CBIA
CALIFORNIA BUILDING INDUSTRY ASSOCIATION

1215 K Street/Suite 1200
Sacramento, CA 95814
916/443-7933
fax 916/443-1960
www.cbia.org

VIA EMAIL: Michael.Rosauer@cpuc.ca.gov; BOR@cpuc.ca.gov

September 24, 2020

Michael Rosauer
Public Utilities Regulatory Analyst
Energy Division
California Public Utilities Commission
505 Van Ness Avenue
San Francisco, CA 94102

Mary Jo Borak
Supervisor
Energy Division
California Public Utilities Commission
505 Van Ness Avenue
San Francisco, CA 94102

RE: Draft Resolution E-5076 – *Adoption of Guidelines to Implement the CPUC Tribal Land Policy Consistent with Executive Order B-10-11 and the CPUC Tribal Consultation Policy, The Tribal Land Transfer Policy, and Public Utilities Code Section 851*

Dear Mr. Rosauer and Ms. Borak:

The California Building Industry Association ("CBIA") is grateful for the opportunity to provide these comments as a follow-up to our August 24th comments on Draft Resolution E-5076 – *Adoption of Guidelines to Implement the CPUC Tribal Land Policy*. CBIA represents approximately 3,000 member companies engaged in homebuilding and land development activities throughout the State of California. Last year, our members produced approximately 84% of the homes constructed and sold in California.

Our primary concern with the Guidelines is the inclusion of easements as a disposition in Draft Resolution E-5076 ("Draft Resolution"). Our request is that easements be excluded from the types of dispositions that are subject to the Draft Resolution.

During the course of business operations of homebuilders, Investor Owned Utilities ("IOU") are regularly asked to relocate their easements. For example, an IOU might be asked by a local municipality or developer to relocate an existing easement (in whole or in part) to:

- facilitate construction of a local or regional roadway to support the movement of people, goods and services, or
- accommodate the development of a new housing project to address the well-documented shortage of housing units in California.[1]

[1] Increasing housing supply has been a top priority for Governor Newsom. When he ran for Governor, Governor Newsom promised to build 3.5 million new housing

In these instances, the underlying landowner (the homebuilder) will often offer a new easement to the IOU (and generally pay for the movement of the affected utility facilities) in return for a quitclaim of the original, affected easement. The original easement represents an encumbrance on private property that is being exchanged for another easement in order to facilitate use of the affected land for a different purpose. The IOU does not experience a gain in connection with the "disposition" of the original easement; rather, the IOU is receiving a like-kind land right in exchange for the original easement. And, in most such instances, the IOU receives the replacement easement and relocates its facilities well in advance of quitclaiming the original easement. Hence, the IOU does not experience a net-reduction in its Real Property assets when it quitclaims the original easement – the IOU has already been "made whole" with replacement property rights and is merely returning to parity when it quitclaims the original easement.

In short: An IOU's quitclaim of an existing utility easement in exchange for a replacement easement should not be considered a "disposition" within the context of the Tribal Land Transfer Policy ("TLTP") and the Draft Resolution. The IOU is not receiving compensation in exchange for the transfer of the old easement. Rather, the IOU is receiving an equivalent land interest in consideration of its ability and willingness to relocate its existing facility. This distinction should be incorporated into the TLTP and the Proposed Guidelines.

I. Questions Presented by the Commission

With the foregoing example in mind, we offer the following responses to the questions presented by the Commission in its Draft Resolution concerning the applicability of the TLTP to conveyances described in GO 173 and GO 69-C.

1. *Will conveyances described in GO 173 and GO 69-C, often easement rights over IOU land, facilitate a meaningful transfer of land to Tribes?*

GOs 173 and 69-C reflect the Commission's prior determination that certain conveyances involving IOU property – given their minor or routine nature – may be handled administratively and without the need for full-Commission approval pursuant to PUC Section 851. In the context

---

units by 2025. See: https://medium.com/@GavinNewsom/the-california-dream starts-at-home-9dbb38c51cae. This represents a significant increase over current production levels. Additionally, Governor Newsom's Statements from his February 19, 2020, State of the State Address include:

We must eliminate roadblocks to housing and shelter.

We need more housing, not more delays.

Of course, the fundamental building block of California's solution has to be more housing. A comprehensive response to our collective failure to build enough of it. When we don't build housing for people at all income levels, we worsen the homeless crisis. It's a vicious cycle and we own it. And the only sustainable way out of it is to massively increase housing production. Let's match our courage on homelessness with courage on housing supply.

of an easement exchange (where monetary consideration is not the driving force behind the disposition), we believe that GOs 173 and 69-C continue to be the appropriate protocols for addressing transactions that meet the qualifications and conditions established in the orders.

We recognize that the question presented by the Commission does not naturally fit the easement exchange example described in the preceding section. The Commission's question is focused upon interests granted by IOUs over the IOUs' landholdings. By comparison, the easement exchange scenario presented by us relates to the release of a real property interest held by an IOU over the land of another (in exchange for an equivalent real property interest granted by the landholder). As such, our land exchange example is not an "apples-to-apples" scenario for purposes of addressing the Commission's question.

Notwithstanding, the Commission's question does invite discourse regarding whether tribes may meaningfully benefit from participation in an easement exchange transaction. We understand that the goal of the TLTP is to facilitate the transfer of culturally-significant properties to tribes by requiring IOUs to offer to tribes a right of first refusal ("ROFR") prior to conveying the Real Property interest to a third party. Consistent with our previous comments, we support policies that promote the opportunity of tribes to acquire ancestral lands. However, in the case of an easement exchange involving private property, it is difficult (nay impossible) to identify how a tribe would benefit from participation in the process. A private property easement exchange does not involve the grant or transfer of a land right over IOU property. Rather, the exchange involves the encumbrance of a land interest held by a third party. Were an IOU obligated to issue to a tribe a ROFR concerning the to-be-quitclaimed original easement (which is ostensibly required under the TLTP and the Proposed Guidelines), what would be the value of the ROFR to the tribe? The scope of the easement is limited to the installation, operation and maintenance of transmission and distribution facilities. As such, it comes with burdens that would have to carried out by the tribe. The tribe would not be entitled to use or enter the easement area for preservation, restoration, performance of cultural rites, *etc*. – such activities would be beyond the scope of the easement. Assuming, *arguendo*, that the IOU could establish a monetary value for the to-be-quitclaimed easement and a tribe were willing and able to pay the purchase price, what would be the use or value of a limited transmission or distribution easement to the tribe? The answer is axiomatic – the easement would have no value to the tribe.

In response to the Commission's initial question: In the context of a private property easement exchange, requiring that an IOU grant a ROFR to a tribe for a to-be-quitclaimed easement – whether through a PUC Section 851 application or an alternative administrative process[2] – would not meet the goal of the TLTP to return usable, meaningful lands to the tribes.

2. *Would inclusion in the TLTP of conveyances subject to GO 173, and GO 69-C divert tribal resources that could be better spent examining potentially more meaningful Section 851 conveyances?*

[2] We recognize that, in the context of an IOU's proposed disposition or exchange of easement rights over third party property, the alternative conveyance process identified in GO 173 may be relevant and available. Whereas GO 69-C involves an IOU's provision of easements and other interests over lands owned by the IOU, such order would not be applicable.

We are generally familiar with the resources available to tribes. It can be generally stated that the resources available to tribes are unequal – some tribes have more resources than others. Accordingly, application of the TLTP to minor and routine conveyances that are the proper subject of GO 173 and GO 69-C could result in the diversion of a resource-limited tribe's attention away from more meaningful PUC Section 851 conveyances.

As in our response to the Commission's initial question (*see* preceding section), the private property easement exchange scenario does not immediately fit the Commission's inquiry regarding limited tribal resources. Similar to the conclusion in the prior section, we cannot envision any value that would accrue to a tribe by participation in a private property easement exchange transaction – whether the transaction were the subject of a PUC Section 851 application or an alternative administrative process.[3] As such, we respectfully submit that the expenditure of any resources by a tribe in connection with a private property easement exchange transaction would be a waste and ill-advised.

Although the Commission's question is directed to tribal resources, we believe that it is both appropriate and necessary to mention that the application of the TLTP to private property easement exchange transactions (whether accomplished pursuant to PUC Section 851 or otherwise) will result in the expenditure of private and public landowner resources. Just as meaningful land transfers to tribes will not result from the applicability of the TLTP to easement exchanges, the expenditure of public and private resources would be similarly wasteful and imprudent if public/private landholders were required to participate in the ROFR process that is mandated by the TLTP. With the assumption and understanding that tribes will not be willing to expend funds toward the acquisition of an easement that has no value to a tribe, requiring public/private landholders to wait for an IOU to issue the required ROFR and for the tribes to reject it simply adds unnecessary time and expense to the easement exchange process. In light of the ever-increasing expense associated with private development and public works projects, asking that public/private landowners incur additional time and expense on a policy that will not produce benefits for tribes (or anyone else) seems particularly wasteful and irresponsible.[4]

3. *Would inclusion in the TLTP of conveyances subject to GO 173 and GO 69-C substantially delay essential IOU operations?*

We are of the opinion that, in the context of easement exchanges, inclusion in the TLTP of conveyances subject to GO 173 and GO 69-C would delay essential IOU operations. Consistent with our comment in the preceding section, requiring the preparation, delivery and processing of a ROFR in any easement exchange transaction – whether pursuant to PUC Section 851 or otherwise – simply introduces an unnecessary element into an already time-consuming process. Were an IOU required to prepare and submit to tribes a ROFR each time a developer (whether public or private) submitted a request for an easement exchange concerning the developer's fee property, the IOU would experience unnecessary delay in responding to the applicant's request and accomplishing its purposes. As previously indicated, most easement exchange transactions involve the applicant's provision of funding to facilitate the IOU's relocation of the affected utility facilities. Requiring participation in an unnecessary ROFR process simply adds to the time necessary to accomplish the utility relocation; in turn, delays in the relocation process result in

[3] *Id*.
[4] See, fn. 4, above.

increased costs for the utility and the applicant (*e.g.*, higher cost of materials and labor due to extended project schedules). The IOUs are in the business of providing reliable utility services in the most efficient and timely manner possible. Requiring compliance with the TLTP's ROFR process – in the easement exchange scenario – is directly inapposite to the IOUs' goals of efficiency and timeliness.

On a related note, requiring TLTP compliance in the context of easement exchanges has the potential of introducing a substantial amount of uncertainty into the process of utility relocations. Utility relocations are typically one element of a larger project that has completed the local, State and federal entitlement processes – including California Environmental Quality Act (CEQA) review and, in some cases National Environmental Policy Act (NEPA) review. In these instances, interested parties – including tribes – have been afforded full opportunity to meaningfully participate in the entitlement process and to provide comments and input regarding the subject project and its constituent parts.[5] Requiring the preparation and transmission of a ROFR pursuant to the TLTP after completion of the entitlement process seemingly invites additional occasions for comment and participation in a project/process that has already been deemed closed and approved by the relevant lead, responsible and responding agencies. Although unlikely, the possibility does exist for a tribe to accept a ROFR in the context of an easement exchange and acquire the old easement. In so doing, the tribe would effectively halt and overturn the fully approved and entitled project, given that the developer may not burden or use the old easement area for development and the IOU will not relocate its existing facilities in the absence of a replacement easement. This would remove some or all of the new homes that have already been approved by removing the available land where the easement exists. This will increase the cost of the remaining homes and decrease the production of new homes, thereby putting the state's housing goals further out of reach. Certainly, this is an unintended consequence of the TLTP; nevertheless, it represents a risk that could seriously complicate and interfere with public and private development.

4. *What is the appropriate application of the TLTP to GO 173, and GO 69-C conveyances, and to easements in real property?*

For the reasons previously discussed, we believe that, in the context of private property easement exchanges, the TLTP should not be applied to conveyances pursuant to GOs 173 or 69-C (specifically) or to conveyances pursuant to PUC Section 851 (generally). Tribes will not benefit from participation in these limited transactions; and, requiring tribal participation will simply increase the cost, expense and uncertainty associated with accomplishing otherwise routine utility relocations involving private property.

Beyond private property easement exchanges, we question the necessity and propriety of applying the TLTP to any matters involving an IOU's disposition of an easement that encumbers private property. IOUs often discover that they are in possession of antiquated and forgotten easements that are neither necessary nor useful for the conduct of the IOUs' business.

[5] *See, e.g.*, California Assembly Bill 52. Effective July 1, 2015, public agencies are required to consult with California Native American tribes that are on the Native American Heritage Commission's consultation list that are traditionally and culturally affiliated with the geographic area of a proposed project that is subject to CEQA (provided that the tribes request formal notification and subsequent consultation).

Nevertheless, these superfluous easements encumber the lands of private property owners and hinder (and sometimes prevent) the use of the land. In such instances, the owner of encumbered property will submit a request to the relevant IOU to terminate the easement. These "easement termination requests" should not be subject to the requirements of the TLTP. Again, we recognize that the purpose of the TLTP is to provide tribes with notice regarding "surplus property" and an opportunity to acquire ancestral lands. This presumes that the Real Property interests to be disposed of by the IOUs have actual value for cultural purposes. As indicated previously, an easement held by an IOU for transmission and distribution purposes has no value to the Native American community. Tribes may not acquire transmission and distribution easements and thereafter change the use of the easement area to accommodate other activities. Unless the tribes were to obtain fee title to the underlying property (which is not owned by the IOUs), the tribes have no ability to control the lands. Therefore, the TLTP's inclusion of easements within the definition of "Real Property" does not advance the interests or objectives of the TLTP. Wherefore, we believe that all transactions and activities related to easements that encumber property owned by third parties should be exempted from the TLTP. **This exemption could be easily accomplished by the Commission through a revision to the term "disposition" that appears in the TLTP. Specifically, the Commission could – and should – exempt from the definition of "disposition" all transactions and matters pertaining to easements on private property**. The interests of the Commission and the Native American community would not be prejudiced or adversely affected by this exemption. Moreover, the development community and especially Californians looking for a home would greatly benefit from the removal of unnecessary – and potentially costly – impediments to otherwise routine matters.

II. Additional Public Review of the TLTP and the Proposed Guidelines is both Appropriate and Necessary

We continue to believe that the Commission should actively seek out comments and participation of interested parties beyond IOUs and the Native American community. There does not appear to be any correspondence from local agencies, affordable housing groups, owners of utility-encumbered parcels and several other parties who could (and will be affected by adoption and implementation of the TLTP. We also believe that the Commission should hold additional public workshops so that all interested parties have an opportunity to participate in a dialogue regarding the TLTP and its requirements. These concerns are more fully laid out in our August 24, 2020, letter, pages 2-3.

III. Conclusion

We appreciate the opportunity to submit this comment letter in relation to the TLTP and the Proposed Guidelines. Additionally, we welcome the opportunity to engage in a meaningful and productive dialog with the Commission and all interested parties in relation to our concerns regarding the TLTP and the Proposed Guidelines, and how they may be resolved without compromising or hindering the goals and objectives of the TLTP. We believe that our concerns may be addressed and resolved through modest revisions to the TLTP and the Proposed Guidelines; hence, we look forward to the Commission's re-opening of the public comment period for these items and receiving notice regarding when the Commission, *et al*. would like to meet.

Thank you, in advance, for your attention to the matters addressed herein. Should the Commission have any questions regarding the comments appearing in this letter, please feel free to contact me at ncammarota@cbia.org any time.

Sincerely,

/s/Nick Cammarota

Senior Vice President & General Counsel

0370/001/X219860.v1

Metropolitan Transit System

September 24, 2020

Energy Division Tariff Unit
California Public Utilities Commission
505 Van Ness Avenue
San Francisco, CA 94102
Via email at: EDTariffUnit@cpuc.ca.gov

Re: Draft Resolution E-5076 – Tribal Land Transfer Policy Implementation Guidelines

Dear ED Tariff Unit:

San Diego Metropolitan Transit System (MTS) respectfully submits the following comments regarding Draft Resolution E-5076 (Draft Resolution) approving the Guidelines to Implement the CPUC Tribal Land Policy (Guidelines). Unfortunately, the Guidelines create confusion and prevent routine and necessary cooperation and collaboration between public agencies like MTS and investor-owned utilities (IOUs) like San Diego Gas & Electric (SDGE). This local cooperation allows important public infrastructure projects to move forward without delay and undue cost. On this basis, MTS requests that the Commission suspend the Policy, withdraw the Draft Resolution and initiate a formal rulemaking to accomplish the Commission's tribal land policy objectives while not impeding public infrastructure projects.

Background

MTS is a public transit agency established under Public Utilities Code sections 120000, et seq. MTS operates light rail transit, fixed route bus, and complementary paratransit services in approximately 75% of San Diego County. MTS provides transit services to approximately 85 million passengers per year. MTS's light rail system is subject to regulation by the Commission's Rail Safety Division.

MTS and SDGE are frequently required to cooperate on each entities' public projects. This is required because MTS and SDGE each operate linear rights-of-way to deliver their services to the San Diego region. At times, an MTS or SDGE project must cross the other entity's right-of-way. Additional coordination and cooperation is also necessary because MTS's light rail transit system operates on electricity and requires specialized equipment to store, transfer, and deliver electricity. Other future projects include coordinating large electric vehicle charging station infrastructure that will be necessary as MTS converts its bus fleet to zero emission technology in compliance with the California Air Resource Board's Innovative Clean Transit regulations.

The MTS railroad right-of-way is a linear right of way that runs north-south (Blue Line) from the US border in San Ysidro, generally following the alignment of Interstate 5, with east-west routes between downtown San Diego and El Cajon (Orange Line), and Old Town San Diego and Santee (Green Line). An 11-mile extension of the Blue Line is currently under construction by the San Diego Association of Governments (SANDAG) and scheduled to open for revenue operations in Fall 2021 (Mid-Coast LRT Extension Project). The Commission has exercised its oversight and approval authority over various aspects of this $2.17 billion rail project.

MTS-SDGE Project Coordination and Cooperation

To the extent MTS and SDGE can do so without compromising their individual agency missions, MTS and SDGE have a history of cooperating to provide license, easement or other non-fee transfers of real property rights to allow public infrastructure projects to move forward. MTS and SDGE staff in the real estate and engineering departments coordinate the space needs and seek design solutions that allow MTS and SDGE facilities or equipment to co-exist in tight rights-of-way or on adjacent properties owned by one party. Where possible, the parties seek to avoid involuntary acquisitions using the condemnation process. In general, when MTS is acquiring a property interest from SDGE, the GO-173 process under Public Utilities Code section 851 is followed. This CPUC process already adds approximately 4 months to any public project, even for minor and routine matters. The Tribal Lands Policy Guidelines further complicate this process and appear to require that MTS condemn all future real estate rights from SDGE instead of engaging in the cooperative process described above. Requiring this adversarial proceeding does not advance principles of good governance and stewardship of public assets.

Tribal Lands Policy Impact

As currently drafted, the Guidelines would require all real estate-related project negotiations between MTS and SDGE to first be offered to the applicable Tribes, even if SDGE has no intention or interest in formally "disposing" of the property in question. MTS requests that the Guidelines be revised to expressly exclude such situations.

This specific conflict recently arose between MTS, SANDAG, and SDGE for the Mid-Coast Project. As part of the light rail extension into the University City area, MTS had trouble finding a vacant site for a traction power substation (TPSS) within the required distance of the new guideway. Ultimately, the only location identified that would not have an adverse impact on the surrounding community was an unused portion of the SDGE Genesee Substation property. The site requires significant grading and retaining walls to be usable by MTS. Although SDGE had no desire to dispose of this portion of the Genesee Substation property, in a spirit of cooperation and support for the regionally significant Mid-Coast Project, SDGE agreed to license the property to MTS for installation of a TPSS subject to various protections for SDGE facilities. Because the TPSS is a significant and expensive piece of infrastructure, and is necessary for the operation of this taxpayer funded transit project, MTS would have preferred a more permanent right to maintain the TPSS in perpetuity, such as an easement. However, the Tribal Lands Policy and the uncertainty surrounding its application in this circumstance, meant that SDGE could only propose a license.[1] The Mid-Coast Project is on a critical path and MTS and SANDAG were required to move forward with the risks associated with a license. A later proceeding for MTS to acquire an easement by condemnation may be required.

This situation does not appear to be the type targeted by the Tribal Lands Policy. Requiring SDGE to first offer this land to the Tribes -- before it is permitted to engage in negotiations with MTS for joint use of SDGE property in support of a public project -- only serves to complicate and delay important public projects. MTS can perceive no benefit to requiring notice to the Tribes in such a situation.

[1] An advice letter concerning this License Agreement transaction is currently pending before the CPUC pursuant to GO-173.

On this basis, MTS recommends the following:

- The Tribal Lands Policy should be reasonably tailored to apply to true "surplus property" that is no longer needed by the Independently Owned Utility (IOU).
- The definition of "disposition" should exclude easements and other non-fee conveyances.
- The Guidelines should not apply to transactions that are subject to GO-69C
- The Guidelines should not apply to transactions with a public agency to support a public project.

For the above reasons, MTS requests that the Commission suspend the Policy, withdraw the Draft Resolution and initiate a formal rulemaking to accomplish the Commission's tribal land policy objectives while not impeding public infrastructure projects. Further, MTS supports the comments and recommendations included in SDGE's comment letter dated August 24, 2020.

Please feel free to contact my office with any questions or requests for clarification. I can be reached at (619) 557-4512 or karen.landers@sdmts.com.

Sincerely,

Karen Landers
General Counsel

cc:

Michael Rosauer
Public Utilities Regulatory Analyst
Energy Division
California Public Utilities Commission
505 Van Ness Avenue
San Francisco, CA 94102
Via email at: Michael.Rosauer@cpuc.ca.gov

Mary Jo Borak
Supervisor
Energy Division
California Public Utilities Commission
505 Van Ness Avenue
San Francisco, CA 94102
Via email at: BOR@cpuc.ca.gov

Tribal Service List 1 (Attachment A)

Attachment A
CERTIFICATE OF SERVICE

I certify that, on this 24th day of September, 2020, I have served via email a true copy of San Diego Metropolitan Transit System's Comments to Draft Resolution E-5076 – Tribal Land Transfer Policy Implementation Guidelines on all emails included in the Service List provided at the following website: https://www.cpuc.ca.gov/tribal/

Julia Tuer
Manager of Government Affairs
San Diego Metropolitan Transit System
Julia.Tuer@sdmts.com

Service List, E 5076, Tribal Land Transfer Policy

First name	Last name	Organization	Title	Email	Phone	Address	
Don	Barnes	Yurok Tribe	Director, Office of Self-Governance	dbarnes@yuroktribe.nsn.us	707-482-1350	190 Klamath Blvd. P.O. Box 1027 Klamath, CA 95548	
Karen	White	Xolon Salinan Tribe	Council Chair	Xolon.salinan.heritage@gmail.com			
W. Anthony	Colbert	CPUC	Assistant Chief Administrative Law Judge	W.Anthony.Colbert@cpuc.ca.gov	415-703-2377	505 Van Ness Avenue SF, CA 94012	
Tad	Williams	Paskenta Band of Nomlaki Indians	Public Works Manager	TWilliams@paskenta.org	(530) 528-4626	2655 Everett Freeman Way P.O. Box 709 Corning, CA 96021	
Will	Micklin	Ewiaapaayp Band	CEO	ceo@leaningrock.com		4054 Willows Road Alpine, CA 91901	
Sally	Peterson	Middletown	Council Member	speterson@middletownrancheria.com	(707) 987-3670	P.O. Box 1035 Middletown, CA 95461-1035	
Brian	Ypez	Hopland	Council Member	byepez@hoplandtribe.com	(707) 472-2100	3000 Shanel Rd. Hopland, CA 95449	
Patricia Sabina	Garcia Nussipov	Agua Caliente Wintun Nation	Tribal Administrator Public Affairs Manager	pagarcia@aguacaliente-nsn.gov SNussipov@yochadehe-nsn.gov	(530) 796-3400	5401 Dinah Shore Drive, Palm Springs, CA 92264 PO Box 18 | Brooks, CA 95606	
Darin	Beltran	Kkoi Nation of No. CA	Chair	dbeltran@koination.com		P.O. Box 3162 Santa Rosa, CA 95402	
Linna Thomas	Jackson	Hoopa Tribe	Manager Utilites	hvpud.gm@gmail.com			
Matthew	Hatcher	Mooretown Rancheria	THPO	Matthew.Hatcher@mooretown.org			
Christina	Bustamonte	City of Carlsbad	City Planner	Christina.Bustamante@carlsbadca.gov>	760-602-4644	1635 Faraday Ave. Carlsbad, CA 92008	
Cheryl	Madrigal	Rincon	THPO	CMadrigcrd@rincon-nsn.goval@rincon-nsn.go	760-297-2635	1 West Tribal Road | Valley Center, CA 92082	
Scott	Lanthrop	Northern Chumash	President	srlinslo1@gmail.com			
Michael	Castello	Sobobo	Tribal Administrator	mcastello@soboba-nsn.gov	(951) 654-5544	23906 Soboba Rd. San Jacinto, CA 92583	
Kimia	Fatehi	Fernandeño Tataviam Band of Mission Indians	Chief of Staff	kfatehi@tataviam-nsn.us	(818) 837-0794	1019 Second Street, Suite 1 San Fernando, California 91340	
Sara	Ryan	Big Velley	Tribal Administrator	sryan@big-valley.net	(707) 263-3924	2726 Mission Rancheria Road Lakeport, California 95453	
Jana	Ganion	Blue Lake	Gov Affairs	jganion@bluelakerancheria-nsn.gov	(707) 497-8638	428 Chartin Road Blue Lake, CA 95525	
Natalie	Forest	Pit River	THPO	thpo@pitrivertribe.org	(916) 335-5421	36970 Park Ave Burney	
Jessica	Mauk	San Manuel	THPO	JMauck@sanmanuel-nsn.gov	(909) 864-8933 x3249	san manuel Band of Mission Indians	
Craig	Marcus	Enterprise	Tribal Administrator	creigm@enterpriserancheria.org		2133 Monte Vista Ave. Oroville, California 95966	
Scott	Quinn	Karuk	Land Manager	scott.Quinn@karuk.us		P.O. Box 1016, Happy Camp	
Sierra	Padilla	Yaqui Nation of Southern California		sierra@stonebear.net			
Sabina	Nussipov	Yocha Dehe Wintun Nation	Public Affairs Manager	SNussipov@yochadehe-nsn.gov	(530) 796-3400	PO Box 18 | Brooks, CA 95606	
Michael	Tully	City of Carlsbad	Parks Planner	Michael.Tully@carlsbadca.gov>	760-268-4724	3096 Harding St. Carlsbad, CA 92008-2320	
Guy	Savage		Assistant County Administrative Officer	gsavage@co.slo.ca.us	(805) 781-5071		
Lisa	Cottle	Winston & Strawn LLP	Partner	LCottle@winston.com>	415-591-1579	101 California Street	San Franciso
Kori	Cordero	Yurok tribe		kcordero@yuroktribe.nsn.us			

Jessica	Engle	Yurok tribe		jstalnaker@yuroktribe.nsn.us			
Megan	Somogyi	Goodin Macbride	Partner	msomogyi@goodinmacbride.com	415.392.7900	505 Sansome Street, Suite 900	San Franciso
Lauren	Brown			Lauren.brown@sbcglobal.net		7 Chuparrosa Drive	San Luis Obispo
Heidi	Krolick	Pacific Forest & Watershed Lands Stewardship Council	Executive Director	hkrolick@stewardshipcouncil.org>	(916) 297-6661	3300 Douglas Blvd., Suite 250	Roseville
Elaine	MacDonald	SDG&E	SDG&E Regulatory Affairs	bmacdonald@sdge.com	: 858-636-5788		
Brian	Korpics	Office of the President, CPUC	Advisor	brian.korpics@cpuc.ca.gov	415) 703-5219		
Matthew	Plummer	Pacific Gas and Electric Company	Regulatory Relations	M3Pu@pge.com>	(415) 973-3477	77 Beale Street, Rm 2338	San Franciso
Molly	Zimney	Pacifdic Gas and Electric	Regulatory Relations	MEZ3@pge.com	(415) 973-3477	77 Beale Street, Rm 2338	San Franciso
Joanie	Yen	Pacific Gas and Electric Company	Regulatory Relations	JxYr@pge.com	(415) 973-3477	77 Beale Street, Rm 2338	San Franciso
Violet	Walker	NCTC	Tribal Member	violetsagewalker@gmail.com			
Fred	Collins	NCTC	Tribal Member	fcollins@northernchumash.org			
Will	Micklin	Ewiiaapaayp Band of Kumeyaay Indians	CEO	<ceo@leaningrock.com	(619) 368-4382	4054 Willows Road	Alpine, CA 91901
Wendy	Lucas	Yaktityutityuyaktilhini Nothern Chumash Tribe of San Luis Obispo Co	Tribal Member	wcwlucas@gmail.com			
Bob	Shoecraft	Shoecraft & Burton LLC	Member of Firm	rshoecraft@sbcivillaw.com	(619) 794-2280	750 B Street, Suite 2610 San Diego, CA 92101	
Trevor	Rebel	PG&E		TDR5@pge.com>			
Deidre	Cyprian	CPUC		Deidre.Cyprian@cpuc.ca.gov	(916) 823-4831		
PG&E		PG&E		PGETariffs@pge.com			
KIMBERLY	LO	PG&E		KELM@pge.com			
ANNIE	HO	PG&E		AMHP@PGE.COM			
Southern California Edison		Southern California Edition		advicetariffmanager@sce.com			
Darrah Morgan		Southern California Edition		darrah.morgan@sce.com			
San Degio Gas & Electric		San Degio Gas & Electric		sdg&etariffs@sdge.com			
BRITTANY	MALOWNEY	San Degio Gas & Electric		bmalowney@sdge.com			
JOFF	MORALES	San Degio Gas & Electric		jmorales@sdge.com			
AURORA	CARRILLO	San Degio Gas & Electric		acarrillo@sdge.com			
So Cal Gas		So Cal Gas		tariffs@socalgas.com			
Ray	Ortiz	Southern California Gas		rortiz@socalgas.com			
Ray	Ortiz	Sempra Utilities		rortiz@semprautilities.com			
Dan	Marsh	Liberty		dan.marsh@libertyutilities.com			
Greg	Campbell	Liberty		greg.campbell@libertyutilities.com			
		Native American Heritage Commission		nahc@nahc.ca.gov			
Brian	McDonald	SCE	SCE Tribal Liaison	Brian.mcdonald@sce.com	626-614-4737		
Jennifer	Summers	SDG&E	Regional Public Affairs	jsummers@sempracutilities.com	858-541-5708		
Jennifer	Darcangelo	PG&E	Tribal and Cultural Resource	j5d8@pge.com	925-324-5171		
Stephanie	Green	CPUC		stephanie.green@cpuc.ca.gov			
Michael	Rosauer	CPUC		michael.rosauer@cpuc.ca.gob			
Molly	Sterkel	CPUC		mts@cpuc.ca.gov			

Jonathan	Koltz	CPUC		jonathan.koltz@cpuc.ca.gov	
Allison	Brown	CPUC		allison.brown@cpuc.ca.gov	
Shannon	O'Rourke	CPUC		shannon.orourke@cpuc.ca.gov	
Sean	Simon	CPUC		sean.simon@cpuc.ca.gov	
Christine	Powell	CPUC		christine.powell@cpuc.ca.gov	
Leuwam	Tesfai	CPUC		leuwam.tesfai@cpuc.ca.gov	
Jack	Mulligan	CPUC		jack.mulligan@cpuc.ca.gov	
Andrew	Barnsdale	CPUC		andrew.barnsdale@cpuc.ca.gov	
Christine	Root	CPUC		christine.root@cpuc.ca.gov	
Kenneth	Holbrook	CPUC		kenneth.holbrook@cpuc.ca.gov	
Terrie	Prosper	CPUC		tdp@cpuc.ca.gov	
Troy	Littleaxe	Modoc Nation	Assistant Tribal Administrator	Troy.littleaxe@modocnation.com	
Donna	Yocum	San Fernando Band of Mission Indians	Chairwoman	ddyocum@comcast.net	
Joyce	Stanfield Perry	Acjachemen Nation	Cultural Resource Director	kaamalam@gmail.com	
Patrick	Orozco		Tribal Chairman	yanapovoic97@gmail.com	
Uyen	Le	Viejas Band of Kumeyaay Indians	Deputy Attorney General	Ule@VIEJAS.com	
Cristina	Rivera	CPUC		Cristina.Rivera@cpuc.ca.gov	

Additional Email Contacts added 8/31/20

Phillip	Del Rosa	Alturas Indian Rancheria		air530@yahoo.com	530-223-5571	901 County Road 56, Alturas, CA, 96101
Josefina	Cortez	Bear River Band of the Rohnerville Rancheria		dakotamcginnis@brb-nsn.gov	707-733-1900	266 Keisner Road, Loleta, CA, 95551
Francis	Steele	Berry Creek Rancheria		fsteele@berrycreekrancheria.com	530-534-3859	5 Tyme Way, Oroville, CA, 95966
Virgil	Moorehead	Big Lagoon Rancheria		vmoorehead@earthlink.net	707-826-2079	708 9th Street, Arcata, CA, 95521
James	Rambeau	Big Pine Paiute Tribe of the Owens Valley		info@bigpinepaiute.org	760-938-2003	825 South Main Street, Big Pine, CA, 93513
Elizabeth	Kipp	Big Sandy Rancheria of Western Mono Indians of California		ek@bigsandyrancheria.com	559-855-4003	37387 Auberry Mission Road, Auberry, CA, 93602
Claudia	Brundin	Blue Lake Rancheria		ahuff@bluelakerancheria-nsn.gov	707-668-5101	428 Chartin Road, Blue Lake, CA, 95525
Herbert	Glazier	Bridgeport Indian Colony		chair@bridgeportindiancolony.com	760-932-7083	355 Sage Brush Drive, Bridgeport, CA, 93517
Daniel	Gomez	Cachil Dehe Band of Wintun Indians		cicc@colusa-nsn.gov	530-458-4186	3730 Highway 45, Colusa, CA, 95932
Mary	Norris	Cahto Tribe of the Laytonville Rancheria		chairman@cahto.org	707-984-6197	300 Cahto Drive, Laytonville, CA, 95454
Daniel	Salgado	Cahuilla Band of Indians		tribalcouncil@cahuilla.net	951-763-5549	52701 Highway 371, Anza, CA, 92539
Edwin	Romero	Capitan Grande Band of Diegueno Mission Indians		counciloffice@barona-nsn.gov	619-443-6612	1095 Barona Road, Lakeside, CA, 92040
Richard	Lash	Cedarville Rancheria		cr.munholand@gmail.com	530-233-3969	300 West 1st Street, Alturas, CA, 96101
Charles	Wood	Chemehuevi Indian Tribe		citchairman@yahoo.com	760-858-4301	1990 Palo Verde, Blythe, CA, 92363
Garth	Sundberg	Cher-Ae Heights Indian Community of the Trinidad Rancheria		aatkins@trinidadrancheria.com	707-677-0211	1 Cher-Ae Lane, Trinidad, CA, 95570
Lloyd	Mathiesen	Chicken Ranch Rancheria of Me-wuk Indians		chixrnch@mlode.com	209-984-9066	16955 Nelson Road, Jamestown, CA, 95327
Dennis	Patch	Colorado Indian Tribes of of the Colorado River Indian Reservation		executiveoffice@crit-nsn.gov	928-669-9211	26600 Mohave Road, Parker, AZ, 85344
Michael	Hunter	Coyote Valley Band of Pomo Indians		tribaladministrator@coyotevalleytribe.com	707-485-8723	7751 North State Street, Redwood Valley, CA, 95470
Chris	Wright	Dry Creek Rancheria Band of Pomo Indians		chrisw@drycreekrancheria.com	707-431-4090	1550 Airport Blvd., Suite 101, Santa Rosa, CA, 95403
		Elem Indian Colony of Pomo Indians		a.garcia@elemindiancolony.org		
		Elk Valley Rancheria		swoods@elk-valley.com		
		Enterprise Rancheria of Maidu Indians		info@enterpriserancheria.org		
Will	Micklin	Eewiiaapaayp Band of Kumeyaay Indians		wmicklin@leaningrock.net		
		Fort Bidwell Indian Community of the Fort Bidwell Reservation		liz.zendejas@fbicc.com		
		Fort Independence Indian Community of Paiute Indians		receptionist@fortindepdence.com		
		Fort Mojave Indian Tribe		timothywilliams@fortmojave.com		
Charles	Alvarez	Gabrielino Tongva Tribe		CAlvarez1@GabrielinoTribe.org	310-403-6048	
Patty	Allen	Greenville Rancheria	Tribal Administrator	pallen@greenvillerancheria.com	530-528-8600	1425 Montgomery Road, Red Bluff, CA, 96080
		Grindstone Indian Rancheria of Wintun-Wailaki Indians		girrancheria@yahoo.com		
Marlene	Sanchez	Guidiville Rancheria		admin@guidiville.net	707-462-3682	401 B Talmage Road, Ukiah, CA, 95482
		Habematolel Pomo of Upper Lake		tribaladmin@upperlakepomo.com		
Ryan	Jackson	Hoopa Valley Tribe		hoopa.receptionist@gmail.com	530-625-4211	Neighborhood Facility Building HWY 96, Hoopa, CA, 95546
Sonny	Elliot	Hopland Band of Pomo Indians		joe2@hoplandtribe.com	707-472-2100	3000 Shanel Road, Hopland, CA, 95449
Bernice	Paipa	Iipay Nation of Santa Ysabel		iipayinfo@yahoo.com	760-765-0846	101 School Canyon Road, Santa Ysabel, CA, 92070
Rebecca	Osuna	Inaja Band of Diegueno Mission Indians		inaja_cosmit@hotmail.com	760-737-7628	2005 S. Escondido Boulevard, Escondido, CA, 92025
Sara	Setshwaelo	Ione Band of Miwok Indians		administrator@ionemiwok.org	209-245-5800	9252 Bush Street, Plymouth, CA, 95669
Russell	Atteberry	Karuk Tribe		attebery@karuk.us	530-493-1600	P.O. Box 1016, Happy Camp, CA, 96039
Dino	Franklin	Kashia Band of Pomo Indians		tribalofc@stewartspointrancheria.com	707-591-0580	1420 Guerneville Road, Suite 1, Santa Rosa, CA, 95403
		La Posta Band of Digegueno Mission Indians		info1@lptribe.net		
		Lone Pine Paiute-Shoshone Tribe		chair@lppsr.org		
		Los Coyotes Band of Cahuilla & Cupeno Indians		loscoyotes@gmail.com		
		Manchester Band of Pomo Indians		manptarena@hughes.net		
		Manzanita Band of Diegueno Mission Indians		ljbirdsinger@aol.com		
Dennis	Ramirez	Mechoopda Indian Tribe		mit@mechoopda-nsn.gov	530-899-8922	125 Mission Ranch Boulevard, Chico, CA, 95926

		Mesa Grande Band of Diegueno Mission Indians	mesagrandeband@msn.com		
		Middletown Rancheria of Pomo Indians	dhummel@middletownrancheria.com		
		Mooretown Rancheria of Maidu Indians	lwinner@mooretown.org		
		Northfork Rancheria of Mono Indians	nfrancheria@northforkrancheria-nsn.gov		
		Pauma Band of Luiseno Mission Indians	paumareservation@aol.com		
Agnes	Gonzalez	Pit River Tribe	administrator@pitrivertribe.org	530-335-5421	36970 Park Avenue, Burney, CA, 96013
Salvador	Rosales	Potter Valley Tribe	pvysecretary@pottervalleytribe.com	707-462-1213	2251 South State Street, Ukiah, CA, 95482
		Quartz Valley Indian Community	tribalchairman@qvir-nsn.gov		
		Quechan Tribe of the Fort Yuma Indian Reservation	qitpres@quechanindiantribe.com		
Jack	Potter	Redding Rancheria	reception@redding-rancheria.com	530-225-8979	2000 Redding Rancheria Road, Redding, CA, 96001
		Redwood Valley Band of Pomo Indians	redwoodres@pacific.net		
Rick	Dowd	Resighini Rancheria	rk.dowd6@verizon.net	707-482-2431	P.O. Box 529, Klamath, CA, 95548
Bo	Mazzetti	Rincon Band of Luiseno Mission Indians	bomazzetti@aol.com	760-749-1051	1 West Tribal Road, Valley Center, CA, 92082
Eddie	Crandall	Robinson Rancheria	ej@rrrc.com	707-275-0527	P.O. Box 4015, Nice, CA, 95464
James	Russ	Round Valley Indian Tribes	tribalcouncil@rvit.org	707-983-6126	77826 Covelo Road, Covelo, CA, 95428
		San Pasqual Band of Diegueno Mission Indians	dorrisc@sanpasqualtribe.org		
		Santa Rosa Band of Cahuilla Indians	srtribaloffice@aol.com		
		Santa Ynez Band of Chumash Mission Indians	info@sybmi.org		
		Scotts Valley Band of Pomo Indians	svpomo@svpomo.org		
		Sherwood Valley Rancheria of Pomo Indians	svrchair@sbcglobal.net		
		Shingle Spring Band of Miwok Indians	tribalchairperson@ssband.org		
Brandon	Gutierez	Susanville Indian Rancheria	jmackay@sir-nsn.gov	530-257-6264	745 Joaquin Street, Susanville, CA, 96130
Cody	Martinez	Sycuan Band of the Kumeyaay Nation	emartinez@sycuan-nsn.gov	619-445-2613	1 Kwaaypaay Court, El Cajon, CA, 92019
		Tejon Indian Tribe	office@tejontribe.net		
		Tolowa Dee-ni' Nation	briannon.fraley@tolowa.com		
		Tule River Indian Tribe	neil.peyron@tulerivertribe-nsn.gov		
Darrell	Mike	Twenty-Nine Palms Band of Mission Indians	admin@29palmsbomi-nsn.gov	760-863-2444	46-200 Harrison Place, Coachella, CA, 92236
Raymond	Hitchcock	Wilton Rancheria	tribaloffice@wiltonrancheria-nsn.gov	916-683-6000	9728 Kent Street, Elk Grove, CA, 95624
Theodore	Hernandez	Wiyot Tribe	michelle@wiyot.us	707-733-5055	1000 Wiyot Drive, Loleta, CA, 95551
Anthony	Roberts	Yocha Dehe Wintun Nation	info@yochadehe-nsn.gov	530-796-3400	P.O. Box 18, Brooks, CA, 95606
Amanda	Vance	Augustine Band of Cahuilla Indians	info@augustinetribe-nsn.gov	760-398-4722	84481 Avenue 54, Coachella, CA, 92236
Sarah	Ryan	Big Valley Band of Pomo Indians of the Big Valley Rancheria	sryan@big-valley.net	707-263-3924	2726 Mission Rancheria Road, Lakeport, CA, 95453
Gloriana	Bailey	Bishop Paiute Tribe	gloriana.bailey@bishoppaiute.org	760-873-3584	50 Tu Su Lane, Bishop, CA, 93514
Doug	Welmas	Cabazon Band of Mission Indians	nmarkwardt@cabazonindians-nsn.gov	760-342-2593	84-245 Indio Springs Parkway, Indio, CA, 92203
Adam	Dalton	Jackson Band of Miwuk Indians	mfallon@jacksonrancheria-nsn.gov	209-223-1935	12222 New York Ranch Road, Jackson, CA, 95642
Shasta	Gaughen	Pala Band of Mission Indians	sgaughen@palatribe.com	760-891-3515	35008 Pala-Temecula Road PMB - 50, Pala, CA, 92059
Mark	Macarro	Pechanga Band of Luiseno Mission Indians	epreston@pechanga-nsn.gov	951-676-2768	12705 Pechanga Road, Temecula, CA, 92392
Isaiah	Vivanco	Soboba Band of Luiseno Indians	dkitchen@soboba-nsn.gov	951-654-2765	23906 Soboba Road, San Jacinto, CA, 92583
Dore	Bietz	Tuolumne Band of Me-Wuk Indians	DBietz@mewuk.com	209-928-3475	19595 Mi-wu Street, Tuolumne, CA, 95379
Irvin	Jim	Washoe Tribe of Nevada & California	Irvin.Jim@washoetribe.us	775-265-4191	919 Highway 395 South, Gardnerville, NV, 89410
Jeff	Grubbe	Agua Caliente Band of Cahuilla Indians	kanderson@aguacaliente.net	760-699-6800	5401 Dinah Shore Drive, Palm Springs, CA, 92264
Rhonda	Morningstar Pope	Buena Vista Rancheria of Me-Wuk Indians	christina@buenavistatribe.com	916-491-0011	1418 20th Street Suite 200, Sacramento, CA, 95811
Robert	Martin	Morongo Band of Mission Indians	kwoodard@morongo-nsn.gov	951-849-4697	12700 Pumarra Road, Banning, CA, 92220
Joseph	Hamilton	Ramona Band of Cahuilla Indians	jgomez@ramona-nsn.gov	951-763-4105	56310 Highway 371 Suite B, Anza, CA, 92539
Marcus	Cuero	Campo Band of Diegueno Mission Indians	marcuscuero@campo-nsn.gov	619-478-9046	36190 Church Road Suite 1, Campo, CA, 91906
Val	Lopez	Amah MutsunTribal Band	vlopez@amahmutsun.org	916-743-5833	P.O. Box 5272, Galt, CA, 95632
Andrew	Galvan	The Ohlone Indian Tribe	chochenyo@AOL.com	510-882-0527	P.O. Box 3152, Fremont, CA, 94539
Marjorie	Mejia	Lytton Rancheria of California	margiemejia@aol.com	707-575-5917	437 Aviation Boulevard, Santa Rosa, CA, 95403
Jennifer	Ruiz	Picayune Rancheria of Chuckchansi Indians	jruiz@chukchansitribe.net	559-412-5590	49260 Chapel Hill Drive, Oakhurst, CA, 93644
Thomas	Tortes	Torres Martinez Desert Cahuilla Indians	tmchair@torresmartinez.org	760-397-0300	66725 Martinez Road, Thermal, CA, 92274
				707-894-5775	555 S. Cloverdale Boulevard, Cloverdale, CA, 95425
				559-855-5043	32861 Sycamore Road #300, Tollhouse, CA, 93667
				707-566-2288	6400 Redwood Drive Suite 300, Rohnert Park, CA, 94928
				619-669-4785	14191 Highway 94, Jamul, CA, 91935
				760-742-3771	22000 Highway 76, Pauma Valley, CA, 92061
				707-463-1454	500 B Pinoleville Drive, Ukiah, CA, 95482
				909-864-8933	26569 Community Center Drive, Highland, CA, 92346
				559-924-1278	16835 Alkali Drive, Lemoore, CA, 93245
				559-822-2587	23736 Sky Harbour Road, Friant, CA, 93626

760-872-3614	1349 Rocking W Drive, Bishop, CA, 93514
530-883-2390	10720 Indian Hill Road, Auburn, CA, 95603
760-933-2321	567 Yellow Jacket Road, Benton, CA, 93512
916-501-2482	P.O. Box 667, Marysville, CA, 95901

PECHANGA INDIAN RESERVATION

Temecula Band of Luiseño Mission Indians

Post Office Box 1477 • Temecula, CA 92593
Telephone (951) 770-6000 Fax (951) 695-1778

September 24, 2020

VIA Electronic Mail
(edtariffunit@cpuc.ca.gov)

California Public Utilities Commission
505 Van Ness Avenue
San Francisco, CA 94102
Michael.Rosauer@cpuc.ca.gov

RE: Pechanga Band of Luiseño Indians Comments on Resolution E-5076—Adoption of Guidelines to Implement the CPUC Tribal Land Policy consistent with Executive Order B-10-11 and the CPUC Tribal Consultation Policy, The Tribal Land Transfer Policy, and Public Utilities Code Section 851

Honorable Commissioners:

These comments are submitted on behalf of the Pechanga Band of Luiseño Indians ("Pechanga"), a federally recognized and sovereign Indian Nation located in the Temecula Valley of Southern California. As the only California Tribe that owns and operates its own traditional wholesale electric utility, Pechanga is uniquely aware of the significant interplay between utility operation and tribal land rights. Our personal philosophy as a utility operator is that utilities should hold the rights of the tribal community paramount, and consistent with this philosophy, we submit these comments in support of Resolution E-5076 with amendments.

I. Pechanga Strongly Supports Returning Ancestral Lands to the Appropriate Tribes.

As foundational matter, Pechanga strongly supports the Tribal Land Transfer Policy's (TLTP) general intent to provide an opportunity for Tribes to regain their ancestral lands. In particular, Pechanga strongly supports the TLTP's creation of a preference for the transfer of Real Property to the appropriate Tribe when an investor owned utility (IOU) plans to dispose of Real Property within the Tribe's ancestral territory (i.e., a tribal "right of first refusal"). Such a preference is consistent with the State's commitment to strengthening and sustaining effective government-to-government relationships between the State and Tribes; and its efforts to correct historical wrongs tolerated, encouraged, subsidized, and committed by State actors.

II. The Guidelines Should Mirror the Definition of "Consultation" in California Government Code Section 65352.4.

Pechanga further supports the TLTP's effort to meaningfully engage Tribes in Commission proceedings by providing timely information and effective notice, and actively facilitating Tribal participation. To ensure that such meaningful engagement exists throughout the land transfer process, Pechanga recommends amending Section 1.3 of the TLTP to include the following definition of "Consultation" from California Government Code Section 65352.4:

"Consultation" means the meaningful and timely process of seeking, discussing, and considering carefully the views of others, in a manner that is cognizant of all parties' cultural values and, where feasible, seeking agreement. Consultation between government agencies and Native American tribes shall be conducted in a way that is mutually respectful of each party's sovereignty. Consultation shall also recognize the tribes' potential needs for confidentiality with respect to places that have traditional tribal cultural significance.

III. The NAHC Should Have 90 Days to Identify the Appropriate Tribal Transferee, and Tribal Transferees Should Have 90 Days to Respond to a Notice of Disposition.

In response to the CPUC's specific request for comment regarding the notice timeframes in Section 2.2, Pechanga supports giving the Native American Heritage Commission (NAHC) 90 days to identify the appropriate tribal transferee for notice purposes. Pechanga recommends Section 2.3 be amended to provide proposed tribal transferees 90 days from the date of notice to respond and engage the consultation process before the IOU may put the real property on the market. Notwithstanding any deadlines proposed herein, good faith consultation should extend as long as necessary to ensure full participation of the Tribes.

IV. Tribes Should Retain the "Right of First Refusal"

Certain IOUs took issue with extending Tribes a "right of first refusal," explaining that a "right of first refusal" would afford Tribes the right to acquire property on the same or better terms than another potential purchaser. The IOUs contend their ability to extend and negotiate offers could be adversely impacted, if a third party is aware that any potential agreement could be discarded should a Tribe decide to accept an agreement with identical terms.

Given that the purpose of the policy is to return ancestral lands to further government-to-government relationships and correct historical injustice, it would follow that Tribes should be able to acquire the subject property on the best terms the IOU is willing to offer. The intent of the policy would be sharply undermined if IOUs were allowed to make an offer that a Tribe is unable or unwilling to accept, then turn around and offer the property to a third party on better terms than offered to the Tribe. Accordingly, not only should the "right of first refusal" language in the TLTP be preserved, the definition of "Right of first refusal" in Section 1.3.j should be clarified to indicate that the IOU must provide the Tribe the right to take or refuse the real property, before the IOU can sell the real property to a third-party purchaser.

V. Lands Within the Reservation, Trust, or Fee Lands of a Tribe Should Not Be Subject to Claims By Multiple Tribes.

Although some disputes regarding ancestral claims to land are likely to arise, inappropriate and unnecessary disputes can be avoided by amending Section 4.3 to clarify that real property within or adjacent to the documented reservation, trust, or fee lands of a Tribe is not subject to claims by other Tribes, unless the primary interested Tribe declines consultation with the IOU or otherwise confirms that it is not interested in the subject real property.

VI. A More Accurate Source for Determining Ancestral Territory Should Be Used.

Section 1.3.a of the draft guidelines references the Handbook of North American Indians as the source for determining the ancestral territory of a tribe that has not designated territory under AB

52. This ethnographic source is very problematic for many tribes who dispute characterizations of their ancestral territories as depicted by the ethnographers relied on in this book. This source will not give CPUC an accurate basis for determining ancestral territory. If an ethnographic source must be used, we recommend using a more widely accepted general source such as Alfred Kroeber's 1925 Handbook of the Indians of California, and even then, only using such a source in the absence of any data regarding ancestral territory, as ethnographic sources are not the most accurate source of territory information.

VII. The NAHC Is Better Equipped Than the IOUs to Mediate Disputes Between Tribes Regarding Ancestral Claims to Land.

The current draft guidelines require the IOUs to resolve disputes between Tribes regarding competing claims to ancestral lands. Given the IOUs' general lack of familiarity with the Tribes' histories and current legal and political configurations, it would be a disservice to both the IOUs and the Tribes to require the IOUs to mediate disputes regarding ancestral land claims. Instead, the role of the NAHC should be expanded to include resolution of such disputes, and Sections 4.2 and 4.3 be amended accordingly. Given its role and current purview, the NAHC is best positioned to work with Tribes to develop mutually agreeable processes for resolving such disputes in a fair and expedient manner.

VIII. The Existence of Other Public Interests Should Not Undermine The Tribes' Rights to Reclaim Their Ancestral Lands

As a final point, the draft guidelines indicate that the Commission's presumption a tribe is the preferred transferee can be overcome by showing transfer of the real property to another entity would be in the public interest. The mere fact that transfer to another entity is also in the public interest should not outweigh the overwhelming public interest the State and Tribes have in returning tribal ancestral lands to tribal communities and respecting tribal sovereignty. As such, Section 3.3 should be amended to eliminate reference to competing public interests.

IX. Conclusion

In conclusion, Pechanga strongly supports the return of tribal ancestral lands to the appropriate Tribes and looks forward to working closely with the CPUC and the NAHC to develop the procedures and protocols to ensure proper and efficient implementation of the TLTP. Should you have any questions regarding these comments, please do not hesitate to contact Breann Nu'uhiwa at (951) 770-6174 or bnuuhiwa@pechanga-nsn.gov. Thank you.

Sincerely,

Mark Macarro
Tribal Chairman

Attachment A

GUIDELINES TO IMPLEMENT THE CPUC TRIBAL LAND POLICY

1. GENERAL PROVISIONS

1.1. Purpose and Intent

a. The purpose of these Guidelines is to implement the Commission's Tribal Land Policy, which it adopted on December 5, 2019.

b. The goals of the Tribal Land Policy are:

i. To recognize and respect Tribal sovereignty;

ii. To protect Tribal sacred places and cultural resources;

iii. To ensure meaningful consideration of Tribal interests and the return of lands within the ancestral territory of the appropriate Tribe; and

iv. To encourage and facilitate notice and Tribal participation in matters before the Commission that involve transfers of real property subject to California Public Utilities Code Section 851.

c. The intent of these Guidelines is therefore to further those goals.

1.2. Construction

a. These Guidelines shall be liberally construed to further the goals of the Tribal Land Policy. *See* Rule 1.1(b).

b. Unless otherwise noted, all statutory references are to the laws of the State of California.

c. These Guidelines do not address whether an Investor Owned Utility should place an easement on utility-owned land before disposing of that land. The Commissioner will consider whether an easement should be placed on any particular land on a case-by-case basis when the Utility asks for authority to dispose of the land.

1.3. Definitions

For purposes of these Guidelines, unless the context otherwise requires—

a. "Ancestral territory" means the territory designated by a tribe and submitted to the Native American Heritage Commission (NAHC) to provide to state agencies and local government for notice of projects under Assembly Bill (AB) 52. (2013-2014 Reg. Sess.) Tribes are the primary source for identification of a tribe's ancestral territory. If a tribe

Deleted: Ensure

Deleted: guidelines

has not designated territory under AB 52, and the NAHC has no data regarding ancestral territory, then "ancestral territory" for that tribe means territory identified in Alfred Kroeber's 1925 Handbook of the Indians of California.

Deleted: Vols. 8, 10 & 11 Sturtevent ed., Handbook of North American Indians (1978).[8]

b. "California Native American tribe" or "tribe" means a Native American tribe located in California that is on the contact list maintained by the NAHC for the purposes of Chapter 905 of the Statutes of 2004. (See Pub. Res. Code, § 21073.) This includes both federally-recognized tribes and tribes that are not recognized by the federal government. Nothing in the policy prevents tribes from consulting with other Native American groups that demonstrate an ongoing connection to a specific place or cultural resource, or issue falling under the jurisdiction of the Commission.

c. "Chairperson" means a tribe's highest elected or appointed decision-making official, whether that person is called chairperson, or president, or some other title.

d. "Consultation" means the meaningful and timely process of seeking, discussing, and considering carefully the views of others, in a manner that is cognizant of all parties' cultural values and, where feasible, seeking agreement. Consultation between government agencies and Native American tribes shall be conducted in a way that is mutually respectful of each party's sovereignty. Consultation shall also recognize the tribes' potential needs for confidentiality with respect to places that have traditional tribal cultural significance.

e. "Disposition" means the transfer, sale, donation, encumbrance, or disposition by any other means of an estate in real property.

f. "Indian country" means "(a) all land within the limits of any Indian reservation under the jurisdiction of the United States Government, notwithstanding the issuance of any patent, and, including rights-of-way running through the reservation, (b) all dependent Indian communities within the borders of the United States whether within the original or subsequently acquired territory thereof, and whether within or without the limits of a state, and (c) all Indian allotments, the Indian titles to which have not been extinguished, including rights-of-way running through the same." (18 U.S.C. § 1151.)

g. "Investor-owned utility" (IOU) means "private corporations or persons that own, operate, control, or manage a line, plant, or system for the transportation of people or property, the transmission of telephone and telegraph messages, or the production, generation, transmission, or furnishing of heat, light, water, power, storage, or wharfage directly or

indirectly to or for the public, and common carriers." (Cal. Const., art. XII, § 3.)

h. "Real property" means any IOU real property whose disposition is subject to approval under Section 851 of the Public Utilities Code.

i. "Request for approval" means an IOU's submission, whether under the formal application process or the informal advice letter process, requesting Commission approval of the disposition of real property under Section 851 of the Public Utilities Code.

j. "Right of first refusal" means that the IOU disposing of real property must contact the tribe or tribes whose ancestral territory is on or adjacent to the real property, and must provide the tribe or tribes the right to take or refuse the real property, before the IOU can seek third-party purchasers for the real property or sell the real property to a third-party purchaser.

Deleted: <#>[8] The Sturtevant books are a 15-volume reference work in Native American studies, edited by William C. Sturtevant, and published by the Smithsonian Institution. Volumes 8, 10, and 11 cover "California," "the Southwest," and "the Great Basin," respectively.¶

1.4. IOU Tribal Website

Each IOU shall create and maintain a website that will serve as a repository for the documentation described in these guidelines.

1. NOTIFICATION

2.1. Notification Generally

When an IOU decides to dispose of real property, before it submits a request for approval to the Commission, the IOU shall notify any relevant tribe or tribes that it intends to dispose of the property.

2.2. IOU to Identify Relevant Tribe or Tribes

a. The IOU shall submit a written request to the NAHC to identify tribes relevant to the territory on which the real property lies.

b. If the NAHC fails to respond within 90 days, or if the NAHC's response is inconclusive:

i. If the real property is located within or adjacent to a federally-recognized tribe's Indian country, the IOU shall provide notice to that tribe.

ii. If the real property is not located within or adjacent to a federally-recognized tribe's Indian country, the IOU shall provide notice to any tribe or tribes on whose ancestral territory the real property lies.

2.2. To Whom Notice Directed

The IOU shall notify the tribal chairperson of any relevant tribes, or the chairperson's designee.

2.3. Contents of Notice

The notice shall include, in plain language:

- **a.** The location and a brief description of the real property at issue;
- **b.** The reason the IOU is disposing of the real property;
- **c.** A statement telling the tribe that they have a right of first refusal on the real property before the IOU may put the real property on the market;
- **d.** An offer to consult with the tribe regarding the tribe's interest in acquiring the real property; and
- **e.** Contact information of an IOU representative who is sufficiently knowledgeable about the real property to answer any questions the tribe might have, so that the tribe can decide whether it is interested in acquiring the real property.
- **f.** A statement that the tribe has 90 days to respond to the notice and begin the consultation process, and if the tribe does not respond, the IOU may put the real property on the market after expiration of the 90-day deadline.

Notice shall be delivered by USPS certified mail, return receipt.

2.4. Notice to be Publicly Available

When the IOU sends notice to a relevant tribe, the IOU shall also post the notice on its tribal website.

2. REQUESTS FOR APPROVAL

3.1. Filing

- **a.** If an IOU submits a request for approval under Section 851, the request must show that the IOU provided notice and consultation to the interested tribe or tribes. The required showing includes:
  - **i.** A copy of the IOU's written request to the NAHC to identify interested tribes;
  - **ii.** A copy of the IOU's written notice to any interested tribal chairperson or their designee with USPS receipt;
  - **iii.** Documentation of any consultation between the IOU and the tribe or tribes.
- **b.** If the IOU does not meet that showing, and if it is unable to cure those deficiencies, the Commission may, in its discretion:
  - **i.** Identify any interested tribes, provide them with notice of the proceeding and an opportunity to comment;
  - **ii.** Direct the IOU to identify, notice, and consult with any interested

tribes; or

iii. Reject the request for approval without prejudice.

3.2. Tribal Participation

a. The Commission will encourage interested tribes to participate in these proceedings.

b. Commissioner staff and Administrative Law Judges will ensure that any comment provided by a tribe is submitted into the record of the proceeding, consistent with the confidentiality provisions set forth in the Commission's Tribal Consultation Policy.

c. If the request for approval is an advice letter filing, any comment submitted by the tribe shall be appended to the draft Resolution disposing of the advice letter filing.

3.3. Presumption in Favor of Tribe

When an IOU requests approval to dispose of real property lying in a tribe's ancestral territory, the Commission will presume that the tribe is the preferred transferee, and that the transfer to the tribe is in the public interest, absent a finding supported by evidence:

a. That the tribe is not interested in acquiring the real property (e.g., that the tribe declined consultation with the IOU or confirmed that it is not interested);

b. That the IOU acted in good faith and, after reasonable effort, was unable to agree with the tribe on reasonable terms for the transfer of the real property; or

c. That transfer of the real property to another entity is necessary to achieve IOU operational requirements, or to comply with any law, rule, or regulation.

Deleted: ; or

Deleted: <#>That transfer of the real property to another entity would be in the public interest.¶

3.4. Impacts on Cultural Resources

As part of its review of any request for approval, the Commission will carefully consider any comments regarding potential impacts on tribal cultural resources, or suggesting measures that would mitigate those impacts. This applies whether the proposed transfer is to the tribe or to a third party.

3. DISPUTE RESOLUTION

4.1. Disputes Generally

It is the Commission's intent that, where possible, disputes be resolved informally, by discussion between the IOU and any interested tribes.

4.2. Disputes About Notice

If there is a dispute about the tribe or tribes that the IOU must notice, or about the extent of any tribe's ancestral territory, the NAHC shall attempt to resolve the dispute through discussion with the tribe or tribes raising the dispute. If discussion is unable to resolve the dispute, the NAHC shall use its best judgment to determine how to proceed with the required notification. The NAHC shall document any steps it takes to resolve such a dispute, and the reasons for any determination that it makes.

4.3. Multiple Interested Tribes

If more than one tribe seeks ownership of available real property, and if the tribes are unable to resolve the dispute themselves, the NAHC shall engage in meaningful consultation with the tribes to resolve the dispute, pursuant to established procedures and processes developed by the NAHC in collaboration with the Tribes. Where the real property at issue lies within or adjacent to the documented reservation, trust, or fee lands of a tribe, that tribe will be deemed to be the primary interested tribe, and the claim of any other tribe to the subject real property shall be deemed subordinate and only permitted if the primary interested tribe declines consultation with the IOU or otherwise confirms that it is not interested in the subject real property.

4. QUARTERLY REPORTS

5.1. Quarterly Reports

- **a.** The IOUs shall, every quarter, provide the Commission with 1) an updated list of recent real property dispositions; 2) a list of upcoming anticipated real property dispositions; and 3) a summary of tribal contacts and consultations (including the outcome of those consultations) they have undertaken over the previous quarter.
- **b.** These reports shall be due on January 1, April 1, July 1, and October 1. If the due date falls on a weekend or holiday, the report shall be due the following business day.
- **c.** The utilities shall post these reports to their tribal website. The Commission will also post the reports on its own website.

Deleted: ¶ ¶

Deleted: IOU

Deleted: IOU

Deleted: IOU

Deleted: IOU

Deleted: attempt to

Deleted: invalid

Deleted: If that fails to resolve the dispute, the IOU, in consultation with the tribes, shall propose a reasonable resolution to the dispute as part of its request for approval. The IOU will take into consideration each tribe's connection to the surplus property at issue; the current use of the property; the proposed use after transfer; and any other relevant considerations raised by the IOU, tribes, and any other stakeholder to the disposition of the real property

Pacific Gas and Electric Company

Erik Jacobson
Director
Regulatory Relations

Pacific Gas and Electric Company
77 Beale St., Mail Code B13U
P.O. Box 770000
San Francisco, CA 94177

Fax: 415-973-3582

October 8, 2020

Energy Division
Attention: Tariff Unit
California Public Utilities Commission
505 Van Ness Avenue
San Francisco, CA 94102

Subject: **Reply Comments of Pacific Gas and Electric Company on Draft Resolution E-5076 - Adoption of Guidelines to Implement the CPUC Tribal Land Policy consistent with Executive Order B-10-11 and the CPUC Tribal Consultation Policy, The Tribal Land Transfer Policy, and Public Utilities Code Section 851**

Dear Energy Division Tariff Unit:

Pacific Gas and Electric Company (PG&E) appreciates this opportunity to reply to comment on Draft Resolution E-5076 (the Draft Resolution).

1. INTRODUCTION

The comments to the Draft Resolution by a diverse group of interested parties express broad support for adopting Guidelines that provide additional guidance on the specific procedures for implementing the Tribal Land Transfer Policy (Policy). The parties have requested further clarification on the treatment of certain easement transactions that would not serve the Policy's objective of returning lands to the tribes and the timeframe and manner in which the tribes will exercise the ROFR. PG&E believes the comments warrant adding procedural detail in the Guidelines to provide more certainty to the disposition process. PG&E also notes many of the comments have questioned the value of expanding the Policy to include easement and license transactions under General Order 69-C because the limited nature of these land rights do not fulfill the objectives of the Policy.

2. DISCUSSION

1. The Guidelines Should Exclude Certain Easement Transactions.

Several parties have submitted comments requesting the Commission recognize that certain easement transactions be excluded from the Policy. PG&E agrees that the Guidelines should add procedural detail relating to the exceptions recognized in the Policy.

2.1.1. Comments on Proposed Rulemaking And To Modify The Scope Of Property Transactions Subject To The Policy.

Southern California Edison (SCE) and San Diego Gas and Electric (SDG&E) propose that the Commission open a formal rulemaking proceeding to develop a policy regarding the disposition of IOU fee-owned property under Section 851. If the Commission is inclined to initiate such a proceeding PG&E would be supportive and participate as an interested stakeholder.

SCE and SDG&E have also questioned the application of the Policy and Guidelines to easements and "less-than-fee" interests, noting that such transactions would not facilitate a meaningful transfer of land to the tribes, cause confusion and potentially create impacts to safety and reliability impacts. The Policy defines a "disposition" to refer to the transfer, sale, donation or disposition by any other means of a fee simple interest or easement in real property. As discussed below, PG&E believes the Commission should recognize certain easement transactions as an exception to the Guidelines. However, PG&E generally agrees with SCE and SDG&E that applying the Policy to easement transactions does not serve the underlying objective to transfer land to the tribes in a manner that respects their unrestricted use and sovereignty over the lands. If the Commission is inclined to limit the application of the Policy to the transfer of fee property, PG&E would support this clarification to the Policy and Guidelines.

2.1.2. Easement Exchanges For Utility Relocation Projects.

The California Building Industry Association (CBIA) recognizes that the IOUs regularly relocate utility easements to accommodate its member's development projects. As CBIA correctly points out, such relocation projects involve the replacement of an equivalent land right. Therefore, CBIA argues these transactions should be viewed as an equivalent exchange to facilitate the landowner's own use of land for a different purpose.

CBIA also questions how a tribe could possibly benefit from an easement exchange with an IOU to accommodate a development project. CBIA emphasizes the nature of the IOU's land right is limited in scope, an easement authorizing use of a linear corridors (of varying widths, but as narrow as a 25' strip of land) for the construction and operation of transmission and distribution facilities. Even if a tribe elected to acquire the easement, the tribe's use would be limited to the same purpose. That is, the tribe would not be entitled to expand the use the easement for an different purpose, such as preservation, restoration or performance of cultural rites. CBIA also observes that requiring the IOUs to notify tribes of a ROFR for easement exchanges on a developer's fee property would result in unnecessary delay in responding to the applicant's request to relocate. For these reasons, CBIA recommends the Guidelines recognize an exception for easement exchanges associated with relocation projects. PG&E agrees with CBIA that the Commission should recognize an exception in the Guidelines for easement exchanges to accommodate relocation projects.

2.1.3. Easements For Interconnection Projects.

The comments by Horizon West Transmission, LLC and the Western Power Trade Forum raise similar considerations with respect to an IOU's grant of an easement to an interconnection customer (IC) to accommodate the IC's electric transmission, storage and generation project that interconnects with the IOU's electric grid. PG&E agrees that such easements are for the limited purpose of allowing IC to interconnect to IOU's electric grid, e.g., to accommodate the extension of an IC's tie line within an IOU's substation. The accommodation of these interconnection projects are specific examples demonstrating the need for the exception in the Policy for dispositions necessary to meet an IOU's operational requirements or to comply with any law, rule or regulation.[1] PG&E recommends the Guidelines include guidance on the specific procedure for submitting transactions for Commission approval under this exception, as proposed in PG&E's opening comments. (See PG&E's opening comments, proposed guideline 2.7(a)).

2.1.4. Certain Transactions May Qualify Under The Exceptions Recognized In The Policy.

The Yurok Tribe and the Paskena Tribe oppose the acknowledgement stated in the Policy that the CPUC may not deem a tribe the preferred transferee of IOU Real Property upon a finding supported by evidence that the conveyance to another entity would be in the public interest. The Yurok Tribe contends the potential exclusion of certain transactions based on a public interest finding is too vague and lacks sufficient limitations. On the other hand, the County of San Luis Obispo requests additional clarification in the Guidelines as to how the Commission would resolve a public interest finding where a tribe may seek to acquire the property. The County's comments note there may be a range of factors that bear on whether a disposition to another party would be in the public interest, e.g., transfer to an governmental agency with experience and financial resources in managing conservation areas, whether the lands raise public trust doctrine issues or use by the public for recreational or educational purposes. PG&E agrees that the Guidelines should acknowledge the notification requirements do not apply where the IOU determines transfer to another person is necessary to meet the IOU's operational requirements or the public interest. (See PG&E's opening comments, proposed guideline 2.7).

2.1.5. Clearing Title of Antiquated Easements Not Used By The IOUs.

CBIA also requests the Policy exclude easement termination requests involving an easement that encumbers the property of CBIA members but is not actually used by the IOU or useful for utility purposes. When such encumbrances are encountered, CBIA members typically request the IOU issue a quitclaim, which serves to remove the

[1] For example, the CAISO tariff sets requirements for the provision of access rights to accommodate interconnection projects. See Section 5.12 of the Large Generation Interconnection Agreement, Appendix EE of the CAISO Tariff, available at the CAISO's website, www.caiso.com/rules.

encumbrance from record title. CBIA requests that such easement termination requests be excluded from the Policy, emphasizing the easements are limited scope and would not authorize a change in use of the easement or advance the interest in the Policy of returning land to tribes. PG&E supports recognizing an exception for such easement termination requests.

2. Comments to the Notification Requirements.

The comments to the Draft Resolution also proposed the Guidelines provide further guidance on the notification requirements.

2.2.1. The Guidelines Should Improve The Procedure To Identify Relevant Tribes.

SDG&E has recommended the Commission's Tribal Liaison work with tribes and the Native American Heritage Commission to establish a map in each IOU's service territory with a pre-defined overlay of the ancestral territory of tribes. SDG&E offers this proposal to add certainty to the notification process and avoid the potential the IOU would need to attempt to resolve a dispute between tribal governments over a disposition. PG&E agrees the NAHC's current process for identifying the ancestral territory of tribes appears overinclusive. A process improvement in identifying the ancestral territory of tribes would serve to minimize disputes arising in the disposition process, which would further the Policy's objective of returning IOU property to the relevant tribe and conserving the resources of the Commission in resolving disputes.

2.2.2. The Resolution Fails To Clarify What Is Meant By "Adjacent To An Tribes Aboriginal Territory."

SCE notes that while the Resolution summarizes the concerns that have been expressed by parties as to the definition in Section 1.3 of the Guidelines, the meaning of the term "adjacent to" in Section 1.3 remains unclear and ambiguous. As noted in PG&E's opening comments, this term is so indefinite that it should be entirely eliminated from the definition.

2.2.3. The Guidelines Should Clarify the Actions Necessary To Exercise The ROFR.

The Yurok Tribe requests clarification on the timeline for the tribe to make the determination that they wish to exercise the ROFR. As noted in PG&E's Opening Comments, the Guidelines lack precision as to the timeframe for the tribe to exercise the ROFR. PG&E proposes the Guidelines clarify the specific actions to be taken by the tribe to exercise the ROFR. The interested tribe should directed to provide a Letter of Intent and Term Sheet (LOI) that delineates the basic terms of the acquisition. The LOI should be provided within 90 days after receiving the IOU's notification of the proposed disposition. (See Section 2.6 of PG&E's proposed edit to the Guidelines). Specifying a

LOI procedure in the Guidelines would memorialize the basic terms of the proposed acquisition and allow the IOU to evaluate the reasonableness of the offer.

2.2.4. Duplicative notices or alternative notifications are not reasonably necessary.

The Yurok Tribe also proposed expanding the notification procedures to require the IOUs provide tribes with multiple notifications in 30 day increments, by letter, email and phone call. PG&E believes the proposal for multiple notifications communicated by alternative methods is not reasonably necessary. Section 2.3 of the Guidelines specifies the IOU's notification is to be delivered by USPS certified mail, return receipt. PG&E believes this procedure is reasonably sufficient to ensure actual delivery to the tribe, together with a record confirming delivery. No duplicative notices to the tribe are reasonably necessary.

2.2.5. Acknowledgement of no interest in an acquisition.

SCE's recommends the Commission adopt a procedure for a tribe with any form of interest in a disposition to respond to an IOU's notification within a 30-day period. Under SCE's proposal, for a tribe that does not respond, the IOU would provide a follow up notification and allow a 10-day response period. PG&E agrees with SCE that the Guidelines should establish a more streamlined procedure that would eliminate the need to hold the ROFR open for the full 90-day period in those cases where the tribe has no interest in the disposition. A response by the tribe receiving notice would not prejudice the tribe's ability to evaluate the proposed disposition for the full 90 day period. SCE's proposal would be in the interest of efficiency in those cases where a tribe had no interested in acquiring the property; it would reduce unnecessary delays and transaction costs associated with the 90-day hold on marketing the property to other parties.

3. The Commission Should Not Extend The Policy To Easement And License Transactions Under General Order 69-C.

PG&E's opening comments recommended that the Policy not be expanded to other transactions under General Order (GO) 69-C because the nature of the easements and license agreements issued under this regulation are limited in scope and would not advance the objectives of the Policy in returning fee property to tribes. The other IOUs have also expressed substantial doubt as to the value of including such GO 69-C transactions. As SCE has noted, applying the Policy and Guidelines to GO 69-C transactions would likely inundate tribes with notifications relating to proposed easements and licenses. PG&E agrees with SDG&E's conclusion that expanding the Policy requirements to such GO 69-C transactions would add significant new complexity to these transactions. The overwhelming consensus in the comments is the Policy should not be extended to such short term, revocable license transactions which will not fulfill the underlying objective of returning lands to tribes.

3. CONCLUSION

For the reasons discussed above, PG&E submits that its proposed modifications to the draft Guidelines would address the requests raised in many of the comments for additional procedural detail in implementing the Policy. The Commission should also consider directing the Commission's Tribal Liaison to work with the tribes and the NAHC on improving the process for identifying ancestral territories in each IOU service territory.

Respectfully submitted,

/S/
Erik Jacobson
Director, Regulatory Relations

cc:

Edward Randolph, Director, Energy Division
Service List CPUC Tribal Land Transfer Policy Resolution E-5076
Michael Rosauer, Energy Division
Mary Jo Borak, Energy Division

ROUND VALLEY INDIAN TRIBES

A Sovereign Nation of Confederated Tribes

TRIBAL COUNCIL OFFICE
77826 COVELO ROAD
COVELO, CALIFORNIA 95428
PHONE: 707-983-6126
FAX: 707-983-6128

LOCATION: ON STATE HWY 162
ONE MILE NORTH OF COVELO
IN ROUND VALLEY
TRIBAL TERRITORY SINCE TIME BEGAN

ROUND VALLEY RESERVATION ESTABLISHED 1856

September 3, 2020

Via Electronic Submittal

Energy Division
Attention: Tariff Unit
California Public Utilities Commission
505 Van Ness Avenue
San Francisco, CA 94102
Email: EDTariffUnit@cpuc.ca.gov

RE: Round Valley Indian Tribes' Comment Letter on Draft Resolution E-5076 and Draft Guidelines to Implement the CPUC Tribal Land Transfer Policy

To Energy Division – Tariff Unit:

The Round Valley Indian Tribes submits these comments pursuant to the California Public Utilities Commission's (Commission) Draft Resolution E-5076 (Draft Resolution), approving the "Guidelines to Implement the CPUC Tribal Land Transfer Policy" (Draft Guidelines).

The Round Valley Indian Tribes (Tribes) are a sovereign confederation of Indian tribes in Northern California that includes the Yuki, Concow, Little Lake, Pomo, Nomlaki, Wailaki and Pit River Tribes. The Round Valley Indian Reservation is located in Mendocino County, within the Upper Eel River Basin. The Round Valley Indian Tribes, like so many of the other California Native American tribes, have lost tens of thousands of acres of tribal lands due to federal government action, including the Allotment process, along with actions by State officials. Undoubtedly, California's Investor-Owned Utilities (IOUs) have benefitted from the unjust, and often illegal, dispossession of Indian land in California. For these reasons, the Round Valley Indian Tribes commend the Commission for formally adopting the Tribal Land Transfer Policy (Policy), which provides an opportunity for tribes to reacquire lands within their ancestral territory. The Policy represents a meaningful step on behalf of the Commission towards redressing historical wrongs suffered by California tribes. The Round Valley Indian Tribes are pleased to provide comments on the Draft Resolution and Draft Guidelines in order to ensure successful implementation of the Policy, consistent with California Native American tribes' unique sovereign status. The Tribes' specific comments on the Draft Resolution and Draft Guidelines are set forth below.

1. Guidelines: Section 1 General Provisions

We recommend the Draft Guidelines be revised to include a section that confirms the sovereign status of California Native American tribes. The Tribes suggest revising Section 1.1(b)(i) to include the following: "These Guidelines are adopted pursuant to treatment of California Native American Tribes as sovereign governments and pursuant to the State's government-to-government relationship with California Native American Tribes." The Guidelines would be stronger from a legal standpoint if they acknowledged tribes as sovereign nations that accept a government-to-government relationship with the State of California. We recommend that Section 1.1(b)(ii) also be revised to clarify that the Guidelines and the Policy are not limited to "Tribal sacred places" within a tribe's ancestral territory. The Policy and implementing Guidelines should apply to any property within a tribe's ancestral territory, not just undeveloped, open spaces.

We also recommend that the definition of "Ancestral Territory" in Section 1.3(a) be revised to include a tribe's own constitution and description of ancestral territory as the fallback option if a tribe has not designated its ancestral territory under Assembly Bill (AB) 52. (2013-2014 Reg. Sess.). Relying on a tribe's own constitution and description of ancestral territories is consistent with the current acknowledgment in the "Ancestral Territory" definition that "Tribes are the primary source for identification of a tribe's ancestral territory." If, however, a tribe's constitution does not include a description of the tribe's ancestral territory, we suggest that the Handbook of North American Indians be used as the final fallback source or designation.

2. Guidelines: Section 2 Notification

We recommend that Section 2.1 Notification Generally be revised to add a requirement that the IOU notify tribes within a set number of days after deciding to dispose of real property. For example, in the case of AB 52, the permitting agency is required to begin consulting with tribes within fourteen (14) days of determination that a project application is complete. The Draft Guidelines should be revised to require a similar fourteen (14) day time-frame to begin consultation with tribes once the IOU decides to dispose of real property.

The Draft Resolution states that "[t]he Draft Guidelines attached adopt a 90-day notice period for the Tribes to effectively assess property issues." See Draft Resolution at 15. However, the Draft Guidelines' only reference to 90 days is in the instance that the NAHC fails to respond to the IOU's written request to identify tribes relevant to the territory on which the real property lies. See Draft Guidelines, Section 2.2(b). We recommend the Draft Guidelines be revised to add a requirement that tribes be given 120 days to respond to a notice from the IOU. We recommend a 120-day period, rather than 90 days, because depending on the information received from the IOU regarding the property, a tribe may need additional time to acquire further information about the property, examine due diligence information, and perhaps conduct environmental assessments. Regarding the questions related to appropriate timeline for noticing and consultation described on page 15 of the Discussion section of the Draft Resolution, the Tribes recommend that, if an IOU properly notifies a tribe of a forthcoming disposition, and if

the tribe does not respond, the IOUs should hold the offer to the tribe open for 60 days to fulfil its obligations under the Policy. A 60-day period seems sufficient to allow a tribe to receive notice and consider whether it is interested in reacquiring the property, without causing unnecessary delay to the efficient transfer of land.

We also recommend that Section 2 be revised to add requirements regarding meaningful consultation with a tribe to determine whether the tribe is interested in reacquiring the real property. Section 3.3(b) states that the Commission will consider whether the IOU "acted in good faith" and with "reasonable effort" to agree with the tribe on reasonable terms for the transfer of the real property. Therefore, we recommend Section 2 be revised to add a requirement that the IOU make a written record of whether the tribe was interested in reacquiring the real property, upon what terms, and if the tribe's proposed terms were unacceptable to the IOU, explain why. A detailed record of decision should be submitted with the IOU's request for approval. This will ensure that when a tribe expresses interest in reacquiring a property, the IOU considers the proposal in good faith.

3. Guidelines: Section 3 Presumption in Favor of Tribes

The Tribes commend the Commission for including Section 3.3. Resumption in Favor of Tribe in the Draft Guidelines and for confirming that the Commission will presume that the transfer to the tribe is in the public interest. However, the Tribes are concerned that Section 3.3(d) provides that this presumption may be rebutted with evidence "that the transfer of the real property to another entity would be in the public interest." We recommend that this subsection (d) be removed from the Draft Guidelines. A balancing of public interests such as this would be difficult and likely contradictory to the purpose and goals of the Policy.

As the Commission is well aware, the Tribes are deeply concerned with protecting tribal cultural and natural resources both within and outside the Tribes' current reservation boundaries. We recommend that Section 3.4 Impacts to Cultural Resources be revised to add a requirement that the IOU coordinate with a tribe's Tribal Historic Preservation Officer (THPO) or other appropriate tribal representative regarding how the disposal of real property might impact a tribe's cultural and natural resources and make a written record of those conversations. That record should also be included in the IOU's request for approval. This will assure the Commission is able to adequately consider any comments regarding potential impacts on tribal cultural resources, and/or suggested measures that would mitigate those impacts.

4. Guidelines: Proposed New Section Addressing GO 173 and GO 69-C conveyances

Last, regarding the questions described on page 12 and 13 of the Discussion sections of the Draft Resolution related to General Orders (GO) 173 and GO 69-C, we recommend that the Draft Guidelines be revised to include these conveyances. The Tribes believe that the conveyances described in GO 173 and GO 69-C, often of easement rights over IOU land, will facilitate a meaningful transfer of land to tribes. Acquiring an easement on tribal ancestral territory oftentimes is an important first step for tribes to re-establish and maintain connections to ancestral lands. The Tribes do not believe that inclusion in the Policy and Draft Guidelines of conveyances subject to GO 173, and GO 69-C would divert tribal resources that could be better spent examining potentially more meaningful Section 851 conveyances. On the contrary, exempting conveyances described in GO 173 and GO 69-C would deprive tribes of meaningful opportunities to reacquire their ancestral lands and would contradict Policy and goals.

For all of the foregoing reasons, the Round Valley Indian Tribes request that the Commission modify the Draft Resolution and Draft Guidelines as requested herein. The Tribes appreciate the opportunity to comment on the Commission's Draft Resolution and Draft Guidelines and look forward to discussing these issues in the future with the Commission.

Respectfully submitted,

James Russ

James Russ, President
Round Valley Tribal Council

cc: Michael Rosauer
Public Utilities Regulatory Analyst
Energy Division
California Public Utilities Commission
505 Van Ness Avenue
San Francisco, CA 94102
Michael.Rosauer@cpuc.ca.gov

Mary Jo Borak
Supervisor
Energy Division
California Public Utilities Commission
505 Van Ness Avenue
San Francisco, CA 94102
BOR@cpuc.ca.gov

ROUND VALLEY INDIAN TRIBES

A Sovereign Nation of Confederated Tribes

TRIBAL COUNCIL OFFICE
77826 COVELO ROAD
COVELO, CALIFORNIA 95428
PHONE: 707-983-6126
FAX: 707-983-6128

LOCATION: ON STATE HWY 162
ONE MILE NORTH OF COVELO
IN ROUND VALLEY
TRIBAL TERRITORY SINCE TIME BEGAN

ROUND VALLEY RESERVATION ESTABLISHED 1856

Certificate of Service

I certify that I have served this day a true copy of the letter of the Round Valley Indian Tribes commenting on the Draft Guidelines to implement the Tribal Land Transfer Policy.

Dated: September 3, 2020 at the Round Valley Indian Reservation

Kathleen "Kat" Willits
Programs Manager

GOODIN,
MACBRIDE,
SQUERI & DAY, LLP

Megan Somogyi, Attorney at Law

October 8, 2020

Energy Division Tariff Unit
California Public Utilities Commission
505 Van Ness Avenue
San Francisco, California 94102
EDTariffUnit@cpuc.ca.gov

Re: San Luis Obispo County Reply Comments on Draft Resolution E-5076

In accordance with the direction given in the Comment Letter accompanying Draft Resolution E-5076, the County of San Luis Obispo submits its reply comments in response to arguments and concerns raised in other stakeholders' opening comments. The County shares the near-universal concern that the current guidelines do not provide enough structure or certainty to ensure that the Tribal Land Transfer Policy is implemented effectively.

Rulemaking for Implementation Guidelines

The County supports the recommendation made by SCE,[1] SDG&E,[2] and SoCalGas[3] that the Commission open a formal Rulemaking to develop more robust implementation guidelines.[4] As the stakeholder comments submitted during the workshop process and in response to the Draft Resolution show, there is a significant lack of clarity on *how* the Tribal Land Transfer Policy will be implemented. The Draft Resolution does not appear to address the concerns raised during the workshop process, and it is unlikely that the final Resolution will resolve the issues raised in opening comments. The Tribal Land Transfer Policy is important and will have significant impacts on how utilities dispose of land and subject to what conditions. Those changes deserve a full and careful examination through a more rigorous process than is afforded by a single round of comments on a Draft Resolution.

[1] SCE Opening Comments, pp. 1–2.
[2] SDG&E Opening Comments, pp. 2–4.
[3] SoCalGas Opening Comments, pp. 2–3.
[4] See also Opening Comments of the California Building Industry Association, p. 6 (advocating for additional process to obtain input from a broader group of potentially impacted stakeholders).

T 415.392.7900 F 415.398.4321
www.goodinmacbride.com
505 Sansome Street, Suite 900 | San Francisco, CA 94111

Direct 415.765.8429
E msomogyi@goodinmacbride.com

General Orders 69-C and 173

The County agrees with the assessment of several parties that applying the Tribal Land Transfer Policy to conveyances of easements and similar limited property interests under General Orders 69-C and 173 is not workable and will not further the purpose of the Policy.[5]

Conclusion

The County appreciates the Commission's efforts in adopting the Tribal Land Transfer Policy and drafting implementation guidelines, as well as the stakeholders' detailed input. The County hopes the Commission will allow the guidelines to be fully developed and looks forward to participating in that process.

Very truly yours,

GOODIN, MACBRIDE,
SQUERI & DAY, LLP

/s/ Megan Somogyi

Megan Somogyi

cc: Michael Rosauer, CPUC Energy Division, Michael.Rosauer@cpuc.ca.gov
Mary Jo Borak, CPUC Energy Division, BOR@cpuc.ca.gov
Service List, Tribal Land Transfer Policy Resolution E-5076

2326/009/X219324.v1

[5] SCE Opening Comments, pp. 3–5; CBIA Opening Comments, *passim*; SDG&E Opening Comments, pp. 5–12; WPTF Opening Comments, *passim*; PG&E Opening Comments, pp. 5–6; Horizon West Opening Comments, *passim*; SoCalGas Opening Comments, pp. 3–6.

VIEJAS
TRIBAL GOVERNMENT

P. O. Box 908
Alpine, CA 91903
1 Viejas Grade Road
Alpine, CA 91901

John A. Christman, Jr., Chairman
Victor E. Woods, Vice Chairman
Rene Curo, Tribal Secretary
Samuel Q. Brown, Tribal Treasurer
Adrian M. Brown, Councilman
Gabriel T. TeSam, Jr., Councilman
Kevin M. Carrizosa, Councilman

Phone: 619.445.3810
Fax: 619.445.5337
viejas.com

September 2, 2020

California Public Utilities Commission
505 Van Ness Avenue
San Francisco, CA 94102
Email: edtariffunit@cpuc.ca.gov
Michael.Rosauer@cpuc.ca.gov
BOR@cpuc.ca.gov

Re: Comments on CPUC's Tribal Land Transfer Policy

Dear California Public Utilities Commission:

On behalf of the Viejas of Kumeyaay Indians, I would like to submit the following comments on the draft *Tribal Land Transfer Policy*. The reason for the comments is to give a definite timeline to provide clarity to the process to allow all interested tribes sufficient notice to participate.

Section 2.2 **IOU to Identify Relevant Tribe or Tribes**

Add

c. The IOU notify the tribes identified by the NAHC under subsection a. within 45 days of their identification.

d. The IOU notify the tribes under subsection b. within 45 days of their identification by the IOU.

Section [2.3] **To Whom Notice Directed**

Replace

The IOU shall notify the tribal persons identified by NAHC, or at a minimum, the Tribal Chairperson and Tribal Historic Preservation Officer of any relevant tribe(s).

Section [2.4] **Contents of Notice**

Add

f. The IOU will give the addressee, 60 days from the date of the USPS certified mail, to respond to the notice.

Thank you for your time and consideration of these comments. Please don't hesitate to contact me if you have further comments or questions at kdunne@viejas-nsn.gov or (619) 659-1157.

Sincerely,
THE VIEJAS BAND OF KUMEYAAY INDIANS

John A. Christman
Chairman

YUROK TRIBE

190 Klamath Boulevard • Post Office Box 1027 • Klamath, CA 95548

August 26, 2020

Michael Rosauer
Public Utilities Regulatory Analyst
Energy Division
California Public Utilities Commission
505 Van Ness Avenue
San Francisco, CA 94102
Michael.Rosauer@cpuc.ca.gov

Mary Jo Borak
Supervisor
Energy Division
California Public Utilities Commission
505 Van Ness Avenue
San Francisco, CA 94102
BOR@cpuc.ca.gov

Re: Yurok Tribe Comments on Resolution E-5076 "*Adoption of Guidelines to Implement the CPUC Tribal Land Policy* […]"

Aiy-ye-kwee'

The Yurok Tribe applauds the California Public Utilities Commission's ("CPUC") creation of a Tribal Land Transfer Policy ("TLPT") and appreciates this opportunity to provide comments on the proposed Guidelines to Implement the CPUC Tribal Land Policy ("Proposed Guidelines").

Proposed Guideline 1.2(C)

The Proposed Guideline 1.2(c) does not clearly address under what circumstances Investor Owned Utilities (IOUs) may be allowed to place an easement on land prior to transfer. This provision is vague and we recommend that it be removed from the guidelines and a provision added that strictly prohibits the placement of easements prior to transfer without the prior, free, and informed consent through formal government to government consultation with the Tribe receiving the property.

Alternatively, we recommend clarity on the scope and type of easements as well as factors the Commission will consider when making the case-by-case evaluation. For example, a small easement necessary to the operation of a utility pole may be acceptable, but a general conservation easement or other major encumbrance should be clearly prohibited. Further, the Commission should defer to the Tribe receiving the property if the inclusion of an easement(s) would be acceptable and appropriate to the Tribe. The Tribe should have the opportunity to review, edit, and consent through the adoption of a tribal resolution or equivalent statement from the tribal government to any easement terms, conditions, and language before the recording of an easement. Additionally, in the event of the creation and recording of an easement, we request the Commission add language requiring that the Tribe's law applies to the enforcement of easement

terms and any IOUs using the easement consents to the Tribe's regulatory and adjudicatory jurisdiction and tribal courts. Application and enforcement of tribal law is necessary to protect tribal cultural resources and to respect tribal jurisdiction and sovereignty.

Further, the Yurok Tribe seeks clarification if it is an individual commissioner or the California Public Utilities Commission making the determination if an easement will be placed on the property prior to transferring to a Tribe.

Proposed Guideline 1.4

Proposed Guideline 1.4 mandates the creation of a website. We recommend that language be modified to mandate a "user-friendly" website that is fully accessible, mobile friendly, and designed in a way that considers the dearth of technology and internet access in rural tribal areas. Like other tribal land within California's borders, the Yurok Reservation does not yet have reservation-wide internet or cellular service, so a variety of options are needed to take advantage of the website's contents, especially in light of the Covid-19 pandemic.

Further, the Yurok Tribe requests the Commission to create its own "user-friendly" website or webpage where each individual IOU website is linked to ensure a central place for all of the necessary information for Tribes to locate and utilize. The Commission should ensure this website or webpage is up to date and that each individual IOU updates their individual pages and/or sites on a regular basis.

Proposed Guideline 2.1

The Proposed Guidelines do not adequately provide a timeline on when the IOUs must notify the Tribes for the opportunity of first refusal nor how long Tribes have to make the determination if they wish to exercise this right. The Commission should amend the Proposed Guidelines to match the language provided in the TLPT stating that:

> IOUs shall provide notice of the proposed disposition of Real Property to the appropriate Tribe(s). The Tribe will have 90 days to respond to the notification as to its interest in the subject Real Property. The IOU shall maintain a record of all contacts with the Tribe(s), including the notice, return receipt as proof that the Tribal Chairperson received such notice, response to the notice, and any other communications with the Tribe or third parties regarding disposition of the subject Real Property.[1]

Further, the Proposed Guideline should indicate that the IOUs should send multiple notifications to Tribes in 30 day increments to ensure Tribes are fully aware of the timeframe and opportunity.

Proposed Guideline 2.2

The Proposed Guidelines should indicate that the IOUs "shall notify the tribal chairperson of any relevant Tribes, or the chairperson's designee" through a written letter, email

[1] TLPT at 5.

communication, and phone call. The purpose of this email is to ensure the IOUs are using every means to communicate and inform the Tribes' of their right of first refusal.

Proposed Guideline 3.2

The Yurok Tribe requests that the Commission amend the Proposed Guideline 3.2(a) to require the Commission to send notification to Tribes' chairpersons and their designees of the topic, time, location, filings, and record and explain the process and opportunity to participate in the review of the advice letter and/or Section 851 proceedings. In this communication the Commission should explain how Tribes can submit comments and filings into the record and provide contact information to a Commission staff member to provide additional support to ensure successful participation of Tribes in the review and proceedings. The Commission should give Tribes at least 60 days to review and file comments and filings into the record. Further, Tribes shall be given at least 60 days to respond to any opposition to the Tribes' comments and filings before the Commission makes a determination on an IOUs advice letter and/or Section 851 proceedings.

These Proposed Guidelines should detail the process for Tribal participation within the review of advice letters and Section 581 proceedings, the role of Tribes in the review and proceedings, and how the Commissioner staff and Administrative Law Judges will review and utilize the information provided by Tribes.

Lastly, the Proposed Guidelines should be reworded to provide additional clarity on the type and purpose of the proceedings to ensure Tribes have all the necessary information to fully participate.

Proposed Guideline 3.3(d)

As written, Proposed Guideline 3.3(d) creates an exception that could swallow the rule and runs contrary to the TLTP goals to recognize and respect Tribal sovereignty, protect Tribal sacred places and cultural resources, ensure meaningful consideration of tribal interests, and the return of lands to the appropriate Tribe. The term "public interest" is too vague and without limitation will lead to results contrary to the TLTP intent. Indeed, such language is reminiscent of policies that are directly responsible for the dispossession of Indian lands for "any public purpose" to the benefit of others, including utility companies, which resulted in grave injustice. The CPUC has acknowledged this unfortunate history and it is our understanding that the TLTP and the Proposed Guidelines are part of a broader effort by the state of California to address past policy harms.[2] We strongly recommend removing this subsection.

[2] *See* Darcie L. Houck, Proposed Tribal Land Transfer Policy and CPUC Process, Tribal Workshop and Consultation, California Public Utilities Commission, PDF page 34 (September 16, 2019), *available at* https://www.cpuc.ca.gov/uploadedFiles/CPUC_Public_Website/Content/About_Us/Supplier_Diversity/9162019%20Central%20California%20Tribal%20Workshop%20and%20Consultation%20Presentations.pdf (quoting 25 U.S. Code § 357 "Proposed Tribal Land Transfer Policy and CPUC Process, Darcie L. Houck "Lands allotted in severalty to Indians may be condemned for any public purpose under the laws of the State or Territory […]").

If the CPUC keeps this subsection, our alternative recommendation is to revise the language in a way that better defines the term "public interest" while also protecting the interests of Tribes and maintaining fidelity to the TLTP goals.

Proposed Guideline 3.4

We strongly recommend the Proposed Guideline 3.4 is revised to require the Commission to request for consultation regarding potential impacts to Tribal cultural resources, carefully consider comments and input regarding potential impacts on tribal cultural resources and the mitigation measures requested, and to adopt mitigation measures to avoid actual and potential impacts to tribal cultural resources informed by government to government consultations. The Commission should strive to implement the mitigation measures requested by the Tribe. If the consulting Tribe does not provide any mitigation measures, then the Commission should first implement "avoidance" mitigation measures and second preservation in place mitigation measures.

The Proposed Guidelines should clarify if the IOUs and the Commission are required to follow the California Environmental Quality Act ("CEQA") environmental review process and AB 52 consultation process. If CEQA review is not required, the Commission should revise the Proposed Guidelines to ensure CEQA protections for Tribal cultural resources are still required and provided in the event of property transfer to third non-Tribal parties.

Proposed Guideline 4.3

We strongly recommend revising Proposed Guideline 4.3 by removing the following language from the last sentence of the paragraph "and any other stakeholder to the disposition of the real property."

Potential disputes between multiple interested Tribes is a sensitive issue and introducing new, unknown, stakeholder interests will undermine the resolution process and has the potential to damage relationships between Tribes and their surrounding communities. Resolution E-5076 acknowledges that the TLTP is an affirmation of the Commission's respect for Tribal sovereignty and goal of ensuring meaningful consideration of Tribal interests. Soliciting and considering the input of "any other stakeholder" when an inter-tribal dispute arises is disrespectful of Tribal sovereignty and contrary to the TLTP and Proposed Guideline 1.1(b)(i) and 1.1(b)(ii).

Again, thank you for the opportunity to provide comments and for your thoughtful consideration of our recommendations for changes to these important Proposed Guidelines. The Yurok Tribe looks forward to our continued work with the CPUC.

Sincerely,

Joseph L. James
Chairperson, Yurok Tribe

DOUGLASS, LIDDELL & KLATT
AN ASSOCIATION OF
PROFESSIONAL CORPORATIONS
GREGORY S. G. KLATT
411 E. HUNTINGTON DRIVE, SUITE 107-356
ARCADIA, CALIFORNIA 91006
Telephone 626.802.5733
Email klatt@energyattorney.com

Donald C. Liddell, P.C.
2928 2nd Avenue
San Diego, California 92103
Telephone 619.993.9096
Facsimile 619.296.4662

Daniel W. Douglass, P.C.
4766 Park Granada, Suite 209
Calabasas, California 91302
Telephone 818.961.3001
Facsimile 747.111.1861

August 24, 2020

VIA EMAIL

Energy Division Tariff Unit
California Public Utilities Commission
edtariffunit@cpuc.ca.gov

Subject: Comments of Western Power Trading Forum on Draft Resolution E-5076

The Western Power Trading Forum ("WPTF") appreciates this opportunity to submit comments on Draft Resolution E-5076. The Draft Resolution adopts Tribal Land Transfer Policy Guidelines ("Guidelines") for investor owned utilities ("IOUs") seeking the approval of the California Public Utilities Commission ("CPUC") for a proposed disposition of real property pursuant to Public Utilities Code §851. The Guidelines implement the CPUC's Tribal Lands Transfer Policy ("TLTP"), which provides additional protections for Native American cultural resources by providing California Native American Tribes ("Tribes") a right of first refusal with respect to surplus IOU real property on lands within the Tribes' ancestral territories. More specifically, the TLTP requires the IOUs to offer the applicable Tribe or Tribes a right of first refusal before putting surplus real property on the market.

WPTF unreservedly supports the CPUC's Tribal Lands Transfer Policy. The State's treatment of Native Americans, particularly during the latter half of the 19th Century and the early 20th Century, was mostly abhorrent. During that period, the State's actions and inaction resulted in nearly every Tribe being systematically stripped of ancestral lands. The TLTP properly recognizes, and seeks to reverse, some of the harmful effects of those historical institutional biases by providing the Tribes a meaningful opportunity to regain lost tribal lands and cultural resources when the IOUs seek to dispose of real property that is no longer used and useful to the IOU and its ratepayers.

WPTF is concerned, however, that the draft Guidelines are overly broad, in that they could be interpreted as providing the Tribes a right of first refusal with respect to *any* disposition of *any* IOU real property. For example, the draft Guidelines could be interpreted as requiring an IOU to provide a right of first refusal with respect to an easement across IOU real property that a developer needs to interconnect a renewable generation facility with the IOU's transmission system.

Obviously, an IOU granting such an easement is very different from an IOU seeking to sell *surplus* real property on the open market. While the "disposition" of real property that is no longer used and useful to ratepayers clearly falls within the ambit of the TLTP, the granting of easements and right of ways that will be used for utility-related purposes and paid for by developers does not.

To avoid confusion and unnecessary litigation that might otherwise delay renewable project timelines and increase development costs, WPTF urges the Commission to modify the Draft Resolution to exclude the disposition of a limited set of real property rights such as non-exclusive easements and rights of way that are used for interconnection purposes. To that end, WPTF supports the modifications to the draft TLTP Guidelines proposed by Horizon West Transmission, LLC in their comments on the Draft Resolution:

1. Revise the definition of "Disposition" as follows:

   "Disposition" **or "dispose of"** means the transfer, sale, donation, encumbrance, or disposition by any other means of an estate in real property**, but excluding transfers, sales, encumbrances, dispositions, grants and conveyances of easements, rights-of-way, leases, licenses, and similar real property rights for use in connection with the construction, operation, and maintenance of electricity generation, storage, transmission, or distribution facilities or equipment**."[1]

2. Revise the definition of "Real property" as follows:

   "Real property" means any **surplus** IOU real property whose disposition is subject to approval under Section 851 of the Public Utilities Code.

3. Revise the definition of "Right of first refusal" as follows:

   "Right of first refusal" means that the IOU disposing of real property must contact the tribe or tribes whose ancestral territory is on or adjacent to the real property, and must provide the tribe or tribes the right to take**/purchase** or refuse the real property **interest proposed in the disposition**, before the IOU can seek third-party purchasers for the real property.

With the aforesaid modifications, the TLTP Guidelines will properly advance the goals of the TLTP without unintentionally frustrating advancement of the State's clean energy and decarbonization policies.

[1] This could be expanded to also include gas, water, sewer and other types of utility facilities, as the reasoning for excluding the specified IOU assets also applies to easements and rights of way granted for other categories of utility infrastructure and equipment.

WPTF thanks the Commission for considering these comments and the modifications to the Draft Resolution described herein.

Respectfully,

Gregory Klatt

Attorney for
Western Power Trading Forum

GK/md
cc: Mary Jo Borak, Supervisor, Energy Division (BOR@cpuc.ca.gov)
Michael Rosauer, Regulatory Analyst, Energy Division (Michael.Rosauer@cpuc.ca.gov)
Service List for the CPUC Tribal Land Transfer Policy Resolution E-5076

BUILDING INDUSTRY
ASSOCIATION OF
SAN DIEGO COUNTY

August 21, 2020

President Marybel Batjer and Commissioners
Public Utilities Commission of the State of California
505 Van Ness Avenue
San Francisco, CA 94102

RE: Comments on Guidelines to Implement the CPUC Tribal Land Transfer Policy

Dear President Batjer and Commissioners:

The Building Industry Association of San Diego (BIA) wishes to express its grave concerns about the unintended consequences that will ensue if the proposed CPUC Tribal Land Transfer Policy (TLTP) Guidelines are adopted as drafted. Thank you for this opportunity to comment.

With eighteen federally-recognized reservations, San Diego County has the largest number of Native American tribes of any county in the United States. Former tribal lands extend from the Pacific Ocean into Baja California, Mexico, and into the desert east of the Cuyamaca Mountains, basically covering all of San Diego. The service territory of San Diego Gas & Electric is coterminous with these areas of former tribal lands, so essentially, the Tribal Land Policy applies to 100% of San Diego County. These circumstances are markedly different from the rest of California—for example, within the territory of Southern California Edison, former tribal lands are often geographically indistinct.

While the goals of the Governor's Tribal Land Policy are laudable, the broad-brush approach of the policy could have serious, presumably unintended negative consequences affecting one of the Governor's signature policy objectives which is housing Californians. In San Diego alone, almost 100,000 units per year are needed to dent the shortage. As drafted, the TLTP will almost surely frustrate the ability of builders to provide homes and could lead to higher costs. BIA can already cite three cases where over 5,000 residential units could be delayed, or worse, thwarted from being built.

The most significant issue for BIA is regarding utility easements, not surplus land disposition. Often, developers have to vacate, move or cross easements, any of which could trigger Section 851 consultations. Requiring SDG&E to offer easements to tribes before quit-claiming, relocating or allowing crossing is simply put, problematic. How?

- No fee interest in the land is granted;
- Use of the land will be confined only to utility use;

- Likely violates the rights of the underlying fee owner; and
- Doesn't advance the Commission's stated purposes.

The solution to this problem is simple—remove all mention of easements from the definition of Disposition. That includes: relocating, vacating, modifying easements, or replacing an easement with another easement with the same landowner.

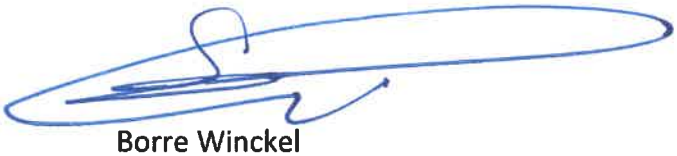
Rest assured, if the TLTP Guidelines stand as drafted, there will certainly be less willingness on the part of landowners to cooperate when SDG&E needs an easement. Why would they when they know any changes could allow a tribe to insert itself, for whatever the reason? Indeed, one truly frightening prospect is for a tribe to use this well-intentioned policy to cynically leverage their position solely for financial gain.

It is hard to imagine San Diego County tribes being supportive of the investor-owned utility deciding which tribe gets the land in the event of a dispute. With eighteen tribes and literally hundreds of years of contentious aboriginal land ownership and ancestral territorial history, having SDG&E be the arbiter of which tribal group is the winner is a recipe for worsened conflict, not resolution.

We agree with your staff being directed to work with the tribes directly, and to ask the tribes for comment on this particular issue. Only one San Diego County tribe is on the distribution list, and its reservation is far from urban areas; the CPUC staff note that only several tribes commented on the Draft TLTP.

If you have any questions, please do not hesitate to contact me.

Very truly yours,



Borre Winckel
President and CEO

cc: BIA Board of Directors

CBIA
CALIFORNIA BUILDING INDUSTRY ASSOCIATION

1215 K Street/Suite 1200
Sacramento, CA 95814
916/443-7933
fax 916/443-1960
www.cbia.org

VIA EMAIL: Michael.Rosauer@cpuc.ca.gov; BOR@cpuc.ca.gov

August 24, 2020

Michael Rosauer
Public Utilities Regulatory Analyst
Energy Division
California Public Utilities Commission
505 Van Ness Avenue
San Francisco, CA 94102

Mary Jo Borak
Supervisor
Energy Division
California Public Utilities Commission
505 Van Ness Avenue
San Francisco, CA 94102

RE: Draft Resolution E-5076 – *Adoption of Guidelines to Implement the CPUC Tribal Land Policy Consistent with Executive Order B-10-11 and the CPUC Tribal Consultation Policy, The Tribal Land Transfer Policy, and Public Utilities Code Section 851*

Dear Mr. Rosauer and Ms. Borak:

The California Building Industry Association ("CBIA") is grateful for the opportunity to provide these comments on Draft Resolution E-5076 – *Adoption of Guidelines to Implement the CPUC Tribal Land Policy*. CBIA represents approximately 3,000 member companies engaged in homebuilding and land development activities throughout the State of California. Last year, our members produced approximately 84% of the homes constructed and sold in California. A primary mission of CBIA is to promote measures and initiatives that support balanced, intelligent growth that are reflective of the building industry's historical - and crucial - significance in California's ability to provide shelter and economic strength for all Californians. To that end, CBIA has a keen interest in working cooperatively with State officials, local governments and others to identify opportunities for addressing California's critical need for housing and development, while simultaneously advancing appropriate measures to promote and protect environmental, cultural and other resources. Hence, CBIA has a strong desire to work collaboratively with landowners, officials, leaders and others regarding development-related issues that are of concern to CBIA members, the State and other stakeholders. It is this desire for collaboration that underlies CBIA's preparation and filing of this comment letter regarding the Draft Resolution E-5076 (the "Draft Resolution").

CBIA only recently received information regarding the California Public Utilities Commission's ("CPUC's" or "Commission's") December 5, 2019 adoption

of the Tribal Land Transfer Policy ("TLTP"). Specifically, we did not receive notice of the TLTP and the proposed policy guidelines which are the subject of the Draft Resolution ("Proposed Guidelines") until August 10, 2020. We applaud the Commission in its efforts to ensure tribal notification and participation in matters that involve ancestral lands. However, the scope of the TLTP and the Proposed Guidelines are of concern to us and our members. Notably, we are concerned that the TLTP and the Proposed Guidelines, as written, could unnecessarily restrict or delay projects that are of local, regional and statewide importance without actually advancing the interests and goals established for the TLTP / Proposed Guidelines. In order to fully address these (and other) issues, we recommend and respectfully request that the TLTP and the Proposed Guidelines be opened up for additional public review and comment in order to allow all stakeholders to participate in a meaningful dialog with the Commission, local agencies, tribes and other interested parties regarding the TLTP and its implementation. We stand ready to participate and look forward to receiving an invitation to provide constructive input and information regarding the Policy and the Proposed Guidelines.

I. Additional Public Review of the TLTP and the Proposed Guidelines is Both Appropriate and Necessary

An examination of the Commission's adoption of the TLTP reflects a lack of meaningful effort to engage non-utility landowners and other interested stakeholders in the review, consideration and approval of the TLTP. The TLTP (at page 6) indicates that a draft version of the TLTP was posted on the Commission's website; moreover, an "Information Sheet" created by the Commission and entitled "Proposed Tribal Land Transfer Policy" discusses a proposed schedule for outreach, notice and comments. However, neither the TLTP nor the Information Sheet indicate that the Commission actively sought the comments or participation of any interested parties beyond Investor-Owned Utilities ("IOUs") and the Native American community. This observation is supported by a review of the comment letters that were submitted in reference to the TLTP. Indeed, the comment file is devoid of any correspondence from local agencies, affordable housing groups, owners of utility-encumbered parcels and several other parties who could (and will) be affected by adoption and implementation of the TLTP. Of particular interest, one of the comment letters submitted by the responding energy IOUs (*i.e.*, SDG&E, PG&E and SCE) contains a specific recommendations that the Commission include interested parties in the TLTP proceedings.[1] Moreover, all of the responding energy IOUs requested that the Commission schedule and hold additional public workshops so that all interested parties would have an opportunity to participate in a dialogue regarding the TLTP and its requirements. However, the Commission elected not to accept these recommendations or requests and proceeded to advance the TLTP to adoption without input from critical parties.

By virtue of the scope and breadth of the TLTP (vis-à-vis impacts on landowners, developers and other interested parties beyond the IOUs and the Native American community), the Commission should have actively pursued commentary and participation from a broader audience. Had the Commission sought such input, we believe that the Commission could have captured a

---

[1] *SDG&E Comment on Proposed Tribal Land Transfer Policy dated October 17, 2019* at 2 ("SDG&E recommends that the Commission first hold public workshops to allow for additional input and dialogue on these issues from a broad range of affected stakeholders. Implementation of any land transfer policy will require coordination among the Commission, utilities, tribal governments, state and federal agencies, and other interested parties.").

wider support base for the TLTP and avoided potential legal infirmities that are inherent in the current TLTP. For example, the Commission's adoption of the TLTP begs the question of whether the Commission - in declaring a preference for the conveyance of lands to tribes - has deprived non-tribal landowners of their due process rights: "A person may not be deprived of life, liberty, or property without due process of law or denied equal protection of the laws." Calif. Const. Art. I, Sec. 7(a).[2] Moreover, the process utilized by the Commission in adopting the TLTP without the informed participation of all interested and affected parties begs the question of whether the Commission has complied with the procedural mandates appearing in California Public Utilities Code Sections 311 and 1701 *et seq*.[3]

It is not our intention to seek the termination of the TLTP. To the contrary, we appreciate the efforts of the CPUC in addressing tribal notification and participation in matters affecting ancestral lands, and we believe that the TLTP and the Proposed Guidelines can be reformed to achieve its goals in a manner that is responsive to the concerns of the development community. As stated above, it is our desire to be an active participant in the process, and to offer constructive input and guidance regarding the TLTP and the Proposed Guidelines. Hence, we respectfully request that the Commission (i) re-open public hearings and consideration of the TLTP, (ii) invite a larger community to participate in the proceedings and (iii) delay adoption of the Proposed Guidelines until such time as all interested parties and stakeholders have had an opportunity to actively engage with the Commission regarding the important issues addressed in the TLTP and the Proposed Guidelines.

II. Comments in Response to Draft Resolution E-5076

Pending the Commission's re-opening of the public comment period relative to the TLTP and the Proposed Guidelines, we offer the following preliminary comments. In relevant part, this letter responds to the Commission's request – appearing in the Draft Resolution – for specific comment on four (4) questions regarding whether the Proposed Guidelines should be revised to differentiate between (i) utility conveyances subject to California Public Utilities Code ("PUC") Section 851 and (ii) utility conveyances intended for specific, limited uses subject to General Orders ("GOs") 173 and 69-C. As indicated in the following paragraphs, we support this

---

[2] As discussed later in this comment letter, consider the situation where a non-tribal landowner requests disposition of a utility easement that encumbers its property. Application of the TLTP would indicate a preference for sale or transfer of the utility easement to a qualified tribe as opposed to relinquishment of the easement to the owner of the underlying fee. This is inconsistent with principles of due process.

[3] We are aware that SoCalGas, SDG&E and SCE have filed a Joint Comment dated July 13, 2020 concerning the Commission's proposed adoption of Rule 3.6(i) of the Rules of Practice and Procedure of the CPUC. Proposed Rule 3.6(i) incorporates the TLTP – and the Proposed Guidelines – by reference into the CPUC's Rules of Practice and Procedure. The Joint Comment specifically questions whether the CPUC has violated due process and certain statutory requirements in connection with its adoption of the TLTP / Proposed Guidelines. We agree with the analyses and recommendations set forth in the Joint Comment – notably, that the Commission suspend application of the TLTP and "initiate a formal rulemaking that allows all interested parties to participate meaningfully in the development of a robust record comprehensively addressing the legal and policy issues arising from the [TLTP]." *Joint Comment* at 23-24.

differentiation and, more directly, requests that the Commission exempt from the TLTP and the Proposed Guidelines all transactions related to easements.

A. Real Property Held by IOUs – Fee Simple v. Easement

The TLTP (as adopted) applies to "any future disposition of Real Property" that is owned by an IOU. "Real Property" is currently defined in the TLTP as "any IOU property whose disposition is subject to approval in accordance with [PUC] Section 851." The TLTP does not draw a distinction between types of "Real Property" owned by the IOUs – the policy applies equally to lands held in fee simple by the IOUs as well as easements and other lesser estates in land. We believe that this is one of the major shortcomings with the TLTP and the Proposed Guidelines.

In the State of California, much of the "Real Property" held by the IOUs is comprised of easements that encumber lands owned by both private and public entities. The purpose of these easements is normally limited to the installation, operation and maintenance of lines and facilities that are necessary for the provision of utility service. In the context of the energy IOUs, the easement rights held by IOUs are generally limited to the transmission and distribution of electricity and gas. These easements vary in size, but generally range from 200 feet in width to 25 feet in width, depending on the type of facilities (*i.e.*, transmission vs. distribution) and location. These easements can be several miles long or only a few feet in length, largely dependent upon the age and ownership characteristics of land underlying the easements. Specifically, older easements that cover large, integrated landholdings may be quite long, while newer easements that cover subdivided and smaller in-tract parcels are usually short.

During the course of business operations of our members, IOUs are regularly asked to relocate their easements. For example, an IOU might be asked by a local municipality or developer to relocate an existing easement (in whole or in part) to:

- facilitate construction of a local or regional roadway to support the movement of people, goods and services, or
- accommodate the development of a new housing project to address the well-documented shortage of housing units in California.[4]

[4] Increasing housing supply has been a top priority for Governor Newsom. When he ran for Governor, Governor Newsom promised to build 3.5 million new housing units by 2025. See: https://medium.com/@GavinNewsom/the-california-dream-starts-at-home-9dbb38c51cae. This represents a significant increase over current production levels. Additionally, Governor Newsom's Statements from his February 19, 2020, State of the State Address include:

> We must eliminate roadblocks to housing and shelter.
>
> We need more housing, not more delays.
>
> Of course, the fundamental building block of California's solution has to be more housing. A comprehensive response to our collective failure to build enough of it. When we don't build housing for people at all income levels, we worsen the homeless crisis. It's a vicious cycle and we own it. And the only sustainable way out of it is to massively increase

In these instances, the underlying landowner will often offer a new easement to the IOU (and generally pay for the movement of the affected utility facilities) in return for a quitclaim of the original, affected easement. Contrary to the import and tenor of the TLTP, the original easement does not constitute "surplus property" that the IOU is seeking to liquidate. Rather, the original easement represents an encumbrance on private property that is being exchanged for another easement in order to facilitate use of the affected land for a different purpose. The IOU does not experience a gain in connection with the "disposition" of the original easement; rather, the IOU is receiving a like-kind land right in exchange for the original easement. And, in most such instances, the IOU receives the replacement easement and relocates its facilities well in advance of quitclaiming the original easement. Hence, the IOU does not experience a net-reduction in its Real Property assets when it quitclaims the original easement – the IOU has already been "made whole" with replacement property rights and is merely returning to parity when it quitclaims the original easement.

In short: An IOU's quitclaim of an existing utility easement in exchange for a replacement easement should not be considered a "disposition" within the context of the TLTP and the Proposed Guidelines. The IOU is not receiving compensation in exchange for the transfer of the old easement. Rather, the IOU is receiving an equivalent land interest in consideration of its ability and willingness to relocate its existing facility. This distinction should be incorporated into the TLTP and the Proposed Guidelines.

B. Questions Presented by the Commission

With the foregoing example in mind, we offer the following responses to the questions presented by the Commission in its Draft Resolution concerning the applicability of the TLTP to conveyances described in GO 173 and GO 69-C.

1. *Will conveyances described in GO 173 and GO 69-C, often easement rights over IOU land, facilitate a meaningful transfer of land to Tribes?*

GOs 173 and 69-C reflect the Commission's prior determination that certain conveyances involving IOU property – given their minor or routine nature – may be handled administratively and without the need for full-Commission approval pursuant to PUC Section 851. In the context of an easement exchange (where monetary consideration is not the driving force behind the disposition), we believe that GOs 173 and 69-C continue to be the appropriate protocols for addressing transactions that meet the qualifications and conditions established in the orders.

We recognize that the question presented by the Commission does not naturally fit the easement exchange example described in the preceding section. The Commission's question is focused upon interests granted by IOUs over the IOUs' landholdings. By comparison, the easement exchange scenario presented by us relates to the release of a real property interest held by an IOU over the land of another (in exchange for an equivalent real property interest granted by

---

housing production. Let's match our courage on homelessness with courage on housing supply.

the landholder). As such, our land exchange example is not an "apples-to-apples" scenario for purposes of addressing the Commission's question.

Notwithstanding, the Commission's question does invite discourse regarding whether tribes may meaningfully benefit from participation in an easement exchange transaction. We understand that the goal of the TLTP is to facilitate the transfer of culturally-significant properties to tribes by requiring IOUs to offer to tribes a right of first refusal ("ROFR") prior to conveying the Real Property interest to a third party. Consistent with our previous comments, we support policies that promote the opportunity of tribes to acquire ancestral lands. However, in the case of an easement exchange involving private property, it is difficult (nay impossible) to identify how a tribe would benefit from participation in the process. A private property easement exchange does not involve the grant or transfer of a land right over IOU property. Rather, the exchange involves the encumbrance of a land interest held by a third party. Were an IOU obligated to issue to a tribe a ROFR concerning the to-be-quitclaimed original easement (which is ostensibly required under the TLTP and the Proposed Guidelines), what would be the value of the ROFR to the tribe? The scope of the easement is limited to the installation, operation and maintenance of transmission and distribution facilities. The tribe would not be entitled to use the easement area for preservation, restoration, performance of cultural rites, *etc*. – such activities would be beyond the scope of the easement. Assuming, *arguendo*, that the IOU could establish a monetary value for the to-be-quitclaimed easement and a tribe were willing and able to pay the purchase price, what would be the use or value of a limited transmission or distribution easement to the tribe? The answer is axiomatic – the easement would have no value to the tribe.

In response to the Commission's initial question: In the context of a private property easement exchange, requiring that an IOU grant a ROFR to a tribe for a to-be-quitclaimed easement – whether through a PUC Section 851 application or an alternative administrative process[5] – would not meet the goal of the TLTP to return usable, meaningful lands to the tribes.

2. *Would inclusion in the TLTP of conveyances subject to GO 173, and GO 69-C divert tribal resources that could be better spent examining potentially more meaningful Section 851 conveyances?*

We are generally familiar with the resources available to tribes. It can be generally stated that the resources available to tribes are unequal – some tribes have more resources than others. Accordingly, application of the TLTP to minor and routine conveyances that are the proper subject of GO 173 and GO 69-C could result in the diversion of a resource-limited tribe's attention away from more meaningful PUC Section 851 conveyances.

As in our response to the Commission's initial question (*see* preceding section), the private property easement exchange scenario does not immediately fit the Commission's inquiry regarding limited tribal resources. Similar to the conclusion in the prior section, we cannot envision any value that would accrue to a tribe by participation in a private property easement exchange transaction – whether the transaction were the subject of a PUC Section 851 application or an

[5] We recognize that, in the context of an IOU's proposed disposition or exchange of easement rights over third party property, the alternative conveyance process identified in GO 173 may be relevant and available. Whereas GO 69-C involves an IOU's provision of easements and other interests over lands owned by the IOU, such order would not be applicable.

alternative administrative process.[6] As such, we respectfully submit that the expenditure of any resources by a tribe in connection with a private property easement exchange transaction would be a waste and ill-advised.

Although the Commission's question is directed to *tribal resources*, we believe that it is both appropriate and necessary to mention that the application of the TLTP to private property easement exchange transactions (whether accomplished pursuant to PUC Section 851 or otherwise) will result in the expenditure of *private and public landowner resources*. Whereas meaningful land transfers to tribes will not result from the applicability of the TLTP to easement exchanges (such that the expenditure of limited tribal resources in said scenarios would be wasteful), it follows that the expenditure of public and private resources would be similarly wasteful and imprudent if public/private landholders were required to participate in the ROFR process that is mandated by the TLTP. With the assumption and understanding that tribes will not be willing to expend funds toward the acquisition of an easement that has no value to a tribe, requiring public/private landholders to wait for an IOU to issue the required ROFR and for the tribes to reject it simply adds unnecessary time and expense to the easement exchange process. In light of the ever-increasing expense associated with private development and public works projects, asking that public/private landowners incur additional time and expense on a policy that will not produce benefits for tribes (or anyone else) seems particularly wasteful and irresponsible.[7]

3. *Would inclusion in the TLTP of conveyances subject to GO 173 and GO 69-C substantially delay essential IOU operations?*

We are of the opinion that, in the context of easement exchanges, inclusion in the TLTP of conveyances subject to GO 173 and GO 69-C would delay essential IOU operations. Consistent with our comment in the preceding section, requiring the preparation, delivery and processing of a ROFR in any easement exchange transaction – whether pursuant to PUC Section 851 or otherwise – simply introduces an unnecessary element into an already time-consuming process. Were an IOU required to prepare and submit to tribes a ROFR each time a developer (whether public or private) submitted a request for an easement exchange concerning the developer's fee property, the IOU would experience unnecessary delay in responding to the applicant's request and accomplishing the purposes thereof. As previously indicated, most easement exchange transactions involve the applicant's provision of funding to facilitate the IOU's relocation of the affected utility facilities. Requiring participation in an unnecessary ROFR process simply adds to the time necessary to accomplish the utility relocation; in turn, delays in the relocation process often result in increased costs for the utility and the applicant (*e.g.*, higher cost of materials and labor due to extended project schedules). The IOUs are in the business of providing reliable utility services in the most efficient and timely manner possible. Requiring compliance with the TLTP's ROFR process – in the easement exchange scenario – is directly inapposite to the IOUs' goals of efficiency and timeliness.

On a related note, requiring TLTP compliance in the context of easement exchanges has the potential of introducing a substantial amount of uncertainty into the process of utility relocations. Utility relocations are typically one element of a larger project that has completed the local, State and federal entitlement processes – including California Environmental Quality Act (CEQA)

---

6 *Id*.

7 See, fn. 4, above.

review and, in some cases National Environmental Policy Act (NEPA) review. In these instances, interested parties – including tribes – have been afforded full opportunity to meaningfully participate in the entitlement process and to provide comments and input regarding the subject project and its constituent parts.[8] Requiring the preparation and transmission of a ROFR pursuant to the TLTP *after* completion of the entitlement process seemingly invites additional occasions for comment and participation in a project/process that has already been deemed closed and approved by the relevant lead, responsible and responding agencies. Although unlikely, the possibility does exist for a tribe to accept a ROFR in the context of an easement exchange and acquire the old easement. In so doing, the tribe would effectively halt and overturn the fully approved and entitled project, given that the developer may not burden or use the old easement area for development and, *quid pro quo*, the IOU will not relocate its existing facilities in the absence of a replacement easement. This would remove some or all of the new homes that have already been approved by removing the available land where the easement exists. This will increase the cost of the remaining homes and decrease the production of new housing, thereby putting the state's housing goals further out of reach. Certainly, this is an unintended consequence of the TLTP; nevertheless, it represents a risk that could seriously complicate and interfere with public and private development.

4. *What is the appropriate application of the TLTP to GO 173, and GO 69-C conveyances, and to easements in real property?*

For the reasons previously discussed, we believe that, in the context of private property easement exchanges, the TLTP should not be applied to conveyances pursuant to GOs 173 or 69-C (specifically) or to conveyances pursuant to PUC Section 851 (generally). Tribes will not benefit from participation in these limited transactions; and, requiring tribal participation will simply increase the cost, expense and uncertainty associated with accomplishing otherwise routine utility relocations involving private property.

Beyond private property easement exchanges, we question the necessity and propriety of applying the TLTP to *any* matters involving an IOU's disposition of an easement that encumbers private property. IOUs oft-times discover that they are in possession of antiquated and forgotten easements that are neither necessary nor useful for the conduct of the IOUs' business. Nevertheless, these superfluous easements encumber the lands of private property owners and hinder (and sometimes prevent) the use of the land. In such instances, the owner of encumbered property will submit a request to the relevant IOU to terminate the easement. These "easement termination requests" should not be subject to the requirements of the TLTP. Again, we recognize that the purpose of the TLTP is to provide tribes with notice regarding "surplus property" and an opportunity to acquire ancestral lands. This presumes that the Real Property interests to be disposed of by the IOUs have actual value for cultural purposes. As indicated previously, an easement held by an IOU for transmission and distribution purposes has no value to the Native American community. Tribes may not acquire transmission and distribution easements and thereafter change the use of the easement area to accommodate other activities. Unless the tribes

[8] *See, e.g.*, California Assembly Bill 52. Effective July 1, 2015, public agencies are required to consult with California Native American tribes that are on the Native American Heritage Commission's consultation list that are traditionally and culturally affiliated with the geographic area of a proposed project that is subject to CEQA (provided that the tribes request formal notification and subsequent consultation).

were to obtain fee title to the underlying property (which is not owned by the IOUs), the tribes have no ability to control the lands. Therefore, the TLTP's inclusion of easements within the definition of "Real Property" does not advance the interests or objectives of the TLTP. Wherefore, we believe that *all* transactions and activities related to easements that encumber property owned by third parties should be exempted from the TLTP. This exemption could be easily accomplished by the Commission through a revision to the term "disposition" that appears in the TLTP. Specifically, the Commission could – and should – exempt from the definition of "disposition" all transactions and matters pertaining to easements on private property. The interests of the Commission and the Native American community would not be prejudiced or adversely affected by this exemption. Moreover, the development community and especially Californians looking for a home would greatly benefit from the removal of unnecessary – and potentially costly – impediments to otherwise routine matters.

III. Consequences for Climate Change and Housing Affordability if Easements are Included

California can rightfully boast of doing more than any other state – and possibly any other country – to protect the environment. When it comes to climate change, California is clearly the leader. These benefits have been brought about through Governor Executive Orders[9], statutes[10] and many regulations. California's building code has continued to evolve with updates every three years so that a new home built this year is over 80% more energy efficient than a home built just 10 years ago. In addition, new homes either include a solar roof or receive power from a community solar facility and must be electric vehicle ready. Water efficiency has also vastly improved so that a new home is 50% more water efficient than homes built 20 years ago. New homes are more energy and water efficient than existing homes. From an environmental perspective, it is far better for a new home to be built in California than in any other state. This too has been recognized by the California Legislature and is codified in Government Code section 65589.5(a)(2)(I):

> An additional consequence of the state's cumulative housing shortage is a significant increase in greenhouse gas emissions caused by the displacement and redirection of populations to states with greater housing opportunities, particularly working- and middle-class households. California cumulative housing shortfall therefore has not only national but international environmental consequences.

As we have already referenced, California is experiencing a severe housing crisis. In addition to the Governor's bold goal to increase California's housing supply, the Legislature found in 2017 that California has accumulated an unmet housing backlog of nearly 2,000 units. (see

---

[9] Executive Orders S-03-0 and B-30-15 established greenhouse gas reduction goals to be incrementally reached so that by 2050 California's greenhouse gas emissions will be 80% below 1990 levels.

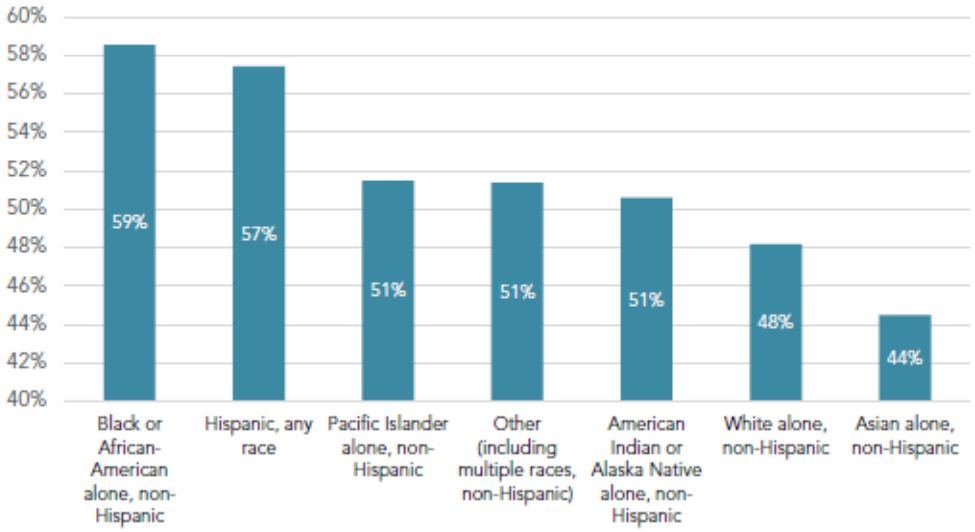
[10] E.g., AB 32 (2006 – charges the California Air Resources Board to develop and implement statewide plans to reduce greenhouse gas emissions), SB 97 (2007 – requires new development projects to analyze and mitigate greenhouse gas emissions) SB 375 (2008 – sets targets for regional transportation plans to reduce greenhouse gas emissions) and SB 743 (2013 – requires new development projects to reduce vehicle miles traveled below that of existing residents and businesses).

Government Code Section 65589.5(a)(2)(D)). The lack of housing is a critical problem that threatens the economic, environmental and the social quality of life in California. California housing has become the most expensive in the nation. The excessive cost of the state's housing supply is partially caused by policies that increase the cost of land for housing and reduce the amount of land available for housing. When Californians have access to safe and affordable housing, they have more money for food and health care; they are less likely to become homeless and in need of government-subsidized services; their children do better in school; and businesses have an easier time recruiting and retaining employees. (see Government Code Section 65589.5(a)(2)(H)).

According to the California Department of Housing and Community Development's State Housing Assessment,[11] those hardest hit by high housing costs are communities of color, including Native Americans:

> Housing cost burden is experienced disproportionately by people of color. Figure 1.22 [below] looks across all income levels in the state and shows that the percentage of renters paying more than 30 percent of their income toward rent is greater for households that identify as Black or African-American, Latino or Hispanic, American Indian or Alaska Native, or Pacific Islander, compared to renter households that identify as White. This may become an even greater factor in the need for affordable housing as population trends suggest that California will become increasingly diverse in the coming decades.

Figure 1.22
Housing Cost Burden Is Distributed Unevenly Across Race and Ethnicity
Average Housing-Cost Burden by Race and Ethnicity 2009-2013



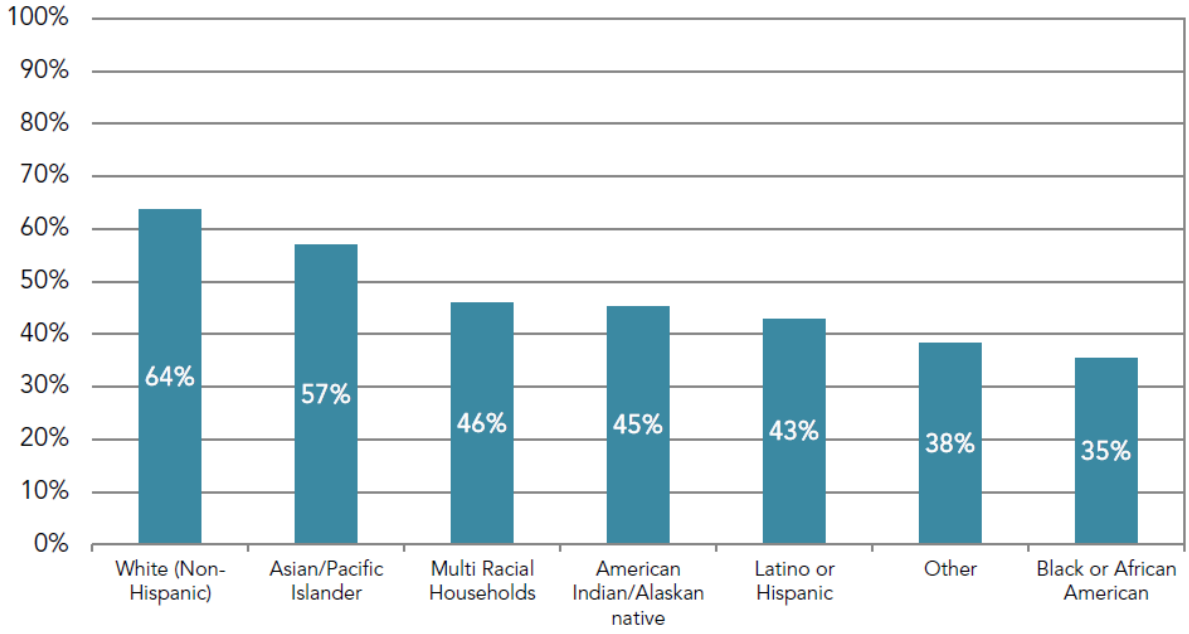
Source: HUD CHAS Data Sets based on 2009-2013 ACS. Graphic by HCD.

Homeownership rates also vary by race and ethnicity in California. As shown below, 64 percent of households that identified as White (Non-Hispanic) were homeowners, compared to

[11] https://www.hcd.ca.gov/policy-research/plans-reports/docs/SHA_Final_Combined.pdf

only 45 percent of households that identified as Native American and 35% of households identified as African American or Black.[12]

Figure 1.15
Homeownership Rates Vary by Race and Ethnicity
California Homeownership Rates by Race and Ethnicity 2011-2015 Average



Source: U.S. Census Bureau, 2011-2015 American Community Survey 5-Year Estimates, Tables B25003A-I, Tenure by Race/Ethnicity California. Graphic by HCD.

This fact has been recognized in the codification of Government Code section 65589.5(a)(2)(F):

> Lack of supply and rising costs are compounding inequality and limiting advancement opportunities for many Californians.

All of this is to say that the application of the TLTP and the Proposed Guidelines to the disposition of easements will either reduce the supply of approved land and housing or increase its

[12] The Equal Protection Clause of the United States' and California's constitutions and the many laws implementing them may become a legal barrier to implementing the TLTP and the Proposed Guidelines. See, e.g., U.S. Constitution Amendment 14, Section 1; California Constitution, Article 1, Section 7 and Article IV, Section 16; Federal Fair Housing Act (42 U.S.C. 3601 et seq.) Housing and Urban Development Regulations (24 Code of Federal Regulations Part 100); Fair Employment and Housing Act (Government Code section 12955 et seq.).

costs or both. This will result in adverse climate change effects and increase housing cost burdens for those least able to absorb those costs. We ask that you consider these effects as you weigh our comments above on the questions that the Commission has presented.

IV. Conclusion

We appreciate the opportunity to submit this comment letter in relation to the TLTP and the Proposed Guidelines. Additionally, we welcome the opportunity to engage in a meaningful and productive dialog with the Commission and all interested parties in relation to our concerns regarding the TLTP and the Proposed Guidelines, and how they may be resolved without compromising or hindering the goals and objectives of the TLTP. We believe that our concerns may be addressed and resolved through modest revisions to the TLTP and the Proposed Guidelines; hence, we look forward to the Commission's re-opening of the public comment period for these items and receiving notice regarding when the Commission, *et al*. would like to meet.

Thank you, in advance, for your attention to the matters addressed herein. Should the Commission have any questions regarding the comments appearing in this letter, please feel free to contact me at any time.

Sincerely,

/s/Nick Cammarota

Senior Vice President & General Counsel
ncammarota@cbia.org

ROUND VALLEY INDIAN TRIBES

A Sovereign Nation of Confederated Tribes

TRIBAL COUNCIL OFFICE
77826 COVELO ROAD
COVELO, CALIFORNIA 95428
PHONE: 707-983-6126
FAX: 707-983-6128

LOCATION: ON STATE HWY 162
ONE MILE NORTH OF COVELO
IN ROUND VALLEY
TRIBAL TERRITORY SINCE TIME BEGAN

ROUND VALLEY RESERVATION ESTABLISHED 1856

September 3, 2020

Via Electronic Submittal

Energy Division
Attention: Tariff Unit
California Public Utilities Commission
505 Van Ness Avenue
San Francisco, CA 94102
Email: EDTariffUnit@cpuc.ca.gov

RE: Round Valley Indian Tribes' Comment Letter on Draft Resolution E-5076 and Draft Guidelines to Implement the CPUC Tribal Land Transfer Policy

To Energy Division – Tariff Unit:

The Round Valley Indian Tribes submits these comments pursuant to the California Public Utilities Commission's (Commission) Draft Resolution E-5076 (Draft Resolution), approving the "Guidelines to Implement the CPUC Tribal Land Transfer Policy" (Draft Guidelines).

The Round Valley Indian Tribes (Tribes) are a sovereign confederation of Indian tribes in Northern California that includes the Yuki, Concow, Little Lake, Pomo, Nomlaki, Wailaki and Pit River Tribes. The Round Valley Indian Reservation is located in Mendocino County, within the Upper Eel River Basin. The Round Valley Indian Tribes, like so many of the other California Native American tribes, have lost tens of thousands of acres of tribal lands due to federal government action, including the Allotment process, along with actions by State officials. Undoubtedly, California's Investor-Owned Utilities (IOUs) have benefitted from the unjust, and often illegal, dispossession of Indian land in California. For these reasons, the Round Valley Indian Tribes commend the Commission for formally adopting the Tribal Land Transfer Policy (Policy), which provides an opportunity for tribes to reacquire lands within their ancestral territory. The Policy represents a meaningful step on behalf of the Commission towards redressing historical wrongs suffered by California tribes. The Round Valley Indian Tribes are pleased to provide comments on the Draft Resolution and Draft Guidelines in order to ensure successful implementation of the Policy, consistent with California Native American tribes' unique sovereign status. The Tribes' specific comments on the Draft Resolution and Draft Guidelines are set forth below.

1. Guidelines: Section 1 General Provisions

We recommend the Draft Guidelines be revised to include a section that confirms the sovereign status of California Native American tribes. The Tribes suggest revising Section 1.1(b)(i) to include the following: "These Guidelines are adopted pursuant to treatment of California Native American Tribes as sovereign governments and pursuant to the State's government-to-government relationship with California Native American Tribes." The Guidelines would be stronger from a legal standpoint if they acknowledged tribes as sovereign nations that accept a government-to-government relationship with the State of California. We recommend that Section 1.1(b)(ii) also be revised to clarify that the Guidelines and the Policy are not limited to "Tribal sacred places" within a tribe's ancestral territory. The Policy and implementing Guidelines should apply to any property within a tribe's ancestral territory, not just undeveloped, open spaces.

We also recommend that the definition of "Ancestral Territory" in Section 1.3(a) be revised to include a tribe's own constitution and description of ancestral territory as the fallback option if a tribe has not designated its ancestral territory under Assembly Bill (AB) 52. (2013-2014 Reg. Sess.). Relying on a tribe's own constitution and description of ancestral territories is consistent with the current acknowledgment in the "Ancestral Territory" definition that "Tribes are the primary source for identification of a tribe's ancestral territory." If, however, a tribe's constitution does not include a description of the tribe's ancestral territory, we suggest that the Handbook of North American Indians be used as the final fallback source or designation.

2. Guidelines: Section 2 Notification

We recommend that Section 2.1 Notification Generally be revised to add a requirement that the IOU notify tribes within a set number of days after deciding to dispose of real property. For example, in the case of AB 52, the permitting agency is required to begin consulting with tribes within fourteen (14) days of determination that a project application is complete. The Draft Guidelines should be revised to require a similar fourteen (14) day time-frame to begin consultation with tribes once the IOU decides to dispose of real property.

The Draft Resolution states that "[t]he Draft Guidelines attached adopt a 90-day notice period for the Tribes to effectively assess property issues." See Draft Resolution at 15. However, the Draft Guidelines' only reference to 90 days is in the instance that the NAHC fails to respond to the IOU's written request to identify tribes relevant to the territory on which the real property lies. See Draft Guidelines, Section 2.2(b). We recommend the Draft Guidelines be revised to add a requirement that tribes be given 120 days to respond to a notice from the IOU. We recommend a 120-day period, rather than 90 days, because depending on the information received from the IOU regarding the property, a tribe may need additional time to acquire further information about the property, examine due diligence information, and perhaps conduct environmental assessments. Regarding the questions related to appropriate timeline for noticing and consultation described on page 15 of the Discussion section of the Draft Resolution, the Tribes recommend that, if an IOU properly notifies a tribe of a forthcoming disposition, and if

the tribe does not respond, the IOUs should hold the offer to the tribe open for 60 days to fulfil its obligations under the Policy. A 60-day period seems sufficient to allow a tribe to receive notice and consider whether it is interested in reacquiring the property, without causing unnecessary delay to the efficient transfer of land.

We also recommend that Section 2 be revised to add requirements regarding meaningful consultation with a tribe to determine whether the tribe is interested in reacquiring the real property. Section 3.3(b) states that the Commission will consider whether the IOU "acted in good faith" and with "reasonable effort" to agree with the tribe on reasonable terms for the transfer of the real property. Therefore, we recommend Section 2 be revised to add a requirement that the IOU make a written record of whether the tribe was interested in reacquiring the real property, upon what terms, and if the tribe's proposed terms were unacceptable to the IOU, explain why. A detailed record of decision should be submitted with the IOU's request for approval. This will ensure that when a tribe expresses interest in reacquiring a property, the IOU considers the proposal in good faith.

3. Guidelines: Section 3 Presumption in Favor of Tribes

The Tribes commend the Commission for including Section 3.3. Resumption in Favor of Tribe in the Draft Guidelines and for confirming that the Commission will presume that the transfer to the tribe is in the public interest. However, the Tribes are concerned that Section 3.3(d) provides that this presumption may be rebutted with evidence "that the transfer of the real property to another entity would be in the public interest." We recommend that this subsection (d) be removed from the Draft Guidelines. A balancing of public interests such as this would be difficult and likely contradictory to the purpose and goals of the Policy.

As the Commission is well aware, the Tribes are deeply concerned with protecting tribal cultural and natural resources both within and outside the Tribes' current reservation boundaries. We recommend that Section 3.4 Impacts to Cultural Resources be revised to add a requirement that the IOU coordinate with a tribe's Tribal Historic Preservation Officer (THPO) or other appropriate tribal representative regarding how the disposal of real property might impact a tribe's cultural and natural resources and make a written record of those conversations. That record should also be included in the IOU's request for approval. This will assure the Commission is able to adequately consider any comments regarding potential impacts on tribal cultural resources, and/or suggested measures that would mitigate those impacts.

4. Guidelines: Proposed New Section Addressing GO 173 and GO 69-C conveyances

Last, regarding the questions described on page 12 and 13 of the Discussion sections of the Draft Resolution related to General Orders (GO) 173 and GO 69-C, we recommend that the Draft Guidelines be revised to include these conveyances. The Tribes believe that the conveyances described in GO 173 and GO 69-C, often of easement rights over IOU land, will facilitate a meaningful transfer of land to tribes. Acquiring an easement on tribal ancestral territory oftentimes is an important first step for tribes to re-establish and maintain connections to ancestral lands. The Tribes do not believe that inclusion in the Policy and Draft Guidelines of conveyances subject to GO 173, and GO 69-C would divert tribal resources that could be better spent examining potentially more meaningful Section 851 conveyances. On the contrary, exempting conveyances described in GO 173 and GO 69-C would deprive tribes of meaningful opportunities to reacquire their ancestral lands and would contradict Policy and goals.

For all of the foregoing reasons, the Round Valley Indian Tribes request that the Commission modify the Draft Resolution and Draft Guidelines as requested herein. The Tribes appreciate the opportunity to comment on the Commission's Draft Resolution and Draft Guidelines and look forward to discussing these issues in the future with the Commission.

Respectfully submitted,

James Russ

James Russ, President
Round Valley Tribal Council

cc: Michael Rosauer
Public Utilities Regulatory Analyst
Energy Division
California Public Utilities Commission
505 Van Ness Avenue
San Francisco, CA 94102
Michael.Rosauer@cpuc.ca.gov

Mary Jo Borak
Supervisor
Energy Division
California Public Utilities Commission
505 Van Ness Avenue
San Francisco, CA 94102
BOR@cpuc.ca.gov

ROUND VALLEY INDIAN TRIBES

A Sovereign Nation of Confederated Tribes

TRIBAL COUNCIL OFFICE
77826 COVELO ROAD
COVELO, CALIFORNIA 95428
PHONE: 707-983-6126
FAX: 707-983-6128

LOCATION: ON STATE HWY 162
ONE MILE NORTH OF COVELO
IN ROUND VALLEY
TRIBAL TERRITORY SINCE TIME BEGAN

ROUND VALLEY RESERVATION ESTABLISHED 1856

Certificate of Service

I certify that I have served this day a true copy of the letter of the Round Valley Indian Tribes commenting on the Draft Guidelines to implement the Tribal Land Transfer Policy.

Dated: September 3, 2020 at the Round Valley Indian Reservation

Kathleen "Kat" Willits
Programs Manager

WINSTON & STRAWN LLP
North America Europe Asia

101 California Street
34th Floor
San Francisco, CA 94111
T +1 415 591 1000
F +1 415 591 1400

LISA A. COTTLE
Partner
(415) 591-1579
lcottle@winston.com

August 24, 2020

Energy Division, edtariffunit@cpuc.ca.gov
California Public Utilities Commission

Mary Jo Borak, BOR@cpuc.ca.gov
Supervisor, Energy Division
California Public Utilities Commission

Michael Rosauer, Michael.Rosauer@cpuc.ca.gov
Public Utilities Regulatory Analyst, Energy Division
California Public Utilities Commission

Re: Comments of Horizon West Transmission, LLC (U 222-E) on Draft Resolution E-5076

Dear Energy Division, Ms. Borak, and Mr. Rosauer:

Introduction

Pursuant to Rule 14.5 of the Rules of Practice and Procedure of the California Public Utilities Commission ("Commission" or "CPUC"), Horizon West Transmission, LLC (U 222-E) ("Horizon West") submits these comments on Draft Resolution E-5076. In Draft Resolution E-5076, the Energy Division proposes guidelines ("Draft Guidelines") for implementing the Commission's Tribal Land Transfer Policy ("TLTP").[1] The Draft Guidelines apply to investor owned utilities ("IOUs") seeking Commission approval pursuant to California Public Utilities Code Section 851 ("Section 851") for the disposition of specified "Real property."[2] The Draft Guidelines are intended to "facilitate transfers of Real Property to California Native American Tribes by offering Tribes a right of first refusal."[3]

Draft Resolution E-5076 states that the IOUs "suggest that the TLTP be clarified to include only those transactions requiring full CPUC approval subject to Section 851, and not the types of

---

[1] "Investor-Owned Utility Real Property- Land Disposition – First Right of Refusal for Disposition of Real Property Within the Ancestral Territories of California Native American Tribes," adopted at the Commission's December 5, 2019 voting meeting and available at https://www.cpuc.ca.gov/uploadedFiles/CPUC_Public_Website/Content/About_Us/Supplier_Diversity/Final%20Land%20Transfer%20Policy%20116.pdf.

[2] Draft Resolution E-5076 at 2 and Attachment A (Draft Guidelines, Section 1.3(g)) at 22.

[3] *Id.* at 2.

minor conveyances subject to General Orders (GO) 173, and GO 69-C, as these conveyances are generally intended . . . for specific, limited uses."[4] Draft Resolution E-5076 then states that:

> "The CPUC expressly seeks comments on whether the Draft Guidelines should be revised. Specifically:
>
> - Will conveyances described in GO 173 and GO 69-C, often of easement rights over IOU land, facilitate a meaningful transfer of land to Tribes?
> - Would inclusion in the TLTP of conveyances subject to GO 173, and GO 69-C divert tribal resources that could be better spent examining potentially more meaningful Section 851 conveyances?
> - Would inclusion in the TLTP of conveyances subject to GO 173 and GO 69-C substantially delay essential IOU operations?
> - What is the appropriate application of the TLTP to GO 173, and GO 69-C conveyances, and to easements in real property?"[5]

Horizon West fully supports the TLTP and the policy goals it is intended to advance, but shares the IOUs' concerns regarding potential application of a right of first refusal to easements granted for specific uses. Horizon West is particularly concerned that the Draft Guidelines could be interpreted to require a right of first refusal for easements and other real property rights that the IOUs may grant for use by specific electric transmission, storage, and generation projects (collectively, "Energy Projects") that require such easements and real property interests to complete construction and interconnect with the IOUs' electric transmission and distribution systems. As explained below, granting a right of first refusal for Energy Project easements and similar real property rights would convey a right that is not usable by the Tribes, and would not facilitate a meaningful transfer of land to Tribes. Granting a right of first refusal for Energy Project easements and similar real property rights also would increase delay and risks for Energy Projects. This result would be contrary to California's requirements and goals for ensuring reliability and increasing reliance on renewable and storage resources. To avoid these unintended consequences, the Draft Guidelines should be modified to exclude easements and real property rights that are conveyed for specific Energy Project uses, as explained below.

---

4 *Id.* at 12.

5 *Id.* at 13.

Comments

1. A right of first refusal for Energy Project easements and similar real property rights would not facilitate a meaningful transfer of land to Tribes.

Developers of Energy Projects in California often require easements and similar real property rights to install facilities on, under, or over IOU land in order to complete construction and interconnect the Energy Projects with the electric transmission and distribution system. IOUs often seek Commission approval pursuant to Section 851 for their conveyances of these property rights for Energy Project use based on showings that the conveyances will not have an adverse impact on the IOUs' ability to provide safe and reliable service at reasonable rates and will not increase rates. For example, Horizon West obtained easements from San Diego Gas and Electric Company ("SDG&E") to interconnect Horizon West's Suncrest Dynamic Reactive Power Support Project with SDG&E's Suncrest Substation, and SDG&E filed Advice Letter 3405-E under Section 851 and GO 173 to obtain Commission approval to grant the necessary easement rights to Horizon West.

As currently drafted, the Draft Guidelines could be interpreted to apply to an IOU's grant of easements like those conveyed to Horizon West, with the result that the IOU could be required to offer Tribes a right of first refusal for such easements. This would not advance the goals of the TLTP. When an IOU proposes to convey an easement or similar real property rights for a specific Energy Project's use, such as a non-exclusive easement to install, operate, and maintain a specific electricity transmission line and related equipment, any corresponding right of first refusal (or right of first offer) by definition must be for the acquisition of the same real property interest—*i.e.*, it must provide a right to purchase a non-exclusive easement to install, operate, and maintain an electricity transmission line and related equipment.[6] Granting this right to Tribes is not meaningful, however, because the right by definition is only usable for installation, operation, and maintenance of an electricity transmission line and related equipment. Unless a Tribe is

[6] Requiring the IOU to offer Tribes any expanded or greater real property interest would not be consistent with a right of first refusal. Such a policy also would create strong disincentives for an IOU to grant easements and similar real property rights for Energy Project uses, and thereby create barriers to Energy Project development.

developing its own project that requires a similar easement in the same area, the offered right would not be of any use to the Tribe. Moreover, because the offered right would be for an equipment-specific non-exclusive easement, granting that right to Tribes would not create any meaningful opportunities for Tribes to acquire fee interests in IOU land. Applying the right of first refusal to Energy Project easements and similar real property interests granted for a specific use therefore would not serve the TLTP's purpose or advance its goals.

Alternatively, even if a Tribe were developing its own project that could use the same easement, the Tribe should be able to obtain its own easement without taking the Energy Project's easement. The Tribe's project and the Energy Project should be coordinated to be co-located on the property. In that scenario, which is the only scenario in which the Tribe could use the easement described above, granting a right of first refusal would not be necessary for the Tribe and could unreasonably delay or otherwise harm the Energy Project.

Additionally, because they are used to interconnect electric infrastructure, Energy Project easements tend to be granted with respect to IOU real property that is used for utility purposes or is adjacent to land used for utility purposes. In this respect, a right of first refusal for Energy Project easements does not advance the purpose of a "right of refusal," which is defined in TLTP to mean that "the IOU disposing of the *surplus property* has to contact the Tribe or Tribes whose ancestral territory surrounds the *surplus property* and provide such tribe(s) the first right to take/purchase or refuse transfer of the property, before the IOU can seek third party purchasers for such *surplus property*."[7] This definition in the TLTP shows that the right of refusal should apply to IOU property that is "surplus" and is being sold because it is not needed for utility service.[8] Although the Draft Guidelines appear to apply more broadly, they should be clarified to exclude

---

[7] TLTP at 1, footnote 1 (emphasis added).

[8] GO 69-C authorizes conveyances of easements over a utility's "operative property" but requires the inclusion of a "reversionary" right for the utility unless the grant is to the state or a political subdivision thereof for a superior governmental use, or to the federal government or agency thereof for a governmental use. Easements over operative utility property that include such a reversionary right for utility use could not be characterized as "surplus property." This supports a revision to the Draft Guidelines to exclude dispositions made pursuant to GO 69-C.

easements and other real property interests granted for specified Energy Project uses, as described more specifically in Section 3 below.

2. Granting a right of first refusal for Energy Project easements and similar real property rights would increase delay and risks for Energy Project development.

Requiring IOUs to offer the right of first refusal to Tribes would add time to the schedule for obtaining necessary easements for Energy Project use. The added time would be significant because the Draft Guidelines would require the IOU to give Tribes 90 days to consider whether to exercise the right of first refusal. This is likely to delay the conveyance of necessary property rights by at least 90 days. Adding further regulatory delay to bringing Energy Projects into operation would be contrary to requirements and policies for ensuring reliability and increasing reliance on renewable and storage resources.

Requiring IOUs to offer Tribes a right of first refusal for an Energy Project's easement or similar real property rights also creates a risk that someone might exercise that right and acquire the interests without a way to use them, or for the purpose of assignment or resale at a higher price. This would derail construction of the Energy Project seeking the easement or similar real property right, and make it more difficult for Energy Project developers to obtain the real estate rights necessary to interconnect their facilities. Furthermore, where an easement or other right is proposed to be granted for a specific Energy Project, it would not be appropriate to apply the Draft Guideline's presumption (specified in Section 3.3) that the Tribe is "the preferred transferee" of an Energy Project's easement or similar real property right, especially if doing so would prevent the Energy Project from being completed or interconnected.

The process required in the Draft Guidelines also does not align with the manner in which easements and similar real property rights are conveyed for Energy Project uses. The Draft Guidelines require an IOU to offer a right of first refusal "before the IOU can seek third-party purchasers for the real property,"[9] but IOUs typically do not make broad offers to grant easements and similar real property rights for Energy Project uses. Rather, because they are facility-specific, it is more likely that an Energy Project developer would identify the need for the easement or

[9] Draft Resolution E-5076, Attachment A (Draft Guidelines, Section 1.3(i)) at 22.

similar real property interest for construction and interconnection of the Energy Project and approach the IOU to request it. The Energy Project developer and the IOU then would agree on appropriate facility placement, negotiate the easement terms and conditions, and prepare the necessary documentation. The final documentation then would be submitted to the Commission prior to execution for approval when required under Section 851. Requiring IOUs to offer a right of first refusal in this context would be very disruptive to the process of obtaining easements and similar real property rights to for Energy Projects.[10] This further shows that the right of first refusal under the Draft Guidelines is not compatible with and could delay or derail the process for obtaining necessary real property interests for Energy Project uses.

For these reasons, it would not be useful or feasible to grant Tribes a right of first refusal for Energy Project easements and similar real property rights granted for a specific use. While Horizon West fully supports the TLTP requirement that surplus, fee interests in IOU land should be offered to the Tribes with a right of first refusal, and also fully supports requirements for consulting and coordinating with Tribes in constructing new infrastructure projects on or near Tribal lands, it is not appropriate to divest Energy Project easements and similar real property rights. Such use-specific conveyances therefore should not be subject to the requirements in the Draft Guidelines.

3. The Draft Guidelines should be modified to exclude conveyances of real property interests for use by specific Energy Projects.

To prevent adverse impacts and delay for Energy Projects, the Draft Guidelines should be modified so that the right of first refusal is not a requirement for IOU dispositions of real property interests granted for Energy Project uses. Below are suggested changes to the Draft Guidelines to achieve this purpose.

---

[10] GO 173, Rule 3 specifies criteria for transactions filed thereunder, including that they "will not have an adverse effect on the public interest or on the ability of the utility to provide safe and reliable service to customers at reasonable rates." (GO 173, Rule 3(b).) Under this standard, a right of first refusal should not be offered for Energy Project easements and similar real property rights eligible for GO 173 because doing so could prevent or delay completion of Energy Projects that are needed for reliability and to support achievement of California's energy policy goals.

1. Revise the definition of "Disposition" as follows:

   "Disposition" **or "dispose of"** means the transfer, sale, donation, encumbrance, or disposition by any other means of an estate in real property**, but excluding grants and conveyances of easements, rights-of-way, leases, licenses, and similar real property rights for use in connection with the construction, operation, and/or maintenance of electricity generation, storage, transmission, or distribution facilities or equipment**."[11]

2. Revise the definition of "Right of first refusal" as follows:

   "Right of first refusal" means that the IOU disposing of real property must contact the tribe or tribes whose ancestral territory is on or adjacent to the real property, and must provide the tribe or tribes the right to ~~take~~ **purchase** or refuse the real property **interest proposed in the disposition**, before the IOU can seek third-party purchasers for the real property.

Conclusion

Horizon West appreciates the Energy Division's and the Commission's consideration of these comments. These comments are being served on the "Service List for the CPUC Tribal Land Transfer Policy Resolution E-5076" available at https://www.cpuc.ca.gov/tribal/.

August 24, 2020

Respectfully submitted,

/s/ Lisa A. Cottle

Lisa A. Cottle
Winston & Strawn LLP
101 California Street, 34th Floor
San Francisco, California 94111-5840
Telephone: (415) 591-1579
Facsimile: (415) 591-1400
lcottle@winston.com

Attorneys for Horizon West Transmission, LLC (U 222-E)

cc: "Service List for the CPUC Tribal Land Transfer Policy Resolution E-5076" available at https://www.cpuc.ca.gov/tribal/.

[11] This could be expanded to include gas, water, sewer and other types of utility facilities, as the reasoning for excluding Energy Project assets also applies to easements and rights of way granted for other categories of infrastructure and equipment.

August 24, 2020

Michael Rosauer
Public Utilities Regulatory Analyst
Energy Division
California Public Utilities Commission
505 Van Ness Avenue
San Francisco, CA 94102
Michael.Rosauer@cpuc.ca.gov

Re: CPUC Tribal Land Transfer Policy – Comment on Draft Resolution

Dear Mr. Rosauer,

I am the Tribal Attorney for the Paskenta Band of Nomlaki Indians ("Band"). On behalf of the Band, please accept these comments regarding the CPUC Draft Resolution E-5076 of the Energy Division. The Band appreciates the effort of the CPUC to engage in meaningful consultation in formulating the Tribal Land Transfer Policy. Our comments are as follows:

A. The Return of Lands within a Tribe's Ancestral Territory should be the Goal of the Tribal Land Transfer Policy.

Governor Newsom acknowledged that genocide was committed against California Native Americans. Indeed, on July 1, 1937, the Commissioner for the Bureau of Indian Affairs John Collier observed:

They were actually murdered. They were outlawed and treated as wild animals, shot on sight…They were enslaved and worked to death. They were treated as predatory animals. They were driven back to totally barren vastnesses, in the Sierras, and out into the desert, and they died of starvation. Their life was outlawed and their whole existence was condemned and their hearts were broken –and they died.[1]

Therefore, the policy should not only be one that respects Tribal governments but also one that advances and restores Tribal sovereignty. We recommend revising pg. 1–5 to account for Historic Land Loss and ensure a proposed outcome where the Right of First Refusal offer to any Tribe is required to be 20% Below Market Rate.

[1] Native American Rights Fund, "California Indians – Double Genocide," National Indian Law Library Announcements, Vol. 1, No. 4, September, 1972, p. 1, Col. 2.).

B. The IOU Should Not Be Allowed to Bypass a Tribe's Preferred Transferee Status.

On pg. 5 of the Resolution, the CPUC will deem a Tribe as the preferred transferee unless the CPUC finds that the Real Property needs to be conveyed to another entity "to achieve IOU operational requirements, or to comply with any law, rule, or regulation." Furthermore, the CPUC can find that "conveyance of Real Property to another entity would be in the public interest." We believe these two options are overly broad and vague. These exceptions to the preferred transferee status may allow for the IOU and CPUC to set aside the goal of the Tribal Land Transfer Policy and undermine the good faith effort for Tribes to restore their ancestral land base in favor of third party non-Tribal entities. Therefore, we recommend the elimination of #3 and #4 as exceptions to the treatment of a Tribe as the preferred transferee.

Respectfully Submitted,

/s/ ERICK GILES
Erick Giles
Tribal Attorney
Paskenta Band of Nomlaki Indians

Attachment 1
CERTIFICATE OF SERVICE

I certify that I have served this day via email a true copy of the Paskenta Band of Nomlaki Comments on Draft Resolution E-5076 to the following members of the California Public Utilities Commission.

Michael Rosauer
Public Utilities Regulatory Analyst
Energy Division
California Public Utilities Commission
505 Van Ness Avenue
San Francisco, CA 94102
Michael.Rosauer@cpuc.ca.gov

Mary Jo Borak
Supervisor
Energy Division
California Public Utilities Commission
505 Van Ness Avenue
San Francisco, CA 94102
BOR@cpuc.ca.gov

Dated August 24, 2020

/s/ ERICK GILES
Erick Giles

Pacific Gas and Electric Company

Erik Jacobson
Director
Regulatory Relations

Pacific Gas and Electric Company
77 Beale St., Mail Code B13U
P.O. Box 770000
San Francisco, CA 94177

Fax: 415-973-3582

August 24, 2020

Energy Division
Attention: Tariff Unit
California Public Utilities Commission
505 Van Ness Avenue
San Francisco, CA 94102

Subject: **Comments of Pacific Gas and Electric Company on Draft Resolution E-5076 - Adoption of Guidelines to Implement the CPUC Tribal Land Policy consistent with Executive Order B-10-11 and the CPUC Tribal Consultation Policy, The Tribal Land Transfer Policy, and Public Utilities Code Section 851**

Dear Energy Division Tariff Unit:

Pacific Gas and Electric Company (PG&E) appreciates this opportunity to comment on Draft Resolution E-5076 (the Draft Resolution).

I. Introduction

PG&E supports the Tribal Land Transfer Policy (Policy) and the important social equity objectives it is intended to accomplish. Namely, PG&E supports recognizing and respecting tribal interests, and facilitating the successful transfer of the ancestral lands of California's native American tribes.

In some cases, the Guidelines provide helpful clarity and direction on how to implement the Policy. In others, the Guidelines are vague, unclear and sweep up unrelated operational or commercial transactions. As it stands, the Guidelines will likely frustrate the purpose of Policy and fail to effectuate transfers to tribes.

PG&E requests additional changes that will improve the efficiency of the disposition of lands and prevent confusion without undermining the overarching goals of the Policy. Specifically, we ask that the Guidelines be revised to:

A. specify the procedure and timeframes for the exercise the right of first refusal;

B. establish a more defined procedure for transactions that the Policy recognizes may qualify for exemption (e.g., conveyances to achieve utility operational requirements) and for certain high value transactions in which tribes may

participate in a competitive sale process while still achieving the greatest gain on sale for ratepayers; and

C. provide an exemption for certain easements which are for a limited use, such as the placement of utility lines, and do not result in a full transfer of the utility real property.

The Draft Resolution also requested comment on whether the Guidelines should be revised to include conveyances described in General Order 173 and 69-C within the scope of the Policy. PG&E does not support expanding the scope of the Policy to include license transactions that are authorized under General Order 69-C. Because such licenses are for a limited use of utility real property, these license transactions would not further the objectives of the Policy of a full transfer of real property to tribes.

PG&E hopes these issues can be remedied and that the draft Guidelines can be approved promptly. However, to the extent they cannot, PG&E requests that the draft Guidelines be held and proceedings be conducted to explore these issues in greater depth.

II. Discussion

A. The Guidelines Should Provide Guidance On The Manner For Tribes To Exercise The Right of First Refusal.

The Draft Resolution clarifies the intent of the term "right of first refusal" in the Guidelines is what the utilities refer to as the "right of first offer." However, in contrast to the procedural detail on the form and content of the IOU's offer of the right of first refusal, the Guidelines lack any guidance on the manner for tribes to exercise the right of first refusal. The Guidelines refer only to a requirement the IOUs must submit documentation of any consultation with the tribe(s) when requesting approval of the transaction under Section 851 (Guidelines, Sec. 3.1(a)). Additional guidance on the manner for exercising the right of first refusal would clarify the actions to be taken to the tribe (e.g., a written offer be provided by the 90th day following receipt of the IOU's notice that specifies the terms of the offer, such as acquisition price or donation). The Guidelines currently lack precision as to the timeframe for the tribe to exercise the right of first refusal. Providing such clarification would add certainty to the IOU's disposition process, and allow it to proceed to market the property to third parties, should a tribe not respond to the IOU's notice.

B. The Term "Adjacent To" Is Ambiguous And Requires Further Clarification.

Section 1.3 of the Guidelines defines the right of first refusal as mean an IOU disposing of real property must contact tribes whose ancestral territory is on or "adjacent to" the real property. This varies from the definition that appears in the Policy, which does not use the term "adjacent to" in defining the right of first

refusal.[1] The Policy also uses the term "immediately adjacent," indicating this term was intended to refer to IOU real property located in close proximity to the tribe's ancestral territory.[2] The Draft Resolution recognizes that informal comments were submitted by both the IOUs and tribes requested clarification on what "adjacent to" a tribe's ancestral lands means, but offers no further clarification in the Guidelines. The "adjacent to" reference in Section 1.3 of the Guidelines is a poor word choice and creates uncertainty as to which tribes may exercise the right of first refusal. The definition should be further modified to clarify the right of first refusal may be exercised by the tribe or tribes whose ancestral territory includes the IOU real property.

C. The Guidelines Should Recognize Exceptions For Sale Of Operational Facilities And Certain High Value Dispositions.

The Policy recognizes that certain transactions may qualify for exemption to achieve IOU operational requirements or that are in the public interest. At the hearing in adopting the Policy, Commissioners recognized that the Policy was not intended to apply to the disposition of utility equipment, and anticipated this guidance would later be memorialized as a cleanup to the Policy.[3] The sale of operational facilities, together with the real property associated with these facilities, would qualify for exemption under the Policy. An example of operational facilities would be the sale of a canal formerly used for power generation to be transferred to a water provider. In these sales, the class of prospective buyers is limited to other utilities qualified to assume the safe operation of the facilities. The Guidelines should recognize that while tribes may receive notification of sales of operational facilities, the Right of first refusal does not apply to such dispositions.

---

[1] Footnote 6 of the Policy provides the following definition; "As we use it here, the term first "right of refusal" means the IOU disposing of the surplus property has to contact the Tribe or Tribes whose ancestral territory surrounds the surplus property and provide such tribe(s) the first right to take/purchase or refuse transfer of the property, before the IOU can seek third party purchasers for such surplus property. (emphasis added).

[2] Footnote 7 of the Policy provides "IOUs shall attempt to resolve any disputes regarding the Tribe with whom it is required to provide notice and/or the location of the tribal territory within which the subject Real Property is located or to which it is immediately adjacent through discussion with the Tribes identified by the NAHC." (emphasis added).

[3] See transcript of December 5, 2019 Commission meeting at 46:50 which included the following exchange: Commissioner Rechtschaffen: "I do have one technical question or clarification Commissioner. My understanding is that the intent of this is to subject Real Property of the utilities to the transfer disposition policy, not equipment or intellectual property. And if that is the case, I think we need to slightly amend footnote 3 which says that Real Property subject to this policy is defined as "any IOU property" whose disposition is subject to approval in accordance with PU Code 854[1] to say that Real Property subject to this policy is defined as "any IOU Real Property" subject to 851 so that it doesn't apply to equipment or intellectual property. I trust that that is the intent of the policy." Commissioner Guzman Aceves: "Yes, I think that would be considered a clean-up amendment."

The Guidelines should also recognize an exemption for circumstances in which a utility initiates a competitive commercial sale process to sell developed property the expected value of the property exceeds a certain threshold (e.g., in excess of $5 million). An example would be the sale of a former service center building with an expected sales price of over $5 million. The Guidelines should recognize a specialized procedure governing the sale of high value real property with an expected value of specified value. This would align with General Order 173, which requires that utilities file a formal Section 851 application, rather than use the advice letter procedure, for transactions valued in excess of $5 million. Consistent with the exemption recognized in the Policy, the IOUs should notify the appropriate tribes of their intent to market the property, and the tribes should have the right to make an offer, though not the right to first offer. The sales price for such high value sales should be determined through a competitive sale process in order to achieve the greatest benefit for customers. This narrow exemption would be in the public interest, because it would provide tribes the opportunity to purchase assets while ensuring the assets are sold for the optimal sale price for customers' benefit and that such sales can be completed within a commercially reasonable timeframe

D. The Guidelines Should Recognize An Exception For Certain Easement Transactions.

The informal comments submitted by PG&E and the other IOUs proposed the Guidelines recognize an exemption for certain easement transactions that do not further the objectives of the Policy of returning IOU real property to tribes. This proposal is based on the limited scope of the easement, which is typically to accommodate an adjoining property owner seeking access across the IOU property, or to extend utility facilities to serve the adjoining owner. Another specific example is the grant of road easements across the frontage of IOU real property to accommodate a roadway project by a state or local agency. The Policy recognizes certain transactions may qualify for exemption that are in the public interest. For these reasons, PG&E supports including guidance in the Guidelines that the tribes will receive notice of the grant of such easements but that the Right of first refusal does not apply to such easements.

E. The Definition of "Dispositions" Should Exclude Mortgages and Similar Transactions Involving Utility Financing.

The Policy at footnote 2 defines the terms "dispose of" or "disposition" to refer to "the transfer, sale, donation or disposition by any other means of a fee simple interest or easement in surplus real property." But Section 1.3(d) of the Guidelines broadens the definition of "Disposition" to mean "the transfer, sale, donation, *encumbrance*, or disposition by any other means of an estate in real property" (emphasis added). Adding the reference to an "encumbrance" of IOU real property would expand the scope of the Policy to include transactions associated with utility

financing, such as a mortgage or other financial instrument used in connection with the securitization of utility financing or restructuring of corporate debt.

A mortgage or similar financial instrument that encumbers utility property requires Commission approval under Public Utilities Code Section 851.4 These financing arrangements, however, do not implicate a transfer of IOU property, and including them in the scope of the Policy would not further its objectives. In fact, requiring notifications to tribes of utility mortgages would impede the IOUs' ability to timely secure financing. To avoid these unintended consequences, the Guidelines should not expand the definition of a Disposition to include an "encumbrance" of IOU property.

The definition of "Disposition" in the Guidelines also includes a catchall phrase -- "disposition by any other means of an estate in real property." This catchall phrase is overbroad and includes transactions that were not intended to be subject to the Policy, such as short term lease transactions. This catchall phrase should be removed from the definition of a "Disposition," or other revisions be made to expressly exclude lease transactions. For these reasons, PG&E recommends the Guidelines retain the definition of "Disposition" in the Policy which properly refers to a fee simple interest or easement in real property.

F. The Policy Should Not Be Expanded to Licenses Issued Under GO 69-C.

The Draft Resolution requested comment on a series of questions concerning conveyances described in GO 173 and GO 69-C. The first question for comment refers to a conveyance of easement rights over IOU land, and whether such a transaction would facilitate meaningful transfer to the tribes. GO 69-C authorizes the utilities to issue easements, licenses and permits for roads, agricultural purposes and other limited purposes on IOU real property. Such conveyances are conditioned on the right of the IOU, on its own motion or by order of the Commission, to terminate the easement, license or permit, when it is necessary or desirable for the IOU in the service of its customers. The exception are easements, licenses and permits issued to governmental agencies, which are not required to be made revocable. Because GO 69-C licenses are required to be for limited purposes and must be expressly reserve the right to terminate the license for utility purposes, these licenses would not further the objective of the Policy in returning lands to the tribes.

There is no need to expand the Guidelines to include GO 69-C licenses. Currently, tribes may request GO 69-C licenses for short-term use of IOU property. From time to time, PG&E receives such requests and has accommodated tribes by issuing GO 69-C licenses, for example for ceremonial purposes on PG&E property.

Expanding the Guidelines to include notification to tribes of the IOU's plans to issue a revocable GO 69-C licenses to a third party would result in delay essential IOU

operations. For example, mandatory access under the CPUC's ROW Decision, D.98-10-058 is provided to telephone and communication providers to PG&E-owned utility poles through license agreements issued under GO 69-C. Providing advance notice to tribes of the issuance of such GO 69-C licenses would delay accommodating these pole attachments.

The issuance of revocable licenses under GO 69-C does not further the policy objectives of the Policy of ensuring tribal participation in the disposition of IOU real property. For these reasons, the Policy should not be expanded to include the issuance of GO 69-C licenses.

Conclusion

For the reasons discussed above, PG&E respectfully requests that the Commission incorporate PG&E's recommendations to the Guidelines as shown in the Attachment A to these Comments.

Respectfully submitted,

/S/
Erik Jacobson
Director, Regulatory Relations

Attachment A – PG&E Recommendations to Guidelines To Implement The CPUC Tribal Land Policy (Redline)

cc:

Edward Randolph, Director, Energy Division
Service List CPUC Tribal Land Transfer Policy Resolution E-5076
Michael Rosauer, Energy Division
Mary Jo Borak, Energy Division

Attachment A

GUIDELINES TO IMPLEMENT THE CPUC TRIBAL LAND POLICY

1.1 GENERAL PROVISIONS

Purpose and Intent

a. The purpose of these Guidelines is to implement the Commission's Tribal Land Policy, which it adopted on December 5, 2019.

b. The goals of the Tribal Land Policy are:

i. To recognize and respect Tribal sovereignty;

ii. To protect Tribal sacred places and cultural resources;

iii. To Ensure meaningful consideration of Tribal interests and the return of lands within the ancestral territory of the appropriate Tribe; and

iv. To encourage and facilitate notice and Tribal participation in matters before the Commission that involve transfers of real property subject to California Public Utilities Code Section 851.

c. The intent of these Guidelines is therefore to further those goals.

1.2 Construction

a. These Guidelines shall be liberally construed to further the goals of the Tribal Land Policy. *See* Rule 1.1(b).

b. Unless otherwise noted, all statutory references are to the laws of the State of California.

c. These guidelines do not address whether an Investor Owned Utility should place an easement on utility-owned land before disposing of that land. The Commissioner will consider whether an easement should be placed on any particular land on a case-by-case basis when the Utility asks for authority to dispose of the land.

1.3 Definitions

For purposes of these Guidelines, unless the context otherwise requires—

a. "Ancestral territory" means the territory designated by a tribe and submitted to the Native American Heritage Commission (NAHC) to provide to state agencies and local government for notice of projects under Assembly Bill (AB) 52. (2013-2014 Reg. Sess.) Tribes are the primary source for identification of a tribe's ancestral territory. If a tribe

has not designated territory under AB 52, “ancestral territory” for that tribe means territory identified in Vols. 8, 10 & 11 Sturtevent ed., Handbook of North American Indians (1978).[8]

b. “California Native American tribe” or “tribe” means a Native American tribe located in California that is on the contact list maintained by the NAHC for the purposes of Chapter 905 of the Statutes of 2004. (See Pub. Res. Code, § 21073.) This includes both federally-recognized tribes and tribes that are not recognized by the federal government. Nothing in the policy prevents tribes from consulting with other Native American groups that demonstrate an ongoing connection to a specific place or cultural resource, or issue falling under the jurisdiction of the Commission.

c. “Chairperson” means a tribe’s highest elected or appointed decision-making official, whether that person is called chairperson, or president, or some other title.

d. “Disposition” means the transfer, sale, donation, ~~encumbrance,~~ or disposition by any other means of a~~n estate~~ fee or easement interest in real property, except for easements or land exchanges for utility purposes, lease and mortgage or other lending transactions.

e. “Indian country” means “(a) all land within the limits of any Indian reservation under the jurisdiction of the United States Government, notwithstanding the issuance of any patent, and, including rights-of-way running through the reservation, (b) all dependent Indian communities within the borders of the United States whether within the original or subsequently acquired territory thereof, and whether within or without the limits of a state, and (c) all Indian allotments, the Indian titles to which have not been extinguished, including rights-of-way running through the same.” (18 U.S.C. § 1151.)

f. “Investor-owned utility” (IOU) means “private corporations or persons that own, operate, control, or manage a line, plant, or system for the transportation of people or property, the transmission of telephone and telegraph messages, or the production, generation, transmission, or furnishing of heat, light, water, power, storage, or wharfage directly or indirectly to or for the public, and common carriers.” (Cal. Const., art. XII, § 3.)

g. “Real property” means any IOU real property whose disposition is subject to approval under Section 851 of the Public Utilities Code.

h. “Request for approval” means an IOU’s submission, whether under the formal application process or the informal advice letter process, requesting Commission approval of the disposition of real property under Section 851 of the Public Utilities Code.

i. “Right of first refusal” means that the IOU disposing of real property must contact the tribe or tribes whose ancestral territory ~~is on or adjacent to~~ includes the real property, and must provide the tribe or tribes the right to ~~take or refuse~~ purchase the real property, or in the case of a donation, accept the donation, before the IOU can seek third-party purchasers for the real property.

1. [8] The Sturtevant books are a 15-volume reference work in Native American studies, edited by William C. Sturtevant, and published by the Smithsonian Institution. Volumes 8, 10, and 11 cover “California,” “the Southwest,” and “the Great Basin,” respectively.

1.4. IOU Tribal Website

Each IOU shall create and maintain a website that will serve as a repository for the documentation described in these guidelines.

2. NOTIFICATION

2.1 Notification Generally

When an IOU decides to dispose of real property, before it submits a request for approval to the Commission, the IOU shall notify any relevant tribe or tribes that it intends to dispose of the property.

2.2 IOU to Identify Relevant Tribe or Tribes

a. The IOU shall submit a written request to the NAHC to identify tribes relevant to the territory ~~on~~ within which the real property lies.

b. If the NAHC fails to respond within ~~90~~ 30 days, or if the NAHC's response is inconclusive:

i. The IOU shall use its best judgment and experience to determine whether ~~If~~ the real property is located within ~~or adjacent to~~ a federally-recognized tribe's Indian country, and the IOU shall provide notice to that tribe.

ii. If the real property is not located within ~~or adjacent to~~ a federally-recognized tribe's Indian country, the IOU shall provide notice to any tribe or tribes ~~on~~ within whose ancestral territory the real property lies using as its reference Vols. 8, 10 and 11 Sturtevent, Handbook of North American Indians, (1978).

2.~~2~~ 3 To Whom Notice Directed

The IOU shall notify the tribal chairperson of any relevant tribes, or the chairperson's designee.

2.~~3~~ 4 Contents of Notice

The notice shall include, in plain language:

a. The location and a brief description of the real property at issue;

b. The reason the IOU is disposing of the real property;

c. A statement telling the tribe that they have a right of first refusal on the real property before the IOU may put the real property on the market;

d. An offer to consult with the tribe regarding the tribe's interest in acquiring the real property; and

e. Contact information of an IOU representative who is sufficiently knowledgeable about the real property to answer any questions the tribe might have, so that the tribe can decide whether it is interested in acquiring the real property.

f. A form Letter of Intent and Term Sheet (LOI) for use by the tribe in the preparation of a written offer to acquire the real property. The LOI will be used by the tribe to provide fundamental information regarding the tribe's interest and to delineate specific desired terms of the real property acquisition.

Notice shall be delivered by USPS certified mail, return receipt.

2.4 5 Notice to be Publicly Available

When the IOU sends notice to a relevant tribe, the IOU shall also post the notice on its tribal website.

2.6 Exercise of Right of First Refusal

a. Tribes shall have 30 days to respond to the notice provided by the IOU as to the tribe's interest in acquiring the real property. Any tribe that elects to exercise the Right of first refusal shall provide the IOU with a completed LOI as described in 2.3 f. above within 90 days of receiving the IOU's notice.

b. The tribe electing to exercise the Right of first refusal and the IOU shall conduct good faith negotiations to reach agreement on reasonable terms for the Disposition consistent with Commission policy.[1] In the event the terms cannot be agreed upon following good faith negotiations, the IOU may put the real property on the market, with the Disposition subject to the Commission's approval under Section 851.notice.

2.7 Exception to Right of First Refusal

The requirement that IOUs provide the relevant tribe(s) with a Right of first refusal, shall not apply under the following circumstances:

a. If the IOU determines that Disposition of the real property to another entity is necessary to achieve IOU operational requirements, or to comply with any law, rule, or regulation;
b. If the IOU determines that Disposition of the real property to another entity would be in the public interest; or
c. If the IOU initiates a competitive process to sell property that has an expected market value in excess of $5 million.
d. If the proposed Disposition is a donation of fee and/or conservation easement interests in real property necessary to implement PG&E's Land Conservation Commitment in accordance

[1] Such terms may include conditioning the Disposition on compliance with all applicable laws, rules and regulations, and requiring the Tribe(s) to provide a limited and/or partial waiver of its sovereign immunity with respect to the enforceability of Disposition-related agreements between the IOU and Tribe(s).

with Commission Decision D. 03-12-035 and related implementing decisions by the Commission.

In such cases, the IOU shall notify any relevant tribe or tribes that it intends to dispose of the property and include the such tribe(s) on the service list of any Section 851 application or advice filing seeking approval of such Disposition and said Section 851 application or advice filing must include evidence supporting its determination. In addition, if Section 2.7(c) applies, the relevant tribe(s) must be provided the opprotunity to participate in the competitive sale process.

3. REQUESTS FOR APPROVAL

3.1. Filing

a. If an IOU submits a request for approval under Section 851, the request must show that the IOU provided notice and consultation to the interested tribe or tribes or that it otherwise served notice of the Section 851 application or advice filing as provided in Section 2.6. The required showing includes:

i. A copy of the IOU's written request to the NAHC to identify ~~interested~~ relevant tribes;

ii. A copy of the IOU's written notice to any ~~interested~~ relevant tribal chairperson or their designee with USPS receipt;

iii. Documentation of any consultation between the IOU and the tribe or tribes~~.~~;

iv. Satisfactory demonstration in its Section 851 application or advice filing that it is not required to provide a Right of first refusal; or

v. Satisfactory demonstration in its Section 851 Application or advice filing that it conducted good faith negotiations with the tribe electing to exercise the Right of first refusal and was unable to reach agreement on reasonable terms for the Disposition consistent with Commission policy.

b. If the IOU does not meet that showing, and if it is unable to cure those deficiencies, the Commission may, in its discretion:

i. Identify any interested tribes, provide them with notice of the proceeding and an opportunity to comment;

ii. Direct the IOU to identify, notice, and consult with any interested tribes; or

iii. Reject the request for approval without prejudice.

3.2 Tribal Participation

a. The Commission will encourage interested tribes to participate in these proceedings.

b. Commissioner staff and Administrative Law Judges will ensure that any comment provided by a tribe is submitted into the record of the proceeding, consistent with the confidentiality provisions set forth in the Commission's Tribal Consultation Policy.

c. If the request for approval is an advice letter filing, any comment submitted by the tribe shall be appended to ~~the draft~~ any Resolution or other authorization disposing of the advice letter filing.

3.3 Presumption in Favor of Tribe

When an IOU requests approval to dispose of real property lying in a tribe's ancestral territory, the Commission will presume that the tribe is the preferred transferee, and that the transfer to the tribe is in the public interest, absent a finding supported by evidence:

a. That the tribe is not interested in acquiring the real property (e.g., that the tribe declined consultation with the IOU or confirmed that it is not interested);

b. That the IOU acted in good faith and, after reasonable effort, was unable to agree with the tribe on reasonable terms for the transfer of the real property;

c. That transfer of the real property to another entity is necessary to achieve IOU operational requirements, or to comply with any law, rule, or regulation; or

d. That transfer of the real property to another entity would be in the public interest or the interests of the IOU's ratepayers as a whole.

3.4 Impacts on Cultural Resources

As part of its review of any request for approval, the Commission will carefully consider any comments regarding potential impacts on tribal cultural resources, or suggesting measures that would mitigate those impacts. This applies whether the proposed transfer is to the tribe or to a third party.

4. DISPUTE RESOLUTION

4.1 Disputes Generally

It is the Commission's intent that, where possible, disputes be resolved informally, by discussion between the IOU and any interested tribes.

4.2 Disputes About Notice

If there is a dispute about the tribe or tribes that the IOU must notice, or about the extent of any tribe's ancestral territory, the IOU shall attempt to resolve the dispute through discussion with the tribe or tribes raising the dispute. If discussion is unable to resolve the dispute, the IOU shall use its best judgment to determine how to proceed with the required notification. The IOU shall document any steps it takes to resolve such a dispute, and the reasons for any determination that it makes.

4.3 Multiple Interested Tribes

If, following notice from the IOU of the proposed Disposition of real property,~~:~~ more than one tribe seeks ~~ownership of available~~ to acquire such real property, and if the tribes are unable to resolve the dispute themselves, the IOU shall engage in meaningful consultation with the tribes to attempt to resolve the dispute. If that consultation fails to resolve the dispute, the IOU, ~~in consultation with the tribes,~~ shall propose a reasonable resolution to the dispute to the Commission as part of its request for approval. The IOU will take into consideration each tribe's connection to the surplus property at issue; the current use of the property; the proposed use after transfer; and any other relevant considerations raised by the IOU, tribes, and any other stakeholder to the disposition of the real property

5. QUARTERLY REPORTS

5.1 Quarterly Reports

a. The IOUs shall, every quarter, provide the Commission with 1) an updated list of recent real property dispositions; 2) a list of upcoming anticipated real property dispositions; and 3) a summary of tribal contacts and consultations (including the outcome of those consultations) they have undertaken over the previous quarter.

b. These reports shall be due on January 1, April 1, July 1, and October 1. If the due date falls on a weekend or holiday, the report shall be due the following business day.

c. The utilities shall post these reports to their tribal website. The Commission will also post the reports on its own website.

6. EVALUATION OF GUIDELINES

The Commission shall evaluate these Guidelines annually to identify any modifications that may be appropriate to apply lessons learned from the preceding year, provide clarity and efficacy of the requirements or to otherwise enhance opportunities to implement Policy objectives.

GOODIN,
MACBRIDE,
SQUERI & DAY, LLP

Megan Somogyi, Attorney at Law

August 24, 2020

Energy Division Tariff Unit
California Public Utilities Commission
505 Van Ness Avenue
San Francisco, California 94102
EDTariffUnit@cpuc.ca.gov

Re: County of San Luis Obispo's Comments on Draft Resolution E-5076 (Tribal Land Transfer Policy)

In accordance with the provisions of General Order 96-B, and the Comment Letter for Draft Resolution E-5076, the County of San Luis Obispo submits its opening comments on the proposed implementation guidelines for the Commission's Tribal Land Transfer Policy. The County supports the purpose and goals of the Policy, but has some concerns about the practical implications of certain draft implementation guidelines.

Tribal Consultation After an 851 Application is Filed

The County supports the Commission's goal of facilitating Tribes' participation in proceedings involving utility property that is relevant to the Tribes' interests. It would be helpful, however, for the Commission to provide additional information about how it envisions the late entry of a Tribe into a proceeding impacting the utility's proposed sale or disposition of that property. The Draft Resolution states that it will give special consideration to Tribal government requests to participate in 851 proceedings, and that, where the Tribe has not received notice from the utility of the proposed sale, the Commission will require meaningful consultation with the Tribal government to determine whether the Tribe is interested in acquiring the real property at issue.[1] That statement appears to contemplate superseding a fully negotiated sale or transfer after the utility has submitted its application for approval of the transaction. If the Commission does intend that to be a possible outcome, the utilities, Tribes, and any other potential stakeholder will need additional guidance on how the Commission intends the Tribal intervention process to work. If the parameters of when a transaction can be superseded are not clear, the County expects that will have a chilling effect on future sales and transfers. It is in the ratepayers' best interests that utilities are able to dispose of property that is no longer necessary to provide utility service, and it is in all stakeholders' interests that any transaction have as much certainty as possible. This may be an appropriate topic for a workshop.

[1] Draft Resolution E-5076, p. 5.

T 415.392.7900 F 415.398.4321
www.goodinmacbride.com
505 Sansome Street, Suite 900 | San Francisco, CA 94111

Direct 415.765.8429
E msomogyi@goodinmacbride.com

Disposal of Utility Property in the Public Interest

The County believes the proposed guidelines would benefit from greater clarity regarding presumption that the Tribe is the preferred transferee and the evidentiary showings that can rebut that presumption.[2] In particular, the provision allowing the presumption in favor of the tribe to be rebutted by a showing that the transfer of the property at issue to another entity would be in the public interest raises several questions for the County. Government entities, such as the State Parks Department, the state university system, and counties and cities, are often in a good position to take ownership of land formerly owned by public utilities, due to their experience managing and maintaining real property, infrastructure, and conservation areas, and due to their comparatively secure financial status. Because the provision allowing transfer to another entity in the public interest is broadly written, it is not clear whether such a public interest finding could be made in circumstances where a Tribe was willing and able to purchase the property. Such a circumstance might occur where the property at issue could be given a conservation easement, where bodies of water on or adjacent to the property raise public trust doctrine issues, or where the property could be dedicated to public use as a park or university facility. If the public interest can be served by either transferring the utility property to a Tribe or to another entity, it is not clear from the draft guidelines how such an issue would be resolved.

This potential conflict was raised by participants in the March 24, 2020 workshop, but the Draft Resolution and proposed guidelines do not appear to shed any additional light on how the Commission would proceed in that situation.[3] Additional discussion in the final Resolution of how the Commission will assess the public interest when reviewing the utilities' Section 851 applications will provide the parties with greater certainty and will relieve the Commission of having to address the same question when it inevitably rises in the future. This issue would also benefit from further discussion during the implementation workshop.

Dispute Resolution

The County shares the concerns raised by several parties during the earlier phases of developing the Tribal Land Transfer Policy that disputes may arise between Tribes as to their claims to certain utility property, and those disputes will likely be challenging to resolve. While the Draft Resolution believes that the dispute resolution provisions in the draft guidelines offer adequate initial guidance to the utilities to resolve such disputes,[4] those provisions appear to leave a number of issues unaddressed.

As the County understands it, the best source of information available to the utilities about the Tribes in whose ancestral territory the property to be disposed of lies is the Native American Heritage Commission (NAHC); the draft guidelines' requirement that the utilities provide evidence of their requests for information from the NAHC appears to support

[2] Draft Resolution E-5076, p. 24 (Section 3.3).
[3] *Id.* at pp. 10–11.
[4] *Id.* at p. 13.

this.[5] Based on the utilities' probable lack of expertise regarding the Tribal interests involved in a particular property, it is not clear that the utilities are the appropriate entities to be responsible for brokering a resolution to disputes between Tribes regarding their ancestral territories. From a transaction negotiation standpoint, the utilities are certainly equipped to negotiate with and between the various parties interested in acquiring utility property. But transactions involving the ancestral territories of multiple Tribes are likely to include issues more complicated and sensitive than are normally inherent in real estate transactions, and those considerations will have significant weight under the Tribal Land Transfer Policy.

The dispute resolution process in the guidelines is also unclear. The draft guidelines appear to contemplate a scenario where the utility, after failing to resolve the dispute between the Tribes, must—in consultation with the tribes—present the Commission with a proposed resolution to the dispute rather than a traditional 851 application that presents a fully negotiated transaction.[6] As a preliminary matter, the County is not certain that, having failed to reach an agreement about the property disposition, the Tribes and the utility will be able to successfully consult and present a proposed resolution to the Commission. Once the proposed resolution, however it was reached, is provided, it is not clear exactly what the utility must present or how the Commission will proceed. If the utility's proposed solution picks a winner, so to speak, must the utility also negotiate and present the terms of the transfer with that Tribe or entity? Or does the Commission only intend to evaluate whether the utility's choice was reasonable, before sending the parties back to negotiate the terms? What level of certainty will the Tribes and other entities have that the time and resources they invest in the negotiation process—which may be considerable where financing and purchase and sale agreements are involved—will not be for naught if the Commission decides the utility chose unwisely? And presumably, any solution proposed by the utility where no agreement could be reached among Tribes with competing interests will be contested. Does the Commission itself have the expertise to arbitrate issues involving Tribes' ancestral territories?

As the dispute resolution process is currently structured in the draft guidelines, it appears to be ripe for uncertainty and some amount of turbulence. The County believes this part of the guidelines would benefit from further development during a workshop.

Recommended Workshop Topics

As is noted above, the County recommends the following topics for workshops on the implementation guidelines:

- The process for Commission consideration of a Tribe's intervention in a proceeding and assertion of an interest in the property being disposed of, after the transaction has been negotiated and submitted for approval;

[5] Draft Resolution E-5076, p. 22 (Section 2.2).
[6] *Id.* (Section 4.3).

- The relationship between the presumption that Tribes are preferred transferee and the provision allowing transfer to a different entity if that transfer would be in the public interest; and

- The mechanics and parameters of the utility-led dispute resolution process between Tribes;

Notice Period

The County believes the proposed 90-day notice period for Tribes to assess the property to be disposed of is reasonable.

Conclusion

The County appreciates the Commission's efforts to adopt the Tribal Land Transfer Policy and to create the draft implementation guidelines. Given the importance of the ancestral, financial, and transactional interests involved in disposing of utility property under the Policy, the County looks forward to the upcoming workshop(s) and to seeing more detailed guidance from the Commission.

Very truly yours,

GOODIN, MACBRIDE,
SQUERI & DAY, LLP

/s/ Megan Somogyi

Megan Somogyi

cc: Michael Rosauer, CPUC Energy Division, michael.rosauer@cpuc.ca.gov
Mary Jo Borak, CPUC Energy Division, BOR@cpuc.ca.gov
Service List, Resolution E-5076

2326/006/X218896.v1

SOUTHERN CALIFORNIA EDISON®
An EDISON INTERNATIONAL® Company

Gary A. Stern, Ph.D.
Managing Director, State Regulatory Operations

August 21, 2020

Energy Division
Attention: Tariff Unit
California Public Utilities Commission
505 Van Ness Avenue

Re: Comments of Southern California Edison Company on Draft Resolution E-5076

Dear Energy Division Tariff Unit,

Pursuant to Rule 14.5 of the California Public Utilities Commission (Commission or CPUC) Rules of Practice and Procedure (Rules), Southern California Edison Company (SCE) appreciates the opportunity to comment on Draft Resolution E-5076 entitled, "Adoption of Guidelines to Implement the CPUC Tribal Land Policy consistent with Executive Order B-10-11 and the CPUC Tribal Consultation Policy, The Tribal Land Policy, and Public Utilities Code Section 851." In these comments, SCE recommends the Commission abate these proceedings in favor of a formal rulemaking both as to the Tribal Land Policy and Guidelines. SCE strongly urges the Commission to consider completing formal rulemaking to ensure there is opportunity for all stakeholders to participate in the process. In the alternative, SCE recommends that the Commission exempt conveyances of easements, leases, and other interests granted by the Investor Owned Utilities (IOUs) to third parties pursuant to General Order (GO) 69-C and 173 from the Tribal Land Policy and Guidelines, provide specific timelines for IOU notifications of property dispositions to Tribes and Tribal responses, and make a number of clarifications to the Guidelines as set forth in SCE's prior comments and supplemental comments provided below.

I. Abate Current Proceedings and Follow Formal Rulemaking Process

SCE supports the Commission's goal of meaningful consideration and prioritization of land transfers from IOUs to California Native American Tribes with historical interest in the land. Unfortunately, the path taken thus far has created a number of both legal and practical obstacles that must be addressed prior to final adoption of the Guidelines. These obstacles are more fully set forth in the joint letter to the Commission sent by SCE, Southern California Gas Company, and San Diego Gas & Electric Company dated July 13, 2020 (the Joint Objections). The Joint Objections were sent in response to the

Commission's proposed adoption of changes to the Commission's Rules of Practice and Procedure intended to implement the Tribal Land Policy. The arguments raised in the Joint Objections also apply to the adoption of the Guidelines and are therefore incorporated herein.

As set forth in the Joint Objections, the Commission's process and procedure on adopting the Tribal Policy prior to finalizing Guidelines (which themselves set forth additional substantive requirements) has been performed in reverse of accepted administrative practice. SCE therefore respectfully urges the Commission to suspend this proceeding in favor of a formal rulemaking process. The formal rulemaking process should provide a meaningful opportunity for all stakeholders (including the IOUs, local governments, the Tribes, and other members of the public) to participate in the process. Additionally, SCE urges the Commission to review and address the voluminous comments previously provided as the majority of objections and concerns identified with the Policy and Guidelines have not been addressed. The failure to do so has and will continue to result in uncertainty and exposes the Policy and Guidelines to legal and practical challenges.

The process by which the Policy, Guidelines, and establishment of a (albeit rebuttable) presumption that land should be transferred to a specified party (Tribe) is susceptible to challenge as being violative of fundamental tenants of due process and equal protection. Such a presumption may also be inconsistent with prohibitions in the Public Utilities Code preventing IOUs from discriminating between customers. See U.S. Const. amend. XIV, § 1; West's Ann.Cal.Const. Art. 1, § 7; Public Utilities Code Section 453(a) ("No public utility shall, as to rates, charges, service, facilities, or in any other respect, make or grant any preference or advantage to any corporation or person or subject any corporation or person to any prejudice or disadvantage."); Joint Utility Letter, pp. 19-20.

SCE reaffirms its commitment to work with the Commission and Tribes to develop a Policy and accompanying Guidelines that are clear, readily capable of being implemented, and that balance the operational needs of the IOUs, the Tribes, local jurisdictions, and the public. A formal rulemaking process preceded by a series of collaborative public workshops would accomplish this goal.

II. Response to Commission Specified Request for Comments [Resolution, Page 13]

SCE provides the following responses to the CPUC's specified request for comments:

1. Will conveyances described in GO 173 and GO 69-C, often of easement rights over IOU land, facilitate a meaningful transfer of land to Tribes?

SCE has reviewed Public Utilities Code Section 851, GO 69-C and GO 173 in the chronological order of their adoption in order to evaluate whether the Tribal Land Transfer Policy should be applied to these conveyances and has included this detailed evaluation as Attachment A to this response letter.

General Order 69-C does not authorize leases, nor does it authorize the sale of real property. Therefore, it is unclear to SCE why such transactions which are most commonly associated with discrete road and utility crossings and licenses for nurseries and other passive uses would frustrate the Commission's goal of returning property to Native American Tribes. As a practical matter, applying the Policy and Guidelines to GO 69-C transactions would result in Tribes being inundated with notices and the grant of rights of first refusal for matters that include easements for road widenings, pipeline crossings, community gardens, and plant nurseries. GO 69-C does not authorize the transfer of fee ownership; therefore, SCE respectfully submits that subjecting such transactions to the Policy or Guidelines will not facilitate a meaningful transfer of land to the Tribes.

The application of the Policy and Guidelines to leases and easement transactions taken pursuant to GO 173 would not facilitate a meaningful transfer of land to Tribes as again, leases and easements do not convey fee ownership. General Order 173 does encompass limited transactions that may convey fee ownership. However, SCE anticipates that such transactions involving the sale of land pursuant to a GO 173 advice letter filing would be discrete and minor. Much like conveyances under GO 69-C, SCE believes the Tribes would be inundated with notices for proposed leases and easements to jurisdictions for various forms of improvements to public and private infrastructure (e.g., road widening easements), which are rights granted to cities and counties and consist of the bulk of SCE transactions pursuant to GO 173. Therefore, SCE finds that conveyances of easements or other interests under either GO 173 or 69-C would, with limited exception, not facilitate a meaningful transfer of land to Tribes.

2. Would inclusion in the [Tribal Land Transfer Policy] of conveyances subject to GO 173 and GO 69-C divert tribal resources that could better be spent examining potentially more meaningful Section 851 conveyances?

SCE cannot speak to the method and manner by which Tribes allocate resources. However, as discussed below, application of the Guidelines in their present form would result in a number of notices and waiting periods for applications that are unrelated to a transfer of fee ownership. SCE respectfully submits that the Policy and Guidelines should be limited to significant fee

conveyances where full Commission review and a Commission Resolution are required.

3. Would inclusion in the [Tribal Land Transfer Policy] of conveyances subject to GO 173 and GO 69-C substantially delay essential IOU operations?

SCE respectfully submits that subjecting conveyances pursuant to GO 173 and 69-C could substantially delay essential IOU operations. The development program for SCE's capital infrastructure frequently requires the acquisition or disposition of easements or the relocation of existing systems of other IOUs. Improvements or expansions of gas or water facilities may require new or enlarged easements to access or cross other utility rights-of-way. Such easements may be addressed pursuant to GO 69-C or 173 and therefore would be subject to the Policy and Guidelines, delaying these essential projects.

Similarly, the inclusion of minor and discrete conveyances of easements or leases to local governments pursuant to GO 173 and 69-C will add considerable delay to local projects and may further jeopardize the state and local government's receipt of federal funding. For example, SCE is presently permitted to provide a jurisdiction with temporary access rights to complete a road widening without further Commission approval, pursuant to GO 69-C. However, the Policy and Guidelines expressly encompass transactions taken pursuant to GO 69-C and would require the 90-day NAHC engagement process and subsequent Tribal consultation. Applying the Policy and Guidelines to all GO 173 and GO 69-C transactions may result in a project delay or cause the state or local government to engage in condemnation as opposed to collaborating with the IOUs.

4. What is the appropriate application of the [Tribal Land Transfer Policy] to GO 173, and GO 69-C conveyances and to easements in real property?

As discussed more fully above and in Attachment A, SCE respectfully submits that the Guidelines and Policy should exempt all conveyances made pursuant to GO 173 and GO 69-C. SCE recommends the Guidelines not extend beyond a transfer of fee ownership or a long-term lease resembling the transfer of fee ownership (e.g., a lease for a term longer than 50 years).

The Tribal Land Transfer Policy contemplated Commission preference for the transfer of Real Property to Tribes when an IOU plans to "dispose" of Real Property within a Tribe's ancestral territory (Resolution, p. 4). However, SCE understood the term "dispose" in the context of the Tribal Consultation Policy to mean a formal sale of a fee interest or a long-term lease that more closely resembles a fee interest (e.g., a lease for a term longer than 50 years).

Public Utilities Code Section 851 encompasses a variety of transactions including the sale, lease, assignment, mortgage, or other dispositions or encumbrances of real property that are "necessary or useful in the performance of the IOUs duties to the public." The Resolution describes the purpose of the Right of First Refusal as being implemented "before putting the property on the market." (Resolution, p. 4). This text appears to assume that the IOU is actively marketing the property for sale or long-term lease. The Resolution also notes that the Guidelines are intended to ensure that the Tribe will have enough information to determine "whether it is interested in purchasing the Real Property." (Resolution, p.5). Exempting the conveyance of easements, licenses, and minor property sales does not appear to be inconsistent with the Commission's primary intent which again appeared to have been to facilitate the transfer of fee ownership to a Tribe.

None of the limited and largely revocable grants made pursuant to GO 69-C involve the conveyance of fee interests in property.

GO 173 does allow for the sale of land (a fee interest) provided the value does not exceed $5 million. Requests for lease approval may not be for 25 years or more or valued over $5 million. Therefore, leases made pursuant to GO 173 do not resemble a long-term transfer of real estate that would be comparable to the transfer of fee ownership (e.g., a lease for a term longer than 50 years). Additionally, GO 173 empowers Commission staff to refer an advice letter filing to the Commission for formal approval under Section 851 if the Commission's staff believe there are issues at stake meriting Commission review. The Commission could therefore clarify that advice letter filings under GO 173 are generally exempt from the Tribal Policy and Guidelines unless staff determines that a sale of land (the fee interest) of a large or particularly significant parcel is at issue. In that case, the matter could both be referred to the Commission for formal approval pursuant to Section 851 and the Tribal Policy and Guidelines would then be made applicable.

5. The CPUC also expressly seeks comment from all interested parties on the appropriate timeline for noticing and consultation. The Draft Guidelines attached adopt a 90-day notice period for the Tribes to effectively assess property issues. If a shorter notice period would suffice without impairing the Tribes' assessment of property issues, the Commission could modify the Draft Guidelines based on comment.

The Draft Resolution identifies a 90-day window for an initial response from the Native American Heritage Commission (NAHC)[1] but is silent on the timeframe for

[1] See E-5076 Draft Comment Resolution, p. 22 Section 2.2b IOU to Identify Relevant Tribe or Tribes.

the Tribes to respond to the subsequent IOU notice of disposition of real property. As previously recommended in SCE's April 30, 2020 comment letter,[2] SCE proposes the Guidance direct IOUs contact the NAHC for an updated referral list on a quarterly basis, which minimizes the burden on the NAHC and streamlines the 90-day timeframe. SCE further notes that Tribes should be given a time certain within which to respond with any form of interest in the transaction and recommends a 30-day time period for Tribal response.

6. If an IOU properly notifies a Tribe of a forthcoming disposition, and if the Tribe does not respond, should the Commission adopt a specific period of time for the IOUs to hold the offer to the Tribe open to fulfil its obligations under the TLTP?

As described above, SCE recommends that the Commission adopt a 30-day period for the initial notification to the Tribe, and if the Tribe does not respond, the IOU provide a follow-up notification and allow for a 10-day response period. The failure to respond should at a minimum authorize the IOU to proceed with its filing.

III. Supplemental Comments

SCE previously commented on the draft Tribal Land Transfer Policy (Policy) and prior drafts of the Implementing Guidelines (Guidelines) on October 11, 2019, November 16, 2019, and April 30, 2020, all of which are incorporated by reference. SCE continues to assert the previous comments were not addressed within the revisions to the Guidelines and Draft Resolution and request the Commission address the comments prior to adopting the Draft Resolution. SCE respectfully supplements its prior comments as follows:

[Draft Resolution, Page 1] Although the Resolution advises that the cost of implementing the Policy is not presently known, SCE firmly believes that both the Policy and Guidelines will add expense associated with delays to potential projects, as discussed above. SCE also believes that there will be significant administrative cost if all conveyances granted pursuant to GO 69-C or GO 173 are made subject to the Guidelines and therefore recommends the Guidelines not be applied to those conveyances.

[Draft Resolution, Page 3] SCE agrees that there has been notice to some of the stakeholders and sporadic public outreach and meetings. However, no meaningful engagement has been made with other stakeholders which should include counties and cities who frequently request conveyances to support county and municipal uses. Given that the Guidelines impact and implicitly modify the requirements of at least two General Orders (GO 69-C and 173), SCE

---

[2] See Southern California Edison's Comments on the Draft Guidelines to Implement the CPUC Tribal Land Policy, p. 2.

believes the Commission should engage in formal rulemaking with broader public outreach.

[Draft Resolution, Page 6] The Resolution states that the Guidelines address disputes between competing Tribes through requiring that the IOU or the CPUC engage in "meaningful consultation" to attempt to resolve the dispute. However, the only standard provided within the Guidelines is that the IOU engage in a "meaningful consultation," there is no mention of CPUC involvement in dispute resolution.[3] The Draft Resolution proclaims that "Only the Tribes can provide the evaluation of each land opportunity presented, and only they can determine the spiritual, symbolic, or cultural value that each available parcel of land holds for a specific Tribe" (Resolution, p. 15). The IOUs are not in a position to dispute a Tribe's ethnographic affiliation with land to be disposed, nor should they be required to award a land transfer to one Tribe over another. As SCE previously recommended, the Guidelines should identify the Commission as responsible for determining Tribes' connection to the subject property through government-to-government consultation with interested tribes.[4]

[Draft Resolution, Page 9] The Resolution summarizes concerns expressed by both the IOUs and Tribes that the definitions remain unclear, such as the term "adjacent to a Tribe's aboriginal territory." The Resolution and Guidelines attempt to address part of this concern by referring to the consultation process set forth in the Guidelines. However, the term "adjacent to" remains ambiguous and unclear.

The Resolution further states, "The Draft Guidelines are intended to provide guidance necessary to effectively and efficiently implement and further the goals of the Commission's [Policy]. Many of the clarifications…requested by the commenters is provided in Section 1.3 of the Draft Guidelines." SCE respectfully submits that Section 1.3 does not address the voluminous comments previously provided to the Commission thus rendering the Resolution, Guidelines, and Policy subject to challenge and rendering them unworkable in their present form.

[Draft Resolution, Page 12] The Resolution attempts to clarify that the IOUs' understanding of the term "right of first refusal" is akin to the IOUs' understanding of a "right of first offer." The Resolution states, "The Draft Guidelines define 'right of first refusal' to mean 'that the IOU disposing of real property must contact the Tribe or Tribes whose ancestral territory is on or adjacent to the real property, and must provide the Tribe or Tribes with the right to take or refuse the real property, before the IOU can seek third-party purchasers for the real property. The CPUC believes this addresses the IOUs' concerns." SCE respectfully submits that the text does not address this significant concern. The terms "right

---

[3] See E-5076 Draft Comment Resolution, p. 25 Section 4.3 Multiple Interested Tribes.
[4] See Southern California Edison's Comments to the Draft Guidelines to Implement the CPUC Tribal Land Policy, April 30, 2020, p. 3.

of first refusal" and "right of offer" are legal terms of art. Each term has a distinct legal meaning.

The definition given by the Guidelines for a "right of first refusal" closely matches the understanding of the term given by California courts with one notable omission. Generally, a right of first refusal requires that the third party (in this instance the Tribe) submit an offer that matches the exact offer put to the other entity. By contrast, a "right of first offer" gives the third party (the Tribe) notice of the transaction and the ability to submit its proposal or offer. The Guidelines remain unclear as to whether or not the Tribe must match the offer given or that they merely be notified of the transaction. The Guidelines establish that the Tribes are given a "right to take or refuse the real property." Either the Commission should provide appropriate contours commensurate with such a "right" (a like for like transaction) or the Commission re-classify the right as a "right of first offer." SCE notes that a right of first refusal would likely be unworkable to the extent SCE was desirous of entering into negotiations for a land-swap if it needed a particular parcel not owned by a Tribe to construct a project or if a public agency needed a specific parcel from SCE (e.g., to expand or enlarge an existing park or other public amenity). SCE further notes that it is frequently approached by third parties which may include local governments or developer who may need an easement for a specific purpose. For example, a developer may ask SCE for an easement over SCE's property to ensure vehicular access to their property. In such a situation it is unclear what benefit a Tribe would see if it either had a right of offer or right of first refusal for an easement the Tribe did not request.

[Draft Resolution, Page 14] The Draft Resolution identifies several concerns raised by Tribes regarding the consultation process but does not provide resolution for these concerns. The Draft Resolution states "the CPUC believes it is important to hold an additional implementation workshop immediately following the formal adoption of the TLTP Guidelines, to address consultation and other implementation issues." However, SCE notes the concerns related to consultation and implementation of the Guidelines are substantial and should be addressed through revisions to the Guidelines prior to CPUC adoption of the Draft Resolution, rather than after the adoption of this Resolution.

[Draft Resolution, Page 25] The Resolution revises the previous reporting requirement from an annual basis to a quarterly reporting basis and requires a list of upcoming and anticipated real property dispositions. SCE objects given that quarterly reporting may become onerous and it may be inappropriate to signal to either a Tribe or the greater public that SCE is evaluating a potential sale prior to SCE having fully completed its review of the feasibility of doing so. SCE recommends the Commission provide guidance as to what would constitute an upcoming or anticipated real property disposition and return to an annual basis frequency.

To the extent of a dispute between multiple interested Tribes (Resolution Section 4.3), the Guidelines require that the IOU engage in "meaningful consultation" and "propose a reasonable resolution." These terms are entirely subjective and require that the IOU attempt to mediate a dispute on matters for which it lacks expertise and may be accused of showing favoritism to one Tribe over another. SCE instead recommends the Resolution require IOUs to provide each Tribe notice and the opportunity to submit offers in those instances where an IOU is selling operational property without need for a specific parcel from a third party (e.g., a land swap) and where the primary motivation of the transaction is profit as opposed to operational need of the purchaser.

IV. Conclusion

SCE respectfully submits that the Commission should suspend the present proceeding and engage in formal rulemaking. It is evident that the Resolution implicitly amends other GOs and the proposed Resolution and Guidelines are subject to considerable legal and practical challenges. In the absence of suspending this proceeding, SCE recommends the Policy and Guidelines should be applied to significant GO 173 fee conveyances where full Commission review and a Commission Resolution are required, the Commission identify specific timelines and process for Tribal consultation, and the Commission address SCE's concerns identified in previous comment letters and the supplemental comments included herein. SCE thanks the Commission for the opportunity to provide its comments and concerns.

Southern California Edison Company

/s/ Gary A. Stern
Gary A. Stern, Ph.D.

GAS:lc:cm

cc: Edward Randolph, Director, CPUC Energy Division
Franz Cheng, CPUC Energy Division
Michael Rosauer, CPUC Energy Division
Mary Jo Borak, CPUC Energy Division
Service List for Draft Resolution E-5076

Attachment A

SCE's evaluation of Public Utilities Code Section 851, General Order 69-C and General Order 173 in the chronological order of their adoption.

Public Utilities Code Section 851

The available legislative history suggests that Public Utilities Code Section 851 was adopted in 1951. Section 851 in pertinent part requires Commission approval of the sale, lease, assignment, mortgage, or other disposition or encumbrance of "…the whole or any part of its…line, plant, system, or other property necessary or useful in the performance of its duties to the public…." Per its terms, this Section empowers the Commission to approve such transactions in order to protect customers and ratepayers. For example, Commission approval may be needed to ensure that service to customers not be abandoned. In addition, the Commission reviews such applications to ensure fairness to the ratepayers.

General Order 69-C

Given the breadth of transactions covered under Section 851, the Commission adopted General Order 69 at some point in the 1950s. See e.g., *Bornholdt v. Southern Pacific Company*, 327 F. 2d 18 (9th Cir. 1964). General Order 69 gave IOUs limited permission to grant discrete real property rights to third parties. The General Order has been updated several times. The latest iteration of the Order was adopted in 1985 (General Order 69-C (GO 69-C)). The Order authorizes IOUs to grant "easements, licenses or permits for use or occupancy on, over, or under any portion of the operative property of said utilities for rights of way, private roads, agricultural purposes, other limited use…whenever it shall appear that the exercise of such easement, license or permit will not interfere with the operations, practices, and services of such public utilities." However, any grant of right made pursuant to General Order 69-C is **expressly conditioned** on either the utility or Commission's right to "Commence or resume the use of the property in question whenever, in the interest of its service to its patrons or consumers, it shall appear necessary or desirable to do so."[1] The condition may therefore result in either the IOU or the Commission revoking the grant. *See, Bornholdt v. Southern Pacific Company*, 327 F. 2d 18 (9th Cir. 1964) (upholding revocation of lease granted pursuant to General Order 69).

General Order 69-C does not authorize leases nor does it authorize the sale of real property. Therefore, it is unclear to SCE why such transactions which are most

[1] It should be noted that the condition is not applicable to grants made to governmental entities for a governmental use.

commonly associated with discrete road and utility crossings and licenses for nurseries and other passive uses would frustrate the Commission's goal of returning property to Native American Tribes. As a practical matter, applying the Policy and Guidelines to GO 69-C transactions would result in Tribes being inundated with notices and the grant of rights of first refusal for matters that include easements for road widenings and pipeline crossings and licenses for community gardens and plant nurseries.

General Order 173

Presumably due to the volume of various property conveyances by IOUs, the legislature adopted amendments to Public Utilities Code Section 851 in 2009 and 2010 ultimately authorizing the Director of the Commission or division Director (e.g., the Director of the Energy Commission) to approve advice letters authorizing the IOUs to engage in certain real property conveyances valued at $5,000,000 or less. See 2009 (A.B. 698) (An Act to amend Sections 851 and 853 of the Public Utilities Code). General Order 173 appears tailored to implement these revisions to Section 851 of the Public Utilities Code and to expedite several forms of conveyances including fee conveyances, easements, and leases. Such transactions would not typically be subject to revocation as is the case with General Order 69-C. Jurisdictions or third parties may therefore opt for conveyances taken pursuant to General Order 173 to provide greater certainty in their land rights and to persuade lenders that such rights may not be readily terminated.

Per its terms, General Order 173 allows an IOU to dispose of operational property under Section 851 where certain prerequisites regarding environmental review have been met (e.g., the transaction does not involve a project under CEQA or where a statutory or categorical exemption applies or another public agency serves as a lead agency). In addition, the transaction may not have an adverse effect on the public interest or on the IOUs' service to customers at reasonable rates. Finally, the transaction may not have a fair market value in excess of $5 million dollars and/or a lease term in excess of 25 years. It should also be noted that the Commission's staff is reserved discretion to refer the matter to the Commission for further review. For example, Rule 3(k) of General Order 173 prohibits approval by the Director if the transaction warrants a "more comprehensive review through a formal Section 851 approval."

SCE respectfully submits that the bulk of transactions taken by it pursuant to General Order 173 involve the conveyance of leases and easements to third parties including local governments and other entities. SCE anticipates that transactions taken pursuant to General Order 173 involving the sale of fee interest in land would be discrete and minor. This is so because the sale of a substantial parcel would likely be connected to a significant third-party project. As such, Commission staff would be empowered to refer applications for advice letter approval for the sale of a large parcel to the Commission for formal 851 approval. If that were to happen, the Commission could certainly order additional noticing to Tribes or other parties if and where applicable.

Finally, it should be noted that the Policy and Guidelines in their present form may delay conveyances from IOUs to local governments that support parks and other recreational amenities. SCE believes the foregoing amendments to Section 851 and resulting issuance of General Order 173 may have been partially in response to delays in approval sought by SCE to engage in a direct lease of operational property to the City of Bellflower for a public park. See CPUC Decision No. 09-03-037. SCE notes that there was considerable public interest in that application and concerns expressed by legislators regarding delays due to questions of valuation for community parks and the need for formal Commission approval. That same year, the legislature also adopted Public Utilities Code Section 857 which confirmed that the Commission may take recreational value into account when assessing conveyances for parks. Subjecting such discrete transfers (not including the transfer of fee ownership for large parcels) to the Policy and Guidelines coupled with the resulting delays to accommodate notice and consultation would be inconsistent with what appeared to be the legislature's goal of expediting such discrete conveyances.

Clay Faber
Director – Regulatory Affairs
8330 Century Park Court
San Diego, CA 92123-1548

cfaber@sdge.com

August 24, 2020

VIA EMAIL (edtariffunit@cpuc.ca.gov)
Energy Division Tariff Unit
California Public Utilities Commission
505 Van Ness Avenue
San Francisco, CA 94102

Re: Draft Resolution E-5076 - Tribal Land Transfer Policy Implementation Guidelines

Dear ED Tariff Unit:

Pursuant to Rule 14.5 of the Rules of Practice and Procedure of the California Public Utilities Commission (the "Commission"), San Diego Gas & Electric Company ("SDG&E") submits these comments regarding Draft Resolution E-5076 (the "Draft Resolution").

I. INTRODUCTION AND SUMMARY

The Draft Resolution proposes guidelines for implementation of the Commission's Tribal Land Transfer Policy[1] adopted by the Commission on December 5, 2019 ("Policy"). The Policy is based on Executive Order N-15-19, which recognizes a need for examination and documentation of the historical relationship between California Native American Tribes ("Tribes") and the State of California,[2] and Executive Order B-10-11, which requires state agencies to facilitate "communication and consultation with" the Tribes and to ensure the Tribes' ability to provide "meaningful input into the development of legislation, regulations, rules, and policies on matters that may affect tribal communities."[3]

The Policy is intended to achieve four objectives: (i) recognize and respect Tribal sovereignty; (ii) protect Tribal sacred places and cultural resources; (iii) ensure meaningful consideration of Tribal interests and the return of lands within the Tribe's ancestral Territory to the appropriate Tribe; and (iv) encourage and facilitate notice and Tribal participation in matters

---

1 *Investor-Owned Utility Real Property – Land Disposition – First Right of Refusal for Disposition of Real Property Within the Ancestral Territories of California Native American Tribes.*

2 Executive Order N-15-19, adopted June 18, 2019.

3 Executive Order B-10-11, adopted September 19, 2011; *see also* CPUC Tribal Consultation Policy.

before the Commission that involve real property transfers subject to Public Utilities Code Section 851, et. seq. ("Section 851") through either application or advice letter processes.[4] The draft implementation guidelines document attached to the Draft Resolution (the "Draft Guidelines") affirms these goals.[5]

SDG&E strongly supports the policy objectives outlined in the Tribal Land Policy and the Draft Guidelines. SDG&E shares the Commission's commitment to building constructive and effective relationships with the Tribes and to facilitating their engagement in matters that affect tribal communities. SDG&E has sought to establish strong partnerships with the nearly 20 federally-recognized Tribes and three non-federally recognized tribes and groups served within SDG&E's distribution service territory. It maintains a dedicated tribal liaison position, as well as other positions across the company that support tribal communities, to ensure that those partnerships are meaningful and lasting.

Tribal land holdings within the San Diego region cover 193 square miles, accounting for approximately five percent of San Diego County's total area. Given the magnitude of the Tribes' land holdings, the Tribal Land Policy and related guidelines will have a significant impact on SDG&E's operations and, potentially, its customers' rates. The requirements adopted also impact the interests of other stakeholders in the region, including landowners, conservation interests, cities, counties, public agencies, and telecommunications carriers and other utilities, and could affect transactions that are essential to supporting regional affordable housing, conservation, infrastructure, infill development, transit, and other projects. Thus, it is essential that the final guidelines adopted by the Commission are well-conceived and workable from a practical perspective. Final guidelines that are poorly-designed – that include legal infirmities, create ambiguity and/or impose unreasonable obstacles on conveyances – could hamper enforcement and will serve to undermine rather than promote the policy goals outlined in the Policy. A deliberative Commission process that carefully considers and addresses the full range of stakeholder perspectives is the most effective means of ensuring a framework for implementing the Tribal Land Policy that is sound and actionable, and that avoids the type of unintended negative consequences that could threaten its viability.

Accordingly, as discussed in more detail below, SDG&E strongly urges the Commission to establish a formal rulemaking proceeding to develop a policy regarding disposition of IOU fee-owned property subject to Section 851 that is located in a Tribe's ancestral territory. Initiation of a formal rulemaking is particularly important here since few stakeholders were involved in development of the Policy, which forms the basis for the Draft Guidelines. A formal rulemaking will ensure that all interested parties have the opportunity for meaningful participation in development of reasonable and implementable policies, consistent with principles of due process, and that the Commission has an adequate record to adopt findings regarding key legal and factual questions (including, but not limited to, those related to safety and cost). Accordingly, the Commission should suspend the Policy, withdraw the Draft Resolution, and initiate a formal rulemaking to accomplish these objectives.

---

4 Policy, pp. 3-4.

5 Draft Guidelines, Section 1.1.

If the Commission elects not to initiate a formal rulemaking, SDG&E proposes below limited critical modifications to the Draft Guidelines. As discussed below, these modifications are necessary to ensure that the final guidelines are lawful, do not interfere with utility operations or cause undue burden to stakeholders, including the Tribes, and are workable from a practical perspective. Finally, to avoid confusion, the Commission should make clear that upon adoption of final guidelines, those guidelines control in the event of a conflict between the language of the Policy and the rules adopted in the final guidelines.

II. THE COMMISSION SHOULD INITIATE A RULEMAKING TO DEVELOP A POLICY RATHER THAN ADOPT LEGALLY FLAWED DRAFT GUIDELINES

The Draft Guidelines are intended to implement the Policy. As SDG&E explained in comments submitted in response to Commission Draft Resolution ALJ-381, which proposed to incorporate the Policy into the Commission's Rules of Practice and Procedure, the Policy was adopted pursuant to a process that deprived parties of their due process rights and violated the procedural requirements contained in Sections 311 and 1701, *et seq*, as well as the Commission's own procedural rules. Those comments, attached hereto in Appendix B, set forth a comprehensive description of the procedural deficiencies in the Commission's adoption of the Policy. The significant due process violations committed by the Commission in adopting the Policy render it unenforceable. Thus, the proposed guidelines are also unenforceable. Moreover, the same due process deficiencies that characterized adoption of the Policy exist in connection with the Draft Guidelines. It appears that the Commission performed limited service of the Draft Guidelines; it did not, for example, serve any service list associated with the water IOUs, despite the fact that the Draft Guidelines expressly provide that water IOUs are subject to the rules adopted therein. In short, the Commission has, again, failed to provide adequate notice to interested parties and in so doing has deprived them of their right to meaningful participation.

In addition, the requirement that the IOUs grant a preference to Tribes in disposing of real property subject to the Policy appears on its face to violate Section 453(a), which prohibits the IOUs from granting a preference as to rates, charges, service, facilities, "or in any other respect." The California Supreme Court has held that the prohibition on discrimination through granting of preferences must be broadly construed.[6] The Commission does not have the requisite authority to order the IOUs to take action that conflicts with the clear prohibition established in Section 453(a). Putting aside the question of whether Executive Orders N-15-19 and B-10-11 operate with statutory effect, neither makes any mention of granting a preference to Tribes in the disposition of real property subject to Section 851. Likewise, the Commission's general plenary authority conferred by Section 701 does not overcome the specific prohibition in

---

[6] *Gay Law Students Ass'n v. Pac. Tel. & Tel. Co*. (1979) 24 Cal. 3d 458, 480 (noting that "legislative history demonstrates that section 453, subdivision (a)'s prohibition of utility discrimination may not properly be interpreted to apply only to discrimination as to rates or services. After initially enacting legislation that proscribed rate or service discrimination, the Legislature consciously broadened the statutory prohibition to bar utility discrimination 'in any respect whatsoever'; the broadened prohibition has been repeatedly reenacted in revised utility regulatory schemes and is retained by the terms of section 453, subdivision (a) today.").

Section 453(a) against granting of preferences.[7] The Court has noted that "[a]dministrative regulations that violate acts of the Legislature are void and no protestations that they are merely an exercise of administrative discretion can sanctify them."[8]

Equally problematic, the findings contained in the Draft Resolution are inadequate to support the requirements proposed in the Draft Guidelines. In particular, the findings related to safety and economic impact that are statutorily required under Section 321.1 are deficient. For example, as discussed below, the application of the Policy and final guidelines to easements and other non-fee conveyances could have a significant negative impact on the safety-related activities of the IOU. Likewise, the Draft Guidelines would have a material cost impact, however the Commission has failed to develop the record on this issue.

Finally, as discussed below, the Draft Guidelines fail to address the implications of tribal sovereignty in the context of application of the Policy to easements and similar non-fee conveyances or the potential for the rebuttable presumption established under the Policy and Draft Guidelines in favor of the Tribes to run afoul of the constitutional prohibition on regulatory takings.[9] In addition, the Draft Resolution improperly expands the scope of potential applicability of the Policy to conveyances under General Order ("G.O.") 69-C despite the fact that the Policy does not contemplate such action and no record exists to support it.

Given the complexity of the factual, legal and policy issues arising from the proposals contained in the Policy and the Draft Guidelines, the Commission should withdraw the Policy and Draft Resolution and initiate a formal rulemaking to develop a policy regarding disposition of IOU fee-owned property subject to Section 851 that is located in a Tribe's ancestral territory that is based on an adequate record and that allows all interested parties the opportunity for meaningful participation, consistent with constitutional principles of due process.

III. IF THE COMMISSION FORGOES A RULEMAKING, CRITICAL CHANGES MUST BE MADE TO THE DRAFT GUIDELINES

If the Commission elects to adopt final guidelines implementing the Policy without the benefit of a formal rulemaking process, critical refinements to the Draft Guidelines are necessary to prevent unintended negative consequences and to protect the public interest. Most crucial is clarification regarding the dispositions to which the Policy and final guidelines apply. Specifically, the Draft Guidelines should be revised to make clear that the requirements contemplated in the Policy apply to transfer, sale, donation, or disposition by any other means of

---

[7] D.99-10-058, p. 27, citing *San Francisco Taxpayers Assn. v. Board of Supervisors* (1992) 2 Cal.4th 571, 577; *Rose v. State of California* (1942) 19 Cal.2d 713, 723-724 ("It is a well established rule of statutory construction that a specific provision relating to a particular subject will take precedence over a more general provision, even if that general provision could be construed broadly to include that subject.").

[8] *Morris v. Williams* (1967) 67 Cal.2d 733, 737.

[9] *See Penn Central Transportation Co. v. City of New York* (1978) 438 U.S. 104.

a fee interest in real property subject to Section 851 that is located in a Tribe's ancestral territory. The Policy currently provides that its requirements also apply to "transfer, sale, donation, or disposition by any other means of . . . [an] easement in real property,"[10] but as discussed in more detail below, application of the Policy to easements and similar "less-than-fee" interests is inconsistent with the intent of the Policy, would cause confusion and potentially create significant negative safety and reliability impacts, and would significantly burden stakeholders, including the Tribes. Accordingly, the Policy should not apply to easements and other "less-than-fee" interests such as limited use licenses or permits under G.O 69-C.

In addition, the Draft Guidelines should be revised to eliminate the requirement that the IOUs resolve disputes between tribal governments related to disposition of the land covered by the Policy. Instead, the Commission's Tribal Liaison should work with the Tribes and the Native American Heritage Commission ("NAHC") to establish a map of each IOU's service area with a pre-defined overlay or hold workshops with the Tribes to develop an approach that does not place the IOUs in the position of dictating an outcome to the Tribes. Upfront agreement as to how disputes will be resolved should be a prerequisite to each Tribe's eligibility to purchase land under the Policy. The Policy should not go into effect until such time that a workable dispute resolution mechanism is in place.

Lastly, the Commission should include modifications to the notice and consultation requirements, as well as clarifications related to confidentiality and reporting requirements, necessary to promote open dialogue and ensure a workable process.

A. The Guidelines Should Apply to Fee-Owned Property Subject to Section 851

Fee simple ownership means that the property owner has title to the property, which includes the land and any improvements to the land, in perpetuity. Ownership in fee grants a real property owner exclusive and unlimited rights on the property (except for zoning or building restrictions, as applicable). SDG&E supports application of the Policy to transactions involving an IOU's transfer, sale or donation of its fee-owned real property that is subject to Section 851 and located in a Tribe's ancestral area, including in response to unsolicited offers. This approach recognizes tribal sovereignty by enabling conveyance of land outright to Tribes without restriction and promotes the goal of returning lands within tribal ancestral territory to the appropriate Tribe.

The Draft Guidelines provide that when an IOU seeks Section 851 approval to dispose of real property located in a Tribe's ancestral territory, the Commission will "presume that the tribe is the preferred transferee, and that the transfer to the tribe is in the public interest . . ."[11] The potential for real property located within a Tribe's ancestral territory to be returned to that Tribe is clearly an appropriate consideration in the public interest evaluation. As discussed above, however, establishing a rebuttable presumption that transfer to a Tribe best serves the public

[10] Policy, p. 1, note 2.
[11] Draft Guidelines, p. 24.

interest violates the plain language of Section 453(a). This aspect of the proposed implementation framework makes it vulnerable to legal attack. Rather than risking invalidation by the court, the Commission should revise the Draft Guidelines to explicitly require that the public interest evaluation undertaken in the context of a Section 851 application or advice letter consider as a criterion the potential for a fee interest in real property to be transferred to a Tribe, but should not impose a presumption in favor of transfer to a Tribe. The Commission should require IOUs to address the tribal transfer element of relevant transactions in the application or advice letter submitted pursuant to Section 851 to ensure that the Commission has an adequate basis for performing its public interest evaluation.

In addition, the existence of the rebuttable presumption favoring transfer to the Tribes with no accompanying criteria for the public interest analysis – and, in particular, no requirement that the real property be sold at fair market value and on favorable market terms – raises constitutional concerns. A rebuttable presumption with no additional context effectively creates a *de facto* requirement that the IOU sell its fee-owned property to the Tribe on whatever terms are offered, even if those terms are unfavorable compared to what might be available in the market. This could be deemed to be an unlawful regulatory taking.[12] Hence, the Draft Guidelines should be revised to require that the public interest evaluation consider whether the Tribe's offer reflects the fair market value of the property and whether the terms of the offer are favorable when compared against other market offers.

B. The Guidelines Should Not Apply to Easements

A real property easement is a limited right to use land owned by another person or organization for a specific, defined purpose. Easements do not convey title. The land that is the subject of the easement may not be used for any purpose other than the purpose expressly defined in the easement. For example, a typical easement for electric utilities provides the utility with the right "to erect, construct, reconstruct, replace, repair, maintain and use, one or more line or lines of poles and/or towers with wires and cables suspended thereon and supported thereby, and underground conduits, wires, cables, vaults and manholes for the transmission and distribution of electricity, and for all other purposes connected therewith." Such an electric utility easement could not be used to install sewer pipes or to construct a bridge or for a playground. Put simply, an easement cannot be used for *any* purpose not expressly provided for in the easement agreement or under law. The purpose of the easement would not change no matter who acquires an interest in it.

In the utility context, easements generally fall into two broad categories:

- Easements held by the IOU over land owned by another party. Typically, such easements are sought by the IOU pursuant to facility extension tariffs where access to a landowner's property is necessary to allow the IOU to conduct safety, equipment maintenance and/or other similar type activities. The use permitted under such easements is narrowly-tailored to this purpose; or

[12] *See Penn Central, supra*, note 9.

- Easements granted by the IOU to allow a party to engage in limited, explicitly-defined activity on IOU fee-owned real property. For example, an IOU might grant a city, county or state agency an easement in connection with a public project, or a neighboring landowner an easement to cross from the landowner's property through the IOU's property to a public road.

Application of the Policy to easements is highly problematic for a few reasons. As discussed below, requiring the IOU to offer the Tribe an easement it holds over land owned by a third-party before relinquishing that easement is a non-starter. A requirement of this sort is inconsistent with the expectations of landowners when they provide utility easements and would likely diminish landowners' willingness to grant such easements in the future, which would significantly impact IOUs' ability to comply with safety-related obligations and perform necessary equipment operations and maintenance.

Similarly, requiring IOUs to offer easements sought by third-parties to a Tribe before granting the requested easement is ill-conceived and contrary to the public interest. It is unworkable from a practical perspective, creates potential legal issues and would serve little purpose; it does not result in return of tribal land and therefore does not meet the policy objectives articulated in the Policy. Accordingly, as discussed below, the Draft Guidelines should be revised to make clear that the requirements contemplated in the Policy apply to transfer of a fee interest in real property subject to Section 851, but does not apply to easements and similar "less-than-fee" interests such as those governed by G.O. 69-C.

(i) IOU Easements Over Land Owned by Other Parties

SDG&E currently holds easements over land owned by other parties in order to enable operation of its business. Most, if not all, easements held by SDG&E are service and distribution easements or rights-of way for which the landowner granting the easement to the utility is not paid any financial remuneration pursuant to tariff rules because they are instead receiving electric or gas service. In this situation, if the IOU removes its facilities from the property, there would no longer be a public purpose for the easement and the landowner would rightfully expect that the utility easement would revert back to the landowner. In a circumstance where an IOU does not unilaterally elect to remove its facilities, but is requested to do so by the landowner (for example, if the landowner requests that SDG&E move its distribution easement to a different location on the property to permit development of the property), SDG&E would be required to relinquish its existing easement in exchange for a new easement that is acceptable to the utility. In such a case, the IOU's relinquishment would arguably be subject to Section 851 since the easement being relinquished is still "used and useful" for utility operations and is being relinquished only to accommodate the landowner's request.

Requiring the IOU to offer the easement to a Tribe prior to disposing of it through relinquishment back to the landowner would raise significant legal and practical concerns. It is well-settled law in California that where a utility acquires an easement in the nature of a right-of-way for a public purpose (as distinguished from a fee simple title), the abandonment of the

public purpose terminates the easement and the easement reverts to the landowner.[13] Any attempt by the IOU to instead transfer the easement to a Tribe would violate this fundamental principle. The Draft Guidelines provides that the rebuttable presumption established under the Policy does not apply where its application would be unlawful, as would be the case here, but it is silent as to the applicability of the notice and communication requirements of the Policy in such a circumstance.[14] Thus, it could be argued that the IOU remains bound to notify the Tribe and negotiate terms of transfer, even in the absence of a rebuttable presumption that the transfer to the Tribe is in the public interest.

This ambiguity would create confusion and undermine regulatory certainty. As a practical matter, it is almost certainly not the case that a Tribe could use an IOU-held easement, which as noted above is for a highly-specific purpose and can be used *only* for that defined purpose. Notification of the intended disposition of the IOU-held easement would therefore serve little purpose – since it likely cannot be used by the Tribe and would not be capable of lawful transfer – but the Tribes and IOUs would be required under the Policy to devote time and resources to what is essentially a pointless exercise. This outcome clearly does not serve the public interest.

Even more problematic, application of the Policy to IOU-held easements could diminish landowners' willingness to grant easements over their land to IOUs in the first place, which could significantly impact safety and reliability. Landowners could be less inclined to grant easements to IOUs if they fear that even if the utility is willing to relocate its facilities and relinquish the easement back to them, the utility would first be required to offer the easement to a Tribe, which would cause delay and confusion. The chilling effect created by the application of the Policy could hamper an IOU's efforts to obtain new easements that are necessary to support utility operations and, in particular, are critical to projects designed to increase safety and system reliability, such as undergrounding utility facilities in high-fire risk areas.

(ii) Easements Over Land Owned by IOUs

The majority of easements (and allowed encroachments)[15] granted by SDG&E to other parties under Section 851 involve variations of following scenarios:

- A party, usually a neighboring landowner, requesting an easement to use a portion of SDG&E's fee-owned property for a specific purpose;
- A party requesting permission from SDG&E to allow them to encroach for a specific purpose within an SDG&E easement upon another person's property for a specific purpose;

---

[13] *See, e.g. Slater v. Shell Oil Co.* (1940) 39 Cal. App. 2d 535; *see also, Northern P. Ry. Co. v. Townsend*, (1903) 190 U.S. 267.

[14] Draft Guidelines, Rule 3.3.c.

[15] An encroachment occurs where a party extends a structure or other use into an IOU's land or an IOU's easement.

- A landowner requesting permission from SDG&E to allow them to encroach for a specific purpose within an SDG&E easement upon that landowner's property; and
- A city, county or state agency asking SDG&E for an easement or permission to encroach into SDG&E fee-owned or easement property in connection with a public project.

As discussed above, an easement is a right to use the property of another for a specifically-defined purpose; a permitted encroachment onto another's property is similarly limited to a pre-defined use or purpose. Easements and encroachments will remain limited in their purpose regardless of their disposition.

The limited nature of the rights granted under an easement, and the process through which such easements are developed, calls into question the logic of applying the Policy to easements granted by the IOU. Easements and encroachments, standing alone, have little to no value to anyone but the requesting party; a Tribe acquiring the easement requested by another party would be subject to the limited purpose or use described in that easement and would not be able to freely use the land for any purpose, as it could with a fee interest. Thus, since it is highly unlikely that a Tribe would or could use the easement for the purpose requested, it is not clear what valid objective is served by offering an easement tailored to suit the purpose of another party to a Tribe. While it could be argued that the benefit to the Tribe lies in the ability to monetize the interest by purchasing it at a discount from the IOU and reselling it to the requestor, this suggestion is highly problematic from a legal perspective. As noted above, governmental action that interferes with "distinct investment-backed expectations" regarding the value of IOU property could be considered an unlawful regulatory taking under *Penn Central*.[16]

Thus, the public interest is plainly not served by requiring the IOU to offer a Tribe an easement that it cannot use. Moreover, the scenario contemplated in the Policy – that an IOU would offer an easement to a Tribe before offering it to a third-party – does not reflect the reality of how IOU easements are created. The Policy's definition of "right of first refusal" anticipates that the IOU would offer the easement to the Tribe "before the IOU can seek third-party purchasers," but this makes little sense from a practical perspective. Typically, the easements granted by SDG&E arise because other parties first reach out to SDG&E to request an easement needed for a specific purpose. For example, a landowner might request to encroach onto SDG&E property as they develop or use their own property; a telecommunications or cable provider might seek an easement to support their operations; or cities, agencies and other community members might approach SDG&E seeking an easement, license or other agreement to support a public project. In other words, the IOU does not "go to the market" to offer an easement. Rather, a party seeing an easement for a particular purpose approaches SDG&E and but for these requestors initiating the request, SDG&E would not consider grant of an easement interest or consent to an encroachment.

[16] *See Penn Central, supra*, note 9.

Once SDG&E has been approached by a party seeking an easement, it must evaluate the feasibility of the easement requested. Requests for an easement generally involve land in and around utility facilities where SDG&E will continue its utility operations, would be accommodating a compatible use, and has no intention of selling its fee interest in the property. The potential impact upon ongoing utility operations requires SDG&E to discuss the proposal with the requestor – sometimes in great detail – in order to understand the proposed use and the nature of the land right being requested and its impact upon the utility, including, without limitation, upon the utility's existing facilities, planned use, operations, access and property. Depending upon the complexity of the request, this review can be a resource-intensive process. SDG&E must evaluate the feasibility of the proposed use, determine if there are any safety or compatibility concerns, and craft the appropriate rights and restrictions needed to protect and maintain the utility use of the property and ensure safe and reliable operations. This evaluation is highly fact-specific and requires close communication with the requesting party.

For example, SDG&E was asked to grant a subterranean tunnel easement across fee-owned property to the San Diego County Water Authority ("SDCWA") for the installation of a major water pipeline connected to the Poseidon desalination plant. The tunnel easement did not include any permanent surface rights on SDG&E's property, as the property continues to be an important electric transmission corridor. Before granting this type of easement, it would be important for the IOU to understand the exact location of the tunnel, its route through the property, physical dimensions, and depth below the surface in order to then analyze any potential conflicts with underground footings for any poles or towers. In addition, the parties would need to understand possible risks to the infrastructure due to construction and geological conditions prior to granting such easement. This process involves a significant amount of time and costs for engineers, geotechnical, and other consultants to evaluate plans and physical conditions before the terms of this type of easement could even be determined. Many conversations between the IOU and requestor would be required in order to get to the point of having an easement interest that could be offered to the Tribes.

Thus, it would be impossible for a Tribe to make a "first offer" on an easement. Neither the IOU nor the Tribe would know in advance what limited use would be sought be a third-party requesting an easement. The only way to apply the "first offer" requirement to an easement would be for the IOU to go through the entire evaluation and negotiation process with a third-party requesting an easement and *then* offer the easement to the Tribe before consummating the transaction with a third-party. This would likely inject significant delay and burden into the process of obtaining easements from the IOUs, which would negatively impact a variety of stakeholders, including the landowners, other utilities, cities, counties, state agencies, builders and other entities that routinely seek easements from the IOUs. In addition to the time required for compliance with Section 851, complying with the "first offer" requirements (again, for land rights of little benefit to Tribes) would add months and overall uncertainty to project schedules for housing and other developments or public improvement projects. In addition to time, there could be additional costs incurred by these projects resulting from such delays, required redesign that may become necessary, and possibly even cancellation. The "first offer" requirement would, likewise, inconvenience the Tribes, who would be required to manage the flow of

requests for responses to "first offer" inquiries arising from easements requested by third-parties, often under tight deadlines.

Put simply, while the "first offer" requirement makes sense in a scenario involving IOU sale of land, it does not fit a circumstance where the interest at issue is an easement or "less-than-fee" property right. Accordingly, the Draft Guidelines should be revised to specifically define "disposition" as the transfer, sale, donation, or disposition by any other means of a **fee interest** in real property subject to Section 851 (and the Policy should be revised to delete the reference to easements in footnote 2). This modification will in no way diminish the effectiveness of the Policy and final guidelines in achieving the objective of returning lands within the Tribe's ancestral territory to the appropriate Tribe. As explained above, easement transactions do not provide an opportunity for Tribes to acquire ancestral lands. Rather, they permit specific uses that do not offer true control over the land because of the limitations and nature of these interests as a matter of real property law – true return of ancestral land to the Tribes comes only through fee simple ownership. Strengthening and ensuring the enforceability of the guidelines that facilitate transfer of IOU fee-owned real property located in ancestral territory to the Tribes is the best means of accomplishing that goal.

Finally, applying the Policy to easements gives rise to issues related to tribal sovereignty that are not present with land sales that result in the Tribe's fee ownership of real property. In an easement scenario, the holder of the easement is legally bound by the limitations on use imposed by the easement. In the utility context, it is critical that easement-holders comply with those limitations – failure to do so could create safety hazards, negatively impact utility operations and/or interfere with system reliability. The existence of tribal sovereign immunity could complicate the IOU's ability to enforce limitations on an ongoing basis or to seek injunctive relief in a circumstance where use of the land is inconsistent with the easement terms and incompatible with utility operations. Neither the Policy nor the Draft Guidelines address this important issue.

C. The Policy and Final Guidelines Should Not Apply to G.O. 69-C Grants

G.O. 69-C offers a very narrow exemption to the broad scope of Section 851. It authorizes a utility to grant "easements, licenses or permits" for "rights of way, private roads, agricultural purposes, or other limited uses of their several properties without further special authorization by the Commission" so long as said uses do not interfere with the operations of the public utility.[17] Thus, by definition, grants subject to G.O. 69-C do not require the filing of a Section 851 application or advice letter. The grants provided under G.O. 69-C are very limited in scope. Specifically, G.O. 69-C grants are only appropriate where the use of the utility property (i) is limited (*e.g.*, excludes structures that are not easily removable, changes to the physical environment and long-term commitments), (ii) does not interfere with utility operations, practices and services, (iii) does not require review under the California Environmental Quality Act ("CEQA"); and (iv) does not involve a license-to-lease transaction where the license is granted with the understanding that the same use of utility property will become irrevocable

[17] Emphasis added.

following the Commission's approval under Section 851. Additionally, G.O. 69-C grants must be revocable subject to the utility's reserve power to commence or resume use of the property where necessary or desirable (with certain exceptions that are not applicable here). These restrictions generally limit these types of grants to short-term access needs, short-term placement of removable equipment or personal property, or access for surveying and little else.

Application of the Policy and final adopted guidelines to G.O. 69-C conveyances is ill-advised for the same reasons that application of the Policy to easements is not sound policy. The temporary and revocable nature of G.O. 69-C grants means that any interest offered to the Tribe would be fleeting and of little practical value – it most certainly would not result in "return of lands within the Tribe's ancestral Territory to the appropriate Tribe." Imposing the Policy requirements on G.O. 69-C grants, including the requirement for express Commission approval and a particularized showing for each grant, would add significant new complexity to the G.O. 69-C process and would impose tremendous burden on all stakeholders, including the Tribes. Accordingly, the Policy and final adopted guidelines should not be applied to G.O. 69-C grants.

D. The Commission Should Coordinate with the Tribes to Address Dispute Resolution

As SDG&E has noted in its prior comments, the proposal to place responsibility for resolving disputes with and among tribal governments on the IOUs is not viable. SDG&E is committed to meaningful partnerships with Tribes, but it does not have the requisite expertise or the authority to make informed judgments about which Tribes hold superior claims to certain properties or to appropriately evaluate "each tribe's connection to the surplus property at issue."[18] These are potentially contentious disputes related to land ownership and ancestral territories. Additionally, Tribes may not feel comfortable divulging potentially confidential information to IOUs to support their connection to certain properties.

Requiring IOUs to dictate the outcome of such disputes also has the potential to erode trust and damage relationships between IOUs and Tribes. Placing dispute resolution outside a formal governmental process may also tend to favor Tribes with more financial resources and exacerbate existing resource inequalities between Tribes. Disputes of this nature are best resolved by a governmental entity and in a Government-to-Government context.

Accordingly, SDG&E proposes that the Draft Guidelines be revised to delete the requirement that IOUs resolve conflicts among the Tribes related to application of the Policy. Instead, the Commission's Tribal Liaison should work directly with the Tribes to develop a map of each IOU's service territory with an overlay establishing the Tribe entitled to receive the right of first offer for disposition of IOU-owned land in each area of the service territory (a "Tribal Interest Reference Map"). This Tribal Interest Reference Map, which would reflect the consensus of all affected Tribes, would be used by the IOUs to determine what Tribe should be

[18] The reference to "surplus property" appearing in Section 4.3 of the Draft Guidelines is inconsistent with other provisions of the Draft Guidelines and the Policy, but the intent of the provision appears clear.

contacted in the event of a disposition covered by the Policy. As part of this process, input from the NAHC could be sought to help in identifying the most appropriate Tribe to receive a right of first refusal in each area of the IOU's service territory. The Commission's leadership of this effort is consistent with Executive Orders B-10-11 and N-15-19, which order the implementation of effective and meaningful Government-to-Government communication between the State and tribes on matters affecting tribal communities.

Alternatively, the Commission should consider holding workshops with the Tribes to pre-define the process for identifying which Tribe is entitled to the right of first refusal, prior to implementation or eligibility under the Policy. Options might include an agreed upon map, as discussed above, a rotation of the right among relevant interested Tribes, utilization of a Native American Land Conservancy to represent multiple interests, or some other methodology that will clearly identify a single Tribe to receive the right of first refusal where ancestral lands overlap.

In either case, upfront agreement as to how disputes will be resolved should be a prerequisite to each Tribe's eligibility to purchase land under the Policy. To avoid confusion and prevent the harm described above, the effectiveness of the Policy should be delayed until such time that a workable dispute resolution mechanism is in place.

E. The Notice, Consultation and Reporting Requirements Contained in the Draft Guidelines Require Modification

In order to ensure an efficient and understandable process for all stakeholders, the Draft Guidelines should be revised to narrow the timeframe for certain activities. For example, under the Draft Guidelines, in order to determine which Tribe must receive the right to make the first offer the IOU must submit a written request to the NAHC to identify tribes with an interest in the territory on which the real property lies. Once this request is made, the NAHC has 90 days to respond to the IOU. As discussed above, a far more efficient approach would be to predetermine which Tribe has the superior claim in each area within the IOU service territory. If the Commission adopts this approach, the delay related to determining which Tribe has the right to make an offer for subject land would be eliminated in its entirety. If not, the Draft Guidelines should be revised to shorten the response time for the NAHC to provide guidance to 30-days to mitigate the delay caused by application of the Policy.

In addition, the Draft Guidelines should include language requiring a 90-day good faith negotiation period beginning upon the Tribe's receipt of notice regarding the property offered for sale. Since the real property subject to disposition will be clearly identified, the Tribe should be in a position to decide fairly quickly whether it is interested in acquiring the property. During the remainder of the 90-day period, the IOU and Tribe would work in good faith to negotiate price and terms for a sale.[19] If the IOU and Tribe fail to reach agreement

[19] It should be noted that a Tribe would not need to perform its feasibility investigations (title review, environmental assessment, engineering studies) during these 90 days, as the time for such diligence would be specified in the purchase agreement.

during the 90-day period, the IOU should be permitted to submit a request for approval under Section 851 without further need for consultation or negotiation with the Tribe. This approach will support the Commission's goal of a streamlined process that both facilitates the efficient transfer of land and encourages the full participation of the Tribes.[20]

In addition, it is essential that the Commission expressly define "reasonable terms" in Rule 3.3(b) in order to reduce the likelihood of disputes between the IOU and Tribe if agreement is not reached. For example, the purchase price should not be less than the present fair market value of the property, in accordance with similar requirements set forth in G.O. 173. The final guidelines adopted should also acknowledge that other terms are more difficult to evaluate but are often as important as price – for example, all cash vs. payments over time; length of escrow period; and allocation of risks during and after the escrow period.

Finally, the Draft Guidelines should be revised to eliminate the requirement that the IOU provide the reason it seeks to dispose of the real property.[21] Under an unsolicited offer scenario, a third-party might be seeking to acquire IOU property in connection with a land assemblage involving other parcels or for a future development solely on IOU property. There may be confidentiality concerns that limit SDG&E's ability to provide this information. The same issues exist in the context of periodic reports of "upcoming anticipated real property dispositions."[22] The Draft Resolution includes no findings or rationale to support these requirements, accordingly they should be deleted from the Draft Guidelines.

F. Application of the Policy to "Less-than-Fee" Transactions Subject to G.O. 69-C and G.O. 173 Would be Extremely Burdensome and Would Interfere with Utility Operations

In the Draft Resolution, the Commission seeks comments regarding whether the Policy and adopted guidelines should apply to conveyances subject to G.O. 173 and G.O. 69-C.[23] As discussed above, no valid rationale exists to support application of the Policy to grants made pursuant to G.O. 69-C. With regard to G.O. 173, SDG&E supports having the Policy apply to *all* fee simple conveyances of utility real property located in a Tribe's ancestral territory, whether Commission approval is sought through the G.O. 173 advice letter process or through a full Section 851 application. SDG&E believes that transfer of fee interests (as opposed to the limited interest conveyed through a "less-than-fee" transaction) will achieve the objective of returning ancestral land to Tribes and furthers the goals of the Policy. In other words, the Commission should determine applicability of the Policy based on the character of the real property interest at issue, and whether transfer of that interest will result in actual return of tribal lands, rather than on the regulatory process used to seek Commission approval of the transfer.

---

20 *See* Draft Resolution, p. 15.
21 Draft Guidelines, Section 2.3.b.
22 *Id*., Section 5.1.a.
23 Draft Resolution, p. 13.

As suggested by the questions included in the Draft Resolution, application of the Policy to all conveyances subject to G.O. 173 and G.O. 69-C would cause significant burden and delay essential IOU operations. While, as noted above, application of the Policy to conveyances of fee interests under G.O. 173 is in the public interest and would be relatively manageable from a workload perspective, application of the Policy to all "less-than-fee" interests conveyed under G.O. 173, as well as those conveyed under G.O. 69-C, would be tremendously burdensome. In order to define the "less-than-fee" interest at issue, the IOU would be required to fully negotiate the interest with the third-party requestor, place the grant on hold in order to make the offer to the Tribe, factor in the timeline of the tribal offer and potential dispute resolution, explain the details of a proposed transaction and respond to questions and concerns from multiple parties, and manage the interaction with the third-party requester. This would hold up projects underway by cities, agencies, other utilities, etc., including affordable housing, infrastructure, transit and infill development projects that also advance important state policy goals. Where the IOU holds an easement on another party's land, application of the Policy could cause significant disruption to critical utility safety and reliability activities, as explained above. In addition, since the IOUs do not currently present G.O. 69-C transactions to the Commission for approval, application of the Policy and the showing requirement included therein would significantly increase the burden associated with such transactions. Likewise, application of the Policy to "less-than-fee" interests will create burden for the Tribes, who will need to spend time and resources to review the many such transactions that the IOU processes annually, none of which would result in return of ancestral land.

IV. CONCLUSION

For the reasons set forth above, the Commission should suspend the Policy, withdraw the Draft Resolution, and initiate a formal rulemaking to develop a policy regarding disposition of IOU fee-owned property subject to Section 851 that is located in a Tribe's ancestral territory. If the Commission elects not to initiate a rulemaking, it should modify the Draft Guidelines in accordance with the comments provided herein and as proposed in Appendix A hereto.

Respectfully Submitted,

/s/ Clay Faber
Clay Faber
Director - Regulatory Affairs

cc: Michal Rosauer – Michael.Rosauer@cpuc.ca.gov
Mary Jo Borak – BOR@cpuc.ca.gov
Tribal Service List E-5076

APPENDIX A

Proposed Revisions to Draft Guidelines

PROPOSED GUIDELINES TO IMPLEMENT THE CPUC TRIBAL LAND POLICY

1. GENERAL PROVISIONS

1.1. Purpose and Intent

a. The purpose of these Guidelines is to implement the Commission's Tribal Land Policy, which it adopted on December 5, 2019.

b. The goals of the Tribal Land Policy are:

- **i.** To recognize and respect Tribal sovereignty;
- **ii.** To protect Tribal sacred places and cultural resources;
- **iii.** To Ensure meaningful consideration of Tribal interests and the return of lands within the ancestral territory of the appropriate Tribe; and
- **iv.** To encourage and facilitate notice and Tribal participation in matters before the Commission that involve transfers of **fee interest in** real property **located in Tribal ancestral territory** subject to California Public Utilities Code Section 851.

c. The intent of these Guidelines is therefore to further those goals.

d. **In the event of a conflict between the requirements contained in the Tribal Land Policy and the requirements adopted in these Guidelines, the requirements set forth in these Guidelines shall prevail.**

1.2. Construction

a. These Guidelines shall be liberally construed to further the goals of the Tribal Land Policy. *See* Rule 1.1(b).

b. Unless otherwise noted, all statutory references are to the laws of the State of California.

c. These guidelines do not address whether an Investor Owned Utility should place an easement on utility-owned land before disposing of that land. The Commissioner will consider whether an easement should be placed on any particular land on a case-by-case basis when the Utility asks for authority to dispose of the land.

1.3. Definitions

For purposes of these Guidelines, ~~**unless the context otherwise requires—**~~

a. "Ancestral territory" means the territory designated by a tribe and submitted to the Native American Heritage Commission (NAHC) to provide to state agencies and local government for notice of projects under Assembly Bill (AB) 52. (2013-2014 Reg. Sess.) Tribes are the primary source for identification of a tribe's ancestral territory. If a tribe has not designated territory under AB 52, "ancestral

territory" for that tribe means territory identified in Vols. 8, 10 & 11 Sturtevent ed., Handbook of North American Indians (1978).[24]

b. "California Native American tribe" or "tribe" means a Native American tribe located in California that is on the contact list maintained by the NAHC for the purposes of Chapter 905 of the Statutes of 2004. (See Pub. Res. Code, § 21073.) This includes both federally-recognized tribes and tribes that are not recognized by the federal government. Nothing in the policy prevents tribes from consulting with other Native American groups that demonstrate an ongoing connection to a specific place or cultural resource, or issue falling under the jurisdiction of the Commission.

c. "Chairperson" means a tribe's highest elected or appointed decision-making official, whether that person is called chairperson, or president, or some other title.

d. "Disposition" means the transfer, sale, donation~~, encumbrance~~, or disposition by any other means of **a fee interest** ~~an estate~~ in real property **that is located in a Tribe's ancestral territory and is subject to Section 851**. **For the avoidance of doubt, "disposition" shall not include conveyance of easements or any other non-fee interest.**

e. "Fair market value" means the price at which the property would change hands between a willing buyer and a willing seller, neither being under any compulsion to buy or to sell and both having reasonable knowledge of relevant facts. (26 C.F.R. §20.2031-1(b)) Fair market value of an item of property is not to be determined by the sale price of the item in a market other than that in which such item is most commonly sold to the public, taking into account the location of the item wherever appropriate. Fair market value may be demonstrated with a detailed description as required under GO 173 (e.g., appraisal).

f. "Immediately adjacent to" means having borders that are contiguous or partially contiguous with another property.

g. "Indian country" means "(a) all land within the limits of any Indian reservation under the jurisdiction of the United States Government, notwithstanding the issuance of any patent, and, including rights-of-way running through the reservation, (b) all dependent Indian communities within the borders of the United States whether within the original or subsequently acquired territory thereof, and whether within or without the limits of a state, and (c) all Indian allotments, the Indian titles to which have not been extinguished, including rights-of-way running through the same." (18 U.S.C. § 1151.)

---

1. [24] The Sturtevant books are a 15-volume reference work in Native American studies, edited by William C. Sturtevant, and published by the Smithsonian Institution. Volumes 8, 10, and 11 cover "California," "the Southwest," and "the Great Basin," respectively.

h. "Investor-owned utility" (IOU) means "private corporations or persons that own, operate, control, or manage a line, plant, or system for the transportation of people or property, the transmission of telephone and telegraph messages, or the production, generation, transmission, or furnishing of heat, light, water, power, storage, or wharfage directly or indirectly to or for the public, and common carriers." (Cal. Const., art. XII, § 3.)

i. "Real property" means any IOU real property whose disposition is subject to approval under Section 851 of the Public Utilities Code.

j. "Request for approval" means an IOU's submission, whether under the formal application process or the informal advice letter process, requesting Commission approval of the disposition of real property under Section 851 of the Public Utilities Code.

k. "Right of first refusal" means that the IOU disposing of **a fee interest in** real property **that is subject to Section 851 and located in a Tribe's ancestral territory,** must contact the tribe ~~**or tribes**~~ whose ancestral territory is on or **immediately** adjacent to the real property**, as identified in the Tribal Interest Reference Map**, and must provide the tribe ~~**or tribes**~~ the right to **acquire the real property at fair market value on reasonable terms** or refuse the **fee interest in the** real property, before the IOU can seek third-party purchasers for the **fee interest in the** real property.

l. "Tribal Interest Reference Map" means a service area map adopted by the Commission for each IOU that identifies the Tribe with the superior interest in each ancestral area depicted in the service area.

1.4. IOU Tribal Website

Each IOU shall create and maintain a website that will serve as a repository for the documentation described in these guidelines.

2. NOTIFICATION

2.1. Notification Generally

When an IOU decides to dispose of **a fee interest in** real property **subject to Section 851 that is located in Tribal ancestral territory**, before it submits a request for **Section 851** approval to the Commission, the IOU shall **refer to the Tribal Interest Reference Map and** notify **the** ~~any~~ relevant tribe ~~or tribes~~ that it intends to dispose of the property.

2.2. IOU to Identify Relevant Tribe or Tribes

a. The IOU shall provide notice to the Tribe identified in the Tribal Interest Reference Map as having the superior interest in the land at issue.

OR, alternatively:

a. The IOU shall submit a written request to the NAHC to identify tribes relevant to the territory on which the real property lies.

b. If the NAHC fails to respond within ~~90~~ **30** days, or if the NAHC's response is inconclusive:

i. **The IOU shall provide notice to a federally recognized Tribe or Tribe(s) if** ~~If~~ the real property is located within or **immediately** adjacent to ~~a federally-recognized~~ **the** tribe's Indian country**.** ~~, the IOU shall provide notice to that tribe.~~

ii. If the real property is not located within or adjacent to a federally~~-~~ recognized tribe's Indian country, the IOU shall provide notice to any tribe or tribes on whose ancestral territory the real property lies.

2.2. To Whom Notice Directed

The IOU shall notify the tribal chairperson of **the** ~~any~~ relevant tribe~~s~~, or the chairperson's designee.

2.3. Contents of Notice

The notice shall include, in plain language:

a. The location and a brief description of the real property at issue;

~~**b.** The reason the IOU is disposing of the real property;~~

c. A statement telling the tribe that they have a right of first refusal on **fee ownership of** the real property before the IOU may put the real property on the market;

d. An offer to consult with the tribe regarding the tribe's interest in acquiring **fee interest in** the real property; and

e. Contact information of an IOU representative who is sufficiently knowledgeable about the real property to answer any questions the tribe might have, so that the tribe can decide whether it is interested in acquiring the **the fee interest** the real property.

Notice shall be delivered by USPS certified mail, return receipt.

2.4. Notice to be Publicly Available

When the IOU sends notice to a relevant tribe, the IOU shall also post the notice on its tribal website.

3. TIMING OF NOTICE AND IOU CONSULTATION

3.1. Timing of Notice

Upon receiving notice from an IOU, the Tribe shall have 30 days to respond to the notification as to its interest in acquiring fee ownership of the subject real property.

3.2. Timing of IOU Consultation

After a disposing IOU has received notice from a Tribe indicating interest in acquiring the subject real property, the disposing IOU and the interested Tribe shall enter into good faith negotiations to determine mutually satisfactory terms. If the terms cannot be agreed upon after a good faith negotiation period of 90 days, the disposing IOU may proceed to offer the real property for sale at fair market value subject to approval by the Commission pursuant to Section 851.

4. REQUESTS FOR APPROVAL

4.1. Filing

a. If an IOU submits a request for approval under Section 851 **for transfer of a fee interest in land that is located in a Tribe's ancestral territory**, the request must show that the IOU provided notice and consultation to the interested tribe or tribes. The required showing includes:

i. A copy of the Tribal Interest Reference Map relied upon by the IOU to identify the Tribe receiving notice;

OR, alternatively:

i. A copy of the IOU's written request to the NAHC to identify interested tribes;

ii. A copy of the IOU's written notice to any interested tribal chairperson or their designee with USPS receipt;

iii. Documentation of any consultation between the IOU and the tribe or tribes. **Documentation shall not include confidential tribal cultural resources information shared with the IOU unless the inclusion of such information is agreed upon by the tribe or consistent with the confidentiality provisions set forth in the Commission's Tribal Consultation Policy.**

b. If the IOU does not meet that showing, and if it is unable to cure those deficiencies, the Commission may, in its discretion:
  i. Identify any interested tribes, provide them with notice of the proceeding and an opportunity to comment;
  ii. Direct the IOU to identify, notice, and consult with any interested tribes; or
  iii. Reject the request for approval without prejudice.

4.2. Tribal Participation

a. The Commission will encourage interested tribes to participate in these proceedings.
b. Commissioner staff and Administrative Law Judges will ensure that any comment provided by a tribe is submitted into the record of the proceeding, consistent with the confidentiality provisions set forth in the Commission's Tribal Consultation Policy.
c. If the request for approval is an advice letter filing, any comment submitted by the tribe shall be appended to the draft Resolution disposing of the advice letter filing.

~~4.3. Presumption in Favor of Tribe~~

~~When an IOU requests approval to dispose of real property lying in a tribe's ancestral territory, the Commission will presume that the tribe is the preferred transferee, and that the transfer to the tribe is in the public interest, absent a finding supported by evidence:~~

~~**a.** That the tribe is not interested in acquiring the real property (e.g., that the tribe declined consultation with the IOU or confirmed that it is not interested);~~
~~**b.** That the IOU acted in good faith and, after reasonable effort, was unable to agree with the tribe on reasonable terms for the transfer of the real property;~~
~~**c.** That transfer of the real property to another entity is necessary to achieve IOU operational requirements, or to comply with any law, rule, or regulation; or~~
~~**d.** That transfer of the real property to another entity would be in the public interest.~~

4.4. Impacts on Tribal Cultural Resources

As part of its review of any request for **Section 851** approval **of disposition of land subject to these Guidelines**, the Commission will carefully consider any comments regarding potential impacts on tribal cultural resources, or suggesting measures that would mitigate those impacts. This applies whether the proposed transfer is to the tribe or to a third party.

5. DISPUTE RESOLUTION

5.1. Disputes Generally

It is the Commission's intent that, where possible, disputes **regarding application of the Policy and these Guidelines** be resolved informally**. ~~, by discussion between the IOU and any interested tribes.~~ If informal resolution between the parties is not possible, the Commission will review and resolve the dispute.**

a. To ensure consistent and lawful application of the Tribal Land Policy and these Guidelines, all Tribes in an IOU's service area must expressly agree to be bound by the Commission's adopted dispute resolution process as a condition for effectiveness of the Tribal Land Policy and these Guidelines in that IOU's service area.

b. If any Tribe in an IOU's service area does not agree to be bound by the Commission's dispute resolution process, the requirements of the Tribal Land Policy and these Guidelines shall not apply in that IOU's service area.

c. Contractual disputes, if any, will be resolved in accordance with the terms of the contact between the IOU and the Tribe.

5.2. Disputes About Notice

If there is a dispute about the tribe or tribes that the IOU must notice, or about the extent of any tribe's ancestral territory, the IOU shall attempt to resolve the dispute through **reference to the Tribal Interest Reference Map. ~~discussion with the tribe or tribes raising the dispute.~~ If the dispute cannot be resolved through reference to the Tribal Interest Reference Map, the Commission will review and resolve the dispute on an expedited basis through a dispute resolution process that: (i) involves the Native American Heritage Commission ("NAHC") or another inter-tribal body with the ability to provide a final determination; and (ii) is based on transparent criteria for determining which Tribe has the superior interest.** ~~If discussion is unable to resolve the dispute, the IOU shall use its best judgment to determine how to proceed with the required notification. The IOU shall document any steps it takes to resolve such a dispute, and the reason for any determination it makes.~~

5.3. Multiple Interested Tribes

If more than one tribe seeks ownership of available real property, and if the **dispute cannot be resolved through application of the Tribal Interest Reference Map or by the** tribes **~~are unable to resolve the dispute~~** themselves, the **Commission ~~IOU~~** shall engage in meaningful consultation with the tribes to attempt to resolve the dispute. ~~If that fails to resolve the dispute, the IOU, in consultation with the tribes, shall propose a reasonable resolution to the dispute as part of its request for approval.~~ The **Commission ~~IOU~~** will take into consideration each tribe's connection to the **real** ~~surplus~~ property at issue; the current use of the property; the proposed use after transfer; and any other relevant considerations raised by the IOU, tribes, **the NAHC,** and any other

stakeholder to the disposition of the real property**. If the Commission is unable to resolve the dispute within a reasonable period, the Tribal Land Policy and these Guidelines shall not apply to the disposition at issue and the IOU shall not be required to offer the fee interest to any Tribe.**

5. QUARTERLY REPORTS

5.1. Quarterly Reports

a. The IOUs shall, every quarter, provide the Commission with 1) an updated list of recent real property dispositions; 2) a list of upcoming anticipated real property dispositions**, while maintaining any third-party confidentiality;** and 3) a summary of tribal contacts and consultations (including the outcome of those consultations) they have undertaken over the previous quarter.

b. These reports shall be due on January 1, April 1, July 1, and October 1. If the due date falls on a weekend or holiday, the report shall be due the following business day.

c. The utilities shall post **the confidential version of** these reports to their tribal website. The Commission will also post the **confidential version of the** reports on its own website.

APPENDIX B

Joint Utility Comments on Draft Resolution ALJ-381 (Proposed Rule 3.6)

July 13, 2020

By Email (Sophia.Park@cpuc.ca.gov)

Sophia J. Park
Administrative Law Judge
California Public Utilities Commission
505 Van Ness Avenue
San Francisco, CA 94102

Re: Draft Resolution ALJ-381 - Joint Comments of San Diego Gas & Electric Company, Southern California Edison Company and Southern California Gas Company on Proposed Rule 3.6(i)[1]

INTRODUCTION

In accordance with the requirements set forth in Public Utilities ("Pub. Util.") Code Section 311(h) and Government ("Gov.") Code Section 11351, San Diego Gas & Electric Company ("SDG&E"), Southern California Edison Company ("SCE")[2] and Southern California Gas Company ("SoCalGas") (collectively, the "Joint Utilities") submit these opening comments regarding proposed Rule 3.6(i) included in draft Resolution ALJ-381 (the "Draft Resolution" or "DR"), issued on May 14, 2020, proposing modifications to the Rules of Practice and Procedure ("Rule" or "Rules") of the California Public Utilities Commission ("Commission").

---

[1] The Joint Utilities have each concurrently submitted in separate comments their proposed revisions to the other draft Rules included in Draft Resolution ALJ-381.

[2] SCE has authorized SDG&E and SoCalGas to represent that SCE joins in this letter and that SDG&E and SoCalGas may submit this letter on SCE's behalf pursuant to Commission Rule 1.8(d).

Among the modifications proposed in the Draft Resolution is addition of new Rule 3.6(i), which mandates compliance with requirements set forth in the Tribal Land Transfer Policy[3] adopted by the Commission on December 5, 2019 ("Policy"), as well as draft implementation guidelines related to the Policy ("Draft Guidelines") that have yet to be adopted by the Commission.

The Policy establishes a "Commission preference" for the transfer of certain real property owned by the investor-owned utilities ("IOUs") that is necessary or useful in the performance of their duties to the public to designated California Native American Tribes ("Tribes").[4] The Policy is designed to ensure that Tribes receive notice of proposed real property dispositions and have an opportunity to acquire lands located within their ancestral territory.[5] The Joint Utilities support the laudable goals set forth in the Policy and remain committed to working collaboratively with stakeholders to identify implementable solutions that achieve the tribal notification objectives of Executive Order B-10-11, which is cited as the basis for the action taken in the Policy. However, while the Joint Utilities support the intent of the Executive Order, the proposal to codify the rules adopted in the Policy through incorporation into the Commission's Rules of Practice and Procedure is highly problematic.

As discussed in more detail below, the Policy, which is incorporated by reference into proposed Rule 3.6(i), was adopted pursuant to a process that deprived parties of their due process rights and violated the procedural requirements contained in Pub. Util. Code Sections 311 and 1701, *et seq*, and the Commission's own rules. In addition, the Policy's requirement that the IOUs grant a preference to Tribes in disposing of Real Property appears on its face to violate Pub. Util. Code Sections 453(a), which prohibits the IOUs from granting a preference as to rates, charges, service, facilities, "or in any other respect," as well as the requirement set forth in Pub. Util. Code Section 321.1 to evaluate economic and safety impacts (the Policy was adopted without this required analysis). The proposal to codify the Draft Guidelines in proposed Rule 3.6(i) is likewise improper. The Draft Guidelines have not yet been formally adopted; the proposal to codify them in their pre-finalized form would improperly deprive parties of their due process rights.

Thus, proposed Rule 3.6(i), which incorporates the Policy and Draft Guidelines by reference, is inconsistent with due process and other statutory requirements, and does not meet the standard of "consistency" with law defined in the California Administrative Procedure Act ("APA"), codified at Gov. Code Section 11340, *et seq*. Proposed Rule 3.6(i) also fails to meet the standard for "clarity" set forth in the APA and violates the procedural requirements of the

---

[3] *Investor-Owned Utility Real Property – Land Disposition – First Right of Refusal for Disposition of Real Property Within the Ancestral Territories of California Native American Tribes*.

[4] Policy, p. 2; Pub. Util. Code § 851.

[5] Policy, pp. 3-4.

Office of Administrative Law ("OAL"). Accordingly, the Draft Resolution should be revised to delete proposed Section 3.6(i) in its entirety.

Given the complexity of the factual, legal and policy issues arising from the proposals contained in the Policy, the Commission should initiate a formal rulemaking to comprehensively address concerns regarding the Policy and to ensure that all interested parties have the opportunity for meaningful participation, consistent with principles of due process. The Commission should also issue a declaratory ruling clarifying that the Policy is not currently in effect pending resolution of the rulemaking and adoption of final tribal notification rules in the Rules of Practice and Procedure. This clarification is necessitated by Gov. Code Section 11340.5, which provides that in order to be enforceable, the Commission's procedural rules must be deemed by the OAL to be compliant with applicable requirements of the Gov. Code and filed with the Secretary of State. In other words, codification and enforcement of Commission requirements related to tribal notification of proposed real property dispositions can occur only *after* the Commission has conducted a fair proceeding and adopted procedural regulations that are consistent with statutory requirements and principles of due process, and are capable of being approved under the APA.

ADMINISTRATIVE PROCEDURE ACT

The APA establishes basic minimum procedural requirements for adoption, amendment, or repeal of administrative regulations by California state agencies.[6] It is intended to promote "bureaucratic responsiveness and public engagement in agency rulemaking."[7] The APA has limited application to the Commission, affecting only the rules of procedure promulgated by the Commission.[8] The rationale for the limited applicability of the APA to regulations adopted by the Commission may rest in the fact that the Public Utilities Code includes comprehensive protections that are intended to operate in a manner similar to the APA to protect procedural due process rights.[9] The Supreme Court of California has observed that where comprehensive procedural protections of the sort set forth in the Public Utilities Code exist, "the Legislature no

---

6 Decision ("D.") 04-05-017, pp. 23-24.

7 *Morning Star Co. v. State Bd. of Equalization*, 38 Cal. 4th 324, 333 (2006).

8 Gov. Code § 11351(a) provides that Gov. Code §§ 11340-11342.610 apply generally to regulations promulgated by the Commission, and that §§ 11343-11345 and § 11346.4 apply to rules of procedure adopted by the Commission. Pub. Util. Code § 311(h) requires the Commission to submit amendments, revisions, or modifications to the Rules of Practice and Procedure to the Office of Administrative Law for prior review in accordance with Gov. Code §§ 11349, 11349.1(a) and (b), 11349.3-11349.6, and 11350.3.

9 *See, e.g.*, Pub. Util. Code §§ 311, 1701, *et seq.*; Section 20(e), Title 1, California Code of Regulations ("CCR").

doubt concluded that compliance with the APA would be largely redundant and might create confusion as to which procedures applied in a particular circumstance."[10]

Thus, the APA applies only to the rules proposed for inclusion in the Commission's Rules of Practice and Procedure. Gov. Code Section 11340.5(a) makes clear that such rules must comply with the applicable requirements of the Gov. Code and be filed with the Secretary of State in order to be enforceable by the Commission: "No state agency shall issue, utilize, enforce, or attempt to enforce any guideline, criterion, bulletin, manual, instruction, order, standard of general application, or other rule, which is a regulation as defined in [Gov. Code] Section 11342.600, ***unless the guideline, criterion, bulletin, manual, instruction, order, standard of general application, or other rule has been adopted as a regulation and filed with the Secretary of State pursuant to this chapter***." (Emphasis added.) Gov. Code Section 11342.600 defines a regulation as "every rule, regulation, order, or standard of general application or the amendment, supplement, or revision of any rule, regulation, order, or standard adopted by any state agency to implement, interpret, or make specific the law enforced or administered by it, or to govern its procedure."

The OAL reviews the Commission's proposed procedural rules for compliance with the standards set forth in the APA.[11] The OAL will consider, among other factors, the "consistency" of the regulation – *i.e*., whether the proposed regulation is "in harmony with, and not in conflict with or contradictory to, existing statutes, court decisions, or other provisions of law,"[12] as well as the "clarity" of the regulation.[13] If the proposed regulation is approved, the OAL will transmit it to the Secretary of State for publication in the California Code of Regulations. The Commission's procedural rules are set forth in Title 20 of the CCR.

TRIBAL LAND POLICY

A. *Regulations Adopted in the Policy*

The Policy is intended to facilitate the transfer of real property owned by Commission-jurisdictional IOUs and subject to Pub. Util. Code Section 851 to Tribes with historical ties to the real property at issue.[14] The Policy establishes a rebuttable presumption that transfer of real

---

[10] *Tidewater Marie Western, Inc. v. Bradshaw*, 14 Cal. 4th 557, 569 (1996).

[11] Gov. Code § 11349.1; *see also* Pub. Util. Code 311(h).

[12] Gov. Code § 11349.1(d).

[13] Gov. Code §§ 11349(a), (c) and (d); *see also* Pub. Util. Code 311(h).

[14] Policy, p. 1 (footnotes omitted).

property at issue to a Tribe best serves the public interest.[15] The Policy imposes an affirmative obligation on the part of each IOU to:

(i) Provide notice to Tribe(s) of the IOU's intent to dispose of real property within tribal ancestral territory;[16]

(ii) Seek to resolve disputes between Tribes making competing claims of a right to acquire;[17]

(iii) Offer a right of first refusal ("ROFR") to the relevant Tribe to acquire the real property at issues;[18]

(iv) Consult with the relevant Tribe concerning the potential acquisition;[19] and

(v) Include a showing of compliance with notice and consultation requirements in the IOU's Section 851 application or advice letter seeking approval to transfer the real property.[20]

The Policy characterizes the notice and consultation procedures as "requirements" and provides that failure to comply with the notice and consultation requirements can be a basis for Commission denial of the IOU's Section 851 application or advice letter.[21] The Policy further emphasizes that the offering of the ROFR to the relevant Tribe is an "expectation" of the Commission, thus making it a *de facto* requirement at the very least.[22] The Policy makes clear

---

[15] *Id*. at pp. 2-3 ("This policy establishes a Commission preference for the transfer of Real Property to Tribes . . . [that] can be rebutted by a showing that a transfer would conflict with applicable laws or regulations, or by a Commission finding, after a hearing, that the transfer would not be in the public interest.").

[16] *See, e.g*., *id*., p. 5 ("Until implementation guidelines are in place, IOUs **shall provide notice** of the proposed disposition of Real Property to the appropriate Tribe(s).") (emphasis added).

[17] *Id*. at p. 6.

[18] *Id*. at p. 5.

[19] Policy, pp. 5-6.

[20] *Id*. at p. 5 (providing that if an IOU submits a Section 851 application or advice letter to the Commission, the Commission "will ensure" that the record of the proceeding includes a showing of notice and consultation with the relevant Tribe).

[21] *Id*. at p. 6 ("If those [notice and consultation] **requirements** are not met, and if those deficiencies cannot be cured, the Commission may deny the application or advice letter without prejudice.") (emphasis added).

[22] *Id*. at p. 1 ("In particular, this Policy creates an expectation that, for any future disposition of Real Property, the IOU will offer Tribes a right of first refusal before putting the property on the market") (footnote omitted); p. 5 ("Where an IOU seeks approval to transfer Real Property within a Tribe's

that IOUs will be expected to demonstrate in their application seeking disposition pursuant to Pub. Util. Code Section 851 that a ROFR was offered and that disputes between Tribes were resolved, thus making compliance with these requirements part of the "notice and consultation" regulation imposed by the Policy and proposed for codification in the Draft Resolution.

While the Commission indicates in the Policy that it intends to provide further guidance regarding compliance with these regulations and will likely supplement them in the yet-to-be-adopted Draft Guidelines,[23] it is clear that the above requirements constitute a basic set of "rules, regulations, orders, or standards of general application" adopted by the Commission to "implement, interpret, or make specific the law enforced or administered by it, or to govern its procedures."[24] The fact that the Commission proposes to formally incorporate the requirements included in the Policy into its Rules of Practice and Procedure through the APA review process affirms the conclusion that these requirements are intended by the Commission to be enforceable regulations.

B. *Development of the Policy and Commission Approval Process*

The Policy includes a description of the process followed by the Commission to develop the requirements contained therein.[25] An "Information Sheet" available on the Commission's website and attached hereto in Appendix A provides additional details regarding the Commission's process.[26] The below description relies on the information set forth in the Policy and the Information Sheet, and posted on the Commission's website, as well as the Joint Utilities' understanding of the process the Commission followed in promulgating the rules contained in the Policy.

The Commission's Emerging Trends Committee adopted a draft version of the Policy in April, 2019. The Commission states that it "made the draft version available for public comments" by posting it on the Commission's website.[27] The Commission maintains a service list for notice of amendments to its Rules of Practice and Procedure ("RPP Service List"), and in

---

ancestral territory, the Commission expect that the IOU will provide the Tribe a right of first refusal.").

[23] *See, e.g.*, *id*. at p. 3, n.8 and pp. 6-7.

[24] *See* Gov. Code § 11342.600.

[25] Policy, pp. 6-7.

[26] Also available at: https://www.cpuc.ca.gov/uploadedFiles/CPUCWebsite/Content/News_Room/NewsUpdates/2019/Tribal%20Land%20Transfer%20Policy%2020190803%20one%20page%20info%20(003)%20clean.pdf

[27] Policy, p. 6.

other instances has provided notice to this service list of proposed policies that implicate its procedural rules.[28] It did not elect to serve the draft policy on this service list.

The draft policy was first presented to attendees at the May 29, 2019 Emerging Trends Committee meeting.[29] The Emerging Trends Committee is led by two designated Commissioners[30] and typically meets on a bi-monthly basis. The draft policy presented at the May 29, 2019 Emerging Trends Committee Meeting (attached hereto in Appendix B) included a placeholder for a Resolution number,[31] but no draft Resolution incorporating the provisions of the draft policy was ever issued by the Commission or circulated for public comments prior to formal adoption of the Policy on December 5, 2019. The Policy was ultimately not adopted as a Commission Resolution, as discussed below.

The Information Sheet provides details regarding the Commission's outreach process. Specifically, the Information Sheet indicates that outreach and notice of proposed policy "to California Tribes" occurred starting in June, 2019 and continued through October, 2019. The Information Sheet lists three "Tribal Consultation Meetings" scheduled for September 16 and 30, 2019, with the third meeting to be held in Southern California on a date to be determined. The Information Sheet does not identify scheduled dates for outreach to other stakeholders potentially affected by the draft policy.

Meeting agendas for the September 16 and 30, 2019 meetings, as well as the third Tribal Consultation meeting held in Southern California on October 11, 2019, are posted on the Commission's website.[32] These meeting agendas are included in Appendix C. Each meeting agenda reflects that the meetings included two sessions: (1) Broadband/telecommunications

---

[28] For example, the Commission's Policy and Governance Committee provided notice to the Commission's service list for notice of amendments to the Rules of Practice and Procedure of the existence of its draft Enforcement Policy (with a link to the draft policy) and notice that the draft policy would be discussed at the next Policy and Governance Committee meeting. The notice provided by the Policy and Governance Committee solicits public feedback prior to the meeting and indicates that courtesy notice is provided even though "no amendments to the [Rules of Practice and Procedure] are proposed by the Draft Enforcement Policy." Email from Deidre Cyprian dated June 17, 2020 with subject line "Draft CPUC Enforcement Policy – For discussion at 7/1/2020 Policy and Governance Committee Meeting."

[29] Information Sheet, p. 1.

[30] The Committee on Emerging Trends is led by Commissioner Shiroma and Commissioner Guzman Aceves.

[31] Document titled "Tribal Land Transfer Policy - presented publicly on May 29, 2019 at the Committee meeting" available at: https://www.cpuc.ca.gov/uploadedFiles/CPUC_Public_Website/Content/About_Us/Supplier_Diversity/Draft%20presented%20publicly%20at%20Committee%20meeting%20%20May%2029%202019.pdf

[32] *See* https://www.cpuc.ca.gov/tribal/.

services in tribal areas;[33] and (2) "Tribal Consultation" including discussion of the proposed Tribal Land Policy. The meeting agendas each indicate that only the telecommunications session would be open to the public; the Tribal Consultation/Tribal Land Policy portion of the meeting was described as being "not open to the public."[34] At the final meeting held October 11, the Commission did permit public participation during the portion of the meeting devoted to the Tribal Land Policy, which was scheduled to last one hour. The Commission also held a webinar focused on the dispute resolution provision of the draft policy on October 31, 2019, which the IOUs were permitted to attend.

The deadline for informal comments on the draft policy is listed in the Information Sheet as October 11, 2019 (the date of the Southern California Tribal Workshop),[35] with additional direction in a footnote that comments could be submitted through October 28, 2019, but should be submitted no later than October 11, 2019 "for purpose of considering comments fully in consideration of any revisions that may occur before the proposed policy is brought before the Commission for a vote," which the Information Sheet indicated would be November 7, 2019.[36] The Policy indicates that the Emerging Trends Committee received informal comments on the draft policy from several stakeholders.[37]

Apart from parties representing tribal interests, the Commission received comments only from the Pacific Forest and Watershed Lands Stewardship Council ("Stewardship Council"),[38] which raised the concern that the draft policy might conflict with implementation of the Land

---

[33] In a ruling issued in a telecommunications-related proceeding, Rulemaking ("R.") 11-11-007, the Commission proved notice of three "Tribal Consultations and Workshops" scheduled on the same dates and locations focused on telecommunications services in low-income and rural tribal communities. (R.11-11-007, *Administrative Law Judges' Ruling Noticing Workshops* (September 10, 2019), included in Appendix D). R.11-11-007 examines "the appropriate regulatory framework to ensure the continued provision of safe, reliable telecommunications services to rural areas at just and reasonable rates," and does not implicate energy or water utility issues. (R.11-11-007, *See Fourth Amended Assigned Commissioner's Scoping Memo and Ruling* (March 22, 2019), p. 1).

[34] Appendix C, Agenda p. 2.

[35] Information Sheet, p 2.

[36] *Id*., n. 4.

[37] Informal comments are available at: https://www.cpuc.ca.gov/uploadedFiles/CPUC_Public_Website/Content/About_Us/Supplier_Diversity/Comments%20Received%20on%20Proposed%20Tribal%20Land%20Transfer%20Policy.pdf.

[38] The Stewardship Council is a private, nonprofit foundation that was established in 2004 as part of a Pacific Gas and Electric Company ("PG&E") settlement and works to conserve watershed lands for the public good through its Land Conservation Program, and to invest in outdoor youth programs through its Youth Investment Program.

Conservation Commitment ("LCC") established by D.03-12-035 and D.08-11-043, and three California energy IOUs – SDG&E, SCE, and PG&E.

The informal comments respectively submitted by the energy IOUs raised several significant legal and policy concerns and identified problematic ambiguities in the draft policy. All three energy IOUs requested that public workshops be scheduled to allow an opportunity for further dialogue regarding the requirements proposed in the draft policy.[39] As noted above, no public stakeholder workshops were held (public meetings included only the brief session at the October 11, 2019 meeting and the October 31, 2019 webinar), although Commissioner staff did participate in individual IOU meetings to discuss concerns with the draft policy.[40] The Commission adopted the requirements set forth in the Policy without meaningfully addressing or resolving the material concerns raised by the energy IOUs in their informal comments (and also did not address the concern raised by the Stewardship Council regarding conflict with the LCC). The suggestion in the Policy that such issues would be addressed in the Draft Guidelines ignores the fundamental nature of the issues raised.[41]

The Commission did not receive comments on the draft policy from *any* other IOUs – *e.g.*, water, sewer – although the regulations adopted in the Policy apply equally to such IOUs and impose direct obligations on them. Nor did the Commission receive comments from other impacted parties, such as landowners with utility easements on their land who would be prohibited under the Policy from seeking to move a utility easement located on their land for any purpose without a ROFR to acquire the easement first being offered to the indicated Tribe. Likewise, no comments were submitted by local agencies, public safety advocates, low-income housing advocates, conservation advocates (other than the Stewardship Council), building industry advocates, or other parties whose interest in acquiring IOU real property would be made inferior to that of the Tribes under the draft policy; nor were comments submitted by ratepayer advocates or any other stakeholder concerned with the impact of the draft policy on the value of ratepayer assets, or any other non-tribal party likely to be affected by the requirements included in the draft policy. For example, it is anticipated that various public projects such as the construction of roads or public rail may be subject to delay if an IOU is required to extend a ROFR to a Tribe when negotiating with local agencies for discrete right of way easements.

---

[39] Letter from Erik B. Jacobson, Director, Regulatory Relations, PG&E, to Commissioners Guzman Aceves and Shiroma, CPUC (September 30, 2019), p.2; Letter from Clay Faber, Director, Regulatory Affairs, SDG&E, to Commissioners Guzman Aceves and Shiroma, CPUC (October 17, 2019), p.2 and Letter from Clay Faber, Director, Regulatory Affairs, SDG&E, to Commissioners Guzman Aceves and Shiroma, CPUC (October 28, 2019), p.3-4; and Letter from Laura Genao, Managing Director, State Regulatory Affairs, SCE to Public Advisor's Office, CPUC (November 15, 2019), p. 2.

[40] For example, SDG&E representatives met with staff from the offices of President Batjer, Commissioner Guzman Aceves and Commissioner Shiroma on November 14, 2019, Commissioner Randolph on November 22, 2019 and Commissioner Rechtschaffen on November 26, 2019.

[41] *See* Policy, p. 7. The Draft Guidelines issued subsequent to adoption of the Policy do not resolve the issues raised in the energy IOUs' respective comments.

Therefore, local agencies should be meaningfully engaged to determine whether such impacts can be addressed through a collaborative process.

The draft policy appeared on the Public Agenda for the Commission's December 5, 2019 business meeting (Agenda #3452) as Agenda Item #64. The agenda for the Commission's December 5 meeting was first posted on November 25, 2019. Agenda Item #64 was included in the "Commissioner Reports" section of the agenda rather than being listed with the other proposed orders and resolutions being considered for adoption by the Commission. In the November 25, 2019 version of the meeting agenda, Agenda Item #64 included the text "Tribal Land Transfer Policy" with no other description or discussion, and with no website link to the draft policy. The draft policy was not posted with the Commission meeting materials until one week later on December 2 – three days before the December 5 Commission meeting. A revised version of the meeting agenda circulated on December 3, 2019 included a website link but no other information regarding the draft policy.[42] A document titled "Rev. 1 - Land Transfer Policy.pdf" was added to the meeting materials posted on the Commission's website on December 4, 2019. The document is presumably a revised version of the draft policy, but changes to the document do not appear to be marked and are not readily apparent.

The final version of the meeting agenda circulated on the morning of December 5, 2019, the day of the Commission meeting, included no additional information or clarification regarding the draft policy. Agenda Item #64 still appeared in the "Commissioner Reports" section of the agenda rather than being listed with the other proposed orders/resolutions, and the text of the agenda item still consisted only of a website link to the draft policy with no description or explanation of the draft policy's purpose or effect. Typically, the description of purpose is set forth in the "Proposed Outcome" discussion included for each proposed order or resolution appearing on the Commission's agenda.[43] The agenda item also omitted discussion of the safety and economic impacts of the draft policy – analysis that is required under Pub. Util. Code Section 321.1 for "each ratemaking, rulemaking, or other proceeding . . ." and which is generally set forth in the "Safety Considerations" and "Estimated Cost" discussion included in the agenda item text for proposed orders and resolutions.[44] Finally, the text of Agenda Item #64 excludes the statement, "Pub. Util. Code § 311 – This item was mailed for Public Comment," which is standard language in the agenda item text for other proposed orders and resolutions included on the Commission's agenda.[45]

---

[42] CPUC Public Agenda #3452, p. 68, available at: https://docs.cpuc.ca.gov/PublishedDocs/Published/G000/M321/K383/321383451.pdf.

[43] *See, e.g.*, *id*. at Items #47 - #50A, pp. 48-53.

[44] *See, e.g.*, *id*.

[45] *See, e.g.*, *id*.

C. *Adoption of Proposed Rule 3.6(i) is Inconsistent with Principles of Due Process*

In Gov. Code Section 11340.1, the Legislature declared its intent "to reduce the number of administrative regulations and to improve the quality of those regulations which are adopted."[46] The Legislature noted that "[t]he language of many regulation is frequently unclear and unnecessarily complex, even when the complicated and technical nature of the subject matter is taken into account."[47] To address this problem, the Legislature created the OAL and established standards that must be satisfied for all administrative regulations codified pursuant to the APA. As discussed above, in reviewing proposed regulations, the OAL will consider, among other factors, the "consistency" of the regulation – *i.e.*, whether the proposed regulation is "in harmony with, and not in conflict with or contradictory to, existing statutes, court decisions, or other provisions of law,"[48] the "clarity" of the regulation[49] and whether it complies with other applicable requirements.

While, as noted above, the Commission is largely exempt from the due process rules set forth in Article 5 of the APA, Pub. Util. Code Section 311(h) requires the Commission to submit revisions to its Rules of Practice and Procedure to the OAL for prior review in accordance with Gov. Code Section 11349.1(a). The OAL will evaluate proposed regulations for compliance with the "consistency" standard set forth in Gov. Code Section 11349(d), among other requirements. The "consistency" standard cannot be met if the proposed regulation is not "in harmony with" the law." In other words, to be approved by the OAL and codified in the CCR, a proposed regulation must be lawful. Thus, OAL's review of a proposed regulation must necessarily take into account a circumstance where an agency has failed to provide due process in adopting a regulation; to the extent a proposed regulation is inconsistent with due process requirements, it is unlawful and fails the "consistency" standard. Gov. Code Section 11349.3 permits the OAL to disapprove a regulation that fails to meet this standard.

The IOUs respectfully submit that the Commission's process is subject to challenge due to a lack of due process afforded both to the IOUs and to other stakeholders. It is true that the Commission provided adequate notice of proposed Rule 3.6(i) and has provided parties an opportunity to be heard in accordance with APA procedures. However, proposed Rule 3.6(i) does not expressly enumerate the requirements the provision is intended to impose; rather it incorporates by reference the requirements included in the Policy, which has already been adopted by the Commission. Where, as is the case here, a proposed regulation incorporates an external order by reference, the external material "shall be reviewed in accordance with procedures and standards for a regulation published in the California Code of Regulations."[50]

---

46 Gov. Code § 11340.1(a).

47 Gov. Code § 11340(b).

48 Gov. Code §§ 11349(d) and 11349.1(a)(4).

49 Gov. Code §§ 11349(c) and 11349.1(a)(3).

50 1 CCR § 20(b).

Thus, the inquiry here is not limited to whether promulgation of proposed Rule 3.6(i) satisfies due process requirements. It must *also* consider whether the rules included in the Policy, which are incorporated into proposed Rule 3.6(i) by reference, were adopted in accordance with due process requirements.

As discussed below, it is clear that the Commission ignored statutory due process requirements and its own procedural rules in promulgating the rules included in the Policy. The defects in the adoption of the Policy and associated rules are further compounded by reliance on the Draft Guidelines. Since the Commission's adoption of the Policy and the regulations included therein was unlawful, the Policy regulations proposed for incorporation by reference into draft Rule 3.6(i) do not meet the "consistency" standard set forth in Gov. Code Section 11349.1(a)(4). The due process violations discussed herein are not minor deficiencies that may be overlooked by OAL; the Commission's actions are wholly at odds with fundamental legal principles and completely contrary to "existing statutes, court decisions, or other provisions of law,"[51] including specific provisions of the Public Utilities Code and long-standing legal precedent. The Commission's due process failures cannot be cured through a subsequent reliance on the APA review and approval process. Put simply, the Commission cannot ratify the constitutionally infirm requirements adopted in the Policy by seeking to incorporate them by reference into a separate rule that is properly reviewed under APA procedural rules. Instead, the Joint Utilities respectfully submit that the Commission should refine the Policy itself following a meaningful engagement of all interested parties through formal rulemaking, and *then* seek to add the new requirements to the Commission's Rules of Practice and Procedure.

The Commission's proposal to codify the Draft Guidelines by incorporating them by reference into proposed Rule 3.6(i) raises similar due process concerns. Again, the Draft Guidelines have not been adopted in final form. Adoption by incorporation and cross-reference in Rule 3.6(i) would constitute the Commission issuing a final decision on the Rules without having afforded interested parties with Due Process. Thus, proposed Rule 3.6(i) fails the "consistency" standard on this count as well. Finally, in addition to failing to meet the "consistency' standard, Rule 3.6(i) does not satisfy the "clarity" standard, as discussed below. The Commission's incorporation by reference of the rules adopted in the Policy also violates applicable requirements set forth in Title 20 of the CCR.

(i) APA/Fundamental Tenets of Due Process

The fundamental tenets of Due Process are that an interested party is afforded reasonable notice and an opportunity to be heard. The APA is designed to ensure that Due Process is provided in administrative decision-making by state agencies. For example, Article 5 of the APA establishes procedural safeguards intended to protect the due process rights of parties who are subject to state agency regulations.[52] The California Supreme Court has observed that "[o]ne

[51] *See* Gov. Code § 11349.1(a)(4).

[52] *See* Gov. Code §§ 11346-11348 and § 11000.

purpose of the APA is to ensure that those persons or entities whom a regulation will affect has a voice in its creation . . . as well as notice of the law's requirements so that they can conform their conduct accordingly."[53] The Court noted further that "[t]he Legislature wisely perceived that the party subject to regulation is often in the best position, and has the greatest incentive, to inform the agency about possible unintended consequences of a proposed regulation. Moreover, public participation in the regulatory process directs the attention of agency policymakers to the public they serve . . ."[54]

Section 1701, *et seq*. of the Public Utilities Code includes procedural due process requirements that are analogous to those set forth in the APA and serve an identical purpose. California Constitution ("Cal. Const."), Article ("Art.") XII, § 2, grants the Commission authority to establish its own procedures, "subject to statute and due process." The Commission's procedural rules are set forth in its Rules of Practice and Procedure. The Legislature has directed that these Commission-adopted procedures rather than those established in the APA will guide Commission rulemaking activity.[55] The Commission's exclusion from the due process requirements of the APA does not signify that the Commission is free to adopt regulations without the constraint of adherence to procedural due process principles, however;[56] nor does the exclusion permit the Commission to seek ratification of regulations adopted without due process through their codification pursuant to the APA. *All* rules adopted by the Commission – including procedural rules the Commission seeks to codify under the APA – must comply with due process requirements.[57]

The Commission is obligated to comply with the procedural requirements established in the Public Utilities Codes and its own rules. Under Gov. Code Section 11349.1(a)(4), the OAL must evaluate proposed regulations – which in this case includes both proposed Rule 3.6(i) *and* the Policy's rules that are incorporated by reference into Rule 3.6(i) – for compliance with the "consistency" standard. A regulation (or a regulation incorporated by reference) that is adopted pursuant to a process that violates the due process requirements included in the Public Utilities

---

[53] *Tidewater Marine Western, Inc. v. Bradshaw*, 14 Cal. 4th 557, 568-569 (1996) (internal citations omitted).

[54] *Id*. at 557, 569.

[55] Gov. Code § 11351; Pub. Util. Code § 311(h).

[56] *See* Cal Const, Art. XII § 2 ("Subject to statute **and due process**, the commission may establish its own procedures.") (Emphasis added).

[57] *See, e.g., Ohio Bell Tel. Co. v. Public Utilities Com.*, 301 U.S. 292 (1937)*; California Trucking Assn. v. Public Utilities Commission*, 19 Cal. 3d 240 (1977).

Code and in the Commission's own procedural rules cannot be deemed to be "in harmony with, and not in conflict with or contradictory to, existing statutes, court decisions, or other provisions of law."[58]

The procedural requirements established in the Public Utilities Codes and the Commission's Rules of Practice and Procedure ensure due process in the Commission's rulemaking process and protect fundamental rights established in the 5th and 14th Amendments to the United States Constitution. In *People v. Western Air Lines, Inc*., the Supreme Court of California described the ongoing nature of the Commission's procedural due process obligation: "Due process as to the commission's initial action is provided by the requirement of adequate notice to a party affected and an opportunity to be heard before a valid order can be made . . . When the commission has acted and an interested party is dissatisfied due process is further afforded by the right of petition for a writ of review to this court."[59] The Court further observed that "due process requirements of law are not for the sole benefit of an accused. They are the best insurance for the government itself against those blunders which leave lasting stains on a system of justice."[60]

In D13-08-005, the Commission discussed the basic requirements for procedural due process, observing that "[w]hile there are no hard and fast rules for determining what is due process since the type of process that should be accorded may be elusive or ever changing, we can glean from the case law the following examples of due process that should be accorded the parties:

- Circulating materials to the interested parties before relying on that information to make findings. (*Louisiana Ass'n of Indep. Producers & Royalty Owners v. FERC* (D.C. Cir. 1992) 958 F.2d 1101, 1113.)
- Adequate notice for the basis of action. (*Brock v. Roadway Express* (1987) 481 U.S. 252.)
- Meaningful opportunity to be heard. (*Armstrong v. Manzo* (1965) 380 U.S. 545.)
- Opportunity to present evidence and argument. (*Rosa v. Bowen* (1988) 677 F. Supp. 782.)."[61]

The Commission explained that the question of what constitutes sufficient due process in a given instance is "a matter of instinct," noting that courts will apply a proverbial "smell test" to

---

[58] Gov. Code § 11349(d).

[59] *People v. Western Air Lines, Inc*., 42 Cal. 2d 621, 632 (1954).

[60] *Sokol v. Public Utilities Commission*, 65 Cal. 2d 247, 255 (1966).

[61] D.13-08-005, pp. 41-42 (footnote omitted).

agency conduct rather than precise legal rules to render a judgement on questions of due process.[62] In particular, a court will consider the totality of the circumstances behind adoption to inform its determination as to whether or not due process was accorded.

This holistic approach is reflected in the Court's discussion of adequate notice, and its conclusion that while due process does not require a particular form of notice, the notice provided must be "reasonable."[63] Notice is reasonable if it is "reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections."[64] The notice must be designed "reasonably to convey the required information . . . and it must afford a reasonable time for those interested to make their appearance."[65] Notice must "at a minimum, be reasonably calculated to afford affected persons the realistic opportunity to protect their interests."[66]

The right to an opportunity be heard is, likewise, not susceptible to precise description. The California Supreme Court has made clear that "[t]he phrase 'opportunity to be heard' implies at the very least that a party must be permitted to prove the substance of its protest rather than merely being allowed to submit written objections to a proposal."[67] The Commission acknowledged and reiterated this standard in D.96-12-036.[68] The Commission has also emphasized that the opportunity to be heard must be "meaningful,"[69] relying on *Armstrong v. Manzo*, 380 U.S. 545, which found that the opportunity to be heard "must be granted at a meaningful time and in a meaningful manner."[70]

As the Court noted in *Western Air Lines, Inc*., due process is not satisfied solely by adequate notice and a meaningful opportunity to be heard; it is also necessary that a dissatisfied party have the right to petition for a writ of review.[71] This necessitates that Commission decisions include findings on all material issues.[72] The Court has made clear that "[f]indings are essential to 'afford a rational basis for judicial review and assist the reviewing court to ascertain

---

62 *Id*. at p. 41.

63 *Pacific Gas & Electric Co. v. Public Utilities Com.*, 237 Cal. App. 4th 812, 860 (2015).

64 *Mullane v. Cent. Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1950).

65 *Id*. (citations omitted).

66 *Horn v. County of Ventura*, 24 Cal. 3d 605, 617 (1979) (citations omitted).

67 *California Trucking Assn. v. Public Utilities Commission*, 19 Cal. 3d 240, 244 (1977).

68 D.96-12-036, p. 5.

69 D.13-08-005, p. 42.

70 *Armstrong v. Manzo*, 380 U.S. 545, 552 (1965).

71 *People v. Western Air Lines, Inc*., 42 Cal. 2d 621, 632 (1954).

72 *Cal. Mfrs. Ass'n v. PUC*, 24 Cal. 3d 251, 258-259 (1979).

the principles relied upon by the commission . . . . as well as assist parties to know why the case was lost and to prepare for rehearing or review . . .'"[73] The Court has explained that "material issues" include every issue that must be resolved to reach the ultimate finding and also that "'findings are required of the basic facts upon which the ultimate finding is based.'"[74] The Court has observed that findings on material issues "help the commission avoid careless or arbitrary action," pointing out that "[t]here is no assurance that an administrative agency has made a reasoned analysis if it need only state [its] ultimate finding . . ."[75]

Provisions of the Public Utilities Code, as well as the Commission's own codified Rules of Practice and Procedure, ensure satisfaction of these due process requirements in Commission proceedings. They establish requirements for adequate notice, a "meaningful" opportunity to be heard, and a final decision that includes findings on material issues. Specifically, Rule 6.1 provides, *inter alia*, that the Commission may adopt or amend its rules, or amend its Rules of Practice and Procedure, by instituting a rulemaking proceeding.[76] Section 1701.1 requires the Commission to (i) assign a category to the proceeding; (ii) assign commissioner(s) to oversee the case and an administrative law judge ("ALJ") when appropriate; (iii) schedule a prehearing conference; and (iv) prepare and issue a scoping memo that describes the issues to be considered and the applicable timetable for resolution and that, consistent with due process, public policy, and statutory requirements, determines whether the proceeding requires a hearing.[77]

The Commission must provide at least 10 days' notice before holding an evidentiary hearing.[78] Parties have the right to present a final oral argument of its case before the Commission.[79] Pub. Util. Code Section 311(d) requires the proposed decision of the assigned Commissioner or ALJ to be filed with the Commission and served upon all parties to the action or proceeding, with a review and comment period of at least 30 days before it is voted on by the Commission. Section 311(g) provides that Commission decisions not subject to Section 311(d) must, likewise, be served on parties and subject to at least 30 days public review and comment. The proposed decision in a proceeding must be presented to the full Commission in a public meeting and the presentation to the full Commission must contain a record of the number of days of the hearing, the number of days that each commissioner was present, and whether the

---

[73] *Id*.

[74] *Greyhound Lines, Inc. v. Public Utilities Com*., 65 Cal. 2d 811, 813 (1967), (citing *California Motor Transport Co. v. Public Utilities Com.* (1963) 59 Cal.2d 270, 273; *Associated Freight Lines v. Public Utilities Com.* (1963) 59 Cal.2d 583).

[75] *California Motor Transport Co. v. Public Utilities Com.*, 59 Cal. 2d 270, 275 (1963).

[76] 20 CCR § 6.1.

[77] Pub. Util. Code §§ 1701.1(a)-(c) see also Rules 7.1, 7.2 and 7.3.

[78] Rule 13.1(a).

[79] Pub. Util. Code §§ 1701.3(i); 1701.4(d).

decision was completed on time.[80] Finally, Section 311(d) requires the final decision adopted by the Commission to set forth recommendations, findings, and conclusions.

The Commission did not comply with any of these requirements in adopting the Policy. The Policy establishes new rules and amends the Commission's procedural rules, but the Commission did not institute a rulemaking or follow any of the procedures set forth in Section 1701.1. The Commission did not seek to provide notice to interested parties by serving the draft policy on the RPP Service List or the service lists for any other relevant proceedings. Parties accustomed to the Commission's standard approach of serving notice of potential Commission rulemaking actions on relevant proceeding service list(s) would not have known to search the Commission's website for the draft policy. While some parties did ultimately discover the draft policy, this hardly constitutes proof of notice "reasonably calculated, **under all the circumstances**, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections."[81]

The Policy was not styled a "proposed decision of the assigned Commissioner or ALJ" as contemplated in 311(d) – but it was nevertheless clearly a Commission decision. Thus, under 311(g) it was required to be served for review and comment at least 30 days prior to being voted on by the Commission. The Commission violated this requirement by failing to serve the draft policy at all, and by posting it with the December 5, 2019 meeting materials only three days prior to the scheduled meeting. Likewise, including notice of the draft policy in the "Commissioner Reports" section of the December 5 meeting agenda rather than listing it with the proposed orders and resolutions interfered with parties' awareness of the pendency of the action. The notice provided by the Commission was plainly not "reasonably calculated to afford affected persons the realistic opportunity to protect their interests."[82] Thus, on this basis alone, it is clear that the Commission violated due process in adopting the Policy.

The Commission's due process deficiencies do not stop at notice, however. The timeline laid out in the Information Sheet for consideration of the Policy was five months.[83] This is an extraordinarily aggressive schedule given the complexities of the matter at hand. The timeline was inadequate to resolve the multiple policy and legal issues, including a potential constitutional issue related to regulatory takings, arising from the Policy. A full vetting of the issues with participation by interested stakeholders would likely involve a timeline at least triple that contemplated in the Information Sheet, if not longer. The five-month timeline described in the Information Sheet suggests an underestimation of the complexities of the issues and potential impacts to various interested parties including the IOUs, local agencies, ratepayers, and the tribes themselves. The time allotted did not permit an opportunity for briefing on legal issues,

---

[80] Pub. Util. Code §§ 1701.3(e) and (f); 1701.4(b).

[81] *See Mullane v. Cent. Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1950) (emphasis added).

[82] *See Horn v. County of Ventura*, 24 Cal. 3d 605, 617 (1979).

[83] Information Sheet, p. 2.

including the Commission's authority to promulgate the regulations at issue, did not allow full consideration of other alternatives or adequately address several significant concerns raised by parties or others that might exist. While some parties met with the Commission and were permitted to submit written objections to the draft policy, this was not sufficient to prove the substance of their protests.[84] Thus the Commission failed to provide an opportunity to be heard "in a meaningful manner."[85]

Finally, the Policy violates the express admonition of the California Supreme Court in *California Motor Transport Co*., against providing only the Commission's "ultimate finding" without including supporting findings on material issues and basic facts.[86] This omission also violates the requirement set forth in Pub. Util. Code Section 311(d) to include recommendations, findings, and conclusions in adopted decisions. The lack of findings in the Policy and the absence of a robust evidentiary record prevents a clear understanding of the principles relied upon by the Commission in rejecting parties' arguments and interferes with judicial review.[87]

The court strongly criticized an administrative decision with similar characteristics in *California Association of Nursing Homes, etc. v. Williams*, 4 Cal. App. 3d 800. At issue in the case was the validity of an administrative regulation establishing standards for determining the level of state payment for certain Medi-Cal patients.[88] The regulation had been adopted and amended five times as an emergency regulation.[89] An administrative petition was filed and a hearing held, with the petitioner, an association representing nursing homes, and another party presenting evidence. The agency presented no evidence to either support the existing regulation or to rebut the showing of complainants, and neither rejected the petition nor took action to amend the existing regulation.[90] The Medi-Cal administrator did not create a formal administrative record containing the evidence upon which he relied in adopting the regulation.[91]

---

84 *See California Trucking Assn. v. Public Utilities Commission*, 19 Cal. 3d 240, 244 (1977).

85 *See Armstrong v. Manzo*, 380 U.S. 545, 552 (1965).

86 *See California Motor Transport Co. v. Public Utilities Com.*, 59 Cal. 2d 270, 274 (1963).

87 *Cal. Mfrs. Ass'n v. PUC, 24 Cal.*, 3d 251, 258-259 (1979).

88 *California Assoc. of Nursing Homes, etc. v. Williams*, 4 Cal. App. 3d 800, 805 (1970).

89 *Id.* at 807.

90 *Id.* at 809.

91 *Id*. at 812.

On review, the agency argued that it had substantially complied with procedural due process requirements since the petitioner and its members had been involved in rate negotiations with agency staff and had access to materials considered in the negotiations.[92] The court rejected the claim that the agency's approach to promulgating the regulation in question complied with due process requirements. It noted that "[a]dministrative agencies have wide latitude in fashioning procedures and pursuing their methods of inquiry," but that "[p]rocedural elasticity cannot be stretched into disregard of the law's public hearing demand."[93] It admonished that "[p]rivate negotiations with selected members or representatives of an affected industry are no substitute for public hearings. There is a public interest in having the law obeyed. Directed by law to hold public hearings, government officials may not resort to invitational gatherings with selected members of an affected business. The participating firms and associations, however immediately affected, cannot waive the public's right of participation."[94]

It is clear in the instant case that the Commission's actions are highly problematic and render the Commission's action on the laudable goal of returning land to Tribes subject to challenge. The Commission failed to follow statutory requirements and violated its own rules in promulgating the regulations contained in the Policy. The court recently held that while Commission decisions enjoy a strong presumption of validity, the court "will annul a decision by the Commission if the Commission failed to comply with its own rules and the failure was prejudicial."[95] In the context of OAL review, the standard is less exacting – a finding of inconsistency with legal requirements by itself is grounds for disapproval of a proposed regulation. The Commission's approval of the Policy plainly violated its own procedural rules, as well as statutory requirements set forth in the Public Utilities Code and general principles of due process. Thus, the Policy fails the "consistency" standard and cannot be incorporated into Rule 3.6(i).

(ii) <u>"Consistency" Standard</u>

In addition to failing to comply with due process requirements, the Policy violates the "consistency" standard by: (i) establishing a preference for transfers under Pub. Util. Code Section 851 to specified parties that appears on its face to be inconsistent with the requirement set forth in Pub. Util. Code Sections 453 to refrain from granting preferences; and (ii) failing to include the analysis required by Pub. Util. Code Section 321.1.

The Policy establishes an express "preference for the transfer of Real Property to Tribes,"[96] and requires the IOUs to grant a ROFR to reflect this preference. However, Pub. Util.

---

92 *Id*. at 812-813.

93 *California Assoc. of Nursing Homes,* 4 Cal. App. 3d at 800.

94 *Id*. at 813.

95 *Calaveras Telephone Co. v. Public Utilities Com.*, 39 Cal. App. 5th 972, 980 (2019).

96 Policy, p. 2.

Code Section 453 provides: "No public utility shall, as to rates, charges, service, facilities, or in any other respect, **make or grant any preference**, or advantage to any corporation or person or subject any corporation or person to any prejudice or disadvantage."[97] Thus, the Policy appears on its face to be inconsistent with the requirement of Section 453. The OAL does not consider arguments related to substantive issues arising from proposed regulations.[98] It is obligated, however, to evaluate whether aspects of the proposed regulation are "in conflict with, or contradictory to," statutory requirements.[99] The Commission did not request briefing on this issue while considering the draft policy and did not include a finding regarding compliance with Section 453 in the adopted version of the Policy. Thus, OAL has no basis for resolving the apparent inconsistency. Accordingly, given the obvious conflict between Section 453 and the requirements of the Policy, the proposed regulation fails the consistency standard and disapproval of proposed Rule 3.6(i) is necessary to further the Legislature's intent to prevent confusion[100] and to ensure the quality of adopted regulations.[101]

Section 321.1(a) of the Public Utilities Code requires the Commission to "assess the consequences of its decisions, including economic effects, and assess and mitigate the impacts of its decision on customer, public, and employee safety, as part of each ratemaking, rulemaking, or other proceeding . . ." Comments on the Policy raised concerns regarding the economic impact of the Policy, for example noting the potential dampening effect on infill and affordable housing development efforts,[102] the impact of the Policy on the ability to move forward with routine land transactions,[103] and transactional and external costs related to compliance.[104] These concerns were not addressed in the Policy, nor were safety concerns discussed, and the adopted version of the Policy contained no findings on these issues. While OAL will not seek to evaluate the merits of arguments presented on economic and safety issues, it must take into account that the Policy was promulgated without analysis of these issues, in contravention of express requirements set forth in Section 321.1. Given this conflict, the proposed Rule fails the consistency standard.

---

97 Pub. Util. Code Section 453(a) (emphasis added).

98 Gov. Code § 11340.1(a).

99 Gov. Code § 11349(d).

100 Gov. Code § 11340(b).

101 Gov. Code § 11340.1(a).

102 *See, e.g.*, Letter from Clay Faber, Director, Regulatory Affairs, SDG&E to Commissioners Guzman Aceves and Shiroma, CPUC (October 28, 2019), p. 1.

103 *See, e.g.*, *id*. at pp. 2-3.

104 *See, e.g.*, *id*. at p. 4.

(iii) "Clarity" Standard

Under the APA, a regulation meets the "clarity" standard when it is "written or displayed so that the meaning of regulations will be easily understood by those persons directly affected by them."[105] Persons are "directly affected" by a regulation if they: "(1) are legally required to comply with the regulation; (2) are legally required to enforce the regulation; (3) derive from the enforcement of the regulation a benefit that is not common to the public in general; (4) incur from the enforcement of the regulation a detriment that is not common to the public in general."[106] A regulation fails to meet the "clarity" standard if it exhibits, *inter alia*, any of the following deficiencies:

- It does not use citation styles that clearly identify published material cited in the regulation;[107]
- It conflicts with the agency's description of the effect of the regulation;[108]

It is clear that proposed Rule 3.6(i), as drafted, fails to ensure that the meaning of the regulations codified through adoption of the Rule will be easily understood by those persons directly affected by them. The universe of parties "directly affected" by the Policy is extremely broad. It includes all Commission-jurisdictional IOUs (*e.g.*, electric, water, sewer), all tribal interests within the State, landowners, local agencies, real estate development interests, ratepayer advocates, public safety advocates, low-income housing advocate, conservation advocates, etc. Very few of these stakeholders were involved in the Commission's development of the Policy and many may be unaware of the Policy's existence. The overly-generalized description of the proposed Rule included in the Draft Resolution will provide little assistance in understanding the implications of the regulations adopted under the Policy.

The most obvious impediment to a clear understanding of what is required under the proposed Rule is the fact that, rather than clearly enumerating the individual requirements adopted under the Policy in a manner similar to the requirements listed in Rule 3.6(a)-(h), the proposed Rule seeks to incorporate the new requirements promulgated in the Policy through reference to the Policy itself. While the CCR does permit inclusion of references to other documents in adopted regulations,[109] setting forth the *entirety* of a regulation in an external document such that the adopted regulation consists of little more than a reference to such external document is a questionable practice at best and, as discussed above, could constitute an

---

[105] Gov. Code § 11349(c).

[106] 1 CCR § 16(b)(1)-(4).

[107] 1 CCR § 16(a)(6).

[108] 1 CCR § 16(a)(2).

[109] 1 CCR § 20(b).

improper end-run around statutory due process requirements. This approach is directly contrary to the Commission's goal of transparency and fails to ensure "clarity" as required by the APA.

While the proposed Rule relies almost entirely on incorporation by reference of the Policy to establish the specifics of the adopted regulation, the proposed Rule fails to provide a legal citation to the Policy (since none exists) and does not otherwise indicate how a directly affected party would obtain the Policy or whether the Policy is subject to change. This would appear to violate the requirement that "citation styles . . . clearly identify published material cited in the regulation,"[110] and would most certainly interfere with the ability of directly affected persons to easily understand the meaning of regulations adopted in the proposed Rule.[111]

Even more problematic is the fact that the description of the conduct that proposed Rule 3.6(i) purports to regulate is far more limited in scope that what is actually contained in the Policy.[112] The proposed Rule is limited to "[a]pplications that involve the **sale** of real property . . .",[113] whereas the Policy applies to many different types of dispositions, including but not limited to sales.[114] Similarly, the proposed Rule directs compliance only with "the **notice and communication requirements** set forth in the Commission's Tribal Land Policy . . .,"[115] and makes no mention of the much more comprehensive compliance showing that is contemplated under the Policy to demonstrate IOU satisfaction of the requirements related to offering a ROFR and dispute resolution (*i.e*., the IOU is required under the Policy to provide a ROFR and engage in dispute resolution, and would be required to include a showing regarding both in its Section 851 application as part of the notice and consultation showing). This inconsistency between the purported effect of the proposed regulation and the Commission's description in the Policy of what is required improperly inhibits the "clarity" of the proposed Rule.[116]

The CCR requires that where a regulation incorporates an external document by reference, the regulation must specify *which* portions of the Policy are being incorporated by reference.[117] If the Commission's intent is to limit enforcement of the Policy to the notice and communication requirements adopted therein, it should so state and expressly provide that all other aspects of the Policy will not be enforced. However, the Commission has not otherwise signaled that its intent is to reduce or eliminate obligations imposed by the Policy. Thus, the

---

[110] *See* 1 CCR § 16(a)(6).

[111] *See* Gov. Code § 11349(c).

[112] *See* 1 CCR § 16(a)(6).

[113] Draft Resolution, Appendix A, p. A-16 (emphasis added).

[114] *See* Policy, p. 1, n. 2.

[115] Draft Resolution, Appendix A, p. A-16 - A-17 (emphasis added).

[116] *See* 1 CCR § 16(a)(2).

[117] 1 CCR § 20(c)(5) (emphasis added).

inconsistency between the Commission's apparent commitment to the Policy and the language of the proposed Rule creates an ambiguity that undermines regulatory certainty and compels a finding that Proposed Rule 3.6(i) fails to meet the "clarity" standard.

D. *Adoption of Proposed Rule 3.6(i) Violates OAL Regulations*

While OAL regulations allow materials to be incorporated by reference, as noted above, OAL rules provide that agencies may incorporate proposed materials by reference "*only if*" certain specified conditions are met. Specifically, the agency must, among other things:

- Demonstrate in the final statement of reason that it would be cumbersome, unduly expensive, or otherwise impractical to publish the document in the CCRs;[118]
- Demonstrate in the final statement of reasons that the document was made available upon request directly from the agency, or was reasonably available to the affected public from a commonly known or specified source. In cases where the document was not available from a commonly known source and could not be obtained from the agency, the regulation shall specify how a copy of the document may be obtained;[119] and
- Specify in the regulation text which portions of the document are being incorporated by reference.[120]

The Commission has failed to meet these requirements in the Draft Resolution. Thus, it is prohibited from incorporating the Policy by reference into proposed Rule 3.6(i).

CONCLUSION

It is clear that prior process followed to adopt the Policy lacked due process. The Policy, its rules, and Draft Guidelines are highly problematic, may lead to unnecessary delays to public projects, and present unintended and/or un-evaluated impacts to ratepayers. Thus, for the reasons set forth herein, the Joint Utilities respectfully request modification of the Draft Resolution to delete proposed Section 3.6(i) in its entirety. To achieve the laudable goals underlying the Policy in a manner that satisfies due process requirements, the Commission should initiate a formal rulemaking that allows all interested parties to participate meaningfully in the development of a robust record comprehensively addressing the legal and policy issues arising from the Policy. The Commission should also issue a declaratory ruling clarifying that

---

[118] 1 CCR § 20(c)(1).

[119] 1 CCR § 20(c)(2).

[120] 1 CCR § 20(c)(5).

the Policy is not currently in effect pending resolution of the rulemaking and adoption of final tribal notification rules in the Commission's Rules of Practice and Procedure.

Respectfully submitted this 13th day of July, 2020.

/s/ *Aimee M. Smith*
AIMEE M. SMITH
8330 Century Park Court, CP32D
San Diego, CA 92123
Telephone: 858.654.1644
Facsimile: 619.699.5027
Email: AMSmith@sdge.com

Attorney for
SAN DIEGO GAS & ELECTRIC COMPANY

/s/ *Melissa A. Hovsepian*
MELISSA A. HOVSEPIAN
555 West Fifth Street, Suite 1400
Los Angeles, CA 90013
Telephone: 213.244.3978
Facsimile: 213.629.9620
Email: MHovsepian@socalgas.com

Attorney for
SOUTHERN CALIFORNIA GAS COMPANY

/s/ *Mark A. Rothenberg*
MARK A. ROTHENBERG
2244 Walnut Grove Avenue
Rosemead, CA 91770
Telephone: 626.302.6916
Facsimile: 626.302.1926
Email: Mark.A.Rothenberg@sce.com

Attorney for
SOUTHERN CALIFORNIA EDISON COMPANY

Appendix A

California Public Utilities Commission (CPUC) Proposed Tribal Land Transfer Policy – Information Sheet

Proposed Tribal Land Transfer Policy

California Public Utilities Commission – Information Sheet

Commissioner Guzman Aceves and Commissioner Shiroma, through the Commission's Emerging Trends Committee have proposed a Tribal Land Transfer Policy that will require investor owned utilities (IOUs) to contact tribal governments and under the circumstances described in the proposed policy to provide a first right of refusal to tribes where an IOU proposes to divest surplus real property. This policy if adopted will provide Native American Tribes an opportunity to regain lands lost through bias and unfair means in the late 1800s/early 1900s.

Background

The Commission adopted a Tribal Consultation Policy on April 26, 2019 of this year. The Commission's Tribal Consultation Policy can be found at https://www.cpuc.ca.gov/tribal/ .

This proposed Tribal Land Transfer Policy, consistent with Executive Order B-10-11, N-15-19, and the Commission's Tribal Consultation Policy, is intended to further the Commission's commitment "to provide meaningful input into the development of legislation, regulations, rules and policies on matters that may affect tribal communities." The proposed policy was drafted after extensive consultation with a number of tribal representatives, the Governor's Tribal Advisor, other state agencies, and stakeholders to address concerns that tribal governments have not had a meaningful opportunity to seek return of lands within their ancestral territory.

The proposed policy was first presented to the Commission during the May 29, 2019 Emerging Trends Committee meeting. Historical information on the taking of California Native American lands was presented by Dr. Beth Rose Middleton Manning. Christina Snider, Governor Newsom's Tribal Advisor also provided comments on statewide policies directed at addressing historical wrongs suffered by California Native Americans, as well as adverse impacts that have carried over and are continuing to face California Native Communities. The Commissioners considered the information presented, the draft of the proposed policy and proposed schedule/next steps. The Emerging Trends Committee was directed to move forward with the proposed schedule/next steps.

The proposed Tribal Land Transfer Policy can be found at https://www.cpuc.ca.gov/tribal/.

More Information and Next Steps

Interested stakeholders are encouraged to provide comments on the proposed policy. Information on the proposed Tribal Land Transfer Policy and the Emerging Trends Committee can be found at: https://www.cpuc.ca.gov/emergingtrends/ .

Martha Guzman Aceves and Genevieve Shiroma are the Commissioners assigned to the Emerging Trends Committee. Information about Commissioner Guzman Aceves is available at: www.cpuc.ca.gov/Guzman_Aceves. Information about Commissioner Genevieve Shiroma is available at: https://www.cpuc.ca.gov/Shiroma/.

Tribal governments that would like to request specific consultation on the proposed Tribal Land Transfer Policy should contact the CPUC Tribal Liaison, Stephanie Green at:

Email: stephanie.green@cpuc.ca.gov **Phone:** 415-703-5245

Proposed Schedule/Next Steps

Outreach and notice of proposed policy to California Tribes	June- October 2019
Tribal Consultation Meetings • Tuolumne Rancheria • Blue Lake Rancheria • Southern California	September -October 2019 September 16, 2019[1] September 30, 2019[2] TBD[3]
Public Comments on Proposed Policy	October 2019[4]
Review and Consider Comments	September-October 2019
Proposed Policy on Commission Agenda for Vote	November 7, 2019

How to Submit Comments

The public, tribal communities, and stakeholders are invited to submit comments (by email or U.S. mail) to:

Address: California Public Utilities Commission
Public Advisor's Office
505 Van Ness Ave., San Francisco, CA 94102
Email: public.advisor@cpuc.ca.gov

Please include in the Subject Line: "Comment on Proposed Tribal Land Transfer Policy". Comments on the proposed policy should be received by October 11, 2019. Additional time may be provided for comment as the Commission will be conducting additional outreach to consult with tribal communities and other stakeholders.

Who to Contact with Questions?

If you have any questions, about the proposed Tribal Land Transfer Policy please contact:

Darcie Houck at darcie.houck@cpuc.ca.gov or Jonathan Koltz at jonathan.koltz@cpuc.ca.gov .

[1] Consultation for September 16, 2019 will be hosted by the Tuolumne Band of Me-Wuk Indians at the Black Oak Casino Hotel Conference, 19400 Norther Tuolumne Rd N, Tuolumne, CA 95379 from 10-4pm. See separate notice for further details.
[2] Consultation for September 30, 2019 will be hosted by the Blue Lake Rancheria at Sapphire Palace Blue Lake Rancheria, 428 Chartin Road, Blue Lake CA 95525 from 10-4pm. See separate notice for further details.
[3] A third consultation will be held in Southern California early October 2019. Additional details will b provided in a separate notice.
[4] Comments will continue to be accepted on a rolling basis through October 28, 2019. However, for purposes of considering comments fully in consideration of any revisions that may occur before the proposed policy is brought before the Commission for a vote interested stakeholders should plan to submit comments no later than October 11, 2019.

Appendix B

California Public Utilities Commission (CPUC)
Draft Tribal Land Transfer Policy
Commissioner Guzman Aceves
May 29, 2019

Commissioner Guzman Aceves

DRAFT

California Public Utilities Commission

Resolution #_____

Investor-Owned Utility Real Property- Land Disposition – First Right of Refusal for Aboriginal Properties to California Native American Tribes

Resolution E-_____

On April 6, 2018, the California Public Utilities Commission (Commission) adopted a Tribal Consultation Policy. Consistent with the goals of the Tribal Consultation Policy and Executive Order B-10-11,[1] this policy provides a first right of refusal by California Native American tribes for: any future disposition[2] of real property currently owned by investor owned utilities (IOUs), including PG&E retained lands[3] pursuant to the Stipulation, [4] not contained within the boundaries of a Federal Energy Regulatory Commission (FERC) jurisdictional project .

Executive Order B-10-11 declares that "the State is committed to strengthening and sustaining effective government-to-government relationships between the State and the Tribes by identifying areas of mutual concern and working to develop partnerships and consensus." The Executive Order directs state executive agencies and departments to "encourage communication and consultation with California Indian Tribes." It further directs state agencies and departments "to permit elected officials and other representatives of tribal governments to provide meaningful input into the development of legislation, regulations, rules, and policies on matters that may affect tribal communities."

---

[1] Adopted September 19, 2011.
[2] The use of the terms "dispose of" and "disposition" in this Resolution refer to the transfer, sale, donation or disposition by any other means of a fee simple interest or easement in real property.
[3] All land currently retained by PG&E that is included in the LCP is referred to here as "retained land," and all "retained land" located outside the boundaries of FERC jurisdictional projects is referred to here as "non-FERC jurisdictional retained land."
[4] The Land Conservation Plan (LCP) was developed in accordance with the Settlement Agreement, dated December 19, 2003, among PG&E and the Commission and the related Stipulation Resolving Issues Regarding the Land Conservation Commitment (Stipulation). *See* D.03-12-035, D.08-11-043, D.10-08-004. Any transfers of utility property, including real property, require Commission approval pursuant to Public Utilities Code section 851. All further statutory code references refer to the Public Utilities Code unless otherwise noted.

As recognized in the Commission's Tribal Consultation Policy, California is home to over 170 California Native American tribes.[5] Executive Order B-10-11 applies to federally-recognized tribes and other California Native Americans. For purposes of this policy, the terms "tribes" and "tribal governments" refer to elected officials and other representatives of federally-recognized tribes and other California Native Americans.

This policy is to be read consistent with the Commission's Tribal Consultation Policy, which requires that the Commission: provide notification of Commission proceedings to tribes, encourage tribal participation in Commission proceedings, and meaningfully consider tribal interests and the protection of tribal sacred places and cultural resources.

This policy requires IOUs to notify the appropriate California tribe(s) at the time the IOU determines it will dispose of watershed properties or retained land located in or adjacent to a tribe's territory.[6] This policy adopts a preference for the transfer of non-FERC jurisdictional watershed and retained land to California tribes consistent with specific considerations, and to the extent that a conflict does not exist with applicable laws or regulations.

The Commission, in adopting this policy, recognizes that:

- The IOUs collectively own a significant amount of undeveloped watershed property located within the aboriginal territories of California tribes. This includes lands both within and without the FERC jurisdictional boundaries. Approximately 140,000 acres of undeveloped watershed property owned by PG&E was identified in the LCP. Some of this land has been transferred to third parties, is in the process of being transferred to third parties or is/will be retained by PG&E consistent with the Stipulation.

- California law and policy encourages consultation and cooperation with tribal governments, particularly concerning the protection of tribal sacred places and cultural resources.[7]

[5] "California Native American tribe" means a Native American tribe located in California that is on the contact list maintained by the Native American Heritage Commission for the purposes of Chapter 905 of the Statutes of 2004. *See* Cal. Pub. Res. Code § 21073. California Native American tribes include both federally recognized tribes and tribes that are not recognized by the federal government. Nothing in the policy prevents tribes from consulting with other Native American groups that demonstrate an ongoing connection to a specific place or cultural resource, or issue falling under the jurisdiction of the Commission.

[6] Tribal territory is defined as the territory designated by the Native American Heritage Commission for notice of projects under AB 52. All notices and consultations required by this policy are to follow the timeframes set out in AB 52 for CEQA consultations.

[7] Consistent with California law and policy, a majority of the Commissioners individually expressed that they would like to see more of the Stewardship Council lands donated tribes. February 8, 2018 Commission Voting Meeting.

- These watershed properties hold historical and spiritual significance for California tribes: some of these lands include the remains of California Native Americans; others are places of spiritual and cultural importance where California Native Americans have prayed, held ceremonies, and gathered traditional and medicinal plants.

- Executive Orders, state laws, policies, and regulations acknowledge legal rights of access to certain lands and require state consultation with affected California Native American tribes prior to taking actions impacting such lands.

Policy Goals: The goals of this policy are as follows:

- Recognize and respect tribal sovereignty.
- Protect tribal sacred places and cultural resources.
- Ensure meaningful consideration of tribal interests and the return of lands within the tribe's aboriginal territory to the appropriate tribe.
- Encourage and facilitate notice and participation in matters before the Commission that involve land transfers subject to the Section 851 through either applications or advice letter processes.

The Commission's review of an IOUs request to dispose of watershed lands may affect tribes and tribal members in several ways, including, but not limited to: 1) impacts to land use activities on or near tribal communities; 2) the ability to protect and access tribal sacred places and cultural resources; and, 3) provide opportunities to return lands to California tribes that are within their tribal territories.

Facilitating Tribal Government Access to Information:

The Commission will encourage and facilitate tribal government access to information concerning matters before the Commission that involve watershed land transactions.

- The Commission will require the IOUs to notify tribal governments of any plans to dispose of watershed properties, including retained lands, within a tribe's territory.
- The Commission will give special consideration to tribal government requests to participate in Commission proceedings involving requests by IOUs in accordance with section 851 to dispose of watershed properties, including retained lands.

The Commission will grant a tribal government's request to become a party in such proceedings and consider the tribe's comments or protest of IOU's request for Commission approval of the transaction.[8] If an IOU fails to provide notice to the appropriate tribe(s) before submitting an application or advice letter requesting Commission approval of the transaction, the Commission will provide the tribe additional time to participate in the proceeding.

- Commission staff and Administrative Law Judges shall ensure that relevant information the Commission receives from a tribe is submitted into the record of a proceeding (including presenting such information to Commissioners where the land transfer is the subject of an advice letter), consistent with the confidentiality provisions set forth in the Commission's Tribal Consultation Policy.

- Where an IOU seeks approval to transfer non-FERC jurisdictional watershed property, including retained land, within a tribe's territory, the tribe shall be deemed the preferred transferee absent a finding supported by substantial evidence that it would be in the public interest to transfer the land to another entity.

- This policy applies to all proposed transfers of non-FERC jurisdictional watershed properties, including retained lands.

If an IOU submits an application or advice letter consistent with section 851 and relevant Commission decisions for the disposition of watershed property, including retained lands, the application or advice letter must include a showing of notice and consultation to the appropriate tribe(s) consistent with the identified tribal territory recognized by the Native American Heritage Commission.[9] This includes:

- A request to the Native American Heritage Commission to identify tribal entities interested in the area where the property being disposed of is located.

- Written notice of any proposed disposition of watershed properties, including retained lands in the Tribe's territory prior to any disposition of such land.

- Documentation of communication between the IOU and the Tribe regarding whether or not the Tribe is interested in acquiring the land at issue.

The Commission will grant the tribe a first right of refusal for any IOU requests to transfer non-FERC jurisdictional watershed property, including retained lands. There

[8] This will include requests made through application or advice letter.
[9] The timeframes for notice and response set out in AB 52 will apply for purposes of this policy.

will be a rebuttable presumption that it is in the public interest to provide tribal entities the first opportunity to acquire such property.

For land transfers pursuant to section 851 for watershed property, including retained lands, located within a FERC jurisdictional project, the Commission will consider any request by a tribal entity, as well as comments regarding potential impacts on tribal cultural resources and suggested mitigation measures that should be included in any authorization of the Commission for the disposition of such assets as part of the proceeding.

Tribal Liaison:

Consistent with the Commission's Tribal Consultation Policy, the Commission's tribal liaison will assist in implementing this policy. The tribal liaison will act as a point of contact for tribes to seek advice on participating in proceedings and inquiries regarding pending section 851 applications/advice letters; filing documents; contacting Commissioners, advisors, or staff; and other related matters. The Tribal Liaison, Stephanie Green, can be contacted at Stephanie.Green@cpuc.ca.gov or (415) 703-5245 Alternatively, tribal governments may contact the Commission's Public Advisor for this assistance (E-mail: Public.Advisor@cpuc.ca.gov or phone: (866) 849-8390).

Appendix C

Rulemaking 11-11-007
Central CA Tribal Workshop and Consultation
Proposed Agenda 2019

Proposed Agenda:
Central CA Tribal Workshop and Consultation

Monday, September 16, 2019, 10 a.m. - 4 p.m.
Black Oak Casino Hotel Conference, 19400 Tuolumne Rd. N., Tuolumne, CA 95379
Hosted by the Tuolumne Me-Wuk

Welcome and Introductory Remarks (10:00-10:20am)

- Details and practicalities about how the workshop and consultation will be managed
- Staff report process

Telecommunications Session 10:20-12:00

- Introduction to the CA High Cost Funds and California High Cost Fund A Rulemaking 10 min
- Case studies and other public purpose programs 20 min
    - Other public purpose programs
        - CA Advanced Services Fund
        - CA Lifeline
    - Case studies
        - Warm Springs, OR
        - Havasupai, AZ using the Educational Broadband Service
- CA High Cost Fund A company presentations 15 min
- Discussion on Tribal and rural needs 15 min
- Group discussion and brainstorm 45 min

Lunch 12:00-1:00

START TRIBAL CONSULTATION NOT OPEN TO THE PUBLIC

Land Transfer Policy Session (1:00-2:00pm)

- Introduction
- Questions and answers
- Providing comments

Individual and Group Consultations (2:00-4:00)

- Contact Michael Minkus to schedule in advance: Michael.Minkus@cpuc.ca.gov, 415-703-1681

No Remote Access

Currently workshop will not be remotely accessible. This information will be updated if streaming or remote participation options become available.

Northern CA Tribal Workshop and Consultation Agenda

When: Monday, September 30, 2019, 10 a.m. - 4 p.m.

Where: Sapphire Palace Event Center at Blue Lake Rancheria
428 Chartin Road, Blue Lake, CA 95525
Hosted by the Blue Lake Rancheria

TRIBAL WORKSHOP - OPEN TO THE PUBLIC – 10:00am-12:00pm

Remote Access

Meeting link: https://bit.ly/2kcsTgw
Meeting number: 712 118 635
Password: bluelake

1-877-820-7831 Local access number
1-720-279-0026 Access number
Attendee access code: 212 296

Welcome and Introductory Remarks (10:00-10:20am)

- Details and practicalities about how the workshop and consultation will be managed
- Staff report process

Telecommunications Session 10:20-12:00

- Introduction to the CA High Cost Funds and California High Cost Fund A Rulemaking 10 min
- Case studies and other public purpose programs 20 min
    - Other public purpose programs
        - CA Advanced Services Fund
        - CA Lifeline
    - Case studies
        - Warm Springs, OR
        - Havasupai, AZ using the Educational Broadband Service
- Provider presentations 15 min
    - CA High Cost Fund A companies
    - Other providers
- Discussion on Tribal and rural needs 15 min
- Group discussion and brainstorm 45 min

Questions to Keep in Mind for the Telecommunications Session

Current voice and broadband service

- What service does your community have now?
- For tribal government, or tribal and individual businesses?
- For residential?
- Does the service meet needs?

Models and solutions

- Upgrade existing service?
- Nearby provider extends service?
- Start a Tribal enterprise?
- Are voice or broadband improvements needed, or both?
- For Tribal government, businesses, residences, or all three?

Lunch 12:00-1:00

- Sapphire Palace will remain open to the public for networking during the lunch hour.
- Attendees will have an opportunity to pre-order lunches during the morning meeting for faster service and/or takeaway. Onsite lunch options are Alice's Restaurant and the Lily Pad Café.

TRIBAL CONSULTATION - NOT OPEN TO THE PUBLIC – 1:00-4:00pm

Land Transfer Policy Session (1:00-2:00pm)

- Introduction
- Questions and answers
- Providing comments

Individual and Group Consultations (2:00-4:00)

- Contact Michael Minkus to schedule in advance: Michael.Minkus@cpuc.ca.gov, 415-703-1681

Southern CA Tribal Workshop & Consultation Agenda

Rulingmaking 11-11-007

When: Friday, October 11, 2019, 10 a.m. - 4 p.m.

Where: Pechanga Resort Casino
Summit Ballroom D
45000 Pechanga Parkway
Temecula, CA 92592
Hosted by the Pechanga Band of Luiseño Indians

TRIBAL WORKSHOP - OPEN TO THE PUBLIC – 10:00am-12:00pm

Remote Access

Meeting link: https://bit.ly/2m5j9oP
Meeting number: 713 125 125
Meeting password: pechanga

1-877-820-7831 Local access number
1-720-279-0026 Access number
Attendee access code: 212 296

Welcome and Introductory Remarks (10:00-10:20am)

- Details and practicalities about how the workshop and consultation will be managed
- Staff report process

Telecommunications Session 10:20-12:00

- Introduction to the CA High Cost Funds and California High Cost Fund A Rulemaking 10 min
- Case studies and other public purpose programs 20 min
    - Other public purpose programs
        - CA Advanced Services Fund
        - CA Lifeline
    - Case studies
        - Warm Springs, OR
        - Havasupai, AZ using the Educational Broadband Service
- Provider presentations 15 min
    - CA High Cost Fund A companies
    - Other providers
- Discussion on Tribal and rural needs 15 min
- Group discussion and brainstorm 45 min

Questions to Keep in Mind for the Telecommunications Session

Current voice and broadband service

- What service does your community have now?
- For tribal government, or tribal and individual businesses?
- For residential?
- Does the service meet needs?

Models and solutions

- Upgrade existing service?
- Nearby provider extends service?
- Start a Tribal enterprise?
- Are voice or broadband improvements needed, or both?
- For Tribal government, businesses, residences, or all three?

Southern CA Tribal Workshop & Consultation Agenda

Rulingmaking 11-11-007

Lunch 12:00-1:00

TRIBAL CONSULTATION - NOT OPEN TO THE PUBLIC – 1:00-4:00pm

Remote Access

- Contact Michael Minkus for remote access info for Tribes Michael.Minkus@cpuc.ca.gov, 415-703-1681

Land Transfer Policy Session (1:00-2:00pm)

- Introduction
- Questions and answers
- Providing comments

Individual and Group Consultations (2:00-4:00)

- Contact Michael Minkus to schedule in advance Michael.Minkus@cpuc.ca.gov, 415-703-1681

Appendix D

Rulemaking 11-11-007
Administrative Law Judges' Ruling Noticing Workshops
September 10, 2019

MFM/HCF/gd2 09/10/2019

FILED
09/10/19
10:32 AM

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Order Instituting Rulemaking into the Review of the California High Cost Fund-A Program	Rulemaking 11-11-007

ADMINISTRATIVE LAW JUDGES' RULING NOTICING WORKSHOPS

This ruling informs interested parties about upcoming workshops to address Item 3 in the Fourth Amended Assigned Commissioner's Scoping Memo and Ruling of March 22, 2019. Item 3 was titled "Low Income and Rural Tribal Communities".[1]

[1] Tribal communities, that may or may not reside in Indian country, in rural areas that typically are not adequately served by broadband. Indian country is defined in the 18 USC § 1151 as, *Except as otherwise provided in sections 1154 and 1156 of this title, the term "Indian country", as used in this chapter, means (a) all land within the limits of any Indian reservation under the jurisdiction of the United States Government, notwithstanding the issuance of any patent, and, including rights-of-way running through the reservation, (b) all dependent Indian communities within the borders of the United States whether within the original or subsequently acquired territory thereof, and whether within or without the limits of a state, and (c) all Indian allotments, the Indian titles to which have not been extinguished, including rights-of-way running through the same.* California has the highest population of Native Americans in the country. See https://www.census.gov/content/dam/Census/library/publications/2012/dec/c2010br-10.pdf A significant portion of this population resides in Northern California, both within and outside of Indian country. California's Native American population includes federally recognized and non-recognized tribal communities that are underserved by telephone and broadband (advanced) services. Tribal governments also require such services and often are in the position of providing necessary services such as medical, housing, primary economic development services and employment opportunities for community members. This proceeding will investigate how to better serve these communities; including tribal governments, businesses, and individuals.

1. Background

The Commission began a review of the California High Cost Fund-A (CHCF-A) program with the Order Instituting Rulemaking (OIR) R.11-11-007. The Fourth Amended Assigned Commissioner's Scoping Memo and Ruling set forth the category, revised the issues to be addressed, and schedule of the proceeding pursuant to Public Utilities (Pub. Util.) Code § 1701.1 and Article 7 of the Commission's Rules of Practice and Procedure.

2. Tribal Consultations and Workshops

The Commission will be conducting three workshops (proceeding tribal consultations):

1. Central California Workshop hosted by the Tuolumne Me-Wuk on September 16, 2019;
2. Northern California Workshop September 30, 2019 hosted by the Blue Lake Rancheria; and
3. Southern California workshop and tribal consultation is anticipated in October 2019.

Parties to this proceeding and representatives from tribal communities in California are encouraged to participate. Only California tribes can participate in the consultation. A flyer is attached with additional details about the consultations. More information is available at: https://www.cpuc.ca.gov/tribal/.

EVENT	DATE
Central California Workshop and Consultation – Tuolumne, CA Black Oak Casino Hotel Conference 19400 Tuolumne Road N, Tuolumne, CA 95379 Hosted by the Tuolumne Me-Wuk	Monday, September 16, 2019, 10:00 a.m. – 4:00 p.m.

Northern California Workshop and Consultation – Arcata, CA Sapphire Palace at Blue Lake Rancheria 428 Chartin Road, Blue Lake, CA 95525 Hosted by the Blue Lake Rancheria	Monday, September 30, 2019, 10:00 a.m. – 4:00 p.m.
Southern California Workshop and Consultation – TBD	Anticipated October, 2019

IT IS RULED that:

1. Parties are hereby informed about an upcoming workshops, September 16, 2019, and September 30, 2019.

Dated September 10, 2019, at San Francisco, California.

/s/ MARY MCKENZIE
Mary McKenzie
Administrative Law Judge

/s/ HAZLYN FORTUNE
Hazlyn Fortune
Administrative Law Judge

Ronald van der Leeden
Director
Regulatory Affairs

555 W. Fifth Street, GT14D6
Los Angeles, CA 90013-1011
Tel: 213.244.2009
Fax: 213.244.4957
RvanderLeeden@socalgas.com

August 24, 2020

VIA EMAIL (edtariffunit@cpuc.ca.gov)

Energy Division Tariff Unit
California Public Utilities Commission
505 Van Ness Avenue
San Francisco, CA 94102

Re: Comments of Southern California Gas Company on Draft Resolution E-5076 - Tribal Land Transfer Policy Implementation Guidelines

Dear Energy Division Tariff Unit:

Pursuant to Rule 14.5 of the Rules of Practice and Procedure of the California Public Utilities Commission ("Commission" or "CPUC"), Southern California Gas Company ("SoCalGas") hereby submits comments on the Commission's Draft Resolution E-5076 – Adoption of Guidelines to Implement the CPUC Tribal Land Policy consistent with Executive Order B-10-11 and the CPUC Tribal Consultation Policy, The Tribal Land Transfer Policy, and Public Utilities Code Section 851 ("Draft Resolution"). SoCalGas did not previously provide comments on the underlying policy entitled "Investor-Owned Utility Real Property – Land Disposition – First Right of Refusal for Disposition of Real Property Within the Ancestral Territories of California Native American Tribes" adopted by the Commission on December 5, 2019 ("Policy"). Rather, SoCalGas concurred with and continues to support the comments on the Policy provided to the Commission by its sister utility, San Diego Gas & Electric ("SDG&E") in October 2019.[1]

SoCalGas has significant concerns about certain issues and procedures raised by the Policy as reiterated in, and in many ways modified by, the Draft Resolution. SoCalGas appreciates and supports the underlying values and objectives proffered by the Policy and firmly believes the formal guidelines supporting the Policy should serve to establish streamlined and effective guidance and procedures to meet those objectives. On the contrary, legally flawed, ambiguous and overreaching guidelines will not only impede the successful implementation of the Policy, but they will create unnecessary delay, cost and risk to a myriad of projects that are in the interest of both the State and the public.

[1] Comment on Proposed Tribal Land Transfer Policy letter from Clay Faber, Director – Regulatory Affairs SDG&E dated October 17, 2019, and Comments on Revised Proposed Tribal Land Transfer Policy letter from Clay Faber, Director – Regulatory Affairs SDG&E dated October 28, 2019.

To that end, as discussed herein, SoCalGas strongly urges the Commission to establish a formal rulemaking proceeding, allowing for a proper deliberative process that thoroughly evaluates and addresses input from all stakeholders, not just a limited group as that involved in the development of the Policy. A formal rulemaking will ensure that all interested parties have the opportunity for meaningful participation in development of reasonable and implementable policies, consistent with principles of due process, and that the Commission has an adequate record to adopt findings regarding key legal and factual questions (including, but not limited to, those related to safety and cost). Accordingly, the Commission should suspend the Policy, withdraw the Draft Resolution, and initiate a formal rulemaking to accomplish these objectives.

If the Commission does not elect to institute a formal rulemaking, SoCalGas offers the following comments on the guidelines set forth in the Draft Resolution ("Draft Guidelines") necessary to implement a viable and effective policy.

I. THE COMMISSION SHOULD INITIATE A RULEMAKING TO DEVELOP A POLICY RATHER THAN ADOPT LEGALLY FLAWED DRAFT RESOLUTION

SoCalGas fully supports the policy goals set forth in both Executive Orders N-15-19 and B-10-11, as well as in the Policy; however, the process by which the Policy was adopted is flawed. That process deprived parties and other stakeholders of their due process rights. It also violated the procedural requirements of Pub. Util. Code Sections 311 and 1701, *et. seq*, as well as the Commission's own procedural rules. SoCalGas, together with SDG&E and Southern California Edison ("SCE"), provided detailed comments addressing such flaws in their joint response to Commission Draft Resolution ALJ-381 ("ALJ-381 Comments").[2] ALJ-381 proposed to incorporate the Policy into the Commission's Rules of Practice and Procedure. It is SoCalGas' position that the significant due process violations committed by the Commission in adopting the Policy render it unenforceable.

The Draft Resolution, which is intended to implement the Policy, was the result of a process characterized by the same due process deficiencies. Consequently, the proposed guidelines are also unenforceable. For example, the Commission performed limited service of the Draft Guidelines, as it did not serve any service list associated with the water Investor Owned Utilities ("IOUs"), yet the Draft Guidelines expressly provide that water IOUs are subject to the rules adopted therein. By failing to do so, the Commission deprived interested parties of their right to meaningful participation in the process.

As noted in the ALJ-381 Comments, by adoption of the Draft Resolution, the Commission is attempting to establish policy in direct contravention of a statutory prohibition. Pub. Util. Code Section 453(a) prohibits an IOU from granting a preference as to rates, charges, service, facilities "or in any other respect." The Policy's requirement that the IOUs grant a preference to Tribes in disposition of real property appears on its face to violate Section 453(a). Neither Executive Order N-15-19 nor Executive Order B-10-11, upon which the Policy is predicated, calls for or suggests the

[2] A copy of the comments is attached hereto in Appendix A, which includes a comprehensive description of the procedural deficiencies in the Commission's adoption of the Policy.

granting of a preference to Tribes in the process for disposition of real property subject to approval by the Commission under Section 851.

In addition, the Policy was adopted without a proper evaluation of economic and safety impacts required by Pub. Util. Code Section 321.1. For example, as discussed in Section II below, the application of the Policy and final guidelines to easements and other *less than fee* conveyances could have a significant negative impact on the safety-related activities of the IOU. Neither these impacts, nor the likelihood of a material cost impact, have been addressed by the Commission in the Policy record, rendering it inadequate to support the requirements proposed in the Draft Guidelines.

Finally, the Draft Resolution improperly expands the scope of potential applicability of the Policy to conveyances under General Order ("G.O.") 69-C, despite the fact the Policy does not at all contemplate such action and no record exists to support it.

Given the complexity of the factual, legal and policy issues arising from the proposals contained in both the Policy and the Draft Guidelines, the Commission should withdraw the Policy and Draft Resolution and initiate a formal rulemaking to develop a policy regarding disposition of IOU fee-owned property subject to Section 851 that is located in a Tribe's ancestral territory that is based on an adequate and comprehensive record and that allows all interested parties to participate meaningfully to develop a policy and implementing guidelines, in a manner consistent with constitutional principles of due process.

II. THE POLICY AND GUIDELINES SHOULD ONLY APPLY TO FEE INTERESTS AND SHOULD NOT APPLY TO EASEMENTS OR OTHER *LESS THAN FEE* GRANTS UNDER G.O. 69-C

The Draft Resolution and its guidelines should be revised to clarify the Policy is applicable to the transfer, sale, donation, or disposition by any other means of a *fee interest* in real property that is subject to Commission approval under Section 851 disposition rules and located in a Tribe's ancestral territory. Specifically, the Draft Guidelines should provide the Policy does not apply to easements and other *less-than-fee* interests, including limited use licenses or permits under G.O. 69-C. To apply the Policy to easements[3] and other *less than fee* property interests does nothing to advance the goals and objectives of the Policy. Rather, it imposes an undue burden on the regular operations of the IOU, where delays could potentially result in compromised safety and reliability, while offering no appreciable value or benefit to Tribes.

A. The Policy and Final Guidelines Should Not Apply to Easements and Other *Less Than Fee* Interests

SoCalGas supports application of the Policy to the transfer, sale, donation or other disposition of a fee simple interest in the IOU's property that is subject to Commission approval under Section 851. Such application directly supports the Policy goals and objectives to provide an opportunity to return ancestral properties to the Tribe having an interest therein. To apply the Policy to easements or other *less than fee* property

[3] Policy, p. 1, note 2.

interests, on the other hand, while doing nothing to advance the Policy objectives, would add substantial burden, delay and risk to the ongoing operations of the IOU.

An easement is a non-possessory right to use the property of another for a specified purpose and does not convey title. The owner of the land generally reserves the right to use the land for all other purposes not expressly excluded by the easement, provided the same does not substantially interfere with the easement holder's permitted use of the land.

Because of the limited, specified permitted uses under easements and other *less than fee* interests (such as encroachment agreements), they offer no value to anyone but the requesting party, as the Tribe would be limited to the same restricted purposes or use. This is entirely distinguishable from a fee interest, where the potential uses are virtually unlimited. Accordingly, application of the Policy to easements and *less than fee* interests would not serve the objectives of the Policy, as it is highly unlikely that a Tribe would or could use the easement for the purpose requested. For example, SoCalGas may grant an easement to SCE to install electrical facilities that supply power to a SoCalGas facility. Similarly, SCE may grant SoCalGas an easement to provide natural gas to an SCE generation facility. The specified purpose of such easements would not change if the easement were granted to a third-party. As such, a Tribe would not be in a position to provide the electrical or natural gas service that is the basis for the grant of easement. It is, however, possible that a Tribe could seek to acquire such an interest for the purpose of "leverage" with the IOU or "resale" to the intended third party, effectively unnecessarily making the Tribes a middle man in a host of transactions to no end but the detriment of ratepayers. Both possibilities should be repugnant from a legal perspective, are contrary to the goals and objectives of the Policy, and both can be easily avoided by excluding application of the Policy to easements and other *less than fee* interests.

Moreover, requiring IOUs to offer easements sought by third parties to a Tribe before granting the requested easement would unreasonably delay critical infrastructure projects and ongoing maintenance and safety operations, as well as other third-party projects that are in the policy interests of the Commission and State, such as highway, railway, housing and infrastructure development.

Accordingly, as further discussed below, the Draft Guidelines should be revised to make clear that the disposition requirements contemplated in the Policy apply only to the transfer of a *fee interest* in real property subject to Section 851, and not to easements and similar *less-than-fee* interests such as those governed by G.O. 69-C (see discussion below in Section II.B).

B. The Policy and Final Guidelines Should Not Apply to G.O. 69-C Grants

(i) Application of the Policy to G.O. 69-C Grants is Inappropriate and Could Jeopardize Safety and Reliability

The Draft Guidelines inappropriately expand the reach of the Policy to grants and other conveyances under G.O. 69-C. This is not only inconsistent with the underlying goals

and objectives of the Policy, but it improperly effects a modification of G.O. 69-C, as such expansion necessarily requires Section 851 approval for transactions expressly excluded from such approval. The Policy does not contemplate such application, and no record exists to support it.

By its very terms, grants that are subject to G.O. 69-C[4] do not require the filing of an application or submittal of an advice letter under G.O. 173. As such, these grants are generally very limited in scope and/or duration, and in any event are required (with limited exception not applicable here) to provide for revocation by the IOU upon order of the Commission or otherwise where necessary or desirable. Specifically, G.O. 69-C grants are only appropriate where the use of the utility property: (i) is limited (*e.g.*, excludes structures that are not easily removable, changes to the physical environment and long-term commitments), (ii) does not interfere with utility operations, practices and services, (iii) does not require review under the California Environmental Quality Act ("CEQA"); and (iv) does not involve a license-to-lease transaction where the license is granted with the understanding that the same use of utility property will become irrevocable following the Commission's approval under Section 851.

Accordingly, given the restricted nature, and often limited duration, of G.O. 69-C grants, application of the Policy to such grants undermines the very purpose of G.O. 69-C. Moreover, the offer of any such interest to Tribes would not advance the goals and objectives of the Policy to provide an opportunity to return lands within ancestral territory to the appropriate Tribe. Rather it would result in an exercise of futility, only leading to delays in the IOU's operations, while possibly risking safety and reliability. Many of these grants are made to assist in municipal, transit or adjacent development projects and environmental monitoring and/or surveying, most of which projects further important State policy goals. Before proceeding with these projects, the IOU would have to fully negotiate the interest with the third-party requestor, subject to the obligation of the IOU to make the offer to the Tribe(s) under the Policy, then the IOU would have to enter into good faith negotiations with the applicable Tribe(s), adding in additional delay and costs for all parties involved, especially if a dispute were to arise during the offer and negotiation process. These often-critical projects could be significantly delayed or unable to proceed at all if the Policy were to apply to the G.O. 69-C grants necessary for such projects.

(ii) Response to Commission's Request for Comment on the Application of the Policy to Transactions under G.O. 69-C and G.O. 173

In the Draft Resolution, the Commission has requested comment on whether the Policy and guidelines should apply to conveyances subject to G.O. 173 (advice letter approvals under Section 851) and G.O. 69-C. For the reasons noted above, SoCalGas believes the expansion of the Policy to include G.O. 69-C transactions improperly modifies G.O. 69-C and, regardless, results in delays and burdens with little to no

[4] Easements, licenses or permits for use or occupancy on, over or under any portion of the operative property of said utilities for rights of way, private roads, agricultural purposes, or other limited uses of their several properties, provided the use thereunder will not interfere with the operations, practices and service of such public utilities to and for their several patrons or consumers.

practical value to the Tribes or advancement of the underlying goals and objectives of the Policy. Worse, such application could jeopardize safety and reliability where the IOU is not able to act swiftly to accommodate short-term needs for which such conveyances are sought. Examples we have encountered include an easement to an adjacent property owner for environmental monitoring to determine the boundaries of migrating contamination, and an easement permitting an adjacent property owner to construct drainage facilities on SoCalGas property to prevent water intrusion and damage to SoCalGas facilities.

As for whether the Policy should apply to transactions eligible for Commission approval under G.O. 173, as noted in Section I.A above, SoCalGas supports such application as it applies to *fee simple* conveyances, whether such approval is sought through a full application or advice letter. The Policy should not, however, apply to conveyances of *less than fee* interests, such as easements, for the same reasons noted in Section II.A above. The application of the Policy should turn on whether the nature of the interest and type of transaction furthers the goals and objectives of the Policy to provide an opportunity to return ancestral Tribal land to the Tribe having an interest in the property interest that is the subject of the proposed transaction. By doing so, the likelihood of disruption to the safe, reliable and efficient operations of the IOU is minimized.

III. THE NOTICE AND CONSULTATION PERIODS AND PROCESS SHOULD BE STREAMLINED AND THE COMMISSION SHOULD ADDRESS DISPUTE RESOLUTION BETWEEN TRIBES

A. The Notice and Consultation Process and Time Period Should be Modified for Fairness and Efficiency

The Draft Guidelines should be revised to establish an orderly and efficient process for the determination of a Tribe's interest in a particular transaction and, upon such determination, to proceed with timely, good faith negotiations of the price and terms of sale. As currently drafted, the IOU is to submit a written request to the Native American Heritage Commission ("NAHC") to identify Tribes with an interest in the territory in which the real property lies. The NAHC then has 90 days to provide such information. The response may identify several Tribes, without determination of the nature or priority of their respective interests. As discussed below, this places the untenable task and unreasonable burden on the IOU to negotiate with potentially multiple Tribes on a fair and equal basis. The IOU does not have the necessary expertise or authority to make fair and informed judgments to determine which Tribe(s) hold superior claims or to evaluate "each tribe's connection to the surplus property at issue." These are potentially contentious disputes related to land ownership and ancestral territories. A far more efficient and fair approach would be to have the NAHC, in consultation with the Tribes and the Commission's Tribal Liaison, predetermine which Tribe has the superior claim within any given territory within the IOU service area. This could be achieved through a series of workshops, which should be conducted and resolved prior to the effectiveness of the Policy. This would eliminate months of potentially fraught discussions, contentious disagreement or "mediation" with and amongst multiple Tribes, and instead, that time could be used for more productive negotiations.

In addition, but at the very least, it is recommended that the time for response from the NAHC be reduced from 90 to 30 days to allow the remainder of the 90-day period for the critical, good-faith negotiations that must take place. That negotiation period should commence upon a Tribe's receipt of the IOU's notice of offer. Particularly, if the Tribes and NAHC have predetermined which Tribe has priority for purposes of the offer, then the Tribe and the IOU would have sufficient time to confirm the Tribe's interest in the property and negotiate the price and terms of sale. If the Tribe declines the offer or the parties are unable to reach agreement with the 90-day period, the IOU could proceed with its request for Section 851 approval. This approach still meets the goals and objectives of the Policy, while providing much-needed certainty and efficiency that will benefit all parties, including the Commission, IOU, the Tribes and other potential stakeholders or counterparties.

B. The Commission Should Coordinate with the Tribes to Address Dispute Resolution

As discussed above, SoCalGas supports a process whereby the NAHC, the Tribes and the Commission's Tribal Liaison predetermine the eligibility and superiority of each Tribe within the IOU's territory to facilitate a swift and fair negotiation process. While this should eliminate the potential for disputes between Tribes regarding a particular IOU offer, it would also eliminate the need for the either the IOU or the Commission to weigh the relative merits of conflicting price and terms of sale amongst multiple Tribes.

In addition, or at least alternatively, for the reasons described in Section II.A above, the Draft Guidelines should be revised to delete the requirement that IOUs resolve conflicts among the Tribes related to application of the Policy. To that end, SoCalGas recommends that, prior to the effectiveness of the Policy, the Commission should establish a dispute resolution process to address a Tribe's eligibility to receive an offer, as well as disputes arising out of the good faith negotiation process.

IV. CONCLUSION

The Policy and the Draft Guidelines are highly problematic and will likely lead to unnecessary delays of both IOU and other public projects, as well as result in unintended and/or un-evaluated impacts to ratepayers. For the reasons set forth herein, the Commission should suspend the Policy, withdraw the Draft Resolution, and initiate a formal rulemaking to develop, in a manner that satisfies due process requirements, a sound and effective policy regarding disposition of IOU fee-owned property subject to Section 851 that is located in a Tribe's ancestral territory. To that end, SoCalGas remains committed to working collaboratively with stakeholders to identify implementable solutions that achieve the objectives of Executive Orders N-15-19 and B-10-11.

If the Commission elects not to initiate a rulemaking, it should modify the Draft Guidelines in accordance with the comments provided herein and, specifically, as proposed by SDG&E in Appendix B to its comment letter submitted contemporaneously herewith.

SoCalGas believes the final guidelines should facilitate the goals and processes set forth in the Tribal Policy, and the clarity that may be achieved by addressing the comments we have shared are critical to that effort. Specifically, the Commission should make clear that final guidelines control in the event of a conflict between the language of the Policy and the rules adopted in the final guidelines, as may be amended from time to time.

We thank you for your time and consideration of these issues.

Sincerely,

/s/ Ronald van der Leeden
Ronald van der Leeden
Director – Regulatory Affairs

Att: Certificate of Service

cc: Michal Rosauer – Michael.Rosauer@cpuc.ca.gov
Mary Jo Borak – BOR@cpuc.ca.gov
Service List for Draft Resolution E-5076

Appendix A
Joint Utility Comments on Draft Resolution ALJ-381 Proposed Rule 3.6

July 13, 2020

By Email (Sophia.Park@cpuc.ca.gov)

Sophia J. Park
Administrative Law Judge
California Public Utilities Commission
505 Van Ness Avenue
San Francisco, CA 94102

Re: Draft Resolution ALJ-381 - Joint Comments of San Diego Gas & Electric Company, Southern California Edison Company and Southern California Gas Company on Proposed Rule 3.6(i)[1]

INTRODUCTION

In accordance with the requirements set forth in Public Utilities ("Pub. Util.") Code Section 311(h) and Government ("Gov.") Code Section 11351, San Diego Gas & Electric Company ("SDG&E"), Southern California Edison Company ("SCE")[2] and Southern California Gas Company ("SoCalGas") (collectively, the "Joint Utilities") submit these opening comments regarding proposed Rule 3.6(i) included in draft Resolution ALJ-381 (the "Draft Resolution" or "DR"), issued on May 14, 2020, proposing modifications to the Rules of Practice and Procedure ("Rule" or "Rules") of the California Public Utilities Commission ("Commission").

---

[1] The Joint Utilities have each concurrently submitted in separate comments their proposed revisions to the other draft Rules included in Draft Resolution ALJ-381.

[2] SCE has authorized SDG&E and SoCalGas to represent that SCE joins in this letter and that SDG&E and SoCalGas may submit this letter on SCE's behalf pursuant to Commission Rule 1.8(d).

Among the modifications proposed in the Draft Resolution is addition of new Rule 3.6(i), which mandates compliance with requirements set forth in the Tribal Land Transfer Policy[3] adopted by the Commission on December 5, 2019 ("Policy"), as well as draft implementation guidelines related to the Policy ("Draft Guidelines") that have yet to be adopted by the Commission.

The Policy establishes a "Commission preference" for the transfer of certain real property owned by the investor-owned utilities ("IOUs") that is necessary or useful in the performance of their duties to the public to designated California Native American Tribes ("Tribes").[4] The Policy is designed to ensure that Tribes receive notice of proposed real property dispositions and have an opportunity to acquire lands located within their ancestral territory.[5] The Joint Utilities support the laudable goals set forth in the Policy and remain committed to working collaboratively with stakeholders to identify implementable solutions that achieve the tribal notification objectives of Executive Order B-10-11, which is cited as the basis for the action taken in the Policy. However, while the Joint Utilities support the intent of the Executive Order, the proposal to codify the rules adopted in the Policy through incorporation into the Commission's Rules of Practice and Procedure is highly problematic.

As discussed in more detail below, the Policy, which is incorporated by reference into proposed Rule 3.6(i), was adopted pursuant to a process that deprived parties of their due process rights and violated the procedural requirements contained in Pub. Util. Code Sections 311 and 1701, *et seq*, and the Commission's own rules. In addition, the Policy's requirement that the IOUs grant a preference to Tribes in disposing of Real Property appears on its face to violate Pub. Util. Code Sections 453(a), which prohibits the IOUs from granting a preference as to rates, charges, service, facilities, "or in any other respect," as well as the requirement set forth in Pub. Util. Code Section 321.1 to evaluate economic and safety impacts (the Policy was adopted without this required analysis). The proposal to codify the Draft Guidelines in proposed Rule 3.6(i) is likewise improper. The Draft Guidelines have not yet been formally adopted; the proposal to codify them in their pre-finalized form would improperly deprive parties of their due process rights.

Thus, proposed Rule 3.6(i), which incorporates the Policy and Draft Guidelines by reference, is inconsistent with due process and other statutory requirements, and does not meet the standard of "consistency" with law defined in the California Administrative Procedure Act ("APA"), codified at Gov. Code Section 11340, *et seq*. Proposed Rule 3.6(i) also fails to meet the standard for "clarity" set forth in the APA and violates the procedural requirements of the

---

[3] *Investor-Owned Utility Real Property – Land Disposition – First Right of Refusal for Disposition of Real Property Within the Ancestral Territories of California Native American Tribes.*

[4] Policy, p. 2; Pub. Util. Code § 851.

[5] Policy, pp. 3-4.

Office of Administrative Law ("OAL"). Accordingly, the Draft Resolution should be revised to delete proposed Section 3.6(i) in its entirety.

Given the complexity of the factual, legal and policy issues arising from the proposals contained in the Policy, the Commission should initiate a formal rulemaking to comprehensively address concerns regarding the Policy and to ensure that all interested parties have the opportunity for meaningful participation, consistent with principles of due process. The Commission should also issue a declaratory ruling clarifying that the Policy is not currently in effect pending resolution of the rulemaking and adoption of final tribal notification rules in the Rules of Practice and Procedure. This clarification is necessitated by Gov. Code Section 11340.5, which provides that in order to be enforceable, the Commission's procedural rules must be deemed by the OAL to be compliant with applicable requirements of the Gov. Code and filed with the Secretary of State. In other words, codification and enforcement of Commission requirements related to tribal notification of proposed real property dispositions can occur only *after* the Commission has conducted a fair proceeding and adopted procedural regulations that are consistent with statutory requirements and principles of due process, and are capable of being approved under the APA.

ADMINISTRATIVE PROCEDURE ACT

The APA establishes basic minimum procedural requirements for adoption, amendment, or repeal of administrative regulations by California state agencies.[6] It is intended to promote "bureaucratic responsiveness and public engagement in agency rulemaking."[7] The APA has limited application to the Commission, affecting only the rules of procedure promulgated by the Commission.[8] The rationale for the limited applicability of the APA to regulations adopted by the Commission may rest in the fact that the Public Utilities Code includes comprehensive protections that are intended to operate in a manner similar to the APA to protect procedural due process rights.[9] The Supreme Court of California has observed that where comprehensive procedural protections of the sort set forth in the Public Utilities Code exist, "the Legislature no

---

6 Decision ("D.") 04-05-017, pp. 23-24.

7 *Morning Star Co. v. State Bd. of Equalization*, 38 Cal. 4th 324, 333 (2006).

8 Gov. Code § 11351(a) provides that Gov. Code §§ 11340-11342.610 apply generally to regulations promulgated by the Commission, and that §§ 11343-11345 and § 11346.4 apply to rules of procedure adopted by the Commission. Pub. Util. Code § 311(h) requires the Commission to submit amendments, revisions, or modifications to the Rules of Practice and Procedure to the Office of Administrative Law for prior review in accordance with Gov. Code §§ 11349, 11349.1(a) and (b), 11349.3-11349.6, and 11350.3.

9 *See, e.g.*, Pub. Util. Code §§ 311, 1701, *et seq.*; Section 20(e), Title 1, California Code of Regulations ("CCR").

doubt concluded that compliance with the APA would be largely redundant and might create confusion as to which procedures applied in a particular circumstance."[10]

Thus, the APA applies only to the rules proposed for inclusion in the Commission's Rules of Practice and Procedure. Gov. Code Section 11340.5(a) makes clear that such rules must comply with the applicable requirements of the Gov. Code and be filed with the Secretary of State in order to be enforceable by the Commission: "No state agency shall issue, utilize, enforce, or attempt to enforce any guideline, criterion, bulletin, manual, instruction, order, standard of general application, or other rule, which is a regulation as defined in [Gov. Code] Section 11342.600, ***unless the guideline, criterion, bulletin, manual, instruction, order, standard of general application, or other rule has been adopted as a regulation and filed with the Secretary of State pursuant to this chapter***." (Emphasis added.) Gov. Code Section 11342.600 defines a regulation as "every rule, regulation, order, or standard of general application or the amendment, supplement, or revision of any rule, regulation, order, or standard adopted by any state agency to implement, interpret, or make specific the law enforced or administered by it, or to govern its procedure."

The OAL reviews the Commission's proposed procedural rules for compliance with the standards set forth in the APA.[11] The OAL will consider, among other factors, the "consistency" of the regulation – *i.e*., whether the proposed regulation is "in harmony with, and not in conflict with or contradictory to, existing statutes, court decisions, or other provisions of law,"[12] as well as the "clarity" of the regulation.[13] If the proposed regulation is approved, the OAL will transmit it to the Secretary of State for publication in the California Code of Regulations. The Commission's procedural rules are set forth in Title 20 of the CCR.

TRIBAL LAND POLICY

A. *Regulations Adopted in the Policy*

The Policy is intended to facilitate the transfer of real property owned by Commission-jurisdictional IOUs and subject to Pub. Util. Code Section 851 to Tribes with historical ties to the real property at issue.[14] The Policy establishes a rebuttable presumption that transfer of real

---

[10] *Tidewater Marie Western, Inc. v. Bradshaw*, 14 Cal. 4th 557, 569 (1996).

[11] Gov. Code § 11349.1; *see also* Pub. Util. Code 311(h).

[12] Gov. Code § 11349.1(d).

[13] Gov. Code §§ 11349(a), (c) and (d); *see also* Pub. Util. Code 311(h).

[14] Policy, p. 1 (footnotes omitted).

property at issue to a Tribe best serves the public interest.[15] The Policy imposes an affirmative obligation on the part of each IOU to:

(i) Provide notice to Tribe(s) of the IOU's intent to dispose of real property within tribal ancestral territory;[16]

(ii) Seek to resolve disputes between Tribes making competing claims of a right to acquire;[17]

(iii) Offer a right of first refusal ("ROFR") to the relevant Tribe to acquire the real property at issues;[18]

(iv) Consult with the relevant Tribe concerning the potential acquisition;[19] and

(v) Include a showing of compliance with notice and consultation requirements in the IOU's Section 851 application or advice letter seeking approval to transfer the real property.[20]

The Policy characterizes the notice and consultation procedures as "requirements" and provides that failure to comply with the notice and consultation requirements can be a basis for Commission denial of the IOU's Section 851 application or advice letter.[21] The Policy further emphasizes that the offering of the ROFR to the relevant Tribe is an "expectation" of the Commission, thus making it a *de facto* requirement at the very least.[22] The Policy makes clear

---

[15] *Id*. at pp. 2-3 ("This policy establishes a Commission preference for the transfer of Real Property to Tribes . . . [that] can be rebutted by a showing that a transfer would conflict with applicable laws or regulations, or by a Commission finding, after a hearing, that the transfer would not be in the public interest.").

[16] *See, e.g*., *id*., p. 5 ("Until implementation guidelines are in place, IOUs **shall provide notice** of the proposed disposition of Real Property to the appropriate Tribe(s).") (emphasis added).

[17] *Id*. at p. 6.

[18] *Id*. at p. 5.

[19] Policy, pp. 5-6.

[20] *Id*. at p. 5 (providing that if an IOU submits a Section 851 application or advice letter to the Commission, the Commission "will ensure" that the record of the proceeding includes a showing of notice and consultation with the relevant Tribe).

[21] *Id*. at p. 6 ("If those [notice and consultation] **requirements** are not met, and if those deficiencies cannot be cured, the Commission may deny the application or advice letter without prejudice.") (emphasis added).

[22] *Id*. at p. 1 ("In particular, this Policy creates an expectation that, for any future disposition of Real Property, the IOU will offer Tribes a right of first refusal before putting the property on the market") (footnote omitted); p. 5 ("Where an IOU seeks approval to transfer Real Property within a Tribe's

that IOUs will be expected to demonstrate in their application seeking disposition pursuant to Pub. Util. Code Section 851 that a ROFR was offered and that disputes between Tribes were resolved, thus making compliance with these requirements part of the "notice and consultation" regulation imposed by the Policy and proposed for codification in the Draft Resolution.

While the Commission indicates in the Policy that it intends to provide further guidance regarding compliance with these regulations and will likely supplement them in the yet-to-be-adopted Draft Guidelines,[23] it is clear that the above requirements constitute a basic set of "rules, regulations, orders, or standards of general application" adopted by the Commission to "implement, interpret, or make specific the law enforced or administered by it, or to govern its procedures."[24] The fact that the Commission proposes to formally incorporate the requirements included in the Policy into its Rules of Practice and Procedure through the APA review process affirms the conclusion that these requirements are intended by the Commission to be enforceable regulations.

B. *Development of the Policy and Commission Approval Process*

The Policy includes a description of the process followed by the Commission to develop the requirements contained therein.[25] An "Information Sheet" available on the Commission's website and attached hereto in Appendix A provides additional details regarding the Commission's process.[26] The below description relies on the information set forth in the Policy and the Information Sheet, and posted on the Commission's website, as well as the Joint Utilities' understanding of the process the Commission followed in promulgating the rules contained in the Policy.

The Commission's Emerging Trends Committee adopted a draft version of the Policy in April, 2019. The Commission states that it "made the draft version available for public comments" by posting it on the Commission's website.[27] The Commission maintains a service list for notice of amendments to its Rules of Practice and Procedure ("RPP Service List"), and in

---

ancestral territory, the Commission expect that the IOU will provide the Tribe a right of first refusal.").

[23] *See, e.g.*, *id*. at p. 3, n.8 and pp. 6-7.

[24] *See* Gov. Code § 11342.600.

[25] Policy, pp. 6-7.

[26] Also available at: https://www.cpuc.ca.gov/uploadedFiles/CPUCWebsite/Content/News_Room/NewsUpdates/2019/Tribal%20Land%20Transfer%20Policy%2020190803%20one%20page%20info%20(003)%20clean.pdf

[27] Policy, p. 6.

other instances has provided notice to this service list of proposed policies that implicate its procedural rules.[28] It did not elect to serve the draft policy on this service list.

The draft policy was first presented to attendees at the May 29, 2019 Emerging Trends Committee meeting.[29] The Emerging Trends Committee is led by two designated Commissioners[30] and typically meets on a bi-monthly basis. The draft policy presented at the May 29, 2019 Emerging Trends Committee Meeting (attached hereto in Appendix B) included a placeholder for a Resolution number,[31] but no draft Resolution incorporating the provisions of the draft policy was ever issued by the Commission or circulated for public comments prior to formal adoption of the Policy on December 5, 2019. The Policy was ultimately not adopted as a Commission Resolution, as discussed below.

The Information Sheet provides details regarding the Commission's outreach process. Specifically, the Information Sheet indicates that outreach and notice of proposed policy "to California Tribes" occurred starting in June, 2019 and continued through October, 2019. The Information Sheet lists three "Tribal Consultation Meetings" scheduled for September 16 and 30, 2019, with the third meeting to be held in Southern California on a date to be determined. The Information Sheet does not identify scheduled dates for outreach to other stakeholders potentially affected by the draft policy.

Meeting agendas for the September 16 and 30, 2019 meetings, as well as the third Tribal Consultation meeting held in Southern California on October 11, 2019, are posted on the Commission's website.[32] These meeting agendas are included in Appendix C. Each meeting agenda reflects that the meetings included two sessions: (1) Broadband/telecommunications

---

[28] For example, the Commission's Policy and Governance Committee provided notice to the Commission's service list for notice of amendments to the Rules of Practice and Procedure of the existence of its draft Enforcement Policy (with a link to the draft policy) and notice that the draft policy would be discussed at the next Policy and Governance Committee meeting. The notice provided by the Policy and Governance Committee solicits public feedback prior to the meeting and indicates that courtesy notice is provided even though "no amendments to the [Rules of Practice and Procedure] are proposed by the Draft Enforcement Policy." Email from Deidre Cyprian dated June 17, 2020 with subject line "Draft CPUC Enforcement Policy – For discussion at 7/1/2020 Policy and Governance Committee Meeting."

[29] Information Sheet, p. 1.

[30] The Committee on Emerging Trends is led by Commissioner Shiroma and Commissioner Guzman Aceves.

[31] Document titled "Tribal Land Transfer Policy - presented publicly on May 29, 2019 at the Committee meeting" available at: https://www.cpuc.ca.gov/uploadedFiles/CPUC_Public_Website/Content/About_Us/Supplier_Diversity/Draft%20presented%20publicly%20at%20Committee%20meeting%20%20May%2029%202019.pdf

[32] *See* https://www.cpuc.ca.gov/tribal/.

services in tribal areas;[33] and (2) "Tribal Consultation" including discussion of the proposed Tribal Land Policy. The meeting agendas each indicate that only the telecommunications session would be open to the public; the Tribal Consultation/Tribal Land Policy portion of the meeting was described as being "not open to the public."[34] At the final meeting held October 11, the Commission did permit public participation during the portion of the meeting devoted to the Tribal Land Policy, which was scheduled to last one hour. The Commission also held a webinar focused on the dispute resolution provision of the draft policy on October 31, 2019, which the IOUs were permitted to attend.

The deadline for informal comments on the draft policy is listed in the Information Sheet as October 11, 2019 (the date of the Southern California Tribal Workshop),[35] with additional direction in a footnote that comments could be submitted through October 28, 2019, but should be submitted no later than October 11, 2019 "for purpose of considering comments fully in consideration of any revisions that may occur before the proposed policy is brought before the Commission for a vote," which the Information Sheet indicated would be November 7, 2019.[36] The Policy indicates that the Emerging Trends Committee received informal comments on the draft policy from several stakeholders.[37]

Apart from parties representing tribal interests, the Commission received comments only from the Pacific Forest and Watershed Lands Stewardship Council ("Stewardship Council"),[38] which raised the concern that the draft policy might conflict with implementation of the Land

---

[33] In a ruling issued in a telecommunications-related proceeding, Rulemaking ("R.") 11-11-007, the Commission proved notice of three "Tribal Consultations and Workshops" scheduled on the same dates and locations focused on telecommunications services in low-income and rural tribal communities. (R.11-11-007, *Administrative Law Judges' Ruling Noticing Workshops* (September 10, 2019), included in Appendix D). R.11-11-007 examines "the appropriate regulatory framework to ensure the continued provision of safe, reliable telecommunications services to rural areas at just and reasonable rates," and does not implicate energy or water utility issues. (R.11-11-007, *See Fourth Amended Assigned Commissioner's Scoping Memo and Ruling* (March 22, 2019), p. 1).

[34] Appendix C, Agenda p. 2.

[35] Information Sheet, p 2.

[36] *Id*., n. 4.

[37] Informal comments are available at: https://www.cpuc.ca.gov/uploadedFiles/CPUC_Public_Website/Content/About_Us/Supplier_Diversity/Comments%20Received%20on%20Proposed%20Tribal%20Land%20Transfer%20Policy.pdf.

[38] The Stewardship Council is a private, nonprofit foundation that was established in 2004 as part of a Pacific Gas and Electric Company ("PG&E") settlement and works to conserve watershed lands for the public good through its Land Conservation Program, and to invest in outdoor youth programs through its Youth Investment Program.

Conservation Commitment ("LCC") established by D.03-12-035 and D.08-11-043, and three California energy IOUs – SDG&E, SCE, and PG&E.

The informal comments respectively submitted by the energy IOUs raised several significant legal and policy concerns and identified problematic ambiguities in the draft policy. All three energy IOUs requested that public workshops be scheduled to allow an opportunity for further dialogue regarding the requirements proposed in the draft policy.[39] As noted above, no public stakeholder workshops were held (public meetings included only the brief session at the October 11, 2019 meeting and the October 31, 2019 webinar), although Commissioner staff did participate in individual IOU meetings to discuss concerns with the draft policy.[40] The Commission adopted the requirements set forth in the Policy without meaningfully addressing or resolving the material concerns raised by the energy IOUs in their informal comments (and also did not address the concern raised by the Stewardship Council regarding conflict with the LCC). The suggestion in the Policy that such issues would be addressed in the Draft Guidelines ignores the fundamental nature of the issues raised.[41]

The Commission did not receive comments on the draft policy from *any* other IOUs – *e.g.*, water, sewer – although the regulations adopted in the Policy apply equally to such IOUs and impose direct obligations on them. Nor did the Commission receive comments from other impacted parties, such as landowners with utility easements on their land who would be prohibited under the Policy from seeking to move a utility easement located on their land for any purpose without a ROFR to acquire the easement first being offered to the indicated Tribe. Likewise, no comments were submitted by local agencies, public safety advocates, low-income housing advocates, conservation advocates (other than the Stewardship Council), building industry advocates, or other parties whose interest in acquiring IOU real property would be made inferior to that of the Tribes under the draft policy; nor were comments submitted by ratepayer advocates or any other stakeholder concerned with the impact of the draft policy on the value of ratepayer assets, or any other non-tribal party likely to be affected by the requirements included in the draft policy. For example, it is anticipated that various public projects such as the construction of roads or public rail may be subject to delay if an IOU is required to extend a ROFR to a Tribe when negotiating with local agencies for discrete right of way easements.

---

[39] Letter from Erik B. Jacobson, Director, Regulatory Relations, PG&E, to Commissioners Guzman Aceves and Shiroma, CPUC (September 30, 2019), p.2; Letter from Clay Faber, Director, Regulatory Affairs, SDG&E, to Commissioners Guzman Aceves and Shiroma, CPUC (October 17, 2019), p.2 and Letter from Clay Faber, Director, Regulatory Affairs, SDG&E, to Commissioners Guzman Aceves and Shiroma, CPUC (October 28, 2019), p.3-4; and Letter from Laura Genao, Managing Director, State Regulatory Affairs, SCE to Public Advisor's Office, CPUC (November 15, 2019), p. 2.

[40] For example, SDG&E representatives met with staff from the offices of President Batjer, Commissioner Guzman Aceves and Commissioner Shiroma on November 14, 2019, Commissioner Randolph on November 22, 2019 and Commissioner Rechtschaffen on November 26, 2019.

[41] *See* Policy, p. 7. The Draft Guidelines issued subsequent to adoption of the Policy do not resolve the issues raised in the energy IOUs' respective comments.

Therefore, local agencies should be meaningfully engaged to determine whether such impacts can be addressed through a collaborative process.

The draft policy appeared on the Public Agenda for the Commission's December 5, 2019 business meeting (Agenda #3452) as Agenda Item #64. The agenda for the Commission's December 5 meeting was first posted on November 25, 2019. Agenda Item #64 was included in the "Commissioner Reports" section of the agenda rather than being listed with the other proposed orders and resolutions being considered for adoption by the Commission. In the November 25, 2019 version of the meeting agenda, Agenda Item #64 included the text "Tribal Land Transfer Policy" with no other description or discussion, and with no website link to the draft policy. The draft policy was not posted with the Commission meeting materials until one week later on December 2 – three days before the December 5 Commission meeting. A revised version of the meeting agenda circulated on December 3, 2019 included a website link but no other information regarding the draft policy.[42] A document titled "Rev. 1 - Land Transfer Policy.pdf" was added to the meeting materials posted on the Commission's website on December 4, 2019. The document is presumably a revised version of the draft policy, but changes to the document do not appear to be marked and are not readily apparent.

The final version of the meeting agenda circulated on the morning of December 5, 2019, the day of the Commission meeting, included no additional information or clarification regarding the draft policy. Agenda Item #64 still appeared in the "Commissioner Reports" section of the agenda rather than being listed with the other proposed orders/resolutions, and the text of the agenda item still consisted only of a website link to the draft policy with no description or explanation of the draft policy's purpose or effect. Typically, the description of purpose is set forth in the "Proposed Outcome" discussion included for each proposed order or resolution appearing on the Commission's agenda.[43] The agenda item also omitted discussion of the safety and economic impacts of the draft policy – analysis that is required under Pub. Util. Code Section 321.1 for "each ratemaking, rulemaking, or other proceeding . . ." and which is generally set forth in the "Safety Considerations" and "Estimated Cost" discussion included in the agenda item text for proposed orders and resolutions.[44] Finally, the text of Agenda Item #64 excludes the statement, "Pub. Util. Code § 311 – This item was mailed for Public Comment," which is standard language in the agenda item text for other proposed orders and resolutions included on the Commission's agenda.[45]

---

[42] CPUC Public Agenda #3452, p. 68, available at: https://docs.cpuc.ca.gov/PublishedDocs/Published/G000/M321/K383/321383451.pdf.

[43] *See, e.g.*, *id*. at Items #47 - #50A, pp. 48-53.

[44] *See, e.g.*, *id*.

[45] *See, e.g.*, *id*.

C. *Adoption of Proposed Rule 3.6(i) is Inconsistent with Principles of Due Process*

In Gov. Code Section 11340.1, the Legislature declared its intent "to reduce the number of administrative regulations and to improve the quality of those regulations which are adopted."[46] The Legislature noted that "[t]he language of many regulation is frequently unclear and unnecessarily complex, even when the complicated and technical nature of the subject matter is taken into account."[47] To address this problem, the Legislature created the OAL and established standards that must be satisfied for all administrative regulations codified pursuant to the APA. As discussed above, in reviewing proposed regulations, the OAL will consider, among other factors, the "consistency" of the regulation – *i.e.*, whether the proposed regulation is "in harmony with, and not in conflict with or contradictory to, existing statutes, court decisions, or other provisions of law,"[48] the "clarity" of the regulation[49] and whether it complies with other applicable requirements.

While, as noted above, the Commission is largely exempt from the due process rules set forth in Article 5 of the APA, Pub. Util. Code Section 311(h) requires the Commission to submit revisions to its Rules of Practice and Procedure to the OAL for prior review in accordance with Gov. Code Section 11349.1(a). The OAL will evaluate proposed regulations for compliance with the "consistency" standard set forth in Gov. Code Section 11349(d), among other requirements. The "consistency" standard cannot be met if the proposed regulation is not "in harmony with" the law." In other words, to be approved by the OAL and codified in the CCR, a proposed regulation must be lawful. Thus, OAL's review of a proposed regulation must necessarily take into account a circumstance where an agency has failed to provide due process in adopting a regulation; to the extent a proposed regulation is inconsistent with due process requirements, it is unlawful and fails the "consistency" standard. Gov. Code Section 11349.3 permits the OAL to disapprove a regulation that fails to meet this standard.

The IOUs respectfully submit that the Commission's process is subject to challenge due to a lack of due process afforded both to the IOUs and to other stakeholders. It is true that the Commission provided adequate notice of proposed Rule 3.6(i) and has provided parties an opportunity to be heard in accordance with APA procedures. However, proposed Rule 3.6(i) does not expressly enumerate the requirements the provision is intended to impose; rather it incorporates by reference the requirements included in the Policy, which has already been adopted by the Commission. Where, as is the case here, a proposed regulation incorporates an external order by reference, the external material "shall be reviewed in accordance with procedures and standards for a regulation published in the California Code of Regulations."[50]

---

46 Gov. Code § 11340.1(a).

47 Gov. Code § 11340(b).

48 Gov. Code §§ 11349(d) and 11349.1(a)(4).

49 Gov. Code §§ 11349(c) and 11349.1(a)(3).

50 1 CCR § 20(b).

Thus, the inquiry here is not limited to whether promulgation of proposed Rule 3.6(i) satisfies due process requirements. It must *also* consider whether the rules included in the Policy, which are incorporated into proposed Rule 3.6(i) by reference, were adopted in accordance with due process requirements.

As discussed below, it is clear that the Commission ignored statutory due process requirements and its own procedural rules in promulgating the rules included in the Policy. The defects in the adoption of the Policy and associated rules are further compounded by reliance on the Draft Guidelines. Since the Commission's adoption of the Policy and the regulations included therein was unlawful, the Policy regulations proposed for incorporation by reference into draft Rule 3.6(i) do not meet the "consistency" standard set forth in Gov. Code Section 11349.1(a)(4). The due process violations discussed herein are not minor deficiencies that may be overlooked by OAL; the Commission's actions are wholly at odds with fundamental legal principles and completely contrary to "existing statutes, court decisions, or other provisions of law,"[51] including specific provisions of the Public Utilities Code and long-standing legal precedent. The Commission's due process failures cannot be cured through a subsequent reliance on the APA review and approval process. Put simply, the Commission cannot ratify the constitutionally infirm requirements adopted in the Policy by seeking to incorporate them by reference into a separate rule that is properly reviewed under APA procedural rules. Instead, the Joint Utilities respectfully submit that the Commission should refine the Policy itself following a meaningful engagement of all interested parties through formal rulemaking, and *then* seek to add the new requirements to the Commission's Rules of Practice and Procedure.

The Commission's proposal to codify the Draft Guidelines by incorporating them by reference into proposed Rule 3.6(i) raises similar due process concerns. Again, the Draft Guidelines have not been adopted in final form. Adoption by incorporation and cross-reference in Rule 3.6(i) would constitute the Commission issuing a final decision on the Rules without having afforded interested parties with Due Process. Thus, proposed Rule 3.6(i) fails the "consistency" standard on this count as well. Finally, in addition to failing to meet the "consistency' standard, Rule 3.6(i) does not satisfy the "clarity" standard, as discussed below. The Commission's incorporation by reference of the rules adopted in the Policy also violates applicable requirements set forth in Title 20 of the CCR.

(i) APA/Fundamental Tenets of Due Process

The fundamental tenets of Due Process are that an interested party is afforded reasonable notice and an opportunity to be heard. The APA is designed to ensure that Due Process is provided in administrative decision-making by state agencies. For example, Article 5 of the APA establishes procedural safeguards intended to protect the due process rights of parties who are subject to state agency regulations.[52] The California Supreme Court has observed that "[o]ne

[51] *See* Gov. Code § 11349.1(a)(4).

[52] *See* Gov. Code §§ 11346-11348 and § 11000.

purpose of the APA is to ensure that those persons or entities whom a regulation will affect has a voice in its creation . . . as well as notice of the law's requirements so that they can conform their conduct accordingly."[53] The Court noted further that "[t]he Legislature wisely perceived that the party subject to regulation is often in the best position, and has the greatest incentive, to inform the agency about possible unintended consequences of a proposed regulation. Moreover, public participation in the regulatory process directs the attention of agency policymakers to the public they serve . . ."[54]

Section 1701, *et seq*. of the Public Utilities Code includes procedural due process requirements that are analogous to those set forth in the APA and serve an identical purpose. California Constitution ("Cal. Const."), Article ("Art.") XII, § 2, grants the Commission authority to establish its own procedures, "subject to statute and due process." The Commission's procedural rules are set forth in its Rules of Practice and Procedure. The Legislature has directed that these Commission-adopted procedures rather than those established in the APA will guide Commission rulemaking activity.[55] The Commission's exclusion from the due process requirements of the APA does not signify that the Commission is free to adopt regulations without the constraint of adherence to procedural due process principles, however;[56] nor does the exclusion permit the Commission to seek ratification of regulations adopted without due process through their codification pursuant to the APA. *All* rules adopted by the Commission – including procedural rules the Commission seeks to codify under the APA – must comply with due process requirements.[57]

The Commission is obligated to comply with the procedural requirements established in the Public Utilities Codes and its own rules. Under Gov. Code Section 11349.1(a)(4), the OAL must evaluate proposed regulations – which in this case includes both proposed Rule 3.6(i) *and* the Policy's rules that are incorporated by reference into Rule 3.6(i) – for compliance with the "consistency" standard. A regulation (or a regulation incorporated by reference) that is adopted pursuant to a process that violates the due process requirements included in the Public Utilities

---

[53] *Tidewater Marine Western, Inc. v. Bradshaw*, 14 Cal. 4th 557, 568-569 (1996) (internal citations omitted).

[54] *Id*. at 557, 569.

[55] Gov. Code § 11351; Pub. Util. Code § 311(h).

[56] *See* Cal Const, Art. XII § 2 ("Subject to statute **and due process**, the commission may establish its own procedures.") (Emphasis added).

[57] *See, e.g., Ohio Bell Tel. Co. v. Public Utilities Com.*, 301 U.S. 292 (1937)*; California Trucking Assn. v. Public Utilities Commission*, 19 Cal. 3d 240 (1977).

Code and in the Commission's own procedural rules cannot be deemed to be "in harmony with, and not in conflict with or contradictory to, existing statutes, court decisions, or other provisions of law."[58]

The procedural requirements established in the Public Utilities Codes and the Commission's Rules of Practice and Procedure ensure due process in the Commission's rulemaking process and protect fundamental rights established in the 5th and 14th Amendments to the United States Constitution. In *People v. Western Air Lines, Inc*., the Supreme Court of California described the ongoing nature of the Commission's procedural due process obligation: "Due process as to the commission's initial action is provided by the requirement of adequate notice to a party affected and an opportunity to be heard before a valid order can be made . . . When the commission has acted and an interested party is dissatisfied due process is further afforded by the right of petition for a writ of review to this court."[59] The Court further observed that "due process requirements of law are not for the sole benefit of an accused. They are the best insurance for the government itself against those blunders which leave lasting stains on a system of justice."[60]

In D13-08-005, the Commission discussed the basic requirements for procedural due process, observing that "[w]hile there are no hard and fast rules for determining what is due process since the type of process that should be accorded may be elusive or ever changing, we can glean from the case law the following examples of due process that should be accorded the parties:

- Circulating materials to the interested parties before relying on that information to make findings. (*Louisiana Ass'n of Indep. Producers & Royalty Owners v. FERC* (D.C. Cir. 1992) 958 F.2d 1101, 1113.)
- Adequate notice for the basis of action. (*Brock v. Roadway Express* (1987) 481 U.S. 252.)
- Meaningful opportunity to be heard. (*Armstrong v. Manzo* (1965) 380 U.S. 545.)
- Opportunity to present evidence and argument. (*Rosa v. Bowen* (1988) 677 F. Supp. 782.)."[61]

The Commission explained that the question of what constitutes sufficient due process in a given instance is "a matter of instinct," noting that courts will apply a proverbial "smell test" to

---

[58] Gov. Code § 11349(d).

[59] *People v. Western Air Lines, Inc*., 42 Cal. 2d 621, 632 (1954).

[60] *Sokol v. Public Utilities Commission*, 65 Cal. 2d 247, 255 (1966).

[61] D.13-08-005, pp. 41-42 (footnote omitted).

agency conduct rather than precise legal rules to render a judgement on questions of due process.[62] In particular, a court will consider the totality of the circumstances behind adoption to inform its determination as to whether or not due process was accorded.

This holistic approach is reflected in the Court's discussion of adequate notice, and its conclusion that while due process does not require a particular form of notice, the notice provided must be "reasonable."[63] Notice is reasonable if it is "reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections."[64] The notice must be designed "reasonably to convey the required information . . . and it must afford a reasonable time for those interested to make their appearance."[65] Notice must "at a minimum, be reasonably calculated to afford affected persons the realistic opportunity to protect their interests."[66]

The right to an opportunity be heard is, likewise, not susceptible to precise description. The California Supreme Court has made clear that "[t]he phrase 'opportunity to be heard' implies at the very least that a party must be permitted to prove the substance of its protest rather than merely being allowed to submit written objections to a proposal."[67] The Commission acknowledged and reiterated this standard in D.96-12-036.[68] The Commission has also emphasized that the opportunity to be heard must be "meaningful,"[69] relying on *Armstrong v. Manzo*, 380 U.S. 545, which found that the opportunity to be heard "must be granted at a meaningful time and in a meaningful manner."[70]

As the Court noted in *Western Air Lines, Inc*., due process is not satisfied solely by adequate notice and a meaningful opportunity to be heard; it is also necessary that a dissatisfied party have the right to petition for a writ of review.[71] This necessitates that Commission decisions include findings on all material issues.[72] The Court has made clear that "[f]indings are essential to 'afford a rational basis for judicial review and assist the reviewing court to ascertain

---

62 *Id*. at p. 41.

63 *Pacific Gas & Electric Co. v. Public Utilities Com.*, 237 Cal. App. 4th 812, 860 (2015).

64 *Mullane v. Cent. Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1950).

65 *Id*. (citations omitted).

66 *Horn v. County of Ventura*, 24 Cal. 3d 605, 617 (1979) (citations omitted).

67 *California Trucking Assn. v. Public Utilities Commission*, 19 Cal. 3d 240, 244 (1977).

68 D.96-12-036, p. 5.

69 D.13-08-005, p. 42.

70 *Armstrong v. Manzo*, 380 U.S. 545, 552 (1965).

71 *People v. Western Air Lines, Inc*., 42 Cal. 2d 621, 632 (1954).

72 *Cal. Mfrs. Ass'n v. PUC*, 24 Cal. 3d 251, 258-259 (1979).

the principles relied upon by the commission . . . . as well as assist parties to know why the case was lost and to prepare for rehearing or review . . .'"[73] The Court has explained that "material issues" include every issue that must be resolved to reach the ultimate finding and also that "'findings are required of the basic facts upon which the ultimate finding is based.'"[74] The Court has observed that findings on material issues "help the commission avoid careless or arbitrary action," pointing out that "[t]here is no assurance that an administrative agency has made a reasoned analysis if it need only state [its] ultimate finding . . ."[75]

Provisions of the Public Utilities Code, as well as the Commission's own codified Rules of Practice and Procedure, ensure satisfaction of these due process requirements in Commission proceedings. They establish requirements for adequate notice, a "meaningful" opportunity to be heard, and a final decision that includes findings on material issues. Specifically, Rule 6.1 provides, *inter alia*, that the Commission may adopt or amend its rules, or amend its Rules of Practice and Procedure, by instituting a rulemaking proceeding.[76] Section 1701.1 requires the Commission to (i) assign a category to the proceeding; (ii) assign commissioner(s) to oversee the case and an administrative law judge ("ALJ") when appropriate; (iii) schedule a prehearing conference; and (iv) prepare and issue a scoping memo that describes the issues to be considered and the applicable timetable for resolution and that, consistent with due process, public policy, and statutory requirements, determines whether the proceeding requires a hearing.[77]

The Commission must provide at least 10 days' notice before holding an evidentiary hearing.[78] Parties have the right to present a final oral argument of its case before the Commission.[79] Pub. Util. Code Section 311(d) requires the proposed decision of the assigned Commissioner or ALJ to be filed with the Commission and served upon all parties to the action or proceeding, with a review and comment period of at least 30 days before it is voted on by the Commission. Section 311(g) provides that Commission decisions not subject to Section 311(d) must, likewise, be served on parties and subject to at least 30 days public review and comment. The proposed decision in a proceeding must be presented to the full Commission in a public meeting and the presentation to the full Commission must contain a record of the number of days of the hearing, the number of days that each commissioner was present, and whether the

---

[73] *Id*.

[74] *Greyhound Lines, Inc. v. Public Utilities Com*., 65 Cal. 2d 811, 813 (1967), (citing *California Motor Transport Co. v. Public Utilities Com.* (1963) 59 Cal.2d 270, 273; *Associated Freight Lines v. Public Utilities Com.* (1963) 59 Cal.2d 583).

[75] *California Motor Transport Co. v. Public Utilities Com.*, 59 Cal. 2d 270, 275 (1963).

[76] 20 CCR § 6.1.

[77] Pub. Util. Code §§ 1701.1(a)-(c) see also Rules 7.1, 7.2 and 7.3.

[78] Rule 13.1(a).

[79] Pub. Util. Code §§ 1701.3(i); 1701.4(d).

decision was completed on time.[80] Finally, Section 311(d) requires the final decision adopted by the Commission to set forth recommendations, findings, and conclusions.

The Commission did not comply with any of these requirements in adopting the Policy. The Policy establishes new rules and amends the Commission's procedural rules, but the Commission did not institute a rulemaking or follow any of the procedures set forth in Section 1701.1. The Commission did not seek to provide notice to interested parties by serving the draft policy on the RPP Service List or the service lists for any other relevant proceedings. Parties accustomed to the Commission's standard approach of serving notice of potential Commission rulemaking actions on relevant proceeding service list(s) would not have known to search the Commission's website for the draft policy. While some parties did ultimately discover the draft policy, this hardly constitutes proof of notice "reasonably calculated, **under all the circumstances**, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections."[81]

The Policy was not styled a "proposed decision of the assigned Commissioner or ALJ" as contemplated in 311(d) – but it was nevertheless clearly a Commission decision. Thus, under 311(g) it was required to be served for review and comment at least 30 days prior to being voted on by the Commission. The Commission violated this requirement by failing to serve the draft policy at all, and by posting it with the December 5, 2019 meeting materials only three days prior to the scheduled meeting. Likewise, including notice of the draft policy in the "Commissioner Reports" section of the December 5 meeting agenda rather than listing it with the proposed orders and resolutions interfered with parties' awareness of the pendency of the action. The notice provided by the Commission was plainly not "reasonably calculated to afford affected persons the realistic opportunity to protect their interests."[82] Thus, on this basis alone, it is clear that the Commission violated due process in adopting the Policy.

The Commission's due process deficiencies do not stop at notice, however. The timeline laid out in the Information Sheet for consideration of the Policy was five months.[83] This is an extraordinarily aggressive schedule given the complexities of the matter at hand. The timeline was inadequate to resolve the multiple policy and legal issues, including a potential constitutional issue related to regulatory takings, arising from the Policy. A full vetting of the issues with participation by interested stakeholders would likely involve a timeline at least triple that contemplated in the Information Sheet, if not longer. The five-month timeline described in the Information Sheet suggests an underestimation of the complexities of the issues and potential impacts to various interested parties including the IOUs, local agencies, ratepayers, and the tribes themselves. The time allotted did not permit an opportunity for briefing on legal issues,

---

[80] Pub. Util. Code §§ 1701.3(e) and (f); 1701.4(b).

[81] *See Mullane v. Cent. Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1950) (emphasis added).

[82] *See Horn v. County of Ventura*, 24 Cal. 3d 605, 617 (1979).

[83] Information Sheet, p. 2.

including the Commission's authority to promulgate the regulations at issue, did not allow full consideration of other alternatives or adequately address several significant concerns raised by parties or others that might exist. While some parties met with the Commission and were permitted to submit written objections to the draft policy, this was not sufficient to prove the substance of their protests.[84] Thus the Commission failed to provide an opportunity to be heard "in a meaningful manner."[85]

Finally, the Policy violates the express admonition of the California Supreme Court in *California Motor Transport Co*., against providing only the Commission's "ultimate finding" without including supporting findings on material issues and basic facts.[86] This omission also violates the requirement set forth in Pub. Util. Code Section 311(d) to include recommendations, findings, and conclusions in adopted decisions. The lack of findings in the Policy and the absence of a robust evidentiary record prevents a clear understanding of the principles relied upon by the Commission in rejecting parties' arguments and interferes with judicial review.[87]

The court strongly criticized an administrative decision with similar characteristics in *California Association of Nursing Homes, etc. v. Williams*, 4 Cal. App. 3d 800. At issue in the case was the validity of an administrative regulation establishing standards for determining the level of state payment for certain Medi-Cal patients.[88] The regulation had been adopted and amended five times as an emergency regulation.[89] An administrative petition was filed and a hearing held, with the petitioner, an association representing nursing homes, and another party presenting evidence. The agency presented no evidence to either support the existing regulation or to rebut the showing of complainants, and neither rejected the petition nor took action to amend the existing regulation.[90] The Medi-Cal administrator did not create a formal administrative record containing the evidence upon which he relied in adopting the regulation.[91]

---

84 *See California Trucking Assn. v. Public Utilities Commission*, 19 Cal. 3d 240, 244 (1977).

85 *See Armstrong v. Manzo*, 380 U.S. 545, 552 (1965).

86 *See California Motor Transport Co. v. Public Utilities Com.*, 59 Cal. 2d 270, 274 (1963).

87 *Cal. Mfrs. Ass'n v. PUC, 24 Cal.*, 3d 251, 258-259 (1979).

88 *California Assoc. of Nursing Homes, etc. v. Williams*, 4 Cal. App. 3d 800, 805 (1970).

89 *Id.* at 807.

90 *Id.* at 809.

91 *Id*. at 812.

On review, the agency argued that it had substantially complied with procedural due process requirements since the petitioner and its members had been involved in rate negotiations with agency staff and had access to materials considered in the negotiations.[92] The court rejected the claim that the agency's approach to promulgating the regulation in question complied with due process requirements. It noted that "[a]dministrative agencies have wide latitude in fashioning procedures and pursuing their methods of inquiry," but that "[p]rocedural elasticity cannot be stretched into disregard of the law's public hearing demand."[93] It admonished that "[p]rivate negotiations with selected members or representatives of an affected industry are no substitute for public hearings. There is a public interest in having the law obeyed. Directed by law to hold public hearings, government officials may not resort to invitational gatherings with selected members of an affected business. The participating firms and associations, however immediately affected, cannot waive the public's right of participation."[94]

It is clear in the instant case that the Commission's actions are highly problematic and render the Commission's action on the laudable goal of returning land to Tribes subject to challenge. The Commission failed to follow statutory requirements and violated its own rules in promulgating the regulations contained in the Policy. The court recently held that while Commission decisions enjoy a strong presumption of validity, the court "will annul a decision by the Commission if the Commission failed to comply with its own rules and the failure was prejudicial."[95] In the context of OAL review, the standard is less exacting – a finding of inconsistency with legal requirements by itself is grounds for disapproval of a proposed regulation. The Commission's approval of the Policy plainly violated its own procedural rules, as well as statutory requirements set forth in the Public Utilities Code and general principles of due process. Thus, the Policy fails the "consistency" standard and cannot be incorporated into Rule 3.6(i).

(ii) <u>"Consistency" Standard</u>

In addition to failing to comply with due process requirements, the Policy violates the "consistency" standard by: (i) establishing a preference for transfers under Pub. Util. Code Section 851 to specified parties that appears on its face to be inconsistent with the requirement set forth in Pub. Util. Code Sections 453 to refrain from granting preferences; and (ii) failing to include the analysis required by Pub. Util. Code Section 321.1.

The Policy establishes an express "preference for the transfer of Real Property to Tribes,"[96] and requires the IOUs to grant a ROFR to reflect this preference. However, Pub. Util.

---

92 *Id*. at 812-813.

93 *California Assoc. of Nursing Homes,* 4 Cal. App. 3d at 800.

94 *Id*. at 813.

95 *Calaveras Telephone Co. v. Public Utilities Com.*, 39 Cal. App. 5th 972, 980 (2019).

96 Policy, p. 2.

Code Section 453 provides: "No public utility shall, as to rates, charges, service, facilities, or in any other respect, **make or grant any preference**, or advantage to any corporation or person or subject any corporation or person to any prejudice or disadvantage."[97] Thus, the Policy appears on its face to be inconsistent with the requirement of Section 453. The OAL does not consider arguments related to substantive issues arising from proposed regulations.[98] It is obligated, however, to evaluate whether aspects of the proposed regulation are "in conflict with, or contradictory to," statutory requirements.[99] The Commission did not request briefing on this issue while considering the draft policy and did not include a finding regarding compliance with Section 453 in the adopted version of the Policy. Thus, OAL has no basis for resolving the apparent inconsistency. Accordingly, given the obvious conflict between Section 453 and the requirements of the Policy, the proposed regulation fails the consistency standard and disapproval of proposed Rule 3.6(i) is necessary to further the Legislature's intent to prevent confusion[100] and to ensure the quality of adopted regulations.[101]

Section 321.1(a) of the Public Utilities Code requires the Commission to "assess the consequences of its decisions, including economic effects, and assess and mitigate the impacts of its decision on customer, public, and employee safety, as part of each ratemaking, rulemaking, or other proceeding . . ." Comments on the Policy raised concerns regarding the economic impact of the Policy, for example noting the potential dampening effect on infill and affordable housing development efforts,[102] the impact of the Policy on the ability to move forward with routine land transactions,[103] and transactional and external costs related to compliance.[104] These concerns were not addressed in the Policy, nor were safety concerns discussed, and the adopted version of the Policy contained no findings on these issues. While OAL will not seek to evaluate the merits of arguments presented on economic and safety issues, it must take into account that the Policy was promulgated without analysis of these issues, in contravention of express requirements set forth in Section 321.1. Given this conflict, the proposed Rule fails the consistency standard.

---

97 Pub. Util. Code Section 453(a) (emphasis added).

98 Gov. Code § 11340.1(a).

99 Gov. Code § 11349(d).

100 Gov. Code § 11340(b).

101 Gov. Code § 11340.1(a).

102 *See, e.g.*, Letter from Clay Faber, Director, Regulatory Affairs, SDG&E to Commissioners Guzman Aceves and Shiroma, CPUC (October 28, 2019), p. 1.

103 *See, e.g.*, *id*. at pp. 2-3.

104 *See, e.g.*, *id*. at p. 4.

(iii) "Clarity" Standard

Under the APA, a regulation meets the "clarity" standard when it is "written or displayed so that the meaning of regulations will be easily understood by those persons directly affected by them."[105] Persons are "directly affected" by a regulation if they: "(1) are legally required to comply with the regulation; (2) are legally required to enforce the regulation; (3) derive from the enforcement of the regulation a benefit that is not common to the public in general; (4) incur from the enforcement of the regulation a detriment that is not common to the public in general."[106] A regulation fails to meet the "clarity" standard if it exhibits, *inter alia*, any of the following deficiencies:

- It does not use citation styles that clearly identify published material cited in the regulation;[107]
- It conflicts with the agency's description of the effect of the regulation;[108]

It is clear that proposed Rule 3.6(i), as drafted, fails to ensure that the meaning of the regulations codified through adoption of the Rule will be easily understood by those persons directly affected by them. The universe of parties "directly affected" by the Policy is extremely broad. It includes all Commission-jurisdictional IOUs (*e.g.*, electric, water, sewer), all tribal interests within the State, landowners, local agencies, real estate development interests, ratepayer advocates, public safety advocates, low-income housing advocate, conservation advocates, etc. Very few of these stakeholders were involved in the Commission's development of the Policy and many may be unaware of the Policy's existence. The overly-generalized description of the proposed Rule included in the Draft Resolution will provide little assistance in understanding the implications of the regulations adopted under the Policy.

The most obvious impediment to a clear understanding of what is required under the proposed Rule is the fact that, rather than clearly enumerating the individual requirements adopted under the Policy in a manner similar to the requirements listed in Rule 3.6(a)-(h), the proposed Rule seeks to incorporate the new requirements promulgated in the Policy through reference to the Policy itself. While the CCR does permit inclusion of references to other documents in adopted regulations,[109] setting forth the *entirety* of a regulation in an external document such that the adopted regulation consists of little more than a reference to such external document is a questionable practice at best and, as discussed above, could constitute an

---

[105] Gov. Code § 11349(c).

[106] 1 CCR § 16(b)(1)-(4).

[107] 1 CCR § 16(a)(6).

[108] 1 CCR § 16(a)(2).

[109] 1 CCR § 20(b).

improper end-run around statutory due process requirements. This approach is directly contrary to the Commission's goal of transparency and fails to ensure "clarity" as required by the APA.

While the proposed Rule relies almost entirely on incorporation by reference of the Policy to establish the specifics of the adopted regulation, the proposed Rule fails to provide a legal citation to the Policy (since none exists) and does not otherwise indicate how a directly affected party would obtain the Policy or whether the Policy is subject to change. This would appear to violate the requirement that "citation styles . . . clearly identify published material cited in the regulation,"[110] and would most certainly interfere with the ability of directly affected persons to easily understand the meaning of regulations adopted in the proposed Rule.[111]

Even more problematic is the fact that the description of the conduct that proposed Rule 3.6(i) purports to regulate is far more limited in scope that what is actually contained in the Policy.[112] The proposed Rule is limited to "[a]pplications that involve the **sale** of real property . . .",[113] whereas the Policy applies to many different types of dispositions, including but not limited to sales.[114] Similarly, the proposed Rule directs compliance only with "the **notice and communication requirements** set forth in the Commission's Tribal Land Policy . . .,"[115] and makes no mention of the much more comprehensive compliance showing that is contemplated under the Policy to demonstrate IOU satisfaction of the requirements related to offering a ROFR and dispute resolution (*i.e.*, the IOU is required under the Policy to provide a ROFR and engage in dispute resolution, and would be required to include a showing regarding both in its Section 851 application as part of the notice and consultation showing). This inconsistency between the purported effect of the proposed regulation and the Commission's description in the Policy of what is required improperly inhibits the "clarity" of the proposed Rule.[116]

The CCR requires that where a regulation incorporates an external document by reference, the regulation must specify *which* portions of the Policy are being incorporated by reference.[117] If the Commission's intent is to limit enforcement of the Policy to the notice and communication requirements adopted therein, it should so state and expressly provide that all other aspects of the Policy will not be enforced. However, the Commission has not otherwise signaled that its intent is to reduce or eliminate obligations imposed by the Policy. Thus, the

---

[110] *See* 1 CCR § 16(a)(6).

[111] *See* Gov. Code § 11349(c).

[112] *See* 1 CCR § 16(a)(6).

[113] Draft Resolution, Appendix A, p. A-16 (emphasis added).

[114] *See* Policy, p. 1, n. 2.

[115] Draft Resolution, Appendix A, p. A-16 - A-17 (emphasis added).

[116] *See* 1 CCR § 16(a)(2).

[117] 1 CCR § 20(c)(5) (emphasis added).

inconsistency between the Commission's apparent commitment to the Policy and the language of the proposed Rule creates an ambiguity that undermines regulatory certainty and compels a finding that Proposed Rule 3.6(i) fails to meet the "clarity" standard.

D. *Adoption of Proposed Rule 3.6(i) Violates OAL Regulations*

While OAL regulations allow materials to be incorporated by reference, as noted above, OAL rules provide that agencies may incorporate proposed materials by reference "*only if*" certain specified conditions are met. Specifically, the agency must, among other things:

- Demonstrate in the final statement of reason that it would be cumbersome, unduly expensive, or otherwise impractical to publish the document in the CCRs;[118]
- Demonstrate in the final statement of reasons that the document was made available upon request directly from the agency, or was reasonably available to the affected public from a commonly known or specified source. In cases where the document was not available from a commonly known source and could not be obtained from the agency, the regulation shall specify how a copy of the document may be obtained;[119] and
- Specify in the regulation text which portions of the document are being incorporated by reference.[120]

The Commission has failed to meet these requirements in the Draft Resolution. Thus, it is prohibited from incorporating the Policy by reference into proposed Rule 3.6(i).

CONCLUSION

It is clear that prior process followed to adopt the Policy lacked due process. The Policy, its rules, and Draft Guidelines are highly problematic, may lead to unnecessary delays to public projects, and present unintended and/or un-evaluated impacts to ratepayers. Thus, for the reasons set forth herein, the Joint Utilities respectfully request modification of the Draft Resolution to delete proposed Section 3.6(i) in its entirety. To achieve the laudable goals underlying the Policy in a manner that satisfies due process requirements, the Commission should initiate a formal rulemaking that allows all interested parties to participate meaningfully in the development of a robust record comprehensively addressing the legal and policy issues arising from the Policy. The Commission should also issue a declaratory ruling clarifying that

---

[118] 1 CCR § 20(c)(1).

[119] 1 CCR § 20(c)(2).

[120] 1 CCR § 20(c)(5).

the Policy is not currently in effect pending resolution of the rulemaking and adoption of final tribal notification rules in the Commission's Rules of Practice and Procedure.

Respectfully submitted this 13th day of July, 2020.

Aimee M. Smith
AIMEE M. SMITH
8330 Century Park Court, CP32D
San Diego, CA 92123
Telephone: 858.654.1644
Facsimile: 619.699.5027
Email: AMSmith@sdge.com

Attorney for
SAN DIEGO GAS & ELECTRIC COMPANY

Melissa A. Hovsepian
MELISSA A. HOVSEPIAN
555 West Fifth Street, Suite 1400
Los Angeles, CA 90013
Telephone: 213.244.3978
Facsimile: 213.629.9620
Email: MHovsepian@socalgas.com

Attorney for
SOUTHERN CALIFORNIA GAS COMPANY

Mark A. Rothenberg
MARK A. ROTHENBERG
2244 Walnut Grove Avenue
Rosemead, CA 91770
Telephone: 626.302.6916
Facsimile: 626.302.1926
Email: Mark.A.Rothenberg@sce.com

Attorney for
SOUTHERN CALIFORNIA EDISON COMPANY