
SUBMITTED COMMITTEE REPORTS

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REPORT OF THE ALTERNATIVE DISPUTE RESOLUTION COMMITTEE*

The Alternative Dispute Resolution (ADR) Committee monitors regulatory actions, court decisions, and legislative initiatives that may impact energy practitioners and their clients. This report provides a summary of some key ADR developments and proceedings in the energy industry through January 2004. The following topics are covered in this report: (1) recent Committee activities; (2) activities, outreach, and cases at the Federal Energy Regulatory Commission (FERC); (3) ADR at state commissions; and (4) ADR in the courts, at the Nuclear Regulatory Commission, and private ADR.

I. SUMMARY OF RECENT COMMITTEE ACTIVITIES

Between April 2002 and January 2004, the ADR Committee held a series of luncheon meetings and sponsored a panel at the Energy Bar Association's Annual Meeting on "Alternative Dispute Resolution at FERC."

The first in the series of ADR luncheons featured a presentation by Chief Administrative Law Judge (ALJ) Curtis L. Wagner, Jr. on the ADR processes used by the FERC's ALJs. Chief Judge Wagner explained the procedure for requesting an ALJ to mediate a FERC-jurisdictional matter between parties, and discussed the benefits gained from engaging in ADR. ALJs Bobbie McCartney and Peter Young discussed the different ADR techniques they used in the Southeast and Northeast Regional Transmission Organization mediations ordered by the Commission.

The second luncheon was "Getting to Agreements at the FERC." William Froehlich, Lead Counsel, Office of the General Counsel (OGC), Administrative Litigation, FERC, and Richard Miles, Director of Dispute Resolution Service (DRS), FERC, discussed the pros and cons of the ADR techniques used by their respective groups. Steven Rothman, Senior Counsel, Market Oversight and Investigations (OMOI), FERC, moderated the panel discussion and commented on the ADR techniques employed by the Enforcement Hotline. As a follow-up, Steven Rothman led an interactive discussion on using the FERC's Enforcement Hotline.

Next, the ADR Committee hosted a "National Energy Arbitration Panel" that presented an overview of using arbitration to resolve energy disputes, discussed the pros and cons of using arbitration as opposed to other forms of ADR techniques or litigation, analyzed the differences in handling energy disputes through a sole arbitrator versus a three-person arbitration panel, and discussed the party-appointed arbitrator's legal and ethical responsibilities.

As a follow-up to the "National Energy Arbitration Panel," P. Jean Baker, Vice-President of the American Arbitration Association (AAA), discussed the following topics:

1. How do arbitration clauses of several Regional Transmission

* The Committee thanks the following members for their valuable contributions to this report: Gloria Halstead, Steven A. Rothman, Jason M. Ryan, Steven Shapiro, Barrett K. Hawks, and Robert S. Fleishman. This summary of developments is not intended to represent the positions or views of the contributors to this report, their clients, or their employers.

Organizations (RTO) or Independent System Operators compare?

2. What kind of energy disputes are appropriate candidates for arbitration, as opposed to litigation or other forms of alternative dispute resolution, and why?

3. How does arbitration compare to other forms of alternative dispute resolution?

4. How does one select a knowledgeable and qualified energy arbitrator from AAA?

5. Under the AAA Commercial Arbitration Rules, what are the differences in handling energy disputes through a sole arbitrator versus a three-person arbitration panel; and

6. Under the AAA Commercial Arbitration Rules, what are the party-appointed arbitrator's legal and ethical responsibilities to uphold the positions of the party that appointed him or her as opposed to the arbitration process itself?

The ADR Committee sponsored a primer at the Annual Meeting on how to choose the ADR process that best suits a client's particular needs in resolving a contested issue before the FERC. ALJ Bobbie McCartney, William Froehlich, Kasha Helget, and Steven Rothman made presentations.

Finally, the ADR Committee hosted a roundtable discussion on the relative success of various ADR activities at the FERC. The Panelists were Steven Shapiro (of the FERC's Dispute Resolution Services), Barrett Hawks, Steven Rothman, and Elizabeth Whittle.

II. SUMMARY OF FERC ADR ACTIVITIES, OUTREACH, AND CASES

For the past several years, parties in all types of proceedings at the Commission have benefited from formal and informal ADR processes. From the most complex and contentious matters to the standard re-licensing process, ADR has had a significant impact. This section provides a highlight of ADR processes sponsored by the Office of Administrative Litigation (OAL), the FERC's administrative law judges, Dispute Resolution Service (DRS), Enforcement Hotline, and informal settlement processes.¹

A. *The Office of Administrative Litigation*

Persistent efforts of the OAL's Trial Staff resulted in an uncontested settlement agreement in Docket No. RP02-13, the first rate case following the construction of Portland Natural Gas Transmission System's pipeline.² The strongly contested proceeding involved tripling of cost-of-service rates, significant changes in rate design, and allegations of mismanagement. The parties filed a significant amount of testimony and exhibits related to these issues, but were able to reach a settlement prior to the trial date even though no settlement judge or mediator was assigned to the case. In January 2003, the Commission approved the settlement, which resulted in substantial refunds and lower rates for the pipeline's customers.

1. More details and examples can be found in FERC ADR News published by the DRS and available at <http://www.ferc.gov/legal/adr/news.asp>.

2. *Portland Natural Gas Transmission Sys.*, 102 F.E.R.C. ¶ 61,026 (2003).

B. Administrative Law Judges

In July 2001, the FERC ordered mediation processes to establish a single RTO in the Northeast and another single RTO in the Southeast.³ The Commission appointed ALJ Peter Young and former Florida PSC Chairman Joe Garcia as co-mediators for the Northeast RTO mediation, while ALJ Bobbie J. McCartney and former New Jersey Public Utilities Commission Chairman Herb Tate were co-mediators for the Southeast RTO process. The Northeast RTO mediation ran from July 24, 2001 through September 7, 2001, was attended by over 400 persons, and produced a detailed business plan for developing and implementing fully-integrated electric markets in the Northeastern United States administered by a single RTO.⁴ The Southeast RTO mediation ran for forty-five days, was attended by more than 200 participants, and narrowed the RTO models under consideration from four to two.

C. Dispute Resolution Service

Either the Commission assigns cases to the DRS or the parties contact the DRS before filing with the Commission. The DRS experienced an increase in the percentage of cases that parties initiated prior to filing with the Commission. Preliminary data reveals that parties are saving \$150,000 on average per case.

In 2002, the DRS assisted the Confederated Tribes of the Colville Reservation (Colville) in addressing concerns related to the treatment of human remains surrounding Grant County PUD's Priests Rapids Hydroelectric Project in Washington State. The Colville, Grant County PUD, and other interested parties established a Cultural Resource Work Group (CRWG) to meet regularly and discuss matters related to compliance with the National Historic Preservation Act. The CRWG established procedures to notify the tribe about human remains and began a dialogue on reburial of remains.

Also in 2002, the DRS worked with representatives of the Minnesota Municipal Power Agency and Southern Minnesota Municipal Power Agency to mediate accounting differences and disputes related to cooperative business ventures. The efforts spanned eighteen weeks and included in-person meetings and teleconferences. The end-result was a resolution that included energy swaps from each others' generators to decrease transmission losses and improve working relationships.

Beginning in September 2002, the DRS assisted the Grand River Dam Authority (GRDA) and various federal and state authorities in reaching an agreement on a fish and waterfowl habitat management plan for Grand River Dam Authority's (GRDA) Pensacola Dam in Langley, Oklahoma.⁵ The stakeholders' interests and options were identified through a mediation process. Once the parties understood the others' interests, they agreed in April 2003 that

3. *Reg'l Transmission Orgs.*, 96 F.E.R.C. ¶ 61,065 (2001); *Reg'l Transmission Orgs.*, 96 F.E.R.C. ¶ 61,066 (2001).

4. *Reg'l Transmission Orgs.*, 96 F.E.R.C. ¶ 63,037 (2001) (containing ALJ Young's report to the Commission).

5. *Grand River Dam Auth.*, 103 F.E.R.C. ¶ 62,102 (2003).

the GRDA would contribute annually to a fund to mitigate the environmental impact of the project, that a technical committee made up of the stakeholders would decide how the mitigation funds would be used, and that the GRDA would fund annual millet seeding. The Commission approved the plan on May 22, 2003.

As to communications, workshops, conference, and outreach, the DRS updated its website so interested parties could more easily find out how to contact the DRS and how to enter into ADR. The DRS continued publishing its quarterly newsletter that it sends to numerous recipients and posts on the DRS website. The DRS issued a new brochure, which provides an educational and promotional perspective on ADR and highlights how the DRS can serve energy industry needs. Moreover, the DRS met with the Florida and Minnesota state commissions to discuss ADR possibilities. The DRS made presentations at the National Association of Regulatory Utilities Commissioners (NARUC) Regulatory Attorneys National Conference, the Michigan State University Institute of Public Utilities (MSU-IPU) annual utility training, and the MSU-IPU annual meeting. DRS also presented outreach material to many regulated companies, facilitated policy discussions for an RTO, and developed a draft ADR program for another RTO.

Finally, the DRS continued its active role on the Inter-Agency ADR Working Group Steering Committee and is participating in that Committee's effort to develop a set of ethical standards for federal mediators. The DRS also leads a group that provides a forum for agencies to receive training and education on establishing their own ADR programs.

D. Enforcement Hotline

The Enforcement Hotline is widely used by the public to informally resolve disputes in matters within the Commission's jurisdiction without litigation or other formal, lengthy proceedings. Hotline staff mediators have been very effective in resolving disputes, including landowner/pipeline disputes, tariff disputes, market disputes, and disputes over procedural questions. The Hotline, however, will not intercede in disputes involving compensation disputes between landowners and natural gas pipelines, matters before the Commission in docketed proceedings, or matters purely involving retail sales and service. Market participants, jurisdictional entities, and members of the public also may ask the Hotline for help or information about any matters within the Commission's jurisdiction.

The Enforcement Hotline has resolved hundreds of disputes informally and answered hundreds of public inquiries. Matters that cannot be addressed and closed informally and expeditiously may be referred for a formal investigation. Also, complainants are always free to terminate a Hotline action at any time and file a formal action with the Commission.

In 2003, the Hotline handled 496 matters of which approximately 66% were informal complaints. There were 215 gas matters, 187 electric matters, forty-five hydroelectric matters, five oil matters and forty-four other matters (often issues that involve retail sales and service). Of these matters approximately 45% were market-related; 26% were problems that landowners had with pipeline

construction; 11% related to hydro issues; 7% dealt with procedural issues; and, 11% were miscellaneous items.

E. Informal ADR Processes

The Commission's Office of General Counsel-Projects and the Office of Energy Projects completed a two-year collaborative process for the re-licensing of El Dorado Project No. 184—a twenty-one megawatt hydroelectric and water supply project owned and operated by the El Dorado Irrigation District (EID). The result was a comprehensive settlement agreement of the EID, federal, state, and local agencies, non-governmental organizations, and landowners, which was filed with the FERC in Project No. 184-065 in April 2003.⁶ EID agreed to take steps to protect fish, enhance recreational opportunities, and monitor ecological indicators.

Parties to several dockets relating to the electric market “gaming strategies,” made public in memoranda from Enron Corporation, participated in unofficial ADR processes in an effort to settle issues raised in a June 2003 show cause order.⁷ Faced with the daunting prospect of protracted hearings on matters that did not involve large dollar amounts, several of the parties negotiated with the FERC's trial staff to reach agreed settlement proposals. The settlement proposals were submitted to the presiding ALJ; some parties filed in opposition to the settlements, and the contested settlements were certified and sent to the Commission for approval.⁸

III. ADR AT STATE COMMISSIONS

In 2002 and 2003, the Public Utility Commission of Texas (PUCT) used informal ADR processes to develop retail electric market protocols for the power region in southeast Texas referred to as the Energy Settlement Area of Texas (ESAT). Since November 2001, the PUCT has moved forward with plans to open the ESAT market. This will be the first retail electric market in Texas outside of the Electric Reliability Council of Texas (ERCOT)—the control area that serves approximately 85% of the state's electric load and 75% of the state's geographical land area—and the first market in Texas to operate under a FERC-approved Open Access Transmission Tariff (OATT). The ESAT area, which is within the Southeastern Electric Reliability Council, is governed by the same 1999 state legislation that led to retail choice in the ERCOT in January 2002. However, in late 2001 the PUCT determined that the necessary retail market institutions for the area would not be fully developed, in place, and tested by

6. *El Dorado Project*, Project No. 184-065, El Dorado Relicensing Settlement Agreement (Apr. 29, 2003), available at http://www.project184.com/doc_lib/documents/2003/Final_Agreement/Final_Settlement.pdf.

7. *Am. Elec. Power Servs. Corp.*, 103 F.E.R.C. ¶ 61,345 (2003).

8. See, e.g., *Reliant Resources, Inc.*, Docket No. EL03-170 (Dec. 9, 2004), available at <http://elibrary.ferc.gov/idmws/nvcommon/NVViewer.asp?Doc=10009542:0>; *PacifiCorp*, 105 F.E.R.C. ¶ 63,043 (2003) (certifying contested settlement).

January 2002 and therefore delayed opening the market.⁹

The first step on the PUCT's path for bringing retail competition to the ESAT was the development of market protocols to govern the activities of market participants, including Entergy Gulf States, Inc., the only electric utility in the region. In January 2002, the PUCT began hosting collaborative sessions with all interested potential market participants to draft the ESAT market protocols. The sessions were conducted both by PUCT staff and outside consultants with experience in the ERCOT and FERC-jurisdictional retail electric markets. Between eight and ten parties regularly took part in the protocol drafting sessions and their efforts continued—sometimes at a rate of two or three in-person drafting sessions per week—until January 2003.

In January 2003, the collaborative session participants filed draft protocols for customer choice in the ESAT.¹⁰ The draft protocols—a nearly 300-page document—consisted largely of agreed-upon language, but also included eleven unresolved issues for the PUCT to consider. These issues included provisions related to protocol revision, audit rights, confidentiality of market information, imbalance of energy pricing, penalties related to self-supply of ancillary services, and dispatch of self-supplied resources.¹¹

Satisfied that the product from the collaborative sessions could serve as the foundation for the ESAT market once the unresolved portions were determined, the PUCT addressed the protocols in three separate hearings in the summer of 2003. At the first hearing in May 2003, the PUCT refrained from issuing an order on the unresolved issues and instead provided substantive guidance to the potential market participants and encouraged further collaboration. These further efforts proved fruitful and resolved many of the issues. The PUCT provided additional guidance to the parties at a second hearing in June 2003, and the result was a non-unanimous settlement agreement resolving all of the remaining protocol issues.¹² The settlement agreement and the resulting ESAT protocols were approved after the third PUCT hearing in August 2003.¹³ The FERC approved those protocols as an amendment to the Entergy OATT in December 2003.¹⁴

9. *Staff's Petition to Determine Readiness for Retail Competition in the Portions of Texas Within the Southeastern Reliability Council*, P.U.C.T. Docket No. 24,469 (Dec. 20, 2001).

10. *Project to Develop Market Protocols for the Portions of Texas Within the Southeastern Electric Reliability Council*, P.U.C.T. Docket No. 25,089 (Jan. 31, 2003) (Protocols for Customer Choice in the Entergy Settlement Area of Texas).

11. *Id.*

12. *Market Protocols for the Portions of Texas Within the Southeastern Electric Reliability Council of Texas*, P.U.C.T. Docket No. 25,089 (July 29, 2003) (Settlement Agreement); *Market Protocols for the Portions of Texas Within the Southeastern Electric Reliability Council of Texas*, P.U.C.T. Docket No. 25,089 (July 31, 2003) (Supplemental Settlement Agreement).

13. *Market Protocols for the Portions of Texas Within the Southeastern Electric Reliability Council of Texas*, P.U.C.T. Docket No. 25,089, Order (Sept. 9, 2003).

14. *Entergy Servs., Inc.*, 105 F.E.R.C. ¶ 61,318 (2003).

IV. ADR IN THE COURTS, THE NUCLEAR REGULATORY COMMISSION, AND PRIVATE ADR

A. *Court and Nuclear Regulatory Commission Actions*

Industry restructuring and deregulation are illuminating some of the many uses of ADR in the energy industries that have previously been kept entirely private. In addition, it has prompted courts to apply their mediation programs growing out of the Alternative Dispute Resolution Act of 1998¹⁵ to a variety of complex energy disputes.

FirstEnergy Ventures Corp. v. NRG Energy, Inc. was the subject matter of an arbitration (mandated by prior agreement) involving a major dispute over the sale of several generating stations. In NRG's bankruptcy proceeding, the court first approved the agreement to arbitrate¹⁶ and then a settlement between the parties.¹⁷

The bankruptcy court in *In re Enron Corp.* directed, sua sponte, that various adversary proceedings involving trading agreements be stayed and that disputes arising under those agreements be mediated before a single mediator.¹⁸ Many of the same or similar claims were apparently settled.¹⁹ The adversary proceeding involving the trading agreements between Enron Power Marketing, Inc. (EPMI), Nevada Power Company, and Sierra Pacific Power Company was not stayed. The Bankruptcy Court issued a decision in EPMI's favor in that proceeding on August 28, 2003, and the matter is now on appeal to the U.S. District Court for the Southern District of New York.²⁰ Additionally, the court recently stayed, at least temporarily, the arbitration of claims involving Enron-affiliated debtors.²¹ Other prominent arbitration cases arising out of the western power crisis are likely to become public over time.

The Fifth Circuit in *American Central Eastern Texas Gas Co. v. Duke Energy Fuels, LLC* affirmed the district court's confirmation of an arbitral award that found that Duke had a monopoly in gas processing in Panola County, Texas and that Duke had violated section 2 of the Sherman Act by refusing to grant American Central a new gas processing contract for additional gas volume with the purpose of preventing American Central from competing with Duke.²²

The Nuclear Regulatory Commission (NRC) recently sought comment on

15. 28 U.S.C. §§ 651-658 (2000).

16. *In re NRG Energy, Inc.*, No. 03-13024 (Bankr. S.D.N.Y. July 18, 2003) (order permitting arbitration).

17. *Id.* (order approving settlement).

18. *In re Enron Corp.*, No. 01-16034 (Bankr. S.D.N.Y. Mar. 20, 2003) (order governing mediation of trading cases).

19. *In re Enron Corp.*, No. 01-16034 (Bankr. S.D.N.Y. Jan. 29, 2004) (multiple orders signed approving various settlement agreements).

20. *Enron Corp. v. Nev. Power Co.*, No. 03-9332 (S.D.N.Y. filed Nov. 24, 2003).

21. *In re Enron Corp.*, No. 01-16034 (Bankr. S.D.N.Y. Jan. 5, 2004) (order regarding debtors' motion to enforce stay, or in the alternative, to enjoin arbitration).

22. *Am. Cent. E. Tex. Gas Co. v. Duke Energy Fuels, LLC*, No. 02-4110, 2004 U.S. App. LEXIS 1216 (5th Cir. Jan. 27, 2004).

the development of a new pilot program that will use ADR mechanisms in cases involving discrimination against whistleblowers.²³ The Commission considered public comment at a meeting held December 10, 2003, and now has a rule under consideration. As a part of comprehensive amendments to its rules of practice, the NRC has also recently adopted procedures that encourage the use of alternative dispute resolution in licensing and enforcement proceedings.²⁴ The rules favor non-binding techniques, particularly mediation, where “[t]he parties are free to develop a mutually acceptable resolution of their dispute.”²⁵ Given the nature of NRC matters, the Commission specifically recognizes that the traditional adjudicatory process may still be the only option for some cases and says, “hearings should continue while ADR is ongoing, unless all parties agree to suspend the hearing and present an appropriate motion to the presiding officer.”²⁶

B. Private Mediation

Mediation has also been used by unregulated utilities to gain unanimous agreement of the multiple members of a generation, and transmission cooperative to a restructuring which separated the generation, transmission, and scheduling functions and put an entirely new form of wholesale power contract in place between the supplier and its distribution cooperative-members. In addition, mediation-like processes have been used to achieve similar contractual changes between distribution cooperatives and their cooperative generation suppliers, as well as to put statewide transition charges in effect to recover the supplier’s stranded costs and prepare for and implement customer choice.

The electric utility industry continues to make substantial use of ADR in construction matters. Use in current projects includes: dispute review boards to hear construction disputes on site as they arise, which have been successful in avoiding more formal processes; mediation of a dispute arising under a major maintenance contract; and mediation in which a power plant owner is participating in an attempt to resolve multiple claims of subcontractors of an insolvent general contractor.

C. Private Use of Arbitration

Another complex determination of allocation of costs occurred among a set of co-owners of a large coal plant and another set of separate owners of combined-cycle plants located on the same site, each of which shares much infrastructure (water, fire protection, security, sanitary sewer, waste water disposal, road system, and similar items). The parties have agreed that any dispute over the allocation of the costs of maintenance and capital improvements to this infrastructure between the coal plant co-owners and the separate combined-cycle owners are to be determined, if necessary, via baseball arbitration by a single arbitrator selected by lot from a list of national accounting

23. Pilot Program on the Use of Alternative Dispute Resolution in the Enforcement Program, 68 Fed. Reg. 67,492 (Dec. 2, 2003).

24. Changes to Adjudicatory Process, 69 Fed. Reg. 2182 (Jan. 14, 2004).

25. *Id.* at 2209.

26. Changes to Adjudicatory Process, 69 Fed. Reg. at 2210.

firms nominated by any of the parties.

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