

MEMORANDUM

Date: April 6, 2018

To: The Commission
(Meeting of April 26, 2018)

From: Committee on Policy and Governance (Committee) -
Commissioner Liane M. Randolph and
Commissioner Clifford Rechtschaffen

Subject: Adoption of Tribal Consultation Policy

On March 21, 2018, the Committee on Policy and Governance endorsed the Tribal Consultation Policy of the California Public Utilities Commission, which is attached for your review.

The Committee initiated its development of a tribal consultation policy at the Committee's July 12, 2017 meeting with a presentation by Judge Cynthia Gomez, Tribal Advisor to Governor Brown and Native American Heritage Commission Executive Secretary. The Committee reviewed and discussed the initial draft tribal consultation policy at the September 13, 2017 Committee meeting. Following the September Committee meeting, the draft tribal consultation policy was posted for public comment, and two public meetings and a webinar were convened in October and November 2017. All tribal governments in the State were invited to participate. A revised tribal consultation policy based on comments was discussed and endorsed at the March 21, 2018 Committee meeting.

The goals of the tribal consultation policy are as follows:

- Recognize and respect tribal sovereignty
- Encourage and facilitate tribal government participation in CPUC proceeding
- Give meaningful consideration to tribal interests in issues within the CPUC's jurisdiction
- Encourage and facilitate tribal government participation in CPUC-approved utility programs
- Protect tribal cultural resources
- Encourage investments by tribal governments and tribal members in onsite renewable energy generation, energy efficiency; low carbon transportation and energy storage.

As proposed in the initial draft tribal consultation policy, Stephanie Green was designated as the Commission's official Tribal Liaison. Stephanie is now leading the Commission's communication and engagement efforts with tribes throughout California.

The Committee requests that the Commission approve the Tribal Consultation Policy.

ATTACHMENT 1

Tribal Consultation Policy of the California Public Utilities Commission

Tribal Consultation Policy of the California Public Utilities Commission

Introduction:

The CA Public Utilities Commission (CPUC or “Commission”) adopts this Tribal Consultation Policy, consistent with Executive Order B-10-11 issued by Governor Edmund G. Brown, Jr. on September 19, 2011). Executive Order B-10-11 declares that “the State is committed to strengthening and sustaining effective government-to-government relationships between the State and the Tribes by identifying areas of mutual concern and working to develop partnerships and consensus.” The Executive Order directs state executive agencies and departments to “encourage communication and consultation with California Indian Tribes.” It further directs state agencies and departments “to permit elected officials and other representatives of tribal governments to provide meaningful input into the development of legislation, regulations, rules, and policies on matters that may affect tribal communities.”

California is home to over 170 California Native American tribes.¹ Executive Order B-10-11 applies to federally-recognized Tribes and other California Native Americans. For purposes of this policy, the terms “tribes” and “tribal governments” refer to elected officials and other representatives of federally- recognized Tribes and other California Native Americans.

This policy is not intended to replace or supplant obligations mandated by federal law. It sets forth provisions for consultation, communication and collaboration with tribes to the extent that a conflict does not exist with applicable laws or regulations. This policy is not a regulation and it does not create, expand, limit, waive, or interpret any legal rights or obligations.

Tribal Liaison:

The Commission’s Tribal Liaison will assist with implementing this policy. The Tribal Liaison is responsible for coordinating outreach, communication, education and other activities affiliated with tribal interests. The Tribal Liaison will act as a point of contact for tribal governments enabling participation in Commission proceedings and Commission-approved programs. The Tribal Liaison will facilitate CPUC leadership availability for government to government consultation. Alternatively, tribal governments may contact the Commission’s Public Advisor for this assistance (Email: Public.Advisor@cpuc.ca.gov or phone: (866) 849-8390). The Tribal Liaison and/or Public Advisor are additional resources, and tribal governments may continue to directly contact relevant Commission staff regarding ongoing issues.

¹ “California Native American tribe” means a Native American tribe located in California that is on the contact list maintained by the Native American Heritage Commission for the purposes of Chapter 905 of the Statutes of 2004. See Public Resources Code § 21073. California Native American tribes include both federally recognized and non- federally recognized tribes. Nothing in this policy prevents tribal consultation with other Native American groups demonstrating an ongoing connection to a specific place or cultural resource, or issue falling under the jurisdiction of the CPUC.

Tribal Consultation Policy of the California Public Utilities Commission

Policy Goals: The goals of this policy are as follows:

- Recognize and respect tribal sovereignty
- Encourage and facilitate tribal government participation in CPUC proceedings
- Give meaningful consideration to tribal interests in issues within the CPUC's jurisdiction
- Encourage and facilitate tribal government participation in CPUC-approved utility programs
- Protect tribal cultural resources
- Encourage investments by tribal governments and tribal members in onsite renewable energy generation, energy efficiency; low carbon transportation and energy storage.

Background Regarding CPUC Authority:

The range of CPUC activities is extensive and includes regulation of privately-owned utilities, including gas, electric and water utilities, and oil and gas pipeline companies, and approval of the rates they charge to customers. The CPUC also regulates some aspects of telecommunication companies, and the safety of utilities, railroads, common carriers, charter party carriers and other transportation providers, but does not approve those companies' rates. The CPUC implements laws that require the electric utilities to procure renewable electricity to reduce greenhouse gas emissions, and that require electric and gas utilities to offer incentives, grants or rebates for energy efficiency, installation of renewable energy or energy storage, and installation of electric vehicle chargers. The CPUC also implements programs that offer reduced rates for low income gas and electric customers (i.e., the California Alternative Rate for Energy (CARE) and Family Electric Rate Assistance (FERA) programs; "Lifeline" for telephone service; subsidies for broadband services for underserved communities; and utility programs that provide no-cost energy efficiency upgrades to low income customers (the Energy Savings Assistance (ESA) Program).

The CPUC's activities may affect tribal governments in several ways, including but not limited to: 1) impacts on a tribe that is a utility customer at buildings and/or businesses owned or operated by the tribe or tribal members; 2) impacts on the affordability, availability and reliability of services provided to tribal members by utilities; and 3) potential impacts from proposed construction of utility infrastructure on or near tribal property or property containing tribal cultural resources. Tribes may also experience impacts from electricity outages, or de-energizing of power lines during hazardous weather conditions.

Tribal Consultation Policy of the California Public Utilities Commission

Facilitating Tribal Government Participation:

1. The CPUC will encourage and facilitate tribal government participation in its programs and proceedings.
 - a. Tribal governments may contact the CPUC's Tribal Liaison for assistance to initiate participation in a proceeding or consultation with CPUC staff or decision-makers. If a tribe identifies a specific issue for consultation with the CPUC, the Tribal Liaison will identify the appropriate Commission staff and/or decision-makers to participate in the discussions and ensure that the matter receives appropriate consideration.
 - b. The CPUC will give special consideration to tribal governments' requests to participate in Commission proceedings. Administrative law judges and Commissioners are encouraged to grant a tribal government's request to become a party in a proceeding, even if a request is untimely, if the proceeding can continue under the existing schedule, or if it is reasonable to modify the schedule and consistent with principles of due process.
 - c. Commission staff will assist tribal governments in locating relevant information and documents that will help them participate in Commission proceedings and/or Commission-approved programs. If necessary, Commission staff will send the relevant information or documents to a tribal government electronically or by regular mail.
 - d. Commissioners and their advisors will make every effort to grant tribal governments' requests for in person meetings with decision-makers, consistent with the applicable law regarding ex parte communications, and the equal time requirements.² Other Commission staff will also accommodate tribal governments' request for in person meetings, whenever possible.
 - e. When Commissioners travel to different cities for public meetings, they will seek to arrange separate meetings with local tribal governments, as time allows.
 - f. Commission staff and Administrative Law Judges shall make efforts to ensure that relevant information the Commission receives from a tribal government is submitted into the record of a proceeding, consistent with the confidentiality provisions of this policy set forth below. Where a tribal government has submitted written comments in a proceeding, the decision shall explain the tribe's concerns and how they are addressed. Where the

²Public Utilities Code § 1701.3(h)(3).

Tribal Consultation Policy of the California Public Utilities Commission

- If confidential information regarding the presence of tribal cultural resources is relevant to a Commission decision, the Commission will work with the tribal government to reach agreement on how to proceed, in an effort to allow the decision-makers to consider the information, while also protecting its confidentiality.

Tribal Consultation Under CEQA:

For projects where the CPUC is the lead agency under CEQA, the CPUC will comply with the statutory requirements regarding tribal consultation enacted by AB 52 (Gatto, 2014) (Pub. Res. Code §§ 21080.3 *et seq.*). The CPUC may also consult the Governor’s Office of Planning and Research *Technical Advisory: AB 52 and Tribal Cultural Resources in CEQA* (June 2017).

Summary of CEQA Consultation Process:

- A tribal government may request CEQA consultation if it is traditionally and culturally affiliated with the geographic area of a proposed project.
- The consultation must take place prior to the release of a negative declaration, mitigated negative declaration, or environmental impact report. (Pub. Res. Code § 21080.3.1(a)). Since the initial consultation occurs early in the agency’s CEQA review process (see below under Timing of Consultation), the consultation will occur before the CPUC’s release of a draft or proposed negative declaration, mitigated declaration, or environmental impact report.
- The consultation must address alternatives to the project, recommended mitigation measures, or significant effects, if requested by the tribe. (Pub. Res. Code § 21080.3.2(a)).
- If the agency determines that a project may cause a substantial adverse change to tribal cultural resources, the agency must consider mitigation measures. The agency must “when feasible, avoid damaging effects to any Tribal cultural resource.” (Pub. Res. Code 21084.3(a)). The statute describes mitigation measures that the agency may adopt, if feasible, to avoid or minimize the impacts. (Pub. Res. § 21084.3(b)).
- The consultation concludes when either 1) the parties agree on measures to recommend to mitigate or avoid a significant effect, if one exists, on a tribal cultural resource (Pub. Res. Code § 21082.3(a)), or 2) a party, acting in good faith and after reasonable effort, concludes that mutual agreement cannot be reached. (Pub. Res. Code § 21080.2.2(b)).

In 2016, Appendix G of the CEQA Guidelines was amended to implement AB 52. The Environmental Checklist in Appendix G of the CEQA Guidelines now directs lead agencies to address tribal cultural resources in Question #11: “Have California Native American tribes traditionally and culturally affiliated with the project area requested consultation pursuant to Public Resources Code section 20180.3? If so, has consultation begun?” Appendix G of the Guidelines also directs the lead agency to identify whether the project would cause a substantial adverse change in the significance of a tribal cultural resource that is: listed or

Tribal Consultation Policy of the California Public Utilities Commission

eligible for listing in the California Register of Historical Resources; is listed in a local register of historical resources; or that is significant pursuant to the criteria in Public Resources Code § 5024.1(c) (CEQA Guidelines, Section XVII).

Advance Request for Notice of Projects:

- Pursuant to AB 52, a tribe may inform agencies in advance that it would like notice of projects subject to CEQA that are seeking the agency's approval and that are within the tribe's traditionally and culturally affiliated area.
- The CPUC's website has a form letter that tribal governments may submit to the CPUC requesting advance notice of CEQA projects in its area. See: <http://www.cpuc.ca.gov/tribal/>.

Timing of Consultation: The CPUC will follow the statutory deadlines for tribal consultation under CEQA, which generally require the following:

- When a tribe has requested notice of CEQA projects, the CPUC must provide written notice to that tribe of a project in its area, within 14 days of determining that the project application is complete.
- A tribe may request to engage in consultation within 30 days of receipt of the notice, and designate a lead contact person.
- The CPUC will begin the consultation process within 30 days of receipt of the request for consultation.
 - The CPUC will hold a consultation meeting at one of the CPUC offices (in Sacramento, San Francisco or Los Angeles) or at a tribal government office within 30 days.
 - If a meeting at a Commission office is not feasible for the tribal government, the consultation may occur at a mutually agreeable alternative location or by telephone.
 - If the tribe requests that the consultation be scheduled for a time after the 30 day period, the CPUC will accommodate the request.
- The CPUC will participate in additional consultation meetings as necessary to address the issues and work in good faith to reach an agreement with the tribal government on recommendations for project modifications or mitigation measures.
- The CPUC will honor a tribe's request for CEQA consultation that is made more than 30 days after the tribe's receipt of notice, as long as there is still time for meaningful consultation to occur.

Tribal Consultation Policy of the California Public Utilities Commission

Other Situations:

When a tribe has not requested advance notice of all CEQA projects from the CPUC, if the Commission is the lead agency, a request will be made to the Native American Heritage Commission to identify tribal entities interested in the project area. Commission staff will ensure that the identified tribal entities receive written notice of a proposed project in their area at the beginning of the environmental review process. The Commission will carefully consider all tribal government comments regarding potential impacts on tribal cultural resources and suggested mitigation measures.