

FINAL MANUAL ON

**ALTERNATIVE REGULATORY PRACTICES AND
ALTERNATIVE DISPUTE RESOLUTION**

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Prepared by

Robert E. Burns

Ellen E. Deason

Raymond W. Lawton, Ph.D.

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MANUAL ON ALTERNATIVE REGULATORY PRACTICES AND ALTERNATIVE DISPUTE RESOLUTION FOR INTERNAL USE OF THE STAFF OF THE PUBLIC UTILITIES COMMISSION OF SRI LANKA

INTRODUCTION AND OVERVIEW

This *Manual* necessarily contains a number of working assumptions. It assumes, for example, that the draft *Human Resources Plan* and the organizational structures and processes contained therein are largely adopted by the Public Utility Commission of Sri Lanka (PUCSL). The *Human Resources Plan* itself recognizes the relatively small staff size envisioned for the PUCSL and the need to organize the PUCSL around teaming and other innovative processes that maximize the productivity, expertise, and creativity of staff. A second important assumption is that the PUCSL will incorporate relevant portions of this *Manual* into the overall procedures now being developed. Mediation and alternative dispute resolution practices must be viewed in the context of PUCSL practices and procedures, which are not yet officially established. The third, and most important assumption, is that only the PUCSL can establish procedures to implement policy, by means of regulation or otherwise. This *Manual* contains a number of recommendations that the PUCSL may accept in whole or in part.

This Alternative Dispute Resolution (ADR) Manual is written in a way that allows for two types of dispute resolution. One type of dispute is the kind that arises between parties that do not include the PUCSL. The other is when the PUCSL is a party to the dispute. In the first type of dispute the parties may be retail, wholesale, agricultural, or residential consumers. These parties may be in dispute with electricity providers, or electricity distribution or transmission entities. The ADR procedures in the Manual most easily and directly deal with these types of disputes. In most cases the PUCSL is able to step-in and act if ADR does not produce a successful outcome.

When the PUCSL is a party to a dispute, the ADR procedures in this Manual still apply. However, extra care must be taken in order to ensure that the other party or parties to the ADR process regard the process as a fair one. Specific steps are suggested throughout the Manual in order to ensure a fair ADR process.

The *Manual* outlines a number of specific criteria about when mediation should be used. Mediation and ADR should be used

- Prior to arbitration efforts or other regulatory actions. We recommend that licensing agreements and PUCSL procedures require notification of the PUCSL prior to the initiation of formal regulatory action, in order that the PCSL staff or the parties can consider whether a good faith effort has been made to first resolve a dispute by mediation.
- PUCSL procedures should allow the parties or the PUCSL staff to halt an ongoing PUCSL regulatory procedure when one or more parties feel all or part of the dispute can be resolved by mediation.
- Individual consumer complaints should first be referred to mediators as allowed under Sri Lanka law. PUCSL staff upon receiving an initial consumer complaint should ensure that the customer has contacted the utility first. If the complaint remains unresolved, both parties should be referred to a mediation service. Due to the small size of the PUCSL staff, only those complaints that continue to remain unresolved should be dealt with directly.
- An initial effort at mediation should be required when dealing with other high volume, repetitive issues, in addition to consumer complaints, where the cost of adjudicating each case would outweigh the societal benefit to be gained through adjudication.
- PUCSL staff should propose mediation when their oversight monitoring activities indicate a problem that may be resolved by mediation, versus a formal regulatory proceeding. Mediation can be superior to many regulatory, arbitration, and legal proceedings when the resolution of the dispute can be helped by a
 - better exchange of information between the parties,
 - clarification or redefinition of the issues,
 - non-adversarial exchange of information,
 - restatement of realistically attainable solutions,
 - an opportunity to explore new or creative solutions, or
 - shift to a forward-looking solution, in effect reducing the importance of the original dispute.

- When the PUCSL staff's informal cost/benefit analysis leads them to decide if the parties would benefit from engaging in mediation.

Mediation and alternative dispute resolution techniques are not recommended to be used in all instances. If the PUCSL feels that the parties to a dispute may agree to a solution that is not in the public interest, then mediation may not be appropriate. Mediation may not always be appropriate when a true zero-sum, winner-takes-all, situation exists. Also, mediation might not be desirable when the PUCSL is attempting to establish a precedent.

1. The Public Utilities Commission of Sri Lanka's Alternative Dispute Resolution (ADR) Program

The ADR program has several integral components. ADR is embedded in a number of working assumptions and policies. These include team building, acting as a learning organization, and functioning in a resource-constrained environment. The PUCSL can make a decision to support the use of ADR and mediation as preferred dispute resolution approaches. The key components supporting such a decision are detailed below.

A. Team Approach

Traditionally, regulatory commissions have been organized in a hierarchical fashion with each separate division or office focusing only on specific areas. While informal cooperation may occur between different divisions, specialization within specific areas is the norm. U.S. federal and many state regulatory commissions follow this model and have large regulatory staffs; several having staffs over a thousand. Sri Lanka has followed a different approach in establishing the Public Utilities Commission of Sri Lanka (PUCSL). It has organized itself around a teaming concept that innovatively acknowledges its relatively small staff size and has operationalized this approach through the *PUCSL Human Resources Plan*.

In an alternative dispute resolution (ADR) context, a team approach means there will not necessarily be a formal division dedicated exclusively to ADR. All PUCSL staff are to be trained in ADR in order that ADR can become one of several standard operating procedures that all staff have competence in. Just as all staff participate in performance evaluations, administrative proceedings, and investigations, ADR is viewed as a basic competency or skill regulatory staff must have. Otherwise, a special division might have to be established in order to discover and monitor all PUCSL activities relative to productive opportunities to use ADR. Under a team approach, many aspects of pending issues can be examined from a variety of perspectives. What the team approach does in practice is to do an informal feasibility assessment as to the costs and benefits of using ADR relative to a specific dispute.

As will be shown below, a team approach is an indispensable element in seeking solutions to a dispute. With teaming as a goal, the PUCSL has taken steps to provide ADR training for all staff and to establish an understanding about when ADR may be used to promote a better regulatory outcome. This *Alternative Dispute Resolution Manual* is intended to be both a resource and a guide for the PUCSL staff.

B. Learning Organization

The PUCSL has made a commitment to be a learning organization. The seminal text, *The Fifth Discipline* originally coined the term "learning organization." A learning organization is a place where people continually expand their capacity to create positive and forward-looking results. It is a place where new and expansive patterns of thinking are nurtured and where people are continually learning how to learn together.

The need for learning organizations is due to governments, utilities, and other business becoming more complex, dynamic, and integrated into global

communities. Excelling in such a dynamic and interdependent environment requires more understanding, knowledge, preparation, and agreement than one person's expertise and experience provides. The PUCSL's commitment to a teaming approach is one example of how a learning organization operates. Teaming explicitly recognizes that no one individual, professional discipline or PUCSL division is sufficient to resolve complex and dynamic problems.

ADR is a key component in the repertoire of tools needed to create and sustain a learning organization. The ADR approach may look to be exclusively process-centered, but it is actually a learning process where parties co-create a solution space that did not previously exist. A traditional regulatory agency can establish a solution to a dispute by regulatory fiat, as tempered by the courts. As long as a commission follows its established administrative procedures, the commissioners ultimately make a decision and issue a rule, finding, or order. The parties are not involved in the final decision, only in the activities leading up to the final decision.

In a learning organization, cumbersome and formalistic proceedings are to be avoided because they narrow the possible range of solutions. The PUCSL clearly retains the right to have administrative procedures and to make regulatory rulings. However, as a learning organization, the PUCSL has a policy to encourage the use of ADR and mediation as a way of optimizing the use of scarce resources and to attempt to have its staff and the parties in a dispute follow learning strategies before other more formal procedures are invoked.

ADR is appropriate in a learning organization as all parties have to "think outside the box" and learn about the merits of the other parties' position. "Win-win" type solutions are more prevalent in ADR situations. This is in contrast to a formal regulatory proceeding where each party may decide to be intransigent and hope for a "winner take all" outcome favorable to them. In these situations, subsequent litigation is a reasonable strategy for any losing party. ADR attempts to

minimize the attractiveness of a litigation strategy by encouraging the parties to learn enough about each other to permit a new consensual solution.

By establishing itself as a learning organization, PUCSL staff should almost regard it as routine to encourage parties to mediate their disputes. In a learning environment the “tried and true” is not necessarily the best public policy outcome. Learning organizations create environments and staff that recognize that rapid changes in shifting environments may be the only constant. ADR is a very effective way to resolve disputes in a forward-looking way.

The PUCSL staff will generally take the initiative in suggesting mediation or other ADR method as a means for resolving the dispute. While not absolutely required, a team approach is an effective way to initiate an ADR process. Ad hoc teams may form once a problem is initially recognized in order to assess the suitability of ADR versus other possible approaches. This *Manual* provides guidelines teams can use to determine the appropriateness and feasibility of ADR in a specific dispute.

C. Small Staff with Constrained Internal Resources

In addition to using teams that form and disband as problems are addressed, the PUCSL envisions ADR as an integral component of a cost effective strategy. Formal regulatory proceedings gain their credibility, in part, by expending a large part of a commission’s resources on procedural safeguards. Huge filings and counter filings by attorneys, engineers, and accountants are the norm. For a commission with a small staff and limited resources, an initial or exclusive reliance on such proceedings may not be a cost effective way to proceed.

ADR allows scarce PUCSL resources to be optimized in a number of ways. First, the team approach avoids the cost of having to have full time dedicated ADR staff or a division devoted exclusively to ADR. If all staff are trained to recognize when opportunities for ADR exist, then dedicated ADR staff are not required.

Second, outsourcing is a common strategy for commissions with resource constraints. The PUCSL should consider using, as appropriate, a variety of external mediation and ADR resources. In Colombo, the Sri Lankan Commercial Mediation Center is an existing resource that can be used. Other similar organizations may develop over time. By working in conjunction with the Commercial Mediation Center and the Sri Lanka Ministry of Justice, the PUCSL can to develop and maintain a list of mediation and ADR experts that are available for use in regulatory disputes. These mediation and ADR experts may be resident in Sri Lanka or be from other countries in the region.

D. Avoid Litigation / Adversarial Approaches, Which Are Resource Intensive

One of the primary goals at the PUCSL and for other entities that use ADR procedures to resolve disputes should be to avoid litigation and lengthy regulatory proceedings. Litigation and formal regulatory proceedings consume scarce resources that could be more productively.

In a mediation or ADR process, significant costs are avoided by the PUCSL and, hopefully, by the parties to the dispute. Regulatory costs are reduced if the parties agree to be involved in a successful ADR process. ADR does not necessarily require public notice, or expert witnesses, or even legal counsel. The parties can save monies because of the more flexible nature of ADR processes. Parties can choose to deal with easy issues first, whereas in conventional regulatory processes this may not be possible. Even the difficult issues can be broken apart to seek out compromise points. Consensus may occur when parties tradeoff and bargain: processes not normally a formal part of a conventional regulatory procedure. To the extent that the ADR is successful, significant costs may be avoided. Even when a successful ADR outcome is not realized, the preliminary work may eventually save money.

In a regulatory context¹ an adversarial process is very resource intensive, as each party generally feels it must question and refute any and all points made by the other party. Consensus is not an option considered in an adversarial process: it is instead viewed by the parties as “zero-sum”, winner-take-all. In a traditional adversarial procedure, parties shift the dispute resolution process to the PUCSL. ADR shifts the initial dispute resolution responsibility back to the parties. The ADR incentive for the parties is to bargain for “half-a-loaf”, rather than risk getting no bread at all if they came out on the wrong side of a commission decision.

In a rapidly transforming economy like Sri Lanka, a dispute delayed can translate into real losses to the economy. We have extensively analyzed regulatory approaches and conclude that ADR is a cost efficient and effective way to initially address disputes between parties in the important energy sector.

E. Need for Transparency – Natural Justice

The rules of natural justice are the minimum standards of fair decision-making imposed on persons or bodies acting in a judicial or quasi-judicial capacity. Where the relevant person or body is required to determine questions of law or fact in circumstances where its decisions will have a direct impact on the rights or legitimate expectations of the individuals concerned, there is an implied obligation to observe the principles of natural justice. The principles of natural justice have as their counterpart in American jurisprudence rules of procedural and substantive due process. In other words, the rule of natural justices is to guarantee procedural fairness.

There are two primary rules underlying the concept of natural justice. They are *audi alteram partem* and *nemo debet esse judex in propria sua causa*. The first

¹ The Public Utility Commission of Sri Lanka (PUCSL) will likely develop streamlined and cost effective regulatory proceedings that recognizes that even expedited regulatory proceedings may consume more resources than successful ADR proceedings.

primary rule translates as “hear the other side.” That means that a person or persons whose interest will be affected by a decision should be given a hearing (that is, should be provided an opportunity to be heard) before the decision is made. The second of the primary rules underlying the concept of natural justice translates as “no one shall be judged in his own case.” In other words, the decision maker must be unbiased.

While there are numerous tenets that comprise putting the concept of natural justice into operation, in a nutshell, natural justice is about the concept of fairness. Justice should be done and it should be seen to be done. These principles of natural justice clearly apply to all judicial and quasi-judicial proceedings of an administrative agency. They also are best applied in legislative and quasi-legislative proceedings because the future rights and expectations of individuals are affected by prospective policy-making. It is therefore incumbent that any administrative procedures developed for the use of the Sri Lankan Public Utilities Commission provide for a process that provides for natural justice in as transparent a process as is possible. This manual is written to achieve that purpose, to the maximum extent feasible.

[Note: items f, g, h and i are written assuming that ADR policies are officially established. The ADR Manual can initially be published without the declarative tone currently contained in the sections, or as statements of intentions, or the sections can be temporarily deleted and inserted in the ADR Manual once ADR has actually been established. Items f, g, h and i are important benchmarks for staff and other stakeholders when they assess undertaking ADR. It will make a significant difference to all parties whether ADR is simply preferred or is made an official procedure.]

- F. Use of alternative dispute resolution and mediation techniques is part of the official procedures at the Public Utility Commission of Sri Lanka.

The PUCSL has established a requirement that all parties regulated by or licensed by the PUCSL must make a good faith effort at mediation prior to using arbitration or litigation in any dispute. Mediation is specifically authorized in Section 17(i) of the Public Utility Commission of Sri Lanka Act and in Sections 18(a) and (b) as a means of dispute resolution, the PUCSL has established a policy that includes ADR techniques as acceptable mediation approaches.

The PUCSL has worked with the Ministry of Justice and the Commercial Mediation Centre of Sri Lanka to develop mediation procedures appropriate for utility sector issues. The ADR Procedural Manual contains elements of mediation and other ADR procedures that are appropriate for the utility sector. Consumer groups or stakeholders without adequate resources should especially benefit from having this ADR Manual as a resource.

The PUCSL has made its ADR and mediation policy known to all PUCSL commissioners and staff, as well as to all relevant stakeholders. Many stakeholders have participated in establishing the ADR policy. The PUCSL has offered mediation and ADR training to all interested stakeholders and has made this ADR Manual available upon demand and prospectively to all interested stakeholders.

- G. The PUCSL has established a two-step ADR process for the resolution of regulatory disputes between parties

The PUCSL has included in all applicable license agreements a statement that establishes a two-step ADR process. This process requires that notification must be made to the PUCSL of a dispute before any litigation, arbitration, mediation occurs, or any regulatory proceeding is initiated. The license provision also states that, subsequent to PUCSL notification, a good faith effort at mediation or

arbitration will be undertaken under the auspices of the PUCSL. The licensee provision notes that if for any reason litigation or arbitration occurs prior to mediation, the licensee will make every effort to suspend litigation or arbitration until a good faith effort at arbitration is made. As a part of its ADR framework, the PUCSL reserves the right to invoke applicable regulatory procedures if the ADR fails to produce a productive outcome.

This policy establishes a two-tiered approach. It first informs all parties of the PUCSL's expectation that mediation or ADR be tried first. It will also inform the PUCSL early on that a dispute exists. This may help the PUCSL in identifying impartial mediators and technical experts. This step allows, at the discretion of the PUCSL, that arbitration may be employed. Second, it increases the desirability of ADR as the parties know that if ADR fails, then the PUCSL will impose a regulatory solution.

H. The PUCSL has established a list of mediators

The PUCSL has provided training in utility regulation to prospective certified mediators.

This training has been provided in the belief that a mediator can do a better job if he or she knows the significant regulatory concerns connected with issues such as alternative pricing approaches, interconnection agreements, and billing methods. If the parties to a dispute agree, PUCSL staff may function as technical advisors to the mediator.

I. The PUCSL has established a conflict of interest standard that must be adhered to by any mediator it employs.

The standard used for PUCSL commissioners for conflict of interest shall also be in effect for mediators authorized by the PUCSL.

2. Enabling Statutes Allow for and Encourage the Use of Alternative Dispute Resolution and Alternative Regulatory Practices

Sri Lanka is ahead of most countries by having legislation in place that encourages the use of mediation by administrative agencies. Generally, alternative dispute resolution techniques such as mediation evolve after regulators, the regulated (in this case the utilities), and consumers have already experienced increased costs and delays that can be associated with more traditional regulatory approaches. Without the enabling legislation, the Public Utilities Commission of Sri Lanka might have had to establish a regulatory proceeding to determine whether alternative regulatory procedures and alternative dispute resolution would be permitted by Sri Lanka law and administrative practices. However, the explicit endorsement of alternative dispute resolution and alternative regulatory practices in Sri Lankan law clearly permits the Commission to support these procedures and to require that they at least be attempted before resorting to other procedures. The sections in Sri Lankan law that permit and support these procedures are set out and briefly discussed below.

A. Section 17(i) of the Public Utilities Act

Section 17i of the Public Utilities Commission of Sri Lanka Act, No. 35 of 2002, states that subject to the provisions of this Act, the Commission shall, among other things, determine by mediation disputes arising in any public utilities industry. While the language in this section appears to require that every dispute be resolved by means of mediation, as discussed later in this manual, reaching a resolution in a mediation process is voluntary. Therefore, a better reading of the statute would be that the Commission shall attempt to resolve by means of mediation any dispute arising in any public utilities industry. The legal draftsman at the Department of Justice agreed that this would be a reasonable interpretation of this statutory provision. Hence, there is a strong endorsement to attempt mediation first in any dispute arising in the industry.

B. Section 18 of the Public Utilities Act

Section 18 of the PUC Act permits the Commission, at its own discretion, in discharging its functions under this or any other industry Act, and where it deems it to be in the public interest, to hold a public hearing in order to investigate and determine any matter. The public hearing is to be held in any manner not inconsistent with the principles of natural justice. Therefore, to the extent that alternative dispute resolution and alternative procedures can be crafted to be consistent (or at least not inconsistent) with the principles of natural justices, such procedures should be permissible for use by the Commission.

C. Section 38 (1) (a), (b), (2) , (3) of the Electricity Reform Act

Section 38 (1) (a) of the Electricity Reform Act, No. 28 of 2002 provides that disputes arising in connection with the supply or use of electricity shall be referred to the Commission by any party to the dispute listed in (a) or (b). The Commission is to mediate (and attempt) to resolve any disputes between a licensee and a tariff customer as provided for in (a), which are mainly interconnection and metering disputes. Any other dispute, other than those listed in (a), between a licensee and either a tariff customer, another licensee, or any other affected party is also to be referred to the Commission if the parties have not been able to resolve the dispute through any dispute resolution procedure prescribed by the Commission, despite the licensee using its best efforts to resolve the dispute. In this latter situation, the Commission will attempt to mediate and resolve the dispute unless the Commission decides it is more appropriate for the dispute to be determined either by court or arbitration. Section 38 (3) states that the practice and procedure that the Commission follows in the resolution of any dispute under Section 38 shall be set out by rules made under the Public Utilities Commission of Sri Lanka Act. This manual is meant to support such rules.

D. The Arbitration Act of 1995

The Arbitration Act of 1995 provides that an arbitration agreement may be in the form of an arbitration clause in a contract or in the form of a separate agreement. Unless the matter in respect to which the arbitration agreement is entered into is contrary to public policy or is not capable of determination by arbitration, any dispute in an arbitration agreement may be determined by arbitration. Recently, arbitration has reportedly fallen into some disfavor in Sri Lanka because of the expense and delay that it entails. Nevertheless, the Commission might require arbitration clauses in license agreements to help resolve certain types of disputes where mediation is unlikely to succeed.

E. The Mediation (Special Categories of Disputes) Act

The Mediation (Special Categories Act of Disputes) Act of 2003 was enacted during the writing of this manual. The act allows the Minister to specify areas (referred to as Special Mediation Board areas) within which settlement of a dispute will be carried out under this Act. The Minister will also prescribe the qualifications with regard to expertise required of prospective mediators. Different qualifications may be prescribed for different categories of disputes. The Mediation Boards Commission will appoint at least twelve qualified individuals to a panel of mediators with respect to each special mediation board area. Before selecting otherwise qualified persons to serve on a panel, the Mediation Boards Commission will send persons possessing such qualifications as prescribed by the Minister to a preliminary training course in mediation skills and techniques. The trained mediators appointed to the panel would over time enhance their existing expertise in the special area. The Commission might find it desirable to seek to have certain specific categories of public utility disputes become a special category area.

ALTERNATIVE DISPUTE RESOLUTION

1. The Twofold Purpose of Using Alternative Dispute Resolution

The purposes of using alternative dispute resolution are twofold. First, alternative dispute resolution can be used to resolve disputes that actually exist. The second purpose is one that is less obvious. Alternative dispute resolution techniques can be used to avoid disputes from arising initially. The alternative regulatory proceedings, discussed later, can help to design regulatory processes in a manner in which disputes are less likely to arise, because all parties already buy-in.

A. The Use of Alternative Dispute Resolution To Resolve Disputes

Disputes will arise in the regulation of public utilities and public utility services. Disputes can arise between a generator and the transmission system provider. They can arise between customers seeking service and the electricity provider. And, they most often arise between the electricity provider and customers who already receive electricity. In many cases, the latter are metering or billing disputes. The alternative dispute resolution techniques that are described later in this section -- including mediation, arbitration, final offer arbitration, mini-trial, early neutral evaluation, and fact finding -- can be used when appropriate to resolve these disputes.

However, some degree of discretion should be exercised in deciding upon the use of alternative dispute resolution. For example, the commission might find it desirable in some instances to try a case of first impression, that is, a case which will set precedent in the first instance. In such a case, regulators might wish to hear the case in a more traditional proceeding to fully air out the issues before the commission makes a precedent setting decision. Another instance when discretion might be useful is when the

commission becomes a party in the dispute. This can take place when the commission is acting to enforce a license provision. In such a situation, the commission must again consider whether the public interest is better served through the use of an alternative dispute resolution technique, or whether a more traditional adjudicatory approach is more desirable, particularly when established commission policy is being enforced.

B. The Holistic Use of Alternative Dispute Resolution in Alternative Regulatory Proceedings To Avoid Disputes

Many of the issues that will be facing the Public Utilities Commission of Sri Lanka will be prospective in nature. They will involve determining prospective issues. Alternative dispute resolution techniques that emphasize consensus-building among the parties can become the heart of alternative regulatory proceedings. The use of consensus-building in such alternative regulatory proceedings can help the commission determine prospective regulation that implements regulatory decisions in a manner in which the stakeholders, that is, the parties who will be affected directly or indirectly by the regulation buy-in to its determination. This leads to greater satisfaction in regulatory implementation. It also leads to fewer appeals and to greater compliance. Thus, if regulatory implementation of prospective policy determinations are done in a manner where there is stakeholder buy-in, future disputes and conflicts are minimized, if not avoided. Some of these alternative regulatory proceedings, which are described later, include negotiated cases, negotiated rulemaking, mediation followed by arbitration, mediation with an arbitrator's sealed envelope, collaboratives (either as joint problem-solving workshops or task forces), and technical conferences.

2. Advantages and Disadvantages

There are advantages and disadvantages to the increased use of alternative dispute resolution and alternative regulatory practices that incorporate alternative dispute resolution techniques. For the most part, if used carefully and thoughtfully, the advantages tend to outweigh the disadvantages in most circumstances.

A. Advantages

1. Less Resource Intensive

It has been argued that the use of alternative dispute resolution techniques and alternative regulatory procedures that incorporate those techniques is less resource intensive. This may or may not be the case. In some instances, using an alternative dispute resolution technique will allow the parties to quickly find the common ground necessary for a win-win resolution. In most of these cases, the use of alternative dispute resolution techniques saves resources. However, there are instances where the issues are complex with many stakeholders. In such circumstances, getting the stakeholders to recognize a set of win-win solutions might be difficult. It might actually require the same amount of resources as a traditional proceeding to produce a solution. Indeed, if the mediator or facilitator lacks special expertise in the subject matter being discussed, it might sometimes require more resources to reach a resolution. That is a reason why, particularly in more complex disputes, it is helpful to have a mediator or facilitator that is trained in the subject matter.

2. Cuts Off Litigation

Another advantage of alternative dispute resolution techniques and alternative regulatory procedures is that it cuts off litigation. This is often desirable for two major reasons. First, litigation is monetarily costly. A great deal of time goes into preparation of case, including time spent on motions, pleading, and discovery of facts. Much of the time spent on litigation centers around information gathering. To the extent that an alternative dispute resolution technique is used, stakeholders often find it to their advantage to voluntarily share information in order to inform and gain the trust of the other stakeholders. The second reason is that litigation usually undermines the relationships between the parties to the case. In many instances, the long term relationship between generator and transmission provider, or the relationship between electricity provider and customer is a long-term relationship that should be preserved as amicably as possible. Alternative dispute resolution techniques and their use in alternative regulatory procedures allow these relationships to be maintained. And, if used successfully, the relationships might even become stronger as there is a better understanding as to the real interests of the parties.

3. Makes Appeals Less Likely

To the extent that alternative dispute resolution techniques and their use in alternative regulatory procedures are not always less resource intensive in making determinations, that is, in reaching an initial decision, the use of these procedures makes appeals less likely. In the United States, the Philippines, and many other countries, the expenses and the time lost due to the appeal of regulatory decisions dwarf the time and expense of reaching the initial decision. Because alternative dispute resolution techniques and their use in alternative regulatory

practices results decisions that are based on principled negotiation, in that they meet the real interests of the parties, there tends to greater satisfaction in the result, which leads to fewer appeals. This leads to a substantial savings of resources for the commission.

4. Buy-In by the Stakeholders

Because alternative dispute resolution techniques seek out the real interests of the stakeholders in order to design solutions that meet the stakeholder's real interests, the stakeholders tend to buy-in to the result. Again, this leads to fewer appeals and also greater compliance when the result is a regulatory implementation of a prospective issue. Greater compliance leads to fewer resources needed for enforcement. The stakeholders tend to buy-in because they have voluntarily self-crafted a mutually acceptable solution to a dispute or have self-crafted a mutually acceptable approach for regulation.

5. More Efficient Solutions That Are Still Equitable

One goal of economic regulation is to attempt to achieve Paerto-Optimal results. Paerto- Optimality requires that no party is made worse off than their current circumstances and that there be a net gain for one or more of the parties. By seeking out win-win solutions, alternative regulatory procedures that use alternative dispute resolution techniques result in solutions that are Paerto-Optimal. No party is required to accept a solution that would leave him or her worse off than his or her current circumstance. And the parties have a mutual interest in seeking out solutions that produce the greatest mutual gain. Thus, use of these procedures produce a better economic regulatory result: more efficient solutions that are still equitable for all parties.

6. Win-Win-Win Solutions: All Stakeholders Win, While Solutions Are in the Public Interest

As discussed, the stakeholders that participate in a procedure using alternative dispute resolution techniques have every reason to design a solution that produces mutual gain. The involvement of the commission can assure that the public interest is also served by the solution. It is the role of the commission and its staff to make certain that all interests in a dispute are represented. Either there should be no unrepresented parties or a portion of the commission staff might need to act as an agent replacing the unrepresented party. Typically, the unrepresented party might be the residential customers and/or small commercial customers. Special efforts might be required to make certain that these parties are in some way represented so that solutions that would affect their interest also reflect their interest. When this is done, solutions tend to be win-win-win, with the final win being that the solution is in the public interest.

B. Disadvantage: Transparency May Be An Issue

A primary concern, though, about the use of alternative dispute resolution techniques is that they require that the information used in the process be kept confidential. Confidentiality is needed both for the sake of building trust between the parties, but also to permit the parties to deal with each other in candor and to reveal their true interests. While decisions reached using alternative dispute resolution techniques may be as transparent or more transparent than decisions reached through bureaucratic discretion, they tend to be less transparent than those reached by means of an adversarial process.

3. Description of Dispute Resolution Processes¹

This section introduces the wide range of dispute resolution techniques that are available as alternatives to litigation. The processes are described starting with the most informal, consensual approaches to settling disputes: negotiation and mediation. Second, there are several informational processes that can help narrow issues or positions and induce movement toward an agreement. Third, is a discussion of the more formal resolution processes that involve adjudication: arbitration and its variant final-offer arbitration. Fourth, hybrid processes that combine mediation and arbitration can be structured to obtain some of the benefits of both procedures.

A. Consensual Processes

1. Negotiation

Negotiation is the fundamental process for resolving disputes and the foundation for dispute resolution techniques other than the adjudicatory methods – litigation and arbitration – in which a decision-maker imposes a resolution on the parties. Principled negotiation, an approach particularly useful in mediation, is described below in section G. 4: “How To Do It – For Mediators.”

2. Mediation

Mediation is an informal process in which a mediator helps parties to identify their concerns and develop proposals for a mutually acceptable agreement. The informality means that parties save time and money if they can resolve their dispute in mediation rather than litigation. The control that the parties maintain over the process means

² Stephen B. Goldberg, Frank E.A. Sander, & Nancy H. Rogers, *Dispute Resolution: Negotiation, Mediation, and Other Processes*, Aspen Law & Business (3rd ed. 1999) is the source for some of the ideas in this section.

that they have the potential to reach an agreement that maximizes their interests. In an ideal agreement, a party concedes on issues it regards as less important in exchange for gains on more important issues. Without assistance, such an agreement is rare because the parties rarely trust each other enough to share enough information to construct desirable trade-offs. A mediator can help facilitate that process.

One of the major advantages of mediation is that it is more consistent with an ongoing working relationship than adversarial methods of disputing. Often parties either wish to, or must, continue to deal with each other. In the commercial context, litigation or even arbitration may result in lost business opportunities. In the regulatory context, an agency, producers and consumers must continue to interact after a dispute. Mediation can help keep that interaction on productive ground. Mediation is also credited with actually improving relationships. By experiencing mediation and learning from the mediator's model, parties can improve their ability to resolve their problems on their own.

Another advantage of mediation is its flexibility. This is seen in the wide range of types of disputes that are successfully resolved in mediation – commercial and public as well as personal and neighborhood. It is also reflected in the adaptability of mediation to disputes with multiple parties or stakeholders. Most important of all, outcomes in mediation are not limited to legal remedies; the parties have the flexibility to include problems that would not be recognized in a court of law and to reach solutions that could not be ordered as legal remedies. For example, a business dispute need not be resolved with damages. The parties may decide to avoid a determination of fault and get on with business by restructuring their relationship or

creating a new contract with favorable concessions or terms that respond to the earlier problems.

Mediation is essentially a negotiation with assistance from a mediator. It is characterized by three essential features. First, a mediator is neutral and has no preference for any party or any particular settlement terms. Second, a mediator does not judge or decide a dispute and cannot impose an outcome on the parties. Third, the parties are in control of the result and do not reach a settlement unless each party consents to terms of an agreement.

A mediator can improve the dynamics of a negotiation in ways that help the parties overcome barriers that are impeding progress.

Depending on the circumstances, a mediator may perform many of the following functions in facilitating an agreement:

- Keep the dialog going,
- Encourage exchanges of information, clarify misconceptions, and help the parties understand each other's views,
- Provide a responsive ear so the parties can be confident they are understood,
- Prompt the parties to assess realistically their alternatives to settlement,
- Shift the emphasis from the past to desirable outcomes for the future,
- Stimulate the parties to think of imaginative solutions,
- In separate caucus sessions, learn about interests the parties are unwilling to disclose to each other, and
- Develop solutions that accommodate the important interests of all the parties.

A mediator's neutrality is central to his or her ability to generate the trust necessary to fulfill these functions. Although mediators have no authority to decide a matter, experience has confirmed that they can improve the success rate of unassisted negotiation. A more detailed

explanation of mediation techniques is provided in the section “How To Do It – For Mediators.”

The emphasis on party control of the mediation agenda and outcome makes mediation an inherently democratic process. It also has a number of practical advantages. One is that the discussion agenda can be expanded or contracted as is helpful to reach an agreement. And the topics need not be limited to legal issues but can include other types of concerns as well. Party participation also requires individuals to be accountable for designing solutions to problems, not just complaining about them. There is empirical support for the belief that direct participation helps parties feel the process is fair and fosters better compliance with the agreed-upon outcome.

Disputes come to mediation in many ways. Parties to a contract can include a term providing that disputes arising out of the contract will be mediated before any legal action is taken. Parties without such a contract term may also agree to mediate after a dispute arises between them. In some systems, courts and agencies refer disputes to mediation and try them only if mediation is not successful. Mediation that is mandatory for the parties raises questions about the effectiveness of a consensual process when the parties are required to participate. In response, commentators draw a distinction between compulsion *into* mediation and compulsion *in* mediation. Research has shown that requiring mediation can actually be an effective means of increasing its voluntary use because parties and, perhaps more importantly, their lawyers become familiar with the advantages of the process.

The typical private mediation is confidential. This gives parties who wish to avoid the publicity of litigation an incentive to mediate. It also

encourages the parties to be candid during the mediation because their comments will go no further than the room. Confidentiality may not always be appropriate, however, in a dispute with a public body. An agency with an obligation to protect the public interest has a need for transparency and legitimacy, considerations that are not usually important in resolving a private dispute. Open meeting laws and “sunshine” provisions may also limit the extent to which a public body can meet in private and maintain confidentiality. Also, if the mediation is relevant to a forward-looking regulation or decision, it is usually important to hear from many stakeholders and it may be advantageous to conduct this process in the public eye.

Mediation can be a very effective means of resolving conflicts. In some court systems approximately 70% of the cases selected and referred to mediation are settled. It is not a panacea, however, and parties may be unable to settle for many reasons. A lack of important information or differing views about the facts of the case or the applicable law can be important barriers to reaching an agreement. When the parties remain far apart because of these factors, it may be useful to use one of the informational processes described in the next section, either before an attempt to mediate or following an unsuccessful mediation.

B. Informational Processes

All these processes provide the parties with a new perspective on their dispute. Some mimic adjudicatory processes in a more informal setting, others are strictly informational. An outsider’s view can help the parties better predict the outcome in litigation or can challenge their assumptions about the case. The goal in a settlement process is to generate movement to reduce the distance between their positions.

1. Neutral Evaluation

In neutral evaluation, the case is assessed for both parties by an experienced neutral following a brief informal presentation by the attorneys. In court programs, the neutral is typically an attorney with expertise litigating in the subject area and the evaluation is conducted early in the case. But depending on the type of evaluation that would be helpful to the parties, they could use a technical expert or a legal expert. The evaluation could focus on factual or legal issues and take place at any stage in a case.

The parties gain the outside perspective of an expert, which can help them see their dispute in a different light and inform their prediction of the outcome that would be imposed if they are unable to reach a settlement. The expert can also help the parties and their experts see commonalities in their positions and thus narrow the issues.

2. Informational Arbitration

Unlike the process usually understood as arbitration, which is binding (see below), this form of arbitration is advisory only. In the court context it is called court-annexed or court-ordered arbitration and may be required by court rule or order. There are many variations of this procedure, but it typically involves a simplified hearing before a court-approved arbitrator who is a lawyer or retired judge. The arbitrator issues an award which the parties can either accept as the outcome, or reject and proceed to trial. Many parties who reject the award do not, however, reach trial. They often find that this arbitration process can inform their bargaining as they work toward settlement.

Through this process, the parties gain a better perspective on how a decision-maker will view the case. If there are legal issues, the award

provides some indication of how they may be decided. By seeing the other side's presentation, the parties can better appreciate the strengths and weaknesses of the case. The process provides a feeling of a "day in court" and focuses attention on the dispute and the desirability of settling it.

3. Mini-trial

Mini-trials are most often used in business disputes and are particularly helpful in settling scientific or technical issues that a judge or jury would have difficulty understanding. Summary presentations are made by attorneys for each party to a panel composed of a neutral advisor and high-level executives from each company. At the close of the presentations, the executives attempt to negotiate a settlement of the dispute with the help of the advisor. If they are unable to reach an agreement, they may call on the advisor to predict what the outcome will be if the matter is litigated.

The theory of the mini-trial is that the executives receive a concentrated education about the dispute. They are then in a position to place it in the larger context of their company's situation and goals. They often conclude that it would be better to settle than to proceed with the expense and distraction of litigation. The mini-trial also creates an event that concentrates attention on the problem. The time and energy the executives devote to the process can generate a momentum toward settlement.

The ideal neutral advisor in a mini-trial is someone who can act as a mediator, but who also has enough expertise to predict the outcome in litigation. The presentations by the attorneys may be informal but should be concise. They can include expert witnesses and exhibits if appropriate, and they are not limited to evidence that would be

admissible in court. Instead of cross-examination by the opposing attorney, the panel asks questions. The purpose is to reveal the strengths and weaknesses of each side to the executives and to help them see the dispute through the eyes of a judge or jury. The executives should be as high-level as possible and need to have full settlement authority. It is preferable to select people who have not had direct involvement in the dispute, so that they do not have a personal investment in a particular outcome.

4. Technical Conference

A technical conference is useful when the dispute has technical aspects and the parties have experts advising them on those issues. It can be a step in a settlement process or a way of smoothing the adjudication or rulemaking process at an agency.

The parties or attorneys and their experts gather, with agency personnel if appropriate, to discuss the technical issues. In one format, experts for both sides make a joint presentation on basic technical background to the agency, which requires them to cooperate and to identify points of consensus. Experts for each side present their perspective, ask each other questions, and comment on others' views.

This process gives an agency a preview of the parties' positions and allows the agency to interact with the technical experts in an informal setting. For the parties, it is an education process about the basis for the other side's position. In the context of settlement, a technical conference may reveal possibilities that have not yet been considered and, at the very least, it provides a technical perspective that might not otherwise influence the process.

C. Adjudicatory Processes

1. Arbitration

Arbitration has been an alternative to litigation for hundreds of years. English merchants used it as early as the thirteenth century to resolve disputes according to their own law (the law merchant) rather than the public law of that time. Because it is a private dispute resolution method agreed between the parties, arbitration procedures tend to vary in their specifics depending on the context of the dispute. These contexts range widely: labor, commercial, construction, family, medical malpractice, consumer, and international trade are but a few examples of the types of disputes commonly determined using arbitration. Arbitration also varies by the specific desires of the parties: their agreement is the source of authority for the process so long as it is within the scope of domestic legislation. Still, it is possible to generalize. The essential aspect of private arbitration is that it is voluntary, binding and final.

Arbitration is voluntary in that the parties agree, often in a contract that establishes their relationship, that disputes will be resolved using arbitration. They also agree on procedures. Arbitration typically duplicates the essential elements of court adjudication: the parties present proofs and arguments to a neutral third party, or a panel of neutrals, with the power to issue a binding decision. The hearing is usually more informal than in court, without strict application of the rules of evidence, but witnesses and exhibits may be presented to the arbitrator or arbitrators. In international commercial arbitration, arbitrators provide a reasoned decision akin to a court opinion, although in many other types of arbitration the award contains only the result without explanation. The Sri Lanka Arbitration Act of 1995 establishes default rules on these and other details, but in general

provides that the parties' agreement will control the procedures they use.

The decision in arbitration is binding. A party to a written arbitration agreement may apply for court enforcement of an arbitral award within one year following the issuance of the award plus fourteen days for requests for corrections. Under the Arbitration Act, the High Court is to enforce the award except in very narrow circumstances. For example, an award may be set aside if the agreement to arbitrate was invalid, the party did not have adequate notice of the arbitral proceedings, the award went beyond the scope of the dispute submitted to arbitration or the High Court finds that the award conflicts with the public policy of Sri Lanka.

Finally, the arbitral award is final. Unlike an appeal, the content of the decision is not normally reviewed by the High Court on an application to enforce or set aside the award. As discussed above, the possibilities for setting aside an award are extremely limited. Furthermore, High Court orders on an arbitration are subject to appeal only by leave of the Supreme Court and only on questions of law. And even this limited ability to appeal may be curtailed by the parties if they enter into an exclusion agreement that excludes any right to appeal an award.

There are many advantages of arbitration over litigation – at least in theory. An important one is the expertise of the decision-maker. The parties select the arbitrator, so they can choose an expert in the area, unlike the generalist judge who would be assigned to the case by the judge. The PUCSL should tread carefully here, however, for parties with disputes with the PUCSL might not accept a PUCSL staff member as a neutral decision-maker. If the parties wish their dispute

to be resolved out of the public eye, arbitration is far preferable to litigation. That said, the legal obligation of the PUCSL to protect the public interest may counsel for open proceedings in many cases. The finality of the decision is another advantage. Courts will usually respect an arbitral decision, which discourages appeals and avoids the cost and time they often require. Along with the infrequency of appeal, the relative informality of arbitral proceedings is often cited as a reason why arbitration is regarded as a low cost, speedy alternative to litigation.

Unfortunately, these theoretical advantages are not always realized. Arbitration is not always as low cost and speedy as desired. Many attorneys tend to copy familiar court procedures, which can undermine the potential savings in cost and time that could result from simpler procedures. Finality can be a disadvantage when there is no means to appeal an erroneous decision. Moreover, in comparison with other dispute resolution procedures such as mediation, the advantages of arbitration are limited in that, like litigation, the neutral determines the outcome. In consensual processes, finality is not assured but there are benefits that can result from a compromise reached by mutual agreement of the parties. When they maintain control of the outcome, the parties can carefully tailor an agreement that trades issues each side values less in return for those they value more. This benefit is lost in arbitration, as is any tendency to comply voluntarily with a mutually agreed outcome.

2. Final-Offer Arbitration

In final-offer arbitration, the arbitrator has only two choices for the outcome: the final offers made by each of the parties. This form of arbitration was developed for disputes about the terms of a new

contract, whereas conventional arbitration is typically applied to disputes about the interpretation of an existing contract. Final-offer arbitration avoids the risk that the parties will not reach an agreement in a consensual process such as mediation and is especially useful when there must be a resolution because the absence of a contract would be extremely undesirable. For example, in an interconnection dispute payment terms must be set or the interconnection cannot proceed.

Final-offer arbitration is also designed to encourage parties to settle. There is a tendency in conventional arbitration for the parties to avoid any compromise of their positions. They fear that an arbitrator will split the difference between the parties' positions and so they will not do as well if they have made concessions and moved off their initial positions. Thus the use of conventional arbitration can cause the parties to maintain extreme positions and discourage them from reaching a negotiated settlement. Final-offer arbitration is an effective way to reduce this chilling effect on negotiation because the arbitrator may not compromise. Instead, the arbitrator must choose the final offer of one of the parties. The parties assume that the arbitrator will choose the more reasonable of the offers, so each party has an incentive to make their offer more reasonable than their opponent's offer. This tends to narrow the distance between the parties' positions and increase the likelihood that they can reach an agreement in the negotiating process without the need to proceed to arbitration.

D. Hybrid Processes

1. Mediation-Arbitration (Med-Arb)

This process combines mediation and arbitration. It allows the parties to reach a mutually-acceptable agreement in mediation if they are able,

but ensures that there will be a resolution even if they cannot reach one in mediation. If the mediation fails, then the neutral serves as an arbitrator and issues a binding, final decision. The primary advantage of combining the two processes is one of efficiency: the same neutral functions as both a mediator and an arbitrator, which reduces the time and money that would be spent to educate a new neutral about the dispute.

There are, however, disadvantages to this combination. First, because the parties know that the mediator has the power to decide the dispute, they are less likely to share information on their priorities and limits. They fear that if it is necessary for the mediator to become an arbitrator this information may hurt them in the final decision. For example, a party may be unwilling to reveal that they would settle for an amount lower than their demand because then the arbitrator would be likely to limit an award to that lower amount. This can handicap the mediator because she must operate with limited information and that makes it less likely that the parties will reach an agreement in mediation.

Second, the dynamics of mediation can be affected by the knowledge that arbitration may follow. In pure mediation, the parties focus primarily on developing their own resolution of the dispute. In med-arb, the parties tend instead to try to persuade the neutral of the merits of their positions. The process may end up with an agreement, but often it may be accepted by the parties (or one of them) only because they believe that if they do not accept it, the outcome will be imposed on them in arbitration.

These disadvantages can be reduced by modifying the process, but modifications may also increase the cost of the process. In one

modification, the neutral is empowered to act only as an advisory arbitrator. If mediation is unsuccessful, he or she predicts the likely outcome in arbitration, but does not actually arbitrate. This prediction can stimulate the parties to reach an agreement and has been very successful in the labor context. However, if the parties are not able to agree, they must incur the expense of bringing in a new neutral to arbitrate.

2. Arbitration-Mediation (Arb-Med)

Arb-Med, a process that switches the order of the resolution techniques, is another way to avoid the disadvantages of Med-Arb. Here the neutral first hears the case as an arbitrator. His decision is placed in a sealed envelope and set aside. Then he tries to mediate the case. If the parties reach an agreement, the envelope is never opened. If mediation is unsuccessful, however, then the envelope is opened and the arbitral decision is binding.

When the processes are combined in this order, the mediation is not affected by the specter of upcoming arbitration, but a resolution is assured. However, the parties must incur the cost of the presentation of evidence to the arbitrator, which they can avoid in med-arb if they are successful in the first stage of the process. In addition, the more adversarial arbitration process may have the effect of hardening the parties' positions and make mediation more difficult.

THE USE OF ADR IN PUBLIC UTILITY COMMISSION PROCEEDINGS

1. Guidance on Selecting a Dispute Resolution Process or Processes³

A. General Guidance

In some circumstances, settlement is not in the public interest. A settled case in this instance does not establish precedent to guide future behavior or develop a line of law. If these are important considerations, litigation that culminates in a judicial decision may be the best process choice. Occasionally, settlement may not be consistent with a party's interest. If a party wants to deter suits against it, it may seek to send a message that it will defend itself firmly and so the costs of suing it will consequently be high. But settlement is usually in a party's interest if acceptable terms can be reached.

A process decision requires information about the dispute and the parties. In many courts the parties are invited to choose their own process. If they are unable, an intake officer or a judge may hold a conference with the attorneys and designate a dispute resolution process.

One general planning principle is to start with informal, low-cost processes and resort to higher cost, more complicated processes only as they become necessary. The lowest cost processes are typically mediation and neutral evaluation. Because mediation is useful in overcoming impediments to settlement in many different situations, some commentators suggest a presumption that it should be used first unless the circumstances strongly indicate otherwise. If mediation is unsuccessful, then the mediator may recommend, or the parties may select, an additional

³ The ideas in this section build on Frank E.A. Sander & Stephen Goldberg, *Fitting the Forum to the Fuss: A User-Friendly Guide to Selecting an ADR Procedure*, 10 *Negotiation Journal* 49 (1994).

process that responds to the reasons for the impasse. This may be followed by a return to mediation if appropriate.

There is another approach that is useful if certain barriers to settlement can be identified at the outset. For example, it may be apparent that the parties need an outside appraisal of the dispute or the opportunity to exchange information before a settlement is possible. In this situation it may be preferable to start with one of the processes that provides a nonbinding evaluation or generates information, such as a neutral evaluation, informational (advisory) arbitration, a mini-trial or technical conference. These processes may produce a settlement directly or the parties can move to mediation after they have the benefits of the initial procedure.

Mediation can succeed in many situations, as described below. The conventional wisdom is that mediation is ideal when the parties share some form of relationship and will need to work together in the future. This relationship need not be personal, businesses have relationships as well. Mediation is also seen as an excellent means to bring out creative solutions, resulting in an agreement that responds to the interests of both parties. But it is a mistake to confine mediation to parties and disputes with these characteristics. Mediation is useful even when a dispute is limited to how much money will be paid and the parties will have no contact in the future. A mediator's ability to help the parties evaluate their case and realize that the alternative of litigation is less desirable than a settlement can be instrumental in settling even cases that do not fit the classic mediation profile.

B. Specific problems characterizing a dispute or the parties

It is possible to identify a number of recurring problems that block settlement and the processes that may be useful in these situations. One of the most common problems in reaching an agreement is poor

communication. This may be a product of a poor relationship, long-standing antagonism, or simple distrust. Mediation is very helpful in this situation because a skilled mediator can control the communication between the parties, using caucuses if necessary. When proposals come through a mediator, they may receive more consideration than when they come directly from an opposing party. Processes such as neutral evaluation, a mini-trial, or informational arbitration, in which the parties can address themselves to a neutral third party rather than each other, may also be useful when there are communication difficulties. But the primary role of the neutral in these processes is typically to evaluate rather than facilitate and so they are not likely to be as effective in overcoming poor communication as mediation.

The need to express emotions is another blocking factor. Sometimes parties need to express their reactions to each other before they can think about future possibilities. This need to “vent” is not confined to family and neighborhood disputes. Companies with business disputes are made up of people who have strong feelings as well. Mediation is the preferred technique in this situation because the disputants themselves are encouraged to participate and parties may be able to air their feelings when a neutral creates a sense of safety and control. In contrast, processes in which the focus is on evidence and attorneys take the lead role are less conducive to expressing emotions.

Settlements are sometimes difficult because the parties hold differing views of the facts. A skilled mediator may be able to get them to set this aside and develop a solution that is independent of the factual dispute. But if a determination is essential, a court or arbitrator may be necessary. If so, it may be possible to submit only a narrow factual dispute to adjudication rather than the entire case. Or a non-binding substitute may be sufficient. An assessment of the conflicting versions of the facts

through informational arbitration, a neutral evaluation, or a mini-trial may help overcome this impediment.

It is also problematic when disputants agree on the facts, but not their legal implications. Each believes that they are assured of a victory in court. Again, there is a potential for a skilled mediator to guide the parties toward a settlement that does not depend on determining who would prevail. If a legal question is of central importance, however, the evaluation that takes place in informational arbitration, a mini-trial, or neutral evaluation may provide a baseline for negotiation. If a determination is unavoidable, arbitration may prove preferable to full-fledged litigation.

Other problems occur when a negotiator represents a group or institution and is under pressure from his constituency. Such pressures can occur when different factions within the group have different views of acceptable outcomes. Mediation is useful here because it is adaptable to multiple parties and a mediator may be able to bring the factions to the table. Constituencies are the source of another problem when a negotiator has committed to deliver a particular result to the group and his future power or employment is at stake. In mediation, the representative may be able to blame a less satisfactory result on pressure from the mediator. Alternatively, a nonbinding evaluative process may be ideal in either of these situations. The outside neutral's evaluation can convince a group that their position is not likely to prevail in litigation.

Another difficult situation occurs when the negotiator in dispute resolution, perhaps the attorney, perhaps the person representing the party, has a vested interest in a certain outcome. An effective way to deal with this barrier to settlement is to involve higher-ups from the organization. Mediation encourages the direct participation of the parties and can be

structured to involve people with a broad perspective if this problem is apparent. A mini-trial is also effective here, because the process is aimed at high-level decision-makers. The other informational procedures can also be tailored to bring such people into the process.

Technical issues pose special problems in dispute resolution. Alternative processes have an advantage here because the decision-maker or evaluator can be selected for the circumstances, unlike a judge who is assigned to cases without input from the parties. In order to be credible, an evaluative process may require a neutral who is an expert, or at least conversant in the area, so that he can provide an assessment that will carry legitimacy with the parties. Technical issues may also be central to constructing creative options for a resolution. In this situation a technical conference can bring experts into the discussion in a productive manner. This can stimulate potential solutions that respond to the technical difficulties. A mini-trial is also ideal because technical experts can participate in the summary presentation of the case and the high-level officials will be able to put this information in context.

2. Settlements in Zero-Sum Proceedings

There is one situation where the use of alternative dispute resolution techniques will not necessarily produce results better than a traditional adjudicatory process. That situation is a proceeding where the outcomes are that of a zero-sum game. Indeed, in such a situation, an alternative dispute resolution technique or proceedings using the technique might actually take more time and be more costly than an adjudicatory proceeding, without producing a better result. However, there are relatively few true zero-sum proceedings.

There are certain conditions that must be met for a proceeding to be a true zero-sum proceeding. First, the conflict must be based wholly on retrospective facts. As soon as prospective issues are introduced into the dispute, then uncertainty because of the uncertainty of the future is introduced. Different parties place different values on future uncertainty, as well as on the on future outcomes. Discovering or introducing prospective issues in a proceeding nearly always transforms it into a non-zero-sum proceeding.

In addition to being a dispute that is based on a retrospective dispute, a zero-sum proceeding is one where one party's gain perfectly matches another party's loss. Typically, zero-sum proceedings deal with loss or compensation. Ratemaking proceedings are sometimes viewed as zero sum proceedings, and, indeed, the revenue requirement portion of the ratemaking proceeding is a zero-sum game between the utility and the ratepayers (as a whole). Once the revenue requirement is set, then the cost allocation phase of ratemaking tends to be a zero-sum proceeding between the different classes of customers. Costs that are not allocated to one customer group are allocated to another. However, because rates are being set for the future, the rate design phase of a rate case proceeding is not a zero-sum proceeding. This is particularly true as different parties place different values on electricity and prefer different degrees of quality of electricity. They have different tolerances to interruption and outage. They also have different demand elasticity. Therefore, at the rate design phase of a rate case, ratemaking ceases to be a zero-sum proceeding. Imaginative use of alternative dispute resolution techniques in alternative regulatory proceedings can take advantage of the rate design phase of ratemaking to try to make ratemaking a candidate proceeding for the use of alternative dispute resolution. The point is that alternative dispute resolution techniques can be widely used in commission proceedings, particularly if zero-sum issues are tied together with non-zero-sum issues.

3. Prospective Issues and Other Non-Zero-Sum Proceedings

As just noted, many conflicts which at first glance might seem to be zero-sum in nature have elements contained within them that can make them non-zero-sum in nature.

One category of conflicts that is almost always non-zero-sum are conflicts that are associated with the determination of prospective issues. Most prospective issues deal with the future and that alone is enough to make them non-zero-sum, in most cases. In addition, most prospective regulatory issues are polycentric (literally many-centered) problems. A polycentric problem is characterized by the large number of potential results and by the fact that many interest groups will be affected by any one of the solutions adopted. Thus each potential solution has complex and unique ramifications. A polycentric problem is like a spider web, where the pull on one strand will distribute tensions in a complicated pattern throughout the web as a whole, with each crossing of strands as a distinct center for distributing tension (or making trade-offs). Thus, polycentric problems can be thought of as being essentially socio-economic since they involve trade-offs affecting the allocation of scarce resources and trade-offs of social values. Because polycentric problems often require prediction and/or planning to be solved, the decision-making process should allow for scientists and experts with the appropriate background to provide information about forecasts about future events (including their uncertainty) and about the relevant multi-variable trade-offs. Alternative regulatory procedures that use consensus-building approaches are particularly well suited for resolving these types of conflicts, particularly where the polycentric nature of the prospective regulatory issue creates indivisible, synergistic relationships among the factors, which makes the problem resist division into discrete subproblems.

4. Developed Alternative Regulatory Proceedings

The following are developed alternative regulatory proceedings that use one or more aspects of alternative dispute resolution techniques to resolve issues: negotiated cases, negotiated rulemaking, mediation with a bite, mediation (with a sealed arbitrator's decision), joint problem-solving workshops (sometimes called collaboratives), task forces (sometimes also called collaboratives), technical conferences, and arbitration. Each is described in turn.

A. Negotiated Cases by Mediation

As noted earlier, most rate cases, consumer complaint cases, or other disputes that come before the commission will not be a pure zero-sum dispute. Most will have a non-zero-sum aspect to them. In a negotiated case, there are two approaches. One approach (used by the Federal Energy Regulatory Commission, the New York Public Service Commission, and many others) has a separate settlement judge assigned to the case. The settlement judge is a trained mediator. He or she then conducts mediation, engaging the parties, getting them to reveal, through principled negotiations, their real interests (as opposed to their legal positions). The settlement judge then encourages the parties to reach a settlement. The use of a separate settlement judge favorably influences the procedure, because the settlement judge can maintain confidentiality of information and gain the trust of parties. If the parties fail to settle under this approach, then the case is assigned to a normal judge who runs the case proceeding.

The second approach is used at small commissions that are particularly strapped for resources. In this approach, there is no separate settlement judge. Rather the judge in the proceeding encourages settlement at an extended pre-hearing conference or conferences. The same judge hears

the case should the parties fail to settle. The disadvantage of this approach is the same as that for mediation-arbitration (med-arb). Parties might be reluctant to reveal information needed to reach settlement, because they are concerned that information that would be confidential in a negotiated context might be used in a hearing. That makes this approach less effective than one using a separate settlement judge.

B. Negotiated Rulemaking

Negotiated rulemaking is distinguished from the more traditional notice-and-comment rulemaking. In notice-and-comment rulemaking, the agency first issues a notice of a proposed rule. Then, during the comment period it collects comments from the individual parties, sometimes allowing a second comment period so that individual parties can comment on each other's comments. Then, the commission issues its final rules based on the comments in the record that it received. In effect, the commission talks to one party and then another and another, and then the commission issues a rule. In traditional notice-and-comment the interested parties do not sit down together and address issues together.

In a negotiated rulemaking, the parties do sit down together early in the process and attempt to address issues together. Before a notice of proposed rulemaking, with the text of the proposed rule is even issued, in a negotiated rulemaking, notice is given that a negotiated rulemaking on an issue or topic will be undertaken. At that point a skilled negotiator or facilitator leads the interested parties in a negotiation on what should be in the rulemaking. There are certain helpful guidelines to be followed. There should be the existence of countervailing power, that is, the various interests should have sufficient power so that no single party could achieve its will without dealing with the others. There should be a limited number of participants, not more than 15 or 20. It might be necessary for

parties to group themselves and select a representative on behalf of the group. Those who are chosen as representatives must have authority to speak on behalf of (and ultimately bind) the represented group. From this point on, the initial writing of the proposed rule is done through principled negotiations. If successful and a unanimous agreement is reached on the language of the rule, then a notice of proposed rulemaking is promulgated. At that time the normal notice-and-comment rulemaking procedure is followed, although the comment period might be at the legal minimum. After comments, the commission can issue a final rule.

C. Mediation With a Bite

In resolving some disputes, the commission might want to present the dispute to a mediator, who can then hear and act as a mediator. Should the parties fail, though, to reach a settlement, the mediator can then act as an arbitrator and decide the unsettled issues. This method was referred to earlier in the med-arb discussion. This method has the advantage that it gives the parties a chance to mediate and settle a dispute, but if they fail to do so, the dispute will be resolved. The principle disadvantage to this approach is that the parties might be reluctant to reveal information that would be confidential in a mediated proceeding, because, if they fail to settle, the mediator will take on the role of an arbitrator and will settle the case. An alternative form would be to refer unsettled matters to a separate arbitrator, while allowing the mediator to keep information confidential.

D. Mediation With A Sealed Arbitrator's Decision

This too is a form of med-arb. In this case, the commission would have the dispute presented before an arbitrator, who would issue a sealed decision. Then the parties would engage in principled negotiations before a mediator. The advantage is that the sealed decision acts as an unknown “Best Alternative to a Negotiated Agreement” (BATNA), increasing

uncertainty and pressuring the parties to settle. The disadvantage is that the parties might harden in their positions as a result of the presentation before the arbitrator.

E. Joint Problem-Solving Workshops (Collaboratives)

A joint problem-solving workshop is basically a process where one or more prospective regulatory issues are tackled by representatives of the interested parties. A joint problem-solving workshop is often used for integrated resource planning (integrating supply-side planning and demand-side planning) and forecasting. It can also be used for generation and/or transmission expansion planning. The key to making this procedure work is that the representatives of the interested parties should be technical people, who nevertheless have the authority to bind their organization or group. The process is a variation of principled negotiation, in that in dealing with the prospective regulatory issue, not only are the true interests of the parties being addressed, but technical problems and obstacles are being addressed. Joint problem-solving workshops often result in reports that the commission can provide notice of and then adopt as policy or rule.

F. Task Forces (Also Sometimes Called Collaboratives)

A task force is similar to a joint problem-solving workshop except that a task force deals with complex, polycentric issues with technical aspects. A task force usually has two or more joint problem-solving workshops underneath it working on distinct sub-issues, while the task force balances, at a higher level, the socio-economic trade-offs that are raised by the prospective regulatory issue. An example of a successful task force was the Electric Utility Industry Restructuring Task Force undertaken by the Governor and the Public Utility Commission of Pennsylvania.

G. Technical Conferences

A technical conference is a means of collecting information outside of the normal discovery process. It relies on give-and-take and consensus-building both to collect information and to narrow the issues that are in contention. The Federal Energy Regulatory Commission widely uses technical conferences as a means of fact finding. Here is how it works. The commission provides notice that it will have a technical conference on a topic and the commission raises a number of issues that it would like to see addressed. The commission then asks stakeholders (and other interested parties, including ones from academia) to volunteer to provide information. The commission can collect some of this information initially as paper (or electronic) filings. Then, the commission chooses a number of experts on the issue to attend and testify at the technical conference. (These experts testify either for free or they are compensated by a stakeholder.) The commission can then ask questions of the experts or have the experts on a panel where they discuss the issue among themselves. As an outcome, most technical conferences narrow the number of issues under contention as well as narrow the range of disagreement on those issues under dispute.

H. Arbitration and Final Offer Arbitration

Arbitration is considered to be an alternative dispute resolution technique even though it does not use principled negotiations. For arbitration to be effective, the parties must select a mutually acceptable arbitrator (or one that is not objectionable to either party). The dispute is presented to the arbitrator (often in a condensed hearing). And the arbitrator makes his or her decision on the dispute. If done properly, arbitration can resolve disputes quickly and at a low cost. It does not necessarily lead to great stakeholder satisfaction in the decisions and it can damage ongoing relationships between the parties as much as a trial does.

Final offer arbitration requires each party to a dispute to present their final (best) offer to the arbitrator. The arbitrator then hears the evidence and based on the evidence picks one of proffered offers as his or her decision. (Note that if the final best offers overlap, then there is clearly room for negotiation.)

5. Integrating Alternative Regulatory Practices with Alternative Dispute Resolution Techniques

The reason that the alternative regulatory practices and procedures are proposed above is that they have at their heart alternative dispute resolution techniques, such as mediation or facilitation. With the exception of arbitration, the alternative dispute resolution techniques are built around consensus-building, principled negotiations, and designing win-win settlement solutions. Therefore, the use of these alternative regulatory practices should be encouraged and used, but only as long as alternative dispute resolution remain at their core.

A. Development of a Settlement or Advisory Report for the Commission

Most of the alternative regulatory practices above should result in a settlement or advisory report to the commission. The commission should examine the report to make certain that the settlement or advice is consistent with the public interest. If it is consistent with (or at least not inconsistent with) the public interest, the commission would likely accept the report and take the necessarily legal steps to reach a decision or issue a rule or order. The commission should be careful not to micro-manage by looking for the ultimate optimal decision. Such an approach allows the perfect to destroy the good. Indeed, there are examples at state commissions where excessive commission rewriting of settlements caused stakeholders to abandon the use of alternative dispute resolution procedures entirely.

B. Dealing with the Problem of Partial Settlements

Ideally, every settlement deals with all the issues raised. In reality, many times the parties are able to settle on numerous issues, but not others. The problem of partial settlements can be handled by having the unresolved issues brought before the commission in either the traditional adjudicatory process or by notice-and-comment rulemaking. The procedure should be followed, only making allowances for the confidentiality of information that was revealed in the settlement.

C. Dealing with the Problem of Non-Unanimous Settlements

While ideally all settlements are unanimous, in reality there might be settlements submitted to the commission where one or two parties hold out and do not settle. (If a significant number of parties fail to settle, then the commission should reject the settlement.) In the case of a non-unanimous settlement, with one or two parties holding out, the commission can hold a hearing on whether the settlement is in the public interest. The settling parties should put on a direct case that the settlement is in the public interest. The objecting parties should be allowed to cross the settling parties and should also be allowed to propose a counter-solution. After hearing the evidence in such a focused, mini-hearing, the commission can decide whether the settlement is in the public interest or not.

DUE PROCESS AND NATURAL JUSTICE CONCERNS

For any alternative regulatory procedure to be acceptable, it must meet the rules of natural justice. Justice should be done and it should be seen to be done. This means that a person or persons whose interest will be affected by a decision are given an opportunity to be heard. This also implies notice and representation. And the decision-maker must be unbiased. Alternative dispute resolution techniques are used both in the United States and Great Britain. They have been upheld as meeting procedural due process concerns in the United States. These include notice, an opportunity to be heard, and having an unbiased decision-maker. If the alternative regulatory procedures and practices above are conducted in a manner consistent with the following guidelines, due process or natural justice concerns should largely be met.

1. Have a Rational Choice of Procedures

Simple disputes tend to lend themselves to simple procedures, for example negotiated cases or arbitration. Technical conferences are mainly for gathering information and data and for narrowing the issues associated with a regulatory decision that deals with prospective issues. Negotiated rulemaking, joint problem-solving workshops and task forces (the latter two sometimes being called collaborative processes) are ideal for dealing with prospective issues. A negotiated rulemaking and task force are most useful for polycentric (complex and interrelated) issues.

2. Issue an Initial Notice of the Process

For an alternative regulatory procedure to meet the concerns of due process and natural justice there must be notice and an opportunity to be heard in any administrative proceeding. The notice requirement is no less important when a commission uses an alternative procedure. The initial notice to be given should be stated in a manner that describes the issue to be considered or the conflict to be resolved and it should describe the alternative procedure to be

used. Since the commission approach on a prospective regulatory issue will not yet have been formulated, the notice should be stated in a manner that is general enough not to foreclose commission options, but specific enough that all potentially interested parties would be notified. If, in addition to the more general public notice, it is the commission's practice to notify individually identifiable interested parties, they should be so notified.

3. Provide for Representation of All Interested Parties

All parties that are likely to be interested parties should be represented in the alternative procedure. Interested parties include anyone who is likely to be directly affected by the commission decision. While one could argue that every individual directly affected should take part in the proceeding, it may be sufficient and necessary for the sake of administrative efficiency to have several groups with similar interests be represented by one organization or named person. For example, one would expect that a residential consumers' advocate exists or could be named to represent the interests of residential consumers. It might be necessary to have a special convener to contact identifiable interested parties in order to encourage them to participate in the alternative procedure. Sometimes, the commission might have to assign staff to represent an unrepresented interest, when an interested party is identified and cannot or will not participate. In some U.S. states, monies are made available to supply certain groups with representation. By getting all of the interested parties to be represented in the alternative procedure, the agency has provided those parties with an opportunity to be heard. That opportunity at an early stage of commission regulatory formulation should guarantee that all interested parties have an early and effective means of influencing commission regulation.

4. Have or Obtain the Necessary Data

Any administrative procedure must have some mechanism to collect the information and data necessary for a rational decision. It is therefore necessary for any alternative regulatory procedure to provide for a means, whether voluntary or not, of collecting the necessary data and information. Procedures that are essentially consensual in nature, such as negotiated rulemaking, joint problem-solving workshops, and task forces, rely on the good faith of the parties to supply the necessary data and information. Should that information not be forthcoming the mediator must make the commission aware of the problem, so that the commission can issue the necessary writs and protective orders to get the information. In the case of a technical conference, the whole point is for the interested parties to supply information.

5. Have a Record or an Advisory Report

For an alternative regulatory procedure to lead to a more accurate result and to meet due process and natural justice concerns, the commissioners should receive the results in the form of either a record of the proceeding or an advisory report. For certain procedures, a complete record of what occurred during a proceeding is probably best. For example, with a technical conference a record of the conference proceedings would probably be most useful to the commissioners, particularly if the commissioners themselves took part in the procedure. The record would show the full dialog between commissioners and expert witnesses and should provide a good base of technical information which the commissioners can rely on to make their decisions. An advisory report would be more appropriate for those alternative procedures that are consensus based, particularly since some of the exchanges and information might be confidential. Nevertheless, the advisory report should be complete and thorough and inform the commissioners concerning what a preferred decision or policy determination should be, including a

rationale and all relevant data. It should also state what plausible options were considered and why they were rejected.

6. The Commission as Ultimate Decision-Maker

The commission is the ultimate decision-maker. It cannot delegate away this role. The commissioners provide the unbiased decision-making required under natural justice. Also, the responsibility for making ultimate decisions is placed squarely on the shoulders of the commissioners by statute. As the ultimate decision-maker, the commission should take advantage of the record or advisory report placed before it by the parties to the alternative regulatory procedure. So long as the suggested regulatory decision placed before the commission is not contrary to the public interest and not contrary to law, the commission should be inclined to accept the record or report and reach its decision in accordance with the recommendations in the record or report.

Of course, if one or more of the recommendations suggested in the record or report is either contrary to the public interest or law, the commission should reject such recommendations. However, even though the commission has the prerogative to reform and revise recommendations that they receive, the commission must be sensitive to the desirability of allowing parties to use alternative dispute resolution techniques to provide their own solutions to disputes and to regulatory issues.

7. Announce the Decision

Once a commission has made its determination concerning a regulation or dispute, it needs to announce its determination in a rule, order, or decision. The commission's rule, order, or decision would describe and discuss the alternative regulatory procedure used, including why it was used, what procedural steps were taken to assure notice, an opportunity to be heard, and

fairness. The rule, order, or decision should discuss the contents of the advisory report or record, including plausible alternative regulatory determinations that were not recommended. In sum, the commission rule, order, or decision would make it clear that the alternative procedure gave the commission a complete, thorough, and coherent record upon which to base its rule, order, or decision. If the commission rejects, modifies, or reforms any of the recommendations in the advisory report or record, the commission will cite the parts rejected and state why they were rejected, modified, or reformed.

IDENTIFICATION OF DECISION-MAKING RESPONSIBILITIES OF THE PUCSL

The PUCSL is a quasi-judicial governmental agency that has extensive decision-making responsibilities. Its core authority is established by statute and its decisions may be reviewed by Sri Lanka courts, and/or revised by Parliament. As the PUCSL is a resource-constrained agency, mediation has been established as a preferred initial step in resolving disputes. Identified below, are occasions where the PUCSL is authorized by statute to act and make decisions. In each of these instances, PUCSL staff and the parties should apply the six pre-assessment feasibility criteria (identified in the following section) in determining whether to use mediation or some other regulatory approach. It is anticipated that the PUCSL staff will act in two ways. First, it will act as a resource for parties coming before the PUCSL and do a pre-mediation feasibility assessment. If mediation is warranted PUCSL staff will link the parties with mediation experts. The PUCSL staff may or may not continue to serve as a technical resource, depending on the issue, relevant PUCSL policy⁴, and the preferences of the parties. A second way is in an outreach mode where the PUCSL staff either identifies a potential problem early-on, or sees an unanticipated opportunity during an ongoing PUCSL formal proceeding, or recognizes that not all significant parties to a dispute are involved.

The Public Utilities Act, No. 28 of 2002, authorizes the PUCSL to regulate the generation, transmission, and distribution of electricity, as well as transforming the electric system. Carrying out these responsibilities will require the PUCSL to make a number of decisions. In addition to Par 17 (i) that states that the PUCSL shall “determine by mediation disputes arising in any public utilities industry...”, the ability to require that information be provided⁵ is another provision of the act that supports the use of mediation. Para 17 (e) requires the PUCSL to prepare a regulatory manual good practices, which also further supports the use of mediation.

⁴ The PUCSL will need to have policies governing when involvement in mediation by staff precludes their further involvement in a regulatory proceeding stemming from the mediation.

⁵ See para 15.

Public Utilities Commission of Sri Lanka Act, No. 35 Of 2002

Section	Description	Mediation Criteria
15 (1) (a)	To request any person, including a regulated entity, to furnish to the commission any information required by the commission	Mediation may be appropriate if dispute could be resolved, in part, by better information exchange, issue clarification, increasing responsiveness of parties, a more realistic assessment, a future perspective, or more creative solutions. Mediation may not be appropriate if dispute solution not in the public interest, zero-sum, or too early.
17 (i)	Determine by mediation disputes arising in any public utility industry	Mediation may be appropriate if dispute could be resolved, in part, by better information exchange, issue clarification, increasing responsiveness of parties, a more realistic assessment, a future perspective, or more creative solutions. Mediation may not be appropriate if dispute solution not in the public interest, zero-sum, or too early.
17 (j)	Set and enforce technical and other standards relating to the safety, quality, continuity and reliability of the public utility industries	Mediation may be appropriate if dispute could be resolved, in part, by better information exchange, issue clarification, increasing responsiveness of parties, a more realistic assessment, a future perspective, or more creative solutions. Mediation may not be appropriate if dispute solution not in the public interest, zero-sum, or too early.
18 (1)	Hold a public hearing in order to investigate or determine, any matter where it deems necessary in the public interest	Mediation may be appropriate if dispute could be resolved, in part, by better information exchange, issue clarification, increasing responsiveness of parties, a more realistic assessment, a future perspective, or more creative solutions. Mediation may not be

Section	Description	Mediation Criteria
		appropriate if dispute solution not in the public interest, zero-sum, or too early.
18 (9) (a)	Make an order or reward, give direction with reasons during or at the conclusion of a public hearing	Mediation may be appropriate if dispute could be resolved, in part, by better information exchange, issue clarification, increasing responsiveness of parties, a more realistic assessment, a future perspective, or more creative solutions. Mediation may not be appropriate if dispute solution not in the public interest, zero-sum, or too early.
24 (1)	Authorize an anti-competitive practice or a merger situation, where the commission is satisfied that it does not operate or is not likely to operate against the public interest	Mediation may be appropriate if dispute could be resolved, in part, by better information exchange, issue clarification, increasing responsiveness of parties, a more realistic assessment, a future perspective, or more creative solutions. Mediation may not be appropriate if dispute solution not in the public interest, zero-sum, or too early.
24 (3) (a)	Prohibit a merger situation, where it operates against the public interest	Mediation may be appropriate if dispute could be resolved, in part, by better information exchange, issue clarification, increasing responsiveness of parties, a more realistic assessment, a future perspective, or more creative solutions. Mediation may not be appropriate if dispute solution not in the public interest, zero-sum, or too early.

Section	Description	Mediation Criteria
24 (3) (b) (ii)	Termination of any anti-competitive practice or abuse of a dominant position or the de-merger of a merger situation	Mediation may be appropriate if dispute could be resolved, in part, by better information exchange, issue clarification, increasing responsiveness of parties, a more realistic assessment, a future perspective, or more creative solutions. Mediation may not be appropriate if dispute solution not in the public interest, zero-sum, or too early.
25 (1) (a)	Enter, inspect, and search the premises in which any regulated entity is carrying on its business, where the commission reasonably believe that an activity identified under section 22 exists	Mediation may be appropriate if dispute could be resolved, in part, by better information exchange, issue clarification, increasing responsiveness of parties, a more realistic assessment, a future perspective, or more creative solutions. Mediation may not be appropriate if dispute solution not in the public interest, zero-sum, or too early.
27 (2)	The commission may published the names and address of all persons convicted under this act	Mediation may be appropriate if dispute could be resolved, in part, by better information exchange, issue clarification, increasing responsiveness of parties, a more realistic assessment, a future perspective, or more creative solutions. Mediation may not be appropriate if dispute solution not in the public interest, zero-sum, or too early.
38 (1)	The commission may make rules in respect of all or any matters for which rules are authorized or required	Mediation may be appropriate if dispute could be resolved, in part, by better information exchange, issue clarification, increasing responsiveness of parties, a more realistic assessment, a future perspective, or more creative solutions. Mediation may not be appropriate if dispute solution not in

Section	Description	Mediation Criteria
		the public interest, zero-sum, or too early.

Electricity Reform Act, No. 28 Of 2002

Section No	Description	Remarks
Sec 3 (C)	To approve technical & operational codes to developed by licensees.	Mediation may be appropriate if dispute could be resolved, in part, by better information exchange, issue clarification, increasing responsiveness of parties, a more realistic assessment, a future perspective, or more creative solutions. Mediation may not be appropriate if dispute solution not in the public interest, zero-sum, or too early.
Sec 3 (d)	To regulate tariffs & other charges.	Mediation may be appropriate if dispute could be resolved, in part, by better information exchange, issue clarification, increasing responsiveness of parties, a more realistic assessment, a future perspective, or more creative solutions. Mediation may not be appropriate if dispute solution not in the public interest, zero-sum, or too early.
Sec 3 (g)	To set & enforce technical & other standards.	Mediation may be appropriate if dispute could be resolved, in part, by better information exchange, issue clarification, increasing responsiveness of parties, a more realistic assessment, a future perspective, or more creative solutions. Mediation may not be appropriate if dispute solution not in the public interest, zero-sum, or too early.

Section No	Description	Remarks
Sec 6 (1)	Commission may appoint electrical inspectors.	Mediation may be appropriate if dispute could be resolved, in part, by better information exchange, issue clarification, increasing responsiveness of parties, a more realistic assessment, a future perspective, or more creative solutions. Mediation may not be appropriate if dispute solution not in the public interest, zero-sum, or too early.
Sec 6 (3)	Making regulations prescribing the manner of getting the services of inspectors.	Mediation may be appropriate if dispute could be resolved, in part, by better information exchange, issue clarification, increasing responsiveness of parties, a more realistic assessment, a future perspective, or more creative solutions. Mediation may not be appropriate if dispute solution not in the public interest, zero-sum, or too early.
Sec 9 (1)	Exempt people from the requirement of having license.	Mediation may be appropriate if dispute could be resolved, in part, by better information exchange, issue clarification, increasing responsiveness of parties, a more realistic assessment, a future perspective, or more creative solutions. Mediation may not be appropriate if dispute solution not in the public interest, zero-sum, or too early.

Section No	Description	Remarks
Sec 12 (C) (i) (a)	Grant a license authorizing any person to generate electricity from identified generation plant.	Mediation may be appropriate if dispute could be resolved, in part, by better information exchange, issue clarification, increasing responsiveness of parties, a more realistic assessment, a future perspective, or more creative solutions. Mediation may not be appropriate if dispute solution not in the public interest, zero-sum, or too early.
Sec 12 (c) (i) (b)	Grant a license authorizing any person transmit electricity	Mediation may be appropriate if dispute could be resolved, in part, by better information exchange, issue clarification, increasing responsiveness of parties, a more realistic assessment, a future perspective, or more creative solutions. Mediation may not be appropriate if dispute solution not in the public interest, zero-sum, or too early.
Sec 12 (c) (ii)	Extend the period of a generation transmission or distribution license.	Mediation may be appropriate if dispute could be resolved, in part, by better information exchange, issue clarification, increasing responsiveness of parties, a more realistic assessment, a future perspective, or more creative solutions. Mediation may not be appropriate if dispute solution not in the public interest, zero-sum, or too early.

Section No	Description	Remarks
Sec 15,16,17	Prescribing the content of a generation, transmission, distribution licenses respectively	Mediation may be appropriate if dispute could be resolved, in part, by better information exchange, issue clarification, increasing responsiveness of parties, a more realistic assessment, a future perspective, or more creative solutions. Mediation may not be appropriate if dispute solution not in the public interest, zero-sum, or too early.
Sec 18 (2)	Giving consent to assign license	Mediation may be appropriate if dispute could be resolved, in part, by better information exchange, issue clarification, increasing responsiveness of parties, a more realistic assessment, a future perspective, or more creative solutions. Mediation may not be appropriate if dispute solution not in the public interest, zero-sum, or too early.
Sec 19 (1) (2)	Revoke a generation transmission, or distribution license as per terms there of by notice published in Gazette and having considered representation made against such revocation	Mediation may be appropriate if dispute could be resolved, in part, by better information exchange, issue clarification, increasing responsiveness of parties, a more realistic assessment, a future perspective, or more creative solutions. Mediation may not be appropriate if dispute solution not in the public interest, zero-sum, or too early.

Section No	Description	Remarks
Sec 21 (1)	Revoke an exemption granted to a person or a category of persons	Mediation may be appropriate if dispute could be resolved, in part, by better information exchange, issue clarification, increasing responsiveness of parties, a more realistic assessment, a future perspective, or more creative solutions. Mediation may not be appropriate if dispute solution not in the public interest, zero-sum, or too early.
Sec 29 (2) (a), (b), (c)	Approve the tariffs set by the licensee, permit cost recovery	Mediation may be appropriate if dispute could be resolved, in part, by better information exchange, issue clarification, increasing responsiveness of parties, a more realistic assessment, a future perspective, or more creative solutions. Mediation may not be appropriate if dispute solution not in the public interest, zero-sum, or too early.
Sec 31 (1) (2)	Modify the conditions of a generation transmission or distribution license with the consent of the licensee	Mediation may be appropriate if dispute could be resolved, in part, by better information exchange, issue clarification, increasing responsiveness of parties, a more realistic assessment, a future perspective, or more creative solutions. Mediation may not be appropriate if dispute solution not in the public interest, zero-sum, or too early.

Section No	Description	Remarks
Sec 32 (2)	The commission may modify the conditions of a generation, transmission, or distribution license without the consent	Mediation may be appropriate if dispute could be resolved, in part, by better information exchange, issue clarification, increasing responsiveness of parties, a more realistic assessment, a future perspective, or more creative solutions. Mediation may not be appropriate if dispute solution not in the public interest, zero-sum, or too early.
Sec 33 (1) (2)	Make an enforcement order to secure compliance with such license condition or statutory requirement	Mediation may be appropriate if dispute could be resolved, in part, by better information exchange, issue clarification, increasing responsiveness of parties, a more realistic assessment, a future perspective, or more creative solutions. Mediation may not be appropriate if dispute solution not in the public interest, zero-sum, or too early.
Sec 37 (1)	Vest the management & control of licensee	Mediation may be appropriate if dispute could be resolved, in part, by better information exchange, issue clarification, increasing responsiveness of parties, a more realistic assessment, a future perspective, or more creative solutions. Mediation may not be appropriate if dispute solution not in the public interest, zero-sum, or too early.

Section No	Description	Remarks
Sec 38 (1) (2)	Resolution of dispute between a licensee & a tariff customer arising under sec. 24 to 29.	Mediation may be appropriate if dispute could be resolved, in part, by better information exchange, issue clarification, increasing responsiveness of parties, a more realistic assessment, a future perspective, or more creative solutions. Mediation may not be appropriate if dispute solution not in the public interest, zero-sum, or too early.
Sec 40 (1) (a)	Determine such standards of overall performance for distribution licensees in connection with quality of supply & promotion of efficient use by consumers	Mediation may be appropriate if dispute could be resolved, in part, by better information exchange, issue clarification, increasing responsiveness of parties, a more realistic assessment, a future perspective, or more creative solutions. Mediation may not be appropriate if dispute solution not in the public interest, zero-sum, or too early.
Sec 43 (1) (2)	Grant consent to install an electric line above/below ground	Mediation may be appropriate if dispute could be resolved, in part, by better information exchange, issue clarification, increasing responsiveness of parties, a more realistic assessment, a future perspective, or more creative solutions. Mediation may not be appropriate if dispute solution not in the public interest, zero-sum, or too early.

Section No	Description	Remarks
Sec 43 (3)	Revocation of the consent granted	Mediation may be appropriate if dispute could be resolved, in part, by better information exchange, issue clarification, increasing responsiveness of parties, a more realistic assessment, a future perspective, or more creative solutions. Mediation may not be appropriate if dispute solution not in the public interest, zero-sum, or too early.
Sec 44	Direct an electric line be “high voltage line”	Mediation may be appropriate if dispute could be resolved, in part, by better information exchange, issue clarification, increasing responsiveness of parties, a more realistic assessment, a future perspective, or more creative solutions. Mediation may not be appropriate if dispute solution not in the public interest, zero-sum, or too early.
Sec 54 (1)	Determining the annual levy to be recovered from every licensee	Mediation may be appropriate if dispute could be resolved, in part, by better information exchange, issue clarification, increasing responsiveness of parties, a more realistic assessment, a future perspective, or more creative solutions. Mediation may not be appropriate if dispute solution not in the public interest, zero-sum, or too early.

Section No	Description	Remarks
Sec 59 (1)	Making rules in respect of all matters	Mediation may be appropriate if dispute could be resolved, in part, by better information exchange, issue clarification, increasing responsiveness of parties, a more realistic assessment, a future perspective, or more creative solutions. Mediation may not be appropriate if dispute solution not in the public interest, zero-sum, or too early.

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Section No	Description	Remarks
Sec 8 (4)	Direct other licensee to take over undertakings if any service provider has failed to submit application form within 1 year	Mediation may be appropriate if dispute could be resolved, in part, by better information exchange, issue clarification, increasing responsiveness of parties, a more realistic assessment, a future perspective, or more creative solutions. Mediation may not be appropriate if dispute solution not in the public interest, zero-sum, or too early.
Sec 9 (1)	Shall exempt any person from obtaining license under some circumstances	Mediation may be appropriate if dispute could be resolved, in part, by better information exchange, issue clarification, increasing responsiveness of parties, a more realistic assessment, a future perspective, or more creative solutions. Mediation may not be appropriate if dispute solution not in the public interest, zero-sum, or too early.
Sec 13 (1) (1)	Shall grant license to any person to operate as a service provider	Mediation may be appropriate if dispute could be resolved, in part, by better information exchange, issue clarification, increasing responsiveness of parties, a more realistic assessment, a future perspective, or more creative solutions. Mediation may not be appropriate if dispute

Section No	Description	Remarks
		solution not in the public interest, zero-sum, or too early.
Sec 13 (1) (2)	Shall extend license to any person to operate as a service provider	Mediation may be appropriate if dispute could be resolved, in part, by better information exchange, issue clarification, increasing responsiveness of parties, a more realistic assessment, a future perspective, or more creative solutions. Mediation may not be appropriate if dispute solution not in the public interest, zero-sum, or too early.
Sec 18 (1)	May revoke the license in accordance with terms of revocation	Mediation may be appropriate if dispute could be resolved, in part, by better information exchange, issue clarification, increasing responsiveness of parties, a more realistic assessment, a future perspective, or more creative solutions. Mediation may not be appropriate if dispute solution not in the public interest, zero-sum, or too early.
Sec 20	Direct other licensee to take over undertakings of service provider, whose license was revoked	Mediation may be appropriate if dispute could be resolved, in part, by better information exchange, issue clarification, increasing responsiveness of parties, a more realistic assessment, a future perspective, or more

Section No	Description	Remarks
		creative solutions. Mediation may not be appropriate if dispute solution not in the public interest, zero-sum, or too early.
Sec 22 (1)	May revoke or withdraw exemption granted to any person	Mediation may be appropriate if dispute could be resolved, in part, by better information exchange, issue clarification, increasing responsiveness of parties, a more realistic assessment, a future perspective, or more creative solutions. Mediation may not be appropriate if dispute solution not in the public interest, zero-sum, or too early.
Sec 27 (2)	May direct any person requiring the service to pay to the licensee	Mediation may be appropriate if dispute could be resolved, in part, by better information exchange, issue clarification, increasing responsiveness of parties, a more realistic assessment, a future perspective, or more creative solutions. Mediation may not be appropriate if dispute solution not in the public interest, zero-sum, or too early.
Sec 35 (5)	May set tariff and charges for subsidizing consumers	Mediation may be appropriate if dispute could be resolved, in part, by better information exchange, issue clarification, increasing responsiveness of

Section No	Description	Remarks
		<p>parties, a more realistic assessment, a future perspective, or more creative solutions. Mediation may not be appropriate if dispute solution not in the public interest, zero-sum, or too early.</p>
<p>Sec 54 (1)</p>	<p>May modify the conditions of license with the consent of licensee</p>	<p>Mediation may be appropriate if dispute could be resolved, in part, by better information exchange, issue clarification, increasing responsiveness of parties, a more realistic assessment, a future perspective, or more creative solutions. Mediation may not be appropriate if dispute solution not in the public interest, zero-sum, or too early.</p>
<p>Sec 55 (1)</p>	<p>May modify the conditions of license without the consent of licensee</p>	<p>Mediation may be appropriate if dispute could be resolved, in part, by better information exchange, issue clarification, increasing responsiveness of parties, a more realistic assessment, a future perspective, or more creative solutions. Mediation may not be appropriate if dispute solution not in the public interest, zero-sum, or too early.</p>

Section No	Description	Remarks
Sec 57 (1)	Shall make an enforcement order	Mediation may be appropriate if dispute could be resolved, in part, by better information exchange, issue clarification, increasing responsiveness of parties, a more realistic assessment, a future perspective, or more creative solutions. Mediation may not be appropriate if dispute solution not in the public interest, zero-sum, or too early.
Sec 57 (2) (c)	Shall revoke or modify the enforcement order	Mediation may be appropriate if dispute could be resolved, in part, by better information exchange, issue clarification, increasing responsiveness of parties, a more realistic assessment, a future perspective, or more creative solutions. Mediation may not be appropriate if dispute solution not in the public interest, zero-sum, or too early.
Sec 59 (2)	Shall direct the compensation be paid by the licensee to the affected person	Mediation may be appropriate if dispute could be resolved, in part, by better information exchange, issue clarification, increasing responsiveness of parties, a more realistic assessment, a future perspective, or more creative solutions. Mediation may not be appropriate if dispute solution not in the public

Section No	Description	Remarks
		interest, zero-sum, or too early.
Sec 61	Shall determine the dispute unless more appropriate to be determined either by court or arbitration	Mediation may be appropriate if dispute could be resolved, in part, by better information exchange, issue clarification, increasing responsiveness of parties, a more realistic assessment, a future perspective, or more creative solutions. Mediation may not be appropriate if dispute solution not in the public interest, zero-sum, or too early.
Sec 63 (a)	Shall determine the quality of service, service level & service standards of overall performance	Mediation may be appropriate if dispute could be resolved, in part, by better information exchange, issue clarification, increasing responsiveness of parties, a more realistic assessment, a future perspective, or more creative solutions. Mediation may not be appropriate if dispute solution not in the public interest, zero-sum, or too early.
Sec 68 (1)	May make rules in respect of all matters for which rules are required or authorized under the Act	Mediation may be appropriate if dispute could be resolved, in part, by better information exchange, issue clarification, increasing responsiveness of parties, a more realistic assessment, a future perspective, or more

Section No	Description	Remarks
		creative solutions. Mediation may not be appropriate if dispute solution not in the public interest, zero-sum, or too early.

**RELATIONSHIP OF DECISION-MAKING
RESPONSIBILITIES OF THE PUCSL AND INTEGRATION OF
ALTERNATIVE DISPUTE AND RATEMAKING PRACTICES**

The above chart amply shows the decision making responsibilities of the PUCSL. Mediation is not appropriate for every single situation that comes before the PUCSL. Mediation is an effective and low-cost dispute resolution tool, however, that has been successfully employed in a wide variety of contexts. The key to successful mediation lies in the skills of the mediator. There are two skill sets that are important. The first is in the pre-mediation feasibility assessment. The second is the repertoire of processes and actions that the mediator uses during mediation.

PUCSL staff plays an important role in a pre-mediation feasibility assessment. Mediation can be initiated by the parties to a dispute, but may also be initiated by the PUCSL. How parties decide to engage in mediation is “their own business”, as long as both parties agree. PUCSL staff plays a more limited role, if at all, when the parties initiate mediation. PUCSL involvement in a mediation solely initiated by the parties may be limited to notification by the parties.

In other instances, parties may be involved in a dispute, where a formal action has been initiated by one or both parties with the PUCSL, a court, or an arbitration proceeding. PUCSL staff may also act to initiate mediation when their technical knowledge indicates that a dispute is emerging, but has not formally been introduced in the courts or the PUCSL. Regulatory staff may know, for example, that a certain billing arrangement for residential consumers in another utility service area caused parties to have a significant dispute. Armed with this knowledge PUCSL staff could seek to convene the parties prior to the dispute emerging.

A pre-mediation feasibility assessment involves two cost/benefit decisions⁶. The first is a cost-benefit decision by the involved parties about whether the total cost of mediation is less than or greater than the total cost of other dispute resolution modes. As mediation is generally a low-cost option to adjudication or arbitration, or formal

⁶ These cost/benefit analyses may be quantitative or qualitative and may not necessarily ever be shared with any other party. The mediator or PUCSL staff need to be able to do some role playing and assess the underlying economic and other motives of the parties. The ability to envision gains that outweigh losses is an important consideration in a pre-mediation feasibility assessment.

regulatory procedures, a party concluding that the cost of mediation is too high generally feels that the probability of victory is higher in the courts or through PUCSL action. A party refusing mediation sees the positive benefits of engaging even in an expensive regulatory proceeding as being worth the effort⁷. The party may not believe it will prevail before the PUCSL and the courts, but values the delay more than the sunk cost of the delay. Specific mediation techniques exist to make a pro-mediation decision more likely. These techniques are centered on a cost/benefit decision about the value of the ongoing relationship between parties.

The second occurs when parties see a dispute as zero-sum or winner-take-all; they are initially less likely to want to mediate. A mediator or PUCSL staff member in a pre-assessment mode needs to advance the idea that the net future cost of future transactions will be lower and more beneficial than the one-time only benefits of a winner-take-all victory. The objective here is to convince the parties that “the future is a very long time”. Spreading the gains from a short-term victory over a long future generally reveals that the short-term gains may often be exceeded by the possible long-term gains associated with a consensual solution. PUCSL staff or mediators can help to present this concept to the parties. It would be the unusual case where a one-time-only victory would be more valuable than the long-term gain from better interactions between the parties. Unfortunately, it is extremely common for parties to a dispute to be consumed only by the details of the immediate dispute. Further, to the extent that the future is thought of at all, the parties often can only imagine dismal futures if they lose. Mediation is an especially attractive dispute resolution option because it is forward-looking.

By being an “interest free” participant in the dispute, the mediator can, through the dispute resolution tools presented in this workbook, enlarge the solution space. Issues can be broken in to smaller pieces and the least contentious ones can be addressed first. Even if all issues have been unsuccessfully addressed in a first round of mediation, a better understanding can emerge that may allow for a second, more successful, round of mediation. A dispute on interconnection might, after a first round mediation, also be

⁷ A party may decide that the economic or financial gain from a delay is worth the cost. It may be the case that the party seeking a delay believes it will lose in both a regulatory proceeding and in adjudication by the courts. But it sees the chance to continue to earn, say, the disputed revenues to be well worth the delay. The party also may have decided that it can harm the other party in a way that may drive it from the market and demonstrate to all the high cost of ever having a dispute with them.

understood as a situation where both parties are also concerned about the siting of transmission lines. This insight might then be useful in producing a more successful second round of mediation.

One way to eliminate some of the economic incentives for delay is to have the PUCSL undertake certain actions. If a dispute centered on a party having actual rates that were alleged to be too high or wrongly calculated, the PUCSL could require either that

- The rates in effect be temporarily suspended, or
- That the rates remain in effect under bond. This means that the party charging the disputed rates posts a bond that guarantees that the disputed economic gain is returned to the paying party, if its regulatory, or judicial, or mediation is successful, or
- That the PUCSL establishes an expedited regulatory proceeding that will rebate the gain from the disputed rates to the in the form of lower future rates.

These techniques can significantly reduce, but do not eliminate, the economic gain from delay.

Part of an assessment may entail stopping other regulatory, arbitration, or judicial proceedings. Generally, most courts allow the parties, in a variety of ways, to resolve their disputes “out of court”. So the existence of an ongoing procedure should not be a serious problem. By the PUCSL already having a rule already in place on mediation as a preferred dispute resolution requirement, the PUCSL can initiate a mediation effort without necessarily having to start a new proceeding. The rule may be a provision in a license agreement or other such commission-approved item. It may also be in a separate rule established by the PUCSL to cover other types of disputes.

A pre-mediation mediation feasibility assessment can also be used in a “time out” mode, after a proceeding is already ongoing. It could be the case that an earlier mediation did not resolve all outstanding issues, and that a formal regulatory proceeding is underway. The PUCSL or one or more of the parties may (for whatever reason) decide that it is interested in re-starting the mediation process for one, some, or all of the disputed issues. The PUCSL needs to have procedures in place to allow for a renewed mediation effort. There is a presumption that a more timely resolution would occur with

mediation than would otherwise happen. The regulatory stipulation process is closely related to the notion of a restarted process. The major difference lies in whether a mediator is involved and whether the restart was suggested by one of the parties. In either case the PUCSL needs to be informed so that a proceeding can be temporarily halted.

What disputes are ready for mediation? By definition, the PUCSL has decided that in most instances, a pre-mediation feasibility assessment should be undertaken, with a presumption that many are mediation candidates. Mediation works best when a dispute has one or more of the following characteristics. The PUCSL staff is ideally placed to identify these situations, but initial identification by the parties may also be effective. As “mediation first” is a PUCSL objective, staff function in an outreach mode. Staff has done a pre-mediation cost/benefit assessment and now is focusing on whether mediation is the right way to proceed. The dispute attributes below reflect the principal strengths of ADR techniques.

ADR and mediation assume that something is missing and attempts in a neutral way to reveal the missing elements. While clashing values are at the core of a dispute, not all values necessarily need to clash irrevocably. ADR focuses on information, process, imagination, and realism shortcomings present in other, more traditional, proceedings.

- **Information exchange** Some portion of all disputes occurs because of a poor exchange of information between the parties. It is the rare dispute, however, that is solely due to a poor information exchange. Parties to a dispute generally are in a competitive mode where open exchange of information is not the norm, nor expected. Or, they can have communication modalities that do not appropriately interconnect, such as a gap likely to exist between a rural consumer group and an electricity transmission entity. Mediation can provide safe, non-confrontational, and reliable information exchange channels. If the

provisional assessment is that information exchange is a problem, then mediation should be considered.

- **Clarification** Parties to a dispute too easily assume that they know what the other party wants. Mediation can often show that neither party fully knows what it wants, let alone what the other party wants. Mediators engage in clarification processes that seek to have each party re-examine its assumptions and conclusions. A dispute may initially be about “high prices”, but clarification might reveal that price volatility is the key concern of one or both parties. If clarification of the issue positions of the parties is thought to be a significant part of the problem, then mediation should be considered.
- **Responsiveness** Often parties to a dispute have no legal requirement to communicate with each other, or to respond to questions from the other party. In a regulatory or judicial proceeding, parties are generally required to share information. Mediation is another way that information can be exchanged, but in a non-adversarial context. A mediator facilitates a back and forth dialogue, where information is exchanged. Questions asked are answered, or handled in other ways. If non-responsiveness is thought to be a key component of a dispute, then mediation should be considered.
- **Realistic assessment** Without supporting one side or another, a mediator can ask parties to critically re-assess. A demand that no further price increases ever occur, or that no curtailment ever happen, or that all overdue bills be paid instantly, may simply be unrealistic. These are undoubtedly very important concerns, but a mediator may ask that the concerns be restated in ways that

are attainable. Phasing-in a new policy is one way a mediator may seek realistic assessment, without taking the side of either party. Having the parties re-state their opponent's position may also constitute a means of realistic appraisal. To the extent that it is felt that one or both parties have not stated realistic issue positions, then mediation should be considered.

- **Shifting from the past to the future** Mediation should be considered when a forward-looking solution looks appropriate. It can be that the immediate facts are agreed to by the parties, or are in such contention that further attention to the details would be unproductive. Mediation is especially useful in refocusing (some or all) of the dispute to the future. The current dispute is not written off, rather the mutual gains possible by changing how both parties will act in the future is the centerpiece of any solution. A billing dispute may, for instance, be rendered moot by an agreement to have capacity reserve margins large enough to avoid, say, the surcharges that initially sparked the billing dispute.
- **Creative solution** Creative solutions are impossible to mandate, but not necessarily that difficult to orchestrate. Mediators consistently seek to have the parties re-state their assumptions, requirements, and preferred solutions. When each party does this enough times, both for itself and its opponent, creative solutions can occur. Having the parties switch roles, or individuals from each party, advocate different positions in trial-type mediation can be very productive. If the initial assessment is that the range of possible solutions

considered by the parties has been too narrow, mediation should be considered.

If the six above dispute attributes are meaningfully present, then mediation should be considered. If the above attributes are not viewed as being significant attributes, mediation may not be a preferred course. Mediation may not be appropriate in the following situations.

- **Not in the public interest** A concern exists that the parties may reach a mutually agreeable solution that is not in the public interest. Two parties may resolve a dispute by agreeing to prices that constrain trade, or eliminate other competitors, or increase pollution. This potential problem can be minimized or virtually reduced where PUCSL rules, or Sri Lanka law exist. Expert judgment is needed by PUCSL staff in order to minimize this risk. Mediation may not be appropriate in this instance.
- **Zero-sum** In some instances a true zero/sum, winner-take-all situation may exist. A dispute may be about which party prevails on a license, hydro site, or pipeline; with a loss being sufficient to drive one party permanently out of the energy market. Mediation may be inappropriate in this instance.
- **Too early** A potential dispute may be identified “too early”, that is before the parties fully understand their interests. This caution may also apply to other types of regulatory proceedings. An example of this may occur when one party’s demand forecast points to a potential problem that the other party is unaware of and does not understand. Other examples may come from changes in tax policy, bank policy, import policies, or changes in vendor technology. The common feature is that one party has already digested the new information and sees a problem, and the other parties have not yet done so. This does not presume that the initiating party is correct, as forecasts and analyses can be wrong. Mediation may be inappropriate in this instance.

MEDIATORS

As a part of its policy of making maximum usage of its resources, the PUCSL may use external mediators. The PUCSL provides mediation training to its staff in order that they may be able to conduct pre-mediation feasibility assessments and to serve as technical advisors, as appropriate and with the consent of the parties. The PUCSL may have disputes in which the PUCSL is a party and may develop appropriate procedures for such situations.

1. Sources

A. Outsourcing

It is anticipated that mediations conducted covering issues under the authority of the PUCSL will generally use an external resource such as the Commercial Mediation Centre of Sri Lanka. As other professional mediation entities are recognized, they may also be used in mediation disputes. The PUCSL could make its staff available, upon mutual agreement of all the parties, to provide the Mediation Centre and the parties with technical assistance.

In special instances where the PUCSL is not able to provide the technical assistance requested, experts from other countries in the region may be identified.

The PUCSL may consider offering basic training in subject areas under its jurisdiction that candidate mediators may take as a means of establishing their expertise in utility regulation and competition.

B. PUCSL Staff

The PUCSL may need to reserve the right to have its staff, or consultants under contract to the PUCSL, to serve as mediators. In a dispute where the PUCSL is one of the parties, PUCSL staff can not serve as mediators.

2. Mediation Process

Currently, three main types of mediation processes are envisioned. Each will have several common features: initial notification of the PUCSL, use of PUCSL recognized mediators, and notification of the PUCSL about the results of the mediation process. While the PUCSL can expect that mediation efforts will produce results that may eliminate the need for further PUCSL action, the PUCSL should necessarily reserve the right to accept or reject, in whole or in part, any and all mediation results. The PUCSL should also reserve the right to order parties to undertake mediation or to return to mediation. The PUCSL should also reserve the right to decide if one or more of the parties lacks the financial resources to participate in a mediation, and to use its regulatory authority to obtain the required resources.

A. Mediation initiated voluntarily by the parties

As mediation is the announced policy of the PUCSL and is supported directly by statute, an expectation exists that parties under the jurisdiction of the PUCSL will voluntarily initiate mediation efforts. How the parties do so is up to them. The PUCSL only needs in these instances to require that the PUCSL be notified as to

- the nature of the dispute,
- whether the dispute is a part of any ongoing regulatory proceeding,
- whether the mediator is one recognized by the PUCSL,
- if PUCSL staff will be needed as technical resources, and
- the substance or resolution of the mediation effort.

B. Mediation initiated by the PUCSL

Mediation here differs only in that the PUCSL has initiated a pre-mediation feasibility assessment in an ongoing or projected dispute and has instructed the parties to begin a mediation effort. The PUCSL only requires that the PUCSL be notified as to

- the nature of the dispute,
- whether the dispute is a part of any ongoing regulatory proceeding,
- whether the mediator is one recognized by the PUCSL,
- if PUCSL staff will be needed as technical resources, and
- the substance or resolution of the mediation effort.

C. Mediation that interrupts an ongoing regulatory, arbitration, or adjudicatory proceeding

Parties under the jurisdiction of the PUCSL may be involved in arbitration or court actions without having first attempted mediation. It is anticipated that the policy of the PUCSL will be that mediation shall be a first step in the resolution of a dispute. One exception to this policy may occur if the PUCSL staff in their pre-mediation feasibility assessment conclude that mediation is not warranted. If the parties are in an arbitration process, the parties can be instructed by the PUCSL that the arbitration process shall be halted, pending the result of a PUCSL mediation process. If the parties are already in an adjudication process in a Sri Lanka court, the parties can be informed and instructed to request a halt in the court proceedings until the PUCSL mediation effort has been allowed to run its course.

The parties may also be in a PUCSL regulatory proceeding that was either preceded by a mediation effort that did not resolve all outstanding issues, or that raised new issues, or that, in the opinion of the PUCSL, could benefit from another mediation effort. Accordingly, the PUCSL may instruct the parties in any phase of a regulatory proceeding that a new mediation effort be undertaken.

The PUCSL only requires that the PUCSL be notified as to:

- the nature of the dispute for the second mediation effort,
- whether the mediator is one recognized by the PUCSL,
- if PUCSL staff will be needed as technical resources, and
- The substance or resolution of the mediation effort.

The PUCSL may then decide whether to accept the result of the mediation and whether any further regulatory action is required.

D. Mediation when the PUCSL is a party

Mediation is appropriate when the PUCSL is a party to a dispute. However streamlined and efficient PUCSL regulatory proceedings are, mediation appears to offer the possibility of a lower cost regulatory solution. A mediation effort involving the PUCSL can be initiated by the PUCSL or another party. While the PUCSL reserves to itself the authority to make a final and definitive solution in a regulatory dispute, it recognizes that mediation may allow a more rapid outcome, without prejudicing the rights of the parties involved.

The intent in mediation is to allow the parties an opportunity for a dialogue in a neutral setting, under the leadership of an external mediator. The objective is to promote a discussion that might otherwise be difficult to have in a more formal regulatory proceeding. Regulatory proceedings must be noticed and the issue(s) under discussion must be clearly identified. Any proposed solution must also be identified. Precedent for a mediation proceeding exists and is similar to what occurs in a stipulated proceeding. As in a stipulated proceeding, the PUCSL staff, rather than the PUCSL commissioners, are involved. Commissioners are presented with a recommended solution, which they can accept, or suggest modifications to, or reject (in whole or in part).

Parties to a regulatory proceeding, including PUCSL staff, may ask to suspend a proceeding while the parties meet to see if they can reach an agreement that may be brought back to the PUCSL for final approval.

In the same manner as a stipulated proceeding, mediation would require identification of the issues in dispute and notification of the parties.

Unlike a stipulation proceeding, an independent mediator is in charge. In a stipulations the parties deal directly with each other

3. Suggestions on Qualifications and Training

A. Expertise

In general, mediators are experts in the process of facilitation, not necessarily in the subject matter of the dispute. Studies of court-connected mediation programs in the United States have found no difference in settlement rates between a mediator who has subject-matter expertise and one with none. That said, this finding may not hold when the problem is complex or the dispute has policy implications. Moreover, parties and attorneys may be more comfortable when they feel the mediator is familiar with the context of a dispute. Also, a mediator who can understand the implications of various outcomes may be more effective in helping the parties construct options for settlement. Thus, an experienced mediator who has been exposed to the utility industry would probably be ideal.

It is common for parties to make the mistake of selecting a retired judge as a mediator simply because he or she carries credibility and authority. A judge may be an excellent mediator, but there is no necessary link. The skills used in adjudication are very different from those used in mediation. It may be hard for a judge who is used to making decisions and issuing rulings to adjust to a process where the parties construct the outcome.

Aptitude, training, and mediation experience are more important than a judicial career.

B. Qualifications and Training

Training requirements for mediators vary widely and in many places mediation is still an unregulated profession. In private mediation, the parties are usually free to select anyone they wish to be a mediator and the market determines who stays in business. Because a mediator does not make decisions that bind the parties, the risk associated with a poor mediator chosen by the parties is that an opportunity to resolve the conflict will be lost, resulting in increased time and cost. But the situation is different when mediation is required by a court or agency. Then the institution needs to ensure that the mediators are qualified, in order to protect the public from incompetent or unscrupulous mediators. They also have an interest in promoting effective mediation so that parties will engage in it with the expectation of success. Many institutions that require mediation allow the parties to choose their own mediator, but they provide a list of pre-approved individuals for the parties to choose from.

Programs commonly impose training requirements and educational qualifications for mediators. Many programs require a basic training course of forty hours as a bare minimum, followed by several co-mediations with an experienced mediator before a person can mediate on their own. Court programs often have a requirement that mediators must be attorneys, except in family law matters. Such requirements are controversial and are often seen by non-lawyer mediators as a way in which lawyers are trying to monopolize the field.

Studies of settlement rates and the parties' satisfaction with mediation have not shown any direct relationship to the amount of training or the

education of the mediator. The factor with the strongest connection to settlement and satisfaction was experience as a mediator. It is reasonable to conclude that success as a mediator is not easily predicted and tends to depend on complex factors.

C. Conflicts of Interest

Because neutrality is so important to the mediation function, many jurisdictions are developing ethical standards designed to screen out mediators with a conflict of interest. These standards generally require a mediator to examine whether his prior contacts, relationships or financial interests create a conflict that would affect the mediator's impartiality, to withdraw if the mediator thinks his impartiality would be impaired, and in any event to disclose the situation to the parties. The mediator should decline to mediate unless all parties decide to retain the mediator after this disclosure.

As an example of a codification of a mediator's duties with regard to conflicts of interest, the new Uniform Mediation Act in the United States requires the following in Article 9:

- (a) Before accepting mediation, an individual who is requested to serve as a mediator shall:
 - (1) make an inquiry that is reasonable under the circumstances to determine whether there are any known facts that a reasonable individual would consider likely to affect the impartiality of the mediator, including a financial or personal interest in the outcome of the mediation and an existing or past relationship with a mediation party or foreseeable participant in the mediation; and
 - (2) disclose any such known fact to the mediation parties as soon as is practical before accepting mediation.

- (b) If a mediator learns any fact described in subsection (a)(1) after accepting mediation, the mediator shall disclose it as soon as is practicable.
- (c) At the request of a mediation party, an individual who is requested to serve as a mediator shall disclose the mediator's qualifications to mediate a dispute.

Because of the role of an advocate and a neutral are so different, there are special problems for lawyer-mediators who also represent clients or are associated with law firms. Rules for this situation are still being developed, but disclosure and consent are basic principles. In one formulation of rules, a mediator should not subsequently represent any party to a mediation in which the mediator served as a neutral in the same or a substantially related matter, unless all parties consent after full disclosure. Additionally, a lawyer should not represent a client adverse to a mediation party without that party's consent, if when acting as a mediator the lawyer learned confidential information about the party. And law firms need to screen lawyers who would be disqualified under these rules from any participation in a representation undertaken by others in the firm.

4. How To Do It – For Mediators

A. Negotiation

Negotiation is a central part of everyday life and is understood by everyone in that context. In more formal disputes, techniques that can be characterized as “principled negotiation” are useful in working towards a resolution. They will be described briefly here because many aspects of principled negotiation are reflected in mediation and one of the goals of a mediator is to help the parties engage in this type of negotiation.

Principled negotiation is known to many from a widely-read book, *Getting to Yes*, by Roger Fisher and William Ury. The techniques are also called “integrative,” “problem-solving,” “interests-based,” “win-win,” or “cooperative” in contrast to “distributive,” “competitive,” or “win-lose” negotiation. Fisher’s and Ury’s description of the five basis element of a principled approach to negotiation can be summarized as follows.

- *Separate the people from the problem.*
Negotiators should attack the problem, not each other, in order to foster constructive problem-solving.
- *Focus on interests, not positions.*
Your position is what you want. Your needs and interests are why you want that. Discussing interests can make it possible to discover mutual or complementary interests that make agreement possible. Sometimes an emphasis on shared interests can be constructive. For example, for many negotiators, maintaining a working long-term relationship between the parties can be an important goal.
- *Invent options for mutual gain.*
There may be outcomes that will advance the interests of both negotiators that can be missed if the parties are unwilling to share information. In one well-known example, two children are trying to agree on how to divide an orange. After much frustration, they split it in half. But if they had known that one wanted the juice for a drink and the other wanted the rind to flavor a cake, they would have seen an outcome that would have maximized both their interests.
- *Use objective criteria.*
Many negotiations require some division of desirable resources. Often price is such an issue, because one rupee for me means one less rupee

for you. It can be possible to refer to outside reference points to determine a value and move away from endless haggling. Market price provides just such a benchmark, when it can be determined easily. Or there may be several applicable criteria that can be used to ground a negotiation. For example, the price of a used car could be adjusted or determined with reference to its age, the model, mileage, condition of the body and interior, or engine repairs that need to be done. Use of such criteria can help negotiators justify their positions and convince the other party that there is a fair and rational basis for an agreement.

- *Know your best alternative to a negotiated agreement (BATNA).*
The reason to negotiate is to obtain a better result that you could achieve without negotiating with that person. You therefore need to know what will happen if your negotiation is unsuccessful, or you run the risk of entering an agreement that you would be better off rejecting, or conversely rejecting an agreement that you would be better off accepting. For example, you would not want to buy a car from a friend without knowing how much a similar car would cost from other sources, such as through newspaper ads or a dealer. It is also very useful to know as much as you can about the other person's BATNA; the offer you make for a car will be affected by what you know about the seller's other options. In a dispute, one's BATNA is often going to court. A court outcome typically has much uncertainty attached to it, but a party's estimation of the likely result at trial usually forms the basis for determining an acceptable settlement offer.

Negotiations, particularly of disputes, often fail. There are many barriers to reaching agreements: some informational, some motivational, and some to do with perceptions of loss or gain. Adding

a mediator to facilitate negotiation and or a technique to promote sharing of information can help surmount such barriers.

B. Mediation⁸

In order to understand how mediation works, it is helpful to break the process down into sequential stages. In actuality, however, the middle stages are not linear, but more cyclical, with the functions looping back and forth and blending together.

- *Beginning the Mediation*

This stage includes setting up the mediation through advance meetings between the mediator and the parties or their counsel, often conducted by telephone. The mediator needs to gather enough information about the parties and the dispute to assess whether he or she should withdraw because of a conflict of interest. If the mediator knows a party or counsel, he should first ask whether this relationship will affect his or her impartiality. If the mediator believes that his impartiality might be compromised, or even appear to be compromised, the mediator should withdraw. If the mediator concludes that a prior relationship will not jeopardize the process, he or she must nonetheless disclose the contact to the parties so they can decide if it is a concern. This should be done as early as possible to avoid disruption to the process.

In many complicated cases, the mediator will also find it helpful to have the parties submit a statement of their positions and reasoning for his review before the start of the mediation. This information may or may not be shared with the other side.

⁸ This section draws on James J. Alfani, Sharon B. Press, Jean R. Sternlight, & Joseph B. Stulberg, *Mediation Theory and Practice*, LEXIS Publishing (2001).

At the mediation itself, the mediator typically begins with an opening statement. The basic components usually include: introducing the mediator, disputants and anyone else present; establishing the mediator's credibility and impartiality through a description of the mediator's experience; explaining the process of mediation and the role of the mediator; explaining the procedures that will govern the process; explaining the extent to which the mediation is confidential; and asking the parties for questions. The mediator typically expresses confidence in the parties' ability to resolve their dispute through mediation. This opening statement helps the participants feel at ease with the process and with the mediator. It also serves to establish a common expectation regarding what will happen during the mediation.

- *Accumulating Information*

In order to assist parties in resolving their dispute, a mediator needs to learn about the issues that brought them to mediation. A mediator may begin to develop an understanding of the situation by requesting that the parties provide written pre-mediation information. In complicated disputes that involve attorneys, they are often asked to submit documentation, copies of any pleadings, and a summary of how the party currently sees the issues to be discussed in mediation.

Following the mediator's opening statement, the disputants or their attorneys take turns describing their concerns. Typically each side is allowed to present their issues without interruption. If an attorney makes the primary presentation, the mediator will typically ask the actual party if they have anything to add. Attorneys tend to focus on legal issues and the party may have additional concerns. The second side to speak should be encouraged to describe their own concerns, not to respond in a defensive manner to the first presentation.

Following the opening statements, the mediator may ask the parties questions, may ask them to respond to each other, or, eventually, may decide to meet separately with each party alone in a caucus. In all these exchanges, the mediator must be a good listener, a good questioner and a good observer. Open questions are an excellent way to get the parties talking. For example: “Would you please elaborate on that statement?” or “How do you see the situation being resolved?” Listening is hard work that requires concentration. Many mediators take notes selectively to help them organize the issues. A mediator can check his or her understanding in several ways. At an appropriate moment, he or she can ask questions to clarify previous statements or attempt to summarize in his or her own words. When meeting with parties separately, he or she can confirm a broader understanding by identifying the emotion behind a statement or the priority a party attaches to a particular issue. Mediators also need to be sensitive to non-verbal clues such as posture and tone of voice which also convey information.

By establishing an atmosphere that encourages constructive exchange during information gathering, a mediator can simultaneously help the parties move their interaction from an adversarial posture toward a more collaborative approach. In its early stages, mediation concentrates on information gathering, but this function continues throughout the process as well.

- *Developing an Initial Agenda*
After the parties have described their respective perspectives on the dispute, and perhaps shared their reaction and evaluation of the other party’s version, the mediator next establishes a structure for the discussion of issues.

This involves first identifying the issues. The most constructive way to do this is to frame issues in neutral, future-oriented terms to avoid defensive responses and arguments on the merits of the claim. For example, a situation a party describes as “bad debt,” can be recharacterized as “payment due and method of payment.” The mediator also faces the challenge of identifying the interests of the parties, rather than defining the issues according to the parties’ legal positions. The mediator also needs to identify, at least for himself, the priorities the parties place on the issues.

In setting an agenda, the guiding principle is to organize the discussion in a way that will help the parties move toward resolution. Some mediators will suggest a relatively easy issue as a place to start the discussion. The idea is that by achieving success on one topic, even if it is relatively unimportant, the parties will be encouraged to believe they can resolve more difficult topics. Other mediators will try to identify the central issue in the dispute and start the discussion there on the theory that if progress is made there, the less important issues will fall into place. The approach will vary depending on the mediator and the circumstances.

- *Generating Movement*

During the parties’ discussions, the mediator’s job is to help them think about their dispute in new ways and consider their options. A mediator typically prompts the parties to use the elements of principled negotiation, described above. After the initial discussions, a mediator will also try to orient the parties toward the future. In contrast to litigation, which tends to focus on determining what happened in the past and who was right or wrong, mediation views the past as relevant only to the parties’ decision on their future actions and relationship.

Mediators may also encourage the parties to consider new facts, create doubts about conclusions, and challenge assumptions. By helping the parties prioritize their concerns, a mediator can create the potential for trade-offs. Another important role is to help each party consider its BATNA and the consequences of not resolving the dispute now. Depending on the circumstances, the mediator may invoke relationship issues or the time, expense and uncertainty of litigation or arbitration.

In the course of the discussions, a mediator may find it helpful to break into separate sessions, or caucuses, where the mediator meets alone with each of the parties in turn. The extent to which caucuses are used varies greatly with the type of mediation and the practice of the mediator. There are several reasons to call a caucus, among them the need to explore settlement options out of the presence of the other party, to address a recalcitrant party, to pause in an emotional situation, or to evaluate proposals that have been generated.

With a caucus, the mediator and the parties need to establish special confidentiality rules. A typical understanding is that if something is said in a caucus that a party does not wish revealed to the other side, the mediator will keep it in confidence. Then, before the end of a caucus, the mediator asks the party if there is anything that should not be shared.

A mediator can use caucuses to present ideas that would be risky for a party to present. For example, a mediator might ask about a hypothetical solution: “If the other party was willing to do X, would you be willing to do Y?” This protects the side that is willing to make some movement because the idea can be rejected without getting annoyed at the other side for suggesting it.

Mediators who use caucuses extensively sometimes try to control communication between the parties by serving as the messenger between them. However, if part of the goal is to improve the working relationship of the parties and to demonstrate ways they can resolve disputes on their own in the future, then using joint sessions whenever possible is more appropriate.

- *Ending the Mediation*

If the parties reach an agreement, the mediator reviews it with both parties jointly to make sure they have the same understanding. It is important to have an outline of the terms completed and signed before the parties leave. The attorneys may draft this “Memorandum of Understanding” or, if the parties are unrepresented the mediator may do this. If appropriate, a more formal agreement can be drafted later by attorneys. If the parties reach a partial agreement, the memorandum should identify both the settlement terms and the issues that remain open.

Parties may also wish to discontinue mediation and resume it after a period of time. They may need to gather more information or they may wish to use another type of dispute resolution to generate a breakthrough. The parties may find it helpful to consult with the mediator about what other options would be most appropriate under the circumstances.

When parties do not settle in mediation, they may still reach an agreement prior to a trial or arbitral hearing. A mediator can assist this process by reviewing the progress that was made, ending the mediation on a positive note, and encouraging post-mediation communication.