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7 BEFORE THE STATE OF WASHINGTON
ENERGY FACILITY SITE EVALUATION COUNCIL

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9 In the Matter of
Application No. 2003-01

10 SAGEBRUSH POWER PARTNERS, L.L.C.

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13 KITTITAS VALLEY WIND
POWER PROJECT

Application No. 2003-01

Renewable Northwest Project
Response to Motion to Disqualify Site
Evaluation Council Members

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17 **I. INTRODUCTION**

18 The Motion to Disqualify Energy Facility Site Evaluation Council Members (“Motion to
19 Disqualify”) fails (1) to adequately consider the statutory scheme which sets forth the agencies
20 who are required to be represented on the Energy Facility Site Evaluation Council (“EFSEC”);
21 and (2) to provide information on any personal, pecuniary gain by any representative serving on
22 EFSEC.

23 While the Department of Natural Resources (“DNR”), as a public agency, may gain
24 financial benefits from a project approval, due to land leases, no showing has been made that
25 the DNR representative would gain personally from approving the application. The case law on
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1 the appearance of fairness doctrine has consistently distinguished between agencies that could
2 benefit in some way from a decision, and personal gain or benefit by individual members of that
3 same agency. Case law has also emphasized the disparate interests of public agencies, and the
4 fact that different departments and officials represent distinct interests.

5 Similarly, no showing of personal gain on the part of the Department of Community
6 Trade and Economic Development (“DCTED”) has been made. While DCTED has a
7 representative serving on EFSEC, and is also making limited arguments as an intervenor, the
8 DCTED representatives are not the same, and serve distinct roles on behalf of the agency. It is
9 quite common for agencies to act in different capacities on an application, and no showing of
10 bias has been made.

11 Should DNR be excluded on the basis of appearance of fairness, Renewable Northwest
12 Project (“RNP”) asks that it be given the opportunity to submit data on the pecuniary benefits of
13 other parties to the proceeding, such as Kittitas County. The analysis used in the Motion to
14 Disqualify would require recusal of the Kittitas County representative, based upon the
15 substantial financial benefits the County stands to gain if the project is approved. Additionally,
16 if DCTED is disqualified based on its representative participating as an intervenor and on
17 EFSEC, then all similarly situated parties should be removed either as intervenors or as decision
18 makers. For example, if DCTED is limited to serving in just one capacity, Kittitas County
19 should be similarly limited, to ensure that the same rules are fairly applied to all parties.

20 II. ARGUMENT

21 A. **A DNR Representative May Serve on EFSEC under the Appearance of Fairness 22 Doctrine as DNR’s Presence is Required by Statute and No Showing of Personal 23 Gain has Been Made. Additionally, No Showing has Been Made that the Interests 24 of the DNR EFSEC Representative are the Same as the Interests of DNR Officials Responsible for Leasing the Property at Issue.**

25 The Legislature has determined which agencies are required, by law, to be represented
26 on EFSEC. These agencies include DNR. “The council shall consist of the directors,

1 administrators, or their designees, of the following departments, agencies, commissions, and
2 committees or their statutory successors: ... Department of natural resources.” RCW
3 80.50.030(3)(a) (emphasis supplied). Because a representative from DNR must serve on
4 EFSEC, it cannot be disqualified under the appearance of fairness doctrine. Additionally,
5 further protection on fairness issues is provided as the DNR representative is not the same
6 agency official responsible for leasing DNR property. Agencies routinely serve distinct,
7 conflicting interests, as more fully articulated in section (B) of this brief, and as recognized in
8 the EFSEC regulations, which address the fairness issue.

9 All state agencies having members on the council are deemed to be parties any
10 adjudicative proceeding before the council. For purposes of any adjudicative
11 proceeding, however, the agency representative on the council shall be deemed
12 to be a member of the council and not a member of the agency. It shall be proper
13 for the agency representative on the council to communicate with employees of
14 the represented agency, excepting those agency employees who have participated
15 in the proceeding in any manner or who are otherwise disqualified by RCW
16 34.05.455.

17 WAC 463-30-050; *See also* WAC 463-39-170 which provides provides standards on what
18 presents a conflict of interest. No allegations under either WAC 463-39-170 or RCW
19 34.05.455 have been made.

20 Such a result is consistent with case law on the appearance of fairness doctrine, which
21 requires a showing of personal gain.¹ “A party asserting a violation of the doctrine must
22 produce sufficient evidence demonstrating bias, such as **personal or pecuniary interest on the**
23 **part of the decision maker**; mere speculation is not enough.” *In re Haynes*, 100 Wn. App.
24 366, 377, 996 P.2d 637 (2000) (emphasis supplied); *See also Organization to Preserve*
25 *Agricultural Lands v. Adams County* (“OPAL”), 128 Wn.2d 869, 913 P.2d 793 (1996). In
26 *OPAL*, a unanimous Washington State Supreme Court found no appearance of fairness violation
where a county commissioner stated that he had had very few phone calls and letters at a public

¹ Note that the EFSEC statute supersedes other laws in the case of inconsistencies. *See* RCW 80.50.110.

1 hearing, but then admitted surprise when confronted at trial with evidence of phone records
2 showing 63 long-distance phone calls to the project proponent. No violation was found as it
3 was not shown that the subject of the calls was in fact related to the permit decision, but could
4 have been related to some other legislative or administrative business not subject to the
5 appearance of fairness doctrine.

6 Other cases have similarly found no appearance of fairness violation when personal
7 gain is not demonstrated. For example, in *Grandmaster Sheng-Yen Lu v. King County*, 110 Wn.
8 App. 92, 38 P.3d 1040 (2002) decisions by the county would ultimately determine whether or
9 not a company would transfer land to be reclaimed from mining to DNR to be held in trust for
10 the county. There was no appearance of fairness issue as there was no allegation that a decision
11 maker would personally benefit from the decision. Another example of this basic principle is
12 illustrated in *Smith v. Mount*, 45 Wn. App. 623, 726 P.2d 474 (1986). Where an agency seizing
13 property could retain that same property for official use or sell the property and use proceeds for
14 agency benefit, “it might be argued that the seizing agency could use the forfeiture procedure as
15 a device to contribute to its drug enforcement war chest.” *Id.* at 627. However, because the
16 hearing officer “had no pecuniary interest, personal or otherwise,” in the property, appearance
17 of fairness was not a concern. *Id.* In *Smith v. Mount*, the party did have the option to remove
18 the proceeding to a court of competent jurisdiction, if the dollar amount was over \$500. Here,
19 EFSEC only recommends approval, and the final decision is made by the Governor, who can
20 consider such issues in making a final determination on siting. *See also Magula v. Department*
21 *of Labor and Industries of State of Washington*, 116 Wn. App. 966, 69 P.3d 354, 357 (2003)
22 (appeal of citation for performing electrical work without a license heard by parties holding
23 such licenses would likely “benefit generally from electrical work denied to general
24 contractors,” but without personal pecuniary gain by individual decision makers there was no
25 appearance of fairness concern).

1 This case law demonstrates that it is not enough to show that an agency may gain
2 something from an approval. Rather, personal gain must be shown. Additionally, any fairness
3 concerns are cured by the fact that EFSEC simply issues a recommendation, and it is the
4 Governor who issues the final decision on the project.

5 If EFSEC decides otherwise, then RNP requests that it be permitted to submit data on
6 the financial benefits Kittitas County would receive from project approval, and that it recuse its
7 representative from EFSEC. Because Kittitas County would obtain significant economic
8 benefits if the project were approved, this would ensure that all parties are subject to the same
9 rules.

10 **B. DCTED Should Be Able to Have a Representative on Both EFSEC and to Offer**
11 **Limited Arguments as an Intervenor because its EFSEC Representative and**
12 **Intervenor Representative are Acting in Distinct Capacities.**

13 Agencies routinely act in different capacities in land use applications, and routinely take
14 disparate positions on development projects. *See e.g. Chelan County v. Nykreim*, 146 Wash.2d
15 904, 52 P.3d 1 (2002) (county had standing to appeal land use decision issued by its planning
16 director) and WAC 463-30-050 (EFSEC regulation providing for agency representatives to act
17 in distinct capacities). Different representatives and departments do not necessarily share the
18 same interest. “[T]here is no showing either in this case or historically in the land use
19 decisionmaking process that planning staff (the executive body of local government) and the
20 Council (the legislative body) necessarily share the same views of environmental impacts.”
21 *Trepanier v. City of Everett*, 64 Wn. App. 380, 385, 824 P.2d 524 (1992). In *Trepanier*, there
22 was no appearance of fairness violation where a project proponent was also the lead
23 environmental review agency (consistent with SEPA regulations), and there was no fairness
24 violation because the city council hears appeal of the zoning code revision drafted by the city.
25 *Id.* *Trepanier* emphasized that “the person responsible for drafting the new code was Senior
26 Planner Allan Giffen,” while “[t]he person charged with carrying out SEPA review was

1 Planning Director Paul Roberts,” which created a separation. *Id.* Additionally, any further
2 appearance of fairness would be cured by the right of administrative appeal to the city council.
3 *Id.* Here, the final decision is made by the Governor, not EFSEC, so any fairness concerns are
4 cured by the fact that EFSEC only issues a recommendation.

5 If EFSEC determines that DCTED should not have separate representatives serve as an
6 intervenor and on EFSEC, then Kittitas County should similarly not be represented in the two
7 distinct capacities. However fairness issues are dealt with, RNP requests that all parties be
8 subject to the same standards regarding participation in this proceeding.

9 III. CONCLUSION

10 No showing of personal bias has been demonstrated to warrant recusal of the DNR
11 representative from EFSEC, although DNR, as an agency, may benefit from the ultimate siting
12 decision. Agencies have distinct, conflicting interests, and it is not enough to simply show that
13 an agency may benefit from project approval. Also, simply because DCTED is offering limited
14 arguments as an intervenor and also has a representative on the decision making board, does not
15 demonstrate any bias. If EFSEC finds otherwise, all parties should be held to the same
16 standard, and Kittitas County should not serve on the EFSEC Board due to its economic interest
17 in the outcome of the decision, nor should it participate as both intervenor and decision maker.
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20 FOSTER PEPPER & SHEFELMAN PLLC
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Susan Elizabeth Drummond, WSBA #30689
Attorneys for RNP
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