

# FERC ADR News

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## FERC'S PERFORMANCE AND RESULTS

### IN USE OF ADR FOR 2006 REPORT TO PRESIDENT

In 2005, Federal departments and agencies were polled on their ADR policies and programs, as well as performance measures, results and challenges in their ADR work. The survey was coordinated by the Department of Justice and the results will be summarized in a report to the President.

FERC's Dispute Resolution Specialist, Richard Miles, responded to the survey. Following is a summary of the report.

#### The Commission's ADR Policy and Programs.

Like the courts, FERC recognizes that settlements are an important part of the administrative process in its mandate to oversee America's utility industries. In this regard, FERC has encouraged settlements involving regulated entities in orders and opinions dating from 1962. FERC has also codified its endorsement of ADR in its regulations at 18 C.F.R. §385.604 (2005).

FERC's ADR programs include the Dispute Resolution Service, Settlement Judge processes, Enforcement Hotline, pre-filing collaborative processes and the "Topsheet" and technical conference processes. These processes are also described on the Commission's website at: <http://www.ferc.gov/legal/adr.asp>.

a. **The Dispute Resolution Service (DRS)** is a neutral organization within the Commission that was established in 1999. The purpose of the DRS is to foster increased use of ADR in all areas that the Commission regulates. Its two primary functions are to perform ADR services such as facilitation and mediation, and to promote and enhance the use of ADR through activities such as trainings, presentations, and collaboration with other groups

in advancing the use of ADR.

b. **The Settlement Judge Process** is codified at 18 C.F.R. §385.603 (2005), and provides that FERC's Administrative Law Judges may serve as Settlement Judges, mediators, facilitators and arbitrators. Settlement Judges assist parties in resolving disputes instead of using a formal adjudicatory proceeding and may compel participation of the parties and submission of documents. Negotiations before a Settlement Judge may not be submitted in a later proceeding.

c. **The Enforcement Hotline** was established in 1987 to provide information to the public and facilitate informal resolution of disputes within the Commission's jurisdiction. The Hotline is codified in 18 C.F.R. §1b.21 (2005). Individuals may contact the Hotline with questions or concerns and the Hotline Staff consults with other FERC staff as necessary to provide an answer. If the caller requests, these contacts may be confidential, unless the matter is appropriate for Commission investigation. Unlike the DRS and Settlement Judges, the Hotline Staff may not address matters once they become docketed in a formal proceeding before the Commission.

d. **Pre-filing Collaborative Processes** are used to address environmental issues in hydroelectric relicensing processes. These processes involve licensees, and other key parties, such as State and Federal agencies and Indian tribes, as well as various interest groups and members of the public affected by a proposed project. The Commission Staff uses facilitation and conflict resolution techniques to help participants resolve issues during these processes.

e. **Top Sheets and Technical Conferences** are used by the Staff to better address issues in matters before the Commission. The Staff in the Office of

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Administrative Litigation uses "Top Sheets" to promote settlements. They present Staff's evaluation of the likely outcome of a case based on precedent, policy and known facts. The Commission uses technical conferences to obtain a common understanding of the facts, clarify outstanding issues and set dates for comments. During these conferences, Staff may encourage parties to consider settlement or may provide them some guidance on issues.

f. **Other processes:** With regard to workplace issues, the Commission averages five formal EEO complaints per year. The EEO process involves informal counseling and is usually successful. In addition, the process includes an offer of mediation, although it is not often used. Conflicts are usually resolved through discussions among the parties without the need for ADR and before a formal grievance is filed.

### **Performance and Results**

Among those submitting reports on performance measures are the Dispute Resolution Service and the Settlement Judges.

The Dispute Resolution Service provides reports on its casework and outreach projects. The DRS performance measures for casework include:

- (1) the percentage of ADR processes concluded in FY 2005 that were non-environmental, non-tribal, and agreed to by parties. (The target is 75% concluded within 120 days total);
- (2) the number of ADR requests and referrals to the DRS. (The target is the number of requests and referrals equal to those achieved in FY 2004); and
- (3) favorable DRS customer satisfaction. (The target is 80% of customers satisfied).

The performance measures for DRS Outreach projects include:

- (1) the timeliness of responses to ADR outreach/workshop requests. (The target is 100% of requests met within 2 weeks of requested date);
- (2) the number of training sessions held. (The target is to increase the number of sessions over FY 2004 numbers); and
- (3) favorable DRS customer satisfaction. (The target is 80% of customers satisfied).

The DRS also tracks the number, type and success of cases it has addressed, and the number and type of outreach projects it conducts both within and outside of the Commission.

The DRS collects evaluations from participants in its case processes and trainings and workshops. To date, the DRS has regularly achieved a customer satisfaction rate in excess of 80% in these areas.

The Settlement Judge Process is similarly successful. The use of Settlement Judges results in the resolution of disputes much faster, with substantial savings of time and resources that would otherwise be expended in costly litigation. For example, during FY 2003 and FY 2004, 87% of all cases set for hearing were first referred to a Settlement Judge. Of those, approximately 75% achieved settlement. In addition, Administrative Law Judges have acted successfully as mediators in several cases.

### **How the FERC ADR Programs Contribute to the President's Three Goals of Good Government**

First, in making the government citizen-centered, the report highlights: (1) the Settlement Judge process for fostering settlements among parties rather than complex litigation; (2) the pre-filing collaborative process for creating an atmosphere in which interested parties can work together to fashion the terms and conditions for a hydroelectric license with the help of Commission Staff; (3) the Hotline process for its quick response to citizen inquiries; and (4) the DRS for helping entities work to develop solutions for business disputes over which they have some control. In addition, the DRS' presentations and training programs, collaborations, consultations and publications promote greater use of ADR generally as a way to achieve solutions that are better tailored to their needs.

Second, in making government results-oriented, the report notes that: (1) the Hotline facilitates resolution of disputes in a quicker, cost-free and less formal fashion than use of a formal complaint process. This is especially true in commercial disputes where time can be of the essence and a large financial stake may be involved; (2) the Settlement Judge process is efficient in saving dollars and time, in allowing the judges to do more with less, and in filling any "down" time between hearings; and (3) the DRS processes save regulated utilities and their customers, as well as the Commission, significant time and money, by avoiding or reducing time spent on preparing for hearings or orders for Commission deliberations.

Third, in making government market-based: use of DRS and Settlement Judge processes, the Enforcement Hotline, and collaborative processes avoid the filing of complaints, protracted litigation and discovery and other formal processes and save time and money for businesses. Also, when business leaders achieve settlements, they can spend more time running their businesses and the Commission Staff can concentrate

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on other critical issues.

**How FERC's ADR Programs Contribute to the President's Five Government-wide Goals**

The first goal is strategic management of human capital. The DRS offers training to Staff to increase and improve its involvement in collaborative pre-filing processes.

The second goal is competitive sourcing. The DRS offers ADR presentations and training to outside entities and other agency staff, advertises ADR successes during these sessions and in the FERC ADR Newsletter, and works with other agencies to advance the use of ADR.

The third goal is improved financial performance. In hydroelectric re-licensing proceedings, the agency uses pre-filing collaborative processes that achieve greater numbers of settlement agreements. These processes also have shown to save months of work per proceeding, and reduce legal costs by avoiding litigation, rehearing requests and appellate review. The Settlement Judge process is also very successful and results in a significant number of settlements. Most settlements are achieved prior to the commencement of evidentiary hearings that can often be

lengthy and costly. Finally, evaluations of DRS mediations consistently demonstrate cost savings from parties who use DRS services.

The fourth goal is expanded electronic government. The Settlement Judges, DRS, and Hotline Staff all make use of electronic means (phones, e-mail, and when appropriate, teleconferencing) to make it easier for entities to contact the Commission and exchange information.

The fifth goal is budget and performance integration. Use of Settlement Judges, DRS processes, and Enforcement Hotline usually save participants and Commission staff significant time and money. The agency encourages participants to use these resources to resolve their disputes cheaper and faster.

**How ADR Processes at FERC Advance the Work of the Agency**

In addition to helping meet the President's directives, ADR processes at FERC save participants time and money and allow them to resolve their disputes effectively and meet their business interests.

***Commission Adopts "No-Action" Letter Process for Public to Obtain Informal Staff Advice Regarding Certain Proposed Transactions***

On November 18, 2005, the Commission issued an Interpretive Order Regarding No-Action Letter Process, 113 FERC 61,174 (2005), which provides a new avenue for the public to obtain informal advice from FERC staff regarding certain matters. The order provides procedures under which the Commission staff can recommend that the Commission take no enforcement action with respect to specific proposed transactions, practices or situations that may raise issues relating to the Standards of Conduct for Transmission Providers, Market Behavior Rules,<sup>1</sup> and Market Manipulation Rules.

The No-Action letter process, which is similar to procedures used by the Securities and Exchange Commission and the Commodity Futures Trading Commission, provides increased certainty on whether particular transactions, practices or situations would be subject to enforcement action by the Commission. The process should assist regulated entities that seek guidance on real-world application of our regulations and orders and reduce entities' risks of failing to comply with those regulations and orders.

A No-Action letter response will not bind the Commission and will not operate as agency action that is subject to rehearing or judicial review. In addition, Commission staff will not respond to a vague or hypothetical no-action letter request or one that addresses the merits of a matter pending before the Commission in an on-the-record proceeding. The issuance of a response to a No-Action letter request is entirely within the discretion of the General Counsel or designee. In response to a request, the General Counsel or designee may state that staff:

1. will not recommend enforcement action if the matter is implemented as described in the request and in any additional information provided;
2. will not recommend enforcement action if the matter is implemented as described under conditions stated in, or as modified in, the response; or
3. may recommend enforcement action if the matter is implemented as described.

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### How the No-Action Letter Differs From the Enforcement Hotline

Both the Enforcement Hotline and the Commission's new No-Action letter program are ways the public can obtain informal advice from the Commission's staff. However, these two processes serve distinct purposes and operate differently.

The Enforcement Hotline is primarily a means for persons to resolve disputes informally or to inform staff about possible violations of Commission requirements. Hotline matters are non-public and Hotline inquiries may relate to any matter within the Commission's jurisdiction. Advice a person receives in a Hotline matter generally reflects only the opinion of the staff responding to it and is not binding on the General Counsel or the Commission.

The new No-Action letter program differs from the Hotline in four primary respects:

1. Under the Interpretive Order, No-Action letters relate only to the Standards of Conduct for Transmission Providers, the Market Behavior Rules, and the Commission's Prohibition of Energy Market Manipulation Rules (however, to the extent the Market Behavior Rules are no longer in effect, staff does not anticipate that it will address in the No-Action letter process issues relating to rescinded Market Behavior Rules);
2. The Commission will make public the staff response to a request for a No-Action letter (along with the request) to provide guidance to the regulated community, and not just persons involved in the proposed matter;
3. No-Action letters will state whether staff would recommend that the Commission take enforcement action if a proposed transaction, practice, situation or other matter were implemented; and
4. A No-Action letter will represent a consensus view of the Commission staff.

Details about the No-Action process, including the text of the November 18, 2005 order, how to file a request for a No-Action letter, and staff responses to requests for No-Action are located on the FERC website at: <http://www.ferc.gov/legal/no-action-letters.asp>.

***Effective February 27, 2006, the Commission rescinded "electric" Market Behavior Rules 2 and 6 and codified the substance of "electric" Market Behavior Rules 1, 3, 4 and 5 in the Commission's regulations. Effective March 29, 2006, the Commission rescinded regulations applying to blanket certificates under which gas sellers make sales for resale that are within the Commission's Natural Gas Act jurisdiction. The rescinded regulations included the "gas" equivalents to "electric" Market Behavior Rule 2.***

**SUCCESSES**

**FROM THE ALJ CORPS**

### **Settlement Judge Post-Settlement Responsibilities**

#### **Help Parties Reach Agreement in Independent System Operator Rate Proceeding**

In 2005, a case involving a California Independent System Operator (CAISO) rate increase was referred to Judge Bruce Birchman as Settlement Judge. Among the concerns raised by the participants was the need for greater budget transparency and reporting of information by CAISO.

With the assistance of Judge Birchman, the parties were able to address their concerns and reach an amicable resolution of the issues set for hearing. A unique feature of the settlement was the establishment of a panel comprised of Settlement Judge Birchman, a representative of the California Public Utilities Commission, and a representative of the California Electricity Oversight Board. The panel's tasks were to: (1) review the final report of an independent consultant engaged by the CAISO to perform a functional assessment of the ISO's management organization; and (2) advise the ISO's transmission customers (the ISO GMC Parties) as to whether the report satisfied the ISO's obligation. The Commission approved the settlement and commended, in particular, the budget transparency objectives in the agreement.

Subsequently, the panel conferred, reviewed the report, and later on advised the ISO's transmission customers and the ISO's Board of Directors that this obligation was satisfied. Thus, the Settlement Judge process proved flexible and beneficial to the parties in reaching a solution that worked well for all of them.



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# SUCCESSSES

## **Judge McCartney Marshals Successful Settlements in California Proceedings**

Recently, the Commission approved a series of successful settlements between Pacific Gas and Electric Company (PG&E) and various electric generators whose power plants were interconnected with the PG&E system in the wake of the California energy crisis. These settlements were the result of a Settlement Judge Process overseen by Judge Bobbie McCartney.

Judge McCartney mediated the process with care to address the interests of each party and to work toward solutions that would benefit them in the near and long term. The Settlement Judge process also saved the parties the time and cost of litigation and resulted in agreements that were likely better than litigated results because the parties agreed to the results themselves.

Counsel for PG&E also wrote a personal letter to Chief Judge Curtis Wagner expressing thanks and commending the efforts of Judge McCartney in directing the settlement discussions. The Counsel observed that Judge McCartney "... has an exceptional ability to work with people, to understand their issues and concerns, and to marshal disputants towards solutions that benefit everyone and lessen the cost and pain of litigation."

# SUCCESSSES

## **Office of Administrative Litigation's Recent ADR Successes in Settlement Judge Proceedings**

FERC's Office of Administrative Litigation has been involved in a number of recent successful settlement discussions. The discussions were successful in no small part because Trial Staff actively incorporated interest-based negotiation techniques in the deliberations to help the parties address their business interests and reach mutually acceptable agreements.

Among the successes are over 30 settlements of disputes involving allegations that the western power markets were manipulated. The negotiations involved a large number of parties with diverse interests. Through patient and careful exploration of the various interests and alternatives to meet

those interests, the Staff was able to aid the parties in reaching agreements on the divisive issues. The processes also helped the parties avoid potentially long and costly litigation that may have resulted in outcomes that did not meet their business needs.

In a settlement proceeding involving a pipeline company, the parties adhered to the Settlement Judge's tight procedural schedule while they tried to wrestle with the issues in dispute. The Staff was able to help the parties work together to find a middle ground between dollar gaps that separated them and still ensure that the final proposed settlement did not run afoul of Commission policy.

# *DRS Staff Collaborate in Developing Training for Use of ADR in Heritage and Cultural Property Conflicts*

In 2005, the Dispute Resolution Service (DRS), in conjunction with the University of Virginia's Institute for Environmental Negotiation, the National Park Service, the National Preservation Institute (NPI), and the U.S. Institute for Environmental Conflict Resolution (ECR), premiered a series of training sessions, and presented a panel on effective collaboration using ADR and third-party neutrals.

The first training entitled, "ADR: Tools for Section 106 Compliance," was conducted at the American Institute of Architects in Washington, D.C. It was the first such training ever conducted. The program addressed compliance with Section 106 of the National Historic Preservation Act (NHPA), the National Environmental Policy Act (NEPA), and the Native American Graves Protection and Repatriation Act (NAGPRA) regarding historic preservation conflicts and the potential for conflicts over cultural property, human burials and sacred items.

Section 106 of the NHPA fosters collaboration and meaningful dialogue via a participatory information sharing process among consulting parties. The so-called "Section 106 process" allows parties to air important issues and engage in consultation about meeting their interests regarding particular cultural resources. The training provided that the Section 106 process can often be navigated more effectively if stakeholders participate in consensus-building techniques to resolve conflicts. Use of these techniques can avert or address conflicts over resources that may otherwise escalate and lead to litigation. The trainers demonstrated that skilled use of facilitation and mediation tools can help participants manage the process, involve multiple stakeholders, and achieve consensus on cultural resources through interest-based negotiation.

Another training entitled, "ADR and Native Cultural Heritage Laws," was conducted at the 2005 Energy Conflict Resolution (ECR) conference in Tucson, Arizona. The training addressed use of appropriate consultation and ADR processes regarding controversies that arise over Native American heritage, traditional cultural places, and human remains and sacred items, as well as the rights to claim remains and items, and how they should be treated. The workshop addressed the benefits of using ADR in the context of the NAGPRA and the NHPA, and the cross-cultural, institutional and other challenges that participants can encounter.

DRS Staff also moderated a panel at the ECR conference entitled, "Sacred Sites and Cultural Places: Applying ADR." The panel was comprised of State and Tribal Historic Preservation Officers. The panelists shared perspectives and challenges when negotiating agreements with Native Americans, federal and land-management agencies, project sponsors, and other interested stakeholders. In particular, they addressed issues involving traditional cultural places and sacred sites under Section 106 and related laws. The panelists encouraged conflict resolution practitioners and preservation experts to assist one another, as well as the other interested stakeholders in these processes. They stressed the importance of reaching agreement on process and substance early on, as well as in actual or developing conflict situations.

The training sessions and panel presentation were well-attended by representatives from Native Nations and non-Native cultural resources specialists, managers, consultants, and other stakeholders involved in implementing NEPA, Section 106 of the NHPA, NAGPRA, and related environmental and historic preservation statutes.

# ADR Under the FERC's Complaint Procedures: Why Complainants Should Try ADR First

In recent months, the Commission has received a number of formal complaints in which the complainants conclude that alternative dispute resolution (ADR) would not work in the proceeding without attempting beforehand to seek assistance from a third-party neutral. Among the statements regarding ADR use in these complaints are the following:

"[The complainant] . . . has attempted for almost a year to resolve this dispute informally . . . . [We even] sent . . . a settlement proposal . . . . For these reasons [we] believe that further discussions . . . would not be productive."

". . . [T]he parties have already discussed the issues presented . . . without a successful resolution. Consequently, the issues have already been joined through those direct discussions with little possibility for success of alternative dispute resolution procedures."

"[We]. . . [e]ngaged in several unsuccessful communications in an attempt to resolve the issues. . . . Based on these communications, . . . [we] reasonably concluded that the parties would be unable to resolve this dispute informally. . . ."

In a recent complaint, the complainant concluded that because the opposing party rejected the complainant's interpretation of the Commission's Regulations, the parties would not be able to resolve this dispute informally.

On occasion, parties provide no statement at all on the application of ADR.

Statements like these (or the lack of a statement regarding use of ADR) reflect a failure to understand ADR and are contrary to the intent of the Commission's complaint filing requirements.

**What Constitutes ADR Use?** First of all, a statement that the parties have simply discussed the matter informally with each other does not constitute use of ADR. Rather, ADR requires the use of a third-party neutral in such dispute resolution discussions. For Commission proceedings, the neutral could be from within the FERC: e.g., a staff person answering Enforcement Hotline calls, a member of the Commission's Dispute Resolution Service, or a Settlement Judge. The third party neutral could also be an individual from the private sector or arranged through an organization that has a roster of ADR Neutrals.

**What Type of ADR Use Does the Commission Specify in Complaint Proceedings?** The Commission provides procedures for handling complaints in Order Nos. 602 and 602-A. These orders strongly encourage and support the consensual resolution of complaints and recommend ADR as one of the preferred resolution paths. To advance this objective, complainants must state:

(1) whether the parties have used the Enforcement Hotline, the Dispute Resolution Service, tariff based dispute resolution mechanisms, or other informal dispute resolution procedures to resolve the dispute, and, if not, why these procedures were not used;

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*ADR Under the FERC's Complaint Procedures: Why Complainants Should Try ADR First (Continued from Page 7)*

(2) whether the complainant believes that ADR under the Commission's supervision could successfully resolve the complaint;

(3) which types of ADR procedures could be used; and (4) whether there is any process on which the parties have agreed for resolving the complaint.

Order 602 adds that the DRS or the Hotline can be used to aid in the informal resolution of disputes before a complaint is filed. See Order No. 602, 64 FR 17987 (Apr. 8, 1999), Order No. 602-A, 64 FR 43608 (Aug. 11, 1999). These requirements are also specified in Rule 206 of the Commission's Regulations, 18 C.F.R. § 385.206 (2005).

**Why Does the Commission Recommend ADR?** The bottom line is that ADR works. Of those Commission cases that use one of the ADR options that provide the assistance of a third party neutral, 70 to 80 percent result in settlement. An ADR process may save time, reduce costs, and result in developing stronger business relationships, especially in comparison to traditional litigation processes. While ADR cannot guarantee results, it works best when parties work cooperatively and focus on identifying and satisfying their underlying interests.

**When ADR Really Is Inappropriate.** There are situations in which ADR use is not advisable. These are provided at section 572(b) of the Administrative Dispute Resolution Act (5 U.S.C. §§ 571-578 (1996)), which the Commission has incorporated by reference in its regulations. Generally, a matter is not a good candidate if the issues raised are issues of policy or law or are precedential and thus are issues that only the Commission can address, or involve persons or organizations that are not parties to the proceeding. However, matters in which parties disagree on the interpretation of contract language are usually excluded from these exceptions - *i.e.*, these are matters that may be addressed by the parties through the use of ADR.

**So, Why Are Parties Reluctant to Consider ADR Even Though It Works?** Here are some possible rationales for avoiding use of a third party neutral to address disputes:

- « *Asking for third-party assistance is viewed as a sign of weakness -Internally to bosses, management -Externally to other entities*
- « *There are concerns about meeting schedules*
- « *ADR can only be applied to the entire project/case instead of discrete disputes*
- « *A company fears loss of control over decisions*
- « *Use of ADR in one case will create a domino effect and require the company to use it in every dispute*
- « *ADR processes are too out of the ordinary for most disputes*
- « *Participants are wedded to traditional approaches: litigation is what they know*
- « *Lawyers only address dispute resolution while managers only address business decisions.*

**When in Doubt: Ask.** One of the duties of the Commission's Dispute Resolution Service is to aid the Commission's staff and outside parties in assessing whether a case is appropriate for ADR. This assistance can be provided via telephone or a convening session with the parties. The conversations may focus on

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# FERC ADR News

## ADR Under the FERC's Complaint Procedures: Why Complainants Should Try ADR First (Continued from Page 8)

whether the parties are interested in meeting their underlying interests or may pursue a more evaluative approach. The DRS will explore with the parties the ADR options available, including the use of a DRS mediator, Settlement Judge or early neutral evaluator from the Commission or an outside a third-party neutral if they prefer someone not connected with the Commission. The conversations on these options are nonbinding, advisory only, and confidential.

The DRS will work with FERC's regulatory community to achieve a wider understanding of ADR and its use in resolving disputes before the Commission. These efforts can be conducted at conferences or at workshops for a particular group or institution. If you have any questions, please contact Rick Miles at 202-502-8702 or Kasha Helget at 202-502-8559, or [ferc.adr@ferc.gov](mailto:ferc.adr@ferc.gov).



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