

BRITISH COLUMBIA UTILITIES COMMISSION

Order G-242-20

Advance Ruling on Confidentiality for *Fuel Price Transparency Act* Submissions

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**SUBMISSIONS OF 7-ELEVEN CANADA, INC.**

OCTOBER 15, 2020

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## INTRODUCTION

1. On September 24, 2020 the Commission issued Order G-242-20 (the “**Proceeding**”), inviting submissions with respect to an advance ruling on confidentiality proposed by Parkland regarding *Fuel Price Transparency Act* (“**FPTA**”) Submissions.
2. 7-Eleven Canada, Inc. (“**7-Eleven**”) has intervened in the Proceeding. 7-Eleven owns or leases 124 retail service stations in British Columbia. 7-Eleven does not supply fuels on a wholesale basis in British Columbia. As a retailer of fuels, 7-Eleven anticipates that eventually it will be a “responsible person” under the FPTA because it will be involved in “reportable activity” under the FPTA. It is also possible that some 7-Eleven stations will be selected to participate in the Retail Pilot program set to launch in November 2020.
3. 7-Eleven fully participated as an intervener in the Commission Inquiry into Gasoline and Diesel prices in British Columbia held in the summer of 2019. As an intervener, 7-Eleven provided information about average monthly retail prices and margins to the Commission in response to a questionnaire. A senior executive of 7-Eleven testified at the public hearing and 7-Eleven submitted written submissions to the Commission.
4. In June 2020, 7-Eleven submitted responses to a government Questionnaire relating to the implementation of the FPTA.
5. On October 9, 2020, 7-Eleven tendered submissions to the Commission with respect to the Retail Pilot program. 7-Eleven addressed confidentiality in those submissions, and welcomes the opportunity to address how commercially and competitively sensitive information should be treated where and when required under FPTA regulations.

## OVERVIEW

6. Subject to the suggested modification outlined below, 7-Eleven supports Parkland's proposal ("**Parkland's Proposal**") for the treatment of confidentiality and competitively sensitive submissions required under the FPTA, which comprises the following:

1. Advanced approval of confidential status be granted to information submitted by responsible persons that they identify as commercially or competitively sensitive in reporting submissions made under the FPTA (Confidential Filings). Responsible persons must ensure that Confidential Filings, or any portions thereof, are clearly marked confidential;

2. For the purpose of the order, confidential materials shall include (i) all Confidential Filings, and (ii) any document created by the BCUC (including its staff and legal counsel) that contains data from Confidential Filings in a manner that allows such data to be discerned;

3. The BCUC will keep confidential materials confidential within the BCUC and only use them for purposes related to its administration of the FPTA;

4. Access to the confidential materials shall be strictly limited to the BCUC (including its staff and legal counsel) who have a need to access such information for purposes related to the administration of the FPTA. To the extent that external consultants, such as information technology professionals, may have access to confidential materials, they are bound by confidentiality undertakings to the BCUC;

5. The BCUC will also ensure the information contained in the Confidential Filings cannot be discerned (e.g., by back-calculation) in the BCUC's public reporting, other published material or reports to government; and

6. Should (i) any of the confidential materials be the subject of a request for disclosure under the Freedom of Information and Protection of Privacy Act, or (ii) proceedings be commenced in the Supreme Court of British Columbia in respect of the confidential materials, the BCUC shall, forthwith, provide specific notice to the affected party and general notice of a request of a proceeding, as the case may be, to all parties that filed Confidential Filings;

7. 7-Eleven generally agrees with the supporting reasons advanced by Parkland in its letter of September 16, 2020. As a retailer operating many stations, it is anticipated that 7-Eleven will eventually be required to produce each month significant volumes of commercially sensitive information including with respect to volumes purchased and sold, and the costs of fuels and transportation. Disclosure

of such information would confer a bargaining advantage on competitors of 7-Eleven and imperil its ability to negotiate confidentially with third party suppliers. There is nothing in the policy underlying the FTPA that suggests that the Legislature intended to cause such harm or to disrupt normal competitive process.

8. The apparent thrust of the FPTA is to provide the public with average information about the industry as opposed to sensitive information about particular market participants. This goal can be accomplished if the Commission restricts itself to publishing only average, anonymized statistics. 7-Eleven shares the caution of Parkland and wants to ensure that any published anonymized data not reveal indirectly or through back-calculation the confidential information of market participants.
9. Finally, it is appropriate to deal with the subject of confidentiality once and upfront for all responsible persons. The FPTA regulatory scheme contemplates regular (monthly) submissions of the same type of information. It is reasonable to believe that significant portions of much of the information required is commercially and competitively sensitive. It would be unnecessary and extremely cumbersome and inefficient if individual responsible persons were forced to apply each month for confidentiality rulings and the Commission was tasked to address them.
10. 7-Eleven proposes that paragraph 6 of the Parkland Proposal be modified by the addition of the highlighted text below:

6. Should (i) any of the confidential materials be the subject of a request for disclosure under the Freedom of Information and Protection of Privacy Act, or (ii) proceedings be commenced in the Supreme Court of British Columbia in respect of the confidential materials, the BCUC shall, forthwith, provide specific notice to the affected party (pursuant to section 23 of the Freedom of Information and Protection of Privacy Act in the case of a request under that legislation) and general notice of a request of a proceeding, as the case may be, to all parties that filed Confidential Filings;

11. Section 23 of the *Freedom of Information and Protection of Privacy Act* is the provision by which the head of a public body subject to a request to access records gives notice to affected third parties. The purpose of this suggested amendment

to the Parkland Proposal is to confirm that the process contemplated by Section 23 will be engaged.

12. With respect to paragraph 4 of the Parkland Proposal, it appears that an expression was inadvertently omitted. 7-Eleven suggests the insertion of the highlighted text as follows:

4. Access to the confidential materials shall be strictly limited to the **commissioners and personnel of the** BCUC (including its staff and legal counsel) who have a need to access such information for purposes related to the administration of the FPTA ...

### **QUESTIONS POSED BY THE COMMISSION**

13. The Commission has requested interveners to address the following questions.
  - a. Whether the BCUC's Rules should be modified to recognize the confidentiality of "protected" information filed under the FPTA;
  - b. Whether additional BCUC terms or directives are necessary beyond the BCUC's Rules and section 9 of the FPTA regarding applications for confidentiality of or the treatment of "protected" information;
  - c. Whether Parkland's proposed terms are feasible under the FPTA, the Administrative Tribunals Act, the Freedom of Information and Protection of Privacy Act, the Competition Act, or other applicable legislation; and
  - d. Submissions on any further process to address requests for an advanced ruling on confidentiality of "protected" information.

- a. Modification of the Commission's Rules to recognize confidentiality**

14. 7-Eleven submits that the Commission should issue an order that gives effect to the Parkland Proposal for all "responsible persons" (as defined in the FPTA). In so doing, the Commission will be recognizing the confidentiality of protected information.

15. 7-Eleven defers to the Commission as to the mechanics to achieve this result. It appears unnecessary for the Commission to modify its Rules, since the Commission has the power to issue such an order pursuant to the existing Rules and pursuant to its authority under Section 11 of the *Administrative Tribunals Act*.
16. 7-Eleven would not object if the Commission were to achieve the scheme contemplated by the Parkland Proposal by amending its Rules as an alternative to issuing an order.

**b. Are additional terms or directives necessary?**

17. 7-Eleven submits that the Commission's Rules and Section 9 of the FPTA do not in themselves give effect to the Parkland Proposal. It will be necessary for the Commission to issue a ruling (in the form of an order) or some other means to give effect to the advance ruling scheme.

**c. Feasibility of the Parkland Proposal**

18. The Parkland Proposal is consistent with legislation and the practices of the Commission.
19. The Commission has the ability to designate as confidential information such applicable information it receives, meaning the information is kept off the public record. See section 2.1 of the *Utilities Commission Act* and Section 11 of the *Administrative Tribunals Act* and Part 4.0 of the Commission's *Rules of Practice and Procedure*.
20. The Commission often receives highly sensitive information in the course of discharging its statutory duties. The ability to designate and treat information as confidential is integral to its operations. Furthermore, under section 9(2) of the FPTA, the Commission has the ability to decide not to publish protected information, i.e. in effect, the Commission is the gatekeeper that decides whether to keep such information confidential.

21. The Commission has the power to make advance rulings. The Commissioner made advanced rulings during the 2019 Inquiry (see issued Orders G148-19, G-162-19, and G-165-19) to safeguard similar information as responsible persons will be required to file under the FPTA regulations. The interveners in the Inquiry had the ability to designate written evidence and testimony as confidential, and such information was not placed on the public record. That greatly facilitated participation in the Inquiry. The Commission was still able to publish robust and meaningful reports. The process adopted in the Inquiry is similar to the Parkland Proposal.
22. Nothing in Section 9(2) of the FPTA would require the Commission to publish commercially sensitive information - protected information - received from responsible persons. The Commission, as in any of its proceedings, has a discretion to publish protected information. Consistent with the approach taken in the Inquiry and other situations where the Commission acquires commercially sensitive information, the Commission ought to act to protect that information.
23. The Commission itself is not responsible for the administration of the *Freedom of Information and Protection of Privacy Act*. Again, nothing in that legislation fetters the ability of the Commission to issue rulings with respect to confidentiality of information coming within the Commission's jurisdiction.
24. Nothing in the federal *Competition Act* fetters the ability of the Commission to issue the advance ruling on confidentiality under the Parkland Proposal.
25. The *Competition Act* promotes competition through provisions which prohibit or provide remedies for certain forms of anti-competitive conduct. That includes the *per se* prohibition on competitors agreeing to fix prices under the criminal conspiracy provision (Section 45(1)) and the ability of the Competition Tribunal under the civil conspiracy provision (Section 90.1) to issue a remedial order to stop or otherwise correct the anticompetitive effects of competitor agreements that are likely to lessen or prevent competition substantially.

26. The *Competition Act* does not address or apparently limit the ability of a provincial entity like the Commission operating within its powers to limit publication of information it receives in its regulatory capacity.
27. Moreover, as noted by Parkland, the voluntary exchange of commercially sensitive information between competitors may facilitate coordination and in some cases, an exchange may lead someone to infer the existence of an agreement that violates or otherwise engages the conspiracy provisions. In other words, it would be bad policy for the Commission to publish or otherwise make available a market participant's commercially sensitive information to the public, suppliers and competitors alike.

**d. Advance Ruling Processes**

28. For the sake of efficiency and predictability and fairness to responsible persons, the Commission should confirm the Parkland Proposal through an advance ruling.
29. No further process is required other than as is set out in the Parkland Proposal. It is incumbent on responsible persons to identify commercially sensitive information and to submit an appropriately redacted public version.
30. For greater certainty, nothing in the advance ruling process should fetter the discretion of the Commission not to publish information received under the FPTA. Whether or not a particular responsible person redacts its submissions, the Commission should consider whether publication of such information in anything other than an anonymized way, would be detrimental to competition in the market or other public interests.

**CONCLUSION**

31. 7-Eleven would be pleased to address any questions the Commission may have arising from these submissions or those of other parties.

32. In the event that the Commission does not accede to the Parkland Proposal, or proposes to adopt a modified version of the Parkland Proposal inconsistent with these submissions, 7-Eleven requests an opportunity to make further submissions in writing and/or at an oral hearing.

ALL OF WHICH IS RESPECTFULLY SUBMITTED THIS 15<sup>TH</sup> DAY OF OCTOBER, 2020



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