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Marija Tresoglavic, Acting Commission Secretary
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Sent Via Email Attachment: Commission.Secretary@bcuc.com

Re: Framework for the Determination of Confidentiality and Treatment of Protected Information collected pursuant to the Fuel Price Transparency Act – Issuance of Framework Draft No. 1

On February 8, 2021, the British Columbia Utilities Commission ("**BCUC**") issued the Framework for Determination of Confidentiality and Treatment of Protected Information – Draft No. 1 ("**Draft Confidentiality Framework**"). The BCUC invited written submission and comments on the Draft Confidentiality Framework on or before March 8, 2021.

I. GENERAL COMMENTS

Imperial Oil ("**Imperial**") thanks the BCUC for the opportunity to provide input on the Draft Confidentiality Framework. We provide our submissions relating to the specific questions posed by the BCUC below. Undefined capitalized terms used herein have the same meaning as in the *Fuel Price Transparency Act*, SBC 2019, c 46 ("**FPTA**").

We want to emphasis at the outset that the provisions of the Draft Confidentiality Framework relating to proposed disclosure of company-specific pricing, volume and cost information two years after data submission is problematic from a commercial, competition and policy perspective.

As discussed below in response to Question #8, a two year confidentiality period applicable to company-specific pricing, volume and cost information does not promote market competiveness, serve the interests of the public, or respect established and existing commercial rights. Disclosure of existing, company-specific commercial pricing information also engages significant competition law concerns.

Many commercial contracts (both from a fuel supply, transportation and storage perspective) have terms longer than two years, as described in more detail below. As such, disclosure of company-specific information after a relatively brief confidentiality period would effectively disclose existing commercial terms.

This practice, if implemented, does not align with the premise underpinning the proposed two year confidentially period, namely: "*The BCUC considers that after a period of two years from the date of submission the sensitivity of Protected Information will have diminished such that confidential treatment is no longer warranted*." We respectfully disagree with this statement; a two year period does not diminish the sensitivity of Protected Information. In fact, implementing a two year confidentiality period would undermine the premises underpinning the FPTA – promoting market competitiveness and public confidence in same. As such, we encourage the BCUC to eliminate, or at minimum significantly lengthen, the time periods in the Draft Confidentiality Framework relating to disclosure of Protected Information.

II. INPUT ON SPECIFIC QUESTIONS

1. Should the final Framework for Determination of Confidentiality and Treatment of Protected Information (Final Framework) be implemented as an order to this proceeding or adopted as

BCUC rules?

The Final Framework should be implemented as a separate BCUC order specifically catered to implementing the FPTA and the Final Framework.

Section 11 of the *Administrative Tribunals Act*, SBC 2004, c 45, confers on the BCUC the power to: (i) control its own processes; and (ii) make rules respecting practice and procedure to facilitate the just and timely resolution of the matters before it. In making the determination as to which mechanism should apply, Imperial submits that the BCUC should consider the following:

- the purpose of the Final Framework, which is specific to the FPTA while the BCUC Rules of Practice and Procedure ("**Rules**") are of general application in respect of various matters that do not relate to the statutory objectives of the FPTA;

- as explained by Imperial in its October 15 submission, Part IV does not adequately govern the receipt and control of Protected Information, and care must be taken to ensure that the Final Framework meets the special requirements and objectives of the FPTA[1]; and

- the FPTA and regulations thereunder expressly contemplated amendments from time to time, which may in turn require periodic changes to the Final Framework.

Imperial submits that, in light of the foregoing considerations, the Final Framework should be implemented as a separate BCUC order for the following reasons. First, this would ensure that the Final Framework is catered specifically to Protected Information and the objectives of the FPTA, without the potential for confusion (to all stakeholders engaged with the BCUC) that may arise by integrating it into the Rules. Second, an order would serve as a recognition that the administration of the FPTA is not a hearing process as contemplated under the Rules. Third, going forward, the BCUC and Responsible Persons may discover that the Final Framework requires adjustments as they learn more about the administration of the FPTA. There may also be changes to the Final Framework as a result of changes to the FPTA or regulations. The process to amend an order would be more streamlined than that to amend the Rules.

In the alternative, if FPTA-specific confidentiality provisions are integrated into the Rules, they should be contained in separate section that applies only to the administration of the FPTA. The Rules must expressly state that Part IV does not apply to the administration of the FPTA and receipt and treatment of Protected Information thereunder.

2. Are the Fuel Data identified as Protected Information in Framework Draft No. 1 reasonable and supportable? If so, please explain why and provide any supporting evidence you may have to justify protecting these items. If not, why not? (Appendix A)

Yes.

Pricing data (including costs) and Volume information is commercially sensitive and may, if disclosed, be problematic from a competition law perspective. As previously noted, pricing and volume information could, if disclosed, provide valuable insights into a Responsible Persons' commercial strategies and planning efforts.

Disclosure could be prejudicial to the Responsible Persons specifically, and to the public generally.

Pricing, volume and transportation cost information is protected by contractual confidentiality safeguards. Imperial requires contractual counter-parties to not disclose such information without express written

[1] For a more detailed summary of our position on this topic, please see Imperial's October 15, 2020 submission: Doc# C4-2.

consent. Similarly, contractual counter-parties (including parties not subject to FPTA) require Imperial to adhere to the same or similar confidentiality safeguards.

Pricing data (including costs) and Volume information falls comfortably within the statutory definition of Protected Information, as defined in section 8 of the FPTA. Designating pricing and volume information, in advance, as Protected Information meets the key principles of promoting market competiveness and reducing regulatory burden.

3. Is there any Fuel Data that is marked as Protected Information in Framework Draft No. 1 that should not be? If so, why? (Appendix A)

No.

4. Is there any Fuel Data that is not marked as Protected Information in Framework Draft No. 1 that should be? If so, why? (Appendix A)

There are certain categories of Fuel Data not marked as Protected Information that, depending on the circumstances, meet the statutory definition of "Protected Information" in section 8 of the FPTA. This information should be protected and should not be disclosed in the same manner as non-protected information.

Certain types of fuel data, specifically "seller name" / "seller address" in the Wholesaler Purchaser Report and "importer" in the Importer Report, may not be obviously commercially sensitive, and may not be commercially sensitive in all situations, but still fall within the definition of Protected Information in some circumstances.

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.

Similarly, recognizing information that is already publicly available, if the BCUC published real-time information on a company-specific basis regarding who the 'Importer' of fuel is, it could be combined and cross-referenced against other publicly available data to provide a competitor or other market actor with insights into supply chains, logistics structures and strategic thinking about market dynamics.

Information relating to "seller name" / "seller address" and "importer" is generally protected by confidentiality safeguards and contractual prohibitions against disclosure without express written consent.

Given that the analysis of determining whether Fuel Data is Protected Information is driven, in part, by context and circumstances, it may be difficult to designate certain categories of Fuel Data as Protected Information generally. However, Responsible Persons should be given the opportunity to identify instances where certain Fuel Data that does not fall within prescribed classes of Protected Information (Pricing and Volume Information) is Protected Information. There should be regulatory flexibility to identify information *in advance* on a line-item basis that meets the definition of Protected Information --- therefore achieving the objective of reducing regulatory burdens and streamlining the disclosure process.

Once the a particular party-specific piece of Fuel Data has been recognized as Protected Information, it should be treated in the same manner as Pricing and Volume Information and there should be no need to justify the status of the Protected Information on a monthly basis. A Responsible Person should not be required to make an application in accordance with the Rules in order to preclude the disclosure of

Protected Information. This does not meet the key principles of promoting market competitiveness or reducing regulatory burden.

5. Is the process proposed for requesting confidentiality over non-Protected Information, on an exception basis, the most regulatory-efficient process? If not, what alternative process would you recommend and why? (Section 4)

No.

See our response to Questions #1 and #4 above. In addition, please see Imperial's earlier submissions, dated October 15, 2020 (Doc# C4-2).

In addition, we respectfully disagree with the BCUC's expectation that requests to not disclose Protected Information not listed in Schedule A of the Draft Confidentiality Framework would be "infrequent". We believe that certain categories of information, such as "seller name / seller address" and "importer" constitutes Protected Information, will regularly be subject to requests for confidentiality for the reasons noted above, and that this information needs to be redacted and protected on a continuous basis, in the same manner as the Pricing and Volume information listed in Schedule A of the Draft Confidentiality Framework.

The existing FPTA Confidentiality Request Forms can be utilized to highlight Protected Information (in addition to Pricing and Volume Information in Appendix A of the Draft Confidentiality Framework) and the BCUC can consider submissions made with respect to any incremental Protected Information on a case by case basis. Until a determination is made, the information should be treated as Protected Information, in the same way that it presently is pending completion and implementation of the Final Framework.

6. Is the undertaking and declaration process proposed for permitting access to Protected Information reasonable? Why or why not? (Section 5.1)

To the extent Protected Information is ever disclosed, Imperial supports the proposed notification requirements associated with limited disclosure of Protected Information. The undertaking and declaration process also provides some (albeit, in our opinion, insufficient) protection to mitigate against inappropriate disclosure of information.

More fundamentally, however, we question what circumstances would justify permitting access to Protected Information given the commercially and competitively sensitive nature of the information. Our positon is that pricing, volume and cost and other Protected Information should not be disclosed on a company-specific basis.

The Protected Information is, by definition, a trade secret or information that would reveal commercial, financial, labour relations, scientific or technical information of or about a responsible person. Given the key principles of the Draft Confidentiality Framework and the sensitivities associated with disclosure, it is difficult to contemplate a situation that would warrant disclosure of fuel data at a company-specific level.

It would be helpful to understand the types of activities and circumstances that the BCUC anticipates may result in disclosure of Protected Information, subject to an undertaking and declaration. Depending on the intended use, there may be more effective ways to protect commercially sensitive data than an undertaking and declaration process. Additional safeguards could include: viewing data at BCUC offices (no copies); indirect disclosure via some form of modified aggregation / anonymization (no raw data); and robust screening procedures / better understanding of person / entity requesting the data, the end uses of data, and why such objectives can't be accomplished via other means (aggregated / anonymized data, etc).

There are also several practical considerations relating to access to Protected Information and the undertaking and declaration process. For example, will permission be granted to merely view the Protected

Information, or make copies of the information? How will the BCUC enforce confidentiality obligations? Will the undertaking and declaration contemplate injunction rights; and if so, who can enforce these rights? What processes (and resources) will the BCUC dedicate to investigate compliance with, and any potential breach of, an undertaking and declaration? If a party does not adhere to the undertaking and declaration, will the BCUC notify the impacted party? What recourse will the impacted party have in such a situation (a right to pursue damages against the party who breached the undertaking and declaration? A legislative right to pursue the BCUC?). Would improper disclosure of contemporaneous pricing and volume data trigger any regulatory reporting requirements, pursuant to the *Competition Act* or otherwise?

7. Are the process and considerations proposed for determining whether the public interest in the disclosure of Protected Information outweighs any potential harm to Responsible Persons reasonable? Why or why not? (Section 5.2). If not, what alternative process and/or considerations should the BCUC consider and why?

There are concerns relating to the factors identified in determining the public interest in disclosing Protected Information.

First, it's unclear why "risk or harm to individuals or public safety" factors so prominently in a discussion around disclosure of commercially and competitively sensitive information.

Second, it's not clear what is intended by the reference to "wrong-doing" as a relevant criteria for determining whether disclosure is in the public interest; particularly given: (i) the BCUC's recent findings that there was "no evidence" of dominant companies exploiting market positions or otherwise engaging in behaviors contrary to the Competition Act; and (ii) the BCUC's recent acknowledgment that the Competition Bureau, not the BCUC, ought to address concerns relating to anti-competitive behaviors.

More generally, listing potential "wrongdoing" as a relevant criteria for assessing disclosure raises questions about the BCUC's role and purpose as administrator of the FPTA. This disclosure related consideration also needs to also be considered in the wider context of other forums for disclosure (regulatory proceedings; civil litigation; etc.). The FPTA is not intended as a means for litigants to obtain data. Nor should it be used for the government to assist in a civil litigation matter or regulatory matter.

Third, considerations relating to public interest do not seem to contemplate the fact that public disclosure of certain information may create an artificial level of transparency that could be detrimental to consumers. Related to this point, other regulatory regimes and rules must also be considered. Disclosure of company-specific pricing information would, in many circumstances, engage *Competition Act* considerations.

Fourth, any list of factors should not be exhaustive. Disclosure of pricing information vs. costs information vs. transportation costs information vs. other Protected Information will engage similar, but not the same, considerations.

8. Are the (i) aggregation; (ii) anonymization; and (iii) time release methodologies proposed appropriate? Why or why not? (Section 6.0) i. If not, what alternative methodologies should the BCUC consider and why?

Aside from issues noted in response to Question #11, the concern with aggregation and anonymization is ensuring that parties do not have the ability to reverse engineer data that could provide commercial or competitive insights into the strategies, operations or plans of a particular Responsible Person.

In some cases, aggregation can be done properly – ie. if several parties' information is aggregated relating to a location and product where there are a large number of actual or potential market participants. In other cases, given the dynamic of the product or the location, aggregation may be more challenging. For

instance, even if a third party could not reverse engineer aggregated data, a market actor (that has knowledge of its own data) may be able to do so. This analysis can be product and fact specific.

This concern is even more pronounced for anonymization. It's also difficult to understand the value to the public generally in disclosing company-specific pricing, volume or cost information, even on an anonymized basis. If done wrong, it can have a significant adverse impact on a responsible person. Furthermore, it's likely to be most relevant, if at all, to other market actors; not the public generally.

The primary concern, however, relates to the proposed two year confidentiality period for Protected 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 are longer than the disclosure period. As such, disclosure of company-specific information after a two year confidentiality period may effectively disclose existing commercial terms and adversely impact commercial relationship and negotiations.

Imperial has a significant number of contractual relationships relating to pricing and supply costs in British Columbia that exceed 2 years. Imperial has dozens of supply contracts relating to branded supply, unbranded supply, industrial and wholesale supply (major industrial players, etc.) and retail supply that extend beyond two years. More specifically, major industrial and wholesale contracts are frequently for periods of 3 years or longer, with certain renewal rights. Major branded supply contracts are for multi-year periods – many of them are 5 years; and in certain circumstances, significantly longer. The majority of unbranded supply relationships and contracts are more than 3 years, some extending as long as 10 years. Certain heavy industrial and government supply contracts, some of which were issued as part of public request for proposal (RFP) processes, are 3 years. In fact, for gasoline alone, more than a third of fuel imported into British Columbia is done pursuant to contracts with terms longer (in some cases significantly longer) than 5 years.

Similarly, commercial relationships relating to transportation, hauling, terminaling, exchange and other facility or infrastructure arraignments are often structured for longer terms. Certain access and infrastructure agreements are longer than 10 years. There are a significant long term haulage agreements with terms up to 10 years. Some exchange agreements have been in place for multi-year periods (via evergreen renewal provisions) and others have terms of 3 years, or longer. There are longer term purchase supply agreements and related off-take agreements with 5 year terms.

The commercial sensitivity around the pricing, volume and cost information in these contracts is not "diminished" after a period of two years so that confidential treatment is no longer warranted. This information remains commercially and competitively sensitive well longer than two years. The information is not shared. Internal controls are in place to prevent disclosure. And contractual obligations (including obligations owed to counter-parties that are not subject to the FPTA) remain in place after 2 years.

Second, certain business lines and relationships have longer term or fixed relationships; particularly supply and logistical relationships (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 price, costs, volume and related information on a company-specific level would be of benefit (or interest) to consumers, or further the objective of transparency. As noted above, while this type of information would be relevant to other market actors, it is difficult to see how disclosure of, in effect,

real-time pricing and volume information on a company-specific basis would serve the public interest. In fact, we submit that it would not be in the public interest.

Imperial does not believe that disclosure of company-specific pricing, volume, cost or other Projected Information should be disclosed after a time-limited confidentiality period, whether it be two years (which, for the reasons noted above, is wholly inadequate) or a significantly longer period of time.

9. Are there any additional areas that should be addressed in Framework Draft No. 1? If so, please explain.

Imperial does not have any additional input on this question.

10. How should the BCUC treat Fuel Data that has been granted advanced approval of confidential status pursuant to Order G-275-20 dated October 30, 2020, following implementation of the Final Framework?

See response to Question #5.

Imperial does not have any specific, additional input on this question.

11. Any other submission?

As noted in Imperial's previous submissions, disclosure of any information (including but not limited to aggregated information) must serve the FPTA purposes of promoting public confidence in the competitiveness of the market.

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, acknowledged 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."

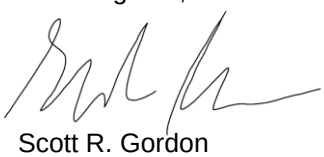
As noted previously, transportation costs are only part of the myriad of costs required to bring product to market. There are other costs of service that are absent from FPTA reporting, including compliance costs over and above Low Carbon Fuel Standard (LCFS) credit costs, certain terminalling costs, overheads and other related costs to serve.

Disclosing transportation costs, even on an aggregated basis, without explaining to consumers that transportation costs are not fully reflective of the complete 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.

Conclusion

Thank you for the opportunity to provide input on the Draft Confidentiality Framework.

Kind Regards,



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