

Ferc ADRnews

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Attorney General Declares ADR an Effective Mechanism

Attorney General Letter. On March 17, 2004, Attorney General John Ashcroft delivered a letter to the Steering Committee of the federal government's Interagency Alternative Dispute Resolution (ADR) Working Group. In that letter, he encouraged use of "ADR as an effective mechanism to maximize our resources and further our goal of good government." Congress and the President established the Working Group to coordinate, promote, and facilitate the effective use of ADR in the government, pursuant to the Administrative Dispute Resolution Act of 1996 and a White House Presidential Memorandum. (See below for more information about the Working Group.)

The Attorney General also stated that:

... ADR helps make the government more results-oriented, citizen-centered, and market-driven. It provides a forum that allows parties to avoid costly litigation and resolve their disputes effectively and efficiently while addressing their business or resource interests. ADR provides for effective public participation in government decisions, encourages respect for affected parties, and nurtures good relationships for the future. Every ADR proceeding that reduces time or litigation costs, or narrows issues, or averts future complaints enables us to conserve our limited resources which must accomplish so much.

Associate Attorney General Remarks. Following delivery of the letter, Robert McAllum, Jr. addressed the Steering Committee. He echoed the Attorney General's strong support of ADR, emphasizing that ADR programs are implementing the President's directives for how a government should be guided. In his remarks, he acknowledged the successes several agencies have obtained, including those of the Federal Energy Regulatory Commission.

Mr. McCallum noted that instead of telling the public what is in its best interest, many agencies are using ADR to obtain citizen input in a collaborative process that achieves a satisfac-

tory result for everyone. With respect to making government more market-based, Mr. McCallum noted that ADR helps businesses avoid time-consuming and often unnecessary litigation so that they can concentrate on running their business. Mr. McCallum acknowledged that while we must be able to litigate any case, we must not litigate every case. There will always be issues of policy, or issues that require the establishment of precedent where ADR will not be cost-effective. But he stated that use of ADR in many areas provides an efficient and cost-effective way to manage the government's business and to permit agencies to perform their core functions.

Interagency ADR Working Group. The Working Group was established by Presidential Memorandum dated May 1, 1998, to assist federal agencies in developing and operating ADR programs. Most of the major federal agencies are part of the Working Group's membership.

To accomplish the tasks of the Working Group, there are four discrete Sections within the Working Group to assist federal agencies in creating ADR programs in specific subject matter areas. Those Sections are: Workplace, Contract/Procurement, Claims, and Enforcement & Regulatory. During the first year of operation, the Working Group operated primarily through these Sections to provide technical assistance and guidance on best practices in ADR program development. These sections have conducted numerous training sessions, meetings, and colloquia on all aspects of ADR. As they have moved forward, the Sections have continued serving the needs of federal agencies interested in developing strong and effective dispute resolution programs.

The Steering Committee is the staff-level committee that supports the work of the Sections and the Working Group. The Steering Committee consists of ADR professionals and experts in the federal government who have given their time and expertise to the cause of the Working Group and its Sections. Many members of the Steering Committee serve as their agency's Dispute Resolution Specialist and are responsible for the operation of ADR programs within their own organizations. FERC's Director of its Dispute Resolution Service is a member of the Steering Committee and has since September 2002, served as Chair of the Interagency Enforcement and Regulatory Dispute Section.

For more information about the Working Group see: <http://www.adr.gov>, and for the complete text of the Attorney General's letter and the Associate Attorney General's speech, see respectively: <http://www.adr.gov/adrwgagltrtochair031204.htm> and <http://www.adr.gov/asgreport0304.htm>.

Dispute Resolution Service Proposes Conflict Resolution Training Program for FERC Staff

In response to Chairman Woods' policy for increased professional training for FERC Staff, the Dispute Resolution Service (DRS) has begun offering classes in conflict resolution for FERC Staff. The objective of the courses is to assist Staff in various Commission resolution processes involving disputed issues. The training could also apply to internal technical deliberations and communications.

Among possible courses in ADR offered are:

1. **Introduction to Conflict Resolution and ADR**. Presents an overview of conflict resolution and problem-solving techniques that individuals, groups, and governments use to manage or address their conflicts in constructive ways. Provides tools that demonstrate how various approaches and negotiation styles can affect the tenor and outcome of the process, and addresses when ADR may and may not be appropriate.
2. **Conflict Assessment**. Addresses how to assess the gamut of conflict from disagreements with fellow staff on technical or policy issues, to inter-agency, multi-stakeholder conflict with overlapping jurisdictions, political complexity, angry citizens and advocates, and uncertain science. Demonstrates how to perform a systematic conflict diagnosis, and how to conduct a Convening Session with parties to explore options to resolve the issues.
3. **Designing & Maintaining a Successful Collaborative Process**. Reviews basic principles for agency engagement in collaborative problem-solving, including: designing and defining the mission of a collaborative process, the role of stakeholders, the role of a neutral, defining issues/interests, establishing working groups, and using a checklist to ensure the collaborative process meets stakeholder needs as the process moves forward.
4. **Introduction to Negotiations**. Examines strategies for negotiation that demonstrate the differences between interest-based and positional bargaining. Concepts include the value of communications, relationships, BATNA (Best Alternative To a Negotiated Agreement), and how to develop interests and options.
5. **Facilitation**. Provides tools for facilitating technical conferences, and other meetings including preparation, and how to uncover interests behind positions and transition the discussion toward settlement.
6. **Early Neutral Evaluation**. Focuses on the role of a neutral and how an Early Neutral Evaluator can provide an early and frank "reality check" for clients and lawyers on the merits of their case before the Commission.
7. **Mediation - Understanding the Mediator's and Your Role**. Discusses use of third-party neutrals to assist parties in their negotiations in Commission proceedings, including: how to select and define the role of a neutral and what to expect from the neutral, how to prepare for the mediation, and staff's role in the mediation.

The DRS can also tailor additional courses to specific needs and concerns such as confidentiality, ethics, barriers to ADR, agreement-drafting, creating value, communications skills, and cultural and gender differences.

SUCCESSSES

Settlement Judge Process Achieves Near-Unanimous Settlement On Difficult Seams Issues

On March 19, 2004, the Commission accepted an agreement among 84 parties that established going-forward principles and procedures and extending dates in the Midwest Independent Transmission System Operator, Inc. (Midwest ISO), et al. and Ameren Services Company, et al. proceeding (Docket Nos. EL02-111-004 and EL03-212-002). The agreement was reached with the assistance of Chief Judge Curtis Wagner acting as settlement judge among the parties.

The Commission had earlier ordered the elimination of regional through and out rates between the PJM Interconnection, L.L.C. and Midwest ISO to be effective April 1, 2004. The Commission also required elimination of through and out rates for new transactions and allowed two-year transitional lost revenue recovery mechanisms (known as Seams Elimination Charge/Cost Adjustments/Assignments (SECAs)) to be put in their place, effective April 1, 2004. Later, the Commission provided time for the parties to participate in the settlement judge process to develop these transitional lost revenue recovery mechanisms.

In his report to the Commission about the settlement, the Chief Judge noted that the parties had participated in 14 full days of negotiations - often involving over 100 participants ---and that individuals and groups of the participants also met among themselves to work on the issues. The Chief Judge explained that going-forward principles and procedures agreed upon by the parties will shorten the transition to the elimination of the through and out rates by 17 months; the agreement retains the through and out rates until December 1, 2004; and then they will be eliminated entirely. The agreement also provides for continued negotiations, with the assistance of the Chief Judge, aimed at developing a long-term transmission pricing structure that eliminates seams in the PJM and Midwest ISO regions. Either a single solution or multiple solutions must be filed with the Commission by October 1, 2004.

Among the participants' comments about the settlement judge process were the following:

“... [T]here was a lot of work by many people, a lot of very difficult compromises, and, as with any settlement, everybody left something here that they did not obtain, and of course, obtained some things that they were seeking to obtain as well.

It is particularly unique, in that the large number of parties involved (sic) - I have been involved in a number of major proceedings with multiple parties and the Commission. This is probably as large as any, and to achieve a settlement of this scope is truly, in my experience, unprecedented.”

Another participant stated that:

“I think [Chief Judge Wagner] deserves a great deal of credit for the success of this effort, and it is an amazing undertaking that we were able to bring so many disparate interests together to sign onto a single document.

If the Commission had not done this, we would have been down the road of a very long litigation proceeding with an uncertain end-state resolution, and we now think that we can see the day within this calendar year when the Commission can have before it, at least one and maybe other proposals that deserve merit and can be implemented in a way that would preclude us from having to litigate over a transitional mechanism that was deeply flawed.”

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Long-Term Misunderstanding Uncovered With Help of ADR

ADR is often a valuable tool that provides corporate executives with a safe and confidential environment to work through difficulties in a business relationship.

FERC's Dispute Resolution Service (DRS) recently mediated between two municipalities embroiled in State court litigation, FERC hearings and multiple arbitrations. This conflict had lasted well over eight years.

The relationship between the parties had begun when they entered into a power sales agreement in the early 1990s when long-term contracts were common place. The power producer was responsible for coal inventory and management under the agreement while the purchaser was responsible for predicting energy and capacity use and cooperating with dispatch. But early in their relationship, the parties became involved in a conflict. They realized that there were vast differences between what was anticipated in the contract and what was being implemented with respect to coal storage, ordering, predictions, and delivery. As a result, there was a communication breakdown between them.

One of the parties brought this matter to the DRS as a result of a recent success on another matter with a DRS mediator. During the mediation, the parties explained their perceptions about the conflict. The mediator helped the parties to focus on communicating their interests to one another. By learning each other's concerns regarding the business relationship, they were able to open up to each other about matters that had remained suppressed for many years. This revelation lifted the cloud between these two individuals and allowed them to see each other not as rivals but as partners who could now engage in joint problem-solving.

The settlement included a cooperative agreement concerning the forecasting, ordering and inventorying of coal; the development of a method to curtail maintenance outages to cause minimal energy losses to the purchasing entity; and a partnering approach in which one party supported the other in obtaining necessary environmental permits to complete a major project.

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in the federal government who have given their time and expertise to the cause of the Working Group and its Sections. Many members of the Steering Committee serve as their agency's Dispute Resolution Specialist and are responsible for the operation of ADR programs within their own organizations. FERC's Director of its Dispute Resolution Service, Richard Miles, is the agency's Dispute Resolution Specialist. He is a member of the Steering Committee, and has since September 2002 served as Chair of the Interagency Enforcement and Regulatory Dispute Section.

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Although some of the participants did not agree with the settlement, the Commission accepted it because the vast majority of the participants supported it. In addition, the Commission found that the agreement ensures revenue neutrality for transmission providers until December 1, 2004 and, more importantly, shortens the two-year transition period for the elimination of seams and through and out rates in the PJM and Midwest ISO by over a year.

SUCCESSSES

ADR Use in OMOI's Enforcement Section: An Effective Tool for Sticky Situations

The Commission's Office of Market Oversight and Investigations includes, among other things, the Division of Enforcement and the Enforcement Hotline. Enforcement conducts investigations of violations of the Commission's rules, orders, and regulations and brings proceedings to remedy those violations. Often, Enforcement matters are resolved through negotiated settlements.

The Enforcement Hotline has been used as an effective informal conflict resolution alternative since 1987. The Hotline invites market participants and the general public to call, e-mail or write to complain or report market activities or transactions that may be an abuse of market power, an abuse of an affiliate relationship, a tariff violation, or another possible violation by a FERC regulated entity. The Hotline also is used by the public to resolve disputes in matters within the Commission's jurisdiction without litigation or other formal, lengthy proceedings. Hotline staff has effectively resolved disputes involving landowners and pipelines, tariff and market issues, and procedural matters. The Hotline, however, will not intercede in disputes involving: (1) compensation between landowners and natural gas pipelines; (2) matters before the Commission in docketed proceedings; or (3) matters purely involving retail sales and service.

Below are two examples in which the Enforcement Division and the Enforcement Hotline have used alternative dispute resolution (ADR) successfully to resolve conflicts.

Enforcement Staff Mediates Between Parties in Recreation Area Dispute. In a matter before the Enforcement Division, a FERC hydropower licensee had violated its license by permitting an unauthorized construction by a city within the licensee's project boundary.

There was no question that the recreation area was a public benefit for a depressed area. While the Commission's license allowed the licensee to grant the city an easement without Commission approval, it required the licensee to ensure that all use and occu-

pancy within the project boundary was consistent with the license. The licensee had certain river flow and safety concerns about the increased water traffic and the use of the boat dock, and refused to grant an easement until those concerns were met. Unfortunately, in direct negotiations about the problem, the licensee and the city reached an impasse.

Instead of using traditional Enforcement remedies (e.g., seeking civil penalties) against the licensee, staff proposed a mediation of the dispute between the licensee and the city. After some investigation and discussions, the licensee and the city agreed, and decided to use an Enforcement staff member as a mediator between the parties.

The presence of a neutral to the dispute between the parties was very helpful to the process. The principals for the city and the licensee had a bad relationship from an earlier dispute, and this made their negotiations about the boat dock more frustrating when they reached an impasse. The mediator was able to help both sides set aside frustrations and open the process to productive communications. In their discussions, the licensee stated its concerns about safety, increased trash and the possible effect on river flows. The city's main interest was to allow its recreation area to proceed as planned and the constructed boat dock to remain in place.

The parties reached an agreement which included, among other things, the city's construction of a boat barrier to additionally protect small crafts in the area close to the dam and flow monitoring to check to effect of the recreation area on flows to the dam. After the parties signed their agreement, the licensee was able to file for an easement that the Commission's Office of Energy Projects staff approved. The Enforcement Division was then able to terminate its case against the licensee.

Enforcement Hotline Facilitates Between Parties in Informal Pipeline Dispute. In a Hotline matter, a city wanted gas transportation on a pipeline to its city gate. The city had discussed this matter with the pipeline and was quoted rates and charges that made the

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DRS Assists in Negotiations Regarding Preference Power Allocations

In the past few months, the Commission's Dispute Resolution Service (DRS) has mediated three successful negotiations between three Native American tribes and power providers regarding preference power allocations from the Western Area Power Administration (WAPA) that are being supplied from the Colorado River Storage Project (CRSP). In each situation, the delivery of the preference power could begin as early as October 1, 2004. The mediations are described below.

Yavapai-Apache Nation

Early in 2004, a representative of the Yavapai-Apache Nation asked the Dispute Resolution Service (DRS) to assist in negotiations with Arizona Public Service (APS), the state's largest electric utility. The negotiations concerned plans to establish an electric utility grid that would be owned and operated by the Yavapai-Apache Nation. APS currently owns the electric grid.

The parties had difficulty deciding upon conditions and cost for transfer of ownership of the electric grid to the Yavapai-Apache -- in particular, the costs and conditions of a study plan that required the parties' joint approval.

The Yavapai-Apache believes it important to establish its own electric utility. It has signed contracts to receive 2 MW of power from the CRSP allocations beginning October 1, 2004.

After holding separate interviews with the parties, including a meeting with the Tribal Chairman, the DRS conducted a one-day mediation session with all parties in Phoenix, Arizona. Through the mediation process, the parties were able to agree on a study plan, which both parties signed the following week. Joint agreement and commitment to the steps in the study plan is a big step toward the Yavapai-Apache becoming its own independent utility and benefiting from the CRSP allocation.

Hualapai Nation

Following the successful outcome on the Yavapai-Apache case, the DRS was contacted by the Hualapai Nation, which was experiencing similar challenges regarding how to receive its federal CRSP power allocations from WAPA beginning in October 2004. Mohave Electric Cooperative currently delivers electricity to the Hualapai Nation at a nearby substation. The Hualapai was uncertain whether taking the additional power directly from Mohave Electric was the best way to accept the CRSP allocations. One of the greatest challenges for the Hualapai was meeting with the essential parties to share information about the options available for accepting the CRSP power.

The DRS made telephone inquiries to the parties and other interested participants and held separate interviews with key parties--prior to the mediation. Later, the DRS conducted the mediation session at an agreed-upon neutral location in Kingman, Arizona. In addition to the Hualapai, BIA and Mohave, representatives from WAPA, the Arizona Public Authority, and PNM attended the mediation.

During the mediation, WAPA explained the options and the group as a whole evaluated which options might result in the greatest benefit to the Hualapai Nation. With the information from this discussion, the Hualapai was able to determine the best option (power-pooling), and is currently selecting a provider.

Havasupai Tribe

The DRS also met with representatives from the Havasupai Tribe, BIA and BIA's engineering consultant to discuss the Havasupai's options for CRSP allocations. To help with the negotiations, the DRS was able to share information about the results of the session with the Hualapai Nation.

The consultant suggested that, as neighbors, the Havasupai and Hualapai nations may consider pooling their individual power allocations for a third party utility to bid on and possibly increase the value of the power to both tribes and the prospective utility. The Havasupai has also decided to use power-pooling and is currently selecting a provider. A decision is expected in the near future by the Tribal Council in order to take full advantage of the power benefits by October.

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DRS Consults with States and Regulators To Encourage ADR Use

One of DRS' goals is to promote and enhance the use of ADR in the utility community outside of the Commission. Another is to consult with outside entities on how to integrate ADR into various dispute resolution processes. In addressing these goals, the DRS staff has worked with state utility commissions in recent months to:

- Inform the state commissions about the roles and services of the DRS,
- Understand how the state commissions approach ADR, and
- Explore ways that the DRS and state commissions could work together to advance ADR use.

The DRS has made several presentations to state commissions and regulatory groups at programs including the National Association of Regulatory Utility Commissioners (NARUC) National Conference of Regulatory Attorneys; the Michigan State University-Institute of Public Utilities (MSU-IPU) NARUC Regulatory Studies Program (Camp NARUC), jointly with representatives from the New York State Department of Public Service; the MSU-IPU Annual Policy Conference, jointly with a representative from the Montana Public Service Commission and the Federal Communications Commission; and a meeting of the NARUC Staff Subcommittee on Gas.

In addition, the DRS has collaborated with the Florida Public Service Commission (FPSC), which has a history of supporting and initiating ADR use. DRS and the FPSC developed an options paper on how to engage interested stakeholders (e.g., Florida Reliability Coordinating Council, investor owned utilities, and the Florida Department of Environmental Protection) in addressing how to advance further ADR use in the state.

The DRS submitted the Florida options paper to the NARUC Staff Subcommittee on Gas for consideration in advancing ADR among the entities that the subcommittee members regulate.

The DRS staff has also conducted a workshop for the Minnesota Public Utilities Commission on ADR use in regulatory disputes.

The state commissions are interested in advancing ADR use because it saves resources (time and money) compared to a litigated process. Also, the state commission representatives expressed interest in the DRS educating their commission about ADR programs. DRS will meet with additional state commissions soon.

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Summary

The parties in all three cases appreciated the DRS' neutrality, on-site visits, and assistance with facilitating and mediating possible solutions for the tribes regarding the CRSP allocations with the October 1 receipt date fast-approaching. When this matter was brought to the DRS, first by legal counsel for the Yavapai-Apache, then by word-of-mouth from the Yavapai-Apache to the Hualapai, and finally, to the Havasupai, other key players decided it was important to meet face-to-face and address the issues. In the end, the structure of the mediation and the participation of Mohave Electric, WAPA, and the expertise of BIA's engineering consultant were all critical to ensure that the tribes and other participants understood every the power option available so they could individually and collectively make the best decisions.

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transportation uneconomical. The city thought that the pipeline was overcharging for its transportation and violating its tariff. The city met with Hotline and other Commission staff to discuss its informal complaint. Staff then explained to the city why the pipeline's proposal was correct and not a tariff violation. Hotline staff then asked the parties if the Hotline could facilitate a meeting between the city and the pipeline to explore other possibilities for economical gas transportation to the city. As a result of that meeting, the pipeline and the city have exchanged information and are now engaged in substantive negotiations. The city was grateful to the Hotline staff for facilitating the meeting with the pipeline and creating the framework for its negotiations



Richard L. Miles, Director, 202-502-8702, richard.miles@ferc.gov

Dispute Resolution Specialists:

Kasha Helget, Editor, 202-502-8559, kasha.helget@ferc.gov

Deborah Osborne, 202-502-8831, deborah.osborne@ferc.gov

Steven Shapiro, 202-502-8894, steven.shapiro@ferc.gov

Jerrilynne Purdy, 202-502-8671, jerrilynne.purdy@ferc.gov

Steven Rothman, 202-502-8643, steven.rothman@ferc.gov

Program Assistant: Tamiko Hinnant, 202-502-6184, tamiko.hinnant@ferc.gov

Federal Energy Regulatory Commission 888 First Street, N.E. Washington, DC 20426