

138 FERC ¶ 61,107  
UNITED STATES OF AMERICA  
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Jon Wellinghoff, Chairman;  
Philip D. Moeller, John R. Norris,  
and Cheryl A. LaFleur.

Kansas Energy LLC  
Trademark Merchant Energy, LLC

Docket Nos. ER11-3163-001  
ER12-126-000  
ER12-126-001  
ER12-126-002  
ER10-3079-001  
ER11-2605-003

Tyr Energy, LLC

ORDER CONDITIONALLY ACCEPTING NOTICE OF CHANGE IN STATUS AND  
REVISED TARIFFS AND ACCEPTING NOTICE OF SUCCESSION

(Issued February 14, 2012)

1. In this order, the Commission conditionally accepts a notice of change in status filed by Trademark Merchant Energy, LLC (Trademark) on September 7, 2011<sup>1</sup> and conditionally accepts the proposed revised market-based rate tariffs filed by Tyr Energy LLC (Tyr Energy) and Trademark, effective December 16, 2011 and December 19, 2011, respectively, as proposed, as discussed below. Additionally, because Trademark and Tyr Energy each meets the criteria for a Category 2 seller<sup>2</sup> in the Northeast, Southeast,

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<sup>1</sup> At the time of this filing, Trademark was known as Kansas Energy LLC. On October 19, 2011, Kansas Energy LLC submitted a notice of succession notifying the Commission that it had changed its name to Trademark.

<sup>2</sup> See *Market-Based Rates for Wholesale Sales of Electric Energy, Capacity and Ancillary Services by Public Utilities*, Order No. 697, FERC Stats. & Regs. ¶ 31,252, at P 849-850, *clarified*, 121 FERC ¶ 61,260 (2007), *order on reh'g*, Order No. 697-A, FERC Stats. & Regs. ¶ 31,268, *clarified*, 124 FERC ¶ 61,055, *order on reh'g*, Order No. 697-B, FERC Stats. & Regs. ¶ 31,285 (2008), *order on reh'g*, Order No. 697-C, FERC Stats. & Regs. ¶ 31,291 (2009), *order on reh'g*, Order No. 697-D, FERC Stats. & Regs. ¶ 31,305 (2010), *aff'd sub nom. Montana Consumer Counsel v. FERC*, 659 F.3d 910 (9th Cir. 2011).

Central and Southwest Power Pool (SPP) regions, and are so designated, each is directed to revise its tariff accordingly. The Commission also accepts the notice of succession filed by Trademark.

## **I. Background**

2. Trademark, a Delaware limited liability company, is a power marketer owned by ITOCHU International Inc. (45 percent), ITC NatGas Holding Co. (35 percent), and Bullseye Energy LLC (20 percent). Both ITOCHU International Inc. and ITC NatGas Holding Co. are wholly owned by ITOCHU Corporation (ITOCHU), a Japanese corporation. Trademark is authorized to make sales at market-based rates.<sup>3</sup>

3. Tyr Energy is a wholly-owned subsidiary of Tyr Energy, Inc., which is also an indirect wholly-owned subsidiary of ITOCHU. Tyr Energy, a power marketer, is authorized to make sales at market-based rates.<sup>4</sup> Tyr Energy indirectly owns a 50 percent interest in TCT Generation Holdings, LLC (TCT Holdings). Chubu Electric Power Company U.S.A., Inc. (Chubu) owns the remaining 50 percent interest in TCT Holdings.

4. On September 7, 2011, Trademark (at that time Kansas Energy, LLC) filed a notice of change in status<sup>5</sup> stating that on December 3, 2010, its affiliate, TCT Holdings, acquired interests<sup>6</sup> in Kiowa Power Partners, LLC (Kiowa), Tenaska Alabama II Partners, L.P. (Tenaska Alabama II), Tenaska Gateway Partners, Ltd. (Tenaska Gateway), Tenaska Georgia Partners, L.P. (Tenaska Georgia), and Tenaska Virginia Partners, L.P. (Tenaska Virginia) (collectively, Tenaska Project Companies).<sup>7</sup>

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<sup>3</sup> *Kansas Energy LLC*, Docket No. ER09-1479-000 (Nov. 2, 2009) (delegated letter order).

<sup>4</sup> *Tyr Energy, LLC*, Docket No. ER03-1182-000 (Sept. 11, 2003) (delegated letter order).

<sup>5</sup> See 18 C.F.R. § 35.42(a)(2) (2011).

<sup>6</sup> Trademark states that TCT Holdings' interests in the Tenaska Project Companies range from 22 percent to 35 percent.

<sup>7</sup> Trademark is reminded that it must submit required filings on a timely basis, or face possible sanctions by the Commission.

5. Kiowa is an exempt wholesale generator (EWG) that owns and operates a 1,220 megawatt (MW) generating facility in the Central and Southwest (CSWS) balancing authority area within the SPP region. Tenaska Gateway is an EWG that owns and operates an 845 MW generating facility in the CSWS balancing authority area.
6. Tenaska Alabama II is an EWG that owns and operates an 885 MW generating facility in the Southern Company Services, Inc. (Southern) balancing authority area within the Southeast region. Tenaska Georgia is an EWG that owns and operates a 945 MW generating facility in the Southern balancing authority area.
7. Tenaska Virginia is an EWG that owns and operates a 904 MW generating facility in the PJM Interconnection, L.L.C. (PJM) market within the Northeast region.
8. Trademark's September 7, 2011 notice of change in status also includes a request for Category 1 seller status in all regions and a revised market-based rate tariff reflecting that category status in all regions.<sup>8</sup> Trademark represents that it meets the criteria for a Category 1 seller in all regions for the following reasons: (1) Trademark does not own any generation in any region and its affiliates do not own generation in the Northwest region; (2) affiliates of Trademark own less than 500 MW of generation in the Northeast, Southeast, Central, SPP, and Southwest regions; (3) Trademark does not own, operate or control any transmission facilities in any region, and its affiliates do not own, operate or control transmission facilities in any region other than the facilities necessary to interconnect their generation to the transmission grid; (4) neither Trademark nor any of its affiliates is affiliated with a franchised public utility in any region; and (5) neither Trademark nor any of its affiliates raises any vertical market power issues.
9. On October 19, 2011, Trademark filed a notice of succession and revised market-based rate tariff reflecting the name change of Kansas Energy LLC to Trademark.
10. On October 21, 2011, Trademark supplemented its September 7, 2011 notice of change in status to include an organization chart for the ITOCHU corporate family and to further assert that Trademark should be designated as a Category 1 seller in all regions.
11. On December 15, 2011, Tyr Energy filed a request for Category 1 seller designation in the Southeast, Central and SPP regions. On December 16, 2011,

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<sup>8</sup> Trademark's tariff previously reflected that it was "a Category 1 Seller, as defined in 18 C.F.R. § 35.36(a)."

Trademark filed a renewed request for Category 1 seller designation in all regions.<sup>9</sup> Both Trademark and Tyr Energy included revised market-based rate tariffs reflecting Category 1 seller status in all regions.<sup>10</sup> Tyr Energy represents that it meets the criteria for a Category 1 seller for the Southeast, Central and SPP regions for the following reasons: (1) Tyr Energy does not own any generation in any region and is affiliated with less than 500 MW in the aggregate in the Southeast, Central and SPP regions; (2) neither Tyr Energy nor any of its affiliates owns, operates or controls transmission facilities other than the facilities necessary to interconnect their generation to the transmission grid; (3) neither Tyr Energy nor any of its affiliates is affiliated with a franchised public utility in any region; and (4) neither Tyr Energy nor its affiliates raises any vertical market power issues.

12. Additionally, Tyr Energy requests that if the Commission does not find that it meets the criteria for Category 1 seller status in all regions, the Commission should confirm that Tyr Energy's previous request for exemption from Category 2 seller status in the Southeast, Central and SPP regions was granted.<sup>11</sup> The December 15, 2011 and December 16, 2011 filings included executed letters of concurrence for the Kiowa, Tenaska Gateway, Tenaska Alabama II and Tenaska Georgia generating facilities, attributing ownership of a certain amount of generation to TCT Holdings based on TCT Holdings' percentage of ownership of the respective facilities. On January 6, 2012, Tyr Energy supplemented its December 15 request and submitted similar executed letters of concurrence from Fox Energy OP, L.P.<sup>12</sup> and Chubu.

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<sup>9</sup> Trademark also requested that the Commission defer action on the notice of succession until the Commission acts on the Category 1 request and pending revised tariffs.

<sup>10</sup> Tyr Energy's currently effective tariff reflects that it is "a Category 2 Seller in the Southeast, Central and Southwest Power Pool regions and a Category 1 Seller in the Northeast, Southwest and Northwest regions, as defined in 18 C.F.R. § 35.36(a)."

<sup>11</sup> On January 3, 2011, Tyr Energy and eight of its affiliates submitted a notice of change in status and tariff amendment. In the change in status, Tyr Energy and its affiliates requested exemption from Category 2 seller status in the Southeast, Central and SPP regions. The change in status was accepted on April 13, 2011. *CalPeak Power LLC*, Docket No. ER11-2602-000 (Apr. 13, 2011) (delegated letter order) (April 13 Delegated Order).

<sup>12</sup> Fox Energy OP, L.P., a wholly-owned, indirect subsidiary of General Electric, owns a 50 percent interest in Fox Energy Company, LLC, which owns and operates an approximately 600 MW generating facility within the Midwest Independent System

(continued...)

## II. Notices

13. Notice of Trademark's September 7, 2011 notice of change in status was published in the *Federal Register*, 76 Fed. Reg. 57,725 (2011), with interventions and protests due on or before September 28, 2011. None was filed.

14. Notice of Trademark's October 19, 2011 notice of succession and revised market-based rate tariff was published in the *Federal Register*, 76 Fed. Reg. 67,164 (2011), with interventions and protests due on or before November 9, 2011. None was filed.

15. Notice of Trademark and Tyr Energy's December 15, 2011 and December 16, 2011 filings was published in the *Federal Register*, 76 Fed. Reg. 80,922 (2011), with interventions and protests due on or before January 6, 2012. None was filed.

16. Notice of Tyr Energy's January 6, 2012 supplement was published in the *Federal Register*, 77 Fed. Reg. 4032 (2012), with interventions and protests due on or before January 27, 2012. None was filed.

## III. Discussion

### A. Change in Status

17. The Commission allows power sales at market-based rates if the seller and its affiliates do not have, or have adequately mitigated, horizontal and vertical market power.<sup>13</sup> As discussed below, the Commission concludes that Trademark continues to satisfy the Commission's standards for market-based rate authority in the SPP region and defers ruling on the Southeast and Northeast regions.

#### 1. Horizontal Market Power

18. Trademark states that its affiliation with additional generation owned by the Tenaska Project Companies in the SPP, Southeast, and Northeast regions does not raise any horizontal market power concerns in any market. Trademark's argument is based on a "derivative share" methodology of allocating affiliate generation, which, as discussed more fully below, we reject as it under-represents the generation owned or controlled by Trademark and its affiliates.

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Operator, Inc. market within the Central region. Tyr Energy indirectly owns the remaining 50 percent interest in Fox Energy Company, LLC.

<sup>13</sup> Order No. 697, FERC Stats. & Regs. ¶ 31,252 at P 62, 399, 408, 440.

19. As a result, we direct Trademark to file an updated market power analyses for the Northeast and Southeast regions within 30 days of the date of this order. We therefore defer ruling on Trademark's market-based rate authority for these regions until the Commission reviews the updated market power analysis directed herein.

20. With regard to the SPP region, we note that Tyr Energy represented that the output of the newly-affiliated facilities located in the SPP region is committed under long-term contracts.<sup>14</sup> Based on this representation, we find that Trademark's instant notification raises no horizontal market power issues with regard to the SPP region.

## **2. Vertical Market Power**

21. Trademark states that its affiliation with the Tenaska Project Companies does not raise any concerns with regard to vertical market power. Trademark represents that neither it nor its affiliates owns any transmission facilities and that Trademark does not own or control any sites for generation capacity development. Trademark represents that although affiliates of Trademark own sites for generation capacity development, those sites have been reported in site generation reports filed with the Commission and these sites do not give it or its affiliates the ability to erect barriers to entry. Trademark affirmatively states that it and its affiliates have not and will not erect barriers to entry into any relevant market. Based on these representations, we find that Trademark's instant notification raises no vertical market power issues.

### **B. Category Status**

22. In Order No. 697, the Commission created two categories of sellers.<sup>15</sup> Category 1 sellers are defined as wholesale power marketers and wholesale power producers that own or control 500 MW or less of generation in aggregate per region; that do not own, operate or control transmission facilities other than limited equipment necessary to connect individual generating facilities to the transmission grid (or have been granted

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<sup>14</sup> See Calpeak Power LLC, Notice of Non-Material Change in Status and Tariff Amendment, Docket No. ER11-2602-000, at 9 (filed Jan. 3, 2011) (stating that the output of the Kiowa Power and Tenaska Gateway facilities is committed under long-term contracts). We interpret Tyr Energy's statement to mean that the entire output of the facilities is *fully* committed.

<sup>15</sup> Order No. 697, FERC Stats. & Regs. ¶ 31,252 at P 848.

waiver of the requirements of Order No. 888<sup>16</sup>); that are not affiliated with anyone that owns, operates or controls transmission facilities in the same region as the seller's generation assets; that are not affiliated with a franchised public utility in the same region as the seller's generation assets; and that do not raise other vertical market power issues.<sup>17</sup> Entities designated as Category 1 sellers are not required to file regularly scheduled updated market power analyses.<sup>18</sup>

23. Sellers that are not Category 1 sellers are Category 2 sellers.<sup>19</sup> Category 2 sellers are required to submit an updated market power analysis every three years according to the schedule adopted in Order No. 697.

24. Trademark and Tyr Energy request that the Commission designate them as Category 1 sellers in each of the six geographic regions that the Commission identified in Order No. 697.<sup>20</sup> Trademark and Tyr Energy argue that they qualify for Category 1 seller status based on the fact that their "derivative share ownership" in the Tenaska Project Companies does not cause them to be affiliated with over 500 MW of generation in any region and that they meet the other criteria for Category 1 seller status in each of the six regions.<sup>21</sup> In addition, with respect to Fox Energy Company, LLC, Trademark and Tyr Energy state that "Tyr Energy's ownership interest (and therefore the Tyr [Energy]'s affiliated interest) in the Fox Energy facility is 50 [percent] or 300 MW"

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<sup>16</sup> *Promoting Wholesale Competition Through Open Access Non-Discriminatory Transmission Services by Public Utilities; Recovery of Stranded Costs by Public Utilities and Transmitting Utilities*, Order No. 888, FERC Stats. & Regs. ¶ 31,036 (1996), *order on reh'g*, Order No. 888-A, FERC Stats. & Regs. ¶ 31,048, *order on reh'g*, Order No. 888-B, 81 FERC ¶ 61,248 (1997), *order on reh'g*, Order No. 888-C, 82 FERC ¶ 61,046 (1998), *aff'd in relevant part sub nom. Transmission Access Policy Study Group v. FERC*, 225 F.3d 667 (D.C. Cir. 2000), *aff'd sub nom. New York v. FERC*, 535 U.S. 1 (2002).

<sup>17</sup> 18 C.F.R. § 35.36(a)(2) (2011).

<sup>18</sup> Order No. 697, FERC Stats. & Regs. ¶ 31,252 at P 849-850.

<sup>19</sup> 18 C.F.R. § 35.36(a)(3) (2011).

<sup>20</sup> Order No. 697, FERC Stats. & Regs. ¶ 31,252 at P 859 and Appendix D.

<sup>21</sup> Trademark and Tyr Energy December 15, 2011 and December 16, 2011 Filings at 7.

and that Tyr Energy “has no other affiliates that own or control jurisdictional assets in the Central region.”<sup>22</sup>

25. Specifically, Trademark and Tyr Energy argue that even though the Tenaska Project Companies own over 500 MW of generation in the Southeast, Northeast and SPP regions, Trademark and Tyr Energy should only be attributed a portion of that generation through what they term the "derivative share" calculation. Trademark and Tyr Energy state that the Tenaska Project Companies are only partially owned by TCT Holdings and TCT Holdings is only 50 percent owned by Tyr Energy, Inc. As a result, they argue that they should not be attributed the entire amount of generation owned by the Tenaska Project Companies, or even the entire amount owned by their affiliate TCT Holdings. Instead, they contend that they should only be attributed the portion of the Tenaska Project Companies' generation calculated by multiplying their affiliated ownership percentages across each level of ownership. For example, TCT Holdings has a 35 percent interest in Kiowa, which owns a 1,220 MW facility. In that case, Trademark and Tyr Energy argue that TCT Holdings should only be allocated 35 percent of 1,220 MW, or 427 MW. Further, TCT Holdings is 50 percent owned by Tyr Energy, Inc. Thus, Trademark and Tyr Energy argue that Tyr Energy, Inc. and its affiliates and subsidiaries, including Trademark and Tyr Energy, should only be attributed 50 percent of 427 MW or 213.5 MW. Using this method, Trademark and Tyr Energy represent that they own or control less than 500 MW of generation in each of the six regions.

26. Trademark and Tyr Energy cite several cases<sup>23</sup> and assert that the Commission has long standing precedent to support their proposed approach. Trademark and Tyr Energy further assert that the Commission previously accepted Tyr Energy's request for Category 1 seller status in the Northeast region, which also relied on the “derivative share” calculation.<sup>24</sup> Trademark and Tyr Energy assert that based on the Commission's actions in granting Tyr Energy's request for Category 1 seller status in the Northeast region, “Tyr [Energy], Trademark Energy, and other parties are justified in relying on the

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<sup>22</sup> *Id.* at 5.

<sup>23</sup> Trademark and Tyr Energy December 15, 2011 and December 16, 2011 Filings at n.23 (citing *Dominion Resources Inc.*, 43 FERC ¶ 61,079, at 61,249 (1998) (*Dominion Resources*); *Coso Power Developers*, 65 FERC ¶ 62,161, at 62,374 (1993); *Modesto Energy Limited Partnership*, 55 FERC ¶ 61,355, at 62,059-60 (1991); *HL Power Co.*, 50 FERC ¶ 61,208, at 61,663 (1990); *Soledad Energy Limited Partnership*, 45 FERC ¶ 61,052, at 61,187 (1998)).

<sup>24</sup> Trademark and Tyr Energy December 15, 2011 and December 16, 2011 Filings at 7. *See Tyr Energy LLC*, Docket No. ER11-2605-002 (Aug. 1, 2011) (delegated letter order).

Commission's orders and there is no just and reasonable reason for the Commission to change its existing policy and precedent in this case."<sup>25</sup>

27. In the alternative, Trademark and Tyr Energy argue that, if the Commission finds that Tyr Energy does not meet the requirements for a Category 1 seller, the Commission should confirm that it previously granted Tyr Energy's request for exemption from Category 2 seller status in the Southeast, Central and SPP regions by accepting the notice of change in status in the April 13 Delegated Order. The notice of change in status included a request for "an exemption from future Category 2 updated market power analyses requirements in the Southeast, Central, and SPP regions."<sup>26</sup>

28. We disagree with Trademark and Tyr Energy's method of allocating affiliate generation. The Commission's analysis when granting market-based rate authority views the seller and its affiliates collectively.<sup>27</sup> The Commission also considers affiliate assets when determining a seller's category status. Moreover, the Commission has not permitted market-based rate sellers to dilute the ownership share of generation attributed to the seller or its affiliates based on multiplying successive shares of partial ownership in a company. As a result, we find Trademark and Tyr Energy's "derivative share" argument unpersuasive and inconsistent with the Commission's practice that considers all assets owned or controlled by a seller's affiliates as well as those owned or controlled by the seller itself. In fact, Trademark and Tyr Energy make note in their submittals of the Commission's practice of determining category status.<sup>28</sup> For these reasons, we reject Trademark and Tyr Energy's "derivative share" methodology. Because Trademark and Tyr Energy have *corporate affiliation* with over 500 MW of generation, we designate

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<sup>25</sup> Trademark and Tyr Energy December 15, 2011 and December 16, 2011 Filings at 7.

<sup>26</sup> See Calpeak Power LLC, Notice of Non-Material Change in Status and Tariff Amendment, Docket No. ER11-2602-000, at 14 (filed Jan. 3, 2011).

<sup>27</sup> See, e.g., Order No. 697, FERC Stats. & Regs. ¶ 31,252 at Appendix A, which reflects that both the pivotal supplier and the market share analyses examine seller and affiliate capacity as compared to non-affiliate capacity, and Appendix B, which gives a sample asset appendix "listing the filing entity and all its energy affiliates and their associated assets."

<sup>28</sup> Trademark Dec. 15 Filing at 6; Tyr Energy Dec. 16 Filing at 6 (500 MW threshold is determined by adding all the generation capacity owned or controlled by the seller or its affiliates within the same region).

Trademark and Tyr Energy as Category 2 sellers in the Northeast, Southeast, Central and SPP regions.

29. We note that, with respect to each of the Tenaska Project Companies, Trademark and Tyr Energy have provided a letter of concurrence from an unaffiliated entity with whom they co-own a company with generation assets. The letters of concurrence purport to allocate a portion of the generation owned by the affiliate. For example, the letter of concurrence signed by Tenaska Oklahoma, Inc. and Tenaska Diamond II, L.P. states that TCT Holdings “only owns approximately 427 MW of the Kiowa Power Partners, LLC generation facility.”<sup>29</sup> While the Commission does permit co-owners to allocate a proportion of jointly-owned *generation facilities* based on ownership percentages as agreed to by co-owners of a facility as discussed in Order No. 697,<sup>30</sup> in this case, the letters of concurrence each relate to a jointly-owned company, not a jointly owned facility. For example, Kiowa is an affiliate of TCT Holdings by virtue of TCT Holdings’ 35 percent ownership interest in Kiowa, and is thus affiliated with Trademark and Tyr Energy. As such, all assets of Kiowa are considered when determining whether Trademark and Tyr Energy meet the criteria for Category 1 status.

30. The cases cited by Trademark and Tyr Energy applying the “derivative share test” established in *Dominion Resources*<sup>31</sup> are not applicable here. Those cases used the “derivative share test” to determine whether a utility’s interest in a qualifying facility (QF) violated the then-existing ownership requirements for QF status.<sup>32</sup> Unlike the analysis used in the market-based rate context, which considers the generation capacity

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<sup>29</sup> The generation facility owned by Kiowa Power Partners, LLC is the 1220 MW Tenaska Kiamichi Generating Station.

<sup>30</sup> Order No. 697, FERC Stats. & Regs. ¶ 31,252 at P 188 (“there may be situations where a *jointly-owned generation facility* is operated by one of the joint-owners for the benefit of and on behalf of all of the joint-owners. Under these circumstances, it may be reasonable to allocate capacity based on ownership percentages.” Emphasis added.); Order No. 697-B, FERC Stats. & Regs. ¶ 31,285 at P 34 (“we will require a seller, who is making an affirmative statement that a contractual arrangement transfers control, to seek a ‘letter of concurrence’ from other affected parties identifying the degree to which each party controls a *facility* and submit those letters with its filing.” Emphasis added.).

<sup>31</sup> *Dominion Resources*, 43 FERC at 61,251.

<sup>32</sup> The ownership requirements for QF status were eliminated by the Energy Policy Act of 2005, Pub. L. No. 109-58, §§ 1261 *et seq.*, 119 Stat. 594 (2005), (EPAAct 2005) and are no longer applicable.

owned or controlled by the seller and its affiliates for purposes of analyzing horizontal market power, the use of the “derivative share test” in the QF context was used to determine, under the former statutory ownership requirement for QF status, an upstream owner’s interest in a QF for purposes of determining whether the QF was “owned by a person not primarily engaged in the sale of electric power (other than electric power solely from cogeneration facilities or small power production facilities).”<sup>33</sup>

31. With regard to Trademark and Tyr Energy's argument that parties are justified in relying on prior decisions granting Tyr Energy's request for Category 1 status, we acknowledge that on August 1, 2011, Tyr Energy was designated a Category 1 seller in the Northeast region.<sup>34</sup> However, that designation was based on Tyr Energy’s representation that it “and [its] affiliates do not own, operate or control 500 [MW] or more of generation in the Northeast region.”<sup>35</sup> Though not expressly disclosed in the filing, this representation appears to have been based on the applicant’s reliance on the “derivative share” methodology rejected herein.<sup>36</sup>

32. Thus, when appropriately accounting for all of their affiliate generation as directed herein, Trademark and Tyr Energy are each affiliated with over 500 MW of generation in the Northeast, Southeast, Central and SPP regions. Therefore, we find that Trademark and Tyr Energy are Category 2 sellers in the Northeast, Southeast, Central and SPP regions.<sup>37</sup>

33. As noted by Trademark and Tyr Energy, a prior notice of change in status filed by Tyr Energy,<sup>38</sup> which also requested “an exemption from future Category 2 updated market power analyses requirements in the Southeast, Central, and SPP regions,” was

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<sup>33</sup> 16 U.S.C. §§ 796(17)(C)(ii), 796(18)(B)(ii) (repealed by EPLRA 2005, 119 Stat. 594).

<sup>34</sup> See *Tyr Energy LLC*, Docket No. ER11-2605-002 (Aug. 1, 2011) (delegated letter order).

<sup>35</sup> *Id.*

<sup>36</sup> We note that actions taken by staff under delegated authority “do not constitute precedent binding the Commission in future cases.” *Midwest Generation, LLC*, 95 FERC ¶ 61,231, at 61,799 (2001).

<sup>37</sup> Order No. 697, FERC Stats. & Regs. ¶ 31,252 at n.1000.

<sup>38</sup> See April 13 Delegated Order.

accepted in the April 13 Delegated Order.<sup>39</sup> We note that the April 13 Delegated Order did not specifically address the requested exemption; however, it did accept the proffered tariff designating Tyr Energy as a Category 2 seller in the Southeast, Central and SPP regions. In light of the analysis included herein, we find that an exemption is not warranted.

34. Accordingly, we direct Trademark and Tyr Energy each to submit a compliance filing within 30 days of the date of this order revising its tariff to reflect its designation as a Category 2 seller in the Northeast, Southeast, Central and SPP regions, and a Category 1 seller in all other regions.

35. Because Category 2 sellers in the Northeast region were required to file their updated market power analyses prior to June 30, 2011 and Category 2 sellers in the Southeast region were required to file their updated market power analyses prior to December 31, 2011,<sup>40</sup> we direct both Trademark and Tyr Energy to file updated market power analyses for the Northeast and Southeast regions within 30 days of the date of this order. We direct Trademark and Tyr Energy to file updated market power analyses for the Central and SPP regions prior to June, 30, 2012 and December 31, 2012, respectively, in accordance with the schedule set forth in Order No. 697-A.<sup>41</sup>

### **C. Notice of Succession and Revised Tariffs**

36. Trademark's notice of succession is accepted for filing. We find that Trademark's revised market-based rate tariffs submitted in conjunction with its notice of change in status and with its notice of succession are moot because they have been overtaken by events. We accept Trademark and Tyr Energy's proposed revised market-based rate tariffs submitted on December 15, 2011 and December 16, 2011, effective as proposed, subject to Trademark and Tyr Energy submitting the compliance filings discussed above within 30 days of the date of this order.

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<sup>39</sup> Calpeak Power LLC, Notice of Non-Material Change in Status and Tariff Amendment, Docket No. ER11-2602-000, at 14 (filed Jan. 3, 2011).

<sup>40</sup> Order No. 697-A, FERC Stats. & Regs. ¶ 31,268 at P 374 and Appendix D - 2.

<sup>41</sup> *Id.* We note that the output from the Fox Energy Company, LLC facility appears to be fully committed. *See* Trademark and Tyr Energy December 15, 2011 and December 16, 2011 Filings at 4 (“Fox Energy sells most of the output of its facility to Wisconsin Public Service Corporation under a long-term tolling agreement and the remainder to Constellation Commodities Group, Inc. under a long-term purchase agreement.”)

#### **D. Asset Appendix**

37. Trademark and Tyr Energy also include appendices of assets in each of their filings as required by Order No. 697.<sup>42</sup> As described above, Trademark and Tyr Energy allocated their affiliate generation by dividing their affiliate generation and allocating it to upstream owners based on their percentage of ownership of the affiliate. Trademark and Tyr Energy used this same method when listing their affiliate generation in their asset appendices. In Order No. 697, the Commission stated “the appendix must list **all** generation assets owned (clearly identifying which affiliate owns which asset) or controlled (clearly identifying which affiliate controls which asset) by the corporate family by balancing authority area, and by geographic region, and provide the in-service date and nameplate and/or seasonal ratings by unit.”<sup>43</sup> Thus, the asset appendix should reflect all generation owned or controlled by applicants and its affiliates and should not be allocated based on the upstream owners’ percentage ownership of the affiliate. Accordingly, the next time Trademark or Tyr Energy files an asset appendix with the Commission, the asset appendix should properly account for all generation assets owned or controlled by the corporate family.

#### The Commission orders:

(A) Trademark’s notice of change in status is hereby conditionally accepted for filing, as discussed in the body of this order.

(B) Tyr Energy’s revised market-based rate tariff is hereby conditionally accepted for filing, effective December 16, 2011, as proposed, as discussed in the body of this order.

(C) Trademark’s revised market-based rate tariff is hereby conditionally accepted for filing, effective December 19, 2011, as proposed, as discussed in the body of this order.

(D) Trademark and Tyr Energy are each hereby directed to make a compliance filing revising their tariffs within 30 days of the date of this order to reflect their designation as Category 2 sellers in the Northeast, Southeast, Central and SPP regions, and Category 1 sellers in all other regions, as discussed in the body of this order.

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<sup>42</sup> Order No. 697, FERC Stats. & Regs. ¶ 31,252 at P 894-895.

<sup>43</sup> Order No. 697, FERC Stats. & Regs. ¶ 31,252 at P 895 (emphasis added).

(E) Trademark and Tyr Energy are hereby directed to file updated market power analyses for the Northeast and Southeast regions within 30 days of the date of this order, as discussed in the body of this order.

(F) Trademark and Tyr Energy are hereby directed to file updated market power analyses for all regions in which they are designated as Category 2 sellers in compliance with the regional reporting schedule adopted in Order No. 697, as discussed in the body of this order.

(G) Trademark's notice of succession is hereby accepted for filing, as discussed in the body of this order.

By the Commission.

( S E A L )

Kimberly D. Bose,  
Secretary.