STATE OF CALIFORNIA

DEPARTMENT OF INDUSTRIAL RELATIONS

DECISION ON ADMINISTRATIVE APPEAL

RE: PUBLIC WORKS CASE NO. 2005-039

KIWI SUBSTATION/ORANGE COUNTY WATER DISTRICT

I. INTRODUCTION

On April 25, 2007, the former Acting Director of the Department of Industrial Relations ("Department") issued a public works coverage determination ("Determination") regarding the construction of electrical facilities undertaken by Southern California Edison ("SCE") for the Orange County Water District ("District") at the Kiwi substation ("Project"). The Determination found that the Project entails construction done under contract and paid for in part out of public funds under the definition of "public works" in what is now Labor Code section 1720(a)(1).[1] The Determination also found that work done by SCE contractors, NRG Power, Inc. ("NRG") and Energy Management Software Solutions, Inc. ("EMSS"), does not fall within the exception in section 1720(a)(1) for work done *directly* by a public utility and, therefore, is public work subject to prevailing wage requirements. The Determination further found that work done directly by SCE employees does fall within the public utility exception of section 1720(a)(1), does not constitute public work under section 1720(a)(2) and, therefore, is not subject to prevailing wages on any statutory basis.

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[1] All further statutory references are to the California Labor Code unless otherwise specified. Subsequent to November 7, 2001, the date SCE and District contracted to do the work, section 1720(a) was amended by Senate Bills 975 and 972, effective January 1, 2002 and January 1, 2003, respectively. (Stats. 2001, ch. 938, § 2 (SB 975); Stats. 2002, ch. 1048, § 1 (SB 972).) While the version of the statutory scheme in effect on November 7, 2001 is the applicable law, the subsequent amendments effected no substantive change to the provisions at issue in this case. Accordingly, the provisions will be referred to in their current renumbered form.

On May 25, 2007, the requesting party, the Southern California Labor/Management Operating Engineers Contract Compliance Committee ("Committee"), filed an administrative appeal of the Determination contesting that portion of the Determination relating to work done directly by SCE employees. On July 20, 2007, SCE submitted additional facts and a rebuttal to the appeal and, on July 26, 2007, the staff of the California Public Utilities Commission ("CPUC") submitted a position statement. On August 21, 2007, Committee submitted further argument responsive to SCE's and CPUC's submissions.

All of the submissions have been considered carefully. For the reasons set forth below, the appeal is granted and the Determination is reversed as to that portion of the Determination relating to work done directly by SCE employees. That portion of the Determination relating to work done by NRG and EMSS is affirmed and incorporated herein by reference.

II. SUPPLEMENTAL FACTS

The facts set forth in the Determination are incorporated herein by reference and supplemented with the following additional information concerning the nature of the work done directly by SCE employees. SCE employees performed above-ground work on the Project, which included the following: looping of a transmission line; constructing an internal telecommunications system between the substation and a grid control center; installing circuit breakers and associated equipment; and testing and inspection of circuit breakers, electrical connections and protection relays.

Project costs amount to approximately $1.7 million, which break down as follows: $1.45 million for equipment and materials; $167,000 for labor associated with the work performed directly by SCE employees; $77,233 for the contract with NRG; and $2,066 for the contract with EMSS.

III. DISCUSSION

The public utility exception in the definition of "public works" in section 1720(a)(1) exempts "work done directly by any public utility company pursuant to order of the Public Utilities Commission or other public authority." Section 1720(a)(2) defines public works as "work done for" certain districts. The Determination found that the work

performed by SCE employees falls within the public utility exception in section 1720(a)(1) because "order of the Public Utilities Commission or other public authority" includes a tariff approved by CPUC regarding "added facilities" and statutes relating to CPUC authority and utility service. The Determination further found that to find such work covered under section 1720(a)(2) would effectively nullify the public utility exception. The Determination concluded that the work performed by SCE employees is not covered under any of the relevant statutory provisions.

No one disputes that the Project meets the definition of public works under section 1720(a)(1) in that it involves construction, done under contract, and paid for in part with public funds. The issue raised on appeal is whether the work was done "pursuant to order of the Public Utilities Commission or other public authority" within the meaning of section 1720(a)(1).[2] Committee observes that CPUC did not order SCE to undertake the Project. Among other points, Committee relies upon the plain meaning of the term "order," the need to narrowly construe statutory exceptions, and the use of the term "order" in the Public Utilities Act of 1915[3] that was in existence in 1931 when the public utility exception was enacted, in asserting that the work here was not done "pursuant to order" of CPUC within the meaning of the statutory exception.

SCE concedes that CPUC did not specifically order SCE to undertake the Project. SCE argues, however, the public utility exception does not require such an order. SCE asserts that work done pursuant to a tariff should qualify for the public utility exception, citing paragraph H of SCE tariff, Rule 2 ("Rule 2(H)"). Under Rule 2(H), SCE must use a form contract on file at the CPUC when formalizing agreements to provide customers with added facilities.[4] SCE notes that the public utility exception requires only that the work be done *pursuant to* order. SCE argues that SCE's compliance with Rule 2(H) satisfies the "pursuant to order" requirement. SCE also notes that in general rate cases it

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2 Given the outcome reached in this Decision that work done directly by SCE employees is covered under section 1720(a)(1), the other issue raised by Committee whether such work is "work done for" a district within the meaning of section 1720(a)(2) need not be addressed.

3 (Stats. 1915, Act 6386, Title 464, §§ 35 and 36, p. 115.)

4 Added facilities are above and beyond the standard facilities normally provided by SCE at its own expense.

brings before CPUC every three years, a blanket budget is proposed for anticipated added facilities work. CPUC includes a certain amount in authorized rates to fund added facilities work as part of its decision in each such general rate case. SCE contends that this funding authorization by CPUC provides an additional basis for finding that the work here was done "pursuant to order."

As mentioned above, Committee argues that "order" in the public utility exception should be construed by reference to the original provisions of the Public Utility Act of 1915 relating to the Railroad Commission.[5] Such argument overlooks the fact that the public utility exception also applies to work done pursuant to order of "other public authorit[ies]."[6] Moreover, to construe "order" to mean only the type of formal orders that the Railroad Commission issued after a hearing pursuant to sections 35 and 36 of the Public Utility Act of 1915 would ignore other methods used by other public authorities and the Railroad Commission itself for accomplishing the same goals for the work of public utilities.[7] Also, to limit the public utility exception to formal orders of CPUC issued after hearings based on sections 35 and 36 of the Public Utility Act of 1915 would disregard section 53, which provides, "No informality ... shall invalidate any order, decision, rule or regulation made .... "

While the interpretation of "order" urged by Committee would be unduly restrictive, the word does connote the imposition of a command or direction.[8] Hewing to the words of the statute, a proper analysis of how the phrase "work done ... pursuant to order" applies in this case considers whether there were legal requirements imposed by the "Public Utilities Commission or other public authority" commanding or directing the

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5 The "Railroad Commission" is the predecessor of CPUC. (See, *Pratt v. Coast Trucking, Inc.* (1964) 228 Cal.App.2d 139, 146-147.)

6 See, e.g., authority granted to State department of engineering over placement, relocation, and removal of pipes, conduits, sewers, wires and railways in or on state roads and highways. (Stats. 1915, c. 99, p. 179, § 1; Stats. 1935, c. 631, pp. 289-291, §§ 673, 680 and 720.)

7 To so construe the public utility exception would also discount the significance of CPUC general orders or CPUC decisions ordering utilities to file tariffs that, in turn, command or direct construction.

8 "Order" is defined as: "*Law.* A. In its widest sense, any command or direction of a court. B. Usually, any direction of a judge or court entered in writing and not included in a judgment or decree." (Webster's 2d New Internat. Dict. (1934), p. 1716.) A similar definition appears in the subsequent edition of that dictionary. (Webster's 3d New Internat. Dict. (1986), p. 1588.)

construction of the added electrical facilities at the Kiwi substation. Whether the legal requirements come in the form of a formal order is not determinative. More significant is whether substantive requirements relating to the construction were imposed by CPUC, the only public authority involved.

In the main, Rule 2(H) describes the financing and charges associated with added facilities. The public utility exception turns, however, on whether CPUC commanded or directed the performance of the work, not on how the work was financed.

As explained above, Rule 2(H) requires SCE to use a form contract on file with CPUC when agreeing with a customer to construct added facilities. SCE did use the form contract when it entered into the Added Facilities Agreement ("Agreement") with District. However, like Rule 2(H), the Agreement mostly concerns monthly charges and issues tangential to the performance of the work, such as the grant of easements for SCE access to customer property, responsibility for construction delays and rights on discontinuance of the use of the facilities.[9]

Pursuant to Rule 2(H), SCE drafted an attachment to the Agreement that described the scope of the work and the estimated total cost to District. The attachment is not filed with CPUC. Under this arrangement, CPUC neither had knowledge of the Project nor any involvement that rises to the level of "order" for purposes of the public utility exception. (Rule 2(H), paragraph (1), and Agreement, Exhibit A.) Further, by its own terms, Rule 2(H) applies "where an applicant requests and SCE agrees." (Rule 2(H), paragraph (1).) The voluntariness contemplated in the tariff suggests the absence of a command or direction as to the work to be done. Although this tariff is not an "order" for purposes of the public utility exception, that does not mean that work done pursuant to other CPUC-approved tariffs cannot qualify for the exception. As indicated above, the

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[9] What matters is not whether an agreement was used to facilitate the work, but whether the work was commanded or directed by CPUC or other public authority. This approach is consistent with prior public works coverage determinations that implicitly sustained the notion that work done by public utility employees qualifies for the public utility exception even though the underlying regulatory schemes contemplate agreements for the work at issue. (See, PW 2001-059, *Utility Agreements for Relocation of Utilities, California Department of Transportation* (October 25, 2002) [finding exception inapplicable to subcontractor work done under utility relocation agreement as "the Utility is not doing the utility relocation work with its own forces but is hiring a contractor..."]; and PW 92-020, *PG&E Agreement for Monterey Road Undergrounding, City of Morgan Hill* (March 5, 1993) [stating case "appears to be unique in that

form in which the "order" comes is not determinative. Identifying the substantive requirements relating to the construction is the critical inquiry.

The fact that CPUC sets SCE's general rates based on budget proposals that include an amount for three years' of anticipated added facilities work relates to the financing of the added facilities generally, not the "work done" in constructing them. Therefore, CPUC's funding authorization cannot be accepted as a type of CPUC order reasonably contemplated by the public utility exception in section 1720(a)(1).

In sum, the role of CPUC in approving the Rule 2(H) tariff, placing on file the form contract, and conducting the triennial rate proceeding does not support a conclusion that the Project was done pursuant to a CPUC order for purposes of the public utility exception.[10]

SCE argues that covering the work performed by SCE employees would nullify the public utility exception. SCE notes that, under Rule 2(H) and the form contract for added facilities, it is not required to request CPUC hearings and obtain individual CPUC orders to carry out added facilities projects. SCE reasons that if "work done ... pursuant to order" meant that individual added facilities projects must be authorized by CPUC, it would have to seek individual hearings and orders, causing an increase in the workload of CPUC, a drain on public utility and customer resources needed to request added facilities, and a delay in the completion of projects needed by customers. However, that the public utility exception may not apply to the present method for carrying out added facilities work does not mean the statute is nullified. The exception applies to other types of public utility work that is commanded or directed by CPUC or other public authority, including

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normally the utility performs work such as this with its own forces and is therefore exempted from the requirement to pay prevailing wages"].)

[10] Similarly, statutes that generally relate to CPUC authority and utility service signify potential, not actual, CPUC command or direction over the Project and, therefore, do not serve as a basis for finding that the work was done pursuant to order within the meaning of the public utility exception. (See, Pub. Util. Code, §§ 451 [public utility must "furnish and maintain ... adequate and reasonable service, equipment, and facilities ... "]; 454(a) [notice to customers and CPUC permission required to alter tariffs and practices]; 489(a) [schedules showing all rates and charges to be filed with CPUC]; 701 [CPUC regulatory authority]; 761 [CPUC hearings into whether service is "unjust, unreasonable, unsafe, improper, inadequate, or insufficient" and CPUC rules for utilities to furnish service on proper demand and tender of rates within the time and conditions provided in said rules]; and 762 [CPUC hearings into whether "additions, extensions, repairs, or improvements to, or changes in, the existing plant ... ought reasonably to be made ..."].)

other conceivable methods for carrying out added facilities work where the role of CPUC in the construction does rise to the level of "order."

SCE also argues that its view of the public utility exception is supported by public policy considerations. Those considerations include the delaying of projects and draining of resources referred to above. However, these public policy considerations are more properly addressed by the Legislature, which is free to amend section 1720(a)(1) in response to current regulatory and industry practice. The Legislature is also free to delete the "pursuant to order" language from the public utility exception altogether, as the State of Illinois did in 1961 and 1963. (See, Miller, *Construction Covered by the Prevailing Wage Act* (1999) 31 Urb. Law. 97, 104-105 [comparing the 1941 Illinois prevailing wage statute, which contained a public utility exception conditioned by the "pursuant to order" language, with amended versions in which that language had been deleted].) That the public utility exception has never been amended by the Legislature despite other recent changes in the prevailing wage law supports the more limited interpretation adopted in this Decision.

With these considerations in mind, it is concluded that the work done directly by SCE employees on the Project does not fall within the public utility exception and therefore is subject to prevailing wage requirements.

IV. CONCLUSION

For the reasons stated above, Committee's appeal is granted and that portion of the Determination finding that the work done directly by SCE employees is not public work is reversed. This Decision constitutes the final administrative action in this matter.

Dated: 1/29/08

John C. Duncan, Director