



**Date:** September 10, 2013  
**To:** Board of Directors  
**From:** Bill Magness, Vice-President, General Counsel and Corporate Secretary  
**Subject:** Member-Affiliate Determination Conditioned Upon Public Utility Commission of Texas (PUCT) Approval of Bylaws

**Issue for the ERCOT Board of Directors**

**ERCOT Board of Directors Meeting Date:** September 17, 2013

**Item No.:** 14

**Issues:**

Whether Calpine Corporation (Calpine) should be considered to be affiliated with a Transmission and Distribution Entity under the proposed amendments to the ERCOT Bylaws and thus ineligible for membership in ERCOT's Independent Generator segment.

**Background/History:**

Calpine is an ERCOT-registered Resource Entity that owns and operates multiple Generation Resources in the ERCOT Region. Calpine has historically maintained its ERCOT membership in the Independent Generator segment under the ERCOT Bylaws. The definition of "Independent Generator" in Section 2 of the Bylaws explicitly limits membership to "[a]ny entity that is not a Transmission and Distribution ('T&D') Entity or Affiliate of a T&D Entity." As the attached letter explains (*see Exhibit A*, Letter of September 6, 2013, from William Taylor III to Craven Crowell), Calpine is affiliated with Cross Texas Transmission LLC (Cross Texas) under the current Bylaws due to LS Power Development LLC's indirect ownership of at least five percent of the voting securities of both Calpine and Cross Texas. ERCOT has determined that, on August 15, 2013, Cross Texas became a "T&D Entity" under the Bylaws due to its energization of Transmission Facilities in the ERCOT Region on that date. Because ERCOT has concluded that Calpine is now affiliated with a T&D Entity, Calpine is no longer eligible to maintain its membership in the Independent Generator segment under the current Bylaws.

Calpine recently proposed amendments to the ERCOT Bylaws that would revise the definition of "Affiliate" to allow the Board to determine on a case-by-case basis whether any two entities should be considered affiliated:

1. When one owns between five and twenty percent of the voting securities of the other;
2. Where the entities do not share a common parent and are not under common influence or control; and
3. Where neither entity exercises substantial influence or control over the policies and actions of the other.



The Corporate Members of ERCOT voted to approve these amendments on August 8, 2013, following Board recommendation of the amendments on July 16, 2013. These amendments have since been filed with the Public Utility Commission of Texas (Commission), which must approve the amendments before they may be given legal effect. *See P.U.C. Docket 41761, Petition of Electric Reliability Council of Texas, Inc., for Approval of Bylaws Amendments.*

Calpine has requested the Board's review of its corporate relationships with Cross Texas and other entities and seeks a prospective determination by the Board that Calpine is not affiliated with any such entities. This determination would enable Calpine to apply for membership in the Independent Generator segment prior to the end of the 2014 ERCOT Membership application process on November 8, 2013. With Membership approval by November 8, 2013, Calpine would be able to vote and field candidates as a Member of the Independent Generator Segment in the November 2013 elections for Directors, TAC Representatives, and members of TAC subcommittees for the 2014 Membership year.

In support of its request, Calpine has provided a verified letter that meets the minimum requirements for a Board determination of non-affiliation. In particular, Calpine has asserted that:

- A single entity (LS Power Development LLC) indirectly owns between five and twenty percent of its voting securities and also owns a controlling interest in Cross Texas, a T&D Entity;
- No entity is a parent to both Calpine and any other T&D Entity, including Cross Texas;
- Calpine is not under common influence or control with any other T&D Entity, including Cross Texas; and
- No entity with an ownership interest in Calpine exceeding five percent and an ownership interest in any T&D Entity (including Cross Texas) exercises substantial influence or control over Calpine.

ERCOT Legal believes this information establishes a prima facie case supporting Calpine's request for a prospective determination of non-affiliation. ERCOT Legal is not aware of any information that would raise any question as to the validity of these assertions.

Calpine's request acknowledges that any Board determination of non-affiliation must be conditioned upon the Commission's approval of the proposed amendments to the definition of "Affiliate" in materially the same form as proposed. If the Commission does not ultimately approve these proposed changes, any Board determination based on these amendments would be ineffectual.

**Key Factors Influencing Issue:**

The key factors influencing the issue are:

- (1) The need to accommodate a reasonable request for a prospective determination that could have an impact on a prospective ERCOT Member's segment categorization and voting interests; and

(2) Calpine's compliance with the proposed minimum requirements for obtaining a Board determination of non-affiliation.

**Conclusion/Recommendation:**

ERCOT Legal concludes that the verified letter provided in support of its request is sufficient to meet the criteria specified in the proposed amendments to the Bylaws' definition of the term "Affiliate." Unless the Board has concerns that are not accounted for in these criteria, ERCOT Legal recommends approving the request, conditioned upon the Commission's approval of the proposed Bylaws amendments.

Additionally, because Calpine is a publicly held company, and because private holdings in a publicly held company can change at any time without notice, ERCOT Legal advises that:

- The Board establish an acceptable range of LS Power Development LLC's percentage ownership in Calpine's voting securities. The proposed Bylaws amendments would allow the Board to make a determination of non-affiliation when the relevant interest is between five and twenty percent of the available voting securities. ERCOT Legal sees no reason that any interest of less than twenty percent should create an affiliation as long as the entity whose ownership interest in Calpine creates a possible affiliation does not at any time exercise substantial influence or control over Calpine's policies and actions;
- The Board expressly provide that any determination of non-affiliation would be automatically invalidated if at any time any entity that owns five percent or more of the voting securities of a T&D Entity also owns twenty percent or more of the available voting securities in Calpine;
- The Board expressly provide that any determination of non-affiliation would be automatically invalidated if at any time any entity that owns five percent or more of the voting securities of a T&D Entity and that also owns at least five percent of Calpine's voting securities begins to exercise substantial influence or control over Calpine's policies or actions; and
- Calpine should be required to notify ERCOT Legal in writing immediately following either of the above developments.



**ELECTRIC RELIABILITY COUNCIL OF TEXAS, INC.**  
**BOARD OF DIRECTORS RESOLUTION**

WHEREAS, under the current Bylaws of the Electric Reliability Council of Texas, Inc. (ERCOT), Calpine Corporation is considered an affiliate of Cross Texas Transmission LLC, (Cross Texas), a Transmission and Distribution Entity (T&D Entity) under the ERCOT Bylaws;

WHEREAS, Calpine has proposed amendments to the definition of "Affiliate" in the Bylaws of ERCOT that would authorize the ERCOT Board of Directors (Board) to determine that Calpine and Cross Texas are not affiliated upon a determination that they do not share a common parent and are not under common influence or control, and that neither entity exercises substantial influence or control over the policies and actions of the other;

WHEREAS, the ERCOT Board recommended these amendments to the Corporate Members at its meeting of July 16, 2013, and the Corporate Members of ERCOT voted to approve these amendments on August 8, 2013;

WHEREAS, Calpine would be foreclosed from becoming a Member of the Independent Generator Segment or voting or participating in the 2014 Independent Generator Segment elections in November 2013 if the Public Utility Commission of Texas (Commission) approves the Bylaws amendments and if Calpine has not been found by the Board to be unaffiliated with Cross Texas under these amendments by the date of these elections;

WHEREAS, Calpine has provided evidence that meets the minimum criteria for a Board determination of non-affiliation with a T&D Entity in these proposed Amendments;

THEREFORE, BE IT RESOLVED, that, except as provided below, and only upon the condition that the Commission approves the proposed amendment to the definition of "Affiliate" in a form materially similar to that proposed, Calpine shall not, upon such Commission approval, be considered an Affiliate of any T&D Entity under the amendments to the Bylaws currently pending approval by the Commission in P.U.C. Docket 41761, *Petition of Electric Reliability Council of Texas, Inc., for Approval of Bylaws Amendments*;

THEREFORE, BE IT FURTHER RESOLVED, that this determination of non-affiliation shall be invalidated and Calpine shall be considered an Affiliate of a T&D Entity if at any time any entity that directly or indirectly owns five percent or more of the available voting securities of a T&D Entity also directly or indirectly owns twenty percent or more of the available voting securities in Calpine or if at any time any entity that directly or indirectly owns five percent or more of the available voting securities of a T&D Entity and that also directly or indirectly owns at least five percent of Calpine's voting securities begins to exercise substantial influence or control over Calpine's policies or actions, and that Calpine shall be required to notify the General Counsel of ERCOT in writing immediately upon the occurrence of either of these events.



**CORPORATE SECRETARY'S CERTIFICATE**

I, Vickie G. Leady, Assistant Corporate Secretary of ERCOT, do hereby certify that, at its September 17, 2013, meeting, the ERCOT Board passed a motion approving the above Resolution by \_\_\_\_\_.

IN WITNESS WHEREOF, I have hereunto set my hand this \_\_\_\_ day of September, 2013.

\_\_\_\_\_  
Vickie G. Leady  
Assistant Corporate Secretary



# CALPINE CORPORATION

717 TEXAS AVENUE, SUITE 1000  
HOUSTON, TX 77002

Exhibit A

NYSE CPN

September 6, 2013

Mr. Craven Crowell  
Chairman, Board of Directors  
ERCOT  
7620 Metro Center Drive  
Austin, Texas 78744

Attention: Bill Magness

Dear Mr. Crowell:

By this letter, Calpine Corporation ("Calpine") requests the ERCOT Board of Directors to find that Calpine is not an Affiliate of Cross Texas Transmission LLC or any other transmission-owning entity, as the term "Affiliate," is defined in Article 2 of the proposed amendments to the ERCOT Bylaws, which are currently pending approval at the Public Utility Commission.

Calpine's relationship with Cross Texas Transmission is shown in the attached diagram. LS Power Development, LLC, through certain subsidiaries ("LS Power") owns approximately 7.8 percent of Calpine voting securities and Luminus Management LLC ("Luminus"), through certain subsidiaries, owns approximately 1.6 percent of Calpine voting securities. Collectively, LS Power and Luminus own approximately 9.4 percent of Calpine voting securities.<sup>1</sup> LS Power and Luminus obtained interests in Calpine voting securities during Calpine's bankruptcy proceeding which took place from December, 2005 through January, 2008. LS Power also owns Cross Texas Transmission. Pursuant to Article 2 of the current ERCOT Bylaws, Calpine and Cross Texas Transmission are therefore "Affiliates" due to these LS Power ownership interests.

On August 15, 2013, Cross Texas Transmission energized its power lines and became a "Transmission and Distribution Entity" as defined in the ERCOT Bylaws. Because the definition of "Independent Generator" in the ERCOT Bylaws specifically excludes any Affiliate of a Transmission and Distribution Entity, Calpine is now precluded from continuing its membership in the Independent Generator segment of ERCOT, notwithstanding the fact that Calpine is one of the largest generators in ERCOT, with 8024 MW of installed generating capacity.

ERCOT members recently voted to amend the definition of "Affiliate" in the ERCOT Bylaws to allow the Board discretion to exclude from that definition any relationship in which an entity (1) owns more than 5% but less than 20% of another entity, (2) is not under common influence or

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<sup>1</sup> Quarterly Report on Holdings of Shares of Calpine Corporation's Common Stock, *LS Power Development, LLC and Luminus Management, LLC*; FERC Docket No. EC08-126-000, dated August 14, 2013.



control with the other entity, and (3) is not subject to actual influence or control of or by that other entity. This and other proposed amendments to the Bylaws are currently pending before the Public Utility Commission of Texas and could be approved before ERCOT membership applications are due in early November.

Calpine wishes to regain its membership in the Independent Generator segment under the proposed amendments to the definition of "Affiliate" and therefore, by this letter, requests a prospective Board determination on Calpine's status, conditioned on the Public Utility Commission's approval of the proposed Bylaws amendments and on Calpine's timely submission of a membership application at the appropriate time. To this end, Calpine hereby asserts as follows:

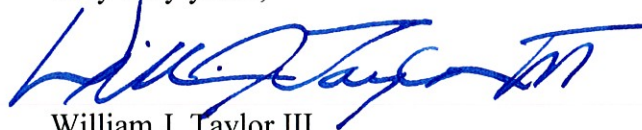
- Calpine does not share a common parent with Cross Texas Transmission or any other Transmission and Distribution Entity, as that term is defined in the ERCOT Bylaws.
- Calpine is not under direct common influence or control with Cross Texas Transmission or any other Transmission and Distribution Entity, as that term is defined in the ERCOT Bylaws.
- Calpine is not subject to substantial influence or control by LS Power, Cross Texas Transmission, or any other Transmission and Distribution Entity.

Calpine submits that this affirmation should be ample support for the Board to make a prospective finding of non-affiliation between Calpine and LS Power under the proposed Bylaws, conditioned upon their approval by the Public Utility Commission.

Calpine requests that the ERCOT Board of Directors grant Calpine's request at its upcoming September 17, 2013 meeting so that Calpine is able to timely register as a corporate member in the Independent Generator segment and participate in segment elections this fall, under the assumption that the Commission approves the proposed Bylaws amendments with sufficient time.

Thank you for your consideration of this request. I will be happy to answer any questions concerning this request at the meeting of the ERCOT Board on September 17, 2013. In the meantime, if you have any questions, please contact me at (713) 830-8821.

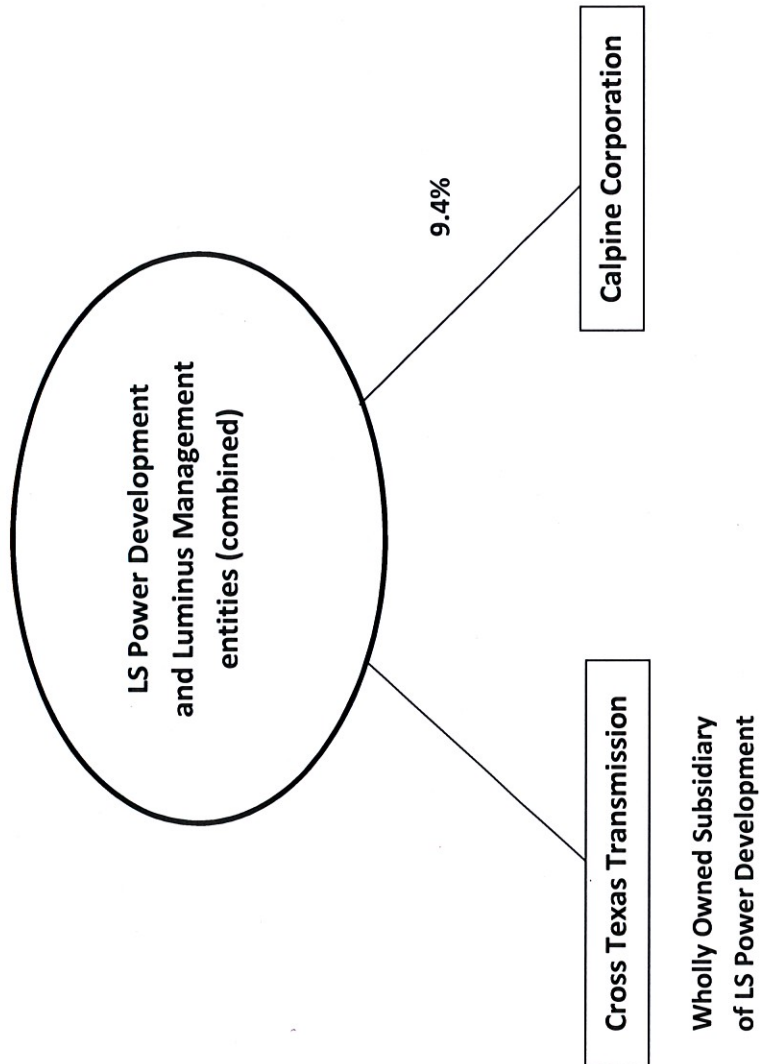
Very truly yours,



William J. Taylor III  
Vice President, Government and Regulatory Affairs

Enclosures (2)


**Diagram**





### Affirmation in Support of Request

I, William Taylor, state that I am Vice President of Government and Regulatory Affairs with Calpine Corporation, and that I am authorized to execute this Affirmation. I affirm that, after reasonable inquiry, the information set forth in the attached letter dated September 6, 2013 addressed to Mr. Craven Crowell, Chairman of the EROCT Board of Directors, is true, complete and correct to the best of my knowledge, information and belief.

  
William Taylor  
Vice President of Government and  
Regulatory Affairs

Subscribed and sworn before me, on this 6 day of Sept, 2013.

  
Notary Public

My Commission Expires: May 29, 2017

