



## MEMORANDUM

To: Board of Directors

From: Chad V. Seely, ERCOT Vice President, General Counsel and Corporate Secretary  
Vickie Leady, Assistant General Counsel and Assistant Corporate Secretary  
Jonathan Levine, Senior Corporate Counsel

Date: June 2, 2020

Re: Item 4, Proposed Bylaws Amendments:  
Interpretation of Existing Bylaws Provisions on Teleconference Meetings

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### I. Issue

Pursuant to the provisions of the ERCOT Bylaws and applicable laws, what matters may the ERCOT Board of Directors (Board) or its subcommittees having at least one Director<sup>1</sup> discuss or take action on at a meeting by teleconference or similar means?

### II. Brief Answer

Consistent with the Public Utility Regulatory Act (PURA),<sup>2</sup> the Bylaws provide that at a teleconference meeting, the Board or its subcommittees may only take action (specifically, vote) on urgent matters. Because “urgent matters” is defined in the Bylaws as “emergency conditions threatening public health or safety, or a reasonably unforeseen situation,” it is not clear that at a teleconference meeting the Board may take action on matters that do not constitute such an emergency or a reasonably unforeseen situation, regardless of the difficulty or impossibility of a quorum convening in person, such as in the current situation caused by the Coronavirus 2019 (COVID-19) pandemic. Accordingly, it is recommended that the definition of “urgent matters” be amended to make clear that if it would be difficult or impossible for a quorum of Directors or subcommittee members to physically convene in one location, the Board or its subcommittees may meet via teleconference and take action on matters that, if action was otherwise delayed, may result in operational, regulatory, legal, organizational or governance risk.

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<sup>1</sup> For simplicity, further references to the Board's subcommittees mean only those subcommittees that have at least one Director.

<sup>2</sup> Tex. Util. Code §§ 11.001-66.016.

While the Bylaws only allow the Board or its subcommittees to take action on urgent matters at a teleconference meeting, the Board or its subcommittees may discuss non-urgent matters without taking action thereon.

### **III. Background**

The ERCOT Board is subject to certain open meeting requirements under Texas law. In Texas, the Texas Open Meetings Act<sup>3</sup> requires meetings of certain specified governmental bodies,<sup>4</sup> including the Public Utility Commission of Texas (PUCT or Commission), to be in person and open to the public, except for limited, expressly authorized closed sessions, and also requires advance notice of any such meetings. While the act does not apply to ERCOT, PURA Section 39.1511 contains requirements that are similar but not identical to certain Open Meetings Act requirements and apply to meetings of the ERCOT Board and any subcommittee that includes at least one Board member. ERCOT Board meetings are also noticed by the PUCT as an open meeting of the Commission, and if a quorum (currently two or more) of the PUCT Commissioners attend an ERCOT Board meeting, the meeting is conducted as a concurrent ERCOT Board meeting and PUCT open meeting and thus must abide by the requisite provisions of the Open Meetings Act.<sup>5</sup>

On March 16, 2020, Texas Governor Greg Abbott issued an order approving a request by the Texas Office of the Attorney General to temporarily suspend certain open meeting laws in response to the Coronavirus (COVID-19) pandemic, allowing relevant governmental bodies to conduct meetings by telephone or video conference.<sup>6</sup> The Governor Abbott Order suspends by specific reference several statutory provisions, including portions of the Texas Open Meetings Act, that require a quorum or a presiding officer to be physically present at the specified location of the meeting. The Governor Abbott Order does not, however, include PURA Section 39.1511 within the list of temporarily suspended statutory provisions. Thus, at present, many governmental bodies in Texas may meet and take action on routine, non-urgent matters via teleconference, but the ERCOT Board continues to be required to meet in person to do the same, due to the constraints imposed by the current meeting provisions of the Bylaws.

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<sup>3</sup> Tex. Gov't Code §§ 551.001–.146. For instance, the Governor Abbott Order, suspends Section 551.127(b), which allows meetings of state governmental bodies covered by the Order to be conducted by videoconference if a quorum is physically present at one location of the meeting, except in limited circumstances. Governor Abbott Order at 1.

<sup>4</sup> The term “governmental body” is expressly defined in the Open Meetings Act to include only certain types of governmental entities. ERCOT does not fall within the Open Meetings Act’s particular definition of “governmental body” and is not subject to the specific provisions in the act.

<sup>5</sup> The PUCT Chairman is an *ex officio*, non-voting member of the ERCOT Board, and one or both of the other two PUCT Commissioners regularly attend Board meetings as guests.

<sup>6</sup> Open Meeting Laws Subject to Temporary Suspension (Mar. 16, 2020) (Governor Abbott Order) (available at [www.texasattorneygeneral.gov/sites/default/files/images/admin/2020/Press/Open%20Meeting%20Laws%20Subject%20to%20Temporary%20Suspension.pdf](http://www.texasattorneygeneral.gov/sites/default/files/images/admin/2020/Press/Open%20Meeting%20Laws%20Subject%20to%20Temporary%20Suspension.pdf)).

## IV. Applicable Rules

### A. Current ERCOT Bylaws and Texas Law, Including PURA

In general, members, governing bodies and governing body committees of corporations and other domestic business entities in Texas may meet and act by remote means.<sup>7</sup> Pursuant to Chapter 22 (“Nonprofit Corporations”) of the Texas Business Organization Code, for a nonprofit corporation such as ERCOT, the members, board of directors, or any committee designated by the board of directors may meet by teleconference or similar means, unless law or the corporation’s governing documents provide otherwise.<sup>8</sup> The means by which the body meets must permit each participant to communicate with all other persons participating in the meeting.<sup>9</sup> If votes occur, the corporation must implement reasonable measures to verify the identity of every person voting at the meeting by means of remote communications and must keep a record of any vote or other action taken.<sup>10</sup>

In addition to the general laws regarding nonprofit corporations, ERCOT governance is also subject to Section 39.1511 of PURA. Section 39.1511(a) states that meetings of the governing body of an independent organization certified under Section 39.151 (i.e., ERCOT) and meetings of a subcommittee that includes a member of the governing body “must be open to the public.” PURA Section 39.1511(c) requires the Commission to ensure that ERCOT “makes publicly accessible without charge live Internet video of all public meetings subject to this section for viewing from an Internet website.” Regarding teleconference meetings, PURA Section 39.1511(b) provides, in pertinent part:

The bylaws and commission rules governing meetings of the governing body *may provide* for a shorter period of advance notice and *for meetings by teleconference technology for governing body meetings to take action on urgent matters*. The bylaws and rules must require actions taken on short notice or at teleconference meetings to be ratified at the governing body’s next regular meeting.

(Emphasis added.) PURA Section 39.1511 does not, however, provide a definition for or otherwise elaborate on the meaning of “urgent matters.”

There are two provisions in the current Bylaws (effective January 17, 2019) regarding the Board’s ability to conduct meetings via teleconference. First, paragraph (e) of Section 4.7 (“Quorum; Action by Directors; Abstentions; Proxies; Seated Directors; Actions Without a Meeting; and Meetings by Telephone”) provides:

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<sup>7</sup> See Tex. Bus. Org. Code § 6.002.

<sup>8</sup> *Id.* §§ 6.002(a) & 22.002.

<sup>9</sup> *Id.* § 6.002(a).

<sup>10</sup> *Id.* § 6.002(b).

Directors (*for urgent matters in accordance with Section 4.6*) may participate in and hold a meeting by means of a conference telephone or other similar communications equipment by means of which all persons participating in the meeting can hear each other, and participation in a meeting pursuant to this Section shall constitute presence in person at such meeting, except where a person participates in the meeting for the express purpose of objecting to the transaction of any business on the ground that the meeting is not lawfully called or convened.

(Emphasis added.) Second, paragraph (c) of Section 4.6 (“Meetings”) provides:

The Board and its subcommittees having at least one Director *may meet by teleconference to consider urgent matters in accordance with Section 4.7(e)*. The Board must ratify any action taken on notice of less than one week or by teleconference at its next regularly scheduled meeting.

(Emphasis added.) The phrase “urgent matters” is defined in Section 4.6(b) as “emergency conditions threatening public health or safety, or a reasonably unforeseen situation.”

In short, PURA Section 39.1511(b) allows the Board to take action on urgent matters at a meeting via teleconference without defining what constitutes an urgent matter. Consistent with this provision, the Bylaws defines what “urgent matters” the Board or its subcommittees may take action upon at a teleconference meeting. However, it is unclear that under this definition, the Board or its subcommittees meet via teleconference during the current pandemic situation and take action on matters that may present a risk to the company if they are not acted upon in a timely manner, unless such matters themselves are related to an emergency or unforeseen situation.

## **B. History of Relevant Bylaws Provisions**

The history of the above provisions of the ERCOT Bylaws does not provide significant evidence of the intent behind the specific wording of the current Board teleconference meeting provisions or definition of “urgent matters,” but does suggest that the provisions were incorporated into the Bylaws to generally follow the language of PURA Section 39.1511(b) after it was added to PURA in 2005. The earliest version of the Bylaws in ERCOT Legal’s electronic files is the version effective September 7, 1990. There is nothing pertaining to meetings for urgent matters (i.e., no exceptions to the general meeting requirements). Section 4.7 (“Actions Without a Meeting and Meetings by Telephone”) of the 1990 version appears to allow Board and committee meetings by teleconference for consideration and vote on all matters (i.e., both non-urgent and urgent matters). Specifically, the 1990 version of Section 4.7 contains language identical to that in Section 4.7(e) today, except for language regarding members of committees, and without the parenthetical language regarding urgent matters:

Members of the Board of Directors or members of any committee designated by such board may participate in and hold a meeting of such members, board or committee by means of a conference telephone or other similar communications equipment by means of which all persons participating in the meeting can hear each other, and participation in a meeting pursuant to this Section shall constitute presence in person at such meeting, except where a person participates in the meeting for the express purpose of objecting to the transaction of any business on the ground that the meeting is not lawfully called or convened.

Section 4.6(c) and the definition of “urgent matters” now in Section 4.7(e) were added to the Bylaws in the version effective May 15, 2006. These additions were both proposed without detailed explanation in ERCOT’s *Petition of the Electric Reliability Council of Texas (ERCOT) for Approval of Amended and Restated Bylaws*.<sup>11</sup> The Initial Staff Comments<sup>12</sup> on the petition raised concern about language in what was then Section 13.8 that allowed the Board to take action by written consent, and the Commission’s Interim Order<sup>13</sup> agreed with this concern, but neither document mentions the proposed new language regarding urgent matters, nor does the Commission’s Final Order.<sup>14</sup>

Review of minutes and certain materials from meetings of the Board and the Human Resources and Governance (HR&G) Committee reveal little discussion on the particular reason for the language chosen, but make clear that the Bylaws were being amended in part to address the addition to PURA Section 39.1511 of the language regarding teleconference meetings for urgent matters.<sup>15</sup> The history of this PURA amendment is discussed in Part V.B below.

## **V. Analysis**

### **A. The Board May Meet via Teleconference to Discuss Any Matter, but May Only Take Action on Urgent Matters**

While PURA and the Bylaws arguably limit the ability of the Board to take action at teleconference meetings to matters that are considered urgent, there is no express prohibition against the Board meeting via teleconference to be presented information on or discuss non-urgent matters.

PURA Section 39.1511(b) provides that ERCOT’s Bylaws may allow teleconference Board meetings “to *take action* on urgent matters,” and that “*actions taken* . . . at teleconference meetings” must later be ratified by the Board.

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<sup>11</sup> Docket No. 32025 (Nov. 9, 2005).

<sup>12</sup> *Id.* (Dec. 2, 2005).

<sup>13</sup> *Id.* (Dec. 20, 2005).

<sup>14</sup> *Id.* (May 15, 2006).

<sup>15</sup> See, e.g., HR&G Committee Report – Bylaws Review, July 19, 2005 Board Meeting (Agenda Item 9) (available at [www.ercot.com/calendar/2005/7/19/39606-BOARD](http://www.ercot.com/calendar/2005/7/19/39606-BOARD)).

(Emphasis added.) Bylaws Section 4.6(c) follows PURA by allowing the Board to consider urgent matters via teleconference, as long as “any action taken” is ratified at the Board’s next regularly scheduled meeting.

Action by the Board is defined by Bylaws Section 4.7(b), which states:

The act of: (i) at least two-thirds of the affirmative votes of the Eligible Voting Directors; and (ii) at least 50% of the total Seated Directors shall be the act of the Board, unless the act of a greater number is otherwise required by law, the Certificate of Formation, or these Bylaws.<sup>16</sup>

In other words, since the Board must vote in order to take action, no votes may be conducted at a teleconference meeting of the Board, except on urgent matters. The Board can, however, convene and discuss non-urgent matters without taking action, so long as other requirements such as the provision of advance notice are met. Not restricting discussions (non-voting matters) that a governing body may hold at a teleconference meeting or a meeting on short notice is logical. No material harm could reasonably be expected to be caused by the Board meeting to discuss a matter but not taking action on it (leaving aside rare situations, such as an emergency requiring immediate attention, where the Board arguably may be *required* to take action).

**B. PURA Permits the ERCOT Bylaws to Establish a Definition of “Urgent Matters”; Accordingly, the Definition of “Urgent Matters” in the Bylaws Should be Reasonably Expanded**

While the ERCOT Bylaws currently provide that members of the Board may only participate in and hold a meeting by teleconference to take action on urgent matters, PURA does not specify what constitutes “urgent matters.” Accordingly, the definition of “urgent matters” in the Bylaws may be amended to allow the Board to meet via teleconference and consider matters beyond those that meet the existing Bylaws definition, subject to the provisions of the Texas Business Organizations Code and other requirements of PURA Section 39.1511.

Because the existing Bylaws do not make clear that, at teleconference meetings, the Board may take action on matters that themselves are not emergency conditions or reasonably unforeseen situations, even if delay could be harmful to ERCOT’s business operations, it is recommended that the definition of “urgent matters” in Section 4.6(b) be amended to make clear that if it would be difficult or impossible for a quorum of Directors or subcommittee members to physically convene in one location—as is presently the case in light of the Coronavirus 2019 (COVID-19) pandemic—the Board or its subcommittees may meet via teleconference and take action on matters that, if action was otherwise

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<sup>16</sup> See *a/so* Tex. Bus. Org. Code § 22.214 (“The act of a majority of the directors present . . . at a meeting at which a quorum is present at the time of the act is the act of the board of directors of a corporation, unless the act of a greater number is required by the certificate of formation or bylaws of the corporation.”).

delayed, may result in operational (including but not limited to those activities and functions affecting the ERCOT market or system), regulatory, legal, organizational or governance risk. This will allow the Board or its subcommittees to continue to carry on business that should not be delayed, without unreasonably risking the health and safety of Board or subcommittee members or other parties that may be required to attend or have a reasonable interest in attending the meeting at which such business will be acted upon.

The proposed expanded definition of “urgent matters” is consistent with the overall purpose of PURA Section 39.1511. The main concern that the Texas Open Meetings Act addresses—the reasonable ability of the public to participate in meetings of those governmental bodies covered by the act—is the same primary concern that the PURA Section 39.1511 provisions requiring open meetings of the ERCOT Board are intended to address. The teleconference meeting language in PURA Section 39.1511(b) was added to PURA as part of Senate Bill 408, passed by the Texas Legislature in the 79th Regular Session in 2005. The legislative history of Senate Bill 408 suggests that the intent of the amendments to PURA Section 39.1511 was to enhance the openness of ERCOT and its oversight by the Commission.<sup>17</sup>

The Senate Research Center Bill Analysis for Senate Bill 408 notes that one impetus for proposing legislative changes to increase openness and oversight of ERCOT was the Sunset Advisory Commission’s recommendations following its review of the PUCT before the 2005 Regular Session.<sup>18</sup> Among the Sunset Advisory Commission’s Key Recommendations, which are contained in its April 2004 Staff Report, was to apply the Open Meetings Act framework to the ERCOT Board and its subcommittees, which “would ensure that anyone interested in the activities of ERCOT could find out about the meetings in advance, and have the opportunity to attend.”<sup>19</sup> Allowing the Board to take action on a broader array of urgent matters than are currently allowed at teleconference meetings in the limited situations when meeting in person would be a threat to the health or safety of the

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<sup>17</sup> The House Research Organization Bill Analyses for House Bill 1777 and Senate Bill 743, which were considered during the same 2005 Regular Session, note that ERCOT had recently been “the target of serious allegations of mismanagement and wasteful spending, and several former employees and contractors have been indicted under felony charges relating to charges of contracting fraud.” House Research Organization, Bill Analysis for Regulated Industries Committee, C.S.S.B. 743 at 4 (May 22, 2005) (“S.B. 743 Bill Analysis”) (available at <https://hro.house.texas.gov/pdf/ba79r/sb0743.PDF>); House Research Organization, Bill Analysis for Regulated Industries Committee, C.S.H.B. 1777 at 4 (May 4, 2005) (“H.B. 1777 Bill Analysis”) (available at <https://lr.texas.gov/scanned/hroBillAnalyses/79-0/HB1777.PDF>). The Bill Analyses also note that differences between governmental bodies and ERCOT should be taken into consideration in applying to ERCOT a framework for open meeting requirements similar to the Texas Open Meetings Act. S.B. 743 Bill Analysis at 4; H.B. 1777 Bill Analysis at 4 (emphasis added).

<sup>18</sup> Senate Research Center, Bill Analysis for Government Organization Committee, S.B. 408 at 1 (Apr. 18, 2005) (available at <https://capitol.texas.gov/tlodocs/79R/analysis/pdf/SB00408I.PDF>)

<sup>19</sup> Sunset Advisory Commission, Public Utility Commission of Texas, Office of Public Utility Counsel, Telecommunications Infrastructure Fund Board and Electric Utility Restructuring Legislative Oversight Committee, Sunset Staff Report at 13 (Apr. 2004).

members of the Board or public or would otherwise be difficult or impossible would not run counter to the goals outlined in the Key Recommendations.

It is also worth noting that if the ERCOT Board were to meet by teleconference to act on business that falls under the proposed expanded definition of “urgent matters,” certain other protections apply that should help mitigate concerns regarding the level of openness that may be presented by the proposed expansion of the definition. For instance, the Texas Business Organizations Code allows boards or membership of non-profit corporations to meet via conference telephone or similar technology, but requires that the company, for any votes, implement “reasonable measures” to verify the identity of persons voting at the meeting by means of remote communications and keep a record of any vote or other action taken. PURA Section 39.1511(c), which requires that live Internet video of all Board meetings be made publicly accessible without charge, also still applies. So long as these reasonable measures are taken, meetings via teleconference achieve the goal outlined in the Sunset Advisory Commission’s April 2004 Staff Report of ensuring that interested parties have advance notice of meetings and the opportunity to participate.

Finally, the restrictions discussed above on the ability of the Board to take action on non-urgent matters via teleconference do not apply to meetings of the ERCOT Corporate Members. As noted in Part IV.A above, the members of a nonprofit corporation like ERCOT may meet by teleconference or similar means, unless law or the corporation’s governing documents provide otherwise. PURA Section 39.1511 does not apply to meetings of the ERCOT Corporate Members. Moreover, Bylaws Section 3.7(g) states, in pertinent part:

Corporate Members may participate in and hold a meeting by means of a conference telephone or other similar communications equipment by means of which all persons participating in the meeting can hear each other, and participation in a meeting pursuant to this Section shall constitute presence in person at such meeting, except where a person participates in the meeting for the express purpose of objecting to the transaction of any business on the ground that the meeting is not lawfully called or convened. Where action is taken without a meeting, notice of the proposed action shall be provided to Corporate Members in accordance with Section 3.7(c).<sup>20</sup>

Thus, no Bylaws amendments are necessary for Corporate Members to take action on routine, non-urgent matters via teleconference.<sup>21</sup>

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<sup>20</sup> Similar language in Bylaws Section 5.1(e) provides that the Technical Advisory Committee (TAC) and its subcommittees may take action on non-urgent matters via teleconference.

<sup>21</sup> To make this clear, it is recommended that the references to “place” be removed from Bylaws Section 3.7(a), which provides, in part, that “Corporate Members shall meet at least annually on a date and at a place to be established by the Board . . . .



## **VI. Conclusion**

Under ERCOT's current Bylaws, the ERCOT Board and its subcommittees may meet via teleconference and discuss any business, but may only take action on urgent matters (emergency conditions threatening public health or safety, or a reasonably unforeseen situation), so long as applicable notice provisions are satisfied for non-urgent matters. To allow the Board and its subcommittees to meet via teleconference and act on matters that, if action was otherwise delayed, may result in operational, regulatory, legal, organizational or governance risk, it is recommended that the Bylaws definition of "urgent matters" be amended accordingly.