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Our reference 1000372952

October 15, 2020

By E-mail

British Columbia Utilities Commission
Suite 410, 900 Howe Street
Vancouver, BC V6Z 2N3

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

Dear Ms. Tresoglavic:

Parkland Corporation Request for Advance Ruling on Confidentiality for *Fuel Price Transparency Act* (the “*FPT Act*”) Reporting Submissions – Shell Canada Limited Submission on Directive #2 of Order G-242-20

We are legal counsel to Shell Canada Limited, acting on behalf of its general partnerships, Shell Canada Products and Shell Trading Canada (collectively, “**Shell**”) in this matter and write to provide submissions on its behalf in response to the Commission’s Order G-242-20 dated September 24, 2020.¹

Shell does not own a refinery in British Columbia, but it owns and operates a number of fuel terminals in the province, imports fuel from out of province, including from the United States, and operates and supplies fuel to British Columbia gas stations, among other activities. As a result, Shell will be required by the *Fuel Price Transparency Regulation*² to begin reporting a significant amount of sensitive commercial information to the BCUC in November 2020. The information that is prescribed to be provided under the *FPT Regulation*, including among other things information regarding Shell’s fuel volumes, purchase prices and import activities, could cause considerable commercial harm to Shell if it were released to the public.

Shell accordingly supports Parkland’s request for an advance ruling on confidentiality, on the terms proposed by Parkland.³ Shell requests that the same confidential treatment requested by Parkland be equally extended to submissions made by Shell under the *FPT Regulation*. This includes limiting any BCUC publishing to anonymized and aggregated information, ensuring that individual market participant data cannot be identified. It is clear that much of the information that individual market participants are required to provide would, if directly published or permissive of back-calculation, directly harm those participants.

Like Parkland, Shell submits that the “requested confidential treatment is appropriate to mitigate significant harm to [Shell] and to align with competition law principles that restrict competitors from exchanging information of this

¹ Exhibit A-2.

² BC Reg 52/2020, as amended by OIC 474/2020 (the “*FPT Regulation*”).

³ Exhibit B-1, pp. 1 and 4-5.

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nature”, and that “addressing this matter in advance of the initial reporting is fair and efficient in the circumstances”.⁴

Shell also notes that, as part of the parallel consultation process the Commission has established for the Retail Pilot Methodology under the *FPT Act*,⁵ both Shell⁶ and Parkland⁷ requested that the Commission make an advance ruling to protect the confidentiality of the commercially sensitive information provided to the Commission through the Retail Pilot. Parkland specifically requested that the advanced ruling in the present proceeding be extended to apply to the Retail Guidelines. Shell supports this request, and accordingly asks the Commission to extend the advanced ruling in this proceeding to the Retail Pilot as well.

We address the four issues raised in paragraph 2 of Order G-242-20 in turn below.

a. Whether the BCUC’s Rules should be modified to recognize the confidentiality of “protected” information filed under the *FPT Act*

Shell submits that the BCUC’s *Rules of Practice and Procedure* (the “**Rules**”) should be modified to ensure that the confidentiality of certain commercially sensitive information filed under the *FPT Act* is protected prior to a responsible person filing such information.

In particular, Shell shares Parkland’s concern that the default approach to confidentiality requests under the Rules involves a party making a request for confidentiality at the same time it files the commercially sensitive information.⁸ Following the submission of the commercially sensitive information by the party, the Commission will determine whether to keep the information confidential or not. If the Commission denies the request for confidentiality over the relevant document, then the Rules permit the Commission to “allow the person that submitted the documents an opportunity to make submissions as to what should be done with the document, such as withdrawing the document”.⁹ Regardless of Commission practices to date, industry requires the formal assurance that sensitive information will not be made public, and the opportunity to address any finding that information does not require confidential treatment, before submitting such information.

Shell also shares and adopts Parkland’s concern regarding the nature of the harm that could result from public disclosure of the information which the Commission will be collecting under the *FPT Act*.

*Unlike the normal circumstances where the BCUC is regulating monopoly utilities, this reporting framework involves multiple parties that are in active competition with one another. It heightens the likelihood and severity of harm that would result from disclosure of commercial information, given that disclosure can directly and adversely affect marketplace competition. Parkland submits that it is reasonable for the BCUC to make a such an order now based on the serious commercial harm that would result to Parkland and others from disclosing commercially sensitive material in a competitive marketplace.*¹⁰

Given the highly sensitive nature of some of the information which the BCUC will be collecting under the *FPT Act*, Shell submits that the Commission should provide advance assurance to responsible persons who are reporting information under the *Act* and the *FPT Regulation* that their commercially sensitive information will be protected from disclosure.

⁴ Exhibit B-1, p. 1.

⁵ <https://www.gaspricesbc.ca/RetailPilot>.

⁶ [Shell Written Comments on the Retail Pilot Methodology](#), dated October 9, 2020.

⁷ [Parkland Written Comments on the Retail Pilot Methodology](#), dated October 8, 2020.

⁸ Exhibit B-1, p. 5. See Rule 18.01, which provides that, if a party wishes to keep information in a document confidential, it must file a confidentiality request at the time it files the document.

⁹ Rule 22.01.

¹⁰ Exhibit B-1, p. 5.

There are different mechanisms at the Commission's disposal to achieve this result. For example, the Commission could:

- i. modify the Rules to provide for advance confidentiality protections in relation to the *FPT Act*, or
- ii. issue a separate order addressing the treatment of confidential information under the *FPT Act*.

The first option appears preferable, but Shell does not have a strong view regarding the specific mechanism the Commission should use, as long as it provides Shell and other reporting entities durable confidence, in advance, that their commercially sensitive information will not be disclosed to the public, thereby protecting the competitive marketplace in which Shell and its competitors operate.

As noted above, Shell supports the terms proposed by Parkland,¹¹ which Shell submits would accomplish this result, and could be incorporated into either an amendment to the Rules or a separate order from the Commission.

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

Yes, Shell submits that additional BCUC terms or directives are necessary beyond the Rules and section 9 of the *FPT Act*.

As noted in the preceding section, the default approach to confidentiality requests under the Rules involves a party making a request for confidentiality at the same time it files the commercially sensitive information, without an assurance that the Commission will ultimately grant confidential treatment over such information.¹²

Section 9 of the *FPT Act* similarly does not provide the advance protection which Shell seeks, since paragraph 9(2)(b) of the *Act* allows the BCUC to publish "protected information" (which includes, among other things, commercially sensitive information) if the BCUC is satisfied that "the public interest in the protected information that will be disclosed outweighs any potential harm to responsible persons".

An advance ruling on confidentiality from the Commission is therefore necessary, in addition to the Rules and section 9 of the *FPT Act*.

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

As explained further below, Shell submits that Parkland's proposed terms are feasible under the *FPT Act*, the *Administrative Tribunals Act*,¹³ the *Freedom of Information and Protection of Privacy Act*¹⁴ and the *Competition Act*.¹⁵

¹¹ Exhibit B-1, pp. 4-5.

¹² See text accompanying footnotes 8 and 9, above.

¹³ SBC 2004, c. 45 (the "*ATA*").

¹⁴ RSBC, c. 165 (the "*FOIPPA*").

¹⁵ RSC 1985, c. C-34.

i. ***The FPT Act***

Nothing in the *FPT Act* prevents the Commission from issuing an order under Parkland's proposed terms. Section 9 of the *FPT Act*, which addresses "protected information" and publication, is permissive, empowering the Commission to publish information acquired under the *FPT Act*, and does not prevent the Commission from imposing its own restrictions and processes regarding what may be published, and how, such as those restrictions and processes sought by Parkland.

Further, Shell submits that Parkland's proposed terms will help to protect the competitive marketplace for gasoline and diesel in British Columbia, and are therefore consistent with the Commission's obligation, under paragraph 4(2)(b) of the *FPT Act*, to administer the *Act* so as to promote (i) the competitiveness of the market for reportable fuels, and (ii) public confidence in the competitiveness of that market.

ii. ***The ATA***

The BCUC is empowered under the *ATA* to make an order on the terms sought by Parkland.

Pursuant to section 2.1 of the *Utilities Commission Act*,¹⁶ sections 11 and 42 of the *ATA* apply to the Commission. Paragraph 11(2)(u) of the *ATA* thus empowers the Commission to make rules "respecting access to and restriction of access to tribunal documents by any person", which Shell submits includes Parkland's proposed terms.

Section 42, in turn, provides that the Commission "may direct that all or part of the evidence of a witness or documentary evidence be received by it in confidence to the exclusion of a party or parties or any interveners, on terms the [Commission] considers necessary, if the [Commission] is of the opinion that the nature of the information or documents requires that direction to ensure the proper administration of justice". This provision empowers the Commission to restrict access to sensitive information in the course of a proceeding.

iii. ***The FOIPPA***

Parkland's proposed terms do not conflict with the *FOIPPA*. Indeed, the proposed terms expressly contemplate the possibility of a request under the *FOIPPA* for disclosure of the information submitted by a party under the *FPT Act*, and provide for notification of the affected party as follows:

*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.*¹⁷

The notification to the affected party which is contemplated by Parkland's proposed terms is consistent with the provisions of the *FOIPPA* addressing the notification of a third party in the event a request is made for access to a record containing that third party's commercially sensitive information.¹⁸

iv. ***The Competition Act***

Parkland's proposed terms are consistent with the *Competition Act*. Shell agrees with Parkland that public disclosure of the type of information which must be reported to the BCUC under the *FPT Act* and the *FPT Regulation* (e.g. regarding fuel pricing and volumes) could undermine the competitiveness of the gasoline and

¹⁶ RSBC 1996, c. 473.

¹⁷ Exhibit B-1, p. 5.

¹⁸ *FOIPPA*, s. 23.

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diesel market in British Columbia.¹⁹ Parkland's proposed terms will accordingly further the purpose of the *Competition Act*: to "maintain and encourage competition in Canada".²⁰

d. Submissions on any further process to address requests for an advanced ruling on confidentiality of "protected" information

Shell does not consider any further process to be necessary at this time, although it reserves the right to make further submissions if necessary following a review of other interveners' submissions, public letters of comment, and Parkland's reply submission.²¹

However Shell requests that, if the Commission grants the advance ruling on confidentiality which is sought by Parkland and Shell, and subsequently determines that some or all of the information collected under the *FPT Act* for which confidential status has been granted may be disclosed (whether through a change of practice or otherwise), the parties which will be affected should be given an opportunity to respond to the possibility of this disclosure.

Please contact the writer if you have any questions.

Yours very truly,



For: Matthew D. Keen

MDK/roe

¹⁹ Exhibit B-1, p. 3.

²⁰ *Competition Act*, s. 1.1.

²¹ Per BCUC Order G-242-20, Appendix A.