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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")**

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

On February 8, 2021, the British Columbia Utilities Commission ("**BCUC**"), as administrator of the *Fuel Price Transparency Act*, S.B.C. 2019, c. 46 (the "***FPTA***"), issued the Framework for Determination of Confidentiality and Treatment of Protected Information - Draft No. 1 (the "**Draft Framework**") and invited interveners to make submissions on the further development and refinement of that framework. Tidewater hereby submits its intervener submissions. We address each of the raised questions by the BCUC in turn below.

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?**

Tidewater takes no position with respect to whether the final Framework for Determination of Confidentiality and Treatment of Protected Information should be implemented as an order to this Application or adopted as BCUC rules pursuant to section 11 of the *Administrative Tribunals Act*, SBC 2004, c. 45.

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)**

In Appendix A to the Draft Framework, the BCUC has designated Fuel Data relating to volume and pricing information as being Protected Information. Tidewater respectfully submits that not only is it reasonable and supportable to designate these categories as Protected Information, but that it is also imperative that

the BCUC do so in order to protect the commercial and competitively sensitive information of responsible persons, preserve the public interest in market competitiveness, and avoid contravention of the *Competition Act*, R.S.C. 1985, c. C-34.

As submitted in our letter of January 13, 2021, Tidewater submits that it is essential that the volume and pricing information which Tidewater and other responsible persons are required to submit under the *Regulations* be identified as Protected Information for the following reasons:

(a) Pricing and volume information is clearly commercial and competitively sensitive and, if disclosed, would cause significant harm and prejudice to responsible persons. Based upon the totality of the submissions made by the responsible persons who have intervened in this Application, it appears to be universally agreed that pricing and volume information is highly competitively sensitive and confidentiality over this information must be stringently safeguarded.

(b) Pricing and volume information is particularly commercially and competitively sensitive in regional markets where there are a limited number of competitors. For example, knowledge of a competitor's pricing information could be readily used by larger competitors to engage in predatory pricing or to undercut the market position of smaller competitors. Volume information could also directly or indirectly reveal a responsible persons' commercial strategies, inventory levels, and production capabilities. This would be particularly detrimental for responsible persons such as Tidewater as the smaller of only two refineries in British Columbia and the only refinery located in Northern British Columbia. The disclosure of this information would potentially enable other refiners to gather information that would impact the competitive nature of its business.

(c) The protection of pricing and volume information is at the heart of competition law principles and falls squarely within the Competition Bureau's list of prohibited information which must not be shared or discussed amongst competitors.[1] Specifically, the Competition Bureau 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.

(d) The commercially sensitive and competitive nature of the volume and pricing information submitted by Tidewater and other responsible persons will necessarily remain constant from reporting period to reporting period.

It is submitted that pricing and volume information clearly meets the definition of "protected information" in the FPTA. At its base level, competitively sensitive information is the type of information a company would not share with its competitors. It includes confidential information that a company considers crucial to competing in its relevant markets. This includes current information such as:

- prices, or price terms, including discounts;
- strategic and marketing plans.;
- detailed cost information;
- customer lists, to the extent that information is confidential;
- methods or formulas used to determine costs or prices; and

[1] See the Competition Bureau's "Bulletin on Corporate Compliance Programs" published June 3, 2015 which states that information relating to pricing, markets, production levels, customers, and bidding situations are all competitively sensitive information which must not be shared.

- pipeline products or research and development plans.

In the Competition Bureau's *Competitor Collaboration Guidelines*, the Bureau states the following:

> **3.7.1 Competitively sensitive information**
>
> An agreement to disclose or exchange information that is important to competitive rivalry between the parties can result in a substantial lessening or prevention of competition. For example, exchanging pricing information, costs, trading terms, strategic plans, marketing strategies or other significant competitive variables can raise concerns under the Act. Where competitors agree to share competitively sensitive information, it can become easier for these firms to act in concert, thereby reducing or even eliminating competitive rivalry.

The exchange of competitively sensitive information among competitors is unlawful when the effect is to substantially lessen or prevent competition. Violations may be found when the circumstances—including but not limited to industry concentration—are such that the exchange is likely to have anticompetitive effects.

The central question in such an inquiry is whether the exchange of information among competitors would likely harm competition by increasing the ability or incentive of competitors to profitably raise prices above competitive levels or reduce output, quality, service, or innovation below what likely would prevail in the absence of the exchange of information. The analysis depends on a variety of factors, including the type of information shared; whether the information that is disseminated is made available to other market participants, such as customers; and safeguards implemented to minimize the risk that competitively sensitive information would be disclosed.

The sharing of information related to a market in which the participants are actual or potential competitors may increase the likelihood of collusion on matters such as price, output, or other competitively sensitive variables. The competitive concern depends on the nature of the information shared. Based on the Competition Bureau's Competitor Collaboration Guidelines, the sharing of information among competitors relating to price, output, costs, or strategic planning is likely to raise competitive concerns.

Tidewater agrees with the submission of Imperial Oil Limited and others that the determination of whether fuel data is "protected information" is a relatively straightforward exercise for most types of fuel data which requires only that the statutory definition of "protected information" be applied. Section 9 of the *FPTA* defines "protected information" as either (a) the trade secrets of responsible persons, or (b) the commercial, financial, labour relations, scientific or technical information of or about a responsible person. The term "trade secret" is, in turn, ascribed the same definition as that found in the *Freedom of Information and Protection of Privacy Act*, R.S.B.C. 1996, c. 165 ("*FOIPPA*") which defines trade secrets as business information that derives actual or potential independent economic value and is the subject of reasonable efforts to prevent disclosure to avoid business harm.

Tidewater notes that section 9 of the FPTA does not require that data reach a certain threshold of commercial or competitive sensitivity in order to meet the definition of "protected information", nor does the *FPTA* confer any discretion on the BCUC to set a threshold on whether certain data is sufficiently commercially or competitively sensitive to warrant protection. Rather, the fuel data need only be "commercial" information about a responsible person or business information that has actual or potential economic value and is the subject of reasonable efforts to prevent disclosure. The pricing and volume information identified in Appendix A to the Draft Framework readily meets this threshold, and is therefore appropriately designated as protected information.

To the extent that the BCUC would like to consider further evidence of the commercial or competitive nature of Tidewater's pricing and volume information, Tidewater would welcome the opportunity to provide further

specific submissions on a confidential basis, as such evidence would necessarily contain highly sensitive information unsuitable for public disclosure in this proceeding.

**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)**

There is no Fuel Data marked as Protected Information in the Draft Framework which should not be marked as Protected Information. Rather, Tidewater respectfully submits that the majority of information that it and other responsible persons provide under the *FPTA* and the *Regulations* is commercial and competitively sensitive information which, therefore, must also be marked as Protected Information in the Draft Framework. Tidewater's specific comments in this regard are set out below in response to question four.

**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)**

Tidewater respectfully submits that there is additional Fuel Data which readily meets the statutory definition of "protected information" in the *FPTA* which has not yet been, but *must be*, marked as Protected Information in the Draft Framework. While Tidewater maintains that all of the information that it submits under the *FPTA* and the *Regulations* is commercially and competitively sensitive information, it is particularly concerned with ensuring that all commercial and competitively sensitive information which would reveal identifying and other information about its customers and suppliers is sufficiently protected. Specifically, Tidewater submits that the following classes or types of Fuel Data are also protected information within the meaning of section 9 of the *FPTA*:

- in the Monthly Importer Report, data provided in respect of "importer", "province of origin", and "state of origin"; and

- in the Monthly Wholesale Purchasers Report, data in respect of "seller name", "seller address", and "province of origin".

Through the course of this Application, Tidewater has submitted that these classes or types of Fuel Data are commercially or competitively sensitive information over which confidentiality must be maintained. Tidewater reiterates its earlier submissions in this regard, and further submits that these classes or types of categories of fuel data are competitively and commercially sensitive information which must be pre-designated as protected information in the Draft Framework for the following reasons:

(a) Disclosure of a seller's name in wholesale fuel purchase transactions would provide a competitor with several types of proprietary information including, but not limited to, the identity of the vendor. Identifying information about sellers is highly competitive information as there is significant competition among responsible persons to identify and secure supply from suppliers. As such, the identification of those suppliers would significantly undermine competition amongst responsible persons. For example, identification of those sellers would permit a larger competitor or extraprovincial competitor to approach that seller and price out a smaller competitor, thereby reducing competition and ultimately harming end user customers. Of equal significance, disclosure of seller information may provide information to others as to whether a refiner within a limited geographical area had sufficient capacity to service the market during a particular period. Again this heightens the risk that one or more extraprovincial competitors could take advantage of a responsible person's commercially and competitively sensitive information to enter the market.

(b) Disclosure of identifying information of importers or wholesale purchasers would reveal the fact that responsible persons are transacting, which is in and of itself commercially and competitively sensitive, particularly in regions with limited market participation.

(c) Disclosing the origin of imported fuel would also disclose highly confidential information regarding the percentage of Tidewater's fuel that it sources from different locations. Even the fact that fuel is sourced and when it may be sourced is itself proprietary information.

(d) The geographical location of supplier refiners is similarly commercially sensitive information because it can be used to identify the seller. The refining industry in Canada is small, with some provinces having only one or two refineries (including, for example, British Columbia which has only two refineries operated respectively by Tidewater and Parkland). As a result, providing general information about the province or geographic location in which a supplier refinery is located would necessarily reveal the identity of the seller and source of supply.

(e) Identifying information about sellers and other third parties is generally protected by confidential provisions in third party contracts, which prohibit disclosure of the details of the transaction and even the fact of the transaction without express written consent.

(f) Third party identifying information and, in particular, identifying information for third party suppliers, vendors, and customers is highly commercially and competitively sensitive information which readily meets the statutory definition of "protected information", as submitted in Tidewater's response to question two above. These classes or types of fuel data are both commercial in nature and are the subject of significant efforts made by responsible persons to prevent disclosure in order to preserve their actual or potential economic value to responsible persons.

(g) The protection of information relating to markets, production levels, customers and bidding situations are all competitively sensitive information which have been identified by the Competition Bureau as categories of information that must not be discussed or shared amongst competitors.[2]

In addition to the above submissions, Tidewater agrees with the submission of Parkland Corporation, Suncor, Imperial Oil and other responsible persons regarding the commercially and competitively sensitive nature of these classes of fuel data. Tidewater would reiterate, however, that the significant risks and detriments highlighted in the submissions of other responsible persons are particularly heightened for smaller competitors in a concentrated regional market, as is the case for Tidewater.

The commercial and competitive sensitivity of these types of Fuel Data is particularly apparent when one considers this data as it relates to the market position of responsible persons such as Tidewater. As referenced in our letter of January 13, 2021, Tidewater owns and operates a single oil refinery located in Prince George, British Columbia (the "Prince George Refinery") which processes crude oil into low-sulphur gasoline and ultra-low sulphur diesel fuel and other refined products for supply in the central and northern regions of British Columbia. Critically, the Prince George Refinery is the smaller of only two refineries in British Columbia and is the only refinery which serves the northern region of British Columbia.

As Tidewater provides limited types of fuels and is the only refiner which services the northern region of British Columbia, disclosure of any details about Tidewater's supply relationships and other relationships with third parties would be significantly detrimental to its competitive position in the market. The market in the northern region of British Columbia is distinct from markets operating in other areas of the province because there are limited participants in the market. Tidewater is the only refiner in the northern British Columbia market and, as a result, the majority of fuel and other refined products supplied in the region are sourced through Tidewater, either by Tidewater itself or through third party sales agreements and arrangements with others. To support its competitive market position in northern British Columbia, Tidewater has made significant infrastructure investments including, for example, in its Prince George Refinery and in rail and other infrastructure which supports and serves the Prince George Refinery.

[2] See the Competition Bureau's "Bulletin on Corporate Compliance Programs" published June 3, 2015.

It is essential that any Fuel Data which would allow competitors to determine the identities or locations of customers and supply locations also be marked as Protected Information. There is significant competition amongst responsible persons to identify and secure supply from suppliers, and Tidewater treats such commercial information as highly sensitive and confidential. The disclosure of those suppliers to Tidewater's competitors would significantly prejudice Tidewater's competitive market position and undermine competition among responsible persons and in the market more generally. Even the fact of a purchase having been made by a refiner from suppliers is competitively sensitive information and would be particularly detrimental for smaller competitors such as Tidewater, whose market position could be readily undercut by larger competitors that could simply price out smaller competitors.

Accordingly, Tidewater urges the BCUC to also designate these categories of fuel data as Protected Information.

**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)**

In light of the highly commercially and competitively sensitive nature of the fuel data submitted by Tidewater and other responsible persons under the *FPTA*, Tidewater respectfully reiterates its submission that the most efficient and effective process for the BCUC to determine confidentiality over fuel data is to pre-designate all reportable fuel data submitted by responsible persons as protected information prior to submission. As submitted in our January 13, 2021 letter, the process for determining whether fuel data is protected information under the *FPTA* must be informed by the federal *Competition Act*, must preserve the public interest in market competiveness, and must recognize that responsible persons themselves are best placed to assess whether its fuel data is commercially sensitive or a trade secret. As such, the starting point for any process must be a presumption that a responsible persons' confidentiality claim is accurate.

Tidewater notes that the responsible persons who have intervened in this proceeding have made variable submissions with respect to (i) what classes and categories of fuel data are commercially sensitive, (ii) why those classes and categories of fuel data are commercially sensitive, and (iii) the level of sensitivity and protection required for those classes and categories of fuel data. While most submissions made to date have noted that the majority or all of the fuel data is protected information, the range of submissions on these points confirms that the intervener responsible persons have overlapping but different vulnerabilities arising from the proposed publication of information. For example, while the designation of volume and pricing as protected information may be considered sufficient for the purposes of some larger competitors in less concentrated markets, this is not the case for smaller competitors in more concentrated regional markets. It is clear on the totality of the submissions in this proceeding that a "one-size fits all" approach to what classes or categories of fuel data are competitive and commercially sensitive information is not feasible or appropriate.

If the BCUC declines to designate classes and categories of fuel data other than pricing and volume as protected information for all responsible persons, then it is essential that the BCUC provide a reasonable opportunity for responsible persons to request that their specific fuel data be pre-designated as "protected information" under the *FPTA* or be otherwise granted confidential treatment under the BCUC rules. Given the importance of such decisions to responsible persons, Tidewater respectfully disagrees with the implication that such requests are likely to be infrequent. Rather, Tidewater expects that unless further classes and categories of fuel data are identified as protected information in the Final Framework, frequent applications for confidential treatment of "non-protected information" are likely to be made by responsible persons.

As submitted in our January 13, 2021 letter, Tidewater submits that a process be implemented whereby responsible persons may 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 being made following the conclusion of this hearing or revisions to the

reporting requirements going forward) or prior to the next reporting period (in the case of reports previously made). The Administrator's determination in respect of any categories of Fuel Data not included among Appendix A of the Draft Framework would apply for each subsequent reporting period either indefinitely or for a time limited period, after which a fresh application would be required. Such a process would balance the public interest policy objectives of the FPTA and reduce the administrative and regulatory burden of protected information determinations for both the Administrator and responsible persons.

In addition, if requests made by responsible persons that information be classified as protected information are denied and any appeal processes exhausted, the responsible party, through its external counsel, should be given the opportunity to request that the BCUC seek the intervention and / or request for representations from the Competition Bureau (the "**Bureau**"). The Bureau, as Canada's competition expert, assists government decision makers in promoting competition across the Canadian economy. As noted in the Bureau's letter to the BCUC dated January 13, 2021:

> "Collection of commercially sensitive information by a regulator is not prohibited by the *Competition Act*, nor is complying with a regulatory requirement that requires the submission of such information. However, as a commodity market with high pricing visibility, geographical constraints on supply (e.g. remote or isolated locations), and concentrated upstream markets, retail gas is particularly vulnerable to coordinated behaviour by market participants. The public release of commercially sensitive information can reduce incentives for market participants to compete with one another, and could facilitate the formation of an agreement or arrangement between competitors, in contravention of the *Competition Act*1 ."

To avoid potential anticompetitive outcomes, the Bureau recommends in its letter that regulators balance the desire for transparency with an effective level of aggregation and delay in the publication of data. These issues are foundational to the BCUC's development and refinement of the Draft Framework. The Bureau should be invited to offer its perspective and recommendations for "safe harbor guidelines" when competitively sensitive (or any non-public) information is shared among competitors. Tidewater urges the BCUC to take up the Bureau's offer to engage with it so as to reduce competitive concerns while allowing the BCUC to improve consumer confidence in the retail gas market.

Alternatively, if requests made by responsible persons that information be classified as protected information are denied and any appeal processes exhausted, the responsible party, through its external counsel, should be given the opportunity to request that the BCUC seek a favourable binding opinion that the proposed aggregation and disclosure would not constitute a reviewable practice or offence from the Commissioner of Competition pursuant to s. 124.1 of the *Competition Act.* Further, any publication of the information would be held in abeyance pending a decision from the Commissioner of Competition.

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

In Section 5.1 of the Draft Framework, the BCUC has proposed an undertaking and declaration process for permitting access to Protected Information upon application by an interested person. It is Tidewater's understanding that Section 5.1 is intended to provide a process by which members of the public may request individual level access to Protected Information. Tidewater respectfully submits that it is not reasonable for the BCUC to propose such a process in the Draft Framework because:

(a) the *FPTA* does not grant statutory authority or otherwise confer jurisdiction on the BCUC to grant individual level access to any of the Fuel Data (including Protected Information) filed by responsible persons under the *FPTA* and the *Regulations*;

(b) the undertaking and declaration process proposed for permitting such assess is contrary to the operation of *FOIPPA*, which is the statutory authority governing disclosure of third party information by a public body, including the BCUC;

(c) the undertaking and declaration process proposed does not sufficiently protect the confidentiality of fuel data generally, and of protected information specifically.

With respect to the statutory authority of the BCUC to grant individual level access to any persons interested in accessing any Fuel Data filed under the *FPTA*, Tidewater respectfully submits that the authority of the BCUC is limited to that granted under section 9(2) of the *FPTA*, which states that:

> **9**(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 the market. [*emphasis added*]

While section 9(2) of the *FPTA* states that the Administrator may publish fuel data if the requirements of that section are met, Tidewater respectfully submits that the Administrator's authority to "publish" fuel data in prescribed circumstances does not, either expressly or by implication, confer a general authority on the BCUC to grant individual level access to Fuel Data upon application by a party who is interested in accessing it. Rather, Tidewater submits that the Administrator's ability to "publish" Fuel Data under section 9(2) of the *FPTA* refers to making information publicly available through a report or similar publication. Such an interpretation of section 9(2) is consistent with the Oxford Dictionary definition of the term "publish" as being to "make generally known; declare or report openly; announce; disseminate" and/or to "make (a work, information, etc.) generally accessible or available; place before the public."

Tidewater notes that there are no other provisions in the *FPTA* or the *Regulations* which expressly or impliedly grant authority to the BCUC to grant access to individual level Fuel Data upon application by an interested party.

In addition to there being no statutory authority to grant individual level access under the *FPTA*, Tidewater respectfully submits that applications by interested parties seeking access to Fuel Data, including Protected Information, are already governed by *FOIPPA* and must be processed pursuant to and in compliance with that legislation. Tidewater notes that the disclosure of third party trade secrets and commercial information by a public body, including the BCUC, to an individual applicant is expressly governed by section 21(1) of *FOIPPA*, which directs the BCUC to refuse to disclose to any applicant information that:

- would reveal the trade secrets or commercial, financial, labour relations, scientific or technical information of or about a third party;
- was supplied, implicitly or explicitly in confidence; and
- that could reasonably be expected to harm significantly the competitive position or interfere significantly with the negotiating position of the third party, or that could result in undue financial loss

Moreover, the provisions of *FOIPPA* also include established processes which must be implemented by the BCUC if it receives an application for access to information and intends to give access that might otherwise be subject to an exception under section 21 of *FOIPPA* including, for example, sections 23 and 24 which require the BCUC to provide notice to any third party affected by the access request and provide an opportunity for written submissions to be made with respect to the requested disclosure. As is noted in section 1.2.1 of the Draft Framework, application of the Draft Framework must be subject to the BCUC's compliance with all applicable legislation including applicable privacy laws.

If the BCUC did have statutory power to grant access requests as proposed in section 5.1 of the Draft Framework, which Tidewater respectfully submits it does not, Tidewater further submits that the undertaking and declaration process as proposed is not sufficient to ensure confidentiality over either the fuel data generally, or over protected information specifically. The fuel data filed by Tidewater and other responsible persons under the *FPTA* is highly sensitive commercial and competitive information, and significant and irreparable harm would accrue to responsible persons if their commercially and competitively sensitive information were to be disclosed, either in breach of an undertaking or inadvertently, and at either the individual level or in ways which are not sufficiently aggregated and anonymized.

**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)**

**(a) If not, what alternative methodologies should the BCUC consider and why?**

Tidewater respectfully submits that the process and considerations proposed in section 5.2 of the Draft Framework for determining whether the public interest in the disclosure of Protected Information outweighs any potential harm to Responsible Persons is not reasonable because it does not sufficiently account for the importance of maintaining the public interest in a competitive marketplace nor for the paramountcy of the federal *Competition Act*.

As a starting point, Tidewater reiterates its previous submissions made January 13, 2021 that the public interest must consider both the public interest in preserving market competitiveness by maintaining confidentiality over commercially and competitively sensitive information and the public interest in disclosure of that sensitive information. In light of the highly sensitive nature of the Fuel Data and the importance of a competitive marketplace, it is difficult to conceive of a scenario in which the public interest in disclosure would outweigh both the public interest in maintaining a competitive marketplace and the significant actual and potential harm that would accrue to responsible persons if their commercially and competitively sensitive information were to be disclosed at either the individual level or in ways which are not sufficiently aggregated and anonymized.

Section 5.2 of the Draft Framework also does not sufficiently account for the requirements and intent of the *Competition Act*. Tidewater respectfully submits that Section 5.2 of the Draft Framework does not sufficiently reflect the applicability of the federal *Competition Act* to the Protected Information and does not build in a process for assessing the extent to which the proposed disclosure is consistent with the applicable requirements under the *Competition Act*. As submitted in our January 13, 2021 letter, it is essential that any rules and procedures concerning the disclosure of protected information be informed by and not infringe on the paramountcy of the federal *Competition Act*. Doing so is, in Tidewater's submission, critical to the effective implementation of the *FPTA* because the stated objectives of the *FPTA* 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, and any failures in this regard may cause significant harm and prejudice to responsible persons and, ultimately, to end user consumers.

**8. Are the (i) aggregation; (ii) anonymization; and (iii) time release methodologies proposed appropriate? Why or why not? (Section 6.0)**

**(a) If not, what alternative methodologies should the BCUC consider and why?**

Tidewater respectfully submits that the aggregation, anonymization and time release methodologies proposed in Section 6.0 of the Draft Framework are not appropriate because they do not sufficiently protect against back-calculation of reporting parties' competitive and commercially sensitive information.

Of note, the U.S. antitrust agencies have established "safe harbor guidelines" when competitively sensitive (or any non-public) information is shared among competitors. The guidelines require that:

i. a third party manages data collection (e.g., a trade association, industry publication, purchaser, government agency, consultant, or academic institution);

ii. the information is more than three months old; and

iii. disseminated information is sufficiently aggregated - this means that any statistic that is distributed must be based on data from at least five providers of data; no individual provider's data represents more than 25 percent of the relevant statistic on a weighted basis; and data aggregation must be sufficient to prevent a participant from deducing the data provided by any individual competitor.

In our submission, even these guidelines will not be sufficient to address the concerns for the following reasons:

(a) BC is a relatively small market and even regions with five responsible persons reporting wholesale transactions may not provide appropriate aggregation to prevent back calculation of confidential data. This is especially true where the market share disproportionately represents one or two market participants. If aggregation is to be performed at a level that is anything other than a provincial level, it should be done at minimum in relation to the following three regions: (i) the Lower Mainland (Greater Vancouver) region, (ii) the Vancouver Island region, and (iii) the remainder of the Province. Aggregation in a level that is any more granular than these regions would fail to protect against back calculation of the data. For example, a region may have five responsible persons reporting wholesale transactions, but may not have five independent sources of supply if those five responsible persons all sourced their supply from the same supplier(s). This would lead to the unintentional disclosure of information irrespective of aggregation.

As indicated in the "safe harbour guidelines", it is insufficient to base information off of five providers' data without taking into consideration whether any individual provider's data represents more than 25 percent of the relevant statistic on a weighted basis. Furthermore, data aggregation must be sufficient to prevent a participant from deducing the data provided by any individual competitor. Given that there are only two refiners operating in British Columbia, this may mean that certain fuel data in relation to refiners cannot be disclosed.

(b) Even with the anonymization of data, certain data may remain capable of identification due to unique characteristics. The sufficient anonymization of data may have little utility.

(c) A time limitation of only two years is insufficient. Many supply arrangements are long term in nature and releasing individual responsible persons' confidential fuel data after only two years may inadvertently lead to the disclosure of confidential information. For example, the nature of a pricing formula or other sensitive aspects of a contractual form may be capable of identification. Furthermore, even expired contracts may remain representative of current forms of agreements.

Given the unique vulnerabilities of each market participant, Tidewater respectfully submits that additional protections should be adopted. As noted above, Tidewater submits that the Bureau should be invited to offer its perspective and recommendations for "safe harbor guidelines" when competitively sensitive (or any non-public) information is shared among competitors. Tidewater urges the BCUC to take up the Bureau's offer to engage with it so as to reduce competitive concerns while allowing the BCUC to improve consumer confidence in the retail gas market.

Further, in Tidewater's submission, each participant should be provided with advance notice of an intention for information to be aggregated and then be provided with an opportunity to consider and object to the proposed aggregation. Given the commercial and competitively sensitive nature of the information, Tidewater recommends that any intended publication of aggregated data be provided to affected responsible persons on an *"external counsel only"* basis, with undertakings from external counsel that the information shall not be shared with their respective clients. If the responsible party, through their external counsel, objects to the proposed aggregation then an opportunity should be provided for a party to request that the BCUC seek a favourable binding opinion that the proposed aggregation and disclosure would not constitute a reviewable practice or offence from the Commissioner of Competition pursuant to s. 124.1 of the *Competition Act* and the publication held in abeyance pending a decision.

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

Tidewater's submissions in response to this question are addressed in the response to question eleven, below.

**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?**

Tidewater respectfully submits that all fuel data submitted by responsible persons and granted advanced approval of confidential status pursuant to Order G-275-20 should retain its full confidential status following implementation of the Final Framework. To the extent that the BCUC determines that fuel data submitted prior to implementation of the Final Framework will be disclosed under s. 9 of the FTPA, Tidewater respectfully submits that it would be appropriate and reasonable to provide responsible persons with an opportunity to make further submissions prior to any such disclosure.

**11. Any other submissions?**

In addition to the above submissions, Tidewater also agrees with the submissions of Imperial Oil and other responsible persons regarding the importance ensuring that any aggregated data which is published is accompanied by sufficient context to ensure that the data is presented in a fulsome manner that promotes public confidence.

Any evaluation and reporting on fuel pricing in British Columbia necessarily must give consideration to British Columbia's unique provincial regulatory regime and the impact of those regulations on pricing. For example, British Columbia requires relatively higher levels of renewable content and lower carbon intensity as compared to other Canadian jurisdictions and, as a result, the costs associated with those increased requirements must be accounted for in any review of fuel pricing. There are several other regulatory costs which are relevant to fuel pricing in British Columbia but are absent from the *FPTA* including, but not limited to, renewable fuel values and carbon intensity compliance costs (referred to as Low Carbon Fuel Standard credit costs). While much of this information is already accessible to the public through online sources, Tidewater recommends that any data presented by the BCUC be accompanied by information about these costs in order to provide fulsome and readily accessible context to the public.

Tidewater would welcome the opportunity to continue to engage with the BCUC and other responsible persons in developing the Final Framework and, ultimately, in ensuring that any publication of aggregated and anonymized fuel data adequately protects the commercial and competitively sensitive information of Tidewater and other responsible persons. Tidewater would also recommend that the BCUC engage with the Competition Bureau to vet any methodologies which the BCUC seeks to adopt for the aggregation and anonymization of protected information.

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

Amy Pressman
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