

POLICY ISSUE (Information)

June 4, 2002

SECY-02-0098

FOR: The Commissioners

FROM: William D. Travers
Executive Director for Operations

SUBJECT: STATUS OF THE STAFF'S EVALUATION OF THE POSSIBLE USE OF
ALTERNATIVE DISPUTE RESOLUTION IN THE AGENCY'S ENFORCEMENT
PROGRAM

PURPOSE:

To inform the Commission of the status of the staff's evaluation of the potential use of alternative dispute resolution (ADR) techniques in the NRC's enforcement program, summarize both the public comments received on the issue and the public workshop held, and to provide a plan for the evaluation necessary to make a final recommendation.

DISCUSSION:

On September 20, 2001, the staff provided the Commission SECY-01-0176 entitled "Evaluation of the Need for an Alternative Dispute Resolution Policy and Procedures for Use in the NRC Enforcement Process." SECY-01-0176 requested the Commission's approval to seek public comments on the use of ADR. The Commission approved the public comment request in a November 7, 2001, Staff Requirements Memorandum (SRM) and the Federal Register Notice (FRN) soliciting comments was issued on December 14, 2001, for a 45 day public comment period.

In April 2001, the Discrimination Task Group issued its draft report and did not recommend adopting ADR techniques into the agency's processes for handling allegations of retaliation against licensee employees for having raised safety concerns based on the unclear impact such processes may have. The Commission stated in the November 7, 2001, SRM that the finalization of the Discrimination Task Group's position should await evaluation of the comments received in response to the December 14, 2001, FRN.

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The public comment period expired at the end of January 2002 and while several parties representing the nuclear industry provided comments, only one comment was received from the general public. No public interest groups had responded. The staff knew from experience that there were several such groups that would have an interest in this subject. The staff contacted these groups and found they were unaware of the FRN because they had become accustomed to receiving notification of such a solicitation on the NRC website rather than in the Federal Register. That portion of the website where the solicitation would normally reside was down in response to September 11, 2001, events. Therefore, the staff, after consultation with the Office of the General Counsel, extended the comment period to March 29, 2002.

As the responses began to come in, two issues became apparent. First, the views on the appropriateness and potential usefulness of ADR techniques widely varied. The industry and its legal counsel embraced the use of ADR techniques broadly and the public interest stakeholders were generally opposed to exploring possible uses of ADR in enforcement. Secondly, many stakeholders, including some members of the NRC staff, appeared to misunderstand what ADR is and how it can be used. The staff conducted a workshop with the goal of better explaining the potential uses of ADR as well as its limitations. A second FRN announcing the workshop and extending the public comment period to March 29, 2002, was issued on February 25, 2002. The workshop was held on March 12, 2002.

The workshop consisted of an overview of the agency's enforcement program to a panel consisting of: one independent ADR specialist; four ADR specialists from various Federal agencies; representatives from the Nuclear Energy Institute (NEI); representatives from the Union of Concerned Scientists; representatives from two law firms representing nuclear utilities; and, representatives from two law firms representing environmental whistle blowers. The panelists discussed the merits and debated the usefulness of ADR techniques in the context of the enforcement process. The workshop was facilitated by the agency's designated ADR specialist, Mr. Francis X. Cameron, Office of the General Counsel.

A summary of the workshop is provided in Attachment 1. Overall, many of the participants (i.e., industry representatives, agency ADR experts, and an attorney from the environmental whistle blower community) believed that ADR could be used beneficially in the NRC enforcement process. They also did not think that any particular areas of the enforcement process should be eliminated from consideration. These participants noted that any decision to use ADR was not irrevocable and the results, either from a pilot, or some type of full-scale implementation, would need to be evaluated. The attorney from the environmental whistle blower community who was in favor of ADR confined her suggestions to the use of ADR in 10 CFR 50.7 discrimination cases and suggested a model that the NRC might follow based on Department of Energy (DOE) experience. Most participants also recommended taking a flexible view on what types of ADR techniques should be used and noted, for example, that facilitation could also be used effectively, as well as mediation. Those participants supporting the use of ADR recommended that a wide pool of third party neutrals should be available for the parties to select from for any particular dispute.

The citizen group representative was opposed to ADR on the grounds that ADR would only provide an opportunity for the enforcement process to be weakened. In his written comments, he noted that if ADR was to have a role, it should only be considered for establishing the fact set that is then used by the NRC staff to determine sanctions, for example, as to when a non-conforming condition was identified or whether the cause of the violation was willful. However, its use would be "distasteful" when ADR is used in a case that involved a challenge to

a proposed sanction. With respect to the potential need for confidentiality in ADR, this commenter noted that the more deals that are brokered behind closed doors, it can only expand the widely perceived impression that NRC has an inappropriate close relationship with the industry it regulates. The staff would note that the issue of confidentiality was discussed at the workshop and a summary of that discussion is presented in Attachment 1.

Written comments in response to the December 14, 2001, FRN were provided by the following parties:

- Marvin I. Lewis (representing himself)
- Florida Power & Light Company (FPL)
- Morgan, Lewis & Bockius LLP (Morgan, Lewis & Bockius) on behalf of PPL Susquehanna LLC, South Texas Project Nuclear Operating Company, and TXU, Inc.
- U.S. Institute for Environmental Conflict Resolution (U.S. Institute)
- Nuclear Energy Institute (NEI)
- North Atlantic Energy Service Corporation (North Atlantic)
- Exelon Generation Company (EGC), LLC (Exelon)
- Tennessee Valley Authority (TVA)
- Akin, Gump, Strauss, Hauer & Feld, LLP (Akin, Gump) on behalf of FirstEnergy Nuclear Operating Company and GPU Nuclear, Inc.
- Union of Concerned Scientists (UCS)
- State of Illinois - Department of Nuclear Safety (State of Illinois)
- Clifford, Lyons, and Garde - two letters

Attachment 2 includes a broad overview of the comments from the parties identified above. Given that the FRN requested comments in the form of answers to questions, the staff has collated the answers to those questions and provided them in Attachment 2. Some respondents who provided detailed responses did not organize their comments according to the specific questions that the Commission identified for comment. The staff has attempted in Attachment 2 to extract the answers to the questions from the broader responses. However, to avoid taking responses out of context, the full comments of all responders are provided in Attachments 3-14.

Conclusions and Plans for Developing a Recommendation

Based on review of the comments received and provided during the March 12, 2002, workshop, the staff has reached several conclusions and plans to proceed as follows:

- There May be a Role for ADR in the Enforcement Program

The staff has evaluated the comments received, including those expressed during the workshop. The staff noted that the comments include many pros and cons regarding the use of ADR in the NRC enforcement program and that many of the comments are

opposed on the same issues. Therefore, at this time, the staff cannot draw any final conclusions regarding whether ADR has a role in the enforcement program and, if it does have a role, how it should be incorporated. However, based on review of stakeholder input, the staff believes that there are areas in the enforcement program which may benefit from the incorporation of ADR and that these areas should be reviewed further.

The staff believes it is appropriate to continue to pursue the viability of incorporating ADR into the enforcement process because it has the potential to reduce unnecessary regulatory burden and improve efficiency. However, the staff needs to specifically evaluate whether the use of ADR will detract from the overall objective of the NRC enforcement program - achieving lasting corrective actions, maintaining safety, increasing (or at least maintaining) public confidence, and increasing (or at least maintaining) effectiveness.

- If ADR Has a Role, NRC Should Focus on Areas Resulting in the Largest Benefits.

Commentors provided a wide range of potential benefits and drawbacks to using ADR. While the staff recognizes that it needs to evaluate all benefits and drawbacks, the staff believes that the largest benefits of implementation of ADR in the enforcement program are greater efficiency, lower costs, and better timeliness. Therefore, the staff plans to narrow the initial focus and scope of its review and evaluation of the use of ADR to areas that would realize these benefits. The staff plans to review whether ADR should be incorporated into one of the following areas of the enforcement program for Reactor and Materials cases: cases involving potential discrimination; cases involving potential wrongdoing; and other cases involving potential escalated enforcement.¹ Historically, these types of cases have taken the most time and resources, for all parties involved, to complete.

While the staff plans to limit the scope of its review at this time, the staff is not precluding expanded use of ADR in the future. Specifically, if incorporation of ADR is appropriate and demonstrates a benefit, the staff will review further use of ADR in other areas, including cases involving non-escalated enforcement.

- If ADR Has a Role, it Should Be Implemented as a Pilot Program.

Based on review of the stakeholder's comments, it is clear that some stakeholders, both internal and external, do not see the benefits of incorporating ADR into the enforcement program. In fact, some believe it will have a negative impact on the enforcement process. Therefore, if the staff recommends incorporation of ADR into the enforcement program, it will recommend initial implementation as a pilot program. The staff believes that implementation of a pilot will better demonstrate whether the benefits

¹ The staff notes that current disputes involving reactor enforcement issues of a technical nature are generally disputes over what significance level the Reactor Oversight Process assigns findings that are associated with violations of regulatory requirements. That significance determination process is not an enforcement process and the Office of Nuclear Reactor Regulation has not been requested to evaluate the use of ADR in this area.

can be realized, provide confidence that there will be no, or minimal, negative impacts, and will provide additional information for how ADR can be further incorporated into the enforcement program. Limiting the scope of the review and evaluation will allow for a complete and thorough evaluation of the pros and cons of using ADR.

For the pilot to be successful in demonstrating the use of ADR, the staff believes that the pilot program should include a representative sample of cases. There should be a sufficient number of cases included in the pilot to adequately exercise the enforcement process but not too many so as to overwhelm the staff and process. The pilot should specifically address at which point in the enforcement process (e.g., during the investigation stage, prior to issuance of a proposed enforcement action, after an enforcement action is issued) ADR should be used. The pilot should include cases in both the Nuclear Reactor Safety and Nuclear Materials Safety Arenas. And finally, the pilot should not focus on an area in which a large number of cases would be excluded based on the six situations included in the ADR Act for which ADR should not be considered.² Choosing the correct type of cases for the pilot will provide the best test of potential use of ADR in the enforcement process. In addition, it would provide useful information regarding whether the use of ADR can be expanded to other areas.

The staff notes that use of an ADR pilot program would be voluntary for all parties, including the NRC. Therefore, if implementation of the pilot for a specific case would compromise the enforcement process, NRC could withdraw from ADR for the case. Other parties would have the same option. In such cases, the NRC would follow the current enforcement process.

- Additional Stakeholder Input is Warranted

As stated, stakeholder input is very mixed on the use of ADR and on a number of issues important to the use of ADR. In order to make any final recommendations for incorporation of ADR into the enforcement program, or even the development of a pilot program, additional stakeholder interactions are necessary. The staff plans to issue a FRN soliciting additional stakeholder comments on the use of ADR. The request for comments will specifically focus on the use of ADR in the areas of cases involving potential discrimination, cases involving potential wrongdoing, and other cases involving potential escalated enforcement. The staff will solicit comments on the pros and cons of ADR as they relate to maintaining safety, increasing public confidence, and maintaining the effectiveness of the enforcement program for the above noted areas. The staff will also specifically request comments on the structure and scope of a pilot program, how an ADR pilot program could be incorporated into the current enforcement program, and criteria for determining success of the pilot.

The staff also may hold several public meetings at various locations to solicit stakeholder input. Prior to each meeting, the staff will provide on NRC's website specific recommendations and questions, based on previous stakeholder input, and

² These six situations were identified in the December 14, 2001, FRN (see Attachment 1).

details of a pilot program for stakeholder review and comment. This will allow the staff to receive continuous feedback on proposed recommendations prior to forwarding the recommendation to the Commission.

Once the actions identified above have been completed, the staff will provide the Commission a proposed pilot program for approval or will provide an alternative recommendation regarding the use of ADR. The staff expects to complete this action by November 15, 2002.

COORDINATION:

The Office of General Counsel has no legal objection to this paper.

/RA by Carl J. Paperiello Acting For/

William D. Travers
Executive Director
for Operations

Attachments:

1. Summary of March 2002 Workshop
2. Summary of Public Comments
3. Comments from Marvin I. Lewis
4. Comments from FPL
5. Comments from Morgan, Lewis & Bockius
6. Comments from U.S. Institute
7. Comments from NEI
8. Comments from North Atlantic
9. Comments from Exelon
10. Comments from TVA
11. Comments from Akin, Gump
12. Comments from USC
13. Comments from the State of Illinois
14. Comments from Clifford, Lyons, and Garde (two letters)

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