Ferc ADR news

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ADR Use in the Offices of Administrative Litigation and Market Oversight and Investigations

Recently, FERC ADR News spoke with managers in FERC's two newest offices regarding their ADR functions. The ADR activities in these offices highlight the variety of dispute resolution options at the Commission.

William Froehlich
Director of OAL

The Office of Administrative Litigation (OAL) was re-established as a separate FERC office in August 2002 and the Chairman named William Froehlich as the Office Director. We recently asked Mr. Froehlich a few questions about the OAL, and its ADR functions.

Q: Will there be any major differences in the functions of the new OAL from the way it operated as a part of OGC?

A: Actually, OAL combines the litigation attorneys from the Office of the General Counsel (OGC) and the litigation technical analysts from Office of Markets, Tariffs, and Rates (OMTR). These employees were already working together on cases set for hearing and settlement judge proceedings.

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Steve Rothman
Director, OMOI's Enforcement Hotline

The Office of Market Oversight and Investigation (OMOI) was established in April 2002 to assess the operations of the nation's gas, oil pipeline, and electricity markets and to ensure vigilant and fair oversight of those areas under Commission jurisdiction. The Commission's Enforcement Hotline is now located in OMOI, with Steve Rothman as its Director. We recently asked Mr. Rothman about the Hotline and its functions in the new OMOI.

Q: First, tell me a little more about what OMOI does.

A: Among OMOI's functions is to understand energy markets and risk management, measure market performance, investigate compliance violations, and

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Alternative Licensing Processes Verified as Faster and Less Costly Than Traditional Processes

Since 1997, FERC has offered applicants for licenses for hydroelectric projects the opportunity to combine the pre-filing consultation process and the environmental review process. These so-called "alternative licensing procedures" (ALPs) differ from the traditional licensing process that separate these processes. In addition, ALPs allow for early scoping of issues pertaining to the National Environmental Policy Act. ALPs are intended to provide increased opportunities for the parties to achieve consensus on study and enhancement needs and to shorten the licensing process.

The bottom line question, however, is: do ALPs save time and money over traditional processes? In an assessment done for Congress in 2001, FERC's Office of Energy Projects (OEP) determined the answer is a resounding, "Yes."

"[T]he ALP typically saved almost 2 years as compared with the traditional process."

OEP determined that the time for applicants to consult and prepare the application (pre-filing time) was 40 months for ALPs versus 32 months for traditional license processes. However, the post-filing processing time was significantly less for ALPs: 16 months versus 47 months. Thus, the ALP typically saved almost 2 years as compared with the traditional process. Further, because many of the ALPs also ended in settlements, rehearings were less likely. In an analysis of projects licensed between 1986 and 2000, 147 rehearing requests were filed on 316 traditionally processed license orders (47%). In contrast, only four rehearings were filed on 20 ALP license orders (20%) and only one rehearing request was on substantive issues. Therefore, the post-order processing time was significantly reduced by use of the ALP, as was the level of controversy on the outcome.

An assessment of the cost of licensing also was done for the 2001 report to Congress. While based on limited data (sample size of only 18 ALPs), Commission staff determined that the total cost of licensing (the cost of preparing the application plus the cost of protection, mitigation, and enhancement measures in a license) was substantially greater for projects prepared using the traditional process than for ALPs.

OEP staff has continued to conduct outreach and to promote the ALP. Due to these efforts, as of January 2003, the Commission has issued 26 orders from applications prepared using the ALP, there are 20 applications using the ALP pending for action, and another 34 applications using the ALP being prepared.

There are a variety of initiatives underway by federal, state and private entities to redesign the licensing process through regulatory and administrative reform. In September 2002, FERC, in conjunction with the Departments of Agriculture, Commerce and the Interior, issued a notice that provided a list of forums to exchange ideas on improving the licensing process. The information gathered at these forums were used as a basis for a proposed rulemaking regarding regulatory reform of the hydropower licensing process that FERC issued in February 2003. FERC plans to issue revised rules by the end of the Summer 2003.

SUCCESSES

From the Dispute Resolution Service:

Collaboration Process in New York a Success for Community and Pipeline Project

The DRS staff's mediation efforts proved successful in a highly contentious pipeline certificate proceeding in New York community. The mediation was initiated following a December 21, 2001, Interim Order issued by the Commission that authorized Millennium Pipeline Company to construct and operate a pipeline from Lake Erie to Consolidated Edison's high-pressure line in the City of Mount Vernon, New York. The Interim order, however, did not certificate a specific route for the Millennium pipeline through Mount Vernon because the citizens of that City raised numerous, specific numerous concerns about pipeline construction through their community and opposed the proposed pipeline in their community. The Interim Order requested that Millennium and the elected officials, interested parties and citizens in Mount Vernon negotiate over an alternative route. The Commission also offered the services of its Dispute Resolution Service to the parties.

The parties accepted the Commission's offer and in January 2002, the Commission's Dispute Resolution Service initiated a mediation process that continued over the next three months in the Mount Vernon area. In early May 2002, Millennium and the Mayor and the City Council of Mount Vernon agreed on a revised pipeline route through Mount Vernon.

The Mount Vernon elected officials called the agreement a major victory for the City because it addressed a number of important concerns. Millennium also claimed that the agreement met all of its interests and stated that it remained committed to working closely with Mount Vernon City officials and its citizens. Both U.S. Senators from New York filed letters commending the efforts of the Commission and its Dispute Resolution Service in support of the parties' negotiation efforts.

MORE SUCCESSES

Examples From the Dispute Resolution Service:

Minnesota Power Agencies Settle Differences and Improve Relationship

In March 2002, DRS staff contacted representatives Minnesota Municipal Power Agency and Southern Minnesota Municipal Power Agency who were involved in a complaint proceeding at the Commission. The parties agreed to the assistance of the DRS in mediating accounting difference and conflicts regarding cooperative business ventures. Over a period of about 18 weeks, the DRS staff and the parties held face-to-face and teleconference meetings, in which the parties were able to resolve the issues and improve their working relationship. As part of the resolution, they agreed to swap energy from each others' generators and thereby reduce transmission losses.

The mediation process gave the parties an opportunity to improve their ability to work cooperatively with each other. This improved relationship should reduce disputes in the future, and eliminate or reduce the number of complaints with the Commission, and result in a savings in time and costs both for the parties and the Commission.

DRS Consults With and Learns From Canadian ADR Affiliates in Calgary

In October 2002, DRS staff met in Calgary with Canada's National Energy Board (NEB), the Alberta Energy and Utilities Board (EUB), and the Alberta Arbitration and Mediation Society to exchange information on the use of alternative dispute resolution in government programs related to the regulation of energy resources. The meeting followed an April session with the NEB in which the DRS was asked to return to provide a more detailed presentation to senior leaders on how the DRS was developed, its scope and responsibilities, and lessons learned since its inception. The NEB also asked the DRS for advice on the development of its in-house ADR program. In turn, the DRS sought input from NEB and EUB about the measures they have taken to increase ADR use.

The DRS believes that the consultation may help in the increased use of ADR in Canada and the United States. This can benefit the NEB, FERC and others in resolving conflicts at less cost and with fewer resources, provide more options to address conflicts between entities in U.S. and Canada, and provide an opportunity for more inter-border infrastructure disputes to be processed through collaborative processes.

MORE SUCCESSES

EXAMPLES FROM OEP, DRS AND OAL STAFFS:

Multi-Office Mediation Effort Helps Community and Licensee Address Trespass Problem

Over a period of several months in 2002, residents living in the vicinity of the Allegheny Dam No. 4 (Project No. 2516) near Shepherdstown, West Virginia were bothered by nighttime noise, rowdiness and safety concerns on property owned by Allegheny Energy Supply, the licensee for the dam. The residents complained about the problems to the licensee, but the parties were unable to resolve the predicament.

Finally, the frustrated residents contacted the FERC's Office of Energy Projects, which, in turn, involved the Enforcement Hotline in the matter. On September 19, 2002, the residents, representatives of the licensee, and FERC staff met to discuss the matter. A member of the Hotline interceded as a mediator during the meeting. He was able to calm the various participants, including residents, local law enforcement representatives, resource agencies, and recreationists and help them view the problem as a joint concern. He then began to guide the participants in exploring mutually-satisfactory alternatives to address the matter.

The participants agreed to meet again and to work with an OEP staff member in continuing to develop solutions. The Commission staff worked to address the concerns of the residents and to ensure that the recreation area remained open to the public. After four meetings in West Virginia, the participants were able to come to a number of solutions to keep trespassers out of the property. The participants also agreed to form a task force to discuss future deterrents such as signs and lighting and to continue use of neighborhood watch to monitor the situation.

The licensee, residents, and recreationists were happy with the result. By working together to find solutions, the licensee was able to satisfy concerns without a large investment of time or money, the residents found they could amiably work with the licensee to find current and future resolutions, and recreationists were able to keep a valuable river access and angler area open, with the help of FERC staff.

Relicensing Process for Santa Anna River, Lytle Creek, and Mill Creek, California Projects

For the past three years, a team from the Dispute Resolution Service and Office of Administrative Litigation has mediated an alternative license public stakeholder process (ALP) involving hydro-power projects on Santa Anna River, Lytle Creek, and Mill Creek in California. The issues in the re-licensing process involved balancing the environmental quality standards for the downstream ecological populations, hydro-power production, and municipal and agricultural uses for the water resources. Additional issues unique to the projects concerned rights of local water districts to project waters, and the effect the Applicants' one hundred year-old contracts with the various water agencies (twelve in total) have on the rights of the licensee, Southern California Edison Company, to produce electricity from the water at the existing dams.

This re-licensing effort was also challenged by a lack of reliable historical data, ongoing drought conditions in many of California's waterways, including the rivers and streams impacted in this ALP, and the recent energy crisis during which the State looked to every source of electricity, including these projects, for additional production.

Unlike many other water rights disputes in California that have ended up in civil litigation, at the end of this collaborative process, Southern California Edison filed the proposed terms and conditions of the projects without protest in November 2001. Because the process allowed the parties to express their concerns, they were able to reach settlement on many issues. The process also provided for their future input. The Commission issued a Draft Environmental Assessment on the project in May 2002, again without protest.

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A: Representing the public interest can give us credibility with the other parties. They recognize that we are not on the side of a particular financial interest, and they know they can count on us to perform an objective analysis that can be the starting point for discussions. How staff participates in a given proceeding depends on whether there is already a neutral in the proceeding, and, if so, the nature of the proceedings, and the role the neutral sees for staff to participate.

Trial staff is as much of an advocate for its position as any other participant in the case. However, we have no reason to promote the financial interests of one party or another. Thus, in proceedings in which there is no neutral, we are frequently called upon to use our analysis and our experience to facilitate an agreement between the parties. We will feel out the parties and suggest parameters for settling a case that is heading towards hearing when we believe that settlement will produce a better result.

Since the passage of the Administrative Dispute Resolution Act, 5 U.S.C. § 571-583 (1996), the Commission's Administrative Law Judges have increasingly acted as neutrals in our proceedings. In fact, the Commission frequently orders settlement judge proceedings before a case goes to hearing. In those cases, we take our cue from the Settlement Judge. Some ALJs ask for staff to assist them directly, instead of arguing its position as one of the assorted participants. This tends to happen in large and complex cases, where the issues are unusual, and the different market and industry sectors are well represented by numerous parties. In more conventional cases, such as rate increases under long-standing contracts, we are more likely to present and argue for our settlement analysis, in our traditional role as trial staff. Even in these more conventional cases, the Settlement Judge may ask us to speak directly to individual parties about particular issues and positions.

On rare occasions we actually provide a staff attorney, usually assisted by technical analysts, to function as a neutral between or among the parties. This happens at the request of parties who have worked with us in this capacity in the past.

Q: In his statement regarding the re-creation of OAL, Chairman Wood said the "trial staff is crucial to the successful settlement of litigated cases." What types of methods does the OAL staff use in trying to achieve settlement, and which are the most effective?

A: Recently we have most often participated in settlement judge proceedings as an advocate for the staff position. If the case involves rates, we obtain data from the utility or pipeline, prepare an analysis for settlement purposes (called a "topsheet"), and share it with the parties at whatever point the settlement judge feels is appropriate. We frequently meet or speak by telephone with individual parties, and suggest areas where we think they could compromise with opposing parties. We also disclose points that we cannot negotiate, typically because they involve Commission policy or precedent that we believe is binding. This is important, because the parties are wasting their time and money if they push forward with a proposal we think the Commission would reject.

I already mentioned that in some cases parties ask for us to act as a neutral.

We have recommended a judicial “mini-trial” of a limited issue in a couple of instances. This can be helpful when the parties are unwilling to negotiate on the full range of issues because they are "stuck" on a preliminary issue that both sides think they can win. Putting on their experts for a quick decision on the preliminary issue, by a Judge picked for that particular purpose, has been effective in breaking the logjam. However, this isn't used very often because it needs the right set of circumstances to appeal to the parties.

Q: Does OAL staff receive any formal training in negotiating settlement discussions? If so, what type? Is it ongoing?

A: Over the years, litigation staff has used several different sources of dispute resolution training, including the Harvard negotiations seminars. It is particularly important to train our attorneys in negotiating techniques, but we have also trained some of our technical staff as well. With the new office, we expect to offer hands-on training which uses realistic scenarios.

Q: Are there any other ways that OAL is able to improve its ability to negotiate with contesting parties?

A: In the world of utility regulation, and deregulation, the parties want to be assured that they are getting a reasonable deal. This means that even when they want to avoid the expense of protracted litigation, they need evidence that the settlement will be reasonable. We try to assign a staff team with the right background to evaluate the particular issues in the proceeding. The team members get as much information as they can in the time frame we’re given, so that staff can perform a reasonable and credible analysis. We also work with the parties to determine what they really want. Sometimes the bottom line needs of a party are very different from what was laid out in the pleadings filed with the Commission. These things can be difficult to do, particularly now, when our caseload is so heavy. However, these are the things we need to do to be helpful to the parties and to the Settlement Judges.

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analyze market data. Our Director, William Hederman, likes to thinks of us as the "cop on the beat."

Q: What is the Enforcement Hotline and what role does it play in OMOI?

A: The Hotline is the Commission's informal complaint process. Through the Enforcement Hotline, we invite market participants, and the general public, to informally call, email or write the Hotline 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. As OMOI is the "cop on the beat," we like to think of the Hotline as "neighborhood watch."

Market participants, jurisdictional entities and members of the public also may ask the Hotline for help or information about any matters within the Commission's jurisdiction.

We receive about 600 new Hotline cases a year.

Q: What happens when you receive a call on the Hotline?

A: The caller is immediately referred to one of the attorneys in OMOI's Enforcement Division, who will informally and expeditiously try to resolve the complaint or address the caller's question. The attorneys consult technical Commission staff, as necessary, to answer or give an opinion about the question. The Enforcement Hotline successfully has resolved hundreds of disputes informally and answered hundreds of public inquiries. Some matters that cannot be addressed and closed informally and expeditiously may be converted to preliminary Enforcement investigations. Also, complainants are always free to terminate a Hotline action at any time and file a formal action with the Commission.

Q: That leads me to ask if the Hotline staff uses ADR to resolve complaints, and if so, what forms of ADR are applied?

A: Much of what we do involves ADR - either through mediation or early neutral evaluation. The Hotline process is a great way to resolve disputes informally and without litigation or other formal, lengthy proceedings. Our attorneys have been very effective in mediating disputes between landowners and pipelines, or disputes arising between our jurisdictional companies. These include tariff disputes, market disputes and disputes over procedural questions. As early neutral evaluators, we also may seek out staff expertise and take a position in a Hotline dispute. Our view, although informal and non-binding on the Commission, will often resolve the dispute and guide the parties to a settlement.

Q: How does the Enforcement Hotline differ from the Commission's Dispute Resolution Service (DRS)?

A: The Hotline staff members are investigators who will try to advise callers on questions or attempt to address disputes in the marketplace, either informally through mediation or early neutral evaluation, or formally through other traditional Enforcement remedies. While we are trained in mediation, there may be times when we are not neutral and take a side with one of the disputing parties. In addition, the Hotline can address complaints and questions up to the time a matter is filed with the Commission. Once a formal complaint or other proceeding is initiated before the Commission, the Hotline staff may not be involved.

The DRS, on the other hand, may address a dispute at any time – prior to or after a matter is filed with the Commission. This is because the DRS staff is independent and neutral from other Commission offices and is not involved in the investigation, trial or decision-making regarding any case. The DRS staff is not subject to rules prohibiting off-the-record communications between and among parties; however, it is subject to separation of functions rules (i.e., the DRS staff may not communicate substantive matters in any of its proceedings with non-DRS staff). They are well-trained in all aspects ADR and perform ADR services, particularly, mediation and facilitation. In addition, they promote the use of ADR both within and outside of the Commission. The Commission refers certain formal complaints to the DRS for mediation. As a note, I also serve on the DRS staff as one of its adjunct mediators.

Q: Besides docketed disputes that are pending at the Commission are there other matters that the Hotline will not address?

A: Yes, we do not address matters that involve the amounts of compensation for pipeline easements or construction damages, and matters purely involving retail sales and service. These are matters that are within the purview of states' exclusive jurisdiction.

Q: How can readers contact the Enforcement Hotline?

A: Either call toll free **1-888-889-8030 or** email us at **Hotline@ferc.gov**.

Ferc ADR news

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- The United States Institute for Environmental Conflict Resolution: What Is It and What Can It Do for You?
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- Improved and Expanded DRS Webpage

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