BEFORE THE STATE OF WASHINGTON
ENERGY FACILITY SITE EVALUATION COUNCIL

In the Matter of
Application No. 2003-01
SAGEBRUSH POWER PARTNERS, L.L.C.
KITTITAS VALLEY WIND POWER PROJECT

I. INTRODUCTION

Intervenor F. Steven Lathrop (the moving party) seeks the disqualification of Energy Facility Site Evaluation Councilmembers Richard Fryhling and Tony Ifie and the Departments of Community, Trade and Economic Development (CTED) and Natural Resources (DNR) from participation in this matter. The Administrative Procedures Act provides that an

This matter is a proceeding to consider Sagebrush Power Partners’ application No. 2003-01 to construct and operate the Kittitas Valley Wind Power Project, an approximately 182-megawatt wind turbine electrical generation facility. Parties to this proceeding are: Sagebrush Power Partners, L.L.C. (represented by Darrel Peeples); Counsel for the Environment Michael Lufkin; the Department of Community, Trade and Economic Development; Kittitas County (represented by James L. Hurson); Renewable Northwest Project (represented by Susan Elizabeth Drummond); Phoenix Economic Development Group; Sierra Club Cascade Chapter; Residents Opposed to Kittitas Turbines (ROKT) (represented by James C. Carmody); F. Steven Lathrop (represented by Jeff Slothower); and Chris Hall.

Responses to F. Steven Lathrop’s motion were timely filed with the Council by Sagebrush Power Partners L.L.C. (the applicant) and intervenor Renewable Northwest Project and untimely filed by Kittitas County. A reply to the responses of Sagebrush Power Partners L.L.C. and Renewable Northwest Project was timely filed by F. Steven Lathrop.
individual whose disqualification is requested shall determine whether to grant the petition. This is Richard Fryhling’s decision on the portion of the motion that seeks to disqualify him. The portions of the motion seeking to disqualify CTED, DNR, and Councilmember Ifie are addressed in separate decisions, with the decision concerning CTED and DNR entered after this declaration and decision is entered.

II. FINDINGS OF FACT

A. The Energy Facility Site Evaluation Council

1. Creation and Purpose

The Energy Facility Site Evaluation Council (the 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. 1970 Wash. Laws 1st ex. sess. §45. The legislature intended to integrate the administrative and technical resources of state government for the review, certification, and monitoring of the siting, construction, and operation of power plants. John A. Granger and Kenneth R. Wise, A Critique of One-Stop Siting in Washington: Streamlining Review Without Compromising Effectiveness, 10 Environmental Law 457 (1980).

2. Membership

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

The six fixed members are a chair appointed by the Governor; and representatives of the Departments of Community, Trade and Economic Development; Ecology; Fish and Wildlife; and Natural Resources; and the Utilities and Transportation Commission. RCW 80.50.030(2)(b) and (3)(a).

Additional members appointed on a case-by-case basis include representatives of local governments and, possibly, four state agencies. The four state agencies that may, at their
discretion, appoint members to consider project applications are the Departments of Agriculture; Health; and Transportation; and the Military Department. RCW 80.50.030(3)(b).

Counties, cities, and port districts appoint Council members when a project is proposed within their boundaries. RCW 80.50.030(4) – (6).

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

All state agencies having members on the council are deemed to be parties to any adjudicative proceedings before the council. For purposes of any adjudicative proceeding, however, the agency representative on the council shall be deemed to be a member of the council and not a member of the agency. It shall be proper for the agency representative on the council to communicate with employees of the represented agency, excepting those agency employees who have participated in the proceeding in any manner or who are otherwise disqualified by RCW 34.05.455.2

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.

3. Funding

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

B. The Department of Community, Trade, and Economic Development

1. Mission

The Department of Community, Trade, and Economic Development (CTED) implements a wide variety of programs in three major subject areas:

- Trade – CTED represents the state in trade activities with other states and nations.

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2 Emphasis added to the original.
• Community Development – CTED provides guidance, technical assistance, and financial assistance to Washington’s cities and counties in the areas of housing, public works, growth management, and social programs.

• Economic Development – CTED provides guidance, and technical and financial assistance to economic development agencies, as well as approved individual developments.

2. CTED’s Energy Division Has Appeared in Support of the Proposed Project

One of CTED’s many programs is its Energy Division. In accordance with its statutory mandate, the Energy Division advises the governor and legislature on energy related matters and performs other energy-related functions such as coordination of the state energy strategy. RCW 43.21F.045; RCW 43.330.904.

The legislature has provided statutory direction to the Energy Division through Washington’s energy policy, which states in pertinent part that “[t]he development and use of a diverse array of energy resources with emphasis on renewable energy resources shall be encouraged….” RCW 43.21F.015(1).

CTED’s Energy Division has appeared in this proceeding in support of the proposed project:

CTED Energy Division supports the Sagebrush Power Partners, LLC’s [a]pplication … as consistent with state energy policy that is to encourage renewable energy resources according to the state energy strategy and RCW 43.21F.015(1).³


In December 2001, CTED selected Richard Fryhling as its appointee to the Council. Councilmember Fryhling has over thirty years of experience working in government on planning, community development, and economic development issues, with a career equally divided between state and local government service. He has worked for CTED as a planner,

³ Notice of Appearance; Notice of Intention to Participate as Intervenor and Preliminary Statement of Issues by Washington State Department of Community, Trade & Economic Development.
helping local governments in eastern Washington implement the Growth Management Act. He also has previous experience on the Council, having served in 1971 – 72 during the first plant approval under the Council’s authorizing legislation. He has never worked for or with CTED’s Energy Division. Councilmember Fryhling has an undergraduate degree in geography and a masters degree in urban planning.

Since his appointment to the Council, Councilmember Fryhling has been strictly isolated from CTED. He works out of his home in Walla Walla, over 300 miles from CTED. He does not share phone systems, computers, fax machines, or mail stops with CTED. No one at CTED has access to his phone, computer, fax machine, or mail.

Since just before his appointment to the Council, Councilmember Fryhling has met with CTED Director Martha Choe two times. The first meeting occurred because Director Choe was interested in discussing his qualifications before appointing him to the Council. The second meeting took place to determine whether Councilmember Fryhling was willing to decrease his time commitment to the Council from full-time to half-time. Director Choe and the rest of CTED are well aware of the needed separation between Councilmember Fryhling and the agency with respect to the proposed project. No one, at any level within CTED, has ever tried to discuss any Council matter with Councilmember Fryhling. No one at CTED has asked him to take any particular position with respect to the proposed project nor does his employment depend on his doing so. Councilmember Fryhling does not have a job description that defines the manner in which he is to undertake his duties. No one at CTED sits in review of his actions as a councilmember. He has prejudged nothing concerning the project and will vote based solely on applicable law and the merits of the matter before him.

C. The Disqualification Motion

The moving party seeks to disqualify Councilmember Fryhling on the grounds that intervention of CTED’s Energy Division in this matter creates an alleged conflict of interest and demonstrates alleged prejudgment in violation of the appearance of fairness doctrine:
With CTED as an intervenor as well as a decision maker, there is a conflict of interest. One of the decision makers is a representative of CTED. CTED is publicly advocating the approval of this application prior to the public hearing. CTED, as an agency, has prejudged this application before the matter has come before an appropriate body for public hearing. This violates the Appearance of Fairness Doctrine and should serve as a basis for the disqualification of CTED and its designated representative from the Energy Facility Site Evaluation Council in this matter.

III. CONCLUSIONS OF LAW

A. The Appearance of Fairness Doctrine is Inapplicable to this Matter

The moving party’s motion to disqualify Councilmember Fryhling must be denied because the appearance of fairness doctrine is inapplicable. The doctrine is inapplicable for three reasons. First, neither the Council nor Councilmember Fryhling is a decisionmaker within the meaning of the doctrine. Second, the matter from which the moving party seeks Councilmember Fryhling’s disqualification is not quasi-judicial. Third, the moving party has not met his threshold burden of providing evidence of actual or potential bias on Councilmember Fryhling’s part. Each reason is discussed below.

1. Neither the Council nor Councilmember Fryhling is a Decisionmaker.

The appearance of fairness doctrine applies only to quasi-judicial decisionmakers. State v. Finch, 137 Wn.2d 792, 808, 975 P.2d 967 (1999); Carrick v. Locke, 125 Wn.2d 129, 143 n.8, 882 P.2d 173 (1994); State v. Post, 118 Wn.2d 596, 618, 826 P.2d 172 (1992). The Council and Councilmember Fryhling are not decisionmakers with respect to certification of the Kittitas Valley Wind Power Project. The Council’s role is statutorily limited to preparing reports and recommendations to the Governor. The Governor alone decides whether to authorize the project. RCW 80.50.040(8) (“[The Council] shall … prepare written reports to the governor”) and RCW 80.50.100 (“[The Council] shall report to the governor its recommendations as to the approval or rejection of an application for certification ….”). The existence and terms of site certification are solely within the Governor’s discretion and are

4 Declaration of Counsel for Intervenor F. Steven Lathrop, B(9).
binding only upon execution of an agreement between the Governor and the applicant. RCW 80.50.100(2). Thus, the appearance of fairness doctrine does not apply to this matter because the Council and Councilmember Fryhling are not decisionmakers.

2. The Matter before the Council is not Quasi-Judicial.


   Several factors are relevant in determining whether an administrative action is quasi-judicial: (1) whether a court has been charged with making the agency’s decision; (2) whether the action is a type which courts historically have performed; (3) whether the action involves the application of existing law to past or present facts for the purpose of declaring or enforcing liability; and (4) whether the action resembles the ordinary business of courts as opposed to that of legislators or administrators. WPEA v. PRB, 91 Wn.App. 640, 647, 959 P.2d 143 (1998).

   In determining whether a particular matter is quasi-judicial, the Supreme Court has directed that a flexible approach be taken, giving ample consideration to the functions being performed by the entity in question. Raynes v. City of Leavenworth, 118 Wn.2d 237, 243, 821 P.2d 1204 (1992); Taggart v. State, 118 Wn.2d 195, 204, 822 P.2d 243 (1992).

   The moving party has asked that CTED and Councilmember Fryhling be disqualified from participation in “this matter” and “this application.” Declaration of Counsel for Intervenor F. Steven Lathrop, at (B). The “matter” and “application” before the Council is the application of Sagebrush Power Partners, L.L.C. to construct and operate the Kittitas Valley Wind Power Project. The legislature has established a multi-faceted process by which the Council develops a recommendation to the Governor regarding such “matters” and “applications.” The Council develops and applies environmental conditions regarding the
type, design, location, construction, and operational conditions of projects. RCW 80.50.040(2). The Council obtains and evaluates independent scientific and technical studies of proposed projects. RCW 80.50.040(6). The Council develops project-specific siting criteria and draft certification agreements for proposal to the Governor. RCW 80.50.040(8). The Council administers air quality and water quality programs with respect to specific projects and issues air quality and water quality permits to project operators. RCW 70.94.422(2) and RCW 90.48.262(2); Chapter 463-38 WAC; Chapter 463-39 WAC. The Council provides for ongoing monitoring of projects to ensure compliance with site certification agreements. RCW 80.50.040(9). The Council holds public information and land use hearings, and such other hearings as it deems appropriate, along with various other public meetings as part of environmental permitting and in compliance with the State Environmental Policy Act and the Open Public Meetings Act. RCW 80.50.090.

According to the WPEA v. PRB test, these activities are not quasi-judicial. 91 Wn. App. 640, 647, 959 P.2d 143 (1998). Courts have never been charged with performing any of the activities related to the Council’s consideration of this matter, nor are these actions typical of those performed by the Courts. Courts do not prepare and implement environmental protection programs or issue air or water quality permits. They do not hold public hearings and take public testimony on land use and other issues. They do not develop on-going monitoring plans for energy plants to assure compliance with contracts between the Governor and a project operator. They do not marshal large amounts of technical information and make recommendations to the Governor concerning the environmental, operational and contractual conditions for construction and operation of large energy plants.

Similarly, this matter does not involve the application of existing laws to facts for the purpose of declaring or enforcing liability. This matter is in many ways analogous to the permitting activities performed by the Departments of Ecology and Fish and Wildlife. The Council’s activities do not resemble the ordinary business of courts. They represent the
ordinary business of the executive branch performing administrative functions. While as part
of the lengthy process of considering a project application the Council is required to hold one
adjudicative hearing, the fact that one adjudicative proceeding is held as part of the Council’s
larger process does not make the administrative matter quasi-judicial. Harris v. Hornbaker, 98

Thus, again, the appearance of fairness doctrine does not apply to this matter because it
is not quasi-judicial.

3. The Moving Party Has Not Met His Threshold Burden of Providing
Evidence of Councilmember Fryhling’s Actual or Potential Bias.

The appearance of fairness doctrine does not apply because the moving party has not
met his threshold burden as articulated by the Supreme Court. Before the appearance of
fairness doctrine will be applied, the moving party must provide evidence of the
decisionmaker’s actual or potential bias. Organization to Preserve Agricultural Lands v.
Adams County, 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

The moving party has not met his threshold requirement. With respect to
Councilmember Fryhling, the moving party has alleged nothing at all. Declaration of Counsel
for Intervenor F. Steven Lathrop at B(8) and (9). While the moving party makes two
allegations about CTED (that a conflict of interest is created by the participation of CTED’s
Energy Division and that CTED has prejudged this matter), he does not provide any evidence
that those allegations can be imputed to Councilmember Fryhling or that Councilmember
Fryhling is biased in his own right. Public officers are entitled to a presumption that they will
properly and legally perform their duties. Magala v. Department of Labor and Industries, 116
Relations Commission, 97 Wn.2d 481, 488, 646 P.2d 129 (1982)). Accordingly, the moving party’s motion must be denied.

Moreover, even with respect to CTED itself the moving party has not met his threshold burden so there is no bias that can be imputed to Councilmember Fryhling. First, the moving party’s skeletal allegation that intervention of the CTED Energy Division creates a conflict of interest in violation of the doctrine cannot suffice to meet his threshold burden of providing evidence of actual or potential bias. The moving party has done nothing more than point out that the legislature has combined two functions within CTED: operation of the CTED Energy Division and appointment of a member of the Council. However, mere combination of functions within an agency does not violate the appearance of fairness doctrine. Washington State Medical Disciplinary Board v. Johnston, 99 Wn.2d 466, 479, 663 P.2d 457 (1983); Smith v. Mount, 45 Wash. App. 623, 626 – 627, 726 P.2d 474 (1986); see also RCW 34.05.458.

Second, the meaning of the term “prejudgment” in this context is the prejudgment of facts about parties, not prejudgment of laws such as the state energy policy. Organization to Preserve Agricultural Lands v. Adams County, 128 Wn.2d 869, 890, 913 P.2d 793 (1996) (citing Buell v. City of Bremerton, 80 Wn.2d 518, 524, 495 P.2d 1358 (1972)). Prejudgment is distinguishable from the policy leanings of a decisionmaker. Organization to Preserve Agricultural Lands v. Adams County, 128 Wn.2d 869, 890, 913 P.2d 793 (1996). Prejudgment is also distinguishable from a decisionmaker’s considering and applying the pertinent laws in a particular case. Skold v. Johnson, 29 Wn. App. 541, 558, 630 P.2d 456 (1981). The moving party has provided no evidence that CTED has actually or potentially prejudged any facts about the parties. Pointing to the Energy Division’s invocation of the statutory state energy policy does not meet the requisite test.

Accordingly, the moving party has not met his threshold burden with respect to Councilmember Fryhling and his motion must be denied.
B. The Appearance of Fairness Doctrine has not been Violated.

The preceding sections of this decision demonstrate that the appearance of fairness doctrine is inapplicable to this matter because neither the Council nor Councilmember Fryhling is a decisionmaker within the meaning of the doctrine, the matter before the Council is not quasi-judicial, and the moving party has not met his burden of providing evidence of Councilmember Fryhling’s bias. In this section, the decision explains that even if the appearance of fairness doctrine were applicable, it has not been violated.

1. Overview of the Appearance of Fairness Doctrine.

Quasi-judicial action will withstand an appearance of fairness challenge if a reasonably prudent and disinterested person would conclude that that all parties obtained a fair and neutral hearing. *Id.* (citing Washington Medical Disciplinary Board v. Johnston, 99 Wn.2d 466, 478, 663 P.2d 457 (1983)). Application of this test requires that the reasonably prudent and disinterested person know and understand all of the relevant facts. *Smith v. Behr Process Corporation*, 113 Wn. App. 306, 340, 54 P.3d 665 (2002).


The moving party makes no specific allegations of a conflict of interest or instance of prejudgment by Councilmember Fryhling. Declaration of Counsel for Intervenor F. Steven Lathrop, B(7) and (8). Instead, his apparent argument seems to be that CTED must be...
disqualified so its appointee must automatically be disqualified. This argument is incorrect on several grounds as discussed below.

a. **The Doctrine is not Primarily Concerned with Affiliation.**

The appearance of fairness doctrine is not primarily concerned with the affiliation of the decisionmaker. The doctrine has been held to be inapplicable despite the fact that a tribunal member was affiliated with a party to the litigation. *Medical Disciplinary Board v. Johnston*, 29 Wn. App. 613, 630 P.2d 1354 (1981); *Loveland v. Leslie*, 21 Wn. App. 84, 583 P.2d 664 (1978). See also *Sherman v. Moloney*, 106 Wn.2d 873, 725 P.2d 966 (1986) (holding that the plaintiff had failed to meet its burden of proof of probable or actual bias by merely alleging that the presiding officer of the state patrol trial board was also the chief of the state patrol without also providing evidence of opinion or prejudgment).

b. **Councilmember Fryhling Cannot Be Disqualified Based Solely on his Affiliation with CTED.**

Councilmember Fryhling’s affiliation with CTED cannot, in and of itself, be the basis for disqualification. The legislature has selected agencies and local governments to appoint members to the Council because those entities have expertise and a statutory stake in the outcome of the Council’s process. RCW 80.50.030 and section II(A)(2) above. The legislature did not select DSHS, the Department of Corrections, or the State Actuary to appoint members to the Council. Those agencies have neither expertise nor a statutory stake in the outcome of the decision to site an energy facility. Rather, the legislature integrated the existing administrative and technical expertise of state and local governments for the siting of major power plants and selected the agencies that appoint the Council’s members accordingly. Sections II(A)(1) and (2) above. The agencies that appoint fixed members of the Council have pre-existing statutory roles in environmental protection, community and economic development, energy, and state trust land management. RCW 80.50.030(2)(b) and (3)(a). The agencies that appoint discretionary member to the Council do so only when their interests
are affected and local governments join only when a project application is within their
jurisdictional boundaries. RCW 80.50.030(3)(b); RCW 80.50.030(4) – (6).

The potential for CTED to intervene in support of the state energy policy is part and
parcel of the overall statutory regime under which the legislature intends the Council to work.
The legislature is presumed to know the statutory duties of the entities it selected to appoint
of functions within an agency does not violate the appearance of fairness doctrine.
Washington State Medical Disciplinary Board v. Johnston, 99 Wn.2d 466, 479, 663 P.2d 457
(1983); Smith v. Mount, 45 Wn. App. 623, 626 – 627, 726 P.2d 474 (1986); see also RCW
34.05.458. The legislature’s decision that the public’s interest is best served by having
agencies with expertise and a stake in the outcome appoint members to the Council must be
respected as a matter of constitutional separation of powers. See Magula v. Department of
Labor and Industries, 116 Wn.App. 966, 973, 69 P.3d 354 (2003); Hillis v. Department of

With respect to the allegation that CTED has prejudged this matter, as discussed
above, the meaning of the term “prejudgment” in this context is the prejudgment of facts
about parties, not prejudgment of laws such as the state energy policy. Organization to
(citing Buell v. City of Bremerton, 80 Wn.2d 518, 524, 495 P.2d 1358 (1972)). The record is
devoid of evidence that CTED has prejudged any facts about the parties.

Finally, there is no evidence that the legislature intended the Council to be deprived of
the CTED-appointed member when the state energy policy or other matters within CTED’s
jurisdiction may be raised in an adjudication. The Council should not be deprived of
Councilmember Fryhling’s knowledge, experience and education under such circumstances.
Section II(B)(3) above. To the contrary, that is exactly the situation in which participation by
CTED’s appointee is most needed. Statutes must be construed to avoid unlikely, absurd or strained consequences. *State v. Stannard*, 109 Wn.2d 29, 742 P.2d 1244 (1987).

Because CTED itself need not be disqualified from participation in this matter, there is no reason to automatically disqualify CTED’s appointee Councilmember Fryhling.

c. **There is No Reason, Independent of Councilmember Fryhling’s Affiliation with CTED, to Disqualify Him.**

In addition, there is no independent reason to disqualify Councilmember Fryhling, separate from his affiliation with CTED. He is in compliance with the Council’s WAC 463-30-050 which makes him a member of the Council and not CTED. He has had no contact with CTED concerning the proposed project. No one at CTED has attempted to influence him regarding the project. He works 300 miles away from CTED and does not share a phone, Email, fax, or mailstop with the agency. He has prejudged nothing concerning the project and will vote based solely on applicable law and the merits of the matter before him. As noted above, Councilmember Fryhling is entitled to a presumption that he will properly and legally perform his duties. *Magala v. Department of Labor and Industries*, 116 Wn. App. 966, 972, 69 P.3d 354 (2003). The moving party has made no allegations and provided no evidence to the contrary.

Consequently, based on the relevant statutes and caselaw, a reasonably prudent and disinterested person who knows and understands the Council’s statutory regime and Councilmember Fryhling’s relationship with CTED would conclude that his participation in this matter does not violate the appearance of fairness doctrine.

C. **There is No Actual Conflict of Interest Separate from the Appearance of Fairness Doctrine.**

The moving party may also be alleging that Councilmember Fryhling must be disqualified, separate from the appearance of fairness doctrine, for an alleged actual conflict of interest. Declaration of Counsel for Intervenor F. Steven Lathrop, B(9). There is
ambiguity on this point because the moving party does not identify the legal basis for his
allegation nor does he discuss it in either his motion or his reply. To the degree that such
unsupported allegation has not been waived by the moving party, an actual conflict of interest
does not result from Councilmember Fryhling’s participation on the Council for the reasons
discussed in the balance of this decision. RCW 34.05.425.

IV. DECISION

Based on the foregoing, and upon consideration of the memoranda of the parties to
these proceedings, Councilmember Richard Fryhling denies the motion of Intervenor F.
Steven Lathrop to disqualify him from membership on the Energy Facility Site Evaluation
Council. This decision may be appealed within 10 calendar days of the date the decision is
mailed.

SIGNED at Olympia, Washington this _____ day of October, 2003.

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

____________________________________

RICHARD FRYHLING