

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Order Instituting Rulemaking on the Commission’s own motion to determine the impact on public benefits associated with the expiration of ratepayer charges pursuant to Public Utilities Code Section 399.8

Rulemaking 11-10-003
(Filed October 6, 2011)

ORDER MODIFYING DECISION (D.) 12-05-037, AND DENYING REHEARING OF DECISION, AS MODIFIED

I. SUMMARY

In today’s decision, we address and dispose of the application for rehearing of Decision (D.) 12-05-037 (or “*Phase 2 Decision*”), filed by Southern California Edison Company (“SCE”). Specifically, we modify D.12-05-037 to: (1) correct a clerical error regarding historical PGC collections; and (2) clarify that Public Utilities Code section 729 does not apply to this proceeding.¹ As modified, rehearing of D.12-05-037 is denied.

II. INTRODUCTION

Funding authorized in section 399.8, which governed the system benefits charge (also known as the public goods charge, or “PGC”), expired as of January 1, 2012. The expired funding provided public benefits in the areas of energy efficiency, renewables, and research, development, and demonstration (“RD&D”). We instituted Rulemaking (R.) 11-10-003 to address funding and program issues related to the renewables and RD&D portions of the now-expired PGC funding.

¹ Subsequent section references are to the Public Utilities Code, unless otherwise specified.

In D.11-12-035 (or “*Phase 1 Decision*”),² we instituted a new surcharge, known as the Electric Program Investment Charge (“EPIC”) to fund renewables and RD&D programs. The *Phase 1 Decision* instituted the EPIC on an interim basis, subject to refund, until we decided policy, programmatic, governance, and allocation issues in Phase 2 of the Rulemaking.

In D.12-05-037, we set up a framework for our oversight of the EPIC, including establishing purposes, governance, and funding collections for 2013-2020.

SCE filed a timely application for rehearing of D.12-05-037. In its rehearing application, SCE argues that: (1) the Commission lacks the authority to impose the EPIC since it is fundamentally the PGC; (2) the EPIC is an unlawful tax on the customers of the investor-owned utilities (“IOUs”); (3) the IOUs’ customers were not afforded notice and opportunity to be heard on the increase of EPIC rates by \$16 million a year over previous PGC expenditures; (4) the record does not support that the EPIC is just and reasonable, and thus, the imposition of the EPIC violates section 451; and (5) D.12-05-037 unlawfully delegates the Commission’s discretionary power over customer funds to another government agency.

We have reviewed each and every argument raised in the rehearing application and are of the opinion that modifications to D.12-05-037, as described herein, are warranted to: (1) correct a clerical error regarding historical PGC collections; and (2) clarify that section 729 does not apply to this proceeding. As modified, rehearing of D.12-05-037 is denied.

² *Phase 1 Decision Establishing Interim Research, Development and Demonstration, and Renewables Programs Funding Levels* [D.11-12-035](2011), as modified by *Order Modifying Decision (D.) 11-12-035 and Denying Rehearing of Decision, as Modified* [D.13-01-016] (2013). The official versions of these Commission’s decisions are available on the internet at <http://docs.cpuc.ca.gov>.

III. DISCUSSION

A. Allegation that the Commission Lacked the Jurisdiction and Authority to Implement the EPIC

SCE's first allegation of error is that the EPIC is a continuation of the PGC by another name, and that the adoption of the EPIC program exceeds the Commission's authority. (Rehearing Application ("Rehrg. App."), pp. 5-9.) We determined that we had the authority to adopt the EPIC in D.11-12-035, the *Phase 1 Decision*. (See e.g. D.11-12-035, *supra*, at p. 21 (slip op.)) We did not make this determination in the *Phase 2 Decision*. Therefore, SCE's allegations regarding the Commission's authority to adopt the EPIC are not properly raised in a rehearing application of the *Phase 2 Decision*. (See Pub. Util. Code, §§ 1731, subd. (b) & 1732.) Rather these allegations should have been raised in a rehearing application of D.11-12-035. Indeed, SCE advanced essentially the same arguments in its application for rehearing of D.11-12-035. (See Rehrg. App., p. 5, fn. 17.) As discussed at length in the Commission's order modifying and denying rehearing of D.11-12-035, the Commission's constitutional and statutory authority extends to the adoption and implementation of programs, like the EPIC, that are cognate and germane to the regulation of public utilities and provide ratepayer benefit. (See D.13-01-016, *supra*, at pp. 6-18 (slip op.)) For these reasons, SCE's arguments to the contrary lack merit.

B. Allegation that the EPIC is an Unlawful Tax

SCE next alleges that the EPIC constitutes an unlawful tax and usurps the Legislature's exclusive authority to impose taxes. (Rehrg. App., pp. 9-12.) As with the jurisdiction issue discussed above, SCE raised the same arguments in its application for rehearing of D.11-12-035. In D.13-01-016, we denied rehearing on the issue of whether the EPIC constitutes an unlawful tax. (D.13-01-016, *supra*, at pp. 18-19 (slip op.)) We deny rehearing of D.12-05-037 on this issue for the same reasons articulated in D.13-01-016.

We also find that SCE's argument that the Commission is barred from adopting the EPIC program by operation of Proposition 26 lacks merit. Enacted by

voters in 2010, Proposition 26 provides that tax changes must be approved by a two-thirds vote of both houses of the Legislature, unless one of the exceptions outlined in Article XIII A, section 3(b) applies. (See Cal. Const., Art. XIII A, § 3, subd. (b).) While SCE's rehearing application focuses on section 3(b) of Proposition 26, it does not mention section 3(a), which limits the application of Proposition 26 to "[a]ny change in state statute" resulting in higher taxes. (See Cal. Const., Art. XIII A, § 3, subd. (a).) As the Commission's adoption of the EPIC program does not result in any statutory change, Proposition 26 is thus inapplicable. Further, Proposition 26 by its terms does not effect any change to Article XII of the California Constitution, which is where the Commission's constitutional authority lies, and does not purport to alter or modify the Commission's statutory jurisdiction and responsibilities. (See D.13-01-016, *supra*, at pp. 6-18 (slip op.)) For these reasons, we find that SCE's taxation argument lacks merit.

C. Allegation that the Commission Provided Inadequate Notice and Opportunity to be Heard

SCE alleges that the Commission's institution of the EPIC without providing notice to the IOUs' customers and without holding evidentiary hearings violates sections 454, 728, and 729, and due process requirements. (Rehrg. App., pp. 12-14.)

Section 1701.1(a) provides: "The commission, consistent with due process, public policy, and statutory requirements, shall determine whether a proceeding requires a hearing." Here, we determined that there was no statutory requirement to hold evidentiary hearings and that the issues in the proceeding may be resolved through filed comments. (Phase 2 Scoping Memo and Ruling of Assigned Commissioner and Administrative Law Judge, issued February 10, 2012, p. 4.) SCE fails to demonstrate any legal error in this determination.

SCE alleges that the EPIC is a rate increase and that we should have followed the requirements for customer notice for rate increases set forth in section 454. (Rehrg. App., p. 13.)³ Section 454 provides:

Whenever any electrical, gas, heat, telephone, water, or sewer system corporation files an application to change any rate, other than a change reflecting and passing through to customers only new costs to the corporation which do not result in changes in revenue allocation, for the services or commodities furnished by it, the corporation shall furnish to its customers affected by the proposed rate change notice of its application to the commission for approval of the new rate.

As SCE itself notes, section 454 only applies where a utility seeks a rate increase, and not to proceedings initiated by the Commission. Therefore, section 454 does not apply to the instant proceeding.

SCE further alleges that sections 728 and 729 required the Commission to hold evidentiary hearings before issuing the *Phase 2 Decision*. These allegations lack merit.

Section 728 provides:

Whenever the commission, after a hearing, finds that the rates or classifications, demanded, observed, charged, or collected by any public utility for or in connection with any service, product, or commodity, or the rules, practices, or contracts affecting such rates or classifications are insufficient, unlawful, unjust, unreasonable, discriminatory, or preferential, the commission shall determine and fix, by order, the just, reasonable, or sufficient rates, classifications, rules, practices, or contracts to be thereafter observed and in force.

³ SCE's rehearing application asserts that the EPIC is a rate increase (Rehrg. App., p. 13) while also taking the inconsistent position that the EPIC is not a rate but an unlawful tax (Rehrg. App., pp. 9-12). The EPIC is neither. Rather, it is a surcharge to fund public interest investments for the benefit of the IOUs' ratepayers.

The provisions of section 728 only apply to the Commission’s consideration of “rates or classifications.” We have previously explained that the terms “rates or classifications” as used in section 728 refer to the prices charged by utilities for products and services. (*Re Universal Service and Compliance with the Mandates of Assembly Bill 3643* [D.99-05-013] (1999) 86 Cal.P.U.C.2d 225, 232.) As explained above, the EPIC is not a rate or classification.⁴

SCE relies on *Southern California Edison Co. v. Public Utilities Com.* (1978) 20 Cal.3d 813, 829, for the proposition that section 728 requires a hearing in every “true ratemaking proceeding.” (Rehrg. App., p. 13, fn. 49.) In that case, the Court explained: “A utility’s rates are essentially the sum of two distinct components: its operating expenses and its return on invested capital. ‘The basic principle [of ratemaking] is to establish a rate which will permit the utility to recover its cost and expenses plus a reasonable return on the value of property devoted to public use.’” (*Southern California Edison Co., supra*, 20 Cal.3d at p. 818, quoting *City and County of San Francisco v. Public Utilities Com.* (1971) 6 Cal.3d 119, 129.) SCE fails to demonstrate that the Commission’s implementation of the EPIC, which is a surcharge, is a “true ratemaking proceeding” as defined by the Court in *Southern California Edison Co.* As a matter of fact, SCE’s rehearing application asserts that the EPIC does not fit within the definition of a “rate” set forth in *Southern California Edison Co.* (Rehrg. App., p. 9.)

Section 729 provides:

The commission may, upon a hearing, investigate a single rate, classification, rule, contract, or practice, or any number

⁴ The fact that the Commission categorized the proceeding as “ratesetting” pursuant to section 1701.1(a) and Rules 7.1 and 7.3 of the Commission’s Rules of Practice and Procedure, does not mean that the Commission is required to hold evidentiary hearings. Section 1701.3(a) states: “If the commission pursuant to Section 1701.1 has determined that a ratesetting case requires a hearing, the procedures prescribed by this section shall be applicable.” The plain language of section 1701.3(a) leaves to the Commission to determine whether a ratesetting case requires an evidentiary hearing. In this case, we determined that such a hearing was not required.

thereof, or the entire schedule or schedules of rates, classifications, rules, contracts, and practices, or any thereof, of any public utility, and may establish new rates, classifications, rules, contracts, or practices or schedule or schedules in lieu thereof.

Section 729 deals with the Commission's authority to investigate rates, classifications, rules, contracts, or practices. (See e.g. *Order Instituting Investigation into the Rates, Charges, and Practices of Pacific Gas and Electric Company* [I.95-02-015] (1995) 1995 Cal. PUC LEXIS 149.) This section does not apply to the instant proceeding as we did not institute any investigation.⁵

In any event, assuming arguendo that section 728 or section 729 did apply to the proceeding, neither section mandates evidentiary hearings. We have previously explained that "a hearing" in the context of sections 728 and 729 means an opportunity to be heard, but does not necessarily mean an evidentiary hearing. (See e.g. *Order Granting Limited Rehearing to Modify Decision (D.) 97-11-074 and Denying Rehearing of Modified Decision* [D.99-02-044] (1999) 85 Cal.P.U.C.2d 71, 81, fn. 8; *Order Modifying Decision 94-08-022 and Denying Rehearing* [D.95-03-043] (1995) 59 Cal.P.U.C.2d 91, 98.) Pursuant to section 1701.1(a), it is for the Commission to determine whether a proceeding requires an evidentiary hearing and to determine the type of hearing (quasi-legislative, adjudicatory, or ratesetting) that is required.

SCE fails to identify any legal requirement that we provide individual IOU customers an opportunity to be heard when we institute a rulemaking. In fact, the California Supreme Court rejected the notion that customers have the right to be heard where the Commission exercises legislative functions delegated to it, such as adopting rules governing service or fixing rates, where it would not be adjudicating vested interests

⁵ Certain statements in D.12-05-037 regarding section 729 may inadvertently suggest that section 729 applies to this proceeding. (See D.12-05-037, pp. 80 & 98 [Conclusion of Law 30].) We modify the D.12-05-037, as set forth in the ordering paragraphs below, to make clear that section 729 does not apply to this proceeding.

or rendering quasi-judicial decisions. (*Wood v. Public Utilities Com.* (1971) 4 Cal.3d 288, 292.) The Court relied on *Public Utilities Com. of State of Cal. v. United States* (9th Cir. 1966) 356 F.2d 236, 241, which stated: “As a ratepayer would have no constitutional right to participate in a legislative procedure setting rates, this right to be heard in a commission proceeding exists at all only as a statutory and not a constitutional right.” (*Wood v. Public Utilities Com.*, *supra*, 4 Cal. 3d at p. 292.) The same analysis applies here, where we are exercising similar legislative functions by implementing a surcharge to fund public interest investments for the benefit of the IOUs’ customers. SCE does not identify any statutory right to notice and right to be heard that the IOU customers would have when we institute a rulemaking to adopt and implement such a surcharge. For the reasons explained above, the requirements of sections 454, 728 and 729 do not apply to this proceeding.

SCE fails to demonstrate that there is any legal requirement that we provide the IOUs' customers with specific individual notice as required for a utility-initiated rate increase or hold evidentiary hearings in this proceeding. Thus, we deny rehearing on this issue.

D. Allegations that the *Phase 2 Decision*’s findings lack evidentiary support

SCE alleges that because the Commission did not hold evidentiary hearings, there is no evidentiary record to support that the \$162 million in annual EPIC funding to be collected from ratepayers is just and reasonable as required pursuant to section 451. (Rehrg. App., p. 14.) SCE also alleges that there is no record to support: (1) the doubling of the RD&D funding previously authorized under the PGC; (2) that the California Energy Commission (“CEC”) is an appropriate administrator or that the amount set aside for administrative activities is appropriate; and (3) the amount of funding budgeted for each administrator for various types of activities, administrative costs, market facilitation activities, or a carve-out for bioenergy research. (Rehrg. App., p. 14.)

SCE is mistaken that there is no record in this case because the Commission did not hold evidentiary hearings. The record of Phase 2 of this proceeding consists of the Electric Program Investment Charge Staff Proposal (“Staff Proposal”),⁶ and Comments and Reply Comments on the Staff Proposal. As explained in section III.C., above, evidentiary hearings were not required for this proceeding.

In reviewing the record, we find that there is some merit to SCE’s allegation that there is a lack of record to support the \$162 million in annual EPIC funding to be collected from ratepayers. We adopted a budget of \$162 million per year because we found that this amount achieved the same approximate total of prior annual PGC collections and utility cost recovery for RD&D projects. (D.12-05-037, p. 87; see also Staff Proposal, pp. 26, 33, 48-49.) The *Phase 2 Decision* stated that prior annual PGC collections were approximately \$146 million. However, there appears to be a clerical error as the Staff Proposal had indicated that prior annual PGC collections were \$143.958 million.⁷ (Staff Proposal, p. 33.) Therefore, the estimate in the *Phase 2 Decision* is off by approximately \$2 million.

We note, however, that the \$162 million budget is a default budget that is already subject to adjustment. The EPIC administrators are required to prepare and submit a detailed triennial investment plan for our approval. (D.12-05-037, pp. 102-104 [Ordering Paragraph 12].) The *Phase 2 Decision* stated that we may modify the exact budgets for each year with the adoption of the investment plans. (D.12-05-037, p. 93 [Finding of Fact 31].) The *Phase 2 Decision* explained that:

The EPIC funding amounts collected in rates are the default budgets for the EPIC program in each investment plan. These are guidelines that may be proposed to be adjusted by the program administrators in each investment plan to be considered by the Commission. Amounts that are

⁶ The Staff Proposal can be found as Attachment A to the Phase 2 Scoping Memo and Ruling of Assigned Commissioner and Administrative Law Judge, dated February 10, 2012.

⁷ As set forth in the ordering paragraph below, we modify D.12-05-037 to correct this clerical error.

uncommitted at the end of a triennial investment funding period should be used to offset future program funding requirements.

(D.12-05-037, p. 92 [Finding of Fact 32].) We determined that although the funding levels are subject to change, it is useful to have a default expectation for annual funding levels for ratemaking and planning purposes. (D.12-05-037, p. 63.)

The administrators' 2012-2014 triennial investment plans are currently before the Commission.⁸ We do not find it necessary to adjust the \$162 million to come up with another interim default budget, when this number would merely be subject to further adjustment in the triennial investment plan applications that are currently pending. We will be further reviewing the final budgets for the EPIC, which includes conducting a just and reasonableness review, in considering the investment plans. At that time, we will consider and approve the final overall budget and amounts budgeted to the various activities.² Therefore, given that we are currently considering the actual final budgets, we find it unnecessary to institute further proceedings at this time to develop additional interim default budgets. The customers ultimately should remain indifferent as the amounts collected from customers under the EPIC will be adjusted in accordance with the final budgets adopted in the triennial investment plan proceeding.

⁸ We are considering the administrators' triennial investment plans in Application (A.) 12-11-001 (CEC's application), A.12-11-002 (San Diego Gas and Electric Company's application), A.12-11-003 (Pacific Gas and Electric Company's application, and A.12-11-004 (SCE's application). We have consolidated the four applications for joint consideration.

² With the exception of technology demonstration and deployment activities and costs set aside for the administrators, the *Phase 2 Decision* based the amounts budgeted for various types of activities on information found in the Staff Proposal. (See Staff Proposal, pp. 19 (applied research and development activities), 22 (carve-out for bioenergy research), 28 (market facilitation activities), & 32 (administrative oversight costs).) With regard to technology demonstration and deployment activities, the *Phase 2 Decision* increased the budget from that proposed in the Staff Proposal because of the addition of the utilities as administrators. (D.12-05-037, p. 43.) With regard to the 10% set-aside for administrative activities, as explained further below, the *Phase 2 Decision* adopted this number based on comments submitted by SCE.

SCE also alleges that there is a lack of record supporting the doubling of the RD&D funding previously authorized under the PGC. (Rehrg. App., p. 14.) As explained above, the \$162 million is not necessarily the final budget for the EPIC. However, data presented in the Staff Proposal suggests that budgeting approximately \$162 million annually for RD&D is actually a conservative amount. (See Staff Proposal, pp. 17-18.) Furthermore, there is support in the record that there is a strong policy rationale for ratepayer funding of RD&D programs. (See e.g. Staff Proposal, pp. 9-12; Joint Comments of the Natural Resources Defense Council, the Union of Concerned Scientists, the Vote Solar Initiative, Sierra Club California, the Nature Conservancy and the Ella Baker Center on the Scoping Ruling and Staff Proposal, dated March 7, 2012, pp. 5-6.)

SCE further argues that there is a lack of record support that the CEC is an appropriate administrator of the EPIC or that the amount set aside for administrative activities is appropriate. (Rehrg. App., p. 14.) The record offers ample support that the CEC is an appropriate administrator for the EPIC. Evidence in the record supports that the CEC is an appropriate administrator for various reasons, including the CEC's mission to develop and support state energy policy, as well as the CEC's existing RD&D infrastructure, staff, and expertise. (See e.g. Staff Proposal, pp. 39-42, Comments of the California Building Industry Association on the Staff Proposal Regarding the Energy Procurement Investment Charge, dated March 7, 2012, p. 4.) The 10% set aside for administrative activities is also supported by the record. In comments, SCE itself stated that a 10% set aside would be consistent with administrative costs that the Commission has previously approved for programs such as the California Solar Initiative and Self-Generation Incentive Program. (Southern California Edison Company's Comments on the Phase 2 Scoping Memo and Ruling of Assigned Commissioner and Administrative Law Judge, dated March 7, 2012, pp. 12-13.)

Based on the foregoing, we deny rehearing regarding SCE's allegations that certain findings in the *Phase 2 Decision* lack evidentiary support. With regard to SCE's allegations regarding the overall EPIC budget and amounts budgeted for various

activities, although we acknowledge that there is some merit to SCE's allegations that there may be insufficient record support for the budget, we do not find it necessary to revisit the interim default budgets at this time as we are currently considering the final budgets in the triennial investment plan applications, and the interim budgets will be adjusted when we adopt the final budgets. The adjustment should ensure customer indifference.

E. Allegation that the Commission unlawfully delegated its authority to the CEC

SCE alleges that the CEC does not have the statutory authorization to administer customer-funded RD&D programs. SCE alleges that we improperly delegated the administration of EPIC-funded programs to the CEC because in its role as an administrator, the CEC would be required to exercise discretion and judgment without proper legislative authorization. (Rehrg. App., p. 15.)

As a general rule, the powers conferred upon public agencies and officers which involve the exercise of judgment or discretion are in the nature of a public trust and cannot be surrendered or delegated to subordinates in the absence of statutory authorization. (*California School Employees Assn. v. Personnel Com.* (1970) 3 Cal.3d 139, 144.) In the absence of statutory authorization, public agencies may still delegate the performance of ministerial tasks. (*Ibid.*) Moreover, an agency's subsequent approval or ratification of an act delegated to a subordinate can validate the act, which becomes the act of the agency itself. (*Id.* at p.145.)

We designated both the CEC and the utilities as administrators of the EPIC program while we retained the policy and funding oversight role. The CEC is to administer activities that are completely pre-commercial in nature. The utilities are to administer activities that are more related to technology demonstration and deployment on the grid.

SCE does not explain exactly what authority we delegated in selecting the CEC as an administrator of the EPIC Program. SCE states that the Legislature has vested the Commission with broad authority to regulate public utilities but does not explain how

we in any way delegated this authority to the CEC. (See Rehrig. App., p. 15.) We continue to make the ultimate policy and funding decisions, and the administrators are subject to our oversight. As we have previously explained: “while the Commission cannot delegate its authority and responsibility to determine recoverable costs, program rules, regulations and policies, it does have authority to transfer the day to day administration of a program, as it does with a variety of programs.” (D.11-12-035, *supra*, at p. 23 (slip op.))¹⁰ Thus, there is no unlawful delegation in this case.¹¹

Furthermore, the Legislature has given the CEC the requisite statutory authorization to administer the EPIC program. Thus, we did not unlawfully designate the CEC as an administrator. SCE’s allegations have no merit if the CEC possesses the necessary authority to administer the program. (See *Schnider v. State of California* (1952) 38 Cal. 2d 439, 443; *California School Employees Assn.*, *supra*, 3 Cal.3d at p. 144.) The CEC may lawfully exercise powers authorized by statute, and its authority extends both to statutory powers expressly granted as well as to those powers reasonably implied from the statute. (*Calfarm Ins. Co. v. Deukmejian* (1989) 48 Cal. 3d 805, 824-25.)

SCE asserts that the CEC lacks the authority to administer the EPIC funds because its authority to administer the PGC funds was pursuant to a legislative grant of power that no longer exists. (Rehrig. App., p. 15.) This assertion lacks merit. Even apart from section 384, which had authorized the CEC to administer the PGC funds, the CEC has the requisite statutory authorization to administer the EPIC program.

¹⁰ Indeed in another Commission proceeding, SCE, along with Pacific Gas and Electric Company and San Diego Gas and Electric Company, argued that transferring the administration of a program to a third party did not constitute an unlawful delegation of the Commission’s authority, and that such an approach was consistent with legal precedent and Commission practice. (See *Decision Granting Authority to Enter into a Research and Development Agreement with Lawrence Livermore National Laboratory for 21st Century Energy Systems and for Costs up to \$152.19 Million* [D.12-12-031] (2012), at pp. 33-35 (slip op.))

¹¹ SCE also asserts without any basis that any funds collected from the IOUs’ customers must be administered by the IOUs with Commission oversight. (Rehrig. App., p. 15.) SCE does not explain why it would be permissible to allow the utilities to administer the program, but not the CEC.

The CEC has the statutory authorization to administer ratepayer funds collected through the EPIC. Subsequent to the Commission's creation of the EPIC, the Legislature enacted Senate Bill ("SB") 1018 (Stats. 2012, ch. 39), which created the EPIC Fund in the State Treasury and stated that the CEC shall administer the fund. (Pub. Res. Code, § 25711.) The Legislature made clear that SB 1018 was neither authorizing the levy of a charge, nor adding to, or detracting from, any existing authority of the Commission to adopt surcharges, like the EPIC. (Pub. Res. Code, § 25712.) There is a distinction between the authority to adopt a surcharge and the authority to administer a surcharge. In SB 1018, the Legislature did not authorize the EPIC and remained silent as to the Commission's authority to adopt the EPIC. But to the extent that the Commission has the requisite authority to create the EPIC, SB 1018 authorizes the CEC to use moneys from the EPIC Fund to administer the program as authorized by the Commission. (Pub. Res. Code, § 25711, subd. (d).)¹²

Furthermore, RD&D is within the statutory mandate of the CEC under Public Resources Code sections 25216(c) and 25401. Public Resources Code section 25216(c) states that the CEC shall:

Carry out, or cause to be carried out, under contract or other arrangements, research and development into alternative sources of energy, improvements in energy generation, transmission, and siting, fuel substitution, and other topics related to energy supply, demand, public safety, ecology, and conservation which are of particular statewide importance.

Public Resources Code section 25401 requires the CEC to continuously carry out studies, research projects, data collection, and other activities to assess the nature, extent, and distribution of energy resources to meet the needs of the state, as well as studies,

¹² We determined in the *Phase 1 Decision* that we possess the requisite authority to establish the EPIC. (See D.11-12-035, *supra*, at p. 21 (slip op.).)

technical assessments, research projects, and data collection directed to reducing wasteful, inefficient, unnecessary, or uneconomic uses of energy.

The CEC also has the necessary statutory authority to accept funds, contract, and spend funds in accordance with its mandate. Public Resources Code section 25218(a) authorizes the CEC to: “Apply for and accept grants, contributions, and appropriations, and award grants consistent with the goals and objectives of a program or activity the commission is authorized to implement or administer.”

SCE asserts that the current case is analogous to *Interim Opinion on the Administrative Structure for Energy Efficiency: Threshold Issues* [D.05-01-055] (2005), in which we determined that the utilities, rather than third parties, should administer energy efficiency programs. According to SCE, D.05-01-055 determined that third party administration of public purpose programs funded by ratepayers would: (1) impede the Commission’s ability to discharge its statutory obligation to oversee program funds; (2) require statutory authorization because the funds are public trust funds; and (3) render program funding vulnerable to borrowing by the Legislature. (Rehrg. App., p. 16.)

In D.05-01-055, we considered proposals for independent administrators of energy efficiency programs. (D.05-01-055, *supra*, at p. 63 (slip op.)) In that decision, we expressed concerns about the degree of control we could exert over third party administrators under the contractual arrangements relied on under the proposals in that proceeding. (*Id.* at pp. 8, 63-65 (slip op.)) SCE does not explain how these concerns demonstrate that our designation of the CEC as an administrator for the EPIC Program constitutes an unlawful delegation. (See Pub. Util. Code, § 1732.) Moreover, the concerns in D.05-01-055 are not applicable here since our oversight over the EPIC funds to be administered by the CEC is not based on contractual authority. Rather, by statute, the CEC may only administer the EPIC funds as authorized by the Commission. (Pub. Res. Code, § 25711, subd. (d).)

The concern in D.05-01-055 that statutory authorization would be required in order to move ratepayer funds to an outside trust account or bank account is also not present here. (D.05-01-055, *supra*, at pp. 8-9 (slip op.)) There is the requisite statutory

authorization in this case as SB 1018 created a fund in the state treasury for moneys received pursuant to the EPIC. (Pub. Res. Code, § 25711.) To the extent that this may render program funding vulnerable to borrowing by the Legislature, this is a policy and not a legal consideration. SCE does not explain how this would make it unlawful for us to designate the CEC as an administrator for the EPIC Program. (See Pub. Util. Code, § 1732.) We have already considered and addressed this policy issue. In order to protect EPIC funds from potential diversion, we required that the utilities remit funding to the CEC on a quarterly basis for administrative funding and when funding is encumbered for programmatic purposes. (D.12-05-037, p. 97. [Conclusion of Law 23].)

We have the authority to designate the CEC and the utilities as administrators of the EPIC, and the CEC has the requisite statutory authorization to administer EPIC funds and to administer RD&D activities. Therefore, SCE's allegations that we unlawfully delegated our authority to the CEC lack merit and we deny rehearing on this issue.

IV. CONCLUSION

For the reasons stated above, D.12-05-037 is modified to: (1) correct a clerical error regarding historical PGC collections; and (2) clarify that section 729 does not apply to this proceeding. Rehearing of D.12-05-037, as modified, is denied.

THEREFORE, IT IS ORDERED that:

1. D.12-05-037 shall be modified as follows:
 - a. The following sentence is inserted at the end of the third paragraph on page 80:

“Furthermore, section 729 does not apply to this proceeding, as it only applies where the Commission is investigating rates, classifications, rules, contracts, or practices.”
 - b. The first sentence in the second paragraph on page 87 is modified to replace “\$146 million” with “\$144 million.”

- c. Conclusion of Law 30 on page 98 is modified to read:

“The Commission used a notice and comment hearing to give parties notice and opportunity to be heard through the filing of opening comments and reply comments on the staff proposal.

2. Rehearing of D.12-05-037, as modified, is denied.
3. Rulemaking (R.) 11-10-003 is closed.

This order is effective today.

Dated April 18, 2013 at San Francisco, California.

MICHAEL R. PEEVEY
President
MICHAEL PETER FLORIO
CATHERINE J.K. SANDOVAL
MARK J. FERRON
Commissioners

Commissioner Carla J. Peterman
recused herself and was not present
during the disposition of this item.