AKIN, GUMP, STRAUSS, HAUER & FELD, L.L.P.
ATTORNEYS AT LAW
ROBERT S. STRAUSS BUILDING
1333 NEW HAMPSHIRE AVENUE, N.W.
WASHINGTON, D.C. 20036
(202) 887-4000
FAX (202) 887-4288
www.akingump.com

AUSTIN
BRUSSELS
DALLAS
DENVER
HOUSTON
LONDON
LOS ANGELES
MOSCOW
NEW YORK
NORTHERN VIRGINIA
PHILADELPHIA
SAN ANTONIO
WASHINGTON, D.C.

RIYADH (AFFILIATE)

DIRECT DIAL NUMBER (202) 887-4500
E-MAIL ADDRESS rlessy@akingump.com

RECEIVED
2002 JAN 29 PM 2:10
Rules and Directives Branch

12/14/01
66 FR 64890
(2)

Roy P. Lessy, Jr.
Direct Dial (202) 887-4500
Direct Fax (202) 955-7763

January 28, 2002

BY REGULAR MAIL & E-MAIL

Mr. Michael Lesar
Chief, Rules and Directives Branch
Division of Administrative Services
Office of Administration, Mail Stop T-6 D59
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555-0001

Re: Request for Comments Regarding the Use of Alternative Dispute Resolution in the NRC's Enforcement Program

Dear Mr. Lesar:

These comments are submitted on behalf of FirstEnergy Nuclear Operating Company and GPU Nuclear, Inc., in response to the notice in the Federal Register published on December 14, 2001 regarding the use of Alternative Dispute Resolution ("ADR") in the NRC's Enforcement Program.

The above-referenced Federal Register noticed identified eleven specific questions for commenters to address as to the use of ADR in NRC's Enforcement activities and also invited more general comments. The specific questions are addressed seriatim below:

1. **Is there a need to provide additional avenues, beyond the encouragement of settlement in 10 CFR 2.203, for the use of ADR in NRC enforcement activities?**

COMMENT: Yes. Providing additional avenues at various points of the NRC enforcement process would assist in both determining the existence or significance of a violation

Template = ADM-013

E-RIDS = ADM-03
Add = T. REIS (TXR)

or proposed violation and reaching fair and expeditious closure of enforcement or proposed enforcement activities. As explain below, ADR holds the promise of more expeditious and therefore, more efficient resolution of issues and disputes. ADR can also facilitate communications between the parties (and complaining entities). The more regulatory tools that are available to all interested parties in an enforcement dispute or potential dispute, the greater the opportunities for effective and efficient resolution of such disputes. Also as described below, ADR can change the dynamic between the parties, who in more traditional administrative or judicial litigation, may tend to be natural adversaries. For example, if a skilled mediator is utilized as part of the ADR process, the mediator may initially focus on more easily resolved issues, therefore building a bridge and trust between disputing parties or entities which can create a momentum that can help resolve larger issues. The mediator may also help the interested entities better understand their opponent's positions and arguments, thereby increasing the possibility for compromise or resolution.

As noted in the Federal Register notice, in the Discrimination, Task Group Report entitled "Draft Review and Preliminary Recommendations for Improving the NRC's Process for Handling Discrimination Complaints" 2001, the Task Group, at the time, recommended no changes to the current process in discrimination cases. That Report, however, looked only at the use of ADR using the sole example of "binding arbitration" at a point prior to NRC conducting an investigation of a discrimination complaint. Therefore, the Task Group's comment on the use of ADR was limited to the pre-investigatory phase of a discrimination complaint. This appears to be a comment based upon a rather limited use of the possibility of ADR, in all of its many forms, and at one point of the NRC enforcement process, as opposed to the use of ADR during the entire enforcement process.

Rather, ADR is broadly defined under the "Administrative Dispute Resolution Act of 1996," 5 U.S.C. 571 (hereinafter the "ADR Act") as "any procedure that is used to resolve issues and controversy, including but not limited to conciliation, facilitation mediation, fact finding, mini trials, arbitration and use of an ombudsman, or any combination thereof." The one example discussed in the Task Force report is much narrower than the potential use of ADR contemplated by the ADR Act. As noted in the Federal Register Notice, in NRC Enforcement cases, in at least one instance, one enforcement case has been resolved through the use of a "Settlement Judge" from the Atomic Safety and Licensing Board Panel. In that instance, a discrimination case was settled after an investigation had occurred (and a notice of violation with a civil penalty had been issued), thereby avoiding an extended hearing (and further utilization of resources by both the Licensee and the NRC Staff). Successful use of a settlement judge in such a case supports the view, as further discussed below, that there is a need to provide the opportunities for the pursuit of ADR in NRC Enforcement activities at various key stages in the enforcement process.

2. What are the potential benefits of using ADR in the NRC enforcement process?

COMMENT: As noted above, ADR permits an expeditious resolution or truncation of disputes. Additional litigation, with discovery and motion practice, can be expensive, resource intensive, time consuming and demoralizing for licensee employees involved in the protracted

process. Under the ADR Act, the parties[1] can negotiate a acceptable procedure for use of the ADR process, including mediation, involving the use of a neutral to assist in defining, and thereby delimiting the real issues in contention.

An important benefit of ADR is that the use of a mediator or facilitator may help the opposing parties better understand the other entity's positions and concerns, thereby increasing the possibility for compromise.

ADR can also be useful in instances where there are difficulties in communication between the parties or where there are more than two parties to a dispute, because the neutral can work with and assist the opposing parties in better understanding each others positions. Once such communication between or among opposing parties has been facilitated, the matter can be substantially narrowed or fully resolved by settlement. To the extent the use of ADR increases effective communications between the parties, particularly in employment discrimination matters, the use of ADR (upon mutual agreement) may favorably influence the work environment at a licensed facility.

Finally, ADR can offer flexibility of penalties. As the EPA has explained, when a case is litigated before an ALJ, usually the primary sanction available is a civil penalty. The amount of the civil penalty goes into the Federal Treasury and is not set aside for environmental purposes. EPA, *ADR Accomplishments Report* 20 (2000) (hereinafter "EPA, ADR Report"). With ADR, the parties, for example, could agree to a reduced civil penalty in conjunction with other actions to be taken by the regulated party. For example, an alleged polluter may agree to a reduced monetary penalty combined with its agreement to update a number of its facilities with more sophisticated pollution control technology, even though the EPA was pursuing an action against only one facility. The alleged polluter could also agree to fund education programs that will help others avoid the same problems.

A good example of the potential of ADR in enforcement cases is a case involving a 1998 EPA enforcement action against Pfizer, Inc. EPA charged that Pfizer's facility on the Thames River in Groton, Connecticut had violated several statutes by improperly managing containers, failing to conduct required inspections and training, discharging effluents in excess of limits set forth in its permit, and failing to report releases required under the Toxic Release Inventory program. Pfizer, the EPA, and the Department of Justice agreed to use ADR to attempt to settle the issue without lengthy litigation. However, the parties initially could not agree on what ADR process to use. The parties engaged a neutral convener to design a process to which all could agree. That process involved two phases: (1) a neutral evaluation phase in which Pfizer and the

[1] As noted above, ADR can facilitate communications between the parties (and complaining entities). In the early stages of a potential enforcement matter, participation in ADR should be broad enough also to include complaining entities, if agreeable to the participants. By facilitating and focusing communications at an early stage, many steps (and resources) in a formal enforcement process may be saved.

government submitted briefs to a mediator, who evaluated the strength of each party's arguments, and (2) face-to-face mediation involving the parties and the mediator. The mediation resolved most questions in dispute, but did not reach a conclusion on the penalty amounts. Despite the lack of an agreement in these mediation sessions, the parties continued negotiations (some sessions included the mediator), until a settlement was reached. The settlement involved the payment of a substantial civil penalty and the implementation of two supplemental projects by Pfizer, valued at an additional $175,000. The first project was an evaluation, by Pfizer, of waste handling practices at the University of Rhode Island. Pfizer agreed to use the knowledge gained to develop a general waste management process for universities and to provide associated training. Pursuant to the second project, Pfizer agreed to undertake the training of secondary school teachers in issues associated with waste management and safety.

The EPA case highlights the flexibility of process and penalties, and demonstrates how parties to an ADR proceeding can become invested in the process. With the supplemental projects agreed to by Pfizer, the EPA achieved a wider benefit for the community than it may have in traditional litigation. Moreover, the experience of resolving this dispute amicably may improve the relationships between these parties in the future.

3. What are the potential disadvantages of using ADR in the NRC enforcement process?

COMMENT: A potential disadvantage of using ADR in the NRC enforcement process is if the ADR procedure does not resolve the issues or fails to achieve the desired result, in which eventuality, the parties will have undertaken the time and cost of ADR and still be required to resolve the matter by traditional means. In addition, as contemplated in the Federal Register Notice, there may be certain cases of first impression, where the NRC's mission and regulatory programs would benefit from the legal principles developed in that case. As traditional use of ADR requires the agreement of parties to the process, ADR should not be mandatory if either the licensee or the NRC Staff feels that full litigation of the particular matter is required to develop precedent or for other significant related purposes. However, the veto of the use of ADR process in NRC enforcement cases by any party, particularly the NRC Staff, should be cautiously invoked, both given the policies underlying the ADR Act and the successful use of ADR in enforcement cases by other federal agencies, such as the EPA.

4. What should be the scope of disputes in which ADR techniques could be utilized?

COMMENT: No particular type of enforcement cases should be disqualified or not considered from the use of ADR techniques. As noted above, and as contained in the Federal Register notice, there may be cases involving, for example, "significant questions of government policy" that have not been adjudicated or where facts of the case are so unique that establishment of new precedent might overide the policies underlying the ADR. 57 Federal Register 36678, (August 14, 1992). If ADR is to be a viable option available to the parties in enforcement cases,

it should be generally available to all parties at each critical stage of the enforcement process, from the pre-investigatory stage to the post-order settlement stage.

5. At what points in the existing enforcement process might ADR be used?

COMMENT: ADR may be used at all points in the enforcement process. At the outset of an enforcement matter, the use of a neutral may, as discussed above, facilitate communication, in appropriate cases, between a licensee and the NRC Staff, or between the licensee and a complaining individual or entity, so as to avoid the necessity of a formal investigation, and the full procedural aftermath as contemplated in 10 C.F.R. Part 2, Subpart B. In that regard, it should be noted that EPA has made ADR available at its Headquarters and at its Regions. EPA, ADR Report at 1, 2, and 15.

The Federal Register Notice also raises the question of whether ADR techniques should be made available in enforcement matters where hearing rights do not automatically attach, such as notices of violation issued without a corresponding civil penalty. Whether or not hearing rights attach, there are enforcement actions, such as 10 C.F.R. 50.5 Notices issued to individuals, that can have a significant impact on the recipient of the Notice or the facility licensee. Accordingly, restricting the availability of ADR to only those matters or issues eligible for hearing requests, would appear to be based upon a limiting view of the benefits of ADR. Inasmuch the use of ADR requires the agreement of parties, a party should have the ability to request the use of ADR to resolve or address enforcement issues not leading to a potential order or civil penalty.

ADR may be also be used after an initial investigation by the NRC but before formal enforcement action has been decided upon. An efficient resolution of the matter or dispute may be developed and agreed upon at this intermediate stage, such as, for example, by the development of licensee commitments, etc., without the necessity of proceeding, step-by-step, through the entire, formal enforcement process.

Finally, ADR has traditionally been used to reach settlements in both private litigation and in enforcement litigation before other federal agencies and can be used in NRC enforcement cases to achieve a full and final resolution of any case involving the potential imposition of a civil penalty or order, thereby avoiding an evidentiary hearing. When a hearing request has been made in such cases, ADR can be utilized at the remedy phase to reach a mutually agreeable final resolution of the matter.

6. What types of ADR techniques might be used most effectively in the NRC enforcement process?

COMMENT: In general, the most effective techniques are those in which the parties are comfortable and to which they are committed. Obviously the appropriate technique can vary depending on who the parties are and what the dispute involves. As noted above, the ADR Act defines ADR as "any procedure that is used to resolve issues in controversy including but not

limited to conciliation, facilitation, mediation, fact-finding, mini trials, arbitration, and use of an Ombudsman or any combination thereof." There is no reason that NRC's regulatory program should not embrace the full range of ADR procedures available under the ADR Act at the Headquarters and Regional levels.

7. Does the nature of the existing enforcement process for either reactor or materials licensees limit the effectiveness of ADR?

COMMENT: To the extent the formal enforcement process limits the providing of information to the licensee until after the completion of an investigation, one of the main benefits of ADR is that it could increase effective communication amongst the parties. The matter could be more efficiently resolved by sharing of complete and relevant information early on in the process through a designated neutral or pursuant to other ADR techniques. This may also permit, in appropriate cases, resolution of the matter at a much earlier stage, before both NRC, licensee, and other resources are used to enter a formal enforcement process, which is often adversarial in nature. Thus, the use of a neutral may allow or encourage resolution of the matter before an adversarial or litigative atmosphere evolves.

8. **Would any need for confidentiality in the ADR process be perceived negatively by the public?**

COMMENT: The need for confidentiality should be examined on a case by case basis. In some ADR cases, such as certain discrimination cases, the ADR may well include participation, at certain junctures, by an alleging party. In other cases, the mediator or other neutral may need to decide whether the ADR process is served by more or less confidentiality, with agreement of the parties. In those instances where the matter is resolved on a confidential basis, a settlement or other agreement would be reached, which agreement would be made publicly available. As in the case of traditional settlement negotiations, the mediation or negotiation itself should not be public, as that might detrimentally effect the confidentiality and efficiency of the settlement discussions. Finally, under existing procedures, particularly in discrimination cases, confidentiality is already maintained to some degree by the use of closed enforcement conferences.

It should be noted that the ADR Act protects the ADR process with confidentiality provisions governing neutrals and parties involved in ADR proceedings. 5 U.S.C. 574. Neither a neutral nor a party to an ADR proceeding can reveal, either voluntarily or "through discovery or compulsory process" a "dispute resolution communication".[2] In addition, a neutral may not voluntarily disclose or disclose through discovery or compulsory process a communication

[2] A "dispute resolution communication" is "any oral or written communication prepared for the purpose of a dispute resolution, . . . except that a written agreement to enter into a dispute resolution proceeding, or final written agreement or arbitral award reached as a result of a dispute resolution proceeding, is not a dispute resolution communication". 5 U.S.C. 571(5).

provided in confidence to the neutral. There are exceptions to the confidentiality provided to ADR communications. Otherwise confidential material may be disclosed where all parties to the ADR proceeding consent; where the communication has already been made public; where a statute requires that the information be made public; or where a court determines that confidentiality should not apply in order to prevent "manifest injustice", to establish a violation of law, or to prevent harm to the public health or safety. See 5 U.S.C. 574(a), (b)(1)-(5). In addition, otherwise confidential information may be disclosed by parties to an ADR proceeding where it is "relevant to determining the existence or meaning of an agreement or award that resulted from the dispute resolution proceeding or to the enforcement of such an agreement or award" and where the dispute resolution communication "was provided to or was available to all parties to the dispute resolution proceeding." See 5 U.S.C. 574(b)(6), (7).

9. For policy reasons, are there any enforcement areas where ADR should not be used, e.g., wrongdoing, employment discrimination, or precedent-setting areas?

COMMENT: Since the ADR Act encourages the use of ADR by federal agencies, it is suggested that its categorical exclusion in certain types of cases should be very cautiously utilized. As noted above, the use of ADR requires the consent of the parties, therefore, if NRC were to withhold its consent to use ADR, that withholding should be done only in very limited circumstances. As to one of the examples posed in the question, the use of ADR in "employment discrimination cases" should be encouraged, so long as confidentiality and privacy are maintained. In fact, this would appear to be an area where the benefits of ADR, such as increased communication amongst the parties, and evaluation of positions by a neutral, would lend itself to resolution by the use of ADR.

As to the use of ADR in additional areas referenced in the question, such as "precedent-setting areas," the NRC may want to evaluate whether the precedent would be more effectively set by rulemaking as opposed to enforcement litigation. It should be noted, however, that ADR can always be used for less than a full resolution of an entire matter. Hence, ADR may be used in such instances, to help define or delimit the real issue(s) in controversy, even where there is the potential for "precedent setting" litigation.

10. What factors should be considered in instituting an ADR process for the enforcement area?

COMMENT: The NRC should consider the fact that the ADR process provides an important additional and efficient tool for resolution of disputes in the enforcement area. Certain matters, if litigated publicly, are of such a nature that they may contain privacy or other restricted information that would not be available to the public, even if the matter were fully litigated.

At the same time, the NRC enforcement process would likely benefit from the use of ADR, in terms of efficiency and increased communication, resulting in the narrowing of differences between the parties. Even if the ADR process is not successful in completely

resolving all issues in an enforcement case, the ADR process, by providing the opportunity for increased, early communication between the participants, may contribute to a more efficient resolution of the matter.

Finally, in instituting the ADR process for the enforcement area, it would be beneficial, as in the case of EPA, to utilize ADR at both Headquarters and the NRC Regions, given the significant role of Regions in NRC enforcement matters.

11. What should serve as the source of neutrals for use in the ADR process for enforcement?

COMMENT: An obvious source of neutrals are members of the Atomic Safety and Licensing Board Panel, including both full-time and part-time members of that panel. If ADR is successfully utilized by the NRC, the Panel may wish to recruit additional part-time members to participate in the NRC process.

The ADR Act states that a neutral can be a government official or "any other individual who is acceptable to the parties." 5 U.S.C. 573(a). EPA, for example utilizes potential neutrals from outside professional groups, many of which have specific training in ADR techniques. Finally, there are, in addition, a number of organizations that provide dispute resolution services, which can be evaluated as providing a potential source of neutrals for use in the ADR process for NRC enforcement matters.

In summary, the use of ADR in NRC enforcement cases will create important additional avenues and processes for the effective consummation and resolution of NRC enforcement matters. It is therefore recommended and urged that the NRC actively implement and develop the use of ADR in its enforcement program.

If there are any questions related to the above or additional information is requested, please feel free to contact the undersigned.

Respectfully submitted,

Roy P. Lessy, Jr.

Roy P. Lessy, Jr.
On behalf of FirstEnergy Nuclear
Operating Company and GPU Nuclear, Inc.