

REPORT OF THE ALTERNATIVE DISPUTE RESOLUTION COMMITTEE

This report addresses selected recent developments relating to the use of Alternative Dispute Resolution (ADR) in the energy industry from January 2008 through January 2009. Below is an index of the major subjects covered:

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I. FEDERAL AGENCY USE OF CONFLICT RESOLUTION

In October of 2008, the Office of Management and Budget and the Council on Environmental Quality issued its annual report summarizing the use of environmental conflict resolution within federal agencies in 2007.¹ According to the report, in 2007, the federal government made wide use of Environmental Conflict Resolution (ECR), defined as any conflict resolution or collaborative problem-solving process involving a neutral third-party.² Nine federal agencies reported using ECR in 320 cases in 2007, which represents a fifty to seventy case increase over the 250-270 cases reported in 2006.³ The U.S. Environmental Protection Agency (EPA) reported the greatest number with ninety cases reported while the Federal Energy Regulatory Commission (FERC) reported twenty-one cases.⁴ Federal Agencies are required to report their use of ECR.⁵

II. DEPARTMENT OF ENERGY NOTICE OF REVISED POLICY STATEMENT ON ADR

The U.S. Department of Energy (DOE) defines ADR as “[A]ny technique for resolving disputes without resorting to litigation in either an administrative or judicial forum.”⁶ Towards this end, the DOE maintains the Office of Conflict Prevention and Resolution, which is tasked with providing “advice and support for ADR initiatives” throughout the DOE, as well as consultation on “resolving

1. OFFICE OF MANAGEMENT AND BUDGET/COUNCIL ON ENVIRONMENTAL QUALITY, ANALYSIS OF FY 2007 ECR REPORTS (Oct. 2008), available at http://www1.va.gov/adr/docs/Analysis_of_2007_ECR_Reports.pdf (hereinafter 2007 ECR REP.).

2. *Id.* at 29.

3. *Id.* at 4.

4. *Id.* at 3.

5. *Id.*

6. UNITED STATES, DEP’T OF ENERGY (DOE), ALTERNATIVE DISPUTE RESOLUTION (2009), <http://www.gc.energy.gov/adr.htm>.

disputes and cases in litigation.”⁷ On October 24, 2008, the DOE published a “Notice of Revised Policy Statement,”⁸ wherein the DOE committed itself to utilizing Environmental Conflict Resolution “to prevent or resolve conflicts that may arise over the . . . impacts of DOE operations on the environment and natural resources.”⁹ Further, the DOE stated it will encourage “the use, when appropriate, of facilitated negotiations. . . with groups of representatives with potentially disparate interests. . . . This includes use of negotiated rulemaking in the development of proposed rules.”¹⁰

III. NATIONAL ACADEMY OF SCIENCES REPORT ON PUBLIC PARTICIPATION IN ENVIRONMENTAL ASSESSMENTS AND DECISION MAKING

A new report from the National Research Council entitled “Public Participation in Environmental Assessment and Decision”¹¹ concludes that, when done correctly, public participation improves the quality of federal agencies’ decisions about the environment. Well-managed public involvement also increases the legitimacy of decisions in the eyes of those affected by them, which makes it more likely that the decisions will be implemented effectively.¹² The report recommends that agencies recognize public participation as valuable to their objectives, not just as a formality required by the law. It details principles and approaches agencies can use to successfully involve the public.

IV. PRESIDENT OBAMA: JANUARY 30, 2009 MEMORANDUM

President Obama issued a memorandum on January 30, 2009, to heads of executive departments and agencies with regard to regulatory review and directed the Office of Management and Budget to produce within 100 days a set of recommendations for a new Executive Order on Federal regulatory review. Among other things the recommendations are to offer suggestions to “encourage public participation in agency regulatory processes.”¹³

V. ADR AT THE FEDERAL ENERGY REGULATORY COMMISSION

The FERC continued to take steps to build programmatic/institutional capacity for ECR in 2008.

The FERC’s Dispute Resolution Service (DRS) entered into an agreement with the Harvard Negotiation & Mediation Clinical Program to study ADR in the energy industry, inclusive of ECR, in three regulated energy sectors:

7. UNITED STATES, DOE, OFFICE OF CONFLICT PREVENTION AND DISPUTE RESOLUTION (2009), http://www.gc.energy.gov/dispute_resolution.htm.

8. *Alternative Dispute Resolution*, 73 Fed. Reg. 63,458 (2008).

9. *Id.* at 63,459

10. *Id.*

11. NATIONAL RESEARCH COUNCIL, PUBLIC PARTICIPATION IN ENVIRONMENTAL ASSESSMENT AND DECISION, NATIONAL ACADEMIES PRESS (2008), available at http://www.nap.edu/catalog.php?record_id=12434.

12. *Id.*

13. Regulatory Review, *Memorandum for the Heads of Executive Departments and Agencies*, 74 Fed. Reg. 5,977 (2009).

electricity, hydropower, and natural gas.¹⁴ The study will help the FERC better understand how energy companies view ADR as a tool for energy conflict prevention and resolution, their receptiveness and resistance to its use and the reasons for those positions, and what measures can be taken to improve the capacity and entry points for ADR/ECR in energy and environmental-related decision-making and problem-solving processes.

The FERC's DRS continued to integrate ADR/ECR objectives and principles in its goals and mission statements and goals and strategic planning. In its Strategic Plan, the FERC notes that it "encourages the use of alternative dispute resolution procedures"¹⁵ as part of its guiding principle of Due Process and Transparency.

The FERC's reported on its ADR/ECR performance and achievement measures for 2008 to the Office of Management and Budget as follows.¹⁶ The DRS addressed fifty-seven new ADR requests and referrals (forty-two were completed within the period and fifteen were ongoing). These numbers exceed the number of referrals for the 2004 fiscal year (fifty-four total). The DRS had a ninety percent success rate in assisting parties achieve consensual resolution of cases (eighteen out of twenty cases were resolved). Of the total number of ADR requests, referrals and cases identified, eighteen of them involved environmental matters. The DRS used ECR to successfully resolve six of these cases and was unable to resolve one of these cases through an ECR process. The DRS was used in a coaching capacity to assist in resolving two of these cases. After initial intake in the DRS, five cases were referred to the FERC's Office of Energy Projects and three were referred to the Enforcement Hotline. ECR was found not to be an inappropriate process for one case. For casework concluded during the period, participants who completed evaluations gave the DRS staff favorable comments for a satisfaction rate of 100%.¹⁷

The FERC engaged in extensive ADR training and education activities and continued to support outreach on ADR/ECR at the request of foreign delegations. The DRS hosted and was hosted by delegations from Thailand and China on the FERC's ADR program for resolving energy-related regulatory conflicts. The DRS receives customer feedback from survey participants completed at training and workshop sessions. In trainings and workshops for the 2008 fiscal year, participant ranking for Course Content averaged eighty-nine percent, and Instructor Effectiveness ninety-three percent, out of 100%.¹⁸

14. HARVARD NEGOTIATION & MEDIATION CLINICAL PROGRAM, PAST PROJECTS (2008), <http://www.law.harvard.edu/academics/clinical/hnmcp/pastprojects/pastprojects.php>.

15. UNITED STATES, DOE, FERC, STRATEGIC PLAN FOR FISCAL YEARS 2006-2011 5 (2006), <http://www.ferc.gov/about/strat-docs/FY-06-11-strat-plan-print.pdf>.

16. 2007 ECR REP., *supra* note 1.

17. *Id.*

18. *Id.*

VI. UNIFORM MEDIATION ACT UPDATE

The Uniform Mediation Act (UMA),¹⁹ first enacted in 2001, and then amended in 2003, has already been enacted by eleven jurisdictions: the District of Columbia, Idaho, Illinois, Iowa, Nebraska, New Jersey, Ohio, South Dakota, Utah, Vermont, and Washington.²⁰ It is being actively considered in several additional jurisdictions.

The UMA includes provisions that protect the confidentiality of mediation communications and protect the integrity of the mediation process. It applies to all mediations that are conducted within the state, not just court-related mediations or mediations that are about a particular subject matter.

The heart of the UMA is a mediation privilege, Section 4, which is held by the parties, the mediator, and non-party participants, such as witnesses and support persons.²¹ While many states have mediation privileges of varying degrees of breadth, the privilege is typically held only by the parties. The privilege is subject to a few narrow exceptions, such as if the mediation agreement was procured by fraud, or if the mediation is being used to perpetuate a crime.

The UMA privilege can be asserted in all formal dispute resolution proceedings, including administrative, legislative, and arbitration proceedings.²² In addition, the UMA privilege can be asserted in both civil and criminal proceedings, which is significant because mediation confidentiality protections are sometimes limited to civil cases, as in California.²³

The UMA includes a provision barring mediators from making reports to courts about what transpired during the mediation process.²⁴ While the UMA confers significant benefits upon mediators, participants, and the process, it also imposes some obligations. Most significantly, it requires mediators to disclose conflicts of interest in a way that is consistent with their professional ethical obligations.²⁵ It also makes clear there is no specific professional background or orientation required for a person to qualify as a mediator under the UMA, in recognition of the broad diversity in mediation practice.²⁶

19. UNIFORM LAW COMMISSION, THE NAT'L CONFERENCE OF COMM'R ON UNIFORM STATE LAWS, UNIFORM MEDIATION ACT (2009), *available at* <http://www.law.upenn.edu/bll/archives/ulc/mediat/2003finaldraft.htm> (hereinafter UMA).

20. UNIFORM LAW COMMISSION, THE NAT'L CONFERENCE OF COMM'R ON UNIFORM STATE LAWS, A FEW FACTS ABOUT THE UNIFORM MEDIATION ACT (2009), http://www.nccusl.org/Update/uniformact_factsheets/uniformacts-fs-uma2001.asp.

21. *Id.*

22. UMA, *supra* note 19.

23. *Id.*

24. *Id.*

25. *Id.*

26. *Id.*

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