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Contact: Jodi Perras, Sierra Club - jodi.perras@sierraclub.org

Kerwin Olson, Citizens Action Coalition - kolson@citact.org

Groups Move for Recusal of Indiana Supreme Court Justice Mark Massa From Leucadia Coal Gasification Case

INDIANAPOLIS - Citing Justice Mark Massa's long and close relationship with the project director for the proposed Rockport coal gasification plant and his work as Gov. Mitch Daniels' general counsel when the governor pushed enabling legislation for the project, the Sierra Club, Citizens Action Coalition, Spencer County Citizens for Quality of Life and Valley Watch filed a motion asking the Indiana Supreme Court justice to be recused or disqualified from hearing a case that will determine the project's future.

According to the Code of Judicial Conduct, "A judge shall not permit family, social, political, financial, or other interests or relationships to influence the judge's judicial conduct or judgment" and "shall disqualify himself or herself in any proceeding in which the judge's impartiality might reasonably be questioned." Additionally, the code establishes that a Justice must disqualify himself or herself from a proceeding in which he has actively served as an attorney for one of the parties, regardless of whether actual bias or prejudice exists. Previous Indiana Supreme Court justices, like former Chief Justice Randall Shepard, recused themselves to prevent even the appearance of potential bias and preserve the court's integrity and independence.

"We have great respect for the Indiana Supreme Court and its history of fairness. As our highest judicial authorities, our Supreme Court justices have a responsibility to avoid even the appearance of impropriety by recusing themselves where impartiality might be reasonably questioned," said Jodi Perras, Indiana Campaign Representative for the Sierra Club's Beyond Coal campaign.

The brief notes that Justice Massa has a long documented relationship with Mark Lubbers, the project's director, which began almost 30 years ago when Lubbers recruited Massa to join the administration of then-Gov. Robert D. Orr. Their professional paths crossed again when both Massa and Lubbers worked in the administration of Gov. Mitch Daniels, with Massa serving as general counsel to the governor and Lubbers as a senior advisor. Lubbers left the Daniels' administration in 2006 and shortly thereafter joined Indiana Gasification, the developer for the proposed Leucadia coal gasification plant.

"Mr. Lubbers is the Indiana Project Director for a party whose 30-year contract and multibillion dollar project, on which he has worked since 2006, is at risk," the motion states. "Justice Massa's relationship to him reaches back 27 years and they have publicly, during the pendency of the appeal of this matter, expressed mutual admiration if not affection for each other. Justice Massa credits Lubbers for giving him 'his first lucky break' and being the 'first of many' to inspire him."

The close relationship between the two men was put on display when Lubbers provided remarks on behalf of Justice Massa during his 2012 robing ceremony to the Supreme Court. "To anyone listening this day who doesn't know Mark Massa I say, he's a gem of extraordinary quality. His facets have been in the making and cut and polished for years. He will be a great jurist' and 'on behalf of all [Justice Massa's] your friends gathered here, I say to you, we are proud of you and we expect great things," Lubbers said. The ceremony took place on May 7, 2012, just two weeks after groups opposing the project filed their briefs with the Court of Appeals.

"Given the long and close relationship between Justice Massa and Lubbers, as well as Massa's previous employment in the Daniels administration, how could one not question the impartiality of the Justice given the circumstances? In order to protect the integrity and independence of the court, Justice Massa should recuse himself from proceeding in this case," said Kerwin Olson, Executive Director of Citizens Action Coalition.

In addition to his relationship with Lubbers, Justice Massa's past role as Gov. Daniels' general counsel exposed him to extrajudicial information about legislation that established the financing for the proposed coal gasification plant. Between 2007 and 2009, during Massa's time as general counsel, the Daniels administration led efforts to pass multiple pieces of legislation, included the 2009 legislation that enabled the Indiana Finance Authority to act as a purchasing intermediary for synthetic natural gas from the proposed coal gasification plant. The current case asks the Supreme Court to interpret key provisions of that legislation and the contract negotiated pursuant to it. As general counsel, Massa would have had some involvement and familiarity with the legislation and the negotiations at the time they were passed, the brief says.

"He has been privy to facts from extrajudicial sources, such as his service as general counsel for Governor Daniels during the negotiation and enactment of critical ... legislation," the motion says. "Continuing to sit on this case notwithstanding legitimate grounds for recusal will damage public confidence in his impartiality for years to come."

"This is not a case of mere background associations, frequent appearances before the court, or mere allegations of bias," the motion states. "Instead, this is a case in which an ordinary person could not avoid having a reasonable doubt that Justice Massa would have problems being impartial given the totality of the circumstances. Justice Massa therefore has a duty to promote public confidence in the impartiality of the judiciary by recusing himself."

Earlier this year, the Indiana General Assembly passed legislation directing the Indiana Utility Regulatory Commission to review the financing agreement for the proposed coal gasification plant, but only if the Supreme Court invalidates the original contract. The motion for recusal can be read [here](#).

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