

# Ferc ADR news

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## ADR IN A NUTSHELL

**A**lternative Dispute Resolution (ADR) is an inclusive term that encompasses a variety of dispute resolution methods used in lieu of adjudicative or adversarial methods for resolving conflicts. Generally, ADR is a voluntary process in which participants focus on meeting their business, consumer resource protection, or other important objectives rather than on whom has the stronger position.



Examples of ADR techniques include collaborative processes, facilitated negotiations, early neutral evaluation, mediation, settlement judge procedures, mini-trial, and binding and non-binding arbitration. One of the strengths of ADR is its flexibility. The parties choose a third party neutral and design the process based on their needs and comfort level. With the help of the third party neutral, the parties explore how to satisfy their underlying interests and find mutually acceptable solutions to their disputes. Ultimately, the ADR process may result in stronger relationships, save time, and reduce costs. While ADR cannot guarantee results, it succeeds when parties work cooperatively and focus on identifying and satisfying their underlying interests.

So think smart! Check with the Dispute Resolution Services (202) 208-0702; 1-877-FERC-ADR (337-2237); [FERC.ADR@FERC.FED.US](mailto:FERC.ADR@FERC.FED.US)) early when you have a dispute to determine if your dispute is an appropriate candidate for ADR.

## WHY USE ADR?



**Y**ou have a dispute. Already, a considerable amount of time, money, and resources have been used to advance your position. Your case is now before the U. S. Court of Appeals. The Court, on its own initiative, selects your case for mediation. At first, you are skeptical of its chances for success. But you give it a try--and mediation works. Your interests are met.

An obvious question is: 'why wasn't mediation or some other ADR process considered at the outset of the dispute'? Was it lack of knowledge of the available options? Was it due to the belief that certain

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# SUCCESSSES

**We have had many ADR successes at the Commission and want to share a few. Take a look:**

## FROM THE DRS

Over a year had lapsed since the Commission required each interstate pipeline to enter into an Operational Balancing Agreement (OBA) with the natural gas companies with whom the pipelines had interconnections. Since approximately 40 OBAs involving 5 major interstate natural gas companies had not been executed, the DRS was asked by the Commission to convene the parties to assess whether a process could be arranged to assist the parties in reaching agreement. Through both face-to-face meetings with the parties as well as telephone contact, the DRS facilitated agreement with the parties in connection with all outstanding OBAs. Factors that contributed to successful execution of the OBA agreements included: face-to-face interactions, active listening, creative thinking, focusing on interests, and periodic check-ins by the facilitator to offer assistance and monitor the progress of the negotiations. In cases where the only barrier to executing an OBA was other work that had taken priority, it took only a dedicated third-party neutral to jump-start the agreement to a successful conclusion.

In another case, a utility and a marketer were involved in a dispute concerning a protested notice of cancellation. While the Commission's 60-day clock was running, the DRS called the parties and explained that the case appeared to be an excellent candidate for an ADR process. The parties agreed to convene to explore the use of ADR. The convening session transitioned into an assisted negotiation with the DRS staff and the parties reached a settlement in principle the same day. The protest was withdrawn and a Commission order became unnecessary. The parties did a great job to focus on their underlying interests and were able to quickly find a creative solution that met their needs.

## FROM THE ALJ CORPS

Judge Peter Young achieved success as a settlement judge in a highly contested New York Independent System Operator (NY ISO) case. The case addressed significant amendments to 38 pre-existing transmission agreements filed by the Member Systems of the New York Power Pool to incorporate various provisions of the NY ISO tariff. The presiding judge and the parties decided to narrow the scope of the hearing through parallel settlement judge proceedings. Throughout the settlement judge proceedings, progressive settlement milestones were established and parties focused on business interests and objectives.

Through an iterative process, these procedures resulted in the submittal of 13 formal offers of partial settlement. These settlements eliminated the vast majority of the substantive issues, as well as many of the original parties from the litigated proceeding. In addition, the settlement judge proceedings provided a mechanism for various parties to resolve separate disputes pending in other Commission dockets.

In another successful settlement judge process conducted by Deputy Chief Judge William J. Cowan in Docket No. EL00-9-000, a complaint filed by Cherokee County Cogeneration Partners, L.P. alleged violations of the Federal Power Act by Duke Electric Transmission. The parties met with the Dispute Resolution Service, and agreed to pursue settlement opportunities under the aegis of a settlement judge. The parties selected Judge Cowan, who proceeded to convene a number of settlement conferences and worked with the parties to explore alternative approaches that might resolve the dispute. This case was somewhat unique in that, in order to settle the FERC-jurisdictional com-

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## Why ADR? from page 1

rights are forfeited if you use ADR? Was it due to the need to have the Commission make a policy call? Or was it based on doing the traditional thing?

There may be many reasons why ADR is not considered, and in some instances, ADR may not be appropriate. But, as the use of ADR at the Commission grows to keep pace with the changes occurring in the oil, electric, gas, and hydroelectric industries, FERC practitioners are learning new ways that ADR can meet their clients' interests earlier and at lower costs. They are learning that there are fewer reasons not to consider ADR.

In order to foster greater use of ADR and to provide ADR services (e.g., convening, facilitation, mediation) at FERC, the Commission created the Dispute Resolution Service (DRS). The DRS staff will answer any questions you may have and will help screen your dispute to determine if it is a good candidate for ADR. If ADR is considered, the DRS staff will convene a meeting with you and the other parties

to discuss options and help you design an ADR process that is tailored to the parties' specific needs. Should the parties decide to use ADR, the DRS will assist you in both finding a third-party neutral for the ADR process and defining what role the third party should have.

Experience has shown that ADR is most effective when used early. Therefore, timelines can be developed and an ADR process can be used parallel to the Commission processing of a case. Remember--ADR is a voluntary process when used through the DRS and you need not give up your rights to pursue your positions at the Commission or the Courts should you decide to go forward with an ADR process.

In just a short time, new ADR practices have taken hold at FERC. The DRS wants to spread the word about those practices and how the public can take full advantage of ADR at FERC. The DRS wants to share FERC's ADR successes and educate the public FERC serves when to think "ADR."

## Hagar the Horrible



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## ALJ from page 2

plaint, other related disputes between the parties needed to be aired and resolved. After much work, a comprehensive settlement was achieved that resolved problems with the purchase power agreement governing the sale and purchase of power from the Cherokee facility to Duke as well as pending court litigation, in addition to the matters in dispute before the Commission. The overall settlement package resolved all current disputes between the parties and modified their on-going relationship to minimize the likelihood of future disputes. The FERC-jurisdictional component of the settlement was accepted by the Commission at its July 26, 2000 meeting.

# STOP THE CLOCK! 60 DAY DISPUTE RESOLUTION



Through an innovative new approach, certain protested filings may be resolvable within the Commission's 60-day window for electric rate and tariff filings. If a case is appropriate for this resolution path, a member of the DRS Staff may contact the parties to explore the possibilities of settling the case. Or, one of the parties can call the DRS to express their interest in this option. The DRS will explain the procedural options to the parties so they can determine whether an ADR process may be an effective way to resolve their dispute. Experience has shown that once parties meet face to face it becomes much more feasible for them to work through their differences-- even during the 60-day period. If the parties wish to pursue ADR beyond the Commission's 60-day window, they may do so, provided they request a delay in the Commission's statutory deadline to act. Of course, Commission review of an agreement may be required.

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## OEP's OUTREACH INITIATIVE

### *ADR Opportunities for Pipeline Certificate Proceedings*

The FERC's Office of Energy Projects (OEP) has a new natural gas outreach initiative that may provide a unique opportunity for the effective use of alternative dispute resolution (ADR) techniques in the early stages of gas pipeline certificate projects. It is hoped that this initiative will nurture an environment in which pipeline stakeholders can work together on pipeline route planning and issue resolution prior to filing these applications with the Commission. The Commission hopes that this new initiative will shorten gas facility certificate processing time through the appropriate use of ADR methods.

OEP's Gas Outreach Initiative is new and broader reaching than previous efforts such as the Collaborative Procedures for Energy Facility Application (Order No. 608, issued September, 1999), a voluntary process modeled after a similar process for hydroelectric licenses. To introduce this new initiative, an initial outreach meeting was held on September 26, 2000 in Albany, NY. There, the Commission staff, State and Federal Agencies and landowner representatives publicly discussed the challenges of landowner and agency participation in project planning, early collaboration with agencies and other issues important to the pipeline community.

The next Outreach Initiative is scheduled for December 7, 2000 at Lewis University in Joliet, Illinois. Look for the notice in late October. Any questions should be referred to Rich Hoffmann, at (202) 208-0066.

## OEP's ALTERNATIVE TO HYDROELECTRIC LICENSING-- COLLABORATION THAT WORKS!

In order to achieve optimum outcomes in hydropower licensing proceedings, the Commission developed the Alternative Licensing Process (ALP)—a collaborative approach that combines pre-filing consultation and environmental review into a streamlined process for the licensing and re-licensing of hydroelectric projects.

The ALP encourages parties to settle or reduce the number of contested issues that would be raised in a license application. To achieve this goal, the ALP: (1) requires the applicant to consult with a variety of entities before preparing an application for Commission review; (2) accelerates the environmental review process by allowing the evaluation of project impacts pursuant to the Environmental Protection Agency; (3) coordinates Federal and State regulatory reviews; and (4) includes a negotiation process aimed at expediting the resolution of disputed issues.

Several licenses have been completed under the alternative process, and many more are currently underway. An early example of successful use of a collaborative process is Avista Corporation's 700-MW Clark Fork Project located in Idaho and Montana. In July 1997, Avista decided to use a collaborative process for Federal, State, and local agencies, non-governmental organizations, local landowners, and others. The members of the relicensing team met regularly, and Commission staff provided guidance and support. A comprehensive settlement agreement was reached that resulted in the protection and enhancement of the natural and human environment. A license incorporating Avista's settlement agreement was issued by the Commission in February 2000, only one year after the license application was filed. Way to go Relicensing Team!

## OAL's NEW APPROACHES TO SETTLEMENT

The new Office of Administrative Litigation's ("OAL") was rolled out on March 31, 1999. OAL's commitment to maximizing the use of ADR was initiated with a comprehensive training program. OAL's ADR training began with a half-day program featuring leaders in the field of Federal ADR showing *how* and *why* ADR makes sense in the context of settlement or litigation of administrative disputes. In addition, all of OAL's managers participated in a one-day ADR training session that was later refined and offered to the entire OAL staff.

OAL's negotiation and settlement skills have been greatly enhanced as a result of this ADR training. For example, in a case involving Iroquois Gas Transmission Co., OAL staff designed an ADR process that permitted a creative approach to discovery. This approach led to a settlement that expanded the scope of the agreement to include an unfiled rate case. In another case, Ameren Services Company, the Commission suspended the start of the hearing to allow for settlement discussions. At the urging of OAL staff, the parties committed to settlement negotiations and agreed that if they proved unsuccessful, an OALJ neutral would be used. The case is unique because it involved six separately filed rate cases which have been consolidated as a result of the ADR process.

OAL will build on its training held and its initial successes with ADR to incorporate more interest-based negotiations in future cases. OAL will also look for opportunities to advance novel solutions to difficult problems.

# Ferc ADR news

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“Most energy companies will conclude that litigation is a terribly inefficient way to manage and compete, especially when the market moves faster than any administrative process possibly could. ADR and other collaborative processes are a key part of the Commission’s efforts to reengineer itself to be ‘better, faster, cheaper.’”

**James J. Hoecker, Chairman**

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**COMING UP  
IN THE  
NEXT ISSUE:**

**More Success Stories  
Convening Sessions 101  
ALJ’s Expedited Settlements  
Training Update**



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