



NUCLEAR ENERGY INSTITUTE

Ellen C. Ginsberg  
Vice President, General Counsel and Secretary

February 1, 2012

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

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

Dear Ms. Bladey:

The Nuclear Energy Institute (NEI)<sup>1</sup> submits the following supplemental comment in response to the above cited *Federal Register* notice concerning the "effectiveness, transparency and efficiency" of the Alternative Dispute Resolution (ADR) program. We recognize that the official comment period has closed on this matter. However, our timely January 17, 2012, comments on Docket ID-NRC-2011-0208 concerning the ADR program's value and potential enhancements to the ADR program inadvertently omitted the point set forth below. We respectfully request that the NRC consider this additional concern to the extent that it is feasible to do so.

#### Consideration of Classified Information in ADR Proceedings

We propose that the NRC's Alternate Dispute Resolution program not preclude the use of ADR for cases involving Classified Information. In our view, the ADR program should permit discussion of a range of sensitive information up to and including Safeguards Information, in ADR proceedings.

Access to Safeguards Information requires a background check (which includes an FBI criminal history record check, and employment history, education, and personal references checks, to determine the person's trustworthiness and reliability), and determination of need-to-know. See 10 CFR 73.22. Access to Classified Information requires a national security clearance and a need-to-know determination. See 10 CFR 95.35. "Need-to-know" is defined in 10 CFR Part 95

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

SUNSI Review Complete  
Template = ADM-013

E-REDS = ADM-03  
All = M. Schwartz (mes)

10/17/2011

76 FR 64124

3

RECEIVED

2012 FEB -1 PM 2:13

RULES AND DIRECTIVES  
BRANCH  
FEB 04  
14:00

Ms. Cindy Bladey  
February 1, 2012  
Page 2

as "a determination made by an authorized holder of classified information that a prospective recipient requires access to specific classified information in order to perform or assist in a lawful and authorized governmental function under the cognizance of the Commission." Presiding over an ADR proceeding as part of an official NRC enforcement activity can be considered a "lawful and authorized government function" within the meaning of the rule. It would therefore seem that ADR mediators with the necessary security clearance could be found to have the appropriate "need-to-know" in light of their "lawful and authorized government function" -- and could be authorized to mediate in ADR cases involving Classified Information.<sup>2</sup> If there are particular circumstances where a need-to-know cannot be established for specific classified information, perhaps NRC should consider additional affirmative steps such as "redacting" the Classified Information, in order to proceed with the ADR.

Please feel free to contact me or Andrew Mauer, NEI Senior Project Manager, Fuel and Materials Safety (202-739-8018) if you have any questions concerning this submittal.

Sincerely,

A handwritten signature in black ink that reads "Ellen C. Ginsberg". The signature is written in a cursive, flowing style.

Ellen C. Ginsberg

---

<sup>2</sup> By way of analogy, we note that a number of presiding officers in NRC adjudications before the Atomic Safety and Licensing Board Panel have access to Classified Information, Safeguards Information, or other sensitive information based on a need-to-know and the appropriate clearance. This enables them to conduct hearings involving NRC protected information (under appropriate security conditions). This precedent supports our argument, since the presiding officer in an adjudicatory proceeding plays a role analogous to that of a mediator in an ADR proceeding