



# What's Different about Energy ADR?

By **Barrett Hawks, Esq.**  
September 1, 2016

The energy industry is quite diverse (utilities, oil and gas explorers and producers, pipelines and more) and encounters an equally diverse number of disputes. Perhaps a difference is that the capital intensity of the energy industry highlights the importance of efficiently resolving any disputes that do occur. Some observations about how the industry accomplishes this may be helpful to others that have the same goals but may yet be less skilled or experienced in achieving their ends.

Because of the capital intensity of the industry, most projects and initiatives have more than one participant. Preservation of these relationships is essential, so an often-used technique is that before any arbitration or litigation, the CEOs negotiate and introduce a

broader perspective on the business impact of the dispute. A similar technique is to require that if those directly involved in the conflict cannot settle it promptly, the negotiations must be conducted by higher level executives of each party. The arrangement can also specify that those executives not be in the direct line of management authority of those who have the conflicting positions.

Energy disputes typically involve huge sums of money. To protect against cost overruns, a construction contract may put more risk on the contractors than they can realistically bear. A protracted fight can result in costly delays or even contractor bankruptcy. One such matter was settled by an additional payment to the contractors, coupled with a

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reorganization of their relationship with each other and a requirement to use a dispute resolution board to settle future disputes up to a certain amount.

Yet another recent case illustrates the variety of available ADR techniques: a class action challenged the claimed retention of too much of the consumers' money in the form of capital credits by several electric membership cooperatives. Because of the complexity of this case, the trial court appointed a special master. The parties reported that the special master gave focused and detailed attention to the issues that a busy judge could not have and that the process avoided court delays.

Due to their neutrality, mediators can also contribute to a broader perspective. They can also more readily identify where the trouble began and thus neutralize the troublemaker. They also know how to work around those who are not sensitive to settlement opportunities and how best to get to the "right people" to achieve settlement.

## Conclusion

The effective use of ADR techniques by the energy industry illustrates (i) the value of de-escalation of conflict and the early and efficient resolution of disputes that unavoidably occur; and (ii) the ready availability of the great variety of ADR techniques that can be employed by businesses that put a high value on meeting schedules yet maintaining good relations with customers, suppliers, and others. These techniques could more often be applied by lawyers drafting agreements, as well as by those who are called upon to assist in the resolution of disputes. •

*Barrett Hawks, Esq. is a JAMS neutral based in Atlanta. He is a nationally recognized expert in the resolution of complex commercial and energy matters, with substantial experience in helping to resolve multi-party conflicts. He can be reached at [bhawks@jamsadr.com](mailto:bhawks@jamsadr.com).*

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