STATE OF VERMONT
PUBLIC UTILITY COMMISSION

Case No. 17-5114-PET

VEPP Inc. petition re: Comtu Falls and Nantanna Mill Dam, Rule 4.100 missing rates for November & December 2018 as well as January, February & March, 2020	

Order entered: 09/21/2018

FINAL ORDER RE: RECOMMENDATION FOR CONTRACT PAYMENT

I. INTRODUCTION

This case involves a petition filed by VEPP Inc. ("Purchasing Agent") concerning the interpretation of two Vermont Public Utility Commission ("Commission") Rule 4.100[1] power purchase agreements ("PPAs") for the output of the Comtu Falls and Nantanna Mill Dam hydroelectric facilities. The facilities are both owned and represented by Gravity Renewables Inc. ("Gravity"). The PPAs each have stated terms of 30 years and contain so called "non-levelized" rate schedules, meaning that the price paid for power generally escalates over time, based on rate forecasts adopted by the Commission in 1985.[2] The 30-year PPA terms began on the date the facilities began operation. Comtu Falls began operation on January 1, 1989, and Nantanna Mill Dam began on April 1, 1990.

The rate schedules specify 30 "power years" of on-peak and off-peak rates which are divided into a "winter power period" (November 1 – April 30) and a "summer power period" (May 1 – October 31). The issues presented in this case arise because the beginning of the PPA term did not coincide with the beginning of the first power year specified in the rate schedules. As a result, the final power year stated in the rate schedules ends on October 31, which is several months before the date the PPAs' 30-year terms expire.[3] Therefore, it is not clear what rates the facilities should receive for their final months of operation. Gravity seeks to continue to receive the rates it received during the final power year of the PPAs. In contrast, the Vermont

[1] Rule 4.100 implements a federal law called the Public Utility Regulatory Policies Act ("PURPA").
[2] PPAs at Attachment B; *Small Power Production rates pursuant to Rule 4.100*, Docket 4933, Order of November 18, 1985.
[3] Comtu Falls' PPA expires December 31, 2018, while Nantanna Mill Dam's PPA expires on March 31, 2020.

distribution utilities argue that continuing to pay such rates would be inconsistent with the intent of the PPAs.

In this proposal for decision, I recommend that the first period of winter rates specified in the PPAs, escalated to today's dollars, serve as the rates for the remaining months of the PPAs.

II. PROCEDURAL HISTORY

On December 7, 2017, the Purchasing Agent filed the petition.

On January 9, 2018, Gravity filed a response to the petition.

On February 22, 2018, a prehearing conference was held.

On March 29, 2018, a second prehearing conference was held. The parties agreed that they would wait until the resolution of Case Number 17-4528-PET[4] and then file briefs addressing the applicability of that decision to the facts of this case. The parties were also directed to address whether any additional process was necessary.[5]

On May 16, 2018, Vermont Electric Cooperative Inc., Burlington Electric Department, the Vermont Public Power Supply Authority, Washington Electric Cooperative Inc., the Town of Stowe Electric Department, and Green Mountain Power Corporation (collectively the "DUs") filed a joint brief.

On May 17, 2018, Gravity filed its brief.

On May 17, 2018, the Vermont Department of Public Service (the "Department") filed its brief.

On June 1, 2018, Gravity filed a reply brief and supporting documents.

On June 1, 2018, the DUs filed a reply brief.

On June 18, 2018, I requested supplemental briefing from the Department and DUs.

On July 2, 2018, the Department and DUs filed supplemental briefs.

No party has requested an evidentiary hearing. Accordingly, the following documents are admitted as if presented at a hearing: the Comtu Falls PPA and the Nantanna Mill PPA.

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[4] *Petition by VEPP, Inc. regarding Rule 4.100 contract for the Sheldon Springs Hydroelectric Project* ("*Sheldon Springs*"), Case No. 17-4528-PET, Order of May 2, 2018, at 15.

[5] *VEPP Inc. petition re: Comtu Falls and Nantanna Mill Dam*, Case No. 17-5114-PET, Order of April 5, 2018.

III. POSITIONS OF THE PARTIES

DUs

The DUs' position is that the facts of this case are similar to those in Case No. 17-4528-PET ("*Sheldon Springs*") and, therefore, these cases should be resolved in the same manner as *Sheldon Springs* by using the first winter-power-period rates for the final months of the PPAs. The DUS argued that the PPAs specify 30 years of non-levelized rates that were approved by the Commission. The DUs represented that the Purchasing Agent has paid these facilities these rates since the commencement of commercial operation of the projects. The DUs contended that the Comtu Falls and Nantanna Mill projects have already been paid the last and greatest non-levelized rates set in their respective PPAs but that they have not been paid for the missing first months (two months in the case of Comtu Falls and five months in the case of Nantanna Mill). Therefore, according to the DUs, the Commission should derive the non-levelized rates for the remainder of the contract terms based on the PPA rates for the months just prior to each project's commercial operation date escalated to today's dollars. The DUs stated that the appropriate escalation rate is the GDP Implicit Price Deflator.

In response to Gravity's arguments concerning course of performance and the statute of limitations, the DUs argued that Gravity misconstrues their position. The DUs maintained that they "do not contest the way the contract was administered and thus are not trying to 'rewrite the manner in which the rates for power are determined going back to the inception of these supply arrangements,' as Gravity contends." Therefore, according to the DUs, Gravity's arguments concerning course of performance and statute of limitations do not apply in this case. The DUs countered that the issue in this case is "how best to interpret the PPAs to appropriately adjust the five months of unpaid Nantanna Mill PPA rates and two months of unpaid Comtu Falls PPA rates to provide a full 30-year pricing schedule given the mismatch between the production dates and the PPA rate schedules."

Gravity

In its initial response to the Purchasing Agent's petition, Gravity argued that "[t]he [Comtu Falls] PPA provides no distinction between 'power year' and 'calendar year', no definition for these terms, and therefore the best interpretation of the PPA is that a power year is

synonymous with a calendar year." Therefore, Gravity contended that Comtu Falls should receive the winter power period rates specified for power year 2018 for its final two months of operation because those two months are in calendar year 2018. Gravity agreed that the Nantanna Mill Dam PPA did not specify rates after December 2019. Gravity stated that it did not object to receiving the 2019 rates for its production in January through March of 2020.

According to Gravity, "setting the rates based on the parties' expectations at the start of the . . . PPAs assures that both the sellers' and the buyer's expectation interests are satisfied, and the rates for the PPAs are based on the information available at the start of the contracts." Gravity argues that qualifying facilities are entitled to sell power pursuant to a legally enforceable obligation with the rates based on "[t]he avoided costs calculated at the time the obligation is incurred," which is the basis for the PPAs.[6]

With respect to the applicability of the *Sheldon Springs* decision, Gravity distinguishes the facts of this case, asserting that the PPAs at issue in this case were not paid out of sequence. For example, Gravity states that "[b]ecause Comtu was generating power when the PPA began and because there is no value prior to January 1, 1989 published in the Comtu PPA, the payments made under the Comtu PPA were neither accelerated nor out of sequence."

Gravity maintained that the parties' course of performance is relevant to how the Commission should interpret the PPAs. Gravity asserted that the parties have engaged in repeated conduct and no party objected to the sequence of payments made by the Purchasing Agent. Therefore, according to Gravity, the course of performance of the parties is relevant to ascertaining the meaning of the PPAs. Gravity also argued that, to the extent that the DUs' arguments are intended to correct a previous mistake, such an outcome is barred by the statute of limitations.

Department

The Department argued that each of the PPAs sets forth rates for a 30-year contract period and that when those rates are multiplied by project output, the product represents the total compensation on which the contracting parties agreed and to which Gravity is entitled. Therefore, according to the Department, there is no need to create new rates for "missing"

[6] Gravity Brief at 2 (citing 18 C.F.R. § 292.304(d)(2)(ii)).

periods, because "all 30 years' worth of rates are set forth in the contract terms." The Department contended that the projects were never paid for output at the starting rates contained in the PPAs but should have been. The Department argued that "[a]ll that remains is to bring those rates forward to today's dollars, as was done in the *Sheldon Springs* matter."

IV. FINDINGS

Based on the evidence of record, I hereby report the following proposed findings to the Commission in accordance with 30 V.S.A. § 8(c).

Comtu Falls

1. The Comtu Falls facility is an approximately 460 kW hydroelectric generation facility located on the Dog River in Sheldon Springs, Vermont. The facility is owned by Gravity. Comtu Falls PPA at 4.

2. The Comtu Falls PPA has a 30-year term, commencing on January 1, 1989. Comtu Falls PPA at 4.

3. Attachment B to the Comtu Falls PPA contains a schedule of non-levelized energy rates, with winter, summer, peak, and non-peak components. Comtu Falls PPA at 1; and Attachment B.

4. The Attachment B rate schedules set forth 30 "power years," each consisting of winter, on-peak and off-peak values, and summer, on-peak and off-peak values. The first power year is labeled as ending in 1989. Comtu Falls PPA at Attachment B-1.

5. The winter period applies to output generated between November 1 and April 30 of each year. The summer period applies to output generated between May 1 and October 31 of each year. On-peak hours for both periods are 0600 hours to 2200 hours Mondays through Fridays. Off-peak hours are all other hours. Comtu Falls PPA at Attachment B-1.

6. The final power year listed on the Attachment B rate schedule is the power year ending in 2018. Comtu Falls PPA at Attachment B-1.

7. Attachment B of the Comtu Falls PPA does not specify any rates for power purchases beyond the Summer Period for the power year ending in 2018. Comtu Falls PPA at Attachment B-2.

Nantanna Mill Dam

1. The Nantanna Mill facility is an approximately 220 kW hydroelectric generation facility located on the Dog River in Northfield, Vermont. The facility is owned by Gravity. Nantanna Mill PPA at Attachments A-1 and A-2.

2. The Nantanna Mill PPA has a term of 30 years. The commencement date identified in the PPA is April 1, 1990. Nantanna Mill PPA at 4.

3. The winter period applies to output generated between November 1 and April 30 of each year. The summer period applies to output generated between May 1 and October 31 of each year. On-peak hours for both periods are 0600 hours to 2200 hours Mondays through Fridays. Off-peak hours are all other hours. Nantanna Mill PPA at Attachment B-1.

4. Attachment B of the Nantanna Mill PPA states that the power-year portion of the rate schedule "[a]ssumes power delivery commencing with Winter 1989-1990 power year." Nantanna Mill PPA at Attachment B-1.

5. The final power year listed on the Attachment B rate schedule is the power year ending in 2019. Nantanna Mill PPA at Attachment B-2.

6. Attachment B of the Nantanna Mill PPA does not specify any rates for power purchases beyond the Summer Period for the power year ending in 2019. Nantanna Mill PPA at Attachment B-2.

V. DISCUSSION

In *Sheldon Springs*, the Commission was presented with the issue of how to interpret a Rule 4.100 contract where the written agreement was ambiguous as to what rates should apply to the power generated during the final months of the 30-year term.[7] The Commission concluded that the ambiguity was the result of the rate schedule being paid out of sequence.[8] The Commission determined that the first winter-period rate specified in the contract, escalated to today's dollars, for the final months of the 30-year term was the appropriate rate in order to implement the original intent of the contract parties.[9]

[7] *Sheldon Springs* at 15.
[8] *Id.*
[9] *Id.* at 16.

The Commission must determine whether the facts of this case are sufficiently similar such that the holding of *Sheldon Springs* should apply here as well. Additionally, the Commission must address Gravity's contention that the course of dealing between the Purchasing Agent and Gravity compels a different outcome in this case and Gravity's assertion that the DUs' proposed resolution is barred by the statute of limitations. I address each of these issues in turn.

I recommend that the Commission determine that the facts of this case are analogous to *Sheldon Springs* and that this case should be resolved in the same manner. Gravity asserts that "[b]ecause Comtu was generating power when the PPA began and because there is no value prior to January 1, 1989 published in the Comtu PPA, the payments made under the Comtu PPA were neither accelerated nor out of sequence." This argument is premised on Gravity's belief that the term "power year" is synonymous with the calendar year. This belief is not supported by the language of the PPAs. Each power year consists of a winter and summer power period. These periods do not coincide with the calendar year. Read from left to right, the rate schedules imply that a power year ends with the summer power period, on October 31. Thus, the power year ending in 1989 would begin on November 1, 1988 and end on October 31, 1989.

Accordingly, I do not agree with Gravity's contention that "there is no value prior to January 1, 1989 published in the Comtu PPA." The first winter period stated in Attachment B of the PPA is for the power year ending in 1989. This period ran from November 1, 1988 through April 30, 1989.[10] Comtu Falls began operations on January 1, 1989, which was two months after the beginning of the power year ending in 1989.[11] The Comtu Falls PPA only specifies rates through October 31, 2018, which is two months before the end of the PPA's 30-year term. Similarly, the Nantanna Mill PPA specifies rates through October 31, 2019, while the PPA's 30-year term runs until March 31, 2020.

In summary, I recommend that the Commission determine that this case presents the same issue as *Sheldon Springs* because the 30-year term of the contract, which was triggered by the operational date of the facilities, does not coincide with the power years specified in the rate schedules attached to each PPA. Therefore, it is necessary to determine what rate, if any, should

[10] *See* Comtu PPA at Attachment B-1 (defining winter and summer power periods that do not coincide with a calendar year).

[11] The power year ending in 1989 closed with the conclusion of the summer power period, on October 31, 1989.

be available to the facilities because it is not clear which rates should apply for the final months of the facilities' operations.

In making this determination, it is important to acknowledge a difference between the PPAs at issue in this case and the contract in *Sheldon Springs*. The contract in *Sheldon Springs* included both levelized and non-levelized rates.[12] The Commission's determination of the appropriate non-levelized rate in that case was informed by the fact that the contract made clear that the present value of the levelized and non-levelized rates were intended to be equal.[13] In contrast, the Comtu Falls and Nantanna Mill PPAs do not have levelized components. Therefore, unlike *Sheldon Springs*, my recommendation to use the first period of winter rates is not based on ensuring consistency with a levelized component.

Instead, my recommendation is based on the language of the contract. The PPAs have stated terms of 30 years and have rate schedules specifying 30 years of rates. The language of the PPAs implies that the rate schedule is intended to match the operation of the plant. For example, Attachment B of the Nantanna Mill PPA states that the rate schedule "[a]ssumes power delivery commencing *with* Winter 1989-1990 power year." Delivery did not commence with the Winter 1989-90 power year and, as a result, Nanatanna Mill only received one month of the first winter power period rates. For this reason, there are five months at the end of Nantanna Mill's 30-year contract period for which the appropriate rate is not clear. The Comtu Falls PPA does not expressly state that its rate schedule is premised on any particular operation date, but a similar interpretation of the rate schedule should apply.

Based on this interpretation of the PPAs, I recommend that the Commission find that Comtu Falls and Nantanna Mill were paid the rates set forth in their respective rate schedules out of sequence. This conclusion is consistent with the holding in *Sheldon Springs*. For the plants' final months of operation, I recommend that the Commission use the first winter power period rates because these are the only rates specified in the PPAs that have not yet been paid. Using these rates adjusted to today's dollars ensures that the parties to the PPAs receive the full benefit that was bargained for.

[12] *Sheldon Springs* at 1.
[13] *Id*. at 16.

Next, I turn to Gravity's arguments concerning course of performance and the statute of limitations. Gravity implies that by paying the rates out of sequence, the Purchasing Agent consented to paying the winter period rates for the final power year of each contract twice. However, it is also plausible that by accepting accelerated payments, Gravity waived its right to receive payment for the first winter power period rates. Therefore, it is possible that Gravity is entitled to no payment under the PPAs because the agreements do not specify any price beyond the final summer power period. Accordingly, I find that the parties' course of performance does not illuminate the parties' intent with respect to what rates should be paid for the final months of the facilities' operation. For this reason, I recommend that the Commission reject Gravity's arguments concerning course of performance because it is not possible to divine the meaning of the PPAs based on the parties' prior conduct.

Finally, I turn to Gravity's argument that "[t]o the extent that these parties' claims are seen as an effort to right wrongs from prior periods, the Vermont statute of limitations should apply." The statute of limitations cited by Gravity provides that:

> A civil action, except one brought upon the judgment or decree of a court of record of the United States or of this or some other state, and except as otherwise provided, shall be commenced within six years after the cause of action accrues and not thereafter.[14]

I recommend that the Commission determine that the statute of limitations cited by Gravity does not apply in this case because it is not a civil action.[15] The Commission is an administrative tribunal with jurisdiction over "the sale to electric companies of electricity generated by [qualifying] facilities."[16] Proceedings to interpret Rule 4.100 contracts are necessary to administer an energy program that the Commission is required by law to implement.[17] Furthermore, this case is not about providing a legal remedy for past conduct. This case is about how to interpret ambiguous portions of a contract governing future sales of electricity.

In closing, the first winter period rate, escalated to today's dollars, is the appropriate rate to ensure that the PPAs are administered in a manner consistent with PURPA. Under that

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[14] 12 V.S.A. § 511.

[15] *Sec'y, Agency of Nat. Res. v. Upper Valley Reg'l Landfill Corp.*, 167 Vt. 228, 239 (1997) (distinguishing between "administrative action" and "civil action").

[16] 30 V.S.A. § 209(a)(8).

[17] Commission Rule 4.100; 16 U.S.C. § 824a-3(f)(1).

statute, Comtu Falls and Nantanna Mill are entitled to be paid the avoided cost for energy and capacity as calculated at the time that the obligation to purchase such power was incurred.[18] At the time the PPAs were drafted, 30 years' worth of rates were calculated and stipulated in the PPAs. Like the facility in *Sheldon Springs*, Gravity is essentially requesting a rate based on a 31st year increment.[19] Paying the first-year winter power period rate maintains the avoided cost calculations contemplated by the parties at the time the PPA was entered into. This outcome will ensure that both parties receive the benefit of their bargain and also ensures that ratepayers do not pay more than required by federal law for the electric output of the facilities.

VI. CONCLUSION

For the reasons stated above, I recommend that the Commission direct the Purchasing Agent to use the first winter power period rates specified in Comtu Falls' and Nantanna Mill's respective PPAs. The Purchasing Agent shall escalate those rates to account for inflation using the most recent published GDP Implicit Price Deflator values available at the time that the bills are generated.

[18] 18 C.F.R. § 292.304(d)(2)(ii).
[19] *Sheldon Springs* at 17.

This Proposal for Decision has been served on all parties to this proceeding in accordance with 3 V.S.A. § 811.

Dated at Montpelier, Vermont this 9th day of August, 2018.

Jake Marren

Jake Marren, Esq.
Hearing Officer

VII. SUMMARY OF COMMENTS

Gravity urges the Commission to reject the Hearing Officer's proposal for decision because it is not a fair or proper resolution of the issues presented. Specifically, Gravity asserts that this case is distinguishable from *Sheldon Springs* because the PPAs "were for the mandatory sale of PURPA power over a defined period at predetermined rates starting from a prescribed start date, and not the establishment of rates to meet the present value of a stream of rates."[20] Therefore, Gravity contends that the rate forecast trends adopted by the Commission in Docket 4933 should be understood to constitute the parties' intention for the contract.

Gravity concedes that the rates for the end of contract periods are not well defined in the PPAs but argues that "it is clear that all of the rates were derived based upon the assumptions that underlie the Docket No. 4933 rates." Gravity argues that the PPA parties' course of performance demonstrates an intent to use those assumptions to derive the final months' contract rates. Gravity asserts that "it is inconceivable that . . .[the PPA] rates would drop more than 80% in any given year," citing the Commission's later determination of new avoided costs in Docket 5177.[21] Gravity also asserts that the Commission should reject the Hearing Officer's consideration of whether Gravity waived its right to payment for the final months of the 30-year term.

Finally, Gravity disputes the Hearing Officer's determination that the statute of limitations should not apply in this case. Gravity contends that the proposal for decision "implements the remedy of paying the Projects pre-contract period rates for power delivered at the end of the contract terms."[22] Gravity states that the statute of limitations is a traditional factor that should be considered by the Commission and "that the time has long since passed to right wrongs, real or perceived, in the administration of the PPAs going back to their inception."[23]

[20] Gravity Comments at 3.
[21] *Id* at 6.
[22] *Id*. at 7.
[23] *Id*. at 8.

VIII. COMMISSION DISCUSSION

Before we address Gravity's arguments, it is helpful to examine the complex history leading to the approval and execution of the PPAs at issue here. The Commission approved long-term forecasts of avoided-cost rates in Docket No. 4933 on November 11, 1985.[24] The rate schedule adopted in that proceeding contained rates that began in 1985 and extended through the "power year ending in" 2018.[25] Almost immediately there were problems: Declining oil prices during the following year caused the Docket 4933 rates to markedly exceed the actual avoided costs of the utilities. Significant litigation ensued as the Department petitioned for changes to the Rule 4.100 program and qualifying facilities sought approval of contracts containing the Docket 4933 rates.[26]

The Commission held that plants that did not begin operation prior to April 30, 1988, were not entitled to receive Docket 4933 rates.[27] The Commission reasoned that "[the Docket 4933] rates were calculated on the basis of an assumption that projects to which they would apply will come on-line not later than April 30, 1988."[28]

In Docket 5168, the Commission denied a request by Gravity's predecessor in interest for a Docket 4933 contract because the facility had not begun operations in time to qualify for such rates.[29] However, the Commission allowed the existing generator at the Comtu facility that was already operating to receive the Docket 4933 rates.[30] For ease of administration, the Commission approved a contract that assumed the first 250 kW of power produced by the facility was produced by the already operating turbine. Any incremental power would be billed at revised avoided-cost rates set in Docket 5117. The Comtu PPA provided that Comtu would be paid "at the thirty-year non-levelized firm power rate for a period of thirty years, beginning January 1, 1989."[31]

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[24] *Small Power Production Rates*, Docket 4933, Order of 11/11/1985.
[25] *Id*.
[26] *Re Small Power Production*, Docket 5191, Order of 8/26/1987, *aff'd sub nom Petition of Department of Public Service* for *Relief in Regard to Small Power Production Under PSB Rule 4.100*, 157 Vt. 120 (1991).
[27] *Id*. at 10.
[28] *Id*.
[29] *Notice re Contract Between Vermont Power Exchange, Inc. and Comtu Falls Corp.*, Docket 5168, Order of 7/29/1988.
[30] *Id*. at 8.
[31] Comtu PPA at 1.

The Nantanna PPA was approved in Docket 5602 on December 29, 1989. In that case, the utilities, the Department, and Gravity's predecessor in interest stipulated to the approval of a PPA containing Docket 4933 rates because the plant had been operating before April 30, 1988. The Nantanna PPA contained a commencement date of April 1, 1990, and states that Nanatanna would be paid "at the thirty-year non-levelized firm power rates found in Attachment B hereto for a period beginning with the Commencement Date and ending thirty years thereafter."

The rate schedules attached to the PPAs each specify 30 years of rates. The rates are arranged in chronological order, broken into six-month winter and summer periods. Unfortunately, the dates contained in the rate schedules do not coincide with the commencement dates of each contract. Thus, we are presented with the question: What rates should Gravity receive for the months that occur after the rate schedules end?

First, we turn to Gravity's specific argument that this case is distinguishable from *Sheldon Springs* because here there is no levelized component of the PPAs that would clarify the parties' expectations about the value of the contract. We disagree with Gravity's claim that this distinction is dispositive here. This case is sufficiently like *Sheldon Springs* for it to be instructive here because both cases deals with contract payments being made out of sequence.[32] We agree with the Hearing Officer that the best way to make sense of the PPAs is to assume that the parties intended for power deliveries to be on the same schedule as the rate schedule.[33] This reading of the PPAs ensures that the rate schedules match the PPAs' stated 30-year terms.

To read the PPAs otherwise would mean that the rate schedules contain no price for power delivered during the final months of the PPAs. If that were the case, then the mismatch between the stated terms of the PPAs and the rate schedules demonstrates a failure of the PPA parties to reach an agreement as to the rates that should be paid for the final months of the 30-year terms. Under this scenario, courts generally determine that a contract in unenforceable because it does not contain all essential terms.[34] We think that such an outcome is not

[32] *Sheldon Springs* at 10.

[33] *See* Nantanna PPA at Attachment B (stating that the rate schedule "[a]ssumes power delivery commencing with Winter 1989-1990 power year").

[34] *Evarts v. Forte*, 135 Vt. 306, 310, (1977) (citing Corbin on Contracts § 95 (1963) "It is never enough that the parties think they have made a contract; they must express their subjective intent in a manner that is capable of understanding. Vagueness, indefiniteness and uncertainty of expression as to any of the essential terms of an agreement have been held to preclude the creation of an enforceable contract."

appropriate where the PPA parties agreed to a 30-year term and the schedules attached to the PPAs contain 30 years' worth of rates. By escalating to today's dollars the first period of winter rates, the Commission can ensure that all parties to the PPAs receive all of the rates contained in those schedules.

Gravity contends that the PPAs are "based on the trends of escalation set forth by the Commission in its 1985 Small Power Production rates as approved in Docket No. 4933."[35] That is correct but the Commission never calculated rates in Docket 4933 beyond those contained in the schedule that is attached to each of the PPAs.[36] Therefore, the Commission finds that there is no basis for Gravity's contention that "the rate forecast trends presented [in Docket 4933] . . . should be understood to constitute the parties' intention for the contract."[37] The Commission agrees with the Hearing Officer's conclusion that the parties agreed to 30 years of rates, as expressed in Attachment B of the PPAs. Gravity has already been paid the last and highest rates stated in the contract; the only rates that remain to be paid are those for the first winter-period months. Paying these rates will fulfill the expectations of the parties, especially Vermont's ratepayers, who are entitled to benefit from the lower rates contained in the first winter period.

For similar reasons, we also reject Gravity's arguments concerning course of performance because the parties' performance does not illuminate what rates should be paid after the rate schedule is finished. As stated above, there were no Docket 4933 rates calculated beyond those set forth in the rate schedules, so the parties' performance does not demonstrate an understanding that additional payment periods would be calculated. To do so would constitute a modification of the agreement. The PPAs do not allow for modification unless the Commission finds those modifications to be in the public interest.[38] We would not approve the escalation or extension of the highest rates contained in the PPAs because it would not be fair to ratepayers who are entitled to purchase power at the rates specified in the PPA rate schedules.

Finally, Gravity "identifies the statute of limitations as a traditional factor that should be considered by the Commission when determining how to interpret the . . . PPAs."[39] Gravity

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[35] Gravity Comments at 4.
[36] *Small Power Production Rates*, Docket 4933, Order of 11/11/1985; Comtu PPA at Attachment B; Nantanna PPA at Attachment B.
[37] Gravity Comments at 4.
[38] *See, e.g.*, Nantanna PPA at 39.
[39] Gravity Comments at 8.

argues that "the time has long since passed to right wrongs, real or perceived, in the administration of the PPAs going back to their inception."[40] The Commission disagrees that the time has passed to administer the PPAs in a manner that implements the original bargain of the parties and protects the public from paying rates higher than specified in the rate schedules. The Commission is responsible for administering Rule 4.100 contracts and this proceeding is necessary to determine the appropriate rates for the final months of the PPAs. For this reason, the Commission rejects Gravity's contention that the statute of limitations should apply in this case.

IX. ORDER

IT IS HEREBY ORDERED, ADJUDGED, AND DECREED by the Vermont Public Utility Commission ("Commission") that:

1. The findings, conclusions, and recommendations of the Hearing Officer, as modified within, are adopted. All other findings proposed by parties, to the extent that they are inconsistent with Order, were considered and not adopted.

2. For the time periods identified in VEPP Inc.'s petition, VEPP Inc. shall bill, and the Vermont electric distribution utilities shall be responsible for payment, for the output of the Comtu Falls and Nantanna Mill Dam hydroelectric facilities using the first winter power period rates specified in Comtu Falls' and Nantanna Mill's respective PPAs. VEPP Inc. shall escalate those rates to account for inflation using the most recent published GDP Implicit Price Deflator values available at the time that the bills are generated.

[40] Gravity Comments at 8.

Dated at Montpelier, Vermont this 21st day of September, 2018.

Anthony Z. Roisman) PUBLIC UTILITY
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)
Margaret Cheney) COMMISSION
)
)
Sarah Hofmann) OF VERMONT

OFFICE OF THE CLERK

Filed: September 21, 2018

Attest: Judith C. Whitney
Clerk of the Commission

Notice to Readers: This decision is subject to revision of technical errors. Readers are requested to notify the Clerk of the Commission (by e-mail, telephone, or in writing) of any apparent errors, in order that any necessary corrections may be made. (E-mail address: puc.clerk@vermont.gov)

Appeal of this decision to the Supreme Court of Vermont must be filed with the Clerk of the Commission within 30 days. Appeal will not stay the effect of this Order, absent further order by this Commission or appropriate action by the Supreme Court of Vermont. Motions for reconsideration or stay, if any, must be filed with the Clerk of the Commission within 28 days of the date of this decision and Order.

PUC Case No. 17-5114-PET - SERVICE LIST

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