

**BEFORE THE ENVIRONMENTAL APPEALS BOARD
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY**

IN RE:)
PIO PICO ENERGY CENTER, LLC) PSD Appeal Nos. 12-04, 12-05 & 12-06
PSD Permit No. SD 11-01)

**PIO PICO ENERGY CENTER LLC’S SUPPLEMENTAL BRIEF IN RESPONSE TO
THE BOARD’S ORDER OF APRIL 5, 2013**

Pio Pico Energy Center, LLC (“Pio Pico”) submits this supplemental brief in response to the Board’s order of April 5, 2013 seeking additional information regarding the ramifications of the California Public Utilities Commission (“CPUC”) decision of March 21, 2013. CPUC, Decision Determining San Diego Gas & Electric Company’s Local Capacity Requirement and Granting Partial Authority to Enter Into Purchase Power Tolling Agreements, Appl. 11-05-023 (Mar. 21, 2013) (“CPUC Decision”). Specifically, the Board posed the following questions:

1. Will Pio Pico construct the plant even without a CPUC-approved power purchase tolling agreement (“PPTA”) with San Diego Gas & Electric Company (“SDG&E”)?
2. If so, whether the nature, purpose, and design parameters of the plant will change or remain as they were originally proposed in Pio Pico’s Prevention of Significant Deterioration (“PSD”) permit application and as permitted by EPA Region IX?
3. Whether Pio Pico is likely to begin construction of the plant within 18 months?
4. Whether the Region would have conducted its Best Available Control Technology (“BACT”) analysis differently “absent Pio Pico’s contractual obligation” with San Diego Gas & Electric Company (“SDG&E”) under the PPTA?
5. Whether a decision on the petitions for review are necessary or whether it would be merely advisory?

Order Scheduling Status Conference and Directing Parties to Provide Additional Information, Dkt. No. 22 (Apr. 5, 2013) (“Order”) at 2, 4-6. The Order also questioned whether it is appropriate to stay the permit appeals or remand the matter back to the Region. Id. at 2-4. Pio Pico responds as follows to the Board’s questions:

1. Pio Pico will proceed with constructing the plant, assuming that EPA Region 9’s decision to issue the plant’s PSD permit is upheld by the Board. Pio Pico has all of the state and local agency approvals required to build and operate the plant and sell electricity into the wholesale power market, under any short term contracts or under a PPTA. Furthermore, as described further below, Pio Pico is negotiating an amended PPTA to conform with the CPUC Decision.
2. The nature, purpose, and design parameters of the Pio Pico plant will remain the same as the design reviewed and permitted by EPA Region 9.
3. Pio Pico plans to begin construction early in the first quarter of 2014, well within 18 months of the PSD permit being issued by EPA, assuming that this Board denies the petitions for review.
4. The PPTA will be amended to show a new delivery date for electricity, consistent with the CPUC Decision. Thus, this amendment does not impact the Region’s BACT analysis.
5. A timely decision on the petitions for review is still necessary. The CPUC Decision did not change the nature, purpose, or design parameters of the plant and Pio Pico currently plans to begin construction of the plant in the first quarter of 2014. Therefore, Pio Pico requests the Board to render a decision on the petitions for review on the current record and the briefs submitted by the parties, including the supplemental briefing submitted in response to the Board’s April 5, 2013 order.

Further details on Pio Pico's responses to the Board's questions are provided below, including a declaration by Pio Pico's President, Gary R. Chandler, and a letter from SDG&E.¹

I. Pio Pico Plans to Proceed With Construction

Pio Pico plans to begin construction on the plant early in the first quarter of 2014. See Exh. 1, Declaration of Gary Chandler ("Chandler Decl.") at ¶ 6. Under California law, Pio Pico has all of the state and local approvals required in order to construct and operate the plant as well as sell electricity into the California wholesale market and under any short term contracts or an approved PPTA. Id. at ¶6. As discussed below, the CPUC Decision has no legal impact on Pio Pico's ability to construct and operate the proposed plant. Further, Pio Pico and SDG&E are currently working to amend the PPTA, ensuring that Pio Pico will have a specific, long-term customer for its peaking generation.

A. The CPUC Decision Does Not Prevent Pio Pico from Constructing and Operating the Proposed Plant

The CPUC Decision had no legal impact on Pio Pico's ability to construct and operate the proposed plant. The CPUC regulates SDG&E, not Pio Pico, and has no jurisdiction over the approvals already issued to Pio Pico for the construction and operation of the plant. See Cal. Publ. Utilities Code §§ 216(a), 701 (CPUC has jurisdiction over only electrical utility companies that deliver electricity to the public). In this instance, SDG&E required the CPUC's approval to

¹ This Board has "in appropriate circumstances ... considered new evidence submitted on appeal demonstrating apparently changed circumstances...." In re Cape Wind Assocs., Inc., OCS Appeal No. 11-01 (EAB May 20, 2011), Slip Op. at 15. In the Cape Wind decision, the Board found that, after briefing on the petition for review concluded, it was appropriate to consider a declaration submitted by the permit applicant rebutting petitioners' new claims and describing how it would respond to changed circumstances. Id. at 16 ("it is similarly appropriate for the Board to consider the declaration Cape Wind submitted regarding its intention to construct facility as described in its permit application."). Such "appropriate circumstances" are present here. The attached declaration regarding the response of both Pio Pico and SDG&E to the CPUC decision will be informative to the Board, satisfy its request for additional information, and are necessary to correct misstated facts and erroneous assumptions in Sierra Club's response. Furthermore, the decision's potential impact on the Pio Pico PSD permit is a question of law. No further technical fact finding is required by EPA Region 9 to determine if the CPUC decision, and related subsequent proceedings, should impact the Region's analysis of the PSD permit application.

enter into the PPTA, which is a long term purchase agreement with Pio Pico to buy power and ancillary services from the proposed plant. Cal. Publ. Utilities Code §§ 365.1, 454.5(b) - (d). Since Pio Pico is not a public utility subject to the CPUC's jurisdiction, it does not need the CPUC's approval to construct and operate the plant or to sell power into the wholesale market or enter into short term contracts for the sale of capacity or energy.

To construct and operate the proposed plant, Pio Pico was required to obtain a license from the California Energy Commission ("CEC"). See Cal. Publ. Res. Code § 25500 (The CEC has exclusive state authority to certify the construction of thermal powerplants); 20 Cal. Code Reg., tit. 20 § 1701 (same). Under California law, the CEC undertakes an expansive review of a proposed powerplant's environmental impacts, site suitability, and alternatives. See Cal. Code Reg., tit. 20 §§ 1704 and Appx. A, 1742-1744 (information required in application to construct); id. §§ 1752, 1752.3, 1752.5 (decision must include findings of facts, conclusions of law, and mitigation measures related to environmental impacts); id. § 2027 (Commission staff report must review environmental impacts, electrical system impacts, related mitigation measures, and site availability and alternatives). The Commission issued Pio Pico a license to construct and operate the proposed plant on September 12, 2012 based on its 558 page decision document. See Commission Decision, Dkt. No. 11-AFC-01, CEC-800-202-003-CMF (Sept. 2012), available at, <http://www.energy.ca.gov/2012publications/CEC-800-2012-003/CEC-800-2012-003-CMF.pdf> (last visited Apr. 11, 2013). Pio Pico also received an air quality permit from the San Diego County Air Pollution Control District. Chandler Decl. ¶ 5. Furthermore, Pio Pico executed a Large Generator Interconnection Agreement with the California ISO that allows Pio Pico to connect to the electrical system grid. Id. This provides for full deliverability of all generation to

the California ISO grid. Id. Aside from the PSD permit, these are the only agency approvals required to construct and operate the plant and to sell electricity. Id.

B. Pio Pico and SDG&E are Amending and Re-Submitting the PPTA in Accordance with the CPUC Decision

Although the CPUC Decision does not affect Pio Pico's ability and intent to construct and operate the proposed plant, Pio Pico and SDG&E are negotiating an amended PPTA to conform with the CPUC's Decision. Chandler Decl. at ¶ 9; Exh. 2, Letter from James P. Avery, SDG&E (Apr. 5, 2013) ("SDG&E Letter") at 1. This amended PPTA will be re-submitted to the CPUC for its approval by May 2013. Chandler Decl. at ¶ 9; SDG&E Letter at 1.

1. The CPUC Decision Ordered SDG&E to Procure New Power Generation for Delivery in 2018

SDG&E applied for the CPUC's approval of three PPTAs, including its PPTA with Pio Pico, that would add new electric generating capacity beginning in mid-2014 to meet system adequacy requirements for the year 2015. CPUC Decision at 3, 14. The CPUC denied SDG&E's application, without prejudice, finding that additional generating capacity would not be needed until 2018. Id. at 2, 14.

The Sierra Club misunderstands the CPUC Decision in two respects. First, it incorrectly claims that that the CPUC found that the Pio Pico plant "is not needed in the near term (if ever)..." Response to Pio Pico Energy Center LLC's Notice of Supplemental Information, PSD Appeal No. 12-04, et seq., Dkt. No. 20.01 (Mar. 26, 2013) ("SC Resp.") at 2. To the contrary, the CPUC ordered SDG&E to procure new generation for delivery in 2018: "we direct SDG&E to procure up to 298 MW of local capacity to come on-line beginning in 2018." CPUC Decision at 18 (emphasis added). The CPUC expressly stated that this directive may be accomplished by

amending the Pio Pico PPTA “to correspond to the identified need.” *Id.* The CPUC’s determination that SDG&E may enter into an amended PPTA with Pio Pico could not be clearer.

Second, Sierra Club errs in claiming that “the CPUC rejected the idea that the [Pio Pico] plant was needed to support integration of renewable generation.” SC Resp. at 2. Such a claim is clearly belied by the CPUC’s order that SDG&E must procure new generation and that amending its PPTA with Pio Pico was an acceptable option. Sierra Club’s claim is further contradicted by the CPUC Decision’s explanation that “the particular operational characteristics of resources that are needed to support renewable resources integration” is “currently before the Commission in the 2012” Long Term Procurement Plan. CPUC Decision at 18. Thus, contrary to the Sierra Club’s claim, the CPUC Decision stated only that this issue is being considered in a separate proceeding that is still pending. Nothing in the language quoted by Sierra Club can overcome the CPUC’s order that SDG&E must procure additional power by 2018 and that amending its PPTA with Pio Pico could satisfy this order. CPUC Decision at 14, 18, 25-26.

2. SDG&E and Pio Pico Will Amend the PPTA in Compliance with the CPUC’s Order

In order to comply with the CPUC’s order, SDG&E and Pio Pico are currently negotiating an amendment to the PPTA to incorporate the CPUC Decision’s mandate for the revised delivery date. Chandler Decl. at ¶ 9; SDG&E Letter at 1. Once an agreement is concluded, SDG&E will re-submit the PPTA to the CPUC for its approval. Chandler Decl. at ¶ 9; SDG&E Letter at 1. SDG&E clearly needs the additional peaking generation that Pio Pico’s proposed plant will offer: “SDG&E anticipates that additional local capacity and peaking generation will be required by SDG&E, as directed by the CPUC, and to support renewable generation resources, such as wind turbines and solar plants ... This is especially important as SDG&E brings more wind and solar facilities on line to meet California’s Renewable Portfolio

Standards.” Id. Further, SDG&E and Pio Pico are currently negotiating the use of Resource Adequacy contracts that would allow SDG&E to receive electricity from the proposed plant when it comes on-line in mid-2015 until the amended PPTA becomes effective. Chandler Decl. at ¶ 10. Resource Adequacy contracts are short-term, one-year agreements that do not require CPUC approval. Id. These contracts will allow SDG&E to bridge the gap between mid-2015 and the amended PPTA’s delivery date. Id. Although Pio Pico maintains that the Clean Air Act does not require an applicant to demonstrate a “need” for its product as a condition for obtaining a PSD permit, SDG&E is committed to purchase electricity from the proposed Pio Pico plant.

II. The Proposed Plant Will Retain the Same Nature, Purpose, and Design

Nothing about the nature, purpose, and design of the Pio Pico plant will change. Chandler Decl. at ¶ 7. The proposed plant will still supply peaking generation, using three nominal 100 megawatt General Electric LMS-100 combustion turbine generators. Id.; EPA Region 9, Fact Sheet and Ambient Air Quality Impact Report, Pio Pico Energy Center, PSD Permit Number SD 11-01 (June 2012) (“Fact Sheet”) at 3. The CPUC Decision did not impact any design or operational criteria, only the PPTA’s delivery date. CPUC Decision at 14. The CPUC considered no other aspect of the proposed plant. See id. at 4 (the “issues to be determined in the proceeding” included only the need for additional generation, whether the PPTAs were cost-effective and reasonable, and the rate treatment for the PPTAs). Thus, the Pio Pico plant will have the same nature, purpose, and design as it was permitted by EPA Region 9.

At the April 11, 2013 hearing before this Board, counsel for Sierra Club appeared to dispute that Pio Pico would actually be constructed and operated as a peaking plant, seeming to infer that Pio Pico may be operated as an “intermediate” baseload generation unit. Although Sierra Club’s argument is not particularly clear, Pio Pico will construct and operate the proposed plant exactly as described in its PSD permit and comply with the limitations on the number of startups per

year, annual operating hours, and fuel quantity limitations. See PSD Permit No. SD 11-01 at C.3, D.1. As discussed above, nothing about the CPUC Decision impacts the nature, purpose, and design parameters of the plant. Further, to the extent that Sierra Club argues that Pio Pico would operate the proposed plant differently than as described in the PSD permit, Sierra Club failed to raise this argument in its petition for review. See Sierra Club, Petition for Review, PSD Appeal No. 12-04, Dkt. No. 3 at 11-12. Therefore, Sierra Club has waived any such argument.

III. Pio Pico Plans to Begin Construction in 2014

Should the Board deny the petitions for review, and EPA issue the final PSD permit, Pio Pico currently plans to begin construction of the proposed plant early in the first quarter of 2014. Chandler Decl. ¶ 6. Pio Pico has arranged for financing for the project, contracted with an engineering, procurement and construction contractor, and ordered equipment for the plant, including the plant's transformers and combustion turbine generators. Id. Pio Pico understands that, in accordance with 40 C.F.R. § 52.21(r)(2), it must "commence construction" within 18 months of receiving its permit and is fully committed to doing so. In fact, Pio Pico seeks to obtain its PSD permit in a timely manner in order to maintain its construction schedule. Chandler Decl. ¶ 8.

IV. Amending the PPTA's Delivery Date Will Not Impact the Region's BACT Analysis

Changing the PPTA's delivery date will not impact the Region's BACT analysis for the proposed plant. Pio Pico applied to construct a peaking generation plant, meaning that it will supply electricity at times of peak electricity demand, follow rapid changes in demand, and be shut down at other times. Fact Sheet at 10 n.3; In re Kendall New Century Development, 11 E.A.D. 40, 50-51 (EAB 2003) (explaining function and purpose of a peaking plant). As explained above, an amendment to the PPTA's delivery date will change nothing about the proposed plant's nature, purpose, or design. Therefore, if Pio Pico's PSD permit were remanded

for another BACT analysis, Region 9 would have no new material information to consider. Finally, as noted above, Pio Pico plans to commence construction of the plant in early 2014. This is well within the PSD program's requirement to commence construction within 18 months of the permit's issuance. The plant will then operate and sell power into the California wholesale electricity market and/or enter into short term resource adequacy contracts with SDG&E until SDG&E accepts power from the plant under the amended PPTA. Therefore, changing the PPTA's delivery date will not result in the Region's BACT analysis becoming "stale."

Sierra Club claims that, "[i]f the plant as permitted was unrelated to the contract with SDG&E ... the Region's permitting basis, public comments, the response to comments, and the parties' arguments to the Board would have been entirely different." SC Resp. at 2. The Sierra Club's assertions are incorrect for two reasons. First, Pio Pico must still, as a contractual matter, build the plant so that it complies with the technical requirements of SDG&E's 2009 Request for Offer. See Fact Sheet at 16 (describing Request for Offer contractual requirements). Thus, Pio Pico's nature, purpose, and design are not "unrelated to the contract" as Sierra Club claims.

Second, the existence (or absence) of a contract with SDG&E is not germane to Sierra Club's comments or arguments. Sierra Club's comments argued that a combined cycle combustion turbine is technologically feasible for supplying peaking generation, Public Comments of Sierra Club (July 24, 2012) at 2-5, as did its petition for review. Sierra Club, Petition for Review, PSD Appeal No. 12-04, et seq., Dkt. No. 3 (Dec. 19, 2012) at 13-18. Although the Region's Fact Sheet and Response to Comments document discussed SDG&E's requirements, those requirements are typical for peaking facilities: the proposed plant will operate intermittently, it may be required to start up and shut down multiple times per day, respond to rapid changes in demand, not operate at all on other days, and it must scale through a range of loads. See Fact

Sheet at 21; EPA, Responses to Public Comments on the Proposed Prevention of Significant Deterioration Permit for the Pio Pico Energy Center (Nov. 2012) (“RTC”) at 14-16; see also In re Kendell New Century Development, 11 E.A.D. at 50-51 (providing similar description of peaking generating facilities); PSD Permit No. SD 11-01 at C.3, D.1 (limiting the number of plant startups per year and limiting hours of operations through fuel quantity limitations).

With or without SDG&E’s contractual specifications, Sierra Club’s arguments would remain the same: the Region improperly rejected the use of a combined cycle combustion turbine for a peaking generation facility. Sierra Club’s arguments will stand or fall based on a technical comparison of simple cycle turbines and combined cycle turbines. See RTC at 27-30 (discussing distinctions in functions and capabilities of both types of turbines). Nothing about the PPTA’s delivery date impacts this technical analysis. Thus, remanding the PSD permit back to the Region for another BACT analysis would be unnecessary and wasteful.

Further, Sierra Club’s argument, if accepted, would mark a major change in this Board’s interpretation of the PSD program. It is well established that the applicant defines the purpose and core design aspects of its proposed facility. See Prairie State Generating Co., 13 E.A.D. 1, 20 (EAB 2006), aff’d sub nom., Sierra Club v. EPA, 499 F.3d 653 (7th Cir. 2007) (“Congress intended the permit applicant to have the prerogative to define certain aspects of the proposed facility that may not be redesigned through application of BACT...”). In its Fact Sheet and Response to Comments document, the Region explained to the public why Pio Pico proposed a peaking generation facility and why it selected specific equipment to meet that role; however, the PSD program did not obligate the Region to verify Pio Pico’s technical conformance with SDG&E’s Request for Offer. This Board has never conditioned an applicant’s right to define its proposed source through verification that the applicant designed it in accordance with a third

party's specifications. As the Board previously stated, it is Pio Pico that "defines the proposed facility's end, object, aim, or purpose – that is the facility's basic design," *id.* at 22, not SDG&E. Pio Pico proposed to construct a peaking plant, using a simple cycle turbine that is appropriate for that role. *See* RTC at 27-30. The Board should reject Sierra Club's contention that Pio Pico's right to define its proposed source hinges on SDG&E's Request for Offer.

V. A Decision by This Board is Still Necessary

For the reasons described above, the CPUC Decision did not change the nature, purpose, or design of the proposed plant, Pio Pico's commitment to construct and operate the proposed plant, or the Region's BACT determination. Given Pio Pico's need to begin construction early in the first quarter of 2014, it hereby requests that the Board render a decision on the petitions for review, using the current record, as expeditiously as possible. *See* Chandler Decl. ¶ 8.

CONCLUSION

For the reasons stated above, there is no need or basis for the Board to either stay these proceedings or remand Pio Pico's PSD permit to the Region for further consideration. Pio Pico requests the Board to continue its consideration of the petitions for review.

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Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on the 15th day of April 2013, copies of the foregoing Supplemental Brief in Response to the Board's Order of April 5, 2013 were served by First Class mail to the following:

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