



DLA Piper (Canada) LLP
Suite 2800, Park Place
666 Burrard St
Vancouver BC V6C 2Z7
www.dlapiper.com

Amy Pressman
amy.pressman@dlapiper.com
T 604.643.6303
F 604.605.3512

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DELIVERED BY EMAIL

British Columbia Utilities Commission
Suite 400 - 900 Howe Street
Vancouver, BC V6Z 2N3

**Attention: Marija Tresoglavic, Acting Commission
Secretary**

Dear Ms. Tresoglavic:

Re: Parkland Corporation Request for Advance Ruling on Confidentiality for Fuel Price Transparency Act Reporting Submissions (the “Application”)

We are counsel to Tidewater Midstream and Infrastructure Ltd. (“Tidewater”).

We write on behalf of Tidewater Midstream as intervener in the above-noted Application whereby Parkland Corporation (“Parkland”) has requested an advance ruling on confidentiality for commercial information that Parkland is required to file under the *Fuel Price Transparency Act*, S.B.C. 2019, c. 46 (the “*FPTA*”) and the amended *Fuel Price Transparency Regulations*, B.C. Reg. 52/2020 as established by Order In Council No. 474/20 dated August 13, 2020 (the “*Regulations*”).

On September 24, 2020, the British Columbia Utilities Commission (“BCUC”), as administrator of the *FPTA*, invited parties that wish to participate in the Application to request intervener status and make intervener submissions. Tidewater submitted its request for intervener status to the BCUC on October 7, 2020 and hereby submits its intervener submissions.

Tidewater is a Canadian based energy company engaged in the natural gas, natural gas liquids and crude oil refining, midstream and infrastructure businesses. While Tidewater’s primary business is in the acquisition and development of oil and gas infrastructure, Tidewater also owns and operates a single oil refinery located in Prince George, British Columbia (the “Prince George Refinery”). The Prince George Refinery processes crude oil into low-sulphur gasoline and ultra-low sulphur diesel fuel and other refined products such as liquefied petroleum gas and heavy fuel oil for supply in the central and northern regions of British Columbia. The Prince George Refinery is one of only two refineries in British Columbia, with the other refinery being owned and operated by Parkland.

As a refiner of gasoline and diesel fuels in British Columbia, commencing in November 2020, Tidewater is similarly required to begin regularly reporting a substantial amount of commercially and competitively sensitive information to the BCUC in accordance with the *Regulations* including, *inter alia*, fuel volumes,

purchase prices, fuel sources, transportation costs, and fuel storage terminal and storage tank capacity. Accordingly, Tidewater is clearly impacted by and has a direct interest in the outcome of this Application.

Tidewater's Commercially and Competitively Sensitive Information is "Protected Information"

Tidewater shares the concerns raised by Parkland in its Application regarding the potential disclosure of the commercially sensitive and highly competitive information that is required to be reported under the *Regulations* (the "Confidential Information"). If the detailed company-specific Confidential Information of Tidewater and others were to be publicly disclosed by the BCUC, there would be considerable harm to the reporting parties' commercial interests as well as a real risk that those parties could be found to have contravened the *Competition Act*.

While these issues have already been addressed by Parkland in the Application and by the BCUC in its confidentiality orders made in the 2019 *Inquiry into Gasoline and Diesel Prices in British Columbia*,¹ Tidewater further emphasizes that these concerns are particularly amplified as between Parkland and Tidewater which respectively own and operate the only two refineries located in British Columbia. In circumstances such as these where there is a concentrated market made up of only two competitors, the sharing of the Confidential Information (even if it were to be aggregated) would necessarily result in Parkland and Tidewater becoming privy to the competitively sensitive information of the other. The disclosure of competitively sensitive information as between Parkland and Tidewater could also potentially expose those parties to an action for contraventions of the *Competition Act*, including the *per se* prohibition on any arrangement or agreement between competitors (including sharing of competitively sensitive information) that results in price fixing, market allocation, or restrictions on output.

The importance of maintaining the confidentiality of commercially sensitive and competitive information is expressly recognized in section 9(2) of the *FPTA*, which precludes publication of commercially sensitive information except in certain prescribed circumstances:

9 (1) In this section:

"protected information" means information that would reveal

- (a) trade secrets of a responsible person, or
- (b) commercial, financial, labour relations, scientific or technical information of or about a responsible person;

"trade secret" has the same meaning as in the *Freedom of Information and Protection of Privacy Act*.

(2) The administrator may publish fuel data, or other information or records, acquired under this Act if the administrator is satisfied that

- (a) protected information will not be disclosed, or
- (b) the public interest in the protected information that will be disclosed outweighs any potential harm to responsible persons, having regard, without limitation, to the importance of:

¹ See: BCUC Orders G-148-19, G-162-19, and G-165-19.

- (i) the competitiveness of the market for reportable fuels, and
- (ii) public confidence in the competitiveness of that market.

As such, Tidewater submits that it is critical that sufficient safeguards be put in place to prevent any such disclosure.

The BCUC's Rules Should be Modified to Recognize the Confidentiality of "Protected Information" filed under the FPTA

Tidewater recognizes that Part IV of the BCUC Rules of Practice and Procedure as established by BCUC Order G-15-19 (the "Rules") provides for processes and procedures to handle confidential documents filed with the BCUC in regard to any and all matters before the BCUC. However, Tidewater shares Parkland's concerns that the Rules do not, in their current form, provide sufficient protection and assurances for the treatment of the Confidential Information. As such, Tidewater respectfully submits (for the reasons outlined below) that additional protections are required through modification of the Rules or by way of an advanced ruling on confidentiality.

The framework for handling confidential documents and confidentiality requests set out in Part IV of the Rules provides for a default approach whereby a party wishing to keep confidential any information in a document must file a fresh request for confidentiality at the time of filing and, in each instance, bears the onus of establishing why the information should be treated as confidential.² The Rules provide that the BCUC may then grant a request for confidentiality with reference to certain relevant factors and on any terms it considers appropriate.³ However, as noted by Parkland in its Application, there is no assurance provided in the Rules that the BCUC will grant the confidentiality request nor is there provision for how the information will be treated if confidentiality is not ultimately granted.

Tidewater respectfully submits that the requirement under the Rules that reporting parties submit a fresh confidentiality request with each information submission is inconsistent with the express wording and intent of the *FPTA*. It is implicit in reading section 9(2) of the *FPTA* that "protected information" is intended to be provided to the BCUC in confidence and to remain confidential unless and until certain very limited conditions are met.

In light of the above, Tidewater respectfully submits that the Rules should be modified to recognize and appropriately accommodate the unique filing and confidentiality requirements which arise under the *FPTA* and the *Regulations*. Specifically, Tidewater would propose that the Rules be modified to provide that "protected information" filed with the BCUC pursuant to the *FPTA* will be accepted by the BCUC as confidential and will not be made publicly available, subject to section 9 of the *FPTA Act*.

In addition, Tidewater respectfully submits that the nature of the Confidential Information requires that an advance confidentiality direction be made. To this effect, Tidewater submits that the Confidential Information readily satisfies the factors outlined in Rule 20.01 of the Rules:

20.01 In determining whether the nature of the information or documents require a confidentiality direction, the BCUC will have regard to matters that it considers relevant, including:

² BCUC Rules of Practice and Procedure, Order G-15-19 at Rules 18.01 and 18.02.

³ *Ibid* at Rules 19.01 and 20.01.

(a) whether the disclosure of the information could reasonably be expected to result in:

- (i) undue material financial loss or gain to a person;
- (ii) significant harm or prejudice to that person's competitive or negotiating position; or
- (iii) harm to individual or public safety or to the environment;

(b) whether the information is personal, financial, commercial, scientific, labour relations or technical information that is confidential and consistently treated as confidential by the person;

(c) whether the person's interest in confidentiality outweighs the public interest in the disclosure of the information or documents in the hearing;

(d) whether the person submitting the document has any legal obligation to maintain confidentiality; and

(e) whether it is practicable to hold the hearing in a manner that is open to the public.

With reference to these factors, Tidewater submits that an advance order directing confidentiality over the Confidential Information filed with the BCUC under the *FPTA* should be made due to the high likelihood of severe harm that would be engendered to Tidewater, the other reporting parties, and the marketplace more generally should the Confidential Information be disclosed. Such an advance direction would also be reasonable in the circumstances given the frequency with which the parties are required to report under the *Regulations*. An advance direction would dispense with the need for Tidewater and others to submit fresh confidentiality requests with each regular reporting cycle, and would decrease any administrative burden which would fall to the BCUC in processing and considering those applications.

Additional Directives Regarding the Confidentiality and Treatment of "Protected Information" are Required

For the reasons outlined above, Tidewater agrees with Parkland that it would be appropriate in the circumstances for the BCUC to issue additional directives regarding the confidentiality and treatment of the Confidential Information in order to protect commercially sensitive information and to maintain the public interest in a competitive marketplace. Tidewater generally agrees with the terms and directives as proposed by Parkland in the Application. However, Tidewater would respectfully propose that the following additional directives also be made:

7. Should the BCUC seek or intend to publish any of the fuel data, or other information or records acquired under the *FPTA*, the BCUC shall, forthwith, provide general notice to all parties that filed Confidential Filings and shall provide an opportunity to any affected party to make submissions to the BCUC under s. 9(2) of the *FPTA*.

8. Should the BCUC seek or intend to publish any of the fuel data, or other information or records acquired under the *FPTA*, the BCUC shall provide an opportunity to any affected party to review the intended publication to identify any commercially or competitively sensitive information prior to publishing. The intended publication shall be shared on an

external counsel basis only and on undertakings from external counsel that the information shall not be shared with their client.

The BCUC May Implement Parkland's Proposed Terms under the *FPTA*, the *Administrative Tribunals Act*, the *Freedom of Information and Protection of Privacy Act*, and the *Competition Act*

Tidewater submits that the directives and terms proposed by Parkland in the Application may—and in some instances, must—be implemented under the *FPTA*, the *Administrative Tribunals Act*, the *Freedom of Information and Protection of Privacy Act*, and the *Competition Act*:

- **Fuel Price Transparency Act.** As submitted above, the proposed terms are consistent with the *FPTA* which provides that "protected information" is not to be published unless and until certain conditions are met. Tidewater submits that it is implicit on a plain reading of section 9 of the *FPTA* that protected information is to be provided to the BCUC in confidence and to remain confidential unless and until the BCUC becomes satisfied that the public interest in disclosing those documents outweighs the harm caused by disclosure. The terms and directives proposed by Parkland will, in Tidewater's submission, permit the reporting parties' protected information to remain confidential as is required by the *FPTA*.
- **Administrative Tribunals Act ("ATA").** Section 11 of the ATA confers general power on the BCUC to control its own process and to make rules respecting its practice and procedure in order to facilitate the just and timely resolution of the matters before it.⁴ Such rules may include those respecting access to and restriction of access to documents by any person as well as rules for different classes of issues and circumstances.⁵ Tidewater submits that the terms and directives proposed by Parkland concerning restriction of access to documents submitted under the *FPTA* may be made by the BCUC pursuant to section 11 of the ATA.
- **Freedom of Information and Protection of Privacy Act ("FOIPPA").** Tidewater submits that the terms proposed by Parkland are also consistent with the BCUC's obligations under Division II of *FOIPPA*. Should any of the Confidential Information submitted by Tidewater or others under the *FPTA* be the subject of an access to information request, section 21(1) of *FOIPPA*⁶ directs the BCUC to refuse to disclose information that:
 - would reveal the trade secrets or commercial, financial, labour relations, scientific or technical information of or about a third party;
 - was supplied, implicitly or explicitly in confidence; and
 - that could reasonably be expected to harm significantly the competitive position or interfere significantly with the negotiating position of the third party, or that could result in undue financial loss or gain to any person or organization.

Moreover, if the BCUC intends to give access to information that might otherwise be subject to an exception under section 21 of *FOIPPA*, it is required to provide notice to any third party affected pursuant to section 23 and 24 of *FOIPPA*.

- **Competition Act.** As submitted above, Tidewater shares Parkland's concerns regarding the disclosure of its competitive information as such disclosure could potentially expose Tidewater and

⁴ *Administrative Tribunals Act*, S.B.C. 2004, c. 45 at s. 11(1).

⁵ *Ibid* at ss. 11(2)(u) and 11(5).

⁶ *Freedom of Information and Protection of Privacy Act*, R.S.B.C. 1996, c. 165 at s. 21(1).



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others to an action for contraventions of the *Competition Act*. Tidewater refers to and adopts Parkland's general submissions in this regard, but would also add that Tidewater would be faced with particularly disproportionate risk in these circumstances because Tidewater is the smaller of only two competitors in a concentrated market.

Tidewater thanks the BCUC for the opportunity to provide intervener submissions on this Application.

Sincerely,
DLA Piper (Canada) LLP

Per:

A handwritten signature in blue ink, appearing to read "AP".

Amy Pressman

AQP