

**IN THE SUPREME COURT OF PENNSYLVANIA
MIDDLE DISTRICT**

BOWFIN KEYCON HOLDINGS, LLC; CHIEF	:	No. 89 MAP 2022
POWER FINANCE II, LLC; CHIEF POWER	:	
TRANSFER PARENT, LLC; KEYCON	:	Appeal from the Order of the
POWER HOLDINGS, LLC; GENON	:	Commonwealth Court at No. 247
HOLDINGS, INC.; PENNSYLVANIA COAL	:	MD 2022 dated July 8, 2022.
ALLIANCE; UNITED MINE WORKERS OF	:	
AMERICA;INTERNATIONAL	:	
BROTHERHOOD OF ELECTRICAL	:	
WORKERS; AND INTERNATIONAL	:	
BROTHERHOOD OF BOILERMAKERS,	:	
IRON SHIP BUILDERS, BLACKSMITHS,	:	
FORGERS AND HELPERS,	:	
	:	
Appellants	:	
	:	
v.	:	
	:	
PENNSYLVANIA DEPARTMENT OF	:	
ENVIRONMENTAL PROTECTION AND	:	
PENNSYLVANIA ENVIRONMENTAL	:	
QUALITY BOARD,	:	
	:	
Appellees	:	

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 injunction¹ 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 CO₂ emissions control program in Pennsylvania and make Pennsylvania eligible to participate in the multi-state CO₂ emissions control program

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 CO₂ allowances and make those allowances available for purchase by fossil fuel-fired electric power plants in Pennsylvania whose CO₂ 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 CO₂ 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 CO₂ cap-and-trade program and has never received revenue from the sale of CO₂ 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.