Ferc ADR news

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Early Neutral Evaluation: An Effective Negotiation Aid

Early Neutral Evaluation ("ENE") can be an extremely useful tool to inform parties of what they might expect if they brought their case to the Commission for resolution.

What is it? And when should it be used?

ENE is a voluntary form of Alternative Dispute Resolution ("ADR") which aims to provide parties in dispute with an early and frank evaluation by an objective observer or "evaluator" of the merits of a case. The goal of ENE is to provide an early assessment of the merits of the case by a neutral expert, such as a Commission staff employee or one of its Administrative Law Judges. In addition, it can provide a "reality check" for clients and lawyers and help to identify and clarify the central issues in dispute.

During ENE, the objective Evaluator will study materials provided by the parties, perform independent research into relevant case law as necessary, consider presentations (written and/or oral), and clarify positions and facts through questioning. The Evaluator then offers an opinion as to the settlement value of the case and the potential outcome of the case. These factors set ENE apart from other evaluative ADR methods, such as arbitration or evaluative mediation, and may make it useful in a variety of situations in which the parties need objective expertise. Moreover, although settlement is not the major goal of ENE, the parties may explore options for settlement during the process.

The key elements to remember about the ENE Process are:

- ENE is a voluntary process in lieu of litigation to address conflicts. Does not eliminate other options.
- ENE is confidential and non-bindary.
- The Evaluator is neutral and will not be involved in any future decision-making, trial, or investigation if no settlement is reached .

ENE is a tool that should be used if parties are locked into positional bargaining. In positional bargaining, parties focus on the value or merit of their positions in which the resolution is based on who has the better position, as opposed to interest-based negotiation in which parties attempt to meet each others' interests. Indeed, a positive outcome of the ENE process would be for the parties to transition to an interest-based approach once they have moved past positional-bargains.

If you are interested in learning more about ENE or need assistance in finding an Evaluator, contact the DRS (1-877-FERC ADR (377-2237) or ferc.adr@ferc.gov) and find out if it may work for you.

"The increased use of ADR at the Commission meets President Bush's directive to make government more citizen-centered, results-oriented, and market driven. ADR 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 an atomsphere that encourages respect for affected parties and nurtures good business relationships for the future. The growing number of ADR "successes" in disputes before the Commission proves that the conflict resolution techniques do indeed work."

Patrick Wood, Chairman

FERC Office of Energy Projects Promotes Improved Natural Gas Stakeholder Pre-Filing Process

The Staff of the Office of Energy Projects (OEP) recently issued a report entitled, "Ideas for Better Stakeholder Involvement in the Interstate Natural Gas Pipeline Planning Pre-Filing Process." The report revised information developed for pipeline companies, agencies, citizens and FERC Staff to help each stakeholder group achieve more effective participation in the process of planning a natural gas pipeline. The report was developed from feedback collected at pre-filing seminars by the OEP-Gas outreach team.

The objective of the report is to provide the best possible guidance on different pre-filing techniques that can be used to address issues that are raised. Pipeline companies are encouraged to seek out greater involvement from various groups early in the planning so those who are interested can participate in the decision-making process. The goal of this early involvement is to achieve consensus and settlements among the groups and the pipeline company about an acceptable project design before the application is filed.

The report provides general information for all stakeholders and a list of considerations for industry stakeholders, federal, state and local agency stakeholders, citizen stakeholders, and the role of the Commission's Staff in the process.

The report is available in FERC's website at: www.ferc.gov under "Informational Resources" or under the "Gas" main page. It also may be requested by e-mail at: gas outreach-feedback@ferc.gov For further information about the Gas Outreach Program or pre-filing NEPA review, contact Rich Hoffman at 202-208-0066.

OEP-Gas Staff Gains Skills in Facilitating Scoping Meetings

In February, 2002, Staff from the Commission's Office of Energy Projects participated in a training designed to help them run better Scoping Meetings for proposed gas projects. The training, which was lead by the members of the Dispute Resolution Service and OEP Senior Staff, explored a variety of issues and problems addressed at Scoping Meetings. The participants discussed various goals, tasks, behaviors and challenges of leading a Scoping Meeting. The Staff also participated in a mock role play of a scoping meeting and discussed how staff can deal with a variety of situations and personalities that they might encounter during a meeting

The trainees generally found it useful to share with each other what does and does not work in running a scoping meeting. Most also found role playing to be a useful preparation and review of real meetings.

Additional programs are planned to sharpen Staff's skills in collaborating with the public.

Questions and Answers About an "On Call Settlement Judge"

Former Deputy Chief Judge William Cowan provided some information about the role of an "On Call Settlement Judge" for parties in FERC proceedings. Following is a Q&A about the functions and benefits of these judges.

Q. Tell me about the "On Call Settlement Judge" that I see listed each day on the event screen in the FERC lobby.

A. There are numerous times during informal settlement discussions between parties in FERC proceedings where an impasse develops that impedes progress toward reaching a consensual resolution of the dispute at hand. The idea of an "On Call Settlement Judge" is to have a trained mediator always available at the Commission to assist the parties in overcoming this type of impasse.

Q. How does one go about calling upon the services of the On Call Settlement Judge?

A. If the parties are in the building, they can simply call the office of the judge who has been designated that day, and whose name and telephone number is posted on the event screen in the FERC building lobby. If the parties are not in the building, they can call the Chief Judge's office at 202-219-2500 to find out the On Call Settlement Judge for the day.

Q. Who are the On Call Settlement Judges and how are they designated?

A. The Commission's Administrative Law Judges are trained in alternative dispute resolution techniques and have considerable experience in mediating the types of disputes that arise in FERC cases. These individuals serve in an "On Call" capacity on a rotating basis, as designated by the Chief Judge.

Q. Is it necessary to get a formal designation from the Chief Judge for this service in a particular case?

A. If the parties want a settlement judge to help them work through some limited issues on a one-time basis, no formal designation is required. The parties would simply call the On Call Settlement Judge's office and request assistance. However, if the parties would like a settlement judge for the full case, a formal request should be made to the Chief Judge, or to the Presiding Judge for recommendation to the Chief Judge.

SUCCESSES

From the Dispute Resolution Service:

Allegheny Electric Power Cooperative, Inc./PPL Electric Utilities Corporation —At the request of the Commission's Office of Markets, Tariffs, and Rates (OMTR), the DRS convened Allegheny Electric Power Cooperative, Inc. and PPL Electric Utilities Corporation to address a long-running dispute regarding pancaked rates, among other things, in a transmission agreement pertaining to their joint ownership of the Susquehanna Steam Electric Station. With the aid of a subject matter expert from OMTR, the DRS assisted the parties in interest-based negotiation after they were asked to "leave their positions" at the door. The DRS also asked the parties to evaluate whether other FERC proceedings in which they were involved could be addressed during the negotiation.

Through frank and open discussions among the technical and business decision-makers on both sides, the parties achieved settlement on the Susquehanna agreement and pancaked rates in a total of four dockets. The agreements were reached within only four months and the settlement was filed a month later.

Corporate ADR Initiative – In 2001, the DRS initiated a pilot study to advance the use of ADR on a systematic basis within the transportation, transmission, producer, and marketing sectors of the natural gas and electric industries. The pilot was conducted in Houston, Texas, where the DRS interviewed corporate decision-makers and managers from four companies: Williams, Enron, Dynegy, and El Paso on their use of ADR or ADR programs. The two main goals of the study were: (1) to increase the use/acceptance of consensual decision-making in resolving disputes before the Commission; and (2) to promote education and involvement of affected participants in consensual decision-making, whenever appropriate.

In meetings with senior managers from these companies, the DRS shared information about the benefits of ADR and the Commission's ADR processes. The DRS also gained a better understanding of the paths these companies currently use to resolve disputes, their interest in using ADR more often and *earlier* in a dispute, and the level of ADR training their staff may need to meet their business interests. The managers acknowledged that earlier collaboration may lead to increased consensus, fewer complaints filed with the Commission, faster case processing, and, as a result, faster business decisions that move energy resources more quickly to serve market demands.

One outcome of the Houston pilot was Williams's request that the DRS provide training to its legal department and regulatory affairs specialists on the Commission's ADR program. The course, which provided CLE credits to legal staff, was held in mid-October 2001 at the Williams headquarters in Tulsa, Oklahoma. Williams's legal and regulatory specialists attended the training and it was also broadcast live to its satellite offices. The DRS received positive feedback on the course.

Future outreach sessions are being planned. If you or your company is interested in learning more about ADR and the Commission's ADR services, please contact the DRS at: 1-888-FERC ADR (337-2237), or ferc.adr@ferc.gov.

SUCCESSES

FROM THE ALJ CORPS:

Northeast RTO Mediation

In a set of orders issued on July 12, 2001, the Commission concluded that four proposed RTOs in the Northeast should be combined into a single RTO to address seams issues among existing independent system operators, and establish efficient markets throughout the region. The Commission directed all parties to these proceedings to participate in joint mediation to craft a proposal to create a single Northeastern RTO and required that the mediator(s) file a report at the end of the process. The Commission appointed Administrative Law Judge H. Peter Young and former Florida Public Service Commission Chairman Joe Garcia as co-mediators.

The mediation ran from July 24, 2001 through September 7, 2001 and over 400 persons representing ISOs, transmission owners, generators, marketers, Canadian entities, state regulators, regional reliability councils, power authorities, electric cooperatives, municipalities, new/emerging technologies, industrial customers, environmental and public interest groups actively participated in the mediation. In light of the vast scope and complexity of the substantive issues, Judge Young confined the mediation task to formulating a detailed Business Plan for: (1) defining the Northeastern RTO's operational paradigm; (2) developing it's infrastructure and rules of the road; and (3) implementing the RTO across the entire region. The objective was to produce a "blueprint" for the development and implementation of a single RTO for the Northeastern United States.

Despite a contentious and challenging process the participants to the mediation produced a detailed and task-oriented Business Plan, which Judge Young attached to his report to the Commission. The Business Plan outlines a comprehensive process for the development and implementation of fully-integrated markets throughout the Northeastern region, as well as a single RTO to administer those markets and to promote development of new infrastructure.

Southeast RTO Mediation

In another order issued on July 12, 2001, the Commission ordered a mediation process to establish a single RTO in the Southeast and for the mediator(s) to file a report with the Commission at the end of the process. The Commission directed Administrative Law Judge Bobbie J. McCartney and former New Jersey Public Utility Commission Chairman Herb Tate to co-mediate the process for a 45 day period.

Approximately 200 participants participated actively in the process. The participants focused on four basic "models" for the formation of an RTO in the Southeast from the various proposals. The plan sponsors presented and marketed each model to the full group. They stressed those aspects of each model that they believed would meet or exceed the requirements of Order 2000 and how they would meet the business needs of the greatest number of market participants.

This multi-dimensional collaborative process proved successful in enabling plan sponsors to identify those areas of the models that were similar or divergent. As a result, at the conclusion of the mediation process, the four models initially under consideration were narrowed to two. In an effort to provide the Commission with the most complete and accurate information possible, these two models, along with the comments of the participants, were included in the Mediation Report that Judge McCartney filed with the Commission on September 10, 2001.

Participant response to the mediation, although often described as "arduous" and "intense," was very positive. Their comments and feedback included: "It was a refreshing break to have a disciplined forum which not only allowed everyone's voice to be heard, but encouraged everyone to listen, consider other stakeholders' perspectives and push for solutions. This is how all market policy discussions should ideally work," and "We have seen more progress in the last month than in the previous 10 years."

SUCCESSES

FROM THE ALJ CORPS:

American Transmission Company Settlement Judge Process

On January 7, 2002, an uncontested settlement was certified to the Commission as a result of a settlement judge process in American Transmission Company, LLC. ATCo is a Wisconsin for-profit transmission company that on January 1, 2001, acquired the transmission facilities of several utilities, including those of Wisconsin Power & Light Company ("WPL"). Prior to that, WPL and Dairyland Power Cooperative ("DPC") jointly planned and operated portions of their transmission systems, providing each other with reciprocal transmission service.

The dispute in this case pertained to continuation of service, including network service, between DPC and WPL under the ATCo regime. After six months of negotiations on their own, the parties, with the FERC trial staff, appeared at a settlement conference on October 16, 2001. At that conference, following joint and separate meetings with the settlement judge, the parties reached an agreement. The settlement, with the acceptance of other ATCo customers who are affected by it, was crafted to resolve payments for a locked-in period, and to put DPC and WPL in positions similar to where they were prior to the date on which ATCo acquired the transmission facilities.

In his certification, the settlement judge commended the active participants both for their excellent advocacy and for their willingness to recognize and accept an "agreement that is well within the range of possible litigation results, while saving the time, expense and uncertainty of litigation."

Commonwealth Edison Company

Administrative Law Judge Edward M. Silverstein served as the settlement judge in *Commonwealth Edison Company*, which involved an interconnection agreement between Commonwealth Edison and Zion Energy LLC. Judge Silverstein required the parties to file a joint statement of issues, including the parties' positions on each, before the first meeting. Upon receipt of these documents, Judge Silverstein determined that there was a general agreement on all but one of the issues. When the judge pointed this out to the parties, they agreed. The parties and the judge were then able to focus on the one issue and the parties came to a quick and amicable resolution and reached overall settlement.

Arizona Public Service Company

Administrative Law Judge Silverstein also served as settlement judge in *Arizona Public Service Company*, which involved an interconnection agreement between the Arizona Public Service Company and Panda Gila River LLP. Judge Silverstein ordered the parties to file a preliminary joint statement of issues including their positions on each issue. The joint statement of issues revealed that the relationship between the two parties to the interconnection agreement was complicated by other relationships that the parties were able to identify. With this information, the judge encouraged all of the parties to speak with one another and identify common interests. Through this dialogue, the parties moved towards agreement. When there were difficulties in the discussion, the judge was able to suggest a workable path. With this assistance, and the efforts of the parties to address their differences, the parties to the interconnection agreement ultimately agreed to re-negotiate not only the terms their own relationship, but the terms of the other relationships as well. They succeeded in reaching a settlement, which is currently pending before the Commission.

SUCCESSES

FROM OGC AND OEP STAFFS:

Creative Solutions for Two Hydroelectric Settlements

In October, 2001, the Commission renewed hydroelectric licenses for PG&E's Rock Creek Cresta Project No. 1962 and Mokelumne Project No. 137 for 30 year terms. The orders were based on settlements filed by the participants in collaborative stakeholder processes that were facilitated by staff in the General Counsel's Energy Projects office.

The settlements provide a delicate balance of recreational, riverine ecology and hyropower production interests. Under an adaptive management program in each process, the participants agreed to establish an Ecological Resource Committee comprised of representatives of the licensee, resource agencies and non-governmental organizations. The Committee staff will assist the licensee in designing monitoring plans, and reviewing and evaluating data for implementation of the agreement. Monitoring will, among other things, determine the effects of recreational activities on the fish populations in the rivers so adjustments in conditions may be made as necessary.

The agreements were heralded by participants and regulators alike as a balanced and thoughtful outcome of the stakeholder processes. The adaptive management programs, in particular, were praised as creative solutions to address the wide variety of interests in the rivers' resources.

ADR Works to Resolve Salmon Controversy in the Pacific Northwest

In the Pacific Northwest, there is an ongoing struggle between developmental interests, especially hydropower development, and the need to protect dwindling stocks of salmon. With the drought and energy shortage in 2001, striking a balance between project operation at Idaho Power's Hells Canyon Complex and salmon protection was especially challenging. Those challenges were met through the use of ADR procedures. ADR provided a forum for a well-organized discussion of the issues, which resulted in a timely and quality resolution that all parties understood and found acceptable.

For about the past ten years, Idaho Power has cooperated with efforts in the Northwest to improve salmon survival through reservoirs in the lower Snake and Columbia Rivers by timing the release of water from its Brownlee Reservoir to coincide with the downstream migration of young salmon. For various reasons, likely related to the drought and energy shortage, Idaho Power decided not to release the salmon augmentation flow in the summer of 2001. The National Marine Fisheries Service, the Federal agency with the responsibility for recovering threatened and endangered salmon and steelhead in the Snake and Columbia Rivers, asked the Commission to require Idaho Power to provide water starting in June from Brownlee Reservoir in support of the salmon flow augmentation program.

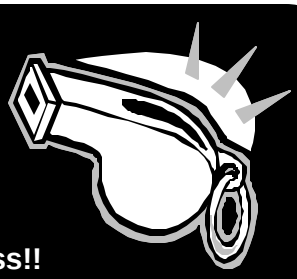
Since time was of the essence, a team of legal and technical staff from the Commission approached the National Marine Fisheries Service and Idaho Power with an ADR process, to use before pursuing other regulatory means of resolving the flow augmentation issue at the Hells Canyon Complex. In one day-long ADR session, the issue was resolved. Idaho Power committed to work with National Marine Fisheries Service in coordinating its summer power operations, to the extent possible given the drought and energy shortage, to optimize the benefit to downstream migration of young salmon.

DRS Sponsors Symposium on ADR Confidentiality

In July, 2001, Staff from the Dispute Resolution Service facilitated a Federal/State Symposium on the subject of confidentiality in Federal ADR proceedings. The two-day Symposium, which was offered on behalf of the American Bar Association, brought together some of the leading academicians and practitioners in the field of ADR. The participants focused on developing guidance for ADR practitioners in several areas. First, was whether a party can expect confidentiality during a conversation with an agency neutral prior to all parties agreeing to enter into the ADR process. Second, was the role of confidentiality in multi-party public/private negotiations. These are situations such as the Commission's public, open collaborative or stakeholder meetings that can include private negotiation sessions from time to time. Third, was developing a better understanding of when and how the shield of confidentiality can be pierced by law enforcement agencies, inspectors general, U.S. Attorneys, or the courts.

It was determined that most ADR practitioners view the confidentiality of any ADR process to be strictly confidential as it concerns an exchange of information or data between one party and the neutral in private session. However, exchanges of information and data in a joint session among multiple parties is not considered to have the same level of confidentiality protections as a private session. This was considered an important concept to stress to parties in discussing their expectations of confidentiality.

The concepts and ideas that were developed at the Symposium are being used by the ABA and an Interagency Group of ADR Specialists as a basis for upcoming publications that address the issue of ADR Confidentiality.



*** PLEASE NOTE ***

Our E-mail Addresses Have Changed!
And So Has the FERC Internet Website Address!!
FERC has adopted the more prevalent ".gov" suffix for both e-mail and the internet.
Please note the change in your files . . . .

Ferc ADRnews

Next Edition Topics

- *Report on the Federal Inter-Agency Steering Committee*
- *Follow-up on the DRS's ADR Workshop at the Annual Hydro-Vison Conference*
- *The United States Institue for Environmental Conflict Resolution: What Is It and What Can It Do for You?*
- *Outreach and Training Program in Coordination with the American Education Institute for the Electric Industry*
- *Review of Ethical Obligations of an Attorney to Recommend ADR to a Client*
- *More ADR Success Stories From the DRS, ALJ Corps and Other Commission Offices*

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