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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”)**

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We write on behalf of Tidewater Midstream and Infrastructure Ltd. (“Tidewater”) as intervener in the above-noted Application.

On October 30, 2020, the British Columbia Utilities Commission (“BCUC”), as administrator of the *Fuel Price Transparency Act*, S.B.C. 2019, c. 46 (the “FPTA”), issued Order G-275-20 in which it granted advanced approval of confidential status to fuel data submitted and identified by responsible persons as “protected information” within the meaning of the *FPTA*, until such time that a hearing process is held to establish a framework for the determination of confidentiality and treatment of protected information going forward. On November 30, 2020, the BCUC invited interveners to make intervener submissions on the development of that framework. Tidewater hereby submits its intervener submissions.

**Tidewater’s ‘Protected Information’**

As referenced in our letter of October 15, 2020, 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, Tidewater is a “responsible person” within the meaning of the *FPTA* and is required to submit monthly reports in accordance with 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*”). Those reports include, *inter alia*, fuel volumes, purchase prices, fuel sources, transportation costs, and fuel storage terminal and storage tank capacity.

As submitted by Tidewater in its October 15, 2020 submission, the fuel data which Tidewater is required to report to the BCUC under the *Regulations* is commercially sensitive and highly competitive information. If Tidewater’s detailed fuel data were to be published by the BCUC, there would be considerable harm to the commercial interests of Tidewater and to other reporting parties, as well as a real risk that Tidewater and others could be exposed to an action for contraventions of the *Competition Act*, R.S.C. 1985, c. C-34. Tidewater is faced with a particularly disproportionate risk in this regard because Tidewater is the smaller of only two competitors in a concentrated market, with the other being Parkland. Tidewater is also the only refiner in Northern British Columbia.

### **Submissions on Determination of Confidentiality**

The BCUC has requested that interveners provide submissions on the most efficient and effective framework and process for the Administrator to determine whether fuel data submitted by responsible persons which they claim is protected information does constitute protected information under the *FPTA*.

Tidewater submits that any process for determining whether fuel data is protected information under the *FPTA* must be informed by the federal *Competition Act* and must preserve the public interest in market competitiveness. In order to do so, the BCUC’s process to assess claims over protected information must recognize that responsible persons themselves are best placed—and indeed, the only ones placed—to assess whether its fuel data is commercially sensitive or a trade secret. For example, while categories of protected information such as purchase prices will, in the normal course, be commercially sensitive for all responsible persons, for some, even the fact that there have been purchase transactions may itself constitute highly competitive and commercially sensitive information. The only party in a position to make such a determination is the responsible person, and as a result, the starting point for any assessment process must be a presumption that a responsible persons’ claim that fuel data is protected information is accurate.

Aside from implementing a presumption that claims made by responsible persons over protected information are valid, Tidewater submits that it is possible for the Administrator to make a predetermination with respect to the types or categories of fuel data that are certainly protected information. The types of fuel data which can be readily identified and pre-determined to be protected information are those which are inherently commercially and competitively sensitive, the sensitive nature of which will be constant from reporting period to reporting period. As a starting point, Tidewater notes that the Competition Bureau’s Bulletin on Corporate Compliance Programs published on June 3, 2015 (the “**Competition Guidelines**”)<sup>1</sup> indicates that information relating to pricing, markets, production levels, customers, and bidding situations are all competitively sensitive information which must not be discussed or shared amongst competitors. Tidewater submits that these categories of information identified by the Competition Bureau can and must be predetermined to be protected information by the Administrator.

With respect to the Monthly Importer Reports and Monthly Wholesale Purchaser Reports specifically, Tidewater submits that the following categories of fuel data are commercially sensitive and competitive information readily captured by the Competition Guidelines which should be predesignated as protected information:

**Volumes Purchased or Imported** - The nature of this category of fuel data is inherently competitively and commercially sensitive, particularly in regional markets where there are limited competitors, as

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<sup>1</sup> *Competition Bureau*, “Corporate Compliance Programs” dated June 3, 2015 and available online: <https://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/03927.html>

such information could be used to directly or indirectly reveal a responsible persons' inventory levels and production capabilities.

**Purchase Prices** - This category of fuel data is inherently competitive and certainly competitively sensitive. The protection of pricing information is at the heart of competition law principles and falls squarely within the Competition Bureau's list of prohibited topics, and as such it must be considered to be protected information.

**Identifying Information of Importers or Wholesale Purchasers** - This type of fuel data is highly competitive and inherently commercially sensitive because disclosure would reveal the fact that responsible persons are transacting, which is in and of itself sensitive and competitive information. This risk is heightened in areas with limited market participation.

**Identifying Information of Sellers (Including Address and Province of Origin)** - This category of fuel data is competitive and commercially sensitive information because there is significant competition among responsible persons to identify and secure supply from suppliers, and the identification of those suppliers would undermine competition among responsible persons. This would be particularly detrimental for smaller competitors, whose market position could be undercut by larger competitors that could price out smaller competitors. In addition to the identities of sellers, the geographical location of those supplier refineries is also commercially sensitive information. The refining industry in Canada is small with some provinces having only one or two refineries. As a result, providing general information about the province or geographic location in which a supplier refinery is located would necessarily reveal the identify of the seller and source of supply.

**Transportation Costs** - This type of fuel data is commercially sensitive because the negotiation of preferred pricing is highly confidential and may provide a competitive advantage.

(collectively, the "Categories of Confidential Information")

With respect to the Annual Storage Reports in their current form, Tidewater is not taking the position that this data is required to be pre-designated as protected information.

Given that the sensitive nature of the Categories of Confidential Information will remain constant from reporting period to reporting period, Tidewater submits that a process be implemented whereby responsible persons submit a single application identifying the fuel data it has determined constitutes protected information. Such an application would be made prior to either the first reporting period for that information (in the case of reports first being made following the conclusion of this hearing) or prior to the next reporting period (in the case of reports previously made). The Administrator's determination on any types or categories not included among the pre-determined categories of protected information would apply for each subsequent reporting period. It would then be incumbent on responsible persons to submit a subsequent application upon any changes in the nature or sensitivity of the fuel data. Such a process would reduce the administrative burden of protected information determinations for both the Administrator and responsible persons.

### **Expiry of Confidential Status of Protected Information**

Tidewater has made very large investments in refining infrastructure that is the sole source of supply for an important region of the province. Releasing detailed confidential information at any time could cause significant commercial damage and reveal sensitive competitive information. No information of any kind should be released within 2 years of its provision. If the Administrator were to decide to release information after 2 years, Tidewater submits that any of its disclosed information should nonetheless be aggregated with the data from the entire province, or at a minimum with the data from the entire province excluding the Vancouver region and excluding Vancouver Island.

## Treatment of Protected Information

The BCUC has further requested that interveners provide submissions on whether fuel data which is determined to be protected information by the Administrator is suitable for public disclosure under section 9(2) of the *FPTA* while meeting the objectives of the *FPTA*.

As a starting point, Tidewater respectfully submits that the fuel data identified by responsible persons as protected information is not suitable for public disclosure under section 9(2)(b) of the *FPTA* because the public interest in the disclosure of that information does not outweigh the potential harm to responsible persons. In Tidewater's submission, the public interest in preserving market competitiveness by maintaining confidentiality over commercially and competitively sensitive information outweighs any public interest in the disclosure of that sensitive information. The only circumstances in which the public interest in disclosure of protected information would outweigh the public interest in a competitive marketplace and in avoiding potential harm to responsible persons, are circumstances in which the data is aggregated in a completely anonymous way which is incapable of revealing protected information through back-calculation. In B.C., this may require aggregation of data from the entire province with the exception of the Vancouver Region and Vancouver Island. The Vancouver Region and Vancouver Island may be aggregated separately.

- i. **Public interest considerations or factors which the Administrator should consider when determining whether “the public interest in the protected information that will be disclosed outweighs any potential harm to responsible persons” pursuant to section 9(2)(b) of the *FPTA*.**

Tidewater acknowledges that the BCUC's mandate in respect of its administration of the *FPTA* is to increase transparency regarding the factors that impact retail prices of fuel in British Columbia and to provide fuel market data and information to consumers. However, any rules and procedures concerning the disclosure of any protected information must be informed by and must not infringe on the paramountcy of the federal *Competition Act*.

In addition to the need to comply with the federal *Competition Act*, Tidewater submits that the *FPTA*'s objectives to promote fuel market competitiveness and public confidence in the competitiveness of the fuel market in British Columbia can only be met by strictly preserving the confidentiality of protected information. Competition is only possible where commercially sensitive information is adequately protected. In this respect, maintaining confidentiality over commercially sensitive information acts to preserve market competitiveness and, as such, is itself in the public interest.

In light of these considerations, Tidewater respectfully submits that the Administrator should consider the following factors when determining whether the public interest in disclosure of public information outweighs any potential harm to responsible persons under section 9(2)(b) of the *FPTA*:

- (a) the applicability of the Federal *Competition Act* to the protected information;
- (b) the extent to which the proposed disclosure is consistent with the applicable requirements under the *Competition Act* and the Competition Guidelines;
- (c) the interests of the public in maintaining public confidence in fuel market competitiveness by keeping protected information confidential;
- (d) the adverse effects that broad disclosure of protected information may have on the fuel markets in British Columbia;
- (e) the adverse effects that disclosure of protected information may have on specific responsible persons in British Columbia, and in particular whether any responsible persons would be disproportionately harmed; and

- (f) the availability of a form of aggregate and non-identifying reporting that could be used instead of broad disclosure of protected information.
- ii. **Ways to aggregate or anonymize protected information such that it can be published pursuant to section 9(2)(a) of the FPTA.**

In Tidewater's submission, there are only very limited ways in which protected information—and Tidewater's protected information, specifically—can be sufficiently aggregated and anonymized in a way that would make it suitable for public disclosure under section 9(2)(a) of the *FPTA*. In the case of Tidewater's protected information specifically, Tidewater submits that there is no effective means to aggregate or anonymize the fuel data such that it can be published pursuant to section 9(2)(a) of the *FPTA* unless the protected information is aggregated on a province-wide basis, or a province-wide basis excluding the Vancouver region and Vancouver Island. Any attempts made to aggregate protected information based on smaller geographic regions would necessarily disclose Tidewater's protected information, either directly or indirectly through back-calculation because Tidewater is one of only two refineries located in British Columbia and is the only refinery located in or around Northern British Columbia.

In the event that the Administrator makes a determination to disclose information under section 9 of the *FPTA* or if any protected information is the subject of a freedom of information request under the *Freedom of Information and Protection of Privacy Act*, Tidewater respectfully submits that the Administrator immediately provide notice to the responsible person(s) affected so that they may be given an opportunity to provide submissions on the disclosure or seek appropriate remedies, as the case may be. Further to Tidewater's October 15, 2020 submission, Tidewater suggests that it would be appropriate for the BCUC to issue the following directives with respect to the treatment of that information:

- 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 have 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.

Given the commercially sensitive and highly competitive nature of responsible persons' protected information and the importance of preserving the competitiveness of the market, these directives would ensure that responsible persons will have sufficient ability to assess the risk of disclosure and, if necessary, seek appropriate recourse.

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

Sincerely,  
**DLA Piper (Canada) LLP**

Per:



Amy Pressman  
AQP