Taking Duke Energy to the Supreme Court

Attorney Blan Holman reflects on SELC’s case and what it’s like to prepare for your day with the highest court

The email arrived on a Monday morning last May. Its subject line was simple and direct: “petition for cert. GRANTED.” In lay terms, this meant the highest court in the land—the U.S. Supreme Court—had agreed to take on SELC’s case against Duke Energy. My first thought? Who is the prankster?

For a month, I’d watched online as other petitions filed with the Court were granted review or—far more often—were denied. Under the best of circumstances, litigants face 100:1 odds of being accepted. In our case, those chances were actually much worse. The United States Solicitor General, called the “Tenth Justice” for his special role before the Court, had already opposed our petition, and the government, which had initially filed the case, had dropped out due to intense industry pressure.

As it turned out, the email was bona fide, and the excitement spread quickly at SELC. Our case charges that Duke Energy spent hundreds of millions of dollars “modernizing” eight coal-fired power plants in North and South Carolina without installing pollution controls required by the Clean Air Act. These plants emit 1.6 million tons per year of sulfur dioxide—15 percent of the SO2 emitted by all power plants nationwide—and over 300,000 tons of nitrogen oxide, a prime contributor of smog. A favorable ruling by the Supreme Court would set a nationwide precedent for the clean-up of old, coal-fired power plants and could result in a 90 percent reduction of these emissions.

The Court grants review of a case only if four Justices out of nine so vote, a practice known as the “Rule of Four.” After the initial thrill, we were quickly sobered by the daunting next hurdle: the “Rule of Five.” Once your case has been heard, it takes a five vote majority to win.

The Supreme Court ultimately decides not on the initial petition, but rather on new, more extensive briefing and oral arguments—so this summer has been a brief-writing maelstrom. SELC attorney Cale Jaffe and I, with guidance by our Supreme Court counsel Sean Donahue, penned the main opening brief, drilling down into arcane legislative and regulatory history and trudging through countless drafts. We reviewed thousands of pages of material in June and July. We’ve also coordinated a number of supporting briefs—including from 20 different states’ attorneys general.

With our brief safely in the hands of the Clerk of the Court (bound into the requisite 6” x 8” booklets), we’re now preparing for what we will receive from Duke Power and its many industrial allies. In October, we’ll have our chance to reply with a second round of briefs, and when it’s time for oral arguments on November 1, we’ll be ready.

Sign up at www.SouthernEnvironment.org to be invited to our November 8 on-line presentation.