

Bylaws Amendment Comments

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

Texas Industrial Energy Consumers (TIEC) is a trade association that represents the interests of large industrial consumers in Texas. In this role, TIEC has provided advice and counsel to the Industrial Consumer Segment as well as to the industrial consumer Corporate Members of ERCOT. 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.

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 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

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(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 provides 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. ERCOT has specifically acknowledged that the process for amending the Bylaws is 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.”²

The Corporate Members approved the Bylaws to expressly provide how the Bylaws were to be amended, and under the TBOC, that process must be followed. Specifically, the Bylaws state that “Corporate Members ***must*** vote to enact the Board-approved amendment...”³ The Corporate Members have consistently followed Section

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

³ ERCOT Bylaws § 13.1(d).

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13.1 to approve bylaw amendments in 2020,⁴ 2018,⁵ 2015,⁶ 2013,⁷ 2010,⁸ 2007,⁹ and 2005.¹⁰

To TIEC's knowledge, ERCOT has only amended the Bylaws without a vote of the Corporate Members once. In 2021, the Texas Legislature passed Senate Bill (SB) 2, which required that ERCOT have an independent Board.¹¹ In response to the statutory mandate to revise the structure and qualifications of the Board of Directors, the Board unilaterally modified the Bylaws to comply with SB 2.¹² 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.¹³

Further, Section 13.1 of the Bylaws do not contemplate any other process for Bylaw amendments that would allow the Board to act unilaterally and bypass a vote of the Corporate Members. Specifically, the statement that "these Bylaws **may** be amended" does not impliedly give the Board expansive authority to unilaterally amend the

⁴ *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).

⁵ *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).

⁶ *Petition of the Electric Reliability Council of Texas, Inc. for Approval of Bylaws Amendment*, Docket No. 44741, Petition at 1 (May 18, 2015).

⁷ *Petition of the Electric Reliability Council of Texas, Inc. for Approval of Bylaws Amendments*, Docket No. 41761, Petition at 1 (Aug. 13, 2013).

⁸ *Petition of the Electric Reliability Council of Texas for Approval of Amended and Restated Bylaws*, Docket No. 37852, Petition at 1 (Jan. 7, 2010).

⁹ *Petition of the Electric Reliability Council of Texas for Approval of Amended and Restated Bylaws*, Docket No. 34427, Petition at 1 (Jun. 21, 2007).

¹⁰ *Petition of the Electric Reliability Council of Texas for Approval of Amended and Restated Bylaws*, Docket No. 32025, Petition at 1 (Nov. 9, 2005).

¹¹ SB 2, Section 3; PURA § 39.151.

¹² *Petition of Electric Reliability Council of Texas, Inc. for Expedited Approval of Bylaws Amendment*, Docket No. 52683, Order (Oct. 20, 2021).

¹³ *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).

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Bylaws.¹⁴ Construing Section 13.1 in such a way 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.¹⁵ Additionally, Texas case law restricts the authority of a corporate board to unilaterally amend an organization's bylaws by inference from an amendment process that requires a vote of the organization's membership. The 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 a board of directors.¹⁶ As such, the Board cannot properly amend the Bylaws without a vote by the Corporate Members under TBOC § 22.102(c)(3).

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.¹⁷

Under TBOC § 22.102(c)(1), 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. Article 9 of ERCOT's Certificate of Formation addresses amendments to the ERCOT Bylaws,¹⁸ and it 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."¹⁹

¹⁴ ERCOT Bylaws § 13.1 states "these Bylaws *may* be amended..." and the Bylaws do not outright say "the Board *may not* amend the bylaws."

¹⁵ See *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."); *In re Aguilar*, 344 S.W.3d 41, 49 (Tex. App.—El Paso 2011, no pet.) ("In construing the bylaws, we apply the rules that govern the interpretation of contracts.")

¹⁶ *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).

¹⁷ 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").

¹⁸ 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.")

¹⁹ *Id.*

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The language in ERCOT's Certificate of Formation clearly "reserve[s] the power [to amend bylaws] exclusively" for the Members. ERCOT's Certificate of Formation reads:

The Corporation may have Members, as provided by the Bylaws. The Bylaws ***may be altered... by the Members, if allowed***, through a procedure set forth in the Bylaws or any other manner set forth in the Bylaws."²⁰

The phrase "if allowed" is offset by commas on either side and modifies the word immediately preceding it ("Members"), so Article 9 should effectively be read as: "ERCOT may have Members if the Bylaws say so. If Members are allowed to exist pursuant to the Bylaws, the Bylaws may be altered by the Members through a procedure set forth in the Bylaws or any other manner set forth in the Bylaws." Thus, once the Bylaws authorized the existence of the Corporate Members, those Corporate Members obtained exclusive authority to amend the Bylaws going forward.

In addition, neither the Bylaws, nor the Certificate of Formation contemplate a different bylaw amendment procedure that would allow the Board to approve new bylaws without a vote of the Corporate Members. As discussed above, the Bylaws set forth a single procedure for bylaw amendments that requires (1) the amendment is approved by the Board, and (2) the Corporate Members vote to enact the amendment.²¹ In addition, when describing the rights of members and associate members, the Bylaws include voting on amendments to the Bylaws as a "right."²²

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

TIEC appreciates the ERCOT Board and the Commission's statements made during the August Board Meeting indicating that the Board and the Commission would

²⁰ ERCOT Certificate of Formation, Article 9 (emphasis added).

²¹ ERCOT Bylaws § 13.1.

²² 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).

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like to maintain stakeholder involvement.²³ 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 the potential loss of their valuable input.

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 ensure that stakeholder input will always be considered. 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 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, and the stakeholders have added tremendous value to ERCOT and the market.

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 together to address issues, ensure the service would not have unintended consequences, and fully vet the NPRR with enough time to be ready for Winter 2023.

²³ Board of Directors Meeting at Item 14 (Aug. 16, 2022) (available at: <https://ercot.new.swagit.com/play/178940/7346>) (explaining that stakeholders are valued contributors).

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Further, 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. In ERCOT, a stakeholder that feels aggrieved based on the final policy decision at ERCOT has the ability to appeal an action to the PUC and ultimately the courts. The fact that so few ERCOT actions are appealed provides evidence that ERCOT's unique stakeholder involvement helps avoid poor policy outcomes that can create market barriers and issues for both resources and loads. As such, the stakeholder process is particularly important at this time, as the PUC continues its efforts to overhaul the ERCOT market. Involved Corporate Members are essential to ERCOT's continued success, and this Bylaw Amendment would unnecessarily limit their involvement.

Conclusion

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