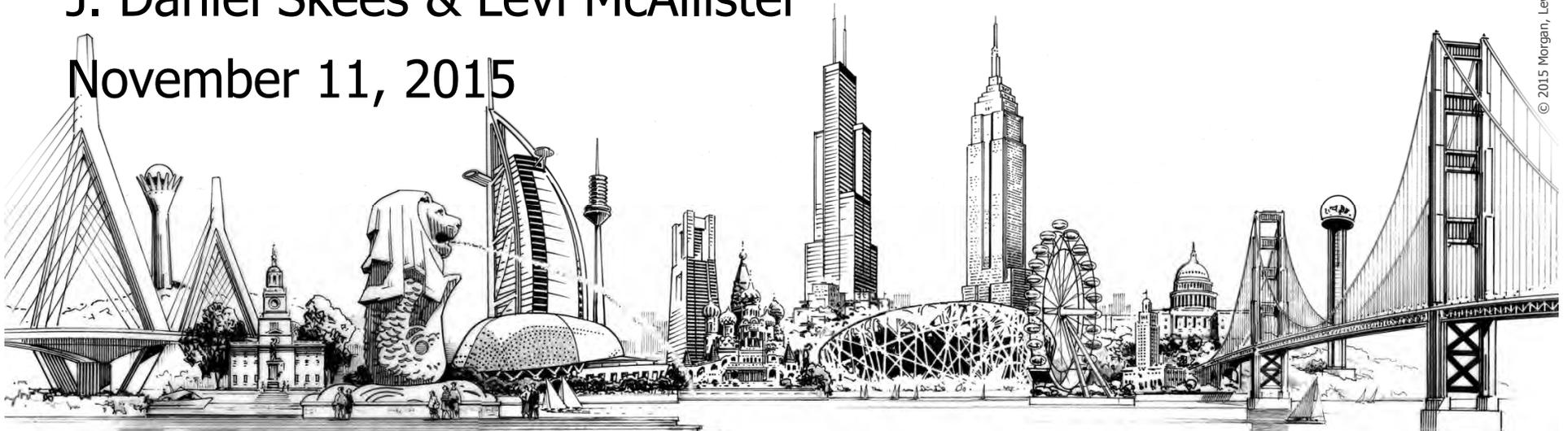


# Morgan Lewis

## PROPOSED FERC REQUIREMENTS FOR ISO/RTO PARTICIPANTS: YOU'RE ALL “CONNECTED ENTITIES”

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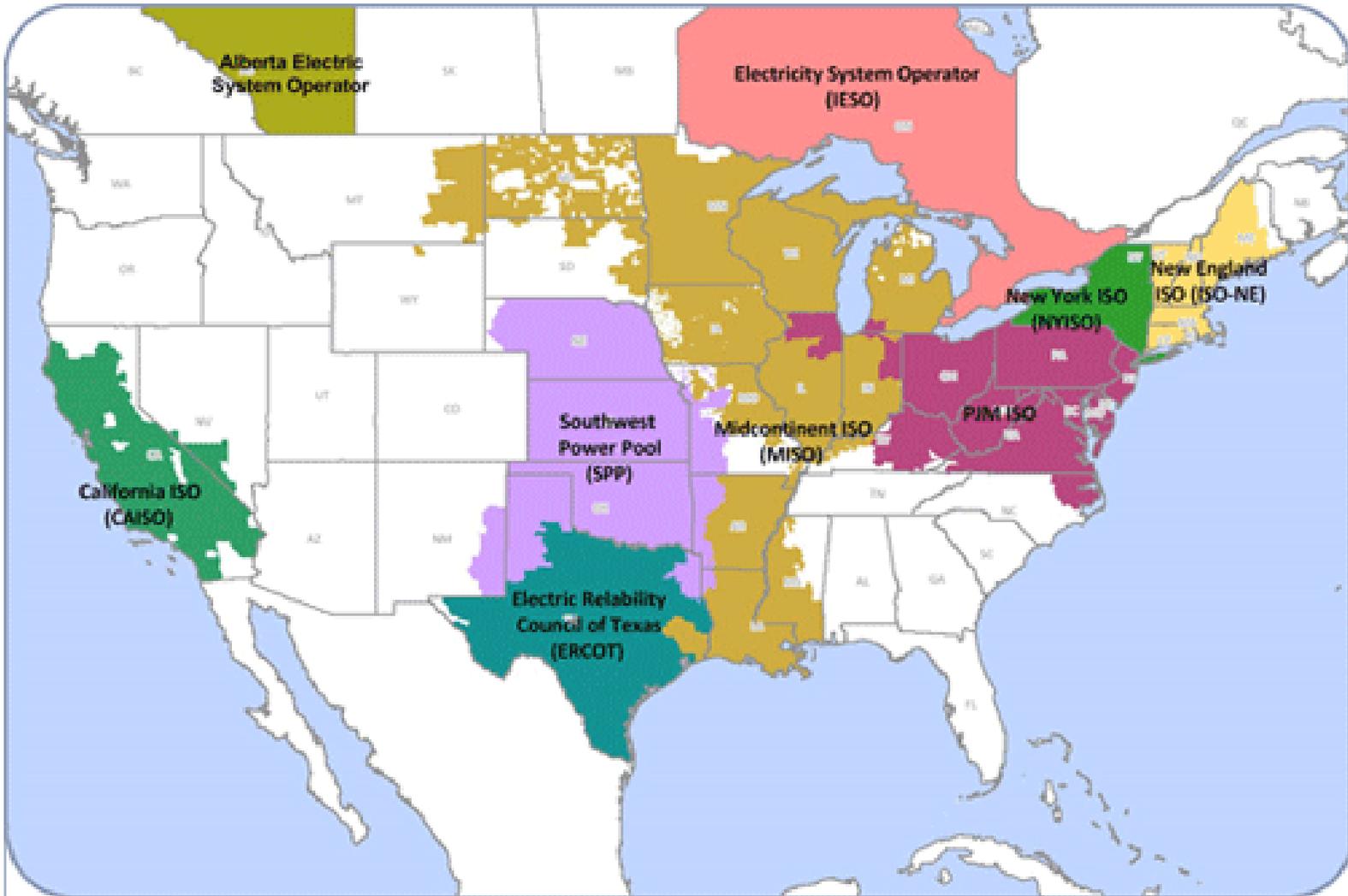
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# ISOs/RTOs

- Independent System Operator (ISOs) and Regional Transmission Operator (RTOs) are inescapable features of the electric landscape
- 90 percent of FERC-regulated wholesale power sales are made by entities that participate in ISOs/RTOs
- A substantial majority of US electric load is located within ISO/RTO-administered service territories
- When FERC recognizes the existence of an ISO/RTO, that ISO/RTO effectively becomes the exclusive wholesale and transmission market

# ISOs/RTOs



# ISOs/RTOs

- Each had a different, one-off origin
- Non-identical practices and tariffs
- An ISO/RTO is inherently complex
  - Long-term capacity supply and adequacy, and long-range bidding requirements
  - Separate markets exist for capacity and energy products
  - Extensive credit requirements
  - Exclusive control over generator and WiresCo interconnection
  - Tariffs, terms and conditions change – frequently

# ISOs/RTOs and FERC Regulation

- FERC regulates ISOs/RTOs (except in most respects for ERCOT)
- FERC must approve all changes in practices, most changes as to market rules and governance
- FERC gathers information from ISOs/RTOs for use in monitoring markets and in enforcement proceedings
- FERC gathers information from ISOs/RTOs for use in developing aggregate market information

# ISOs/RTOs and Credit

- ISOs/RTOs clear trades from purchasers of wholesale power and transmission service
- ISOs/RTOs collect cash from market participants
- ISOs/RTOs are typically exclusive energy clearing markets
- Typically, absent creditworthiness being established by a parent guarantee, recourse upstream is limited – where it exists at all
- ***An ISO/RTO has no automatic right to look to parents and affiliates when a market participant defaults***

# ISOs/RTOs and Credit

- ISOs/RTOs impose creditworthiness standards on market participants
- Every ISO/RTO requires participants to disclose their “affiliates” as part of establishing creditworthiness
- Every ISO/RTO retains the right to impose family-wide creditworthiness limits and caps on automatic extensions of credit

# “Affiliation” Under Existing FERC Requirements

- “Affiliate” status is key to many FERC, ISO/RTO disclosure obligations
- Typically, “affiliate” means:
  - Direct or indirect ownership or control, including common upstream control, via
  - Voting or equivalent interest, at a
  - Threshold of 10% (in some contexts, 5%)

# “Affiliation” Under Existing FERC Requirements

- Standard is used by:
  - Every ISO/RTO
  - FERC, in M&A matters
  - FERC, in many power sales/rate filing contexts
- Similar standards are used in other FERC contexts, sometimes relying on the lower 5% level

# What Information Does FERC Want Now?

- Information to understand the ownership, employment, debt, and contractual relationships of market participants in RTOs/ISOs
  - “Connected Entity” identification
  - Corporate ownership affiliates
  - Executive officers
  - Traders
  - Debt holders with certain rights
  - Vendors providing services related to jurisdictional markets
  - Unique alphanumeric identification numbers known as “Legal Entity Identifiers” (LEIs)

# What Information Does FERC Want Now?

- ISOs/RTOs would have obligation to provide the market participants' information to FERC
  - ISO/RTO Tariffs to provide mechanism for collection from market participants
- FERC considering expanding the disclosure requirements to non-RTO/ISO market participants

# Understanding The FERC Proposal

- FERC believes that “Affiliate” status does not sweep in a sufficiently wide body of business relationships to permit the ISOs/RTOs and FERC to comprehensively identify all relationships present in particular trades
- New “Connected Entity” status – ***substantially*** wider than “Affiliate” status
- New “Legal Entity Identifier” (LEI) registration requirement
- Extensive new form, chart requirements
- Disclosures re LEIs participating in one ISO/RTO must now be made to all ISOs/RTOs

# Why Does FERC Want This Information?

- Understanding the undisclosed relationships between market participants would allow FERC to identify behavior that is manipulative, abusive, or fraudulent
  - Market participants share relationships that are not revealed through existing affiliate disclosure requirements
  - Market participants may be undertaking transactions that benefit entities with whom there is no public documented relationship
- Fits into FERC's Strategic Plan for monitoring and surveillance to detect and deter marketing manipulation

# The Proposed Definition of Connected Entities

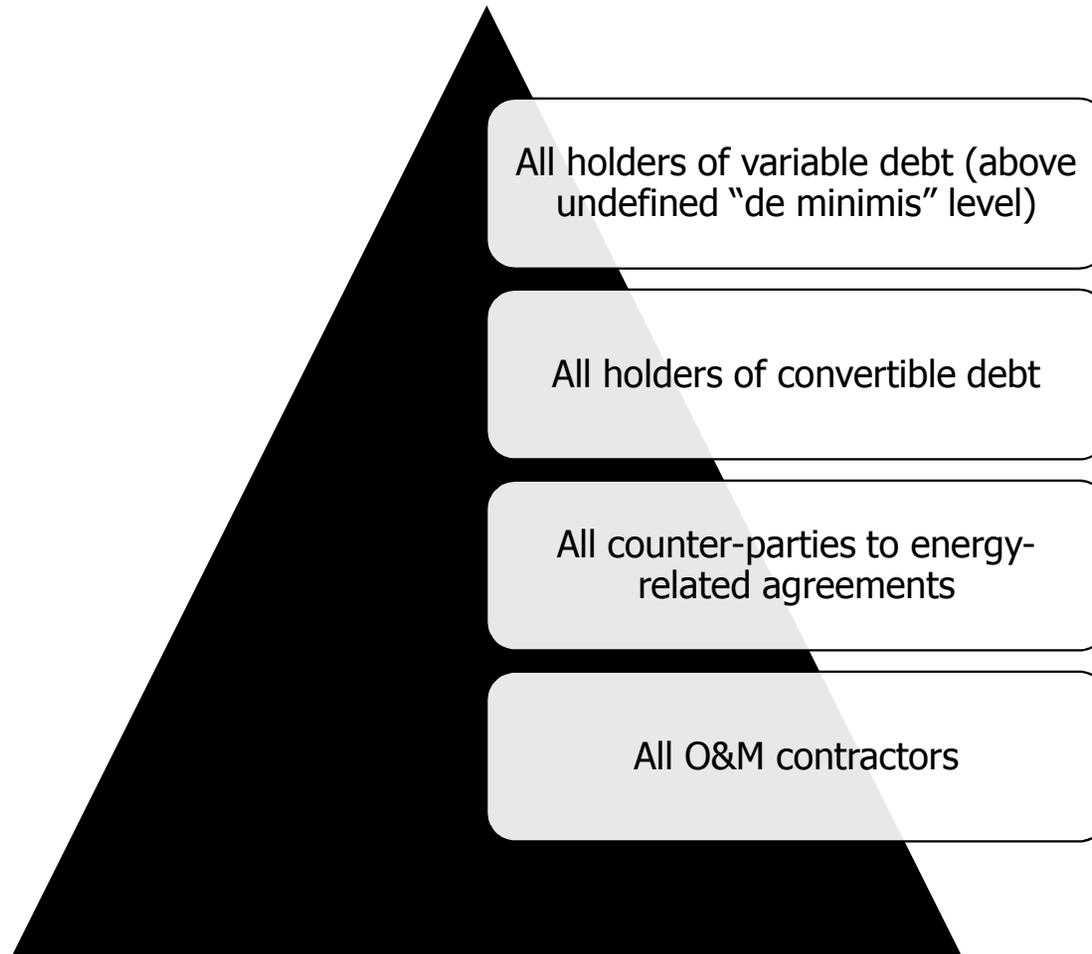
All direct and indirect parents and subs (10% trigger)

All direct and indirect Affiliates (10% trigger)

All passive, non-voting, direct and indirect parents (10% trigger) – ***including non-jurisdictional investment relationships***

CEO, CFO, CCO, and ***all "traders"*** (undefined)

# The Proposed Definition of Connected Entities



# Connected Entities – Lenders

- Does a Borrower have legal authority to procure an LEI for a Lender?
  - Will consents be required? Do financing documents contemplate LEI disclosures?
- Isn't all debt "convertible" in the event of uncured defaults?
  - So ***aren't all lenders Connected Entities?***
- Other uncertainties
- Anticipating lender objections to being identified

# Connected Entities – Investors

- Historical treatment of passive and non-controlling investors
- Will investors excluded from FPA jurisdiction be Connected Entities that are swept indirectly into FPA jurisdiction?
- What about immaterial, intermediate ownership vehicles (including, e.g., tax blocker entities) – must they be listed?

# Connected Entities – More Unknowns

- A market participant may not always know the RM15-23 Connected Entity facts, when **investors** are at arm's-length
- A market participant may not always know the RM15-23 Connected Entity facts, when **lenders** are at arm's-length
- Tradable debt
  - Publicly listed bonds
- Passive LP investors, including investors in fund entities

# LEIs

- A FERC-regulated entity must **now** have one or more of:
- An e-tariff company code issued by the Commission;
- Market-Based Rate authorization from the Commission, with a unique issuance docket, issued under 18 C.F.R. Part 35 Subpart H;
- A Commission-issued docket for reactive power and/or other ancillary services sales;
- A docket number applicable to the ISO/RTO participant's status as a Qualifying Facility under 18 C.F.R. Part 292;
- A docket number applicable to the ISO/RTO participant's status as an Exempt Wholesale Generator under 18 C.F.R. Part 366;
- One or more docket numbers applicable to the facility's interconnection agreement(s);
- Such identifying numbers as are assigned by each ISO/RTO.

# LEIs

- Creating the appearance of jurisdiction
- LEIs for entities to which there is no legal recourse
- Treatment of intermediate SPEs (such as special blocker entities)
- What if a special-purpose intermediate owner has no EIN (such as an intermediate owner that has elected partnership treatment) and cannot otherwise be easily identified – will a consistently-reportable LEI be made available?
- Will jointly-owned market participants be forced to engage in lengthy cross-owner LEI disclosures?

# FERC Jurisdiction Issues

- Can FERC really do this?
- FPA jurisdiction
  - Differences between knowledge-based disclosures VS. being a jurisdictional person/entity
- Basis for “Connected Entities” as FERC-jurisdictional persons
- Enforcement:
  - Audits of market participants by ISOs/RTOs
  - Audits of market participants and of ISOs/RTOs by Commission Enforcement staff

# Implementation

- Timing
  - How many months of full-time work will it really take to reasonably permit substantial compliance?
  - Updating each IRO/RTO within 15 days of a change
  - Annual certification
- Delivery of LEI information
- Confidential treatment – except it's not confidential
  - The limitations of FERC's confidentiality regulations
  - Order No. 760 data
  - Part 1b investigatory data
  - The risks of FOIA disclosure

# Implementation

- FERC's estimates of time to be consumed:
  - Is FERC's estimate of a few hours reasonable?
  - Once initial information is gathered, what additional time will be needed to audit and assemble results?
  - What additional time will be needed to obtain LEIs?
  - What additional time will be needed to prepare charts?
- FERC technical conference – December 8, 2015
- Comments due January 22, 2016
  - Both pre-conference and post-conference filings may be submitted

# QUESTIONS

# THANK YOU

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