

2005 ERCOT Bylaws Review - Suggested and Required Changes

September 6, 2005

Governance and Administrative Enhancements; Compliance with SB 408

SECTION(S) AFFECTED	DESCRIPTION OF SUGGESTED CHANGE OR ISSUE	COMMENTS (Updated to include public comments)	DRAFT RECOMMENDATION OF THE HR & GOVERNANCE COMMITTEE
I. Suggestions From the Board			
2.1, 3.4, 4.3(a)	Permit trade associations comprised of members that meet the current definition of Commercial Consumers to join ERCOT as a Corporate Member and pay an Annual Fee less than the \$2,000 Fee currently required for Corporate Members. With respect to the Commercial Consumer Board and TAC seats, relax the requirement that Board members and TAC members must be employees of a Corporate Member. Allow the Commercial Consumers to elect Board and TAC representatives as is the practice for Industrial Consumers and other Segments.	<p>1. Commercial Consumers have not been active in ERCOT. Changes are needed to encourage participation.</p> <p>2. Language should exclude “sham” trade associations created solely for the purpose of gaining ERCOT membership. Screening criteria will need to be developed.</p> <p>3. Eligible trade associations should be limited to those that represent the interests of Commercial Consumers.</p> <p><u>Comments:</u> DeAnn Walker (CenterPoint Energy): This proposal should be confined to the Segment identified. Other Segments should not have associations as ERCOT members. Bob Manning (HEB, ERCOT Board member): A Membership Fee of \$0 for members is needed to encourage commercial consumer membership. Chuck Courtney (Texas Retailers Association): TRA supports the proposed language. An association wishing to join must be state-wide with most members in TX; however, a certain percentage of ERCOT Load as a requirement may be difficult to ascertain. Dues should be minimal. Tom Rose (TXU): The goal should be to have an actual end use customer (principal or employee) on the Board (not just a hired agent for an association). Bob Manning: If a trade association provides an employee to serve on the Board, that person would not likely be available during legislative session. Ideally, an employee of an actual customer would serve on the Board. If not, an association might need to hire someone to attend the meetings (e.g., a paralegal). In his opinion, a self-serve REP could qualify as a commercial consumer; however, other consumers (such as Safeway) consider this a conflict of interest. A \$100 membership fee could be charged for individual companies that wish to become members; however, membership for trade associations should be \$0. An association should qualify for membership only if its members consume at least one million MWh of electricity in the ERCOT Region per year.</p>	<p>Recommended with additional language changes. The proposed Bylaws changes should provide that:</p> <ul style="list-style-type: none"> * The Board member seat should be filled by an employee of a commercial consumer. Parties have indicated that it is likely that an employee of an association would not be available to serve on the Board during legislative sessions (due to other work commitments), and a paralegal or other agent hired just to attend Board meetings would not bring a full commercial consumer perspective. Under this recommendation, representatives other than employees would still be allowed for TAC and its subcommittees (this is the true for all TAC and subcommittee seats under the current Bylaws). * Membership should be free for commercial consumer associations that qualify. * Commercial consumer association members must represent at least one million MWh of consumption in the ERCOT Region. * Membership fees should be \$100 for Corporate Members which are actually commercial consumers, not associations (\$50

			<p>for Associate Members).</p> <p>* Large commercial consumers will be able to elect their Board representative (The current Board representative would appoint a successor only if no members are available to elect a representative).</p>
2.17, 4.2, 4.3(e), 13.6	Eliminate the current practice of seating Board Alternates and the use of proxies by Board members.	<p>1. The practice of allowing Board alternates (Segment Alternates and Designated Alternates) is very unusual in the corporate world and cumbersome.</p> <p>2. Some corporations do not allow Board members to use proxies.</p> <p>3. Eliminating alternates (and proxies) would encourage attendance by regular Board members.</p> <p>4. Giving a proxy would be limited to other Board members.</p> <p><u>Comments:</u></p> <p>DeAnn Walker: Centerpoint has concerns about doing away with Segment Alternates. If a Market Participant Board member cannot be there, the Segment would go unrepresented.</p> <p>Tom Rose: Having alternates is against good governance practice. Additionally, SB 408 does not provide for alternates. Segment Alternates were intended as a transition from a three representative per Segment Board. The transition has passed; therefore, Segment Alternates are no longer needed.</p> <p>Neil Eddlemen (TEAM): TEAM has concerns that a Segment position will be weakened when the Segment representative is unable to attend. TEAM suggests allowing a Market Participant Board member to assign a proxy to any Corporate Member instead of having Segment Alternates.</p> <p>Mark Walker (ERCOT): A Board member's fiduciary duty is to ERCOT, not a Market Participant Segment. SB408 is very prescriptive and does not contemplate alternates. Use of Segment Alternates creates liability and insurance issues. If a Board member cannot attend meetings, there is process in the Bylaws to replace Board Members.</p> <p>Neil Eddlemen: The Board election process should be reevaluated if Segment Alternates are eliminated.</p> <p>Denise Stokes (Competitive Assets): The intent of Segment Alternates on Board is to bring perspectives. Voting capability of the alternate is needed to ensure the communication of the Segment perspective.</p> <p>Bob Manning (HEB, ERCOT Board member): The ERCOT Board has been briefed about liability of being a director. Directors have obligation to attend Board meetings. There is potential liability for a Board member who does not show up to</p>	<p>Recommended. The use of alternates on the Board creates undue risks to the organization given ERCOT's governance structure. The need for stakeholder involvement in Board meetings is amply satisfied on the Board level both by the participation of Market Participant directors seated on the Board and the ability of <i>any</i> person to speak at a Board meeting. The proposed revisions allow Board members to give proxies to other Board members. Under the proposed revisions, only the CEO, PUCT Chair and Public Counsel would be allowed to designate an alternate representative.</p>

		<p>meetings. Board members must take directorship seriously or risk legal liability in event of lawsuit. The need for stakeholder representation is profound, but it can be achieved by other means.</p> <p>Neil Eddlemen: Resource constraints sometimes make it difficult to make all Board meetings. The Bylaws should accommodate this.</p> <p>Denise Stokes: Each Segment should be allowed to elect an agent as a Board member.</p>	
4.3(b)	Sitting Independent Board members should be allowed to participate in the selection of new Independent Board members. Current section 4.5(b) was written prior to the time that the ERCOT Board included Independent Board members.	The section needs to be updated to reflect the presence of Independent Board members and allow their participation.	Recommended
13.10	Revise or delete the sunset provision contained in the current Bylaws.	<p><u>Comments:</u></p> <p>It is not necessary to specify a sunset date in the Bylaws.</p>	Recommended: Delete the sunset date provision.
II. Changes Required by SB 408			
4.3	<p><i>Revised PURA §39.151 (effective Sept. 1, 2006):</i></p> <p>(g) The bylaws must specify the process by which appropriate stakeholders elect members and, for unaffiliated members, prescribe professional qualifications for selection as a member. The bylaws must require the use of a professional search firm to identify candidates for membership of unaffiliated members. The process must allow for commission input in identifying candidates. The governing body must be composed of:</p> <p>(1) the chairman of the commission as an ex officio nonvoting member;</p> <p>(2) the counsellor as an ex officio voting member representing residential and small commercial consumer interests;</p> <p>(3) the chief executive officer of the independent organization as an ex officio voting member;</p> <p>(4) six market participants elected by their respective market segments to serve one-year terms, with:</p> <p>(A) one representing independent generators;</p> <p>(B) one representing investor-owned utilities;</p> <p>(C) one representing power marketers;</p> <p>(D) one representing retail electric providers;</p> <p>(E) one representing municipally owned utilities; and</p> <p>(F) one representing electric cooperatives</p> <p>(5) one member representing industrial consumer interests and elected by the industrial consumer</p>	<p><i>This provision is not effective until September 1, 2006.</i> The detailed process for selection of Market Participant Board Members is currently set forth in the Board Policies and Procedures. Some portion of this process should be moved to the Bylaws in order to comply with this requirement.</p> <p>The Bylaws must also be updated to reflect the revised Board membership and requirement that the Chair be an Unaffiliated Director. The Board has committed to selecting the new Unaffiliated Directors by the end of 2005 and select a new Unaffiliated Chair by September 1, 2006.</p>	Recommended

	<p>market segment to serve a one-year term</p> <p>(6) one member representing large commercial consumer interests selected in accordance with the bylaws to serve a one-year term; and</p> <p>(7) five members unaffiliated with any market segment and selected by the other members of the governing body to serve three-year terms</p> <p>(g-1) The presiding officer of the governing body must be one of the members described by Subsection (g)(7).</p>		
4.6, 13.8	<p>New PURA §39.1511(a): Meetings of the governing body of an independent organization certified under Section 39.151 and meetings of a subcommittee that includes a member of the governing body must be open to the public. The bylaws of the independent organization and the rules of the commission may provide for the governing body or subcommittee to enter into executive session closed to the public to address sensitive matters such as confidential personnel information, contracts, lawsuits, competitively sensitive information, or other information related to the security of the regional electrical network.</p>	<p>Currently, the ERCOT Bylaws provide access to Board meetings for <i>members</i> and other ERCOT procedures provide for public access to meetings. The section should be revised to clarify access by the public to Board meetings and Board committee meetings except for appropriate executive session issues, conforming language as set forth in SB 408. The list of items eligible for executive session discussion in SB 408 is not limited and should be expanded in the Bylaws to include other types of information normally protected by the Texas Open Meetings Act.</p>	Recommended
4.6	<p>New PURA §39.1511(b): The bylaws of the independent organization and rules of the commission must ensure that a person interested in the activities of the independent organization has an opportunity to obtain at least seven days' advance notice of meetings and the planned agendas of the meetings and an opportunity to comment on matters under discussion at the meetings. The bylaws and commission rules governing meetings of the governing body may provide for a shorter period of advance notice and for meetings by teleconference technology for governing body meetings to take action on urgent matters. The bylaws and rules must require actions taken on short notice or at teleconference meetings to be ratified at the governing body's next regular meeting. The notice requirements may be met by a timely electronic posting on the Internet.</p>	<p>Revise the section to reflect the wording of the new statute.</p>	Recommended
8.2	<p>New PURA §39.1512:</p> <p>(a) If a matter comes before the governing body of an independent organization certified under Section 39.151 and a member has a direct interest in that matter or is employed by or has a substantial</p>	<p>The statute does not require these duties to be in the Bylaws, but at least some incorporation and reference would be useful to ensure consistent application. The Ethics Agreement should also comport with these requirement.</p>	Recommended

	<p>financial interest in a person who has a direct interest in that matter, that member shall publicly disclose the fact of that interest to the governing body at a public meeting of the body. The member shall recuse himself or herself from the governing body's deliberations and actions on the matter and may not vote on the matter or otherwise participate in a governing body decision on the matter.</p> <p>(b) A disclosure made under Subsection (a) shall be entered in the minutes of the meeting at which the disclosure is made.</p> <p>(c) The fact that a member is recused from a vote or decision by application of this section does not affect the existence of a quorum.</p>	<p>Legislative history indicates that "direct interest" is not intended to include matters of general benefit to an entire market segment.</p>	
III. Stakeholder Suggestions			
3.1(a), 4.2, 5.1(a)(1)	<p>Aggregators are currently allowed to join ERCOT in the Independent REP Segment. Aggregator participation has been low and Aggregator interests do not always align well with REP interests.</p>	<p>1. The Bylaws could create a separate membership classification for Aggregators instead of the current practice of including Aggregators in the Independent REP Segment.</p> <p>2. Legislation prevents ERCOT from adding additional Segments and/or Board seats.</p> <p><u>Comments:</u> Neil Eddlemen: Aggregators should be adjunct members; they are not like REPs but are more like consumers. Bob Manning: Aggregators do not represent consumer interests because they make money off of consumers. Denise Stokes: An aggregator is not an REP by statute or in practice. Bob Manning: Removing aggregators from the REP Segment would force them to be treated as second class. Although it may be worthwhile to consider redesigning/adding membership segments eventually, this will be a major undertaking better left for the future. Mark Walker: By implication, the legislature has limited the Segments to those listed for Board membership.</p>	Not recommended
2.12	<p>Reduce the number of pole-miles of transmission that an entity must own in order to be eligible to join ERCOT as an IOU.</p>	<p>This would allow Cap Rock to qualify for membership in this Segment.</p> <p><u>Comments:</u> CapRock proposes that any electric utility operating within the ERCOT Region, regardless of amount of pole miles or outside activity, should qualify for membership in this Segment. TXU suggested that IOU members should have a substantial interest in the ERCOT Region.</p>	<p>Recommended. The recommendation is consistent with PURA definitions of "electric utilities." There is a possibility that allowing additional IOUs (with significant non-ERCOT presence) will dilute the ERCOT Region perspective; however, not many additional IOUs would likely qualify for membership even if the</p>

			definition is broadened.
12.1(d)	Currently, amendments to the Bylaws are approved by the Board and then submitted to the Corporate Members for enactment. The Independent Board members are involved in approving the Bylaws at the Board level, but have no role in the enactment process carried out by the Corporate Members.	Independent Board members should participate in the amendment approval process at the membership level, perhaps by allowing the Independent Board members to vote as an additional Segment. <u>Comments:</u> DeAnn Walker: It is not necessary to add a Segment for Independent Members to vote on Bylaws amendments. Centerpoint supports TXU comments on this issue.	Not recommended. Independent Directors already participate at the Board level in approving Bylaws changes. Membership consists of stakeholders; only Members should vote on Bylaws changes approved by the Board.
3.1(b)	Require members of all segments except consumers to maintain PUC registration or certification as required by PURA.	TXU provided written comments in support of this proposal, but participants did not discuss it at the meeting.	Recommended. Although the application of the definitions of each Segment lead to the same result, this is a helpful clarification.
5.1(a)	Cumulative voting for REPs for TAC seats	<u>Comments:</u> Smith Day (Direct Energy): Cumulative voting will allow more minority REP member representation on TAC. With current practice, the same 51% can elect all four REP TAC seats. The Bylaws should provide for cumulative voting for REPs unless REPs opt for a another voting process by super majority. Denise Stokes: This issue should be taken up within REP Segment, not in the Bylaws. Shannon Bowling (Cirro Energy): Why should this apply only to the REP Segment? Also, participatory voting is already an option and may address the concern.	This request has been withdrawn.
4.4.	Require Vice Chair to be a Market Participant	<u>Comments:</u> Bob Manning: Having a Market Participant Vice Chair on the Board is a good idea, but it is not necessary to mandate it.	Not recommended
IV. ERCOT Staff Cleanup			
4.6	Expand persons who can call a special meeting of the Board to include the Chair, Vice Chair, and the CEO or his designee.	Given the additional prescription on Board meeting procedure, it would be prudent have some flexibility in calling special meetings of the Board, which will have expanded notice requirements.	Recommended
5.2	Remove provisions allowing TAC to submit budget requests to ERCOT – rewrite to allow recommendations. Modify provisions regarding the approval of operational guide changes.	These provisions are a vestige of past practice and is no longer needed; however, a reference to the ability to make recommendations on the ERCOT budget matters and referencing TAC’s role in approving technical requirements would be appropriate. <u>Comments:</u> Mark Dreyfus (Austin Energy): Should this new role of TAC be recognized in the Bylaws?	Recommended
5.3	Change normal notices of TAC meeting to one week; removal of redundant provision on quorum.	Revised meeting provision is consistent with the Board process and current TAC practice. <u>Comments:</u> Neil Eddlemen: The term “seated” should be clarified to count an alternate who is filling in for a regular member as a seated	Recommended

		member for purposes of a quorum. Mark Walker: This is a good clarification to include in the next draft.	
9.1	Allow ERCOT to reimburse Unaffiliated and Consumer Directors for expenses related to training activities. Suggest making provision to allow reimbursement for registration, travel, lodging and related expenses for those Directors.	It is in ERCOT's best interests to have Directors that are well prepared to undertake their fiduciary and oversight duties for ERCOT, and training supports that goal.	Recommended
12.1	Membership approval of Bylaws amendments – clarify that the Board may seek approval from members without calling a meeting.	Approval by the Members of Bylaws amendments can be made without a meeting currently, but that requires the Board having to approve an exception to the current process that assumes a meeting. As in the current circumstances, it is reasonable to recognize that Member approval without meeting is sometimes appropriate.	Recommended
13.6, 13.7	The current rule on Board and TAC is that only abstentions reduce the number of votes needed for action – but vacancies in positions should not count towards the requirement for action.	Confirmation of the current practice to reduce the number needed for action by vacancies for the Board and TAC would help avoid confusion on this issue.	Recommended
V. Suggestions Not Requiring Bylaws Changes			
None	<i>New PURA §39.1515</i> (e) In adopting rules governing the standards for funding the market monitor, the commission shall consult with a subcommittee of the independent organization's governing body to receive information on how money is or should be spent for monitoring functions.	A Bylaws provision is not required for creation of a Board subcommittee; this issue could be addressed in the Board Procedures or other documents.	No Bylaws changes are necessary. A subcommittee will be assigned.
None	The Board has discussed the need to evaluate the allocation of duties among the Board committees.	1. This issue could be addressed in the Board Procedures or other documents. 2. Adding more Board committees could create additional scheduling and logistics problems. Regardless of the number of committees, the same Board members will be tasked with the work of the Board.	To be addressed by HR & Governance Committee. Bylaws change not necessary.
4.10, 5.4	The Board's involvement in reliability matters, such as NERC activities, should be defined. Reconcile ERCOT responsibilities under oversight imposed by federal energy legislation (NERC/FERC/ERO) when compared to PURA and SB 408 (PUCT).	These issues could be addressed in the Board Procedures or other documents.	Awaiting action by FERC. Bylaws changes would be premature at this time.
4.10	The Board has discussed a review of Sarbanes Oxley requirements as an industry standard and whether some elements should be added to ERCOT Board governance.	This issue could be addressed in the Board Procedures or other documents.	The Finance and Audit Committee has agreed to address this issue. Bylaws changes are not necessary.