

STATE OF NORTH CAROLINA  
COUNTY OF PERQUIMANS

IN THE OFFICE OF  
ADMINISTRATIVE HEARINGS  
15 EHR 07012

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STEPHEN E. OWENS and )  
STEPHANIE G. BADAWI, )  
 )  
Petitioners, )  
 )  
v. )  
 )  
NORTH CAROLINA DEPARTMENT OF )  
ENVIRONMENT AND NATURAL )  
RESOURCES, DIVISION OF ENERGY, )  
MINERAL AND LAND RESOURCES )  
 )  
Respondent. )

**RESPONDENT'S PREHEARING  
STATEMENT**

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NOW COMES Respondent North Carolina Department of Environmental Quality ("DEQ"), Division of Energy, Mineral and Land Resources ("DEMLR"), by and through the undersigned counsel and files this Prehearing Statement pursuant to the Order signed by the Honorable Melissa Owens Lassiter, Administrative Law Judge, on October 6, 2015.

The paragraphs of this Prehearing Statement correspond to those of the October 6, 2015 Order. Respondent reserves the right to amend this Prehearing Statement as this matter progresses.

**1. THE ISSUES TO BE RESOLVED.**

This matter involves correspondence written by the Chief of the Energy Section of DEMLR to Atlantic Wind, LLC ("Atlantic Wind") stating that its Desert Wind Project ("Desert Wind Project") is not subject to the permitting provisions of N.C. Session Law 2013-51. See An Act to Establish a Permitting Program for the Siting and Operation of Wind Energy Facilities,

ch. 51, 2013 N.C. Sess. Laws 51 (codified at N.C.G.S. §§ 143-215.115, et seq.) (“S.L. 2013-51” or “Wind Act”). The issue to be resolved is whether Respondent prejudiced Petitioners’ rights and erred in one of the five ways enumerated in N.C.G.S. § 150B-23(a).

**2. A BRIEF STATEMENT OF THE FACTS AND REASONS SUPPORTING THE PARTY’S POSITION ON EACH MATTER IN DISPUTE.**

On May 17, 2013, the North Carolina General Assembly enacted Session Law 2013-51, creating a new wind energy permitting program under which developers of future wind energy projects in North Carolina are required to apply for and receive permits to build and operate wind energy facilities. S.L. 2013-51 by its own terms applies only to wind energy facilities that had not already received certain written “Determinations of No Hazard to Air Navigation” from the Federal Aviation Administration (“FAA”) at the time the law became effective. S.L. 2013-51, sec. 2.

Atlantic Wind and its affiliate Iberdrola Renewables (“Iberdrola”) have been developing the Desert Wind Project since long prior to the May 17, 2013 passage of S.L. 2013-51. Based on information provided to Respondent by Atlantic Wind, Respondent sent correspondence to Atlantic Wind on April 29, 2015 (“April 29 Letter”), stating that the Project is not subject to the permitting provisions of S.L. 2013-51 because the Project had received the necessary FAA determinations prior to S.L. 2013-51 becoming law. Construction has been underway on the Desert Wind Project since July 14, 2015. *See, e.g., Groundbreaking at North Carolina’s First Wind Farm*, Iberdrola Renewables, [http://iberdrolarenewables.us/rel\\_15.07.14.html](http://iberdrolarenewables.us/rel_15.07.14.html) (July 14, 2015).

Petitioners claim that Respondent erroneously “fail[ed] to require Iberdrola to go through the permitting process” (Pet’rs’ Statement of the Case 2) and that the April 29 Letter constituted

an “ultra vires act.” (Pet.1.) Petitioners further contend that Respondent’s action denied Petitioners the protections of a DEQ permitting process (Pet.1.) and that the harm done to Petitioners can “only be repaired by compliance with the permitting procedures established under the Act.” (Pet’rs’ Statement of the Case 2.).

On November 3, 2015, Respondent filed a Motion to Dismiss the Petition on several grounds. First, Respondent contends that this court lacks subject matter jurisdiction over the Petition because (i) the Petition is untimely under N.C.G.S. § 150B-23 and (ii) Petitioners’ claims are not redressable through any relief that this Court is empowered to grant. Second, Respondent contends that Petitioners have failed to state a claim upon which relief can be granted under Rule 12(b)(6) of the North Carolina Rules of Civil Procedure because (i) Petitioners cannot claim that Respondent failed to act as required by law where the Wind Act did not require Respondent to take any mandatory action and (ii) Petitioners’ claim that Respondent’s April 29 Letter constituted an “ultra vires” act lacks any basis in law or fact.

This motion is now pending before the Court. In the event that the Court denies Respondent’s motion to dismiss, Respondent asserts that the April 29 Letter was properly issued, reflecting the proper interpretation of the Wind Act as applied to Atlantic Wind.

### **3. THE STATUTES, RULES, AND LEGAL PRECEDENT, IF KNOWN.**

Relevant statutes and rules include: Chapter 150B of the North Carolina General Statutes, S.L. 2013-51 and the legal authority cited in Respondent’s Memorandum in Support of Motion to Dismiss.

### **4. A LIST OF PROPOSED WITNESSES.**

Respondent may call the following persons to testify as witnesses in this contested case:

- Brad Atkinson, Chief, Energy Section of the DEMLR.

Additionally, Respondent may call as a witness any person familiar with the facts of this case, as well as any person named as a witness by any other party. Respondent reserves the right to supplement this list as it prepares for hearing in this matter.

**5. WHETHER YOU WISH TO PURSUE DISCOVERY. IF SO, THE LENGTH OF TIME REQUIRED.**

Respondent may pursue discovery. If Respondent pursues discovery, Respondent anticipates needing two months to complete discovery.

**6. LOCATION AND DATE OF HEARING.**

Respondent has yet to receive a scheduling order.

**7. IF YOU DO NOT HAVE AN ATTORNEY, YOUR HOME AND BUSINESS ADDRESS AND TELEPHONE NUMBER.**

Respondent is represented by counsel.

**8. ESTIMATED LENGTH OF HEARING.**

Respondent estimates that the hearing on the merits in this case will take approximately one day.

**9. OTHER SPECIAL CONSIDERATIONS.**

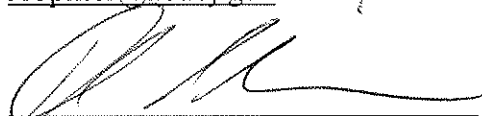
None.

Respectfully submitted, this the 4<sup>th</sup> day of November, 2015.

ROY COOPER  
Attorney General

By:   
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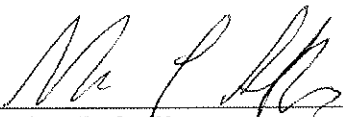
**CERTIFICATE OF SERVICE**

The undersigned certifies that a copy of the foregoing **PREHEARING STATEMENT** has been served on the Petitioners by electronic mail and by depositing a copy of the same in an official depository of the United States Mail, first class, postage prepaid, and addressed to Petitioners' counsel of record as follows:

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*Counsel for Petitioner*

This the 4<sup>th</sup> day of November, 2015.

  
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Asher P. Spiller  
Assistant Attorney General