

Negotiated Settlements:  
The development of economic and legal thinking

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# Negotiated Settlements: The development of legal and economic thinking<sup>a</sup>

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## Abstract

Negotiated settlements are a form of regulation of public utilities that is alternative or complementary to the conventional process of litigation. Since the early 1960s they have been seen primarily as a means of coping with a regulatory backlog and as saving regulatory processing time. More recently legal scholars and practitioners suggest that settlements better serve the needs of the parties, allow greater flexibility and innovation, and can achieve results that lie beyond the traditional litigated approach. Economists have had little to say about settlements. Recent research indicates a high proportion of settlements in some US and Canadian jurisdictions and confirms that settlements involve considerable innovation, notably the introduction of rate moratoria, multi-year incentive regulation and light-handed regulation, that otherwise might not have been possible. Subject to an adequate process, settlements allow market participants to make their own decisions instead of imposing the judgements, preferences and decisions of the regulatory agency. There is considerable scope for further research on the impact and policy implications of this practice.

JEL Classification: L51 Economics of regulation, L97 Utilities general, L94 Electric utilities, L95 Gas utilities, pipelines, water utilities.

Key words: negotiated settlements, regulation, innovation.

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## **1. Introduction**

Public utility regulation in the US and Canada is conventionally understood as involving a formal process of litigation conducted by a public utility commission, after which the commission determines the outcome. In practice, however, some rate cases are settled by negotiation and agreement between the utility and some or all of the interested parties, and this agreement is subsequently considered and typically approved by the commission. Such 'negotiated settlements' are apparently widespread and have been discussed by legal scholars and regulatory practitioners. Despite this, they have been virtually ignored in the economic literature until recently. There has been little or no indication of how often and under what conditions litigation and settlements are used in practice, whether either method is becoming more or less prevalent, for what kinds of cases each method tends to be used, and how if at all the outcomes differ from one method to another.

To the extent they are acknowledged at all, negotiated settlements have been seen primarily as a quicker, less costly or more convenient way of dealing with a regulatory load, and as achieving essentially the same outcome as conventional litigation. Settlements may have been of this kind initially. However, recent research indicates that negotiated settlements can also lead to outcomes significantly different from litigation. In some respects these outcomes are beyond the competence of utility regulatory commissions to achieve. Arguably, negotiated settlements have changed the nature of utility regulation in important respects. They also indicate a promising way forward for utility regulation in future.

This paper provides a brief and self-contained summary of the development of legal and economic thinking on negotiated settlements. Section 2 provides some background on the emergence of settlements. Section 3 traces the evolving discussions by legal scholars and practitioners. These include an appreciation of the role of settlements in reducing regulatory delay, a debate about non-unanimous settlements, and an emerging recognition of the distinctive contribution that settlements can make. Section 4 notes the paucity of treatment in the economic literature then summarises three recent economic contributions that begin to document the role of settlements in the US and Canada. Section 5 concludes and suggests the case for further research and policy developments on this topic.

## **2. Background: the emergence of settlements**

It is said that the Federal Power Commission (FPC) originally adopted settlement procedures in 1949, although it was not until the early 1960s that it began actively to

foster settlements as a way of resolving its backlog of cases.<sup>1</sup> The origin of the backlog lay in the Phillips case.<sup>2</sup> The burden of cases that this led to has been well documented.<sup>3</sup>

There were other causes of regulatory delay in the power sector. In the late 1960s and early 1970s the rises in oil prices, inflation and interest rates disturbed the previous arrangements involving minimal regulatory intervention. Utilities brought more rate cases, electric rates rose and consumer organisations became more active in the proceedings. “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. Faced with increased rate filings and active consumer intervention, commissions felt overburdened.”<sup>4</sup>

Commissions and utilities began to question the effectiveness of traditional rate base regulation: they found it too ‘rigid’ and ‘adversarial’. “Proposals to develop methods for settlement of rate cases were made to expedite the process and ease the conflicts among parties. Eventually some commissions even adopted formal rules for settling cases.”<sup>5</sup>

By the early 1970s the decision times of litigated rate cases were a concern at all major US federal regulatory agencies.<sup>6</sup> Settlement was one of a variety of techniques proposed to deal with the situation. Other techniques included streamlined judicial procedures, automatic adjustment clauses, authorisation of partial rate increases, time limits on agency action, increased delegation, decreased public participation, and increased reliance on informal rulemaking. Alternative Dispute Resolution (ADR) mechanisms (sometimes including settlements) were also proposed.<sup>7</sup>

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<sup>1</sup> Krieger (1995 p. 283, fn. 114). He also notes “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.”

<sup>2</sup> In 1951 the FPC held that it lacked jurisdiction over Phillips Petroleum Company, including on the grounds that Phillips’ activities were exempt under the Natural Gas Act. “On June 7, 1954, the Supreme Court ... held that Phillips was subject to the jurisdiction of the FPC and directed the commission to determine whether the firm’s prices were just and reasonable. ... The Court thus handed the Federal Power Commission the complex task of determining the wellhead price for thousands of independent natural gas producers – a task which it had not sought. ... Instead of the 157 natural gas companies subject to its jurisdiction at the end of 1953, the Phillips decision extended the commission’s power to 4,365 independent producers who sold to interstate pipelines. In July, 1954, the commission issued an order freezing the wellhead price of natural gas. It directed all producers to file their rates. By June 30, 1963, 17,809 certificate applications had been filed.” (Phillips 1969, pp. 596-604)

<sup>3</sup> By 1960 over 2900 applications for increased rates were awaiting FPC action, and only 10 cases had been dealt with. (Breyer and MacAvoy 1974 p. 68) The FPC was characterised by a ‘breakdown of administrative process’. (pp. 71-2) Wilcox (1966 p. 378) notes that in 1960 the FPC had 3200 requests and estimated that, even with tripled staff, it would take at least 82 years to deal with them.

<sup>4</sup> Krieger (1995 p. 281) citing Joskow (1974).

<sup>5</sup> Krieger (1995, pp. 281, 283-4).

<sup>6</sup> “[T]he Interstate Commerce Commission stands almost alone in its ability to decide a case in less than two years.” Morgan (1978 p. 43).

<sup>7</sup> Burns (1988) summarises “alternative procedures that might be used by state public utility commissions in place of trial-type, adjudicatory procedures. These are procedures that can lead to more efficient determination of routine commission decisions and procedures that can be used to consider forward-looking economic, financial, and other regulatory policy issues.” (p. iii) One direction of development

### 3. Survey of the legal literature<sup>8</sup>

#### 3.1 An explicit case for settlements

Legal scholars have followed with interest the development of negotiated settlements. Spritzer (1971) observed that the FPC, unlike other federal agencies (ICC, FCC and CAB), “has had signal success in settling rate cases” especially for gas pipelines. “Even though these are invariably multiparty proceedings, settlement of some or all of the issues was achieved in more than half the cases during the period 1960-70.” (p. 43) He conjectured that the factors that have played a part include exchange of relevant data beforehand, an active checking role of the agency’s staff, a pre-hearing conference to focus the issues, and a settled methodology and standards.

Morgan (1978) documented the extent of delay in rate making at the four main regulatory agencies and the time savings resulting from settlement. Having considered the alternatives, he saw settlements as part of the solution to a serious regulatory problem.<sup>9</sup> In order to achieve “a quantum leap in the speed of agency decisions without adversely affecting quality”, he suggested a “new view of the proper role of an agency in the ratemaking process”. According to this, “agencies should be viewed not primarily as decision makers in contested cases, but as a means of helping the parties in such cases work out a result that is both mutually acceptable and in the public interest”. (p. 55). His “revised strategy” had three interrelated components, of which the third was settlements.<sup>10</sup> These would be particularly conducive to saving time.<sup>11</sup>

Morgan explicitly considered possible objections to settlements. Were the outcomes wrong by definition because only the regulatory agency could determine the public interest and only by a traditional ratemaking procedure? No, because in practice there is a ‘range of reasonableness’ rather than a single correct outcome; because most rate cases reflect private disputes rather than public interest issues; and because settlement is common elsewhere in the law.

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involved Alternative Dispute Resolution (ADR) procedures, which often tended to focus on the resolution of customer complaints. Another direction (sometimes using the same term ADR) was the process of negotiated stipulations and settlements between the utility and interested parties, notably the consumer advocate.

<sup>8</sup> Wang (2004) provides a useful listing of the legal literature, including the main papers mentioned here, but does not discuss the evolution of legal thinking. He provides a helpful outline of the litigated and settlement approaches as practiced at FERC.

<sup>9</sup> Morgan noted the widespread agreement that “something is wrong with much of the substance and procedure of regulation [especially] the complexity of administrative procedure and the sheer time consumed”. (p. 22) There was a lengthy processing time at the FPC: “what saved the system from total collapse was the FPC’s unique practice of settling large numbers of its cases”. (p. 42)

<sup>10</sup> The three components were increased use of informal rulemaking to establish predictable standards, earlier acquisition of data, and “increased reliance on settlements to eliminate the inevitably time-consuming decision and opinion stages of present administrative legislation”. (p. 22)

<sup>11</sup> “Approximately one-third of the time in a typical case is spent assembling the facts in presentable form. Fully two thirds of the time is spent presenting the case to the agency and waiting for the agency to reach a decision and write an opinion. Settlement could save part of that last two-thirds.” (Morgan 1978, pp. 69-70)

Morgan acknowledged that, although the wisdom of allowing settlement was obvious, “the real problem may be guaranteeing that all significantly affected interests are represented in any settlement negotiation.” He identified four different kinds of situation. 1) Where both (sic) parties are private firms, the agency is like a court (e.g. FPC gas pipeline cases) and settlement has been relatively easy. 2) Where the regulated firm is the proponent of change and the regulatory agency is the adversary party, intervenors and customers with adverse interests are often sufficient foils to make the situation analogous to 1). 3) Where a competitor protests another’s rate decrease, settlement will pose particular public interest problems and could degenerate into price-fixing. 4) Where cases are initiated by one type of customer, settlement could simply shift the burden of paying for cost increases to a less articulate or well-organised group.

The commission and staff thus have important roles to play in the settlement process. Morgan recommended four practices to alleviate potential problems.<sup>12</sup> He noted the possibility that not all parties would reach consensus, and the risk that minor differences might destroy the entire settlement effort. He endorsed the view that lack of unanimous consent should not preclude approval of a settlement, provided the settlement was found reasonable and there was an opportunity for objectors to put their views.

### **3.2 The spread and benefits of settlements**

The view that settlements should become an objective of regulatory policy seems to have been accepted at the Federal Energy Regulatory Commission (FERC), which superseded the FPC in 1977. By 1980 settlements were reached in approximately two-thirds of all electric utility rate cases there, and in 1986 in over 70 per cent of gas pipeline rate cases.<sup>13</sup> It was once claimed that FERC “resolves approximately 80 per cent of its caseload through negotiated settlements.”<sup>14</sup>

Settlements evidently developed in various State commissions as well as federal ones. Petrusis (1985) lists 13 then-recent settlements from eight different states. Krieger (1995) calculates that 16 States plus the District of Columbia have recognised non-unanimous settlements. Goodman (1998) footnotes settlements in 18 states in the period 1990-95. It would not be surprising if the majority of US States have now recognised settlements of some kind.

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<sup>12</sup> First, agencies should seek to ensure that their rules and decisions reduce the kinds of uncertainty that tend to prevent settlement. Second, the agency should move the case towards a hearing, which may be useful pressure or may be quicker than settlement. Third, part of the agency’s staff should act as a surrogate for identifiable interests that are not parties to the formal proceeding. Fourth, the agency should have “a significant residual burden of guaranteeing a fair result” and “must ensure that the public interest (or the interest of missing class members) does not go unrecognized”, to which end it would seem appropriate to publish the proposed settlement and invite comments. Morgan (1978 pp. 72-76).

<sup>13</sup> Wang (2004, fn. 2, p. 142) and Walker (1986 p. 343).

<sup>14</sup> Petrusis (1985, p. 379) citing a 1984 memorandum to the American Bar Association. Phillips (1993 p. 199) says that “FERC generally resolves electric and gas wholesale rate applications by settlement. (In fiscal year 1980, forty-seven of the fifty-four electric cases concluded [87%] were resolved by settlement.)”

Settlements have been used in a wide variety of regulatory contexts.<sup>15</sup> At least one state has actively demanded that a utility seek to achieve a settlement.<sup>16</sup>

A number of legal commentators and practitioners discussed the benefits of negotiated settlements over traditional adjudication methods. One commissioner refers to reductions in ‘time, expense and hostility’.<sup>17</sup> This seems to have been a general perception.<sup>18</sup> Some disadvantages of settlements were also noted, but primarily as perceptions rather than substance.<sup>19</sup> Katko (1987) worried about lack of transparency in some cases, but considered that this could be overcome by the commission acting as mediator rather than as negotiator.<sup>20</sup>

Given the benefits of settlements, there was some concern that regulatory commissions could not function without them. Walker (1986) noted the view of a Senate Judiciary Committee that informal or settlement procedures “are truly the lifeblood of the administrative process”. The view of the FPC, the courts and FERC was that “the Commission could not possibly cope with the flood of business ... if the outcome of a substantial part of that business were not the result of voluntary settlements entered into by the parties”. Walker examined the technical nature of the settlement process at the Commission and reviewed with some concern recent decisions bearing on the continuing ability of that process to “eliminate the need for often costly and lengthy formal hearings”. There was also some concern that a single non-consenting party could derail the process.<sup>21</sup>

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<sup>15</sup> Petrusis (1985, p. 381) instances water, electric and telephone rate cases; sale of an electric plant and various ratemaking and accounting aspects of nuclear plant; and competition in telecommunications and new telecommunications offerings of private line service and customer-owned coin-operated telephones.

<sup>16</sup> Washington State commission, expressing its ‘distress and impatience with the litigiousness of proceedings’ ordered the company to convene a ‘collaborative’ to reach consensus, and eventually was presented with a stipulated settlement. (Goodman 1998, p. 87)

<sup>17</sup> For example, “The New Mexico Commission and its Staff have settled more cases than ever in recent years. Settling by stipulation is still on an *ad hoc* case-by-case basis, but it does reduce the time, expense and hostility typical of the traditional rate case.” Helman (1984).

<sup>18</sup> Petrusis (1985) p. 380 cites the finding by Morgan (1978) that settlements reduced the average processing time of FPC cases by nine months or more in both electric and gas cases. He lists the benefits of settlements as expediting the regulatory process, reducing rate case expenses, reducing the uncertainties inherent in regulation, reducing the ‘battlefield mentality’ inherent in contested rate cases and encouraging mutual understanding and consensus.

<sup>19</sup> Petrusis (1985) instanced the perception that others rather than the Commission are making the decision, a perception of ‘secret deals’ between company and Commission staff, and possible insufficient attention to prior rulings and regulatory principles.

<sup>20</sup> Katko noted the advantages of the settlement process in saving time, money and resources in New York State, but instanced a case where utilities were allowed to pass on \$4.45 billion of nuclear costs to ratepayers. It was possible that consumers might not have the right to be heard or to make an input. In order to “restore the public’s faith in the PSC by providing for consumer protection in the ratemaking process”, he advocated “encouraging settlements between the parties with the PSC acting as a mediator, not as an active negotiator”. (p. 1331)

<sup>21</sup> Following a series of decisions in transportation cases, Drom (1991) noted that a “single nonconsenting party may be able to derail a transportation rate settlement affecting dozens of parties and thus may force the pipeline and other interested parties to participate in an often lengthy and expensive evidentiary hearing”. (p. 341)

### 3.3 A concern about non-unanimous settlements

Krieger (1995) was more concerned for the interests of the non-consenting parties. He commented that, in establishing their procedures for settling cases, “most commissions concluded that a requirement of unanimous agreement would undermine the settlement process.” (pp. 283-4) He noted the benefits that commentators had seen in unanimous settlements, but worried that “In the context of public utility regulation, however, a unique and disturbing practice has arisen: the nonunanimous or contested settlement.” The danger of such an approach was that “Parties with a substantial interest in a utility proceeding can be left out of the decision-making process.” This was because a utility could “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.” (p. 262)

He reported an increase in the frequency of non-unanimous settlements, and a willingness of states to recognise such settlements.<sup>22</sup> Faced with non-unanimous settlements, “a few [commissions] regard settlement agreements merely as additional evidence to be considered in reaching a traditional rate base decision”. However, most commissions do not do this, and “consider the merits of settlement agreements without holding a full adjudicatory proceeding”.<sup>23</sup>

Krieger noted that “the literature on dispute resolution has identified a number of factors for evaluating the quality of dispute resolution mechanisms.”<sup>24</sup> He then examined “the non-unanimous settlement process in light of each factor, comparing this process with traditional rate base regulation and the unanimous settlement process”.

He focused particularly on “the problems that representatives of captive ratepayers face as intervenors in rate proceedings”. (p. 299) A concern here was that “the party with the superior power will not be motivated to engage in serious dialogue if it knows that it can

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<sup>22</sup> He reported one non-unanimous settlement before 1980, 4 during 1980-85, and 19 after 1985. A significant number of these cases involved recent or cancelled generating plant. In 17 of the 24 cases no consumer group was a signatory and in 3 cases one or more consumer groups did not agree to the settlement. “To date, sixteen state commissions and the District of Columbia Commission have recognized the validity of nonunanimous settlement of rate cases. Six of these commissions have gone so far as to adopt formal rules providing procedures for approval of such settlements.” (pp. 264-5) Unfortunately, Krieger gives no data on the numbers, growth and spread of unanimous or uncontested settlements against which to judge these figures.

<sup>23</sup> “These commissions will approve a settlement even without the development of a complete evidentiary record or finding of fact on each of the elements of the rate base formula. 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. 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’; whether the settlement comports favorably with the possible outcome if there were no agreement; whether the negotiation process was reasonable; whether a range of interests is represented by the parties who sign the agreement; and whether the settlement is supported by substantial evidence.” (pp. 285-6, footnotes omitted)

<sup>24</sup> “Five of 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.” (pp. 298-9)

achieve its goals outside of the negotiating process”. In addition, “a party with greater financial resources and technical expertise will often attempt to intimidate weaker parties into settlement. Faced with this pressure, parties with fewer resources are likely to feel constrained to accept less than fair outcomes.” (pp. 303-4)

In Krieger’s view, the non-unanimous settlement process raised the risk that the burden of increased utility prices would be borne disproportionately by captive residential and low-income ratepayers. He concluded that settlement had to be unanimous in order to protect these less powerful groups.

### **3.4 A response on non-unanimous settlements**

Buchmann and Tongren (1996) disagreed. They argued that “the theoretical problems that Professor Krieger sees in non-unanimous settlements simply do not arise in practice”. His “conclusion that *unanimous* settlements are necessary to protect certain consumer groups ... is neither necessary nor conducive to reasonable regulation”. (pp. 337,8)

Buchmann and Tongren argued that in the case of a non-unanimous settlement an oral hearing is far more likely than if there is unanimity. Non-signatory parties are not left out: they are able to cross-examine and present their evidence. The comments about balance of power do not reflect real life, since the ‘superior power’ is subject to the litigated regulatory process and can *not* be sure of achieving its goals outside the negotiation process. Far from intimidating weaker parties, “in the authors’ experience, some utilities have gone to great lengths to provide data and explain the process to ‘weaker parties’”. Moreover, “whether viewed as a ‘political’ question or simply as sound customer relations, legitimate ratepayer concerns cannot be ignored as a practical matter. If they are, the commission will know and act accordingly.”

They further argued that the demand for unanimity “opens the door to hostage-taking. ... No plausible reason justifies granting a [limited-issue] party, or an industrial intervenor seeking a particularized tariff design to enhance its own (but not others’) interests, the power to hold up and control the whole process.”(p. 343)

### **3.5 A wider range of benefits**

If a requirement that a settlement be unanimous reduced the likelihood of achieving it, this raises the question as to what the benefits of a settlement really are. Krieger summarised the advantages that commentators had seen in alternative dispute resolution (ADR) mechanisms.

Among these benefits are the saving of time and money; the flexibility and creative responsiveness of alternative processes; the achievement of results that better serve the needs of the parties; the enhancement of community involvement

in the dispute resolution process; the reduction of court caseloads; and broader access to the justice system.<sup>25</sup>

These are evidently wider than generally noted. However, he suggested that the savings in time can be over-rated.<sup>26</sup> Some consumer advocates who have engaged in settlements endorse this point.<sup>27</sup> Experience in Canada suggests that settlements take longer to bring about, but take less regulatory time to process. However, the parties seem to regard time negotiating a settlement as productive rather than wasted.

### 3.6 Flexibility and innovation

Buchmann and Tongren (1996) based their case for retaining the option of settlement on benefits other than savings in time.

[If] the case is fully tried, all sorts of non-traditional, i.e. non-statutory, options which might be reached through agreement may go out the window. (p. 343)

The authors argued that rate case settlements are not solely compromises of rate case issues.

Quite to the contrary, the settlement process permits solutions that the regulatory agency itself, constrained by statute, may *not* be able to pursue.<sup>28</sup> Without denigrating the obvious savings in time and expense arising from a settlement, the flexibility inherent in the settlement process may be by far the most telling ground for its encouragement...

This was significant in the evolving competitive context.

Flexibility is especially important now, as the utility marketplace moves from integrated monopolies to multi-party and/or unbridled competition. Since full and effective competition will take years to accomplish, parties to utility proceedings must effectively function in this largely undefined transitional period. The creation of the new competitive environment will be far more successful if stakeholders are able to talk openly, share ideas, and challenge the traditional approaches that once suited the monopoly marketplace. ... By exploring new approaches, parties will be able to fashion solutions beyond the regulatory authority of a commission when they do not violate any important regulatory principle or practice.

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<sup>25</sup> Krieger (1995 pp. 259-60), footnotes omitted. He attributes identification and discussion of the point about flexibility and creative responsiveness to five commentators in the period 1988 to 1993.

<sup>26</sup> "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. ... the process of negotiating these [unanimous] settlements takes substantial time." (Krieger 1995, p. 301)

<sup>27</sup> "... settlements are not necessarily a faster way than litigation to handle utility regulation – just better in many cases. Sometimes, negotiations take months before agreement is finally reached and a settlement is submitted to the regulator for approval." (Palast et al 2003, p. 97)

<sup>28</sup> "For example, in Ohio the commission cannot compel a utility to phase-in a rate increase ... but there seems no doubt that a utility may *agree* to such a phase-in." (fn. 37, p. 344)

In the view of these authors, the refusal to consider non-unanimous settlements “ignores the reality that regulatory settlements, unanimous or not, can produce effectively crafted and truly innovative results.” (p. 344). Others confirm that settlements can lead to innovative outcomes.<sup>29</sup> This is also the experience reported in the studies below.

### **3.7 Recent practice on non-unanimous settlements**

Goodman (1998) footnotes judgements on about 30 settlements in 18 states in the period 1990-95. About half of these relate to contested settlements. Commissions have evidently considered the non-unanimity issue carefully. They seem to be aware of ‘tyranny of the majority’ concerns and to have examined non-unanimous settlements before deciding whether to accept them. They have allowed non-settling parties a chance to dispute the settlement. Some regulators have been particularly concerned to develop explicit yet flexible procedures for dealing with contested settlements.<sup>30</sup>

In the three jurisdictions studied in detail (discussed below) commissions have not rejected non-unanimous settlements in favour of a litigated solution. There have been very few contested settlements in Florida and Canada, and they do not seem to have been a significant issue there. At FERC, other solutions have been found.<sup>31</sup>

### **3.8 Serving the needs of the parties**

The claim that negotiated settlements better serve the needs of the parties is not a new one. It is implicit in the analysis by Morgan (1978), for example. Some commissions have said this explicitly.<sup>32</sup> It is an aspect that seems to be increasingly appreciated, and it is useful to understand why settlements have an advantage here.

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<sup>29</sup> For example, “negotiations have resulted in settlements with creative solutions that could not have been achieved through litigation. Lots of good examples exist, that go beyond rate cases. Many of the state electricity restructuring collaboratives that resulted in rate freezes, social goal funds, and customer choice of electric suppliers are the best examples. These occurred between 1996 and the peak of the California debacle (end of July 2001).” (Robert Burns, personal communication, 10 February 2006) Interestingly, FERC’s website lists a dozen press releases for settlements in the last two years, mostly associated with the California/Western energy crisis.

<sup>30</sup> For example, in 2002 the Canadian National Energy Board updated its negotiated settlement guidelines “with the explicit goal of providing flexibility to effectively address contested settlements”. The revised guidelines provide for the Board to hear the applicant’s arguments in favour of the settlement, the views of parties opposed to the settlement, and the applicant’s response to the opposition. The Board would then decide whether to approve or deny the settlement or to allow it on an interim basis and hold a hearing to deal with the issues raised by the dissenting parties. (Doucet and Littlechild 2006a)

<sup>31</sup> Wang (2004) reports that of 41 cases at FERC, 22 were unanimous, 17 were contested and 2 were litigated. In 11 of the 17 contested cases, FERC held that the contesting parties’ contentions lacked merit or their interests were too attenuated. In 2 contested cases FERC compared the outcome to what it would have been under litigation. In the remaining 6 contested cases FERC approved the settlement for the consenting parties and severed the contesting parties to litigate their interests separately.

<sup>32</sup> “The Michigan commission held [in 1991] that a solution devised by the parties was ‘more likely to fit their needs and circumstances’ besides ‘conserving the scarce resources of the parties and the Commission’.” (Goodman 1998, p. 88)

Regulators do not know the precise situations and preferences of the parties involved. They have to make judgements according to their own perceptions and preferences rather than those of the parties. Their choice is not necessarily what the parties themselves would choose, and therefore not necessarily as acceptable. Consumer advocate practitioners Palast et al (2003) put it this way.

[W]hen the regulator makes the decisions, everyone loses something, and parties have no control over what they lose. In the negotiation process, each party chooses which among the many points it is willing to lose in order to gain something else. Although this may sound like a distinction without a difference, in fact, the trade-offs arrived at voluntarily are much more stable and effective. Negotiated settlements are actually more democratic because all parties participate in the decision. As a result the terms are more likely to be implemented with enthusiasm and effectiveness than if they had been imposed from above by a regulator. Furthermore, in an atmosphere of trust and negotiation, more information is freely shared, with the result that more comprehensive solutions can be developed.(p. 96)

The greater involvement of parties themselves means that a wide range of issues is susceptible to settlement, and “some kinds of utility cases can be better resolved through negotiation than litigation.”<sup>33</sup> The reason is that “negotiation allows the parties themselves to make the trade-offs, instead of leaving it to the regulator to split the difference.”

### **3.9 Updating information and policy**

Some are concerned about the loss of information with settlements compared to litigation. They suggest that there should be litigation at periodic intervals in order to keep their information up to date. Another suggestion is that the greater flexibility and use of settlements at a time of rapid change in the market might mean that regulatory policies fail to adapt to changing conditions.<sup>34</sup> On this basis, some might argue that

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<sup>33</sup> “These include energy conservation or efficiency programs, and payment and other assistance to the poorest citizens of society.” (p. 88) “Besides energy conservation cases, other types of cases have been successfully negotiated and settled, including the guiding principles of electricity industry restructuring in Rhode Island and Massachusetts, price-setting cases in New York and elsewhere, and cases in which the regulator was reviewing the operating performance of generating plants owned by an electric utility.” (pp. 96-7)

<sup>34</sup> A correspondent on an earlier draft (private communication, 28 Aug 2006) suggests that one of the major causes of the explosion of settlements in the 1990s may have been that the industry was changing rapidly and the regulators were unable or unwilling to adapt their policies to the changing conditions fast enough. As a result, parties were facing possible litigated results that would reflect out-of-date, poorly suited policies, which would have left all parties dissatisfied and worse off. The litigated outcomes were also highly uncertain and would have taken a long time. Through settlements, parties could get reasonable results without putting the regulator in a position of having to reconsider major policies (which it would most likely have wanted to do through a lengthy, generic rulemaking). // One of the casualties of the explosion of settlements is the necessary and appropriate evolution and adaptation of regulatory policy to changing industry circumstances. In the early rounds of a rate case, parties may raise some important issues of regulatory policy, but then through the settlement the issues never get resolved (settlements generally state that the details should not be interpreted as suggesting any particular policy is right or wrong, there is no precedent, etc.) // Despite settlements virtually displacing litigation, the regulator's

regulators should periodically litigate in order to keep their information or policies up to date, or just to keep their hand in. Some regulators, such as Alberta EUB, have taken such a view. (Doucet and Littlechild, 2006b)

Others would argue that, although industry has an interest in having a well-informed regulator, the proposed cure is worse than the disease. It is entirely possible (and not uncommon at the NEB in Canada) for a settlement to make provision for the publication of relevant information. A litigated decision cannot necessarily achieve what a settlement could. As yet, in the three jurisdictions studied below where settlements have been widely adopted, there has been occasional need to revert back to litigation, but no pressure to go beyond that.

#### **4. Survey of the economic literature**

##### **4.1 Textbooks and journals**

The economic literature on negotiated settlements is sparse. The traditional textbooks on regulation have little if anything to say. Bonbright (1961) and Garfield and Lovejoy (1964) do not mention settlements. Wilcox (5<sup>th</sup> ed 1966) refers briefly to ‘informal procedures’.<sup>35</sup> Phillips (1969) devotes just a few sentences to these informal procedures. In a later text (Phillips 2<sup>nd</sup> ed. 1993) he provides a three-page discussion of them, including the settlement practice at FERC. However, the informal procedures in question are primarily discussions and agreements between commission and utility rather than between utility and other interested parties.<sup>36</sup>

Even the economic literature on the FPC makes little or no explicit reference to settlements, and does not discuss them.<sup>37</sup> MacAvoy and Pindyck (1973) have only a passing reference.<sup>38</sup> The literature on reform of regulation in the early 1970s does not

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policies (that is, how it would resolve the issues, if given a chance) remain crucially important, because they determine each party's expectations regarding a litigated result. This determines each party's bargaining position in the settlement process, and has a big impact on the result. If, over time, the regulator's policies stagnate and become increasingly mismatched to the current markets and unclear, it may become increasingly difficult to reach settlement, or it may take longer or result in more contesting parties.

<sup>35</sup> He says (p. 291) that rate cases may be handled informally and that rate reductions are sometimes forthcoming from negotiations between commissioners and utility officials.

<sup>36</sup> Phillips (1969) says that “informal procedures are frequently used to deal with customer complaints” and that “some commissions adopt informal procedures even when such issues as rates and rate of return are under consideration”, but that in such latter cases “interested parties, however, are usually not permitted to intervene as in formal proceedings”. (p. 139) He notes three advantages of informal procedures: time and money are saved, commissioners (as opposed to staff) become better acquainted with the problems confronting the industries, and an informal atmosphere is more conducive to mutual understanding and respect. Phillips (1993) identifies three similar benefits (saving time and money, better mutual understanding and respect, and more current data. He identifies two potential disadvantages: a potential denial of due process since intervenors cannot always participate, and reliability of unchallenged data

<sup>37</sup> E.g. MacAvoy (1970), MacAvoy and Breyer (1971) and Breyer and MacAvoy (1974) discuss at length the problems of the FPC without mentioning negotiated settlements.

<sup>38</sup> “Area ceilings reached by negotiated settlements between producers and consumers have been proposed to the [Federal Power] Commission, and the Commission has found them to be ‘reasonable ceiling prices’ not outside the range of possible average costs.” (p. 459)

comment on settlements.<sup>39</sup> Interestingly, it is a lawyer (Breyer 1982) who makes a brief comment on the FPC's use of negotiation and bargaining, finding the process and outcomes economically unsatisfactory.<sup>40</sup>

More recent textbooks on regulation are no more forthcoming than earlier ones.<sup>41</sup> Nor does the journal literature on economic regulation discuss settlements. The same is true of later literature in the public choice tradition.<sup>42</sup>

Cooter and Rubinfeld (1989) document how the law and economics literature has analysed settlement versus trial, most recently in terms of game theory. There has been some analysis of the incentives of plaintiffs and defendants, which assumes that settlements may be attractive in saving costs and reducing uncertainty.<sup>43</sup> But the authors explain that theory alone is insufficient to predict the effects of legal rules; strategic aspects of settlement behavior have not produced consensus; and economists have only recently begun to make empirical studies of trial settlement split. The contribution of this literature is thus somewhat limited as yet, and none of it has made particular reference to settlements in the context of public utility regulation.

## 4.2 Research by Joskow

In the early 1970s Joskow produced an important series of papers describing and analysing the formal and informal processes of public utility regulation. These led to greater understanding of how regulation actually works.<sup>44</sup> They introduced ideas and concepts that have potential implications for the analysis of settlements, although the papers themselves make no reference to the settlement process.

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<sup>39</sup> E.g. Noll (1971), Breyer (1971).

<sup>40</sup> "The difficulties of standard setting and public interest allocation led the FPC to rely in part upon negotiation and bargaining among pipelines and their customers. ... Yet negotiated plans, too, had serious drawbacks ... First, many of those affected by the plan were not represented at the bargaining table. ... Second, mutually satisfactory negotiated solutions did not necessarily send gas to where it was most valuable. ... Finally, the FPC decided to retreat to the rules set out in Order 467 and simply overlook the need for exceptions. This approach solved the administrative problem, but at the price of allocating gas in what was an economically arbitrary way." (Breyer 1982 p. 258)

<sup>41</sup> E.g. Kahn (1970, 1971), Owen and Brauetigam (1978), Bonbright et al (2<sup>nd</sup> ed 1988), Spulber (1989), Viscusi et al (2000). Crew and Kleindorfer (1979, p. 104), summarising practice in New Jersey, have one sentence noting the possibility of both sides agreeing to a stipulation to be approved or litigated. Spulber (1989 p. 32) cites research on mediating disputes but does not discuss negotiated settlements. Nor do other contributions from sociology and political science (e.g. Meier 1985, 1993, Ripley and Franklin 1982, 1991).

<sup>42</sup> E.g. Holburn and Spiller (2002), Holburn and Vanden Burgh (2006).

<sup>43</sup> "There is more scope for settlement when litigation is costly, negotiations are inexpensive, and the disputants are pessimistic about trial outcomes. ... Risk aversion ... presumably increases the probability of a settlement." (Cooter and Rubinfeld 1989 p. 1076)

<sup>44</sup> For example, he showed that the presence or absence of intervenors offering conflicting rate testimony has an effect on the allowed rate of return; analysed the utility's decision to seek rate increases or to offer rate reductions; and examined the choice of regulatory instruments and changes in regulatory processes. (Joskow 1972b, 1973, 1974, respectively) Joskow and Noll (1981) provide a useful review of this approach, including brief reference to the informal regulatory process and bargaining between commissions and utilities.

An unpublished part of Joskow's PhD thesis included a case study of regulation in New York State. It analysed what he called the 'informal regulatory process': "a negotiation or bargaining process embedded in a system of continuous day-to-day surveillance and occasional formal regulatory action".<sup>45</sup> In New York State this informal process was responsible for "most of the rate reductions and some of the rate increases that have taken place in the past ten years". (p. 71)

Why did firms bother with this informal process rather than wait for the Commission to come after them? Joskow concluded that the answer was fairly simple: in the long run it was more profitable to do so.<sup>46</sup>

At this stage, the 'informal regulatory process' meant settlements between the regulated firm and that part of the commission staff associated with consumer protection or the consumer advocate. Quite when, why and how far this process was superseded or complemented by settlements between the regulated firm and its customers or other interested parties remains to be documented.<sup>47</sup> To our knowledge, only three recent pieces of economic research, dating from thirty years after Joskow's work, examine how such negotiated settlements actually work in practice.

### 4.3 Settlements at FERC

Wang (2004) set out to determine how the settlement process at FERC differed from the formal adjudicatory process, how the outcome differed, and why the players settled a case. He examined 41 natural gas pipeline rate cases from 1994 to 2000, of which 34 were settled in whole, 5 were settled in part, and two were fully litigated. He noted that a

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<sup>45</sup> "This process involves efforts of the Commission to get a firm to lower its rates or improve its service quality without resorting to the formal hearing process. On the part of the firm it may involve attempting to anticipate demands of the Commission Staff and to act before the Commission does by offering rate reductions or attempting to reduce the Staff's demands to a level satisfactory to the company without having to resort to formal pressures." (Joskow 1972a p. 27)

<sup>46</sup> "Firms that can stay out of the formal hearing process either by efficient operations to avoid the necessity of filing for rate increases, or by very efficient operations coupled with a series of rate reductions over time, will tend in the long run to earn a higher rate of return than those firms that must continually file for rate increases or those firms that wait for the Commission to force them to make rate decreases. The firms seemed to have picked a strategy that allows them to trade-off short run profits for a higher level of profits in the long run. To put it another way, in New York State it pays to avoid the formal hearing process. There is a built-in incentive for efficient operations because firms that are in a position to file rate reductions or at least keep from filing for rate increases, can in effect keep part of the extra profits that they earn. This is the genesis of the aversion of firms to formal rate cases. These cases subject the firm's operations to a much greater level of scrutiny than the quarterly or annual reviews of financial reports, admit testimony of intervenors and force the Commission to make a decision that is much more visible to the public." (p. 74)

<sup>47</sup> Joskow has conjectured as follows. "At that time consumer groups were not so well organized. The New York PSC had an independent staff that was supposed to represent consumers. Since most of the price changes initially involved price reductions there was little intervenor interest. When price increases began to emerge there was more active intervention by industrial consumers and more formal rate cases." (personal communication 19 January 2006). See also Krieger (1995). Littlechild (2006a) dates the change in approach at the Florida PSC to about 1986, when the Office of Public Counsel began to get actively involved in settlements with the utilities.

typical case involved many issues.<sup>48</sup> He found that “the informal settlement process differs fundamentally from the litigation process, thus leading to significantly different outcomes.”<sup>49</sup> The most significant outcome was one that FERC could not impose in a litigated case.

Perhaps the most innovative settlement outcome is the rate moratorium provision in 21 of the 39 settlements in the sample. It is remarkable that the rate moratorium, a simple form of price cap regulation, arises endogenously from the settlement process of the traditional rate of return cases. FERC is prohibited by the governing statute from imposing a rate moratorium on the pipeline in a litigated case, but is free and willing to approve settlements with rate moratoria. (p. 142)

There is perhaps a question as to how far these rate moratoria were intended as a simple form of price cap in the sense of incentive regulation.<sup>50</sup> However, Wang’s conclusion is not in doubt, that the main purpose of settlement was not to reduce uncertainty about regulatory decisions, but to achieve an outcome that could not be achieved under litigation.<sup>51</sup>

#### **4.4 Stipulations at Florida Public Service Commission**

Littlechild (2003, 2006a,b) examined rate cases before the Florida Public Services Commission (PSC) during the period 1976-2002. He looked in particular at the role of the Office of Public Counsel (OPC) in bringing forward settlements (referred to as stipulations) with utilities and other interested parties. The main results were as follows.

- Stipulations were used in potentially more significant and promising cases: in 31% of earnings reviews but only 7% of cases where utilities requested rate increases and under 2% of ‘minor’ cases.
- Stipulations were more widely used for rate reductions than rate increases: they accounted for 77% of rate reductions but only 0.7% of allowed rate increases.

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<sup>48</sup> These include “the quality and variety of the services, the level and structure of the service prices, the inputs, and many other contractual issues such as the contract length and the timing of the following rate case”. (p. 142)

<sup>49</sup> “In order to reach the ‘just and reasonable’ end result for a litigated case, FERC follows an issue-by-issue merits determination procedure. That is, FERC makes a separate decision on each of the issues, based on the findings of fact and its rules, policy and precedents. During the settlement process, however, the players could focus directly on the end result by bargaining over all the issues together as a package, so that they can make tradeoffs among the issues.” (p. 142)

<sup>50</sup> A correspondent notes that gas pipelines were previously required to come in every three years for a rate case. FERC Order 636 in 1992 removed that obligation. Thenceforth, an important element of the settlement was the agreement between the pipeline and its customers as to how long the agreed rate should last before review. In other words, the fixed duration may have been primarily a response to the regulatory framework rather than an attempt to improve incentives to efficiency.

<sup>51</sup> “The empirical findings suggest that the players settle a pipeline rate case mainly to make the tradeoffs that cannot be made during the litigation process. Avoiding the uncertainty in the formal adjudicatory process is of secondary importance because the litigation outcome is apt to be fairly predictable, and for some cases is known.” (p. 143) “The settlement approach to ratemaking substantially expedites the regulatory process and leads to creative solutions that cannot be achieved through ratemaking.” (p. 162)

- Stipulations were typically associated with more significant outcomes: the average rate reduction was \$49.6m with a stipulation and \$6.7m without.
- Stipulations were not merely a way of saving costs: costs saved by stipulations were relatively small, estimated at under 0.5% of the amounts involved in the settlements.
- Stipulations were not merely an alternative route to the same outcome as litigation would have achieved: nine electricity stipulations achieved \$3.8bn of rate reductions, most of which would not otherwise have been achieved, and at the very least the savings were achieved earlier than they might otherwise have been.
- The benefits of stipulations were not limited to one set of users: industrial users gained most from the stipulations but residential customers gained too.

What did the Florida utilities gain from settlements that conceded large rate reductions? In addition to avoiding the uncertainty and possible embarrassment of hearings, utilities mainly achieved innovative modifications to the procedures and outcomes that the PSC would otherwise have adopted. Often they did so in the face of opposing advice by Commission staff. The utilities obtained more flexible accounting conventions (deferring provisions, and not increasing depreciation or reversing it). Most importantly the utilities secured revenue sharing incentive arrangements lasting several years instead of cost of service (rate of return) regulation or earnings sharing.

Whether Florida's experience is unique compared to other state utility commissions is a matter for further research. How far Florida's policy was associated with the person appointed as Public Counsel during this whole period remains to be seen, but important stipulations have been agreed under his successor.

#### **4.5 Settlements at National Energy Board in Canada**

Negotiated settlements have been encouraged by the National Energy Board (NEB) in Canada since the late 1980s and widely adopted since the mid-1990s. (Doucet and Littlechild 2006a) In contrast to the FPC, the NEB was not driven by a desire to reduce a backlog of cases, although there was certainly an aim to reduce the frequency and duration of regulatory proceedings. Government deregulation policy was also an influence. Importantly, oil and gas pipelines and shippers realised they could achieve their ends more effectively and more surely with settlements than they could by conventional litigation. Multi-year incentive agreements developed particularly rapidly among all the pipelines. Settlements have also been used to specify and improve service quality, revise information and publication requirements, and agree investments and risk-sharing arrangements for new facilities. One particularly innovative settlement provided for the transition of one pipeline's gas gathering and processing services to a specially designed scheme of light-handed regulation. This provided for negotiated settlements with individual shippers, information provision to facilitate price discovery, interconnection terms to reduce barriers to entry, and a complaint-handling procedure that envisaged the NEB as the last resort rather than the first.<sup>52</sup>

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<sup>52</sup> Schultz (1999), Doucet and Littlechild (2006a).

With the exception of one gas pipeline during the four-year period 2001-4, negotiated settlements have superseded the litigation of oil and gas pipeline toll and tariff cases for at least the last decade. They have streamlined the regulatory process. For example, settlements last between 50 per cent and 150 per cent longer than previous litigated outcomes, and NEB processing times have been cut by between a quarter and two-thirds. Settlements have also provided a new forum for collaboration and increased value creation between pipelines and their customers. Observers and participants are in no doubt that this could not have occurred under the traditional litigated approach to utility regulation.

The key contributions of the NEB seem to have been twofold. One was to modify the settlement guidelines in 1994 to say, in effect, that if the process of settlement was acceptable (i.e. was open and reached general agreement) then the Board would deem the outcome just and reasonable and would not 'cherry-pick' the settlement. This assured the parties that their negotiations were not in vain. The other contribution was the 'generic cost of capital' decision that provided an explicit and uniform basis for annually updating the cost of capital of each pipeline in the absence of a settlement. This removed a main source of dispute and of market power, and thereby facilitated negotiation and agreement on the provision of services of increased value to customers.

Ongoing research on the use of settlements at the Energy and Utilities Board (EUB) in Alberta (Doucet and Littlechild 2006b) suggests that the EUB takes a more 'hands on' approach than the NEB, and places more emphasis on generating information for the record. Nonetheless, settlements have been increasingly adopted in Alberta, and take roughly half as long to complete as litigated cases. Settlements have also been innovative. For example, one settlement introduced performance based rate making in the gas sector; another settlement was the means of implementing the Regulated Rate Option (RRO) in the electricity sector. The latter is an innovative form of retail price control based on a risk-sharing approach to energy procurement contracts, which is unlikely to have been possible under traditional litigation.

## **5. Conclusions**

### **5.1 Main findings**

Economists have unduly neglected negotiated settlements. In the 1960s settlements may simply have been a means of clearing a sudden regulatory backlog. In the 1970s they may have provided a way of avoiding hearings and reducing regulatory processing times. In the three jurisdictions where settlements from the 1980s onwards have recently been studied, they have indeed reduced regulatory processing time. During the 1990s they largely superseded the conventional process of regulation by litigation. But they have also provided a means of introducing radical and innovative changes that either could not or would not have been implemented with the conventional regulatory approach. Examples include price moratoria, multi-year incentive regulation including with respect to quality metrics, and a carefully designed and implemented transition to light-handed regulation with provision for settlements negotiated with individual users.

## 5.2 Further research

The three studies cited do not begin to cover the whole of North America, and they have focused on the energy sector. Settlements have been observed and/or encouraged in several other sectors too.<sup>53</sup>

It would therefore seem worth systematically documenting the extent to which settlements are used across the utility sectors and across other jurisdictions in North America. How have settlements developed over time, and what types of cases are or are not conducive to settlement? Inter alia, this would test the hypotheses and remedies put forward by Morgan. The three studies mentioned have begun to document the nature and effects of settlements, but more work is needed to understand more precisely what the benefits are and who gains most, when and where settlements work well and when and where they don't. An important factor is the role of the regulatory agency, consumer advocate or attorney general in representing the interests of smaller and residential customers. Are the latter more vulnerable to settlements than to litigated decisions or (as in Florida) do they appear to secure net gains? Also important is the effect or otherwise of the regulatory framework and the policy of the regulatory agency.

Have there been settlements in other countries where litigation is not the norm, or are they less needed there? In the UK, for example, the license amendments that are a typical means of implementing price controls offer the regulator more flexibility than the North American litigated framework. Nonetheless, an interesting recent development is the encouragement by the UK Civil Aviation Authority (CAA) of "constructive engagement" between British Airports Authority (BAA) airports and their airline users. The aim is to agree a business plan including traffic forecasts, investment requirements and other parameters relevant to the agency's price control review. Good progress is reported at BAA's two largest airports (London Heathrow and London Gatwick).

## 5.3 Implications for policy

Given the success of settlements in the three jurisdictions studied, it is surely worth considering their use elsewhere. It is also worth reflecting on the policy stance that settlements embody. Conventionally, the decision to regulate a utility or other sector means that the judgements, preferences and decisions of the market participants are replaced by the judgements, preferences and decisions of the regulatory agency. Even if the agency wishes to replicate the effects of a competitive market, it still makes all the key decisions. Negotiated settlements change that. Subject to a satisfactory settlement process, the regulatory agency allows market participants to make the key decisions themselves, using their own judgements and preferences.

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<sup>53</sup> One recent example is the invitation of the FCC chairman (M Powell) to incumbent telephone network providers and their competitors to "work earnestly to arrive at commercially negotiated [access] rates". At least two networks seem to have taken this up. Sappington and Unel (2005 p. 282)

If the purpose of regulation is to prevent market participants from taking their own decisions, and to substitute regulatory decisions reflecting a different view of the public interest, then settlements may not be appropriate. But if regulation is justified by some perceived 'market failure' such as market power or a free rider problem, with no presumption that the judgements of market participants are inadequate, then settlements can be encouraged. In doing so, the regulatory agency can take steps to address the market failure without substituting its own judgements on the main decisions.

The NEB's 'generic cost of capital' decision is a case in point. It served to curb the pipelines' market power without prescribing the form or duration of the terms that pipelines and users might agree upon. Where representatives of smaller consumers might otherwise be unable to participate adequately, some jurisdictions like the EUB in Alberta make provision for funding relevant expenses. In Argentina, transmission users propose, decide and finance transmission expansions, with provisions for all to pay so as to deal with the free rider problem. (Littlechild and Skerk 2004a,b) Going back to an earlier era, the study by Coase (1974) of how British lighthouses were financed in the nineteenth century shows how institutional arrangements can overcome a public goods problem while leaving decisions to the lighthouse users and builders. These various examples suggest that, within an appropriate framework, transactions costs have not been a bar to effective negotiations.

In all these cases there is a more limited but nonetheless still critical role for regulation. The concept is broader than 'promoting competition'; it is more like 'enabling the market to work'. To use the words of Morgan (1978) cited above: "agencies should be viewed not primarily as decision makers ... but as a means of helping the parties ... work out a result that is both mutually acceptable and in the public interest".

Within many present regulatory frameworks, regulators could invite licensees and market participants to explore the possibility of settlements. It would also be possible to design or modify statutory duties to enable or encourage this approach. For example, the Alberta Energy and Utilities Board Act 1995 (s132) provides that "the Board must recognize or establish rules, practices and procedures that facilitate negotiated settlement". A UK utility regulator is presently obliged to 'protect the interests of consumers, wherever appropriate by promoting effective competition'. It would be possible to add the clause 'and by promoting negotiated settlements or other arrangements agreed between licensees and consumers'. There is evidently much scope here for fruitful work by economists, lawyers and policymakers.

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