

STATE OF MICHIGAN

IN THE 20<sup>TH</sup> CIRCUIT COURT FOR THE COUNTY OF OTTAWA  
SPECIALIZED BUSINESS DOCKET

414 Washington Street  
Grand Haven, Michigan 49417  
616-846-8315

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**CONSUMERS ENERGY COMPANY,**  
Plaintiff / Counter-Defendant,

v

**WOLVERINE POWER SUPPLY  
COOPERATIVE, INC., d/b/a  
WOLVERINE POWER COOPERATIVE,**  
Defendant / Counter-Plaintiff.

**OPINION AND ORDER**

File No. 22-006876-CB

Hon. Jon Van Allsburg

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**Opinion and Order on Wolverine's Motion for Partial Reconsideration  
and on Consumers Energy's Motion for Sanctions**

Wolverine has filed a motion requesting partial reconsideration of this Court's Opinion and Order on Multiple Discovery Disputes, filed October 23, 2023. Consumers Energy also filed a motion seeking sanctions against Wolverine for discovery violations. As stated below, Wolverine's Motion for Partial Reconsideration is granted in part, and Consumers Energy's Motion for Sanctions is denied.

**Wolverine's Motion for Partial Reconsideration**

Wolverine argues that this Court should reconsider the portions of its previous Order requiring Wolverine to disclose information regarding the Palisades Nuclear Generating Station ("Palisades") other than the Palisades Power Purchase Agreement ("PPA"), which Wolverine has already produced. Wolverine argues that the PPA contains all the information that Consumers could need to show Wolverine's mitigation of damages. Motions for reconsideration are governed by MCR 2.119(F), unless another rule applies.

Generally, and without restricting the discretion of the court, a motion for rehearing or reconsideration which merely presents the same issues ruled on by the court, either expressly or by reasonable implication, will not be granted. The moving party



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must demonstrate a palpable error by which the court and the parties have been misled and show that a different disposition of the motion must result from correction of the error.<sup>1</sup>

Wolverine alleges that the Court made three palpable errors in its previous Order. First, Consumers' motion to compel discovery responses was filed well before the discovery responses in question were due, so it was procedurally improper for the Court to grant the motion. Second, the documents relating to Palisades are not relevant to Wolverine's mitigation of damages, and the Court erred in holding otherwise. Third, the PPA itself adequately provided all possibly relevant data to Consumers, so requiring additional discovery is unduly burdensome, overly broad, and disproportionate.

The first alleged error does not justify a different disposition of the motion. MCR 2.310 requires parties to serve a written response to a request for production of documents within 28 days after service of the request.<sup>2</sup> Here, Consumers' request for production of documents regarding Palisades was served on September 13, 2023, making the response due by October 11. The Court's Order was issued on October 23, after the responses were due. The Court's Order did not give Wolverine any less time than they were entitled to under the court rules. The Court's Order also limited the required production to documents that had not already been produced, recognizing the possibility that documents would be produced without a court order. The court rules contemplate this possibility in MCR 2.313(A)(5), where they provide guidance when a party provides discovery after a motion to compel is filed or where a party files the motion without first attempting in good faith to obtain the discovery without court action. Error or not, the result of the decision here did not affect the outcome, which is that Wolverine was required to produce non-privileged responsive documents.

The second alleged error is not a palpable error. Wolverine alleges that the Palisades PPA is not relevant to mitigation because Wolverine should have been able to benefit from the energy and capacity from Campbell 3 as well as any other sources. This issue was previously raised in Wolverine's Response to Consumers' Third Motion to Compel. The extent to which energy and capacity from Palisades could replace energy and capacity currently available from Campbell 3 is

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<sup>1</sup> MCR 2.119(F)(3).

<sup>2</sup> MCR 2.310(C)(2).

directly relevant to Wolverine's claimed damages and the argument that Wolverine could not obtain an equivalent or comparable replacement for Campbell 3. Information about the Palisades PPA is relevant to this case and is discoverable.

The third alleged error is that the Palisades PPA itself provided all the relevant information that Consumers might need, so the requirement that Wolverine turn over additional documents surrounding the PPA is disproportionate to the needs of the case. The Court concedes that its prior order was overbroad in scope.

In item y(i), Wolverine was ordered to turn over "any comparisons between entering into the Palisades PPA and other options for Wolverine Power procuring energy and/or capacity from other sources." Wolverine argues that Consumers already has the Palisades PPA and all other PPAs to which Wolverine is a party and that Consumers is capable of performing its own comparisons of those options. Wolverine's argument does not account for negotiations that did not lead to a PPA. These would be relevant to Wolverine's argument that a replacement of Campbell 3 would be impossible or impractical. These documents must be produced.

In items y(ii and iii), Wolverine was ordered to turn over communications with Wolverine's members and board about the Palisades PPA. Consumers has not shown how these documents would be relevant to this case. These documents need not be produced.

In item y(iv), Wolverine was ordered to produce "written statements issued by Wolverine regarding the Palisades PPA." Wolverine argues that these are publicly available statements and that Consumers has superior resources and can locate the information it seeks here without burdening Wolverine. Documents created for the public are not subject to the same concerns about confidentiality that cover much of the other discovery. These documents must be produced.

In items y(v, viii, ix, and xii), Wolverine was ordered to produce the amount, cost, and price of energy and capacity it is forecasted to have under the Palisades PPA, as well as the date Wolverine expects to start receiving energy or capacity under the PPA. Wolverine argues that this information was included in the PPA and has already been provided.<sup>3</sup> That argument does not

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<sup>3</sup> The court was not provided with a copy of the Palisades PPA and is therefore unable to independently analyze the accuracy of this statement.

show an error by the Court and therefore does not justify reconsideration. Consumers Energy is entitled to file its own motions for production of documents if it believes that the PPA does not adequately contain this requested information.

In items y(vi, vii, and xi), Wolverine was ordered to produce any comparisons of its costs of purchasing power and capacity under the PPA to its costs of purchasing power and capacity from Campbell 3 or from other sources. Wolverine was also ordered to produce any analysis or comparisons of forecasted prices of energy and capacity under the PPA to past prices from Campbell 3 or anticipated future prices from other sources. Wolverine argues that these comparisons can be derived fully from data in the PPA and other documents in Consumers' possession. This is not an argument that the Court's previous order was in error. This argument is that the order has already been obeyed. Wolverine need not reproduce information already accessible to Consumers. Again however, Consumers may file its own motions if it believes that relevant and responsive information here has not adequately been disclosed.

In item y(x), Wolverine was ordered to produce the forecasted price that Wolverine will charge its members for energy from the Palisades PPA. Wolverine argues that the price to its members is not relevant to any theory of mitigation of Wolverine's damages. The price Wolverine ultimately charges its members will depend on a number of factors, most of which are irrelevant to this questions in this case. These documents need not be produced.

In items z(i, ii, and iii), Wolverine was ordered to produce "all analysis conducted about the Palisades PPA evaluating whether to execute the Palisades PPA, including but not limited to those identified by Eric Baker." Wolverine argues that Consumers has the PPA and can make its own analysis of the costs, competitiveness, and affordability of the PPA. Wolverine's analysis evaluating whether to execute the Palisades PPA is only tangentially relevant to the facts at issue in this case. To the extent that Consumers cannot use the data included in the PPA to make its own analysis of the costs, competitiveness, and affordability of the PPA, Consumers may file its own motions for production of documents.

#### **Consumers Energy's Motion for Sanctions**

Consumers has also moved for sanctions against Wolverine for alleged discovery violations.

The court rules specifically authorize default judgment as a sanction for discovery abuses. MCR 2.313(B)(2)(c). However, it is a drastic measure and should be used with caution. Before imposing the sanction of default judgment, the trial court should consider whether the failure to respond to discovery requests extends over a substantial period, whether there was a court order directing discovery that was not complied with, the amount of time that elapsed between the violation and the motion for default judgment, and whether willfulness has been shown. The court should also evaluate other options before concluding that a drastic sanction is warranted. The sanction of default judgment should be employed only when there has been a flagrant and wanton refusal to facilitate discovery and not when failure to comply with a discovery request is accidental or involuntary.<sup>4</sup>

Consumers argues that Wolverine violated the October 23, 2023 Order by not producing documents responsive to numerous categories included in the Order. Wolverine did produce responsive documents. They also produced objections, albeit in the form of a motion to reconsider. This unusual format was only required due to Consumers' conduct in prematurely filing a motion to compel production before the response to the request for production of documents was due and this Court's partially granting that motion. Wolverine's objections all appear to be resolved with the resolution of the motion for reconsideration, so all additional production under the previous order must be completed within 28 days of the entry of this Order. This alleged violation does not merit sanctions.

Consumers argues that Wolverine violated its duty to supplement responses to its requests for production by not supplementing its earlier responses with information about the Palisades PPA. However, Wolverine complied with its obligations under MCR 2.302(E), which provides that a party must supplement or correct its response "in a timely manner if the party learns that in some material respect the disclosure or response is incomplete or incorrect, *and if the additional or corrective information has not otherwise been made known to the other parties during the discovery process or in writing.*"<sup>5</sup> Here, there is no question that Consumers was made aware of the Palisades PPA. There is therefore no justification for sanctions based on Wolverine's failure to supplement its previous responses with information that Consumers already had.

Consumers argues that Wolverine produced a spreadsheet that was missing some data regarding the depreciation schedule for some Wolverine assets. At deposition, Wolverine's

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<sup>4</sup> *Mink v Masters*, 204 Mich App 242, 244; 514 NW2d 235 (1994) (cleaned up).

<sup>5</sup> MCR 2.302(E)(1)(a)(i). (Emphasis added).

witnesses could not explain why this spreadsheet was missing values or how other values came to be calculated without reference to the missing values. There is no evidence or even allegation that the missing data was relevant to Wolverine's claim other than as an example of how depreciation was calculated. There has been no showing that any data was willfully excluded from Wolverine's production. Sanctions are not justified here.

Consumers argues that Wolverine's history of scheduling and cancelling depositions just before the close of discovery merits the sanction of dismissal. However, there is significant evidence that both sides here have engaged in retaliatory gamesmanship. Sanctions, especially the extreme sanction of dismissal, are not warranted here.

Consumers argues that Wolverine's counsel improperly instructed Eric Baker, a corporate representative of Wolverine, not to answer deposition questions that were allegedly outside the scope of the notice of deposition. Consumers is correct here. This conduct was improper. Under MCR 2.306(C)(4)(a), "[s]ubject to limitation imposed by an order under MCR 2.302(C) or [MCR 2.306(D)], evidence objected to on grounds other than privilege shall be taken subject to the objections." Mr. Baker's testimony should have been taken subject to objection. The protective order covering evidence in this case did not limit the application of MCR 2.306(C)(4)(a). "A person may instruct a deponent not to answer only when necessary to preserve a privilege or other legal protection, to enforce a limitation ordered by the court, or to present a motion under MCR 2.306(D)(1)."<sup>6</sup> Counsel for Wolverine did not identify a privilege, other legal protection, or otherwise valid reason to instruct Mr. Baker not to answer a question. Nevertheless, this violation does not warrant the extreme sanction of dismissal. MCR 2.306(D)(3) permits an objecting party to suspend a deposition in response to an examination conducted in bad faith. Counsel for Consumers chose to continue the deposition. Lesser sanctions against counsel for Wolverine are appropriate here. However, Consumers made very clear in their motion that they do not believe any sanction less than dismissal is warranted. The Court will therefore decline to impose lesser sanctions.

Consumers argues that Wolverine's counsel engaged in repeated improper speaking objections, suggesting answers to witnesses. Consumers points to clear and repeated examples of

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<sup>6</sup> MCR 2.306(C)(5)(a).

this behavior in the deposition transcripts. However, Wolverine is also able to point to repeated examples of counsel for Consumers doing the same thing during deposition of her witnesses. The mutual misbehavior of both parties here negates the applicability of sanctions.

Consumers argues that Wolverine's counsel improperly coached Mr. Baker's answer to a deposition question by going off the record while a question was pending to consult with Mr. Baker. It is not clear based on the transcript whether a question was actually pending when counsel for Consumers proposed going off the record to allow Mr. Baker time to review a filing Wolverine had previously made. Mr. Baker asked before going off the record to speak to his counsel and Consumers' counsel did not object. Dismissal is not appropriate for this violation.

Consumers argues that Wolverine misled the Court by asserting that Consumers withheld documents relating to the selection of the 2040 and 2039 retirement dates for Campbell 3. Consumers has continually alleged that no such documents exist. This Court previously found that any such documents would be relevant and must be produced if they do exist. Asking for these documents is therefore not a valid basis for sanctions.

Consumers argues that Wolverine improperly failed to produce Zach Anderson for a deposition in his individual capacity after previously deposing him as a corporate representative for Wolverine. Wolverine points to MCR 2.313(B)(2) and argues that sanctions are appropriate only for failure to obey a court order to appear for deposition. If Consumers wished to depose Mr. Anderson in his personal capacity, the correct response would be to file a motion to compel. That motion has not been filed. Sanctions are therefore inappropriate at this time.

Both sides here have engaged in unacceptable discovery abuse and are spared sanctions only by their counterparts' similar misbehavior. Parties and counsel should be warned that further bending of the court rules or this Court's orders will not be overlooked.

### **Conclusion**

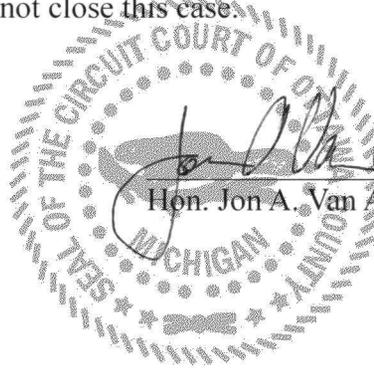
Wolverine's Motion for Partial Reconsideration is GRANTED IN PART. The Court's Order issued October 23, 2023 is amended as follows: Documents responsive to items y(ii, iii, and x) need not be produced. Items y(v, vi, vii, viii, ix, xi, and xii) and z(i, ii, and iii) have been

adequately produced. The balance of the Order remains in effect. Consumers Energy's Motion for Sanctions is DENIED.

*IT IS SO ORDERED.*

This is not a final order and does not close this case.

Date: January 2, 2024



*[Handwritten Signature]*  
Hon. Jon A. Van Allsburg, Circuit Judge