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

9 In the Matter of  
10 Application No. 2003-01

11 SAGEBRUSH POWER PARTNERS,  
12 L.L.C.

13 KITTITAS VALLEY WIND POWER  
14 PROJECT

PREHEARING ORDER NO. 6  
COUNCIL ORDER NO. 786

DECISION OF THE ENERGY  
FACILITY SITE EVALUATION  
COUNCIL, COUNCILMEMBER  
RICHARD FRYHLING, AND  
COUNCILMEMBER TONY IFIE IN  
RESPONSE TO INTERVENOR F.  
STEVEN LATHROP'S PETITION  
FOR REVIEW

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16 **I. INTRODUCTION**

17 As part of the prehearing process, Intervenor F. Steven Lathrop (the moving party)  
18 sought to disqualify Councilmembers Richard Fryhling and Tony Ifie and the Departments of  
19 Community, Trade and Economic Development (CTED) and Natural Resources (DNR) from  
20 participation in this matter.<sup>1</sup> On October 14, 2003, the Energy Facility Site Evaluation Council

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22 <sup>1</sup> This matter is a proceeding to consider Sagebrush Power Partners' application No. 2003-01 to construct  
23 and operate the Kittitas Valley Wind Power Project, an approximately 182-megawatt wind turbine electrical  
24 generation facility. Parties to this proceeding are: Sagebrush Power Partners, L.L.C. (represented by Darrel  
25 Peeples); Counsel for the Environment John Lane; the Department of Community, Trade and Economic  
26 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.

1 (the Council) and Councilmembers Ifie and Fryhling issued their three prehearing orders in  
2 response to the motion (the prehearing orders).<sup>2</sup> The moving party then filed the motion at  
3 issue here,<sup>3</sup> which is essentially a motion for reconsideration. This is the consolidated decision  
4 of the Council, Councilmember Tony Ifie, and Councilmember Richard Fryhling in response to  
5 the petition for review.

## 6 II. DISCUSSION

7 The moving party challenges the prehearing orders on four grounds. First, he alleges  
8 that the orders are procedurally invalid and void. Second, he reiterates the argument made in  
9 his original motion that the appearance of fairness doctrine requires disqualification of CTED,  
10 DNR, and Councilmembers Ifie and Fryhling. Third, he asserts for the first time that a  
11 common law rule other than the appearance of fairness doctrine requires the disqualification of  
12 CTED, DNR, and Councilmembers Ifie and Fryhling. Fourth, he also raises for the first time a  
13 procedural due process challenge to their participation. Each assertion is addressed below.

### 14 A. THE PREHEARING ORDERS ARE PROCEDURALLY VALID.

15 The moving party characterizes the prehearing orders as initial orders that fail to  
16 comply with WAC 463-30-330(2) because “they do not include any ‘statement describing  
17 available procedures for administrative relief’” and “[reduce] the time for appeal by half” (i.e.,  
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19 <sup>2</sup> Prehearing Order No. 3 (Decision and Declaration of Councilmember Richard Fryhling in Response to  
20 Intervenor F. Steven Lathrop’s Disqualification Motion); Prehearing Order No. 4 (Decision and Declaration of  
21 Councilmember Tony Ifie in Response to Intervenor F. Steven Lathrop’s Disqualification Motion); Prehearing  
22 Order No. 5 (Decision of the Energy Facility Site Evaluation Council in Response to Intervenor F. Steven  
23 Lathrop’s Motion to Disqualify the Department of Natural Resources and the Department of Community Trade  
24 and Economic Development).

25 <sup>3</sup> The moving party’s motion is titled “Petition for Review of Initial Order of the Decision of the Energy  
26 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 [sic] 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 [sic] for Review of the Decision and Declaration of Council Member  
Richard Frylingher [sic] in Response to F. Steven Lathrop’s Disqualification Motion (Prehearing Order No. 4;  
Council Order No. 782).”

1 from the 20 days required in WAC 463-30-330(2) to the ten days required in the prehearing  
2 orders). Petition for Review, at 2.

3 The moving party mischaracterizes the prehearing orders. While he is correct that they  
4 are “prehearing orders,” he is incorrect that they are also “initial orders” subject to WAC 463-  
5 30-330. Prehearing orders and initial orders are two different things, subject to different  
6 procedural requirements. The prehearing orders complied with the applicable rule, which is  
7 WAC 463-30-270(3), not WAC 463-30-330(2) cited by the moving party. The correct rule,  
8 WAC 463-30-270(3), states:

9 Following the prehearing conference, the presiding officer shall issue an order  
10 reciting the action taken at the conference, the amendments allowed to the  
11 proceedings, and the agreements made by the parties concerning all of the  
12 matters considered. If no objection to such notice is filed within ten days after  
the date such notice is mailed, it shall control the subsequent course of the  
proceeding unless modified for good cause by subsequent order.

13 (Emphasis added.) Each of the prehearing orders properly apprised the parties that this relief  
14 was available and that they had the stated ten days to seek it. Prehearing Order No. 3 at 15;  
15 Prehearing Order No. 4 at 15; Prehearing Order No. 5 at 18 – 19.

16 The moving party’s characterization of the prehearing orders as initial orders fails to  
17 account for distinction made by both the Administrative Procedure Act and the Council’s rules  
18 between post-adjudication orders (including initial orders) and other kinds of orders such as the  
19 prehearing orders. According to the Administrative Procedure Act, initial orders are  
20 preliminary versions of final orders. RCW 34.05.461. Both initial and final orders are issued  
21 after the adjudicative proceeding has taken place and deal with the substantive merits of the  
22 matter before the decisionmaker, and not with preliminary procedural matters such as  
23 disqualification motions. RCW 34.05.461 (3) and (4) (“Initial and final orders shall include a  
24 statement of findings... .” “Findings of fact shall be based exclusively on the evidence of  
25 record in the adjudicative proceeding ... .”); compare RCW 34.05.425(3) – (5) on decisions in  
26 response to motions to disqualify; Department of Ecology v. City of Kirkland, 84 Wn.2d 25,

1 523 P.2d 1181 (1974); Lewis County v. Public Employment Relations Commission, 31  
2 Wn.App. 853, 644 P.2d 1231 (1982).

3 The Council's rules also recognize this distinction between initial or final orders and  
4 prehearing orders. Initial and final orders are addressed at WAC 463-30-320; WAC 463-30-  
5 330; and WAC 463-30-335. Prehearing orders are addressed separately at WAC 463-30-270,  
6 the rule under which the Council issued the prehearing orders.

7 The three prehearing orders are not initial or final orders. They were expressly  
8 captioned as prehearing orders.<sup>4</sup> The decisions embodied in the prehearing orders arose in the  
9 context of a prehearing conference and were issued before the adjudication was scheduled and  
10 held.<sup>5</sup> The prehearing orders do not address the substantive matter before the Council, which  
11 is Sagebrush Power Partners' application to construct and operate a wind turbine electrical  
12 generation facility.

13 For these reasons, the Council and Councilmembers Ifie and Fryhling conclude that the  
14 prehearing orders were properly treated as prehearing orders under WAC 463-30-270(3) and  
15 not as initial orders under WAC 463-30-330(2). Petitions for review of the prehearing orders  
16 needed to be filed within ten days. Each of the three prehearing orders notified the parties that  
17 they could seek such relief within that timeframe and the moving party did so. This fully  
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20 <sup>4</sup> The decisions were captioned as Prehearing Order No. 3, Prehearing Order No. 4, and Prehearing Order  
No. 5.

21 <sup>5</sup> At the first prehearing conference in this matter, the moving party orally sought to disqualify  
22 Councilmembers Fryhling and Ifie. Prehearing Order No 1, at 8. Because he articulated no facts in support of his  
23 request, the Council suggested that he file a written motion to disqualify. Id. He subsequently did so. Motion to  
24 Disqualify Energy Facility Site Evaluation Council Members; Motion to Clarify Issues; Motion for  
25 Reconsideration or Alternatively Objection to Limitation of Issues; Declaration of Counsel for Intervenor F.  
26 Steven Lathrop; Certificate of Service. In response, the Council issued Prehearing Order No. 2 establishing a  
schedule for other parties to respond to the motion and for the moving party to reply. Prehearing Order No. 2.  
Responses were filed by the applicant Sagebrush Power Partners, intervenor Renewable Northwest Project, and  
Kittitas County and a reply was timely filed by the moving party and the Council issued the prehearing orders.  
The adjudication itself has yet to be scheduled.

1 complied with the applicable rule, WAC 463-30-270(3). As a consequence, the prehearing  
2 orders were procedurally valid.

3 **B. THE MOVING PARTY HAS NOT PROVIDED A BASIS UPON WHICH THE**  
4 **COUNCIL AND COUNCILMEMBERS IFIE AND FRYHLING SHOULD REVERSE**  
5 **THEIR DECISIONS WITH RESPECT TO THE APPEARANCE OF FAIRNESS**  
6 **DOCTRINE.**

7 In his motion for reconsideration, the moving party reiterates the position taken in his  
8 original motion that participation in this matter by CTED, DNR, and Councilmembers Fryhling  
9 and Ifie violates the appearance of fairness doctrine.

10 However, in making his argument the moving party appears to leave at least seven  
11 significant portions of the prehearing orders undiscussed and unchallenged: (1) CTED and  
12 DNR are not members of the Council and therefore not subject to a motion to disqualify; (2)  
13 entire agencies cannot be disqualified under the doctrine; (3) the Council is not a  
14 decisionmaker within the meaning of the appearance of fairness doctrine; (4) the moving party  
15 failed to meet his threshold burden of providing evidence of actual or potential bias; (5) the  
16 doctrine is not primarily concerned with affiliation; (6) no reason apart from affiliation exists  
17 to disqualify Councilmembers Ifie and Fryhling; and (7) the common law appearance of  
18 fairness doctrine cannot thwart the composition of the Council intentionally established by the  
19 legislature. Together and separately these unchallenged conclusions continue to warrant denial  
20 of the moving party's motion to disqualify. For this reason, the Council and Councilmembers  
21 Ifie and Fryhling remain unconvinced that the disqualification motion should be granted.

22 Turning nonetheless to the portions of the orders that the moving party does challenge,  
23 the Council and Councilmembers Ifie and Fryhling conclude that the moving party's  
24 arguments do not justify reversal of the prehearing orders. Each argument will be discussed in  
25 turn.

26 While the moving party quarrels with the statement in the prehearing orders that the  
appearance of fairness doctrine applies to decisionmakers acting in a quasi-judicial capacity

1 (because he views the Organization to Preserve Agricultural Lands v. Adams County, 128  
2 Wn.2d 869, 913 P.2d 793 (1996) case as distinguishable as a local land use case unlike this  
3 proceeding) he fails to explain why the three other non-land use cases cited by the Council for  
4 this same proposition are inapplicable. Petition for Review, page 3. The Council cited State  
5 v. Finch, 137 Wn.2d 792, 808, 975 P.2d 967 (1999); Carrick v. Locke, 125 Wn.2d 129, 143  
6 n.8, 882 P.2d 173 (1994); State v. Post, 118 Wn.2d 596, 618, 826 P.2d 172 (1992).<sup>6</sup> These  
7 recent, non-land use cases all hold that the appearance of fairness doctrine applies solely to  
8 decisionmakers acting in quasi-judicial capacities.

9 As a related matter, the moving party is also incorrect in asserting that the cases  
10 limiting the appearance of fairness doctrine to quasi-judicial proceedings apply only to local  
11 land use decisions. For two decades, non-land use case decisions have repeatedly applied the  
12 limit outside the local land use context. In addition to the three cases cited in the preceding  
13 paragraph, see also Washington State Medical Disciplinary Board v. Johnston, 99 Wn.2d 466,  
14 478, 663 P.2d 457 (1983) (Professional licensure case stating “[a]lthough this doctrine  
15 originated in the land use area, ... it has been extended to other types of quasi-judicial  
16 administrative proceedings... .”); Magala v. Department of Labor and Industries, 116 Wn.App.  
17 966, 972, 69 P.3d 354 (2003) (Department of Labor and Industries electrical inspection case  
18 stating “[t]he appearance of fairness doctrine applies to administrative tribunals acting in a  
19 quasi-judicial capacity.”); Bunko v. City of Puyallup Civil Service Commission, 95 Wn.App.  
20 495, 503, 975 P.2d 1055 (1999) (civil service appeal case stating “[t]he appearance of fairness  
21 doctrine protects public confidence in quasi-judicial proceedings”).

22 The statute cited by the moving party in this regard (RCW 42.36.010) is irrelevant.  
23 Contrary to the moving party’s assertion, the purpose of Chapter 42.36 is not to restrict the  
24 application of the quasi-judicial limitation only to local land use cases. When the statute was  
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26 <sup>6</sup> Cited in Prehearing Order No. 5, at 8; Prehearing Order No. 4, at 6; Prehearing Order No. 3, at 6.

1 enacted, the doctrine had not been applied by the courts outside the land use context so the  
2 statute could not have had such a purpose. After the development of the appearance of fairness  
3 doctrine in land use cases over the course of a decade, in 1978 the Supreme Court stated that  
4 the doctrine is not constitutionally based. City of Bellevue v. King County Boundary Review  
5 Board, 90 Wn.2d 856, 863, 586 P.2d 470 (1978). The legislature thereupon in 1982 in Chapter  
6 42.36 limited the doctrine’s application and scope in the land use context by identifying the  
7 types of local land use decisions subject to the doctrine. 1982 Wash. Laws c 199 §1 (codified  
8 at RCW 42.36.010). The legislature defined some kinds of local land use decisions as being  
9 quasi-judicial and subject to the doctrine and other kinds of local land use decisions as not  
10 being quasi-judicial and therefore not subject to the doctrine. RCW 42.36.010. It wasn’t until  
11 a year later that the doctrine was first expressly applied by the courts outside a land use case.  
12 Washington State Medical Disciplinary Board v. Johnston, 99 Wn.2d 466, 478, 663 P.2d 457  
13 (1983). The courts thereupon continued to develop and refine the doctrine outside the land  
14 use context and, as discussed in this and the preceding two paragraphs, have continued to apply  
15 it only to quasi-judicial decisionmakers.

16 The moving party also challenges the Council’s use of the WPEA v. PRB case to define  
17 what action is quasi-judicial because, according to him, “[i]t dealt with whether a state agency  
18 was exercising a judicial function” and was not an appearance of fairness doctrine case.  
19 Petition for Review, page 3 (discussing WPEA v. PRB, 91 Wn.App. 640, 959 P.2d 143  
20 (1998)). However, the case indeed dealt with the issue of quasi-judicial status, expressly  
21 stating “the following factors are relevant in determining whether an administrative action is  
22 quasi-judicial.” 91 Wn.App. 640, 647, 959 P.2d 143 (1998) (emphasis added). The moving  
23 party did not proffer an appearance of fairness doctrine case on quasi-judicial status that he  
24 finds to be better law. The Council chose the WPEA v. PRB case because it is relatively  
25 recent, because it addresses quasi-judicial activities by state agencies, and because it explores  
26 the pertinent considerations in a well-reasoned and detailed fashion. In any event, application

1 of an appearance of fairness doctrine case on the same issue would produce the same result.  
2 Side v Cheney, 37 Wn.App. 199, 201, 202, 679 P.2d 403 (1984). In Side, the Court of Appeals  
3 stated that the test for distinguishing between quasi-judicial and non-quasi-judicial functions is  
4 whether the function performed by the agency is one which the judiciary has historically  
5 performed prior to creation of the agency. Prior to the creation of the Council, Washington  
6 courts did not historically make recommendations to the Governor about the siting,  
7 environmental permitting, and ongoing monitoring of large energy plants. Accordingly, under  
8 this appearance of fairness doctrine case, the Council's functions would not be quasi-judicial.

9 With respect to the moving party's assertion that the matter before the Council is quasi-  
10 judicial because of the presence of an administrative law judge; because of references in  
11 Prehearing Order No. 1 to adjudicative proceedings; and because of the applicability of the  
12 Administrative Procedure Act (APA) to the adjudicative proceeding portion of the this matter,  
13 he appears to misperceive the position expressed in the prehearing orders. Petition for Review,  
14 page 4. The prehearing orders expressly acknowledge that the Council holds one adjudicative  
15 proceeding under the APA. Prehearing Order No. 5, at 9 – 11; Prehearing Order No. 4, at 7 –  
16 9; Prehearing Order No. 3, at 7 – 9. The point the orders make, however, is that the matter  
17 before the Council extends well beyond that one APA hearing and that the APA hearing is only  
18 part of a lengthy and multi-faceted process. The pertinent legal issue is the proper  
19 characterization of the entire process involved in the Council's preparation of a  
20 recommendation to the Governor, not merely the characterization of one isolated portion of  
21 that process. As discussed in the prehearing orders and in the preceding paragraphs, under the  
22 pertinent legal test for quasi-judicial status, the Council's preparation of a recommendation to  
23 the Governor does not meet the test for quasi-judicial action so the appearance of fairness  
24 doctrine does not apply.



1 For these reasons, the Council and Councilmembers Ifie and Fryhling find nothing in  
2 the moving party's Petition for Review that would warrant granting his motion to disqualify or  
3 reversing the decision in the prehearing orders based on the appearance of fairness doctrine.

4 **C. NO COMMON LAW PRINCIPLE SEPARATE FROM THE APPEARANCE OF**  
5 **FAIRNESS DOCTRINE REQUIRES THE DISQUALIFICATION OF CTED, DNR, OR**  
6 **COUNCILMEMBERS FRYHLING AND IFIE.**

7 With respect to the moving party's attempt to invoke some sort of common law  
8 principle separate from the appearance of fairness doctrine,<sup>7</sup> the Council has been unable to  
9 locate any such doctrine. The moving party cites Chicago, Milwaukee, St. Paul and Pacific  
10 Railroad Company v. Washington State Human Rights Commission, 87 Wn.2d 802, 557 P.2d  
11 307 (1976) and State ex rel. Barnard v. Board of Education, 19 Wash. 8, 52 P. 317 (1898) in  
12 support of this proposition. However, the Chicago case was an appearance of fairness doctrine  
13 case and the Barnard case has been treated by the Washington Supreme Court as a precursor of  
14 the appearance of fairness doctrine. Washington State Medical Disciplinary Board v.  
15 Johnston, 99 Wn.2d 466, 478-479, 468, 663 P.2d 457 (1983). Both cases must be evaluated in  
16 light of the entire body of appearance of fairness jurisprudence articulated in the prehearing  
17 orders and this order. Neither case can be read in isolation in an attempt to create a  
18 disqualification doctrine that Washington caselaw does not support. In addition, the moving  
19 party cites Offutt v. United States, 348 U.S. 11, 75 S.Ct. 11, 99 L.Ed. 11 (1954). The issue in  
20 Offutt was the Supreme Court's supervisory authority over the administration of criminal  
21 justice in federal courts under a specific rule in the Federal Rules of Criminal Procedure. 348  
22 U.S. at 12 – 13. The Council does not read this case as creating any sort of common law right  
23 under Washington law.

24 In conclusion, the Council and Councilmembers Ifie and Fryhling find nothing in the  
25 moving party's Petition for Review that would warrant granting his motion to disqualify and

26 <sup>7</sup> Petition for Review, at 4 – 5.

1 reversing the decision in the prehearing orders based on a common law principle other than the  
2 appearance of fairness doctrine.

3 **D. PARTICIPATION BY COUNCILMEMBERS IFIE AND FRYHLING DOES**  
4 **NOT VIOLATE CONSTITUTIONAL DUE PROCESS REQUIREMENTS.**

5 The moving party asserts that the statutory composition of the Council is  
6 unconstitutional on due process grounds. Petition for Review, at 5 – 6. Specifically, the  
7 moving party faults the legislature for combining two functions within CTED and DNR:  
8 appointing a member to the Council and at the same time operating the CTED Energy Division  
9 which implements the state energy policy, and managing the DNR land leasing program. *Id.*  
10 The moving party is of the view that DNR’s appointee, Councilmember Ifie, and CTED’s  
11 appointee, Councilmember Fryhling, are so tainted by their affiliation with DNR and CTED  
12 that their participation on the multi-member Council is unconstitutional. For the reasons  
13 explained below, the Council and Councilmembers Ifie and Fryhling disagree.

14 A statute is presumed constitutional and the party challenging it bears the burden of  
15 proving it unconstitutional beyond a reasonable doubt. State ex rel. Heavy v. Murphy, 138  
16 Wn.2d 800, 808, 982 P.2d 611 (1999) (quoting Belas v. Kiga, 135 Wn.2d 913, 920, 959 P.2d  
17 1037 (1998). This standard is met only if argument and research establish that there is no  
18 reasonable doubt the statute violates the Constitution. *Id.*

19 The moving party cites only one case in support of his argument, In re Detention of  
20 CW, 147 Wn.2d 259, 53 P.3d 979 (2002). Petition for Review, at 6. In re Detention of CW  
21 considered the procedural due process necessary to protect the liberty interests at stake in civil  
22 commitment proceedings for mentally ill individuals. At issue was the amount of time  
23 allowable for a hospital to refer an allegedly mentally ill patient to a county-designated mental  
24 health professional. Given that the moving party is asserting a property interest, not a liberty  
25 interest, and that the facts and applicable law in In re Detention of CW bear no similarity to the  
26 matter at hand, the Council and Councilmembers Ifie and Fryhling do not find the case to be

1 persuasive authority warranting a conclusion that the statutory composition of the Council is  
2 unconstitutional.

3 To the contrary, the pertinent caselaw supports a conclusion that the legislatively  
4 established composition of the Council is constitutional. Both the federal and state Supreme  
5 Courts have made clear that the mere combination of functions within agencies such as DNR  
6 and CTED does not, without more, violate the Constitution. Withrow v. Larkin, 421 U.S. 35,  
7 47, 95 S.Ct. 1456, 43 L.Ed.2d 712 (1975); Washington State Medical Disciplinary Board v.  
8 Johnston, 99 Wn.2d 466, 477, 663 P.2d 457 (1983).

9 With respect to Councilmember Fryhling, the moving party asserts he is denied due  
10 process because CTED has “taken a public position on the matter” by virtue of the CTED  
11 Energy Division’s intervention in this proceeding and invocation of the statutory state energy  
12 policy. Petition for Review, at 5. The moving party then imputes the Energy Division’s  
13 position to Councilmember Fryhling, notwithstanding the evidence in the record that no one at  
14 CTED has attempted to influence Councilmember Fryhling and that he will vote based solely  
15 on the applicable law and the merits of the matter before him.<sup>8</sup>

16 The pertinent cases do not support the moving party’s view that the CTED Energy  
17 Division’s policy or legal position is both automatically imputable to Councilmember Fryhling  
18 and constitutionally disqualifying. The existence of a statutory state energy policy has nothing  
19 to do with unconstitutional bias or prejudgment. To violate due process, bias must be with  
20 respect to a party litigant, not the subject matter of the lawsuit. Brauhn v. Brauhn, 10 Wn.  
21 App. 592, 599, (1974). Prejudgment concerns issues of fact about the parties, as distinguished  
22 from issues of law or policy. Hortonville Joint School District No. 1, 426 U.S. 482, 495, 96 S.  
23 Ct. 2308, 49 L.Ed. 2d 1 (1976); Hammond v. Baldwin, 866 F.2d 172, 177 – 178 (6<sup>th</sup> Cir.  
24 1989); Ritter v. Board of Commissioners of Adams County Public Hospital District No. 1, 96

25 \_\_\_\_\_  
26 <sup>8</sup> Prehearing Order No. 3, at 5.

1 Wn.2d 503, 512, 637 P.2d 940 (1981). Evidence of a decisionmaker’s political outlook is  
2 irrelevant to prove bias. Layne v. Hyde, 54 Wn. App. 125, 131, 773 P.2d 83, review denied,  
3 113 Wn.2d 1016 (1989). Even if CTED or the Energy Division had attempted to influence  
4 Councilmember Fryhling with regard to the state energy policy, application of a law is simply  
5 not unconstitutional bias.

6 Moreover, even if the CTED Energy Division’s legal or policy position met the  
7 definition of what can be constitutionally biasing, the moving party’s argument that the Energy  
8 Division speaks on behalf of the entire agency and that as an agency employee Councilmember  
9 Fryhling will be so fearful for his job or otherwise influenced by CTED’s view of the energy  
10 policy that he will be unable to render a fair decision is unsupported. The moving party has  
11 proffered no evidence that the Energy Division speaks on behalf of the entire agency or that  
12 either it or CTED influences Councilmember Fryhling’s actions. The moving party has  
13 provided no evidence to counter the only evidence in the record on this point – evidence that  
14 clearly states that no one at CTED has communicated with Councilmember Fryhling or  
15 attempted to influence him in any way.<sup>9</sup> No one has asked Councilmember Fryhling to take  
16 any particular position on the proposed project and his employment does not depend on his  
17 doing so.<sup>10</sup>

18 The Seventh Circuit Court of Appeals’ decision in Van Harken v. City of Chicago is  
19 instructive in this regard. In holding that drivers’ due process rights had not been violated  
20 when their parking violations were adjudicated by hearings examiners hired on an “at will”  
21 basis by the city’s director of revenue who managed the fines the drivers paid, the Court stated:

22 ...we do not think the adjudicative reliability of the hearing officers is fatally  
23 compromised by the manner of their appointment and by their lack of secure  
24 tenure. The officers are not paid by the number of hearings that they resolve

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24 <sup>9</sup> Prehearing Order No. 3, at 5.

25 <sup>10</sup> Id.

1 against the respondent ...; they have no quota of fines that they must impose on  
2 pain of losing their jobs or having their pay reduced; and they have no other  
3 financial stake in the outcome of the cases they adjudicate ... . If their very  
4 indirect, very tenuous stake (a fear that if a hearing officer let off too many  
5 alleged parking violators, the Director of Revenue may get angry and fire him)  
6 were enough to disqualify them on constitutional grounds, elected judges, who  
7 face significant pressure from the electorate to be “tough” on crime, would be  
8 disqualified from presiding at criminal trials, especially in capital cases. They  
9 are not.

10 103 F.3d 1346, 1352 – 1353 (7<sup>th</sup> Cir. 1997) (emphasis added).

11 With respect to Councilmember Ifie, the moving party asserts DNR “holds a clear  
12 vested interest” in the outcome of this matter. Petition for Review at 5. Presumably, he is  
13 referring to the \$28,000 in lease payments received by DNR from the applicant for use of state  
14 land for the proposed project. The moving party does not challenge that this amount is *de*  
15 *minimus* in comparison with DNR’s biennial budget (\$223 million), the revenue DNR  
16 generated for the common school trust account (\$67.5 million), and the lease revenues DNR  
17 received in fiscal year 2002 (\$37.2 million).<sup>11</sup> Nor does the moving party challenge the fact  
18 that DNR itself does not profit from receipt of the \$28,000 in lease payments because the funds  
19 support school construction under the control of the board of education.<sup>12</sup> This sort of *de*  
20 *minimus* institutional interest does not violate due process. The Fourth Circuit Court of  
21 Appeals’ holding in Doolin Security Savings Bank, F.S.B. v. Federal Deposit Insurance  
22 Corporation is helpful in this regard:

23 The FDIC’s interest in maintaining the [deposit insurance] fund appears no  
24 greater than the interests of many agencies that adjudicate penalty or fee  
25 determinations in their own administrative proceedings. Presumably all  
26 agencies inherently have some level of “institutional bias,” but such an interest  
does not render all agencies incapable of adjudicating disputes within their own  
proceedings given the strong public interest in efficient, effective, and expert  
decisionmaking in the administrative setting. We decline to abrogate the  
presumption of integrity and honor of administrators who serve as adjudicators  
... and we agree with the Board’s decision that the FDIC procedures do not  
violate Doolin’s due process right to a disinterested decisionmaker.

<sup>11</sup> Prehearing Order 4, at 4 – 5.

<sup>12</sup> *Id.*

1 53 F.3d 1395, 1407 (4<sup>th</sup> Cir. 1995). See also Van Harken v. City of Chicago, 103 F.3d 1346,  
2 1353 (7<sup>th</sup> Cir. 1997); Commonwealth of the Northern Mariana Island v. Kaipat, 94 F.3d 574  
3 (9<sup>th</sup> Cir. 1996) (no due process violation because “[e]xpenditures from that Fund, including  
4 when or whether there are any, and for what kind of improvement, are up to the Governor.”)

5 Moreover, as was the case with respect to Councilmember Fryhling, no one at any level  
6 within DNR has communicated with Councilmember Ifie about the proposed project or has  
7 asked him to take any particular position on it. His employment does not depend on how he  
8 votes in this matter. The fact that DNR has received *de minimus* lease payments does not  
9 influence Councilmember Ifie’s decision in any way and he will vote solely as a member of the  
10 Council.

11 With respect to both Councilmember Ifie and Councilmember Fryhling, sufficient  
12 protections are in place to ensure the constitutional due process rights of all parties are  
13 protected. Councilmembers do not act with unbridled discretion, which is a relevant  
14 consideration with regard to due process. Republic Industries, Inc. v. Teamsters Joint Council  
15 No. 83 of Virginia Pension Fund, 718 F.2d 628, 640 - 641 (4<sup>th</sup> Cir. 1983). Strict sideboards are  
16 set on the actions of the Council, including Chapter 80.50 RCW, Chapter 43.21C (the State  
17 Environmental Policy Act), 42 U.S.C.A. §§ 7501 – 7671q (Clean Air Act), Chapter 70.94  
18 RCW (Washington Clean Air Act), 33 U.S.C.A. §§ 1251 – 1387 (Water Pollution Control  
19 Act), Chapter 80.48 RCW (Washington Water Pollution Control Act), and Title 463 WAC.  
20 The Council’s WAC 463-30-050 binds councilmembers to act as members of the Council and  
21 not of their appointing agencies. Moreover, the fact that the Council is composed of  
22 representatives of a variety of state agencies and local governments with different interests and  
23 different areas of expertise provides additional protection. As the Fourth Circuit Court of  
24 Appeals stated in Republic Industries:

25 [t]o forbid tribunals composed of individuals drawn from organizations  
26 interested in the matter being regulated on the ground of such interest would  
deny the tribunal valuable, and perhaps otherwise unavailable, expertise.

1 718 F.2d 628, 640. The appointee of no one agency or local government issues the Council's  
2 recommendation to the Governor. Rather, the appointees of the Governor, agencies, and local  
3 governments with a variety of relevant interests, experience, technical competencies, and  
4 specialized knowledge bring their expertise to bear to produce the best possible combined  
5 recommendation to the Governor. To allow parties to eliminate those appointees that they  
6 view (rightly or wrongly) as being less favorable to their position than other Councilmembers  
7 would greatly diminish the overall fairness of the process with regard to all the disparately  
8 situated parties to the Council's adjudications.

9 In light of the foregoing, the Council and Councilmembers Ifie and Fryhling are not  
10 persuaded that the legislative choice to assign dual responsibilities to DNR and CTED is  
11 unconstitutional. One who asserts a combination of functions is unconstitutional must  
12 overcome a presumption of honesty and integrity in those serving as adjudicators. Withrow v.  
13 Larkin, 421 U.S. 35, 47, 95 S.Ct. 1456, 43 L.Ed.2d 712 (1975). The moving party's  
14 unsupported assertion that "no reasonable person ... could conclude that these two men ... are  
15 going to do anything other than vote in favor of the application"<sup>13</sup> does not overcome either the  
16 presumption of honesty to which Councilmembers Ifie and Fryhling are entitled or the actual  
17 evidence in the record that they are in no way influenced by their employers and will vote  
18 solely based on applicable law and the merits of the matter before them.<sup>14</sup> This is not a  
19 situation in which Councilmembers Ifie and Fryhling take any active partisan role with respect  
20 to either DNR's leasing program or CTED's Energy Division, dual roles which, if they existed,  
21 could indeed be constitutionally disqualifying. In re Water Use Permit Applications, 94  
22 Hawaii 97, 120 -121, 9 P.3d 409 (Haw. 2000). To the contrary, Councilmembers Ifie and  
23 Fryhling are actively insulated not only from any involvement with the lease for the proposed

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25 <sup>13</sup> Petition for Review, at 5 – 6.

26 <sup>14</sup> Prehearing Order No. 4, at 5; Prehearing Order No. 3, at 5.

1 project and the Energy Program but also from any influence whatsoever by DNR or CTED  
2 with respect to the project.

3 The moving party has not proffered “argument and research is sufficient to establish  
4 that there is no reasonable doubt” that the dual roles assigned to DNR, CTED, and  
5 Councilmembers Ifie and Fryhling by the legislature violate the Constitution. Consequently,  
6 the Council and Councilmembers Ifie and Fryhling have no basis upon which to disqualify  
7 DNR, CTED, and DNR and CTED’s appointees to the Council.

8 **III. DECISION**

9 Based on the foregoing, and upon consideration of the Petition for Review, the Council  
10 and Councilmembers Tony Ifie and Richard Fryhling decline to issue an order disqualifying  
11 CTED, DNR, Councilmember Ifie, or Councilmember Fryhling from participation in this  
12 matter.

13 DATED this \_\_\_\_\_ day of January, 2004.

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16 \_\_\_\_\_  
17 Jim Luce, Chair

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Hedia Adelsman

18 \_\_\_\_\_  
19 Tony Ifie

\_\_\_\_\_

Richard Fryhling

20 \_\_\_\_\_  
21 Tim Sweeney

\_\_\_\_\_

Chris Smith Towne

22  
23 \_\_\_\_\_  
24 Patti Johnson