



MEDIATING ALTERNATIVE ENERGY DISPUTES

By Zela "Zee" G. Claiborne, Esq.

Energy disputes are usually complex and very expensive to litigate, so those in the traditional oil and gas industries have used arbitration and mediation successfully for years. Most contracts in the energy sector have ADR clauses, and many of those are "step agreements" providing for negotiation between officers of the companies and then mediation as a prerequisite for arbitration. Recently, there has been an increase in the use of ADR to resolve disputes involving alternative energy as well. These disputes come in a wide variety, involving both contract and tort claims. Some recent cases include the alleged breach of a Power Purchase Agreement between a geothermal company and a utility, a dispute between the owner and a contractor engaged in constructing a large ground-mounted photovoltaic-panel solar energy project, two solar companies negotiating over rights of way for transmission lines, disputes over intellectual property and alleged poor construction of solar panel arrays or underperforming systems.

There are some special concerns to consider when these parties go to mediation. First, it is likely that experts can be of assistance. Experts may provide information on the specifications for the manufacture of a solar tracker system or may assist in a construction dispute. Second, certain regulatory agencies may be at least peripherally involved, and an attorney or someone else familiar with the workings of the agencies may be very helpful. In a recent case, an action by the Bureau of Land Management pushed two solar companies into negotiations. Knowledge of the Bureau's operations was important to resolution.

In addition, consider the following tips for successful mediation:

1. Decision-makers Should Attend

Bring senior executives with authority to settle. Both sides should bring representatives of comparable authority; arriving with a lower-level representative when the other side is represented by the CEO may give the impression that the settlement effort is not serious.

It is almost impossible to settle when a decision-maker is available only by phone or email. Mediation is a dynamic process that cannot be summarized adequately after the fact for someone who was absent. It is all too easy for someone who was not present for all the discussions to say "no" to whatever is offered. This suggestion may sound like common sense, but it is

surprising how many mediations fail because the right decision-makers are not present.

2. Decide When to Mediate

An early mediation offers the advantage of a substantial savings of time and money. Consider mediating before an arbitration demand is made or a complaint is filed with the court. The businesspeople may be able to negotiate a resolution without moving to any filings.

3. Focus on Mediation Goals

The goal of mediation is to find a business solution rather than focusing on trial arguments about which party is right or wrong. There is a big difference between trial advocacy and effective mediation negotiation. Consider a range of settlement options in advance and think about the point of view of the other side and what their needs might be. Then work with the mediator to create an atmosphere where the parties can discuss a variety of potential resolutions and, eventually, settle on an acceptable solution.

4. Document the Settlement

After lengthy negotiations, it is not a good idea to draft a detailed settlement agreement at the end of the mediation. Sometimes counsel will bring a draft settlement agreement that will work. However, the best practice is to make a list of deal points agreed upon and ask client representatives to sign this short form agreement. This agreement will be legally binding and give counsel time to exchange drafts of a final and complete agreement that can be executed later.

As the alternative energy industry grows, we will see more participants embrace mediation when disputes arise. The process allows all involved to pursue resolutions that benefit both sides and return to their core business operations. ■

Zela ("Zee") G. Claiborne is a full-time mediator and arbitrator with JAMS and has mediated hundreds of cases, both domestic and international. She also serves on the CPR Panels of Distinguished Neutrals and the mediation panel of the Northern California U.S. District Court. She can be reached at zclaiborne@jamsadr.com.

1.800.352.JAMS | www.jamsadr.com

*This article was originally published by LAW.COM
and is reprinted with their permission.*

THE RESOLUTION EXPERTS

