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**BEFORE THE STATE OF WASHINGTON
ENERGY FACILITY SITE EVALUATION COUNCIL**

In the Matter of
Application No. 2003-01

SAGEBRUSH POWER PARTNERS, LLC,

KITTTITAS VALLEY WIND POWER
PROJECT

PETITION FOR REVIEW OF
INITIAL ORDER OF THE
DECISION OF THE ENERGY
FACILITY SITE EVALUATION
COUNCIL IN RESPONSE TO
INTERVENOR F. STEVEN
LATHROP'S MOTION TO
DISQUALIFY THE
DEPARTMENT OF NATURAL
RESOURCES AND THE
DEPARTMENT OF
COMMUNITY TRADE AND
ECONOMIC DEVELOPMENT
(Prehearing Order No. 5; Council
Order No. 783); PETION FOR
REVIEW OF THE DECISION
AND DECLARATION OF
COUNCIL MEMBER TONY IFIE
IN RESPONSE TO
INTERVENOR F. STEVEN
LATHROP'S
DISQUALIFICATION MOTION
(Prehearing Order No. 3; Council
Order No. 781); PETION FOR
REVIEW OF THE DECISION
AND DECLARATION OF
COUNCIL MEMBER RICHARD
FRYLINGER IN RESPONSE TO
F. STEVEN LATHROP'S
DISQUALIFICATION MOTION

I. INTRODUCTION

On July 1, 2003, Intervenor F. Steven Lathrop (“Lathrop”) filed a motion to disqualify the Energy Site Evaluation Council Members, Motion to Clarify Issues; Motion for Reconsideration or Alternately Objection to Limitation of Issues. Specifically, the motion sought to disqualify Energy Site Evaluation Council member Tony Ifie and the Washington State Department of Natural Resources’ participation in the decision on Application No. 2003-01. The motion also sought to disqualify Energy Site Evaluation council member Dick Fryling and the Department of Community Trade and Economic Development from participation in Application No. 2003-01.

On October 14, 2003, EFSEC council member Tony Ifie filed a decision and declaration of council member Tony Ifie in response to Lathrop’s disqualification motion. In that decision and declaration, “council member Tony Ifie denied the motion of Intervenor F. Steven Lathrop”. At the same time, council member Richard Fryling filed the same decision as council member Tony Ifie and the Energy Site Evaluation Council entered Pretrial Order No. 5, Council Order No. 783 which denied Lathrop’s motion to disqualify CTED and DNR from participation in the decision making related to Application No. 2003-01.

Pursuant to WAC 463-30-330, Lathrop, as a party to the adjudicated proceeding, petitions for review of the decision of EFSEC and to deny Lathrop’s motion to disqualify DNR and CTED and Ifie and Fryling’s declaration and decision denying Lathrop’s requested relief to disqualify them.

II. Discussion

A. All three of the decisions are procedurally deficient.

None of the three prehearing initial orders which are the subject of this petition for review comply with WAC 463-30-330(2) as they do not include any “statement describing available procedures for administrative relief.” Other than arbitrarily reducing the time for appeal by half, the moving party is given no direction as to the procedure to be followed to file a timely appeal. This failure is substantive in an adjudicative process, and the orders are void.

1 B. Applicability of the Appearance of Fairness Doctrine.

2 The decision of EFSEC in response to the motion to disqualify the DNR and the CTED,
3 council member Richard Fryling's decision and declaration and council member Tony Ifie's
4 decision and declaration all reach the conclusion that the Appearance of Fairness Doctrine does
5 not apply. The stated rationale that the Appearance of Fairness Doctrine is inapplicable is
6 inconsistent with Washington law. "The Appearance of Fairness Doctrine was judicially
7 established in *Smith v. Skagit County*, 75 Wn.2nd 715, 453 P.2d 832 (1969), The Doctrine
8 requires that public hearings which are adjudicatory in nature meet two requirements: The
9 hearing itself must be procedurally fair, *Smith* at 740, 453 P.2d 832, and the hearing must be
10 conducted by impartial decision makers. *Beulie v. Bremerton*, 80 Wn.2d 518, 523, 495 P.2d,
11 1358 (1972). *Raynes v. City of Leavenworth*, 118 Wn.2d 237, 245, 821 P.2d 1204 (1992). It is
12 axiomatic that, whenever the law requires a hearing of any sort as a condition precedent to the
13 power to proceed, it means a fair hearing, a hearing not only fair in substance, but in appearance
14 as well". *Smith*, 75 Wn.2d at 739.

15 The statement that "The Appearance of Fairness Doctrine applies to administrative
16 decision makers acting in a quasi-judicial capacity" is not accurate. The case cited by EFSEC,
17 Ifie and Fryling, *Organization to Preserve Agricultural Lands v. Adams County*, 128 Wn.2nd 869,
18 889, 913 P.2d 793 (1996) involved a local land use decision. As a result, the case is not
19 applicable to the present situation because we are not dealing with a local land use decision. The
20 case of *WPEC v. PRB*, 91 Wn.App 640, 647, 959 P.2d 143 (1998) is also inapplicable as it did
21 not deal with the Appearance of Fairness Doctrine. It dealt with whether a state agency was
22 exercising a judicial function. Whether EFSEC is sitting in a quasi-judicial capacity or not is
23 irrelevant to the issue at hand because the cases limiting the Appearance of Fairness Doctrine to
24 only quasi-judicial proceedings apply only to local land use decisions. RCW 42.36.010 The
25 purpose of Ch. 42.36 of the Revised Code of Washington is to limit the Appearance of Fairness
26 Doctrine in local land use decisions to quasi-judicial actions of local decision making bodies as
defined in the statute. RCW 42.36.010. The Application of Sagebrush Power Partners LLC is
not a local land use decision and the Appearance of Fairness Doctrine is not subject to the
limitation that the process be quasi-judicial. Thus, EFSEC, Ifie, and Fryling's arguments that the
Appearance of Fairness Doctrine does not apply because this is not a quasi-judicial action are

1 incorrect. All non local land use decision proceedings, which are not legislative, are governed
2 by the Appearance of Fairness Doctrine.

3 Even if EFSEC, Ifie and Fryhling are correct and the Appearance of Fairness Doctrine is
4 limited to quasi-judicial proceedings is accurate, the argument that the proceedings in the matter
5 of Application No. 2003-01 are not quasi- judicial is ludicrous. The proceedings in this matter,
6 from the outset have been adjudicative by its own pleadings. See Prehearing Order No. 1. WAC
7 463-30, which controls here, is titled “Procedure-Adjudicative Proceedings.” An administrative
8 law judge conducts the proceeding in which the parties are subject to numerous rules relating to
9 discovery, the calling of witnesses, and the providing of evidence, the rebutting evidence, etc
10 results in a quasi-judicial proceeding. As such, appearance of fairness, by EFSEC’s own
11 definitions applies.

12 C. Allowing Ifie and Fryling, the DNR and CTED to participate in the decision in
13 the matter of Application No. 2003-01 violates common law rules of disqualification of
14 decision makers.

15 A fundamental principal of our system is that judges and decision makers be fair and
16 unbiased. *Chicago, M. St. & P.R. Co. v. Washington State Human Rights Commission*, 87
17 Wn.2d 802, 807, 557 P.2d. 307 (1977). An interest that is alleged to create bias or unfairness
18 need not be direct or obvious. *Id.* at 808. “any interest, the probable and natural tendency of
19 which is to create a bias in the mind of the judge for or against a party to the suit, is sufficient to
20 disqualify. . . . Pecuniary interest in the result of the suit is not the only disqualifying interest.”
21 87 Wn.2d 808-809 Washington courts long ago stated:

22 The principle of impartiality, disinterestedness, and fairness on the
23 part of the judge is as old as the history of courts; in fact, the
24 administration of justice through the mediation of courts is based
25 upon this principle. It is a fundamental idea, running through and
26 pervading the whole system of judicature, and it is the popular
acknowledgment of the inviolability of this principle which gives
credit, or even toleration, to decrees of judicial tribunals. Actions
of courts which disregard this safeguard to litigants would more
appropriately be termed the administration of injustice, and their
proceedings would be as shocking to our private sense of justice as
they would be injurious to the public interest.

1 In this process there should be “no question or suspicion as to the integrity and fairness of
2 the system, i.e., ‘justice must satisfy the appearance of justice.’” *Offutt v. United States*, 348 U.S.
3 11, 14, 75 S.Ct. 11, 13, 99 L.Ed. 11 (1954). As the Washington State Supreme Court said in
4 1898

5 Caesar demanded that his wife should not only be virtuous, but
6 beyond suspicion; and the state should not be any less exacting
7 with its judicial officers, in whose keeping are placed not only the
8 financial interests, but the honor, the liberty and the lives of its
9 citizens, and it should see to it that the scales in which the rights of
10 the citizen are weighed should be nicely balanced, for, as was well
11 said by Judge Bronson in *People v. Suffolk Common Pleas*, 18
12 Wend. 550:

13 '(N)ext in importance to the duty of rendering a righteous
14 judgment, is that of doing it in such a manner as will beget no
15 suspicion of the fairness and integrity of the judge.'

16 *State ex rel. Barnard v. Board of Education, supra, 19 Wash. at 18, 52 P. at 321.*

17 The same principle applies to this process. It is fundamentally unfair, appears unfair, and
18 creates a perception in the public that the process is not fair when individuals making a decision
19 in this matter, are affiliated with agencies that, in the case of CTED, are clearly in existence to
20 promote this type of project or, in the case of DNR, stand to gain financially as a result of the
21 approval of this project.

22 D. Statutes and/or rules to the contrary are unconstitutional and violate due process.

23 None of the statutes and rules governing EFSEC have been reviewed by the courts in the
24 context of constitutionality or under due process standards. However, a rule that says that an
25 employee of a state agency which is a member of EFSEC is only viewed as only a member of the
26 council and ignores the employee relationship provides no insulation from constitutional and due
process requirements, especially where the state agency holds a clear vested interest in or has
taken a public position on a project before the council. Substantial private property interests are
at stake. Moreover, the risks and impacts to these interests are clear where no reasonable person,
viewing the facts objectively, could conclude that these two men, who each are representing their
respective agencies by definition (RCW 80.50.030), are going to do anything other than vote in

1 favor of the application. Finally, the matter can easily be resolved by removing them as the
2 council will not lose its quorum requirements or its ability to continue to consider the
3 application. *In re the Matter of C.W.*, 147 Wn. 2d 259, 53 P 3rd. 979 (2002).

4 For EFSEC to allow Ifie, and Fryling and the DNR and CTED to continue to participate
5 in a determination of Application No. 2003-01 violates the long-standing law in this state as well
6 as the state and federal constitutions. The decisions by EFSEC, Ifie, and Fryling to deny the
7 motion to disqualify should be reversed and Ifie, Fryling, CTED and DNR, either directly or
8 through their agents or employees, should be precluded from participating in Application No.
9 2003-01.

10 Respectfully Submitted this 23rd day of October 2003

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12 _____
13 Jeff Slothower, WSBA #14526
14 Attorney for Intervenor F. Steven Lathrop

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