

# PERILOUS PROXIES: ISSUES OF SCALE FOR CONSUMER REPRESENTATION IN AGENCY PROCEEDINGS

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*One oft-ignored but frequently employed method for improving agency accountability is the use of “proxy advocates,” government agencies or lawyers charged with giving voice to underrepresented interests in agency proceedings. Though the bulk of these proxy advocates are used in state agencies to aid ratepayers in regulatory proceedings, several were created to police federal agency action in the 1970s. Those federal proxy advocates were short-lived, but the idea has persisted in national politics, both in legislative and non-governmental calls for administrative reform. These advocates remain in use by the states.*

*This Note asks what conditions contribute to a proxy advocate’s effective consumer advocacy by examining the historical and institutional context of proxy advocates at the state and federal level. It concludes that proxy advocates can most successfully represent consumer interests at the state level when they are independent from political influence and at the federal level when they can be held accountable to consumers rather than the general polity. Finally, this Note addresses ways in which these findings can be used to improve proxy advocates’ representation of consumer interests at the federal level.*

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INTRODUCTION

The financial turmoil of 2008 led Congress to create the Consumer Financial Protection Bureau (CFPB), an agency many hoped would improve the regulation of financial markets.<sup>1</sup> The CFPB was supposed to represent the interests of consumers to administrative agencies thought to be overly solicitous of the financial institutions they were intended to rein in.<sup>2</sup> Advocates of reform were dismayed, however, to find that the presumptive leader of the Bureau—noted consumer advocate and scholar Elizabeth Warren—would not be confirmed by a fractured legislature. The coverage of Warren’s non-appointment focused on the procedural features in the Senate that have widely prevented vacancies from being filled, such as the filibuster and anonymous holds.<sup>3</sup> Other commentators pointed to financial institutions’ opposition to Warren.<sup>4</sup> Not only does this latter explanation intuitively make sense, there is historical precedent

1. See Ben Protes, *New Consumer Bureau Reaches Out to Wall Street*, N.Y. TIMES DEALBOOK BLOG (Nov. 26, 2010, 7:00 AM), <http://dealbook.nytimes.com/2010/11/26/new-consumer-bureau-reaches-out-to-wall-street>.

2. “Finally, regulators were not truly independent of the influence of the financial institutions they regulated.” *Community and Consumer Advocates’ Perspectives on the Obama Administration’s Financial Regulatory Reform Proposals: Hearing Before the H. Comm. on Fin. Serv.*, 110th Cong. 2 (2009) (testimony of Edmund Mierzwinski, Consumer Program Director, U.S. Public Interest Research Group), available at [http://www.house.gov/apps/list/hearing/financialsvcs\\_dem/mierzwinski\\_7.16.09.pdf](http://www.house.gov/apps/list/hearing/financialsvcs_dem/mierzwinski_7.16.09.pdf). This was, of course, not the only reason for the creation of the CFPB. See *Creating the Consumer Protection Bureau*, CONSUMER FINANCIAL PROTECTION BUREAU, <http://www.consumerfinance.gov/the-bureau/creatingthebureau/> (last visited Sept. 19, 2011).

3. Testimony of Edmund Mierzwinski, *supra* note 2.

4. See, e.g., Simon Johnson, *Who’s Afraid of Elizabeth Warren?*, N.Y. TIMES ECONOMIX BLOG (Mar. 17, 2011, 5:00 AM), <http://economix.blogs.nytimes.com/2011/03/17/whos-afraid-of-elizabeth-warren>. At the time of publication, Warren had withdrawn from consideration and Richard Cordray had been nominated to the office and subsequently installed as a recess appointment. Nikki Sutton, *President Obama Nominates Richard Cordray to Lead Consumer Financial Protection Bureau*, THE WHITE HOUSE BLOG (July 18, 2011, 3:55 PM), <http://www.whitehouse.gov/blog/2011/07/18/president-obama-nominates-richard-cordray-lead-consumer-financial-protection-bureau>; Dan Pfeiffer, *America’s Consumer Watchdog*, THE WHITE

for such practice. Congressional failure to protect consumers is not merely a product of recent Senate practice but a recurring problem whenever the federal government tries to protect consumers in the administrative state.<sup>5</sup> In fact, this is not even the first time that a watchdog agency has found itself without a leader due to industry opposition. The CFPB is not itself a new idea; there is a long history of such “proxy advocates” in American government.

The idea of a proxy advocate is simple: The government creates one agency to influence the decisions of another agency. If the government thinks Alex may not be making proper decisions because he lacks adequate information (or is beholden to private interests), it can assign a proxy advocate, Peter, to keep an eye on Alex. Peter will ensure that Alex has all the relevant information and can monitor Alex to make sure that he gives that information the attention it deserves.

Proxy advocates provide such oversight to agencies. The agency might ignore consumer interests, whether because the consumers cannot communicate their interests to the agency or because the agency staff favors the interests of the regulated industry. The proxy advocate acts on behalf of the consumers, representing them before the agency.<sup>6</sup> For example, when an agency conducts ratemaking proceedings, consumers may not be able to participate in order to represent their interests, but the proxy advocate can appear in their stead to ensure that the consumers’ point of view is heard and is supported by evidence entered into the record. All proxy advocates are entitled to file into the record of the agency before which they are tasked with representing consumers.<sup>7</sup> That is to say, a proxy advocate created to represent residential consumers before a Public Utility Commission (PUC) would have the power to file into the commission’s record. Generally, proxy advocates are created to represent a constituency that is diffuse or otherwise incapable of adequate unaided representation. Although proxy advocates can take many forms, they are always created by the

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HOUSE BLOG (Jan. 4, 2012, 10:45 AM), <http://www.whitehouse.gov/blog/2012/01/04/americas-consumer-watchdog>.

5. This history is discussed *infra* Part II.D.

6. While these offices go by a variety of names, this Note refers to all of them as “proxy advocates.” Some such offices are led by individual officials and others directed by multi-member commissions, which this Note will refer to as bureaucratic entities (“it”) rather than appointees (“she”). *See also infra* Parts II.C and II.D.

7. Given the difficulty of concisely and consistently citing to each state’s proxy advocate practices, all citations are given in the Appendix.

government<sup>8</sup> and instructed to advocate for a constituency. Proxy advocates that represent consumers of regulated utilities appear on behalf of electric, gas, telecom, rail, or airline consumers to ensure that their collective interests are represented before the relevant regulatory agency. To accomplish this, the proxy advocate is empowered to appear before another governmental agency to represent the constituency's interests.<sup>9</sup> The proxy advocate does not actually make policy decisions but rather makes recommendations or presents information to another agency that makes a decision.<sup>10</sup>

Although there are many entities in government that protect public interests, proxy advocates are distinct from each of them. First, the proxy advocate picks sides in a contested policy area, rather than giving due consideration to all sides of a dispute, which separates proxy advocates from inspectors general, who usually do not advocate for policy but rather monitor fraud or malfeasance. Advocating for a particular interest group also distinguishes the proxy advocate from the agency before which it appears, since that agency will regulate in the general interest. Additionally, in contrast to prosecutors, the proxy advocate does not enforce laws.<sup>11</sup>

Though facially similar to ombudsmen, proxy advocates play a very different role.<sup>12</sup> Ombudsmen are intended to facilitate interac-

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8. There are, in some cases, nongovernmental organizations that represent the consumer interest. While they may function similarly to proxy advocates, the fact that they are privately operated makes them qualitatively different. See WILLIAM T. GORMLEY, JR., *THE POLITICS OF PUBLIC UTILITY REGULATION* 49 (1983).

9. *Id.* at 49 ("The idea seems to be that you set a bureaucrat to catch a bureaucrat.").

10. *Id.*

11. Admittedly, enforcement has policy implications. However, an enforcement action occurs within the sphere of pre-established policy. Proxy advocates, by contrast, act to change that policy.

12. One may be forgiven for mistaking a proxy advocate for an ombudsman: members of Congress have made the same mistake. See *Authorization and Oversight Hearing on the United States Railway Association and the Office of Rail Public Counsel: Hearing Before the Subcomm. for Surface Transp. of the S. Comm. on Commerce, Sci., and Transp.*, 95th Cong. 1 (1977) (statement of Sen. Russell B. Long, Chairman, Surface Transp. Subcomm.) ("An independent and effective public counsel can be an excellent ombudsman for the various rail users . . ."). The Office of Rail Public Counsel addressed the question of its role as an ombudsman directly:

Because of anticipated budgetary constraints I do not visualize the Office functioning as an ombudsman in the sense of processing large numbers of individual claims or disputes involving rail services. However, there are likely to be some instances where individual complaints bring to light broader problems which affect the public at large and with which the Office should deal.

tions between the public and the bureaucracy.<sup>13</sup> The ombudsman is not supposed to influence the bureaucrat's policy choices, as the proxy advocate should.<sup>14</sup> The proxy advocate's power to challenge an administrative decision in the regulatory proceeding itself, or on appeal, further distinguishes the roles. Moreover, proxy advocates generally represent a defined class or group of consumers, rather than individuals.<sup>15</sup>

While the function of proxy advocates is generally accepted, it is less clear where they should be located within government in order to be effective. The recent debates over the Consumer Financial Protection Bureau brought the controversy over the bureaucratic location of such proxy advocates to the forefront of contemporary public discussion. Agency independence was central

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*Nominations—October-December: Hearings Before the S. Comm. on Commerce, Sci., and Transp.*, 95th Cong. 104–05 (1977) (statement of Howard A. Heffron, nominee for the position of Director of the Office of Rail Public Counsel).

13. See Paul R. Verkuil, *The Ombudsman and the Limits of the Adversary System*, 75 COLUM. L. REV. 845 (1975). The three defining elements of an ombudsman are (1) its nonpartisan and independent role as a supervisor of the executive branch, (2) its role handling specific complaints against the administration, and (3) its power to investigate, criticize, publicize, but not overturn, administrative action. *Id.* at 847.

14. GORMLEY, *supra* note 8, at 50, 214.

15. Although Colorado is the only state that explicitly prohibits involvement of the proxy advocate in consumer complaints, COLO. REV. STAT. § 40-6.5-106(d)(2) (LexisNexis 2011) (“[T]he consumer counsel shall not be a party to any individual complaint between a utility and an individual.”), most proxy advocates aim to protect a class of consumers rather than individual consumers. See *infra* Part II.C. Some proxy advocates represent individual consumers more directly. This may ask them to serve as a clearinghouse for complaints. GA. CODE ANN. § 46-10-4(b) (2004) (“[A]pppear in the same representative capacity in similar administrative proceedings affecting the consumers of this state . . . .”); KAN. STAT. ANN. § 66-1223(d) (2002) (“[R]epresent residential and commercial ratepayers who file formal utility complaints with the state corporation commission.”); OHIO REV. CODE ANN. § 4911.02(B)(2)(b) (West 2010) (“[T]ake appropriate action with respect to residential consumer complaints concerning quality of service, service charges, and the operation of the public utilities commission.”); PA. CONS. STAT. ANN. § 309-4(c) (West 1990) (“[A]uthorized to represent an interest of consumers which is presented to him for his consideration upon petition in writing by a substantial number of persons . . . .”); TEX. UTIL. CODE ANN. § 13.003(a)(7) (West 1997) (“[M]ay represent an individual residential or small commercial consumer with respect to the consumer’s disputed complaint concerning utility services that is unresolved before the commission . . . .”); WIS. STAT. ANN. § 196.26(1m) (West 2010) (“[M]ay investigate [filed] complaint . . . as it considers necessary.”). See also Richard L. Goodman, *The Role of Consumer Advocacy Before the Public Utilities Commission of Ohio*, 8 CAP. U. L. REV. 213, 231–32 (1978) (noting that the outcome of a consumer counsel’s backbilling case involving seven consumers would be generally applicable).

to these debates.<sup>16</sup> A topic familiar to administrative law scholars, agency independence recently grabbed the attention of the public, becoming the subject of heated newspaper editorials.<sup>17</sup> The central issue was where to locate an agency charged with protecting consumer interests in the administrative state in order to most effectively protect consumers.<sup>18</sup> Many consumer advocates assumed greater independence to be an unmitigated good, presuming that placing a consumer advocate under the influence of the bank-friendly Federal Reserve would hinder its mission. However, the evidence does not support this conclusion. In fact, independence appears to make federal proxy advocates less successful as representatives of consumer interests.

Proxy advocates can be a powerful tool for consumer protection, but their success is determined by their design.<sup>19</sup> This Note argues that the institutional design of proxy advocates determines how effectively consumers are represented. Proxy advocates must be independent enough to escape the pressure of regulated industry but not so aloof as to disconnect them from the consumers they represent. Specifically, independence hinders the performance of federal proxy advocates, although it makes state proxy advocates more effective. Federal proxy advocates must rely on institutional features that keep bureaucrats connected to their constituency.

Part I examines proxy advocates in the context of their historic development. Part I.A discusses the evolution of state proxy advocates in public utility regulation. Part I.B recounts the history of the three most salient federal proxy advocates. Part II focuses on how proxy advocates are designed. It begins, in Part II.A, with an ac-

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16. See *supra* notes 3–4 and accompanying text.

17. See, e.g., Editorial, *Pick Your Side*, N.Y. TIMES, Mar. 13, 2010, at A18, available at <http://www.nytimes.com/2010/03/13/opinion/13sat1.html>; Editorial, *A Fair Shake for Local Thrifts*, THE PLAIN DEALER, May 6, 2010, at A9, available at 2010 WLNR 9469281; Victoria McGrane, *Groups Push Independent CFPA*, POLITICO (Mar. 3, 2010, 5:23 AM), <http://www.politico.com/news/stories/0310/33786.html>.

18. Editorial, *Battle Over Reform*, N.Y. TIMES, June 13, 2010, at WK9, available at <http://www.nytimes.com/2010/06/13/opinion/13sun2.html> (“Banks and other lenders are also fighting to ensure that a new consumer financial protection regulator is neither powerful nor independent. There must be no exceptions for auto dealers and payday lenders, no pre-emptive or veto power for federal officials over the consumer regulator’s decisions.”).

19. See generally Mathew D. McCubbins, Roger G. Noll & Barry R. Weingast, *Structure and Process, Politics and Policy: Administrative Arrangements and the Political Control of Agencies*, 75 VA. L. REV. 431 (1989) [hereinafter *Structure and Process*]; Mathew D. McCubbins, Roger G. Noll & Barry R. Weingast, *Administrative Procedures as Instruments of Political Control*, 3 J. L. ECON. & ORG. 243 (1987) [hereinafter *Administrative Procedures*].

count of the context in which proxy advocates operate. Part II.B explains why proxy advocates are necessary and theorizes how they may alter the landscape of agency decisionmaking. Parts II.C and II.D discuss the structure of state and federal proxy advocates in light of the earlier discussions. With this understanding in mind, Part III looks at how well proxy advocates have performed to ask whether effective consumer representation through proxy advocates at the federal level is possible. Since all proxy advocates may intervene in rate setting proceedings, and many do so, Part III.A looks at the success of state and federal proxy advocates in this practice and concludes that federal proxy advocates are even less successful than state proxy advocates. Part III.B asks whether independence improves proxy advocate performance at the federal level, as it appears to on the state level, concluding that other factors better explain improved federal proxy advocate performance. Part IV makes some preliminary proposals for how proxy advocates can more effectively represent consumer interests. It suggests that courts should pay greater attention to conflicts between proxy advocates and agencies and that the federal government can play an effective role in assisting state proxy advocates.

## I.

### PROXY ADVOCATES IN HISTORICAL CONTEXT

Proxy advocates have a long history in American government. This history is helpful in understanding how proxy advocates function, as well as understanding their place in administrative law. Since proxy advocates developed differently in federal and state governments, and because the goal of this paper is to compare proxy advocates across these levels of government, their histories are presented separately.<sup>20</sup> This section will provide the historical background necessary to understand why proxy advocates have taken on the institutional features described in Part II.

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20. State proxy advocates have received considerably more academic attention than federal proxy advocates. There are several reasons for this, including the interest in comparisons of utility regulation across states and the relatively low profile of federal proxy advocates in administrative law generally, and even within interest group representation more specifically. As a result, the discussions of federal proxy advocates are drawn more from primary documents than the discussion of state proxy advocates, which is drawn from the comparatively voluminous secondary literature.

### A. *State Proxy Advocates*

Proxy advocates emerged in connection with public utility regulation, which began with railroads and has spread to analogous fields.<sup>21</sup> Proxy advocates in state utility regulation, for example, appear before the public utility commission (PUC), which is charged with regulating rates.<sup>22</sup> Like railroads, electric utilities provide essential services for which operators can extract exploitative rents from consumers.<sup>23</sup> Moreover, natural monopolies in railroad and electric utility markets meant no competition between service providers to keep prices low.<sup>24</sup> These early proxy advocates were created

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21. See GREG PALAST ET AL., *DEMOCRACY AND REGULATION* 107–08 (2003) (explaining that utility regulation began with state railroad oversight and, later, electricity).

22. See GORMLEY, *supra* note 8, at 49–50 (noting proxy advocates that appear before Public Utility Commissions). The PUC, which may also be called the Public Service Commission (PSC), may take almost as many different forms as a proxy advocate. It may regulate electricity, railroads, water, and telecommunications operators. The commissioners may be appointed by the governor with senate confirmation, or they may be elected to a term of years. Indeed, most academic literature regarding democratic utility regulation has focused on the commission and the impact of electing, rather than appointing, commissioners. See Guy L. F. Holburn & Pablo T. Spiller, *Interest Group Representation in Administrative Institutions: The Impact of Consumer Advocates and Elected Commissioners on Regulatory Policy in the United States* 2–3 (Univ. of Cal. Energy Inst. Working Paper Series, Paper No. EPE-002, 2002), available at <http://www.ucei.berkeley.edu/pwrpubs/epe002.html> [hereinafter Holburn & Spiller] (noting that elected commissioners tilt rate structures to the advantage of residential consumers); see also Timothy Besley & Stephen Coate, *Elected Versus Appointed Regulators: Theory and Evidence 2* (Nat'l Bureau of Econ. Research, Working Paper No. 7579, 2000), available at <http://www.nber.org/papers/w7579> (observing that regulatory issues are bundled with other policy preferences held by appointing politicians, but are discrete in elections for regulatory commissioners). But see Kenneth W. Costello, *Electing Regulators: The Case of Public Utility Commissioners*, 2 *YALE J. ON REG.* 83, 84 (1984) (suggesting that evidence indicates that elected PUCs will not lead to lower prices).

23. Richard A. Posner, *Natural Monopoly and Its Regulation*, 21 *STAN. L. REV.* 548, 550–53 (1968) (outlining—and critiquing—the traditional arguments in favor of regulating natural monopolies).

24. After a firm makes capital investment in reliance on existing rail shipping or electricity generation options, the market is an inadequate check on the rail or electric company. Since the start up costs required to enter the rail or electricity market are incredibly high—and much higher than the marginal costs to the monopoly holder of adding capacity for additional users in the region served by the monopoly holder—it is difficult for a competitor to become established. Due to the low marginal cost for existing rail and electricity providers to expand service to accommodate increased capacity, railroads and electric utilities both came to be seen as natural monopolies, where it made economic sense for only one firm to serve a geographic constituency.

by the states to curb the perceived abuses of state public utility commissions.<sup>25</sup>

The public utility commissions were themselves created to reign in utilities. With competition unable to protect utility consumers, state governments turned to regulation to guard against abuses by both railroads and electric utilities. The first utility regulator, the Massachusetts Board of Railroad Commissioners, was created in 1869 and used its investigative powers to encourage transparency.<sup>26</sup> As the concern of states shifted to electric utilities rather than railroads,<sup>27</sup> rate regulation by utility commissions was advocated by investor-owned utilities as a way to quell Populist anger and accompanying demands to municipalize power generation.<sup>28</sup> Wisconsin was the first state to set rates by administrative process in 1907, followed by almost all states in the union by 1921.<sup>29</sup>

Public utility commissions were, and are, charged with serving the general welfare.<sup>30</sup> The goals of the state regulators included “guaranteed returns on capital invested to prevent confiscation of

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25. Since this section is illustrative rather than exhaustive, this Note focuses its attention on several state proxy advocates that have been the subject of secondary literature.

26. PALAST, *supra* note 21, at 108.

27. This change in focus was a product of both economic forces, the rising significance of electric utilities, and a changing regulatory landscape following the Interstate Commerce Act of 1887, ch. 104, 24 Stat. 379. The Interstate Commerce Act permitted the federal government to regulate railroads, a power previously reserved to the states. See John J. Esch, *The Interstate Commerce Commission and Congress—Its Influence on Legislation*, 5 GEO. WASH. L. REV. 462, 462–63 (1937); see also Kenneth L. Hirsch, *Toward a New View of Federal Preemption*, 1972 U. ILL. L.F. 515, 531 (noting field preemption by the Interstate Commerce Commission regarding rail safety regulation).

28. PALAST, *supra* note 21, at 111–12.

29. *Id.* at 113. The only holdout, Delaware, followed suit in 1978. *About Agency*, DEL. DEP’T OF STATE, DIV. OF THE PUB. ADVOCATE, <http://publicadvocate.delaware.gov/HTML/aboutagency.shtml> (last updated Apr. 19, 2011). This use of scientific principles and disinterested experts to make decisions would become the hallmark approach of the New Deal era. See William M. Barvick, *Public Advocacy Before the Missouri Public Service Commission*, 46 UMKC L. REV. 181, 182 (1978) (discussing the Missouri Public Service Commission as a shift away from adversarial rate-setting methods).

30. Barvick, *supra* note 29, at 183 (“Strictly speaking, the Commission does not protect the public interest; it determines the public interest.”); see also *Fiscal Year 1980 Authorizations of Appropriations for the U.S. Railway Association and Office of Rail Public Counsel: Hearing on S. 447 and S. 448 Before the Subcomm. on Surface Transp. of the S. Comm on Commerce, Science, and Transp.*, 96th Cong. 19 (1979) (discussion between Mr. Madigan and Mr. Heffron) [hereinafter *FY1980 USRA and OPC Appropriations*]. Heffron was asked whether he thought the ICC protected the public interest, and if so, why the ORPC was needed.

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property,” which was to be determined by transparent information gathering and informal negotiations guided by a “just and reasonable” standard.<sup>31</sup> No particular constituency was privileged by this approach. Rather, the commission had to balance the interests of all constituencies. The task of protecting and representing the interests of vulnerable parties rested with the parties themselves.

Realizing that some constituencies had difficulty representing themselves, the first proxy advocates were created in the early 1920s. Concern over the growing power of utility companies led Maryland to create the first independent consumer proxy agency.<sup>32</sup> The Maryland statute is remarkable in its similarity to the statutes that persist today.<sup>33</sup> The states that followed Maryland varied in how they designed their proxy advocates. For example, in 1923, Missouri empowered the general counsel of the Public Service Commission to defend consumer interests.<sup>34</sup> Between the 1920s and 1970s, only two other states created proxy advocates to protect consumers.<sup>35</sup>

The 1970s saw a renewed consumer interest in utility issues,<sup>36</sup> however, and a correspondingly broadened use of proxy advocates. Interest representation became a vital component of administrative proceedings in the 1970s,<sup>37</sup> and as interest group participation increased, scholars became concerned that bureaucratic deci-

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31. PALAST, *supra* note 21, at 113.

32. J. Jonathan Schraub, *The Office of Public Counsel: Institutionalizing Public Interest Representation in State Government*, 64 GEO. L.J. 895, 917 (1976) (citing Act of Apr. 9, 1924, ch. 534, §§ 1–2, 1924 Md. Laws 1301, 1301).

33. Act of Apr. 9, 1924, ch. 534, § 2, 1924 Md. Laws 1301, 1305–06 (“Whenever application, protest or other form of complaint is made to the Commission of or concerning any act or omission . . . subject to the jurisdiction of the Commission, . . . it shall be the duty of said People’s Counsel . . . to participate in the preparation or reforming of the pleadings . . . and to appear before the Commission . . . in the interest of the public . . . and the services of the experts employed by said Commission as well as the records and other facilities of the Commission shall be availed of by said People’s Counsel in the performance of these public duties . . .”).

34. Barvick, *supra* note 29, at 184–85 (1978) (citing MO. REV. STAT. § 386.080 (1969)).

35. In addition to Missouri and Maryland, a handful of other states created proxy advocates before the 1970s: Indiana in 1941, Rhode Island in 1966. Goodman, *supra* note 16, at 214 n.3.

36. There are several reasons why consumer salience of utility issues increased in the 1970s. *See, e.g.*, Goodman, *supra* note 16, at 214–15 (noting that consumer concern arose from price increases due to oil embargoes and perceived “congressional indifference”).

37. *See* Richard B. Stewart, *The Reformation of Administrative Law*, 88 HARV. L. REV. 1667, 1760–61 (1975) (observing that interest representation improves outcomes, justice, and confidence in administrative decisionmaking).

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sionmakers would place special interests above the general welfare.<sup>38</sup> Indeed, Congress found that these suspicions were well founded<sup>39</sup> and looked for ways to ensure that agencies regulated in the public interest.<sup>40</sup> Congress identified so-called “proxy advocates” as an effective tool for ensuring the representation of consumer interests.<sup>41</sup> Several reasons have been cited for the emergence of proxy advocates, including discontent with government, rising gas prices, and federal funding of state proxy advocates.<sup>42</sup> State legislatures recognized that residential consumers were not only the largest and most diffuse class of ratepayers but also the least able to absorb the rising costs of services. Unlike industrial ratepayers, residential consumers cannot pass rate increases on to customers.<sup>43</sup> Moreover, as one state noted, they were “historically under-represented before utility regulatory agencies.”<sup>44</sup> By 1978, twenty states had independent agencies that operated as

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38. For a summary of early theories of bureaucratic decisionmaking, see Jason Webb Yackee & Susan Webb Yackee, *A Bias Toward Business? Assessing Interest Group Influence on the U.S. Bureaucracy*, 68 J. POL. 128, 130 (2006). For a discussion of agency capture theory, see George J. Stigler, *The Theory of Economic Regulation*, 2 BELL J. ECON. & MGMT. SCI. 3, 3–7 (1971) (describing agency behavior in relation to industry in terms of supply of regulatory rents). For a discussion of “iron triangles,” see J. Leiper Freeman, *The Bureaucracy in Pressure Politics*, 319 ANNALS AM. ACAD. POL. & SOC. SCI., Sept. 1958, at 10 (describing bureaucrats as pressure groups). *But see* Thomas L. Gais et al., *Interest Groups, Iron Triangles, and Representative Institutions in American National Government*, 14 BRIT. J. POL. SCI. 161, 163 (1984) (questioning the continued existence of iron triangles in American politics).

39. S. COMM. ON GOVERNMENTAL AFFAIRS, 95TH CONG., STUDY ON FEDERAL REGULATION, VOLUME III: PUBLIC PARTICIPATION IN REGULATORY AGENCY PROCEEDINGS 2 (Comm. Print 1977) [hereinafter PUBLIC PARTICIPATION STUDY] (“There is substantial evidence that this imbalance of representation does, in fact, exist to the detriment of the regulatory process.”).

40. The recommendations, expounded upon at length in the full report, include easing the requirements for standing and intervention, as well as an independent consumer protection agency, advisory committees, and direct compensation of intervenors. *Id.* at XI–XIV.

41. *Id.* at XII (recommending creation of consumer advocate offices within federal agencies and provision of grants to assist states in doing the same).

42. Goodman, *supra* note 15, at 214–16; *see also* Guy L. F. Holburn & Richard G. Vanden Bergh, *Consumer Capture of Regulatory Institutions: The Creation of Public Utility Consumer Advocates in the United States*, 126 PUB. CHOICE 45, 66–68 (2006) (arguing that proxy advocates are created by center-left coalitions to lock-in policy gains).

43. Goodman, *supra* note 15, at 218.

44. *Id.* (citing the reasons given by the 111th Ohio General Assembly for creating the Office of Consumers’ Counsel).

proxy advocates, and another twelve charged their Attorneys General with representing consumer interests.<sup>45</sup>

Today, proxy advocates are part of the regulatory landscape in forty-five of the fifty states.<sup>46</sup> Mississippi has considered legislation to create a proxy advocate, although it has yet to pass both legislative chambers.<sup>47</sup> While a few states created general consumer advocacy departments in lieu of proxy advocates, some, like New Jersey's, have since been abolished.<sup>48</sup>

### B. *Federal Proxy Advocates*

Although state proxy advocates have received the bulk of attention from legal scholars and economists, federal proxy advocates are older. Since federal proxy advocates were so short-lived, they are less frequently discussed and less easily researched. Congressional testimony, statutes, regulations, and agency documents reveal a rich and varied history of federal proxy advocates, spanning from the now-defunct Interstate Commerce Commission to the contemporary Consumer Financial Protection Bureau. Two particular fields in which proxy advocates left a noticeable impact were

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45. *Id.* at 214 nn.3 & 4. Between 1924 (Maryland) and 1974 (Florida), only two states created proxy advocates: Washington, D.C. in 1926, Indiana in 1941, and Rhode Island in 1966. *Id.* at 213 n.3; *see also* Potomac Elec. Power v. District of Columbia, 651 F. Supp. 907, 908 (D.D.C. 1986) (noting that the District of Columbia proxy advocate was created in 1926, abolished in 1952, and reestablished in 1975).

46. The five that do not are Idaho, Louisiana, Mississippi, North Dakota, and South Dakota.

47. Press Release, Office of the Attorney General of Miss., Public Utilities Bill Passes House (Feb. 13, 2009), *available at* [http://www.ago.state.ms.us/index.php/press/releases/public\\_utilities\\_bill\\_passes\\_house1](http://www.ago.state.ms.us/index.php/press/releases/public_utilities_bill_passes_house1) (discussing passage of HB1087); *Report of All Measures*, MISS. STATE LEGISLATURE, [http://billstatus.ls.state.ms.us/2009/pdf/all\\_measures/allmsrs.xml](http://billstatus.ls.state.ms.us/2009/pdf/all_measures/allmsrs.xml) (last visited Nov. 6, 2011); *see also* Adam Lynch, *AARP: Consumer Advocate Needed for PSC*, JACKSON FREE PRESS, July 21, 2010, [http://www.jacksonfreepress.com/index.php/site/comments/aarp\\_consumer\\_advocate\\_needed\\_for\\_psc](http://www.jacksonfreepress.com/index.php/site/comments/aarp_consumer_advocate_needed_for_psc).

48. N.J. STAT. ANN. § 52:27E-50 (West 2010) (repealed 2010). One topic that this Note does not directly explore is the conditions that lead to the continued existence of proxy advocates. On the surface, the continued existence of proxy advocates in the states implies that they are doing something right or at least not incurring significant political opposition. By contrast, the fact that the few federal proxy advocates have only persisted for a few brief years before disappearing implies the opposite. However, isolating the myriad factors that contribute to the creation or abolition of a bureaucratic agency is beyond the scope of this Note.

railroad and airline regulation.<sup>49</sup> This section will flesh out the history of proxy advocates in these areas: how they were created and how they were terminated.<sup>50</sup>

As early as 1903, the Interstate Commerce Commission contracted with attorneys to serve as public counsel on behalf of consumer interests.<sup>51</sup> This was the first use of a proxy advocate. However, as these were individual attorneys, hired on a contract basis, rather than repeat players, they were distinct from the proxy advocates that would come later. It is also unclear whether they had the technical expertise, or the ability to contract for expert assistance, that is so important to other proxy advocates.

During the 1960s and 1970s, Congress proposed numerous proxy advocates for a variety of circumstances. While most failed to pass, some proxy advocates were successfully created.<sup>52</sup> Most ambitiously, proxy advocates have been proposed with broad mandates to speak for consumers writ large before the whole federal bureaucracy.<sup>53</sup> However, each such proposal failed in Congress.<sup>54</sup> The only

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49. Helpfully, both railroad and interstate airlines at this time were governed by so-called “rate-and-entry” regulation, much like the public utilities discussed at the state level.

50. The few scholars that have addressed federal proxy advocates have focused on the OPC. *See, e.g.*, Bruce Blatchly, *Railroad Reorganization Under the Regional Rail Reorganization Act of 1973: An Overview*, 40 ALB. L. REV. 812 (1976); Theodore S. Bloch & Robert Jay Stein, *The Public Counsel Concept in Practice: The Regional Rail Reorganization Act of 1973*, 16 WM. & MARY L. REV. 215 (1974); Nathan I. Finkelstein & Collister Johnson, Jr., *Public Counsel Revisited: The Evolution of a Concept for Promoting Public Participation in Regulatory Decision-Making*, 29 ADMIN. L. REV. 167, 169 (1977).

51. *Rail Competition and Service: Hearing on H.R. 2125 Before the H. Comm. on Transp. and Infrastructure*, 110th Cong. 579 (2007) (testimony of Charles D. Nottingham, Chairman, Surface Transportation Board) (noting that Louis Brandeis was contracted as public counsel in 1914). For a further discussion of the debate regarding Brandeis’s service, see *Brandeis’s Part in Rate Hearing*, N.Y. TIMES, Nov. 27, 1913 (discussing whether Brandeis would represent shippers, minority stockholders, or both); *Brandeis Attacks Rayburn Stock Bill*, N.Y. TIMES, June 20, 1914.

52. Insofar as this Note seeks to focus on the effects of proxy advocates after they have already been created, an assessment of the factors that lead to their creation is beyond its limited scope. In examining the conditions under which states have created proxy advocates, Holburn and Vanden Bergh have found that elected political actors are more likely to create proxy advocates when they are “less certain about remaining in office at the next election.” Holburn & Vanden Bergh, *supra* note 42, at 66–67.

53. Though this proposal came in numerous forms, the idea was generally the same in each incarnation—an agency that could represent the interests of consumers before other agencies. A summary of prior proposals was included in the Senate report accompanying The Consumer Protection Act of 1977. *See* S. REP. NO. 95-169, at 5–6 (1977). The first of these proposals was put forward by Sen. Estes

proxy advocates enacted were given limited purview and were sometimes created by regulation rather than statute. Even these, however, were neither long-lived<sup>55</sup> nor viable.<sup>56</sup> There have been recommendations to establish proxy advocates within a variety of administrative agencies, including the Consumer Products Safety Commission,<sup>57</sup> the Federal Communications Commission,<sup>58</sup> and, most recently, the Federal Energy Regulatory Commission.<sup>59</sup> The

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Kefauver in 1961 to create a Department of Consumers. S. 1688, 87th Cong. (1961). Proposals were introduced to establish similar offices at the Cabinet level, S. 860, 91st Cong. (1969); in the Executive Office of the President, S. 3097, 91st Cong. § 2 (1969); as an independent agency, S. 3165, 91st Cong. § 2 (1969); and in the Department of Justice, S. 3240, 91st Cong. (1969).

54. None of these attempts were successful: though one bill passed the Senate in the 91st Congress, it never made it to a floor vote in the House. *See* S. REP. NO. 95-169, at 6 (1977). In the 92nd Congress, it passed the House but not the Senate. *Id.* at 7 (noting that S. 3970 failed a cloture vote thrice). The last push was in the 95th Congress, which failed in early 1978. *See* BERNICE ROTHMAN HASIN, CONSUMERS, COMMISSIONS, AND CONGRESS 127-34 (1987) (describing the turns in the press and among consumerists, such as Michael Pertschuk, that led to the bill's demise).

55. The difficulty of passing consumer protection legislation is observed in the legislative history of the CFPB, *supra* notes 1-4, and can be inferred from the theories of regulation discussed in subsequent sections. *See infra* Part II.A (describing barriers to consumer representation); *see also* Holburn & Vanden Bergh, *supra* note 42. Arthur Bonfield lists a variety of extinct proxy advocates of which little record now exists. Arthur Earl Bonfield, *Representation for the Poor in Federal Rulemaking*, 67 MICH. L. REV. 511, 538 (1969) (including the National Bituminous Coal Commission and the Department of Agriculture). At one point, the Postal Rate Commission required that a hearing opportunity be granted to an officer of the Commission who would represent consumer interests. Terrence Roche Murphy & Joel E. Hoffman, *Current Models for Improving Public Representation in the Administrative Process*, 28 ADMIN. L. REV. 391, 405 (1976).

56. As Arthur Bonfield noted, “[a]lmost all of the consumer’s counsel offices organized as separate entities within the federal establishment have atrophied and disappeared.” Bonfield, *supra* note 55, at 538.

57. One proposal would have placed a proxy advocate in the Consumer Product Safety Commission. NAT’L COMM’N ON PROD. SAFETY, FINAL REPORT PRESENTED TO THE PRESIDENT AND CONGRESS 115 (1970) (recommending the appointment of a consumer product safety advocate to represent the interests of consumers before the Commission). This proposal was removed from the final legislation, under the assumption that a general “consumer protection agency” would be created. Antonin Scalia & Frank Goodman, *Procedural Aspects of the Consumer Products Safety Act*, 20 UCLA L. REV. 899, 902 n.20 (1973). As discussed above, this never came to fruition.

58. PUBLIC PARTICIPATION STUDY, *supra* note 39, at 72 n.1.

59. *See* American Clean Energy and Security Act of 2009, H.R. 2454, 111th Cong. § 194 (creating an Office of Consumer Advocacy); *see also* Darren Samuelsohn & Ben Geman, *14 Hours Later, House Democrats Hold the Line on Climate Bill*, CLIMATEWIRE, May 20, 2009, available at <http://www.nytimes.com/cwire/2009/05/20/20climatewire-14-hours-later-house-democrats-hold-the-line-12208.html>.

attention that proxy advocates received in the federal government during the 1960s and 1970s corresponded to the interest at the state level.<sup>60</sup>

This Note discusses three federal proxy advocates which are not only among the most widely discussed in the literature, but also whose variations demonstrate that increased independence often does not facilitate a proxy advocate's success. One federal proxy advocate was created in the Civil Aeronautics Board's (CAB) Office of the Consumer Advocate (OCA) to represent consumers before the Board.<sup>61</sup> The Office of Consumer Affairs, as OCA was originally known, began as a consumer complaint section of the CAB Bureau of Enforcement before it was granted limited independence within the CAB under the authority of the Managing Director.<sup>62</sup> In 1974, regulations gave it powers of appearance before the board,<sup>63</sup> but its role as a facilitator of consumer complaints kept it well-grounded in the concerns of its constituency.<sup>64</sup> Though the OCA achieved a modicum of independence, such as the ability to file directly into the docket of a pending matter rather than requiring the approval of the CAB, the Board retained significant power over the OCA through its control over budget and personnel.<sup>65</sup> The CAB was phased out with the deregulation of the airline industry, thus eliminating the OCA as well.<sup>66</sup>

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60. See *supra* notes 39–48 and accompanying text.

61. Part II.D provides a more extensive description of federal proxy advocate structure. In particular, see *infra* notes 233 & 234 and accompanying text.

62. PUBLIC PARTICIPATION STUDY, *supra* note 39, at 74.

63. Initially it was constituted as the Office of Consumer Affairs and entrusted with handling complaints and distributing consumer guides. *Id.* It was then renamed the Office of the Consumer Advocate, 39 Fed. Reg. 39867 (Nov. 12, 1974), and given status as a party before the board, 14 C.F.R. §§ 302.9, 302.11 (1978).

64. See PUBLIC PARTICIPATION STUDY, *supra* note 39, at 78–79 (noting that the primary complaints and OCA activities between 1974 and 1975 focused on baggage damage and overbooking).

65. *Id.* at 80. This was the main objection of the Aviation Consumer Action Project, the primary consumer group that appeared before the CAB, to the OCA. *Id.* at 81.

66. The elimination of the CAB necessarily abolished the OCA, a subsidiary office. Pub. L. No. 95-504, § 40, 92 Stat. 1705, 1744 (1978). Certain of the OCA's powers persist in the Department of Transportation's Office of the General Counsel, in the Office of Aviation Enforcement and Proceedings (OAEP). 49 C.F.R. § 1.22(d) (2009); see also *Aviation Enforcement & Proceedings (C-70)*, DEP'T OF TRANSP. OFFICE OF THE GEN. COUNSEL, <http://www.dot.gov/ost/ogc/org/aviation> (last visited Oct. 9, 2011) (responsibilities include "handling of informal consumer complaints" and "enforcement of consumer protection regulations").

Two other significant proxy advocates were created to participate in rail proceedings. The Office of Public Counsel (OPC) was a proxy advocate created within the Interstate Commerce Commission.<sup>67</sup> After the OPC closed, Congress created the Office of Rail Public Counsel (ORPC). This was the first federal proxy advocate created to be independent of the agency before which it appeared.<sup>68</sup> Both offices represented consumer interests before the Interstate Commerce Commission.<sup>69</sup>

The Regional Rail Reorganization (3-R) Act of 1973 created the OPC. This legislation reorganized several bankrupt northeastern railroads into Conrail.<sup>70</sup> Although traditional bankruptcy procedures had been adequate to handle prior railroad insolvencies,

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67. See Finkelstein & Johnson, *supra* note 50, at 168–69; see also Interstate Commerce Commission Evaluation of the Secretary of Transportation's Rail Services Report, 39 Fed. Reg. 17147, 17149 (May 13, 1974) (stating that the RSPO contributed to this ICC report and that the OPC, whose function was “to provide legal representation and assistance to the public throughout the restructuring process set in motion by the [3-R] Act,” held public hearings to solicit views and comments). See generally Regional Rail Reorganization (3-R) Act of 1973, Pub. L. No. 93-236, 87 Stat. 985 (1974) (establishing the statutory scheme in which the OPC would operate).

68. Railroad Revitalization and Regulatory Reform (4R) Act of 1976, Pub. L. No. 94-210, § 304, 90 Stat. 31, 51–52. The author has been unable to identify any prior, independent proxy advocates.

69. The role and purpose of the Interstate Commerce Commission in relation to the railroads has been a topic of extensive historical debate. Gabriel Kolko first challenged the “prevalent history of the federal regulation of railroads . . . [as] ‘a counterpoise to the power of private business’ and ‘the complaint of the unorganized against the consequences of organization.’” GABRIEL KOLKO, RAILROADS AND REGULATION 1877–1916 2 (1965) (quoting RICHARD HOFSTADTER, THE AGE OF REFORM: FROM BRYAN TO F.D.R. 214, 231 (1955)); see also THEODORE E. KEELER, RAILROADS, FREIGHT, AND PUBLIC POLICY 22–23, 26–32 (1983) (describing the role of the ICC as a codification of the common law of common carriers that balanced competing interests of consumers and railroads and noting that the ICC also reconciled the needs of railroads with competing interests of other modes of freight transportation).

70. The debate over the cause of the railroad bankruptcies was among the disputes in which the proxy advocate was embroiled. While railroads, such as Penn Central, claimed that the losses were due to the operation of light-density lines, this may only have accounted for a small portion of the losses. For a discussion of the circumstances surrounding the legislation, resulting nationalization, and reprivatization, see RICHARD SAUNDERS, THE RAILROAD MERGERS AND THE COMING OF CONRAIL 313 (1978) (noting that only 17% of total losses were due to light-density lines under the railroad's own accounting, and only 7% of the losses according to the Interstate Commerce Commission); Blatchly, *supra* note 53, 823–24 (discussing the process); James S. Ang & Carol Marie Boyer, *Finance and Politics: Special Interest Group Influence During the Nationalization and Privatization of Conrail* (European Fin. Mgmt. Ass'n 2000), available at <http://ssrn.com/abstract=251413>.

they were ill suited for the wave of bankruptcies in the Northeast in the early 1970s. The continued operation of the railroad eroded the bankruptcy estate, thus preventing the payment of creditors,<sup>71</sup> but the strong public need for railroad transportation required them to continue operation.<sup>72</sup> By passing the 3-R Act, Congress created four entities to facilitate the reorganization. The United States Railway Association (USRA) was the principal planning and funding agency. It was authorized to make loans and issue obligations on behalf of the Department of Transportation.<sup>73</sup> Congress also authorized the creation of Conrail, the corporation that would operate the railroad, and it created a three judge judicial panel with jurisdiction over all proceedings related to the plan.<sup>74</sup>

The fourth entity, the Rail Services Planning Office (RSPO), was created within the Interstate Commerce Commission. Its director was appointed by the ICC. The RSPO did not have planning or funding authority; rather, its purpose was to serve as a counterweight to the USRA in the planning process by soliciting public comment in response to the reorganization and planning efforts of the Department of Transportation<sup>75</sup> and the USRA.<sup>76</sup> One of its major duties was to prepare the Evaluation of the USRA's Preliminary System Plan.<sup>77</sup> In order to do so, the RSPO created a proxy advocate, the Office of Public Counsel.<sup>78</sup> The OPC was given both a permanent<sup>79</sup> and outreach staff, which represented affected geographic areas.<sup>80</sup> The outreach program was essential: the Conrail reorganization threatened to deprive towns of their access to the

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71. See SAUNDERS, *supra* note 70, at 304 (describing *New Haven Inclusion Cases*, 399 U.S. 392 (1970), and the continued erosion of the bankruptcy estate of the Penn Central line by continued operation of the railroad, as mandated by regulators).

72. *Id.* at 303–07 (comparing the options of liquidation and nationalization).

73. Blatchly, *supra* note 53, at 823; see also Regional Rail Reorganization Act of 1973, Pub. L. No. 93-236, § 202(a)(2), 87 Stat. 985, 990 (1974).

74. Blatchly, *supra* note 50, at 823–24; see also 3-R Act § 209.

75. 3-R Act § 205(d)(1).

76. 3-R Act § 207(a)(2).

77. See RAIL SERVICES PLANNING OFFICE, EVALUATION OF THE U.S. RAILWAY ASSOCIATION'S PRELIMINARY SYSTEM PLAN 1 (1975) (noting that one of the Office's "two major responsibilities" is to analyze the Report of the Secretary of Transportation and the Preliminary System Plan).

78. It was thus a regulatory, rather than a statutory, creation. See Finkelstein & Johnson, *supra* note 50, at 170–71.

79. The permanent staff consisted of seven lawyers and four supporting personnel. Bloch & Stein, *supra* note 50, at 226 n.47.

80. *Id.* at 225–26.

national rail network, and thus their livelihood, but the towns were unable to participate in a Washington-based agency proceeding.

Congress created the Office of Rail Public Counsel following the successful completion of the OPC's duties. In 1976, the RSPO gave its final comments on the USRA plan, thus fulfilling its statutory mission, but Congress was impressed by its performance and sought to make the public counsel a permanent feature of the bureaucracy. A letter from Senator Vance Hartke referred to the OPC as an "unqualified success."<sup>81</sup> Thus, Congress decided to continue and ostensibly improve the office by transforming it into the Office of Rail Public Counsel.<sup>82</sup>

The Office of Rail Public Counsel was intended to continue representing consumer interests in railroad regulation, but it met significant opposition to undertaking its mission. The creation of the office, one study noted, was "a paper change, as the actual implementation of the legislation was frustrated by President Ford and the Commission itself."<sup>83</sup> The much-vaunted independence of the ORPC required the President to appoint a director<sup>84</sup> and the

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81. Finkelstein & Johnson, *supra* note 50, at 186 n.71. Similarly glowing comments were included in the appropriations request by the ICC for the ORPC for 1978. See *Department of Transportation and Related Agencies Appropriations for Fiscal Year 1978, Part 3: Hearings on H.R. 7557 Before a Subcomm. of the S. Comm. on Appropriations*, 95th Cong. 578 (1977) (Verbatim comments of legislators, businesses, public interest groups, and citizens are included in the subsequent pages.).

82. Railroad Revitalization and Regulatory Reform (4R) Act of 1976, Pub. L. No. 94-210, § 304, 90 Stat. 31, 51. Prior to the creation of this office, the ICC sought to preserve the OPC and expanded its mandate. See *Interim Regulatory Reform Act of 1977: Hearing on S. 263 Before the S. Comm. on Commerce, Sci., and Transp.*, 95th Cong. 127-128 (1977) [hereinafter *Interim Authority Decision*] (reprinting an ICC press release, issued October 31, 1975, regarding the expanded OPC).

83. PUBLIC PARTICIPATION STUDY, *supra* note 39, at 85.

84. 4R Act § 304. Indeed, presidential appointment was required for the leader of the new office. *Interim Authority Decision*, *supra* note 82, at 126 (concluding that the ICC could not appoint an interim leader for the ORPC). Despite impressions given in testimony by Interstate Commerce Commission officials, the ICC may have sought the DOJ opinion not in the hopes of being granted the power to make the interim appointment, but of being forbidden it. *Compare Authorization and Oversight Hearing on the United States Railway Association and the Office of Rail Public Counsel of the Interstate Commerce Commission: Hearing Before the Subcomm. for Surface Transp. of the S. Comm. on Commerce, Sci., and Transp.*, 95th Cong. 18 (1977) (statement of George M. Stafford, Chairman, Interstate Commerce Commission) ("As it became evident that the appointment was not soon forthcoming, the Commission, partially through its own initiative and partially through the urging and support of this committee, sought alternative methods to effect the intent of the legislation until such time that a director was appointed."), *with* PUBLIC PARTICIPATION STUDY, *supra* note 39, at 86 ("Interpreting the legislation to mean that

new office to seek its own budget line.<sup>85</sup> These requirements freed the office from direct control by other agencies, but they also forced the fledgling office to convince the Executive to nominate a Director, and to convince Congress to confirm that selection and provide the office with adequate funding. These obstacles would delay the agency's progress until 1978.<sup>86</sup>

Although the ORPC appeared to be a model proxy advocate on paper,<sup>87</sup> members of Congress criticized the ORPC from its inception and eventually dissolved the office.<sup>88</sup> At first, the ORPC was criticized for its very existence: Legislators balked at the inefficiency of having a separate office that seemingly duplicated the role of the ICC.<sup>89</sup> Later, the office's failures gave critics ample ammunition. The Senate's report on the failures in coal price regulation by the ICC,<sup>90</sup> then a central part of the politically and economically volatile energy crisis, laid part of the blame on the ORPC for its failures in representing the public.<sup>91</sup> The central criticism was that the representation of the public interest required active solicitation of pub-

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the Office of Rail Public Counsel could not be set up until the President appointed a director, the ICC sought an opinion from the Justice Department.”).

85. 4-R Act § 304.

86. *See Nominations—October-December, supra* note 12, at 103.

87. The director of the ORPC testified to fulfilling its purpose of organizing to overcome collective action problems, noting that his office asked the question: “How about rail users . . . ? Are rate bureaus in their interest because the railroads and the shippers happen to like that type of arrangement?” *Rail Public Counsel Authorization for Fiscal Year 1980: Hearing on H.R. 2420 Before the Subcomm. on Transp. and Commerce of the H. Comm. on Interstate and Foreign Commerce*, 96th Cong. 15 (1979) [hereinafter *FY1980 ORPC House Authorization*] (statement of Howard A. Heffron, Director, Office of Rail Public Counsel).

88. Since it was intended as a check on a bureaucratic function—a redundancy—, it was frequently identified as wasteful in Congressional hearings. The ICC also had a Bureau of Investigation and Enforcement that furthered the appearance of redundancy. Moreover, the ORPC's inability to secure broader support for funding and leadership is unsurprising, given that similar agencies had been proposed for decades but had never been authorized by Congress. *See* Letter from Elmer B. Staats, Comptroller General of the United States, to Sen. John Melcher (Mar. 22, 1979) (on file with author) (observing that the Senate's creation of the ORPC limited its jurisdiction to intervention in proceedings related to the ICC); *see also* S. Rep. No. 96-97, at 3–4 (1979) (noting that the Office of Special Counsel could easily assume the ORPC's role).

89. *See, e.g., FY1980 ORPC House Authorization, supra* note 90, at 13–15 (statement of Rep. Gary A. Lee, Member, H. Subcomm. on Transp. and Commerce).

90. H. COMM. ON INTERSTATE AND FOREIGN COMMERCE, 96TH CONG., RAILROAD COAL RATES AND PUBLIC PARTICIPATION: OVERSIGHT OF ICC DECISIONMAKING (Comm. Print 1980) [hereinafter *COAL RATE REPORT*].

91. *Id.* at 6, 8–9, 107–12.

lic opinion,<sup>92</sup> but the ORPC solicited the opinions of the Edison Electric Institute and the National Coal Association, rather than those of the consumers.<sup>93</sup>

In 1980, ORPC funding was reduced from \$1,850,000 to \$1,200,000 with an eye toward phasing it out.<sup>94</sup> It was formally eliminated in 1995, along with the rest of the Interstate Commerce Commission,<sup>95</sup> though funding had not been authorized since FY1980.<sup>96</sup> It might be argued that the ORPC failed because it was not given enough time, but it appears that its failure was structurally predetermined. It was forced to fight for its own budget and leadership, but it definitionally lacked an organized interest that could pressure either Congress or the Executive.

## II.

### PROXY ADVOCATES IN INSTITUTIONAL CONTEXT

Proxy advocates have been created to help consumers who are frequently underrepresented in agency proceedings. As shown by state and federal proxy advocates, these offices frequently help con-

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92. *Id.* at 6, 8, 107–110.

93. *Id.* at 110 (both the Edison Electric Institute and the National Coal Association are trade associations whose interests are aligned with utilities rather than consumers).

94. *See* Amtrak Reorganization Act of 1979, Pub L. No. 96-73, § 301, 93 Stat. 537, 557; S. REP. 96-67, at 3 (1979). After the ORPC was eliminated, there was a division within the ICC that was somewhat similar to a proxy advocate: the Bureau of Investigation and Enforcement. This was eventually renamed the Bureau of Hearing Counsel. 49 Fed. Reg. 18,848 (May 3, 1984). The Bureau of Investigation and Enforcement performed some functions similar to a proxy advocate, such as filing comments into the docket of Interstate Commerce Commission proceedings. *See, e.g.,* Carolina Freight Carriers Corp. v. Interstate Commerce Comm'n, 627 F.2d 563, 564–65 (D.C. Cir. 1980) (“The Bureau of Investigation and Enforcement also participated in the hearings.”); *Cont'l Grain Co. v. Interstate Commerce Comm'n*, 603 F.2d 939, 941 (D.C. Cir. 1979) (“The Commission . . . ordered [the BIE] to further investigate specific instances of possible violations of the Elkins Act.” (internal quotation marks omitted)). However, the BIE was part of the agency, rather than an independent watchdog, and was often directed to undertake activities on behalf of the Commission. *See, e.g.,* Rocky Mountain Motor Tariff Bureau, Inc. v. Interstate Commerce Comm'n, 590 F.2d 865, 866 (10th Cir. 1979) (“The ICC directed the Bureau of Investigation and Enforcement to participate.”). Indeed, the record reveals that the BIE's relation to the ICC could lead to the Bureau's recommendations being flatly rejected, and then the Bureau subsequently requested to investigate the alternative course of action chosen by the Commission, given the control of the BIE by the ICC. *See Cont'l Grain Co.*, 603 F.2d at 941–43.

95. *See* ICC Termination Act of 1995, Pub. L. No. 104-88, 109 Stat. 803.

96. *See* Amtrak Reorganization Act of 1979 § 301; S. REP. 96-67, at 3.

sumers disadvantaged by regulated utilities, such as electricity or rail. This section addresses why consumers need to be protected and how proxy advocates serve that function. It begins in Part II.A at the highest level of generality by describing how consumers function in the administrative process and the difficulties they face.<sup>97</sup> Next, Part II.B demonstrates how proxy advocates can help consumers. Finally, Parts II.C and II.D narrow the scope of the inquiry and move from theory to practice. Specifically, these sections address how proxy advocates at the state and federal level help consumers. They survey the powers that are given to proxy advocates and the ways in which proxy advocates are kept accountable. The paper continues in Part III to compare these specific approaches with regard to proxy advocate effectiveness.

#### A. *Consumers in the Administrative Process*

Whether a proxy advocate can represent consumers begs a more fundamental question: why are these consumers unable to represent themselves? For an interest group to represent its views in a political forum, the group must overcome three hurdles. The interest must (1) organize, (2) participate in the proceeding, and (3) be credibly heard by the decisionmaker. Compared to private firms, however, diffuse consumer interests are less able to organize, less able to participate in technical agency proceedings, and less likely to be heard by agency decisionmakers. This section addresses these three hurdles and presents a theoretical framework in which to understand why consumers struggle to represent their own interests in administrative proceedings. It concludes by contrasting the relative abilities of consumer groups and private firms to influence policy.

Administrative procedures determine administrative outcomes.<sup>98</sup> When Congress delegates decisionmaking to agencies, it relies on a body of laws to constrain agency discretion in accordance with the dictates of the particular substantive delegation.<sup>99</sup> Although the amount of policy space given to the agency can be hugely broad,<sup>100</sup> legislatures rely on administrative law to constrain

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97. Part II.A.

98. See generally *Structure and Process*, *supra* note 19; *Administrative Procedures*, *supra* note 19.

99. For a more complete discussion of how legislation begets regulation within the structure of these constraints, see STEVEN P. CROLEY, REGULATION AND PUBLIC INTERESTS: THE POSSIBILITY OF GOOD REGULATORY GOVERNMENT 14–22 (2008).

100. See *Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 474 (2001) (“In the history of the Court we have found the requisite ‘intelligible principle’ lacking in

agency decisions by way of previous legislative directives and judicial decisions. Agencies are further constrained by process requirements, such as the Administrative Procedures Act.<sup>101</sup> Such statutes hold agencies to judicially reviewable standards in how they conduct their proceedings.<sup>102</sup> Other restrictions on agencies, such as conducting cost-benefit analyses,<sup>103</sup> impose substantive requirements on agency decisions.

In particular, administrative procedures assure “fair representation for all affected interests” in agency proceedings.<sup>104</sup> This assurance not only facilitates transparency but also implicitly recognizes the “assumption that there is no ascertainable, transcendent ‘public interest,’ but only the distinct interests of various individuals and groups in society.”<sup>105</sup> Since agencies must make a decision from amongst those competing interests,<sup>106</sup> it follows that certain constituencies may not be protected if they are unrepresented in the proceedings.<sup>107</sup>

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only two statutes, one of which provided literally no guidance for the exercise of discretion . . .”).

101. 5 U.S.C. §§ 500–584 (2006). There are similar statutes that govern state administrative agencies. *See generally* Arthur Earl Bonfield, *The Federal APA and State Administrative Law*, 72 VA. L. REV. 297 (1986) (describing the relationship of the federal APA to the development of the Model State Administrative Procedure Act).

102. *See* 5 U.S.C. §§ 701–706 (2006) (explaining the process of judicial review of agency action).

103. Exec. Order No. 12,291, 3 C.F.R. 127, 129 (1981); Exec. Order No. 12,866, 3 C.F.R. 638, 645 (1993); Exec. Order No. 13,422, 3 C.F.R. 191, 192 (2007).

104. Stewart, *supra* note 37, at 1712; *see also* Comment, *Public Participation in Federal Administrative Proceedings*, 120 U. PA. L. REV. 702, 723–30 (1972) (discussing approaches to decisionmaking “in the public interest”).

105. Stewart, *supra* note 37, at 1712.

106. Agencies are frequently given a statutory mandate to regulate in the “public interest.” *Administrative Procedures*, *supra* note 19, at 272 (“[L]egislation typically delegates to agencies vague mandates accompanied by broad grants of authority to the agency to define the ‘public interest.’”). This may be more accurately spoken of as serving the general welfare. Barvick, *supra* note 29, at 183 (“The Commission has followed this public good-general welfare view of the public interest since its inception.”).

107. *See FY1980 ORPC House Authorization*, *supra* note 87, at 19 (dialogue of Rep. Edward R. Madigan, Member, H. Subcomm. on Transp. and Commerce, and Howard A. Heffron, Director, Office of Rail Public Counsel) (“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: . . . 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.”).

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Interest group involvement should improve policy through the adversarial clash of opposing interests, but this requires that all relevant interests participate on fair footing.<sup>108</sup> Not all groups participate equally, however. Private firms and trade groups have a sizable financial stake in the outcome, and they have the resources to research proposed rules, file comments, and keep a close eye on administrative agencies that may affect their financial interests.<sup>109</sup> Most consumers possess only a fractional stake in the outcome, and they lack the capital know-how to identify and organize in response to relevant agency proceedings.<sup>110</sup> Since substantial procedural obstacles to participation have been lowered to encourage appearance by interest groups and outside parties,<sup>111</sup> the failure of citizens to vindicate demands in agency proceedings now generally arises from the practical (as opposed to legal) obstacles to participation, such

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108. See Robert B. Leflar & Martin H. Rogol, *Consumer Participation in the Regulation of Public Utilities: A Model Act*, 13 HARV. J. ON LEGIS. 235, 241 (1976) (citing Richard Stewart, *The Reformation of American Administrative Law*, 88 HARV. L. REV. 1667, 1677–78, 1684 (1975)). This approach seems to presume that the adversarial clash of interests will yield a result that (all at once) most satisfies preferences, maximizes social welfare, and is in accord with the legislative delegation. It is possible, or indeed likely, however, that the result that yields the most satisfaction amongst involved parties, however, either imposes externalities or contradicts legislative intent. This question is bracketed for now and addressed further when examining the scope of the proxy advocate's mandate. See *infra* Part II.

109. See Marissa Martino Golden, *Interest Groups in the Rule-Making Process: Who Participates? Whose Voices Get Heard?*, 8 J. PUB. ADMIN. RES. & THEORY 245, 257 (1998) (“[B]usiness groups—whether they are corporations or trade associations—utilize much more sophisticated monitoring techniques than the smaller advocacy groups do.”).

110. These principles apply to consumer involvement in elections as well as agency decisionmaking. An interest group could try to change the agency's mind or change the agency by electing a new principal, but they must overcome the same barriers to participation. Consumers, however, may more easily affect agency proceedings since they require fewer resources than electoral contests.

111. Where the doctrinal barriers to citizen involvement in agency proceedings were once a significant obstacle to citizen participation, they are now an historical footnote. See *United Church of Christ v. FCC*, 359 F.2d 994, 1003–04 (D.C. Cir. 1966) (granting standing to consumers as a means of ensuring that the public voice is heard in regulatory proceedings); *United States v. Pub. Utils. Comm'n*, 151 F.2d 609, 613–14 (D.C. Cir. 1945) (granting standing to the United States to challenge the Public Utility Commission's actions in its customer capacity); see also Leflar & Rogol, *supra* note 108, at 245 (“A series of judicial decisions, legislative acts, and administrative rulings over the past decade has opened up the regulatory agencies to ‘private attorneys general’ . . .”). See generally Ernest Gellhorn, *Public Participation in Administrative Proceedings*, 81 YALE L.J. 359, 361 (1972) (“Most efforts on behalf of public intervention to date have been focused on establishing a ‘right’ to intervene. This battle has largely been won . . .”).

as the inability to form an interest group, participate in a proceeding, or convince a decisionmaker.

The first, and perhaps most significant, barrier to participation in agency proceedings is organization. Diffuse interests seeking public goods often face a significant collective action problem with respect to interest group formation. As explained by Mancur Olson, a collective action problem arises when an individual understands that she will share in the benefit of a non-excludable good whether she participates in the group effort or not.<sup>112</sup> If success requires the participation of multiple members of the group, and the other members of the group fail to participate, then no one will obtain the benefit, including the individual, regardless of whether she chose to participate.<sup>113</sup> Thus, it is only rational for her *not* to participate in the collective action. Such is the case with an individual considering whether to petition an agency for a desired policy.<sup>114</sup> While the benefits to the individual may be significant, they will not likely surpass the high initial costs of assembling a cohort of people willing to share the costs of establishing an organization to appear before the agency. Rather, “the marginal cost and benefit must be equal not only for the group as a whole, but also for each of its members.”<sup>115</sup> All of this is to say that if she cannot have the support of a group behind her in lobbying for a policy, she will not succeed, and thus she will not try without a guarantee that she will have support.

Yet diffuse interest groups are more successful than this (admittedly pessimistic) account would suggest. At the individual level, there are reasons for political involvement that cannot be explained purely by economic self-interest. People may participate for ideological, moral, and solidaristic reasons.<sup>116</sup> They may also be

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112. See generally MANCUR OLSON, *THE LOGIC OF COLLECTIVE ACTION: PUBLIC GOODS AND THE THEORY OF GROUPS* 10–22 (1971); see also Richard L. Revesz, *Federalism and Environmental Regulation: A Public Choice Analysis*, 115 HARV. L. REV. 553, 560–71 (2001).

113. Olson draws the analogy from a defection from monopoly pricing:

The individual member of the typical large organization is in a position analogous to that of the firm in a perfectly competitive market, or the taxpayer in the state: his own efforts will not have a noticeable effect on the situation of his organization, and he can enjoy any improvements brought about by others whether or not he has worked in support of his organization.

OLSON, *supra* note 112, at 16.

114. See Revesz, *supra* note 112, at 561–62.

115. *Id.* at 562.

116. See CROLEY, *supra* note 99, at 43 (“Although [interest group] members may have overlapping interests, they also have individualized interests.”).

subject to “bounded self-interest,” whereby people “care, or act as if they care, about others, even strangers, in some circumstances.”<sup>117</sup> Members of small groups may be more willing to contribute to collective goods, even when the costs exceed their direct benefits, since they are more likely to act out of concern for others in their group.<sup>118</sup> Additionally, consumers may form representative groups that can organize electoral campaigns and mobilize public attention, although they must overcome the obstacles to forming a group from a diffuse interest at the outset.<sup>119</sup> These tools are more important in influencing the elected government officials,<sup>120</sup> however, since bureaucrats may be insulated from direct electoral accountability, as by civil service rules.<sup>121</sup>

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117. Christine Jolls, Cass R. Sunstein & Richard Thaler, *A Behavioral Approach to Law and Economics*, 50 STAN. L. REV. 1471, 1479 (1998); see also *id.* at 1541 n.208 (“A standard argument for law under the conventional economic approach is that self-interested people will create collective irrationality; if people are boundedly self-interested, however, this problem may tend to disappear.”).

118. For a contrary view, see CROLEY, *supra* note 99, at 42. Croley notes the argument that collective action is more likely in small groups but argues that “[c]onceptually, there is no necessary connection between group size and the influence the marginal member’s contribution has on the probability that the good will be produced.” *Id.*

119. These may broadly grouped as the transaction costs of mobilization. For example, consumers of electricity may face transaction costs in organizing to drive down prices, thereby preventing full competition. See Joseph P. Tomain, *The Past and Future of Electricity Regulation*, 32 ENVTL. L. 435, 448 (2002). In starkest terms, the savings are dispersed over so many people that each consumer would only gain pennies in savings but would have to expend more than that (in resources or opportunity cost) to realize that gain. For a discussion of whether transaction costs are reduced in subnational jurisdictions for environmental lobbying, see Revesz, *supra* note 112, at 560; Joshua D. Sarnoff, *The Continuing Imperative (But Only from a National Perspective) for Federal Environmental Protection*, 7 DUKE ENVTL. L. & POL’Y F. 225, 285–86 (1997).

120. One should keep in mind that participation is neither universal nor equal. Rather, participation varies, demographically speaking, in terms of who participates and how much they do so. Citizen groups, for example, may not be as effective as corporations at tracking agency behavior. See Golden, *supra* note 109, at 258 & tbl.5 (showing that citizens groups are more likely to rely on informal networks to track agency action). While technology might have changed the nature of agency monitoring, there is still reason to believe that corporations are ahead of citizen groups with regard to agency monitoring, based on this evidence. See SIDNEY VERBA ET AL., *VOICE AND EQUALITY: CIVIC VOLUNTARISM IN AMERICAN POLITICS* 174–77 (1995) (noting that participation is not evenly distributed across all groups, and that some interests rely on proxies).

121. RONALD N. JOHNSON & GARY D. LIBECAP, *THE FEDERAL CIVIL SERVICE SYSTEM AND THE PROBLEM OF BUREAUCRACY* 8 (1994) (“In structuring the bureaucracy, the president and the Congress had an incentive to insulate senior-level officials from political manipulation in the administration of policy. Achieving this goal

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Additionally, diffuse interest groups have been slow to organize before administrative proceedings.<sup>122</sup> One legislature-commissioned report in 1977 showed the minimal representation of diffuse public interests, as opposed to the robust representation of private (business) interests.<sup>123</sup> In recent years, however, studies have reflected increasing interest group participation in agency proceedings.<sup>124</sup>

Even if diffuse consumers can organize, they must also overcome a second obstacle: the difficulty and cost of participating in agency proceedings. Citizen groups often lack adequate notice of upcoming proceedings.<sup>125</sup> As a result, a great many decisions and proceedings are conducted without any participation by public interest groups, and some agencies have received “literally no attention at all” from public interest groups.<sup>126</sup> Businesses, conversely, are notified by trade groups, which they organize and join due to their significant vested financial interest.<sup>127</sup> Even if a diffuse group

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required shielding them from arbitrary dismissals and limiting the role of political favoritism in promotion and advancement.”).

122. For a general discussion of appearance of public interest groups, firms, and individuals before administrative agencies, see CROLEY, *supra* note 99, at 123–25. R

123. See PUBLIC PARTICIPATION STUDY, *supra* note 39, at 16 (“[W]e found that in agency after agency, participation by the regulated industry predominates—often overwhelmingly.”). When agencies try to stimulate citizen participation, the individuals active in such programs tend to have been previously active in agency affairs, include a large component of representatives from other government agencies, and represent a small portion of the public affected by the program, skewing toward the well-educated and affluent. Walter A. Rosenbaum, *The Paradoxes of Public Participation*, 8 ADMIN. & SOC’Y 355, 372 (1976).

124. See Scott R. Furlong & Cornelius M. Kerwin, *Interest Group Participation in Rule Making: A Decade of Change*, 15 J. PUB. ADMIN. RES. & THEORY 353, 360–62 (2005); Golden, *supra* note 109, at 255; Yackee & Yackee, *supra* note 38. R

125. See Golden, *supra* note 109, at 257–59; Leflar & Rogol, *supra* note 108, at 245–46. Private citizens often lack the time and resources to monitor the day-to-day happenings of agencies. *Id.* However, the Internet has made this process considerably easier and more accessible. R

126. See Peter H. Schuck, *Public Interest Groups and the Policy Process*, 37 PUB. ADMIN. REV. 132, 137 (1977) (indicating the high threshold costs of participation). In a review of meetings held by OIRA to review pending rules, fifty-six percent were attended solely by so-called “narrow-interests” while ten per cent were attended only by “broad-based” interests. Steven Croley, *White House Review of Agency Rulemaking: An Empirical Investigation*, 70 U. CHI. L. REV. 821, 871 (2003) (noting that twenty eight percent of meetings had representatives from both narrow- and broad-based interests).

127. See Golden, *supra* note 109, at 263. R

is aware of a proceeding, it may lack expertise and thus not be able to participate adequately.<sup>128</sup>

Participation in proceedings is costly and complex and may require a high threshold of spending beneath which involvement is either impossible or meaningless.<sup>129</sup> These costs are generally incurred due to legal fees, technical assistance, and clerical costs imposed by the agencies.<sup>130</sup> Whether the cost is \$30,000-40,000 to participate in FDA proceedings<sup>131</sup> or \$100,000 to contest a utility rate increase request,<sup>132</sup> the cost of fighting against an agency decision may outstrip the group's annual budget<sup>133</sup> or cost more to fight than it would benefit the consumers.<sup>134</sup> If participation costs are particularly high, public interest groups would understandably choose other, cheaper battles to fight, perhaps hoping to capitalize on those victories in fundraising revenue that could be used in later agency proceedings. Additionally, if the costs exceed benefits, involvement would require marginal contributions from group members in excess of the marginal benefit, rendering participation

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128. See GORMLEY, *supra* note 8, at 164. The generalization that citizen groups lack expertise does not always hold true. In some cases, they possess considerable and invaluable expertise. See, e.g., Schuck, *supra* note 126, at 134 (describing a public interest law firm, usually supported by a foundation, a university, or by fees from public interest groups that furnishes formal legal representation to unorganized as well as organized interests); *About NRDC: Who We Are*, NATURAL RES. DEF. COUNCIL, [http://www.nrdc.org/about/who\\_we\\_are.asp](http://www.nrdc.org/about/who_we_are.asp) (last visited Oct. 9, 2011) (describing the NRDC's "staff of more than 300 lawyers, scientists, and policy experts"). Additionally, for a discussion of the costs of expert witnesses, see Roger C. Cramton, *The Why, Where and How of Broadened Public Participation in the Administrative Process*, 60 GEO. L.J. 525, 540 (1972). Not all proceedings are complex, however. In utility regulation, such citizen groups, termed "grassroots advocates" by William Gormley, proved themselves effective in low complexity issues, such as the establishment of lifeline rates. See GORMLEY, *supra* note 8, at 165.

129. For example, participation in a "simple" rulemaking at the CAB (filing an answer to a petition for reconsideration) cost six percent of an interest group's total annual budget. See PUBLIC PARTICIPATION STUDY, *supra* note 39, at 19. Notably, this was for clerical costs alone. Today, where it is easy to find and file into rulemaking dockets on the Internet, these figures may be lower. However, where technical expertise or computational power is required to formulate comments, as is the case for ratemaking, the costs are still significant.

130. See PUBLIC PARTICIPATION STUDY, *supra* note 39, at 17-18.

131. Schuck, *supra* note 126, at 137 (in 1972 dollars).

132. Leflar & Rogol, *supra* note 108, at 246.

133. Schuck, *supra* note 126, at 137.

134. That consumers would elect not to participate in such a proceeding may be described as the neopluralist view of agency behavior, wherein a group will spend up to an amount equal to the value that its members place on a desired political good. See CROLEY, *supra* note 99, at 53 (citing Gary S. Becker, *A Theory of Competition Among Pressure Groups for Political Influence*, 98 Q.J. ECON. 371 (1983)).

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economically irrational, as discussed above.<sup>135</sup> Since the public interest group may be opposed by a firm spending considerably more money, the cost of successful participation may be much higher than merely the cost of appearing.<sup>136</sup>

As the idea of threshold spending illustrates, the benefits from interest group participation may not have a strictly linear relationship to cost. Consider the costs and benefits to a group of consumers from participating in a hypothetical agency proceeding. If participation were a threshold good, like paying \$100 in fees merely to file into the docket, spending any amount less than that will provide no benefits.<sup>137</sup> If the relationship between the costs of representation before the agency and benefits from the agency were linear, a consumer group might save \$200 dollars for its members for every \$100 it spends before the agency. This would be true for the first \$100 (\$200 of savings) as well for the next \$1,000 (\$2,000 of savings). However, there may be increasing marginal gains to participation, meaning that the consumer group saves more money for each additional dollar spent beyond a certain point. For example, after spending \$1,000, every additional \$100 spent may save the consumers \$300. This is quite plausible for consumer representation before an agency: Spending more allows one to present technical evidence and investigate the technical evidence of opponents. Additionally, the consumer group could then become a frequent participant in the proceedings, and thus be taken more credibly as a repeat player.<sup>138</sup> Now, if the consumer group spent \$1,500, it

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135. See Revesz, *supra* note 112, at 560–71 (describing Olson’s analysis of collective action problems). R

136. It is difficult to precisely describe the resource disparity between private firms and public interest groups in a given administrative proceeding, but it most certainly exists. In Civil Aeronautics Board (CAB) proceedings in 1976, the eleven trunk airlines spent \$2,851,000 on outside counsel. The one public interest group active before that agency, the Aviation Consumer Action Group, had a total budget of \$40,000, of which half was spent on CAB proceedings. PUBLIC PARTICIPATION STUDY, *supra* note 39, at 18–19.

137. Schuck, *supra* note 126. In some cases, the marginal gains from further participation are zero, insofar as the benefits to participation are of a threshold nature, where the group benefits just by appearing before the agency with no greater benefit for spending more. R

138. Mark Seidenfeld, *The Psychology of Accountability and Political Review of Agency Rules*, 51 DUKE L.J. 1059, 1078–80 (2001). That is to say, an interest group that has more people and more funding, or that participates in more agency decisions with more technical expertise, and does so over a longer period of time, may achieve disproportionately better results than an interest group with fewer resources. Agencies may be more responsive to parties who consistently appear before them or who are more likely to litigate adverse decisions.

would save \$3,500.<sup>139</sup> At some point, however, there are likely to be decreasing marginal gains to participation. After spending \$1,000,000 on this hypothetical agency, the next dollar spent would not provide the same savings as the first, if only because the agency can only provide so many benefits to the consumers.

One solution to the cost of funding participation has been to reimburse certain parties involved in agency proceedings.<sup>140</sup> These so-called “intervenor funding” provisions can help citizen groups contest agency proceedings where budget shortfalls would otherwise prevent participation. However, many of these statutes only allow reimbursement after the action, rather than upfront payment of costs, meaning the problems presented by high upfront costs are unresolved.<sup>141</sup> Fee reimbursement provisions are still in force,<sup>142</sup> but some have been repealed.<sup>143</sup>

Even if an interest group organizes and participates, it is of no matter unless its voice is heard credibly by the adjudicator. Ensuring credible hearing by the agency is the third difficulty faced by interest groups. Under the traditional model of bureaucratic behavior, this responsiveness to interest groups was inherently malign,<sup>144</sup> but it is a necessity in the interest group representation model of

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139. \$2,000 in savings for the first \$1,000 invested, and \$1,500 for the next \$500.

140. See 1 MARY FRANCES DERFNER & ARTHUR D. WOLF, COURT AWARDED ATTORNEY FEES ¶ 5.05[3] (1992).

141. See generally Michael I. Jeffery, *Intervenor Funding as the Key to Effective Citizen Participation in Environmental Decision-Making: Putting the People Back into the Picture*, 19 ARIZ. J. INT'L & COMP. L. 643 (2002) (arguing that intervenor funding—rather than award of costs—will best improve the quality of environmental proceedings).

142. Statutes which still contain attorney fee provisions include the Veterans Employment Opportunities Act of 1998, 5 U.S.C. § 3330c(b) (2006); the Consumer Products Safety Act, 15 U.S.C. § 2056(c) (2006); the Toxic Substances Control Act, 15 U.S.C. § 2605(c)(4)(A) (2006); the Federal Power Act with respect to the Federal Energy Regulatory Commission, 16 U.S.C. § 825q-1(b)(2) (2006); the Public Utility Regulatory Policies Act of 1978, 16 U.S.C. § 2632(a) (2006); the State Department Basic Authorities Act of 1956, 22 U.S.C. § 2692 (2006); and the Surface Mining Control and Reclamation Act of 1977, 30 U.S.C. § 1275(e) (2006). Michigan's proxy advocate also functions, in part, by this approach: an oversight board funds actions by private parties and the Attorney General.

143. For example, the Federal Trade Commission's attorney fee provision section, 15 U.S.C. § 57a(h) (1980), the most widely discussed in the literature from the late 1970s and in use since 1975, was repealed in 1994. See Act of Aug. 26, 1994, Pub. L. No. 103-312, § 3, 108 Stat. 1691 (1994).

144. See Stewart, *supra* note 37, at 1684 (“The sense of uneasiness aroused by this resurgence of discretion is heightened by perceived biases in the results of the agency balancing process . . .”).

administrative behavior.<sup>145</sup> However, such representation can only remain benign so long as it occurs in a fair proceeding.<sup>146</sup>

Beyond the three hurdles any interest group must overcome to be heard by an agency, different kinds of interest groups may influence agencies differently. However, scholars have yet to provide a clear picture of how different types of interest groups influence agencies.<sup>147</sup> Despite increasing congressional delegations of authority to administrative agencies,<sup>148</sup> academics have continued to focus on the influence of interest groups on the legislative process rather than on the administrative process.<sup>149</sup> The few studies of interest group influence in agencies are divided. One study conducted mail and telephone surveys of different interest groups.<sup>150</sup> This survey, however, relied on the groups to self-report their level of “influence” on a one-to-five scale.<sup>151</sup> Another study measured thirty final and proposed rules against 17,000 public comments; it concluded that business interests have a disproportionate impact on agency decisions.<sup>152</sup> However, a previous study that used a similar compari-

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145. *See id.* at 1684–85.

146. Without interrogating the question of “what is fair” down to first principles, it should be sufficient to say that a “fair” process affords the process due to the participants. This process should provide some combination of adequate notice, confrontation of witnesses and presentation of evidence, the ability to retain counsel, an impartial decisionmaker, a decision resting on the rules and evidence presented at the proceeding, and a statement of reason for the decision. *Mathews v. Eldridge*, 424 U.S. 319, 325 n.4 (1976) (citing *Goldberg v. Kelly*, 397 U.S. 254, 266–71 (1970)).

147. One recent and notable exception to this is a recent paper by three administrative law scholars. Wendy Wagner et al., *Rulemaking in the Shade: An Empirical Study of EPA’s Air Toxic Emission Standards*, 63 ADMIN. L. REV. 99 (2011) (tracing interest groups’ engagement and influence through the lifecycle of EPA rulemakings).

148. At the same time that Congress has yielded discretion to agencies, presidents have tried to exercise more control over the administrative state. *See, e.g., Croley, supra* note 126, at 821–24.

149. Golden, *supra* note 109, at 246 (“Yet despite all of the attention paid to interest group influence in Congress, little attention has been paid to this facet of agency rulemaking. Most scholarly attention has focused on either the technical facets of rule making, such as the use of cost-benefit analysis, or on interest groups in the congressional context.”).

150. Scott R. Furlong, *Interest Group Influence on Rule Making*, 29 ADMIN. & SOC’Y 325, 331–32 (1997) (describing the four types of groups as trade associations, citizen groups, corporations, and unions).

151. *Id.* at 333. For a critique of the methodology of this study, see Golden, *supra* note 109, at 248 (critiquing scholarship’s focus on Washington listed groups and noting the groups’ incentive to overreport their influence in self-reported surveys).

152. Yackee & Yackee, *supra* note 38, at 128–29.

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son of final and proposed rules found the comments of business groups did not have a disproportionate impact;<sup>153</sup> rather, influence was contingent on the “the degree of conflict among commenters, the sides in the conflict, and the paucity of repeat players.”<sup>154</sup>

Not only do different interest groups have different influences on policy makers, different policy makers are subject to different influences. Although diffuse and concentrated interest groups compete for regulatory rents before both the legislature and administrative agencies, they influence legislators and administrators differently. Agencies make decisions subject to a variety of constraints and motivations. The agency is overseen by and administers laws passed by legislators, who are in turn constrained by the electorate and subject to their own internal motivations.<sup>155</sup> The agency itself is accountable to the executive, which has its own interests and goals, and the agency further is constrained by administrative processes, the accountability of agency employees, and the internal motivations of agency employees. An interested public may decrease the “slack” given to bureaucrats and legislators, thus decreasing the influence of the government official’s personal goals.<sup>156</sup> As such, the agency relies on authority delegated and discretion granted to it by the executive, the legislature, and the public.<sup>157</sup> Since the legislature, the executive, the agency, and the public influence the policy outcomes, regulated firms and consumers compete to win attention and support for the policies they support.

The nature of the policymaker is not the only variable that determines the effectiveness of consumer groups. Rather, many factors affect consumer success: the decisionmaker, the mechanism of

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153. See Golden, *supra* note 109, at 262 (surveying ten rules from EPA, HUD, and NHTSA in the Clinton administration and finding no significant business influence). For a survey of the methodology of the Yackee & Yackee and Golden studies, see Yackee & Yackee, *supra* note 38, at 129 (critiquing the coding and sample size of the Golden study).

154. Golden, *supra* note 109, at 261.

155. See also Michael E. Levine & Jennifer L. Forrence, *Regulatory Capture, Public Interest, and the Public Agenda: Toward a Synthesis*, 6 J.L. ECON. & ORG. 167, 176–78 (1990) (discussing the “slack” between the general polity and the regulator, which provides the regulator with policy discretion as well as with “ideological consumption” in the form of policies that are favored by the regulator but not necessarily in the public interest).

156. *Id.* at 186.

157. The scope of public involvement depends directly on the structure of the agency. If the PUC Commissioners are elected, public responsiveness is much more important than if they are appointed by the executive, whose broader policy portfolio can be used to assuage public opinion with other, higher profile policies while appointing a hostile commissioner.

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influence, and the policy area. Legislators and bureaucrats operate in very different contexts, and thus they may be differently affected by interest group influence. Laws may restrict agency decisionmaking, such as by limiting *ex parte* contacts with interest groups.<sup>158</sup> Legislators might have no such restrictions. The personal and professional objectives of legislators may also be different from those of career bureaucrats. Administrators and legislators may also be more or less vulnerable to capture.<sup>159</sup>

Legislators and bureaucrats may have slack, or situations in which the agent is less closely supervised by its principal and thus capable of exercising discretion, but the factors that contribute to such slack differ between legislators and bureaucrats.<sup>160</sup> Bureaucrats frequently work on highly technical matters that are more difficult for the polity to understand or learn about, let alone organize opposition to. Legislators, by contrast, are subject to frequent criticism by electoral opponents and the press. Even when bureaucrats see their slack reduced, it is for different reasons: they may be restricted by new laws or judicial decisions. Although these may be a product of pressure on a legislator, the pressure put upon the bureaucrat is significantly attenuated. Legislators and bureaucrats thus vary both in where they have slack and in the way that slack-reducing factors affect them.

The decisionmaker also dictates what methods of influence may be used. Here, consumer groups and private interests may have very different strengths. For example, consumer groups can bring attention to issues, provide public credibility, and muster grass roots organizational strength. These are all significant powers, but they may not influence bureaucrats as effectively as they would democratically accountable legislators. Conversely, concentrated interests can more easily make promises of post-government employment, which can persuade agency decisionmakers as well as legislators.

The method of influence may be dictated by other factors as well, but not all methods of influence are equally effective.<sup>161</sup> For example, it might be more difficult to capture public attention regarding a highly technical issue, and legislators may be more easily

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158. 5 U.S.C. §§ 557(d)(1), 551(14) (2006).

159. Levine & Forrence, *supra* note 155, at 185–91 (outlining various factors that influence the amount of “slack”).

160. *Id.*

161. See JEFFREY M. BERRY, *THE NEW LIBERALISM: THE RISING POWER OF CITIZEN GROUPS* 93–102 (1999); JACK L. WALKER, *MOBILIZING INTEREST GROUPS IN AMERICA* 104–14 (1991).

influenced where there is a lack of public scrutiny. Some choices may be predetermined by the administrative process. For example, if a ratemaking proceeding is already before the PUC, the parties would likely appear before the PUC rather than before the governor.<sup>162</sup> If, however, there are broader issues of policy at stake, or the interest group wants to alter the selection of the commissioners, the stakeholders may lobby the commission's principal—the executive, if the commissioners are appointed, or the electorate, if they are elected.

These factors set the stage for competition between interest groups, but there are sometimes wholly external influences on agency decisions. For example, the governor may make appointments as a form of political patronage, and voters may make decisions for public utility commissioners on such low information as to make them practically arbitrary. There is no simple explanation of why certain policies pass and others founder, of why some interest groups are successful and others are not, but these factors help explain why interest groups behave the way they do.

Attempts to increase participation, such that agencies more accurately reflect public interests, must also guard against opening opportunities for regulated industries to exercise undue influence. The history of the Consumer Product Safety Act provides several instructive lessons. The petition process under § 10, which was revoked by statute several years after its initial passage, shows one possible downside to public involvement.<sup>163</sup> Though Congress did not intend the petition process to set the regulatory agenda of the Consumer Product Safety Commission (CPSC), the CPSC felt it had limited discretion to deny petitions and underestimated the effort it would take to handle the petition docket.<sup>164</sup> Indeed, not only was the standard setting process itself arduous, but the CPSC would conduct hearings on all petitions, even when petitioners supplied little support for the proposed standard or when the proposal was

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162. Ex parte communications between the governor and the PUC are frowned upon by administrative procedure acts. *Cf. supra* note 160. It is also more likely difficult to convince a governor to focus resources and attention on a highly specialized issue, as compared to convincing an agency that is already required to make a decision. Of course, if one of the groups can offer the Governor electoral resources, they may move up on his priority list.

163. See Teresa M. Schwartz, *The Consumer Product Safety Commission: A Flawed Product of the Consumer Decade*, 51 *GEO. WASH. L. REV.* 32, 47–49 (1982) (explaining that the Commission initially adopted a reactive posture to consumer petitions).

164. *Id.*

meritless on its face.<sup>165</sup> As with most agencies that permit a similar mechanism, the petition process began to be used by industry as a means of pursuing exemptions.<sup>166</sup>

These obstacles explain why consumers face such an uphill battle for representation. Even when consumers can organize, they must fund participation in costly agency proceedings, and still, there is no guarantee that they will be heard by the agency decisionmaker.

### *B. Understanding the Role of the Proxy Advocate*

Given the advantages that private firms have over diffuse consumers in influencing agency proceedings, it is understandable that policymakers might turn to solutions like proxy advocates to ensure consumer voice. This section provides the reader with a brief summary of how a proxy advocate can mitigate these disadvantages.

Interest groups and institutional design are heavily interrelated. Agencies are influenced by interest groups, and interest group decisions are in turn influenced by agency design. Proxy advocates change the environment in which the agency operates. Likewise, proxy advocates may be subject to similar interest group influence as agencies: they rely on public support; are subject to internal administrative constraints; and are subject to some sort of oversight. The most significant difference between proxy advocates and agencies is that proxy advocates are intended to be faithful advocates for consumer interests and, as such, should be designed to prevent other interests (such as utility or industry) from commandeering them. Once a proxy advocate is created, moreover, its existence influences the operation of the original agency. The agency is presented with another “interest group,” in the sense that another agency is now a party regularly appearing before it, and the interest groups are operating in a different structural environment.

Begin with a simplified and idealized version of proxy advocate behavior. The commission, which had been making decisions with little or no consumer input, is now presented with a consistently present and technically capable voice speaking for consumers. Whereas the agency would have previously heard only the voice of

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165. *Id.* at 49–52 (discussing the petition for a pool slide standard, which was supported by industry members with a financial stake in a mandatory product standard and which embroiled the CPSC in a proceeding to the detriment “of the Commission and consumers”).

166. *Id.* at 54; *see also* Scalia & Goodman, *supra* note 57, at 951–52 (noting that the proposed consumer advocate would have been a necessary counterweight to the petition process to ensure that such actions are taken to benefit consumers).

the regulated companies, the proxy advocate presents a competing voice. Since agencies are required to base their decisions on the evidence presented,<sup>167</sup> this new input can be very significant. The agency may still side with the regulated company, but it must provide a basis in the record for disagreeing with the consumer perspective. If the agency fails to provide such reasons, the proxy advocate can prevail on appeal since the evidence is in the record.<sup>168</sup> The proxy advocate, in this vision, presents a voice for consumers by creating an agency that is, by definition, captured by consumers.

Consider the decisions of residential and commercial ratepayers before and after such a proxy advocate is created. Prior to the creation of the proxy advocate, consumers overburdened by utility bills may have directly lobbied the PUC, lobbied its principal, or simply not have lobbied at all. After the proxy advocate is created, those consumers might redirect their activities to lobby the proxy advocate, and other consumers who may not have participated at all may be mobilized to act. There are several reasons why consumers would lobby the proxy advocate. First, proxy advocates might reach out to consumers to solicit their views.<sup>169</sup> Second, proxy advocate statutes may empower the office to serve as a clearinghouse for consumer complaints.<sup>170</sup> Additionally, proxy advocates reduce the cost

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167. ARTHUR EARL BONFIELD & MICHAEL ASIMOW, *STATE AND FEDERAL ADMINISTRATIVE LAW* 223–24, 363–64 (1989) (outlining the rationales behind the requirement that an agency state its findings and reasons).

168. *Id.* at 569–77 (discussing review of agency decisions of fact, particularly in state court).

169. This may be a statutory mandate, as in Texas, or it may just be that websites and consumer information direct consumers to the proxy advocate. TEX. UTIL. CODE ANN. § 13.064 (West 1997). If a utility commission has a consumer department, it may not direct consumers to an attorney general or independent agency. *Compare State and Local Consumer Agencies in Arizona*, USA.GOV, <http://www.usa.gov/directory/stateconsumer/arizona.shtml> (last visited Oct. 10, 2011) (designating the Arizona Office of the Attorney General as a state consumer protection office), *with Consumer Services*, ARIZ. CORP. COMM'N, <http://www.azcc.gov/divisions/utilities/consumerservices.asp> (last visited Oct. 10, 2011) (noting only the PUC's consumer services). *See also Consumer Information*, PA. PUB. UTIL. COMM'N, <http://www.puc.state.pa.us/general/consumereducation.aspx> (last visited Oct. 10, 2011) (outlining the sources of information available to consumers). Searches for “complain about utility rates Colorado” on Google.com returns that state's Office of Consumer Counsel as the first result.

170. *See, e.g.*, HAW. REV. STAT. § 269-55 (2007); KY. REV. STAT. ANN. § 367.150 (LexisNexis 2008); ME. REV. STAT. ANN. tit. 35-A, § 1702(4) (2010); N.Y. EXEC. LAW § 94-a(3)(1) (McKinney 2011); OR. REV. STAT. § 774.160 (2009); N.C. GEN. STAT. ANN. § 62-15(d)(7) (West 2000 & Supp. 2011).

of intervening before the PUC.<sup>171</sup> Lastly, if the PUC is seen as hostile, consumers—and even consumer groups—may try to work with the agency more hospitable to their interests. If a consumer believes that her electricity rates are too high, the costs of simply complaining, by phone or letter, to the proxy advocate and to the PUC will be equal. However, complaining to the proxy advocate might mobilize its technical expertise on behalf of the consumer's cause. Each of these factors brings consumers and the proxy advocate into direct contact. The proxy advocate then appears before the PUC, relaying these opinions.<sup>172</sup> Although a proxy advocate cannot bind the determination of the agency,<sup>173</sup> it can introduce evidence into the record that the commission must evaluate in accordance with administrative procedures.<sup>174</sup> The PUC could have easily disregarded a consumer's conclusory complaint, but it requires more effort to deny claims supported by technical expertise.

If proxy advocates are created to overcome consumers' inability to organize, the picture presented thus far shows that consumers may have new and different problems to overcome. First, they may have to compete with organized consumers also represented by the proxy advocate, such as commercial ratepayers. The connection between a proxy advocate and its underrepresented constituents may weaken if there are more organized interests to whom it is also accountable. Second, consumers may have to compete to influence the proxy advocate's principal to ensure that a responsive advocate is even appointed to lead the office. If they fail at this, and they are thus connected to a proxy advocate controlled by a captured principal, their efforts are entirely wasted. Monitoring the proxy advocate and expressing their concerns to it will not change anything, since the advocate will represent the organized interest.<sup>175</sup> In such a case, consumers would be better off monitoring the agency directly.

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171. Holburn & Vanden Bergh, *supra* note 42, at 47 (“[B]y granting automatic intervenor status to advocates, and by providing financial resources, state advocacy legislation substantially improved the level of consumer representation in administrative processes.”).

172. Since the proxy advocate may also be empowered to suggest legislative reforms and make recommendations to the executive, it may also be suggested that the proxy advocate appears before the principal in those states where PUC commissioners are appointed by the governor and confirmed by the legislature.

173. *See infra* Part IV.

174. The rate regulation process is subject to due process protections. Among these is a requirement to give reasons in response to comments. *See, e.g.*, *United States v. Fla. E. Coast Ry. Co.*, 410 U.S. 224, 238–246 (1973) (discussing rate regulation in due process terms).

175. If an entity is responsive to public pressure, it follows that the interest group that is best able to exert that pressure will accrue the greatest benefit from

Many of these problems emerge when proxy advocates have broader constituencies, such as all consumers (including commercial ratepayers), rather than just residential ones. However, if a proxy advocate must be convinced to adopt the views of the under-represented constituency, it must still rely on mobilization. Residential consumers are thus back where they started, although now they are trying to police the proxy advocate rather than the PUC. As these consumers focus on the proxy advocate, utilities meanwhile continue to pressure the PUC and its principal directly.<sup>176</sup> This scenario risks misallocating consumer resources, since they will be trying to influence one agency that is in turn trying to influence another.

This potential misallocation of resources can be easily remedied, however. The constituencies of proxy advocates can be narrowly drawn to only include the groups most in need of representation. Residential consumers are in the greatest need of such aid; they are the most diffuse and see the smallest gain per member from organizing for public goods. A narrowly drawn constituency also ensures that diffuse interests are not forced to compete with organized interests. Where the proxy advocate can identify and represent the consumer interest, such as by acting as a clearinghouse for complaints<sup>177</sup> or by conducting consumer outreach,<sup>178</sup> it can reduce the chances of being commandeered by organized interests.

Just as proxy advocates may be captured by organized consumer interests, they may be accountable to a principal who is in turn beholden to a particular interest group.<sup>179</sup> A proxy advocate is

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that entity. Since consumers are less able to organize and exert influence, it likewise follows that organized interests will be better represented.

176. Generally, proxy advocates do not represent industrial consumers. Rather, their mandate is written to include residential ratepayers, and sometimes commercial ratepayers. See *infra* Part II.C.

177. See, e.g., ARIZ. REV. STAT. ANN. §§ 40-461, 40-464(C) (2011); HAW. REV. STAT. § 269-55 (2007); IND. CODE ANN. § 8-1-1.1-8.1 (West 2010). See also the discussion of the Office of the Consumer Advocate, *infra* notes 254–60.

178. See TEX. UTIL. CODE ANN. § 13.064 (West 1997). Also relevant is the discussion of the Office of Public Counsel, *supra* Part I.B.

179. Although a proxy advocate can help consumer interests be heard in the agency's proceedings, it is unable to represent consumers before the agency's principal, or help consumers organize to influence the agency or its principal directly. The interests who oppose consumers, however, appear directly before the agency and influence its principal. At best, a proxy advocate can commission studies and suggest legislation, but it cannot harness the same electoral resources that utilities can provide. While consumers as a diffuse group have such potential to marshal voters, this returns consumers to square one: they need to organize to provide

accountable to a principal in the same way that any agency is: Someone, frequently the Governor, has the power to appoint the proxy advocate and may have the power to either hinder their efforts, by threats of removal or reducing funding, or help, such as by supporting them against political attacks or allocating them more resources and power. That is to say, if a proxy advocate is accountable to a Governor who relies on utility companies for electoral support, the proxy advocate may be undermined from above. Utility companies can influence selection of proxy advocates just as they can influence selection of utility commissioners.<sup>180</sup>

Ensuring that the proxy advocate cannot be captured through the principal is considerably more difficult than adjusting the constituency. The proxy advocate must be held accountable in a way that precludes undue involvement by concentrated interests. Some oversight mechanisms ameliorate the problem of lack of accountability, such as requiring certain qualifications of proxy advocates. As will be seen in Part III, one likely solution, independence, might cause as many problems as it solves.

Although consumers may attempt to influence all relevant parties—the proxy advocate, the PUC, and their respective principals—this is unlikely for several reasons. First, consumers have limited financial and political resources to expend on monitoring and lobbying. Second, as discussed, when competing for beneficial policies from the PUC, consumers will be competing against utilities and industrial consumers. While they will not always lose this battle, it may dissuade them from pursuing this course of action, especially when there is an active proxy advocate.

Proxy advocates promise to improve consumer representation, but they introduce a host of new problems. Although these may be resolved by appointing “good” proxy advocates who zealously protect the consumer interest, structural assurances of effective advocacy are preferable. But what does a properly designed proxy advocate look like? Parts II.C and II.D survey the different designs used by state and federal proxy advocates, respectively.

Both state and federal proxy advocates employ a variety of designs. They are not only given different powers but also monitored and controlled in a variety of ways. This variation provides us a number of points of comparison. Most significantly, the differences

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such electoral benefits, just as they would have had to organize to fulfill the role of the proxy advocate.

180. Imposing statutory qualifications for proxy advocates may reduce the likelihood that utilities can encourage appointment of insidious proxy advocates. See *infra* Part II.C.

in accountability allow comparisons among state proxy advocates and between those state proxy advocates and their federal counterparts. By comparing how these state and federal proxy advocates perform, Part III will demonstrate how an effective proxy advocate can be designed.

### C. Design of State Proxy Advocates

Comparing state and federal proxy advocates requires a baseline understanding of how these entities function. This section introduces state proxy advocates by describing their powers and the oversight mechanisms used to control them. The Appendix contains citations to the statutes that govern each state's proxy advocate.<sup>181</sup>

The most basic of a proxy advocate's powers is the right of appearance before the state utility regulatory commission. The right of appearance is the basis of the proxy advocate's function and has been affirmed by state courts.<sup>182</sup> While states vary in their wording, most grant the proxy advocate power to initiate and intervene in administrative proceedings, as well as to appeal such rulings before appropriate courts.<sup>183</sup> These powers of appearance are particularly important, since resolution of an issue by a proxy advocate can bind private litigants by *res judicata*.<sup>184</sup>

In addition to the right of appearance, proxy advocates are also given powers and privileges that make them more effective in

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181. See *infra* Appendix. For the purposes of this discussion, Washington, D.C.'s Office of People's Counsel is counted as a state proxy advocate.

182. For a discussion of the right to appeal, see *State ex rel. Mo. Power & Light Co. v. Riley*, 546 S.W.2d 792 (Mo. Ct. App. 1977) (concluding that the Public Counsel of Missouri had authority to appeal Public Service Commission's decision). However, the proxy advocate may not have always had such powers. See *State ex rel. McKittrick v. Mo. Pub. Serv. Comm'n*, 175 S.W.2d 857, 862, 865 (Mo. 1943) (en banc) (holding that the Attorney General lacked a right to intervene on behalf of consumer interests, or to apply for a rehearing, writ of review, and appeal, because that right was reserved to the General Counsel).

183. All proxy advocates can appear before the state regulatory commission, and many more can appear before other relevant state and federal agencies. See MD. CODE ANN., PUB. UTIL. § 2-205(b) (LexisNexis 2010) (noting that the proxy advocate may appear before "any federal or State unit"); MINN. STAT. ANN. § 8.33(6) (West 2005) (providing for intervention in federal proceedings). *Contra* Mo. REV. STAT. § 386.710(2) (2000) (referring only to appearance before the Commission).

184. See *Brandon v. Ark. W. Gas Co.*, 61 S.W.3d 193, 201-03 (Ark. Ct. App. 2001) (holding that private litigants had a full and fair opportunity to litigate the issue of refunds when the Attorney General, acting as a proxy advocate, entered into a settlement that did not allow for refunds).

such proceedings. Some states require that the PUCs provide information directly to the proxy advocate upon its receipt by the PUC.<sup>185</sup> Statutes may also give the proxy advocate the right to inspect PUC records<sup>186</sup> and the power to issue subpoenas.<sup>187</sup> Some states give proxy advocates additional powers, beyond appearance before the Commission, either to complement those efforts<sup>188</sup> or to fulfill other consumer-minded goals.<sup>189</sup>

While states grant fairly uniform powers to proxy advocates, they differ widely in the oversight mechanisms they use to regulate proxy advocates. States generally use two types of controls: *ex ante* restrictions on proxy advocate priorities and discretion, and *ex post* mechanisms that ensure political accountability.

One means of controlling a proxy advocate is by setting clear priorities for the office upon its creation, as by defining the proxy advocate's constituency.<sup>190</sup> Such priorities clearly define the diffuse interests that the proxy advocate should aid.<sup>191</sup> By contrast, where a constituency is not defined, proxy advocates are given free reign in how to allocate their resources. Of the forty-five states with proxy advocates, twenty-seven are tasked with defending the public interest generally. While only five states require the proxy advocate to defend residential consumers,<sup>192</sup> twelve states have proxy advocates represent residential, small business, and agricultural interests.<sup>193</sup> A further two states define the proxy advocate's mission as represent-

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185. See, e.g., ME. REV. STAT. ANN. tit. 35-A, § 1708 (2010).

186. See, e.g., DEL. CODE ANN. tit. 29, § 8716(d)(5) (2003 & Supp. 2010).

187. See, e.g., CAL. PUB. UTIL. CODE § 309.5(e) (West 2004) ("The division may compel the production or disclosure of any information it deems necessary to perform its duties from entities regulated by the commission . . .").

188. See OHIO REV. CODE ANN. § 4911.02(B)(2)(d) (West 2010) (permitting "long range studies concerning various topics relevant to the rates charged to residential consumers").

189. See N.H. REV. STAT. ANN. § 363:28(V) (LexisNexis 2008) (directing the proxy advocate to publicize programs that help low income telephone customers).

190. A proxy advocate's rights of appearance may also be limited by its substantive grant of authority. See, e.g., GA. CODE ANN. § 46-10-4 (2004) (jurisdiction extends to defend the customers of any utility doing business in the state); ME. REV. STAT. ANN. tit. 35-A, § 1702(5) (same); OHIO REV. CODE ANN. § 4911.14 (West 2010) (jurisdiction limited to parties lying wholly within the state or, when the party lies partly within the state, to the part doing business within the state).

191. These are generally interests who are unable to appear on their own behalf.

192. One example is Maryland. See MD. CODE ANN., PUB. UTIL. § 2-204 (Lexis 2010) (residential and noncommercial).

193. One of the states is California. See CAL. PUB. UTIL. CODE § 309.5(a) (West 2004) ("[T]he division shall primarily consider the interests of residential and small commercial customers.").

ing non-high volume consumers<sup>194</sup> or those that have inadequate representation.<sup>195</sup>

States may also place qualifications on staff to guard against undue influence. The most common of these is the requirement that the person have an expertise in the field.<sup>196</sup> Even if a political ally or stealth deregulator is sought by the appointer, these restrictions ensure a bare minimum of qualification. Certain employment covenants are also used, especially as a means of insulating regulators from the influence of regulated entities. These may include restrictions on holding stock in regulated companies,<sup>197</sup> post-termination employment in regulated industries,<sup>198</sup> holding any other job concurrently with the role as proxy advocate,<sup>199</sup> or broad “conflict of interest” provisions.<sup>200</sup> These directives are generally balanced against the need to find knowledgeable and experienced persons to fill the roles.<sup>201</sup> Restrictions may also be imposed against partisan or political activity. These are most common when the proxy advocate operates as a corporation,<sup>202</sup> but they also appear in other forms.<sup>203</sup> There are also restrictions and requirements placed on the proxy advocates, such as those on ex parte contacts,<sup>204</sup> as

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194. NEB. REV. STAT. § 66-1830(1) (2009).

195. MO. REV. STAT. § 386.710(3) (2000).

196. *See, e.g.*, FLA. STAT. ANN. § 350.061(1) (West 1999) (requiring the proxy advocate to be an attorney); GA. CODE ANN. § 46-10-3 (2004) (“The director shall be a practicing attorney qualified by knowledge and experience to practice in public utility proceedings.”).

197. NEB. REV. STAT. § 66-1830(3).

198. CONN. GEN. STAT. ANN. § 16-2(c) (West 2007).

199. OHIO REV. CODE ANN. § 4911.04 (West 2010). An interesting contrast is the Nebraska public advocate, whose contact information lists a private law firm that practices in Public Sector Services, including utility rate negotiations and litigation. *Member Directory*, NAT’L ASSOC’N OF STATE UTIL. CONSUMER ADVOCATES, <http://www.nasuca.org/archive/about/membdir.php> (last visited Oct. 11, 2011) (listing Roger Cox of Harding & Shultz as the Nebraska Public Advocate); *see also Public Sector Services*, HARDING & SHULTZ, <http://www.hslegalfirm.com> (follow “Areas of Practice” hyperlink; then follow “Public Sector Services” hyperlink) (last visited Oct. 11, 2011) (listing “[u]tility rate negotiations and litigation” as one of the firm’s services).

200. TEX. UTIL. CODE ANN. § 13.042 (West 1997) (prohibiting service as proxy advocate if the person is, or is a spouse of, an employee, paid consultant, or officer of utility trade association; or if the person is a registered lobbyist under Texas statute).

201. NEV. REV. STAT. § 228.320(1)(a) (2009).

202. 220 ILL. COMP. STAT. ANN. 10/16 (West 2007).

203. FLA. STAT. ANN. § 350.061(3) (West 1999).

204. *See, e.g.*, WYO. STAT. ANN. § 37-2-402(a)(i) (2011).

well as required reports to other government offices.<sup>205</sup> These features ensure the separation and accountability of the office.

States may also restrict the discretion of proxy advocates to guide their performance. Nevada mandates certain proxy advocate interventions,<sup>206</sup> while California mandates that the proxy advocate meet with the utility before taking action.<sup>207</sup> Texas requires the proxy advocate to create a plan to solicit public input through hearings.<sup>208</sup> Other states mandate that the proxy advocate's agenda be set by a third party, such as an oversight board.<sup>209</sup>

Such restrictions on proxy advocates hint at the ex post mechanisms that states use to ensure accountability. Whereas priorities guide the office from the beginning, ex post restrictions provide that the decisions of the proxy advocate will be evaluated and, thus, that a proxy advocate not fulfilling its duties will suffer the consequences.

The most significant form of ex post control is political accountability. Depending on where a proxy advocate is placed in the bureaucracy, it is subject to different pressures and accountable to different actors. Fifteen proxy advocates function through states' attorneys general.<sup>210</sup> In ten states, the proxy advocate is a division of the agency that regulates utilities.<sup>211</sup> Eighteen states have placed their proxy advocates elsewhere in the state's executive branch,<sup>212</sup>

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205. The government may be able to request reports, FLA. STAT. ANN. § 350.0611(4) (West 1999), or the proxy advocate may be required to make an annual report, CAL. PUB. UTIL. CODE § 309.5(b) (West 2004).

206. NEV. REV. STAT. 228.360(a) (in all disposal of generation assets proceedings).

207. CAL. PUB. UTIL. CODE § 309.5(h).

208. TEX. UTIL. CODE ANN. § 13.064 (West 1997).

209. See Appendix.

210. There are five states where the Attorney General's duties include those of a proxy advocate. There are an additional nine states that have a specific position in the Attorney General's office dedicated to representing consumer interests. In all but one of these states, that position is appointed by the Attorney General. In the other, Kentucky, it is appointed by the Governor. The Attorney General may also be relevant in other states. For example, there may be proxy advocate elsewhere in the executive branch, but who uses the Attorney General as counsel. The Attorney General's role is frequently codified in statute, but not all states create a separate department within Attorney General's office. Rather, states like Alaska assign the Attorney General the task of representing the public interest, but have not statutorily authorized a division of the Department of Law for that purpose.

211. The location of each state's proxy advocate is noted in the Appendix.

212. Nine states place the proxy advocate as a subsidiary in another department. COLO. REV. STAT. § 40-6.5-102 (LexisNexis 2011) (Dep't of Regulatory Agencies); DEL. CODE ANN. tit. 29, § 8716(a) (2003 & Supp. 2010) (Dep't of State); GA. CODE ANN. § 46-10-3 (2004) (Office of Consumer Affairs); HAW. REV. STAT. §§ 269-

either in another department, such as consumer affairs or state, or as a freestanding agency. In three states, the proxy advocate is a government-chartered, nonprofit corporation, known as a Citizens Utility Board. In two, the proxy advocates are under the legislature. In at least one case, a proxy advocate initially created within an agency was severed to form an independent office.<sup>213</sup>

These variations speak to the varying degrees of independence that proxy advocates are granted. While independence in discussions of administrative agencies generally refers to independence from the President,<sup>214</sup> an independent proxy advocate in this discussion is autonomous from the utility commission before which it appears. The least independent proxy advocate is placed in the Commission, and it is thus subject to control by the same agency before which it appears as a party. To give the proxy advocate more independence, it can be placed elsewhere in the executive branch and held accountable to the Governor or another executive branch official. Within these political contexts, proxy advocates are further controlled by the administrative law of the state.<sup>215</sup> Such law may

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51, 269-52 (2007) (Dep't of Commerce and Consumer Affairs); MO. REV. STAT. § 386.700 to 386.710 (2000) (Dep't of Economic Development); N.J. STAT. ANN. § 52:27EE-46 (West 2010) (Dep't of Treasury); N.Y. EXEC. LAW § 94-a (McKinney 2011) (Dep't of State); S.C. CODE ANN. § 37-6-103 (2000) (Comm'n on Consumer Affairs); UTAH CODE ANN. § 54-10a-201 (LexisNexis 2010) (Dep't of Commerce). A further eight states appear to have created free standing agencies. ARIZ. REV. STAT. ANN. § 40-461 to 40-464 (2011); IND. CODE ANN. § 8-1-1.1-1 to 8-1-1.1-9.1 (West 2010); KAN. STAT. ANN. § 66-1222(a) (2002); MD. CODE ANN., PUB. UTIL. § 2-201 to 2-206 (Lexis 2010); MONT. CODE ANN. § 69-2-204 (2009); OHIO REV. CODE ANN. §§ 4911.01 to 4911.20 (West 2010); TEX. UTIL. CODE ANN. §§ 13.001 to 13.064 (West 1997).

213. In Missouri, consumer interests had been represented by the General Counsel of the Public Service Commission, which also acted as counsel to the Commission. Barvick, *supra* note 32, at 184–85. The legislature, recognizing the conflicts of interest created by this arrangement, moved those duties into a new Office of the Public Counsel. *Id.* at 195–96; *see also* Schraub, *supra* note 32, at 918–19 (noting that the Office of Public Counsel was located within the Department of Consumer Affairs and was appointed by the Department's Director). Today, there are eleven staff members, including three attorneys. *Who We Are*, MO. OFFICE OF THE PUB. COUNSEL, <http://www.mo-opc.org/Home/OPC/Who%20We%20Are.html> (last visited Oct. 11, 2011). For the current statute, see MO. REV. STAT. § 386.710 (2000).

214. *See, e.g.*, Alan B. Morrison, *How Independent Are Independent Regulatory Agencies?*, 1988 DUKE L.J. 252, 252 (“[T]he term may be defined in many ways, but for me an independent agency is one whose members may not be removed by the President except for cause, rather than simply because the President no longer wishes them to serve . . .”).

215. *See, e.g.*, NEV. REV. STAT. § 228.330(1) (2009) (noting that personnel decisions are made according to the same procedures as in the Attorney General's

establish the ways in which the proxy advocate is held accountable or specify the way it must undertake its duties, such as requiring it to request comments in anticipation of proceedings held by the regulator.<sup>216</sup> Additionally, procedural protections of state administrative procedure may apply in theory, although such requirements may be under-enforced.<sup>217</sup>

Appointment and removal power are strong indicators of the degree of agency independence and scope of accountability. In seventeen states, the governor appoints the proxy advocate, and in another seven, a lower-level executive branch official does so.<sup>218</sup> Some of these states, like Ohio, have a more attenuated appointment process.<sup>219</sup> In four states, the public utility commission appoints the proxy advocate. The other six states that have a proxy advocate housed in the public utility commission have their leader appointed by the governor. The three states that have Citizens Utility Boards rely on citizen members to elect leadership. The legislature may also be involved; in two states they appoint the proxy advocate directly, and in other states they confirm appointees. Conditions for removal vary as well. Thirteen states have fixed terms for officials, although they vary between two and six years. Six states note that

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Office). *But see* CAL. PUB. UTIL. CODE § 309.5(h) (West 2004) (describing the “meet and confer process”).

216. In one instance, the Missouri Public Counsel encouraged the utility commission to conduct hearings on rate increases. The Public Counsel requested that the anticipated rate increases be sent to consumers along with monthly bills, together with the address of the Public Counsel. *See* Barvick, *supra* note 32, at 207.

217. The California Public Utility Commission has voluntarily separated its proxy advocate, the Division of Ratepayer Advocates, from the PUC. *See* Michael Asimow, *Toward a New California Administrative Procedure Act: Adjudication Fundamentals*, 39 UCLA L. REV. 1067, 1178–79 & n.379 (1992). The Water Resources Control Board has a smaller staff, and thus an attorney who is an adversary in one case may be an advisor in the next. *Id.* Interactions between PUC and DRA staff may be more porous than indicated. There is no record of any suit being brought to enforce separation of function requirements. There would likely be procedural hurdles to bringing any such action. Insomuch as agency actions in the federal APA scheme may only be challenged when final and when there is standing, it is not certain that either condition would be met by a failure of a proxy advocate.

218. To give a few examples: Colorado (Executive Director of the Dep’t of Regulatory Agencies); Georgia (Director of Consumer Affairs); Hawaii (Director of Commerce and Consumer Affairs); Kansas (an executive board is appointed by the Governor, who in turn appoints the Counsel); Missouri (Director of Dep’t of Economic Development); New Jersey (Public Advocate); Ohio (Consumers’ Counsel Governing Board); South Carolina (Director of Consumer Affairs). The oversight mechanisms are cited in the Appendix.

219. Among the states that use this attenuated approach are Colorado, Kansas, and Ohio.

proxy advocates serve at the pleasure of the person who appointed them.<sup>220</sup>

Another significant factor in proxy advocate oversight is how the proxy advocate is funded. In rare cases, the statute sets a dollar amount of funding.<sup>221</sup> More frequently, the proxy advocate either receives a budget appropriation from the legislature<sup>222</sup> or is permitted to raise money by levying fees on utilities.<sup>223</sup> When the proxy advocate must fight for its budget from either the legislature or the Commission, it is subject to its control. This is of particular concern with respect to the Commission: An increased budget for the proxy advocate means more work for the Commission in the form of responding to the proxy advocate's comments, which creates a clear institutional incentive for underfunding. The size of the budget, in turn, appears related to funding scheme. The largest budgets appear to come from fee levies.<sup>224</sup> Proxy advocates with a separate budget line have greater variability between states.<sup>225</sup> While the costs of electricity ratemaking hearings may vary from state to state, Ohio illustrates the magnitude of the sums involved. Ohio utilities spent \$4.9 million in 1976 to win \$665 million in rate increases

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220. ARIZ. REV. STAT. ANN. § 40-462(B) (2011); CAL. PUB. UTIL. CODE § 309.5(b) (West 2004); DEL. CODE ANN. tit. 29, § 8716(a) (2003 & Supp. 2010); KAN. STAT. ANN. §66-1222(e) (2002); OHIO REV. CODE ANN. § 4911.02(A) (West 2010). *But see* VT. STAT. ANN. tit. 30, § 1 (2008) (setting up a scheme whereby the commissioner serves at the pleasure of the government and the director of public advocacy is in turn appointed by the commissioner).

221. ALA. CODE § 37-1-18 (LexisNexis 1992).

222. COLO. REV. STAT. § 40-6.5-107 (LexisNexis 2011).

223. NEV. REV. STAT. § 704.033 (2009).

224. Four states with fees have budgets over \$2,000,000. CONN. GEN. STAT. ANN. § 16-49 (West 2007); MASS. GEN. LAWS ANN. ch. 12, § 11E, ch. 14, § 3 (West 2010); OHIO REV. CODE ANN. § 4911.18; 71 PA. CONS. STAT. ANN. § 309-4.1 (West 1990). Two more have budgets over \$1,000,000. ALASKA STAT § 42.05.254 (2010); TEX. UTIL. CODE ANN. § 13.041(b) (West 1997). The budgets were reported in surveys answered by each of the offices. *See Member Surveys*, National Association of Utility Consumer Advocates, NAT'L ASSOC'N OF STATE UTIL. CONSUMER ADVOCATES, <http://www.nasuca.org/archive/about/membdir.php> (follow "More Information" hyperlink under each state's listing, where available) (last visited Oct. 11, 2011).

225. For example, Indiana has some staff set by statute and other staff that it can request through appropriations. In addition to its budget of over \$2,000,000, it has forty-seven professional staff, five support staff, and \$751,000 budget for consultants. *See* IND. CODE ANN. § 8-1-1.1-6.1 (West 2010). Tennessee's proxy advocate, housed in the office of the Attorney General, must make separate appropriations requests, but has a budget between one and two million dollars and eleven professional staff members. TENN. CODE ANN. 65-4-118(a) (2004). In Colorado, the appropriations request comes out of the Public Utilities Commission's budget. § 40-6.5-107. For details on each office's staff and budget, see *Member Surveys*, *supra* note 224.

before the PUCO.<sup>226</sup> At the time, the consumer counsel had an annual budget of approximately \$2.25 million.<sup>227</sup> Today, proxy advocate budgets vary between under \$500,000 to over \$2,000,000.<sup>228</sup>

These *ex ante* and *ex post* means of oversight are essential to understanding how proxy advocates choose to use their powers. For example, even if an attorney general acting as a proxy advocate has a general mandate and may intervene whenever she deems it advisable, she does not act without limitation. Rather, she is subject to the same political constraints that regulate the behavior of any attorney general.<sup>229</sup> Similarly, the executive and the legislature may have powers over the proxy advocate, such as appointment or removal and funding, respectively. If the proxy advocate serves for a term of years, the executive has less influence. If the legislature must confirm the nominee, this increases its influence. Creating a self-funding mechanism can reduce legislative power. The institutional design of the proxy advocate determines the degree and nature of influence that will be exercised over the proxy advocate, and it can predetermine its efficacy, as will be demonstrated in Part III.

#### D. Design of Federal Proxy Advocates

Like state proxy advocates, federal proxy advocates vary in what powers they are given and how they are controlled. The most significant difference between federal and state proxy advocates lies in the feedback mechanisms that connect a possibly nation-wide constituency to the federal proxy advocate.

The powers of federal proxy advocates are similar to those of state proxy advocates. Both the Civil Aeronautic Board's Office of Consumer Advocate and the Interstate Commerce Commission's Office of Rail Public Counsel had the power to appear as a party in agency proceedings, for example. The OCA had powers of appear-

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226. Goodman, *supra* note 15, at 225.

227. The proxy advocate had a two-year budget of \$4.5 million. *Id.* at 220. The size of the consumer counsel was driven downward, according to Goodman, by the so-called "taxpayer revolt" of the time. This motivated a consciousness of the cost efficacy of the counsel office.

228. Compare *Oregon Member Survey*, NAT'L ASSOC'N OF STATE UTIL. CONSUMER ADVOCATES, [http://www.nasuca.org/archive/OR%20Member%20Survey%20\(6\).pdf](http://www.nasuca.org/archive/OR%20Member%20Survey%20(6).pdf) (last visited Oct. 11, 2011) (indicating a budget of less than \$500,000), with *Florida Member Survey*, NAT'L ASSOC'N OF STATE UTIL. CONSUMER ADVOCATES, <http://www.nasuca.org/archive/FL%20NASUCA%20Member%20Survey.pdf> (last visited Oct. 11, 2011) (indicating a budget of over \$2,000,000).

229. See Scott M. Matheson, Jr., *Constitutional Status and the Role of the State Attorney General*, 6 U. FLA. J.L. & PUB. POL'Y 1, 12 (1993) (situating the attorney general as a representative of the "public interest").

ance before the Board equivalent to those of any other party.<sup>230</sup> The OCA “petitioned for rulemakings, submitted comments on pending rulemaking proceedings, commented on reports presented by other components of the Board, supported the petitions of external parties, and filed various letters and comments on proposed and pending matters.”<sup>231</sup> The ORPC was granted similar powers by its authorizing statute.<sup>232</sup> Unlike the OCA, however, it was granted the power to seek judicial review.<sup>233</sup> While it was thought that the office would be active in such litigation,<sup>234</sup> the ORPC participated in few judicial proceedings.<sup>235</sup> The Office of Public Counsel had a similar, albeit limited power, insofar as its duties were limited to filing comments for the RSPO report.<sup>236</sup>

In addition to the formal power of appearance, federal proxy advocates also appear to play a more advisory role. The OPC had the narrowly defined power to draft the response reports.<sup>237</sup> The

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230. 14 C.F.R. §§ 302.9, 302.11 (1978). Ratemaking proceedings within the CAB were primarily conducted by the Bureau of Economics. When a carrier filed for a rate change, the Bureau of Economics would review the proposal and send a recommendation to the Board, which must make a decision within thirty days. *Appendix to Oversight of Civil Aeronautics Board Practices and Procedures: Hearings Before the Subcomm. on Admin. Practice and Procedure of the S. Comm. on the Judiciary*, Vol. I, 94th Cong. 36 (1976) [hereinafter *CAB Hearings*]. The OCA may also share its views in this process. *Id.* at 130–31 (discussing a 4% fare increase effective November 1974 in which OCA circulated a memo describing its views). The Board was not required to give the OCA’s views any particular weight. See PUBLIC PARTICIPATION STUDY, *supra* note 39, at 74. Since the ratemaking procedures were grounded in figures and methodologies established by a five-year study, the OCA found it difficult to sway the Board. *CAB Hearings* at 64 n.9 (citing OCA’s memo in a dissent from the Board’s decision); see also PUBLIC PARTICIPATION STUDY, *supra* note 39, at 77.

231. PUBLIC PARTICIPATION STUDY, *supra* note 39, at 76. It did not have the power to seek judicial review of Board decisions. *Id.* at 74.

232. Railroad Revitalization and Regulatory Reform (4-R) Act of 1976, Pub. L. No. 94-210, § 304, 90 Stat. 31, 51–52.

233. *Id.*

234. See *Atchison, Topeka & Santa Fe Ry. v. Interstate Commerce Comm’n*, 580 F.2d 623, 640 n.33 (D.C. Cir. 1978) (“Had a rail public counsel existed at the start of this dispute, he would have voiced another perspective.”).

235. The ORPC was involved in two judicial proceedings. One was decided. *Nat’l R.R. Passenger Corp. v. Interstate Commerce Comm’n*, 610 F.2d 865 (D.C. Cir. 1979). Another was on the Supreme Court’s docket, but the Court declined to hear the case. *Interstate Commerce Comm’n v. Chicago & N. W. Transp. Co.*, 582 F.2d 1043 (7th Cir. 1978), *cert. denied* 439 U.S. 1039 (1978). For a discussion of ORPC action, see *FY1980 ORPC House Authorization*, *supra* note 87, at 273–75 (appendix providing cumulative list of cases in which ORPC appeared).

236. 4-R Act § 304.

237. Bloch & Stein, *supra* note 50, at 227–29.

OCA had a duty to advise the Board on all consumer related matters.<sup>238</sup> Its portfolio in this regard included overbooking and baggage handling issues. The OCA was given this power before it was granted right of appearance, and it was merely advisory. For example, the OCA submitted a white paper on baggage handling issues to the Board, but no action was taken until the Senate took up the issue.<sup>239</sup> As such, the OCA chose to use its formal powers instead, once it had acquired them, such that their position would be less likely to be “summarily dismissed.”<sup>240</sup>

Like state proxy advocates, federal proxy advocates vary in their oversight. Just as is the case for state proxy advocates, the two most salient features of federal proxy advocate control are independence and accountability to constituencies. Whereas state proxy advocates, with one notable exception,<sup>241</sup> do not emphasize contact between the proxy advocate and its constituents, the matter appears to be a significant concern for federal proxy advocates and, as will be seen in Part III, a significant factor in proxy advocate success.

As with state proxy advocates, a central aspect of accountability is independence. The varying levels of independence of federal proxy advocate are similar to the considerable variation seen among state proxy advocates. Both the OCA and the OPC were structurally part of the agencies before whom they appeared, a situation similar to the state proxy advocates located within public utility commissions. The OCA was referred to as an “organizationally distinct consumer advocacy unit,” although it was an office of limited autonomy under the supervision of the managing director of the CAB.<sup>242</sup> Since the office lacked a statutory basis, it relied on the grace of CAB for funding.<sup>243</sup> By contrast, the ORPC was designated as independent in its authorizing statute.<sup>244</sup> This independence was affirmed by the DOJ.<sup>245</sup> Its budgetary independence was set out as well,<sup>246</sup> along with its initial appropriation.<sup>247</sup>

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238. PUBLIC PARTICIPATION STUDY, *supra* note 39, at 75.

239. *Id.*

240. *Id.* at 75–76.

241. TEX. UTIL. CODE ANN. § 13.064 (West 1997).

242. PUBLIC PARTICIPATION STUDY, *supra* note 39, at 74.

243. *Id.* at 74, 79–82.

244. Railroad Revitalization and Regulatory Reform (4-R) Act of 1976, Pub. L. No. 94-210, § 304, 90 Stat. 31, 51–52. (“There shall be established . . . a new independent office affiliated with the Commission to be known as the Office of Rail Public Counsel.”).

245. *Interim Authority Decision*, *supra* note 82, at 125–26.

246. 4-R Act § 304.

247. *Id.*

Appointment and removal are also important to federal proxy advocates. Since the OCA and OPC were regulatory rather than statutory creations, however, any constraints on personnel policy, such as appointment and removal, were never set out in statute.<sup>248</sup> By contrast, ORPC's independence was carefully dictated by statute. The Director of the Office was to be appointed for a four-year term,<sup>249</sup> with presidential appointment and the advice and consent of the Senate.<sup>250</sup>

One feature of accountability particularly relevant to federal proxy advocates is connection to and communication with their constituencies. All federal proxy advocates were structured to permit feedback between advocates and constituents, although some proxy advocates did this more effectively than others. The OCA was initially created to serve as a conduit for information between consumers and the CAB by acting as a clearinghouse for complaints.<sup>251</sup> In this role, it successfully focused attention on the problems of air passengers.<sup>252</sup> This continued through its life as a proxy advocate, when it was the conduit for consumer complaints regarding the airlines.<sup>253</sup> Upon the receipt of complaints, it would refer the complaints to the airlines, refer the matter to the Bureau of Enforcement,<sup>254</sup> send memoranda to Board staff alerting them to problems, or appear as a party to a proceeding itself.<sup>255</sup> It also published monthly reports summarizing complaints<sup>256</sup> and disseminated other informational material.<sup>257</sup>

The OPC succeeded at establishing a conduit between itself and its constituency as well. In fact, as with the OCA, such commu-

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248. The OCA's personnel are "controlled through the regular channels of the CAB organization." PUBLIC PARTICIPATION STUDY, *supra* note 39, at 80. OCA had expertise that outside advocacy groups lacked. *Id.* at 83. OPC's control over personnel was indirectly provided for in the statute that authorized the RSPO. Regional Rail Reorganization Act of 1973, Pub. L. No. 93-236, § 205(c), 87 Stat. 985, 993 (1974)

249. 4-R Act § 304.

250. *Id.*

251. PUBLIC PARTICIPATION STUDY, *supra* note 39, at 75.

252. 39 Fed. Reg. 39867 (Nov. 12, 1974).

253. *CAB Hearings*, *supra* note 230, at 484 (noting that letters received by OCA revealed that passengers were not concerned about limitations on carriers baggage liability). R

254. *Id.* at 485 (noting that they did so with overbooking complaints).

255. See PUBLIC PARTICIPATION STUDY, *supra* note 39, at 74-86.

256. *CAB Hearings*, *supra* note 230, at 546 (noting that it was a party to the Board's investigation of live animal transportation). R

257. See PUBLIC PARTICIPATION STUDY, *supra* note 39, at 76.

nication was its very purpose.<sup>258</sup> As discussed above, the OPC was created to aid the RSPO in commenting on the reorganization plans for the bankrupt northeastern railroads. To accomplish this goal, the OPC had permanent (Washington-based) and outreach staff. The permanent staff monitored the federal agencies and courts, passing that information onto the outreach attorneys, who were a conduit for information between Washington and affected constituencies. The outreach attorney, who was generally a private lawyer based in Washington and under contract, would relay information to the public at regional hearings and then take the opinions voiced at those hearings back to Washington. They also assisted local rail users in forming “branch line committees” to represent local interests before the federal agencies. When the ORPC was created, legislators intended for it to continue the outreach activities of the OPC.<sup>259</sup> However, it failed to actively solicit public opinion,<sup>260</sup> in part due to a lack of funding.

The experience of the ORPC shows that weak feedback mechanisms allow proxy advocates to drift from their consumer focus. Absent statutory mandates, these federal proxy advocates have struggled to identify their constituencies and to prioritize conflicts therein. In the absence of clear guidance to protect consumers, there is a greater risk that organized interests will sway the proxy advocate at the expense of diffuse consumers. The squeaky wheel gets the grease: small businesses, which can organize and communicate with the proxy advocate more easily, will become the focus of agency concerns, rather than residential consumers who may not object or object as persistently.

While the OCA complaint mechanism would ensure that the office maintained some connection to the interests of consumers, the Advocate also gave consideration to the interests of airlines. The OCA staff had no predetermined method for deciding how to prioritize conflicts between different groups of consumers.<sup>261</sup> By contrast, the OPC’s clear and narrow statutory mission ensured that it focused on the priorities of rail consumers. Given the narrow scope of the OPC’s mission, its constituency was clearly defined. The ORPC, which had a broader mandate, was unable to define its constituency. By statute, the Office was supposed to represent com-

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258. The following discussion of the OPC’s outreach advocacy functions is compiled from primary and secondary sources. *See supra* note 50.

259. Railroad Revitalization and Regulatory Reform (4-R) Act of 1976, Pub. L. No. 94-210, § 304, 90 Stat. 31, 51–52.

260. COAL RATE REPORT, *supra* note 90, at 6, 8, 107–10.

261. PUBLIC PARTICIPATION STUDY, *supra* note 39, at 82.

munities and users of rail service who “might not otherwise be adequately represented before the Commission in the course of such proceedings.”<sup>262</sup> In its first year in operation, the ORPC testified before Congress that it interpreted this broad statutory mandate as establishing three priorities:<sup>263</sup> (1) continuing the OPC program of conducting outreach programs to solicit customer opinions on light rail policy, (2) participating in ICC regulatory proceedings to better develop the record, and (3) bringing attention to issues of rail safety raised by the transportation of hazardous materials.<sup>264</sup> The ORPC also noted that it sought to avoid duplication of state efforts.<sup>265</sup> When the Office began participating in energy proceedings related to transportation pursuant to the Powerplant and Industrial Fuel Use Act,<sup>266</sup> it became clear that the Office was not following these priorities. Rather than soliciting the opinions of unrepresented consumer interests, it sought out the opinions of well-represented interests such as the Edison Electric Institute and the National Coal Association.<sup>267</sup>

262. 4-R Act § 304.

263. In FY1979, Howard Heffron testified that priority setting was a “continuing process.” *Department of Transportation and Related Agencies Appropriations for Fiscal Year 1979: Hearings on H.R. 12933 Before a Subcomm. of the S. Comm. on Appropriations, pt. 4*, 95th Cong. 209–10 (1978). However, by FY1980 he was able to provide more specificity. *FY1980 USRA and OPC Appropriations, supra* note 30, at 19 (“In determining which proceedings to enter we consider, among other things, (1) whether the issues involved are of major importance (either intrinsically or as precedent) to communities, rail users, and the public generally; and (2) whether the interests which are potentially affected are able to represent themselves adequately in the proceeding.”); *FY1980 ORPC House Authorization, supra* note 87, at 3–7 (outlining ORPC’s top three priorities).

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264. *FY1980 ORPC House Authorization, supra* note 87, at 3–7. A complete list of the ORPC’s activities is listed as an appendix to the testimony. *Id.* at 12–13.

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265. *Id.* at 18. Notably, the ORPC would seek involvement in regional rail proceedings that affect multiple states. This rationale for federal involvement—to control interstate spillover effects—is among the most theoretically sound. *See generally* Richard L. Revesz, *Federalism and Interstate Environmental Externalities*, 144 U. PA. L. REV. 2341 (1996) (discussing the state spillover provisions of the Clean Air Act, 42 U.S.C. §§ 7401–7671 (2006), while arguing that the Act has been unsuccessful at forcing internalization of state externalities).

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266. *FY1980 ORPC House Authorization, supra* note 87, at 7. *See also* Powerplant and Industrial Fuel Use Act of 1978, Pub. L. No. 95-620, § 804, 92 Stat. 3289, 3348 (repealed 1987) (giving ORPC the authority to “present the views of users, as well as the views of the general public and affected communities, and, where appropriate, providers of rail services in proceedings of Federal agencies concerning (1) the impact of energy proposals and actions on rail transportation, and (2) whether transportation policies are consistent with National energy policies”). The results of this intervention are discussed at notes 90–92, 282–284 and accompanying text.

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267. COAL RATE REPORT, *supra* note 93, at 110.

Given the role that proxy advocates aspire to play in administrative proceedings, as discussed in Parts II.A and II.B, as well as the way in which state and federal proxy advocates fill that role, as discussed in Parts II.C and II.D, the question remains whether the reality has fulfilled the promise of theory. As will be demonstrated in Part III, proxy advocates can indeed succeed, but this success hinges on the way in which they are designed.

### III. PROXY ADVOCATES AS REPRESENTATIVES

Proxy advocates help consumers overcome obstacles that limit the involvement of diffuse interests. Part II set out a theoretical model for understanding the problem, the solution, and the state and federal implementation. Now, in Part III, this Note asks whether these proxy advocates have succeeded. By examining differences among federal and state proxy advocates in terms of their success and their structure, this section concludes that state proxy advocates are generally more successful than federal proxy advocates, but that federal proxy advocates are effective when they are designed to maintain contact with their constituents.

What does it mean for a proxy advocate to be successful? A proxy advocate is successful when the regulatory agency it monitors makes decisions favorable to its constituency. Although there are a wide variety of favorable decisions a proxy advocates may seek, this section looks specifically at rate-setting proceedings to compare the performance of federal and state proxy advocates.<sup>268</sup> Rate-setting proceedings provide proxy advocates a clear opportunity to help their constituents by saving them money otherwise paid to regulated utilities.<sup>269</sup> Not only do almost all proxy advocates participate in rate setting, but also these proceedings allow qualitative and

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268. Throughout this section, comparisons are made between the performance of proxy advocates in the regulation of electric utilities, telephone rates, railroads, and airlines. The regulation of each of these is a distinct administrative process subject to its own procedures, but this should not preclude comparisons so long as the analysis accounts for those differences.

269. Rate setting proceedings are not the only way for proxy advocates to help constituents. For example, a proxy advocate may also secure other policies from the PUC that benefit residential consumers such as lifeline rates, prevention of wintertime shutoff, or green energy. They could also participate in the hearings that determine the mechanism and procedures for rate setting. *See, e.g., supra* note 230.

quantitative comparisons to be made between the presence, absence, or variations of the proxy advocates.<sup>270</sup>

Part III.A looks at the effect of state and federal proxy advocates on these rate proceedings. It concludes that proxy advocates are more successful in rate proceedings at the state level. Part III.B asks how the institutional design of proxy advocates relates to its performance in rate setting. This section concludes that state proxy advocates flourish when granted independence, but federal proxy advocates suffer from independence. Heterogeneity and size appear to have the biggest impact on the success of proxy advocates. Mechanisms that keep proxy advocates accountable to their constituents, however, may ensure effective representation.

A. *Rate Setting as an Indicator of Proxy Advocate Success*

This section discusses when proxy advocates have adequately represented diffuse consumers. By examining the effect of proxy advocates in ratemaking proceedings, this section provides a baseline against which to compare proxy advocates. As will be shown, the level of government—federal or state—appears to be among the most significant determinants of success for proxy advocates.

State proxy advocates have been successful at contesting rate increases requested by utilities.<sup>271</sup> While there are no similar studies at the federal level, the historical record, as developed later in this section, indicates that federal proxy advocates were ineffective in ratemaking proceedings, failed to secure funding, and were unresponsive to their constituencies.

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270. Additionally, statistical techniques can be used to control for confounding variables, since proxy advocate performance can be compared across states and over time. See GORMLEY, *supra* note 8, at 161–62 (describing the statistical methods used in computing the behavioral affects); Holburn & Spiller, *supra* note 22, at 8–10 (describing the methodology for comparing the expected allowed return on equity (ROE) to actual ROE to control for political, demographic, and institutional variables; factors independent of management, such as state GDP and fuel prices; and regulatory climate and economic factors). As can be observed from the preceding, rates are frequently used as a metric by scholars in this field.

271. Economists have examined the behavior of state proxy advocates and shown that they have been successful at contesting rate increases requested by utilities. See *infra* note 273. However, state proxy advocates may be less successful at ensuring that these savings go to residents, as opposed to other ratepayers. Although current research does not distinguish between general and residential-only proxy advocates, forthcoming research from Holburn & Spiller may indicate that residential-only proxy advocates “are indeed associated with rate structures that dramatically favor residential consumers.” Holburn & Vanden Bergh, *supra* note 42, at 63.

State proxy advocates have been successful at reducing the influence of utility companies over state public utility commissions. However, as discussed below, they may be less successful at ensuring that these savings go to residents, as opposed to other ratepayers. Utility rates are determined by public utility commissions, which set allowed return on equity (ROE). The ROE determines what rates the utilities can charge consumers. Utilities try to increase the ROE and are often successful. As has been repeatedly shown, the ROE drops when a proxy advocate represents consumer interests before the commission.<sup>272</sup> When a proxy advocate wins a reduction in ROE, utility consumers in the proxy advocate's jurisdiction save money by paying the lower rates. Since all state proxy advocates define their constituencies to include utility consumers, even if some narrow the constituency further to include only residential or other types of consumers,<sup>273</sup> the reduced ROE is evidence that the proxy advocate is accomplishing its statutory mandate.

However, savings alone do not necessarily indicate the proxy advocate's success; it is possible that the savings won by the proxy advocate are being allocated to some consumers at the expense of others. Such disparate allocation of savings may indicate that the proxy advocate is representing a heterogeneous constituency and allocating benefits to the better-organized interest within that constituency. This appears to be the case for state proxy advocates: While there is a decrease in ROE when a proxy advocate is present, residential consumers end up paying more while commercial consumers get all of the savings.<sup>274</sup> If it is the case that state proxy advocates who represent general consumers allocate savings to commercial consumers ahead of residential consumers, it does not

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272. The earliest study on proxy advocates included an evaluation on ROE in electricity proceedings. GORMLEY, *supra* note 8, at 162–63 (discussing the effect of proxy advocacy on utility companies' rate hike requests, which factor into ROE). Similar conclusions were reached studying ROE figures in electricity proceedings in the 1980s. *See generally* Holburn & Spiller, *supra* note 22. A similar finding was made using telephone rates. *See* Robert N. Mayer et al., *Consumer Representation and Local Telephone Rates*, 23 J. CONSUMER AFF. 267, 281 (1989). Most recently, a proxy advocate was found to create pro-consumer outcomes in negotiated settlements, which are an alternative to the traditional adjudicatory ratemaking process. *See* Stephen Littlechild, *Stipulated Settlements, the Consumer Advocate and Utility Regulation in Florida*, 35 J. REG. ECON. 96, 107 (2008) (concluding that the participation of the Office of Public Counsel resulted in faster and greater stipulated rate reductions).

273. *See* Appendix.

274. Holburn & Spiller, *supra* note 22, at 22 (finding that residential rates increased 2.0% to 2.3% due to the presence of consumer advocates).

necessarily follow that the proxy advocate is failing.<sup>275</sup> However, representing an interest that is capable of organizing at the expense of one that cannot negates the purpose of a proxy advocate.<sup>276</sup>

Federal proxy advocates have been significantly less successful in rate-setting proceedings than their state counterparts.<sup>277</sup> With OCA and ORPC, for example, involvement in ratemaking proceedings occurred rarely for both and was a priority for neither. The OCA participated in nine fare tariffs and succeeded in only two.<sup>278</sup> The staff of the OCA, consisting of three attorneys, four economic researchers, and fifteen support staff, with a budget of \$220,000 in 1976,<sup>279</sup> was almost certainly unable to match the airlines' multi-

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275. It may still, however, mean that the proxy advocate is making a poor decision. Since commercial and industrial ratepayers can pass utility costs onto consumers, and are more capable of representation in such proceedings without the help of proxy advocates, a skew to residential consumers may be the right policy choice. However, equitable distribution may be mandated by statute. DEL. CODE ANN. tit. 29, § 8716 (2003 & Supp. 2010) ("To advocate the lowest reasonable rates for consumers . . . consistent with an equitable distribution of rates among all classes of consumers."). Or indeed one may be instructed to work for lower rates generally but to prefer certain interests. *E.g.*, CAL. PUB. UTIL. § 309.5(a) (West 2004) (prefer residential and small business consumers in revenue allocation and rate design); *Welcome to the Consumer Advocate Division*, PUB. SERV. COMM'N OF W. VA., <http://www.cad.state.wv.us> (last visited Oct. 25, 2011) ("The Consumer Advocate Division advocates primarily on behalf of residential consumers . . ."). The political problem raised by choosing between constituencies was the reason why Gormley suggested that proxy advocates would elect to stay out of ratemakings. GORMLEY, *supra* note 8, at 170.

276. There is not yet any published data on whether the misallocation of proxy advocate representation remains a problem in jurisdictions that limit proxy advocate constituencies to only residential consumers. However, there is some empirical evidence suggesting that residential-only proxy advocates indeed skew their advocacy in favor of residential consumers. *See supra* note 274.

277. Since the OPC was not involved in any such proceedings, this investigation is necessarily limited to the ORPC and the OCA. As discussed *supra* Part I.B, the OPC was only involved in the insolvency of the northeastern railroads and the reorganization thereof into Conrail. Due to obscurity and sample size, federal proxy advocates are less amenable to the econometric analysis to which their state-level counterparts have been subject. Using Congressional documents, however, an assessment can be made of the effect of federal proxy advocates on ratemaking proceedings.

278. PUBLIC PARTICIPATION STUDY, *supra* note 39, at 76. Additionally, "[f]ive of the nine fare tariff proceedings involved applications for fare increases and the OCA prevailed in only one of those five." *Id.* These tariffs were set through a procedure "similar to that used in classical utility regulation," but relying on airline industry averages and a set formula. *Id.* at 77.

279. *Id.* at 74.

million dollar spending.<sup>280</sup> By comparison, proxy advocates in state utility regulation might more easily keep pace with industry spending; state proxy advocates are frequently funded in excess of one million dollars per year.<sup>281</sup>

The ORPC was also relatively absent from ratemaking proceedings, and failed when it did appear.<sup>282</sup> When the ORPC did appear in a rate proceeding, it was influenced by the private interests that it was created to contest.<sup>283</sup> In this sense, the ORPC failed its mission. Despite its statutory duty to represent those interests which would otherwise not be represented, it both represented otherwise capable interests (trade associations) and was unable to represent diffuse interests.<sup>284</sup>

Since participation in ratemaking proceedings is one of the most direct ways for a proxy advocate to help its constituency, and state proxy advocates show that success in ratemaking proceedings is possible, federal proxy advocates' absence from such proceedings cannot be explained as a simple choice to engage in other forms of intervention. However, one may argue that participation in ratemaking proceedings is simply an inaccurate gauge of performance. That is to say, federal proxy advocates may be just as "successful" as state proxy advocates but succeed in areas other than ratemaking proceedings. This is a reasonable argument, and in some cases, federal proxy advocates were unable to appear in ratemaking proceedings.<sup>285</sup> However, even where able to appear, federal proxy advocates have both failed to participate and done poorly when they have participated. The OCA, for example, was able to participate in ratemaking proceedings but dealt more frequently with complaints related to luggage handling. While this representation undoubtedly helped consumers, it is not clear that the public benefitted more from fewer lost bags than it would have

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280. The combined spending of the airlines on CAB proceedings exceeded three million dollars in 1976. PUBLIC PARTICIPATION STUDY, *supra* note 39, at 18.

281. See Goodman, *supra* note 16, at 225. For a further discussion of state funding of proxy advocates, see *infra* Part II.C.

282. See COAL RATE REPORT, *supra* note 90, at 147 (illustrating that the cost in constant dollars for rail transport of coal has increased). The reviewed documents, such as *FY1980 USRA and OPC Appropriations*, *supra* note 30, at 17–18, reflect participation in ratemaking proceedings, but they do not indicate any victories. By comparison, the same documents note success in safety. *Id.* at 21 (noting success in requiring speed indicators in locomotives hauling hazardous materials).

283. See *supra* notes 90–92 and accompanying text.

284. PUBLIC PARTICIPATION STUDY, *supra* note 39 (showing that regulated industries dominated agency proceedings).

285. The OPC, for example, was not able to participate in ratemaking proceedings while representing of rail consumers in underrepresented localities.

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from lower fares (which, after all, allows more people the opportunity to lose their luggage). Moreover, history shows that proxy advocates could have won significant price decreases for consumers, particularly in regulated interstate markets.<sup>286</sup> Where federal proxy advocates were able to participate in ratemaking proceedings, they should have done so, since the benefits won from such activity would surely have inured to the consumers.

*B. Independence as an Explanation for Proxy Advocate Performance*

This section looks at the effect of proxy advocate independence on performance. The ratemaking analysis from Part III.A demonstrates a divergence between state proxy advocates, which perform more effectively with independence, and federal proxy advocates, for whom independence is a mixed blessing. It concludes that bureaucratic independence may prevent successful federal proxy advocacy, but that providing conduits for communication between constituents and proxy advocates can improve representation.

Before addressing the divergent effect of independence on federal and state proxy advocates, one particular explanation for the variation between federal and state proxy advocates should be addressed. Federal proxy advocates have been funded at lower levels than state proxy advocates, which may explain their failure. However, this is not always true and causality may run the other way. In fact, state proxy advocate funding varies widely. Alabama's proxy advocate has a statutory budget of \$250,000 whereas other states fund their proxy advocates in excess of two million dollars.<sup>287</sup> Moreover, underfunding federal proxy advocates appears linked to the same factors that hindered their development and continued existence. That is to say, if federal proxy advocates failed due to underfunding, it is likely that the proxy advocate was underfunded as a way to eliminate it. For example, the ORPC was defunded when

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286. While the drop in airline prices after deregulation may have other causes as well, deregulation appears to have benefitted the airline markets significantly. See Stephen Breyer, *Airline Deregulation, Revisited*, BUSINESSWEEK.COM (Jan. 20, 2011, 5:00PM), [http://www.businessweek.com/bwdaily/dnflash/content/jan2011/db20110120\\_138711.htm](http://www.businessweek.com/bwdaily/dnflash/content/jan2011/db20110120_138711.htm) (noting the unforeseen "spectacular growth" of the airline industry after deregulation).

287. See *Member Surveys*, *supra* note 224 (Some of the states whose budgets exceed two million dollars, according to the surveys on this site, include Florida, Indiana, Iowa, Massachusetts, and Pennsylvania.). For Alabama's statutory budget, see ALA. CODE § 37-1-18 (LexisNexis 1992). Regardless of funding, all of these proxy advocates have continued to exist, and there is no indication that funding is correlated to performance.

Congress decided that it was redundant.<sup>288</sup> Furthermore, consumers have more difficulty organizing to protect proxy advocates at the federal level. Just as consumers were unable to push the nomination and confirmation of a director, they were unable to convince Congress to continue funding the office. This is intuitively understandable—a proxy advocate is created *because* consumers are incapable of such action. States, however, may not suffer the same fate. Because states are smaller and likely more homogenous than the mass of federal consumers, a state's consumers may be more able to organize and less likely to argue internally to the detriment of broader goals.

Independence is an important starting point for analyzing proxy advocates.<sup>289</sup> If the proxy advocate is located within the PUC, and is subject to the hiring and firing power of the commissioners,<sup>290</sup> appropriated for by the PUC's budget requests,<sup>291</sup> housed in the same building,<sup>292</sup> part of the same bureaucratic culture, and serving in the same institutional structure as the agency adjudicating the proceeding before which it serves as an advocate, the proxy may be a less zealous advocate for fear of offending the parent agency. These concerns are common in administrative law, where boundaries are frequently drawn between advocates and adjudicators. Of course, these fears might be out of proportion to reality. The Model State Administrative Procedure Act bars *ex parte* communications and the sharing of officials, both of which minimize these risks.<sup>293</sup> While these resource benefits may influence the proxy advocate,<sup>294</sup> they also reduce its costs of operation. If the proxy advocate cannot free ride on the agency's appropriations for technical experts, attorneys, and support staff, it will have to fight

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288. See *supra* note 92 and accompanying text.

289. The specifics of state and federal proxy advocate independence are discussed *supra* Parts II.C and II.D.

290. See, e.g., NEB. REV. STAT. § 66-1830(2) (2009).

291. DEL. CODE ANN. tit. 29, § 8716(d)(4) (2003 & Supp. 2010). The funds are appropriated from the Delaware Public Utility Regulatory Revolving Fund, which is provided for in DEL. CODE ANN. tit. 26, § 116.

292. See IOWA CODE ANN. § 475A.3 (West 2009) (placing the office of the consumer advocate "at the same location as the utilities division of the department of commerce," even though the two are separate divisions).

293. BONFIELD & ASIMOW, *supra* note 167, at 792–93. But it is known to happen. See *supra* note 220.

294. State *ex rel.* Utils. Comm'n v. Seaboard Coast Line R.R., 303 S.E.2d 549, 555 (N.C. Ct. App. 1983) (finding that the commission acted within its authority when it allowed the proxy advocate to appear when such appearance was challenged as "beyond [the advocate's] statutory authority" by a regulated company).

for those appropriations itself, or reallocate its general budget to overhead rather than interventions.

At the state level, the most successful proxy advocates are those that are most independent. The most comprehensive study on the effect of independence on state proxy advocate performance examined telephone rates. It found that the most consumer-friendly outcomes were produced by independent counsels, followed by the state's Attorney General and divisions within the PUC.<sup>295</sup> Independent counsels operate subject to the least control, since they have both the technical expertise and are least subject to outside control. The study found no statistically significant difference between the effects of Attorneys General and divisions in the PUC. Both were less effective than independent counsels, but the study cites different reasons for their difficulties. The PUC divisions are subject to significant internal oversight, whereas the Attorney General may lack expertise and likely has dual loyalties to defend the PUC as well as to act as a proxy advocate. However, Attorneys General today frequently have technical consultants, thus providing the needed expertise.<sup>296</sup> Additionally, the Attorney General is likely to be more zealous than the PUC when the office contains a division dedicated to representation, and when political pressure encourages the Attorney General to use it.<sup>297</sup> Given that today's Attorney General proxy advocates have technical staff and more political accountability, it appears that they may be more effective consumer advocates than at the time this study took place.

Independent federal proxy advocates do not produce the same pro-consumer outcomes as their state counterparts. The one independent proxy counsel advocate had significant implementation problems, which were reminiscent of the considerable legislative obstacles faced by prior proposals to create independent consumer protection agencies.<sup>298</sup> Placement within the agency, however, creates other, perhaps equally insidious, issues. Proxy counsels housed within agencies, however, appear limited by control from above.<sup>299</sup>

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295. Mayer et al., *supra* note 272.

296. *See* Appendix.

297. Even when there are separate divisions in the PUC, they are not always respected. *See supra* note 220.

298. *See supra* notes 55–63 and accompanying text.

299. The dilemma was summarized thusly: "Ironically, despite the fact that the 1976 legislation theoretically established an office of substantial independence and power [in the Office of Rail Public Counsel], the lack of implementation of that office has seriously compromised its independence and left it less effective than the in-house advocacy office in the Civil Aeronautics Board." PUBLIC PARTICIPATION STUDY, *supra* note 39, at 86.

The only independent federal proxy advocate, the Office of Rail Public Counsel,<sup>300</sup> had a brief, tumultuous existence before it was eliminated.<sup>301</sup> A significant obstacle for the ORPC was the appointment process for its leadership. The statute provided for presidential appointment of the director of the ORPC, but it took quite a while for Howard Heffron to be nominated and confirmed to lead the office.<sup>302</sup> Apart from the lack of leadership, budgeting also posed problems for the nascent office. Its initial funding precluded it from using outreach attorneys or hiring technical consultants, crippling the office.<sup>303</sup>

Not only did the ORPC struggle to survive, it failed at its task while it was operating. As the *Railroad Coal Rates* report found, the office's energies were misdirected. Rather than identifying and representing the views of the public, the ORPC advocated its own views.<sup>304</sup> When the ORPC did represent the views of "the public," it listened to the views of such concentrated, private interests as the National Coal Association and public utility companies.<sup>305</sup> It is undoubtedly easier for a hobbled proxy advocate, lacking in resources and outreach attorneys, to hear the views of organized interests who have a financial stake in agency proceedings, but this ease contra-

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300. As discussed *supra* Part I.B, the ORPC was the only federal proxy advocate whose leadership, budgetary authority, and agenda setting power existed independently of the agency before which it appeared.

301. For a discussion of the history of the ORPC, and its defunding, see *supra* notes 84-99 and accompanying text.

302. See *Nominations—October-December*, *supra* note 12, at 103; *Amending the Interstate Commerce Act to Authorize Appropriations for the Office of Rail Public Counsel for Fiscal Year 1979: Hearing Before Subcomm. on Transp. and Commerce of the H. Comm. on Interstate and Foreign Commerce*, 95th Cong. 2 (1978) (statement of Howard Heffron) ("I have been in office slightly more than 3 months as I come here today."); see also *Authorizations for the United States Railway Association: Hearing Before the Subcomm. for Surface Transp. of the S. Comm. on Commerce, Sci., and Transp.*, 95th Cong. 2 (1977) (statement of Sen. John A. Durkin, Member, S. Comm. on Commerce, Sci., and Transp.) (expressing dismay at the failure to appoint a director for one full year, despite the statute's command to appoint a director within sixty days). The Interstate Commerce Commission sought authorization to nominate an interim director, but permission to do so was denied. *Interim Authority Decision*, *supra* note 82, at 125-26.

303. See *supra* note 262. In requesting authorization in 1980, the ORPC noted that it used outreach attorneys in an Amtrak route reorganization. *FY1980 USRA and OPC Appropriations*, *supra* note 30, at 16. This appears to be the only use of outreach attorneys by the ORPC, and it seems restricted to only this matter. By contrast, it notes that the requested budget would permit outreach "if the occasion arises." *Id.* at 18. It further downplayed the prospects of future outreach attorneys. *Id.* at 22-23.

304. See *COAL RATE REPORT*, *supra* note 90, at 108.

305. *Id.* at 110.

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dicts both the specific statutory authorization for ORPC involvement in energy proceedings<sup>306</sup> and for the office.<sup>307</sup> Proxy advocates do little good when they aid organized and represented interests, especially at the expense of diffuse consumer interests.

Despite the cautionary tale of the ORPC, the alternative of placing a proxy advocate within the agency is not significantly more appealing. The dangers of internal proxy advocates can be seen in the aviation context. Leaving the proxy advocate under the authority of the agency created the self-defeating dysfunction of an internal advocacy office adopting the views of its parent agency.<sup>308</sup> For example, rather than declaring his responsibility to be “to consumers,” the director of the OCA, the putative guardian of the consumer cause, testified that he works to balance those interests with those of air carriers and regulators.<sup>309</sup> Although agencies should look to balance the interest of consumers and regulated industries, a proxy advocate should be a zealous voice for its constituents. After all, they are advocates. Since it is easier to operate within a parent agency, however, the OCA never sought the independence that might have solved its capture.<sup>310</sup> The experience of the OCA was

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306. Powerplant and Industrial Fuel Use Act of 1978, Pub. L. No. 95-620, § 804, 92 Stat. 3289, 3348 (repealed 1987) (“shall present the views of users, as well as the views of the general public and affected communities”); *see also* COAL RATE REPORT, *supra* note 90, at 109–10. Indeed, ORPC was forced to spread itself even thinner when it was given responsibility for energy proceedings, likely exacerbating the problem.

307. *See* Railroad Revitalization and Regulatory Reform (4-R) Act of 1976, Pub. L. No. 94-210, § 304, 90 Stat. 31, 51–52 (instructing the Director to solicit the views of underrepresented parties).

308. PUBLIC PARTICIPATION STUDY, *supra* note 39, at 81 (quoting interviews with a representative of the Aviation Consumer Action Project in which the representative asserted that a lack of independence would lead to cooperation).

309. *Oversight of Civil Aeronautics Board Practices and Procedures, Vol. 2: Hearings Before the Subcomm. on Admin. Practice & Procedure of the S. Comm. on the Judiciary*, 94th Cong. 1124 (1975) (statement of Jack Yohe, Director, Office of the Consumer Advocate, Civil Aeronautics Board). While this quotation has been read to reflect an honest assessment of his opinions, it may have been a politically motivated statement to create the appearance of impartiality and thus avoid opposition to the OCA by the industry. *See* PUBLIC PARTICIPATION STUDY, *supra* note 39, at 83.

310. The Office of Consumer Advocate disavowed a desire to gain greater independence from the Civil Aeronautics Board for fear of becoming embroiled in the same budgetary fights that hindered the ORPC. PUBLIC PARTICIPATION STUDY, *supra* note 42, at 81 (“[The director of OCA] stated that while there might be some benefits in a separate appropriations line, he did not want to get involved in direct dealings with the appropriations committees and deferred to the Board Chairman in that regard.”).

not all negative. The Office did have some successes, albeit not in rate setting proceedings.

Nonetheless, a comparison of two in-agency proxy advocates shows the risks of proxy advocates that lack independence. While the OCA was placed in the agency, it was somewhat insulated from its influence.<sup>311</sup> A more extreme example of agency influence, the ICC's Bureau of Investigation and Enforcement, shows how divisions of agencies are ill suited to robust representation of consumer interests. Having identified a failure in the ORPC's representation of consumer interests in coal ratemaking proceedings, legislators turned to a bureau within the ICC charged with developing the agency record on behalf of the public interest. Looking at two cases, however, an oversight report found that the Commission restricted "the scope, access, and timeliness of [Bureau] access" to discovery in one proceeding<sup>312</sup> and denied the Bureau permission to develop the record in the other.<sup>313</sup>

Although both complete independence and dependence lead to ineffective proxy advocacy, there is one alternative institutional design that may function well at the federal level. The Office of Public Counsel, the ORPC's predecessor agency, used outreach attorneys as a feedback mechanism between central decisionmakers in Washington and areas affected by the Conrail reorganization, and vice-versa.<sup>314</sup> The results of this office were overwhelmingly positive.<sup>315</sup> While the ORPC intended to continue the use of such outreach attorneys, both as a means of staying abreast of public opinion and as a check against agency drift, they did not do so. While one study suggested that this was itself a product of agency drift,<sup>316</sup> it appears more likely that the decision to end the outreach attorney program was a financial one forced by insufficient funding.<sup>317</sup>

The comparative success of the OPC and ORPC suggests that federal proxy advocate failure may be due to the heterogeneity and size of the constituency. The OPC had a very limited mission, whereas the ORPC had a broad mandate. Moreover, since the OPC was only operating in specific towns in a specific region, its re-

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311. *See supra* Part II.D.

312. COAL RATE REPORT, *supra* note 90, at 113.

313. *Id.* at 114.

314. *See supra* Part II.D.

315. *See supra* Part I.B.

316. *See* COAL RATE REPORT, *supra* note 90, at 107–10.

317. *See supra* Part I.B.

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sources were more focused than those of the ORPC, which had to protect the whole country.

The experience of the OPC suggests that these obstacles may be overcome by institutional design. First, when the scope of the office is constrained to a limited mission, as it was by the OPC, drift is less likely.<sup>318</sup> Second, an office that uses outreach attorneys is more likely to maintain a connection to the constituents, as the OPC did and the ORPC did not.

That state proxy advocates have been successful without the outreach suggested here indicates that heterogeneity and size may be the salient difference between federal and state proxy advocates. Given the differences observed between federal and state proxy advocates, similarly structured proxy advocates create significantly different results when placed in federal or state government. Most significantly, whereas independent state proxy advocates are more successful, an independent federal proxy advocate is less successful.

This point is further emphasized by the experience of a dependent but accountable federal proxy advocate, the OPC. Rather than doing a poor job, as would non-independent state proxy advocates, it is the most successful of the federal proxy advocates. This is because it had a clearly defined mission and remained close to the views of its narrowly defined constituency as a result of the outreach program it used. The OPC is thus the exception that proves the rule: while it forsakes the freedom that makes state proxy advocates effective, it gains stability from its bureaucratic location and effectiveness from its narrow focus and clear communications.

The classes of interests represented by the state proxy advocates might be more homogenous, for example, due to the circumscribed constituency. Indications that residential-only state proxy advocates are more effective than general proxy advocates only bolster this point. The smaller geographic scope of state proxy advocates makes it easier for them to maintain communication between the advocate and the constituency than it is for federal proxy advocates. The costs of communicating, both for constituents to reach the advocate and for the advocate to understand its constituents, may be low enough in states to obviate the need for outreach attorneys. Even if federal proxy advocates can maintain such communication, however, heterogeneity may still hinder their performance. Since federal proxy advocates need to represent interests from a variety of states, but maintain enough support to sustain their exist-

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318. This may also be demonstrated if residential-only state proxy advocates are more effective than general proxy advocates. *Supra* Part III.A.

tence, they may need to balance consumer interests in a way that distorts their representation of consumer preferences.

However, even if a federal proxy advocate represents a narrow and homogenous constituency, independence may still significantly hinder its performance by forcing it to engage in battles that it is ill-equipped to fight. The hallmark independence of the ORPC—requirements of a presidentially appointed director and a separately appropriated budget—crippled that office. It was unable to convince the legislature and the executive of its importance, and narrowing its constituency or using outreach attorneys would not have helped it avoid its eventual elimination. However, given that states have had successful proxy advocates with requirements of independent funding<sup>319</sup> and appointment, it is possible that reducing heterogeneity and the impact of size may help an independent federal proxy advocate survive. Thus, it appears that independence does not help a federal proxy advocate, but other changes to its structure might.

State proxy advocates are more successful than federal proxy advocates, but federal proxy advocates do not respond as well to greater independence, the change that most helps their state counterparts. The ready explanation for this difference is heterogeneity and size. While this is analytically apparent, this Note cannot definitively say which is the explanation. Hopefully, further empirical research can explain the clear differential demonstrated here. Nonetheless, the comparisons provide sufficient data to ask how federal proxy advocates can be improved.

#### IV. IMPROVING PROXY ADVOCATE REPRESENTATION

Part III sought to understand what makes federal and state proxy advocates effective. It concluded that independence improves state proxy advocate performance but can undermine federal proxy advocates. At the federal level, proxy advocates require a connection to their constituency to stay focused and effectively fulfill their duties. Given this understanding, this section asks how these lessons can be applied to improve consumer representation. Part IV.A suggests that the positions of proxy advocates should be

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319. The ICC was unable to obligate funds appropriated to the ORPC. *See Department of Transportation and Related Agencies Appropriations for Fiscal Year 1978: Hearing on H.R. 7557 Before the Subcomm. on Transp. Appropriations of the H. Comm. on Appropriations*, 95th Cong. 522 (1977) (statement of John P. Kratzke, Acting Managing Director, Interstate Commerce Commission).

more seriously considered by reviewing courts. Part IV.B more modestly suggests that, given the difficulties of federal proxy advocates, the federal government can best aid consumer representation by funding state proxy advocates.

#### A. *Proxy Advocates and Deference*

Given the significant role courts play in administrative decisionmaking,<sup>320</sup> the legal system must properly account for proxy advocates, especially in cases where they contest agency decisions. By default, courts evaluate agency decisions with deference.<sup>321</sup> As shown below, this has not changed when a proxy advocate is present, but perhaps it should. If a proxy advocate has the potential to misdirect public pressure such that consumers engage the proxy advocate instead of the agency,<sup>322</sup> it is important that this influence is not misplaced. However, it appears as though it may be. Rather than trying to influence the agency, whose decision will be reviewed under a deferential standard of review, consumers raise grievances before the proxy advocate, who in turn may raise them before the agency. A proxy advocate's work culminates in either a decision by the agency, who accounts for the proxy advocate's views as one perspective among many, or a court challenge, where the court defers to the agency's position over the proxy advocate's.<sup>323</sup>

Two conclusions follow from analyzing this process. First, consumers' focus on proxy advocates gains the benefit of technical expertise at the risk of an unfaithful representative. If consumers approach the commission directly, their views must be taken into account by the commission, whose decision will be given deference. But their views will lack sophistication, and the agency would likely dispatch them easily as a result. If consumers approach the commission through the proxy advocate, their argument will be more robust, and thus taken more credibly by the commission, but they must also trust the proxy advocate to express their views faithfully. Second, the agency decisionmaking process is qualitatively different when a proxy advocate is involved. There is a second politically ac-

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320. See CROLEY, *supra* note 99, at 72–76.

321. See, e.g., *Nextel W. Corp. v. Ind. Util. Regulatory Comm'n*, 831 N.E.2d 134, 156 (Ind. Ct. App. 2005) (reviewing a determination of the public interest by the Commission under a substantial evidence standard); *Wash. Att'y Gen. v. Wash. Utils. & Transp. Comm'n*, 116 P.3d 1064, 1068 (Wash. Ct. App. 2005) (reviewing the decision of the Commission under an "arbitrary and capricious" standard).

322. See *supra* Part II.B.

323. See *Wash. Att'y Gen.*, 116 P.3d at 1068 (noting the Commission's "wide discretion" and ultimately affirming the Commission's action).

countable, statutorily authorized office involved in the process who may reach a conclusion contrary to the agency's.<sup>324</sup> Both reasons indicate that courts should be cautious in granting agency deference in the presence of proxy advocates.

Though deference is justified on a variety of grounds, each also argues for granting deference to proxy advocates. If deference is owed to agencies due to their political accountability, the proxy advocate may be as or more politically accountable than the public utility commission.<sup>325</sup> Deference may also be justified on the basis of expertise, but, again, proxy advocates are no less technically competent than the PUCs that they challenge.<sup>326</sup> Not only are proxy advocates repeat players in a technical field, but they generally have a budget for hiring consultants as well. Furthermore, deference may reduce costs of governance by creating a background presumption against which the legislature can operate.<sup>327</sup> However, courts have not used this approach to analyze decisions in the presence of a proxy advocate. The proxy advocate presents a situation where deference to agency decisions may not be appropriate under the traditional approaches, but courts continue to defer. The proxy advocate is not charged with promulgating overlapping rules or making binding policy determinations,<sup>328</sup> but it is created by the legislature and endowed with expertise to represent interests before a separate body.

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324. On the issue of deference in the case of competing interpretations, see *Gonzalez v. Oregon*, 546 U.S. 243 (2006) (holding that federal law did not authorize the Attorney General to prohibit physician-assisted suicide as authorized by Oregon law).

325. If, for example, public utility commissioners are appointed by the governor for ten-year terms without legislative confirmation, whereas the proxy advocate is appointed every two years with confirmation, the proxy advocate has a more grounded claim to being a responsive voice of the populace.

326. Courts will defer to agencies that frequently deal with complicated technical issues since they are more adept at assessing these issues than judges who lack a scientific background and a familiarity with the issues bred by day-to-day exposure. As a result, a better decision will be made by the specialist. See, e.g., Reuel E. Schiller, *The Era of Deference: Courts Expertise, and the Emergence of New Deal Administrative Law*, 106 MICH. L. REV. 399, 441 (2007) (noting the continued role of expertise in American administrative law).

327. Since the legislature knows that courts will give agencies wide discretion upon review, they can choose to narrow that by limiting the scope of delegation.

328. This question of deference when agencies have competing rulemaking authority remains complicated. See Jacob E. Gersen, *Overlapping and Underlapping Jurisdiction in Administrative Law*, 2006 SUP. CT. REV. 201, 206–07 (citing *Gonzalez v. Oregon*, 546 U.S. 243 (2006) (finding that deference was not owed to the Attorney General given the expertise of the Secretary of Health and Human Services and the presumption against preemption)).

A reviewing court is thus left with the following conundrum: The legislature has sought to delegate its decisionmaking responsibilities to an independent agency and to reduce enforcement costs by granting the agency deference in litigation; however, a subsequent legislative coalition is skeptical enough of the agency to implement an additional control mechanism—a proxy advocate—that polices that agency.<sup>329</sup> Courts have resolved this problem by ignoring the subsequent legislative coalition. While this approach conserves judicial resources, it does not satisfy the other justifications for deference. The proxy advocate is a similarly expert body, and its presence creates a background presumption against which legislatures govern. Indeed, resolving a dispute between two experts does not stretch the judicial role too far afield, as it would to require a judge to develop a technical recommendation *de novo*.

Take, for example, a case where a proxy advocate brings to a court's attention an issue which might not otherwise have been reviewed. Such a case provides a clear example of the proxy advocate fulfilling its function. For example, in South Carolina, the reviewing court set aside a conclusion that trade association dues could be included in rate calculations following an objection that was noted and appealed by a proxy advocate.<sup>330</sup> Though the court reviewed the dispute under a deferential standard, the case suggests that a proxy advocate's opposition can serve as a red flag to reviewing courts. Even without judicial review, the proxy advocate's views must still be taken into account by the agency itself. Even if the agency sides with the utility at the end of the ratemaking proceeding, it must still acknowledge the arguments of the proxy advocate if its decision is to withstand even the most deferential judicial review.

Although the proxy advocate plays a necessary role in flagging issues for reviewing courts, this does not dictate what standard the courts should use to evaluate the proxy advocate's views. The strongest approach would grant deference to the proxy advocate when it contests agency decisions in litigation. The weakest version would continue the status quo, whereby commissions are given significant deference and proxy advocates merely ensure that agencies meet minimal standards of due process. A middle ground would

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329. See Holburn & Vanden Bergh, *supra* note 42, at 61 (“[L]ess electorally confident governments have a greater incentive to lock-in favored policies by designing institutional structures that are difficult for future political generations to dismantle.”).

330. Hamm v. S.C. Pub. Serv. Comm'n, 422 S.E.2d 110, 114 (S.C. 1992).

diminish deference to the agency decisions in litigation when the consumer's advocate is on the opposing side.

The strong version would be a poor idea for several reasons. First, it would effectively replace commission decision making with proxy advocate decisionmaking. Even if the proxy advocate were only given deference when they opposed the commission, the commission would likely be required to acquiesce to any demands placed upon them by the proxy advocate.<sup>331</sup> While some consumer advocates would argue that this is preferable, most proxy advocates are neither equipped for such burdensome decision making, nor do their statutory mandates reach to provide for the "general welfare" as should be required from utility proceedings. That is to say, the Commission must balance interests, and the proxy advocate must zealously represent only one.<sup>332</sup> As a result, they would impose significant costs on the groups that are not within their statutory constituency, such as industrial consumers. Moreover, assuming such a responsibility as to make binding determinations would require courts to read proxy advocate statutory authority beyond the plain meaning of the authorizing statutes.

The middle ground, however, might improve judicial decision-making. When a proxy advocate contests an agency decision, it can indicate to courts the presence of a public choice problem meriting judicial intervention. Proxy advocates and commissions may reach different conclusions for a variety of reasons, but the disagreement will necessarily be between two politically accountable, technically expert offices that are subject to different political currents. The commission, in general, will be subject to greater influence by utilities and industrial companies, while the proxy advocate will be subject to other (perhaps no less insidious) political influences, such as commercial utility customers or political demagoguery. Second, after the public choice problem is highlighted by the disagreement between the proxy advocate and the commission, the court's inter-

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331. Though not every action by a public utility commission is litigated by the proxy advocate at present, granting deference to proxy advocate decisions would alter both parties' strategic choices. Today, the likelihood of losing due to judicial deference reduces the proclivity of proxy advocates to bring suits. Rather, they (sensibly) pursue other strategies with a great likelihood of success. When the greatest likelihood of success comes from litigation, that would supplant other strategies, and the PUC would act based on an expectation that any litigation would result in a court deferring to the proxy advocate's position.

332. *Pub. Serv. Co. of N.H. v. Patch*, 136 F.3d 197, 208 (1st Cir. 1998) (emphasizing "[New Hampshire's] legislative directive requiring [the Office of Consumer Advocate] to devote its representational zeal entirely to the cause of the consumer").

vention is aided by technical expertise on both sides. A court reviewing such a disagreement with diminished deference is arguably acting well within the scope of legislative intent. The enacting coalition that created the proxy advocate did so after the agency had been well established, and thus did so to guard against future utility rate hikes by anti-consumer commissions.<sup>333</sup>

Of course, there are both legal and policy objections to this approach. Most significantly, enacting coalitions were presumably aware that agency decisions were given deference. If they had intended to weaken such deference, they could have done so. Additionally, when courts have given agencies deference over proxy advocate objections, they have not sought to change the standard of review. This is not to suggest, however, that legislatures should not begin to demand such a change or that legislators keep abreast of developments in judicial review of utility ratemaking.

On a policy level, moreover, it is not clear that a court *should* trust the proxy advocate, let alone above the PUC. As the Indiana Court of Appeals noted, these are two different parties who guard the public interest in utility proceedings with a proxy advocate.<sup>334</sup> As such, the court held that opposition by the proxy advocate did not constitute conclusive proof that the PUC's decision was opposed to the public interest, nor did it require the PUC to meet a higher standard of proof.<sup>335</sup> As required by administrative procedure, the PUC must always account for the positions presented them, including those of the proxy advocate in the initial decision-making. However, they are granted considerable latitude in how they respond to such comments.

More importantly, given the varying success of proxy advocates at the federal and state level, it is not clear that all proxy advocates should be treated as unquestioned harbingers of good. If there is a disagreement, the PUC may well be right. Even were this true, however, proxy advocates should not be ignored. The voices of the proxy advocate's constituents—diffuse as they are—should still be heard. So long as the proxy advocate exists, therefore, courts should account for their interaction with the citizenry in their review.

The diminished deference standard would permit such an analysis. If the proxy advocate litigates a PUC rate setting, the court can look at whether the proxy advocate's processes were representa-

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333. See Holburn & Vanden Bergh, *supra* note 42, at 61.

334. Nextel W. Corp. v. Ind. Util. Regulatory Comm'n, 831 N.E.2d 134, 155–57 (Ind. Ct. App. 2005).

335. *Id.* at 156.

tive of their constituency. Among state proxy advocates, the judge can look at indicia of independence and whether the proxy advocate is responsive to consumer needs. At the federal level, the judge may look at how the proxy advocate remains accountable to its constituents.

There is precedent for this diminished deference approach, both in theory and in practice. When an agency's action implicates a threatened or endangered species, the Endangered Species Act (ESA) requires that the acting agency consult with the agency that administers the ESA.<sup>336</sup> This requires that an agency, which may be predisposed toward its statutory mission, formally take into account the views of an agency that is dedicated to considering the ESA. The proposal here has a similar effect: an agency is forced to look outside of itself to ensure that the effects on consumers are properly considered. Professor Catherine Sharkey's agency reference model suggests that an administrative agency can be vested with the power to make initial, albeit reviewable, determinations in crowded policy spaces.<sup>337</sup> Though her argument focuses on agency determinations of preemption, the principle applies to proxy advocates. The agency determination "should be the beginning—not the end"—of the analysis.<sup>338</sup>

If the proxy advocate is an unfaithful agent, however, this raises further problems for how courts review their decisions. At least one court has found that a proxy advocate's litigation of an issue precludes a private litigant's cause of action.<sup>339</sup> The same indicia of representation can be used to determine whether the proxy advocate has provided adequate representation.<sup>340</sup> This section, however, presupposes the power of the proxy advocate to participate in a litigation. In some cases, the courts have denied inter-

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336. See 16 U.S.C. § 1536(a) (2006); see also *Thomas v. Peterson*, 753 F.2d 754, 763–64 (9th Cir. 1985) (the Forest Service's failure to consult the Fish and Wildlife Service and to prepare a biological assessment, where an endangered species may have been present in the area of its proposed action, was not a *de minimis* violation of the ESA); RICHARD L. REVESZ, *ENVIRONMENTAL LAW AND POLICY* 945–50 (2008).

337. Catherine M. Sharkey, *Products Liability Preemption: An Institutional Approach*, 76 G.W. L. REV. 449, 477 (2008).

338. *Id.* at 479.

339. *Brandon v. Ark. W. Gas Co.*, 61 S.W.3d 193, 203 (Ark. Ct. App. 2001) (holding that action by the Arkansas Attorney General precluded later action by ratepayers).

340. *Cf. Hansberry v. Lee*, 311 U.S. 32, 44 (1940) ("Because of the dual and potentially conflicting interests of those who are putative parties to the agreement . . . , it is impossible to say, solely because they are parties to it, that any two of them are of the same class. Nor without more . . . can some be permitted to stand in judgment for all.").

venor status to proxy advocates on the theory that their interests are sufficiently represented by the agency.<sup>341</sup>

*B. The Federal Role for Proxy Advocates*

In examining federal and state proxy advocates separately above, this paper has thus far ignored their overlap. Proxy advocates of one jurisdiction can, and often do, operate in another. Though many state proxy advocates can and do represent their constituencies in federal agency and judicial proceedings,<sup>342</sup> federal proxy advocates have not been given similar powers. These state proxy advocates are well established in state government,<sup>343</sup> and function well as independent agencies.<sup>344</sup>

State proxy advocates thus appear capable of representing consumer interests, even at the federal level, under two conditions. The first requirement is that they are legally empowered to do so. The second is that the proxy advocate or advocates must adequately represent the national constituency. If one state's consumers have divergent interests from those of another, both states' proxy advocates must be involved to present their views. If a federal agency approves a pipeline that benefits one state by passing through the wilderness of another, both states should be represented. A federal proxy advocate, by contrast, would be forced to balance the competing interests of each state's consumers and may thus avoid representing consumers in the issue altogether.

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341. *See, e.g.*, *Pub. Serv. Co. of N.H. v. Patch*, 136 F.3d 197, 208–09 (1st Cir. 1998) (finding that the proxy advocate's role of advocating the consumer interest differed from the PUC role of balancing consumer and utility interests, but concluding that this case presented no divergence in their views); *In re Pub. Serv. Co. of N.H.*, 88 B.R. 546, 556–57 (Bankr. D.N.H. 1988) (finding that the interests of all consumers are represented by the state through the Attorney General and thus granting only limited intervenor status to the proxy advocate).

342. The only two states that seem to restrict the appearance of their respective proxy advocates to appearance before state utility commissions are Vermont and Arizona. VT. STAT. ANN. tit 30, § 2(b) (2008) (providing that in cases requiring hearing before the board, the director shall represent the interests of the people of the state); *see also* ARIZ. REV. STAT. ANN. § 40-462 (2011) (specifying that the residential utility consumer office represents consumer interests “before the corporation commission”). More commonly, the grant of power is broad and extends to all state and federal administrative and judicial proceedings. *See* MINN. STAT. ANN. § 8.33(6) (West 2005) (granting the Attorney General authority to intervene in “federal proceedings”); N.Y. EXEC. LAW § 94-a(3)(8) (McKinney 2011) (before “federal, state and local administrative and regulatory agencies”).

343. *See* Part I.B.

344. *See* Part III.B.

Federal proxy advocates may be necessary in several situations, even if state proxy advocates can appear federally. For example, if the increased burden on proxy advocates—that of participation in numerous federal proceedings—overburdens the state proxy advocates. A state proxy advocate who neglects local utility rate settings to monitor natural gas sales may save local consumers less money, although the overall savings to consumers nationwide may be greater. However, federal proxy advocates may lack accountability. Reliance on state proxy advocates may also create yet another collective action problem. Since certain agency and judicial interventions will be public goods, such as monitoring the natural gas market, state proxy advocates will free ride on the efforts of their counterparts.

Another case which would justify a federal proxy advocate is a diffuse interest systemically underrepresented by state proxy advocates, whose voice merits inclusion in agency proceedings. Grouping consumers by state does not always properly sort interests. For instance, a number of states may have a minority class of consumers who would be disadvantaged by a more permissive hydroelectric licensing process, such as commercial fishers or residents in affected areas. However, it is unlikely that any state proxy advocate would represent these interests since the majority preference, for cheaper energy, would direct its activities. Although a federal proxy advocate may not always advocate more strongly for such minority interests, it provides such a class of consumers with a federal entity who may be more sensitive to their concerns.

Despite these exceptions, state proxy advocates are more effective consumer representatives than federal proxy advocates. The federal government should recognize the problems with federal proxy advocates and thus encourage the development of state proxy advocates. This has been attempted once before.<sup>345</sup> Given proxy advocates' need for resources and their variable funding structures, federal money could do a great deal in furthering consumer interests.<sup>346</sup>

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345. See H.R. REP. NO. 95-1750, at 19–20 (1978) (Conf. Rep.) (appropriating \$10,000,000 for state offices of consumer representation in FY1979 and FY1980 through the Public Utility Regulatory Policies Act, H.R. 4018, 95th Cong. (1978)); see also Goodman, *supra* note 15, at 215 (citing H.R. 4018 as a reason for the increase in the use of state proxy advocates). For a broader discussion of this approach to federalism, see PAUL E. PETERSON ET AL., *WHEN FEDERALISM WORKS* (1986).

346. As John Chubb has pointed out, however, distributing federal funds through state and local governments introduces an additional interest group to the analysis—those very governments, who can redirect the funds to their benefit

## V. CONCLUSION

Experience shows that proxy advocates help improve consumer representation in agency proceedings, but optimism must be tempered by history. If such mechanisms are to be used to govern the discretion of federal agencies, these proxy advocates must be designed to ensure communication with the constituencies they represent. The expansion of the administrative state shows no signs of slowing down, and the federal government is right to ensure that business interests do not commandeer these proceedings to the detriment of consumers.

Congress must make sure that dedicated bureaucratic voices for consumers speak on behalf of the consumer. Where it does, courts should take heed. Where it does not, however, Congress would be wise to find other ways of protecting consumers.

## APPENDIX

State proxy advocates exist in a variety of forms. Generally, statute creates an office or mandates that attorneys general represent consumer interests. In such cases, the relevant considerations are fairly consistent. Who appoints the proxy advocate? Where is the proxy advocate located in the state government? Does the proxy advocate serve for a term of years? What constituency does the proxy advocate represent? Is there an additional layer of oversight? These questions are addressed in Table 1.

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or the benefit of their political allies. See John E. Chubb, *Excessive Regulation: The Case of Federal Aid to Education*, 100 POL. SCI. Q. 287, 304–05 (1985).

	Statutory Section	Loc.	Appt.	Conf.	Term	Mand.	Oversight
AL	ALA. CODE § 37-1-16 to -18 (LexisNexis 1992)	AG	AG			General	
AK	ALASKA STAT. § 42.04.070 (2010)	AG				General	PUC
AZ	ARIZ. REV. STAT. ANN. § 40-461 to -464 (2011)	Exec	Gov	Y		Residential	
AR	ARK. CODE ANN. § 23-4-301 to -308 (2002 & Supp. 2009)	AG	AG			General	
CA	CAL. PUB. UTIL. CODE § 309.5 (West 2004)	PUC	Gov	Y		General*	
CO	COLO. REV. STAT. § 40-6.5-101 to -10 (LexisNexis 2011)	Exec	Exec			Res/Ag/SmBiz	Bd.
CT	CONN. GEN. STAT. ANN. § 16-2a (West 2007)	PUC	Gov	Y	5	General	
DC	D.C. CODE § 34-803 (LexisNexis 2001 & Supp. 2010)	PUC	Gov	Y	3	General	
DE	DEL. CODE ANN. tit. 29, § 8716 (2003 & Supp. 2010)	Exec	Gov	Y		General	
FL	FLA. STAT. ANN. § 350.061 (West 1999)	Leg	Leg	Y		General	
GA	GA. CODE ANN. § 46-10-1 (2004)	Exec	Exec			Res/SmBiz	
HI	HAW. REV. STAT. § 269-51 (2007)	Exec	Gov	Y		General	
IL	220 ILL. COMP. STAT. ANN. 10/16 (West 2007)	Corp	Board			Res/(SmBiz)	
IN	IND. CODE ANN. § 8-1-1.1-1 (West 2010)	Exec	Gov		4	General	Council
IA	IOWA CODE ANN. § 475A.1 (West 2009)	AG	AG		4	General	Council
KS	KAN. STAT. ANN. § 66-122 (2002)		Gov		4	Res/SmBiz	CURB
KY	KY. REV. STAT. ANN. § 37.130 (LexisNexis 2008)	AG	Gov		3	General	Council
ME	ME. REV. STAT. ANN tit. 35-A § 1701 (2010)	Exec	Gov	Y	4	Res/SmBz/LowInc	
MD	MD. CODE ANN., PUB. UTIL. § 2-201 (LexisNexis 2010)	Exec	AG	Y	5	Res/NonComm	
MA	MASS. GEN LAWS ANN. ch. 12, § 11E (West 2010)	AG	AG			General	
MI	MICH. COMP. LAWS ANN. § 460.6f (West 2011)	Exec	Gov			Res	Bd.
MN	MINN. STAT. ANN. § 8.22 (West 2005)	AG	AG			Res/SmBiz	
MO	MO. REV. STAT. § 386.700 (2000)	Exec	Exec			General/(Inad.)	

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State	Statute	Leg	Leg	Y	Volume	Agency
MT	MONT. CODE ANN. § 5-16-101 (2009)	PUC	PUC			General
NE	NEB. REV. STAT. § 66-1830 (2009)	PUC	PUC		4	Not High Volume
NV	NEV. REV. STAT. § 228.300 (2009)	AG	AG		4	General
NH	N.H. REV. STAT. ANN. § 363:28 (LexisNexis 2008)	PUC	Gov		4	Res
NJ	N.J. STAT. ANN. 52:27EE-46 (West 2010)	Exec	Gov			Inad.
NM	N.M. STAT. ANN. § 8-5-2 (LexisNexis 2004)	AG				Res/Smbiz
NY	N.Y. EXEC. LAW § 94-a(3)(8) (McKinney 2011)	Exec	Gov(FN)	Y		General
NC	N.C. Gen. Stat. Ann. § 62-15 (West 2000 & Supp. 2011)	PUC	PUC			General
OH	OHIO REV. CODE ANN. § 4911.01 (West 2010)	Exec	AG(Bd.)			Res
OR	OR. REV. STAT. § 774 (2009)	Corp	Board			General
PA	PA. CONS. STAT. ANN. § 309-1 (West 1990)	AG	AG			General
RI	R.I. GEN. LAWS § 39-1-17 (2006)					General
SC	S.C. CODE ANN. § 37-6-512 (2000)	Exec	Exec			General
TN	TENN. CODE ANN. § 65-4-118 (2004)	AG				General
TX	TEX. UTIL. CODE ANN. § 13.001 (West 1997)	Ind	Gov	Y	2	Res/Smbiz
UT	UTAH CODE ANN. § 54-10-201 (LexisNexis 2010)	Exec	Gov	Y	6	Res/Smbiz
VT	Vt. STAT. ANN. tit. 30, § 1 (2008)	PUC	PUC			General
VA	VA. CODE ANN. § 2-2-517 (2008)	AG				General
WA	WASH. REV. CODE ANN. § 80.01.100 (West 2011)	AG				General
WV	W. VA. CODE ANN. § 24-1-1(f) (LexisNexis 2004 & Supp. 2010)	PUC	PUC			General
WI	Wis. STAT. ANN. § 199.01 (West 2010)	Corp	Board			Res/Ag
WY	WYO. STAT. ANN. § 37-2-401 (2011)	PUC	Gov			General

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