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| **Title** | Comments on ERCOT’s Proposed Amendments to the ERCOT Bylaws |
| **Date** | September 30, 2022 |
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| **Submitter’s Information** | |
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| **Market Segment** | Independent Generator |

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| **Comments** |

Luminant Generation Company LLC (Luminant) appreciates the opportunity to provide these comments to the members of the ERCOT Board of Directors concerning the proposed amendments to the ERCOT Bylaws as discussed at the August 15, 2022, meeting of the ERCOT Board’s Human Resources and Governance (HR&G) Committee, the August 16, 2022, meeting of the Board of Directors and as contained in a Market Notice issued on September 9, 2022, by ERCOT. These comments are timely submitted by the September 30, 2022, date established in the Market Notice.

**Introduction**

Luminant is a corporate member of ERCOT and is an active participant in both the ERCOT markets and in the many stakeholder committees, work groups, task forces, and subcommittees that have facilitated the Protocol and policy decisions made by the ERCOT Board over the past two decades that are the foundation for those markets. Luminant is committed to the continued success of the ERCOT markets and appreciates the Board members’ commitment both to ERCOT’s mission and to addressing the evolving challenges and opportunities that market participants face on a daily basis.

The social and economic welfare of all Texans is dependent upon the assets and services that market participants own and provide and, of course, also upon ERCOT’s management and control of the grid’s operation. Stakeholder input about decisions that impact ERCOT and the markets, including this proposed modification of the ERCOT Bylaws, is essential. Luminant appreciates being able to offer its observations on the proposed Bylaw amendments, which—if adopted—would limit such stakeholder input. As explained in greater detail below, Luminant respectfully requests that the Board decline to adopt the proposed changes that would limit or eliminate corporate member approval of changes to the ERCOT Bylaws or its Certificate of Formation, as well as decline to adopt changes that would allow for unilateral changes to the TAC procedures.

**Background**

The ERCOT Board is considering adopting a number of amendments to the ERCOT Bylaws, the most significant of which provide that the Bylaws and ERCOT’s Certificate of Formation may be amended by the ERCOT Board acting on its own, without approval by the Corporate Members. With these amendments, Corporate Members would only be given notice of any changes and an opportunity to comment on them, “to the extent practicable.”

These amendments would fundamentally change the way ERCOT has operated since it was established. Additionally, comments made at the August Board meeting suggested that these proposed amendments may not be put to the Corporate Members for an approval vote, as is currently provided for in the Bylaws and has been ERCOT’s policy as evidenced by its past actions.

In Luminant’s view, the proposed amendments to sever Corporate Members from the process for revising ERCOT’s core governing documents are ill-advised on a policy basis, and member voting, as reflected in the current Bylaws, should be preserved. Luminant is aware of legal concerns that other commenters may emphasize regarding the proposed amendments; Luminant encourages the Board to also consider the merits of those concerns.

**Policy** **Issues**

Changing the Bylaws to remove member voting on changes to the ERCOT Bylaws and Certificate of Formation is not in the best interests of the ERCOT markets, the ERCOT Board, or the public.

ERCOT’s primary responsibility is to ensure the reliability of the grid and the efficiency of the electricity market for the benefit of the public and all stakeholders. This highly critical mission is becoming increasingly complex; the ERCOT Board’s decisions can have enormous personal and economic consequences for Texans, Texas businesses and the Texas economy as a whole. The ERCOT Board will be better informed and better able to make decisions if stakeholder expertise and experience continue to be an integral part of the discussion and a component of all decision-making processes. Corporate member approval of fundamental governance elements, such as the Certificate of Formation and Bylaws, is an important component of the checks and balances that ensure stakeholder input remains integral to the Board’s decision-making.

Luminant recognizes that adoption of this proposal to eliminate stakeholders’ formal voting rights would not, by itself, silence all stakeholder input. Stakeholders would, in the absence of more draconian changes by the ERCOT Board, retain the existing TAC procedures and underlying stakeholder vetting process for proposed changes to ERCOT rules. They would also remain free to seek opportunities to present their views to ERCOT Board members, either through formal processes such as filing comments on Nodal Protocol Revision Requests and other ERCOT rule changes or informally, through direct advocacy with individual ERCOT Board members. But the ERCOT Board should be mindful that formally quashing corporate member voting in matters of ERCOT governance, in addition to recent examples of the ERCOT Board overturning unanimous or nearly unanimous stakeholder-supported positions,[[1]](#footnote-1) would signal that the ERCOT Board is inclined to restrict stakeholder input generally and places decreased value on the concerns of, or the compromises offered by, market participants on ERCOT rule and governance matters. Luminant does appreciate comments made at the August Board meeting extolling the value of stakeholder input while laying out these proposed revisions to the Bylaws. The signals provided by the ERCOT Board’s actions, however, outweigh the signals provided by those words.

It may be that the individuals on the ERCOT Board will remain open to divergent stakeholder input. But if the proposed Bylaws amendments are adopted, the formal policy of ERCOT will be that such input can be skipped over or ignored unless an ERCOT Board Director or PUC Commissioner champions the stakeholder’s concerns. Since its inception, the ERCOT Board has relied upon the expertise of both ERCOT staff and market participants to understand the spectrum of perspectives more fully around any given proposal. Devaluing stakeholder input would upset the carefully crafted balance between ERCOT and the industry participants that allows the Board to make more informed decisions. The policy and real-world implications of telling the owners of, and investors in, the facilities on which the grid depends that their input has no formal value are significant. Luminant respectfully asks the Board to fully consider these consequences before taking any action on the proposed amendments.

ERCOT’s unique status contemplates and compels active involvement of market participants in policy and governance decisions.

ERCOT is a non-stock, membership-based, non-profit corporation. Its slogan “Your Power. Our Promise.” reflects the unique role it plays as an organization whose primary assets are hardware, software, and back-office business systems. ERCOT must deliver a stable electricity market by coordinating the output of hundreds of billions of dollars of assets owned and operated by its members, who own no stock in ERCOT and are independent economic actors – in many if not most instances competitors with each other for market opportunity and revenue. ERCOT’s role is to prioritize the reliable delivery of electricity and create an efficient market, but it bears none of the economic cost or risk for doing so. Stakeholder participation in governance and policy implementation at ERCOT functions as a tool to help balance and protect both the public interest and the economic viability of a market that is heavily dependent on investor capital and the confidence of market participants. The effective functioning of the market, driven by decisions of the ERCOT Board, is critical to ensuring that members continue to participate in and invest in the market, which is, in turn, essential to life in and the economic vitality of Texas.

This stakeholder involvement model is not new. ERCOT has functioned with heavy stakeholder involvement since its formation, even before it was formally certified as the Independent System Operator in 2001.[[2]](#footnote-2) Until Senate Bill 2 was adopted in 2021 creating a politically-appointed, fully independent ERCOT Board of Directors, the ERCOT Board included representatives from key stakeholders of the market segments. Through the Technical Advisory Committee (TAC) process, Protocol changes and policy issues are debated, improved and recommendations for action are submitted to the Board for discussion and vote. Collaboration and compromise are necessary for any initiative to succeed, and helping the Board arrive at decisions is at least utilitarian for the market overall, because stakeholders can negotiate to mutually limit downside risks and ensure equitable access to the upside opportunities of a given policy’s implementation. Luminant submits that corporate member approval of changes to the ERCOT Bylaws and Certificate of Formation does not, in itself, constitute corporate member “control” of ERCOT governance. Rather, it requires mutual assent to changes in ERCOT’s core governing documents by the ERCOT Board, the PUC, and the majority of the Corporate Members.

Public Utility Commission contested case and rulemaking proceedings would be expensive, lethargic, and time-consuming ways to address dynamic market issues.

The stakeholder process ERCOT has observed for so long included opportunity for input on the decisions of the Board as it adopted Protocols and other rules. Formal approval of ERCOT rule changes by the PUC has been required since September 1, 2021.[[3]](#footnote-3) To date, there has been little or no objection to the PUC’s approval votes for lack of due process under the requirements of the Administrative Procedure Act. However, if stakeholders lose their voice in the ERCOT process, without any meaningful opportunity for input by affected stakeholders, and if the PUC continues to approve changes to ERCOT’s rules without a rulemaking or other more formal process of some kind, this could lead to legal challenges of the PUC’s approvals, an outcome that would markedly delay and complicate the adoption of needed Protocol revisions.

In other words, stakeholder concerns about changes to ERCOT’s rules will not vanish if ERCOT’s governance and procedures limit or eliminate their ability to meaningfully engage in the ERCOT rule change process. Without the opportunity for negotiation and compromise, the forum for stakeholder engagement could further shift from ERCOT committees and the ERCOT Board to contested cases at the PUC, to the Legislature, or to challenges in the courts. This would increase regulatory risk (due to uncertainty), require greater use of stakeholder and public resources, and— because of the uncertainty—reduce incentives to invest in the Texas market.

Luminant respectfully requests that the Board consider such dynamics as it deliberates the proposed amendments.

ERCOT Board decisions are not often appealed and actively litigated through the Texas judicial system. This is presumably because the ERCOT Board’s decisions have, heretofore, generally been a product of the collaborative, negotiated compromises that the stakeholders have made on difficult issues—compromises that typically result in sound Board decisions supported by a majority of the market. In other ISOs where stakeholder participation is not as robust as it has been in ERCOT, there is much more active litigation, and contested challenges to ISO decisions are more often the way issues are resolved rather than through market negotiation and compromise. If the PUC (or the courts) becomes the forum for vetting every ERCOT Board decision, it will be expensive and time consuming and potentially result in sub-optimal market outcomes.

**Closing Summary**

In summary, for all the policy reasons explained herein, Luminant respectfully asks the Board to reject the proposed amendments to Sections 3.2, 5.1(k), 13.1, and 13.2 of the ERCOT Bylaws relating to elimination of corporate member approval for ERCOT’s governing documents and unilateral changes to the TAC procedures.

1. E.g., NPRR1108 ERCOT Shall Approve or Deny All Resource Planned Outage Requests; NPRR1112 Reduction of Unsecured Credit Limits. In both of these NPRR decisions, the Board’s vote, albeit thoughtfully considered and discussed, rejected a TAC stakeholder compromise recommendation that addressed, respectively, market participants’ concerns about generation unit operations and access to credit markets at reasonable cost. While the Board’s role is to make decisions it feels are best for the market overall, rejecting a TAC compromise recommendation devalues the diversity of opinions among stakeholders and the knowledge and experience embedded in those opinions, while also devaluing compromises reached by stakeholders. [↑](#footnote-ref-1)
2. Application of the ERCOT ISO for Certification as the Independent Organization to Perform Transmission and Distribution Access, Reliability, Information Exchange and Settlement Functions, Docket No. 22061, Final Order (Feb. 2, 2001) [↑](#footnote-ref-2)
3. S.B. 2 , Act of May 31, 2021, 87th Leg, R.S. [↑](#footnote-ref-3)