Financial Barriers to Public Participation in the Regulatory Process

Henry E. Howell Jr.
FINANCIAL BARRIERS TO PUBLIC PARTICIPATION IN THE REGULATORY PROCESS†

HENRY E. HOWELL, JR.*

When "populism" swept the country in the late nineteenth century on the wings of William Jennings Bryan's silver-tongued oratory, state legislatures sought to regulate the powerful and monopolistic public utility companies in accordance with the public interest.1 However viable the concept of regulation, it has been perverted in practice so that many regulatory agencies throughout America have become captured by the "regulated" industries.2

In Virginia, as in other states, a populist-oriented movement has sought to redress the improprieties which result when agencies are subject to undue influence from industry. Within the past decade in Virginia, our movement has succeeded in exposing discriminatory underwriting practices employed by automobile insurance companies which previously had been condoned by the State Corporation Commission.3 Additionally, we have been instrumental in ensuring that due process of law is accorded to public interest intervenors participating in Commission hearings;4 indeed, almost $5 million recently was restored to Virginia consumers as compensation for past denials of due process in regulatory proceedings.5

In addition to securing important procedural and substantive reform in regulatory matters, concerned consumer representatives have played an important role in preventing unjustified rate increases sought by public utilities. For example, in 1972, a $79 million rate increase sought by the Virginia Electric and Power Company was reduced to a $41 million

† This Article elaborates upon the purpose, theory, and legal authority underlying the author's appeal to the Supreme Court of Virginia in Howell v. S.C.C., Record No. 8102 (appeal pending, Supreme Court of Virginia, October term, 1972). The author wishes to gratefully acknowledge the research assistance and writing contribution of Howard E. Copeland, third-year law student at the University of Virginia, in the preparation of the brief in that case and the formulation of this Article.

*LL.B., University of Virginia. Lieutenant Governor, the Commonwealth of Virginia.


increase. Consumer involvement also played an integral role in the Commission's rejection of a premature application for rate increases from the C & P Telephone Company, arguing that the rate increase was based on an improper debt ratio and that the utility had been granted a prior rate increase less than a year earlier.

This Article will recite and examine the legal and political underpinnings that have served as the foundation for these efforts. Additionally, it will consider the desirability of public participation in hearings before the State Corporation Commission. Specifically, it will be argued that free transcripts of SCC hearings should be made available to concerned members of the public. At present, the financial burden of acquiring such transcripts has the unfortunate effect of discouraging public involvement. It will be submitted that sound regulatory thinking supports the proposition that the costs of transcripts should be borne either by the state or by the rate applicant.

THE PHILOSOPHY OF PUBLIC INTEREST LAW

The basic premises of public interest law in this Commonwealth can be found in the Constitution of Virginia in the words of George Mason, which have remained unchanged since 1776. First, government is reminded of whom it serves and in what capacity: "[A]ll power is vested in, and consequently derived from, the people, that magistrates are their trustees and servants, and at all times amenable to them." The Constitution then provides a standard of performance and delivers an ultimatum:

[O]f all the various modes and forms of government, that is best which is capable of producing the greatest degree of happiness and safety, and is most effectually secured against the danger of maladministration; and whenever any government shall be found inadequate or contrary to these purposes, a majority of the community hath an indubitable, inalienable, and indefeasible right to reform, alter or abolish it, in such manner as shall be judged most conducive to the public weal.

These are not only words for all seasons, but a bill of rights for all people. From this bold statement, it is clear that all forms of govern-

9. Id. art. I, § 3.
ment are to serve the "public interest" and that it is the duty of all public servants to reform any system that does not serve the people.

The need for government regulation of business in order to preserve the health, safety, and welfare of its citizens was recognized by the Supreme Court of the United States at the turn of the century. The classic statement of this need was expressed by Chief Justice Waite in

Murnn v. Illinois:

Property does become clothed with a public interest when used in a manner to make it of public consequence, and affect the community at large. When, therefore, one devotes his property to a use in which the public has an interest, he, in effect, grants to the public an interest in that use, and must submit to be controlled by the public for the common good, to the extent of the interest he has thus created.10

From this broad policy foundation, today's public interest lawyer is able to allege and represent a public interest in almost every substantial business activity and, even more certainly, in every governmental action. Both the general provisions of the fourteenth amendment to the United States Constitution and the specific dictates of the Constitution and Code of Virginia11 create a standard of "fair and reasonable" public utility rates, one which a public interest lawyer may enforce.

In a sense, the public interest lawyer presumes to speak for the public without the benefit of office, the mandate of an election, or the statutory duty to formulate and enforce public policy. However, it is the logical implication of a democratic society that everyone is his own "private attorney general"12 and is empowered to enforce the rights vested in the public by statutory and constitutional authority.

THE DESIRABILITY AND FACILITATION OF PUBLIC PARTICIPATION

Intervention in and appeal of administrative decisions by the public is a valuable process in a democratic society. The State Corporation


12. See, e.g., Office of Communications of the United Church of Christ v. FCC, 359 F.2d 994 (2d Cir. 1966); Scenic Hudson Preservation Conference v. FPC, 354 F.2d 608 (2d Cir. 1965).
Commission of Virginia permitted the participation of public interest representatives in hearings on important public matters long before federal agencies solved the problem of standing. The Commission's Rule 10 provides: "[A]ny interested party may intervene in a case by attending the hearing and executing and filing with the bailiff a notice of appearance on forms provided for the purpose. . . ." 13 Rule 8 is just as permissive in defining parties and public interest representatives:

[A]ny party may appear in person or by attorney. A foreign attorney may appear with a Virginia attorney. A person who is not a lawyer may not represent clients before the Commission, but may testify as a witness on behalf of the public, or of a chamber of commerce or other association, or of a corporation of which he is a full-time employee or by which he has been employed as an expert witness. . . . 14

As a result of these rules, intervenors before the SCC have not encountered the difficulties in gaining standing to participate in and appeal from agency decisions which have confronted public interest groups at the federal level. It is only in recent years that the problem of standing has been resolved with respect to public interest groups appearing before federal agencies. 15

The policy of unrestricted participation reflected by the Commission's rules appears to reflect an understanding of the value and desirability of public participation in public decision-making. The importance of intervention is stated succinctly by Professor Ernest Gellhorn:

The demand for broadened public participation in governmental decision making rests on the belief that government, like all other institutions, rarely responds to interests not represented in its deliberations. An administrative agency is usually exposed only to the views of its staff, whose position necessarily blends a number of discrete public interests, and of private persons with a clear financial stake in the proceedings. The emergence of individuals and groups willing to assist administrative agencies in identifying interests deserving protection, in producing relevant evi-

14. Id. 8 (emphasis supplied).
dence and argument suggesting appropriate action, and in closing
the gap between the agencies and their ultimate constituents pre-
sents an opportunity to improve the administrative process.16

Public participation is especially important in rate making, where
the public's economic interests are directly at stake. A recurring prob-
lem has been identified by Judge Skelly Wright, who has inquired
"whether the regulatory agency is unduly oriented toward the indus-
try it is designed to regulate, rather than the public interest it is designed
to protect." 17 In Virginia, the "old Commission," which was composed
of Judges Catterall, Hooker and Dillon, was overly sympathetic to
utility requests. The fact that it was a "captured agency" is evidenced
by the close-working relationship between a regulated utility monopoly
and the Commission, which resulted in an illegal 38-minute hearing in
1969.18

There is, however, adequate opportunity for public interest inter-
venors to ameliorate the effect of this imbalance by performing the
duties neglected by public officials. A public interest advocate finds no
legal barrier to intervention before the Commission.19 If he fails to
persuade the Commission of his position, he may consult the Constitu-
tion and Code of Virginia20 for any violations of law to assign as error
on appeal. Once a person has become a "party intervenor," he may
appeal, as of right, by authority of constitution and statute,21 as well as
rule of court.22 The work of the public interest intervenor is to supple-

16. Gellhorn, Public Participation in Administrative Proceedings, 81 YALE L.J. 359,
403 (1972) [hereinafter cited as Gellhorn]. See generally Cramton, The Why, Where,
and How of Broadened Public Participation in the Administrative Process, 60 GEO. L.J.
525 (1972) [hereinafter cited as Cramton]; Lazarus & Onek, The Regulators and the
People, 57 VA. L. REV. 1069 (1971) [hereinafter cited as Lazarus & Onek]; Comment,
Public Participation in Federal Administrative Proceedings, 120 U. PA. L. REV. 702
(1972).
recent decision to trim and postpone a rate application, C & P Tel. Co., S.C.C. No.
19152 (Va., Sept. 1972), gives reason to hope that the newly constituted Commission
will decline to engage in ex parte arrangements with the utilities, and that the Com-
mission's General Counsel aggressively will pursue and represent the public interest.
VA. CONST. art. IX, § 2.
19. See notes 13 & 14 supra & accompanying text.
20. See note 11 supra & accompanying text.
The Virginia Constitution provides that: "any party in interest, or any party aggrieved
by any final finding, order or judgment of the Commission, shall have, of right, an
appeal to the Supreme Court. . . ." VA. CONST. art. IX, § 4.
22. VA. SUP. CT. R. 5:18 (g).
ment the representation of the public required of the Attorney General\(^{23}\) and the Commission's General Counsel.\(^{24}\)

While the public interest intervenor before the SCC need not be concerned with his right of standing, there are serious practical difficulties which may frustrate this right. At the time of this writing, the appeal on the merits of the current \textit{VEPCO} rate case is in abeyance\(^{25}\) while legal attempts are being made to overcome the financial barriers presently limiting access to the appeals court.\(^{26}\)

**Financial Barriers to Appeal: Transcripts**

The public interest in fair and reasonable rates cannot be safeguarded effectively if appeal from Commission decisions is not fully available. Since most public interest representatives are somewhat impecunious as to their public interest activities, the primary barrier to appeal is a want of financial resources with which to prosecute their case. In order to enhance participation in the policy-making process by these persons, it is necessary to reduce their expenses. One important expense that has become an obstacle to public involvement is the cost of obtaining necessary transcripts. Reduction of this unnecessarily prohibitive expense is crucial, and the means by which such a reduction could be implemented merit examination.

This inquiry may be facilitated by reference to the pending \textit{VEPCO} case, where the right of public intervenors to obtain transcripts at the expense of the regulated utility is at issue.\(^{27}\) The Virginia Rules of

\(^{23}\) \textit{Va. Code Ann.} §§ 2.1-133.1 to 133.3 (Cum. Supp. 1972). This statute creates a Division of Consumer Counsel in the Office of the Attorney General of Virginia, but provides only one lawyer and no expert staff, under present budgetary allowances. Although this is a laudable concept, it is presently inadequate to deal with the complexity of issues presented in rate hearings and is plagued with the inherent bias of being a part of the Attorney General's Office, which represents the Commission in many instances. A better implementation of the public defender concept would be through the creation of an independent "Consumer Protection Agency," consolidating the presently fragmented consumer efforts and extending its powers and resources to meet the challenge of representing the public. Even the efforts of such an independent agency could be supplemented by individual consumer representatives, intervening to represent interests of discrete portions of the public.


\(^{25}\) \textit{VEPCO}, S.C.C. No. 19027 (Va., Sept. 20, 1972) (appeal noted but not acted upon by the Supreme Court).


Court\textsuperscript{28} and the Virginia Code\textsuperscript{29} provide that the Clerk of the Commission is \textit{required} to prepare and transmit the record to the Supreme Court of Virginia whenever an appellant files a notice of appeal from a Commission decision. Receipt of the transcript is necessary to perfect an appeal as of right, and the Clerk currently requires that the appellant pay a copying fee of 50 cents per page\textsuperscript{30} before processing the transcript. Two alternatives to this costly procedure are available, but the Clerk and the Commission generally have been unwilling to utilize them. First, according to an interpretation of the Attorney General of Virginia,\textsuperscript{31} if the appellant presents the Clerk with a certified transcript purchased by the appellant or by the rate applicant, the Clerk may certify this transcript as part of the record and transmit it without charge. Second, the Clerk is empowered to certify and transmit the original transcript which he receives from the Commission reporter.\textsuperscript{32} This procedure was authorized by the Commission in the current VEPCO litigation; however, the extraordinary authorization apparently was granted only to preserve the rights of the Lieutenant Governor's office to pursue an appeal on the merits of the rate increase decision. Thus, unless the Virginia Supreme Court rules that public interest intervenors without adequate funds are entitled to have the record transmitted at no charge, the Clerk will seek to retrieve the transcript and will refuse to follow this exceptional procedure in the future.\textsuperscript{33} As a result, public interest intervenors will be forced to bear the cost of transmitting the record, either by having the Clerk copy his transcript or by

\begin{footnotesize}
\begin{enumerate}
\item \textsuperscript{28} VA. SUP. Ct. R. \textnumero 5:18 (d), (e).
\item \textsuperscript{29} VA. CODE ANN. \textsection 12.1-40 (Cum. Supp. 1971).
\item \textsuperscript{30} \textit{Id.} \textsection 13.1-124 (Cum. Supp. 1971). The third and final paragraph reads: "For making up, certifying and transmitting a record on appeal the clerk shall charge and collect fifty cents per page \textit{for all papers necessary to be copied}, and in addition, the sum of five dollars." (emphasis supplied).
\item \textsuperscript{31} Opinion letter from Attorney General Andrew P. Miller to Lieutenant Governor Henry E. Howell, Jr., October 5, 1972.
\item \textsuperscript{32} The Commission routinely purchases an original and three copies of the transcript of every proceeding. Thus, there is a certified transcript available for transmission without any additional cost to the Commonwealth, and with little additional inconvenience to the Commission. Unlike the federal administrative system, the participants do not subsidize the agency's copies by an exclusive contract with a reporting firm, and there is no reason that the Commission could not order another copy at its expense to accommodate public interest interveners. For a detailed description of the federal system and its problems, see Gellhorn, \textit{supra} note 16, at 390-93; Lazarus & Onek, \textit{supra} note 16, at 1099.
\item \textsuperscript{33} Opinion letter from Commissioner Junie L. Bradshaw to Lieutenant Governor Henry E. Howell, Jr., October 26, 1972.
\end{enumerate}
\end{footnotesize}
purchasing one. In either case, this cost is estimated by the Commission staff to be about $2,000.

In addition to the expense of transmitting the record, an appellant presently must obtain his own copy of the transcript of proceedings in order to "designate the appendix" in accordance with the Rules of Court. The designation of the appendix involves the tedious and expensive work of choosing the portions of the record that support the appellant's case and typing those passages to accompany the opening brief. This system is in lieu of the former "Record on Appeal," which was printed and was also costly.

The court has the option, by authority of Rule 5:41, to dispense with the requirement that public interest intervenors and appellants prepare an appendix. Ideally, this rule would be applied in those actions where representatives of the public who are without large means are seeking to represent the public interest. Elimination of the expense of preparing the appendix would facilitate public participation, as would the elimination, as authorized by Rule 5:35, of the multiple copy requirement.

Even if these burdens on public participation are removed, the public interest intervenor still needs a copy of the transcript for the preparation of his brief. As the Commission's opinion in the VEPCO case explains, a "public copy" of the transcript is available in the Commission's office. However, the opinion also indicates that the copy may not be removed from that office, and it is extremely doubtful that a lawyer or his clerical staff could work effectively at a public office. Professor Gellhorn confirms that public interest lawyers who appear before federal agencies find that working with the "public copy" is awkward to the point of being unfeasible.

Thus, under current procedures, an appellant from a decision of the Commission must bear a substantial financial burden; in the present VEPCO case this amounts to approximately $4,000. One of the questions the Supreme Court should consider in connection with the present appeal is whether the shifting of this burden would threaten the fiscal health of the Commonwealth, whose government administers a five billion dollar budget biannually, or of VEPCO, whose fiscal health is guaranteed by the very hearings at issue. The question should be considered in light of the valuable services which may result from such a minor expenditure. If the primary purpose of the ratemaking process

34. VA. SUP. CT. R. 5:35-41.
is to serve the public interest, surely such an expense is justified by its assurance that an important and widely held point of view will be represented until the case has been carried to completion. By shifting the cost of transcripts either to the Commonwealth or to VEPCO, the expenses of representing the public and consumers would be spread among millions of members of the public through taxes, or among millions of consumers through utility rates. These would be appropriate means to assure representation of the public interest.

While these and other litigation costs would add to the tax or rate burden of the public, the increased burden would be negligible under a properly drawn Commission rule. In many instances, public interest intervenors could return more to taxpayers and consumers than would be expended. For example, the public interest appeal of an SCC insurance rate decision in 1969 produced an annual savings to Virginians of several million dollars in premiums. In that case, the costs of appeal were borne by the state AFL-CIO. The majority of public interest cases, however, will be dependent upon the private resources of a public intervenor. Such a system cannot assure the effective representation of significant and widely held points of view, especially under the more costly rules of procedure now in effect.

The arguments developed above rest on the premise that the cause of non-governmental public interest representation is indigence. In shifting the financial burden of appeal, no showing should be required of public interest intervenors other than an informal declaration that they lack the necessary funds, rather than the normal indigency requirements for proceeding in forma pauperis.

These proposals are modest in comparison to the advances achieved by public interest groups practicing before some of the federal regulatory agencies. The decisions of these agencies should be persuasive to the Commission, should the question arise before it again, and to the Supreme Court of Virginia in the current VEPCO appeal.

The Developing Federal Rule

The Federal Trade Commission has set the example in striking down barriers to public participation in agency proceedings. In 1970, the FTC set a valuable precedent by providing a free transcript, at government expense, to a group of law students (Students Opposing Unfair Practices, Inc., or S.O.U.P.) who took action in opposition to deceptive practices.
advertising of the Campbell Soup Company.\textsuperscript{38} Significantly, S.O.U.P. was denied permission to proceed \textit{in forma pauperis}, yet the group was provided with a free transcript in recognition of the value of their public service. Shortly after the FTC’s action, the Federal Power Commission established liberal guidelines for determining qualification for free transcripts, but refused to allow an organization known as People Organized to Win Effective Regulation (P.O.W.E.R.) to proceed \textit{in forma pauperis} and to receive a free transcript,\textsuperscript{39} because it had not shown that it could not afford the FPC’s bargain transcript rates of $15 per hearing. By contrast, the SCC has not promulgated financial hardship guidelines and refuses to allow intervenors to proceed \textit{in forma pauperis}. It is not surprising that the FPC denied P.O.W.E.R.’s request for $10,000 in advance fees and costs, since P.O.W.E.R. did not prove its need or its unique ability to represent the public; its request was very expensive, much larger than the cost of a single transcript that a pool of intervenors would share under the proposed SCC rule. The FPC also chose to rationalize its denial of resources to P.O.W.E.R. with the argument that the Commission adequately represents the public interest. While the FPC’s pledge is laudable, the agency’s own rules allow for intervention by the public and even by indigents.

It is important to note that neither of these decisions required a showing of technical indigency; rather, the decisions to provide public interest groups with meaningful access to the regulatory decision-making scheme was based upon an informal assessment of the potential contribution to be made by the public interest participant and upon the hardship presented by existing financial barriers.

In 1971, the Administrative Conference of the United States offered this rationale and recommendation for the elimination of prohibitive costs of regulatory participation:

\begin{quote}
The cost of participation in trial-type proceedings can render the opportunity to participate meaningless. Agencies have an obligation to minimize transcript charges, to avoid unnecessary filing requirements, and to provide assistance in making information available; and they should experiment with allowing access to their staff experts as advisers and witnesses in appropriate cases.

The cost of recording formal proceedings should be borne by the agencies, not by the parties or other participants to the pro-
\end{quote}

\textsuperscript{39} Initial Rates for Future Sales of Natural Gas for All Areas, 44 F.P.C. 655, 657-79 (1970).
ceeding (except to the extent that a person requests expedited delivery). Existing contracts and arrangements should be revised to provide for the availability, either through a reporting service or the agency itself, of transcripts at a minimum charge reflecting only the cost of reproducing copies of the agency's transcript. Transcripts should be available without charge to indigent participants to the extent necessary for the effective representation of their interests. Where the aggregate of these transcript costs imposes a significant financial burden on the agency, the agency should seek and Congress should provide the necessary additional appropriation.40

Of course, the battle to revise reporting contracts need not be fought in Virginia, since the SCC pays for its transcripts. But the application of Recommendation 28 to the Commission would provide public interest intervenors with transcripts at little or no cost. The Administrative Conference's reference to "the cost of reproducing" contemplates the actual photocopy cost, estimated at three cents per page. This requirement was included in a recent federal statute providing that federal agencies must allow "any person" to obtain a transcript at cost.41 Such a system would not be barred by the Code of Virginia, section 13.1-124, since the Commission could transmit its original copy to the court and provide a photocopy as a "working copy" without certifying such copy. Furthermore, the clerk could loan the intervenor a transcript for one day in order to permit the intervenor to obtain his own "working copy."

A further exposition of the logic of Recommendation 28 is provided by Professor Gellhorn, author of the successful proposal:

There is an additional reason for insisting that agencies bear the full cost of transcription. The agency usually initiates the hearing and controls it, and it is the agency's responsibility to transcribe the proceedings and maintain records. Transcription thus seems to be a legitimate cost of government, and should be paid out of general revenues.42

The immediate past Chairman of the Administrative Conference, Roger C. Cramton, also has recommended the elimination of financial barriers

---


41. Federal Advisory Committee Act § 11 (41 U.S.L.W. 67, 69 (Nov. 7, 1972)).

42. Gellhorn, supra note 16, at 392.
which presently discourage intervention by public interest groups. In concurring with Professor Gellhorn and the Administrative Conference, he advocates limiting the transcript fee to the actual cost of duplication. The payment of this "minimal" charge, he argues, is necessary to discourage frivolous requests, and should be required except where an indigent is being prosecuted by the government. The argument that a minimal charge is necessary to discourage frivolous requests is not compelling, since an agency screening can accomplish the same purpose. However, nominal charges are not unreasonable, since the thrust of the proposal represents a worthwhile goal—the elimination of heavy and unnecessary burdens.

The modesty of the proposal as to transcript expenses is revealed by contrasting it with decisions granting public interest intervenors expert witness' and attorneys' fees. Again in this area, the Federal Trade Commission was in the vanguard, deciding that indigent respondents in an administrative prosecution are entitled to free legal defense, even if the respondent is a corporation. The Comptroller General recently has approved the FTC's policy of paying the costs of transcripts for indigent respondents and intervenors, as well as per diem expenses for their attorneys and witnesses.

There is also precedent for shifting the costs of attorneys' fees to the regulated company. Although attorneys' fees are not normally a taxable cost of litigation, the United States Supreme Court has held that the shareholders' representatives in a derivative action are entitled to reimbursement. The Court stated:

[T]he absence of an avowed class suit or the creation of a fund, as it were, through stare decisis rather than through a decree—hardly touch[es] the power of equity in doing justice as between a party and the beneficiaries of his litigation. . . .

Other cases have departed further from the traditional metes and bounds of the doctrine, to permit reimbursement in cases where

44. Recommendation 28 proposes the use of the agency's own experts and file information, but stops short of attorney's fees or expert witness fees.
46. Opinion of the Comptroller General, 31 AD. L.2d 474, 475 (July 24, 1972): "[A]s in the case of an indigent respondent, and for the same reasons, appropriated funds of the Commission would be available to assure proper preparation" for intervenors pleading hardship. The common reason for providing transcripts and other resources to a respondent or intervenor is his "basic right to prepare and present his case on a level substantially equal to that of his opposition. . . ." See the discussion of the request which prompted the decision in Lazarus & Onek, supra note 16 at 1099-1100.
the litigation has conferred a *substantial benefit* on the members of an ascertainable class, and where the Court's jurisdiction over the subject matter of the suit makes possible an award that will *operate to spread the costs proportionately among them.* . . . 47

Acting on the premise that the ancient law on attorney's fees cannot serve all modern needs, the Supreme Court and Congress have authorized the payment of attorneys' fees in order to encourage persons of modest means to participate in important public policy decisions, thus benefitting society at large. 48 The application of this evolving policy to ratemaking is apparent: while the public interest intervenor represents a class of persons—the public consumers—in an action which creates no *tangible* fund from damages, his costs should be compensated since he has acted on behalf of the "class." This principle recently was applied in an administrative proceeding. In an action between a public interest group and a license applicant, a court of appeals reversed the FCC and approved a settlement which included the applicant's payment of the group's attorney fees. 49

Two Washington lawyers have identified a line of cases applying this doctrine:

The practice of awarding fees for the representation of unrepresented interests is an established tradition in certain areas of regulation, for example, in reorganizations supervised by the SEC under the Public Utility Holding Company Act of 1935. In such areas, the courts have forged rules to maximize the incentives of public interest representatives to appear. The Third Circuit even went to the extent of requiring compensation where the representatives initiated a challenge and subsequently failed, before the agency and through multiple appeals, to win the benefits they sought on behalf of the class which they represented. There is nothing in the case-law to suggest that the judiciary would not extend the same encouragement to agencies in fields affecting the interests of consumers, minority groups, or environmentalists. 50

In Virginia, the time may not be propitious for shifting attorneys' and expert witness' fees, but there is compelling logic for providing

---

representatives of the public with transcripts, which are the minimum incidents of appeal. Favorable operation of this rule may subsequently lead to its extension. However, since the SCC has rejected the argument even as to transcripts, it is necessary to persuade the Supreme Court of Virginia that the constitutions of Virginia and the United States require that public interest intervenors be provided free or low-cost transcripts.

The Mandate of the Fourteenth Amendment

Although it seems apparent that the Commission ought to provide free transcripts to public interest intervenors, the question remains to be considered whether such procedure is compelled by the mandates of the fourteenth amendment of the United States Constitution and article I, section 11, of the Constitution of Virginia. In recent years, the Supreme Court of the United States has demonstrated sensitivity to the financial exigencies of litigants. This sensitivity is marked by an intolerance toward judicial expenses which effectively deny persons without sufficient means the right of access to the courts, on the ground that such preclusion constitutes a denial of procedural due process and equal protection of the laws. The "access rule" was announced by the Supreme Court in Griffin v. Illinois, where an indigent defendant was granted the right to a free transcript in order to appeal his criminal conviction. The general principle, which was destined to be applied broadly, was stated by Mr. Justice Black:

There is no meaningful distinction between a rule which would deny the poor the right to defend themselves in a trial court and one which effectively denies the poor an adequate appellate review accorded to all who have money enough to pay the costs in advance. It is true that a State is not required by the Federal Constitution to provide appellate courts or a right to appellate review at all. But that is not to say that a State that does grant appellate review can do so in a way that discriminates against some convicted defendants on account of their poverty. Appellate review has now become an integral part of the Illinois trial system for finally adjudicating the guilt or innocence of a defendant. Consequently at all stages of the proceedings the Due Process and Equal Protection Clauses protect persons like petitioners from invidious discriminations. There can be no equal justice where

52. 351 U.S. 12 (1956).
the kind of trial a man gets depends on the amount of money he has. Destitute defendants must be afforded as adequate appellate review as defendants who have money enough to buy transcripts.  

Although the transcript rule was developed for, and first applied to, indigent criminal defendants, the principle recently has been extended to several civil actions. The first of these cases was Boddie v. Connecticut, which held that persons without the means to pay a filing fee for a divorce action must be granted access to the courts. Although Griffin was based on due process and equal protection, the majority opinion of Mr. Justice Harlan in Boddie emphasized due process:

Thus, although they assert here due process rights as would-be plaintiffs, we think appellants' plight, because resort to the state courts is the only avenue to dissolution of their marriages, is akin to that of defendants faced with exclusion from the only forum effectively empowered to settle their disputes. Resort to the judicial process by these plaintiffs is no more voluntary in a realistic sense than that of the defendant called upon to defend his interests in court. For both groups this process is not only the paramount dispute-settlement technique, but, in fact, the only available one. In this posture we think that this appeal is properly to be resolved in light of the principles enunciated in our due process decisions that delimit rights of defendants compelled to litigate their differences in the judicial forum.

Mr. Justice Douglas' concurring opinion emphasized the rationale and re-asserted the equal protection theory. More recently, the same principle has been applied to persons appealing from adverse judgments in housing eviction cases who could not afford to post required penalty bonds.  

In Board of Supervisors v. C & P Telephone Company of Virginia, the Supreme Court of Virginia was sensitive to the need for procedural due process in administrative proceedings. In that case, the failure of the Commission to provide a full hearing on the evidence constituted a denial of due process. It is not a difficult step to argue that the failure to provide the incidents and requisites of appeal is similarly a denial of

53. Id. at 18-19.  
54. 401 U.S. at 371 (1971).  
55. Id. at 376-77.  
56. Id. at 386.  
due process. If the right of appeal is frustrated because an intervenor is without funds for that purpose, the argument also becomes one of a denial of equal protection of the laws. However, to paraphrase Mr. Justice Black's opinion in *Griffin*, there is no meaningful distinction between the denial of procedural due process and equal protection in a Commission hearing, and the denial of due process and equal protection which results from placing an unbearable financial burden on the right of appeal.

These arguments can be made meaningful through an examination of the current *VEPCO* appeal. The appeal seeks, in effect, to shift a burden that is grievously heavy for a group of public interest advocates, but which would be of little fiscal consequence to *VEPCO* or the Commonwealth. The appeal seeks to compel the Commission to certify and transmit its copy of the transcript of the hearing as part of the record in the case, which could be done at no additional expense and with little additional inconvenience to the Commission. Further, the appeal asks that *VEPCO* or the Commission provide, under a well-defined administrative rule, a "working copy" of the transcript to facilitate preparation of the case on the merits of the rate increase. Finally, Rules 5:41 and 5:35 have been invoked in an effort to have the court relieve qualified members of the class of public interest intervenors of the tasks of designating the appendix and of presenting multiple copies of its filing.

Either the Commission or *VEPCO* should be required to bear part of the financial burden of public interest intervention so as to assure full and effective representation of a significant portion of the public's point of view. By this method, the cost of representation would be spread among taxpayers or utility customers. To deny the public its full representation because its advocates lack the funds to perfect and prepare an appeal while the public's money, in the form of taxes and rate revenue, assures the Commission staff and *VEPCO* of full representation, is to discriminate invidiously against the public with its own money.

Such a result is at least as deplorable as any of the fourteenth amendment deprivations which appeared in the cases following the rationale of *Griffin v. Illinois*. As in *Boddie*, for example, present practice in Virginia precludes meaningful access to the civil courts by public interest intervenors. The Supreme Court of Virginia and the Commission are the only forums that can provide relief to the consumers who must

bear the burden of rate increases sought by monopolistic public utilities. Since an intervenor is entitled by rule and statute to appeal Commission decisions, the effective denial of access to an appeals court is just as much a denial of procedural due process as would be the denial of an opportunity to appear before the Commission in the first instance. To deny such access simply because an intervenor's funds are insufficient to meet the expense of "representing" the public is a denial of equal protection of the laws, since industry invariably has the means to appeal. The fact that such financial discrimination exists is particularly aggravating when it is recognized that industry's representation is paid for by revenues derived from the very persons against whose interests the discrimination works—the consumers of the public utility.

**Formulation and Administration of the Proposed Rule**

There is no cause to be alarmed by the implications of adopting the present proposal. The Commission or the court can develop a standard by which to judge whether the public interest intervenor's contribution to the process is sufficient to justify aiding the group. A model rule is that used by the Federal Trade Commission in evaluating S.O.U.P., Inc. as a worthy intervenor:

The thrust of our opinion in Campbell Soup is that before the Commission will allow intervention into its proceedings, it must be demonstrated that (1) the persons seeking such intervention desire to raise substantial issues of law or fact which would not otherwise be properly raised or argued, and (2) the issues thus raised are of sufficient importance and immediacy to warrant an additional expenditure of the Commission's limited resources on a necessarily longer and more complicated proceeding in that case, when considered in light of other important matters pending before the Commission. This second factor means a determination that such additional expenditure is fully consistent with the Commission's own assessment of overall priorities governing the allocation of its own resources. A finding of this nature should be one prerequisite to an ultimate judgment that "good cause" exists to permit intervention in a particular case.

But we wish to emphasize that satisfaction of the above standard, or of any other test or formula, will not automatically result in a right of intervention. As stated previously, the exercise of

---

61. See notes 21 & 22 infra & accompanying text.
discretion on a question of intervention depends on an assessment of all of the facts and circumstances of a particular case, and each grant or denial will have minimal, if not nonexistent, precedential value. But as further guidance for future applicants, we would suggest the following additional factors which will generally be considered: the applicant's ability to contribute to the case; the Commission's need for expedition in the handling of the case; and the possible prejudice to the rights of original parties if intervention is allowed.  

The Court of Appeals for the District of Columbia Circuit has rejected the argument that providing intervenors with an effective right of participation will render the system unmanageable. In Office of Communications of the United Church of Christ v. FCC, the court said:

We recognize this will create problems for the Commission but it does not necessarily follow that 'host' of protesters must be granted standing [or in this case, free transcripts] to challenge a renewal application or that the Commission need allow the administrative processes to be obstructed or overwhelmed by captious or purely obstructive protests. The Commission can avoid such results by developing appropriate regulations by statutory rule making. . . .

There would be no added expense, and little inconvenience, if the Commission were required to transmit its own transcript as part of the record, since each Commissioner has a copy. Moreover, since major rate cases are supposed to come before the Commission only infrequently, it would not be an unreasonable expense to either the Commonwealth or the rate applicant to provide a “working copy” to a public interest intervenor. Expenses could be minimized by adopting a rule requiring that all such intervenors share the single copy and that filing times be extended appropriately. Likewise, the court could relieve such intervenors of a substantial burden by waiving the appendix requirement under Rule 5:41.

The question as to which institution—the Commission or the utility company—should provide the necessary transcripts seemingly does not raise any serious problems. Assignment of the expense to either party

---

63. 359 F.2d 994, 1005 (D.C. Cir. 1966).
would spread the cost over a large segment of the public, the beneficiary of the representation. However, imposition of the costs of appeal on the rate applicant is already in effect in some cases in the District of Columbia, where the Court of Appeals has upheld a District of Columbia statute requiring a rate applicant to pay the costs of investigations and appeals by the District of Columbia Public Service Commission staff, which acts as a public interest representative.

The rationale and operation of a similar system at the federal level have been described by Lazarus and Onek:

Significantly, a mechanism is presently available to provide, at no additional cost to the government, funds adequate to cover the costs of providing counsel to underrepresented groups in many administrative proceedings. Under Title V of the Independent Offices Appropriations Act, agencies may assess fees from regulated companies to cover the cost of license applications, rate increase applications, route allocations, and registrations. Proceeds from these assessments increase the general treasury. Presently the fees assessed are low, covering only the cost of processing applications. There is, however, no reason why the fees should not be increased to cover the costs of public participation in agency proceedings. To be sure, consumers of regulated industries would ultimately bear the cost of this representation, but the incremental cost would be minimal, and consumers would be unlikely to protest the burden of financing advocates for their own interests—especially since their purchases already finance the representation of industry.

Furthermore, we believe that regulatory agencies may directly assess the cost of public interest representation against the regulated industries. For example, in any major proceeding initiated by a regulated company involving an application or request, which if granted would result in economic benefit to the industry, we believe that the agency could not only appoint counsel to represent the affected public interests, but could also assess the applicant company for the reasonable fees of those appointees.

The SCC can adopt such a system within its legislative discretion or by order of the Supreme Court of Virginia, since it is authorized by

statute to assess and collect charges from corporations as the Commission deems proper and lawful.\textsuperscript{68} Such a proposal might take the following form:

1. The Commission will certify and transmit one of its transcripts to the Supreme Court as part of the record, at no cost, to perfect the appeal.

2. The rate applicant will be assessed the cost of one “working copy” of the transcript, to be shared by all public interest intervenors who have made a significant contribution to the hearing. The rate applicant would have the option of providing a transcript directly to the intervenors, if (as is usually the case) the utility has employed its own reporter.

3. The decision as to which intervenors are “significant” may be drawn simply, so that upon becoming a “party intervenor,” a statement that he lacks the necessary funds will entitle a “significant” intervenor to obtain a transcript. The filing of written pleadings qualifies a party as a “party intervenor.” \textsuperscript{69}

\textbf{Conclusion}

Our society can no longer be operated on the principle of \textit{noblesse oblige}. No longer can reliance be placed upon generous persons or organizations of means, or even those charged by law with the duty of providing for the general welfare. Therefore, when a public need arises, it must be satisfied by the resources drawn from the people—through taxes or the revenues of public utilities.

The need which so urgently presents itself is the full and effective representation of the public in actions in which millions of dollars are at stake. If a large segment of the public effectively is denied access to a constitutionally and statutorily guaranteed appeal, those hundreds of thousands of people have been deprived of property without due process of law. If they have been denied access to the appeals process because they have no access to a fund composed of their own monies,

\textsuperscript{68} VA. CODE ANN. §§ 12.1-19(4), (6) (Cum. Supp. 1971). Read in conjunction with Section 12.1-32, this section provides the Commission with adequate authority to fashion a rule requiring rate applicants to provide incidents of appeal, specifically transcripts, to public interest interveners for meritorious appeals.

\textsuperscript{69} VA. S.C.C.R. PRAC. & P. 10. Although the term “party intervenor” is not used in the rule, it has been adopted as a significant term by the Commission; the term means one who is entitled to notice by reason of his filing of pleadings.
which fund is available to their adversary for the purpose of appeal, they have been denied the equal protection of the laws by an invidious financial discrimination. Such a system cannot operate consistently with a sense of fair play, with modern notions of the people's role in public decision-making, or with the constitutions of Virginia or the United States.