

**PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA**

ENERGY DIVISION

RESOLUTION E-5076

January 14, 2021

**R E S O L U T I O N**

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.

PROPOSED OUTCOME:

- This Resolution approves the Tribal Land Transfer Policy (TLTP) Guidelines to Implement the CPUC Tribal Land Transfer Policy. These TLTP Guidelines provide non-mandatory guidance on complying with the TLTP to all CPUC-jurisdictional public utilities requesting permission to dispose of real property under Public Utilities Code Section 851 (Section 851). These Guidelines are mandatory on all electrical corporations (Pub. Util. Code, § 218), gas corporations (Pub. Util. Code, § 222)—but excluding corporations that only operate independent gas storage facilities (e.g., Lodi Gas Storage, Wild Goose Storage, Central Valley Storage, Gill Ranch Storage, or any similarly situated entity), and common carrier pipeline corporations—and water corporations (Pub. Util. Code, § 241) – excluding those with less than 2,000 service connections (i.e., Class C and D water utilities). For purposes of this Resolution and these Guidelines, those corporations are referred to as “Investor Owned Utilities,” or “IOUs.” When IOUs seek to dispose of real property under Section 851, these Guidelines require

IOUs to take affirmative steps to determine whether California Native American Tribes (Tribes) are interested in purchasing the property, and these Guidelines give Tribes a right of first offer on the property before the IOU may put the property on the open market.

#### SAFETY CONSIDERATIONS:

- Effective administration of the TLTP is part of the responsibility of the IOUs to meet their obligations under Public Utilities Code Section 451 to provide services that promote the safety, health, comfort, and convenience of their patrons, employees and the public.

#### ESTIMATED COST:

- The TLTP will require additional noticing and consultation with affected Tribes. The additional cost of implementing the TLTP is not known at this time.

---

#### SUMMARY

This Resolution adopts the California Public Utilities Commission's (CPUC) Tribal Land Transfer Policy Draft Implementation Guidelines (Draft Guidelines), with an effective date of issuance. The Draft Guidelines apply to Investor Owned Utilities (IOUs) seeking CPUC approval for the future disposition of all fee interest conveyances of real property pursuant to Public Utilities Code Section 851. The Draft Guidelines

will facilitate transfers of fee interest in real property to Tribes by offering Tribes a contractual right of first offer.

## BACKGROUND

On September 19, 2011 Governor Edmund G. Brown Jr. issued Executive Order B-10-11, which first committed the State of California 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. Executive Order B-10-11 created the position of Governor's Tribal Advisor within the Office of the Governor and further ordered: "that it is the policy of this Administration that every state agency and department subject to my executive control shall encourage communication and consultation with California Indian Tribes. Agencies and departments shall permit elected officials and other representatives of Tribal governments to provide meaningful input into the development of legislation, regulations, and policies on matters that may affect Tribal communities."<sup>1</sup>

On June 18, 2019, Governor Gavin Newsom reaffirmed Governor Brown's Order with Executive Order N-15-19. Executive Order N-15-19 states that in early statehood, California's first Governor, Peter Burnett declared "a war of extermination" against Tribal communities and that the State's laws and policies continued to discriminate against Native Americans and to deny the existence of Tribal government well into the twentieth century. The order further acknowledges that the State of California has never formally apologized for these historical wrongs that were tolerated, encouraged, subsidized and committed by State actors against Native Americans.

---

<sup>1</sup> Executive Order B-10-11 Governor Edmund G. Brown Jr. September 19, 2011

Acting to advance the intent of both Executive Orders, the CPUC Committee on Policy and Governance approved the Tribal Consultation Policy (Consultation Policy) on March 21, 2018; on April 6, 2018, the Consultation Policy was formally adopted by the CPUC.<sup>2</sup> The Consultation Policy recognizes Tribal sovereignty and ensures meaningful consideration of Tribal interests within the CPUC's jurisdiction by facilitating Tribal government participation in CPUC proceedings – including California Environmental Quality Act consultations, protecting Tribal cultural resources, encouraging Tribal investments in various renewable energy efforts and participation in CPUC-managed grant programs and CPUC-approved utility incentive and subsidy programs.

### **Tribal Land Transfer Policy**

Consistent with the goals of the Consultation Policy, and both Executive Orders, the CPUC's Emerging Trends Committee proposed a Tribal Land Transfer Policy intended to provide additional protections for Native American cultural resources by providing an opportunity for Native American Tribes to regain lands within their ancestral territory, but lost through institutional bias and unfair means in the 1800s and early 1900s.

Development of the Tribal Land Transfer Policy (TLTP) occurred from June through October of 2019. Notice to stakeholders, public outreach and meetings were held with Tribes; public comments on the proposed policy were accepted. Following receipt and

---

<sup>2</sup> CPUC Tribal Consultation Policy, Adopted April 2018.

<https://docs.cpuc.ca.gov/PublishedDocs/Published/G000/M212/K861/212861685.PDF>

review of comments, the Draft TLTP was placed on the CPUC Agenda for vote. On December 5, 2019, the TLTP was formally adopted by the CPUC.<sup>3</sup>

The TLTP builds on the Tribal Consultation Policy by establishing a CPUC preference for the transfer of real property to Tribes when an investor owned utility (IOU) plans to dispose of real property within a Tribe's ancestral territory. Conceptually, the Policy creates an expectation that for any future disposition of real property subject to Public Utilities Code Section 851, the IOUs will offer Tribes a right of first offer before putting the property on the market.

In adopting the TLTP, the CPUC affirms its respect for Tribal sovereignty, supports the protection of Tribal sacred places and resources, and seeks to ensure meaningful consideration of Tribal interests, including the return of lands within the Tribe's ancestral territory. The TLTP acknowledges that IOUs own real property located within Tribes' ancestral territories and upholds California law and policy encouraging consultation and cooperation with Tribal governments to protect Tribal sacred places and cultural resources of historical, spiritual, and ceremonial importance to Tribes. The CPUC's review of real property transfers subject to Section 851 may affect land use activities on or near Tribal communities, may affect the protection and accessibility of Tribal sacred sites and cultural resources, and may provide opportunities to return lands to California Tribes within their Tribal Territories.

A cornerstone of the TLTP is acknowledging the need for the CPUC and the IOUs to respect the sovereignty of the Tribes and the respect for and consideration of spiritual beliefs and cultural values by provision of timely information on the process to effectively engage in CPUC proceedings of interest. To ensure the Tribes are informed

---

<sup>3</sup> CPUC Tribal Land Transfer Policy, Adopted December 5, 2019.

[https://www.cpuc.ca.gov/uploadedFiles/CPUC\\_Public\\_Website/Content/About\\_Us/Supplier\\_Diversity/Final%20Land%20Transfer%20Policy%20116.pdf](https://www.cpuc.ca.gov/uploadedFiles/CPUC_Public_Website/Content/About_Us/Supplier_Diversity/Final%20Land%20Transfer%20Policy%20116.pdf)

of transfers, the CPUC will facilitate Tribal Government access to information by first providing effective notice to Tribes, early meaningful consultation, and then facilitating Tribal participation in proceedings involving requests by IOUs to dispose of real property subject to Public Utilities Code Section 851. When an IOU plans to dispose of real property within a Tribe's ancestral territory, the CPUC will ensure that the Chairperson or the designee of any appropriate Tribe receives notice of the planned disposition and a request to meet from the IOU.

The Revised Draft Guidelines attached to this Draft Resolution implement the TLTP. Information required to be provided to Tribes by the Revised Draft Guidelines include: 1) identification of the real property at issue; 2) the reason for the disposition; 3) contact information for a representative of the IOU that is able to provide and, 4) at the Tribes request, enough additional information for the Tribe to determine whether it is interested in purchasing the real Property.

To facilitate a Tribe's evaluation of real property of interest, the CPUC will give special consideration to Tribal government requests to participate in CPUC proceedings involving requests by IOUs to dispose of real property under Section 851. A Tribal Government may request to become a party in such proceedings, and if the appropriate Tribe does not receive notice before the IOU begins the Section 851 process, the CPUC will provide the Tribe reasonable additional time to participate in the proceeding, and will require meaningful consultation with the Tribal government to determine whether the Tribe is interested in acquiring the real property. CPUC staff and Administrative Law Judges will ensure that relevant information received from a Tribe is submitted into the record of a proceeding.

Importantly, where an IOU seeks approval to transfer real property within a Tribe's ancestral territory, the IOU will provide a Tribe a right of first offer. The CPUC will further deem that Tribe the preferred transferee absent a finding supported by evidence that: 1) the Tribe declined consultation or otherwise confirmed it is not interested in acquiring the real property; 2) that the IOU acted in good faith and, after reasonable effort, was unable to agree with the Tribe on reasonable terms to transfer

the real property consistent with CPUC policy; 3) that the conveyance of the real property to another entity is necessary to achieve IOU operational requirements, or to comply with any law, rule, or regulation; or 4) that conveyance of real property to another entity would be in the greater public interest.

If an IOU submits an application or advice letter consistent with Section 851 for the disposition of real property, the CPUC will ensure that the record contains a showing of notice and meaningful consultation with the appropriate Tribe(s), consistent with the identified Tribal ancestral territory recognized by the Native American Heritage Commission (NAHC). This includes, but is not necessarily limited to:

- a copy of a written request to the NAHC to identify Tribal entities interested in the area where the real property being disposed of is located;
- a copy of written notice to the Tribal Chairperson or their designee of the IOU's intent to dispose of the subject real property, including a request to consult with the Tribe regarding the Tribe's interest to acquire the subject real property;
- Documentation of communication between the IOU and the Tribe regarding whether the Tribe is interested in acquiring the real property.

If those requirements are not met, and if those deficiencies cannot be cured, the CPUC may deny the Application or Advice Letter.

As part of its review of any disposition of real property under Section 851, the CPUC will consider any request by a Tribal entity, comments regarding potential impacts on Tribal cultural resources, or suggested measures to mitigate those impacts. This applies to all such transfers, consistent with all laws, rules, and regulations governing the protection of cultural resources on real property.

If more than one Tribe seeks ownership of available real property, and if the Tribes are unable to resolve the dispute themselves, the TLTP Guidelines require that the IOU or the CPUC will engage in meaningful consultation with the Tribes to attempt to resolve the dispute.

The Guidelines requires the IOUs to establish a website for all matters pertaining to the Guidelines and Policy. The Guidelines also require quarterly reporting, such as a list of recent and upcoming IOU real property transactions, and a summary of Tribal contacts and consultations and the outcome of the consultations, undertaken over the previous quarter. The CPUC will post these reports from the IOUs.

### **Informal Comments Received on Draft Tribal Land Transfer Policy and the Draft Guidelines**

During the comment period on the Draft Tribal Land Transfer Policy, the CPUC received informal comments<sup>4</sup> from the three large electric utilities, several California Native American Tribes, the Native American Land Conservancy, and the Pacific Forest and Watershed Lands Stewardship Council (Stewardship Council). The informal comments received were, where appropriate, incorporated in the TLTP and subsequently, the Revised Draft Guidelines attached to this Resolution. Although the informal comments received have already been considered, a summary of some of the key comments received will serve as background and may facilitate additional comments on this Draft Resolution to further develop the TLTP Guidelines, and the associated record of this Resolution before the CPUC.

Comments submitted by IOUs generally proposed certain clarifications and modifications to the Draft TLTP regarding the types of transactions subject to the Draft TLTP, the resources to identify the appropriate Tribe within a geographic area, and the process challenges associated with providing a “right of first refusal.”

---

<sup>4</sup> The comments received prior to this Resolution are designated here as “informal” because while they inform the actions taken in this Resolution, they were not part of a CPUC proceeding. Comments received by the CPUC prior to the issuance of this Draft Resolution are available here: <https://www.cpuc.ca.gov/Tribal/>



The IOUs recommended the Policy be clarified to exclude the types of minor conveyances subject to General Orders 173 and 69-C, as such minor conveyances are typically made to governmental entities, or to developers as a condition of their development projects. These types of grants generally allow specific and limited uses. IOUs stated that including easements interests in IOU real property subject to the “right of first refusal” offer significantly expands the requirements for IOUs without advancing the goal of the Draft Policy of returning lands to Tribes.

The IOUs expressed concern with the definition “within or adjacent to Tribal territory,” and “Tribal territory is defined as the territory designated by the Tribe and submitted to the NAHC for notice of projects under AB 52.” The IOUs believe that there may be disputes between Tribes regarding areas outside of the recognized bounds of a reservation. Specifically, an IOU may inadvertently notify or show preference to one Tribe as opposed to another where there are competing claims. Additionally, IOUs state that the TLTP does not specify the protocols to be used should two or more Tribes lay claim to the same property, and it is not clear that the NAHC will attempt to resolve claims or disputes between Tribes. At a minimum, the IOUs believe the CPUC should provide a detailed map with associated single points of contact for providing the notice.

The IOUs’ requested that the Policy be amended to provide a “right of first offer” as opposed to a “right of first refusal,” explaining that a “right of first refusal” provides a third party with the contractual right to acquire property on the same or better terms as had been proposed by another potential purchaser, who has expended time and resources investigating any number of issues related to the sale. The ability to extend and negotiate offers for the disposition of the property 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.

The IOUs explained that negotiations with a third party typically occur prior to the transaction being submitted to the CPUC for approval pursuant to Section 851, and third parties would be less willing to negotiate for the acquisition of real property

before a Tribe confirms that it has no interest in that property. Instead, a “right of first offer” would ensure the Tribes are provided with notice and an opportunity to present an offer prior to the CPUC completing its deliberations on a disposition.

Comments submitted by the Stewardship Council stress the importance of exempting Pacific Gas and Electric Company’s (PG&E) Land Conservation Commitment (LCC) from the Tribal Land Transfer Policy. First, the Stewardship Council believes that key provisions in the Draft Policy conflict with the legal requirements of the PG&E Bankruptcy Settlement Agreement and Stipulation ordered in Decision (D.) 03-12-035. Second, the Stewardship Council states that since its inception it has made a concerted effort to extend the benefits of the LCC to Native American entities resulting in more than 8000 acres donated in fee. To facilitate the transfers the Stewardship Council has allocated several million dollars in funding to Native American entities providing critical support to enable the Tribes to meet the robust conservation provisions of the LCC. Finally, even though many donations are still in negotiation, the planning efforts have been mostly completed and the Stewardship has funding only to complete the LCC before dissolving in 2022.

Comments submitted by the Tribes were broadly supportive of the Tribal Land Transfer Policy but expressed concern that the Policy does not clearly state what lands would be considered the Tribe’s aboriginal territory and what “adjacent to a Tribes aboriginal territory” means. For many federally recognized Tribes, lands that are traditionally and culturally affiliated with a Tribe include those lands that are located within the Tribe’s reservation, but also include lands located beyond the reservation boundaries. It is not uncommon for several Tribes to claim a historical, cultural, or spiritual connection to the same lands, and the Tribal Land Transfer Policy may result in multiple Tribal claims to the same property.

The Tribes also stressed the need for a clear standard of “meaningful consultation.” Comments recommend that meaningful consultation means consultation in advance with the decision maker or intermediaries with clear authority to present Tribal views

to the IOU. Simply requiring documentation of communications between and IOU and the appropriate Tribe, in and of itself, is not meaningful consultation.

The Draft Guidelines are intended to provide the guidance necessary to effectively and efficiently implement and further the goals of the CPUC's TLTP. Many of the clarifications of the TLTP requested by commenters is provided in Section 1.3 Definitions of the Draft Guidelines.

Following issuance of a preliminary version of the Draft Guidelines, the CPUC held a Tribal Land Transfer Policy Workshop on March 24, 2020. Due to Covid-19 restrictions, the Workshop was held by Webinar and comments were received via chat during the Workshop.<sup>5</sup>

Workshop comments specific to Draft Guidelines include:

A comment from Mona Tucker suggested that Section 3.3(d) should be removed from the Draft Guidelines, as she contends it has the potential to greatly devalue the benefits of the TLTP to Tribes and is contradictory. Ms. Tucker believed Section 3.3(d) puts an undue burden on Tribes against entities who may seek a variety of uses that could be claimed as a greater "public interest."

---

<sup>5</sup> Materials from the March 24, 2020 workshop on the Draft TLTP Guidelines, including an agenda and a Chat Transcript, can be found here: <https://www.cpuc.ca.gov/Tribal/>

A comment from Kara Woodruff stated that dozens of comments related to the closure of Diablo Canyon request the conservation of the 12,000 acres of Diablo Canyon Lands. In these comments the CPUC has been asked to require Conservation Easements be placed on any land transfers away from IOU's to Tribes or any other recipients. Ms. Woodruff sought clarity on how the CPUC will protect the conservation values and suggests the CPUC include in the TLTP Guidelines a provision that requires an analysis of conservation values and a Conservation Easement, where appropriate.

Additional Comments from the public at the workshop:

- One commenter stated that the TLTP starts with the presumption that transferring lands to a native Tribe is in the public interest but does not consider that such interest may be contrary to important community values such as conservation.
- Commenters were interested in learning more about the possibility of quarterly noticing of upcoming real property dispositions in addition to the Annual Report required in Section 5.1 of the Draft Guidelines.
- Commenters were interested in the number of Tribal groups contacted regarding the TLTP, the database of those contacts, and the contact for the CPUC's Tribal Liaison.
- Commenters questioned when the California Environmental Quality Act (CEQA) would be triggered, if a transfer of land would trigger CEQA, who would be the Lead Agency under CEQA, and the relationship between CEQA and a Conservation Easement for protecting land in perpetuity.
- A commenter questioned how local government rules and regulations apply to a sovereign nation land.
- Another commenter offered that both CEQA and any local rules apply to Tribal land held in fee, and the federal government will conduct National Environmental Policy Act (NEPA) review if/when the Tribes propose that land be accepted into trust by the Bureau of Indian Affairs.

Where appropriate, the informal comments received at the March 24 workshop were incorporated into the Draft Guidelines appended below.

## NOTICE

Notice of Resolution E-5076-E is made by publication in the CPUC's Daily Calendar. A copy of Draft Resolution E-5076 was mailed and distributed in accordance with Section 4 of General Order 96-B and Rule 15.6 of the CPUC Rules of Practice and Procedure.<sup>6</sup>

## COMMENTS

Draft Resolution E-5076 was originally circulated on July 31, and the initially established comment period was for opening comments to be received by August 24, 2020 with reply comments to be received by September 3.

On September 2, the September 3 due date for comments was suspended and the comment period was extended to September 24, 2020, with reply comments due October 8, 2020. After that comment period closed, Draft Resolution E-5076 and the appended Draft Guidelines received substantive amendments, and Draft Resolution E-5076 was revised and re-circulated for an additional comment period on December 11, 2020. On January 5, 2021 comments on Revised Draft Resolution E-5076 were submitted by 3 California Native American Tribes,<sup>7</sup> the 3 major IOUs, and the California Coastal Commission.

---

<sup>6</sup> The CPUC Rules of Practice and Procedure. <https://www.cpuc.ca.gov/rpp/>

<sup>7</sup> The Santa Rosa Rancheria Tachi Yokut Tribe and the Dry Creek Rancheria Band of Pomo Indians submitted comments that were substantially identical. For simplicity's sake, this Resolution refers only to those comments made by the Santa Rosa Rancheria Tachi Yokut Tribe. The CPUC means no disrespect to the Dry Creek Rancheria Band of Pomo Indians.

During the initial comment period, comments were received from several California Tribes, Investor Owned Utilities, industry groups, a California county and a public agency. The received comments were generally supportive of the Tribal Land Transfer Policy but offered numerous suggestions to improve the Draft TLTP Guidelines to improve TLTP implementation and to more effectively achieve Tribal interests.

To make it easier to follow the procedural history, the CPUC refers to the version of the Guidelines that was circulated on July 31 as the “Initial Draft Guidelines,” and to the version of the Guidelines that was recirculated on December 11 as the “Revised Draft Guidelines.”

### **Comments from Tribes on the Initial Draft Guidelines**

The Yurok Tribe submitted comments that addressed specific sections of the Initial Draft Guidelines and requested the following modifications:

- Section 1.2(c) was seen as not clearly addressing the circumstances under which IOUs may be allowed to place an easement on land prior to transfer. The Yurok Tribe recommended that placement of major encumbrances such as conservation easements be prohibited prior to transfer unless by consent of the receiving Tribe and that the Tribe’s regulatory and adjudicatory jurisdiction apply.
- Section 1.4 should be modified to mandate a “user-friendly” website that accommodates limited Tribal Internet access.
- Section 2.1 should be amended to match the language in the TLTP. The Tribe further recommends that the IOUs should send multiple notifications in 30-day increments.
- Section 2.2 should be modified to indicate that notification should be through a written letter, e-mail, or phone call.
- Section 3.2(a) should be amended to require the CPUC to send notification to the Tribes of the topic, time, location, filing and record and explain the process and opportunity to participate in the advice letter and/or 851 proceedings and detail the process for Tribal participation including allowing 60 days to review and file

comments into the record and allowing 60 days to respond to any opposition to the Tribe's comments.

- Section 3.3(d) should be removed to eliminate the exception from the TLTP that could follow from the term "public interest", or to revise the subsection to better define the term.
- Section 3.4 should be revised to require the CPUC to request consultation regarding potential impacts to Tribal cultural resources and carefully consider the mitigation measures requested, striving to implement the mitigation measures requested by the Tribe and should clarify if the IOUs and the CPUC are required to follow the CEQA process.
- Section 4.3 should be modified to eliminate the term "any other stakeholder" to avoid undermining the process and damaging relationships between Tribes.

The Paskenta Band of Nomlaki Indians (Paskenta Band) recommended revising the Initial Draft Guidelines to ensure that any land subject to the Guidelines is offered to any Tribe at 20% below market rate. The Paskenta Band also believed that the exemptions that could exclude a Tribe as the preferred transferee were too broad and vague and may allow the IOUs and CPUC to undermine the goals of the TLTP.

The San Fernando Band of Mission Indians commented that it is imperative that the language in Draft Resolution E-5076 clarify land disposition when an IOU plans to dispose of real property specific to Ancestral Lands, rather than the broad language of "cultural and traditionally affiliated".

The Xolon Salinan Tribe requested more information on how GO 173 and GO 69-C easements are used. The Xolon Salinan Tribe is a State Recognized Tribe with no monthly income. Therefore, land transfers would have to be donated or purchased at \$1.00 to make a legal real estate transaction. The Tribe stated that within the Central Coast region there are other Tribal entities that may have overlapping ancient Tribal boundaries, due to the number of inconsistent academic writings. The Tribe recommended that Tribal evidence of connection to a specific land should lie mainly within the Pre-Contact era, not after contact (Mission era).

The Round Valley Tribes, a sovereign confederation of Northern California Indian Tribes, submitted comments suggesting numerous changes to the Initial Draft Guidelines. First, the Round Valley Tribes suggested revising Section 1.1(b)(i) to acknowledge Tribes as sovereign nations, and Section 1.1(b)(ii) to apply the policy to any property within a Tribe's ancestral territory. The Round Valley Tribes also suggested Section 1.3(a) be revised to rely on a Tribe's constitution and description of "Ancestral Territory" if a Tribe has not designated its ancestral territory under Assembly Bill (AB) 52. If a Tribe's constitution does not include a description of ancestral territory the Handbook of North American Indians should be used as a source.

The Round Valley Tribes recommended that Section 2.1 be revised to require a 14-day timeline to begin consultation with Tribes once the IOU decides to dispose of real property. Next the Round Valley Tribes recommended extending the response period by Tribes from 90 to 120 days. Also, the Round Valley Tribes recommended that, after an IOU properly notices a Tribe of a forthcoming disposition, and the Tribe does not respond, the IOUs should hold the offer to the Tribe open for 60 days. Section 2 should be revised to require that the IOUs maintain a written record of communications with Tribes related to specific dispositions.

The Round Valley Tribes recommended that Section 3.3(d) be removed because a balancing of public interest would contradict the goal of the TLTP. Additionally, Section 3.4 should be revised to require that IOUs coordinate with a Tribe's Tribal Historic Preservation Officer (THPO) or other appropriate Tribal representative regarding how the conveyance of real property might impact Tribal cultural resources. A written record should be kept and submitted with the IOUs request for approval.

Finally, the Round Valley Tribes recommended that General Orders 173 and 69-C be included in the Initial Draft Guidelines, as both orders represent a possible first step for Tribes to re-establish and maintain connection to ancestral lands.



## **IOU Comments on the Initial Draft Guidelines**

SoCalGas, SCE, SDG&E, and PG&E submitted comments in support of the goals of the TLTP, but critical of the process by which the Policy was adopted. They recommended that, given the complexity of the factual, legal and policy issues arising from the TLTP and Initial Draft Guidelines, the CPUC should withdraw both and initiate a formal rulemaking. The IOUs asserted that the Initial Draft Guidelines would likely frustrate the purpose of the TLTP and fail to effectuate transfers to the Tribes.

The IOUs agreed that the Initial Draft Guidelines should be revised to clarify that the TLTP is applicable to a fee interest in real property and not easements and other less-than-fee interests, as an easement is a non-possessory right, the transfer of which would not advance the goals of the TLTP.

The IOUs took the position that the TLTP should not be expanded to licenses issued pursuant to GO 69-C because such licenses are required to be for limited purposes and can be terminated as necessary for utility purposes. The IOUs commented that GO 69-C does not authorize leases, nor the sale of real property. Rather, they argued, applying the TLTP and Initial Draft Guidelines to GO 69-C transactions would inundate Tribes with notices for easements for road widenings, pipeline crossings, community gardens, and plant nurseries. Occasionally Tribes may request such licenses for ceremonial purposes on IOU property but expanding the Guidelines to include notification to Tribes to issue a revocable GO 69-C license would result in delay of operations such as accommodating telephone and communication providers using IOU utility poles.

The IOUs commented that the Initial Draft Guidelines should be revised to establish an orderly and efficient process for the determination of a Tribe's interest in a particular transaction. They suggested that the NAHC, in consultation with the Tribes and the CPUC's Tribal Liaison, should predetermine which Tribe has a superior claim within any given territory within the IOU service area. The Initial Draft Guidelines should be

revised to delete the requirement that IOUs resolve conflicts among Tribes related to the TLTP.

They also suggested the response time from the NAHC should be reduced from 90 to 30 days to allow the remainder of the 90-day period for negotiations.

PG&E believed the term “adjacent to” is ambiguous and should be changed to clarify the right of first refusal may be exercised by the Tribe or Tribes whose ancestral territory includes the IOU real property. They recommended the guidelines be changed to:

- specify the procedures and timelines for the exercise of the Right of First Refusal;
- establish a procedure for transactions that may qualify for exemption and for high value transactions in which Tribes may participate while still achieving the greatest gain on sale for the ratepayers; and

PG&E also maintained that the Initial Draft Guidelines should recognize exceptions for sale of operational facilities such as water canals being sold to water districts, and the commercial sale of developed property such as the sale of a service center building. The Initial Draft Guidelines should recognize a specialized procedure governing the sale of high value property with an expected value. For example, GO 173 requires a utility to file an 851 application for transactions valued over \$5 million.

PG&E stated the definition of “dispositions” should exclude the term “encumbrance” to avoid expanding the scope of the TLTP to include transactions associated with utility financing that do not implicate a transfer of IOU property. Also, the phrase “disposition by any other means of an estate in real property” would include short-term leases and transactions not intended to be subject to the TLTP.

SCE commented that the application of the TLTP and Initial Draft Guidelines to leases and easement transactions pursuant to GO 173 does encompass limited transactions

that may convey fee ownership but the bulk of transactions involve leases and easements to counties and cities for various forms of improvement projects.

SCE argued that subjecting conveyances pursuant to GO 173 and 69-C could substantially delay essential IOU operations because SCE's capital infrastructure frequently requires the acquisition or disposition of easements or the relocation of existing systems of other IOUs. For example, SCE is presently providing a jurisdiction with temporary access rights to complete a road widening, without further CPUC approval, pursuant to GO 69-C.

SCE asked that the Initial Draft Guidelines and TLTP exempt all conveyances made pursuant to GO 173 and GO 69-C and should not extend beyond a transfer of fee ownership or a long-term lease of less than 50 years. According to SCE, exempting the conveyance of easements, licenses, and minor property sales does not appear to be inconsistent with the CPUC's intent to transfer fee ownership to a Tribe.

SCE noted that GO 173 does allow for the sale of land provided the value does not exceed \$5 million. Lease approval by GO 173 cannot be for more than 25 years and therefore does not resemble a long-term transfer of real estate that would be comparable to fee ownership.

SCE further noted that GO 173 empowers CPUC staff to refer an Advice Letter filing to the CPUC for formal approval under Section 851 if staff believe there are issues that merit CPUC review. SCE states that the CPUC could exempt advice letter filing under GO 173 from the TLTP and Initial Draft Guidelines unless staff determines that a sale of land of a large or significant parcel is at issue and should be referred to the CPUC for formal approval pursuant to Section 851.

SCE commented that the Initial Draft Resolution identified a 90-day window for an initial response from the NAHC. SCE suggested that Tribes should be given a 30-day time period to respond to the subsequent IOU notice of disposition of real property. If

the Tribe does not respond the IOU should provide a follow-up notice and allow for a 10-day response period.

SCE believed the Initial Draft Guidelines were unclear as to whether the Tribe must match the offer given or that they merely be notified of the transaction.

SCE noted that the concerns related to consultation and implementation of the Guidelines are substantial and should be addressed not by an implementation workshop, but through revisions to the Initial Draft Guidelines prior to CPUC adoption of the Draft Resolution, rather than after the adoption of the Resolution.

SCE objected to the Draft Resolution's requirement of IOU reporting on a quarterly basis, as opposed to the TLTP's annual reports. SCE further argued that the requirement of a list of upcoming and anticipated real property transactions is potentially onerous, and that it would be inappropriate for SCE to signal that it is evaluating a potential sale.

If a dispute arises between multiple interested Tribes, the Initial Draft Guidelines required that the IOU engage in "meaningful consultation" and "propose a reasonable resolution." SCE believed these terms are subjective and require the IOU to mediate a dispute. Instead, SCE recommended that IOUs be required to provide each Tribe notice and opportunity to submit offers in those instances where an IOU is selling operational property without need for a specific parcel from a third party (land swap) and where the primary motivation of the transaction is profit as opposed to operational need of the purchaser.

### **Other Comments on the Initial Draft Guidelines**

The California Building Industry Association (CBIA) submitted comments indicating a primary concern over the inclusion of easements as a disposition in the Initial Draft

Resolution and request that easements be excluded from the types of dispositions subject to the TLTP.

CBIA stated that home builders and municipalities regularly ask IOUs to relocate easements to facilitate the construction of roadways or to accommodate the development of new housing projects. Homebuilders will often offer a new easement to the IOU in return for a quitclaim of the original, affected easement.

It further stated that 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, as the IOU is not receiving compensation in exchange for the transfer of the old easement but is receiving an equivalent land interest.

According to CBIA, GO 173 and GO 69-C ensure that certain routine IOU conveyances may be handled administratively and without need for full CPUC approval. In the context of an easement exchange, GO 173 and 69-C are the appropriate protocols.

CBIA asserted that an easement held by an IOU for transmission and distribution purposes has no value to Tribes because they cannot change the use of the easement. Unless the Tribes were to obtain fee title to the underlying land, which does not belong to the IOU, the Tribes would no ability to control the land. Thus, CBIA argued that all transactions related to easements should be excluded from the TLTP. According to CBIA, this exemption could easily be accomplished through a revision to the term "disposition" that excludes all transactions pertaining to easements on private property.

Finally, CBIA argued that the CPUC should seek additional comments and hold additional public workshops to seek input from local agencies, affordable housing groups, owners of utility encumbered parcels, and other parties.

San Diego Metropolitan Transit System (MTS) submitted comments stating that the Initial Draft Resolution created confusion and prevents routine cooperation between public agencies and IOUs, and asked the CPUC to suspend the TLTP, withdraw the Initial Draft Resolution and initiate a formal rulemaking.

According to MTS, MTS and SDG&E each operate linear rights-of-way and at times must cross the other entity's right-of-way and have a history of providing license, easement, or other non-fee transfers of real property rights to allow public infrastructure projects to move forward while avoiding involuntary acquisitions using the condemnation process. Using the GO 173 process under Section 851 adds approximately 4 months to public projects. According to MTS, the Initial Draft Guidelines would require all real estate-related project negotiations between MTS and SDG&E to first be offered to the applicable Tribes, even if SDG&E has no intention or interest in formally disposing of the property in question.

MTS recommended the TLTP should apply to "surplus property" that is no longer needed by the IOU, the definition of disposition should exclude easements and other non-fee conveyances, and the TLTP should not apply to GO 69-C conveyances, or to transactions with a public agency to support a public project.

The Western Power Trading Forum (WPTF) submitted comments expressing concern that the Initial Draft Guidelines were overly broad and could be interpreted to apply to easements across IOU real property that a developer needs to interconnect a renewable generation facility with the IOU's transmission system.

To avoid confusion and unnecessary litigation that might delay renewable project timelines and costs, WPTF urged the CPUC to modify the Initial Draft Resolution to exclude disposition of a limited set of real property rights such as non-exclusive easements and rights-of-way that are used for interconnection purposes.

Horizon West Transmission, LLC (Horizon West) submitted comments expressing concern that the Initial 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 (Energy Projects) that require such easements and real property interests to complete construction and interconnect with the IOU's electric transmission and distribution system.

Horizon West commented that when an IOU proposes to convey an easement or similar real property right for a specific Energy Project's use, such as to install specific equipment, any corresponding right of first refusal must be for the acquisition of the same right and would not be meaningful to a Tribe.

Horizon West believed granting a right of first refusal for Energy Project easements and similar real property rights would increase delay and risks for Energy Project development and creates a risk that someone might exercise the right without a way to use them or for the purpose of resale at a higher price. Where easement rights are granted for a specific Energy Project it is not appropriate to assume that the Tribe is the "preferred transferee" especially if doing so would prevent an Energy Project from being completed or interconnected.

Horizon West believed the Initial 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 Projects.

The County of San Luis Obispo commented that the Initial Draft Guidelines would benefit from greater clarity regarding the presumption that the Tribe is the preferred transferee and 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. According to the County, 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 issue would also benefit from further discussion during the implementation workshop.

The County was concerned that disputes may arise between Tribes' claims to certain properties and, 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 for brokering a resolution of disputes between Tribes regarding their ancestral territories as such transactions are likely to be more sensitive and complex than typical real estate transactions. The County believes the dispute resolution process in the Draft Guidelines to be unclear. According to the County, if the utility fails to resolve a dispute between Tribes, it is unclear how the utilities will propose a resolution to the CPUC. As the dispute resolution process is currently structured in the Draft Guidelines, the County believes it would benefit from further development during a workshop.

#### **January 5, 2021 Comments on Revised Draft Resolution E-5076**

The California Coastal Commission (CCC) submitted comments recommending that the Revised Draft Guidelines Section 2.1 be modified to require that IOUs notify the CCC and any relevant local governments of Section 851 Fee dispositions subject to the TLTP for real property located within the coastal zone.

Comments submitted by the Northern Chumash Tribal Council (NCTC) clarify that Tribal sacred places and cultural landscape resources are described in SB 18 and refers to Public Resources Code Section 5097.9 and 5097.995 and may be eligible for listing in the California Register of Historic Resources pursuant to Section 5024.1. The NCTC comments that Alfred Kroeber's reference to ancestral territory is not recognized by all California Tribes and should not be used as a resource. Next, the NCTC points out that all California Native American Tribes are independent governmental entities. The NCTC recommends that the IOUs consider undertaking pre-consultation with Tribal entities to develop a foundation of mutual respect and cooperation. The NCTC comments that the IOU Tribal website should place a high priority on Tribal confidentiality to protect and preserve cultural places. The NCTC believes that 60 days for a Tribe to express interest is preferable. Finally, the NCTC expresses concern with



the “parallel agendas within the IOUs that run contrary to the intent of the TLTP and how Tribes will be treated fairly and equally”.

The Santa Rosa Rancheria Tachi Yokut Tribe (Tachi Yokut) commented that examples of when an easement could be placed on real property should be provided and that the Tribe purchasing the property should be consulted on any proposed easement, and additional negotiations should occur between the Tribe and IOU if the CPUC authorizes an easement over land prior to transfer to a Tribe if that easement was not anticipated during negotiations. The Tachi Yokut point out in comments that there is no explanation for how the workshop will affect the definition of “ancestral territory”. Next, the Tachi Yokut comment that the change in scope of the IOUs to which the TLTP would apply is inconsistent with the TLTP and should be modified to include all IOUs. Regarding Notification, the Tachi Yokut request that the timeframes in the Revised Draft Guidelines should not begin until a USPS return receipt is received by the IOU indicating that the notice was delivered to and accepted by the Tribe, and that the Tribe should have 90 days, not 60 to respond to the IOUs notice. The Tachi Yokut comment that 60 days is insufficient time for due diligence and recommends at least 90 days be provided. Additionally, the Tachi Yokut request that all notices sent by IOUs to Tribes also be sent to the CPUC.

Regarding requests for approval, the Tachi Yokut comment that Revised Draft Guidelines Section 3.1(b)(i) should be modified to read: “identify any interested Tribes through the procedures described in Section 2.2, provide them with notice of the proceeding, an opportunity to comment, and an opportunity to acquire the real property at the terms negotiated by the IOU with the third-party purchaser”. Next, the Tachi Yokut comments seek clarification of Revised Draft Guidelines Section 3.1 and the actions that the CPUC may take under that Section. Next, the Tachi Yokut comment that Revised Draft Guidelines Section 3.2 should be modified to require the CPUC to identify all interested Tribes in accordance with the procedures described in Section 2.2 if such Tribes have not already been identified. The Tachi Yokut next comment that Section 3.3(d) lacks clarity as to how the CPUC would determine how another public interest would be evaluated and suggest that the section should be modified to read: “that transfer of the real property to another entity would serve a

greater public interest. The Tachi Yokut comment that Section 3.4 should be modified to require that all “review and consideration of impacts to cultural resources will be consistent with all laws, rules, and regulations governing the protection of cultural resources on the Real Property”.

Regarding dispute resolution, the Tachi Yokut are concerned that the IOUs have authority to resolve disputes over which Tribes should be notified and suggest modifying Section 4.2 to read: “if there is a dispute about the Tribe or Tribes that the IOU must notice, or about the extent of any Tribes ancestral territory, the IOU shall provide notice to all Tribes who claim the property as within their ancestral territory”. Additionally, the Tachi Yokut comment that parties to a dispute should seek mediation assistance from the NAHC.

Finally, the Tachi Yokut request that several sections of the Revised Draft Guidelines be amended to incorporate the requirements of a “right of first offer” and several other clerical corrections.

Southern California Edison (SCE) submitted comments recommending that the Tribes and Commission identify ancestral territories through government-to-government consultation and provide a map overlay of IOU service areas relative to Tribal ancestral lands, arguing that IOUs are not positioned to determine the ancestral territories of Tribes and believe it would be more efficient to use an overlay map created by the Commission and Tribes.

Next, SCE proposes to amend Revised Draft Guidelines Section 2.2(a) to allow IOUs to contact the NAHC quarterly, rather than on a per-project basis.

Next, SCE recommends that Section 1.3(d) be revised to clarify that easements and all less-than-fee transactions do not apply to the TLTP.

Finally, SCE recommends that Section 5.1(a) be limited to quarterly reporting of dispositions in-process and completed dispositions and not include a list of upcoming, anticipated dispositions.

SDG&E/ SoCalGas (Sempra) submitted comments stating that the Revised Draft Resolution appears to violate PU Code Section 453(a), which prohibits IOUs from granting a preference as to rates, charges, service, or facilities. Sempra also argues that the Revised Draft Resolution effects a regulatory taking. Next, Sempra comments that the dispute resolution approach proposed in the Revised Draft Resolution is problematic, because dispute resolution between Tribes is within those Tribes' power as sovereign nations, rather than within the power of the State of California or the CPUC. Additionally, Sempra requests several modifications to the Revised Draft Guidelines to clarify a number of terms including "disposition", "real property", and "right of first offer".

Finally, Sempra recommends replacing the dispute resolution provisions in Section 4 with interim provisions pending the results of the technical workshop.

PG&E comments that the Revised Draft Resolution creates a new requirement that IOUs must file an application to seek approval of transactions under Section 3.3 of the Revised Draft Guidelines. PG&E argues that real property transfers that are shown by supporting evidence are necessary to achieve IOU operational requirements, or to comply with law, rule, or regulation as described under Section 3.3(c) of the Draft Guidelines do not warrant a more comprehensive review through a formal section 851 application.

## DISCUSSION

Revised Draft Resolution E-5076 and the corresponding Revised Draft Guidelines include revisions in response to the numerous issues raised in the first round of formal comments. Formal comments on Initial Draft Resolution E-5076 were received on September 24 and Reply Comments were received on October 8, 2020. Comments

added important information to the record, and where appropriate were incorporated in the Revised Draft Resolution and to the corresponding sections of the Revised Draft Guidelines.

The Revised Draft Resolution was circulated for an additional round of comments, which were received on January 5, 2021.

The Discussion Section will address this first round of comments on Draft Resolution E-5076 and Revised Draft Resolution comments received on January 5, 2021 in the same order as they pertain to the Draft Guidelines.

Before discussing comments pertaining directly to the Revised Draft Guidelines, it is necessary to address Sempra's comment that the Revised Draft Resolution appears to violate PU Code Section 453(a), which prohibits IOUs from granting a preference as to rates, charges, service, or facilities, as well as the comment that the Revised Draft Resolution amounts to a regulatory taking. These comments directly challenge the legality of TLTP as a whole, and must be addressed before moving on to comments addressing specific Sections of the Revised Draft Guidelines.

The arguments put forth by Sempra are a misreading of the TLTP and the Revised Draft Guidelines. The utilities' second argument is easier to dispose of, so the Commission addresses it first. Sempra argues that the TLTP and Revised Draft Guidelines require IOUs to sell their fee-owned property to a Tribe "on whatever terms are offered," and forces IOUs "to agree to any and all terms set forth by a Tribe," such that the TLTP and Revised Draft Guidelines amount, on their face, to an unlawful regulatory taking. That is an incorrect reading of the TLTP and Revised Draft Guidelines. Rather, the TLTP and Revised Draft Guidelines provides Tribal governments with a *rebuttable* presumption that they are the preferred transferee for covered fee simple transfers in their ancestral territory, and implements this presumption by providing them the right of first offer. The TLTP and Revised Draft Guidelines do not render a utility helpless to negotiate a good deal or require the Commission to accept a bad deal should one be presented. Nor, indeed, do the TLTP

or Revised Draft Guidelines require the utilities to make *any* deal: if a transaction becomes unattractive for the utility, for any reason, it can choose not to undertake it. A facial challenge to a regulation on the ground that it effects a taking will only stand where the challenger shows that the “mere enactment” of the regulation “denies an owner economically viable use of his land . . . .” (*Keystone Bituminous Coal Ass’n v. DeBenedictus* (1987) 480 U.S. 470, 495 [internal quotation marks omitted]; *accord, e.g., Beach & Bluff Conservancy v. City of Solana Beach* (2018) 28 Cal.App.5th 244, 264.) *Sempra* has not shown that here.

More fundamentally, *Sempra* asserts that the TLTP and Revised Draft Guidelines require IOUs to unlawfully discriminate in favor of California Tribes, in violation of Section 453 of the Public Utilities Code. But Section 453 does not prohibit *all* discrimination. As the California Supreme Court has long and repeatedly held, Section 453 prohibits only *unreasonable* discrimination. (*See, e.g., U.S. Steel Corp. v. Pub. Util. Com.* (1981) 29 Cal.3d 603, 612 [classifications must “be found to rest upon some reasonable differentiation fairly related to the object of regulation.” (internal quotation marks omitted)]; *Live Oak Water Users’ Ass’n v. Railroad Com.* (1923) 192 Cal. 132, 143 [“Not every discrimination or recognition of a ground of difference may be classified as unlawful. A discrimination based upon reason and justice can properly exist.”].) Thus, while the TLTP does treat different classes of customers differently, it is within the longstanding powers of the CPUC to do so, as long as the differentiation is reasonable.

Here, treating Tribes differently, as a class of customers or stakeholders, than other classes is reasonable, because the differentiation is fairly related to, and calculated to advance, a legitimate governmental goal. As stated in the draft Resolution, Executive Order (EO) B-10-11<sup>8</sup> commits the State of California to strengthening government-to-government relationships with the Tribes and to providing meaningful opportunities

---

<sup>8</sup> <https://www.ca.gov/archive/gov39/2011/09/19/news17223/index.html>

for Tribal input into matters that affect them. Additionally, Executive Order N-15-19<sup>9</sup> acknowledged the harms and discrimination against Tribes, and the Tribes' roles in protecting and stewarding the land of California. In furtherance of EO N-15-19, the Governor's September 25, 2020 Statement of Administrative Policy on Native American Ancestral Lands<sup>10</sup> finds a governmental goal in Tribes' acquiring land for the purposes of: self-determination and self-government; facilitating access to sacred sites and cultural resources; engaging in traditional and substance gathering, hunting and fishing; land management and stewardship using traditional ecological knowledge; reducing Tribal land fractionalization; and, providing opportunities for education, community development, economic diversification, cultural preservation and awareness, and various investment and developmental opportunities. Implicit in these policies is the unique status of Tribal Governments as not only entities with their own sovereignty but entities with historical, cultural, communal and environmental ties to land in California that no other bodies share to the same degree. This Administrative Policy also expressly advances the goal of adopting appropriate policies and practices for Tribes to access certain lands. Many of the above legitimate state interests were encapsulated in the Commission's Tribal Land Transfer Policy, adopted on December 5, 2019, as well as the Commission's Tribal Consultation Policy, adopted on April 6, 2018, without any party challenging via appeal.

To the extent necessary, the CPUC takes official notice of both Executive Orders and the Administrative Policy, and to the facts contained therein. (Evid. Code, § 452, subd. (c).) Moreover, the CPUC finds that the fact that California Tribes were dispossessed of their land, in a manner and to an extent different than any other class of persons in

---

<sup>9</sup> <https://www.courts.ca.gov/documents/BTB25-PreConTrauma-02.pdf>

<sup>10</sup> <https://www.gov.ca.gov/wp-content/uploads/2020/09/9.25.20-Native-Ancestral-Lands-Policy.pdf>

California, is a fact “of generalized knowledge that [is] so universally known that [it] cannot reasonably be the subject of dispute.” (Evid. Code, § 451, subd. (f).)

Because the treatment of Tribes established in the TLTP and in the Revised Draft Guidelines adopted today is based on the Tribe’s unique status and fairly related to a legitimate governmental goal, the Commission rejects the argument that the TLTP and Revised Draft Guidelines violate Section 453’s anti-discrimination mandate.

Round Valley Indian Tribes (Round Valley Tribes) commented that the Initial Draft Guidelines should acknowledge Tribes as sovereign governments entitled to a government-to-government relationship with the State of California.

The CPUC agreed that the acknowledgement of Tribal sovereignty would strengthen the Draft Guidelines. Initial Draft Guidelines Section 1.1(b)(i) was revised accordingly.

Round Valley Tribes recommended that the Draft Guidelines Section 1.1(b)(ii) be revised to indicate the Policy is not limited to “Tribal sacred places” within a Tribe’s ancestral territory but should instead apply to any property—not just undeveloped land—within a Tribe’s ancestral territory.

The intent of Section 1.1(b)(ii) is to ensure the protection of Tribal sacred places and cultural resources by providing Tribes the ability to own and thus control land containing cultural resources or representing a sacred place. The CPUC acknowledges that the land may have been subject to varying degrees of development since the pre-contact era and does not intend the Guidelines and TLTP to apply only to undeveloped, open spaces. The CPUC expects that this clarification addresses the Tribe’s concerns.

The NCTC comment that Tribal sacred places and cultural landscape resources are described in SB 18 as referenced by Public Resources Code Sections 5097.9 and

5097.995. The NCTC do not appear to request any changes to the Revised Draft Guidelines in this respect, but Section 1.1(b)(iii) has been revised to reference SB 18.

The Yurok Tribe commented that Initial Draft Guidelines Section 1.2(c) did not clearly address the circumstances under which an IOU may place an easement on land prior to transfer. The Tribe believes the provision is vague and recommends the Draft Guidelines be revised to prohibit the placement of easements, especially a general conservation easement, without the consent of the Tribe receiving the property.

Section 1.2(c) currently states: “These guidelines do not address whether an Investor Owned Utility should place an easement on utility-owned land before disposing of that land. The CPUC 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”. The CPUC acknowledges that unnecessarily restricting land use by placement of easements prior to transfer is contrary to the goals of the TRTP. However, the CPUC cannot anticipate when it might be necessary to place an easement on a piece of land before disposition. For example, in some circumstances, easements may be necessary to preserve IOU rights-of-way, or continued access critical to ongoing operational requirements. Section 1.2(c) provides for a case-by-case assessment of easements at the time of disposition. For this reason, Section 1.2(c) remained unchanged

The Tachi Yokut comment that Section 1.2(c) should be modified to provide more examples of when an easement could be placed on real property whose disposition is subject to the TLTP prior to transfer to a Tribe. The Tachi Yokut believe that enumerating these examples would provide illustrative guidance to the CPUC in assessing requests by an IOU on a case-by-case basis to ensure that land is not unnecessarily restricted prior to conveyance. The Tachi Yokut also request that Section 1.2(c) is modified to ensure the Tribe purchasing the property is consulted regarding any proposed easement and if the easement was not anticipated during negotiations of the purchase terms between the Tribe and IOU, additional negotiations should be allowed.



While the CPUC cannot foresee all possible circumstances where placement of an easement is necessary, a utility might, for example, need to place an easement on transferred land to allow access to retained land, or to accommodate existing utility lines or conduits. Easements encumbering real property are legal contracts identified in the property deed and must be disclosed as part of a sales agreement. As such, any easements encumbering the property would be disclosed prior to initiation of negotiations. Section 1.2(c) remains unchanged.

## DEFINITIONS

### **Definition of “Ancestral Territory”**

The Xolon Salinan Tribe commented that inconsistent academic writings have documented overlapping ancient Tribal boundaries and recommend that Tribal connection to specific territory should be based on pre-contact evidence.

The Pechanga Band commented that the Section 1.3(a) of the Initial Draft Guidelines referenced the “Handbook of North American Indians” as the source for determining the ancestral territory of a Tribe that has not designated territory under AB52 but claim that this source is less widely accepted than Alfred Kroeber’s 1925 “Handbook of the Indians of California”, and further recommend that ethnographic sources should only be used in absence of other data. The Round Valley Tribes recommend that in such cases the Tribe’s own constitution and description of ancestral territory be used. The CPUC changed Section 1.3(a) to refer to the Kroeber work.

The NCTC now comments that Alfred Kroeber is not recognized by many California Tribes and believe that individual Tribal consultations will enable the determination of traditional Tribal territories. The CPUC appreciates that not all Tribes recognize Alfred Kroeber as the accepted authority on Tribal ancestral territories and agrees with NCTC that the Tribes themselves are best able to determine Tribal ancestral territorial boundaries and that individual Tribal consultations should be the basis for determining ancestral territorial boundaries. To the extent that Kroeber’s “Handbook of the Indians

of California” can provide any use as a resource, it should be referenced where appropriate.

The IOUs and Tribes continue to stress the need for a means of determining Tribal ancestral territory that places the Tribes and CPUC in a government-to-government leadership role. SCE believes that it would be more effective and efficient if IOUs utilize an overlay map determined through consultations between Tribes and the CPUC. SCE recommends that the mapping be complete before implementing the Revised Draft Guidelines.

The CPUC recognizes the need to find consensus among Tribes on a reliable method or a generally accepted means of determining, or reaching agreement on Tribal ancestral territory, to both facilitate IOU noticing, and to also avoid disputes that could arise in the absence of general agreement on ancestral territorial boundaries.

To reach consensus among Tribes on generally accepted ancestral territorial boundaries and a system for assigning ancestral territory within each IOU service territory, the CPUC will hold a public workshop with Tribes, IOUs and other interested parties to arrive at an accepted method of determining Tribal ancestral territory that can be narrowly applied for purposes of TLTP notification. As recommended in SCE’s and SDG&E’s comments, a map overlay of IOU territory relative to Tribal ancestral lands, may be one possible outcome.

The Tachi Yokut comment that there is no explanation of how the public workshop will affect the definition of “ancestral territory”.

The CPUC cannot predetermine the outcome of the public workshop that will be held with Tribes, IOUs, and interested parties. It is hoped that the workshop will lead to an accepted method for determining Tribal ancestral territory in certain geographic locations where consensus on such territory can be achieved. We cannot foresee the degree of consensus until discussion begins. The workshop may identify large

geographic areas of consensus between Tribes on agreed upon ancestral territorial boundaries and may also identify areas of ancestral overlap.

#### Definition of “Disposition”

IOU comments on the Initial Draft Guidelines sought clarity on the scope of the TLTP and expressed concern that the term “encumbrance” would expand the TLTP to include the easement and license transactions that are a frequent and routine part of IOU business and operations.

The IOUs suggested that the TLTP be clarified to exclude the types of minor conveyances subject to GO 173, and GO 69-C, as these conveyances are generally intended to for specific, limited uses.<sup>11</sup> Staff expressly sought comment on the types of conveyances appropriate to include in the TLTP. 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?

---

<sup>11</sup> CPUC General Orders are available at [https://www.cpuc.ca.gov/generalorders/CPUC General Order 173, “Regarding advice letter approval of certain transfers of interests in utility property pursuant to Public Utilities Code Section 851”](https://www.cpuc.ca.gov/generalorders/CPUC%20General%20Order%20173,%20%22Regarding%20advice%20letter%20approval%20of%20certain%20transfers%20of%20interests%20in%20utility%20property%20pursuant%20to%20Public%20Utilities%20Code%20Section%20851%22)

<https://docs.cpuc.ca.gov/PublishedDocs/Published/G000/M027/K106/27106129.PDF>

CPUC General Order 69-C, “Easements on property of public utilities”

<https://docs.cpuc.ca.gov/PUBLISHED/Graphics/645.PDF>

- 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?

### **Encumbrances are Less than Fee Simple Interest in Real Property**

The IOUs were unanimous that the Guidelines should only apply to utility fee-owned real property subject to Section 851 conveyance and should not apply to easements or GO 69-C grants.

The IOUs explained that easements are either held by the IOU over land owned by another party or are granted by the IOU to allow a party to engage in limited, explicitly defined activity on IOU fee-owned property, and does not convey title. The land that is subject to the easement may not be used for any purpose other than the purpose expressly defined in the easement, and the easement usually only provides the IOUs with the right to construct and maintain electrical infrastructure.

Most utility easements are service and disTribution easements granted by landowners in return for receiving electric or gas service. In situations where the IOU removes its facilities there would no longer be a public purpose and the easement would revert to the landowner. In situations where a landowner requests the easement be moved to a different location, the utility would accommodate the request in exchange for a new easement location acceptable to the utility, and subject to Section 851 approval.

The majority of easements granted by the IOUs to other entities involve the granting of easements to neighbors to use a specific piece of property for a specific purpose, or to a party requesting permission from an IOU to encroach for a specific purpose within an IOU's easement upon another person's property.

The IOUs contended that easements and encroachments have little or no value to anyone but the requesting party and would be of little value or benefit to a Tribe. Because of the limited nature of easements, the IOUs argued that the public interest is not served by requiring the IOUs to offer a Tribe an easement the Tribe cannot meaningfully use.

The CPUC agrees that including real property easements in the Policy will not advance the stated goals of the TLTP to return ancestral lands to the appropriate Tribe. Instead, inclusion of easements would be contrary to the public interest by needlessly slowing useful utility conveyance processes without furthering the goals of the Policy. Accordingly, real property easements will be exempt from the TLTP.

Although real property easements will be exempt from the TLTP, Tribes can and should seek real property easements over IOU real property where such easements may benefit the Tribe.

### **GO 69-C Grants and Licenses**

The IOUs were also unanimous in their comments that the TLTP and Guidelines should not apply to GO 69-C grants. The IOUs argued that GO 69-C applies a narrow exemption to Section 851, specifically authorizing a utility to grant easements, licenses or permits for rights of way, private roads, agricultural purposes or other limited uses without special authorization by the CPUC so long as the uses do not interfere with the operations of the IOU. Specifically, GO 69-C grants are only appropriate where use of the utility real property is limited and revocable and excludes the placement of permanent structures or changes to the physical environment. Thus, grants subject to GO 69-C do not require the filing of a Section 851 application or advice letter.

The CPUC agrees with the IOUs that applying the Policy to GO 69-C grants would not advance the stated goal of the TLTP to return ancestral lands to the appropriate Tribe. For this reason, the TLTP will exclude GO 69-C conveyances. The Initial Draft Guidelines were revised accordingly.

Although GO 69-C conveyances are exempt from the TLTP, Tribes can and should continue to seek GO 69-C conveyances where beneficial to the Tribe.

### **GO 173**

Consistent with the CPUC's determination that all IOU fee simple transactions in real property be subject to the TLTP, the TLTP applies to transfers of

real property subject to Section 851 but filed by Advice Letter according to the terms and expedited procedures of GO 173.

Exemption for PG&E Land Conservation Commitment (LCC) Watershed Lands Donated in Fee.

The Stewardship Council identified provisions in the TLTP that may conflict with D.03-12-035. The CPUC recognizes that the PG&E Watershed Land Conservation Commitment (LCC), regarding which lands are subject to D.03-12-035 and are subject to Section 851, must be addressed in the context of the TLTP.

Specifically, the CPUC exempts all LCC land conveyances recommended for fee donation to the qualified recipients identified by the Stewardship Council, whether final, or still pending CPUC approval. However, this exemption does not extend to watershed parcels recommended by the Stewardship Council to be retained by PG&E under the LCC. These retained parcels, protected in perpetuity by conservation easement while excluding specific areas necessary for ongoing PG&E operations, remain under the jurisdiction of the CPUC, and shall be submitted to the CPUC for approval under Section 851 or GO 173. As such, these lands are subject to the TLTP and should be made available, where appropriate, for conveyance to Tribes.

To provide necessary clarity on the scope of applicable dispositions, and to make clear that the TLTP will not apply to any "encumbrance" over real property, such as

easements and licenses, but only to fee interest in Real Property, Section 1.3(d) was revised to read: “Disposition” means the transfer, sale, donation, or disposition by any other means of a fee interest in Real Property. And Section 1.3(g) was revised to read: “Real Property” means any IOU real property whose disposition is subject to approval under Section 851 of the Public Utilities Code.

SCE and Sempra recommend revisions to Section 1.3(d) to ensure the applicability of the Revised Draft Guidelines is clear: “Easements, licenses, and leases are not considered “dispositions” subject to the Tribal Land Transfer Policy. The CPUC will provide the recommended clarification and revise Section 1.3(d) accordingly.

The Tachi Yokut correctly note that, whereas the TLTP applies to all CPUC-jurisdictional utilities, the the Revised Draft Resolution applies only to Electrical and Gas IOUs and class A and B Water Companies. The Tachi Yokut further note that this change did not come in response to stakeholder comments, and that the CPUC has not explained the change.

To be clear: the TLTP is still in effect, and still applies to all CPUC-jurisdictional utilities. That Policy “expresses a preference for the types of disposition the Commission would like to see,”<sup>12</sup> and the CPUC expects that the Guidelines will provide useful instruction to all CPUC-jurisdictional utilities in applying the TLTP. The Guidelines *also* make the TLTP mandatory for a subset of CPUC-jurisdictional utilities. It is a longstanding rule that the government, having identified a problem, need not solve the entire problem at once but may approach it in stages. (*See, e.g., New Orleans v. Dukes* (1976) 427 U.S. 297, 303 [“Legislatures may implement their program step by step . . . adopting regulations that only partially ameliorate a perceived evil and deferring complete elimination of the evil to future regulations.”] (internal citation omitted).) The CPUC determined that at this time, the gas and electric IOUs and large

---

<sup>12</sup> TLTP, *supra* n.3, at pp. 1-2.

water companies would provide the best opportunity for fee transfers to real property to Tribes under the TLTP. The CPUC may choose to expand the reach of the TLTP to other industry sectors as it gains experience administering the program.

### **“Adjacent to”**

PG&E commented that the term “adjacent to” used in Section 1.3(i) creates uncertainty and should be replaced. In Section 2.2(b)(ii), the Initial Draft Guidelines again used the term “adjacent to” stating: “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 property lies.”

To remove any uncertainty surrounding the use of the term “adjacent to” the CPUC replaced use of that term in the Revised Draft Guidelines with the term “abutting” --the legal term for sharing a common property line.

### **Right of First Refusal, Right of First Offer**

The “right of first refusal” and the “right of first offer” describe contractual rights held by a potential buyer. The Initial Draft Guidelines previously described the right extended to the Tribes as a “right of first refusal,” which required “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.” Following comment from the IOUs suggesting that “right of first offer” is the appropriate term to describe the legal right being extended, the CPUC changed the language in the Revised Draft Guidelines to read “right of first offer.” A “right of first offer” would provide the Tribe advance notice of the transaction and the ability for the Tribe to submit its proposal or offer for land that becomes available, before the IOUs can either list the property on the open market or enter negotiations with other parties.



Additionally, following good faith negotiations, should an IOU and Tribe fail to reach agreement on price or terms of sale, the IOUs must, before accepting a lower price, or offering more favorable terms than was offered to the Tribe, reoffer the interested Tribe the same price and terms negotiated with the interested third-party purchaser. The CPUC believes this addresses the IOUs' concerns while ensuring Tribes are offered available land on the best possible terms.

The Tachi Yokut comment that safeguards of a "right of first offer", as the term is used under California law, should be incorporated into the Revised Draft Guidelines. Specifically, when submitting notice to a Tribe that an IOU intends to dispose of real property, the IOU must offer an initial purchase price of the property. The Tachi Yokut further argue that the IOU should not later be allowed to sell the property at a price lower than that offered to the Tribe.

The CPUC believes that its existing review processes provide adequate safeguards to ensure that IOUs deal with Tribes in good faith. At this time, we will not require the IOU to offer an initial purchase price: doing so may make sense in some transactions, but not in others, and we decline to impose a blanket rule here. And, as noted above, we already require that should an IOU and Tribe fail to reach agreement on price or terms of sale, the IOU must, before accepting a lower price, or offering more favorable terms than were offered to the Tribe, reoffer the interested Tribe the same price and terms negotiated with the interested third-party purchaser.

The NCTC reference Government Code Section 65562.5 as requiring consultation to determine the proper level of confidentiality to protect and treat a cultural place with appropriate dignity, where such places are located on lands to be designated for transfer. The NCTC suggest that engaging in pre-consultation efforts may develop a foundation for a mutually respectful and cooperative relationship. The Commission supports the concept of pre-consultation and will explore consultation protocols at the upcoming workshop.

The NCTC comments that the IOU Tribal Website described in Revised Draft Guidelines Section 1.4 should prioritize Tribal confidentiality to protect prehistoric, archaeological, cultural, spiritual, and ceremonial places. The Commission shares Tribal concerns for confidentiality and will ensure privacy assurances are in place.

The Tachi Yokut suggest that Section 1.4 be modified to require that the IOU Tribal Website be publicly available, user friendly, and easily accessible from the home screen of the IOU's website. The CPUC agrees that the IOU Tribal Websites should be publicly available and readily accessible, and while the CPUC agrees that the IOUs should strive to make their websites user friendly, the CPUC notes that "user friendliness" is hard to define and often means different things to different people, and declines to adopt a specific requirement.

## NOTIFICATION

Section 2.2(b) of the Revised Draft Guidelines provides 90 days for the NAHC to identify Tribes relevant to the territory on which the real property lies. Should the NAHC fail to respond or the response is inclusive, subsections (b)(i) and (ii) direct the IOU to provide notice to the relevant Tribe.

The Round Valley Indian Tribes recommended that the Initial Draft Guidelines be revised to allow Tribes 120 days to respond to a notice from the IOU. The Pechanga Band agreed that the NAHC should have 90 days to identify the appropriate Tribal transferee, but after notification, the Tribal transferee should have 90 days to respond to a Notice of Disposition.

Comments submitted by both Tribes and IOUs indicated that the Initial Draft Guidelines could benefit from greater clarity and specificity on notification timelines including the time period Tribes are granted to respond to an IOU notification, and following notification, the time period granted to the Tribes to conduct the necessary due diligence investigation to make an informed purchasing decision.

The CPUC agreed that the Notification Section in the Initial Draft Guidelines should be revised to provide for greater clarity on both noticing and timing of IOU consultation including: the number of days the NAHC will require to identify the relevant Tribe, the number of days a Tribe will need to respond to IOU notification to express interest in the disposition, and finally, the number of days required by the Tribe to conduct necessary due diligence, submit an offer to the IOU, and conclude negotiations.

In the Revised Draft Guidelines, the CPUC made the following three clarifications. First, following the IOUs' written request to the NAHC to identify the relevant Tribe, the NAHC should determine within 30 days whether a relevant Tribe can be identified. If the NAHC fails to identify the relevant Tribe, the Draft Guidelines then task the IOU with identifying the relevant Tribe.

Second, following notification by the IOU, Tribes will have 30 days to acknowledge receipt of the IOU notification and indicate interest in the real property disposition. If the IOU fails to receive a response in 30 days, the IOU shall send a second notice to the relevant Tribe. If the IOU fails to receive a response to the second notice within an additional 30 days, or the Tribe notifies the IOU that it declines the property, the IOU can then list and proceed with sale of the real property having satisfied its TLTP noticing obligation.

Third, once a Tribe expresses interest in a piece of land, the Tribe and the IOU shall make a good-faith effort to reach an agreement in principle within an additional 60 days. If, following this final 60-day period, the Tribe and IOU are unable in good faith to reach an agreement in principle, the IOU may list the real property on the open market. This is not intended to be a hard deadline; nothing in these Guidelines requires the parties to end good-faith negotiations after 60 days, so long as the parties feel that negotiations continue to be fruitful. The CPUC reminds both the IOUs and the Tribes that the CPUC will consider whether parties have acted in good faith when considering the merits of an 851 application.

The CPUC recognizes the importance of allowing the Tribe adequate time to conduct a thorough due diligence investigation of the IOU Real property being sold and believes that a 120-day evaluation and negotiation period following notification is an adequate time period. Requiring the relevant Tribe to provide an initial response within 60 days allows the IOU to move forward with the listing of property that holds no interest to the Tribe. Section 2 of the Draft Guidelines was revised accordingly.

The Tachi Yokut now recommend that Section 2.2(b)iii should be modified to provide Tribes with 90 days to respond to the notifications as to its interest in the subject real property. Additionally, the Tachi Yokut believe that 60 days is insufficient for the conduct of due diligence.

The CPUC believes that the combined period of 120 days is sufficient for the purposes of due diligence necessary to making an informed purchasing decision. The prospective Tribe will have 60 days to communicate interest to the selling IOU and an additional 60 days for remaining due diligence should the Tribe pursue purchase. And, as stated, the final 60-day period is not an absolute deadline if negotiations continue to progress. Section 2.2(b)(iii) will remain unchanged.

The Tachi Yokut believe that a provision should be added to the Revised Draft Guidelines requiring the IOU to send a copy of all notices sent to Tribes to the CPUC. Additionally, Section 2.5 should be modified to require the CPUC to post all notices on its website. Because they would impose an additional increased burden on CPUC staff, the CPUC declines to adopt these suggestions at this time but, once the Guidelines are in place, the CPUC may revisit the question.

The CPUC believes that effective notification is dependent upon reaching consensus among Tribes on agreement of ancestral territory territorial boundaries, and on a system in place to quickly assign IOU real property to the relevant Tribe. As described above, a technical workshop involving the IOUs, Tribes and other interested parties will be held in Spring, 2021 to reach consensus on ancestral territory, and an on a

system for efficiently identifying the ancestral territory relative to IOU service territory boundaries for the purpose of TLTP noticing.

#### REQUESTS FOR APPROVAL

The Tachi Yokut suggests that Revised Draft Guidelines Section 3.1(a)(ii) should be modified to require the IOU provide any other documentation requested by the CPUC. Also, it suggests that a provision should be added to Section 3.1(a) requiring the CPUC keep confidential any materials designated by the Tribe.

The CPUC declines both suggestions as unnecessary. First, subject to narrow claims of privilege, IOUs must always provide requested documentation to CPUC staff; thus, staff already have the suggested authority. (Pub. Util. Code, § 314, subd. (a).) Second, in General Order 66-D, the Commission has already set forth a process for deciding when information submitted to it should be kept confidential.

The Tachi Yokut is concerned that, if an IOU fails to properly notice or consult with a Tribe and then asks the CPUC to approve the disposition of land in which the Tribe is interested, Section 3.1(b) provides the Tribe *only* an opportunity to comment on the proposed disposition, *and not* an opportunity to negotiate for and potentially purchase the land.

The intention of Section 3.1(b) is to ensure that the appropriate Tribe(s) are provided an opportunity to acquire ownership of the real property, regardless of whether the IOU was successful in noticing and consulting. The CPUC believes the source of confusion is the phrase “provide them with notice of the proceeding and an opportunity to comment”. The intent of the Section is to engage the appropriate Tribe in the full noticing and consultation process independent of the IOU, if necessary, with the goal of transferring the real property subject to Section 851. In fact, Section 3.1(b) provides protections ensuring that Section 851 sales subject to the TLTP are not approved unless conforming to proper noticing and consultation processes, even if the CPUC itself is

required to perform those tasks. Section 3.1(b) will be revised to provide this clarification.

The Yurok Tribe asked that the CPUC amend Draft Guideline 3.2(a) to require the CPUC to send notification to Tribes' Chairpersons and their designees of the topic, time, location, filings, and record and explain the process or opportunity to participate in the review of Section 851 advice letters or applications.

The CPUC understands that Tribal participation in CPUC proceedings can benefit from a greater understanding of advice letter filings and the Section 851 application procedures. The public workshop to be held following the approval of the Draft Guidelines will address procedures for Section 851 applications and advice letter filings, as well as CPUC process in general.

The Tachi Yokut comment that Section 3.2 should be modified to require any interested Tribe to receive notice of the proceedings and procedures for the opportunity to comment. Additionally, they recommend that Section 3.2(a) should be modified to require the CPUC identify all interested Tribes in accordance with the procedures described in Section 2.2 if such Tribes have not already been identified.

The CPUC agrees that the proposed modifications to Section 3.2(a) will help ensure effective Tribal participation. Section 3.2(a) will be modified accordingly.

#### PRESUMPTION IN FAVOR OF TRIBE

The Round Valley Tribes noted that Draft Guidelines Section 3.3(b) states that the CPUC will presume the Tribe is the preferred transferee, and that the transfer is in the public interest, absent a finding supported by evidence. This presumption assumes the IOU acted in good faith, exercised reasonable effort, and offered reasonable terms to the Tribe. The Round Valley Tribes recommended that the Initial Draft Guidelines be revised to require the IOUs make a written record of whether the Tribe was interested in acquiring the real property, and the terms of the sale offered.

The CPUC agrees a written record of IOU efforts to reach agreement with Tribes and of the negotiations that occurred are reasonable and will facilitate CPUC oversight of IOU real property dispositions subject to the TLTP. Section 3.1(a)(iii), which requires documentation of any consultation between the IOU and Tribe, was revised to include utility efforts that occurred pursuant to Section 3.3(b).

Sempra comments that certain provisions and definite limitations of terms should be contained in Section 3.3(b) of the Revised Draft Guidelines to help IOUs and Tribes reach agreement in real property transactions. Specifically, Sempra recommends revisions to Section 3.3(b) to require that the terms offered by the Tribe are on par with what would be expected in a similar market transaction. Sempra proposes the following revision to Section 3.3(b):

“That the IOU acted in good faith and, after reasonable effort, was unable to agree with the Tribe on reasonable and commercially marketable terms for the transfer of the real property, including, but not limited to, as to the fair market value and manner of compensation, limited waivers of sovereign immunity, no presumption of IOU compliance with applicable federal, state and municipal laws and regulation, and other provisions as would be expected in similar market transactions.”

The CPUC agrees that the proposed revision to Section 3.3(b) will provide the clarity and certainty that is required to reach agreement on fee transfers of real property and will reduce transaction risk to both IOUs and Ratepayers by holding Tribes to commercially marketable terms.

In comments on the Initial Draft Guidelines, Tribes expressed concern with Section 3.3(d), which allows the presumption in favor of the Tribes to be rebutted by a finding “that transfer of the real property to another entity would be in the public interest.” The Tribes recommended that the subsection be removed because the balancing of public interests would be difficult and would contradict the intent and purpose of the Policy. Conversely, the County of San Luis Obispo commented that many governmental entities, such as State Parks, the state university system, counties and

cities, are well positioned to take ownership of land formerly owned by utilities, especially where public trust doctrine issues are involved or conservation easements are appropriate. The County believed that it was unclear from the Initial Draft Guidelines how the public interest issue will be resolved.

The CPUC fully understands the overlapping historical injustices that the State, its agents, and the utilities worked on California's native people. The CPUC cannot undo those injustices. We can, at best, partially mitigate them. That is what the TLTP, and these Guidelines, are intended to do. At the same time, the CPUC has a legal obligation to weigh the public interest; to determine what is best for all Californians. In recognition of our history of injustice, the presumption in favor of the Tribes places a thumb firmly on one side of the scales. But we cannot entirely neglect the other side.

Thus, the CPUC acknowledges that overreliance on subsection (d) could effectively undermine the TLTP. And, on the other hand, rejecting all non-Tribal transferees could be counter to the public interest as well. The CPUC recognizes that it cannot foresee all future scenarios that may involve the transfer of IOU real property to entities requesting that property. The Section 851 formal application process requires a vote of the full CPUC to approve the sale of IOU real property. The formal application process allows for evidentiary hearings, if necessary, to consider all evidence and hear all arguments, prior to arriving at a decision. This process is designed to provide full and transparent consideration of whether a Section 851 transfer is in the public interest. Removing Section 3.3(d) would limit the discretion of the CPUC in its determination of the public interest as required by the State Constitution. For this reason, Section 3.3 subsection(d) was not removed.

The Tachi Yokut now comment that the inclusion of Section 3.3(d) fails to provide clarity on how the CPUC would evaluate competing public interests. They suggest that Section 3.3(d) be modified to read: "That transfer of the real property to another entity would serve a greater public interest".



The CPUC believes this is a reasonable clarification. Section 3.3(d) will be modified to incorporate the suggested phrase.

PG&E notes that the Revised Draft Guidelines add a new procedural requirement that would require TLTP transactions under Section 3.3 proceed through a formal Section 851 application. PG&E believes that real property transfers that are shown by supporting evidence as necessary to achieve IOU operational requirements, or to comply with law, rule, or regulation, as described under Section 3.3(c) of the Revised Draft Guidelines do not warrant a more comprehensive review through a formal Section 851 application. PG&E argues that CPUC review of qualifying real property transfers necessary to achieve IOU operational requirements should continue to be allowed under the GO 173 advice letter treatment specified in Section 851. The CPUC agrees with PG&E that the exemption under Draft Guidelines Section 3.3(c) is critical to allowing utility projects to efficiently progress. The CPUC also agrees with PG&E that GO 173 contains adequate procedural mechanisms to ensure that transactions that warrant more thorough review can be instead processed by the formal Section 851 process if deemed necessary by CPUC staff. For this reason Revised Draft Guidelines Section 3.3(c) will remain subject to GO 173 treatment under Section 851. The CPUC notes, however, that General Order 96-B always allows CPUC staff to determine that an advice letter, including one subject to GO 173, requires disposition by formal proceeding.<sup>13</sup> We therefore expect that dispositions subject to GO 173 will be handled by advice letter, but do not rule out the possibility that such a disposition may require additional process.

The Tachi Yokut comment that the inclusion of Section 3.3(d) fails to provide clarity on how the CPUC would evaluate competing public interests. They suggest that Section

---

<sup>13</sup> See GO 96-B, General Rules, Rule 5.3; *see also* GO 173, Rule 2.4 (“Advice letters filed pursuant to this order shall generally be processed pursuant to GO 96-B or its successor regulation . . .”).

3.3(d) be modified to read: “That transfer of the real property to another entity would serve a greater public interest”.

As stated above, removing Section 3.3(d) would limit the discretion of the CPUC in its determination of the public interest. In fact, the purpose of that discretion is to determine the greater public interest. For this reason, Section 3.3(d) was modified to incorporate the suggested phrase.

In a situation where IOU real property is for sale and the evidence supports a finding that the Tribe is not the preferred transferee under Rule 3.3, Subsections (b) and (d), the IOU will not be permitted to file for approval of the sale using the GO 173 advice letter process, but instead must file a formal 851 application. Requiring a formal 851 application assures that fullest possible examination of the transfer occurs, including evidentiary hearings, if necessary. The CPUC believes that requiring the formal 851 application approval process for IOU real property dispositions subject to Section 3.3 will ensure that the presumption in favor of the Tribe does not become a nullity. Section 3.3 was revised accordingly.

The Tachi Yokut comment that Section 3.4 should be revised, consistent with the TLTP, to require that all “review and consideration of impacts to cultural resources will be consistent with all laws, rules, and regulations governing the protection of cultural resources on the real property”. The CPUC believes that the suggested language was implied in Section 3.4 but will revise the Section as suggested to provide additional strength and clarity.

### **Standard Definition of Consultation**

Comments submitted by the Tribes generally supported the goals of the TLTP, but expressed a need for more information on how the TLTP would be applied, and how disputes over ancestral lands common to more than one Tribe and subject to multiple claims would be resolved. Tribes also expressed concern over a lack of a clear standard for “meaningful consultation.”

The Pechanga Band commented that the Guidelines should mirror the definition of “consultation” in 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.

The CPUC agrees that formal definition of such a key term is warranted. Accordingly, the CPUC accepts that use of California Government Code Section 65352.4 provides additional clarification sought by the Tribes. The Revised Draft Guidelines now reflect the definition of “consultation” to be in accordance with Government Code Section 65352.4

Tribes were concerned that consultation occur only with Tribal leadership with the authority to represent the Tribe. The CPUC understands that concern. To ensure that consultation occur with authorized Tribal leadership, a list of each approved Tribal leader authorized to engage in consultation should be submitted by Tribes to each IOU. It will be the responsibility of the Tribes to keep the list of authorized Tribal leadership current.

Following identification of the appropriate Tribe and its approved Tribal leader, and formal notice per Section 2 of the Draft Guidelines, the IOU shall request consultation. Consultation can be initiated by various means including by letter, telephone call, or personal visit. The IOU’s request for consultation represents a gesture of good will on behalf of the IOU and will likely facilitate the conveyance process by ascertaining whether the Tribe is interested in the real property in question.

## **Protection of Tribal Cultural Resources**

The Tribes are greatly concerned with protecting cultural resources within and outside current reservation boundaries and requested that the Draft Guidelines require the IOUs to coordinate with a Tribes Tribal Historic Preservation Officer (THPO) or other appropriate Tribal representative and keep a written record regarding how the disposal of IOU Real property might impact cultural resources.

The CPUC agrees that requiring a record of such discussions will facilitate the CPUC's ability to consider impacts on cultural resources. Section 3.4 was revised accordingly.

### **DISPUTE RESOLUTION**

Section 4 of the Draft Guidelines addresses dispute resolution, including disputes about notice and disputes involving multiple interested Tribes. Regarding noticing, the Draft Guidelines generally assign responsibility for resolving disputes to the IOUs and generally require the IOUs to engage the Tribe(s) to resolve disputes that may arise. Also, should discussion between the IOU and the Tribe(s) fail to resolve the dispute, the IOU is required to exercise its best judgment in determining how to proceed, while documenting steps it has taken to resolve the dispute and the reasons for any determination it makes.

Both the IOUs and Tribes expressed concern over the lack of IOU resources to identify the correct Tribe for purposes of noticing under Section 851. IOU comments addressed their capacity to resolve claims or disputes over Tribal territory should they arise between Tribes. Similarly, the Tribes expressed concern that the IOUs were not the appropriate entity to resolve such potential disputes. Both Tribes and IOUs generally reject the proposal that the IOUs should be given responsibility for resolving disputes with and among Tribes.

The IOUs claim to not have expertise or authority to make judgments on competing Tribal claims and expressed concern that making such judgements could damage the

relationship between IOUs and Tribes. They speculate that placing dispute resolution outside a formal governmental process may also tend to favor Tribes with greater financial resources.

Likewise, the Pechanga Band believes that, due to the IOUs' lack of familiarity with Tribes' histories and legal and political configurations, the IOUs' are ill-equipped to mediate disputes regarding ancestral land claims. The Pechanga Band prefers that the role of the NAHC be expanded to include dispute resolution.

The NCTC is concerned that not all California NAHC-recognized Tribes are treated fairly and equally.

The Tachi Yokut expressed concern in comments that the IOUs have absolute authority under Rule 4.2 to resolve disputes over which Tribes should be notified even though the Revised Draft Guidelines acknowledge that Tribes are the primary source for identification of a Tribe's ancestral territory. The Tachi Yokut believe that all Tribes who claim the property is within their ancestral territory should be notified. They suggest modifying Section 4.2 to read: "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 provide notice to all Tribes who claim the property as within their ancestral territory."

The Tachi Yokut also expressed concern that the IOUs have authority under Section 4.3 to resolve disputes between Tribes if more than one Tribe seeks ownership of the property. Though the Tachi Yokut recognize that the CPUC has no jurisdiction over the NAHC, the parties should be required to request mediation by the NAHC. They suggest that in the event the NAHC is unable to assist in mediation, the IOU should not be tasked with proposing a resolution.

The IOUs are unanimous in their belief that the dispute resolution process outlined by the CPUC is unworkable in that it requires the IOUs to exercise independent judgment to resolve disputes that may arise between Tribes. The IOUs maintain that it is not

clear that the CPUC has the jurisdiction to direct the IOUs to resolve territorial disputes between sovereign nations. Nor is it clear that the IOUs possess the requisite expertise to make informed judgments about which Tribe may hold superior claims to certain properties.

The CPUC recognizes that the NAHC has greater expertise in this area than either the CPUC or the IOUs and would welcome its guidance. However, the CPUC has no jurisdiction over the NAHC, and their participation facilitating dispute resolution would necessarily be voluntary. Nevertheless, the CPUC agrees with the Tribes that disputing parties should first contact the NAHC to seek mediation as a first step toward dispute resolution. Section 4.3 has been amended to so require.

Moreover, the CPUC disagrees with the IOUs' assertion that they are being required to finally adjudicate competing claims between Tribes. They are being required to put together a proposed transaction with one buyer, and to present that proposed transaction to the CPUC for approval. Under the current dispute resolution framework, it is *the CPUC* that will ultimately adjudicate disputes, in the Section 851 application. The CPUC has further clarified this point in Section 4.3.

The IOUs recommended that the CPUC work directly with the Tribes to develop a Tribal overlay map of each IOUs service territory (Tribal Interest Reference Map) which would reflect the consensus of all affected Tribes.

The CPUC believes that agreement on Tribal ancestral boundaries among Tribes and a process for applying the agreed upon boundaries to the IOUs notification process would minimize potential future disputes among Tribes over noticing. Until agreement is reached and a process is developed, the Draft Guidelines provide guidance and outline a transparent process to resolve potential disputes. Recently, the CPUC created the position of Tribal Advisor to provide expertise and coordination within the CPUC on Tribal matters. The CPUC expects the Tribal Advisor to act as a meaningful resource to Tribes, IOUs, and CPUC staff with the ability to provide independent and unbiased oversight of dispute resolution efforts between Tribes and

IOUs. The Commission acknowledges that only the Tribes can determine the spiritual, symbolic, or cultural value that each available parcel of land hold for a specific Tribe. Accordingly, we agree that it is inappropriate for IOUs to make that determination, and that the IOUs should not bear final responsibility for settling disputes between Tribes. Instead, as the Guidelines have always explained, the IOUs will partner with Tribes and the CPUC in this role. The CPUC has further clarified this framework in Section 4.3.

The CPUC will work with Tribes, IOUs and other interested parties to reach agreement on Tribal ancestral boundaries and on a process by which agreement on boundaries can be operationalized by IOUs to enable efficient, dispute free notifications. The proposed creation of Tribal ancestral territorial map overlays of IOU service areas, or perhaps even the creation of a new Tribal land reference system using Geographical Information System (GIS) technology, may be possible.

To initiate this process, the CPUC will hold a public workshop with Tribes, IOUs and other interested parties to reach general agreement on Tribal ancestral boundaries, identify areas of disagreement, and possibly even identify systems to incorporate ancestral territorial mapping into IOU notification systems.

Ultimately, however the CPUC agrees with the Tribes and IOUs that it will be the CPUC's responsibility, consistent with the TLTP, to make a final determination in any dispute. This has always been both the intent and the outcome of the Guidelines.

### **Future Public Workshop**

Because of the concerns expressed by Tribes and IOUs regarding the consultation process, notification, and dispute resolution, the CPUC believes it is important to hold a public workshop to address TLTP implementation issues, including a discussion of possible protocols that can be applied to ensure the consultation process is meaningful. The workshop will be held within 90 days of the formal adoption of the Draft Guidelines.

With the clarification provided in this revised Draft Resolution, the CPUC believes that the Draft Guidelines will provide the necessary direction to IOUs and the Tribes.

The CPUC realizes that this difficult and complex effort will only succeed by partnering with the Tribes themselves. 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. For this reason, the CPUC believes that a partnership with the Tribes is essential to the success of this effort. The TLTP expresses this belief in a concise statement of goals, and the Adopted Guidelines will provide the plan to achieve it.

The TLTP recognizes that until recently the Tribes have not been extensively involved in the CPUC process, and lacking that experience, will need the full cooperation of CPUC staff to participate fully and effectively. For this reason, the TLTP directs CPUC staff to facilitate and encourage transfers of real property to the Tribes, expressing a preference that real property of Tribal importance return to the rightful ancestral Tribe. What the TLTP cannot do, however, is determine an outcome. Each Section 851 transfer will be considered in the CPUC's existing process, which provides all affected stakeholders notice and an opportunity to participate.

Irrespective of the CPUC's intent to facilitate Tribal involvement and the CPUC's expression of preference for land dispositions going to Tribes showing a strong interest in that ancestral land, the TLTP recognizes that the stated preference can, and must be, by law, rebutted by a showing that the transfer would conflict with established law, regulation or a CPUC finding that the transfer would not be in the public interest.

The CPUC has carefully reviewed every comment it received on the Draft Guidelines. To the extent the CPUC has not specifically addressed a comment here, that suggestion has been declined.



## CONCLUSION

The TLTP Guidelines are a means of protecting Tribal lands of special significance to Native American Californian Tribes, ensuring the protection of sacred sites and cultural resources by offering the opportunity for Tribal ownership of ancestral lands. The CPUC approves the TLTP with the clarification that all less-than-fee conveyances of real property are exempt from the TLTP. Accordingly, all easement interest and/or license agreements subject to GO 69-C, Section 851, or GO 173 are exempt from the general application of the TLTP.

The PG&E watershed lands subject to PG&E's LCC ordered by D.30-12-035 donated in fee under Section 851, or currently designated for fee donation, are exempted from the TLTP. However, PG&E watershed lands designated by the Stewardship Council for retention by PG&E will be subject to the TLTP, but in accordance with the terms of the LCC ordered by D. 03-12-035, following the dissolution of the Stewardship Council, expected in 2022.

Following the formal adoption by the CPUC of the Guidelines, the CPUC will hold a public workshop with IOUs, Tribes, and interested third parties to identify areas of agreement on Tribal ancestral territorial borders and to discuss the possible development of a system by which agreement on those borders can facilitate IOU TLTP notification efforts. Additionally, the public workshop will facilitate additional clarification of the Adopted Guidelines including general information on PU Code Section 851 procedures and GO 173 advice letter filings.

Finally, once these Guidelines have been in place long enough to give the CPUC and parties some experience with how the Guidelines play in real life, the CPUC believes it may make sense to undertake a more formal review. This more formal review may consider expanding the mandatory nature of this policy to small water utilities, telecommunication utilities, and other relevant entities. Therefore, the CPUC will direct CPUC staff, within two years of the date of this Resolution, to prepare, and to place on

the Commission's agenda, a proposed Order Instituting Rulemaking to consider revisions to these Guidelines.

## FINDINGS

1. On September 19, 2011 Governor Brown issued Executive Order B-10-11 which stated that the State of California is committed to strengthening government to government relationships with California Native American Tribes.
2. On June 18, 2019 Governor Gavin Newsom reaffirmed Governor Brown's Order with Executive Order N-15-19.
3. On April 6, 2018, the CPUC formally adopted the Tribal Consultation Policy to ensure meaningful consideration of Tribal interests within CPUC programs.
4. On December 5, 2019, the CPUC formally adopted the Tribal Land Transfer Policy (TLTP) which provides additional protections for California Native American cultural resources by providing an opportunity for Tribes to regain ownership of lands within their ancestral territory.
5. Informal comments were received by the CPUC on the TLTP from various interested parties including IOUs and Tribes, from June through October of 2019.
6. To further the goals of the TLTP, the CPUC issued Draft Guidelines to Implement the CPUC Tribal Land Transfer Policy (Draft Guidelines).
7. On March 24, 2020, an informational workshop was held by CPUC staff and Commissioners to offer clarification of the Guidelines. Due to COVID-19, the workshop was held via webinar. Informal comments were accepted via the web chat feature.
8. Draft Resolution E-5076 was originally circulated on July 31, and the initially established comment period was for opening comments to be received by August 24, 2020 with reply comments to be received by September 3.
9. Draft Resolution E-5076 expressly sought additional public comment on the Draft Guidelines applicability to GO 173 and GO 69-C conveyances.
10. During the comment period ending on October 8, 2020 numerous comments were received from interested parties addressing the applicability of GO 173 and GO 69-C conveyances and other issues related to the TLTP Draft Implementation Guidelines.

11. On September 2, the September 3 due date for comments was suspended and the comment period was extended to September 24, 2020, with reply comments due October 8, 2020. After that comment period closed,
12. As a result of comments received on Draft Resolution E-5076, the Draft Resolution was revised to provide an exemption for all less-than-fee conveyances of interest in real property, including Section 851 and GO 173 conveyances of easements over real property, and GO 69-C licenses.
13. PU Code Section 851 conveyances of fee interests in real property, including fee interest conveyances subject to GO 173, are subject to the TLTP.
14. PG&E retained watershed lands conveyances subject to PU Code Section 851 or GO 173 are not exempt from the TLTP.
15. PG&E Watershed Lands LCC protected by Conservation Easement and designated by the Stewardship Council for fee donation are exempt from the TLTP.
16. PG&E watershed lands retained by PG&E will remain subject to the TLTP following the approval of donation of Conservation Easement over those retained parcels in accordance with D.03-12-035, and the dissolution of the Stewardship Council.
17. The different treatment of Tribes as a class of customers in the TLTP Guidelines herein is reasonably tailored to advance a litigate state interest in addressing past harms to Tribes.
18. Draft Resolution E-5076 and the appended Draft Guidelines received substantive amendments, and Draft Resolution E-5076 was re-circulated for an additional comment period on December 11, 2020.

THEREFORE, it is ordered that:

1. The Tribal Land Transfer Policy Guidelines are approved, with revisions described in this resolution and attached herein as Appendix A.
2. The CPUC will hold a public workshop with Investor Owned Utilities (IOUs) and interested Tribes as soon as practical after the adoption of this Resolution to discuss implementation issues with the Tribes and IOUs.
3. Within two years of the date of this Resolution, staff shall prepare, and shall place on the Commission's agenda, a proposed Order Instituting Rulemaking to consider revisions to these Guidelines.

This Resolution is effective today.

I certify that the foregoing resolution was duly introduced, passed and adopted at a conference of the Public Utilities Commission of the State of California held January 14, 2021; the following Commissioners voting favorably thereon:

/s/Rachel Peterson  
Rachel Peterson  
Executive Director

MARYBEL BATJER  
President  
MARTHA GUZMAN ACEVES  
CLIFFORD RECHTSCHAFFEN  
GENEVIEVE SHIROMA  
Commissioners

## 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 and acknowledge the need for the CPUC and the IOUs to respect the sovereignty of the Tribes, and to show respect and consideration of spiritual beliefs, and cultural values, by providing timely information
  - ii. To acknowledge Tribes' entitlement to a government to government relationship with the State of California
  - iii. To protect Tribal sacred places and cultural resources on all ancestral lands deemed important to the Tribe.
  - iv. To Ensure meaningful consideration of Tribal interests and the return of lands within the ancestral territory to the appropriate Tribe; and
  - v. 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.
- d. In the event of a conflict between the requirements contained in the Tribal Land Policy Transfer 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 Commission 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.
- d. In the event of a conflict between the requirements contained in the Tribal Land Policy Transfer Policy and the requirements adopted in these Guidelines, the requirements set forth in these Guidelines shall prevail.

### 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 Alfred Kroeber’s “Handbook of the Indians of California, 1925”.
- 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, or disposition by any other means of a fee interest in real property. Easements, licenses, and leases are not considered “dispositions” subject to the Tribal Land Transfer Policy.
- 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 any electrical corporation (Pub. Util. Code, § 218), gas corporation (Pub. Util. Code, § 222) — but excluding corporations that only operate independent gas storage facilities or common carrier pipeline corporations — and water corporations (Pub. Util. Code, § 241) — but excluding those with fewer than 2,000 service connections.
- g. “Real property” means any IOU real property owned in fee simple 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 offer” means that the IOU disposing of real property must contact the Tribe or Tribes whose ancestral territory is on or abutting 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.
- j. “Meaningful 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. (California Government Code Section 65352.4)

#### 1.4. IOU Tribal Website

Each IOU shall create and maintain a readily-accessible public 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. For property within the coastal zone, the IOU shall also notify the Coastal Commission and any relevant local governments.

### 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 30 days, or if the NAHC's response is inconclusive:
  - i. If the real property is located within or abuts 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 abutting 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.



- c. Following IOU notification, the Tribe shall have 30 days to express interest in acquiring the real property. If a Tribe fails to respond in 30 days, the IOU shall send a second notice. If a Tribe fails to respond to the second notice within an additional 30 days, the IOU has satisfied its noticing responsibility.
- d. If the Tribe responds to the IOU notice indicating interest in acquiring the real property, a further 60 days is allotted for Tribal due diligence and good-faith negotiation with the notifying IOU.
- e. At the conclusion of the 60-day period, if the IOU and the Tribe have not reached an agreement in principle, and if such an agreement does not look reasonably imminent despite good-faith negotiation, the noticing IOU may seek third-party purchasers for the real property.

### 2.3. To Whom Notice Directed

The IOU shall notify the Tribal chairperson of any relevant Tribes, or the chairperson's designee, as identified by authorized Tribal leadership.

### 2.4. 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 offer on the real property before the IOU may put the real property on the market;
- d. An offer of initial terms of sale of the real property;
- e. An offer to consult in accordance with California Government Code Section 65352.4, with the Tribe regarding the Tribe's interest in acquiring the real property; and

- f. 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.

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

### 2.5. 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.

## 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. 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 return receipt;
  - iii. Documentation of any consultation between the IOU and the Tribe or Tribes, including a written record of whether the Tribe was interested in acquiring the real property, the initial terms of sale offered to the Tribe, and any subsequent terms offered to the Tribe more favorable than the initial terms.
- 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 acquire the real property in accordance with terms of these guidelines; ;

- 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. Commission 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;
- 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 greater public interest.
- e. Should subsections (b) or (d) apply, the IOU must file a formal Section 851 application with the Commission seeking approval for the conveyance of the real property.

### 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 to 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 and, when necessary, with the CPUC's Tribal Advisor.

##### 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 provide notice to all Tribes who claim the property as within their ancestral territory and 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

- a. If more than one Tribe seeks ownership of available real property, and if the Tribes are unable to resolve the dispute themselves, the IOU shall submit a written request to the NAHC for voluntary assistance in mediating the dispute. Any findings made by the NAHC as part of the mediation shall be included in the IOUs request for approval.

- b.** If the NAHC fails to respond within 30 days, or is unwilling to assist in mediating the dispute, the IOU shall engage in meaningful consultation with the Tribes to attempt to resolve the dispute. The IOU shall document any steps it takes to resolve the dispute and shall include such documentation in its request for approval.
- c.** It remains the IOU's responsibility to identify a buyer and to present a proposed transaction to the CPUC for its review.
- d.** The CPUC shall ultimately settle the dispute, recognizing that Tribes are the primary source for identifying ancestral territory, and utilizing the findings of the NAHC and/or the IOUs documentation of its consultation with the Tribes. The CPUC, in consultation with the Tribes, shall propose a reasonable resolution to the dispute as part of its approval process. The CPUC will take into consideration each Tribe's connection to the 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 in-process 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 IOUs shall post these reports to their Tribal website. The Commission will also post the reports on its own website.