

To: Commission
From: Jayne Johnson
Re: Underground Facility Protection Act: Right to a Jury Trial for Negligence Claims
Date: February 11, 2013

MEMORANDUM

This Memorandum results from Commission Staff monitoring of state judicial decisions calling for legislative action. Staff seeks Commission authorization for a project 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 Office of Dispute Settlement (ODS) without preserving the right to a jury trial. *N.J.S. 48:2-80(d)*. The Supreme Court considered this provision in *Jersey Central Power & Light Co. v. Melcar Utility Co.*, 2013 WL 263107 (N.J. Jan. 24, 2013) and held the statute unconstitutional.

In *Jersey Central Power & Light Co. (JCP&L)*, the defendant Melcar conducted excavations to install underground cables for Verizon. During the course of the work, JCP&L's underground electrical lines were damaged. JCP&L filed a complaint against Melcar and Verizon under the UFPA, *N.J.S. 48:2-73, et seq.* On the day set for trial, Melcar made an oral motion to dismiss the matter for lack of jurisdiction, citing that under *N.J.S. 48:2-80(d)* the matter had to be heard by the ODS. After briefs were submitted, the Law Division dismissed the complaint and the Appellate Division affirmed the decision.

On appeal, the Supreme Court first considered whether the statute provides for discretionary referral of disputes under \$25,000 to the ODS. The Court ruled that the plain language of the statute manifests the Legislature's intent to require the alternative dispute resolution process for disputes under \$25,000. The Court looked to the penultimate sentence of the subsection that creates two categories of disputes. Here, the Legislature used the word "shall" when describing the resolution of disputes under \$25,000. The Court concluded that use of the word "shall" is intended to be mandatory and not permissive and confirmed this conclusion with the last sentence of the subsection that states parties may agree to select another alternative dispute resolution forum. The Court found that the sentence would be meaningless if the provision merely permitted parties to use the services of the ODS.

Then, the Court considered whether the statute on its face constitutes a deprivation of the constitutional right to a jury trial. The Court ruled that the property damage claim alleged by JCP&L is a common law negligence cause of action. Consequently, the State Constitution attaches the right to a trial by jury. *N.J. Const. art. I, ¶ 9*. The Court in *Jersey Central Power & Light Co.* explained that "even when the Legislature has acted to compel the use of arbitration, this Court has highlighted the important caveat of permitting a right to a trial *de novo* following mandatory arbitration whenever the constitutional right to jury trial was implicated." *Jersey Central Power & Light Co. v. Melcar Utility Co.*, 2013 WL 263107, at 11. The Court held that the statute as written is constitutionally flawed because it did not preserve the right to a jury trial by even providing an option to petition for a trial *de novo*, as in the automobile arbitration

provisions. See *N.J.S.* 39:6A-31; *N.J.S.* 2A:23A-25. The Court found that the Legislature required alternative dispute resolution, but did not identify its preferred method. The Court also determined that since the ODS process concluded with arbitration, and the statute did not call for a trial *de novo*, the ODS was powerless to resolve the statutory deficiency by indicating that it would recognize the need for a trial *de novo* when its process for resolving the dispute was not successful. The Court explained that its only recourse was to declare that the statute in question was “constitutionally flawed” noting that the Court, like ODS, was powerless to add language to the statute, and that only the Legislature may make the correction. *Jersey Central Power & Light Co. v. Melcar Utility Co.*, 2013 WL 263107 at 12.

N.J.S. 48:2-80(d) presently reads as follows:

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.

A preliminary draft of a proposed revision of the statutory language in response to the Court’s determination in *Jersey Central Power & Light Co.* is set forth below. The draft language is based on the existing statute and the statutory provisions pertaining to the mandatory non-binding arbitration required for personal injury automobile negligence claims.

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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 the claim is less than \$25,000, shall, except as provided in subsection (d)(2) of this section, be subject to arbitration by the assignment judge of the court in which the action is filed;

(2) Nothing in this act shall be construed to discourage parties from pursuing the alternative dispute resolution processes set forth in subsection (d)(1) for an amount greater than \$25,000.

(3) The provisions subsection (d)(1) of this section shall not apply to any controversy in which an arbitration decision was rendered prior to the filing of the action.

(4) After an arbitration conducted pursuant to subsection (d)(1), the court shall, upon motion of any of the parties, confirm the arbitration decision, and the action of the court shall have the same effect and be enforceable as a judgment in any other action; unless one of the parties petitions the court within 30 days of the filing of the arbitration decision for a trial *de novo* or for modification or vacation of the arbitration decision for any of the reasons set forth in this title, or an error of law or factual inconsistencies in the arbitration findings.

Drafting issues to consider if the Commission authorizes the project include the tolling of the statute of limitations and cost provisions. In addition, determining whether the arbitration process should remain within the discretion of the Office of Dispute Settlement or whether statutory provisions should detail the arbitration process like the automobile arbitration provisions.