

FERC ADR NEWS

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The Ethics and Value of Dispute Resolution for Energy Conflicts!

The Administrative Dispute Resolution Act (ADR Act) establishes the statutory framework for, and encourages agencies to employ, alternative dispute resolution (ADR). The confidentiality of ADR processes, the neutrality of a mediator, and value of other ADR resources to settle cases - such as early-neutral evaluators and subject matter experts - are not readily apparent or clearly understood by prospective users of ADR. This lack of awareness and understanding makes prospective users more hesitant to engage in an ADR process, thus impeding ADR's use as an early, practical and effective tool for energy conflict prevention and resolution by stakeholders involved in energy and environmental disputes.

When unassisted negotiations fail, many prospective users of ADR resort to traditional means of resolving their conflicts: costly and adversarial litigation. This choice frequently reflects misconceptions and misperceptions

about ADR processes. Recently, at the Energy Bar Association's November meeting in Washington D.C., a panel of ADR practitioners, FERC's Dispute Resolution Service among them, addressed the *Ethics of ADR* to an audience comprised of energy attorneys, administrators and others to debunk the myths and false notions about ADR.

Myth: What I say in mediation will be used against me later by others.

Confidentiality is protected under Section 4 of the Administrative Dispute Resolution Act (5 U.S.C. §574), an umbrella of other federal and state laws and regulations, and as appropriate, confidentiality agreements, both verbal and written, that are developed and entered into by

parties to an ADR process. In mediation, one of several ADR process choices, communications between the mediator (a.k.a. third-party neutral) and parties to a dispute, including a neutral's notes and documents prepared for the proceeding, must be kept strictly confidential by the mediator and the parties. It is also noteworthy that communications between the neutral and individual parties in the early pre-session phase of an ADR process are protected. Exceptions to confidentiality do exist under Section 574(a) and (b) of the ADR Act for common-sense reasons--the communication was already made public, all parties and the mediator agree on disclosure, in court ordered situations to prevent harm, and in a few situations where a statute (and not an agency's administrative regulation) specifically requires the information to be made public.

Under the Act's stipulations, agencies are given discretion on when and how to use ADR methods and whether to use disclosure provisions under the statutory authority they possess. Although the ADR Act generally prohibits a party from disclosing "dispute resolution communications" made in a joint mediation session, Section 574(b) of the ADR Act does not protect documents and oral communications made available to all parties to a joint session. Added confidentiality protections contained in agreements to mediate, protective orders, and agency rules of practice may be necessary to fully protect the communications between parties in a joint session. The Commission's Rule 606, Confidentiality in Dispute Resolution Proceedings (18 CFR 385) specifically excludes the ADR Act's provision to make information and communications shared in a joint

mediation session public. Rule 606 (a) and (b) treat as confidential communications provided in confidence during a joint session to either or both the neutral and other parties.

The ADR Act allows for other stipulations on confidentiality. For example, parties may agree to alternative confidentiality protections for disclosure by themselves or by a mediator in an agreement provided these protections are established with the mediator at the onset of the ADR proceeding. Parties should discuss with the mediator all the options available to ensure the appropriate communications are well-protected. If the parties don't inform the neutral of alternative confidentiality provisions at the outset, the provisions of Section 574(a) apply.

Myth: I can't trust the mediator because she/he is a FERC employee.

The Commission's Rule 604(c), Alternative Means of Dispute Resolution, defines a neutral as an employee of the Federal government or any other individual who is acceptable to the participants to a dispute resolution proceeding. Subsection (c) (3) states that neutrals may be selected from among the Commission's Administrative Law Judges or other employees, from rosters kept by the Federal Mediation and Conciliation Service, the American Arbitration Association, or from any other sources.

The Commission's Dispute Resolution Service (DRS), established in 1999, and is a neutral unit comprised of trained mediators. The DRS provides ADR services for parties engaged in FERC-

related disputes. There are currently five full-time mediators and one part-time mediator. The DRS neutrals are non-decisional employees who are exempt from the Commission's ex parte rules, and are required by law to maintain confidentiality in dispute resolution proceedings.

As mentioned, in any ADR proceeding at the Commission, communications, both oral and written, are protected under Rule 606. Rule 606 (a) specifically states that a neutral in a dispute resolution proceeding shall not voluntarily disclose, or through discovery or compulsory process be required to disclose, any information concerning any dispute resolution communication or any communication provided in confidence to the neutral except for reasons similar to those exclusions identified under the ADR Act.

Myth: The Commission's neutrals are on FERC's side.

Parties to a dispute resolution proceeding are the decision-makers in an ADR proceeding. Neutrals from the DRS, settlement judges, and other ADR service providers at FERC and elsewhere are not decision-makers unless they serve as an arbitrator. The "Model Standards of Conduct for Mediators," dated September 2005, provides that a mediator must conduct a mediation based on self-determination of the parties. In other words, the parties - not the mediator - are in control of the decisions to resolve a dispute. Under the statutory requirements and as an ethical matter, neutrals at FERC and elsewhere may not advocate one particular position over another, and may not serve as decision-makers or advisors. A neutral

works solely for the parties, guiding them within a dispute to achieve mutual understanding and agreement.

Myth: If a mediator or neutral really doesn't take sides, then mediation has no value for me, especially if I have a strong case.

Mediation is highly successful at the Commission. In a mediation process, the neutral is ethically bound to not favor or support one party's position over another. Parties with a strong position entering mediation routinely gain much in mediation because the problem-solving process requires creative brainstorming and focuses on meeting the business interests of the parties. From time to time in a mediation, one or more parties may wish to explore with the neutral the strengths and weaknesses of their case in a private caucus or a joint session, but the neutral must not judge or evaluate a particular party's position or comment on whether or not a party might gain or lose more in an another dispute resolution forum.

However, ADR adds further value because the DRS, with the consent of the parties, can offer parties a Subject Matter Expert (SME) or Early Neutral Evaluator (ENE) from Commission staff. These experts understand Commission rules and policies, as well as technical issues, and can provide an "informed opinion" on the strengths and weaknesses of a case. These experts are bound by the same confidentiality provisions as a neutral. In addition, once these experts are committed to the ADR process, they cannot perform

an advisory function on the case if it comes before the Commission for action.

With the mediator's assistance, a SME or ENE will assist parties in private caucus or a joint session, whichever grouping the parties prefer. The ENE or SME makes "a call on the case" based on informed opinion and judgment, subject matter knowledge, and expertise. An opinion issued by a SME or ENE is advisory only and can never be made public. The ENE's or SME's opinion *is* only an opinion and the parties do not have to abide by it. Still, there is much to gain from this opinion because it can inform the parties' decisions about whether they wish to continue with mediation or choose a different process in which they lose control over the outcome.

If you are considering ADR for a dispute resolution proceeding, the Commission's DRS can answer questions in more detail. ADR processes can be initiated at any time and parties are encouraged to consider ADR even before filing a formal complaint with the Commission. The DRS will convene the parties at their request to jointly determine which type of ADR process is most suitable for their case. For example, the parties can request or the DRS can guide parties on the use of an ENE or SME depending on the dispute in question. However, a party is under no obligation to use ADR, even after participating in a convening session, because ADR is voluntary.

In addition to neutral services, the DRS offers outreach services and training to assist parties and entities entering a collaborative process or a dispute resolution proceeding to improve their skills in facilitating and negotiating solutions to meet their business interests.



FERC in ACR Resolution Magazine: Check It Out!

FERC's dispute resolution opportunities and accomplishments are on display in the Spring 2008 *ACResolutions Magazine* article "Citizen Access to the Federal Government."

"Citizen Access to the Federal Government" provides the statutory context for the development of alternatives to litigation – the *Administrative* Dispute Resolution Act of 1996 (ADRA I) and the *Alternative* Dispute Resolution Act of 1998 (ADRA II), which together reinforced a federal government commitment to alternative dispute resolution. FERC embraced the opportunities inherent in these Acts, as evidenced by the multiple dispute resolution opportunities at the Commission: from the FERC Dispute Resolution Service (DRS) to the Settlement Judge Process to the Enforcement Hotline, FERC provides citizens varied entry points for pursuing settlement.

The article also highlights the impact of ADR in providing new and creative avenues for resolving conflict and improving access to justice. The 2002 FERC settlement process over the route for the Millennium pipeline from Lake Erie to Consolidated Edison's high-pressure line in Mount Vernon, New York is highlighted as an example of a

creative dispute resolution process that afforded all parties access to justice.

The process, under the auspices of FERC neutrals – co-mediators from the Dispute Resolution Service and a subject matter expert (also commonly referred to as an early-neutral-evaluator) from the Office of Energy Projects – was structured to provide all stakeholders the opportunity to voice their concerns and interests in confidence with the mediators and subject matter expert on location during the day or evening when it was most convenient for them. The process was also structured to ensure the involvement of key decision-makers integral to maintaining progress including the natural gas company, the city's mayor, city council, state and federal representatives and the community. The result of this effort: after three months of mediation, Millennium, the Mayor of Mount Vernon, and the city of Mount Vernon agreed on a revised pipeline route through the Mount Vernon community.

From the DRS



Brown Bag Lunch and Learn Events for Early 2009

The *Lunch and Learn series* sponsored by the Dispute Resolution Service continues in 2009 with two engaging presentations that consider the role and impact of culture in disputes.

Negotiating Water Rights – Guest Speaker

The first session, held on Tuesday, January 6, 2009, featured speaker Jerry Muys, the president of Muys & Associates, P.C., who practices public land, water resource, and environmental law. Jerry has written extensively in these fields and taught federal land and natural resources law at the University of Virginia Law School and water law at the George Washington University Law School. At this session, we previewed the “Voices of the Jemez River” video, which shows the success of diverse users on the Rio Jemez in negotiating an agreement regarding water deliveries during drought. Jerry discussed his experience on efforts – such as that on the Rio Jemez – to “divide water out west” and provided his perspective on the cultural dynamics of such efforts. One Commissioner and sixty staff attended the session.

Sacred Sites

The second session, date to be determined, will feature a documentary film and case study about the San Francisco Peaks in Flagstaff Arizona. The proposed development of a ski resort at the center of the peaks, held sacred by more than 13 Native American Nations, has generated considerable resistance. The film will be used as a springboard to explore the questions of how culture can affect a dispute, the role of values in cultural disputes, and the ways culture and values play a role in the communities in which FERC is involved.

These are just the first of many brown bag lunch and learn sessions that the DRS has planned for 2009. Stay tuned!

Training Courses

ADR News for Commission Employees

Recent and Upcoming ADR Courses for Commission Staff

The Dispute Resolution Service (DRS) recently offered a half-day *Difficult Conversations* training course. Based on tips from “*Difficult Conversations: How to Discuss What Matters Most*,” by Douglas Stone, Bruce Patton, and Sheila Heen of the Harvard Negotiation Project, the course directed trainees to consider the challenges of difficult conversations with the goal of transforming a difficult conversation into a learned conversation, in which parties are open to understanding, sharing, and joint problem-solving. Trainees learned strategies to approach difficult conversations, with a particular focus on communication tools to employ when other parties are not interested in engaging in a “learning conversation.” Throughout the course, trainees had the opportunity to practice the skills of preparing for and engaging in a difficult conversation.

The Dispute Resolution Service also recently offered one of our “core” ADR courses: *Facilitating Meetings and Technical Conferences: How to Ensure Productive Group Discussions*. The facilitation course provided trainees an opportunity to learn more about facilitation process design and skills to better navigate technical conferences, scoping meetings, pre-filing conferences, and even office staff meetings. Trainees developed strategies to deal with

difficult people, transition into other collaborative/problem-solving roles, and employ an interest-based problem-solving approach to assist meeting participants in achieving their goals.

JAN	FEB	MAR
APR	MAY	JUNE
JULY	AUG	SEPT
OCT	NOV	DEC

Mark your calendar for the next Interest Based Negotiation course schedule for May 12-14, 2009

The negotiation course provides an in-depth look at the 7 Key Elements of Interest-Based Negotiation. The course begins with a look at traditional – or win/lose – negotiation, as well as an examination of the barriers that are inherent to and exacerbated by adversarial negotiation tactics. The Interest-Based Negotiation model is proposed as one that might eliminate, or at least alleviate, some of these barriers, through a focus on communication, relationship-building and, ultimately, mutually satisfactory solutions. Trainees will learn how to brainstorm creatively and strengthen their BATNA (best alternative to a negotiated agreement) to meet their interests fully. In addition, participants will experience, through lecture and role play, the interplay between gender and negotiation and culture and negotiation. Finally, participants will have the opportunity to explore the dynamics of multi-party negotiation, particularly decision-making within this context.

Commission employees may contact the Dispute Resolution Service staff with any questions about our courses. Space is usually limited so sign up early!

ADR Techniques and Tools



Highlights of “Difficult Conversations: How to Discuss What Matters Most,” by Douglas Stone, Bruce Patton, and Sheila Heen



We've all experienced difficult conversations, whether with a co-worker, superior, or subordinate in a professional context, or with family or friends in a personal context. No matter the situation, the sentiment surrounding a difficult conversation is likely the same: dread. In their book, “Difficult Conversations: How To Discuss What Matters Most,” Douglas Stone, Bruce Patton, and Sheila Heen of the Harvard Negotiation Project aim to help readers conquer this dread and assist them in transforming difficult conversations into learning

conversations, in which parties are open to understanding, sharing, and joint problem-solving.

Step One

The first step in transforming a difficult conversation is deconstructing what transpires during the course of such conversations. Through research, Stone, Patton, and Heen discovered that no matter what the subject, difficult conversations can be broken down into three conversations: the what happened conversation, the emotions conversation, and the identity conversation.

The “What Happened”? Conversation

The what happened conversation is where we spend most of our time, consumed by who is right, who meant what, and who is to blame. Given the focus on rights, intentions, and blame, it is no surprise that one of the hallmarks of a difficult conversation is that people disagree. Stone, Patton, and Heen illustrate why.

We disagree because we have different stories, resulting from relying on different information, noticing different things, and interpreting information differently according to our past experiences and self-interest. We also disagree because we have different intentions and, more noteworthy, we assume that we know the intentions of others. Finally, we disagree because we assign blame.

To surmount this disagreement, the authors propose a number of approaches:

- Questioning “What information might they have that I do not?”

- Thinking about your story – and their story –and trying to embrace both.
- Disentangling intentions from impact and recognizing that even good intentions may have a negative impact.
- Inquiring about the other party’s intent.
- Distinguishing blame (which involves judgment and looks backward) from contribution (which involves understanding and looks forward) and inquiring: how did we each contribute to bringing about this situation?

The Emotions Conversation

The emotions conversation is often at the heart of a difficult conversation. Though we may try to disregard emotions and focus solely on solving a problem, underlying emotions often bleed into a conversation, making it difficult to have a constructive exchange.

To address the challenges posed by the emotions conversation, the authors suggest:

- Sorting out one’s emotions – after all, emotions are natural and important. Acknowledging how the situation – or conversation – makes you feel is the first step in managing your own emotions and understanding the emotions of the other party.
- Negotiating with emotions. Recognizing that emotions are formed in response to our thoughts helps us to understand that as we learn more about a situation, our thoughts may change.

- Sharing emotions. Letting the other side know that what they have said has made an impression on you, that their emotions matter, and that you are working to understand and open lines of communication. And remember, for those who struggle with sharing, it is helpful to think about the impact that this is having on you. An “I message,” or impact statement, provides a structure for doing so. Convey what you are feeling: “I feel...,” followed by the action that is causing you to feel this way: “when...,” followed by the impact that this has on you: “because...” The power of an I message or impact statement is that it equips you to express your feelings in a manner that enhances the possibility that the other side will listen, rather than get on the defensive.

The Identity Conversation

The identity conversation encompasses the stories we tell/believe about ourselves regarding who we are in the world. Difficult conversations can threaten our identity, leading us to question: “Am I competent?” “Am I good?” “Am I worthy?”

To manage this identity conversation, the authors suggest:

- Avoiding all or nothing identities.
- Grounding identity by becoming aware of your identity issues.
- Complexifying your identity by recognizing that:
 1. you will make mistakes.
 2. your intentions are complex.

3. you have contributed to the problem.
- Keeping your balance in the face of identity issues by letting go of trying to control their reaction, preparing for their response and, when necessary, taking a break.

Step Two

Understanding – and walking through - the three conversations encompassed within a difficult conversations primes you to consider the merits of broaching the difficult conversation.

The authors suggest reflecting on your purpose and approach:

- What do I hope to accomplish by having this conversation.
- Is a conversation the best way to address my issues and achieve my purpose?
- Can I alleviate the problem by altering my contributions?
- If I don't raise it, what can I do to help myself let go?

Finally, the authors suggest that if you do raise it, focus on the three purposes that work:

- Learning their story,
- Expressing your views and feelings, and
- Problem-solving together.

Step Three

Once the decision is made to raise the matter, it is time to strategize about how to do so. Typical openings – which focus on our OWN stories and often, trigger identity issues for the listener – usually don't assist us in moving forward.

The authors posit an alternative approach: rather than focusing on your own story, describe the problem as the

difference between your story and the story of the other side. Recognize both viewpoints as valuable and important elements of a discussion.

Secondly, the authors recommend describing your purpose in the conversation and extending an invitation to the other side to join you in working through the matter. This transforms the dynamic of the conversation, from one where two parties are talking at each other to one where two parties are working as partners to address their issues.

Step Four

Now that the other party has accepted your invitation to join as a partner in working through the situation, it is time to explore their story and yours.

The first step is through listening to understand the other side's perspective on what happened. Tools to do so include:

- Asking questions, particularly open-ended questions that solicit information in a non-judgmental manner, for example: Help me understand WHY this is important to you.
- Acknowledging the feelings behind the arguments and accusations, for example: What I hear you saying is...
- Paraphrasing to let the other side know that they are heard and to make sure that you have a clear understanding of what they have said, for example: What I heard from you is...Is that correct?

The next step is to share your own viewpoint, experiences, intentions, and feelings. The authors posit three guidelines for doing so:

- Don't present your conclusions as THE TRUTH.
- Share where your conclusions come from.
- Don't exaggerate with "always" and "never": give the other side room to change.

Finally, the authors suggest assisting the other party in helping to understand you, through asking them to paraphrase what you have said and asking them how they see it differently – and why.

Step Five

Now that lines of communication have been opened and information shared, it is time to engage in joint problem-solving.

The authors suggest the following guidelines:

- Gather information and test your perceptions, through:
 - Crafting and agreeing to a test.
 - Expressing what is still missing.
 - Expressing what would persuade you.
 - Inquiring what, if anything, would persuade them.
 - Asking their advice.
- Invent options in an open, non-evaluative manner. Options should meet each side's most important concerns and interests.
- Look to standards for what SHOULD happen, while keeping in mind the important standard of mutual care taking: relationship that always go one way rarely last.

- Talking about how to keep communication open as you move forward.

Conclusion

Stone, Patton, and Heen's five steps are not a panacea for all difficult conversations. But, hopefully, these steps equip us with tools to make difficult conversations more constructive and, maybe, at times, transform our difficult conversations into learning conversations.



The Development of Online Dispute Resolution (ODR)
(adapted from "Online Dispute Resolution: Some Context and a Report on Recent Developments," by Daniel Rainey, Director of the Office of Alternative Dispute Resolution Services, National Mediation Board, prepared for the Mayhew-Hite Report, December 2005)

Background

Online dispute resolution developed in response to the burgeoning of e-commerce in the 1990s. E-commerce generated unique conflicts between geographically diverse buyers and sellers for whom conventional legal or alternative dispute resolution avenues did not provide viable resolution options. And so online dispute resolution emerged, providing cyber-disputants with a simple, efficient, and cost-effective alternative. Square

Trade, the primary ODR provider for eBay, is one of the most active e-commerce dispute resolution service providers. How does it work? To access Square Trade services, a buyer or seller simply clicks the “file a case” button on eBay and completes an online form regarding the problem and potential solutions. Square Trade then contacts the other party, via e-mail, with instructions on responding to the case. Once each party is aware of the issues, they first try to reach agreement using Square Trade’s Direct Negotiation tool. If the parties cannot resolve the case through Direct Negotiation, they can request the assistance of a Square Trade mediator, who helps to facilitate an on-line solution-oriented discussion between the parties.

Since the early years, ODR application has expanded beyond commercial to other disputes including labor, contract, business, and family. For example, the National Mediation Board, the federal agency responsible for resolving disputes in the airline and railroad industries, utilizes ODR tools to negotiate contracts, to craft final contract language for collective bargaining agreements, and to facilitate problem solving efforts.

The range and capabilities of ODR providers have increased in response to the expansion of ODR application, as demonstrated here with a look at a handful of ODR providers. There is Cybersettle, which provides a Web-enabled settlement application coupled with an optional telephone facilitation. Cybersettle’s on-line services generate high speed settlements by matching offers and demands. There is also Juripax, which provides a multi-lingual on-line mediation service for e-commerce, employment, and family disputes. Juripax provides for a textual,

asynchronous communication, which allows parties to log into the ongoing discussion and negotiate at different times and places. This alleviates the need for participants to immediately respond, thus “allowing for a less emotional and more reflective communication.” There is also the Mediation Room, which provides a range of ODR tools including: blind bidding, collaborative fora, and anonymous brainstorming. With anonymous brainstorming, parties are able to post messages anonymously, thus allowing them to consider and discuss proposals in a fully objective fashion without being influenced by the person making them.

But What Does This Mean For Us?

FERC subscribes to two service providers with ODR-relevant capacities.

The first is WebEx. WebEx is the leading provider of web meetings, or web conferences. Web meetings make it possible to share what’s on your computer desktop with people in other locations, in real time over the web. People may use web meetings for a variety of purposes. For example, in a multi-party dispute resolution process that is nearing settlement, parties may choose to convene a web conference to draft settlement language. The initiator of the web conference has the ability to control all additions and modifications to the document – or to pass control of the document to another attendee, who would then have the ability to craft the agreement language. In late 2006, Judge Brenner utilized WebEx technology in the PJM contested multi-party settlement process.

Web meetings are relatively easy to schedule and to manage. There is no special room to schedule, and no special equipment to learn. All participants can participate from their desktops. Users of WebEx need only go to their browsers to start an impromptu meeting – or schedule ahead. Other attendees can be invited to join. And any application, document or presentation can be shared. Of course, a picture is worth a thousand words, and with WebEx, there is an option to include a video from a web cam for a more face-to-face interaction.

The second ODR-related tool that is accessible to FERC is Survey Monkey. Survey Monkey gives users the opportunity to design online surveys quickly and easily. Survey Monkey also assists with the dissemination and collection of the survey and, when the results are in, with survey analysis. All the data that is collected remains private. Survey Monkey can be a useful tool for evaluations, or opinion surveys, or for any other information-gathering purpose.

Additionally, there is the possibility of utilizing existing technology to meet specific needs. During one earlier FERC proceeding involving hundreds of parties negotiating the large generator interconnection agreement and procedures, for example, the Commission established a live web site. The site enabled participants, working groups, and the facilitators of the process to check-in at any time on the status of varying documents, to provide live comments, and to post onto the web site. The FERC DRS has also utilized a special web site for hydro relicensing efforts as well as cooperating with the Energy ADR Forum Report.

We welcome suggestions from all of you on how we can best utilize ODR tools, either those already available to FERC or those described above, to best meet your needs. We look forward to hearing from you!

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