

BRITISH COLUMBIA UTILITIES COMMISSION

Order G-242-20

Order G-303-20

Order G-159-21

Framework for the Determination of Confidentiality and Treatment of Protected  
Information under the *Fuel Price Transparency Act*

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

**FRAMEWORK DRAFT NO. 2**

JUNE 15, 2021

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## INTRODUCTION

1. 7-Eleven Canada, Inc. ("**7-Eleven**") welcomes the opportunity to offer its perspective on the Framework for the Determination of Confidentiality and Treatment of Protected Information - Draft No. 2 ("**Framework Draft No. 2**").
2. 7-Eleven reiterates its earlier submissions of March 8, 2021 with respect to Framework Draft No. 1. 7-Eleven is aligned with the goals of the *Fuel Price Transparency Act* ("**FPTA**") and is pleased that certain of its concerns have been accommodated in the current draft.
3. There are a number of remaining issues that 7-Eleven wishes to address to assist the Commission as it finalizes the Framework.

## Commission Topics for Consultation

### Designation and Treatment of Information Collected by the Commission

4. In the letter of May 25, 2021 (Exhibit A-9) ("**May 25, 2021 Letter**"), the Commission seeks submissions from parties on 16 topics.
5. Unless otherwise stated, 7-Eleven repeats and relies on its submissions of March 8, 2021.
6. 7-Eleven has no additional comments with respect to topics 1-5, 8-9 and 11 of the May 25, 2021 Letter.

### Internal ID, Seller Information and Supply Location

6. **The BCUC requests that parties provide submissions clarifying the specific harm and/or public interest associated with the publication of the internal ID and comment Fuel Data fields.**
7. **The BCUC requests that parties provide submissions clarifying the specific harm and/or public interest associated with the publication of the seller name and address, and supply location Fuel Data fields.**
7. 7-Eleven addresses these topics from a retailer's perspective.

8. A party's selection of internal notes, including identification, is inherently private and is generally not public. A responsible person may choose to include in internal notes sensitive information not intended to be made public, including with respect to counterparties such as suppliers.
9. The Panel appears to recognize that comments may contain confidential information. It argues (in the May 25, 2021 Letter) that it would be preferable to use the case by case process outlined in Section 4.0 of Framework Draft No. 2. While that approach could be followed, to do so unnecessarily raises the burden of compliance costs and therefore is inappropriate.
10. 7-Eleven reiterates its March 8, 2021 submissions that the FPTA should be interpreted and applied purposively. That means that disclosure should not be made for the sake of disclosure. The FPTA is directed at the transparency of fuel prices and that is not served by public disclosure of internal ID and comments selected by individual responsible persons.
11. With regards to counter-party information (such as suppliers, supply location and supplier addresses) the Panel notes (in the May 25, 2021 Letter) that  

... there are a limited number of fuel wholesalers in the market, and a similarly limited number of supply locations in the province, which suggests that the wholesaler name and address, and the supply location of retail fuel purchases may be general industry knowledge. Further, while certain counterparty agreements may include confidentiality provisions, the Panel understands that these provisions exclude disclosures required by law, as is the case with the FPT Act.
12. With respect to the Panel, this misses the point. The fact that there are a limited number of fuel wholesalers does not make the identification of the particular contracting party (and associated information, such as the supply location) any less sensitive or compelled disclosure any less prone to distort competition. Competing wholesalers and competing retailers have an interest in monitoring where supply is sourced and whether it is consistently sourced. In view of such scrutiny, contracting parties often choose to keep private their decision to engage with one another and

the terms. If there are few options, then competitors may be better able to guess but even such guesswork is eliminated if there is mandatory, public disclosure.<sup>1</sup>

13. On the other hand, there is little apparent legitimate public benefit to forced disclosure of counterparty information. The policies underlying the FPTA including the promotion of transparency of fuel prices and competition, and those goals are not served by mandatory disclosure of contracting parties for a particular retailer, as opposed to aggregated disclosure of prices and costs which does not reveal confidential information of any particular responsible person.
14. Finally, the presence of an exception in a contract for disclosure required by law does not in any way support a view that the information is not in the first instance confidential. Everyone must obey the law. If a valid law requires information to be disclosed, parties may not contract around that. The FPTA does require that confidential (protected) information be filed, in spite of the contractual terms, but the FPTA does not require that all protected information be published. There no compelling policy reason directed at transparency of fuel prices why the identity of counterparties, including supply location, or the terms of supply, should be made public.

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<sup>1</sup> In some situations, competitors may be able to deduce the counterparty due to a branding relationship between the supplier and retail station. However, there are other situations, such as unbranded or retailer-branded stations, where the counterparty relationship is not generally known.

**Information not identified as Confidential**

**10. The BCUC requests that parties provide submissions to explain their rationale for supporting or objecting to the proposed treatment of the Fuel Data not identified as confidential Protected Information in their submissions on Framework Draft No. 2.**

15. 7-Eleven reiterates its position set out in the March 8, 2021 submissions. The very purpose of the Retail Pilot (and the Retail Survey) is to assist the government in the development of regulations which would not issue until 2022 at the earliest.

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.

16. Section 3.2 of Framework Draft No. 2 contemplates that the Commission may advise the Minister and select staff of information collected, including protected information. 7-Eleven agrees that it may be appropriate for the Commission to share information collected during the Retail Pilot and Retail Survey with the Minister for the purpose of developing appropriate regulation.
17. However, under Framework Draft No. 2, most of the information collected from retailers pursuant to the Retail Pilot and Retail Station Survey would be published under the FPTA.
18. The point is not so much whether particular information provided under the Retail Pilot or Retail Station Survey is, by itself confidential, but rather that such information was not collected pursuant to a regulation to the FPTA as information that the government designated to be collected and published for the purposes of the FPTA. Instead, as noted, this information was collected solely for a different purpose, to inform the government whether to collect information from retailers under the FPTA and what information should be collected from them.
19. With respect, 7-Eleven does not understand this paragraph in the May 25, 2021 Letter:

**In Framework Draft No. 2, only the volume- and price-related Fuel Data listed in Tables A1 and A2 collected through the Retail Purchase Report and Retail Sales Report are proposed as confidential Protected Information. The BCUC has previously committed, as part of the Retail Pilot, to hold any information that would reveal the identity of the retail stations selected for the Retail Pilot confidential. Given the unique nature of the Retail Pilot Fuel Data and its focused purpose of reporting data to the Government of BC, the final Retail Pilot report to the Minister may be the appropriate place to formalize commitments around the confidentiality of Retail Pilot Fuel Data that is not confidential Protected Information.**

20. In this passage, the Commission appears to recognize that information provided during the Retail Pilot, including identifying information that may not be in of itself confidential (such as the street address of a retail station selected to participate), should not be disclosed, at least at this time, in view of prior commitments. As the Commission wrote in October 2020 (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.

21. Yet, Framework Draft No. 2 Appendix A3 purports to make available and presumably publish most of the fields of information collected under the Retail Pilot. Publication of such information would be in direct contrast to prior statements of the Commission. To now publish such information would tend to erode confidence in any future representations of the Commission that information provided will remain protected and confidential.

22. In the May 25, 2021 Letter, the Commission also writes:

**With respect to the identity and contact information of the individual who completed the Retail Station Survey,<sup>28</sup> while Framework Draft No. 2 does not propose this information be treated as confidential Protected Information, the Panel notes the BCUC's treatment of personal details with appropriate protections.**

23. With respect, in Framework Draft No. 2, the Commission does not explain its “treatment of personal details with appropriate protections”. On the face of Appendix A3, personal information of representatives will not be protected and apparently will be disclosed or made available to the public. Such disclosure does not advance the policy goals of the FPTA directed at the transparency of fuel prices, and is inappropriate.

### **Approaches for Making Protected Information Non-Confidential**

24. 7-Eleven supports efforts to further the policy of the FPTA by making information compelled by regulations under section 5 (that is relevant to the determination of fuel prices) available in a way that promotes transparency and competition.
25. It is important to strike a careful balance with commercial and competitive interests where the information is commercially sensitive.

### **Aggregation and Anonymization (Section 5.2.2)**

#### **12. The BCUC requests that parties provide submissions on the proposed revisions to the aggregation and anonymization process.**

26. 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.
27. Under Section 5.2.2, the Commission proposes a process where, after the Commission prepares an aggregation and anonymization of protected information, that it would provide external counsel for the affected responsible persons an opportunity to comment. Such counsel would be required to sign the Undertaking at Appendix B.
28. The Commission contends that “...[t]his process would ensure confidential Protected Information is not shared with Responsible Persons, while simultaneously allowing the BCUC to benefit from the specialized knowledge of industry experts prior to publishing sensitive Fuel Data.”

29. 7-Eleven agrees that there should be a 30 day consultation period. There are certain issues with the proposal as set out in Framework Draft No. 2:
- (a) Nowhere does the Commission explain how it will seek to aggregate and anonymize information. The Commission should be required to explain the particular method used when it produces aggregations or anonymizations for comment. Such methodology should be disclosed to the responsible persons and interested parties and not be restricted to external counsel.
  - (b) The Commission should release to the responsible person directly the proposed anonymization of its information. There is no need to restrict access to external counsel since, unlike aggregation, it does not involve the protected information of other persons.
  - (c) External counsel are not “industry experts” and acting alone, may not be able to evaluate the risk that the information could be disaggregated or used to identify the responsible person in question. This is one reason why the Commission’s proposed methodology should be disclosed to the responsible persons and other interested parties, and that the counsel be able to freely consult with them regarding the methodology. The Undertaking should provide that external counsel may discuss the Commission’s proposed methods and other non-protected information with others. Further, the Undertaking should provide that external counsel may retain independent experts and may disclose to such experts information received from the Commission to assist counsel in providing comments to the Commission.
  - (d) The Undertaking at Appendix B is not appropriate for external counsel for the purposes of Section 5.2.2. The first portion of the Undertaking require an explanation of why the information is sought. That does not apply to disclosures under Section 5.2.2. Only the portion dealing with the understanding and the actual enumerated paragraphs should apply for the purposes of Section 5.2.2. Accordingly, there should be a separate undertaking for external counsel.

**Passage of Time (Section 5.2.3)**

**13. The BCUC requests that parties provide submissions on the proposal to review the status of confidential Protected Information in two years time.**

30. 7-Eleven agrees with the proposal that the Commission not release any protected information due to the passage of time without further consultation from responsible persons and interested parties.

**Undertaking and Declaration Process** (Section 6.0, Appendix B)

**14. The BCUC requests that parties review the proposed declaration and undertaking form and provide comments, including any suggested modifications in their submissions on Framework Draft No. 2.**

31. Framework Draft No. 2 contemplates that the Undertaking and Declaration found at Appendix B may be used in two situations:
  - (a) By external counsel for a Responsible Person who may make submissions with respect to the adequacy of the Commissioner's aggregation and anonymization of protected information (Section 5.2.2)
  - (b) Anyone who applies for access (Section 6.0)
32. The differences are stark. In the first instance, the information is received only by external counsel - regulated professionals who routinely deal with and protect confidential information - for a purpose of limited duration and scope. The scope does not involve manipulating or promulgating the information but rather is only to assist the Commission to protect confidentiality.
33. By contrast, in the second instance, there is no limit to the potential individuals who may seek and obtain access or the purposes for which they may acquire and use the information. There are a number of problems with providing access to the public and the proposed form of undertaking.
34. To begin, the concept is misconceived. The FPTA does not confer on the Commission the jurisdiction to grant selective access to protected information. Section 9(2) only allows the Commission, as administrator, the option to "publish" protected information - i.e. making the information generally available to the public.
35. Moreover, even assuming the Commission has jurisdiction, Framework Draft No. 2 does not provide any insight into plausible scenarios where granting selective access to a member of the public may advance the policies of the FPTA. Assuming that access is granted to an individual, how will disclosure to a single member of the population promote a public good?

36. It may be the case that the Commission contemplates that the recipient may use the protected information to generate and publish analysis or commentary. However, according to the Undertaking, the recipient commits
- not to divulge, directly, indirectly or in any manner, information disclosed under the conditions of this undertaking except to a person granted access to such information or to staff of the BCUC;
37. It is unclear whether the Commission intends that a recipient may lawfully circumvent this restriction by taking measures (such as aggregation or anonymization) to protect the identities of the responsible persons and their protected information. However, that is not set out expressly in Framework Draft No. 2. Moreover, it is difficult to formulate effective measures and to be confident that they work. For precisely that reason, the Commission itself now proposes to vet proposed aggregation or anonymization with external counsel for responsible persons before it will make any publication. And while an institution like the Commission may be expected to act in the public interest with expertise in receiving, using or disclosing confidential information, there are no such checks and balances on members of the public.
38. Finally, the proposal does not sufficiently protect responsible persons and other interested parties from misuse or disclosure of protected information:
- (a) Under Framework Draft No. 2, the Commission will only provide the responsible person who filed the protected information the opportunity to respond to the request for access. However, there may be other interested parties who should also have that opportunity. Disclosure may well affect the competitive process and the interests of persons other than the responsible person who made the filing (for example if the protected information was pricing information, it also impacts the counterparty to the transaction).
  - (b) There is no provision for a responsible person or other interested party to sue to recover damages caused by intentional, negligent or other disclosure of protected information. The recipient gives the Undertaking to the Commission, not the responsible person.
39. Accordingly, the Commission itself should provide responsible persons and anyone else affected, the Commission's undertaking to compensate them for damages (and

associated costs and legal fees) resulting from any disclosure or misuse of protected information provided by the Commission to third parties.

**Reporting to the Minister (Section 3.2)**

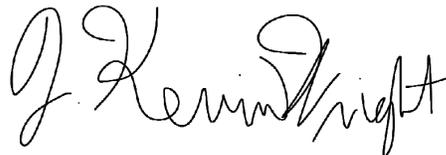
**16. The BCUC requests that parties provide submissions explaining their rationale for supporting or objecting to the proposed language in Framework Draft No. 2 respecting the BCUC's ability to share confidential Fuel Protected Information Data with the Minister and selected staff in their Ministry in light of the BCUC's responsibilities as Administrator.**

40. In principle, 7-Eleven agrees that the Commission may disclose information filed under the FPTA with the Minister and selected staff on a confidential basis.

**CONCLUSION**

41. 7-Eleven would be pleased to address any questions the Commission may have arising from these submissions or those of other parties.
42. 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. 2.

ALL OF WHICH IS RESPECTFULLY SUBMITTED THIS 15<sup>TH</sup> DAY OF JUNE, 2021



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