



October 20, 2020

Via Electronic Filing

Oregon Public Utility Commission
Attention: Filing Center
201 High Street, Suite 100
Post Office Box 1088
Salem, OR 97308-1088

Re: AR 629 – Alternative Dispute Resolution for Complaint Filings and Requests for Declaratory Rulings

Dear Commissioners:

NewSun Energy LLC (NewSun) appreciates the opportunity to submit written comment on the Oregon Public Utility Commission's (PUC's) proposed draft rules filed with the Secretary of State on August 28, 2020.¹ The PUC opened this rulemaking in response to Public Utility Regulatory Policies Act (PURPA) qualifying facilities' (QFs') concerns that the PUC's contested case process is lengthy, expensive, subject to discovery disputes, and overly complex.² The current draft rules, while they may relieve some of the QF-utility complaint load at the PUC, rely too much on process and lack simplicity. NewSun, as litigant in QF proceedings, believes that the best way to avoid QF-utility complaints and to reduce the complexity of such complaints is to explicitly provide for an informal staff consultation rule where a staff-facilitated dialogue can occur before disputes arise.

Staff Consultation Rule

In the informal rulemaking process, NewSun proposed a staff consultation rule that would provide for an informal dialogue between the utility, the QF and PUC Staff before disputes arise.³ The purpose of this informal dialogue is to enable the QF and the utility to present their respective positions on a given topic, engage in a staff-facilitated discussion, and hear staff's thoughts on the PUC's likely applicable rules and policies. The PUC did not include a staff consultation rule in the draft rules, but should add it to the final rule for the reasons articulated below.

¹ NewSun also provided oral comments at the rulemaking hearing.

² *Pub. Util. Comm'n of Or Investigation into PURPA Implementation*, Docket No. UM 2000, Comments of the Northwest and Intermountain Power Producers Coalition, the Renewable Energy Coalition, and the Community Renewable Energy Association in Response to OPUC Workshop at 7 ("The Commission's contested case process has generally proven to be lengthy, expensive, subject to discovery disputes, and overly complex.").

³ Administrative Hearings Division Report at 7-9 (Aug. 14, 2020).

1. Informal Dialogue Encourages More Constructive Long-Term Relationships

Informal dialogue encourages more constructive long-term relationships.⁴ This can be evidenced through the PUC's own dockets. In the UM 2000/2001 process regarding the PUC's interim solutions to interconnection data transparency, utilities and QFs came together in a staff-facilitated informal workshop setting to collaboratively balance what interconnection data would be the most useful for QF developers and what data the utilities could provide. This process resulted in data being made available and without prolonged or expensive litigation.⁵

Additionally, in Portland General Electric Company's (PGE's) UM 1987 docket regarding its extensive edits to its standard QF contract, QFs and PGE came together in another staff-facilitated informal workshop setting to review, discuss, and agree on revisions to PGE's standard contract. That dialogue helped lead to a further staff-led discussion between a limited group of representatives from all three investor-owned utilities and QF representatives in an effort to develop standard terms and conditions for QF contracts for the AR 631 rulemaking. NewSun participated in both the UM 2000/2001 and the UM 1987 dialogues, and it is our understanding that the AR 631 discussion has also made constructive progress. The staff consultation rule would simply facilitate this type of constructive dialogue between individual QFs and utilities before disputes arise and before a formal contested case docket is filed or opened.

The current alternative dispute resolution (ADR) process outlined in the draft rules creates a formalized process for mediation with a PUC-appointed mediator. While this process may facilitate resolution of disputes after they materialize, the informal staff consultation rule would facilitate dialogue *before* disputes arise. Even the Joint Utilities acknowledged at the rulemaking hearing that once a dispute is formalized, "something psychological" happens which entrenches parties in their positions and inhibits dispute resolution. This psychological entrenchment can occur upon the filing of a formalized ADR petition just as it can occur upon the filing of a complaint. The staff consultation rule, however, would facilitate early dialogue and constructive long-term relationships between QFs, utilities and Staff before people get too entrenched in their positions.

2. Utilities Moderate Their Positions When Staff is Involved

It is NewSun's experience that utilities will often take more extreme positions when discussing PURPA matters with an individual QF, but that those positions are moderated when the utility is asked to articulate that view in front of Staff. While Staff would not serve as a formal mediator, Staff's effectiveness at facilitating dialogue and consensus-building based on Staff's own understanding of the PUC's rules and policies is also evidenced by the dockets noted above (UM 2000/2001 and UM 1987) where the QFs and utilities were able to constructively work towards resolution with staff as a facilitator. To the extent that there are concerns about staff's role in the consultation process in relation to the PUC's internal operating procedures or ex parte rules, NewSun is confident that the rule can appropriately account for these concerns or the internal

⁴ Attachment A at 5 (Ari Peskoe, *Alternative Dispute Resolution at Public Utility Commissions*, Harvard Law School Environmental Law Program Policy Institute (May 24, 2017)).

⁵ See *Pub. Util. Comm'n of Or Investigation into PURPA Implementation*, Docket No. UM 2000, Staff Report on UM 2001 Distribution System Interconnection Data (Oct. 20, 2020).

operating procedures can be amended, as there are many commissions across the country that employ Staff in an ADR or ADR-like process and that include an “open-door” communication policy enabling communications before either side decides to file a complaint which may not run afoul of ex parte rules.⁶

In reality in dockets actually filed before the PUC, Staff sometimes takes a position that aligns with the utilities, sometimes takes a position that aligns with QFs, and sometimes takes a position that aligns with neither. What is important about Staff’s understanding though, is that Staff has experience with the PUC’s rules and policies and that Staff’s recommended course of action is often followed by the PUC. Therefore, Staff’s involvement can help moderate positions so people do not lose credibility with staff and can help people understand whether their view of PUC policy will hold weight or whether it is simply unreasonable.

3. Codifying the Staff Consultation Option Helps Even-Out the Power Imbalance Between QFs and Utilities

An important consideration in developing an ADR process is the balance of power among the parties.⁷ Joint Utilities assert that the staff consultation rule is not necessary because the option already exists.⁸ However, this view just further skews the balance of power in the utilities’ favor because regulated utilities have historically exerted significant influence over regulatory proceedings.⁹ In Oregon, utility representatives already call PUC Staff on a regular basis and have informal conversations with Staff about a variety of matters. While NewSun has also informally discussed various matters with Staff and their Department of Justice counsel, many QFs may not know this option exists and certainly would not be likely to know that they could get both Staff and the utility on the line to informally discuss a PURPA matter.

By codifying Staff’s availability for informal consultations, the PUC can help ensure that QFs know about this option and help balance the resources known and available to QFs and utilities. A formal process is not necessary and is counter-productive to facilitating an informal and collaborative dialogue; therefore, the PUC should not bog down this staff consultation rule with any mandatory notice provisions, processes for parties to respond in writing, or new confidentiality provisions as requested by the utilities in the informal rulemaking process. Rather, the rule should remain flexible and simply outline how someone can request such an informal consultation and set some expectations about when and how that consultation will occur so that QFs have some understanding of what to expect.¹⁰

Finally, requiring a utility to participate in a staff consultation helps hold them to their mandatory purchase obligation. The utility is the entity over which the PUC has general regulatory oversight and which has the mandatory purchase obligation under PURPA. On the contrary, the QF is the beneficiary of the federal and state PURPA statutory and regulatory paradigm where it is entitled to sell its power to a utility, and it is utility customer in the interconnection process

⁶ See Attachment A at 9-10, 12.

⁷ Attachment A at 9.

⁸ Joint Utilities’ Comments on Staff’s Proposed Rules at 3-4 (Oct. 2, 2020).

⁹ Attachment A at 9.

¹⁰ NewSun’s initial proposal proposed a 14-day time-frame within which to hold the consultation and a time limit on how long the consultation may extend, absent an agreement to do otherwise.

entitled to the same protections the PUC provides to the utility's other customers. In some states, interconnection complaints are treated the same as other consumer complaints and subject to the same informal dispute resolution processes.¹¹ It would be an odd result if the PUC established an informal dispute resolution process for retail consumers, but then allowed the utility to refuse to participate. QF customers should get at least the same level of attention. In Oregon, all QF-related complaints including on interconnection appear to be handled in formal contested cases. There is an imbalance of power between the QF and utility, and the QF often is placed in the position where it must either accept the utility's interpretation of a given PUC policy or litigate. Litigation means delay, which only benefits the utility and creates unnecessary risk for the QF. However, under PURPA, QFs are supposed to be *encouraged*. Allowing the utility to refuse to participate in a simple and practical informal staff consultation when they may be taking an unreasonable view of PUC policy, simply allows them to continue to be unreasonable and skirt their PURPA obligations, while not encouraging QF development. As such the utility should generally be required to participate.¹²

4. This is a Practical Solution That Has No Downside

The staff consultation rule has no downside. This is a practical solution offered up by an entity that has litigated QF complaints before the PUC and that has no real downside if it is made available in addition to the ADR process currently outlined in the draft rules. If the option currently exists but no one knows about it or has used it, then what is the downside of advertising that it is available and setting some basic expectations?

ADR is not a top-down process, and no one process will fit every scenario.¹³ Rather, the PUC should listen to QF parties about what they think will be helpful because they have filed the majority of QF-utility complaints, and the PUC should provide multiple ADR options that can be used in circumstances where they are best suited. Even if the PUC adopts a staff consultation rule on a pilot basis with a mechanism to track its effectiveness, that would be better than no alternative.

There has been a concern that PUC Staff may not have the bandwidth to participate in a consultation in every instance, but NewSun does not oppose giving Staff the option to decline to participate so long as it does not do so unreasonably and NewSun has no expectation that Staff will act unreasonably. NewSun finds Staff to be incredibly helpful and accommodating, and in the informal rulemaking process Staff was generally supportive of this idea. This is a practical solution that has been proven effective in even broader and more complex matters like in interconnection data transparency and standard contract terms and conditions. As such, the PUC should revise the draft rules to include an informal staff consultation rule.

¹¹ Attachment A at 21.

¹² NewSun has not proposed to make the staff consultation required for the QF if requested by a utility because it may create the same kind of hurdle or barrier to QF contracting that the AHD sought to avoid by making the ADR process voluntary. However, should the PUC decide that QF participation ought to be mandated in the staff consultation rule, it should be sure to provide the QF a reasonable opportunity to decline to participate, in order to mitigate these concerns.

¹³ Attachment A at 4.

Mediation Process

NewSun supports the PUC's efforts to simplify, shorten, and potentially reduce the cost of its traditional contested case process. While the mediation process described in the draft rules may have some impact on reducing the number of disputes or resolving them more quickly, the process relies too much on process and lacks simplicity. NewSun has some concerns about the effectiveness of mediation because a QF representative that participated in the pilot mediation process noted in the informal rulemaking process that the mediation was a very time consuming process requiring the party to commit a lot of resources and that eventually involved an unrelated policy matter. Therefore, there is space for a more practical, simple, and less formalized option, such as the staff consultation rule.

In addition, the process should not be mandatory. In Administrative Law Judge Moser's summary of the feedback he received in response the pilot mediation processes, there was feedback indicating that the process becomes a frustrating waste of time where the other side does not meaningfully participate. If a utility is already obstructing or delaying its mandatory purchase obligation, then it should not be permitted to continue to delay or obstruct that process with a mandatory mediation process.

Meet and Confer

NewSun does not support the utility-proposed pre-complaint meet and confer requirement and simply asserts that if a utility needs a better process to elevate disputes to senior management, then that utility should implement a better internal process, or rather that the PUC should require the utility to do so. At a minimum, the PUC should not place the burden of requiring the utility to comply with its mandatory purchase obligation on the QF who has most likely already made attempts to resolve the issue with the utility, but which has not been resolved due to the utility's own failure to escalate the dispute internally. A meet and confer, would simply require the QF to jump through one more hoop in order to hold the utility accountable and should not be adopted.

Conclusion

In conclusion, the PUC should revise the draft rules and include a staff consultation option. There is no reason not to make this practical yet simple solution that already exists clear in the PUC's rules because the informal dialogue helps encourage more constructive long-term relationships, holds utilities accountable for their misbehavior they may engage in when Staff is not present, and helps even out the power imbalance between QFs and utilities. Further, the mediation process should remain as drafted and the PUC should not adopt a mandatory meet and confer process, which will further burden the dispute resolution process.

Sincerely,



Marie P. Barlow

In-House Counsel

Policy & Regulatory Affairs

mbarlow@newsunenergy.net

Attachment A

Ari Peskoe

Alternative Dispute Resolution at Public Utility Commissions
Harvard Law School Environmental Law Program Policy Institute
(May 24, 2017)



HARVARD LAW SCHOOL

Environmental Law Program

Policy Initiative

ALTERNATIVE DISPUTE RESOLUTION AT PUBLIC UTILITY COMMISSIONS

ARI PESKOE | Senior Fellow in Electricity Law, Harvard Environmental Policy Initiative

May 24, 2017

ALTERNATIVE DISPUTE RESOLUTION AT PUBLIC UTILITY COMMISSIONS

Introduction

State Public Utility Commissions (PUCs or Commissions) vary in organizational structure and legal duties. A Commission's responsibilities often include permitting infrastructure; setting rates, terms, and conditions for service provided by gas, electric, and telecommunications utilities; and resolving consumer complaints. All PUCs operate under a similar set of core legal principles, although state-specific laws provide each PUC with jurisdiction over particular industries and outline core functions.

Historically, PUCs have made decisions through adjudicatory proceedings and notice-and-comment rulemakings. Alternative dispute resolution (ADR) processes and practices offer less formal means for settling conflicts, sharing information, and reaching consensus on public policy. PUCs are using ADR mechanisms to reduce administrative burdens, obtain higher quality information, and engage regulated entities and stakeholders in the decision-making process.

This paper characterizes ADR broadly to include any process encouraged, initiated or administered by PUC staff that departs from traditional, formal proceedings. This paper provides background information on common forms of ADR, discusses considerations for using ADR in settling public utility disputes, and highlights how PUCs across the country incorporate ADR into their operations. The paper was informed by conversations with staff members or Commissioners at regulatory Commissions in seventeen states. Given the diversity of ADR practices across the country, this paper does not comprehensively document all types of ADR used at PUCs. Rather, it provides illustrative examples that may be tailored by PUCs to their own unique circumstances.



¹The 17 states are Arkansas, California, Colorado, Connecticut, Florida, Hawaii, Maine, Massachusetts (DPU and DTC), Michigan, Montana, Nevada, New York, North Carolina, Rhode Island, Vermont, Washington, and West Virginia.

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Key Takeaways for Regulators

1. Every Commission Can Employ ADR

Regardless of resources, budget, or legal authority, a PUC can develop a practice of using ADR. Initial steps that require minimal staff time include: encouraging settlement at prehearing conferences or in procedural orders, requiring parties to state in a pre-hearing filing whether they intend to engage in settlement discussions, building time for ADR into procedural schedules, urging parties to file joint comments in rulemaking proceedings, and issuing a policy statement that favors settlements and consensus-building processes.

2. ADR Processes Should Match Commission Goals

ADR may save Commission resources, improve the quality of information, reduce litigation, enhance public participation, and result in better outcomes for regulated companies and stakeholders. However, ADR likely cannot achieve all of these objectives in a single proceeding. A PUC should identify the goals it is trying to achieve and design an ADR process that may be able to help. For instance, if a PUC is trying to obtain better information in a rate case it might convene an informal technical session, while if it aims to minimize staff resources it might encourage parties to settle and provide staff to mediate the case.

3. Flexibility May Enhance the Likelihood of Success

ADR is not a top-down process. Commissions should be open to feedback and willing to adapt when doing so may enable parties to settle or find consensus. For instance, PUCs have made significant procedural modifications mid-proceeding in response to participants' requests. PUCs are able to accommodate these requests because they possess broad legal authority to establish procedures that advance their core regulatory missions.

4. Commissions Should Experiment and Track Performance

There is no one-size-fits-all solution to successful ADR. Design of an ADR process might account for the nature of the proceeding and issues, the participants, staff resources, Commission expertise, statutory deadlines, and public policy implications, as well as other factors. Inevitably, not every outcome produced by ADR will meet a Commission's expectations. By documenting and evaluating ADR efforts, a PUC can refine its approach, unify disparate ADR proceedings, and construct a more formal ADR effort.

5. Commissions Can Learn from Each Other

A PUC that has little or no experience with ADR is not starting from a blank slate. PUCs across the country are utilizing a range of ADR processes, including mediating rate cases, managing working groups, holding informal technical sessions, and arbitrating siting disputes. PUCs contacted for this paper were enthusiastic about discussing ADR and made themselves available for follow-up questions after our initial conversations.

ADR's Relevance to PUCs

Some legal scholars argue that civil law's primary purpose is to foster efficient resource allocation.¹ Under this view, the dispute resolution system is "a screening, channeling, and signaling mechanism. It attracts or captures [cases] with potential for generating new (or refining older) resource allocation incentives; and it handles these cases in such a way as to accumulate accurate information relevant to the resource allocation implications of the case."² This economic view of dispute resolution can be applied to PUCs. Where a proceeding may significantly influence or set public policy, a PUC ought to develop a record, hold hearings, and issue a decision. Other cases should be resolved through settlements.

This theoretical approach to dispute resolution is incomplete because it fails to recognize that ADR has the potential to alleviate many of the stresses that Commissions are facing. PUCs are addressing novel issues, many related to new technologies and business models, ranging from transportation services to distributed energy resources. These issues draw new participants to PUCs who may be unfamiliar with Commission practice and opposed by traditionally regulated entities. Enabling statutes and Commission precedent may not apply neatly to these companies or their services. As PUCs adapt, they must also continue to deliberate on traditional utility rate cases and other routine but complex matters. Meanwhile, in many states, PUCs are constrained by dwindling budgets and cannot hire additional staff.

ADR can offer several advantages over traditional adjudication that address some of these challenges.³

- ADR may involve far fewer PUC staff members than litigation and does not include costly and lengthy formalities. By avoiding litigation, ADR frees staff resources that would otherwise be dedicated to developing testimony, writing briefs, appearing at hearings, drafting initial decisions, issuing rulings, and defending decisions in courts.⁴ ADR can reduce caseloads, thereby enhancing a PUC's overall productivity and efficiency.⁵ Even where ADR does not resolve the entire matter, reaching a stipulation on some issues can allow for a more focused and efficient subsequent adjudication or rulemaking.
- ADR can enable open dialogue between parties, which may encourage creative solutions that are

mutually beneficial and brokered by multiple parties. By allowing for cooperative party-driven solutions, participants may be more satisfied with the results as compared to adjudication.⁶

- Litigation encourages each party to "express its own self-interest as forcefully and skillfully as possible."⁷ As a result, each side views the process as an antagonistic zero-sum game and many plausible resolutions or policy options are left unexplored. By contrast, ADR mechanisms, including consensus-building processes such as workshops or solicitation of off-the-record comments, may allow parties to see common ground that might have gone unnoticed in an adversarial process. Such processes can also inform the PUC about parties' positions and goals, which may be particularly helpful for issues that are new to the Commission.
- ADR can facilitate collaboration and may provide the Commission with higher quality information. In litigation, expert witnesses compete in attempting to sway the Commission on highly technical subjects. Parties aim to discredit each other's studies in order to undermine competing claims, rather than improve the quality of information available to everyone.⁸ Non-traditional information-gathering mechanisms, such as working groups, can enable transparent communications that produce information that is more helpful to decision makers.
- Adjudication is a top-down process that often results in one side "losing" the dispute. Opposing parties communicate very little with each other and may even view interaction as a sign of weakness.⁹ ADR, on the other hand, typically requires parties to interact. Engagement may be particularly beneficial when participants include new market entrants or issue-driven stakeholders unfamiliar with utilities and other established PUC participants. Informal dialogue through workshops or other mechanisms can encourage more constructive long-term relationships as compared to initial encounters in a hearing room.
- For many parties, ADR is more accessible than litigation and allows them to more meaningfully contribute to the process and ultimate resolution.¹⁰

Of course, ADR may not always be efficient or lead to successful outcomes. Parties can spend many hours in mediation only to find that they have made little progress in resolving their dispute. In multi-party ADR processes, some parties may dominate the discussions, leading others to feel that they are not being heard and are left out of the decision making. Even where parties reach a settlement, it may leave contested issues unresolved and therefore open for future cases. While ADR is not a panacea, it can be an important tool in a PUC's toolbox. Notably, no PUC that spoke to us for this paper suggested they wanted to reduce their usage of ADR.

Common Forms of ADR

ADR processes can be classified based whether they are "facilitative" or "evaluative." Facilitative ADR "attempts to forge consensus by helping the parties communicate their views and proposals to one another, and to sort out their individual interests and priorities."¹¹ In evaluative ADR, a neutral party "expresses reactions to what he or she perceives to be the merits of the disputants' respective positions." The neutral's reactions "get each disputant to appreciate more realistically the weaknesses of his or her position, and the downside risks of failing to achieve a compromise."¹² Critics of evaluative ADR argue that, like litigation, it is "an adversarial process where each side vies for the neutral [party's] favor."¹³ It thus might fail to reorient the parties away from a win-lose mentality, and towards a cooperative approach that values mutually acceptable solutions.

In practice, ADR is often neither strictly evaluative nor exclusively facilitative; moreover, an initially facilitative process might evolve to become more evaluative. For example, PUC staff may facilitate dispute resolution by convening parties so they may better understand each other's positions. Following discussions, parties might then call on staff to provide

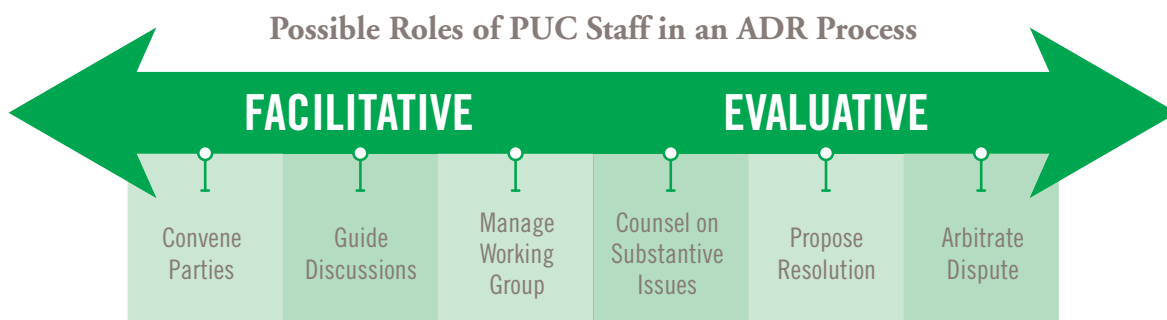
guidance on appropriate grounds for settlement based on law, industry practice, or another metric. Rather than viewing ADR as evaluative or facilitative, it may be more helpful to think of ADR techniques as falling along a facilitative-evaluative continuum.

Where an ADR process should fall on that spectrum depends on the nature of the dispute or proceeding. Evaluative ADR may be appropriate when a limited resource, such as money, is at issue. The parties are therefore likely to be in an adversarial posture with conflicting goals and might benefit from an active but neutral mediator. A facilitative ADR process may be more appropriate for rulemakings or other proceedings in which multiple parties have different but not necessarily conflicting goals. A problem-solving, facilitative ADR process might seek common ground by eliciting the parties' interests and trying to address the needs that motivate their positions.¹⁴

Ranging from most facilitative to most evaluative (and closest to formal adjudication), common ADR processes include conciliation, facilitation, mediation, early neutral evaluation, and arbitration.¹⁵ The following summaries are based primarily on FERC's definitions.¹⁶ Scholars and ADR practitioners often use different definitions.

Conciliation

The goal of conciliation is to build bridges of communication between the parties, help parties correct and clarify misconceptions about one another and their positions, and develop trust so that open and collaborative discussions can take place. Parties may meet on their own or with the assistance of a neutral conciliator, such as PUC staff. The neutral conciliator may simply provide meeting space and handle logistics, or take on more active roles. For instance, a conciliator may act as an intermediary, guide in-person discussions, prevent conflict from developing or escalating, or affirm parties' abilities to work together.



Some PUCs are limited in how they deploy ADR due to state rules about *ex parte* communication. Conciliation may be an attractive option because it does not aim to resolve the substantive dispute. For example, where PUC staff advise the Commission and do not participate as a party in proceedings, staff may not be allowed to have off-the-record interactions with parties about the issues. However, staff may be able to convene the parties to discuss procedural matters; then, that conversation could spark dialogue about substantive matters after staff leaves the room. PUCs have also convened parties to share information in ratemaking cases and learn about new technologies, such as distributed solar and storage. These proceedings can be classified as conciliatory because they are neither aimed at resolving any dispute nor are they part of a rulemaking process.

Facilitation (or facilitative mediation)

Facilitation also seeks to improve lines of communication between parties. But while conciliation primarily seeks to encourage trust and dialogue, facilitation aims to resolve a particular dispute, develop a rulemaking, or otherwise engage the parties in discussion about the substance of a proceeding. A facilitator's interventions focus on process and attempt to help the parties move efficiently towards an agreement. The facilitator is impartial about the substantive issues under discussion.

Facilitation may be most appropriate where parties or issues are not extremely polarized, parties appear to have enough trust in each other to develop a mutually acceptable solution, or parties share a common goal and will benefit from a jointly acceptable outcome. At several PUCs, staff facilitates settlement discussions in rate cases when they sense that parties are likely able to resolve at least some of the issues. Rate cases, particularly for water and other smaller utilities, feature familiar sets of parties, lawyers, and issues. Just by bringing the parties together in the same room and facilitating dialogue, staff may be able to help the parties narrow the scope of the proceeding or resolve the case.

Mediation (or evaluative mediation)

In mediation, a neutral third party without decision-making authority works with parties to help them reach a settlement. Unlike facilitators, evaluative

mediators provide subject-matter expertise, but they do not wield that expertise by imposing settlement terms on the parties. Rather, at the request of the parties, a mediator may provide counsel on legal issues, suggest settlement terms, or advise on whether a proposed agreement is likely to be approved by the Commission. Like facilitators, mediators also oversee the process and attempt to move the parties efficiently through the mediation.

A mediator could be an administrative law judge (ALJ), PUC staff member (or staff team), or an outside consultant. A mediator is generally not instructed by the Commission or a staff supervisor to conduct a facilitative or evaluative process. Rather, the neutral party typically has the discretion to assume an evaluative role and advise the parties on the substance of the dispute if she feels it is appropriate and will assist the parties in reaching a resolution.

Early Neutral Evaluation

Early neutral evaluation (ENE) offers parties an assessment of the merits of their cases by a neutral evaluator, such as an ALJ or PUC staff member. The form of the proceeding can vary widely. Parties may be limited to short written briefs that state their claims or defenses and outline their evidence, or they may be allowed to offer detailed exhibits or expert testimony. The evaluator may also hold oral arguments or even question witnesses. After conducting her investigation, the evaluator may offer a written or oral opinion about potential outcomes of the case if it were to proceed, and may also suggest grounds for a settlement. The process and outcome are typically confidential, non-binding, and not included as part of the record of any subsequent proceeding.

ENE may be useful when parties strongly disagree about their likelihood of success on the merits and are therefore locked in "positional bargaining." In these situations, parties hold on to and argue for a fixed position, regardless of their underlying interests. ENE may help reframe the dispute and allow parties to escape their entrenched positions. In practice, ENE is rarely, if ever, used at Commissions that discussed ADR with us.¹⁷

Arbitration

Arbitration can look very similar to ENE. In arbitration, parties present their claims and arguments to an arbitrator or panel of arbitrators. Unlike ENE, the arbitrator's decision may be binding. Arbitration may be appropriate when parties want a third party to resolve the dispute and want to avoid the cost and formalities of a formal PUC-administered adjudication. Few PUCs that we talked to for this report had conducted arbitrations or encouraged or required parties to engage in arbitration. That said, the siting case study on page 20 includes an arbitration process.

Other Consensus-Building Processes Used by PUCs

These ADR techniques can be used in tandem or in hybrid forms, particularly where a proceeding involves multiple stakeholders. For example, a PUC may convene parties for “technical” or “working group” sessions to elicit their views on various issues. Although such sessions are not textbook examples of ADR, they can be classified as a form of conciliation when they aim to encourage dialogue and gather information that could inform future proceedings. Conciliation, adapted by a PUC, allows regulated entities and stakeholders to better understand each other's interests and goals.¹⁸

A PUC may then combine that conciliatory process with a mediated process. Negotiated rulemaking “uses a consensus-based process to write a proposed rule rather than having agency staff write this rule after having informal conversations and meetings

with affected parties.”¹⁹ The PUC's initial task is typically to choose or approve proposed working group members.²⁰ Once a committee is formed, PUC staff may merely facilitate, or might float straw proposals, opine on the legality of parties' proposals, or participate substantively in the negotiations. According to scholars, negotiated rulemakings may “reduce the likelihood of post-rulemaking litigation, save time, infuse more expertise into the rulemaking process, and potentially encourage problem-solving, broad participation, and flexible rulemaking.”²¹ However, the process may exclude key stakeholders, and some studies dispute whether negotiated rulemaking actually reduces litigation risk or saves time.²² One scholar argues that allowing regulated entities to draft their own rules may “pervert the public interest to the benefit of private interests.”²³

As discussed below, a PUC might set up a process in which a working group develops a proposal that may then be refined by the Commission before it is officially proposed. With representatives from utilities, consumer and environmental advocacy groups, the state energy office, large consumers, and other stakeholders, PUC-approved working groups have been tasked with producing reports that inform a rulemaking process, developing consensus positions on technical matters, and submitting proposed rules to the Commission. Similarly, Commissions have issued “Notices of Inquiry” to solicit comments that inform a proposed rule. While that process may not fit neatly into traditional definitions of ADR, gathering information outside of a formal proceeding is consistent with the goals of conciliatory processes.

PUC-approved working groups have been tasked with producing reports that inform a rulemaking process, developing consensus positions on technical matters, and submitting proposed rules to the Commission.

From Theory to Practice: Tailoring Dispute Resolution Mechanisms for PUCs

In choosing to encourage ADR or request that parties engage in consensus-building processes, a PUC may want to further its own goals, such as conserving staff resources, generating accurate information for the Commission, or bringing the parties together around a mutually acceptable outcome. When it designs an ADR process to match its goals, a PUC should be mindful of how participants may perceive and engage with the process. Dispute resolution mechanisms can inhibit or foster access to and harm or enhance the legitimacy of the decision-making process.

For instance, a dispute resolution system may favor participants with more resources and experience at a particular forum.²⁴ In considering whether and what type of ADR is appropriate for a given situation, a PUC may consider how the dispute resolution mechanism might balance power among the parties. The rules that govern formal processes are designed, in part, to ensure that parties have fair access to the decision-making process.²⁵ Because ADR typically lacks formal rules, there is a risk that one party may dominate the discussions or take advantage of another party's lack of experience or expertise. A neutral party that is aware of the potential imbalance can help establish guidelines for the process and alleviate this concern.

Ensuring that parties have equally valued input contributes to the legitimacy of the process and the outcome. Historically, regulated companies have exerted significant influence over regulatory proceedings, leading some participants to question their fairness.²⁶ A potential downside of ADR processes is that participants may fear that the utility is colluding with supposedly neutral staff to push settlement talks in its favor while at the same

time providing the PUC with cover by allowing it to approve a settlement rather than issue a decision in favor of the utility. While that perception may be unwarranted and unfounded, a PUC should be sensitive to the appearance of unfairness and strive to maintain legitimacy in the eyes of stakeholders and the public.

Legitimacy of a dispute resolution or decision-making process may be enhanced by including “consensus-building” tools, such as workshops, technical sessions, or other forums that allow for collaboration, into a rulemaking or adjudicatory proceeding.²⁷ Even if the parties do not reach consensus, a process that invites participation may make the outcome more palatable to the public by providing participants with opportunities to hear others' views, explore the strengths and weaknesses of various proposals, and appreciate the diversity of interests and tradeoffs involved in the ultimate decision.²⁸

The remainder of this part of the paper discusses practical considerations about ADR at PUCs. Based on discussions with PUCs and documents filed at PUCs, this section summarizes how PUCs have approached the following issues: the roles played by PUC staff and Commissioners; legal authority to administer ADR; whether ADR is mandatory or voluntary; the importance of Commission leadership in encouraging ADR; when in a proceeding's timeline to initiate ADR; confidentiality; and training PUC staff in ADR techniques.

Practical Considerations for Using ADR at a PUC

Roles of PUC Staff and Commissioners

Whether and how staff and Commissioners participate in settlement conferences, workshops, and other ADR processes often depends in part on the organizational structure of the PUC and its resources. PUCs that employ ALJs or other hearing officers may designate settlement judges either at the request of the parties or on their own accord. Settlement judges play a variety of roles, including explaining PUC practice to participants who are unfamiliar with the PUC, engaging in shuttle diplomacy, facilitating discussions among the parties (perhaps by asking neutrally framed questions to elicit discussion), suggesting settlement terms, and advising parties on whether a proposed settlement is likely to be approved by Commissioners.

Dispute resolution mechanisms can inhibit or foster access to and harm or enhance the legitimacy of the decision-making process.

At some PUCs with more limited resources, staff serves as advisors to the Commission and does not participate in adjudicative proceedings as a party. Staff may be able to set up a “firewall” to avoid rules about ex parte communication that allows a staff member to facilitate settlement discussions. In some states, the law explicitly allows staff to be walled off as needed. For example, the Florida Supreme Court has sanctioned the PSC’s designation of staff into advisory and prosecutorial functions in a given proceeding.²⁹ Prosecutorial staff in Florida may engage in settlement discussions as a party.³⁰

At Commissions that employ such separation, staff may convene and facilitate settlement discussions, and even suggest settlement terms. At another PUC, staff elicits dialogue among the parties about the underlying issues of the case and then leaves the room in order to avoid ex parte concerns, with the hope that parties will continue talking and work towards settlement. To stimulate continued conversation, staff may request that the parties provide written updates on their progress.

Some PUCs with tight budgets and lean staffs indicated that they either do not have the resources to spare, or that such separation among staff members was infeasible. At these Commissions, any settlement negotiations are conducted by the parties and without any assistance from Commission staff.

In several states, staff has facilitated working groups, workshops, or other collaborative proceedings on various topics. Where the Commission merely seeks information, staff may simply facilitate discussion and ensure that parties are responding with information relevant to the Commission’s inquiry. One PUC’s general counsel explained that staff has organized workshops where they listen and ask probing questions while remaining neutral on the substance. Alternatively, when the goal of the working group is to develop proposed rules for submission to the Commission, staff may play a more active role and attempt to move the group towards consensus. In some states, staff participates as a party by engaging in the substantive discussions, submitting written comments, and even serving as lead author on a report filed with the Commission.

Legal Authority to Administer ADR

While most PUCs do not have specific legislative authority to organize ADR processes, no PUC

identified any legal obstacle to implementing ADR programs, apart from ex parte rules (as discussed in the previous section). In general, each PUC conducts ADR mechanisms under its enabling statute, which provides it with broad authority to create procedures necessary to fulfill its statutory duties. PUCs are typically afforded wide deference in how they structure proceedings and deliberate. That said, laws in some states do specifically mention ADR. Two examples are highlighted below.

Connecticut law provides that the PUC “shall, whenever it deems appropriate, encourage the use of proposed settlements produced by alternative dispute resolution mechanisms to resolve contested cases and proceedings.”³¹ This section merely “demonstrates that the public policy of Connecticut favoring the private resolution of disputes extends to matters within the DPUC’s jurisdiction.”³² Although the statute does not appear to grant the PUC any specific authority, the PUC regularly invokes it in approving settlements and has also cited to it when assigning a mediation team to a dispute.³³

Florida’s Administrative Procedure Act provides that an agency “may hold public workshops for purposes of rule development” and “must hold public workshops . . . if requested in writing by any affected person, unless the agency head explains in writing why a workshop is unnecessary.”³⁴ When an agency holds a workshop, it must ensure that staff responsible for the proposed rule is available to explain the rule and to respond to questions. The agency is permitted to hire a neutral party to “facilitate or mediate,” or the agency may “employ other types of dispute resolution alternatives . . . appropriate for rule development.”³⁵ The law also allows agencies to use negotiated rulemaking and states that an agency “should consider the use of negotiated rulemaking when complex rules are being drafted or strong opposition to the rules is anticipated.”³⁶ Several other states have similar provisions that specifically authorize or encourage negotiated rulemaking.³⁷

Mandatory or Voluntary

PUCs do not typically require parties to use ADR to resolve a dispute (with the exception of consumer complaints; see page 21). But, it is common practice for PUCs to *encourage* parties to settle rate cases and other major disputes.

Encouragement takes various forms. The Colorado Commission has a rule that “encourages” settlement of contested cases.³⁸ In most states, encouragement is less formal. One Commissioner explained that the state’s energy bar understands that the Commission prefers settlements to adjudication. A Commissioner might remind parties of this preference at a pre-hearing conference or at some other point in a proceeding to emphasize the point. A staff member at another Commission said a hearing officer might take a “passive-aggressive” approach by, for example, asking the parties at a prehearing conference if they anticipate needing the standard number of hearing days. The implication is that parties ought to reach at least a partial settlement to reduce the amount of time in the hearing room. An ALJ from a different state noted that while the PUC could not force parties to engage in settlement discussions, it could require them to listen to a hearing officer at a pre-hearing conference discuss the benefits of ADR and describe the settlement process and ADR services offered by the PUC.

At the outset of a dispute, ALJs at the California PUC typically require parties to meet and confer or to submit written statements that outline the legal and factual issues of the case and propose a procedural schedule. In many cases, the ALJ’s pre-hearing conference order also requires parties to include a statement about their intent to engage in settlement talks or consider other alternatives to litigation.³⁹ Such requirements are often met with boilerplate responses indicating that the parties are open to discussing settlement.⁴⁰ However in some cases the party statements reflect a genuine intent to hold discussions.⁴¹ While the California PUC offers settlement judges to facilitate discussions, parties can choose to forgo PUC resources and initiate their own discussions without the assistance of PUC staff.

Washington’s administrative code requires the Commission to “set in the procedural schedule for each adjudicative proceeding the date for an initial settlement conference.”⁴² The rule builds on a 1994 Policy Statement that “encourages” settlement of disputes as well as jointly stipulated facts, limitation of issues for hearing, and other partial agreements or stipulations.⁴³ Pre-hearing conference orders note that the Commission can “provide dispute resolution services” and provide contact information for relevant staff.⁴⁴ At the conference, the presiding ALJ reiterates the Commission’s support for settlement.⁴⁵

Institutional support for ADR may be critical for its success.

That said, the 1994 Policy Statement “does not endorse settlements involving major shifts in policy that deprive [the Commission] of the opportunity to determine policy.” Other Commissions expressed similar reservations. This preference for formal process to set major policies recognizes the value of a public forum for policy debates where Commissioners shape the outcome and are politically accountable.⁴⁶

Leadership and Personalities

Institutional support for ADR may be critical for its success. Such support can take several forms. Some states have structured ADR programs that are administered by ALJs or other staff.⁴⁷ Disputing parties are informed as a matter of course about ADR opportunities and can request a settlement judge or other facilitator or may be assigned one by the Commission or staff.

In states without organized ADR programs, staff and Commissioners can still signal strong support for ADR. For instance, the California PUC issued a resolution in 2005 about “Expanding the Opportunities for and Use of Alternative Dispute Resolution” that “endorse[d] the policies behind ADR” and “encourage[d] its more frequent and systematic application.”⁴⁸ As mentioned, the Washington Commission published a policy statement encouraging ADR in 1994. Any PUC can encourage ADR by adopting similar resolutions or policy statements.

As discussed, staff and Commissioners utilize informal tactics for encouraging ADR, such as discussing it at pre-hearing conferences. A state’s energy bar is likely to quickly understand the Commission’s preference, but translating that preference into action by parties appearing before the Commission can be a difficult task.

Where long-standing practice at the PUC is to decide disputes exclusively through litigation and develop rules through formal proceedings, lawyers that practice before the PUC may be inclined to stick with the status quo. Several Commissions suggested that particular attorneys that are prominent before the PUC may be impediments to increased use of ADR either because they prefer to litigate or because their personalities appear to be more suited for contested proceedings rather than collaborative processes. At the same time, they also indicated that certain ADR techniques may be effective at cooling the temperature in the room and focusing parties on substantive rather than personal matters. Leadership on ADR at the Commission level can be one tactic for reforming entrenched practice and building support among practitioners for ADR.

Preference for the status quo is not exclusively a symptom of practitioners' recalcitrance. Some Commissions indicated that Commissioners may perpetuate an institutional bias against ADR. At these PUCs, Commissioners prefer to control the outcome of proceedings by making decisions themselves rather than approving parties' settlements.

Timing of ADR

When to initiate an ADR process can depend on a PUC's rules, statutory deadlines, and the Commission's goals in that particular proceeding. When parties propose to settle their dispute, the PUC typically has a duty under state law to ensure that the settlement terms are consistent with the "public interest." Some PUCs make that assessment by comparing the settlement terms to the resolution that might have resulted from a fully litigated case.⁴⁹ Under this standard, PUCs disfavor "black box" settlements that present the Commission with settlement terms without any evidence or explanation of how the parties arrived at their final agreement. In order to meaningfully assess the proposed settlement, the Commission needs a record to review. While a settlement can be supported by testimony filed concurrently with a proposed agreement,⁵⁰ some Commissions may discourage settlement negotiations until after the utility has filed its initial case or until after parties have filed responsive testimony.

Statutory deadlines can constrain participants' ability to resolve disputes with ADR. Yet, a deadline can also motivate parties to reach agreement or the PUC to develop an efficient process. By law in some states, proposed rates filed by a utility go into effect after

a set number of days, absent a PUC order to the contrary.⁵¹ PUCs may be authorized to suspend the deadline, but the amount of the delay may also have a statutory cap. In such states, parties may have a very limited window to settle rate cases.

PUCs may operate under statutory deadlines in other contexts, too. For example, the Vermont Legislature in 2011 provided the Public Service Board with approximately six months to set standard-offer prices for certain renewable technologies.⁵² As the Legislature did not set procedural requirements for the process, the Board responded with an order stating that it would not follow contested case procedures and designating two staff members as co-hearing officers to conduct the proceedings.⁵³ Within eleven weeks, staff held a pre-hearing conference, a workshop, and a technical hearing and received written comments from stakeholders. Two months later, the Board adopted the hearing officers' findings and recommendations.⁵⁴

With regard to complaint proceedings against a utility (other than consumer complaints), some PUCs try to intervene in disputes before the filing of a contested case. An "open-door" communication policy between PUC staff and regulated entities allows staff to be aware of potential conflicts between regulated companies and encourage parties to settle before either side files a formal complaint. Communicating with staff prior to the initiation of a formal proceeding may not run afoul of *ex parte* rules.

PUCs may also initiate rulemakings with a pre-proposal request for comments and an informal workshop. These processes enable stakeholders to shape the proposal before the PUC commences formal notice-and-comment procedures. In Iowa, the Utilities Board often opens a rulemaking docket with a "Notice of Intended Action" that details potential rule changes, and an order requesting stakeholder comments. After reviewing comments, the Board then formally commences notice-and-comment rulemaking.⁵⁵ As required by the state's Administrative Procedure Act,⁵⁶ the Washington Commission similarly opens rulemaking dockets with a "Pre-proposal Statement of Inquiry" that invites written comments for consideration at a stakeholder workshop. An accompanying Notice of Opportunity to File Written Comments may identify specific issues for comment and may also solicit parties to file statements of proposed issues that will guide the rulemaking process.⁵⁷

Extending the rulemaking docket by adding pre-proposal comments and a workshop can actually improve the efficiency of the process and reduce litigation risk. By communicating with stakeholders before a formal proposal, the PUC can incorporate input into the proposed rule and thereby build support for its proposal. With stakeholder input already included in the proposed rule, the PUC may receive fewer comments during the formal proceeding. The final rule may thus look very similar to the rule that is formally proposed.

The pre-proposal phase may also provide the PUC with flexibility that a traditional notice-and-comment process would not. In one recent case, the Washington Commission issued a pre-proposal notice that invited comments on “issues related to natural gas conservation.”⁵⁸ After receiving a round of comments, the Commission issued another notice requesting specific information from natural gas utilities. Following a workshop and additional comments, the Commission issued a notice announcing its intent to develop a “policy statement”² and inviting written comments on a number of issues as well as oral statements at an upcoming meeting. The fluid nature of the proceeding reflected the Commission’s responsiveness to participants’ comments and shows how the Commission’s general approach of encouraging stakeholder input early and throughout a proceeding can shape the ultimate outcome.

Of course, a PUC enjoys discretion about how it chooses to proceed after receiving initial comments. It could stick to a pre-determined agenda, but the Washington example illustrates a case where the Commission was open to allowing stakeholder input to guide the process. In states that do not

explicitly authorize or require a pre-proposal notice, as Washington law does, PUCs may be able to achieve similar flexibility by issuing notices of inquiry or convening workshops prior to opening a rulemaking docket.

Confidentiality and Off-the-Record Proceedings

Settlement discussions in adjudicative proceedings are generally confidential. In some states, this rule is codified in statute or in PUC regulations. New York regulations specify that “[n]o discussion, admission, concession or offer to stipulate or settle . . . made during any negotiation session concerning a stipulation or settlement shall be subject to discovery, or admissible in any evidentiary hearing against any participant who objects to its admission.”⁵⁹ This rule also applies to mediation.⁶⁰ Other PUCs have similar rules.⁶¹

Absent a rule about confidentiality or admissibility, statements made during a settlement negotiation or mediation could be admissible in an adjudicated proceeding. As a general matter, Federal Rule of Evidence 408 and similar rules adopted by every state prohibit the admissibility of statements made during settlements talks. However, a recent study of how those rules are applied by courts concludes that “relatively few legal negotiations today are covered by the rules.” Moreover, courts tend to favor admitting evidence under various exceptions to the rules.⁶² The study notes a distinction in how adjudicatory and ADR processes view information sharing. In litigation, a party may need access to information held by other parties to prove its case. In ADR, parties must have confidence that they can safely disclose information that they might choose not to share in a contested proceeding. In seeking to balance this “fundamental tension,” courts tend to favor admitting relevant information.⁶³

The fluid nature of the proceeding reflected the Commission’s responsiveness to participants’ comments and shows how the Commission’s general approach of encouraging stakeholder input early and throughout a proceeding can shape the ultimate outcome.

²The policy statement explains that under Washington law “[a]n agency is encouraged to advise the public of its current opinions, approaches, and likely courses of action by means of interpretive or policy statements.” RCW 34.05.230(1). According to the Commission, policy statements “are intended to be more flexible than rules, though they can be converted into rules after some period of implementation.”

In some circumstances, state law could actually require disclosure of information relevant to settlements. In 2016, the Pennsylvania Supreme Court held that the PUC had to disclose a tip letter that triggered an investigation into a utility's response to a winter storm and resulted in a settlement between the PUC and the utility.⁶⁴ The court concluded that a statute requiring the PUC to release "any documents relied upon by the commission in reaching its determination" "evinces the General Assembly's desire to effectuate transparency . . . in the government's dealings with public utilities." The court rejected the PUC's argument that disclosure would interfere with utilities' willingness to cooperate with investigations and enter into settlement agreements. State freedom-of-information or right-to-know laws could, in theory, compel disclosures as well.⁶⁵

For collaborative processes, a PUC can choose whether to conduct proceedings on- or off-the-record. If the PUC is seeking to develop a record to inform a rulemaking, it may insist that workshops be conducted on-the-record and request that parties submit written comments before or after the session. If the purpose of convening is to improve the quality of information that the PUC is receiving and help staff understand a particular topic, an off-the-record session may be more effective at eliciting frank

conversation. As described on pages 16 to 19, PUCs have also facilitated or requested that parties organize off-the-record working sessions that culminate in a written report filed with the Commission.

Training

No PUC indicated that it had staff dedicated exclusively to ADR. For PUCs that employ ALJs, judges that are not presiding over a case could be assigned as a settlement judge and facilitate or mediate discussions. At other PUCs, staff members could be tasked with administering an ADR process on a case-by-case basis, with assignments often based either on subject-matter expertise or interpersonal skills that are relevant to ADR.

In general, PUC staff does not receive formal ADR training. Some Commissions indicated that staff had historically attended local or national ADR training sessions, but noted that budgets no longer allow for that. Some Commissions said that they train a newer staff member by pairing her with an experienced staff member on an ADR team. Another option used by a few PUCs is to hold staff training sessions run by an experienced staff member. In general, ALJs were more likely to have formal training than other PUC staff, and few Commissions reported any formal training in recent years.

Examples of ADR at PUCs

This section describes PUC proceedings featuring ADR. The summaries are based primarily on publicly available documents filed at the PUC. This paper does not attempt to evaluate whether any particular ADR process was "successful" from the perspective of the PUC or the parties. Defining success is difficult and subjective and would require feedback from PUC staff, Commissioners, and stakeholders.⁶⁶ Such analysis is beyond the scope of this paper. The purpose of these examples is to illustrate various ADR techniques to show how they might be applied at other PUCs.

Ratemaking and Other Adjudicative Proceedings

PUCs can be grouped into four categories with regard to their use of ADR in ratemaking and other adjudicative proceedings:

1. The PUC has a policy that encourages ADR, does so beginning at the pre-hearing conference stage of a proceeding, and offers the PUC's ADR resources to the parties.
2. The PUC does not have a formal policy on ADR but generally encourages parties to engage in settlement talks and may opportunistically deploy staff to facilitate or mediate discussions when staff or Commissioners identify a proceeding that appears to be ripe for complete or partial settlement.
3. The PUC may encourage ADR but staff does not facilitate or mediate settlement talks.
4. The PUC does not encourage ADR and does not make staff available to assist.

Washington: Settlement Talks Change the Focus; Outside Neutral Facilitates Settlement

A proceeding in Washington about a utility's proposal to develop a liquefied natural gas (LNG) facility illustrates the first category. The utility initiated the proceeding in August 2015 with a request that the PUC approve a contract with a shipping company and a methodology for allocating costs between regulated and unregulated services.⁶⁷

Consistent with its policy, the Washington Commission encouraged parties to settle from the outset. The notice scheduling a pre-hearing conference indicated that the conference would address “opportunities for informal resolution of issues by alternative means, such as settlement negotiations in which all parties may participate.” A subsequent pre-hearing order invited parties to utilize the Commission's ADR resources. At the pre-hearing conference, the ALJ “encouraged” parties to pursue settlement and remarked, “if I wasn't the judge in this case, I could certainly see some opportunities to mediate it successfully.” He suggested that the parties schedule technical conferences and report back on efforts to narrow the issues for hearing. The ALJ then provided the parties time to go off-the-record and propose a procedural schedule. The parties agreed to three technical conferences within two months and a status conference with the ALJ shortly thereafter.⁶⁸

At the status conference, parties agreed that the technical sessions were “productive and useful.”⁶⁹ The parties continued informal discussions and, pursuant to their negotiated schedule, submitted briefs to the Commission shortly thereafter. After reviewing the briefs, the Commission “provisionally” determined it did not have jurisdiction over the proposed contract and requested that the parties explore alternative business models that could fall under the Commission's jurisdiction.⁷⁰ One month later, the Commission granted staff's unopposed motion to suspend the procedural schedule, concluding that “[p]roviding the parties additional time and opportunity for settlement discussions . . . is in the public interest,” and ordered staff to keep the ALJ informed about settlement talks.⁷¹

Ultimately, at the suggestion of the utility, the parties hired a mediator and an independent technical advisor. The mediator administered seven in-person conferences and five telephonic conferences. More than a year after the proceeding began, parties filed in support of a settlement agreement that allocated costs of the project between the utility company's regulated



and unregulated businesses. In its order approving the settlement, the Commission noted the parties' “commendable level of effort” over the previous year.⁷²

In this case, the parties drove the process and ultimate outcome. Although the case lasted fourteen months, ADR likely saved Commission and party resources. Importantly, the parties themselves identified the narrow jurisdictional issue for briefing early in the process.⁷³ Had the proceeding not included extensive discussions at the outset and instead proceeded directly into litigation, this threshold issue might not have been addressed by the Commission until it took up the full case at hearing. Concluding that it lacked jurisdiction over the initial proposal, the Commission then relied on the parties to craft a solution.

Vermont: Informal Workshop Provides a Forum for Discussion

The Vermont Public Service Board (PSB), which falls in the third category, incorporates a workshop into its “alternative” ratemaking process, to enhance understanding of a utility's proposed rate changes. Vermont law allows the PSB to approve “alternative forms of regulation” that offer the utility incentives to improve performance.⁷⁴ The PSB's alternative ratemaking procedures include at least one workshop conducted during the discovery phase of the proceeding that allows staff and stakeholders “to familiarize themselves with the [filing] and the supporting, benchmark cost of service.”⁷⁵ At these workshops, utility representatives explain the company's proposal and field questions from staff and other parties.

These workshops can be valuable to staff in helping them understand the issues, particularly where ex-parte rules limit communication with the parties. Other PUCs could consider whether such informal sessions in utility rate case might inform Commission staff and other parties and facilitate early dialogue that might lead to settlement discussions.

Collaborative and Information Gathering Proceedings

Based on his in-depth analysis of four consensus-building processes administered by northeastern PUCs in the late 1980s and early 1990s, Dr. Jonathan Raab, an expert in applying ADR processes to energy and environmental regulation, finds four reasons for why these processes led to better outcomes for the parties:

1. The best technical information was sought and shared, instead of being selectively pursued and used as a weapon, as in traditional contested cases.
2. The parties' own concerns and experiences were more directly reflected in the proposed solutions.
3. The parties were able to reach beyond the confines of precedent and other potential legal restrictions that a PUC might have faced to find more workable and efficient solutions that better met their needs.
4. The parties could work out their solutions at a level of technical detail that would be extremely difficult if not impossible in a contested case or rulemaking proceeding.⁷⁶

This section highlights examples of proceedings that aimed to capture these advantages.

Connecticut: Working Groups Propose Rules, Resolve Disputed Issues

Connecticut regulators created separate stakeholder groups to discuss submetering, net energy metering, and competitive supply. While all are called "working groups," as summarized below the competitive supply working group serves a different function; further, all three groups were authorized by regulators under different circumstances.

In January 2013, the Connecticut Public Utilities Regulatory Authority (PURA) opened a docket to investigate submetering electricity.³ Initially, the proceeding was conducted under the PURA's formal ex parte rules that prevent off-the-record communication between parties and staff assigned to the matter.⁷⁷ In June, after the parties had submitted written comments, conducted discovery, and participated in a public meeting, the Legislature passed a bill that amended the submetering law.

PURA prosecutorial staff then filed a motion requesting that the Authority establish a working group of docket participants to implement the

new statute, hoping that the working group could "develop a consensus among the stakeholders."⁷⁸

PURA convened a technical meeting to discuss the request⁷⁹ and then approved the creation of the group, consisting of prosecutorial staff, the consumer advocate, a legal aid office, utilities, and property management companies. From September 11 to November 6, the working group met in person five times. Staff advisors to the Commission attended these sessions as observers.⁸⁰

The working group's report identifies and explains where members reached consensus. Where there was no consensus, the report provides positions of the parties and makes recommendations for moving forward.⁸¹ PURA's decision, issued several months later, quotes from the working group report and adopts some of its recommendations.⁸²

In December 2016, PURA created a new working group on net energy metering (NEM) that appears to be modeled after the submetering working group. In a decision about utility NEM programs, PURA noted that several parties had filed comments requesting the creation of a working group. In response, PURA tasked the utilities with "conduct[ing]" a working group to develop joint recommendations on issues specified by the Authority and other issues identified by the group. The Authority set dates for five working group meetings between mid-January to mid-April 2017 and a May due date for the group's report. The Authority intended "to facilitate the group's efforts and progress."⁸³

While also called a "working group," the Supplier Working Group convened in 2011 is somewhat different. In 2010, PURA's predecessor established a docket to review business activities of competitive retail electric suppliers.⁸⁴ In an order deciding several issues about competitive supply, the Department established a working group to "assist [it] in resolving several market related issues through a collaborative process."⁸⁵ The Department deferred to the group on what issues it would focus on and how it would operate. It also designated staff members to "monitor and, if needed, participate in the working group and adjudicate if need be, any issues that cannot be resolved by the working group."⁸⁶ A subsequent notice invited electric distribution companies, competitive suppliers, interested persons, and the Retail Electric Suppliers Association to participate.⁸⁷

³ Submetering is the use by a customer of a non-utility meter located downstream from the utility's meter. In Connecticut, submetering had been used at campgrounds and marinas. The docket was initiated in part in response to an application by a property management company to submeter at four of its properties.

The Department initially envisioned a long-term role for the group, but it met only twice in 2011.⁸⁸ In 2014, it reconvened the group, finding that it “provided a cost effective forum to address changes that are occurring in the retail energy market in Connecticut.”⁸⁹ The group has since met approximately six to eight times per year. In contrast, the submetering and NEM working groups had shorter terms and more focused goals. They held several meetings over the course of a few months in attempt to reach consensus on a discrete set of issues and to draft reports that inform a future Authority rulemaking.

Arkansas: PSC Creates Working Groups on Energy Efficiency and Net Metering

A 2015 report by the State and Local Energy Efficiency Action Network⁴ identifies Arkansas as one of more than twenty states that have employed energy efficiency collaboratives. The report notes that such “collaboratives are particularly useful mechanisms to evaluate energy efficiency program design because the design and implementation of these programs involve a mix of market, social, and technology factors that can be difficult to frame and organize in a utility regulatory forum.” Collaboratives can engage participants that do not have the time or expertise to participate in a formal evidentiary-type process but can offer insight based on their experiences. The flexibility of a collaborative working group allows the group to be used in a variety of circumstances, such as to evaluate current programs, plan future initiatives, or respond mid-stream to unexpected performance.⁹⁰

Collaboratives can engage participants that do not have the time or expertise to participate in a formal evidentiary-type process but can offer insight based on their experiences.

The Arkansas PSC established its EE collaborative in 2006. Citing high energy prices and the “minimal level” of energy efficiency programs in the state, the PSC issued a Notice of Inquiry to investigate a range of issues about energy efficiency.⁹¹ Following a workshop and a round of written comments, the PSC “direct[ed] the parties to initiate a collaborative process” and produce a report on issues identified by the Commission.⁹² The PSC engaged the Regulatory Assistance Project (RAP) to facilitate the process. RAP managed the working group’s meetings, organized the agendas, suggested policies that would meet the parties’ needs, produced the group’s report, and submitted draft rules to the PSC.⁹³

The group met five times over nine days from August 28 to October 27. PSC “general staff” (as distinct from “Commissioners’ staff” that advises Commissioners) participated as a party along with representatives from utilities, renewable energy companies, large consumers, local NGOs, and the state energy and attorney general’s offices.⁹⁴ The group report identifies issues where the parties could not reach consensus.⁹⁵ The report and the group’s proposed rules served as the basis for the PSC’s final rules.⁹⁶

The role of the EE collaborative gradually expanded.⁹⁷ In 2013, the PSC provided the collaborative “with an ongoing mission to maximize the benefits of utility EE programs for ratepayers and for Arkansas.” The PSC stated that it wanted to provide a forum for addressing differences among stakeholders, formalizing a process for engaging technical expertise, and establishing a procedure for narrowing the issues requiring Commission action.⁹⁸ The PSC directed the collaborative to hire a neutral facilitator and technical expert and to establish guidelines to govern its proceedings. The adopted guidelines “outline a decision-making process under which [] members strive to achieve the highest level of consensus possible on every decision” and submit their recommendations to the PSC as a single, joint filing.⁹⁹ Where the collaborative fails to achieve consensus, the guidelines urge the parties to minimize the number of individual party filings. The PSC has commended the energy efficiency working group for “achieving the benefits offered by collaboration.”¹⁰⁰

⁴SEE Action is facilitated by the U.S. Department of Energy and U.S. Environmental Protection Agency.

Because of the success of that working group, the PSC granted general staff's request to initiate a similar group to address net metering. In 2015, in response to net metering legislation passed by the Arkansas Legislature, the PSC initiated "a docket to gather information."¹⁰¹ It directed staff to generate a strawman proposal and invited parties to intervene and submit responsive filings. Notably, general staff requested that the PSC consolidate a dozen petitioners into four groups based on staff's perception of the parties' overlapping interests. The PSC rejected this suggestion, saying that while its "seeks . . . to achieve administrative efficiency, [] in this rulemaking proceeding [it] errs on the side of broad and diverse participation."¹⁰²

Meanwhile, in developing the strawman proposal, the general staff organized an informal technical conference for parties intending to participate in the docket. When it submitted the proposal, general staff recommended that the PSC establish a staff-led working group to "engage in a dialogue to facilitate the collection of pertinent information and to establish guiding principles for the development of net-metering tariffs." Staff hoped the process would "provide an opportunity for Parties with divergent points of view to work cooperatively toward finding common ground while still maintaining the Parties' ability to address their issues before the Commission." The group would then develop proposed NEM rates that meet the requirements of the 2015 law, guided by a series of questions posed by the PSC in its order initiating the docket.¹⁰³

Again, the working group would aim to reach consensus on each issue, make a record of its decisions for reporting to the PSC, and provide for dissenting reports to the PSC on issues not resolved by the participants. Participants filed an unopposed motion in support of the working group recommendation, and the Commission approved its creation.¹⁰⁴

Nevada: Investigatory Docket on Energy Storage

A proceeding in Nevada about battery storage illustrates several information-gathering mechanisms. Battery technologies are particularly relevant to Nevada public policy. Nevada is home to Tesla's "gigafactory," which benefits from a tax package approved by the Legislature. Governor Sandoval hopes that energy technologies such as batteries become a driver of the state's economy.¹⁰⁵ Nevada PUC investigations may influence the PUC's regulation of new technologies and inform proposed legislation.¹⁰⁶

In January 2016, the PUC voted to open an "investigatory docket regarding battery storage technologies." Two months later, it issued an order requesting comments on issues about battery technologies, whether the state's utilities should include batteries in their integrated resources plans, legislative action to eliminate barriers to battery deployment, and utilities' investigations of battery deployment.¹⁰⁷ A concurrently filed notice announced a workshop to discuss the anticipated written comments.¹⁰⁸ Following the workshop, the PUC announced up to two "stakeholder meetings for the purpose of allowing [the utility] and stakeholders the opportunity to informally discuss the rules governing the behind-the-meter storage interconnection process."¹⁰⁹

There are salient differences between "workshops" and "stakeholder meetings." Workshops are on-the-record sessions run by a Commissioner; stakeholder meetings are off-the-record and conducted primarily by the parties, although a PUC staff member may facilitate the meeting. Workshops provide an opportunity for a Commissioner and other policymakers to learn about participants' views. Stakeholder meetings provide a forum for the parties to understand each other's views and attempt to reach consensus.

The stakeholder meetings, held three weeks apart, resulted in the parties submitting a list of outstanding issues to the Commission with a summary of the positions of parties.¹¹⁰ The PUC responded with a request for comments about technical issues raised by the parties, and later scheduled two additional stakeholder meetings and a workshop on interconnection.¹¹¹ Meanwhile, the PUC had held a separate workshop on a utility's proposed storage project and requested comments and held an additional workshop on energy storage issues pertaining to utility planning.¹¹² The PUC's Regulatory Operations Staff is participating as a party in the proceeding and has filed written comments.



Rhode Island: Stakeholder Process about Value of Distributed Energy Resources

In Rhode Island, Dr. Raab facilitated a stakeholder process about the value of distributed energy resources. The proceeding can be traced to a utility's rate design proposal that included escalating fixed fees based on a ratepayer's consumption.¹¹³ The utility later withdrew its proposal, recognizing that staff and intervenors "d[id] not support the Company's proposed rates, but have expressed their interest in engaging in further discussions on rate design . . . in light of net metering and the changing distribution system that is expected to include more distributed energy resources."¹¹⁴ Staff then issued a memo to all docket participants explaining that it was drafting a memo to Commissioners to suggest the scope of a follow-up docket. It requested comments on the "attributes" that can be measured on the electric system and how they should be measured and suggested that parties' responses would inform its memo to the Commission.¹¹⁵

The PUC then opened docket no. 4600 with the goal of "develop[ing] a report that will guide the PUC's review" of the utility's future rate filings. It also invited individuals and organizations to apply to the PUC to become members of a stakeholder group that would identify and quantify costs and benefits of DERs and announced a request for proposals for a facilitator that would manage the group and develop a report to the PUC.¹¹⁶ The working group ultimately included the utility, four non-profit advocacy organizations, two coalitions of local renewable energy and energy efficiency interests, a retail provider, and three state agencies.¹¹⁷ PUC staff participated in discussions but not in the decision-making that led to the group's recommendations.¹¹⁸

The group met nine times over ten months, with the initial two meetings facilitated by PUC staff and the remaining seven conducted by Dr. Raab.¹¹⁹ The group's ground rules established a goal of achieving consensus on recommendations to the PUC, and encouraged communication among members between meetings.¹²⁰ The facilitator prepared meeting agendas, provided participants with reading materials in advance of meetings, and drafted the group's final report. The group's final report reflects consensus positions on costs and benefits of DERs, rate design principles, and related issues. The report advises that it is starting point and its recommendations

should be improved over time. The PUC convened a technical session on the report and then adopted the report and directed the utility and staff to take various actions consistent with the report's recommendations.¹²¹

Colorado: Flexible Rulemaking Process Adapts to Stakeholder Requests

A telecommunications rulemaking illustrates how a PUC repeatedly modified a proceeding in response to stakeholder feedback, encouraged dialogue and coordination, and solicited feedback through multiple rounds of comments and workshops.

In response to legislation, the Colorado PUC issued a notice of proposed rulemaking (NOPR) to amend various telecommunications rules. The NOPR summarized proposed rule changes but noted that it was a "starting point for comments" and not intended to be comprehensive of all changes. The Commission assigned a Commissioner as the hearing officer, solicited written comments, and announced one workshop.¹²² Less than one month later, the hearing officer approved a request from several participants to delay the deadline for comments and the initial workshop and to schedule a second workshop.¹²³

After reviewing written comments, the hearing officer issued revised proposed rules and announced a workshop to discuss that document.¹²⁴ Finding that "the exchange of information at the [recent] workshop was very helpful," the hearing officer urged participants to reach consensus and file joint comments reflecting workshop discussions.¹²⁵ Participants then organized three groups about specific subjects. Shortly thereafter, the hearing officer approved one group's request to delay the comment deadline and hold an additional workshop, in hopes that the revised schedule "allows the participants an opportunity to continue to work to reach consensus."¹²⁶

Shortly after that workshop, the three working groups requested that the hearing officer delay the scheduled hearing in order to accommodate an additional workshop in the interim. "Appreciating the work that had been done and progress made," the hearing officer granted the request.¹²⁷ The hearing officer's recommended decision reflected the suggestions of the three working groups.¹²⁸ Only one company filed exceptions to the recommended decision, which it claimed "correct a few clerical errors."¹²⁹

This proceeding shows how procedural orders can be used to encourage parties to reach consensus. It is noteworthy that requests to delay comment deadlines or facilitate additional workshops were typically filed jointly by more than one party. The hearing officer consistently granted those requests, under the belief that providing additional time would allow parties to find common ground. The approvals reinforced the hearing officer's explicit encouragement that parties work together and attempt to reach consensus.

Siting

In most states, PUCs have jurisdiction over transmission line siting. State law typically tasks the PUC with evaluating whether there is "need" for the line, the effect of the line on reliability, alternatives to the new line, and its potential environmental impacts.¹³⁰ To construct the line, a project developer negotiates with landowners along the line's route for easements and is often allowed to exercise the power of eminent domain if it fails to reach an agreement. PUCs often oversee disputes between the developer and potentially affected landowners over the line's route, the terms and conditions of easements acquired through eminent domain, and issues that arise during construction or while the facility is in operation.

Maine PUC Creates Ombudsman and ADR Team to Handle Siting Disputes

The Maine PUC's Landowner Dispute Resolution Process (LDRP) was established by a settlement agreement between a Maine utility proposing 350 miles of new transmission lines and organizations that participated in the approval proceeding before the PUC.¹³¹ The LDRP was intended to "ensure that timely and adequate attention [was] given to landowner issues during the [project's] construction phase."¹³² It aims to quickly and informally resolve disputes with amounts in controversy less than \$200,000.

Dispute resolution is initially facilitated by an ombudsman, who is a PUC employee. The PUC's 2012 annual report indicates that "most" of the 90 cases handled by the ombudsman that year were resolved through a negotiated resolution.¹³³ If the ombudsman concludes that a dispute cannot be so resolved, or if one party insists on escalating the dispute, the ombudsman refers the matter to the Landowner Dispute Resolution Team (LDRT), a staff team that includes at least one member each from the Commission's Consumer Assistance Division, Energy and Gas Division, and Legal Division. The ombudsman may assist the landowner in preparing submissions to the LDRT but does not participate in the LDRT decision-making process.

Within five working days of receiving written submissions, the LDRT notifies parties if it needs more information, whether it concludes that a conference is necessary, or whether the LDRT can decide the matter based on the initial submissions. Once it has the information it needs, the LDRT has five business days to write decision memos providing: a summary of the positions and the evidence presented, the LDRT's findings and conclusions, and a statement of the parties' rights to appeal. A party may appeal an LDRT decision to the Commission within five business days. On appeal, the Commission may uphold, reverse, modify, or remand the decision for further factual development. Unless remanded, the Commission will reach its decision based upon the record developed by the LDRT.

The PUC conferred jurisdiction over landowner disputes to the LDRT under its broad statutory authority to "delegate to its staff such powers and duties as the commission finds proper."¹³⁴ The process does not divest the Commission of its authority to investigate or resolve disputes, and the amount-in-controversy ceiling of \$200,000 ensures that larger disputes are resolved directly by the Commission.



Consumer Complaints

Every PUC that we spoke to about consumer complaints has an informal process that aims to resolve disputes at the staff level and avoid a formal process that would culminate in a Commission decision. Consumer complaints are typically about utility bills, but some PUCs allow complaints about other issues, including vegetation and interconnection, to be handled by an informal process.

Approaches vary by Commission, but in general PUCs accept informal complaints through a telephone hotline or online form (a few PUCs require written submittals¹³⁵). Staff then contacts a designated person at the relevant utility to gather facts or to request that the utility contact the customer and attempt to resolve the complaint. At many PUCs, staff acts as an intermediary between the utility and the customer and may relay settlement offers, suggest a compromise, or advise on outcomes that would be consistent with PUC rules. At some PUCs, staff may convene a meeting between the customer and utility, particularly if the complaint is about a large amount of money. In some states, the utility is encouraged to contact the consumer directly.

Florida's consumer complaint procedures begin with such informal discussions and illustrate how staff can take on evaluative roles in the resolution process.¹³⁶ After receiving a complaint, staff sends a summary to the utility. If the utility resolves the issue within three days, the complaint is not recorded by the PUC as a complaint against the utility in its regular reporting. If the matter is not resolved, the company must submit a written response to staff about its proposed resolution and may be required to provide further information and documentation. Staff then proposes a settlement to the utility and consumer. If either the utility or the consumer does not agree to the settlement proposal, a three-member team that includes staff from the general counsel's office, consumer assistance division, and appropriate technical division reviews the complaint. Assuming the team concludes that the PUC has jurisdiction over the complaint and makes other findings, it holds an informal conference where each side may present information in support of its position. If the parties are still unable to settle, staff will forward the matter to the Commission.

A few features of Florida's consumer complaint procedures stand out. One, the utility has an explicit incentive to resolve an issue quickly and without the assistance of PUC staff. Two, the three-day window provides the utility with a tight deadline for resolving the issue. Other states allow negotiations, which may involve staff, to continue indefinitely. Three, the staff-review team provides an additional layer of process before a consumer complaint can reach the Commission. The team provides one more opportunity for informal resolution and assures that any complaint heard by the Commission is properly before it to further minimize use of Commission time.

Across PUCs, informal complaint resolution processes are very successful at avoiding litigation and resolving disputes. PUCs receive thousands of complaints per year,¹³⁷ and in many states only a handful of consumer complaints are heard by the Commission. At the same time, when an informal complaint reveals that a utility may have violated regulations, staff might try to persuade the consumer to file a formal complaint to develop a record of the violation. Numerous consumer complaints about the same issue or clustered in the same region can lead to formal Commission investigations. For instance, the Michigan PSC initiated an investigation into a utility's estimated billing practices in part because of the "high volume" of consumer complaints it received.¹³⁸ The investigation resulted in a \$500,000 fine and an order to reform meter reading practices.¹³⁹

ADR may play an important role in such investigations. Particularly when public safety is at issue, a PUC's primary goal may be to bring the utility into compliance in a timely manner. A negotiated settlement may be a faster means of doing so than a full investigation and litigated case.

Endnotes

- *Ari Peskoe is the Senior Fellow in Electricity Law at the Harvard Environmental Policy Initiative. This report would not have been possible without the participation of Commissioners and staff at 18 Commissions listed in footnote 1. Thanks to Harvard Law students Keith Thomas, Charlie Corbett, and Ryan Rossner for research assistance.
- ¹Robert A. Baruch Bush, *Dispute Resolution Alternatives and the Goals of Civil Justice: Jurisdictional Principles for Process Choice*, 1984 WIS. L. REV. 893, 909 (1984) (citing Richard Posner, *A Theory of Negligence*, 1 J. LEGAL STUD. 29, 32–34 (1972) as well as other sources).
- ²*Id.* See also Frank H. Easterbrook, *Justice and Contract in Consent Judgments*, 1987 U CHI. LEGAL F. 19, 26 (“Resolving disputes is only one of the two principal functions of the legal system. The other is shaping legal rules to use in the future. . . . If every case were settled, there would be no ongoing process of elucidation.”).
- ³See Stefan H. Krieger, *Problems for Captive Ratepayers in Nonunanimous Settlements of Public Utility Rate Cases*, 12 YALE J. ON REGULATION 256, 259–60 (enumerating various benefits of ADR); Public Utilities Commission of California, Resolution ALJ-185 (Aug. 25, 2005), http://docs.cpuc.ca.gov/word_pdf/FINAL_RESOLUTION/49129.pdf (stating that “ADR processes are often preferable to a litigated result because they potentially can produce outcomes that are more responsive to the parties’ needs, more consistent with the public interest, avoid the narrow results of litigation that may not adequately address the parties’ problems, encourage more active participation of all parties (regardless of an individual party’s size or resources), save the parties’ time and resources, and allow the Commission to direct its decision-making resources to other important proceedings”); Report of the Energy ADR Forum, *Using ADR to Resolve Energy Industry Disputes: The Better Way* (Oct. 2006), at p. 5, <http://www.raabassociates.org/Articles/EnergyADRForumReport-Oct2006.pdf> (outlining benefits of ADR).
- ⁴See Krieger, *supra* note 3, at 259 n. 3.
- ⁵See Krieger, *supra* note 3, at p. 260.
- ⁶See Energy ADR Forum, *supra* note 3, at 6; Krieger, *supra* note 3, at 260, fn. 4; Miriam K. Mills, *Overview and Implications of Alternative Dispute Resolution*, 16 POL’Y STUD. J. 493 (1988).
- ⁷Alfred A. Marcus et al., *The Applicability of Regulatory Negotiation to Disputes Involving the Nuclear Regulatory Commission*, 36 ADMIN. L. REV. 213 (1984).
- ⁸JONATHAN RAAB, USING CONSENSUS BUILDING TO IMPROVE UTILITY REGULATION (1994) at 50 (quoting Lawrence Susskind and Allen Morgan, *Improving Negotiation in the Regulatory Process*, Electric Perspectives (EEL), Spring 1986, pp. 22–31).
- ⁹Marcus, *supra* note 7, at 213.
- ¹⁰See Krieger, *supra* note 3, at p. 260; see also *id.*, fn. 6; Joe Bryson and Michael Li, The State and Local Energy Efficiency Action Network, *Energy Efficiency Collaboratives: Driving Ratepayer-Funded Efficiency through Regulatory Policies Working Group* (Sep. 2015).
- ¹¹Jack M. Sabatino, *ADR as ‘Litigation Lite’: Procedural and Evidentiary Norms Embedded Within Alternative Dispute Resolution*, 47 EMORY L.J. 1289, 1297 (Fall 1998).
- ¹²*Id.*
- ¹³Lela Love and Ellen Waldman, *The Hopes and Fears of All the Years: 30 Years Behind and the Road Ahead for Widespread Use of Mediation*, 31 OHIO ST. J. ON DISP. RESOL. 123, 136 (2016).
- ¹⁴Leonard L. Riskin, *Understanding Mediators’ Orientations, Strategies, and Techniques: A Grid for the Perplexed*, 1 HARVARD NEGOT. L. REV. 7, 14 (1996).
- ¹⁵*Id.*
- ¹⁶The summaries are based on FERC’s website, <https://www.ferc.gov/legal/adr/continuum/com-dra.asp>.
- ¹⁷California Public Utilities Commission, Resolution ALJ-185 (Aug. 25, 2005), available at: http://docs.cpuc.ca.gov/word_pdf/FINAL_RESOLUTION/49129.pdf.
- ¹⁸See, e.g., Andrew S. Katz, *Using the EEI-NEM Master Contract to Manage Power Marketing Risks*, 21 ENERGY L. J. 269, (2000) (recounting that lawyers, traders, and risk managers participated in a working group to draft the master agreement and observing that “a tremendous amount of common understanding resulted as the expanded working group tried to document what their traders and risk managers said they were doing everyday”).
- ¹⁹Hannah J. Wiseman, *Negotiated Rulemaking and New Risks: A Rail Safety Case Study*, 7 WAKE FOREST J. OF L. AND POL’Y (2017).
- ²⁰See 5 U.S.C. §§ 561–570 for an outline of the federal negotiated rulemaking process.
- ²¹Wiseman, *supra* note 19.
- ²²*Id.*; see also Cary Coglianese, *Assessing Consensus: The Promise and Performance of Negotiated Rulemaking*, 46 DUKE L.J. 1255, 1259 (1997) (stating that “negotiated rulemaking has long lacked systematic evidence showing that it yields superior results over conventional rulemaking,” and concluding, based on empirical evidence, that the process “has not proven itself superior to the informal rulemaking that agencies ordinarily use”).
- ²³William Funk, *When Smoke Gets in Your Eyes: Regulatory Negotiation and the Public Interest – EPA’s Woodstove Standards*, 18 ENVTL. L. 55 (Fall 1987).
- ²⁴See Albert Yoon, *The Importance of Litigant Wealth*, 59 DEPAUL L. REV. 649, 650–51 (2010) (citing Marc Galanter, *Why the “Haves” Come Out Ahead: Speculations on the Limits of Legal Change*, 9 LAW & SOC’Y REV. 95, 103–04 (1974) and several other works that explore litigation involving parties of disparate wealth and experience).
- ²⁵Krieger, *supra* note 3, at 305 (noting too that “procedural safeguards of [the adjudication] process can restrict the undue influence of parties with superior power”).
- ²⁶*Id.* at 315.
- ²⁷See Raab, *supra* note 8, at 50–51, 86–88, 128–29, 181–84.
- ²⁸*Id.* at 181–82.
- ²⁹Florida Public Service Commission, Docket 150259-GU, Order No. PSC-16-0205-AS-GU (May 19, 2016) (citing *Cherry Commun. v. Deason*, 652 So. 2d 803 (Fla. 1995)).
- ³⁰*Id.*
- ³¹CON. GEN. STAT. § 16-19jj.
- ³²Connecticut Light and Power Co. v. Department of Public Utility Control, 2006 WL 2627426 (Sup. Ct. Dis. of New Britain).
- ³³Connecticut Public Utilities Regulatory Authority, Docket No. 16-04-23, Commission Order (Sep. 28, 2016) (citing to statute as consistent with assignment of mediation team); Docket No. 11-10-06, Commission Order (May 15, 2013) (“Pursuant to Conn. Gen. Stat. §16-19jj and based on review of the above described record, the Authority finds that the Settlement Agreement is just, reasonable and in the public interest.”).
- ³⁴FLA. STAT. § 120.54(2)(c) (2016).
- ³⁵*Id.*
- ³⁶FLA. STAT. § 120.54(2)(d) (2016).
- ³⁷Julia Kobick, *Negotiated Rulemaking: The Next Step in Regulatory Innovation at the Food and Drug Administration*, 65 FOOD & DRUG L. 425, 430 n. 50 (citing statutes or regulations in Idaho, Montana, Nebraska, Texas, and Washington).
- ³⁸4 CCR § 723-1:1408.

- ³⁹See California Public Utilities Commission, Docket 15-12-001, ALJ Order (Jan. 26, 2016); Docket 15-12-002, ALJ Order (Jan. 27, 2016); Docket 16-10-004, ALJ Order (Nov. 30, 2016); Docket 17-01-001, ALJ Order (Feb. 9, 2017). Not all pre-hearing conference orders include the statement about ADR. See Docket 12-04-15, Assigned Commissioner's Scoping Memo and Rules (Jun. 15, 2012); Docket 15-04-012, ALJ Order (Jan. 27, 2016).
- ⁴⁰See California Public Utilities Commission, Docket 15-12-001, Prehearing Statement of Siskiyou Telephone Co. (Feb. 3, 2016); Docket 15-12-001, Prehearing Statement of Volcano Telephone Co. (Feb. 3, 2016).
- ⁴¹See, e.g., California Public Utilities Commission, Docket 16-10-004, Joint Prehearing Conference Statement (Dec. 7, 2016).
- ⁴²WAC § 480-7-700(3)(a).
- ⁴³Washington Utilities and Transportation Commission, Docket A-940351, Policy Statement on Alternate Dispute Resolution Techniques and Case Management (Dec. 22, 1994). Commission regulations also "supports parties' informal efforts to resolve disputes without the need for contested hearings." WAC § 480-07-700.
- ⁴⁴See Washington Utilities and Transportation Commission, Docket UG-151663, Prehearing Conference Order (Sep. 9, 2015); Docket UE-160228, Prehearing Conference Order (Mar. 28, 2016).
- ⁴⁵Washington Utilities and Transportation Commission, Docket UG-151663, Transcript (Sep. 9, 2015) at 12:3–8 (Judge Moss: "... the point we always make in prehearing conferences is that the Commission does support the informal settlement of matters, and the parties are encouraged to pursue that as an alternative and an option to resolve disputes").
- ⁴⁶Krieger, *supra* note 3, at 322.
- ⁴⁷See, e.g. California PUC Resolution ALJ-185, Washington orders, *infra* notes 67 to 73 and accompanying text.
- ⁴⁸California Public Utilities Commission, Resolution ALJ-185 (Aug. 25, 2005), available at: http://docs.cpuc.ca.gov/word_pdf/FINAL_RESOLUTION/49129.pdf.
- ⁴⁹The New York Public Service Commission's settlement guidelines identify six factors that the PSC must consider in evaluating whether a proposed settlement is in the public interest, including: "whether the result compares favorably with the likely result of full litigation and is within the range of reasonable outcomes." New York Public Service Commission, Case Nos. 90-M-0255, 92-M-0138, Opinion No. 92-2 (Mar. 24, 1992).
- ⁵⁰New York Public Service Commission, Case Nos. 90-M-0255, 92-M-0138, Opinion No. 92-2 (Mar. 24, 1992); 4 CCR § 723-1:1408 (encouraging parties filing a proposed settlement to "provide comprehensive reasoning regarding the terms of a settlement").
- ⁵¹See, e.g., N.Y. PUB. SERV. LAW § 66(12)(f); MT CODE § 69-3-302; ARK. ANN. CODE § 23-4-411; HI REV. STAT. § 269-16.
- ⁵²Vermont Public Service Board, Docket Nos. 7780, 7781, 7782, Order Opening Investigations (Sep. 13, 2011). Amendments to 30 V.S.A. § 8005 were passed on May 25, 2011 and went into effect on July 1.
- ⁵³*Id.*
- ⁵⁴Vermont Public Service Board, Docket Nos. 7780, Board Order (Jan. 23, 2012).
- ⁵⁵See, e.g., Iowa Utilities Board, Docket No. RMU-2016-0007, Order Requesting Stakeholder Comment on Potential Rule Changes (Aug. 8, 2016), Order Commencing Rulemaking (Feb. 10, 2017); Docket No. RMU-2016-0002, Order Requesting Stakeholder Comment on Potential Rule Changes (Oct. 18, 2016), Order Commencing Rulemaking (Feb. 10, 2017).
- ⁵⁶RCW § 34.05.310.
- ⁵⁷See, e.g., Washington Utilities and Transportation Commission, Docket No. UG-121207, Notice of Opportunity to File Written Comments and an Optional Statement of Proposed Issues (Jul. 31, 2012); Docket No. A-130355, Notice of Opportunity to File Written Comments and an Optional Statement of Proposed Issues (May 15, 2013).
- ⁵⁸See Washington Utilities and Transportation Commission, Docket No. UG-121207.
- ⁵⁹16 NYCRR 3.9(d).
- ⁶⁰16 NYCRR 3.9(e); see also New York Public Service Commission, Case No. 01-M-0886, Memorandum and Resolution Adopting Addition of Section 3.9(e) to NYCRR (Aug. 5, 2002).
- ⁶¹20 Cal Code Regs. 1-1-12.6; WAC § 480-07-700(4)(b), (c); Mont. Admin. R. 38.2.3001; W. Va. C.S.R. § 15-1-11.b.
- ⁶²Richard C. Reuben, *The Dirty Little Secret of Legal Negotiation: Confidentiality Under Federal Rule 408 and Related State Laws*, University of Missouri School of Law Legal Studies Research Paper No. 2014-25 (September 4, 2014), available at: <https://ssrn.com/abstract=2491686>.
- ⁶³*Id.* at pp. 31–33.
- ⁶⁴Pennsylvania Public Utility Comm'n. v. Andrew Seder/The Times Leader, et al., 139 A.3d 165 (Pa. 2016) (interpreting 66 Pa.C.S. § 335(d)).
- ⁶⁵See Reporters Committee for Freedom of the Press, Cases Concerning Public Access to ADR, <https://www.rcfp.org/secret-justice-alternative-dispute-resolution/cases-concerning-public-access-adr> (listing federal and state cases about access to ADR records and proceedings and showing that federal courts allowed access in about half of cases while state courts allowed access in about three-quarters of cases).
- ⁶⁶Dr. Raab highlights three questions that are relevant to evaluating a multi-party consensus-building ADR process: 1) Were process-related resources saved? 2) Did the consensus-building process enhance the legitimacy of the traditional process and of the final results? 3) Were the final remedies, plans, and policies more practical because they used a consensus-building process? Raab, *supra* note 8, at 50.
- ⁶⁷In the Matter of Petition of Puget Sound Energy, Washington Utilities and Transportation Docket UG-151663, PSE Filing Letter (Aug. 11, 2015).
- ⁶⁸Transcript at 12:3–18, 27:2–17, 34.
- ⁶⁹Transcript at 48:6–11.
- ⁷⁰Order 04.
- ⁷¹Order Suspending Procedural Schedule.
- ⁷²Final Order Approving and Adopting Settlement Stipulation (Oct. 31, 2016).
- ⁷³See Order 04 at p. 7.
- ⁷⁴30 V.S.A. § 218d.
- ⁷⁵Vermont Public Service Board, Docket Nos. 7803, 7843, Final Order (Aug. 21, 2012).
- ⁷⁶Raab, *supra* note 8, at 220–21.
- ⁷⁷Connecticut Public Utility Regulatory Authority, Docket No. 13-01-26, Letter to All Parties (Feb. 26, 2013) ("There may be no communication, direct or indirect, with Directors or the Authority's staff assigned to assist the Directors on any issue of fact or law pertaining to this matter unless that communication takes place in the course of a noticed hearing or meeting, or is made in writing with copies supplied to all other designated participants.").
- ⁷⁸Motion to Establish a Working Group (Jul. 31, 2013).
- ⁷⁹Notice of Technical Meeting (Aug. 21, 2013).
- ⁸⁰Letter of Prosecutorial Staff to Nicholas Neeley, Acting Executive Secretary (Nov. 15, 2013).
- ⁸¹Submeter Working Group Report (Jan. 27, 2014).
- ⁸²Interim Decision (Aug. 6, 2014).
- ⁸³Connecticut Public Utility Regulatory Authority, Docket No. 15-09-03, Interim Decision (Dec. 28, 2016).
- ⁸⁴Connecticut Department of Public Utility Control, Docket No. 10-06-24, Decision (Mar. 16, 2011).

- ⁸⁵Connecticut Public Utility Regulatory Authority, Docket No. 13-07-18, Decision (Nov. 5, 2014). The group was created by the Mar. 16, 2011 decision, where the Department stated that it hoped the group would “reach collaborative agreements and resol[ve] common issues.”
- ⁸⁶*Id.*
- ⁸⁷Notice of Working Group Meeting (Apr. 1, 2011).
- ⁸⁸The Department issued an order that affirmed the group’s consensus positions on various technical issues. Connecticut Department of Public Utility Control, Docket No. 10-06-24, Notice of Directive and Working Group Meeting (April, 27, 2011).
- ⁸⁹*Id.*
- ⁹⁰Bryson and Li, *supra* note 10, at 33.
- ⁹¹Arkansas Public Service Commission, Docket No. 06-004-R, Order No. 1 (Jan. 12, 2006).
- ⁹²Order No. 03 (Jun. 30, 2006).
- ⁹³Order No. 04 (Jul. 25, 2006).
- ⁹⁴Richard Sedano, A Collaborative Stakeholder Process Addressing Energy Efficiency in Arkansas Pursuant to Docket No. 06-004-R (Oct. 31, 2006).
- ⁹⁵The PSC established “consensus [as] a goal of the collaborative process.” Order No. 04; *see also* Sedano Report at 3.
- ⁹⁶Order No. 12 (Jan. 11, 2007).
- ⁹⁷Bryson and Li, *supra* note 10, at 33.
- ⁹⁸Arkansas Public Service Commission, Docket No. 13-002-U, Order No. 01 (Jan. 4, 2013).
- ⁹⁹Order No. 17 (Feb. 20, 2014).
- ¹⁰⁰*See, e.g.*, Order No. 22 (Dec. 9, 2014); Order No. 27 (Jun. 8, 2015).
- ¹⁰¹Arkansas Public Service Commission, Docket No. 16-027-R, Order No. 01 (Apr. 29, 2016).
- ¹⁰²Order No. 03 (Jul. 1, 2016).
- ¹⁰³Initial Comments of the General Staff (Jul. 22, 2016).
- ¹⁰⁴Order No. 04 (Aug. 18, 2016).
- ¹⁰⁵*See, e.g.*, Gov. Brian Sandoval, Executive Order 2016-04 (Feb. 23, 2016), Order Directing the Governor’s Office of Energy to Reconvene the New Energy Industry Taskforce, http://gov.nv.gov/News-and-Media/Executive-Orders/2016/EO_-2016-04-New-Energy-Task-Force/, Charles Fleming, “Tesla Gigafactory Will Change Nevada Forever, Gov. Sandoval Says,” L.A. TIMES (Sep. 5, 2014), <http://www.latimes.com/business/autos/la-fi-hy-tesla-nevada-20140905-story.html>.
- ¹⁰⁶Public Utilities Commission of Nevada, 2017 Biennial Report (Jan. 31, 2017), <http://puc.nv.gov/uploadedFiles/pucnv.gov/Content/About/BiennialReport.pdf> (stating that the PUC’s “primary electric utility regulatory activities include . . . investigating new technologies and developing plans for implementation . . . to the benefit of the State”); Strategic Plan for Fiscal Years 2015-2020, [http://puc.nv.gov/uploadedFiles/pucnv.gov/Content/About/StrategicPlan\(1\).pdf](http://puc.nv.gov/uploadedFiles/pucnv.gov/Content/About/StrategicPlan(1).pdf) (including as a goal that the PUC will “address legislative directives” and listing as an implementation strategy that the PUC will assist legislators in policy decisions); Presentation to the Legislature (Feb. 2017), <https://perma.cc/7HRB-2XGT> (noting that its quasi-legislative role includes conducting investigative workshops on “relevant policy issues”).
- ¹⁰⁷Public Utilities Commission of Nevada, Docket No. 16-01013, Procedural Order (Apr. 4, 2016).
- ¹⁰⁸Notice of Workshop (Apr. 4, 2016).
- ¹⁰⁹Procedural Order No. 02 (Jun. 1, 2016).
- ¹¹⁰Correspondence to All Parties (Sep. 2, 2016).
- ¹¹¹Procedural Order No. 4 (Sep. 22, 2016); Procedural Order No. 6 (Feb. 28, 2017).
- ¹¹²Procedural Order No. 3 (Jul. 15, 2016).
- ¹¹³Rhode Island Public Utilities Commission, Docket No. 4568, Notice of Opening Docket and Prehearing Conference (Jul. 2 2015); National Grid, Executive Summary (Jul. 9, 2015).
- ¹¹⁴National Grid, Unopposed Motion to Withdraw Filing (Jan. 15, 2016).
- ¹¹⁵Staff Request for Comments on a Docket to Investigate the Changing Distribution System (Feb. 5, 2016).
- ¹¹⁶Notice of Commencement of Docket and Invitation for Stakeholder Participation (Mar. 18, 2016).
- ¹¹⁷Docket 4600: Stakeholder Working Group Process, Report to the Rhode Island Public Utilities Commission (Apr. 5, 2017), <http://www.raabassociates.org/Articles/RI%204600%20Final%20WG%20Report%204-5-17.pdf>.
- ¹¹⁸*Id.*
- ¹¹⁹*Id.*
- ¹²⁰Docket 4600: Stakeholder Working Group Process: DRAFT Groundrules (Sep. 23, 2016), <http://www.raabassociates.org/Articles/RI%20WG%20Groundrules%20Draft%20v2.pptx>.
- ¹²¹Docket 4600 website, Notice of Technical Session (Apr. 20, 2017) and summary of PUC actions taken at its open meeting (May 4, 2017).
- ¹²²Colorado Public Utilities Commission, Proceeding No. 16R-0453T, Notice of Proposed Rulemaking (Jun. 1, 2016).
- ¹²³June 29 Order.
- ¹²⁴Sept. 16 Order; Sept. 22 Order.
- ¹²⁵Sept. 29 Order.
- ¹²⁶Oct. 19 Order.
- ¹²⁷Nov. 10 Order.
- ¹²⁸Decision No. R17-0295, Recommended Decision of Hearing Officer Frances A. Koncija Amending Rules (Apr. 14, 2017).
- ¹²⁹CenturyLink’s Exceptions to the Recommended Decision (May 1, 2017).
- ¹³⁰Alexandra B. Klass, *Takings and Transmission*. 91 N.C. L. REV. 1079, 1101 (2013) (citing Michael Dworkin et al., Energy Transmission and Storage, in THE LAW OF CLEAN ENERGY: EFFICIENCY AND RENEWABLES 531, 538–39 (Michael B. Gerrard ed., 2011)).
- ¹³¹Issue Information: CMP Transmission Line Expansion, Maine Public Utility Commission, <http://www.maine.gov/tools/whatsnew/index.php?topic=puc-faq&cid=65091&cv=article>.
- ¹³²Maine Public Utilities Commission, Docket No. 2008-255, Order on Landowner Dispute Resolution Process (Aug. 25, 2010).
- ¹³³Maine Public Utilities Commission, 2012 Annual Report (Feb. 1, 2013), http://www.maine.gov/mpuc/about/annual_report/documents/2012AnnualReport.pdf.
- ¹³⁴ME. REV. STAT. tit. 35-A, § 107.
- ¹³⁵*See, e.g.*, IOWA CODE ANN. § 476.3.
- ¹³⁶The process is detailed in FLA. ADMIN. CODE R. 25-22.032.
- ¹³⁷Florida Public Service Commission, 2016 Annual Report, <https://www.floridapsc.com/Files/PDF/Publications/Reports/General/Annualreports/2016.pdf>, at 10 (showing 8,506 complaints in 2016); Massachusetts Department of Telecommunications and Cable, Fiscal Year 2016 Annual Report, <http://www.mass.gov/ocabr/docs/dtc/admin/j-annual-reports-annual-report-fy16-fy-2016-dtc-annual-report-final.pdf> at 25 (showing 2,363 investigations).
- ¹³⁸Michigan Public Service Commission, Case No. U-18002, Order to Open Investigation (Jan. 19, 2016).
- ¹³⁹Order Concluding Investigation (Jun. 9, 2016).