Is Utility Law Neutral?

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We often hear that utility law is neutral; that its purpose is to "balance the interests of shareholders and customers." This perspective misses utility law's very purpose: to identify and address the unavoidable conflicts between the utility's private interest and the statutory public interest. Meanwhile, conventional regulatory practices give more space to monopoly messaging than to objective analysis.

To explain and correct these errors, I address here two questions:

- *Legal substance:* Does our decisionmaking downplay the utility's conflicts of interest?

- *Legal procedure:* Do our procedures favor the utility messaging over objective analysis?

The resulting analysis points to this answer: Commissions should do less presiding, more leading. Commissions are not courts; they are policymakers, obligated to align legal substance and procedure with legislative intentions and market realities. The legislative intention is not to

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balance shareholder and customer interests, but to align the utility's conduct with the public interest.

I. Legal substance: Does our decisionmaking downplay the utility's central conflict of interest?

I address here three interrelated concerns:

- There is an inherent, unavoidable conflict between a monopoly and its captives. Why then do we presume the monopoly's "prudence" and "good faith"?
- We allow utilities to hide their conflicts when they should be removing them.
- We allow executive compensation plans that reward executives for acting adversely to customers

A. There is an inherent, unavoidable conflict between a monopoly and its captives. Why then do we presume the monopoly's "prudence" and "good faith"?

1. The presumption of prudence in brief

a. Ratemaking statutes commonly impose on the utility a burden of proof; specifically, the burden of proving that its rates are just and reasonable. This burden of proof translates into a risk of nonpersuasion.[2] A utility that fails to carry its burden of proof on an issue loses that issue.

b. Some commissions help the utility meet its burden of proof by applying a rebuttable presumption of prudence. The presumption has this evidentiary effect: The utility need not provide any affirmative evidence of its prudence unless an intervenor, or the commission, first produces evidence of imprudence—evidence that creates "serious doubt" about the utility's prudence. By producing that evidence of imprudence, the intervenor rebuts the utility's presumption of prudence. The utility then must produce affirmative evidence of its prudence, or lose for failure to carry its burden of proof. The utility's evidence of prudence, if it overcomes

[2] *See generally* James Fleming, Jr., Burdens of Proof, 47 Va. L. Rev. 51 (1961).

the intervenor's evidence of imprudence, satisfies the utility's burden of proof.[3]

c. *Terminology caution:* Some describe the intervenor's burden as a "burden of proof," but that terminology is technically inaccurate. The utility has the burden of proving that its proposed rate is just and reasonable. The intervenor's burden is not a burden of proof but rather a burden of production. If the intervenor produces no evidence of imprudence, the utility's presumption of prudence remains unrebutted; the presumption that was rebuttable becomes conclusive. The utility has, technically, "proved" its reasonableness without having produced any evidence of its prudence. That is the power of the rebuttable presumption: If unrebutted, it allows the utility to carry its burden of proof.

d. A South Carolina Supreme Court decision sums up this standard approach:

> Although the burden of proof of the reasonableness of all costs incurred which enter into a rate increase request rests with the utility, the utility's expenses are presumed to be reasonable and incurred in good faith. This presumption does not shift the burden of persuasion but shifts the burden of production on to the Commission or other contesting party to demonstrate a tenable basis for raising the specter of imprudence. This evidence may be provided . . . through the Commission's broad investigatory powers. The ultimate burden of showing every reasonable effort to minimize . . . costs remains on the utility.[4]

2. The presumption of prudence has no substantive rationale

a. Tracing the the presumption of prudence back to its likely origin reveals no rationale in law, logic or policy. I have seen no court or commission decision that explains why a commission should

[3] *See, e.g.*, *State ex rel. GS Techs. Operating Co. v. Pub. Serv. Comm'n of Missouri*, 116 S.W.3d 680, 694 (Mo. Ct. App. 2003) (explaining that if the intervenor creates "serious doubt," the utility has "the burden of dispelling these doubts and proving the questioned expenditure to have been prudent").

[4] *Utils. Servs. of S.C. v. S.C. Office of Regulatory Staff*, 392 S.C. 96, 109-110 (2011) (quoting *Hamm v. S.C. Pub. Serv. Comm'n*, 309 S.C. 282, 286-87 (1992)).

assume that company protected from competition will perform as if it were subjected to competition. Nor has any court or commission explained why an intervenor or a commission, lacking any information about the utility's internal decisionmaking, should presume that the decisionmaking is prudent.

b. As far I can tell, the presumption traces back to Justice Brandeis's famous concurrence in *Missouri ex rel. Southwestern Bell Tel. Co. v. Pub. Serv. Comm'n of Missouri,* 262 U.S. 276 (1923). There he wrote (at 289 n.1):

> The term "prudent investment" is not used in a critical sense. There should not be excluded, from the finding of the base, investments which, under ordinary circumstances, would be deemed reasonable. The term is applied for the purpose of excluding what might be found to be dishonest or obviously wasteful or imprudent expenditures. Every investment may be assumed to have been made in the exercise of reasonable judgment, unless the contrary is shown.

This short paragraph contains no statutory, constitutional or policy rationale for "assum[ing]" that a monopoly always incurs its costs "in the exercise of reasonable judgment." The passive voice ("may be assumed") yields no information about the source of the assumption. Moreover, the language grades the utility on a curve: In return for the lucrative right to provide a monopoly service to captive customers, a utility need only be not "dishonest or obviously wasteful or imprudent."

3. Reasons for modifying the presumption

a. In the nonutility world, a seller's performance is disciplined by competition. Under competition, a seller that fails to perform as well as its competitors loses revenue to those competitors. In regulating utilities, the way to induce competitive performance is to set competitive performance standards, then reduce the utility's revenues to the extent it fails to satisfy those standards.

b. Given this logic, the presumption of prudence makes no sense. It substitutes a presumption about performance for actual performance. But customers don't pay for presumptions; they pay for performance. Presumed performance is not real performance.

c. Today we have utilities that—

(1) fail to assess whether their coal plants' prospective costs are lower that the all-in costs of alternative supply scenarios;

(2) fail to join regional transmission organizations, where generation costs—customers' largest costs—are subjected to competition rather than incurred by rate-basing;

(3) insist on "incentives" merely to perform at average levels;

(4) resist using competitive bidding in determining generation options; and

(5) compensate executive leadership based not on performance for shareholders rather than customers.

How are those behaviors so obviously customer-focused and customer-benefitting as to deserve a presumption of prudence?

d. Searching for defenses of the presumption, I found in one appellate decision this statement: "[T]he pressures of a competitive market and the fact of arm's length bargaining for goods and services allows us to assume, in absence of a showing to the contrary, that such operating expenditures [of the utility] are legitimate."[5] This statement lacks logic. A retail utility might buy some of its inputs from a competitive market, but it does not itself operate in a competitive market. So it has no urgent reason to choose the least-cost suppliers—or to operate so efficiently as to reduce its dependence on outside suppliers.

e. Equally importantly, we all know that an investor-owned utility increases its profit by (a) making capital expenditures to increase its rate base; and (b) in rate cases, over-projecting operating expenses and under-projecting sales. Despite these obvious biases, we grant the utility a presumption of prudence.

f. In sum: When there are no competitive forces to align the seller's interests with the customers' interests, those interests are in conflict. When a seller has interests in conflict with its customers,

[5] *Boise Water Corp. v. Idaho Pub. Utils. Comm'n*, 97 Idaho 832, 838 (1976).

the logical posture is not presumption of prudence but skepticism about performance.

4. Ways to modify the presumption

a. Despite the presumption's problems, commissions still use it. And when commissions and intervenors lack the resources to produce evidence of imprudence, the presumption of prudence becomes a free pass to cost recovery. But a free pass conflicts with regulation's purpose. What are the alternatives?

b. Utilities argue that with the presumption, each utility would have to affirmatively prove the prudence of every decision and the reasonableness of every dollar. This is hyperbole—exaggeration designed to distract. For routine decisions whose costs are in line with market prices, that rationale does work. But for nonroutine expenditures, the commission should assume that a company protected from competition will not act as if subjected to competition. The commission should require proof of prudence—objective facts showing that the utility's costs are the lowest feasible costs.

c. Consider the Florida Commission's response when Gulf Power, a Southern Company subsidiary, sought rate base recovery of, and return on, its coal inventory. The utility's sole evidentiary support was "the collective wisdom of the company's management." The Commission was unimpressed:

> With all deference to Gulf's management, a policy followed by management that has such a tremendous financial impact on ratepayers must be substantiated with more than an assertion that it is the result of collective management wisdom. We do not wish to substitute our judgment for that of management. However, we insist that management's judgment be substantiated in a way that permits intelligent review of it.

The Commission then described the type of evidence that would show prudence:

> [Substantiating management's judgment] can best be accomplished by performance of an analysis or study that identifies all of the major factors that

> influence development of a coal inventory policy, indicates the relative weight that should be attached to each factor, and evaluates the benefits and costs, in light of these factors, associated with a range of alternate coal inventory levels. . . . In the absence of that kind of empirical support for its position, we find that the Company failed to carry its burden of proof.[6]

The Florida Commission had it right. Its approach—and my recommended approach—neither conflicts with the presumption, nor requires the utility to justify every dollar. The commission can specify expenditures for which it requires affirmative evidence of reasonableness. By applying the presumption surgically rather than universally, the commission will avoid the generic presumption's adverse effect—an auto-acceptance of an unproven presumption that all costs are prudent unless shown otherwise.

B. We allow utilities to hide their conflicts when they should be removing them

1. Any transaction between a seller and a buyer has the potential for conflict. The seller wants the highest possible profit; the buyer wants the lowest possible price. In competitive markets, both sides to the transaction rely on market forces to narrow, eliminate, or least resolve, that conflict. Market forces play that role because the true market force is the availability of alternatives. Alternatives allow each of the seller and the buyer to walk away from each other.

2. In the utility-customer relationship, there are no competitive market forces because the customer has no alternatives. The substitute for market forces is the regulator. But the seller-buyer conflict is still there. What then must the regulator do?

    a. First, identify the conflict—each situation in which where the utility can profit at the customer's expense.

    b. Then, for each conflict identify a standard for performance—a standard that can act as a proxy for the absent alternatives. Only that way can regulation create the discipline that we get from competition.

[6] *Gulf Power Co. v. Fla. Pub. Serv. Comm'n*, 453 So. 2d 799, 804 (Fla. 1984).

c. Organize evidentiary hearings around the utility's conflicts. Organize the hearings not around what the utility wants, but around what the public interest requires.

3. How does the utility's inherent conflict—between its profit interest and the public interest—so routinely get suppressed? One reason is social. Regulators are people. People don't like conflict. The social pressure is always to avoid conflict, to settle cases as if our interests were in common. I know a consumer advocate—a highly professional, and fearless attorney—who was told by a utility executive "We all got along fine until you got here." The social pressure is that if you don't buy the utility's framing, if you don't settle, you're the cause of the conflict. That social pressure hides the fact that the conflict is inherent in the utility's monopoly position.

C. We allow executive compensation plans that reward executives for acting adversely to customers

1. Incentive compensation plans should align the legitimate interests of investors and customers

a. Spread over billions of kilowatthours, the actual dollars in executive compensation plans affect customers only minutely. But decisions made by utility executives affect customers greatly. The problem presented by incentive compensation is less its size than its shape.

b. In a competitive market, a company's earnings—and thus its stock value—depend on attracting and keeping customers. In that competition context, paying compensation based on earnings need not conflict with the interests of customers. But in the monopoly context, that logic fails.

2. The typical utility executive compensation plan does the opposite

a. Like a competitive company, a utility can reward its executives based on earnings and stock price. But unlike a competitive company, a monopoly utility's earnings don't much depend on attracting and keeping its customers. Its earnings depend, heavily, on persuading regulators to adopt rates that produce the widest possible gap between actual revenues and actual costs. One way to get a wide gap is to persuade regulators to approve increases to rate base, to over-project operating costs, and to under-project sales. Persuading the regulator to plug those incorrect numbers into the

standard equations for revenue requirement and rates increases the potential for higher earnings.

b. So when a utility bases executive compensation on earnings or stock price, or when it compensates executives with stock rather than dollars, it causes conflict with multiple regulatory priorities. Consider three examples.

(1) *Basing compensation on short-term earnings rewards cost-cutting.* Cost-cutting helps customers only if it eliminates waste; not if it defers necessary maintenance, deprives utility employees of the pay they need to perform at their best, or reduces the types of research and development that support innovation. Basing compensation on short-term earnings also rewards executives who game the regulatory process by proposing to commissions a revenue requirement that exceeds the expected cost of service.

(2) *Basing compensation on stock price, along with paying compensation in stock, can cause companies to prefer rate-based capital expenditures over less expensive operating-cost measures.* Large capital expenditures make a company debt-heavy, therefore less able to respond nimbly to new technologies that empower customers to save on their bills. These capital expenditures become sunk costs that all customers have to pay off before they can enjoy new forms of supply, like solar self-supply or energy conservation.

c. Basing compensation on earnings is common in competitive markets. But the practice doesn't transfer comfortably to a utility monopoly market. Under competition, a company's financial results depend on satisfying customers, because customers can always shift their purchases to other companies. So a plan based on the company's financial results has no necessary conflict with the customers' interests. A utility monopoly's customers cannot shift their purchases to other companies. So the potential for conflict is constant.

3. Solution: Align executive compensation with operational performance, unconflicted by financial performance

a. The solution to executive-compensation conflict is not to disallow executive-compensation dollars. We need to pay our utility executives what it takes to attract the best people. And merely disallowing costs won't remove the conflicts because the small dollars involved, relative to the billions in revenues, won't cause the utility boards to remove the conflicts.

b. Instead, commissions should require utilities to replace conflicted plans with unconflicted plans: plans that compensate based not on earnings performance but customer-oriented performance. Commissions should require that compensation plans link executive pay to indices that advance efficiency—indices like generating unit heat rates, nuclear unit downtime, advanced meter installations, distribution losses, and customer conservation.

c. Utilities might argue commission involvement in executive compensation plans crosses the boundary that separates regulating the company from running the company—a violation of the so-called "management prerogative doctrine."[7] I disagree. Regulators routinely influence utility operations when they approve or disapprove plenty of inputs, like fuel contracts, purchased power agreements, generating units, mergers and acquisitions, and refinancings. And regulators have overall responsibility for ensuring that the utility carries out its obligation to serve reliably and cost-effectively. Prohibiting a utility from rewarding executives for actions that harm customers is not running the utility; it's protecting consumers who cannot protect themselves. That is precisely what regulators should do.

II. Legal procedure: Do our procedures favor utility messaging over objective analysis?

On legal procedure, I present three challenges:

[7] Interpreting utility statutes, some courts draw this rough line: Regulators do outcomes (prices, quality, safety); while utilities do inputs (corporate organization, purchasing practices, hiring and firing). I discuss this case law in my book *Regulating Public Utility Performance: The Law of Market Structure, Pricing and Jurisdiction* (Amer. Bar. Assoc. 2d ed. 2021) at Chapter 2.D.3.d.

- Why do we frame proceedings based on the utility's positions rather than on public-interest perspectives?

- Why do we organize hearings around parties rather than by issues?

- During evidentiary hearings, why are tribunals so often silent?

A. Why do we frame proceedings based on the utility's positions rather than on public-interest perspectives?

1. The need to frame objectively

a. Framing a proceeding is how an agency can establish and communicate a proceeding's purpose. In regulatory statutes, the lodestar is the public interest. This statutory phrase purports to describe the regulator's mission, but phrase's breadth gives insufficient guidance. Sufficient guidance comes from the commission's framing. When a commission agency frames a proceeding about a utility proposal, the commission is defining the public's interest in that action, then establishing how the proceeding will pursue that public interest.

b. Framing means stating the questions that the proceeding must answer, as specifically as possible. The ultimate questions are always these:

(1) What is the desired performance?

(2) How do we shape the utility's actions and goals to produce that performance?

2. The utility's stake in framing

If the commission doesn't perform this framing function, the utility will do it. For framing is the first stage in the contest to set the commission's priorities—the stage where the utility seeks to have the commission adopt the utility's definition of the public interest, and the utility's view of the relevant questions. The utility frames the proceeding to increase the chance that the proceeding's outcome with match the utility's goals.

3. The active regulator's approach to framing

a. How well do we, as regulators, resist the utility's frame? How often do our orders and opinions start by describing what policy the utility wants rather that what performance the public interest requires? Rather than allowing the utility's interests to control the agency's framing, the active regulator—the effective regulator—frames the proceeding to align the utility's interest with the public interest. Instead of the agency answering the questions that the utility wants answered, the active agency establishes the questions that the utility must answer.

b. Litigation involves advocacy, but advocacy does not ensure objectivity. Advocating a position is not the same thing as explaining an issue. Parties often conflate these two things by spinning: framing an issue in a manner that leans toward the preferred outcome. Spinning works when regulators are passive: when they copy the utility's statement of issues into the agency's statement of issues. Active commissions, in contrast, rewrite the parties' issues so that objectivity prevails. Doing so signals to the parties that the path to persuasion is not spinning but educating. The result is a forum that parties respect rather than manipulate.

c. Consider Judge Posner's plea for help:

> I don't understand [lawyers'] inability to see their cases from the judges' perspective. If they could do that they might realize that they are not giving the judges what they need the full context of the case, both factual and legal, making no unrealistic assumptions about the extent of judicial preparation and depth of judicial understanding of novel cases. Lawyers who can imagine themselves as judges would understand the importance of visual aids, the importance of scene setting, the necessity of radical simplification, and the acute judicial need for patient explanation of the mysteries of modern technology, an ever more salient element of modern litigation.[8]

4. Tools for active framing

a. *In the opening order, state the issues as precisely as they will appear in the agency's final order:* The more precision and detail

[8] Richard Posner, *Reflections on Judging* at 357 (2013).

in the agency's statement of issues, the more likely that parties will address those issues in the detail necessary to make the record complete. Vague categories like "effect on competition" and "effect on rates" are too loose; they leave the parties free to omit facts and analyses they find inconvenient—the very facts and analyses that the commission needs to make the right decisions. Better to use precise questions like "Will the vertical joining of generation and transmission erect entry barriers in specific product and geographic markets?"

b. *Be alert to evidentiary gaps:* Parties might hope that by ignoring the agency's frame, they can return the case to their initial focus. This strategy takes the form of evidentiary submissions that are narrower and vaguer than what the agency needs. The agency must be alert to these gaps when they occur. Otherwise, the opinion-writers could face a post-hearing stack of submissions and transcripts that is insufficient to decide the issues that the agency wants to decide.

c. *Remember the unrepresented:* Given the high cost of participation, there will be interests and groups affected by a regulatory proceeding who cannot participate in it. Commissions should fill these participation gaps by including in the issue list those issues that the nonparticipating interests would have raised.

B. Why do we organize hearings around parties rather than by issues?

1. Commissions typically organize evidentiary hearings around parties. Each party presents its witnesses for cross-examination, one at a time, in whatever order the party wants. A witness who testifies on multiple issues gets crossed on all those issues during the witness's single appearance. For each witness, each opposing party's lawyer takes a turn cross-examining. Only occasionally the ALJ or a panel member will insert a question. Most tribunals ask few if any questions; if they ask any, they do so only after the attorney cross is complete. And if an opposing counsel says "I have no cross of this witness," most tribunals excuse the witness rather than asking their own questions—even if the witness has prefiled 100 pages of detail.

2. This standard practice elevates parties over issues. It scatters discussion of a single issue over multiple days and weeks. It makes the tribunal a passive observer rather than an active decisionmaker. The evidentiary hearing becomes a platform for party strategy rather than an opportunity for tribunal enlightenment.

3. The better approach is to organize the evidentiary hearings around issues rather than parties, and to witness panels rather than individual witness appearances. The tribunal divides the hearing days into issue segments. For each issue segment, all parties' witnesses who address that issue appear on a panel simultaneously. The tribunal begins the questioning, asking whatever questions they deem necessary to help them understand the issues requiring resolution. When the tribunal's questioning is complete, the parties have an opportunity to question. At that point, most of the necessary questions have been asked.

4. I used this approach in a series of proceedings held by the Hawai`i Commission to address renewable portfolio standards, third-party administrator for energy efficiency programs, competitive bidding requirements, distributed generation, feed-in-tariffs, decoupling, renewable energy surcharges, and other issues relating to the need to reduce the states dependence on fossil fuels. I also used it as the hearing examiner for the Puerto Rico regulator's rate case hearings in November and December 2025.

5. This approach raises the value-per-day ratio dramatically. There are at least three reasons: (a) The witnesses are debating their positions with each other, (b) a full discussion of a particular issue occurs in one place in the transcript, and (c) the majority of questions reflect the commission's needs rather than the parties' strategic goals.

6. Richard Posner makes a similar recommendation. His *Reflections on Judging* (2013), in a subchapter on juries' difficulty dealing with complex issues (at p.311), suggests having opposing witnesses testify in pairs, back to back.

C. During evidentiary hearings, why are tribunals so often silent?

In my experience as a witness and litigator, I have seen active questioning by the tribunal only rarely. Most often, the hearing examiner, the ALJ, and the commissioners mostly watch. One learns little about what is on their minds, or what questions they have. In other situations—such as my work in Puerto Rico and Hawai`i, the tribunal has been an active questioner. Consider these comments by the Puerto Rico utility regulator, in a recent rate case in which I was the Hearing Examiner. The regulator made clear its expectation that together, the Hearing Examiner and Commissioners must produce a complete record:

> It is essential for the Hearing Examiner and the Commissioners to ask questions to ensure that the record

> contains all necessary elements for the proper adjudication. As consistently recognized in administrative law and adjudicator practice, the presiding officer is authorized to ask questions that seek clarification, elicit additional relevant information, or further develop the administrative record, provided that such questioning does not cross the line into advocacy.[9]

The Energy Bureau later supplemented those thoughts:

> [T]hroughout the evidentiary hearing, the Hearing Examiner made clear that the determination of a just and reasonable rate cannot rest exclusively on the evidence that the parties elect to present, particularly where such selective presentation would omit information necessary for the Energy Bureau to fulfill its statutory mandate. The Hearing Examiner further explained that the Energy Bureau must consider all relevant and material information required to reach a well-informed decision, and that the development of the evidentiary record cannot be left solely to the discretion of the parties advocating for the approval of a rate. Rather the Commissioners must have access to the information necessary to independently, assess whether the proposed rate is just and reasonable.[10]

Here are similar thoughts from a federal circuit court:

> [T]he Commission has claimed to be the representative of the public interest. This role does not permit it to act as an umpire blandly calling balls and strikes for adversaries appearing before it; the right of the public must receive active and affirmative protection at the hands of the Commission.
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> The Commission must see to it that the record is complete. The Commission has an affirmative duty to inquire into and consider all relevant facts.[11]

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[9] Resolution and Order (Dec. 9, 2025), Case No. NEPR-AP-2023-0003.

[10] Resolution and Order of January 16, 2026, Case No. NEPR-AP-2023-0003.

[11] *Scenic Hudson Preservation Conference v. Federal Power Commission*, 354 F.2d 608, 620 (2d Cir. 1965) (referring to the Federal Power Commission), *cert. denied sub nom*., *Consolidated Edison Co. v. Scenic Hudson Preservation Conference*, 384 U.S. 941 (1966).

III. Commissions are not courts; they should do less presiding, more leading

A. Regulators are policymakers, not dispute-deciders

1. In some states, the commissioners view themselves as judges and the commission as a court. They wait for disputes to decide, they leave it to the parties to make the record, and they assume that oppositional adjudication will produce the record they need. They label themselves and their procedures "quasi-judicial." This practice is wrong.

2. A utility commission's purpose derives from its origins. The state's legislature (in around eight states, the state's constitution) creates a commission. It delegates to that commission a set of substantive powers—powers to set rates, to set performance standards, to determine whether mergers and consolidations satisfy the public interest. Common to these commands and standards is a single legislative purpose: within a defined substantive space (e.g., activities of electricity, gas, telecommunications and water utilities), make policy for the public.

3. That is not what courts do. No statute or constitution grants substantive powers to a court. Courts merely resolve disputes; they don't make substantive policy.

4. Courts and commissions do have commonalities. Both make decisions that bind parties. Both base decisions on facts. Both create evidentiary records through adversarial truth-testing. But courts do not receive substantive duties from legislatures. Courts do not seek problems to solve; they wait for parties' complaints. Courts don't promulgate rules for general applicability; they resolve disputes of individual parties. Courts are confined to violations of law. In contrast, commissions are compelled by statute to advance the public welfare. A court can only eliminate negatives; a commission is required by statute to produce positives.

5. It is true that like commission decisions, court orders can make policy that affects nonparties. A class action suit under civil rights or securities laws, an antitrust suit against a Microsoft or an AT&T, can set policy for a generation. But consider this difference: In courts, the judge's power to act is defined by, and confined to, the issues stated by a plaintiff's complaint. At commissions, a party's filing is stimulation but not limitation. The commission can add issues, combine proceedings, invite the appearance of other parties, or convert a two-party complaint into a multi-party rulemaking, all as the public interest demands.

6. We cause confusion when we describe a commission as "quasi-judicial." The phrase makes one sound erudite but it communicates little. "Quasi" means "seemingly." A commission is "seemingly judicial"? "Kind of looks like judicial?" No. A commission "kind of looks like" all three branches of government. It looks like a legislature when promulgating rules, like an executive agency when enforcing those rules, and like a court when deciding complaints. But utility commissions, looked at legally rather than analogously, are not "like" anything. They are what they are: units of government created to exercise powers delegated by legislature or constitution to make substantive policy, sometimes using court-like procedures, other times using legislative-like procedures, other times using executive-like procedures.

B. Acting like a court undermines a commission's effectiveness

1. A court's substantive power is defined and confined by the plaintiff's complaint. A regulator who acts like a judge confines himself similarly: She assumes that the parties, their interests, their arguments, and their legal citations comprise the full factual and substantive universe warranting his attention. This assumption relies on one or more incorrect premises:

    a. that a proceeding's multiple private interests will display some pattern from which the commission can determine the public interest;

    b. that those private interests' evidentiary submissions will produce information sufficiently relevant and objective to discern the public interest;

    c. that all possible private interests have hearing room resources sufficient to get the commission's ear; or

    d. that through all the oppositional conduct at the evidentiary hearing, the truth will emerge.

2. A commission that accepts any of these premises undermines its effectiveness, by:

    a. becoming intellectually passive, focusing on what the parties are seeking instead of how to advance the public interest;

b. imposing the wrong time horizon (the parties' short-term desires rather than the public's long-term needs);

c. reducing the regulator's objectivity because the regulator learns the issues from parties' arguments rather than from impartial sources; and

d. distorting the regulator's personal time management, because as the parties load the record with conversation among themselves—testimony, cross-examination, and briefs exchanged four ways (direct, reply, answering, and cross-answering)—procedural law compels the regulator to read every page, leaving insufficient time and mental space to read and think on her own.

C. Conclusion

A commission is not a court; a regulator is not a judge. In regulation, there is no reason for a commission to adopt a court-like posture, waiting for disputes to arrive and saying nothing during the evidentiary process. A commission must lead, not preside.

IV. "Affordability": No place for CEO virtue-signaling

A. This letter went from Philadelphia Electric's CEO to its customers

Dear Customer,

I'm writing to personally share an important update regarding your PECO electric and natural gas service.

After listening closely to our customers, community partners, and leaders across our region, PECO has decided to withdraw our previously filed electric and natural gas regulatory rate review requests with the Pennsylvania Public Utility Commission (PUC).

I know many households and businesses are facing real financial pressure from rising everyday costs not just energy, but housing, food, healthcare, transportation, and more. Given those realities, we believe now is not the right time to move forward with additional delivery rate increases.

What this means for you

By withdrawing these filings, your electric and natural gas delivery rates will not increase.

Safety and reliability remain nonnegotiable. We will continue essential investments to keep your service safe, secure, and dependable.

This is a timing-based decision, not a change in our long-term commitment to maintaining and modernizing the energy system that southeastern Pennsylvania depends on.

We will also continue expanding energy assistance, energy efficiency, and customer support programs especially for those customers who need help the most.

Listening to our customers and acting responsibly is core to how we do business. This decision reflects our commitment to balancing affordability today with safe, reliable service now and thoughtful investments for the future.

Thank you for trusting PECO to serve you and your community.

Sincerely,

David Vahos
PECO President & CEO

B. My thoughts

1. Two legal violations

a. He says "putting customer affordability first." Well then, what is "second"? The needs of the electric system? Affordability is not part of a utility's legal obligation; satisfying the needs of the electric system is its legal obligation. To put something that is not the utility's legal obligation ahead of something that is its legal obligation is to violate that legal obligation.

b. He says that PECO is "balancing" affordability with safe, reliable service. That statement is also a statement of unlawfulness. You don't "balance" anything against safe, reliable service. A "balance" presumes opposites, meaning that you do less of each to get to a "balance." But under the statute the utility is not allowed to provide anything less than safe, reliable service. The utility has no legal discretion to make affordability a factor in deciding when to spend money. The utility has no discretion to balance anything against its obligation to serve reliably.

c. What if you were a utility shareholder? A utility shareholder invests to make money. A retiree invests in a utility to have money for retirement. The utility's board of directors has a fiduciary obligation—a legal obligation—to its shareholders to maximize profit. When utility seeks a rate increase to pay for capital expenditures, and wins that rate increase, there is more profit for shareholders. So what is this utility saying—that it will violate its fiduciary obligation to its shareholders, in the name of affordability of its customers? The utility is not a charitable organization. If shareholders are concerned about affordability, they can make their own charitable contributions. If the utility is forgoing profit to assist affordability, it is violating its fiduciary obligation to its shareholders.

2. Misunderstanding of affordability's relationship to ratemaking

a. For most of us, there is no problem of "affordability." So lowering rates for all, because electricity prices are a problem for some, starves the electric system to give well-off people a break. How sensible is that?

b. Affordability is a societal problem, therefore a political problem. A political problem requires a political solution. Political solutions must come from legislators, not utilities and their regulators. A utility CEO talking affordability is grandstanding and virtue-signaling. If he wants to solve the affordability problem, he should be talking about taxing wealth to bring the less fortunate and the unlucky the support they need to succeed, not lowering rates below what the system needs.

c. Where a utility can help on "affordability": By accepting regulatory standards that require maximum customer value at minimum customer cost. Standards produce accountability. As the legendary business scholar Peter Drucker wrote, What gets measured, improves." One can measure customer value and customer cost. One can identify shortfalls in value and cost. And then one can hold the utility accountable, just like a competitive market holds restaurants accountable. Mushiness about affordability avoids accountability—accountability for the conduct that makes utility prices what they are.