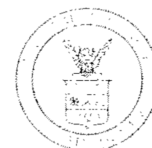
U.S. Department of Labor

Wage and Hour Division
Washington, D.C. 20210



JUN 2 0 2011

Terry R. Yellig
Sherman, Dunn, Cohen, Leifer & Yellig, P.C.
Suite 1000
900 Seventh Street, N.W.
Washington, D.C. 20001

Dear Mr. Yellig:

This is in response to the February 15, 2011 request of the International Brotherhood of Electrical Workers, AFL-CIO (IBEW) and IBEW Local 98 for reconsideration of the February 7, 2011 ruling of the Wage and Hour Division (WHD) regarding the application of Davis-Bacon Act (DBA) prevailing wage and labor standards to the installation of so-called "smart meters" by PECO Energy Company (PECO). The installation of these meters is part of a $423 million Smart Future Greater Philadelphia (SFGP) project being performed by PECO, and is funded in part by a $200 million grant under the Department of Energy (DOE) Smart Grid Investment Grant (SGIG) Program. The American Recovery and Reinvestment Act of 2009 (ARRA) provides the funding for this grant.

Based on the information and documentation provided by the IBEW, DOE, and PECO, WHD concluded in its February 7 ruling that the routine installation of smart meters by PECO subcontractors is not subject to DBA prevailing wage and labor standards. Specifically, WHD found that installation of smart meters "on a pre-existing privately-owned building where there is already a functional mechanical electricity meter does not constitute Davis-Bacon construction, alteration or repair."

In the request for reconsideration, you first contend that WHD's February 7 ruling did not address all issues raised by the IBEW in its original request (dated July 23, 2010) for a ruling concerning the DBA's application to the SFGP. Specifically, you contend that the IBEW's original request for a ruling was not limited to the installation of smart meters, but rather sought a ruling "concerning application of the so-called 'utility exception' to construction, repair, and alteration work performed by or on behalf of PECO related to performance of the [SFGP] . . . ." As explained in the Department of Labor *Field Operations Handbook* (FOH), the "utility exception" to DBA application provides that:

> Where a public utility is furnishing its own materials and is in effect extending its own utility system, such work is not subject to DBRA [Davis-Bacon and related Acts]. The same conclusion would apply where the utility company may contract out such work for extending its utility system. However, where the utility

company agrees to undertake a portion of the construction of a covered project such work would be subject to the DBRA labor standards requirements of the construction contract. FOH Chap. 15d09(b).

Although DOE initially relied on the utility exception to conclude that the DBA did not apply to much of the work involved in the SFGP and similar projects, DOE subsequently acknowledged that the utility exception was not applicable to such work. As a result, DOE withdrew the two "Frequently Asked Questions" (FAQs) discussed in the request for reconsideration and replaced them with revised FAQs that did not in any way suggest that the utility exception applies to the work performed under the SGIG Program. We agree that the discussion of the utility exception in the original FAQs was inaccurate, and we understand that you participated in the drafting of the revised FAQs on behalf of the IBEW. Because DOE is no longer relying on the utility exception, and because DOE has taken steps to ensure that the SGIG Program grant recipients do not misapply the utility exception, our February 7 ruling properly did not address that exception. Although you indicated in a supplemental submission dated April 14, 2011 that the IBEW lacks confidence that DBA prevailing wage requirements will properly be applied to construction work funded by SGIG Program grants notwithstanding the revised FAQs, we are unaware of any specific instance in which the utility exception has been misapplied to the SGIG Program, and we therefore decline in this letter to issue an advisory opinion regarding the scope of the utility exception.

We also decline to reverse our ruling that the routine installation of smart meters by PECO subcontractors is not subject to DBA labor standards. Our February 7 ruling described the routine installation of smart meters as follows:

> The technicians who perform [routine smart meter installation] receive one week of training, primarily in safety procedures. Routine installation itself takes approximately two minutes and consists of breaking the tamper clip with a wire clipper, removing the ring securing the old meter with a screw driver, removing the meter, plugging in the new meter to the existing connection, reattaching the ring, and installing a new tamper clip. No wiring or connection changes or upgrades are required. There is no indication that the skills or tasks typical of an electrician, or any other type of construction activity, are necessary to perform the installation. Nor do the installers perform any type of testing or verification procedures on the new meters.

Based on this description of the installation process, we concluded that the routine installation of smart meters on a pre-existing privately-owned building where there is already a functional mechanical electricity meter does not constitute Davis-Bacon construction, alteration or repair. We also observed that where meter installation requires the performance of construction work by laborers and mechanics in the DBA context (for example, where the meter installation requires rewiring, installation of circuit breaker boxes, or similar work beyond that typically required for routine meter installation), DBA prevailing wage and labor standards will apply.

The IBEW's request for reconsideration does not dispute that routine smart meter installation occurs in the manner described above. Instead, you claim that this description incorrectly focuses on the level of skill needed for routine installation of smart meters. We disagree; our description of routine smart meter installation focuses on the nature of the work performed, not the level of skill required. Davis-Bacon coverage does not depend on the skill level of a "laborer" or "mechanic" engaged in "construction"; however, coverage does depend on whether or not the laborer or mechanic is engaged in construction. Our February 7 ruling examined the elements of the work involved in routine smart meter installation and concluded that regardless of the skill with which such work may be performed, replacement of a meter in the manner described is not construction, alteration or repair.[1] We continue to believe that this approach is consistent with the regulations at 29 CFR 5.2(j) and 5.2(m), as well as with relevant precedent, including *Lance Love, Inc.*, WAB No. 88-32, slip op. at 2 (March 28, 1991) and *Ray Wilson Company*, ARB No. 02-086, slip op. at 8 (February 27, 2004), which make clear that "if someone works on a project covered by the Act and performs tasks contemplated by the Act, that person is covered by the Act, regardless of any label or lack thereof."

*Norsaire Systems, Inc.*, WAB No. 94-06 (February 28, 1995) (*Norsaire II*), on which you rely, does not warrant a different conclusion. The work at issue in *Norsaire II* primarily involved the adaptation, adjustment and calibration of a large cooling system at a mail handling facility. The work, which included mechanical and electrical work, plumbing and pipefitting, and other types of construction work, required 24 employees working on the cooling system an average of 19 hours per week for four months. Given the nature of the work at issue in *Norsaire II*, that case is readily distinguishable from the routine smart meter installation at issue in this case.

For the foregoing reasons, we affirm our ruling that Davis-Bacon labor standards are not applicable to the routine installation of smart meters on a pre-existing privately-owned building where there is already a functional mechanical electricity meter. We further conclude that the additional issues presented in your February 15, 2011 and April 14, 2011 letters are moot. This letter constitutes a final ruling under 29 CFR 5.13. A petition for review may be filed with the Department of Labor Administrative Review Board pursuant to 29 CFR 7.9.

Sincerely,

Nancy J. Leppink
Acting Wage and Hour Administrator

cc: Jean S. Stucky, U.S. Department of Energy
Howard M. Radzely, Morgan, Lewis & Bockius LLP

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[1] Likewise, the installation of in-home monitoring equipment is not construction, alteration or repair subject to the DBA. We understand that the in-home monitoring equipment at issue consists of small electronic devices that are battery operated or plugged into a wall outlet and that receive readings from the smart meter on the volume of electricity being used. The devices, which will be supplied to fewer than 5,000 PECO customers, are about the size of a conventional thermostat and may be mounted on the wall with small screws or simply placed on a table.