



# MEMO

**Date:** December 7, 2004  
**To:** Board of Directors  
**From:** Bob Kahn, Chair HR & Governance Committee  
**Subject:** Amendments to 401(k) Plan and Money Purchase Plan

## **Issue for the ERCOT Board of Directors**

**ERCOT Board of Director Meeting Date:** December 14, 2004

**Agenda Item No.:** 12a(1)

### **Issues:**

Amendments to the 401(k) Plan and the Money Purchase Plan (individually, a “Plan” and, collectively, the “Plans”) are proposed as follows:

- a) Removal of Trustee. Amendment of both Plans to remove the former CFO as a co-Trustee of the Plans.
- b) Clarification of Definition of Compensation. Amendment of both Plans effective January 1, 2005, to clarify the definition of “Compensation” used for determining contributions (and for other purposes as stated in the respective Plans).
- c) Change from Automatic Annuity Form of Benefit (401(k) Plan Only). Amendment of the 401(k) Plan effective April 1, 2005, to eliminate annuities as the automatic form of benefit. (The delayed effective date would allow ERCOT time to provide the 90-days’ advance notice to participants of the amendment that is required by IRS regulations.)

### **Background/History:**

- a) Removal of Trustee. The CFO resigned on November 15, 2004, and hence should not continue as a Trustee of the Plans.
- b) Clarification of Definition of Compensation. ERCOT makes contributions under the Plans related to specific items of compensation. Those items include regular pay, overtime, bonuses, vacation and holiday pay, sick pay and short term disability benefits. Amendment of the Plans will clarify the definition of compensation.
- c) Change from Automatic Annuity Form of Benefit (401(k) Plan Only). Currently, the 401(k) Plan provides that the automatic form of benefit for a participant is a “qualified annuity”—generally, a single life annuity for an unmarried participant and a joint and survivor annuity for a married participant. (Similarly, the automatic form of benefit for a surviving spouse of a participant who died before receiving a benefit is a single life annuity.) Thus, in order to receive a lump-sum distribution, for example, a participant must waive the annuity form of benefit with the written consent of his or her spouse (if any). To date, all participants have waived the



## MEMO

annuity form of benefit and elected a lump-sum distribution. However, because of the automatic annuity provision, ERCOT must provide written disclosures to participants about the automatic annuity, which are confusing to participants who have little interest in annuities. In addition, ERCOT must obtain spousal consent not only for benefit distributions but also for participant loans. Thus, amendment of the 401(k) Plan to eliminate annuities as the automatic form of benefit would simplify plan administration. However, as the amendment would preserve the annuity form of benefit as an option, the amendment would not take away a benefit from participants.

### **Key Factors Influencing Issues:**

- a) Removal of Trustee. It would not be prudent to have the former CFO continue as a Trustee of the Plans.
- b) Clarification of Definition of Compensation.
  - 1) Certainty in Plan administration.
  - 2) Simplification of Plan administration.
  - 3) Reduction in the opportunity for administrative errors.
- c) Change from Automatic Annuity Form of Benefit (401(k) Plan Only).
  - 1) Simplification of Plan administration.
  - 2) Reduction in the opportunity for administrative errors.
  - 3) Reduction in confusion on the part of participants.
  - 4) Preservation of the annuity form of benefit as an option.

### **Alternatives:**

- a) Removal of Trustee. As it would not be prudent to have the former CFO continue as a Trustee, removal is the only alternative.
- b) Clarification of Definition of Compensation.
  - (1) Amend the Plans.
  - (2) Do not amend the Plans and continue to administer the provisions as they exist.
- c) Change from Automatic Annuity Form of Benefit (401(k) Plan Only).
  - (1) Do not amend the 401(k) Plan and continue to administer the provisions required because of the automatic annuity form of benefit.
  - (2) Amend the 401(k) Plan.

### **Conclusion/Recommendation:**

The H.R. & Governance Committee and ERCOT staff recommend that the Board approve ERCOT's execution of documents: (a) to amend the 401(k) Plan and the Money Purchase Plan to remove the former CFO as a Trustee of the Plans; (b) to amend the 401(k) Plan and the Money Purchase Plan effective January 1, 2005, to clarify the definition of



## MEMO

“Compensation” used for the purpose of determining contributions; and (c) to amend the 401(k) Plan effective April 1, 2005, to eliminate annuities as the automatic form of benefit by incorporating the safe harbor rules regarding the provision of qualified annuities under Sections 401(a)(11) and 417 of the Internal Revenue Code of 1986. A proposed resolution is provided.



## **RESOLUTION OF THE ERCOT BOARD OF DIRECTORS**

**WHEREAS**, the Electric Reliability Council of Texas, Inc. (“ERCOT”) maintains the Electric Reliability Council of Texas 401(k) Savings Plan (the “401(k) Plan”) and the Electric Reliability Council of Texas Money Purchase Plan (the “Money Purchase Plan”) (individually, a “Plan” and, collectively, the “Plans”), each of which is a defined contribution plan and trust agreement maintained under Sections 401(a) et seq. of the Internal Revenue Code of 1986 (the “Code”); and

**WHEREAS**, pursuant to Section 23.02 of each Plan, ERCOT has the right to amend choices on the Adoption Agreement to the Plan; and

**WHEREAS**, pursuant to Section 22.11 of each Plan, the Employer has the right to remove Trustees of the Plan; and

**WHEREAS**, ERCOT’s Board of Directors deems it desirable and in the best interests of ERCOT: (1) to amend both of the Plans to remove the former CFO as a Trustee; (b) to amend both of the Plans effective January 1, 2005, clarify the definition of “Compensation” used for the purpose of determining contributions (and for other purposes as provided in the respective Plans); and (c) to amend the 401(k) Plan effective April 1, 2005, to eliminate annuities as the automatic form of benefit by incorporating the safe harbor rules regarding the provision of qualified annuities under Code Sections 401(a)(11) and 417.

After full discussion and due consideration thereof, it was duly

**RESOLVED**, that the removal of Ms. Maxine N. Buckles as a Trustee of each of the Plans be and hereby is in all respects authorized, approved and confirmed effective November 15, 2004; and

**FURTHER RESOLVED**, that amendment of each Plan effective January 1, 2005, to clarify the definition of “Compensation” used for the purpose of determining contributions (and for other purposes as provided therein) be and hereby is, in all respects, authorized, approved and confirmed; and

**FURTHER RESOLVED**, that amendment of the 401(k) Plan effective April 1, 2005, to incorporate the safe harbor rules regarding the provision of qualified annuities under Code Sections 401(a)(11) and 417 be and hereby is, in all respects, authorized, approved and confirmed; and

**FURTHER RESOLVED**, that the actions of the officers of ERCOT in executing such documents as may be required or desirable and in taking such other actions as may be necessary or desirable to effectuate the foregoing resolutions, to render said amendments fully effective, and otherwise to maintain for the Plans compliance with the requirements of the Code, the Employee Retirement Income Security Act of 1974 (“ERISA”), and any other applicable legal requirements be and hereby are, in all respects, authorized, approved, ratified and confirmed.