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

In the Matter of Application No. 2009-01

WHISTLING RIDGE ENERGY LLC

WHISTLING RIDGE ENERGY
PROJECT

PREHEARING ORDER NO. 17
COUNCIL ORDER NO. 862

DECISION AND DECLARATION OF
COUNCILMEMBER DOUG
SUTHERLAND IN RESPONSE TO
INTERVENORS' DISQUALIFICATION
MOTION

I. INTRODUCTION

Intervenors Save Our Scenic Area (SOSA), Friends of the Columbia Gorge (Friends), and the Seattle Audubon Society (Audubon) (the moving parties) seek the disqualification of Energy Facility Site Evaluation Councilmember Doug Sutherland from participation in this matter. The Administrative Procedures Act (APA) provides that an individual whose disqualification is requested shall determine whether to grant the petition. RCW 34.05.425(5). This is Doug Sutherland's decision on the motion that seeks to disqualify him.

II. FINDINGS OF FACT

A. The Energy Facility Site Evaluation Council

1. Creation and Purpose

The Energy Facility Site Evaluation Council (Council) was created in 1970 to provide "one stop" service in the siting of power plants, rather than having the various pieces of a siting decision spread among a multiplicity of state agencies and local governments. Laws of 1970,

1 1st Ex. Sess., § 45. The Legislature intended to integrate the administrative and technical
2 resources of state government for the review, certification, and monitoring of the siting,
3 construction, and operation of power plants. John A. Granger and Kenneth R. Wise, *A*
4 *Critique of One-Stop Siting in Washington: Streamlining Review Without Compromising*
5 *Effectiveness*, 10 Environmental Law 457 (1980).

6 **2. Membership**

7 The Council consists of representatives from a variety of state agencies and local
8 governments. There are six fixed members and a varying number of additional members
9 appointed when their appointing entities' interests are affected by a proposed project.

10 The six fixed members are a chair appointed by the Governor, and representatives of
11 the Departments of Ecology, Fish and Wildlife, Commerce, Natural Resources, and the
12 Utilities and Transportation Commission. RCW 80.50.030(2)(b) and (3)(a).

13 Additional members appointed on a case-by-case basis include representatives of local
14 governments. RCW 80.50.030(4) states:

15 The appropriate county legislative authority of every county wherein an
16 application for a proposed site is filed shall appoint a member or designee as a
17 voting member to the council. The member or designee so appointed shall sit
18 with the council only at such times as the council considers the proposed site for
19 the county which he or she represents, and such member or designee shall serve
20 until there has been a final acceptance or rejection of the proposed site.

21 By statute, the Council consists of agency representatives and not of the agencies
22 themselves. RCW 80.50.030(3). The Council's WAC 463-30-050 underscores this principle:

23 All state agencies and local governments having members on the council are
24 deemed to be parties to any adjudicative proceedings before the council. *For*
25 *purposes of any adjudicative proceeding, however, the agency or local*
26 *government representative on the council shall be deemed to be a member of*
the council and not a member of the agency or local government. Members of
the council shall not communicate with employees of the represented agency or
local government, who have participated in the proceeding or who are otherwise
disqualified by RCW 34.05.455.

(Emphasis added.) The Council is not a consortium of state agencies. It is a stand-alone entity
comprised of the appointees of the governor, state agencies, and local governments.

1 **3. Funding**

2 The Council is totally fee funded. Applicants and permits holders are required to pay
3 the Council’s reasonable and necessary costs, including councilmembers’ salaries and
4 expenses, staff salaries, and overhead. RCW 80.50.071 and RCW 80.50.175. Actual
5 expenditures are dependent on the number of applications and operating sites.

6 **B. Councilmember Doug Sutherland**

7 On October 26, 2010, Skamania County selected Doug Sutherland as its designee to the
8 Council. Councilmember Sutherland has over 30 years’ experience working in government
9 such as having served on the Tacoma City Council, twice elected mayor of Tacoma, he served
10 as chair of the Puget Sound Air Quality Authority, he served as city manager for the city of
11 SeaTac for three years, twice elected Pierce County executive, and twice elected State of
12 Washington Commissioner of Public Lands. Councilmember Sutherland has a Bachelor’s
13 Degree in History, spent 11 years with The Boeing Company, purchased the Tacoma Tent and
14 Awning Company, and finally became involved in local politics, which lead to his
15 aforementioned political career.

16 The County of Skamania is not a party to this proceeding. Nevertheless, the County is
17 well aware of the needed separation between Councilmember Sutherland and the County with
18 respect to the proposed project. Other than the rudimentary information necessary to contract
19 with him to be the County’s designee, no one, at any level within the Skamania County
20 government, has ever tried to discuss the Whistling Ridge Energy Project with Councilmember
21 Sutherland. No one at Skamania County has asked him to take any particular position with
22 respect to the proposed project nor does his employment depend on his doing so.
23 Councilmember Sutherland will not benefit financially if the project is approved or not. The
24 Skamania County Commissioners do not sit in review of his actions as a councilmember. He
25 has prejudged nothing concerning the project and he will vote solely based on applicable law
26 and the merits of the matter before him.

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III. CONCLUSIONS OF LAW

A. The Moving Parties Have Not Met Their Threshold Burden of Providing Evidence of Councilmember Sutherland’s Actual or Potential Bias

A violation of the appearance of fairness doctrine does not apply to the facts of this case because the moving parties have not met their threshold burden as articulated by the Washington Supreme Court. Before the appearance of fairness doctrine will be applied, the moving parties must provide evidence of the decision maker’s actual or potential bias. *Org. to Pres. Agric. Lands v. Adams Cy. (OPAL)*, 128 Wn.2d 869, 890, 913 P.2d 793 (1996) (citing *State v. Post*, 118 Wn.2d 596, 618, 826 P.2d 172 (1992)). Mere speculation is not enough to meet this burden. *In re Haynes*, 100 Wn. App. 366, 377 n.23, 996 P.2d 637 (2000).

The moving parties have not met their threshold requirement. With respect to Councilmember Sutherland, the moving parties have alleged an insufficient factual basis for recusal. *See* Declaration of J. Richard Aramburu in Support of Request/Motion for Recusal of Doug Sutherland and Declaration of Nathan J. Baker in Support of Intervenor Friends of the Columbia Gorge’s and Seattle Audubon Society’s Response to Save Our Scenic Area’s Request for Recusal or Disqualification of Doug Sutherland. While the moving parties allege that Doug Sutherland is biased because he has made statements in favor of wind power energy, they do not provide any evidence that those allegations can be imputed to Councilmember Sutherland to taint his decision in the siting process for the Whistling Ridge Energy Project or that Councilmember Sutherland is biased in his own right against the moving parties. Public officers are entitled to a presumption that they will properly and legally perform their duties. *Magula v. Dep’t of Labor and Indus.*, 116 Wn. App. 966, 972, 69 P.3d 354 (2003) (citing *City of Hoquiam v. Pub. Empl. Relations Comm’n*, 97 Wn.2d 481, 488, 646 P.2d 129 (1982)).

Accordingly, the moving parties have not met their threshold burden with respect to Councilmember Sutherland, and their motions must be denied.

1 **B. The Appearance of Fairness Doctrine Will Not Be Violated**

2 The preceding sections of this decision demonstrate that the appearance of fairness
3 doctrine is inapplicable to this matter because the moving parties have not met their burden of
4 providing evidence of Councilmember Sutherland’s actual bias for his participation in this
5 adjudication.

6 **1. Overview of the Appearance of Fairness Doctrine**

7 Quasi-judicial action will withstand an appearance of fairness challenge if a reasonably
8 prudent and disinterested person would conclude that all parties obtained a fair and neutral
9 hearing. *Smith v. Mount*, 45 Wn. App. 623, 626-27, 726 P.2d 474 (1986) (citing *Wash. State*
10 *Med. Disciplinary Bd. v. Johnston*, 99 Wn.2d 466, 479, 663 P.2d 457 (1983)). Application of
11 this test requires that the reasonably prudent and disinterested person know and understand all
12 of the relevant facts. *Smith v. Behr Process Corp.*, 113 Wn. App. 306, 340, 54 P.3d 665
13 (2002).

14 Despite the name of the doctrine, mere “appearance” of unfairness is insufficient to
15 sustain an appearance of fairness challenge. *State v. Carter*, 77 Wn. App. 8, 11, 888 P.2d 1230
16 (1995). The moving parties must provide evidence of the decision maker’s actual or potential
17 bias. *OPAL*, 128 Wn.2d at 890. Mere speculation is not enough to meet this burden. *Haynes*,
18 100 Wn. App. at 377.

19 **2. Application of the Doctrine to Councilmember Sutherland**

20 The moving parties have made only general allegations of potential bias by
21 Councilmember Sutherland because he has, in the past, made favorable statements in favor of
22 wind power energy and, in particular, wind power in Kittitas County. This argument is
23 incorrect on several grounds as discussed below.
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1 **a. Councilmember Sutherland's Statements Are Insufficient to**
2 **Disqualify Him**

3 There is no independent reason to disqualify Councilmember Sutherland. He is in
4 compliance with the Council's statute, WAC 463-30-050, which makes him an independent
5 member of the Council. He has had no contact with Skamania County other than his
6 employment contract to serve as the County's designee concerning the proposed project. No
7 one at the County has attempted to influence him regarding the project. He has prejudged
8 nothing concerning the project and will vote based solely on applicable law and the merits of
9 the matter before him. He will not benefit financially if the proposed project is approved or
10 not. As noted above, Councilmember Sutherland is entitled to a presumption that he will
11 properly and legally perform his duties. *Magula*, 116 Wn. App. at 972. The moving parties
12 have made no allegations and provided no substantive evidence to the contrary.

13 Consequently, based on the relevant statutes and case law, a reasonably prudent and
14 disinterested person who knows and understands the Council's statutory regime and
15 Councilmember Sutherland's statements concerning wind power energy in general,
16 understands his present and past affiliations with respect to the proposed project and would
17 conclude that his participation in this matter does not violate the appearance of fairness
18 doctrine or constitute a conflict of interest.

19 **C. There Is No Actual Conflict of Interest Separate From the Appearance of Fairness**
20 **Doctrine**

21 The moving parties also seem to be alleging that Councilmember Sutherland must be
22 disqualified, separate from the appearance of fairness doctrine, for an alleged actual conflict of
23 interest. There is ambiguity on this point because the moving parties do not identify the legal
24 basis for their allegation other than point to Councilmember Sutherland's present and past
25 affiliations with organizations promoting wind power. These affiliations do not present a
26 conflict of interest on the Whistling Ridge Energy Project and do not result from

1 Councilmember Sutherland's participation on the Council for the reasons discussed above.
2 RCW 34.05.425.

3 **IV. DECISION**

4 Based on the foregoing and upon consideration of the declarations and memoranda of
5 the moving parties to these proceedings, Councilmember Doug Sutherland denies the motion
6 of intervenors Save Our Scenic Area, Friends of the Columbia Gorge, and the Seattle Audubon
7 Society to disqualify him from membership on the Energy Facility Site Evaluation Council.

8 I certify and declare under penalty of perjury under the laws of the State of Washington
9 that the facts set out herein are true and correct.

10 SIGNED at Olympia, Washington, this _____ day of December, 2010.

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DOUG SUTHERLAND
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