

Forgers and Helpers (collectively, Petitioners), enjoined the Pennsylvania Department of Environmental Protection (DEP) and the Pennsylvania Environmental Quality Board (EQB) (collectively, Respondents) from implementing, administering, or enforcing Rulemaking #7-559, entitled CO₂ Budget Trading Program (the Rulemaking), and, most importantly, directed Petitioners to file a bond in the amount of \$100,000,000. The latter order denied Petitioners' "Application for Reconsideration of Bond Requirement" (Application for Reconsideration).

The Supreme Court, in its August 18, 2022 order, specifically directed this Court to address the individual grounds raised by Petitioners in their Application for Reconsideration. Petitioners' Application for Reconsideration raised four distinct grounds as part of their request to this Court to reconsider and modify the amount of the bond. First, Petitioners asserted that "the amount of the bond should not be more than nominal," Application for Reconsideration at 4, because Respondents will not sustain any damages should the preliminary injunction ultimately be found to have been improperly granted. Second, Petitioners averred that the preliminary injunction herein will not prevent Respondents from collecting the proceeds from the September 2022 Regional Greenhouse Gas Initiative (RGGI) allowance auction, noting that a preliminary injunction was also granted in the related case of *Ziadeh v. Pennsylvania Legislative Reference Bureau* (Pa. Cmwlth., No. 41 M.D. 2022, filed July 8, 2022). Third, Petitioners contended that, as a matter of equity, they should not be required to file a bond that effectively covers the estimated amount of proceeds that all regulated entities would have paid, or at least a material portion thereof, in connection with the September 2022 RGGI allowance auction. Fourth, and finally, Petitioners stated that the bond requirement directs

them “to do something that is infeasible, if not impossible,” Application for Reconsideration at 9, noting the original 14-day deadline for filing the bond.

The Court will address each of Petitioners’ assertions below. However, before we address the individual assertions, we note the general considerations for imposition of a bond. Pa. R.Civ.P. 1531(b)(1)-(2)¹ mandates the imposition of a bond in conjunction with the grant of a preliminary injunction, providing as follows:

(b) Except when the plaintiff is the Commonwealth of Pennsylvania, a political subdivision or a department, board, commission, instrumentality or officer of the Commonwealth or of a political subdivision, a preliminary or special injunction shall be granted only if

- (1) the plaintiff files a bond in an amount fixed and with security approved by the court, naming the Commonwealth as obligee, conditioned that if the injunction is dissolved because improperly granted or for failure to hold a hearing, the plaintiff shall pay to any person injured all damages sustained by reason of granting the injunction and all legally taxable costs and fees, or
- (2) the plaintiff deposits with the prothonotary legal tender of the United States in an amount fixed by the court to be held by the prothonotary upon the same condition as provided for the injunction bond.

“The bond requirement in [Pa. R.Civ.P.] 1531(b)(1) is merely to insure a ready source for payment of damages if due.” *Juniata Foods Inc. v. Mifflin County*

¹ Pa. R.A.P. 106 provides that “[u]nless otherwise prescribed by these rules the practice and procedure in matters brought before an appellate court within its original jurisdiction shall be in accordance with the appropriate general rules applicable to practice and procedure in the courts of common pleas, so far as they may be applied.”

Development Authority, 486 A.2d 1035, 1037 (Pa. Cmwlth. 1985). As stated by our Superior Court, “[t]he purpose of an injunction bond . . . is to protect [the party] in the event that the preliminary injunction was improperly granted and damages were sustained thereby.” *Parkinson v. Lowe*, 760 A.2d 65, 68 (Pa. Super. 2000). Additionally, “[t]he question of the proper amount of a bond for a preliminary injunction is within the discretion of the hearing court.” *Broad & Locust Associates v. Locust-Broad Realty Company*, 464 A.2d 506, 508 (Pa. Super. 1983) (citing *Safeguard Mutual Insurance Company v. Williams*, 345 A.2d 664, 671 (Pa. 1975)).

Further, as this Court has explained,

trial courts must determine bond amounts on a case-by-case basis. The court in *Christo [v. Tuscan, Inc.]*, 533 A.2d 461 (Pa. Super. 1987),] noted that, under Rule 1531(b), trial courts should require a bond which would cover damages that are reasonably foreseeable, rather than a bond that would cover all damages, because the nature of a preliminary injunction hearing makes a court’s primary duty the consideration of whether to grant an injunction; the amount of potential damages to the party whose conduct is sought to be enjoined is not the court’s primary concern.

To determine the proper amount of bond, courts should balance the equities involved. . . .

Greene County Citizens United by Cumpston v. Greene County Solid Waste Authority, 636 A.2d 1278, 1281 (Pa. Cmwlth. 1994). We now turn to Petitioners’ individual assertions as set forth above.

Nominal Bond/ Excessive Bond Amount

We will address Petitioners’ first and third assertions together. In their first assertion, Petitioners alleged that “the amount of the bond should not be more

than nominal,” Application for Reconsideration at 4, because Respondents will not sustain any damages should the preliminary injunction ultimately be found to have been improperly granted. In their third assertion, Petitioners contend that, as a matter of equity, they should not be required to file a bond that effectively covers the estimated amount of proceeds that all regulated entities would have paid, or at least a material portion thereof, in connection with the September 2022 RGGI allowance auction. In other words, Petitioners essentially challenge the amount of the bond as excessive. The Court disagrees with Petitioners’ allegations.

First, the Court specifically disagrees with Petitioners to the extent that they argue that Respondent will not sustain any damages should the preliminary injunction ultimately be found to have been improperly granted. The Court’s July 8, 2022 order granting Petitioners’ preliminary injunction precludes Respondents from “implementing, administering, or enforcing the Rulemaking,” thereby effectively precluding the Commonwealth’s participation in the upcoming September 2022 RGGI allowance auction, and perhaps further allowance auctions depending on the timing of this Court’s and our Supreme Court’s resolution of this and related cases.

The Commonwealth expected to receive in excess of \$200 million as a result in its participation in the September 2022 auction alone, based on the-then most recent auction price of \$13.50 per allowance. *See* Notes of Testimony (N.T.), May 10, 2022 Preliminary Injunction (PI) Hearing, at 252 (testimony of James Locher, Manager of the Keystone-Conemaugh Project Office, that the March 2022 auction price was \$13.50 per allowance); May 11, 2022 PI Hearing, at 101 (testimony of Allen Landis, Executive Policy Specialist with Respondent DEP, that the Commonwealth expected to place approximately 15 million allowances into the September 2022 auction (when multiplied by \$13.50 per allowance totals

\$202,500,000)). The Commonwealth's proceeds from the RGGI allowance auctions are deposited into the Clean Air Fund, which is managed by DEP and used exclusively to combat air pollution. *See* N.T., May 10, 2022 PI Hr'g, at 135 (testimony of former DEP Secretary Patrick McDonnell); N.T., May 11, 2022 PI Hr'g, at 103 (testimony of Mr. Landis). The Commonwealth's loss of such proceeds constitute damages resulting from this Court's grant of a preliminary injunction.

Moreover, contrary to Petitioners' third assertion, the imposition of a \$100,000,000 bond does not effectively cover the estimated amount of proceeds that all regulated entities would have paid in connection with the September 2022 RGGI allowance auction. While the \$100,000,000 bond admittedly represents a significant or material portion of the Commonwealth's expected proceeds from this auction, the Court relied on the testimony of Petitioners' own witness in setting this bond amount.

Mr. Locher, the Manager of the Keystone-Conemaugh Project Office, which manages the Keystone and Conemaugh Generating Stations,² testified regarding the number of tons of CO₂ emissions from these plants in 2021. N.T., May 10, 2022 PI Hr'g, at 250-51. Mr. Locher indicated that each Generating Station consists of two fossil fuel-fired power plants, which emitted a total of 15.5 million tons of CO₂ in 2021. *Id.* at 251. More specifically, Mr. Locher testified that Keystone Generating Station's two units emitted approximately 4.3 million and 3.6

² According to Petitioners petition for review, Bowfin KeyCon Holdings, LLC, Chief Power Finance II, LLC, Chief Power Transfer Parent, LLC, and KeyCon Power Holdings, LLC, are all partial owners of the Keystone and Conemaugh Generating Stations, each of which consist of Pennsylvania-based fossil fuel-fired power plants that have a nameplate capacity of 25 megawatts (MW) or greater, thereby subjecting the plants to the requirements of RGGI. Petition for Review ¶¶ 2-5. GenOn Holdings, Inc. holds ownership interests in various unidentified Pennsylvania-based fossil fuel-fired power plants that have nameplate capacities of 25 MW or greater. Petition for Review ¶ 6.

million tons of CO₂, totaling 7.9 million tons, and Conemaugh Generating Station's two units each emitted approximately 3.8 million tons of CO₂, totaling 7.6 million tons. *Id.* at 250.

Given that RGGI required all applicable power plant owners to account for emissions starting July 1, 2022, the Court divided the 15.5 million tons for 2021 in half, to represent the latter half of 2022, and multiplied this figure, 7,750,000 tons, by the most recent auction price in the record, \$13.50.³ While this resulted in allowances totaling \$104,625,000, the Court rounded this number down to \$100,000,000 to establish a bond amount that was aligned with the evidence of record. While this bond amount was premised solely on the record evidence related to the power plants that were part of the Keystone and Conemaugh Generating Stations, given the express language of Pa. R.Civ.P. 1531(b)(1) that describes the purpose of the bond as accounting for “all damages sustained by reason of granting the injunction” (emphasis added), and the discretion afforded to this Court in setting the bond amount, the Court could have imposed an even greater bond amount. Thus, the bond amount imposed by this Court was neither excessive nor inequitable as alleged by Petitioners.

Preliminary Injunction Will Not Prevent Respondents From Collecting The Proceeds From The September 2022 RGGI Allowance Auction

Second, Petitioners aver that the preliminary injunction herein will not prevent Respondents from collecting the proceeds from the September 2022 RGGI

³ These figures represent only the power plants that are part of the Keystone and Conemaugh Generating Stations. Petitioner GenOn Holdings, Inc. did not identify in which power plants it maintains an ownership interest in the petition for review and there was no evidence presented at the preliminary injunction hearing in this regard.

allowance auction, noting that a preliminary injunction was also granted in the related case of *Ziadeh*. The fact that a preliminary injunction was issued in this related case has no relevance to the present action. The present case stands on its own with respect to the grant of Petitioners' Preliminary Injunction Application. As noted above, Pa. R.Civ.P. 1531(b) mandates the issuance of a bond in conjunction with the issuance of a preliminary injunction.⁴ The Court must apply the applicable Rules of Civil and/or Appellate Procedure in each case. The Court merely applied Pa. R.Civ.P. 1531(b) in establishing a bond requirement herein. Thus, the Court finds no merit to this argument by Petitioners.

Infeasibility Of Bond Requirement


Fourth, and finally, Petitioners state that the bond requirement directs them “to do something that is infeasible, if not impossible.” Application for Reconsideration at 9. In this regard, Petitioners noted the original 14-day deadline for filing the bond.

We begin by reiterating that Pa. R.Civ.P. 1531(b) mandates the imposition of a bond in conjunction with the issuance of a preliminary injunction, with limited exceptions not applicable herein. Additionally, a trial court, which includes this Court when acting in a case such as this filed in our original jurisdiction, has discretion with respect to the amount of the bond. We believe this discretion also extends to establishing the time period within which a bond must be filed. While our July 8, 2022 order granted Petitioners 14 days to file a significant bond, this case present important issues not only for the parties involved but also for each

⁴ In *Ziadeh*, the party identified as the Senate intervenors sought and were granted a preliminary injunction and were excepted from the bond requirement under Pa. R.Civ.P. 1531(b).

and every citizen of this Commonwealth that requires expeditious use of the Court's resources. Moreover, nothing prevented Petitioners from requesting additional time to secure and file a bond. Indeed, this Court's July 22, 2022 order denying Petitioners' Application for Reconsideration provided them an additional 30 days to comply with the bond requirement.

Furthermore, as to Petitioners' allegation that meeting the bond requirement set forth in our July 8, 2022 order is an impossibility that denies them meaningful access to the judicial system, it is nothing more than that, an allegation. Petitioners did not present any evidence or argument during the course of the preliminary injunction hearing with respect to the amount of any potential bond should the Court find in their favor. Similarly, Petitioners' Application for Reconsideration did not request a further hearing with respect to the bond issue. The Court is not aware of what actions, if any, Petitioners took to attempt to comply with the bond requirement or why compliance is an impossibility. Thus, the Court rejects Petitioners' argument regarding the infeasibility of the bond requirement.⁵



MICHAEL H. WOJCIK, Judge

⁵ On August 19, 2022, Respondents filed an answer in opposition to Petitioners' Application for Reconsideration. However, because this Court denied Petitioners' Application by order dated July 22, 2022, and our Supreme Court did not direct this filing, the Court will not consider the same.