

FERC

ADR NEWS

Federal Energy Regulatory Commission

Volume 9, Issue 1

Published By

Dispute
Resolution
Service



Winter 2011

FERC Increases ADR Use

On May 1, 2010, DRS assumed responsibility for dispute-related calls pertaining to construction and operation of jurisdictional infrastructure projects, pursuant to the Commission's April 15, 2010 Instant Final Rule (Docket No. RM10-21-000) Transferring Certain Enforcement Hotline Matters to the DRS Helpline Under the Natural Gas Act and the Federal Power Act.

Since May, DRS averaged 5-10 helpline inquiries a week, for a total of 135 calls between May 1st and September 30, 2010. Most pertained to natural gas pipeline issues (69%), though hydropower concerns were raised as well (21%). Also, DRS received calls pertaining to electric issues (9%) and oil issues (1%).

Of the calls received since the transfer, DRS successfully addressed or resolved 43% - 59 calls in total - before the close of the fiscal year. Some calls are inquiries, where landowners are seeking information. Some calls necessitate **conciliation**, a process through which a DRS neutral opens the lines of communication between parties to clarify misunderstandings and pave the way for a resolution. Some calls necessitate **mediation**, in which DRS neutrals work with the landowner and the company to clarify issues, understand concerns, and brainstorm potential resolution options.

Since ADR is voluntary, both parties must agree to the process. And importantly, any person who contacts the DRS Helpline is not precluded from filing a formal action with the Commission. A party may terminate an ADR process at any time.

To ensure calls receive proper attention, DRS staff coordinate with other offices as appropriate. About 21% of helpline calls were referred to other offices for resolution within the first five months, or in some cases referred to other agencies. Upon entering the new fiscal year, about 30% of the calls since transferring the helpline involved ongoing processes, with DRS staff continuing to work with parties to resolve their concerns.

The Commission's decision to house the helpline with DRS has been well received, with many parties willing to engage in ADR. Companies report they appreciate the commitment of DRS neutrals to listen to all sides of the story. One company representative reported, "This is the first time someone asked me about my perspective on the matter." Landowners report they also appreciate the responsiveness of DRS. "This is one happy camper from Lancaster, Ohio," said a farmer calling to thank DRS for its assistance in working with him and the pipeline company to restore his property.

Helpline Success.

In a recent mediation case, an interstate pipeline company and a large agricultural landowner were engaged in a dispute about damages that occurred during construction of a pipeline across the landowner's property. The pipeline company and the landowner agreed to engage the help of FERC's DRS. A DRS employee, who travelled to the area, conducted an on-site mediation with the parties. With DRS assistance, the dispute was resolved. Both parties were appreciative and satisfied with the service DRS provided.

DRS Staff Gain Subject Matter Expertise.

In response to an increasing number of landowners calling the helpline, DRS neutrals are bolstering their knowledge of pipeline construction and operation. In November, two DRS staff members attended the Commission's Environmental Review and Compliance for Natural Gas Facilities Seminar in Austin, Texas. This seminar covered the Commission's environmental review process followed by introduction to pipeline construction, discussion of pre-construction preparation considerations, and review of baseline mitigation measures for pipeline construction and restoration. This new information will equip DRS to better understand the issues involved in pipeline construction and operation and work more effectively with landowners and companies in overcoming these issues.

DRS visits Dominion Pipeline Project & Compressor Station



Dispute Resolution Specialists, Paula Felt (left) and Joshua Hurwitz accompanied Office of Energy Projects' Outreach Manager Doug Sipe and Project Manager Kandilarya Jacaman on an inspection of Dominion's Hub III Pipeline Project earlier this fall. The trip to Waynesburg, Pennsylvania enabled DRS staff to view

first-hand the complexities of pipeline construction and to learn from Dominion representatives how they addressed landowner concerns about right-of-way easements on their properties. DRS staff also toured the nearby Dominion Crayne

FERC-Harvard Partnership

The Harvard Negotiation and Mediation Clinical Program provided DRS with a report documenting their findings from the second phase of observation and analysis regarding conflict resolution at the Commission.

The Phase II study, conducted by three Harvard Law students, involved internal exploration of conflict resolution practices within different Commission offices, and the DRS unit. It complemented the 2008 Phase I study, which examined ADR experiences and opinions held by external stakeholders in the energy industry.

Phase II findings broadly recommended the DRS increase its visibility within the Commission, raise awareness of dispute resolution services, and provide advanced substantive ADR training to Commission staff. The DRS is working to address these recommendations.

Compressor Station to understand how it operates and how Dominion handles noise abatement issues at such facilities.

Matters relating to landowners' rights-of-way, property restoration, and noise levels at compressor stations constitute a large volume of calls to the DRS Helpline. DRS appreciates the valuable educational opportunity provided by OEP and Dominion to better comprehend pipeline construction and compressor station operations, as well as company practices with affected landowners.

F o n d F a r e w e l l t o R i c k M i l e s



Richard Miles came to the Commission in 1971 as a summer intern, working his way up to senior executive positions, including Director of the Office of Administrative Litigation, and dedicating over 38 years to federal service at FERC.

While Rick served in various capacities at the Commission, it was in the ADR realm where he made an indelible mark – and found a calling. In February 1999, Rick, already serving as the Commission’s Dispute Resolution Specialist under the Administrative Dispute Resolution Act of 1996, received permission to establish a new unit at the Commission devoted to the use of ADR to resolve regulatory energy conflicts. A decade later, DRS, with the highest levels of Commission support for ADR, continues to trail-blaze and successfully implement and institutionalize ADR services to *prevent and resolve energy conflicts*. Externally, the Commission’s DRS receives recognition from federal partners as an ADR program model.

Rick, who served as the first Director of the DRS, had the vision to see parties could succeed in fulfilling their individual business goals in the face of conflict by taking ownership and control over their problems. If disputants could sit down together and talk through their interests – usually guided by a neutral third-party mediator – a mutually agreed upon and often creative solution to the conflict could emerge. Time and time again, this proved correct. Rick brought parties to mutual agreement in two-party cases and complex, controversial multiparty disputes in the hundreds of millions of dollars.

Rick’s passion and joy as a mediator reflected well on disputants too. With his guidance, not only did parties succeed at the challenge of resolving their *own* protracted disputes, but also, many disputants shifted their adversarial stance from arguing the rightness of their respective legal positions to cooperative team-playing to focus on meeting all business

interests *and* improving business relationships going forward. Mediation sessions with Rick typically ended with handshakes all around (even in those infrequent instances when parties couldn’t resolve their differences).

In addition to successfully mediating complex energy disputes, among them a few cases remanded to FERC by the U.S. Supreme Court, Rick appeared on countless ADR panels, conducted numerous workshops, and trained and mentored others in conflict resolution and negotiation skill sets in the U.S. and abroad. National organizations and international governments sought Rick’s advice, based on his pioneering efforts and demonstrated successes, with eagerness to incorporate ADR tools in their own regulatory programs. Rick’s message was simple—ADR does work and FERC had the track record to prove it. Rick was instrumental in realizing this.

Rick’s presence will be missed at the Commission, but his efforts to promote ADR will continue through the legacy of trained Dispute Resolution Specialist practitioners, whom Rick mentored and inspired during his tenure at the Commission. We wish Rick well upon his retirement from federal service and any further pursuits in the field of ADR.

Congratulations to Deborah Osborne

The Commission is pleased to announce Deborah Osborne as the new Director of the Dispute Resolution Service. As Director, Deborah serves as a Commission expert and point of contact for matters involving the use of ADR techniques to resolve energy disputes. In this capacity, she provides ADR advice and consultation, and promotes and implements ADR initiatives within the Commission and by the public it serves. An anthropologist and dispute resolution practitioner, Deborah was initially recruited to set up the functions of DRS upon its creation in 1999, and served as a Dispute Resolution Specialist. Deborah formerly served as the Commission's Federal Preservation Officer and cultural resources specialist in the Office of Energy Projects.

Currently, Deborah co-leads several ADR initiatives at FERC. One is a joint partnership study with the Harvard Negotiation and Mediation Clinical Program and students at Harvard Law School designed to identify entry points for ADR in Commission proceedings based on an internal and external assessment of stakeholders. (*See related article in this issue.*) Related is an initiative implementing FERC's 5-Year Strategic Plan to promote broad participation, including the use of ADR services in the Commission's processes and procedures to achieve energy goals. For the second time, Deborah co-leads a Native American and Non-Native planning team for an upcoming, biannual skills exchange session for members on the Native Network roster, which is housed at the U.S. Institute for Environmental Conflict Resolution. The training provides an opportunity for intercultural practitioners to gather and exchange experiential knowledge and tools to improve the quality and resolution of disputes associated with federal undertakings in Indian country, Native Alaskan and Native Hawaiian territories and thereby avoiding costly, litigation. Deborah was re-nominated as a Board Member for the National Preservation Institute (NPI) having designed and instructed a popular course for NPI on conflict resolution tools to assist environmental and cultural resources managers in their responsibilities to comply with the National Environmental Policy and National Historic Preservation acts.

An experienced neutral, Deborah has mediated well over 100 cases, many multi-party and high-dollar value disputes, on a range of complex regulatory, commercial, environmental, and Native American interests, with an outstanding record of success. Upon more recent requests from the U.S. Department of the Interior's Solicitor's Headquarters and regional Solicitor's Office in Anchorage, Deborah received Commission approval and successfully mediated a complex Native Alaskan case.



Deborah is certified in mediation through the Straus Institute for Dispute Resolution at Pepperdine University, in commercial mediation through the Northern Virginia Mediation Service, and in negotiation through the Harvard Negotiation Institute. She holds graduate and undergraduate degrees in Anthropology from the George Washington University and Temple University, respectively. Periodically, she publishes on anthropological and conflict resolution research in professional journals and has conducted anthropological fieldwork on three continents. Certified by the Supreme Court of Virginia, she mediates cases in Virginia's General District Court in the City of Alexandria in her spare time.

Under Deborah's leadership, the Commission's DRS looks forward to continuing to offer and expand quality ADR services at FERC to result in good outcomes for energy, the environment and consumers.

Training

NEW: Understanding and Relating to Different Temperament Styles

The DRS staff is rolling out a range of training courses incorporating the Four Lenses Temperament Assessment. The Four Lenses Assessment equips trainees to understand their own temperament preferences – as well as other temperament preferences – which offer a better understanding of how people may view a similar situation quite differently. Understanding one’s own temperament and a colleague’s based on the Four Lenses Assessment, for example, can pave the way for improved dialogue between parties, especially when temperaments are different.

In June and September of this year, the DRS paired the Four Lenses Assessment with principles from William Ury’s book, *Getting Past No*. After taking an introspective look at themselves and their interaction with others, training participants had an opportunity to apply that insight to strategies for working with others to achieve successful results in difficult negotiations. The DRS is currently working with different offices at the Commission to customize training that incorporates the Four Lenses Temperament Assessment with the conflict prevention and resolution skill sets that will meet the needs and facilitate the mission of the respective offices. Stay tuned!

52nd Annual Regulatory Studies Program

This past August, DRS staff gave two workshops at the Institute of Public Utilities Annual Regulatory Studies Program (Program) sponsored by Michigan State University’s Institute of Public Utilities (IPU-MSU). The workshops, which encompassed an overview of ADR and detailed information about mediation, were attended by regulators from many different countries. DRS staff has served on the faculty for the Program for five straight years.

IPU-MSU is a not-for-profit, non-partisan research and training center designed to promote education and research in

the public utility fields. It supports informed, effective, and efficient regulation of the electricity, natural gas, water, and telecommunications industries

ADR Tools for FOIA Professionals

At the request of the Department of Justice’s Office of Information Policy and the National Archives and Records Administration’s Office of Information Services, DRS staff designed and provided a day-long training program for Freedom of Information Act (FOIA) Public Liaisons. FOIA personnel from 20 federal agencies attended this training, designed to provide liaisons with conflict resolution skills to assist them in resolving FOIA disputes, a new responsibility mandated by the OPEN Government Act of 2007. The skills taught were designed to assist FOIA professionals when interacting with the requester community and agency personnel.

As a result of this session, DRS received requests to provide additional training for FOIA personnel from the Department of Veterans Affairs (VA), and the American Society of Access Professionals (ASAP). DRS staff provided a four-hour dispute resolution course at the VA for FOIA professionals from both its headquarters and regional offices. DRS also provided a full-day course on conflict management skills for government employees and others working on FOIA issues attending the ASAP summer convention.

Outreach

American Cultural Resources Association Entertains ADR/ECR

Upon request, the Commission's DRS engaged an audience of 119 cultural resources industry professionals at the annual meeting of the American Cultural Resources Association (ACRA) in Madison, Wisconsin this September. The topic was the application of ADR processes, also known as Environmental Conflict Resolution (ECR), to resolve environmental and cultural resource conflicts arising from federal undertakings.

The Office of Management and Budget (OMB) and Council on Environmental Quality (CEQ) coined the term "ECR" in a joint policy memo issued to federal agencies on November 28, 2005 to encourage increased use of ECR tools such as mediation to resolve environmental and cultural disputes, and the Commission responds annually to an OMB-CEQ survey on implementing ECR at FERC. Even prior to the joint policy memo, the DRS championed the use of ECR tools for energy regulatory conflicts affecting the environment, Indian tribal interests, and historic preservation disputes. These efforts were rewarded by mediation successes in each major industry regulated by FERC.

The DRS staff has been requested to assist the U.S. Institute for Environmental Conflict Resolution in designing a one-day skills workshop at the ACRA conference next year. Many industry practitioners conduct archeological and ethnographic research and engage in intercultural dialogue on FERC licensed hydropower and pipeline-certificates. Increased awareness of ECR tools will prepare them to better address conflicts which emerge during compliance with the National Environmental Policy Act, Section 106 of the National Historical Preservation Act, or related statutes.

ADR at the CPUC

In September, DRS presented "The Application of ADR to Regulatory Activities: Lessons Learned from FERC's Perspective" to a captive audience comprised of the California Public Utility Commission's (CPUC) Executive Director, departmental heads, and administrative law judges (ALJs), among others. Following the well-received presentation, DRS conducted a training workshop for ALJs, approved for Continuing Legal Education credit. The course covered effective tools DRS mediators have employed to resolve complex regulatory and environmental disputes. FERC and the CPUC are identifying opportunities, inclusive of training, to bolster and broaden the use of ADR techniques in energy decision-making and collaborative stakeholder processes in the future.

Resources and Values in Conflicts

Aimee Wilson, DRS intern, and Conflict Resolution M.A. Candidate at Georgetown University presented a lunch-and-learn event in September. The topic, understanding distribution and value aspects of environmental resource disputes, drew a diverse crowd of Commission employees during their lunch hour to learn about the complex nature of resource conflicts and understand the role of DRS in resolving disputes.

Book Review – Suggestions

For Dealing with Impossible People.

Bullies, Tyrants & Impossible People. How to Beat Them without Joining Them by Ronald M. Shapiro and Mark A. Jankowski

Throughout our lifetimes, we experience bullies, tyrants and impossible people. We may sit next to them on an airplane, wait behind them in the check out line, or interact with them at work. While we often want to avoid contact with these people, sometimes we cannot hide. Authors Ronald M. Shapiro and Mark A. Jankowski, in their recent book, *Bullies, Tyrants & Impossible People. How to Beat Them without Joining Them*, provide practical advice on how to deal with such people without acting like them ourselves.

The authors encourage implementing what they call the NICE system: **N**eutralize your emotions, **I**dentify the type, **C**ontrol the encounter, and **E**xplore options. Using the NICE technique does not mean “...you are malleable, passive or excessively accommodating,” but rather “...that you are focused, assertive and resourceful.”

Neutralize Your Emotions

We cannot control everything, especially the emotions of others. However, we can try to control our own emotions and reactions to difficult people. With emotions in check, we have a better chance of a positive outcome.

Rather than reacting to the strategies of bullies, tyrants or other impossible individuals, Shapiro and Jankowski say to neutralize by focusing on the issue at hand. “Difficult people are like the dishes on the menu with the little red pepper symbol next to them,” write the authors. “It’s a warning that you may get burned. Take an antacid. Neutralize, neutralize, neutralize.”

You can neutralize your emotions by changing your physiology: “slowing your pace, lowering your voice, changing your physical environment, taking a deep breath, relaxing your

shoulders, smiling, putting your finger to your lips, asking questions, listening and counting silently.”

Alternatively, neutralize your emotions by changing your psychology. Replace doubt, pessimism, or questioning with empowering beliefs such as “I am ready, I can handle this situation, and I am in control of my own reactions... I will listen and then react accordingly... I will be reasonable. I will show respect and expect respect...”

Identify the Type

After neutralizing your emotions, figure out what type of difficult person you are confronting. Shapiro and Jankowski say there are three types of difficult people but sometimes the type is hard to determine (and some people may exhibit all three types at the same time).

Situational difficult persons are those “who’s situation or circumstances make them difficult.” Something happened to change them temporarily from reasonable into irrational people – maybe a car accident or a visit with the in-laws. Until you acknowledge their situations and calm their emotions, you cannot expect to resolve a pending problem or issue.

Strategically difficult persons are those “who believe being unreasonable is effective.” Being difficult has gotten them results in the past. The authors offer deactivators for the top twenty tactics they use including “Take It or Leave It,” “False Deadlines,” “Passive-Aggressive,” “Ganging

Up,” and “Surprise Information.” If you understand these tactics and how to respond, strategically difficult persons may change their behavior.

Simply difficult persons are those whose “ingrained personality characteristic” is to be difficult. These folks may do a lot of yelling and screaming, exhibit no sympathy towards others, be egotistical, be unfocused, threaten others, be a bully, be deceitful, or conveniently forget commitments. The authors remind us simply that difficult persons “...only have power if we give it to them. And we always have some power of our own.”

Control the Encounter

Understanding which type of difficult person you are dealing with is critical in knowing what techniques could modify or change the problem behavior. The authors describe what situations cause conflict for the **situational difficult person** and recommend tools to de-escalate these situations. For the **strategically difficult person**, the authors identify their strategies and how to work within the boundaries of their strategies to develop a good counterstrategy. The authors explain the basis of power for the **simply difficult person**, and when the best solution may be walking away. When dealing with difficult people, it is important to realize we cannot use the same techniques we use with reasonable people who are trying to find solutions. The authors write, “...the best, most effective, field-evening way to balance someone’s authoritative power is simply to question it.”

Explore the Options

Even after shaping the encounter, you may still be at an impasse. The process of getting “unstuck” often requires brainstorming options to get past the “must haves,” the “winner take all” mentality and the “fragility of egos,” or the “embarrassment of losing face.” Both sides take part in coming up with options rather than giving in to only one choice. “Alternatives,” says author James Dale, “are the aspirin of

fevered conflict.” They are ways that have not been considered and are “new solutions from new angles.”

Shapiro and Jankowski stress that exploring options shows the other side’s cooperativeness, NOT weakness. Options provide opportunity to introduce your ideas and allow the other side to feel in control as they select their preference, enabling the other side to “win” while reaching a resolution that meets your needs.

The authors say it is important to step back and view the situation from the other person’s perspective and equally important to “...get other people to see the world through our eyes.” Do this by asking questions such as “What would you do if you were on my side of the table?”

When two sides are in “an emotionally charged, high-stakes, competitive encounter, you can’t ask for more than a way out. That’s what creative options are all about—finding an exit in a room that seems to have no doors. Try the window. Look for a skylight. Knock down a wall. Sometimes the right answers aren’t obvious. They require an open mind and a good imagination.”

We’ve Moved!

The Dispute Resolution Service is now located in the new building at 1100 First St. N.E. in Washington, D.C., while the mailing address remains at 888 First St. N.E. DRS staff works in the new energy efficient LEED certified building three blocks away.

Book Review – Turning Negative Emotions into Assets in Negotiation.

Beyond Reason. Using Emotions as You Negotiate by Roger Fisher and Daniel Shapiro

In their book, *Beyond Reason. Using Emotions as You Negotiate*, authors Roger Fisher and Daniel Shapiro look at the importance of addressing negative emotions during negotiations to harvest them in a positive way. “Emotions deeply inform both what we want and how we go about getting it,” state the authors as they shed light on the five core emotional concerns they see arising during any interaction: appreciation, affiliation, autonomy, status, and role. Awareness of these concerns gives us the negotiating power to generate positive emotions in others and in ourselves.

These core concerns – appreciation affiliation, autonomy, status, and role – are often hidden behind emotions. People want to be understood and valued; they want to feel connected to others; they want the ability to make decisions without others imposing; they want acknowledgement of their status; and they want to have a fulfilling role which incorporates their skills, interests, values and beliefs. If we understand the emotions held by other parties as well as our own emotions, we can use these to focus on substantive interests, enhanced relationships and core concerns rather than the emotions themselves.

All parties in a negotiation should take time to figure out which core concerns are present. Fisher and Shapiro provide step-by-step guidance on how to manage these five core concerns once identified. The strategies can help us turn an uncomfortable, unproductive process into one that includes problem solving and relationship building. The authors suggest reviewing what techniques worked well and which did not – to learn from each of our negotiating experiences.

In the last chapter of their book, Fisher and Shapiro invite the former President of Ecuador to explain how he used his understanding of the core concerns of the former President of

Peru to successfully negotiate a peace agreement to end a fifty-year boundary dispute. In the words of Desmond Tutu, the book gives “...Powerful, practical advice. It will put your emotions to good use.”

Contact the DRS:

Toll Free Help Line: 1-877-337-2237

DRS e-mail: ferc.adr@ferc.gov

DRS online: www.ferc.gov/legal/adr.asp

Deborah Osborne, Director

deborah.osborne@ferc.gov
202.502.8831

Deirdre McCarthy Gallagher, Group Manager

deirdre.gallagher@ferc.gov
202.502.8078

Jerrilynn Purdy

jerrilynn.purdy@ferc.gov
202.502.8671

Joshua Hurwitz

joshua.hurwitz@ferc.gov
202.502.6668

Stephen J. Williams

stephen.williams@ferc.gov
202.502.6780

Paula J. Felt

paula.felt@ferc.gov
202.502.6544

Aimee M. Wilson

aimee.wilson@ferc.gov
202.502.6592

Renee Perry, Program Assistant

renee.perry@ferc.gov
202.502.8006



**Federal Energy Regulatory Commission
Dispute Resolution Service**

888 First Street, N.E., Washington D.C. 20426