

available to the Racing Commission by the single-pool wager provider or totalisator operator, as appropriate. In the event that any resulting hardware or software changes are required to be made to the Racing Commission computer system, the single-pool wager provider shall be directly responsible for all related costs incurred by the Racing Commission. Nothing contained in this section shall preclude the single-pool wager provider from contracting with any other person or entity to reimburse any such costs to it.

13:71-27A.14 System failure for single-pool wagering event

Where, due to any system failure in connection with a Racing Commission approved single-pool wagering event, including as a result of a system failure of the odds calculation engine, the totalisitor, or any interface between the odds calculation engine and the totalisator, odds cannot be calculated or wagers cannot be processed utilizing the single-pool wagering system, such odds shall be calculated utilizing the multi-pool traditional wagering system. In the event that the multi-pool wagering system cannot be utilized, the rules in effect governing totalisator failure for multi-pool traditional wagering shall apply.

TREASURY — GENERAL

(a)

OFFICE OF THE PUBLIC DEFENDER DISPUTE SETTLEMENT OFFICE

Alternative Dispute Resolution Process for Underground Facility Protection Act Damages Claims

Proposed New Rules: N.J.A.C. 17:39

Authorized By: Joseph E. Krakora, Public Defender of New Jersey,
Office of the Public Defender.

Authority: N.J.S.A. 48:2-73 et seq., specifically 48:2-80.d; 52:27EE-
21 et seq., specifically 52:27EE-22; and 2A:158A-1 et seq.,
specifically 2A:158A-7(j).

Calendar Reference: See Summary below for explanation of
exception to calendar requirement.

Proposal Number: PRN 2012-188.

Written comments relating to this notice of proposal should be submitted by February 15, 2013 to:

Jessica L. Miller, Esq.
NJ Dispute Settlement Office
PO Box 853
25 Market Street
Trenton, NJ 08625-0853

The agency proposal follows:

Summary

The Office of the Public Defender and its Dispute Settlement Office (DSO) are proposing new rules governing the Underground Facility Protection Act Arbitration Program. This chapter outlines the rules and procedures for arbitration in the DSO's Underground Facility Protection Act Arbitration Program. The chapter lays out the procedures for service; initiating an arbitration; payment of fees; qualifications and role of the arbitrator; information exchange between the parties; the arbitration proceeding; appearances at arbitrations; failure to appear; arbitration decisions; and the disposition of claims in excess of \$25,000.

Pursuant to N.J.S.A. 48:2-80.d, DSO developed alternative dispute resolution procedures to resolve claims arising from damage to underground facilities. DSO currently distributes written procedures to parties each time a new claim is filed. The procedures are also available at: <http://www.state.nj.us/defender/UndergroundFacilityProtectionAct.pdf>. DSO is proposing new rules that codify the procedures currently in use with certain changes. Prior to proposing new rules, DSO published a notice of pre-proposal at 44 N.J.R. 1191(a) and considered comments received on the notice of pre-proposal when preparing the proposed new rules.

As the Office of the Public Defender has provided a 60-day comment period on this notice of proposal, this notice is excepted from the rulemaking calendar requirement pursuant to N.J.A.C. 1:30-3.3(a)5.

Social Impact

The proposed new rules will have a beneficial social impact by providing the public, excavators, and underground facility operators (including public utilities), clear instructions for use of the DSO Underground Facility Protection Act Arbitration Program (the Program). The Program provides for quick and efficient resolution of disputes arising from damaged underground facilities in a non-binding fashion. This relieves the burden on the court system while providing a forum in which parties can present their claims for a decision on the facts and law of the case. Additionally, it provides the parties an opportunity to hear the opposing side's case prior to formal litigation to assist in settlement or other disposition of the matter.

Economic Impact

The new rules are expected to have an economic impact on the parties who utilize the services in that the program charges fees as set forth in N.J.A.C. 17:39-1.5 and 1.12(b)2. The chapter also imposes costs to parties of sending certified mail as set forth in N.J.A.C. 17:39-1.3 and 1.11(b). Finally, the rules may impose costs in that parties are allowed, but not required, to retain an attorney. However, the proposed new rules will have a positive economic impact by relieving some of the burden on the court system of hearing cases under \$25,000, regarding damage to underground facilities. The proposed new rules will also provide an efficient means of disposing of claims, and saving money for all parties.

Federal Standards Statement

Executive Order No. 27 (1994) and N.J.S.A. 52:14B-1 et seq. require State agencies that adopt, readopt, or amend State rules exceeding any Federal standards or requirements to include in the rulemaking document a Federal standards analysis. There are no Federal standards applicable to the proposed new rules. Accordingly, no Federal standards analysis for the proposed new rules is needed.

Jobs Impact

DSO does not expect the proposed new rules to have any effect on job creation or loss in New Jersey.

Agriculture Industry Impact

DSO does not expect the proposed new rules to have any effect on the agriculture industry in New Jersey. To the extent a member of the agricultural industry requests a mark out or operates underground facilities, DSO anticipates that this process will be more efficient than litigating any disputes.

Regulatory Flexibility Analysis

The proposed new rules will impose reporting, recordkeeping, or other compliance requirements on small businesses, as defined in the Regulatory Flexibility Act, N.J.S.A. 52:14B-16 et seq. The proposed new rules will affect contractors, who will be affected by the new proposed rules if an underground facility is damaged in the location at which they have dug or are digging, prompting the filing of a request for arbitration under this chapter. The new rules will require small businesses involved in the program to keep records of notices sent to the other parties to a dispute. Additionally, small businesses are allowed, but not required, to obtain the services of an attorney if they so choose. There are no initial costs to comply with the new rules. The annual cost of compliance will vary widely, with some contracts being completely unaffected and others potentially having multiple claims within the course of a year. N.J.A.C. 17:39-1.5 lays out the fee structure for parties involved in an arbitration under this chapter.

The proposed new rules are designed to minimize the impact of defending underground facility damage claims on small businesses. The Underground Facility Act requires all claims for less than \$25,000 be subject to alternative dispute resolution before litigation, and charges DSO with administering an alternative dispute resolution program for that purpose. DSO anticipates that this process will be more efficient than litigation in resolving these claims.

Housing Affordability Impact Analysis

The proposed new rules are not expected to have an impact on affordable housing in New Jersey or on the average costs associated with housing because the rules pertain to an arbitration process as an alternative to litigation.

Smart Growth Development Impact Analysis

The proposed new rules are not expected to have an impact on smart growth in New Jersey or on housing production in Planning Areas 1 or 2, or within designated centers, under the State Development and Redevelopment Plan in New Jersey because the rules pertain to an arbitration process as an alternative to litigation.

Full text of the proposed new rules follows:

CHAPTER 39
OFFICE OF PUBLIC DEFENDER RULES

SUBCHAPTER 1. UNDERGROUND FACILITY PROTECTION ACT ARBITRATION PROGRAM

17:39-1.1 Purpose

(a) 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.

(b) 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.

(c) 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.

17:39-1.2 Definitions

The following words and terms, when used in this subchapter, shall have the following meanings, unless the context clearly indicates otherwise.

“Act” or “UFPA” means the Underground Facility Protection Act, N.J.S.A. 48:2-73 et seq.

“Arbitration request” means a written request for arbitration submitted to DSO.

“Claimant” means a person or entity that claims it has sustained damage arising under N.J.S.A. 48:2-80.d.

“Dispute” means a claim arising under N.J.S.A. 48:2-80.d.

“DSO” means the Dispute Settlement Office in the Office of the Public Defender.

“Respondent” means any party to an arbitration against whom a claim is asserted.

17:39-1.3 Service

(a) Where mailing or service is required pursuant to this subchapter, such service shall be accomplished through:

1. Certified mail, return receipt requested, or commercial carrier, which includes tracking or other a proof of service with signature; and

2. Simultaneous regular mail.

(b) Notwithstanding any other provision of this section, parties to an action may agree to an alternative method of service on each other except for an arbitration request, which must be served as set forth in (a) above.

(c) Service by mail pursuant to this section shall have the same effect as personal service, and the simultaneous mailing shall constitute effective service unless the mail is returned by the U.S. Postal Service or commercial carrier with a marking indicating it has not been delivered, or DSO has other reason to believe that service was not effective. If the certified mail or commercial carrier package is returned marked “unclaimed” or “refused,” service is effective provided that the regular mail has not been returned. Process served by mail may be addressed to a post office box only if the sender cannot, by diligent effort, determine the

addressee’s street address or if the post office or commercial carrier does not make street-address delivery to the addressee.

17:39-1.4 Arbitration request and response

(a) To initiate arbitration, a claimant shall file an arbitration request with DSO, which shall include:

1. The amount of damages claimed;

2. A list of all parties to the dispute, including address and telephone number;

3. A list of counsel representing parties to the dispute, if any, including address and telephone number;

4. The required filing fee as set forth in N.J.A.C. 17:39-1.5(e);

5. The location at which the damage occurred;

6. The date on which the damage occurred;

7. Whether, to the claimant’s knowledge, any other arbitration request has been made and if any other proceeding is pending regarding the same facts or circumstances. If any other proceeding is pending, claimant shall briefly describe the status of the proceeding; and

8. A statement that this dispute will be arbitrated in accordance with this subchapter.

i. As part of this statement, the parties shall be made aware that N.J.A.C. 17:39-1 is available at: www.lexisnexis.com/njaoal.

(b) The claimant shall simultaneously serve a copy of the arbitration request on each of the parties in accordance with N.J.A.C. 17:39-1.3(a).

(c) A respondent may file a counterclaim, cross-claim, or third-party claim for any damages arising under N.J.S.A. 48:2-80.d from the incident identified in the arbitration request.

1. A respondent must follow the procedures for making an arbitration request as set forth in (a) above, including payment of filing fees in accordance with N.J.A.C. 17:39-1.5.

2. Counterclaims, cross-claims, and third-party claims must:

i. Be filed within 15 days of service of the arbitration request;

ii. Identify whether it is a counterclaim, cross-claim, or third-party claim; and

iii. Reference the original arbitration request.

(d) Any respondent who fails to file a counterclaim, cross-claim, or third-party claim, shall not be entitled to an award of damages at an arbitration.

(e) All claims arising under a single incident will be arbitrated jointly at the discretion of DSO.

(f) Each party shall pay only one arbitration or rejection fee for participation in an arbitration involving counterclaims, cross-claims, or third-party claims.

(g) DSO will schedule an arbitration hearing to take place within 60 days of receipt of the arbitration request. DSO will send a notice of the hearing by regular mail to all parties.

(h) Adjournments will be granted only with the approval of DSO.

1. A party requesting an adjournment shall first contact the other parties to request consent. If all parties consent, then the party requesting the adjournment shall:

i. Submit a written request for adjournment to DSO noting that all parties have consented to the adjournment; and

ii. Serve all parties with the written request in accordance with N.J.A.C. 17:39-1.3.

2. If all parties do not consent to the adjournment, the requesting party shall:

i. Submit a written request for adjournment to DSO indicating the reason for the request, noting that not all parties have consented; and

ii. Serve all parties with the written request in accordance with N.J.A.C. 17:39-1.3.

3. DSO will determine whether to grant the adjournment and shall notify all parties of its decision in writing within two business days of receipt of the request.

4. If an adjournment is granted DSO will send a new notice with the new date and time to all parties by regular mail.

17:39-1.5 Fees

(a) All parties participating in the arbitration must pay their respective fees in the amounts and by no later than the time specified in this subsection.

(b) All fees must be tendered to DSO in the form of a check payable to "Treasurer - State of New Jersey."

(c) Filing fees must be received by DSO with the arbitration request.

(d) Arbitration fees must be received by DSO from each party prior to the commencement of the arbitration hearing.

(e) The fee schedules are as follows:

1. Each claimant shall pay a filing fee based on the amount of the claim, as follows:

i. For claims up to and including \$1,000: \$50.00; or

ii. For claims of \$1,001 to \$24,999: \$100.00.

2. Each party shall pay an arbitration fee based on the amount of the initial arbitration request, as follows:

i. For claims up to and including \$1,000: \$50.00;

ii. For claims from \$1,001 to \$5,000: \$100.00;

iii. For claims from \$5,001 to \$15,000: \$150.00; or

iv. For claims from \$15,001 to \$24,999: \$200.00.

3. Any party seeking to reject an arbitration decision shall pay a rejection fee based on the total amount of the actual decision, regardless of the portion of the decision for which the rejecting party is found liable, as follows:

i. For decisions up to and including \$1,000: \$50.00;

ii. For decisions from \$1,001 to \$5,000: \$100.00;

iii. For decisions from \$5,001 to \$15,000: \$150.00; or

iv. For decisions from \$15,001 to \$24,999: \$200.00.

(f) DSO may, in its discretion, reduce or waive the fees for a particular party based on financial hardship, on a case-by-case basis, for good cause shown. A party desiring a fee reduction or fee waiver shall make its request to DSO in writing and state the reason for its request. Such request shall not discuss the subject matter of the arbitration. The request need not be copied to the other parties. DSO will call the party requesting a reduction or waiver within two business days of receipt of the request to inform the party whether the request has been granted. DSO will also send the party requesting the reduction or waiver a letter stating whether the request has been granted.

(g) No arbitration will be scheduled unless and until the claimant pays the filing fee or obtains a waiver.

1. Failure of a party to pay an applicable fee, except as set forth in (f) above, or otherwise comply with this subchapter, will be deemed a failure to appear at arbitration pursuant to N.J.A.C. 17:39-1.10. Such party will be barred from participating in the arbitration.

17:39-1.6 The arbitrator

(a) A DSO attorney shall serve as the arbitrator. One or more members of DSO may assist the arbitrator in any arbitration at the discretion of DSO.

(b) The arbitrator shall have 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.

(c) The arbitrator shall not be bound by the rules of evidence and shall admit all relevant evidence presented in accordance with N.J.A.C. 17:39-1.7.

(d) No party may communicate with the arbitrator regarding the subject matter of the arbitration without prior notice to all parties.

17:39-1.7 Information exchange between the parties

(a) At least 10 days prior to the scheduled hearing, each party shall provide all other parties with a concise statement of the factual and legal issues in the case, including any cross-claims, counterclaims, and/or third-party claims. A copy of the statement shall be simultaneously provided to DSO by fax, email, or regular mail.

(b) Each party shall provide all other parties with relevant documentary evidence at least 10 days in advance of the arbitration hearing and simultaneously provide DSO with copies of the same. Relevant documentary evidence includes, but is not limited to, billing statements, photographs, reports, copies of mark-out tickets, and other records related to the matter.

(c) Any documentation not provided to all parties and to DSO according to (a) and (b) above shall not be relied on by a party during the arbitration hearing unless the arbitrator determines, in his or her sole

discretion, that exceptional circumstances prevented the timely exchange of the information.

(d) The arbitrator may consider a party's unreasonable failure to produce relevant evidence during the course of the arbitration as the arbitrator deems appropriate.

17:39-1.8 Arbitration proceedings

(a) The arbitration hearing shall not be recorded.

(b) 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, except for the enforcement of the arbitration decision.

(c) The arbitrator shall not be called as a witness in any subsequent legal proceeding or trial.

17:39-1.9 Appearances at arbitration

(a) Each party or their representative is required to attend the arbitration hearing prepared to set forth its position and present any relevant evidence and information pursuant to N.J.A.C. 17:39-1.7.

(b) A claimant has the burden of proving its damages. Each party will be permitted to make opening and closing statements, provide testimony, and present evidence.

(c) An appearance on behalf of each party is required at the arbitration hearing. A party is not required to be represented by an attorney. An arbitration may be adjourned to allow a party to obtain counsel, if the party so requests, at the sole discretion of the arbitrator.

17:39-1.10 Consequences of failure to appear

(a) If a claimant does not appear, the arbitration will proceed and the arbitrator will render a decision of no award on its claims against all respondents, except for good cause shown.

(b) If a respondent does not appear, the arbitrator will first determine if proper service was made upon the non-appearing respondent by examining the proof of service provided by the claimant.

1. If proper service is found to have been made by the claimant upon respondent(s) failing to appear, then the arbitration will proceed in respondent's absence and the arbitrator will render a decision.

2. If the arbitrator finds that proper service has not been made upon a non-appearing respondent, the failure to appear shall be deemed for good cause shown and the arbitration hearing shall be rescheduled to allow for proper service in accordance with N.J.A.C. 17:39-1.3.

i. The non-appearing respondent shall be responsible to tender an arbitration fee pursuant to N.J.A.C. 17:39-1.5(e)2 prior to the commencement of the rescheduled arbitration hearing.

(1) If the appearing parties already paid the appropriate arbitration fee, they shall incur no new fees for the rescheduled hearing. If they have not yet tendered the arbitration fee, they may either do so on the day of the non-appearance in anticipation of the next date, or they may choose to tender the fee immediately prior to the rescheduled hearing.

(c) A party who fails to appear, for good cause shown, other than as provided in (b) above, may request a new hearing within 10 business days of the originally scheduled hearing, by filing a letter with DSO stating the reason or reasons for its non-appearance and requesting a new hearing.

1. The non-appearing party shall simultaneously serve a letter pursuant to N.J.A.C. 17:39-1.3 on all other parties indicating that they have requested a new hearing. The request may be granted for good cause in the sole discretion of DSO. DSO will send a notice scheduling a new hearing date or advising the parties that the request has been denied. If a new hearing is scheduled, no new information exchange shall be required in advance of the new hearing date, but parties who had not previously exchanged information shall do so in accordance with this section.

(d) Unless a new hearing is scheduled pursuant to this section, failure to appear at an arbitration hearing shall be deemed a waiver of that party's right to reject a decision under this subchapter.

17:39-1.11 Decisions

(a) DSO shall mail a copy of the decision to all parties, including non-appearing parties, no later than 15 business days after the completion of the arbitration hearing.

(b) 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 signature. The rejecting party shall simultaneously serve a copy of the letter on all parties.

(c) If no party rejects the decision by filing a letter with DSO and paying the rejection fee within the 30-day period, the decision shall become binding on all parties.

(d) Any party may seek to confirm an award pursuant to law.

(e) 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. 48:2-80.d and any party may immediately file an action in Superior Court to pursue its damage claim.

17:39-1.12 Claims involving \$25,000 and above

(a) Parties to cases involving claims of \$25,000 and above may request arbitration through DSO.

(b) N.J.A.C. 17:39-1.1 through 1.11 shall apply to cases involving claims of \$25,000 and above, with the following exceptions:

1. The claimant is required to obtain the written consent of all parties to arbitration and provide the written consent to DSO prior to making an arbitration request. The arbitration request shall specifically note that the claimant has obtained the consent of all parties; and

2. The fees at N.J.A.C. 17:39-1.5(e) shall not apply, but shall be replaced as follows:

i. The filing fee paid by a claimant shall be \$150.00;

ii. The arbitration fee paid by each party shall be \$250.00; and

iii. The rejection fee paid by the party rejecting the decision shall be as follows:

(1) If the decision is \$25,000 or more: \$250.00; or

(2) If the decision is less than \$25,000, the fees set forth in N.J.A.C. 17:39-1.5(e)3 shall apply.
