

BRITISH COLUMBIA UTILITIES COMMISSION

Order G-242-20

Order G-303-20

Advance Ruling on Confidentiality for *Fuel Price Transparency Act* Submissions

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**SUBMISSIONS OF 7-ELEVEN CANADA, INC.**

**FRAMEWORK DRAFT NO. 1**

MARCH 8, 2021

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## INTRODUCTION

1. 7-Eleven Canada, Inc. (“7-Eleven”) offers its perspective on the Framework for Determination of Confidentiality and Treatment of Protected Information - Draft No. 1 (“**Framework Draft No. 1**”) published by Commission staff on February 8, 2021.
2. The present debate is not about whether detailed fuel data required by regulation will be collected and made available for proper purposes of the *Fuel Price Transparency Act* (“FPTA”). That is a given. 7-Eleven is aligned with the goals of the FPTA but has concerns that certain proposals would have the unintended consequence of diluting competition in the marketplace, as well as public confidence in competition. The public interest, and the public’s confidence in competition is protected in an environment where the commercially and competitively sensitive data of individual market participants is not made available to competitors.
3. In a nutshell:
  - (a) The FPTA should be interpreted and applied purposively when considering the treatment of information, including when the Commission exercises its discretion under section 9(2) of the FPTA.
  - (b) The legislation is aimed at making factors affecting fuel prices in the market more transparent and promoting public confidence in competition. Such goals are satisfied if information is published in sufficiently aggregated ways. It is not necessary or in furtherance of a legitimate purpose to publish commercially or personally sensitive information of particular companies or individuals.
  - (c) Put another way, the public interest is not disclosure for the sake of disclosure, but to promote competition in the market as a whole.
  - (d) The scheme contemplates that the information to be collected will be established by regulation. The apparent priority was with respect to wholesale markets. Regulations were in place in 2020 and mandatory collection commenced by November.
  - (e) By contrast, there are no regulations yet for the collection of retail data. The government considered that should be reviewed in a one year period. Certain data from select locations was chosen, not for the purpose of publication, but to inform government policy of the formulation of

regulations. It is inconsistent with the purpose of the legislative scheme for such information to be published (which Framework Draft No. 1 purports to do).

- (f) Collected protected information should not be made public automatically after two years. Instead, if the Commission believes there are reasons why particular information should be published, it should disclose those reasons and allow the affected persons to be heard before any order of disclosure is made.
- (g) Responsible persons should have the ability to challenge the categorization and demonstrate on a case by case basis, why their information should be treated as protected.

#### **Information Collected during the Retail Pilot Should not be Published**

- 4. Under Framework Draft No. 1, certain information collected from retailers pursuant to the Retail Pilot and Retail Station Survey would be published. 7-Eleven submits that this is misconceived.
- 5. 7-Eleven is a retailer. It does not supply fuel as a wholesaler. It is not currently subject to reporting requirements under the Fuel Price Transparency Regulation B.C. Reg. 52/2020.
- 6. In October 2020, certain 7-Eleven stations in British Columbia were selected to participate in the Retail Pilot. 7-Eleven has (and will continue) to submit information required under the Pilot and intends to fully comply with the legislation.
- 7. The Retail Pilot and Retail Station Survey originated with a special direction from the Minister: "Direction to require submission of fuel data from retail dealers of gasoline and diesel fuel in British Columbia and report to the Minister" effective August 14, 2020 ("**Special Direction**").
- 8. The Special Direction calls for the Commission to exercise its authority under section 6 of the FPTA to require fuel data from retailers, using its discretion to select a representative sample of retail fuel operations across the Province. Unlike the regulations issued under section 5, the Special Direction does not specify

which fields of retail data are to be collected. That was left to the discretion of the Commission.

9. On October 19, 2020, the Commission published its Retail Pilot Methodology. It outlined its intention to draw on an initial sample of 50 retail locations in the province to participate by providing certain fields of information under the Retail Pilot. When discussing the sampling process, the Commission noted (emphasis added):

**The list of selected retail stations will not be posted publicly to mitigate potential risks of market distortion.** Instead, the BCUC will contact directly the retail dealers who are selected to participate in the Pilot starting October 19, 2020. Those retail dealers will be required to submit fuel data for the reporting period November 1, 2020 to November 30, 2021.

10. Framework Draft No. 1 makes repeated reference in the tables to retail data collected under the Special Direction (see Tables A1, A2, A3). And while certain pricing and volume data collection under the Special Direction is designated as protected, much of the information so collected is non-protected, as listed in Table A3. That includes:

Retail Station Name, Address, Responsible Person Name,  
Address, Representative Name, Representative Position

11. The FPTA addresses Fuel Price Transparency in Part 3. The statute itself does not require any particular information to be produced. Instead, that is left to *regulations*:

5(1) If required by **the regulations**, a person who is a responsible person in all or part of a reporting period must, in accordance with this section, submit the prescribed fuel data for the reporting period to the administrator.

12. Currently, there are regulations requiring wholesalers, importers and others to produce fuel data. There are no regulations relating to retailers. The very purpose of the Retail Pilot (and the Retail Survey) is to inform the government, following a report from the Commission, as to the development of regulations which would not

issue until 2022 at the earliest. As the Commission summarized in the Retail Pilot Methodology dated September 22, 2020:

By the special direction dated August 14, 2020, the British Columbia Utilities Commission (BCUC) is directed to use its authority, as the designated administrator of the Fuel Price Transparency Act (FPT Act) and in accordance with the FPT Act, to require fuel data from retailer dealers of reportable fuels for the purpose of a retail data collection pilot (Pilot). The stated goal of the Pilot is to inform the development of regulations for ongoing data collection targeted at the retail component of the fuel supply chain in British Columbia.

13. Section 9(2) of the FPTA addresses publication of data under the FPTA. The legislation is permissive. There is no general requirement or presumption that any and all information collected under the FPTA be published:

(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

(i) the competitiveness of the market for reportable fuels, and

(ii) public confidence in the competitiveness of that market.

14. The question then is how the Commission should properly exercise its discretion to publish any fuel data or information (i.e. non-protected information) and then how to treat protected information. The implicit premises of Framework Draft No. 1 appear to be:

(a) All non-protected information will be published, including information gathered in the Retail Pilot.

- (b) Determinations will be made as to which categories of collected information are non-protected and that all such information will be published.
- (c) Certain pricing and volume information will be considered protected, but may be made public:
  - (i) at any time if aggregated or anonymized;
  - (ii) in a disaggregated, non-anonymized way after two years;
  - (iii) at any time upon request by a member of the public.

The responsible person will only have an opportunity to oppose publication of their protected pricing and volume information in response to a question under (iii) but not in respect of (i) or (ii).

- 15. With all due respect, the purpose of the FPTA is not collection and disclosure of information for the sake of disclosure, but to provide for greater transparency with respect to factors affecting fuel prices to promote competition in the market as a whole.
- 16. Clearly some of the information collected - emails, phone numbers, the names of representative persons - while logical for the purposes of administration of the FPTA - do not factor in the price of fuel and its disclosure will not promote competition in the market as a whole.
- 17. Information collected under the Retail Pilot should not be published under section 9(2) of the FPTA. It should be deemed protected information. The stated purpose of such collection is not to somehow promote competition (by publishing a sample of information from 50 stations over a one year period), but to inform the government's decision on how to structure the regulations under section 5 that will apply to retail stations. It is then, and only then, after the government has considered what fields of data should be collected, in what manner and from whom, that the Commission would be in a proper position to exercise a discretion about publication.
- 18. There are unintended consequences if the Retail Pilot information is disclosed. Recall that the Commission determined in October 2020 not to publish a list of

retail stations under the Pilot precisely to avoid the risk of market distortion. Yet Table A3 in the Framework Draft No. 1 would require publication of much information that would tend to identify the selected stations and responsible persons. Such publication would be unfair, unnecessary and could well introduce market distortion.

19. In the event that the Commission determines to publish collected retail data, 7-Eleven addresses several issues and considerations below.

### **Section 6 Framework - Approaches for Making Protected Information Non-Confidential**

20. 7-Eleven supports efforts to further the policy of the FPTA by making information compelled by regulations under section 5 (and that is relevant to the determination of fuel prices) available in a way that may promote transparency and competition.
21. It is important to strike a careful balance with commercial and competitive interests where the information is commercially sensitive.

#### *Aggregation and Anonymization (6.2 and 6.3)*

22. 7-Eleven agrees that in principle aggregation and anonymization of sensitive data such as pricing and volume data compelled by regulation may support the legislative goals.
23. With respect to anonymization under Section 6.3, there is an insufficient basis to determine how the Commission will ensure that the data is (and remains) anonymous:

The BCUC may publish anonymized Protected Information in instances where the BCUC has determined that such anonymization will not result in the direct or indirect disclosure of the identity of the Responsible Person associated.

24. With respect, the Commission may not appreciate whether disclosure of particular information of a responsible person will be kept anonymous. In the circumstances,

persons familiar with the industry or the responsible person may be able to back-calculate or deduce the identity of who produced the information. That is particularly so if the Commission publishes batches of similar information, especially if other identifying characteristics (such as the geographic area from which the individual data is drawn) are made available.

25. It is not fair to a responsible person that their protected information be disclosed irretrievably through inadequate (if well-intended) attempts to anonymize. The Framework should be revised to either remove anonymization alone as an accepted tool or to provide a notice to a responsible person before their data is published and to provide them a meaningful opportunity within at least 30 days to present evidence and make submissions.

*Passage of Time (6.4)*

26. 7-Eleven particularly objects to the proposal in Section 6.4 of the Framework Draft No. 1 to provide for automatic publication of confidential information after two years.
27. The Commission staff proposes that the Commission may propose to disclose the confidential information of a responsible person in less than two years, but agrees that the responsible person be given notice and 30 days to object.
28. 7-Eleven submits that no protected information should be disclosed automatically after the passage of time. Instead, if the Commission seeks to publish protected information at any time (other than through appropriate aggregation), notice of the proposal and the public interest reasons for disclosure must be given to the responsible person and other persons who may be affected by the disclosure, and that these respondents have at least 30 days to present submissions and/or evidence to assist the Commission in its deliberations.
29. 7-Eleven accepts that in theory, some confidential information in some industries may lose its sensitivity over time. However, there are good reasons why at least

some confidential information in this industry is unlikely to lose its confidential nature over two years or even longer.

30. To illustrate, 7-Eleven has entered and expects in the future to enter into multi-year agreements with wholesale fuel suppliers. Because those agreements are extremely sensitive, 7-Eleven is not prepared to produce them as exhibits in these proceedings without a prior confidentiality order of the Commission and an opportunity to consult with other affected persons (i.e. the suppliers themselves) about production.
31. The issue here is not whether the public will get access to relevant pricing (and margin) information across segments of a market. If and when the Commission publishes such data on a sufficiently aggregated basis (to avoid any prospect of back-calculation), the information will be made available and the goals of the FPTA will be satisfied.
32. One question then is what further legitimate legislative goal would be achieved by publishing responsible person or site-specific wholesale prices following a two year (or shorter) lag? The Commission (or other proponents) should be prepared to articulate the reasons and to allow affected persons to answer.
33. Moreover, there is good reason to believe that disclosure of wholesale pricing in a particular supply contract will be injurious to competition and to the commercial relationships themselves.
34. Retailers like 7-Eleven compete to acquire fuel on favourable terms. Because wholesale fuel prices fluctuate, the pricing used in the contract would typically not be absolute but would be defined by a formula in relation to a standard, observable price such as a rack-rate.
35. If current charges were unrelated to prices from two years earlier then one might think there is little harm in disclosing the older prices. However, that is not the case where there is a formula in a long-term contract. Using knowledge of prevailing reference rates from two years ago, a rival or other person may back-calculate the

formula if the two-year old prices were revealed. Once the formula is disclosed, the rivals would be able to calculate the *current* pricing.

36. Once this dynamic becomes entrenched, it would jeopardize and distort future supply contract negotiations. A wholesale supplier may take a very different approach to a negotiation knowing that any compromises or concessions will eventually become known to the market (and demanded by other customers) because of publication under the FPTA by the Commission.
37. For these reasons, 7-Eleven urges the Commission not to provide for automatic publication of data after a time lag (whether two years or longer period). It is doubtful that such disclosure would improve the understanding of market forces and factors (because more meaningful aggregated data could be made available) and it is more likely than not to cause commercial and competitive harm. If the Commission staff believes that disclosure should be made in a particular situation, procedural fairness requires that the responsible person and other affected persons have an opportunity to know the reasons advanced by the Commission in order that they may respond and be heard.

#### **Categorical Approach to Determination of Protected Information**

38. Framework Draft No. 1 contemplates what appears to be a final decision with respect to whether categories of information are always non-protected information. And while certain categories of information would be considered protected information, there are various ways that such treatment may be varied (see sections 5 and 6). However, once information is determined to be non-protected, it will become available to the public irretrievably.
39. Responsible persons who are compelled to provide information should have the opportunity to challenge both the automatic designation of their information as non-protected and its putative publication.
40. Thus, while it may be appropriate for administrative purposes to keep default categories of information that will be considered to be non-protected, there should

always be an opportunity for the affected responsible person to apply to challenge the treatment of their information. Such challenges could be required to be filed within 14 days of production to the Commission. Pending the decision of the Commission, the information submitted by that responsible person would remain confidential.

41. In practice, one would expect initially there to be few challenges brought and over time that the number of challenges would diminish as the Commission had the opportunity to consider specific circumstances previously and had issued rulings with reasons.

**Undertaking and Declaration Process (Section 5.1)**

42. Section 5.1 would allow virtually anyone to apply to have access to protected information upon a summary application. The information may be very sensitive to the responsible person in question. Further, disclosure may well affect the interests of other persons (for example if the protected information was pricing information, it also impacts the other person to the transaction). If the information were misused or disclosed, it may be very difficult for the responsible person to establish the violation or to secure an effective remedy.
43. It is unclear what a person, to whom information is granted, would be permitted to do in furtherance of the goals of the FPTA. While an institution like the Commission may be expected to act in the public interest in receiving, using or disclosing confidential information, there are no such checks and balances on members of the public.
44. Accordingly, the Commission should at a minimum give notice of at least 30 days to the responsible person and other persons with an interest in the information (if known) and allow them to oppose production or to seek terms.
45. It will also be important that affected responsible persons have meaningful recourse if access is provided and confidentiality undertakings are not honoured. The protocols should provide an express right to affected persons to bring

proceedings in a court of competent jurisdiction to obtain injunctive relief and to recover damages caused by wrongful disclosure or other misuse of the information or breach of undertaking. The Commission should have discretion to require security be posted to support the undertaking to the Commission and to the affected persons.

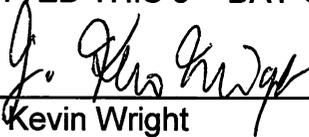
**Treatment of Information Already Collected**

46. The Commission has asked interveners to address the treatment of fuel data that was granted confidential status pursuant to Order G-275-20 dated October 30, 2020.
47. With respect to data collected under the Retail Pilot and Retail Survey, 7-Eleven reiterates that such information should remain confidential, although it may inform policy recommendations for the development of regulations for the retail segment.
48. Otherwise, 7-Eleven submits that such data should be kept confidential on the terms its was collected. It would be unfair to responsible persons and other affected parties to revisit the determinations made, particularly if they were not given an opportunity to present submissions and evidence in the event the Commission proposed to produce any non-aggregated data.
49. The Commission might determine to publish sufficiently aggregated fuel data previously collected on the basis that publication in that manner would further the purposes of the FPTA. In that case, the Commission should give precise notice of its intentions and reasons and allow affected persons to make further submissions.

**CONCLUSION**

50. 7-Eleven would be pleased to address any questions the Commission may have arising from these submissions or those of other parties.
51. 7-Eleven submits it would be in the public interest to allow for interested parties to respond to submissions of other parties on Framework Draft No. 1.

ALL OF WHICH IS RESPECTFULLY SUBMITTED THIS 8<sup>TH</sup> DAY OF MARCH, 2021

  
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