

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 CONSUMERS' MOTION FOR
CLARIFICATION AND/OR PARTIAL RECONSIDERATION**

Consumers Energy has filed a motion requesting clarification of this Court’s Opinion and Order dated October 24, 2022. The Opinion and Order held that “Consumers may, in its sole discretion, retire from service any and all property included in Campbell 3, PROVIDED that Consumers ‘shall continue to operate CAMPBELL 3 and make necessary Capital Improvements in a manner consistent with’ the Operating Agreement while this litigation remains pending.” Consumers argues that being forced to continue to operate the plant while this litigation is pending nullifies Consumers’ contractual authority to retire the plant in its sole discretion. Consumers asks this Court to either clarify its opinion to allow Consumers to operate Campbell 3 consistent with a May 2025 retirement date or reconsider the opinion and strike the language requiring the plant to continue operations while litigation continues.

Courts must “read contracts as a whole, giving harmonious effect, if possible, to each word and phrase.”¹ In doing so, courts must “avoid an interpretation that would render any part of the

¹ *Wilkie v Auto-Owners Ins Co*, 469 Mich 41, 51; 664 NW2d 776 (2003).

contract surplusage or nugatory.”² The Operating Agreement is the contract between the parties and states, on the one hand, “CONSUMERS shall have sole authority in decisions regarding the retirement from service of any and all property included in CAMPBELL 3.”³ The Agreement also states, on the other hand, “pending the resolution of the disagreement by arbitration or litigation, CONSUMERS shall continue to operate CAMPBELL 3 and make necessary Capital Improvements in a manner consistent with this Agreement[.]”⁴ These clauses can be read in harmony. Section 7.5 of the Operating Agreement gives Consumers “sole authority” to make retirement decisions, not unlimited authority. Section 18.5 simply limits the way that authority may be exercised while litigation is active.

Consumers remains obligated to make “necessary Capital Improvements in a manner consistent with” the Operating Agreement while this litigation is ongoing. The Operating Agreement does not strictly define what improvements are necessary. Because “contracts must be construed consistent with common sense and in a manner that avoids absurd results,” and because Consumers is only ordered to make “*necessary* Capital Improvements,” Consumers is not obligated to continue to maintain Campbell 3 as if the plant was going to operate until 2039.⁵ Consumers may therefore continue to operate and invest in Campbell 3 consistent with the May 2025 retirement date.⁶

Consumers also raises, for the first time in this action, the argument that the Michigan Public Service Commission (“MPSC”) has primary jurisdiction over the continued operation of Campbell 3. Requiring Consumers to continue to operate Campbell 3 in accordance with the parties’ Operating Agreement while this litigation is ongoing would not be inconsistent with the MPSC’s previous approval of Consumers’ decision to retire Campbell 3 in 2025.⁷

² *Klapp v United Ins Grp Agency*, 468 Mich 459, 468; 663 NW2d 447 (2003).

³ Operating Agreement, § 7.5.

⁴ Operating Agreement, § 18.5.

⁵ *Parrish v Paul Revere Life Ins Co*, 103 Mich App 95, 97; 302 NW2d 332, 333 (1981).

⁶ Consumers has not identified any actions that it is required to take as “necessary Capital Improvements” that are inconsistent with the planned May 2025 retirement of Campbell 3.

⁷ Further, this Court is not aware of any circumstances that would prevent the Court from completing this litigation in accordance with Case Management Guidelines prior to Consumer’s intended retirement date.

Primary jurisdiction applies where a claim is originally cognizable in the courts and comes into play whenever enforcement of the claim requires the resolution of issues which, under a regulatory scheme, have been placed within the special competence of an administrative body.⁸

“[I]n such a case, the judicial process is suspended pending referral of such issues to the administrative body for its views.”⁹ The doctrine of primary jurisdiction is “a concept of judicial discretion and deference.”¹⁰ Like subject-matter jurisdiction, primary jurisdiction is not subject to waiver by a party’s prior failure to assert it.¹¹ “It may be raised *whenever* a dispute can more appropriately be resolved by the administrative agency with authority over such claims.”¹² “No fixed formula exists for applying the doctrine of primary jurisdiction. In every case the question is whether the reasons for the existence of the doctrine are present and whether the purposes it serves will be aided by its application in the particular litigation.”¹³ There are three major reasons for the existence of the doctrine.

First, a court should consider the extent to which the agency's specialized expertise makes it a preferable forum for resolving the issue. Second, it should consider the need for uniform resolution of the issue. Third, it should consider the potential that judicial resolution of the issue will have an adverse impact on the agency's performance of its regulatory responsibilities.¹⁴

The issue here is specifically whether the Operating Agreement and this Court’s order allow Consumers to operate and make necessary capital improvements to Campbell 3 consistent with a May 2025 retirement date, or if Consumers must, for the duration of this litigation, maintain the plant in accordance with the originally planned 2039 retirement date.

⁸ *Rinaldo's Const Corp v Michigan Bell Tel Co*, 454 Mich 65, 70; 559 NW2d 647 (1997) (cleaned up).

⁹ *Travelers Ins Co v Detroit Edison Co*, 465 Mich 185, 198; 631 NW2d 733 (2001).

¹⁰ *Michigan Basic Prop Ins Ass'n v Detroit Edison Co*, 240 Mich App 524, 529; 618 NW2d 32 (2000).

¹¹ *Travelers*, 465 Mich at 204.

¹² *Id.*

¹³ *Attorney Gen v Blue Cross Blue Shield of Michigan*, 291 Mich App 64, 85; 810 NW2d 603 (2010).

¹⁴ *Id.* at 86.

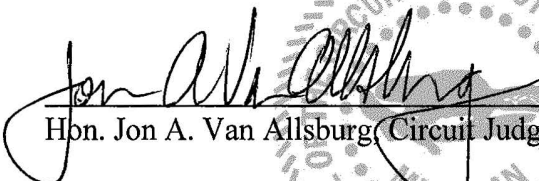
The MPSC has intimate knowledge of the specialized rules and regulations surrounding public utilities. However, those rules and regulations do not come into play here. The dispute at issue underlying this motion is one of contractual interpretation. No specialized technical knowledge is required to resolve this dispute. The Court is capable of determining the obligations of the parties under the Operating Agreement.¹⁵ Secondly, the Operating Agreement is a contract specifically involving these parties. There is no demonstrated need for uniform resolution of the terms of a specific contract governing a single specific power plant. This is unlike the facts in *Travelers Ins Co*, where the Supreme Court found that there was a need for uniformity and consistency in the application of a standard service contract.¹⁶ Finally, this decision does not create the potential for an adverse impact on the MPSC's performance. The MPSC will regulate Campbell 3 through May 2025 regardless of the resolution of this issue. The facts present here do not support the application of the primary jurisdiction doctrine over this issue.

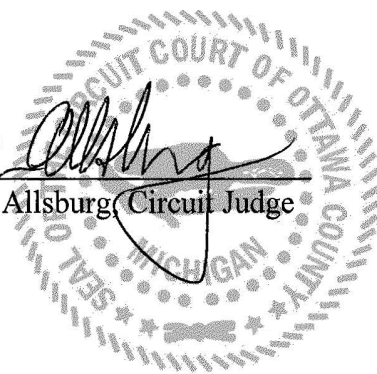
The Court GRANTS Consumers' request to clarify its previous ruling. The Court's order dated October 24, 2022, is amended to add the following sentence: Consumers' continued operation and investments in Campbell 3 shall be made consistent with its obligations under the Operating Agreement and consistent with a May 2025 retirement date, provided that while this litigation remains pending it shall not do so in a manner that would leave Consumers unable to meet its contractual obligations after May 2025.

IT IS SO ORDERED.

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

Date: May 15, 2023


Hon. Jon A. Van Allsburg (Circuit Judge)



¹⁵ *Attorney Gen v Diamond Mortg Co*, 414 Mich 603, 615; 327 NW2d 805 (1982).

¹⁶ *Travelers*, 465 Mich at 207.