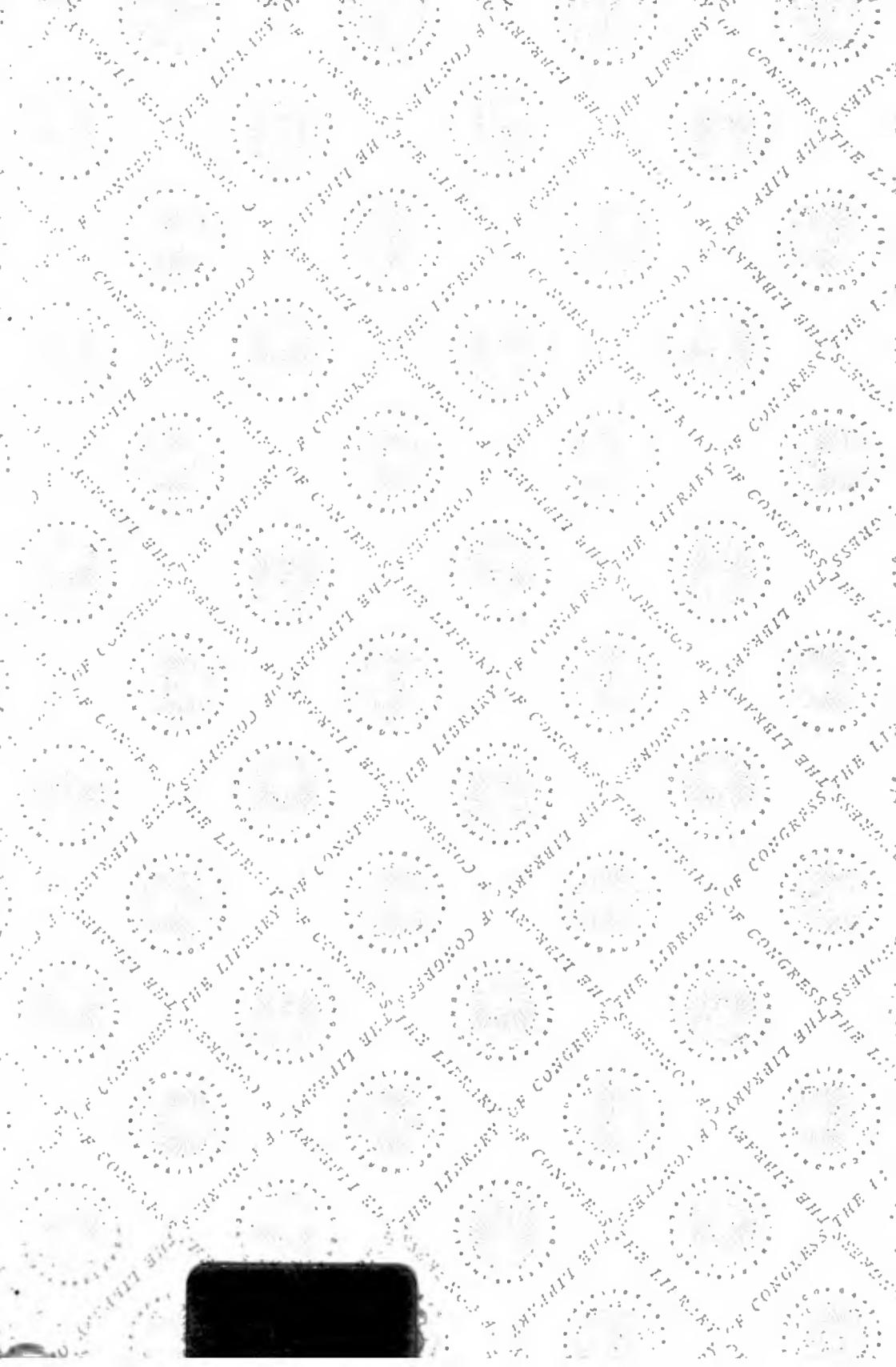
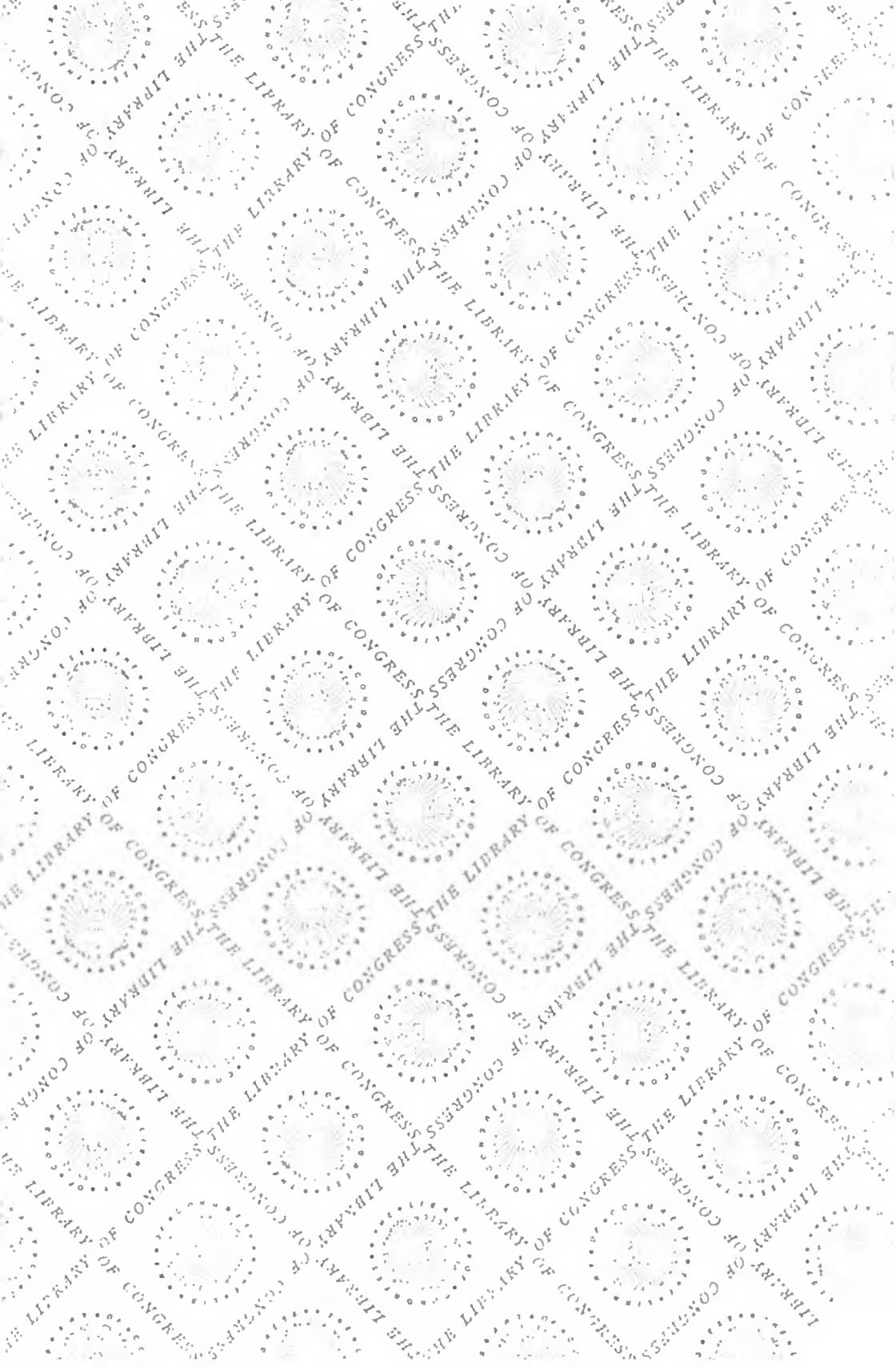


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and Foreign Commerce: Subcommittee on Transportation and Commerce

RAIL PUBLIC COUNSEL AUTHORIZATION FOR FISCAL YEAR 1980

HEARING
BEFORE THE
SUBCOMMITTEE ON
TRANSPORTATION AND COMMERCE
OF THE
COMMITTEE ON
INTERSTATE AND FOREIGN COMMERCE
HOUSE OF REPRESENTATIVES

NINETY-SIXTH CONGRESS

FIRST SESSION

ON

H.R. 2420

A BILL TO AUTHORIZE ADDITIONAL APPROPRIATIONS FOR
THE OFFICE OF RAIL PUBLIC COUNSEL

FEBRUARY 27, 1979

Serial No. 96-16

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Committee on Interstate and Foreign Commerce



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RAIL PUBLIC COUNSEL AUTHORIZATION FOR FISCAL YEAR 1980

TUESDAY, FEBRUARY 27, 1979

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

The subcommittee met at 9:30 a.m., pursuant to notice, in room 2218, Rayburn House Office Building, Hon. James J. Florio, chairman, presiding.

Mr. FLORIO. The subcommittee will come to order.

We will attempt to establish the precedent of starting on time for the course of the year. As I mentioned, a committee that deals with railroads has a symbolic emphasis that should be placed on punctuality.

I want to welcome all to the first official meeting of the Subcommittee on Transportation and Commerce, and my first hearing as its Chairman.

We are here to consider the authorization for fiscal year 1980 for the Office of Rail Public Counsel.

One of the things on which the committee would like to focus today is how the Office of Rail Public Counsel defines its statutory mission.

There are many who claim that such an office merely duplicates the role of the Interstate Commerce Commission. I would like to know how the Office perceives itself, and how it has fulfilled its statutory role.

One of the clear statutory goals of the Office of Rail Public Counsel is providing assistance to State and local organizations, and individuals who are concerned about rail issues.

I would like to know how State and local concerns are considered in making decisions about where the Office is to become involved, and also what procedures exist for soliciting the views of State and local organizations and individuals.

I am anxious to know how that analysis or alternatives is progressing, and also when we can expect to see the results of that analysis.

I am hopeful the witness will address himself to these issues in particular, and any other issues he deems appropriate.

Without objection the text of H.R. 2420 will be printed at this point in the record.

[The text of H.R. 2420 follows:]

(1)

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96TH CONGRESS
1ST SESSION

H. R. 2420

To authorize additional appropriations for the Office of Rail Public Counsel.

IN THE HOUSE OF REPRESENTATIVES

FEBRUARY 26, 1979

Mr. STAGGERS (by request) introduced the following bill; which was referred to the Committee on Interstate and Foreign Commerce

A BILL

To authorize additional appropriations for the Office of Rail Public Counsel.

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 10388 of title 49, United States Code, is
4 amended to read as follows:

5 “§ 10388. Authorization of appropriations

6 “There is authorized to be appropriated to the Office of
7 Rail Public Counsel to carry out this subchapter not to
8 exceed \$1,850,000 for the fiscal year ending September 30,
9 1980, and such sums as are necessary for the fiscal year
10 ending September 30, 1981.”

Mr. FLORIO. At this point we would like to call the first witness, who is the Director of the Office of Rail Public Counsel, Mr. Howard Heffron.

Mr. Heffron, I have had the opportunity to read your statement in full and I appreciate your forwarding it to us. Would you please summarize your remarks as you see fit?

**STATEMENT OF HOWARD A. HEFFRON, DIRECTOR, OFFICE OF
RAIL PUBLIC COUNSEL**

Mr. HEFFRON. I am pleased to appear before you today, Mr. Chairman, on behalf of the Office of Rail Public Counsel's request for an authorization of \$1,850,000 for fiscal year 1980.

The Office, as I am sure you are aware, was created under the 4-R Act as an independent office affiliated with the Interstate Commerce Commission.

The mission of the Office is to participate in proceedings before the Commission with the object of assisting in development of a public interest record, generally to furnish the goal of safe, efficient, reliable, and economical rail transportation services.

In all of our activities we have been guided by the basic purposes for which the Office has been created. That is to add to the record three kinds of evidence and analysis which are needed for informed decisionmaking and to assure representation for citizen and communities point of view that would not otherwise be adequately represented.

While the Office has been in existence for just a bit more than 1 year, I am pleased to report to you that we have come a long way in that first year.

The Office was created without any transfer of personnel, property, records, or files. It is truly a case of zero base budgeting and as a matter of fact, during our first calendar year of existence in 1978 we had an average of just a little more than five professional staff members on board. Nevertheless today, a little more than 1 year, the Office of Rail Public Counsel is a functioning organization with an established presence before the Interstate Commerce Commission, the Department of Transportation, with liaison with National Transportation Safety Board, and various State agencies and user groups concerned with rail transportation.

The longer statement, which I provided, gives a comprehensive report of the activities we engaged in last year. I think at this time I would like to summarize those activities by referring to three categories of highlights which I think will in combination reflect the scope of the Office.

First, I think I would like to mention the outreach program. This is a program which was conducted in connection with the Amtrak route restructuring, as I am sure you will recall.

The Congress directed the Rail Services Planning Office to conduct hearings around the country on the Department of Transportation's preliminary route restructuring proposals and at the same time directed the Office of Rail Public Counsel, to the extent practicable, to assist communities and users in making their views known.

Now, that occurred early last spring and right in the midst of our initial organizing activities, but the interest in rail passenger service was just so important and so manifest around the country that we felt we had to immediately devote top priority to organizing an outreach program and doing everything we could to facilitate the input of people and organizations around the country.

So we actually retained on contract 25 private lawyers who we had to recruit. We sent them out all over the country. They went to 33 States.

They contacted directly over 2,500 individuals interested in rail passenger service.

They conducted 200 local meetings at which they advised the attendees of what the issues were, of how best to marshal whatever data, evidence, or arguments the localities or the organization or the individuals concerned wanted to present at the hearings.

Then they attended the 512 hearings which were held to help the individuals who were going to be present to testify or present statements at these hearings. The same outreach attorneys were supplied with fairly detailed training and analytical materials by a backup staff at the Office in Washington.

The outreach attorneys, when this process was over, filed rather complete reports which were then sent to the Rail Service Planning Office, which I think used it very heavily in those portions of its report, which referred to particularly, the social consequences and concerns reflected around the country with respect to those proposals.

That was one facet of the work during our first year, and I think it focuses, partially at least, on one of the comments you made in your opening statement, and that is the Office's interaction with communities, localities, States, organizations, and individuals around the country concerned with rail service.

In order to conduct this program item, it was necessary to identify such people and to locate them, and this was done working through State organizations, through rail user organizations, and other groups around the country.

Mr. FLORIO. If I could ask a question on that point, Mr. Heffron? From what you have indicated in terms of informing people about the existence of the hearings, bringing the issues to the people, was there anything done that nonlawyers could not have done?

Informed layman, it seems to me, could have done the informing as to when things were going on and what the essential issues were.

Mr. HEFFRON. I think a portion of what the outreach attorneys did would have to be considered a kind of public education effort.

I think there is no question about that, but I do think the effort went beyond that. In the effort to analyze the impact of the changes in the route structure and in particular localities, states, cities, whatever, there was a need to go into the various relevant factors which would impact on a decision.

I think that was more than what a layman could do. There was a need to read the statute for example and to interpret it, to describe the statutory procedures and the role of the various government agencies and the kind of factors which the Congress had indicated ought to be given weight in the process. So I think it was an effort that required a mixture of talents of which legal talent was one.

If I may move now to just the second sort of broad facet of our activities during the first year. Here I refer to ICC regulatory proceedings.

The office's actual participation before the ICC ranged over a wide spectrum of subjects going from abandonments and mergers, contract rates, capital incentives, rates, adequacy of revenues, rate bureaus, various informal rulemaking procedures, and changes in ICC rules of practice requests for exemption from regulation in terms of substantive issues, in terms of procedures, procedural types of matters. These were rulemakings ranging from informal rulemaking proceedings using the comment procedure to formal rulemaking proceedings where testimony on the record was taken to trial-type hearings where full witnesses and cross-examination and pleadings were used.

Here I might mention on particular proceeding which I think highlights the impact an office of this kind can, and in this instance, I think, did have.

I am referring to the first request for an exemption under the 4-R Act. Now the provision of the 4-R Act which grants the authority to the Commission to issue exemptions could be seen—and I think we saw it—as really authority to engage in kind of selective deregulation to take cuts off the regulatory scheme, and if it seemed sensible to withdraw regulations from that area by granting an exemption.

Now, in this particular instance the first application for an exemption was filed with respect to agricultural commodities by the Southern Pacific Railroad. Our Office immediately filed with the Commission telling the Commission we thought this was a very important issue, that they ought to take on the merits and set it down as quickly as they could.

Eventually the Commission came forth with a different disposition. In effect it dismissed the petition for the exemption requested and issued a notice, an advance notice of proposed rulemaking, which opened up the subject and in effect said, "We want to issue regulations on the question of exemptions which would reach to any hypothetical request for exemption anybody might conceive of, and we want to issue comprehensive regulations to deal with every facet of that subject."

We saw this as a procedure which was bound to cause enormous delays and expense, and we opposed it and we told the Commission that we thought that was only going to cause delay and expense to the parties.

We thought they should get to the business at hand, passing on a specific application for a specific exemption.

We also did market studies and concluded that within the broad area of agricultural commodities the subject of fruits and vegetables was one in which the competition was so great that this seemed a suitable area for the Commission to proceed to take a good look at.

So we recommended to the Commission that they abandon this comprehensive and very time-consuming rulemaking approach and issue a specific notice that they would go forward and take a hard look at this exemption application. Eventually they came around.

They have issued a notice proposing an exemption in the area of fresh fruits and vegetables that is now pending before the Commission with a decision expected shortly.

That is the second facet of the Office's activities last year. In proceedings before the ICC, I mentioned application for exemption as one illustration.

Now, the third facet that I would mention is the field of rail safety. This statute tells us that we should further the public interest, and among other things, rail safety.

We took a look at the rail safety area and we have participated in a number of rail safety proceedings which are again listed in the comprehensive list of activities which is appended to my full statement.

In doing so in this case we did more than simply react to what other agencies were doing. In this case we went out and took the initiative and actually developed and prepared two petitions to the Department of Transportation asking them to take various actions with respect to rail safety matters.

That was another facet of our activities. We became particularly concerned with the movement of hazardous materials and I believe the accepted fact that the numbers of derailments are increasing, the volume of shipments of hazardous materials is increasing, and the number of derailments due to track problems is increasing.

When you put all that together you have a prescription for some very major potential problems, and we tried to address one aspect of that area.

Now, if I can sum up then, the three major facets of activity that I referred to as activities during our first year—and I don't mean to suggest the amount of time or staff resources devoted was equal to each of these three—these three are simply a division which shows the dimensions of the Office's activities in its first year.

The outreach program, where we attempted to reach communities, localities, individuals, impact education by the proposed changes in passenger rail routes via the Amtrak route restructuring proposed by the Department of Transportation.

Second, the participation in the ICC proceedings to develop a record in which an objective group could come in and elaborate on the record basically to assist the Commission in making informed decision-making.

And third, the area of rail safety where we responded to various ongoing activities of other agencies and located what we thought were gaps in the system which ought to be brought to the attention of the authorities concerned.

I should emphasize our Office—I think I am sure you know—we have no regulatory power—we can't issue rules or regulations or tell anyone to do anything.

We are basically an office that advocates. We attempt to close the gap in records. We attempt to improve the quality of decisionmaking by those agencies which have the authority to make decisions.

So those are a few illustrations of the kinds of activities we engaged in during our first year.

Now, the fact is that we had to pass up a number of important proceedings during our first year for lack of resources, and there is no question that we would have gotten into these proceedings if we had been able to recruit fast enough, if we had not in effect sort of stopped to deal with the outreach program, and the Amtrak restructuring, and had we not been impacted by the Federal hiring freeze.

But we are moving as fast as we can now to improve that situation. We badly need cost analysts, transportation analysts, financial analysts to work along with lawyers, because this has to be a multidisciplinary effort. It can't be done purely by lawyers by themselves, reading law books.

Now, in addition, as we look into next year, we find that apart from continuing with the activities I have related, the Power Plant and Industrial Fuel Use Act—which was an act late last year as part of the energy program—the Office of Rail Public Counsel was expressly assigned additional responsibilities to participate in proceedings of Federal agencies basically where the relationship between energy and transportation policies are at issue, and indeed may come into conflict.

We are attempting to really think through exactly what sort of impact this new mandate will have on the Office.

At the moment the Department of Energy has proposed procedural regulations which we are looking at.

This provision comes as part of the coal conversion program, where there will be as one example of what is likely to be forthcoming the statute provides for various exemptions from the requirement that exists in new plants, that new plants use coal, and among these possibilities for exemptions are contentions that transportation facilities will not be adequate or will be too costly.

It would be anticipated we would participate in those exemption proceedings among others.

If I can sum up, Mr. Chairman, the authorization we are requesting, we thing, to use an overworn word, is a lean one.

It is no more than we have had during the current fiscal year, but we will be able to live with it and mount outreach programs affording assistance to communities and rail users similar to that which was done earlier in the Amtrak hearings.

There are quite a few matters which will be coming up in the next year which I might mention now perhaps. I say next year, I mean matters which will be coming up over the next several months which are bound to continue into the fiscal year for which our authorization requested is directed.

Among these I might mention mergers. We know that the Chessie & Seaboard Cos.' line merger proceeding will be an ongoing one at the Commission. That is an important one. We think we should be in there.

The so-called D.T. & I., Detroit, Toledo & Ironton proceeding is now pending and will be a ongoing one. We are already participating in that proceeding. Hearings have been held. They will continue onward.

There is a general trend in the industry, in the direction of mergers or purchases or consolidations of one sort or another. All of these proceedings can have very important impacts on the communities and users who would be affected. We think those are proceedings we should get into, abandonments.

There are presently as I understand, 130 abandonment applications now pending at the Commission involving something over 5,000 miles of track.

That is not to mention those listed as potentially subject to abandonment which the railroads can file at any time. Roughly they are coming in, that is, new applications, and at the rate of 12 per month.

There are peaks and valleys, and sometimes they can come in in large batches as may happen with the Milwaukee Road. We are coming into the tougher abandonments. I understand that the initial abandonments which were filed by the railroads net with roughly a 50-percent opposition rate.

They were picking those very light density lines which were almost de facto abandoned and have not been in use. But now I understand recent opposition rate has risen to 80 percent.

I think it is generally accepted that the tougher abandonment applications will be coming forth, and by tougher we mean those with which people rely on more heavily and therefore will be fare more concerned with the impact. So that is another area.

The Milwaukee Road and its problems is a subject matter which one could almost refer to all by itself. We are now looking at the different facets of the Milwaukee Road's problems to see where our office can participate in a sensible effective way without draining all of our resources.

Now, there the Milwaukee Road involves abandonments which are now pending and many more will be filed. We are looking at some of these.

It involves a plan for reorganization which is pending in the Federal court and we have already been asked by a Member of the Congress to participate in that proceeding.

The seventh circuit in Chicago has just sent back to the Commission for further hearings the Milwaukee original application, many many years ago to participate in the northern lines merger. That is a merger that created Burlington Northern.

That will be a major proceeding before the Commission. The Milwaukee is negotiating with various railroads to sell off portions of its properties in the Western United States and those negotiations—should they eventuate—will eventually come before the Commission for approval.

So the Milwaukee Road and its problems may well be a major area.

Then there are rulemakings at the ICC. One, of course, a very important one is the whole issue of market dominance.

The Commission has a major study underway. That study should be concluded this year and may well eventuate in proposed changes.

The regulation is opening market dominance which has been much criticized. There are other rulemakings.

There is a very important rulemaking on accounting matters and costing definitions which cuts across many of the Commission's activities. There is an important rulemaking in the area of abandonment relating to whether opportunity costs are to be calculated in the overall decision of whether to permit the railroad to abandon or not.

Another area are rate cases. We would expect a continuing series of rate cases ranging from general rate increases to specific rate proposals. Some of these are bound to involve the whole issue of differential pricing which comes up in the coal cases, how high may a railroad raise its rates to take care of problems suffered elsewhere in its commodity movements.

There is an important case generally in the rates area, Long Island Railroad division case which raises the issue of how the railroads divide the rates paid on interline movements.

Another area is procedural reform. Of course our office is part of that segment of the 4-R Act called procedural regulatory reform.

We are looking at the procedures of the ICC with a view toward developing proposals to help expedite the movement of cases through the ICC.

[Mr. Heffron's prepared statement follows:]

STATEMENT OF HOWARD A. HEFFRON, DIRECTOR, OFFICE OF RAIL PUBLIC COUNSEL

Mr. Chairman, I am pleased to testify before you today on behalf of the Office of Rail Public Counsel's request for an authorization of an appropriation of \$1,850,000 for fiscal year 1980.

The Office, as members of this Committee are aware, was created under section 304 of the Railroad Revitalization and Regulatory Reform Act of 1976, commonly known as the 4R Act. We are an independent office affiliated with the Interstate Commerce Commission and our mission is to develop a public interest record in proceedings before the Interstate Commerce Commission and generally to further the goal of safe, efficient, reliable, and economical rail transportation services. We are also charged with soliciting, evaluating and presenting to the ICC the views of those communities and users of rail services which would not otherwise be adequately represented in ICC proceedings concerning rail transportation. We are authorized to enter any ICC proceeding involving a railroad, we may petition the ICC to initiate such a proceeding, and we may seek judicial review of any ICC action on any matter involving a railroad.

While the Office of Rail Public Counsel has been in existence for little over a year, I am pleased to report to you that we have come a long way in that first year of operation. The Office was created without any transfer of personnel, property, records or files—truly a case of zero base budgeting. Indeed, during the first calendar year of existence—1978—we had an average of about 5 professional staff members on board. Nevertheless, today, little more than a year after the Office was organized, the Office of Rail Public Counsel is a functioning organization with an established presence before the Interstate Commerce Commission and the Department of Transportation. We also have established effective liaison with the National Transportation Safety Board and state agencies concerned with rail transportation.

This major progress toward achieving our statutory objective has been made despite unexpected limitations of staff. I had hoped to complete our initial staffing of 20 persons by the end of the last fiscal year, that is September 30, 1978. We came close to that goal in September. However, following some staff changes and then the federal hiring freeze which was imposed in October, our staff now consists of 15 persons of whom 9 are attorneys, 1 administrative assistant, 1 paralegal, and 4 support personnel. It is plain to me that this staffing falls short of our needs. Our need for staff analysts, as well as additional attorneys, is clear, if we are to participate fully in ICC proceedings and make a contribution to the deregulation debates which are ahead.

We intend to recruit actively in the weeks ahead for all these specialists and to reach our authorized positions of 29 as early as possible. However, I do not intend to compromise on the quality of personnel in order to create a full staff overnight. If we are to serve our function of improving the quality of ICC decisionmaking and representing rail users such as small shippers, communities, rail passengers, and other members of the public upon whom the rail system impacts and whose interests might not otherwise be adequately represented in these proceedings, then our filings and presentations must be of the highest possible quality. Therefore, I intend to proceed in the future as I have in the past, by a painstaking recruitment process to locate and hire personnel who I feel can make a significant professional contribution to the Office.

I should add that I am proud of the results of that process thus far. The Office of Rail Public Counsel is staffed with highly qualified and dedicated professionals who have come from both the private and public sectors to help make this Office work. We are not headline hunters; our effectiveness depends and will continue to depend upon the painstaking attention to detail and deliberation which are the mark of the true professional.

In our first year, the Office has entered a wide variety of rulemaking and adjudicative proceedings before the Interstate Commerce Commission, has ag-

gressively pursued important issues of rail safety before the Department of Transportation, has facilitated and assisted participation by members of the public and community organizations throughout the nation in Congressionally mandated hearings concerning Amtrak passenger service rail routes, and has begun a dialogue with state agencies and user groups to identify areas of greatest public concern. (For the Committee's information, I have appended a complete list of both ICC and other agency proceedings in which we have participated.)

I would like to mention some of the activities of the Office during the past year which I believe show the scope and depth of its work product.

First, early in 1978, the Department of Transportation had in preparation its preliminary report on the Amtrak route structure. As you know, this report recommended a drastically reduced system for Amtrak. Under mandate from the Congress, hearings by the ICC's Rail Services Planning Office were scheduled in communities along the lines affected by the report and the legislation instructed this Office "to the extent practicable" to protect the interests of communities and users which otherwise might not be adequately represented. Widespread public concern was obvious and we decided that we had to respond immediately and do whatever we could to facilitate participation by concerned communities, organizations, and members of the public.

It was this decision that prompted our outreach program. On very short notice, the Office contracted with 25 private attorneys, most of whom had extensive experience in public hearing work. The 25 outreach attorneys traveled to 33 states to prepare for the hearings. In advance of these trips, the attorneys made phone contacts with more than 1,000 individuals in state, county, and local government, as well as rail users and a wide variety of community and local organizations. Press releases were sent to the media in all hearing locations, containing information about the local impact of the report, and advising about opportunities for persons seeking assistance in organizing their testimony to meet with the assigned outreach attorney in the days preceding the hearing. Over 200 such local meetings in 33 states took place and, excluding contacts through radio, TV, and newspapers, the Office notified well over 2,500 people directly about the hearings, the implications of the report to their local rail service, and the relevant considerations which might helpfully be elaborated on the record.

The outreach attorneys attended all 52 hearings held throughout the nation. They assisted witnesses, asked clarifying questions, monitored hearing procedures, and prepared reports in accordance with a detailed outline developed by this Office. A backup staff in the Office prepared detailed training, factual, and analytical materials on the rail passenger system and the DOT proposals which were forwarded periodically to the outreach attorneys. We sent the detailed reports filed by these attorneys (some 1,200 pages of material in all) to the Rail Services Planning Office of the ICC and that office relied heavily on them in preparing its report on the DOT proposals.

The basic purpose of the outreach program was not to advocate any particular position developed in this Office but to facilitate meaningful presentations at the hearings of a wide variety of evidence and views by concerned individuals and organizations in a complex area of public policy. I believe that our efforts contributed substantially to the breadth and productiveness of public participation in the route hearings. In this unique program, citizens around the country discovered from personal contacts and direct assistance from the outreach staff that government was not necessarily indifferent and remote but could be helpful and accessible.

The Office has also established a solid presence in ICC proceedings. Our participation has ranged from informal and formal rulemaking proceedings to evidentiary trial type hearings involving a wide spectrum of regulations matters affecting rail transportation including abandonments, mergers, contract rates, capital incentive rates, adequacy of rail revenues, rate bureaus, accessibility of railroad cost data, rate proceedings, informal rulemaking procedures, changes in the ICC rules of practice, and exemptions from regulations under the 4R Act.

Virtually all of these matters share one common characteristic: They involve issues of great technical complexity requiring in most instances a multidisciplinary approach utilizing the services of knowledgeable specialists, including attorneys, economists, cost, financial and transportation analysts. In a field as complex as transportation, it is especially important that an independent body without any special economic interest to advance be available to help ensure

that the record is complete and that the views of those who might otherwise go unrepresented are presented to assist the Commission in its deliberations.

One especially significant proceeding which I would like to touch on in passing was an application by a carrier for exemption from regulation for movements of agricultural commodities. This application was the first of its kind under the 4R Act, and the Office urged the Commission to consider it and the issues it raised promptly on the merits. The Commission dismissed the application without a hearing, expressing an unwillingness to pass upon individual exemption applications until it had developed and promulgated comprehensive regulations covering all the possible applications for exemptions which might hypothetically be filed. The Office opposed this action as unnecessarily cumbersome, expensive, time consuming, and contrary to the intent underlying the 4R Act. In addition, the Office retained outside experts to analyze movements of certain commodities to determine whether a grant in whole or in part of the requested exemption might subject any particular groups of shippers to unrestrained monopoly power, submitted evidence for the record on the point, and suggested that the Commission investigate the feasibility of an exemption for fresh fruits and vegetables. The Commission eventually agreed with this position and issued a notice of proposed exemption for fresh fruits and vegetables. We hope that it will make a final decision this month. I believe that the vigor and speed of this Office's action contributed importantly to the relatively prompt handling of this very important matter by the Commission.

We have taken several actions in the area of rail safety. Among the more important of these was a petition asking the Materials Transportation Bureau of the Department of Transportation to begin a rulemaking proceeding with the object of banning the movement of hazardous materials over track which does not comply with minimum safety standards. The purpose of this petition is, of course, to reduce the risk of derailments involving hazardous materials. We also filed a petition with the Federal Railroad Administration asking that it promptly complete a rulemaking which has been pending for close to five years on the subject of locomotive speed indicators and recorders. This is an issue on which the National Transportation Safety Board has made numerous recommendations, thus far to no avail. The matter of speed indicators and recorders is too important to be left inconclusively in regulatory limbo; there should be a prompt decision by FRA, one way or the other, with a public explanation of its reasons.

I have cited examples of the kind of role the Office has played in a variety of regulatory proceedings. The fact is that because of staff limitations, we have had to pass up many other proceedings which we felt would have justified our intervention. There will undoubtedly be proceedings of equal or greater importance arising in fiscal year 1980 in matters of mergers, abandonments, deregulation, rates, and safety.

Indeed in section 804 of the Powerplant and Industrial Fuel Use Act of 1978, Pub. L. No. 95-620, which became law at the end of last year, the Congress added to our responsibilities by expressly directing the Office to appear in proceedings of federal agencies concerning the impact of energy proposals and actions on rail transportation and whether transportation policies are consistent with national energy policies. We are still in the process of determining what additional demands this new mandate may impose on the Office.

To conclude, Mr. Chairman, the funding I am requesting takes into account the broad scope of the Congress' mandate to the Office of Rail Public Counsel. Our request is a lean one. The funding that we are requesting for fiscal year 1980 is no more than was appropriated for the current year. Our budget figure is based on our experience during our first year as well as the delay we anticipate before reaching our full staff complement. We believe we will be able to live within this budget and, if the occasion arises, to mount outreach programs affording assistance to communities and rail users similar to the earlier assistance we provided during the Amtrak route hearings.

I urge the Congress to provide the funds requested for the fiscal year starting next October. I am confident that the responsibilities the Congress has specifically imposed on this new Office will be carried out in a manner which is responsible and thoroughly professional.

APPENDIX

OFFICE OF RAIL PUBLIC COUNSEL CUMULATIVE LIST OF PROCEEDINGS,
FEBRUARY 9, 1979

ICC PROCEEDINGS

- (a) Ex Parte No. 55 (Sub-No. 30), Price Competition Among Practitioners;
- (b) Ex Parte No. 274 (Sub-No. 2A), Identification and Handling of Related Rail Abandonment Applications;
- (c) Ex Parte No. 274 (Sub-No. 2B), Increased Public Participation in Rail Abandonment Proceedings;
- (d) Ex Parte No. 282 (Sub-No. 2), Railroad Acquisition, Control, Merger, Consolidation, Coordination Project, Trackage Rights and Lease Procedures;
- (e) Ex Parte No. 290, Procedures Governing Rail General Increase Proceedings;
- (f) Ex Parte No. 327 (Sub-No. 1), Requirements and Procedures Relating to Rate Incentives for Capital Investment;
- (g) Ex Parte No. 346, Rail General Exemption Authority;
- (h) Ex Parte No. 353, Confidentiality of Financial Data and Ex Parte No. 360, Regulations for the Processing of FOIA Requests;
- (i) Ex Parte No. 358-F, Proposed Policy Statement Regarding Railroad Contract Rates;
- (j) Ex Parte No. 350, Improving Commission Regulations, and Ex Parte No. 350 (Sub-No. 1), Informal Rulemaking Procedures;
- (k) Ex Parte No. 353, Adequacy of Railroad Revenues;
- (l) Ex Parte No. 344, Terminal Performance Standards Governing the Transportation of Nonperishable Commodities;
- (m) Ex Parte No. 357, Increased Freight Rates and Charges, Nationwide—8 Percent;
- (n) Finance Dockets Nos. 28499 (Sub-No. 1), Norfolk and Western Railroad Company—Control—Detroit, Toledo & Ironton Railroad Company, and 28676 (Sub-No. 1), Grand Trunk Western Railroad—Control—Detroit, Toledo and Ironton Railroad Company and Detroit and Toledo Shore Line Railroad Company.
- (o) Docket No. 36368 Southern Pacific Transportation Company, (application for exemption from regulation);
- (p) Ex Parte No. 277 (Sub-No. 1), Regulations Governing the Adequacy of Intercity Railroad Passenger Service (also before the Department of Transportation as OST Docket No. 46, Nondiscrimination on the Basis of Handicap);
- (q) Docket No. 36989, Adams Packing Association, Inc., et al., v. Consolidated Rail Corporation, et al. (rate proceeding);
- (r) Docket No. 37020, Increased Minimum Weights, etc. (rate proceeding);
- (s) Docket No. 37063, Increased Rates on Coal, L&N RR, October 31, 1978;
- (t) Section 5b Applications Nos. 2 (Western Railroads-Agreement, 3 (Eastern Railroads-Agreement) and 6 (Southern Railroads-Agreement);
- (u) Docket No. 36988, Alternative Methods of Accounting for Railroad Track Structures; and
- (v) Finance Docket No. 28910F, Rio Grande Western Railroad to Discontinue Operation of Trains No. 5, 17 and 18 between Grand Junction, Co. and Salt Lake City, Utah.

AMTRAK ROUTE RESTRUCTURE HEARINGS

RSPO hearings held pursuant to § 4(c) Amtrak Improvement Act of 1978.

DOT PROCEEDINGS

- (1) Safety:
 - (a) Freight Cars Periodic Inspection, FRA Docket No. RSFC-5;
 - (b) General Safety Inquiry, FRA Docket No. RSSI-78-5;
 - (c) Speed Indicators and Recorders, FRA Docket LI-4; and
 - (d) Hazardous Materials, MTB Docket No. P-708.
- (ii) Other: (a) Hearing on DOT Preliminary Report, A Prospectus for Change in the Freight Railroad Industry.

JUDICIAL PROCEEDINGS

- (a) National Railroad Passenger Corp. v. United States, et al. D.C. Circuit Court Docket Nos. 77-1596 and 77-1626; and
 (b) Interstate Commerce Commission v. Chicago and North Western Transportation Co., et al., U.S. Supreme Court Docket No. 78-411.

LEGISLATION

"Powerplant and Industrial Fuel Use Act of 1978," Pub. L. No. 95-620.

Mr. FLORIO. Mr. Heffron, we will be in position to consult the ICC agenda ourselves. We appreciate the significance of some of these points you are raising.

If that does conclude your prepared comments, what I would like to do is adopt—if there is no objection from the committee—an operating procedure which consists of alternating between majority and minority members in the order which individuals arrive, thus providing the incentive reinforcement for punctuality.

Ms. MIKULSKI. I know I was one of the ones who asked you yesterday to be punctual but I must say I have been a victim of Washington's potholes. They were bigger and deeper than I was and I apologize for being late.

Mr. FLORIO. I could make all sorts of comments about the depth of the potholes but I won't.

Before calling on Mr. Heffron, I note in the 4-R Act that there is a statutory requirement that the Office of Rail Public Counsel submit monthly reports to the ICC. We would like to receive from you, at your convenience, some of those reports I assume you are submitting.

Mr. HEFFRON. They have been submitted regularly.

Mr. FLORIO. We also ask for your assistance in obtaining for us copies of the ICC's annual evaluation of your office. We have reached out to the ICC, and to this point have not received them. We will continue the attempt to obtain these evaluations, but should you have a copy of their reports we would appreciate receiving them.

Mr. Lee?

Mr. LEE. Thank you, Mr. Chairman.

Mr. Heffron, as a freshman Congressman fully cognizant of the environment in the country having just come through an election, the apparent need to streamline and become more effective and efficient, the first question which I ask myself in attempting to look at the necessity of continuation of this function, is item really necessary?

Obviously, I am sure you come from a biased point of view and the answer is yes, but I have to say to you, sir, that predicated upon the research and the reading I have been able to accomplish, item appears to me that there is not a need for the continuation of the Office of Public Counsel, that this is a function that conceivably can be performed by the Interstate Commerce Commission.

Second, there is another layer of bureaucracy and function of government. Third, it contributes to the inefficiency and ineffectiveness of the operation of overall government.

Frankly in the research I have been able to conduct I was not able to justify substantially the outreach functions you described or some of the other functions you have gone through.

In summary, I don't think there is justification to continue this operation.

Mr. HEFFRON. Well, let me comment on that if I may, briefly.

First, as to the outreach function, that is a function that has been directed by the Congress so that I think that this was not a function which our office made an independent judgment to engage in.

The statute was very clear. The Amtrak Improvement Act of 1978 tells us to do it and we did it, but, in addition, I think that the organizations and the user groups and associates who made contact with the outreach program found it extremely helpful.

Indeed they were gratified that in this particular case the Government was not remote and inaccessible but turned up right there in their locality, helpful.

Indeed they were gratified that in this particular case the government was not remote and inaccessible but turned up right there in their locality, helpful.

And I think if you are a believer in public participation and that the views of the people should be made known in these matters, then the question is how do you go about doing it.

The matters are highly technical. They are extremely complicated. The economic interests that are concerned with the outcome of these proceedings are very well represented. They have all the experts they possibly need at their command, and the question is how can we make any entry into the process and provide a channel for the views of people out there.

These are views that when people are protesting an abandonment, if they are businessmen, small businessmen, they may have perfectly good grounds. They may not know what those grounds are because the area is so complicated that it is not enough to say, "I don't want to lose my service. It will cost me more to ship some other way."

These are highly technical issues, and the only way to do it is to have an expert look at it, so that I think there is a justification for that function.

But to go back to your basic, more fundamental question. I think I would take it, if I may, in two steps; and step one is the question of what I call function in the sense of is there a need to have the record of proceedings conducted by the Interstate Commerce Commission elaborated on by a body which is not one of the contending economic interests.

Now, if you accept the fact that there is such a need and I believe—I don't know what your views on that are—I know the Interstate Commerce Commission itself believes there is such a need—the Chairman has said so on many occasions. Indeed even before he was Chairman he said so in an opinion—and that is largely because the Interstate Commerce Commission has adopted the judicial model of operation.

It is a passive recipient of what the parties bring to it and the question then is, if that is so—and I believe it is so—do the parties bring everything that is necessary for wise, informed decisionmaking, or is there a basis for believing that an independent organization can fill the gaps, can take its own look and say "Wait a minute, this is also relevant, and this is also relevant," and add to the record.

Now, I think that function is one that the ICC needs, and accepts that it needs, and that is one of the basic functions the office fulfills. That is taking a look at these proceedings and making sure that all of

the relevant materials are in there. That serves a lot of purposes, in addition to wiser decisionmaking by the Commission.

Without that function you would have instances where the Commission itself might feel the need to order that certain additional facts be presented to it in order to reach its own determination. That is a very very inefficient and wasteful way to go about it after the Commission has already reviewed the record and, in effect, to start a new round of proceedings to fill in gaps that the Commission itself has noted in its consideration.

I don't think we want a procedure which is going to require constant remands by the Commission to its own administrative law judges or by the courts to the Commission because the record of these proceedings is incomplete.

I think that also goes now for rulemaking proceedings because under the recent decisions of the Federal courts even in rulemaking proceedings there is a record, not the same kind of record, but there is a record, and that record has to be complete and justify the decision reached.

So I think there is a need to have an independent body representing the diffuse interests that are out there coming in and have its voice heard. Now, one example that occurs to me offhand, is a recent proceeding involving rate bureaus at the Commission in which the railroads commented that they support rate bureaus.

Rate bureaus are organizations under which the railroads prices fix with immunity under the antitrust laws. The railroads favored the continuation of rate bureaus and the shippers—the shipper interests commented also, that they also favored the continuation of rate bureaus. They favored it for their own reasons, their own reasons being they preferred the stability that could be obtained by three overall rate-fixing processes, to the insecurity that might come from a competitive market setting of rates.

Now, we thought it was important in that case that a organization such as ours should take a look and ask the question, "How about rail users; how about people who are paying the charges for using this system? Are rate bureaus in their interest because the railroads and the shippers happen to like that type of arrangement?"

We thought it was important that we ask that question and that we present a filing on it, so that I think the function is there.

I think the need for the functions plainly exists. It has to be performed in all these regulatory agencies one way or the other. The record before these agencies has to be complete or else there is going to be problems and there will be delays and expenses for all concerned.

The next question if I can pass that—

Mr. FLORIO. Mr. Heffron, we have a 5-minute rule on the questioning procedure. Therefore your answers—

Mr. HEFFRON. I didn't realize that.

Mr. LEE. I yield back my time.

Mr. HEFFRON. I would like to complete my answer though.

Ms. MIKULSKI. Could you be crisp though, sir?

Mr. HEFFRON. The next question is how do you perform the function? Do you do it through an in-house organization or do you do it through an independent outside group?

If you have a certain skepticism about the bureaucracy, I think you want an independent outside organization whose budget is not con-

trolled, whose personnel policies are not controlled by the very institution whose policies it will be questioning.

I think that is particularly important when you come to a period of deregulation, when what we are talking about is cutting back on the authorities of the Interstate Commerce Commission.

I think you want an outside group that is not a part of the very institution whose authority may be cut back to comment and to deal with those problems.

So I come to the conclusion that an independent group is the best way to do it, and that it is the way to cut through the bureaucratic layers that I am as much concerned about as you are. Rather than bury a group supposedly representing the public interest, bury it in the middle of the bureaucracy whose activities it should be questioning if it is truly independent.

Mr. FLORIO. Ms. Mikulski?

Ms. MIKULSKI. Thank you, Mr. Chairman. On page 3 of your testimony, Mr. Heffron, you talk about the need to employ specialists such as economists, et cetera.

No. 1, could you borrow those, or No. 2, rather than having full-time employees with varying degrees of specialties because with each case you are going to need special lists for different matters—do you find perhaps contracting out might be one more efficient use of resources?

No. 2, that would not be building the bureaucracy that my colleague Mr. Lee raised?

Mr. HEFFRON. What we have done—I think we need a minimum sort of core group of specialists on hand.

I think that—take a cost analyst for example. I think the work a cost analyst does, in looking at rail form A and the various types of data submitted by the railroads is something he can do in almost any type of proceeding.

These people are in short supply. The State rail offices would love for us to have people like that available and you just can't go out and contract at a drop of a hat.

Ms. MIKULSKI. Many State agencies are running budget surpluses.

My State has \$200 million left over for example. These State agencies would love for you to do their job for them.

I don't think you were created to do that. I am not so sure you were created to represent States. They are not like "Joe Six-Pack," your ordinary consumer.

Mr. HEFFRON. I know that. We are making a great effort to avoid duplicating anything that the States are doing themselves but the fact is that these cost analysts are in very short supply.

They are hard to come by. For us to go out and contract every time we need a cost analyst—in the first place we may not be able to meet certain time deadlines we have to meet, and the people we want may not be available.

Having said that, the fact is—

Ms. MIKULSKI. But you talk about the need for staff economists, cost analysts, a financial analyst, a transportation analyst, I am sure you will need a coordinator of the analysts.

Mr. HEFFRON. I am not planning on one.

Ms. MIKULSKI. I am not being pugnacious with you.

Mr. HEFFRON. I realize that danger is there and that is there no matter where you put this function in or outside of any other agency. I am aware of that item.

As a matter of fact, during our first year we proceeded by contracting out, and we have tried to avoid as much as possible contracting out to the commercial contracting organizations.

We have gone to the universities to the extent that people were available, and we have gotten quite a number of notable figures who have heard us in various matters and other matters we have had to go to Commerce organizations and some of them have been quite helpful.

The staffing that is referred to in the text here is really a very small group who in effect would be as needed, working with these outside groups in an effort to streamline the participation and cut costs.

I think ultimately it will cut costs to have a few of these people on board.

Ms. MIKULSKI. I think the message that we want to convey is that in doing your job we want you to have the resources you need but we would appreciate a consciousness of limited resources.

The other thing is that in your staff that you now have, how many people have you employed who are women and minorities, and in what capacity are they utilized—for example, the nine attorneys?

Mr. HEFFRON. The nine attorneys, we have two women.

Ms. MIKULSKI. And administrative assistant?

Mr. HEFFRON. Administrative assistant is a woman, paralegal is a woman.

Ms. MIKULSKI. What about blacks and other minorities.

Mr. HEFFRON. There are two blacks on the clerical staff, none in professional capacity. We will employ them when they come along.

Ms. MIKULSKI. What do you mean you will employ them when they come along?

Mr. HEFFRON. We will interview obviously with a view toward having a balanced office.

Ms. MIKULSKI. That is what I was interested in—if steps had been taken.

Mr. Chairman, if I have more time left, I would like to clarify the role of the agency a bit more precisely. Why would you be involved in the merger of the Chessie-Seaboard?

Mr. HEFFRON. A merger involves or may involve changes in service patterns. The question is what impact will those changes in service patterns have on the areas that have and are being served?

Will there be improvements in service or will there be some people hurt? Will there be economies of scale or will there be diseconomies of scale?

Will the organization be so big it may not be manageable and there will be problems? Will the cost savings that are claimed for the merger actually be realized?

Will the safety policies of one organization be imposed on the other, and, if so, what are those policies?

Ms. MIKULSKI. I understand. What do you anticipate your role to be in the forthcoming efforts on railroad deregulation?

Do you see yourself doing anything? The office is new, and I am trying to get a picture of this.

Mr. HEFFRON. As a minimum there are going to be proposals put forth, legislative proposals. There are going to be changes in regulations proposed.

I would see that as a minimum we will participate in those proposals and attempt to identify concerns of the small shippers and rail users, farmers, so on. The groups, the diffuse groups that are out there that are not going to be representative of a group, if a group such as ours does not try to identify what their concerns are and at least make sure those concerns are put forward up front in a persuasive sensible way for the decisionmakers to take into account.

Ms. MIKULSKI. Mr. Chairman, that answered my questions at this point.

Mr. MADIGAN. On the question of abandonments, there are State Departments of Transportation that have people with expertise on these questions of railroad abandonment.

You referred to farmers. Most Farm Bureau organizations have transportation expertise. There is a small shippers association. Most small manufacturers—certainly all large manufacturers—have someone in their employ who works on transportation problems dealing with tariffs, charges, things of that nature.

The duties that you have outlined for your office are the statutory duties of the Interstate Commerce Commission. They send—in most cases that I have been familiar with, hearing officers out to the areas where abandonments would occur to have hearings on the spot and to allow all these people to testify and to make a record for the Commission.

I don't see what other role is available to you.

Mr. HEFFRON. Mr. Madigan, let me say this first. I don't recall whether you were here when I indicated earlier, since we have no regulatory power, we do not duplicate the Interstate Commerce Commission.

When the Interstate Commerce Commission conducts an abandonment hearing that sends an administrative law judge, in fact a judge out to the locality who holds hearings, the question then is who are the parties in those proceedings and what do they submit?

Now, where we would come in, if we come in, is in that capacity. I might add, one of the basic criteria in the office is to ask the question, are we duplicating, will we duplicate the function of any other body in the particular proceeding?

If there is an active State rail office that is participating, we are not going to get in, and we have made that known to the State officials.

We have gone to their various meetings. We have sent them a lengthy memorandum telling them that that was our view, that we would not do that, that we would like to look instead for types of abandonment proceedings, for example, that may cut through a whole region where there are multiple State impacts.

Mr. MADIGAN. Excuse me, but if we then used the Amtrak restructuring as an example—you, I believe, retain 25 outside attorneys and then your report essentially just summarizes statements or opinions by various individuals that service by Amtrak is needed, was that a good expenditure of tax dollars to get that kind of information that most of us assumed was there to begin with?

Mr. HEFFRON. I think it was more than simply a repeat of a statement that, they want, they like passenger service or don't like it, because we did not limit our assistance to any particular spectrum of opinion.

I think the point was that these were experts who had been trained to talk to people so that the views they had could be put into terms that would be persuasive because they would be relevant and deal with the factors which ought to be considered in these matters, but it was not simply a repeat of what people would say.

Mr. MADIGAN. Where then is the evidence of your being persuasive in changing anything that the Department of Transportation did?

Mr. HEFFRON. We know this. That in the final report one of the northern route lines was retained. The report does mention that the social factors which were brought out at these hearings were very important in the decision to retain that particular route. I think there are other examples in the final report.

Now, I can't prove that any particular action, any particular representative of our office took specifically led to that statement in the final report, but I think it is fair to say that the overall effort which put forth, developed, and permitted these views to be put forth was one that was taken into account and in this case it had that result I think.

Mr. MADIGAN. Do you agree that the function of the Interstate Commerce Commission is to protect the public interest in matters relating to transportation decisions?

Mr. HEFFRON. Yes.

Mr. MADIGAN. Do you think they do that?

Mr. HEFFRON. I think they try to do that as they see best in the light of their functions and the procedures they have to follow.

Mr. MADIGAN. Do you think it is necessary to have you watch them to see that they do what they are supposed to do?

Mr. HEFFRON. I don't think we watch them. I think it is necessary that another public body participate in those proceedings out front and produce whatever evidence, whatever arguments are relevant to the matter before the Commission so that it does not have only the views of those interests that are well financed that follow these proceedings very carefully with specialist assistance.

Mr. MADIGAN. Thank you, Mr. Chairman.

Mr. FLORIO. Thank you, Mr. Heffron. In deference to the other witnesses I will submit some questions to you that I would appreciate your answering and sending back to us for inclusion in the record.

[The information requested was not available to the subcommittee at the time of printing.]

Mr. FLORIO. I would like to just comment, and perhaps ask one question. As you know—and I think the record is clear—I have been a supporter of the philosophy, or the rationale that you put forth. I also believe there is a need for an adversary relationship with the ICC to, on occasion, be called upon to judge as well as to prosecute the public interest.

Saying this does not diminish the significance, in my opinion, of attempting to have your office operate in an as cost effective way as is possible. I think what this means is that you have to develop a methodology under which you will isolate matters having social significance

in the transportation field above the specific items with which you are dealing.

There may be some interest in your becoming involved in that, but in light of the limited resources that you do have, it would seem to me you should have a responsibility to remain uninvolved in specific instances unless each has an application to other areas. Let me draw to this point the analogy of the Legal Services Corporation that the Congress put together a number of years ago.

At the outset, the people in that Corporation became involved in the divorce proceedings for the under privileged. The Corporation ultimately ascertained that they would be better to devote their energy into modifying some of the basic inequities in the divorce law and therefore had to, on occasion, reject individual applicants who came into their respective offices. I think that is an end you should be striving towards.

Frankly I am not as enthused about the performance of the Office in the preliminary Amtrak hearings. I don't think that is the most significant way you can allocate your resources.

As you know, Congress, in the last session, in rejecting the authorization, did not exactly give you a overwhelming vote of confidence. So it is in your interest, and the interest of the Office—which I believe is a needed Office—to be working very diligently to prove the importance of this particular Office to the 96th Congress.

I would be hopeful that you will be working as best you can on doing things as visibly as possible so as to impress upon the public, as well as the Congress, that you do serve a needed function.

I am looking forward to receiving from the ICC, if they would be inclined to provide it for us, their evaluation of your Office. The statute does require that they make their evaluation, and specifically calls for their comments on the shortcomings of the Office. I think it would be helpful to receive—so that we can suggest to you, even in greater specificity, what we think you should be doing.

I am appreciative of your attendance here and look forward to receiving from you the answers to the questions I will submit to you. Thank you very much.

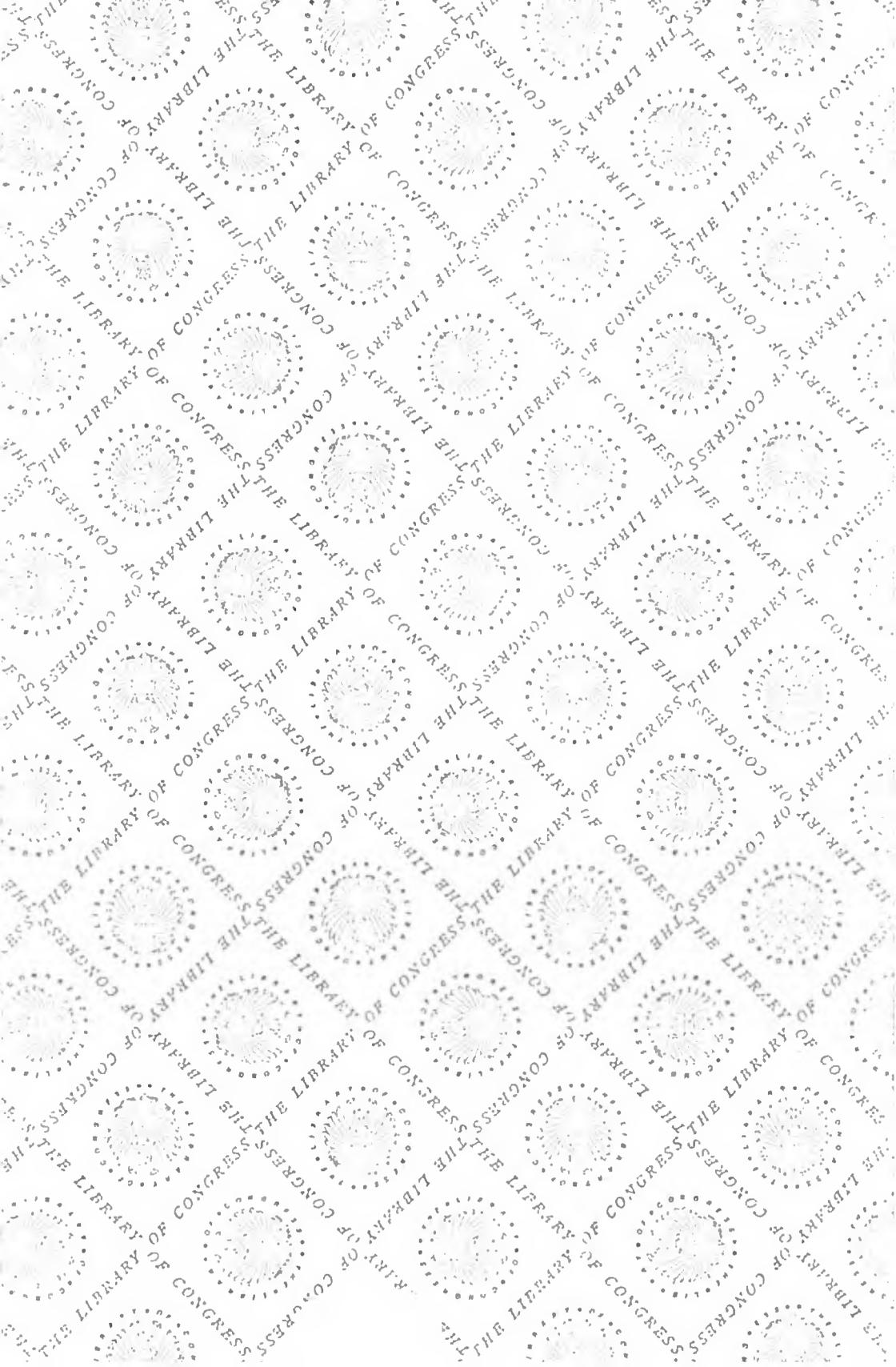
Mr. DEVINE. No questions.

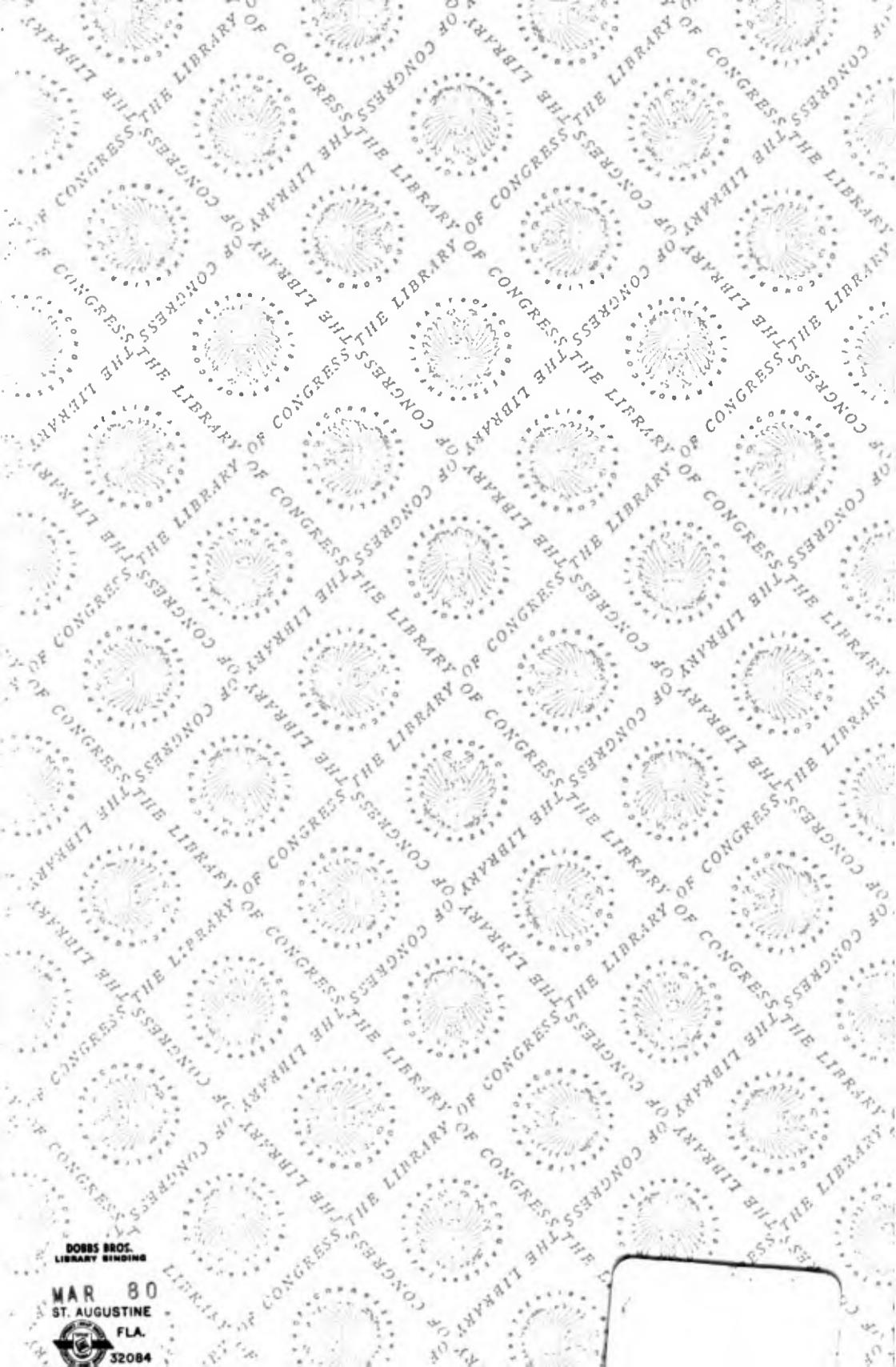
Mr. FLORIO. That concludes our hearing on H.R. 2420.

[Whereupon, as 10:45 a.m., the subcommittee adjourned.]



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