

Judicial Inquiry Commission

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August 30, 1991

This is in response to your request for an advisory opinion from the Alabama Judicial Inquiry Commission. Your question is whether you are disqualified from presiding over a civil case under the following facts:

A civil action has been filed against a public utility which furnishes natural gas to its customers. The complaint alleges that the gas company has charged its customers excessive rates.

The plaintiffs in the suit are residential customers of the gas company defendant. They have filed a motion for class action determination. It has not been established whether the plaintiffs would represent commercial customers of the gas company.

From 1977 until April of 1991 you were a commercial customer of the defendant because you purchased gas from the defendant for your law office. Since December of 1990 you have been a residential customer of the defendant.

The principal ethical consideration involved in answering this question is Canon 3C(l)(c), Alabama Canons of Judicial Ethics, which provides:

"C. DISQUALIFICATION

- (1) A judge should disqualify himself in a proceeding in which his disqualification is required by law or his impartiality might reasonably be questioned, including but not limited to instances where:

* * * *

- (c) He knows that he, ... has a financial interest in the subject matter in controversy or in a party to the proceeding, or any other interest that could be substantially affected by the outcome of the proceeding;" (emphasis added)

Canon 3 prescribes two classes of disqualifying interests. First, you have no "financial interest" in the outcome of the civil action against the gas company even though there is a possibility that the result of that action may cause a reduction in your utility rate or a refund for excessive rates you have paid in the past.

A “financial interest” is specifically defined as “ownership of a legal or equitable interest, however small, or a relationship as director, advisor, or other active participant in the affairs of a party, ...” Canon 3C(3)(c). A remote contingent benefit that a judge might at some future date share in any refund that might be ordered for certain utility customers has been held not to constitute a “financial interest”, but does constitute an “other interest”. In re New Mexico Natural Gas Antitrust Litigation, 620 F.2d 794, 796 (10th Cir. 1980) and In re Virginia Electric & Power Company, 539 F. 2d 357, 366 (4th Cir. 1976). See also Aetna Life Insurance Company v. Lavoie, 475 U.S. 813, 826, 106 S.Ct. 1580, 1588, 89 L.Ed.2d 823 (1986) holding that while the Alabama Supreme Court Justices might conceivably have had a slight pecuniary interest in an action against an insurer seeking punitive damages for a bad-faith refusal to pay a valid claim because of their possible inclusion in the class action brought by other justices against another insurer alleging bad faith, that interest was not “direct, personal, substantial, and pecuniary.”

Second, you should disqualify yourself if the outcome of the civil proceeding could substantially affect your interest as a customer of the utility.

“Although being a rate payer does not involve ‘ownership of a legal or equitable interest’ in the party to whom the judge made such payments, the committed concluded that at some point a relationship to a party as a utility customer ... should disqualify a judge. The test is that a judge should disqualify himself if the outcome of the proceeding could substantially affect his interest as a customer of the utility ...”

In re Virginia, 539 F.2d at 368, quoting E. Thode, Reporter’s Notes to Code of Judicial Conduct at 66-67 (1973). In In re New Mexico, 620 F.2d at 796, the judge’s gas bill would be lowered by \$31 per year if the plaintiffs were successful. In In re Virginia, 539 F.2d at 368, the potential existed that the judge might save up to \$100 over the next 40 years.

In determining whether you have an interest that could be “substantially affected” by the outcome of the civil action, you should consider any benefit you will receive if the plaintiffs are successful, whether that benefit is such that a reasonable person may question your impartiality, and the remoteness of the interest and its extent or degree. L. Abramson, Judicial Disqualification Under Canon 3C of the Code of Judicial Conduct at 64-65 (American Judicature Society, 1986).

You have provided this Commission with no information concerning the size of any benefit you may receive should the plaintiffs be successful. If you determine that your disqualification is required on the basis of your status as a past and/or present customer of the defendant because your interest could be substantially affected, instead of recusing yourself, you may disclose the interest on the record for a remittal of disqualification. The remittal must be in writing, signed by all parties and lawyers, and it must be independent of the judge’s participation. Canon 3D.

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Please note that class representatives may not in their representative capacity agree to remit judicial disqualification in a class action. Advisory Opinion 86-253.

As an alternative to remittal of disqualification, you may not simply exclude yourself as a member of the class as provided for in Rule 23(c)(2), Alabama Rules of Civil Procedure. By excluding yourself from the class you would not preclude yourself from receiving the benefit of any lowered rate on your gas utility in the future.

The Commission thanks you for your inquiry and commends you for your effort in seeking to perform your judicial duties in an impartial manner.

Respectfully,

JUDICIAL INQUIRY COMMISSION