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Alternative Dispute Resolution (ADR) in the Energy Sector in the US

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Kimberly Bazikov

Senior Program Officer

National Association of Regulatory Utility Commissioners



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Outline

- ADR Defined
- Negotiation Approaches
- Benefits of ADR
- Use of ADR in State and Federal Processes
- ADR Program Development
- Ethical Considerations



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What is ADR?

- A term that covers a variety of dispute resolution methods.
- ADR generally focuses on interests but can focus on positions.
- ADR is generally a voluntary process.
- ADR involves a third party neutral.
- ADR is NOT
 - adjudication (except for arbitration)
 - appropriate to every dispute
 - a guarantee that a solution will result

Resolving Disputes Continuum

Where Does ADR Fit in Conflict Resolution?

Step 1 -- Unassisted Negotiation

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Step 2 -- ADR (Assisted Negotiation)

Mediation

*Arbitration (not ass't neg.)

Step 3 -- Adjudication

Court

Administrative

Binding Arbitration



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Mediation

What is it?

- The intervention of an acceptable, impartial and neutral third party who has no decision-making authority
- The objective of the third-party neutral is to assist the parties in voluntarily reaching a resolution
- Mediation does not eliminate other dispute resolution options
- Process is confidential



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Mediation (cont.)

How is it done? A Mediator:

- works with parties to develop a process that meets their needs and the role they want the mediator to play
- will focus parties on identifying issues first and then have parties define their underlying interests
- will focus parties on developing options and may suggest options to encourage parties to expand the range of possible resolutions
- works with parties in caucuses, or with all parties present, to explore options that address their interests
- can differ in their degree of directiveness.



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Binding Arbitration

What is it and how is it done?

- A party presents a dispute to an impartial or neutral individual (arbitrator) or panel (arbitration panel) for issuance of a binding decision (non-appealable on the merits). The parties usually have the ability to select the arbitrator(s). The parties may retain a particular arbitrator (often from a list of arbitrators) to decide a number of cases or to serve the parties for a specified length of times. Parties are typically free to negotiate the terms and conditions under which arbitrators are used to resolve disputes, including the procedures for their selection.



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Binding Arbitration (cont.)

When is it used?

Binding arbitration is most appropriate when the parties want a third party to decide the outcome of their dispute for them but would like to avoid the formality, time, and expense of a trial. The parties do not retain control over how their dispute is resolved, and generally cannot appeal the arbitrator's award.



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Role of the Third-Party Neutral

- Works with the parties to help them find mutually acceptable, win/win or mutual-gain solutions
- Assists the parties with identifying their interests
- Assists the parties with creative problem-solving through the generation of options to meet their interests
- Is evaluative in an early neutral evaluation role or in arbitration



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ADR May Not Be Appropriate If:

- The resolution will define policy
- Existing procedures cannot be changed
- Outcome would affect non-participants
- A full record is important (*e.g.*, rate case)
- A definitive resolution is required
- Parties do not have full commitment to the process or they want a definitive ruling based on their position



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Part II: Negotiation Approaches in ADR

Basic Elements

- Separates people from the problem
- Explores all interests to define issues clearly
- Brainstorms possibilities and opportunities
- Establishes a fair process and objective criteria
- Should identify “Best Alternative to a Negotiated Agreement” (BATNA)
- Focuses on effective communication and relationships



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Positional-Based Aspects of ADR

- Parties focus on the value or merit of their positions in which the resolution is based on who has the better position, as opposed to interest-based negotiation in which parties attempt to meet each others' interests
- Party sees that if one is right, the other must be wrong
- Large opening demands, reluctance to disclose information, may threaten consequences if no agreement, hard on people and the problem
- Can damage relationship/trust, inhibits creative solutions, acceptance of compromise



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Major Distinctions Between Positions and Interests

Positions are what a party feels/believes/wants

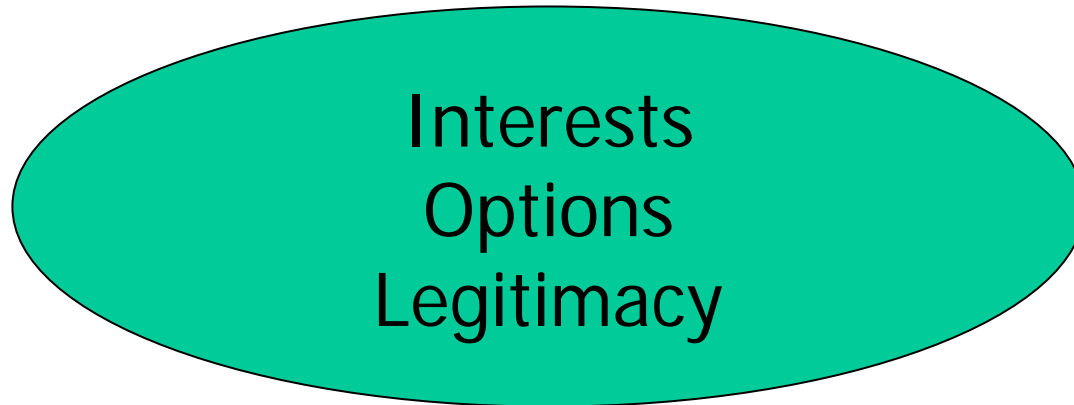
The party's own solutions to an issue.

Interests are why a party feels/believes/wants a certain thing

What is important about the issue.

7 Elements of Effective Negotiation: Circle of Influence*

- Communication Relationship



- Commitment BATNA

* *Getting to Yes, Roger Fisher and William Ury (1981).*



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ADR as Mutual Gains Negotiations*

- Preparation (know your BATNA, define your interests and think about opponents interests)
- Create Value (brainstorm, no attribution or evaluation, make the pie larger)
- Distribute Value (build trust, standards, use neutrals)
- Follow Through (use monitoring, incentives, focus on relationships)

* *Dealing With An Angry Public, Lawrence Susskind and Patrick Field.*



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Benefits of ADR

What are the benefits of ADR?

- Timing and flexibility
- Third-party neutrals work within the schedules set by the parties
- ADR can be parallel process on discrete disputes
- No filing required
- Reduced costs
- Increases level of compliance



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Benefits of ADR (cont.)

- If no agreement is reached, parties are better prepared for an adjudicatory process
- Builds constructive relationships



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Examples of Support for ADR Use in Federal and State Government Processes

State Examples

- New York Public Service Commission
- Illinois Commerce Commission
- Montana Public Service Commission
- Oregon Public Utilities Commission
- Public Service Commission of Wisconsin
- Colorado Public Utilities Commission
- Washington Utilities and Transportation Commission

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Administrative Dispute Resolution Act of 1990*

- promotes the use of alternative means of dispute resolution
- ADR is any voluntary procedure used instead of traditional adjudication to resolve matters in controversy
- each agency is required to designate a senior official to be the Dispute Resolution Specialist
- ADR may be used only "if the parties agree to such a proceeding"

**Initially passed in 1990, later finalized in 1996*



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ADR Use: Using ADR Benefits Competitive Gas and Electric Markets

Competition:

- requires faster and more flexible decision-making
- benefits from certainty
- in most circumstances, benefits if business interests are met rather than deciding which party has the winning legal position
- seeks cost avoidance
 - lower litigation costs
 - fewer human resources devoted to disputes



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A Couple of Reasons why ADR Use Should Continue

- Increased savings in dollars and human resources when resolving disputes
- Limited regulatory resources



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Designing an ADR Program

- About the disputes
 - Types
 - Number -- increasing or decreasing
 - Cost of disputes
 - Effect on working environment
- Resolution Methods
 - Current methods
 - Who has authority to resolve?
 - How long does it take?
 - Are results lasting and parties satisfied?
 - Are relationships being improved?



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Any Cultural Considerations to Designing an ADR Program?

- Theories of Fairness
 - Legal framework: under the shadow of the law” or the “umbrella of the law; look to statutes, cases, legal precedent to determine what is fair
 - Equity Theory: fairness of the division or the decision is based on what each person contributed, *e.g.*, skills, degree of difficulty, creativity, level of sacrifice, time
 - Culturally based: proceeds divided equally within group-regardless of who did what; divided on basis of need rather than individuals contribution; divided based on status within culture or gender. Use culture values to determine what is fair.



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FERC ADR Program: The Dispute Resolution Service (Established 1999)

- Convenes parties to begin an ADR process
- Performs facilitation and mediation
- Conducts ADR outreach activities (*e.g.*, panel presentations, workshops, training, consultation services)
- Works with state regulatory agencies and private and public utilities in the development of ADR programs
- Develop partnerships with public and private organizations
- Travels to the site of the dispute or event



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Sample Staff Training Program

- Introduction to ADR
- Conflict Assessment Training
- Facilitating a Technical Conference
- Use of Early Neutral Evaluation
- Interest-Based Negotiation Training
- Participating in a Mediation Process



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Ethical Considerations

- Neutral is responsible to:
 - Parties
 - Process
 - Profession
 - Public and unrepresented parties
- How responsible?
 - Non-injury to parties
 - Empower parties
 - Confidentiality
 - Disclosure
 - Voluntary process
 - Clear expectations
 - Neutral/impartial
 - Fairness
 - Good faith



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Ethical Dilemmas

- Problems may concern:
 - Confidentiality
 - Assessing participants' cases
 - Deal brokering attempts
 - Lying

Possible Solutions:

- Consult advisor (if no confidentiality violation)
- Take action to resolve matter
- Withdraw (must explain tactfully)



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For More Detailed Information on ADR

*You may contact Grace Delos Reyes, Assistant General
Counsel, NARUC*

Email: gdelosreyes@naruc.org