

ALTERNATIVE DISPUTE RESOLUTION

AT RTOS, ISOS, AND POWER POOLS

*Energy Bar Association Alternative Dispute Resolution Committee, Panel
Presentation – May 22, 2007¹*

Synopsis: RTO's and ISO's have increased their use of ADR over the past number of years. This increase is largely attributable to their approved FERC tariffs which require ADR. It is also the result of an increased awareness and belief that ADR contributes to sound business practice and improved working relationships amongst traditional sellers and buyers in the industry. On May 22, 2007, the Energy Bar Association's Alternative Dispute Resolution Committee hosted a presentation with various leaders of the RTO's, ISO's, and power pools. The Committee extends a special thank you to Robert Wax for his leadership in organizing and moderating this panel discussion. The presentation included the following: Wayne Harris, Chair, MISO ADR Committee, outlined the three step tariff process ranging from negotiation and mediation to arbitration; Don Shonkwiler, Senior Counsel for the California ISO, presented the various authorities for parties to wind up in ADR and the organization's usage of ADR over the past few years; William Museler, for the New England Power Pool, explained that most of the disputes before the NEPOOL board were the result of market design and cost allocation questions; and Craig Glazer from PJM pointed to its Operating Agreement Provisions that call for a two step process—negotiation and then mediation. If mediation is unsuccessful, the mediator offers a non-binding recommendation. Disputes not settled through mediation are sent to binding arbitration and the amount in controversy is less than \$1 million. If greater than \$1 million the arbitration is non-binding. Additional speakers discussed portions of the Energy ADR Forum Report published in October 2006: Robert Fleishman discussed FERC's Review of ADR Outcomes and George (Chip) Cannon discussed the portion of the report addressing RTO's, ISO's, and power pools.

1. This is a transcript of a presentation sponsored by the Energy Bar Association's Alternative Dispute Resolution Committee. The presentation was made on May 22, 2007, in the Washington, D.C. Office of Jones Day. (Editor's note: Without diluting the content of the presentations made, the following transcript has been edited for publication in the *Energy Law Journal*).

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PROCEEDINGS

I. OPENINGS REMARKS

MR. DOWNS: Good afternoon everybody. I am Clark Downs. I am a partner here at Jones Day, and it is our very great privilege to welcome you here today for this Energy Bar Association Alternative Dispute Resolution Committee Brown Bag Luncheon.

Your speakers have worked very, very hard to put on a really incredibly in-depth presentation. You can tell from the books that are made available to you.

At this point, I would like to introduce Paul Mohler who is a partner with Heller Ehrman here in Washington and the co-chair of the Alternative Dispute Resolution (ADR) Committee of the Energy Bar Association.

Paul.

II. INTRODUCTION

MR. MOHLER: Thank you, Clark, and thanks to Jones Day for hosting this event. We are very appreciative of that and the fine facilities. I would also like to thank our colleagues at the Federal Energy Regulatory Commission (FERC) for preparing and bringing over the presentation materials.

On behalf of the Energy Bar Association's ADR Committee, I am honored to introduce Bob Wax, who has spent over a year organizing this program, from the early concept stage, through arranging for the speakers, and finally the presentation itself today.

Bob is a full-time arbitrator and mediator with his own company, Charter Resolution, LLC. Bob was formerly with the firm of LeBoeuf, Lamb, Greene & MacRae, and before that was with Northeast Utilities. He is an honors graduate of Tufts University and received his law degree from the University of Virginia.

III. MODERATOR'S INTRODUCTION OF PANEL

MR. WAX: Thank you, Paul.

I first want to begin by thanking Paul and Clark for hosting this meeting. I would like to welcome everybody who is here in D.C., and I believe there are about twenty-five or thirty people on the phone. We have a good turnout.

As Paul noted, I am the program chair of this presentation as well as the moderator of this program. My responsibilities as moderator were to organize the program and the significant set of materials that you have, which I will describe to you in a second.

We want to make sure that all of your questions are answered so we will have a formal question-and-answer period at the end of the presentations, and I will try to keep this meeting going so there is plenty of time for that.

Those of you who are on the phone feel free at any point to send a question via email. Those questions will be brought up here, and we will address those as well as the ones from the audience.

This session is being transcribed for a potential future publication in the *Energy Law Journal*.

As Paul mentioned, I am a full-time independent arbitrator and mediator, and that requires me to give a bit of a caveat at the beginning. I am performing the function of only being the moderator.

I have been a sole arbitrator in a proceeding at the California ISO as well as one at the Midwest ISO, and I will not comment in any way on those matters if they are addressed at this session and/or any of the processes that relate to those cases because of confidentiality.

Let me finish this introduction by briefly commenting on the extensive materials that those of you on the phone received via email and those of you who are in the room have before you. It is probably the definitive resource on the subject of ADR and ISOs and RTOs; that's what our goal was.

In there, you have the bios of our panelists, and I will not review that extensive material. You have the PowerPoints™ for the presentations that are being given today. You have all of the relevant ADR dispute resolution provisions for the four organizations who are before us today.

You have a compendium, mostly thanks to Dan Shonkwiler at the California ISO, of what we believe are most, if not all, of the reported decisions of the Federal Energy Regulatory Commission and in a couple of court cases related to this topic, and then you have a section of the Energy ADR Forum Report published in 2006, which Bob Fleishman and Chip Cannon on our panel will be talking about today.

With that, what I would like to do is introduce all of our panelists up front at the beginning before they come to the podium. Their full bios are in the material, so I won't dwell upon them.

For those of you here in Washington, on my immediate right, our first speaker is Wayne Harris, who is chief counsel of ACES Power Marketing in Indiana and is Chair, for these purposes most importantly, of the Midwest ISO's ADR Committee. He received his bachelor's degree at the University of Pennsylvania's Wharton School and his J.D. from Indiana University.

Our next speaker is Dan Shonkwiler who is senior counsel at the California Independent System Operator. Before the CAISO, he was in private practice at the Brobeck firm and at Wiley Rein. He has an A.B. and a J.D. degree from the University of Michigan.

Our third panelist is Bill Museler, the only non-lawyer who is with us today. Bill is the Chair of the NEPOOL Board of Review; previously he was the president of the New York ISO from 1999 to 2005 and before that was an executive vice-president at the Tennessee Valley Authority. He has a B.S. engineering degree from Pratt Institute and an M.S. in mechanical engineering from Worcester Polytech.

Our fourth panelist is Craig Glazer. Craig is the vice-president of federal government policy for PJM Interconnection. Prior to that he was a Commissioner and Chair of the Public Utilities Commission of Ohio where he had a distinguished career. He has his undergraduate degree also from the University of Pennsylvania and is a graduate of Vanderbilt's Law School.

Then, to return to our Washington law experts, Bob Fleishman, who is on my left here, is Of Counsel at Covington & Burling. He is Editor-in-Chief of the *Energy Law Journal*, a former president of the Energy Bar Association, and along with me also is a mediator and arbitrator in the energy arena. Before

Covington, he was general counsel of Constellation Energy Group and Baltimore Gas & Electric Company. He is a graduate of Georgetown University and Boston University's Law School.

Last but not least, Chip Cannon, a partner of the Washington Office of Latham & Watkins, has an extensive regulatory practice, including at FERC. He was also active in the Energy ADR Forum along with Bob Fleishman and has an undergraduate degree from Tulane and received his law degree from George Washington University.

With that we will begin our program formally with a presentation by Wayne Harris.

IV. PANELISTS FROM RTOS, ISOS, AND POWER POOLS

MR. HARRIS: Good afternoon. I'm going to try and do three things today. First I'm going to give you some background and statistics on the Midwest ISO. Second, I'm going to walk you through the ADR process at the Midwest ISO. Third, I'm going to point out some of the exceptions to the process as it stands today. Let me start off with some background of the Midwest ISO.

The Midwest ISO was approved as the nation's first regional transmission organization in 2001. The Midwest ISO is a nonprofit, member-based organization with its headquarters in Carmel, Indiana. It has twenty-eight transmission-owning members and sixty-eight non-transmission owning members and 256 market participants.

The Midwest ISO provides reliable operation and equal access to over 93,000 miles of transmission power lines in fifteen states and the Canadian Province of Manitoba.

Its footprint is approximately 920,000 square miles and the Midwest ISO's administered grid interconnects with the Independent Electric System Operator of Ontario, the PJM Interconnect, the Mid-Continent Area Power Pool, the Southwest Power Pool, and the Tennessee Valley Authority.

The Midwest ISO manages one of the world's largest energy markets. There is a Day-Ahead Energy Market; a Real-Time Energy Market; and an FTR, or Financial Transmission Rights Market.

It clears more than \$2 billion monthly in energy market transactions with a peak load of 116,000 megawatts and a generating capacity within its footprint of over 133,000 megawatts.

The Midwest ISO is governed by an eight-member, independent board and the Midwest ISO ADR Committee is one of three committees that report directly to the board.

The ADR Committee consists of six members that manage and administer the ADR process. The dispute resolution procedures are found in Attachment HH to the Energy Markets Tariff and it applies to all disputes relating to any matters governed by the ISO agreement, the tariff, or the business practices of the Midwest ISO.

There are three components of the Midwest ISO ADR process. They include: first, informal dispute resolution; second, mediation; and third, arbitration.

Let me first talk about some of the exceptions or special variations to Attachment HH or the dispute resolution process. First, there are expedited procedures that consist of real-time operation disputes. You don't want to have to go through a long process, or a somewhat involved process for real-time disputes.

There are also expedited procedures for disputes concerning available transmission capacity and determinations of facility ratings. There are also variations that apply to small-generator interconnection agreements and large-generator interconnection agreements.

There are also separate procedures for disputes regarding obligations to build or enlarge transmission facilities.

Now, given these exceptions and variances, as I stated earlier, there are three general processes. There is the informal dispute resolution process, mediation, and arbitration.

As outlined in the ADR process flow chart in the materials that you have, step one is the informal dispute resolution process. As you can see, the Midwest ISO is a stakeholder-oriented organization. The process is designed so that there is a lot of communication between the disputing parties.

I will walk through the process very briefly. First, the disputing parties attempt to resolve the dispute with the Midwest ISO, and that starts out at the client-representative level.

If they are unsuccessful in resolving it at that level, then they move on to an officer of the disputing party and an officer of the Midwest ISO. They then attempt to resolve the issue.

If they cannot resolve the dispute, then it goes into step two. But if they are able to resolve the dispute and it is resolved with a proposed change to the revenue distribution to the MISO, then that is posted to the MISO to give notice to all the parties, and then that process is completed.

If it is resolved without a change to the revenue distribution by the MISO, then that, too, is also processed and that is posted to the website as well.

In the event there is a revenue change, and once it is posted to the website, there is an opportunity for other parties to find out about that and then to intervene. If there is a party that is unsatisfied with that process, it then moves to step two.

Step two, there are two portions of Step two. First, on the left is arbitration, and then second on the right in the exhibit is mediation. We will go through mediation first.

First, the parties file a Notice of Dispute with the ADR Committee. At that point the ADR Committee has ten days. In that ten days, their job is to determine whether the mediation is highly unlikely to lead to resolution of the dispute.

There are three possible outcomes. The Committee will decide or could decide that mediation is wholly appropriate.

Alternatively, the parties could agree amongst themselves that mediation is appropriate, or the expiration of the ten-day period could occur and then the parties would proceed to mediation.

The parties then have ten days to agree upon a mediator. If the parties cannot agree, then the ADR Committee chair in consultation with the other committee members and the parties shall select a mediator.

Within thirty days after the selection of a mediator, the parties should have a resolution. If the parties do not have a resolution and have not alternatively agreed otherwise to extend the period of time for a resolution to be made or for the parties to complete the mediation, then the mediator is charged with the responsibility of issuing a recommendation to the parties.

After the mediator issues a recommendation to the parties in writing, within fifteen days after the issuance of that recommendation, the mediator will reconvene the parties and attempt to resolve the matter one final time.

If the parties are successfully able to resolve the matter, then that matter is then posted to the Midwest ISO website and the matter is resolved. If they are unable at that point to do so, then the parties have the option of attempting arbitration.

Now, unlike the informal dispute resolution procedures and mediation—and, by the way, I will point out that mediation is nonbinding—the arbitration procedures are permissive. Attachment HH says that they “may” participate in arbitration.

If the parties do agree to participate in arbitration, within fourteen days of receiving a demand, a party should notify the other party if they believe that the dispute is not suitable for arbitration and that it should be heard by a regulatory body such as the FERC.

In that case, the parties have 120 days to file their appropriate proceeding or pleading with the FERC, and if not, then the dispute reverts back to arbitration.

The parties then have fourteen days to agree upon the arbitrator. If they do not select a single arbitrator, then they have seven additional days. In that time, the parties will be aligned in accordance with their particular sides, and each side will then select an arbitrator. Those two arbitrators will then select a third arbitrator that will serve as the arbitrator that will run or govern the proceedings.

I just want to point out some important features of arbitration. There is confidentiality. There are expedited disposition opportunities with discovery or without discovery.

There is also an eight-month time limit that is established under Attachment HH in which the parties must complete the arbitration. If the parties wish, they may extend that for an additional sixty days, but otherwise they are limited to the eight months to dispose of the arbitration.

Let me just wrap up and just point out one other matter that is of importance, and that is, that there are matters that parties may find that are unsuitable or are wholly within, rather, the jurisdiction of FERC, and those matters will be handled by the FERC. I will be available to answer questions as we proceed.

Thank you.

MR. WAX: Thank you, Wayne. Our next speaker, as I explained a bit ago, is Dan Shonkwiler from the California Independent System Operator.

MR. SHONKWILER: Hi. I'm Dan Shonkwiler from the California ISO, and I have to say this is a great topic. But it's a challenging one in terms of having a story to really engage the audience. Some of the disputes we have had are really quite interesting. But I can't talk about those because they are still pending.

I tried a number of angles with my wife to see if I could get some sort of layperson's interest, a story to pull this thing along. My wife thinks you are going to be fighting sleep.

But I think there is a story. The story is that the use of ADR, which otherwise you might view as merely a regulatory requirement, is a business success. The reason is it takes a large number of disputes and funnels them down through succeeding steps to about one a year that requires some kind of outside intervention, either an arbitrator or an appeal to the Commission to resolve.

I want to walk through how that happens at the California ISO and explain the circumstances where that tends to work better and where it tends to work worse.

By way of background, the California ISO is an ISO, not an RTO or a power pool. We are governed by a five-member board that is independent of our stakeholders. Beginning February 1, 2008, we will also be operating an Integrated Forward Market, which will add to the complexity of our business.

A. *ADR Agreements*

In terms of ADR Agreements, the place to begin is the tariff dispute resolution process.² A couple of notes about that: First, it is mandatory for any dispute that "arise[s] under" the tariff or any of the related agreements.³ That potentially includes a broad range of disputes, from anything in operations to grid planning and on to settlements. As a practical matter, settlements disputes—i.e., the money, provide the bulk of the disputes that go through this process.

Before I dive into the details of the tariff dispute resolution process, I should mention two other ADR processes that we use for commercial contracts and RMR. Because our corporate bylaws actually mandate the use of ADR,⁴ our vendor procurement group asks to insert a AAA arbitration clause in every commercial contract. Second, our reliability must-run contracts use a different ADR process. People who have worked with us for a long time might ordinarily assume that RMR follows the tariff procedures. You should check Schedule K of the RMR contracts to find the governing ADR process.

2. CAL. INDEP. SYS. OPERATOR CORP., FERC ELECTRIC TARIFF, THIRD REPLACEMENT VOLUME NO. 1 § 13 (2006), <http://www.caiso.com/1c0b/1c0ba7462ca30.pdf> [hereinafter CAISO TARIFF].

3. *Id.* § 13.1.1.

4. CAL. INDEP. SYS. OPERATOR CORP., AMENDED AND RESTATED BYLAWS OF THE CALIFORNIA INDEPENDENT SYSTEM OPERATOR CORPORATION Art. IX. § 5. (2001), <http://www.caiso.com/docs/2000/06/01/2000060110361815044.pdf>.

B. *Tariff Dispute Resolution Process*

The tariff dispute resolution process is the same three-step process that the Commission urges on ISOs, that is: negotiation, followed by mediation, and then arbitration. The Commission recommended that process again in Order 890 from a few months ago.

We call the negotiations step “good faith negotiations” or “GFN.” When a party brings a dispute to the ISO, the officer in the affected area nominates a staff member to serve as the lead negotiator. These are confidential business negotiations. The ISO doesn’t involve a lawyer in the discussion unless the disputing party wants to bring lawyers of its own. If a matter is resolved, the agreement always includes a provision that the resolution is non-precedential.

As you’ll see when we get to the numbers, the bulk of the work is done there, at the negotiation stage. Most matters are resolved through agreements. And even when there aren’t agreements, the matters often end at this stage because they just aren’t pursued further. A handful become complaints at the Commission and then the rest go on, if the party pursues it, to a Statement of Claim.

A Statement of Claim is submitted to the California ISO Board of Governors’ ADR Committee. The committee has delegated its responsibilities to AAA, so the process is administered by AAA and California ISO staff.

The first step with the Statement of Claim is mediation. Two things might be unique to this mediation step in California. First, mediation is optional. It is pursued only if the majority of the parties ask for it.⁵ It is not mandatory for all matters. And when the parties do choose to mediate, the second unique point is that the tariff allows the parties to refer any of these disputes to a technical body that is willing to hear it.⁶ That could be WECC, NERC, or FERC.

If thirty days go by without a resolution, any party can bring a demand for arbitration. Your packets include our arbitration rules,⁷ which I think are similar to the other ISOs. The only point to mention is that they include both the tariff provisions related to ADR and some supplemental rules that were prepared by AAA as the delegate of our ADR Committee.

The last two steps in the tariff dispute resolution process provide for appeals of any arbitration award to FERC or to a court (our ADR process can accommodate non-jurisdictional disputes). And then there is a separate provision that provides for appeals from FERC on to the U.S. Court of Appeals.

Tariff Dispute Process By the Numbers

Dispute Stage	Any Given Year	Actual Numbers
Settlement Disputes	Thousands	1760/year avg. in last 2 years

5. CAISO TARIFF, *supra* note 2, § 13.2.3.

6. *Id.* § 13.2.4.

7. CAISO TARIFF, *supra* note 2, § 13.3.

Negotiations	10 to 20	11/year avg. in last 2 years
Statements of Claim	1	10 in 9 years
Mediations	<1	3 in 9 years
Arbitrations	1	7 in 9 years

Down the left hand column here I have the stages of the dispute resolution process. The first stage, settlement disputes, actually is not a part of the formal alternative dispute resolution process. It is a business process that involves our settlements folks answering billing inquiries. I wanted to include that here because it is important context—it shows you what is coming into the large end of the funnel. As you will see, our settlement staff obviously does a great job of resolving disputes at that stage.

If you go over to the far, right-hand side, I have actual numbers. Our two-year running average of settlement disputes for 2005 and 2006 is 1,760. Over the past two years, we count an average of eleven negotiations begun a year.

Then, as you move down the right-hand column, the units change from annual averages to totals since startup. There have been ten Statements of Claims since we began operations in 1998, three mediations, and seven demands for arbitration. In the center column, I converted these into annual averages so you can compare apples with apples.

My only caution is there is a lot of overlap between those numbers. They don't add up quite as neatly as you would think.

The last step is seven demands for arbitration. Four of those were litigated all the way to an award and three were settled before a hearing.

C. More Data

I looked at all of the Statements of Claim to answer the question: What is it about these ten matters since startup that couldn't be resolved despite everybody's best efforts? They have a couple of things in common.

First is the respondent or the defendant. It is always us. That's not because the ISO has a monopoly on questionable conduct; it's the subject matter. Nine out of ten arbitrations involve settlement disputes. The California ISO settlement system doesn't match up buyers and sellers. So anyone who wants to challenge a settlement decision is looking in the first instance to the ISO, which is an agent for and stands in the shoes of the market. Thus, every settlement dispute becomes a claim against the ISO.

In terms of the nature of the settlement disputes, only two of those come out of the crisis. You may have heard we had a crisis in California in 2000-2001. Having only two of the claims arise from the crisis might be fewer than you would expect.

Three of the claims have roots—and I use that term loosely because I was looking hard for patterns—in grandfathered contracts that our participating transmission owners entered before ISO startup.

The remaining four claims were all interesting, unique kinds of business accidents that are complex and require assistance in sorting out. But I couldn't find any common pattern to share with you.

Two other patterns are worth mentioning. Arbitrating parties have always chosen a single, neutral arbitrator even though the tariff allows three-arbitrator panels and some other options. The parties have always been able to find comfort in a single arbitrator.

In addition, speed is sometimes featured as a reason to adopt ADR processes. For whatever reason, that hasn't worked out in California. Even though parties are entitled to insist on award within six months after the appointment of an arbitrator,⁸ the average for our four awards is twenty months after the statement of claim and, presumably, eighteen to nineteen months after the appointment of an arbitrator.

D. Experience on Appeal

The standard of review, which you will hear more about later, is essentially that the Commission reviews errors of law, whether a decision is beyond the scope of the tariff or the FPA, and not issues of fact.⁹

There have been four appeals to FERC, meaning that every one of the losing parties in one of our arbitrations has appealed on to the Commission. In your packet, you will see that two of those four appeals have resulted in Commission Orders.¹⁰ Those orders are going to have to speak for themselves.

I will mention that a different order, which I can summarize quickly, remanded a matter to the arbitrator because he had issued a one-sentence award denying the claims. Our tariff requires "Findings of Fact and Conclusions of Law." The matter was remanded to the arbitrator,¹¹ and we got the findings and conclusions for Commission review.

There have been appeals to the D.C. Circuit in both of the matters where there were Commission orders. You shouldn't expect any decisions though. One is pending settlement discussions, and the other was voluntarily remanded to FERC.

E. What is ADR an Alternative To?

To wrap this up, I wanted to offer my take on when this process works well and when it doesn't. I think that depends on what alternative dispute resolution is an alternative to.

8. CAISO TARIFF, *supra* note 2, § 13.3.10.

9. *Id.* § 13.4.1.

10. *Cities of Anaheim v. Cal. Indep. Sys. Operator Corp.*, 107 F.E.R.C. ¶ 61,070 (2004), *reh'g denied*, 110 F.E.R.C. ¶ 61,387 (2005), *reh'g granted after remand*, 118 F.E.R.C. ¶ 61,255 (2007); *see also Cal. Indep. Sys. Operator Corp.*, 107 F.E.R.C. ¶ 61,150 (2004), *reh'g denied*, 111 F.E.R.C. ¶ 61,078 (2005).

11. *Cities of Anaheim v. Cal. Indep. Sys. Operator Corp.*, 101 F.E.R.C. ¶ 61,235 (2002).

If it is an alternative to court, the ISO will fight to get into arbitration. We have done it twice when parties have sued us or our market participants, and we successfully compelled arbitration both times.

One of those two matters resulted in an opinion that is in your packet.¹² I would recommend the opinion. It is interesting due to the topic. The question was whether participation in the negotiation step of the ADR process was a prerequisite to compelling arbitration.

I would also recommend it because the author is Judge Levi, formerly of the Eastern District of California, who is the new dean of Duke Law School, so it is an excellent piece of work.

To the extent ADR is an alternative to a FERC complaint, there is some frustration on our end. You will also see in your packet an order involving Strategic Energy.¹³ This was issued back toward the beginning of the California ISO's experience with ADR. The Commission refused to hear a complaint about a garden variety settlement dispute.¹⁴ They obviously wanted that in ADR.

Since then we believe the Commission has changed its mind and allows any party to bring an issue to the Commission, rather than confining them to ADR. We just infer that from arguments that we've raised that haven't been considered in the orders.

So you have two very different processes: arbitration, on the one hand, in California with live hearing, and something on paper before the Commission. The plaintiff can choose whichever forum they like, and the other side, always us, is stuck with it. That can be a frustration, and it is something that I'm going to recommend our company look at.

That is all I've got. There is more information about arbitration on the California ISO website. I hope that after you take a look at it, you will recommend that your client not sue the California ISO.

MR. WAX: Thank you, Dan.

Before I introduce the next speaker, I just want to make two comments about Dan's remarks, one, the one-sentence remanded arbitration decision by a sole arbitrator, I want to make it clear to everybody that was not me. I mentioned earlier that I had decided one of these cases, and that was not the one sentence case.

Second of all, just an observation on Dan's remark about the twenty-month period for the average of these matters to resolve themselves. In the commercial arbitration arena that does seem like a long time. However, I guess if one thinks about the alternative potentially being FERC, maybe the twenty months is not a long time to be waiting for a decision in that context.

Now, Bill Museler.

MR. MUSELER: Thank you very much and thank you for inviting me here today. I will start off by pointing out a distinction between what the

12. *PacifiCorp. v. Sempra Energy Trading Corp.*, Civ-04-0701 (E.D. Cal. July 2, 2004) (order compelling arbitration).

13. *Strategic Energy L.L.C. v. Cal. Indep. Sys. Operator Corp.*, 95 F.E.R.C. ¶ 61,312 (2001).

14. "We will deny Strategic Energy's Complaint as premature, because it has not complied with the ISO Tariff ADR procedures." *Id.* ¶ 62,069.

NEPOOL Review Board and the other ADR procedures are. The best way to do that is to kind of define what NEPOOL is versus the New England ISO.

Everybody knows that before the market started in the Northeast there were three power pools: the New England Power Pool, the New York Power Pool, and PJM.

As the ISOs were formed in New York, the New York Power Pool actually ceased to exist. Most of its members plus additional sectors formed the management committee of the ISO right in the initial stages.

In New England, it happened differently. NEPOOL actually owned the tariff and the ISO did not have 205 rights initially, and so in the beginning NEPOOL as an organization continued to exist and continued to have quite a bit of stroke with respect to what happened.

Now, as things evolved in New England, before the RTO era, New England had to go through a major iteration of its market, which was completed in about 2003 and then various things occurred, but finally the RTO formation occurred in 2005.

The most recent major iteration in New England has been that the capacity market settlement was filed and is in the process of being implemented. I give you this background because it does inform as to how things have evolved, especially with respect to the NEPOOL Review Board.

The NEPOOL Review Board only deals with decisions or failures to act of the NEPOOL organization. NEPOOL is the equivalent of the old New England Power Pool plus with the additional members that make up the current electricity sector, including generators, independent power producers, and the like.

Just to set the differences here, originally the Appeal Board, the Review Board, would hear appeals of decisions by NEPOOL, not by the New England ISO, and still only hears any appeals from the NEPOOL Participants Committee.

Those decisions were binding on the members of NEPOOL. They are not binding on the ISO, but they were binding on the participants of NEPOOL but could be appealed to FERC, just like arbitration awards can in the ADR world.

The RTO Settlement changed the authority of the Review Board and today it is "advisory" instead of "binding" on NEPOOL members.

The purpose of the NEPOOL Review Board is really the same before and after the formation of the RTO except its relative influence has changed quite a bit.

The reason that the Review Board was created by the NEPOOL market participants was to prevent the tyranny of the majority. In the ISOs, including the New York ISO, there are ways that are put in there to accomplish some of the same things and some of it leads to the ADR procedures in those entities.

The NEPOOL Review Board could hear an appeal of a NEPOOL decision or a failure to act on the filing of an appeal by any member of the NEPOOL Participants Committee.

I won't go through the before and afters, but the current rules are when we talk about expedited decisions, because of the changes that occurred in the formation of the RTO, a number of things have happened.

On the timing standpoint, the Review Board has a current mandatory requirement to issue decisions on any of these appeals in thirty-five business

days. Now we have only had one appeal since that has been in effect, and we did meet that one in 2005.

The board dates are set in advance; it has to be approved. The members of the board are approved in advance by the Participants Committee of NEPOOL. There are five members. Two are arbitrators, they are members of the AAA and actively participate in arbitration work; and the other three members, of which I am one, are industry experts, people that have experience in the markets and in the operation of RTOs and power systems.

The idea was to create a totally independent board not one that has one from column A, one from column B, and a neutral, to try to give it some credence so that it can be relied on.

Now, just one more thing. One of the major changes in New England when the RTO was formed, and this was the same in some of the other entities as well, even though none of the ISOs and RTOs are exactly alike in their governance, basically the market participants or the members, however you want to refer to them, became more, if not totally, advisory to the ISO instead of being able to have either shared governance or, in the case of NEPOOL, to have tariff rights in the first place.

At the same time when the members of NEPOOL became advisory to the ISO the Review Board became advisory to the NEPOOL Members Committee. If we get appeals now, our decisions are no longer binding on the NEPOOL Participants Committee.

The Board's advisory opinions can be used as independent third-party background or evidentiary details, which people have used and file when they file with FERC. If they are going to pick a fight with the ISO, depending on what the decision was, they may or may not choose to append decisions of the review board.

All of that history kind of can be reflected in the number of reviews and appeals we have had. You can see when the ISO was formed, and particularly when it was in its early stages, there were quite a few appeals every year, but they dropped down. Since the formation of the RTO the numbers of appeals have been relatively modest. Last year, we had no appeals, and thus far this year we have no appeals.

The kinds of appeals we have had in the past are shown here. The folks on the phone don't have this. Very quickly, most of them had to do with market design, as you would expect. That was eleven; five had to do with cost allocation; two had to do with interconnections; two had to do with market, market monitoring, and one had to do with RTO formation in the first place.

What I should mention, and this goes with I think what California mentioned earlier, is that a lot of the really major decisions in New England within NEPOOL and between NEPOOL and ISO New England, for example, the design of the new market in 2003 and the formation of the RTO in 2005, were, I'll call it, "global settlements" by the market participants and the ISOs, and other third parties have settled many of the fundamental market issues.

In the case of New England, the regulators have always played a major role in the making of these major market decisions. The role of the Review Board, pretty much after the fundamental decisions have been made, has been relative to the implementation of those major decisions, like, what kind of a market is it going to be and particularly things like the capacity market.

Well, there is a lot of devil in the detail. A lot of those have to do with the kinds of appeals that we get and are likely to get.

Looking into the future, the New England markets, just like I think all the markets in the Northeast and all the markets that exist, I think that this goes for the Midwest as well as California, are maturing. They are not all in the same stages of maturity and they all have a ways to go.

In New England, the forward capacity market is going to be a challenge to get implemented even though it has been approved. Market participant settlements in all of these areas have been getting better, somewhat less contentious.

The role of the Review Board for NEPOOL may need some major review. Again, we are not an arbitration panel, but we do provide particularly for some of the minority interests to make sure that there is an independent third-party look at decisions that may not be in the best interest of the industry in New England. With that I will give up the podium and I will be available for any questions.

MR. WAX: Thank you very much. Our last panelist from one of our organizations is Craig Glazer from PJM.

MR. GLAZER: First off, welcome everyone. Being here today is an incredibly pleasant diversion after spending the morning dealing with great issues that, frankly, needed some form of alternative dispute resolution.

Here in Washington, alternative dispute resolution seems to be going to that domed building over there somewhere. That is a form of alternative dispute resolution. Going to the newspapers, that is another form of alternative dispute resolution.

Getting your state commissioners all hot and bothered, that is another form of dispute resolution. It is nice to come to look at and discuss a more structured, organized, and civil form of alternative dispute resolution.

I am here to tell you a little bit about the experience at PJM with alternative dispute resolution. For one, there are two basic messages. One, is it was absolutely central to building confidence by the market participants during the time of the formation of the market and the development of the fundamental agreements, the operating agreement and the tariff. Number one, it was very, very important to the market participants.

Number two, sort of going in the opposite direction, it has really not been used very much at all, at least within our market. We are celebrating ten years of operating as a wholesale market.

Less than a dozen times in ten years has alternative dispute resolution been used. Towards the end, I will give you my thoughts on why that is, and hopefully, in the questions we can discuss that.

I mentioned first and foremost, just moving to Slide 2, that the guiding principles really did serve us well and were incredibly important to the drafters of the key documents. One was clearly defined procedures. It couldn't be squishy as to what people had to do and when they had to do it. It had to be voluntary.

There was a strong, strong feeling and stays to this day that parties want the ability to go to the Commission, to bring their dispute promptly to the Commission.

Alternative dispute resolution comes into play at certain times, but that has sort of been a fundamental principle and maybe a lot of the explanation.

That being said, the parties also understand when you go to the Commission it is a very public process. There are certain disputes for which parties wanted confidentiality, and those seem to be the ones that were central to this process and that have used the process. The final one is dollar thresholds.

I am not going to spend a lot of time on the procedures. They are not that different than what you have heard from MISO, from NEPOOL, and California in terms of how it actually works, but a couple of features.

Let me start with mediation and go to arbitration. Let me talk a little bit about the operating agreement and the tariff with regard to each. There is a little bit of sort of a two-pronged process here.

One is in mediation, and our operating agreement calls for mediation. The mediator can provide a confidential, nonbinding recommendation on resolution and actually provide sort of an assessment of each party's position. That is kind of a very helpful thing. Then, it is mandatory that parties negotiate based on that assessment, a reality check, if you will, associated with that.

That being said, we have different provisions in our operating agreement and our tariff. You might ask, "Well, what is all this difference between these two documents?"

Well, there is sort of a tortured history in PJM of this. There are two separate documents. There is an operating agreement for which to this day the members have 205 rights.

On the other hand, there is a tariff for which the PJM Board has 205 rights. The operating agreement governs things like governance and voting, but then there are some things in there that we are not quite sure why they are in there: regional transmission planning, but billing, metering, default, accounting, and billing are all found in the operating agreement. Lo and behold, mediation is also found in the operating agreement.

The tariff at PJM, on the other hand, contains the market rules of PJM. Interestingly, when you are dealing with the market rules, LMP, clearing price, et cetera, there is no mandatory mediation provision.

The thinking, as far as I have been able to piece together in talking to some of the veterans of this, was that ADR was always considered an optional process. Particularly when you are dealing with the market and the market rules, people want to take their chances with FERC rather than have sort of a private ruling on a market rule.

When it comes to billing and accounting questions, metering questions, then people were much more amenable to ADR. We found mediation provisions in the operating agreement; they do not exist in the tariff. Just a little interesting aside there.

Let's go to arbitration, again, sort of separate rules here. In the operating agreement, sort of the constitution, if you will, of PJM, there is mandatory, binding arbitration for small disputes less than a million dollars but voluntary, nonbinding arbitration for amounts other than that, again, the thinking being there is always that pathway to the Commission.

Moving to Slide 9, if I can, what I find interesting is the pathway to get to the Commission is kind of interesting and kind of different if you're in an operating agreement versus a tariff.

If you are in the operating agreement, a provision of the operating agreement, your appeal rights basically revolve around errors of law, interpretation of commission rulings, et cetera, by the arbitrator.

The fact issues are essentially deemed to be binding. Once you are going into this process, you will be subject to the factual determinations of the arbitrator.

It is also sort of a "me too" provision. There is a provision where interveners can come into the case and ask that those arbitration findings, the factual findings, be applied to them as well, or they can challenge those factual findings and say that they were clearly erroneous. Again, it's sort of a limited path in terms of what the FERC can review and not, again, sort of on errors of law as opposed to errors of fact.

If we go to the tariff, on the other hand, containing the market rules—I am now on Slide 11, sorry for skipping around a little bit here—but we've got an even different standard of review, a more narrow standard of review.

One, that arbitration has got to be more rapid, that arbitration is more limited. You can't appeal to FERC unless you can show that the conduct of the arbitrators or the decision violated standards in the Federal Arbitration Act or the Administrative Dispute Resolution Act.

Now you are in an arbitration. You are in on a complex market rule, and the arbitration has that much more power over you. You can see rapidly why people are sort of a little hesitant to use the arbitration process that was built into the tariff.

As I said, it has been infrequently used. Less than twelve in ten years? I think there are a couple of reasons for that, some good and ones that would give us pause.

One is there is a provision for immediate involvement of senior officers before you ever get to mediation or arbitration. We find incredibly important sort of bumping things up in an organization, getting it focused at the higher level, and that is sort of required in the process.

Many of these disputes, as California mentioned, resolved with a good faith negotiation. Quite frankly, these arbitration processes are complex. "Hey, if I'm going to put on a case with discovery, et cetera, I might as well put it on at the Commission" is probably the thinking of parties, instead of putting it on in front of the arbitrator and then getting somebody appealing it to the Commission.

Really what we find is the only reason people might consider arbitration as opposed to going to the Commission is twofold. One, you want a more rapid decision, which you will get; and, two, what we have seen is confidentiality.

Confidentiality is probably the biggest plus, but in terms of actually sort of saying, "This is the preferred procedure," with the exception of those two factors, people would much rather go to the Commission.

That being said, just in wrapping up here, a couple of the lessons learned over ten years. If you are going to do this, confidentiality is key. A defined process provides that confidence. Arbitrators and mediators are helpful.

Also, and this is going to sound a little self-serving here, but it is true, the Office of Interconnection, these are oftentimes disputes between two parties, not involving the RTO.

The Office of Interconnection staff have played a key role in narrowing the issues, in educating the arbitrator on the complexities of the market rules, and then trying to bring parties together.

My suggestion is don't make the RTO necessarily the bad guy, the defendant. In fact, that neutral staff can, in fact, and in our case has helped to resolve a whole number of these disputes.

Again, boy, this sure beats talking about stuff on Capitol Hill or in the newspapers. I appreciate the opportunity to talk about this today. I'm ready for questions.

Thank you.

MR. WAX: Thank you, Craig and thanks to our four panelists from the organizations. We are now going to turn to the Washington experts.

Our first speaker is Bob Fleishman. As I mentioned, Bob was responsible for the Energy ADR Forum Report, and it had a number of sections with this topic about use of alternative dispute resolution at RTOs, ISOs, and power pools.

Bob will fill us in a little bit on that, but most importantly on FERC's review of those particular matters. We have heard something about this already today.

V. PANELISTS ON ENERGY FORUM ADR REPORT SECTIONS ON ISOS/RTOS

MR. FLEISHMAN: Good afternoon. I was quite involved in the Energy ADR Forum Report. There are excerpts of that at the end of the materials.

I am going to address one of the areas there which is the scope of agency review, in particular, FERC review of outcomes in an ADR setting, both arbitration and then also with respect to mediation or other ADR mechanisms or tools.

As I was preparing for this set of remarks, I was thinking about President Lincoln who spoke about compromise. He said, "The spirit of concession and compromise, that spirit which has never failed us in past periods, may be safely trusted for all the future."

We know a lot about President Lincoln's strength of character and his dedication to principles, and he was really unshakeable in that regard, but he nevertheless was a first-rate compromiser. He understood that compromise is necessary in everyday life. I think part of that was because he had tried or been involved in about 5,000 legal cases. It taught him that in many cases "half a loaf" was no better than "no loaf" at all.

Why do we care about what the scope of review is in these type of situations? Well, the nature and degree of the agency's review is an important consideration because often you are sitting there asking, "if we have a dispute that is resolved with ADR, is it going to be reviewed by FERC *ab initio*? Is the agency going to overturn the outcome, and then will we have wasted lots of time and money? Or, is the agency likely to defer to the ADR outcome? What kind of standard of review is it going to apply in a particular situation?" These are very important questions.

Well, it is really not that difficult when you are looking at FERC. Among other things, it depends on the agency's organic statute. In this situation, since we're talking about RTOs, ISOs, and power pools, the Federal Power Act (FPA) is the organic statute. We also must consider the intersection of the FPA with other laws dealing with arbitration and the like, including the Federal Arbitration Act and the ADR Acts in 1990 and 1996.

What we do know is that, as a general matter, FERC is going to provide substantial or appropriate deference (the cases aren't precisely clear) with respect to an arbitrator's factual findings, an arbitrator's award, or other ADR outcomes. When we're talking about other ADR outcomes, we are talking, for example, about a mediation where the result is embodied in some type of settlement submitted to the agency.

We also know that under the ADR Act of 1996, there are a couple of things that FERC cannot do. It may not vacate a binding arbitration or arbitration award nor can terminate arbitration proceedings. There is a lot more detail about that in an appendix in your materials about the scope of review from the Energy ADR Forum Report.

I would like to drill down a bit and explore the question in a slightly different way along the lines of conversations I've had with Bob Nordhaus, Chip Cannon, and Bob Wax and others in connection with the Energy ADR Forum Report. The question is, for disputes subject to FERC's jurisdiction, is arbitration just an additional stage or hurdle prior to litigation?

In terms of the framework here, in addition to the statutes I mentioned earlier, there are: administrative rulings; executive orders dealing with the scope of arbitration awards by agencies and the like; the FERC's ADR rules of the FERC promulgated in 1995 implementing the 1990 Act; certain FERC decisions; and the tariff provisions or the portions of the operating agreements, depending upon the nature of the conflict involved, with respect to the RTOs, ISOs, and power pools.

There are also contract arbitration clauses which could be of critical importance in the next generation of ADR scope of review issues that have really not been ventilated at the FERC. I am talking about market-based rate contracts where the contract, depending upon the services involved and contract term, may not be filed at FERC.

So, the first example is the arbitration of issues and proceedings that are pending before the Commission. These are matters that are brought to the Commission through the procedures and the tariffs of the power pools, RTOs, and ISOs. In example 2(a), we have the arbitration of disputes in a pending FERC proceeding where you have a rate change filing of some type that would be required to effectuate an arbitration award. In example 2(b), we have those market-based rate contracts that can be modified, and it's not precisely clear what the nature of the FERC filing, rate filing, you might need to have.

Examples 1 and 2(a) reflect situations where, as I discussed earlier, it is clear that there is substantial or appropriate deference under existing FERC precedent in connection with an the review of an ADR outcome. There is going to be FERC review and supervision, against the backdrop of FERC's general policies favoring settlements.

The area where there is a lack of clarity is in connection with example 2(b) regarding market-based rates. A lot of the precedent I referenced earlier

either predated the ADR Acts or the market-based rate regime with respect to electricity. When and if those ADR outcomes do reach the Commission, I think there is going to be a question about the appropriate scope of review: should it be a substantial deference scope of review, or some other standard? It's hard to imagine why it should be anything other than a substantial deference standard, but we just don't know at this point.

With that, I am going to pass the baton to the next speaker.

Thank you.

MR. WAX: Thank you Bob, and our next and last speaker at the presentation stage is Chip Cannon at Latham & Watkins.

MR. CANNON: Both Bob Fleishman and Bob Wax have made reference to the Energy ADR Forum Report that was issued last year. If you look in the materials that you have been given, Appendix D to that report is included there.

Appendix D is a side-by-side that we put together of the ADR mechanisms and structures that are in place in the various ISOs, RTOs, and power pools. This side-by-side really formed the basis for the Forum's section in the report on recommendations for these regional organizations.

Rather, though, than refer to it as recommendations, I like to think of it as more or less the best practices, those areas where the organizations appear to be moving in the same direction in terms of structure and mechanisms.

My comments today were going to give an overview of where we see those best practices, those areas where there is a common structure among the organizations.

I find myself perhaps in the enviable position of addressing topics that I think most people have already addressed today, so I'm going to keep my comments relatively brief and provide a very high-level overview of where there are some common traits for the various organizations. Then we can move on to the questions, because I think it is actually more interesting to talk about perhaps where the organizations differ than where they are the same.

First, as has already been mentioned, in most of the organizations you will see the alternative dispute resolution procedures will apply to disputes that arise under what I refer to as the "organizational" or the "operational" documents of the organization.

In some instances, you will have, and I think this was referenced earlier, the ADR procedures in the tariff that will apply to all disputes that arise between a market participant or the regional operator, or between two market participants, under the particular tariff and related agreements.

In some organizations, an operating agreement has one set of procedures and a tariff has another. In ERCOT, I believe it is the protocols that apply to any disputes that arise in that market.

As a general matter, the procedures will apply to any disputes that arise under those organizational governing documents with certain express carve-outs. For example, billing disputes are often covered under other procedures.

You will often have pro forma agreements, such as interconnection agreements, that will have their own separate set of ADR procedures. Often, the procedures will specifically carve out real-time operational disputes, and there is generally a carve-out for disputes regarding the justness and reasonableness of rates.

You will also generally see, as I think has been made clear here, a three-step process: first, starting off with good faith negotiations, then nonbinding mediation, and then finally arbitration.

You will see that three-step process in basically all the markets that we reviewed, with the possible exception of the WSPP, which goes straight to mediation and doesn't have the good faith negotiations.

The one distinction that you will see between the various markets that is with respect to the various time frames. For example, in good faith negotiations, the time frame ranges anywhere between thirty and perhaps ninety days. If a resolution isn't reached at that point, you go on to mediation.

In some markets, there is really no time frame at all for the good faith negotiations; negotiations would end whenever the parties agree that they are not likely to reach resolution.

However, this is perhaps a good point to mention as well, in almost all of the provisions that we have seen, there is a fair amount of flexibility built in for the market participants to change the time lines, to change a lot of the provisions that apply the resolution of their dispute.

If you take a look at the various ADR procedures and mechanisms, one place where at least facially it appears that there are some differences between the various organizations is when you get into the nuts and bolts of how the arbitration itself is being held. If you actually look more closely, a lot of the distinctions are more superficial than anything else.

It appears to me, at least from reading the various provisions, that one over-arching concept that applies basically throughout is the ability of the participants to the dispute to take whatever mechanisms are in place (for example, hearings, cross-examination of witnesses, discovery) that may be proposed by the various ADR Committees or the general counsel's office of the respective organization, to either take those or to come up with something that seems to make better sense with respect to resolving their particular dispute.

Once again, this is a very, very high-level view of what we have seen as some of the commonality between the organizations. It's interesting, and I think I made this point in the last Energy ADR Forum when we presented the report, when you first take a look at the various mechanisms, it appears that they are all fairly different. But once you boil down to over-arching principles, you see that there are really strong similarities.

Once again, though, for purposes of today's discussion, I would be interested in hearing in the questions where the provisions are actually different in the various markets.

Thanks.

MR. WAX: Thank you, Chip. Thank you to all of our speakers.

VI. QUESTIONS AND ANSWERS

MR. WAX: We are going to do this in two ways. I am going to take comments from the audience here in Washington. We are getting email comments, or questions, excuse me, as well.

Before I take questions from the audience, there were a couple that I wanted to throw to our panelists and see what they have to say. The first question is have your organizations ever used or thought about using a formal

ADR provider such as the AAA, “American Arbitration Association,” CPR, JAMS, or the like, to help administer or to administer your alternative dispute matters?

If not, why not? If you do not use them, how does the so-called “self-administered” arbitration or mediation process work at your organizations?

Wayne, do you have a thought on that from the Midwest ISO?

MR. HARRIS: We have not used a third-party provider to provide dispute resolution such as CPR or AAA. Typically, the committee itself is overseeing the process. One of the considerations is you have got generally an up-front additional cost that the parties would have to bear, and that is just something to consider when doing that.

MR. WAX: In terms, though, of selection, and the others can add this to the question when it gets to be their turn, I don’t know if you mentioned this in your remarks, the Midwest ISO has a list its ADR committee has put together of potential arbitrators and mediators for your proceedings? You don’t necessarily have to use those kinds of organizations for that; is that right?

MR. HARRIS: That’s correct. We have a list of arbitrators as well as a separate list of mediators that we rely upon and that list is something that we tend to rely on for the selection of arbitrators and mediators.

MR. WAX: Craig, how about at PJM?

MR. GLAZER: Well, the short answer is with twelve of these in ten years this isn’t the booming business in PJM and not something that we have had to really put that level of resources into.

The committee, which is actually made up of stakeholders and members of the Office of Interconnection, actually does come up with that list, maintain that list, maintain files of arbitration decisions, et cetera.

After this point, things may change, but up to this point the administration has not been an overwhelming task such that we needed to farm it out or that there were specialized services. Again, that may change now.

MR. WAX: Along the same lines of my subsequent question I had asked Wayne, am I correct PJM also has a list that it maintains, it’s ADR Committee, of arbitrators and mediators?

MR. GLAZER: Yes.

MR. WAX: But you don’t need these organizations I mentioned to perform that function for you?

MR. GLAZER: No.

MR. WAX: Bill Museler, this question is probably mostly irrelevant for NEPOOL, but you look like you had some thoughts on it.

MR. MUSELER: Yes. It is actually pretty relevant, especially with respect to the NEPOOL members who control the budgets because the NEPOOL Review Board is essentially a dedicated group which they fund every year to the tune of about \$300,000 a year. That is what it costs to keep on retainer the five specific members of the review board.

The NEPOOL members are in the process of discussing whether or not that expense is justified on an ongoing basis. It sounds like we are all serving about the same order of magnitude of arbitrations or appeals or whatever you want to call them, which is not a lot, and appears to be getting less.

That issue has arrived at NEPOOL, and they may well decide to go to a more ad hoc type of arrangement in the future after this year. The question of expense particularly is an ongoing thing. I'm sure it is the same in every organization. There is a lot of pressure to try to keep the expenses of the RTOs down and minimize the administrative expenses. This is the case at NEPOOL, and it is not insignificant.

MR. WAX: Thank you.

Chip, do you have anything to add to that in terms of the other organizations you have looked at, other than the ones that are here?

MR. CANNON: Actually, I don't think I saw any references really in the regulations themselves other than to probably certain tariff provisions that they have incorporated by reference, regulations, for example, for AAA, but once again they could be superseded by what the parties wanted to do.

MR. WAX: The next question, and then I will turn to the audience, was given to me in advance by Steve Shapiro from FERC's ADR Office. Steve couldn't be here today because he is in a mediation in Boston, but I promised him I would make sure the question was asked.

The question is, as our panelists are aware FERC has expressed willingness to reform the governance of RTOs by adding regional customers to the boards and creating something called "hybrid boards." The question is, if that unfolds, will that have any impact on alternative dispute resolution at RTOs and ISOs; and if so, what, if anything? Does anybody want to try their hand at that?

Craig?

MR. GLAZER: I think this whole issue of "hybrid boards," I think is going to add a level of complexity especially to this issue of alternative dispute resolution.

As I indicated, the RTO staff, for example, has played a key role in the arbitrations that we have had, but now the staff is reporting to a board, and the board has market participants as some of the members.

Things get a little fuzzier in terms of roles and responsibilities. I think there has been a value in having the RTO as sort of the neutral entity. If that gets more complex—personally, I think there are other ways to address the accountability issue short of getting into the board structure. That is probably a discussion for another day.

MR. WAX: Bill, NEPOOL?

MR. MUSELER: I think it is almost a reversal. FERC has spent several years getting to the point of almost demanding independent boards on the RTOs and ISOs, which I think has turned out to be the right thing.

If they are really serious about this, they are talking about going back. There may be ways to surmount these problems. But in the past, the hybrid boards have had all kinds of problems associated with them.

I am on the IDSO Board in Ontario. They just two years ago finally switched from a hybrid board to an independent board because they almost couldn't get anything done. It was, is almost impossible for the sector members of the board to separate their own fiduciary responsibilities to their companies from their, supposedly, independence requirements on the board. I don't know how you do that, and I wouldn't like to try it myself.

Texas, I think ERCOT, I think is in the process of moving away from the hybrid board to the independent board. I think it is a move that probably is a move backwards.

MR. WAX: If it were to proceed in that direction, at NEPOOL in particular Board of Review, how do you think it would sort of change that picture, if at all?

MR. MUSELER: As far as the Board of Review, it probably wouldn't change because, again, we just deal with the members' decisions, not the ISO's decisions.

We don't get involved in a dispute because the ISO changed a market rule or something like that. It probably wouldn't affect us too much.

However, it would certainly affect the New England markets big time. I don't know, I think it probably would result in a lot more litigation at the FERC based on bias on the part of the RTO boards and the hybrid boards.

MR. WAX: Well, maybe there is a place for ADR in that then, in that subsequent litigation.

MR. MUSELER: Maybe.

MR. WAX: Dan or Wayne, any thoughts on this subject.

MR. SHONKWILER: I'm not ready to touch the California ISO governance issue.

MR. WAX: Wayne, anything?

MR. HARRIS: I will let stand the comments of Bill and Craig.

MR. WAX: Okay, fine.

Why don't I turn to the audience here in the Washington, because nobody has yet brought any questions in, if there are any out there in the field. Any questions in the audience here in Washington that you would like to ask our panelists? This is sort of a unique opportunity to have these folks in front of you.

A VOICE: I would like to ask Wayne, the ADR Committee of MISO as I understand it has a responsibility to determine a dispute if mediation would be highly unlikely to lead to settlement. What criteria does the Committee use to do that and how often has the Committee been asked to do that?

MR. HARRIS: One of the tasks of the ADR Committee is when a Notice of Dispute is received, we have ten days to reply to the parties as to whether or not we believe that mediation is highly unlikely to lead to a result.

The question was, what are the factors that the committee uses in making that determination? It is really a case-by-case determination, looking at the facts presented.

One of the things we certainly consider is, what is the impact? Is this something that is determinable by mediation, or is it something that should perhaps go directly to the FERC for resolution? That is certainly one of the criteria that we look at. Beyond that, it is sort of a case-by-case determination. I believe we have only made that determination once.

MR. WAX: Other questions here in Washington?

MR. MOHLER: We have been focused today on mediation and ADR within RTOs. RTOs are large organizations. They rub shoulders with other RTOs now. This question may be more for Craig and Wayne and possibly Bill. Have you seen any developments with ADR for disputes between RTOs?

MR. GLAZER: Well, there are a couple of pieces of that. One is the RTOs themselves, seams issues are big issues for RTOs. We have a variety of structures to deal with those. It is a requirement to be an RTO that you address seams issues.

For example, between PJM and New York we have an active seams management process. With MISO, it is actually is a condition of those companies integrating into PJM or MISO.

ADR hasn't played that much into it. If we have a dispute, usually the dispute involves a whole bunch of market participants as well. Therefore, you are inevitably at FERC and you are probably in front of an ALJ in a settlement process. We have had those.

I'm not sure how ADR would work. Again, it is not our money in a sense. I don't want to get into a whole accountability issue, but it's not our money.

If New York and PJM are having a dispute, a whole lot of people have an interest in that dispute.

I'm not sure just an arbitration or even traditional mediation between parties would work in that context. I think an ALJ process actually would work better here.

MR. HARRIS: I would echo Craig's comments. It is probably something that would go to the FERC Dispute Resolution Office to resolve or an ALJ before it were to go to any type of arbitration, or any type of informal dispute resolution because those kinds of issues would involve all the stakeholders.

MR. WAX: Well, we have the good fortune of having in the audience Rick Miles who heads FERC's ADR Office. Rick, do you want to add anything on this subject about seams issues and the use of ADR in that forum?

MR. MILES: I think Craig's point is well taken. One of the barriers to effective ADR process is getting the right people to the table. If Craig or Dan come to the table but they can't represent the constituency, how can they negotiate? I mean, that is a major concern.

As Craig pointed out, if they do have these issues, our recommendation is talk to us and we will work with you to develop an ALJ process or a mediation process. We will help you do that.

For those of you who have an interest in ADR generally, there was a report just sent to the President on the use of ADR within the Federal Government. You can find it at www.adr.gov.

If you want to know what the Federal Government is doing, there are a hundred and some pages that talk about that. You can also take a look at the back part of it, and there are a number of recommendations that we have made to the President.

MR. WAX: For those of you who could not hear that on the phone, what Rick was referencing was a new report that has been sent to the President by Federal agencies, a cross agency group, on the subject of ADR. It can be found at www.adr.gov. You may want to take a look at that, if this whole subject area interests you.

Our panelists, anything to add to what you've heard from others or the questions?

If not, I want to thank our panelists very, very much, particularly those who came from California and the Midwest and New England to join us. I also want to thank our Washington participants. And I want to thank everybody who tied in. I want to thank the Energy Bar Association for the help it gave in putting this together. Again, last but not least, thanks to Clark Downs and the folks at Jones Day who provided these fine facilities for us today.

Thank you very much.