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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. 4
COUNCIL ORDER NO. 782

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

15 **I. INTRODUCTION**

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

1 individual whose disqualification is requested shall determine whether to grant the petition.
2 RCW 34.05.425(5). This is Richard Fryhling's decision on the portion of the motion that seeks
3 to disqualify him. The portions of the motion seeking to disqualify CTED, DNR, and
4 Councilmember Ifie are addressed in separate decisions, with the decision concerning CTED
5 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
23 Wildlife; and Natural Resources; and the Utilities and Transportation Commission. RCW
24 80.50.030(2)(b) and (3)(a).

25 Additional members appointed on a case-by-case basis include representatives of local
26 governments and, possibly, four state agencies. The four state agencies that may, at their

1 discretion, appoint members to consider project applications are the Departments of
2 Agriculture; Health; and Transportation; and the Military Department. RCW 80.50.030(3)(b).
3 Counties, cities, and port districts appoint Council members when a project is proposed within
4 their boundaries. RCW 80.50.030(4) – (6).

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

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

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

17 3. Funding

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

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

23 1. Mission

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

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

² Emphasis added to the original.

- 1 • Community Development – CTED provides guidance, technical assistance, and
2 financial assistance to Washington’s cities and counties in the areas of housing,
3 public works, growth management, and social programs.
- 4 • Economic Development – CTED provides guidance, and technical and financial
5 assistance to economic development agencies, as well as approved individual
6 developments.

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

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

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

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

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

21 **3. Councilmember Richard Fryhling.**

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

26 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.

1 helping local governments in eastern Washington implement the Growth Management Act. He
2 also has previous experience on the Council, having served in 1971 – 72 during the first plant
3 approval under the Council’s authorizing legislation. He has never worked for or with CTED’s
4 Energy Division. Councilmember Fryhling has an undergraduate degree in geography and a
5 masters degree in urban planning.

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

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

23 **C. The Disqualification Motion**

24 The moving party seeks to disqualify Councilmember Fryhling on the grounds that
25 intervention of CTED’s Energy Division in this matter creates an alleged conflict of interest
26 and demonstrates alleged prejudgment in violation of the appearance of fairness doctrine:

1 With CTED as an intervenor as well as a decision maker, there is a conflict of
2 interest. One of the decision makers is a representative of CTED. CTED is
3 publicly advocating the approval of this application prior to the public hearing.
4 CTED, as an agency, has prejudged this application before the matter has come
5 before an appropriate body for public hearing. This violates the Appearance of
6 Fairness Doctrine and should serve as a basis for the disqualification of CTED
7 and its designated representative from the Energy Facility Site Evaluation
8 Council in this matter.⁴

9 III. CONCLUSIONS OF LAW

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

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

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

19 The appearance of fairness doctrine applies only to quasi-judicial decisionmakers. State
20 v. Finch, 137 Wn.2d 792, 808, 975 P.2d 967 (1999); Carrick v. Locke, 125 Wn.2d 129, 143 n.
21 8, 882 P.2d 173 (1994); State v. Post, 118 Wn.2d 596, 618, 826 P.2d 172 (1992). The Council
22 and Councilmember Fryhling are not decisionmakers with respect to certification of the
23 Kittitas Valley Wind Power Project. The Council's role is statutorily limited to preparing
24 reports and recommendations to the Governor. The Governor alone decides whether to
25 authorize the project. RCW 80.50.040(8) ("[The Council] shall ... prepare written reports to
26 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).

1 binding only upon execution of an agreement between the Governor and the applicant. RCW
2 80.50.100(2). Thus, the appearance of fairness doctrine does not apply to this matter because
3 the Council and Councilmember Fryhling are not decisionmakers.

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

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

9 Several factors are relevant in determining whether an administrative action is quasi-
10 judicial: (1) whether a court has been charged with making the agency's decision; (2) whether
11 the action is a type which courts historically have performed; (3) whether the action involves
12 the application of existing law to past or present facts for the purpose of declaring or enforcing
13 liability; and (4) whether the action resembles the ordinary business of courts as opposed to
14 that of legislators or administrators. WPEA v. PRB, 91 Wn.App. 640, 647, 959 P.2d 143
15 (1998).

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

20 The moving party has asked that CTED and Councilmember Fryhling be disqualified
21 from participation in "this matter" and "this application." Declaration of Counsel for
22 Intervenor F. Steven Lathrop, at (B). The "matter" and "application" before the Council is the
23 application of Sagebrush Power Partners, L.L.C. to construct and operate the Kittitas Valley
24 Wind Power Project. The legislature has established a multi-faceted process by which the
25 Council develops a recommendation to the Governor regarding such "matters" and
26 "applications." The Council develops and applies environmental conditions regarding the

1 type, design, location, construction, and operational conditions of projects. RCW
2 80.50.040(2). The Council obtains and evaluates independent scientific and technical studies
3 of proposed projects. RCW 80.50.040(6). The Council develops project-specific siting criteria
4 and draft certification agreements for proposal to the Governor. RCW 80.50.040(8). The
5 Council administers air quality and water quality programs with respect to specific projects and
6 issues air quality and water quality permits to project operators. RCW 70.94.422(2) and RCW
7 90.48.262(2); Chapter 463-38 WAC; Chapter 463-39 WAC. The Council provides for on-
8 going monitoring of projects to ensure compliance with site certification agreements. RCW
9 80.50.040(9). The Council holds public information and land use hearings, and such other
10 hearings as it deems appropriate, along with various other public meetings as part of
11 environmental permitting and in compliance with the State Environmental Policy Act and the
12 Open Public Meetings Act. RCW 80.50.090.

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

23 Similarly, this matter does not involve the application of existing laws to facts for the
24 purpose of declaring or enforcing liability. This matter is in many ways analogous to the
25 permitting activities performed by the Departments of Ecology and Fish and Wildlife. The
26 Council's activities do not resemble the ordinary business of courts. They represent the

1 ordinary business of the executive branch performing administrative functions. While as part
2 of the lengthy process of considering a project application the Council is required to hold one
3 adjudicative hearing, the fact that one adjudicative proceeding is held as part of the Council's
4 larger process does not make the administrative matter quasi-judicial. Harris v. Hornbaker, 98
5 Wn.2d 650, 660, 658 P.2d 1219 (1983).

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

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

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

17 The moving party has not met his threshold requirement. With respect to
18 Councilmember Fryhling, the moving party has alleged nothing at all. Declaration of Counsel
19 for Intervenor F. Steven Lathrop at B(8) and (9). While the moving party makes two
20 allegations about CTED (that a conflict of interest is created by the participation of CTED's
21 Energy Division and that CTED has prejudged this matter), he does not provide any evidence
22 that those allegations can be imputed to Councilmember Fryhling or that Councilmember
23 Fryhling is biased in his own right. Public officers are entitled to a presumption that they will
24 properly and legally perform their duties. Magala v. Department of Labor and Industries, 116
25 Wn. App. 966, 972, 69 P.3d 354 (2003) (citing City of Hoquiam v. Public Employment
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1 Relations Commission, 97 Wn.2d 481, 488, 646 P.2d 129 (1982)). Accordingly, the moving
2 party's motion must be denied.

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

14 Second, the meaning of the term "prejudgment" in this context is the prejudgment of
15 facts about parties, not prejudgment of laws such as the state energy policy. Organization to
16 Preserve Agricultural Lands v. Adams County, 128 Wn.2d 869, 890, 913 P.2d 793 (1996)
17 (citing Buell v. City of Bremerton, 80 Wn.2d 518, 524, 495 P.2d 1358 (1972)). Prejudgment
18 is distinguishable from the policy leanings of a decisionmaker. Organization to Preserve
19 Agricultural Lands v. Adams County, 128 Wn.2d 869, 890, 913 P.2d 793 (1996).
20 Prejudgment is also distinguishable from a decisionmaker's considering and applying the
21 pertinent laws in a particular case. Skold v. Johnson, 29 Wn. App. 541, 558, 630 P.2d 456
22 (1981). The moving party has provided no evidence that CTED has actually or potentially
23 prejudged any facts about the parties. Pointing to the Energy Division's invocation of the
24 statutory state energy policy does not meet the requisite test.

25 Accordingly, the moving party has not met his threshold burden with respect to
26 Councilmember Fryhling and his motion must be denied.

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

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

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

9 Quasi-judicial action will withstand an appearance of fairness challenge if a reasonably
10 prudent and disinterested person would conclude that that all parties obtained a fair and neutral
11 hearing. Id. (citing Washington Medical Disciplinary Board v. Johnston, 99 Wn.2d 466, 478,
12 663 P.2d 457 (1983)). Application of this test requires that the reasonably prudent and
13 disinterested person know and understand all of the relevant facts. Smith v. Behr Process
14 Corporation, 113 Wn. App. 306, 340, 54 P.3d 665 (2002).

15 Despite the name of the doctrine, mere "appearance" of unfairness is insufficient to
16 sustain an appearance of fairness challenge. State v. Carter, 77 Wn. App. 8, 11, 888 P.2d 1230
17 (1995). The moving party must provide evidence of the decisionmaker's actual or potential
18 bias. Organization to Preserve Agricultural Lands v. Adams County, 128 Wn.2d 869, 890, 913
19 P.2d 793 (1996) (citing State v. Post, 118 Wn.2d 596, 618, 826 P.2d 172 (1992)). Mere
20 speculation is not enough to meet this burden. In re Haynes, 100 Wn. App. 366, 377 n.23, 996
21 P.2d 637 (2000).

22 **2. Application of the Doctrine to Councilmember Fryhling.**

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

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

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

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

14 Councilmember Fryhling's affiliation with CTED cannot, in and of itself, be the basis
15 for disqualification. The legislature has selected agencies and local governments to appoint
16 members to the Council because those entities have expertise and a statutory stake in the
17 outcome of the Council's process. RCW 80.50.030 and section II(A)(2) above. The
18 legislature did not select DSHS, the Department of Corrections, or the State Actuary to
19 appoint members to the Council. Those agencies have neither expertise nor a statutory stake
20 in the outcome of the decision to site an energy facility. Rather, the legislature integrated the
21 existing administrative and technical expertise of state and local governments for the siting of
22 major power plants and selected the agencies that appoint the Council's members accordingly.
23 Sections II(A)(1) and (2) above. The agencies that appoint fixed members of the Council
24 have pre-existing statutory roles in environmental protection, community and economic
25 development, energy, and state trust land management. RCW 80.50.030(2)(b) and (3)(a).
26 The agencies that appoint discretionary member to the Council do so only when their interests

1 are affected and local governments join only when a project application is within their
2 jurisdictional boundaries. RCW 80.50.030(3)(b); RCW 80.50.030(4) – (6).

3 The potential for CTED to intervene in support of the state energy policy is part and
4 parcel of the overall statutory regime under which the legislature intends the Council to work.
5 The legislature is presumed to know the statutory duties of the entities it selected to appoint
6 members to the Council. Little v. Little, 96 Wn.2d 183, 634 P.2d 498 (1981). Combination
7 of functions within an agency does not violate the appearance of fairness doctrine.
8 Washington State Medical Disciplinary Board v. Johnston, 99 Wn.2d 466, 479, 663 P.2d 457
9 (1983); Smith v. Mount, 45 Wn. App. 623, 626 – 627, 726 P.2d 474 (1986); see also RCW
10 34.05.458. The legislature’s decision that the public’s interest is best served by having
11 agencies with expertise and a stake in the outcome appoint members to the Council must be
12 respected as a matter of constitutional separation of powers. See Magula v. Department of
13 Labor and Industries, 116 Wn.App. 966, 973, 69 P.3d 354 (2003); Hillis v. Department of
14 Ecology, 131 Wn.2d 373, 389, 932 P.2d 139 (1997).

15 With respect to the allegation that CTED has prejudged this matter, as discussed
16 above, the meaning of the term “prejudgment” in this context is the prejudgment of facts
17 about parties, not prejudgment of laws such as the state energy policy. Organization to
18 Preserve Agricultural Lands v. Adams County, 128 Wn.2d 869, 890, 913 P.2d 793 (1996)
19 (citing Buell v. City of Bremerton, 80 Wn.2d 518, 524, 495 P.2d 1358 (1972)). The record is
20 devoid of evidence that CTED has prejudged any facts about the parties.

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

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

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

7 In addition, there is no independent reason to disqualify Councilmember Fryhling,
8 separate from his affiliation with CTED. He is in compliance with the Council's WAC 463-
9 30-050 which makes him a member of the Council and not CTED. He has had no contact with
10 CTED concerning the proposed project. No one at CTED has attempted to influence him
11 regarding the project. He works 300 miles away from CTED and does not share a phone,
12 Email, fax, or mailstop with the agency. He has prejudged nothing concerning the project and
13 will vote based solely on applicable law and the merits of the matter before him. As noted
14 above, Councilmember Fryhling is entitled to a presumption that he will properly and legally
15 perform his duties. Magala v. Department of Labor and Industries, 116 Wn. App. 966, 972,
16 69 P.3d 354 (2003). The moving party has made no allegations and provided no evidence to
17 the contrary.

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

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

24 The moving party may also be alleging that Councilmember Fryhling must be
25 disqualified, separate from the appearance of fairness doctrine, for an alleged actual conflict
26 of interest. Declaration of Counsel for Intervenor F. Steven Lathrop, B(9). There is


1 ambiguity on this point because the moving party does not identify the legal basis for his
2 allegation nor does he discuss it in either his motion or his reply. To the degree that such
3 unsupported allegation has not been waived by the moving party, an actual conflict of interest
4 does not result from Councilmember Fryhling's participation on the Council for the reasons
5 discussed in the balance of this decision. RCW 34.05.425.

6 **IV. DECISION**

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

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

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

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16 
17 RICHARD FRYHLING
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