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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 LLC

13
14 KITTITAS VALLEY WIND POWER
15 PROJECT
16

PREHEARING ORDER NO. 3
COUNCIL ORDER NO. 781

DECISION AND DECLARATION OF
COUNCILMEMBER TONY IFIE IN
RESPONSE TO INTERVENOR F.
STEVEN LATHROP'S
DISQUALIFICATION MOTION

17 **I. INTRODUCTION**

18 Intervenor F. Steven Lathrop (the moving party) seeks the disqualification of Energy
19 Facility Site Evaluation Council members Richard Fryhling and Tony Ifie and the Departments
20 of Community, Trade and Economic Development (CTED) and Natural Resources (DNR)
21 from participation in this matter.¹ The Administrative Procedures Act provides that an
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23 ¹ This matter is a proceeding to consider Sagebrush Power Partners' application No. 2003-01 to construct
24 and operate the Kittitas Valley Wind Power Project, an approximately 182-megawatt wind turbine electrical
25 generation facility. Parties to this proceeding are: Sagebrush Power Partners, L.L.C. (represented by Darrel
26 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.

1 individual whose disqualification is requested shall determine whether to grant the petition.
2 RCW 34.05.425(5). This is Tony Ifie's decision on the portion of the motion that seeks to
3 disqualify him. The portions of the motion seeking to disqualify CTED, DNR, and
4 Councilmember Richard Fryhling are addressed in separate decisions, with the decision
5 concerning CTED and DNR entered after this declaration and decision is entered.

6 II. FINDINGS OF FACT

7 A. The Energy Facility Site Evaluation Council

8 1. Creation and Purpose

9 The Energy Facility Site Evaluation Council (the Council) was created in 1970 to
10 provide "one stop" service in the siting of power plants, rather than having the various pieces
11 of a siting decision spread among a multiplicity of state agencies and local governments. 1970
12 Wash. Laws 1st ex. sess. §45. The legislature intended to integrate the administrative and
13 technical resources of state government for the review, certification, and monitoring of the
14 siting, construction, and operation of power plants. John A. Granger and Kenneth R. Wise, A
15 Critique of One-Stop Siting in Washington: Streamlining Review Without Compromising
16 Effectiveness, 10 Environmental Law 457 (1980).

17 2. Membership

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

21 The six fixed members are a chair appointed by the Governor; and representatives of
22 the Departments of Community, Trade and Economic Development; Ecology; Fish and
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25 Responses to F. Steven Lathrop's motion were timely filed with the Council by Sagebrush Power
26 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.

1 Wildlife; and Natural Resources; and the Utilities and Transportation Commission. RCW
2 80.50.030(2)(b) and (3)(a).

3 Additional members appointed on a case-by-case basis include representatives of local
4 governments and, possibly, four state agencies. The four state agencies that may, at their
5 discretion, appoint members to consider project applications are the Departments of
6 Agriculture; Health; and Transportation; and the Military Department. RCW 80.50.030(3)(b).
7 Counties, cities, and port districts appoint Council members when a project is proposed within
8 their boundaries. RCW 80.50.030(4) – (6).

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

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

19 The Council is not a consortium of state agencies. It is a stand-alone entity comprised
20 of the appointees of the governor, state agencies and local governments.

21 3. Funding

22 The Council is totally fee funded. Applicants and permits holders are required
23 to pay the Council’s reasonable and necessary costs, including councilmembers’
24 salaries and expenses, staff salaries, and overhead. RCW 80.50.071 and RCW
25 80.50.175. Actual expenditures are dependent on the number of applications and
26 operating sites.

27 B. The Department of Natural Resources

28 1. Mission

² Emphasis added to the original.

1 The Department of Natural Resources (DNR) has a variety of functions. In addition to
2 regulating forest practices and performing wild land fire suppression statewide, DNR manages
3 3 million acres of uplands and 2.6 million acres of aquatic lands on behalf of the citizens of the
4 state. The 3 million acres of uplands were granted to the state in Washington's Enabling Act,
5 and are held in trust pursuant to federal law and the Washington Constitution. 25 Stat. 676
6 (1889); Wash. Const. art. 16. The legislature has authorized DNR to lease trust land for a
7 variety of purposes. RCW 79.01.242. As a matter of federal and state law, income from trust
8 land leases benefits trust beneficiaries such as the K-12 school system.

9 **2. The Common School Trust, DNR's Budget, and the Sagebrush Power**
10 **Partners Lease.**

11 DNR's current biennial state funded operating budget is \$223 million. 2003 Wash.
12 Laws, 1st Sp. Sess., ch. 25, Sec. 308. In fiscal year 2002, DNR received lease revenues of
13 \$37.2 million.

14 In 2003, DNR leased trust land to Sagebrush Power Partners for the Kittitas Valley
15 Wind Power Project. Since its inception, this lease has generated approximately \$28,000 in
16 income for the common school (K-12) trust managed by DNR. According to DNR's 2002
17 Annual Report, the total revenue generated by DNR and directed into the common school trust
18 account in that year was \$67.6 million. Seventy-five percent of this money goes directly into
19 the Common School Construction Fund, which in accordance with the state constitution, is to
20 be used "exclusively for the purpose of financing the construction of facilities for the common
21 schools." Wash. Const. art. 9, sec. 3; RCW 28A.515.320. School construction is not the
22 mission of DNR – that mission falls upon the state board of education. RCW 28.525.190. The
23 other twenty-five percent earned from the leasing money goes into a Resource Management
24 Cost Account (RMCA), which is a trust asset dedicated to the management of the trust. RCW
25 79.64.020, -.030, -.040; AGO 1989, No. 14. DNR does not have any direct appropriation
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1 authority with respect to the RMCA; therefore the legislature must first appropriate such funds
2 before the DNR is authorized to spend them for the purposes of managing the trust.

3 DNR has not appeared in this proceeding in support of the proposed project.

4 **3. Councilmember Tony Ifie**

5 In January 2001, DNR selected Tony Ifie as its appointee to the Council.
6 Councilmember Ifie has over 23 years of experience working in government on transportation
7 and natural resources issues. He has worked for DNR as a Division Manager of the agency's
8 Engineering Division. Councilmember Ifie has an undergraduate degree in civil engineering, a
9 master's degree in transportation engineering and is a licensed civil engineer.

10 Since his appointment to the Council, Councilmember Ifie has been strictly isolated
11 from the DNR office that is leasing land to the project proponent. He works out of DNR's
12 headquarters in Olympia, over 150 miles from DNR's southeast regional office in Ellensburg.
13 He does not share phone systems, computers, fax machines, or mail stops with the regional
14 Ellensburg DNR office. No one in the Ellensburg DNR office has access to his phone,
15 computer, fax machine, or mail.

16 DNR is well aware of the needed separation between Councilmember Ifie and DNR
17 with respect to the proposed project. No one, at any level within DNR, has ever tried to
18 discuss the Kittitas Valley Wind Power Project with Councilmember Ifie. No one at DNR has
19 asked him to take any particular position with respect to the proposed project nor does his
20 employment depend on his doing so. He will not benefit financially if the project is approved.
21 Councilmember Ifie does not have a job description that defines the manner in which he is to
22 undertake his duties as a member of the Council. No one at DNR sits in review of his actions
23 as a councilmember. He has prejudged nothing concerning the project and will vote solely
24 based on applicable law and the merits of the matter before him.

25 **C. The Disqualification Motion**

1 The moving party seeks to disqualify Councilmember Ifie as DNR's representative to
2 the Council based on an alleged conflict of interest and an alleged violation of the appearance
3 of fairness doctrine:

4 [The lease payment to DNR] not only is an actual conflict of interest in that the
5 Department of Natural Resources has a pecuniary interest in the out come of the
6 determination the Energy Site Evaluation Council [sic] will make but it also
7 violated the Appearance of Fairness Doctrine.

8 The Department of Natural Resources' participation violates the second prong
9 of the Appearance of Fairness Doctrine. The Department of Natural Resources
10 will benefit financially if the application is approved. The Department of
11 Natural Resources' participation as a decision maker on this application is a
12 clear violation of the Appearance of Fairness Doctrine.³

13 III. CONCLUSIONS OF LAW

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

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

22 1. Neither the Council nor Councilmember Ifie is a Decisionmaker.

23 The appearance of fairness doctrine applies only to quasi-judicial decisionmakers. State
24 v. Finch, 137 Wn.2d 792, 808, 975 P.2d 967 (1999); Carrick v. Locke, 125 Wn.2d 129, 143 n.
25 8, 882 P.2d 173 (1994); State v. Post, 118 Wn.2d 596, 618, 826 P.2d 172 (1992). The Council
26 and Councilmember Ifie 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

³ Declaration of Counsel for Intervenor F. Steven Lathrop at A(4) and (7).

1 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 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 Ifie are not decisionmakers.

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

9 The appearance of fairness doctrine applies to administrative decisionmakers acting in a quasi-judicial capacity. Organization to Preserve Agricultural Lands v. Adams County, 128 Wn.2d 869, 889, 913 P.2d 793 (1996). The Council’s consideration of Sagebrush Power Partners’ application is not quasi-judicial.

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13 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).

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20 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).

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24 The moving party has asked that DNR and Councilmember Ifie be disqualified from participation in “this matter” and “this application.” Declaration of Counsel for Intervenor F. Steven Lathrop, A(7). The “matter” and “application” before the Council is the application of

1 Sagebrush Power Partners, L.L.C. to construct and operate the Kittitas Valley Wind Power
2 Project. The legislature has established a multi-faceted process by which the Council develops
3 a recommendation to the Governor regarding such “matters” and “applications.” The Council
4 develops and applies environmental conditions regarding the type, design, location,
5 construction, and operational conditions of projects. RCW 80.50.040(2). The Council obtains
6 and evaluates independent scientific and technical studies of proposed projects. RCW
7 80.50.040(6). The Council develops project-specific siting criteria and draft certification
8 agreements for proposal to the Governor. RCW 80.50.040(8). The Council administers air
9 quality and water quality programs with respect to specific projects and issues air quality and
10 water quality permits to project operators. RCW 70.94.422(2) and RCW 90.48.262(2);
11 Chapter 463-38 WAC; Chapter 463-39 WAC. The Council provides for on-going monitoring
12 of projects to ensure compliance with site certification agreements. RCW 80.50.040(9). The
13 Council holds public information and land use hearings, and such other hearings as it deems
14 appropriate, along with various other public meetings as part of environmental permitting and
15 in compliance with the State Environmental Policy Act and the Open Public Meetings Act.
16 RCW 80.50.090.

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

1 Similarly, this matter does not involve the application of existing laws to facts for the
2 purpose of declaring or enforcing liability. This matter is in many ways analogous to the
3 permitting activities performed by the Departments of Ecology and Fish and Wildlife. The
4 Council's activities do not resemble the ordinary business of courts. They represent the
5 ordinary business of the executive branch performing administrative functions. While as part
6 of the lengthy process of considering a project application the Council is required to hold one
7 adjudicative hearing, the fact that one adjudicative proceeding is held as part of the Council's
8 larger process does not make the administrative matter quasi-judicial. Harris v. Hornbaker, 98
9 Wn.2d 650, 660, 658 P.2d 1219 (1983).

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

12 **3. The Moving Party Has Not Met His Threshold Burden of Providing**
13 **Evidence of Councilmember Ifie's Actual or Potential Bias.**

14 The appearance of fairness doctrine does not apply because the moving party has not
15 met his threshold burden as articulated by the Supreme Court. Before the appearance of
16 fairness doctrine will be applied, the moving party must provide evidence of the
17 decisionmaker's actual or potential bias. Organization to Preserve Agricultural Lands v.
18 Adams County, 128 Wn.2d 869, 890, 913 P.2d 793 (1996) (citing State v. Post, 118 Wn.2d
19 596, 618, 826 P.2d 172 (1992)). Mere speculation is not enough to meet this burden. In re
20 Haynes, 100 Wn. App. 366, 377 n.23, 996 P.2d 637 (2000).

21 The moving party has not met his threshold requirement. With respect to
22 Councilmember Ifie, the moving party has alleged nothing at all. Declaration of Counsel for
23 Intervenor F. Steven Lathrop at A. While the moving party alleges that DNR's receipt of lease
24 payments creates a conflict of interest, he does not provide any evidence that those allegations
25 can be imputed to Councilmember Ifie or that Councilmember Ifie is biased in his own right.
26 Public officers are entitled to a presumption that they will properly and legally perform their

1 | duties. Magala v. Department of Labor and Industries, 116 Wn. App. 966, 972, 69 P.3d 354
2 | (2003) (citing City of Hoquiam v. Public Employment Relations Commission, 97 Wn.2d 481,
3 | 488, 646 P.2d 129 (1982)).

4 | Moreover, even with respect to DNR itself the moving party has not met his threshold
5 | burden. DNR is the legislatively established leasing agent for state-owned trust land and also
6 | appoints a member to the Council. Section II(A) and (B) above. Disposition of the lease
7 | payments is not under DNR's control and DNR obtains no tangible benefit from them. Id. at
8 | (B)(2). Mere combination of functions within an agency does not violate the appearance of
9 | fairness doctrine. Washington State Medical Disciplinary Board v. Johnston, 99 Wn.2d 466,
10 | 479, 663 P.2d 457 (1983); Smith v. Mount, 45 Wash. App. 623, 626 – 627, 726 P.2d 474
11 | (1986); see also RCW 34.05.458.

12 | Accordingly, the moving party has not met his threshold burden with respect to
13 | Councilmember Ifie and his motion must be denied.

14 | **B. The Appearance of Fairness Doctrine has not been Violated.**

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

21 | **1. Overview of the Appearance of Fairness Doctrine.**

22 | Quasi-judicial action will withstand an appearance of fairness challenge if a reasonably
23 | prudent and disinterested person would conclude that that all parties obtained a fair and neutral
24 | hearing. Id. (citing Washington Medical Disciplinary Board v. Johnston, 99 Wn.2d 466, 478,
25 | 663 P.2d 457 (1983)). Application of this test requires that the reasonably prudent and
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1 disinterested person know and understand all of the relevant facts. Smith v. Behr Process
2 Corporation, 113 Wn. App. 306, 340, 54 P.3d 665 (2002).

3 Despite the name of the doctrine, mere “appearance” of unfairness is insufficient to
4 sustain an appearance of fairness challenge. State v. Carter, 77 Wn. App. 8, 11, 888 P.2d 1230
5 (1995). The moving party must provide evidence of the decision maker’s actual or potential
6 bias. Organization to Preserve Agricultural Lands v. Adams County, 128 Wn.2d 869, 890, 913
7 P.2d 793 (1996) (citing State v. Post, 118 Wn.2d 596, 618, 826 P.2d 172 (1992)). Mere
8 speculation is not enough to meet this burden. In re Haynes, 100 Wn. App. 366, 377 n.23, 996
9 P.2d 637 (2000).

10 **2. Application of the Doctrine to Councilmember Ifie**

11 The moving party makes no specific allegations of a conflict of interest by
12 Councilmember Ifie. Declaration of F. Steven Lathrop, at (A). Instead, his apparent
13 argument seems to be that DNR must be disqualified so its appointee must automatically be
14 disqualified. This argument is incorrect on several grounds as discussed below.

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

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

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

16 The potential for DNR to lease land to a project developer is part and parcel of the
17 overall statutory regime under which the legislature intends the Council to work. The
18 legislature is presumed to know the statutory duties of the entities it selected to appoint
19 members to the Council. Little v. Little, 96 Wn.2d 183, 634 P.2d 498 (1981). Combination
20 of functions within an agency does not violate the appearance of fairness doctrine.
21 Washington State Medical Disciplinary Board v. Johnston, 99 Wn.2d 466, 479, 663 P.2d 457
22 (1983); Smith v. Mount, 45 Wn. App. 623, 626 – 627, 726 P.2d 474 (1986); see also RCW
23 34.05.458. The legislature's decision that the public's interest is best served by having
24 agencies with expertise and a stake in the outcome appoint members to the Council must be
25 respected as a matter of constitutional separation of powers. See Magula v. Department of
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1 Labor and Industries, 116 Wn.App. 966, 973, 69 P.3d 354 (2003); Hillis v. Department of
2 Ecology, 131 Wn.2d 373, 389, 932 P.2d 139 (1997).

3 The moving party makes much of the fact that the project proponent has paid DNR
4 \$28,000 in lease payments. However, this amount is de minimus in comparison with DNR's
5 biennial budget (\$223 million), the revenue DNR generated for the common school trust
6 account (\$67.5 million), and the lease revenues DNR received in fiscal year 2002 (\$37.2
7 million). Section II(B)(2) above. The Council simply does not agree with the moving party
8 that receipt of \$28,000 in light of DNR's multi-million dollar budget, trust revenues and lease
9 revenues demonstrates actual or potential bias. In addition, as discussed in sections II(B)(1)
10 and (2) above, as a matter of federal and state law, the lease revenues received by DNR are
11 trust funds that belong, not to DNR, but to the trust beneficiaries. Equally significant,
12 disposition of the lease payments is not under DNR's control and provides no tangible benefit
13 to either DNR or its appointee to the Council. Section II(B)(1) and (2) above.

14 Moreover, the legislature has made it clear that receipt of fees or other monies from
15 project applicants is an appropriate part of the Council's work. The entire Council is a fee-
16 funded entity. RCW 80.50.071, RCW 80.50.175, and section II(A)(3) above. Council
17 members' salaries and agency expenditures are entirely dependent on fees paid by applicants
18 and permit holders. Id. To adopt the moving party's reasoning, the entire Council – with the
19 exception of its chair - would have to disqualify itself, something that the legislature did not
20 intend to occur.

21 Finally, there is no evidence that the legislature intended the Council to be deprived of
22 the DNR-appointed members when the trust beneficiaries' interests are most at stake, i.e.
23 when trust land is being proposed for use as the site of a major energy facility. The Council
24 should not be deprived of Councilmember Ifie's knowledge, experience and education when
25 faced with a decision concerning siting an energy facility on state trust land. Section II(B)(3)
26 above. To the contrary, that is exactly the situation in which DNR representation on the

1 Council is most crucial. Statutes must be construed to avoid unlikely, absurd or strained
2 consequences and the Council does not conclude that the legislature intended DNR's
3 appointee to be disqualified when use of state trust land is proposed as the site of an energy
4 facility. State v. Stannard, 109 Wn.2d 29, 742 P.2d 1244 (1987).

5 Because the Council has determined that DNR itself need not be disqualified from
6 participation in this matter, there is no reason to automatically disqualify Councilmember Ifie
7 based solely on his affiliation with DNR.

8 **c. There is No Reason, Independent of Councilmember Ifie's**
9 **Affiliation with DNR to Disqualify Him.**

10 In addition, there is no independent reason to disqualify Councilmember Ifie, separate
11 from his affiliation with DNR. He is in compliance with the Council's WAC 463-30-050
12 which makes him a member of the Council and not DNR. He has had no contact with DNR
13 concerning the proposed project. No one at DNR has attempted to influence him regarding
14 the project. He works 150 miles away from DNR's Ellensburg leasing office and does not
15 share a phone, Email, fax, or mailstop with the regional DNR office. He has prejudged
16 nothing concerning the project and will vote based solely on applicable law and the merits of
17 the matter before him. He will not benefit financially if the proposed project is approved. As
18 noted above, Councilmember Ifie is entitled to a presumption that he will properly and legally
19 perform his duties. Magala v. Department of Labor and Industries, 116 Wn. App. 966, 972,
20 69 P.3d 354 (2003). The moving party has made no allegations and provided no evidence to
21 the contrary.

22 Consequently, based on the relevant statutes and caselaw, a reasonably prudent and
23 disinterested person who knows and understands the Council's statutory regime and
24 Councilmember Ifie's relationship to DNR with respect to the proposed project would
25 conclude that his participation in this matter does not violate the appearance of fairness
26 doctrine.

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

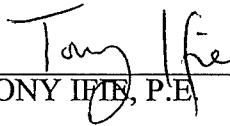
3 The moving party may also be alleging that Councilmember Ifie must be disqualified,
4 separate from the appearance of fairness doctrine, for an alleged actual conflict of interest.
5 Declaration of Counsel for Intervenor F. Steven Lathrop, A(4) and (7). There is ambiguity on
6 this point because the moving party does not identify the legal basis for his allegation nor does
7 he discuss it in either his motion or his reply. To the degree that such unsupported allegation
8 has not been waived by the moving party, an actual conflict of interest does not result from
9 Councilmember Ifie's participation on the Council for the reasons discussed in the
10 immediately preceding section. RCW 34.05.425.

11 **IV. DECISION**

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

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17 SIGNED at Olympia, Washington this 13th day of October, 2003

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

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22 _____
23 TONY IFIE, P.E.
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