

POLICY ISSUE NOTATION VOTE

March 12, 2004

SECY-04-0044

FOR: The Commissioners

FROM: William D. Travers
Executive Director for Operations

SUBJECT: PROPOSED PILOT PROGRAM FOR THE USE OF
ALTERNATIVE DISPUTE RESOLUTION IN THE
ENFORCEMENT PROGRAM

PURPOSE:

To obtain Commission approval for a proposed revision to the U.S. Nuclear Regulatory Commission (NRC) Enforcement Policy (as addressed in the attached *Federal Register* notice) to include an interim enforcement policy describing the pilot program for the use of alternative dispute resolution (ADR) in the NRC enforcement program. The proposed interim policy will become final Commission enforcement policy if no substantive comments are received.

SUMMARY:

On September 8, 2003, the Commission issued a staff requirements memorandum (SRM) for the staff to "develop and implement a pilot program to evaluate the use of Alternative Dispute Resolution in handling allegations or findings of discrimination and other wrongdoing." This paper provides the Commission with the staff's proposed interim enforcement policy describing the pilot program. The pilot program is consistent with the program previously described in SECY-03-0115 and amended in the associated SRM.

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BACKGROUND:

The staff proposed development of a pilot program to evaluate the use of ADR in the enforcement program in SECY-03-0115, dated September 4, 2003. Utilizing ADR at four points in the investigation and enforcement program was considered. Specifically, the staff recommended:

1. "Early ADR" following the receipt of an allegation of discrimination and an initial Office of Investigations (OI) preliminary interview of the whistleblower for low significance cases which meet the *prima facie* threshold for conducting an OI investigation;
2. The use of ADR in low significance and higher significance cases following the completion of an OI investigation that substantiates an allegation of discrimination or other wrongdoing, but prior to an enforcement conference;
3. The use of ADR following the issuance of a Notice of Violation and Civil Penalty (if proposed);
4. The use of ADR following imposition of a Civil Penalty, but prior to a hearing on the case.

In its SRM dated September 8, 2003, the Commission directed the staff to develop and implement a pilot program. However, the Commission directed the staff to develop a process such that early ADR could be used regardless of the significance of the case and in lieu of an initial OI preliminary interview.

The staff conducted a public meeting on December 10, 2003, to discuss the issues associated with an ADR pilot program and sought written comments until December 31, 2003.

DISCUSSION:

Several issues were identified for further discussion in SECY-03-0115 and others were identified as the pilot program was developed. Most of the concerns, by both internal and external stakeholders, focused on Early ADR. The staff believes many of the issues have been adequately addressed in the proposed pilot program. However, some concerns remain and are described briefly below.

General Issues

Most stakeholders believed external neutrals, rather than internal NRC neutrals, were necessary to ensure that all parties viewed the neutral as unbiased. Some suggested a roster of neutrals should be available for the parties to select from. The staff, based on input from internal and external experts, determined a list of organizations that have established rosters of neutrals (e.g. The Udall Institute for Environmental Conflict Resolution) will be provided on the Office of Enforcement's (OE) ADR web page, with the allowance that any neutral the parties agree to will be acceptable.

With the scope increase due to removal of the significance criteria associated with Early ADR, the issue of neutral fees became more significant. The staff is sensitive to the fact that whistleblowers would not likely have the financial ability to pay half of a neutral's fee as is the

typical custom in ADR but if licensees pay the entire fee, whistleblowers would likely be concerned about bias. Therefore, the staff requested comments regarding how neutrals should be paid in Early ADR. Industry stakeholders suggested that at least through the pilot program, the NRC should pay for the entire cost of the neutral's services and assess licensee fees under 10 CFR Part 171 for these costs in Early ADR since a successful pilot program could benefit the entire industry. Other stakeholders present did not voice an objection to the industry's suggestion. While the staff agrees with the recommendations of the stakeholders, it will significantly affect the cost of the ADR program. The staff also noted that if the NRC paid the entire fee, there would be reduced concern about any potential bias of the neutral by either party. Cost estimates will be discussed in the "Resources" section. The staff believes there is a sufficient NRC presence in early ADR through the review by the allegation review board to permit the NRC funding of neutrals.

The length of the pilot program was discussed. Some stakeholders recommended the length of the pilot be 2 to 3 years. Conducting a useful evaluation and review will likely depend principally on the number of cases in which ADR was attempted as much as the length of time that has past. Considering that three distinct types of cases are possible in the pilot program, namely early ADR following an allegation review board for discrimination cases, ADR after OI completes an investigation for discrimination, and ADR for other wrongdoing cases after OI completes an investigation, the staff intends to offer the pilot program as necessary to establish a reasonable "sample size" in each area. A widely used program may need a year or less before a meaningful evaluation can be completed. During the pilot program, the staff will establish criteria to conduct an evaluation of the pilot at the end of the period. Data will be collected as to why or why not parties offered ADR either accepted or declined and the perceptions of the process. The staff will then make final recommendations to the Commission one year after the start of the pilot program if the number of cases using ADR is sufficiently large. If few cases have been completed in a year, the staff will continue the pilot and report to the Commission no later than 2 years after the pilot program initiation.

Issues Related to Early ADR

The staff believes that, consistent with the existing Enforcement Policy and in addition to the NRC-sponsored early ADR option, licensees should be encouraged to develop ADR programs of their own for use in conjunction with an employee concerns type program. A licensee ADR program has the potential for resolving the issue through ADR before the issue is brought to the NRC. However, licensees have made it clear that a significant impediment to both that type of program and the proposed NRC early ADR program is the possibility of an OI investigation after the case is settled. External stakeholders were explicit in stating that there must be certainty that if the parties arrive at a settlement, the NRC will not initiate an investigation or enforcement action regarding the same issue. The same stakeholders acknowledge a staff review of a settlement for any restrictive agreements in violation of the employee protection regulations is important and should be conducted. Therefore, the staff proposes that should an employee who alleges retaliation for engaging in protected activity utilize a licensee's program to settle the discrimination concern and the NRC is notified by either party, no NRC investigation will be initiated if both the licensee and employee agree that a settlement agreement is being actively pursued. If a settlement is reached through a licensee's program, the NRC's further involvement in the case should be limited to a review of

the settlement for restrictive agreements in violation of 10 CFR 50.7(f) *et al.*, and abuse of the ADR process. Given an acceptable settlement, the NRC will not investigate or take enforcement action.

The staff believes the more timely resolution of discrimination concerns that should be brought about by early ADR will be a greater benefit to the safety conscious work environment (SCWE) than any potential negatives associated with adopting such a process. However, some of the potential shortcomings of the process are worth discussion.

Stakeholders from the industry and those representing whistleblowers suggested that Early ADR settlements are not appropriate means for documenting SCWE corrective actions. Rather, the industry offered to use some other vehicle and suggested the NRC could address concerns related to the SCWE through the inspection process. However, the staff notes that there would not be a prohibition from including SCWE corrective actions in a settlement agreement if the parties wanted to consider them as a possible element of a settlement. In fact, one of the parties may find it appropriate to consider such actions as part of the settlement. While the inspection process alone would allow the NRC an avenue to suggest necessary SCWE actions, the suggestions would not be binding as they may be if included in a settlement agreement.

Whistleblower representatives and several internal stakeholders have concerns regarding cases where deliberate misconduct may have played a role in a discrimination case but is not identified through the investigation process because settlement occurs in early ADR. The industry has suggested that the process will take care of the issue, *e.g.*, the industry does not want management engaged in deliberate misconduct and will independently take appropriate corrective action as warranted. On an individual case basis, such abuse may be prevented by the whistleblowers who believe they have been wronged in a deliberate or malicious manner and therefore do not agree to early ADR. The staff believes that on an overall program basis, particularly egregious scenarios where discrimination becomes a “business” decision could eventually be identified through the number of allegations at a particular facility. On average, only a few percent of the cases investigated each year result in a determination of deliberate discrimination. While the staff recognizes that it may be possible a settlement in an early ADR case could have involved an instance of deliberate misconduct, the staff believes that the considerations presented above substantially mitigate that potential.

Implementation

The staff intends to publish the attached *Federal Register* notice soliciting public comment for a period of 30 days. If comments are received such that significant changes to the proposed pilot are necessary, the staff will submit a revised program for Commission approval. However, if public comments do not suggest significant changes to the pilot are warranted, the staff will publish the final policy in a second *Federal Register* notice. The staff believes this approach is appropriate because extensive discussion and comment periods have previously existed on the subject of ADR in the enforcement program, the proposed policy reflects stakeholder feedback, and the substantive issues are documented in this paper.

The staff plans to implement the pilot in a phased approach. Because only the licensee and the NRC are involved in ADR after an OI investigation is complete, no later than 30 days after the close of the comment period, the staff will begin offering the opportunity to engage in ADR

during the post investigation enforcement process. Within 60 days after the close of the comment period, the staff will begin offering early ADR to whistleblowers who have established a *prima facie* case of discrimination. The additional delay will allow the development of a booklet providing additional information regarding ADR in general and the NRC's program in particular. The staff believes the booklet is necessary in order for a whistleblower to make an informed choice as to whether to voluntarily engage in ADR.

RESOURCES:

The following resource estimates are approximate. The level of detail contained in these estimates is not sufficient to support planning and budgeting decisions. None of the following resource estimates have been incorporated into the current budget planning period. Given the substantial impact on the OE budget, funding to support this program will have to be made available through agency reprogramming.

Fundamental to the estimation of resources is the assumed use of the pilot program. Cost estimates for the proposed pilot are substantially larger than previously discussed in SECY-03-0115 due to the expansion of scope for early ADR. Associated resource savings could also be substantially larger. Approximately 80 complaints of discrimination are investigated per year. The staff estimates the number of early ADR attempts between 20 and 40 per year. The pilot proposed that the NRC pay for the entire cost of the neutral for early ADR and recover these costs through Part 171 annual fees. Consistent with stakeholder input, the pilot program initiates the early ADR process after an allegation review board review of a complaint to establish a *prima facie* case (this step screens out allegations that would not receive any further NRC review under the current process). At this point, an OI investigation would typically be initiated. This, combined with the expectation that the SCWE will be greatly improved by early resolution of the alleged discrimination, is the basis for the staff's belief that the payment is within NRC authority.

Proposals were discussed in which the licensee involved in early ADR would be responsible for either half (as typical in ADR) or the entirety of the neutral's fee. Most stakeholders, both internal and external, believed that NRC payment of the neutral provided the greatest amount of assurance to a whistleblower that the neutral would be unbiased.

As described in SECY-03-0115, the hourly rate of an external neutral is between \$125 and \$325 an hour. The number of hours involved will depend on the complexity of the case. Recently a mediator was used to settle an enforcement case. The actual fee was \$280 per hour plus expenses and the total fee was \$3,360. The case was very simple with the parties in agreement on many issues prior to starting the negotiation. Therefore, for estimating purposes, the staff has assumed an average neutral cost per case of \$5000. If half of the cases that meet a *prima facie* threshold per year (40) participate in early ADR, the potential cost to the NRC associated with neutral fees would be approximately \$200,000.

Coincidentally, the number of post-investigation ADR sessions will likely approximate the early ADR estimates. Approximately 40 discrimination and other wrongdoing cases are substantiated per year. The staff believes most of those cases will request ADR. Since ADR is voluntary, a licensee has nothing to lose, other than half of the neutral's fee, by attempting to negotiate a settlement. However, since the licensee is paying half the neutral's fee, as is the standard practice in ADR, the NRC will incur approximately \$100,000 annually for post-investigation

ADR. These costs will be recovered through Part 171 annual fees. Any additional staff travel expenditures generated by the ADR program are not accounted for.

Estimating NRC resource savings would be speculative at this point in the development of the pilot. Total resource savings are principally a function of two assumptions; how many ADR sessions are successful, and the point in the process each successful negotiation occurs. Successful Early ADR sessions will result in the largest savings, most notably investigatory and potentially subsequent enforcement related costs. A successful ADR process after an investigation is complete will not result in substantial savings *per case*, unless a hearing is avoided. As a partial response to OMB Circular A-11, OE has committed to evaluate, during FY2005, the efficiency of the enforcement process in handling allegations of discrimination. This response will provide a more accurate estimate of resource savings as a result of the pilot ADR program.

RECOMMENDATION:

The staff recommends that the Commission approve publication of the attached *Federal Register* notice.

COORDINATION:

The Office of the Chief Financial Officer has reviewed this paper and has no objection. The Office of the General Counsel has no legal objection to the positions presented in this paper.

This paper has been sent to ASLBP for information.

Notes:

1. The proposed interim enforcement policy will be published in the *Federal Register* for a 30 day public comment period. Absent public comments that cause a reconsideration of a policy decision, a final interim enforcement policy, potentially containing editorial changes and corrections, will be published no later than 30 days after the public comment period expires without additional Commission approval.
2. The appropriate Congressional Committees will be notified when the final *Federal Register* notice is published.

The Commissioners

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3. The Office of Enforcement's web page will be updated and enforcement guidance memoranda issued to provide additional implementation guidance.

/RA/

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Executive Director
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Interim Policy for the Use of ADR in the Enforcement Program

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WITS 200000070
ADAMS Package: ML040550442
SECY Paper: ML040550454
Draft FRN with Proposed Interim Enforcement Policy: ML040550473

*See previous concurrence

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