

Decision 02-08-076

August 22, 2002

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Order Instituting Rulemaking to
Examine the Commission's Future
Energy Efficiency Policies,
Administration and Programs.

Rulemaking 01-08-028
(Filed August 23, 2001)

**ORDER MODIFYING AND DENYING REHEARING OF DECISION
02-05-046, AS MODIFIED**

I. SUMMARY

By this Order, the Commission denies the application for rehearing filed by Pacific Gas & Electric Company ("PG&E") of Decision (D.) 02-05-046 ("Decision"). This Decision was issued in an Order Instituting Rulemaking ("OIR"), R.01-08-028, which was instituted on August 23, 2001, to examine the Commission's future energy efficiency ("EE") policies, administration and programs. (R.01-08-028 at 1.) R.01-08-028 explained the Commission's desire to encourage both utilities and non-utilities to propose EE programs for 2002 and beyond, and stated that the Commission would specify particular program evaluation criteria in a future order.

On May 16, 2001, the Commission issued D.02-05-046. The Decision announced the winners of the Commission's solicitation of local EE programs for 2002-03, in furtherance of the goals set forth in the OIR. The Commission made third parties eligible for \$100 million in funding available in 2002 and 2003 for local programs and made PG&E, San Diego Gas & Electric Company ("SDG&E"), Southern California Edison Company ("SCE") and Southern California Gas Company ("SoCalGas") eligible for \$25 million in local program funding. In this Decision, we specified the procedure for evaluating the

proposals, including describing the importance of local programs, proposal scoring, local program mix, funding limitations and coordinating statewide and local programs. The Commission also affirmed the Commission's right to require the investor-owned utilities (“IOUs”) to administer energy efficiency contracts (“EE Contracts”) and set forth a list of standard contract terms that should be addressed. (See D.02-05-046 at 20.) In addition, the Decision directed the IOUs and third parties, among other things, to file and serve Program Implementation Plans, to provide a higher degree of budget detail. D.02-05-046 followed our announcement of its intention to solicit proposals and establishing the criteria for the proposal solicitation in D.01-11-066. (D.02-05-046 at 7.)

In D. 01-11-066, the Commission concluded that statewide programs will continue to be the backbone of EE policy for 2002, and that they must be uniform, with consistent terms and requirements in all utility service areas. With regard to non-utility programs, D.01-11-066 included directions to the major IOUs, i.e., SCE, PG&E, SDG&E and SoCalGas, to execute standard contracts with those non-IOU providers awarded funding. Certain standard contract terms for these third-party contracts were prescribed and a meet and confer process was established in order to discuss, review, and modify these terms. The IOUs were directed to coordinate the meet and confer sessions and to file monthly accounting reports with the Commission for conducting, monitoring, and implementing oversight review of the expenditure of EE funds. It provided that any disputes arising from the meet and confer sessions are to be resolved pursuant to directions from the Administrative Law Judge (“ALJ”). Contract provisions were required to cover several key areas.¹ Finally, the IOUs were expressly made responsible for day-to-day contract administration, and were allowed up to five percent of each

¹ These include: dispute resolution; withdrawal or withholding of funds in the event of complete or partial program failure; the conducting of financial and performance audits; gathering public feedback; responding to complaints; periodic reporting during and at the conclusion of the contract period; payment terms, conditions, process and schedule; and disbursement of funds upon the meeting of certain performance thresholds.

contract amount as compensation for such administration, subject to reasonableness review and refund if the IOUs' efforts raise concerns. (D.01-11-066 at 31.)

The IOUs, including PG&E, filed an application for rehearing of D.01-11-066. In this application for rehearing, the IOUs' arguments included: (1) D.01-11-066 unlawfully evaded the state contracting laws; (2) the Commission lacked authority to require the utilities to sign and be responsible for third-party contracts that include terms mandated by it; (3) D.01-11-066 attempted to order the IOUs to provide contract administration services; and (4) the contracts are unconscionable and therefore, void as a matter of law. The Commission denied rehearing of D.01-11-066 in D.02-04-063, but modified D.01-11-066 to include additional findings of fact and conclusions of law. No petitions for writ of review were filed in court. PG&E has made nearly identical arguments in its application for rehearing of D.02-05-046.

PG&E timely filed its Application for Rehearing of D.02-05-046 ("application for rehearing") on June 17, 2002. In its application for rehearing, PG&E contends that the Commission committed the following legal errors: (1) the Commission's decision is an unlawful evasion of the state contracting laws; (2) the Commission has exceeded the scope of its authority by: (a) forcing the utilities to enter into third-party contracts whose terms are mandated by the CPUC, (b) forcing the IOUs to enter into contracts that are unconscionable; (c) ordering the utilities to provide contract administration services (d) and adjudicating the rights of parties under private contracts.

We have carefully considered PG&E's contentions and are of the opinion that good cause for rehearing has not been demonstrated. Accordingly, we deny this application for rehearing. However, as explained below, we will modify the Decision with respect to the natural gas EE Contracts.

II. DISCUSSION.

A. PG&E's Claims May Fail On Procedural Grounds.

Most of the arguments that PG&E has presented in its application for rehearing of D.02-05-046 were made in a prior application for rehearing of D.01-11-066 by PG&E. The Commission has already disposed of all of these claims in D.02-04-063, with the exception of arguments that the EE Contracts are unconscionable and that the Commission lacks the authority to adjudicate the rights of parties under private contracts. Thus, we have already considered most of the arguments that PG&E presented in its application for rehearing of D.02-05-046 in a related decision in the same proceeding.

We believe that section 1709 of the Public Utilities Code, which estops a party from making the same argument that has already been disposed of in a decision on rehearing in the same proceeding, could apply to PG&E's repetitive arguments. This section states that "[i]n all collateral actions or proceedings, the orders and decisions of the commission which have become final shall be conclusive." (Pub. Util. Code § 1709.) California caselaw has reinforced the validity of section 1709. In one case, the California Supreme Court stated that "[w]hen [the Commission's] determinations within its jurisdiction have become final they are conclusive in all collateral actions and proceedings." (*The People v. Western Air Lines, Inc.* (1954) 42 Cal. 2d 621.) PG&E made identical arguments in its application for rehearing of D.01-11-066 and the Commission addressed these arguments in Decision (D.) 02-04-063, Order Modifying and Denying Rehearing of Decision 01-11-66 and Denying Motion to Stay. Since D.01-11-066 is a decision issued in the same proceeding as D.02-05-046, section 1709 may apply to preclude PG&E from making these same arguments in its application for rehearing of D.02-05-046.

B. PG&E's Contention That D.02-04-046 Is An Unlawful Evasion Of the State Contracting Law.

Even if the Commission examines the merits of PG&E's claims, they fail as a matter of law. The foundation of PG&E's main argument is that the Commission did not comply with the California Public Contracts Code in formulating the EE Contracts. However, as stated in D.01-11-066, D.02-04-063 and D.02-05-046, the EE Contracts are not public contracts, and therefore the Public Contracts Code does not apply. A public contract is one that is "entered into by any state agency." (Cal. Pub. Con. Code § 10295.) A public contract is also one that is financed using state funds. (See Pub. Con. Code § 10100, *et seq.*; see also *Associated Builders and Contractors, Inc., Golden Gate Chapter v. San Francisco Airport Commission* (1999) 21 Cal. 4th 352, 364.)

The EE Contracts that are of concern are between IOUs and third parties, non-utility program providers. Pursuant to California law, the Commission has oversight responsibilities for the collection of EE funds and implementation of the IOU programs.² As indicated in these statutes, the Commission has overseen IOU EE spending for decades. In 2000, the Legislature revised statutes so that now specific dollars amounts to be spent on EE, as overseen by the Commission, were earmarked. (Cal. Pub. Util. Code § 399.8(a)-(d).) The Commission's oversight responsibilities include governance of how the IOUs should carry out EE programs, including to what extent third party implementers

² Section 399.8 (a) of the Public Utilities Code states: "In order to ensure that the citizens of this state continue to receive safe, reliable, affordable, and environmentally sustainable electric service, it is the policy of this state and the intent of the Legislature that prudent investments in energy efficiency, renewable energy, and research, development and demonstration shall continue to be made." Section 399.9(d) states, in part: "The commission shall order San Diego Gas and Electric Company, Southern California Edison Company, and Pacific Gas and Electric Company to collect these funds commencing on January 1, 2002, as follows . . . [280 million dollars] per year in total for energy efficiency and conservation activities, . . . [135 million dollars] in total per year for renewable energy, and . . . [62 million 500 thousand] in total for research, development and demonstration . . ." Section 399.8(d) of the Public Utilities Code states: "The commission and the Energy Commission shall retain and continue their oversight responsibilities as set forth in . . . [specified sections] of the Public Resources Code."

are to be involved. (See D.02-04-063.) Our regulatory authority³ gives us necessary foundation for directing the IOUs to utilize non-IOU providers for part of the EE programs.

Pursuant to our regulatory and oversight authority, we reviewed program proposals from third parties, and directed and authorized IOUs to fund these programs and administer the contracts with these parties. In D.02-05-046, the Commission selected the third party implementers for the 2002-2003 local EE programs. The Commission conducted a proceeding to develop guidelines on EE programs to be funded. The Commission reviewed bids and authorized the IOUs to fund the EE programs. The IOUs then entered into contracts with third parties.

The local EE funds are financed by Public Goods Charge ("PGC") funds collected in 2002 and 2003. The IOUs collect the PGC funds from electric customers and hold these funds in IOU bank accounts. Those PGC funds have not been, and will not be, in the Commission's possession or the state treasury or fiscal system. It is clear that the funds that are at the heart of the EE Contracts are not state dollars. The PGC charges used for these EE Contracts have never passed through state coffers, and the state has never had access to these funds. Rather, these funds are from the public purpose surcharge, and move directly from the ratepayers to the IOUs to fund the contracts. The Commission merely regulates the dispersal of those funds pursuant to its statutory mandate.

The Commission recognizes that natural gas EE funds are treated differently than electric EE funds.⁴ According to California statutory law, the natural gas companies collect a surcharge, which is then passed on to the State Board of Equalization ("SBE"), and then the funds are deposited in a Natural Gas Consumption Surcharge account. Because the nature of the PGC charges is different for natural gas consumption, the Commission herein modifies D.02-05-

³ Provided in Public Utilities Code sections 701, 702, 728, 761, 762 and 770.

⁴ See Public Utilities Code Section 890, *et seq.*

046 to indicate that if the IOUs cannot receive reimbursement for funds spent on natural gas EE Contracts, the Commission will consider any IOU requests to compensate IOUs for any unreimbursed gas EE Contract due to their compliance with the Commission's orders. However, the modification of D.02-05-046 only extends to natural gas EE Contracts, and not electric EE contracts. The Commission emphasizes that despite this modification of D.02-05-046, the Commission believes that all the EE Contracts, both gas and electric, are not public contracts subject to the Public Contracts Code.

The Public Contracts Code expressly applies only to "contracts entered into by any state agency." (Cal. Pub. Con. Code § 10295.) The Commission is not a contracting party in the EE Contracts, nor is it named in the contracts as a third party beneficiary. The EE Contracts are not meant to be state contracts, but rather, they are contracts between the IOUs and third parties selected to implement local EE programs. Because the Commission is not a party to the contracts at issue here, the Public Contracts Code does not apply. (*Cf. Associated Builders & Contractors, Inc. v. Tri-County Met. Transp. Dist.* (Ore. App. 2000) 12 P.3d 62, 68-69 (holding Oregon government contracts statutes inapplicable to subcontracts because state not a party to subcontracts).) The EE Contracts between the IOUs and third parties are valid and enforceable, just like other contracts that the IOUs have entered into during the course of their implementation and administration of EE programs in past years.

One of the main purposes of the Public Contracts Code is to ensure that public funds are expended in a responsible and diligent manner. As a policy matter, the EE Contracts are not public contracts because the funds expended for these contracts are ratepayer dollars, not public funds. The Commission is in charge of regulating disposition of these funds according to its statutory authority under Sections 381, 399.4(a)(1), 399.8(d) and (e) of the Public Utilities Code. We

acted in a manner consistent with our oversight responsibilities for the collection of EE funds and implementation of the local EE programs.⁵

Moreover, the contracts at issue look more like assistance grants than contracts to procure goods or services for the Commission. In somewhat analogous contexts, the Attorney General (“AG”) has opined that even a contract to which a state agency is a party does not fall within the ambit of the Public Contracts Code where the contract is not for the benefit of the agency, but instead is an assistance contract, the benefits of which inure to the public generally. (See 74 Op. Att’y Gen. 10 (Cal. 1991) (grants to community college districts); 58 Op. Att’y Gen. 586 (Cal. 1974) (law enforcement assistance grants to community groups).)

C. PG&E’s Claim That the PUC Does Not Have the Authority To Order Utilities To Enter Into Third-Party Contracts.

PG&E argues that the Commission “has required the Utilities to sign and be responsible for third-party contracts that include terms mandated by the CPUC.” (App. for rehearing 12.) PG&E contends that we have exceeded our authority under the Public Utilities Code by setting the terms and conditions of the contracts. (*Id.* at 13.) PG&E’s argument fails for two reasons. The Commission does have the power under the Public Utilities Code to regulate the terms and conditions of the EE Contracts. In addition, PG&E relies on precedent that is not relevant to the Commission’s role in the EE Contracts.

The Commission is in charge of regulating disposition of the EE funds according to its statutory authority under sections 381, 399.4(a)(1), 399.8(d) and (e) of the Public Utilities Code. Section 381(b) states that “[t]he Commission shall allocate funds . . . to programs which enhance system reliability and provide in-state benefits as follows . . . (1) Cost-effective energy efficiency and

⁵ See also Public Utilities Code sections 701, 702, 728, 761, 762 and 770, which provide the necessary foundation for directing the IOUs to utilize non-IOU providers for part of the EE programs.

conservation activities.” (Cal. Pub. Util. Code § 381(b); see Cal. Pub. Util. Code § 399.8(e) (providing that “[t]he commission . . . shall retain and continue [its] oversight responsibilities as set forth in Section[] 381 . . .).) In addition, the Public Utilities Code declares that “. . . it is the policy of this state and the intent of the Legislature that the commission shall continue to administer cost-effective energy efficiency programs authorized pursuant to existing statutory authority.” (Pub. Util. Code § 399.4(a)(1).) The Commission acted consistent with its oversight responsibilities for the collection of EE funds and implementation of the local EE programs.

PG&E cites caselaw to support its contention that the Commission lacks authority to require the utilities to sign and be responsible for third-party contracts that include terms mandated by the Commission. PG&E’s reliance on *Pacific Tel. & Tel. Co. v. P.U.C.* (1950) 34 Cal.2d 822 (“*Pacific Telephone*”) is misplaced. In *Pacific Telephone*, the Supreme Court concluded that the Commission, in exercising its ratemaking authority, could not limit the amount of fees paid by Pacific Telephone to its parent American Tel. & Tel. Co. (AT&T) under a contract for management and accounting services. Although PG&E acknowledges that this decision was subsequently questioned in *General Tel. Co. v. P.U.C.* (1983) 34 Cal.3d 817 (“*General Telephone*”), PG&E argues that *Pacific Telephone* has not been overruled and has in fact been followed as recently as 1986 in *Stepak v. American Tel. & Tel. Co.* (1986) 186 Cal.App.3d 633, at 641-645.⁶ PG&E’s analysis is faulty.

⁶ *Stepak* dealt with the Commission’s consideration of the fairness of a merger to minority shareholders in a merger approval proceeding. The Court of Appeal found no reason to prevent the minority shareholders from prosecuting their action in superior court since it did not interfere with any Commission regulatory proceeding or policy. Therefore *Stepak*, like *Pacific Telephone*, did not involve Commission action to directly achieve better service to the utility’s customers. However, the instant proceeding clearly does involve this consumer-utility relationship, since energy efficiency programs are designed to aid customers by reducing consumption; and thereby assisting in the avoidance of service interruptions, as well as reducing customers’ costs. Therefore, the *Stepak* decision is not controlling authority.

Although PG&E is correct that the *Pacific Telephone* decision has not been overruled, the Supreme Court in the *General Telephone* decision subsequently limited its application by holding that the same result of the Commission's decision could have been attained by simply disallowing the excessive fees Pacific Telephone was paying to AT&T. (*General Tel. Co. v. PUC*, *supra*, 34 Cal.3d at 827) The Court concluded in *General Telephone* that the Commission's order compelling competitive bidding for acquisition of central office equipment was a valid exercise of its authority under Public Utilities Code sections 701, 728, 761 and 762 because it was undertaken to improve services rendered to General Telephone's customers. These statutes, combined with the authority established in Public Utilities Code Sections 381 and 382, provide the necessary support for the directives in the D.02-05-046. As in the *General Telephone* case, the D.02-05-046's orders are designed to carry out the goal of better EE services for the IOUs' customers. In sum, the Commission's orders come within the guidelines laid down in the more recent *General Telephone* decision and in California statutory law.

D. PG&E's Argument That the EE Contracts Are Unconscionable.

PG&E complains that the Commission exceeded the scope of its authority by ordering IOUs to enter into third-party contracts that the IOUs have expressed an unwillingness to enter into. (App. for Rehearing at 15.) Therefore, in PG&E's view, these contracts lack mutual consent and are void as a matter of law pursuant to Civil Code sections 1550 and 1565.⁷ (*Id.*) PG&E also argues that the EE Contracts are contracts of adhesion. (*Id.*) Therefore, PG&E believes that the EE Contracts are unconscionable and are void. (*Id.*)

These arguments fail for several reasons. First, the Civil Code sections cited by PG&E are applicable to the contracting parties, namely the

⁷ These sections set out the essential elements required for a valid contract and provide that contractual consent must be "free, mutual and communicated to each other."

particular IOU and the third party implementer. Civil Code sections 1550 and 1565 are not applicable to the regulator-regulatee relationship and the authority placed with the Commission by the Legislature to implement these programs. Second, D.02-05-046 only ordered the IOUs and the Energy Division of the Commission to meet and confer to develop a set of standard terms that the IOUs will use in the EE Contracts with third party implementers. (D.02-05-046 at 47, Conclusion of Law 17.) Agreed upon contract terms cannot be said to be unconscionable. Moreover, a contract containing agreed upon contract terms cannot be considered a contract of adhesion. Therefore, PG&E's assertion that the EE Contracts are unconscionable and are contracts of adhesion because the IOUs did not consent to the EE Contract terms is without merit.

Additionally, PG&E claims that the EE Contracts are unconscionable because the IOUs have been put in the "untenable situation where they are potentially liable for any wrongdoing by the program implementers, thereby exposing the [IOUs] to financial liability . . ." (App. for Rehearing at 16.) However, in D.02-05-046, we stated that we "will not hold IOUs responsible for the failure of a third party program to meet its performance goals. . . . [w]e do expect, however, that the IOUs will exercise due diligence in overseeing third party programs . . ." (D.02-05-046 at 22, and at 47, Conclusion of Law 18.) Therefore, PG&E's contention lacks foundation.

Finally, PG&E's claim that the EE Contracts are unconscionable overlooks the important fact that the funds to be disbursed under the third party contracts are not the property of the IOUs, but instead are monies the IOUs have collected in rates by means of the PGC for a specific purpose designated by the Legislature. The nature of the IOUs' role in this regard is virtually that of a trustee.

E. PG&E’s Contention That the Commission Does Not Have the Authority To Order the Utilities To Provide “Contract Administration” Services.

PG&E argues that D.02-05-046 orders the IOUs to provide contract administration services for the EE contracts that “the Utilities did not seek, would not choose to perform under the Commission’s rules and policies, and for which the Commission has offered, without any justification, inadequate compensation for the services which it desires.” (App. for Rehearing at 17.) PG&E maintains that companies providing such services are not designated as public utilities in the Public Utilities Code, that it has not dedicated its resources to provide such administration and that such administration has nothing to do with the provision of energy distribution services. (*Id.*) PG&E also asserts that since a utility cannot be asked to provide a utility service beyond that which it has agreed to serve, the Commission does not have the authority to ask the IOUs to provide a service for contract administration. (*Id.* at 18.) PG&E’s reasoning is faulty. As previously stated, the Commission has the authority to order the IOUs to provide contract administration services for the EE Contracts. (See Cal. Pub. Util. Code §§ 381, 399.4, 399.8(a)-(d).)

In support of its contention, PG&E relies on a prior Commission decision. (*Holocard v. Pac. Tel & Tel. Co.* (1981), D. 92791, 5 CPUC 2d 649, corrected by D. 92980, 6 CPUC 2d 87, modified and rehearing denied by D. 93362, 6 CPUC 2d 423 (“*Holocard*”).) In *Holocard*, the Commission found that Pacific Telephone had not dedicated its property to provide billing service to Holocard, a credit card verification company. PG&E’s reliance on *Holocard* is misplaced. In *Holocard*, Pacific Telephone had not dedicated any resources to provide billing services for non-utilities. However, with regard to EE programs and services, PG&E has been providing such services for years, including some by means of contracts with third parties. Contract administration has obviously been a part of such programs. As stated by RESCUE and SESCO, Inc. “Contract

administration is a procedure that is necessary to virtually all commercial functions” (RESCUE & SESCO, Inc. Response to Utility Applications for Rehearing, p.18).⁸

Moreover, PG&E relies on two California Supreme Court cases to support its argument that the Commission exceeded its authority in ordering the IOUs to provide contract administration services. These cases do not apply to D.02-05-046. In particular, PG&E cites *California Water and Telephone Company v. Public Utilities Commission* (1959) 51 Cal. 2d 478 (“*California Water*”), to support its claim that the Commission cannot ask a utility to provide services beyond that which it has agreed to provide, and that the Commission cannot require such additional dedication of assets. In *California Water*, the Commission had modified a contract between a utility and a developer directing the utility to provide service to a previously undedicated service area. (51 Cal. 2d at 488.) The court found that the Commission did not have the authority to modify the private contract, however, the court determined that the Commission did have the authority to regulate California Water and compel it to serve the developer. (*Id.* at 489.) Thus, the *California Water* case only speaks to situations where the Commission requires a utility to extend its service to an undedicated area and “to devote its property to some other use than the public use to which the utility has dedicated the property.” (*Id.*)

The other case that PG&E cites to support this argument, *Pacific Telephone and Telegraph Company v. Eshelman* (1913) 166 Cal. 640 (“*Eshelman*”), is similarly inopposite. In *Eshelman*, the Commission ordered a utility to permit a physical connection to be made between its telephone lines and those of rival companies. (166 Cal. 640, 646.) In annulling the Commission’s

⁸ PG&E also cites *TURN v. P.G.&E. Co.* (1983) D.83-12-047, 13 CPUC 2d 561, at 568 as a decision that discusses *Holocard* favorably. However, this decision, which deals with the use of PG&E’s billing envelope space, finds *Holocard* “clearly inopposite” since a new public utility service was not involved. Likewise, the provision of energy efficiency services by means of contracts is not a new service for California IOUs.

action, the court found that the Commission's order constituted a taking and no payment had been made in advance of the taking. (*Id.*) The *Eshelman* case, which is based on a takings claim, is not related to PG&E's argument that the Commission lacks the authority to require the IOUs to provide contract administration services.

Clearly, the *California Water* and *Eshelman* cases do not provide any support for PG&E's claim that the Commission does not have the authority to order the IOUs to provide contract administration services for the EE contracts. For the foregoing reasons, PG&E's argument fails.

F. PG&E's Assertion that the Commission Does Not Have the Authority to Adjudicate the Rights of Parties Under Private Contracts.

PG&E claims that the Commission does not possess the power to adjudicate the rights and duties of parties to the types of private contracts mandated in D.02-05-046. PG&E cites to a case where the California Supreme Court stated that, with respect to the petitioner's assumption that the Commission had "adjudicated incidents of title, and has adjudicated the rights of third parties against the public utility . . . the commission expressly recognizes that its functions do not include determining the validity of contracts . . . [i]t claims only the power to construe, for purposes of exercising its regulatory and ratemaking authority, the existing rights of a regulated utility." (*Camp Meeker Water Systems, Inc. v. Public Utilities Commission* (1990) 51 Cal. 3d 845, 861 ("*Camp Meeker*").)

PG&E's interpretation of this portion of the *Camp Meeker* decision is faulty. In this case, Camp Meeker Water System argued that the Commission exceeded its authority in adjudicating interests in real property. The court determined that "in the exercise of its rate-making authority, the commission has done no more than construe deeds conveying real property and easements to petitioner and its predecessor." (*Camp Meeker*, 51 Cal. 3d at 850.) The court further observed that "the commission acknowledges that it does not have

jurisdiction equivalent to that of a court, to adjudicate incidents of title, and that it would be bound by a judicial ruling in a quiet title action . . .” (*Id.* at 850.) The court’s statement that the Commission recognizes that it does not have jurisdiction to determine the validity of contracts refers to property rights and adjudicating incidents of title, not determining contractual rights generally. Thus, *Camp Meeker* does not provide PG&E any authority to support its claim that the Commission does not have the jurisdiction to adjudicate the rights of the parties under the EE Contracts.

PG&E also cites to a 1983 Commission decision regarding Qualifying Facilities. (D.82-01-103.) In this decision, the Commission “ordered the major California electric utilities to file standard offers for power purchases based on avoided cost principles.” (*Id.* at 1.) In its application for rehearing, PG&E states that in D.82-01-103, “the Commission was quite clear that its role did not involve dictating contract terms . . .” (App. for Rehearing at 16.) PG&E takes the language of D.82-01-103 out of context. In D.82-01-103, the Commission stated that “on the issue of PUC involvement in negotiating nonstandard offers, we do not believe it will be necessary or appropriate to become involved. Utilities and QFs are to negotiate with each other, and we will review the product for approval or disapproval. We have no intention of intervening or rewriting contracts.” (D.82-01-103 at 92.) Thus, contrary to PG&E’s contention, the Commission was not “quite clear that its role did not involve dictating contract terms.” Rather, we stated that in this case, we did not need to become involved in the negotiation of these contracts. Like *Camp Meeker*, D.82-01-103 does not support PG&E’s contention that in D.02-05-0046, the Commission exceeded its authority by adjudicating the rights of parties under private contracts. Therefore, PG&E’s argument lacks merit.

III. CONCLUSION

For the reasons stated above, PG&E has failed to establish legal error in the Decision. Therefore, the application for rehearing by PG&E is denied. We will, however, modify our order to clarify that since natural gas EE funds are handled differently than electric EE funds, the Commission will consider a request from IOUs to compensate the IOUs for any unreimbursed natural gas EE Contract costs incurred due to compliance with Commission orders.

Therefore **IT IS ORDERED** that:

1. D.02-05-046, p. 49, is modified to include the following Conclusion of Law:

Conclusions of Law

29. If the IOUs cannot receive reimbursement for funds spent for natural gas EE Contracts, then the Commission will consider requests from IOUs to compensate IOUs for any contract costs incurred due to compliance with Commission orders.
2. Rehearing of D.02-05-046, as modified, is hereby denied.
3. This proceeding shall remain open.

This order is effective today.

Dated August 22, 2002, at San Francisco, California.

LORETTA M. LYNCH
President
HENRY M. DUQUE
CARL W. WOOD
GEOFFREY F. BROWN
MICHAEL R. PEEVEY
Commissioners