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Mediating Public Disputes: Obstacles and Possibilities

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Mediated negotiation has recently been used to supplement traditional methods of resolving complex public resource allocation disputes in the United States. Although many of these efforts have apparently been successful, procedural concerns have been raised by a number of analysts. In this paper, we focus on five of these concerns: (1) problems of representation, (2) the difficulties of setting an appropriate agenda, (3) obstacles to joint fact finding, (4) difficulties of binding parties to their commitments, and (5) obstacles to monitoring and enforcing negotiated agreements. Our discussion builds on three cases: a negotiated investment strategy undertaken by the state of Connecticut; a dispute over the siting of a low-income housing project in Forest Hills, New York; and an environmental dispute involving energy production facilities along the Hudson River. These experiences indicate that the difficulties associated with mediation can be overcome with the application of innovative techniques, and the assistance of a skillful and astute mediator.

Disputes over the allocation of public resources are usually handled by legislative, administrative, and judicial bodies. More often than not these bodies produce results not as fair, efficient, or stable as they could be. Instead of reconciling contending interests, these traditional dispute resolution mechanisms tend to exacerbate underlying conflicts and leave the combatants in a worse position to deal with their differences in the future.

Supplements to our traditional methods of resolving resource allocation disputes are needed to produce better results. Mediation has been used with

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increasing frequency in recent years to help resolve public disputes (Goldmann, 1980; Susskind, Bacow, & Wheeler, 1984; Talbot, 1983). Several federal agencies, including the Environmental Protection Agency (EPA), have experimented with mediation in the rule-making process (Baldwin, 1983). Mediation has been used to resolve a conflict over funding the state unemployment compensation fund in Wisconsin (Bellman & Sachs, in press), to resolve water allocation disputes in the western United States (Folk-Williams, 1982; Kennedy & Lansford, 1982), and to handle a variety of complicated noncriminal cases that a federal district judge thought might be settled more expeditiously out-of-court (but with the assistance of a court-appointed mediator). Dozens of land use and facility siting disputes have been resolved through face-to-face negotiation aided by a mediator (Bacow & Wheeler, 1984).

The key to mediated negotiation is face-to-face dialogue among the relevant stake holders assisted by a nonpartisan facilitator. Mediated negotiation is appealing because it addresses some of the shortcomings of traditional dispute resolution processes. It allows for those most affected to be directly involved, it often produces settlements more rapidly and economically than litigation, and it is adaptable to the stake holders' needs. Successful mediated negotiation produces informed voluntary agreements by removing the artificial constraints imposed by standardized adjudicatory procedures.

In contrast to simple negotiation, mediated negotiation involves an intervenor—someone to help the parties overcome their communication difficulties. Mediators also handle the arrangements necessary in the course of a prolonged negotiation and, in complex public disputes, play a crucial role in ensuring that public disputes are not transformed into private settlements. They accomplish this by keeping channels of communication open and pressing the participants to keep the interests of the public-at-large in mind (Susskind & Ozawa, 1983).

Despite the successes achieved thus far, the use of mediated negotiation in public sector disputes has its critics. They have raised several concerns, five of which are the focus of this paper: (1) problems of representation, (2) difficulties of setting an appropriate agenda, (3) obstacles to joint fact finding, (4) difficulties of binding parties to their commitments, and (5) obstacles to monitoring and enforcing negotiated agreements. One other concern of the critics—cooptation resulting from unequal political power or bargaining ability—will not be discussed here.[1]

We have examined three cases in which mediated negotiation was used to

[1]It is our view that while politically powerful groups may trick or force less-powerful groups into participating in mediated negotiation, the less-powerful groups retain the equivalent of a veto. (Mediated agreements are not imposed but rather accepted voluntarily by all parties.) Moreover, no group that agrees to participate in mediation gives up its subsequent right to pursue its interests through more traditional dispute resolution processes.

settle public disputes. We have reviewed the procedures and tactics employed by the mediator, and evaluated the outcomes in light of the critics' charges. Our analyses and conclusions follow.

Procedures

Mediating public disputes is in many ways akin to international peacemaking. For instance, the process of mediation must be "sold" to all the affected parties each time a dispute arises; there are few institutionalized agreements regarding the process of dispute resolution. The participants frequently do not understand mediation, even after it has been explained. Some stake holders may be concerned about their ability to represent their own interests effectively. Most public disputes involve adversaries who do not expect to resume or repeat negotiations at specified intervals, which removes some of the pressure to live up to agreements.

In contrast, mediation in the more familiar labor–management arena has been standard practice for decades and is institutionalized through federal legislation. In labor–management disputes, the parties (and their representatives) are readily identifiable and the issues (until very recently) clearly circumscribed—conditions seldom true in public resource allocation disputes. Despite the apparent lack of a supportive structure or a legislative context for applying mediated negotiation in public sector disputes, a number of procedures have been developed that can help create an environment conducive to joint problem solving. They are aimed at "solving" some of the problems that commonly emerge in ad hoc negotiating relationships. Many depend on the intervention of a skilled mediator.

Dealing with the Problems of Representation

In most private disputes the stake holders are readily identifiable. They either participate directly or select people to represent them. In public disputes, however, representation is much more problematic. Most public resource allocation disputes involve a great many stake holders. It is often logistically impossible to engage all interested members of every affected group in negotiations. A system of representation must be devised. Unfortunately, many groups cannot agree on who should represent them. In addition, some interests are diffuse, inarticulate, or hard to organize. In environmental disputes, for example, the interests of future generations compete with the short-term interests of land developers. Who can represent generations yet unborn?

Several strategies address the problem of representation. First, the community-at-large must be informed that a mediation effort is about to be undertaken. Potential stake holders must be contacted or surveyed by "knowledgeable"

locals (i.e., the staff of government agencies, well-known community organizations, civic leaders, etc.) to compile a list of still other groups that should be contacted. To ensure that the interests of hard-to-represent groups are protected, mediators can identify surrogates or prevail on existing organizations to accept special responsibility for representing diffuse interests (i.e. a group such as the Consumer's Union might be asked to represent general consumer interests) (Susskind, Richardson, & Hildebrand, 1978).

Established organizations can be used as focal points—organizing and clustering large numbers of stake holders into smaller representative teams. Groups with shared concerns should be expected to join forces. A process of "pyramiding" can be used to involve an ever-increasing number of participants (Susskind & Weinstein, 1980). While a core team of representatives may be "at the table," each team is expected to remain in contact with its "constituents" throughout the negotiation process.

How are interested parties judged "legitimate" and by whom? Decisions about such sensitive matters must be made collectively. Usually, the most obvious stake holders draw together first. Then, as other groups come forward, the first group (with prodding and advice from the mediator) decides whether to admit still others. Most of the time, the initial participants agree to err on the side of inclusiveness, since credibility in the public's eye is essential to implementing any agreements that emerge.

Representatives in a mediation effort can only be effective if they have authority to speak for their constituents. More importantly, their effectiveness as negotiators depends on how others estimate their ability to live up to their agreements. It can be difficult to ensure that self-proclaimed spokespeople have authority to make commitments, especially when ad hoc coalitions are involved. Negotiations often begin with participants specifying the scope of their authority. Nevertheless, such verbal assurances may be unconvincing, and other means of verifying the ability of representatives to commit their constitutents should probably be devised.

Setting a Reasonable Agenda

It is harder to define the negotiation items in a public dispute than in labor disputes. The agenda is especially important since it confines the scope of negotiable issues. Agendas bound too narrowly limit the possibility of maximizing joint gains. Agendas too broad create an impossible workload.

The range of items to negotiate, as well as the procedures for introducing new items, must be discussed when ground rules are first established. In public disputes, the mediator usually plays an active role at this early stage, since the parties are not well acquainted and have reason to be distrustful.

Joint Fact Finding

In traditional collective bargaining situations (focused on wage levels, fringe benefits, and working conditions) the costs of particular proposals are generally easy to predict. In public resource allocation disputes, however, disagreements tend to hinge on contrary forecasts, technical assumptions, and different interpretations of fact. Bacow and Wheeler (1984) explain, for example, that

> [A]t the heart of most environmental controversies lies a dispute over the likely future consequences of a proposed action . . . . Making predictions about impacts that will occur well into the future necessarily involves a fair degree of scientific and technical analysis . . . . Although we can predict the operation of a few natural systems quite accurately—the rise and fall of the tides is a good example—our understanding of how most ecosystems operate in fairly limited. As a result, our predictions are necessarily approximations of reality . . . . This produces a situation ripe for conflict. (Chapter 5, pp. 1–2)

Our ability to forecast is constrained by the primitiveness of our models and sometimes by the lack of "baseline" data. Most predictions, however well conceived, are open to debate.

Joint fact finding is one means of dealing with differences arising from conflicting interpretations of data. If groups with competing interests can develop a common data base, collaborate in preparing forecasts, or commission a single set of consulting studies, the "battle of the print-out" (in which technical specialists hired by each side challenge the adequacy of the other's facts and forecasts) can be avoided.

In public disputes, sharing information can be crucial to achieving agreement. Unequal (financial and technical) resources that give one party an advantage often lead to mistrust. One party may reject certain "facts"simply because they are furnished by an adversary. This tends to debase the value of scientific and technical input, undermining confidence in studies or advice provided by expert consultants.

One solution is to select one member of each stake-holding team to serve on a fact-finding task force. Or both sides can appoint a joint technical committee to advise the whole group. Such strategies can help ascertain agreed-upon facts and can narrow the range of technical matters in dispute (Greenberg & Straus, 1977). In several instances, fact-finding task forces have actually built and tested simple forecasting models that constricted dramatically the range of disputed issues (Holling, 1978).

The mediator plays an important role in joint fact finding, particularly in reassuring the parties that all key information has indeed been shared. Moreover, the mediator may be called upon to administer funds from a resource pool to commission additional technical assistance.

Binding Parties to Their Commitments

The parties involved in collective bargaining usually have a long-term relationship built around recurrent negotiation. Parties invovled in public disputes tend to be one-time-only adversaries. This provides less incentive to honor agreements, especially if changing conditions render the terms of agreement less attractive. Moreover, since public sector disputes often involve ad hoc clusters of interest groups, dissatisfied individuals or even factions may break away at any point, challenging agreements reached by the others. Splinter groups may disavow commitments made by their representatives.

One method of holding parties accountable is to require performance bonds, held in escrow, until all obligations are satisfied. If one party fails to fulfill an obligation, such funds can be used to compensate adversely affected parties.

A second method, especially appropriate in dealing with public disputes, has been proposed by Sullivan (1984). He suggests referenda be used to ratify certain negotiated agreements. If the electorate accepts an agreement, it can become legally binding on all parties.

The suitability, acceptability, and success of such devices will vary in different situations. The more such arrangements are clarified in writing, the more likely they are to prove effective.

Monitoring and Enforcing Negotiated Agreements

The attractiveness of mediation depends largely on the implementability of negotiated agreements. Implementation may be difficult because there are no institutionalized rules to enforce informal agreements. Unless the involved parties make specific provisions to ensure monitoring and enforcement, settlements will probably not endure.

A number of ingenious devices for enforcing agreements have been explored. Rivkin (1977) has suggested "self-enforcement" mechanisms. In the dispute settlement over siting a suburban shopping mall, for example, the negotiated agreement required the developer to deposit a $100,000 letter-of-credit at a local bank, guaranteeing funds for the construction of a well-landscaped berm to buffer abutting homes from the new commercial area. The agreement specified that the berm would be one of the first components built. Default on this item would have delayed further execution of the agreement.

There are other methods of ensuring monitoring and enforcement. A committee of representatives can be chosen by the participants and assigned the chore of supervising implementation. Or, if a government agency is agreeable, it can be assigned responsibility for enforcement. Responsibility for implementation can also be assigned to the mediator. Although this extends the duration of the mediator's involvement, the mediator's proven nonpartisanship, trustworthiness,

understanding of and commitment to the agreement ought not to be undervalued.

There is always the possibility that ad hoc agreements will unravel if one party fails to fulfill its commitment or behaves in unsatisfactory ways. Events beyond the control of the parties may prevent implementation. Therefore, it is important that procedures for remediation be spelled out in the written agreement.

Three Case Studies

Many public disputes have been mediated successfully.[2] Three such cases are described below. They are based on material extracted from recorded observations, interviews, and documents (in the first case), and retrospective interviews and written reports (in the two latter cases). First the basic chronology of events is reported. Then the selection and role of the mediator is discussed along with the outcome of the effort.

The Connecticut Negotiated Investment Strategy

In 1982 the state of Connecticut faced the prospect of distributing 33 million dollars in federal aid for social services. That allocation was 27% less than the state had received the previous year. The governor chose to pursue a mediated approach, modeled after the Kettering Foundation's Negotiated Investment Strategy (NIS) experiments (Watts, 1983). Eighteen state agencies, 114 municipalities, and a great many private service providers demanded a chance to participate.

Preparations for the negotiation included organizing stake-holding interests into three teams representing the state, municipal governments, and nonprofit agencies involved in providing social services (and eligible for the federal aid). All the state agencies qualified to receive block grant funds were included. Representation of municipal interests was coordinated through the Connecticut Conference of Municipalities and the Council of Small Towns. The nonprofit service providers' team was assembled by the leaders of a group of about 30 associations representing nonprofit organizations identified through a survey of relevant state agencies. A fourth "observer" team representing the private sector was invited to attend the bargaining sessions, in the hope that exposure to this process would enhance the coordination between public and private agencies. Team members were selected by the constituencies of the groups represented.

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[2]The Conservation Foundation has a list of 130 successful efforts. Speech by G. Bingham to the American Law Institute—American Bar Association Course on Environmental Law, February 25, 1984.

The teams met in five formal joint sessions held between October and December 1982. Representatives from the teams met before the first bargaining session to select a mediator and to establish ground rules (e.g., "all technical information should be shared"). Training sessions familiarized the participants with the NIS process and negotiating techniques.

The agenda for the negotiating sessions was set at the first joint session in October. Before each formal meeting the teams prepared written statements addressing specific agenda items. Discussion focused on jointly revising these statements. By the fourth formal session, the mediator had integrated the points of agreement into a draft. The groups used this document to narrow their discussion. An agreement was signed on December 23, 1982, at the final scheduled session.

The signed agreement outlined a procedure for distributing block grant funds and established a tripartite committee to monitor implementation. The tripartite committee was also charged with resolving outstanding issues and interpreting the agreement should future disagreements arise.

The negotiating teams chose Josh Stulberg, a lawyer, as their mediator. The ground rules called for the mediator to play a rather passive role. His tasks were to designate official observers, prepare minutes of all joint sessions, coordinate meeting schedules, develop the agenda, control the pace of the bargaining sessions, and assist the teams in preparing written statements. Stulberg adhered to these prescriptions. He made little effort to counteract conspicuous imbalances among the teams and took no responsibility for clarifying technical matters, although the state team clearly held an advantage, particularly given the complicated financial manipulations proposed.

The negotiating groups seemed reasonably satisfied with the agreement, although the document was later described as "a summary of all the teams' positions rather than a collaborative effort to maximize joint gains" (Watts, 1983, p. 39). Endorsements by the governor and the state legislature symbolized the state's support for the negotiated agreement. The process incurred higher costs than a more typical approach to setting budget priorities, but a unilateral decision would surely have encountered severe political opposition, and possibly litigation.

The Connecticut NIS was carried out with careful attention to agenda setting and representation. The agenda for the negotiating sessions was determined jointly. Both the agenda and the identification of participating interests were largely based on past precedents. Both tasks were undertaken in public forums. This enhanced the credibility of the final agreement in the eyes of the community at large. Dissatisfaction with the agreement, reportedly expressed by some Hispanics, might be traced to insufficient attention to team building and a failure of some team members to stay in touch with their constituents.

Cooperative fact finding occurred, but the ability of the negotiating parties

to respond to and use information varied drastically according to their technical capabilities. Stulberg has been criticized for failing to provide additional technical assistance to disadvantaged team(s). Another mediator, sensitive to such imbalances, might have handled the situation differently.[3]

The Forest Hills Case

The Forest Hills case involved a neighborhood protest against New York City's plan to build a large public-housing project in Queens (Gillers, 1980). In 1971 the New York City Housing Authority began construction of a rental-housing complex for low-income, minority families in a middle-class Forest Hills neighborhood. Project designers envisioned 840 apartment units stacked into three 24-story towers.

The neighborhood quickly organized in opposition to the project. Vocal residents expressed anxiety about the influx of outsiders. Picket lines were set up and threats of violence followed.

Unwilling to set an undesirable precedent or to lose its already sizable investment in the project, the city did not want to abandon the Forest Hills site. The intensity of public reaction, however, demanded an official response. Not only were the protestors gaining nationwide media attention and becoming an embarrassment to Mayor Lindsay, but the welfare of the future project's residents was at stake.

In May 1972, Deputy Mayor Richard Aurelio asked Mario Cuomo, a lawyer practicing in Queens at the time (now governor of New York), to help mediate the dispute. Cuomo had been involved in an earlier dispute that led to selection of the Forest Hills site. Cuomo agreed to help with the Forest Hills case, but insisted on maintaining strict independence from the city government. He accepted no remuneration, no staff assistance, no specific instructions, and made no prior commitments. Nevertheless, the fact that the mayor had asked Cuomo to intervene undoubtedly affected Cuomo's credibility. The mayor was perceived as a prominent, interested, and active participant in the dispute. Many project supporters suspected that Mayor Lindsay hoped to use the housing-project dispute to recoup political support among Forest Hills voters.

Cuomo spent five and a half months on the dispute. He kept an "open door," inviting all interested parties to speak to him. He met with representatives of neighborhood opposition groups, and of the city and federal governments. When it became apparent that project supporters were less persistent in voicing their concerns, Cuomo sought out appropriate representatives, including the leaders of the black community, and members of civic and religious organizations. He

[3]See for example, the description of the mediator's role in Smith, D. "Brayton Point Coal Conversion," in Susskind, Bacow, & Wheeler (1983).

sought to "hear all sides." At the end of five and a half months, he submitted his recommendations to the city administration.

Cuomo called himself a "fact finder," a title that was probably more accurate than that of mediator. He made no attempt to bring the parties together. He tried to gain an "objective" understanding of the concerns of the parties, to evaluate options, and to discover the basis for a peaceful resolution of the dispute.

He initially avoided taking a personal stand on the substantive issues. Gradually, however, Cuomo urged the project's opponents to compromise—he believed they had no legal basis for halting construction. He convinced the Forest Hills residents that their unyielding stance would eventually provide the city with a rationale for continuing the project as planned. By showing a willingness to compromise, he reasoned, the residents might effectively force the city to accept project modifications. Cuomo floated ideas regarding revisions in the project design. By the time he submitted his report to the city, he was confident that his suggestions would be accepted by all parties.

Three buildings of 12 stories containing a total of 420 units now stand on the Forest Hills site, just as Cuomo's report recommended. In addition, rather than the originally proposed rental units, the city established a low-income housing cooperative, the first of its kind in the nation. The owner–occupant management arrangement was a significant change proposed in the fact-finding report. Co-op tenants say that community relations are excellent, and many attribute the occupants' sense of responsibility to their ownership of the units. Residents in surrounding Forest Hills have described the people living in the project as hard-working citizens with a sense of upward mobility with whom they share many values. Overall, the cooperative ownership arrangement appeared to significantly increase community acceptance of the project.

Cuomo's proposed modifications reduced the amount of federal aid awarded to New York City for housing. This incurred costs for the city, but apparently the city considered it a price worth paying to restore peace.

Although the Forest Hills case was not formally "negotiated," Cuomo's behavior as fact finder is not too different from the role played by a "shuttle diplomat" in an international dispute. His strategy for developing the settlement depended on his ability to generate a "single negotiating text," bouncing ideas off representatives of the various interests to test their strengths, weaknesses, and overall acceptability. His recommendations embodied concessions on both sides. Because the transactions were filtered through Cuomo, neither party was put in the position of having to yield to the other or appearing "soft."[4]

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[4]Fisher and Ury (1978) describe a "single negotiating text" as a draft agreement prepared by a mediator or an anonymous author, presented to the group, not for acceptance, but for criticism. Together, the parties discuss ways of improving the draft, revising it until the text contains all the

Representation posed a rather difficult problem, since opponents in most community disputes (such as those involving low-income housing or hazardous waste facility siting) are often more vocal and visible than are supporters. In this case, the media coverage given to the Forest Hills dispute served to alert the public to the fact that negotiations were proceeding. Combined with Cuomo's open door policy, this allowed all potential participants to express their interests. Cuomo assumed responsibility for the representativeness of the stake holders.

The Storm King Mountain Case

In 1963 the Consolidated Edison Company of New York (Consolidated Edison) sparked a lengthy and fiery dispute by submitting an application to the Federal Power Commission (FPC) for an operating license to build a power plant at the base of Storm King Mountain, 40 miles north of New York City (Talbot, 1983). An ad hoc group calling itself the Scenic Hudson Preservation Conference quickly formed to oppose the granting of an FPC license. In an historic ruling, a U.S. Appeals Court agreed with the environmental group's claim that the FPC had to consider scenic beauty in its licensing decision.

As the FPC reconsidered Consolidated Edison's proposal, the issues multiplied. In addition to esthetic considerations, legal, economic, and environmental questions were raised regarding the cumulative impact of the five existing power plants situated along the upper Hudson. The controversy involved three environmental groups, four public agencies, and five utility companies over a period of 17 years. The federal government and the utility companies spent millions of dollars on administrative hearings, litigation, and scientific studies.

In March 1979 attorneys representing two environmental groups approached the lawyer for Consolidated Edison to suggest the possibility of settling the dispute out of court. The idea appealed to the utility company executives. All the parties were so embroiled at that point, however, that they felt a mediator was needed. In April 1979 they asked Russell Train, then president of the World Wildlife Fund and a former EPA administrator, to mediate. After contacting the major parties and confirming their willingness to cooperate, Train agreed to assist.

The first official mediation session was held on August 28, 1979, in New

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elements necessary for agreement. Fisher describes the merits of the "single text" approach: it avoids the otherwise overwhelming pressure on the parties to crystallize and harden their positions; it allows progress to be made without anyone's having to make "concessions"; it directs the parties' attention to the future by focusing on the means for coping with practical problems (rather than focusing on past grievances); it allows a party who fears the slippery slope to refrain from giving up anything until it sees the end of the road; it facilitates corridor diplomacy ("we might be able to accept clause 41 if you would accept clause 12B"); and finally, at the end of the line, there is a single text of a proposed agreement.

York City. Twenty-eight persons representing 11 groups attended. Three key groups were readily identifiable: EPA, Consolidated Edison, and the coalition of environmentalists. (EPA became involved in 1972 when it assumed responsibility for water quality in the Hudson River under the Water Pollution Control Act Amendments of 1972.)

As mediator, Train scheduled and organized negotiating sessions. At the first meeting, Train instructed all the parties to submit written proposals describing possible areas of agreement, and he distributed copies of these statements prior to the second meeting. These proposals provided a starting point.

Although the discussions progressed surprisingly well at first, the discovery of an error in a technical document submitted by the utilities threatened to disrupt the proceedings. Train promptly stepped in, suggesting that a smaller team of technical experts retained by the utilities and the government agencies meet to work out agreements on certain technical issues.[5] The technical task force met for four months, but failed to reach agreement. Aware that such a setback could sink the negotiations, Train suggested reorganizing the task force to include attorneys representing the environmental groups. The new combination reached agreement on a computer-generated set of impact estimates, and it eventually generated a blueprint for the final agreement.

The utilities and the environmental groups were willing to support a proposal put forward by the task force in August 1980. EPA, however, was reluctant. The mediator stepped in again, this time applying pressure on the recalcitrant party. One well-placed call to EPA's Washington office brought EPA's representative back to the bargaining table.

Intensive negotiations continued for four more months. By December 1980, a draft agreement had emerged. Train encouraged the group to decide on a date for a formal signing session, which, in effect, created a final deadline. On December 18, 1980, the parties sat down together and, without a further word, signed the agreement.

Consolidated Edison dropped its Storm King plans and turned the site over to the Palisades Interstate Park Commission for public use. The utility companies agreed to implement precautionary measures aimed at reducing the threat to the river's aquatic life posed by existing power-generating technology. The companies also agreed to contribute $12 million for research on Hudson River fish populations. The environmental groups were reimbursed for their legal fees and agreed, in turn, to support the agreement (which translated into higher consumer rates) before the relevant regulatory agencies. EPA agreed to relax its require-

[5]These involved primarily questions about the impact of the electrical facilities on the fish populations, specifically on mortality and reproduction rates. Since pertinent data were scarce, the technical task force sought to reach agreement not on the "facts" per se, but on a method for determining facts (i.e. which tests would be acceptable for estimating impacts).

ment for expensive cooling towers at existing power plants. All litigation and administrative proceedings were halted.

The formula agreed upon required a considerable degree of cooperation within each group (e.g., among the utility companies) and between groups (e.g., between the environmentalists and the utility companies). The agreement was fully implemented within a year of signing.

The approach Train used involved identifying agenda items and setting a direction for the discussions. Joint fact finding was important to resolve some of the highly technical aspects of the Storm King debate. The parties were held to their commitments by the carefully ordered sequencing of the tasks required of each party under the terms of the agreement. The relatively short time frame for implementation minimized the need for further monitoring. The parties were sufficiently invested in the resolution that they collectively oversaw the implementation of the written agreement.

The Storm King case illustrates the critical role that an active mediator can play. The trust necessary for negotiations to succeed was nearly shattered by the detection of serious errors in technical documents submitted by one party. Frustration ran high when the technical task force failed to reach agreement after four months of bickering. Train's skilled intervention prevented the negotiations from aborting prematurely.

Conclusions

The three cases described above indicate that most of the obstacles to mediated negotiation can be overcome. Much depends, however, on the skill of the mediator.

The representation problem can be handled in different ways. In the Storm King case, after 17 years of public controversy, spokespersons for the interested parties were relatively easy to identify. When representatives of the interested parties are not readily identifiable, as in the Forest Hills case, it may be necessary for the mediator to play a more active role in ensuring that all the appropriate interests are heard. This can be done independently, as in Cuomo's case, or by asking the participants to anticipate and respond to potential objections from interests not at the bargaining table. Our underlying presumption is that the more comprehensive the effort to take account of competing interests, the more stable will be the final agreement (since involved parties are less likely to block the implementation of an agreement they helped to draft).

Agenda setting is difficult because of the ad hoc nature of most public dispute resolution efforts and the participants' unfamiliarity with the process of searching for joint gains. Cuomo's tactic of interviewing the parties separately, at least at the outset, can often help. After conferring with the participants, a mediator can prepare a focused agenda. Alternatively, as the Connecticut case

indicates, the first negotiating session can be used to develop a more complete agenda. Each approach requires the mediator to assume additional responsibility.

Mediators also play an important role in initiating and sustaining joint fact finding. In the Connecticut case, although the parties agreed to share data, the budgetary items under discussion required an in-depth understanding of the state budget. Stulberg did not make an effort to provide technical assistance to the municipal and nonprofit teams, despite their obvious disadvantage. In contrast, in the Storm King case, the mediator made a deliberate effort to ensure that all the parties had access to the best possible technical advice. In the Forest Hills case, it was Cuomo's ability to synthesize the concerns of the stake holders that led to the eventual settlement. A mediator can help the parties avoid "losing face" by accepting reqponsibility for writing (and rewriting) agreements or by presenting proposals without disclosing their source. Because many parties in recent public dispute resolution efforts have been relatively untutored in the intricacies of mediation, the intervenors have had to work especially hard to protect the parties from obvious pitfalls.

Mediators can also suggest innovative enforcement mechanisms. As the Storm King case illustrates, they can propose structuring agreements so that required actions are scheduled in an alternating fashion throughout the implementation period.

The Connecticut case suggests that special committees can be used to monitor implementation. In other cases the mediator may have to assume responsibility for supervising implementation. One of the participants in the Storm King case noted that implementing the agreement took longer than everyone expected because "Russ Train left the case right after the signing and wasn't around to push and prod everyone" (Talbot, 1983, p. 24).

We do not assume mediation will yield a consensus in every situation. There are many instances in which one or more of the parties to a dispute has good reason to believe it will prevail in court, before a regulatory body, or through the legislative process. Under these circumstances, even if mediated negotiation is likely to produce a fairer, more efficient, more stable outcome, the incentives to join the mediation effort may not be sufficient to bring all the key parties to the bargaining table. A trusted mediator may not be available. Relationships among the parties may have deteriorated to a point where face-to-face interaction or joint problem solving is out of the question. Finally, institutional obstacles may stand in the way. For example, a government agency may be prohibited by statute from engaging in certain types of negotiations or limited in the promises it can make. Yet current experience suggests that face-to-face negotiation, aided by a nonpartisan facilitator, can lead to informed voluntary agreements in a great many instances. It seems so much more sensible to spend the public's tax dollar trying to invent mutually advantageous outcomes than to allow disputes to drag on or to pay the exorbitant costs of litigation.

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