IN THE SUPREME COURT OF PENNSYLVANIA
MIDDLE DISTRICT

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,	:	No. 89 MAP 2022
Appellants	:	Appeal from the Order of the Commonwealth Court at No. 247 MD 2022 dated July 8, 2022
v.	:	
PENNSYLVANIA DEPARTMENT OF ENVIRONMENTAL PROTECTION AND PENNSYLVANIA ENVIRONMENTAL QUALITY BOARD,	:	
Appellees	:	

ORDER

PER CURIAM

AND NOW, this 8th day of September, 2022, Petitioners'/Appellants' Application for Order Modifying Injunction During Pendency of Appeal is hereby **DENIED**. For purposes of Pa.R.Civ.P. 1531(b)(1), the bond amount of $100 million set by the Commonwealth Court's order of July 8, 2022 is to be filed with the Commonwealth Court no later than Thursday, September 15, 2022. The Application for Leave Nunc Pro Tunc to File an Amici Curiae Brief (1) in Support of Respondents'/Appellees' Response Per

August 18 Order or (2) in Support of Appellees' Answer to Appellants' Application for Order Modifying Injunction During Pendency of Appeal is **DENIED.**

Justice Mundy files a dissenting statement in which Justice Brobson joins.

Justice Brobson files a dissenting statement in which Justice Mundy joins.

Justice Dougherty notes his dissent.

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PENNSYLVANIA DEPARTMENT OF ENVIRONMENTAL PROTECTION AND PENNSYLVANIA ENVIRONMENTAL QUALITY BOARD,	:	
Appellees	:	

DISSENTING STATEMENT

JUSTICE MUNDY **FILED: September 8, 2022**

Appellants, the plaintiffs in the underlying action, obtained relief in the form of a preliminary injunction. That relief became all but illusory when the Commonwealth Court imposed a bond requirement in the immense amount of $100 million. To ensure that access to justice remains more than a theoretical possibility, I would remand for imposition of a nominal bond. Hence, I respectfully dissent from this Court's present denial of Appellants' request for an order modifying the injunction.

The background in this matter is spelled out in detail in the Commonwealth Court's opinion granting the preliminary injunction, *see Bowfin KeyCon Holdings, LLC v. DEP*, No. 247 M.D. 2022, *slip op*. at 1-10 (Pa. Cmwlth. July 8, 2022), and it need not be repeated in detail here. Very briefly, as a purported exercise of its rulemaking power, the Department of Environmental Protection (DEP) enacted a major change in policy which will significantly impact electricity producers and consumers in this Commonwealth.[1] Under the policy change, Pennsylvania is to join the Regional Greenhouse Gas Initiative (RGGI), a cap-and-trade initiative that presently includes eleven New England and Mid-Atlantic states. Through quarterly auctions, carbon-dioxide allowances will be purchased by electric utility steam generating units of at least 25 megawatts serving generators that produce electricity for sale. These auctions will have a dramatic effect on DEP's budget. DEP's total budget for the most recent fiscal year was approximately $169 million, but with the inclusion of the carbon-dioxide auction proceeds, DEP expects to receive approximately $443 million for the 2022-2023 fiscal year, an increase of $274 million, or 162%.[2]

Appellants argued that the rulemaking amounted to an unconstitutional usurpation of the General Assembly's power to levy taxes. The Commonwealth Court determined Appellants had raised a substantial legal question, as required for the issuance of a preliminary injunction. *See generally Marcellus Shale Coal. v. DEP*, 185 A.3d 985, 986

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[1] DEP is an administrative agency of the Executive Branch of this Commonwealth. It acted pursuant to an executive order issued by the Governor. The rulemaking itself was accomplished by the Environmental Quality Board (EQB) per a rulemaking package submitted to it by DEP. *See id*. at 4. *See generally Tire Jockey Serv., Inc. v. DEP*, 915 A.2d 1165 (Pa. 2007) (observing EQB promulgates environmental regulations which DEP then enforces).

[2] This figure was given by DEP's secretary during testimony in the companion case of *Ziadeh v. Pennsylvania Legislative Reference Bureau*, No. 41 M.D. 2022 (Pa. Cmwlth.).

n.4 (Pa. 2018) (listing the six prerequisites for preliminary injunctive relief). It noted, *inter alia*, that, per the rulemaking record, the cost of administering and overseeing the carbon-dioxide trading program would only consume 6% of the proceeds from the auctions, making it difficult to characterize those proceeds as a fee. The court observed, as well, that it is unclear how DEP is authorized to obtain auction proceeds for Pennsylvania allowances purchased by non-Pennsylvania sources not subject to DEP's regulatory authority which are not tethered to carbon-dioxide emissions in Pennsylvania. *See Bowfin KeyCon*, No. 247 M.D. 2022, *slip op*. at 25-28. Thus, the court enjoined DEP from implementing, administering, or enforcing the rulemaking until further order of the court. *See id*. at 33. Contemporaneous with its order granting preliminary injunctive relief, the court issued a separate order pursuant to civil rule 1531(b)(1) requiring Appellants to post a bond in the amount of $100 million.[3]

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[3] Rule 1531(b) states:

> (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.

Pa.R.Civ.P. 1531(b).

Appellants sought reconsideration of that amount, asserting it would effectively prevent the injunction from safeguarding the interests of Appellants it was designed to protect; it did not reflect actual damages occasioned by the injunction; it was excessive and unnecessary under the circumstances; it effectively denied access to judicial review and injunctive relief; and it should be reduced to a nominal amount. *Cf. People v. Tahoe Reg'l Planning Agency*, 766 F.2d 1319, 1325 (9th Cir. 1985) (recognizing that courts may require only nominal security where "access to judicial review" would otherwise be effectively denied).

The Commonwealth Court denied reconsideration and, at this Court's direction, *see Bowfin KeyCon Holdings, LLC v. DEP*, No. 89 MAP 2022, Order (Pa. Aug. 18, 2022), it eventually issued an opinion in support of the bond amount. Essentially, the court explained the bond requirement is designed to compensate the defendant in the event the preliminary injunction is later determined to have been improperly granted, and the bond here fulfills that function. In terms of the $100 million figure, the court stated it roughly covers the monetary benefits DEP would have reaped absent the injunction from the September 2022 RGGI auction of carbon-dioxide allowances pegged to emissions from Appellants' generating stations. *See Bowfin KeyCon Holdings, LLC v. DEP*, No. 247 M.D. 2022, *slip op*. at 1-7 (Pa. Cmwlth. Aug. 25, 2022). Thus, although DEP would not lose any actual funds, the court fashioned the bond to cover DEP's opportunity costs. Although Appellants pointed out that DEP, in fact, could not possibly have participated in that auction because it had been enjoined from doing so in the companion case of *Ziadeh v. Pennsylvania Legislative Reference Bureau*, No. 41 M.D. 2022 (Pa. Cmwlth.)[4] – and

[4] In *Ziadeh* no bond was required because the defendant is a Commonwealth entity. DEP explained in that matter that Pennsylvania's allowances would not be included in the September 2022 quarterly auction unless the supersedeas in that case was reinstated by August 18, 2022, which it was not. The Commonwealth Court's order denying reconsideration in the present matter was filed that same day.

thus, the opportunity cost was fictitious – the court summarily dismissed that concern as having "no relevance" because the "present case stands on its own." *Id*. at 8. Finally, the court rejected Appellants' claim that posting such a large bond was infeasible, stating Appellants had failed to supply evidence during the hearing on the merits of the preliminary injunction concerning how large of a bond they would be able to supply, and they did not request a hearing on the issue when they asked for reconsideration. *See id*. at 9.

Reviewing courts should disfavor extraordinarily high bond amounts. The trial court has balanced the harms and determined the damage from not enjoining the challenged conduct is greater than that from enjoining it, the harm to the party seeking the injunction is irreparable, and the injunction will not adversely affect the public interest. *See Marcellus Shale Coal.*, 185 A.3d at 986 n.4. I am also particularly troubled by the Commonwealth Court's reasoning in the present case, and its determination that the bond must cover the opportunity cost the preliminary injunction imposes upon the government, even where the forgone opportunity derives from a program as to which a substantial question has been raised concerning its legality – and where the cost will not, in fact, be incurred in any event. Because DEP is prevented from participating in the September 2022 auction by virtue of the injunction in *Ziadeh*, DEP's opportunity costs do not arise "by reason of granting the injunction" in the present case for purposes of Rule 1531(b)(1). *See supra* note 3.

Even if they did, I would not be convinced DEP would suffer irreparable harm from having to delay its participation in RGGI auctions until such time as the legality of its entry into that scheme can be fully tested in the courts. DEP is not a private, profit-seeking entity; like all government agencies, it is an arm of the state tasked with fulfilling certain

functions in the public interest with the public funds that have been allocated for its use.[5] Under the Commonwealth Court's reasoning, moreover, perverse incentives are created: the government can allocate to itself ever increasing sums of money through programs that are of questionable legality, and the greater the sums involved the more difficult it will be for anyone to effectively challenge the conduct. When the ship of state multiplies its speed, courts should not make the steering mechanism unduly difficult to use.

More generally, when assessing the propriety of the government's decision to embark upon a program that will garner benefits to itself in perpetuity, if the program's validity is suspect, courts should be scrupulous to ensure that litigation testing the legality of the state's actions can go forward in an effective fashion. If the state's ability to enter upon that course of action is temporarily delayed, causing it to incur short-term opportunity costs, that is simply the price society is willing to pay to ensure the government acts within the bounds of the law. Ultimately, it is the people who are harmed when the government takes actions benefitting itself which are later determined to be unlawful. We may assume they are willing to incur a modest opportunity cost in each case where the propriety of the state's conduct may reasonably be questioned to ensure they do not lose out in the general run of cases.

I would hold that the $100 million bond amount represents an abuse of discretion and remand for entry of a nominal bond.

Justice Brobson joins this dissenting statement.

[5] Appellants argue such a large damages calculation tends to reinforce the concept that the forgone net revenues amount to an unconstitutional tax, as a mere administrative fee would be substantially consumed through administration of the program. *See* Brief for Petitioners/Appellants at 7.

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DISSENTING STATEMENT

JUSTICE BROBSON **FILED: September 8, 2022**

Under Pennsylvania Rule of Civil Procedure 1531(b), a nongovernmental party who seeks a preliminary injunction must file a bond or deposit legal tender in an amount fixed by the issuing court for the preliminary injunction to be effective. *See, e.g.*, *Walter v. Stacy*, 837 A.2d 1205, 1207-09 (Pa. Super. 2003). The bond or cash deposit is "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." Pa.R.Civ.P. 1531(b)(1) (emphasis added). The amount of the required security lies within the sound discretion of the issuing court, which must balance the equities involved. *See Safeguard Mut. Ins. Co. v. Williams*, 345 A.2d 664, 671 (Pa. 1975); *Greene Cnty. Citizens United by Cumpston v. Greene Cnty. Solid Waste Auth.*, 636 A.2d 1278, 1281 (Pa. Cmwlth. 1994).

In relation to the bond requirement, appellate decisional law largely focuses either on the failure of the issuing court to require any bond or cash deposit to secure a preliminary injunction[1] or a challenge by the enjoined party to the adequacy of the amount fixed to compensate the enjoined party for any damages.[2] There is, however, a dearth of appellate law in this Commonwealth addressing challenges to a bond amount as excessive. Nonetheless, it seems to me that the discretion of the issuing court in fixing the amount should be as assailable for its alleged excessiveness as it is for its alleged inadequacy. With all due respect to the Commonwealth Court, I agree with Appellants, and Justice Mundy,[3] that the Commonwealth Court abused its discretion in fixing the bond amount in this matter at $100 million.

Appellants (Petitioners below) initiated their action in the Commonwealth Court's original jurisdiction, challenging the lawfulness of a Pennsylvania Environmental Quality Board (EQB) rulemaking (Rulemaking) that would, in general terms, establish a mandatory cap-and-trade CO_2 emissions control program in Pennsylvania and make Pennsylvania eligible to participate in the multi-state CO_2 emissions control program

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[1] *See, e.g.*, *Walter*, 837 A.2d at 1207-09; *Christo v. Tuscany Inc.*, 454 A.2d 1042, 1044 (Pa. Super. 1982).

[2] *See, e.g.*, *Safeguard Mut.*, 345 A.2d at 671; *Greene Cnty.*, 636 A.2d at 1281-82; *Broad and Locust Assocs. v. Locust-Broad Realty Co.*, 464 A.2d 506, 509 (Pa. Super. 1983).

[3] Dissenting Statement at 5-6 (Mundy, J., dissenting).

known as the Regional Greenhouse Gas Initiative (RGGI). If implemented, the Rulemaking would empower the Pennsylvania Department of Environmental Protection (DEP) to create CO_2 allowances and make those allowances available for purchase by fossil fuel-fired electric power plants in Pennsylvania whose CO_2 emissions exceed state-established limits. The power plants would purchase those allowances at regional auctions administered by RGGI. The proceeds of the auctions would be returned to the Commonwealth and deposited in the Commonwealth's Clean Air Fund.

In securing a preliminary injunction, temporarily blocking the Rulemaking from becoming law, Appellants convinced the Commonwealth Court, *inter alia*, that there is a substantial legal question over EQB's authority to promulgate and DEP's authority to implement the Rulemaking. *Bowfin KeyCon Holdings, LLC v. Dep't of Env't Prot.* (Pa. Cmwlth., No. 247 M.D. 2022, filed July 8, 2022) (*Bowfin KeyCon I*), slip op. at 18-19. The Commonwealth Court further held that absent preliminary injunctive relief, Appellants, which include owners and operators of power plants subject to the Rulemaking, would suffer financial injury in the form of compliance costs for which they *could not* recover damages should the Commonwealth Court ultimately conclude that the Rulemaking is invalid. *Id.* at 19. *See Marcellus Shale Coal. v. Dep't of Env't Prot.*, 185 A.3d 985, 997 (Pa. 2018) (noting sovereign immunity bars recovery of compliance costs from Commonwealth if regulations ultimately held invalid). These compliance costs, the Commonwealth Court noted, will ultimately be passed on to consumers. *Bowfin KeyCon I*, slip op. at 20-21. Moreover, the Commonwealth Court found an *absence* of credible evidence that the Rulemaking promises an immediate environmental benefit if implemented without a temporary delay to allow the courts to rule on the Rulemaking's validity. *Id.* at 22-23. Even assuming such evidence, however, the Commonwealth Court

reasoned that greater harm would result from immediate implementation of a rulemaking that a court would later find to be invalid. *Id.* at 23.

While the preliminary injunction remains in effect, power plants subject to the Rulemaking in the Commonwealth will not be required to purchase CO_2 allowances in upcoming RGGI allowance auctions, and the Commonwealth, consequently, will not receive the proceeds from those auction purchases. The Commonwealth Court based its decision fixing the bond amount at $100 million on estimates of the revenue the Commonwealth would realize from the September 2022 RGGI allowance auction. *Bowfin KeyCon Holdings, LLC v. Dep't of Env't Prot.* (Pa. Cmwlth., No. 247 M.D. 2022, filed Aug. 25, 2022) (*Bowfin KeyCon II*), slip op. at 6-7. While I do not challenge the evidence on which the Commonwealth Court relied in fixing the bond amount, the Commonwealth Court did so without assessing first whether any person will be injured at all by a temporary delay in implementation and enforcement of the Rulemaking for appropriate judicial review.

As noted above, the purpose of the preliminary injunction bond is to compensate for damages due to injury from an improperly issued injunction. It is undisputed, however, that Pennsylvania is not now, nor has it ever been, a member of RGGI. Pennsylvania has never implemented a CO_2 cap-and-trade program and has never received revenue from the sale of CO_2 allowances, whether through its own auction or an auction administered by RGGI. The Rulemaking proposes an entirely new environmental program that creates an entirely new stream of revenue to the Commonwealth's Clean Air Fund. There is no record evidence or finding by the Commonwealth Court below that *the absence of this new program or revenue—i.e.*, the *status quo ante* the Rulemaking—has inflicted injury on the Commonwealth compensable in damages. There is no evidence or finding by the Commonwealth Court below that the preliminary injunction here

will cause the Commonwealth to incur costs that it must be able to recover if the preliminary injunction is later ruled invalid. Moreover, as noted above, the Commonwealth Court noted the absence of any evidence in the record showing that a temporary delay in implementation of the Rulemaking would cause immediate environmental harm compensable in damages. Balanced against this dearth of evidence of injury or damages to others is the Commonwealth Court's finding that without a preliminary injunction, Pennsylvania power plants, and ultimately Pennsylvania energy consumers, may be forced to incur unrecoverable compliance costs under a rulemaking that may be invalid.

In short, while the Commonwealth may benefit financially from its participation in upcoming RGGI allowance auctions, there is no evidence that it will be harmed or suffer injury if it is preliminarily enjoined from doing so to allow meaningful judicial review of the Rulemaking. I, therefore, respectfully dissent from the Court's denial of Petitioners' Application for Order Modifying Injunction During Pendency of Appeal (Application). Instead, I would grant the Application and require Appellants to post a nominal bond under Pennsylvania Rule of Civil Procedure 1531(b).

Justice Mundy joins this dissenting statement.