

PROJECT NO. 51878

**REPORTS OF THE ELECTRIC § PUBLIC UTILITY COMMISSION
RELIABILITY COUNCIL OF TEXAS §
FOR CALENDAR YEAR 2021 § OF TEXAS**

**NOTICE OF ELECTRIC RELIABILITY COUNCIL OF TEXAS, INC.
REGARDING CORPORATE GOVERNANCE STATUS AND
EXPECTED VACANCY OF CHIEF EXECUTIVE OFFICER POSITION**

COMES NOW, Electric Reliability Council of Texas, Inc. (ERCOT), and provides notice of the status of ERCOT corporate governance. Given the recent resignations of several members of the ERCOT Board of Directors (Board), ERCOT is not able to fulfill certain statutory, regulatory and governing document requirements, some for an immediate time and some possibly for an indefinite time in light of the current Board composition. In addition, in accordance with 16 Texas Administrative Code (TAC) 25.362(h), ERCOT provides notice that a vacancy is expected to occur for the ERCOT Chief Executive Officer (CEO) position as of May 3, 2021, which the Board is currently addressing in the interim.

**I. RESIGNATIONS OF DIRECTORS AND CURRENT COMPOSITION OF THE
ERCOT BOARD AND ITS COMMITTEES**

A. Summary of Composition and Current Status of the ERCOT Board

PURA¹ § 39.151(g) mandates that ERCOT be governed by a 16-member Board of Directors, specifically composed of three types of Directors – that is, eight representatives of various electric industry Market Segments (including consumers), three *ex officio* representatives, and five members who are unaffiliated with any electric industry Market Segments, in order for ERCOT to maintain its certification as an independent organization under PURA.² Each Market

¹ Public Utility Regulatory Act, TEX. UTIL. CODE ANN. §§ 11.001-66.016.

² PURA § 39.151(g) provides that “[t]o maintain certification as an independent organization under this section, an organization's governing body must be composed of persons specified by this section and selected in accordance with formal bylaws or protocols of the organization,” and further provides that the governing body “must be composed of” the Commission Chair (*ex officio*, non-voting); the chief executive (that is, the Public Counsel) for the Office of Public Utility Counsel (*ex officio*); the ERCOT CEO (*ex officio*); eight Market Participants [more correctly, Market Segments, to be consistent with ERCOT corporate governance and Protocol terminology] represented and elected by (a) independent generators, (b) investor-owned utilities, (c) power marketers, (d) retail electric providers, (e) municipally owned utilities, (f) electric cooperatives, (g) industrial consumers, and (h) large commercial consumers (*i.e.*, Market Segment Directors); and five members “unaffiliated with any market segment and selected by the other members of the governing body to serve three-year terms.” Pursuant to Amended and Restated Bylaws of Electric

Segment elects a Segment Alternate,³ in addition to a Market Segment Director, to serve in the Market Segment Director's absence or vacancy; and as such, the ERCOT Board has a total of 16 Directors and eight Market Segment Alternates.⁴ On January 1, 2021, there was only one vacancy on the ERCOT Board (including the Market Segment Alternates), for the fifth Unaffiliated Director; and a petition for approval had been filed with the Public Utility Commission of Texas (Commission) for the approval of an Unaffiliated Director candidate to fill that sole vacancy.⁵ At the date of this Notice, ERCOT has received resignations of eight Directors and one Segment Alternate, and three Market Segments have successfully conducted elections for successor Market Segment Directors⁶, now leaving ten voting Directors and one non-voting Director⁷ on the Board as well as seven Segment Alternates as described in further detail in this Notice and as illustrated in Attachment A.

B. Resignations of Eight Directors (including all Unaffiliated Directors then Serving) and One Segment Alternate Received Since February 23, 2021

On February 23, 2021, ERCOT received notice in writing from all four Unaffiliated Directors then serving on the ERCOT Board – Sally Talberg (Board Chair), Peter Cramton (Board Vice Chair), Terry Bulger (Finance and Audit (F&A) Committee Chair) and Raymond Hepper

Reliability Council of Texas, Inc. (Approved by the Commission on July 31, 2020) (Bylaws) § 4.2, there is also Segment Alternate for each of the Market Segment Directors, each of which is also elected by the members of the relevant Market Segment, who can attend and vote at meetings in the absence of the respective Market Segment Director (including while such Director is unable to attend a Board meeting or while such Director's seat is vacant). The Public Counsel for the Office of Public Utility Counsel represents residential and small consumer interests, and is thus considered, along with the Market Segment Directors, a representative of a Market Segment.

³ The Residential and Small Commercial Consumer Director is an *ex officio* position held by Public Counsel, who is appointed by the Texas Governor and confirmed by the Texas Senate. The Residential and Small Commercial Consumer Director does not have a Segment Alternate because Public Counsel may designate alternate representatives from the Office of Public Utility Counsel who can act at Board and Committee meetings in Public Counsel's absence as permitted by Bylaws § 4.3(e).

⁴ See Bylaws Article 2 § 27 (which defines "Segment Alternate") and § 4.2 (which provides for the composition of the ERCOT Board with Market Segment Alternates).

⁵ *Petition of Electric Reliability Council of Texas, Inc. for Approval of Unaffiliated Director*, Docket No. 51604 (Dec. 9, 2020).

⁶ The Independent Retail Electric Provider (IREP) Segment elected its successor Market Segment Director on March 4, 2021, and is currently conducting an election for its successor Segment Alternate and should report the results to ERCOT shortly. The Municipal Market Segment elected its successor Market Segment Director on March 5, 2021. The Cooperative Segment elected its successor Market Segment Director on March 9, 2021.

⁷ The Commission Chair is the *ex officio*, non-voting Director. DeAnn Walker resigned her position as the Commission Chair, effective March 1, 2021. Since this Director position is *ex officio*, the position was automatically filled upon Texas Governor Greg Abbott's March 3, 2021 appointment of Arthur D'Andrea as Commission Chair. On March 8, 2021, Commissioner Shelly Botkin resigned her position on the Commission, effective immediately. As such, if Chairman D'Andrea is not able to attend a Board meeting, then he will not have an alternate representative until the appointment of a new Commissioner to the Commission.

(Human Resources and Governance (HR&G) Committee Chair) – as well as IREP Market Segment Director Vanessa Anesetti-Parra, that they each would be resigning, effective upon the adjournment of the February 24, 2021 Urgent ERCOT Board Meeting by Teleconference (February 24 Board Meeting). Also on February 23, 2021, ERCOT received notice in writing from Craig S. Ivey, who was the subject of an ERCOT petition for approval pending Commission consideration that was intended to fill the sole prior Unaffiliated Director vacancy on the Board, that he had withdrawn as an Unaffiliated Director candidate, effective February 23, 2021. On February 23, 2021, ERCOT filed notice with the Commission, advising the Commission of these developments,⁸ and also filed notice of the withdrawal of its petition for Commission approval of Mr. Ivey as an Unaffiliated Director.⁹

Subsequent to ERCOT's filing of the notice of resignations, Randal Miller, IREP Segment Alternate, submitted his resignation on February 23, 2021, effective immediately. Accordingly, upon the adjournment of the February 24 Board Meeting, the IREP Segment no longer had representation on the ERCOT Board, with both the Director and Segment Alternate positions vacant. On February 25, 2021, ERCOT received notice that Cooperative Market Segment Director Clifton Karnei was resigning from the Board, effective immediately. On February 27, 2021 ERCOT received notice that Municipal Market Segment Director Jacqueline A. Sargent was resigning from the Board, effective immediately.

C. Board Vacancy Considerations and Vacant Leadership Roles

With the recent Board member resignations from February 23, 2021, successor Directors have been elected for the three previously vacant Market Segment Directors positions (Cooperative, IREP and Municipal Market Segments),¹⁰ but none of the five Unaffiliated Director positions is currently filled. With the withdrawal of Mr. Ivey's Unaffiliated Director candidacy, there are no Unaffiliated Director candidates immediately available who have been identified through an executive search firm (as required by PURA § 39.151(g), ERCOT Bylaws § 4.3(b)(2)

⁸ *Notice of Electric Reliability Council Of Texas, Inc. regarding the Resignation of Four Unaffiliated Directors from the Board of Directors and Withdrawal of One Unaffiliated Director Candidate from Consideration for Approval*, Project Nos. 27706 and 51812 and Docket No. 51604 (Feb. 24, 2021).

⁹ *Electric Reliability Council of Texas, Inc. Notice of Withdrawal of its Petition for Approval of Unaffiliated Director Craig S. Ivey*, Docket No. 51604 (Feb. 24, 2021).

¹⁰See *supra* note 6.

and ERCOT Board Policies and Procedures § 7.3.3¹¹), selected through the nomination process and vetted to meet the Unaffiliated Director eligibility criteria required by Section 4.3(b) of the ERCOT Bylaws for any of the five Unaffiliated Director vacancies on the Board. Of all of the Director positions in general, the Unaffiliated Director vacancies are the most difficult to fill by far, due to the lengthy, multi-step nomination and approval process as well as the stringent eligibility requirements.¹²

The Board Chair and Vice Chair leadership roles, each of which must be filled by an Unaffiliated Director,¹³ are vacant. This is a highly extraordinary occurrence in and of itself, but particularly when there are no Unaffiliated Directors on the Board and no Unaffiliated Directors candidates being considered in the required nominating process. Further, both the F&A and HR&G Committees are required to be composed of at least two Unaffiliated Directors pursuant to their respective Committee Charters; however, as of the date of this Notice, there are no Unaffiliated Directors to fill those Committee positions, which will likely be the case for an extended period of time. The current composition of the F&A Committee, the requirements for which are set forth in the F&A Committee Charter, consists of five members, none of whom are Unaffiliated Directors. Both the F&A Committee Chair and Vice Chair positions are vacant, which positions were both formerly occupied by Financial Experts.¹⁴ Only one remaining member has been confirmed to qualify as a Financial Expert. The current composition of the HR&G Committee, which requirements are stated in the HR&G Committee Charter, consists of four Directors, none of whom are Unaffiliated Directors.¹⁵ The HR&G Committee Chair position is vacant. The only leadership position currently filled for the Board or either of its Committees is the HR&G Committee Vice

¹¹ The ERCOT Board Policies and Procedures (amended effective April 9, 2019 by the ERCOT Board) may be found on the ERCOT website at: http://www.ercot.com/content/wcm/key_documents_lists/88679/Board_Policies_and_Procedures_eff_04.09.2019.pdf.

¹² Selection of Unaffiliated Directors is discussed in greater detail in Section II below.

¹³ PURA § 39.151(g-1) requires that the Board Chair be an Unaffiliated Director. ERCOT Bylaws § 4.4 require that the Board Chair and Vice Chair both be Unaffiliated Directors so that the Vice Chair could assume the Chair duties immediately (and without a separate election) if the Chair was no longer able to serve for any reason.

¹⁴ The F&A Committee Charter (effective February 9, 2021) may be found on the ERCOT website at: http://www.ercot.com/content/wcm/key_documents_lists/27313/FA_Committee_Charter_Effective_February_9_2021.pdf. The F&A Committee Financial Expert requirement is discussed in Part II.B below.

¹⁵ The HR&G Committee Charter (effective February 9, 2021) may be found on the ERCOT website at: http://www.ercot.com/content/wcm/key_documents_lists/27312/HRG_Committee_Charter_Effective_February_9_2021.pdf.

Chair position, currently held by the *ex officio* Public Counsel Director. The leadership roles will be discussed in greater detail in Section II below.

D. Expected Vacancy of ERCOT CEO Position and Corresponding *Ex Officio* Board Position

On March 3, 2021, the Board voted to terminate the employment of ERCOT CEO Bill Magness, effective in 60 days from the date of receipt of written notice of termination, that is, May 3, 2021. The Board is actively working on a transition plan in light of Mr. Magness' upcoming departure. The Board directed ERCOT staff to issue a request for proposal (RFP) for an executive search firm to provide search services for a successor CEO. The RFP is expected to be issued as early as March 10, 2021.¹⁶ As required by 16 TAC § 25.362(h), ERCOT will provide information to the Commissioners concerning the process for selecting a new CEO, the candidates who have been identified and their qualifications, any recommendation that will be made to the Board, and any other information requested by a Commissioner. Also, Bylaws § 8.2 requires Board election of the CEO.

The *ex officio* Director positions on the Board change directly in accordance with a change to the corresponding office. Accordingly, upon the effectiveness of Mr. Magness' termination, if a new CEO (whether permanent or interim) has been appointed, the new CEO would assume the *ex officio* Director position upon election as CEO by the Board.

II. REQUIREMENTS REGARDING THE ERCOT BOARD OF DIRECTORS AND ITS COMMITTEES PURSUANT TO PURA, COMMISSION RULES AND ERCOT GOVERNING DOCUMENTS

A. Vacancies on the ERCOT Board of Directors and Selection of Directors

The manner in which a vacancy on the Board is filled depends on the type of Director affected – that is, Market Segment Director, *ex officio* Director or Unaffiliated Director. Market Segment Directors are unpaid Directors¹⁷ who are required to be employed by ERCOT Members of their Market Segment and who must be elected by ERCOT Members in that particular Market

¹⁶ The RFP will be posted on the Procurement page of ERCOT's website at: <http://www.ercot.com/about/procurement/rfp/index>.

¹⁷ In accordance with Bylaws § 10.1, the only Board members who receive payment from ERCOT to serve on the Board are the five Unaffiliated Directors, pursuant to compensation outlined in Section 2.8 of the ERCOT Board Policies and Procedures. The other 11 Directors are unpaid for their voluntary service on the Board.

Segment. Each Market Segment Director has a Segment Alternate¹⁸ who must meet the same eligibility requirements as the corresponding Market Segment Director. Like Market Segment Directors, Segment Alternates are duly elected by their respective Market Segment and are also unpaid. A Segment Alternate can attend and vote at meetings in the absence of their respective Market Segment Director (including due to the Director’s inability to attend or due to a Director vacancy).

For Market Segment Directors and Segment Alternates, pursuant to Bylaws Section 4.3(a)(3), vacancies are filled through an election by the relevant Market Segment. *Ex officio* Directors—the ERCOT CEO, Commission Chair and the Public Counsel for the Office of Public Utility Counsel—hold their Director positions by virtue of their office, and change directly and immediately in accordance with a change to the corresponding office. ERCOT does not pay *ex officio* Directors for their service on the Board; however, the ERCOT CEO receives a salary from ERCOT as an employee. When there is an Unaffiliated Director vacancy on the Board, there is a lengthy, three-stage process for filling the vacancy and seating the Unaffiliated Directors. As required by Bylaws § 4.3(b), Unaffiliated Director candidates are (1) presented by an executive search firm (as described in further detail below) and selected by the Nominating Committee of the Board, (2) elected by the ERCOT Membership subject to Commission approval, and (3) formally approved by the Commission by order. A candidate may not serve on the Board until approved by the Commission.¹⁹

B. Process for Filling Unaffiliated Director Vacancies and Unaffiliated Director Criteria

The process for filling Unaffiliated Director vacancies is governed by PURA § 39.151(g), 16 TAC § 25.362(g), Bylaws § 4.3(b) and Board Policies and Procedures § VII. PURA § 39.151(g) states, in pertinent part:

To maintain certification as an independent organization, ... [the independent organization’s] 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

¹⁸ Bylaws Article 2 § 27 defines “Segment Alternate.”

¹⁹ Moreover, pursuant to 16 TAC 25.362(g)(5), an Unaffiliated Director whose three-year term has expired and who has been re-elected by the ERCOT Membership must cease serving as a Board member until the reappointment is approved by order of the Commission.

firm to identify candidates for membership of unaffiliated members. The process must allow for commission input in identifying candidates.

Consistent with PURA, 16 TAC § 25.362(g) states that “ERCOT shall establish and implement criteria for an individual to serve as a member of its governing board, procedures to determine whether an individual meets these criteria, and procedures for removal of an individual from service if the individual ceases to meet the criteria,” and contains detailed parameters regarding selection, removal and other matters pertaining to members of the Board. In particular, paragraph (g) also sets forth minimum requirements for the qualification criteria and procedures for removal; specifies that decisions concerning qualification or removal from the Board are subject to Commission review; requires ERCOT to notify the Commissioners of any Unaffiliated Director vacancy; requires ERCOT to “provide information to the Commissioners concerning the process for selecting a new member, the candidates who have been identified and their qualifications, any recommendation that will be made to the governing board, and any other information requested by a commissioner”; and states that the selection of an Unaffiliated Director is subject to approval by the Commission and that a person who is selected may not serve on the Board until the Commission approves the selection.²⁰

i. Required Engagement of Executive Search Firm and Selection by ERCOT Nominating Committee of the Board

In accordance with these requirements, Bylaws § 4.3(b) sets forth a detailed process for selecting Unaffiliated Director candidates and the minimum qualifications for such candidates. Bylaws § 4.3(b) establishes a standing committee of the Board, the Nominating Committee, to whom the Board delegates the responsibility of selecting Unaffiliated Director candidates. As mandated by PURA § 39.151(g), Bylaws § 4.3(b)(2) requires that the Nominating Committee “retain an executive search firm to locate and present candidates with the required qualifications.” Bylaws Section 4.3(b)(2) also requires that Unaffiliated Director candidates have experience in one or more specified fields germane to the responsibilities of the Board and be independent of

²⁰ 16 TAC § 25.362(g) contains additional requirements regarding membership on the Board that do not relate to a vacancy, such as stating that an Unaffiliated Director whose three-year term has expired shall, if reappointed by the ERCOT Corporate Members, cease serving until the reappointment is approved by the Commission; stating that the commission may remove an Unaffiliated Director for cause and defining “cause” for such purpose; and specifying that compensation, per diem and travel reimbursements to be paid to Unaffiliated Directors shall be subject to Commission review and approval.

any Market Participant in the ERCOT Region, and sets forth the independence requirements for candidates. Typically, to commence the search process, the Nominating Committee discusses the desired qualifications for any open positions and instructs ERCOT staff to issue an RFP for executive search firms. At its subsequent meeting, the Nominating Committee reviews executive search firm bids and selects a firm for the Unaffiliated Director search.

Bylaws § 4.3(b)(3) requires that the Nominating Committee or its subcommittee (if one is created for such purpose) interview the qualified candidates. Typically, the Nominating Committee works with the selected executive search firm on a final set of desired qualifications with input from the Commission for any specified qualifications, generally so that the Unaffiliated Director candidate's professional expertise will complement and balance that of the other Unaffiliated Directors then serving on the Board. After conducting its search, the executive search firm presents candidates to the Nominating Committee, which identifies a small number of finalist candidates who then are subject to further review to confirm that they are unaffiliated with the ERCOT market pursuant to the independence qualifications required by PURA § 39.151(g)(7) and Bylaws § 4.3(b)(2)(ii).²¹ Pursuant to 16 TAC § 25.362(g)(5), ERCOT must provide notice to the Commission of the "candidates who have been identified and their qualifications, any recommendation that will be made to the [Membership], and any other information requested by

²¹ Bylaws § 4.3(b)(2)(ii)(a) provides:

An Unaffiliated Director or family member (any spouse, parent, spouse of a parent, child or sibling, including step and adoptive relatives and household member) shall not have the following: 1. Current or recent ties (within the last two years) as a director, or Officer of a Market Participant or its Affiliates; 2. Current or recent ties (within the last two years) as an employee of an ERCOT Member or NERC-Registered Entity operating in the ERCOT Region; 3. Direct business relationships, other than retail customer relationships, with a Market Participant or its Affiliates; and 4. To the extent that an Unaffiliated Director or family member (any spouse, parent, spouse of a parent, child or sibling, including step and adoptive relatives) living in the same household or any other household member owns stocks or bonds of Market Participants, these must be divested or placed in a blind trust prior to being seated on the Board.

As of March 1, 2021, ERCOT has approximately 2,400 Market Participant registrations by entities. The Market Participant registrations vary by number throughout the year. Many Market Participant entities are primarily electric industry companies, but some Market Participant entities are not primarily engaged in electric industry activities, such as financial institutions, municipalities, chemical companies and steel companies. Some of these entities are registered as multiple Market Participant types. ERCOT cannot estimate the number of Affiliates of these Market Participants, but the affiliations vary widely. Each affiliation is examined on a case-by-case basis for purposes of these independence requirements. Many qualified Unaffiliated Director candidates who are Texas residents have not been able to meet the requirement of being independent from the ERCOT market, given the large number of Market Participants and their Affiliates (as defined in Bylaws Article 2).

a commissioner.” After consultation with the Commission on qualifications of the finalist candidates, the Nominating Committee interviews finalists and votes to select a finalist candidate for recommendation to the ERCOT Corporate Members (Membership) at a Nominating Committee meeting; and after formal selection by the Nominating Committee, the selected candidate is submitted to the ERCOT Corporate Members (Membership) for approval by election, subject to ultimate formal approval by order of the Commission.

ii. Election by ERCOT Corporate Members Subject to Formal Commission Approval

The ERCOT Corporate Members meet annually in accordance with Tex. Bus. Org. Code § 22.153(a), historically in December. There have been occasions in which the Nominating Committee has selected a candidate on a timeline that permits the Membership to vote upon the selected candidate at its annual meeting in December,²² but typically the Board must call a special meeting of the ERCOT Corporate Members for the purpose of voting on the Nominating Committee’s candidate. If this is the case, the Board first must vote to call the special meeting. ERCOT staff then issues notice to Corporate Members of the special meeting, which must be delivered to each Member at least three weeks prior to the date of the meeting pursuant to Bylaws § 3.7(b).²³ Bylaws § 3.7(g) permits Corporate Members to take action otherwise required to be taken at 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.” Accordingly, ERCOT staff includes a consent and voting ballot with the notice to each Corporate Member and requests that ballots are returned prior to the scheduled meeting. If the requisite number of ballots are received by ERCOT prior to the special meeting (as has occurred in many recent cases), the meeting is cancelled and the results of the election are announced to the Membership. Otherwise, the special meeting is held as scheduled, and a vote is conducted at such meeting. The Corporate Members vote pursuant to the structure set forth in Bylaws § 13.1(d). If elected, Bylaws § 4.3(4) requires that ERCOT staff

²² See, e.g., *Petition of Electric Reliability Council of Texas, Inc. for Approval of Unaffiliated Director*, Docket No. 47916 (Mar. 29, 2018).

²³ The three weeks’ advance notice requirement in Bylaws § 3.7(b) falls within the range required by Tex. Bus. Org. Code § 22.156(a), which provides that “notice shall be delivered to each member entitled to vote at [a] meeting not later than the 10th day and not earlier than the 60th day before the date of the meeting.”

file a petition for approval of the Unaffiliated Director with the Commission, as required by 16 TAC § 25.362(g)(5).

iii. Commission Approval by Order

Commission proceedings for approval of an ERCOT Unaffiliated Director are conducted pursuant to the Commission's Procedural Rules.²⁴ Due to timing requirements contained in the rules, the process typically takes several months, even if the requirements for informal disposition under 16 TAC § 22.35 have been met, which shortens the process slightly. In the three most recent proceedings, which were conducted on the same timeline and each of which qualified for informal disposition, there were 113 days between ERCOT's petition filings and the Commission's issuance of orders approving the petitions.²⁵ In the two proceedings previous to those, which were conducted on the same timeline and each of which qualified for informal disposition as well, there were 86 days between ERCOT's petition filings and the Commission's issuance of orders approving the petitions.²⁶ Since 2003, there have been no intervenors in any of the Commission dockets in which ERCOT petitioned for the approval of an Unaffiliated Director, which are listed in Attachment B. For the most recent approval of the elections of first-term Unaffiliated Directors Sally Talberg and Raymond Hepper, just under 19 months elapsed for the entire selection and approval timeline (*i.e.*, from the date of the Nominating Committee meeting addressing Unaffiliated Director qualifications and the executive search firm request for proposal until the entry of the Commission order approving their respective elections and reelection).²⁷ Most recent Unaffiliated Director vacancies have taken well over a year to fill, due to the mandatory, multi-step processes.

²⁴ 16 TAC §§ 22.1-.299.

²⁵ *Petition of Electric Reliability Council of Texas, Inc. for Approval of Re-election of Unaffiliated Director*, Docket No. 51060 (Nov. 5, 2020); *Petition of Electric Reliability Council of Texas, Inc. for Approval of Unaffiliated Director*, Docket No. 51062 (Nov. 5, 2020); *Petition of Electric Reliability Council of Texas, Inc. for Approval of Unaffiliated Director*, Docket No. 51063 (Nov. 5, 2020).

²⁶ *Petition of Electric Reliability Council of Texas, Inc. for Approval of Re-election of Unaffiliated Director*, Docket No. 47915 (Mar. 29, 2018); *Petition of Electric Reliability Council of Texas, Inc. for Approval of Unaffiliated Director*, Docket No. 47916 (Mar. 29, 2018).

²⁷ *Petition of Electric Reliability Council of Texas, Inc. for Approval of Re-election of Unaffiliated Director*, Docket No. 51060 (Nov. 5, 2020); *Petition of Electric Reliability Council of Texas, Inc. for Approval of Unaffiliated Director*, Docket No. 51062 (Nov. 5, 2020); *Petition of Electric Reliability Council of Texas, Inc. for Approval of Unaffiliated Director*, Docket No. 51063 (Nov. 5, 2020).

For Unaffiliated Directors, PURA § 39.151(g)(7) specifies a term of three years. Further, Bylaws § 4.3(c) provides that an Unaffiliated Director may be reelected for up to two consecutive terms, and that Unaffiliated Directors’ terms “shall be staggered to the extent possible, unless changed by Amendment to these Bylaws.” The HR&G Committee of the Board, pursuant to its Charter, reviews Unaffiliated Director staggering and succession planning on a routine basis and determined that staggering is significantly affected by Unaffiliated Director resignations or failure to seek additional terms, considering the lengthy and complex Unaffiliated Director selection and approval process.²⁸

C. Board Leadership

In addition to the requirements described above regarding Board vacancies, there are requirements regarding the leadership positions on the Board. PURA § 39.151(g-1) requires that the presiding officer of the Board—that is, the Board Chair—must be one of the Unaffiliated Directors as described in PURA § 39.151(g)(7). ERCOT Bylaws § 4.4 requires that both the Board Chair and Vice Chair be Unaffiliated Directors. Due to the critical importance of Board leadership, Board Policies and Procedures § 7.7 provides that the “Board Chair and Vice Chair shall be elected to serve in their positions until their respective successors are elected in the following year to avoid any break in service of Board leadership.”

D. Committee Composition and Leadership

As permitted by Bylaws § 4.8, the Board has delegated certain responsibilities to the F&A Committee and HR&G Committee, each of which the Board created at its discretion almost two decades ago. Each of these two Committees is governed by a Committee Charter that sets forth the Committee’s purpose and responsibilities as well as rules concerning membership and qualification. Regarding Committee composition, the F&A Committee Charter²⁹ states that “The Committee shall be comprised of at least five Board members, at least three of which are from Market Segments and two or more of which must be Unaffiliated Board members.”

²⁸ A memo and a chart illustrating the historical challenges of succession planning of Unaffiliated Directors may be found at: http://www.ercot.com/content/wcm/key_documents_lists/103970/9_Unaffiliated_Director_Succession_Planning.pdf.

²⁹ The Finance and Audit Committee Charter may be found on the ERCOT website at: http://www.ercot.com/content/wcm/key_documents_lists/27313/FA_Committee_Charter_Effective_February_9_2021_.pdf.

Regarding qualifications, the F&A Committee Charter requires that each Committee Member be able to read and understand fundamental financial statements, including the balance sheet, income statement and cash flow statement. The Committee also must have at least one designated “Financial Expert,” and states:

At a minimum, the Financial Expert must have past employment experience in finance or accounting, requisite professional certification in accounting or any other comparable experience or background which ensures the individual’s financial sophistication, including a past or current position as a Chief Executive Officer (“CEO”), Chief Financial Officer (“CFO”) or other senior officer with financial oversight responsibilities.

The F&A Committee Chair is also required by the Committee Charter to have “accounting or related financial management expertise.”

In addition to the duties delegated to the F&A Committee by the Board as set forth in the F&A Committee Charter, the ERCOT Nodal Protocols require that the F&A Committee approve the ERCOT Internal Audit Department’s annual audit plan,³⁰ approve the inclusion of material issues in audits required to be performed under ERCOT Nodal Protocol Section 1.4.3.1, Audits to be Performed, upon request by an ERCOT Member or Market Participant and prior approval of the Technical Advisory Committee (TAC),³¹ and make recommendations to the Board regarding the Market Adjustment Factor set forth in ERCOT Nodal Protocol § 16.11.4.1, Determination of Total Potential Exposure for a Counter-Party,³² and require that audit results be reported to the F&A Committee, who is required to review any findings and recommended actions identified as a result of an audit.³³

Similar to the F&A Committee Charter, the HR&G Committee Charter³⁴ states that the HR&G Committee “shall be comprised of representatives from at least two Market Segments and

³⁰ ERCOT Nodal Protocols, Section 1, Overview (Jan. 1, 2021).

³¹ *Id.*

³² ERCOT Nodal Protocols, Section 16, Registration and Qualification of Market Participants (Jan. 1, 2021).

³³ ERCOT Nodal Protocols, Section 1, Overview (Jan. 1, 2021).

³⁴ The Human Resources and Governance Committee Charter may be found on the ERCOT website at: http://www.ercot.com/content/wcm/key_documents_lists/27312/HRG_Committee_Charter_Effective_February_9_2021_.pdf.

at least two Unaffiliated Directors. Unlike the F&A Committee, there are no additional requirements for HR&G Committee members or leadership.³⁵

The Directors decide from among themselves who shall participate in each of the two Committees. In recent years, membership has been split evenly, with seven members on each Committee when the Board has no vacancies.³⁶

III. ISSUES REGARDING COMPLIANCE WITH GOVERNANCE REQUIREMENTS

On account of the recent Board member departures, including all Unaffiliated Directors, and the resulting vacancies, there are certain governance requirements that ERCOT cannot presently satisfy or is at reasonable risk of not being able to satisfy in the near future. Presently, the Board has neither a Chair nor Vice Chair, and no current Board members meet the requirements of PURA and the Bylaws to be appointed Chair or Vice Chair. On account of urgent, time-sensitive business related to the February 2021 extreme winter weather event, the Board has already needed to conduct one Urgent Meeting since the February 24, 2021 Unaffiliated Director resignations (that is, on March 3, 2021) and has scheduled another Urgent Meeting for March 12, 2021, and there is potential that the Board will need to conduct one or more additional Urgent Meetings prior to its next regularly scheduled meeting on April 13, 2021.³⁷ Because PURA requires that the presiding officer of the Board be an Unaffiliated Director, and the Bylaws also require that the Board Chair and Vice Chair both be Unaffiliated Directors, the Board cannot appoint either a Chair or Vice Chair so long as no Unaffiliated Directors are seated on the Board.

The inability of the Board to elect a Chair or Vice Chair that satisfies the requirements of PURA and the Bylaws is likely to persist for several months, absent immediate emergency

³⁵ Both the F&A Committee Charter and HR&G Committee Charter state that the Committee Chair shall not be the ERCOT CEO. As the ERCOT CEO does not sit on either Committee, this restriction is immaterial.

³⁶ The ERCOT CEO and Commission Chair do not serve on either Committee.

³⁷ The Board convened an Urgent Meeting on March 3, 2021. In the absence of a Board Chair and Vice Chair, pursuant to the ERCOT Bylaws, the ERCOT Corporate Secretary, who is also the CEO's designee, called and administered the meeting on behalf of the Board. Although the Corporate Secretary could call an Urgent Meeting and serve as a person (but not Board member) unaffiliated with the market to conduct the meeting, the Board Chair is a critical position to be filled due to the ongoing duties to be the voice of the collective decisions of the Board and to work with the ERCOT CEO, the Commission, the Legislature, stakeholders and the public in between meetings. In addition, the Board Chair typically has been designated as the sole representative of the Board to apply for and obtain secret clearance to receive classified information from various federal agencies in connection with security and cybersecurity matters.

measures by the Commission or, more likely, the Legislature to assist with the composition of the Board. While it is possible to shorten the Nominating Committee selection process from the usual practice by holding more frequent meetings, the requirements to use a professional search firm to identify candidates and notify and consult with the Commissioners prior to the Nominating Committee's selection of a candidate to present to the ERCOT Corporate Members significantly restricts the ability to shorten the process. The Bylaws and Tex. Bus. Org. Code. § 22.156(a) require advance notice of any special meeting of the ERCOT Corporate Members, and even if ERCOT were to receive sufficient ballots in advance of the meeting to conclude the vote and cancel the meeting, this process is likely to take several days, given the number of Corporate Members and ERCOT Bylaws requirement of approval by a majority of Member Segments (*i.e.*, at least four out of seven Member Market Segments).³⁸ Finally, even under the Commission rules for informal disposition, the Commission approval process is likely to take several months.

Beyond the lengthy time typically needed due to the aforementioned requirements, Governor Abbott recently declared the reform of ERCOT an emergency item this legislative session. Several legislative hearings have already been held, and others may be upcoming. Given that the composition of the Board is mandated by statute, there appears to be a reasonable likelihood that statutory changes could be made that impact Board composition requirements and related matters. If ERCOT were to begin the process for selecting candidates to fill the existing Unaffiliated Director vacancies and material changes were made to these requirements, it could significantly diminish the value of any efforts invested on candidate selection or render such efforts useless altogether, depending on the nature of the changes. Absent direction otherwise, ERCOT does not plan to proceed with initiating the nominating process for any Unaffiliated Director vacancies for the aforementioned reasons.

In regard to the Board's Committees, since no Unaffiliated Directors are seated, at present neither the F&A Committee nor HR&G Committee can comply with the requirement in each Committee's Charter that two members be Unaffiliated Directors, which is likely to persist for several months as explained above. If the remaining F&A Committee member that has been designated a Financial Expert were to resign, and none of the newly appointed members were to

³⁸ See Bylaws §§ 4.3(b)(2)(ii)(b)(4) & 13.1(d).

qualify as Financial Expert, the F&A Committee would also be out of compliance with the Committee Charter requirement that at least one member be designated a Financial Expert.

The lack of Board and F&A Committee leadership present additional risks. Fundamentally, ERCOT is lacking Board leadership, and the independent guidance of the Unaffiliated Directors that is important to the Board's balanced decision-making as well as its credibility, at an extremely critical time for the company. ERCOT has been the subject of several lawsuits arising from the recent extreme winter weather event. It is also the subject of multiple investigations by a variety of agencies, and is the subject of hearings at the Texas Legislature. On account of the February 2021 extreme winter weather event, ERCOT has been required to short pay Market Participants owed monies from ERCOT on account of Market Participant failures to make complete payments to ERCOT for settlement invoices when due, peaking with a short payment of approximately \$2.1 billion on February 26, 2021.³⁹ These short payments have created uncertainty in the markets ERCOT administers that could affect the credit ratings of participants, which could impact their future participation. Furthermore, on March 4, 2021, Moody's Investors Service (Moody's) downgraded ERCOT's Issuer rating from its longstanding Aa3 to A1, and ERCOT's financial outlook from "stable" to "negative," which has financial implications for ERCOT, "following the political and financial fallout" from the extreme winter weather event.⁴⁰

Bylaws § 4.10 prohibits the Board from delegating certain duties, and requires that the Board adopt policies regarding the delegation of others. The lack of Board leadership may complicate the ability of the company to communicate or seek guidance from the Board on numerous significant, non-delegable issues with important financial, litigation or other ramifications for the company. A non-delegable duty, the approval of the Budget must be completed for the coming two years and was scheduled to be presented to the F&A Committee

³⁹ The total of approximately \$2.1 billion reflects the total amount that ERCOT would have short paid to Market Participants, excluding the \$800 million in Congestion Revenue Right (CRR) auction revenues used by ERCOT to cover a portion of the total short payment amount, as authorized under the authority granted to ERCOT by Commission Order on February 21, 2021, in Project No. 51812. ERCOT has issued several Market Notices reporting the details of short payments arising from Market Participant failures to make full invoice payments when due, and may continue to do so after the date of this Notice. All of these Market Notices are or will be publicly available on the ERCOT website at http://www.ercot.com/services/comm/mkt_notices/archives (Category: Settlements).

⁴⁰ Moody's, Electric Reliability Council of Texas, Inc. – Moody's downgrades ERCOT to A1, outlook negative, Yahoo! Finance, Mar. 4, 2021, available at <https://finance.yahoo.com/news/electric-reliability-council-texas-inc-232607952.html>.

and Board, which now only has one Financial Expert, for discussion at their April 2021 meetings and for formal approval at the June 2021 Board meeting in order to get the Board-approved Budget timely filed with the Commission in July 2021 for final approval prior to year-end 2021. ERCOT may now need to consider adjustments to the budget schedule to ensure proper Board consideration.

In addition, ERCOT's independent financial auditor has historically reported to the Board through the F&A Committee and communicated with F&A Committee leadership regarding key issues, including requests by the auditor to address the full Committee. Without F&A Committee and Board leadership, ERCOT's auditors do not have a clear line of necessary communication in order to complete their work. Acceptance of ERCOT's financial statement audit reports was expected to be considered for vote at the April 2021 Board meeting; however, without F&A Committee and Board leadership, the timing of the preparation and completion of such critical audit reports is very likely to be affected, which could in turn affect other aspects of ERCOT operations. ERCOT has existing debt instruments that require ERCOT to furnish audited financial statements in April 2021. The risk of failing to meet this requirement is likely to rise over time, and meeting the requirement may already no longer be viable. The possibility of an extremely delayed audit report could make it difficult for ERCOT to meet its covenants with respect to these existing debt instruments, absent waivers acceptable to ERCOT's lenders. ERCOT is in the process of obtaining the appropriate waivers to manage this risk.

There are less apparent risks related to ERCOT's governance situation as well. So long as the Board operates with a significant number of vacancies, the balance of the legislatively-created Board composition may be skewed so as to create an unintentional effect of providing uneven weighting to certain Market Segment votes, which could create criticism of the Board's actions while it is operating without being fully seated. There is also a possibility that the uncertainty surrounding the membership on the Board and its very structure, given the possibility of Commission or Texas Legislature action on ERCOT reform that may impact ERCOT

governance,⁴¹ as well as the lack of a Board Chair or Vice Chair, may make it more difficult to attract candidates for the vacant ERCOT CEO position.

ERCOT will continue to monitor this extremely fluid and dynamic situation and provide the Commission updates on corporate governance matters.

Respectfully Submitted,

/s/ Chad V. Seely

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ATTORNEYS FOR ELECTRIC RELIABILITY
COUNCIL OF TEXAS, INC.

⁴¹ For example, House Bill 10, filed March 5, 2021, would amend PURA § 39.151(g) to change the required Board composition by eliminating the “five members unaffiliated with any market segment and selected by the other members of the governing body,” and adding three members appointed by the Texas Governor (one of whom would represent “residential consumer interests” and would be in addition to the *ex officio* Public Counsel Director), one member appointed by the Texas Lieutenant Governor, and one member appointed by the Speaker of the Texas House of Representatives. All Board members would be required to be residents of the State of Texas, and the Board Chair would be designated by the Governor. Tex. H.B. 10, 87th Leg., R.S. (2021). As filed, House Bill 10 does not address whether the appointed Unaffiliated Directors would be required to meet any professional eligibility criteria to demonstrate an understanding of the technical, regulatory and financial issues presented to the Board.

ERCOT BOARD OF DIRECTORS – 2021

STATUTORILY-REQUIRED REPRESENTATIVES*	DIRECTOR	MARKET SEGMENT ALTERNATE
Consumer – Residential <i>(ex officio)</i>	Lori Cobos – Office of Public Utility Counsel	N/A
Consumer – Commercial	Nick Fehrenbach – City of Dallas	Jennifer Richie – City of Waco
Consumer – Industrial	Sam Harper – Chaparral Steel Midlothian, LP dba Gerdau	Glen Lyons – ExxonMobil Power and Gas Services Inc.
Cooperative	Julie Parsley - Pedernales Electric Cooperative, Inc. <i>elected March 9, 2021</i>	Mike Kezar – South Texas Electric Cooperative Inc.
ERCOT CEO <i>(ex officio)</i>	Bill Magness	N/A
Independent Generator	Kevin Gresham – RWE Renewables Americas LLC	Steven Schleimer – Calpine Corporation
Independent Power Marketer	Keith Emery – Tenaska Power Services Co.	Kevin Bunch – EDF Trading North America LLC
Independent Retail Electric Provider	Shannon K. McClendon - Demand Control 2 LLC <i>elected March 4, 2021</i>	Vacant <i>Segment Election in Process</i>
Investor-Owned Utility	Mark Carpenter – Oncor Electric Delivery Company LLC	Wade Smith – American Electric Power Service Corporation
Municipal	Bob Kahn - Texas Municipal Power Agency <i>elected March 5, 2021</i>	Ian Taylor – New Braunfels Utilities
PUCT Chair <i>(ex officio, non-voting)</i>	Arthur D’Andrea <i>assumed PUC Chair role on March 3, 2021</i>	N/A
Unaffiliated <i>with any Market Segment as required by PURA § 39.151(g) and with required professional experience and eligible under Bylaws § 4.3(b)</i>	Vacant (1) Vacant (2) Vacant (3) Vacant (4) Vacant (5) <i>No Vetted, Eligible Candidates Unaffiliated with the ERCOT Market</i>	N/A

* ERCOT Board of Directors composition in accordance with Texas statute - PURA § 39.151(g).

ERCOT Petitions for Approval of Unaffiliated Directors, 2003 – 2020

- Docket No. 27652 – Mr. David Baggett, Mr. Miguel Espinosa and Mr. Armentrout (2003)
- Docket No. 30994 – Ms. Carolyn Lewis Gallagher (2005)
- Docket No. 32492 – Mr. Michehl R. Gent (2006)
- Docket No. 33183 – Ms. Jan L. Newton (2006)
- Docket No. 33185 – Mr. Mark Armentrout (2006 renewal)
- Docket No. 35862 – Dr. Alton D. Patton (2008) and Mr. Miguel Espinosa (2008 renewal)
- Docket No. 36566 – Mr. Michehl Gent and Ms. Jan Newton (2009 renewal)
- Docket No. 38373 – Mr. Jorge Bermudez (2010)
- Docket No. 38492 – Ms. Laura Doll (2010)
- Docket No. 39843 – Mr. Craven Crowell (2011)
- Docket No. 39844 – Karl V. Pfirrmann (2011)
- Docket No. 39845 – Judy W. Walsh (2011)
- Docket No. 40233 – Michehl Gent (2012 renewal)
- Docket No. 41260 – Jorge Bermudez (2013 renewal)
- Docket No. 42539 – Craven Crowell (2014 renewal)
- Docket No. 42540 – Karl Pfirrmann (2014 renewal)
- Docket No. 42541 – Judy Walsh (2014 renewal)
- Docket No. 44742 – Peter Cramton (2015)
- Docket No. 45763 – Jorge Bermudez (2016 renewal)
- Docket No. 46952 – Judy Walsh (2017 renewal)
- Docket No. 46953 – Karl Pfirrmann (2017 renewal)
- Docket No. 46954 – Craven Crowell (2017 renewal)
- Docket No. 47915 – Peter Cramton (2018 renewal)
- Docket No. 47916 – Terrence J. “Terry” Bulger (2018)
- Docket No. 50160 – Terrence J. “Terry” Bulger (2020 renewal)
- Docket No. 50162 – Raymond Hepper (2020)
- Docket No. 50163 – Sally Talberg (2020)
- Docket No. 51604 – Craig S. Ivey (2020)