



NEW JERSEY LAW REVISION COMMISSION

Tentative Report Relating to

Underground Facility Protection Act

May 23, 2013

The New Jersey Law Revision Commission is required to “[c]onduct a continuous examination of the general and permanent statutory law of this State and the judicial decisions construing it” and to propose to the Legislature revisions to the statutes to “remedy defects, reconcile conflicting provisions, clarify confusing language and eliminate redundant provisions.” *N.J.S.* 1:12A-8.

This Tentative Report is distributed to advise interested persons of the Commission's tentative recommendations and the opportunity to submit comments. Comments should be submitted no later than **August 1, 2013**.

The Commission will consider these comments before making its final recommendations to the Legislature. The Commission often substantially revises tentative recommendations as a result of the comments it receives. If you approve of the report, please inform the Commission so that your approval can be considered along with other comments. Please send comments concerning this tentative report or direct any related inquiries, to:

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

Introduction

The Commission has approved a project revising a subsection of the Underground Facility Protection Act (UFPA) by revising language that compels parties seeking property damages in underground facility disputes to submit their claims to the Dispute Settlement Office (DSO) 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) (*JCP&L*) and held the statute unconstitutional.

Background

Underground Facility Protection Act

In 1994, third party construction damage caused a gas pipeline explosion in Edison, New Jersey. Thousands of lives were spared because the late night explosion occurred in the factory district of the town. 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 quickly leveled eight apartment buildings. Hundreds suffered burns and smoke inhalation but only one death was reported from an apparent heart attack. Robert D. McFadden, *Explosion in Edison: The Overview; New Jersey Pipeline Explosion Sets Off Panic, Chaos and Fear*, N.Y. TIMES, Mar. 25, 1994.

In the wake of the explosion, the Legislature responded quickly by enacting the UFPA, *N.J.S. 48:2-73, et seq.*, a measure designed to protect the public from the risk of harm and companies from the loss posed by hazards from underground facilities. *JCP&L*, 212 N.J. at 581. The Legislature recognized that underground facilities such as pipelines, transmission lines, and stations benefit the public because they protect “against storm-related damage, thereby preventing service interruptions to customers.” *Id.* at 581-82. But, the underground placement of these facilities poses a hazard 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.” *Id.* at 582.

The Legislature created the UFPA to preserve the public benefit and reduce the risk of harm and loss by strengthening the excavation notice system. *Id.* The UFPA created the “One-Call Damage Prevention System” which serves “as a central repository” for intent to excavate notices. *Id.*; *N.J.S. 48:2-76*. Once received, the notices are forwarded to the appropriate utility. *Id.* The Board of Public Utilities regulates the UFPA and manages the day-to-day operation of the “One Call System” through the Division of Reliability and Security. *JCP&L*, 212 N.J. at 582. The UFPA requires that notices of intent be 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. *Id.*; *N.J.S. 48:2-82*. The statute also requires that, within three days of receiving a notice of intent, an operator of an underground facility, must “[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.” *Id.*; *N.J.S.* 48:2-80(a)(2).

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

Role of the Dispute Settlement Office (DSO)

Currently, all UFPA disputes under \$25,000 are submitted to the Dispute Settlement Office (DSO) within the Office of the Public Defender for alternative dispute resolution (formerly the Office of Dispute Settlement (ODS)). DSO conducts mediation and arbitration proceedings and prior to the *JCP&L* case, disputes under \$25,000 were considered for either resolution method. As noted by the Court, DSO now submits all disputes under \$25,000 to arbitration. *JCP&L*, 212 N.J. at 585. DSO has outlined its arbitration procedures and publishes them on the Office of the Public Defender’s website. 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 DSO for mediation or arbitration by consent of the parties. (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 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. 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 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.
9. Evidence - Each party is required to attend the arbitration hearing prepared 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, 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 DSO and all other parties by certified mail that they have rejected the award and simultaneously pays the required rejection fee to 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.

Office of the Public Defender, Dispute Settlement Office, Underground Facility Protection Act, Underground Facility Protection Act Resolution Procedure, <http://www.state.nj.us/defender/UndergroundFacilityProtectionAct.pdf> (last visited May 10, 2013).

Prior to the *JCP&L* proceedings, the DSO had not formally adopted rules or regulations establishing the procedures to be followed for matters requiring alternative dispute resolution. *See JCP&L*, 212 N.J. at 566-67. *JCP&L* claimed unfairness because the DSO failed to formally establish its procedures. *Id.* at 601, n.1. As noted in the case footnotes, the DSO has since filed rule proposals addressing many of the issues raised in the *JCP&L* action. *Id.* at 601, n.2.

Jersey Cent. Power & Light v. Melcar

In *JCP&L*, the defendant Melcar conducted excavations to install underground cables for Verizon of New Jersey (Verizon) and during the course of the work, JCP&L's underground electrical lines were damaged. 212 N.J. at 584. Pursuant to the UFPA, JCP&L filed a complaint against Melcar and Verizon for \$13,176.65 in damages. *Id.* On the day set for trial, Melcar made an oral motion to dismiss the matter for lack of jurisdiction pursuant to *N.J.S.* 48:2-80(d) which requires the matter to be heard by the DSO. *Id.* The Special Civil Part of the Law Division dismissed the complaint and the Appellate Division affirmed the decision. *Id.*

On appeal, the Supreme Court first considered whether the statute provides for discretionary referral of disputes under \$25,000 to the DSO. *Id.* at 585. 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. *Id.* at 588. 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. *Id.* The Court looked to the last sentence of the subsection that states parties may agree to select another alternative dispute resolution forum. *Id.* The Court found that the sentence would be "meaningless" if the provision merely permitted parties to use the services of the DSO. *Id.* Accordingly, the Court held that the plain language of the statute manifests the Legislature's intent to require alternative dispute resolution for disputes under \$25,000 but does not identify the preferred method of resolution. *Id.* at 588, 599-600.

The Court then considered whether the statute on its face constitutes a deprivation of the constitutional right to a jury trial. *Id.* at 593. The Court ruled that the property damage claim alleged by JCP&L is a common law negligence cause of action. *Id.* at 595. Consequently, the State Constitution attaches the right to a trial by jury. *N.J. Const. art. I, ¶ 9. Id.* 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*.” *Id.* at 597; *see e.g.*, *N.J.S.* 39:6A-31; *N.J.S.* 2A:23A-25. 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. *Id.* at 600. 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 statute, and that only the Legislature may make the correction. *Id.*

Proposed DSO Rule

During the pendency of the *JCP&L* matter, the DSO filed a rule proposal pursuant to the Administrative Procedure Act. Alternative Dispute Resolution Process for Underground Facility Protection Act Damages Claims, 44 *N.J.R.* 3056 (proposed Dec. 17, 2012) (to be codified at *N.J.A.C.* 17:39) *amended by* 44 *N.J.R.* 3056(a) (proposed Jan. 7, 2013) (supplementing the Rule Summary and *N.J.A.C.* 17:39-1.1(c) as follows:

Rule Summary:

“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” (added language is underlined).

N.J.A.C. 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 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 DSO, in which case, this subchapter shall not apply. *See also* Alternative Dispute Resolution Process for Underground Facility Protection Act Damages Claims, 44 *N.J.R.* 3056 (proposed Apr. 16, 2012) (to be codified at *N.J.A.C.* 17:39) (added language is underlined).

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

1. Pursuant to *N.J.S.A.* 48:2-80.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.A. 48:2-80.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 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 DSO pursuant to this subchapter at any time through direct negotiation.

The proposed rules alter the process of service, *N.J.A.C. 17:39-1.3* and stipulate that a DSO attorney will serve as the arbitrator. *N.J.A.C. 17:39-1.6*. The arbitrator has the power to: (1) oversee the management of the hearing and to conduct the hearing; (2) administer oaths and affirmations; (3) determine the law and facts of the case; and (4) render a decision in the matter. 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 pursuant to *N.J.A.C. 17:39-1.7*. *N.J.A.C. 17:39-1.6*. In addition, “no party may communicate with the arbitrator regarding the subject matter of the arbitration without prior notice to all parties.” *N.J.A.C. 17:39-1.6*.

Additional requirements are given for information exchange, *N.J.A.C. 17:39-1.7*; the arbitration request and response, *N.J.A.C. 17:39-1.4*; arbitration proceedings, *N.J.A.C. 17:39-1.8*; appearances at arbitration, *N.J.A.C. 17:39-1.9*; and consequences for failure to appear, *N.J.A.C. 17:39-1.10*. *N.J.A.C. 17:39-1.11* provides procedures for confirming or rejecting arbitration decisions and addresses the issues raised in the *JCP&L* action. *N.J.A.C. 17:39-1.11*. Specifically, the provision provides:

1. 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 DSO indicating its rejection of the decision and enclosing the appropriate rejection fee pursuant to *N.J.A.C. 17:39-1.5(e)(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 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.A. 48:28-80.d 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 DSO.” *N.J.A.C.* 17:39-4.12 (emphasis added). The comment period for the amended rule proposal ended March 8, 2013; accordingly, rule adoption is pending.

DRAFT LANGUAGE

A proposed revision of the statute in response to the Court’s determination in *JCP&L* is set forth below:

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) A dispute arising from the provisions of this subsection, where the claim is less than \$25,000, shall be subject to mandatory arbitration as established by the Dispute Settlement Office within the Office of the Public Defender;

(2) A dispute arising from the provisions of this subsection, where the claim is in excess of \$25,000, may be submitted for arbitration by the Dispute Settlement Office or by another arbitration association, if all parties to the action consent in writing and provide written consent to the Dispute Settlement Office or other arbitration association;

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

(4) An arbitration conducted pursuant to subsection d. of this section shall have the same effect and be enforceable as a judgment in any other action; 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 established by the Dispute Settlement Office.

COMMENT

This draft language results from the determination of the New Jersey Supreme Court when this provision was considered in *Jersey Cent. Power & Light Co. v. Melcar Utility Co.*, 212 N.J. 576 (2013).