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Submitter Information

Name: Ellen Ginsberg
Address:
1776 I Street, NW
Suite 400
Washington, DC, 20006
Submitter's Representative: Ellen Ginsberg
Organization: Nuclear Energy Institute

General Comment

Nuclear Energy Institute Comments on Implementation of the Alternative Dispute Resolution Program

Attachments

NEI comments re ADR January 17 2012 FINAL

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NUCLEAR ENERGY INSTITUTE

Ellen C. Ginsberg
Vice President, General Counsel and Secretary

January 17, 2012

Ms. Cindy Bladey
Chief, Rules and Directives Branch (RADB)
Office of Administration
Mail Stop TWB-05-BO1M
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555-0001

Re: Comments on Implementation of the Alternative Dispute Resolution Program (76 Fed. Reg. 64124; Oct. 17, 2011) Docket ID-NRC-2011-0208

Dear Ms. Bladey:

On behalf of the commercial nuclear energy industry, the Nuclear Energy Institute (NEI)[1] submits these comments in response to the above cited *Federal Register* notice and to memorialize views offered during the November 8, 2011 Nuclear Regulatory Commission (NRC) meeting with stakeholders on the Alternative Dispute Resolution (ADR) program. The purpose of that meeting was to "allow stakeholders to provide feedback regarding their perceptions of the ADR Program's effectiveness, transparency and efficiency." 76 Fed. Reg. at 64125. The NRC set forth 28 questions in the *Federal Register* notice to elicit specific information regarding both the Early ADR and Post-investigation ADR programs. The comments below recap the information provided by NEI during the meeting in response to those questions and provide additional views on the ADR program's value, potential enhancements and areas into which it might be expanded.

We note at the outset that the development of the ADR program has well served the interests of the NRC, industry employees and licensees. The program was developed based on the agreement by most, if not virtually all, stakeholders that the process whereby NRC's Office of Investigations (OI) investigated *all* claims related to an allegation of discrimination did not lead to productive results for any of the parties. The features of the ADR program were developed through a collaborative stakeholder-NRC approach, and the agency agreed to pilot the program to test its ability to meet the objectives established. The NRC sought public comment during and after the ADR pilot program and has continued to review the program's operation and results in the ensuing years. This process for the program's development and its use over time are

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[1] NEI is the organization responsible for establishing unified industry policy on matters affecting the nuclear energy industry. NEI's members include all entities licensed to operate commercial nuclear power plants in the United States, nuclear plant designers, major architect/engineering firms, fuel fabrication facilities, nuclear material licensees, and other organizations and individuals involved in the nuclear energy industry.

testament to that which can be accomplished when there is an accurate problem statement on which stakeholders and the agency agree, a timely solution is developed with stakeholder input, and the solution is implemented, reviewed and improved over time.

We support the purpose of the ADR program, which was initiated to permit NRC licensees and their employees to engage in ADR to resolve discrimination cases and other cases of wrongdoing in a more timely and effective way. As noted during the November 8th meeting and in previous NEI comments, the industry believes that ADR is an effective and efficient approach for resolving allegations and proposed enforcement actions. In many instances, ADR has proven to be considerably more efficient and effective than the traditional investigation and enforcement processes. In general, ADR also offers a more cost-effective means of resolving disputes when compared to traditional investigation and enforcement. The industry believes that out-of-pocket expenses (mediator fees and other costs of ADR) are relatively reasonable and almost always significantly less than expenses associated with legal counsel retained for OI investigations.

More broadly, the NRC's ADR program achieves certain public policy objectives. For example, in Post-investigation ADR, the NRC and the licensee work together to develop appropriate corrective actions. Unlike a traditional enforcement conference, ADR permits the NRC and the licensee to develop useful actions that will actually improve licensee performance. Licensee "buy-in" ensures not only literal compliance with the Confirmatory Order, but genuine management interest and emphasis. So, too, Early ADR serves the public interest by providing a timely, non-confrontational forum for the resolution of employment disputes between employees and management. Regardless of the outcome, invasive and protracted OI investigations disrupt the work environment and often breed mistrust and unrest. Early resolution of employment disputes helps to preserve a healthy work environment.

Another significant advantage of ADR is that it is more timely than OI investigations and enforcement action. The time for disposition through ADR is typically measured in a few months, rather than years, as has been the case in some traditional investigation and enforcement actions. Experience also has shown that ADR not only allows all parties to address issues more directly and informally, but generally promotes reconciliation, a particularly worthy goal in allegation-related disputes. The NRC's trend statistics confirm the perceived value of the ADR program with an increasing number of mediations.[2]

In an effort to be responsive to the NRC's request that answers to the questions set out in the *Federal Register* notice be provided in writing, NEI offers the following comments. Because a number of our comments address more than one question and cover both Early ADR and Post-investigation ADR, we have grouped the answers by topic.

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[2] See transcript of Nov. 8, 2011 NRC public meeting on Implementation of the OE ADR Program, p. 13.

➢ **The ADR Program Supports the NRC's Mission**

In our view, both the Early (Pre-investigation) and Post-investigation ADR programs support the NRC's mission to protect the public health and safety and the environment with regard to radiological hazards. We also concur that, to date, the ADR program generally facilitates the NRC's achievement of the goals set forth in its Enforcement Policy: deterring noncompliance by emphasizing the importance of compliance with NRC requirements and encouraging prompt identification and timely, comprehensive correction of violations. As previously noted, Post-investigation ADR, in particular, promotes the development of sound, comprehensive corrective actions.

Further, we believe the NRC should continue the ADR program because it is consistent with a much broader government initiative to encourage resolution of disputes through creative, cooperative, alternative means. (See discussion of the Administrative Dispute Resolution Act of 1996 and the NRC ADR program in Section 2.4.3. of the Enforcement Policy.) It is well recognized that formal government investigations, enforcement processes and litigation are often time consuming, costly and simply not very effective. Having an additional mechanism through which parties can resolve disputes on a voluntary basis provides significant value and is in keeping with the trend for federal and state agencies, as well as federal and state court systems.

Additionally, in our experience, Post-investigation ADR outcomes typically convey a strong, transparent regulatory message. The Confirmatory Orders issued following successful Post-investigation ADRs are available to the public, and explicitly describe the allegations, the regulatory requirements in question, and actions the parties have taken and agreed to take so that the proceeding can be closed.

➢ **Expansion of the ADR Program**

Early ADR is currently limited to the resolution of allegations of discrimination and expressly excludes the resolution of technical issues prior to the initiation of an NRC investigation. In answer to the NRC's question 2, we agree that there may be other types of issues that could usefully be resolved through the ADR program. When allegations of deliberate wrongdoing are substantiated, in many instances the licensee has already identified the wrongdoing, disclosed it to the NRC, and taken appropriate corrective action. ADR could be used to avoid an OI investigation in such cases, particularly when the individual involved is a relatively low-level employee. Since the NRC would probably not take action against the individual in such a situation, initiating an OI investigation would serve only a very limited purpose.

Post-investigation ADR is limited to the resolution of wrongdoing cases and related technical issues after the conclusion of an NRC investigation. In response to the NRC's question, the scope of Post-investigation ADR could be expanded to include, for example, non-wrongdoing cases involving the imposition of a civil penalty. Assuming NRC has the resources to undertake this modification, such an expansion is likely to benefit both NRC licensees and the NRC, and would avoid the need for an enforcement conference. ADR provides a less restrictive vehicle

that tends to facilitate frank exchanges, which often leads to an agreement between the parties. Moreover, as noted above, the resulting Confirmatory Orders convey a clear and transparent regulatory message to both NRC licensees and the public.

- **Abuse of the ADR Program and Restrictions on its Use**

As the NRC points out in the *Federal Register* notice, "abuse of the program" is the exception in the overall use of the ADR program. We do not believe that such abuse is widespread and, consequently, do not see a compelling need for a definition of "abuse of the program." Nevertheless, given the importance of the ADR program, "abuse of the program" could be defined to provide greater clarity to both public stakeholders and NRC Staff. For example, a working definition could be: "Abuse of the ADR program includes instances in which the NRC reasonably believes that a party enters the mediation in bad faith." Although other, more specific definitions could also be used, an overly-restrictive definition could exclude some abusive activities from the scope of the definition. Further, given that all parties must agree to ADR, if one party perceives "abuse," it is not compelled to participate.

- **Effect of Settlement**

Currently, Early ADR is offered in lieu of an NRC OI investigation. If the parties reach a settlement agreement that does not prohibit or discourage the alleger from engaging in a protected activity, NRC does not initiate an investigation and closes the allegation. In question 5, NRC asks whether this aspect of the Pre-investigation ADR program should be changed. In our view, modifying this aspect of the program would remove an essential incentive that NRC licensees have to enter into ADR—which is to avoid the time, expense, and other inconveniences associated with an OI investigation. The industry's experience has been that OI investigations can be resource-intensive, disrupt routine plant operations and impact employee morale. If a successful Early ADR settlement does not preclude the initiation of an OI investigation, licensees will simply not use the ADR process.

- **Transparency of the ADR program**

In our view, some factors to consider in measuring the "transparency" of the ADR program are:

- Whether the parties have a clear understanding of the ADR process.
- Whether the parties have sufficient access to NRC data concerning the historical success of the program in mediating similar concerns.
- Whether the parties have access to knowledgeable personnel at NRC to answer specific questions on the ADR process.

Regarding the degree of transparency of the existing ADR program, we believe the NRC has done a good job in publishing brochures and providing information on its webpage that explains

the ADR process. Moreover, the subject matter appropriate for a Post-investigation ADR is clearly set forth in NRC Inspection Reports and the enforcement correspondence, as well as in the NRC Staff's underlying findings that support the apparent violation. From the public's perspective, the ADR process starts with a fully disclosed apparent violation. The outcome of the ADR is also fully disclosed.

Early ADR settlements, however, must continue to be protected from public disclosure. Both the individual and the licensee must be assured that they can reach a resolution that does not violate the legitimate privacy interests of the individual or the financial and competitive interests of the licensee. Without confidentiality, Early ADR settlements will become extremely rare, at best.

- **Timeliness of the ADR Program**

Overall, Early ADR is timely, particularly when compared to the nine months that an average OI investigation now takes to complete. For Post-investigation ADR, the trend data for 2005 through 2010 indicates that the average time from agreement to mediate to agreement in principle is *65 days*. While there may be room for some improvement, reaching an agreement in 65 days is not easy and continues to require a great deal of effort.

The trend data shows that it takes about 69 days for NRC to issue the Confirmatory Order after the agreement in principle. This is too long to issue an Order that the NRC has already agreed to in principle. The NRC should tighten its internal review process so that this period can be shortened.

- **ADR Program Metrics**

In our view, the primary factor that should be considered in measuring the effectiveness of the ADR program is the likelihood of reaching a settlement of the allegation. Other relevant factors include the timeliness of the ADR program and the effectiveness of the available mediators.

- **ADR Mediators**

It is difficult to provide a consensus view in response to Question 11. Our information indicates that the mediators who participate in the NRC's ADR program appear to be unbiased. However, some mediators are significantly more effective than others. In fact, some of the mediators are not effective and appear to lack the skills necessary to succeed as mediators in the NRC's program. Others are superb. On a related inquiry (whether the mediators are familiar with the NRC regulatory environment), we think that it would facilitate the ADR process overall if the mediators could be given training to increase their familiarity with both with NRC's regulatory environment and basic programs that licensees use to address employee issues, such as the Corrective Action Program and Employee Concerns Program.

In terms of numbers, we understand from the industry that the NRC regions need more mediators. Some NEI member companies have observed that it would be helpful to have a larger

pool of available mediators. This could be helpful for a number of reasons. For example, we are aware of situations where both sides have objected to mediators and there were none left.

Further, the industry believes that mediators should show up at the mediation session ready and willing to stay as long as needed to resolve the matter. One NRC licensee reportedly had a mediator in a case last year who announced to the parties, even before introductions were made, that he had a 5pm flight that day. In every interaction that day with the mediator, it was clear that he had his eye on the clock. Such unprofessional behavior disadvantages both sides participating in the mediation and undermines the value of ADR in general.

- **Effectiveness and Potential Enhancements**

In general, NEI believes that the ADR program has been effective to date. Because ADR is less formal, less adversarial, and more open than traditional enforcement proceedings, it tends to facilitate resolving the issues rather than having the parties "hold their ground" on principle or otherwise. In particular, the Post-investigation ADR process is designed to motivate both the licensee and the NRC to develop their own internal positions in preparation for ADR. Ideally, the parties are able to reach more of a common understanding of the matter, in a less confrontational setting, than tends to be the case in enforcement conferences. Another advantage is that use of ADR is also far less paper-intensive and requires fewer filings.

Despite its benefits, we think that the ADR program could be improved in several ways. It would be helpful to *screen out from the Early- ADR process those discrimination allegations that have no reasonable basis*. As discussed above, it also would be helpful to *have a larger pool of mediators experienced in the NRC regulatory scheme and familiar with licensee programs* to address employees' issues, such as the Corrective Action and Employee Concerns programs. On a related point, *the process used to select and monitor the progress of mediators should be re-examined with the goal of attracting, training and retaining highly-qualified mediators*.

Additionally, the ADR program administrator should *encourage allegers to have legal counsel involved*, where appropriate, because the odds of a successful mediation increase significantly when the alleger is represented by counsel.

Although the facts are the same in both a 10 CFR 50.7 claim and an Energy Reorganization Act Section 211 proceeding, allegers and licensees often engage in two entirely distinct processes (the OI investigation and Section 211 proceeding). Consequently, *it would be helpful if NRC and DOL coordinated* to provide DOL with notice of the ADR proceeding and DOL agreed to hold its proceeding in abeyance pending completion of the NRC ADR process and to dismiss the DOL matter if the parties successfully resolve the NRC matter. Such an arrangement would help to avoid situations in which a licensee is required to actively seek an extension of time from the DOL pending completion of the ADR process or filing responsive documents and presenting witnesses for interviews while the parties are (or will be) actively engaged in attempting to resolve identical or virtually identical claims in the NRC matter. In addition, there should be

flexibility for the parties to enter into ADR even after the OI investigation has commenced. There have been occasions when both parties desired to enter into ADR early in the investigation, but that request was denied. An unbending rule that discourages a settlement simply because an OI investigation has started is arbitrary, unnecessary and contrary to the overall public policy of encouraging settlements.

The *3 day period for the alleger to revoke the agreement should not apply when the alleger is represented by counsel.* One NEI member describes a case where the licensee negotiated a settlement after 17 hours of effort by the parties, only to have the alleger, who was represented by counsel, revoke the settlement the next morning.

In conclusion, for all of the reasons stated, the industry recommends that the NRC's ADR pilot program be retained as a permanent part of the Enforcement Program, and expanded if feasible. ADR should cover a greater variety of allegations and proposed enforcement actions, and should be available throughout the investigation and enforcement processes – not simply at four discrete points in time.

Sincerely,

Ellen C. Ginsberg

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