

## DEPARTMENT OF INDUSTRIAL RELATIONS

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April 25, 2007

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Re: Public Works Case No. 2005-039  
Kiwi Substation  
Orange County Water District

Dear Mr. Carroll:

This constitutes the determination of the Director of Industrial Relations regarding coverage of the above-referenced project under California's prevailing wage laws and is made pursuant to California Code of Regulations, title 8, section 16001(a). Based on my review of the facts of this case and an analysis of the applicable law, it is my determination that the work of construction and installation of electrical facilities at the Kiwi substation ("Project") is public work subject to prevailing wage requirements only to the extent it is being done by contractors of the public utility; that work being done directly by the public utility with its own employees is not public work.

#### Facts

Southern California Edison ("SCE") is a public utility whose service area includes the City of Fountain Valley, California. SCE provides electric energy distribution services for customers within its service area. The Orange County Water District ("District") is a special governmental district first established in 1933 and is funded by Orange County revenues and District assessments. Its purpose is to manage the groundwater resources within District boundaries. Historically, the electric energy needs of District in Fountain Valley were served by a single line to the Orangewater substation, located on District-owned property. The substation contained SCE-owned equipment associated with the single line service. An institutional need for redundant electric capacity led District to negotiate with SCE the installation of a second line. The limited physical space at the Orangewater substation prohibited the second line from being located there. District made space available to SCE on District-owned property some 500 feet away from the Orangewater substation in what would become known as the Kiwi substation. At the same time, the plan called for SCE to move the existing Orangewater substation facilities and equipment to the Kiwi substation.

On or about November 7, 2001, District entered into an Added Facilities Agreement ("Agreement") with SCE to undertake the Project. The Agreement provides that District is to pay for the costs of the Project; the added facilities, once built, would exclusively serve District's electrical energy needs. The scope of work for the Project included the construction and installation of a 66kV interconnection facility with two-line service, equipped with three 66kV

circuit breakers and a 12kV revenue metering device. The electrical equipment was secured to the realty or to the distribution racks attached to the realty by various methods, including bolts, nuts and welding.

Project costs for the added facilities amounted to approximately \$1.7 million, which District paid to SCE. SCE used its own employees to perform the majority of the work. For the remaining portion of the work, SCE entered into two contracts, one with NRG Power, Inc. ("NRG"), and the other with Energy Management Software Solutions, Inc. ("EMSS"). Under a purchase order dated October 10, 2003, for a price of \$58,800, NRG erected and installed a 66kV steel rack, relay cubicles, disconnect switches, circuit breakers, power transformers and associated electrical equipment. Under a purchase order dated December 5, 2003, for a price of \$2,400, EMSS installed three relays to existing panels and grounded the perimeter fence.

#### Discussion

Under the applicable version of Labor Code section 1720(a)(1),<sup>1</sup> "public works" is defined as "[c]onstruction, alteration, demolition, or repair work done under contract and paid for in whole or in part out of public funds, except work done directly by any public utility company pursuant to order of the Public Utilities Commission or other public authority." "Installation" was added to section 1720(a)(1) by Senate Bill 975 ("SB 975") as an additional type of covered work effective January 1, 2002. The date the Agreement was entered into here is the benchmark date for determining the applicable version of section 1720. The Agreement was entered into on November 7, 2001. Although the applicable statutory law is that which was in effect prior to the passage of SB 975, the coverage analysis of installation work did not change; the work is covered if it involves the bolting, securing or mounting of fixtures to realty. (See, e.g., PW 2005-017, *Western Contract Services, Assembly and Disassembly of Free-Standing Modular Furniture* (December 16, 2005).)<sup>2</sup>

"Public works" is also defined under section 1720(a)(2) as "work done for irrigation, utility, reclamation, and improvement districts, and other districts of this type." Section 1771 generally requires the payment of prevailing wages to workers employed on public work. Section 1772

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<sup>1</sup> All statutory references are to the California Labor Code, unless otherwise indicated.

<sup>2</sup> PW 2005-041, *Pre-Rinse Spray Valve Program (Phase II)*, California Urban Water Conservation Council (May 11, 2006). The legislative history of SB 975 indicates that the inclusion of "installation" as a type of covered work in section 1720(a)(1) was meant to conform to "several precedential coverage decisions made by the Department of Industrial Relations." (Senate 3d Reading, Senate Bill 975 (2001-2002 Reg. Sess.) as amended August 30, 2001, p. 4; Senate Rules Committee, Office of Senate Floor Analyses, Unfinished Business of Senate Bill 975 (2001-2002 Reg. Sess.) August 30, 2001, p. 5.) The relevant precedential coverage decisions issued prior to passage of SB 975 have in common the bolting, securing or mounting of fixtures to the realty. (See, e.g., PW 99-034, *Valley View Elementary School, Pleasanton Unified School District, Installation of Signage by Marketshare, Inc.* (September 29, 1999); PW 99-061, *Toilet Partition/Bathroom Accessories Installation, Zanker Elementary School, Milpitas Unified School District* (November 10, 1999); and PW 99-060, *Metal Lockers and Metal Storage Shelving, Santa Clara Police Facility* (November 30, 1999).)

provides that "[w]orkers employed by contractors or subcontractors in the execution of any contract for public work are deemed to be employed upon public work." Under section 1774, such contractors or subcontractors "shall pay not less than the specified prevailing rates of wages to all work[ers] employed in the execution of the contract." Work falls within the scope of sections 1771, 1772, and 1774 when it is "functionally related to the process of construction" and "an integrated aspect of the 'flow' process of construction." (See *O.G. Sansone Co. v. Dept. of Transportation* (1976) 55 Cal.App.3d 434, 444, quoting *Green v. Jones* (1964) 23 Wis.2d 551, 128 N.W.2d 1, 7.)

The parties do not dispute that the Project meets the three elements in the definition of "public works" under section 1720(a)(1). The building of the facilities is clearly construction. The securing of the electrical equipment is installation because the equipment is affixed to the realty by bolts, nuts and welding. And, the work is done under contract, the Agreement, and paid for in whole or in part out of public funds of District. The issues in dispute are whether the public utility exception in section 1720(a)(1) exempts from the definition of public work any of the work performed under the Agreement and whether, independent of section 1720(a)(1), the work constitutes public work under section 1720(a)(2).

The Southern California Labor/Management Operating Engineers Contract Compliance Committee ("Committee") argues that the public utility exception does not apply because there was no order of the California Public Utilities Commission ("CPUC") directing SCE to perform the work. Acknowledging that the work may have been done according to CPUC standards, the Committee believes that circumstance is no different than that faced by any private contractor whose work must comply with state and local construction codes. The Committee also argues that, apart from section 1720(a)(1), the Kiwi substation work is public work under section 1720(a)(2) because District is a "district" within the meaning of that section.

SCE admits that the CPUC did not specifically order SCE to undertake any portion of the Project. SCE maintains, however, that because the work was scheduled, coordinated, supervised and approved by SCE, and because the Agreement itself was authorized by a CPUC-approved tariff, SCE Rule 2 ("Rule 2"), paragraph (H), the Project qualifies for the public utility exception.

Article XII, section 6 of the California Constitution provides that the CPUC "may fix rates, establish rules, examine records, issue subpoenas, administer oaths, take testimony, punish for contempt, and prescribe a uniform system of accounts for all public utilities subject to its jurisdiction." The CPUC's role is to "supervise and regulate every public utility." (Pub. Util. Code, § 701.) Every public utility must "obey and comply with every order, decision, direction, or rule made or prescribed by the commission in the matters specified in [the statutes], or any other matter in any way relating to or affecting its business as a public utility." (Pub. Util. Code, § 702.) Mandated to prescribe rules for the performance of "any service or the furnishing of any commodity of the character furnished or supplied by any public utility," the CPUC may hold hearings and find "that additions, extensions, repairs, or improvements to, or changes in, the existing plant" of a public utility "ought reasonably to be made ... to secure adequate service of facilities." (Pub. Util. Code, §§ 761, 762.) The CPUC's authority in that regard is buttressed by

the requirement that a public utility “furnish and maintain such adequate and reasonable service, equipment, and facilities ... as are necessary to promote the safety, health, comfort, and convenience of its patrons, employees, and the public.” (Pub. Util. Code, § 451.)<sup>3</sup>

Public utilities long have been required to extend their facilities and to place themselves in a position where they can give proper and adequate service. (*Butler v. Pacific Gas & Elec. Co.* (1913) 3 C.R.C. 629.) Public utilities may not withdraw from public service any portion of the territory they serve. (C.P.U.C. General Order No. 96A, paragraph XIV (1988) adopted by C.P.U.C. Dec. No. 88-09-059.) “[O]n proper demand and tender of rates,” public utilities “shall furnish such commodity or render such service within the time and upon the conditions provided in [CPUC] rules.” (Pub. Util. Code, § 761.) If need be, a customer of a public utility may file a complaint at the CPUC to obtain service that has been denied by the utility, for “[a] public utility must meet all reasonable demands for extension of service within its service area in accordance with lawfully filed tariffs.” (*Matheisl v. Pacific Gas & Elec. Co.* (1993) 50 C.P.U.C. 2d 174.)

CPUC tariffs consist of schedules “showing all rates, tolls, rentals, charges, and classifications collected or enforced, or to be collected or enforced, together with all rules, contracts, privileges, and facilities which in any manner affect or relate to rates, tolls, rentals, classifications, or service.” (Pub. Util. Code, § 489(a).) When approved by the CPUC, tariffs filed under Public Utilities Code section 489(a) have the force of law. (*Pacific Bell v. Public Utilities Com’n* (2000) 79 Cal.App.4th 269, 274; *Pacific Gas & Elec. Co.* (1977) 81 Cal.P.U.C. 551, 554 [tariffs are as binding upon the utility as upon its customers; deviations from tariffs are unlawful unless the CPUC specifically authorizes them].) While a public utility may seek to alter a published tariff, it must do so only with notice to customers and permission from the CPUC. (Pub. Util. Code, §§ 454, 491; C.P.U.C. General Order No. 96A, paragraph X.)

Rule 2 is a tariff that sets forth the voltage specifications, rate schedules, and equipment specifications that bind both SCE and its customers in the provision of electrical energy. (Cal.P.U.C. Dec. No. 97-10-087 (1998).) Rule 2, paragraph (H), governs SCE’s installation of added facilities beyond the “adequate and reasonable” facilities installed by SCE at its own expense under Public Utilities Code section 451. When a customer requests added facilities and SCE agrees to install them, the facilities must be installed at customer expense under the terms and conditions of a contract in a form allowed under a tariff approved by the CPUC. The form contract used for the Agreement in this case is authorized by a tariff approved by the CPUC on July 30, 1993. (Cal.P.U.C. Dec. No. G930616 (1993).) If SCE sought to proceed on the Project under terms and conditions different than those provided in the tariff’s form contract, it would first have had to apply to the CPUC for permission. (Pub. Util. Code, § 454(a).)

As is relevant to this case, the public utility exception in section 1720(a)(1) contains the following two elements: the work must be “done directly by any public utility company” and the work must

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<sup>3</sup> Additionally, Public Utilities Code section 768 provides that “[t]he [CPUC] may establish uniform or other standards of construction and equipment, and require the performance of any other act which the health or safety of its employees, passengers, customers, or the public may demand.”

be done “pursuant to order of the Public Utilities Commission or other public authority.” The first element is met as to the work SCE performed using its own employees. (See, e.g., PW 91-056, *Southern California Regional Rail Authority Lease of Union Pacific Right-of-Way* (November 30, 1993) [for highway work done pursuant to a statute governing railroad crossings, “[t]he [public utility company] exclusion covers PUC ordered work that is done by a public utility company with its own forces.”].)<sup>4</sup>

As for the second element, “pursuant to order of the Public Utilities Commission or other public authority,” the wording can be traced the adoption of the Public Wage Act in 1931. (Stats. 1931, ch. 397, § 4, p. 912.) That Act defined public works to include “any construction or repair work done under contract, and paid for in whole or in part out of public funds, other than work done directly by any public utility company pursuant to order of railroad commission or other public authority ....” What meaning was intended by “other public authority” was suggested by language preceding that phrase that defined public works to include “street, sewer and other improvement work done under the direction and supervision or by the authority of any officer or public body ....” *Ibid.* Under the rule of statutory construction that terms repeated in a statute are presumed to have the same meaning, the phrase “work done .... pursuant to order of railroad commission or other public authority” in the public utility exception means work done either pursuant to an order of the railroad commission or pursuant to an order of an officer or other public body.<sup>5</sup> (See, *People v. Anderson* (2002) 28 Cal.4th 767, 792-793.) The Legislature can be described as a public body. As such, the Legislature issues its commands via statutes. Work done pursuant to a statute, then, constitutes work done “pursuant to order ... of [a] public authority” within the meaning of the public utility exception. Also, work done pursuant to a tariff approved by the CPUC constitutes work done “pursuant to order of the Public Utilities Commission” within the meaning of the public utility exception since deviations from approved tariffs are unlawful unless the CPUC specifically authorizes them. (*Pacific Gas & Elec. Co., supra*, 81 Cal.P.U.C. at p. 554.) With this understanding, a directive regarding public utility service as contained in statutes enacted by the Legislature or orders and tariffs of the CPUC satisfies the second element of the public utility exception of section 1720(a)(1).

Public Utilities Code section 451 requires adequate and reasonable service for customers within a public utility’s service territory and the District is located within SCE’s territory. The wording of Rule 2, paragraph (H) suggests that SCE did not have to agree to District’s request for a second line. (See, Rule 2, paragraph (H)(1) [“Where an applicant requests and SCE agrees to install

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<sup>4</sup> Given the year-round employment of utility employees, interpreting the public utility exception to exclude work that is performed by a utility’s employees from “public work” comports with the policy view of the California Supreme Court in *Bishop v. City of San Jose* (1969) 1 Cal.3d 56, 63-64. While *Bishop* concerned employees of public entities, not employees of public utilities, the Court’s recognition that “a legislative purpose [of California’s prevailing wage laws] to deal only with contracted public work, and not with work done by a municipality by force account” bears mention.

<sup>5</sup> The “railroad commission” in section 4 is the predecessor of the CPUC. (See *Pratt v. Coast Trucking, Inc.* (1964) 228 Cal.App.2d 139, 146-147.)

facilities which are in addition to, or in substitution for the standard facilities, the costs thereof shall be borne by the applicant”].) It has long been the rule, however, that a public utility corporation is bound, upon demand, to supply its commodity to consumers. (*Hotchkiss v. Moran* (1930) 109 Cal.App. 321, 324.) An electric utility company, as a “quasi-public corporation, enjoying the privilege under the constitution of using the public streets of the municipality for the location and maintenance of its conduits and transmission lines” would be liable for damages if it “wrongfully refused to furnish ... electricity.” (*Thompson v. San Francisco Gas & Elec. Co.* (1912) 18 Cal.App. 30, 34.)

The form agreement used in this case is authorized by an SCE tariff approved by the CPUC on July 30, 1993. (Cal. P.U.C. Dec. No. G930616.) That authorization obviates the need for SCE to apply to the CPUC for permission to enter such agreements on an ad hoc basis. Having a general obligation to provide service to customers within its service area and having entered into the Agreement, SCE was bound by statutes and CPUC tariffs and orders in how it conducted the work, just as if the work had been specifically mandated. The form, terms and conditions of the Agreement were set by tariffs and the specifications of the work at issue were dictated by statutes, tariffs, and CPUC general orders.

Under these circumstances the work on the Project was tantamount to being “done ... pursuant to order of the Public Utilities Commission or other public authority” within the meaning of section 1720(a)(1) because it was done pursuant to statute and CPUC tariff. (Pub. Util. Code, §§ 451, 454(a), 489(a), 761; Rule 2.)<sup>6</sup> To the extent that SCE used its own employees to perform any of the work called for under the Agreement, that work is deemed “done directly by any public utility company pursuant to order.” As such, the work performed by SCE’s own employees falls under the public utility exception in section 1720(a)(1).

The Committee’s analogy to private contractors who comply with state and local construction codes neglects the specialized nature of regulated electric utility service. Unlike construction performed by private contractors, SCE retained ownership interest in the equipment it installed on the Project. Due to that retained ownership interest and the critical nature of the service involved in delivering electric energy, the terms and conditions under which public utilities provide that service are regulated in a more comprehensive way than regulation of other private construction. Also, outside of installing its own generator, a customer such as District has no viable alternative but to use SCE to meet its added electrical needs given SCE’s monopoly status within its service territory, whereas in contracting for other types of construction, District’s choices would not be restricted to one contractor. District did not issue a request for proposal, as is the case with construction projects planned by public entities. Rather, District applied to SCE, and SCE alone, as its only option to construct and install the needed facilities. To that extent, the purposes

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<sup>6</sup> Given the conclusions reached herein that the subject work is done pursuant to order of the CPUC and the state Legislature, it is unnecessary to reach the issue of whether the work is also done pursuant to an order of the District. Although District is also “other public authority” within the meaning of section 1720(a)(1), the scope of what qualifies as “order of ... other public authority” will be left for another determination in a case in which the facts squarely present that issue.

underlying the prevailing wage laws that relate to protecting employees from substandard wages if contractors recruited labor from distant cheap-labor areas and allowing union contractors to compete with nonunion contractors are not implicated by the use of SCE employees to perform work on the Project. (*Lusardi Construction Co. v. Aubry* (1992) 1 Cal.4th 976, 987.)

SCE cites its tariff to argue that the work performed by NRG and EMSS also falls within the public utility exception in section 1720(a)(1). Yet, the tariff only relates to the “pursuant to order” prong of the exception. Regarding the work performed by NRG and EMSS employees under contract with SCE, the second prong of the public utility exception is not met, for that work was not “done directly by any public utility company.” Therefore, the public utility exception in section 1720(a)(1) does not apply to the work performed by NRG and EMSS employees. Consequently, the work performed by NRG and EMSS is public work within the meaning of section 1720(a)(1).

While the work “done directly” by SCE employees is not public work under the public utility exception in section 1720(a)(1), the question remains whether it is public work under section 1720(a)(2) as “work done for irrigation, utility, reclamation, and improvement districts, and other districts of this type.” It is axiomatic that section 1720(a)(2) cannot be read in isolation, for it is part of a statutory scheme and, alone, does not define what type of work done for a district is “public work.” (See, *Dyna-Med, Inc. v. Fair Employment & Housing Com.* (1987) 43 Cal.3d 1379, 1387 [“[t]he words of [a] statute must be construed in context, keeping in mind the statutory purpose, and statutes or statutory sections relating to the same subject must be harmonized, both internally and with each other, to the extent possible.”].) Historical development of a statute may be taken into account in ascertaining the Legislature’s intent. (*DuBois v. Workers’ Comp. Appeals Bd.* (1993) 5 Cal.4th 382, 393.) In “harmonizing the disparate, and sometimes discordant, statutory provisions, [courts] are guided by the maxim that, where statutes are otherwise irreconcilable, later and more specific enactments prevail, pro tanto, over earlier and more general ones.” (*Wells v. One2One Learning Foundation* (2006) 39 Cal.4th 1164, 1208.)

Two bases exist to find that section 1720(a)(2) provides no independent ground for finding the work done directly by SCE employees to be public work. First, section 1720(a)(2) does not list the type of work done for districts that qualifies as public work. To discover what type of work is covered by section 1720(a)(2), reference must be made to section 1720(a)(1) (“[c]onstruction, alteration, demolition, installation, or repair work”). (See, e.g., PW 2005-009, *The Hauling of Biosolids from Orange County; The Application of Hauled Biosolids on Farmland in Kern and Kings Counties* (April 21, 2006) [“the most reasonable way to define the scope of section 1720(a)(2) is to require that the work fall within one of the types of covered work enumerated in section 1720(a)(1).”].) Harmonizing the two sections of the statute in this way comports with basic rules of statutory construction.

Second, the language of section 1720(a)(2), “work done for irrigation, utility, reclamation and improvement districts, and other districts of this type,” first appeared in the definition of public work in the 1929 version of Penal Code section 653c. (Stats. 1929, ch. 793, § 1, p. 1603.) As previously stated, the public utility exception of section 1720(a)(1) originated in 1931. (Stats.

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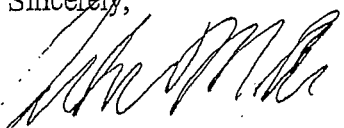
1931, ch. 397, § 4, p. 912.) Consistent with the rules of statutory construction, the later, more specific, public utility exception in section 1720(a)(1) prevails over the earlier, more generalized, section 1720(a)(2).

Moreover, to find the work done directly by SCE employees is public work under section 1720(a)(2) would eviscerate the section 1720(a)(1) public utility exception. Such an interpretation would do violence to the statutory scheme as a whole. Given the applicability of the public utility exception of section 1720(a)(1) to the work done directly by SCE's workforce, assuming District is considered one of "other districts of this type," section 1720(a)(2) alone does not provide a valid basis for finding the work performed by SCE itself to be public work. This is consistent with the analysis of section 1720(a)(2) in PW 2005-009, *The Hauling of Biosolids from Orange County; The Application of Hauled Biosolids on Farmland in Kern and Kings Counties* (April 21, 2006).

To summarize, the work performed by SCE's own employees falls within the public utility exception to the definition of public work and therefore is not subject to prevailing wage requirements. The work performed by NRG and EMSS employees, however, does not fall within the exception and therefore is subject to prevailing wage requirements.

I hope this determination satisfactorily answers your inquiries.

Sincerely,



John M. Rea  
Acting Director