



**To:** Human Resources and Governance (HR&G) Committee  
**From:** Bill Magness, ERCOT Vice President, General Counsel and Corporate Secretary  
Vickie Leady, ERCOT Assistant General Counsel and Assistant Corporate Secretary  
**Date:** May 6, 2013  
**Re:** Item 4: 2013 Bylaws Revision Review

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At the request of HR&G Chairman Karl Pfirrmann and for the Committee's benefit, this memorandum will review:

- Statement of the Bylaws revision issues to be addressed at the May 2013 meeting of the Committee;
- Review of the Bylaws revision process, as discussed at the March 2013 Committee meeting;
- The proposed 2013 Bylaws review and approval schedule, as discussed at the March 2013 Committee meeting; and
- The summary of Bylaws revisions proposed by three ERCOT Corporate Members, as discussed in part at the November 2012 Committee meeting.

#### **Issues to be Addressed at May 2013 Committee Meeting**

At the May 2013 meeting of the Committee, ERCOT staff presents three proposals for Bylaws amendments that have been submitted by ERCOT Corporate Members. There is no request for a vote on the proposals at this time. As discussed herein, the proposals, and a summary of each one prepared by its respective proponent, are included with this memorandum.

#### **Bylaws Review and Revision Process**

For the Committee's convenience, the Bylaws review and revision process (as provided with the March 18, 2013 Committee meeting materials) is hereby included.

ERCOT currently operates pursuant to the *Amended and Restated Bylaws of Electric Reliability Council of Texas, Inc.*, which were approved by the Public Utility Commission of Texas (PUCT or Commission) on April 16, 2010.

Section 13.1 of these Bylaws, the Public Utility Regulatory Act (PURA) Section 39.151(g), PUCT Substantive Rule Section 25.362(c) and the HR&G Committee Charter provide the requirements and process for approval of any Bylaws amendments. In brief, the Bylaws amendment process may be summarized as follows:

1. Submission of Proposal: Any Corporate Member must submit a proposal of its proposed amendment with supporting documentation to the ERCOT Chief Executive Officer (CEO).
2. Placement of Proposal on Board Agenda After HR&G Committee Review and Recommendation: The CEO will place such proposal on the Board's agenda in the time and manner prescribed by the Board. Given the delegation of duties from the Board to the



HR&G Committee for review of ERCOT’s governing documents, the HR&G Committee would first review and make a recommendation to the Board on such proposal prior to placing the proposal on the Board agenda.

3. Board Recommendation to Corporate Members for Approval: If the Board votes to approve the proposal, the Board shall place the proposal on the agenda of the next Annual Meeting of the Corporate Members unless the Board in its discretion calls a Special Meeting of the Corporate Members.
4. Vote by Corporate Members: Corporate Members must vote using the procedure more particularly described in Section 13.1(d) of the Bylaws. At least four of the seven Market Segments must affirmatively vote to amend the Bylaws.
5. Filing of Petition for Approval of Bylaws Amendment with the Commission: If the Corporate Members vote to approve the proposal, then ERCOT Legal will seek the approval of the Commission by filing a petition for approval of amendments to the Bylaws. Any amendments to the Bylaws shall only be effective upon formal Commission approval.

**Proposed 2013 Bylaws Review and Approval Schedule**

For the Committee’s convenience, the proposed 2013 Bylaws review and approval schedule (as provided with the March 18, 2013 Committee meeting materials) is hereby included and as modified with updates.

Based on prior feedback from the HR&G Committee and consideration of logistical timing, ERCOT Legal would propose the following Bylaws review and approval schedule:

<b>Date</b>	<b>Action</b>	<b>Comments</b>
March 18, 2013	HR&G Committee reviews initial revisions to the Bylaws proposed by ERCOT Legal at its meeting	Expected discussion only by HR&G Committee <u>Update: Discussion occurred.</u>
Prior to May 1, 2013	ERCOT Legal would discuss with Commission staff any substantive revisions to the Bylaws which had been proposed by ERCOT Legal and Corporate Members to date	Feedback from Commission staff would be gathered for further discussion by the HR&G Committee at its May 2013 meeting
May 13, 2013	HR&G Committee reviews substantive revisions to the Bylaws proposed by ERCOT Legal and Corporate Members at its meeting	Expected discussion only by HR&G Committee
Prior to July 1, 2013	ERCOT Legal develops further analysis based on feedback from the HR&G Committee, Corporate Members and Commission staff	Feedback from Commission staff would be gathered for further discussion by the HR&G Committee at its July 2013 meeting
July 15, 2013	<ul style="list-style-type: none"> <li>• HR&amp;G Committee reviews further feedback from ERCOT Legal and Corporate Members, as applicable</li> <li>• ERCOT Legal discusses any required</li> </ul>	Expected discussion only by HR&G Committee



Date	Action	Comments
	amendments to the Bylaws arising from the legislative session • Deadline for proposed amendments to be considered by HR&G Committee	
September 16, 2013	HR&G Committee reviews substantive revisions to the Bylaws proposed by ERCOT Legal and Corporate Members at its meeting	Expected discussion only by HR&G Committee
Prior to November 1, 2013	ERCOT Legal would discuss the feedback received by the HR&G Committee with Commission staff and Corporate Members who submitted proposals	Final red-lined edits prepared by ERCOT Legal for submission to the HR&G Committee
November 18, 2013	Assuming sufficient support, HR&G Committee votes to recommend that the Board approve recommendation of the amendments to the Bylaws to the Corporate Members	Expected vote by HR&G Committee
November 19, 2013	Assuming sufficient support, Board votes to recommend amendments to the Bylaws for approval by the Corporate Members at their Annual Meeting	Expected vote by the Board
December 10, 2013	Assuming sufficient support, Corporate Members vote to approve amendments to Bylaws at their Annual Meeting subject to Commission approval	Expected vote by Corporate Members
January 2013	Assuming approval by the Corporate Members, ERCOT Legal files a petition for approval of the amendments to the Bylaws with the Commission	
Upon approval by Commission	Amendments to the Bylaws become effective upon approval by the Commission and in accordance with Commission order	

This proposed schedule has been provided for the Committee’s convenience and may be modified at the discretion of the Committee.

Initial Administrative Bylaws Revisions Proposed by ERCOT Legal

The initial proposed administrative and clerical revisions to the Bylaws as proposed by ERCOT Legal were provided with the March 18, 2013 Committee meeting materials.

Summary of Substantive Bylaws Revisions Proposed by Corporate Members

Substantive amendments to the Bylaws as proposed by Corporate Members are hereby identified in Exhibit A.



Each of the amendments includes:

- (a) The proposed language change, shown as a markup (in bold and underlined text) of the existing Bylaws;
- (b) The identity of the party proposing the amendment; and
- (c) A summary explanation of the purpose of the amendment, provided by the party proposing the amendment.

No vote on these proposed substantive revisions is being requested at this time. The Committee's input on these changes will be solicited at its May 14, 2013 meeting.

We look forward to discussing these matters with you at the May 14, 2013 meeting.

Requested Amendments to the ERCOT Bylaws Proposed by ERCOT Corporate Members

1. Amend ERCOT Bylaws, Article 5 (Technical Advisory Committee), Subsection 5.1(c).

(c) Fifty-one percent (51%) of the eligible, Seated Representatives of TAC shall constitute a quorum for the transaction of business; and abstentions do not affect calculation of a quorum. Affirmative votes of: (i) two-thirds of the Eligible Voting Representatives of TAC; and (ii) at least 50% of the total Seated Representatives shall be the act of TAC. For purposes of voting on TAC, TAC representatives who **are not present or** abstain from voting shall not have their votes included in the total number of votes from which the requisite percentage of affirmative votes is required for action.

*The amendment was proposed by Mr. Clayton Greer (Morgan Stanley), who provided the following explanation for the proposal:*

The reason for this change is that the current language effectively turns the vote of someone who is not present to a "No" vote when the calculation is made for passage. We could actually have a quorum present, but not have the ability to pass a single voting item due to the procedure. The change will revise these votes to the same effect as a vote of "abstain," which is done in other bodies.

2. Amend ERCOT Bylaws, Article 4 (Board of Directors), Subsection 4.3(a)(4).

(a) Selection of Market Participant Directors and Segment Alternates: ...

(4) Each Market Participant Director and each Segment Alternate, except as provided above for the Commercial Consumer Director, must be an employee of a Member, **or a company which directly or indirectly controls Member**. Unless otherwise provided in these Bylaws, if an employee of a Member **or a company which directly or indirectly controls Member** is elected or appointed to serve on the Board, such person is only eligible to serve in such capacity so long as he or she is an employee of the same Member, **controlling entity** or organization as he or she was at the time of such election or appointment.

*The amendment was proposed by Mr. Vanus Priestley (Macquarie), who provided the following explanation for the proposal:*

The current bylaws prohibit members of the Independent REP and Independent Power Marketer segment with common corporate structures to participate on the ERCOT Board. Specifically section 4.3(a)(4) limits market participant directors to "employees" of a member. Currently the Independent Generator and Investor Owned Utility Segments have provisions in the bylaws that allow their representatives to be employees of a controlling company. The bylaws change provided will expand that ability to the Independent REP, and Independent Power Marketer segments. Evident by the fact that it does not apply to Independent Generators and Investor Owned Utilities, the limitation does not appear to have a specific purpose.

3. Amend ERCOT Bylaws, Article 2 (Definitions), Subsection 2.1.

1. **Affiliate.** This includes an entity (e.g. a person or any type of organization) in any of the following relationships: (i) an entity that directly or indirectly owns or holds at least five percent of the voting securities of another entity, (ii) an entity in a chain of successive ownership of at least five percent of the voting securities of another entity, (iii) an entity which shares a common parent with or is under common influence or control with another entity or (iv) an entity that actually exercises substantial influence or control over the policies and actions of another entity. Evidence of influence or control shall include the possession, directly or indirectly, of the power to direct or cause the direction of the management and/or policies and procedures of another, whether that power is established through ownership or voting of at least five percent of the voting securities or by any other direct or indirect means. In the case of (i) or (ii) above, where one entity owns or holds at least five percent, but less than 20 percent, of the voting securities of another entity, and the relationships in (iii) and (iv) do not exist, the Board shall have discretion to determine whether or not the entities are Affiliates of one another for the purpose of determining Member segment and voting rights. Similarly, in cases where the level of control or influence is disputed, the Board shall have discretion to determine whether or not the entities are Affiliates of one another. Membership in ERCOT shall not create an affiliation with ERCOT.

*The amendment was proposed by Mr. William J. Taylor, III (Calpine Corporation), who provided the following explanation for the proposal:*

Statement of the Issue and Purpose of the Proposed Amendment

The purpose of the current Affiliate provision is to guard against affiliated entities becoming Members of more than one segment, which would increase their voting strength. However, the current provision may designate some entities as Affiliates, which clearly do not operate as affiliated companies, solely because one entity owns at least five percent of the other entity.<sup>1</sup> In the case of an Independent Generator or Independent Power Marketer, if it is affiliated with a Transmission and Distribution Entity, it cannot become a Corporate Member<sup>2</sup> in any segment regardless of the facts that create the affiliate status under the current Bylaws. While the entity can join as an Associate Member in the same segment as the affiliated entity, it will not enjoy full membership rights that it would ordinarily hold as a Corporate Member in the segment that it is qualified to join because of the Affiliate rule.<sup>3</sup>

The proposed amendment simply provides the Board with the discretionary authority to consider a request by an entity to find that the entity should not be deemed an Affiliate of another entity under

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<sup>1</sup> Article 2.1(i)-(ii) (“(i) an entity that directly or indirectly owns or holds at least five percent of the voting securities of another entity, (ii) an entity in a chain of successive”).

ownership of at least five percent of the voting securities of another entity

<sup>2</sup> Articles 2.14 (Independent Generator) and 2.15 (Independent Power Marketer).

<sup>3</sup> Article 3.2(a)(Corporate Members) (“[S]hall have the rights and obligations as described in these Bylaws including the right to vote any matter submitted to the general Membership ( such as election of Directors, election of TAC Representatives and amendment of the Articles of Incorporation and these Bylaws”).

the Bylaws. The effect of the proposal is similar to the affiliate provision in the Operating Agreement for PJM Interconnection, L.L.C., which provides that an entity is not an affiliate of another entity if the entity (i) owns the securities of another entity as an investment, (ii) holds less than 10% of the outstanding securities of another entity, (iii) lacks board representation on the other entity or vice-versa and (iv) does not in fact exercise influence over day-to-day management decisions.<sup>4</sup> However, the PJM Agreement also provides that “unless the contrary is demonstrated to the satisfaction of the Members Committee,” control shall be presumed.<sup>5</sup>

The proposed amendment would provide a similar right to ERCOT entities to make a showing to the ERCOT Board that the entities are not affiliated. The amendment would extend the Board’s discretionary authority to determine who is an Affiliate, provided the entity owns at least five percent (5%) but not more than twenty percent (20%) of the shares of the voting securities of another entity.

The ERCOT Bylaws have a number of Articles that refer to “Affiliate” or otherwise implicate the proposed change. For the purposes of drafting the proposed amendment, in addition to the Affiliate provision, the following provisions were reviewed:

- 2.9 Entity
- 2.14 Independent Generator
- 2.16 Independent REP
- 2.18 Investor Owned Utility
- 2.30 Transmission and Distribution Entity
- 3.1 Membership
- 3.2 Membership Types and Voting Rights
- 3.6 Participation

However, the proposed amendment will not have any unintended consequences on these specific provisions and to best of our knowledge any remaining provisions in the Bylaws.

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<sup>4</sup> PJM Operating Agreement, 1.2 Affiliate (Attached).

<sup>5</sup> Assumes the entity is not an affiliate under any of the other four criteria to determine affiliate status.