

PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Resolution ALJ-185
Administrative Law Judge Division
August 25, 2005

R E S O L U T I O N

RESOLUTION ALJ-185. Expanding the Opportunities for and Use of Alternative Dispute Resolution Processes at the Public Utilities Commission.

Summary

Alternative Dispute Resolution (ADR) approaches have been commonly used at the Commission for many years. Because we endorse the policies behind ADR, we are taking additional steps now to encourage its more frequent and systematic application in formal proceedings (and selectively to avoid the filing of formal proceedings). We also believe our renewed emphasis on ADR should be accompanied by careful evaluation of its results so that all participants gain a better understanding of the types of proceedings and issues that lend themselves to ADR, as well as the types of ADR methods that appear to work best in the Commission context.

Under the supervision of the Chief Administrative Law Judge (CALJ), we desire to expand ADR opportunities, both as to the types of matters to which it will be applied and to the ADR methods that will be available. This resolution sets forth the need for and purpose of this initiative; basic procedures; and the respective responsibilities of parties, ALJs, and the Commission in implementing this program.

The Commission's fundamental mission is to define and protect the public interest as it relates to utility rates and service. We believe that ADR, in appropriate instances, helps us fulfill our mission; however, ADR does not relieve us of our ultimate responsibility to act in the public interest.

Background

ADR commonly refers to the process of resolving a dispute between two or more persons without obtaining a formal, binding resolution of the dispute by a court or

agency. ADR includes a variety of individual processes such as negotiation, fact-finding, mediation, and arbitration.

For purposes of this resolution, we use a more limited definition of ADR: the use of a neutral person to assist two or more other parties in resolving disputed issues in a formal Commission proceeding. However, this definition recognizes that, in certain proceedings, the Commission must approve the parties' resolution of the disputed issues to ensure that their agreement comports with the applicable law, satisfies the public interest, and is enforceable. Also, as discussed below, ADR may be appropriate in other disputes, not yet pending as formal proceedings, arising within the Commission's jurisdiction.

Because we emphasize the voluntary nature of ADR, our definition does not include processes, such as binding arbitration, that impose a solution on the disputing parties. Also, we do not intend that this ADR program displace the use of traditional, required case management methods to narrow the scope of litigation (*e.g.*, "meet and confer" requirements).

ADR processes are often preferable to a litigated result because they potentially can produce outcomes that are more responsive to the parties' needs, more consistent with the public interest, avoid the narrow results of litigation that may not adequately address the parties' problems, encourage more active participation of all parties (regardless of an individual party's size or resources), save the parties' time and resources, and allow the Commission to direct its decisionmaking resources to other important proceedings. ADR processes are not appropriate in all formal proceedings. For instance, the Commission must issue a final decision in some proceedings in order to establish needed policy or precedent.

Description of the ADR Program

The ALJ Division will manage the use of ADR in formal proceedings, and ALJs will be used primarily as the disinterested facilitators, mediators, and evaluators ("neutrals") in the program. Anticipating this new emphasis, the ALJ Division has started to implement basic components of the program. The ALJ Division's consultations with the federal courts (Ninth Circuit and Northern District), state courts, Federal Energy Regulatory Commission, individual ADR professionals, and practitioners at this Commission have helped us formulate this program. The basic program components are:

1. **Eliciting participants' input**--In December 2004, the ALJ Division hosted three focus group discussions (utility representatives, organizations representing residential and business consumers, and Commission staff) to gain insights to help us design this initiative. Participants were generally supportive of an increased ADR emphasis.

Focus group participants, however, expressed concerns, chiefly about ALJs' expertise to be neutrals, whether ADR would delay proceedings, whether certain parties could circumvent ADR processes with direct appeals to individual Commissioners, and how the Commission would review settlements produced by these ADR processes. This resolution responds to these major concerns.

2. **ALJ training**--Twenty-six ALJs received several days of ADR training in February 2005 provided by faculty from the federal courts, California Commission on Judicial Education and Research (Judicial Council), Federal Energy Regulatory Commission, and Commission staff. The ALJ Division is continuing to provide additional ADR training on specialized topics. This instruction builds on training individual ALJs have completed and continue to receive from the National Judicial College, University of Southern California, State Bar of California, and other providers.

3. **Case selection**--ALJ Division management has been screening newly filed proceedings to identify those that may benefit from ADR. ALJ Division management also may identify disputes, not yet filed as formal proceedings, which may benefit from ADR, thereby avoiding a proceeding. When promising proceedings are identified, the Assigned Commissioner and assigned ALJ will be asked to discuss ADR prospects with the parties and to request ADR assistance when appropriate. Assigned ALJs or Law and Motion ALJs also will encourage ADR, as warranted, for discovery disputes arising during a proceeding. The ADR process may also be used to reach stipulations to key facts, whose removal as contested issues may speed resolution of the case. Except for facilitations (see below), disputing parties may choose not to participate in ADR although the Assigned Commissioner and/or assigned ALJ may order disputing parties to meet with a neutral to discuss the feasibility of ADR.

We envision that ADR may be used in all types of proceedings before the Commission. In some proceedings, ADR may be used to address all disputes among the parties. In other proceedings, ADR may be used in a specific phase of the proceeding or as a means to resolve a set of issues. In some instances, however, ADR processes may not be appropriate, *e.g.*, when the Commission needs to establish precedent or broad policy, the Commission needs to apply a uniform result, when a settlement or other outcome would affect non-participants, or when one or more key parties are not committed to an ADR process.

4. **Assignment of neutrals**--Upon request of the Assigned Commissioner's Office and/or assigned ALJ, ALJ Division management will assign an appropriate ALJ to act as a neutral. In some proceedings, another Commission staff member or an outside professional may be assigned as a neutral. In complicated cases, more than one qualified neutral will be offered to the parties. In simpler cases, only one qualified neutral may be initially offered, but one or more of the parties have the right to request

another neutral. Except when outside professionals are used as neutrals, these ADR services will be provided at no charge to the parties.

5. **Types of ADR services**--Initially, the ALJ Division will provide facilitation, mediation, and early neutral evaluation (ENE) services.

- **Facilitation** involves an ALJ or other staff convening and moderating a meeting or workshop where advance notice has been given, and all parties to the proceeding may attend. The ALJ's role is to promote constructive communication among the parties.
- **Mediation** involves an ALJ convening and meeting with those parties who have agreed to the process, both in joint and separate sessions, where sensitive communications are confidential and privileged as settlement discussions. The ALJ's role is to help the parties achieve a mutually acceptable outcome.
- **Early neutral evaluation (ENE)** involves one or more ALJs who, after a presentation by the disputing parties, provide those parties with a confidential, nonbinding evaluation of the strengths and weaknesses of their positions.

6. **Appropriate documentation and approval of settlements**--When settlements have been reached, they will be documented by enforceable agreements among the settling parties. In many instances, the settlement can be implemented by dismissing the proceeding. In other situations, the settlement must be submitted to the assigned ALJ and the Commission for review.

7. **Measurement and Evaluation**--One purpose of our renewed ADR emphasis is to identify the appropriate ADR methods to resolve disputes successfully, efficiently, and with a high level of participant satisfaction. A systematic evaluation program is necessary to make these determinations. This evaluation will include both qualitative and quantitative measures. The ALJ Division will use confidential questionnaires and occasional interviews with ADR participants (parties, their lawyers, the neutrals, and decisionmakers) to obtain feedback about their ADR experiences and how ADR affected the Commission's decisionmaking role. The ALJ Division will also track and compare case duration and management information so as to compare results in ADR and non-ADR proceedings.

8. **Periodic reports**--The ALJ Division will report to us, every four months during the next year, on the implementation of the ADR program.

Basic Principles

We decline at this moment to establish a detailed set of procedures for the ADR program because the ALJ Division and participants should be able to experiment and learn as they implement this program. We encourage feedback from all parties on the process. Rather than detailed procedures, we announce a set of principles that establish a basic framework for the program:

1. **Voluntary**--Generally, participation in ADR processes should be voluntary. Disputing parties cannot be forced to agree. When our staff is a disputing party, we strongly encourage staff to participate in ADR in appropriate circumstances. In three instances, ALJs and Assigned Commissioners can require disputing parties to participate in ADR processes: (a) facilitated workshops or other public meeting to discuss disputed issues; (b) settlement conferences conducted by the assigned ALJ or Assigned Commissioner; and (c) joint or separate meetings of disputants, conducted by an ALJ who is not the assigned ALJ, where the desirability and feasibility of an ADR process are explored. Litigants may assist by stating their amenability to ADR in their initial pleadings or during the proceeding. We do not disturb, however, required case management procedures traditionally used by assigned ALJs to identify issues and narrow disagreement in formal proceedings.
2. **Use of ALJs**--ALJs should be used to provide ADR services. Experienced and knowledgeable ALJs are now available to serve as neutrals in most instances. While not all ALJs who have expressed interest in serving as neutrals have the same training and experience, the ALJ Division has commenced an aggressive education and training program. Often, this training will include the pairing of experienced and less-experienced ALJs in ADR processes. We also expect the ALJ Division to take the lead in providing negotiation and ADR training to other Commission staff. We see this as a long-term commitment. We are confident that, by beginning to use ALJs now and providing ADR training and opportunities to other Commission staff, we will build an exceptionally competent core of neutrals who have both ADR and substantive expertise.
3. **Timeliness**--ADR should not be allowed to unduly prolong proceedings or needlessly burden the parties with additional preparation. It is, in fact, our expectation that if parties are diligent in preparing for the discussion of contested issues, the duration of formal proceedings actually may be shortened. Even if time is not saved, a negotiated settlement may still be more beneficial to the parties and the public than a litigated result.
4. **Good faith**-- We are giving renewed emphasis to ADR because we believe that in many instances, these processes will produce, consistent with the public interest, a solution more favorable to all settling parties. Consequently, we request the parties' and their representatives' good faith cooperation in implementing this program by (a) exploring the desirability and feasibility of ADR in particular proceedings, (b) fairly

explaining the pros and cons of ADR to clients, (c) respecting confidentiality agreements entered into as part of ADR, and (d) assisting the ALJ Division in evaluating the program. We firmly believe the parties and their representatives should not use an ADR process as an instrument for delay or solely for discovery purposes. We also affirm the neutral's authority to terminate an ADR process when one or more participants act in bad faith.

5. **Confidentiality**--For many ADR processes to be successful, the participating parties and the neutral must enter into confidentiality agreements. These agreements usually prevent the parties from publicly disclosing confidential information exchanged during the discussions. The agreements also prevent the neutral from communicating confidential information, the substance of the discussions, or the positions of any of the participating parties to anyone including the decisionmakers. Confidentiality is always critical in mediation and ENE; but even in public workshops, confidentiality agreements may be required to enable participants to participate openly and creatively. Our Rule 51.9 of the Commission's Rules of Practice and Procedure (Rules) already establishes the confidentiality of discussions in all of these contexts, and, in accordance with law, we will honor and enforce these agreements. When confidential ADR processes are used, we believe the neutral's communications with the decisionmaker should be limited to timing and scheduling, a generalized assessment of whether settlement is likely, and other administrative and ministerial matters.

6. **Commission review**—Many settlements can be finalized without further action by the Commission. Some settlements reached in formal proceedings still must be submitted to an ALJ and the Commission for review and approval. Such review may be required to fulfill the Commission's constitutional and statutory obligations or to protect the litigants' rights. In focus group discussions, participants registered two concerns about the Commission's role in reviewing settlements. One concern is that the Commission may rewrite the settlement in a manner that defeats the reasonable expectations of the settling parties. A second concern is that, after a purported settlement, one party may engage in ex parte communications with individual Commissioners to secure a more favorable result in the Commission's final decision.

We believe that both situations detract from the emphasis we wish to give to ADR processes. For ADR to be an attractive option for parties, proposed settlements should be reviewed expeditiously; and, when the principal hearing officer has recommended approval of a proposed settlement, we normally will defer to that recommendation. Our review of good faith settlements will be undertaken to implement the settling parties' reasonable expectations consistent with our obligations to non-settling parties and our constitutional and statutory requirements. If time permits, and as contemplated by Rule 51.7, we will indicate our reasons for not accepting all or part of a settlement and allow the parties an opportunity to address our concerns. We also will

resist the efforts of parties to circumvent the ADR process by ex parte appeals to individual Commissioners.

Response to Comments

On May 27, 2005, the proposed resolution was served on persons appearing on the service lists in several recent rulemaking proceedings.

Four entities submitted comments to the ALJ Division concerning the proposed resolutions: San Diego Gas & Electric Company and Southern California Gas Company (joint), Pacific Gas and Electric Company (PG&E), and the Office of Ratepayer Advocates (ORA).

a. San Diego Gas & Electric Company and Southern California Gas Company. These companies expressed their enthusiastic support for the ADR program as outlined in the proposed resolution. They also raised three specific concerns. Their first concern is how commercially sensitive information will be handled in ADR sessions. Our guidance is that when ALJs act as neutrals under the proposed ADR program, they will request that the participating parties execute a confidentiality agreement binding the parties and the neutral. If parties believe that the agreement's provisions are inadequate, they may request modifications before they sign the agreement and the ADR process commences. During the voluntary ADR process, each participating party controls what information is communicated to the neutral and other participating parties. Independent of the ADR process, however, the assigned ALJ (not the neutral) may have already decided confidentiality questions and determined what discovery information must be provided to other parties.

San Diego Gas & Electric Company and Southern California Gas Company also are concerned about who will have access to the advisory evaluations rendered by one or more ALJs in voluntary early neutral evaluations (ENEs). We instruct that unless the participating parties agree otherwise, ENEs will be conducted as a settlement process pursuant to confidentiality agreements binding the parties and those ALJs acting as neutral evaluators. The evaluators will not share information about the parties' presentations during ENEs with the assigned ALJ or Commissioners. The evaluators also will not share or discuss their evaluations with the assigned ALJ or Commissioners.

Finally, San Diego Gas & Electric Company and Southern California Gas Company caution that the Commission should not allow parties to manipulate the ADR so as to unduly delay formal proceedings. We anticipate that ADR will improve decisionmaking and, in some cases, save time. The program will be monitored to minimize delay, and ongoing evaluations of the program will help us understand whether the program is fulfilling its purpose or is being used to delay.

b. Pacific Gas and Electric Company. PG&E submitted generally negative comments on the proposed resolution. First, PG&E indicated that “the need for and purpose of this initiative” is not expressed in the proposal. The proposed resolution, however, states that “ADR processes are often preferable to a litigated result” and enumerates the reasons why. We believe that formal proceedings, litigated to conclusion, are appropriate and necessary in many instances to allow the parties a full opportunity to be heard and to fulfill our constitutional and statutory obligations. We also believe that many disputes may be resolved short of such lengthy and expensive undertakings. The contemplated ADR program provides the Commission with more tools to assist in dispute resolution.

PG&E also comments that the proposed resolution does not distinguish the proposed ADR program from the existing settlement rules (Rules 51 to 51.10, *Rules of Practice and Procedure*). The existing settlement rules address the process for considering and approving a proposed settlement; the rules do not address how reaching settlements might be facilitated. The proposed resolution, by comparison, authorizes a comprehensive program of flexible ADR processes to assist willing parties in resolving disputes.

PG&E is also concerned about the initial screening of newly filed proceedings to identify those potentially benefiting from ADR. PG&E indicates that parties may feel pressured to participate and that, in screening, the ALJ Division “may effectively send a signal to the parties and decisionmaker about the perceived merits of the case.”

The screening process only requires that the ALJ Division systematically consider when ADR processes may be appropriate. Many federal and state courts now undertake similar screening. Formal proceedings are expensive undertakings, and the Commission should be sensitive to when alternative processes may be employed. When a proceeding is identified as having ADR possibilities, the ALJ Division is only indicating that a mutually beneficial outcome may be possible without the Commission’s need to establish new policy or precedent.

Finally, PG&E suggests that, even in formal proceedings not initially identified as prospects for ADR, parties should still be able to request ADR assistance. We agree, and we have so modified No. 3, “Case Selection,” under the Description of the ADR Program.

c. Office of Ratepayer Advocates. ORA submitted comments “fully support[ing] the efforts of the ALJ Division in crafting processes and a formal program to encourage the use of alternative dispute resolution” processes. ORA also emphasized the importance of ADR being voluntary, which it is under the proposed resolution.

Conclusion

We believe that ADR offers great potential to the Commission, and all who practice before the Commission, for improving decisionmaking processes in formal proceedings and certain other disputes. The ADR program should be implemented deliberately so that all participants can learn from experience and improve the processes. We pledge our full support for this initiative and encourage the participation of others.

IT IS RESOLVED as follows:

1. An expanded alternative dispute resolution (ADR) program is established under the supervision of the Chief Administrative Law Judge (CALJ).
2. The CALJ shall proceed to implement the ADR program as described above, giving special emphasis to the basic principles we have outlined.
3. The CALJ shall monitor and evaluate the ADR program and, based on the interim results, make necessary modifications to the program so as to achieve the goals and principles we have outlined.
4. During the next year, the CALJ shall report to us every four months on the implementation of the ADR program. At the conclusion of the year, the CALJ shall provide us with an evaluation of the ADR program and make recommendations concerning the program's future.

This resolution is effective today.

I certify that the foregoing resolution was duly introduced, passed, and adopted at a conference of the Public Utilities Commission of the State of California held on August 25, 2005, the following Commissioners voting favorably thereon:

/s/ STEVE LARSON

STEVE LARSON
Executive Director

MICHAEL R. PEEVEY
President
GEOFFREY F. BROWN
SUSAN P. KENNEDY
DIAN M. GRUENEICH
JOHN A. BOHN
Commissioners