



## **HR&G Agenda Item 7.2.1**

### ***Endorsement of Proposed Amendments to ERCOT Articles of Incorporation and Bylaws***

***Dated March 22, 2018***

Presented by ERCOT Legal to the  
Technical Advisory Committee on  
March 22, 2018



## **Item 10: Endorsement of Proposed Amendments to ERCOT Articles of Incorporation and Bylaws**

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Assistant Corporate Secretary

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Technical Advisory Committee Meeting

ERCOT Public

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# ERCOT Governing Documents Amendments

At the April 2018 Human Resources and Governance Committee (HR&G) and Board of Directors meetings, ERCOT Legal expects to propose for vote and approval amendments to its governing documents, that is:

- ERCOT Articles of Incorporation
- ERCOT Bylaws



# Proposed Amendments to ERCOT Articles of Incorporation

# ERCOT Articles of Incorporation Amendments

- Current Articles of Incorporation have been in effect since December 19, 2000
- Legally sufficient, but stale information and language could benefit from updating
- For efficiency, amendments to Articles will be submitted simultaneously with the amendments to the Bylaws

# Proposed Articles Amendments

- In consultation with ERCOT's outside corporate counsel, ERCOT Legal has proposed updates to the Articles
  - To conform with current corporate and tax-exempt organization legal requirements
  - To maintain ERCOT's tax-exempt status
  - To update factual references
  - To include references to applicable provisions of PURA and PUC Substantive Rules

## Proposed Articles Amendments – *cont'd*

Highlights of a couple of key substantive changes

- Removes Membership approval step for statutory changes to take effect in relation to limitation of liability of directors – now change is automatic
- Identifies PUCT Substantive Rule which governs distribution of assets and winding up provisions if and upon decertification of ERCOT as independent organization
- Identifies PURA as the source for the mandatory composition of the ERCOT Board of Directors



## Proposed Articles Amendments – *cont'd*

Clean and red-lined versions of the proposed Amendments to the Articles of Incorporation are contained in the meeting materials





# Proposed Amendments to ERCOT Bylaws

# ERCOT Bylaws Amendments

- ERCOT Legal proposed amendments to the Bylaws in the following general categories
  - Affiliate definition
  - Membership Segment definition based on PUC Project No. 46304, Revised Order, Directive #1, Southern Cross Transmission
  - Officer definition
  - Updates to legal code references
  - Corrections to scrivener's errors

# Stakeholder Comments on ERCOT Bylaws

- Stakeholder comments were received (contained in the meeting materials)
  - Affiliate definition
  - Membership Segment definition
  - A technical legal code update (Cooperatives)
- ERCOT Legal appreciates the feedback and has reviewed the comments for discussion at the TAC meeting
- A red-lined version of the proposed amendments to the Bylaws will be provided at a later date

## Goal of Amending Affiliate Definition

To update the Affiliate definition with corporate best practice for addressing passive investments by a single person in more than one Member while still avoiding a concentration of influence or control over ERCOT by multiple Members controlled by the same person

# Stakeholder Comments on Affiliate Definition

Proposed edits on Affiliate definition received jointly from

- American Electric Power Service Corporation
- CenterPoint Energy Inc.
- Dynegy Inc.
- Exelon Corporation
- First Solar Inc.
- Lone Star Transmission LLC
- Luminant Generation Company LLC
- Reliant Energy Retail Services LLC
- Oncor Electric Delivery Company LLC
- Texas Industrial Energy Consumers

## Comments on Affiliate Definition – *cont'd*

Suggested edits to refine ERCOT Legal's proposed definition

1. To incorporate exclusions in PURA's definition of affiliate to streamline analysis for certain types of investors, and to align the definition with the governing statute
2. To make the 10% ownership threshold an independent variable for evaluating control
3. In cases where the question of affiliation arises because of the common ownership by an upstream investor, to clarify that non-control of either ERCOT Member results in no affiliation with respect to the other
4. To introduce a process for rebutting a presumption of control



## Stakeholder Blacklined Edits (first of five slides)

These stakeholder comments accept ERCOT Legal's proposed changes and show proposed additions with a double underline and proposed deletions with a single strikethrough.

1. **Affiliate.** Affiliate shall mean, with respect to any person, (i) any other person who, directly or indirectly, through one or more intermediaries, controls, is controlled by, or is under common control with such person, and (ii) any other person determined by ERCOT, after notice and opportunity for hearing to be heard at a Board meeting, to exercise, directly or indirectly, through one or more intermediaries, ~~substantial influence or~~ control over such person. *{definition continued on next slide}*



## Stakeholder Blacklined Edits – *cont'd*

As used in this definition, (x) “person” shall mean any individual, corporation, limited liability company, partnership, firm, ~~joint venture~~, association, joint stock company, trust, unincorporated organization, or other entity, **but shall exclude all of the entities listed in Section 11.0042(a)(1)-(4) of the Public Utility Regulatory Act (“PURA”), as well as the entities listed in PURA § 11.0042(a)(5) if the conditions in PURA § 11.0042(a)(5)(A) and (B) are satisfied**, and (y) “controls”, “controlled by”, or “under common control with” means the possession **by a person**, directly or indirectly, through one or more intermediaries, of the power to direct or cause the direction of the management and/or policies and procedures of another person, whether through voting securities, contract or otherwise. *{def. cont'd on next slide}*





## Stakeholder Blacklined Edits – cont'd

Ownership by a person of equity securities (whether publicly traded or not) of another person shall not result in control or affiliation for purposes of this definition if ~~(a) the securities are held as an investment, (b)~~ the holder owns (in its name or via intermediaries) less than 10 percent of the outstanding securities of the person. Ownership by a person of equity securities equal to or greater than 10 percent of the outstanding securities of another person shall not result in control or affiliation for purposes of this definition if (a) the securities are held as an investment, (c) the holder does not have representation on the person's board of directors (or equivalent governing body) ~~or vice versa~~ and ~~(d)~~ the holder does not in fact exercise influence over day to day management decisions. *{def. cont'd on next slide}*

## Stakeholder Blacklined Edits – *cont'd*

A voting interest of ten percent or more by a person whose ownership does not meet the foregoing conditions shall create a rebuttable presumption of control. For purposes of determining whether two otherwise unrelated persons are affiliated based on a holder's ownership of equity securities of both persons, the holder's ownership interest shall not result in common control for purposes of this definition if such holder's ownership meets the foregoing conditions for either person. *{definition continued on next slide}*

## Stakeholder Blacklined Edits – *cont'd*

~~In cases where the level of control or influence is disputed,~~ A person wishing to rebut a presumption of control may submit to the Board a request to be heard, and the Board shall have discretion to determine whether or not the ~~entities~~ persons are Affiliates of one another for the purpose of determining Member Segment and voting rights by reference to the foregoing factors and other persuasive evidence. Membership in ERCOT shall not create an affiliation with ERCOT.

# ERCOT Legal Response

- ERCOT Legal will propose an increase in the threshold percentage of control from the proposed 10% to 20% (after another review of actual submissions of passive investor holdings from Members)
- Exclusions to Section 11.0042(a)(1)-(5) of the Public Utility Regulatory Act (PURA) are too narrow to pick up all of the different types of passive investors in ERCOT Members. Suggested edit could be accepted with more simplistic and standard definitions of affiliate, person and control, combined with a presumption of affiliation at 20%

## ERCOT Legal Response – *cont'd*

- Using a 20% threshold would eliminate the need for making the 10% threshold an independent variable for evaluating control
- Suggested clarification regarding common ownership of an upstream investor without control of one ERCOT Member, resulting in no affiliation with respect to the other, will be recommended by ERCOT Legal
- Suggested specific process for rebutting the presumption of control by the ERCOT Board will be recommended by ERCOT Legal

## Stakeholder Comment – Legal Code Updates

For the Cooperative Membership Segment definition, Brazos Electric Power Cooperative recommended a legal code update from Tex. Rev. Civ. Stat. 1396-50.01 to Chapter 251 of the Texas Business Organizations Code.

ERCOT Legal agrees with the suggested edit and recommends such change to be incorporated as part of all other Bylaws amendments.

# PUCT Directive related to Membership Definition

Directive #1 from May 23, 2017 Revised Order in PUC Project No. 46304 (in pertinent part):

**“ERCOT shall . . . determine the appropriate market segment for Southern Cross Transmission and any other entity.”**

# Stakeholder Comments on Membership Segment Definition

Three sets of comments received on Membership Segment issue (all comments are contained in the meeting materials).

- Two commenters recommended that SCT be placed in the IPM Segment:
  - Oncor
  - TIEC
- One commenter recommended that SCT be placed in the IOU Segment:
  - SCT

ERCOT continues to believe that the IOU and IPM Segments are the two most appropriate Segments to consider expanding to accommodate SCT's membership. See [ERCOT memo from 2/22/18 TAC meeting](#).





# Possible revisions for SCT in IOU Segment

(1) Insert a new Section 11 in Article 2, to read as follows:

**Independent DC Tie Operator.** Any entity which is not a Transmission and Distribution (“T&D”) Entity or Affiliate of a T&D Entity and that (i) owns or operates a Direct Current Tie (“DC Tie”) interconnected to the ERCOT System, or (ii) is preparing\* to own or operate a DC Tie to be interconnected to the ERCOT Transmission Grid.

(2) Amend Article 2, Section 15 to read as follows:

## **Investor-Owned Utility (“IOU”).**

a. An investor-held, for-profit “electric utility” as defined in PURA §31.002(6) that (a) operates within the ERCOT Region, (b) owns 345 KV interconnected transmission facilities in the ERCOT Region, (c) owns more than 500 pole miles of transmission facilities in the ERCOT Region, or (d) is an Affiliate of an entity described in (a), (b), or (c);

b. A public holding company of any such electric utility; or

c. An Independent DC Tie Operator.

\* It may be appropriate to add requirements for entities that are “preparing to own or operate” a DC Tie to qualify as an Independent DC Tie Operator.

# Possible revisions for SCT in IPM Segment

(1) Insert a new Section 11 in Article 2, to read as follows:

**Independent DC Tie Operator.** Any entity which is not a Transmission and Distribution (“T&D”) Entity or Affiliate of a T&D Entity and that (i) owns or operates a Direct Current Tie (“DC Tie”) interconnected to the ERCOT System, or (ii) is preparing\* to own or operate a DC Tie to be interconnected to the ERCOT Transmission Grid.

(2) Amend Article 2, Section 15 to read as follows:

**Independent Power Marketer.** Any entity that is not a T&D Entity or Affiliate of a T&D Entity and is registered at the PUCT as a Power Marketer to serve in the ERCOT Region. For the purposes of Segment classification, an Independent DC Tie Operator, if such Member does not fit in any other classification, shall participate as an Independent Power Marketer.

\* It may be appropriate to add requirements for entities that are “preparing to own or operate” a DC Tie to qualify as an Independent DC Tie Operator.

# Expected Schedule

Date	Meeting	Purpose
03.22.2018	TAC	Discuss Articles of Incorporation (Articles) and Bylaws amendments proposed by ERCOT Legal and stakeholders; TAC can vote to endorse amendments if desired, but not required
04.09-10.2018	HR&G Committee/ Board of Directors	Request recommendation by HR&G Committee and Board approval for amendments to Articles and Bylaws and for Board approval to call Special Meeting of Corporate Members
05.2018	Special Meeting of Corporate Members	Request approval by Corporate Members subject to PUCT approval
06.2018	--	ERCOT Legal will file petition for approval of amendments with the PUCT. Absent PUCT approval, amendments cannot be effective

## April 2018 HR&G Committee and Board Meetings

- ERCOT Legal will request the HR&G Committee recommend and the Board approve amendments to the Articles and Bylaws at the April 9-10, 2018 meetings
- ERCOT Legal will also request that the Board call a Special Meeting of Corporate Members for approval of the amendments subject to PUCT approval

## Special Meeting of Corporate Members

- Bylaws allow vote by ballot with a Special Meeting of Corporate Members
- If any failure to reach a quorum by ballot, then in-person meeting of Corporate Members will be required

# Proposed Ballot Votes

Votes on ballot expected to be drafted for approval of proposed amendments as follows:

- Vote 1: Articles of Incorporation
- Vote 2: Bylaws: Affiliate definition
- Vote 3: Bylaws: Membership Segment definition
- Vote 4: Bylaws: All other amendments

### Vote 1 – Articles of Incorporation

- Approval of the amendments to the Articles of Incorporation, subject to Public Utility Commission of Texas (PUCT) approval (with amendments reflected in an attachment)
- One vote to be cast
  - For; or
  - Against

### Vote 2 – Bylaws: Affiliate definition

- Approval of the amendments to the Affiliate definition in the Bylaws, subject to Public Utility Commission of Texas (PUCT) approval (with amendments reflected in an attachment)
- One vote to be cast
  - For; or
  - Against



### Vote 3 – Bylaws: Membership Segment definition

- Approval of the amendments to Membership Segment definition in the Bylaws, subject to Public Utility Commission of Texas (PUCT) approval (with amendments reflected in an attachment)
- One vote to be cast
  - For amendments to the Independent Power Marketer Membership Segment definition;
  - For amendments to the Investor-Owned Utility Membership Segment definition; or
  - Against amendments to either Membership Segment definition

### Vote 4 – Bylaws: All other amendments

- Approval of the amendments to all other amendments in the Bylaws, subject to Public Utility Commission of Texas (PUCT) approval (with amendments reflected in an attachment)
  - Officer definition
  - Updates to legal references
  - Corrections to scrivener's errors
- One vote to be cast
  - For; or
  - Against

Questions?