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| **Title** | Comments on ERCOT’s September 9, 2022 Board-Proposed Bylaws Amendment |
| **Date** | September 30, 2022 |
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| **Comments** |

# Introduction

The Sierra Club is a member of the small commercial class within ERCOT and also serves on the Reliability Operations Committee. We frequently collaborate with other commercial consumers as well as OPUC as the representative of residential consumers both at ROS, but also in other ERCOT forums, including TAC and occasionally the Board of Directors. While we are not opposed to every proposed change in the Bylaws, including needed clarifications and clean up of language that is no longer relevant, we are very opposed to moving forward on changes that would allow the Board to change bylaws with no stakeholder input. Thus, we want to clearly state that the Electric Reliability Council of Texas (“ERCOT”) Bylaws do not provide the ERCOT Board of Directors (“Board”) with authority to adopt the Bylaws Amendment, and adopting the Bylaws Amendment would violate the Texas Business Organization Code (“TBOC”). In addition, these bylaw changes could have significant negative implications for the ERCOT market and the state of Texas in general. Our view is also that the Legislature in approving SB 2 clearly wanted to have an independent Board of Directors; however, they were not removing other stakeholder processes or the role of stakeholders within ERCOT, including how future bylaws are changed. State simply, they wanted the Board of Directors to be free of stakeholder representation but not of participation. If a future legislature wants to grant the Board of Directors with that exclusive authority, it should do so.

# Comments

1. Under Texas law, ERCOT’s current Bylaws and its Certificate of Formation bar the Board from unilaterally changing ERCOT’s Bylaws

The TBOC § 22.102(c) restricts the Board’s discretion to change ERCOT’s Bylaws. That provision precludes a nonprofit’s Board of Directors from amending or repealing the organization’s bylaws, or adopting new bylaws, if:

(1) this chapter or the corporation's certificate of formation wholly or partly reserves the power exclusively to the corporation's members; . . . or

(3) in amending, repealing, or adopting a bylaw, the members expressly provide that the board of directors may not amend or repeal the bylaw.

Both of those factors are present here.

* 1. The Board cannot amend the Bylaws because the Members approved the bylaw amendment process, which does not permit the Board to amend the Bylaws.
* The Corporate Members adopted Section 13.1 of the Bylaws, which lays out the following method for amending the Bylaws: (1) an amendment must be approved by the Board, and then (2) the Corporate Members must vote to enact the amendment.
  + The Corporate Members approved the Bylaws to expressly provide how the Bylaws were to be amended, so that process must be followed. Specifically, the Bylaws provide that “Corporate Members ***must*** vote to enact the Board-approved amendment…”[[1]](#footnote-1)
  + The Corporate Members approved Bylaw amendments in 2020,[[2]](#footnote-2) 2018,[[3]](#footnote-3) 2015,[[4]](#footnote-4) 2013,[[5]](#footnote-5) 2010,[[6]](#footnote-6) 2007,[[7]](#footnote-7) and 2005.[[8]](#footnote-8)
  + ERCOT has only amended the Bylaws without a vote of the Corporate Members once. This occurred in 2021 in response to a statutory mandate for ERCOT to revise the structure and qualifications of the Board of Directors.[[9]](#footnote-9)
* The statement that “these Bylaws may be amended” in Section 13.1 of the Bylaws does not grant the Board expansive authority to amend the Bylaws in a manner that is not specified.
  1. The Board is also prohibited from amending the Bylaws under TBOC § 22.102(c)(1) because ERCOT’s Certificate of Formation reserves that power exclusively to its Corporate Members.[[10]](#footnote-10)
* TBOC § 22.102(c)(1) provides that a Board of Directors cannot amend a corporation’s bylaws if the corporation's certificate of formation wholly or partly reserves that power exclusively to the corporation's members.
* The Bylaws set forth a procedure for bylaw amendments that requires a vote of the Corporate Members :
  + The Bylaws provide that, subject to PUC approval, they can be amended if (1) the amendment is approved by the Board, and (2) the Corporate Members vote to enact the amendment.[[11]](#footnote-11)
  + When describing the rights of members and associate members, the Bylaws include voting on amendments to the Bylaws as a “right.”[[12]](#footnote-12)
* The language in ERCOT’s Certificate of Formation clearly “reserve[s] the power [to amend bylaws] exclusively” for the Members because ERCOT’s Certificate of Formation says the Bylaws “***may***be altered …by the Members, ***if allowed***…”[[13]](#footnote-13)
  + “If allowed” modifies the word that it is closest to (“Members”), so the second sentence of Article 9 should effectively be read as: “If Members are allowed [to exist pursuant to the Bylaws], the Bylaws may be altered, amended or repealed or new Bylaws adopted by the Members through a procedure set forth in the Bylaws or any other manner set forth in the Bylaws.” Thus, at the point the Bylaws authorized the existence of the Corporate Members, those Corporate Members obtained exclusive authority to amend the Bylaws going forward.

Removing Corporate Members’ voting power in the Bylaws would undermine stakeholder participation and lead to uncertainty.

* While the Board has indicated its intent to keep stakeholder involvement, the proposed Bylaw Amendment creates a significant risk that stakeholders will be marginalized, which could have far-reaching consequences for ERCOT and the market. There will be nothing to prevent this board or a future board from eliminating TAC, or other important voting committees that help develop protocols and offer important information to ERCOT and its board.

If the Board can amend the Bylaws without a vote of the Corporate Members, a future Board would clearly have the power to eliminate the stakeholder process altogether. The current Bylaws provide a necessary check on the Board’s authority and allows the stakeholders to act as a backstop. As noted below, stakeholders provide important input in both the design and implementation of PUC and ERCOT directives. Without this input, ERCOT and the market would suffer.

* Ultimately, having Corporate Members involved in amending the Bylaws ensures that market-wide policy decisions are well-reasoned and thoroughly vetted. There are a myriad of examples where ERCOT staff came up with a reasonable change to protocols or operations that would have had unintended consequences or additional costs if not for the stakeholder process.
* As just one recent example, at the latest ROS meeting, the committee voted to change a new requirement on generators to conduct an engineering study to examine their operations from once every five years to once every seven years when ERCOT agreed that their own analysis showed this would be sufficient.
* When ERCOT transitioned to a deregulated market, it relied on the stakeholders’ knowledge and expertise to create the rules of the market through a deliberative process. This was also essential in the transition from a zonal to a nodal market, which was ordered by the Commission but then implemented at ERCOT with stakeholder input. ERCOT was essentially created by stakeholders to serve stakeholders. That would never have been possible without stakeholder input.
* More recent processes like Real-Time Co-optimization, new ancillary services development and the Battery Energy Storage Taskforce relied on the expertise of those with new operations and technologies that were tremendously helpful to the ERCOT Board and staff.
* Active involvement by the stakeholders ensures that policies are thoroughly vetted and the implications are considered from all sides. The makeup of the Corporate Members forces different groups with disparate positions and interests to work together to build consensus, which leads to more well-thought-out and better policies that account for the collective interests of all Texans. The interests of generators – to provide electricity and make money – is balanced against the need to keep costs reasonable and the market reliable.

If a stakeholder feels aggrieved based on the final policy decision, it has the ability to appeal the action to the PUC and ultimately the courts. It should be a testament to the well-reasoned policy decisions that arise from the stakeholder process that there have been so few appeals of ERCOT’s actions.

Stakeholder involvement is unique to ERCOT, and it avoids poor policy outcomes that can create market barriers and issues for both resources and loads.

**Conclusion**

The Sierra Club is opposed to the proposed bylaws, which will have far-reaching consequences. The Board should not move forward with a Bylaw Amendment without a stakeholder vote. Approving these bylaws without such a vote is in direct violation of Texas law and the current bylaws.

1. ERCOT Bylaws § 13.1(d). [↑](#footnote-ref-1)
2. *Petition of Electric Reliability Council of Texas, Inc. for Expedited Approval of Bylaws Amendment*, Docket No. 50918, Petition at 2 and 76-79 (Jun. 10, 2020). [↑](#footnote-ref-2)
3. *Petition of Electric Reliability Council of Texas, Inc. for Approval of Amendments to Articles of Incorporation and Amended and Restated Bylaws*, Docket No. 48677, Petition at 2 (Sep. 11, 2018). [↑](#footnote-ref-3)
4. *Petition of the Electric Reliability Council of Texas, Inc. for Approval of Bylaws Amendment*, Docket No. 44741, Petition at 1 (May 18, 2015). [↑](#footnote-ref-4)
5. *Petition of the Electric Reliability Council of Texas, Inc. for Approval of Bylaws Amendments*, Docket No. 41761, Petition at 1 (Aug. 13, 2013). [↑](#footnote-ref-5)
6. *Petition of the Electric Reliability Council of Texas for Approval of Amended and Restated Bylaws*, Docket No. 37852, Petition at 1 (Jan. 7, 2010). [↑](#footnote-ref-6)
7. *Petition of the Electric Reliability Council of Texas for Approval of Amended and Restated Bylaws*, Docket No. 34427, Petition at 1 (Jun. 21, 2007). [↑](#footnote-ref-7)
8. *Petition of the Electric Reliability Council of Texas for Approval of Amended and Restated Bylaws*, Docket No. 32025, Petition at 1 (Nov. 9, 2005). [↑](#footnote-ref-8)
9. *Petition of Electric Reliability Council of Texas, Inc. for Expedited Approval of Bylaws Amendment*, Docket No. 52683, Order (Oct. 20, 2021). [↑](#footnote-ref-9)
10. TBOC § 22.102(c)(1) (“this chapter or the corporation's certificate of formation wholly or partly reserves the power exclusively to the corporation's members”). [↑](#footnote-ref-10)
11. ERCOT Bylaws § 13.1. [↑](#footnote-ref-11)
12. ERCOT Bylaws § 3.2(a) (“Corporate Members – shall have the rights and obligations as described in these Bylaws including ***the right to vote on all matters submitted to the general membership*** (such as election of TAC Representatives and ***amendments to the Certificate of Formation and these Bylaws***) (emphasis added). [↑](#footnote-ref-12)
13. ERCOT Certificate of Formation, Article 9. [↑](#footnote-ref-13)