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VIA ELECTRONIC DDS

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83862/562

British Columbia Utilities Commission
Suite 410, 900 Howe Street
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Attention: Ms. Marija Tresoglavic, Acting Commission Secretary

RE: **Parkland Corporation Request for Advance Ruling on Confidentiality for Fuel Price
Transparency Act (“FPTA”) Reporting Submissions (“Proceeding”)
Intervener Submission**

Dear Ms. Tresoglavic:

We act on behalf of Suncor Energy Inc. (“Suncor”) in respect of the above noted British Columbia Utilities Commission (“Commission”) Proceeding. In accordance with the Commission’s Order G-242-20 dated September 24, 2020, enclosed please find Suncor’s Submission.

Should you have any questions or require any additional information, please do not hesitate to contact the undersigned.

Sincerely,



Terri-Lee Oleniuk

Encl.

cc. Chris Hustwick, Director, Downstream Legal Affairs Canada, Suncor Energy

SUNCOR ENERGY

INTERVENER SUBMISSION REGARDING PARKLAND CORPORATION'S REQUEST FOR ADVANCE RULING ON CONFIDENTIALITY FOR *FUEL PRICE TRANSPARENCY ACT* REPORTING SUBMISSIONS

I. INTRODUCTION

This submission is made in accordance with the direction of the British Columbia Utilities Commission (the "**Commission**" or the "**BCUC**") in Order G-242-20, dated September 24, 2020.¹

On September 16, 2020, Parkland Corporation ("**Parkland**") filed an application with the Commission for an advance ruling on confidentiality for certain information that Parkland is required to file under the *Fuel Price Transparency Act*² ("**FPT Act**") and the *Fuel Price Transparency Regulation*³ ("**FPT Regulation**") ("**Application**")⁴. Parkland seeks an advance confidentiality order which would allow any filing made under the FPT Act to be made on a confidential basis if the responsible person submitting the information identifies it as containing commercially or competitively sensitive information (the "**Proposed Advance Confidentiality Order**").

Suncor Energy Inc. and its affiliates (collectively, "**Suncor**"), like Parkland, are subject to the FPT Act and the FPT Regulation. The FPT Act and FPT Regulation require fuel importers, wholesalers, terminal owners/operators, and those who supply fuel to retail dealers to submit regular reports to the BCUC, as Administrator, starting in November 2020. Suncor and certain affiliates are required to provide information to the BCUC pursuant to the FPT Regulation, and potentially pursuant to the still in development Retail Pilot.⁵ Accordingly, Parkland's request for an advance confidentiality ruling pertaining to this reporting is of interest to Suncor.

Suncor is an integrated Canadian energy company. The company supplies refined petroleum products into British Columbia, primarily from its refining operations in Alberta, and operates or supplies 229 Petro-Canada service stations across the province, as well as Petro-Canada Cardlock and Wholesale Marketer locations, third-party marketers, and commercial fuel customers. Suncor fully participated in the BCUC's 2019 *Inquiry into Gasoline and Diesel Prices in British Columbia* (the "**Inquiry**") and subsequent and ongoing industry engagement by the BC government and the BCUC on the reporting requirements under the FPT Act.

¹ BCUC [Order G-242-20](#), Parkland Corporation Request for Advance Ruling on Confidentiality for Fuel Price Transparency Act Reporting Submissions, September 24, 2020.

² S.B.C. 2019, c. 46, s. 3.

³ B.C. Reg. 52/2020.

⁴ [Request from Parkland](#), Parkland Corporation Request for Advance Ruling on Confidentiality for Fuel Price Transparency Act Reporting Submissions, September 16, 2020.

⁵ Initiated by the Ministry of Energy, Mines, and Petroleum Resources, [Special Direction to the British Columbia Utilities Commission issued under Section 4 of the Fuel Price Transparency Act](#), Direction to require submission of fuel data from retail dealers of gasoline and diesel fuel in British Columbia and report to the Minister, August 14, 2020.

Suncor supports Parkland's Application. Suncor submits that the Proposed Advance Confidentiality Order is consistent with the Commission's authority under the BCUC Rules of Practice and Procedure⁶ ("**BCUC Rules**"), the *Administrative Tribunals Act*⁷, and the *Freedom of Information and Protection of Privacy Act*⁸, as well as the FPT Act and FPT Regulation. Moreover, allowing responsible persons to declare in advance which information is confidential will also best serve the objectives of the FPT Act and Canada's *Competition Act*⁹ by limiting to the greatest extent possible the negative impacts of disclosure of this information on the competitiveness of the fuel market¹⁰ in BC and facilitating timely reporting of sufficient information to "promote public confidence in the competitiveness of the gasoline and diesel fuel market."¹¹

II. RESPONSE TO QUESTIONS POSED BY THE BCUC

A. *Whether the BCUC's Rules should be modified to recognize the confidentiality of "protected" information filed under the FPT Act*

The BCUC Rules operate alongside the FPT Act. As noted by the Commission in its hearing order for this proceeding, Part IV of the BCUC Rules, which provides a procedure for confidential documents, applies to all requests for confidentiality before the Commission.¹² However, the BCUC Rules are not intended to limit any statutory provision which protects the confidentiality of information.¹³ As indicated by the BCUC in its Reporting Guidelines for Reporting Requirements of the Fuel Price Transparency Regulation¹⁴ (the "**FPT Guidelines**"), the BCUC can consider the confidentiality of information under the BCUC Rules and can also choose not to publish information it receives, under Section 9 of the FPT Act.¹⁵ The compliance of the Proposed Advanced Confidentiality Order with the FPT Act is discussed in greater detail in Section II.C below.

Furthermore, the BCUC Rules themselves are capable of addressing the issues raised in relation to information submitted under the FPT Act. While, as argued in greater detail by Parkland in the Application and by Suncor in Part III of this submission, the nature of the information required to be submitted under the FPT Act necessitates an advance order, such an advance order is possible under the BCUC Rules. The BCUC has the discretion under Part IV of the BCUC Rules to make advance orders of confidentiality, without altering the BCUC Rules, as demonstrated in

⁶ BCUC [Order G-15-19](#), British Columbia Utilities Commission Rules of Practice and Procedure, December 17, 2018.

⁷ SBC 2004, c 45.

⁸ RSBC 1996, c 165.

⁹ RSC 1985, c C-34.

¹⁰ Suncor is using the term "market" or "markets" for purposes of expediency but this usage does not indicate Suncor's acceptance that any such market exists or acceptance of any specific market definition, whether from a geographic or product perspective.

¹¹ BCUC [Letter L-9-20](#), Re: British Columbia Utilities Commission – Fuel Price Transparency Act, March 16, 2020.

¹² BCUC Order G-242-20, at PDF 2.

¹³ BCUC Rules, Section 17.02.

¹⁴ BCUC, [Reporting Guidelines](#), Fuel Price Transparency Regulation, B.C. Reg. 52/2020, October 5, 2020.

¹⁵ FPT Guidelines, PDF 2.

the three orders relating to advance confidentiality made in the Inquiry¹⁶ (the “**Inquiry Advance Confidentiality Orders**”). This is not a situation where the confidential nature of submitted information needs to be determined on a case by case basis as is normally contemplated under Part IV of the BCUC Rules. The nature of the information to be submitted under the FPT Regulation is known, as are its potential competitive and commercial implications. The Commission therefore has all the information it needs to determine whether such information should be protected as confidential under the BCUC Rules.

Moreover, any determination under the BCUC Rules for confidentiality can be complementary to the BCUC’s duties in relation to “protected information” under the FPT Act. The factors which the BCUC considers in determining confidentiality under Section 20 of the BCUC rules include the factors which must be considered under Section 9 of the FPT Act; namely, whether the information is personal, financial, commercial, scientific, labour relations, or technical information, and the balancing between the public interest and any harm that might be caused by disclosure.¹⁷

However, Suncor respectfully submits that any advance confidentiality order should be carefully drafted to ensure that the principles embedded in Part IV of the BCUC Rules can be fully applied in the unique reporting context of the FPT Act. In particular, given the short timelines in which information must be reported and potentially distributed under the FPT Act, the application of sections 21.03 and 22 of the BCUC Rules should be clarified. Section 21.03 governs the procedure for objections to confidentiality requests. Suncor submits that the current proceeding to consider the Proposed Advance Confidentiality Order is the venue for objections to be fully considered and there should be no further opportunity for objections to be advanced. Section 22 meanwhile protects the rights of the submitter where the Commission denies the confidentiality request. Suncor recognizes that submission of data required under the FPT Act and the FPT Regulation is compulsory, but submits that clear advance understanding of how information will be treated will allow reporting entities the opportunity to consider if further steps are necessary prior to being required to commence reporting.

B. Whether additional BCUC terms or directives are necessary beyond the BCUC’s Rules and section 9 of the FPT Act regarding applications for confidentiality of or the treatment of “protected” information

For the reasons discussed elsewhere in this submission, Suncor respectfully submits that no additional terms or directives are necessary, presuming the Commission continues to allow the advance protection of confidential information as it did throughout the Inquiry, and provides the clarity on the application of sections 21.03 and 22 of the BCUC Rules as requested above.

C. Whether Parkland’s proposed terms are feasible under the FPT Act, the Administrative Tribunals Act, the Freedom of Information and Protection of Privacy Act, the Competition Act, or other applicable legislation

Suncor respectfully submits that the Proposed Advance Confidentiality Order is feasible under and consistent with the existing confidentiality framework, namely, the statutes listed, in concert

¹⁶ BCUC [Order G-148-19](#), An Inquiry into Gasoline and Diesel Prices in British Columbia, July 8, 2019; BCUC [Order G-162-19](#), An Inquiry into Gasoline and Diesel Prices in British Columbia, July 23, 2019; BCUC [Order G-165-19](#), An Inquiry into Gasoline and Diesel Prices in British Columbia, July 25, 2019.

¹⁷ BCUC Rules, Section 20.

with the BCUC Rules. The Commission’s authority under this existing confidentiality framework and the factors that are considered by the Commission when exercising this authority support granting Parkland’s Application, as follows and as further discussed in Part III of this submission.

The FPT Regulation appoints the BCUC as the Administrator under the FPT Act, with the discretion to make rules to implement the provisions of the FPT Act.¹⁸ The BCUC has already exercised this discretion in the creation of the FPT Guidelines. The FPT Act also gives the Administrator the specific discretion, in Section 9, to determine whether information submitted under the Act should be made publicly available, and in what form. This discretion is complementary with the Proposed Advance Confidentiality Order for two reasons. First, the Administrator is empowered to decide what publication is necessary to satisfy the goals of the FPT Act.¹⁹ This supports the notion that the BCUC may use additional tools, such as the Proposed Advance Confidentiality Order, to define and clarify what information it will publish.

Second, Section 9 of the FPT Act provides specific circumstances where reported information must not be published, which are consistent with the Proposed Advanced Confidentiality Order. Information may not be published if it contains protected information, which includes commercial and financial information of a responsible party, and the public interest in disclosure of that information does not outweigh any potential harm that disclosure might cause to the submitting party.²⁰ Section 9 also provides further guidance on what the public interest in disclosure is in the specific context of the FPT Act; namely public confidence in and actual competitiveness of the market for fuels in BC. This latter aspect is particularly important, as disclosure of competitively sensitive information can serve to reduce, rather than foster, competition, which is discussed in further detail below.

The *Administrative Tribunals Act* meanwhile grants the BCUC broad authority to control its own processes and make rules respecting practice and procedure to facilitate the just and timely resolution of matters before it.²¹ The *Administrative Tribunals Act* specifically provides the Commission with the power to direct that any evidence submitted to it be submitted confidentially where such confidential submission is necessary to ensure the proper administration of justice.²² Suncor submits that this power supports the discretion the Commission can exercise under the BCUC Rules, and therefore supports granting the Proposed Advance Confidentiality Order.

The Commission has applied factors from the *Freedom of Information and Protection of Privacy Act* to guide the use of its discretion on matters of confidentiality.²³ These factors are consistent with the Proposed Advance Confidentiality Order. In particular, in accordance with the *Freedom of Information and Protection of Privacy Act*, the BCUC can refuse to disclose information that would reveal commercial or financial information of a third party, such as a responsible person, if

¹⁸ FPT Regulation, Section 2.

¹⁹ FPT Act, Section 9(2).

²⁰ FPT Act, Section 9(2)(b).

²¹ *Administrative Tribunals Act*, Section 11(1).

²² *Administrative Tribunals Act*, Section 42.

²³ BCUC, [Order G-12-13](#), An Application by FortisBC Inc., for a Certificate of Public Convenience and Necessity, for the Advanced Metering Infrastructure Project Objection to Request for Confidentiality, January 22, 2013. This decision was made under an older version of the confidential filings’ procedure, but the major provisions were substantively the same.

revealing that information would significantly harm the competitive or negotiating position of that third party.²⁴

The Proposed Advanced Confidentiality Order is also consistent with the *Competition Act*, and the underlying objectives that the *Competition Act* and the FPT Act share in the promotion of the competitiveness of BC fuel markets. Parkland’s Application correctly notes that any exchange by the parties of the competitively sensitive information captured by the Proposed Advanced Confidentiality Order would raise issues under the *Competition Act*. Equally important, any disclosure by the BCUC of such information would have the same deleterious effects on competition, effects antithetical to those intended to result from the FPT Act, FPT Regulation and the *Competition Act*.²⁵ As the Competition Bureau’s Competitor Collaboration Guidelines note:

“... disclosure or exchange of information between competitors can impair competition by reducing uncertainties regarding competitor’s strategies and diminishing each firm’s commercial independence.”²⁶

This concern is only heightened where information related to all of a given market’s, or markets’, participants is disclosed.

BC consumers have an important interest in preserving competitive rivalry and thus protecting against the disclosure of competitively sensitive information. Unlike in other contexts, Parkland’s Application does not simply require a weighing of the public’s interest in disclosure against the information holder’s interest in confidentiality, it requires a balancing of the competing public interests in disclosure and confidentiality of the information. The Proposed Advanced Confidentiality Order achieves such a balance.

D. Submissions on any further process to address requests for an advanced ruling on confidentiality of “protected” information

Suncor supports Parkland’s Proposed Advance Confidentiality Order and, if it is granted, believes no further process is necessary. In the alternative, if the Commission declines to grant the requested order, Suncor believes that a confidentiality order or orders could be made for certain and specific kinds of information required to be submitted under the FPT Act and the FPT Regulation. As the information required is specified in the FPT Guidelines and thus is known, it is possible for the Commission to determine, through an additional process, which of that information is protected information or confidential information whose disclosure could reasonably be expected to cause harm to the responsible person to whom it pertains. If the Commission decides that such a specific order or orders are appropriate in the circumstances, Suncor respectfully requests an additional process to determine what information should be kept confidential.

In any case, Suncor notes that the reporting obligations under the FPT Act and the FPT Regulation begin November 1, 2020. Because of the potential harm described in this submission and in Parkland’s Application, Suncor respectfully submits that data provided as of November 1,

²⁴ *Freedom of Information and Protection of Privacy Act*, Section 21.

²⁵ Indeed, as Parkland’s Application notes, antithetical to competition policy and consumer protection law objectives in other jurisdictions where the information in question would be relevant to these markets.

²⁶ Competition Bureau, [Competitor Collaboration Guidelines](#), May 9, 2009, at Section 3.7.

2020 must be protected. Suncor requests that if a determination on confidentiality is not possible by that date then the BCUC issue an interim confidentiality order with the terms as proposed by Parkland in the Proposed Advance Confidentiality Order. If the BCUC feels it is necessary to protect the public interest in disclosure, such an order could be made subject to further order of the BCUC.

In addition, Suncor submits that any confidentiality order should apply to any further reporting requirements that may be created under the FPT Act, as appropriate, including the Retail Pilot.

III. THE PROPOSED ADVANCE CONFIDENTIALITY ORDER IS APPROPRIATE IN THE CIRCUMSTANCES

Suncor submits that according to the BCUC Rules, and the applicable statutory regimes discussed above, the relevant factors for the determination of confidentiality in the case of Parkland's Application include:

- (i) whether the information is financial or commercial information;
- (ii) whether there is the potential for significant harm or prejudice to a person's competitive or negotiating position; and
- (iii) the information holder's interest in confidentiality balanced with the public's interest in the disclosure of the information for transparency purposes, the nondisclosure of competitively sensitive information to preserve the competitiveness of the fuels market in BC, and the public confidence in the competitiveness of that market.

Suncor respectfully submits that the information required to be submitted under the FPT Act and the FPT Regulation will necessarily include financial and commercial information of responsible persons, and this factor therefore weighs in favour of granting Parkland's Application. Suncor submits that the other factors outlined above also weigh in favour of granting Parkland's Application.

B. There is potential for significant harm from disclosure of reported information

Suncor generally agrees with Parkland's description in their Application of the potential harm from the disclosure of information submitted under the FPT Act. In particular, Suncor submits that, like for Parkland, making public Suncor's "pricing, cost, and other sensitive competitive information" could cause Suncor significant commercial harm from competitors seeking market share or counterparties in contractual negotiations.²⁷

Suncor is also concerned that the potential harm from disclosure of financially and commercially sensitive information is national in scope. Suncor, like other responsible persons under the FPT Act, operates its business on a national scale and determines fuel prices in a consistent manner across all jurisdictions. Suncor's competitors in markets not governed by the FPT Act could take advantage of the information disclosed under the Act to undermine Suncor's position in those

²⁷ Parkland Application at PDF 3.

markets. This is both harmful to Suncor and contrary to the aims of the FPT Act, as it would undermine Suncor’s ability to operate competitively in BC and elsewhere.

Suncor also agrees with Parkland that there is a heightened risk of commercial harm from this data as compared to data from monopoly utilities that are commonly regulated by the BCUC, as the parties who are providing this information are in direct competition with each other.²⁸ As noted, promoting the competitiveness of BC fuel markets is the core objective of the FPT Act, and as such, any potential harm to the competitiveness of the markets should be weighed heavily in the Commission’s determination. Concerns with ensuring as competitive a market as is possible are discussed in greater detail in this submission in Section II C above and Section III B ii below.

C. *The Proposed Advance Confidentiality Order properly preserves the public interest*

i. *The public interest in disclosure does not require disclosing raw data*

Suncor submits that the disclosure of raw, individual data from responsible persons is not necessary to serve the public interest in disclosure, especially as articulated in the FPT Act. The BCUC, like other provincial and federal regulatory bodies, is frequently able to make determinations on the public interest and to provide the transparency required of a regulator even when dealing with confidential information. The actions taken by the BCUC in the Inquiry is a good example. The Inquiry Advance Confidentiality Orders did not prevent the BCUC from making a full report to the Government of British Columbia and to the public.

Suncor also submits that aggregated and anonymized information should be appropriate in almost all cases to promote public confidence in the competitiveness of the market for gasoline and diesel in BC. Publication of data in this form certainly did not impede the BCUC’s ability to convey its findings to the public in the context of the Inquiry. Suncor also notes that aggregated data continues to be provided on the BCUC’s “Gas Prices BC” website to explain information such as average and daily fuel prices and fuel price components.²⁹ Company specific or back-calculable data would provide little additional information compared to aggregate data, and pose great potential for material harm, as discussed above.

In their Application, Parkland also notes that the time in between reporting cycles (30 days) under the FPT Regulation means that addressing confidentiality issues on a case by case basis would be inefficient and limit the BCUC’s ability to use the data provided.³⁰ Suncor agrees and notes that timely reporting serves the interests of the FPT Act by promoting public confidence in the regulatory system and therefore in the competitiveness of the fuels market in BC. Delays to reporting caused by addressing individual confidentiality requests would undermine that confidence and result in unnecessary regulatory burden and thus increased costs for parties, costs which may ultimately be passed on to consumers.

²⁸ Parkland Application at PDF 5.

²⁹ See for instance BCUC, “BC Fuel Info: Price Factors”, website: <https://www.gaspricesbc.ca/PriceFactors>.

³⁰ Parkland Application at PDF 5.

Addressing confidentiality requests on a monthly case by case basis would also place a burden on the resources of the Commission and all parties with an interest in the reporting made under the FPT Act.

- ii. *The competitiveness of the fuels market supports the Proposed Advanced Confidentiality Order*

Suncor also agrees with Parkland that the protection of competitively sensitive information can actually improve the competitiveness of markets, as recognized in the area of competition law.³¹ Suncor respectfully submits that consideration of this fact is at least part of what is intended by Section 9(2)(b)(i) of the FPT Act, which suggests that the competitiveness of the fuels market in BC is part of the public interest in the disclosure of such information.

IV. CONCLUSION

Suncor respectfully submits that for all of the reasons outlined above, the Proposed Advanced Confidentiality Order is appropriate in the circumstances and Parkland's Application should be granted, and should be made applicable to any further reporting requirements that may be created under the FPT Act, as appropriate, including the Retail Pilot.

In the alternative, if the Commission believes that the Proposed Advanced Confidentiality Order as applied for is not warranted, Suncor submits that an advance confidentiality order or orders could be issued for certain and specific information required to be submitted under the FPT Act, and requests an additional process for determining which information should be subject to such an order or orders.

Finally, if a determination on these confidentiality issues is not possible by November 1, 2020, Suncor submits that an interim confidentiality order is appropriate given the potential harm and public interest considerations described above.

³¹ Parkland Application at PDF 3-4.