UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Collection of Connected Entity Data	**)**	
From Regional Transmission Organizations	**)**	**Docket No. RM15-23-000**
And Independent System Operators	**)**	

COMMENTS OF THE INDEPENDENT GENERATION OWNERS & REPRESENTATIVES

Pursuant to the Notice of proposed rulemaking addressing Collection of Connected Entity Data from Regional Transmission Organizations and Independent System Operators issued on September 17, 2015 (NOPR) and the Commission's Order Granting Motion for Technical Conference and Request to Postpone Comment Deadline issued on November 10, 2015, the undersigned entities (collectively, the Independent Generation Owners & Representatives), respectfully submit these comments regarding the NOPR for consideration by the Commission.

I. COMMUNICATIONS

Communications concerning these comments should be addressed to the following individuals:

Jessica C. Friedman
Andrew O. Schulte
Van Ness Feldman, LLP
1050 Thomas Jefferson St., NW
Washington, DC 20007
Tel: (202) 298-1800
jcf@vnf.com
aos@vnf.com

II. INTRODUCTION

Each of the Independent Generation Owners & Representatives indirectly owns and/or controls electric generating facilities and power marketers that are participants in

markets administered by regional transmission organizations (RTOs) and independent system operators (ISOs) or represents the interests of such persons. The NOPR proposes to implement new regulations that would require market participants in an RTO or ISO to collect, report, and update on a continual basis extensive information concerning their ownership structure and corporate relationships, corporate officers, direct and indirect investors (including non-controlling investors), and lending and other material contractual relationships (Connected Entity Data). Accordingly, the Independent Generation Owners & Representatives have a substantial vested interest in the outcome of this proceeding.

As a threshold matter, the Commission has not carried its burden to show that the proposed reporting regime is necessary or that the benefits, if any, outweigh the enormous burden on the energy industry and its investors. There is no concrete evidence that the proposed additional reporting would in fact result in better detection of market manipulation. To the contrary, the proposed rule requires extensive reporting of irrelevant information regarding entities that have nothing to do with the energy industry or trading operations of market participants. This will only serve to increase frivolous investigations of entities that are functionally unconnected rather than improve the Commission's surveillance activities. Moreover, the Commission's proposal is wholly inconsistent with a long line of Commission precedent, which firmly establishes that certain investors, lenders, and contractors have no ability to direct a market participant's activities. A market participant's arrangements with these entities are intentionally structured to isolate such entities from the day-to-day operations and management of the market participant. These entities have no practical ability to collude with the market

participant. Additionally, the Independent Generation Owners & Representatives have significant concerns regarding the scope of the proposed reporting regime and the excessive burden of complying with the proposed regulations. For these reasons, the Independent Generation Owners & Representatives oppose adoption of the proposed rule and urge the Commission to withdraw or at a minimum materially modify the currently unworkable proposal.

III. INDEPENDENT GENERATION OWNERS & REPRESENTATIVES

Independent Generation Owners & Representatives are private equity firms that invest in a wide array of businesses, including the independent power sector. Private equity firms make these investments through multiple fund vehicles (PE Funds) in unrelated commercial enterprises (portfolio companies). PE Funds function as a conduit between, on the one hand, long-term investors such as public and private pension funds and endowments and, on the other hand, portfolio companies, providing an important alternative source of capital to the economy and an alternative asset class for long-term investment. Collectively, PE Funds own interests in thousands of portfolio companies in diverse industries around the globe, the vast majority of which are unrelated to the energy sector. PE Funds, generally, do not become involved in the day-to-day management or business activities of their portfolio companies.

PE Funds are closed-end pooled investment vehicles, most frequently organized as limited partnerships. A PE Fund typically is controlled by its general partner (GP), which makes investment decisions for the fund and is affiliated with the private equity firm that advises the fund. The GP makes a significant capital commitment to the fund, i.e., a contractual agreement to contribute capital from time to time over the term of the

fund as and when needed by the fund to make investments and pay expenses.[1] The PE Fund also obtains capital commitments from sophisticated third-party investors who agree to become limited partners (or members or shareholders in a non-partnership structure) of the fund (LPs). The LPs are not involved in the management or control of the business of the fund except in very limited circumstances. LPs of PE Funds include corporate pension plans, public retirement plans, foundations, endowments, sovereign wealth funds, insurance companies and (historically) banks, and to a lesser extent, very high net worth individuals and family offices.

While PE Funds take an active role in the high level governance of their portfolio companies and receive information in connection therewith, they are not generally involved in the day-to-day market activities and operations of portfolio companies. Information that is received by PE Fund representatives concerning the trading or other day-to-day activities of portfolio companies seldom, if ever, consists of the type of information that could present an opportunity for collusion among the firm and its portfolio companies. In the rare instance when a PE Fund representative receives information concerning a portfolio company's trading or other day-to-day activities, such individual would not normally share this information with other portfolio companies or otherwise use it to affect any other entity's activities. In other words, information generally flows one way, into the PE Fund, and is not then used to affect the activities of other entities.

The organization and operation of private equity firms do not raise the collusion concern identified in the NOPR. PE Funds do not coordinate business activities across

[1] Relative to other investors, however, the GP's economic interest in the portfolio company is usually small and generally does not exceed 10% of the company.

their portfolio companies. Further, portfolio companies conduct business independently of one another, the investing PE Fund, and the rest of the private equity firm. As discussed below, the NOPR entirely disregards the manner in which such entities actually operate and would impose substantial reporting obligations with no benefit to the Commission's surveillance activities.

IV. COMMENTS

A. The Proposed Rule is Not Necessary

The NOPR requested comments on the Commission's need for Connected Entity Data.[2] In a Statement issued concurrently with the NOPR, Commissioner Cheryl LaFleur cautioned that "the Commission should always consider carefully whether the benefits offered by new compliance obligations outweigh the burdens that will be faced by market participants" and recognized that "the requirements in the Noticed of Proposed Rulemaking would create a significant new reporting regime for all market participants."[3] Further, at the NOPR Technical Conference held on December 8, 2015, Commissioner Tony Clark invited market participants to comment on whether, as a threshold matter, the Commission had met its burden of showing that the proposed rule is necessary. For the reasons detailed below, the Commission has not adequately demonstrated that there is a need to collect the proposed Connected Entity Data, especially in light of the heavy and costly compliance burden it will impose on market participants and those who invest in the electric industry.

---

[2] Collection of Connected Entity Data from Regional Transmission Organizations and Independent System Operators, 152 FERC ¶ 61,219 at P 36 (2015) (NOPR).

[3] Id. at LeFleur, C., concurring.

1. The Commission Has Not Met Its Burden of Showing a Need for Connected Entity Data

The Commission asserts that the proposed rule will allow it to better monitor and protect the markets. The Commission bases this assertion on pure speculation that a market participant might act to benefit connected entities. However, the Commission has provided no empirical or even anecdotal evidence that market participants actually collude with certain investors, lenders, or other parties that do not direct the day-to-day management or affairs of such market participants. Instead, the Commission is proposing overly inclusive reporting requirements regardless of whether the collected data would make any difference whatsoever in its ability to detect market manipulation. This type of unsupported hypothetical need for information does not justify imposing a significant reporting burden on the entire industry.

In National Fuel Gas Supply Corp. v. FERC, the Commission attempted to expand the standards of conduct governing the relationship between natural gas pipelines and their marketing affiliates to include their non-marketing affiliates. To justify the proposed rulemaking, the Commission "relied on both an asserted theoretical threat of undue preferences and a claimed record of abuse."[4] The United States Court of Appeals for the D.C. Circuit rejected the proposed rulemaking because the Commission "provided no evidence of a real problem" and failed to "include a single example of abuse" by the entities that would be subject to the proposed rule.[5] Further, with regard to the Commission's reliance on a theoretical threat, the Court of Appeals provided the following guidance:

[4] Nat'l Fuel Gas Supply Corp. v. FERC, 468 F.3d 831, 839 (D.C. Cir. 2006).

[5] Id. at 841.

> If FERC chooses to rely solely on a theoretical threat, it will need to explain how the potential danger . . . justifies such costly prophylactic rules. . . . If FERC believes that the nature of the alleged misconduct renders it undetectable through normal reporting mechanisms, FERC would have to say, for example, why such evidence of abuse was detected before it adopted [the proposed rule under review] . . . . We cannot say that any of these theoretical rationales, alone or in combination, would justify adoption of the [proposed rule]. . .; they merely illustrate the kind of analysis FERC would need to undertake if it attempts to support the [proposed rule] based solely on a theoretical threat (that is, absent record evidence of abuse).[6]

The Commission has not properly supported the current NOPR based solely on a theoretical threat.

The NOPR provides no record of evidence of collusion between market participants and so-called Connected Entities, and the Commission's market manipulation cases are bereft of such evidence. For example, the proposed rule would have done little, if anything, to detect the type of fraud alleged in the Commission's recent Order to Show Cause and Notice of Proposed Penalty in Coaltrain Energy, L.P. (Coaltrain).[7] Except for potential trader information[8] (and information that is already reported under existing FERC regulations such as managing owners with day-to-day control of a market participant's operations, as discussed below), none of the Connected Entity Data required under the proposed rule is relevant to that case; there is no allegation that the traders in Coaltrain acted in concert with any other entity that would be a "Connected Entity" under the NOPR. The same is true of every other market

[6] Id. at 844-45.

[7] Coaltrain Energy, L.P., et al., 154 FERC ¶ 61,002 (2015).

[8] The NOPR fails to define "trader" in any meaningful way so it is unclear if such information would have actual utility.

manipulation case that has been publicly investigated by the Commission and the Commission has offered no evidence otherwise.

The Commission also asserts that the proposed rule is necessary because entities under common control might collude to manipulate the market. However, market participants are already required to report their common control through existing RTO/ISO affiliate disclosure requirements and the Commission's regulations under the Federal Power Act, as amended (FPA). As discussed below, there is no need to implement a new and onerous reporting scheme to collect information that is already available to the Commission.

2. The Commission's Existing Comprehensive Reporting Mechanisms Provide the Necessary Information

The Commission currently imposes comprehensive reporting requirements on market participants through the RTO/ISO tariffs and under various sections of the FPA, including sections 203, 204, 205, and 305(b). In each case, these reporting obligations are intended to identify all of the legal and business relationships that are relevant to an entity's wholesale market transactions. Without adequate justification, the NOPR seeks to impose duplicative obligations and extend these reporting obligations to relationships that have no effect on a market participant's behavior. The proposed extension to entities that do not control day-to-day activities of a market participant essentially results in a reporting regime focused on non-connected entities.

Under section 205 of the FPA, a market participant with market-based rate (MBR) authorization already must keep the Commission informed of all of its affiliates

on an ongoing basis.[9] In the MBR context, "affiliate" is broadly defined to include any entity that could conceivably influence the activities of the market participant,[10] even where the entities have only minority ownership interests or limited board representation such that they cannot alone take action to direct the management of the market participant. The Commission's Staff policy implementing the MBR reporting rules also requires disclosure of any passive or non-voting owners together with an evidentiary showing that such owners cannot influence the activities of the market participant.[11] Further, a market participant with MBR authority is required to report any contractual relationships that relate to the commitment of the output of a generating unit. These MBR filings permit the Commission to track and scrutinize any and all changes in the

[9] Under section 35.42 of the Commission's regulations and Order No. 697, an entity with MBR authority must timely report changes in status that reflect a departure from the facts the Commission relied upon in granting its market-based rate authority and file an updated market power analyses every three years.

[10] Section 35.36(a)(9) of the Commission's regulations defines an Affiliate as:

> (i) Any person that directly or indirectly owns, controls, or holds with power to vote, 10 percent or more of the outstanding voting securities of the specified company; (ii) Any company 10 percent or more of whose outstanding voting securities are owned, controlled, or held with power to vote, directly or indirectly, by the specified company; (iii) Any person or class of persons that the Commission determines, after appropriate notice and opportunity for hearing, to stand in such relation to the specified company that there is liable to be an absence of arm's-length bargaining in transactions between them as to make it necessary or appropriate in the public interest or for the protection of investors or consumers that the person be treated as an affiliate; and (iv) Any person that is under common control with the specified company.

Under the Commission's regulations, "owning, controlling or holding with power to vote, less than 10 percent of the outstanding voting securities of a specified company creates a rebuttable presumption of lack of control." 18 C.F.R. 35.36(a)(9) (2015).

[11] This policy regarding passive investors is formalized in the proposed revisions to the Commission's MBR regulations pending in Ownership Information in Market-Based Rate Filings, 153 FERC ¶ 61,309 (2015) (MBR Ownership NOPR).

relevant relationships of market participants. Through these filings, the Commission receives narrative descriptions of ownership, affiliate, and contractual relationships and, under Order No. 816, will soon receive asset appendices in a searchable and sortable electronic format and pending rehearing may receive detailed organizational charts depicting those relationships.[12]

A market participant with MBR authority also must file Electric Quarterly Reports (EQRs).[13] A market participant's EQRs provide a comprehensive picture of market transactions conducted during the prior quarter, including transaction counterparties, pricing, and all other material terms. Taken together, the EQRs and MBR filings provide the Commission with a wealth of information regarding a market participant's legal and business relationships that can be used for purposes of market surveillance.

In addition, many market participants are public utilities that are subject to section 203 of the FPA. A public utility must obtain prior authorization from the Commission under section 203 of the FPA before a new entity can acquire a 10% or greater voting interest in or control over the public utility. The Commission thoroughly reviews the effect that the proposed new ownership or control relationship will have on competition, rates, and regulation to ensure that there are no adverse market effects. Thus, the Commission is apprised of significant relationship changes before the changes even go into effect.

---

[12] See Refinements to Policies and Procedures for Market-Based Rates for Wholesale Sales of Electric Energy, Capacity and Ancillary Services by Public Utilities, Order No. 816, 80 Fed. Reg. 67,056 (Oct. 30, 2015), FERC Stats. & Regs. ¶ 31,374 at PP 20-21 (2015) (Order No. 816) (effective January 28, 2016).

[13] 18 C.F.R. § 35.10b.

The NOPR also ignores the existing interlocking directorate reporting requirements of Parts 45 and 46 of the Commission's regulations. A person who is an officer or director of more than one market participant, thereby creating a potential for joint action, currently is subject to the advance authorization and annual reporting requirements of Parts 45 and 46 of the Commission's regulations. There is no need to create a duplicative reporting requirement as proposed in the NOPR.

While the Independent Generation Owners & Representatives acknowledge that the current market participant data collection practices vary among the RTOs/ISOs, the existing scope of those reporting obligations is generally consistent with other reporting obligations under the FPA. Although it may make sense to create a more uniform reporting regime across all markets, it is not necessary to implement more onerous, repetitive, or wholly unnecessary reporting requirements. All of the existing reporting requirements provide more than enough information and data to assist the Commission in its surveillance activities. As discussed further below, the additional expansive reporting requirement in the NOPR will only hinder the Commission's objectives.

3. The Bulk of Connected Entity Data Would Have No Practical Utility With Respect to Market Surveillance

The Commission requested comments on whether the information requested by the proposed rule would have practical utility.[14] As stated in the NOPR, the Connected Entity Data is intended to "assist screening and investigative efforts to detect market manipulation."[15] As discussed above, the Commission has not established that market participants collude with their Connected Entities and therefore that such information

[14] NOPR at P 36.

[15] Id. at Summary.

would assist with market surveillance. Further, the sheer volume of irrelevant information required to be provided by market participants with complex organizational structures and business relationships would do little, if anything, to prevent market manipulation. Indeed, if the rule is implemented as proposed, it could undermine the Commission's surveillance efforts and greatly increase the regulatory burden on market participants by increasing false positives and frivolous investigations based on connections that have no bearing on a market participant's activities. By making connections to entities that are not involved in the day-to-day operations of market participants, the vast majority of relationships reported under the proposed regulations will be too attenuated to be meaningful.

Similar agencies such as the Commodity Futures Trading Commission (CFTC) have recognized the importance of limiting reportable entities to those that possess "control" over market participants. Pursuant to its Ownership and Control Reports rule, the CFTC collects ownership and control information where "control" is defined as the ability to actually direct trading activities.[16] By contrast, the NOPR extends to reporting of entities that do not direct a market participant's trading or other day-to-day business activities and thus cannot act in concert by with the market participant. There is no clear value in collecting this type of information, and any little value there may be will be outweighed by the enormous cost and burden of compliance, including wasted efforts on investigations and audits caused by false positives.

[16] Ownership and Control Reports, Forms 102/102S, 40/40S, and 71, 78 Fed. Reg. 69,178 at 69,187 (defining "control" as "to actually direct, by power of attorney or otherwise, the trading of a special account or a consolidated account.").

B. The NOPR Conflicts With Well-Established Commission Precedent

The proposed rule also radically departs from established Commission precedent without justification.[17] Specifically, the NOPR presumes collaboration and control among market participants and so-called Connected Entities that is wholly inconsistent with the Commission's precedent under the FPA.

The NOPR is premised on the assumption that market participants and Connected Entities are able to jointly participate in a common course of conduct. This is not the case with investors that do not exercise day-to-day operational control over market participants. Commission precedent currently recognizes that, as a practical matter, an entity that lacks control over a market participant's day-to-day actions, such as trading activities, cannot act in concert with such market participant to engage in coordinated patterns or business activities. Moreover, portfolio companies that operate entirely independently of one another have no visibility into the day-to-day operations of each other and thus do not have access to the information that would be required to collude.

Whether or not a relationship confers "control" over an entity's business operations is central to the Commission's regulation of market participants under the FPA. The Commission's regulations distinguish affiliates from non-affiliates by considering whether an entity has control over the specified company, whether the specified company exerts control over another entity, or whether an entity is under common control with the specified company.[18] Interests that do not confer control do not establish a relationship that must be reported in FPA filings with the Commission.

---

[17] Further, it is not clear that sections 222, 301(b), 307(a), and 309 of the FPA authorize the expansive scope of the NOPR.

[18] 18 C.F.R. § 35.36(a)(9).

The Commission consistently disclaims jurisdiction under FPA sections 201 and 203 over entities that do not control FERC-jurisdictional assets.[19] These disclaimers are based on the fact that the entities have no operational control over a specified company or asset and they are not otherwise in the business of producing or selling electric power at wholesale or engaging in transmission in interstate commerce.[20] Notwithstanding the existence of such disclaimer orders, the NOPR proposes to treat these same investors as Connected Entities.

The Commission explained its criteria for finding that certain interests do not convey control in its FPA Section 203 Supplemental Policy Statement:

> The Commission has found an investment to be passive if, among other things, (1) the acquired interest does not give the acquiring entity authority to manage, direct or control the day-to-day wholesale power sales activities, or the transmission in interstate commerce activities, of the jurisdictional entity; and (2) the acquired interest gives the acquiring entity only limited rights (e.g., veto and/or consent rights necessary to protect its economic investment interests, where those rights will not affect the ability of the jurisdictional public utility to conduct jurisdictional

[19] See e.g., NM Neptune, LLC , 150 FERC ¶ 61,043 (2015) (disclaiming jurisdiction under FPA sections 201 and 203); Starwood Energy Grp. Global, L.L.C., et al., 153 FERC ¶ 61,332 (2015) (Starwood Energy) (disclaiming jurisdiction under FPA sections 201 and 203); Southline Transmission, L.L.C., et al., 152 FERC ¶ 61,211 (2015) (disclaiming jurisdiction under FPA section 201); NextEra Energy Partners, LP, et al., 150 FERC ¶ 61,071 (2015) (NextEra Energy) (disclaiming jurisdiction under FPA section 203); Catalina Solar, LLC, 144 FERC ¶ 61,141 (2013) (disclaiming jurisdiction under FPA section 201); PSEG Long Island LLC, et al., 145 FERC ¶ 61,010 (2013), dismissing reh'g, 145 FERC ¶ 61,183 (2013) (disclaiming jurisdiction under FPA section 201); California Pub. Employees' Retirement Sys., 138 FERC ¶ 61,073 (2012) (disclaiming jurisdiction under FPA section 203); Shiloh III Wind Project, LLC, 138 FERC ¶ 61,064 (2012) (disclaiming jurisdiction under FPA section 201); Alta Wind I, LLC, 133 FERC ¶ 61,240 (2010) (disclaiming jurisdiction under FPA section 201); KeySpan-Raveswood, LLC, et al., 124 FERC ¶ 61,133 (2008) (disclaiming jurisdiction under FPA section 201); Solios Power LLC, 114 FERC ¶ 61,161 (2006) (Solios Power) (disclaiming jurisdiction under FPA section 203); Neptune Regional Transmission Sys., et al., 111 FERC ¶ 61,306 (2005) (Neptune RTS) (disclaiming jurisdiction under FPA section 201).

[20] See e.g., Neptune RTS, 111 FERC ¶ 61,306 at PP 24-25.

activities); and (3) the acquiring entity has a principal business other than that of producing, selling, or transmitting electric power.[21]

The Commission has routinely disclaimed jurisdiction under section 203 over the transfer of investments that meet the foregoing requirements because "[i]f no change in control results from the transaction, it is not likely to adversely affect competition, rates or regulation, or result in cross-subsidization."[22]

Recently, in NextEra Energy Partners, LP, the Commission found certain limited partnership interests in NextEra Energy Partners, LP (NextEra Partners) did not provide "authority to manage, direct, or control the day-to-day activities of NextEra Partners or any of its subsidiaries, or its jurisdictional facilities."[23] Consequently, the Commission disclaimed jurisdiction over the transfer of those interests. Similarly, in Starwood Energy Group Global, L.L.C., the Commission disclaimed jurisdiction over the purchase and sale of certain limited partnership interests in private equity investment funds managed or controlled by Starwood Energy Group Global, L.L.C. (Starwood Funds).[24] The Commission expressly stated that the Starwood Funds and their affiliates do not need to identify such interests in any future section 205 or 203 filings.[25]

---

[21] FPA Section 203 Supplemental Policy Statement, 120 FERC ¶ 61,060 at P 54 (2007) (citing Milford Power Co., LLC, 118 FERC ¶ 61,093 at P 35 n.21 (2007); D.E. Shaw Plasma Power, 102 FERC ¶ 61,265 at PP 15 (2003) (Shaw); and Metro. Life Ins. Co., 113 FERC ¶ 61,300 at P 6 (2005)).

[22] Id. at P 47. In addition, the Commission has granted blanket authorization under FPA section 203 for transfers of non-voting securities because such transfers cannot raise competitive issues given the non-controlling nature of the interests. See 18 C.F.R. § 33.1(c)(2)(i).

[23] NextEra Energy, 150 FERC ¶ 61,071 at P 30 (2015) (citing, Shaw, 102 FERC ¶ 61,265 at PP 19-20; Solios Power, 114 FERC ¶ 61,161 at PP 9-10).

[24] Starwood Energy, 153 FERC ¶ 61,332 at P 18.

[25] Id. at P 21. The Commission also confirmed that the limited partnership investors were not holding companies or affiliates or associate companies with respect to any public-

Likewise, in AES Creative Resources, L.P., the Commission found that securities (such as tax equity interests) that give investors only those limited rights necessary to protect their economic investments do not trigger reporting requirements under the Commission's MBR regulations.[26] The Commission found that such limited rights do not entitle investors "to vote in the direction or management of the affairs" of the public utilities and, therefore, do not confer control or establish an affiliation.[27]

In stark contrast to the NOPR, the Commission recently proposed to eliminate the requirement that an entity with MBR authority identify all of its upstream owners. The Commission explained that "information about owners that are not considered affiliates under section 35.36(a)(9) is not necessary to evaluate horizontal and/or vertical market power … [and] continuing to require information on unaffiliated owners may create a burden that is unrelated to the Commission's approach to determining whether a seller should have market-based-rate authority."[28] The NOPR, however, seeks to require reporting of every single intermediate entity in the market participant's corporate ownership chain, most (if not all) of which are wholly irrelevant to the market participant's market activities. Market participants frequently are owned by numerous

---

utility companies under the Public Utility Holding Company Act of 2005. Id. at P 24.

[26] AES Creative Resources, L.P., et al., 129 FERC ¶ 61,239 at PP 25, 28 (2009). These limited rights include consent and veto rights for the assumption of new indebtedness; the encumbrance or sale of assets with a value above a specified amount; mergers or consolidations or acquisitions of all or substantially all of the assets of any other entity; capital expenditures exceeding those contemplated by the major project documents; expenditures that exceed the approved budget by a certain amount; settlement of claims; the reduction of insurance coverage; contracts with an affiliate of any member or the possession of project company property by any member; and new power purchase agreements with "related persons" as defined in the Internal Revenue Code. Id. at PP 26-27.

[27] Id. at 28.

[28] MBR Ownership NOPR at P 8 (citing NOPR).

special-purpose entities due to particular tax, securities and other legal requirements. The Commission has granted a FPA section 203 blanket authorization for changes to intermediate ownership structures because these special-purpose entities do not influence the day-to-day operations of public utilities.[29] However, these pass-through intermediate entities would be treated as Connected Entities under the NOPR and market participants would be required to provide detailed reporting about the organization and role of each such entity. This futile exercise is entirely unnecessary to assist the Commission in its market surveillance activities.

The NOPR completely ignores the Commission's careful and reasoned delineation between investors that control the day-to-day activities of a market participant and those that intentionally do not exercise such control. At the Technical Conference, Commission Staff stated that all investors are included in the NOPR because they are concerned that a significant financial interest could provide a motive to manipulate the markets, even if such an interest does not confer control.[30] In reality, an investor has no opportunity to engage in market manipulation through a market participant over which it has no day-to-day operational control.

The NOPR also unjustifiably departs from Commission precedent regarding entities that hold profits interests or lenders with rights to convert debt to ownership interests.[31] Holders of debt instruments and purely financial interests typically have only those limited veto or consent rights necessary to protect their economic investments and

[29] 18 C.F.R. § 33.1(c)(6).

[30] Staff Responses to Definition Questions at Technical Conference at 1, Docket No. RM15-23-000 (Dec. 8, 2015) (Staff Responses).

[31] NOPR at P 23.c; see also, Staff Responses at 3-4.

thus they lack the ability direct the operations of market participants. As a result, the Commission customarily treats lenders and investors with only economic interests as passive entities that need not be reported in any FPA context. Commission precedent also establishes that convertible debt does not require prior authorization under section 203 when the debt is assumed; rather, prior authorization is only required before the debt is actually converted to an equity interest.[32] This precedent clearly recognizes the lack of control rights associated with convertible debt rights prior to conversion.

The NOPR also fails to appreciate that debt instruments are routinely syndicated and traded. Many market participants may not know or have the ability to find out which entities hold debt instruments. Further, the frequency with which debt instruments are traded makes it virtually impossible to comply with the NOPR. Nevertheless, the Commission asserts that such compliance is necessary without establishing the usefulness of information about these non-controlling debt holders.

At the Technical Conference, Commission Staff clarified that the NOPR proposal to report agreements is intended to target only those agreements that confer "control over the trading activities, or over the unit commitment decisions, of a market participant."[33] The Independent Generation Owners & Representatives agree with this clarification as consistent with Commission precedent (although unnecessary in light of existing reporting requirements). If the Commission does not reject the NOPR as unnecessary

[32] Transactions Subject to FPA Section 203, Order No. 669, 71 Fed. Reg. 1,348 (Jan. 6, 2006), FERC Stats. & Regs. ¶ 31,200 (2005), order on reh'g, Order No. 669-A 71, Fed. Reg. 28,422 (May 16, 2006), FERC Stats. & Regs. ¶ 31,214 at P 97 (2006) ("In those instances where the security is non-voting when issued or acquired but can be converted to voting at a later date, we will treat the security as a voting security when it is converted."), order on reh'g, Order No. 669-B, 71 Fed. Reg. 42,579 (July 27, 2006), FERC Stats. & Regs. ¶ 31,225 (2006).

[33] Staff Responses at 4.

and duplicative of existing reporting requirements, the Independent Generation Owners & Representatives urge the Commission to similarly limit any other reporting of Connected Entities to those that have actual control over a market participant's trading activities and market-related functions.

C. The NOPR Imposes an Undue Burden on Market Participants and Investors

The NOPR specifically asked for comments on the accuracy of the Commission's burden estimates.[34] Commissioner LaFleur also asked market participants to comment on "the incremental costs or burdens that would be created by this new reporting requirement."[35] As discussed below, the burden estimates provided in the NOPR do not come close to reflecting the reality of complying with the proposed regulations for the majority of market participants.

The NOPR claims that "the data related to the Connected Entity is information readily available to the market participant" and "the costs of gathering the data is expected to be largely administrative in nature with some minimal review by legal staff."[36] These assumptions are entirely unfounded.

The Commission fundamentally misunderstands that market participants typically lack the practical means necessary to collect reportable information. Many market participants have complex organizational structures and numerous business relationships that would be swept into the NOPR's proposed reporting regime notwithstanding the irrelevant nature of the information. Gathering and maintaining the required information

[34] NOPR at P 36.

[35] Id. at LeFleur, C., concurring.

[36] Id. at P 43 (footnote omitted).

would be a huge and novel undertaking, requiring extensive work by officers and attorneys. The Commission's characterization of the work as "largely administrative" wholly misapprehends the breadth of the information requested in the NOPR and the legal complexity involved in interpreting and applying the provisions outlined in the NOPR.

Much of the proposed Connected Entity Data is not available to the market participant with the reporting obligation because entities that are operated independently of one another do not share information. An ordinary market participant will be required to collect large amounts of data about or from third parties that are not within its control. PE Fund portfolio companies, which currently operate independently of one another, would be required to coordinate to aggregate data across the entire PE firm. Further, if a market participant is owned by two or more unaffiliated PE Funds, these unaffiliated funds would have to exchange confidential and sensitive information in order for the market participant to satisfy the NOPR's reporting requirements. In this regard, the information sharing requirements of the NOPR would actually promote collusion rather than prevent it.[37]

The Commission estimates that it would require four hours per participant, at a total cost of $168 per participant, to register for a "Legal Entity Identifier" (LEI) "and to collect, standardize, and provide the requested data to the RTO/ISO."[38] The NOPR also estimates that updates to the submitted data, which would be required on an ongoing basis, would require three hours a year per participant, for a total cost of $126, per

[37] Further, the proposed rules have the potential to require information sharing among third parties that could have anti-trust implications.

[38] Id.

participant.[39] The NOPR further estimates that one quarter of "[m]arket participants or Connected Entities may, from time to time, seek to confirm the accuracy of information concerning them that has been submitted to an RTO/ISO by other market participants" and that this will take one hour, at a cost of $42 per participant or Connected Entity.[40] Finally, the NOPR estimates that Connected Entities will spend one hour responding to requests for information from market participants, at a cost of $42 per Connected Entity.[41]

The foregoing estimates are entirely divorced from reality. The NOPR does not recognize the complexity of the organizational structures of private equity funds and institutional investors, in which there can be many layers of indirect ownership relationships, multiple classes of equity interests with different voting and economic rights, and fund managers with management rights but minimal or no equity interests. Determining which entities in such complex organizational structures must be reported under existing requirements already requires a significant investment of time and money. Expanding the analysis to determine which entities qualify as Connected Entities under the NOPR would require considerable time and legal analysis. For example, identifying Connected Entities where multiple classes of equity interests have differing rights and cannot be aggregated into expressions of ownership percentages is not straightforward as the NOPR presumes. Market participants owned by private equity funds or institutional entities are likely to have very large numbers of Connected Entities under the proposed

[39] Id.

[40] Id. at P 45.

[41] Id.

regulations, the majority of which have no practical ability to influence the actions of or collude with the market participant.[42]

Moreover, the Commission underestimates the difficulty of summarizing the major terms of contracts. The volume and variety of such agreements is extensive and each agreement requires individual review. Distilling the major terms of a single contract would require many hours of work by attorneys and other professionals at significant expense to the market participant.

In addition, the complicated organizational structures of private equity funds, institutional investors, and other industry participants are constantly evolving, debt and equity interests are frequently transferred, and contracts are constantly being executed, amended, and terminated. Given the expansive scope of the NOPR, market participants affected by these structures would be continually engaged in compliance activity related to monitoring and reporting Connected Entities. Even if the requirement to update information is extended to a longer time frame, larger corporate organizations and private equity funds with complex partnership structures would be required to devote substantial employee time to track, confirm, and update their Connected Entity Data.

To illustrate the excessive burden that would be imposed on many market participants, Appendix A includes an organizational chart based on ownership of an actual private equity owned market participant. As indicated, a typical portfolio company in a PE Fund has a multilayered organizational structure due to financing, tax, and other legal and regulatory requirements. In addition to the large number of entities in the portfolio company's organizational structure that would be Connected Entities under the

[42] See Appendix A (providing a representative ownership structure for a private equity-owned market participant).

NOPR, a typical PE Fund portfolio company also has multiple debt facilities and contractual arrangements throughout that structure that would be reportable under the proposed rule. The undue burden imposed on a single representative market participant clearly outweighs the presumed and unsupported benefits of the information that would be collected.

In addition to the compliance burden imposed on market participants, the proposed rule would have the further effect of chilling investment in the energy sector. Private equity funds, institutional investors, and lenders value privacy in transactions and demand confidentiality from their counterparties. They do so because it could harm them in future negotiations for similar transactions and in structuring future investments and financing arrangements. The primary way that investors and lenders safeguard their privacy and intrusion from unnecessary regulation is by carefully structuring investments with respect to governance and control rights. The NOPR directly jeopardizes this protection, which would chill investment in market participants. The result would be a higher cost of capital for market participants and ultimately more expensive electricity for consumers, neither of which has been justified by a need for the Connected Entity data.

D. Alternatives to the NOPR

If the Commission determines that it should proceed with the NOPR in spite of the foregoing issues, the Independent Generation Owners & Representatives urge the Commission to tailor the proposed rule to strike an appropriate balance between the burden and the potential benefit. As discussed herein, the definition of Connected Entity must be limited to entities that have the ability to control a market participant's day-to-day operations and trading activities (and thus present a material risk of collusion with

such market participant). Further, the Commission should be mindful of the duplicative nature of many of the NOPR's proposed reporting requirements and should establish exemptions for certain market participants such as market participants that are public utilities subject to the existing reporting requirements of the FPA.

The Commission should refrain from requiring reporting of basic management agreements that create nothing more than an agency relationship. Such contractors are acting solely on behalf of the market participant, which retains authority to direct the actions of these contractors. Because these contractors do not have authority to act on their own behalf, there is no utility in reporting these arrangements. Further, the Commission should limit reporting of detailed contractual provisions to a case-by-case basis. The identification of a relevant contract with the counterparty should be sufficient for the Commission to identify cases in which additional information may be warranted. In the case of a typical management agreement, the Commission should grant an exemption from reporting based on the reasonable assumption that controlling owners will police their managers to ensure that their managers operate the assets for the owner's benefit and not the manager's benefit.

The Independent Generation Owners & Representatives urge the Commission to limit the definition of Connected Entities to entities that have day-to-day operational control over market participants and their trading patterns. The Commission has not demonstrated that entities without such control can collude with market participants. Further, the definition of Connected Entity should exclude foreign entities to the extent that such entities are "connected" to a market participant solely by common ownership or control and do not conduct business in the United States.

The Independent Generation Owners & Representatives further urge the Commission to clarify that a market participant's duty to report Connected Entity Data is limited to the best of its knowledge after due inquiry. Market participants should not be held liable for failure to report information not provided by a Connected Entity and should not have to track down and submit questionnaires to entities having no control relationship with the market participant.

While the Independent Generation Owners & Representatives do not believe that the NOPR is necessary, the Independent Generation Owners & Representatives recognize that there would be benefit to implementing uniform reporting requirements across all markets. The adoption of a standard affiliate disclosure obligation for all RTOs/ISOs, focusing on entities with actual control over a market participant's trading activities, would facilitate more accurate reporting of information. Further, nation-wide reporting of all affiliates rather than market-specific reporting is consistent with the Commission's MBR regulations and would improve the practical utility of the information.

The Independent Generation Owners & Representatives also recommend that the Commission adopt a more manageable time frame for updating Connected Entity Data. The 15-day requirement proposed in the NOPR is simply impossible for many market participants to satisfy, particularly given that Connected Entities often will be third parties outside of the market participant's control. The Independent Generation Owners & Representatives recommend that updates be provided on an annual basis, which would allow market participants to provide more accurate data in an orderly fashion. Anything more than an annual reporting obligation would be excessively burdensome and would reduce the accuracy of reporting, which would undermine the utility of the information.

V. CONCLUSION

For the foregoing reasons, the Independent Generation Owners & Representatives submit that the proposed regulations have not been shown to be necessary and that the burdens associated with compliance far outweigh the benefits. The Independent Generation Owners & Representatives strongly urge the Commission to withdraw the NOPR. In the alternative, the Commission should modify the NOPR to address the material issues discussed herein.

Respectfully submitted,

/s/ Jessica C. Friedman

Jessica C. Friedman
Andrew O. Schulte
Van Ness Feldman, LLP
1050 Thomas Jefferson St., NW
Washington, DC 20007

On Behalf of the Independent Generation Owners & Representatives:

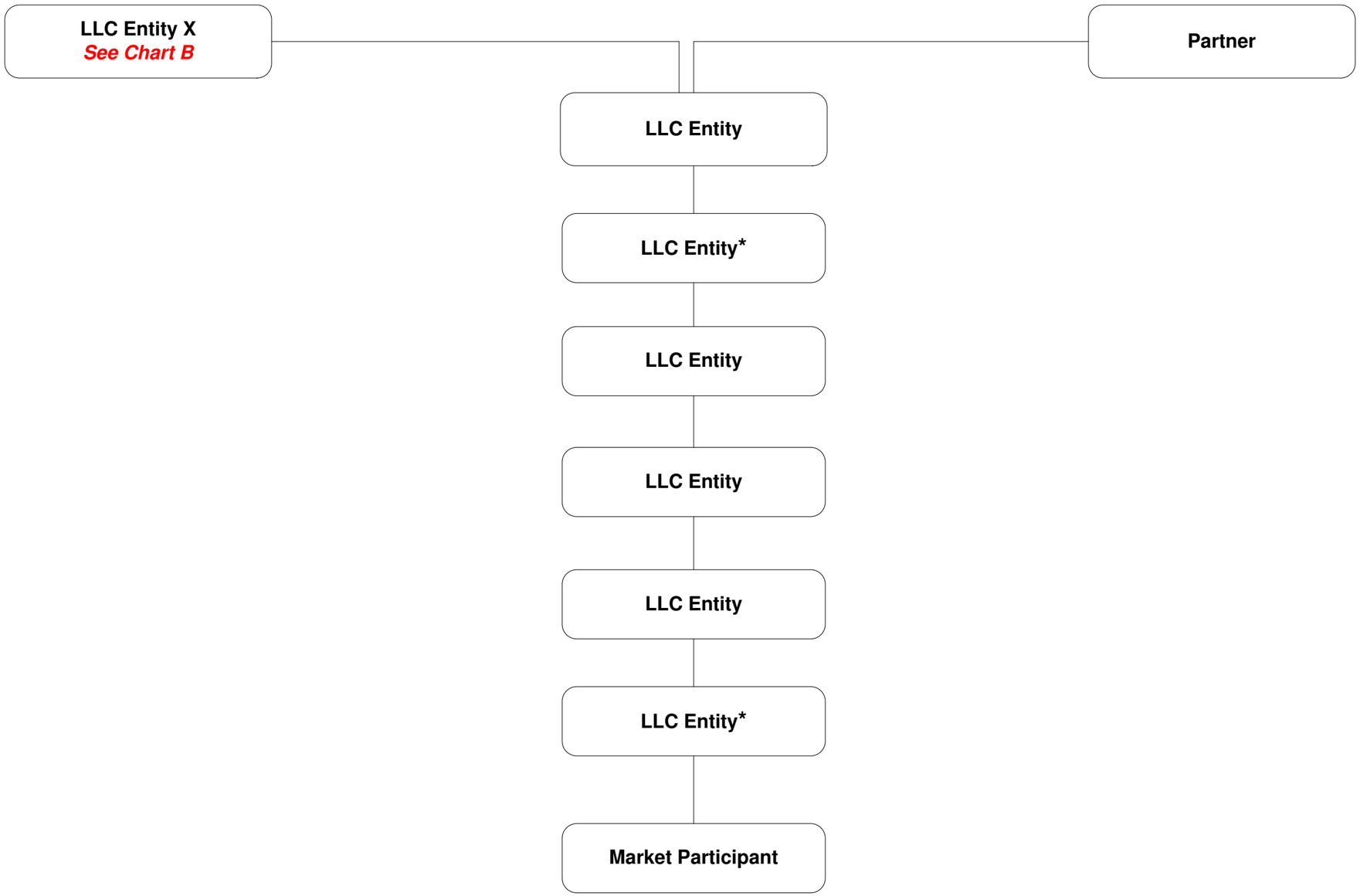
Private Equity Growth Capital Council
ArcLight Capital Partners, LLC
Cogentrix Energy Power Management, LLC

January 22, 2015

Appendix A

Representative Ownership of a PE-Owned Market Participant

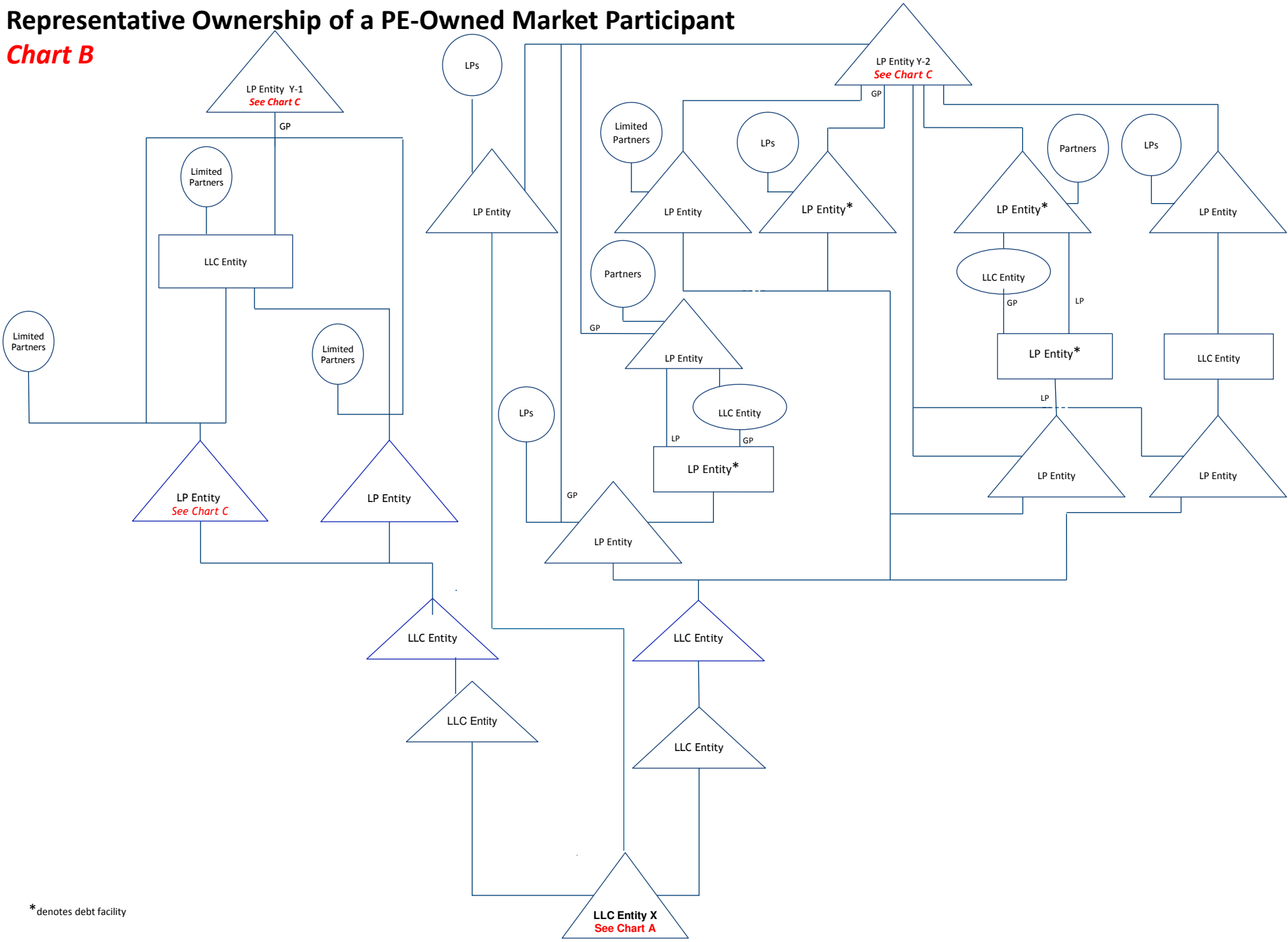
Chart A



* denotes debt facility

Representative Ownership of a PE-Owned Market Participant

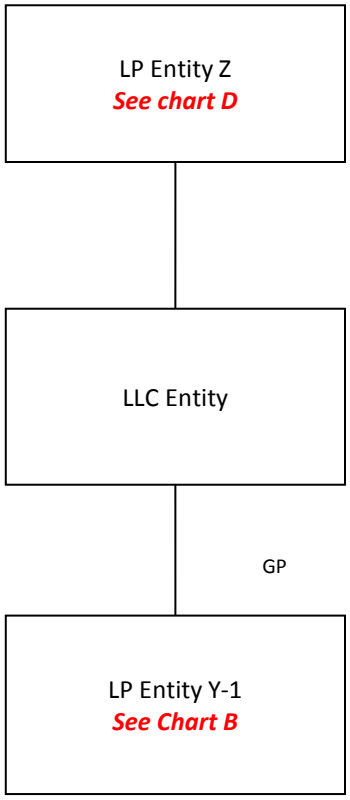
Chart B

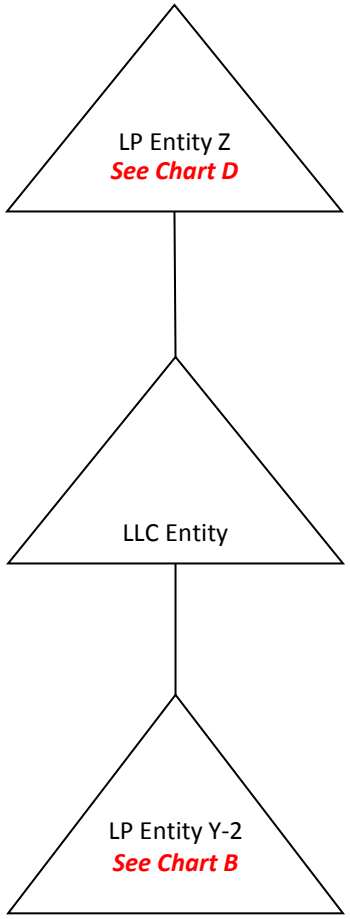


*denotes debt facility

Representative Ownership of a PE-Owned Market Participant

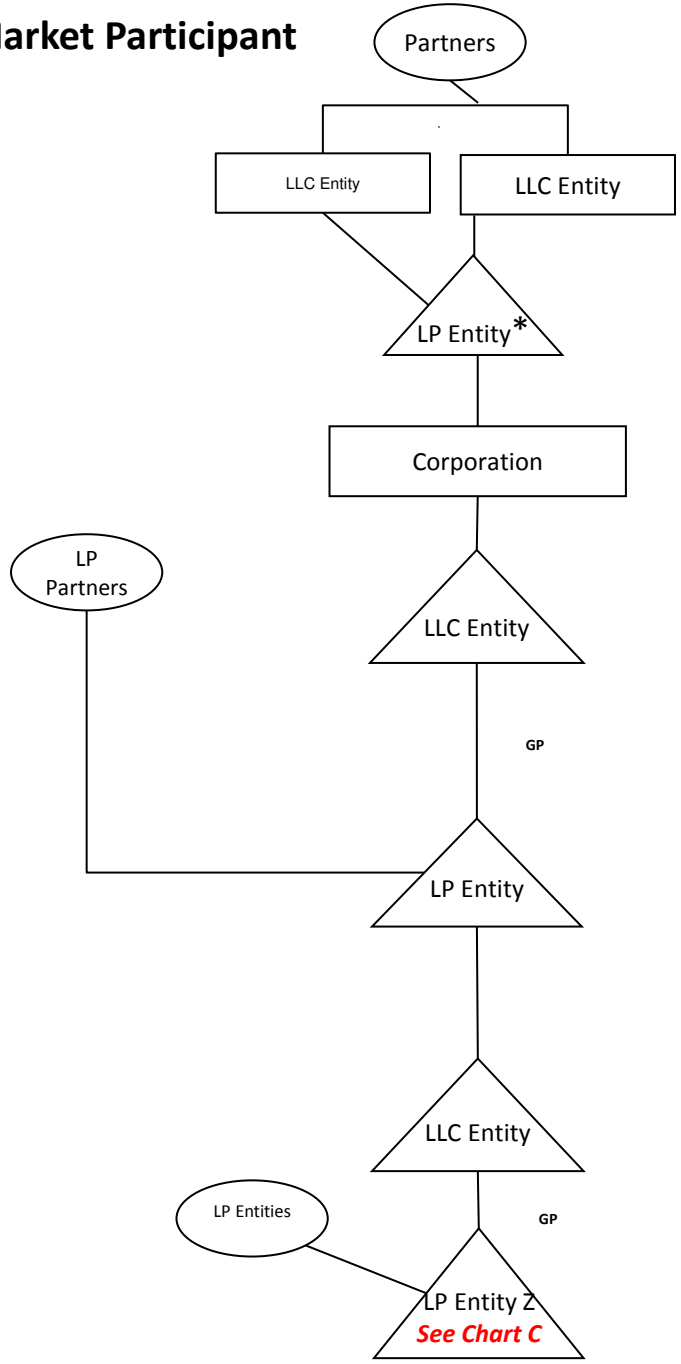
Chart C





Representative Ownership of a PE-Owned Market Participant

Chart D



* – denotes debt facility