

A Framework for C2C Notification, Consultation, and Dispute Resolution in the Development of Oil and Gas:

The Regulatory Alignment Team proposes that the EUB adopt a framework that references good industry practices for negotiations between companies at the pre-application stage. When an EUB application is required to deal with unresolved issues, the team recommends that the framework be used to better explain EUB expectations for consultations, dispute resolution, and the hearing process. The framework and accompanying flowchart were developed using material from the C2C Dispute Resolution Task Force on best dispute resolution practices and augmenting material from *EUB Guide 56: Energy Development Applications and Schedules* and *Guide 65: Resources Applications for Conventional Oil and Gas Reserves* and the EUB ADR program. *Key recommendations* for regulatory changes are shown in bold.

The framework includes four stages:

- 1. Planning an oil and gas development proposal**
- 2. Identifying and engaging potentially affected companies**
- 3. Addressing objections/concerns**
- 4. Addressing unresolved objections through the regulatory process**

The team recommends that the EUB through expectations listed in application guides, informational letters, and various regulatory publications (ie. CAPP Guide for Effective Public Involvement), strongly support the use of ADR tools and techniques prior to filing an EUB application.

The team also recommends the EUB enhance the participant involvement framework of the new Guide 56 by referencing good ADR practices in C2C disputes.

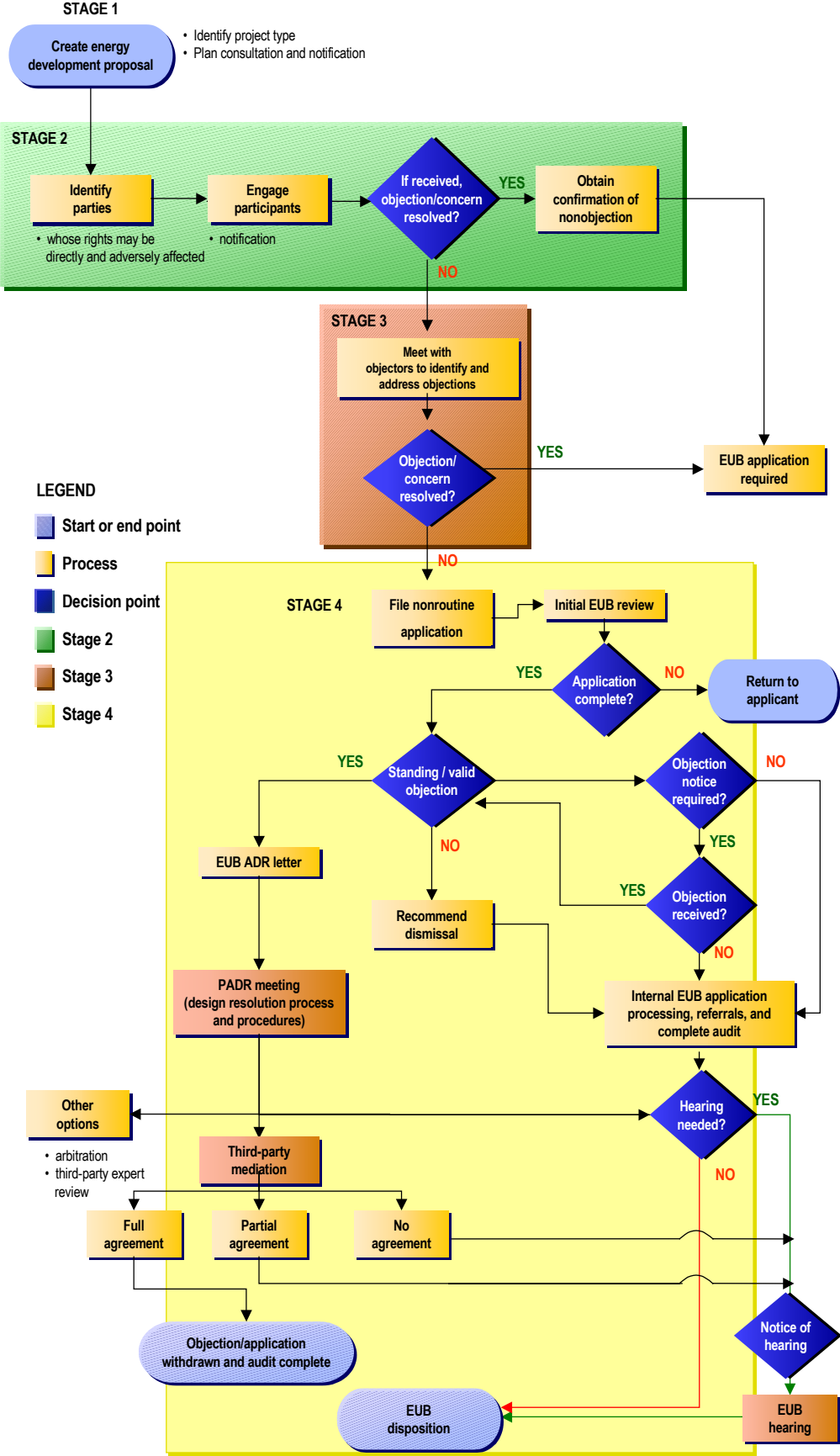
Stage 1: Planning an oil and gas development proposal

It is important that a proponent of any development plan and implement a participant involvement program at an early stage of any project (e.g., prior to finalizing such items as location, size, and throughput). “Participant involvement” is an umbrella term used by the EUB to encompass all aspects of public, industry, and regulator interactions and communications. It implies that each company, organization, community, group, and individual with a stake in the discovery, development, and delivery of Alberta’s resources is a participant and as such has both specific roles and responsibilities.

Planning considerations should include how to best engage other parties, what information parties require, how to notify and consult, consideration of issues that may be raised, what the parties’ interests may be, and the range of options that could be discussed. Dispute resolution may be considered on a continuum from notification, consultation, and negotiation to the use of a third party to assist through mediation,

arbitration, EUB hearing, or litigation. The more effective planning and implementation of participant involvement is the less likely the concerns will escalate to a dispute.

C2C Disputes



Roles and Responsibilities for C2C Participant Involvement

Proponent: The proponent must identify all potentially affected companies and parties whose rights may be directly and adversely affected by the proposed project and/or who may have an interest in the proposal. The proponent must notify these parties and upon receipt of concerns must enter into direct consultations to provide appropriate information and dialogue in an attempt to reach a resolution (as addressed in the rules of practice, section 18(4)).

Concerned company(s): Upon learning of another company's proposal through notification by the company or otherwise, the concerned company must promptly contact the proponent and notify the proponent of its interests or concerns. Early involvement may lead to having a greater influence on project planning and a broader consideration and evaluation of options. Accordingly, companies are strongly encouraged to participate in ongoing issue identification, problem solving, and planning with respect to energy development projects.

EUB: All objections/concerns regarding applications made by persons whose rights may be directly or adversely affected by an approval will be considered by the EUB (Energy Resources Conservation Act, Section 26).

As the regulator of the energy industry, the EUB has the authority to approve or deny proposed energy development and to decide which parties have standing in cases of outstanding objections/concerns (see flowchart and Section 4.2.4.3).

The EUB assists companies to understand the regulatory requirements and expectations and how to apply them in C2C disputes. The EUB also strongly supports issue mitigation and conflict resolution. It sponsors and encourages the use of ADR tools and techniques. The EUB expects parties involved in C2C disputes to attend a Preliminary ADR (PADR) meeting to discuss dispute resolution options and procedures to deal with the dispute. The meeting is run by dispute resolution experts and attended by EUB staff. The PADR meeting is a key element of the EUB ADR program; further logistical details are provided in Section 4.2.4.5.

Stage 2: Identifying and engaging potentially affected companies

The EUB sets out the minimum radius of investigation for the various energy developments for wells and facilities in *Guide 56* (Tables 5.1, 6.1, and 7.1). *Guide 65*, (Tables 1 and 2) specifies the minimum notification for resources applications, including the various C2C equity applications such as rateable take, common carrier/processor/purchaser, and compulsory pooling. The radii set out in the guides are guidelines only; it is the proponent's responsibility to assess areas beyond the minimums and determine if other companies may be affected or have an interest.

Industry should develop an effective participant involvement program that includes parties whose rights may be directly and adversely affected by the nature and extent of the proposed application. The development and implementation of this program occurs prior to the filing of an application to the EUB and includes the distribution of a project description, responding to questions and concerns, discussing options, alternatives, and mitigating measures, and seeking confirmation of no objection (where concerns have been initially raised) through cooperative efforts.

Stage 3: Addressing objections/concerns

Rules of Engagement

In order for the negotiations to be effective, parties need to be willing to engage in a genuine problem-solving process. Accordingly, representatives of the parties should:

- conduct themselves in an honest and forthright manner, i.e., no withdrawal from communication, and no use of “power plays” or coercion to win agreement;
- make an honest and serious attempt to
- design a process for resolving the dispute, and
- resolve the dispute;
- have full, unrestricted decision-making authority;
- be willing to listen to the other party’s (parties’) representative(s), make accommodations, and consider alternative solutions; and
- fully disclose all available information required for a complete, frank discussion of options in reaching a resolution of substantive issues.

If negotiations are stalling or the issues are wide in scope, the parties should consider the involvement of senior management personnel. This may assist by providing a different focus, clarifying the scope of the issues to be resolved, and establishing priorities and the importance of future relations between the companies.

Third-Party Assistance

The parties can also agree to jointly select neutral third parties to analyze technical information and provide information to the negotiation. The parties could also decide to require the expert to:

- render a nonbinding or binding decision if required,
- arbitrate the dispute, or
- mediate the dispute.

Negotiations may become difficult when:

- there has been a significant expenditure of time and resources to deal with the dispute with no resolution;
- relationships between the parties begin to deteriorate; or
- one or more of the parties refuses to engage in dialogue or disclose information.

At this point, the parties may find it helpful to involve a mediator and/or an ADR Service Provider, a neutral third party in their discussions.

Mediation can be a timely and efficient option compared to litigation or a EUB hearing. The role of the mediator is to facilitate discussion and focus the parties through a fair and effective process by:

- assisting the parties in determining what issues need to be resolved;
- creating a thorough understanding of each other's needs and interests; and
- facilitating the generation of a wide range of options from which the parties can select a mutually agreeable solution.

What is often missing prior to the mediation is the lack of shared information and a clear understanding of the other party's overall interests or the availability of options.

To enhance the potential for successful mediation, the ADR Service Provider or mediator may encourage the parties to consider the following tips in their preparation and attendance in mediation.

Preparation for Mediation

Preparation for mediation should be no less an effort than preparation for litigation, arbitration, or a regulatory hearing.

- Prepare yourself for interest-based negotiations (the elements of which are alternatives, interests, options, legitimacy, relationships, communication, and commitment).
- Establish your BATNA (best alternative to a negotiated agreement)—the BATNA is what you can do independently of the other side if mediation fails. It is the standard against which all settlement options/alternatives will be measured to determine whether you should settle the dispute.
- Articulate and understand the interests that underlie your position going in to the mediation (i.e., your concerns, hopes, expectations, priorities, beliefs, fears, values, and needs).
- Spend time considering what the other parties' interests may be.
- Prioritize your interests and anticipate what interests you and the other side may have in common that can be addressed and lead to a durable, lasting resolution of the dispute.
- Where interests may diverge, consider what objective industry customs and standards may be relied on as persuasive to one side or the other.
- Brainstorm about options (solutions) that may satisfy the interests of both sides.
- Strategize about who will speak—what and how you will communicate: avoid confrontation, and encourage relationship building.
- Make sure you have authority to make commitments at the mediation (or can telephone someone who has greater authority to settle).

Attendance at Mediation

- Seek understanding of the other side's position and ask the other side to try to understand your position.

- Be prepared to ask questions—not to trap, embarrass, or intimidate, but to discover WHY and HOW: why the other side is taking the position it is, and how it will be better off if its position is accepted. Discover underlying interests for which options and solutions can be developed.
- Clarify misunderstandings and information gaps. Work from a common information base.
- Question data and information and review it against objective standards and criteria.
- Ask for justification and be prepared to justify.
- Try to keep the focus of the mediation on problem solving—looking for options that will satisfy yours and the other side’s interests and that are better than your BATNA.
- Listen to the other side. Try to understand where it is coming from. Look for creative options to create a win/win solution to the dispute.
- Refrain from the temptation to “cut to the chase,” “get to the bottom line,” find a “final solution” too quickly.
- Model your behaviours on how you expect to be treated by the other side.

If the parties are unable to agree on the selection of a mediator, they might consider obtaining a list of potential mediators from groups such as the Alberta Arbitration and Mediation Society (www.aams.ab.ca) or a list of oil and gas service providers and mediators maintained by a stakeholder committee involved with the EUB ADR program (www.eub.gov.ab.ca/BBS/public/ADR/roster.htm).

Costs of the mediation, arbitration, or other options, such as expert opinions, are to be shared equally by the affected companies, unless they agree on a different arrangement at the beginning of the process.

Stage 4: Addressing unresolved objections through the regulatory process

The EUB recommends that the applicant address and attempt to resolve objections and concerns prior to filing an application with the EUB. EUB *Guide 56* and *Guide 65* currently specify a number of expectations regarding the applicant’s C2C participant involvement program. Recommendations for additional requirements are listed in italics below.

EUB Expectations for C2C Participant Involvement

5. The EUB requires that the notification (through written correspondence) and consultation program (through direct communication) be developed and completed prior to filing an application.
6. The applicant is expected to develop an effective participant involvement program engaging both potentially affected and interested parties at an early stage of planning.

7. The EUB expects that industry contacts will precede public consultations and notification.
8. Information packages must be developed and distributed to all parties included in the participant involvement program. The package must include a written overview of the proposal, including, as appropriate, the location, type, and design capacities. If the proposal is part of a larger project, the applicant is expected to discuss the entire project and how it complements other energy development in the area. The applicant is expected to minimize the cumulative impacts of energy development and to show it has applied good planning practices with respect to the public and the environment.
9. The applicant is expected to notify all parties whose rights may be directly and adversely affected. The applicant should *specify* reasonable time to respond (*a minimum of 14 calendar days*) and specific instructions as to *how to ask questions or express concerns*. The onus is on these parties *to respond and raise any objections/concerns* to the proposal.
10. The applicant is expected to consult with or to notify other oil and gas reserve owners, operators of existing facilities, and other parties that express an interest in the proposed development, whether located inside or outside the minimum radius specified in the guides, and allow them the opportunity to obtain project specific information.
11. If the notified party wants to discuss the proposal, the EUB expects that a company representative with full knowledge of the overall plans and direction of future development options should be available to answer questions.
12. As negotiations proceed, the EUB expects there to be face-to-face meeting(s) involving knowledgeable individuals with decision-making authority to discuss options and seek resolution of issues and concerns.
13. The applicant is expected to document commitments made and have a process in place to monitor and follow up on commitments.

Filing a Non-routine Application and Initial EUB Review

For most C2C disputes, the EUB expects a substantial effort to be made to resolve the dispute. A request for an EUB hearing should be considered only as a last resort. If all objections/concerns cannot be resolved through direct negotiations or with third-party assistance, the applicant must file a non-routine application for reasons of participant involvement and request a hearing in parallel with the EUB ADR process. The applicant may also request a ruling on the objector's standing.

When filing a non-routine application as a result of outstanding objections or concerns from affected parties, the applicant must include a written summary of the outstanding objections or concerns for the EUB's review and consideration.

The application must include a description of why the negotiation did not lead to a settlement and what dispute resolution efforts were conducted. Matters of confidentiality

and disclosure should be addressed and determined prior to submission of the application.

During the initial review (Stage 4 of the flowchart), the EUB will scan the application to ensure that it includes all the information required for processing. To be complete, the application must include a copy of all correspondence between the project proponent and affected parties.

The EUB will make a determination of the completeness of the applicant's notice and participant involvement program.

The EUB may request audit information on industry notification that includes a record of contact with other industry parties, giving

- name, address and telephone number of all parties contacted;
- copies of all related correspondence received; and
- disclosure meeting minutes, including
 - date of meeting,
 - meeting notice and/or invitation,
 - invitation list,
 - names, addresses and telephone numbers of participants, and
 - project information presented or supplied.

The team recommends that the EUB significantly reduce the timelines for this initial review if there is a potential that the matter is frivolous, used as a tactic, or is outside the EUB's jurisdiction.

Standing and Validity of Objection

If the objections/concerns remain unresolved, the Board or its delegate, upon consideration of the application and objections received, decides on the best course of action, which may include denying the application, setting aside the objections, or holding a public hearing.

The EUB will seek to clarify standing and the reasons for the objections prior to submitting a dismissal recommendation.

The team recommends that the EUB put in place an expedited process if there is a potential the matter is frivolous, used as a tactic, outside EUB jurisdiction, or the objector may not have standing if the matter proceeds to an EUB hearing.

There is wide industry support for the EUB to expand the cost regulations to award cost payments in C2C disputes. Currently there are no consequences for abuse of the regulatory system. The team believes that some form of consequence is appropriate to provide a deterrent to would-be abusers of the system and to motivate parties to engage in meaningful dialogue within the collaborative process. While section 28 of the Energy Resources Conservation Act provides the Board with the discretion to award costs to companies whose business includes the trading in or transportation or recovery of any energy resource, the Board rarely exercises this authority. The Team believes that some form of consequence is appropriate to provide a deterrent to would-be abusers of the system and to motivate parties to engage in meaningful dialogue within the collaborative process. The Team recommends that the Board should exercise its authority to consider

an award of costs in industry-to-industry disputes upon the submission of an interested party. Such a cost award would be for some or all of a party's costs and would be based upon the criteria listed in section 55 of the EUB's Rules of Practice.

The Team recommends that the EUB utilize the discretion provided in section 28 of the Energy Resources Conservation Act to award costs, where appropriate, in EUB proceedings arising from industry-to-industry disputes.

EUB ADR Letter

The following clause should be included in an EUB letter that will be sent to the applicant and all identified objectors very early in the processing of an application. The letter should briefly outline EUB expectations that all the companies in an industry dispute should attend a Preliminary ADR (PADR) meeting. The applicant may initiate the meeting through a service provider or mediator, *and the date for the PADR meeting should be set within 14 calendar days of receipt of the letter*. Should a company choose not to attend at least the PADR meeting, it must provide reasons to the EUB.

The team recommends that EUB staff send an ADR letter to all parties in a company-to-company dispute as soon as possible following receipt of an application and associated objections. The letter should outline EUB expectations for the timely convening of a PADR meeting and provide information and advice in this regard.

The team suggests that the following clauses be included in the EUB letter:

I would like to bring to your attention the EUB's *Informational Letter (IL) 2001-01*, which describes the Appropriate Dispute Resolution (ADR) program. Section 6 of the IL states the EUB expectation that for company-to-company disputes the parties attend, as a minimum, a Preliminary ADR (PADR) meeting. The purpose of this meeting is to have the parties discuss process and procedures and decide on ADR options. The PADR meeting is typically chaired by a mediator and attended by EUB staff and is of short duration. The outcome of the PADR meeting could be a wide variety of ADR options, including mediation, a resumption of negotiations, or the conclusion of the parties that an EUB hearing is required. As described in the IL, the PADR meeting and subsequent resolution efforts (such as mediation) will occur in parallel to the regulatory process and will not delay the processing of an otherwise complete application.

The EUB expects that a PADR meeting be arranged within **14 calendar days** of the receipt of this letter. To initiate the ADR process, the applicant may contact one of the service providers listed on the EUB ADR Web page. If you decline to attend a PADR meeting, please provide a written explanation to the undersigned.

In order to assist you with scheduling and planning the PADR, the EUB has provided on its Web site a list of service providers and mediators who can assist you. You are encouraged to review the roster of service providers and mediators and contact one of them to assist you in the planning and execution of the PADR.

PADR Meeting

The need, intent, and expected content for a PADR meeting are stated in Section 6 of *IL 2001-01: Appropriate Dispute Resolution (ADR) Program and Guidelines for Energy Industry Disputes*. The PADR meeting is distinct from the previous negotiations or use of third-party assistance prior to filing an application. EUB staff attends the PADR and the focus of the meeting is on process, which should include an evaluation of the merits of various ADR options, including an EUB hearing.

The PADR meeting provides an opportunity for parties in conflict to discuss the dynamics of their dispute and jointly design a dispute resolution process appropriate to their unique situation. In essence, this sees the parties building a road map for resolution of their dispute, while ensuring that they do not harm or compromise their hearing or litigation steps.

PADR meetings are flexible. They generally

- are facilitated by a neutral dispute resolution expert;
- deal with process issues, not substantive issues;
- identify all the necessary parties and address issues of authority;
- address planning, preparation, and logistics for the dispute resolution process;
- enable the custom design of the appropriate dispute resolution tool (i.e., mediation, arbitration, hearing) and, if applicable, the selection of appropriate third-party assistance (e.g., technical expert, arbitrator, mediator); and
- provide the parties with the best opportunity to make an informed decision about continued participation in a future dispute resolution process.

Experience to date with this type of meeting has been very positive for a number of reasons:

- It's a safe and simple first step in stressful and conflicted situations. Most parties agree to an invitation to a PADR meeting because they have "nothing to lose."
- Parties tend to buy into and more fully commit to a dispute resolution process that they have helped to design, which has historically resulted in a higher settlement rate before a hearing.
- The parties identify roadblocks and preparation issues and plan for these effectively, enhancing the success of their process.
- The parties bring decision-makers to the meeting, which is scheduled for a specific duration to maximize results.
- An informed "no" with a decision to proceed with a hearing is a legitimate outcome.

In order for the EUB ADR process to be effective, parties need to be willing to engage in a genuine problem-solving process as an alternative to having an EUB Board hearing. Accordingly, representatives of the parties to the PADR meeting should participate in an honest and forthright manner, following good "rules of engagement" (see Stage 3). Additionally, the EUB expects the parties to fully disclose all information that might be relevant to the negotiations.

The outcome of a PADR meeting is usually a signed agreement in which the parties agree how to proceed. It may include viable options, such as resuming negotiations, obtaining independent technical expert advice, participating in mediation, or referring the matter to

arbitration or to an EUB hearing. In addition, the parties agree to a number of procedures, such as what information should be exchanged, timelines, costs, and who should participate. For a more complete list of PADR topics, refer to *IL 2001-01*.

If the parties reach agreement using ADR, it is not necessary to file the agreement with the EUB. However, the applicant must amend its application if it has been impacted; if the EUB has received a written objection from a party, the same party must remove its objection in writing.

No Resolution or Partial Resolution Leading to an EUB Hearing

Should the parties not reach full agreement through mediation and the outstanding item(s) fall under EUB jurisdiction, a hearing will likely be needed. The parties should discuss this potential at the PADR meeting. To ensure efficient use of time and resources, the reports and submissions used in an unsuccessful mediation could also be used at the EUB hearing.

The matter of confidentiality must be discussed at the PADR meeting. Should it be necessary to proceed to an EUB hearing following a mediation session, the parties must then apply the confidentiality agreement and decide what documents and discussions should be considered at the hearing? Generally, reports and documents can be submitted with certain confidential sections removed. Discussions are typically kept confidential, and one party should not speak for the other party at the hearing. In summary, whatever is said at a PADR meeting or mediation session is confidential if the parties have agreed that it is to be kept confidential, except for (1) anything contained in a mediated agreement, and (2) information required by regulation (safety, environment protection, and resource conservation, as outlined in *IL 2001-01*). In addition, whatever was said and any record of what took place at a PADR or mediation session is not admissible in a subsequent EUB proceeding unless the parties otherwise agree in writing.

The matter of disclosure must also be addressed, and each party must address the amount of information it is willing to bring forward. To increase the possibility of success and the range of potential solutions, parties should disclose all relevant information. The complete production/disclosure of relevant and material documents and the reliability of the parties are important underpinnings of the EUB's regulatory process. It is not appropriate to withhold information that the parties intend to use at a hearing subsequent to the mediation.

The Team believes that any documents intentionally not produced at an ADR session should not be later relied on in a proceeding before the EUB unless the EUB is satisfied that there is sufficient cause for the omission or non-production of the document at the ADR session. The Team notes that the EUB's Rules of Practice provides that a party may not rely on documentary evidence at a proceeding unless that evidence was previously filed with the Board and provided to interested parties. The Team believes that following the determination that an EUB proceeding is necessary the EUB should set early submission dates so that the information that will be relied upon at the proceeding is provided to all parties in a timely fashion. ADR as a parallel process could then proceed. This procedure should improve the sharing of information; however as outlined in section

4.2.4.3 the EUB should also consider awarding costs should the matter create a delay in the proceeding or extend the length of the proceeding, resulting in needless waste of time and money.

The team recommends that the EUB clarify the admissibility and submission deadlines for new documentary evidence at a EUB hearing subsequent to a PADR meeting and mediations in order to avoid any party being taken by surprise or being prejudiced.