



Item 4: Status Report regarding Bylaws Amendments

Bill Magness

Vice President, General Counsel and Corporate Secretary

Human Resources and Governance Meeting

ERCOT Public

September 16, 2013

Summary

- **Status of Bylaws Amendments**
- **Report on the Special Meeting of Corporate Members**
- **Analysis of Vote Calculations**
- **Review of Outstanding Matters**
- **Lessons Learned**

Status of Bylaws Amendments

- **On July 16, 2013, the Board of Directors called a Special Meeting of Corporate Members to approve the Bylaws Amendments.**
- **On August 8, 2013, the Corporate Members approved the Bylaws Amendments at a Special Meeting.**
- **On August 13, 2013, ERCOT filed a petition with the Public Utility Commission of Texas (Commission) for approval of the Bylaws Amendments.**
- **The Bylaws Amendments are currently pending in Docket No. 41761, and will not become effective until the Commission enters an order approving them.**

Report on the Special Meeting of Corporate Members

- On July 18, 2013, ERCOT issued a notice of a Special Meeting on August 8, 2013, at the ERCOT Austin office for a vote on the Bylaws Amendments (Notice).
- The Notice enclosed a consent and ballot form (Consent) to take action in lieu of holding the Special Meeting for submission by August 2, 2013.
- The Special Meeting was held on August 8, 2013 because ERCOT received an insufficient number of consent/ballot forms.
- To our knowledge, this was the first time ERCOT has held an in-person Special Meeting. Typically, ERCOT receives sufficient consent/ballots to take action by ballot in lieu of an in-person meeting.

Analysis of Corporate Member Participation for Ballot Vote

- **Requires diligent reach-out efforts by Segment Directors and ERCOT Legal for any ballot vote**
- **Participation may have been less than usual due to:**
 - Availability of Designated Representatives of the Corporate Members due to summer or work conflicts (e.g., budget review cycles for cities)
 - Complexity and number of Bylaws Amendments
 - The relatively short amount of time for Corporate Members to consider the Bylaws Amendments
 - Potential confusion over ramifications of Bylaws Amendments due to ongoing revisions by Corporate Members and Board members up to and including the July 15, 2013 HR&G Committee meeting
 - An assumption that a Corporate Member's participation is not essential or would not make a difference in the vote

Analysis of Vote Calculations

- Voting procedures set forth in the Bylaws differ between a ballot vote and an in-person vote of Corporate Members
- **Ballot vote**: a vote calculation based on all Corporate Members being present
- **In-person vote**: a vote calculation based on Corporate Members present (in person or by proxy) at the meeting

Corporate Member Numbers by Segment

Corporate Members of Record (as of July 9, 2013 Record Date)		
Segment		Number
Consumer	Commercial	148
	Industrial	16
	Residential	2
Cooperative		35
Independent Generator		21
Independent Power Marketer		23
Independent Retail Electric Provider		15
Investor Owned Utility		7
Municipal		12
TOTAL		279

Review of Outstanding Matters

- Continue to work on issues related to Board-member eligibility based on employment status with a Corporate or Associate Member, which were raised by prior proposed Bylaws amendment
- Consider whether voting calculations for Special Meetings of Corporate Members should be addressed



To: Human Resources and Governance (HR&G) Committee
From: Bill Magness, Vice-President, General Counsel & Corporate Secretary
Vickie Leady, Assistant General Counsel & Assistant Corporate Secretary
Date: September 9, 2013
Re: Item 4 – Status Report regarding Bylaws Amendments

This memorandum will provide a status report regarding the amendments to the *Amended and Restated Bylaws of Electric Reliability Council of Texas, Inc.* (Bylaws), including:

- I. Status of the Bylaws amendments;
- II. A report on the Special Meeting of Corporate Members; and
- III. A review of outstanding matters.

I. Status of Bylaws Amendments

Bylaws amendments have been:

- Recommended by the HR&G Committee to the Board of Directors (Board) on July 16, 2013;
- Recommended by the Board to the Corporate Members on July 17, 2013;
- Approved by the Corporate Members at a Special Meeting on August 8, 2013; and
- Pending formal approval of the Commission in Docket No. 41761.

a. Board Acceptance of HR&G Recommendations

At its July 16, 2013 meeting, the Board received the HR&G Committee report on all of the Bylaws amendments it had considered. At the same meeting, the Board voted to accept the recommendations of the HR&G Committee to approve Bylaws amendments proposed by ERCOT Legal, Morgan Stanley Capital Group, Inc. (Morgan Stanley) and Calpine Corporation (Calpine) and to recommend that the Corporate Members approve such proposed Bylaws amendments. Also, at its July 16, 2013 meeting, the Board voted to call a Special Meeting of the Corporate Members for a vote to approve the proposed Bylaws amendments as soon as practicable.

b. Corporate Member Approval of Bylaws Amendments

On July 18, 2013, pursuant to the direction of the Board, ERCOT issued its notice of Special Meeting of Corporate Members to be held on August 8, 2013 (Special Meeting) for a vote to approve four proposed amendments to the Bylaws. On August 8, 2013, the Special Meeting was held and the Corporate Members voted to approve all four proposed amendments to the Bylaws.

c. ERCOT Petition for Commission Approval of Bylaws Amendments

On August 13, 2013, ERCOT Legal filed the *Petition of Electric Reliability Council of Texas, Inc. for Approval of Bylaws Amendments* with the Commission in Docket No. 41761 and requested an expedited procedural schedule, which would allow for consideration of a proposed order on the Bylaws amendments as early as the October 3, 2013 Commission Open Meeting. ERCOT requested the expedited schedule so that the Bylaws amendments may be approved by the Commission and, thus, become effective for the 2014 ERCOT Membership application process,



which ends on November 8, 2013. Such expedited schedule has been entered in this Docket. The Bylaws amendments cannot become effective unless and until the Commission formally approves them by order.

II. Report on the Special Meeting of Corporate Members

a. Notice of Special Meeting Issued on July 18, 2013

As stated previously, on July 18, 2013, pursuant to the direction of the Board, ERCOT issued a notice of Special Meeting to its Corporate Members of record (Notice).

The Notice provided in pertinent part that:

- The Special Meeting was scheduled to be held at 10:00 a.m. on August 8, 2013, at ERCOT's Austin office for a vote on the Bylaws amendments;
- Pursuant to Section 3.7(b) of the Bylaws, the Corporate Members could take action without the need for a meeting if they provided their consent in writing by a sufficient number of Corporate Members as would be necessary to take that action at a meeting at which all of the Corporate Members were present and voted;
- The Official Consent and Ballot form (Consent) was included with the Notice along with the pertinent exhibits illustrating the Bylaws amendments; and
- The deadline for returning the Consent was 5:00 p.m. on August 2, 2013.

Please note that this Notice was provided in the same general format and style and with the same general meeting logistics (that is, for an in-person meeting) as all other prior notices of special meetings called by the Board for at least the last five years.

b. Special Meeting Held on August 8, 2013

Since ERCOT did not receive sufficient participation by the deadline on August 2, 2013, to allow a ballot vote in lieu of an in-person meeting, ERCOT held the Special Meeting on August 8, 2013, at its Austin office pursuant to the Notice. To our knowledge, it is the first time that an in-person Special Meeting has been held.

At the Special Meeting, after confirmation that a quorum had been convened, the Corporate Members approved all four Board-recommended Bylaws amendments by separate votes. During the meeting, ERCOT Legal reported that all Segments except the Independent Power Marketer (IPM) Segment approved all four proposed Bylaws amendments. After the meeting and upon further review of the IPM vote, it was determined that this Segment also voted in favor of all four proposed Bylaws amendments. As such, all seven Segments voted to approve these Bylaws amendments.

In this instance, the calculation of the vote by the IPM Segment did not change the outcome of the overall vote by the Segments to approve the four sets of Bylaws amendments. The affirmative vote of a minimum of four Segments was required to approve any of the Bylaws amendments; and even without the IPM Segment vote, six Segments voted in favor of the Bylaws amendments, thereby approving them.



c. **Analysis of Corporate Member Participation and Vote Calculations**

Since current ERCOT Legal staff cannot recall that ERCOT has ever hosted an in-person Special Meeting and since some Corporate Members inquired about the need for in-person Special Meeting, an overview of the analysis Corporate Members' participation and vote calculations is hereby provided.

i. **Participation of Corporate Members**

Historically, with multiple reminders from ERCOT Legal staff and by their Market Segment Director, Corporate Members will participate and submit their Consents to take action in lieu of a meeting. In this instance, ERCOT Legal cannot say with certainty the reasons that sufficient Consents were not submitted. The reasons may include:

- Issues with availability of Designated Representatives of the Corporate Members during the summer months (*e.g.*, summer vacations or work schedules for some Corporate Members such as cities which have to propose their budgets);
- The logistical challenges related to voting, which includes printing out the Consent, having it signed by a Designated Representative (identified in ERCOT's records), and faxing or scanning it to ERCOT for submission;
- The complexity of the matter for which the vote was being taken, considering that the notice provided several exhibits containing the extensive modifications to the Bylaws; or possible lack of understanding of the Bylaws amendments (*e.g.*, a Corporate Member may decide not to submit a vote on a matter that may be complex or that may have potential unintended ramifications), which would typically be reserved for the Annual Meeting of Members in December;
- The amount of time that Corporate Members had to consider the Bylaws amendments, a more complex matter than those addressed by typical ballot votes by Corporate Members (*e.g.*, election of Unaffiliated Directors);
- Potential confusion over ramifications on the Bylaws amendments for which votes were being taken due to the ongoing revisions of the language by Corporate Members and Board members up to and including the July 15, 2013 HR&G Committee meeting; or
- An assumption that the Corporate Member's participation is not essential or would not make a difference in the outcome of the vote.

ii. **Corporate Member Vote Calculations**

The voting procedures differ when Corporate Members of the Segments except for the Consumer Segment vote by ballot for a Special Meeting (in lieu of a Special Meeting) than when they vote (in person or by proxy) at an actual Special Meeting. The relevant Bylaws provisions are provided for reference in the attached Appendix. A review of the Corporate Member numbers by Segment and vote calculations whether by ballot or in person follows.



1. Corporate Member Numbers by Segment

At the time of the Special Meeting, the Corporate Members of record (that is, at the record date of July 9, 2013) totaled 279, which were represented by Segment as follows:

Corporate Members of Record		
Segment		Number
Consumer	Commercial	148
	Industrial	16
	Residential	2
Cooperative		35
Independent Generator		21
Independent Power Marketer		23
Independent Retail Electric Provider		15
Investor Owned Utility		7
Municipal		12
TOTAL		279

2. Ballot Votes

When conducting a ballot vote (in lieu of an in-person Special Meeting), Section 3.7(g) requires a vote count based on all Corporate Members being present. The first threshold is meeting the quorum requirement, that is, at least 51% of the Corporate Members, in person or by proxy. Then Section 13.1(d) of the Bylaws provides the second threshold specifically for voting procedures for Bylaws amendments. Thus, all Segments except the Consumer Segment must have an affirmative vote of at least two-thirds to carry the Segment vote. The Consumer subsegments must have a simple majority to carry the subsegment; and then at least two of the three subsegments must vote affirmatively to carry the Consumer segment.

To illustrate the difference in the ballot voting versus in-person voting, it should be noted that the IPM Segment had a total of 23 Corporate Members at the time of the vote on the Bylaws amendments. Under a ballot vote, the IPM Segment would need affirmative votes of at least two-thirds of its Corporate Members (that is, a minimum of 16 votes) to carry the IPM Segment vote.

3. Special Meeting Votes

When conducting a vote at a Special Meeting, a sufficient number of Corporate Members must convene to establish a quorum and Section 13.1(d)(2) would apply. Section 13.1(d)(2) requires only an affirmative vote of at least two-thirds of the Corporate Members of a Segment present, except for the Consumer Segment. Section 13.1(d)(3) does not have the “present” language for the Consumer subsegment votes (which have a lower threshold for voting) so the vote would be counted considering all of the Corporate Members of the Consumer subsegments (not just those present).

Under this language, the voting methodology is different than ballot voting. At the Special Meeting, 8 of the 23 Corporate Members for the IPM Segment attended in person or by proxy. They all voted unanimously in favor of the first three Bylaws amendments; and seven voted in favor and one opposed the Calpine Bylaws amendment. Under Section 13.1(d)(2), the



Corporate Members of the IPM Segment who attended in person or by proxy carried the IPM Segment vote since at least two-thirds of them present at the meeting voted in favor of the amendments. At the time of the meeting, ERCOT reported that the IPM Segment vote did not carry since the balloting voting methodology was considered rather than the in-person meeting methodology.

4. Potential Consequence of Different Voting Calculations

To illustrate the potential consequence of different voting calculations by ballot and in person, consider a situation in which the Consumer Corporate Members (and possibly those from other Segments) constitute the quorum and have only one IPM Corporate Member attend the meeting and carry the IPM Segment vote. At the Special Meeting, one gentleman held 83 Commercial Consumer votes by proxy. Without his attendance, the quorum requirements would not have been met for the Special Meeting. At the Special Meeting, a minimum of 143 Corporate Members had to attend in person or by proxy to meet the quorum requirements; and at the time of the meeting, ERCOT Legal counted 168 in attendance in person or by proxy.

It should be noted that the Consumer subsegments have a different voting methodology (total members vs. those present at the meeting), but they have a lower voting threshold (51% vs. 2/3); however, the Consumer Segment vote is comprised of at least two of the three subsegments (which is comparable to the two-thirds requirements of other Segments).

5. Other Considerations

The Bylaws allow for a meeting of Corporate Members to be conducted by “conference telephone or other similar communications equipment”; however the Notice provided information for an in-person meeting only. The Notice could not be modified for different meeting logistics (that is, for a conference call or different meeting date) without creating a cascading effect of delays which would affect the ability of the Bylaws amendments to be approved prior to the end of the 2014 Membership application process. Furthermore, at this time, ERCOT Legal would not recommend a conference call for a meeting of Corporate Members, given the tracking and verification challenges for the large number of people who would be on a call.

III. Outstanding Matters

At the July 16, 2013 Board meeting, the HR&G Committee Chairman noted the HR&G Committee’s willingness to work with ERCOT Legal to address issues related to Board-member eligibility based on employment status with a Corporate or Associate Member, which were raised by a Bylaws amendment proposed by a Corporate Member, Macquarie Energy LLC, which was not recommended to the Board by the HR&G Committee. It would be useful for the HR&G Committee to establish a timeline for consideration of these issues.

Given the issues which have been identified with regard to voting calculations for Special Meetings of Corporate Members, the HR&G Committee may consider whether it wants to address the voting methodology for ballot vs. in-person meeting, considering the worst-case potential outcome of one Corporate Member being able to carry one Segment vote.

We look forward to discussing these matters with you at the September 16, 2013 Committee meeting.



Appendix of Relevant Bylaws Provisions

Section 3.7(g) of the Bylaws provides that:

Unless otherwise provided by law, any action required or permitted to be taken at any meeting of the Corporate Members may be taken without a meeting, if a consent in writing, setting forth the action to be taken, is signed by a sufficient number of Corporate Members as would be necessary to take that action at a meeting *at which all of the Corporate Members were present and voted.* (Emphasis added.)

Section 3.7(e) of the Bylaws provides that:

Representation at any meeting of ERCOT of at least fifty-one percent (51%) of the Corporate Members, in person or by proxy, shall constitute a quorum for the transaction of business at such meeting; and abstentions do not affect calculation of a quorum. Except as otherwise provided in these Bylaws, an act of fifty-one percent (51%) of the Corporate Members shall be the act of the Corporate Members. For purposes of voting of the Corporate Members, Corporate Members who 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. (Emphasis added.)

Section 13.1(d) of the Bylaws provides that:

Corporate Members must vote to enact the Board-approved amendment by the following voting procedure:

- (1) For the purposes of voting on Bylaws, each Segment shall have one whole vote.
- (2) *Except for the Consumer Segment, an affirmative vote of at least two-thirds of the Corporate Members of a Segment present constitutes an affirmative vote by that Segment.*
- (3) For purposes of voting on Bylaws amendments, the Consumer Segment shall be subdivided into the following Consumer subgroups:
 - (i) Residential Consumers
 - (ii) Commercial Consumers
 - (iii) Industrial Consumers

An affirmative vote of the majority of the Corporate Members within a Consumer subgroup shall constitute an affirmative vote of that subgroup. *An affirmative vote of at least two of the three Consumer subgroups shall constitute an affirmative vote of the Consumer Segment.* (Emphasis added.)

- (4) An affirmative vote by at least four of the seven Segments shall be necessary to amend these Bylaws.