independent agencies in voting to establish the Office of Public Counsel, providing it with extensive powers.

Shortly thereafter, however, the Congress began serious consideration of the 4-R Act, which provided for a rail public counsel to be nominated by the President and confirmed by the Senate. Since that measure, in effect, removed the Commission from the selection process, indicating that the Congress might wish to proceed in a different way to create this important office—and I personally consider it very important—the Commission delayed implementing its own action not wanting to act counter to congressional intent.

Section 304 of the 4-R Act of 1976 provides for the establishment of the Office of Rail Public Counsel, and authorized funding for the budgetary periods 197T, transition quarter and 1977. The legislation gave this office a considerable degree of independence and as anticipated, called for a Director to be appointed by the President with the advice and consent of the Senate.

This appointment never came to pass and to this day, the Director's position, as well as all other positions, remain unfilled.

As it became evident that the appointment would not soon be forthcoming, the Commission, partially through its own initiatives and partially through the urging and support of Congress, sought alternative methods to effect the intent of the legislation until a Director was appointed. The Commission sought the advice of its own legal counsel, the Department of Justice, the General Accounting Office, and the



Office of Management and Budget as to the legality and propriety of either appointing an interim Director, or invoking its general administrative powers to direct some of its employees to perform functions analogous to those provided for in section 304.

In spite of our research, the Commission was unable to find a legal way to accomplish either of the above. The Department of Justice was particularly adamant in its belief that we lack such authority.

The Commission has continued to support the concept of a public counsel in the only manner left to it, through the Public Counsel Section in the Rail Services Planning Office. Although this office lacks the independence and authority of a Rail Public Counsel, the Commission has provided the Public Counsel section with resources to represent the public in Commission rulemaking and other proceedings.

We have provided that section with office space, positions, and contract funds for outreach attorneys and other personnel. We have funded these activities from our own general appropriation. Although the Commission's fiscal year 1976, transition quarter and fiscal year 1977 appropriations specifically earmark funds for the Office of Rail Public Counsel, we have concluded, after consulting with the Department of Justice, the OMB, and our own general counsel, that only the Presidentially appointed Director has the right to obligate these earmarked funds.

Thus, at the end of the transition quarter, we returned to Treasury \$186,000 in Rail Public Counsel Funds for 1976, and \$225,000 in funds for the transition quarter. During that time, the Commission spent over \$301,200, exclusive of overhead and administration, for the Public Counsel Section.

The Commission's fiscal year 1977 appropriations earmark \$1,999,400 for the Office of Rail Public Counsel, none of which has been obligated pending the appointment of the Director.

For fiscal year 1977, through February 28, the Commission has spent \$143,620, exclusive of overhead and administration, for the Public Counsel Section. It is our understanding that the Director, when appointed, will possess authority to reimburse the Commission for these expenditures.

Also, realizing that when the Director is appointed fiscal year 1977 will be more than half over, the Office of Management and Budget has recommended that \$1 million of Rail Public Counsel funds be used to fund the increased pay costs of the Commission resulting from Executive Order No. 11941 issued October 10, 1976.

For fiscal year 1978, the Commission has proposed that the Office of Rail Public Counsel receive \$2,033,000, while OMB has recommended \$700,000.

At the time our estimate was developed, the Commission realized that authorizing legislation for fiscal year 1978 did not exist. However, we felt it important that this be brought to the attention of the Appropriations Committees and believed this the best way to accomplish that end.

The Commission also supports, and will continue to support, the idea of broadening the scope of the Rail Public Counsel concept to include all other surface modes of transportation. Public representation is needed in motor and water carrier proceedings just as it is needed in rail proceedings.



Further, it would not be logical to limit the public counsel's authority to rail matters given the interdependence of the various modes of the Nation's transportation system.

The Commission is proud of its own advocacy of the public counsel concept and we sincerely hope that the intent of section 304 of the 4-R Act will soon be realized through the appointment of a Director and the implementation of a permanent office.

I should point out to the subcommittee that about 10 days ago, the Commission received a communication from the Deputy Comptroller General, in response to a letter we sent June 14, 1976, which reinforced the view of the Department of Justice, OMB, and our General Counsel, that we had no authority to appoint an interim Director or other employees of the Office of Rail Public Counsel.

At the same time, we were told, in the opinion of the Office of the Comptroller General of the United States, the Commission can create an Office of Public Counsel with some, but not complete, independence, from the Commission. Functions relating to rail matters would be a proper activity to that office until a Director could be appointed or confirmed for the Office of Rail Public Counsel, created by the act.

It is my understanding that the President now is actively seeking to fill that position soon. So, at this late date, there would appear to be little sense to seek to parallel the particular activity.

We will be glad to answer any questions.

Mr. ROONEY. Thank you, Mr. Clapp.

Would you introduce for the record your colleagues.

Mr. CLAPP. To my right is Commissioner A. Daniel O'Neal, the Chairman-designate of the Interstate Commerce Commission. Beyond him is John P. Kratzke, the Acting Managing Director of the Commission. To my left, is Mark L. Evans, the General Counsel of the Commission.

Mr. ROONEY. Mr. Clapp, it is my understanding that one of the principal functions performed by the Public Counsel, with regard to the final system plan, pertained to representing small communities and shippers with regard to whether or not a particular branch line is viable. I recognize that this will continue to be a question with regard to the national program, which is to take effect in accordance with the provisions of the 4-R Act.

But I question whether this will be the principal activity of the Public Counsel. In your opinion, what will be the principal duties of the Public Counsel? What do you consider the essential ingredients of an effective counsel?

Mr. CLAPP. As you pointed out, I think there will continue to be the obligation to assist smaller communities, independent groups, and consumer groups, in achieving proper representation.

We are still carrying out this activity through the RSPO, in connection with public hearings in the Delmarva line situation, and in the Wildwood, Fla. situation—also recently, we had 10 outreach attorneys in Chicago with respect to the application of Chicago, Southshore and South Bend, to discontinue service in nearby Illinois and Indiana.

But I would think, once a Rail Public Counsel Office is established, that its primary functions obviously would be to assist in the development of the record in important matters coming before the Commis-



sion so that one could insure that the public interest is indeed represented.

This obviously would go far beyond the abandonment proceedings and the restructuring of the rail services in the Northeast, and would include rulemaking, ratemaking, carrier practices, and all of the parallel activities.

We believe that it is very important that the public be properly represented in proceedings of that magnitude and we believe the Office of the Rail Public Counsel can help.

Mr. ROONEY. Is there anyone opposed to this concept of a Rail Public Counsel?

Mr. CLAPP. There was, as you know, a division within the Commission as to the establishment of an overall public counsel to carry on the functions because some members of the Commission did not feel a specific office was necessary. The majority believed it was extremely important and desirable, and it was adopted. We have been looking forward to having an active Public Counsel assisting us in our work.

Mr. ROONEY. You state on page four of your statement that, "For fiscal year 1978, the Commission has proposed that the Office of Rail Public Counsel receive \$2,033,000, while OMB has recommended \$700,000." As you know, H.R. 5798 provides for \$1 million for Rail Public Counsel for fiscal year 1978.

Your statement does not contain any justification for the \$2 million requested. Could you please indicate why you believe \$2 million is necessary, and also, why you believe that \$1 million would not be sufficient?

Mr. CLAPP. As you recognize, the Office of a Rail Public Counsel would rely, to an important degree, on contractual arrangements with outreach attorneys and consultants as well as with computer services, to supplement the basic staff. We do believe, however, that in order to carry on an effective job that office should have a minimum of 21 staff people.

Predominantly, the professionals would be lawyers, but the group would perhaps also include auditors, planners and engineers. We think that 21 is not excessive and that when we have an organization of 21 including attorneys and other professionals you are already moving up in terms of cost. But in addition, much of the work of the Rail Public Counsel involves extensive travel around the country, so we would expect that travel costs would be greater than they would be for many other activities.

In terms of the consultant services, we are estimating for attorneys something like \$600,000 for travel and salaries. These would be outreach attorneys. For technical consultants, about \$400,000. For staff salaries and benefits for the basic group, \$520,000. These are approximate figures. Then, of course, there must be provision for rent, supplies, equipment, and telephones. Printing and copying would be probably \$100,000, to be sure that the word is disseminated.

For the travel of the regular staff, we estimated another \$79,000. So, our figure, we feel, is a reasonable one.

Mr. ROONEY. Mr. Skubitz could not be with us this morning. I am sure, however, there are a couple of questions with regard to the 21



attorneys in your \$2 million budget request he would like to have asked, had he been here.

For the record, will you please indicate the total amount of the \$2 million which would be paid for salaries, and in that figure, can you tell me the average salary of each in-house attorney?

[The following material was received for the record:]

OFFICE OF RAIL PUBLIC COUNSEL—TENTATIVE GRADE STRUCTURE, FISCAL YEAR 1978

| Position title                                 | Grade | Number | Salary                |
|------------------------------------------------|-------|--------|-----------------------|
| Director.....                                  | GS-18 | 1      | <sup>1</sup> \$39,629 |
| Deputy director.....                           | GS-17 | 1      | 39,629                |
| Assistant public counsel.....                  | GS-16 | 1      | 39,629                |
| Supervisory attorney.....                      | GS-15 | 4      | 135,156               |
| Staff attorney.....                            | GS-14 | 2      | 57,450                |
| Staff attorney.....                            | GS-13 | 1      | 24,308                |
| Staff attorney.....                            | GS-12 | 1      | 20,442                |
| Staff attorney.....                            | GS-11 | 2      | 34,012                |
| Subtotal-professional staff <sup>2</sup> ..... |       | 13     | 390,255               |
| Secretary.....                                 | GS-9  | 1      | 14,097                |
| Secretary.....                                 | GS-8  | 1      | 12,763                |
| Secretary.....                                 | GS-7  | 1      | 11,523                |
| Secretary.....                                 | GS-6  | 2      | 20,740                |
| Clerk-steno.....                               | GS-5  | 1      | 9,303                 |
| Clerk-typist.....                              | GS-4  | 2      | 16,632                |
| Subtotal-support staff.....                    |       | 8      | 85,058                |
| Total compensation.....                        |       | 21     | 475,413               |
| Benefits.....                                  |       |        | 47,531                |
| Total compensation and benefits.....           |       |        | 522,844               |

<sup>1</sup> Estimates were prepared prior to the recently enacted executive pay raise. It is assumed that the \$33,000 included in the Commission's budget estimate of \$2,033,000 but not included in the attached budget would be sufficient to cover this pay raise.

<sup>2</sup> Although all professional positions are listed as attorneys, it is intended that some of these staff positions will be filled by professionals in other areas, and so forth economists or financial analysts.

TOTAL BUDGET REQUEST

|                                         |           |
|-----------------------------------------|-----------|
| Staff salaries and benefits.....        | \$522,844 |
| Rent.....                               | 48,000    |
| Supplies (maintenance).....             | 12,600    |
| Equipment (rental).....                 | 8,760     |
| Telephone.....                          | 34,000    |
| Postage.....                            | 26,000    |
| Printing and copying.....               | 100,000   |
| Staff travel and per diem.....          | 79,000    |
| Contractual services:                   |           |
| Administrative.....                     | 60,000    |
| Training.....                           | 10,000    |
| Consultant services (including travel): |           |
| Attorneys.....                          | 637,096   |
| Travel, per diem.....                   | 187,000   |
| Salary.....                             | 450,000   |
| Technical consultants.....              | 400,000   |
| Litigation expenses.....                | 10,000    |
| Library (maintenance).....              | 500       |
| Miscellaneous expenses.....             | 50,000    |
| Total.....                              | 2,000,000 |

Mr. CLAPP. In our proposed budget for fiscal 1978 the figure set forth for personnel benefits is \$501,500 broken down as follows: personnel compensation, \$458,000 and personnel benefits, \$47,000. We shall furnish for the record a more detailed breakdown.



Mr. ROONEY. Has any of the amount been budgeted for consultant's services and if so, how much is budgeted for consultant's services?

Mr. CLAPP. In the fiscal year 1978 budget we have one classification of "other objects" which includes consultant services where we have \$1,435 million. A more detailed proposal we have been working with sets aside, for consultant's services, \$637,000 for attorneys, including travel and salary and \$400,000 for technical consultants.

Mr. ROONEY. I wonder what type of work the outside consultants would be doing?

Mr. CLAPP. There are many activities that are ongoing under the 4-R Act in which I think that the Office of the Rail Public Counsel would want to involve itself. The Commission, for example, is making increased use of rulemaking proceedings and the Rail Public Counsel would feel an obligation to follow those, to be of assistance with respect to them, in data gathering, environmental assessment, economic analyses, that kind of thing. In connection with the 4-R Act one of the activities that has been suggested is the creation of an abandonment manual that can be sent to communities.

In fiscal 1978, there is supposed to be a study of merger policies and procedures. By October 5, the ICC and the Department of Transportation are to submit to Congress the result of studies relating to market dominance. These would be of interest to the Rail Public Counsel.

Also, the ICC has to report to the Congress next February on actions taken with respect to recyclables. A rail public counsel might help to insure that good records are made with respect to that. The Office also wants to develop some independent studies of its own. It would want to participate as to ICC attempts to develop a national surface transportation plan.

Of course, the Department of Transportation has developed recommendations regarding the financing of railroads, and the Public Counsel would want to look at that pretty close. It is hard to say precisely what activities, of course, any Director would want to engage in, but there are many, many opportunities, certainly, to provide adequate protection of the public interest.

Mr. ROONEY. Thank you very much, Mr. Chairman. We welcome Mr. O'Neal here today. We are looking forward to serving both of you. Thank you very much.

[Whereupon, at 10:30 a.m., the hearing adjourned.]