

February 12, 2013

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Kirsten Walli
Secretary
Ontario Energy Board
P.O. Box 2319
2300 Yonge Street, Suite 2700
Toronto ON M4P 1E4

Dear Ms. Walli:

**Re: Request of Six Nations Council for a Written Hearing in File No. EB 2012-0467
Application for an Electricity Generation Licence**

We are legal counsel for SunE Norfolk Bloomsburg LP, the applicant for a generating licence ("SunE" or the "Applicant") in this matter, and have been instructed to respond to the Request of Six Nations Council ("Six Nations"). Six Nations makes two requests: (i) a written hearing and (ii) what is, in substance, an injunction against, or a denial of the generating licence, for an indefinite time, until the completion of an event the satisfactory completion of which is within the sole discretion of Six Nations.

Overview of the Response of the Applicant:

Request for a Written Hearing:

The request for a written hearing is moot. The Board has already ordered a written hearing in its January 8, 2013 Notice of Application and Written Hearing. There is nothing more for the Board to do in that regard.

Paragraph 5 of the Six Nations letter has 8 sub-paragraphs setting out the reasons why it requests a written hearing. As the request itself is moot, the reasons given supporting that request are irrelevant.

The Applicant will make no further submissions responding to this request.

Request for a Denial of the Generation Licence for an Indefinite Time:

The request that the Board "not grant an electricity generation licence" to SunE until "consultation and accommodation discussions are complete with the Six Nations Elected

Council." How is the Board to determine when these discussions are "complete"? They are complete only when both participants in the discussions say they are complete. Thus, Six Nations essentially asks the OEB to delegate to it the power to determine when the licence is to be issued.

Six Nations has not provided any evidence in support of this extraordinary request. All the Board had been given is the bald request, unsupported by anything.

For the reasons set out below, the OEB has no jurisdiction to grant this request. Alternatively, even if it has such jurisdiction, granting the request, at this late date, and on the record before it, would be an improper exercise of the OEB's discretion, resulting in a loss of jurisdiction.

Attached as Appendix "A" is the letter to SunE from Six Nations providing a copy of the Request for a Written Hearing sent to the Board. The purpose of the request is set out in the second paragraph of the Six Nations letter:

"We have taken this course merely to protect our interest in having a satisfactory arrangement with your firm concluded in the very near future."

The "satisfactory arrangement" that Six Nations seeks is financial compensation from SunE, which SunE believes is not owed to Six Nations in law or in equity. If Six Nations believes it is right, its remedy lies with the courts. How much money, if any, SunE should pay to Six Nations is irrelevant to whether SunE meets the requirements of the *Ontario Energy Board Act* for a generation licence. Paying Six Nations is not a legal condition precedent to the OEB granting a generation licence. The OEB should not permit its licensing procedures to be used for collateral purposes unrelated to the criteria for licensing a generator.

Detailed Response of the Applicant to the Request for a Denial of the Generation Licence for an Indefinite Time:

The Facts:

1. SunE is already in operation, generating electricity into the grid under an interim licence issued by the Board on January 10, 2010.
2. The generating equipment is ground-mount solar PV panels with a total capacity of 10 MW. It is located on a farm that has been used as a cash crop farm (e.g., corn and soy bean) by its owners for over 100 years, and perhaps twice that long. Given the nature of the farming and the fact that the property has been fenced, there is no hunting, fishing or trapping being exercised on the property. There has been no hunting, fishing or trapping on this farm by Six Nations as there is nothing to hunt or fish or trap there. It lacks an air of reality to suggest that this small set of solar panels, on this property, can have any effect on the current exercise of the hunting and fishing and trapping rights protected by the Nanfan Treaty of 1701.

The Legal Issues:

3. If there is any duty to consult it is that of the Crown, which is not a party to this Application. The duty to consult arises when the Crown (i) has knowledge of the potential existence of aboriginal or treaty rights, and (ii) contemplates conduct that might adversely affect these rights.



4. While Six Nations has asserted treaty rights in the Nanfan Treaty of 1701, those rights are irrelevant to the SunE application for a generator's licence because (i) there is no evidence of any hunting or other treaty activities on the property, and (ii) no evidence has been presented of any potential specific impacts on treaty rights associated with the Board granting the generator's licence. Unlike projects which create environmental impacts on the ground, such as the large gas pipeline dealt with by the Board in its Union Gas decision, or those constructed on Crown lands used by Aboriginal communities, the project before the Board is a small solar project on private farm lands in Norfolk County. The assertion of ongoing litigation involving the subject property is litigation involving the Crown and is irrelevant, as the SunE lands are privately held and were disposed of by the Crown approximately 200 years ago.

5. While arguably there is no duty to consult given there are no impacts associated with the Generators Licence and the project location is 17km from the Six Nations reserve lands, SunE held several meetings with Six Nations and others to provide information with respect to the project. (The 273 page Consultation Report (item 6) by Hatch Consulting and the MOE Notice to Aboriginal Communities (Item 27) are found on the SunEdison web site at <http://www.sunedison.ca/norfolk/>). During these meetings Six Nations did not raise any concerns about potential impacts. Rather, they were interested in potential employment opportunities and receiving financial "compensation". As there is nothing to compensate for, SunE has no obligation to provide any compensation.

6. Six Nations has asked the Board to deny the licence until the consultation process has been completed. No dates have been set to start, let alone to complete, and further consultations about anything. Given that Six Nations' sole purpose in writing to the Board is to pressure SunE to conclude a "satisfactory arrangement ... in the very near future", Six Nations will not agree that consultations have been completed until financial arrangements satisfactory to Six Nations have been put in place. In the absence of potential impacts arising from the Board granting the generator's licence later this month, SunE has no obligation to negotiate accommodation measures. Any commercial discussions relating to employment opportunities and any other financial compensation that may sought from Sun E are beyond the jurisdiction of the Board to consider in deciding whether to grant the generator's licence. Further, in the absence of any evidence of impacts, the OEB is entitled to use its common sense to recognize that this request is merely a stratagem to try to extract money by attempting to delay indefinitely the start-up date for this generation project.

7. Looked at practically, Six Nations is asking for a de facto interlocutory injunction of indefinite duration. If the Board was to apply the three-part test for such an injunction found in the case law (e.g., *RJR-MacDonald Inc. v. Canada (Attorney General)*, [1994] 1 S.C.R. 311) it would have to deny the injunction. On the first part of the test, is there a serious question to be tried, SunE would argue the application would fail because in the absence of any potential impact on Six Nations there is no serious legal question in issue. On the second part, will Six Nations suffer "irreparable harm" if the Board now grants the licence to SunE, it would again fail. Irreparable harm is harm that cannot be compensated in damages. As the facilities have already been constructed, any impacts have already occurred and the granting of a generators licence would not create further or new impacts. If the generation of electricity harms Six Nations it can sue for damages. The OEB's generator's licence would not be any impediment to a damages claim because such a licence does not and cannot authorize injury to the property or person of anyone. The third part is: which party would suffer the greater or



lesser harm from granting or refusing the remedy? The answer is clear. Six Nations has engaged in no hunting or other treaty activity on this property for over a century. Whether the property is used to generate electricity or to grow corn or soy bean crops is equally harmless to it. Delaying the issuance of the license will impose obvious financial harm on SunE, and a long delay might destroy the enterprise.

8. The OEB does not have jurisdiction to assess the validity of the Six Nations land claims. In any event, these claims are against the Crown, not SunE. There are literally hundreds of similar small, ground mounted solar projects under the FIT program, across Ontario. A high proportion of these will be in rural or remote areas, where one or more First Nations will have some unresolved aboriginal claims, which are likely to take decades to resolve. If these First Nations are encouraged by the OEB to submit requests for indefinite delays in granting licences, there will be many such requests, most of them without merit, and all of them requiring extensive resources to resolve. The OEB should be clear in its reasons for denying the Six Nations request for an indefinite delay in granting the licence that the Board is not the appropriate forum for the resolution of such claims, and has no jurisdiction to grant the request.

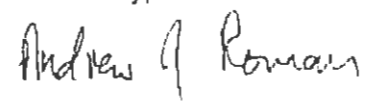
9. The OEB is an administrative tribunal which, when hearing and deciding an application for a licence, is exercising a statutory power of decision. As such, it has a duty of fairness, which includes deciding applications before it in a timely manner. Granting the request to refuse to issue the licence that the Applicant would otherwise be entitled to, for an indeterminate period, until the completion of an event over which neither the Board nor the Applicant have control, would amount to an abdication of the Board's jurisdiction rather than its lawful exercise.

10. A written hearing before the OEB to review an application for a generator's licence is not the appropriate forum to assess any consultation requirements. Item 27 cited above shows that the Crown approved this project, and told Six Nations that in a letter dated May 25, 2012. Thus, Six Nations has been aware of the Crown's approval, and done nothing about it, since then.

11. The Crown's earlier decisions granting the permits and approvals necessary to construct the generation facilities, which facilities had been constructed prior to this application and in compliance with the permits and approvals, was the appropriate forum for the Six Nations to raise any concerns associated with this generation project. The issuance of the licence does not result in any impacts and there is no legal obligation to negotiate any financial deal with the Six Nations. Therefore, whether Six Nations was seeking a denial of licence for a specific time period or, as here, indefinitely, it has shown no basis for any such denial.

12. If the Six Nations could delay the issuance of the Licence, the financial survival of the Applicant could be endangered, putting SunE in the position of having to give into any demands by the Six Nations to end the delay. This does nothing for the Board's statutory objective to "promote the use and generation of electricity from renewable energy sources". The Board should not permit its processes to be abused in this way.

Yours truly,

A handwritten signature in black ink that reads "Andrew J. Roman". The signature is written in a cursive, flowing style.

Andrew J. Roman
Senior Counsel
Miller Thomson LLP

c. Lonny Bomberry, Six Nations Council





January 30, 2013

SunEdison
Norfolk Bloomsburg LP
595 Adelaide St E.
Suite 400
Toronto, Ontario
M5A 1N8

Attn: Ms. Courtney Searle

Dear Madam:

RE: Solar Plant in Norfolk County

Enclosed herewith, please find a copy of the Request for a Written Hearing by my principal, the Six Nations Elected Council. The Request was e-filed with the Ontario Energy Board yesterday.

We have taken this course merely to protect our interest in having a satisfactory arrangement with your firm concluded in the very near future.

Sincerely,

Lohny Bomberry, Director
Six Nations Lands and Resources