STATE OF MICHIGAN

IN THE 20TH CIRCUIT COURT FOR THE COUNTY OF OTTAWA
SPECIALIZED BUSINESS DOCKET
414 Washington Street
Grand Haven, Michigan 49417
616-846-8315
* * * * *

CONSUMERS ENERGY COMPANY,
Plaintiff / Counter-Defendant,

v

OPINION AND ORDER

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

File No. 22-006876-CB

Hon. Jon Van Allsburg

OPINION AND ORDER ON MULTIPLE DISCOVERY DISPUTES

On May 1, 2023, this Court entered an Order for Discovery Mediation. While some issues were resolved through mediation, others remain outstanding.

Wolverine's Second Renewed Motion to Compel

Wolverine argues that Consumers has refused to produce documents relating to its selection of the 2039 retirement date for Campbell 3. The core of Wolverine's remaining claim is that Consumers changed the retirement date for Campbell 3 from 2039 to 2025 in bad faith. Wolverine is requesting discovery on Consumers' earlier decision to set a 2039 retirement date as part of its 2018 Integrated Resource Plan (IRP). Consumers contends that the 2039 retirement date included in the 2018 IRP was just an accounting placeholder used for depreciation purposes and as a baseline in models of other scenarios. Interrogatory responses and deposition testimony support Consumers' allegation that no analysis of a retirement date for Campbell 3 was performed prior to fall 2020.

> Parties may obtain discovery regarding any non-privileged matter that is relevant to any party's claims or defenses and proportional to the needs of the case, taking into account all pertinent factors, including whether the burden or expense of the proposed discovery outweighs its likely benefit, the complexity of the case,

> the importance of the issues at stake in the action, the amount in controversy, and the parties' resources and access to relevant information. Information within the scope of discovery need not be admissible in evidence to be discoverable.[1]

Wolverine's theory of relevance for these documents is to compare the decision-making process setting Campbell 3's 2039 retirement date with the later decision to retire the plant in 2025. This is relevant to their claim. However, expecting Consumers to search through over 40 years of documents would be wildly disproportionate to the needs of this case. Counsel for Wolverine stated on the record that they were only asking to go back to the time frame of Consumers' 2018 IRP that made the 2039 date clear. This is a reasonable balance of burden and benefit. Similarly, a request for production of all documents that merely reference the planned 2039 retirement date would be overbroad and disproportionate. Only documents that consider, review, plan, or decide whether or when to retire Campbell 3 are responsive to this request. However, such documents would be relevant regardless of the proposed retirement year. A document that merely states that the retirement date was in 2039, without more, would not illuminate Consumers' decision-making process or have relevance to Wolverine's claim of bad faith.

To the extent that these documents have not previously been produced, Consumers is ordered to produce all non-privileged documents from the preparation for the 2018 IRP that consider, review, plan, or decide whether or when to retire Campbell 3.

Wolverine's Motion to Compel the Deposition of Garrick Rochow

Wolverine seeks to compel deposition testimony from Consumers Energy CEO, Garrick Rochow. Consumers opposes this motion, citing the apex deposition rule.

> As used by other state and federal courts, the apex-deposition rule provides that before a plaintiff may take the deposition of a high-ranking or "apex" governmental official or corporate officer, the plaintiff must demonstrate both that the governmental official or corporate officer possesses superior or unique information relevant to the issues being litigated and that the information cannot be obtained by a less intrusive method, such as by deposing lower-ranking employees.[2]

The burden of proving that the apex-deposition rule applies is on the party opposing discovery.[3] The party opposing discovery must first move for a protective order and make a

[1] MCR 2.302(B)(1).

[2] *Alberto v Toyota Motor Corp*, 289 Mich App 328; 796 NW2d 490 (2010).

[3] *Id.* at 338-39.

showing "regarding the lack of the proposed deponent's personal knowledge and that other discovery methods could produce the required information."[4] Only then is the party seeking discovery required "to demonstrate that the proposed deponent has unique personal knowledge of the subject matter of the litigation and that other methods of discovery have not produced the desired information."[5]

As CEO, Mr. Rochow is unquestionably the apex corporate officer at Consumers. There is no dispute here that Mr. Rochow was involved in the meetings and discussions that led to a recommendation to the Consumers Board of Directors that Campbell 3 be retired in 2025. Under MCR 2.313(A)(3), if the Court denies a motion to compel in whole or in part, "it may enter a protective order that it could have entered on motion made under MCR 2.302(C)." Accordingly, the Court will treat Consumers' brief in opposition to Wolverine's motion to compel as a motion for a protective order for purposes of determining whether the apex deposition rule applies.

The remaining question for the Court is whether Mr. Rochow has unique personal knowledge that cannot be obtained by Wolverine through less-intrusive methods. Consumers has argued extensively that any relevant knowledge Mr. Rochow may have had was not superior or unique because it could be obtained from other discovery methods. Consumers points to the affidavit completed by Mr. Rochow in which he testifies that he lacks superior or unique knowledge of the proposal to retire Campbell 3 in 2025, and that any personal knowledge he has is simply what was presented to him by other Consumers Energy employees. Affidavit and deposition testimony from other lower-ranking Consumers employees supports this claim.

In its Motion to Compel Testimony, Wolverine cites redacted emails and deposition testimony to support their position that Mr. Rochow had relevant personal knowledge.[6] However, all of those instances involved other lower-ranking Consumers officers or employees who have testified or still could testify to the information they provided to Mr. Rochow.

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[4] *Id.*

[5] *Id.*

[6] In deference to the parties' Stipulated Confidentiality and Protective Order, the Court will not reproduce those redacted conversations or decisions here. This opinion is based on a review of the unredacted filings.

Wolverine cites several unpublished federal district court cases from other states that apply the apex-deposition rule, but these cases are factually distinct from the situation here.[7] In *Great Southland Ltd v Landash Corp*, the apex deposition rule was held not to apply to a CEO who was copied on multiple emails and directed another employee to get involved.[8] There, the party opposing deposition failed to present existing declarations and depositions from lower-level employees. Here, that evidence has been produced showing less intrusive methods of obtaining the information. In *Khan v. Boohoo.com USA, Inc.*, the apex deposition rule was held not to apply to a CEO where emails showed he demanded sole control of relevant decisions.[9] No such evidence of unilateral decision-making by Mr. Rochow has been produced. In *Wonderland Nurserygoods Co v Baby Trend, Inc*, the apex deposition rule was held not to apply to a CEO where contradictory evidence existed as to whether the CEO had directed certain actions or participated in product design.[10] The district court determined that the conflict weighed in favor of allowing the deposition. Here, no evidence has been presented disputing Consumers' allegation that Mr. Rochow was a member of the senior management team but had no unique knowledge of the proposal to retire Campbell 3 not shared by other members of the management team.

The apex deposition rule applies here. Wolverine's motion to compel the deposition of Garrick Rochow is denied.

Consumers' Motion to Compel Depositions

Consumers asks the court for an order compelling Wolverine to produce its CEO, Eric Baker, for deposition. Wolverine has designated Mr. Baker as its corporate representative on deposition topics including "all facts supporting Wolverine's allegations that Consumers Energy acted in bad faith in deciding to retire Campbell 3 in 2025." However, counsel for Consumers concedes that the parties previously agreed that Mr. Baker's deposition would be set for October

[7] The apex-deposition rule in *Alberto* is based on precedent from federal appellate and district courts. *Alberto*, 289 Mich App at 334. "[I]n the absence of available Michigan precedents, we turn to federal cases construing the similar federal rule for guidance." *Brenner v Marathon Oil Co*, 222 Mich App 128, 133; 565 NW2d 1 (1997).

[8] *Great Southland Ltd v Landash Corp*, unpublished opinion of the District Court for the Southern District of Ohio, issued May 6, 2021 (No. 2:17-CV-719).

[9] *Khan v. Boohoo.com USA, Inc.*, unpublished opinion of the District Court for the Central District of California, issued July 28, 2021 (No. CV 20-03332 GW).

[10] *Wonderland Nurserygoods Co v Baby Trend, Inc*, unpublished opinion of the District Court for the Central District of California, issued January 7, 2022 (No. 5:14-cv-1153-JWH).

17, 2023. Consumers' objections to that date arise out of their proposed fact discovery deadline of October 18, 2023. However, Consumers also requests the ability to perform additional limited discovery if needed after the Baker deposition, despite the close of fact discovery. The court is opposed to setting a deadline for fact discovery that would not actually close fact discovery. Consumers' proposed deposition schedule and cut-off date would give them between seven and fourteen days of follow-up discovery after Mr. Baker's deposition.

The court will therefore set a deadline for fact discovery of October 30, 2023. Assuming Mr. Baker's deposition went forward as planned, this will give Consumers a week to do any follow-up discovery. Consumers requested five days from the close of fact discovery to the deadline for serving affirmative expert reports. Wolverine requested ten days in their proposed scheduling order but lowered the request to seven days at oral argument. The court will give them seven days, which makes affirmative expert reports due by November 6, 2023. Wolverine's proposed schedule gives Consumers' experts only seven days to prepare a rebuttal report, which is an unreasonably short amount of time. Consumers requested twenty-one days to prepare a rebuttal expert report. Three weeks from November 6 lands on the Monday after Thanksgiving, so the court will set the rebuttal report deadline for the following Monday, November 27, 2023.

The parties' proposed schedules agree that expert discovery can be completed within seven days of the rebuttal report deadline and that dispositive motions can be completed and filed within an additional seven days. Expert discovery must be completed by December 4, 2023 and dispositive motions must be filed by December 18, 2023. Respecting the 21-day filing requirement in MCR 2.116(G)(1)(a)(i) will unfortunately require moving the previously set dispositive motion hearing date to January 8, 2024. The court remains optimistic and does not believe that this delay will necessitate any further changes to the schedule.

Wolverine has named three potential expert witnesses who may testify: Rich Polich, Steven Hunt, and Matt King. Consumers has requested that the court order Wolverine to confirm exactly which of these experts they intend to call at trial so that depositions can be scheduled. Counsel for Wolverine stated on the record that they only anticipate calling Mr. Polich to testify, though that could change based on the fact depositions that remain to be taken. Under MCR 2.302(B)(4), a party may take the deposition of a person whom the other party expects to call as an expert witness at trial but may not discover facts known or opinions held by an expert who is not expected to be called as a witness at trial, except under exceptional circumstances. Consumers is entitled to depose Mr. Polich and any other experts Wolverine expects to call on mutually agreeable dates prior to the close of expert discovery on December 4, 2023.

Consumers' Third Motion to Compel

In Consumers' Third Motion to Compel Discovery, Consumers argues that Wolverine has been deficient in fulfilling its discovery obligations. Consumers first alleges that the search terms and parameters used by Wolverine were deficient.

Consumers has had Wolverine's search terms and parameters since March 3, 2023, when parties were ordered to exchange them. Consumers now objects to this production, alleging that certain custodians were omitted, that the search terms used were too narrow, that the search terms were not applied uniformly to all custodians, that the date range was inadequate, and that non-email documents were not adequately searched. However, all of these issues were clearly evident on the face of the terms and parameters disclosure in March. Consumers has produced no evidence that it timely objected or otherwise notified Wolverine about its specific concerns regarding Wolverine's search terms and parameters until September 2023.

This absence is conspicuous in light of the extensive evidence both sides have offered showing their attempts to resolve the other discovery issues here, including a March 23, 2023 letter from Consumers to Wolverine alleging other deficiencies in Wolverine's document production and a March 8, 2023 letter from Wolverine to Consumers independently alleging that many of these same deficiencies existed in Consumers' document production. Even in light of the May 1, 2023 order to mediate discovery disputes, Consumers failed to demonstrate its opposition to Wolverine's search terms within a reasonable time and thereby waived its objection to them. *In Ford Motor Co v Edgewood Properties, Inc*, a federal court took the same approach in denying a delayed motion to compel production of documents that were first produced without accompanying metadata, holding that "it is without question unduly burdensome to a party months after production to require that party to reconstitute their *entire* production to appease a late objection."[11]

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[11] *Ford Motor Co v Edgewood Properties, Inc*, 257 FRD 418, 426 (DNJ, 2009).

Even if not waived, Consumers' proposed search terms are wildly overbroad in proportion to the needs of the case. Consumers has not justified the additional terms, which include terms as broad as "coal," "nuclear," "contract AND price," and "energy AND sale." The disclosed list of search terms used by Wolverine and included by Consumers as an exhibit flatly contradicts the Consumers claim that Wolverine only searched for the term "Campbell 3" and only in conjunction with the words "retire" or "Voices for Cooperative Power." Consumers also cites to *Brown v Tellermate Holdings, Ltd* for the proposition that every custodian must be required to apply every search term.[12] This proposition is simply not supported by the case.

Nor do the deposition references to 2016 legislative and regulatory changes support more than tripling the date range of documents to be searched, going from roughly two to seven years. Consumers points to deposition testimony from Ron McCullick indicating that other individuals would have responsive documents, but the testimony cited only establishes that documents were possessed by Zach Anderson, whose "non-Outlook locations" were searched for the responsive documents referenced. To the extent those documents referenced in the cited portions of Ron McCullick's deposition[13] have not previously been produced or a valid privilege asserted, Wolverine is ordered to produce those documents.

Consumers has not carried its burden to show that unproduced, responsive documents are in the possession of Wolverine employees. "[I]n the face of a protest of 'inexplicable deficiencies' in a party's production, vague and speculative notions that there, in essence, *should be more*, are insufficient to compel judicial action."[14]

On September 14, 2023, Consumers served its Sixth Set of Requests for Production of Documents. These requests were in response to the public announcement that Wolverine had made a deal to purchase energy and capacity from the Palisades nuclear power plant. Wolverine's ability and cost to purchase energy and capacity is directly relevant to Wolverine's theory of damages and to Wolverine's mitigation of those damages. While Consumers filed its motion to compel before Wolverine's responses to Consumers' request for production of documents were due, that

[12] *Brown v Tellermate Holdings Ltd*, No. 2:11-CV-1122, 2014 WL 2987051, at *16 (SD Ohio, July 1, 2014), adopted as mod No. 2:11-CV-1122, 2015 WL 4742686 (SD Ohio, August 11, 2015).

[13] McCullick Dep. Tr., 36:15-37:11, 46:6-48:1, 48:21–25, 62:2-63:25, 64:9-66:15.

[14] *Ford Motor Co*, 257 FRD at 427-28, citing *United States v O'Keefe*, 537 F Supp 2d 14 (DDC, 2008).

deadline has since passed. To the extent that the documents requested in Consumers' Sixth Set of Requests for Production of Documents have not already been produced or a valid privilege asserted, Wolverine is ordered to produce those documents.

In its proposed order, Consumers has asked the court to order the production of twenty-seven subcategories of documents that were referenced in deposition testimony. "The Michigan court rules establish an open, broad discovery policy. Discovery is permitted for any relevant matter, unless privileged. However, a trial court should also protect the interests of the party opposing discovery so as not to subject that party to excessive, abusive, or irrelevant discovery requests."[15] A trial court is within its discretion to limit discovery when it becomes excessive or abusive.[16]

Consumers gives only a boilerplate explanation for how the documents are relevant in three categories: documents related to whether Wolverine anticipated or should have anticipated an accelerated retirement schedule for Campbell 3 based on market trends toward decarbonization, documents related to Wolverine's and its member's damages, and documents related to Wolverine's mitigation (or failure to mitigate) its damages. Wolverine, however, has failed to present any evidence of the burdens it would incur if it complied with Consumers' request.

Consumers asks for:

a. The models and forecasts, and all underlying documents and communications relating to those models and forecasts, referenced by Wolverine's witnesses at Johnson Dep Tr., 13:4-11, 16:2-24, 18:19–25, 52:7-12, 58:11-19, 82:3-5, 82:9-25, 84:13-25, 85:18-25, 147:18-26, 149:24-25; and Anderson Dep. Tr., 13:10–14:16, 16:18-17:7, 22:10-18, 28:13-16, 29:10-12, 40:16-25, 45:7-16. This is wildly overbroad in comparison to Wolverine's claims. It seeks huge amounts of irrelevant information on Wolverine's business. Consumers has not demonstrated how this request would be responsive to any of its requests for production.
b. All documents related to strategic planning from 2016 as discussed at Johnson Dep Tr., 19:9-11. This is beyond the scope of Consumers' requests for production as well as the cited transcript, which does not discuss strategic planning from 2016.

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[15] *Bronson Methodist Hosp v Auto-Owners Ins Co*, 295 Mich App 431; 814 NW2d 670 (2012) (cleaned up).

[16] *Chastain v Gen Motors Corp*, 254 Mich App 576, 593; 657 NW2d 804 (2002).

c. All documents and communications generated by, relied upon by, or disseminated by Wolverine's power supply team June 1, 2019, as described at Johnson Dep. Tr., 28:24–29:1. The transcript here does not mention any documents. A request for all documents that this group has ever touched is overbroad.

d. All ACES marketing materials, Power System/Power Engineers data, and other models relied on for long-term planning June 1, 2019, as discussed at Johnson Dep. Tr., 3:09-31:25. [sic] Again, here there is no explanation for how this information would be relevant to Wolverine's claim or Consumers' defenses. A generic explanation that this shows an attempt to mitigate damages by planning for long-term needs is not adequate to demonstrate that the burden of providing these documents outweighs its benefit.

e. All membership agreements between Wolverine and each of its members in effect since June 1, 2019, to present. These documents are relevant to Wolverine's claim that its members will be harmed by the 2025 shutdown of Campbell 3 and Wolverine's calculation of damages to those members. These must be produced.

f. All written policies pertaining to Wolverine's allocation of losses to its members and communications and documents related to Wolverine's decision not to allocate its losses related to Campbell 3 to its members since January 1, 2016, and records pertaining to how Wolverine treated other retirements of facilities, as discussed at McCullick Dep. Tr., 100:5-101:7. Wolverine's allocation of losses to its members is directly relevant to Wolverine's claimed damages. Policies and communications on this matter, as well as records of the policies in action are relevant. These documents must be produced.

g. Decarbonization policies that Wolverine presented to or discussed with its Board, including all underlying documents and communications about those policies, from January 1, 2016, to present, as discussed at Johnson Dep. Tr., 20:8–16. Evidence of existing decarbonization polices or strategies has not been shown to be relevant to the claims at issue here.

h. Documents and communications generated by, relied on by, or disseminated by, Wolverine's policy and regulatory team that tracks trends on decarbonization from January 1, 2016, to present, as discussed at Johnson Dep. Tr., 32:21–33:8. Again, a request for all documents that a team has touched is overbroad in proportion to the needs of the case.

i. All documents and communications related to Wolverine's monitoring of coal plant closures from January 1, 2016, to present, as discussed at Johnson Dep. Tr., 81:6–16.

Wolverine's tracking of coal plant closures is directly relevant to Consumers' defenses here, so these documents must be produced.

j. Data, communications, and other documents discussing and underlying the power supply presentations given to Wolverine's board so that Consumers Energy may ascertain what the presentations reference and include, as discussed at Johnson Dep. Tr., 156:23-157:9, 161:9-15, 164:4-5. Here, Consumers is requesting specific data used to support charts in a previously disclosed document. These documents must be produced.

k. Native versions, along with all documents underlying, informing, or discussed in the data presented in WPSC0003627 (Deposition Exhibit No. 7, discussed at McCullick Dep Tr. pp. 90–94). These are specific documents that must be produced.

l. An accurate list of the undepreciated assets with correct retirement dates and documentation that explains why retirement dates were chosen for each asset, as discussed at McCullick Dep. Tr., 73:2-75:6, 76:3-77:4, 78:16-79:6, 79:22-81:7. This is again a specific request for particular relevant facts and must be produced.

m. All internal correspondence discussing Campbell 3's retirement, including the written communications identified at Johnson Dep. Tr., 64:15-20 and McCullick Dep. Tr., 30:6-16. These documents are relevant and must be produced.

n. Documents related to any previous adjustments Wolverine has made to Campbell 3's depreciation date, including all underlying modeling, documents, and communications informing that change, as was discussed at McCullick Dep. Tr., 35:16 – 37:7. Wolverine's treatment of Campbell 3's depreciation date is directly relevant to Consumers' defenses that the previous 2039 retirement date was a mere accounting placeholder. These documents must be produced.

o. Documents demonstrating Wolverine's electric capacity for the 2010/2011 and 2013/2014 years, as requested in RFP No. 5. Wolverine's capacity prior to the events at issue is of questionable relevance, but the burden here is likely light and does not outweigh the potential benefit.

p. Documents related to Mr. McCullick's calculation of the undepreciated book value of the assets for Campbell 3, as discussed at McCullick Dep. Tr., 46:6-48:1; 48:21–25. These documents relate directly to Wolverine's calculation of damages and must be produced.

q. Documents related to the information Mr. McCullick provided to Mr. Anderson for calculating the $13,633,505 figure mentioned in Wolverine's interrogatory responses, as discussed at McCullick Dep. Tr., 62:2-63:25. These documents relate directly to Wolverine's calculation of damages and must be produced.

r. The original Excel documents calculating the figures in Exhibit 4 to the depositions, which have the embedded formula used to arrive at those figures, discussed at McCullick Dep. Tr., 64:9-66:15. These documents relate directly to Wolverine's calculation of damages and must be produced.

s. The complete records containing the excerpted pages produced at PSC00024499 and WPSC0024500 and the policies mentioned in WPSC0023826. WPSC0024499 and WPSC0024500 are slides from a presentation comparing 2040 and 2025 Campbell 3 depreciation dates. The context of the full presentation is relevant, and Wolverine has made no argument against their inclusion. Those presentations must be produced. It is not clear to the court what document is recorded at WPSC0023826. No relevance has been shown.

t. Documents confirming the purchases, prices, and obligations for the purchases reflected on WPSC0003699. WPSC0003699 is a chart showing Wolverine's capacity positions and purchases over time. Documents must be produced sufficient to confirm the data in that chart.

u. Documents and communications relating to Wolverine's purchase or analysis of solar energy, or other forms of energy, to replace the energy and capacity from Campbell 3, as discussed at Johnson Dep. Tr., 21:12–15, 104:6–13,105:3–9. These documents are directly related to Wolverine's mitigation efforts and must be produced.

v. Reports and presentations distributed internally or given to Wolverine's Board, as well as all communications, documents, data, and models underlying and informing those presentations, regarding alternative energy sources to replace Campbell 3, as discussed at Johnson Dep. Tr. at 109:11-110:1; Anderson Dep. Tr. at 30:9–31:6; 34:3–15. Reports and presentations regarding alternative energy sources to replace Campbell 3 are relevant and must be produced. Documents and communications directly related to those reports and presentations are also relevant and must be produced, but calling for all data underlying and informing those reports is overbroad.

w. The underlying figures, formulas, and data referenced at Johnson Dep. Tr., 17:12-119:18; 121:23-122:16. Consumers has failed to provide the court with this portion of the Johnson transcript. This data need not be produced.

x. The Power Purchase Agreement for energy and capacity from Palisades Nuclear Plant ("Palisades PPA"), and any related agreements, assignments, or amendments. This agreement is relevant to Wolverine's mitigation efforts and must be produced.

y. All analyses, modeling, summaries, and documents pertaining to the Palisades PPA, including but not limited to the following:

   i. any comparisons between entering into the Palisades PPA and other options for Wolverine Power procuring energy and/or capacity from other sources;

   ii. communications with Wolverine Power's members about the Palisades PPA;

   iii. communications with Wolverine Power's Board of Directors about the Palisades PPA;

   iv. Written statements issued by Wolverine regarding the Palisades PPA;

   v. the forecasted costs to Wolverine Power of purchasing energy and capacity under the Palisades PPA;

   vi. any comparisons of costs to Wolverine Power of purchasing energy and capacity under the Palisades PPA and costs of purchasing energy and capacity from Campbell 3;

   vii. any comparisons of costs to Wolverine Power of purchasing energy and capacity under the Palisades PPA and costs of purchasing energy and capacity from sources other than through the Palisades PPA, including but not limited to alternative agreements;

   viii. the forecasted amount of energy and capacity on an annual basis that Wolverine Power expects to receive through the Palisades PPA;

   ix. the forecasted price that Wolverine Power will pay under the Palisades PPA for each year from 2025 to 2039;

   x. the forecasted price that Wolverine Power will charge its members for energy from the Palisades PPA from 2025 to 2039;

   xi. any analyses or comparisons of forecasted prices under the Palisades PPA to (i) past prices for energy and/or capacity from Campbell 3; and (ii) anticipated future prices of energy and/or capacity procured and/or purchased through other sources; and

xii. the anticipated date when Wolverine Power expects to start receiving energy and/or capacity under the Palisades PPA. The specific requests are relevant to Wolverine's mitigation efforts and must be produced. However, the request for all analyses, modeling, summaries, and documents pertaining to the Palisades PPA is overbroad. Documents pertaining to the Palisades PPA but not covered by any of the twelve subcategories here need not be produced.

z. All analysis conducted about the Palisades PPA and evaluating whether to execute the Palisades PPA, including but not limited to those identified by Eric Baker:

i. That Palisades PPA is "reasonably competitive with other carbon-free alternatives today on the market,"

ii. That "restarting Palisades is a more affordable proposition than building a new plant," and

iii. That "Palisades has an existing plant that's been largely fully deprecated [sic: depreciated] [and] the costs of restarting this plant are much more manageable for the owner and that translates into more affordable power offtake agreements." These analyses speak to the comparison between the Palisades PPA and other carbon-free alternatives, which are relevant to Wolverine's mitigation efforts. These documents must be produced.

aa. Presentations, meeting materials, meeting minutes, and other documents relating to informing Wolverine's Board of Directors and its members about the Palisades PPA, including approval of the Palisades PPA. The internal process of informing Wolverine's board and members about the Palisades PPA is irrelevant to any claim or defense at issue here. These documents need not be produced.

The court's decision that various documents listed above must be produced does not negate any claims of privilege regarding particular documents, nor does it require Wolverine to produce any document that it has already produced.

Consumers goes on to argue that the court should order Wolverine to make a complete response to Consumers' Requests for Admission Nos. 8-21 and 23-50 and Interrogatory No 13. Wolverine states that, after initially objecting to providing any response, it has now served supplemental responses that fully address any deficiencies. Consumers does not note any further disagreement on this issue.

Finally, Consumers argues that twenty documents included in Wolverine's privilege log are not subject to privilege. Wolverine has asserted attorney-client privilege over three email chains that included Kendra Kloss as a sender or recipient. Kendra Kloss is identified by Wolverine as the administrative assistant to Joseph Bauman, Wolverine's Chief Legal Officer. "The attorney-client privilege attaches to direct communication between a client and his attorney as well as communications made through their respective agents."[17] "Where an attorney's client is an organization, the privilege extends to those communications between attorneys and all agents or employees of the organization authorized to speak on its behalf in relation to the subject matter of the communication."[18] Here, Ms. Kloss was an agent of Mr. Baumann as his administrative assistant and privilege is not waived by her presence.

Consumers next points to fourteen more email chains that included Kacy Wickenhauser, Wolverine's Chief Human Resources Officer. As an officer of the corporation, Ms. Wickenhauser would have the authority to speak for Wolverine in relation to the subject matter of the emails in question. Attorney-client privilege was not waived by her inclusion.

Consumers disputes Wolverine's assertion of attorney-client privilege over three email chains based on their alleged lack of legal advice. Wolverine describes the privilege assertions as: "Confidential email and attachments containing and discussing attorney-client communications with Wolverine's in-house counsel for purpose of seeking legal advice concerning Consumers' 2021 IRP submission and associated capacity repercussions," "Confidential email and attachments containing and discussing attorney-client communications with Wolverine's in-house counsel for purpose of seeking legal advice concerning potential loss from Campbell 3 retirement," and "Confidential email containing and discussing attorney-client communications with Wolverine's in-house counsel for purpose of seeking legal advice concerning repercussions of Campbell 3 closure on electric capacity in light of Operating Agreement." Where documents asserts a plausible

[17] *Reed Dairy Farm v Consumers Power Co*, 227 Mich App 614, 618; 576 NW2d 709 (1998).

[18] *Id.* at 619.

showing of privilege, the appropriate response is an *in camera* review by the court to determine if privilege is appropriate.

IT IS HEREBY ORDERED AS FOLLOWS:

1. To the extent that these documents have not previously been produced, Consumers is ordered to produce all non-privileged documents from the preparation for the 2018 IRP that consider, review, plan, or decide whether or when to retire Campbell 3.
2. Wolverine's motion to compel the deposition of Garrick Rochow is DENIED.
3. The previous Scheduling Order is amended such that Fact Discovery shall be completed by October 30, 2023. Affirmative expert reports shall be served by November 6, 2023. Rebuttal expert reports shall be served by November 27, 2023. Expert discovery shall be completed by December 4, 2023. Dispositive motions shall be filed by December 18, 2023 and heard on January 8, 2024.
4. To the extent that the documents requested in Consumers' Sixth Set of Requests for Production of Documents have not already been produced or a valid privilege asserted, Wolverine is ordered to produce those documents.
5. To the extent that the documents have not already been produced or a valid privilege asserted, documents responsive to the categories e, f, i, j, k, l, m, n, o, p, q, r, s, t, u, v, w, y, and z must be produced in accordance with the qualifications in this opinion.
6. Documents 20, 34, and 41 on Wolverine's Second Amended Privilege Log must be presented to the court for *in camera* review.

The issue of sanctions is reserved.

IT IS SO ORDERED.

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

Date: October 23, 2023

Hon. Jon A. Van Allsburg, Circuit Judge