

DRAFT

PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

ENERGY DIVISION

**Agenda ID: 18659
RESOLUTION E-5076
November 5, 2020**

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 Guidelines to Implement the CPUC Tribal Land Transfer Policy (TLTP Guidelines), with exemptions for PG&E watershed lands designated for fee donation. The TLTP Guidelines require Investor Owned Utilities (IOUs) requesting permission to dispose of Real Property under Section 851 of the Public Utilities Code (Section 851) to take affirmative steps to determine whether California Native American Tribes (Tribes) are interested in purchasing the property.

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 result in some 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 or Commission) CPUC Tribal Land Transfer Policy Guidelines (TLTP Guidelines), with an effective date of issuance. The TLTP Guidelines apply to investor owned utilities (IOUs) seeking Commission approval for the future disposition of Real Property pursuant to Public Utilities Code Section 851. The TLTP Guidelines will facilitate transfers of Real Property to California Native American Tribes by offering Tribes a right of first refusal.

BACKGROUND

On September 19, 2011 Governor Edmund G. Brown Jr. issued Executive Order B-10-11 which first committed the State of California 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. 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."¹

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

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

historical wrongs that were tolerated, encouraged, subsidized and committed by State actors against Native Americans.

Acting to advance the intent of both Executive Orders, the California Public Utilities Commission's (CPUC or Commission) 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 Commission.² 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 Commission-managed grant programs and Commission-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 review of comments, the Draft TLTP was placed on the

² CPUC Tribal Consultation Policy, Adopted April 2018.

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

Commission Agenda for vote. On December 5, 2019, the TLTP was formally adopted by the CPUC.³

The TLTP builds on the Tribal Consultation Policy by establishing a Commission 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 refusal before putting the property on the market.

In adopting the TLTP, the Commission 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 Commission'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 the empowerment of Tribes through provision of timely information and the understanding of process to effectively engage in Commission proceedings of interest. To ensure the Tribes are informed of transfers, the Commission will facilitate Tribal Government access to information by first providing effective notice to Tribes, and then facilitating Tribal participation in proceedings involving requests by IOUs to dispose of Real

³ 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

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.

The TLTP Guidelines attached to this Resolution implement the TLTP. Information required to be provided to Tribes by the TLTP 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 Commission 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. Commissioners' 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 refusal. 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 Commission 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 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 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 an offer 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 Commission may deny the Application or Advice Letter.

As part of its review of any disposition of Real Property under Section 851, the Commission 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 comments⁴ from the three large electric investor-owned utilities (IOUs), 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 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 “right of first refusal.”

The IOUs recommended the Policy be clarified to include only those transactions requiring full Commission approval subject to Section 851 and not the types of minor conveyances subject to General Orders 173, or 69-C, as such minor conveyances are typically made to governmental entities or developers as a condition to 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

⁴ 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/>

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 Commission should provide a detailed map with associated single points of contact for providing the notice.

The IOUs’ request that the Draft TLTP Guidelines be amended with 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 right to acquire property on the same or better terms as had been proposed by a potential purchaser, who has expended time and resources investigating any number of issues. 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 Commission 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 stress 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 Commission'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 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.⁵

Workshop comments specific to Draft Guidelines include:

A comment from Mona Tucker suggests 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 believes 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.”

A comment from Kara Woodruff referenced 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 seeks 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

⁵ 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/>

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 California Environmental Quality Act (CEQA) would be triggered, if 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 CEQA and local jurisdiction applies 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 Commission'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.⁶

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

DISCUSSION

The Final TLTP and Draft Guidelines include clarifications in response to some issues raised in comments. The first clarification regards the possible misinterpretation of the term “first right of refusal.” The IOUs interpret the term as providing a third party with the right to acquire property on the same or better terms as has been proposed by a potential purchaser. The IOUs are concerned that their ability to negotiate conveyances would be hindered, if a third party is aware that any potential agreement could be discarded should a tribe decide to accept the agreed upon terms for the purchase of the land.

The IOUs suggest that “right of first offer” is the preferred approach in that it provides an interested Tribe the right to make a first offer for land that becomes available, before the IOUs enter negotiations with other parties. To be clear, the intent of the term “right of first refusal” used in the Draft Guidelines is what the IOUs refer to as “right of first offer.” The Draft Guidelines define “right of first refusal” to mean “that the IOU disposing of real property must contact the tribe or tribes whose ancestral territory is on or adjacent to the real property, and must provide the tribe or tribes the right to take or refuse the real property, before the IOU can seek third-party purchasers for the real property.” The CPUC believes this addresses the IOUs’ concerns.

The IOUs next suggest that the TLTP be clarified to include only those transactions requiring full CPUC approval subject to Section 851, and not the types of minor conveyances subject to General Orders (GO) 173, and GO 69-C, as these conveyances are generally intended to for specific, limited uses.⁷ The

⁷ 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”

Footnote continued on next page

CPUC expressly seeks comment on whether the Draft Guidelines should be revised. Specifically:

- Will conveyances described in GO 173 and GO 69-C, often of easement rights over IOU land, facilitate a meaningful transfer of land to Tribes?
- Would inclusion in the TLTP of conveyances subject to GO 173, and GO 69-C divert tribal resources that could be better spent examining potentially more meaningful Section 851 conveyances?
- Would inclusion in the TLTP of conveyances subject to GO 173 and GO 69-C substantially delay essential IOU operations?
- What is the appropriate application of the TLTP to GO 173, and GO 69-C conveyances, and to easements in real property?

Next, the IOUs expressed concern over the lack of resources to identify the correct Tribe for purposes of noticing under Section 851, specifically regarding their ability to resolve claims or disputes over Tribal territory should they arise between tribes. The Draft Guidelines contain a Section specifically addressing dispute resolution, including disputes about notice and disputes involving multiple interested Tribes. The CPUC believes that the Draft Guidelines offer adequate initial guidance to IOUs to resolve such disputes.

<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>

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 as such, should be made available, where appropriate, for conveyance to Tribes, and subject to the TLTP.

Future conveyances of PG&E retained watershed lands would be made following the proven model of conveyance that the Stewardship Council developed for previous LCC fee donations. PG&E retained watershed lands would be available for TLTP consideration following the completion of the LCC planning effort led by the Stewardship Council, allowing the Stewardship Council to dissolve, as planned, and within budget, in 2022. Future conveyances of PG&E retained watershed lands subject to the TLTP would be submitted to the CPUC under Section 851 or GO 173.

Comments submitted by the Tribes were generally supportive of the goals of the TLTP but expressed a need for more information on how the TLTP would be applied, and how ancestral lands common to more than one Tribe and subject to multiple claims, would be resolved. Tribes submitting comment also expressed concern over a lack of clear standard of “meaningful consultation.” Finally, Tribes were concerned that consultation occur only with Tribal leadership with the authority to represent the Tribe.

Because of the concerns expressed by Tribes regarding the consultation process, the CPUC believes it is important to hold an additional implementation workshop immediately following the formal adoption of the TLTP Guidelines, to address consultation and other implementation issues. Parties are invited to

comment on the topics that could be addressed in an implementation workshop. With the clarification provided in this Resolution, the CPUC believes that the Draft Guidelines will provide the necessary direction to IOUs and the Tribes.

The CPUC also expressly seeks comment from all interested parties on the appropriate timeline for noticing and consultation. The Draft Guidelines attached adopt a 90-day notice period for the Tribes to effectively assess property issues. If a shorter notice period would suffice without impairing the Tribes' assessment of property issues, the Commission could modify the Draft Guidelines based on comment. And, if an IOU properly notifies a Tribe of a forthcoming disposition, and if the Tribe does not respond, should the Commission adopt a specific period of time for the IOUs to hold the offer to the Tribe open to fulfil its obligations under the TLTP? The CPUC seeks a streamlined process that will facilitate the efficient transfer of land, but not at the expense of the full participation of 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 Draft Guidelines provides the plan to achieve it.

The TLTP recognizes that 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.

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 GO 173 and GO 69-C conveyances are not exempt from, the general application of the TLTP. The CPUC expects all easements in real property, including the full breadth of all possible conveyances are not subject to exemption from this policy without being subject to comment.

The PG&E watershed lands LCC donated in fee, 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 following the conclusion of the LCC and the dissolution of the Stewardship Council, expected in 2022.

Following the formal adoption by the CPUC of the Draft Guidelines, the Commission will hold an additional public workshop with IOUs and interested Tribes intended to provide additional clarification of the adopted Guidelines.

COMMENTS

Public Utilities Code section 311(g)(1) provides that this Draft Resolution must be served on all parties and subject to at least 30 days public review and comment prior to a vote of the Commission. Section 311(g)(2) provides that this 30-day period may be reduced or waived upon the stipulation of all parties in the proceeding. Comments on Draft Resolution E-5076 must be received by the CPUC Tariff Unit within 20 days of service of the Resolution. The reply comment period is 10 days. Instructions to parties on how to serve comments are provided

in the attached comment letter. Contact edtariffunit@cpuc.ca.gov to receive a copy of the comment letter.

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 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 Commission 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. This Resolution expressly seeks additional public comment on the Draft Guidelines applicability to GO 173 and GO 69-C conveyances.
9. PG&E retained watershed lands conveyances subject to PU Code Section 851 or GO 173 are not exempt from the TLTP.
10. PG&E Watershed Lands LCC protected by Conservation Easement and designated by the Stewardship Council for fee donation are exempt from the TLTP.
11. 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 and the dissolution of the Stewardship Council, expected in 2022.
12. 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.

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 November 5, 2020; the following Commissioners voting favorably thereon:

ALICE STEBBINS
Executive Director

Attachment A

GUIDELINES TO IMPLEMENT THE CPUC TRIBAL LAND POLICY

1. GENERAL PROVISIONS

1.1. Purpose and Intent

- a. The purpose of these Guidelines is to implement the Commission's Tribal Land Policy, which it adopted on December 5, 2019.
- b. The goals of the Tribal Land Policy are:
 - i. To recognize and respect Tribal sovereignty;
 - ii. To protect Tribal sacred places and cultural resources;
 - iii. To Ensure meaningful consideration of Tribal interests and the return of lands within the ancestral territory of the appropriate Tribe; and
 - iv. To encourage and facilitate notice and Tribal participation in matters before the Commission that involve transfers of real property subject to California Public Utilities Code Section 851.
- c. The intent of these Guidelines is therefore to further those goals.

1.2. Construction

- a. These Guidelines shall be liberally construed to further the goals of the Tribal Land Policy. See Rule 1.1(b).
- b. Unless otherwise noted, all statutory references are to the laws of the State of California.
- c. These guidelines do not address whether an Investor Owned Utility should place an easement on utility-owned land before disposing of that land. The Commissioner will consider whether an easement should be placed on any particular land on a case-by-case basis when the Utility asks for authority to dispose of the land.

1.3. Definitions

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

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

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

- b.** “California Native American tribe” or “tribe” means a Native American tribe located in California that is on the contact list maintained by the NAHC for the purposes of Chapter 905 of the Statutes of 2004. (See Pub. Res. Code, § 21073.) This includes both federally-recognized tribes and tribes that are not recognized by the federal government. Nothing in the policy prevents tribes from consulting with other Native American groups that demonstrate an ongoing connection to a specific place or cultural resource, or issue falling under the jurisdiction of the Commission.
- c.** “Chairperson” means a tribe’s highest elected or appointed decision-making official, whether that person is called chairperson, or president, or some other title.
- d.** “Disposition” means the transfer, sale, donation, encumbrance, or disposition by any other means of an estate in real property.
- e.** “Indian country” means “(a) all land within the limits of any Indian reservation under the jurisdiction of the United States Government, notwithstanding the issuance of any patent, and, including rights-of-way running through the reservation, (b) all dependent Indian communities within the borders of the United States whether within the original or subsequently acquired territory thereof, and whether within or without the limits of a state, and (c) all Indian allotments, the Indian titles to which have not been extinguished, including rights-of-way running through the same.” (18 U.S.C. § 1151.)
- f.** “Investor-owned utility” (IOU) means “private corporations or persons that own, operate, control, or manage a line, plant, or system for the transportation of people or property, the transmission of telephone and telegraph messages, or the production, generation, transmission, or furnishing of heat, light, water, power, storage, or wharfage directly or

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

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

- g.** “Real property” means any IOU real property whose disposition is subject to approval under Section 851 of the Public Utilities Code.
- h.** “Request for approval” means an IOU’s submission, whether under the formal application process or the informal advice letter process, requesting Commission approval of the disposition of real property under Section 851 of the Public Utilities Code.
- i.** “Right of first refusal” means that the IOU disposing of real property must contact the tribe or tribes whose ancestral territory is on or adjacent to 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.

1.4. IOU Tribal Website

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

2. NOTIFICATION

2.1. Notification Generally

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

2.2. IOU to Identify Relevant Tribe or Tribes

- a.** The IOU shall submit a written request to the NAHC to identify tribes relevant to the territory on which the real property lies.
- b.** If the NAHC fails to respond within 90 days, or if the NAHC’s response is inconclusive:
 - i.** If the real property is located within or adjacent to a federally-recognized tribe’s Indian country, the IOU shall provide notice to that tribe.
 - ii.** If the real property is not located within or adjacent to a federally-recognized tribe’s Indian country, the IOU shall provide notice to any tribe or tribes on whose ancestral territory the real property lies.

2.2. To Whom Notice Directed

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

2.3. Contents of Notice

The notice shall include, in plain language:

- a. The location and a brief description of the real property at issue;
- b. The reason the IOU is disposing of the real property;
- c. A statement telling the tribe that they have a right of first refusal on the real property before the IOU may put the real property on the market;
- d. An offer to consult with the tribe regarding the tribe's interest in acquiring the real property; and
- e. Contact information of an IOU representative who is sufficiently knowledgeable about the real property to answer any questions the tribe might have, so that the tribe can decide whether it is interested in acquiring the real property.

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

2.4. Notice to be Publicly Available

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

3. REQUESTS FOR APPROVAL

3.1. Filing

- a. If an IOU submits a request for approval under Section 851, the request must show that the IOU provided notice and consultation to the interested tribe or tribes. The required showing includes:
 - i. A copy of the IOU's written request to the NAHC to identify interested tribes;
 - ii. A copy of the IOU's written notice to any interested tribal chairperson or their designee with USPS receipt;
 - iii. Documentation of any consultation between the IOU and the tribe or tribes.
- b. If the IOU does not meet that showing, and if it is unable to cure those deficiencies, the Commission may, in its discretion:
 - i. Identify any interested tribes, provide them with notice of the proceeding and an opportunity to comment;
 - ii. Direct the IOU to identify, notice, and consult with any interested tribes; or
 - iii. Reject the request for approval without prejudice.

3.2. Tribal Participation

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

3.3. Presumption in Favor of Tribe

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

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

3.4. Impacts on Cultural Resources

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

4. DISPUTE RESOLUTION

4.1. Disputes Generally

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

4.2. Disputes About Notice

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

4.3. Multiple Interested Tribes

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

5. QUARTERLY REPORTS

5.1. Quarterly Reports

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