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

## **INTRODUCTION**

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

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

<sup>2</sup> SCE has authorized SDG&E and SoCalGas to represent that SCE joins in this letter and that SDG&E and SoCalGas may submit this letter on SCE’s behalf pursuant to Commission Rule 1.8(d).

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

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

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

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

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

<sup>4</sup> Policy, p. 2; Pub. Util. Code § 851.

<sup>5</sup> Policy, pp. 3-4.

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

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

### **ADMINISTRATIVE PROCEDURE ACT**

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

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<sup>6</sup> Decision (“D.”) 04-05-017, pp. 23-24.

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

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

<sup>9</sup> *See, e.g.*, Pub. Util. Code §§ 311, 1701, *et seq.*; Section 20(e), Title 1, California Code of Regulations (“CCR”).

doubt concluded that compliance with the APA would be largely redundant and might create confusion as to which procedures applied in a particular circumstance.”<sup>10</sup>

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

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

## **TRIBAL LAND POLICY**

### ***A. Regulations Adopted in the Policy***

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

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<sup>10</sup> *Tidewater Marie Western, Inc. v. Bradshaw*, 14 Cal. 4<sup>th</sup> 557, 569 (1996).

<sup>11</sup> Gov. Code § 11349.1; *see also* Pub. Util. Code 311(h).

<sup>12</sup> Gov. Code § 11349.1(d).

<sup>13</sup> Gov. Code §§ 11349(a), (c) and (d); *see also* Pub. Util. Code 311(h).

<sup>14</sup> Policy, p. 1 (footnotes omitted).

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

- (i) Provide notice to Tribe(s) of the IOU's intent to dispose of real property within tribal ancestral territory;<sup>16</sup>
- (ii) Seek to resolve disputes between Tribes making competing claims of a right to acquire;<sup>17</sup>
- (iii) Offer a right of first refusal ("ROFR") to the relevant Tribe to acquire the real property at issues;<sup>18</sup>
- (iv) Consult with the relevant Tribe concerning the potential acquisition;<sup>19</sup> and
- (v) Include a showing of compliance with notice and consultation requirements in the IOU's Section 851 application or advice letter seeking approval to transfer the real property.<sup>20</sup>

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

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

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

<sup>17</sup> *Id.* at p. 6.

<sup>18</sup> *Id.* at p. 5.

<sup>19</sup> Policy, pp. 5-6.

<sup>20</sup> *Id.* at p. 5 (providing that if an IOU submits a Section 851 application or advice letter to the Commission, the Commission "will ensure" that the record of the proceeding includes a showing of notice and consultation with the relevant Tribe).

<sup>21</sup> *Id.* at p. 6 ("If those [notice and consultation] **requirements** are not met, and if those deficiencies cannot be cured, the Commission may deny the application or advice letter without prejudice.") (emphasis added).

<sup>22</sup> *Id.* at p. 1 ("In particular, this Policy creates an expectation that, for any future disposition of Real Property, the IOU will offer Tribes a right of first refusal before putting the property on the market") (footnote omitted); p. 5 ("Where an IOU seeks approval to transfer Real Property within a Tribe's

that IOUs will be expected to demonstrate in their application seeking disposition pursuant to Pub. Util. Code Section 851 that a ROFR was offered and that disputes between Tribes were resolved, thus making compliance with these requirements part of the “notice and consultation” regulation imposed by the Policy and proposed for codification in the Draft Resolution.

While the Commission indicates in the Policy that it intends to provide further guidance regarding compliance with these regulations and will likely supplement them in the yet-to-be-adopted Draft Guidelines,<sup>23</sup> it is clear that the above requirements constitute a basic set of “rules, regulations, orders, or standards of general application” adopted by the Commission to “implement, interpret, or make specific the law enforced or administered by it, or to govern its procedures.”<sup>24</sup> The fact that the Commission proposes to formally incorporate the requirements included in the Policy into its Rules of Practice and Procedure through the APA review process affirms the conclusion that these requirements are intended by the Commission to be enforceable regulations.

#### **B. *Development of the Policy and Commission Approval Process***

The Policy includes a description of the process followed by the Commission to develop the requirements contained therein.<sup>25</sup> An “Information Sheet” available on the Commission’s website and attached hereto in Appendix A provides additional details regarding the Commission’s process.<sup>26</sup> The below description relies on the information set forth in the Policy and the Information Sheet, and posted on the Commission’s website, as well as the Joint Utilities’ understanding of the process the Commission followed in promulgating the rules contained in the Policy.

The Commission’s Emerging Trends Committee adopted a draft version of the Policy in April, 2019. The Commission states that it “made the draft version available for public comments” by posting it on the Commission’s website.<sup>27</sup> The Commission maintains a service list for notice of amendments to its Rules of Practice and Procedure (“RPP Service List”), and in

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ancestral territory, the Commission expect that the IOU will provide the Tribe a right of first refusal.”).

<sup>23</sup> See, e.g., *id.* at p. 3, n.8 and pp. 6-7.

<sup>24</sup> See Gov. Code § 11342.600.

<sup>25</sup> Policy, pp. 6-7.

<sup>26</sup> Also available at:

[https://www.cpuc.ca.gov/uploadedFiles/CPUCWebsite/Content/News\\_Room/NewsUpdates/2019/Tribal%20Land%20Transfer%20Policy%2020190803%20one%20page%20info%20\(003\)%20clean.pdf](https://www.cpuc.ca.gov/uploadedFiles/CPUCWebsite/Content/News_Room/NewsUpdates/2019/Tribal%20Land%20Transfer%20Policy%2020190803%20one%20page%20info%20(003)%20clean.pdf)

<sup>27</sup> Policy, p. 6.

other instances has provided notice to this service list of proposed policies that implicate its procedural rules.<sup>28</sup> It did not elect to serve the draft policy on this service list.

The draft policy was first presented to attendees at the May 29, 2019 Emerging Trends Committee meeting.<sup>29</sup> The Emerging Trends Committee is led by two designated Commissioners<sup>30</sup> and typically meets on a bi-monthly basis. The draft policy presented at the May 29, 2019 Emerging Trends Committee Meeting (attached hereto in Appendix B) included a placeholder for a Resolution number,<sup>31</sup> but no draft Resolution incorporating the provisions of the draft policy was ever issued by the Commission or circulated for public comments prior to formal adoption of the Policy on December 5, 2019. The Policy was ultimately not adopted as a Commission Resolution, as discussed below.

The Information Sheet provides details regarding the Commission's outreach process. Specifically, the Information Sheet indicates that outreach and notice of proposed policy "to California Tribes" occurred starting in June, 2019 and continued through October, 2019. The Information Sheet lists three "Tribal Consultation Meetings" scheduled for September 16 and 30, 2019, with the third meeting to be held in Southern California on a date to be determined. The Information Sheet does not identify scheduled dates for outreach to other stakeholders potentially affected by the draft policy.

Meeting agendas for the September 16 and 30, 2019 meetings, as well as the third Tribal Consultation meeting held in Southern California on October 11, 2019, are posted on the Commission's website.<sup>32</sup> These meeting agendas are included in Appendix C. Each meeting agenda reflects that the meetings included two sessions: (1) Broadband/telecommunications

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<sup>28</sup> For example, the Commission's Policy and Governance Committee provided notice to the Commission's service list for notice of amendments to the Rules of Practice and Procedure of the existence of its draft Enforcement Policy (with a link to the draft policy) and notice that the draft policy would be discussed at the next Policy and Governance Committee meeting. The notice provided by the Policy and Governance Committee solicits public feedback prior to the meeting and indicates that courtesy notice is provided even though "no amendments to the [Rules of Practice and Procedure] are proposed by the Draft Enforcement Policy." Email from Deidre Cyprian dated June 17, 2020 with subject line "Draft CPUC Enforcement Policy – For discussion at 7/1/2020 Policy and Governance Committee Meeting."

<sup>29</sup> Information Sheet, p. 1.

<sup>30</sup> The Committee on Emerging Trends is led by Commissioner Shiroma and Commissioner Guzman Aceves.

<sup>31</sup> Document titled "Tribal Land Transfer Policy - presented publicly on May 29, 2019 at the Committee meeting" available at:  
[https://www.cpuc.ca.gov/uploadedFiles/CPUC\\_Public\\_Website/Content/About\\_Us/Supplier\\_Diversity/Draft%20presented%20publicly%20at%20Committee%20meeting%20%20May%2029%202019.pdf](https://www.cpuc.ca.gov/uploadedFiles/CPUC_Public_Website/Content/About_Us/Supplier_Diversity/Draft%20presented%20publicly%20at%20Committee%20meeting%20%20May%2029%202019.pdf)

<sup>32</sup> See <https://www.cpuc.ca.gov/tribal/>.

services in tribal areas;<sup>33</sup> and (2) “Tribal Consultation” including discussion of the proposed Tribal Land Policy. The meeting agendas each indicate that only the telecommunications session would be open to the public; the Tribal Consultation/Tribal Land Policy portion of the meeting was described as being “not open to the public.”<sup>34</sup> At the final meeting held October 11, the Commission did permit public participation during the portion of the meeting devoted to the Tribal Land Policy, which was scheduled to last one hour. The Commission also held a webinar focused on the dispute resolution provision of the draft policy on October 31, 2019, which the IOUs were permitted to attend.

The deadline for informal comments on the draft policy is listed in the Information Sheet as October 11, 2019 (the date of the Southern California Tribal Workshop),<sup>35</sup> with additional direction in a footnote that comments could be submitted through October 28, 2019, but should be submitted no later than October 11, 2019 “for purpose of considering comments fully in consideration of any revisions that may occur before the proposed policy is brought before the Commission for a vote,” which the Information Sheet indicated would be November 7, 2019.<sup>36</sup> The Policy indicates that the Emerging Trends Committee received informal comments on the draft policy from several stakeholders.<sup>37</sup>

Apart from parties representing tribal interests, the Commission received comments only from the Pacific Forest and Watershed Lands Stewardship Council (“Stewardship Council”),<sup>38</sup> which raised the concern that the draft policy might conflict with implementation of the Land

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<sup>33</sup> In a ruling issued in a telecommunications-related proceeding, Rulemaking (“R.”) 11-11-007, the Commission proved notice of three “Tribal Consultations and Workshops” scheduled on the same dates and locations focused on telecommunications services in low-income and rural tribal communities. (R.11-11-007, *Administrative Law Judges’ Ruling Noticing Workshops* (September 10, 2019), included in Appendix D). R.11-11-007 examines “the appropriate regulatory framework to ensure the continued provision of safe, reliable telecommunications services to rural areas at just and reasonable rates,” and does not implicate energy or water utility issues. (R.11-11-007, *See Fourth Amended Assigned Commissioner’s Scoping Memo and Ruling* (March 22, 2019), p. 1).

<sup>34</sup> Appendix C, Agenda p. 2.

<sup>35</sup> Information Sheet, p 2.

<sup>36</sup> *Id.*, n. 4.

<sup>37</sup> Informal comments are available at:

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

<sup>38</sup> The Stewardship Council is a private, nonprofit foundation that was established in 2004 as part of a Pacific Gas and Electric Company (“PG&E”) settlement and works to conserve watershed lands for the public good through its Land Conservation Program, and to invest in outdoor youth programs through its Youth Investment Program.



Conservation Commitment (“LCC”) established by D.03-12-035 and D.08-11-043, and three California energy IOUs – SDG&E, SCE, and PG&E.

The informal comments respectively submitted by the energy IOUs raised several significant legal and policy concerns and identified problematic ambiguities in the draft policy. All three energy IOUs requested that public workshops be scheduled to allow an opportunity for further dialogue regarding the requirements proposed in the draft policy.<sup>39</sup> As noted above, no public stakeholder workshops were held (public meetings included only the brief session at the October 11, 2019 meeting and the October 31, 2019 webinar), although Commissioner staff did participate in individual IOU meetings to discuss concerns with the draft policy.<sup>40</sup> The Commission adopted the requirements set forth in the Policy without meaningfully addressing or resolving the material concerns raised by the energy IOUs in their informal comments (and also did not address the concern raised by the Stewardship Council regarding conflict with the LCC). The suggestion in the Policy that such issues would be addressed in the Draft Guidelines ignores the fundamental nature of the issues raised.<sup>41</sup>

The Commission did not receive comments on the draft policy from *any* other IOUs – *e.g.*, water, sewer – although the regulations adopted in the Policy apply equally to such IOUs and impose direct obligations on them. Nor did the Commission receive comments from other impacted parties, such as landowners with utility easements on their land who would be prohibited under the Policy from seeking to move a utility easement located on their land for any purpose without a ROFR to acquire the easement first being offered to the indicated Tribe. Likewise, no comments were submitted by local agencies, public safety advocates, low-income housing advocates, conservation advocates (other than the Stewardship Council), building industry advocates, or other parties whose interest in acquiring IOU real property would be made inferior to that of the Tribes under the draft policy; nor were comments submitted by ratepayer advocates or any other stakeholder concerned with the impact of the draft policy on the value of ratepayer assets, or any other non-tribal party likely to be affected by the requirements included in the draft policy. For example, it is anticipated that various public projects such as the construction of roads or public rail may be subject to delay if an IOU is required to extend a ROFR to a Tribe when negotiating with local agencies for discrete right of way easements.

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<sup>39</sup> Letter from Erik B. Jacobson, Director, Regulatory Relations, PG&E, to Commissioners Guzman Aceves and Shiroma, CPUC (September 30, 2019), p.2; Letter from Clay Faber, Director, Regulatory Affairs, SDG&E, to Commissioners Guzman Aceves and Shiroma, CPUC (October 17, 2019), p.2 and Letter from Clay Faber, Director, Regulatory Affairs, SDG&E, to Commissioners Guzman Aceves and Shiroma, CPUC (October 28, 2019), p.3-4; and Letter from Laura Genao, Managing Director, State Regulatory Affairs, SCE to Public Advisor’s Office, CPUC (November 15, 2019), p. 2.

<sup>40</sup> For example, SDG&E representatives met with staff from the offices of President Batjer, Commissioner Guzman Aceves and Commissioner Shiroma on November 14, 2019, Commissioner Randolph on November 22, 2019 and Commissioner Rechtschaffen on November 26, 2019.

<sup>41</sup> See Policy, p. 7. The Draft Guidelines issued subsequent to adoption of the Policy do not resolve the issues raised in the energy IOUs’ respective comments.

Therefore, local agencies should be meaningfully engaged to determine whether such impacts can be addressed through a collaborative process.

The draft policy appeared on the Public Agenda for the Commission’s December 5, 2019 business meeting (Agenda #3452) as Agenda Item #64. The agenda for the Commission’s December 5 meeting was first posted on November 25, 2019. Agenda Item #64 was included in the “Commissioner Reports” section of the agenda rather than being listed with the other proposed orders and resolutions being considered for adoption by the Commission. In the November 25, 2019 version of the meeting agenda, Agenda Item #64 included the text “Tribal Land Transfer Policy” with no other description or discussion, and with no website link to the draft policy. The draft policy was not posted with the Commission meeting materials until one week later on December 2 – three days before the December 5 Commission meeting. A revised version of the meeting agenda circulated on December 3, 2019 included a website link but no other information regarding the draft policy.<sup>42</sup> A document titled “Rev. 1 - Land Transfer Policy.pdf” was added to the meeting materials posted on the Commission’s website on December 4, 2019. The document is presumably a revised version of the draft policy, but changes to the document do not appear to be marked and are not readily apparent.

The final version of the meeting agenda circulated on the morning of December 5, 2019, the day of the Commission meeting, included no additional information or clarification regarding the draft policy. Agenda Item #64 still appeared in the “Commissioner Reports” section of the agenda rather than being listed with the other proposed orders/resolutions, and the text of the agenda item still consisted only of a website link to the draft policy with no description or explanation of the draft policy’s purpose or effect. Typically, the description of purpose is set forth in the “Proposed Outcome” discussion included for each proposed order or resolution appearing on the Commission’s agenda.<sup>43</sup> The agenda item also omitted discussion of the safety and economic impacts of the draft policy – analysis that is required under Pub. Util. Code Section 321.1 for “each ratemaking, rulemaking, or other proceeding . . .” and which is generally set forth in the “Safety Considerations” and “Estimated Cost” discussion included in the agenda item text for proposed orders and resolutions.<sup>44</sup> Finally, the text of Agenda Item #64 excludes the statement, “Pub. Util. Code § 311 – This item was mailed for Public Comment,” which is standard language in the agenda item text for other proposed orders and resolutions included on the Commission’s agenda.<sup>45</sup>

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<sup>42</sup> CPUC Public Agenda #3452, p. 68, available at:  
<https://docs.cpuc.ca.gov/PublishedDocs/Published/G000/M321/K383/321383451.pdf>.

<sup>43</sup> *See, e.g., id.* at Items #47 - #50A, pp. 48-53.

<sup>44</sup> *See, e.g., id.*

<sup>45</sup> *See, e.g., id.*

**C. *Adoption of Proposed Rule 3.6(i) is Inconsistent with Principles of Due Process***

In Gov. Code Section 11340.1, the Legislature declared its intent “to reduce the number of administrative regulations and to improve the quality of those regulations which are adopted.”<sup>46</sup> The Legislature noted that “[t]he language of many regulation is frequently unclear and unnecessarily complex, even when the complicated and technical nature of the subject matter is taken into account.”<sup>47</sup> To address this problem, the Legislature created the OAL and established standards that must be satisfied for all administrative regulations codified pursuant to the APA. As discussed above, in reviewing proposed regulations, the OAL will consider, among other factors, the “consistency” of the regulation – *i.e.*, whether the proposed regulation is “in harmony with, and not in conflict with or contradictory to, existing statutes, court decisions, or other provisions of law,”<sup>48</sup> the “clarity” of the regulation<sup>49</sup> and whether it complies with other applicable requirements.

While, as noted above, the Commission is largely exempt from the due process rules set forth in Article 5 of the APA, Pub. Util. Code Section 311(h) requires the Commission to submit revisions to its Rules of Practice and Procedure to the OAL for prior review in accordance with Gov. Code Section 11349.1(a). The OAL will evaluate proposed regulations for compliance with the “consistency” standard set forth in Gov. Code Section 11349(d), among other requirements. The “consistency” standard cannot be met if the proposed regulation is not “in harmony with” the law.” In other words, to be approved by the OAL and codified in the CCR, a proposed regulation must be lawful. Thus, OAL’s review of a proposed regulation must necessarily take into account a circumstance where an agency has failed to provide due process in adopting a regulation; to the extent a proposed regulation is inconsistent with due process requirements, it is unlawful and fails the “consistency” standard. Gov. Code Section 11349.3 permits the OAL to disapprove a regulation that fails to meet this standard.

The IOUs respectfully submit that the Commission’s process is subject to challenge due to a lack of due process afforded both to the IOUs and to other stakeholders. It is true that the Commission provided adequate notice of proposed Rule 3.6(i) and has provided parties an opportunity to be heard in accordance with APA procedures. However, proposed Rule 3.6(i) does not expressly enumerate the requirements the provision is intended to impose; rather it incorporates by reference the requirements included in the Policy, which has already been adopted by the Commission. Where, as is the case here, a proposed regulation incorporates an external order by reference, the external material “shall be reviewed in accordance with procedures and standards for a regulation published in the California Code of Regulations.”<sup>50</sup>

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<sup>46</sup> Gov. Code § 11340.1(a).

<sup>47</sup> Gov. Code § 11340(b).

<sup>48</sup> Gov. Code §§ 11349(d) and 11349.1(a)(4).

<sup>49</sup> Gov. Code §§ 11349(c) and 11349.1(a)(3).

<sup>50</sup> 1 CCR § 20(b).

Thus, the inquiry here is not limited to whether promulgation of proposed Rule 3.6(i) satisfies due process requirements. It must *also* consider whether the rules included in the Policy, which are incorporated into proposed Rule 3.6(i) by reference, were adopted in accordance with due process requirements.

As discussed below, it is clear that the Commission ignored statutory due process requirements and its own procedural rules in promulgating the rules included in the Policy. The defects in the adoption of the Policy and associated rules are further compounded by reliance on the Draft Guidelines. Since the Commission's adoption of the Policy and the regulations included therein was unlawful, the Policy regulations proposed for incorporation by reference into draft Rule 3.6(i) do not meet the "consistency" standard set forth in Gov. Code Section 11349.1(a)(4). The due process violations discussed herein are not minor deficiencies that may be overlooked by OAL; the Commission's actions are wholly at odds with fundamental legal principles and completely contrary to "existing statutes, court decisions, or other provisions of law,"<sup>51</sup> including specific provisions of the Public Utilities Code and long-standing legal precedent. The Commission's due process failures cannot be cured through a subsequent reliance on the APA review and approval process. Put simply, the Commission cannot ratify the constitutionally infirm requirements adopted in the Policy by seeking to incorporate them by reference into a separate rule that is properly reviewed under APA procedural rules. Instead, the Joint Utilities respectfully submit that the Commission should refine the Policy itself following a meaningful engagement of all interested parties through formal rulemaking, and *then* seek to add the new requirements to the Commission's Rules of Practice and Procedure.

The Commission's proposal to codify the Draft Guidelines by incorporating them by reference into proposed Rule 3.6(i) raises similar due process concerns. Again, the Draft Guidelines have not been adopted in final form. Adoption by incorporation and cross-reference in Rule 3.6(i) would constitute the Commission issuing a final decision on the Rules without having afforded interested parties with Due Process. Thus, proposed Rule 3.6(i) fails the "consistency" standard on this count as well. Finally, in addition to failing to meet the "consistency" standard, Rule 3.6(i) does not satisfy the "clarity" standard, as discussed below. The Commission's incorporation by reference of the rules adopted in the Policy also violates applicable requirements set forth in Title 20 of the CCR.

(i) APA/Fundamental Tenets of Due Process

The fundamental tenets of Due Process are that an interested party is afforded reasonable notice and an opportunity to be heard. The APA is designed to ensure that Due Process is provided in administrative decision-making by state agencies. For example, Article 5 of the APA establishes procedural safeguards intended to protect the due process rights of parties who are subject to state agency regulations.<sup>52</sup> The California Supreme Court has observed that "[o]ne

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<sup>51</sup> See Gov. Code § 11349.1(a)(4).

<sup>52</sup> See Gov. Code §§ 11346-11348 and § 11000.

purpose of the APA is to ensure that those persons or entities whom a regulation will affect has a voice in its creation . . . as well as notice of the law's requirements so that they can conform their conduct accordingly.”<sup>53</sup> The Court noted further that “[t]he Legislature wisely perceived that the party subject to regulation is often in the best position, and has the greatest incentive, to inform the agency about possible unintended consequences of a proposed regulation. Moreover, public participation in the regulatory process directs the attention of agency policymakers to the public they serve . . .”<sup>54</sup>

Section 1701, *et seq.* of the Public Utilities Code includes procedural due process requirements that are analogous to those set forth in the APA and serve an identical purpose. California Constitution (“Cal. Const.”), Article (“Art.”) XII, § 2, grants the Commission authority to establish its own procedures, “subject to statute and due process.” The Commission’s procedural rules are set forth in its Rules of Practice and Procedure. The Legislature has directed that these Commission-adopted procedures rather than those established in the APA will guide Commission rulemaking activity.<sup>55</sup> The Commission’s exclusion from the due process requirements of the APA does not signify that the Commission is free to adopt regulations without the constraint of adherence to procedural due process principles, however;<sup>56</sup> nor does the exclusion permit the Commission to seek ratification of regulations adopted without due process through their codification pursuant to the APA. *All* rules adopted by the Commission – including procedural rules the Commission seeks to codify under the APA – must comply with due process requirements.<sup>57</sup>

The Commission is obligated to comply with the procedural requirements established in the Public Utilities Codes and its own rules. Under Gov. Code Section 11349.1(a)(4), the OAL must evaluate proposed regulations – which in this case includes both proposed Rule 3.6(i) *and* the Policy’s rules that are incorporated by reference into Rule 3.6(i) – for compliance with the “consistency” standard. A regulation (or a regulation incorporated by reference) that is adopted pursuant to a process that violates the due process requirements included in the Public Utilities

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<sup>53</sup> *Tidewater Marine Western, Inc. v. Bradshaw*, 14 Cal. 4th 557, 568-569 (1996) (internal citations omitted).

<sup>54</sup> *Id.* at 557, 569.

<sup>55</sup> Gov. Code § 11351; Pub. Util. Code § 311(h).

<sup>56</sup> *See* Cal Const, Art. XII § 2 (“Subject to statute **and due process**, the commission may establish its own procedures.”) (Emphasis added).

<sup>57</sup> *See, e.g., Ohio Bell Tel. Co. v. Public Utilities Com.*, 301 U.S. 292 (1937); *California Trucking Assn. v. Public Utilities Commission*, 19 Cal. 3d 240 (1977).

Code and in the Commission’s own procedural rules cannot be deemed to be “in harmony with, and not in conflict with or contradictory to, existing statutes, court decisions, or other provisions of law.”<sup>58</sup>

The procedural requirements established in the Public Utilities Codes and the Commission’s Rules of Practice and Procedure ensure due process in the Commission’s rulemaking process and protect fundamental rights established in the 5th and 14th Amendments to the United States Constitution. In *People v. Western Air Lines, Inc.*, the Supreme Court of California described the ongoing nature of the Commission’s procedural due process obligation: “Due process as to the commission's initial action is provided by the requirement of adequate notice to a party affected and an opportunity to be heard before a valid order can be made . . . . When the commission has acted and an interested party is dissatisfied due process is further afforded by the right of petition for a writ of review to this court.”<sup>59</sup> The Court further observed that “due process requirements of law are not for the sole benefit of an accused. They are the best insurance for the government itself against those blunders which leave lasting stains on a system of justice.”<sup>60</sup>

In D13-08-005, the Commission discussed the basic requirements for procedural due process, observing that “[w]hile there are no hard and fast rules for determining what is due process since the type of process that should be accorded may be elusive or ever changing, we can glean from the case law the following examples of due process that should be accorded the parties:

- Circulating materials to the interested parties before relying on that information to make findings. (*Louisiana Ass'n of Indep. Producers & Royalty Owners v. FERC* (D.C. Cir. 1992) 958 F.2d 1101, 1113.)
- Adequate notice for the basis of action. (*Brock v. Roadway Express* (1987) 481 U.S. 252.)
- Meaningful opportunity to be heard. (*Armstrong v. Manzo* (1965) 380 U.S. 545.)
- Opportunity to present evidence and argument. (*Rosa v. Bowen* (1988) 677 F. Supp. 782.).<sup>61</sup>

The Commission explained that the question of what constitutes sufficient due process in a given instance is “a matter of instinct,” noting that courts will apply a proverbial “smell test” to

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<sup>58</sup> Gov. Code § 11349(d).

<sup>59</sup> *People v. Western Air Lines, Inc.*, 42 Cal. 2d 621, 632 (1954).

<sup>60</sup> *Sokol v. Public Utilities Commission*, 65 Cal. 2d 247, 255 (1966).

<sup>61</sup> D.13-08-005, pp. 41-42 (footnote omitted).

agency conduct rather than precise legal rules to render a judgement on questions of due process.<sup>62</sup> In particular, a court will consider the totality of the circumstances behind adoption to inform its determination as to whether or not due process was accorded.

This holistic approach is reflected in the Court’s discussion of adequate notice, and its conclusion that while due process does not require a particular form of notice, the notice provided must be “reasonable.”<sup>63</sup> Notice is reasonable if it is “reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections.”<sup>64</sup> The notice must be designed “reasonably to convey the required information . . . and it must afford a reasonable time for those interested to make their appearance.”<sup>65</sup> Notice must “at a minimum, be reasonably calculated to afford affected persons the realistic opportunity to protect their interests.”<sup>66</sup>

The right to an opportunity be heard is, likewise, not susceptible to precise description. The California Supreme Court has made clear that “[t]he phrase ‘opportunity to be heard’ implies at the very least that a party must be permitted to prove the substance of its protest rather than merely being allowed to submit written objections to a proposal.”<sup>67</sup> The Commission acknowledged and reiterated this standard in D.96-12-036.<sup>68</sup> The Commission has also emphasized that the opportunity to be heard must be “meaningful,”<sup>69</sup> relying on *Armstrong v. Manzo*, 380 U.S. 545, which found that the opportunity to be heard “must be granted at a meaningful time and in a meaningful manner.”<sup>70</sup>

As the Court noted in *Western Air Lines, Inc.*, due process is not satisfied solely by adequate notice and a meaningful opportunity to be heard; it is also necessary that a dissatisfied party have the right to petition for a writ of review.<sup>71</sup> This necessitates that Commission decisions include findings on all material issues.<sup>72</sup> The Court has made clear that “[f]indings are essential to ‘afford a rational basis for judicial review and assist the reviewing court to ascertain

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<sup>62</sup> *Id.* at p. 41.

<sup>63</sup> *Pacific Gas & Electric Co. v. Public Utilities Com.*, 237 Cal. App. 4th 812, 860 (2015).

<sup>64</sup> *Mullane v. Cent. Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1950).

<sup>65</sup> *Id.* (citations omitted).

<sup>66</sup> *Horn v. County of Ventura*, 24 Cal. 3d 605, 617 (1979) (citations omitted).

<sup>67</sup> *California Trucking Assn. v. Public Utilities Commission*, 19 Cal. 3d 240, 244 (1977).

<sup>68</sup> D.96-12-036, p. 5.

<sup>69</sup> D.13-08-005, p. 42.

<sup>70</sup> *Armstrong v. Manzo*, 380 U.S. 545, 552 (1965).

<sup>71</sup> *People v. Western Air Lines, Inc.*, 42 Cal. 2d 621, 632 (1954).

<sup>72</sup> *Cal. Mfrs. Ass’n v. PUC*, 24 Cal. 3d 251, 258-259 (1979).

the principles relied upon by the commission . . . as well as assist parties to know why the case was lost and to prepare for rehearing or review . . .”<sup>73</sup> The Court has explained that “material issues” include every issue that must be resolved to reach the ultimate finding and also that “findings are required of the basic facts upon which the ultimate finding is based.”<sup>74</sup> The Court has observed that findings on material issues “help the commission avoid careless or arbitrary action,” pointing out that “[t]here is no assurance that an administrative agency has made a reasoned analysis if it need only state [its] ultimate finding . . .”<sup>75</sup>

Provisions of the Public Utilities Code, as well as the Commission’s own codified Rules of Practice and Procedure, ensure satisfaction of these due process requirements in Commission proceedings. They establish requirements for adequate notice, a “meaningful” opportunity to be heard, and a final decision that includes findings on material issues. Specifically, Rule 6.1 provides, *inter alia*, that the Commission may adopt or amend its rules, or amend its Rules of Practice and Procedure, by instituting a rulemaking proceeding.<sup>76</sup> Section 1701.1 requires the Commission to (i) assign a category to the proceeding; (ii) assign commissioner(s) to oversee the case and an administrative law judge (“ALJ”) when appropriate; (iii) schedule a prehearing conference; and (iv) prepare and issue a scoping memo that describes the issues to be considered and the applicable timetable for resolution and that, consistent with due process, public policy, and statutory requirements, determines whether the proceeding requires a hearing.<sup>77</sup>

The Commission must provide at least 10 days’ notice before holding an evidentiary hearing.<sup>78</sup> Parties have the right to present a final oral argument of its case before the Commission.<sup>79</sup> Pub. Util. Code Section 311(d) requires the proposed decision of the assigned Commissioner or ALJ to be filed with the Commission and served upon all parties to the action or proceeding, with a review and comment period of at least 30 days before it is voted on by the Commission. Section 311(g) provides that Commission decisions not subject to Section 311(d) must, likewise, be served on parties and subject to at least 30 days public review and comment. The proposed decision in a proceeding must be presented to the full Commission in a public meeting and the presentation to the full Commission must contain a record of the number of days of the hearing, the number of days that each commissioner was present, and whether the

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<sup>73</sup> *Id.*

<sup>74</sup> *Greyhound Lines, Inc. v. Public Utilities Com.*, 65 Cal. 2d 811, 813 (1967), (citing *California Motor Transport Co. v. Public Utilities Com.* (1963) 59 Cal.2d 270, 273; *Associated Freight Lines v. Public Utilities Com.* (1963) 59 Cal.2d 583).

<sup>75</sup> *California Motor Transport Co. v. Public Utilities Com.*, 59 Cal. 2d 270, 275 (1963).

<sup>76</sup> 20 CCR § 6.1.

<sup>77</sup> Pub. Util. Code §§ 1701.1(a)-(c) see also Rules 7.1, 7.2 and 7.3.

<sup>78</sup> Rule 13.1(a).

<sup>79</sup> Pub. Util. Code §§ 1701.3(i); 1701.4(d).



decision was completed on time.<sup>80</sup> Finally, Section 311(d) requires the final decision adopted by the Commission to set forth recommendations, findings, and conclusions.

The Commission did not comply with any of these requirements in adopting the Policy. The Policy establishes new rules and amends the Commission's procedural rules, but the Commission did not institute a rulemaking or follow any of the procedures set forth in Section 1701.1. The Commission did not seek to provide notice to interested parties by serving the draft policy on the RPP Service List or the service lists for any other relevant proceedings. Parties accustomed to the Commission's standard approach of serving notice of potential Commission rulemaking actions on relevant proceeding service list(s) would not have known to search the Commission's website for the draft policy. While some parties did ultimately discover the draft policy, this hardly constitutes proof of notice "reasonably calculated, **under all the circumstances**, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections."<sup>81</sup>

The Policy was not styled a "proposed decision of the assigned Commissioner or ALJ" as contemplated in 311(d) – but it was nevertheless clearly a Commission decision. Thus, under 311(g) it was required to be served for review and comment at least 30 days prior to being voted on by the Commission. The Commission violated this requirement by failing to serve the draft policy at all, and by posting it with the December 5, 2019 meeting materials only three days prior to the scheduled meeting. Likewise, including notice of the draft policy in the "Commissioner Reports" section of the December 5 meeting agenda rather than listing it with the proposed orders and resolutions interfered with parties' awareness of the pendency of the action. The notice provided by the Commission was plainly not "reasonably calculated to afford affected persons the realistic opportunity to protect their interests."<sup>82</sup> Thus, on this basis alone, it is clear that the Commission violated due process in adopting the Policy.

The Commission's due process deficiencies do not stop at notice, however. The timeline laid out in the Information Sheet for consideration of the Policy was five months.<sup>83</sup> This is an extraordinarily aggressive schedule given the complexities of the matter at hand. The timeline was inadequate to resolve the multiple policy and legal issues, including a potential constitutional issue related to regulatory takings, arising from the Policy. A full vetting of the issues with participation by interested stakeholders would likely involve a timeline at least triple that contemplated in the Information Sheet, if not longer. The five-month timeline described in the Information Sheet suggests an underestimation of the complexities of the issues and potential impacts to various interested parties including the IOUs, local agencies, ratepayers, and the tribes themselves. The time allotted did not permit an opportunity for briefing on legal issues,

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<sup>80</sup> Pub. Util. Code §§ 1701.3(e) and (f); 1701.4(b).

<sup>81</sup> *See Mullane v. Cent. Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1950) (emphasis added).

<sup>82</sup> *See Horn v. County of Ventura*, 24 Cal. 3d 605, 617 (1979).

<sup>83</sup> Information Sheet, p. 2.

including the Commission's authority to promulgate the regulations at issue, did not allow full consideration of other alternatives or adequately address several significant concerns raised by parties or others that might exist. While some parties met with the Commission and were permitted to submit written objections to the draft policy, this was not sufficient to prove the substance of their protests.<sup>84</sup> Thus the Commission failed to provide an opportunity to be heard "in a meaningful manner."<sup>85</sup>

Finally, the Policy violates the express admonition of the California Supreme Court in *California Motor Transport Co.*, against providing only the Commission's "ultimate finding" without including supporting findings on material issues and basic facts.<sup>86</sup> This omission also violates the requirement set forth in Pub. Util. Code Section 311(d) to include recommendations, findings, and conclusions in adopted decisions. The lack of findings in the Policy and the absence of a robust evidentiary record prevents a clear understanding of the principles relied upon by the Commission in rejecting parties' arguments and interferes with judicial review.<sup>87</sup>

The court strongly criticized an administrative decision with similar characteristics in *California Association of Nursing Homes, etc. v. Williams*, 4 Cal. App. 3d 800. At issue in the case was the validity of an administrative regulation establishing standards for determining the level of state payment for certain Medi-Cal patients.<sup>88</sup> The regulation had been adopted and amended five times as an emergency regulation.<sup>89</sup> An administrative petition was filed and a hearing held, with the petitioner, an association representing nursing homes, and another party presenting evidence. The agency presented no evidence to either support the existing regulation or to rebut the showing of complainants, and neither rejected the petition nor took action to amend the existing regulation.<sup>90</sup> The Medi-Cal administrator did not create a formal administrative record containing the evidence upon which he relied in adopting the regulation.<sup>91</sup>

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<sup>84</sup> See *California Trucking Assn. v. Public Utilities Commission*, 19 Cal. 3d 240, 244 (1977).

<sup>85</sup> See *Armstrong v. Manzo*, 380 U.S. 545, 552 (1965).

<sup>86</sup> See *California Motor Transport Co. v. Public Utilities Com.*, 59 Cal. 2d 270, 274 (1963).

<sup>87</sup> *Cal. Mfrs. Ass'n v. PUC*, 24 Cal., 3d 251, 258-259 (1979).

<sup>88</sup> *California Assoc. of Nursing Homes, etc. v. Williams*, 4 Cal. App. 3d 800, 805 (1970).

<sup>89</sup> *Id.* at 807.

<sup>90</sup> *Id.* at 809.

<sup>91</sup> *Id.* at 812.

On review, the agency argued that it had substantially complied with procedural due process requirements since the petitioner and its members had been involved in rate negotiations with agency staff and had access to materials considered in the negotiations.<sup>92</sup> The court rejected the claim that the agency's approach to promulgating the regulation in question complied with due process requirements. It noted that "[a]dministrative agencies have wide latitude in fashioning procedures and pursuing their methods of inquiry," but that "[p]rocedural elasticity cannot be stretched into disregard of the law's public hearing demand."<sup>93</sup> It admonished that "[p]rivate negotiations with selected members or representatives of an affected industry are no substitute for public hearings. There is a public interest in having the law obeyed. Directed by law to hold public hearings, government officials may not resort to invitational gatherings with selected members of an affected business. The participating firms and associations, however immediately affected, cannot waive the public's right of participation."<sup>94</sup>

It is clear in the instant case that the Commission's actions are highly problematic and render the Commission's action on the laudable goal of returning land to Tribes subject to challenge. The Commission failed to follow statutory requirements and violated its own rules in promulgating the regulations contained in the Policy. The court recently held that while Commission decisions enjoy a strong presumption of validity, the court "will annul a decision by the Commission if the Commission failed to comply with its own rules and the failure was prejudicial."<sup>95</sup> In the context of OAL review, the standard is less exacting – a finding of inconsistency with legal requirements by itself is grounds for disapproval of a proposed regulation. The Commission's approval of the Policy plainly violated its own procedural rules, as well as statutory requirements set forth in the Public Utilities Code and general principles of due process. Thus, the Policy fails the "consistency" standard and cannot be incorporated into Rule 3.6(i).

(ii) "Consistency" Standard

In addition to failing to comply with due process requirements, the Policy violates the "consistency" standard by: (i) establishing a preference for transfers under Pub. Util. Code Section 851 to specified parties that appears on its face to be inconsistent with the requirement set forth in Pub. Util. Code Sections 453 to refrain from granting preferences; and (ii) failing to include the analysis required by Pub. Util. Code Section 321.1.

The Policy establishes an express "preference for the transfer of Real Property to Tribes,"<sup>96</sup> and requires the IOUs to grant a ROFR to reflect this preference. However, Pub. Util.

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<sup>92</sup> *Id.* at 812-813.

<sup>93</sup> *California Assoc. of Nursing Homes*, 4 Cal. App. 3d at 800.

<sup>94</sup> *Id.* at 813.

<sup>95</sup> *Calaveras Telephone Co. v. Public Utilities Com.*, 39 Cal. App. 5<sup>th</sup> 972, 980 (2019).

<sup>96</sup> Policy, p. 2.

Code Section 453 provides: “No public utility shall, as to rates, charges, service, facilities, or in any other respect, **make or grant any preference**, or advantage to any corporation or person or subject any corporation or person to any prejudice or disadvantage.”<sup>97</sup> Thus, the Policy appears on its face to be inconsistent with the requirement of Section 453. The OAL does not consider arguments related to substantive issues arising from proposed regulations.<sup>98</sup> It is obligated, however, to evaluate whether aspects of the proposed regulation are “in conflict with, or contradictory to,” statutory requirements.<sup>99</sup> The Commission did not request briefing on this issue while considering the draft policy and did not include a finding regarding compliance with Section 453 in the adopted version of the Policy. Thus, OAL has no basis for resolving the apparent inconsistency. Accordingly, given the obvious conflict between Section 453 and the requirements of the Policy, the proposed regulation fails the consistency standard and disapproval of proposed Rule 3.6(i) is necessary to further the Legislature’s intent to prevent confusion<sup>100</sup> and to ensure the quality of adopted regulations.<sup>101</sup>

Section 321.1(a) of the Public Utilities Code requires the Commission to “assess the consequences of its decisions, including economic effects, and assess and mitigate the impacts of its decision on customer, public, and employee safety, as part of each ratemaking, rulemaking, or other proceeding . . .” Comments on the Policy raised concerns regarding the economic impact of the Policy, for example noting the potential dampening effect on infill and affordable housing development efforts,<sup>102</sup> the impact of the Policy on the ability to move forward with routine land transactions,<sup>103</sup> and transactional and external costs related to compliance.<sup>104</sup> These concerns were not addressed in the Policy, nor were safety concerns discussed, and the adopted version of the Policy contained no findings on these issues. While OAL will not seek to evaluate the merits of arguments presented on economic and safety issues, it must take into account that the Policy was promulgated without analysis of these issues, in contravention of express requirements set forth in Section 321.1. Given this conflict, the proposed Rule fails the consistency standard.

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<sup>97</sup> Pub. Util. Code Section 453(a) (emphasis added).

<sup>98</sup> Gov. Code § 11340.1(a).

<sup>99</sup> Gov. Code § 11349(d).

<sup>100</sup> Gov. Code § 11340(b).

<sup>101</sup> Gov. Code § 11340.1(a).

<sup>102</sup> *See, e.g.*, Letter from Clay Faber, Director, Regulatory Affairs, SDG&E to Commissioners Guzman Aceves and Shiroma, CPUC (October 28, 2019), p. 1.

<sup>103</sup> *See, e.g., id.* at pp. 2-3.

<sup>104</sup> *See, e.g., id.* at p. 4.

(iii) “Clarity” Standard

Under the APA, a regulation meets the “clarity” standard when it is "written or displayed so that the meaning of regulations will be easily understood by those persons directly affected by them."<sup>105</sup> Persons are "directly affected" by a regulation if they: “(1) are legally required to comply with the regulation; (2) are legally required to enforce the regulation; (3) derive from the enforcement of the regulation a benefit that is not common to the public in general; (4) incur from the enforcement of the regulation a detriment that is not common to the public in general.”<sup>106</sup> A regulation fails to meet the “clarity” standard if it exhibits, *inter alia*, any of the following deficiencies:

- It does not use citation styles that clearly identify published material cited in the regulation;<sup>107</sup>
- It conflicts with the agency's description of the effect of the regulation;<sup>108</sup>

It is clear that proposed Rule 3.6(i), as drafted, fails to ensure that the meaning of the regulations codified through adoption of the Rule will be easily understood by those persons directly affected by them. The universe of parties “directly affected” by the Policy is extremely broad. It includes all Commission-jurisdictional IOUs (*e.g.*, electric, water, sewer), all tribal interests within the State, landowners, local agencies, real estate development interests, ratepayer advocates, public safety advocates, low-income housing advocate, conservation advocates, etc. Very few of these stakeholders were involved in the Commission’s development of the Policy and many may be unaware of the Policy’s existence. The overly-generalized description of the proposed Rule included in the Draft Resolution will provide little assistance in understanding the implications of the regulations adopted under the Policy.

The most obvious impediment to a clear understanding of what is required under the proposed Rule is the fact that, rather than clearly enumerating the individual requirements adopted under the Policy in a manner similar to the requirements listed in Rule 3.6(a)-(h), the proposed Rule seeks to incorporate the new requirements promulgated in the Policy through reference to the Policy itself. While the CCR does permit inclusion of references to other documents in adopted regulations,<sup>109</sup> setting forth the *entirety* of a regulation in an external document such that the adopted regulation consists of little more than a reference to such external document is a questionable practice at best and, as discussed above, could constitute an

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<sup>105</sup> Gov. Code § 11349(c).

<sup>106</sup> 1 CCR § 16(b)(1)-(4).

<sup>107</sup> 1 CCR § 16(a)(6).

<sup>108</sup> 1 CCR § 16(a)(2).

<sup>109</sup> 1 CCR § 20(b).

improper end-run around statutory due process requirements. This approach is directly contrary to the Commission’s goal of transparency and fails to ensure “clarity” as required by the APA.

While the proposed Rule relies almost entirely on incorporation by reference of the Policy to establish the specifics of the adopted regulation, the proposed Rule fails to provide a legal citation to the Policy (since none exists) and does not otherwise indicate how a directly affected party would obtain the Policy or whether the Policy is subject to change. This would appear to violate the requirement that “citation styles . . . clearly identify published material cited in the regulation,”<sup>110</sup> and would most certainly interfere with the ability of directly affected persons to easily understand the meaning of regulations adopted in the proposed Rule.<sup>111</sup>

Even more problematic is the fact that the description of the conduct that proposed Rule 3.6(i) purports to regulate is far more limited in scope than what is actually contained in the Policy.<sup>112</sup> The proposed Rule is limited to “[a]pplications that involve the **sale** of real property . . .”,<sup>113</sup> whereas the Policy applies to many different types of dispositions, including but not limited to sales.<sup>114</sup> Similarly, the proposed Rule directs compliance only with “the **notice and communication requirements** set forth in the Commission’s Tribal Land Policy . . .”,<sup>115</sup> and makes no mention of the much more comprehensive compliance showing that is contemplated under the Policy to demonstrate IOU satisfaction of the requirements related to offering a ROFR and dispute resolution (*i.e.*, the IOU is required under the Policy to provide a ROFR and engage in dispute resolution, and would be required to include a showing regarding both in its Section 851 application as part of the notice and consultation showing). This inconsistency between the purported effect of the proposed regulation and the Commission’s description in the Policy of what is required improperly inhibits the “clarity” of the proposed Rule.<sup>116</sup>

The CCR requires that where a regulation incorporates an external document by reference, the regulation must specify *which* portions of the Policy are being incorporated by reference.<sup>117</sup> If the Commission’s intent is to limit enforcement of the Policy to the notice and communication requirements adopted therein, it should so state and expressly provide that all other aspects of the Policy will not be enforced. However, the Commission has not otherwise signaled that its intent is to reduce or eliminate obligations imposed by the Policy. Thus, the

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<sup>110</sup> See 1 CCR § 16(a)(6).

<sup>111</sup> See Gov. Code § 11349(c).

<sup>112</sup> See 1 CCR § 16(a)(6).

<sup>113</sup> Draft Resolution, Appendix A, p. A-16 (emphasis added).

<sup>114</sup> See Policy, p. 1, n. 2.

<sup>115</sup> Draft Resolution, Appendix A, p. A-16 - A-17 (emphasis added).

<sup>116</sup> See 1 CCR § 16(a)(2).

<sup>117</sup> 1 CCR § 20(c)(5) (emphasis added).

inconsistency between the Commission's apparent commitment to the Policy and the language of the proposed Rule creates an ambiguity that undermines regulatory certainty and compels a finding that Proposed Rule 3.6(i) fails to meet the "clarity" standard.

**D. *Adoption of Proposed Rule 3.6(i) Violates OAL Regulations***

While OAL regulations allow materials to be incorporated by reference, as noted above, OAL rules provide that agencies may incorporate proposed materials by reference "*only if*" certain specified conditions are met. Specifically, the agency must, among other things:

- Demonstrate in the final statement of reason that it would be cumbersome, unduly expensive, or otherwise impractical to publish the document in the CCRs;<sup>118</sup>
- Demonstrate in the final statement of reasons that the document was made available upon request directly from the agency, or was reasonably available to the affected public from a commonly known or specified source. In cases where the document was not available from a commonly known source and could not be obtained from the agency, the regulation shall specify how a copy of the document may be obtained;<sup>119</sup> and
- Specify in the regulation text which portions of the document are being incorporated by reference.<sup>120</sup>

The Commission has failed to meet these requirements in the Draft Resolution. Thus, it is prohibited from incorporating the Policy by reference into proposed Rule 3.6(i).

**CONCLUSION**

It is clear that prior process followed to adopt the Policy lacked due process. The Policy, its rules, and Draft Guidelines are highly problematic, may lead to unnecessary delays to public projects, and present unintended and/or un-evaluated impacts to ratepayers. Thus, for the reasons set forth herein, the Joint Utilities respectfully request modification of the Draft Resolution to delete proposed Section 3.6(i) in its entirety. To achieve the laudable goals underlying the Policy in a manner that satisfies due process requirements, the Commission should initiate a formal rulemaking that allows all interested parties to participate meaningfully in the development of a robust record comprehensively addressing the legal and policy issues arising from the Policy. The Commission should also issue a declaratory ruling clarifying that

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<sup>118</sup> 1 CCR § 20(c)(1).

<sup>119</sup> 1 CCR § 20(c)(2).

<sup>120</sup> 1 CCR § 20(c)(5).

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July 13, 2020  
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the Policy is not currently in effect pending resolution of the rulemaking and adoption of final tribal notification rules in the Commission's Rules of Practice and Procedure.

Respectfully submitted this 13<sup>th</sup> day of July, 2020.

/s/ Aimee M. Smith

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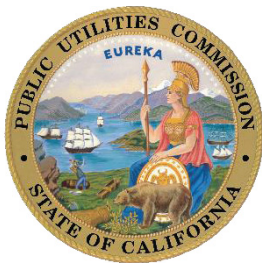
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# **Appendix A**

## **California Public Utilities Commission (CPUC) Proposed Tribal Land Transfer Policy – Information Sheet**



# Proposed Tribal Land Transfer Policy

California Public Utilities Commission – Information Sheet

Commissioner Guzman Aceves and Commissioner Shiroma, through the Commission’s Emerging Trends Committee have proposed a Tribal Land Transfer Policy that will require investor owned utilities (IOUs) to contact tribal governments and under the circumstances described in the proposed policy to provide a first right of refusal to tribes where an IOU proposes to divest surplus real property. This policy if adopted will provide Native American Tribes an opportunity to regain lands lost through bias and unfair means in the late 1800s/early 1900s.

## Background

The Commission adopted a Tribal Consultation Policy on April 26, 2019 of this year. The Commission’s Tribal Consultation Policy can be found at <https://www.cpuc.ca.gov/tribal/>.

This proposed Tribal Land Transfer Policy, consistent with Executive Order B-10-11, N-15-19, and the Commission’s Tribal Consultation Policy, is intended to further the Commission’s commitment “to provide meaningful input into the development of legislation, regulations, rules and policies on matters that may affect tribal communities.” The proposed policy was drafted after extensive consultation with a number of tribal representatives, the Governor’s Tribal Advisor, other state agencies, and stakeholders to address concerns that tribal governments have not had a meaningful opportunity to seek return of lands within their ancestral territory.

The proposed policy was first presented to the Commission during the May 29, 2019 Emerging Trends Committee meeting. Historical information on the taking of California Native American lands was presented by Dr. Beth Rose Middleton Manning. Christina Snider, Governor Newsom’s Tribal Advisor also provided comments on statewide policies directed at addressing historical wrongs suffered by California Native Americans, as well as adverse impacts that have carried over and are continuing to face California Native Communities. The Commissioners considered the information presented, the draft of the proposed policy and proposed schedule/next steps. The Emerging Trends Committee was directed to move forward with the proposed schedule/next steps.

The proposed Tribal Land Transfer Policy can be found at <https://www.cpuc.ca.gov/tribal/>.

## More Information and Next Steps

Interested stakeholders are encouraged to provide comments on the proposed policy. Information on the proposed Tribal Land Transfer Policy and the Emerging Trends Committee can be found at: <https://www.cpuc.ca.gov/emergingtrends/>.

Martha Guzman Aceves and Genevieve Shiroma are the Commissioners assigned to the Emerging Trends Committee. Information about Commissioner Guzman Aceves is available at: [www.cpuc.ca.gov/Guzman\\_Aceves](http://www.cpuc.ca.gov/Guzman_Aceves). Information about Commissioner Genevieve Shiroma is available at: <https://www.cpuc.ca.gov/Shiroma/>.

Tribal governments that would like to request specific consultation on the proposed Tribal Land Transfer Policy should contact the CPUC Tribal Liaison, Stephanie Green at:

**Email:** [stephanie.green@cpuc.ca.gov](mailto:stephanie.green@cpuc.ca.gov)

**Phone:** 415-703-5245

## Proposed Schedule/Next Steps

Outreach and notice of proposed policy to California Tribes	June- October 2019
Tribal Consultation Meetings	September -October 2019
<ul style="list-style-type: none"> <li>• Tuolumne Rancheria</li> <li>• Blue Lake Rancheria</li> <li>• Southern California</li> </ul>	September 16, 2019 <sup>1</sup> September 30, 2019 <sup>2</sup> TBD <sup>3</sup>
Public Comments on Proposed Policy	October 2019 <sup>4</sup>
Review and Consider Comments	September-October 2019
Proposed Policy on Commission Agenda for Vote	November 7, 2019

## How to Submit Comments

The public, tribal communities, and stakeholders are invited to submit comments (by email or U.S. mail) to:

**Address:** California Public Utilities Commission  
 Public Advisor's Office  
 505 Van Ness Ave., San Francisco, CA 94102  
**Email:** [public.advisor@cpuc.ca.gov](mailto:public.advisor@cpuc.ca.gov)

Please include in the Subject Line: "Comment on Proposed Tribal Land Transfer Policy". Comments on the proposed policy should be received by October 11, 2019. Additional time may be provided for comment as the Commission will be conducting additional outreach to consult with tribal communities and other stakeholders.

## Who to Contact with Questions?

If you have any questions, about the proposed Tribal Land Transfer Policy please contact:

Darcie Houck at [darcie.houck@cpuc.ca.gov](mailto:darcie.houck@cpuc.ca.gov) or Jonathan Koltz at [jonathan.koltz@cpuc.ca.gov](mailto:jonathan.koltz@cpuc.ca.gov) .

<sup>1</sup> Consultation for September 16, 2019 will be hosted by the Tuolumne Band of Me-Wuk Indians at the Black Oak Casino Hotel Conference, 19400 Norther Tuolumne Rd N, Tuolumne, CA 95379 from 10-4pm. See separate notice for further details.

<sup>2</sup> Consultation for September 30, 2019 will be hosted by the Blue Lake Rancheria at Sapphire Palace Blue Lake Rancheria, 428 Chartin Road, Blue Lake CA 95525 from 10-4pm. See separate notice for further details.

<sup>3</sup> A third consultation will be held in Southern California early October 2019. Additional details will b provided in a separate notice.

<sup>4</sup> Comments will continue to be accepted on a rolling basis through October 28, 2019. However, for purposes of considering comments fully in consideration of any revisions that may occur before the proposed policy is brought before the Commission for a vote interested stakeholders should plan to submit comments no later than October 11, 2019.

## **Appendix B**

California Public Utilities Commission (CPUC)

Draft Tribal Land Transfer Policy

Commissioner Guzman Aceves

May 29, 2019

**Commissioner Guzman Aceves**

**DRAFT**

**California Public Utilities Commission**

**Resolution # \_\_\_\_\_**

**Investor-Owned Utility Real Property- Land Disposition – First Right of Refusal for Aboriginal Properties to California Native American Tribes**

Resolution E- \_\_\_\_\_

On April 6, 2018, the California Public Utilities Commission (Commission) adopted a Tribal Consultation Policy. Consistent with the goals of the Tribal Consultation Policy and Executive Order B-10-11,<sup>1</sup> this policy provides a first right of refusal by California Native American tribes for: any future disposition<sup>2</sup> of real property currently owned by investor owned utilities (IOUs), including PG&E retained lands<sup>3</sup> pursuant to the Stipulation,<sup>4</sup> not contained within the boundaries of a Federal Energy Regulatory Commission (FERC) jurisdictional project .

Executive Order B-10-11 declares that “the State is committed to strengthening and sustaining effective government-to-government relationships between the State and the Tribes by identifying areas of mutual concern and working to develop partnerships and consensus.” The Executive Order directs state executive agencies and departments to “encourage communication and consultation with California Indian Tribes.” It further directs state agencies and departments “to permit elected officials and other representatives of tribal governments to provide meaningful input into the development of legislation, regulations, rules, and policies on matters that may affect tribal communities.”

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<sup>1</sup> Adopted September 19, 2011.

<sup>2</sup> The use of the terms “dispose of” and “disposition” in this Resolution refer to the transfer, sale, donation or disposition by any other means of a fee simple interest or easement in real property.

<sup>3</sup> All land currently retained by PG&E that is included in the LCP is referred to here as “retained land,” and all “retained land” located outside the boundaries of FERC jurisdictional projects is referred to here as “non-FERC jurisdictional retained land.”

<sup>4</sup> The Land Conservation Plan (LCP) was developed in accordance with the Settlement Agreement, dated December 19, 2003, among PG&E and the Commission and the related Stipulation Resolving Issues Regarding the Land Conservation Commitment (Stipulation). See D.03-12-035, D.08-11-043, D.10-08-004. Any transfers of utility property, including real property, require Commission approval pursuant to Public Utilities Code section 851. All further statutory code references refer to the Public Utilities Code unless otherwise noted.

As recognized in the Commission's Tribal Consultation Policy, California is home to over 170 California Native American tribes.<sup>5</sup> Executive Order B-10-11 applies to federally-recognized tribes and other California Native Americans. For purposes of this policy, the terms "tribes" and "tribal governments" refer to elected officials and other representatives of federally-recognized tribes and other California Native Americans.

This policy is to be read consistent with the Commission's Tribal Consultation Policy, which requires that the Commission: provide notification of Commission proceedings to tribes, encourage tribal participation in Commission proceedings, and meaningfully consider tribal interests and the protection of tribal sacred places and cultural resources.

This policy requires IOUs to notify the appropriate California tribe(s) at the time the IOU determines it will dispose of watershed properties or retained land located in or adjacent to a tribe's territory.<sup>6</sup> This policy adopts a preference for the transfer of non-FERC jurisdictional watershed and retained land to California tribes consistent with specific considerations, and to the extent that a conflict does not exist with applicable laws or regulations.

The Commission, in adopting this policy, recognizes that:

- The IOUs collectively own a significant amount of undeveloped watershed property located within the aboriginal territories of California tribes. This includes lands both within and without the FERC jurisdictional boundaries. Approximately 140,000 acres of undeveloped watershed property owned by PG&E was identified in the LCP. Some of this land has been transferred to third parties, is in the process of being transferred to third parties or is/will be retained by PG&E consistent with the Stipulation.
- California law and policy encourages consultation and cooperation with tribal governments, particularly concerning the protection of tribal sacred places and cultural resources.<sup>7</sup>

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<sup>5</sup> "California Native American tribe" means a Native American tribe located in California that is on the contact list maintained by the Native American Heritage Commission for the purposes of Chapter 905 of the Statutes of 2004. See Cal. Pub. Res. Code § 21073. California Native American tribes include both federally recognized tribes and tribes that are not recognized by the federal government. Nothing in the policy prevents tribes from consulting with other Native American groups that demonstrate an ongoing connection to a specific place or cultural resource, or issue falling under the jurisdiction of the Commission.

<sup>6</sup> Tribal territory is defined as the territory designated by the Native American Heritage Commission for notice of projects under AB 52. All notices and consultations required by this policy are to follow the timeframes set out in AB 52 for CEQA consultations.

<sup>7</sup> Consistent with California law and policy, a majority of the Commissioners individually expressed that they would like to see more of the Stewardship Council lands donated tribes. February 8, 2018 Commission Voting Meeting.

- These watershed properties hold historical and spiritual significance for California tribes: some of these lands include the remains of California Native Americans; others are places of spiritual and cultural importance where California Native Americans have prayed, held ceremonies, and gathered traditional and medicinal plants.
- Executive Orders, state laws, policies, and regulations acknowledge legal rights of access to certain lands and require state consultation with affected California Native American tribes prior to taking actions impacting such lands.

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

- Recognize and respect tribal sovereignty.
- Protect tribal sacred places and cultural resources.
- Ensure meaningful consideration of tribal interests and the return of lands within the tribe's aboriginal territory to the appropriate tribe.
- Encourage and facilitate notice and participation in matters before the Commission that involve land transfers subject to the Section 851 through either applications or advice letter processes.

The Commission's review of an IOUs request to dispose of watershed lands may affect tribes and tribal members in several ways, including, but not limited to: 1) impacts to land use activities on or near tribal communities; 2) the ability to protect and access tribal sacred places and cultural resources; and, 3) provide opportunities to return lands to California tribes that are within their tribal territories.

Facilitating Tribal Government Access to Information:

The Commission will encourage and facilitate tribal government access to information concerning matters before the Commission that involve watershed land transactions.

- The Commission will require the IOUs to notify tribal governments of any plans to dispose of watershed properties, including retained lands, within a tribe's territory.
- The Commission will give special consideration to tribal government requests to participate in Commission proceedings involving requests by IOUs in accordance with section 851 to dispose of watershed properties, including retained lands.

The Commission will grant a tribal government's request to become a party in such proceedings and consider the tribe's comments or protest of IOU's request for Commission approval of the transaction.<sup>8</sup> If an IOU fails to provide notice to the appropriate tribe(s) before submitting an application or advice letter requesting Commission approval of the transaction, the Commission will provide the tribe additional time to participate in the proceeding.

- Commission staff and Administrative Law Judges shall ensure that relevant information the Commission receives from a tribe is submitted into the record of a proceeding (including presenting such information to Commissioners where the land transfer is the subject of an advice letter), consistent with the confidentiality provisions set forth in the Commission's Tribal Consultation Policy.
- Where an IOU seeks approval to transfer non-FERC jurisdictional watershed property, including retained land, within a tribe's territory, the tribe shall be deemed the preferred transferee absent a finding supported by substantial evidence that it would be in the public interest to transfer the land to another entity.
- This policy applies to all proposed transfers of non-FERC jurisdictional watershed properties, including retained lands.

If an IOU submits an application or advice letter consistent with section 851 and relevant Commission decisions for the disposition of watershed property, including retained lands, the application or advice letter must include a showing of notice and consultation to the appropriate tribe(s) consistent with the identified tribal territory recognized by the Native American Heritage Commission.<sup>9</sup> This includes:

- A request to the Native American Heritage Commission to identify tribal entities interested in the area where the property being disposed of is located.
- Written notice of any proposed disposition of watershed properties, including retained lands in the Tribe's territory prior to any disposition of such land.
- Documentation of communication between the IOU and the Tribe regarding whether or not the Tribe is interested in acquiring the land at issue.

The Commission will grant the tribe a first right of refusal for any IOU requests to transfer non-FERC jurisdictional watershed property, including retained lands. There

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<sup>8</sup> This will include requests made through application or advice letter.

<sup>9</sup> The timeframes for notice and response set out in AB 52 will apply for purposes of this policy.



will be a rebuttable presumption that it is in the public interest to provide tribal entities the first opportunity to acquire such property.

For land transfers pursuant to section 851 for watershed property, including retained lands, located within a FERC jurisdictional project, the Commission will consider any request by a tribal entity, as well as comments regarding potential impacts on tribal cultural resources and suggested mitigation measures that should be included in any authorization of the Commission for the disposition of such assets as part of the proceeding.

Tribal Liaison:

Consistent with the Commission's Tribal Consultation Policy, the Commission's tribal liaison will assist in implementing this policy. The tribal liaison will act as a point of contact for tribes to seek advice on participating in proceedings and inquiries regarding pending section 851 applications/advice letters; filing documents; contacting Commissioners, advisors, or staff; and other related matters. The Tribal Liaison, Stephanie Green, can be contacted at [Stephanie.Green@cpuc.ca.gov](mailto:Stephanie.Green@cpuc.ca.gov) or (415) 703-5245 Alternatively, tribal governments may contact the Commission's Public Advisor for this assistance (E-mail: [Public.Advisor@cpuc.ca.gov](mailto:Public.Advisor@cpuc.ca.gov) or phone: (866) 849-8390).

## **Appendix C**

Rulemaking 11-11-007

Central CA Tribal Workshop and Consultation

Proposed Agenda 2019

## Proposed Agenda:

### Central CA Tribal Workshop and Consultation

Monday, September 16, 2019, 10 a.m. - 4 p.m.

Black Oak Casino Hotel Conference, 19400 Tuolumne Rd. N., Tuolumne, CA 95379

Hosted by the Tuolumne Me-Wuk

#### Welcome and Introductory Remarks (10:00-10:20am)

- Details and practicalities about how the workshop and consultation will be managed
- Staff report process

#### Telecommunications Session 10:20-12:00

- Introduction to the CA High Cost Funds and California High Cost Fund A Rulemaking 10 min
- Case studies and other public purpose programs 20 min
  - Other public purpose programs
    - CA Advanced Services Fund
    - CA Lifeline
  - Case studies
    - Warm Springs, OR
    - Havasupai, AZ using the Educational Broadband Service
- CA High Cost Fund A company presentations 15 min
- Discussion on Tribal and rural needs 15 min
- Group discussion and brainstorm 45 min

#### Lunch 12:00-1:00

#### START TRIBAL CONSULTATION NOT OPEN TO THE PUBLIC

#### Land Transfer Policy Session (1:00-2:00pm)

- Introduction
- Questions and answers
- Providing comments

#### Individual and Group Consultations (2:00-4:00)

- Contact Michael Minkus to schedule in advance: [Michael.Minkus@cpuc.ca.gov](mailto:Michael.Minkus@cpuc.ca.gov), 415-703-1681

#### No Remote Access

Currently workshop will not be remotely accessible. This information will be updated if streaming or remote participation options become available.

# Northern CA Tribal Workshop and Consultation Agenda

**When:** Monday, September 30, 2019, 10 a.m. - 4 p.m.

**Where:** Sapphire Palace Event Center at Blue Lake Rancheria  
428 Chartin Road, Blue Lake, CA 95525  
Hosted by the Blue Lake Rancheria

**TRIBAL WORKSHOP - OPEN TO THE PUBLIC – 10:00am-12:00pm**

## Remote Access

Meeting link: <https://bit.ly/2kcsTgw>

1-877-820-7831 Local access number

Meeting number: 712 118 635

1-720-279-0026 Access number

Password: bluelake

Attendee access code: 212 296

## Welcome and Introductory Remarks (10:00-10:20am)

- Details and practicalities about how the workshop and consultation will be managed
- Staff report process

## Telecommunications Session 10:20-12:00

- Introduction to the CA High Cost Funds and California High Cost Fund A Rulemaking 10 min
- Case studies and other public purpose programs 20 min
  - Other public purpose programs
    - CA Advanced Services Fund
    - CA Lifeline
  - Case studies
    - Warm Springs, OR
    - Havasupai, AZ using the Educational Broadband Service
- Provider presentations 15 min
  - CA High Cost Fund A companies
  - Other providers
- Discussion on Tribal and rural needs 15 min
- Group discussion and brainstorm 45 min

## Questions to Keep in Mind for the Telecommunications Session

### Current voice and broadband service

- What service does your community have now?
- For tribal government, or tribal and individual businesses?
- For residential?
- Does the service meet needs?

### Models and solutions

- Upgrade existing service?
- Nearby provider extends service?
- Start a Tribal enterprise?
- Are voice or broadband improvements needed, or both?
- For Tribal government, businesses, residences, or all three?

## Northern California R.11-11-007 Workshop and Tribal Consultation

**Lunch 12:00-1:00**

- Sapphire Palace will remain open to the public for networking during the lunch hour.
- Attendees will have an opportunity to pre-order lunches during the morning meeting for faster service and/or takeaway. Onsite lunch options are Alice's Restaurant and the Lily Pad Café.

**TRIBAL CONSULTATION - NOT OPEN TO THE PUBLIC – 1:00-4:00pm****Land Transfer Policy Session (1:00-2:00pm)**

- Introduction
- Questions and answers
- Providing comments

**Individual and Group Consultations (2:00-4:00)**

- Contact Michael Minkus to schedule in advance: [Michael.Minkus@cpuc.ca.gov](mailto:Michael.Minkus@cpuc.ca.gov), 415-703-1681

# Southern CA Tribal Workshop & Consultation Agenda

Rulingmaking 11-11-007

**When:** Friday, October 11, 2019, 10 a.m. - 4 p.m.

**Where:** Pechanga Resort Casino  
Summit Ballroom D  
45000 Pechanga Parkway  
Temecula, CA 92592  
Hosted by the Pechanga Band of Luiseño Indians

## TRIBAL WORKSHOP - OPEN TO THE PUBLIC – 10:00am-12:00pm

### Remote Access

Meeting link: <https://bit.ly/2m5j9oP>

1-877-820-7831 Local access number

Meeting number: 713 125 125

1-720-279-0026 Access number

Meeting password: pechanga

Attendee access code: 212 296

### Welcome and Introductory Remarks (10:00-10:20am)

- Details and practicalities about how the workshop and consultation will be managed
- Staff report process

### Telecommunications Session 10:20-12:00

- Introduction to the CA High Cost Funds and California High Cost Fund A Rulemaking 10 min
- Case studies and other public purpose programs 20 min
  - Other public purpose programs
    - CA Advanced Services Fund
    - CA Lifeline
  - Case studies
    - Warm Springs, OR
    - Havasupai, AZ using the Educational Broadband Service
- Provider presentations 15 min
  - CA High Cost Fund A companies
  - Other providers
- Discussion on Tribal and rural needs 15 min
- Group discussion and brainstorm 45 min

### Questions to Keep in Mind for the Telecommunications Session

#### Current voice and broadband service

- What service does your community have now?
- For tribal government, or tribal and individual businesses?
- For residential?
- Does the service meet needs?

#### Models and solutions

- Upgrade existing service?
- Nearby provider extends service?
- Start a Tribal enterprise?
- Are voice or broadband improvements needed, or both?
- For Tribal government, businesses, residences, or all three?

# Southern CA Tribal Workshop & Consultation Agenda

Rulingmaking 11-11-007

Lunch 12:00-1:00

TRIBAL CONSULTATION - NOT OPEN TO THE PUBLIC – 1:00-4:00pm

## Remote Access

- Contact Michael Minkus for remote access info for Tribes  
[Michael.Minkus@cpuc.ca.gov](mailto:Michael.Minkus@cpuc.ca.gov), 415-703-1681

## Land Transfer Policy Session (1:00-2:00pm)

- Introduction
- Questions and answers
- Providing comments

## Individual and Group Consultations (2:00-4:00)

- Contact Michael Minkus to schedule in advance  
[Michael.Minkus@cpuc.ca.gov](mailto:Michael.Minkus@cpuc.ca.gov), 415-703-1681

# **Appendix D**

Rulemaking 11-11-007

Administrative Law Judges' Ruling Noticing Workshops

September 10, 2019





A-17

MFM/HCF/gd2 09/10/2019

FILED

09/10/19  
10:32 AM**BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA**

Order Instituting Rulemaking into the  
Review of the California High Cost  
Fund-A Program

Rulemaking 11-11-007

**ADMINISTRATIVE LAW JUDGES' RULING NOTICING WORKSHOPS**

This ruling informs interested parties about upcoming workshops to address Item 3 in the Fourth Amended Assigned Commissioner's Scoping Memo and Ruling of March 22, 2019. Item 3 was titled "Low Income and Rural Tribal Communities".<sup>1</sup>

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<sup>1</sup> Tribal communities, that may or may not reside in Indian country, in rural areas that typically are not adequately served by broadband. Indian country is defined in the 18 USC § 1151 as, *Except as otherwise provided in sections 1154 and 1156 of this title, the term "Indian country", as used in this chapter, means (a) all land within the limits of any Indian reservation under the jurisdiction of the United States Government, notwithstanding the issuance of any patent, and, including rights-of-way running through the reservation, (b) all dependent Indian communities within the borders of the United States whether within the original or subsequently acquired territory thereof, and whether within or without the limits of a state, and (c) all Indian allotments, the Indian titles to which have not been extinguished, including rights-of-way running through the same.* California has the highest population of Native Americans in the country. See <https://www.census.gov/content/dam/Census/library/publications/2012/dec/c2010br-10.pdf> A significant portion of this population resides in Northern California, both within and outside of Indian country. California's Native American population includes federally recognized and non-recognized tribal communities that are underserved by telephone and broadband (advanced) services. Tribal governments also require such services and often are in the position of providing necessary services such as medical, housing, primary economic development services and employment opportunities for community members. This proceeding will investigate how to better serve these communities; including tribal governments, businesses, and individuals.

## 1. Background

The Commission began a review of the California High Cost Fund-A (CHCF-A) program with the Order Instituting Rulemaking (OIR) R.11-11-007. The Fourth Amended Assigned Commissioner's Scoping Memo and Ruling set forth the category, revised the issues to be addressed, and schedule of the proceeding pursuant to Public Utilities (Pub. Util.) Code § 1701.1 and Article 7 of the Commission's Rules of Practice and Procedure.

## 2. Tribal Consultations and Workshops

The Commission will be conducting three workshops (proceeding tribal consultations):

1. Central California Workshop hosted by the Tuolumne Me-Wuk on September 16, 2019;
2. Northern California Workshop September 30, 2019 hosted by the Blue Lake Rancheria; and
3. Southern California workshop and tribal consultation is anticipated in October 2019.

Parties to this proceeding and representatives from tribal communities in California are encouraged to participate. Only California tribes can participate in the consultation. A flyer is attached with additional details about the consultations.

More information is available at: <https://www.cpuc.ca.gov/tribal/>.

EVENT	DATE
<p><b>Central California Workshop and Consultation - Tuolumne, CA</b>            Black Oak Casino Hotel Conference            19400 Tuolumne Road N,            Tuolumne, CA 95379            Hosted by the Tuolumne Me-Wuk</p>	<p>Monday, September 16, 2019,            10:00 a.m. - 4:00 p.m.</p>

<b>Northern California Workshop and Consultation - Arcata, CA</b> Sapphire Palace at Blue Lake Rancheria 428 Chartin Road, Blue Lake, CA 95525 Hosted by the Blue Lake Rancheria	Monday, September 30, 2019, 10:00 a.m. - 4:00 p.m.
<b>Southern California Workshop and Consultation - TBD</b>	Anticipated October, 2019

**IT IS RULED that:**

- Parties are hereby informed about an upcoming workshops, September 16, 2019, and September 30, 2019.

Dated September 10, 2019, at San Francisco, California.

/s/ MARY MCKENZIE  
 Mary McKenzie  
 Administrative Law Judge

/s/ HAZLYN FORTUNE  
 Hazlyn Fortune  
 Administrative Law Judge