

ADAMS BROADWELL JOSEPH & CARDOZO

A PROFESSIONAL CORPORATION

ATTORNEYS AT LAW

601 GATEWAY BOULEVARD, SUITE 1000  
SOUTH SAN FRANCISCO, CA 94080-7037

TEL: (650) 589-1660  
FAX: (650) 589-5062

mdjoseph@adamsbroadwell.com

SACRAMENTO OFFICE

1225 8th STREET, SUITE 550  
SACRAMENTO, CA 95814-4810

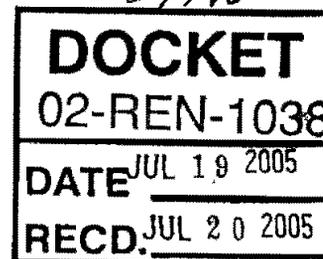
TEL: (916) 444-6201  
FAX: (916) 444-6209

DANIEL L. CARDOZO  
RICHARD T. DRURY  
THOMAS A. ENSLOW  
TANYA A. GULESSERIAN  
MARC D. JOSEPH  
OSHA R. MESERVE  
SUMA PEESAPATI  
GLORIA D. SMITH

FELLOW  
KEVIN S. GOLDEN

OF COUNSEL  
THOMAS R. ADAMS  
ANN BROADWELL

July 19, 2005



John L. Geesman  
Commissioner and Presiding Member  
Renewables Committee  
California Energy Commission  
1516 Ninth Street  
Sacramento, CA 95814

Jackalyne Pfannenstiel  
Commissioner and Associate Member  
Renewables Committee  
California Energy Commission  
1516 Ninth Street  
Sacramento, CA 95814

Re: New Renewables Facilities Program Guidebook; 02-REN-1038

Dear Commissioners Geesman and Pfannenstiel:

I am writing on behalf of California Unions for Reliable Energy ("CURE") to request that the California Energy Commission revise its "New Renewable Facilities Program Guidebook" (April 2004) 500-04-001F ("Guidebook") to include a discussion of the prevailing wage requirements established by statute. Public Utilities Code section 399.14, subdivision (h), requires renewable energy facilities that are awarded supplemental energy payments ("SEPs") from the New Renewable Facilities Program ("NRFP") to comply with California's prevailing wage law. Currently the Guidebook states on page 2 that it will provide a discussion of these prevailing wage requirements, but no discussion follows.

The original draft of the Guidebook (January 2004) contained a section on prevailing wage requirements, but this section was deleted in the final adopted version. The reason behind this deletion was the inadvertent confusion caused in 2003 when the Legislature amended and renumbered some sections of the Public

1299-001a

July 19, 2005

Page 2

Utilities Code and Public Resources Code, but failed to delete the original section and failed to update the relevant cross-references to these sections. The Energy Commission apparently decided to omit from the Guidebook all discussion of the prevailing wage requirement pending resolution of this inadvertent statutory confusion.

Subsequent to the publication of the Guidebook, the Legislature enacted further technical amendments correcting the cross-references, removing the unneeded original section and reaffirming the applicability of prevailing wage requirements to renewable energy facilities that are awarded SEPs from the NRFP. Accordingly, the Energy Commission should now update the Guidebook with an explanation of these requirements.

To understand the background of this issue, we trace the statutory history.

#### **I. The Original Prevailing Wage Requirement, SB 1078 (2002)**

In 2002, Senate Bill 1078 was enacted, establishing the Renewable Portfolio Standard program. Under the RPS program, the California Energy Commission awards Supplemental Energy Payments to renewable generation resources for the above market costs of generating renewable energy. (Public Utilities Code section 383.5 (2002).) SB 1078 also provided that if a renewable energy generating resource is awarded SEPs by the Energy Commission, the project is a “public work” that must pay the prevailing wages pursuant to the Labor Code. This requirement was codified in Public Utilities Code section 399.14, subdivision (h). As enacted in 2002, 399.14(h) provided as follows:

(h) Construction, alteration, demolition, installation, and repair work on an eligible renewable energy resource that receives production incentives or supplemental energy payments *pursuant to Section 383.5*, including, but not limited to, work performed to qualify, receive, or maintain production incentives or supplemental energy payments is “public works” for the purposes of Chapter 1 (commencing with Section 1720) of Part 7 of Division 2 of the Labor Code.

(Former Pub. Utilities Code § 399.14, subd. (h), added by Stats. 2002, ch. 516 (SB 1078), § 3 (emphasis added).)

July 19, 2005

Page 3

## **II. SB 183 (2003) Inadvertently Failed to Update the Statutory References Contained in Public Utilities Code Section 399.14, Subdivision (h)**

In 2003, Senate Bill 183 was enacted. That bill made several unrelated substantive changes to the renewable energy program, and recast the provisions of Section 383.5 of the Public Utilities Code as nearly identical provisions in Sections 25740 through 25750 of the Public Resources Code.

The bill also attempted to repeal Section 383.5 of the Public Utilities Code (since its provisions had been transferred to the Public Resources Code), and to update the references to Section 383.5 in other code sections to reflect the new provisions in the Public Resources Code. However, the repealing provision of SB 183 did not become operative because another bill, Senate Bill 168, also amended Section 383.5. Section 383.5 thus remained in the code, along with nearly identical provisions in the Public Resources Code.

In addition to failing to repeal Section 383.5, the bill failed to update the cross references to Section 383.5 contained in Section 399.14, subdivision (h), as well as cross references to Section 383.5 in Public Utilities Code sections 399.11(d), 399.12(a)(1), 399.13(c), 399.15(a), 399.15(a)(2), 399.15(b)(3), 445(d), 445(e), among other sections.

While Section 399.14, subdivision (h), had not been updated to reference the new Sections 25742 and 25743 of the Public Resources Code, its reference to the original nearly identical sections in Public Utilities Code section 383.5 remained valid since Section 383.5 had not been deleted. Thus, on its face, the prevailing wage requirement of Section 399.14, subdivision (h) still applied to projects awarded SEPs from the NRFP as defined by Section 383.5. Nonetheless, this chain of events created enough confusion that the Energy Commission decided not to include the prevailing wage requirement section in the final version of the New Renewable Facilities Program Guidebook.

## **III. The Passage of SB 1891 (2004) Corrected the Statutory References and Eliminated Any Uncertainty to the Applicability of Prevailing Wage Requirements**

In 2004, the Legislature acted to correct the confusion it had inadvertently created the year before. With the passage of SB 1891 (2004), the now unnecessary

July 19, 2005

Page 4

and duplicative Public Utilities Code section 383.5 was eliminated. Moreover, Section 399.14, subdivision (h) was amended to reference the 2003 statutory sections now controlling payment of SEPs from the NRFP.

As amended, Public Utilities Code section 399.14, subdivision (h), now requires that:

(h) Construction, alteration, demolition, installation, and repair work on an eligible renewable energy resource that receives production incentives or supplemental energy payments *pursuant to Sections 25742 and 25743 of the Public Resources Code*, including, but not limited to, work performed to qualify, receive, or maintain production incentives or supplemental energy payments is “public works” for the purposes of Chapter 1 (commencing with Section 1720) of Part 7 of Division 2 of the Labor Code.

This revised section contains no substantive changes and imposes no new prevailing wage requirements. Rather, it merely changes the cross reference from Section 383.5 to the nearly identical Public Resources Code sections 25742 and 25743. This change does, however, eliminate any uncertainty that may have existed regarding the applicability of prevailing wage requirements to the NRFP after the 2003 amendments.

#### **IV. The Guidebook Should Be Revised to Include the Prevailing Wage Requirement in Order to Provide Clarification and Guidance to the Regulated Industry**

With the 2004 Legislative fix, there no longer exists any ground for excluding a discussion of prevailing wage requirements from the Guidebook. The Guidebook was originally intended to include a section on prevailing wage requirements and, in fact, still contains a phantom reference to such a section on page two of the current edition.

Amending the Guidebook to include the prevailing wage requirement will provide clarification and guidance to the regulated industry of its legal responsibilities accompanying an award of SEPs from the NRFP. The need for such clarification is especially important in light of the recent statutory confusion over these sections.

The consequences of not explicitly informing recipients of their obligation to pay prevailing wages could be severe. Many developers of renewable energy resources are currently submitting binding bids to investor owned utilities. Some may be planning to seek SEPs. These developers should have accurate information as to their construction costs when preparing their bids. It serves no one to have developers inaccurately estimate their costs, only to later discover the error. Clear notice of prevailing wage requirement also helps protect the CEC from the need for future enforcement actions. Developers, the Commission and California's RPS program will have the greatest chance of success if all parties have complete information at all times.

We suggest the following section on prevailing wage requirements be added to the Guidebook:

#### **PREVAILING WAGE REQUIREMENTS**

Renewable energy facilities that are awarded SEPs are subject to the state's prevailing wage law with respect to any of the following types of work performed on the facility.

- Construction
- Alteration
- Demolition
- Installation
- Repair

Work of this type is subject to prevailing wage pursuant to Public Utilities Code section 399.14(h) and the Department of Industrial Relations (DIR) Determination *Re: Salton Sea 6 Geothermal Power Plant Project, Public Work Case 2002-043 (April 10, 2003)*.

The Energy Commission will satisfy its responsibilities as the awarding body by:

1. Notifying the owners of renewable energy facilities who are awarded SEPs of their prevailing wage requirements
2. Notifying DIR of the facility owners who are awarded SEPs
3. Requiring all such facility owners to include provisions for the payment of prevailing wage in their contracts for facility construction, alteration, demolition, installation and repair work

July 19, 2005

Page 6

4. Requiring all such facility owners to provide certification acknowledging the payment of prevailing wage prior to receiving any SEP payments

The Energy Commission will notify the facility owner and DIR once a power purchase contract had been awarded and a determination of the potential SEP award made.

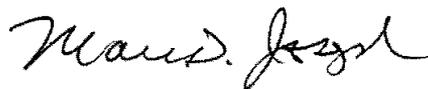
## V. Conclusion

According to its introduction, the purpose of the Guidebook is to “describe the requirements to qualify for and receive production incentives, referred to as supplemental energy payments (SEPs), from the New Renewable Facilities Program (NRFP) element of the Energy Commission’s Renewable Energy Program.” Under Public Utilities Code section 399.14, subdivision (h), one of the requisites to qualify for and receive SEPs is complying with the State’s prevailing wage requirements for public works. The failure of the Guidebook to disclose this requirement is potentially misleading and unfair to the regulated industry that may rely on this guidance.

The Energy Commission expressly recognizes in its forward to the Guidebook that the Guidebook “may need to be revised periodically to reflect market and regulatory developments and lessons learned as California gains experience in implementing the Renewable Portfolio Standard.” Now that the statutory language requiring recipients of SEPs to meet prevailing wage requirements has been clarified, it is time to make such a revision.

Thank you for your consideration of this matter. I would be happy to discuss this matter with you at your convenience.

Sincerely,



Marc D. Joseph

MDJ:bh

cc: Docket 02-REN-1038

ADAMS BROADWELL JOSEPH & CARDOZO

A PROFESSIONAL CORPORATION

ATTORNEYS AT LAW

601 GATEWAY BOULEVARD, SUITE 1000  
SOUTH SAN FRANCISCO, CA 94080-7037

TEL: (650) 589-1660  
FAX: (650) 589-5062

bheeley@adamsbroadwell.com

SACRAMENTO OFFICE

1225 8th STREET, SUITE 550  
SACRAMENTO, CA 95814-4810

TEL: (916) 444-6201  
FAX: (916) 444-6209

DANIEL L. CARDOZO  
RICHARD T. DRURY  
THOMAS A. ENSLOW  
TANYA A. GULESSERIAN  
MARC D. JOSEPH  
OSHA R. MESERVE  
SUMA PEESAPATI  
GLORIA D. SMITH

FELLOW  
KEVIN S. GOLDEN

OF COUNSEL  
THOMAS R. ADAMS  
ANN BROADWELL

July 19, 2005

Docket Office  
California Energy Commission  
1516 Ninth Street  
Sacramento, CA 95814

Re: 02-REN-1038

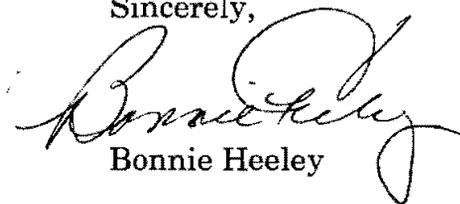
Dear Docket Clerk:

Enclosed are 14 copies of a letter submitted on behalf of CURE requesting that the CEC revise its New Renewable Facilities Handbook. The originals of this letter were mailed directly to Commissioner and Presiding Member John L. Geesman and to Commissioner and Associate Member Jackalyne Pfannenstiel.

Please docket this document and provide us with an endorsed-filed copy. We have enclosed a self-addressed, stamped envelope for this purpose.

Thank you for your assistance.

Sincerely,



Bonnie Heeley

:bh  
Enclosures

1299-002a