



NEW JERSEY LAW REVISION COMMISSION

**Draft Final Report
Relating to**

Underground Facilities Protection Act

July 7, 2014

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Underground Facility Protection Act - N.J.S. 48:2-80 subsection d.

Introduction

This report proposes revising a subsection of the Underground Facility Protection Act (UFPA) by replacing language that compels parties seeking property damages in underground facility disputes to submit their claims to the Dispute Settlement Office (DSO)¹ without preserving their right to a jury trial.² The Supreme Court considered this provision in *Jersey Cent. Power & Light Co. v. Melcar Utility Co.* and held the statute unconstitutional.³

Background

In 1994, third-party construction damage caused a gas pipeline explosion in Edison, New Jersey.⁴ Thousands of lives were spared because the late night explosion occurred in the factory district of the town.⁵ Residents of a nearby apartment community were able to escape with only their lives in the narrow seven to ten minute window between the actual explosion and the advance of the inferno that eventually leveled eight apartment buildings in the community.⁶ Hundreds suffered burns and smoke inhalation and one death was reported from an apparent heart attack.⁷

In the wake of the explosion, the Legislature responded quickly by enacting the UFPA, a measure designed to protect the public from the risk of harm and companies from loss posed by hazards from underground facilities.⁸ The Legislature recognized that underground facilities such as pipelines, transmission lines and stations benefit the public because they protect “against

¹ This office is better known as the Office of Dispute Settlement (ODS) as identified on its website, <http://www.state.nj.us/defender/ods.shtml> (last visited July 1, 2014). This report refers to the office as the Dispute Settlement Office (DSO) based on the title provided in N.J.S. 52:27EE-21 which establishes the Office of the Public Defender in the Dispute Settlement Office and N.J.S. 52:27EE-22 which authorizes the services provided by the Dispute Settlement Office.

² N.J. STAT. ANN. §48:2-73, *et seq.* (West 2013); *see* N.J. STAT. ANN. §48:2-80 subsec. d. (West 2013).

³ *Jersey Cent. Power & Light Co. v. Melcar Utility Co.*, 212 N.J. 576, 581 (2013) (*JCP&L v. Melcar*).

⁴ Brent Johnson, *Edison Residents Oppose Putting Cell Tower Near Gas Pipeline*, STAR-LEDGER, Nov. 16, 2010, available at http://www.nj.com/news/local/index.ssf/2010/11/edison_residents_oppose_puttin.html.

⁵ Robert D. McFadden, *Explosion in Edison: The Overview; New Jersey Pipeline Explosion Sets Off Panic, Chaos and Fear*, N.Y. TIMES, Mar. 25, 1994, available at <http://www.nytimes.com/1994/03/25/nyregion/explosion-edison-overview-new-jersey-pipeline-explosion-sets-off-panic-chaos.html>.

⁶ *Id.*

⁷ *Id.*

⁸ N.J.S. 48:2-73, *et seq.*, *JCP&L*, 212 N.J. at 581.

storm-related damage, thereby preventing service interruptions to customers,” while providing other practical and aesthetic benefits.⁹ But, the underground placement of these facilities poses hazards to “those who may be unaware of their presence” and “those who may not take the sufficient steps to prevent damage to the facilities of which they are aware.”¹⁰

The Legislature created the UFPA to preserve the public benefit and reduce the risk of harm and loss by strengthening the excavation notice system.¹¹ The UFPA created the “One-Call Damage Prevention System” designed “to serve as a central repository for the receipt of intent to excavate notices, which are forwarded to the appropriate utility.”¹² The Board of Public Utilities regulates the UFPA and provides day-to-day operation of the “One Call System” through the Division of Reliability and Security.¹³ The UFPA requires that notices of intent are given to the “One-Call System” not less than three business days and not more than ten business days prior to the commencement of any excavation or demolition.¹⁴ The statute also requires that, within three days of receipt of a notice of intent, an operator of an underground facility, “[m]ark, stake, locate or otherwise provide the position and number of its underground facilities which may be affected by a planned excavation or demolition.”¹⁵

The UFPA carries significant penalties for those who disregard its provisions. Subsection d. of the UFPA was added in 2005, creating liability for failure to mark by an operator of an underground facility and for an excavator who damages an underground facility.¹⁶ Subsection d. requires disputes involving amounts less than \$25,000 to be submitted to the DSO for alternative dispute resolution.¹⁷

Role of the Dispute Settlement Office (DSO)

Currently, all UFPA disputes under \$25,000 are submitted to the DSO for alternative dispute resolution. The DSO conducts mediation and arbitration proceedings and prior to the *JCP&L v. Melcar* case, disputes under \$25,000 were considered for either resolution method. As noted by the Court, the DSO now submits all disputes under \$25,000 to arbitration.¹⁸ The DSO

⁹ *Id.* at 581-82.

¹⁰ *Id.* at 582.

¹¹ *Id.*

¹² *Id.*, see N.J. STAT. ANN. 48:2-76 (West 2013).

¹³ See *id.*

¹⁴ *Id.*, see N.J. STAT. ANN. 48:2-82 (West 2013).

¹⁵ *Id.*, see N.J. STAT. ANN. 48:2-80 subsec. a.2 (West 2013).

¹⁶ See N.J. STAT. ANN. 48:2-80 subsec.d. (West 2013).

¹⁷ *Id.*

¹⁸ *JCP&L*, 212 N.J. at 585.

has outlined its arbitration procedures and publishes them on the Office of the Public Defender website.¹⁹ The DSO procedures include the following:

1. ADR Procedure – All disputes under \$25,000 referred to the DSO pursuant to the Underground Facility Protection Act shall be submitted to mandatory arbitration by DSO.

Disputes involving amounts greater than \$25,000 may also be submitted to the DSO for mediation or arbitration by consent of the parties. (The DSO will charge its regular court fees for these cases.)

2. Notice of Arbitration - The party requesting arbitration (“the claimant”) shall send a certified letter to the DSO requesting arbitration along with the appropriate filing fee, and shall send a copy of this request by certified mail to all other parties named in the matter. Arbitrations shall be scheduled to take place within 45 days of receipt of the request. The DSO shall mail notice of the arbitration hearing to all parties. A copy of this notice shall also be sent to all parties by the claimant via certified mail. Adjournments of the scheduled date shall be permitted only upon approval of the DSO.
3. Location of Hearing – DSO Office, Hughes Justice Complex, 25 Market Street, 1st Floor, North Wing, Trenton, NJ 08625.
4. Legal Representation - A party may represent themselves or have an attorney or other individual present to assist them at the arbitration hearing.
5. Arbitration Fees - All parties participating in the arbitration must pay their respective arbitration fees prior to the arbitration commencing.
6. Arbitrator - A member of DSO staff will serve as the arbitrator.
7. Powers of Arbitrator - The arbitrator shall have the power to compel the production of relevant documentary evidence, to administer oaths and affirmations, to determine the law and facts of the case, to render a decision in the matter and to oversee the management and conduct of the hearing.
8. Pre-Hearing Submissions - Pre-hearing submissions are not required. However, the parties may exchange relevant documentary evidence prior to the arbitration hearing. A copy of all documents exchanged shall be submitted to the arbitrator for review on the day of the hearing.

¹⁹ Office of the Public Defender, Dispute Settlement Office, Underground Facility Protection Act, Underground Facility Protection Act Resolution Procedure, *available at* <http://www.state.nj.us/defender/UndergroundFacilityProtectionAct.pdf> (last visited July 1, 2014).

9. Evidence - Each party is required to attend the arbitration hearing prepare to set forth its position and present any relevant information including correspondence, damage, reports, and photographs. The arbitrator shall admit all relevant evidence and shall not be bound by the rules of evidence. The arbitration hearing will not be recorded.

The arbitrator's findings of fact and conclusions of law shall not be evidential in any subsequent legal proceeding or trial, nor shall any testimony given at the arbitration hearing be used for any purpose at such subsequent legal proceeding. Nor may the arbitrator be called as a witness in any such subsequent legal proceeding or trial.

10. Failure to Appear - An appearance on behalf of each party is required at the arbitration hearing. If the party claiming damages does not appear, that party's request for ADR under the statute shall be dismissed. If a party defending against a claim of damages received a notice of the arbitration hearing and does not appear the claimant will have the option of either: 1) proceeding with the arbitration against the non-appearing party with the arbitrator making an award based on the evidence presented; or 2) terminating the ADR process as to the non-appearing party prior to the arbitration hearing commencing and filing a claim in superior court. (The arbitration hearing will proceed with any remaining defending parties that are present.)
11. Notice of Arbitration Award - No later than ten business days after the completion of the arbitration hearing. The DSO shall send out a copy of the award to all parties. A copy of this award shall also be sent by the claimant via certified mail or by personal services to all parties, including any non-appearing parties.
12. Rejection of the Award - The arbitration award shall be final, binding and enforceable by a court unless within 30 days after receiving the arbitration award, a party thereto (including a party who failed to appear at the arbitration hearing), notifies the DSO and all other parties by certified mail that they have rejected the award and simultaneously pays the required rejection fee to the DSO.
13. Satisfaction of Statutory ADR Requirement - The statutory ADR requirement is satisfied 30 days after all parties have received the arbitration award or if a defending party does not appear for the arbitration. If the arbitration award is rejected by any party the statutory requirements for ADR will still have been met and any party may immediately file an action in superior court to pursue its damage claim.
14. Fee Schedule is provided for disputes ranging under \$1,000 to \$24,999.

Prior to the *JCP&L v. Melcar* proceedings, the DSO had not formally adopted rules or regulations establishing the procedures to be followed.²⁰ JCP&L claimed unfairness because the DSO failed to formally establish its procedures.²¹ As noted in the case footnotes, the DSO subsequently filed rule proposals addressing many of the issues raised in the *JCP&L v. Melcar* action.²²

Jersey Cent. Power & Light v. Melcar

In *JCP&L v. Melcar*, the defendant Melcar excavated an area of land to install cables for Verizon of New Jersey (Verizon) and during the course of the work, JCP&L's underground electrical lines were damaged.²³ Pursuant to the UFPA, JCP&L filed a complaint against Melcar and Verizon for \$13,176.65 in damages.²⁴ On the day set for trial, Melcar made an oral motion to dismiss the matter for lack of jurisdiction pursuant to the UFPA which requires the matter to be heard by the DSO.²⁵ The complaint was dismissed by the Special Civil Part Court and the Appellate Division affirmed the decision.²⁶

On appeal, the Supreme Court first considered whether the UFPA provides for discretionary referral of disputes under \$25,000 to the DSO.²⁷ The Court determined that the penultimate sentence of the subsection creates two categories of disputes, disputes less than \$25,000 and those in excess of \$25,000.²⁸ The Court ruled that the Legislature's use of the word "shall" when describing the resolution of disputes under \$25,000 was intended to create a mandatory directive and not discretionary referral of claims to the DSO.²⁹ The Court looked to the last sentence of the subsection that states parties may agree to select another alternative dispute resolution forum.³⁰ The Court found that the sentence would be "meaningless" if the provision merely permitted parties to use the services of the DSO.³¹ Accordingly, the Court held that the plain language of the statute manifests the Legislature's intent to provide alternative dispute resolution for disputes under \$25,000, but does not identify the preferred method of

²⁰ *JCP&L*, 212 N.J. 601 at n. 2.

²¹ *See id.*

²² *Id.*

²³ 212 N.J. at 584.

²⁴ *Id.*

²⁵ *Id.*; see N.J.S. 48:2-80 subsec. d.

²⁶ *JCP&L*, 212 N.J. at 584.

²⁷ *Id.* at 585.

²⁸ *Id.* at 588.

²⁹ *Id.*

³⁰ *Id.*

³¹ *Id.*

resolution.³² The Court then considered whether the statute on its face constitutes a deprivation of the constitutional right to a jury trial.³³ The Court ruled that the property damage claim alleged by JCP&L is a common law negligence cause of action.³⁴ Consequently, the State Constitution attaches the right to a trial by jury.³⁵ The Court noted that “even when the Legislature has acted to compel the use of arbitration” a “private litigant’s right to a trial by jury for a cause of action rooted in common law” has been preserved by expressly “including the right to a trial *de novo*.”³⁶ Since the statute does not mandate arbitration or call for a trial *de novo*, the Court concluded that the DSO is powerless to resolve the statutory deficiency by issuing conforming rules that recognize the right to a trial *de novo* when the DSO fails to resolve the dispute through arbitration.³⁷ Accordingly, the Court held that its only recourse was to declare that the statute in question was “constitutionally flawed” noting that the Court, like the DSO, was powerless to add language to the provision, and that only the Legislature may amend the statute.³⁸

Proposed DSO Rule

During the pendency of the *JCP&L v. Melcar* matter, the DSO filed the following rule proposal pursuant to the Administrative Procedure Act:

“This chapter outlines the rules and procedures for arbitration in the DSO’s Underground Facility Protection Act Arbitration program and allows for parties, by mutual consent, to opt to use an alternative dispute resolution provider other than the DSO”.³⁹

N.J. ADMIN. CODE 17:39-1.1 Purpose

(a)-(b) (No change.)

(c) Notwithstanding anything in this subchapter to the contrary, the parties may:

1. [negotiate] *Negotiate* or otherwise resolve or withdraw some or all issues

³² *Id.* at 588, 599-600.

³³ *Id.* at 593.

³⁴ *Id.* at 595.

³⁵ *N.J. Const. art. I, ¶ 9.*

³⁶ *Id.* at 597, 59; *see e.g.*, N.J. STAT. ANN. 39:6A-31 (West 2013); N.J. STAT. ANN. 2A:23A-25 (West 2013).

³⁷ *Id.* at 600.

³⁸ *Id.*

³⁹ Alternative Dispute Resolution Process for Underground Facility Protection Act Damages Claims, 44 N.J. REG. 3056 (LexisNexis 2013)(proposed Dec. 17, 2012)(to be codified at N.J. ADMIN. CODE 17:39 (LexisNexis 2013) amended by 44 N.J. REG. 3056a. (proposed Jan. 7, 2013)(supplementing the Rule Summary and N.J. ADMIN. CODE 17:39-1.1c. (LexisNexis 2013)).

relating to a dispute submitted to DSO pursuant to this subchapter [at any time through direct negotiation]*; or*

2. By mutual consent of all parties, choose an alternative dispute resolution provider other than the DSO, in which case, this subchapter shall not apply.⁴⁰

The stated purpose of the proposed rule N.J.A.C. 17:39 is as follows:

1. Pursuant to N.J.S. 48:2-80 subsection d, a provision of the Underground Facility Protection Act, certain claims shall be subject to an alternative dispute resolution process as established within the Dispute Settlement Office in the Office of the Public Defender, except as provided in (c) below.
2. All disputes for damages arising under N.J.S. 48:2-80 subsection d. for an amount less than \$25,000 shall be submitted for a mandatory dispute resolution process as set forth in this subchapter. Any matter submitted to the DSO under the Act shall be subject to arbitration as set forth in this subchapter.
3. Notwithstanding anything in this subchapter to the contrary, the parties may negotiate or otherwise resolve or withdraw some or all issues relating to a dispute submitted to the DSO pursuant to this subchapter at any time through direct negotiation.

The proposed rules alter the process of service and stipulate that an attorney from the DSO will serve as the arbitrator.⁴¹ The arbitrator has the power to: (1) oversee the management and conduct of the hearing; (2) administer oaths and affirmations; (3) determine the law and facts of the case; and (4) render a decision in the matter.⁴² Under the proposed rules, the arbitrator is “not to be bound by the rules of evidence and must admit all relevant evidence presented in accordance” with rules for information exchange.⁴³ In addition, “no party may communicate with the arbitrator regarding the subject matter of the arbitration without prior notice to all parties.”⁴⁴

⁴⁰ *Id.*(emphasis added, underlined text indicates proposed language); *see also* Alternative Dispute Resolution Process for Underground Facility Protection Act Damages Claims, 44 N.J. REG. 3056 (LexisNexis 2013)(proposed Apr. 16, 2012)(to be codified in N.J. ADMIN. CODE 17:39 (LexisNexis 2013)).

⁴¹ N.J. ADMIN. CODE 17:39-1.3 (LexisNexis 2013)(governing the process of service); N.J.A.C. 17:39-1.6 (stipulating that a DSO attorney will serve as arbitrator).

⁴² *Id.*

⁴³ N.J. ADMIN. CODE 17:39-1.6 (LexisNexis 2013)(referring to N.J.A.C 17:39-1.7 governing rules for information exchange).

⁴⁴ *Id.*

Additional requirements are given for information exchange; the arbitration request and response; arbitration proceedings; appearances at arbitration; and consequences of failure to appear.⁴⁵ The provision concerning arbitration decisions deals directly with the issues presented in the *JCP&L v. Melcar* action.⁴⁶ Specifically, the provision provides:

1. The DSO shall mail a copy of the decision to all parties, including non-appearing parties, no later than 15 days after the completion of the arbitration hearing;
2. A party wishing to reject a decision shall, within 30 days of the date of the decision, file a letter with the DSO indicating its rejection of the decision and enclosing the appropriate rejection fee pursuant to N.J.A.C. 17:39-1.5e.3. The letter shall be hand delivered or sent by certified mail, return receipt requested or commercial carrier, which includes tracking or other proof of service with no signature. The rejecting party shall simultaneously serve a copy of the letter on all parties.
3. If no party rejects the decision by filing a letter with the DSO and paying the rejection fees within the 30-day period, the decision shall become binding on all parties.
4. Any party may seek to confirm an award pursuant to law;
5. If the arbitration decision is rejected by any party, the parties shall be deemed to have met the alternative dispute resolution requirement of N.J.S. 48:28-80d. and any party may immediately file an action in Superior Court to pursue its damage claim.

The proposed rules also address claims in excess of \$25,000 stating that “parties to cases involving claims of \$25,000 and above *may* request arbitration through the DSO.”⁴⁷ The DSO suspended the rulemaking process, along with its dispute resolution services for UFPA claims after the Supreme Court’s decision in the *JCP&L v. Melcar* case.

DRAFT LANGUAGE

The utility companies that provided formal comment to the Commission’s Tentative Report each stated that the New Jersey Superior Court, Special Civil Part and Small Claims courts provide efficient and cost-effective resolution of claims under \$15,000. The companies emphasized that the process is typically completed in about 60 days, from the filing of the

⁴⁵ N.J.A.C. 17:39-1.7, N.J.A.C. 17:39-1.4 (governing arbitration request and response); N.J. A.C. 17:39-1.8 (outlining arbitration proceedings); N.J.A.C. 17:39-1.9 (addressing appearances at arbitration); N.J. A.C. 17:39-1.10 (governing consequences of failure to appear).

⁴⁶ N.J. A.C. 17:39-1.11.

⁴⁷ N.J.A.C. 17:39-4.12 (emphasis added).

complaint to the entry of judgment. The companies maintained that submitting claims under \$15,000 to alternative dispute resolution does not produce a similarly efficient and timely judgment.

Staff prepared the following draft language to acknowledge the comments provided by the utility companies, while endeavoring to respond to the Supreme Court decision in *JCP&L v. Melcar*.

DRAFT LANGUAGE - N.J.S. 48:2-80 subsection d.

d. Any underground facilities operator that fails to mark, locate, or otherwise provide the position and number of its underground facilities which may be affected by a planned excavation or demolition, in accordance with the provisions of paragraph (2) of subsection a. of this section, shall be liable for any costs, labor, parts, equipment and personnel downtime, incurred by an excavator damaging a facility owned, operated or controlled by the underground facility operator. An excavator that damages an underground facility in violation of the provisions of the "Underground Facility Protection Act," P.L.1994, c. 118 (C.48:2-73 et seq.) shall be liable for any costs, labor, parts, equipment and personnel downtime, incurred by the underground facilities operator that owns or controls the damaged underground facility. ~~Any dispute arising from the provisions of this subsection, where the claim is less than \$25,000, shall be subject to an alternative dispute resolution process as established within the Office of Dispute Settlement in the Office of the Public Defender. Nothing in this act shall be construed to discourage parties from pursuing alternative dispute resolution processes for an amount greater than \$25,000. The parties may by mutual agreement designate another alternative dispute resolution association for all matters.~~

(1) Except as provided in subsection d.(2) of this section, any dispute arising from the provisions of this subsection, where a claim:

(A) satisfies and does not exceed the maximum amount in controversy for matters cognizable in Small Claims court, shall proceed with a small claims action pursuant to the New Jersey Court Rules, unless all parties to the action consent in writing to alternative dispute resolution according to the rules and procedures established by the Dispute Settlement Office in the Office of the Public Defender (Dispute Settlement Office);

(B) satisfies and does not exceed the maximum amount in controversy for matters cognizable in the Special Civil Part of the Superior Court, and does not proceed pursuant to subsection (1)(A) of this section, shall proceed with a Special Civil Part action pursuant to the New Jersey Court Rules, unless all parties to the action consent in writing to alternative dispute resolution according to the rules and procedures established by the Dispute Settlement Office;

(C) exceeds the maximum amount in controversy for matters cognizable in the Special Civil Part but does not exceed \$25,000 shall be subject to alternative dispute resolution according to the rules and procedures established by the Dispute Settlement Office.

(D) exceeds \$25,000 may be subject to alternative dispute resolution according to the rules and procedures established by the Dispute Settlement Office, if all parties to the action consent in writing.

(2) The parties may by mutual agreement designate another alternative dispute resolution association for any dispute arising from subsection d.(1) of this section.

(3) An arbitration conducted pursuant to this section shall have the same effect and be enforceable as a judgment pursuant to the New Jersey Court Rules unless:

(A) one of the parties petitions the court within 30 days of the filing of the arbitration decision for a trial *de novo*, or

(B) one of the parties files a letter to reject the arbitration pursuant to the rules and procedures established by the Dispute Settlement Office.

COMMENT

The language proposed in N.J.S. 48:2-80 subsection d.(1)(D) was recommended by a commenter who was involved in the *JCP&L v. Melcar* case and sought to ensure that the final determination of an arbitration conducted by the DSO would be enforceable and comport with the New Jersey Court Rules as a nonbinding arbitration provision.

DRAFT LANGUAGE - N.J.S. 52:27EE-22

In light of the Supreme Court decision in *JCP&L* and the subsequent suspension of dispute resolution by the DSO pursuant to the UFPA, this report also recommends adding language to the DSO's authorization statute, N.J.S. 52:27EE-22 that identifies the services the Legislature has designated to the DSO under the UFPA. The following language is proposed to harmonize subsection N.J.S. 52:27EE-22 subsection a.(1) with the language of the UFPA:

52:27EE-22. Services authorized; fees

a. The Dispute Settlement Office may provide, in the discretion of the Public Defender, mediation and other third party neutral services in the resolution of disputes which involve the public interest and may enter into agreements or contracts to carry out any of the purposes or functions of this section. The office may assist public or private parties in resolving disputes. The office is authorized to:

(1) facilitate the resolution of disputes through the provision of mediation and other neutral dispute resolution services including alternative dispute resolution for certain underground facility disputes pursuant to N.J.S. 48:2-80;

- (2) establish standards for the selection, assignment, and conduct of persons acting on behalf of the office in the resolution of disputes;
 - (3) conduct educational programs and provide other services designed to reduce the occurrence, magnitude, or cost of disputes;
 - (4) design, develop, or operate dispute resolution programs, or assist in improving or extending existing dispute resolution programs;
 - (5) work with the business ombudsman or advocate in the New Jersey Commerce and Economic Growth Commission and take such other action as will promote and facilitate dispute resolution in the State; and
 - (6) coordinate and cooperate with the Office of Administrative Law so as to avoid duplication of effort and to facilitate alternate resolution of disputes that would otherwise require administrative hearings.
- b. The Public Defender may establish reasonable fees to be charged to public or private parties for the provision of the educational, consultation, dispute resolution, or other services authorized herein and may apply for and accept on behalf of the State any federal, local, or private grants, bequests, gifts, or contributions to aid in the financing of any of the programs or activities of the office. The Public Defender in the name of the State shall do all that is necessary and proper to receive or to collect all moneys due to the State, including such fees, grants, bequests, gifts, or contributions, by or reimbursement for services rendered pursuant to this section.

COMMENT

The proposed changes are identified by the underlined text.

CONCLUSION

The revisions proposed in this report are recommended in response to the Supreme Court decision in *JCP&L v. Melcar*. This report seeks to preserve the legislative intent of N.J.S. 48:2-80 subsection d. and to specifically identify in the DSO authorization statute, N.J.S. 52:27EE-22, the services the Legislature has designated to the DSO under the UFPA.