



The Alternative Dispute Resolution Program at The California Public Utilities Commission 2009



The Alternative Dispute Resolution Program at the California Public Utilities Commission: *An Update Through Calendar Year 2009*



An Overview

This report reviews the Commission's formal Alternative Dispute Resolution (ADR) program through calendar year 2009. Though the Commission has used ADR approaches on a largely ad hoc basis for many years, the formal program, established in August 2005 by Resolution ALJ-185,¹ represents a renewed Commission effort to educate parties about ADR's potential, to encourage the use of ADR whenever appropriate, and to make well-trained neutrals available free of charge. The Administrative Law Judge (ALJ) Division administers the ADR program.

The Commission offers three ADR services through the formal program: mediation, facilitation, and early neutral evaluation, also known as ENE. Since 2005, parties to over 100 formal and informal matters have used one of these ADR services, most frequently mediation or facilitation (or both). Measured as a settlement or partial settlement by disputants, or a successful facilitation, the program's success rate in 2009 was 71% and cumulatively since 2005, 69%. Distilling program success to such statistics, however, fails to capture other benefits of ADR, which may include less-controversial, better-designed, and more durable solutions and sometimes (though not always) reduced expenditure of time and financial resources.

Adjudicatory proceedings (complaints and investigations) represent about half of each year's ADR caseload, on average. The other half consists of a few informal matters (disputes resolved prior to – and thereby avoiding – a formal filing), various applications, and the occasional rulemaking. The subject matter of the applications is quite varied and includes energy, communications, or water issues (particularly water general rate cases), as well as rail crossing issues. We believe we have only begun to tap the promise ADR holds as a tool to aid in the review and potential resolution of a greater number of the many ratesetting and quasi-legislative proceedings filed at the Commission in any given year.

Six Core Principles Shape the Commission's ADR Program

As the ALJ Division works to expand the use of ADR, the six principles set out in Resolution ALJ-185 continue to guide us.² These are, in summary:

¹ Resolution ALJ-185, August 25, 2005, *Expanding the Opportunities for and Use of Alternative Dispute Resolution Processes at the Public Utilities Commission*.

² Resolution ALJ-185 at 4-6.



- **Voluntary**—Parties must agree to submit their dispute to mediation or early neutral evaluation. However, an ALJ or Assigned Commissioner may require parties to attend facilitated workshops, settlement conferences, or meet with a neutral to explore the feasibility of mediation.
- **ALJ Neutrals**—The Commission will maintain a core group of trained and experienced neutrals in the ALJ Division.
- **Timeliness**—ADR generally should shorten, not prolong, proceedings. However, even if a negotiated settlement takes longer than litigation, the result may be more durable and self-enforcing because the parties have crafted and agreed to it.
- **Good faith**— ADR should not be used to delay or secure tactical advantage, but to explore the potential for agreement. Clients should be advised of the pros and cons of ADR and confidentiality agreements should be respected.
- **Confidentiality**—Many ADR processes require confidentiality so that parties can meaningfully explore fundamental interests and engage in creative problem-solving.
- **Commission review**—Where the parties reach settlement, some proceedings, particularly complaints, may be dismissed or withdrawn. If Commission review is necessary, the Commission will expeditiously approve settlements that are legally sufficient.

Where ADR is appropriate, the Commission provides ADR services at no cost to the participants, including an ALJ neutral and meeting space at the Commission’s offices in San Francisco or Los Angeles (or other meeting space available for Commission use free of charge). Participants, at their own cost, may elect to contract with private, professional neutrals and to arrange for commercially available meeting space.

ALJ Neutrals: Training, Partnerships, and Practice

Resolution ALJ-185 recognizes that well-trained neutrals are critical to the success of any ADR program. The Commission’s panel of neutrals numbers about 30 trained ALJs, all of whom have completed, at a minimum, a 40-hour intensive ADR training curriculum, or its equivalent.

The ALJ Division has organized two major training efforts. In early 2005, an initial group of ALJs completed a week-long, intensive training course taught by professionals from the federal courts, the Judicial Council, the Federal Energy Regulatory Commission, and expert Commission staff. A second intensive training program, composed of three, separate, week-long modules on negotiation, mediation, and facilitation—all offered through the Center for Negotiation and Dispute Resolution at Hastings College of Law—concluded in 2009. A number of ALJs (together with staff from other Commission divisions) attended one or more of those modules. In addition, individual ALJs have completed training through state bar continuing education programs, the National Judicial College, and other academic providers.



A partnership with the San Francisco Superior Court in 2008, and again in 2009, has provided both additional training and practice. ALJ neutrals who have completed training in the Court's Self-Represented Litigant Mediation Program may serve as volunteer mediators in the Small Claims Division on an as-available basis (typically during the local law schools' vacation periods).

The ALJ Division promotes ongoing training for all neutrals. In addition to encouraging attendance at ADR courses offered locally through bar associations, community boards, and other organizations, we hold regular in-house "practice group" sessions to provide ALJ neutrals with opportunities to further develop expertise. On several occasions, Hastings professionals have provided coaching sessions for ALJ neutrals. In addition, some of our neutrals have served as "judges" or "mediators" in Hastings' clinical simulations for its law students.

Other Developments: Website Updates and Outreach

We strive to keep the ADR pages on the Commission's website current. (See <http://www.cpuc.ca.gov/puc/adr>) Information posted there includes descriptions of the formal ADR program, biographies for each of the available ALJ neutrals, and contact information for the ADR Coordinator (both telephone number and "live" email link). In 2009, using open source software, we also added a confidential evaluation questionnaire to make it easy for participants to give us completely anonymous and timely feedback on their experiences with the ADR program.

Outreach is another ongoing effort. We welcome opportunities to publicize the formal ADR program, so that those who might benefit from ADR know what options exist at the Commission and how to request them. The July 2009 San Francisco meeting of the California Council for Public Utility Counsel, also known as the CCPUC, provided one notable opportunity. The program focused on the Commission's ADR program, featuring an opening presentation by the Chief ALJ, followed by a moderated panel discussion that included the current and former ADR Coordinators. We recognize that continuing education is necessary to ensure that Commission staff, representatives of utilities and other regulated entities, and the public who use Commission services know that ADR is available here, and understand the range of possibilities it offers.

Measures of Success: ADR Results, Participant Evaluations, and Working Group Input

Calendar year 2009 saw neutrals engage in 34 formal and informal matters, a new high mark for our ADR program, compared to a range of 16 to 25 in prior years. Two of those ADR assignments are still open, one never commenced because the parties had a change of heart, 22 resulted in settlement, partial settlement, or a useful facilitation, and 9 did not settle, yielding a "success" rate of approximately 71%. Thus, while arithmetic counts provide only a simplistic assessment of ADR's overall success, the measure for 2009 compares very favorably with the cumulative average since 2005, which is 69%.



Evaluation responses from ADR participants generally have been positive. The large majority of responses indicate that participants have found the formal program to be fair, that it usually has reduced their litigation costs, and that it typically has reduced the time needed to resolve the dispute. Where settlement was not reached, the explanations most frequently given have been either that the parties were too far apart or that one or more other parties really did not want to settle.

We also have received positive feedback from another quarter. In the spring of 2009, the Chief ALJ convened an all-volunteer group of practitioners representing consumers as well as various regulated entities to study existing Commission processes and make recommendations for improvement. Their work product, the recent *Report of the Practice and Procedure Working Group*, commends the use of ADR and related “best practices” for case management. The report concludes that no statutory or other rule changes are needed, but makes several recommendations that we discuss in the following section.

Where We Go From Here

The current ADR program can be developed further in at least two areas. The first of these, increasing ADR program use, is something we began to work on in 2009 and we discuss it in greater detail below. The second, establishing a dedicated ADR Facility (meeting room space, etc., at the Commission’s headquarters) was identified in the January 2008 *Administrative Law Judges Division Annual Report to the Commission*. Currently that project is on hold, awaiting development when the Commission’s budget permits. It continues to be much needed, given the pressure on the limited number of meeting rooms at the Commission.

Increasing use of the ADR program requires a two-fold approach, at a minimum. One part of the effort must be an intensified, routine focus on reviewing new filings and identifying those potentially suitable for some form of ADR (particularly ratesetting and quasi-legislative proceedings). Resolution ALJ-185 envisions that ADR may be used in *all types* of proceedings. Though not all proceedings may be suitable candidates for mediated settlements, ADR has many uses beyond settlement of ultimate issues and can be a very effective case management tool. Thus, the Chief ALJ, together with her management team, has commenced a review of all new filings for ADR possibilities. The ADR Coordinator then follows up on these assessments with the ALJs assigned to each proceeding. This joint effort aims not only to target those filings where the prospect for a mediated resolution is rather apparent, but also to identify filings where mediation could be an effective tool in reducing the scope of litigated issues or where facilitated workshops might foster understanding in order to streamline, and even shorten, proceedings.

The second part of this two-fold approach must be an intensified educational effort. We need to continue to expand familiarity with the program and its possibilities, both inside the Commission and outside, so that disputants know that ADR options exist and can request timely assistance. Education presents an ongoing challenge, given periodic



turnover among Commission staff, utility personnel, and other practitioners. During 2009, the ALJ Division undertook a number of steps to raise awareness and the CCPUC presentation, already mentioned, is only one example. We also revised the Instructions to Answer form letter to ensure that information about the ADR program is communicated before a defendant files an answer to a complaint, we initiated contact with key staff in other Commission divisions to further introduce the ADR program, and we began to make the ADR Coordinator available to describe the program at prehearing conferences and other venues.

The Practice and Procedure Working Group's report strongly encourages this ongoing educational outreach. That report recommends that in all suitable proceedings, ADR should be considered as a case management tool (not only as a means to achieve settlement of the ultimate issues) and should be utilized together with several related "best practices." These other "best practices" include: requiring that parties meet and confer to jointly develop issue matrixes, schedules, and recommendations for workshops or technical conferences; soliciting prehearing conference statements on the potential for ADR and other matters; and encouraging informal resolution of discovery disputes.

ADR in Complex Proceedings—a Survey

We include below, since we have not reported it before, a survey of some of the more complex applications and quasi-legislative matters where Commission-sponsored ADR has been successfully employed since commencement of the formal ADR program. The chronology is based on the date each docket opened.

- **A.08-04-019** – California-American Water Company, the Commission's Division of Ratepayer Advocates (DRA), and the Monterey Peninsula Water Management District, after intensive mediation talks, reached a settlement on a recommendation to the Commission for rules for recording and the process for future review of certain costs the utility incurred in 2007 (termed "preconstruction costs") in connection with the Monterey District's long-term water supply solution.
- **A.07-07-003** – A three-day mediation of a general rate case for San Gabriel Valley Water Company resulted in the settlement of all issues except cost of capital by the water utility, DRA, the City of Fontana, and the Fontana Unified School District.
- **R.06-02-013** – More than 30 parties, including all major California electric utilities, a number of electric energy resellers, representatives of banking/financial investment interests, and 2 utility consumer groups negotiated protocols for auctioning sales of energy (known as the "energy auction") and reached a settlement after approximately 20 mediated sessions held, in person and by teleconference, over a five-month period.
- **A.05-06-020** – Over the course of four sessions held during a four-month period, Union Pacific Railroad, Metrolink, the City of Glendale, Disney Co., the Commission's Consumer Protection and Safety Division, a group of homeowners, and others participated in negotiations concerning a proposed, new rail crossing in the



City at Flower Street, along a rail right-of-way where several fatal accidents had occurred previously. Mediation resulted in a settlement by all but one party on the terms for approval of the crossing; the Commission adopted the settlement and no appeal was filed.

- **A.04-09-019** – Facilitated workshops on contentious cost issues (including financing and coordination with state and local agencies) were held during 2009 in Phase 2 of California-American Water Company’s application for approval of the Coastal Water Project, a proposed desalination plant and associated infrastructure to resolve long-term water supply issues on the Monterey Peninsula. Multiple parties participated, including the water utility, DRA, Marina Coast Water District, Monterey Peninsula Water Management District, Monterey County Water Resources Agency, and Surfrider Foundation. The workshops led to development of a common comparison exhibit reconciling parties’ assumptions about the capital and the operations and maintenance costs of the proposed project and alternatives. Subsequently, the Commission has assigned an ALJ neutral to assist in settlement discussions.
- **R.99-11-022** – Multiple parties reached settlement in a rulemaking on avoided cost pricing for electric generators (known as “Qualifying Facilities”) at the end of five days’ mediation, providing economic certainty to the parties and avoiding protracted litigation.

Conclusion

In 2009, the ALJ Division stepped up the work of fostering the successful use of ADR at the Commission. While ADR is used frequently in complaint cases and other adjudications, we believe that some form of ADR could be used more widely in ratesetting and quasi-legislative proceedings. We are undertaking a two-fold approach, striving both to identify suitable disputes, informal as well as formal, in a timely manner and to provide ongoing education about the availability of ADR at the Commission and its multi-faceted potential.

