IN THE COMMONWEALTH COURT OF PENNSYLVANIA

BOWFIN KEYCON HOLDINGS, LLC;
CHIEF POWER FINANCE II, LLC;
CHIEF POWER TRANSFER PARENT, LLC
KEYCON POWER HOLDINGS, LLC;
GENON HOLDINGS, INC.;
PENNSYLVANIA COAL ALLIANCE;
UNITED MINE WORKERS OF AMERICA;
INTERNATIONAL BROTHERHOOD OF
ELECTRICAL WORKERS; and
INTERNATIONAL BROTHERHOOD OF
BOILERMAKERS, IRON SHIP BUILDERS
BLACKSMITHS, FORGERS AND HELPERS

Petitioners,

v.

PENNSYLVANIA DEPARTMENT OF
ENVIRONMENTAL PROTECTION and
PENNSYLVANIA ENVIRONMENTAL
QUALITY BOARD,

Respondents.

No. 247 M.D. 2022

BRIEF OF AMICI CURIAE PENNSYLVANIA MANUFACTURERS' ASSOCIATION, INDUSTRIAL ENERGY CONSUMERS OF PENNSYLVANIA, PENNSYLVANIA ENERGY CONSUMER ALLIANCE, PENNSYLVANIA CHAMBER OF BUSINESS AND INDUSTRY AND NATIONAL FEDERATION OF INDEPENDENT BUSINESS IN SUPPORT OF PETITIONERS' APPLICATION FOR PRELIMINARY INJUNCTION

Dated: June 6, 2022

BECKLEY & MADDEN, LLC
212 North Third Street, Suite 301
Harrisburg, Pennsylvania 17011
(717) 233-7691 (telephone)
(717) 233-3740 (facsimile)

Charles O. Beckley, II (PA 47564)
cbeckley@pa.net
Thomas S. Beckley (PA 77040)
becks@pa.net

2022 JUN -6 PM 1:57
RECEIVED
COMMONWEALTH COURT
OF PENNSYLVANIA

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES CITED ii

I. STATEMENT OF INTEREST 1

II. SUMMARY OF ARGUMENT 3

III. ARGUMENT 5

A. THE RGGI REGULATION'S REQUIREMENT THAT AN OPERATOR OF A FOSSIL FUEL-FIRED ELECTRIC GENERATION PLANT PURCHASE CO_2 ALLOWANCES TO REMAIN IN BUSINESS CONSTITUTES THE IMPOSITION OF AN UNLAWFUL TAX 5

1. The Requirement to Purchase Allowances is a Tax, Not a Fee 5

2. Section 6.3(a) Does Not Authorize DEP to Impose a Carbon Tax 12

3. Ultimately, the Commonwealth's Consumers of Electricity Will Bear the Burden of DEP's Unlawful Carbon Tax 17

IV. CONCLUSION 20

TABLE OF AUTHORITIES CITED

Cases | **Page**

Bailey v. Drexel Furniture Co., 259 U.S. 20, 42 S.Ct. 449 (1922) 20

California Chamber of Commerce v. State Air Resources Board, 216 Cal.Rptr. 694 (Cal. App. 5th 2017) .... 11, n. 1

City of Philadelphia v. Southeastern Pennsylvania Transportation Authority, 303 A.2d 247 (Pa. Cmwlth. 1973) 7

Commonwealth v. McClelland, 233 A.3d 717 (Pa. 2020) 16

Commonwealth v. Tobin, 828 A.2d 415 (Pa. Cmwlth. 2003), *appeal denied*, 576 Pa. 726 .... 7, 11

Costa v. City of Allentown, 153 A.3d 1159 (Pa. Cmwlth 2017), *appeal denied*, 643 Pa. 108 .... 7, 11

Greenacres Apartments, Inc. v. Bristol Township, 482 A.2d 1356 (Pa. Cmwlth. 1984) 8, 11

Mastrangelo v. Buckley, 433 Pa. 352, 250 A.2d 447 (1969) 6, 12

National Biscuit Co. v. City of Philadelphia, 374 Pa. 604, 98 A.2d 182 (1953) 6, 7

Pennsylvanians Against Gambling Expansion Fund, Inc. v. Commonwealth of Pennsylvania, 583 Pa. 275, 877 A.2d 383 (2005) 13

Phantom Fireworks Showroom, LLC v. Wolf, 198 A.3d 1205 (Pa. Cmwlth. 2018) 13

Protz v. Workers' Compensation Appeal Board (Derry Area School District), 639 Pa. 645, 161 A.3d 827 (2017) 12, 13

Rizzo v. City of Philadelphia, 668 A.2d 236 (Pa. Cmwlth. 1995) 8

Cases **Page**

Talley v. Commonwealth of Pennsylvania, 553 A.2d 518 (Pa. Cmwlth 1989) 8, 11

Thompson v. City of Altoona Code Appeals Board, 934 A.2d 130 (Pa. Cmwlth. 2007) 7

Tosto v. Pennsylvania Nursing Home Loan Agency, 460 Pa. 1, 331 A.2d 198 (1975) 13

West Philadelphia Achievement Charter Elementary School v. The School District of Philadelphia, 635 Pa. 127, 132 A.2d 957 (2016) 15

White v. Commonwealth of Pennsylvania, Medical Professional Liability Catastrophe Loss Fund, 571 A.2d 9 (Pa. Cmwlth. 1990) 7, 8

William Penn Parking Garage, Inc. v. City of Pittsburgh, 464 A.2d 168, 346 A.2d 269 (1975) 12, 13

Wilson v. School District of Philadelphia, 328 Pa. 225, 195 A. 90 (1937) 12

Constitution

Pa. Const. Art. II, § 1 12

Statutes

1 Pa.C.S. § 1922(3) 16

35 P.S. § 4006.3(a) .... *passim*

Rules of Court

Pa.R.A.P. 531(b)(2) .... 1, n. 1

Regulations

25 Pa. Code § 143.1 15

Regulations **Page**

25 Pa. Code § 145.304 .... 5, n. 1

25 Pa. Code § 145.305 .... 5, n. 1

25 Pa. Code § 145.306 5

Other

52 Pa.B. No. 17 (April 23, 2022) .... *passim*

Commonwealth of Pennsylvania, 2021-2022 Budget, https://www.patreasury.gov/transparency/budget.php 10

March 29, 2002, testimony of Matthew Knittel, Director of the Independent Fiscal Office, before the Joint Hearing of the Senate Environmental Resources and Energy and Community, Economic and Recreational Development Committees, community.pasenategop.com/wp-content/uploads/sites/56/2022/03/knittel- rev.pdf 9

RGGI Auction Allowance Prices and Volumes, https://www.rggi.org/Auctions/Auction-Results/Prices-Volumes 9

I. STATEMENT OF INTEREST

The Pennsylvania Manufacturers' Association, Industrial Energy Consumers of Pennsylvania, the Pennsylvania Energy Consumer Alliance, the Pennsylvania Chamber of Business and Industry and the National Federation of Independent Business respectfully submit this brief as *amici curiae* in support of Petitioners' application for a preliminary injunction.[1]

Since its founding in 1909, the Pennsylvania Manufacturers' Association ("PMA") has served as a leading voice for Pennsylvania manufacturing, its 540,000 employees on the plant floor, and the millions of additional jobs in supporting industries. From its headquarters in the Frederick W. Anton, III, Center, across from the steps to the State Capitol Building in Harrisburg, PMA seeks to improve the Commonwealth's competitiveness by promoting pro-growth public policies that reduce the cost of creating and keeping jobs in Pennsylvania. PMA has forcefully advocated for forward-looking strategies that will ensure a secure, stable supply of market-priced energy for Pennsylvania's businesses and citizenry.

Founded in 1982, Industrial Energy Consumers of Pennsylvania ("IECPA") is an association of large, energy-intensive, trade-exposed industrial entities. Its

---

[1] Pursuant to Pa.R.A.P. 531(b)(2), *amici curiae* state that no party, counsel for a party, or person other than *amici curiae*, their members or counsel authored any portion of this brief or made any monetary contribution intended to fund this brief's preparation and submission.

members are "energy-intensive" because they consume large amounts of energy, which means that small changes in energy rates can lead to large increases in cost. Its members are "trade-exposed" because they cannot pass cost increases on to customers without risking the loss of those customers to global competition. As a voice for large energy consumers in Pennsylvania, IECPA has played a critical role in the restructuring of the electric and natural gas industries and supports and promotes competitive energy markets and regulatory structures that facilitate consumers' use of those markets.

The Pennsylvania Energy Consumer Alliance's ("PECA") members include businesses, manufacturers, colleges and other organizations that support pro-growth energy policies in the Commonwealth in order to keep energy costs in Pennsylvania at competitive levels for large energy consumers. PECA focuses its efforts on ensuring that the leaders of Pennsylvania's government (1) understand the impact that energy and energy policy has on business, (2) prioritize the importance of energy to Pennsylvania's economy, and (3) balance legislative and regulatory initiatives to enhance opportunities for business growth in the Commonwealth.

The Pennsylvania Chamber of Business and Industry ("PA Chamber") is the largest broad-based business association in Pennsylvania. It has close to 10,000 member businesses throughout Pennsylvania, which employ more than half of the Commonwealth's private workforce. Its members range from small companies to

mid-size and large business enterprises. The Pennsylvania Chamber's mission is to advocate on public policy issues that will expand private sector job creation, to promote an improved and stable business climate, and to promote Pennsylvania's economic development for the benefit of all Pennsylvania citizens.

The National Federation of Independent Business ("NFIB") is the nation's leading small business association, representing members in Washington, D.C., and all 50 states. Founded in 1943 as a nonprofit, nonpartisan organization, NFIB's mission is to promote and protect the right of its members to own, operate, and grow their businesses. In Pennsylvania specifically, NFIB represents nearly 13,000 small businesses, spanning virtually every sector of the Commonwealth's economy. Small businesses consistently rank energy-related costs as a significant obstacle to maintaining their operations.

II. SUMMARY OF ARGUMENT

The requirement to purchase CO_2 allowances that the Department of Environmental Protection and the Environmental Quality Board (hereinafter referred to collectively as "DEP") seek to impose through the RGGI regulation on operators of fossil fuel-fired electric generation facilities is not a "fee." It is a tax, designed to generate hundreds of millions of dollars of revenue each year for DEP to "invest" in yet-to-be-identified projects. Despite DEP's assertion to the contrary, Section 6.3(a) of the Air Pollution Control Act does not authorize it to assess this

new carbon tax. Interpreting Section 6.3(a) as DEP suggests would render it unconstitutional as an unlawful delegation of legislative power, since Article II, Section 1 of Pennsylvania's Constitution vests the power to tax, a uniquely legislative power, in the General Assembly.

Ultimately, electric generators required to purchase allowances will pass on the cost of DEP's proposed new carbon tax to the thousands of members of the business community represented by *amici curiae* in the form of substantially higher electricity rates. This will in turn irreparably harm the manufacturers and other industrial and commercial users forced to pay those higher rates with no hope of recovering their increased costs, and permanently damage the Commonwealth's competitive position by rendering it more difficult for Pennsylvania to retain existing businesses and attract new ones.

For these reasons, *amici curiae* respectfully request the Court to grant Petitioners' application to enjoin preliminarily the implementation of the RGGI regulation.

III. ARGUMENT

A. THE RGGI REGULATION'S REQUIREMENT THAT AN OPERATOR OF A FOSSIL FUEL-FIRED ELECTRIC GENERATION PLANT PURCHASE CO_2 ALLOWANCES TO REMAIN IN BUSINESS CONSTITUTES THE IMPOSITION OF AN UNLAWFUL TAX

1. The Requirement to Purchase Allowances Is a Tax, Not a Fee

As a condition of obtaining and maintaining a permit to operate a "CO_2 budget unit," the RGGI Regulation requires the operator of a fossil fuel-fired electricity generator to purchase "one CO_2 allowance for each ton of CO_2 emitted from the budget unit each year."[2] 52 Pa.B. 2481, 25 Pa. Code § 145.306 (c)(2). That is really the guts of the RGGI program. By compelling fossil fuel-fired electricity generators to make the Hobson's choice of collectively spending hundreds of millions of dollars per year on CO_2 allowances or shutting down, DEP hopes to reduce greenhouse gas emissions by forcing these generators out of business.

DEP contends that the allowances are in effect a "license fee" (a fee that a generator must pay for the privilege of doing business in the Commonwealth) that Section 6.3(a) of the Air Pollution Control Act ("APCA"), 35 P.S. § 4006.3(a), authorizes DEP to impose on the operators of fossil fuel-fired power plants. Section

---

[2] A "CO_2 budget unit" is defined as "a unit that serves an electricity generator with a nameplate capacity equal to or greater than 25 MWe" which supplies more than 10 percent of its annual gross generation to the electric grid. 25 Pa. Code §§ 145.304(a) and 145.305(a)

6.3(a) provides, in relevant part, that "[t]his section also authorizes the board by regulation to establish fees to support the air pollution control program authorized by this act and not covered by fees required by section 502(b) of the Clean Air Act." 35 P.S. 4006.3(a).

Section 6.3(a) authorizes DEP to establish "fees" to "support the air pollution control program." The Pennsylvania Supreme Court set forth the "distinguishing features" of a license fee 70 years ago in *National Biscuit Co. v. City of Philadelphia*, 374 Pa. 604, 98 A.2d 182 (1953):

> The distinguishing features of a license fee are (1) that it is applicable only to a type of business or occupation which is subject to supervision and regulation by the licensing authority under its police power; (2) that such supervision and regulation are in fact conducted by the licensing authority; (3) that the payment of the fee is a condition upon which the licensee is permitted to transact his business or pursue his occupation; and (4) that the legislative purpose in exacting the charge is to reimburse the licensing authority for the expense of the supervision and regulation conducted by it.

National Biscuit Co. 374 Pa. at 615-616, 98 A.2d at 188. *See also Mastrangelo v. Buckley*, 433 Pa. 352, 386, 250 A.2d 447, 464 (1969) (A license fee "must be commensurate with the expense incurred...in connection with the issuance and supervision of the license or privilege.").

As this Court has explained repeatedly, in order to be a valid license fee, the fee must bear some reasonable relationship to the cost of regulation; if it raises an amount of revenue disproportionate to the cost of regulation, then it is a tax:

> A license fee is distinguishable from a tax which is a revenue producing measure characterized by the production of a high proportion of income relative to the costs of collection and supervision. Thus, if a license fee collects more than an amount commensurate with the expense of administering the license, it would become a tax revenue and cease to be a valid license fee.

Thompson v. City of Altoona Code Appeals Board, 934 A.2d 130, 133 (Pa. Cmwlth. 2007) (citations omitted). *See also, e.g., Costa v. City of Allentown*, 153 A.3d 1159, 1165 (Pa. Cmwlth 2017), *appeal denied* 643 Pa. 108 ("[A] license fee will be struck down if its amount is 'grossly disproportionate to the sum required to pay the cost of the due regulation of the business.'") (quotation omitted); *Commonwealth v. Tobin*, 828 A.2d 415, 424-425 (Pa. Cmwlth. 2003), *appeal denied* 576 Pa. 726 ("An administrative fee may be charged to defray the cost of inspections. But, such a fee cannot be a revenue raising measure or it is an invalid tax.") (citations omitted); *City of Philadelphia v. Southeastern Pennsylvania Transportation Authority*, 303 A.2d 247, 251 (Pa. Cmwlth. 1973) ("The common distinction is that taxes are revenue-producing measures authorized under the taxing power of government; while license fees are regulatory measures intended to cover the cost of administering a regulatory scheme authorized under the police power of government.").

It does not matter that the charge may be called a "fee" or an "allowance." "[I]t is the nature and apparent purpose of the charge which controls its classification." *National Biscuit Co.*, 374 Pa. at 626-627, 98 A.2d at 193. *See also White v. Commonwealth of Pennsylvania, Medical Professional Liability*

Catastrophe Loss Fund, 571 A.2d 9, 11 (Pa. Cmwlth. 1990) ("The question of whether an enactment is a tax or regulatory measure is determined by the purposes for which it is enacted and not by its title."). "[T]he crucial factor" in determining whether a particular charge "constitutes a valid regulatory fee is whether the charge is intended to cover the cost of administering a regulatory scheme or providing a service." *Rizzo v. City of Philadelphia*, 668 A.2d 236, 239 (Pa. Cmwlth. 1995). "A tax is characterized by the production of large income and the high proportion of income relative to the cost of collection and supervision." *White*, 571 A.2d at 12.

"Thus, if a license fee collects more than an amount commensurate with the expense of administering the license, it would become a tax revenue and cease to be a valid license fee." *Talley v. Commonwealth of Pennsylvania*, 553 A.2d 518, 519 (Pa. Cmwlth 1989). *See also Greenacres Apartments, Inc. v. Bristol Township*, 482 A.2d 1356, 1359 (Pa. Cmwlth. 1984) ("A license fee, of course, is a charge which is imposed...for the privilege of performing certain acts, and which is intended to defray the expense of regulation. It is to be distinguished from a tax, or revenue producing measure, which is characterized by the production of large income and a high proportion of income relative to the costs of collection and supervision.").

The sale of the allowances will generate an enormous amount of revenue for DEP. DEP initially projected that, in RGGI's first year, the sale of 61 million CO_2 allowances would generate approximately $198 million of income. 52 Pa.B. No. 17,

p. 2509. This figure was based on an estimated price of $3.24 cents per allowance. *Id.* At the December 1, 2021, RGGI auction, however, the sale price per allowance was $13.00; at the March 9, 2022, auction the sale price per allowance increased to $13.50; and at the most recent auction on June 1, 2022, the sale price per allowance rose again to $13.90. (*RGGI Auction Allowance Prices and Volumes*, https://www.rggi.org/Auctions/Auction-Results/Prices-Volumes).

Since Governor Wolf initiated the RGGI rulemaking process on October 3, 2019, the allowance price has increased by 167 percent, from $5.20 at the September 4, 2019, auction to $13.90 at the June 1, 2022, auction. (*Id.*). Using the $13.50 allowance price from the March 9, 2022, auction, the Commonwealth's Independent Fiscal Office estimated that the approximately 58 million allowances that DEP expects to sell during the first year of the program's operation would yield revenue in the amount of approximately $781 million. (*March 29, 2002, Testimony of Matthew Knittel, Director of the Independent Fiscal Office, Before the Joint Hearing of the Senate Environmental Resources and Energy and Community, Economic and Recreational Development Committees*, community.pasenategop.com/wp-content/uploads/sites/56/2022/03/knittel-rev.pdf). And if the $13.90 per allowance price from the most recent June 1, 2022, auction is used, the revenue figure grows to over $800 million.

DEP estimates that only six percent of the auction proceeds will be needed "for any programmatic costs related to administration and oversight of the CO_2 Budget Trading Program (5% for the Department and 1% for RGGI, Inc.)." 52 Pa.B. No. 17, p. 2508. This means that if the sale of allowances generates $781 million in income in the program's first year, only six percent of that amount, or $46.86 million, would be used "to defray the expense of regulation." *Greenacres*, 482 A.2d at 1359. $734.14 million would remain at DEP's disposal. To put this amount of money in perspective, it represents almost two percent of the Commonwealth's $38,571,338,610.00 budget for 2021-2022; it is more than four times the General Assembly's $169,042,000.00 appropriation to DEP for 2021-2022; and it is more than the General Assembly's 2021-2022 appropriations for DEP, the Department of Revenue ($179,913,000.00), the Department of Agriculture ($174,515,000.00) and the Department of General Services ($130,314,000.00) combined. (*Pennsylvania 2021-2022 Budget*, https://www.patreasury.gov/transparency/budget.php).

DEP cannot argue seriously that the RGGI regulation's requirement that operators of fossil-fuel fired electric generation plants purchase CO_2 allowances constitutes a "fee" authorized by Section 6.3(a) of APCA when that "fee" bears no reasonable relationship to the cost of administering the RGGI program. As recognized by the Pennsylvania House and Senate Environmental Resources and Energy Committees, 52 Pa.B. No. 17, p. 2492, the mandate to purchase CO_2

allowances is not a fee at all. It is, rather, a revenue-generating tax, designed to produce hundreds of millions of dollars of income for DEP to use as it sees fit, and for that reason it is invalid and should be enjoined. *See Costa*, 153 A.3d at 1165 ("[A] license fee will be struck down if its amount is 'grossly disproportionate to the sum required to pay the cost of the due regulation of the business.'"); *Tobin*, 828 A.2d at 424-425 ("An administrative fee may be charged to defray the cost of inspections. But, such a fee cannot be a revenue raising measure or it is an invalid tax.") (citations omitted); *White*, 571 A.2d at 12. ("A tax is characterized by the production of large income and the high proportion of income relative to the cost of collection and supervision."); *Talley*, 553 A.2d at 519 ("Thus, if a license fee collects more than an amount commensurate with the expense of administering the license, it would become a tax revenue and cease to be a valid license fee."); *Greenacres*, 482 A.2d at 1359 ("A license fee...is to be distinguished from a tax, or revenue producing measure, which is characterized by the production of large income and a high proportion of income relative to the costs of collection and supervision.").[3]

---

[3] DEP may try to rely on *California Chamber of Commerce v. State Air Resources Board*, 216 Cal.Rptr. 694 (Cal. App. 5th 2017), to argue that the carbon tax it seeks to impose is a fee and not a tax, but the cap-and-trade program at issue in *California Chamber* was promulgated pursuant to an enabling act; it included legislation directing how auction proceeds were to be spent; the program operated differently; and the case was decided under California law, the principal issue being whether the cap-and-trade program constituted a tax within the meaning of California's Proposition 13.

2. Section 6.3(a) of APCA Does Not Authorize DEP to Impose a Carbon Tax

"[T]he power to tax is a legislative power...." *William Penn Parking Garage, Inc. v. City of Pittsburgh*, 464 A.2d 168, 218, 346 A.2d 269, 294 (1975). *See also Mastrangelo*, 433 Pa. at 362-363, 250 A.2d at 452 ("The power of taxation, in all forms and of whatever nature lies solely in the General Assembly of the Commonwealth acting under the aegis of our Constitution."); *Wilson v. School District of Philadelphia*, 328 Pa. 225, 229, 195 A. 90, 94 (1937) ("The taxing power, one of the highest prerogatives, if not the highest, of the Legislature, must be exercised through representatives chosen by the people.").

Article 2, Section 1 of Pennsylvania's Constitution vests the legislative power of the Commonwealth "in a General Assembly, which shall consist of a Senate and a House of Representatives." Pa. Const. Art. II, § 1. "The framers of the Constitution believed that the integrity of the legislative function was vital to the preservation of liberty." *Protz v. Workers' Compensation Appeal Board (Derry Area School District)*, 639 Pa. 645, 655, 161 A.3d 827, 833 (2017). As a general proposition, the legislative power may not be delegated:

> The prohibition against delegation of legislative power 'requires that the basic policy choices involved in "legislative power" actually be made by the Legislature as constitutionally mandated.' This doctrine serves two interrelated purposes. First, it seeks to insure that 'basic policy choices' be made by duly authorized and politically responsible officials. Second, it seeks to protect against the arbitrary exercise of unnecessary and uncontrolled discretionary power.

William Penn, 464 Pa. at 212, 346 A. 2d at 291 (citations and quotations omitted).

Although the General Assembly may confer on another body the discretion to execute a law, the legislative power to do so "is subject to two principal limitations: (1) the basic policy choices must be made by the Legislature; and (2) the 'legislation must contain adequate standards which will guide and restrain the exercise of the delegated administrative functions.'" *Pennsylvanians Against Gambling Expansion Fund, Inc. v. Commonwealth of Pennsylvania*, 583 Pa. 275, 333, 877 A.2d 383, 418 (2005) (quotation omitted); *See also Protz*, 639 Pa. at 656, 161 A.3d at 834 (same). "Such standards both articulate the 'basic policy choices' made by the General Assembly and serve to confine the exercise of discretion, thus guarding against its arbitrary exercise." *William Penn*, 464 Pa. at 168, 346 A.2d at 292. *See also Tosto v. Pennsylvania Nursing Home Loan Agency*, 460 Pa. 1, 11, 331 A.2d 198 (1975) ("[W]hen the Legislature delegates policymaking discretion to administrative agencies, it must make the 'basic policy choices' which will serve as standards to guide and restrain the exercise of discretion."); *Phantom Fireworks Showroom, LLC v. Wolf*, 198 A.3d 1205, 1227 (Pa. Cmwlth. 2018) (same).

Only six cents out of every dollar of the carbon tax that DEP seeks to levy on electricity generators is needed to pay for the cost of the RGGI program. Section 6.3(a) contains no guidelines whatsoever to guide DEP's discretion in spending the other 94 cents of every dollar of revenue generated by the "fee." DEP says it would

use the revenue generated by the allowance auctions for "investments" in such vague categories of expenses as "energy efficiency initiatives" like "upgrading appliances and lighting, weatherizing and insulating buildings, upgrading HVAC and improving industrial processes."[4] 52 Pa.B. No. 17, p. 2508. Other types of "investments" for which DEP might use the money include projects like "abandoned oil and gas well plugging, electric vehicle infrastructure, carbon capture, utilization and storage, combined heat and power, energy storage, repowering projects and vocational trainings, among others." *Id.*

The only apparent limit on DEP's discretion to spend over $700 million of newfound money each year may be found in DEP's own regulation relating to the use of funds deposited into the Clean Air Fund. 25 Pa. Code § 143.1. But Section 143.1 really contains no limit at all, since it provides that "the full and normal range of activities of the Department shall be considered to contribute to the elimination of air pollution," and it allows money to be spent for such things as the "[p]urchase of contractual services and consultation from firms or individuals with air pollution or other relevant expertise," "[e]xtraordinary costs of litigation," and "the costs of a

---

[4] As IECPA noted in its submission to the Independent Regulatory Review Commission ("IRRC"), Pennsylvania already has a robust energy efficiency and conservation regime, implemented by the Pennsylvania Public Utility Commission, which has cost Pennsylvania's energy consumers well over $2 billion since its inception in 2009, with over $1 billion of the expense coming from the large industrial and manufacturing community alone. (*August 10, 2021, IEPCA Submission to IRRC*, p. 5).

public project necessary to abate air pollution whether or not the exclusive purpose of that project is the abatement of air pollution." 25 Pa. Code 143.1(b)(3), (5) and (6).

DEP has acknowledged that the General Assembly has provided DEP with no guidance or parameters concerning how to spend the hundreds of millions of dollars of revenue it stands to collect – as noted above, an amount equal to about two percent of the Commonwealth's 2021-2022 budget – by stating that it "plans to develop a draft plan for public comment outlining reinvestment options separate from this final-form rulemaking." 52 PA.B. No. 17, p. 2507. In partnership with the Delta Institute, DEP plans to develop "a set of Guiding Principles and a final strategy document that will be used to guide the Department's implementation of this final-form rulemaking, including the investment of auction proceeds in projects that benefit communities dependent on fossil-fuel fired EGU's." 52Pa.B. No. 17, p. 2491.

These judgments concerning how to use the revenue generated by a new carbon tax, however, are constitutionally mandated to be made by elected, politically-accountable legislators. Section 6.3(a) of the APCA, upon which DEP relies for its authority to impose a carbon tax, contains none of the guidelines or limits on DEP's exercise of its discretion that are required by the non-delegation doctrine. *See, e.g., West Philadelphia Achievement Charter Elementary School v. The School District of Philadelphia*, 635 Pa. 127, 140-141, 132 A.2d 957, 965-966

(2016) ("The Distress Law also lacks any mechanism to limit the SRC's actions so as to 'protect[] against administrative arbitrariness and caprice.'...This is a substantial deficiency because this Court has generally viewed the inclusion of such limitations as a necessary condition to satisfy the non-delegation rule.") (citations and quotation omitted).

If the Court were to hold, as DEP urges, that Section 6.3(a) of APCA authorizes DEP to impose a tax in the form of the mandate to purchase CO_2 allowances, such a holding would render Section 6.3(a) unconstitutional, as an improper delegation of legislative authority. This the Court should not do. The Court should instead hold that the requirement to purchase CO_2 allowances which serves as the keystone of the RGGI regulation is not the kind of "fee" that Section 6.3(a) permits DEP to impose. *See* 1 Pa.C.S. § 1922 (3) ("[T]he General Assembly does not intend to violate the Constitution...of this Commonwealth."). *See also, e.g., Commonwealth v. McClelland*, 233 A.3d 717, 735 (Pa. 2020) ("'[W]hen a statue is susceptible of two constructions, by one of which grave and doubtful constitutional questions arise and by the other of which such questions are avoided, our duty is to adopt the latter'.") (quotation omitted).

In this regard, if the Court were to interpret Section 6.3(a) as DEP requests, it is difficult to see where DEP's power to tax would end. If DEP can tax the operators of fossil fuel-fired power plants that emit CO_2 into the atmosphere, then presumably

DEP can tax the operators of gasoline-powered cars or lawn mowers, diesel-powered trucks, tractors or locomotives, jet airplanes or even a backyard charcoal grill. Taken to its logical limit, DEP contends that Section 6.3(a) confers upon it the power to reshape the economy in fundamental ways through the imposition of a carbon tax. Despite DEP's assertion that the RGGI regulation "is not a policy decision of such a substantial nature that it requires legislative review," 52 Pa.B. No. 17, p. 2496, surely this is precisely the kind of basic policy choice which should be made in the first instance by our elected General Assembly.

3. Ultimately, the Commonwealth's Consumers of Electricity Will Bear the Burden of DEP's Unlawful Carbon Tax

As DEP itself has recognized, electricity generators forced to purchase CO_2 allowances or lose their investment in their business will "most likely incorporate this compliance cost into their offer price for electricity. The price of electricity is then passed onto electric consumers." 52 PA.B. No. 17, p. 2500. Perhaps said more plainly, the price of electricity in Pennsylvania is going to go up because generators are going to pass along the cost of purchasing CO_2 allowances to electricity users.

While DEP has predicted fairly modest increases, as noted by Matthew Knittel, the Director of the Independent Fiscal Office, DEP based those predictions on its flawed assumption that the auction price per allowance would be only $3.57 in 2022. At the last auction in June, 2022, the price per allowance was $13.90, almost four times what DEP anticipated. (community.pasenategop.com/wp-

contnet/uploads/sites/56/2022/03/knittel-rev.pdf). Consequently, electricity prices can be expected to increase by at least approximately four times what DEP had originally estimated.

DEP's carbon tax will fall on the backs of all consumers, but will most negatively impact the manufacturers and other industrial and commercial users of large quantities of electricity represented by *amici*. IECPA estimates that due to the increase in the auction price of CO_2 allowances, the total annual increase in electricity costs in the Commonwealth, including residential, commercial and industrial users, could approach $870 million per year. This represents a projected annual increase for a large manufacturer of the kind represented by IECPA and PECA of roughly $2.7 million per year, which equates to more than 30 manufacturing jobs and 160 supporting jobs.

For many of the manufacturers represented by PMA, energy costs are their single largest monthly expense. NFIB has found that for approximately 35 percent of the small businesses for which it advocates, energy costs constitute one of their top three expenditures, and that energy costs concern small business more than cash flow, poor earnings and training and managing employees. Each year, America's small businesses, which include individual sole proprietorships, spend close to 60 billion dollars on energy. These are not costs that can be easily passed on to consumers in a normal environment, let alone our current inflationary one.

Moreover, because many of IECPA's and PECA's large industrial users are "trade-exposed," they cannot pass increased electricity costs on to their customers without risking the loss of those customers to foreign competitors not burdened by a carbon tax. And these "foreign" competitors are not limited to off-shore companies. If the Commonwealth implements RGGI, Pennsylvania's businesses will now also have to compete with companies in neighboring non-RGGI states which do not have their energy costs artificially inflated by a carbon tax.

These costs also threaten to rob manufacturers and industrial users of the resources needed to incorporate clean-air and other environmentally beneficial technologies into their operations. Unless the Court preliminarily enjoins the implementation of the RGGI regulation, these expenses incurred by the Commonwealth's business community will be irreparably lost if the Court later declares RGGI to be unlawful.

In short, RGGI threatens to convert Pennsylvania from a state with relatively low electricity rates compared to its neighboring states to a state with artificially high energy costs, which will directly affect the Commonwealth's ability to attract and retain businesses. As IECPA stated in its comments on the RGGI rulemaking submitted to the IRRC, "IECPA is very concerned that adoption of any proposed regulations to comply with RGGI will jeopardize the survival of manufacturing and industrial concerns in Pennsylvania." (*August 10, 2021, IEPCA Submission to IRRC,*

p. 7). PECA stated in its comments to the IRRC that "as many PECA members have also heavily invested in cogeneration units and CHP systems, the Proposed Rulemaking may have unduly punitive effects on such businesses and a chilling effect on additional investment in such systems, which provide measurable efficiency and environmental benefits to the Commonwealth." (*January 14, 2021 PECA Submission to IRRC*, p. 2).

PMA echoed these concerns in its submission to IRRC, noting that "[a]dding on additional costs will drive manufacturing out of Pennsylvania and make it exceedingly difficult to bring new firms in; essentially making RGGI a hard cap on economic growth in the manufacturing sector....We lose the jobs, we lose the power, and we all pay more for no environmental benefit." (*August 25, 2021, PMA Submission to IRRC*, p. 3).

IV. CONCLUSION

Whether attempting to reduce greenhouse gas emissions represents good policy is not before this Court. Neither is whether DEP's motive in wanting to enter into RGGI is the product of good intentions. To paraphrase what Chief Justice Taft observed a century ago with regard to unconstitutional legislation in *Bailey v. Drexel Furniture Co.*, 259 U.S. 20, 37, 42 S.Ct. 449, 451 (1922):

> The good sought in unconstitutional [regulation] is an insidious feature, because it leads citizens and [regulators] of good purpose to promote it without thought of the serious breach it will make in the ark of our

> covenant, or the harm which will come from breaking down recognized standards.

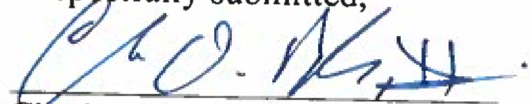
Bailey Drexel Furniture Co., 259 U.S. at 37, 42 S.Ct. at 451.

If Pennsylvania is to enter into the Regional Greenhouse Gas Initiative, then that decision should be made by the elected members of the General Assembly, not an administrative agency. Because the legislature has not made that choice, enforcement of the RGGI regulation's imposition of a carbon tax on the operators of fossil fuel-fired electric generation plants, and by extension on the Commonwealth's consumers of electricity, should be enjoined.

For all of the foregoing reasons, and for the reasons stated in the briefs of Petitioners, the thousands of businesses large and small throughout the Commonwealth represented by *amici curiae* the Pennsylvania Manufacturers' Association, Industrial Energy Consumers of Pennsylvania, the Pennsylvania Energy Consumer Alliance, the Pennsylvania Chamber of Business and Industry, and the National Federation of Independent Business respectfully request the Court to grant Petitioners' application for a preliminary injunction.

Dated: June 6, 2022

Respectfully submitted,

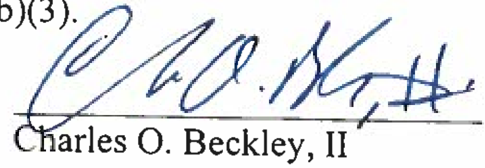


Charles O. Beckley, II, Esquire
Attorney I.D. No. 47564
Thomas S. Beckley, Esquire
Attorney I.D. No. 77040
BECKLEY & MADDEN, LLC
212 North Third Street, Suite 301
Harrisburg, Pennsylvania 17101
(717) 233-7691 (telephone)
(717) 233-3740 (facsimile)
cbeckley@pa.net
becks@pa.net

CERTIFICATE OF WORD COUNT

I, Charles O. Beckley, II, certify that the foregoing brief contains fewer than 7,000 words, which complies with Pa.R.A.P. 531(b)(3).

Dated: June 6, 2022

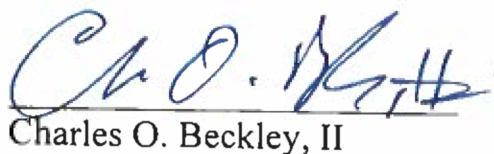


Charles O. Beckley, II

CERTIFICATE OF COMPLIANCE

I certify that this filing complies with the provisions of the *Case Records Public Access Policy of the United Judicial System of Pennsylvania* that require filing confidential information and documents differently than non-confidential information and documents.

Dated: June 6, 2022



Charles O. Beckley, II

PROOF OF SERVICE

I hereby certify that I am this day serving the foregoing document upon the persons and in the manner indicated below, which service satisfies the requirements of Pa. R.A.P. 121:

Service by Fed Ex addressed as follows:

Anthony R. Holtzman (PA 200053)
Tad J. Macfarlan (PA 312188)
Jonathan R. Vaitl (PA 324164)
K&L Gates LLP
17 North Second Street, 18th Floor
Harrisburg, PA 17101-1507
(717) 231-4500 (telephone)
(717) 231-4501 (fax)
anthony.holtzman@klgates.com
Counsel for Petitioners Bowfin KeyCon Holdings, LLC, Chief Power Finance II, LLC, Chief Power Transfer Parent, LLC, KeyCon Power Holdings, LLC, and GenOn Holdings, Inc.

David R. Overstreet (PA 68950)
Christopher R. Nestor (PA 82400)
Overstreet & Nestor, LLC
461 Cochran Road, Box 237
Pittsburgh, PA 15228
(717) 645-1861 (telephone)
david.overstreet@palawgroup.com
Counsel for Petitioners Pennsylvania Coal Alliance, United Mine Workers of America, International Brotherhood of Electrical Workers, and International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers and Helpers

Matthew A. White (PA 55812)
Thomas W. Hazlett (PA 88052)
Thomas J. Gallagher IV (PA 316269)
Brian N. Kearney (PA 326227)
Ballard Spahr LLP

1735 Market Street, 51st Floor
Philadelphia, PA 19103
(215) 665-8500
Counsel for Respondents

Peter J. Fontaine (Pa. 75184)
James F. Van Orden (Pa. 325101)
Amorie I. Hummel (Pa. 322670)
COZEN O'CONNOR, P.C.
One Liberty Place
1650 Market Street, Suite 2800
Philadelphia, PA 19103
215.665.2000
pfontaine@cozen.com
jvanorden@cozen.com
ahummel@cozen.com
Attorneys for Intervenors
Constellation Energy Corporation and Constellation Energy Generation, LLP

JESSICA R. O'NEILL
(Pa. I.D. No. 205934)
ANGELA M. KILBERT
(Pa. I.D. No. 320071)
EMMA H. BAST
(Pa. I.D. No. 330854)
Citizens for Pennsylvania's Future
1429 Walnut Street, Suite 400
Philadelphia, PA 19102
215-545-9694
oneill@pennfuture.org
kilbert@pennfuture.org
bast@pennfuture.org
Counsel for Citizens for Pennsylvania's Future
and the Sierra Club

JOSEPH OTIS MINOTT
(Pa. I.D. No. 36463)
ALEXANDER G. BOMSTEIN
(PA ID No. 206983)

PAUL JAY COHEN II
(PA ID No. 331112)
Clean Air Council
135 South 19th Street, Suite 300
Philadelphia, PA 19103
215-567-4004
joe_minott@cleanair.org
abomstein@cleanair.org
pcohen@cleanair.org
Counsel for Clean Air Council

MARK SZYBIST
(Pa. I.D. No. 94112)
Natural Resources Defense Council
1152 15th Street NW, Suite 300
Washington, DC 20005
(570) 447-4019
mszybist@nrdc.org
Counsel for Natural Resources Defense Council

Nicholas M. Clabbers
NICHOLAS M. CLABBERS
(Pa. I.D. No. 331062)
Kaplan Kirsch Rockwell
1675 Broadway
Suite 2300
Denver, CO 80202
215-350-0908
Nclabbers@kaplankirsch.com
Counsel for Environmental Defense Fund

Dated: June 6, 2022

Charles O. Beckley, II, Esquire