"Regulatory Settlements": When Do Private Agreements Serve the Public Interest?

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It is the policy of this commission to encourage settlements.

— Multiple sources

Settlements seem somehow to reach the lowest common denominator in many instances, and often end up defying the public interest. They are often used to tie commissioners' hands, not to help them resolve vexing problems.

— Former state commission chair

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State commissions are seeing more filings: rate cases, requests for pre approvals, corporate restructurings. Commissions also are instigating proceedings themselves: carbon reduction options, transmission construction, and renewable energy. Staff sizes are dropping due to retirements and hiring freezes.

The resulting workload-resource squeeze makes settlements attractive as work reducers. But settlements are double edged swords: They have positive value if they solve public-interest challenges, negative value if they edge the commission out of its statutory role. This distinction is not always easy to discern.

Is "settlement" a misnomer? First, a clarification of terms. A regulated utility may conduct no commerce—provide no service, charge no rates—absent commission approval based on filed documents. This "filed rate doctrine" distinguishes utility regulation from ordinary commerce. In regulation, a settlement settles nothing substantive; it is only the parties' proposal.

Benefits of Settlements

Informality: Settlement processes involve informal exchange. Informal exchange enhances understanding of each entity's technical problems and private goals. Both effects spiral upwards. As technical fluency grows, commissions defer to the parties' solutions, encouraging more informal exchange, more technical understanding, and more commission deference. Mutual exposure to parties' private goals spurs settlement solutions that align private interest with public interest—if the commission has established public-interest parameters first.

Expedition: Settlements can save decisionmakers time. Two caveats: First, the parties' time matters too. When unguided settlement processes combine with resource differentials, large

parties can grind down the small, making "settlement" a euphemism for "take it or leave it." Litigation, when disciplined and efficient, can make resource differences less relevant. Second, saving decisionmakers' time is not an end in itself; success is measured in high-quality decisions, not per year dispositions.

Risks of Regulation-by-Settlement

A settlement culture can induce regulatory passivity: The less they get into the parties' business, the less they (a) engage mentally, (b) learn about the regulated businesses, (c) gain confidence, and (d) lead objectively. A stance of "Let's see what the parties say" leads to "Let's see what the parties want" and, ultimately, "Who are we to stand in the way of their deal?" There is risk of atrophy: Muscles unused become muscles less able. This spiral points downward: As the commission becomes less engaged and less alert, it becomes less respected and less relied upon, leading to more settlements and more atrophy.

Favoring Settlement in the Abstract Confuses Commissions with Courts

A court's jurisdiction is limited to a case or controversy initiated by a plaintiff. A settlement eliminates the controversy. Plaintiff vs. Defendant becomes plaintiff and defendant, the parties agreeing that they no longer need the judge. The court has no general "public interest" power independent of the dispute as defined by the parties. (Caution: In disputes with a large public-interest component, a court could reject a plaintiff defendant motion to withdraw, especially if interveners remain dissatisfied. The court's powers still are bounded, however, by the original complaint.

But a commission is not a court. (See "Commissions Are Not Courts; Regulators Are Not Judges"). A commission's powers are defined not by the case as filed, but by substantive enabling law. The commission's baseload duty—to ensure reliable service at reasonable prices—does not vary with parties' private decisions to initiate or "settle" disputes. The regulatory purpose is not inter-party peace but public-interest advancement.

So When Are Settlements Appropriate?

Settlements are appropriate when they help a commission carry out its public-interest obligations. Favorable conditions include: (1) The settlement subject demands technical proficiency, (2) the parties' proficiency exceeds the commission's, and (3) the parties' private interests are aligned with the long term public interest.

But beware of gaps—in the settlement process and the outcome. If the settlement process is missing segments of the public-interest spectrum, such as future generations, workforce quality, environmental responsibility, management efficiency, and technological innovation, the settlement's claim on the public interest is incomplete. And the mere presence of these segments does not necessarily mean effective presence. The mantra that "settlements are

more efficient than litigation" has holes when there are resource differentials. Undisciplined settlement processes favor large parties: They can attend more meetings, produce more studies, bring more staff, pay more lawyers to talk longer and louder. In contrast, strong judges using efficient litigation procedures can make resource differentials diminish. Abstract preferences for settlement ignore these points.

What Evidentiary Support?

A commission order makes policy. A settlement approving order is no different. Credible policies require credible evidence. A settlement therefore needs testimony supporting the signatories' public-interest assertions—testimony having the same rigor and comprehensiveness as litigation testimony. "We negotiated hard and this is our agreement" is not public-interest evidence.

The record should not only contain evidence that supports the settlement; it should retain the evidence that preceded the settlement. Settlements often require each signatory to withdraw its initial testimony, mainly because that testimony contradicts the settlement outcome. A party now asserting that "the settlement ROE of 12.5% is sufficient" prefers no reminder of his witness's prior statement that "anything below 14% will cripple the company." No party wishes to be heard saying, "As my chances of victory vary, so does my view of the truth." Testimony is a statement under oath; it is not mere choreography, to revise as the music changes. Credibility is the coin of the regulatory realm. Respect for the realm diminishes if the commission abets testimonial hide and seek. Leaning in the other direction—recording all filed testimony, pre and post settlement—disciplines parties to take public-interest positions to begin with. It also ensures transparency, a factor essential to earning the public's trust.

Recommendations for Regulators

Regulatory settlements are joint proposals for commission action. They advance the public interest when the "jointness" arises not from short term baby splitting, not from one party dominance masked as compromise, but from expert idea sharing. (Settlements also work for compromises of private commercial matters that do not affect non parties, present or future.) The likelihood of public-interest results rises, therefore, if the commission focuses not on an abstract preference for harmony, but on two criteria:

1. *A settlement proposal must be backed by principles and evidence aligned with commission priorities.*

2. *The resources, expertise, and alternatives available to each party must be roughly equivalent. Under these conditions, no one party's view of "the public interest" prevails for reasons other than merit.*