



Control Number: 43537



Item Number: 5

Addendum StartPage: 0

House Bill (HB) 1600 and Senate Bill (SB) 567 83rd
Legislature, Regular Session, transferred the functions
relating to the economic regulation of water and sewer
utilities from the TCEQ to the PUC effective
September 1, 2014

State Office of Administrative Hearings



Shelia Bailey Taylor
Chief Administrative Law Judge

43537
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PUBLIC UTILITY COMMISSION
FILING CLERK

May 17, 2005

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VIA FACSIMILE NO. 512-322-8143

Re: *Mediated Settlement Conference*, SOAH Docket No. 582-05-3744; Texas Commission on Environmental Quality v. City of Lindale

Dear Counsel:

Judge Cassandra Church has referred this case for a mediated settlement conference. **The mediation will be held on June 9, 2005, in SOAH's hearing rooms in the William P. Clements Building, 300 West 15th Street, 4th Floor, Austin Texas 78701.¹ It will begin at 9:00 a.m.** Parties should be prepared for the mediation to continue until at least 5:00 p.m. and should be prepared to make arrangements to continue into the evening.

¹ 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 are small private lots at Lavaca and 17th Street., 15th St. and San Antonio, and 18th Street and Colorado. These lots tends to fill up early.

William P. Clements Building
Post Office Box 13025 ♦ 300 West 15th Street, Suite 502 ♦ Austin Texas 78711-3025
(512) 475-4993 Docket (512) 475-3445 Fax (512) 475-4994

5

Administrative Law Judge Carol Wood and I will serve as mediators in this case.² We believe we can be completely neutral and impartial. You will find a short description of our legal experience on the attachment entitled "Mediators - Short Resume."

We realize that successful mediations require that parties have confidence in the mediators. If any party has an objection to either of us serving as mediators in this case, please contact Judge Renee M. Rusch, ADR Team Leader, immediately. Her direct telephone number is (512) 936-0721.

So that participants in the mediated settlement conference will know what to expect, we enclose a description of the mediated settlement conference process used at SOAH. Please review it carefully and give copies of it to everyone who will be involved in the mediation process.³ Please note that mediation at SOAH is generally a collaborative process. SOAH mediators try to facilitate communication, clarify issues, and help the parties assess their options, but the mediators will not tell the parties *how* to resolve their dispute; it will be up to the parties to create their own resolution. Therefore, participants should come to the mediation knowing the strengths and weaknesses of their respective cases and willing to think creatively.

The mediators will review the file before the mediation to become acquainted with the facts and issues in dispute. In addition, we would appreciate a short written description of this dispute from your point of view. (You may also indicate any particular documents in the case file you would like for us to review before the mediation.) 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. Therefore, while you may share any or all information with opposing counsel, you are not required to do so. (Please indicate whether the information has been shared.) As a minimum, the mediators request you provide the following information:

1. A short background statement describing the dispute.
2. A list of facts agreed to by all participants.
3. A list of facts in dispute among the participants.
4. 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.
5. A list of persons who will attend the mediation and their relationship to the dispute.⁴

²As ADR Team Leader, Judge Rusch is also designated as a co-mediator in this case so that the mediators may discuss case-related matters with her as necessary. The confidentiality provision described in this letter and enclosure also apply to Judge Rusch, although it is rarely necessary for the primary mediators to relate information of a confidential nature to her.

³ Additional information about alternative dispute resolution at SOAH is located at our website: www.soah.state.tx.us.


⁴ The mediators will look at this list, in part, to consider whether there will be an appropriate balance of representatives for each party.

6. The names and titles of all persons who must approve any agreement and your plans to obtain that approval if an agreement is reached.⁵
7. A summary of any settlement offers made or rejected.
8. A description of what you need to be able to resolve this dispute.
9. A description of what you think the other side *needs* in order to be able to resolve this dispute.
10. Any other information that you believe the mediators should have before the mediation.
11. Proposed times when you can have a brief telephone discussion with the mediators between the date of this submission and the date of the mediation. This conversation will probably take no more than an hour. Please include the appropriate telephone number.


Please submit copies of this information directly to Judge Carol Wood and me by 5:00 p.m. on June 2, 2005.⁶ This information should not be filed with SOAH's docketing office, although it should have the docket number and the mediators' names clearly displayed on it. Because this material is confidential in the context of this mediation, it should be clearly marked as confidential. It will be returned to the parties or destroyed at the end of the mediation process.

We wish you success in your efforts to reach common ground. If you have further questions, you may call Judge O'Malley or Judge Wood at (512) 475-4993.

Sincerely,



Carol Wood
Administrative Law Judge/ Mediator



Michael J. O'Malley
Administrative Law Judge/ Mediator

Enclosure

cc: Judge Cassandra Church
Judge Renee M. Rusch

⁵ 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.

⁶ You may submit this material by fax to (512) 936-0730. If you do, please call my secretary, Donna Swope, (512) 936-0731 so she can pick up the fax as soon as it arrives.

STATE OFFICE OF ADMINISTRATIVE HEARINGS
WILLIAM P. CLEMENTS BUILDING
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Phone (512) 475-4993
Facsimile (512) 475-4994

MEDIATION SERVICE LIST

AGENCY: **TEXAS COMMISSION ON ENVIRONMENTAL QUALITY
(TCEQ)**

STYLE/CASE: **TCEQ v CITY OF LINDALE**

SOAH DOCKET NUMBER: 582-05-3744

TCEQ DOCKET NUMBER: 2004-1722-UCR

**STATE OFFICE OF ADMINISTRATIVE
HEARINGS**

ADMINISTRATIVE LAW JUDGE

PARTIES

REPRESENTATIVE/ADDRESS

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CITY OF LINDALE

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**xc: Docket Clerk, State Office of Administrative Hearings
Docket Clerk, Office of the Chief Clerk, TCEQ, Fax No. (512) 239-3311**

Mediator - Short Resume'

O'Malley, Michael J.

Judge O'Malley has been licensed since 1989 and has been an Administrative Law Judge since 1990. After a short period of time in private practice, he became a Hearings Officer/Administrative Law Judge at the Public Utility Commission of Texas. Judge O'Malley transferred to SOAH in September 1995. He is currently an Administrative Law Judge on the utility, economics, and alternative dispute resolution teams and received training as a mediator in January 1995. Judge O'Malley has worked on a variety cases, including highly complex utility cases. He has also worked on a number of other cases for SOAH. While at SOAH, he has facilitated the settlement of a number of cases. Judge O'Malley knows of no reason why he cannot be completely neutral and impartial as a mediator in this case.

Wood, Carol

Judge Wood was licensed as an attorney in 1982. She has been a briefing attorney with the Texas Court of Criminal Appeals and a staff attorney with the Third Court of Appeals in Austin. Judge Wood has been an administrative law judge/hearings examiner since 1987, joining SOAH in the Natural Resources Division in 1995. Her current docket includes cases pertaining to natural resources, medical licensing, and workers' compensation issues. Judge Wood received training and began doing mediations in natural resources cases in 1996.

**What you need to know for your
Mediated Settlement Conference
at the State Office of Administrative Hearings**

1. Take advantage.

Your upcoming mediated settlement conference (“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 or “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.

2. 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’ role is to seek, in good faith, a resolution to their dispute that will satisfy their most important needs. If parties’ most important needs cannot be met through a mediated agreement, parties still have the opportunity for a contested case hearing.

3. The process.

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. 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. These meetings sometimes continue with offers and counteroffers carried back-and-forth by the mediator.¹ 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.

¹While the mediator caucuses with the other side, you may have time to make telephone calls or do other short tasks. Come prepared for having some time on your own.

4. Mediations are confidential.

Communications in a 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 on x-date 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. On the other hand, information shared in a mediation that is otherwise subject to discovery is not “made confidential” simply because it is shared in the mediation.

5. Mediation is *not* simply positional bargaining.

When people negotiate over 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?

Mediation guides parties to focus on the interests that lie behind each party's position: *Why* do they take that 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 livelihood. Sometimes it is possible to agree to a solution that fulfills both of these interests.

6. Know the case.

Mediations are most successful when parties are knowledgeable about all issues in dispute. 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. 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 both their strong and weak points. A thorough analysis enables you to realistically assess your options.

7. Think “outside the box.”

Be creative. Think about what you really need to accomplish to resolve the case. 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 impose. They can assess administrative penalties and/or place licensees on

probation with conditions, as well as revoke licenses. On the other hand, don't expect this mediation to resolve all issues in your relationship – keep your focus on the SOAH case.

8. Bring authority to settle.

It is very important to have full settlement authority in the room. If absolutely necessary, you may confer with others by telephone.² There are, however, distinct disadvantages to engaging in a mediation under these conditions. An attorney who comes in thinking he or she has full “authority to settle” often concludes that some creative offer requires consultation with someone outside the room. Problems can then 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 find it easier to overestimate the strength of their case and underestimate the persuasiveness of the other party's arguments. This may – at worst – result in an impasse in the mediation after many hours of effort in which the parties' representatives have worked diligently to forge an agreement acceptable to everyone in the room.

9. Facilitative compared to evaluative 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 reached. However, in private meetings, 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 even 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 administrative law judge) often gives parties a useful glimpse of how their case may be perceived by a neutral third party. Of course, any views expressed by a mediator under these circumstances are confidential, don't constitute legal advice, and are not predictions as to how the presiding judge will view the issues. Giving such an evaluation is completely discretionary with the mediator unless the parties have requested, and the mediator has agreed, before the mediation, to provide such an evaluation.

10. State policy encourages fair and speedy resolutions of disputes before state agencies.

The Governmental Dispute Resolution Act, passed during the 75th Legislative Session (Tex. Gov't Code, Chapter 2009), provides that disputes before state agencies should be resolved as quickly and fairly as possible. The Act encourages state agencies to support this policy by developing and using alternative dispute resolution in appropriate aspects of their operations and programs. This mediated settlement conference is such an alternative dispute resolution process. May you find common ground in this process.

²If you have to communicate with another person by telephone, the mediator may need to talk to that person with you. You will, of course, also be able to discuss matters with that person privately.

*** TX REPORT ***

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DATE:

May 18, 2005

NUMBER OF PAGES INCLUDING THIS COVER SHEET:

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SOAH DOCKET NO.: 582-05-3744

TCEQ DOCKET NO.: 2004-1722-UCR

REGARDING: **LETTER REGARDING MEDIATED SETTLEMENT CONFERENCE**FROM: Michael O'Malley and Carol Wood, Mediators

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Docket Clerk (TCEQ)	512/239-3311
David Klein	512/239-0606
Philip Haag	512/370-2850
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May 17, 2005

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SOAH DOCKET NO.: 582-05-3744

TCEQ DOCKET NO.: 2004-1722-UCR

REGARDING: **LETTER REGARDING MEDIATED SETTLEMENT CONFERENCE**

FROM:

Michael O'Malley and Carol Wood, Mediators

	FAX TO:	FAX NO.:
Blas Coy (TCEQ - OPIC)		512/239-6377
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