

Nonunanimous Settlements of Public Utility Rate Cases: A Response

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This is a brief response to Professor Stefan W. Krieger's lengthy review¹ of the genesis and development of public utility regulation in the United States, in which he perceives that the settling of utility rate cases is a growing practice. Professor Krieger draws the conclusion that *unanimous* settlements are necessary to protect certain consumer groups.² In this response, we suggest that Professor Krieger has misinterpreted regulatory history and reached a conclusion that is neither necessary nor conducive to reasonable regulation.³

At the outset, it might be observed that the Center for Public Resources, a non-profit institution deeply interested in nonlitigation dispute resolution, has explored nonunanimous settlements at great length.⁴ Its Utilities Committee

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1. Stefan H. Krieger, *Problems for Captive Ratepayers in Nonunanimous Settlements of Public Utility Rate Cases*, 12 YALE J. ON REG. 257 (1995).

2. The authors have made no attempt at an encyclopedic review of non-unanimous utility rate case settlements nor, for that matter, of the perhaps even more wide-spread practice of settling other utility proceedings, such as fuel clause cases, which, quite contrary to Professor Krieger's apparent belief, Krieger, *supra* note 1, at 263 n. 20, can have a "significant impact on ratepayers". See, e.g., *Industrial Energy Consumers v. Public Util. Comm'n*, 629 N.E.2d 423 (Ohio 1994). They have, rather, drawn primarily on their own practical experience. It might be noted that Messrs. Tongren and Buchmann have frequently represented opposing interests and viewpoints. They are, however, in accord on the point under discussion in this article.

3. In his terminology, Professor Krieger occasionally reveals his predilection for a particular type of consumer. It is difficult to see why industrial customers are not "consumers." Krieger, *supra* note 1, at 264, or why the term "proxy," although perhaps technically correct, should be so consistently applied to statutory consumer advocates such as Mr. Tongren, *see id.* at 284 n. 121, as if to minimize their legitimacy. Professor Krieger does, however, accurately observe that at times these "proxies" face conflicts between various subgroups of their constituencies, *id.* at 335, which is one reason why intervention by purported representatives of such subgroups is so frequently authorized. See, e.g., *Senior Citizens Coalition v. Public Util. Comm'n*, 433 N.E.2d 583 (Ohio 1982).

4. CENTER FOR PUBLIC RESOURCES, INC., NEGOTIATED SETTLEMENT OF UTILITY REGULATORY PROCEEDINGS: RECOMMENDED PRACTICES (1993) [hereinafter RECOMMENDED

consisted of regulators, consumer advocates,⁵ and practicing attorneys.⁶ Generally speaking, its *Recommended Practices*, which were widely distributed, favored informal negotiations and recommended that regulatory commissions encourage such settlement processes. While the *Recommended Practices* recognized differing points of view—in some measure reflecting differing institutional procedures in the several regulatory jurisdictions—the consensus was certainly not to recommend, *ipso facto*, prohibiting regulatory rejection of nonunanimous settlements. Indeed, the recommendations describe what the authors believe to be the prevailing practice:

The rights of dissenting parties should be protected with the customary rights of notice and an opportunity to be heard in accordance with state law and applicable commission procedures

. . . .

A contested settlement should be required to have substantial record evidence to support the determination that the settlement is just and reasonable and in the public interest

The weight which will be accorded a contested settlement often depends on the breadth of participation.⁷

If these standards are followed, and in the experience of the authors they *are* followed, the theoretical problems that Professor Krieger sees in nonunanimous settlements simply do not arise in practice, and it is at least arguable that they do not even present themselves on a theoretical plane.

If we look at the history of utility regulation in this country, it seems clear that underlying economics, at least for a long time, favored the development of natural monopolies for the rendition of certain basic services. Given this situation, it was equally clear that some form of governmental price supervision was required. Direct regulation by state legislatures proved highly inefficient and politically driven. The development of the regulatory commission followed. The commission was thought capable of acquiring an institutionalized expertise that would enable it to address pricing questions with a more extensive background of experience and a broader view of inter-utility relationships than are available to most individual legislators. This much Professor Krieger recognizes. Nevertheless, he fails to see, in what started as a struggle between the Grangers and the courts, that once consumer-protection regulation had been imposed (and it makes no difference whether by the legislature or some regulatory commission), the utility acquired corresponding

PRACTICES].

5. Including representatives of industrial consumers.

6. Including Mr. Buchmann.

7. RECOMMENDED PRACTICES, *supra* note 4, at 27.

constitutional rights. Consumers, however, did not acquire any constitutional rights from utility regulation.⁸

Thus, the proposition—implicit in Professor Krieger’s discussion—that nonunanimous settlements prejudiced some section of the consuming public depends not on any constitutional argument, but must find its basis elsewhere. This presents another major problem with Professor Krieger’s analysis. He speaks as if there were a more or less uniform “regulatory” law, both procedural and substantive, among jurisdictions. This is simply inaccurate. There is a wide variation in substantive,⁹ organizational,¹⁰ and procedural practices.¹¹ This has two implications. First, any argument about the statutory grounds for settlement, be it unanimous or nonunanimous, must be jurisdiction-specific. Second, no conclusions can be drawn with respect to the desirability and/or lawfulness of nonunanimous settlements without examining the settlement process followed in a particular jurisdiction, whether by custom or rule. It should be recognized that even the *unanimous* settlement of a rate case cannot bind a regulatory commission.¹² The commission has an independent, non-delegable duty, to determine if the settlement is in the public interest, much like a court in a class or derivative proceeding.¹³ Rate settlements are not situations in which A sues B for a million dollars and settles for half, with no particular impact on the public. As a result, many of the legalistic criticisms which Professor Krieger aims at nonunanimous settlements apply to unanimous ones as well, a factor which he does not seem to take into account.

All this being said, it may be helpful to outline how a settlement comes before a state regulatory commission.¹⁴ In the case of a unanimous settlement, the settlement papers usually include an agreement that all prefiled testimony

8. See Krieger, *supra* note 1, at 311 n. 253.

9. A major difficulty for any multi-state practitioner in this area is remembering whether some item of investment or expense is allowable or not in “this” jurisdiction.

10. In some jurisdictions, the commission (W. Va.) or a panel of the commission (Md.) hears the evidence; in others (Va., Pa., Ohio), an administrative law judge, who may or may not issue a recommended decision, does so. In some jurisdictions the adversarial staff is independent of the commission (Pa.); in others, not so (Ohio). In some jurisdictions, the consumer advocate is independent of the commission (Ohio); in others, not so (W. Va.).

11. For example, usually in these cases testimony (at least expert testimony) is written and pre-filed. There is a wide difference, however, in the timing of such filings. Some jurisdictions require all testimony—direct, responsive, rebuttal—to be filed prior to hearing (Va, W. Va.); others handle each step as a separate hearing phase (Pa., Md.). In some jurisdictions the staff’s position is formally known through issuance of a report well before hearing (Ohio); in others that may not be so (Va.).

12. See *In Re Monongahela Power Company*, No. 94-1918-EL-AIR (Ohio Pub. Util. Comm’n Nov. 9, 1995)(on file with Yale Journal on Regulation).

13. See Fed. R. Civ. P. 23(e), 23.1.

14. The authors are mindful of their strictures about differences between jurisdictions. The text is a generalized discussion, not necessarily applicable in any particular jurisdiction, and does not deal with how the settlement was reached, which may be subject to local procedural rules. See RECOMMENDED PRACTICES, *supra* note 4, at 10-12.

be admitted, a waiver of cross-examination (conditioned on approval of the settlement), and perhaps details of the constituent parts of the settlement.¹⁵ The commission may or may not hold an oral hearing.¹⁶ Even a *unanimous* settlement, however, may be rejected.¹⁷ In any event, the commission has a "record." Just what constitutes that "record" may well depend on the timing of the settlement's submission in relationship to local practice regarding the timing of filing testimony and the status of the hearing. For example, a unanimous settlement may be reached before the commencement of hearings, during the course of hearings, or after the conclusion of an otherwise fully litigated proceeding. Since any settlement should be viewed as a whole or "package," the relevant record is that developed in support of the settlement. This is particularly true if the settlement includes components which could not have been litigated (e.g., a moratorium on future rate increase applications).

In the case of a nonunanimous settlement the procedure is not dissimilar, but an oral hearing is far more likely. The witnesses, whose testimony has usually been prefiled (sometimes months before), are tendered for cross-examination, the signatory parties waive cross-examination (which they are entitled to do), and the non-signatories proceed with both cross-examination and the presentation of their evidence.¹⁸ This is hardly a "summary" process.

The technical question, then, is whether a burden of proof has been unlawfully shifted to the non-signatory parties. Note that, in these circumstances, the utility has plainly met its burden of going forward. Contested issues are, therefore, just that. The regulatory agency may make up its mind on the record developed. If the commission inadequately explains its reasoning or makes insufficient findings, presumably it is subject to reversal, but that is always the case.¹⁹ Professor Krieger misses the fact that all settlements are compromises and in a great many instances the parties have not agreed on the details of the ratemaking "formula."²⁰ Professor Krieger's

15. This is certainly true for the distribution of revenue requirements between customer classes and the design of rates within each class. Nevertheless, these are often embedded in tariffs represented as reflecting the settlement and may not be spelled out in the agreement itself. Normally any requisite proofs of publication are also stipulated into evidence.

16. There seems to be no need to enter into the sometimes vexed question of what constitutes a "hearing." See, e.g., *Barasch v. Pennsylvania Pub. Util. Comm'n*, 546 A.2d 1296 (Pa. Commw. Ct. 1988), *allocatur denied*, 567 A.2d 655 (Pa. 1989). West Virginia practice, for example, is to require the presence of all witnesses, even if their testimony is unanimously agreed to and cross-examination waived, in the event that the commission itself has questions.

17. See *Pennsylvania Pub. Util. Comm'n v. West Penn Power Co.*, No. R-811836 (Pa. Commw. Ct. 1982)(on file with Yale Journal on Regulation). In that case, the Administrative Law Judge declined to recommend a unanimous settlement. The Pennsylvania Commission accepted the settlement, but only by a 3-2 vote.

18. See, e.g., *Re Potomac Edison Co.*, 1994 Md. PSC LEXIS 179 (August 17, 1994).

19. See, e.g., *Monongahela Power Co. v. West Virginia Pub. Serv. Comm'n*, 276 S.E.2d 179 (W. Va. 1981).

20. Krieger, *supra* note 1, at 276-77.

comments on a “balance of power”²¹ in negotiations do not reflect real life. Certainly, if “the superior power . . . knows that it can achieve its goals outside of the negotiation process,” it will have less “motiv[at]ion to engage in serious dialogue.”²² It is rare, however, that any party, “superior” or otherwise, can be so sure of the regulatory result of full litigation.²³ Furthermore, the “goals” are usually far more complicated than just an increase in rates (e.g., the timing of the increase, the achievement of a reasonable division of cost responsibility among customer classes, and economic development or competitive considerations). On the contrary, it is often the case that parties who know they can *not* achieve their goals through full litigation are least likely to engage in “serious dialogue.”

The “classic ratemaking formula,” described by Professor Krieger,²⁴ is an extremely broad-brush depiction that must be carefully analyzed in light of the practices of the several jurisdictions. Rate base is not necessarily the utility’s investment. It may be subject to “used and useful” criteria which vary widely and may be determined at quite different points in time relative to the effectiveness of new rates. The shorthand “formula” speaks of “expenses,” but the relevant item is *allowable* expenses and the jurisdictions differ on those. Thus, the effect of an “allowed return” or, more precisely, an allowed return on equity, that seems generous may be vitiated by the *disallowance* of substantial investments or expenses or both, while an allowed return that, on the surface, may appear far less satisfactory (from the utility’s point of view) may work out more favorably in actual experience because of, for example, the use of more current or projected data for rate base or expenses or both.

Virtually all settlements provide that they are to have no precedential value. Yet, in practice, it is very difficult to avoid the impression, if line items are publicly agreed to, that a precedent has been established. And, really, who can say what the various settling parties privately thought of their chances on each of the numerous issues presented? The regulatory agency’s responsibility is to ensure that rates are just and reasonable.²⁵ If a representative group of parties suggests that they are, no doubt the commission can consider that fact, without compelling each party to reveal its own analysis of the strengths and

21. *Id.* at 302-04.

22. *Id.* at 303.

23. See Stefan H. Krieger, *An Advocacy Model for Representation of Low-Income Intervenors in State Utility Proceedings*, 22 ARIZ. ST. L.J. 639, 649 (1990) (“It is impossible to predict with certainty how a particular commission is going to rule in a specific case.”).

24. Krieger, *supra* note 1, at 276-77. To cite an article more than forty years old, albeit by a most distinguished commentator, for the proposition that rate base regulation, and thus presumably the “formula,” is here to stay, *see id.* at 277 n.84, borders on the misleading.

25. The regulatory agency’s responsibility is not to ensure that rates are “in the public interest,” as Professor Krieger suggests. *See Krieger, supra* note 1, at 293 n.171. The “public interest” issue concerns whether the agency has heard enough to come to a conclusion on justness and reasonableness.

weaknesses of its own case.

Professor Krieger argues that regulatory commissions regularly approve settlements. That may be so, but it is incorrect to draw the conclusion that the commissions necessarily have abandoned their responsibilities. Again, Professor Krieger overlooks a most important consideration. Experienced practitioners would not present a regulatory agency with a proposal that would be obviously unacceptable, would have characteristics which could embarrass the commission in future cases, or would be violative of established precedent. It would make no sense.

A frequent comment in settlement negotiations is "the commission will never buy that." While Professor Krieger seems to accept the outworn proposition that the regulator eventually becomes the captive of the regulated,²⁶ he ignores the fact that utilities deal with their regulators and their staffs on a daily basis—not just with regard to general rate cases—and that the intervenors in general rate cases are the utility's customers. Those who participate in these cases know that they will be seeing each other again soon and that there is little room for sleight-of-hand.

We do not know why Professor Krieger argues that "a party with greater financial resources and technical expertise will often attempt to intimidate weaker parties into settlement."²⁷ To the contrary, in the authors' experience, some utilities have gone to great lengths to provide data and explain the process to "weaker parties."²⁸ Professor Krieger apparently assumes that commission staffs and "proxy" advocates systematically fail to perform their function. Again, we must point out that, whether viewed as a "political" question or simply as sound customer relations, legitimate ratepayer concerns cannot be ignored as a practical matter. If they are, the commission will know and act accordingly. Although they may not be completely satisfied in every single case, ratepayer concerns are *not* ignored.²⁹

26. *Id.* at 314.

27. *Id.* at 303-04. His citations are not to utility regulatory authorities, but to articles dealing with environmental, transactional issues that have no particular relevance for the on-going relationships involved in utility ratemaking.

28. See *Duff v. Public Util. Comm'n*, 384 N.E.2d 264, 268-69 (Ohio 1978). Nevertheless, the authors are not at all sure how to define "weaker parties" in this context.

29. All of this applies to the non-signatory intervenor. Professor Krieger seems to assume that this is an underfunded "consumer" intervenor. This is not necessarily so. For a nonunanimous revenue distribution "settlement" adopted over the objection of the utility, see *Re Monongahela Power Co.*, 130 Pub. Util. Rep. 4th (PUR) 1 (W. Va. Pub. Serv. Comm'n 1991). Industrial customers are often non-signatories. See, e.g., *Industrial Energy Consumers v. Public Util. Comm'n.*, 629 N.E.2d 423, 424-35 (Ohio 1994). In an increasingly competitive regulatory environment, future would-be competitors have frequently become intervenors and non-signatories to various "alternative regulation" plans. See *In re Ohio Bell Telephone Co.*, No. 93-487-TP-ALT (Ohio Pub. Util. Comm'n 1994) (on file with Yale Journal on Regulation), *appeals pending sub nom.*, *Time Warner AxS v. Public Util. Comm'n*, No. 95-587, *AT&T Communications of Ohio, Inc. v. Public Util. Comm'n*, No. 95-588, *MCI Telecommunications Corp.*, No. 95-589 (Ohio

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When Professor Krieger demands “unanimity,” he opens the door to hostage-taking. For example, if a non-signatory really is interested only in a limited issue (use of conservation measures, life-line rates, etc.), under normal procedures *that* issue is fully litigated. No plausible reason justifies granting such a party, or an industrial intervenor seeking a particularized tariff design to enhance its own (but not others’) interests, the power to hold up and control the whole process. What Professor Krieger fails to see is that, if push comes to shove and the case is fully tried, all sorts of non-traditional, i.e. non-statutory, options which might be reached through agreement may go out the window. *That* is the critical problem which his article fails to address.

The standards adopted by the Ohio Commission more than a decade ago,³⁰ were expressly adopted by the Supreme Court of Ohio in *Consumers’ Counsel v. Public Util. Comm’n.*,³¹ a gas base-rate case in which all parties (including the utility, staff, industrial intervenors, and the major municipality in the utility’s service area), except the Office of the Ohio Consumers’ Counsel, had joined.³² The court’s standards were as follows:

1. Is the settlement a product of serious bargaining among capable, knowledgeable parties?
2. Does the settlement, as a package, benefit ratepayers and the public interest?
3. Does the settlement package violate any important regulatory principle or practice?

...

We endorse the commission’s effort utilizing these criteria to resolve its cases in a method economical to ratepayers and public utilities.³³

The Ohio Court, however, made it quite clear that in any event the commission must determine, from the evidence, what is just and reasonable. To succeed,

1995). These are hardly underfunded parties.

30. See *Re Cincinnati Gas & Elec. Company*, 71 P.U.R.4th 140 (Ohio Pub. Util. Comm’n 1985)(citing similar cases).

31. 592 N.E.2d 1370, 1373 (Ohio 1992), a case that Professor Krieger does not cite, although he refers to the earlier Ohio Commission decision in *Re Cleveland Elec. Illuminating Co.*, 99 Pub. Util. Rep. 4th (PUR) 407 (Ohio Pub. Util. Comm’n 1989), at least eleven times. See Krieger, *supra* note 1 at nn. 17, 21, 24, 27, 28, 29, 320, 321, 322, 336, 357. Professor Krieger also missed *Duff v. Pub. Util. Comm’n*, 384 N.E.2d 264 (Ohio 1978), and *Akron v. Public Util. Comm.*, 378 N.E.2d 480 (Ohio 1978).

32. While Mr. Tongren was not then with the Office of the Ohio Consumers’ Counsel, both authors agree that, whatever differing views they may have with regard to this decision, it represents the definitive pronouncement of the Ohio Supreme Court on this subject at the time of writing.

33. 592 N.E.2d at 1373.

an appellant must show that the commission's order was against the manifest weight of the evidence.³⁴

It is important to observe that these standards require that the proposed solution not *violate* any important regulatory principle or practice. Professor Krieger's repeated references to "a full case record" and similar expressions³⁵ strongly imply that he views rate case settlements solely as compromises of rate case issues.³⁶ Quite to the contrary, the settlement process permits solutions that the regulatory agency itself, constrained by statute, may *not* be able to pursue.³⁷ Without denigrating the obvious savings in time and expense arising from a settlement, the flexibility inherent in the settlement process may be by far the most telling ground for its encouragement.

Flexibility is especially important now, as the utility marketplace moves from integrated monopolies to multi-party and/or unbundled competition. Since full and effective competition will take years to accomplish, parties to utility proceedings must effectively function in this largely undefined transitional period. The creation of the new competitive environment will be far more successful if stakeholders are able to talk openly, share ideas, and challenge the traditional approaches that once suited the monopoly marketplace and which seem to be the foundation of Professor Krieger's argument. By exploring new approaches, parties will be able to fashion solutions beyond the regulatory authority of a commission when they do not violate any important regulatory principle or practice. While this may serve to "replace the rule of law in basic policy issues with privately bargained-for deals,"³⁸ it does so when the academic "rule of law" is inadequate to handle real life situations *and the regulatory agency retains full power to reject the private bargain*.

Professor Krieger seems to be arguing that acceptance of a nonunanimous settlement in *itself* violates an important regulatory principle.³⁹ That position is not legally supportable in many regulatory jurisdictions and overlooks the many very real protections for *all* parties which are inherent in the regulatory process. His position also ignores the reality that regulatory settlements, unanimous or not, can produce effectively crafted and truly innovative results.

34. *Id.*

35. Krieger, *supra* note 1, at 294.

36. Confirmed by his repeated references to Business & Professional People for Pub. Interest v. Illinois Comm. Comm'n., 555 N.E.2d 693, 704 (Ill. 1989) ("as long as the provisions of such a [settlement] proposal are within the Commission's power to impose").

37. For example, in Ohio the commission cannot compel a utility to phase-in a rate increase, see Cincinnati Gas & Elec. Co. v. Public Util. Comm'n., 620 N.E.2d 821 (Ohio 1993); Columbus S. Power Co. v. Public Util. Comm'n., 620 N.E.2d 835 (Ohio 1993), but there seems no doubt that a utility may *agree* to such a phase-in, see Re Dayton Power & Light Co., 1992 Ohio PUC LEXIS 57 (January 22, 1992).

38. Krieger, *supra* note 1, at 323.

39. Obviously, as the numerous cases which he cites demonstrate, it does not violate an important regulatory *practice*.

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Oftentimes those results will lead to the enhancement of values advocated by Professor Krieger. It makes no sense to jeopardize such outcomes by arbitrarily imposing an unrealistic “balance of power” standard on the regulatory and settlement processes.

