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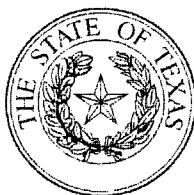


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# State Office of Administrative Hearings

40114



2013 SEP -5 AM 10:46  
PUBLIC UTILITY DIVISION  
FILING CLERK

Cathleen Parsley  
Chief Administrative Law Judge

September 4, 2013

Mark Wilder  
Southwestern Tariff Analyst  
2514 Tangley St.  
Houston, TX 77005

VIA FACSIMILE NO. (713)522-0145

Christie M. Villarreal  
AT&T Texas  
816 Congress Ave., Ste. 1100  
Austin, TX 78701

VIA FACSIMILE NO. (512)870-3420

Re: Mediation, SOAH Docket Nos. 473-13-0845 (PUC No. 40092); 473-13-0920 (PUC No. 40114); 473-13-0921 (PUC No. 40115); and 473-13-2878 (PUC No. 41096); Complaint of City of Houston Against Southwestern Bell Telephone Company d/b/a AT&T Texas

Dear Counsel:

This case has been referred to mediation, and I have been assigned as the mediator. Your confidence in my ability to serve as an impartial mediator is important to the process. Therefore, if you have any concerns, please contact Judge Renee M. Rusch, Alternative Dispute Resolution Team Leader, immediately. Her direct telephone number is (512) 936-0721.<sup>1</sup>

Enclosed is a description of mediation at SOAH. Please distribute copies to all participants and ask them to read it before the mediation. *Please follow the enclosed revised instructions for submitting confidential mediation information to SOAH carefully.*

<sup>1</sup> My biography is available upon request.

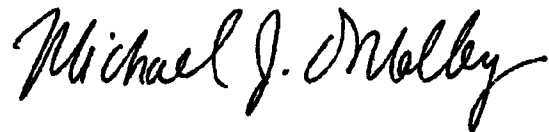
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I would also appreciate your compliance with the following schedule:

<b>Submit written pre-mediation submission to fax no. 512/ 936-0730 or by email to <u>Michael.O'Malley@soah.texas.gov</u></b> <i>Please follow enclosed submission instructions exactly.<sup>2</sup></i>	<b>October 18, 2013</b>
<b>Submit proposed dates for confidential pre-mediation telephone call.</b>	<b>October 18, 2013</b>
<b>Mediation to be held at SOAH Houston, The Preserve at North Loop, 2020 North Loop (610) West, Suite 111, Houston, Texas.</b>	<b>November 7, 2013 @ 9:00 a.m.</b>

I wish you success in your efforts to reach common ground. If you have any questions, you may call me at (512) 936-0726.

Sincerely,



Michael J. O'Malley  
Administrative Law Judge/Mediator

MJO/Ls

Enclosures: "Mediation at SOAH" brochure and "Additional SOAH Mediation Information"

cc: Renee M. Rusch, ALJ, ADR Team Leader  
Paul Keeper, Presiding ALJ

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<sup>2</sup> If you submit your pre-mediation materials by fax, please contact my assistant, Liz Slick at 512-475-3363, or me shortly before you transmit the fax, so that we will know to check the fax machine.

If you have documentary evidence, case law, or other authority that supports your position, bring copies to the mediation. Analyze the other side's case. Know their strong and weak points. Keep in mind, however, that your goal at mediation is not to convince the other side that you are "right," but rather, to try to reach an agreement that protects your most important needs.

### Think "outside the box"

Be creative. Think about what you really need to accomplish to resolve the dispute. Carefully consider the interests of the various parties and try to formulate multiple options that will meet those needs. In disciplinary cases against professional licensees, for example, many agencies originally had only one enforcement tool, revocation of the license to practice. Now those agencies generally have flexibility as to the kinds of sanctions they may impose. Be careful, however, not to expect the mediation to resolve all issues in your relationship. Keep your focus on the SOAH case. Be realistic. Successful mediation involves compromise. You are unlikely to get everything you would like. Try to stay focused on what you really need.

### Bring authority to settle

Bring to the mediation only those people who have a need to participate, *i.e.*, people directly involved in the dispute. But be sure to have full settlement authority in the room. If absolutely necessary, you may confer with others by telephone, but there are distinct disadvantages to mediating in these circumstances. Problems may arise because persons outside the mediation have not experienced the dynamics of the conversations in the room. Without the benefit of that experience, they may overestimate the strength of their case and underestimate the merits of the other party's circumstances. At worst, such a turn of events may lead to an impasse in the mediation after the participants have spent many hours working to forge an agreement acceptable to everyone in the room.

### Mediation styles

Mediation at SOAH is generally a collaborative process. We facilitate communication and clarify issues, help parties assess their options, and memorialize any agreements the parties reach. However, in caucuses, mediators sometimes help parties analyze the strengths and weaknesses of their cases. If the mediator evaluates some aspect of your case, remember that any opinion expressed by the mediator is just that—one person's opinion. That opinion is based on limited information, such as summaries of anticipated evidence. Discovery may not have been completed yet. The mediator has not had the opportunity to assess witness credibility, nor has the mediator done independent legal research. In spite of these limitations, the view of a mediator (who in other circumstances hears cases as an ALJ) often gives parties a useful glimpse of how their case may be perceived by a neutral third party. Any views expressed by a mediator under these circumstances are confidential, do not constitute legal advice, and are not predictions as to how the presiding ALJ will view the issues. Giving such an evaluation is discretionary with the mediator unless the parties have requested, and the mediator has agreed, before the mediation, to provide such an evaluation.

### Please give us some feedback

We continually strive to improve our mediation services. Please give us some feedback about your mediation experience at SOAH. What did you like? What do you think we could do better?

Date of mediation: \_\_\_\_\_

Mediators: \_\_\_\_\_

Comments: \_\_\_\_\_

\_\_\_\_\_  
May we share your comments with the mediators?

# STATE OFFICE OF ADMINISTRATIVE HEARINGS



## MEDIATION

300 West 15<sup>th</sup> Street  
Suite 504  
Post Office Box 13025  
Austin, Texas 78711-3025

512-475-4993

[www.soah.state.tx.us](http://www.soah.state.tx.us)

## Take advantage

Your upcoming mediation may be your best - and perhaps your last - opportunity to resolve your own dispute. When a dispute is submitted to a higher authority for resolution, for example, to an administrative law judge ("ALJ") after a contested case hearing, the parties no longer control the outcome. Frequently, no one is wholly satisfied with the resolution imposed by the higher authority. In addition, the resources required to prepare and present a contested case, and pursue it through available appeals, are considerable. For these reasons, we encourage you to actively and fully participate in this opportunity to reach agreement. Remember, parties have more flexibility to craft creative solutions than an ALJ, who is bound by the statutes and regulations applicable to your case.

## What to expect

The mediation will usually begin with a joint meeting. The mediator will explain the process, each individual will be given an opportunity to make a short statement, and clarifying questions may be asked. Then, typically, the mediator will meet with each side separately. We call these separate meetings "caucuses." In these caucuses, any confidential information you give the mediator will be kept confidential unless you specifically authorize the mediator to relay it to the other side. However, keep in mind that it is often helpful to identify and share your reasons for making certain requests and to explain not just what you want but also why you believe it is appropriate. The caucuses sometimes continue with the mediator carrying offers and counteroffers back and forth. One or more additional joint meetings may be held. If the parties reach an agreement, it is usually reduced to writing and signed by the individuals present before the end of the mediation. Because a state agency is involved, any written agreement may be a public document, depending on how other law (such as the Public Information Act aka Open Records Act) characterizes such an agreement.

## Should you bring a lawyer?

You may appear at the mediation with an attorney you have hired to represent you or you may represent yourself ("pro se"). The staff of the state agency with which you are in conflict will almost always be represented at the SOAH mediation by a state-employed attorney. The SOAH mediator will work hard to explain the process and facilitate a constructive meeting, but the SOAH mediator is neutral and impartial. The mediator will not represent you or advise you during the mediation. The mediator cannot make decisions for you or advise you whether a proposed agreement is good or bad for you. You will have to make these decisions on your own if you decide to participate in the mediation without an attorney.

## Mediations are confidential

Communications in mediation are confidential. This includes any offers and counteroffers made by the participants. The mediator will not communicate about the mediation with any decision-maker who handles this case, other than to report in writing that a mediation took place and whether it was successful. A mediator cannot be compelled to testify about anything that occurred during the mediation. If partial agreements are reached, such as a list of stipulated facts, they will be reported to the presiding ALJ in writing, as approved by the parties, and filed in the case. Comments made by the mediator during the process are also confidential. However, information shared in mediation that is otherwise subject to discovery does not become confidential simply because it is shared in mediation.

## You are in control

The power to settle a dispute through mediation lies entirely with the participants. The mediator cannot issue orders or force the parties to reach an agreement. The mediator's role is to be neutral, to guide the process and to facilitate communications. The parties' job is to work, in good faith, to resolve

their dispute in a way that satisfies their most important needs. If the parties' most important needs cannot be met through a mediated agreement, the parties still have the opportunity for a contested case hearing.

## Mediation bargaining

When people negotiate about something, they usually stake out a position, argue for it, and make concessions to reach a compromise. Remember the last time you bought a car? There was a listed price; you offered something less; the salesman countered by coming off the listed price a fraction. You may have gone through this exercise more than once. But there were no clear principles guiding the participants as they moved from one position to another, except to try to get the best deal possible, probably meeting somewhere in the middle. Did you feel confident that you got a good deal?

In mediation, the mediator helps the parties focus on the interests that lie behind their respective positions. *Why* do they take a certain position? What concerns, public policies, and private needs cause them to take that position? If these interests can be openly identified, parties are more likely to craft creative solutions that satisfy everyone's interests. For example, an agency prosecuting a disciplinary case against a professional licensee is usually concerned with protecting the public and deterring future bad acts. The licensee is usually interested in protecting his or her professional reputation and ability to earn a living. Through mediation, the parties often can agree to a solution that fulfills all of these interests.

## Know the case

Mediations are successful when parties understand the issues and can realistically assess their options. What evidence do you have to prove your case? How objective is it? If your case turns on the credibility of witnesses, it is usually harder to predict the outcome.

## ADDITIONAL SOAH MEDIATION INFORMATION

1. The following information should be included in each party's CONFIDENTIAL written pre-mediation submission. *Submissions not clearly marked CONFIDENTIAL may be posted on SOAH's website. Therefore, it is important that you follow the instructions below carefully.*
  - a. A short description of the dispute.
  - b. Any documents you would like the mediators to review before the mediation.
  - c. A list of facts agreed to by all participants.
  - d. A list of facts in dispute.
  - e. A list of disputed legal issues, if any. Include copies of any supporting legal authority if pertinent to the mediation. Please highlight passages that are significant for your position.
  - f. A list of persons who will attend the mediation and their relationship to the dispute. (Generally, mediations at SOAH involve only the persons directly involved in the dispute and their lead counsel. If you anticipate that someone else will attend, please let the mediators know as soon as possible, so that the mediators may consider whether there will be an appropriate balance of representatives for each party.)
  - g. The names and titles of all persons who must approve any agreement and your plans to obtain that approval if an agreement is reached.<sup>1</sup>
  - h. A summary of any settlement offers made or rejected.
  - i. A description of what you *need* to be able to resolve this dispute.
  - j. A description of what you think the other side *needs* in order to be able to resolve this dispute.
  - k. Any other information you believe the mediators should have before the mediation.
  - l. **Several dates and times between the date of the written submission and the mediation when you will be available for a confidential telephone caucus with the mediators.**

***IMPORTANT:*** BECAUSE THIS MATERIAL IS SUBMITTED IN THE CONTEXT OF MEDIATION, IT SHOULD BE CLEARLY MARKED AS *CONFIDENTIAL*. PLEASE FAX YOUR PRE-MEDIATION STATEMENT *DIRECTLY* TO THE MEDIATORS AT 512-936-0730. DO NOT SUBMIT IT TO THE PRESIDING ADMINISTRATIVE LAW JUDGE. IF THE STATEMENT IS DELIVERED TO SOAH'S DOCKETING OFFICE, IT SHOULD BE ENCLOSED IN A SEALED ENVELOPE CLEARLY MARKED *CONFIDENTIAL MEDIATION INFORMATION*, AND THE DOCKET NUMBER AND THE MEDIATORS' NAMES SHOULD BE CLEARLY DISPLAYED ON THE ENVELOPE.

### 2. Ex Parte Communications

A mediator, unlike a judge in a contested case or a lawsuit, is not subject to *ex parte* prohibitions and may communicate with each participant individually. It is up to you whether you share your pre-mediation submission with opposing counsel. Please identify any information you are sharing.

### 3. Parking

Parking in this area is difficult. Parking is available for a fee at the Bob Bullock Museum, located at 1800 Congress, and the Capitol Visitors' Parking Garage, located at 1201 San Jacinto, several blocks away from the SOAH hearings facility. There is also a for-fee parking garage in the Wells Fargo Bank building at the corner of Guadalupe and 15<sup>th</sup> Street.

### 4. Mediation Time

The mediation may last until 5:00 p.m. or later. The parties should be prepared to continue into the evening, if necessary.

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<sup>1</sup> Successful mediations require creativity and flexibility from all participants. In our experience, mediations are most productive when party representatives who hold the ultimate settlement authority attend and participate in the mediation.