Scott R. Gordon
Assistant General Counsel
Telephone: 587.476.4406
Email: scott.r.gordon@esso.ca

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British Columbia Utilities Commission
Attention: Marija Tresoglavic, Acting Commission Secretary
Suite 410, 900 Howe Street
Vancouver, BC V6Z 2N3

Re: Intervenor Submissions – Imperial Oil re: Framework for the Determination of Confidentiality and Treatment of Protected Information collected pursuant to the Fuel Price Transparency Act

On November 30, 2020, the British Columbia Utilities Commission ("**BCUC**") invited intervenors in the *Parkland Advance Confidentiality Ruling Application*, established by Order in Council No. 474/20, to provide submissions relating to the: (1) determination of confidentiality; and (2) treatment of protected information.

Imperial Oil ("**Imperial**") thanks the BCUC for the opportunity to provide written comments regarding the above matters. As stated in Imperial's previous submissions, Imperial believes it can play an important role in helping inform the BCUC and ultimately assisting British Columbians understand the complexities involved in providing finished petroleum products to consumers. At a high level, Imperial's position is that:

- Disclosure of company-specific "protected information" would be highly prejudicial to "responsible persons" (as defined under the *Fuel Price Transparency Act*, SBC 2019, c 46 and associated regulations ("FPTA")) and would erode, not enhance, competitiveness and public confidence in the competitiveness of the market.

- As an alternative to collecting and disclosing protected information, an independent, third-party expert supported by a conceptual model and publicly-available data would be effective in providing the public in British Columbia with additional transparency at much less cost for government and industry. As the model is developed, discussion could occur around providing supplemental information from industry on an aggregated basis, which would help avoid competitive risks associated with providing proprietary information.

- Disclosure of "protected information", if any, should: (i) be anonymized; (ii) be aggregated; (iii) relate to historic information (lag between reporting periods and disclosure, similar to other regulatory processes); (iv) consider, in conjunction with impacted responsible parties, whether disclosure could have unintended consequences; and (v) be accompanied by appropriate context to ensure full and fair disclosure.

- The BCUC should ensure that prior to any company-specific protected information being disclosed, or if confidential materials are the subject of a request for disclosure under the *Freedom of Information and Protection of Privacy Act*, specific notice is provided to the affected responsible persons so that it may assess whether to seek recourse.

Please find our specific comments below.

I. Determination of Confidentiality

Imperial presently submits two monthly reports pursuant to the FPTA: (1) a monthly importer report; and (2) a monthly wholesale purchaser report. Imperial will also submit a fuel storage terminal report on or before January 31, 2021.

Imperial's submissions focus on the above reports; however, as a supplier of responsible persons who may report data pursuant to other parts of the FPTA, Imperial has an a interest in ensuring that all competitively and commercially sensitive information (including counter-party data subject to contractual confidentiality safeguards) is properly protected.

Section 9 of the FPTA defines "protected information" as: (a) "trade secrets of responsible person" or (b) "commercial, financial, labour relations, scientific or technical information of or about a responsible person."

The term "trade secret" is ascribed the same definition as adopted in the *Freedom of Information and Protection of Privacy Act*, which includes business information that derives actual or potential independent economic value and is the subject of reasonable efforts to prevent disclosure to avoid business harm.

The majority of information that Imperial provides pursuant to the FPTA is "protected information" given the competitively and commercially sensitive nature of the information, coupled with the significant contractual and operational steps taken by Imperial, and its counterparties, to prevent disclosure of such information.

Predetermination of Confidentiality for Certain Types of Fuel Data

Imperial respectfully submits that it is possible and, in fact, a relatively straightforward exercise to pre-determine for most (but not all) types of fuel data, where the data meet the statutory definition of "protected information" based on competition law considerations, contractual prohibitions against disclosure of information, and clear commercial sensitivities associated with certain information.

Pricing, volume and cost information is clearly commercially sensitive and may, if disclosed, be problematic from a competition law perspective. Pricing information and to a slightly lesser extent volume and transportation cost information is the most competitively and commercially sensitive information subject to mandatory FPTA disclosure. Pricing, volume and transportation information could, if disclosed, provide valuable insights into a responsible party's commercial strategies and planning efforts. Disclosure could be prejudicial to the responsible parties specifically, and to the public generally.

Pricing, volume and transportation cost information is protected by confidentiality safeguards. Imperial generally requires contractual counter-parties to not disclose such information without express written consent. Similarly, contractual counter-parties (including parties not subject to the FPTA) require Imperial to adhere to the same or similar confidentiality contractual obligations.

In summary, it is clear that "purchaser price / litre" (importer / wholesale), volume (wholesale) and transportation costs (importer) is "protected information" under the FPTA. We strongly encourage the BCUC to declare these (and other) classes and categories of fuel data as "protected information".

Other types of fuel data, for example "seller name" / "seller address", are not as obviously commercially sensitive, but still fall within the definition of "protected information". For example, disclosure of a seller's name (or address; which would identify the seller name) in relation to purchases of wholesale fuel may provide a competitor or other market actor with valuable insights into supply chains, logistics structures and strategic thinking about market dynamics. Specifically, if a seller only operates in a part of the province, or only provides certain types of fuel, disclosure of details of the supply relationship can lead to an inappropriate level of transparency that can be detrimental to the responsible person submitting the fuel data and, ultimately, to the end use consumer.

Information relating to "seller name" / "seller address" is generally protected by confidentiality safeguards and contractual prohibitions against disclosure without express written consent. Given the above, seller name / seller address (wholesale) is "protected information" under the FPTA.

Data required to be provided pursuant to the fuel storage terminal provisions of the FPTA (transloading capacity; loading capacity; unloading capacity; blending capacity, maximum capacity; tank heel volume; and net useable capacity) is also "protected information", for the reasons above.

For example, information that shows a particular terminal is operating at or near its capacity could be used by competitors to inform their business strategy in that market (e.g. it could provide insights that a particular supplier may not have capacity to grow market share, or take other strategic actions). This, in turn, creates a potential concern with competitiveness and could detrimentally impact end-use consumers.

No Expiry of Confidential Information

Imperial does not believe the confidential status of protected information should expire after a certain time period. There are principled and practical reasons to suggest disclosure of company-specific information would not meet the policy objectives of enhancing competitiveness and public confidence in the competitiveness of the market.

First, at least for certain types of protected information (pricing, volume, costs), many agreements have terms that could be longer than the disclosure period. Some agreements contain set pricing and volume thresholds. As such, depending on how / when data is disclosed, disclosure could be detrimental to commercial interest even if disclosure is only made on a historic basis. Thus, while the information may appear to be historical, its disclosure may affect current commercially sensitive information and interests.

Second, certain business lines and relationships have longer term or fixed relationships; particularly supply and logistical relationships (terminal information; transportation; etc.). Disclosure of a supply relationship in a particular geographic area or in relation to a specific product may inadvertently provide competitors or other market actors commercially sensitive information that can be used to distort market forces. These supply relationships are often longer term relationships, aside from contractual term periods.

Third, and more generally, aside from market actors looking for insights and competitive advantages, it is difficult to see how providing historic price, costs, volume and related information at the level of the responsible person level would be of benefit (or interest) to consumers or the objective of transparency.

II. Treatment of Protected Information

The BCUC should consider the following non-exhaustive factors in determining whether to disclose protected information:

1. Commercially sensitive nature of protected information;
2. Adverse effects on competition in the market;
3. Competition law concerns and the interaction between disclosure and federal competition laws;
4. Contractual confidentiality obligations, including obligations owed by responsible persons to counterparties;
5. Jurisdictional concerns and prejudicial impacts. Obligations (and costs) would not apply to entities operating outside the jurisdiction; or operations that fall, in part, outside the jurisdiction;
6. Compliance costs associated with reporting (and disclosure) obligations;
7. The impact on disclosure on existing responsible persons, and potential new market entrants;
8. The significant steps (and costs) that parties take to protect their confidential information;
9. The public benefit (if any) in disclosing information (whether anonymized, aggregated, or otherwise);
10. Mitigating effects of providing historic information; and
11. Whether there is a better means to promote market competitiveness, and public confidence in the market (aside from disclosing protection information -- anonymized, aggregated, or otherwise).

Given these considerations, and in particular considering the competitively and commercially sensitive nature of many categories of fuel data, it is difficult to conceive of any circumstance where the public interest in disclosure of company-specific protected information outweighs potential harm to responsible persons.

First, in the vast majority, if not all, cases the public interest in preserving the confidentiality of protected information will significantly outweigh the public interest in disclosing protected information. The protection of detailed company-specific commercial and competitively sensitive information will support, rather than diminish, public confidence in the competitiveness of BC fuel markets (for the same reasons and principles that federal competition law prohibits certain activities). Conversely, disclosure of protected information has the potential to create an artificial and inappropriate level of transparency in the market that could negatively impact free market principles and distort competition – to the detriment of consumers.

Second, and related to the above point, the collection and potential disclosure of protected information has a significant competition law component. The purpose of the *Competition Act* is, in part, to "maintain and encourage competition in Canada in order to promote the efficiency and adaptability of the Canadian economy …. and in order to provide consumers with competitive prices and product choices."

Guidance from the Competition Bureau is that sharing of competitively sensitive information between rival competitors can, depending on the context and the circumstances, result in a substantial lessening or prevention of competition. Other provisions in the *Competition Act* dealing with competitor interactions engage criminal sanctions. In this sense, BCUC facilitated broad disclosure of company-specific protected information to the public generally, and to competitors specifically, not only runs contrary to the stated purposes of the FPTA (promote market competitiveness, and public confidence in the competitiveness of the market); it could also defeat the policy objectives and substantive aims of federal competition laws.

Third, the legislative test in section 9 of the FPTA is not *solely* a general public interest test. Although refusal to disclose protected information can (and should) be justified on the basis of a general balancing of public interest alone, the test is whether the general public interest, taking into account the competiveness of the market and public interest in the competiveness of the market, outweighs potential harm to responsible persons. This is a discrete, but important, consideration in assessing disclosure.

Responsible persons have a significant interest in ensuring that protected information is not disclosed to competitors, commercial counter-parties or other market actors. Disclosure of protected information could erode competitive advantages, negatively impact commercial negotiations and otherwise distort the free market. In short, there is significant prejudice to responsible persons in disclosing company specific protected information.

Related to the above points, there is little, if any, public benefit in disclosing <u>anonymized protected information</u> at the responsible person level. The marginal benefits, if any, of disclosing company-specific anonymized data are significantly outweighed by actual and potential adverse impacts to competitiveness in the market generally, and to specific responsible persons. Anonymized data can in many instances be reverse engineered to identify the source of information given the number of market participants in a specific product line, or geographic area or sector, or even based on volume profiles. Even if consumers are not able to identify an anonymized source, market participants may be able to identify the responsible person given access to their own internal data. Once again, this raises competitiveness and, more specifically, competition law considerations.

There are also concerns with disclosing <u>aggregated protected information</u>.

First, and similar to the above issues regarding anonymized information, aggregated data can in many instances be reverse engineered to identify the source of information given the number of market participants in a specific product line, or geographic area or sector. This extends beyond a responsible person's pricing and volume information. For example, there may be a limited number of transportation options (rail, truck, etc.) available for certain producers and products lines, such that disclosure of

aggregated responsible person data could inadvertently disclose confidential rail and freight rates that could detrimentally impact the responsible person, contractual counter-party and consumers more generally.

Second, and more generally, it's important to ensure that disclosure of any aggregated information serves the FPTA purposes of promoting public confidence in the competitiveness of the market.

For example, disclosure of aggregated transportation costs would not provide consumers with a complete or accurate understanding of the true cost to deliver product to market. The BCUC Final Reporting Requirement Guidelines, dated October 5, 2020, acknowledge that: "The Regulations do not require cost information associated with the importing of reportable fuel, other than the cost of transporting reportable fuel from its source to the location in British Columbia at which it is delivered."

As noted previously, transportation costs are only part of the myriad of costs required to bring refined product to market. There are several other costs of service that are absent from the FPTA, including compliance costs over and above Low Carbon Fuel Standard (LCFS) credit costs, certain terminalling costs, discounts and overheads. Disclosing transportation costs, even on an aggregated basis, without explaining to consumers that transportation costs are not reflective of the full costs of service, does not promote public confidence in the competitiveness of the market. As such, disclosure, whether aggregated or otherwise, should be accompanied with appropriate context to ensure data is presented in a full and fair manner.

If protected information is disclosed, it should be done on an anonymized, aggregated and historic basis. Several administrative and regulatory agencies, including Statistics Canada, the British Columbia Ministry of Energy, Mines and Petroleum Resources, the Canadian Energy Regulator and the United States Energy Information Agency, disclose anonymized and aggregated data, and there is typically a lag between the reporting period and public disclosure (historic data).

More generally, it may not be obvious that certain types of fuel data are competitively and commercially sensitive – even if done on an aggregated or anonymized basis. Care must be taken to ensure that information is not disclosed in a manner that does not unintentionally identify a responsible person (via reverse engineering, or otherwise).

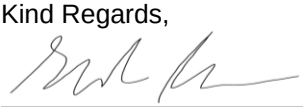
Notice to Responsible Persons of Disclosure or Potential Disclosure of Protected Information

With respect to company-specific protected information, in the event that the administrator makes a determination under section 9 of the FPTA to disclose confidential information belonging to a responsible person, or if any confidential materials are the subject of a request for disclosure under the *Freedom of Information and Protection of Privacy Act*, the administrator should immediately provide specific notice to the affected responsible persons so that they may assess whether to seek the appropriate recourse. Given the sensitivity of the information and the importance of a competitive market, responsible persons must have the ability to assess these risks and determine whether to seek recourse to prevent disclosure.

III. Conclusion

Despite the concerns noted above, Imperial firmly believes that working productively with the BCUC is in the best interests of all involved and we look forward to addressing these issues productively.

Kind Regards,



Scott R. Gordon
Legal Counsel