

# REPORT OF THE ALTERNATIVE DISPUTE RESOLUTION COMMITTEE

This report addresses selected recent developments relating to the use of ADR in the energy industry.<sup>1</sup> Among other things, it provides updated information and statistics on the use of ADR at the Federal Energy Regulatory Commission (FERC or Commission) and recent developments under the Energy Charter Treaty. The time frame covered by this report is January 2007 to December 2007.

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## I. DEVELOPMENTS AT THE FEDERAL ENERGY REGULATORY COMMISSION

### A. *The FERC's Commitment to ADR Remained Strong in FY-2007*

The FERC continued to build programmatic/institutional capacity for ADR and Environmental Conflict Resolution (ECR) in FY-2007.<sup>2</sup> In its Strategic Plan, the Commission “encourages the use of alternative dispute resolution procedures” as part of its guiding principle of *Due Process and Transparency*.<sup>3</sup> The annual Performance Budget Request to the Office of Management and Budget tracks environmental collaborative problem-solving and ADR processes (including ECR) and identifies specific performance measurement data and results supporting the Commission’s ADR and ECR initiatives.<sup>4</sup>

Examples of the Commission’s continuing commitment to the use of ADR and ECR include action in three FY-2007 rulemakings:

On November 16, 2006, the Commission issued final regulations setting forth procedures for the processing of applications to site electric transmission

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1. This report does not include Alternative Dispute Resolution (ADR) developments relating to regional transmission organizations or independent system operators which were the subject of a symposium previously published in the Energy Law Journal. See Energy Bar Association Alternative Dispute Resolution Committee, Panel Presentation, *Alternative Dispute Resolution at RTOs, ISOs, and Power Pools*, 28 ENERGY L.J. 517 (2007).

2. The FERC’s fiscal year runs from October through September.

3. FERC, FERC STRATEGIC PLAN FOR FISCAL YEARS 2006 – 2011 5 (2006), <http://ferc.gov/about/strat-docs/FY-06-11-strat-plan-print.pdf>.

4. See FERC, FY 2008 CONGRESSIONAL PERFORMANCE BUDGET REQUEST 79-80 (2007), <http://ferc.gov/about/strat-docs/FY08-budg.pdf>.

facilities.<sup>5</sup> Those regulations encourage maximum participation from all interested stakeholders, requiring the development of a Public Participation Plan and setting forth procedures for extensive pre-application and post-application processes. The participation plans will provide all interested parties, including affected landowners, with information on all aspects of the proposed project, including environmental impacts. The participation plans provide for public involvement during the extensive pre-filing and application processes. Further, in its order adopting the regulations, the Commission offered the assistance of its Dispute Resolution Service (DRS) to assist states in the planning of electric transmission facilities.

On February 16, 2007, the Commission adopted a final rule reforming its decade-old open-access transmission regulatory framework.<sup>6</sup> Order No. 890: (1) strengthens the *pro forma* open-access transmission tariff, or OATT, to ensure that it achieves its original purpose of remedying undue discrimination; (2) provides greater specificity to reduce opportunities for undue discrimination and facilitate the Commission's enforcement; and (3) increases transparency in the rules applicable to planning and use of the transmission system.<sup>7</sup> All public utility transmission providers, including RTOs and ISOs were required to file revisions to their *pro forma* OATT. The filings were to include dispute resolution procedures to address both procedural and substantive planning issues related to Order No. 890's planning process. Order No. 890 encouraged transmission providers, customers, and other stakeholders to utilize the DRS to help develop a three-step dispute resolution process, consisting of negotiation, mediation, and arbitration.<sup>8</sup>

On August 6, 2007, the Commission revised its regulations to delegate to the Secretary of the Commission the authority to direct the DRS to contact the parties in a complaint proceeding and establish a date by which the DRS must report to the Commission whether a dispute resolution process to address the complaint will be pursued by the parties.<sup>9</sup> This is consistent with section 385.206 of the Commission's regulations governing complaints which requires a person filing a complaint before the Commission to state in the initial pleading whether various dispute resolution mechanisms have been used, or if not, why not, and whether the complainant believes that ADR under the Commission's supervision could be helpful and what types of ADR processes could be used.<sup>10</sup>

Jurisdictional entities, stakeholders, and the public can find additional information about the Commission's Dispute Resolution Service on the main page of the FERC website, and can inquire about or request that an ADR or ECR process be initiated via the DRS toll-free helpline and email address, or the Commission's Enforcement hotline.<sup>11</sup> A project sponsor, stakeholders, other

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5. Order No. 689, *Regulations for Filing Applications for Permits to Site Interstate Electric Transmission Facilities*, F.E.R.C. STATS. & REGS. ¶ 31,234 (2006), 71 Fed. Reg. 69,440 (2006).

6. Order No. 890, *Preventing Undue Discrimination and Preference in Transmission Service*, [Regs. Preambles 2007] F.E.R.C. STATS. & REGS. ¶ 31,241 (2007), 72 Fed. Reg. 12,266 (2007), *order on reh'g and clarification*, Order No. 890-A, 121 F.E.R.C. ¶ 61,297 (2007).

7. *Id.*

8. *Id.*

9. Order No. 699, *Conforming Changes*, [Regs. Preambles] F.E.R.C. STATS. & REGS. ¶ 31,254 (2007), 72 Fed. Reg. 45,320 (2007).

10. Complaints, 18 C.F.R. § 385.206 (2007).

11. Federal Energy Regulatory Commission, <http://www.ferc.gov/> (last visited Mar. 8, 2008).

agencies, and members of the public may contact the DRS at any time and the DRS can initiate an ADR process informally with the parties if they are interested.

The Commission invests in and supports Commission-wide training to expand employees' knowledge and skills relating to ADR methods and tools for conflict prevention and resolution, such as facilitation and interest-based negotiation for environmental collaborative problem-solving. During 2007, the Commission's DRS provided a three part training course to employees: 1) Introduction to ADR processes; 2) Facilitating Meetings and Technical Conferences; and 3) Effective Negotiation Processes.<sup>12</sup> Also in 2007, the Commission hosted a four-day interagency conflict coaching skills training course, led by an internationally recognized Canadian conflict coach who developed the field of conflict coaching.<sup>13</sup> Twelve ADR representatives from six agencies, including the Commission, the U.S. Department of Agriculture/Forest Service, the U.S. Department of Education, the U.S. Department of the Interior, the Securities and Exchange Commission, and the Veterans Administration, attended.

*B. Two-Thirds of the Cases Closed by the FERC's Office of Administrative Law Judges During FY-2007 Were Resolved by ADR.*

The FERC's commitment to ADR and settlement processes is further illustrated by the following statistical data for FY-2007 from the FERC's Office of Administrative Law Judges (OALJ).<sup>14</sup> This data includes cases that were resolved through settlement negotiations among the parties, settlements achieved using the FERC settlement judge process, and settlements facilitated by the DRS.<sup>15</sup>

ITEM	FY- 2007
Cases Assigned	76
Total Workload (including pre-existing cases)	165
Cases Terminated	100
Cases in Process	65
Settlement Judge/Med. Procedures	40
Cases Resolved Thru ADR	67
Settlements Certified, including partial settlements	67

Table 1<sup>16</sup>

12. See FERC, DISPUTE RESOLUTION SERVICE (DRS), <http://www.ferc.gov/legal/adr/drs.asp> (last visited Mar. 8, 2008); FERC, CONTINUUM OF DISPUTE RESOLUTION APPROACHES (2007), <http://www.ferc.gov/legal/adr/continuum/com-dra.asp>.

13. FERC, DISPUTE RESOLUTION SERVICE (DRS), <http://www.ferc.gov/legal/adr/drs.asp> (last visited Mar. 8, 2008).

14. This is aggregated data that may in some cases reflect partial settlements. FERC, SETTLEMENTS: HOW SETTLEMENTS RESOLVE CONFLICTS, <http://www.ferc.gov/legal/settlements.asp> (last visited Mar. 7, 2008); FERC, COURT CASES: PENDING CASES, <http://www.ferc.gov/legal/court-cases/pend-case.asp> (last visited Mar. 7, 2008); FERC, COURT CASES: OPINIONS, <http://www.ferc.gov/legal/court-cases/opinions.asp> (last visited Mar. 7, 2008); FERC, COURT CASES: NEW PETITIONS, <http://www.ferc.gov/legal/court-cases/new-petitions.asp> (last visited Mar. 7, 2008).

15. *Id.*

16. *Id.*

As shown in Table 1, the FERC conducted or had in progress forty settlement judge procedures during FY-2007. A total of sixty-seven cases pending before the OALJ were resolved in whole or part using various forms of ADR. In other words, fully two-thirds of the one-hundred OALJ cases that were terminated in FY-2007 were resolved through some form of ADR.

### C. Cases and Appeals

*Port of Seattle v. FERC*, Case Nos. 6-72649, 6-72957 & 6-75044 (consolidated), and 6-72649, 6-72957 and 6-75044 (9th Cir.):<sup>17</sup> These petitions for review of FERC orders approving settlements between various parties related to the 2000-2001 California energy crisis are scheduled to be briefed in the first half of 2008. Among other things, Port of Seattle has argued on rehearing of the FERC's orders that approval of the settlements was unduly discriminatory against non-settling parties, preferentially favored settling parties, and that there were material issues of fact in dispute.<sup>18</sup> A date for oral argument has not yet been established.

*Massachusetts Municipal Wholesale Electric Company v. ISO New England*, FERC Docket No. EL07-32:<sup>19</sup> This case involved allegations raised by MMWEC that ISO NE engaged in discriminatory practices when it shifted loads from the Day Ahead Market to the Real Time Market; and violated its tariff. The DRS in this matter was able to be a neutral go-between outside entities without violating confidentiality. The mediator was also able to assist the parties crafting a process to deal with a policy question that was raised through the negotiations. Through an extensive ADR process with assistance from the FERC's DRS, this case was fully resolved and the original complaint withdrawn.

*NStar Gas Company v. Algonquin Gas Transmission, LLC*, FERC Docket No. RP07-395-000:<sup>20</sup> *NStar* involved a complaint filed alleging tariff violations by Algonquin causing possible shut down in pipeline operations while testing under the Department of Transportation's Pipeline Integrity Act. The parties spent significant time and money exploring alternative fuel supplies to mitigate any pipeline curtailments during the testing period, including the possibility of moving LNG tankers through the downtown section of Boston. This alternative was ultimately found to be non viable, leading to an apparent impasse that was overcome through mediation which assisted the parties in finding an alternative resolution involving the joint construction of a loop to the existing pipeline. Settlement was reached between the principal negotiating parties and filed at the FERC where it has been contested. As of this writing, the FERC had not yet issued a ruling in this matter.

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17. *Port of Seattle v. FERC*, 499 F.3d 1016 (9th Cir. 2007).

18. Request for Rehearing of the Port of Seattle, Wash. Of the June 21, 2007 Order Approving the Settlement Agreement Among Pacificorp and the California Parties, *San Diego Gas & Elec. Co. v. Sellers of Energy and Ancillary Services, et al.*, Nos. EL00-95-000, et al. (F.E.R.C. July 20, 2007); *Port of Seattle v. FERC*, 499 F.3d 1016 (9th Cir. 2007).

19. *Massachusetts Municipal Wholesale Electric Company v. ISO New England*, No. EL07-32 (F.E.R.C. Jan. 23, 2007).

20. *NStar Gas Company v. Algonquin Gas Transmission, LLC*, No. RP07-395-000 (F.E.R.C. Apr. 9, 2007).

*Duke Power, a division of Duke Energy Corporation*, Project Nos. 2602-012, 2686-051, and 2698-045:<sup>21</sup> A number of parties (including The Friends of Lake Glenville Association, Inc. and others) have challenged the institution of binding arbitration, without prior review by the Commission under Rules 604 and Rule 605,<sup>22</sup> based on an offer of settlement of a hydroelectric relicensing proceeding. Rules 604 and 605 generally govern the use of ADR and binding arbitration to resolve matters in controversy before the Commission. The parties argued that these Rules expressly require prior Commission review of proposals to use binding arbitration in such cases and prohibit making consent to arbitration a condition of entering into a contract (such as a settlement agreement) or obtaining a benefit (such as the benefits to be provided only to settling parties under the proposed offer of settlement). In an order in late 2006, the Commission did not address the complaint except to state that it had not been “briefed” and that the Commission was therefore unable to address it.<sup>23</sup> The Commission also stated that its rules concerning alternative means of dispute resolution “are voluntary procedures.”<sup>24</sup> A motion for reconsideration is pending.

## II. DEVELOPMENTS UNDER THE ENERGY CHARTER TREATY

The Energy Charter Treaty (ECT) “establishes a legal framework in order to promote long term cooperation in the energy field.”<sup>25</sup> The ECT was signed in 1994 and entered into force in 1998. It has been signed or acceded to by fifty-one states, mainly countries in Europe and the former U.S.S.R., as well as the EU, Japan, and Australia (Contracting Parties).<sup>26</sup> The ECT has many states with observer status including the U.S., China, Saudi Arabia, Iran, Venezuela, Tunisia, United Arab Emirates, and many other Persian Gulf states as well as international organizations such as the World Bank and the Association of Southeast Asian Nations.<sup>27</sup> The ECT provisions include (a) investment protections intended to create a “level playing field”<sup>28</sup> and reduce to a minimum the non-commercial risks associated with energy sector investments; (b) trade provisions consistent with the World Trade Organization’s rules and practice; (c) obligations to facilitate transit of energy on a non-discriminatory basis consistent with the principle of free transit; (d) energy efficiency and environmental provisions which require states to formulate a clear policy for improving energy efficiency and reducing the energy cycle’s negative impacts on the environment; and (e) dispute resolution mechanisms for investment related disputes between an investor and a Contracting Party or between one state and another as to the application or interpretation of the ECT.

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21. Order Denying Rehearing, *Duke Power*, Project Nos. 2602-012, 2686-051, 2698-045 (F.E.R.C. Dec. 21, 2006).

22. 18 C.F.R. §§ 385.604-605 (2007).

23. *Duke Power*, 117 F.E.R.C. ¶ 61,303, at n.9 (2006).

24. *Id.*

25. ENERGY CHARTER SECRETARIAT, THE ENERGY CHARTER TREATY AND RELATED DOCUMENTS 44 (2004), [http://www.encharter.org/fileadmin/user\\_upload/document/EN.pdf](http://www.encharter.org/fileadmin/user_upload/document/EN.pdf).

26. *Id.* at 17.

27. *Id.*

28. *Id.* at 14.

The filing of investor-state claims pursuant to rights claimed under investment treaties continues to grow. In 2007 four new publicly known ECT cases were filed: one against Hungary in connection with electricity concessions, one against Kazakhstan in connection with the exploration and extraction of hydrocarbons, and two against the Republic of Hungary in connection with electricity generation. All four were filed with the International Centre for Settlement of Investment Disputes (ICSID).<sup>29</sup> In addition, the following decision was released in 2007, addressing a key jurisdictional issue under the ECT.

*A. Jurisdictional Decision*

*Ioannis Kardassopoulos v Georgia*, ICSID Case No. ARB/05/18:<sup>30</sup> A decision was released in this arbitration on July 6, 2007 exploring for the first time the issue of jurisdiction under the ECT pursuant to the “provisional application” language in the treaty.<sup>31</sup> Section 45 of the ECT provides that “[E]ach signatory agrees to apply this Treaty provisionally pending its entry into force . . . to the extent such provisional application is not inconsistent with its constitution, laws or regulations.”<sup>32</sup> Claimant contended that Respondent, the Republic of Georgia (Georgia), had violated the terms of the ECT after issuing a decree which was alleged to have expropriated a concession granted earlier for reconstruction of energy pipelines and infrastructure.

In its procedural defense to the proceeding, Georgia challenged the tribunal’s jurisdiction under the ECT because the actions in issue, although they took place after Georgia signed the ECT, occurred before it ratified the ECT and before the ECT took effect upon ratification by thirty states. The arbitral tribunal rejected this argument after a careful analysis of the language of the ECT and relevant international law. The tribunal held that under the provisional application language of the ECT the whole ECT treaty is to be applied as if all of its provisions were already in force even though the formal entry into force of the ECT had not yet occurred. The tribunal noted that if it were to limit the application of the ECT to after the ECT definitively entered into force it would “exclude from the scope of the ECT”<sup>33</sup> the provisional period before entry into force and “such a result would strike at the heart of the clearly intended provisional application regime.”<sup>34</sup> Georgia also contended that provisional application of the ECT was excluded because it was inconsistent with Georgian and Greek law. After taking conflicting expert evidence on these points, the Tribunal rejected Respondent’s contentions and found that the provisional application of the ECT did not violate Georgian or Greek law.

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29. AES Summit Generation Limited and AES-Tisza Eromu Kft. v. Republic of Hungary, ICSID Case No. ARB/07/22 (2007); Electrabel S.A. v. Republic of Hungary, ICSID Case No. ARB/07/19 (2007); and Liman Casplan Oil BV and NCL Dutch Investment BV v. Republic of Kazakhstan, ICSID Case No. ARB/07/14 (2008).

30. *Ioannis Kardassopoulos v. Georgia*, ICSID Case No. ARB/05/18 (2007).

31. THE ENERGY CHARTER TREATY, *supra* note 22, at 89.

32. *Id.*

33. *Ioannis Kardassopoulos v. Georgia*, ICSID Case No. ARB/05/08, 59 (2007).

34. *Id.*

*B. Significance of Award*

While provisional application is found in connection with some other trade and investment treaties it is a relatively unusual provision and thus has occasioned comparatively little discussion, making the tribunal's decision in the Georgia case one of some significance. The decision is particularly timely and of current interest because claims for over \$30 billion have been filed in a series of arbitrations against Russia by the former shareholders of the Yukos oil company who are alleging expropriation.<sup>35</sup> A preliminary jurisdictional question in those cases will likely also turn on the provisional application language in the ECT. Russia signed the ECT in 1994 but never ratified it. It is expected that Russia will argue that it is not bound to a provisional application of the ECT. It is interesting to note that the chair of the arbitral tribunal which rendered the decision in the Georgia case is also the chair of the tribunal in the Yukos oil case.<sup>36</sup>

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35. See generally, Michael D. Goldhaber, *Houston, We have an Arbitration*, AM. LAWYER, Summer 2007.

36. *Id.*

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