

# **USING ADR TO RESOLVE ENERGY INDUSTRY DISPUTES:**

## **THE BETTER WAY**

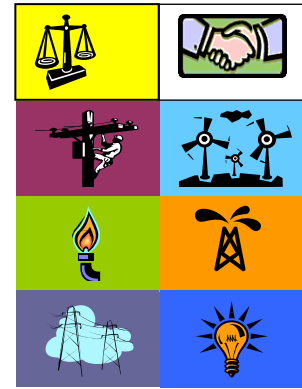
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**REPORT OF THE ENERGY ADR FORUM**

**OCTOBER 2006**

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# Everything you need for successful resolution of energy disputes.

The benefits of using Alternative Dispute Resolution Techniques (ADR) include:

## ADR PROMOTES CREATIVE SOLUTIONS

- ▶ Improves information flow between parties
- ▶ Reaches objectives not available through traditional litigation
- ▶ Greater control over the outcome can be achieved

## ADR PROMOTES EFFICIENT DECISION MAKING BY REGULATORY AGENCIES

- ▶ Consensus-based policies are created instead of win-lose outcomes
- ▶ Decreases regulatory lag time so decisions are made more quickly and efficiently
- ▶ Builds cooperative relations between industry and regulators

## ADR PRESERVES RELATIONSHIPS

- ▶ Fosters a “solution-oriented” atmosphere to maintain positive relations
- ▶ Enhances party commitments to comply with agreements
- ▶ Reduces future litigation and instills greater long-term trust



## ADR PROMOTES GOOD BUSINESS

- ▶ Boosts employee morale and public relations, and minimizes disruption
- ▶ Can be private and confidential, limiting public notoriety
- ▶ Reduces uncertainty, resulting in lower capital costs and greater profitability

## ADR SAVES TIME AND MONEY

- ▶ Minimizes costs passed on to customers
- ▶ Minimizes operational delays
- ▶ Avoids lengthy and expensive litigation and preserves resources

## ADR PROVIDES BENEFITS EVEN WITHOUT FULL SETTLEMENTS

- ▶ Greater understanding of each other's positions and interests is achieved
- ▶ Issues can be streamlined or excluded
- ▶ Neutral's insights can give fresh perspective on possible litigation outcomes

## RECENT ADR SUCCESSES

- ▶ Developing Regulatory Rules
- ▶ Resolving Business Transaction Disputes
- ▶ Restructuring Markets
- ▶ Enforcing Regulatory Policies
- ▶ Electric Utility Bankruptcy Reorganizations
- ▶ Gas Pipeline Certificate Proceedings
- ▶ Licensing Hydroelectric Projects
- ▶ Site Cleanups
- ▶ Customer Complaints
- ▶ Developing Regional Regulatory Policies

# USING ADR TO RESOLVE ENERGY INDUSTRY DISPUTES: THE BETTER WAY

## Report of the Energy ADR Forum

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# Executive Summary

In the multi-billion dollar energy industry, the economic stakes of regulatory decisions and business dealings—and the cost of regulatory or judicial delay—are enormous. More and more, stakeholders in fast-paced, competitive energy markets find that better and quicker decisions are increasingly crucial—qualities that burdensome litigation and other adversarial processes often fail to provide. Given regulatory and market trends, public agency and private industry leaders—as well as capital markets—require, and should demand, improvements in the way conflicts over regulatory and private energy dealings are resolved.

This Report urges expanded use of **Alternative Dispute Resolution (ADR)** and suggests why that expansion is critical. ADR offers stakeholders and decision-makers a means to retain control of key determinations affecting their future that otherwise might be captive to years of litigation and appeals. ADR leads to better and often quicker decisions, enhanced certainty, more procedural flexibility, potential cost savings, and other efficiencies. While some companies and agencies have altered the way they handle conflict to reach prompt, flexible, and substantively sound decisions, many industry entities are struggling over how to employ ADR. This Report enables energy industry stakeholders and practitioners to understand fully their conflict resolution options, compare them analytically, and make thoughtful choices that serve their interests.

The Center for the Advancement of Energy Markets established an Energy ADR Forum in 2005 to explore these issues and develop a set of practical recommendations. The Forum members included suppliers, customers, regulators, policymakers, law firms, dispute resolution service providers, and energy companies and others involved with energy production, transmission, distribution, and regulatory activities. The Energy ADR Forum's Report offers practical advice for energy industry participants who wish to benefit from fresh approaches for conflict resolution and difficult decision-making. It explains the panoply of ADR options, identifies typical energy disputes and issues, and presents brief histories illustrating ADR successes in developing and enforcing regulatory policies and regulations, certificating pipelines, licensing hydroelectric projects, and handling commercial business transactions, site cleanups, bankruptcies, and customer complaints.

The Energy ADR Forum's Report offers practical advice for energy industry participants who wish to benefit from fresh approaches for conflict resolution and difficult decision-making.

The Report also provides strategies and practices that allow key industry players—including executives, policymakers, regulators, and attorneys who influence process and policy decisions—to recognize the value of innovative methods of conflict management and to employ them optimally.

The Report furnishes insights into the systematic implementation of ADR to produce superior outcomes in these key areas: (1) policymaking and similar regulatory settings (e.g., planning, policy or related agency actions); (2) litigation involving application of agency policies in particular situations (e.g., tariffs); and (3) disputes involving private industry contracts and other business transactions. Among the practical issues the Report addresses are how to:

- create effective policies that encourage ADR
- provide for systematic review and analysis of conflicts for ADR applicability
- select an appropriate ADR approach
- choose high-quality mediators and other neutrals
- adopt assisted negotiation processes to engage stakeholders in policy development
- designate and train personnel who will be responsible for the implementation of ADR
- prepare effective agreements to use ADR
- promote confidentiality in ADR
- streamline agency use of negotiation processes and review of proposed settlements

Forum members plan to follow up on this Report with programs, presentations, and other activities that permit industry stakeholders including executives, policy makers, regulators, attorneys, and others, to explore how they and their organizations can take greater advantage of ADR. The Project Director, Bob Fleishman, the Work Group Co-Chairs, and other Forum Members welcome inquiries from readers on how best to move ahead.

ADR leads to better and often quicker decisions, enhanced certainty, more procedural flexibility, potential cost savings, and other efficiencies.



# Introduction

Each day public and private organizations in the energy industry become involved in conflict—whether by choice, necessity, accident, ignorance, or simply being in the wrong place at the wrong time. Many reflexively want to sue their adversaries or bring them before a regulatory agency—occasionally because litigation may be the best route to resolve their conflict, sometimes because the lawyers are most comfortable with litigation, and often because they are unaware of other viable options.

In fact, many choices may serve businesses, regulators, and others far better than conventional adjudicatory approaches. Litigation is costly, often protracted, burdensome, highly adversarial, and damaging to relationships. In addition, attempts to resolve differences on the development of energy policies through conventional rulemaking processes can be inefficient and time-consuming. The outcome is generally uncertain and beyond the parties' control, and, as we know, uncertainty is disfavored by capital markets.

In the multi-billion dollar electricity, oil, and natural gas industries, the financial stakes of regulatory decisions and business dealings are enormous. For too long, the members of the Energy ADR Forum have seen time-consuming litigation before regulatory commissions, administrative agencies, and courts employed to resolve conflicts and reach policy and business decisions. As a result, business is hampered in its strategic planning by uncertain outcomes. Commercial relationships are damaged and often severed over acrimonious litigation. All too often, solutions imposed by judges or regulators are ill-tailored to industry realities.

Today's fast-paced, increasingly competitive energy markets require better approaches to dispute resolution. Public and private energy industry stakeholders need better and quicker decisions, enhanced certainty, more procedural flexibility, cost savings, and other dispute resolution efficiencies. More effective, expanded use of **Alternative Dispute Resolution (ADR)** will allow the industry, including businesses, regulators, and consumers, to take more control over its destiny and create workable solutions fitting individual circumstances. It will also deliver more practical, legitimate outcomes and other improvements to energy decision-making processes and their results, and minimize risk and uncertainty and thus be viewed favorably by the capital markets.

## THE CENTER FOR THE ADVANCEMENT OF ENERGY MARKETS

The Center for the Advancement of Energy Markets (CAEM) is a non-profit, independent, Washington, DC-based think tank founded in 1999 to promote market-oriented solutions to the challenges that confront the energy industry, other network industries, and the Nation. CAEM's expertise covers the entire energy market, but with a particular focus on electricity and natural gas, both wholesale and retail. CAEM seeks to develop intellectual capital for moving toward new public policies and regulation, new business models, and new technologies driven by competitive energy markets.

One aspect of this goal involves ensuring that regulators and others involved in energy industry decision-making handle their conflicts as effectively as possible. CAEM believes that effective and expanded use of ADR in energy disputes can enhance the efficiency, profitability, and long-term success of any company, as well as improve the effectiveness and reduce the cost of regulation. To promote this result, CAEM established an Energy ADR Forum, comprised of suppliers, customers, regulators, policymakers, law firms, dispute resolution service providers, and energy companies and others involved with energy production, transmission, distribution, and regulatory activities.<sup>1</sup> The Energy ADR Forum's members and leadership are set forth in Appendices A and B.

Forum members' activities included compiling relevant data and materials<sup>2</sup>; identifying and examining success stories; and preparing issues papers to aid Forum members and priority audiences to explore opportunities and concerns for enhanced ADR use. After working for over a year, Forum members offer this Report with advice on the best ADR practices<sup>3</sup> and recommendations as to how energy industry entities can implement them.

Recent years have seen some changes in the way many companies and agencies handle conflict or set policies. ADR is now used in various proceedings and transactions involving the Federal Energy Regulatory Commission, Regional Transmission Organizations (RTOs), Independent System Operators (ISOs), Department of Energy, Environmental Protection Agency, Nuclear Regulatory Commission, and state utility/public service commissions. In addition, contracts governing private business relationships increasingly contain ADR provisions.

Nevertheless, many industry entities have just begun to explore the diverse ways to put ADR to good use. Much remains to be done before energy industry stakeholders and practitioners fully understand their conflict resolution options and can compare alternatives so that their resolution choices will best serve their interests.

This Report highlights a better way: employing ADR methods that address the need for decisions that are prompt, certain, flexible, and substantively sound.

This Report demonstrates how regulators and industry players can create a framework that allows diverse energy industry participants to develop fresh approaches for handling conflicts cost-effectively and making difficult decisions collaboratively in priority categories of energy-related activity. It also shows how these stakeholders can carry out strategies that enable key industry players—including executives, policy makers, regulators, and attorneys who manage or influence significant process and policy decisions—to recognize the value of innovative methods of conflict management, assess systematically their potential use, and employ them to maximum effect. This will enable them to reach superior <sup>4</sup>outcomes in: (1) policy-making and similar regulatory settings (e.g., involving broader planning, policy or related agency actions); (2) litigation involving application of policies in particular situations (e.g., court and administrative proceedings); and (3) disputes involving contracts and other business transactions, which may or may not involve a government regulator.

## What is ADR?

ADR includes a spectrum of techniques involving various combinations of negotiation, facilitation/mediation, and evaluation processes to resolve issues in place of traditional forms of adjudication – litigation and administrative processes. ADR generally involves a third-party neutral who assists the disputing parties in designing and conducting a process to find mutually acceptable solutions to their disputes, provides advice, or directly resolves the dispute, depending on the type of ADR. In addition to dispute resolution, ADR also encompasses consensus-building processes used to develop policies or regulations or to reach or influence decisions involving many different stakeholders. Regulators can use ADR in many areas to streamline decision-making and conserve scarce public resources, while industry can use it to avoid the costs and delay of formal adjudication.

ADR will allow the industry, including businesses, regulators, and consumers, to take more control over its destiny and create workable solutions fitting individual circumstances.

# Benefits of ADR

ADR processes, reasonably employed, will enhance negotiations and improve outcomes' quality, workability, acceptability, and legitimacy. They will minimize operational delays and, in many cases, yield long-run savings in time and money. Even when ADR is not "quicker and cheaper," the up-front investment is likely to bear substantial dividends down the road, for the reasons set forth below.

## 1 ADR PROMOTES CREATIVE SOLUTIONS

- ▶ ADR improves the flow of information among parties to yield creative, technically superior outcomes.
- ▶ ADR affords the flexibility to reach objectives not available through litigation; productive solutions can be crafted in ADR that a judge or regulatory agency lacks the power to order.
- ▶ Parties retain greater control over the outcome.

## 2 ADR PROMOTES EFFICIENT DECISION MAKING BY REGULATORY AGENCIES

- ▶ Agencies can shift from win-lose outcomes to consensus-based policies more workable in today's markets.
- ▶ Scarce agency resources can be more efficiently utilized, and agencies can focus on market oversight or other consumer functions.
- ▶ Moving from formal hearings to ADR may decrease regulatory lag and increase efficiency and effectiveness.
- ▶ ADR enhances the regulatory compact by fostering more productive and cooperative relations between the industry and regulators.
- ▶ Implementation of policies will be smoother due to enhanced understanding and buy-in of affected interests, requiring less agency oversight.

## 3 ADR PRESERVES RELATIONSHIPS

- ▶ While a court fight will yield a "winner" and a "loser," often damaging business relationships, ADR fosters a more "solution-oriented" atmosphere to solve the immediate problem and to maintain a good working relationship in the future.

- ▶ ADR enhances party commitments to comply with agreements they have developed.
- ▶ ADR reduces future litigation and instills greater long-term trust and understanding.



#### **4 ADR PROMOTES GOOD BUSINESS**

- ▶ ADR means less disruption for executives, managers, and supervisors.
- ▶ When disputes are resolved peacefully, employee morale and public relations benefits increase.
- ▶ Mediation and other forms of ADR can be private and confidential, allowing many commercial disputes to be resolved with less public notoriety.
- ▶ Rather than putting resources into litigation, corporations can focus on future business opportunities.
- ▶ Reduced uncertainty from ADR use is valued in capital markets, resulting in reduced capital costs and increased profitability.

#### **5 ADR SAVES TIME AND MONEY**

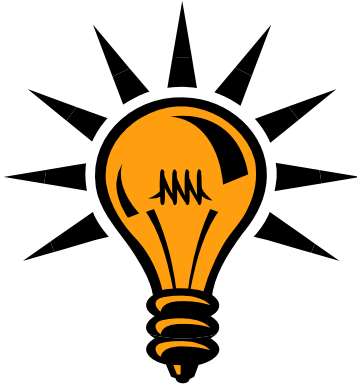
- ▶ ADR can minimize regulatory costs passed on to customers.
- ▶ ADR often minimizes operational delays and the associated erosion of project economics.
- ▶ ADR can avoid lengthy and expensive litigation that requires large allocations of internal resources that must be diverted from other corporate opportunities.

#### **6 ADR PROVIDES BENEFITS EVEN WITHOUT FULL SETTLEMENTS**

- ▶ Even when the parties don't sign an agreement resolving a conflict in its entirety, the vast majority report benefits from engaging in the process.
- ▶ Parties may agree on issues that can be dropped, streamlining the issues taken forward in the courts or before agencies.
- ▶ Parties often gain a clearer understanding of their case and others' positions and underlying interests, leading to more efficient hearings.
- ▶ Neutral's insights into the issues can give a fresh perspective on litigation strategy, positions, and possible outcomes.

## A Range of ADR Options Exists

A wide range of ADR options exists that regulators, policy-makers, and stakeholders should consider in tackling important energy-related issues. At a minimum, stakeholders can work together without third-party assistance in



settlement negotiations and other collaborative processes. But, such processes can often be greatly enhanced by engaging the assistance of neutral third parties, particularly where multiple stakeholders and complex issues are involved.

As the dispute resolution “spectrum” chart on page 10 and the ADR Glossary in Appendix C demonstrate, there is a range of options for third-party assistance that should be carefully weighed to match parties’ needs in a given case. Generally, these options are as follows:

**FACILITATION**—a third party assists with process management, often including process design, communications, document management, and running meetings. As with all ADR processes *except* binding arbitration, all substantive decisions remain with parties. Facilitators are often used to run workshops and technical sessions, focused on education and structured feedback, rather than reaching formal agreements.

**MEDIATION**—a third party provides all the “facilitation” services to run good meetings and also actively assists parties in reaching agreements on the substance by mutual gains negotiation. In addition to smaller two-party cases, mediators are often used in negotiated rulemakings, other multi-party consensus processes, and settlement of complex litigation.

**MED-ARB**—a hybrid process where mediation is followed by arbitration (binding or non-binding), if necessary.

**EARLY NEUTRAL EVALUATION**—an example of a type of non-binding arbitration. In early neutral evaluation, a third party renders an expert opinion of likely litigation outcomes, based on presentations and initial filings, and may then also play a mediative role.

**MINITRIAL**—a structured settlement process in which the parties seek to reframe issues in controversy from the context of litigation to the context of a business problem. Typically, attorneys for each party make summary presentations to a panel consisting of a neutral advisor and non-lawyer representatives from each party who possess settlement authority. The representatives then attempt to negotiate a resolution, often with the aid of the advisor’s expert opinion or mediative assistance.

**ARBITRATION**—the equivalent of court litigation, but without formal court processes or evidentiary rules. In arbitration, a third party considers the arguments and evidence submitted by each side and then renders a decision; the arbitral decision typically is binding on the participants, but can be non-binding or advisory if so agreed in advance. Arbitration is often used with a limited number of parties and narrow issues.

ADR is now used in various proceedings and transactions involving the Federal Energy Regulatory Commission, Regional Transmission Organizations, Independent System Operators, Department of Energy, Environmental Protection Agency, Nuclear Regulatory Commission, and state utility/public service commissions.

# Dispute Resolution Spectrum

Parties Control Substantive Outcome and Process	<b>Third-Party Assisted ADR</b>					Court or Tribunal Controls Substance & Process
Unassisted Negotiations	Facilitation	Mediation (incl. Reg-Neg)	Med-Arb	Third-Party Advice (incl. ENE, minitrial)	Binding Arbitration	Litigation
<b>Non-Directive</b>	Parties lose (Neutral gains) control of process then substance <span style="float: right;">—————→</span>					<b>Directive</b>
	<span style="float: left;">←————</span> Best Opportunity to Preserve/Improve Long Term Relationships <span style="float: right;">————→</span>					
	<span style="float: left;">←————</span> Best Opportunity for Win-Win Solutions <span style="float: right;">————→</span>					
<b>Third Party Role</b>	Listening ↔	Clarifying ↔	Assisting ↔	Advising ↔	Controlling ↔	Deciding



# Energy Issues and Disputes Are Amenable to ADR



## Typical Energy Disputes and Issues

Energy related issues and disputes amenable to ADR can occur in numerous arenas, as the “spectrum” of ADR energy applications on page 13 indicates. Energy disputes fall into three different categories, described below.

### **1 POLICY-MAKING/RULEMAKING TO IMPLEMENT POLICY**

Controversies at the left end of this spectrum occur when regulators, legislators, and other policymakers are formulating new policies, laws, regulations, and programs that govern how energy is produced, distributed, consumed, and priced (e.g., establishing a regulatory framework and policies for a new or evolving market structure, such as retail gas and electric competition; creating strategies to encourage development of renewable energy sources; addressing large-scale environmental conflicts, natural resource and environmental justice issues). These cases generally involve issues of the widest impact. They often (but not always) involve many parties or stakeholders with diverse interests. Here, commissions and other policy-makers have used ADR for collaborative problem-solving to reach consensus among representatives of affected interests, often with the assistance of a facilitator or mediator. These range from facilitated technical sessions and workshops to formal negotiated rulemakings.

### **2 REGULATORY LITIGATION/ADJUDICATORY PROCEEDINGS TO APPLY RULES/MAJOR FACILITY SITING**

In the middle of the spectrum are cases that usually involve regulatory litigation or the application of policy and law to specific situations. Many of these cases involve application of a policy or regulation and are likely to have substantial public impact (e.g., siting and permitting of energy facilities, large-scale licensing or certificate of public convenience and necessity decisions, traditional rate or service proceedings often requiring hearings).

Some, but not all, of these cases have a more circumscribed number of parties and issues (often defined by statute), and usually require the approval of the regulatory authority for a binding resolution. They range from large-scale conflicts associated with licensing or certificating large facilities, such as hydroelectric or liquefied natural gas (LNG) operations, to smaller-scale service or rate cases. In these cases, regulators and other responsible agencies have successfully employed mediation, technical conferences, and advisory opinions, as well as occasional early neutral evaluation and binding or non-binding arbitration.

### **3 TRANSACTIONAL AND OTHER INDIVIDUAL DISPUTES**

At the right end of this spectrum are business or transactional disputes between two or more energy-related businesses or between businesses and consumers. These cases often focus on contractual or tariff-based arrangements among parties (e.g., business transactions, retail customer vs. utility or energy service company (ESCO), disputes among ESCOs, utilities or direct RTO/ISO customers, and other market participants). They fall less often under the primary jurisdiction of state and federal regulators and more often under the jurisdiction of courts, RTOs, or ISOs. Resolution may or may not require approval of the regulatory authority (depending, in some cases, on the nature of the resolution of the dispute). These disputes vary in complexity. Simple, discrete cases usually involve limited issues and are often based on contractual relationships, the application of tariffs to a particular customer, or the enforcement of residential or other consumers' rights. Success resolving these cases has been achieved using mediation, non-binding or binding arbitration, early neutral evaluation, and other processes. In complex cases, with more complicated and numerous issues and greater stakes, mediation, early neutral evaluation, binding and non-binding arbitration and other ADR techniques have been very successful.

A range of ADR options exists, including facilitation, mediation, med-arb, early neutral evaluation, minitrial and arbitration.

# Spectrum of ADR Energy Applications

**Upstream** ————— **Downstream**

Broad Policy  
Development  
(e.g., strategies to  
encourage new  
sources or markets)

Facility Licensing/  
Certification/Siting

Complex  
Disputes

Contractual  
Disputes

Dispute Settlements



Exchange of  
Information on  
Energy Issues  
with the Public

Rulemaking  
to Implement  
Policies

Regulatory  
Litigation/Adjudicatory  
Proceedings to Apply  
Rules

**Many** ————— **Interested Parties** ————— **Fewer**

# Recent ADR Successes

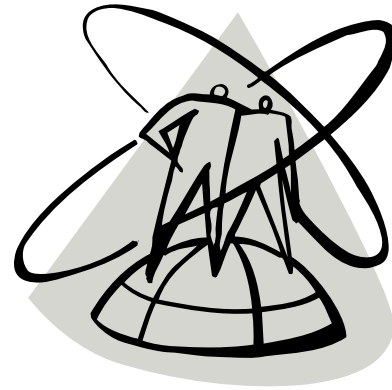
Here are a few examples of innovative, collaborative approaches that have been taken recently to address recurrent energy industry frictions.

## 1 DEVELOPING REGULATORY RULES

The Rhode Island PUC launched a negotiated rulemaking to develop the rules to implement Rhode Island’s Renewable Energy Standards law, imposing a renewable portfolio standard. The law requires electricity suppliers to rely on an increasing percentage of renewable energy resources (up to 16% in 2020) to supply Rhode Island consumers. The rulemaking included over 15 stakeholder organizations and covered a wide range of issues. The group, aided by an independent outside mediator, met over a six-month period and reached a consensus on all but a few issues. The 41-page final report to the PUC contained the proposed rules and a discussion of the alternatives proposed on the few non-consensus issues. The PUC then held a technical session with the negotiating group to better understand the proposed rules and non-consensus issues. It made tentative decisions on the non-consensus issues, essentially issuing the group’s proposed rules as its own draft rules for the required notice-and-comment period. After holding one hearing, the PUC issued final rules.

## 2 BUSINESS TRANSACTIONS

A dispute between two large energy companies arose over the terms of an agreement under which one of the companies (a supplier) agreed to purchase from the other (a generator) installed capability (ICAP) for a six-year period at a fixed rate and up to a maximum amount of megawatts per month. In mid-2001, the supplier sought to terminate the contract after ISO-New England’s need for and valuation of the ICAP product became the source of considerable debate and litigation at the FERC and in court. After failed attempts of the parties to settle on their own, the supplier terminated the contract and suggested early mediation, despite its litigation counsel’s warning that this would be perceived as a sign of weakness. Though the generator’s litigation counsel also rejected the suggestion as premature, the trial judge ordered the parties to attend mediation. Once in mediation, the case was quickly resolved, removing a significant distraction for each party’s respective businesses, preserving a business relationship, averting the cost and uncertainties of continued litigation, and avoiding the potential reputational and business impacts of an adverse decision. The difficulties this case presented with respect to getting to mediation led one of the parties to revise its contracts routinely to include mediation.

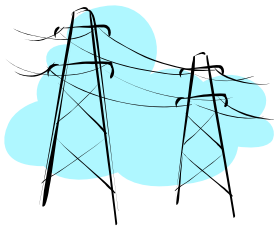


### **3 RESTRUCTURING MARKETS**

In 1994, the New York Public Service Commission urged parties to work collaboratively in a proceeding to identify the regulatory and ratemaking practices that would best assist in the transition to a more competitive electric industry. The consensus building effort, overseen by an ALJ acting as a mediator, framed several complex issues, brought in experts to help educate parties, and sought a common understanding of the complexities involved in any restructuring of the electric industry. While a complete agreement or consensus was not reached, significant progress was made in narrowing differences on issues of critical importance among parties with disparate interests. As a result of the consensus process, the Commission concluded that opening wholesale and retail electric markets to competition was in the public interest. Many participants commented that the tone and interactive nature of the proceeding were more constructive than those of other formats.

### **4 ENFORCING REGULATORY POLICIES**

In September 2003, the Nuclear Regulatory Commission directed agency staff to develop a pilot program to evaluate the use of ADR in handling any conflict involving an allegation or finding involving the NRC's safety enforcement mission. In March 2004, the Commission, supplementing the enforcement process, approved a pilot mediation program that allows parties to resolve selected complaints in a faster, less expensive, and less contentious way than a lengthy investigation or costly adjudication. NRC enforcers have found, and a final Commission evaluation suggests, that these ADR processes allow parties to discuss differences constructively; better understand each other's concerns, interests, and expectations; speak for themselves; and work together to find their own lasting solutions.



## **5 ELECTRIC UTILITY BANKRUPTCY REORGANIZATIONS**

As a result of the California energy crisis, Pacific Gas and Electric Company filed for bankruptcy reorganization in 2001, then the largest bankruptcy case ever. Working with a mediator, the State and PG&E resolved all outstanding issues with an innovative agreement that expedited PG&E's emergence from bankruptcy and avoided years of appellate litigation. Among other things, PG&E agreed to a shareholder-funded venture capital fund for renewable technologies and a land stewardship council through which it has given the State thousands of acres of parkland. In return, the Commission agreed to allow PG&E to recover the bulk of its power costs from customers.

## **6 GAS PIPELINE CERTIFICATE PROCEEDINGS**

Mediation proved successful in a highly contentious FERC natural gas pipeline certificate proceeding in New York. Mediation was initiated following a Commission Interim Order authorizing construction and operation of a pipeline in upstate New York. The order, however, did not certify a specific pipeline route through one major city because citizens of that city opposed the pipeline's construction through their community. After a three-month mediation by FERC's Dispute Resolution Service, the city's mayor and city council agreed with the pipeline company on a revised route through the city that addressed community and corporate concerns. Both U.S. Senators from New York filed letters commending FERC's efforts in support of the parties' negotiations.



## 7 LICENSING HYDROELECTRIC PROJECTS

FERC offers those applying for licenses for hydroelectric and other power projects the opportunity to use "alternative licensing procedures" (ALPs). These ALPs combine the pre-filing consultation process and the environmental review process—unlike traditional licensing, which separates these processes. Many of these ALPs increase parties' opportunities to shorten the licensing process by allowing for early scoping of issues pertaining to the National Environmental Policy Act and by achieving consensus on study and enhancement needs. In an assessment done for Congress in 2001, FERC's Office of Energy Projects determined that ALPs and other mediation efforts at FERC save time and money compared to traditional processes. Applicants using ALPs typically saved almost two years in combined pre- and post-filing time, as compared to the traditional processes; they also had far fewer rehearings, because so many of the ALPs ended in settlements rather than controversial orders. The same study determined that the total cost of licensing (the cost of preparing the application plus the cost of protection, mitigation, and enhancement measures in a license) was substantially greater for projects using the traditional processes than for ALPs.

## 8 SITE CLEANUPS

A public utility and a brownfields developer entered into a purchase and sale agreement for the developer's purchase of historically contaminated property owned by the utility. The agreement contained various cost-shifting provisions depending upon the type of development contemplated, the nature and extent of the contamination present, and the costs necessary to adequately remediate the property. The utility's state regulator had approved the agreement based on certain environmental assumptions. The parties' dispute centered on competing environmental analyses of the contamination and remediation issues and the developer's evolving plans for the property. Both parties spent a great deal of money and time on these negotiations, but in frustration began threatening litigation and staking out their respective positions (even though both parties, for different reasons, really wanted the sale to go forward). After four days of mediation spread over several months, the parties restructured the contract's payment and remediation provisions by employing creative approaches for dealing with contingencies and by reflecting each of their interests in a manner which also satisfied the state regulator that the restructured arrangement was in the customer's best interests.

## 9 CUSTOMER COMPLAINTS

The New York Commission opened a proceeding to investigate complaints from a large number of municipal customers who claimed to have been overcharged for years for street lighting services. It urged the parties to negotiate settlements with assistance from technical Staff, and the case was assigned to an Administrative Law Judge for formal hearings, if necessary. The ALJ, acting as a mediator, met with the parties on a number of occasions to encourage and assist the parties to move forward. Many parties settled. When the ALJ concluded that the parties needed guidance on legal questions, the ALJ issued a recommended decision on these narrowly-defined issues and the Commission approved it. With those aspects of the parties' litigation risks more clearly defined, private settlement negotiations were successful in all other cases, except one. In the final case, mediation produced an agreement that went beyond the street lighting issues to settle other disputes that had arisen between the parties. In this case, the Commission used facilitation, negotiations, litigation, a Settlement Judge, and mediation to resolve the disputes to the satisfaction of the parties.

## 10 DEVELOPING REGIONAL REGULATORY POLICIES

Northeastern states participating in the Regional Greenhouse Gas Initiative (RGGI) developed a regional greenhouse gas cap-and-trade program for the Northeastern and Mid-Atlantic United States through a process that integrated public participation and stakeholder input. The public utility commissions and environmental agencies in the states hired an outside facilitator to help design a regional stakeholder process, and to facilitate the bimonthly stakeholder meetings bringing together state representatives and affected stakeholders from 2004 through 2005. The regional stakeholder process served as a high-level sounding board for the states as they developed the RGGI framework including detailed modeling. The process resulted in an historic Memorandum of Understanding signed by the Governors in seven states to implement RGGI in their states.





# Making Better Use of ADR in Energy Settings

## General Advice for Regulatory Agencies and Participants in Proceedings



Taking advantage of federal laws authorizing ADR and policies encouraging the use of ADR to resolve environmental disputes,<sup>4</sup> some federal and state regulatory entities have begun to build ADR processes into many of their activities. Other agencies and industries, though, have yet to enjoy their benefits. These benefits derive from a culture that values collaborative decision-making and the creation of structures and processes that allow settlements earlier than “at the courthouse steps”—i.e., before contested proceedings and lawsuits have taken on a life of their own and heavy time and cost burdens have been incurred. These recommendations<sup>5</sup> suggest how these entities should begin to forge a new approach that fully incorporates ADR processes:

- **Regulatory agencies** should encourage, and parties, as a matter of course, should engage in good faith negotiation of regulatory conflicts as early as possible.
- **Parties** should also systematically consider from the outset whether to use ADR processes.
- **Attorneys** should initiate discussions of the potential for ADR processes upon first being consulted.
- **Regulators** should screen filings when instituting proceedings, and consider directing them to an ADR process.
- **Parties and regulators** should include all legitimate stakeholders in ADR processes to foster communication, cooperation, and credibility.
- **Parties** should secure the direct involvement of regulatory agencies in resolution of policy-making and policy-implementation conflicts whenever possible.<sup>6</sup>

- **Regulators and parties** should commit adequate resources to the ADR effort.
- **Parties** should not exclude contentious or sensitive issues from dispute resolution processes and should look for opportunities to maximize joint gains.
- **Parties** should consider using third-party neutrals (e.g., mediators) to assist negotiation.
- **Regulators** should structure ADR processes to supplement or supplant traditional adjudicatory and rulemaking procedures.
- **Regulators and lawmakers** should investigate and modify traditional procedures better to accommodate regulatory agencies' ADR opportunities.
- **Regulators and parties** should apply appropriate confidentiality rules in all ADR processes.
- **Regulatory agencies** should appoint an ADR Coordinator to advocate for collaborative decision-making approaches throughout the organization, ensure employees' ongoing awareness and training, oversee the appropriate screening of ADR cases, and maintain high-level enthusiasm and support for the ADR program.
- **Regulatory staff** that will negotiate in contested adjudicatory proceedings should have subject-matter expertise. Both staff and all participating stakeholders should be trained in "mutual gains" negotiation techniques whenever possible.<sup>7</sup>

#### ADR Promotes Efficient Decision Making by Regulatory Agencies

- ▶ Creates consensus-based policies instead of win-lose outcomes
- ▶ Resources can be more efficiently utilized, and agencies can focus on market oversight or other consumer function
- ▶ Decreases regulatory lag time so decisions are made more quickly and efficiently
- ▶ Builds cooperative relations between industry and regulators
- ▶ Fosters more productive and cooperative relations between the industry and regulators
- ▶ Promotes smoother implementation of policies due to enhanced understanding and buy-in of affected interests, requiring less agency oversight

# Sound ADR Practice

## 1 REGULATORY AGENCIES

Regulators should seek ways to engage stakeholders meaningfully in rulemaking and policy development, as well as adjudicatory dispute resolution, through a variety of ADR processes. (See the two spectrum boxes, above.) These may range from informal processes (such as technical sessions, workshops, and stakeholder groups that function as sounding boards or advisors to generate options and gauge the degree of consensus among stakeholders) all the way to formal, consensus-seeking processes, such as negotiated rulemaking. In such proceedings, regulatory agencies can publish proposed rules prepared by interested parties using ADR and which then go through a notice-and-comment process before being adopted as final.

It is often useful in such proceedings for regulators to articulate basic goals and boundaries and pose questions of other interested parties. Regulators should find ways to involve stakeholders prior to releasing an agency's fully fleshed-out proposal.

Agencies considering use of ADR, especially in a policy-making or other large-scale setting that involves complex, contentious issues, might want to sponsor a preliminary assessment by a third party who confers in confidence with all identifiable interests. Using interview results and other data, this "assessor" can identify goals and issues, find affected interests which are initially difficult to identify, recommend if ADR is appropriate (and if so, the type and timing of ADR), and advise on such matters as representation, the "shape of the table," and process design. The assessor may also be considered for the neutral's role in any ensuing mediation or other ADR process.

## 2 INDEPENDENT SYSTEM OPERATORS, REGIONAL TRANSMISSION ORGANIZATIONS, AND OTHER ELECTRIC TRANSMISSION ORGANIZATIONS AND OPERATORS

Many ISOs and RTOs, such as PJM, Midwest ISO, California ISO, Southwest Power Pool (SPP) and others, have procedures in place that route commonly occurring disputes into ADR. The chart in Appendix D reflects our understanding of the currently applicable tariff provisions and operating procedures and compares a number of these ADR provisions and operators. While some of these ADR processes appear to be working well, opportunities for improvement exist.

The Forum suggests that ISOs and RTOs, as well other Transmission Organizations now forming (such as the Entergy and MidAmerican Independent Transmission Coordinators), encourage disputing parties to attempt to negotiate agreements in contested cases wherever possible, and establish ADR systems reflecting the following principles:<sup>8</sup>



- ADR should be required for disputes related to “ISO/RTO Agreements,” either between ISO/RTO members or between members and the ISO/RTO.
- Parties should undertake good faith negotiations and consider from the outset whether it makes sense to engage a third-party neutral.
- Parties should engage in mediation prior to the initiation of arbitral, regulatory, or other litigation procedures.
- To aid in prompt selection of able neutrals, ISOs/RTOs should have, and make widely known and accessible, a roster of qualified neutrals; any such entity that does not have such a roster should consider adopting one. ISOs/RTOs should update mediation, arbitration, and technical advisor rosters according to an established schedule.
- The chair of the ISO’s/RTO’s ADR Committee should distribute to the disputing parties the names of several mediators from a roster of mediators and/or advisors, and establish a selection process to choose the neutral, such as a reverse strikeout process. The mediator should be able to select a technical advisor from an advisor list, if the dispute is highly technical and the mediator needs technical assistance.
- Mediation should begin promptly. A dispute under a specified amount (e.g., \$1 million) that is not resolved by mediation within one to two months after the mediator is appointed (or a later date mutually agreed to by the parties) should be sent routinely to binding arbitration. Parties should also consider agreeing to submit larger disputes to mediation or binding arbitration.
- ISOs/RTOs should avoid requiring or expecting mediators routinely to provide parties with mediators’ evaluations at the end of unsuccessful or partially successful mediation proceedings, even if such evaluations are confidential and non-binding. ISOs/RTOs may wish to explicitly allow parties the option to seek an assessment on a case-by-case basis, which might be delivered jointly or separately, according to parties’ wishes.

- Parties should generally split the cost of the mediation.
- In cases where mediation does not yield a full agreement, the parties should have a brief period (e.g., 14 days) to select an arbitrator by agreement from a roster of arbitrators. If they cannot agree, then each party should pick one “neutral” arbitrator and those two “neutral” arbitrators should choose a third “neutral” arbitrator to serve as the chair of the panel.
- The arbitrator should hold a preliminary hearing to organize a schedule, discovery, and other matters, and should hold an evidentiary hearing. Cross examination of witnesses should be allowed, unless parties agree to allow resolution based on a written record.
- The arbitrator should issue a written decision based on the evidence, arguments, and the law promptly after an evidentiary hearing. If the issue affects matters subject to the jurisdiction of FERC under the Federal Power Act, the decision must be filed at FERC.
- Parties should split the cost of the arbitrator unless the arbitrator recommends a different allocation, and parties should have a limited time after the arbitral decision to appeal it to the body having jurisdiction over the matter.
- Appropriate confidentiality rules should apply in all mediation, arbitration, and other ADR processes.

FERC recently proposed to reform its open access transmission policies under Order No. 888.<sup>9</sup> In connection with proposed reforms to regional transmission planning processes, FERC suggested that electric transmission providers must propose a dispute resolution process, such as requiring senior executives to meet prior to the filing of any complaint and using a third-party neutral.<sup>10</sup> In addition, the proposed pro forma tariff sheets set forth dispute resolution procedures regarding internal dispute resolution procedures and arbitration.<sup>11</sup> However, FERC does not provide that the parties may submit matters to mediation. The Forum suggests that these ADR procedures be as robust and flexible as possible, consistent with the recommendations in this Report.



## **CONFLICTS ARISING UNDER ENERGY AGREEMENTS ARE AMENABLE TO ADR RESOLUTION**

- Purchase and Sale of Energy Commodities and/or related Financial Energy Transactions (Standardized Agreements)
- EEI Master Agreement (EEI Gas Annex, EEI Master Netting Agreement EEI Collateral Annex, Optional Provisions for Use with EEI Master Agreement)
- ISDA Master Agreement (ISDA Gas Annex, ISDA/EEI Power Annex ISDA Energy Agreement Bridge (cross-agreement netting), ISDA Margin, Provisions/Credit Support Annex)
- WSPP Master Agreement (WSPP Netting Agreement, WSPP Collateral Annex, WSPP Security Agreement, Mediation and Arbitration Procedures)
- NAESB Base Contract for Sales/Purchase of Natural Gas (NAESB WGQ Trading Partner Agreement (Natural Gas), NAESB WGQ Funds Transfer Agent Agreement (Natural Gas), NAESB WGQ Model Credit Support Addendum, NAESB WEQ Funds Transfer Agent Agreement (Electric Power), GasEDI Base Contract for Sale and Purchase of Natural Gas, GasEDI Base Contract for Short Term Sale and Purchase of Natural Gas)
- Tolling Transactions/Agreements
- Fuel-Supply Transactions/Agreements
- Off-Take and Power Purchase Transactions/Agreements
- Transmission and Transportation Transactions/Agreements
- Operations & Maintenance (O&M) Transactions/Agreements
- Engineering, Procurement and Construction (EPC) Transactions/Agreements
- Energy Project Development Financing Transactions/Agreements
- Traditional Energy Asset Acquisition and Divestiture Transactions/Agreements
- Energy Risk Management Service Transactions/Agreement
- Renewable Energy Transactions/Agreements
- Utility – ESCO operating agreement
- Consumer-Utility Agreements

### 3 INDIVIDUAL DISPUTES AND BUSINESS TRANSACTIONS

Participants in energy transactions, ranging from fairly simple standardized commodity agreements to large transactions involving several layers of complex agreements, as set forth on page 24, will benefit from a practical understanding of the range of ADR processes and how they can be applied to diverse energy-related transactions.

The Forum hopes to promote understanding of ADR processes available to transacting parties and industry best practices for dispute resolution that will allow transacting parties to tailor ADR processes that are effective for their particular energy transaction and the potential disputes that may arise.

No “one size” of ADR solution will “fit all” business transactions or other energy disputes. The particular risk profiles and business objectives of participants in a transaction should determine the ADR process. They also dictate the tools, specified in related agreements, to create a comprehensive scheme—beginning with negotiation and consensus-seeking processes and proceeding, if necessary, to evaluative processes or binding arbitration. These dispute handling arrangements can be tailored to address the unique characteristics and specific needs of a transaction.

The Forum recommends that as energy industry decision-makers become more informed and experienced about ADR practice, an “industry standard” be developed to promote and support efforts to address energy disputes most efficiently and effectively. Until that time, the Forum makes the following recommendations on drafting successful ADR clauses.

A number of questions must be carefully considered, and, depending upon circumstances, multiple options for resolving these questions may exist. While various form clauses are available and may be suitable, differences exist and important choices must be made. Accordingly, parties entering into sophisticated agreements, particularly those governing conduct over a number of years, should consult counsel experienced in this subject. A well-drafted ADR clause should contain procedures such as mandatory negotiation, mediation, and/or conciliation, as well as procedures such as early neutral evaluation or arbitration.

Procedures should encourage parties to make the best effort possible to resolve the dispute amicably themselves via unassisted negotiation. To this end the ADR clause should contain a negotiation provision requiring **good faith negotiation** for a specified time before resorting to more formal proceedings. Party-to-party negotiation should be followed by elevating the dispute to higher level managers on each side where a broader view of the business relationships may produce a resolution that is beyond the reach of the individuals directly handling or involved in dispute.

An optional next step or alternative to direct negotiations should be the **early selection of a third-party neutral, such as a mediator**. A technical expert can also work in a team with a professional mediator. The mediator should have a specified period of time to pursue resolution, following which more formal steps may be taken. The mediation process should be confidential, voluntary and relatively informal.<sup>12</sup> If the mediation does not result in a resolution of the dispute, it may nonetheless narrow the issues to be put to arbitration and enhance the prospect that the long-term business relationship will be preserved.

If the dispute is of a technical nature, **early neutral evaluation** of the dispute may be the most expeditious way forward. This could include the appointment of an independent expert in the field (e.g. an engineer) or use of an agency's resources to provide an expert. The expert's determination can be binding or advisory.

Any **binding arbitration** features of a contractual ADR clause should be unambiguous, establish a reasonable and expeditious process, and result in a determination that will be enforceable. A well-drafted arbitration clause should consider issues such as what disputes to arbitrate; whether arbitration should be administered or non-administered; and how to address issues such as place of arbitration, choice of law, selection and independence of arbitrators, and other key matters. The more the above issues can be resolved in advance in a clearly-written arbitration clause, the better for both avoidance of the necessity of arbitration and the conduct of it in a professional, non-hostile manner. All arbitrators should be both impartial and independent. Sample agreements, confidentiality clauses, and other materials for using ADR are contained in Appendix E.

### ADR Promotes Good Business

- ▶ Boosts employee morale and public relations, and minimizes disruption
- ▶ Can be private and confidential, limiting public notoriety
- ▶ Reduces uncertainty, resulting in lower capital costs and greater profitability



Arbitration agreements or clauses should generally address the following issues:

## **ARBITRATION AGREEMENTS**

### **WHAT TO ARBITRATE**

All disputes or only certain kinds.

### **ADMINISTERED OR NON-ADMINISTERED**

If arbitration is to be administered, the arbitral institution should be selected, e.g., the American Arbitration Association. If the agreement is international, there are several organizations from which to choose, e.g. the International Chamber of Commerce and AAA's International Centre for Dispute Resolution. The International Institute for Conflict Prevention and Resolution (CPR Institute) provides optional assistance with selecting arbitrators, but otherwise largely allows the parties and the arbitrators to proceed in their own way and at their own pace.

### **PLACE OF ARBITRATION**

This is not just a place of convenience to parties and counsel, although that is important. Ordinarily, the arbitral procedures will be governed by the place of the arbitration. With international agreements the place of arbitration is even more important, particularly in connection with enforcement of, or challenge to, the arbitral award.

### **CHOICE OF LAW**

With respect to a domestic agreement, the ADR clause should specify the law of a certain state to govern determination of substantive issues. Where parties are incorporated in one state, have headquarters in another state, maintain the assets in another state but put the deal together in yet another state, a number of choices may be available. Care should be taken to see that the law selected allows the subject matter of the contract to be resolved by arbitration. In an international agreement, say with respect to the construction of a large electric power plant, local law may be controlling as to substantive rights and obligations. However, it may be advisable to provide that the arbitration agreement and proceeding will be governed by the law of another country.

## **ARBITRATION AGREEMENTS (CONTINUED)**

### **ARBITRATOR SELECTION**

The ability of the parties to have control over the selection of the decision makers is one advantage of arbitration over court adjudication. The method of selecting arbitrators should be carefully considered and expressly addressed in the arbitration clause. It should also specify the number of arbitrators and any special qualifications. If the parties could agree on a single arbitrator, that would be superior from the standpoint of time and cost. That is normally not possible and most arbitrations are conducted by a three member panel. Often a two-tier approach is used: each party appoints one arbitrator and the two arbitrators select a third arbitrator to act as chair of the tribunal. If the two party appointed arbitrators are unable to agree or for some other reason do not make an appointment of a third arbitrator within some stated time, the arbitral institution would do so. With respect to energy agreements governing sophisticated or unfamiliar transactions, it is probably advisable that arbitrators have experience relevant to the substantive issues in question, or that they be selected from a pre-approved panel of the arbitral organization or other relevant organization, such as RTOs/ISOs.

### **INDEPENDENCE OF ARBITRATORS**

Under some arbitral rules, the two party-appointed arbitrators were traditionally free to discuss the case with the party appointing them and, even though charged to render a fair decision to both parties, were seen as really there on behalf of one or the other party. In recent years, arbitral rules have moved to require that all arbitrators, including those chosen by parties, be both impartial and independent. This means that, after they are selected, substantive ex parte conversations (i.e. conversations not in the presence of the other party) with parties or their counsel are not allowed. In our view this is clearly the best practice and is different from mediation where the mediator's caucusing with each side on substantive issues is often a critical ingredient of the process.

### **OTHER ARBITRATION ISSUES**

A variety of other questions may arise, particularly in international arbitrations, including confidentiality of information disclosed during the arbitration proceeding, evidentiary rules, language, allocation of costs including attorney fees, availability of interest on an award, and the currency of an award.

## 4 USING THIRD PARTIES TO ASSIST NEGOTIATION—FACILITATION AND MEDIATION

### General Advice

Regulators should generally encourage parties engaged in negotiations to use a mediator or facilitator to assist when negotiations involve many issues, include contentious issues, encompass numerous parties, or have stalled. Regulators should use third-party neutrals (either in-house or from outside) as a matter of course to aid negotiations, especially in policy formation stakeholder processes involving multiple parties and issues.

When the process is limited to education about the substance and stakeholders perspectives on the substance, rather than formal agreement, the third party typically acts as a “facilitator.” The facilitator is charged with planning and running effective meetings and managing communications and document flow. When the goal of an ADR process is agreement or consensus, the third party typically acts as a “mediator.”<sup>13</sup> Mediators must do all the things that “facilitators” do as well as assist parties in reaching agreements. Facilitators should be trained in managing communications and running good meetings; mediators will require, in addition, expertise in mutual gains negotiation and other mediation skills.

All mediators and all third parties who serve in evaluative roles should be acceptable and accountable, as appropriate, to all parties and should have latitude to act independently of the sponsoring entity or employer. All third parties (except arbitrators, once selected) generally should serve at the pleasure of the parties.

### QUALIFICATIONS FOR FACILITATORS AND MEDIATORS

- ▶ Expertise in mutual gains negotiations and in mediation process skills, including gathering background information, communicating information to others, analyzing data, assisting parties to explore options and reach agreement, managing cases, and helping document any agreement by the parties.
- ▶ Ability to act in an impartial and non-partisan manner, with no substantive stake in the outcome.
- ▶ Compliance with applicable ethical standards.<sup>14</sup>
- ▶ Adequate substantive knowledge of the issues and type of dispute to manage communication, help parties develop options, and alert parties to relevant information. The amount of substantive knowledge that is necessary will depend on the nature of the dispute. Mediators with little substantive knowledge in a complicated technical or policy case probably should be paired with a technical expert to serve most effectively.

## **In-House vs. Outside Professional Facilitators and Mediators**

Consistent with the fundamental premise that the parties should control ADR processes, all mediators and other ADR neutrals (as opposed to judges assigned by a jurisdictional authority to act in a decision-making role) should be acceptable to all parties and be selected by the parties. While in some instances (such as negotiated rulemaking or other agency-initiated ADR processes) the agency may select the neutral (either in-house or outside) before identification of specific stakeholder participants, agencies should nevertheless be responsive to party acceptability concerns. Regulators should consider, on a case-by-case basis, whether they wish to offer parties the assistance of an in-house mediator.<sup>15</sup>

Regulatory agencies, including those with qualified in-house third parties, should never require the exclusive use of in-house neutrals. Instead, the parties should always have the option of unassisted negotiation or of using an outside mediator (whose cost parties may have to assume, though regulatory entities should consider making funding available for outside mediators in cases where warranted).

Agencies initiating policy-making and other large scale consensus-building processes that involve complex, contentious issues, should weigh explicitly the relative benefits of employing an experienced in-house third party against using an outside professional, to serve as assessor and to lead any subsequent negotiations. Factors to consider include whether parties are likely to find an insider acceptable and whether they will offer candid views to an inside assessor. If an in-house third party is selected, that person should seek solely to assist party negotiations and should never attempt to negotiate on behalf of the regulatory agency or any other participant. Other internal staff negotiators should be responsible for representing the agency. The in-house third party should never advise regulators on the dispute.

## **5 USING THIRD PARTIES TO MAKE DECISIONS—BINDING ARBITRATION**

In employing binding arbitration, parties should keep in mind the following principles.

Arbitration should generally be used only after mediation has first been tried. However, in specific pre-defined cases (e.g., small amounts of money are at stake, decision deadlines are very tight, issues and options are very narrow), immediate resort to arbitration may be warranted.

Arbitrators should be skilled and impartial and possess substantive knowledge (although it is possible for the arbitrator to be provided access to a neutral expert); possess the ability to conduct timely hearings and write clear decisions; and comply with applicable ethical standards.<sup>16</sup>

## BINDING ARBITRATION IN ENERGY SETTINGS



Binding arbitration has been employed in a variety of energy settings, including cases like the following:

- ▶ \$15 million dispute involving the interpretation of key terms in a supply agreement between a natural gas supplier and a electricity generating plant under which the plant sells electricity and remits a portion of the revenue back to the natural gas supplier.
- ▶ Million dollar dispute between a landfill gas supplier and an electricity generating plant using landfill gas to operate its facility. The plant alleged that supplier failed to maintain landfill gas collection system properly, thereby causing a significant reduction in the volume and pressure of gas received.
- ▶ Multi-million dollar dispute arising out of a steam service agreement under which a natural gas cogeneration plant's failure to supply steam to a recycling plant as required under service agreement allegedly caused over \$8 million in additional costs to claimant.
- ▶ \$2.6 million dispute regarding the proper price for the supply of steam provided by claimant's cogeneration facility under an energy services agreement.
- ▶ Dispute between two Spanish energy companies regarding the revision of the contract price for LNG in which claimant sought a determination that an upward revision in the contract price was warranted due to changed circumstances.
- ▶ \$28 million dispute involving a failure to pay for oil supplied to operate a power plant in the Dominican Republic.

## 6 ANALYZING CONFLICTS AND CHOOSING APPROPRIATE ADR APPROACHES

ADR experts and entities that assist companies and others to employ ADR effectively have begun to develop instruments for helping to “fit the forum to the fuss” by determining whether a particular dispute is suitable for resolution through a specific ADR process. The International Institute for Conflict Prevention & Resolution, for instance, has prepared an ADR Suitability Guide that addresses critical questions about how best to resolve particular disputes. These include: (1) Is mediation appropriate for our dispute?; (2) What other ADR process choices might be suitable?; (3) If nothing else works, should we arbitrate or go to court?; and (4) What other resources might be helpful?

Instruments like the CPR Institute’s Mediation Analysis Screen, which comprises a part of this Suitability Guide, let parties assess the impact of a variety of relevant factors, including their overarching, legal, and pragmatic goals for managing the dispute; the suitability of the dispute for problem-solving; and the potential benefits of employing ADR for the particular case.

Recent ADR Successes are in areas such as

- ▶ Developing Regulatory Rules
- ▶ Resolving Business Transaction Disputes
- ▶ Restructuring Markets
- ▶ Enforcing Regulatory Policies
- ▶ Electric Utility Bankruptcy Reorganizations
- ▶ Gas Pipeline Certificate Proceedings
- ▶ Licensing Hydroelectric Projects
- ▶ Site Cleanups
- ▶ Customer Complaints
- ▶ Developing Regional Regulatory Policies

# International Institute for Conflict Prevention & Resolution Mediation Analysis Screen<sup>17</sup>

## **1 FACTOR ONE: THE PARTIES' GOALS FOR MANAGING THE DISPUTE**

### OVERARCHING GOALS

Is maintaining a relationship between the parties important? *Yes/No*

Is maintaining control over the outcome of the dispute important? *Yes/No*

Is maintaining control over the resolution process important? *Yes/No*

### LEGAL GOALS

Can the parties privately agree to needed remedies and relief without the need for court orders? *Yes/No*

Can necessary information to resolve the dispute be obtained by means other than formal discovery? *Yes/No*

### PRAGMATIC GOALS

Is avoiding the high cost often incurred in litigation important? *Yes/No*

Is a speedy resolution of the dispute important? *Yes/No*

Is privacy important to the parties? *Yes/No*

## **2 FACTOR TWO: THE SUITABILITY OF THE DISPUTE FOR PROBLEM SOLVING**

### PARTIES' CAPACITY FOR PROBLEM SOLVING

Matters of fundamental principle are not at stake? *Yes/No*

Public vindication is not important? *Yes/No*

### QUALITY OF PARTIES' RELATIONSHIP

High degree of tension/conflict/distrust does not exist between the parties? *Yes/No*

Neither party is significantly more powerful than the other (e.g., financial/business savvy)? *Yes/No*

#### PRACTICAL REALITIES

The parties do not lack resources with which to bargain? *Yes/No*

The dispute does not involve managerial responsibility? *Yes/No*

### **3 FACTOR THREE: THE POTENTIAL BENEFITS OF MEDIATION FOR CASE**

To assist the parties to resolve the dispute, could a mediator aid in clarifying the issues? *Yes/No*

Are anger/negative emotions causing impasses or likely to cause impasses in negotiating a resolution? *Yes/No*

Would an opportunity for the parties to tell their stories and be heard by the other side be helpful to resolve the dispute? *Yes/No*

Would an opportunity for an apology be helpful to resolve the dispute? *Yes/No*

Would a “reality check” for the parties regarding their positions and expectations be helpful to resolve the dispute? *Yes/No*

Would the confidential setting of a mediation be helpful to resolution? *Yes/No*

Would an opportunity to explore the possibility of trade-offs and creative solutions be helpful? *Yes/No*

Would the opportunity to educate decision-makers by their attendance at a mediation be helpful? *Yes/No*

Would having an intermediary, the mediator, make offers and counteroffers be helpful? *Yes/No*

Would having an intermediary, the mediator, reframe proposals be helpful? *Yes/No*



# Achieving “Success”: Recommendations for Systematically Integrating ADR into Industry Regulation, Policymaking and Decision-Making

## Promoting ADR Use Systematically

Agencies,<sup>18</sup> energy companies, law firms, and other industry entities should adopt explicit policies that strongly encourage voluntary ADR use and that:

- ▶ Identify personnel responsible for providing advice on the implementation of ADR to further organizational goals and for making decisions to approve the use of ADR in specific settings;
- ▶ Identify personnel to act as points of contact for those interested in exploration of ADR use in specific settings;
- ▶ Provide for systematic review of all conflicts for appropriateness and viability or opportunity for ADR;
- ▶ Signal explicit executive support for reasonable agreements reached in ADR;
- ▶ Offer training in interest-based or mutual gains negotiations, facilitation and meeting management, and other forms of neutral-assisted ADR; and
- ▶ Offer guidance on documentation of settlements or justification of agreements that must be approved by the regulator.

These entities should also:

- ▶ Assure an appropriate level of ADR education and awareness among those who influence process decisions for conflict resolution;
- ▶ Require outside counsel to possess (or have available) expertise in ADR processes and review all cases for ADR potential;
- ▶ Ensure that proper ADR provisions exist in all transactional agreements; and
- ▶ Offer ADR and consensus building processes routinely in specified settings.

## Regulatory Agencies' Review and Encouragement of ADR Processes

An issue that often arises in ADR is the extent to which a regulatory agency, such as FERC or a state PSC or PUC, will, or must, review an ADR-generated settlement agreement or other ADR outcome and the degree of deference an agency will afford such an agreement or outcome. The nature and degree of regulatory agency review of ADR outcomes is an important consideration for industry stakeholders.



Typically, the regulatory standard of review depends on an agency's "organic" energy statute, such as the Natural Gas Act, the Federal Power Act, or state utility statutes. Generally, ADR outcomes must not be unjust, unreasonable, unduly discriminatory or preferential, or inconsistent with the public interest.

At FERC, there is a mandatory review of various ADR outcomes in a manner consistent with statutory standards. Importantly, substantial or significant deference is accorded an arbitrator's factual findings and awards, as well as other ADR outcomes.<sup>19</sup> Although the ADR Forum has not done a comprehensive survey or analysis to assess how states address the scope of review issue, the basic principles regarding the substantial deference that should be accorded to ADR outcomes are reasonable and should be adopted by states, as some have, consistent with their organic statutes, regulations, and policies.

**Regulatory agencies** should review the areas that they regulate to determine the potential for the establishment and use of ADR mechanisms as an alternative to more formal agency action and adopt guidance for the industry and all stakeholders to encourage use of ADR. Where such use is appropriate, regulatory agencies should:

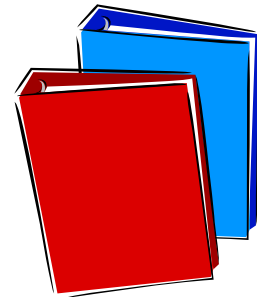
- ▶ Encourage regulated entities to pursue ADR mechanisms to resolve disputes that would otherwise be decided through litigation;
- ▶ Specify streamlined procedures for reviewing settlements and rendering decisions concerning other ADR outcomes;

- ▶ Establish a specific burden of proof or other review standard by which settlement agreements will be judged (when a review is necessary). That standard should take into consideration the extent to which ordinarily adversarial parties have reached a mutual agreement;
- ▶ Oversee the general operation of ADR processes to ensure they are fair and effective; and
- ▶ Provide other incentives to use ADR, such as expedited review or forestalling other regulatory action.

## Documentation and Accountability in ADR

**Agencies**, to encourage effective use of ADR, should:

- ▶ Provide means by which all appropriate decision-makers are involved in, or regularly apprised of, the course of major negotiations (subject to any confidentiality or ex parte limitations) and endeavor to streamline internal review of settlements. These efforts should serve to ensure that the concerns of interested segments are reflected as early as possible in negotiations, and to reduce the likelihood that tentative agreements will be upset;
- ▶ This early identification of issues and involvement of parties could be fostered by using a formal notice of ADR discussions, served on the parties and outlining any issues, concerns, or boundaries that the agency wishes to convey. Commissioners' and staffs' initial input should be gathered prior to formal notice, wherever possible; and
- ▶ Offer guidance to agency staff on the degree of documentation that is appropriate to justify settlements reached via ADR. Such guidance should emphasize the needs for flexibility without undermining accountability. For instance, the agency guidance could require the principal representing the agency in negotiations, or his or her advisor, to set down factors taken into consideration, the main elements of the negotiation, and other significant facts or considerations justifying any negotiated result, subject to appropriate confidentiality preservation.



## Assuring Confidentiality of ADR Negotiations

**Agencies, corporations, and parties in cases** where ADR is employed should:

- ▶ Recognize that confidentiality of dispute resolution communications promotes the integrity of ADR processes and allows parties to engage freely in candid, informal discussions that yield superior outcomes;
- ▶ Utilize ADR agreements and standard practices that provide maximum protection of neutrals' and parties' communications made during ADR processes, consistent with applicable statutes and rules;<sup>20</sup>
- ▶ Assure that their representatives in ADR processes and third-party neutrals they utilize are aware of the importance of maintaining confidentiality; and
- ▶ Include provisions in any agreement to employ ADR that specify confidentiality expectations, including any possible exceptions or any need to disclose details of a proposal to superiors or reviewers in order to obtain approval.

Agencies should be aware of the broad scope of benefits associated with the use of ADR to resolve disputes and should offer the parties a broad variety of voluntary ADR services supplied by staff and/or outside third party neutrals.

# Designing Credible ADR Programs

**Agencies and other entities that establish ADR programs** have responsibilities to provide fair, high-quality processes. If agencies and other entities planning and implementing ADR activities seek to obtain the input of all appropriate stakeholders early in the design process, they will have a greater probability of acceptance and long term satisfaction. These entities should engage in early, meaningful outreach to affected interests.



In addition, they should systematically explore and carry out the following tasks:

- ▶ Raise awareness of, and obtain buy-in for, ADR programs and activities among decision-makers and program users who are key to success;
- ▶ Obtain resources to sustain an ADR program;
- ▶ Develop an ADR training and outreach program;
- ▶ Employ the services of internal and outside third parties to assist negotiations, and take into account issues of mediator roster management, selection and evaluation;
- ▶ Find an ideal location for the ADR program, whether inside or outside the agency, that will maximize acceptability to potential users;
- ▶ Understand and offer training on the ethical duties facing ADR third parties and program managers;
- ▶ Seek meaningful user feedback, evaluate outcomes and administration to gauge how well ADR is working and to make improvements over time; and
- ▶ Share evaluation results to the maximum extent possible.

## Voluntariness of ADR

**Regulatory agencies** should make mediation and other forms of ADR available to stakeholders in appropriate circumstances, and require stakeholders to consider participating in ADR processes. ADR processes should be voluntary and controlled by the parties. While agencies can strongly encourage stakeholders to participate in mediation, they should not require it, unless mandated by law (such as arbitration in certain circumstances under the Telecommunications Act of 1996).<sup>21</sup>

## Use of Settlement Judges

**Agencies and parties in cases** should recognize that a presiding judge for a dispute in adjudication often cannot help the parties' settlement negotiations in any comprehensive way without risking the appearance of impropriety. In most cases, a separate settlement judge within or outside an agency should be used to assist parties in confidential settlement discussions. If the parties are unsuccessful in settling any or all issues with the aid of a settlement judge, those issues should be forwarded to an independent trial judge.

## Improving Conflict Management Skills and Awareness

**Agencies, energy companies, and other entities** should ensure that, in addition to using ADR themselves, their attorneys, consultants and other key personnel engaged in handling conflicts receive education and hands-on training in mutual gains negotiation and related conflict management skills. This training can be obtained from a variety of sources, including using standardized outside trainings, tailoring sessions to the organization's needs, or training staff members as negotiation or ADR trainers.

**National Association of Regulatory Utility Commissioners (NARUC)** should establish a Committee to focus on ADR issues, and also employ its Training Committee to address ADR education. The Energy Bar Association and state bar associations should take similar actions as appropriate.

## **KEY POINTS IN IMPROVING CONFLICT MANAGEMENT SKILLS AND AWARENESS**

### **GOVERNMENTAL/REGULATORY AGENCIES**

- ▶ Agencies should be aware of the broad scope of benefits associated with the use of ADR to resolve disputes and should offer the parties a broad variety of voluntary ADR services (supplied by staff and/or outside consultants).
- ▶ Those responsible for the delineation of the dispute resolution process for the agency, as well as in-house neutrals, should have specific training or expertise in mutual gains negotiations, mediation, early neutral evaluation, and other forms of ADR. Agencies that have the resources to develop in-house expertise should undertake a training program to instill and maintain appropriate skills and to permit agency personnel to stay abreast of developments in ADR.<sup>22</sup>
- ▶ Agencies should ensure that all regulations, policies and procedures adopt ADR provisions that encourage the use of these methodologies at the earliest possible time.
- ▶ Agencies should consider making funds available to retain outside ADR experts, where the use of such experts seems reasonable. In addition, agencies should consider developing lists of in-house neutrals (available subject to staffing limitations) and outside ADR professionals to assist the parties in resolving their disputes.
- ▶ Agencies should take advantage of videoconferences, multi-site hearings, and other innovative procedures, in addition to using ADR methods, to enhance public involvement and improve the effectiveness of their decision making.

### **ATTORNEYS**

- ▶ Attorneys should have a substantial knowledge of the range of potential ADR options and should advise their clients of available options, including the benefits and drawbacks of each.
- ▶ Attorneys should always seek to resolve disputes by mutual agreement, and in every case should consider negotiation and mediation prior to arbitration or litigation.
- ▶ Attorneys should strongly consider the use of ADR clauses in contracts or agreements to reduce the cost of disagreements that might arise in the future.
- ▶ Law firms should adopt the CPR Institute's Law Firm Policy Statement on Alternatives to Litigation, which commits them to counsel clients about ADR options.

## **KEY POINTS IN IMPROVING CONFLICT MANAGEMENT SKILLS AND AWARENESS (CONTINUED)**

### **COMPANIES**

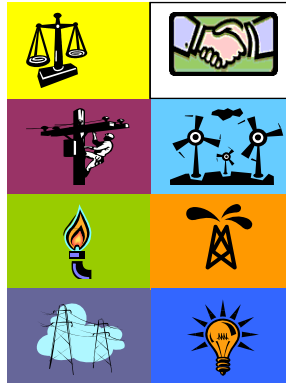
- ▶ Company executives and those involved in deciding litigation strategy should have expertise in ADR processes, or at least have such expertise available to them.
- ▶ Company executives and attorneys should always seek settlement via negotiations and should seriously explore the use of mediation or other consensus-based processes before considering litigation or binding arbitration.
- ▶ Companies should, wherever reasonably possible, include contract provisions for the resolution of disputes using appropriate ADR processes.
- ▶ Companies should subscribe to the CPR Institute's Corporate Policy Statement on Alternatives to Litigation, which obligates them to explore the use of ADR in disputes with other signers.

A bibliography containing references to a variety of useful materials appears as Appendix J.

Public and private energy industry stakeholders need better and quicker decisions, enhanced certainty, more procedural flexibility, cost savings, and other dispute resolution efficiencies.



# Conclusion: What Next?



Competition in energy markets has led to a steeply rising number of disputes. Moreover, these disputes are often more complex than industry participants have been required to manage in the past. As disputes multiply in numbers and complexity, the need to resolve them in a commercially acceptable time frame will become even more important. Moreover, the changing landscape of energy regulation argues for collaborative problem solving to develop policies, guidelines and rules. All stakeholders must find more effective ways to work together collaboratively to anticipate and manage conflicts, lest the potential benefits of moving to a more competitive system be diminished in the delays and expense associated with traditional, adversarial approach to dispute resolution.

What can enhanced use of ADR accomplish? We can reasonably expect that expanded use of ADR can produce an energy industry in which stakeholders and practitioners:

- ▶ Understand and utilize their conflict resolution options;
- ▶ Resolve difficult regulatory and business questions in ways that result in creative solutions;
- ▶ Preserve relationships;
- ▶ Reduce business uncertainty and disruption; and
- ▶ Save time and money via more efficient decision-making and more successful implementation of policies.

While substantial progress has been made in some areas, reaching these goals will require significant changes in corporate, legal, and government culture, as described above. It will also require substantial outreach and educational activity to create a receptive audience. The Energy ADR Forum is confident, though, that with these changes in place, energy industry stakeholders and participants facing conflicts will be far better able to deal effectively with them than they now are.

The Energy ADR Forum members will follow up on this Report with programs, presentations, and other activities that permit interested energy industry participants to explore how they and their particular organizations can take greater advantage of ADR. The Project Director, Bob Fleishman, the Work Group Co-Chairs, and other Forum Members welcome inquiries on how best to move ahead.

# Appendices

**Appendix A: Energy ADR Forum Membership List**

**Appendix B: Energy ADR Forum Work Groups List**

**Appendix C: ADR Glossary**

**Appendix D: ADR Provisions in Connection with Various RTOs, ISOs, and Power Pools**

**Appendix E: Sample Agreements and Clauses for Using ADR**

**Appendix F: ABA/ACR/AAA Model Standards of Conduct for Mediators**

**Appendix G: AAA/ABA Code of Ethics for Arbitrators in Commercial Disputes**

**Appendix H: Model State Resolution**

**Appendix I: Federal Energy Regulatory Commission's Scope of Review over Alternative Dispute Resolution Outcomes**

**Appendix J: Bibliography**

# Appendix A

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# Appendix B

## Energy ADR Forum Work Group Lists

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# Appendix C

## ADR Glossary

**Alternative means of dispute resolution (or ADR).** Any procedure emphasizing creativity and cooperation in place of adjudicative means of problem-solving. ADR typically involves a neutral and is used as an alternative to a hearing, trial, or other more formal procedure to resolve an issue in controversy. ADR includes but not limited to, facilitation, mediation, fact-finding, minitrials, arbitration, or any combination.

**Arbitration.** An ADR process in which the disputing parties present their case to one or more neutrals (“arbitrators”), who hear evidence and argument and render a decision or award on the merits (binding or non-binding). Arbitration differs from mediation and other ADR processes in which the neutral helps the disputing parties develop a solution on their own.

**Caucus.** A private meeting or series of separate meetings in an ADR proceeding that take place between the neutral and one or more, but not all, participants. Many mediators and other ADR neutrals sometimes work in private caucuses with parties to give them a chance to explore acceptable resolution options, develop or clarify proposals and interests, or move closer to resolution. A “joint session,” by contrast, includes all parties and the ADR neutral.

**Dispute resolution (DR) communication.** Any oral, written, or electronic communication prepared for the purposes of a dispute resolution proceeding, including memoranda, notes or work product of the neutral, parties or non-party participant. “DR communications” are generally protected by statute or agreement to promote candor and creative problem-solving.

**Early neutral evaluation.** An ADR process in which the parties and their counsel present the factual and legal bases of their case to a neutral evaluator—often someone with specifically relevant legal, substantive, or technical expertise or experience—who then offers a non-binding oral or written evaluation of the strengths and weaknesses of the parties’ cases. This evaluation can form the basis for settlement discussions facilitated by the neutral evaluator if the parties so choose.

**Facilitation.** A collaborative process involving the use of techniques to improve the flow of information in a meeting. In it, a neutral facilitator seeks to assist a group to discuss issues constructively and provides procedural direction to help the group move through a problem-solving process to arrive at a jointly agreed-on goal. While facilitation bears many similarities to mediation, and while facilitation techniques may be applied to decision-making meetings where a specific outcome is desired (e.g., resolution of a conflict or dispute), the neutral in a facilitation process (the “facilitator”) often plays a less active role than a mediator. The term “facilitator” is often used interchangeably with the term “mediator,” but a facilitator typically does not become as involved in the substantive issues.

**Fact-finding.** An ADR process in which a neutral fact-finder receives information and arguments from the parties about the issues and facts in a controversy (and may conduct additional research to investigate the issues in dispute), and then submits a report with findings of fact and perhaps recommendations based on those findings.

**Joint session.** A meeting in an ADR proceeding that (unlike a caucus) includes all parties and the ADR neutral.

**Mediation.** An ADR process in which a neutral third party (a “mediator”) with no decision-making authority seeks to assist the parties in voluntarily reaching an acceptable resolution of issues in controversy. While mediators differ in their methods of assisting disputing parties, the mediator typically enables the parties to initiate progress toward their own resolution. A mediator enhances negotiations by improving communication between parties, identifying interests, and exploring possibilities for a mutually agreeable resolution.

**Minitrial.** A structured ADR process in which the parties seek to reframe issues in controversy from the context of litigation to the context of a business problem. Typically, attorneys for each party make summary presentations to a panel consisting of a neutral minitrial advisor and non-lawyer party representatives who possess settlement authority. The panel then attempts to negotiate a resolution of the issues in controversy.

**Neutral (or ADR Neutral).** An individual who functions specifically to aid the parties in a DR proceeding to resolve an issue in controversy. Depending on his or her function at a given time, an ADR neutral may be an administrative neutral/program neutral, a session neutral, or assessor (sometimes called a “convening neutral”):

- An administrative neutral (or program neutral) typically conducts the day-to-day administration of an ADR program, including intake, assistance in identifying and obtaining session neutrals, record-keeping, establishment of evaluation mechanisms, and offering parties aid and advice.
- A session neutral assists the parties during and between negotiation sessions in exploring options, identifying common interests, and resolving their dispute.
- An assessor (or “convening”) neutral (assessor or convenor) typically confers with potentially interested persons regarding a situation involving conflict to: identify the issues in controversy and all affected interests, determine whether direct negotiations would be suitable, educate parties about the ADR process, design the structure of an ADR process to address the conflict, and possibly bring the parties together to negotiate.

**Negotiated rulemaking.** A multi-party consensus process used as an alternative to the traditional notice-and-comment approach to issuing regulations, in which agency officials and affected private representatives meet under the guidance of a neutral to engage in negotiation and draft a proposed agency rule, policy, or standard. The public is then asked to comment on the resulting proposed rule. By encouraging participation by interested stakeholders, the process makes use of private parties' perspectives and expertise, and can help avoid subsequent litigation over the resulting rule.

**Negotiation.** A process of discussion and give-and-take in which disputants communicate their differences to one another through conference, discussion and compromise, in order to resolve them.

**Non-party participant.** Experts, friends, support persons (including lawyers), potential parties, and others who participate in the mediation or other ADR proceeding but are not parties.

**Settlement judge.** An ADR process in which a judge—different from the presiding judge in the case—meets with the parties jointly and separately, acting as a mediator or neutral evaluator in a case pending before a tribunal.

## Appendix D

### ADR Provision in Connection with Various RTOs, ISOs, and Power Pools

	<b>Applicability of Provisions</b>	<b>Preliminary Requirements</b>	<b>Mediation</b>	<b>Arbitration</b>	<b>Arbitration Procedures</b>	<b>Decision</b>
<b>PJM</b>	Required for disputes related to “PJM Agreements”, either between PJM members or between members and PJM.	Parties shall undertake good-faith negotiations.	If dispute is not resolved through negotiations, shall be subject to non-binding mediation prior to the initiation of arbitral, regulatory, or other dispute resolution procedures. Chair of the ADR Committee distributes list of 7 mediators from the PJM mediator and/or advisor rosters. Parties select by using a reverse strikeout process. If a resolution isn’t reached by 30 <sup>th</sup> day after the mediator is appointed (or mutually-agreed later date), mediator shall promptly provided the disputing parties with a written, confidential, non-binding recommendation on resolution of the dispute, including the assessment by the mediator of the merits of the principal positions. The mediator must then reconvene the parties for one more meeting to try and settle the case. Parties split the cost of the mediation.	If the dispute is not settled through mediation and is under \$1 million, it goes to binding arbitration. Parties can also agree to submit disputes greater than \$1 million to binding arbitration, if they so choose. The parties then have 14 days to agree on an arbitrator from the PJM list of arbitrators. If they can not, then each pick one and the two choose a third arbitrator.	The arbitrator sets the schedule, means of discovery etc. and holds an evidentiary hearing with cross examining witnesses, unless parties agree to allow resolution based on a written record. There are confidentiality rules. Parties split the cost of the arbitrator.	The arbitrator must issue a written decision based on the evidence, PJM Agreements, and the law. If issue affects matters subject to jurisdiction of FERC under Section 205 of the Federal Power Act, it must be filed at FERC. Parties have one year of the arbitral decision to appeal the decision with the appropriate body having jurisdiction over the matter.
<b>CAISO</b>	Apply to disputes between parties which arise under the ISO	“Good faith efforts” must be made by ISO and	Confidential mediation is an optional precursor to arbitration that 75% of	Parties may commence arbitration if they have not succeeded in negotiating or	Arbitration procedures are consistent with AAA	Arbitration decision shall be no later than 6 months from the arbitrator’s

	Documents except where the decision of the ISO is stated in the provisions of ISO Tariff to be final. Do not apply to disputes as to whether rates and charges set forth in ISO Tariff are just and reasonable. If dispute arises involving a government agency, ISO Tariff procedures are “subject to any limitations imposed on the agency by law” and do not apply to constitutional disputes.	the parties to negotiate and resolve any dispute prior to invoking the ISO ADR Procedures	parties must agree to after one party has submitted a “statement of claim.” Mediator selected by the parties from a list of 7 candidates produced by the ISO ADR Committee (or any alternate source), with parties alternately striking names from the list if no consensus is possible. Mediation is non-binding, but, with the parties’ consent, resolution may include referring the dispute directly to a technical body for resolution or advisory opinion or referring the dispute directly to FERC.	mediating a resolution of their dispute within 30 days, through an arbitration demand served on Cal. ISO and the other parties. Selection of arbitrator selection depends on amount in controversy: if < \$1M, parties select arbitrator from list of 10 qualified candidates supplied by Cal. ISO or AAA or, if no agreement is possible, alternately strike names from the list until one name remains. If > \$1M, parties may agree on single arbitrator, or shall endeavor in good faith to agree on a single arbitrator from a list; if no agreement is possible, each party shall select an arbitrator from the list, and the two selected arbitrators shall in turn select a third.	Commercial Arbitration Procedures, to the extent that they are not inconsistent with Cal. ISO Tariff. If parties agree to “baseball-style” arbitration, they submit to the arbitrator and each other their last best offers in the form of the award they think the arbitrator should make and the arbitrator shall be limited to awarding only one of the proposed offers.	appointment, Party may appeal to FERC or any court of competent jurisdiction on grounds that the award is contrary to or beyond the scope of the relevant ISO documents, federal or state law. The arbitration award is stayed pending appeal unless, at a party’s request, FERC or the court of competent jurisdiction issues an order amending or extinguishing the stay.
<b>MISO Transmission and Energy Markets Tariff (Attach. HH)</b>  [At time of preparation, Attach. HH was still subject to further compliance filings.]	Addresses disputes relating to any matter governed by ISO Agreement, the Tariff or the Transmission Provider’s adopted Business Practices arising between 2 or more parties. Parties retain rights under state law and ability to file complaints with FERC.  Other than the ADR procedures described herein, the Transmission Provider employs expedited dispute resolution procedures for real-time operational disputes related to	Parties’ designated reps shall work together until any party declares an impasse, at which point each party shall designate an officer to review until the parties reach resolution, or an officer declares an impasse.	After informal procedures, but prior to initiation of arbitration, matter is subject to non-binding arbitration, unless ADR Committee (made up of 6 representatives selected by the Board) determines within 10 days that resolution of dispute is unlikely to be reached through mediation, given the nature of dispute or positions of the parties. Parties agree on mediator within 10 days based on full list of available neutral mediators kept by Committee. If parties cannot agree, the ADR Committee Chair appoints neutral mediator from list	Any matter not resolved through mediation may be brought to arbitration, but any dispute regarding the obligation to build transmission facilities is subject to resolution of appropriate regulatory authority if it has jurisdiction and one of the parties demands that the matter be brought to the authority. Any argument that any provision of the ISA Agreement or that any action or failure of any party is contrary to federal or state law shall only be heard by the relevant court or agency, until all parties agree otherwise. Party seeking to invoke jurisdiction of court or agency must notify other parties.  Party seeking arbitration must	ADR Committee may adopt and make available standard ADR procedures, which may be mutually modified or adopted for use in a proceeding by the parties. Arbitrator may permit an entity to intervene if party has a direct monetary interest that will be materially affected, and it is not represented by an existing party in the proceeding. The procedures shall provide for an evidentiary hearing with cross	Decision must be issued within 8 months from selection of arbitrators, provided that parties may agree to shorten the timeline with the consent of the arbitrator. Parties may also agree to extend the date by no more than 60 days. Any decision to extend or shorten the timeline must be made within 45 days from the selection of the arbitrators. The written decision may, at arbitrator’s discretion, include findings of fact. Decisions shall be kept by the ADR Committee and, subject to confidentiality provisions, be made available to parties upon request. Decision may

	system security and reliability issues), and shorted resolution procedures for disputes involving Available Transmission Capacity determinations and facilities ratings.		kept by Committee. Parties must in good faith attempt to resolve dispute in accordance with the mediator's procedures and timeline. If no resolution is reached within 30 days, then mediator shall provide a confidential, non-binding recommendation on resolution. Parties will meet and in good faith attempt to resolve dispute in light of recommendation. If parties fail to reach a resolution, then party may commence arbitration, or judicial, regulatory or other proceedings. Each party bears its own costs and splits the common costs.	send demand to parties with specificity of matters. The parties may unanimously agree on single arbitrator. If parties are unable to agree within 14 days, then each party shall designate an arbitrator from a list prepared by the ADR Committee. The chosen arbitrators will select a 3d arbitrator from the Committee's list with the 3d arbitrator serving as Chair.	examination of witnesses, and subject to the Federal Rules of Evidence. The procedures include confidentiality provisions for information provided in course of proceeding. Each party shall bear its own costs and its share of the common costs.	not revise or alter any provision of the ISO Agreement or the Tariff. Any decision that the ADR Committee determines affects matters subject to FPA Section 205 or 206 shall be filed with FERC by the Committee, and any decision that affects matters subject to state jurisdiction shall be filed with such state.  If a party fails to invoke FERC jurisdiction of a dispute within 120 days, then that party will be deemed to have waived its rights to invoke such jurisdiction. However, a party or intervenor may seek review of arbitrator's decision at FERC within 45 days of the decision. The review is limited to facts contained in the record and is limited only to whether the decision revised the FERC-filed tariffs or ISO Agreement or violates FERC's procedures or policies. This does not impact any rights that FERC may have.
<b>NYISO Services Tariff and OATT</b>	Dispute Resolution Administrator (DRA) appointed by ISO to administer procedures. Procedures are used to resolve disputes between Market Participants and ISO	Step 1 is to present dispute directly to a senior representative of each party for resolution on an informal basis as	DRA may submit disputes to non-binding mediation where subject matter involves proposed change or modification of a rule, rate, Service Agreement or Tariff provision. Mediator may dismiss if dispute did	If DRA refers dispute to arbitration, DRA has 10 days to distribute list of qualified arbitrators. Parties agree on arbitrator or take turns striking names from list. All arbitrator's costs are borne by losing party.	There is no right to discovery, deposition, interrogatories or other informational requests, but arbitrator may request information in addition to initial submissions	Arbitrator submits decision within 90 days of appointment, including findings of fact and legal basis for decision. Decision is final and binding if parties agree that the decision will be binding or dispute is less than

	<p>involving services provided under ISO Tariffs (excluding rate changes or other changes to Tariffs or rules relating to service). ISO has contracted with AAA to manage dispute resolution process.</p>	<p>promptly as possible. If individuals cannot resolve by mutual agreement within 30 days, dispute can be submitted to DRA.</p> <p>There are also expedited procedures pursuant to which parties must immediately confer and resolve dispute within 5 days, or the dispute is immediately submitted to the DRA.</p>	<p>not arise under Tariffs or claim is de minimis. DRA submits list of 10 qualified mediators, and parties agree on mediator or take turns striking from list. No schedule may extend beyond 90 days from mediator's appointment. If not resolved within 90 days, DRA provides a confidential, non-binding recommendation for resolution, including assessment of merits of principal positions, but this is not admissible in subsequent proceeding. If parties still cannot resolve, then any dispute not involving a proposed change to a Services Agreement or Services Tariff may be referred to arbitration process or disputing party may resort to regulatory or judicial proceedings.</p>	<p>If dispute is referred to DRA on an expedited basis, DRA will appoint an arbitrator from a list of 10 within 5 days. Arbitrator is selected randomly by drawing names from the list until available arbitrator is found. .</p>		<p>\$500k. Decisions affecting matters subject to FERC jurisdiction must be filed with FERC, and decisions affecting matters subject to NYPSC must be filed with NYPSC. Decision can serve as basis for entry of judgment by any NY court having jurisdiction. Within one year, any party may request that FERC or any other jurisdictional federal or NY regulatory or judicial vacate or modify decision that is based on error of law; contrary to statutes, rules or regulations; violates the FAA or ADRA, and is based on arbitrator's conduct that violates the FAA.</p> <p>For expedited dispute, arbitrator will resolve within 15 days from appointment. Arbitrator will select as an award the award proposed by one of the parties in their written submissions and shall render findings of fact and basis for the decision. Decision is final and binding. However, within one year, a party may request that any federal, state regulatory or judicial authority in NY having jurisdiction, take such action as may be appropriate for a decision that is based on fraudulent conduct of demonstrable bias of the arbitrator.</p>
<b>NYISO/ NYSRA Agreement</b>	Govern disputes between ISO and NYSRC as to	ISO and NYSRC have 30 days to resolve dispute	None	If parties unable to resolve within 30 days, dispute may be referred to PSC by either party.	The PSC will develop procedural rules to resolve dispute.	PSC will provide written decision, including findings of fact and basis for decision.

	implementation and application of Reliability Rules.	informally.		(If dispute also affects matters subject to FERC jurisdiction, it must be resolved directly by FERC and not referred to NYSPSC.) PSC shall on an expedited basis determine whether dispute should be dismissed or accepted for arbitration. PSC may dismiss if complaining party failed to negotiate in good faith, the dispute is not reasonably related to Reliability Rules or their application, or the dispute is de minimis.		Order may be entered on the award by any NY state court having jurisdiction. Within 1 year of decision, any party may request that FERC vacate, modify or take other appropriate action with respect to a decision that is based on an error of law: contrary to statutes, rules or regulations; violates the FAA or ADRA; or involves a dispute in excess of \$500k.
<b>ERCOT Protocols</b>	Disputes between ERCOT and Market Participants regarding ERCOT Protocols and any other approved market guide or related agreements. Request for arbitration must be sent within 6 months of date on which information giving rise to ADR became available to market participant.	Any dispute submitted for arbitration shall first be reserved to senior dispute representative to parties. If dispute is not resolved within 60 days, such dispute will be referred to mediation or arbitration.	Parties have 10 days to agree on mediator. If parties cannot agree, mediator chosen according to AAA Commercial Mediation Rules. Within 15 days of appointment, mediation shall commence. If parties have not resolved the dispute within 60 days of first mediation, the dispute may be submitted to arbitration upon agreement of the parties. If parties are unable to agree on arbitration, any party may apply to relief from PUC or other governmental authority.	If parties agree to arbitration, arbitrators generally conduct arbitration pursuant to AAA Commercial Arbitration Rules and applicable rules and regulations of PUCT or other tribunal having jurisdiction. Parties will discuss selection of arbitrator. If possible, one arbitrator should be selected. If none is selected, each party may choose 1 arbitrator to sit on 3 member panel, and two selected arbitrators choose 3d to serve as chair.	Parties may seek to intervene if they can demonstrate that their rights would be materially affected by outcome. Each party is responsible for its own costs as well as its pro rata share of the costs of the mediator or arbitrators.	Arbitrator may only interpret and apply provisions of applicable statutory authority, applicable rules, regulations and authorities having jurisdiction, and may not modify any of the foregoing. Arbitrator shall render decisions within 120 days. If no decision within 120 days, any party may apply for relief with PUCT or any governmental authority having jurisdiction. If arbitration decision is not appealed within 30 days, then decision becomes final and binding.
<b>WSPP</b>	ADR procedures can apply to any dispute between Parties to a transaction arising under the WSPP,"but <u>must</u> be applied to disputes over the calculation of damages arising out of non-performance in a	Informal or formal non-binding mediation is required before binding arbitration may proceed	Non-binding mediation is required before binding dispute resolution or any other form of litigation may proceed. Informal mediation must be requested in writing by all parties to a dispute, and consists of a conference call between the parties, WSPP's General Counsel,	Arbitration can only begin after the dispute has been referred to formal or informal mediation, either by agreement of the parties (if binding dispute resolution is not required) or by written notice of one of the parties (if binding dispute resolution is required. Written notice of claim and demand for arbitration must be	Parties are entitled to obtain documents from one another after arbitrator appointed, and Fed. R. Civ. P. govern discovery. Oral hearing can be waived by agreement of the parties. Arbitrator determines rules of	Arbitration decision issued within 10 business days after the end of the hearing (or within 10 business days of the last date briefs were to be submitted, if oral hearing was waived. Arbitrator not limited in the remedies that may be ordered (so long as any arbitration award is consistent



	Service Schedule A, B, or C transaction and disputes over the methodology for calculation of a termination payment in the event of default.		the Chair of the WSPP Operating Committee, and/or another independent and knowledgeable person requested by the Chair, with purpose of discussing issues and having independent views stated. Parties seeking formal mediation must serve written notice on the Chair and the General Counsel, after which the other parties have 8 days to respond. Mediator is selected from list of ten disinterested candidates (including at least one suggested by each party), or appointed by the Chair if the parties are unable to agree. Time and place of mediation set by agreement of parties (or mediator, if agreement is impossible), with procedures determined by mediator. Each party shall have at least one representative with the authority to settle the dispute present at the mediation.	served on Chair and other parties. Other parties have ten days to respond and counterclaim. Arbitrator selected from a list of 10 eligible, disinterested candidates (including at least one person suggested by each party) compiled by the Chair.	conduct and evidence at arbitration hearing, but each party shall have the right to present evidence, including witnesses, and examine other parties' witnesses.	with the provisions of the WSPP Agreement and any applicable Confirmation Agreement with respect to the liability and damages of any party, unless the parties agree in advance to limit the arbitrator's choice of remedies. Nothing is intended to waive any provision of the Federal Arbitration Act or any right under state statute or common law to challenge an arbitration award or to prevent any action to enforce any arbitration award.
<b>ISO-NE Services Tariff</b>	Matters that arise under the Services Tariff.	Any dispute shall be the subject of good faith discussions for a period of not less than 60 days unless a party presents exigent circumstances, or the Tariff gives the party a right to submit the dispute directly to FERC for resolution.		Any dispute that is not resolved through good-faith negotiations may be submitted by any party directly to FERC or other appropriate forum for resolution. Notwithstanding the foregoing, any dispute arising under the Tariff may be submitted to arbitration or any other form of alternative dispute resolution upon the agreement of all affected parties.		

<b>ISO-NE, NEPOOL Participant Agreement</b>	Matters that arise under Agreement.	Good faith negotiations require for a period of not less than 60 days unless a party presents exigent circumstances, or the Agreement gives a party the right to submit a dispute directly to FERC for resolution.		Any dispute that is not resolved through good-faith negotiations may be submitted by any party directly to FERC for resolution.		
<b>NEPOOL Market Rule 1, Appendix A</b>	Dispute over any ISO mitigation imposed on a Resource. Actions subject to review are (1) imposition of mitigation remedy, and (2) continuation of mitigation remedy.			ADR Neutral reviews facts and circumstances on which ISO-NE based its decision and remedy imposed by ISO-NE. Neutral will only remove mitigation if it determines that ISO's application of mitigation policy was clearly erroneous. Neutral will consider whether adequate opportunity was given to Market Participant to present information, any voluntary remedies proposed by Market Participant, and the need for ISO-NE to act quickly to preserve competitive markets.		
<b>Restated NEPOOL Agreement</b>	Covers disputes as to Participants Committee action or failure to take Action			Appeals are made with the Review Board within 5 days following the meeting of the Participants Committee to which the appeal relates. Review Board is composed at the election of Participants Committee of 4 or 5 members selected from Participants Committee. Procedural rules are set by Review Board.	Agreement provides for certain intervention rights. A hearing, if any, will be held as soon as reasonably practicable.	Review Board decision is made within 35 days of giving the notice of appeal. If Review Board denies the appeal, no further action is required by Participants Committee. If Review Board grants the appeal, the Review Board may recommend how to address the subject of the appeal. Any such recommendation shall be non-binding only. Any action taken by the Review Board does not restrict the rights of a party

						to seek review by FERC or in any other available forum. No requirement to submit an appeal to the Review Board prior to exercising any such rights.
<b>Southwest Power Pool OATT</b>	Covers disputes between a Transmission Provider and Transmission Customer involving transmission service under Tariff	Dispute referred to representatives of each party for resolution on informal basis.		If dispute is not resolved informally within 30 days (or period agreed upon among parties) then it is referred to single neutral arbitrator. If parties cannot choose an arbitrator within 10 days, then each party chooses an arbitrator to sit on a 3 person arbitration panel. The 2 arbitrators select the 3d arbitrator within 20 days. Arbitrators must be knowledgeable in electric utility matters, including transmission and bulk power issues.	Arbitrators will generally apply the Commercial Arbitration Rules of the AAA, as well as any applicable FERC regulations and Regional Transmission Group rules. Each party will bear its own costs and share the arbitrators' costs.	Decision is rendered within 90 days and provides basis for decision. Arbitrators may only interpret and apply provisions of Tariff and Service Agreements, and may not modify or change those. Decision is final and binding on the parties (except that if the Federal Govt is one of the parties, then the decision is non-binding). Parties may appeal only on the ground that the arbitrators violated the Federal Arbitration Act or the Administrative Dispute Resolution Act. Parties retain the right to file a complaint with FERC.

# Appendix E

## Sample Agreements and Clauses for Using ADR

### Sample FERC ADR Agreement

This Alternative Dispute Resolution Agreement (“Agreement”) among the \_\_\_\_\_ and \_\_\_\_\_ (collectively, the “Parties”), and the Dispute Resolution Service (“DRS”) of the Federal Energy Regulatory Commission (“FERC” or “Commission”), is being entered into for purposes of discussing how the Parties might resolve certain questions generally related to FERC Docket No. The Parties and DRS agree as follows:

1. Mediator: The Mediator in this case serves at the pleasure and with the consent of all the undersigned Parties. Therefore, the Mediator for this case shall be mutually agreed upon by the Parties. The Parties agree that the Mediator for this case shall be \_\_\_\_\_ of the Commission's DRS.

The Mediator's role shall be to facilitate negotiations between the Parties to resolve whatever disputes they may have. The Mediator will meet and communicate separately and together as necessary with the Parties and their counsel to discuss possible ways of resolving such disputes, in accordance with the terms of this Agreement.

The Mediator shall not offer a decision on the merits of the dispute nor shall he offer an opinion on the technical merits of the position of any of the Parties, without the permission of the Parties. The Mediator shall make no written findings or recommendations. Mediation sessions shall not be recorded verbatim and no formal minutes or transcripts shall be maintained.

2. Technical Assistance: The Mediator shall be assisted by a Technical Expert, \_\_\_\_\_, from the Commission’s Office \_\_\_\_\_. The Technical Expert will be recused from all FERC decisional activities relating to this docket.

These documents are for informational purposes only. They are not intended to be a comprehensive summary of recent developments in the law, treat exhaustively the subjects covered, provide legal advice, or render a legal opinion. Users should first seek advice of counsel in the appropriate jurisdiction.

The Technical Expert will assist the Mediator and the Parties in achieving a mutually satisfactory settlement. He will not offer an opinion or position on the technical merits of the case unless requested by all Parties.

3. Schedule: The Parties will meet on \_\_\_\_\_ at \_\_\_\_\_ offices in \_\_\_\_\_, and may continue discussions and meet thereafter as agreed to by the Parties to achieve resolution in this matter.

4. Confidentiality: To promote frank and productive discussions, the Parties, the Technical Expert, and the Mediator, agree that the mediation process shall be confidential. Specific offers, proposals, terms of settlement, or other statements made during the mediation process or in furtherance of settlement shall not be used by any of the Parties, the Technical Expert, or the Mediator for any other purpose outside the mediation process.

The mediation is subject to the Commission's rules governing confidentiality of communications in dispute resolution proceedings, including Rule 606 of the Commission's Rules of Practice and Procedure, 18 C. F. R. 385.606, as well as any and all other relevant Commission rules pertaining to mediation, dispute resolution, and settlement. The mediation shall be treated as compromise negotiations under Rule 408 of the Federal Rules of Evidence. Participation in the mediation, including attendance at proceedings, statements made, and documents prepared or furnished by any Party, attorney or other participant, will be confidential, and shall not be construed for any purpose as an admission of liability or otherwise against a Party's interest, or otherwise referred to by any Party who learned of or received such information.

This process, and the Mediator's and Technical Expert's participation in it, are privileged under the Administrative Dispute Resolution Act of 1996 (5 U.S.C. § 574) ("ADRA") and all relevant state statutes or regulations. The Mediator and Technical Expert shall not disclose to any other Party information conveyed to them in confidence by another Party, unless authorized to do so by that Party or otherwise required under the ADRA or other applicable law. The Parties, their attorneys and representatives, the Mediator and Technical Expert shall not disclose to third parties any information regarding the negotiations, including settlement terms, proposals, offers, or other statements, unless all Parties agree in writing or as required under the ADRA or other applicable law. The Parties may furnish confidential information to their employees, officers, directors, agents, consultants, and advisors (collectively "representatives") who need to have access to such information in order to facilitate the mediation or settlement. As a condition to such disclosure, the Parties shall inform any recipients of confidential information about the confidential nature of the information and shall be responsible for any breach of this Agreement.

This Agreement shall not restrict any Party from using or disclosing information which (i) is or becomes generally available to the public or to non-parties other than as a result of a disclosure directly or indirectly by the disclosing Party or its representatives; (ii) was within the using or disclosing Party's possession prior to it being furnished hereunder, provided that such information is not subject to another confidentiality agreement with any other party, or under other contractual, legal or fiduciary obligation of confidentiality or, (iii) is rightfully obtained by a Party from a third party authorized to make such disclosure without restriction, whether or not shared under this Agreement.

The Mediator shall not be deemed a "necessary or indispensable" party, as those terms are used in connection with Rule 19 of the Federal Rules of Civil Procedure and any state law equivalent, in any future judicial, administrative or arbitral proceeding. The Parties shall not subpoena or otherwise seek to obtain from the Mediator any documents relating to the mediation process submitted to the Mediator by any Party. The Parties shall not subpoena the Mediator to testify as a witness regarding the mediation process. In no event will the Mediator voluntarily testify on behalf of one or more of the Parties, provide advice or information to any person or

entity, or participate as a Commission staff advisor or expert, regarding any pending or future judicial, administrative, or arbitral action or proceeding relating to any of the matters discussed in the mediation process.

5. Cost of the Mediation: The Parties will cover their own costs of travel and per diem in order to attend or participate in the mediation. No Commission or other fees will be assessed for this mediation.

6. Good Faith: All Parties will act in good faith in all aspects of this mediation. Specific offers, proposals, terms of settlement, or other statements made during the mediation may not be used by any Party for any other purpose.

7. Right to Withdraw and Termination by the Mediator: Any Party may withdraw from the mediation at any time without prejudice. Withdrawing Parties remain bound by the confidentiality provisions of this Agreement and the obligation to pay their share, through the effective date of withdrawal, of the expenses associated with the mediation, if any. The Parties agree that the Mediator has the discretion to terminate the mediation at any time if the Mediator believes that the case is inappropriate for mediation or that it would not be productive to continue.

9. Additional Provisions: Agreements among the Parties on other issues or ground-rules may be developed and incorporated into this Agreement at any time during the mediation, by a written modification to this Agreement signed by all Parties.

10. Choice of Law: This Agreement shall be governed by and interpreted in accordance with California law without regard to the conflicts of laws statutes.

11. Counterpart Signatures: This Agreement may be executed in one or more counterparts, which together shall constitute one instrument.

The Parties and the Commission’s DRS have executed or caused this Agreement to be executed by their duly authorized officers or representatives as of the date set forth below.

Date: \_\_\_\_\_ By: \_\_\_\_\_

Date: \_\_\_\_\_ By: \_\_\_\_\_

Date: \_\_\_\_\_ By: \_\_\_\_\_

## Sample AAA Arbitration Clauses

### Clause 1: Domestic Agreement

“Any dispute, controversy or claim arising under, out of or relating to this contract and any subsequent amendments of this contract, including, without limitation, any question regarding its formation, validity, binding effect, interpretation, performance, breach or termination, as well as non-contractual claims, (a Dispute), that is not resolved following written notification within (enter a number) by the parties’ respective senior or executive vice presidents after in person or telephonic meetings by them to address the dispute shall be submitted to mediation. If not settled within (enter a number) days after submission of the dispute to mediation, the dispute shall be resolved by arbitration. The arbitration shall be administered by the American Arbitration Association (“AAA”) under its Commercial Arbitration Rules, in effect on the date the case is filed with the AAA. The parties also agree that the AAA Optional Rules for Emergency Measures of Protection shall apply to the proceedings. A judgment on the award rendered by the arbitrator(s) may be entered in any court having jurisdiction thereof. All suits, hearings and proceedings shall take place in (City, State), are subject to the jurisdiction of the U.S. District Court for the (Name) District of (State), (Place) Division at (City), and shall be governed in all substantive and procedural respects by the Federal Arbitration Act, Title 9, United States Code, and the law of the State of (state). The arbitration shall be conducted before (one/three) arbitrator(s), licensed to practice as an attorney in the State of (state) for at least (number) years and expert in the areas of (Subject matter).”

### Clause 2: International Agreement

“Any dispute, controversy or claim arising under, out of or relating to this contract and any subsequent amendments of this contract, including, without limitation, any question regarding its formation, validity, binding effect, interpretation, performance, breach or termination, as well as non-contractual claims, (a “Dispute”), that is not resolved following written notification within (enter a number) days by the parties’ respective senior or executive vice presidents after in person or telephonic meetings by them to address the dispute shall be submitted to mediation. If not settled within (enter a number) days after submission of the dispute to mediation, the dispute shall be resolved by arbitration. The arbitration shall be administered by the American Arbitration Association (“AAA”) under its International Arbitration Rules, in effect on the date the case is filed with the AAA’s International Center for Dispute Resolution (“ICDR”). The place of arbitration shall be (City, State or Country), unless otherwise agreed to by the parties. The interpretation and application of this arbitration clause, as well as the conduct of the arbitral

proceedings, shall be governed by the Federal Arbitration Act, Title 9, United States Code. The language of the arbitration shall be in English. A judgment on the award rendered by the arbitrator(s) may be entered in any court having jurisdiction thereof. The arbitration shall be conducted before (one/three) arbitrator(s), licensed to practice as an attorney in the State of (state) for at least (number) years and expert in the areas of (Subject matter). Nothing in these dispute resolution provisions shall be construed as preventing either party from seeking conservatory or similar interim relief in any court of competent jurisdiction.”

#### Clause 3: Optional Non-Disclosure Provision

“The whole arbitration procedure shall be executed pursuant to a strict non-disclosure agreement signed by the parties and the arbitrator(s) agreeing to (1) conduct such proceedings in confidence and (2) maintain in confidence all confidential information or trade secrets disclosed or produced in the course thereof. All press releases or public statements regarding the status of such proceedings shall be prepared jointly and only by the parties.”

#### Clause 4: Optional Disclosed “Hi-Lo” (Bracketed, Bounded) Arbitration

“Any award of the arbitrator in favor of (specify party) and against (specify party) shall be at least (specify a dollar amount) but shall not exceed (specify a dollar amount). (Specify a party) expressly waives any claim in excess of (specify a dollar amount) and agrees that its recovery shall not exceed that amount. Any such award shall be in satisfaction of all claims by (specify a party) against (specify a party).”

#### Clause 5: Optional Undisclosed “Hi-Lo” (Blind Bracketed) Arbitration

“In the event that the arbitrator denies the claim or awards an amount less than the minimum amount of (specify), then this minimum amount shall be paid to the claimant. Should the arbitrator’s award exceed the maximum amount of (specify), then only this maximum amount shall be paid to the claimant. It is further understood between the parties that, if the arbitrator awards an amount between the minimum and the maximum stipulated range, then the exact awarded amount will be paid to the claimant. The parties further agree that this agreement is private between them and will not be disclosed to the arbitrator.”

#### Clause 6: Optional Baseball (Final Offer, Last Best Offer) Arbitration

“Each party shall submit to the arbitrator and exchange with each other 30 days in advance of the hearing their last, best offers in a single monetary amount payable in cash at the close of the hearings. The arbitrator shall be limited to awarding only one or the other of the two figures submitted.”



Clause 7: Optional Night Baseball (Undisclosed Final Offer, Last Best Offer) Arbitration

“Each party shall submit to each other, but not to the arbitrator, 30 days in advance of the hearing their last, best offers in a single monetary amount payable in cash at the close of the hearings. The arbitrator shall issue a decision without seeing the proposal of either party. The arbitrator shall then examine the proposals and award the proposal of the party who came closest to the decision.”

For Early ADR  
Allegation Number:

Post-Investigation ADR  
EA Number:

All Cases  
ADR Number:

**U.S. NUCLEAR REGULATORY COMMISSION ADR PROGRAM  
Administered by Cornell's Institute on Conflict Resolution**

**AGREEMENT TO MEDIATE**

**We agree** to engage in mediation to attempt to resolve our issues.

**Mediator's Role.** We understand that the mediator will assist us to reach resolution in the mediation, that (s)he has no authority to decide the outcome, and that (s)he will not act as an advocate or representative for any of us.

The mediator will conduct a face-to-face session with all parties. Each side will be expected to present a summary of its views and respond to the mediator's questions. After this session, the mediator may hold private sessions separately with each side to assist in finding a mutually acceptable settlement. The mediator may hold subsequent sessions and discussions in person or on the telephone.

**Confidentiality.** We understand that mediation is a confidential process, and that the mediator is prohibited by federal law (the Administrative Dispute Resolution Act, 5 U.S.C. 574) from discussing the mediation proceedings, testifying on anyone's behalf concerning the mediation, or submitting any report on the substance. We understand that there are a few rare exceptions to mediator confidentiality, which the mediator will explain further if any participant requests; these exceptions include instances such as where someone expresses an intent to commit violence or where a federal judge orders disclosure to prevent an injustice.

We may consult with advisors, legal counsel, or representatives at any time during the mediation or prior to signing any agreement. Otherwise, we will not discuss the substance of this mediation with anyone who was not present, nor will we share such information voluntarily with non-participants, *except* those who may need certain information to aid us in implementing a settlement. Confidentiality will not extend to information indicating a potential or existing safety or security issue at any facility requiring action by the NRC.

In cases between an employee and employer, the identity of the employee must be released to the employer in order to conduct the mediation.

**Withdrawal.** We understand that mediation is voluntary and that we may withdraw at any time. However, any participant who withdraws will remain bound by the above confidentiality terms.

**Settlement Agreements.** If we sign a settlement agreement resolving some or all of our issues, that agreement will bind us.

***For Early ADR Only:*** Except that no settlement agreement will be final until three days after it is signed and any party may reject it during that three-day period. We also understand that the NRC must review any settlement that we agree to *solely* to ensure that it will not restrict or discourage an employee from providing information on potential safety violations to the NRC.

***For Post-Investigation ADR Only:*** Any agreement signed by the parties will be preliminary in nature until the final settlement agreement is confirmed by order. Both parties may discuss the terms of the agreement, and if necessary, the basis for those terms, with those responsible for development, acceptance, and issuance of the order, on a need-to-know basis.

**Conducting the Mediation.** We expect this mediation to be completed within 90 days after we sign this agreement.

***For Early ADR Only:*** The NRC pays the total fee and expenses of the mediator. The parties are only responsible for the cost, if any, of a mediation meeting room.

***For Post-Investigation ADR Only:*** each party agrees to pay 50 percent of the mediator's total fee and expenses.

No participant will seek to hold the NRC liable for the mediation's conduct or results.

By signing below, we acknowledge that we understand this agreement to mediate and will abide by it.

_____	_____	_____
Party	Representative	Date
_____	_____	_____
Party	Representative	Date
_____	_____	
Mediator	Date	

## Sample ADR Provisions for Transmission Construction Contracts

1. **Negotiation Between Executives.** The Parties shall attempt in good faith to resolve any dispute arising out of or relating to this Agreement and/or the Work, promptly by negotiation between executives who have authority to settle the controversy and who are at a higher level of management than the Persons with direct responsibility for administration of this Agreement. Any Party may give the other Party written notice of any dispute not resolved in the normal course of business. Such notice shall include: (a) a statement of that Party's position and a summary of arguments supporting that position; and (b) the name and title of the executive who will be representing that Party and of any other Person who will accompany the executive. Within fifteen (15) days after delivery of the notice, the receiving Party shall respond with: (i) a statement of that Party's position and a summary of arguments supporting that position; and (ii) the name and title of the executive who will represent that Party and of any other Person who will accompany the executive. Within thirty (30) days after delivery of the initial notice, the executives of both Parties shall meet at a mutually acceptable time and place, and thereafter as often as they reasonably deem necessary, to attempt to resolve the dispute. All reasonable requests for information made by one Party to the other will be honored. All negotiations pursuant to this Section 1 are confidential and shall be treated as compromise and settlement negotiations for purposes of applicable Law and rules of evidence.

2. **Mediation.** If the dispute has not been resolved by negotiation within forty-five (45) days after the disputing Party's notice, or if the Parties failed to meet within thirty (30) days, each as contemplated in Section 1, the Parties shall endeavor to settle the dispute by mediation under the then current CPR Mediation Procedure; *provided, however*, that if one Party fails to participate as provided herein, the other Party can initiate mediation prior to the expiration of the forty-five (45) days. Unless otherwise agreed, the Parties will select a mediator from the CPR Panels of Distinguished Neutrals.

3. **Arbitration.** Any Dispute arising out of or relating to this Agreement, including the breach, termination or validity thereof, which has not been resolved by a non-binding procedure as provided herein within ninety (90) days of the initiation of such procedure, shall be finally resolved by arbitration in accordance with the then current CPR Rules for Non-Administered Arbitration by a sole arbitrator, for disputes involving amounts in the aggregate under Three Million Dollars (\$3,000,000), or three arbitrators, for disputes involving amounts in the aggregate equal to or greater than Three Million Dollars (\$3,000,000), of whom each Party shall designate one in accordance with the "screened" appointment procedure provided in CPR Rule 5.4; *provided, however*, that if either Party will not participate in a non-binding procedure, the other may initiate arbitration before expiration of the above period. The arbitration shall be governed by the Federal Arbitration Act, 9 U.S.C. §§ 1 et seq. and judgment upon the award rendered by the arbitrator(s) may be entered by any court having jurisdiction thereof. The place of arbitration shall be [city, state].

4. **Powers of Arbitrator(s)**. The arbitrator(s) are not empowered to award damages in excess of compensatory damages (including liquidated damages specified herein) and each Party expressly waives and foregoes any right to punitive, exemplary or similar damages unless a statute requires that compensatory damages be increased in a specified manner. All costs of the arbitration shall be paid equally by the Parties, unless the award shall specify a different division of the costs. Each Party shall be responsible for its own expenses, including attorney's fees. Both Parties shall be afforded adequate opportunity to present information in support of its position on the dispute being arbitrated. The arbitrator may also request additional information from the Parties.

5. **Deferral**. The Parties may agree to defer such arbitration proceeding, without prejudice to the Indemnified Person(s), pending the resolution of a particular Claim disputed by Contractor.

6. **Continued Performance**. Unless otherwise directed by Owner, Contractor shall continue performance of the Work in conformance with the requirements of this Agreement notwithstanding the existence of any Claim, Dispute and/or proceeding between the Parties. Nothing herein shall prejudice, impair or otherwise prevent Owner from receiving equitable relief, including an order for specific performance and/or an injunction, from an appropriate Governmental Authority (including under Section \_\_\_ ) pending the conclusion of any mediation and/or arbitration proceeding.

7. **Compelled Arbitration**. Each Party will proceed in good faith to conclude the arbitration proceeding as quickly as reasonably possible. If a Party refuses to participate in an arbitration proceeding as required by this Agreement, the other Party may petition any Governmental Authority having proper jurisdiction for an order directing the refusing Party to participate in the arbitration proceeding. All costs and expenses incurred by the petitioning Party in enforcing such participation will be paid for by the refusing Party.

# Sample ADR Provisions For Commercial Contracts

## **Negotiation Between Executives**

The parties shall attempt in good faith to resolve any dispute arising out of or relating to this Agreement, promptly by negotiation between executives who have authority to settle the controversy and who are at a higher level of management than the persons with direct responsibility for administration of this contract. Any party may give the other party written notice of any dispute not resolved in the normal course of business. Such notice shall include: (a) a statement of that party's position and a summary of arguments supporting that position; and (b) the name and title of the executive who will be representing that party and of any other person who will accompany the executive. Within fifteen (15) days after delivery of the notice, the receiving party shall respond with: (a) a statement of that party's position and a summary of arguments supporting that position; and (b) the name and title of the executive who will represent that party and of any other person who will accompany the executive. Within thirty (30) days after delivery of the initial notice, the executives of both parties shall meet at a mutually acceptable time and place, and thereafter as often as they reasonably deem necessary, to attempt to resolve the dispute. All reasonable requests for information made by one party to the other will be honored.

All negotiations pursuant to this clause are confidential and shall be treated as compromise and settlement negotiations for purposes of applicable rules of evidence.

## **Mediation**

If the dispute has not been resolved by negotiation within forty-five (45) days of the disputing party's notice, or if the parties failed to meet within thirty (30) days, the parties shall endeavor to settle the dispute by mediation under the then current CPR Mediation Procedure; provided, however, that if one party fails to participate as provided herein, the other party can initiate mediation prior to the expiration of the forty-five (45) days. [The parties have selected \_\_\_\_\_ as the mediator in any such dispute, and he/she has agreed to serve in that capacity and to be available on reasonable notice. In the event that \_\_\_\_\_ becomes unwilling or unable to serve, the parties have selected \_\_\_\_\_ as the alternative mediator. In the event that neither \_\_\_\_\_ nor \_\_\_\_\_ is willing or able to serve, the parties will agree on a substitute with the assistance of CPR.] Unless otherwise agreed, the parties will select a mediator from the CPR Panels of Distinguished Neutrals.

## **Arbitration**

Any dispute arising out of or relating to this contract, including the breach, termination or validity thereof, which has not been resolved by a non-binding procedure as provided herein within ninety (90) days of the initiation of such procedure, shall be finally resolved by arbitration in accordance with the then current CPR Rules for Non-Administered Arbitration by a sole arbitrator, for disputes involving amounts in the aggregate under three million dollars (\$3,000,000), or three arbitrators, for disputes involving amounts in the aggregate equal to or greater than three million dollars (\$3,000,000), of whom each party shall designate one in accordance with the “screened” appointment procedure provided in Rule 5.4; provided, however, that if either party will not participate in a non-binding procedure, the other may initiate arbitration before expiration of the above period. The arbitration shall be governed by the Federal Arbitration Act, 9 U.S.C. §§ 1-16, and judgment upon the award rendered by the arbitrator(s) may be entered by any court having jurisdiction thereof. The place of arbitration shall be [city, state].

The arbitrator(s) are not empowered to award damages in excess of compensatory damages and each party expressly waives and foregoes any right to punitive, exemplary or similar damages unless a statute requires that compensatory damages be increased in a specified manner.

## **Appendix F**

### **ABA/ACR/AAA Model Standards of Conduct for Mediators**

#### **AMERICAN ARBITRATION ASSOCIATION**

**(ADOPTED SEPTEMBER 8, 2005)**

#### **AMERICAN BAR ASSOCIATION**

**(ADOPTED AUGUST 9, 2005)**

#### **ASSOCIATION FOR CONFLICT RESOLUTION**

**(ADOPTED AUGUST 22, 2005)**

**SEPTEMBER 2005**



# The Model Standards of Conduct for Mediators 2005

The Model Standards of Conduct for Mediators was prepared in 1994 by the American Arbitration Association, the American Bar Association's Section of Dispute Resolution, and the Association for Conflict Resolution<sup>1</sup>. A joint committee consisting of representatives from the same successor organizations revised the Model Standards in 2005.<sup>2</sup> Both the original 1994 version and the 2005 revision have been approved by each participating organization.<sup>3</sup>

## Preamble

Mediation is used to resolve a broad range of conflicts within a variety of settings. These Standards are designed to serve as fundamental ethical guidelines for persons mediating in all practice contexts. They serve three primary goals: to guide the conduct of mediators; to inform the mediating parties; and to promote public confidence in mediation as a process for resolving disputes. Mediation is a process in which an impartial third party facilitates communication and negotiation and promotes voluntary decision making by the parties to the dispute. Mediation serves various purposes, including providing the opportunity for parties to define and clarify issues, understand different perspectives, identify interests, explore and assess possible solutions, and reach mutually satisfactory agreements, when desired.

## Note on Construction

These Standards are to be read and construed in their entirety. There is no priority significance attached to the sequence in which the Standards appear.

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<sup>1</sup> The Association for Conflict Resolution is a merged organization of the Academy of Family Mediators, the Conflict Resolution Education Network and the Society of Professionals in Dispute Resolution (SPIDR). SPIDR was the third participating organization in the development of the 1994 Standards.

<sup>2</sup> Reporter's Notes, which are not part of these Standards and therefore have not been specifically approved by any of the organizations, provide commentary regarding these revisions.

<sup>3</sup> The 2005 version to the Model Standards were approved by the American Bar Association's House of Delegates on August 9, 2005, the Board of the Association of Conflict Resolution on August 22, 2005 and the Executive Committee of the American Arbitration Association on September 8, 2005.

The use of the term “shall” in a Standard indicates that the mediator must follow the practice described. The use of the term “should” indicates that the practice described in the standard is highly desirable, but not required, and is to be departed from only for very strong reasons and requires careful use of judgment and discretion.

The use of the term “mediator” is understood to be inclusive so that it applies to co-mediator models. These Standards do not include specific temporal parameters when referencing a mediation, and therefore, do not define the exact beginning or ending of a mediation.

Various aspects of a mediation, including some matters covered by these Standards, may also be affected by applicable law, court rules, regulations, other applicable professional rules, mediation rules to which the parties have agreed and other agreements of the parties.

These sources may create conflicts with, and may take precedence over, these Standards. However, a mediator should make every effort to comply with the spirit and intent of these Standards in resolving such conflicts. This effort should include honoring all remaining Standards not in conflict with these other sources.

These Standards, unless and until adopted by a court or other regulatory authority do not have the force of law. Nonetheless, the fact that these Standards have been adopted by the respective sponsoring entities, should alert mediators to the fact that the Standards might be viewed as establishing a standard of care for mediators.

## **STANDARD I. SELF-DETERMINATION**

A. A mediator shall conduct a mediation based on the principle of party self-determination. Self-determination is the act of coming to a voluntary, uncoerced decision in which each party makes free and informed choices as to process and outcome. Parties may exercise self-determination at any stage of a mediation, including mediator selection, process design, participation in or withdrawal from the process, and outcomes.

1. Although party self-determination for process design is a fundamental principle of mediation practice, a mediator may need to balance such party self-determination with a mediator’s duty to conduct a quality process in accordance with these Standards.

2. A mediator cannot personally ensure that each party has made free and informed choices to reach particular decisions, but, where appropriate, a mediator should make the parties aware of the importance of consulting other professionals to help them make informed choices.

- B. A mediator shall not undermine party self-determination by any party for reasons such as higher settlement rates, egos, increased fees, or outside pressures from court personnel, program administrators, provider organizations, the media or others.

## **STANDARD II. IMPARTIALITY**

- A. A mediator shall decline a mediation if the mediator cannot conduct it in an impartial manner. Impartiality means freedom from favoritism, bias or prejudice.
- B. A mediator shall conduct a mediation in an impartial manner and avoid conduct that gives the appearance of partiality.
  - 1. A mediator should not act with partiality or prejudice based on any participant's personal characteristics, background, values and beliefs, or performance at a mediation, or any other reason.
  - 2. A mediator should neither give nor accept a gift, favor, loan or other item of value that raises a question as to the mediator's actual or perceived impartiality.
  - 3. A mediator may accept or give de minimis gifts or incidental items or services that are provided to facilitate a mediation or respect cultural norms so long as such practices do not raise questions as to a mediator's actual or perceived impartiality.
- C. If at any time a mediator is unable to conduct a mediation in an impartial manner, the mediator shall withdraw.

### **STANDARD III. CONFLICTS OF INTEREST**

- i. A mediator shall avoid a conflict of interest or the appearance of a conflict of interest during and after a mediation. A conflict of interest can arise from involvement by a mediator with the subject matter of the dispute or from any relationship between a mediator and any mediation participant, whether past or present, personal or professional, that reasonably raises a question of a mediator's impartiality.
- ii. A mediator shall make a reasonable inquiry to determine whether there are any facts that a reasonable individual would consider likely to create a potential or actual conflict of interest for a mediator. A mediator's actions necessary to accomplish a reasonable inquiry into potential conflicts of interest may vary based on practice context.
- iii. A mediator shall disclose, as soon as practicable, all actual and potential conflicts of interest that are reasonably known to the mediator and could reasonably be seen as raising a question about the mediator's impartiality. After disclosure, if all parties agree, the mediator may proceed with the mediation.
- iv. If a mediator learns any fact after accepting a mediation that raises a question with respect to that mediator's service creating a potential or actual conflict of interest, the mediator shall disclose it as quickly as practicable. After disclosure, if all parties agree, the mediator may proceed with the mediation.
- v. If a mediator's conflict of interest might reasonably be viewed as undermining the integrity of the mediation, a mediator shall withdraw from or decline to proceed with the mediation regardless of the expressed desire or agreement of the parties to the contrary.
- vi. Subsequent to a mediation, a mediator shall not establish another relationship with any of the participants in any matter that would raise questions about the integrity of the mediation. When a mediator develops personal or professional relationships with parties, other individuals or organizations following a mediation in which they were involved, the mediator should consider factors such as time elapsed following the mediation, the nature of the relationships established, and services offered when determining whether the relationships might create a perceived or actual conflict of interest.

## **STANDARD IV. COMPETENCE**

- A. A mediator shall mediate only when the mediator has the necessary competence to satisfy the reasonable expectations of the parties.
1. Any person may be selected as a mediator, provided that the parties are satisfied with the mediator's competence and qualifications. Training, experience in mediation, skills, cultural understandings and other qualities are often necessary for mediator competence. A person who offers to serve as a mediator creates the expectation that the person is competent to mediate effectively.
  2. A mediator should attend educational programs and related activities to maintain and enhance the mediator's knowledge and skills related to mediation.
  3. A mediator should have available for the parties' information relevant to the mediator's training, education, experience and approach to conducting a mediation.
- B. If a mediator, during the course of a mediation determines that the mediator cannot conduct the mediation competently, the mediator shall discuss that determination with the parties as soon as is practicable and take appropriate steps to address the situation, including, but not limited to, withdrawing or requesting appropriate assistance.
- C. If a mediator's ability to conduct a mediation is impaired by drugs, alcohol, medication or otherwise, the mediator shall not conduct the mediation.

## **STANDARD V. CONFIDENTIALITY**

- A. A mediator shall maintain the confidentiality of all information obtained by the mediator in mediation, unless otherwise agreed to by the parties or required by applicable law.
1. If the parties to a mediation agree that the mediator may disclose information obtained during the mediation, the mediator may do so.
  2. A mediator should not communicate to any non-participant information about how the parties acted in the mediation. A mediator may report, if required, whether parties appeared at a scheduled mediation and whether or not the parties reached a resolution.

3. If a mediator participates in teaching, research or evaluation of mediation, the mediator should protect the anonymity of the parties and abide by their reasonable expectations regarding confidentiality.
- B. A mediator who meets with any persons in private session during a mediation shall not convey directly or indirectly to any other person, any information that was obtained during that private session without the consent of the disclosing person.
  - C. A mediator shall promote understanding among the parties of the extent to which the parties will maintain confidentiality of information they obtain in a mediation.
  - D. Depending on the circumstance of a mediation, the parties may have varying expectations regarding confidentiality that a mediator should address. The parties may make their own rules with respect to confidentiality, or the accepted practice of an individual mediator or institution may dictate a particular set of expectations.

## **STANDARD VI. QUALITY OF THE PROCESS**

- A. A mediator shall conduct a mediation in accordance with these Standards and in a manner that promotes diligence, timeliness, safety, presence of the appropriate participants, party participation, procedural fairness, party competency and mutual respect among all participants.
  1. A mediator should agree to mediate only when the mediator is prepared to commit the attention essential to an effective mediation.
  2. A mediator should only accept cases when the mediator can satisfy the reasonable expectation of the parties concerning the timing of a mediation.
  3. The presence or absence of persons at a mediation depends on the agreement of the parties and the mediator. The parties and mediator may agree that others may be excluded from particular sessions or from all sessions.
  4. A mediator should promote honesty and candor between and among all participants, and a mediator shall not knowingly misrepresent any material fact or circumstance in the course of a mediation.

5. The role of a mediator differs substantially from other professional roles. Mixing the role of a mediator and the role of another profession is problematic and thus, a mediator should distinguish between the roles. A mediator may provide information that the mediator is qualified by training or experience to provide, only if the mediator can do so consistent with these Standards.
  6. A mediator shall not conduct a dispute resolution procedure other than mediation but label it mediation in an effort to gain the protection of rules, statutes, or other governing authorities pertaining to mediation.
  7. A mediator may recommend, when appropriate, that parties consider resolving their dispute through arbitration, counseling, neutral evaluation or other processes.
  8. A mediator shall not undertake an additional dispute resolution role in the same matter without the consent of the parties. Before providing such service, a mediator shall inform the parties of the implications of the change in process and obtain their consent to the change. A mediator who undertakes such role assumes different duties and responsibilities that may be governed by other standards.
  9. If a mediation is being used to further criminal conduct, a mediator should take appropriate steps including, if necessary, postponing, withdrawing from or terminating the mediation.
  10. If a party appears to have difficulty comprehending the process, issues, or settlement options, or difficulty participating in a mediation, the mediator should explore the circumstances and potential accommodations, modifications or adjustments that would make possible the party's capacity to comprehend, participate and exercise self-determination.
- B. If a mediator is made aware of domestic abuse or violence among the parties, the mediator shall take appropriate steps including, if necessary, postponing, withdrawing from or terminating the mediation. C. If a mediator believes that participant conduct, including that of the mediator, jeopardizes conducting a mediation consistent with these 8 Standards, a mediator shall take appropriate steps including, if necessary, postponing, withdrawing from or terminating the mediation.

## **STANDARD VII. ADVERTISING AND SOLICITATION**

- A. A mediator shall be truthful and not misleading when advertising, soliciting or otherwise communicating the mediator's qualifications, experience, services and fees.
  - 1. A mediator should not include any promises as to outcome in communications, including business cards, stationery, or computer-based communications.
  - 2. A mediator should only claim to meet the mediator qualifications of a governmental entity or private organization if that entity or organization has a recognized procedure for qualifying mediators and it grants such status to the mediator.
- B. A mediator shall not solicit in a manner that gives an appearance of partiality for or against a party or otherwise undermines the integrity of the process.
- C. A mediator shall not communicate to others, in promotional materials or through other forms of communication, the names of persons served without their permission.

## **STANDARD VIII. FEES AND OTHER CHARGES**

- A. A mediator shall provide each party or each party's representative true and complete information about mediation fees, expenses and any other actual or potential charges that may be incurred in connection with a mediation.
  - 1. If a mediator charges fees, the mediator should develop them in light of all relevant factors, including the type and complexity of the matter, the qualifications of the mediator, the time required and the rates customary for such mediation services.
  - 2. A mediator's fee arrangement should be in writing unless the parties request otherwise.<sup>9</sup>
- B. A mediator shall not charge fees in a manner that impairs a mediator's impartiality.
  - 1. A mediator should not enter into a fee agreement which is contingent upon the result of the mediation or amount of the settlement.



2. While a mediator may accept unequal fee payments from the parties, a mediator should not allow such a fee arrangement to adversely impact the mediator's ability to conduct a mediation in an impartial manner.

**STANDARD IX.      ADVANCEMENT OF MEDIATION PRACTICE**

- A. A mediator should act in a manner that advances the practice of mediation. A mediator promotes this Standard by engaging in some or all of the following:
  - 1. Fostering diversity within the field of mediation.
  - 2. Striving to make mediation accessible to those who elect to use it, including providing services at a reduced rate or on a pro bono basis as appropriate.
  - 3. Participating in research when given the opportunity, including obtaining participant feedback when appropriate.
  - 4. Participating in outreach and education efforts to assist the public in developing an improved understanding of, and appreciation for, mediation.
  - 5. Assisting newer mediators through training, mentoring and networking.
- B. A mediator should demonstrate respect for differing points of view within the field, seek to learn from other mediators and work together with other mediators to improve the profession and better serve people in conflict.

## Appendix G

### AAA/ABA Code of Ethics for Arbitrators in Commercial Disputes

#### The Code of Ethics for Arbitrators in Commercial Disputes

Effective March 1, 2004

The Code of Ethics for Arbitrators in Commercial Disputes was originally prepared in 1977 by a joint committee consisting of a special committee of the American Arbitration Association and a special committee of the American Bar Association. The Code was revised in 2003 by an ABA Task Force and special committee of the AAA.

##### *Preamble*

The use of arbitration to resolve a wide variety of disputes has grown extensively and forms a significant part of the system of justice on which our society relies for a fair determination of legal rights. Persons who act as arbitrators therefore undertake serious responsibilities to the public, as well as to the parties. Those responsibilities include important ethical obligations.

Few cases of unethical behavior by commercial arbitrators have arisen. Nevertheless, this Code sets forth generally accepted standards of ethical conduct for the guidance of arbitrators and parties in commercial disputes, in the hope of contributing to the maintenance of high standards and continued confidence in the process of arbitration.

This Code provides ethical guidelines for many types of arbitration but does not apply to labor arbitration, which is generally conducted under the Code of Professional Responsibility for Arbitrators of Labor-Management Disputes.

There are many different types of commercial arbitration. Some proceedings are conducted under arbitration rules established by various organizations and trade associations, while others are conducted without such rules. Although most proceedings are arbitrated pursuant to voluntary agreement of the parties, certain types of disputes are submitted to arbitration by reason of particular laws. This Code is intended to apply to all such proceedings in which disputes or claims are submitted for decision to one or more arbitrators appointed in a manner provided by an agreement of the parties, by applicable arbitration rules, or by law. In all such cases, the persons who have the power to decide should observe fundamental standards of ethical

conduct. In this Code, all such persons are called "arbitrators," although in some types of proceeding they might be called "umpires," "referees," "neutrals," or have some other title.

Arbitrators, like judges, have the power to decide cases. However, unlike full-time judges, arbitrators are usually engaged in other occupations before, during, and after the time that they serve as arbitrators. Often, arbitrators are purposely chosen from the same trade or industry as the parties in order to bring special knowledge to the task of deciding. This Code recognizes these fundamental differences between arbitrators and judges.

In those instances where this Code has been approved and recommended by organizations that provide, coordinate, or administer services of arbitrators, it provides ethical standards for the members of their respective panels of arbitrators. However, this Code does not form a part of the arbitration rules of any such organization unless its rules so provide.

#### *Note on Neutrality*

In some types of commercial arbitration, the parties or the administering institution provide for three or more arbitrators. In some such proceedings, it is the practice for each party, acting alone, to appoint one arbitrator (a "party-appointed arbitrator") and for one additional arbitrator to be designated by the party-appointed arbitrators, or by the parties, or by an independent institution or individual. The sponsors of this Code believe that it is preferable for all arbitrators including any party-appointed arbitrators to be neutral, that is, independent and impartial, and to comply with the same ethical standards. This expectation generally is essential in arbitrations where the parties, the nature of the dispute, or the enforcement of any resulting award may have international aspects. However, parties in certain domestic arbitrations in the United States may prefer that party-appointed arbitrators be non-neutral and governed by special ethical considerations. These special ethical considerations appear in Canon X of this Code.

This Code establishes a presumption of neutrality for all arbitrators, including party-appointed arbitrators, which applies unless the parties' agreement, the arbitration rules agreed to by the parties or applicable laws provide otherwise. This Code requires all party-appointed arbitrators, whether neutral or not, to make pre-appointment disclosures of any facts which might affect their neutrality, independence, or impartiality. This Code also requires all party-appointed arbitrators to ascertain and disclose as soon as practicable whether the parties intended for them to serve as neutral or not. If any doubt or uncertainty exists, the party-appointed arbitrators should serve as neutrals unless and until such doubt or uncertainty is resolved in accordance with Canon IX. This Code expects all arbitrators, including those serving under Canon X, to preserve the integrity and fairness of the process.

#### *Note on Construction*

Various aspects of the conduct of arbitrators, including some matters covered by this Code, may also be governed by agreements of the parties, arbitration rules to which the parties have agreed, applicable law, or other applicable ethics rules, all of which should be consulted by the

arbitrators. This Code does not take the place of or supersede such laws, agreements, or arbitration rules to which the parties have agreed and should be read in conjunction with other rules of ethics. It does not establish new or additional grounds for judicial review of arbitration awards.

All provisions of this Code should therefore be read as subject to contrary provisions of applicable law and arbitration rules. They should also be read as subject to contrary agreements of the parties. Nevertheless, this Code imposes no obligation on any arbitrator to act in a manner inconsistent with the arbitrator's fundamental duty to preserve the integrity and fairness of the arbitral process.

Canons I through VIII of this Code apply to all arbitrators. Canon IX applies to all party-appointed arbitrators, except that certain party-appointed arbitrators are exempted by Canon X from compliance with certain provisions of Canons I-IX related to impartiality and independence, as specified in Canon X.

#### CANON I. AN ARBITRATOR SHOULD UPHOLD THE INTEGRITY AND FAIRNESS OF THE ARBITRATION PROCESS.

A. An arbitrator has a responsibility not only to the parties but also to the process of arbitration itself, and must observe high standards of conduct so that the integrity and fairness of the process will be preserved. Accordingly, an arbitrator should recognize a responsibility to the public, to the parties whose rights will be decided, and to all other participants in the proceeding. This responsibility may include pro bono service as an arbitrator where appropriate.

B. One should accept appointment as an arbitrator only if fully satisfied:

(1) that he or she can serve impartially;

(2) that he or she can serve independently from the parties, potential witnesses, and the other arbitrators;

(3) that he or she is competent to serve; and

(4) that he or she can be available to commence the arbitration in accordance with the requirements of the proceeding and thereafter to devote the time and attention to its completion that the parties are reasonably entitled to expect.

C. After accepting appointment and while serving as an arbitrator, a person should avoid entering into any business, professional, or personal relationship, or acquiring any financial or personal interest, which is likely to affect impartiality or which might reasonably create the appearance of partiality. For a reasonable period of time after the decision of a case, persons who have served as arbitrators should avoid entering into any such relationship, or acquiring any such interest, in circumstances which might reasonably create the appearance that they had been influenced in the arbitration by the anticipation or expectation of the relationship or interest.

Existence of any of the matters or circumstances described in this paragraph C does not render it unethical for one to serve as an arbitrator where the parties have consented to the arbitrator's appointment or continued services following full disclosure of the relevant facts in accordance with Canon II.

D. Arbitrators should conduct themselves in a way that is fair to all parties and should not be swayed by outside pressure, public clamor, and fear of criticism or self-interest. They should avoid conduct and statements that give the appearance of partiality toward or against any party.

E. When an arbitrator's authority is derived from the agreement of the parties, an arbitrator should neither exceed that authority nor do less than is required to exercise that authority completely. Where the agreement of the parties sets forth procedures to be followed in conducting the arbitration or refers to rules to be followed, it is the obligation of the arbitrator to comply with such procedures or rules. An arbitrator has no ethical obligation to comply with any agreement, procedures or rules that are unlawful or that, in the arbitrator's judgment, would be inconsistent with this Code.

F. An arbitrator should conduct the arbitration process so as to advance the fair and efficient resolution of the matters submitted for decision. An arbitrator should make all reasonable efforts to prevent delaying tactics, harassment of parties or other participants, or other abuse or disruption of the arbitration process.

G. The ethical obligations of an arbitrator begin upon acceptance of the appointment and continue throughout all stages of the proceeding. In addition, as set forth in this Code, certain ethical obligations begin as soon as a person is requested to serve as an arbitrator and certain ethical obligations continue after the decision in the proceeding has been given to the parties.

H. Once an arbitrator has accepted an appointment, the arbitrator should not withdraw or abandon the appointment unless compelled to do so by unanticipated circumstances that would render it impossible or impracticable to continue. When an arbitrator is to be compensated for his or her services, the arbitrator may withdraw if the parties fail or refuse to provide for payment of the compensation as agreed.

I. An arbitrator who withdraws prior to the completion of the arbitration, whether upon the arbitrator's initiative or upon the request of one or more of the parties, should take reasonable steps to protect the interests of the parties in the arbitration, including return of evidentiary materials and protection of confidentiality.

#### *Comment to Canon I*

A prospective arbitrator is not necessarily partial or prejudiced by having acquired knowledge of the parties, the applicable law or the customs and practices of the business involved. Arbitrators may also have special experience or expertise in the areas of business, commerce, or technology which are involved in the arbitration.

Arbitrators do not contravene this Canon if, by virtue of such experience or expertise, they have views on certain general issues likely to arise in the arbitration, but an arbitrator may not have prejudged any of the specific factual or legal determinations to be addressed during the arbitration.

During an arbitration, the arbitrator may engage in discourse with the parties or their counsel, draw out arguments or contentions, comment on the law or evidence, make interim rulings, and otherwise control or direct the arbitration. These activities are integral parts of an arbitration. Paragraph D of Canon I is not intended to preclude or limit either full discussion of the issues during the course of the arbitration or the arbitrator's management of the proceeding.

**CANON II. AN ARBITRATOR SHOULD DISCLOSE ANY INTEREST OR  
RELATIONSHIP LIKELY TO AFFECT IMPARTIALITY OR  
WHICH MIGHT CREATE AN APPEARANCE OF PARTIALITY.**

A. Persons who are requested to serve as arbitrators should, before accepting, disclose:

(1) any known direct or indirect financial or personal interest in the outcome of the arbitration;

(2) any known existing or past financial, business, professional or personal relationships which might reasonably affect impartiality or lack of independence in the eyes of any of the parties. For example, prospective arbitrators should disclose any such relationships which they personally have with any party or its lawyer, with any co-arbitrator, or with any individual whom they have been told will be a witness. They should also disclose any such relationships involving their families or household members or their current employers, partners, or professional or business associates that can be ascertained by reasonable efforts;

(3) the nature and extent of any prior knowledge they may have of the dispute; and

(4) any other matters, relationships, or interests which they are obligated to disclose by the agreement of the parties, the rules or practices of an institution, or applicable law regulating arbitrator disclosure.

B. Persons who are requested to accept appointment as arbitrators should make a reasonable effort to inform themselves of any interests or relationships described in paragraph A.

C. The obligation to disclose interests or relationships described in paragraph A is a continuing duty which requires a person who accepts appointment as an arbitrator to disclose, as soon as practicable, at any stage of the arbitration, any such interests or relationships which may arise, or which are recalled or discovered.

D. Any doubt as to whether or not disclosure is to be made should be resolved in favor of disclosure.

E. Disclosure should be made to all parties unless other procedures for disclosure are provided in the agreement of the parties, applicable rules or practices of an institution, or by law. Where more than one arbitrator has been appointed, each should inform the others of all matters disclosed.

F. When parties, with knowledge of a person's interests and relationships, nevertheless desire that person to serve as an arbitrator, that person may properly serve.

G. If an arbitrator is requested by all parties to withdraw, the arbitrator must do so. If an arbitrator is requested to withdraw by less than all of the parties because of alleged partiality, the arbitrator should withdraw unless either of the following circumstances exists:

(1) An agreement of the parties, or arbitration rules agreed to by the parties, or applicable law establishes procedures for determining challenges to arbitrators, in which case those procedures should be followed; or

(2) In the absence of applicable procedures, if the arbitrator, after carefully considering the matter, determines that the reason for the challenge is not substantial, and that he or she can nevertheless act and decide the case impartially and fairly.

H. If compliance by a prospective arbitrator with any provision of this Code would require disclosure of confidential or privileged information, the prospective arbitrator should either:

(1) Secure the consent to the disclosure from the person who furnished the information or the holder of the privilege; or

(2) Withdraw.

### CANON III. AN ARBITRATOR SHOULD AVOID IMPROPRIETY OR THE APPEARANCE OF IMPROPRIETY IN COMMUNICATING WITH PARTIES.

A. If an agreement of the parties or applicable arbitration rules establishes the manner or content of communications between the arbitrator and the parties, the arbitrator should follow those procedures notwithstanding any contrary provision of paragraphs B and C.

B. An arbitrator or prospective arbitrator should not discuss a proceeding with any party in the absence of any other party, except in any of the following circumstances:

(1) When the appointment of a prospective arbitrator is being considered, the prospective arbitrator:

(a) may ask about the identities of the parties, counsel, or witnesses and the general nature of the case; and

(b) may respond to inquiries from a party or its counsel designed to determine his or her suitability and availability for the appointment. In any such dialogue, the prospective arbitrator may receive information from a party or its counsel disclosing the general nature of the dispute but should not permit them to discuss the merits of the case.

(2) In an arbitration in which the two party-appointed arbitrators are expected to appoint the third arbitrator, each party-appointed arbitrator may consult with the party who appointed the arbitrator concerning the choice of the third arbitrator;

(3) In an arbitration involving party-appointed arbitrators, each party-appointed arbitrator may consult with the party who appointed the arbitrator concerning arrangements for any compensation to be paid to the party-appointed arbitrator. Submission of routine written requests for payment of compensation and expenses in accordance with such arrangements and written communications pertaining solely to such requests need not be sent to the other party;

(4) In an arbitration involving party-appointed arbitrators, each party-appointed arbitrator may consult with the party who appointed the arbitrator concerning the status of the arbitrator ( *i.e.*, neutral or non-neutral), as contemplated by paragraph C of Canon IX;

(5) Discussions may be had with a party concerning such logistical matters as setting the time and place of hearings or making other arrangements for the conduct of the proceedings. However, the arbitrator should promptly inform each other party of the discussion and should not make any final determination concerning the matter discussed before giving each absent party an opportunity to express the party's views; or

(6) If a party fails to be present at a hearing after having been given due notice, or if all parties expressly consent, the arbitrator may discuss the case with any party who is present.

C. Unless otherwise provided in this Canon, in applicable arbitration rules or in an agreement of the parties, whenever an arbitrator communicates in writing with one party, the arbitrator should at the same time send a copy of the communication to every other party, and whenever the arbitrator receives any written communication concerning the case from one party which has not already been sent to every other party, the arbitrator should send or cause it to be sent to the other parties.

#### CANON IV. AN ARBITRATOR SHOULD CONDUCT THE PROCEEDINGS FAIRLY AND DILIGENTLY.

A. An arbitrator should conduct the proceedings in an even-handed manner. The arbitrator should be patient and courteous to the parties, their representatives, and the witnesses and should encourage similar conduct by all participants.

B. The arbitrator should afford to all parties the right to be heard and due notice of the time and place of any hearing. The arbitrator should allow each party a fair opportunity to present its evidence and arguments.



C. The arbitrator should not deny any party the opportunity to be represented by counsel or by any other person chosen by the party.

D. If a party fails to appear after due notice, the arbitrator should proceed with the arbitration when authorized to do so, but only after receiving assurance that appropriate notice has been given to the absent party.

E. When the arbitrator determines that more information than has been presented by the parties is required to decide the case, it is not improper for the arbitrator to ask questions, call witnesses, and request documents or other evidence, including expert testimony.

F. Although it is not improper for an arbitrator to suggest to the parties that they discuss the possibility of settlement or the use of mediation, or other dispute resolution processes, an arbitrator should not exert pressure on any party to settle or to utilize other dispute resolution processes. An arbitrator should not be present or otherwise participate in settlement discussions or act as a mediator unless requested to do so by all parties.

G. Co-arbitrators should afford each other full opportunity to participate in all aspects of the proceedings.

*Comment to paragraph G*

Paragraph G of Canon IV is not intended to preclude one arbitrator from acting in limited circumstances (e.g., ruling on discovery issues) where authorized by the agreement of the parties, applicable rules or law, nor does it preclude a majority of the arbitrators from proceeding with any aspect of the arbitration if an arbitrator is unable or unwilling to participate and such action is authorized by the agreement of the parties or applicable rules or law. It also does not preclude ex parte requests for interim relief.

**CANON V. AN ARBITRATOR SHOULD MAKE DECISIONS IN A JUST, INDEPENDENT AND DELIBERATE MANNER.**

A. The arbitrator should, after careful deliberation, decide all issues submitted for determination. An arbitrator should decide no other issues.

B. An arbitrator should decide all matters justly, exercising independent judgment, and should not permit outside pressure to affect the decision.

C. An arbitrator should not delegate the duty to decide to any other person.

D. In the event that all parties agree upon a settlement of issues in dispute and request the arbitrator to embody that agreement in an award, the arbitrator may do so, but is not required to do so unless satisfied with the propriety of the terms of settlement. Whenever an arbitrator embodies a settlement by the parties in an award, the arbitrator should state in the award that it is based on an agreement of the parties.

CANON VI. AN ARBITRATOR SHOULD BE FAITHFUL TO THE RELATIONSHIP OF TRUST AND CONFIDENTIALITY INHERENT IN THAT OFFICE.

A. An arbitrator is in a relationship of trust to the parties and should not, at any time, use confidential information acquired during the arbitration proceeding to gain personal advantage or advantage for others, or to affect adversely the interest of another.

B. The arbitrator should keep confidential all matters relating to the arbitration proceedings and decision. An arbitrator may obtain help from an associate, a research assistant or other persons in connection with reaching his or her decision if the arbitrator informs the parties of the use of such assistance and such persons agree to be bound by the provisions of this Canon.

C. It is not proper at any time for an arbitrator to inform anyone of any decision in advance of the time it is given to all parties. In a proceeding in which there is more than one arbitrator, it is not proper at any time for an arbitrator to inform anyone about the substance of the deliberations of the arbitrators. After an arbitration award has been made, it is not proper for an arbitrator to assist in proceedings to enforce or challenge the award.

D. Unless the parties so request, an arbitrator should not appoint himself or herself to a separate office related to the subject matter of the dispute, such as receiver or trustee, nor should a panel of arbitrators appoint one of their number to such an office.

CANON VII. AN ARBITRATOR SHOULD ADHERE TO STANDARDS OF INTEGRITY AND FAIRNESS WHEN MAKING ARRANGEMENTS FOR COMPENSATION AND REIMBURSEMENT OF EXPENSES.

A. Arbitrators who are to be compensated for their services or reimbursed for their expenses shall adhere to standards of integrity and fairness in making arrangements for such payments.

B. Certain practices relating to payments are generally recognized as tending to preserve the integrity and fairness of the arbitration process. These practices include:

(1) Before the arbitrator finally accepts appointment, the basis of payment, including any cancellation fee, compensation in the event of withdrawal and compensation for study and preparation time, and all other charges, should be established. Except for arrangements for the compensation of party-appointed arbitrators, all parties should be informed in writing of the terms established;

(2) In proceedings conducted under the rules or administration of an institution that is available to assist in making arrangements for payments, communication related to compensation should be made through the institution. In proceedings where no institution has been engaged by the parties to administer the arbitration, any communication with arbitrators (other than party appointed arbitrators) concerning payments should be in the presence of all parties; and

(3) Arbitrators should not, absent extraordinary circumstances, request increases in the basis of their compensation during the course of a proceeding.

CANON VIII. AN ARBITRATOR MAY ENGAGE IN ADVERTISING OR PROMOTION OF ARBITRAL SERVICES WHICH IS TRUTHFUL AND ACCURATE.

A. Advertising or promotion of an individual's willingness or availability to serve as an arbitrator must be accurate and unlikely to mislead. Any statements about the quality of the arbitrator's work or the success of the arbitrator's practice must be truthful.

B. Advertising and promotion must not imply any willingness to accept an appointment otherwise than in accordance with this Code.

*Comment to Canon VIII*

This Canon does not preclude an arbitrator from printing, publishing, or disseminating advertisements conforming to these standards in any electronic or print medium, from making personal presentations to prospective users of arbitral services conforming to such standards or from responding to inquiries concerning the arbitrator's availability, qualifications, experience, or fee arrangements.

CANON IX. ARBITRATORS APPOINTED BY ONE PARTY HAVE A DUTY TO DETERMINE AND DISCLOSE THEIR STATUS AND TO COMPLY WITH THIS CODE, EXCEPT AS EXEMPTED BY CANON X.

A. In some types of arbitration in which there are three arbitrators, it is customary for each party, acting alone, to appoint one arbitrator. The third arbitrator is then appointed by agreement either of the parties or of the two arbitrators, or failing such agreement, by an independent institution or individual. In tripartite arbitrations to which this Code applies, all three arbitrators are presumed to be neutral and are expected to observe the same standards as the third arbitrator.

B. Notwithstanding this presumption, there are certain types of tripartite arbitration in which it is expected by all parties that the two arbitrators appointed by the parties may be predisposed toward the party appointing them. Those arbitrators, referred to in this Code as "Canon X arbitrators," are not to be held to the standards of neutrality and independence applicable to other arbitrators. Canon X describes the special ethical obligations of party-appointed arbitrators who are not expected to meet the standard of neutrality.

C. A party-appointed arbitrator has an obligation to ascertain, as early as possible but not later than the first meeting of the arbitrators and parties, whether the parties have agreed that the party-appointed arbitrators will serve as neutrals or whether they shall be subject to Canon X, and to provide a timely report of their conclusions to the parties and other arbitrators:

(1) Party-appointed arbitrators should review the agreement of the parties, the applicable rules and any applicable law bearing upon arbitrator neutrality. In reviewing the agreement of the parties, party-appointed arbitrators should consult any relevant express terms of the written or oral arbitration agreement. It may also be appropriate for them to inquire into agreements that have not been expressly set forth, but which may be implied from an established course of dealings of the parties or well-recognized custom and usage in their trade or profession;

(2) Where party-appointed arbitrators conclude that the parties intended for the party-appointed arbitrators not to serve as neutrals, they should so inform the parties and the other arbitrators. The arbitrators may then act as provided in Canon X unless or until a different determination of their status is made by the parties, any administering institution or the arbitral panel; and

(3) Until party-appointed arbitrators conclude that the party-appointed arbitrators were not intended by the parties to serve as neutrals, or if the party-appointed arbitrators are unable to form a reasonable belief of their status from the foregoing sources and no decision in this regard has yet been made by the parties, any administering institution, or the arbitral panel, they should observe all of the obligations of neutral arbitrators set forth in this Code.

D. Party-appointed arbitrators not governed by Canon X shall observe all of the obligations of Canons I through VIII unless otherwise required by agreement of the parties, any applicable rules, or applicable law.

#### CANON X. EXEMPTIONS FOR ARBITRATORS APPOINTED BY ONE PARTY WHO ARE NOT SUBJECT TO RULES OF NEUTRALITY.

Canon X arbitrators are expected to observe all of the ethical obligations prescribed by this Code except those from which they are specifically excused by Canon X.

##### *A. Obligations under Canon I*

Canon X arbitrators should observe all of the obligations of Canon I subject only to the following provisions:

(1) Canon X arbitrators may be predisposed toward the party who appointed them but in all other respects are obligated to act in good faith and with integrity and fairness. For example, Canon X arbitrators should not engage in delaying tactics or harassment of any party or witness and should not knowingly make untrue or misleading statements to the other arbitrators; and

(2) The provisions of subparagraphs B(1), B(2), and paragraphs C and D of Canon I, insofar as they relate to partiality, relationships, and interests are not applicable to Canon X arbitrators.

##### *B. Obligations under Canon II*

(1) Canon X arbitrators should disclose to all parties, and to the other arbitrators, all interests and relationships which Canon II requires be disclosed. Disclosure as required by Canon II is for the benefit not only of the party who appointed the arbitrator, but also for the benefit of the other parties and arbitrators so that they may know of any partiality which may exist or appear to exist; and

(2) Canon X arbitrators are not obliged to withdraw under paragraph G of Canon II if requested to do so only by the party who did not appoint them.

### *C. Obligations under Canon III*

Canon X arbitrators should observe all of the obligations of Canon III subject only to the following provisions:

- (1) Like neutral party-appointed arbitrators, Canon X arbitrators may consult with the party who appointed them to the extent permitted in paragraph B of Canon III;
- (2) Canon X arbitrators shall, at the earliest practicable time, disclose to the other arbitrators and to the parties whether or not they intend to communicate with their appointing parties. If they have disclosed the intention to engage in such communications, they may thereafter communicate with their appointing parties concerning any other aspect of the case, except as provided in paragraph (3);
- (3) If such communication occurred prior to the time they were appointed as arbitrators, or prior to the first hearing or other meeting of the parties with the arbitrators, the Canon X arbitrator should, at or before the first hearing or meeting of the arbitrators with the parties, disclose the fact that such communication has taken place. In complying with the provisions of this subparagraph, it is sufficient that there be disclosure of the fact that such communication has occurred without disclosing the content of the communication. A single timely disclosure of the Canon X arbitrator's intention to participate in such communications in the future is sufficient;
- (4) Canon X arbitrators may not at any time during the arbitration:
  - (a) disclose any deliberations by the arbitrators on any matter or issue submitted to them for decision;
  - (b) communicate with the parties that appointed them concerning any matter or issue taken under consideration by the panel after the record is closed or such matter or issue has been submitted for decision; or
  - (c) disclose any final decision or interim decision in advance of the time that it is disclosed to all parties.
- (5) Unless otherwise agreed by the arbitrators and the parties, a Canon X arbitrator may not communicate orally with the neutral arbitrator concerning any matter or issue arising or expected to arise in the arbitration in the absence of the other Canon X arbitrator. If a Canon X arbitrator communicates in writing with the neutral arbitrator, he or she shall simultaneously provide a copy of the written communication to the other Canon X arbitrator;
- (6) When Canon X arbitrators communicate orally with the parties that appointed them concerning any matter on which communication is permitted under this Code, they are not obligated to disclose the contents of such oral communications to any other party or arbitrator; and

(7) When Canon X arbitrators communicate in writing with the party who appointed them concerning any matter on which communication is permitted under this Code, they are not required to send copies of any such written communication to any other party or arbitrator.

*D. Obligations under Canon IV*

Canon X arbitrators should observe all of the obligations of Canon IV.

*E. Obligations under Canon V*

Canon X arbitrators should observe all of the obligations of Canon V, except that they may be predisposed toward deciding in favor of the party who appointed them.

*F. Obligations under Canon VI*

Canon X arbitrators should observe all of the obligations of Canon VI.

*G . Obligations Under Canon VII*

Canon X arbitrators should observe all of the obligations of Canon VII.

*H. Obligations Under Canon VIII*

Canon X arbitrators should observe all of the obligations of Canon VIII.

*I. Obligations Under Canon IX*

The provisions of paragraph D of Canon IX are inapplicable to Canon X arbitrators, except insofar as the obligations are also set forth in this Canon.

# Appendix H

## Model State Resolution<sup>23</sup>

### PUBLIC UTILITY/SERVICE COMMISSION OF THE STATE OF

Resolution \_\_\_\_\_

MM/DD/YYYY

RESOLUTION \_\_\_\_\_.

Use of Alternative Dispute Resolution Processes at the  
\_\_\_\_\_ Public Utility/Service Commission

#### Summary

Alternative Dispute Resolution (ADR) approaches have been commonly used in the courts for many years and are now being used in federal administrative proceedings and some state agencies. Because we endorse the policies behind ADR, we are taking steps to encourage its more frequent and systematic application in formal proceedings (and selectively to avoid the filing of formal proceedings). ADR should be accompanied by a careful evaluation of its results so that all participants gain a better understanding of the types of proceedings and issues that lend themselves to ADR, as well as the types of ADR methods that appear to work best in the regulatory context.

Under the supervision of the Chief Administrative Law Judge (CALJ), we desire to offer a range of ADR opportunities, both as to the types of applicable matters and to the available ADR methods. This resolution sets forth: the need for and purpose of this initiative; basic procedures; and the respective responsibilities of parties, ALJs, and the Commission to implement this program.

The Commission's fundamental mission is to define and protect the public interest as it relates to utility rates and service. We believe that ADR, in appropriate instances, helps us fulfill our mission; however, ADR does not relieve us of our ultimate responsibility to act in the public interest.

## **Background**

ADR commonly refers to the process of resolving a dispute between two or more persons without obtaining a formal, binding resolution of the dispute by a court or agency. ADR includes a variety of individual processes such as facilitation of a multiparty negotiation session or fact-finding, early neutral evaluation, mediation, and arbitration.

Because we emphasize the voluntary nature of ADR, our definition does not include processes, such as binding arbitration, that impose a solution on the disputing parties. Nevertheless, binding arbitration or other processes that impose a resolution may still offer more attractive options than court or administrative litigation. Also, we do not intend that this ADR program displace the use of traditional, required case management methods to narrow the scope of litigation (e.g., “meet and confer” requirements).

ADR processes are often preferable to a litigated result because: (a) they can produce outcomes that are more responsive to the parties’ needs; (b) are more consistent with the public interest; (c) can avoid the narrow results of litigation that may not adequately address the parties’ problems (d) will encourage more active participation of all parties (regardless of an individual party’s size or resources); (d) can often save the parties’ time and resources; and (e) will allow the Commission to direct its decision-making resources to other important proceedings.

In certain cases, the Commission must approve the parties’ ADR resolution of the disputed issues to ensure that their agreement comports with the applicable law, satisfies the public interest, and is enforceable. Also, as discussed below, ADR may be appropriate in other disputes arising within the Commission’s jurisdiction, but which are not yet pending as formal proceedings.

## **Description of the ADR Program**

The Office of Administrative Law Judges will manage the use of ADR in formal proceedings, and ADR-trained ALJs (or other appropriately trained neutrals in the Agency) will be used as the disinterested facilitators, mediators, and evaluators (“neutrals”) in the program at no cost. However, the CALJ, in consultation with the Commission, will establish advisory criteria for using outside professionals to act as neutrals. Outside professionals will be available to the parties as neutrals at their cost.

The basic ADR program components are:

1. Training—An appropriate number of ALJs and other staff members should receive several days of ADR training by qualified faculty. The ALJ Division should provide continuing additional ADR training on specialized topics. This instruction should build on training individual ALJs and staff members have completed and continue to receive from the National Judicial College or similar qualified providers.
2. Case selection--ALJ Division management will screen newly filed proceedings to identify those that may benefit from ADR. ALJ Division management also may identify



disputes, not yet filed as formal proceedings, which may benefit from ADR, thereby avoiding a proceeding. When appropriate proceedings are identified, the assigned ALJ or other appropriate agency personnel will be asked to discuss ADR prospects with the parties and to request ADR assistance when appropriate. ADR may be used in all types of proceedings before the Commission. In some cases, ADR may be used to address all disputes among the parties. In others, ADR may be used in a specific phase of the proceeding or as a means to resolve a set of issues. Assigned ALJs should also encourage ADR, as warranted, for discovery disputes arising during a proceeding. The ADR process may also be used to reach stipulations as to key facts, whose removal as contested issues may speed resolution of the case. Except for facilitations (see below), disputing parties may choose not to participate in ADR although the assigned ALJ may order disputing parties to meet with a neutral to discuss the feasibility of ADR.

3. Assignment of neutrals--Upon request of the Assigned Commissioner's Office and/or assigned ALJ, ALJ Division management will offer the parties the choice of an ADR ALJ (or other qualified staff neutral) or an outside professional to act as a neutral. In complicated cases, more than one qualified neutral will be offered to the parties and technical staff may be assigned. Except when outside professionals are used as neutrals, these ADR services will be provided at no charge to the parties. Parties shall pay all costs of outside professionals. Until experience points to an appropriate policy, the Commission will decide on a case by case basis whether any or all such costs may be passed on to ratepayers.

4. Types of ADR services--Initially, the ALJ Division will provide access to facilitation, mediation, and early neutral evaluation services.

- Facilitation involves an ADR ALJ or outside ADR professional convening and moderating a meeting or workshop where advance notice has been given, and all parties to the proceeding may attend. The neutral's role is to promote constructive communication among the parties. In appropriate situations, staff appointed by ALJ Division may serve as a facilitator with the concurrence of the parties.
- Mediation involves an ADR ALJ or outside ADR professional convening and meeting with those parties who have agreed to the process, both in joint and separate sessions, where sensitive communications are as confidential and privileged as settlement discussions. The neutral's role is to help the parties achieve a mutually acceptable outcome.
- Early neutral evaluation involves one or more ADR ALJs or outside ADR professionals who, after a presentation by the disputing parties, provide those parties with a confidential, nonbinding evaluation of the strengths and weaknesses of their positions.

5. Appropriate documentation and approval of settlements--When settlements have been reached, they will be documented by enforceable agreements among the settling parties. In many instances, the settlement can be implemented by dismissing the proceeding. In other situations, the settlement must be submitted to the assigned ALJ and the Commission for review.

6. Measurement and Evaluation--One purpose of our ADR emphasis is to identify the

appropriate ADR methods to resolve disputes successfully, efficiently, and with a high level of participant satisfaction. A systematic evaluation program is necessary to make these determinations. This evaluation will include both qualitative and quantitative measures. The ALJ Division will use confidential questionnaires and occasional interviews with ADR participants (parties, their lawyers, the neutrals, and decision-makers) to obtain feedback about their ADR experiences and how ADR affected the Commission's decision-making role. The ADR program should consider utilizing the services of an independent third party to evaluate the responses received on the case evaluations and to make recommendations back to the Commission. The ALJ Division will also track and compare case duration and management information so as to compare results in ADR and non-ADR proceedings.

8. Periodic reports--The ALJ Division will report to us periodically, during the next year, on the implementation and operation of the ADR program.

### **Basic Principles**

We decline at this moment to establish a detailed set of procedures for the ADR program because the ALJ Division and participants should be able to experiment and learn as they implement this program. We encourage feedback from all parties on the process. Rather than detailed procedures, we announce a set of principles that establish a basic framework for the program:

1. Voluntary--Generally, participation in ADR processes should be voluntary. Disputing parties cannot be forced to agree. When our staff is a disputing party, we strongly encourage staff to participate in ADR in appropriate circumstances. In three instances, ALJs and Assigned Commissioners can require disputing parties to participate in ADR processes: (a) facilitated workshops or other public meeting to discuss disputed issues; (b) settlement conferences conducted by the assigned ALJ or Assigned Commissioner; and (c) joint or separate meetings of disputants, conducted by an ADR ALJ, who is not the assigned ALJ, where the desirability and feasibility of an ADR process are explored. Litigants may assist by stating their amenability to ADR in their initial pleadings or during the proceeding. We do not disturb, however, required case management procedures traditionally used by assigned ALJs to identify issues and narrow disagreement in formal proceedings.
2. Use of ALJs and Outside Professionals—Use of ALJs to provide free ADR services should be voluntary. Parties are free to choose outside ADR professionals, but must pay all associated costs. The CALJ shall also commence an aggressive internal education and training program. We also expect the ALJ Division to take the lead in providing negotiation and ADR training to other Commission staff. We see this as a long-term commitment. We are confident that, by beginning to use ALJs now and providing ADR training and opportunities to other Commission staff, we will build an exceptionally competent core of neutrals who have both ADR and substantive expertise, while still permitting parties to have the option to use the services of outside professionals at their cost.
3. Timeliness--ADR should not be allowed to unduly prolong proceedings or needlessly burden the parties with additional preparation. It is, in fact, our expectation that if parties are diligent in preparing for the discussion of contested issues, the duration of formal proceedings actually may be shortened. Even if time is not saved, a negotiated settlement may still be more

beneficial to the parties and the public than a litigated result.

4. Good faith-- We believe that in many instances, these ADR processes will produce, consistent with the public interest, a solution more favorable to all settling parties. Consequently, we request the parties' and their representatives' good faith cooperation to implement this program by (a) exploring the desirability and feasibility of ADR in particular proceedings, (b) fairly explaining the pros and cons of ADR to clients, (c) respecting confidentiality agreements entered into as part of ADR, and (d) assisting the ALJ Division in evaluating the program. We firmly believe the parties and their representatives should not use an ADR process as an instrument for delay or solely for discovery purposes. We also affirm the neutral's authority to terminate an ADR process when one or more participants act in bad faith, or whenever the neutral believes that continuing ADR would not be productive.

5. Confidentiality--For ADR to be successful, confidentiality agreements are often required, unless that protection is provided by statute or regulation. These agreements usually prevent the parties from publicly disclosing information exchanged during the discussions or using the information in future litigation. The agreements also prevent the neutral from communicating confidential information, the substance of the discussions, or the positions of any of the participating parties to anyone including the decision-makers. Confidentiality is always critical in mediation and early neutral evaluation; but even in certain portions of public workshops, confidentiality agreements may be required to enable participants to participate openly and creatively. We will honor and enforce these laws, rules, and agreements consistent with our statutory responsibilities. When confidential ADR processes are used, we believe the neutral's communications with the assigned ALJ should be limited to timing and scheduling, a generalized assessment of whether settlement is likely, and other administrative and ministerial matters. Parties should likewise limit any communications with all Commissioners and the assigned ALJ.

6. Commission review—Many settlements can be finalized without further action by the Commission. Some settlements reached in formal proceedings still must be submitted to an ALJ and the Commission for review and approval. Such review may be required to fulfill the Commission's constitutional and statutory obligations, to protect the litigants' rights, or establish new policies or rules.

For ADR to be an attractive option for parties, proposed settlements should be reviewed expeditiously; and, when the assigned ALJ or Commissioner has recommended approval of a proposed settlement, we normally will defer to that recommendation. Our review of good faith settlements will be undertaken to implement the settling parties' reasonable expectations consistent with our obligations to non-settling parties and our constitutional and statutory requirements. If time permits, we will indicate our reasons for not accepting all or part of a settlement and allow the parties an opportunity to address our concerns. We also will resist the efforts of parties to circumvent the ADR process by ex parte appeals to individual Commissioners.

## **Conclusion**

We believe that ADR offers great potential to the Commission, and all who practice before the Commission, for improving decision-making processes in formal proceedings and certain other disputes. The ADR program should be implemented deliberately so that all participants can learn from experience and improve the processes. We pledge our full support for this initiative and encourage the participation of others.

IT IS RESOLVED as follows:

1. An alternative dispute resolution (ADR) program is established under the supervision of the Chief Administrative Law Judge (CALJ).
2. The CALJ shall proceed to implement the ADR program as described above, giving special emphasis to the basic principles we have outlined.
3. The CALJ, with the approval of the Commission, shall establish advisory criteria for the outside ADR professionals.
4. The CALJ shall monitor and evaluate the ADR program and, based on the interim results, make necessary modifications to the program so as to achieve the goals and principles we have outlined.
5. During the next year, the CALJ shall report to us every four months on the implementation of the ADR program. At the conclusion of the year, the CALJ shall provide us with an evaluation of the ADR program and make recommendations concerning the program's future.

This resolution is effective today.

# Appendix I

## Federal Energy Regulatory Commission's Scope of Review over Alternative Dispute Resolution Outcomes

### I. Introduction

This analysis<sup>24</sup> will address the Federal Energy Regulatory Commission's ("FERC") scope of review over (1) alternative dispute resolution ("ADR") outcomes in general and (2) "binding arbitration" in particular.<sup>25</sup>

### II. ADR Outcomes in General

According to FERC orders, decisions, and regulations, it must maintain some measure of review over ADR outcomes. The Commission's standard of review, however, depends on the particular energy statute that governs the matter subject to ADR. This interaction between an ADR outcome and the relevant energy statute is evident from FERC's "intent . . . that the ultimate outcome of an ADR proceeding . . . be subject to Commission review in a manner that conforms with the Commission's statutory duties using existing procedures for evaluating settlements." Alternative Dispute Resolution, 60 Fed. Reg. 19,494 at 14,495-6 (April 19, 1995) (final rule implementing the Administrative Dispute Resolution Act of 1990).

These standards of review range from ensuring that ADR outcomes are "consistent with the public interest" to ensuring that ADR is "just and reasonable." FERC, however, has generally indicated that it will give "substantial deference" to ADR outcomes. *See generally id.* at 19,498. In order to address the general legal principles governing the Commission's scope of review over ADR outcomes, this portion of the analysis will address the legal authority that: (1) indicates FERC must review ADR outcomes; and (2) discusses the specific review standards to which ADR is subject.

#### A. **Mandatory Review**

The preamble to the FERC regulation that implemented the Administrative Dispute Resolution Act of 1990 ("ADRA I"), in conjunction with FERC orders and decisions has clearly specified that FERC must review all ADR outcomes. For example, in the preamble to the 1995 regulations regarding ADRA I, FERC asserted that it "obviously must reserve authority to ensure that decisions reached through ADR procedures are not contrary to the public interest or inconsistent with statutory requirements." *Id.*

Moreover, as recently as 2004, one FERC order reaffirmed that the Commission is required by statute to review ADR outcomes. *See N.Y. Indep. Sys. Operator, Inc.*, 109 F.E.R.C. ¶ 61,163, at 61,779 n.28 (2004) (reconfirming that the "ultimate outcome of an ADR proceeding, like any other settlement[,] is subject to Commission review in a manner that conforms with the Commission's statutory duties"). In 1990 and 1994 orders, FERC indicated

that an arbitration agreement was “consistent with the Commission’s statutory responsibility” precisely because the agreement required the submission to FERC of any ADR outcome that the parties reached. *Amerada Hess Pipeline Corp.*, 53 F.E.R.C. ¶ 61,266, at 62,053 (1990); *see also Southwest Reg’l Transmission Ass’n*, 69 F.E.R.C. ¶ 61,100, at 61,402-03 (1994) (noting that the Commission conditioned its approval of the association’s Bylaws on the inclusion of a “requir[ement] that any arbitration decision issued pursuant to the Bylaws that affects matters subject to the Commission’s jurisdiction . . . be filed with the Commission”). Finally, FERC has also indicated that the Commission will entertain the appeal of “any ADR resolution.” *See Houston Lighting & Power Co.*, 83 F.E.R.C. ¶ 61,181, at 61,745 (1998).

## **B. Specific Standards of Review**

This section will address the specific standards of review that FERC must apply to ADR outcomes, according to: (1) statutory provisions; (2) a FERC preamble to its ADR regulations; (3) orders regarding Regional Transmission Groups, Order No. 888, and Order No. 2000; and (4) other FERC orders and decisions.

### **1. Statutory Basis for FERC’s Standard of Review**

According to the Senate Report that accompanied ADRA I, this statute preserved and merely supplemented the procedures regarding ADR that each agency already followed prior to the enactment of the new law. S. Rep. No. 101-543, *reprinted in* 1990 U.S.C.C.A.N. 3931, 3931-3932. Therefore, FERC must continue to review ADR outcomes in accordance with “the Commission’s own organic statutes[,]” which have established standards that ADR outcomes must satisfy if FERC is to approve the outcomes. *See* Alternative Dispute Resolution, 60 Fed. Reg. 19,494 at 19,496 (1995).

### **2. Preamble to Final ADR Regulations**

In 1995, FERC provided a general statement summarizing the standard of review that FERC would apply to ADR results. The 1995 preamble to FERC’s final regulations implementing ADRA I indicated that FERC generally would give “substantial deference” to ADR outcomes. *Id.* at 19,498.

### **3. Policy Statement Regarding Regional Transmission Groups, Order No. 888, and Order No. 2000**

Earlier in 1993, a FERC policy statement had provided more insight regarding the Commission’s deference toward ADR outcomes. The Commission’s policy statement regarding Regional Transmission Groups (“RTGs”) explicitly described several factors affecting the level of deference that RTGs engaging in an ADR process will receive. These factors include “the type of issue to be resolved, the degree of specificity in the RTG agreement, . . . and [the] type of ADR being used.” Policy Statement Regarding RTGs, 58 Fed. Reg. 41,626 at 41,632 (Aug. 5, 1993).

In Order No. 888 regarding open access non-discriminatory transmission services, FERC described its intent to “give deference to the planning, dispute resolution, and decision-making processes of an RTG.” FERC Order No. 888 at 642 (Apr. 24, 1996), <http://www.ferc.gov/legal/maj-ord-reg/land-docs/rm95-8-00w.txt>. In Order 2000 regarding Regional Transmission Organizations, FERC noted, “it is generally more efficient for these organizations to resolve many disputes internally rather than bringing every dispute to the Commission.” FERC Order No. 2000, 65 Fed. Reg. 810 at 830 (Jan. 6, 2000). This order also reconfirmed the sentiment from the Commission’s 1993 policy statement that it would “entertain proposals for some degree of deference to decisions rendered pursuant to an ADR process, pursuant to procedures that . . . assure due process for all participants.” *Id.* at 831.

#### 4. *Orders and Decisions*

Regarding the “Commission’s own organic statutes” that the Senate Report to ADRA I previously mentioned, several other FERC orders and decisions reviewing ADR outcomes under various energy statutes have provided further insight regarding the Commission’s view of the appropriate scope of review.

FERC recently noted that it had the “plenary authority” to review an arbitration award “de novo.” *N.Y. Indep. Sys. Operator, Inc.*, 109 F.E.R.C. ¶ 61,163, at 61,778-9 (2004). The Commission, however, balanced this “de novo” review with its statutory responsibility to “encourage[] parties to resolve their disputes by arbitration” and denied one party’s request for a rehearing of the Commission’s earlier refusal to consider certain of the party’s exhibits. *Id.* The Commission subsequently noted that it “has long indicated that it would accord appropriate deference to ADR outcomes.” *Id.* at 61,781. According such deference, the Commission affirmed the arbitration award but ordered a revision of the calculation of compensation due in the award. *Id.* at 61,783. FERC also has ruled that it may review an arbitrator’s decision where the rights of the parties have been prejudiced. Such review occurs at the conclusion of the arbitration process, when parties may appeal the arbitrator’s decision and findings of fact. *Midwest Indep. Transm. System Operator*, 115 F.E.R.C. ¶ 61, 177 at P 31(2006), *reh’g denied*, 116 F.E.R.C. ¶ 61, 233 (2006).

FERC stated in 2004, “The Commission has long recognized the value of parties seeking to resolve disputes through means other than formal litigation before the Commission, and thus has stated that it is desirable and appropriate, if otherwise consistent with the public interest, for the Commission to adhere to the results of a binding arbitration award. . . .” *Cities of Anaheim et al. v. Cal. Indep. Sys. Operator Corp.*, 107 F.E.R.C. ¶ 61,070, at P 33 (2004). The tariff subject to arbitration in this case, however, “provide[d] for a right of appeal . . . upon a claim that an arbitrator’s decision [was] contrary to or beyond the scope of . . . the Federal Power Act, or the Commission’s regulations or decisions.” Therefore, the Commission reversed the arbitrator’s award that had favored the independent system operator (“ISO”) and required the ISO to refund the amounts it had overcharged the petitioners. *Id.*

In *Cal. Indep. Sys. Operator Corp.*, 107 F.E.R.C. ¶ 61,152 (2004), *reh’g denied*, 111 F.E.R.C. ¶ 61,078 (2005), the Commission gave “substantial deference” to the arbitrator’s factual findings in accordance with the ISO Tariff and upheld the arbitrator’s award.

On rehearing, the Commission interpreted the ISO Tariff's provisions regarding an automatic stay of the arbitrator's award so as to apply during the pendency of an appeal to a court of competent jurisdiction, not just during the pendency of an appeal to the Commission. 111 F.E.R.C. ¶ 61,078 at P 25.

In 1997-98, FERC addressed a dispute over the Commission's acceptance of certain revisions to ADR provision of transmission service tariffs for transmission of power over two high voltage, direct current interconnections. *Houston Lighting & Power Co.*, 81 FERC ¶ 61,015 (1997); 83 F.E.R.C. ¶ 61,181 (1998). During this dispute, FERC addressed one party's contention that the "Revised Tariff inappropriately require[d] alternative dispute resolution ... prior to filing a complaint with the Commission...." 83 F.E.R.C. at 61,745. In response, FERC emphasized its preference for parties to "resolve disputes on their own, or with the help of a mediator, ... thus eliminat[ing] the need to bring disputes to [FERC]." *Id.* Despite this preference, however, FERC also noted, "Of course, we will permit any party to appeal any mediation decision" and "any ADR resolution may be appealed to the Commission...." *Id.* Ultimately, FERC denied a request for a rehearing of its previous order that had approved the ADR provisions in the Revised Tariff. *Id.* at 61,745-47. In a similar fashion, FERC recently noted that it permits parties to hydropower licensing settlements to agree as to the form of dispute resolution provisions they will use during the license term, even though it could only enforce them against licensees. Policy Statement on Hydropower Licensing Settlements, 116 F.E.R.C. ¶ 61,270 at P 15 (Sept. 21, 2006).

Before it issued its ADR regulations in 1995, FERC explicitly noted the scope of review over ADR outcomes that the Federal Power Act ("FPA") and the Natural Gas Act ("NGA") require. In 1991, FERC determined that a party's dispute should be subject to arbitration. *Madison Gas & Elec. Co.*, 56 F.E.R.C. ¶ 61,447, at 62,579-80 (1991). FERC ordered the parties to file promptly the outcome of arbitration with FERC so that it could determine whether the award was "consistent with the public interest"—the standard of review that section 205 of the FPA establishes. *Id.* at 61,580. Then in 1993, FERC reaffirmed that "we are bound to enforce" the FPA, which requires the Commission to "ensure that the [ADR] is not unjust, unreasonable, or unduly discriminatory or preferential." Policy Statement Regarding RTGs, 58 Fed. Reg. 41,626 at 41,631 (1993). In a similar vein, when FERC reviewed a corporation's process for arbitration under the NGA in 1991, FERC applied a "just and reasonable standard" in accordance with the statutory requirement of the NGA. *Transcon. Gas Pipe Line Corp.*, 57 F.E.R.C. ¶ 61,345, at 62,113-14 (1991).<sup>26</sup>

Although the Commission's pronouncements have described a variety of standards of review for ADR outcomes, there are a few principles that appear to apply. FERC generally reviews ADR outcomes to ensure they are "just and reasonable" and "consistent with the public interest" under the Federal Power Act and the Natural Gas Act. Even in light of FERC's mandatory review, however, it has determined that it will conduct its review of ADR outcomes with varying degrees of deference.



### **III. Binding Arbitration**

The requirement that FERC must provide some review over “binding arbitration” has been grounded more specifically in constitutional concerns than FERC’s review over ADR outcomes in general. In the Administrative Dispute Resolution Act of 1996 (“ADRA II”), 5 U.S.C. §§ 571 et seq., however, Congress eliminated several avenues by which FERC previously had been able to review “binding arbitration” awards. This indicates that FERC currently has less of an obligation to review “binding arbitrations” than prior to the 1996 Act. This portion of the analysis will (1) summarize the statutory and regulatory provisions governing the review of “binding arbitration,” (2) discuss past and present views regarding the constitutionality of “binding arbitration,” and (3) describe how ADRA II altered the review of “binding arbitration” as part of an overall effort to further encourage the use of ADR mechanisms.

#### **A. Statutory Provisions Regarding the Review of “Binding Arbitration”**

According to ADRA I and ADRA II, which addressed “binding arbitration,” arbitration awards become final thirty days after an arbitration agreement has been served on every involved party. 5 U.S.C. § 580(b) (2000). Therefore, FERC has up to thirty days in which to review such an award. The standard under which FERC must scrutinize arbitration awards is “based on the statutory standard that applies to the issues resolved, and depends, therefore, on whether the issues involve rate, certificate, or other matters in the Commission’s jurisdiction.” Administrative Dispute Resolution: Notice of Proposed Rulemaking, 59 Fed. Reg. 59,715 at 59,723 (Nov. 18, 1994).

#### **B. Constitutional Background**

In the early 1990s, the executive branch had significant concerns regarding the constitutionality of “binding arbitration,” but over the past ten years, these concerns have partially dissipated. During this same time period, Congress diminished the number of avenues by which FERC could review “binding arbitration” when Congress passed ADRA II in 1996.

President George Bush issued an Executive Order in 1991 that prohibited the federal government from voluntarily agreeing to “binding arbitration,” even though ADRA I in 1990 provided for such arbitration. *See* Exec. Order No. 12,778, 56 Fed. Reg. 55,195 at 55,196 (Oct. 25, 1991).<sup>27</sup> ADRA I had addressed concerns within the U.S. Department of Justice regarding the constitutionality of “binding arbitration” by establishing a thirty-day period during which FERC could review any “binding arbitration” award before it became final.<sup>28</sup> *See* S. Rep. No. 101-543, *reprinted in* 1990 U.S.C.C.A.N. 3931, 3935-37. The 1991 Executive Order, however, precluded the use of “binding arbitration” even with this review period.

However, a Justice Department official in 1995 drafted a memorandum that indicated the Department no longer believed there was a general constitutional prohibition on the federal government entering a “binding arbitration” agreement. *See* Justice Dep’t Mem.<sup>29</sup> Moreover, President Clinton issued an Executive Order in 1996 that overturned the previous ban on “binding arbitration.” *See* Exec. Order No. 12,988, 61 Fed. Reg. 4727 at 4734 (Feb. 5, 1996).<sup>30</sup>

### C. Alterations to “Binding Arbitration” Provisions by ADRA II

Although ADRA II maintained the thirty-day review period that Congress originally enacted to address the constitutionality concerns regarding binding arbitration, ADRA II diminished FERC’s ability to review arbitration outcomes. ADRA II eliminated FERC’s ability to vacate binding arbitration awards and eliminated FERC’s authority to terminate arbitration proceedings. *See* 5 U.S.C. § 580 (2000); Administrative Dispute Resolution Act of 1996, Pub. L. No. 104-320, § 8, 110 Stat. 3870 at 3872 (1996).

No House or Senate Report accompanied ADRA II to clarify the intent behind Congress’s elimination of these provisions to vacate or to terminate arbitration. The preambles to FERC’s regulations to conform to changes made by the Act, however, indicated that the 1990 provisions allowing an agency to vacate or terminate arbitration “were seen as having a chilling effect on the use of ADR.” *Complaint Procedures*, 64 Fed. Reg. 17,087 at 17,088 (April 8, 1999). According to the Commission, the elimination of these provisions would “further foster an environment that promotes consensual resolution of disputes....” *Id.* In addition, the Federal Motor Carrier Safety Administration issued a statement of guidance regarding “binding arbitration,” which described the ability under the 1990 Act to “opt out” of an arbitration award as rendering the arbitrations as “less than ‘binding.’” *Guidance for the Use of Binding Arbitration Under the Administrative Dispute Resolution Act of 1996*, 69 Fed. Reg. 10,288-90 (Mar. 4, 2004). Therefore, the agency asserted that the 1996 Act was necessary to authorize “fully binding arbitration.” *Id.*<sup>31</sup>

Because Congress has eliminated the Commission’s statutory authority to vacate arbitration awards or terminate arbitration proceedings, FERC currently enjoys less review over “binding arbitration” awards than prior to the 1996 Act. This might be an indication that Congress and the executive branch have determined that constitutional concerns no longer require FERC to maintain as strict of a review over ADR outcomes. No legislative history regarding ADRA II, however, states that it is constitutionally viable for FERC to completely forgo review of “binding arbitration” awards.

#### **IV. Conclusion**

The 1990 and 1996 Administrative Dispute Resolution Acts declined to mandate any new standard of review over ADR outcomes regarding “binding arbitration” and other ADR mechanisms. Rather, the laws merely supplemented an agency’s longstanding approach to review ADR outcomes. The Natural Gas Act and the Federal Power Act and other statutes administered by FERC—and a number of orders and decisions interpreting these Acts—set forth FERC’s scope of review.

FERC currently must oversee ADR outcomes sufficiently to ensure that the outcomes align with the statutory standards. Moreover, FERC’s regulations explicitly specify such a requirement of review. The agency does accord ADR outcomes some degree of deference. Of significance, Congress eliminated the Commission’s statutory authority to vacate arbitration awards or terminate arbitration proceedings, thus FERC currently has a reduced level of review over “binding arbitration” awards than prior to ADRA II.

# Appendix J

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U. S. Environmental Protection Agency: Office of Pollution Prevention and Toxics, *Constructive Engagement Resource Guide: Practical Advice for Dialogue among Facilities, Workers, Communities, and Regulators* (1999).

## **Selected Web Sites**

American Arbitration Association website, <http://www.adr.org>

CPR International Institute for Conflict Prevention and Resolution website,  
<http://www.cpradr.org>

Federal ADR Work Group homepage, <http://www.adr.gov/index.html>

Federal Energy Regulatory Commission, ADR Newsletter,  
<http://72.14.203.104/search?q=cache:jhBYUm18Qg4J:www.ferc.gov/legal/adr/news.asp+ferc+adr&hl=en&gl=us&ct=clnk&cd=1&client=firefox-a>

# Endnotes

<sup>1</sup> Members participated in the Forum’s work as individuals, rather than formal representatives of any governmental or other entity, and their participation does not reflect any entity’s support for, or endorsement of, this Report’s findings or recommendations.

<sup>2</sup> CAEM established an internal website for the Forum’s activities.

<sup>3</sup> ADR Forum members believe that consistent adherence to all of these recommendations will afford all parties the most satisfactory, productive ADR experience possible, but also recognize that some governmental entities, regulatory agencies, or companies may not be able to implement them fully at all times due to resource constraints or contradictory laws, rules, or policies.

<sup>4</sup> E.g., the Administrative Dispute Resolution Act of 1996, 5 U.S.C. §§571-584, Public L. No. 104-320; the Alternative Dispute Resolution Act of 1998, 28 U.S.C. § 651-658, Public L. No. 105-315; and a policy memorandum on environmental conflict resolution from the Office of Management and Budget and the Council on Environmental Quality (November 28, 2005).

<sup>5</sup> See Jonathan Raab, *Using Consensus Building to Improve Utility Resolution*, American Council for Energy-Efficient Economy (1994).

<sup>6</sup> To increase the likelihood that settlements will reflect regulators’ policies and preferences, regulators should consider including members of agency staff as parties in settlement negotiations. These staff negotiators should not be able to advise regulators in the same proceeding. Instead, other staff, who do not confer with negotiating staff, should advise regulators.

<sup>7</sup> Interest-based or mutual gains negotiation is called by various names, such as “win-win” negotiation, to represent an approach to negotiation first captured in Roger Fisher and William Ury’s *Getting to Yes*.

<sup>8</sup> These principles are intended to offer an example of aspects of a well thought-out ADR system, rather than a template to replicate.

<sup>9</sup> Preventing Undue Discrimination and Preference in Transmission Service, Notice of Proposed Rulemaking, 71 Fed. Reg. 32636 (June 6, 2006).

<sup>10</sup> *Id.* at 32668.

<sup>11</sup> *Id.* at 32724-5 (Proposed Open Access Transmission Tariff Section 12). In addition, the Energy Policy Act of 2005 (EPAAct 2005) added a provision to the Federal Power Act that promotes ADR. Section 1232 of EPAAct 2005, dealing with federal utility participation in transmission organizations, requires that a “contract, agreement or other arrangement transferring control and use of all or part of the transmission system of a Federal utility to a Transmission Organization” shall include “a provision for the resolution of disputes through arbitration or other means... notwithstanding the obligations and limitations of any other law regarding arbitration ....” Pub. L. No. 109-58, § 1232 (2005).

<sup>12</sup> The role of the mediator is *not* to render a decision. In appropriate circumstances and with the knowing consent of the parties, however, a mediator may be appointed an arbitrator of the dispute.

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<sup>13</sup> Some agencies blur these distinctions by using terms like “settlement judge” to refer to an ALJ serving as a mediator, expert advisor, or other kind of ADR neutral.

<sup>14</sup> E.g., the Model Standards of Conduct for Mediators, included as Appendix F, recently revised by the Association for Conflict Resolution, American Bar Association, and American Arbitration Association, as well as other professional or ethical codes applying to those wearing more than one "hat" in an ADR proceeding (e.g., mediator, attorney, judge).

<sup>15</sup> Many regulatory agencies, especially in smaller states, will not have qualified mediators on staff. At other times, the appropriate staff mediator may not be available, or for certain cases outside mediators may be preferred or better suited for any of a variety of reasons.

<sup>16</sup> See, e.g., AAA/ABA Code of Ethics for Arbitrators in Commercial Disputes, included as Appendix G.

<sup>17</sup> © International Institute for Conflict Prevention & Resolution, 575 Lexington Avenue, New York, NY 10022; (212) 949-6490, [www.cpradr.org](http://www.cpradr.org). Reprinted with permission of CPR Institute. The CPR Institute is a nonprofit initiative of 500 general counsel of major corporations, leading law firms and prominent legal academics whose mission is to install ADR into the mainstream of legal practice.

<sup>18</sup> A model resolution for state public utility/service commissions is included as Appendix H.

<sup>19</sup> An analysis of, among other things, key FERC actions under the Federal Power Act and the Natural Gas Act is included as Appendix I.

<sup>20</sup> E.g., Administrative Dispute Resolution Act, 5 U.S.C. § 574; ABA Committee on Federal ADR, *Guide to Confidentiality under the Federal Administrative Dispute Resolution Act* (March 2005) (<http://www.abanet.org/dispute/news/2006/Guide-Final-Jul05.pdf>); in New York, see rules at 16 NYCRR sec. 3.9(d)(e).

<sup>21</sup> Public Law No. 104-104, codified at 47 USC §§ 151 et seq. (Feb. 8, 1996).

<sup>22</sup> It may be useful to encourage in-house third party neutrals to volunteer in local dispute resolution settings such as local courts, community mediation programs, and others to improve and maintain their ADR skills. Also, to the extent that agency staff members are active participants in resolution of litigated cases or other conflicts, they should be trained in the use of ADR processes, similar to the training and knowledge-based requirements for attorneys and companies as noted herein.

<sup>23</sup> This resolution is modeled on the approach of California PUC. While differing in some details, a comparable approach has been successfully used at the New York PSC. Although this model assigns ADR activities and administration to the agency’s Office of ALJs, it is not meant to imply that only ALJs are capable of administering or implementing such a program; indeed, FERC and other agencies have successfully located major ADR responsibilities elsewhere.

<sup>24</sup> The information in this Appendix is not legal advice. Readers should seek specific legal advice before acting on subjects addressed herein.



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<sup>25</sup> This analysis will treat “binding arbitration” separately from other ADR mechanisms because it is the only type of ADR whose review process receives particular treatment in the Administrative Dispute Resolution Act of 1996 (“ADRA II”). “Binding arbitration” has an historical background that is distinct from other types of ADR.

<sup>26</sup> In addition to these cases where the Commission directly reviewed an ADR outcome, in 1989 the D.C. Circuit reviewed a FERC ruling regarding arbitration. *See Duke Power Co. v. FERC*, 864 F.2d 823 (D.C. Cir. 1989). In this case, the D.C. Circuit reviewed FERC’s decision to resolve a dispute in lieu of arbitration even though the parties had entered into an agreement with a mandatory arbitration clause. *Id.* at 829. Although this case is distinguishable from the issue of FERC’s scope of review over ADR outcomes, the opinion still provides useful information about a federal court’s general approach to reviewing FERC decisions regarding ADR mechanisms. In its opinion, the D.C. Circuit considered whether FERC had “properly retained jurisdiction to decide [a] dispute despite an arbitration clause in [certain] agreements” between the petitioner and the intervenors. *Id.* at 824. The D.C. Circuit held that “the Commission properly retained jurisdiction over the subject matter of this dispute” because the issue before FERC was “a matter distinctly within the Commission’s statutory mandate.” *Id.* at 825. Although the Commission had a “policy of encouraging arbitration of disputes,” the circuit court held that “the Commission acted within its discretion in declining to submit the instant dispute to arbitration.” *Id.* at 830.

<sup>27</sup> In a 1995 memorandum discussing the aspects of binding arbitration that have raised constitutional concerns, the Justice Department referenced “the federal government . . . entering into binding arbitration,” the executive branch’s judgment “being subordinated to the judgment of an arbitrator,” and “the government when it is a party.” Justice Dep’t Mem. §§ (III), (V)(B). This terminology implies that particular constitutional concerns arose when a federal agency was actually a party to the arbitration.

<sup>28</sup> Specifically, the Justice Department had believed that such arbitration might violate the Appointments Clause, U.S. Const. art. II, § 2, cl. 2, which requires the President to appoint officers of the United States. *See* S. Rep. No. 101-543, *reprinted in* 1990 U.S.C.C.A.N. 3931, 3935. The concern was that in “binding arbitration,” arbitrators who had not received appointment from the President would be “perform[ing] agency decision-making powers.” *Cf. id.*

<sup>29</sup> The Department in 1995 based this assertion on its conclusion that arbitrators who parties retain to decide a particular matter are more akin to independent contractors than federal employees. Justice Dep’t Mem. § II(A)(4). Because arbitrators are not federal employees, “it cannot be said that they are officers of the United States,” and therefore, “the Appointments Clause does not place any . . . restrictions on the manner in which they are chosen.” *Id.* The memorandum clarified, however, that “the Constitution does impose substantial limits on the authority of the federal government to enter into binding arbitration in specific cases.” For example, the memorandum noted that “the general separation of powers principle would stand as a bar to vesting an arbitration panel with unreviewable authority to direct . . . [the] conduct of federal litigation by the executive branch’s attorneys.” *Id.* § IV. The memorandum continued on to note, however, that when “a dispute over the exercise of executive authority is submitted to binding arbitration, the general separation of powers principle has little force.” *Id.* The memorandum also discussed several Supreme Court cases, including a 1985 opinion that this analysis later addresses, to highlight that certain arbitration schemes could violate Article III requirements regarding judicial review. *Id.* § (V)(A)(1).

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<sup>30</sup> One additional constitutional issue regarding “binding arbitration” within an administrative agency arose before the Supreme Court in *Thomas v. Union Carbide Agricultural Products Co.* *Thomas v. Union Carbide Agric. Prods. Co.*, 473 U.S. 568 (1985). In this case, the Court considered whether Congress vested too much decision-making authority in a non-Article III tribunal when it authorized an administrative agency (the Environmental Protection Agency) to resolve disputes via arbitration procedures that were subject to limited judicial review. *Id.* at 589-93. The Court found that the arbitration scheme at issue preserved sufficient judicial review, even though the relevant arbitration outcomes might receive review for only “fraud, misconduct, or misrepresentation.” *Id.* at 592. Ultimately, the Court held that Congress “may create a seemingly ‘private’ right that is so closely integrated into a public regulatory scheme as to be a matter appropriate for agency resolution with limited involvement by the Article III judiciary.” *Id.* at 593-94.

<sup>31</sup> Moreover, the Senate Report accompanying the passage of the 1990 Act indicated that the provisions allowing an agency to vacate or terminate arbitration were “added to resolve Constitutional concerns about an arbitrator’s making decisions for the federal government.” *See* S. Rep. No. 101-543, *reprinted in* 1990 U.S.C.C.A.N. 3931, 3944. Therefore, it is possible that the executive branch’s change in sentiment regarding the constitutionality of “binding arbitration” as evidenced in Executive Order 12,988 and the 1995 Justice Department Memorandum may also have influenced Congress to believe that provisions allowing an agency to vacate an arbitration award or terminate an arbitration proceeding were unnecessary.