

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

PATRICK J. McDONNELL, SECRETARY :
OF THE DEPARTMENT OF :
ENVIRONMENTAL PROTECTION :
and CHAIRPERSON OF THE :
ENVIRONMENTAL QUALITY :
BOARD, :

Petitioner, :

v. :

PENNSYLVANIA LEGISLATIVE :
REFERENCE BUREAU, VINCENT C. :
DeLIBERATO, JR., DIRECTOR OF THE :
LEGISLATIVE REFERENCE BUREAU, :
and AMY J. MENDELSON, DIRECTOR :
OF THE PENNSYLVANIA CODE and :
BULLETIN, :

No. 41 MD 2022

Respondents, :

SENATE PRESIDENT PRO TEMPORE :
JAKE CORMAN, et al., :

Senate Intervenor :
Respondents, :

HOUSE SPEAKER BRYAN CUTLER, :
et al., :

House Intervenor :
Respondents. :

PROPOSED ORDER

AND NOW, this ___ day of _____, 2022, upon consideration of the
Senate Intervenors' Extraordinary Request that this Court Enter an Interim Order

(Without Hearing or Argument) Prohibiting Publication of the RGGI Rulemaking in the *Pennsylvania Bulletin* and Petitioner's Answer thereto, it is hereby **ORDERED** that the Senate Intervenors' Extraordinary Request is hereby **DENIED**.

BY THE COURT:

J.

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**PETITIONER'S ANSWER IN OPPOSITION TO THE SENATE
INTERVENORS' EXTRAORDINARY REQUEST THAT THIS COURT
ENTER AN INTERIM ORDER (WITHOUT HEARING OR ARGUMENT)
PROHIBITING PUBLICATION OF THE RGGI RULEMAKING IN THE
*PENNSYLVANIA BULLETIN***

Petitioner, by his undersigned counsel, hereby files this Answer to the Senate Intervenors' Extraordinary Request that this Court enter an Interim Order (Without Hearing or Argument) Prohibiting Publication of the RGGI Rulemaking in the *Pennsylvania Bulletin* until the Issues Involved in their Application for Special Relief in the Nature of a Preliminary Injunction can be Fully Briefed, and in support thereof avers as follows:

1. On April 1, 2022, the Senate Intervenors filed a Response to Petitioner's Request for an Extension of Time to File Brief in Opposition to Senate Intervenors' Application for Special Relief in the Nature of a Preliminary Injunction. The Court's April 1, 2022 Order granted Petitioner's request and Petitioner's brief is now due no later than April 25, 2022.

2. Although titled as a "Response to Petitioners' Request for an Extension of Time," paragraphs 8 through 13 of the Senate Intervenors Response contain an extraordinary request.

3. Based upon the possibility that the Senate fails to override Governor Wolf's veto of Senate Concurrent Regulation Review Resolution 1 ("S.C.R.R.R. 1") by April 5, 2022, the Senate Intervenors request an extraordinary interim order (without hearing or argument) prohibiting publication of the RGGI Rulemaking in the *Pennsylvania Bulletin* until the issues raised by the Senate Intervenors can be fully briefed and decided by the Court.

4. The Senate Intervenors' request is extraordinary because publication of the RGGI Rulemaking in the *Pennsylvania Bulletin* is governed by the provisions set forth in Section 7(d) of the Regulatory Review Act ("RRA"), 71 P.S. § 745.7(d), and the approvals of the Governor's Office of General Counsel and the Pennsylvania Office of Attorney General as to the RGGI Rulemaking's form and legality and the approval of the Independent Regulatory Review Commission.

5. It is undisputed that the RGGI Rulemaking has already received all the necessary approvals. See paragraph 15 of the Senate Intervenors' own Application. It is Petitioner's contention that such approvals required the Legislative Reference Bureau ("LRB") to publish the regulation in the December 25, 2021 issue of the *Pennsylvania Bulletin*. See Count One of Petitioner's Petition for Review in the Nature of a Complaint for Permanent and Peremptory Mandamus and for a Declaratory Judgment ("Petitioner's Petition").

6. Section 7(d) of the RRA provides a two step procedure for the General Assembly to reject the RGGI Rulemaking. The first step provides that "the Senate and the House of Representatives shall each have 30 calendar days or ten legislative days, whichever is longer, **from the date on which the concurrent resolution has been reported**, to adopt the concurrent resolution." (Emphasis added). The word "reported" refers back to the Senate or House Committee originating the report of the concurrent resolution to the Senate or the House.

7. If the House and Senate fail to adopt the concurrent resolution within Section 7(d)'s prescribed time period, the regulation must be published in the next available issue of the *Pennsylvania Bulletin*. It is Petitioner's contention that the House failed to adopt S.C.R.R.R. 1 within the prescribed time period and, therefore, the LRB was required to publish the regulation in the December 25, 2021 issue of the *Pennsylvania Bulletin*. See Count Two of Petitioner's Petition.

8. The LRB refused to publish the RGGI Rulemaking in the *Pennsylvania Bulletin* on the ground that the House timely adopted S.C.R.R.R. 1.

9. Both the LRB and the House Intervenors filed Preliminary Objections to the Petition for this reason and the schedule for resolving this dispute is set forth in the Court's March 29, 2022 scheduling Order.

10. However, under Section 7(d), Governor Wolf had the right to, and did, veto S.C.R.R.R. 1. If the Senate fails to override his veto, the RGGI Rulemaking **must** be published in the next available issue of the *Pennsylvania Bulletin*.

11. There is no dispute about this fact. Thus, on April 1, 2022, the LRB Respondents filed an Application for Leave to Amend New Matter in [the LRB] Respondents' Answer to Senate Intervenor Respondents' Application for Special Relief in the Nature of a Preliminary Injunction, in which the **LRB Respondents** stated:

2. Respondents anticipate that the legislative time period for disapproving final-form regulation #7-559:CO2 Budget Trading

Program (hereinafter referred to as the Trading Program Regulation¹) under Section 7(d) . . . will expire no later than Tuesday, April 5, 2022, if the Senate fails to override Governor Wolf’s veto of Senate Concurrent Regulation Review Resolution 1.

3. Upon expiration of the time period under Section 7(d), the Legislative Reference Bureau **must** publish the Trading Program Regulation in the next available issue of the *Pennsylvania Bulletin* on Saturday, April 9, 2022.

(Emphasis and footnote added).

12. In sum, if the Senate fails to override the Governor’s veto, Section 7(d) requires that the Trading Program Regulation (or RGGI Rulemaking as referenced by the Senate Intervenors) be published in the next available issue of the *Pennsylvania Bulletin*.

13. The non-Section 7(d) issues sought to be raised by the Senate Intervenors in their Counterclaims and Application cannot controvert or eviscerate the requirements of Section 7(d).

14. Accordingly, there is no basis for the Senate Intervenors’ extraordinary request for an interim order (without hearing or argument) prohibiting the publication of the RGGI Rulemaking in the *Pennsylvania Bulletin* in the event the

¹ The “Trading Program Regulation” and the “RGGI Rulemaking” are one and the same regulation.

Senate fails to override the Governor's veto.² Simply stated, their request is contrary to the requirements contained in Section 7(d).

15. Finally, the Senate Intervenors contend this is an "urgent" matter because the Court's March 28, 2022 Order directed Petitioner to file his answer to their Application within two business days. As evidenced by the Court's March 29, 2022 scheduling Order and April 1, 2022 scheduling Order, the Court intends to resolve the parties' outstanding disputes in due course.

WHEREFORE, Petitioner respectfully requests that this Court deny the Senate Intervenors' extraordinary request for an interim order (without hearing or argument) prohibiting the publication of the RGGI Rulemaking in the next available issue of the *Pennsylvania Bulletin* on April 9, 2022 because their request is contrary to Section 7(d) of the RRA.

Dated: April 4, 2022

Respectfully submitted,

/s/ David H. Pittinsky

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² If the Senate and the House override the Governor's veto, the disputes covered by this Court's March 29 scheduling Order will still be in play.

CERTIFICATION

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

Dated: April 4, 2022

/s/ David H. Pittinsky

David H. Pittinsky

(Pa. 04552)

CERTIFICATE OF SERVICE

I, David H. Pittinsky, hereby state that I have caused to be served a true and correct copy of the foregoing Answer via the Court's PACFile.

Dated: April 4, 2022

/s/ David H. Pittinsky

David H. Pittinsky