



Philip D. Murphy
Governor

Joseph L. Fiordaliso
President

Sheila Y. Oliver
Lt. Governor

Aida Camacho-Welch
Secretary of the Board

STATE OF NEW JERSEY
Board of Public Utilities
44 South Clinton Avenue, 3rd Floor, Suite 314
Post Office Box 350
Trenton, New Jersey 08625-0350
www.nj.gov/bpu/

NOTICE¹

**In the Matter of the Re-adoption by Notice of New Jersey Administrative Code
("N.J.A.C.") 14:2 "Underground Facilities: One Call Damage Prevention System"
Docket No. AX18020155**

Stakeholder Meeting – April 11, 2019

The Staff of the Board of Public Utilities (Board) invites all interested parties and members of the public to a stakeholder meeting to discuss the re-adoption of the Board's rules, entitled "Underground Facilities: One-Call Damage Prevention System" as set forth in N.J.A.C. 14:2.

Board Staff is charged with working alongside stakeholders to review and propose changes to these rules outlined in Chapter 2. As part of this process, a number of issues will be analyzed, including, but not limited to, operator responsibilities, excavator responsibilities and other best practices that will not only assist in the protection of underground facilities, but will also promote the safety of our community. This meeting is a follow up meeting to the March 22, 2018, May 21, 2018, September 7, 2018, and October 22, 2018 stakeholder meetings in which multiple issues were brought up by the participating stakeholders. After the four stakeholder meetings were held, the Board requested additional comments to be submitted to the secretary's office. After those comments were reviewed it was determined that the comments should be discussed in an open discussion, as to give the different stakeholders an opportunity to openly evaluate the merits of each comment.

For this specific stakeholder meeting, issues pertaining to the following will be discussed:

Additional comments received by the Board. Comments are posted as an attachment to this notice accessible on the Board's website at <http://www.nj.gov/bpu>

Along with this notice, Board Staff will notify previous participants and potential participants about this stakeholder process on the Board's website at <http://www.nj.gov/bpu>.

¹Not a paid legal advertisement.

Questions should be directed to Phil Galka in the Board's Division of Reliability and Security via email at bpu.onecall@bpu.nj.gov.

Stakeholder Meeting: In the Matter of the Board's Review of N.J.A.C. 14:2 Underground Facilities: One-Call Damage Prevention System

Date: April 11, 2019

Location: New Jersey Board of Public Utilities
44 South Clinton Avenue
Trenton, NJ 08625
Multi-purpose Room (1st Floor)

Time: Check-in: 9:30 a.m.
Start Time: 10:00 a.m.



Aida Camacho-Welch
Secretary of the Board

Dated: March 12, 2019

Kvarta, Andrew

From: H. Steven Vollers
Sent: Tuesday, April 24, 2018 5:02 PM
To: Onecall, BPU
Subject: NJBPU One-Call Stake-Holder Suggestions

Dear Mr. Galka,

At the 4/11/18 NJCGA meeting you requested input from the group for upcoming Stake-Holder meetings that will review existing One-Call/BPU regulations so I went to a few of our most experienced Utility Supervisors for suggestions which are listed below:

How is an "unsafe condition" defined? Once submitted what is the normal response? Is the sender contacted via his/her submitted phone or email and roughly how soon after submission?

How do we record an "unsafe condition" submission for our own records? From the website you can't print or save the filled-out form...

How should a contractor report in improper utility installation that puts the contractor and/or the public in immediate or future danger? In our opinion, deviation from the National Fuel Gas Code would be the defining factor.

In addition to reporting to the appropriate utility representative the BPU should be notified as well but a method needs to be established. Define the proper installation parameters for each utility on the OneCall website or accepted standard install for each utility.

We strongly suggest mandating detectable marking tape, in addition to a trace wire for non-conducting utilities, in all underground utility installations, both public & private. The most basic detectors will locate it and digging up a piece of tape is a final clue that something lies beneath. If tape is broken it breaks the continuity of the signal for detection and is not repairable, this is why trace wire in addition to marking tape should be used as wire can be properly repaired should it be broken to prevent signal loss in the future.

Regarding unmarked or mismarked utilities, could there be a way to report actual utility locations, when physically uncovered, so that future markouts are accurate and possible damage/injury avoided? We need to improve as-built databases and presently actual location data is being ignored. (I would suggest mandated GPS based locating/mapping for unearthed utilities by owner for those without proper records, damaged utilities and all new critical infrastructure (water, Gas, Electric, Telecom) installations as GPS provides accurate X/Y and Z axis locations and does not rely on ever changing surface conditions or layered record systems not reaching the mark out contractors. Possibly as state database for all owners)

The law (48:2-80 a2 and d) states that the number of utilities in an individual markout are to be reported. To our knowledge this is not done at all and my conversations with markout companies confirm this... I suggest that we enforce the existing law as it is important to know how many items need to be located by hand at a given markout. In addition, known abandoned systems should be communicated to excavator to eliminate confusion. The material type ie: plastic vs cast iron or steel should be made known as well.

We request explanation of the process (48:2-80 d) where claims less than \$25,000 can be pursued via the "Office of Dispute Settlement in the Office of the Public Defender". Is there a form to file or phone number to call regarding such claims?

How is "reasonable care" defined? There needs to be a workable definition developed that protects both the utility owner and the contractor. Hand excavation through pavement is not feasible when a utility lies directly below it and not at the depth dictated by code. Standardized installation practices need to be defined and enforced, this would eliminate a lot of the variables and also define liability in a damage situation.

We receive ticket check and response tickets for mark outs called in where the locator says "done", "marked" and "not in conflict" however these conditions are not true.

What is our recourse? Calling in another standard ticket causes another three day marking period, we can't call these in as Emergency tickets when they don't meet the criteria.

One-Call web site should include phone numbers for each utility owner that is a direct line for mark out issues and damage issues. A direct contractor line that does not put you in a customer service arena or an endless menu with no relevant option for getting to the right person.

All are submitted to you for consideration as means to reduce existing infra-structure damage, improve efficient future designs, and improving the safety environment where contractors perform their work.

Thank you for this opportunity and please let me know your thoughts regarding these matters.

H. Steven Vollers

Senior V/P – Safety Committee Chairman

O: 908-725-1026

www.VollersCompany.com



Kvarta, Andrew

From: Charles Peters
Sent: Tuesday, September 18, 2018 3:11 PM
To: nj@occinc.com; Onecall, BPU
Subject: [EXTERNAL] Re: Message from New Jersey One Call to Charles Peters

Keep up the good work.
Don't change a thing.

-----Original Message-----

From: njmailadmin <njmailadmin@occinc.com>
To: cpetersnj
Sent: Tue, Sep 18, 2018 2:33 pm
Subject: Message from New Jersey One Call to Charles Peters

To: Charles Peters

From: New Jersey One Call
1 Corporate Place South, Suite 150
Piscataway, NJ 08854
Phone: 877-256-2697

In the Matter of the Re-adoption by Notice of New Jersey Administrative Code ("N.J.A.C")
14:2 "Underground Facilities: One Call Damage Prevention
System" Docket No. AX18020155

Stakeholder Meeting - October 22, 2018

The Staff of the Board of Public Utilities (Board) invites all interested parties and members of the public to a stakeholder meeting to discuss the re-adoption of the Board's rules, entitled "Underground Facilities: One-Call Damage Prevention System" as set forth in N.J.A.C. 14:2.

Board Staff is charged with working alongside stakeholders to review and propose changes to these rules outlined in Chapter 2. As part of this process, a number of issues will be analyzed, including, but not limited to, operator responsibilities, excavator responsibilities and other best practices that will not only assist in the protection of underground facilities, but will also promote the safety of our community. This meeting is a follow up meeting the the March 22, 2018, May 21, 2018, and September 7, 2018 stakeholder meeting in which multiple issues were brought up by the participating stakeholders.

For this specific stakeholder meeting, issues pertaining to the following will be discussed:

N.J.A.C. 14:2-5.1 General markout provisions.
N.J.A.C. 14:2-5.1 through N.J.A.C. 14:2-5.6
N.J.A.C. 14:2-6.1 Violations in general.
N.J.A.C. 14:2-6.1 through N.J.A.C. 14:2-6.9

Along with this notice, Board Staff will notify previous participants and potential participants about this stakeholder process on the Board's website at <http://www.nj.gov/bpu>

Questions should be directed to Phil Galka in the Board's Division of Reliability and Security via email at bpu.onecall@bpu.nj.gov

Stakeholder Meeting: In the matter of the Board's Review of N.J.A.C. 14:2 Underground Facilities: One-Call Damage Prevention System

Date: October 22, 2018
Location: New Jersey Board of Public Utilities
44 South Clinton Avenue
Trenton, NJ 08625
Multi-purpose Room (1st Floor)
Time: Check-In: 9:30 a.m.
Start Time: 10:00 a.m.

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Fwd: Suggestion

Galka, Phillip

Sent: Monday, February 26, 2018 3:21 PM

To: Kvarta, Andrew

Attachments: [Ticket: 18112122](#)

----- Original message -----

From: Cheryl Auditor
-Date: 2/26/18 3:20 PM (GMT-05:00)
To: "Galka, Phillip" <Phillip.Galka@bpu.nj.gov>
Subject: Suggestion

I would like to attend the meeting and suggest that The Board allow the use of the same ITIC's system that Maryland uses and that is to include a link to the Ticket Mapping to ensure accuracy of the location to be marked. Please see attached sample - see "Excavator Responsibilities" at the bottom of the page. Is this something that could be addressed at the meeting ?

Stakeholder Meeting: In the Matter of The Board's Review of N.J.A.C 14:2 UNDERGROUND FACILITIES: ONE-CALL DAMAGE PREVENTION SYSTEM. Date: March 22, 2018 Time: 10:00 am

**Location: New Jersey Board of Public Utilities
 44 South Clinton Avenue
 Trenton, NJ 08625
 Multi-Purpose conference Room (1st Floor)**

Thanks,
Cheryl

Cheryl Auditor | Administrative Assistant
 CASCADE
 629 Wright Debow Road, Jackson, NJ 08527
 732-296-6620



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Fwd: New Jersey one call damage prevention system

Galka, Phillip

Sent: Monday, February 26, 2018 3:39 PM

To: Kvarata, Andrew

----- Original message -----

From:

Date: 2/26/18 3:38 PM (GMT-05:00)

To: "Galka, Phillip" <Phillip.Galka@bpu.nj.gov>

Subject: New Jersey one call damage prevention system

Philip, my name is Rick Fiorelli from RAF Builders LLC in South Jersey. Unfortunately I am not able to attend the meeting. As a contractor I am aware how New Jersey one call works I have used it many many times, it is often frustrating that so many local utilities do not participate. Why couldn't it be made mandatory that everyone who has anything in the ground must participate it seems logical to me.

Sent from my iPhone

Kvarta, Andrew

From: Sal Zuccaro
Sent: Wednesday, September 19, 2018 11:15 AM
To: Onecall, BPU
Subject: [EXTERNAL] General Markout Provisions being Updated

Mr. Phil Galka,

I would propose the ability to "renew" an existing markout ticket. Example: If I am a site contractor working on a new school being built, and I have a current markout, when my 45-days are about to expire, I should be able to call in with my effective markout, and simply renew the request.

I would also consider extending the limits of only being able to call in two city blocks at a time. Example: If I am installing a sewer main down Main Street, from Ave A to Ave Z, I should be able to call in more than simply two intersections per request.

Sal Zuccaro

--

Sal Zuccaro
Zuccaro Inc.
64 Commerce St.
Garfield, NJ 07026

973-472-9554 o.

973-472-9653 f.

"If you have to get your parents' permission to go on a field trip or take an aspirin in school, but not to get an abortion ... You might live in The United States of America."

NEW JERSEY SENATE



BRIAN P. STACK
SENATOR 33RD DISTRICT
411 PALISADE AVENUE
JERSEY CITY, NJ 07007

TEL (201) 721-5263
FAX (201) 721-5986
SenStack@n.jleg.org

COMMITTEES:
CHAIR - LEGISLATIVE OVERSIGHT
VICE CHAIR - BUDGET AND APPROPRIATIONS
MEMBER - JUDICIARY
MEMBER - COMMUNITY AND URBAN AFFAIRS

October 11, 2018

Joseph Fiordeliso
President
New Jersey Board of Public Utilities
44 S. Clinton Avenue
Trenton, NJ 08625

Dear Mr. Fiordeliso,

I am writing to your esteemed board to ask for your assistance with utility mark outs. As Mayor of Union City, we have spent millions in renovations of sidewalks and road paving improvements.

I am asking for your board's assistance in establishing a rule that once utility companies work is completed, all utility markings must be removed within 10 days. This is only fair! Take for instance Union City, each time we repave a street, we place trees and provide new sidewalks at an average cost of \$250,000-\$300,000 a block. Additionally, we have to deal with digging up our newly paved streets/sidewalks only days after they have been completed. In all cases, we usually notify all utilities 1 year in advance of existing work. It would be practical for utility companies to do any repairs when the municipality opens sidewalks/ street for upgrades. I can only believe the board understands how difficult it is for struggling municipalities to expand funding for new streets/sidewalks only to have the utilities mark them up. They must be forced to return and remove markings within a short time. It is only fair to your rate payers and all New Jersey tax payers.

If the board of public utilities should consider taking any of your meetings on the road, Union City has beautiful facilities to accommodate the board.

Sincerely,

Brian P. Stack
Mayor of Union City/ Senator - 33rd District

BPS:fe

Kvarta, Andrew

From: Noble Milton
Sent: Tuesday, November 27, 2018 1:07 PM
To: Onecall, BPU
Subject: [EXTERNAL] NJ One Call App

With today's technological advancements, it is easier to utilize smart phones when it comes to notifying the State as to where and when you plan to excavate. I propose an NJ ONE CALL APP. This app will allow the caller to mark their Longitude & Latitude, take photos and circle the area they plan to dig as well as make notations of any unforeseen issues such as an abandoned pipe, unmarked utilities or any dangers that may have been unearthed. The app will be an on running diary for that specific job location. This can also be a way of notifying future excavators of items that may hamper their utility run. Callers will be encouraged to take photos of under obstacles that can later be attached to a google map that is specifically geared towards underground mapping. I think we are long over due for an upgrade in regards to the notification process of digging underground.

Thank you

5.28.18 - Milton

DMR Construction Services
160 Hopper Ave
Waldwick, NJ 07463
201-652-2411 Office
201-652-1173 Fax

Kvarta, Andrew

From: MaryLu Suriano
Sent: Thursday, November 29, 2018 8:41 AM
To: nj@occinc.com; Onecall, BPU
Subject: [EXTERNAL] Re: Message from New Jersey One Call to Marylu Suriano

Good Morning Phil Galka (Div of Reliability & Security),

RE: Notice to submit additional comments

I've been doing mark-outs for 18 years. The one thing I come across often is from phone calls after the mark-out has been created by the actual field guys who do the mark-outs.

- 1) If we could put for "Remarks", things like (back of bldg, or some identifying facts that makes their job easier, I think it would behoove everyone.) It would enable me to send out exact information to the mark-out guys, it would stop/slow down them calling in to say "WHERE is it?" and anything to prevent huge mark out mistakes and catastrophes.
- 2) "owner owned" - With all the technology today, this should not inhibit the mark-out people to locate anything. I think it would improve not only the mark-out ticket but the main thing "Safety First". I'm not saying they have to walk all over the place for owner owned, but if it is in the area they are marking in, they should mark it out in a different color for owner owned. They should not have a catch phrase of "Owner owned" and should mark it out. If I remember correctly, the NJ One call class I went to many years ago, indicated that they "are to mark it out" and most of the field guys think I'm kidding when I say they are to do it and will argue with me that they are not allowed.
- 3) "Community" - this should also be able to be used for stating "Parking Area". It should not have to be something so specific like a name of a condo facility etc.
- 4) "Start Date" should have a spot for "Next available date". It just makes sense! We have no problem getting the next available date. It should not have to be a "hard date" Which ironically I've notice it shortened the mark-out time. So I write across the date area "Next Available Date"
- 5) Having more room to write would be nice on the Fax in sheets. I do not have time to do these on the webpage.

Thank you so very much for looking for our input. I always say "The people who use the items should be the ones who help make it better!"

Have a great day!!

Maryl
Sodon's Electric Inc.
Administrative Assistant
25 W. Highland Ave
Atlantic Highlands, NJ 07716
P) 732-291-1713
F) 732-291-8702

On Mon, Nov 26, 2018 at 3:43 PM <njmailadmin@occinc.com> wrote:

To: Marylu Suriano

From: New Jersey One Call
1 Corporate Place South, Suite 150
Piscataway, NJ 08854
Phone: 877-256-2697

NOTICE

In the Matter of the Re-adoption by Notice of New Jersey Administrative Code ("N.J.A.C.") 14:2 "Protection of Underground Facilities: One Call Damage Prevention System" - Docket No. AX18020155

Notice to submit additional comments

The Staff of the Board of Public Utilities (BPU) invites all interested parties and members of the public to comment on the re-adoption of the BPU's regulations pertaining to underground facilities: One-Call damage prevention system, as outlined in N.J.A.C. 14:2.

Staff is charged with working alongside stakeholders to review and propose changes to the rules outlined in Chapter 2. As part of this process, a number of issues will be analyzed, including, but not limited to, operator responsibilities, excavator responsibilities, and other best practices that will help protect underground facilities and promote safety in our community. Staff has held several public workgroups over the past few months to discuss different aspects of the rules.

Please submit any additional comments related to the re-adoption of N.J.A.C. 14:2 to BPU.ONECALL@BPU.NJ.GOV. Written comments are invited and must be submitted to Aida Camacho-Welch, Secretary, New Jersey Board of Public Utilities, 44 South Clinton Avenue, 3rd Floor, Suite 314, CN 350, Trenton, New Jersey 08625. Written comments must be received by 5 p.m. on December 31, 2018.

Questions should be directed to Phil Galka in the Division of Reliability and Security via email at BPU.ONECALL@BPU.NJ.GOV.

For all replies, please email nj@occcinc.com Do not reply to the sender of this email
occref



Sylvia L. Del Vecchio
Manager
State Government Relations

One Gateway Center
9 Gates Avenue, 2nd Floor
Montclair, NJ 07042-3399

973-233-9814

December 27, 2018

SUBMITTED ELECTRONICALLY TO BPU.ONECALL@BPU.NJ.GOV

Geoffrey Gersten, Esq.
Deputy Attorney General
Department of Law and Public Safety
Division of Law
124 Halsey Street, 5th Floor
Post Office Box 45029
Newark, NJ 07101-45029

Mr. Phillip Galka
Bureau Chief
NJ Board of Public Utilities
44 South Clinton Avenue, 3rd Floor
Post Office Box 350
Trenton, NJ 08625-0350

Re: **Proposed Revisions to N.J.A.C. §14:2 – Underground Facilities: One-Call
Damage Prevention System – Informal Comments**

Dear Mr. Gersten and Mr. Galka:

Verizon New Jersey Inc. ("Verizon") appreciates the opportunity to submit these informal comments in connection with the readoption of the Board's rules in Chapter 2 of the New Jersey Administrative Code (*N.J.A.C.* Chapter 14:2).

N.J.A.C. § 14:2-3.2 – Notice of intent to excavate – contents, perimeter marking

Subsection (b) 6 requires excavators to provide the One Call Center with sufficient information to enable underground facility operators to determine the location and boundaries of the excavation site. For example, excavators should report the street address, the block and lot of the site, and/or a description of any white perimeter

markings if such markings are used. During the stakeholder process, the suggestion was made to amend this section to require excavators who will be working in large business campuses, residential developments or other expansive plots of land to provide the geographical coordinates of the excavation site to a degree sufficient to locate the actual excavation area within several feet.

Verizon proposes that this requirement be expanded to all One Call tickets, with the exception of those that are submitted by residential homeowners. One Call tickets often contain incorrect street addresses, which cause delays in marking facilities, mismarks and potential damages. These errors can be reduced or avoided through the use of coordinates.

N.J.A.C. § 14:2-3.3 Excavators – onsite requirements

During the stakeholder process, Mr. Galka proposed an amendment to this rule that would require the onsite excavator to have a copy of the One Call ticket in his or her possession. Verizon proposes as an alternative that the Board institute a web-based ticket lookup system, which would enable both excavators and operators to view the full details about tickets and any associated disposition while they are in the field. The requirement for a physical copy of the ticket is impractical for large operators such as Verizon whose personnel works different shifts or who may be replaced so they can be dispatched to another job. In addition, physical copies of a ticket do not provide excavators with sufficient information about operator responses.

A web-based ticket lookup system will solve several issues: 1) it will provide operators with information about the excavation area, aiding the accuracy of markouts; 2) it will give excavators real time information regarding operator responses, preventing delays and damages; 3) it will facilitate an operator's replies to violation notices issued by Board Staff; and 4) it will reduce administrative efforts by the One Call center because they will no longer be required to find tickets in response to excavator or operator requests. In addition, Verizon technicians, similarly to other utility field

technicians and excavators do not use paper copies of records, but instead mobile applications via a tablet or smart phone to access information including facility information.

N.J.A.C. § 14:2-4.3 Underground facility operators – markout records

Subsection (d) requires that operators submit records regarding markouts to the Board upon request. Records may be submitted in paper form or electronically. Verizon urges Board Staff to commence a pilot for electronic submission, which concept was discussed during the Stakeholder process. The ability to submit records electronically will greatly simplify responding to Board Staff requests for information, will cut down on the time required to provide such documentation, and will better facilitate tracking requests and responses by both the Board Staff and by operators.

N.J.A.C. § 14:2-4.4 Underground Facility operators – accidents and emergencies

Subsection (b) 1. requires operators to immediately dispatch appropriate personnel to an excavation site to assist in locating and protecting underground facilities when an emergency ticket is called. Mr. Galka suggested an amendment that would instead require the operator to immediately "contact" the excavator. Verizon supports this change.

Mr. Galka also proposed an addition to this subsection that would require operators to provide the One Call Center with the telephone number of an onsite contact. Verizon opposes this proposal. As discussed above, shift-work and other potential workforce deployment issues mean that onsite personnel are likely to change. Verizon instead proposes operators be required to provide the telephone number of a center which will be able to immediately contact onsite personnel should the need arise.

Electronic Response Pilot Program

During the Stakeholder sessions, the industry and Board Staff agreed that this program, which was designed to enable excavators to check on the status of operator

responses when the time to mark facilities expires, should be implemented. Verizon fully supports this proposal. From an excavator's perspective, it will allow better management and scheduling of construction work and will help prevent damage. It will also greatly reduce the number of erroneous violations that Board Staff must issue, and will significantly cut the time operators spend investigating and contesting these violations.

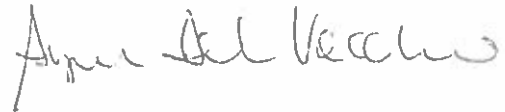
This year to date, Verizon contested more than 45 violations where facilities had been marked correctly and on time, and more than 20 violations where the ticket was correctly cleared because no buried facilities exist. In both scenarios, the excavators issued update tickets indicating that Verizon did not respond, despite the fact that the facilities were marked or the ticket was cleared and a response was e-mailed to the excavator. Providing excavators the ability to review all operator responses to a ticket after the markout period ends will diminish confusion, prevent delays, avert unnecessary dispatches and reduce the administrative burden on all parties caused by inaccurate update tickets.

Verizon also agrees with other operators and excavators who proposed the expansion of the potential responses that are returned by the system. Specifically, the pilot program allowed three responses: "Marked", "Clear", and "No Response". Verizon proposes that in addition, the following responses be returned: "Invalid Address," "No Access," and "Additional Information Required." These additional responses will prevent delays by allowing operators and excavators to communicate promptly when a ticket cannot be marked because the address is incorrect or the operator could not gain access due to some physical impediment, such as a locked gate or vehicles parked over a manhole. Finally, Verizon requests that Board Staff not impose violations when a ticket is marked late due to circumstances beyond the operator's control, such as bad weather or no access to the site, as long as the operator communicates with the excavator. Verizon understands that New Jersey statutes require tickets to be marked within three

business days. However, circumstances occasionally prevent markouts to be performed in a timely manner despite the operator's best efforts. These circumstances should be taken into account before charging an operator with a violation.

Thank you for your consideration of this comments. Verizon looks forward to submitting formal comments once draft rules are published.

Sincerely,

A handwritten signature in cursive script that reads "Sylvia Del Vecchio".

Sylvia Del Vecchio

**Jersey Central
Power & Light**

A FirstEnergy Company

Joshua R. Eckert, Esq.
(973) 401-8838
(330) 384-3875 (Fax)

J. Eckert
1/7/19

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CASE MANAGEMENT

JAN 03 2019

BOARD OF PUBLIC UTILITIES
TRENTON, NJ

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Morristown, NJ 07962

December 31, 2018

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New Jersey Board of Public Utilities
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3rd Floor, Suite 314, CN 350
Trenton, New Jersey 08625
bpu.onecall@bpu.nj.gov

**Re: In the Matter of the Re-adoption by Notice of New Jersey Administrative Code
("N.J.A.C.") 14:2 "Protection of Underground Facilities: One Call Damage
Prevention System," Docket No. AX 18020155
Comments and Recommendations of Jersey Central Power & Light Company**

Dear Secretary Camacho-Welch:

On November 26, 2018, the Staff of the New Jersey Board of Public Utilities ("Staff") issued a notice inviting interested parties and members of the public to submit additional comments regarding the re-adoption of N.J.A.C. 14:2 "Protection of Underground Facilities: One Call Damage Prevention System," (the "One Call Rules" or "Rules") by the New Jersey Board of Public Utilities ("Board").

Jersey Central Power & Light Company ("JCP&L" or the "Company") appreciates the opportunity to provide these comments and looks forward to working with Staff and the Board to ensure the continued success of the One Call System. The Company's proposed changes to the One Call Rules, which are outlined below, promote a more efficient and effective regulatory scheme for underground facility operators and excavators without compromising the underlying goal of the Rules – public safety.

Comments and Recommendations

- A. **The Board should amend N.J.A.C. 14:2-3.2(b)(6) to require excavators to provide a street address and global positioning system ("GPS") information to assist with identifying the excavation site.**

N.J.A.C. 14:2-3.2(b)(6) requires that an excavator submitting a One Call request to provide a description of the excavation site that is "sufficient to enable the underground facility operator to accurately determine the location and boundaries of the site." Presently, the Rule contemplates the excavator providing the street address of the site, the block and lot of the site, and/or a

J. Eckert, Esq.

**In the Matter of the Re-adoption by Notice of N.J.A.C. 14:2,
“Protection of Underground Facilities: One Call Damage Prevention System”
Docket No. AX18020155
Page 2**

description of any white perimeter markings the excavator may have made to identify the site, as long as the information provided is sufficient to accurately identify the location and boundaries of the site.

JCP&L recommends amending the One Call Rules to require that excavators provide both a street address and GPS coordinates to assist underground facility operators. Too frequently, the information provided by excavators to the One Call Center is insufficient to accurately identify the excavation site. In JCP&L’s experience, most excavators provide only the street address for the excavation site. Whether the excavator provides an incorrect street address, or the street address is difficult to identify in the field, the result is the same – the excavation site is not marked-out properly. By requiring both a street address and GPS coordinates, however, underground facility operators will be able to verify the accuracy of the information provided by the excavator and will have additional information if the street address cannot be easily identified in the field. As a result, the likelihood that the excavation site will be accurately determined is increased.

JCP&L also encourages the Board to establish a defined process when the excavator provides conflicting information regarding the location or scope of the excavation site. More specifically, the Company recommends that the Board clarify in the Rules that an underground facility operator is relieved of its duty to mark-out within three days if it notifies the One Call Center that the information provided by the excavator is insufficient to accurately identify the location or scope of the excavation site. This clarification will encourage excavators to provide accurate information and decrease the likelihood that a site is marked-out incorrectly. Alternatively, the Board could establish a hierarchy for the information an underground facility operator should rely upon when marking-out a site. For example, if the GPS coordinates conflict with the street address, the underground facility operator should be permitted to rely on the GPS coordinates – as intrinsically more accurate than a street address – and conduct a mark-out for the GPS-identified site. Either way, these changes promote public safety by encouraging the accurate identification of excavation sites.

- B. The Board should permanently implement the electronic positive response program and clarify that an underground facility operator’s timely use of the system is sufficient to meet the notification requirements found in N.J.A.C. 14:2-4.2(b)(2) and (e)(2).**

Several years ago, the Board initiated a pilot program called electronic positive response (“EPR”), which allows underground facility operators to notify excavators regarding the status of their One Call tickets electronically through the One Call Center. JCP&L has voluntarily participated in this program since its inception and supports its extension to all underground facility operators. In JCP&L’s experience, the EPR program has facilitated efficient and effective communication with excavators. Accordingly, the potential for miscommunication has been reduced and any issues with being unable to reach excavators has been eliminated. The Board should make participation in the EPR program a requirement for all excavators and underground facility operators.

In addition to amending the One Call Rules to require participation in the EPR program, the Board should also clarify that an underground facility operator’s timely response using the system meets the operator’s notification requirements found in N.J.A.C. 14:2-4.2(b)(2) and (e)(2). These provisions require that an underground facility operator make a reasonable effort to notify an excavator when the operator does not have facilities at an excavation site. Through EPR, an underground facility operator can quickly communicate this information to an excavator without worrying about not being able to reach one of the excavator’s representatives. Use of the EPR system guarantees that the excavator is promptly made aware of whether an underground facility operator has facilities at the excavation site. The Board should clarify that an underground facility operator’s use of EPR meets the operator’s notification requirements under the Rules.

C. The Board should clarify that underground facility operators and excavators may respond to a notice of probable violation (“NOPV”) by electronic mail.

JCP&L also requests that the Board clarify that underground facility operators and excavators may respond to notices of probable violation by electronic mail. N.J.A.C. 14:2-6.5(a) requires that the party receiving an NOPV submit its response to the Board’s Division of Reliability and Security within twenty-one days of the NOPV’s receipt. While not addressed in the Rules, the Board’s current practices call for the alleged violator to provide its response and any supporting documentation by mail. The Board can promote the efficient exchange of information and resolution of NOPVs by clarifying that alleged violators can provide the necessary information to the Board by electronic mail.

D. The definition of a One-Call Incident should be updated to reflect current costs associated with damage to underground facilities.

Finally, the Board should amend the definition of One-Call Incident in the Rules to reflect the current costs associated with damage to underground facilities. N.J.A.C. 14:2-1.2 provides, *inter alia*, that an incident involving an underground facility resulting in more than \$5,000 damage to the property of others constitutes a One-Call Incident. In accordance with N.J.A.C. 14:2-4.4(d), an underground facility operator must notify the Board’s Division of Reliability and Security within one-hour of becoming aware of a One-Call Incident. While JCP&L supports the policy underlying this rule – ensuring that the Board is promptly made aware of large incidents – the \$5,000 threshold is outdated. Based on industry costs today, the \$5,000 threshold means that almost any contact with JCP&L’s facilities, no matter how minor, will constitute a One-Call Incident requiring immediate reporting. When there is no emergency or threat of injury, these reporting requirements are administratively burdensome and can potentially slow down the restoration process. Accordingly, JCP&L requests that the Board re-evaluate the damage threshold in N.J.A.C. 14:2-1.2.

JCP&L again thanks the Board for the opportunity to provide comments on these important rules. JCP&L hopes the Board will consider adopting the above recommendations, which simplify the One Call process and are aligned with the public safety purpose at the heart of the Rules. If

**In the Matter of the Re-adoption by Notice of N.J.A.C. 14:2,
"Protection of Underground Facilities: One Call Damage Prevention System"
Docket No. AX18020155
Page 4**

you have any questions or if you would like to further discuss JCP&L's above comments and recommendations, please do not hesitate to contact me.

Very truly yours,

A handwritten signature in blue ink, appearing to read "Joshua R. Eckert", with a long horizontal flourish extending to the right.

Joshua R. Eckert
Counsel for Jersey Central Power & Light Company



PLATT & RISO, P.C.

Attorneys at Law

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December 28, 2018

VIA EMAIL & OVERNIGHT DELIVERY

Board of Public Utilities
STATE OF NEW JERSEY
44 South Clinton Avenue, 3rd Floor, Suite 314
CN 350
Trenton, New Jersey 08625-0350

Attn: Aida Camacho-Welch, Secretary

**RE: In the Matter of the Readoption by Notice of New Jersey Administrative Code ("N.J.A.C.") 14:2 "Protection of Underground Facilities: One Call Damage Prevention System" – Docket No. AX18020155
Submission of Comments to Proposed Rulemaking
Our File No. 18-0011**

Dear Ms. Camacho-Welch:

This firm represents the interests of the Township of Voorhees in Camden County, New Jersey, with respect to the above-referenced readoption of regulations implemented pursuant to the New Jersey Underground Protection Facilities Act. Kindly accept this correspondence as the Township's comments to the re-adoption of N.J.A.C. 14:2-1, et seq. and provide a copy of these comments to Bureau for their consideration.

The Township has two comments:

1. The Township requests that the term "reasonable effort" as used in N.J.A.C. 14:2-4.1(b) and 2-4.2(b)(2) be specifically defined in Section 14:2-1.2. Since it is undefined, the term "reasonable effort" is subject to varying interpretations and could be construed anywhere on the spectrum between overly narrow to excessively broad. Indeed, in this counsel's experience with the Division of Reliability and Security over the last year, it was suggested that a "reasonable effort" should include efforts not otherwise explicitly required by the regulations, including but

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not limited to obtaining and utilizing sonar or other similar type of expensive equipment to locate underground water and/or sewer facilities, the expense of which may be cost-prohibitive to a municipality; engaging in repeated communications with an excavator (regardless of the excavator's experience, knowledge or communication skills) to better identify the proposed excavation areas, even where the excavator has not chosen to box out the excavation area in white paint (see comment #2 below); probing the entirety of a property from property line to property line between the clean out and the connection at the structure when unable to locate the underground facilities using a tracer wire or other "reasonable effort"; and taking any and all additional effort to locate underground municipal facilities regardless of the extent of such effort and/or burden such effort imposes on the municipality.

The Township acknowledges, understands and accepts the public policy and human safety concerns sought to be enforced through the regulations and intends to continue to make every effort to be fully compliant with the markout and record keeping requirements. The concern is not with the effort that is clearly required by the regulations but instead with ensuring that operators can comply with the potentially boundless scope of an otherwise undefined "reasonable effort" standard. The Bureau surely can acknowledge and understand that the hardest standard to comply with is one that amounts to a moving target.

This is an issue in Voorhees, and likely countless other municipalities, because much of the water and sewer infrastructure in this State is aging and/or of advanced age. To be sure, many of the older facilities within the Township will fall within the exception set forth in Section 14:2-4.1(b), and therefore will be subject to the "reasonable effort" standard. As a result, none of the infrastructure in Voorhees was installed with a tracer wire which would be the most convenient method for locating facilities underground. In fact, the Township has just about every type of sewer lateral and main materials in its aging sewer system other than that which would have been installed with a tracer wire, including but not limited to orangeburg, terra cotta, transite, cast iron, concrete, ductile iron, PVC, and HDPE. As the Bureau probably recognizes, orangeburg, terra cotta, transite, concrete, PVC and HDPE sewer lines cannot be located through conventional means of location like the use of metal detectors. Moreover, using probes with orangeburg and terra cotta runs the risk of damaging the laterals which, ironically, is one of the risks that the Underground Facilities Protection Act was designed to avoid. In such instances, it is nearly impossible for the Township to gauge exactly what type of efforts would satisfy the "reasonable effort" standard.

We suspect that most municipalities in this State with municipally-owned water and/or sewer infrastructure likewise have aging facilities that will fall within the exception requiring "reasonable effort" to locate their facilities. Thus, this issue is not unique to Voorhees Township. Nor does it appear to be unique that tracer wires are not found even where the infrastructure is new enough that tracer wires were required at the time of installation. In this counsel's experience, it is not uncommon for no tracer wire to be found in facilities installed after 1994.

Finally, providing a definition of "reasonable effort" also would clarify that such standard is only required where the exemption set forth in N.J.A.C. 14:2-4.1(b) applies. Recently, the

Division of Reliability and Security have intimated that the "reasonable effort" standard will be applied by the Bureau even when the markout efforts do not fall under this exemption. In other words, it has been recommended that the "reasonable effort" standard be applied in response to ALL markout requests, whether or not the exemption, and thus the standard, actually applies as a matter of law.

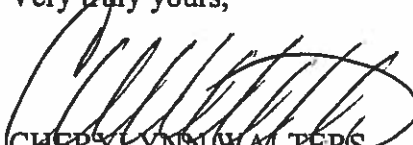
In defining the term "reasonable effort," the Bureau should provide examples of efforts that it would deem reasonable based upon its wealth of experience and keeping in mind the feasibility of municipal operators to obtain certain types of equipment. For example, since the regulations do not require the use of any specific type of equipment, the definition could include a list of acceptable methods and/or equipment, starting with tracer wires (where they exist). The definition also could include types of equipment the Bureau believes should be utilized in all mark out attempts, such as probes, followed by a list of examples of recommended (but not required) equipment that should be utilized only if the operator owns or possesses same, such as more expensive sonar or sonar-like equipment.

2. With respect to excavator responsibility, the Township also recommends that white perimeter marking be made mandatory instead of optional, as set forth in N.J.A.C. 14:2-3.2(c). Since the overriding goal of the regulations is safety and security, as well as minimizing damage to underground facilities to the largest extent possible, a slightly larger onus should be placed on the efforts required of an excavator. This is especially true where, as has been the case recently, the Division of Reliability and Security has been strongly encouraging better communication efforts between operators and excavators in furtherance of ensuring a cooperative effort to protect the health and safety of all persons involved and/or affected by the potential dangers of excavating near or around underground facilities.

As it currently stands, the excavator's only responsibility is to place a timely call to the One Call Center and wait for markouts to be performed, whereas an operator, and especially a municipal operator, carries a large and often difficult markout burden, as noted above. Requiring excavators to provide a white perimeter markout would not place a huge burden on an excavator. At the same time, it would alleviate some of the burden placed on municipal operators thereby leading to higher efficiency and reduced cost to the municipality. More importantly, however, it would instill a sense of responsibility in excavators and would serve to encourage the excavator to communicate more often with the operator, thereby achieving the cooperative effort sought and/or encouraged by the Division of Reliability and Security.

Thank you for your time and consideration.

Very truly yours,


CHERYL LYNN WALTERS
For the Firm

Board of Public Utilities
STATE OF NEW JERSEY
Attn: Aida Camacho-Welch, Secretary
December 28, 2018
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CLW/

cc: Lawrence Spellman – Voorhees Township Administrator (via email)
Joseph Lovallo – Voorhees Township Director of Public Works (via email)
Joseph B. Hale – Voorhees Township Code Enforcement (via email)

L\18-0011 - Voorhees Planning Board 2018\BPU Markouts\BPU Rulemaking Comments\L-BPU(CommentsreReadoptionofOneCallRegs)-122818.doc



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BOARD OF PUBLIC UTILITIES
TRENTON, NJ

December 21, 2018

VIA E-Mail and Overnight Mail

The Honorable Aida Camacho-Welch
Secretary of the Board
New Jersey Board of Public Utilities
44 South Clinton Avenue
Trenton, NJ 08625
BPU.ONECALL@bpu.nj.gov

Re: BPU Docket No. AX18020155 – In the Matter of the Re-adoption by Notice of the New Jersey Administrative Code (“N.J.A.C.”) 14:2 “Protection of Underground Facilities: One Call Damage Prevention System”

Dear Secretary Camacho-Welch:

The National Association of Water Companies – New Jersey Chapter (“NAWC-NJ”)¹ submits these comments in response to the Notice issued in the above-referenced docket on November 26, 2018. In this Notice, Board Staff invites all interested parties to comment on the re-adoption of the Board’s regulations pertaining to the Underground Facilities: One-Call Damage Prevention system as set forth in N.J.A.C. 14:2. Staff has held a few public workgroups in this docket during the course of 2018 to discuss the different aspects of these rules including, but not limited to, operator responsibilities under these regulations. NAWC-NJ’s comments reflect these discussions and its concerns long expressed over these regulations going back well over a decade.

NAWC-NJ has long expressed its deep concern with and opposition to the continued implementation and re-adoption of N.J.A.C. 14:2-4.2(c), which states that for purposes of conducting a utility mark-out:

¹ The NAWC-NJ Chapter is comprised of the following member water utility companies: Aqua New Jersey, Gordon’s Corner Water Company, Middlesex Water Company, New Jersey American Water Company and Suez Water New Jersey, Inc.

*CMS J. DiSilvano
J. Boyd C. Vachier*

(c)...an underground facility operator shall be *deemed to control* all portions of an underground facility carrying metered service, which are not located on the customer's side of the meter, regardless of who owns the property.²

Since its adoption in 2007, implementation of N.J.A.C. 14:2-4.2(c) has been proven problematic and unworkable for the water industry and inconsistent with the underlying goal of the statute this rule was created to implement – the Underground Facilities Protection Act (“UFPA”).³ For over a decade, NAWC-NJ has detailed the reasons for this in two prior rulemaking re-adoption proceedings before the Board and then – when the Board failed to address these reasons – before the Superior Court of New Jersey, Appellate Division following the Board's most recent re-adoption of this rule in 2015.⁴

In light of the Appellate Division's view – as expressed in its Per Curiam Opinion dated August 18, 2017 – that the Board failed to fully address these reasons or explain why it re-adopted N.J.A.C. 14:2-4.2(c)⁵, these reasons bear repeating and re-emphasizing in this current rulemaking docket.

First, the customer, not the water companies, owns and controls the water and wastewater lines on the customer's property. The customer is under no obligation to share information related to these lines with the service provider.

Second, the customer, not the water companies, is responsible for the location and installation of the water and wastewater lines on the customer's property. The customer has the right to determine or change the location of these lines with no obligation to inform the service provider. The service provider possesses no records to indicate the location of these lines.

Third, the water lines are in most instances made of non-metallic material and cannot be located with the usual and customary equipment and methodology available to locate metallic facilities. In addition, even though current building codes require tracer wires, it is the practical experience of the water and wastewater companies that such wires are frequently not provided by the customer. This is an omission over which the service provider has no control.

Fourth, water companies typically have no easements or rights of access to come on to the customer's property, especially when the trigger for such a visit would be a request for a mark-out related to a project on an adjoining property. Under these circumstances, the ability of water companies to gain access to the property is difficult as they must confront a lack of engagement or response by the customer to such requests, and on some occasions a flat-out refusal by the customer to permit water companies the necessary access.

² N.J.A.C. 14:2-4.2(c) (emphasis added).

³ N.J.S.A. 48:2-73 to -91.

⁴ In Re Readoption of N.J.A.C. 14:2, Dkt No. A-3913-14T2, Unpublished Per Curiam Opinion (App. Div. Aug. 18, 2017) (attached).

⁵ Id. at 13-14.

Fifth, the cost to the service provider of pursuing these mark-outs far exceeds the benefit. Under the current N.J.A.C. 14:2-4.2(c), water companies are left exposed to significant legal liability for attempting to comply with this rule. Specifically, where a water company attempts to mark out facilities they neither own, control or can locate, they run a significant risk of error that can cause property damage or, worse, physical harm to property owners.

The inherent problems with the N.J.A.C. 14:2-4.2(c) “deemed to control” standard as applied to water companies were true at the time of the rule’s adoption, were true during the Board’s subsequent re-adoption in 2015 and resulting Appellate Division litigation, and remains true today. It is NAWC-NJ’s continuing position that the Board should, as part of the re-adoption of N.J.A.C. 14:2, revise N.J.A.C. 14:2-4.2(c) to eliminate a “deemed to control” standard on water companies for the reasons detailed above.

During the public workgroup sessions held in this docket, Staff has led discussions among the parties to preliminarily explore alternatives to the N.J.A.C. 14:2-4.2(c) “deemed to control” construct prior to a formal submission of a proposed rule. One possible alternative that has been raised is to eliminate the N.J.A.C. 14:2-4.2(c) “deemed to control” language, and in its place develop a rule that is more directly based on the UFPA’s definition of “Operator” as set forth in N.J.S.A. 48:2-75, which states:

“Operator” means a person owning or operating, or controlling the operation of, an underground facility, but shall not include a homeowner who owns only residential underground facilities, such as an underground lawn sprinkler system or an underground structure for a residential low-voltage lighting system.⁶

If Staff ultimately decides to travel down this path in terms of creating a replacement rule for N.J.A.C. 14:2-4.2(c)’s “deemed to control” standard, it is important that this new rule not serve as a back door attempt to maintain the same “deemed to control” standard by another name. In previous circumstances, Staff has argued that water companies should be held as “operating” or “controlling the operation” of customer-side service lines because they control both: (1) the water that flows through its pipe into the customer’s service lines; and (2) the shut-off valve located in the public right-of-way which can be used to stop the flow of water into a customer-side service line in order to prevent a theft of service.

Any attempt to use a new N.J.S.A. 48:2-75-based rule to re-animate this interpretation as applied to water companies is an absolute nonstarter for NAWC-NJ. Control over the water flowing through a pipe or a shut-off valve attached to a customer-side service line in a public right-of-way does not establish ownership rights, operational rights, or control of the operation of a customer-side service line, period. To interpret and enforce otherwise is akin to declaring a person who gets into a car and drives that car onto the New Jersey Turnpike to now control the operation of the entire New Jersey Turnpike. This absurd result is in contravention to the core purpose of the UFPA, which is to limit as much as possible risks associated with excavation activities near underground facilities. Declaring water companies the owners and controllers of facilities they neither own or control does nothing to limit those risks.

⁶ N.J.S.A. 48:2-75.

In raising this possible alternative rule, some Staff members have stated that research into PHMSA regulations might provide guidance for crafting appropriate mark-out rules to infrastructure that reaches the customer's home. In addition, some gas companies have stated a preference for maintaining the current "deemed to control" standard of N.J.A.C. 14:2-4.2(c) out of concern that some gas facilities may intersect with customer-side water service lines and therefore "deeming control" of those lines to water companies somehow provides an opportunity to map out those lines to avoid any risky "cross-bore" related excavation.

Again, any attempt to apply a gas industry-specific solution regulation like PHMSA on water companies or preserve the "deemed to control" standard solely to accommodate a gas industry-specific problem is an attempt to squeeze a square peg into a round hole and a nonstarter for NAWC-NJ. Gas companies, unlike water companies, have the luxury of being able to operate or control the operation of gas service lines that extend all the way to a customer's residence or business. To confer the same one-size-fits-all requirement on water companies for facilities they do not own, operate or control runs into the same problems that have been cited by NAWC-NJ for the past 11 years and have been the subject of prior Board re-adoption proceedings and Appellate Division litigation.

NAWC-NJ acknowledges that before the Board and stakeholders lies a difficult problem to solve. NAWC-NJ stands ready to work with Staff and all stakeholders to try and find a solution or set of solutions that fulfills the UFPA's core purpose of limiting the risks of damage caused by excavation activities near utility underground facilities and respects the property rights and limits of the water companies. For this reason, NAWC-NJ opposes re-adoption of the N.J.A.C. 14:2-4.2(c) "deemed to control" standard or any proposed alternative that applies a substitute identical "deemed to control" standard to water companies – whether that alternative is based more closely on the definition of "Operator" as set forth in N.J.S.A. 48:2-75 or on PHMSA regulations that have no applicability to water companies.

We look forward to working with the Board and all stakeholders to find viable and long-lasting solutions to these problems for the benefit of the New Jersey residents and businesses who are collectively our customers and constituents.

Respectfully,



Jay L. Kooper
Chairman

National Association of Water Companies – New Jersey Chapter

**NOT FOR PUBLICATION WITHOUT THE
APPROVAL OF THE APPELLATE DIVISION**

This opinion shall not "constitute precedent or be binding upon any court." Although it is posted on the internet, this opinion is binding only on the parties in the case and its use in other cases is limited. R.1:36-3.

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-3913-14T2

IN RE READOPTION OF
N.J.A.C. 14:2.

Argued January 26, 2017 – Decided August 18, 2017

Before Judges Hoffman and O'Connor.

On appeal from the New Jersey Board of
Public Utilities, Docket No. AX14070647.

James H. Laskey argued the cause for appellants Association of Environmental Authorities of New Jersey, New Jersey Section of the American Water Works Association, and National Association of Water Companies, New Jersey Chapter (Norris, McLaughlin & Marcus, PA, attorneys; Mr. Laskey, of counsel and on the brief; Nicholas J. Dimakos, on the brief).

Yao Xiao, Deputy Attorney General, argued the cause for respondent New Jersey Board of Public Utilities (Christopher S. Porrino, Attorney General, attorney; Andrea M. Silkowitz, Assistant Attorney General, of counsel; Mr. Xiao, on the brief).

PER CURIAM

Appellants, the Association of Environmental Authorities of New Jersey, the New Jersey Section of the American Water Works

Association, and the National Association of Water Companies, New Jersey Chapter, comprise of water and wastewater companies and authorities. Appellants challenge the validity of N.J.A.C. 14:2-4.2(c)¹ (regulation), readopted by respondent Board of Public Utilities (BPU) on March 16, 2015. Among other things, appellants contend the BPU exceeded its statutory authority when it readopted this regulation. We remand for further proceedings.

I

In 1994, the Legislature enacted the Underground Facility Protection Act (UFPA or Act), N.J.S.A. 48:2-73 to -91. "[T]he Legislature enacted the UFPA to protect both the public from the risk of harm and the utility companies from unnecessary losses." Jersey Cent. Power & Light Co. v. Melcar Util. Co., 212 N.J. 576, 582 (2013). The Act establishes a "One-Call Damage Prevention System" (System) to protect underground facilities, commonly referred to as pipes, mains or lines, because these facilities are frequently subject to accidental damage from excavating equipment and explosives. See James Constr. Co. v. Bd. of Pub. Utils., 298 N.J. Super. 355, 360 (App. Div. 1997).

¹ In their brief, appellants do not identify the specific regulation or regulations in N.J.A.C. 14:2 they challenge, but it is evident from their arguments their attack is limited to the readoption of N.J.A.C. 14:2-4.2(c).

Under the Act, underground facilities include those carrying water and wastewater.

The Act requires that, before performing an excavation, an excavator must "notify the [One-Call System] . . . of his intent to engage in excavation or demolition not less than three business days and not more than [ten] business days prior to the beginning of the excavation or demolition." N.J.S.A. 48:2-82(a). Once an excavator notifies the System, the One-Call center informs the applicable underground facility operators of the pending excavation. See N.J.A.C. 14:2-4.2. Operators are then required to mark out the facility within three business days. N.J.S.A. 48:2-80(a)(2). The Act defines an operator as a person or entity that owns, operates, or controls the operation of an underground facility, but does not include a "homeowner who owns only residential underground facilities, such as an underground lawn sprinkler system or an underground structure for a residential low-voltage lighting system." N.J.S.A. 48:2-75.

The Act designated the BPU as the appropriate State agency to provide policy oversight to the System and to enforce the provisions of the Act. N.J.S.A. 48:2-74. In accordance with this mandate, the BPU adopted regulations to implement the Act. See N.J.A.C. 14:2-1.1 to -6.10. The regulation at issue in this

appeal, N.J.A.C. 14:2-4.2(c), initially adopted in 2007, 39 N.J.R. 4435 (Oct. 15, 2007), was readopted on March 16, 2015, 47 N.J.R. 659-61 (Mar. 16, 2015). N.J.A.C. 14:2-4.2(c) is set forth below; for context we also include N.J.A.C. 14:2-4.2(b):

(b) Within three business days after receiving information from the One-Call center regarding a planned excavation or demolition, an underground facility operator shall do either of the following:

1. If the underground facility operator owns, operates or controls any underground facilities on the site, the underground facility operator shall mark out the site as required under N.J.A.C. 14:2-5, except if a facility is exempt from mark out requirements under N.J.A.C. 14:2-4.1(b) or (c). If an underground facility operator does not own or operate a facility, but controls it, the operator is responsible for compliance with this paragraph; or

2. If the underground facility operator does not own, operate or control any underground facilities on the site, the underground facility operator shall make a reasonable effort to notify the excavator of that fact.

(c) For the purposes of (b) above, an underground facility operator shall be deemed to control all portions of an underground facility carrying metered service, which are not located on the customer's side of the meter, regardless of who owns the property. For example, if a

residential electric customer owns an underground electric line, which provides electricity from the street to the customer's electric meter in an area served by overhead electric lines, the electric utility shall be deemed to control that underground electric line.

[N.J.A.C. 14:2-4.2(b) and (c) (emphasis added).]

In accordance with the rule-making procedures of the Administrative Procedure Act (APA), N.J.S.A. 52:14B-1 to -15, before the readoption of N.J.A.C. 14:2, the BPU invited comments from the public. See N.J.S.A. 52:14B-4(a). Appellants provided comments in opposition to the readoption of the subject regulation. The BPU provided responses to appellants' comments, but declined to make any changes to it or any other regulation in N.J.A.C. 14:2. We address the relevant comments and responses.

It is not disputed that, unlike electric or gas companies, appellants' members typically do not own the lines which extend from their lines under a public right-of-way and the customer's building or meter. The line from the road or curb to the customer's building is generally owned by the customer. Appellants commented the language in N.J.A.C. 14:2-4.2(c) is unreasonable because it compels a service provider, which merely

uses a line to carry its commodity, to mark out the line even if the line is owned, operated, or controlled by another.

The BPU rejected appellants' comment, responding as follows:

There is a risk to underground facilities, including water facilities, that the Legislature has sought to protect through the Underground Facility Protection Act (UFGPA) and this chapter is designed to effectuate. Transferring this responsibility from an operator to a homeowner would not serve this public policy. Additionally, Federal standards for state one-call programs call for the inclusion of all underground facility operators.

[47 N.J.R. 659(a) (March 16, 2015).]

Without providing a specific citation, the BPU claimed the Act provided it with the authority to compel a service provider to mark out a line it neither owns, operates or controls, as long as the provider uses the line. The BPU stated:

Under the One-Call statute, if a utility delivers metered service, it controls the operation of the utility line up to (and often including) the meter, regardless of who owns the line. This is evidenced by the utility's authority to prosecute any person who taps into this line to divert utility service. Since the utility controls the line, it is the underground facility operator who is responsible for marking the facility under the One-Call program. This is a sensible policy because residential utility lines on the utility's side of the

meter generally have more capacity than customer-controlled utility lines on the customer's side of the meter. Therefore, the risk posed by an excavator hitting the utility controlled line is much greater than the risk for a smaller, customer-controlled line behind the meter. This distinction applies to both residential and non-residential facilities. If a large commercial utility customer has installed underground utility lines on its side of the meter, the customer is responsible for locating those lines, not the utility. As such, the Board of Public Utilities (Board) declines to adopt the recommended change.

[Ibid. (Emphasis added).]

Appellants also commented that, even if their members are obliged under the Act to conduct mark-outs, the members do not have immunity should a property owner assert a claim for trespassing as a result of a member entering an owner's property to conduct a mark-out. The BPU responded:

Pursuant to the Board's rules at N.J.A.C. 14:3-3.6 and 3A.1(a)5i, a utility shall have the right to reasonable access to a customer's premises and may discontinue service in appropriate circumstances if access is refused. Additionally, utility providers routinely access customer premises, including in response to emergencies. As such, the Board declines to adopt the recommended change.

[Ibid.]

II

On appeal, appellants contend the BPU's decision to readopt the regulation without change was arbitrary, capricious, and unreasonable, as evidenced by its responses to their comments. Appellants contend the responses do not provide a justification to readopt the regulation without any changes, and urge we set the regulation aside. Before we address appellants' arguments, we briefly summarize the law that governs our review.

Regulations adopted by administrative agencies are accorded substantial deference, provided they are consistent with the terms and objective of the governing statute. Nelson v. Bd. of Educ., 148 N.J. 358, 364-65 (1997). An administrative agency may not "extend a statute to give it a greater effect than its language permits." GE Solid State, Inc. v. Dir., Div. of Taxation, 132 N.J. 298, 306 (1993). Thus, "when the provisions of the statute are clear and unambiguous, a regulation cannot amend, alter, enlarge or limit the terms of the legislative enactment." Flinn v. Amboy Nat'l Bank, 436 N.J. Super. 274, 294 (App. Div. 2014) (quoting L. Feriozzi Concrete Co. v. Casino Reinvestment Dev. Auth., 342 N.J. Super. 237, 250-51 (App. Div. 2001)). "[A]ny regulation or rule which contravenes a statute is of no force, and the statute will control." L. Feriozzi,

supra, 342 N.J. Super. at 251 (quoting Terry v. Harris, 175 N.J. Super. 482, 496 (Law Div. 1980)).

Courts are required to intervene if an agency's action is inconsistent with the legislative mandate. See Williams v. Dep't of Human Servs., 116 N.J. 102, 108 (1989). "[W]e have invalidated regulations that flout the statutory language and undermine the intent of the Legislature." In re Adoption of N.J.A.C. 7:26B, 128 N.J. 442, 450 (1992). Our review is limited to an examination of whether: (1) the action offends the State or Federal Constitution; (2) the agency's action violates express or implied legislative policies; (3) there is an absence of substantial evidence to support the agency's findings; and (4) in applying the legislative policy to the facts, the agency failed to reach a conclusion based on the relevant factors. George Harms Constr. Co., Inc. v. N.J. Tpk. Auth., 137 N.J. 8, 27 (1994).

Under the APA, an agency "shall consider fully all written and oral submissions respecting the proposed rule," N.J.S.A. 52:14B-4(a)(3), and prepare for the public a report providing the agency's response to the comments submitted. N.J.S.A. 52:14B-4(a)(4). Responses must be meaningful, reasoned and supported. See Animal Prot. League of N.J. v. N.J. Dep't of Env'tl. Prot., 423 N.J. Super. 549, 573-74 (App. Div. 2011)

("[d]isagreement with a reasoned, supported agency determination does not give rise to an APA violation"), certif. denied, 210 N.J. 108 (2012). In fact, "[t]he purpose of the APA rulemaking procedures is 'to give those affected by the proposed rule an opportunity to participate in the process, both to ensure fairness and also to inform regulators of consequences which they may not have anticipated.'" In re Provision of Basic Generation Serv. for Period Beginning June 1 2008, 205 N.J. 339, 349 (2011) (quoting In re Adoption of 2003 Low Income Hous. Tax Credit Qualified Allocation Plan, 369 N.J. Super. 2, 43 (App. Div.), certif. denied, 182 N.J. 141 (2004)).

Appellants argue the Act does not provide and the BPU cannot justify how a service provider is deemed to control a line merely because it uses the line to transmit its product. Appellants also challenge the BPU's conclusion a service provider controls a water line merely because the provider has the power to prosecute a party who taps into such a line through which the provider's water is flowing and unlawfully divert it. Appellants note it is the water itself that is confiscated when diverted under unlawful circumstances, not the line itself.

Appellants further attack the BPU's claim large commercial customers that have installed underground utility lines on their "side of the meter" are responsible for locating their lines for

mark outs. Appellants point out meters are commonly located adjacent or close to a customer's building. Thus, most of a commercial customer's line is not on the customer's side of the meter. Therefore, service providers have the task of locating most of the line between the meter and the road for their commercial customers, which are generally difficult to locate.

On the question of their members' vulnerability to trespass claims, appellants dispute the BPU's conclusion N.J.A.C. 14:3-3.6 and N.J.A.C. 14:3A.1(a)(5)(i) provide immunity. Appellants note N.J.A.C. 14:3-3.6 provides a utility reasonable access to a customer's premises, as well as to any property on the premises furnished by the facility, but only for the purpose of "inspecting" the premises incident to the rendering of service, including "reading meters; inspecting, testing, or repairing its facilities used in connection with supplying the service; or the removal of its property." Appellants observe this regulation does not provide utilities access to conduct mark outs.

Appellants further note N.J.A.C. 14:3-3A.1(a)(5)(i) merely provides the utility shall have the right to suspend, curtail, or discontinue service if the customer refuses reasonable access to the customer's premises in accordance with N.J.A.C. 14:3-3.6.

The BPU's response to appellants' arguments includes, in part, what the BPU provided in response to appellants' comments

when the readoption of N.J.A.C. 14:2 was pending. The BPU also provides additional reasons in its brief for readopting the subject regulation. Although we have considered these additional reasons, our role is to review the responses the BPU provided to the comments submitted when the subject regulation was pending readoption, not the additional justifications an agency includes in its brief to explain its previous actions.

"The grounds upon which an administrative order must be judged are those upon which the record discloses that the action was based[,]" and not upon an after-the-fact explanation of the administrative agency's decision. In re Petition of Elizabethtown Water Co., 107 N.J. 440, 460 (1987) (quoting Sec. and Exch. Comm'n v. Chenery Corp., 318 U.S. 80, 87, 63 S. Ct. 454, 459, 87 L. Ed. 626, 633 (1943)). See also In re N.J.A.C. 7:1B-1.1 Et Seq., 431 N.J. Super. 100, 139 (App. Div. 2013) (noting the Department of Environmental Protection's attempt to rehabilitate web postings created after promulgating various rules by asserting additional explanations in its brief was inappropriate, stating "[a]n appellate brief is no place for an agency to try and rehabilitate its actions.").

We question, without deciding, the BPU's claim that: (1) the Act provides authority for the premise the mere use of a line to deliver a product is commensurate with operating or

controlling it; (2) a utility is deemed to control a line if the utility can prosecute a person who taps into and diverts the service provided through that line; and (3) N.J.A.C. 14:3-3.6 and N.J.A.C. 3A.1(a)5(i) immunize a service provider from a claim of trespassing if its agent or employee enters another's property to mark out a line.

We recognize the Legislature has

determine[d] that it is in the public interest for the State to require all operators of underground facilities to participate in a One-Call Damage Prevention System and to require all excavators to notify the One-Call Damage Prevention System prior to excavation or demolition.

[N.J.S.A. 48:2-74.]

However, as previously addressed, with the exception of homeowners who own residential underground facilities, an "operator" is a person or entity that owns, operates, or controls an underground facility. N.J.S.A. 48:2-75. A significant issue is whether appellants' members are operators under the Act.

In our view, the responses the BPU provided to appellants' comments when the subject regulation was pending re-adoption neither fully addressed appellants' comments nor explained why N.J.A.C. 14:2-4.2(c) warranted re-adoption without any change. Thus, it is not clear from the agency's responses whether it

fully considered appellants' comments, as statutorily required under the APA. N.J.S.A. § 52:14B-4(a)(4). See Animal Prot. League of N.J., supra, 423 N.J. Super. at 572 ("Public comments should be "given a meaningful role" in the process of rule adoption"). The responses provided raises the question whether appellants' comments were given the consideration required by the APA, which is significant because, under the APA, any rule not adopted in substantial compliance with the Act is invalid, see N.J.S.A. 52:14B-4(d).

That said, it would be premature to set aside N.J.A.C. 14:2-4.2(c) when further exposition of the BPU's reasoning may well elucidate why it determined no change to this regulation was warranted. See, e.g., Animal Prot. League of N.J., supra, 423 N.J. Super. at 575 (even if the agency misconstrued or perhaps exaggerated the comments and support for its actions, "we cannot say that such response in isolation (or even assuming a minimal number of other such responses) would support a finding that respondents violated the APA").

Therefore, we remand this matter to the BPU to enable it to amplify its responses to appellants' comments and fully explain its reasons for readopting N.J.A.C. 14:2-4.2(c) without change. The BPU shall have ninety days to provide its amended responses to appellants' comments. If it deems appropriate, the BPU is

not foreclosed from proposing an amendment to N.J.A.C. 14:2-4.2(c). If it decides to do so, BPU shall be afforded the time to which it is entitled under the APA.

Remanded for further proceedings consistent with this opinion. We do not retain jurisdiction.

I hereby certify that the foregoing is a true copy of the original on file in my office.



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BOARD OF PUBLIC UTILITIES
TRENTON, NJ

New Jersey American Water
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RECEIVED
CASE MANAGEMENT

December 27, 2018

DEC 31 2018

BOARD OF PUBLIC UTILITIES
TRENTON, NJ

VIA E-Mail and Regular Mail

The Honorable Aida Camacho-Welch
Secretary of the Board
New Jersey Board of Public Utilities
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BPU.ONECALL@bpu.nj.gov

Re: BPU Docket No. AX18020155 – In the Matter of the Re-adoption by Notice of the New Jersey Administrative Code (“N.J.A.C.”) 14:2 “Protection of Underground Facilities: One Call Damage Prevention System”

Dear Secretary Camacho-Welch:

New Jersey-American Water Company, Inc. appreciates this opportunity to submit additional comments on the Board of Public Utilities’ re-adoption of the BPU’s regulations pertaining to underground facilities: One-Call damage prevention system, as outlined in N.J.A.C. 14:2.

New Jersey American Water was an active participant in the public workgroups in this docket held throughout the year to discuss issues of concern with regard to the One-Call rules including, but not limited to, operator responsibilities under these regulations. Our comments, below, reflect New Jersey American Water’s concerns stemming from these discussions regarding changes being considered to the One-Call regulations that we believe are outside of the intent of the rules for public safety and security.

Removal of Paint and Flags

During the public workgroup sessions held in this docket, discussions were held among the stakeholders about adding language to the One-Call regulations concerning responsibility for removal of paint and flags mark-outs following completion of a job, primarily due to aesthetic concerns expressed by municipalities over the painted mark-outs left behind on hardscapes. There is no way for an excavator or owner of the facilities to know whether an open ticket is still being worked at that location. Removal of the mark-outs without such

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J. Boyd, Legal

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knowledge can lead to disastrous consequences that far outweigh the aesthetic issue of leaving the mark-outs in place. It is imperative that we choose safety over aesthetics in this regard and do not assign responsibility for removal of paint and flag mark-outs. We respectfully recommend that this proposed requirement be rejected and remain excluded from the newly-proposed regulations.

Marking Gravity Sewer

During the workgroups among the stakeholders BPU Staff also proposed adding gravity sewers to the definition of "underground facility" under N.J.A.C. 14:2-1.2 in the new proposed rule, believing that the intent of the law was only to exclude storm drains. Staff's expressed intent of including gravity sewers in the definition of underground facility is to try to protect gravity sewers (lines with negative pressure) from damage from contractors using root cutters on customer premises. However, since this typically happens on the customer-side of the line, or where the customer owns the entire lateral (which the operator is not responsible for marking out under the regulations), the proposed change in definition would not actually result in more or better markouts of customer-side gravity sewers, or otherwise prevent damage to those lines, which represent the vast majority of the risk, while potentially imposing additional costs on operators for little or no incremental benefit. Currently, the definition of underground facility does not include storm drains or gravity sewers, and we respectfully request that this definition remain as stated, whereby operators are only required to mark out forced sewer lines.

Respectfully submitted,

/s/ Jeffrey S. Bowlby

Jeffrey S Bowlby
Sr. Operations Manager