

To: New Jersey Law Revision Commission
From: Jayne Johnson
Re: Underground Facility Protection Act, N.J.S. 48:2-80d – *JCPL v. Melcar* decision
Date: June 9, 2014

MEMORANDUM

Executive Summary

This memorandum provides statutory draft language in response to comments received after the informal distribution of the report to utilities companies throughout the state. Staff seeks the Commission's authorization to expand the scope of this project to address the concerns presented by utility companies subject to the Underground Facility Protection Act (UFPA). N.J.S. 48:2-73 et seq.

Background

The tentative report proposes revisions to a subsection of the UFPA by replacing language that compels parties seeking property damages in underground facility disputes to submit their claims to alternative dispute resolution, without preserving their right to a jury trial. N.J.S. 48:2-80(d). The Supreme Court considered this provision in *Jersey Cent. Power & Light Co. v. Melcar Utility Co.*, 212 N.J. 576 (2013) and held the statute unconstitutional.

The tentative report proposes revisions to the UFPA based on the Supreme Court's decision and the comments received from the litigating parties. Additional comments were received after the report was released, and the draft language was revised in response to those comments.

At a subsequent NJLRC meeting, the Commission approved informal distribution of the revised draft language to utility companies throughout the state. The utility companies that provided formal comment each stated that the New Jersey Superior Court, Special Civil Part and Small Claims court 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 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* and preserve the legislative intent of the statute.

DRAFT LANGUAGE

Staff proposes the following revisions to N.J.S. 48:2-80d:

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) Any dispute arising from the provisions of this subsection, where a claim:

(A) satisfies and does not exceed the amount in controversy for small claims actions may proceed with a small claims action pursuant to the New Jersey Court Rules;

(B) satisfies and does not exceed the amount in controversy for matters cognizable in the Special Civil Part, 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 Office of Dispute Settlement in the Office of the Public Defender (Office of Dispute Settlement);

(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 mandatory arbitration according to the rules and procedures established by the Office of Dispute Settlement;

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

(2) An arbitration conducted pursuant to subsection d. of 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 Office of Dispute Settlement.

Staff seeks the Commission's authorization to expand the scope of this project by including this draft language in the report.