

Bylaws Amendment Comments

Title	Comments on ERCOT's September 9, 2022 Board-Proposed Bylaws Amendment
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Comments

Introduction

Freeport LNG Development, L.P. ("Freeport LNG") appreciates the opportunity to provide comment on the Electric Reliability Council of Texas's ("ERCOT's") 09 September 2022 ERCOT Board of Directors ("Board") proposed Bylaws Amendment. Freeport LNG is an LNG export company on Quintana Island, near Freeport, Texas and is headquartered in Houston, Texas. Freeport LNG is the seventh largest liquefaction facility in the world and the second largest in the United States. Freeport LNG is the largest all-electric drive motor plant of its kind in the world, making it one of the largest industrial consumers in the ERCOT market.

The ERCOT Bylaws do not provide the ERCOT 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.

The Amendment creates a significant risk that stakeholders will be marginalized, which could have far-reaching consequences for ERCOT and the market as a whole. If the Board can amend the Bylaws without a vote of the Corporate Members, a future Board would clearly have the power to narrow and even completely eliminate the stakeholder process entirely. Having Corporate Members involved in amending the Bylaws ensures that market-wide policy decisions are well-reasoned and thoroughly vetted.

The Board should not move forward with a Bylaw Amendment without a stakeholder vote, to include Corporate Members.

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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 controls how corporate entities like ERCOT are governed, and TBOC § 22.102(c) restricts the ERCOT 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.

A. The Board cannot amend the Bylaws because the Members approved the Bylaw amendment process, which does not permit the Board to amend the Bylaws.¹

- 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..."²
 - The Corporate Members approved Bylaw amendments in 2020,³ 2018,⁴ 2015,⁵ 2013,⁶ 2010,⁷ 2007,⁸ and 2005.⁹

¹ TBOC § 22.102(c)(3) ("in amending, repealing, or adopting a bylaw, the members expressly provide that the board of directors may not amend or repeal the bylaw.").

² ERCOT Bylaws § 13.1(d).

³ *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).

⁴ *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).

⁵ *Petition of the Electric Reliability Council of Texas, Inc. for Approval of Bylaws Amendment*, Docket No. 44741, Petition at 1 (May 18, 2015).

⁶ *Petition of the Electric Reliability Council of Texas, Inc. for Approval of Bylaws Amendments*, Docket No. 41761, Petition at 1 (Aug. 13, 2013).

⁷ *Petition of the Electric Reliability Council of Texas for Approval of Amended and Restated Bylaws*, Docket No. 37852, Petition at 1 (Jan. 7, 2010).

⁸ *Petition of the Electric Reliability Council of Texas for Approval of Amended and Restated Bylaws*, Docket No. 34427, Petition at 1 (Jun. 21, 2007).

⁹ *Petition of the Electric Reliability Council of Texas for Approval of Amended and Restated Bylaws*, Docket No. 32025, Petition at 1 (Nov. 9, 2005).

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- ERCOT previously acknowledged that the process for amending the Bylaws was the process set out in Section 13.1 of the Bylaws. In 2013, ERCOT summarized its Bylaws amendment process as including requirements that “[a]ny Corporate Member must submit a proposal of its proposed amendment with supporting documentation to the ERCOT Chief Executive Officer (CEO)” and “Corporate Members must vote using the procedure more particularly described in Section 13.1(d) of the Bylaws. At least four of the seven Market Segments must affirmatively vote to amend the Bylaws.”¹⁰
- To our knowledge, 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.¹¹
 - Senate Bill (SB) 2 required that ERCOT have an independent Board.¹² When implementing this mandate, the Board unilaterally modified the Bylaws to comply with SB 2.¹³
 - While the 2021 amendment should have been approved by the Corporate Members under Section 13.1 of the Bylaws, failing to follow that process did not waive the process for future amendments.
 - Under Texas case law, failing to follow corporate bylaws is a voidable act that may be subsequently ratified or confirmed.¹⁴
- 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.¹⁵
 - Construing Section 13.1 as giving the Board unconditional authority to amend the Bylaws is contrary to Texas case law and rules of interpretation. Generally, the law assumes that when drafters describe a particular procedure for accomplishing a ministerial task, it is implicit that other approaches not specifically described are excluded.¹⁶ Section 13.1 of the Bylaws do not contemplate any other process for Bylaw amendments that

¹⁰ *Petition of the Electric Reliability Council of Texas, Inc. for Approval of Bylaws Amendments*, Docket No. 41761, Pet. at 1–2 (Aug. 13, 2013).

¹¹ *Petition of Electric Reliability Council of Texas, Inc. for Expedited Approval of Bylaws Amendment*, Docket No. 52683, Order (Oct. 20, 2021).

¹² SB 2, Section 3; PURA § 39.151.

¹³ *Petition of Electric Reliability Council of Texas, Inc. for Expedited Approval of Bylaws Amendment*, Docket No. 52683, Order (Oct. 20, 2021).

¹⁴ *City of Hughes Springs v. Hughes Springs Volunteer Ambulance Serv., Inc.*, 223 S.W.3d 707, 715 (Tex. App.—Texarkana 2007, no pet.) (finding that a 1997 bylaw amendment was voidable and ratified when the bylaws were not challenged for over seven years).

¹⁵ ERCOT Bylaws § 13.1 states “these Bylaws **may** be amended...” and the Bylaws do not outright say “the Board **may not** amend the bylaws.”

¹⁶ *First Nat. Bank of Luling v. Nugent*, 384 S.W.2d 224, 226 (Tex. Civ. App.—San Antonio 1964, writ ref’d n.r.e.) (“[T]he expression in a contract of one or more things of a class implies the exclusion of all not expressed... This maxim is recognized in Texas.”).

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would allow the Board to act unilaterally and bypass a vote of the Corporate Members.

- Texas case law supports the idea that the authority of a corporate board to unilaterally amend an organization's bylaws should not be inferred from an amendment process that requires a vote of the organization's membership. Case law holds that if a set of bylaws says it "may be amended by a vote of the majority of the members," the bylaws do not also delegate power to the board.¹⁷

B. 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.¹⁸

- 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.
- Amendments to the ERCOT Bylaws are addressed in Article 9 of ERCOT's Certificate of Formation.¹⁹ Article 9 does two things: (1) it allows ERCOT to "have Members as provided in the Bylaws"; and (2) provides that the Bylaws can "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."
- 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.²⁰
 - When describing the rights of members and associate members, the Bylaws include voting on amendments to the Bylaws as a "right."²¹
- 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**..."²²

¹⁷ *Aldrich v. State ex rel. Cox*, 658 S.W.2d 323, 326 (Tex. App.—Tyler 1983, no writ) ("[E]ach set of bylaws provides that said bylaws **may be amended** by a vote of the majority of the members present at any meeting of the corporation." Thus, "the purported adoption of the... bylaws by the board alone exceeded the scope of their authority and thus the...bylaws were never validly adopted.") (emphasis added).

¹⁸ 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").

¹⁹ ERCOT Certificate of Formation, Article 9 ("The Corporation may have Members as provided in the Bylaws. The Bylaws may be altered, amended or repealed or new Bylaws adopted, by the Members, if allowed, through a procedure set forth in the Bylaws or any other manner set forth in the Bylaws.").

²⁰ ERCOT Bylaws § 13.1.

²¹ 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).

²² ERCOT Certificate of Formation, Article 9.

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- “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.

2. Removing Corporate Members’ voting power in the Bylaws would marginalize stakeholders and lead to uncertainty.

- TIEC appreciates the ERCOT Board’s statements made during the August Board Meeting indicating that the Board would like to maintain stakeholder involvement. However, the Amendment creates a significant risk that stakeholders will be marginalized, which could have far-reaching consequences for ERCOT and the market.

A. The Bylaw Amendment opens the door to further marginalization of stakeholders and removes a beneficial check on the Board’s authority.

- 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 entirely. 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.

B. Stakeholders provide a valuable role in implementing policies.

- 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.
- 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.
 - For example, SB 3 directed ERCOT to develop a firm fuel supply service. The first draft of the Nodal Protocol Revision Request (NPRR) to implement that service had a number of issues. Stakeholders and ERCOT worked

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together to address issues, make sure the service would not have unintended consequences, and ensured the NPRR was passed in time to be ready for Winter 2023.

- 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

For those reasons, the Board should not move forward with a Bylaw Amendment without a stakeholder vote, to include Corporate Members.