

THE VERMONT PUBLIC ADVOCATE

Prepared for the Vermont Legislative Council

Vermont Department of
Public Service

September 1987

Introduction

This report is prepared at the request of the Vermont Legislative Council to assist the Joint Legislative Committee on Public Power, Public Advocacy and Basic Residential Rates created by 1987 Vt. Laws No. 65 (better known as "S.130"). Among other tasks, S.130 charges the Joint Legislative Committee to "review and assess the role of the director of public advocacy." Section 8(c). This report considers in turn the organization of the public advocate's office; the mission and work it performs; the resources, strengths and weaknesses of the office; and finally explains how DPS handles a utility matter before the Public Service Board.

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I. ORGANIZATION OF THE PUBLIC ADVOCATE'S OFFICE

A. Current Organization

The office of the Director for Public Advocacy (popularly known as the Public Advocate) is a statutory position created as part of the general reorganization of the old Public Service Commission into the modern Public Service Board ("PSB") and Department of Public Service ("DPS"). 30 V.S.A. sec. 1(a).¹ The Director for Public Advocacy, on behalf of DPS, is required by statute to "represent the interests of the people of the state" in "cases requiring hearings" by PSB. 30 V.S.A. sec. 2(b). The Director for Public Advocacy may employ, with the approval of the Commissioner of Public Service, other experts and clerical staff. 30 V.S.A. sec. 1(c).

The legislature has not otherwise directed how the office of the Director for Public Advocacy (the "Director") is to be organized. In this absence, the office has developed within DPS as a matter of agency practice. There is no statutory requirement that the Director be a lawyer, but all four to have held the post have been trial lawyers. DPS has created a "Division of Public Advocacy" headed by the Director, who is responsible to the Commissioner. The Division includes staff lawyers known as Special Counsel. The Director and the Special Counsel are compensated as "exempt" employees. There are no experts (such as engineers, economists, or analysts) or clerical personnel assigned to the Division. Other DPS personnel provide this support to the Division as part of their duties.

B. Historical Organization

The 1980 reorganization of the old Commission created the Director for Public Advocacy as the primary representative of the public interest before the PSB. Before the 1980 reorganization, the attorney general or the respective state's attorney was charged to "represent the

See 1980 Vt. Laws No. 204. Although DPS and PSB are offspring of the same parent, they are separate and independent agencies. Each has distinct functions in the regulatory regime under Title 30 of Vermont Statutes Annotated. PSB is vested with quasi-judicial and rule-making powers; DPS is charged with advocacy, planning, and power procurement duties.

state" in several specific matters.² In other proceedings, the Public Service Commission generally hired lawyers in private practice to represent the public. In practice, the attorney general often retained a private lawyer to do the work. Lawyers on the staff of the Commission would sometimes appear before the Supreme Court to defend appeals from its orders. On occasion, the attorney general, outside counsel for the public, and Commission lawyers would all appear in the same matter.

Although the Public Advocate has been established as the primary representative of the public, some aspects of the pre-1980 organization still exist. The PSB has discretion in any hearing to "request the attorney general or a member of the Vermont bar to represent the public or the state." 30 V.S.A. sec. 2(b). Statutes enacted last session divest the Public Advocate of responsibility in specific matters. S.130 authorizes DPS, upon PSB approval, to resell electrical energy from any source directly to Vermont consumers at retail. The PSB must either "request the appearance of the attorney general" or "appoint a member of the Vermont bar to represent the interests of the public or the state" in such approval hearings. 30 V.S.A. sec. 212e(a). S.114 authorizes DPS to enter into contract, subject to PSB approval, for the terms of basic telecommunications services. The attorney general must appoint or retain one or more "public contract advocates" to "represent the public interest" in such contracts at PSB approval hearings. 3 V.S.A. sec. 165.

C. Organization In Other States

Almost every state provides for some government advocate to represent the interest of the public before utility regulatory agencies. The states' organizations, funding, duties, and staffing vary so much that generalization is not very useful. The staff of the Colorado Public Utilities Commission is conducting a survey of state public advocates which should soon be available.

To provide some immediate comparison, DPS conducted an informal telephone survey of the other New England states, New York, and New Jersey. Specific practices vary widely, but typically these states have two agencies which may contest the utility position in regulatory proceedings. The technical staff of the regulatory body itself prepares positions, which are presented by staff lawyers (Maine and Connecticut) or by specially assigned assistant attorneys

² See 30 V.S.A. former secs. 102, 217, & 231 (repealed eff. Feb. 1, 1981).

general (New Jersey and New Hampshire). In these four states, a separate office analogous to that of the Public Advocate may present the interests of consumers or the public. New York and Rhode Island present opposite extremes. In New York, three staffs with scores of lawyers and experts may represent the interests of the public before the Public Utilities Commission. All three sometimes appear, in addition to the Commission's own staff. In Rhode Island, assistant attorneys general work with commission staff to present a single case.³

The practices of the other northeastern states are thus quite unlike Vermont's. Only DPS is available to routinely challenge the position of a utility; PSB staff does not present a case of its own. Unlike most other public interest representatives, however, DPS has a staff of in-house experts to advise the lawyers and appear as witnesses.

II. MISSION AND WORK OF THE PUBLIC ADVOCATE

The main responsibility and work of the Public Advocate is to represent the public interest in proceedings before the PSB. The Public Advocate's lawyers appear in other forums as well, and also provide legal advice to DPS on many matters which are not litigated. The office currently has over 150 active matters.

A. Representation of the Public Interest Before PSB

The primary mission of the Director for Public Advocacy is to represent the public interest in administrative litigation before the PSB. This mission follows from the mandate set forth in 30 V.S.A. sec. 2(b): "In cases requiring hearings by the board, the department, through the director for public advocacy shall represent the interests of the people of the state, unless otherwise specified by law."⁴ The Public Advocate's work before PSB therefore parallels the

³ See Conn. Gen. Stat. sec. 16-2A; Me. Rev. Stat. Ann. tit. 35A, sec. 1701; N.H. Rev. Stat. Ann. sec. 363:28; N.J. Rev. Stat. Ann. sec. 52:27E-1; N.Y. Pub. Serv. Law sec. ---; R.I. Gen. Laws 39-1-39.

⁴ In S.130 and S.114, both enacted in 1987, the Legislature has directed that others represent the "interests of the public or the state" and the "public interest", respectively. 30 V.S.A. sec. 212e(a); 3 V.S.A. sec. 165.

scope of PSB jurisdiction over public service companies and the conduct of their business.

The public advocate appears in cases involving utilities which provide electricity, telephone and telegraph services, gas, cable television, and water (if the company is privately owned). In the past fifteen years, the major PSB dockets have been rate cases to determine how much rates should be increased because of increased capital investment and operating expenses. The era of major rate cases may have ended with the Seabrook docket this spring. They probably will be replaced by cases of equal magnitude involving the rapidly evolving structure of the utility industry, such as deregulation, mergers, expanded competition, access to transmission facilities, development of so-called "small power" facilities, and importation of Canadian energy.

Much of the ordinary work of the Public Advocate will continue unchanged. Many dockets concern the award of licenses, known as "certificates of public good," for a company to begin operations or construct new facilities (known as a "section 248" proceeding). The Public Advocate is specifically required to appear in PSB proceedings on the formation of public service corporations, commencement of a public service business, and the issuance of stock or the incurring of substantial indebtedness by a public service corporation. 30 V.S.A. §§ 102, 217, 231. There will always be dockets to enforce the public service laws and orders of the PSB, and to resolve significant consumer disputes.

B. The Nature of the "Public Interest"

The mission of the Public Advocate is to represent the "public interest", broadly understood to be the long-term interest of all Vermonters in the economical, reliable, and environmentally sound provision of utility services. Specific statutory charges require the Public Advocate to represent the "public" or the "interests of the people of the state." In the absence of statutory definitions, the public advocacy division has interpreted both statutory charges to express the same concept of the "public interest."

5 PSB jurisdiction over cable television was greatly reduced by the Cable Communications Policy Act of 1984. 47 U.S.C. sec. 521 et seq. PSB retains "general regulatory authority over cable companies to the extent that federal law still permits." Petition of Small Cities Cable Television, No.4985, slip op. at 3 (Vt.P.S.B. Aug. 27, 1987).

The Public Advocate's primary concern, of course, is to secure the lowest possible rates for ratepayers. The "public interest", however, encompasses not only the interests of ratepayers but of others affected by utility operations, including other consumers, business and industry, and the state as a whole. The public interest may not always be in the lowest possible rates, but in rates which ensure the safe and reliable provision of adequate service.

C. Litigation in Other Forums

In addition to the primary work before the PSB, the Public Advocate also represents the public interest in a wide variety of cases before the Vermont Supreme Court, federal regulatory agencies and appellate courts, and sometimes in Vermont superior court. Although these cases are numerically only a small fraction of the division's total case load, they are generally quite important. They therefore require much more of the Public Advocate's resources than might be thought from their small number.

The Vermont Supreme Court hears appeals from orders by the PSB and the superior courts. The Public Advocate usually is involved in at least a half-dozen cases pending before the Supreme Court at any one time. There are two pending appeals of special importance: Vermont Department of Public Service v. Massachusetts Municipal Wholesale Electric Co., involving the contractual obligation of six Vermont utilities for over \$200 million to finance construction of the Seabrook nuclear power plant; and In re Central Vermont Public Service Co., in which the PSB denied most of the rate increase sought by Central Vermont to recover \$46.3 million it lost on its investment in Seabrook.

The public advocacy division has represented the public interest of Vermont in matters before the Federal Communications Commission ("FCC"); the Federal Energy Regulatory Commission ("FERC"); and the Nuclear Regulatory Commission ("NRC"). These administrative agencies have exclusive authority over crucial utility matters: interstate telephone; interstate transmission of gas and electricity, and hydroelectric development; and nuclear plant safety and licensing, respectively. Of special recent interest are FERC cases involving Vermont's entitlement to low-cost power from the New York Power Authority and licensing of the Champlain Gas Pipeline, and NRC cases on the expansion of the Vermont Yankee spent fuel pool and plant decommissioning. Appeals from the decisions of these agencies have required the public advocacy division to appear in federal circuit courts in Boston, New York, and Washington, D.C.

The Public Advocate has also brought suit in Vermont Superior Court to enjoin unlawful utility actions. Two recent prominent examples are the MMWEC suit to void consumer-owned utilities' contracts for Seabrook investments which were not approved by ratepayers, and to restrain bonus payments by a subsidiary to the former manager of Vermont Electric Cooperative.

D. Other Legal Work

Much work of the Public Advocate, like that of most lawyers, involves legal planning, advising, and drafting, as well as litigation. Indeed, a substantial part of lawyers' time is devoted to matters which are not in formal litigation before the PSB or elsewhere.

Much of this work is performed in anticipation of foreseeable litigation so that staff lawyers are prepared to react quickly when a case begins. The leading example at the moment is study of the likely issues in a utility bankruptcy. Litigation can also be avoided by timely negotiation. With the assistance of DPS technical personnel, special counsel frequently review proposed construction and tariff filings, and meet with utility counsel to discuss possible settlement of disputed issues.

The Public Advocate also works with DPS personnel to initiate change in the public interest. A recent example is ongoing scrutiny of utility revenue requirements to determine if rates can be reduced or stabilized due to the lower corporate tax rate under the Tax Reform Act of 1986 and the reduced cost of capital. Green Mountain Power Corporation, the state's second largest electric utility, implemented a negotiated rate reduction this spring as a result of this effort. Special counsel and DPS technical personnel are also working with utilities on plans to ensure service to several large ski resort areas (including Stowe, Sherburne, and Waitsfield) while minimizing the burden to others on the power system.

The Public Advocate provides in-house legal assistance to DPS. As does any state agency, DPS requires almost daily legal advice both major and minor. Lawyers respond to public record requests, interpret statutes, review and draft bills during the legislative session, and follow federal regulatory developments. Major recent projects include negotiation and drafting of a telecommunications contract authorized by S.114; development of a revised administrative rule for the award of contracts to small power producers; and an initiative to obtain a copy of the "Reed Report" on possible problems with nuclear containment structures manufactured by General Electric.

E. Current Case Load

1. Public Service Board: 130+ dockets

Electric.....	56
Small Power.....	31
Water.....	11
Cable Television.....	8
Telephone.....	8
Gas.....	4

2. Vermont Supreme Court: 11 cases

3. Federal

FERC.....	3
NRC.....	3
Appeals.....	1

III. RESOURCES AND PROBLEMS

The Public Advocacy Division is an integral part of DPS. With the exception of certain designated personnel, all of the resources of the Public Advocate -- personnel, funding, and physical plant -- are resources of DPS.

A. Personnel

In addition to the Director, there are five Special Counsel positions within the Public Advocacy Division: four lawyers, and one financial analyst. All are "exempt" employees who hold advanced degrees. One lawyer position is open and will be filled shortly. The financial analyst position recently became vacant when Suzanne Rude was named as a Member of the Public Service Board.

Staff, clerical, and other professional personnel (engineers, analysts, and economists) are not assigned to the Public Advocacy Division, but their services are made available as necessary to assist the Public Advocate. It is estimated that two stenographers work full time, and an administrative secretary and an account clerk devote half their time, to work for the Public Advocacy Division. The other professional personnel, as a group, are estimated to devote one-third of their time to work for the Public Advocate.

B. Funding

The Public Advocacy Division is funded as part of DPS from the gross revenues tax levied under 30 V.S.A. sec. 22. This tax funds both DPS and PSB. Some costs for additional personnel may be assessed to the utilities involved in certain cases. 30 V.S.A. sec. 21. Salary and benefits for the Director, five Special Counsel, and clerical and staff personnel, approximated \$287,000 on an annualized basis in 1987.

C. Physical Plant

The Public Advocacy Division occupies offices interspersed within DPS on the third floor of the State Office Building at 120 State Street in Montpelier. The Division enjoys a standard complement of state-issue office equipment. Facilities for filing, word processing, computing, photocopying, and the like, are shared with all DPS personnel. Legal reference materials consist of a basic Vermont collection, the Commerce Clearing House Utilities Law Reporter, and a handful of treatises. Public Utilities Reports since 1953 (without current digest) and U.S. Law Week are shared with PSB. Most legal research must be conducted at the State Library.

D. Strengths and Weaknesses

The main strength of the Public Advocacy Division lies in the generally excellent professional personnel, both legal and technical, within DPS. The Public Advocate has historically been able to hire energetic young lawyers with superior credentials. They are attracted by the variety and significance of the work, salaries somewhat better than usual in Vermont, and not unimportantly, a desire to work "in the public interest" and the good esprit de corps at DPS. The talent and enthusiasm of the Special Counsel go far to make up for advantages of the large private law firms which typically represent the utilities.

The Division enjoys the daily consultation of the technical personnel at DPS to support its work. The expert knowledge of the engineers, economists, and analysts is essential to assist the lawyers in understanding and developing cases in the several complex and arcane industries subject to regulation. These personnel possess a broader view of the public interest in a case than may be evident on its facts alone, and are a pool of expert witnesses to testify before PSB.

Paradoxically, the main weakness of the Public Advocate lies in turnover of lawyers. The present Director is the fourth to hold the post since its creation only six years ago. The lawyer of longest tenure has been with the office about two and a half years. The continual replacement of personnel carries a heavy transaction cost: new lawyers must be trained in regulated utility law and become familiar with unfinished cases. Less experienced counsel are at a disadvantage to the old hands who appear on behalf of the utilities. The division lacks a long "institutional memory" of precedents, tactics, and personalities which gives strength to a law firm.

The turnover problem is in large part attributable to the very quality of the lawyers attracted to be Special Counsel, who are able to find higher paying jobs with private law firms. It is doubtful that many have started work at DPS planning to leave when they become experienced. But their energy and credentials, when enriched by intensive experience with the Public Advocate, make them attractive to private employers.

The decision to leave DPS in most cases seems impelled not just by money, but by "burn out." The special counsel carry heavy case loads, often at a disadvantage in resources to opposing private counsel. There is not enough time to prepare every case to a high standard of excellence. The relentless pressure predictably becomes wearisome and frustrating.

IV. HOW THE DEPARTMENT HANDLES UTILITY CASES

The lawyers of the Public Advocacy Division serve as DPS team leader during the review of utility proposals. When a utility proposal is filed at PSB, statutes require an immediate evaluation by the DPS. DPS may have up to several weeks to make a recommendation. The department may support the filing or recommend the filing be suspended and investigated.

DPS' initial evaluation is coordinated by the Public Advocate. The proposal is divided among department experts, who make preliminary judgements on technical, economic, legal, environmental, planning and consumer issues. The Public Advocacy staff then summarizes the department's concerns in a "tariff letter" to the Public Service Board.

Suspension of a utility proposal by the PSB begins a lengthy review process. Each division of DPS -- planning, engineering, economics, advocacy and consumer affairs -- performs a detailed review of the proposal and directs its comments to the responsible Special Counsel. The staff experts, and occasionally specially hired consultants, will

advise and educate the Advocate's Special Counsel on issues involved in the case.

As a team leader, the Advocacy Division serves as a clearinghouse for staff efforts in preparation of pre-filed testimony and the "discovery" process where one party in a PSB case seeks written information from another. Special Counsel attend all hearings conducted by the PSB in the case, present position developed by DPS, call witnesses to support the case (DPS staff frequently serve as expert witnesses) and cross-examine witnesses presented by another party. Finally, Special Counsel prepare legal briefs before the PSB closes the record and begins to prepare an order.

Not all cases handled by the department follow this format. On occasion, the department participates in legal actions before state and federal courts as well as federal regulatory bodies. Again, the advocacy staff serves as the team leader in presenting a comprehensive view of the department's concerns.

More utilities frequently present their proposals to department staff before filing formally with the Public Service Board. This frequently results in an improved filing and can help avoid costly litigation of a case.

DEPARTMENT OF PUBLIC SERVICE
ORGANIZATIONAL CHART

