

BEFORE THE ENVIRONMENTAL APPEALS BOARD

U.S. ENVIRONMENTAL PROTECTION AGENCY  
WASHINGTON, D.C.

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ORDER SCHEDULING STATUS CONFERENCE

ENVIR. APPEALS BOARD

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


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ORIGINAL

Thursday,  
April 11, 2013

Administrative Courtroom  
Room 1152  
EPA East Building  
1201 Constitution Avenue, NW  
Washington, D.C.

The above-entitled matter came on  
for hearing, pursuant to notice, at 1:00 p.m.

BEFORE:

THE HONORABLE KATHIE A. STEIN  
Environmental Appeals Judge

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APPEARANCES:On Behalf of the Pio Pico Energy  
Center, LLC:

JIM WEDEKING, ESQ.  
DAVE BUENTE, ESQ.  
of: Sidley Austin, LLP  
1501 K Street, NW  
Washington, DC 20005  
(202) 736-8281

On Behalf of the Environmental  
Protection Agency Region IX:

JULIE WALTERS, ESQ.  
of: Environmental Protection Agency  
Office of Regional Counsel  
Region IX  
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San Francisco, CA 94105-3901

and

BRIAN DOSTER, ESQ.  
of: Environmental Protection Agency  
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APPEARANCES (continued):

On Behalf of the Sierra Club:

                  JOANNE SPALDING, ESQ.  
                  TRAVIS RITCHIE, ESQ.  
of: Sierra Club  
                  85 Second Street  
                  San Francisco, CA 94105  
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and

                  DAVID C. BENDER, ESQ.  
of: McGillivray, Westerberg & Bender  
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On Behalf of Robert Simpson  
and Helping Hand Tools:

                  ROBERT SIMPSON  
                  27126 Grandview Avenue  
                  Hayward, CA 94542  
                  (510) 688-8166

ALSO PRESENT:

Nivea Berrios, Senior Counsel, EAB  
Suzanne Krolikowski, Senior Counsel, EAB  
Eurika Durr, Clerk of the Board

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1 P-R-O-C-E-E-D-I-N-G-S

2 (1:02 p.m.)

3 MS. DURR: All rise.  
4 Environmental Appeals Board of the United  
5 States Environmental Protection Agency is now  
6 in session for a status conference in re Pio  
7 Pico Energy Center.

8 Permit Number SD 11-01, EPA PSD  
9 Appeal Numbers 12-04, 12-05, and 12-06.  
10 Honorable Judge Kathie Stein presiding.

11 Please turn off all cell phones,  
12 and recording devices are not allowed. Please  
13 be seated.

14 JUDGE STEIN: Good morning,  
15 everyone. I'm Judge Stein serving as the lead  
16 Judge in this particular matter. And with me  
17 on my left is Nivea Berrios, Senior Counsel  
18 for the Board, and Suzanne Kolikowski, another  
19 Senior Counsel for the Board.

20 We decided to schedule the status  
21 conference in response to a flurry of motions  
22 that we were receiving. We thought the most

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1 productive way to proceed would be to hear  
2 from you today, followed by submissions which  
3 are due next week so the Board can try and  
4 make an informed decision as to what next  
5 steps to take.

6 This matter has been under active  
7 consideration by the Board. We understand  
8 this is an important matter for all parties  
9 concerned and we appreciate your flexibility  
10 for being here today.

11 I'd like to begin by asking  
12 everyone to introduce themselves and their  
13 clients who may be present with them. And I  
14 think we'll start here in Washington and then  
15 we will proceed to Region IX and I believe we  
16 have people on the phone from Wisconsin and  
17 California and Australia.

18 Following introductions, I'm going  
19 to ask to hear first from the attorneys for  
20 Pio Pico; second, from the Region/General  
21 Counsel's Office; thirdly, from Sierra Club;  
22 and, fourthly, from Mr. Simpson. I don't

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1 believe we have anyone here from Helping  
2 Hands, but anyone can correct me if I'm wrong.  
3 And why don't we begin with Pio Pico.

4 MR. WEDEKING: Good morning.  
5 Thank you for Pio Pico. Do you want me to  
6 come up --

7 JUDGE STEIN: Why don't you  
8 just --

9 MR. WEDEKING: Okay. Also from  
10 Pio Pico is Dave Sandler and David Buente.

11 MR. SANDLER: Good morning. Dave  
12 Sandler and Dave Buente from Sidley Austin.

13 JUDGE STEIN: Thank you.

14 MR. DOSTER: Brian Doster from the  
15 EPA Office of General Counsel.

16 JUDGE STEIN: Thank you.

17 MS. SPALDING: Joanne Spalding,  
18 Sierra Club.

19 MS. WALTERS: I'm Julie Walters,  
20 Office of Regional Counsel. And to my right  
21 is Lisa Beckham from the Air Permits Office.  
22 And to my left is Gerardo Rios. He's the head

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1 of our Permits Office here in Region IX.  
2 Travis Ritchie from the Sierra Club, and Roger  
3 Kohn who's also from our Air Permits Office.

4 JUDGE STEIN: Thank you. And do  
5 we have someone on the phone in Wisconsin?  
6 Mr. Bender?

7 MR. BENDER: Yes, Your Honor. I'm  
8 David Bender for Sierra Club.

9 JUDGE STEIN: I can't hear  
10 anything. Was Mr. Bender on the phone?

11 MR. BENDER: Can you hear me, Your  
12 Honor?

13 JUDGE STEIN: Now I can hear you.  
14 Yes.

15 MR. BENDER: Okay. David Bender  
16 for Sierra Club, Your Honor.

17 JUDGE STEIN: Okay. And then Mr.  
18 Simpson?

19 MR. SIMPSON: Yes. I'm here. I  
20 didn't hear who was before Mr. Bender at all.  
21 I'm also a Director with Helping Hand Tools.

22 JUDGE STEIN: Thank you. Why

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1 don't we -- I appreciate everyone making  
2 themselves available. Why don't we proceed  
3 with Pio Pico. Why don't you make some  
4 opening remarks and then I will probably have  
5 some questions afterwards.

6 MS. WALTERS: Excuse me, Your  
7 Honor. I just wanted to note we cannot hear  
8 the folks that are participating by telephone.

9 JUDGE STEIN: Okay. You can't  
10 hear them at all?

11 MS. WALTERS: No.

12 JUDGE STEIN: Let's try this  
13 again. Can we see if Region IX can hear Mr.  
14 Bender and also Mr. Simpson.

15 MR. BENDER: This is David Bender,  
16 Your Honor.

17 JUDGE STEIN: We can hear. Can  
18 you hear, Region IX?

19 MS. WALTERS: No.

20 JUDGE STEIN: I'm not sure why  
21 you're unable to hear. I -- there's obviously  
22 going to be a transcript made of this

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1 particular proceeding. I'm happy to allow a  
2 few minutes to see if we can solve this  
3 problem technically but, if not, I'm going to  
4 proceed with the conference because I think  
5 I'm largely going to ask the parties to --  
6 let's do this. Let's see if we can't get this  
7 technical glitch fixed.

8 MR. SIMPSON: I can hear you and  
9 Mr. Bender perfectly.

10 MS. WALTERS: Also, that because  
11 we have the Office of General Counsel attorney  
12 present, who I understand --

13 MR. SIMPSON: I can't hear.

14 MS. WALTERS: -- who I think would  
15 be particularly prejudiced to the proceeding,  
16 so if we can't fix the problem, I think it  
17 could be a problem.

18 JUDGE STEIN: One moment.

19 MR. DOSTER: Your Honor, can I  
20 offer just a simple practical suggestion.  
21 Region IX, can you hear me?

22 MS. WALTERS: Yes.

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1 MR. DOSTER: Okay. One thing we  
2 often do at Headquarters to solve this problem  
3 is we have -- you all -- you could call in on  
4 the speakerphone and use that as the audio but  
5 keep -- and use the video.

6 MS. WALTERS: Okay.

7 MR. BENDER: That might be a  
8 simple fix, a quick fix to the problem.

9 MS. WALTERS: Okay. We have a  
10 call in over here, so let's try that.

11 (Pause.)

12 JUDGE STEIN: We'll just have to  
13 do our best. Can you hear now?

14 MS. WALTERS: It is muted. Hold  
15 on a second. We're going to adjust -- figure  
16 out how to get the audio so it can be --

17 (Pause.)

18 Can you hear?

19 JUDGE STEIN: We can hear you.  
20 Mr. Bender, can you try speaking and see if  
21 Region IX can hear you now.

22 MR. BENDER: Yes. This is David

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1 Bender.

2 MS. WALTERS: Great. We can hear  
3 you now.

4 JUDGE STEIN: And Mr. Simpson?

5 MR. SIMPSON: Yes. I can hear Mr.  
6 Bender and I believe I heard Region IX there.

7 JUDGE STEIN: All right.

8 MS. WALTERS: I can hear you.  
9 Thank you.

10 JUDGE STEIN: All right. Thank  
11 you, Mr. Doster, for that suggestion. If  
12 people could move the phone closest to who's  
13 going to be speaking in order to assist the  
14 court reporter in transcribing.

15 MR. WEDEKING: Good afternoon,  
16 Your Honor. Jim Wedeking for Pio Pico. As I  
17 understand the purpose of this meeting is to  
18 generally figure out what's going on with the  
19 plant; more specifically, will it still be  
20 built and, if it will, will it retain the same  
21 purpose and design as permitted by Region IX.  
22 The answer to those questions is yes.

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1 I could take each one of these  
2 questions in just a little more detail if  
3 you'd like.

4 JUDGE STEIN: I'd appreciate that.

5 MR. WEDEKING: First, I'd like to  
6 back up a little bit and briefly touch on the  
7 California Regulatory Agency --

8 JUDGE STEIN: If you could speak  
9 up a little bit so everybody could hear, that  
10 would be great.

11 MR. WEDEKING: To begin with, Pio  
12 Pico does not require CPUC's approval to  
13 construct and operate the plant. The CPUC  
14 regulates San Diego Gas & Electric, not Pio  
15 Pico. CPUC must approve San Diego's contracts  
16 to buy power.

17 Pio Pico has obtained a license  
18 from the California Energy Commission and the  
19 San Diego Regional Management District that  
20 has all the licenses it needs to build and  
21 operate the plant and sell them to the  
22 California ISO as far as the state is

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1 concerned. So the CPUC decision only deals  
2 with whether San Diego can buy the power that  
3 Pio Pico generates.

4 Assuming that the Board would  
5 uphold Region IX's PSD permit, Pio Pico would  
6 like to begin construction of the plant in the  
7 first quarter of 2014. So they have a  
8 contractor, they purchased equipment, design  
9 and engineering is ongoing, and they're ready  
10 to go.

11 As far as the purpose and design  
12 of the plant, will it remain the same, it's  
13 still going to be constructed as a peaking  
14 plant and it's still going to use the same  
15 modern turbines. It will still require the  
16 same quick startability. It will still need  
17 to easily scale through those. It's going to  
18 be the same plant as permitted by Region IX  
19 and it's still going to provide peaking  
20 generation to San Diego Gas & Electric.

21 The CPUC decision only found that  
22 San Diego Gas & Electric would require the

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1 peaking generation capacity in 2018 as opposed  
2 to 2014 as the PPTA originally required. The  
3 CPUC actually ordered San Diego Gas & Electric  
4 to amend the PPTA with Pio Pico or it could  
5 start the whole request for the process over  
6 again. Pio Pico and San Diego Gas & Electric  
7 are amending the PPTA, as ordered by the  
8 California Public Utility Commission. The  
9 only thing that changes is the delivery date.

10 JUDGE STEIN: So you're telling me  
11 that you're in the process of amending that  
12 PPTA with San Diego?

13 MR. WEDEKING: That's correct,  
14 Your Honor.

15 JUDGE STEIN: When will that  
16 process be completed?

17 MR. WEDEKING: The end of this  
18 month and it should be resubmitted to the CPUC  
19 in the beginning of May. This will leave an  
20 interim period between the time that Pio Pico  
21 expects the plant to come online, which is  
22 about September 2015 -- or 2018, when the

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1 revised PPTA should come into effect.

2           During those times, Pio Pico will  
3 still sell power to San Diego Gas & Electric  
4 through a resource adequacy contract. These  
5 are short-term one-year contracts which do not  
6 require CPUC approval.

7           So all that's being done --

8           JUDGE STEIN: So let me understand  
9 this. California has said that there's no  
10 need for this plant until 2018.

11           MR. WEDEKING: Correct.

12           JUDGE STEIN: And the contract,  
13 which was relied on both by Pio Pico and by  
14 the Region in determining facts for the  
15 facility, cannot be consummated at this  
16 time --

17           MR. WEDEKING: I'm sorry. I  
18 didn't catch the last part.

19           JUDGE STEIN: The contract --

20           MR. WEDEKING: Yes, ma'am.

21           JUDGE STEIN: -- cannot be  
22 consummated in its current form but will be

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1 amended to provide for a start date of 2018?

2 MR. WEDEKING: That's correct.

3 JUDGE STEIN: If you're going to  
4 build this plant -- and so how is San Diego  
5 going to buy power from you now?

6 MR. WEDEKING: Through resource  
7 adequacy contracts. These are short-term  
8 contracts. The fact is San Diego Gas &  
9 Electric still believes it needs the power to  
10 meet other regulatory requirements.

11 So what it can do is it's going to  
12 reshuffle the power it takes from other  
13 providers. It wants to reduce reliance on  
14 older less efficient power plants. It needs  
15 to take the power. And it can do so through  
16 a different form without CPUC approval.

17 JUDGE STEIN: And when that  
18 arrangement is consummated, are those public  
19 documents, are those private documents?  
20 What's the nature of the arrangement?

21 MR. WEDEKING: They're -- I  
22 believe they're still submitted to CPUC but

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1 they don't require a formal adversary hearing  
2 and approval process.

3 JUDGE STEIN: And do you have a  
4 time frame when you know when that might be in  
5 place?

6 MR. WEDEKING: It would come into  
7 place by the time that the plant came online,  
8 which is around September 2015, I believe.

9 JUDGE STEIN: So this would not be  
10 in place in the middle of this year?

11 MR. WEDEKING: I'm sorry. What  
12 would not be in place?

13 JUDGE STEIN: In other words, the  
14 arrangement to amend the PPTA is intended to  
15 occur sometime sooner?

16 MR. WEDEKING: Yes, ma'am.

17 JUDGE STEIN: But --

18 MR. WEDEKING: At the end of this  
19 month. Right now, there's a draft of an  
20 amended PPTA circulated among the parties.  
21 They're taking comments. They should finalize  
22 it by the end of April for submission to the

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1 CPUC by the beginning of May.

2 Now, again, nothing changes about  
3 the PPTA except for the delivery date. It's  
4 the same plant using the same design.

5 JUDGE STEIN: Yes. But if you  
6 were originally planning for a start date of  
7 2018, the notion of determining that in 2013  
8 for something five years away, presumably that  
9 might change considerably over that period of  
10 time.

11 MR. WEDEKING: Construction  
12 will -- right now, as planned. Construction  
13 would begin in the first quarter of 2014. It  
14 takes about 16 to 18 months to complete  
15 construction, which would put it online around  
16 June to September 2015. That's when it would  
17 be operating. Pio Pico's well aware that if  
18 the PSD permit is approved, it has 18 months  
19 to begin construction or it must reapply.

20 JUDGE STEIN: So what you're  
21 proposing is to operate this as a merchant  
22 plant?

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1                   MR. WEDEKING: Technically that's  
2                   how it would operate, even though the power is  
3                   still going to San Diego Gas & Electric.

4                   JUDGE STEIN: And for those of us  
5                   that are less well-informed than you may be,  
6                   can you tell me a little bit about what a  
7                   merchant plant is and whether it needs any  
8                   particular approvals?

9                   MR. WEDEKING: A merchant plant is  
10                  simply a plant that sells electricity into the  
11                  wholesale power market. That means it doesn't  
12                  have any particular buyer in mind. Its  
13                  electricity is purchased on the stock market.  
14                  The approval for these things vary from state  
15                  to state. It's my understanding California's  
16                  a little strange in that few states actually  
17                  provide these types of long-term 20-, 25-year  
18                  power purchase agreements. Most power plants  
19                  that require a PSD permit are merchant plants.  
20                  So if you can think back to the last PSD  
21                  permit that was litigated before the Board,  
22                  almost certainly it was a merchant plant.

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1 JUDGE STEIN: Does this require a  
2 different kind of financing? I mean, I don't  
3 want to delve into the details of your  
4 financial arrangements, but does this mean  
5 that from a financial perspective there are a  
6 bunch of other things that have to happen that  
7 are contingent, or is what you're saying that  
8 this is really a pretty firm go?

9 MR. WEDEKING: Final change  
10 secured.

11 To sum it all up, the last thing  
12 that Pio Pico is waiting on are these  
13 proceedings.

14 JUDGE STEIN: Okay.

15 MR. WEDEKING: And once that is  
16 done and the PPTA is amended, they're ready to  
17 go.

18 JUDGE STEIN: And do you need any  
19 additional permits from the state?

20 MR. WEDEKING: No, Your Honor.

21 JUDGE STEIN: Okay. Let me move  
22 to a different set of questions that has been

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1 on my mind, which is that the -- and I'll pose  
2 these questions to the Region also -- but in  
3 the response to comments for this permit, the  
4 Region relied extensively on the San Diego  
5 contract as dictating the need for the plant.  
6 And the -- many of their petitioners had  
7 argued that you should have been building a  
8 combined cycle rather than a single cycle  
9 plant, and basically what we have in the  
10 current record is something which says, No, we  
11 had to build what we built because of our  
12 contract with San Diego.

13 Now we have a circumstance where  
14 you're telling me that, you know, that you're  
15 likely to have a contract with San Diego that  
16 will kick in in 2018. Before then, in the  
17 interim period, you're going to try to sell  
18 the power to San Diego and others. If you  
19 were writing this decision, and in order to  
20 agree with everything that Pio Pico and the  
21 Region said, then where in the administrative  
22 record would I look for support for your

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1 arguments?

2 MR. WEDEKING: Well, arguments --

3 JUDGE STEIN: Well, with respect  
4 to the BACT issue. Because what I see in that  
5 record largely -- and I'm not saying that the  
6 Board is looking on this -- is I see San Diego  
7 made us do it, San Diego made us do it, and  
8 the administrative record is replete with  
9 that.

10 So one question that I have is  
11 whether, you know, assuming everything that  
12 you say is correct, whether or not this permit  
13 nonetheless needs, because of a change of  
14 circumstances, either the response to comments  
15 to be amended or there to be some additional  
16 process so that the record in fact reflects  
17 what you're now proposing to do as opposed to  
18 what you were proposing to do before the  
19 PUC --

20 MR. WEDEKING: So what I would  
21 write in the opinion, I would say something to  
22 the effect of, "Contrary to Petitioner's

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1 arguments, Region IX could not rely on the San  
2 Diego Gas & Electric specifications to justify  
3 the BACT determination," citing, for instance,  
4 Prairie State Generating Company as affirmed  
5 by the Sierra Club. I would remind them that  
6 the Applicant decides what type of source it  
7 chose to build. In this case, Pio Pico  
8 decided to build a peaking unit. Now, the  
9 Region supplied the public with lots of  
10 information about why Pio Pico chose to build  
11 a peaking unit and why it chose the specific  
12 equipment it did to satisfy that role.  
13 However, the Applicant decides to define the  
14 source the way it sees fit.

15 And while the Region did look at  
16 alternative processes to see if it could have  
17 a lesser-polluting process that would still  
18 allow Pio Pico to fulfill its role as a  
19 peaking unit, never before -- to my knowledge,  
20 at least -- has the Region required -- my  
21 apologies -- the Board required permitting  
22 authorities to premise a PSD permit on whether

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1 or not the Applicant complied with third party  
2 technical specifications.

3 In the end, Pio Pico decided to  
4 build a peaking plant. And they did that --  
5 or they seek to build that, regardless of  
6 whether it has a contract with a buyer or not.

7 JUDGE STEIN: Well, I'm more hung  
8 up about the fact that there's a contract than  
9 I am about the wording of the response to the  
10 comments. And I'm not saying that I  
11 thoroughly reviewed it, but as Sierra Club  
12 argued in its motion papers, there is an  
13 extensive amount of information in this record  
14 about the 2009 request for offer in the  
15 contract.

16 I'm not saying we've decided that  
17 question. We haven't decided anything. But  
18 I'm asking you to help us through this. And  
19 if I recall, Prairie State, that was a  
20 redefining the source case.

21 MR. WEDEKING: That's correct.

22 JUDGE STEIN: This is not.

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1 MR. WEDEKING: No, but it does go  
2 to the very basic premise that the Applicant  
3 defines the source. That's not terribly  
4 controversial. Pio Pico decided to build a  
5 peaking plant. The Region would be -- it can  
6 functionally serve as a peaking plant with a  
7 combined cycle unit. It found that based on  
8 the technical requirements for a peaking  
9 plant, not necessarily because of the  
10 contract, but no peaking plant could use a  
11 combined cycle unit. I think that's well  
12 supported in the record.

13 I would be very -- I think it  
14 would have substantial ramifications if a  
15 decision was phrased in the sense that that is  
16 substantially based on whether an applicant  
17 complied with technical specifications by a  
18 third party.

19 JUDGE STEIN: No. I think the  
20 question for us is now we're in a changing  
21 circumstances. Is the design and purpose of  
22 the plant still the design and purpose that it

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1 was before?

2 MR. WEDEKING: It is exactly the  
3 same and it must still comply with San Diego  
4 Gas & Electric's request for offer. It will  
5 still have to comply with that, just in 2018  
6 as opposed to 2014.

7 JUDGE STEIN: So that wouldn't  
8 change the configuration of the plant?

9 MR. WEDEKING: It would not. To  
10 say it more directly, I can't --

11 MR. BUENTE: The response that the  
12 company will file -- the response that the  
13 company will submit next week will document  
14 these representations with declarations so  
15 that the Board has in the record an assurance  
16 that it's not going to change. The company's  
17 not changing the nature of the parties.

18 JUDGE STEIN: That's very helpful.

19 I think that's all the -- I think that's all  
20 the questions that I had for Pio Pico. Did  
21 you have anything else that you wanted to  
22 leave us with? I understand that a lot is

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1 going into the planning and development of  
2 this plant, and the Board does not lightly ask  
3 these questions. We've had a number of cases  
4 before us in the past where when a  
5 circumstance like this developed, the  
6 realistic prospect that the plant would be  
7 built went from a very high likelihood to a  
8 very low likelihood. So the nature of our  
9 questions relates to really needing an  
10 assurance of where we stand.

11 MR. WEDEKING: I would only leave  
12 you with the fact that Pio Pico is ready to  
13 go. They would not look forward to a remand  
14 or a stay because they want to begin  
15 construction as soon as they're permitted to.  
16 We don't believe that a remand is necessary as  
17 there is no additional information that the  
18 Region would have to review. Everything about  
19 how the plant would be built is exactly the  
20 same.

21 Thank you, Your Honor.

22 JUDGE STEIN: Thank you very much.

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1 Why don't we hear from Region IX, Mr. Doster.

2 I'm not sure which of you is --

3 MR. DOSTER: Ms. Walters.

4 JUDGE STEIN: Ms. Walters.

5 MS. WALTERS: Can you hear me  
6 okay?

7 JUDGE STEIN: Yes.

8 MS. WALTERS: Great. In terms of  
9 the questions that the Board posed to the  
10 Region in its order, we considered those  
11 questions and provided a sort of detailed  
12 explanation of the basis for our position.

13 MR. SIMPSON: I'm sorry. Could  
14 you --

15 JUDGE STEIN: It's Ms. Walters  
16 from Region IX.

17 MR. SIMPSON: I can't hear her.

18 MS. WALTERS: Let's try unhooking  
19 the phone and seeing -- and I'll move the  
20 video conference and see if you can hear me  
21 that way.

22 Can you hear me now?

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1 MR. SIMPSON: Oh, yes.

2 JUDGE STEIN: You're fine in the  
3 courtroom.

4 MS. WALTERS: Okay. Great.

5 MR. SIMPSON: Okay. Thank you.

6 MS. WALTERS: So in following up  
7 on the questions that the Board is interested  
8 in hearing from the Region on as described in  
9 its order, we have considered those questions  
10 and wanted to provide a sort of brief further  
11 explanation today and, if there is further  
12 briefing that the Board would request, we'd  
13 like to discuss the timing of that,  
14 considering the fact that we haven't yet seen  
15 the permittee's filing that will explain in  
16 more detail its plans and intent for the plant  
17 from this point forward.

18 In terms of our BACT analysis, I  
19 think this is sort of a unique case in which,  
20 as Pio Pico said, we actually had a contract  
21 in place that we could look at that provided  
22 a lot of detail about the purpose and design

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1 of the facility that the Applicant was  
2 proposing. In most cases, we don't have a  
3 piece of paper that describes it other than  
4 the application itself.

5 So in reviewing the analysis  
6 and -- the analysis and application and doing  
7 our own analysis, we referenced a lot of  
8 information in the PPA and the RFO because  
9 that is -- those were the documents that were  
10 referred to in the PSD permit application that  
11 describes the purpose and design of the  
12 facility.

13 But our feeling is that whether or  
14 not there was such a contract or not, since  
15 the application merely describes the same  
16 information that appeared in the PPA and the  
17 RFO, and the Applicant has -- Pio Pico has  
18 said generally the entity to define the  
19 purpose of the project and associated design  
20 elements, our analysis is exactly the same,  
21 but I think the references in the record to  
22 the PPA and the RFO are a little confusing

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1 because those documents were referenced in the  
2 application itself.

3 So there's a lot of discussion of  
4 those documents, but the documents themselves  
5 were not driving our BACT analysis or ultimate  
6 determination that a combined cycle facility  
7 would not be technically feasible to meet the  
8 purpose and associated design elements that  
9 the Applicant put forth.

10 We had also had a discussion with  
11 the Applicant whereby it provided a brief  
12 description of the fact that the project would  
13 not be changing, the contract terms would not  
14 be changing other than dates, and that the  
15 purpose and design of the project would remain  
16 exactly the same, regardless of the CPUC's  
17 disapproval of the current PPTA.

18 So based on that, we didn't  
19 believe there was any reason we would need to  
20 reopen our analysis or any of the permit  
21 terms.

22 JUDGE STEIN: So I want to ask you

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1 the same question that I asked counsel for Pio  
2 Pico. If I were -- or if the Board were to  
3 decide that this BACT analysis should be  
4 upheld, it's your position that despite  
5 whatever confusion there may be, there's  
6 sufficient analysis in the record that the  
7 Region would not be asking to reconsider  
8 supplementing the response to comments but  
9 would basically stand on the record that's  
10 here? If you don't have an answer to that,  
11 you can answer it next week, but --

12 MS. WALTERS: You know, we haven't  
13 seen the filing from the permittee but, at  
14 this point, we don't think there's any need to  
15 reopen the record, particularly because this  
16 issue was raised after the record was closed  
17 and we think that it could be addressed  
18 adequately through briefing.

19 The question is whether the CPUC's  
20 disapproval somehow undoes or calls into  
21 question the basis for the Region's  
22 determination. As I said earlier, the

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1 determination was that based on the purpose  
2 and design of the project as a peaking and  
3 load-shaping facility, we haven't seen and  
4 there's no information in the record to  
5 indicate that a combined cycle unit has been  
6 used to serve as a peaking facility. We  
7 didn't receive comments that demonstrated  
8 that. And we don't believe there is a need to  
9 reopen the issue because the substance of it  
10 is not going to change.

11 JUDGE STEIN: Is there anything  
12 else that you want to -- I understand you have  
13 a timing question. What is it that the Region  
14 would be seeking? I know that the order  
15 currently specifies that Pio Pico and the  
16 Region are to file on the same day. What is  
17 it that you need that's not provided in the  
18 current order?

19 MS. WALTERS: What we discussed is  
20 that it would be helpful to see some of the  
21 documentation that Pio Pico has indicated it  
22 will be providing. We think that would be

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1       instructive both to the Region and to the  
2       Board in terms of our -- providing our  
3       contention about whether anything would change  
4       about the contract, whether anything would  
5       need to be reopened.

6                 The other consideration is I'm the  
7       lead attorney on the matter. I'm supposed to  
8       report to jury duty this Monday. So what we  
9       would propose is that at our final review on  
10      April 29th, which is two weeks from the 15th,  
11      if my jury duty service is very short, we  
12      would endeavor to file something as soon as  
13      possibly, hopefully before that date, and then  
14      we would suggest that the other parties'  
15      responses would be due a week after the week  
16      of the filing.

17                JUDGE STEIN: I think that that's  
18      way too long. I'm, you know, prepared to  
19      entertain some additional time for the Region,  
20      but it seems to me that given that this is a  
21      PSD permit, which the Board, as you know,  
22      endeavors to get out as promptly as possible,

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1 I can't envision a two-week period of time.  
2 But we will take the request under advisement  
3 and we will set out a revised schedule.

4 I am prepared to give you some  
5 time, but I'm just concerned about -- I want  
6 to give you sufficient time to look at it, but  
7 at the same time we want to be able to keep  
8 moving forward.

9 Mr. Buente, did you have a  
10 comment?

11 MR. BUENTE: No, Your Honor.

12 MR. DOSTER: Your Honor, if I  
13 could just ask, the timing issue is -- the  
14 length of time is based solely on the fact  
15 that Ms. Walters is assigned to jury duty.

16 JUDGE STEIN: Right.

17 MR. DOSTER: It is not -- she  
18 doesn't need --

19 MR. SIMPSON: I'm sorry. I can't  
20 hear the speaker. This is Rob Simpson.

21 MR. DOSTER: My apologies, Mr.  
22 Simpson. This is Brian Doster from the Office

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1 of General Counsel. I just wanted to add on  
2 the --

3 MR. SIMPSON: That's much better.

4 MR. DOSTER: -- the timing point  
5 of the motion. She's the lead counsel for  
6 Region IX on this case. She's not going to  
7 have the opportunity next week to review that  
8 information if she's in jury duty. We can do  
9 our best among legal offices to try to find a  
10 substitute counsel, but she's in the best  
11 position and the best understanding of the  
12 record.

13 It's not that we feel we need that  
14 much time to write the response if she's  
15 available, but she may not be available.

16 JUDGE STEIN: I see. I used to  
17 practice law in California. I'm well  
18 familiar, having served for five weeks on a  
19 jury in California, so I just want to be sure  
20 that we don't end up delaying this  
21 indefinitely.

22 MR. DOSTER: That is not our

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1 interest at all either. It's just a difficult  
2 situation with the uncertainty of knowing  
3 whether she's going to be available.

4 JUDGE STEIN: Well, Ms. Walters,  
5 will you have any information for us next week  
6 about the status that you could provide the  
7 Board? I mean, obviously, if you're going to  
8 end up serving on a long-term jury, the  
9 Agency's going to have to go forward, and the  
10 Board can obviously go forward as well, but --

11 MS. WALTERS: I will do my best  
12 not to serve on a long jury. But right now,  
13 I'm scheduled to call in on Sunday night to  
14 find out whether I need to report on Monday,  
15 so probably by the early part of next week  
16 I'll know whether I'm done or whether I'll be  
17 continuing, what the schedule might look like.

18 JUDGE STEIN: Okay. And why don't  
19 we proceed with the fact that Pio Pico's brief  
20 is still due on the 15th and then we will go  
21 ahead and set a subsequent date for everyone  
22 else.

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1                   One more question for you, Ms.  
2 Walters. Is the Region saying that assuming  
3 the representations made in the courtroom  
4 today are followed up with declarations, that  
5 its analysis of the permit would have been the  
6 same had the PPTA and RFO not existed at the  
7 time it considered the application?

8                   MS. WALTERS: Yes, assuming the  
9 project purpose and design was the same. We  
10 can't really speculate as to whether the  
11 project might have been different somehow or  
12 the purpose might have been different if those  
13 documents had not been in place, but we don't  
14 think that they are critical to the purpose  
15 and design. They were merely illustrative of  
16 the purpose and design.

17                   JUDGE STEIN: Under what  
18 circumstances would the Region feel a need to  
19 reconsider or reopen this particular permit?  
20 Is there a set of circumstances that you think  
21 would require that, or you want to wait and  
22 see the documents and you can let us know the

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1 answer to that question next week?

2 MS. WALTERS: Yeah. I think in  
3 general if there were some reason to believe  
4 that the purpose and design would change  
5 substantively; for example, if the permittee  
6 wanted to build a base load facility, say,  
7 instead of a peaking facility, obviously that  
8 would call into question the entire premise of  
9 the analysis that we did. But the information  
10 that's been provided to date doesn't suggest  
11 that there's any substantial difference  
12 between what was originally proposed and what  
13 will be built and operated moving forward.

14 JUDGE STEIN: Thank you very much,  
15 Ms. Walters. Mr. Doster, do you have anything  
16 else to add?

17 MR. DOSTER: One small detail.  
18 This is Brian Doster again. One detail I  
19 think -- that I think it's important to note,  
20 Your Honor, is that the PPA is not actually in  
21 the administrative record. What the Region  
22 did here is rely on the Applicant's

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1 representation of its intentions based on the  
2 PPA. Is that correct, Ms. Walters?

3 MS. WALTERS: Yes.

4 MR. DOSTER: Confirm that. That's  
5 my understanding. So to -- you know, to the  
6 extent -- what you're focused on -- you're  
7 focused on the contract itself, but the  
8 contract is simply a piece of information.  
9 The Applicant could have stated the exact same  
10 information in his application and the Region  
11 would have treated that information and relied  
12 on it in exactly the same way. The form of  
13 the information I think is not -- is not that  
14 significant here. It's the information itself  
15 that was represented in the application which  
16 was referring to the contract as the basis for  
17 that information, but it's the same  
18 information, and I think that's what the  
19 Applicant and the Region has been telling you,  
20 is the information itself is not changing.

21 JUDGE STEIN: Okay. Thank you. I  
22 think at this point I would like to hear from

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1 the Sierra Club and I don't know whether I'm  
2 going to be hearing from Mr. Bender or Ms.  
3 Spalding, or both.

4 MS. SPALDING: How about I start  
5 and Mr. Bender can chime in on what I'm sure  
6 I'll miss. Joanne Spalding with the Sierra  
7 Club. Just a few short points. One thing I  
8 want to point out is that the Applicant and  
9 the Region keep describing this plant as a  
10 peaking plant. It's not a peaking plant.  
11 It's a peaking and intermediate load plant  
12 that is permitted to operate over 4,000 hours  
13 in a year. The record contradicts the  
14 position that -- of both Pio Pico and the  
15 Region --

16 JUDGE STEIN: I'm sorry. Can you  
17 speak up a little?

18 MS. SPALDING: Sure. Is that  
19 better?

20 JUDGE STEIN: Yes.

21 MS. SPALDING: That -- that it's a  
22 peaking plant that would be built -- that the

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1 Region did not rely on the power purchase  
2 agreement and the RFO. The statement of basis  
3 and the responsive comments explicitly connect  
4 the application, the project purpose, and the  
5 PPA.

6 The -- the Region did not actually  
7 perform an analysis of the alternatives. It  
8 was relying on the CPUC process to do that.  
9 So I don't see how the Region could now say it  
10 need not revisit this.

11 Our position is that the permit  
12 should be remanded to the Region for  
13 reconsideration in light of this new  
14 information and potential changes that might  
15 occur.

16 The resource adequacy contracts  
17 are not the RFO. We don't know what they will  
18 say. And they are -- there's been no  
19 determination of need by any entity -- any  
20 regulatory entity at this point because  
21 neither the Region nor the CPUC -- the  
22 California Public Utilities Commission -- made

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1 that determination.

2 The --

3 JUDGE STEIN: And why is it that  
4 the PUC has made a determination of need?

5 MS. SPALDING: The PUC has made a  
6 determination that there is no need until  
7 2018, and by 2018 things might be very  
8 different and control technology might be very  
9 different. The Region has stated that there's  
10 no evidence that a combined cycle unit could  
11 be used for this purpose. However, the  
12 combined cycle technology is evolving rapidly  
13 and the newest units on the market are made to  
14 support renewable, they're made to be -- to be  
15 load-shaping units that can -- with fast start  
16 capabilities that we believe there's adequate  
17 information in the record to show that they  
18 could satisfy --

19 JUDGE STEIN: Right. No, I  
20 understand the main arguments that you've  
21 raised and obviously, you know, if we go ahead  
22 and decide this permit appeal, we're going to

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1 get into the merits of those arguments. What  
2 I'm trying to figure out is --

3 MS. SPALDING: Well, and I don't  
4 mean to reiterate that, but the -- but my  
5 point is that by 2018 -- if the power is not  
6 needed until 2018, then it's premature to  
7 build a technology that's -- to rely on BACT  
8 at this point because there's no need until  
9 five years from now and --

10 JUDGE STEIN: But I'm assuming  
11 that what the company is saying is that during  
12 these four years, it's going to operate by  
13 selling power to others.

14 MS. SPALDING: But there's been no  
15 determination of need and the Region never  
16 visited that question of need or alternatives  
17 because they were relying on the California  
18 Public Utilities Commission for that  
19 determination.

20 JUDGE STEIN: Okay.

21 MS. SPALDING: And I think that's  
22 all I have to say and I would just ask if Mr.

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1 Bender has anything to add. Thank you.

2 JUDGE STEIN: Before -- I have one  
3 more question for you. What is the  
4 significance of Pio Pico also being an  
5 intermediate plant?

6 MS. SPALDING: Well, an  
7 intermediate -- a peaking plant has -- does  
8 not operate nearly as often and so it's -- an  
9 intermediate plant can -- runs more frequently  
10 and it's -- the combined cycle technology is  
11 used for intermediate purposes all the time,  
12 and combined cycle with duct burners can  
13 operate as an intermediate load and peaking  
14 plant. So there -- so the technology -- so  
15 saying it's simply a peaking plant is a  
16 misrepresentation of what the permit actually  
17 allows.

18 JUDGE STEIN: Right. But I'm  
19 assuming what they're saying is since it's  
20 going to serve starting in 2018 this peaking  
21 function, that it still needs to have the  
22 capability of operating as a peaking plant.

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1 MS. SPALDING: Right, but a  
2 peaking and intermediate plant is different  
3 than a simple cycle peaking plant that is only  
4 a peaking plant. The technological question  
5 is different.

6 JUDGE STEIN: Is this an issue  
7 that was raised in your motion?

8 MS. SPALDING: I believe we did  
9 raise this, but that would be a good question  
10 to ask Mr. Bender just to make sure. Thank  
11 you.

12 JUDGE STEIN: Mr. Bender.

13 MR. BENDER: Thank you, Your  
14 Honor. I don't have much to add other than to  
15 reiterate that my understanding of the  
16 arguments today from the Applicant and from  
17 the Region are that everything would be  
18 exactly the same and, you know, we should  
19 effectively go back to the application, to the  
20 statement of basis, to all the public review  
21 documents, and to the response to comments.  
22 And every time there's a reference to the

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1 specific RFO and PPA requirements starting  
2 next year, we should cross that out and write  
3 "peaking plant" instead. And we should also  
4 assume that peaking plant means a combustion  
5 turbine and nothing else and so nothing would  
6 change. And those are premises that Sierra  
7 Club does not agree with and had the public  
8 review documents said that, the application  
9 said that, the comments would have been  
10 different and this case would have been  
11 different.

12 Additionally, the representations  
13 today, as I understand them, are that there  
14 will be a PPA for San Diego Gas & Electric in  
15 2018 and that the plant will be the same to  
16 meet that PPA. My understanding from the  
17 California Public Utilities Commission  
18 decision is that --

19 JUDGE STEIN: I'm sorry. I'm  
20 having difficulty hearing you.

21 MR. BENDER: Can you hear me now?

22 JUDGE STEIN: You said "my

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1 understanding ..."

2 MR. BENDER: My understanding of  
3 the California Public Utilities Commission  
4 decision is that the plant is not needed until  
5 2018, if then. Even if the PPA is revised to  
6 provide power under contract beginning in  
7 2018, the Applicant would still have to  
8 demonstrate to the Agency -- to that  
9 California agency that it would be needed in  
10 that year, you know, and what could well  
11 happen is that it's not needed in that year  
12 either, and so we'd be in a series of  
13 applications and denials and revisions and  
14 applications and denials and revisions. And  
15 so what is actually approved for a PPA may be  
16 something very different than simply crossing  
17 out the year in which it starts.

18 JUDGE STEIN: So your suggestion  
19 is that this should be remanded to the Region  
20 for reconsideration and reopening of public  
21 comment period; is that Sierra Club's position  
22 as you see it now?

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1                   MR. BENDER: That's correct, Your  
2 Honor. That's correct, Your Honor, because  
3 both that's what we read the regulations and  
4 the precedents for support, but also because  
5 Sierra Club's comments and presumably the  
6 comments of the other Petitioners in this case  
7 would have been different if the project  
8 purpose and the application had contained  
9 what's being described now as kind of "We'll  
10 sell it to the market without a contract for  
11 a few years and then try to get a new contract  
12 approved in the future" or whatever finally  
13 evolves and might be approved by the  
14 California Public Utilities Commission.

15                   The comments would have been  
16 different and the arguments in this case would  
17 have been different.

18                   JUDGE STEIN: Okay. Thank you  
19 very much. I'd like to hear from Mr. Simpson  
20 at this point.

21                   MR. SIMPSON: Thank you. Well,  
22 from what I'm hearing, Pio Pico is scrambling

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1 trying to figure out what their next plant is  
2 going to be. They say, Well, maybe it's going  
3 to be a merchant plant and they say they've  
4 bought some equipment, maybe a resource  
5 adequacy contract. I didn't see any of that  
6 on the record for this -- for this action or  
7 I would have commented on it.

8 The Region points out that it was  
9 confusing their reliance on the PPA and, yes,  
10 it was confusing and it sort of derailed this  
11 process. The response to comments on page 73  
12 in my -- in response to my comments about the  
13 lack of need for this facility, the EPA points  
14 out, "The EPA has not conducted a detailed  
15 need analysis for the CPUC. Available  
16 information in the record for EPA permit  
17 decisions indicates that there is in fact need  
18 for the project. In Section 7.13 of the facts  
19 sheet, the Applicant has a 20-year power  
20 purchase agreement with San Diego Gas &  
21 Electric. The purpose of this project is to  
22 meet the specific objectives of SDG&E's 2009

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1 request for offers."

2 Now, it's true that maybe sometime  
3 in the future, San Diego's gonna need some  
4 more electricity from these old-style plants.  
5 But to saddle San Diego with this plant now  
6 when there is no demonstrated need when the  
7 EPA told me they relied on -- there is in fact  
8 need kind of has made a process that I as a  
9 member of the public can't keep up with. I  
10 can't figure out why we would be saddled with  
11 what's not even that technology for today on  
12 the hopes that this facility can get some  
13 agreement to sell its products sometime in the  
14 future just so, in addition to the BACT  
15 analysis for today's peaking facilities --  
16 there's peaking facilities that are combined  
17 cycle. They just wrote their projects or it  
18 wouldn't -- it wouldn't appear that that  
19 worked for this one. It worked for other  
20 ones. So it doesn't make sense that this  
21 couldn't be a more efficient facility.

22 So part of my concern with this

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1 process, too, is if we're -- if -- by going  
2 through this process, we're extending that  
3 permit.

4 JUDGE STEIN: I didn't hear the  
5 last sentence.

6 MR. SIMPSON: By going through  
7 this appeal process, are we extending that  
8 permit? Does that permit -- does that 18  
9 months for this permit to start happen from  
10 when the permit was issued or from when we're  
11 finished with this action?

12 JUDGE STEIN: The 18-month period  
13 begins to run, it's my understanding, is once  
14 the permit is final. So it's after the Board  
15 rules. So the 18-month period doesn't  
16 begin -- let's -- if hypothetically the Board  
17 were to affirm the permit, the 18-month period  
18 I believe, correct me if I'm wrong, Mr.  
19 Doster, would run from then or whenever the  
20 Federal Register -- whenever the applicable  
21 notification takes place after the Board  
22 ruling. But the 18-month period is not

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1 running now.

2 MR. SIMPSON: That's my  
3 understanding. And -- well, I suppose that  
4 can't be avoided, but to delay this process  
5 while the Applicant tries to figure out what  
6 their next move is, I just see it as a  
7 smokescreen.

8 JUDGE STEIN: So what is it that  
9 you're asking the Board to do then? I mean,  
10 the question the Board is trying to figure out  
11 is whether it's gonna go ahead and decide the  
12 appeal based on what we have before us or  
13 whether the Board is going to take some  
14 additional action to ship this back to the  
15 Region for some further analysis.

16 Are you suggesting you're opposed  
17 to a delay in the Board ruling on the current  
18 appeal? The Sierra Club seems to be asking  
19 us --

20 MR. SIMPSON: Yes. I would not  
21 like to -- pardon?

22 JUDGE STEIN: Sierra Club I

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1 believe has asked us to ship this back to the  
2 Region for reconsideration and reopening of  
3 the comment period. Are you suggesting that  
4 you want the Board to go ahead and decide this  
5 based on the present record?

6 MR. SIMPSON: I'm saying that it  
7 should be remanded today and not a year from  
8 now and I'm saying that the Board should  
9 understand that nobody's built a merchant  
10 plant in California in the last 15 years. So  
11 the likelihood of somebody building a merchant  
12 plant now is -- it's just not gonna happen.  
13 They're just -- they're just grasping at  
14 straws.

15 So while we commented on what the  
16 Region told us this permit was about, we  
17 haven't had a chance to comment on -- we don't  
18 really know what it's about now. Until the  
19 Applicant tells us what their real plan is,  
20 none of us really know what positions we have.  
21 So I think the Board can remand this  
22 expeditiously and save everyone a lot of time.

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1 Thank you.

2 JUDGE STEIN: Okay. Thank you  
3 very much. At this point, I would like to  
4 hear if there are any final comments from Pio  
5 Pico.

6 MR. WEDEKING: Just a few brief  
7 points, Your Honor. The comments by Sierra  
8 Club and Mr. Simpson, they appear to request  
9 a remand to look at need again. And we've  
10 heard a lot of characterizations about what  
11 the CPUC decided.

12 I'd just like to point your  
13 attention to page 18 of the CPUC's decision,  
14 the bottom paragraph. "For all these reasons,  
15 we direct San Diego Gas & Electric to procure  
16 up to 298 megawatts of local capacity to come  
17 online beginning in 2018." So, therefore, the  
18 fact that it needs additional capacity by 2018  
19 is not in question.

20 He continues further, "As  
21 discussed previously, San Diego Gas & Electric  
22 may seek to meet this need using either the

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1 Quail Brush Energy Project or the Pio Pico  
2 Energy Center if the proposed PPTAs are  
3 amended to correspond to the identified unit."

4 So it seems to be pretty clear  
5 that the CPUC has determined that the need is  
6 there, just at a different year.

7 Now, this takes me to the second  
8 point. Never has a facility been required to  
9 demonstrate the need for its product in order  
10 to get a PSD permit. This would be a very  
11 strange conversation if Pio Pico were  
12 proposing a chemical plant and, therefore,  
13 there would need to be some discussion of  
14 whether a certain industry needed those  
15 chemicals. Need has always been for PSD  
16 purposes a business decision. If the  
17 applicant says we would like to build a  
18 peaking plant or it says we would like a build  
19 a base load plant and if there are state  
20 regulatory agencies that examine that, then  
21 they're the ones who examine that. Remanding  
22 for need is not necessary in this case and

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1 we'll be happy to supply the documentation  
2 required to show exactly what San Diego Gas &  
3 Electric and Pio Pico intend to do from here  
4 on out.

5 JUDGE STEIN: Okay. Now, as I  
6 understand the need question, I see it tied in  
7 with this question of alternatives which is  
8 central to some of the issues that have been  
9 raised in the appeal. And I guess one of the  
10 questions that ultimately may come to play is  
11 if the PPTA and RFO had not specified what  
12 they specified, would combined cycle have been  
13 considered? And, you know, that's obviously  
14 an issue that's been raised in this appeal.  
15 We're going to need to look at that question.

16 MR. WEDEKING: I'm not sure -- I'm  
17 not sure if the plant would be built if San  
18 Diego Gas & Electric hadn't requested a  
19 peaking plant. I'm not sure how they would  
20 have decided to spend their money anyway --  
21 otherwise. I think remand -- Sierra Club  
22 claims that its comments would be different

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1 now that the PPTA will be amended. The fact  
2 that their comments in front of the Region  
3 was, You must use a combined cycle plant. If  
4 this were remanded, their comments will be,  
5 You must use a combined cycle plant. The  
6 analysis would be exactly the same by the  
7 Region. There's no new information to renew  
8 here. They -- I don't doubt that they would  
9 phrase things differently, but that's what the  
10 debate is all about. Can you use a combined  
11 cycle turbine for peaking? Nothing has  
12 changed in the interim. You can't according  
13 to the Region IX's analysis. And unless  
14 there's some ground-shaking new technological  
15 developments between then and now, the  
16 analysis will be exactly the same.

17 JUDGE STEIN: Okay.

18 MR. WEDEKING: Thank you.

19 JUDGE STEIN: Let me just confer  
20 with my colleagues for a moment.

21 (Pause.)

22 Okay. Any final comments from

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1 General Counsel's Office in Region IX?

2 MS. WALTERS: This is Julie  
3 Walters in Region IX. I just had a couple of  
4 points that I wanted to make to follow up on  
5 some of the statements that were made.

6 In terms of the need issue that  
7 the counsel for Pio Pico described, I did want  
8 to clarify that contrary to some of the  
9 statements made by counsel for the Sierra  
10 Club, Region IX specifically determined it  
11 would not decide the need for the project. I  
12 think there was a statement that we relied on  
13 the CPUC for a needs determination. However,  
14 we did not do so. We typically don't make  
15 those determinations, given the complexity of  
16 the market and the regulatory regime in  
17 California. We did not do so here and we  
18 don't believe it's necessary to do so in order  
19 to resolve the appeal of this PSD permit.

20 And with respect to the argument  
21 that comments would have been different if the  
22 project were described as a peaking or

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1 intermediate unit versus referencing the PPA  
2 and RFO, we strongly disagree with that. We  
3 believe the information in the record and the  
4 application make clear that the nature of the  
5 unit that was being proposed was a peaking and  
6 load-shaping unit and the analysis was based  
7 primarily on the need to ramp up and ramp down  
8 various amounts of energy quickly, come online  
9 from a cold start quickly, turn off quickly,  
10 and really respond to the renewable energy  
11 market and the fact that there would be these  
12 needs that would come and go very quickly.  
13 And we think that was very clear from the  
14 record and the response to the comments, and  
15 so we agree with counsel for Pio Pico that the  
16 nature of the comments that could have been  
17 made originally wouldn't change now based on  
18 the fact that the PPA may be changed in terms  
19 of the ultimate state when SDG&E would be  
20 expecting electricity from Pio Pico under its  
21 contract.

22 The last point that I wanted to

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1 make is there's been a lot of discussion of  
2 the fact that the revised agreement would not  
3 go into effect until 2018 and the Region is  
4 not -- did not base its analysis on the dates  
5 in which power would be requested by SDG&E.  
6 We looked at the nature of the facility that  
7 was being proposed. And we're not aware of  
8 any requirement in PSD that a plant operate  
9 within a particular period of time. There is  
10 a deadline for construction of the plant and  
11 completion of construction in 5321-R of 40  
12 C.F.R. Part 52, but there's been a lot of  
13 discussion of when will the plant operate and  
14 will that still be -- you know, would the same  
15 BACT analysis have been made at that time.  
16 And I think the PSD program is set up so that  
17 construction needs to begin within a certain  
18 time frame and then operations will follow.  
19 We've never focused on the date when the  
20 facility will start operating per se. And I  
21 think it's very difficult to do that. Plants  
22 may have different needs and things that are

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1 tied to the construction date that are pretty  
2 speculative to, I think, get into that type of  
3 detail when making a PSD determination. And  
4 we did not look at that at all in making our  
5 determination here.

6 JUDGE STEIN: If the PPTA/RFO had  
7 not sort of described -- I don't know whether  
8 "described" is the right word -- but if the  
9 original BACT analysis wasn't in some way  
10 constrained or relied on that, would combined  
11 cycle have been considered in a different way?

12 MS. WALTERS: No, it would not.  
13 When we looked beyond the contract documents,  
14 we said, What is the purpose of this project?  
15 What are the design elements that are  
16 necessary to meet that purpose? This is a  
17 peaking facility with some load-shaping and  
18 they want to have the flexibility to turn the  
19 unit on and off as needed very quickly and we  
20 haven't seen evidence that a combined cycle  
21 can meet that need. It can't be designed to  
22 offer the same type of flexibility that these

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1 peaking units can, and that's why we  
2 ultimately decided that that was not  
3 technically feasible. We didn't think it was  
4 appropriate for the Region to try to redefine  
5 the source and tell the Applicant it needed to  
6 serve a different purpose that might be -- you  
7 know, have reduced emissions in some other way  
8 but wouldn't really satisfy the purpose that  
9 the Applicant was proposing to meet.

10 JUDGE STEIN: Thank you. Any  
11 other comments? Mr. Doster?

12 MR. DOSTER: No, Your Honor.

13 JUDGE STEIN: Sierra Club, any  
14 further comments?

15 MS. SPALDING: Your Honor, I will  
16 defer to Mr. Bender. I just would like to say  
17 that with regard to the comment about need and  
18 reliance on the CPUC, we really think that  
19 might be a question of how we characterize  
20 what the response to comments say and we will  
21 address that in our written document.

22 JUDGE STEIN: Mr. Bender, any

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1 final comments?

2 MR. BENDER: Thank you, Your  
3 Honor. I think just to reiterate, you know,  
4 we do not agree that combined cycle cannot  
5 serve a peaking and intermediate load purpose,  
6 and the response to comments was that a  
7 combined cycle plant would be too large for  
8 this PPA or -- and/or would not ramp up and  
9 ramp down at the specific time -- 10-minute,  
10 30-minute time increments that this PPA  
11 requires.

12 You know, we fundamentally  
13 disagree that everything would have been the  
14 same in the background documents, the  
15 comments, and the response to comments, if the  
16 Region had said peaking and intermediate load  
17 plant rather than specifying this specific  
18 technology called for by this specific power  
19 purchase agreement.

20 JUDGE STEIN: Thank you. Mr.  
21 Simpson, any final comments?

22 MR. SIMPSON: Sure. Just briefly.

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1 Thank you. This facility is adjoining another  
2 facility that serves the same function and --

3 JUDGE STEIN: Can you please speak  
4 up? I'm having trouble hearing you.

5 MR. SIMPSON: Oh, sure. I'm  
6 sorry. This facility that sits right on the  
7 border of Mexico is adjoining another facility  
8 that serves the exact same purpose but barely  
9 functions. This would just be an addition --  
10 it's not -- the Region is trying to say it's  
11 designed to meet some need but it's a  
12 manufactured need. So what that means is if  
13 it gets built, they're gonna try and get it  
14 into play. They're gonna try and use it for  
15 whatever scenario comes up which, without  
16 definition of what scenario's coming up, we  
17 don't know if this is a facility that's  
18 needed. We're pretty clear that it's not.  
19 But with this nebulous it shows some need if  
20 that need happens to meet this exact contract  
21 doesn't -- doesn't satisfy the damage -- to  
22 offset the damage it will do to the

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1 environment.

2 I think that it -- trying to  
3 backload this thing is putting the cart before  
4 the horse, that we need to -- we need to see  
5 whether EPA wants to do it or is going to rely  
6 on the state to do it, somebody needs to say,  
7 This is what's needed, so let's build this.  
8 Not let's build this and put it into whatever  
9 need happens to come up just because we happen  
10 to have a PSD permit.

11 Thank you.

12 JUDGE STEIN: All right. I want  
13 to thank everybody for their time today. I  
14 think the way I want to proceed is that the --  
15 Pio Pico, can your brief come in on the 15th?  
16 Are you able to do that, or do you need a  
17 little more time in light of this to get your  
18 brief in?

19 MR. WEDEKING: I think the 15th  
20 will be fine, Your Honor.

21 JUDGE STEIN: Okay. Why don't you  
22 get your brief in the 15th. I will take under

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1       advisement the Region's request that it have  
2       two weeks. I will give you at least a week.  
3       But I would like to wait and hear from the  
4       Region early next week after Ms. Walters  
5       figures out the jury duty situation in  
6       California, whether I will give you up to two  
7       or not, but you'll have at least a week. And  
8       then I will allow for reply briefs sometime  
9       after that.

10               We'll issue a scheduling order  
11       next week but, in the meantime, I don't think  
12       I'm going to issue anything until such time as  
13       I've got further information about the  
14       Region's time frame.

15               MR. DOSTER: Your Honor, would it  
16       be helpful if we submitted a status report or  
17       something on Monday?

18               JUDGE STEIN: That would be  
19       helpful. I unfortunately have had a personal  
20       experience in California which was most  
21       unfortunate, having spent -- having arrived to  
22       a new job and spent five weeks on jury duty,

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1 and I have carried that with me since 1981,  
2 but I know it can be quite unpredictable and  
3 I think a short period of time is fine, but I  
4 don't want to extend this too long.

5 Thank you, everybody, for your  
6 time. I greatly appreciate it and I  
7 appreciate also the presence of the various  
8 clients of the Region and of the company to  
9 let us know your views here. Thank you.

10 (Whereupon, the conference was  
11 concluded at 2:11 p.m.)

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Place: Washington, DC

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*Neal R. Gross*

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Court Reporter

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