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PUBLIC PARTICIPATION IN THE REGULATION OF UTILITIES BY THE VIRGINIA STATE CORPORATION COMMISSION: HOW THE COMMISSION MAKES PUBLIC POLICY WHILE IT MAKES RATES

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Public utility regulation in Virginia and throughout the United States is a vehicle for the formation and execution of a significant portion of government economic policy. The commonly held notion that utility regulation operates only to “protect the consumer” may be true in theory, but in practice it is only one aspect of much more substantial economic activity. Any regulatory commission, including Virginia’s State Corporation Commission, may find itself “protecting the consumer” with lower rates while at the same time damaging the consumer with poor energy policy, poor transportation policy, reduced environmental protection, and reduced service. The role of utility regulation in the nation’s energy crisis demonstrates these significant, albeit unintended, effects.

Beginning with the Arab oil boycott in the fall of 1973, the United States has drifted through an unstructured public debate and governmental groping designed to establish a national energy policy. Because electric generation accounts for 25 percent of the nation’s energy consumption,1 electric utility regulation policies are crucial to any coordinated energy policy. In 1974 the new Federal Energy Office (now the Federal Energy Administration), the Energy Research and Development Administration, and various state and local energy planning bodies faced the stark reality that much of the nation’s energy supply was controlled by the Federal Power Commission and almost 50 state regulatory commissions.2 Ninety percent of the retail rates of electricity in the nation, which dictate the electric industry’s profits and corporate policies, are regulated pri-

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2. Id. at 143.
marily by state commissions. In addition, virtually all of our natural gas production, transportation, and distribution likewise is regulated by independent commissions. Therefore, when one looks at the Virginia State Corporation Commission as a "protector of the consumer," one also should see its actions in electric and gas rate cases as affecting Virginia's energy consumption and its energy policies to a substantial degree.

Perhaps the reason behind the common oversimplification of utility regulation is that the terms "public interest" and "consumer" are misleading. There is no single monolithic "public interest," but only the combination of many private interests or concerns. Likewise there is no single "consumer" position. Economic activity has many facets—financial, environmental, political, and social. The "public interest" is a combination of all of them.

In view of the magnitude of the State Corporation Commission's role as an instrument of broad economic policies in which it must weigh many, often competing, considerations, it is appropriate to inquire how well it makes public policy while it makes rates. This Article will examine the current structure of utility regulation in Virginia by the State Corporation Commission, assess the Commission's efforts and ability to formulate and implement public policy positions, and suggest appropriate improvements.

3. Describing the federal role in utility regulation, Jack W. Carlson, Assistant Secretary of the Interior, said: "A number of federal agencies — the FPC, the Treasury, the FEA, the Department of Commerce and the SEC, in addition to the Department of the Interior — are concerned with the viability and the regulation of the utility industry and are engaged in continuous studies of policy options to determine the appropriate federal role." Id. at 10.

4. VA. CONST. art. IX, § 2 provides: "The Commission shall in proceedings before it ensure that the interests of the consumers of the Commonwealth are represented ...." See also Newport News & Old Point Ry. v. Hampton Rds. Ry. & Elec. Co., 102 Va. 847, 851, 47 S.E. 858, 859 (1904) (object of creation of the Commission was the protection of public rights).

5. Another example of the economic power of regulatory commissions can be found in the nation's transportation policy when states and the federal government are attempting to create a balanced transportation policy, but railroads, trucking, and water carriers are controlled by independent state and federal regulatory agencies. One interesting response to this problem is found in railroad regulation. The Rail Revitalization and Regulatory Reform Act of 1976, P.L. 94-210, has mandated major reform in the Interstate Commerce Commission's regulatory process. To make regulation more responsive to broader transportation policy formulation, it has, among other things, given the railroads more flexible rate making, required Department of Transportation review of many Commission actions, established a permanent rail transportation planning and policy office in the Commission, mandated an overhaul in Commission accounting and rate making practices, and established a permanent Office of Public Counsel to develop a broader range of public participation in Commission proceedings.
Regulation of public utilities in Virginia is established by the state constitution, in which the State Corporation Commission is given the power and "charged with the duty of regulating the rates, charges, and services and . . . the facilities of railroad, telephone, gas, and electric companies." Therefore, "utility regulation" refers to one or more of three separate and identifiable activities: ratemaking, service regulation, and the regulation of facilities. These three functions often are confused because they are closely interrelated. For example, a service may depend on a rate level and a rate level may depend upon facilities construction. A brief discussion of each term should indicate their differences.

The term "regulate" with respect to rates is defined explicitly in sections 56-234 and 56-235 of the Code of Virginia, which provide that public utility rates must be "just and reasonable." As the Supreme Court of Virginia has recognized, "rates fixed by the Commission should be just and reasonable to the consumers whose rates are fixed." In other words, the rates should be fixed "in relation to the Company's costs of serving" the consumers. "Cost of serving" utility customers in Virginia is defined as the sum of: (a) all operating expenses, (b) interest charges on all debt, and (c) a fair return on equity investment. Therefore, for a rate to be "just and reasonable," it must generate enough revenues to cover (a) and (b) and have net earnings equal to (c). If the net earnings fail to equal or exceed (c), the rates are not "just and reasonable."

In making rates the State Corporation Commission must engage in two distinct, though interrelated, subfunctions. It must establish what would be a fair rate of return on the investment committed to the public service, and then it must establish a schedule of tariffs...
or prices that will provide the utility with the opportunity to render adequate utility service and achieve that fair return. Significantly, a utility only should have an "opportunity" to earn such a return. This has been described as a "fishing license" because it gives the utility only the opportunity to earn the return and is no guarantee that the utility will succeed.\(^{11}\) Examining the overall profitability of the enterprise calls for extensive financial, economic, and legal analyses and is always, essentially, an exercise in informed judgment. Establishing the price structure or tariffs of the utility is a subjective exercise involving significant questions of public policy. Regulators determine which customers or classes of customers will be charged what portion of the operating expenses and fair return of the company and to what degree those prices will affect those customers and their usage of the utility service.\(^{12}\)

The regulation of utility service requires a determination of whether the service is of an appropriate quality and whether there is discrimination among customers.\(^{13}\) Such inquiries can be rather extensive, covering matters as diverse as the availability of underground electric lines, various telephone service offerings, the definition of local and long distance telephone calling areas, and customer policies with respect to deposits, cut-offs for failure to pay, and equipment repair.

The regulation of a utility's facilities is primarily a function of its

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12. This aspect of the rate case has been a secondary concern in the past. As the Virginia Supreme Court said in Norfolk v. C & P Tel. Co., 192 Va. 292, 320, 64 S.E.2d 772, 789 (1951): "Where, how and from what precise source or sources the increased revenue awarded is to be obtained is primarily an administrative duty and undertaking to be exercised by the Commission." See also Apartment House Council of Metrop. Washington, Inc. v. PEPCO, 215 Va. 291, 294, 208 S.E.2d 764, 766 (1974). However, since 1970 the enormous growth rate of telephone and electric demand has brought into focus the important role played by rate design as a stimulator of increased consumption. Therefore it now occupies perhaps the most important phase of the proceeding because it is only through reduced growth that consumers can see any significant decrease in their utility bill. For a discussion of consumer concerns and actions in this area see Joskow, Inflation and Environmental Concern: Structural Change In the Process of Public Utility Price Regulation, 17 J. LAW & ECON. 291, 317-22 (1974).


ratemaking duties because the construction and utilization of facilities has a substantial impact on the cost of serving customers. The State Corporation Commission’s power, however, goes substantially further to issues such as power line siting, hydro-electric plant licensing, and allocation of territories among utilities.

A survey of the broad-ranging activities of the State Corporation Commission that are subsumed under the term “regulation” reveals that these functions involve, to a substantial degree, the exercise of judgment based on the Commission’s perception of the public interest. Empirical data and expert opinion are controlling only in determining the elements of a utility’s cost of service. In establishing prices, regulating service, and controlling physical plant the Commission must make wide-ranging value judgments based on an appropriate combination of what the public wants and what the public needs. This often is referred to as “legislative” judgment and it requires an assessment and judgment as to the overall public interest. Most of these decisions should be based on such empirical data and such testimony as is relevant, but instead they depend largely upon the State Corporation Commission’s own definition of public policy.

16. Joskow, The Determination of the Allowed Rate of Return in a Formal Regulatory Hearing, 3 Bell J. Econ. 632, 634 (1972), suggests a formula in which the judgment of the commissioners is a primary factor in the rate of return determination. See also Illo & Parcell, Economic Objectives of Regulation—The Trend in Virginia, 14 WM. & MARY L. REV. 547, 566 (1973).
Determination Of The Public Interest In State Corporation Commission Proceedings

To make the best judgment of the overall public interest, the State Corporation Commission must make its decision on the most comprehensive record possible. Rate proceedings should bring forth the full presentation and documentation of all viable positions on these issues or it would be simply accidental or fortuitous if the Commission were able to assess the public interest accurately. The State Corporation Commission is not elected by the people; it is appointed by the General Assembly. Other than the informal discussions members of the Commission have outside the courtroom, which certainly should not be the basis for regulation, they must depend upon the parties before them and the Commission staff to create a complete record upon which they can make their judgments.

Utility rate cases offer a strange amalgam of adversarial and inquisitorial fact-finding formats. The public utilities, with their extensive legal staffs and expert witnesses, participate before the State Corporation Commission as fully prepared adversaries. Any student of regulation in Virginia who attends any of the major utility rate cases could only conclude that the preparation and presentation of the utilities is impressive, complete, and compelling. The Commission can and does act in a partially inquisitorial role, seeking the facts, but the greatest emphasis is placed upon the members of the Commission as judges and triers of fact who rely upon the parties to develop and to document the record.

For an adversarial proceeding to be reliable as a fact-finding institution, it must facilitate an equality of advocates. How can the public rely upon a proceeding for the determination of facts and the public interest when one adversary totally and completely overpowers the other by preparation and organization? The virtual pov-

18. The necessity of a complete record in rate regulation cases has been recognized previously. See Barrett, Public Interest and the Adversary System, 42 ICC Prac. J. 42, 47-48 (1974); Cramton, The Why, Where and How of Broadened Public Participation In the Administrative Process, 60 Geo. L.J. 525, 530 (1972); Gelhorn, Public Participation In Administrative Proceedings, 81 Yale L.J. 359, 370-71 (1972).


20. A. Grey Staples, former General Counsel for the State Corporation Commission, in testimony before the State Senate Commerce and Labor Committee during its 1975 session, said that:

because consumer representation in utility rate cases is deemed inadequate in the eyes of most consumers, the regulatory process itself has little credibility
Regulation of Utilities

Among Virginia consumers, even the regulators themselves perceive this as a problem. Based on my experience in the regulation of Virginia utilities, I would say that it requires substantive analysis of relatively complex economic, engineering, accounting, financial, and environmental issues. The utilities can always be counted upon by the State Corporation Commission to thoroughly present their side of the story on these issues. But what about the consumer? The question of integrity of regulation and the public confidence in the fundamental fairness of the regulatory process are as important as the decisions ultimately rendered. I would say to the degree that the residential utility consumer is not adequately represented in utility rate cases in Virginia, an important side of the story is missing. And, the public's perception of utility regulation in Virginia suffers because of it.

For an effective empirical argument that the presence of an intervenor opposing the utility's position results in outcomes more favorable to the consumer, see Joskow, The Determination of an Allowed Rate of Return in A Formal Regulatory Hearing, 3 Bell. J. Econ. 632, 634 (1972).

21. These expenses are included in the utility's operating costs and passed along to the customer as part of the rate determination equation.


Contrast this idea with Pontz & Scheller, The Consumer Interest - Is It Being Protected
Furthermore, the Commission staff is employed and directed by the judges themselves, who are charged with “protecting” the public interest and not with “representing” it. The State Corporation Commission was established and is charged with the obligation of “protecting the interest of consumers.” But the concept of “protecting” someone’s interest is separate and distinct from “representing” his interest. The distinction is fundamental. In the context of the Commission’s obligation to consumers, it is the difference between merely providing a forum for regulating certain utilities (“protecting”), and insuring or facilitating consumer participation (“representing”) in agency proceedings. To examine effectively values and financial data in a rate case, the proceeding must be strongly adversarial. The language of Section 2 of Article IX of the Virginia Constitution requires that consumers be “adequately represented” before the State Corporation Commission. This language was described in the 1969 constitutional debates in the House of Delegates: “The key word there is ‘represented.’ We did not say ‘protected’ . . . they must have representation. There must be an adversary proceeding.”

Further, when there are equal advocates, the public must be able to rely upon State Corporation Commission procedures to guarantee a full and complete record. The quality and integrity of regulatory proceedings and the public’s confidence in the fundamental fairness of the regulatory process are as important as the decisions ultimately rendered. Our legal system is based on the concept that if parties have had fair opportunity to prepare and present their case and to cross-examine the opposition’s witnesses, the judgment of the finder of fact shall be binding. The process is relied upon to assure the most accurate factual determinations. Any failure by the State Corporation Commission to build the record can only call into question the adequacy of the record itself as a basis for the determination of the significant public policy questions before the Commission.

Virginia law places a few procedural requirements on the State Corporation Commission. Under Virginia Code section 56-236, a
utility is allowed to file its new tariffs, and it must give thirty days notice under section 56-237 before the tariffs can be changed. The Commission has the power under section 56-238 to suspend the tariff changes. Therefore, Virginia law only authorizes the Commission, if it wishes, to investigate rates and to establish rates that would be just and reasonable if it finds existing rates to be unjust and unreasonable. The procedural requirements of Chapter 5 of Title 12 of the Code provide only the most skeletal notice and hearing requirements. Under section 12.1-39, the Commission need file an opinion on a rate increase only if its decision is appealed. No party is given the right to cross-examine witnesses and there is no requirement of hearings. If there is a hearing, the Commission regularly sets a time period for cross-examination of thirty minutes for each party, regardless of the complexity of the facts or the evasiveness of the witness. Furthermore, there is no clear burden of proof placed upon the public utility. The law requires only that the Commission be satisfied as to the reasonableness of any rate brought into question.

Finally, to ensure fair and correct judicial action, triers of law and fact in our legal system rely upon the establishment of standards and definitions that circumscribe the power of the agency. For ex-
ample, a judge or a jury is given the ability to make findings of fact based on adequate evidence, but these findings must be made in the context of a proper definition of the various elements. To find a criminal guilty a judge must find that each element of the charge was proved. Likewise, if a grant of power to an administrative agency is defined by specific standards, the agency must make its decision in accord with these standards.  In practice, however, few meaningful standards have been provided in grants of power to administrative agencies.

The Virginia Supreme Court has refused repeatedly to reverse the State Corporation Commission unless the court finds the Commission clearly has abused its discretion. The Code, however, provides no specific standards other than the general requirement that the rates be "just and reasonable." Because the General Assembly has not exercised its authority to prescribe standards, the Commission retains broad legislative discretion. Therefore, without such limiting standards and the resultant difficulty of finding an abuse of discretion, it hardly is surprising that the Commission has been overturned only once in the past 50 years.

PUBLIC PARTICIPATION IN RECENT UTILITY RATE HEARINGS IN VIRGINIA

Until the 1970's controversy over utility rate cases was extremely limited. Only a handful of major utility rate cases arose during the 1950's and 1960's and public opposition generally centered around servicing complaints rather than higher rates. Since the early part of this decade, a continuing series of rate increases by the state's largest public utilities has sparked a cycle of protest by consumers

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34. Broad grants of power with few or no controlling standards have been upheld repeatedly, both for federal and state administrative agencies. K. DAVIS, ADMINISTRATIVE LAW TREATISE §§ 2.01-2.05 (1958). State courts, however, have been somewhat more demanding in requiring a statement of certain standards for the administrative agency to follow. Id. § 2.07. The Virginia Supreme Court has given support to a requirement of some standards, but in reality little in the way of substantive standards has been required. See Ours Properties, Inc. v. Lay, 198 Va. 848, 96 S.E.2d 754 (1957); Butler v. Commonwealth, 189 Va. 411, 53 S.E.2d 152 (1949).

Davis, however, does note a trend toward requiring administrative agencies to define their own standards if the legislature fails to impose sufficient ones to prevent abuses of discretionary power. K. DAVIS, ADMINISTRATIVE LAW OF THE SEVENTIES § 2.00-6, at 27 (1976). For further discussion of this trend see note 57 infra & accompanying text.
across Virginia. With the possible exception of court decreed school busing, no issue has excited greater opposition in Virginia in recent years.

Although every major Virginia utility has generated some public criticism because of increased rates, the increases granted the Virginia Electric & Power Company (Vepco) have been cited frequently by consumers as a prime example of the failure of the state’s regulatory system to regulate Virginia’s public utilities properly. Indeed, action by the State Corporation Commission in Vepco rate cases serves as the focus for most consumer criticism of utility rates.

Arlington and Fairfax counties always have intervened and presented cases for the consumer, though they have had to rely on limited budgets. Opposition to utility rate increases by individual consumers has evolved slowly since the first large requests in 1970. At first, a few individuals intervened in a number of utility rate proceedings on behalf of themselves and the consumer, but they also had limited resources. Like the counties, they have not had access to the expertise of accountants, economists, fuel experts, and financial analysts which is needed to mount a truly effective rate case. These individuals have had to rely instead solely on their own legal expertise in the utility rate cases in which they have participated.

Since the early 1970’s, the Virginia Committee for Fair Utility Rates has represented the state’s large commercial users in utility rate cases. Although industry has refused to disclose the amount of money it has spent in opposition to utility rate cases, a reasonable estimate would place the figure in excess of several hundred thousand dollars.

37. During the 1950’s and 1960’s utility rates were low and the rate of return was high; now, however, rates are high but the rate of return is low. This process is analyzed in detail in Joskow, supra note 12.

38. In the period between 1970 and 1975, Vepco requested $283.7 million in rate relief, and of that total, the Commission granted $191 million, or 67% of the total rate relief for which it had applied (State Corporation Commission Case Nos. 18759, 19027, 19342, and 19426). This fall, the State Corporation Commission is faced with the largest round of utility rate increase applications in its history. Vepco has requested $66.3 million in additional rates (Case No. 19730) the Appalachian Power Company has asked for and received permission to increase its rates by $13 million (Case No. 19723), the Washington Gas & Light Company has asked for $14.2 million (Case No. 19737), and the Chesapeake & Potomac Telephone Company has requested $77.2 million in rate relief (Case No. 19696).

In 1971, the General Assembly created, within the office of the Attorney General, the Division of Consumer Counsel, which was intended as an institutional response to the need for permanent consumer representation in utility rate cases.\textsuperscript{40} It also was seen as a fulfillment of the constitutional requirement for consumer representation. However, little additional money was provided the Attorney General for this mammoth new responsibility. Additionally, the legal framework under which the Attorney General operates presents some serious institutional drawbacks.\textsuperscript{41} Because the Division is charged with the duty of representing "the interests of the people as consumers," it cannot represent a specific consumer interest that is in conflict with other consumer interests. Moreover, as noted earlier, it is overly simplistic to believe that one official or office can represent all aspects of the multifarious "public interest."

For independent consultants alone, the utilities outspent the Attorney General 20 to 1 in rate cases between 1970 and 1974. Each utility has substantial "in-house" accountants and engineers, and the Attorney General has none; therefore the true disparity must be much greater. During that period, the Attorney General spent $169,000\textsuperscript{42} in utility rate cases while the expenditures of the state's utilities totalled $3.1 million.\textsuperscript{43} The enormous gap in resources is demonstrated by the figures for 1974. In that year, Vepco alone spent $921,556 in its rate cases, charging these expenditures to the consumer as part of the utility's operating expenses,\textsuperscript{44} while the Attorney General spent $63,981 in all rate cases in Virginia the same year.\textsuperscript{45}

\textsuperscript{40.} VA. CODE ANN. § 2.1-133.1 (Repl. Vol. 1973). Under this statute the Division is charged with the duty of representing the consumer interest before government agencies, specifically including the State Corporation Commission. The Division is bound to initiate such studies as may be necessary to protect consumer interests.

\textsuperscript{41.} Compare Howell, Financial Barriers To Public Participation In The Regulatory Process, 14 WM. & MARY L. REV. 567, 572 n.23 (1973) (describing the establishment of the Division as a "laudable concept . . . presently inadequate" to deal with the problems of representing the consumer interest) with Brasfield, supra note 13, at 595 (describing the Division as "diligent and effective in carrying out" their duties), and Miller and Massie, Ratemaking Issues In Virginia: Suggestions For Legislative Clarification, 14 WM. & MARY L. REV. 601, 610-11 (1973).

\textsuperscript{42.} Information on expenditures provided to authors by Division of Consumer Counsel, Virginia Attorney General.

\textsuperscript{43.} Information on expenditures provided to authors by the Office of Public Information, State Corporation Commission.

\textsuperscript{44.} Id.

\textsuperscript{45.} Information on expenditures provided to authors by Division of Consumer Counsel, Virginia Attorney General.
The 1974 Vepco application (Case No. 19426) triggered a huge petition drive in eastern Virginia in opposition to the increased rates. The petition drive gathered over 40,000 signatures and served as the starting point for several other independent efforts on the part of consumers and their representatives to mount an effective case before the State Corporation Commission against the Vepco request. In 1975, a group of northern Virginia localities served as the impetus in the formation of the Virginia Coalition of Local Governments on Public Utilities\(^4\) to coordinate and fund a major intervention on behalf of consumers in the Vepco rate case. It committed over $100,000 to the case.\(^4\) In early 1975, a coalition of various consumer, neighborhood, and labor groups formed their own organization called Consumer Congress of the Commonwealth of Virginia to raise money for an effective residential consumer intervention in the Vepco case. Drawing support from 9,000 Virginians, Consumer Congress raised $55,000 to hire its own utility experts for the Vepco case.\(^4\) For the first time, small consumers joined to present a comprehensive case to the Commission on their own behalf.

The Vepco application (Case No. 19426) represented the most structured and methodical opposition to a utility rate request the Commission ever had witnessed. The Consumer Congress, the Committee for Fair Utility Rates, the Virginia Coalition, and the Attorney General hired respected expert witnesses to testify against the rate increase. Additionally, Consumer Congress spent about $25,000 of the money it raised to present a peakload pricing proposal that it believed would moderate Vepco's growth and thus lead to a stabilization of its rates. In August 1975, after two weeks of hearings, the Commission granted Vepco an increase of $99 million. In addition, a $44 million surcharge to be spread over the following four years was added to Vepco's request to recover costs for nuclear fuel purchases it had made in the past.\(^4\)

That proceeding demonstrated that even when the public, including both small residential customers and Virginia's largest

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\(^4\) The group was composed of the City of Alexandria, Arlington County, Fairfax County, Prince William County, Middlesex County, City of Falls Church, Essex County, Gloucester County, King & Queen County, King William County, City of Norfolk, and City of Charlottesville.

\(^4\) Information on expenditures provided to the authors by Virginia Coalition of Local Governments of Public Utilities.

\(^4\) The authors participated in the organization of that group. Mr. Schell still serves as its counsel.

\(^4\) Order, Application of Vepco, Case No. 19426 (August, 1975).
industries, mounts the best effort possible, it falls woefully short. Not only were public efforts outmatched in the Vepco proceeding, but also there was virtually no public participation in a concurrent application of Chesapeake and Potomac Telephone Company, which received a substantial increase on August 19, 1975. This lack of participation was because the limited resources of consumers had been devoted exclusively to the Vepco case.

Proposals To Ensure Adequate Consumer Representation in State Corporation Commission Utility Rate Cases

In the wake of Vepco’s 1974 rate request and the State Corporation Commission’s 1975 decision to grant the rate increase, a number of state governmental study groups sought to address themselves to the problem of providing consumers with adequate, full-time representation in utility rate cases. Governor Mills E. Godwin, Jr. appointed a blue-ribbon citizens panel to study the whole problem of utility regulations in Virginia. The Governor’s Electricity Costs Commission made an extensive study of consumer representation before the Commission. At the same time, the General Assembly moved forward with reports by the Study Committee on State Governmental Management and the Joint Subcommittee Study of Public Utilities recommending reform of utility regulation.

All three reports focused on how to improve consumer representation in utility rate cases. The final report of the Governor’s Electricity Costs Commission recommended the establishment of an independent agency to represent consumers in rate cases and recommended the transfer of all consumer advocacy functions to it from the Attorney General. Noting that the Attorney General “cannot represent one class of customer against another in electricity rate cases,” the report found an “immediate need” for such an agency. The Joint Subcommittee added:

[W]hen one considers the pervasive influence arising from the need for energy and utility services, it appears clearly that adequate attention to the interest of consumer protection is needed. The utilities, with substantial funds to spend in litigation, are more than any individual or an ad hoc consumer group can cope with effectively. It appears that our present Consumer Counsel

50. SCC Case No. 19500.
is functioning under a handicap when confronted by the strong efforts which private utilities are able to muster.\textsuperscript{52}

The various legislative and governmental study groups looking at utility regulation agreed that consumer representation was a keystone of utility reform and that it could serve as the foundation for restoring faith in the regulatory process. The question of what structure to adopt to guarantee consumer representation in Virginia’s utility regulation system has become an important policy question facing the General Assembly.

The General Assembly has the power to make the recommended reforms. The Virginia Supreme Court has described the State Corporation Commission’s power in rate making as legislative, meaning that every Commission decision is regarded as being “prima facie, just, reasonable and correct” and would stand unless it was shown to be an “abuse of legislative discretion.”\textsuperscript{53} The court has made it equally clear that such discretion was based solely on sections 156(f) and (g) of the now superseded Virginia Constitution as restated in section 56-235 of the Code of Virginia.\textsuperscript{54} Those provisions contained language establishing a high degree of latitude for Commission action. The new Virginia Constitution, however, states: “Subject to such criteria and other requirements as may be prescribed by law, the Commission shall have the power and shall be charged with the duty of regulating . . . .”\textsuperscript{55} As Professor A. E. Dick Howard makes clear in his Commentaries on the Constitution of Virginia, these new constitutional provisions give the General Assembly power to set standards for the Commission:

As to rates, services, and charges, the General Assembly is given the power to lay down whatever guidelines and criteria it will for the SCC’s exercise of its regulatory function. . . . The Assembly can, for example, prescribe by statute what factors are to go into rate-making, what rate of return is to be allowed, and what basis . . . is to be used to determine the value of plant against which rate of return is to be computed.\textsuperscript{56}

Thus it no longer is true that the State Corporation Commission enjoys full legislative discretion under the Constitution, for the 1971


\textsuperscript{53} Board of Supervisors v. VEPCO, 196 Va. 1102, 1109-10, 87 S.E.2d 139, 144 (1955).

\textsuperscript{54} Id. at 1110, 87 S.E.2d at 144-45.

\textsuperscript{55} Va. Const. art. IX, § 2 (1971).

Constitution has given the General Assembly the power to set limits on that discretion. The only problem is that the General Assembly has failed to act, leaving the Commission's broad discretion intact.\(^57\)

Virginia, of course, provides only one example of an attempt to solve the problem of lack of consumer representation. Nationally, the movement to improve consumer representation in utility rate cases has taken three forms:

1. Liberalization of the standing requirements for public-interest litigants to intervene in and to seek judicial review of agency adjudications;
2. Intervention by state attorneys general in agency proceedings on behalf of consumers; and
3. Creation of offices of consumer counsel with the specific statutory duty of representation of consumer interests in utility regulatory proceedings.\(^58\)

To fulfill the role required of it as an adequate representative of consumer interests, any office charged with representing consumer interests, regardless of how it is organized, funded, or operated, must satisfy three requirements: (1) it must possess the expertise

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57. Professor Davis has called attention to the recent trend of courts requiring administrative rulemaking to provide standards to govern administrative discretion when the legislature has failed to provide such standards. K. Davis, Administrative Law of the Seventies § 2.00-6 (1976). "Courts may require administrators to articulate the standards that guide their discretion." Id. § 2.00-6, at 27. Davis adopts this position and views the new trend favorably because it can be the means by which control is maintained over the exercise of discretionary power. Id. § 2.00, at 20.

Arguably this requirement for administrative agencies to establish the standards by which they will arrive at their decisions should be applied to the State Corporation Commission. The failure of the General Assembly to provide even certain limited standards or definitions leaves an opportunity for abuse. As one court has noted: "One essential element of a properly made decision is that it accords with previously stated, clearly articulate rules and standards. This is so because there is a tendency for regulatory systems that operate without clearly enunciated standards to be inherently irrational and arbitrary." Harnett v. Board of Zoning, Subdiv. and Bldg. Appeals and Planning Bd., 350 F. Supp. 1159, 1161 (D.V.I. 1972).

Additionally, the State Corporation Commission is not subject to any of the other means of control usually placed upon administrative agencies. As discussed earlier, the Commission has few procedural safeguards that could provide protection against arbitrary decisions. See notes 25-32 supra & accompanying text. The legislature often serves as a check on discretionary administrative action, but the General Assembly has not acted in this respect. A final means of control used to guard against arbitrary administrative determinations is judicial review, but effective judicial review of Commission actions does not exist because of the Virginia Supreme Court's limited view of its role in reviewing Commission action. See note 35 supra & accompanying text.

necessary to provide utility consumers with systematic and continuing representation, (2) it must be funded adequately, and (3) it must be accountable to the consumers it represents and be able to represent diverse views. Existing initiatives in this area throughout the nation uniformly fail to satisfy one or more of the requirements.

Simple liberalization of standing requirements does not guarantee adequate funding for on-going consumer representation, though the office might be more responsive to its consumer clients. The 44 states that utilize the Office of Attorney General uniformly find that his political role prevents him from representing specific constituencies.\textsuperscript{59} He often is underfunded and has absolutely no requirement to be responsible to his customer-clients. The eight states that have created a special office of “Consumer Counsel” or “Public Counsel”\textsuperscript{60} have established an on-going consumer representation,\textsuperscript{61} but, depending on state general revenues, the office often is underfunded\textsuperscript{62} and almost uniformly has no obligation to be responsive to its customer-clients.\textsuperscript{63}

One proposal considered by the Virginia State Senate during its last session\textsuperscript{64} is designed to reduce or eliminate the inherent defects in existing consumer representation and to meet the three requirements mentioned above. The Senate bill would create a Residential Utility Consumers’ Council that would be charged as an advocate to represent the interests and needs of residential consumers. This Council would be funded through a special check-off space on every utility bill that would allow the utility customer to make a volun-

\textsuperscript{59} Id. at 247-50.


\textsuperscript{61} In each of these states the Consumer Counsel is charged with the duty of representing the consumer’s interest before administrative agencies, thus providing an institutionalized means of consumer participation and overcoming the lack of continuity problem inherent in individual challenges.

\textsuperscript{62} See Leflar & Rogol, supra note 58, at 251 & nn.69-71.

\textsuperscript{63} The “Consumer Counsel” is not elected by the people in any of these jurisdictions. He is appointed either by the Governor (Connecticut, Indiana, and Maryland), a legislative committee (Florida and Montana), or some administrative official (District of Columbia (Commissioner) and Georgia (Attorney General)).

\textsuperscript{64} S.B. 509, 1975 Sess.
tary contribution with his monthly utility payment. The utilities would accumulate the voluntary contributions and transfer them to the Council. Collection costs would be paid for by the Council itself. Each contributor would become a member of a non-profit corporation and could vote to elect Council directors, thereby influencing policy decisions. The directors, in their fiduciary roles, would be charged with the responsibility of spending the funds accumulated and could hire a full-time staff of lawyers, accountants, economists, engineers, and other specialists to appear before the State Corporation Commission. The Council would provide institutionalized, ongoing organization for representing residential consumers in utility rate matters. It would be empowered, if it found diverging residential utility consumer views, to fund additional intervenors, all with the purpose of building a complete record and bringing all significant issues before the Commission.

The funding mechanism is another unique aspect of the proposal. It would allow consumers to contribute voluntarily, thereby promoting public participation and involvement. And, because the Consumers' Council would not depend upon general revenues of the state, it would not cost the taxpayers any money. Although it is impossible to judge the amount of money that would be voluntarily contributed by consumers to the Council, even the utilities believe that it would be a significant amount. If the experience of Consumer Congress is any guide, financial resources would not be a problem. Consumer Congress raised $55,000 over a period of a few short months by utilizing volunteers who solicited contributions door-to-door. A check-off provision would provide a much easier and more regular method of collecting voluntary funds. The funding mechanism also provides an additional degree of responsiveness to consumer needs. If consumers had confidence in the Consumers' Council they would contribute to it, and if they lost confidence they simply could cease contributing. Additionally, the creation of the Consumers' Council could insure that consumers have adequate representation that would be free from the political infighting that can characterize the annual state budget process.

65. Testimony on February 16, 1976 in Richmond, Virginia, by utility officials opposed to S.B. 509 during hearings before the Senate Commerce and Labor Committee estimated that the Consumers' Council was capable of raising anywhere from several hundreds of thousands of dollars to a million dollars annually.
Conclusion

The General Assembly unquestionably should undertake a careful examination of existing substantive and procedural ratemaking standards, which are too broad at present. But this is not enough, because the crux of the rate regulation problem is lack of consumer representation. The need for the consumer's voice to be heard in utility rate cases never has been greater than it is now. If the regulatory system is to remain credible to the citizens it serves, it must guarantee a true adversary procedure between consumers and the utilities in rate hearings. That guarantee can be fulfilled only if well financed public participation in utility rate cases becomes a part of utility regulation and if the State Corporation Commission recognizes its obligation to seek out and promote full participation by all interest groups in utility rate cases.