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Problems for Captive Ratepayers in Nonunanimous Settlements of Public Utility Rate Cases

Stefan H. Krieger

Maurice A. Deane School of Law at Hofstra University

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Problems for Captive Ratepayers in Nonunanimous Settlements of Public Utility Rate Cases

Stefan H. Krieger†

Professor Krieger discusses the recent tendency of public utility commissions to approve nonunanimous settlements of rate cases without full hearings. With the rising interest in alternative dispute resolution methods and the pressing demands of increasingly complex rate cases, a number of public utility commissions have encouraged negotiated settlement of rate cases. In many instances, commissions have approved these settlements over the strenuous objections of consumer groups. Professor Krieger argues that in the current regulatory environment, the nonunanimous settlement trend poses significant dangers. The nonunanimous settlement process raises the risk that the burden of increased utility prices will be borne disproportionately by captive residential and low-income ratepayers. Professor Krieger concludes that requiring unanimous settlement is necessary to protect these less powerful groups.

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†Associate Professor of Law, Hofstra University. B.A., University of Chicago; J.D., University of Illinois. I wish to thank James E. Hickey, Jr. and Stephen Fogel for their comments on this manuscript. I also wish to express my gratitude to my research assistants Joy Archer, David Fontana, Robin Chadwick, and Karen Nielsen for their help in preparation of this Article. Finally, I would like to thank Hofstra University for providing me with the research support that made preparation of this Article possible.

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Introduction

During the past thirty years, scholars and practitioners have shown an increased interest in the development of alternatives to traditional litigation as a means for resolving disputes.¹ The literature is replete with discussions of various alternative dispute resolution (ADR) mechanisms. These mechanisms include negotiation, mediation, arbitration, mini-trials, and summary jury trials.² A number of commentators have noted the advantages these methods have over traditional adjudication. Among these benefits are the saving of time and money;³ the flexibility and creative

1. STEPHEN B. GOLDBERG ET AL., *DISPUTE RESOLUTION* 3-7 (2d ed. 1992); Robert D. Raven, *Alternative Dispute Resolution: Expanding Opportunities*, ARB. J., June 1988, at 44; see Kathleen Sampson, Exploring the Issues in Private Judging, Panel Discussion at the American Judicature Society's Annual Meeting (Aug. 7, 1993) (edited transcript), in 77 JUDICATURE 203 (1994); see also Talbot D'Alemberte, *ADR Has Come Into Its Own*, ARB. J., Mar. 1991, at 3, 60; Robert B. McKay, *The Many Uses of Alternative Dispute Resolution*, ARB. J., Sept. 1985, at 12 (discussing the "dramatic expansion of ADR"); Richard A. Salem, *The Alternative Dispute Resolution Movement: An Overview*, ARB. J., Sept. 1985, at 3.

2. DONOVAN LEISURE NEWTON & IRVINE, *ADR PRACTICE BOOK* §§ 1.1-11.7 (John H. Wilkinson ed., 1990 & Supp. 1993); GOLDBERG ET AL., *supra* note 1, at 7-13; see SUSAN M. LEESON & BRYAN M. JOHNSTON, *ENDING IT: DISPUTE RESOLUTION IN AMERICA* (1988); LEONARD L. RISKIN & JAMES E. WESTBROOK, *DISPUTE RESOLUTION AND LAWYERS* (1987); see also JAY FOLBERG & ALISON TAYLOR, *MEDIATION: A COMPREHENSIVE GUIDE TO RESOLVING CONFLICTS WITHOUT LITIGATION* (1984). See generally *THE POLITICS OF INFORMAL JUSTICE* (Richard L. Abel ed., 1982) [hereinafter *POLITICS OF INFORMAL JUSTICE*].

3. DONOVAN LEISURE NEWTON & IRVINE, *supra* note 2, §§ 2.2-.3; see Tom Arnold, *Fundamentals of Alternative Dispute Resolution: Why Prefer ADR*, in 2 PATENT LITIGATION 1993, at 655 (PLI Pats., Copyrights, Trademarks, & Literary Prop. Course Handbook Series No. 376, 1993); David C. Bergmann, *ADR: Resolution or Complication?*, PUB. UTIL. FORT., Jan. 15, 1993, at 20; Richard M. Berman, *Rate Regulation: Cable TV is Ready for ADR*, ARB. J., June 1993, at 70, 71 (1993) (discussing the advantages of arbitration); Sampson, *supra* note 1, at 203; Lloyd N. Shields, *Why Attorneys Use ADR*, 41 LA. B.J. 222 (1993). But see Gail Bingham & Leah V. Haygood, *Environmental Dispute Resolution: The First Ten Years*, ARB. J., Dec. 1986, at 3, 12-13 (discussing environmental dispute resolution as not being comparable to litigation when evaluating cost and time savings).

responsiveness of alternative processes;⁴ the achievement of results that better serve the needs of the parties;⁵ the enhancement of community involvement in the dispute resolution process;⁶ the reduction of court caseloads;⁷ and broader access to the justice system.⁸ Given these purported benefits, proposals have been made suggesting the use of ADR to resolve a wide range of disputes that are traditionally adjudicated in the courts. These range from consumer cases⁹ and housing disputes¹⁰ to divorce¹¹ and domestic violence actions.¹² Authors have also called for the use of ADR processes in such complex fields as environmental¹³ and nuclear energy regulation.¹⁴

4. DONOVAN LEISURE NEWTON & IRVINE, *supra* note 2, § 2.5; see Bergmann, *supra* note 3, at 20; Sampson, *supra* note 1, at 203; J. Walton Blackburn, *Environmental Mediation as an Alternative to Litigation*, 16 POL'Y STUD. J. 562, 563 (1988); Raven, *supra* note 1, at 44, 46.

5. GOLDBERG ET AL., *supra* note 1, at 5; see also Miriam K. Mills, *Overview and Implications of Alternative Dispute Resolution*, 16 POL'Y STUD. J. 493 (1988).

6. GOLDBERG ET AL., *supra* note 1, at 5; see also Alfred A. Marcus et al., *The Applicability of Regulatory Negotiation to Disputes Involving the Nuclear Regulatory Commission*, 36 ADMIN. L. REV. 213, 214 (1984).

7. GOLDBERG ET AL., *supra* note 1, at 5; Bergmann, *supra* note 3, at 20; Sampson, *supra* note 1, at 203.

8. GOLDBERG ET AL., *supra* note 1, at 5-7.

9. *Id.* at 389-91; see Ronald J. Adams, *Consumer Complaint Arbitration: The Corporate View*, ARB. J., Dec. 1988, at 41.

10. See Lauren J. Resnick, *Mediating Affordable Housing Disputes in Massachusetts: Optimal Intervention Points*, ARB. J., June 1990, at 15.

11. See Thomas E. Carbonneau, *A Consideration of Alternatives to Divorce Litigation*, 1986 U. ILL. L. REV. 1119; Joyce Hauser-Dann, *Divorce Mediation: A Growing Field?*, ARB. J., June 1988, at 15; Steven T. Knuppel, *Promise and Problems in Divorce Mediation*, 1991 J. DISP. RESOL. 127; David Singer, *Mediation—A Growing Means for Settling Divorce Conflicts*, ARB. J., Dec. 1992, at 21.

12. Karla Fischer et al., *The Culture of Battering and the Role of Mediation in Domestic Violence Cases*, 46 SMU L. REV. 2117 (1993).

13. See Douglas J. Amy, *The Politics of Environmental Mediation*, 11 ECOLOGY L.Q. 1 (1983); Blackburn, *supra* note 4; Stephen Crable, *ADR: A Solution for Environmental Disputes*, ARB. J., Mar. 1993, at 24; Alfred Levinson, *Environmental Dispute Resolution and Policy Making*, 16 POL'Y STUD. J. 575 (1988); John P. McCrory, *Environmental Mediation—Another Piece for the Puzzle*, 6 VT. L. REV. 49 (1981); Barry G. Rabe, *The Politics of Environmental Dispute Resolution*, 16 POL'Y STUD. J. 585 (1988); David Singer, *The Use of ADR Methods in Environmental Disputes*, ARB. J., Mar. 1992, at 55; Bruce Stiftel & Neil G. Sipe, *Mediation of Environmental Enforcement: Overcoming Inertia*, 1992 J. DISP. RESOL. 303; Lawrence Susskind, *Environmental Mediation and the Accountability Problem*, 6 VT. L. REV. 1 (1981).

14. See, e.g., Marcus et al., *supra* note 6.

ADR has recently been touted as an answer to problems in public utility regulation. Traditionally, public utility rates are set in formal adjudicatory hearings in which all parties, primarily utilities and different classes of ratepayers, have the right to present their cases before utility commissions.¹⁵ In the late 1970s and early 1980s, however, commentators began to argue that some provision for informal settlement was needed to address the regulatory delay inherent in the formal process.¹⁶ In the middle and late 1980s, the problem of regulatory delay led state public utility commissions to experiment with informal alternatives to traditional adjudicatory proceedings.¹⁷ By 1990, a commissioner in Colorado, a state that has experimented with ADR, praised informal settlement, observing that it "can provide all the fairness of legal due process and be a more effective means of building long-term relationships which reflect the underlying reality of American public utility regulation as a 'win-win' proposition."¹⁸

In the context of public utility regulation, however, a unique and disturbing practice has arisen: the nonunanimous or contested settlement. ADR mechanisms have rarely departed from the traditional concept of the litigation model in which all parties must either agree to the resolution of the dispute or at least to the procedures that will lead to that resolution.¹⁹ While some states require unanimous consent before allowing settlements of rate cases,²⁰ many public utility commissions have abandoned the traditional predicate for settlement, unanimity, and have approved rate

15. See *infra* notes 65-89.

16. See, e.g., Thomas D. Morgan, *Toward a Revised Strategy for Ratemaking*, 1978 U. ILL. L.F. 21, 22, 76-78; see *infra* notes 115-116 and accompanying text.

17. See, e.g., *In re Public Serv. Co.*, 72 Pub. Util. Rep. 4th (PUR) 660 (Ind. Pub. Serv. Comm'n 1986); *In re Nine Mile Point Two Nuclear Generating Facility*, 78 Pub. Util. Rep. 4th (PUR) 23 (N.Y. Pub. Serv. Comm'n 1986); *In re Cleveland Elec. Illuminating Co.*, 99 Pub. Util. Rep. 4th (PUR) 407 (Ohio Pub. Util. Comm'n 1989).

18. Ronald L. Lehr, *Regulatory Negotiations*, PUB. UTIL. FORT., Sept. 13, 1990, at 20, 25.

19. See generally WALTER A. MAGGIOLO, *TECHNIQUES OF MEDIATION* 95-103 (1985); PAUL PRASOW & EDWARD PETERS, *ARBITRATION AND COLLECTIVE BARGAINING: CONFLICT RESOLUTION IN LABOR RELATIONS* 1-16 (1970).

20. *Business & Professional People for Pub. Interest v. Illinois Commerce Comm'n*, 555 N.E.2d 693, 704-5 (Ill. 1989); *Kentucky Am. Water Co. v. Kentucky ex rel. Cowan*, 847 S.W.2d 737 (Ky. 1993); *Missouri ex rel. Monsanto Co. v. Public Serv. Comm'n*, 716 S.W.2d 791 (Mo. 1986); *Missouri ex rel. Fischer v. Public Serv. Comm'n*, 645 S.W.2d 39 (Mo. Ct. App. 1982).

case settlements to which several of the parties have not given their assent.²¹ As long as the utility and perhaps one or two other parties reach an agreement with the commission staff,²² these commissions are willing to approve the agreement and to forgo the requirement of a full evidentiary hearing. They reason that such a procedure is necessitated by the sheer number of parties involved in rate cases and the ability of a single party to obstruct an otherwise reasonable settlement. Accordingly, these commissions see the oxymoronic notion of a nonunanimous or contested settlement as the only realistic means of implementing the settlement process in these cases.²³

The danger of such an approach is obvious. Parties with a substantial interest in a utility proceeding can be left out of the decision-making process. Although commissions that permit nonunanimous settlements require review of these settlements to determine their reasonableness,²⁴ these commissions often defer to the decision of the consenting parties.²⁵ The utility can come to the bargaining table with a proposal, walk away from negotiations whenever it finds the counterproposal of some other party objectionable, continue discussions with the commission staff, and then present to the commission an agreement with the staff as a settlement. Furthermore, in their zeal to reap the benefits of the nonunanimous settlement process, commissions shift the burden of proof to the nonconsenting parties by forcing them to prove the unreasonableness of

21. See, e.g., *In re Potomac Elec. Power Co.*, 81 Pub. Util. Rep. 4th (PUR) 587, 597-98 (D.C. Pub. Serv. Comm'n 1987); *In re Public Serv. Co.*, 72 Pub. Util. Rep. 4th (PUR) 660 (Ind. Pub. Serv. Comm'n 1986); *In re Louisville Gas & Elec. Co.*, 107 Pub. Util. Rep. 4th (PUR) 348, 352-53 (Ky. Pub. Serv. Comm'n 1989); *In re Nine Mile Point Two Nuclear Generating Facility*, 78 Pub. Util. Rep. 4th (PUR) 23 (N.Y. Pub. Serv. Comm'n 1986); *In re Cleveland Elec. Illuminating Co.*, 99 Pub. Util. Rep. 4th (PUR) 407 (Ohio Pub. Util. Comm'n 1989); *In re El Paso Elec. Co.*, 101 Pub. Util. Rep. 4th (PUR) 405, 409-10 (Tex. Pub. Util. Comm'n 1988).

22. The vast majority of states have three or four member commissions that are either appointed by the governor, selected by the legislature, or elected by popular vote. CHARLES F. PHILLIPS, JR., *THE REGULATION OF PUBLIC UTILITIES* 119 (1985). Commissions hire expert staff to advise them on technical ratemaking issues. See *infra* note 106.

23. See, e.g., *In re Rules of Practice & Procedure Before the Comm'n*, 112 Pub. Util. Rep. 4th (PUR) 215, 218 (Mich. Pub. Serv. Comm'n 1990).

24. See, e.g., *In re Rules of Practice & Procedure Before the Comm'n*, 112 Pub. Util. Rep. 4th (PUR) 215, 229 (Mich. Pub. Serv. Comm'n 1990); *In re Cleveland Elec. Illuminating Co.*, 99 Pub. Util. Rep. 4th (PUR) 407, 450 (Ohio Pub. Util. Comm'n 1989); *In re El Paso Elec. Co.*, 101 Pub. Util. Rep. 4th (PUR) 405, 409 (Tex. Pub. Util. Comm'n 1991).

25. See cases cited *supra* note 17.

the settlement. While both traditional regulatory hearings and the unanimous settlement process provide protection for all parties, the nonunanimous settlement process places some parties at a severe disadvantage.

Data on reported commission cases show an increase over the past decade in the use of the nonunanimous settlement mechanism to decide rate cases. A vast majority of those cases terminated in settlements to which consumer groups were nonconsenting parties.²⁶ Of the twenty-four reported general rate cases in which nonunanimous settlements have been approved by commissions, only one was decided prior to 1980, four were decided between 1980 and 1985, and the remainder were decided after 1985.²⁷ A significant number of these settlements arose in the context

26. These data were obtained by reviewing nonunanimous settlement cases reported in *Public Utilities Reports* and on Lexis and Westlaw. The research was restricted to general rate cases, those in which a commission considered the overall revenue requirement of the utility and the allocation of that requirement among the different customer classes. Although commissions have used the nonunanimous settlement mechanism in limited-issue rate cases, such as those involving the rate impact of changes in tax laws, the research encompasses only general rate cases because of their significant impact on ratepayers.

27. For an explanation of general rate cases, see *supra* note 26. The twenty-four cases include the following commission proceedings: *In re Arkansas La. Gas Co.*, 141 Pub. Util. Rep. 4th (PUR) 319 (Ark. Pub. Serv. Comm'n 1992), *aff'd* Bryant v. Arkansas Pub. Serv. Comm'n, 877 S.W.2d 594 (Ark. Ct. App. 1994); *In re Pacific Gas & Elec. Co.*, 99 Pub. Util. Rep. 4th (PUR) 141 (Cal. Pub. Util. Comm'n 1988); *In re Public Serv. Co.*, 72 Pub. Util. Rep. 4th (PUR) 660 (Ind. Pub. Serv. Comm'n 1986); *In re Louisville Gas & Elec. Co.*, 107 Pub. Util. Rep. 4th (PUR) 348 (Ky. Pub. Serv. Comm'n 1989), *rev'd sub nom. Kentucky ex rel. Cowan v. Kentucky Pub. Serv. Comm'n*, 120 Pub. Util. Rep. 4th (PUR) 168 (Ky. Cir. Ct. 1991), *aff'd sub nom. Louisville Gas & Elec. Co. v. Kentucky ex rel. Cowan*, 862 S.W.2d 897 (Ky. Ct. App. 1993); *In re Washington Gas & Light Co.*, No. 8545, Order No. 70658 (Md. Pub. Serv. Comm'n 1993); *In re Detroit Edison Co.*, 39 Pub. Util. Rep. 4th (PUR) 107 (Mich. Pub. Serv. Comm'n 1980); *In re UtiliCorp United, Inc.*, No. ER-93-37 (Mo. Pub. Serv. Comm'n June 18, 1993); *In re Nine Mile Point Two Nuclear Generating Facility*, 78 Pub. Util. Rep. 4th (PUR) 23 (N.Y. Pub. Serv. Comm'n 1986); *In re Cleveland Elec. Illuminating Co.*, 99 Pub. Util. Rep. 4th (PUR) 407 (Ohio Pub. Util. Comm'n 1989); *In re Portland Gen. Elec. Co.*, 86 Pub. Util. Rep. 4th (PUR) 463 (Or. Pub. Util. Comm'n 1987); *Pennsylvania Pub. Util. Comm'n v. Peoples Natural Gas Co.*, 1992 WL 315144 (Pa. Pub. Util. Comm'n 1992); *In re Houston Lighting & Power Co.*, 134 Pub. Util. Rep. 4th (PUR) 303 (Tex. Pub. Util. Comm'n 1991); *In re El Paso Elec. Co.*, 101 Pub. Util. Rep. 4th (PUR) 405 (Tex. Pub. Util. Comm'n 1988), *aff'd*, *City of El Paso v. Public Util. Comm'n*, No. D-3053, 1994 WL 278111 (Tex. June 22, 1994); *In re Virginia Elec. & Power Co.*, 76 Pub. Util. Rep. 4th (PUR) 580 (W. Va. Pub. Serv. Comm'n 1986); *In re Hope Natural Gas Co.*, 51 Pub. Util. Rep. 4th (PUR) 431 (W. Va. Pub. Serv. Comm'n 1983).

Information on the remaining cases was obtained from opinions involving judicial review of commission approval of nonunanimous settlements. See *United States v. Public Serv. Comm'n*, 465 A.2d 829 (D.C. 1983); *Business & Professional People for Pub. Interest*

proceedings addressing the rate treatment for expenses of recently constructed or canceled plants, particularly nuclear generating facilities.²⁸ In seventeen of the twenty-four cases, no consumer group was a signatory to the nonunanimous settlement; in three cases, one or more consumer groups did not agree to the settlement; and in only four cases other groups, such as industrial intervenors, were the sole nonconsenting parties.²⁹ To date, sixteen state commissions and the District of Columbia

v. Illinois Commerce Comm'n, 555 N.E.2d 693 (Ill. 1990); Kentucky Am. Water Co. v. Kentucky *ex rel.* Cowan, 847 S.W.2d 737 (Ky. 1993); Missouri *ex rel.* Monsanto Co. v. Public Serv. Comm'n, 716 S.W.2d 791 (Mo. 1986); Missouri *ex rel.* Fischer v. Public Serv. Comm'n, 645 S.W.2d 39 (Mo. Ct. App. 1982); Attorney Gen. v. New Mexico Pub. Serv. Comm'n, 808 P.2d 606 (N.M. 1991); City of Somerville v. Public Util. Comm'n, 865 S.W.2d 557 (Tex. Ct. App. 1993); City of Abilene v. Public Util. Comm'n, 854 S.W.2d 932 (Tex. Ct. App. 1993); *In re* New England Tel. & Tel. Co., 382 A.2d 826 (Vt. 1977).

28. See, e.g., Business & Professional People for Pub. Interest v. Illinois Commerce Comm'n, 555 N.E.2d 693 (Ill. 1989); *In re* Pacific Gas & Elec. Co., 99 Pub. Util. Rep. 4th (PUR) 141 (Cal. Pub. Serv. Comm'n 1988); *In re* Public Serv. Co., 92 Pub. Util. Rep. 4th (PUR) 660 (Ind. Pub. Serv. Comm'n 1986); *In re* Louisville Gas & Elec. Co., 107 Pub. Util. Rep. 4th (PUR) 348 (Ky. Pub. Serv. Comm'n 1989); *In re* Nine Mile Point Two Nuclear Generating Facility, 78 Pub. Util. Rep. 4th (PUR) 23 (N.Y. Pub. Serv. Comm'n 1986); *In re* Cleveland Elec. Illuminating Co., 99 Pub. Util. Rep. 4th (PUR) 407 (Ohio Pub. Util. Comm'n 1989); *In re* El Paso Elec. Co., 101 Pub. Util. Rep. 4th (PUR) 405 (Tex. Pub. Util. Comm'n 1991); *In re* Houston Lighting & Power Co., 134 Pub. Util. Rep. 4th (PUR) 303 (Tex. Pub. Util. Comm'n 1991).

29. In the following cases, no consumer group was a signatory party to the nonunanimous settlement: Business & Professional People for Pub. Interest, 555 N.E.2d 693 (Ill. 1990); Kentucky Am. Water Co., 847 S.W.2d 737 (Ky. 1993); Attorney Gen. v. New Mexico Pub. Serv. Comm'n, 808 P.2d 606 (N.M. 1991); City of Somerville Public Util. Comm'n, 865 S.W.2d 557 (Tex. Ct. App. 1993); City of Abilene Public Util. Comm'n, 854 S.W.2d 932 (Tex. Ct. App. 1993); *In re* New England Tel. & Tel. Co., 382 A.2d 826 (Vt. 1977); *In re* Arkansas La. Gas Co., 141 Pub. Util. Rep. 4th (PUR) 319 (Ark. Pub. Serv. Comm'n 1992); *In re* Pacific Gas & Elec. Co., 99 Pub. Util. Rep. 4th (PUR) 141 (Cal. Pub. Util. Comm'n 1992); *In re* Louisville Gas & Elec. Co., 107 Pub. Util. Rep. 4th (PUR) 348 (Ky. Pub. Serv. Comm'n 1989); *In re* Detroit Edison Co., 39 Pub. Util. Rep. 4th (PUR) 107 (Mich. Pub. Serv. Comm'n 1980); *In re* UtiliCorp United, Inc., No. ER-93-37 (Mo. Pub. Serv. Comm'n 1993); *In re* Nine Mile Point Two Nuclear Generating Facility, 78 Pub. Util. Rep. 4th (PUR) 23 (N.Y. Pub. Serv. Comm'n 1986); *In re* Portland Gen. Elec. Co., 86 Pub. Util. Rep. 4th (PUR) 463 (Or. Pub. Util. Comm'n 1987); *In re* Houston Lighting & Power Co., 134 Pub. Util. Rep. 4th (PUR) 303 (Tex. Pub. Util. Comm'n 1991); *In re* El Paso Elec. Co., 101 Pub. Util. Rep. 4th (PUR) 405 (Tex. Pub. Util. Comm'n 1991); *In re* Virginia Elec. & Power Co., 76 Pub. Util. Rep. 4th (PUR) 580 (W. Va. Pub. Serv. Comm'n 1986); *In re* Hope Natural Gas Co., 51 Pub. Util. Rep. 4th (PUR) 431 (W. Va. Pub. Serv. Comm'n 1983).

In the following cases, at least one consumer representative was a nonsignatory, but other consumer groups did agree to the settlement: Missouri *ex rel.* Fischer v. Public Serv. Comm'n, 645 S.W.2d 39 (Mo. Ct. App. 1982); *In re* Public Serv. Co., 72 Pub. Util. Rep. 4th (PUR) 660 (Ind. Pub. Serv. Comm'n 1986); *In re* Cleveland Elec. Illuminating Co.,

Commission have recognized the validity of nonunanimous settlement of rate cases.³⁰ Six of those commissions have gone so far as to adopt formal rules providing procedures for approval of such settlements.³¹

In those states in which the nonunanimous settlement of rate cases is allowed, use of the process is likely to continue. The recent deregulation of the electric and telecommunications industries will contribute to this trend. Commissions confronted with the very difficult ratemaking issues raised by deregulation may seek alternatives to traditional adjudication, as they did in handling the nuclear plant controversies.

With deregulation, commissions are faced with the complex issue of the allocation of costs between basic service customers, such as low-income families, who do not have access to alternative sources of service (captive customers), and customers who do have such access. This problem is particularly severe for electric utilities with substantial sunk

99 Pub. Util. Rep. 4th (PUR) 407 (Ohio Pub. Util. Comm'n 1989).

In the following cases, the sole nonconsenting parties were nonconsumer groups: *United States v. Public Serv. Comm'n*, 465 A.2d 829 (D.C. 1983); *Missouri ex rel. Monsanto Co. v. Public Serv. Comm'n*, 716 S.W.2d 791 (Mo. 1986); *In re Washington Gas Light Co.*, 84 MD PSC 274 (Md. Pub. Serv. Comm'n 1993) (No. 8545, Order No. 70658); *Pennsylvania Pub. Util. Comm'n v. Peoples Natural Gas Co.*, 1992 WL 315144 (Pa. Pub. Util. Comm'n 1990).

30. The states in which commissions have recognized the validity of nonunanimous settlements are Arkansas, California, Indiana, Illinois, Kentucky, Maryland, Michigan, Missouri, New Mexico, New York, Ohio, Oregon, Pennsylvania, Texas, Vermont, and West Virginia. *See supra* note 27.

31. *In re Commission's Rules of Practice & Procedure*, 29 CPUC 2d 392 (Cal. Pub. Util. Comm'n Sept. 28, 1988) (Nos. 88-09-060, 84-12-0281); *Rules of Practice & Procedure*, Case No. 712, Order No. 10048, 1992 WL 548031 (D.C. Pub. Serv. Comm'n 1992); *In re Rules of Practice & Procedure Before the Comm'n*, 112 Pub. Util. Rep. 4th (PUR) 215 (Mich. Pub. Serv. Comm'n 1990); *In re Rules of Practice & Procedure*, No. 110, 1993 WL 562148 (N.M. Pub. Util. Comm'n Oct. 4, 1993); *In re Procedures for Settlement & Stipulation Agreements*, Nos. 90-M-0255, 92-M-0138, 1992 WL 487888 (N.Y. Pub. Serv. Comm'n Mar. 24, 1992); MO. CODE REGS. tit. 4, § 240-2.115; *see also* 15 Tex. Reg. 6101 (Oct. 19, 1990) (proposed amendment to TEX. ADMIN. CODE tit. 16, §§ 21.201-21.208 setting forth nonunanimous settlement procedures which were never adopted).

costs in generating plants. With the advent of retail wheeling,³² utilities that wish to retain their large industrial customers will need to set prices for these customers that are competitive with lower cost alternatives provided by independent producers and other utilities.³³ They will thus attempt to shift as many costs as possible onto captive ratepayers in order to remain competitive. Similarly, in the telecommunications area, local companies may want to shift a large portion of shared costs onto captive customers in order to remain in competition for the business of large customers. Such cost-shifting may occur even though some of these costs are attributable to non-basic services,³⁴ from which the captive customers derive no benefit. The intensification of competition in the utility industry will make the allocation of costs between captive and noncaptive ratepayers one of the main issues at stake in ratemaking proceedings.³⁵

The use of the nonunanimous settlement mechanism may have a significant effect on how these costs are allocated. Commissions, wishing to avoid contentious and lengthy hearings, may choose to defer to settlements reached among the utility, the staff, and large customers. However, if nonunanimous settlements which are opposed by representatives of captive ratepayers are approved without full adjudicatory hearings, the interests of many customers will be ignored.

This Article will examine the use of nonunanimous settlement procedures by public utility commissions in light of the problems inherent in such procedures, with particular regard to the plight of captive ratepayers.³⁶ First, the Article will present a brief history of the

32. Under retail wheeling a local utility is required to deliver the power of another utility or independent producer for a fixed transmission charge. See Phillip S. Cross, *Retail Wheeling—Happy Motoring for State Regulators?*, PUB. UTIL. FORT., June 15, 1994, at 46.

33. See generally Suede G. Kelly, *Overview*, in XVI PUB. UTIL. ANTHOLOGY xvii, xix-xx (Allison P. Zabriskie ed., July-Dec. 1993).

34. See generally Mark E. Meitzen, *Shared Costs and the Cash Cow Debate: Who Gets Milked*, PUB. UTIL. FORT., Apr. 1, 1991, at 32, 33.

35. See Richard J. Rudden & Robert Hornick, *Electric Utilities in the Future, Competition is Certain, the Impact is Not*, PUB. UTIL. FORT., May 1, 1994, at 21, 23.

36. Because of the different political contexts of federal and state ratemaking, this Article confines its analysis to nonunanimous settlements of rate cases in state public utility proceedings. The notion of nonunanimous settlements of rate cases originated in federal regulation of wholesale rates. See *Mobil Oil Co. v. Federal Power Comm'n*, 417 U.S. 283 (1974); *Pennsylvania Gas & Water Co. v. Federal Power Comm'n*, 463 F.2d 1242 (D.C. Cir. 1972); *Lexington v. Federal Power Comm'n*, 295 F.2d 109 (4th Cir. 1961). State commissions and courts have relied on federal cases to support their approval of such settlements. See *infra* notes 120, 162-186 and accompanying text. But see *Business & Professional People for Pub. Interest v. Illinois Commerce Comm'n*, 555 N.E.2d 693 (Ill.

development of rate regulation by state public utility commissions. It will then describe the factors that led to the emergence of nonunanimous settlements in utility rate proceedings and examine the statutory authority for allowing such settlements. Next, it will analyze the benefits and deficiencies of nonunanimous settlement as a dispute resolution mechanism, with special attention to the problems of captive ratepayers. Finally, the Article will recommend that the courts and commissions reject the nonunanimous settlement process as a method for resolving rate cases.

I. The Historical Development of Rate Base Regulation

The history of rate base regulation—the traditional method for setting utility rates—is a saga of a search for workable procedures and standards to balance the power between regulated industries and their consumers. The early development of the independent regulatory commission movement in America was tied to problems of railroad supervision and control. The present public service and utility commissions are, for the most part, the outgrowth of railroad commissions established to deal with the problems of railroad power.³⁷ Initially, railroads wielded tremendous economic power over their customers. In response, customers sought relief from state legislatures. When these forums proved to be inadequate for continuous regulation of railroads, legislatures created independent commissions to regulate the industry. However, when state legislatures and commissions began to assert significant control over railroads, the

1990) (noting that the *Mobil* case “dealt with Federal law and a Federal agency; Federal procedures are not necessarily consistent with Illinois law and procedures.”) *Id.* at 704. In the federal environment, because the consumers are usually large public utilities, the balance of power among the parties is much more even than in the state context.

The Article also limits discussion to rate-related cases. ADR procedures have also been encouraged in rulemaking and investigatory proceedings. See Evan van Hook, Note, *Conservation Through Cooperation: The Collaborative Planning Process for Utility Conservation and Load Management*, 102 YALE L.J. 1235 (1993). However, the impact of the use of those procedures on the balance of power in the commission has not been significant.

Finally, the Article does not address the issue of whether regulation, rather than the market, is the best method for setting public utility rates. See generally Bernard S. Black & Richard J. Pierce, Jr., *The Choice Between Markets and Central Planning in Regulating the U.S. Electricity Industry*, 93 COLUM. L. REV. 1339 (1993). The Article assumes that the regulatory system is the place in which rates are set and considers the proper use of ADR within such a system.

37. HENRY C. SPURR, 1 GUIDING PRINCIPLES OF PUBLIC SERVICE REGULATION 9 (1924).

railroads sought in the federal courts to regain their power. As a result of these efforts, the Supreme Court ultimately balanced the competing interests of the industry and consumers by allowing commissions substantial authority to regulate railroads as long as they adhered to certain formal standards which protected the rights of railroad stockholders. These standards have been the essential basis for rate base regulation of public utilities.

A. *The Growth of Independent Regulatory Commissions*

Before the 1870s, railroads possessed substantial economic leverage over their customers, causing customers to respond by seeking legislative protection. The legislatures began to place sharp restrictions in railroad charters they granted.³⁸ As a result, numerous charters contained provisions fixing maximum rates,³⁹ and some even went so far as to determine rates by a sliding scale that varied inversely with railroad profits.⁴⁰ This form of regulation soon proved to be inadequate because of its inflexibility. Economic conditions were constantly changing as modern technology was being developed, necessitating a more dynamic regulatory response. Charter provisions could not easily be changed to meet new and unforeseen situations, making a dynamic regulatory process

38. As early as 1836, the Massachusetts legislature reserved to itself the authority to modify railroad rates. PAUL RODGERS, *THE NARUC WAS THERE: A HISTORY OF THE NATIONAL ASSOCIATION OF REGULATORY UTILITY COMMISSIONERS* 3 (1979). The legislature carved out the ratemaking power from the charters it granted to each railroad. The Massachusetts Legislature, for example, enacted a special statute to incorporate the Hartford & Springfield Rail-Road Corporation:

The Legislature may, after the expiration of five years from the time when the said rail-road shall be opened for use, from time to time, alter or reduce the rate of tolls or other profits upon said road; but the said tolls shall not, without the consent of said corporation, be so reduced as to produce, with said profits, less than ten percent per annum.

1839 Mass. Acts. ch. 101, § 5.

39. SPURR, *supra* note 37, at 2 (stating "maximum rate statutes were quite the rage at one time"); *see also* Rates of Fare & Freight, 1874 Iowa Acts 61 (setting reasonable maximum rates for the transportation of freight and passengers on the different railroads of the state).

40. *See* Trustees of Dartmouth College v. Woodward, 17 U.S. (4 Wheat.) 518 (1819).

impossible.⁴¹

When it became clear that the job of railroad regulation could not be handled effectively by the legislature, consumers demanded more stringent and continuous control to offset the power of the companies. In response, legislatures created independent commissions to regulate the industry. Under pressure from the Granger movement, a number of states, beginning with Illinois, enacted laws that fixed rates for transportation, grain elevators, and warehouses.⁴² In 1869, the Illinois legislature passed the first of the Granger Laws, which required rates to be just and reasonable. However, this Act failed to provide an effective means for enforcement of its provisions.⁴³ Finally, in 1873, the Railroad and

41. See PHILLIPS, *supra* note 22, at 112. Maximum rate statutes were often passed without adequate consideration of the problems involved and without knowledge of the circumstances that the individual company faced. As a result, the statutes were often arbitrary and unfair. See SPURR, *supra* note 37, at 2.

Attempts at municipal regulation also proved ineffective. Municipalities relied primarily on franchise agreements as a means of exercising control over railroads. Before a company could commence operation, it had to acquire a franchise from the city council. The franchise usually set exact standards for service to be rendered and rates to be charged. See generally HERMAN H. TRACHEL, *PUBLIC UTILITY REGULATION* (1950); DELOS F. WILCOX, *MUNICIPAL FRANCHISES* (1910). However, a franchise had the status of a contract which a state could not impair without the grantee's approval. See *Trustees of Dartmouth College*, 17 U.S. (4 Wheat.) at 518. Therefore, it was often impossible for franchises to be changed regardless of how "ill-considered or antiquated with respect to current needs for regulation they might be." BURTON N. BEHLING, *COMPETITION AND MONOPOLY IN PUBLIC UTILITY INDUSTRIES* 24 (1938). Predictably, the companies resisted downward rate changes, and the municipalities resisted upward adjustments. As a result, especially where exclusive franchises were issued, municipalities "found themselves in the disagreeable situation of having bargained away their right to allow competition without having retained effective control over rates and service." *Id.* at 25. Furthermore, the agreements often failed to provide the administrative machinery needed to ensure that the company fulfilled the terms of its contract. PHILLIPS, *supra* note 22, at 113. Thus, franchise regulation, like regulation by charter provisions, did not provide a flexible remedy for the problems of excessive railroad power.

42. Between 1871 and 1874, Illinois, Iowa, Minnesota, and Wisconsin enacted Granger legislation imposing stringent rate and service regulations on railroads, grain elevators, and warehouses. Even though the Granger laws were eventually repealed in every state except Illinois, they established a pattern that other states followed. RODGERS, *supra* note 38, at 4; see also Charles F. Adams, Jr., *The Granger Movement*, 120 N. AM. REV. 394 (1875); Charles R. Dietrick, *The Effects of the Granger Acts*, 11 J. POL. ECON. 237 (1903); A.E. Paine, *The Granger Movement in Illinois*, 1 U. ILL. STUD. 335 (1905).

43. Act of Mar. 10, 1869, §§ 1-7, 1869 Ill. Laws 309-12 (statute only provided for criminal penalties against officers, agents, or employees of the company who wilfully or knowingly violated the act); ROBERT E. CUSHMAN, *THE INDEPENDENT REGULATORY COMMISSIONS* 26 (1941). In 1871, Illinois created the Board of Railroad and Warehouse Commissioners, which was charged with enforcing the laws regulating railroads and grain

Warehouse Commission gained the power to issue a schedule of maximum rates and, more importantly, to prosecute violations of the Act.⁴⁴

The companies fought back against this assertion of regulatory power, but initially they were unsuccessful. In *Munn v. Illinois*,⁴⁵ grain elevator owners charged that the Illinois legislature's attempt to set maximum rates was a violation of the Fourteenth Amendment. The Supreme Court rejected this challenge, observing:

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.⁴⁶

In upholding the Act, the Court "laid the cornerstone of modern regulation" and "placed a powerful weapon in the hands of the states."⁴⁷ Between 1870 and 1890, a large number of states followed Illinois' lead and established railroad commissions with the power to fix rates and enforce orders.⁴⁸ These commissions had two types of powers. First,

elevators. Board of Railroad & Warehouse Commissioners Act of Apr. 13, 1871, §§ 1-19, 1871 Ill. Laws 618-24. This statute, however, provided no procedure to enforce the Commissioners' powers. See generally ALEXANDER DAVIDSON & STUVE BERNARD, COMPLETE HISTORY OF ILLINOIS FROM 1873 TO 1884 (1884) (discussing Granger railroad legislation and the political aspects of the Granger movement in Illinois).

44. Act of May 2, 1873, 1873 Ill. Laws 136-60.

45. 94 U.S. 113 (1876). In 1874, fourteen grain storage plants operated in Chicago. The plants were owned by approximately thirty people and were controlled by nine companies. The leaders of the nine firms periodically met in order to agree on grain storage rates. The defendants were convicted and fined for charging rates in excess of those fixed pursuant to the Act. The court concluded that the owners had a "virtual monopoly." *Id.* at 131.

For a description of the arguments against the Granger laws, see generally FRANK HENDRICK, RAILWAY CONTROL BY COMMISSIONS 161 (1900) (condemning Granger laws); W.M. Grosvenor, *The Communist and the Railway*, 4 INT'L REV. 585 (1877) (arguing that Granger legislation was communistic).

46. 94 U.S. at 126.

47. RODGERS, *supra* note 38, at 4; see also Walton H. Hamilton, *Affectionation with Public Interest*, 39 YALE L.J. 1089 (1930); Breck P. McAllister, *Lord Hale and the Business Affected with a Public Interest*, 43 HARV. L. REV. 759 (1930).

48. See, e.g., Act of Mar. 2, 1889, ch. 192, 1889 Kan. Sess. Laws 284-86 (giving conditional powers to the Board of Railroad Commissioners); Railroads and Other Common Carriers, ch. 124, 1883 Kan. Sess. Laws 186-96; Act of Mar. 7, 1887, ch. 10, 1887 Minn.

they had the authority to oversee railroads. This power allowed the commissions to ensure that the railroads complied with the law by inspecting railroads for safety, investigating accidents, examining company accounts, and compelling disputants and witnesses to testify under oath. More importantly, these commissions could set reasonable and nondiscriminatory railroad rates. By law, a rate established by the commission was *prima facie* reasonable in any suit between a railroad and any shipper.⁴⁹ Moreover, the attorney general and, in certain circumstances, the commission could bring suit to enforce the rates established by the commission.⁵⁰

B. *Judicial Restraints on Regulation by Independent Commission*

In the political battle between railroads and consumers, the *Munn* decision gave state legislatures substantial power to regulate railroads and other companies "affected with the public interest."⁵¹ The railroads,

Carriers, ch. 124, 1883 Kan. Sess. Laws 186-96; Act of Mar. 7, 1887, ch. 10, 1887 Minn. Laws 49-66 (regulating common carriers and creating the Railroad and Warehouse Commission); Act of Mar. 11, 1884, ch. XXIII, 1884 Miss. Laws 31-44 (regulating railroad rates and creating a railroad commission); Act of Mar. 29, 1875, 1875 Mo. Laws 112-19 (regulating charges of railroad companies and providing for railroad commissioners); Act of Sept. 14, 1883, ch. 101, 1883 N.H. Laws 78-81 (establishing a Board of Railroad Commissioners). The financial panic of 1873 placed many railroads in financial difficulty. Because the panic occurred at the same time that the strong commissions were being established, public opinion turned against the commissions. As a result, many of the newly-formed commissions were abolished or converted to playing an advisory role. However, this trend was short lived. By 1887, ten states had established strong commissions with rate making and enforcement power. These states were: Alabama, California, Georgia, Illinois, Kansas, Minnesota, Mississippi, Missouri, New Hampshire, and South Carolina. See CUSHMAN, *supra* note 43, at 27; MARTIN G. GLAESER, PUBLIC UTILITIES IN AMERICAN CAPITALISM 64 (1957).

49. See, e.g., *Chicago B. & Q. R.R. v. Jones*, 37 N.E. 247, 249 (Ill. 1894); *St. Paul Ass'n of Commerce v. Chicago B & Q. R.R.*, 158 N.W. 982, 984 (Minn. 1916). See generally CUSHMAN, *supra* note 43, at 27.

50. CUSHMAN, *supra* note 43, at 27. While the strong commissions had the power to set rates and issue orders, they were dependent on the courts for the enforcement of those orders. *Id.* at 32.

51. Neil N. Bernstein, *Utility Rate Regulation: The Little Locomotive That Couldn't*, 1970 WASH. U. L.Q. 223, 231-32.

The state had only to determine that the circumstances with respect to a particular business warranted the imposition of some form of price control and 'if a state of facts could exist that would justify such legislation,' the courts would assume that it did exist. Under those circumstances, *Munn* seemed to say, the property owner was at the mercy of the legislature. This was consistent

however, maintained their attacks in the courts on legislative regulation. In *Chicago, Milwaukee & St. Paul Railway Co. v. Minnesota*,⁵² one railroad challenged a Minnesota statute establishing a railway commission with the power to determine "equal and reasonable rates." Under the statute, if a railroad refused to obey a rate reduction order, the Commission had the authority to seek a writ of mandamus from the state court. When the Commission sought the writ against a railroad, the company attempted to defend itself by showing that the reduced rates were not equal and reasonable. The state court, however, held that the Commission's decision was unreviewable because the statute had made the Commission's decision "final and conclusive."⁵³

The Supreme Court reversed, holding that the statute was unconstitutional:

In the present case, the railroad alleged that the rate of charge fixed by the commission was not equal or reasonable, and [the Minnesota] Supreme Court held that the statute deprived the company of the right to show that judicially. The question of the reasonableness of a rate of charge for transportation by a railroad company, involving as it does the element of reasonableness both as regards the company and as regards the public, is eminently a question for judicial investigation, requiring due process of law for its determination. If the company is deprived of the power of charging reasonable rates for the use of its property, and such deprivation takes place in the absence of an investigation by judicial machinery, it is deprived of the lawful use of its property, and thus in substance and effect, of the property itself, without due process of law⁵⁴

relations, there was no limitation on the police power of the states.

Id. (footnotes omitted).

52. 134 U.S. 418 (1890).

53. *Id.* at 457.

54. *Id.* at 457-58. Three justices dissented, observing: "[The decision] practically overrules *Munn v. Illinois* . . . and the several railroad cases that were decided at the same time. The governing principle of those cases was that regulation and settlement of fares of railroads and other public accommodations is a legislative prerogative and not a judicial one." *Id.* at 461 (dissenting opinion).

While in *Munn*, consumers had won a major victory which gave state legislatures the power to regulate public utilities, the *Chicago, Milwaukee* decision limited that power by affording companies the right to a full judicial hearing before they were required to comply with a rate order.

The power of state legislatures was further limited by the Supreme Court's 1898 decision in *Smyth v. Ames*,⁵⁵ in which it set constitutional standards for the reasonableness of rates. In that case, railroad stockholders challenged a legislative reduction in rates as confiscatory, resulting in an actual taking of their property without fair compensation in violation of constitutional due process.⁵⁶ The Court held:

[T]he basis of all calculations as to the reasonableness of rates to be charged by a corporation maintaining a highway under legislative sanction must be the fair value of the property being used by it for the convenience of the public. And, in order to ascertain that value, the original cost of construction, the amount expended in permanent improvements, the amount and market value of its bonds, the present as compared with the original cost of construction, the probable earning capacity of the property under particular rates prescribed by statute, and the sum required to meet operating expenses, are all matters for consideration, and are to be given such weight as may be just and right in each case . . . What the company is entitled to ask is a fair return upon the value of that which it employs for the public convenience.⁵⁷

railroads and other public accommodations is a legislative prerogative and not a judicial one." *Id.* at 461 (dissenting opinion).

55. 169 U.S. 466 (1898).

56. The doctrine that state rate fixing must not be confiscatory was originally pronounced in *Stone v. Farmers' Loan & Trust Co.*, 116 U.S. 307, 331 (1886) (holding that "[u]nder pretense of regulating fares and freights, the State cannot require a railroad corporation to carry persons or property without reward; neither can it do that which in law amounts to a taking of private property for public use without just compensation, or without due process of law.").

57. 169 U.S. at 546-47. The idea that a common carrier is entitled to a reasonable rate for his services has its roots in the English common law. See *Bastard v. Bastard*, 2 Shower 82 (K.B. 1679). By the same token, common law courts declared that common carrier rates must be reasonable. In his treatise *De Portibus Maris*, 1 Harg. Law Tracts 78 (1670), Sir Matthew Hale, Chief Justice to King James I of England, wrote that when private property is affected with the public interest, the rates for public use must be reasonable and moderate. Lord Hale's reasoning was relied upon by the Court in *Munn v. Illinois*, 94 U.S. 113, 126 (1876). The common law notion of reasonable rates can be traced back to the Church

This decision set the constitutional standard that a utility is entitled to a fair rate of return on its property. At the same time, the case created standards to counterbalance consumers' disproportionate political clout with state legislatures. The Court assumed that legislatures and their designees were subject to political pressure from the public and would safeguard the rights of consumers.⁵⁸ The Court hoped "to protect the utility owner whose voice was not heeded by the legislature and to ensure that the rates were not too low from his standpoint."⁵⁹

With *Smyth*, a balance was struck between the power of the railroads and the power of their customers. While initially the railroads dominated their customers, consumers fought back and achieved direct statutory regulation and then the creation of commissions with authority to establish rates and to enforce them. Facing these consumer victories, railroad stockholders feared that unlimited control by legislatures could make their investments worthless.⁶⁰ Motivated by this fear, they counterattacked in the courts. Although the courts recognized the authority of state legislatures to regulate railroads and other public utilities, they also recognized the right of the railroads to a fair return.

The *Smyth* and *Chicago, Milwaukee* decisions set the standards from which the modern system of rate regulation developed. The *Chicago, Milwaukee* decision required that a utility be accorded a full hearing before it could be compelled to comply with a state rate order. Under *Smyth*, no state could confidently issue a rate order unless it could prove to a court that the rates provided the utility with a fair return on fair value. In order to arrive at a fair profit to be covered by rates for the use of the plant, the state needed to determine the value of the physical plant used by the utility.⁶¹ The new mandate necessitated regulation by commission rather than by direct legislative action.⁶² Commissions could implement the due process hearings mandated by *Chicago, Milwaukee*, and at the same time could provide an efficient forum for the valuation

Fathers' doctrine of just price. GLAESER, *supra* note 48, at 196-197.

58. FRANCIS X. WELCH, CASES AND TEXTS ON PUBLIC UTILITY REGULATION 236 (rev. ed. 1968).

59. *Id.*

60. See generally Bernstein, *supra* note 51, at 241-42.

61. *Id.* at 243.

62. *Id.* at 577. States began to establish independent regulatory commissions that had the authority to value property as the basis for setting reasonable rates. By 1915, every state except Delaware had established some kind of board to regulate utilities. *Id.* at 296; SPURR, *supra* note 37, at 12.

of property required by *Smyth*.⁶³ The requirements of full hearings and the adherence to particular constitutional standards for ratemaking assured investors that they would receive a fair profit on their investments.⁶⁴ Thus, the modern system of regulation was developed to protect the rights of both consumers and investors.

C. *The Modern Process of Rate Base Regulation*

In response to the *Chicago*, *Milwaukee* and *Smyth* cases, legislatures inserted provisions into utility commission enabling statutes that provided for hearings in rate cases and established particular standards for ratemaking.⁶⁵ The current process for regulation of rates is essentially the same as that contained in the early statutes.

Consistent with *Chicago*, *Milwaukee*, statutes provide for full adjudicatory hearings on utility proposals to change rates.⁶⁶ Utilities must file proposed rate schedules with the commission and must publish notice of the proposed changes.⁶⁷ The commission then has a period of time, usually thirty to forty-five days, to decide whether or not to suspend the rates and to hold hearings on the proposed schedules.⁶⁸ If the commission does not suspend the new schedules, the utility puts them into effect after

63. Bernstein, *supra* note 51, at 242.

64. *Id.* at 241-42. A contemporary editorial on the *Smyth* decision observed: "Many observations might be made on this decision, but practically the most important point about it is that it makes the law perfectly plain, and makes railway property much more secure from attacks through State legislation than it has hitherto been." A.G. Sedgwick, *Nebraska Freight-Rate Decision*, 66 NATION 260, 261 (1898).

65. See, e.g., N.Y. Public Service Law § 1 (McKinney 1916).

66. Although the act of prescribing rates for the future is considered a legislative function, the determination of whether a rate is reasonable is considered a judicial function. See *ICC v. Cincinnati, N.O.T.P. Ry.*, 167 U.S. 479, 499 (1897).

67. See, e.g., An Act to provide for the regulation of public utilities, 1913 Ill. Laws 459, § 35; ILL. ANN. STAT. ch. 220, § 5/9-201(a) (Smith-Hurd 1993); TEX. REV. CIV. STAT. ANN. art. 1446(c), § 43(a) (Vernon Supp. 1993). Rate cases can also be initiated by the commission itself or on the complaint by a ratepayer. See, e.g., ILL. ANN. STAT. ch. 220, § 5/9-250 (Smith-Hurd 1993).

68. See, e.g., 1913 Ill. Laws 459, § 36. See generally NATIONAL ASS'N OF REGULATORY COMM'RS, 1989 ANNUAL REP. ON UTIL. AND CARRIER REG. 849-52 (1990) (Table 209) [hereinafter NARUC REP.].

the waiting period.⁶⁹ If the commission does suspend the proposed rates, it holds hearings on the reasonableness of the schedules before the commissioners themselves, hearing examiners, or administrative law judges designated by the commission.⁷⁰

At those hearings, the utility and "such persons or corporations as the commission shall allow to intervene" have a right to appear in person or through an attorney, to introduce evidence, and to cross examine witnesses.⁷¹ Commissions have the power to hire expert staff, including attorneys, engineers, and accountants, who can testify at the proceedings.⁷² In addition, commissions have the authority to issue subpoenas compelling the testimony of witnesses or the production of books and accounts.⁷³ Although commissions are not bound by technical rules of evidence or similar formalities when taking testimony,⁷⁴ a full record of the hearing is required.⁷⁵ At the conclusion of such a hearing, the commission must make findings of fact and enter an order based on the record.⁷⁶

In addition to hearing procedures, and in accordance with *Smyth v. Ames*, the enabling statutes have also set standards for the ratemaking process. They require that commissions set rates that are "just and reasonable."⁷⁷ Consistent with *Smyth*, this phrase has been read to require that commissions allow the utility an opportunity to earn a reasonable return on its invested capital and to pay its reasonable operating expenses.⁷⁸ This requirement is reflected in the classic ratemaking formula: $R = O + B(r)$, where R is the revenue required by the

69. See, e.g., 1913 Ill. Laws 459, § 35.

70. See, e.g., *id.* § 60. See generally NARUC REP., *supra* note 68, at 910-13 (Table 228).

71. See, e.g., 1913 Ill. Laws 459, § 65. See generally NARUC REP., *supra* note 68, at 269-302.

72. See, e.g., 1913 Ill. Laws 459, § 3.

73. See, e.g., *id.* § 65.

74. See, e.g., *id.* § 60. See generally NARUC REP., *supra* note 68, at 269-302.

75. See, e.g., 1913 Ill. Laws 459, § 65.

76. See, e.g., *id.* § 65.

77. See, e.g., *id.* § 36 ("On such [rate] hearing the commission shall establish the rates or other charges . . . which it shall find to be just and reasonable.").

78. PHILLIPS, *supra* note 22, at 157-60; see TEX. REV. CIV. STAT. ANN. art 1446(c), § 39(a) (Vernon Supp. 1993) ("In fixing rates of a public utility, [the commission] shall fix its overall revenues at a level which will permit such utility a reasonable opportunity to earn a reasonable return on its invested capital used and useful in rendering service to the public over and above its reasonable operating expenses.").

company, O is the utility's operating expenses, B is the firm's rate base (invested capital), and r is the reasonable return allowed the company on its rate base.⁷⁹ The commission bases the precise amount for each of these elements on evidence obtained from the utility's books and records and from expert testimony.⁸⁰ Over the years, many different statutory and regulatory standards have been developed to guide commissions in determining, as precisely as possible, each of the terms in the ratemaking formula.⁸¹

In *Federal Power Commission v. Hope Natural Gas Co.*,⁸² the Supreme Court rejected, as a constitutional matter, rigid adherence to the *Smyth v. Ames* fair value standard for ratemaking. Generally, however, states have not abandoned the rate base method for formulating rates. In *Hope*, the Court concluded that a commission is not required to use any particular method in determining rates as long as the end result is fair. Nevertheless, in interpreting commission enabling statutes, state courts have generally required commissions to follow the basic formula for rate fixing outlined in *Smyth v. Ames*.⁸³ Despite the end-result language of *Hope*, state courts have held that the commission must render findings of fact on each of the variables in the formula, and that any material error as to a particular variable renders the end result invalid.⁸⁴ As one court

79. RICHARD J. PIERCE, JR., & ERNEST GELLHORN, *REGULATED INDUSTRIES* 89 (1987); see *Citizens Util. Co. v. Illinois Commerce Comm'n*, 529 N.E.2d 510, 512-13 (Ill. 1988).

80. Even the earliest enabling statutes for utility commissions empowered them to establish a uniform system of accounts to be kept by utilities. See, e.g., 1913 Ill. Laws 459, § 11.

81. See generally Stefan H. Krieger, *The Ghost of Regulation Past: Current Applications of the Rule Against Retroactive Ratemaking in Public Utility Proceedings*, 1991 U. ILL. L. REV. 983, 995-96.

82. 320 U.S. 591, 602 (1944).

83. WELCH, *supra* note 58, at 284.

84. See, e.g., *Keystone Water Co. v. Pennsylvania Pub. Util. Comm'n*, 385 A.2d 946, 953-55 (Pa. 1978) (per curiam) (opinion in support of affirmance for a divided court rejects Commission's argument that it could give no consideration to a plant as an element of rate base as long as the end result was just and reasonable); *Commonwealth Tel. Co. v. Public Serv. Comm'n*, 32 N.W.2d 247 (Wis. 1948) (rejecting Commission's order that failed to determine rate base or rate of return). See generally Francis X. Welch, *The Rate Base Is Here to Stay*, PUB. UTIL. FORT., Oct. 22, 1953, at 635, 641 (observing that despite the "end result" language in *Hope*, "the ghost of *Smyth v. Ames* is still doing business at the same old stand").

has observed: "If the Commission makes a material error, in considering the elements which make up the rate base, the rate of return, the operating expenses or the operating income, the error will necessarily be reflected in its conclusion."⁸⁵

Finally, the enabling acts provide standards for the distribution of rates among different customer classes and within particular classes. Generally, statutes proscribe "undue discrimination" in rates.⁸⁶ Beyond that proscription, commissions have broad discretion in designing rates.⁸⁷ However, most commissions focus on the cost of providing service to different customers as the basis for allocation of rates.⁸⁸ As with the revenue requirement, commissions have developed different methodologies to determine the "cost of service,"⁸⁹ and expert evidence on this issue is presented at the rate hearings.

Although the rate regulation process initially began as a legislative attempt to rein in the power of utilities, over time the process has taken on many of the accoutrements of a judicial proceeding. Formal hearings are held, the utility has the burden of proof to show that its proposed rates are just and reasonable, expert witnesses are presented for cross examination, exhibits are introduced, and a record is preserved. As at a trial, the commission uses certain legal standards to assess the evidence used in determining each of the variables in the revenue requirement formula and to decide upon the proper rate design. The commission is then required to issue detailed findings of fact. If any material finding is

old stand").

85. *Southwestern Bell Tel. Co. v. State Corp. Comm'n*, 386 P.2d 515, 525 (Kan. 1963).

86. *See, e.g.*, 1913 Ill. Laws 459, § 38 ("No public utility shall, as to rates or other charges, services, facilities or in any other respect, make or grant any preference or advantage to any corporation or person or subject any corporation or person to any prejudice or disadvantage. No public utility shall establish or maintain any unreasonable difference as to rates or other charges, services, facilities, or in any other respect, either as between localities or as between classes of service.").

87. *See, e.g.*, *Wood v. Public Util. Comm'n*, 481 P.2d 823, 827 (Cal. 1971); *Texas Alarm & Signal Ass'n v. Public Util. Comm'n*, 603 S.W.2d 766, 772 (Tex. 1980); *City of West Allis v. Public Serv. Comm'n*, 167 N.W.2d 401, 405 (Wis. 1969). Commissions may base the allocation of rates on any of the following factors: the cost of providing service to the different customers, the purpose for which the service is used, the quantity or amount of service received, the different character of service furnished, the time or season of use, the constancy or regularity of use, or "any other matter which presents a substantial difference as a ground of distinction." *Texas Alarm & Signal Ass'n*, 603 S.W.2d at 772.

88. *See* PIERCE & GELLHORN, *supra* note 79, at 181-82.

89. *Id.* at 182-93.

erroneous, the order is invalid. This approach is an outgrowth of the political balance reached between the railroads and their customers during the late nineteenth century. The power to prescribe rates is considered a legislative function, but the determination of the reasonableness of those rates is regarded as a judicial function.

II. The Development of Nonunanimous Settlements of Rate Cases

The energy crisis of the 1970s contributed to the rapid increase in the number of rate cases brought before commissions. Burdened by a backlog of litigation, commissions developed new methods of resolving rate cases, including the use of nonunanimous settlements. Commissions have adopted two approaches to nonunanimous settlements. Some have used these settlements merely as evidence to be considered in the context of full evidentiary hearings. Other commissions have approved nonunanimous settlements without such hearings, thereby potentially ignoring the interests of groups which were not parties to the settlement agreement.

A. *Changes in the Regulatory Environment*

Until the late 1960s, the adjudicatory model for ratemaking was generally considered to be quite effective. Prior to that time, public utility regulation was a fairly placid affair, with little attention given to modifying the procedures of traditional rate base regulation. For example, during the first part of the twentieth century, the electric utility business required only minimal regulatory intervention.⁹⁰ Throughout this period, thermal efficiency gradually grew and the scale of power plants soared, resulting in a trend toward lower operating expenses and declining marginal costs.⁹¹ In this environment, electric utilities filed rate cases infrequently because they generally felt they were receiving a satisfactory rate of return without formal regulatory proceedings.⁹² Meanwhile, consumer groups were content because nominal prices were either constant

90. See RICHARD F. HIRSH, *TECHNOLOGY AND TRANSFORMATION IN THE AMERICAN ELECTRIC UTILITY INDUSTRY* 176 (1989).

91. *Id.* at 176.

92. Paul L. Joskow, *Inflation and Environmental Concern: Structural Change in the Process of Public Utility Price Regulation*, 17 J.L. & ECON. 291 (1974).

or falling.⁹³ And with no complaints from consumer groups or requests for relief from utilities, utility commissions remained passive.⁹⁴ As Richard Hirsch describes:

During much of the century . . . the stakeholders in the electric power matrix had formed an implicit consensus about the technological system and its management. Benefits accrued to all: consumers enjoyed electricity whose unit price declined gradually. Investors profited from steadily increasing dividends and share prices of utility stocks. Managers congratulated themselves for their aptitude in running a complex technological enterprise and for improving the financial picture of their companies. Manufacturers happily took new orders for the advanced technology that they pioneered. And regulators sat quietly on the sidelines providing little interference in what appeared to be one of the best examples of a natural monopoly.⁹⁵

Then, in the late 1960s, a rise in energy prices caused the situation to change dramatically. The technological advances that had resulted in lower prices were no longer occurring at such a rapid rate.⁹⁶ Concurrently, inflation skyrocketed, and interest rates climbed steeply.⁹⁷ Then, in October of 1973, the country was hit by the Arab oil embargo, and the energy crisis began. In reaction to these events, electric utilities embarked on nuclear construction programs, and gas utilities sought alternative sources of fuel.⁹⁸

With rising fuel costs and massive construction projects, utilities no longer felt that they were receiving an adequate price for their services. Consequently, they brought many more formal rate cases before public

93. *Id.* at 299.

94. *See id.* at 298-99.

95. HIRSH, *supra* note 90, at 176-77.

96. Stefan H. Krieger, *An Advocacy Model for Representation of Low-Income Intervenors in State Public Utility Proceedings*, 22 ARIZ. ST. L.J. 639 (1990).

97. *Id.* at 639-40.

98. *Id.* at 640; *see also* James E. Hickey, Jr., *Mississippi Power & Light Company: A Departure Point for Extension of the "Bright Line" Between Federal and State Regulatory Jurisdiction over Public Utilities*, 10 J. ENERGY L. & POL'Y 57, 63-64 (observing that the energy crisis reaffirmed "the reasonableness of planning decisions to build nuclear power plants").

and by 1975, it had climbed to 114.⁹⁹ Rate cases became frequent occurrences for many utilities. Commissions discovered that utilities never seemed to be able to achieve the allowed rate of return set in a case, and, after the termination of one case, immediately filed new cases for further relief.¹⁰⁰ In addition, ancillary proceedings began to arise, addressing adjustments for fuel costs and other rate-related issues.¹⁰¹ As a result of the rapid growth in rate proceedings, electric rates rose ninety percent nationally in the five years after 1970.¹⁰²

As the number of rate cases grew and rates began to soar, consumer organizations became active in these proceedings. Some groups grew out of neighborhood and civic organizations whose members felt the crunch of higher utility rates and sought to put political pressure on commissions. Other groups addressed particular issues that they felt were important to the public interest, such as environmental concerns. Industrial and commercial consumer groups intervened to protect the pocketbooks of large and medium energy users. Finally, in reaction to political pressure from ratepayers, state legislatures began to develop offices of public counsel, and other proxy advocates, such as offices of attorneys general, sought to represent the interests of consumers in rate proceedings.¹⁰³

Faced with increased rate filings and active consumer intervention, commissions felt overburdened.¹⁰⁴ Rate cases became lengthy

99. Krieger, *supra* note 96, at 640.

100. Joskow, *supra* note 92, at 313.

101. Krieger, *supra* note 81, at 986-87.

102. Krieger, *supra* note 96, at 640.

103. *Id.* at 643-44.

104. Joskow, *supra* note 92, at 313. "As a result of the changing economic and social environment in which they were operating, the 'satisfactory' balancing of different interest groups that had characterized the procedural equilibrium of the 1950s and 1960s was now being quickly destroyed." *Id.* James Richardson quotes from a technical report to the Edison Electric Institute:

Increases in energy prices, as well as public awareness and political organizing around consumer and environmental issues, have sharpened the conflict among utilities, consumer and environmental interest groups, and state utility regulatory authorities. Complex technical and financial issues are hotly debated in administrative hearings. With increasing frequency, parties dissatisfied with the results of hearings appeal decisions to state courts on procedural grounds. This further distracts from efforts to deal with the substantive issues at hand, and increases the costs and delays associated with operating the utility.

James R. Richardson, *Overcoming Obstacles to Negotiating Electric Utility Industry Regulations*, 7 NEGOTIATION J. 41, 41 (1991).

proceedings, delayed in part by the sheer number of cases filed with commissions, the complexity of the issues involved, and the participation of intervenor groups.¹⁰⁵ Commission staffs,¹⁰⁶ strapped by limited resources, confronted the daunting tasks of evaluating and presenting testimony on the ever-expanding number of cases.¹⁰⁷ Rate orders in major cases began to run into the hundreds of pages, with thousands of additional pages of records of the testimony, exhibits, and briefs.¹⁰⁸ And, with extremely large rate hikes at stake, appeals of rate orders, especially by consumer groups, became a frequent occurrence.¹⁰⁹

While most consumer intervenor groups were not particularly successful in these cases at first, they eventually had a significant impact. One early study found that in New York Public Service Commission gas and electric rate cases, "the presence of an intervenor will vary from no effect to a reduction of 0.40 percentage points in the allowed rate of return, depending on the degree of conflict between the [utility] and the intervenor."¹¹⁰ While it is unclear whether the reductions were the result of effective advocacy by the intervenors or merely the consequence of political concessions by the Commission,¹¹¹ indisputably the presence of an intervenor had some effect in at least some cases. And even if consumer groups did not affect the ultimate decision in the case, their participation and demands for compliance with procedural requirements

James R. Richardson, *Overcoming Obstacles to Negotiating Electric Utility Industry Regulations*, 7 NEGOTIATION J. 41, 41 (1991).

105. Morgan, *supra* note 16, at 24-25. This problem was not just an issue for energy regulation. In telecommunications, there has been significant uncertainty on all sides as a result of the deregulation of the telephone industry. Jonathan Brock, *Using Negotiation and Mediation as an Adjunct to Utility Regulation and Rate Setting*, in MEDIATION INST., DEVELOPING SYSTEMS FOR THE SETTLEMENT OF RECURRING DISPUTES: FOUR CASE STUDIES AND RECOMMENDATIONS 1, 2 (1984).

106. Staff members of most commissions are appointed by and report to the commission or its executive director to advise the commission on technical engineering, accounting, economics, and legal issues. *See, e.g.*, ILL. ANN. STAT. ch. 220, §§ 5/11-201 to 5/11-208 (West 1993). In some states staff members have civil service or merit protections, while in others there is no such job security. *See generally* NARUC REP., *supra* note 68, at 307-12, 864-83 (Table 215).

107. *See generally* Jonathan D. Raab, *Consensus-Building in Electric Utility Regulation* 89 (1992) (unpublished Ph.D. dissertation, Massachusetts Institute of Technology).

108. Richardson, *supra* note 104, at 42-43.

109. Krieger, *supra* note 81, at 988.

110. Paul L. Joskow, *The Determination of the Allowed Rate of Return in a Formal Regulatory Hearing*, 3 BELL J. ECON. & MGMT. SCI. 632, 641 (1972).

111. Morgan, *supra* note 16, at 50.

delayed the proceedings as long as possible, postponing the ultimate imposition of higher rates.¹¹² As time went on, a number of these groups refined their strategies, retained highly effective expert witnesses, and became quite successful at reducing the magnitudes of rate increases allowed by commissions.¹¹³

B. *Nonunanimous Settlement as an Alternative to Traditional Rate of Return Regulation*

Faced with active consumer participation in rate cases, commissions and utilities began to question the effectiveness of traditional rate base regulation.¹¹⁴ Commissioners and some commentators began to describe the process as too “rigid” and “adversarial.”¹¹⁵ Furthermore, although adjudicatory processes were originally established to address the requirements of *Chicago*, *Milwaukee* and *Smyth*, some commissions now challenged reliance on a judicial model for setting rates.¹¹⁶ Proposals

112. *See id.* at 25.

113. *See, e.g., infra* notes 243-248 and accompanying text.

114. Raab, *supra* note 107, at 95-96 (author interviewed commission representatives in seven states, all of whom indicated a rise in settlements over the past five to ten years). In the third edition of *Public Utilities Reports Digest*, the first reference to reported settlements of cases occurs in the early 1960s in hotel, water, and telephone rates. Starting in the early 1980s, the number of reported cases raising settlement issues increased significantly. *See* 5 PUB. UTIL. REP. DIG. 3D *Procedure* § 31 (1983).

At the federal level, the Federal Power Commission (FPC), the precursor to the Federal Energy Regulatory Commission (FERC), originally adopted settlement procedures in 1949. Raab, *supra* note 107, at 95. It was not until the early 1960s, however, that the FPC began to actively foster settlements as a way of resolving cases. At that time, the Commission was faced with numerous requests for rate increases by gas pipeline companies. Because of the backlog in proceedings, the companies had collected over \$1 billion subject to refund. *Id.*

115. *See, e.g., Brock, supra* note 105, at 20; *The Forum—Question 2: Dispute Resolution*, PUB. UTIL. FORT., Nov. 8, 1990, at 28, 30-31 [hereinafter *Question 2: Dispute Resolution*].

116. *See, e.g., In re Commission's Rules of Practice & Procedure*, 28 CPUC 2d 77 (Cal. Pub. Util. Comm'n Apr. 27, 1988) (Nos. 88-04-059; 84-12-028). Adopting a settlement rule, the Commission rejected a consumer intervenor's proposal that a rate case be fully litigated if the settlement is contested. The Commission noted:

Once a stipulation or settlement is proposed, we wish to move quickly to examine it, receive parties' comments, hear parties' cases, and decide the matter, providing earlier certainty of outcome than would be possible under a year-long rate case schedule and freeing up parties' resources so that they might be used productively in other proceedings.

Id.

to develop methods for settlement of rate cases were made to expedite the process and ease the conflicts among parties.¹¹⁷ Eventually some commissions even adopted formal rules for settling cases.¹¹⁸

In establishing these procedures, most commissions concluded that a requirement of unanimous agreement would undermine the settlement process. They assumed that the utility must consent to the settlement,¹¹⁹ but recognized no requirement for agreement by all the intervenors. In supporting this position, a number of commissions pointed to language in federal cases construing the settlement provisions of the federal Administrative Procedure Act (APA):

There is nothing in the Administrative Procedure Act which expressly requires unanimous consent of all the participating parties to an agreement of settlement; and to read such a contention into the statute in view of the countless state agencies, municipalities, and consumers who may be interested in an administrative proceeding would effectively destroy the settlement provision.¹²⁰

While a unanimity rule would obviously make the achievement of settlements more difficult, these commissions fail to explain in any detail why such a requirement for state ratemaking cases would "effectively destroy" the settlement process. A few merely suggest that a requirement of unanimous consent would allow inactive or uncooperative parties to block any possible settlement.¹²¹

117. See, e.g., *In re Public Serv. Co.*, 72 Pub. Util. Rep. 4th (PUR) 660 (Ind. Pub. Serv. Comm'n 1986).

118. See *supra* note 31.

119. Although no decision ever directly addresses this issue, commissions and courts apparently assume that because of the constitutional protections accorded utility investors in rate proceedings, a nonunanimous settlement cannot be approved without the utility's consent. See *supra* notes 52-57 and accompanying text.

120. *City of Lexington v. Federal Power Comm'n*, 295 F.2d 109, 121 (4th Cir. 1961); see *In re Iowa Elec. Light & Power Co.*, 46 Pub. Util. Rep. 4th (PUR) 130, 146 (Iowa Commerce Comm'n 1982) (citing *Lexington*); see also *In re Pacific Gas & Elec. Co.*, 99 Pub. Util. Rep. 4th (PUR) 141, 176 (Cal. Pub. Util. Comm'n 1988) (citing *Pennsylvania Gas & Water Co. v. Federal Power Comm'n*, 463 F.2d 1242, 1250 (D.C. Cir. 1972)). The federal Administrative Procedure Act provides that all interested parties shall be given the opportunity for submission of "offers of settlement." 5 U.S.C. § 554(c)(1) (1988).

121. See *In re Rules of Practice & Procedure Before the Comm'n*, 112 Pub. Util. Rep. 4th (PUR) 215, 218 (Mich. Pub. Serv. Comm'n 1990); see also *In re Cleveland Elec. Illuminating Co.*, 99 Pub. Util. Rep. 4th (PUR) 407, 418 (Ohio Pub. Util. Comm'n 1989).

Implicit in these decisions is the belief that some intervenors, especially public interest and consumer groups, have an interest in obstructing settlements. Such groups, some commentators argue, have a strong ideological commitment to their causes and thus are less likely to compromise.¹²² Additionally, some have asserted that these organizations seek media attention to gain political support for their causes and accordingly favor the public forum of litigation over the more private negotiation arena.¹²³ Finally, it is argued that “[b]ecause such groups sell advocacy rather than marketplace products, they often tend to be dominated by lawyers, with a preference for victory through litigation.”¹²⁴ Faced with these notions about consumer groups, commissions assume that the settlement process will usually be successful only if unanimity is not required.

C. *Approaches to the Nonunanimous Settlement Process*

Commissions have adopted two general approaches to nonunanimous settlement procedures. A few regard settlement agreements merely as additional evidence to be considered in reaching a traditional rate base decision.¹²⁵ Under this approach, the utility presents its case-in-chief, and the settlement is introduced into evidence. Then, other parties and staff respond. The commission renders findings of fact on the entire record, including the settlement agreement, based on the traditional rate base formula. Because this approach maintains the requirement of a full evidentiary hearing, it deviates little from traditional ratemaking methods.

Most commissions, however, consider the merits of settlement agreements without holding a full adjudicatory proceeding.¹²⁶ These

(criticizing intervenors for failing to present testimony on revenue requirement when staff, industrial intervenors, city, and proxy consumer advocate were signatories to agreement).

122. See Richard B. Stewart, *The Discontents of Legalism: Interest Group Relations in Administrative Regulation*, 1985 WIS. L. REV. 655, 674.

123. *Id.*

124. *Id.* Indeed, in the *LG&E* case, the Commission specifically criticized the intervenors for their demands in negotiations for attorneys’ fees. *In re Louisville Gas & Elec. Co.*, 107 Pub. Util. Rep. 4th (PUR) 348, 354 (Ky. Pub. Serv. Comm’n 1989).

125. *In re Northern Indiana Pub. Serv. Co.*, 85 Pub. Util. Rep. 4th (PUR) 605, 614 (Ind. Util. Reg. Comm’n 1987) (“[I]t is our duty to make an independent decision of all relevant matters giving consideration to all evidence of record including the Stipulation between the parties.”).

126. See, e.g., *In re Commission’s Rules of Practice & Procedure*, 29 CPUC 2d 392 (Cal. Pub. Util. Comm’n Sept. 28, 1988); *In re Rules of Practice & Procedure Before the*

commissions will approve a settlement even without the development of a complete evidentiary record or findings of fact on each of the elements of the rate base formula.¹²⁷ The commission holds hearings on the settlement, takes evidence both in support of and against the settlement, and determines whether or not to approve it.¹²⁸ In making this decision, commissions do not use the traditional rate base method, but consider a number of other factors. These factors include whether the settlement is in the "public interest";¹²⁹ whether the settlement comports favorably with the possible outcome if there were no agreement;¹³⁰ whether the negotiation process was reasonable;¹³¹ whether a range of interests is represented by the parties who sign the agreement;¹³² and whether the settlement is supported by substantial evidence.¹³³

This approach to the nonunanimous settlement process is well illustrated by the 1989 decision of the Kentucky Public Service

Comm'n, 112 Pub. Util. Rep. 4th (PUR) 215, 218-19 (Mich. Pub. Serv. Comm'n 1990); *In re* Rules of Practice & Procedure, No. 110, 1993 WL 562148 (N.M. Pub. Util. Comm'n Oct. 4, 1993); *In re* Procedures for Settlement & Stipulation Agreements, Nos. 90-M-0255, 92-M-0138, 1992 WL 487888 (N.Y. Pub. Serv. Comm'n Mar. 24, 1992). John M. Katko, Note, *Negotiated Ratemaking and the Public Service Commission: Adjusting Its Present Structure to Ensure Fairness*, 38 SYRACUSE L. REV. 1319, 1323 (1989).

127. At times, even after the development of a full evidentiary record, a commission will use the second approach, considering the reasonableness of the settlement rather than variables of the revenue requirement formula. *See, e.g.*, *City of Somerville v. Public Util. Comm'n*, 865 S.W.2d 557 (Tex. Ct. App. 1993). In *City of Somerville*, after extensive hearings and the issuance of a report by the hearing examiners, the utility entered into a nonunanimous settlement with several of the parties. The Commission held hearings on the settlement agreement and approved it. In its findings of fact, the Commission did not detail the underlying variables used to calculate the revenue requirement. Instead, the Commission merely found the settlement to be "reasonable and in the public interest." *Id.* at 562 n.14.

128. *See, e.g.*, *In re* Commission's Rules of Practice & Procedure, 29 CPUC 2d 392, Rule 51.6 (Cal. Pub. Util. Comm'n Sept. 28, 1988) (Nos. 88-09-060; 84-12-028); *In re* Rules of Practice & Procedure, No. 110, 1993 WL 562148, at *33-34 (N.M. Pub. Util. Comm'n Oct. 4, 1993) (No. 110); *In re* Procedures for Settlement & Stipulation Agreements, 1992 WL 487888, at *19 (N.Y. Pub. Serv. Comm'n Mar. 24, 1992) (Nos. 90-M-0255, 92-M-0138). If the commission does not approve the settlement, it will allow the parties to renegotiate the agreement or litigate the case. *See, e.g.*, 1992 WL 487888, at *19.

129. *See infra* part V.A.

130. *See infra* part V.C.

131. *See infra* part V.D.

132. *See infra* part V.E.

133. *See infra* part V.B.

concerned the rate treatment for a new electric generating facility, Trimble County, constructed by Louisville Gas & Electric (LG&E). From the time the plant was originally authorized in 1978 through the next decade, intervenors including the Kentucky Attorney General, the county, and consumer groups had questioned in a number of cases the need for the new plant.¹³⁵ Finally, after construction was nearly complete, the Commission refused to allow the utility to collect rates to pay for twenty-five percent of the plant.¹³⁶ The utility appealed this decision, and the Commission opened a new docket to determine the rate treatment for the disallowed portion of the plant.¹³⁷

LG&E and the parties to the case, including the intervenors and Commission staff, then began to engage in settlement negotiations.¹³⁸ LG&E made proposals for certain rate reductions and dismissal of its appeal, but the intervenors wanted not only a reduction in rates, but also refunds of rates paid for construction of the disallowed portion of the plant and payment of their attorneys' fees.¹³⁹ When LG&E would not consider payment of either refunds or attorneys' fees, the negotiations with the intervenors broke down. LG&E then continued in its discussions with the Commission staff and reached a nonunanimous settlement with the staff for a rate reduction and dismissal of the appeal.¹⁴⁰

LG&E then presented the agreement to the Commission, which held hearings on the reasonableness of the settlement. While professing to place the burden of demonstrating the reasonableness of the settlement on LG&E and the staff,¹⁴¹ the Commission merely reviewed the events

135. See, e.g., *In re Louisville Gas & Electric Co.*, No. 8924 (Ky. Pub. Serv. Comm'n May 16, 1984); *In re Louisville Gas & Elec. Co.*, No. 8616 (Ky. Pub. Serv. Comm'n Mar. 2, 1983).

136. *In re Formal Review of the Current Status of Trimble County Unit No. 1*, No. 9934 (Ky. Pub. Serv. Comm'n April 20, 1989).

137. *In re Louisville Gas & Elec. Co.*, 107 Pub. Util. Rep. 4th (PUR) 348, 350 (Ky. Pub. Serv. Comm'n 1989).

138. *Id.* at 354-55.

139. *Id.*

140. *Id.* at 355.

141. *Id.* at 358.

leading up to the settlement, compared the ratepayer benefits of the settlement to the maximum benefit it assumed ratepayers would otherwise receive, and concluded that the settlement was reasonable. The Commission made no attempt to examine the reasonableness of the stipulated rates using the traditional standard.¹⁴² Instead, it based much of its decision on what it perceived to be the unreasonable position taken by intervenors in the negotiation process.¹⁴³ As the trial court held in reversing the order:

[T]he entire proceeding before the PSC regarding the settlement agreement can be considered nothing more than the most summary of proceedings with witnesses for LG&E and the PSC staff cheer-leading in favor of the agreement. The [Commission] clearly placed the burden upon the intervenors to demonstrate that the settlement agreement was unreasonable and/or unlawful.¹⁴⁴

Because most commissions have a tendency to take this informal approach to approving settlements, an approach which represents a significant departure from traditional rate base ratemaking, this Article will focus primarily on the use of this method.

III. The Statutory Basis for Nonunanimous Settlement of Rate Cases

In examining the propriety of nonunanimous rate case settlements, the initial issue is whether there is statutory authorization for such a

142. See *supra* notes 77-81 and accompanying text.

143. *In re Louisville Gas & Elec. Co.*, 107 Pub. Util. Rep. 4th (PUR) 348, 354 (Ky. Pub. Serv. Comm'n 1989). The Commission noted:

Despite LG&E's firm opposition to paying the intervenors' attorney fees, the Intervenor Group persisted in its efforts. The affidavits demonstrate that the Intervenor Group was so intent on recovering \$1.6 million of attorney fees that the group proposed *increasing* future electric rates so that LG&E could recoup its payment from the ratepayers. The Intervenor Group's proposal would effectively transform LG&E into a mere conduit by which the Intervenor Group would recover its attorneys fees by taxing the ratepayers.

Id.

144. *Kentucky ex rel. Cowan v. Kentucky Pub. Serv. Comm'n*, 120 Pub. Util. Rep. 4th (PUR) 168, 173-74 (Ky. Pub. Serv. Comm'n 1991), *aff'd*, 862 S.W.2d 897 (Ky. Ct. App. 1993). The court also expressed concern that the chairman of the Commission and a Commission member communicated at a luncheon meeting with LG&E's president prior to filing a formal settlement offer with the Commission. *Id.* at 170.

procedure. Three major statutory arguments have been raised against the nonunanimous settlement process: (1) that commission enabling acts do not permit commission staff to participate in settlement negotiations or, alternatively, do not allow settlement without the consent of governmental intervenors; (2) that statutory provisions allowing for settlements of administrative cases apply only if all parties consent; and (3) that, in the absence of unanimous settlement, enabling acts require full evidentiary hearings. A review of these arguments demonstrates that, although the first has little merit, the second and third raise serious doubts about whether nonunanimous settlements of rate cases are statutorily permissible under most enabling acts.

A. *The Role of Staff and Governmental Intervenors*

One court has held that because of the unique nature of the commission's staff, it cannot be a party to a settlement agreement. In *In re New England Telephone & Telegraph Co.*,¹⁴⁵ the court noted that the Vermont Public Service Board's enabling act charged it only with the duty to assure adequate utility service at just and reasonable rates. Therefore, the court reasoned, the staff counsel lacked the authority to enter into agreements because it was impossible for it to obtain authority from its client, the Board, to do so.¹⁴⁶

This reasoning is overly formalistic and shows a misunderstanding of how an administrative staff functions. As the court recognized in *New England Telephone*, the staff regularly takes positions in cases, filing direct and rebuttal testimony and cross-examining witnesses.¹⁴⁷ The staff does not receive formal authority from the board to take particular positions in these cases. Rather, the staff operates as a bona fide party: investigating the facts and testifying in regard to its findings, hiring expert witnesses, and making arguments on both law and facts.¹⁴⁸ "[I]n none of its activities is Staff subject to direction by the Commission; Staff is instead an autonomous participant making its presentations to the

145. *In re New England Tel. & Tel. Co.*, 382 A.2d 826, 836 (Vt. 1977).

146. *Id.* at 835-36. Although this case did concern a nonunanimous settlement, its holding would be applicable to unanimous settlements as well.

147. *Id.* at 835-36.

148. *Attorney Gen. v. New Mexico Pub. Serv. Comm'n*, 808 P.2d 606, 609 (N.M. 1991).

Commission and eliciting rulings from it."¹⁴⁹ By their very nature, administrative agencies serve investigative, prosecutorial, and judicial functions.¹⁵⁰ If the staff, as the prosecutorial arm of the commission, decides to take a position in a rate case, it should not matter whether the staff presents this position through litigation or a proposed settlement. No provision of the traditional statutory schemes precludes such activity by staff.¹⁵¹

Some government intervenors make the converse argument that the relevant statutes preclude settlements without their participation. The standard enabling act for a legislatively created consumer representative¹⁵² provides that it will represent the interests of residential and small business ratepayers in public utility proceedings.¹⁵³ Some of these representatives argue that this authority bars commissions from approving settlements which the representatives oppose.¹⁵⁴ This argument, however, ignores the function of these consumer offices. These representatives' legislative grant of power to advocate on behalf of a particular group of consumers is not equivalent to the authority to veto an agreement considered contrary to the public interest.¹⁵⁵

B. *Statutory Authorization for Settlement of Administrative Cases*

When a utility proposes new rates, the commission has the statutory authority to suspend rates and to hold hearings on their justness and reasonableness.¹⁵⁶ While most commission enabling statutes do not explicitly allow for the settlement of cases, many state administrative

149. *Id.* at 609-610 (noting problem that settlement would be impossible in case in which staff is only party besides the utility).

150. *See generally* 1 KENNETH C. DAVIS & RICHARD J. PIERCE, JR., ADMINISTRATIVE LAW TREATISE § 2.3 (3d ed. 1994).

151. Staff's participation in settlement discussions, however, may raise problems in regard to the balance of power in the negotiation process. *See infra* notes 236-239 and accompanying text.

152. *See supra* note 103 and accompanying text.

153. *See, e.g.*, FLA. STAT. ANN. § 350.061 (West 1980); MD. CODE ANN. art. 78, §§ 14, 15 (1991); TEX. CIV. STAT. ANN. art. 1446c, § 15A (West 1980 & Supp. 1994).

154. *Bryant v. Arkansas Pub. Serv. Comm'n*, 877 S.W.2d 594, 597 (Ark. Ct. App. 1994); *City of El Paso v. Public Util. Comm'n*, 839 S.W.2d 895, 904-05 (Tex. Ct. App. 1992), *aff'd in part*, 883 S.W.2d 179 (Tex. 1994).

155. *Arkansas Pub. Serv. Comm'n*, 877 S.W.2d at 597; *City of El Paso*, 839 S.W.2d at 904-905.

156. *See supra* notes 68-71 and accompanying text.

procedure acts, which are applicable to public utility commissions, have specific provisions that provide for settlements.¹⁵⁷ The Model Administrative Procedure Act (Model APA), for example, states: "Unless precluded by law, informal disposition may be made of any contested case by stipulation, agreed settlement, consent order, or default."¹⁵⁸

Courts are divided in their interpretation of such language. Two courts have held that such a provision allows only unanimous agreements.¹⁵⁹ Reading the term "settlement" literally, they require consent of all parties. In construing language identical to the Model APA, for example, the Illinois Supreme Court observed: "In order for the commission to dispose of a case by settlement . . . all of the parties and intervenors must agree to the settlement."¹⁶⁰

A number of other jurisdictions, however, read their enabling acts and administrative procedure acts to allow nonunanimous settlements without full adjudicatory hearings.¹⁶¹ They contend that settlement in the regulatory context has a different meaning from settlement in traditional civil litigation. These jurisdictions base their interpretation not on the statutory language of the commission enabling acts or the administrative procedure acts but on a case that interpreted the federal Administrative Procedure Act (APA). In that case, *Pennsylvania Gas & Water Co. v. Federal Power Commission*,¹⁶² the court rejected a customer's challenge to a nonunanimous settlement approved by the Federal Power Commission:

157. See, e.g., MODEL STATE ADMINISTRATIVE PROCEDURE ACT [hereinafter MODEL APA] § 9(d), 15 U.L.A. 207 (1981); see also 15 U.L.A. 137 (1981) (table of jurisdictions in which Model Act has been adopted).

158. MODEL APA § 9(d), 15 U.L.A. 207 (1981).

159. *Business & Professional People for Pub. Interest v. Illinois Commerce Comm'n*, 555 N.E.2d 693, 700 (Ill. 1989); *Kentucky Am. Water Co. v. Kentucky ex rel. Cowan*, 847 S.W.2d 737, 740-41 (Ky. 1993).

160. 555 N.E.2d at 700.

161. See, e.g., *In re Public Serv. Co.*, 72 Pub. Util. Rep. 4th (PUR) 660 (Ind. Pub. Serv. Comm'n 1986); *In re Iowa Elec. Light & Power Co.*, 46 Pub. Util. Rep. 4th (PUR) 130 (Iowa Commerce Comm'n 1982); *Attorney Gen. v. New Mexico Pub. Serv. Comm'n*, 808 P.2d 606 (N.M. 1991); *City of El Paso v. Public Util. Comm'n*, 883 S.W.2d 179 (Tex. 1994); *Bryant v. Arkansas Pub. Serv. Comm'n*, 877 S.W.2d 594 (Ark. Ct. App. 1994); *City of Abilene v. Public Util. Comm'n*, 854 S.W.2d 932 (Tex. Ct. App. 1993).

162. *Pennsylvania Gas & Water Co. v. Federal Power Comm'n*, 463 F.2d 1242 (D.C. Cir. 1972).

"[S]ettlement" carries a different connotation in administrative law and practice from the meaning usually ascribed to settlement of civil actions in a court. . . . [I]n agency proceedings settlements are frequently suggested by some, but not necessarily all, of the parties; if on examination they are found equitable by the regulatory agency, then the terms of the settlement form the substance of an order binding on all the parties, even though not all are in accord as to the result. This is in effect a "summary judgment" granted on "motion" by the litigants where there is no issue of fact.

. . . Only by exercising such "summary judgment" or "administrative settlement" procedures when called for can the usual interminable length of regulatory agency proceedings be brought within the bounds of reason and the agencies' competence to deal with them.¹⁶³

Citing this language and relying on the public policy favoring settlement of disputes, a number of jurisdictions interpret their statutory schemes to permit nonunanimous settlements of cases.¹⁶⁴

The basis for this interpretation is quite weak. The enabling acts require hearings on the record, and the administrative procedure acts allow for settlements. No court or commission that permits contested settlements without full evidentiary hearings cites any statutory language or legislative history to support this practice. Nor do they identify any textual basis in the relevant statutes that suggests that settlement in the regulatory context connotes something different than settlement of civil litigation.¹⁶⁵ Indeed, even the court in *Pennsylvania Gas & Water* acknowledged that, while the federal APA allows for the settlement of cases, it does not, by its terms, allow for nonunanimous settlements.¹⁶⁶ Instead of examining the language of the applicable enabling or administrative procedure acts, the courts permitting nonunanimous settlements merely rely on conclusory assertions about public policy

163. *Id.* at 1246.

164. See, e.g., *In re Public Serv. Co.*, 72 Pub. Util. Rep. 4th (PUR) 660, 683-84 (Ind. Pub. Serv. Comm'n 1986); see also *Attorney Gen. v. New Mexico Pub. Serv. Comm'n*, 808 P.2d 606, 610 (N.M. 1991); *In re Iowa Elec. Light & Power Co.*, 46 Pub. Util. Rep. 4th (PUR) 130, 146 (Iowa Commerce Comm'n 1982).

165. Nor do they explain the reason the utility must be a party to the settlement if settlement means something different in the regulatory context.

166. *Pennsylvania Gas & Water Co.*, 463 F.2d at 1247.

favoring expeditious resolution of cases.¹⁶⁷ But as one court has observed in rejecting the concept of nonunanimous settlements, public policy concerns, such as the exigencies of a rate case, do not constitute grounds for a commission to exceed its statutory authority.¹⁶⁸

More importantly, most cases allowing nonunanimous settlements do not recognize the limited nature of the *Pennsylvania Gas & Water* holding. The court in that case likened contested settlements to summary judgments. It approved the contested settlement precisely because the Commission had accepted as true all of the factual allegations of the customer challenging the settlement. The court observed: "If the Commission were required in a case such as this one to hold a full and formal evidentiary hearing despite the fact that it accepted all of a participant's factual allegations as true and still found their conclusions to be wanting, the settlement procedure would be rendered meaningless."¹⁶⁹ Most state commissions that have approved contested settlements, however, do not use a summary judgment standard. Instead, they forgo full hearings even when there are contested issues.¹⁷⁰ Even those that purport to apply a summary judgment standard often ignore it when faced with contested facts.¹⁷¹

167. *But see In re Iowa Elec. Light & Power Co.*, 46 Pub. Util. Rep. 4th (PUR) 130, 145-46 (Iowa Commerce Comm'n 1982) (suggesting that intervenor has burden to show that Administrative Procedure Act's use of "settlement" language means unanimous agreement, although acknowledging that statutory scheme does not expressly allow for nonunanimous settlements).

168. *Missouri ex rel. Fischer v. Public Serv. Comm'n*, 645 S.W.2d 39, 43 (Mo. Ct. App. 1982).

169. *Pennsylvania Gas & Water Co.*, 463 F.2d at 1251.

170. *See, e.g., City of El Paso v. Public Util. Comm'n*, 883 S.W.2d 179 (Tex. 1994); *In re Nine Mile Point Two Nuclear Generating Facility*, 78 Pub. Util. Rep. 4th (PUR) 23 (N.Y. Pub. Serv. Comm'n 1986).

171. *See, e.g., In re Public Serv. Co.*, 72 Pub. Util. Rep. 4th (PUR) 660, 687 (Ind. Pub. Serv. Comm'n 1986). Using the summary judgment standard in the rate case context, the test would be whether there is any genuine issue of fact as to the utility's revenue requirement provided by the agreement, assuming all the facts as presented by parties opposing the settlement to be true. *See Pennsylvania Gas & Water Co.*, 463 F.2d at 1252. In *Public Service Co.*, although the Commission professed to use such a standard, it instead applied the test of whether "issues of material fact remained in conflict and whether adoption of the terms of the settlement proposal would be in the public interest." *Public Serv. Co.* at 687. There is a significant difference between these two standards. The first focuses on the elements of a traditional rate case; the second ignores those elements and replaces them with a vague public interest test.

C. *Requirement in Enabling Statutes of Full Evidentiary Hearings*

Three courts have held that, in the absence of unanimity, commission enabling acts require full evidentiary rate base hearings.¹⁷² However, several other courts and commissions have ruled that the enabling statutes do not require full evidentiary hearings before approval of nonunanimous agreements.¹⁷³ Courts that permit nonunanimous settlements without full hearings disregard the enabling acts' traditional requirement of findings in regard to the justness and reasonableness of approved rates. In the absence of unanimous consent, the statutes require full evidentiary hearings in every case.

A number of the courts which allow nonunanimous settlements cite the Supreme Court decision in *Mobil Oil Corp. v. Federal Power Commission*,¹⁷⁴ another Federal Power Commission (FPC) rate case, in support of the proposition that the enabling acts allow such settlements.¹⁷⁵ In *Mobil*, after an extensive record had been made in hearings, a settlement proposal agreed to by a large majority of all interests was approved by the Commission.¹⁷⁶ The State of New York challenged this settlement because it lacked unanimous support.¹⁷⁷ The Court rejected this challenge. It held first that the Commission clearly had the power to admit the agreement into the record.¹⁷⁸ The Court then adopted the holding of the court of appeals affirming the Commission decision:

No one seriously doubts the power—indeed, the duty—of FPC to consider the terms of a proposed settlement which fails to receive unanimous support as a decision on the merits. . . . We

172. *Business & Professional People for Pub. Interest v. Illinois Commerce Comm'n*, 555 N.E.2d 693, 704 (Ill. 1989); *Kentucky Am. Water Co. v. Kentucky ex rel. Cowan*, 847 S.W.2d 737, 740-41 (Ky. 1993); *State ex rel. Monsanto Co. v. Public Serv. Comm'n*, 716 S.W.2d 791 (Mo. 1986); *State ex rel. Fischer v. Public Serv. Comm'n*, 645 S.W.2d 39 (Mo. Ct. App. 1982).

173. *Bryant v. Arkansas Pub. Serv. Comm'n*, 877 S.W.2d 594, 599-600 (Ark. Ct. App. 1994); *Attorney Gen. v. New Mexico Pub. Serv. Comm'n*, 808 P.2d 606, 610-11 (N.M. 1991).

174. *Mobil Oil Corp. v. Federal Power Comm'n*, 417 U.S. 283 (1974).

175. *Bryant*, 877 S.W.2d at 599-600; *New Mexico Pub. Serv. Comm'n*, 808 P.2d at 610-11.

176. 417 U.S. at 296-98.

177. *Id.* at 312.

178. *Id.* at 312.

agree with the D.C. Circuit that even “assuming that under the Commission’s rules [a party’s] rejection of the settlement rendered the proposal ineffective *as a settlement*, it could not, and we believe should not, have precluded the Commission from considering the proposal *on its merits*.”¹⁷⁹

If a proposal enjoys unanimous support from all of the immediate parties, it could certainly be adopted as a settlement agreement if approved in the general interest of the public. But even if there is a lack of unanimity, it may be adopted as a resolution *on the merits*, if FPC makes an independent finding supported by “substantial evidence on the record as a whole” that the proposal will establish “just and reasonable” rates for the area.¹⁸⁰

Relying upon the “independent finding” language of *Mobil*, a number of commissions and courts read the decision as allowing commissions to forgo full hearings in rate cases and to approve nonunanimous settlements if they make independent findings that the agreements are in the public interest.¹⁸¹ While these courts acknowledge that in *Mobil* the FPC held traditional rate hearings and made its decision on an extensive evidentiary record, they contend that the case does not require full-blown rate hearings, but allows flexible procedures for considering nonunanimous settlements.¹⁸² They assert that as long as the record contains sufficient evidence to support the settlement, the agreement strikes a fair balance between the ratepayers and the utility, and the contesting parties have had

179. *Id.* at 313-14 (quoting *Michigan Consolidated Gas Co. v. Federal Power Comm’n*, 283 F.2d 204, 224 (D.C. Cir. 1960)).

180. *Id.* at 314, (quoting *Placid Oil Co. v. Federal Power Comm’n*, 483 F.2d 880, 883 (5th Cir. 1973) (emphasis in original)).

181. *See, e.g.*, *Bryant v. Arkansas Pub. Serv. Comm’n*, 877 S.W.2d 594, 599-600 (Ark. Ct. App. 1994); *In re Public Serv. Co.*, 72 Pub. Util. Rep. 4th (PUR) 660, 685 (Ind. Pub. Serv. Comm’n 1986); *In re Iowa Elec. Light & Power Co.*, 46 Pub. Util. Rep. 4th (PUR) 130, 146 (Iowa Commerce Comm’n 1982).

182. *See, e.g.*, *United States v. Public Serv. Comm’n*, 465 A.2d 829, 833 n.3 (D.C. 1983) (rejecting argument that *Mobil* is inapplicable unless a full administrative record has been established); *In re Public Serv. Co.*, 72 Pub. Util. Rep. 4th (PUR) 660, 685 (Ind. Pub. Serv. Comm’n 1986) (“Although an administrative settlement must be approved on the basis of an adequate record, the procedures from which this record is derived are quite flexible.”).

an opportunity to present their positions, the requirements of *Mobil* have been met.¹⁸³

This reading of *Mobil* is incorrect. The *Mobil* Court in no way rejected the requirement of traditional rate hearings in nonunanimous settlement cases. By observing that unanimous agreements should be approved if they are "in the general interest of the public,"¹⁸⁴ the Court indicated that such hearings were not required when all parties are in agreement. But, in regard to nonunanimous settlements, the Court noted that they "may be adopted as a resolution *on the merits*, if FPC makes an independent finding supported by 'substantial evidence on the record as a whole' that the proposal will establish 'just and reasonable' rates for the area."¹⁸⁵ By using the language "on the merits," the Court did not merely envision approval of the settlement agreement under some nebulous public interest standard, but endorsement reflecting an independent determination "on the merits" that the settlement established "just and reasonable" rates.¹⁸⁶ Such approval necessarily requires the development of a full case record.

183. See, e.g., *City of Akron v. Public Util. Comm'n*, 378 N.E.2d 480, 483 (Ohio 1978) (although no testimony presented on rate of return, court affirmed order approving nonunanimous settlement, noting that "the commission afforded appellants full opportunity to present evidence with respect to all contested issues"); *City of Abilene v. Public Util. Comm'n*, 854 S.W.2d 932, 939 (Tex. Ct. App. 1993) ("[t]he procedure used in this case offered adequate opportunity for all parties to present their positions for the Commission's consideration"). See generally *In re Procedures for Settlement & Stipulation Agreements*, Nos. 90-M-0255, 92-M-0138, 1992 WL 487888, at *12 (N.Y. Pub. Serv. Comm'n Mar. 24, 1992).

184. *Mobil Oil Corp. v. Federal Power Comm'n*, 417 U.S. 283, 314 (1974).

185. *Id.* at 314.

186. *Business & Professional People for Pub. Interest v. Illinois Commerce Comm'n*, 555 N.E.2d 693, 704 (Ill. 1989). In that case, the court reversed a Commission order approving a nonunanimous settlement because the order was based on the settlement agreement, not on the merits. The court observed that "[a]bsent statutory law to the contrary, we have no quarrel with the Commission's ability to *consider* a settlement proposal not agreed to by all of the parties and the intervenors as a decision on the merits, as long as the provisions of such a proposal are within the Commission's power to impose, the provisions do not violate the [Public Utilities] Act, and the provisions are independently supported by substantial evidence in the whole record." *Id.* See also *City of Somerville v. Public Util. Comm'n*, 865 S.W.2d 557, 562 (Tex. Ct. App. 1993); *In re Idaho Power Co.*, 102 Pub. Util. Rep. 4th (PUR) 139, 148 (Idaho Pub. Util. Comm'n 1989) (Miller, Comm'r, separate opinion).

The phrase “just and reasonable,” which is contained in public utility commission enabling acts, is a term of art.¹⁸⁷ It was incorporated into public utility statutes in response to *Smyth v. Ames*. Although the constitutional fair value standard established by *Smyth* has been abandoned, its requirement of a full examination of the utility’s rate base, operating expenses, and reasonable rate of return as a basis for setting rates has become an essential component of ratemaking statutes.¹⁸⁸ Traditional rate base ratemaking requires an evidentiary record as well as findings of fact based on this record.¹⁸⁹ In other words, under these statutes, when confronted with a nonunanimous settlement, the issue for a commission is not whether the settlement proposal reasonably balances the interests of ratepayers or whether substantial evidence supports that particular agreement.¹⁹⁰ Instead, as in any rate case, a commission must make findings on the merits regarding rate base, operating expenses, rate of return, and rate design.

For these reasons, the flexible hearings approach adopted by most commissions in reviewing nonunanimous settlements is prohibited by traditional statutes. While such hearings might expedite the process and allow for more efficient processing of cases, commissions do not have statutory authority to use such a process in the absence of unanimous consent.¹⁹¹ In their attempts to handle the complexity and demands of these cases, the commissions, with the blessing of a number of courts, have ignored the previously recognized requirements of traditional rate base hearings.

IV. Nonunanimous Settlement of Rate Cases as a Dispute Resolution Mechanism

Even if the enabling statutes permit commissions to approve nonunanimous settlements without traditional rate hearings, it is unclear whether such a process is a valid dispute resolution mechanism. While commentators and commissioners have preached the value of

187. See *supra* notes 55-64 and accompanying text. See generally PIERCE & GELLHORN, *supra* note 79, at 100-101.

188. See *supra* notes 65-85 and accompanying text. See generally PIERCE & GELLHORN *supra* note 79, at 101.

189. *Business & Professional People*, 555 N.E.2d at 700.

190. *Id.* at 702; *State ex rel Fischer v. Public Serv. Comm’n*, 645 S.W.2d 39, 43 (Mo. Ct. App. 1982).

191. 645 S.W.2d at 43.

nonunanimous settlement as a means of expediting the processing of cases,¹⁹² they have failed to examine in-depth all the issues raised by this departure from traditional ratemaking methods.¹⁹³

In recent years, a significant amount of literature has developed concerning the functioning of different dispute resolution systems and the selecting of a process for dispute resolution.¹⁹⁴ Although few of these commentators have addressed the area of public utility regulation,¹⁹⁵ their insights can be very helpful in identifying general principles for evaluating the benefits and weaknesses of the nonunanimous settlement process. While rate cases differ in some respects from environmental, civil rights, domestic relations, and other civil controversies, these disputes all raise some common issues. These issues include the equity of the process, the legitimacy of the system, and the administration of justice. Rate cases are not entirely *sui generis*. Therefore, it is useful to expand any examination of the propriety of nonunanimous settlements beyond the narrow issues of the arcane world of rate regulation.

The literature on dispute resolution has identified a number of factors for evaluating the quality of dispute resolution mechanisms.¹⁹⁶ Five of

192. See, e.g., *In re* Commission's Rules of Practice & Procedure, No. 87-11-053 at *4 (Cal. Pub. Util. Comm'n Nov. 25, 1987) (Westlaw, PUR Database); *In re* Procedures for Settlement & Stipulation Agreements, Nos. 90-M-0255, 92-M-0138, 1992 WL 487888, at *2 (N.Y. Pub. Serv. Comm'n Mar. 24, 1992); Morgan, *supra* note 16, at 76-78; Marilyn O'Leary, *Negotiated Settlements in Utility Regulation*, PUB. UTIL. FORT., Aug. 21, 1986, at 11.

193. But see Katko, *supra* note 126 (addressing problems of nonunanimous settlement in a particular case before the New York Public Service Commission).

194. See, e.g., POLITICS OF INFORMAL JUSTICE, *supra* note 2; DOUGLAS J. AMY, THE POLITICS OF ENVIRONMENTAL MEDIATION (1987); JEROLD AUERBACH, JUSTICE WITHOUT LAW: RESOLVING DISPUTES WITHOUT LAWYERS (1983); Richard Delgado, *ADR and the Dispossessed: Recent Books About the Deformalization Movement*, 14 L. & SOC. INQUIRY 145 (1988); Richard Delgado et al., *Fairness and Formality: Minimizing the Risk of Prejudice in Alternative Dispute Resolution*, 1985 WIS. L. REV. 1359; Harry T. Edwards, *Alternative Dispute Resolution: Panacea or Anathema?*, 99 HARV. L. REV. 668 (1986); Owen M. Fiss, Comment, *Against Settlement*, 93 YALE L.J. 1073 (1984); Philip J. Harter, *Dispute Resolution and Administrative Law: The History, Needs, and Future of a Complex Relationship*, 29 VILL. L. REV. 1393 (1983-1984); David Luban, *The Quality of Justice*, 66 DENV. U. L. REV. 381 (1989); Lawrence Susskind & Gerard McMahon, *The Theory and Practice of Negotiated Rulemaking*, 3 YALE J. ON REG. 133 (1985); Sally E. Merry, *Disputing Without Culture*, 100 HARV. L. REV. 2057 (1987) (reviewing STEPHEN B. GOLDBERG ET AL., DISPUTE RESOLUTION (1985)).

195. See Morgan, *supra* note 16; van Hook, *supra* note 36; Raab, *supra* note 107.

196. See, e.g., Robert A. Baruch Bush, *Dispute Resolution Alternatives and the Goals of Civil Justice: Jurisdictional Principles for Process Choice*, 1984 WIS. L. REV. 893;

the most significant factors are: (1) the efficiency of the process; (2) the balance of power among the parties in the process; (3) the legitimacy of the process; (4) the effect of the process on human relationships; and (5) the role of the process in clarifying fundamental policy issues.¹⁹⁷ In this part, the Article will describe each of these factors, reviewing the dispute resolution literature on each of them. The Article will then examine the nonunanimous settlement process in light of each factor, comparing this process with traditional rate base regulation and the unanimous settlement process. Throughout this discussion, the Article will focus on the problems that representatives of captive ratepayers face as intervenors in rate proceedings.

A. *The Efficiency of the Process*

The first factor which needs to be evaluated in judging a dispute resolution mechanism is the efficiency of the process. As one commentator has observed:

Minimizing the cost of administration of social enterprises, although rather pedestrian by comparison to the other goals . . . , is a well established and independent societal goal. Even where action must be undertaken in the public interest to achieve desired goals the action should itself be conducted so as to consume as few resources as possible in administrative costs.¹⁹⁸

In the rate regulation context, because of the time and resources devoted to rate cases by commission staff, utility managers, intervening parties, and the commissioners themselves, administrative costs can be quite significant. Accordingly, it is often argued that the settlement process, especially with respect to nonunanimous settlements, contributes to process-related savings.

Commissions assert that settlement of rate cases conserves public and private resources. Noting the increasingly complex nature of some rate

Luban, *supra* note 194; Frank E.A. Sander, *Alternative Methods of Dispute Resolution: An Overview*, 37 U. FLA. L. REV. 1 (1985).

197. Bush, *supra* note 196, at 908-21; Luban, *supra* note 194, at 401-17; Sander, *supra* note 196, at 13-15.

198. Bush, *supra* note 196, at 920.

cases, commissions urge settlement as a means to remove the burden of the procedural formalities of adjudicatory hearings from their staffs.¹⁹⁹ They also contend that settlement avoids the risks to the commissions of appellate litigation.²⁰⁰ Further, commissions point to the savings of time and money for utility management and staff which would otherwise be involved in the full litigation of a case.²⁰¹ Moreover, they assert that settlement expedites the process of information-gathering for both the parties and the commission.²⁰² Commissions contend that formal litigation fosters extreme posturing by the different parties and the coloring of information presented as evidence, both of which obstruct an expeditious exchange of ideas and data.²⁰³

Some commissions have suggested that a nonunanimous settlement rule is required to achieve these benefits. Without such a rule, it is feared, an inactive party or obstructionist consumer intervenor may boycott any negotiations, arbitrarily blackball a reasonable settlement, and force full-scale hearings.²⁰⁴ As a result, any savings of time and resources derived from the settlement process would be wasted.

199. See, e.g., *In re* Commission's Rules of Practice & Procedure, No. 87-11-053 at *4 (Cal. Pub. Util. Comm'n Nov. 25, 1987) (Westlaw, PUR Database); *In re* Chesapeake & Potomac Tel. Co., 84 Pub. Util. Rep. 4th (PUR) 364, 369 (D.C. Pub. Serv. Comm'n 1987); *In re* Louisville Gas & Elec. Co., 107 Pub. Util. Rep. 4th (PUR) 348, 364-65 (Ky. Pub. Serv. Comm'n 1989); *In re* Procedures for Settlement & Stipulation Agreements, Nos. 90-M-0255, 92-M-0138, 1992 WL 487888, at *2 (N.Y. Pub. Serv. Comm'n Mar. 24, 1992); *In re* Cincinnati Gas & Elec. Co., 52 Pub. Util. Rep. 4th (PUR) 304, 306-307 (Ohio Pub. Util. Comm'n 1983); *In re* El Paso Elec. Co., 101 Pub. Util. Rep. 4th (PUR) 405, 409 (Tex. Pub. Util. Comm'n 1988). See generally Brock, *supra* note 105, at 2, 20; Morgan, *supra* note 16, at 24-42; Raab, *supra* note 107, at 66, 88-92.

200. *In re* Nine Mile Point Two Nuclear Generating Facility, 78 Pub. Util. Rep. 4th (PUR) 23, 29 (N.Y. Pub. Serv. Comm'n 1986).

201. See, e.g., *id.* at 30; *In re* Chesapeake & Potomac Tel. Co., 84 Pub. Util. Rep. 4th (PUR) 364, 369 (D.C. Pub. Serv. Comm'n 1987); *In re* El Paso Elec. Co., 101 Pub. Util. Rep. 4th (PUR) 405, 409 (Tex. Pub. Util. Comm'n 1988).

202. See *Question 2: Dispute Resolution*, *supra* note 115, at 35.

203. See *id.* at 34 (quoting Pennsylvania Commissioner William Smith stating "[f]ormal litigation is expensive, time consuming, and tends to foster extreme positions on the part of the litigants").

204. See *supra* notes 121-124 and accompanying text.

The limited empirical research on the settlement of rate cases does not wholly support the claims of its proponents in regard to process-related savings. While no study of the time savings of the nonunanimous settlement process has been made, the few studies addressing unanimous settlements show that the process of negotiating these settlements takes substantial time. For example, Jonathan Raab's study of the unanimous settlement of the Pilgrim Nuclear Plant case found that the settlement process required considerable expenditures of time and money.²⁰⁵ Settlement discussions in that case began only after the evidentiary hearings were completed. All the parties interviewed were skeptical about the usefulness of negotiations any earlier in the process.²⁰⁶ As one participant stated:

A settlement would not have made sense either prior to or early in the hearings. We needed to get all the information out on the table. Otherwise, the settlement would have become a back room deal, and not a creative solution based on the evidence and the parties' different expectations of the future. Until we had developed the case on paper, we would not have known how to set all the parameters in the settlement, and it would have been rather arbitrary.²⁰⁷

Although, as Raab notes, it is possible that this exchange of information could have been more expeditiously accomplished without formal evidentiary hearings,²⁰⁸ even informal, technical information meetings would have required considerable commitments of time.

While it can be argued that studies such as Raab's support a nonunanimous settlement rule, there is no indication in any of these cases that the cause of delay was an obstructionist intervenor. In the cases analyzed, there were only limited process-related savings, which were due

205. Raab, *supra* note 107, at 133, 143 (concluding that settlement of the Pilgrim generating plant case in Massachusetts, after conclusion of hearings, could not be credited with significant resource savings).

206. *Id.* at 143.

207. *Id.* at 143. In Jonathan Brock's study of an independent telephone utility's unanimous settlement of a rate case, he found that the negotiation process shaved time off the proceedings, even though he also determined that a serious exchange of information required substantial expenditures of time and resources by the parties and commission staff. Brock, *supra* note 105, at 8-10.

208. Raab, *supra* note 107, at 143.

to the complex and technical nature of rate disputes, rather than to an arbitrary blackballer. Undoubtedly, a requirement of unanimous consent lengthens the negotiation process to some extent. Studies of negotiating groups have found that a unanimous decision-making rule usually lengthens the negotiation process and creates a greater probability of group impasses.²⁰⁹ However, serious negotiations of rate cases require substantial outlays of time and money regardless of the decision-making rule used. While nonunanimous settlements of rate cases unquestionably save some time and money, the extent of these savings is unclear and may be overestimated by proponents of such settlements.

B. *The Balance of Power Among the Parties in the Process*

A second factor to be considered in evaluating the propriety of the nonunanimous settlement process is the balance of power among the parties in the process. Many commentators assert that one of our societal goals is distributional justice—"the attainment of equity in the distribution of society's resources, including all forms of wealth and power."²¹⁰ For the dispute resolution system, this goal translates into procedures that protect the have-nots and counterbalance the power and wealth of the haves.²¹¹ In other words, distributional justice is achieved when a dispute resolution mechanism gives all parties equally valued input into the decision-making process.²¹²

1. *The Importance of a Balance of Power in Negotiation*

Settlement mechanisms do not exist in a vacuum. As Sally Engle Merry has observed:

No [dispute resolution] process exists separately from its place in the unfolding sequence of stages, which gives it meaning and force. If parties are aware that a more coercive process will ensue if mediation fails, the dynamics of the mediation will differ sharply from "pure mediation," because the expectation

209. Leigh L. Thompson et al., *Group Negotiation: Effects of Decision Rule, Agenda, and Aspiration*, 54 J. PERSONALITY & SOC. PSYCHOL. 86, 92 (1988).

210. Bush, *supra* note 196, at 911.

211. *Id.* at 911-12; Luban, *supra* note 194, at 407-13.

212. See Luban, *supra* note 194, at 411.

of an imposed settlement will inevitably alter the meaning of the event for all the actors.²¹³

Therefore, the ability of each participant in any ADR process to wield its power, through litigation, political clout, physical strength, or psychological pressure, is an essential factor which must be considered in determining the appropriateness of the use of that process to resolve a particular problem.

Most commentators conclude that a relative balance of power among the parties is a necessary component in socially just negotiations.²¹⁴ Without such a balance, there will be little incentive for good faith negotiations by all parties.²¹⁵ The party with the superior power will not be motivated to engage in serious dialogue if it knows that it can achieve its goals outside of the negotiation process. In addition, even if discussions take place, it is unlikely that they will lead to optimal solutions if there is no balance of power. When a balance of power is established, the parties are less able to use coercion and manipulation to achieve their ends, and it is more likely that they will share information and reason together in designing a settlement that addresses each party's interests.²¹⁶

Finally, without a balance of power, it is unlikely that the result will be equitable. As Jerold Auerbach has observed: "Compromise only is an equitable solution among equals; between unequals, it inevitably reproduces inequality."²¹⁷ For example, a party with greater financial resources and technical expertise will often attempt to intimidate weaker

213. Merry, *supra* note 194, at 2066.

214. See AMY, *supra* note 194, at 80 (in the context of environmental mediation, author contends that mediation tends to be viewed as appropriate only when there is a relative balance of power between the disputants); Amy, *supra* note 13, at 8; Brock, *supra* note 105, at 15; Susskind, *supra* note 13, at 14 (In regard to environmental mediation, the author asserts that "a mediator should probably refuse to enter a dispute in which the power relationships among the parties are so unequal that a mutually acceptable agreement is unlikely to emerge."). *But see* Susskind & McMahon, *supra* note 194, at 154. Susskind and McMahon found that EPA demonstrations of negotiated rulemaking disprove the hypothesis that such rulemaking will fail if one party has inordinate power goals without having to deal with others. They found that environmental groups with less power were effective because they were able to form coalitions with more powerful allies. In the nonunanimous settlement context, however, such coalition formation is difficult for less powerful groups. See *infra* notes 233-238 and accompanying text.

215. See, e.g., Brock, *supra* note 105, at 17.

216. See generally AMY, *supra* note 194, at 92-93; Bob Rosin, *EPA Settlements of Administrative Litigation*, 12 *ECOLOGY L.Q.* 363, 370 (1985).

217. AUERBACH, *supra* note 194, at 136.

parties into settlement.²¹⁸ Faced with this pressure, parties with fewer resources are likely to feel constrained to accept less than fair outcomes.²¹⁹ Such an outcome is especially likely when the negotiation process is forced on the parties, as in situations of compulsory mediation.²²⁰

2. *Formalism as a Tool of Power in Dispute Resolution*

Formal adjudication is one instrument that can be used by less powerful parties to protect their interests against more powerful opponents.²²¹ The procedural safeguards afforded by adjudication serve several functions. First, they create certain internal constraints on the decision-maker. They require her to apply existing rules and standards to the particular case. In addition, because of the repetitive nature of most caseloads, they encourage her to consider a case in terms of the relevant legal and factual issues, not the parties involved.²²²

Second, these safeguards provide external constraints on the decision-maker. For example, disqualification, ex parte communication, and recusal rules all help in controlling bias.²²³ While some of these procedures are infrequently used, their mere existence creates an institutional check on improper influence in the decision-making process.

Finally, these safeguards establish controls on the parties "by defining the scope of the action, formalizing the presentation of evidence, and reducing strategic options."²²⁴ Rules of procedure, for example,

218. See AMY, *supra* note 194, at 143-45; see also Amy, *supra* note 13, at 9 ("instead of avoiding mediation or seeking to exclude other groups from the process, powerful interests may actively embrace mediation as a way of co-opting their weaker opponents"); Susskind, *supra* note 13, at 15 (commenting on the effects of leverage in mediation).

219. See generally Fiss, *supra* note 194, at 1076 ("the poorer party may be less able to amass and analyze the information needed to predict the outcome of the litigation and thus be disadvantaged in the bargaining process"); Susskind, *supra* note 13, at 15. Additionally, informal processes open the door for decision-maker prejudices to influence the decision-making. See generally Delgado et al., *supra* note 194, at 1374, 1402.

220. AMY, *supra* note 194, at 146 ("A lack of voluntariness may undermine much of the integrity and legitimacy of the mediation.").

221. *Id.* at 106; Richard L. Abel, *Introduction* to POLITICS OF INFORMAL JUSTICE, *supra* note 2, at 1, 11 (arguing that formalism protects powerless such as defendants in criminal cases and tenants in eviction actions). See generally Delgado et al., *supra* note 194.

222. Delgado et al., *supra* note 194, at 1368.

223. *Id.* at 1368-69.

224. *Id.* at 1374.

require notice at each stage of a case, provide a formal schedule for the litigation process, allow for an open exchange of information among the parties, and mandate explicit findings of fact by the decision-maker.²²⁵ Similarly, rules of evidence limit the power of the parties in the presentation of their cases, establish exclusions for irrelevant and prejudicial evidence, provide an agenda for production of proof, require foundations to establish the competency of witnesses and the reliability of testimony, and limit the admissibility of prejudicial evidence.²²⁶

The limitations that formal rules impose upon the decision-maker and the parties help to provide a level playing field for all of the parties. As Owen Fiss has observed, “[j]udgment aspires to an autonomy from distributional inequalities.”²²⁷ Although imbalances of power can distort the adjudication process, the procedural safeguards of that process can restrict the undue influence of parties with superior power.²²⁸

The significance of formal procedures as tools for balancing power in dispute resolution is well illustrated by the historical development of the rules of traditional rate base regulation. As described earlier, in the early nineteenth century consumers sought protection from legislatures to counteract the superior economic power of railroads.²²⁹ As a result of these efforts, legislatures established strong commissions that possessed considerable power over railroads.²³⁰ Fearing unlimited control by legislatures and commissions, railroads themselves sought relief in the courts, and the Supreme Court created formal procedural protections to counterbalance what it saw as the superior power of consumers.²³¹ With the formal requirements of notice, hearings, findings of fact, and substantive standards, the Court attempted to strike a balance between the power of railroads and their consumers.

225. *Id.* at 1371-73.

226. *Id.* at 1373-74.

227. Fiss, *supra* note 194, at 1078.

228. *Id.* at 1077-78.

229. *See supra* notes 40-41 and accompanying text.

230. *See supra* notes 42-43 and accompanying text.

231. *See supra* part I.B.

3. *The Balance of Power and Nonunanimous Settlements*

The balance of power in negotiations is certainly a key concern in public utility disputes. Many conflicts among utilities, consumer groups, and government intervenors are not merely the result of failures in communication that can be resolved through improved dialogue.²³² In many rate cases, a battle over strong political interests lies underneath the technical data and expert opinions. Issues such as the allocation of the costs of new generating facilities, the rate treatment of cancelled nuclear plants, the determination of rate design, and the proper rate of return require the balancing of different political, social, and economic interests.²³³ Given the importance of the balance of power among the parties in the negotiation process, any assessment of the impact of negotiated settlements on distributional justice must not ignore the relative power of each party.

The nonunanimous settlement mechanism tends to give utilities superior bargaining power in the negotiation process, especially in relation to weaker intervenors. The utility has a power to which no other party is entitled: the power to veto a settlement. In any negotiation, the utility knows that the discussions end as soon as it walks away from the bargaining table. If any other party withdraws, however, the negotiations can continue, and the commission can approve a contested agreement in a flexible hearing. Because representatives of groups such as captive ratepayers fear that they may be left out of a settlement agreement, they may be coerced and manipulated into an agreement they would otherwise not accept.

The tendency of nonunanimous decision-making to foster coalition formation aggravates this problem. One general study of coalition formation found that, in three-person negotiation groups that followed majority rule decision-making, two members usually formed a coalition "to prevent the remaining negotiator from achieving his or her most

232. See generally AMY, *supra* note 194, at 228:

The fundamental flaw underlying any attempt to rely on [alternative] dispute resolution to resolve public policy conflicts is that such well-meaning efforts ultimately rest on a false understanding of what politics is all about. Politics is not simply about communication, it is about power struggles. It is not only about common interests, but also about conflicting interests. And it not only involves horse-trading, but competition between conflicting values and different moral visions.

233. Krieger, *supra* note 96, at 648.

important interests and to ensure that the two colluding members achieved their most important interests.”²³⁴ The study also found that colluding members tended to stick together for the duration of the negotiations because they feared that a new coalition might be formed against them.²³⁵

Coalition formation in rate cases may lead to a detrimental manipulation of the negotiation process. Rate cases usually involve multiple issues, and each party has varying degrees of interest in regard to each of these issues. For example, an industrial intervenor might be very interested in certain rate design issues and less concerned about the amount of the rate hike. Because the utility must be a signatory to the agreement, the nonunanimous settlement process may give intervenors the incentive to ally themselves with the utility and to agree to provisions demanded by the utility in which they have only moderate interest. In return, the utility might accept their conditions. In this hypothetical, the industrial intervenor might agree to the amount of a utility rate hike in order to persuade the utility to agree to the intervenor’s rate design proposal. While that intervenor might have an interest in addressing the rate hike issue, it will likely forgo that interest rather than endanger its alliance with the utility. Although all the remaining intervenors may strongly contest the amount of the rate hike, the agreement will be presented to the commission as a settlement of all issues between the utility and the industrial intervenor. Because the utility has a superior capacity to form coalitions, the balance of power in negotiations becomes even more distorted.

Participation of the commission staff in the nonunanimous agreement may accentuate the power imbalance. The staff, as an arm of the commission, wields significant power.²³⁶ Indeed, if the staff allies itself with the utility, a bandwagon effect may be created, swaying other parties

234. Thompson et al., *supra* note 209, at 92. These groups also used an issue agenda for decision-making. *Id.*

235. *Id.*

236. *Cf.* AMY, *supra* note 194, at 150 (observing that in context of environmental mediation the presence of governmental representatives maximizes power imbalances).

to join the agreement, albeit reluctantly.²³⁷ As one court that recognizes the concept of nonunanimous settlements has noted:

[Nonunanimous agreements create] the possibility of an unintentional shift of the burden of proof from the utility to the opponents of the stipulation. There is a danger that when presented with a ready-made solution, the Commission might unconsciously require that the opponents refute the agreement, rather than require the utility to prove affirmatively that the proposed rates are just and reasonable. This danger is increased when the Commission staff is a signatory party and is in a position of advocating the stipulation.²³⁸

The vast majority of nonunanimous settlements include the utility and commission staff but exclude consumer groups.²³⁹ While most commission staff members attempt to represent the public interest in good faith and while some consumer groups adamantly object to all rate increases, this coalition-building phenomenon raises serious distributional justice questions. With the pressures of limited time and resources, the commission staff might in good faith ally itself with the utility in order to expedite negotiations and resolve a case.

The nonunanimous settlement process significantly affects the ability of consumer groups to use the legitimate threat of formal hearings as a weapon in negotiations. In most rate cases, the utility has significantly more power than most intervenors. It has most of the technical information regarding the relevant issues in the case within its control, it usually has a permanent staff of experts, and it has the resources to hire additional expert consultants.²⁴⁰ Usually, however, it does not have unlimited time to litigate cases and, like most litigants, it is concerned

237. *But see In re Commission's Rules of Practice & Procedure*, No. 87-11-053, at *9 (Cal. Pub. Util. Comm'n Nov. 25, 1987) (Westlaw, PUR Database) (rejecting bandwagon effect argument in approving rule allowing for nonunanimous settlements and stating: "We wish to assure parties that it is the Commission and not the stipulating parties which must make the decision in any matter. We are not bound to approve a stipulation or settlement simply because it is offered.").

238. *City of Abilene v. Public Util. Comm'n*, 854 S.W.2d 932, 938-39 (Tex. Ct. App. 1993). The court, however, approved the settlement without addressing whether or not the commission had incorrectly shifted the burden of proof in that case. *Id.*

239. *See supra* note 29 and accompanying text.

240. Utilities also wield significant influence with commissions. *See infra* notes 261-265 and accompanying text.

with the risk of losing the case. Besides obtaining its requested rate relief, the utility is interested primarily in an expeditious hearing of its case. On the other hand, many consumer groups, especially those representing the interests of low-income and other captive customers, rely on the formal procedural protections of the hearing process to offset the power of the utility. By insisting that the utility defend its prima facie case and meet statutory standards for each of the elements of the rate-making formula²⁴¹ and demanding that the commission render detailed findings of fact on each of the elements, these consumer groups attempt to create a more level playing field with their adversaries.

In some cases, the nonunanimous settlement process has the potential to deprive consumer intervenors of the protections of formal procedures. With a requirement of unanimous agreement, all parties would know that they must negotiate within the shadow of the law.²⁴² If these negotiations fail, these parties would have the right to have their case heard at a traditional rate base hearing. If the utility faces lengthy hearings, presentation of numerous witnesses, difficulties with meeting certain statutory standards, or the possibility of extended delays and appeals, consumer intervenors may hold some power over the utility. The effectiveness of these weapons becomes more limited with the use of nonunanimous settlement. If the utility can obtain consent from staff and perhaps one or two other intervenors, such as industrial customers, consumer groups may be left out of the settlement and may have no opportunity for a full-blown hearing.

The importance of formalism for power balancing is not merely hypothetical; it is exemplified by the recent successes of consumer groups in rate cases, and by the attempts of some utilities and commissions to use the settlement process to offset these accomplishments.

A prime example is the Illinois Commerce Commission's handling of Commonwealth Edison rate cases in the 1970s and 1980s. In the early 1970s, Edison embarked upon an ambitious construction program to add six nuclear generating units.²⁴³ Forecasting increased load growths,

241. See *supra* notes 77-85 and accompanying text.

242. This term is used in the dispute resolution area to refer to the notion that negotiations occur against the backdrop of possible full-scale litigation. See generally Robert H. Mnookin & Lewis Kornhauser, *Bargaining in the Shadow of the Law: the Case of Divorce*, 88 YALE L.J. 950 (1979) (introducing and discussing term).

243. See *In re Commonwealth Edison Co.*, 84 Pub. Util. Rep. 4th (PUR) 469 (Ill. Commerce Comm'n 1987).

Edison persuaded the Commission to approve certificates for these plants.²⁴⁴

Throughout the 1970s and the early 1980s, consumer groups and other intervenors aggressively challenged rate increases resulting from the construction program in the Commission and the courts. These earlier challenges, however, were largely unsuccessful.²⁴⁵ Finally, in 1985, various consumer and government intervenors challenged a Commission order granting a \$494.8 million rate increase for costs associated with one of these plants.²⁴⁶ These intervenors appealed the order, arguing that the Commission erred by presuming that the costs of the plant were reasonable, rather than requiring an affirmative showing of reasonableness.²⁴⁷ In April 1986, the trial court held in favor of the intervenors and remanded the case to the Commission.²⁴⁸

After the trial court's decision, Edison proposed negotiations and, shortly thereafter, entered into an agreement with a number of governmental parties to settle rate issues concerning three additional nuclear plants.²⁴⁹ Consumer groups attacked this nonunanimous settlement, and in July 1987 the Commission, by a four to three vote, rejected the settlement.²⁵⁰ Undeterred, Edison filed a new rate case and entered into a new settlement with the Commission's staff and industrial

244. *Id.* at 477. Consumer, environmental, and "public interest" groups, as well as governmental intervenors, objected to the construction of these plants, challenging Edison's optimistic forecasts for increased load. *See In re Commonwealth Edison Co.*, 50 Pub. Util. Rep. 4th (PUR) 221, 222-25 (Ill. Commerce Comm'n 1982). In 1978, the commission initiated its own investigation into the efficacy of this construction program, and, in 1980, it directed Edison to complete its construction program in as timely and economic a manner as possible. *In re Commonwealth Edison Co.*, 84 Pub. Util. Rep. 4th (PUR) 469, 476 (Ill. Commerce Comm'n 1987).

245. *See, e.g.*, *People v. Illinois Commerce Comm'n*, 448 N.E.2d 986 (Ill. App. Ct. 1983); *In re Commonwealth Edison Co.*, 50 Pub. Util. Rep. 4th (PUR) 221, 222-25 (Ill. Commerce Comm'n 1982).

246. *In re Commonwealth Edison Co.*, 71 Pub. Util. Rep. 4th (PUR) 81 (Ill. Commerce Comm'n 1985).

247. *People ex rel. Hartigan v. Illinois Commerce Comm'n*, 510 N.E.2d 865 (Ill. 1987).

248. *People ex rel. Hartigan v. Illinois Commerce Comm'n*, 85 CH 1097, slip. op. (Cir. Ct. of Cook County Apr. 29, 1986).

249. Carol McHugh, *The \$1.34 Billion Utility Bargain: Shedding Light on the Edison Case*, CHI. LAW., Dec. 1993, at 16.

250. *Id.* at 17; *In re Commonwealth Edison Co.*, 84 Pub. Util. Rep. 4th (PUR) 469 (Ill. Commerce Comm'n 1987).

intervenors. After expedited proceedings, the Commission approved the nonunanimous settlement.²⁵¹

The Commonwealth Edison saga illustrates consumer intervenors' use of formal procedures to attempt to balance the power in dispute resolution.²⁵² After the Commission approved Edison's construction program, the Commission continued to grant the utility's requests for rate increases. But after Edison completed the new plants, consumer groups effectively raised a procedural argument, the erroneous presumption of reasonableness by the Commission, to attack a rate increase associated with one of the plants. Just as the formal procedures of rate base ratemaking established in *Chicago*, *Milwaukee* and *Smyth* protected utilities from the power of commissions perceived to be overly-sympathetic to ratepayers, consumer groups now used these same types of procedures to counterbalance the power of the utility.²⁵³

The *Edison* cases also demonstrate the use of the nonunanimous settlement process to thwart the use of formal procedures as a tool of power. In other contexts, several commentators have suggested that one of the reasons for the current upsurge in ADR has been the increased use of the judicial process during the 1960s to expand entitlements for disadvantaged groups who had not previously used those processes: for example, women in domestic violence cases, low-income consumers in credit and collection actions, and poor tenants in eviction proceedings.²⁵⁴ Indeed, commentators argue that these disadvantaged groups have used

251. See *In re Commonwealth Edison Co.*, 117 Pub. Util. Rep. 4th (PUR) 401 (Ill. Comm. Comm'n 1988); McHugh, *supra* note 249, at 17.

252. The Edison case is not an isolated attempt by a utility to use the nonunanimous settlement process after consumer successes. In *In re Louisville Gas & Elec. Co.*, 107 Pub. Util. Rep. 4th (PUR) 348 (Ky. Pub. Serv. Comm'n 1989), the utility entered into such a settlement after the commission had disallowed twenty-five percent of a newly constructed generating plant, and in *In re Nine Mile Point Two Nuclear Generating Facility*, 78 Pub. Util. Rep. 4th (PUR) 23 (N.Y. Pub. Serv. Comm'n 1986), the utility and the commission staff used the nonunanimous settlement process in response to strong consumer challenges to the Shoreham nuclear plant.

253. Unlike utilities, ratepayers may not have a constitutional right to particular rates. Compare *State ex rel. Jackson County v. Public Serv. Comm'n*, 532 S.W.2d 20, 31 (Mo. 1975) (rejecting argument that ratepayers have a vested right in existing rates) with *Nebraska ex rel. Spire v. Northwestern Bell Tel.*, 445 N.W.2d 284, 297-98 (Neb. 1989) (recognizing consumers' right to reasonable rates). The requirements for rate hearings contained in the enabling statutes, however, give both utilities and ratepayers the rights to procedural protections in those hearings.

254. See *POLITICS OF INFORMAL JUSTICE*, *supra* note 2, at 3; Merry, *supra* note 194, at 2072.

the formal mechanisms of adjudication to balance power against their opponents. In response, their opponents have proposed more informal dispute resolution mechanisms to thwart this newly-gained power.²⁵⁵

The history of the *Edison* case supports this hypothesis that recent interest in ADR has been fueled by a desire to upset the balance of power created by formal procedures. For over a decade, intervenors had challenged Edison's nuclear construction programs. Although many of these cases were lengthy proceedings involving complex issues, neither the utility nor the Commission requested the use of the settlement process and the abandonment of traditional rate base ratemaking. Throughout this period, however, Edison was relatively successful in obtaining relief. Edison conjured up the idea of informal, nonunanimous settlements of rate cases only after consumer groups used the formal ratemaking procedures to counterbalance Edison's power with the Commission. Without the constraints of formalism, the utility obtained the Commission staff's assent to a nonunanimous settlement and eventually the Commission's blessing for the agreement. The utility, therefore, used the nonunanimous settlement procedure to deprive intervenors of the power they had gained through formal processes.

Admittedly, the *Edison* cases are unusual: they arose out of the bygone era of nuclear plant construction and involved hundreds of millions of dollars of rate increases. Commentators may argue that the desire of the Commission and staff to approve the nonunanimous settlement resulted from the unique exigencies of those cases and times. Without any evil intent, commissions tried to address a difficult situation not entirely of their making. It is also possible that, in situations less critical than those in the *Edison* case, the settlement process might actually help to level the playing field for less advantaged intervenors. Indeed, given the technical complexity of rate cases and the limited resources of such intervenors, the less formal setting of the bargaining table might give these intervenors more power.²⁵⁶ This type of setting actually might help intervenors become more powerful by organizing their own coalitions with the utility or with other intervenors.

255. POLITICS OF INFORMAL JUSTICE, *supra* note 2, at 3; Merry, *supra* note 194, at 2072.

256. *In re* Procedures for Settlement & Stipulation Agreements, Nos. 90-M-0255, 92-M-0138, 1992 WL 487888, at *2 (N.Y. Pub. Serv. Comm'n Mar. 24, 1992).

On the other hand, there are lessons to be learned from cases such as *Edison*. In the current climate of increased deregulation, commissions will face serious conflicts between the rights of large ratepayers with access to alternative sources of service and captive customers with no such access.²⁵⁷ The balance of power issues in rate cases that have arisen over the past twenty-five years will remain, and many representatives of captive ratepayers may rely on the formal process in good faith to protect their rights. In their desire to expedite the resolution of rate cases, it is important that commissions and their staffs not lose sight of the impact of nonunanimous settlements on the relative balances of power of the parties in the dispute resolution process. Distributional justice requires a level playing field, and the nonunanimous settlement process can have the tendency to tip the balance in favor of the utility.

C. *The Impact on the Legitimacy of the System*

The effect of nonunanimous settlements on the legitimacy of the ratemaking system is the third factor that should be considered when evaluating the appropriateness of the settlement processes. As Baruch Bush observes:

Every society strives to ensure that its governing institutions and structures appear legitimate in the eyes of its members. Note that the goal is defined in terms of appearance and perception, not some objective standard of fairness or political economy. Even if the society denies certain citizens the right to participate in decision-making, it may nevertheless achieve legitimacy in the eyes of its members, if it appears that this is an appropriate thing to do. Indeed, even the victims of the denial may accept it as legitimate.²⁵⁸

Thus, a determination of whether the nonunanimous settlement mechanism enhances or diminishes the legitimacy of the regulatory system requires an examination of the perceptions of fairness held by both the parties to the proceeding and others who are affected by the decisions.²⁵⁹

257. See *supra* notes 32-35 and accompanying text.

258. Bush, *supra* note 196, at 918.

259. Raab, *supra* note 107, at 77.

When examining the legitimacy issue, it is important to note that the regulatory system is not simply the unidirectional assertion of authority by a commission over its regulated industries. Rather, it is a process of ongoing interactions and relationships among the different participants—commissioners, commission staff, utility personnel, and intervenors—played out against the backdrop of the different legal and political methods available to these parties.²⁶⁰

A number of political scientists and economists assert that most commissions are dominated by the industries they regulate.²⁶¹ They argue that, although agencies are frequently created in response to a call for reform, over years of regular contact a subtle relationship begins to develop between the regulator and the regulated company.²⁶² Eventually, the commission, looking for safety in all its decisions, surrenders its power to the regulated companies.²⁶³ Other commentators contend that regulators become overly sympathetic to the regulated industries, either because they previously worked for the companies or because they have plans for such employment in the future.²⁶⁴ And still others assert that well-organized utilities buy power from political parties that have electoral and financial resources. Rational self-interested government officials strive to maximize their wealth by adopting policies consistent with the interests of the regulated company.²⁶⁵

Commentators have challenged all these versions of the so-called “capture theory” on both historical and empirical bases,²⁶⁶ but few question the fact that, at the very least, companies tend to exert significant influence in the regulatory process. Regulators and regulated companies develop a relationship of close mutual dependence. The companies rely upon regulators for their revenues and profit. Most regulators by nature are risk averse. Wishing to avoid blatant failures, regulators rely upon the regulated companies to provide reliable and high quality service.²⁶⁷ “An

260. Krieger, *supra* note 96, at 656.

261. *Id.* at 651.

262. See MARVIN BERNSTEIN, *REGULATING BUSINESS BY INDEPENDENT COMMISSION* 74-84 (1955).

263. *Id.* at 86-95.

264. George Stigler, *The Theory of Economic Regulation*, 2 *BELL J. ECON. & MGMT. SCI.* 3, 11 (1971).

265. *Id.*

266. See Krieger, *supra* note 96, at 653-54.

267. See James Wilson, *The Politics of Regulation*, in *THE POLITICS OF REGULATION* 357, 376-77 (James Wilson ed., 1980).

agency will be reluctant to push too hard with regulatory directives that may cause, or plausibly be claimed to cause, service failures. Regulators are similarly reluctant to enforce measures that may seriously impair the financial health of the regulated industry.”²⁶⁸

Given these tendencies toward capture or, at the least, mutual dependence of commissions and utilities, the legitimacy of the decision-making process in the regulatory system can often be a subject of significant contention.²⁶⁹ Unanimous settlement of regulatory cases enhances the legitimacy of the dispute resolution process. When traditional adversaries work together to reach a consensus and the commission eventually approves the settlement, the legitimacy of the process is strengthened.²⁷⁰ When all parties have worked out a decision together, they tend to be more willing to commit themselves to it.²⁷¹

Unfortunately, however, the nonunanimous settlement process may exacerbate legitimacy problems. Settlement discussions often involve ex parte communications among the parties at unannounced and sometimes secret meetings.²⁷² There is nothing nefarious in such contacts. Indeed, the closed dispute resolution process purportedly encourages parties to be candid in the exchange of information, discourages the posturing of more public procedures, and fosters frank discussions of respective positions.²⁷³ In the public utility commission context, however, closed processes may increase the dangers raised by the already mutually dependent relationship of staff and company officials. In fact, these kinds of settlement discussions may expose commission staff to persistent pressure to go along with a settlement or face the consequences of the adverse effects that lengthy hearings may have on the financial health of the company. Failure of commission staff to go along with a settlement may also negatively impact their professional careers.²⁷⁴

268. Stewart, *supra* note 122, at 663.

269. See, e.g., Katko, *supra* note 126, at 1320 (discussing Nine Mile Point Two project).

270. Raab, *supra* note 107, at 340.

271. See Rosin, *supra* note 216, at 368.

272. *Id.* at 392.

273. *Id.*

274. See *id.* at 372.

All ADR processes in commissions run the risk of fostering private or secret meetings with commission staff. It is only natural for utility managers to cooperate with agency officials with whom they have an ongoing close relationship. The nonunanimous settlement procedure, however, strengthens this tendency. Because utilities do not have to obtain the consent of all the parties and because the commission staff has significant influence over the commission,²⁷⁵ the nonunanimous settlement procedure encourages utilities to reach an agreement with the staff. The procedure fosters closed back room meetings with staff, without the participation of other parties.²⁷⁶ And, once the commission staff has signed the agreement, without a unanimity requirement, other parties will either be forced to join the settlement or face the uphill battle of challenging the agreement in a flexible hearing before the commission. The nonunanimous settlement system diminishes the perception of fairness of commission decision-making.

A good illustration of this problem is the New York Public Service Commission's proceedings in the mid-1980s concerning the rate base allowance for the Nine Mile Point Two Nuclear Generating Facility.²⁷⁷ Throughout the construction of that plant, the most expensive nuclear generating facility in the history of the United States, consumer groups challenged the need for its construction.²⁷⁸ As the plant neared completion, the Consumer Protection Board (CPB), the state-funded consumer advocate,²⁷⁹ requested a Commission inquiry into the cost overruns at the plant and the alleged mismanagement or imprudence of the co-owners.²⁸⁰ In response, the Commission instituted a proceeding

275. See generally Lehr, *supra* note 18, at 23 ("While it is often said that regulators are captured by the industries they regulate, it is often more true that they are captives of their staff.").

276. The recently adopted New York settlement guidelines attempt to address this problem by requiring notices of all negotiation meetings to all parties. *In re Procedures for Settlement & Stipulation Agreements*, Nos. 90-M-0255, 92-M-0138, 1992 WL 487888, at *17 (N.Y. Pub. Serv. Comm'n Mar. 24, 1992). The commission recognized that meetings without notice are "too susceptible of impropriety to be tolerated." *Id.* at 6.

277. See *In re Nine Mile Point Two Nuclear Generating Facility*, 78 Pub. Util. Rep. 4th (PUR) 23 (N.Y. Pub. Serv. Comm'n 1986); Katko, *supra* note 126.

278. Katko, *supra* note 126, at 1319 (noting that the original price tag for the plant was \$400 million while its final cost was in excess of \$6 billion); see *Burstein v. Public Serv. Comm'n*, 470 N.Y.S.2d 698 (N.Y. App. Div. 1983).

279. See N.Y. EXEC. LAW art. 20, §§ 550-53 (Consol. 1983).

280. Katko, *supra* note 126, at 1325.

to investigate the prudence of all expenditures at the plant.²⁸¹ But before hearings began, the Commission staff and the utilities stunned intervenors by submitting a proposed settlement to the Commission. This agreement, reached in private negotiations, the record of which was kept secret, required ratepayers to pay over \$4.45 billion of the plant's costs and contained the assurance that no investigations would be held in regard to the prudence of the plant's construction costs. After expedited hearings, the Commission approved the settlement.²⁸²

In response to attacks on the secret nature of the negotiations, the Commission found that "in the circumstances of this case such confidentiality may have been necessary to the development of the settlement proposal."²⁸³ But the Commission failed to recognize the effect of this closed process on the perception of legitimacy of its decision-making process. As the dissenting commissioners observed in their opinion:

The intervenors were forced to react to a *fait accompli* instead of being permitted to have a voice in shaping an agreement. Therefore, the record in this case is but poorly developed. For example, the question of the cost impact of delays in commencing construction was raised by intervenors early in the prudence proceedings but was settled without adducing evidence. . . . As it is, serious doubt remains as to whether or not the construction duration on which the settlement is based is appropriate. The same could be said for the other issues which affect the cost of the plant.²⁸⁴

281. *In re Nine Mile Point Two Nuclear Generating Facility*, 78 Pub. Util. Rep. 4th (PUR) 23, 25 (N.Y. Pub. Serv. Comm'n 1986).

282. The original agreement established a rate base allowance of \$4.45 billion. *Id.* at 25. The commission initially rejected the settlement, advising the parties that \$4.16 billion would be a sounder basis for a rate allowance for the plant. When the utilities agreed, hearings were held on the revised settlement. *Id.* at 27.

283. *Id.* at 46. Although the commission had guidelines prohibiting negotiation without notice to other parties, the commission approved the agreement because the guidelines were not "legally binding rules" and "departure from the guidelines did not substantially impair any party's right to be heard on the proposed settlement" *Id.* at 46-47.

284. *Id.* at 51-52. The commission's decision was motivated by its prior experience of lengthy hearings on the Shoreham nuclear power plant. Apparently the Commission did not want to undergo drawn-out prudence hearings in this case. *Id.* at 28-29.

One answer to the problem of a closed process is that staff can be precluded from the settlement process. See generally *Question 2: Dispute Resolution*, *supra* note 115, at 34 (The Commissioner expressed the opinion that "by keeping the staff out of negotiations, we have

Again, it can be argued that the Commission opted for this closed process solely because of the unique issues involved in the case. The Commission in fact has recently adopted stronger rules precluding *ex parte* contacts between its staff and other parties in the negotiation process.²⁸⁵ Nevertheless, as commissions confront difficult issues raised by a competitive environment in the future, the legitimacy issues raised by this case will be very real. Participants in collaborative decision-making processes, such as negotiation, consider the process to be legitimate only if they perceive that their interests were better served by that process than by traditional adjudication.²⁸⁶ Even if the commission staff operates in good faith and refrains from any private negotiations with the utility, a commission faces great difficulty in avoiding the appearance of unfairness when it approves a settlement between its staff and the utility, excluding the representatives of a significant segment of ratepayers, such as captive customers, and failing to provide a full hearing on those issues important to the excluded parties. Even open proceedings can be perceived as illegitimate if some participants are considered mere bystanders. The lesson to be learned from the *Nine Mile Point Two* case is that there is a possible adverse effect of nonunanimous settlements on process legitimacy.

D. *The Effect of the Process on Human Relationships*

A fourth factor to be considered in evaluating the quality of a dispute resolution process is its impact on human relationships. An important societal goal is that members of the society cooperate as much as possible at individual and group levels.²⁸⁷ As David Luban notes, one criterion of justice is reconciliation, "transforming the disputants and their mutual relationships so that they come to acknowledge each other's point of view and common humanity."²⁸⁸ This transformation is desirable because it

tried to prevent any appearance of commission involvement in 'back room' deals."). The problem with this approach is that staff, with its technical knowledge, has an important role to play in negotiations. See Raab, *supra* note 107, at 197.

285. *In re* Procedures for Settlement & Stipulation Agreements, Nos. 90-M-0255, 92-M-0138, 1992 WL 487888, at *4-5 (N.Y. Pub. Serv. Comm'n Mar. 24, 1992).

286. Raab, *supra* note 107, at 340.

287. Bush, *supra* note 196, at 916.

288. Luban, *supra* note 194, at 413.

can lead to more efficient resource utilization and inspire creative problem solving.²⁸⁹

Commissions argue that negotiations, even those that lead to nonunanimous settlements, promote peaceful relations among the parties and ultimately result in a cooperative resolution of the case.²⁹⁰ As one court noted: "The law has no interest in compelling all disputes to be resolved by litigation."²⁹¹ Negotiation, it is argued, can bring public interest groups with limited resources into a process from which they might otherwise be excluded.²⁹² At the bargaining table, parties have the opportunity to share technical information and to understand each other's interests "faster than the highly contentious and positional hearings allow"²⁹³ And then the parties and staff can work together to shape solutions "without the rigid formality of litigation."²⁹⁴

Commissions assert that traditional rate base regulation is not a perfect system for resolving complex ratemaking issues.²⁹⁵ Because the regulatory process is inherently ambiguous, especially in areas that require forecasting, proponents of settlement argue that any attempt to arrive at a single correct solution through litigation is pointless.²⁹⁶ As the commission in the *Nine Mile Point Two* case observed in the context of a prudence challenge: "[I]t is not possible to quantify directly the cost

289. Bush, *supra* note 196, at 916.

290. See Attorney Gen. v. New Mexico Pub. Serv. Comm'n, 808 P.2d 606, 610 (N.M. 1991); *In re Cincinnati Gas & Elec. Co.*, 52 Pub. Util. Rep. 4th (PUR) 304 (Ohio Pub. Util. Comm'n 1983); *In re El Paso Elec. Co.*, 101 Pub. Util. Rep. 4th (PUR) 405, 409 (Tex. Pub. Util. Comm'n 1988).

291. Utah Dep't of Admin. Serv. v. Public Util. Comm'n, 658 P.2d 601, 613 (Utah 1983).

292. *In re Procedures for Settlement & Stipulation Agreements*, Nos. 90-M-0255, 92-M-0138, 1992 WL 487888, at *2 (N.Y. Pub. Serv. Comm'n Mar. 24, 1992).

293. Raab, *supra* note 107, at 143.

294. *Question 2: Dispute Resolution*, *supra* note 115, at 31.

295. See, e.g., *In re Nine Mile Point Two Nuclear Generating Facility*, 78 Pub. Util. Rep. 4th (PUR) 23, 28 (N.Y. Pub. Serv. Comm'n 1986); *In re New England Tel. & Tel. Co.*, 106 Pub. Util. Rep. 4th (PUR) 343, 347 (R.I. Pub. Util. Comm'n 1989). See generally Morgan, *supra* note 16, at 71 ("Ambiguity is an inherent characteristic of the ratemaking process The most that can be hoped of any process, whether formal or compromised, is that the result will fall within a range of reasonableness.").

296. Morgan, *supra* note 16, at 70-71; Raab, *supra* note 107, at 92.

implications of each specific act of imprudence in an extremely complex construction project that extended over more than a decade."²⁹⁷ Negotiation, on the other hand, gives the parties the opportunity to devise creative solutions not easily achieved through litigation.²⁹⁸ For instance, one commentator points approvingly to the creative practicality of the unanimous settlement of the *Pilgrim Nuclear Power Plant* case.²⁹⁹ In that case, the parties agreed to tie the utility's cost recovery directly to the plant's future performance in order to avoid the necessity of traditional litigation over the prudence of the plant's costs.³⁰⁰

Despite the benefits of the negotiation process in general, the nonunanimous settlement procedure has several deficiencies in fostering cooperative relationships. Such a procedure may discourage the players from developing collaborative relationships over time. Because nonunanimous settlement procedures do not require unanimous consent, participants in the process may be drawn into alliances against each other and are not encouraged to seek solutions that address the interests of all the parties.³⁰¹ The process may stimulate collaboration between two or among three of the parties, but other parties may be left out entirely. Unfortunately, in most commissions the nonunanimous settlement process has resulted in ongoing utility and commission staff coalitions against consumer intervenors.³⁰² When a significant segment of ratepayers, such as captive customers, consistently has the status of nonconsenting party, cooperation among parties is not enhanced.

It also is questionable whether the nonunanimous settlement process promotes creative brainstorming and problem-solving. Social scientists have found that:

297. *In re Nine Mile Point Two Nuclear Generating Facility*, 78 Pub. Util. Rep. 4th (PUR) 23, 28 (N.Y. Pub. Serv. Comm'n 1986).

298. *In re Procedures for Settlement & Stipulation Agreements*, Nos. 90-M-0255, 92-M-0138, 1992 WL 487888, at *2 (N.Y. Pub. Serv. Comm'n Mar. 24, 1992) (contending that negotiations may provide the opportunity to address issues that might result in regulatory innovations); Brock, *supra* note 105, at 20.

299. Raab, *supra* note 107, at 137-38.

300. *In re Boston Edison*, D.P.U. 88-28, 48, 89-100 (Mass. Dept. Pub. Util. Oct. 3, 1989).

301. See *supra* notes 235-239 and accompanying text. See generally *In re Idaho Power Co.*, 102 Pub. Util. Rep. 4th (PUR) 139, 148 (Idaho Pub. Util. Comm'n 1989) (Miller, Comm'r, separate opinion) ("[I]f the future is going to be characterized by consensus rather than by confrontation, there has to be a genuine effort to obtain consensus from all interests.").

302. See *supra* note 29 and accompanying text.

Integrative strategies require that group members learn other members' preferences and find ways to expand the pie of resources to accommodate these preferences. Encouraging negotiation groups to reach unanimous decisions may help them to accomplish these goals by forcing them to consider nonobvious alternatives that increase the amount of resources to be divided and the goals of all group members. Consequently, participants in a unanimous group may be more committed to the group's final decision, have more control over the process of reaching agreements, and be more satisfied with the group's decision.³⁰³

Without the unanimity requirement, the parties in a commission settlement negotiation may not feel pressure to approach the issues creatively. Rather, they may merely seek to develop alliances, especially with commission staff, in order to gain quick approval by the commission. The *Trimble County*,³⁰⁴ *Nine Mile Point Two*,³⁰⁵ and *Edison cases*³⁰⁶ all support this hypothesis. In all three cases, without the constraints of a unanimity rule, the utility did not feel compelled to work with consumer groups to develop creative solutions, but rather primarily sought to reach agreements with commission staff, to the detriment of consumer intervenors.

E. *The Effect of the Process on Clarifying Fundamental Policy Issues*

A final factor that should be evaluated in considering the propriety of the nonunanimous settlement process is the impact of that process on clarifying fundamental policy issues. Public hearings and decisions on fundamental policy issues are valuable to society. They help guide our behavior on matters of public concern.³⁰⁷ As Judge Harry Edwards observed: "One essential function of the law is to reflect the public

303. Thompson et al., *supra* note 209, at 87. *See generally* Raab, *supra* note 107, at 142 ("Parties needed the opportunity to present their own and probe each other's cases. This ventilating was probably necessary to get numerous facts and opinions on the table and to allow the parties to more realistically assess their relative strengths in the cases.").

304. *See supra* notes 134-143 and accompanying text.

305. *See supra* notes 277-284 and accompanying text.

306. *See supra* notes 243-251 and accompanying text.

307. *See generally* Blackburn, *supra* note 4, at 571.

resolution of . . . irreconcilable differences [in disputes about fundamental public values]; lawmakers are forced to choose among these differing visions of the public good."³⁰⁸ Public airing of disputes clarifies for the disputants, and society as a whole, the conflicting moral and philosophical values at stake in a particular case. Some problems are not just about interpersonal disputes or failures to communicate, but are instead about basic disagreements about society's direction.³⁰⁹ Formal adjudicatory proceedings do not attempt to avoid these controversies. They provide a public forum for these debates.³¹⁰ Finally, public pronouncements on fundamental policies help make officials and agencies politically accountable. When officials make public decisions on these difficult issues, those affected may have some recourse through the democratic process.³¹¹

For these reasons, most commentators have recognized that disputes about fundamental policies are poor candidates for ADR processes.³¹² In his seminal article, *Against Settlement*,³¹³ Owen Fiss notes:

Adjudication uses public resources and employs not strangers chosen by the parties but public officials chosen by a process in which the public participates. These officials, like members of the legislative and executive branches, possess a power that

308. Edwards, *supra* note 194, at 678-79; see also Frank H. Easterbrook, *Justice and Contract in Consent Judgments*, 1987 U. CHI. LEGAL F. 19, 26 ("Resolving disputes is only one of the two principal functions of the legal system. The other is shaping legal rules to use in the future. . . . If every case were settled, there would be no ongoing process of elucidation.").

309. See generally AMY, *supra* note 194, at 172-187 (noting that conflicts may be about fundamental principles or conceptions of society and, consequently, not amenable to negotiation).

310. See generally Delgado et al., *supra* note 194, at 1394 (pointing out that informalism ignores conflicts about basic social tensions); Edwards, *supra* note 194, at 678 (noting that settlement techniques may never be able to reconcile disputes about fundamental public values).

311. Edwards, *supra* note 194, at 677 ("[e]nvironmental mediation and negotiation present the danger that environmental standards will be set by private groups without the democratic checks of governmental institutions"). See generally Rosin, *supra* note 216, at 372-73 (noting that settlements make it difficult for public to monitor agency conduct).

312. Raab, *supra* note 107, at 54-55. See generally AMY, *supra* note 194, at 172-76 (noting that mediation can distort environmental conflict); Amy, *supra* note 13, at 15-16 (observing, in the context of environmental mediation, that mediation of controversies over nuclear power plants is inappropriate).

313. Fiss, *supra* note 194.

has been defined and conferred by public law, not by private agreement. Their job is not to maximize the ends of private parties, not simply to secure the peace, but to explicate and give force to the values embodied in authoritative texts such as the Constitution and statutes: to interpret those values and to bring reality into accord with them.³¹⁴

The danger with ADR is that it can replace the rule of law on basic policy issues with privately bargained-for deals.³¹⁵ Even fervent supporters of ADR acknowledge that certain disputes involving questions of fundamental rights should be decided through formal dispute resolution mechanisms.³¹⁶

In the public utility context, not all ratemaking issues concern fundamental public values. Issues such as the setting of the utility's allowed rate of return or the allowance or disallowance of minor operating expenses are not generally questions that call for official elucidation.³¹⁷ They usually raise technical issues with few policy implications. On the other hand, questions relating to the methodologies for the treatment of imprudent construction costs of new plants, the performance standards for new plants, and the allocation of costs between captive customers of a utility and customers who have market alternatives are controversial issues that generally require public debate and official decision.³¹⁸ These are issues which have a major impact on both the utilities and ratepayers. They either address significant issues of future rate increases or of cost

314. *Id.* at 1085.

315. See Edwards, *supra* note 194, at 676-77; David Schoenbrod, *Limits and Dangers of Environmental Mediation: A Review Essay*, 58 N.Y.U. L. REV. 1453, 1466 (1983) (reviewing ALLAN TALBOT, *SETTLING THINGS* (1983)).

316. See Raab, *supra* note 107, at 54-55.

317. See Harter, *supra* note 194, at 1411 ("No one would seriously contend that a disagreement over how much postage should be placed on a package should be made by means of a trial.").

318. Cf. Daniel Joseph & Michelle L. Gilbert, *Breaking the Settlement Ice: The Use of Settlement Judges in Administrative Proceedings*, 3 ADMIN. L.J. 571, 590-91 (1989-1990) (discussing 1 C.F.R. § 305.86-3(D)(11) (1993) and recommending that "[s]ettlement procedures may not be appropriate for decisions on some matters involving major policy issues"). See generally Raab, *supra* note 107, at 55-56 (observing that ADR may be inadvisable for extremely controversial cases or where there is need for public illumination on details of public utility's actions or proposals).

allocation among different customer classes. Without such determinations, utilities have little direction for long-term planning, and ratepayers have little guidance as to the amounts of future rate increases.

The nonunanimous settlement mechanism has the potential for permitting settlements under circumstances in which they are inappropriate. By definition, the more controversial a case, the more difficult it will be to reach agreement among all parties. Indeed, one study has shown that collaborative dispute resolution on utility issues is much more successful on smaller technical issues than on larger policy matters.³¹⁹ The failure to obtain unanimity on a policy issue may not reflect unreasonable intransigence on the part of non-settling parties, but instead may show that the issue should be resolved through the formal hearing process rather than through the settlement process. As an Ohio commissioner observed in a dissent from a decision that approved a nonunanimous settlement stipulating nuclear plant performance standards:

Unfortunately, the more complex the policy consideration, the less likely a consensus position is to produce policy coherence in all areas. In this case, the Commission clearly needs to establish plant performance standards which promote economic efficiency, which assess penalties when standards are not achieved, [which] reward[] when they are exceeded, and most importantly, which promote[] safe operation of plants.

The Stipulation [however] establishes nuclear performance standards which supersede any other such standards that may be adopted by the Commission during the time that the Stipulation is in effect.³²⁰

Commissions should be wary of using nonunanimous settlements to avoid hard decisions that might in the long run be beneficial to the regulatory process and the public at large, especially as significant deregulation begins. The utilities, large customers, and captive ratepayers should receive clear signals from commissions in regard to the

319. See Raab, *supra* note 107, at 204.

320. *In re Cleveland Elec. Illuminating Co.*, 99 Pub. Util. Rep. 4th (PUR) 407, 461 (Ohio Pub. Util. Comm'n 1989).

commissions' policies. Without such direction, participants will be unable to plan reasonably for the future. Nonunanimous settlements, therefore, should not be used to avoid hard decisions.

V. Safeguards Against the Dangers of Nonunanimous Settlements

As this discussion shows, significant problems exist with the nonunanimous settlement process for resolving rate cases. While this process is more efficient than traditional rate adjudication and the unanimous settlement process, it raises serious questions concerning the furtherance of social justice, the legitimacy of the process, the advancement of human relationships, and the protection of fundamental rights. Commissions have attempted to address some of these problems by adopting certain procedures and standards for review of nonunanimous settlements. Most commissions require an independent assessment to determine whether the settlement is in the public interest. Others require that substantial evidence support the settlement. Certain commissions compare the settlement with the possible outcome of the case if it had been litigated. Some commissions evaluate the reasonableness of the negotiation process itself. Finally, some examine the range of interests represented by the parties who signed the agreement. In this part, the Article will evaluate how well each of these procedures addresses the problems raised by the nonunanimous settlement process.

A. *Independent Assessment by the Commission to Determine if the Settlement is in the Public Interest*

Before approving a nonunanimous settlement, most commissions require an independent assessment of the agreement to determine if it is in the public interest.³²¹ Commissions emphasize that settlements are not binding upon them and that they, not the parties to the case, have the

321. See, e.g., *In re Potomac Elec. Power Co.*, 81 Pub Util. Rep. 4th (PUR) 587, 597 (D.C. Pub. Serv. Comm'n 1987); *In re Rules of Practice & Procedure Before the Comm'n*, 112 Pub. Util. Rep. 4th (PUR) 215, 229 (Mich. Pub. Serv. Comm'n 1990); *In re Cleveland Elec. Illuminating Co.*, 99 Pub. Util. Rep. 4th (PUR) 407, 450 (Ohio Pub. Util. Comm'n 1989); *In re El Paso Elec. Co.*, 101 Pub. Util. Rep. 4th (PUR) 405, 409 (Tex. Pub. Util. Comm'n).

ultimate responsibility to determine the validity of a rate order.³²² Commissions analogize the situation to the approval of settlements in class action cases, where "the details of a resolution can probably best be understood and worked out by the parties themselves, but the court must assure that the public interest . . . does not go unrecognized."³²³

Although this approach is well-intentioned, its major flaw is the amorphous nature of the public interest standard. In another context, Owen Fiss observes that the Tunney Act,³²⁴ which allows a court to approve an antitrust settlement proposed by the Department of Justice if it is in the public interest, "provides the judge with virtually no guidance in making this determination or in deciding whether to approve the settlement. The public-interest standard in fact seems to invite the consideration of such nonjudicial factors as popular sentiment and the efficient allocation of prosecutorial resources."³²⁵

In fact, in applying the public interest standard to approve nonunanimous settlements, some commissions have been prone to consider factors having little relation to the reasonableness of the rates. For example, one commission noted that "it does not serve the public interest for this Commission to continue to review past mistakes and postures [of the utility]; it is in the public interest that this Commission and the Company's management both focus on the future"³²⁶ This same commission found that a settlement was in the public interest because it avoided the risk of an adverse ruling from the state supreme court. Another commission concluded that it was not in the public interest to require a cost-of-service study or an expanded-load research program before its approval of a settlement because the studies requested were too complex and would delay the proceeding.³²⁷ Still another commission

322. See, e.g., *In re Louisville Gas & Elec. Co.*, 107 Pub. Util. Rep. 4th (PUR) 348, 352 (Ky. Pub. Serv. Comm'n 1989); *In re Cleveland Elec. Illuminating Co.*, 99 Pub. Util. Rep. 4th (PUR) 407, 417 (Ohio Pub. Util. Comm'n 1989).

323. Morgan, *supra* note 16, at 74; see also *In re San Diego Gas & Elec. Co.*, Decision No. 92-12-019, Application No. 91-11-024 I.92-02-004, 1992 WL 465296, at *1 (Cal. Pub. Util. Comm'n Dec. 3, 1992).

324. Antitrust Procedures & Penalties Act, 15 U.S.C. § 16(e) (1988).

325. Fiss, *supra* note 194, at 1081.

326. *In re Idaho Power Co.*, 102 Pub. Util. Rep. 4th (PUR) 139, 146 (Idaho Pub. Util. Comm'n 1989).

327. *In re Iowa Elec. Light & Power Co.*, 46 Pub. Util. Rep. 4th (PUR) 130, 146 (Iowa Commerce Comm'n 1982).

found that a settlement was in the public interest because the benefits to ratepayers under the agreement were substantially equivalent to those that would be reaped if the utility filed for a threatened additional rate increase.³²⁸

Contrary to the suggestion by some commissions that the public interest standard is equivalent to the just and reasonable criteria in traditional rate base ratemaking,³²⁹ the two are quite different. As described previously, the traditional standard requires an examination of each element of a utility's revenue requirement—the rate base, rate of return, and operating expenses—and then a separate consideration of the reasonableness of rate allocation among customer classes.³³⁰ In contrast, the public interest standard is merely a rough appraisal as to whether the settlement “strikes a fair balance among the interests of ratepayers and investors”³³¹ Instead of looking at each of the variables in the ratemaking formula, the commission need only consider whether the agreement, as an integrated whole, is fair or whether it comports with some vague notion of regulatory policy.³³²

The *Nine Mile Point Two* rate case reflects the distinction between these two approaches.³³³ The nonconsenting parties to the agreement, the consumer intervenors, asserted that the New York Public Service Commission had to determine the prudence of the utility's actions during the construction of the plant in order to decide the just and reasonable rate base. The majority summarily rejected this argument and implicitly suggested that the just and reasonable standard is equivalent to a public interest test.³³⁴ The majority, however, failed to recognize that the

328. *In re Louisville Gas & Elec. Co.*, 107 Pub. Util. Rep. 4th (PUR) 348, 359 (Ky. Pub. Serv. Comm'n 1989).

329. *See In re Nine Mile Point Two Nuclear Generating Facility*, 78 Pub. Util. Rep. 4th (PUR) 23, 43-44 (N.Y. Pub. Serv. Comm'n 1986).

330. *See supra* notes 77-89 and accompanying text.

331. *In re Procedures for Settlement & Stipulation Agreements*, Nos. 90-M-0255, 92-M-0138, 1992 WL 487888, at *13 (N.Y. Pub. Serv. Comm'n Mar. 24, 1992).

332. *See id.* at 12-13; *Business & Professional People for Pub. Interest v. Illinois Commerce Comm'n*, 555 N.E.2d 693, 702 (Ill. 1989) (rejecting a nonunanimous settlement because commission looked at decision as an “integrated whole,” and did not decide each issue on the merits).

333. *In re Nine Mile Point Two Nuclear Generating Facility*, 78 Pub. Util. Rep. 4th (PUR) 23 (N.Y. Pub. Serv. Comm'n 1986); *see supra* notes 277-284 and accompanying text.

334. *In re Nine Mile Point Two Nuclear Generating Facility*, 78 Pub. Util. Rep. 4th (PUR) 23, 43-44 (N.Y. Pub. Serv. Comm'n 1986).

expression "just and reasonable" is a term of art in traditional ratemaking, not just a general statement of policy. As the dissent pointed out, the determination of justness and reasonableness required the consideration of two key issues: the value of the enhancements to the plant and the reasonableness of the construction delays. A prudence review was essential to such a determination.³³⁵

An independent assessment under a public interest standard provides little protection against abuses of the nonunanimous settlement process. While some commissions use the public interest standard to engage in a serious review of ratemaking issues,³³⁶ others unfortunately do not. The latter commissions balance the interests in any way they see fit. Motivated by concerns of delay and risk aversion, some commissions simply approve the settlement.³³⁷ Therefore, the independent assessment mechanism provides limited protection against imbalances of power or unfair commission staff-utility alliances in the negotiation process of nonunanimous settlements. Nor does the assessment place limits on the commission's authority to approve such agreements and to avoid decisions on significant policy issues. Quite simply, the independent assessment mechanism can permit a commission to clothe an unprincipled decision in the ostensibly acceptable attire of the public interest.

B. *Fact-Finding Hearings to Determine if the Settlement is Supported by Substantial Evidence*

Some commissions require a fact-finding hearing to determine if substantial evidence supports a nonunanimous settlement.³³⁸ These hearings are not full-blown rate case hearings but rather are flexible

335. *Id.* at 52.

336. *See, e.g., In re Cleveland Elec. Illuminating Co.*, 99 Pub. Util. Rep. 4th (PUR) 407 (Ohio Pub. Util. Comm'n 1989).

337. *See supra* notes 326-328 and accompanying text. *See generally* Rosin, *supra* note 216, at 368.

338. *See, e.g., Business & Professional People for Pub. Interest v. Illinois Commerce Comm'n*, 555 N.E.2d 693, 704 (Ill. 1989); *In re Public Serv. Co.*, 72 Pub. Util. Rep. 4th (PUR) 660, 684-87 (Ind. Pub. Serv. Comm'n 1986); *In re Rules of Practice & Procedure Before the Comm'n*, 112 Pub. Util. Rep. 4th (PUR) 215, 218-19 (Mich. Pub. Serv. Comm'n 1990). *But see In re Idaho Power Co.*, 102 Pub. Util. Rep. 4th (PUR) 139 (Idaho Pub. Util. Comm'n 1989) (rejecting hearing requirement).

hearings to determine the propriety of the settled rates.³³⁹ Like the problems with the independent assessment process, this procedure fails to provide adequate protection against the dangers of nonunanimous settlements. If the commission does not have precise standards for evaluating the reasonableness of its decisions, a fact-finding hearing does little to prevent the commission from abusing its discretion. The phrase “substantial evidence” only has meaning if the commissions evaluate the substantiality of the evidence under a specific standard.

Without the requirements that the parties present evidence on each variable of the traditional ratemaking formula and that the commission make findings of fact on each of those variables, fact-finding hearings on nonunanimous settlements can become simply the presentation of canned testimony in favor of the settlement.³⁴⁰ The predisposition of commissions to favor settlements as a means of conserving resources and expediting cases can give rise to window-dressing hearings in which the outcome is essentially predetermined. As the reviewing court in the *LG&E* case observed: “[The] entire proceeding before [the commission] regarding the settlement agreement can be considered nothing more than the most summary of proceedings with witnesses for LG&E and the [commission] staff cheer-leading in favor of the agreement.”³⁴¹ In one Texas Commission case, the attorney for one of the agreement’s supporters even acknowledged on the record that accounting data had been fabricated for the purpose of justifying the settlement.³⁴²

Allowing opposing parties to cross-examine witnesses for the signatories and to present evidence in opposition to the agreement does

339. See *supra* notes 182-183 and accompanying text.

340. See generally *Rhode Island Consumers' Council v. Federal Power Comm'n*, 504 F.2d 203, 210 (D.C. Cir. 1974) (warning in federal context against pro forma hearings).

341. *Kentucky ex rel. Cowan v. Kentucky Pub. Serv. Comm'n*, 120 Pub. Util. Rep. 4th (PUR) 168, 173 (Ky. Ct. App. 1991); see also *United States v. Public Serv. Comm'n*, 465 A.2d 829, 834 (D.C. 1983) (Terry, J., concurring) (“In my judgment the procedure by which a settlement was imposed in this case on an unwilling [intervenor] reeked of unfairness. The Commission’s decision to limit [the intervenor] to the presentation of one witness, in particular, strikes me as arbitrary and capricious. . . .”).

342. *In re Gulf States Util. Co.* (Nos. 8702 et seq.) Transcript of proceedings at 160 (Tex. Pub. Util. Comm’n) (One of settling parties acknowledges that “there has been some talk about these numbers being fill numbers or backed-into numbers. Of course, a lot of them are backed into. Let’s not kid anybody on that.”).

little to make these hearings more fair. While commissions profess to place the burden of proof on those favoring the settlement,³⁴³ such declarations are not helpful without a substantive standard for decision-making.³⁴⁴ Some commissions would rather approve agreements than face lengthy hearings and may saddle opponents with the burden of showing the unreasonableness of the agreement.³⁴⁵ This procedure does little to rectify the possible power imbalances between utilities and captive ratepayer intervenors that result from the nonunanimous settlement process. Further, this procedure does not contribute to the perception of a legitimate decision-making process.

C. *Comparison of the Settlement with the Possible Outcome*

Some commissions compare the nonunanimous settlement agreement with the possible outcome of litigation to evaluate the reasonableness of the nonunanimous settlement.³⁴⁶ For example, the New York settlement guidelines provide that one of the factors to be considered in reviewing

343. See, e.g., *In re Louisville Gas & Elec. Co.*, 107 Pub. Util. Rep. 4th (PUR) 348, 358 (Ky. Pub. Serv. Comm'n 1989); *In re Procedures for Settlement & Stipulation Agreements*, Nos. 90-M-0255, 92-M-0138, 1992 WL 487888, at *18 (N.Y. Pub. Serv. Comm'n Mar. 24, 1992) ("The burden of proving that a proposed settlement is in the public interest rests on the parties proposing the settlement.").

344. See *City of Abilene v. Public Util. Comm'n*, 854 S.W.2d 932, 938-39 (Tex. Ct. App. 1993) ("There is a danger that when presented with a ready-made solution, the Commission might unconsciously require that the opponents refute the agreement, rather than require the utility to prove affirmatively that the proposed rates are just and reasonable.").

345. *Kentucky ex rel. Cowan v. Kentucky Pub. Serv. Comm'n*, 120 Pub. Util. Rep. 4th (PUR) 168, 173-74 (Ky. Ct. App. 1991). See generally Morgan, *supra* note 16, at 76 (discussing that a federal Administrative Conference recommends that objectors be allowed to present objections to nonunanimous settlements and noting that "[t]he hearing under such circumstances may seem to be less than wholly objective; [the objector] seems in effect forced to prove the others wrong. Assuming the agency has the data well in hand and has previously resolved many of the underlying policies, however, the actual detriment to the objector is relatively slight, while the benefit to the expeditious flow of cases through the agency seems significant indeed.").

346. See, e.g., *In re Potomac Elec. Power Co.*, 81 Pub. Util. Rep. 4th (PUR) 587, 604-05 (D.C. Pub. Serv. Comm'n 1987); *In re Louisville Gas & Elec. Co.*, 107 Pub. Util. Rep. 4th (PUR) 348, 359 (Ky. Pub. Serv. Comm'n 1989); *In re Procedures for Settlement & Stipulation Agreements*, Nos. 90-M-0255, 92-M-0138, 1992 WL 487888, at *12 (N.Y. Pub. Serv. Comm'n Mar. 24, 1992).

a settlement is “whether the result compares favorably with the likely result of full litigation and is within the range of reasonable outcomes.”³⁴⁷ If the parties reach a settlement before they develop a full record in a case, the commission holds mini-hearings on the settlement during which supporters of the agreement present testimony predicting the outcome of a fully-litigated case and contrasting those projections with the settlement amounts. Opponents can then attempt to contest these predictions.

Like the other two methods for reviewing nonunanimous settlements, this method is subject to abuse. As Owen Fiss observes in his critique of the comparison with judgment approach for evaluating class action settlements under Rule 23 of the Federal Rules of Civil Procedure:

[T]he judgment being used as a measure of settlement is very odd indeed: *It has never in fact been entered, but only imagined.* It has been constructed without benefit of a full trial, and at a time when the judge can no longer count on a thorough presentation promised by the adversary system. The contending parties have struck a bargain, and have every interest in defending the settlement and convincing the judge that it is in accord with the law.³⁴⁸

In the nonunanimous settlement context, commissions have to face the opponents to the agreement. But, given the summary nature of the approval hearings, the lack of standards for reviewing evidence, and the usual alliance between staff and the utility, opponents frequently have a difficult time persuading the commission that the settlement agreement is not within the range of possible outcomes. As long as the supporters of the agreement present some credible basis for their predictions, the commission is likely to give its approval.³⁴⁹

347. *In re Procedures for Settlement & Stipulation Agreements*, Nos. 90-M-0255, 92-M-0138, 1992 WL 487888, at *12 (N.Y. Pub. Serv. Comm’n Mar. 24, 1992).

348. Fiss, *supra* note 194, at 1082.

349. See, e.g., *In re Nine Mile Point Two Nuclear Generating Facility*, 78 Pub. Util. Rep. 4th (PUR) 23, 30-31 (N.Y. Pub. Serv. Comm’n 1986). In that case, concerning rate base allowances or disallowances for the Nine Mile Point Two nuclear generating plant, supporters of the settlement compared the allowances for the Shoreham plant, which resulted from a previous fully-litigated proceeding. While the Commission accepted this comparison, the dissenters observed that, “[t]o use the Shoreham disallowance as the basis for the Nine Mile Point Two disallowance is to base a decision on the shadow of a shadow.” *Id.* at 54.

D. *Examination of the Reasonableness of the Negotiation Process*

A few commissions also examine the reasonableness of the negotiation process itself to determine whether to approve a nonunanimous settlement.³⁵⁰ They consider whether any parties have been excluded from settlement discussions, whether any parties were precluded from participating in the drafting of the agreement, and whether the negotiation process was tainted with any irregularities.³⁵¹ If the commission concludes that the parties conducted the negotiations at arm's-length and in good faith, the commission can approve the settlement.³⁵² For example, in the *LG&E* case, the Kentucky Public Service Commission approved the settlement after reviewing affidavits and reply affidavits describing the bargaining process. It found that all the parties had the opportunity to participate in negotiations, that the conduct of the discussions was proper and regular, and that the intervenors opposing the deal had taken unreasonable positions in these discussions.³⁵³

The examination of the negotiations, however, may inhibit the very kind of open and informal exchanges that are helpful in facilitating negotiation. Indeed, some commissions address this problem by adopting confidentiality rules prohibiting disclosure of the substance of settlement discussions without the consent of all parties.³⁵⁴ In adopting such a rule, the California Public Utilities Commission stated that its "intent was to

350. See e.g., *In re Louisville Gas & Elec. Co.*, 107 Pub. Util. Rep. 4th (PUR) 348, 354-56 (Ky. Pub. Serv. Comm'n 1989); *In re Rules of Practice & Procedure Before the Comm'n*, 112 Pub. Util. Rep. 4th (PUR) 215, 229 (Mich. Pub. Serv. Comm'n 1990).

351. *In re Louisville Gas & Elec. Co.*, 107 Pub. Util. Rep. 4th (PUR) 348, 354-56 (Ky. Pub. Serv. Comm'n 1989); cf. *In re Procedures for Settlement & Stipulation Agreements*, Nos. 90-M-0255, 92-M-0138, 1992 WL 487888, at *6 (N.Y. Pub. Serv. Comm'n Mar. 24, 1992) (prohibiting caucuses between utility and non-utility parties without notice because private meetings between such parties fail to give the impression of an open process).

352. *In re Louisville Gas & Elec. Co.*, 107 Pub. Util. Rep. 4th (PUR) 348, 356 (Ky. Pub. Serv. Comm'n 1989).

353. See *id.* at 354-56.

354. See, e.g., *In re Commission's Rules of Practice & Procedure*, 29 CPUC 2d 392, Rule 51.9 (Cal. Pub. Util. Comm'n Sept. 28, 1988) (Nos. 88-09-060, 84-12-028) ("No discussion, admission, concession or offer to stipulate or settle, whether oral or written, made during any negotiation on a stipulation or settlement shall be subject to discovery, or admissible in any evidentiary hearing against any participant who objects to its admission."); *In re Procedures for Settlement & Stipulation Agreements*, Nos. 90-M-0255, 92-M-0138, 1992 WL 487888, at *19 (N.Y. Pub. Serv. Comm'n Mar. 24, 1992).

create a forum where free and open discussions could take place during the settlement discussions themselves.”³⁵⁵ Without such protection, parties may refrain from the kind of free-wheeling discussions that lead to creative solutions to problems. Their goal may merely be to make a record of their purported good faith efforts to negotiate.³⁵⁶

This approach also suffers from a lack of standards. Commissions simply have not developed, and would be hard pressed to develop, workable criteria for reviewing the reasonableness of the negotiation process itself. The fact that intervenors have an opportunity to participate in settlement negotiations does not, by itself, indicate that the utility and staff negotiated in good faith. Any party can go through the motions of bargaining without any intention of budging from its original position. Likewise, given the informal nature of the negotiation process, it is a difficult task for a commission to distinguish between a party’s posturing in negotiations and its actual position on a particular issue. It is odd for commissions to accept settlement as a means to avoid the rigorous requirements of traditional regulation while they embrace the additional obligation of reviewing affidavits and counter-affidavits from participants to evaluate the reasonableness of the bargaining process itself.

E. *The Range of Interests Supporting the Settlement*

In assessing the propriety of a nonunanimous settlement, some commissions consider the range of interests held by the parties that

355. *In re* Commission Rule of Practice & Procedure, No. 88-09-060, at *35 (Cal. Pub. Util. Comm’n Sept. 28, 1988) (Westlaw, PUR Database).

356. In *In re* Louisville Gas & Elec. Co., 107 Pub. Util. Rep. 4th (PUR) 348 (Ky. Pub. Serv. Comm’n 1989), the commission rejected the argument that a review of the reasonableness of the negotiation process violated the prohibition against admitting evidence of settlement offers in a trial. The commission reasoned that this prohibition

is based on the reasoning that “the law favors settlement of controversies out of court, and will not permit an offer of compromise to be used as a weapon against the party making the offer.” . . . That reasoning, however, has no application to the determination of the issue of whether the proceeding leading to the Settlement Agreement is tainted. This issue addresses not a trial of the merits of the Settlement Agreement, but rather the conduct leading up to that Agreement.

Id. at 353. This argument, however, misses the point. The policy preventing use of settlement offers as a weapon against another party is itself based on the belief that such use would inhibit free and open negotiations among the parties. Whether evidence of settlement offers is admitted on the merits of the case or for a review of the reasonableness of the negotiations, its admission has a chilling effect on settlement discussions.

support the settlement.³⁵⁷ If a broad spectrum of intervenor interests supports the agreement or if traditionally adversarial parties are signatories to the agreement, these commissions will give the nonunanimous settlement careful consideration. The concern is the legitimacy of the settlement process. As the New York Public Service Commission observed in adopting settlement guidelines: "To avoid any appearance of impropriety in settlements, every effort must be made to ensure that potentially interested parties have an adequate opportunity to participate in negotiations."³⁵⁸ To provide an incentive for such participation, commissions notify the parties that the commission will consider the breadth of interests represented by signatory parties. Through this inclusionary process, commissions hope to address the problems of power imbalance inherent in nonunanimous settlements.

This approach, however, does not completely remedy those problems. While the New York Public Service Commission's approach commendably recognizes the need to include as many parties as possible in the agreement, it provides little protection for representatives of captive ratepayers. Given the variety of interests represented in major rate cases, it is difficult, if not impossible, to develop a workable definition of the term "range of interests." For example, if all industrial and commercial intervenors, as well as the commission's staff, support the agreement, a commission may find that the participation criterion is satisfied. Similarly, if most residential and governmental intervenors are signatories, but low-income customers oppose the agreement, a commission also may reasonably conclude that a broad spectrum of the interests are included.

Like the phrase "public interest," the phrase "range of interest" is subject to ad hoc interpretations. When the Michigan Public Service Commission recently approved a nonunanimous settlement, it suggested

357. See, e.g., *In re* Rules of Practice & Procedure Before the Comm'n, 112 Pub. Util. Rep. 4th (PUR) 215, 229 (Mich. Pub. Serv. Comm'n 1990); *In re* Detroit Edison Co., 39 Pub. Util. Rep. 4th (PUR) 107, 111 (Mich. Pub. Serv. Comm'n 1980); *In re* Procedures for Settlement & Stipulation Agreements, Nos. 90-M-0255, 92-M-0138, 1992 WL 487888, at *19 (N.Y. Pub. Serv. Comm'n Mar. 24, 1992); *In re* Cleveland Elec. Illuminating Co., 99 Pub. Util. Rep. 4th (PUR) 407, 417, 449 (Ohio Pub. Util. Comm'n 1989). But see *In re* Louisville Gas & Elec. Co., 107 Pub. Util. Rep. 4th (PUR) 348, 352 (Ky. Pub. Serv. Comm'n 1989).

358. *In re* Procedures for Settlement & Stipulation Agreements, Nos. 90-M-0255, 92-M-0138, 1992 WL 487888, at *4 (N.Y. Pub. Serv. Comm'n Mar. 24 1992).

that the commission staff itself can represent a range of interests because the staff's role "is to promote the public interest, including the interests of ratepayers."³⁵⁹ Given this vague notion of the range of interests, some commissions may conclude that a broad range of interests is represented simply to avoid the delay caused by disapproval of nonunanimous settlements.

The large number of issues raised in rate cases compounds this problem. When negotiation involves two or more issues, "majority rule is subject to numerous methods of strategic manipulation and paradoxes of voting," the result of which may not reflect the optimal outcome desired by the consenting parties.³⁶⁰ In rate cases, some parties may have aligning interests on some issues, but conflicting interests on others.³⁶¹ For instance, industrial intervenors may agree with residential groups on disallowances for certain utility expenditures, but may differ with regard to the methods of allocating rates among customer classes. Disagreements may even arise within the same customer class. Moreover, each party may assign different weights and priorities to a particular issue. The fact that a range of intervenors supports a nonunanimous settlement does not necessarily mean that those intervenors represent a wide spectrum of positions on all issues in the case.

Assent to the nonunanimous settlement by the Office of Public Counsel or another proxy advocate does not alleviate these definitional problems.³⁶² Although such advocates are charged with the task of intervening on behalf of large numbers of ratepayers, the advocate cannot practically represent all of those consumers' conflicting interests. As one judge noted in an appeal from a case in which the utility's largest customer opposed a nonunanimous settlement entered into with the District of Columbia's Office of People's Counsel: "I seriously doubt whether the

359. *In re Midland Cogeneration Venture Ltd. Partnership*, 141 Pub. Util. Rep. 4th (PUR) 127, 159 (Mich. Pub. Serv. Comm'n 1993).

360. Thompson et al., *supra* note 209, at 87.

361. See *supra* notes 235-236 and accompanying text.

362. See *In re Public Serv. Co.*, 72 Pub. Util. Rep. 4th (PUR) 660, 685 (Ind. Pub. Serv. Comm'n 1986) (noting that when proxy advocate participates in drafting proposed settlement agreement, commission has responsibility to scrutinize merits of agreement more carefully).

One commentator has suggested that the proxy advocate should be the chief negotiator for the various consumer concerns. Katko, *supra* note 126, at 1335-37. He does not, however, address the issue of possible conflicting concerns of consumer groups.

Office of People's Counsel, which purports to represent all consumers in the District of Columbia, can ever adequately represent the interests of [that customer] which are likely to be at odds with the interests of its other 'clients.'"³⁶³ In a similar vein, a dissenting commissioner lamented the fact that although the state's attorney general and most other intervenors agreed to a nonunanimous settlement, they failed to address issues raised by a community organization. He observed that "[t]he lesson to be learned is that if the future is going to be characterized by consensus rather than by confrontation, there has to be a genuine effort to obtain consensus from all interests."³⁶⁴

VI. The Unanimity Rule for Settlement of Rate Cases

As the above analysis indicates, there are significant questions regarding whether public utility commission enabling acts authorize nonunanimous settlements of rate cases. Regardless of the issue of statutory authority, serious policy questions exist as to the propriety of the process. Finally, although laudable, commission efforts to remedy these problems through independent assessments of nonunanimous settlements are not completely effective. These independent assessments are seemingly standardless, providing little protection to weak parties, such as captive ratepayers.

A. *Advantages of a Unanimity Rule*

A rule requiring unanimity before commission approval of settlements addresses many of these problems by helping to maintain the balance of power in negotiation. Because all parties, not just the utility, have veto power, consumer groups may use the threat of formal hearings as a bargaining weapon. Utilities cannot avoid negotiating in the shadow of the law simply by forming alliances with some parties against others.³⁶⁵

363. *United States v. Public Serv. Comm'n*, 465 A.2d 829, 834 n.1 (D.C. 1983) (Terry, J., concurring).

364. *In re Idaho Power Co.*, 102 Pub. Util. Rep. 4th (PUR) 139, 148 (Idaho Pub. Util. Comm'n 1989) (Miller, Comm'r, separate opinion).

365. See *supra* notes 235-239 and accompanying text.

Because all parties have more or less an equal role in the negotiation process, the public perceives the process as legitimate.³⁶⁶ A unanimity rule will also promote commission decisions on fundamental public issues.³⁶⁷ Although all participants to a proceeding can consent to an agreement on public issues, unanimity increases the likelihood that a commission will render a formal determination on an issue when a significant segment of the public desires it. Finally, unanimous consent encourages parties to develop creative, nonobvious solutions for the issues in a case.³⁶⁸ As a result, a unanimity rule may actually increase participation in the bargaining process in the long term.³⁶⁹

Admittedly, the formal adjudicatory process has significant limitations. The process neither encourages innovative solutions to long-term policy issues nor fosters cooperative relationships among the parties. It may also have the tendency to become bogged down in protracted disputes. A unanimity rule, however, affords the benefits of ADR without jeopardizing the rights of any of the parties.

The contrast between the use of unanimity and nonunanimity rules is starkly illustrated by the two rounds of negotiations in the *Edison* cases.³⁷⁰ In the first round, the utility entered into a nonunanimous settlement with several governmental parties. Edison presented the agreement to consumer intervenors as a *fait accompli*. As an Edison vice president put it: "The agreement is not negotiable; that's the way it was put together. That doesn't mean we won't talk to people, and have, but changing the terms of the agreement, no. We've given our absolute best on this agreement now and we just can't change it."³⁷¹ When consumer intervenors pushed for negotiations, Edison did not budge. The Illinois Commerce Commission, in its desire to approve the settlement, held hearings on the agreement seven days a week, often starting at eight a.m. and ending at two a.m. the next morning.³⁷² The attorney for one

366. See *supra* notes 261-268 and accompanying text.

367. See *supra* notes 312-320 and accompanying text.

368. See *supra* notes 290-306 and accompanying text.

369. See Thompson et al., *supra* note 209, at 87.

370. See *supra* notes 243-251 and accompanying text.

371. Mark Eissman, *Edison Won't Negotiate on its Rate Plan*, CHI. TRIB., Dec. 25, 1986, at 1.

372. McHugh, *supra* note 249, at 16.

consumer intervenor commented that the agreement "was supposed to be a done political deal . . . Edison, with the support of the hearing examiner, was trying to drive us into the ground."³⁷³ When the Commission rejected this settlement by a four to three vote, Edison allied with the Commission staff and entered into a new nonunanimous settlement for a \$480 million rate increase.³⁷⁴ The Commission held another "around the clock proceeding" and eventually approved the settlement.³⁷⁵

The Illinois Supreme Court reversed the Commission's decision, holding that the Commission's enabling statute did not authorize nonunanimous settlements.³⁷⁶ Thereafter, the second round of negotiations took place, under the court's requirement of a unanimity rule. During these negotiations, Edison did not approach consumer intervenors with a "done deal," but recognized the balance of power. Edison's attorney observed:

As these cases went on, there were times when the consumer . . . parties might have thought they had the upper hand . . . And then there were times . . . when Edison might have thought it had the upper hand. But, no one consistently had the upper hand. It seemed like there ought to be a way, to use somewhat of a cliché, 'to cut through the Gordian knot.'³⁷⁷

Initiated by Edison's president, the bargaining took place over several months, with numerous confidential settlement conferences among all the parties with "hard bargaining on an almost daily basis."³⁷⁸ Negotiated line-by-line, word-by-word, settlement papers were "extensively edited and marked up by all the attorneys."³⁷⁹ The final agreement settled six large rate cases.³⁸⁰

373. *Id.*

374. *Id.* at 17.

375. *Id.*

376. *Business & Professional People for Pub. Interest v. Illinois Commerce Comm'n*, 555 N.E.2d 693 (Ill. 1990).

377. McHugh, *supra* note 249, at 20 (quoting Dale E. Thomas, attorney for Edison).

378. *Id.* at 22.

379. *Id.* (quoting Howard A. Learner, litigant for consumers' group).

380. *Id.* at 15.

Regardless of the merits of the settlement agreements, the two rounds of negotiations clearly illustrate the difference between negotiations under a unanimity and under a nonunanimity rule. The nonunanimous settlement process substantially favored the utility. Edison forged alliances with governmental parties and presented the settlement to the other parties on a take-it or leave-it basis. To gain Commission approval, Edison allied with the Commission staff. To expedite the case, the Commission held accelerated hearings. Then, in reviewing this settlement, the Commission failed to use the traditional ratemaking standards, but applied a vague balancing test, considering the agreement as an integrated whole.³⁸¹

Negotiations under a unanimity rule, however, reflected a more legitimate process. Edison approached consumer intervenors as equal partners in the discussions. Settlement provisions were negotiated issue by issue. Collaboration was encouraged. Even with the large number of involved parties and the variety of interests represented,³⁸² the parties reached a final resolution.

A unanimity rule clearly has the drawbacks of expanding the time devoted to negotiations and increasing the probability of group impasse.³⁸³ Expeditious processing of cases, however, cannot be a goal unto itself. The legitimacy of the decision-making process and the final result is a vital factor that should be considered in evaluating the success of any dispute resolution mechanism. Most studies of administrative ADR show that negotiation is not a panacea for all problems of the adjudicatory system. Indeed, administrative ADR has been found to be a successful process for dispute resolution only in a limited number of such cases.³⁸⁴ When there are multiple parties and issues, and when some of those issues concern fundamental values or beliefs, informal settlement of a dispute

381. *Business & Professional People for Pub. Interest v. Illinois Commerce Comm'n*, 555 N.E.2d 693, 702 (Ill. 1990).

382. McHugh, *supra* note 249.

383. *See generally* Thompson et al., *supra* note 209, at 92.

384. *See generally* AMY, *supra* note 194, at 215 (noting that mediation tends to work only in certain circumstances); Stewart, *supra* note 122, at 677 (observing that prospects for negotiated litigation alternatives are greater in certain types of cases); Susskind & McMahon, *supra* note 194, at 152-53 (concluding that parties will not participate in negotiations if their alternatives elsewhere will produce better results).

may be impossible.³⁸⁵ Even if possible, settlement may require expenditures equivalent in time and resources to those in traditional formal processes.³⁸⁶ In other words, there is no quick fix to the problems of delay in public utility rate cases.

B. *The Problem of the Intransigent Intervenor*

The difficulty of the intransigent intervenor does not warrant the abandonment of a unanimity rule. As described above, some commissions reject a requirement of unanimous consent because they assume that inactive or uncooperative parties would have the ability to block any possible settlement. They fear that the consumer groups will unreasonably hold out solely for their own political purposes.³⁸⁷ The problem with this argument is the assumption that a party's intransigence necessarily reflects unreasonable behavior. A consumer group may choose not to agree to a nonunanimous settlement because the group adheres to certain fundamental beliefs about a particular issue, because it feels that a public hearing would help to build collective action on an issue, or because it believes that a formal pronouncement of policy by the commission is necessary. None of these motives are per se unreasonable and they should not be grounds for abandoning a unanimity requirement. Intransigent utilities are not treated in this manner. When Edison presented its nonunanimous settlement to consumer intervenors and refused to negotiate its terms,³⁸⁸ the Commission did not propose a process which would permit the staff and other intervenors to reach a nonunanimous settlement to the exclusion of the utility.

385. See generally Stewart, *supra* note 122, at 677 n.81 (quoting an estimate that only ten percent of environmental controversies can be successfully negotiated); Susskind, *supra* note 13, at 152 (Commenting on the EPA's experience with negotiated rulemaking, the author observes that "parties are unlikely to make the necessary concessions to reach consensus if the only way to reach agreement is to compromise fundamental values or beliefs.").

386. Raab, *supra* note 107, at 133-34 (concluding that the settlement of the Pilgrim generating plant case in Massachusetts could not be credited with significant resource savings).

387. See *supra* text accompanying notes 122-123.

388. See *supra* text accompanying note 371.

Even if a party is intransigent and a full settlement cannot be reached, the process of negotiation itself may aid the eventual resolution of the dispute. As one commentator observed in regard to negotiated rulemaking in the environmental context: "In some respects, negotiated rulemaking cannot fail. At the very least, conflicts can be clarified, data shared, and differences aired in a constructive way. Even if a full consensus is not achieved, the negotiation process may still have narrowed the issues in dispute."³⁸⁹ In contrast to the divisiveness created by the nonunanimous settlement process, a unanimity rule encourages a process in which collaboration is a goal. At the very least, those parties who have reached an understanding on certain issues may present at the hearings joint positions for the commission to formally consider. Even after negotiations break down, discussions may continue in the shadow of formal hearings, possibly leading to an eventual unanimous agreement.³⁹⁰

Many commissions already have rules to protect the process from intervention by parties who represent no cognizable interest or who have no intent to participate. The procedural rules of many commissions provide that an intervenor must have or represent "a justiciable interest which may be adversely affected by the outcome of the proceeding," require the timely submission of specific position statements by intervenors on issues in the case, and compel them to accept the status of the record at the time of the intervention.³⁹¹ Such rules may be used to exclude any latecomer whose primary purpose is to scuttle a negotiated settlement.

If these rules prove to be insufficient, there is certainly no impediment to the adoption of reasonable regulations limiting intervention to parties who will "fairly and adequately" represent the interests of particular customer classes.³⁹² Several commissions now consider the range of interests represented by the parties in evaluating the reasonableness of nonunanimous settlements.³⁹³ This same kind of

389. Susskind & McMahon, *supra* note 194, at 159.

390. See Richardson, *supra* note 104, at 45-46 (describing New Mexico rate case where parties settled after pre-hearing negotiations failed).

391. See, e.g., IND. ADMIN. CODE tit. 170, r. 1-1-9 (1994); TEX. ADMIN. CODE tit. 16, § 22.103 (1994).

392. Cf. FED. R. CIV. P. 23(a).

393. See *supra* notes 357-364 and accompanying text.

analysis could be conducted at the intervention stage of the case without as significant a danger that the decision will be tainted by the unprincipled desire for a speedy settlement of the case.³⁹⁴

Finally, even if intervention rules will not effectively address the problem of the intransigent intervenor, the potential for delay is not that great. In twenty-four reported decisions, the holdout party was never a lone discontented ratepayer or disgruntled utility employee. Not one empirical study of settlements in the public utility ratemaking area has identified blackballers. Although such parties certainly exist, commissions should balance the danger of an intransigent intervenor against the numerous problems of nonunanimous settlement. Unless blackballers pervade commission proceedings, the advantages of an inclusionary process through the unanimity rule outweigh its disadvantages.

Conclusion

In the late nineteenth century, the formal procedures of traditional rate base ratemaking were established to protect the rights of utility investors. Nearly a century later, consumer groups have used these same procedures to safeguard their own interests. Relying on traditional ratemaking procedures, consumer groups actively intervened in cases, pressed commissions to conduct serious inquiries into the prudence of utility expenditures, sought equitable allocation of rates, and appealed adverse decisions to the courts. As a result, cases that were once relatively simple proceedings became lengthy endeavors, taxing commission time and resources.

Commissions then began to experiment with negotiated settlements. Faced with strong consumer participation, many commissions decided that the only practical way to expedite cases was to allow nonunanimous settlements, even if consumer intervenors objected. To protect against abuse, commissions held hearings on these settlements, reviewing their reasonableness under a public interest standard. They have supplemented traditional rate base ratemaking with a new kind of flexible ratemaking.

394. Although commissions could be prone to limiting intervention for the purpose of expediting the cases, intervenors would have more protection under this approach than under the present nonunanimous settlement process. The issue on judicial review of a denial of a motion to intervene would not be the broad issue of the reasonableness of the settlement, but the narrow one of the validity of the denial. Faced with the potential for judicial review of its intervention decisions, commissions would most likely continue a liberal intervention policy for legitimate intervenors.

This divergence from formal procedures, when all parties have not consented to the settlement, creates problems, especially for less powerful consumer groups. Formalism has helped to protect the rights of ratepayers in recent years and has been an effective tool in reining in utility power in commission proceedings. By allowing only the utility to veto an agreement, the nonunanimous settlement process dilutes the force of the threat of formal proceedings. No longer must the utility bargain entirely in the shadow of the law. Consumers run the risk that the utility will form alliances with the commission staff, industrial intervenors, or large commercial intervenors and then gain commission approval. Indeed, in over eighty percent of the reported nonunanimous settlement decisions, a consumer group was not a signatory.

Although many of these cases arose in the context of rate treatment for large utility construction projects, a number of lessons for future cases can be drawn from them. While the nonunanimous settlement process is more efficient than traditional adjudication, the process has the potential for accentuating power imbalances in negotiations and creating a perception of unfairness in decision-making. This process may not necessarily advance cooperative relationships among the parties and may not promote formal declarations of policy on fundamental issues.

In this age of deregulation, these lessons are significant for captive ratepayers, who seek protection through ratemaking proceedings from utility attempts to shift costs to captive ratepayers in a competitive marketplace. A unanimity rule protects against some of the problems of the nonunanimous settlement process. It helps to maintain a balance of power among the parties. It promotes a perception of fairness in the decision-making process of commissions and utilities. It increases the possibility that commissions will render significant policy decisions. Most importantly, a unanimity rule helps to establish an environment where collaboration is promoted. Although compared to formal adjudication, a unanimity rule may not significantly decrease the time and resources expended on a case, and in some cases may allow an intransigent intervenor to block an agreement, in the long run it may foster cooperation among the parties. Faced with the reality that they are required to muster unanimous consent and that they may be involved in other proceedings in the future, parties will be encouraged to brainstorm creative solutions to their problems. Unlike the nonunanimous settlement process, which has the potential for creating power imbalances and harmful alliances, a unanimity rule provides commissions with a legitimate ADR mechanism.

