Ferc ADRnews

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TO CONVENE OR NOT TO CONVENE?

If you have a dispute that may be suitable for alternative dispute resolution (ADR), but are not certain which options may be available to you or your client, a convening session is an excellent way to find out.

A convener is a neutral person who assists in commencing settlement discussions or an ADR process such as mediation. At FERC, members of the Dispute Resolution Service (DRS) Staff act as conveners for this purpose. In its first contact with the parties (usually a phone call), the DRS will explore the possibility of using ADR to resolve the conflict. If an interest exists, the DRS will "convene," i.e., meet with the parties and explain the ADR options available to them.

During the convening session, the DRS representative will act as a guide, help the parties understand the process, get the process started, and aid in discussing the selection of a third party neutral. The parties may select a third party neutral from inside or outside the Commission and will define the role the third party neutral will have. If the parties choose a third party neutral other than the DRS representative to proceed with an ADR process, the DRS representative will step out of the picture, and the parties' choice will continue the process.

For parties interested in ADR, there is nothing to lose by requesting a convening session. It will not delay the Commission's ordinary processing of a case unless the parties make such a request. Nor will a convening session bind the parties to continue with an ADR process. So, if the parties to your dispute are interested in ADR, perhaps the convening session is just what your case needs for an ADR jumpstart.

"I have the highest regard for the ADR process and the Commission's Dispute Resolution Service. From the perspective of the parties to a dispute (potential or actual), this process provides an alternative to time and resource intensive litigation. From the perspective of the Commission, the ADR process allows for the resolution of disputes in a timely and streamlined manner. As the Commission continues to accelerate its processing of disputes brought to its attention, and as the number and complexity of disputes continues to increase, the ADR process likewise becomes increasingly valuable."

-- Chairman Curt Hébert, Jr.

Inside This Issue

2-4 Success Stories from ALJ, DRS, OGC, OAL

5 Faster Approval of Uncontested Settlements

SUCCESSES

We continue to have many ADR successes at the Commission. Take a look:

FROM THE ALJ CORPS

Judge McCartney was the settlement judge in Puget Sound Energy, Inc. (PSE). As a result of the settlement process, the parties agreed to an uncontested settlement regarding an interconnection issue on PSE's system. The settlement judge procedures provided a procedural and analytical framework within which the parties could bring the issues in dispute to resolution without the time and expense of protracted litigation. The settlement negotiations were conducted by use of telephone, fax and email, which permitted the timely sharing of information at minimal expense to the parties.

Judge McCartney provided early neutral evaluation of the respective positions of the parties, in conjunction with feedback regarding FERC policies, procedures and precedent. These actions permitted resolution of the disputed issues in a manner that facilitated easy and uniform interconnection by generators, thereby promoting competition and consumer interests.

Judge Brenner conducted a settlement judge proceeding involving many parties and several consolidated dockets. This proceeding resulted in an uncontested settlement that was approved by the Commission. The issues involved certain terms of Central Maine Power Company's Open Access Transmission Tariff, interconnection agreements and return on equity. The comprehensive settlement was reached after many sessions among the parties and before Judge Brenner. One marathon session was held at the Augusta offices of the Maine PUC in order to accommodate the many interested parties located in Maine.

As stated in the explanatory statement filed with the parties' settlement: "Given the variety of interests involved in this case, the complexity of the transmission system in New England, the evolution of the energy industry in . . . Maine, and the novel issues to consider, it took significant effort for the settling parties to reach an agreement . . ." In addition, the parties reached a temporary compromise regarding a long-standing dispute in Central Maine's service area at least until March 2003. Related issues are addressed in the context of the New England Power Pool's Order 2000 compliance efforts.

The settlement puts into place a schedule and process for informational filings updating the formula rate, discovery requests and challenges to the accuracy of the data and calculations under the formula.

SUCCESSES

FROM THE DISPUTE RESOLUTION SERVICE

The Kansas *Ad Valorem* Proceedings

The Kansas *ad valorem* proceedings have a long and complicated history extending back 17 years. In 1996, the United States Court of Appeals for the D.C. Circuit held that Kansas *ad valorem* taxes could not be recovered from gas consumers as an add-on to the price of gas and that liabilities for overcharges extended back to October 4, 1983. The dollars, number of claims and participants involved is staggering. Of the four largest cases, the combined refund claims are in the range of $240 million dollars. For example, one pipeline estimates that there are approximately 600 working interest owners behind 60 operators on its system. Some of the operators and working interest owners are no longer in business, and some working interest owners are deceased.

Numerous petitions for clarification or other form of relief are also pending before the Commission and additional petitions are certain to be filed absent a settlement of the proceedings. In addition, at least two dozen appeals have been filed with the U.S. Court of Appeals with several more appeals possible if the cases remain unsettled. Federal and state legislation has been proposed from time to time in an attempt to resolve the issues. Without resolution of the cases, state court litigation may require appellate review. In sum, settlements of these proceedings would avoid the expenditure of several millions of dollars and allow significant business and Commission resources to focus on the future and not the past.

In March 2000, two conferences were held to initiate ADR processes in the Kansas *ad valorem* proceedings. The participants agreed that settlement negotiations should be pursued separately for each pipeline involved with the Kansas *ad valorem* tax refund issues. The participants also agreed to have the DRS facilitate/mediate the settlement negotiations.

To date, the DRS's efforts have been successful in a number of instances and are ongoing in others. In the Colorado Interstate Gas Company proceeding, the Commission approved a settlement that resolves approximately 90% of the dollars at issue. For the Williams Gas Pipeline Company, the Commission approved a settlement that eliminates 622 of 652 claims and is likely to eliminate additional claims of producers who wish to take advantage of the offered credit. A settlement that resolves all claims in the Northern Natural Gas Company proceeding was approved by the Commission in December 2000. And in February, the DRS reinstated a mediation process to resolve the claims in the Panhandle Eastern Pipeline Company proceeding.

The settlement of so many claims in the *ad valorem* proceedings represents a huge accomplishment for all involved. The *ad valorem* cases are an example of the success that can be achieved when parties work together with a common goal in mind.

In the next issue of *FERC ADR News*, read the feature about past DRS successes, including one of our first success stories, the Phelps Dodge case.

SUCCESSES

From Office of the General Counsel & Office of Administrative Litigation

The Market Oversight and Enforcement Section of the Office of General Counsel (Enforcement) and Columbia Gas Transmission Corporation (Columbia), Columbia Gulf Transmission Company (Gulf), and Columbia Energy Services, Inc. (CES) (collectively the "Columbia Companies") successfully used ADR to settle a preliminary enforcement investigation. For several years, Columbia engaged in certain gas imbalance transactions with eight of its customers, including CES. During a portion of that time period, Gulf engaged in gas imbalance transactions with eight customers, not including CES. These gas imbalance transactions allowed the shippers to generate revenues based on the fluctuating seasonal price of natural gas. For certain transactions, Columbia received a large portion of the generated revenues. When Columbia and Gulf engaged in the gas imbalance transactions, Columbia and Gulf did not provide the gas imbalance service to every shipper that sought to participate. Columbia and Gulf also did not post the availability of their gas imbalance services on their electronic bulletin boards or make the services known to all customers.

The parties sought to negotiate a settlement but reached an impasse. Enforcement then suggested that the parties meet with the DRS to discuss whether this matter could be resolved by ADR in lieu of litigation. After a convening session with DRS, the parties jointly selected Judge Lawrence Brenner to offer an early neutral evaluation of their respective positions and explore how to satisfy their underlying interests. The Commission later approved the settlement reached by the parties through ADR. This demonstrates how ADR can be successfully employed in enforcement cases at FERC.

Office of Administrative Litigation (OAL) staff is often able to provide parties as well as judges with technical and legal expertise. For example, OAL staff may serve the role of independent early neutral evaluators, which often permits the parties to view their litigation risks, strengths and weaknesses in an objective manner. Thus, they may realize that settlement is in their best interests. Below are several recent successes in which OAL staff exercised early neutral evaluation, facilitation and negotiation skills:

- Northern Border Pipeline Company was the last major gas pipeline using a "cost of service" tariff (rather than the usual stated rate tariff). This permitted the pipeline to recover cost increases without Section 4 authorization and unreasonably insulated it from risk. Through negotiations with the parties, Northern Border switched from a rate with a single demand charge and no commodity rate to a stated rate tariff that uses the Commission's preferred SFV methodology.
- Following the Commission's conditional merger approval, Nevada Power Company and Sierra Pacific Power Company divested their generation facilities and filed certain tariffs and contracts governing the sales of generation from those units. The Commission set for hearing various recourse rates for the buy-back of power. OAL staff facilitated settlement negotiations that led to a settlement of all outstanding issues.
- The California Reliability Must-Run proceedings involved complex issues such as the pricing, terms and conditions for generating units that must operate at certain times, and which exercise locational market power when they are operating. The parties and OAL staff engaged in settlement discussions before a settlement judge and developed creative, practical business solutions to the complex problems in the case. The settlements reached meshed the realities of the business world with the need for reliability of the electrical grid.

See our next issue for more information on early neutral evaluation.

Ferc ADR news

Did you know?

The Commission has recently instituted new procedures that will result in faster approval of uncontested settlements. Under the new procedures the Administrative Law Judge (ALJ) attaches a draft letter order to the certification of uncontested settlement. After the settlement is certified to the Commission, the matter is scheduled for the next Commission meeting for approval.

COMING UP IN THE NEXT ISSUE:

- **Early Neutral Evaluation**
- **On-call Settlement Judge**
- **Is Your Case an ADR Candidate?**

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