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| Title | Joint Comments on ERCOT’s Proposed Amendment to ERCOT Bylaws |
| Date | September 30, 2022 |
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| Submitter’s Information | |
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| Company | Joint Commenters (see below for Company Names and see “Appendix A” for full Joint Commenters’ Submitters Information) |
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| Market Segment | Independent Generator; Independent Retail Electric Provider; Municipal; Independent Power Marketer; Cooperative; Industrial Consumer; Commercial Consumer |

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| Comments |

**Introduction**

The Corporate Members of the identified companies and market segments (collectively, “Joint Commenters”) respectfully submit these comments to ERCOT’s September 9, 2022, [proposed amendments](https://www.ercot.com/files/docs/2022/09/09/02%20Draft%20Bylaws%20Amendment%2009092022%20(Clean%20and%20Redline).zip) to the Amended and Restated Bylaws of Electric Reliability Council of Texas, Inc. (effective October 12, 2021) (“[ERCOT Bylaws](https://www.ercot.com/files/docs/2021/10/12/Amended_and_Restated_Bylaws_of_ERCOT__eff_10122021_.pdf)”).

**Joint Commenters comprise of 27 number of separate 2022 ERCOT Corporate Members:** *Jupiter Power LLC; Reliant Energy Retail Services LLC; Calpine Corporation; Luminant Generation Company LLC; CPS Energy; Austin Energy; Golden Spread Electric Cooperative Inc.; EDF Trading North America LLC; Tenaska Power Services Co.; GEUS; Fayette Electric Cooperative Inc.; Air Liquide Large Industries U.S. LLP; WattBridge Texas LLC; City of Eastland; RWE Renewables Americas LLC; Southern Power Company; Kerrville Public Utility Board; City of Garland; Demand Control 2, LLC; Eolian, L.P.; Denton Municipal Electric; OhmConnect Texas LLC; AP Gas & Electric (TX) LLC dba APG&E; Shell Energy North America (US) LP; Key Capture Energy LLC; and Apex Clean Energy Holdings; Buffalo Gap Wind LLC*.[[1]](#footnote-1),[[2]](#footnote-2) **Joint Commenters’ ERCOT Corporate Members represent six different (non-Adjunct) Market Segments**: *Independent Generator; Independent Retail Electric Provider; Municipal; Independent Power Marketer; Cooperative; and Consumers (including Industrial Consumers and Commercial Consumers)*. Joint Commenters appreciate the opportunity to comment on ERCOT’s proposed amendments.[[3]](#footnote-3)

At the August 15, 2022, meeting of the Human Resources and Governance (“HR&G”) Committee of the ERCOT Board of Directors (“ERCOT Board”), the HR&G Committee directed ERCOT staff to propose amendments to the ERCOT Bylaws such that future amendments to ERCOT’s governing documents—i.e., the Amended and Restated Certificate of Formation of Electric Reliability Council of Texas, Inc. (effective January 31, 2019) (“ERCOT COF”) and the ERCOT Bylaws—would not require approval by the Corporate Members, thereby providing that Corporate Members would only retain the right to elect representatives of the Technical Advisory Committee (“TAC”) of ERCOT, and no other voting rights related to ERCOT governance matters.

On September 9, 2022 (following the August HR&G and ERCOT Board meetings), ERCOT staff posted proposed amendments to the ERCOT Bylaws and issued a [Market Notice](https://www.ercot.com/services/comm/mkt_notices/detail?id=72d4bf5f-da7d-4bca-9360-7c61059a764e) inviting Corporate Members to comment on the proposed amendments by September 30, 2022. Although the Market Notice noted an expected discussion of the proposed amendments and Corporate Member comments at the October 17 and 18, 2022 HR&G Committee and ERCOT Board meetings, a subsequent [Market Notice](https://www.ercot.com/services/comm/mkt_notices/detail?id=b62a93a8-804d-4705-84c2-76f63abc93bf) on September 29, 2022, indicated that the HR&G Committee and Board do not intend to vote on the proposed amendment at the October 17 and 18, 2022 meetings, and intend to continue to discuss overall corporate governance matters, in conjunction with the Reliability and Markets Committee (R&M), including the proposed Bylaws amendment and stakeholder process enhancements as part of the TAC Structural and Procedural Review. Joint Commenters appreciate the intent for “enhancing stakeholder input and involvement in the R&M Committee and Board processes.”[[4]](#footnote-4) However, it has not been clearly communicated to the Corporate Members that they will be given an opportunity to vote on any such ERCOT Board-approved amendments to the ERCOT Bylaws, as is required by ERCOT’s governing documents.

Joint Commenters appreciate the continued ability to comment on the proposed amendments to the ERCOT Bylaws and have spent a considerable amount of time to provide guidance on potential issues arising from the proposed amendments. These comments identify policy implications and legal questions concerning the proposed amendments to the ERCOT Bylaws and the process by which such amendments are effectuated. The continued and increased health and reliability of the ERCOT market and grid are of the utmost importance to all market segments, as evidenced by the collaboration of representatives from each segment on these comments. To help ensure that any amendments to ERCOT’s governing documents avoid adverse impacts to the ERCOT market and grid and satisfy legal requirements, the Joint Commenters respectfully request that the ERCOT Board fully consider these comments and present any ERCOT Board-approved amendments for a full vote of the Corporate Members as set forth in the ERCOT Bylaws.

1. **Policy Considerations**

The Joint Commenters believe it imperative to emphasize the chilling effect the proposed amendments could have on decisions to enhance and maintain the health and reliability of the ERCOT grid, including continued investment in generation, maintenance of reliable grid operations, and the fostering of innovative and affordable offerings for current and prospective Texas consumers by the members who provide those offerings to end-use customers. This section highlights policy considerations identified by Joint Commenters as reasons for the ERCOT Board to carefully consider the proposed amendments.

1. **A successful energy-only market requires that its participants have a vested interest in the activities of the organization—i.e., in the development and refinement of market policy and rules.**

ERCOT’s Corporate Members (i.e., ERCOT stakeholders) exist to have an interest—a stake—in the operation and success of the ERCOT market and grid. Because membership is voluntary, ERCOT also depends on Corporate Members for success. Corporate Members are defined by ERCOT Bylaws § 3.2(a)(1) as ERCOT Members with “the rights and obligations as described in these bylaws including the right to vote on all matters submitted to the general membership (such as selection of TAC Representatives and amendments to the Certificate of Formation and these Bylaws).” Under the aegis of Public Utility Commission of Texas (“PUCT” or “Commission”)-determined boundaries and policies, ERCOT stakeholders, through collaboration with ERCOT, the Commission, the Office of Public Utility Counsel (“OPUC”), and other market participants registered with ERCOT, have developed the processes and implemented the policies that have supported and sustained the competitive electric market in the ERCOT Region.

ERCOT’s Protocols, rules, procedures, and stakeholder processes emphasize the importance of collaborative, market-wide efforts to achieve a stable, functioning market—e.g.:

Balanced market rules are a basic element in Texas competition. Clear, predictable and well-designed rules help foster a stable electricity market. [ERCOT] market rules are developed by participants from all aspects of the electricity industry. The rules and amendments are reviewed by the [Commission] to ensure that they satisfy the public interest.[[5]](#footnote-5)

ERCOT stakeholders meet regularly in a number of forums to discuss and develop Protocols and procedures that govern the ERCOT System and its wholesale and retail markets. In the ERCOT stakeholder process—from working groups, task forces, and subcommittees, to [TAC] and the ERCOT Board of Directors—Market Participants, along with ERCOT Staff, work together to ensure a reliable bulk electric system and equitable access to the ERCOT markets.[[6]](#footnote-6)

The [ERCOT] Protocols, created through the collaborative efforts of representatives of all segments of Market Participants, means the document adopted by ERCOT, including any attachments or exhibits referenced in these Protocols, as amended from time to time, that contains the scheduling, operating, planning, reliability, and Settlement (including Customer registration) policies, rules, guidelines, procedures, standards, and criteria of ERCOT.[[7]](#footnote-7)

The ERCOT Board, [TAC], and other ERCOT subcommittees authorized by the ERCOT Board or TAC or ERCOT may develop polices [sic], guidelines, procedures, forms, and applications for the implementation of and operation under, these Protocols and to comply with applicable rules, laws, and orders of a Governmental Authority.[[8]](#footnote-8)

ERCOT is a nonprofit corporation, overseen by the Commission and statutorily mandated “to ensure access to the transmission and distribution systems for all buyers and sellers of electricity on nondiscriminatory terms; ensure the reliability and adequacy of the regional electrical network; ensure that information relating to a customer's choice of retail electric provider is conveyed in a timely manner to the persons who need that information; and ensure that electricity production and delivery are accurately accounted for among the generators and wholesale buyers and sellers in the region.”[[9]](#footnote-9) ERCOT can most effectively perform its statutory responsibilities by involving stakeholders (i.e., the buyers and sellers of electricity), who willingly and voluntarily share their experience and expertise, and incorporating their technical expertise. ERCOT stakeholders are largely made up of businesses that have invested substantial amounts of capital in the ERCOT market. Accordingly, the proposed amendments to the ERCOT Bylaws could subject stakeholders and Market Participants to legitimate risks of loss of capital. As a nonprofit corporation subject to complete oversight by a state agency, ERCOT bears no similar capital investment risk. Therefore, ERCOT does not have the same financial incentives as stakeholders to ensure that the ERCOT market and the grid function reliably and optimally for all end-use customers. As discussed in further detail below, under the ERCOT Bylaws, Corporate Members must vote to amend the ERCOT Bylaws. Eliminating this right of ERCOT stakeholders is a clear signal to investors of regulatory and market uncertainty, which sends a negative investment signal that, all else equal, will impact operations, reliability, and the provision of energy to consumers within the state.

1. **If the proposed amendments to the ERCOT Bylaws are adopted, ERCOT’s governance structure will most closely resemble the structure of California ISO (“CAISO”).**

CAISO, Midcontinent ISO (“MISO”), and New York ISO (“NYISO”) each have bylaws that control ISO governance. PJM Interconnection (“PJM”) has an operating agreement that controls PJM’s governance. Comparing the governing documents and structures of other ISOs with the proposed amendments to the ERCOT Bylaws suggests that ERCOT’s governance structure would shift substantially towards CAISO’s structure.

1. **CAISO’s Bylaws can generally be amended by the Board of Directors without Member approval but are subject to certain Federal Energy Regulatory Commission (“FERC”) and stakeholder counterbalances.**

Most of CAISO’s Bylaws “may be amended by the vote of at least two-thirds of the [Board members] then in office.”[[10]](#footnote-10) Somewhat similarly to the ERCOT Board, all five CAISO Board members “are selected by appointment of the Governor of the State of California and subject to confirmation by the Senate of the State of California.”[[11]](#footnote-11) Thus, generally, the CAISO Bylaws can be amended without approval or input from CAISO stakeholders.

Amendments to Article IV of the CAISO Bylaws (Western Energy Imbalance Market (“EIM”) Governing Body) require the CAISO Board to follow enhanced notice procedures to ensure the EIM Governing Body is involved in those amendments.[[12]](#footnote-12) The EIM Governing Body is composed of members nominated by CAISO stakeholders and approved by the EIM Governing Body.[[13]](#footnote-13) The EIM Governing Body has joint authority with the CAISO Board over certain market rules and the CAISO Tariff.[[14]](#footnote-14)

However, even if the EIM Governing Body opposes proposed changes to Article IV, the CAISO Board can override that stakeholder opposition with a unanimous CAISO Board vote.[[15]](#footnote-15) Therefore, the CAISO Board can unilaterally amend the CAISO Bylaws without stakeholder approval.

Notably, as with any FERC-jurisdictional market, parties in CAISO can directly raise concerns about CAISO’s Bylaws and rules through a Federal Power Act (“FPA”) 206 complaint with FERC.[[16]](#footnote-16)

1. **In MISO and NYISO, bylaws can only be amended by the Board of Directors, but stakeholders can participate in the selection of Board members.**

MISO’s Bylaws can only be amended by the MISO Board “subject to the receipt of all necessary federal and state regulatory approvals, and provided that no amendment is contrary to the MISO Agreement.”[[17]](#footnote-17) Similarly, NYISO’s Bylaws “may be amended or repealed by the affirmative vote of six of the directors of the Corporation at a meeting duly called for the purpose of altering [the] by-laws.”[[18]](#footnote-18)

However, MISO’s nine-member board is directly “elected by the Members from a slate of candidates presented to them by the Nominating Committee.”[[19]](#footnote-19) MISO’s Nominating Committee consists of “three Board Members whose terms are not expiring appointed by the Board and two members of the Advisory Committee selected by the Advisory Committee.”[[20]](#footnote-20) In turn, the Advisory Committee consists of 25 representatives from various stakeholder groups.[[21]](#footnote-21) In addition to at least two qualified Board candidates provided by an executive search firm, MISO members can also submit the names of other qualified Board candidates directly to the Nominating Committee.[[22]](#footnote-22)

NYISO has an independent/unaffiliated 10-member Board, which is elected by the existing Board members.[[23]](#footnote-23) Although market participants “shall conduct a search for new directors and recommend to the Board a list of at least three qualified candidates for each vacancy,” the “Board may, by a majority vote, either choose a candidate from among those recommended by the [market participants] or choose a candidate not so recommended.”[[24]](#footnote-24)

1. **PJM’s Operating Agreement requires member approval and allows members to elect all voting Board members.**

Unlike the bylaws of CAISO, MISO, and NYISO, PJM’s Operating Agreement includes an amendment procedure similar to ERCOT’s. PJM’s Operating Agreement can only be amended upon:

(i) submission of the proposed amendment to the PJM Board for its review and comments; (ii) *approval of the amendment . . . by the Members Committee*, after consideration of the comments of the PJM Board, in accordance with Operating Agreement, section 8.4, or written agreement to an amendment of all Members not in default at the time the amendment is agreed upon; and (iii) approval and/or acceptance for filing of the amendment by FERC and any other regulatory body with jurisdiction thereof as may be required by law.[[25]](#footnote-25)

The PJM Members Committee is “composed of representatives of all the Members.”[[26]](#footnote-26) Members are divided into five sectors (generation owners, other suppliers, transmission owners, electric distributors, and end-use customers), and each member has one vote.[[27]](#footnote-27) PJM members also elect all nine voting members of the PJM Board.[[28]](#footnote-28)

Accordingly, MISO, NYISO, and PJM all provide much greater opportunity for stakeholder input and involvement than CAISO or ERCOT under the proposed Bylaws amendments.

1. **ERCOT is a membership-based nonprofit organization for which the Commission already has complete oversight.**

As a membership-based 501(c)(4) nonprofit corporation, ERCOT is governed by a board of directors and is subject to *complete oversight* by the Commission.

Rules adopted by [ERCOT] and enforcement actions taken by [ERCOT] under delegated authority from the commission are subject to commission oversight and review and may not take effect before receiving commission approval. [ERCOT] is directly responsible and accountable to the commission. The commission has complete authority to oversee and investigate the organization's finances, budget, and operations as necessary to ensure [ERCOT’s] accountability and to ensure that [ERCOT] adequately performs [its] functions and duties. [ERCOT] shall fully cooperate with the commission in the commission's oversight and investigatory functions.[[29]](#footnote-29)

1. **The amendment process in ERCOT Bylaws § 13.1 provides oversight by the ERCOT Board and the Commission and fosters stakeholder engagement.**

The ERCOT Bylaws and PURA sufficiently protect the authority of the ERCOT Board and the Commission to control amendments to the ERCOT Bylaws. Currently, all proposed Bylaws amendments must be submitted to the ERCOT Board and “approved by an act of the Board.”[[30]](#footnote-30) Additionally, the ERCOT Bylaws “must be approved by the [C]ommission and must reflect the input of the [C]ommission.”[[31]](#footnote-31) Corporate Members cannot amend the Bylaws without the oversight and approval from the ERCOT Board and the Commission. Further, at least four of the seven Corporate Member Segments must agree on any proposed amendments to the ERCOT Bylaws.[[32]](#footnote-32) This structure ensures that the ERCOT Board, Corporate Members, and the Commission agree on any amendments to the ERCOT Bylaws and encourages thoughtful collaboration among all interested parties.

1. **Legal Questions**

For the policy reasons discussed above, ERCOT’s unique role under the Public Utility Regulatory Act (“PURA”), as the Commission’s certified independent organization makes stakeholder input (including as established by the current Bylaws, Protocols, and other processes) essential to the success of the ERCOT market. Indeed, no provision of PURA expressly requires the proposed Bylaw amendments, and no provision of PURA regarding amendments to the ERCOT Bylaws is in conflict with the current ERCOT Bylaws. In short, PURA has not been demonstrated to be in conflict with the Texas Business Organizations Code (“TBOC”) as to the issues raised by ERCOT’s proposed Bylaw amendments. But the proposed amendments would appear to contravene certain provisions of the Texas Business Organizations Code TBOC, as described below.

The TBOC, PURA, ERCOT COF, and ERCOT Bylaws govern the procedure by which the ERCOT Bylaws may be amended. As detailed below, amending the ERCOT Bylaws without approval of the Corporate Members could violate the TBOC. Moreover, if the proposed amendments are adopted, the ERCOT Bylaws could conflict with state law and the ERCOT COF. The Joint Commenters appreciate the dialogue at the August ERCOT Board meetings regarding the intent of the Texas Legislature and Governor in drafting and enacting Senate Bill (“SB”) 2. However, the statutory changes to PURA in SB 2 do not appear to direct amendments to the ERCOT Bylaws without “an affirmative vote by at least four of the seven [Corporate Member] Segments . . . .”[[33]](#footnote-33)

1. **Must amendments to the ERCOT Bylaws currently be approved by the Corporate Members in order to become effective?**

[TBOC Chapter 22](https://statutes.capitol.texas.gov/Docs/BO/htm/BO.22.htm), “Nonprofit Corporations,” governs the purposes and powers of Texas nonprofit corporations like ERCOT—a “[membership-based 501(c)(4) nonprofit corporation](https://www.ercot.com/about).” TBOC § 22.102(c) provides that a corporation’s board of directors may amend its bylaws, *unless* (in relevant part): the corporation’s COF “wholly or partly reserves the power exclusively to the corporation’s members;”[[34]](#footnote-34) or “in amending, repealing, or adopting a bylaw, the members expressly provide that the board of directors may not amend or repeal the bylaw.”[[35]](#footnote-35) The Board should carefully consider whether these exceptions apply with respect to amendments to the ERCOT Bylaws.

1. **Does ERCOT’s COF reserve the exclusive power to amend the ERCOT Bylaws to the Corporate Members?**

TBOC § 22.102(c)(1) appears to give the ERCOT Board the authority to amend the ERCOT Bylaws *unless* the ERCOT COF “wholly or partly reserves the power exclusively to [ERCOT’s] members.”[[36]](#footnote-36) The ERCOT COF addresses amendments to the ERCOT Bylaws in just one place—Article 9. Article 9 of the ERCOT COF does two things: (1) it allows ERCOT to “have Members as provided for in the [ERCOT] Bylaws” (i.e., if the ERCOT Bylaws provide for Members, then Members are allowed); and (2) it provides that the ERCOT Bylaws can 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.”[[37]](#footnote-37) Specifically, the ERCOT Bylaws provide for three classes of members and include several pages of policies governing those members.[[38]](#footnote-38)

The ERCOT Board should consider whether the TBOC § 22.102(c)(1) exception to the default provision in TBOC § 22.102(c) that gives the ERCOT Board the authority to amend the ERCOT Bylaws applies here because Article 13 of the ERCOT Bylaws, “Amendments,” specifies the procedure for amending the ERCOT Bylaws. Specifically, Article 13 maintains that subject to the Commission’s approval, the ERCOT Bylaws “may be amended, altered, or repealed by the voting Segments,” if: (1) the amendment(s) have been approved by the ERCOT Board; *and* (2) the Corporate Members vote to enact the Board-approved amendment(s) (“An affirmative vote by at least four of the seven Segments shall be necessary to amend these Bylaws.”).[[39]](#footnote-39)

ERCOT Bylaws § 3.2, “Membership Types and Voting Rights,” describes the corporation’s membership types and “voting rights.” Specifically, Corporate Members “shall have the rights . . . described in the Bylaws including the right to vote on all matters submitted to the general membership . . . such as . . . amendments to the [ERCOT COF] and these Bylaws.”[[40]](#footnote-40)

The permissive character of the language in Article 9 of the ERCOT COF (“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.”) and § 13.1 of the ERCOT Bylaws (“these Bylaws ***may*** be amended”) warrants careful consideration. According to case law, the qualifying phrase, “if allowed,” must be limited to the words and phrases immediately preceding it: “by the Members.”[[41]](#footnote-41)

Additionally, the word “may” “creates discretionary authority or grants permission or a power.”[[42]](#footnote-42) Thus, the Board should consider whether Article 9 of the ERCOT COF and § 13.1 of the ERCOT Bylaws create discretionary authority to amend the ERCOT Bylaws, and if so, whether that discretionary authority is vested in the Corporate Members.

1. **Does the amendment process in the ERCOT Bylaws (Article 13), allow the ERCOT Board to amend the Bylaws without approval of the Corporate Members?**

In adopting the ERCOT Bylaws, the Corporate Members adopted Article 13, “Amendments,” which provides the procedure for amending the ERCOT Bylaws—i.e., any amendment to the ERCOT Bylaws must be approved by the ERCOT Board, and then approved by the Corporate Members. The ERCOT Bylaws were drafted and adopted to specifically reserve the power to amend the ERCOT Bylaws in the Corporate Members—i.e., “Corporate Members ***must vote*** ***to enact*** the Board-approved amendment . . . .”[[43]](#footnote-43) ERCOT Bylaws § 13.1(d) (emphasis added). Voting on Board-approved amendments to the ERCOT Bylaws is a right vested with the Corporate Members; it is not discretionary for Corporate Members to approve amendments. Further, ERCOT Bylaws § 13.1(d)(4) requires that “[a]n affirmative vote of at least four of the seven [Corporate Member] Segments ***shall be necessary to amend*** these Bylaws” (emphasis added).

Before acting on the proposed amendments to the ERCOT Bylaws, the Board should consider whether the permissive character of the language in Article 9 of the ERCOT COF and § 13.1 of the ERCOT Bylaws (as described above) authorizes the ERCOT Board to amend the Bylaws without approval of the Corporate Members or otherwise deviate from the amendment process set forth in ERCOT Bylaws § 13.1. Relevant to this consideration may be that the ERCOT Bylaws provide only one procedure to amend the ERCOT Bylaws, and “Corporate Members ***must vote to enact*** the Board-approved amendment . . . .”[[44]](#footnote-44) ERCOT Bylaws § 13.1(d) (emphasis added).

The ERCOT Bylaws have been amended 13 times since the original ERCOT Bylaws were adopted in 2001.[[45]](#footnote-45) The ERCOT Board has sought Corporate Member approval of every amendment to the ERCOT Bylaws, with the exception of the 2021 amendments, which were made to conform with requirements of [SB 2](https://capitol.texas.gov/tlodocs/87R/billtext/pdf/SB00002F.pdf#navpanes=0). On numerous occasions, ERCOT has confirmed the process set forth in ERCOT Bylaws § 13.1(d) to be the process required for amending the ERCOT Bylaws.

In 2005, the ERCOT Board proposed amendments to the ERCOT Bylaws in response to statutory changes to PURA that addressed the Commission’s oversight of ERCOT and ERCOT’s governing body. However, the ERCOT Board-approved amendments did not receive a sufficient number of Corporate Member votes to pass.[[46]](#footnote-46) The ERCOT Board revised the proposed amendments, resubmitted the changes to the Corporate Members, and eventually received approval of the Corporate Members. Notably however, in response to comments filed in the docket regarding the procedural requirements for amending the ERCOT Bylaws, ERCOT stated, “First, the [ERCOT] Board approves the amendments; then, the Corporate Members vote on the amendments.”[[47]](#footnote-47)

In 2013, ERCOT summarized the amendment process as including requirements that “[a]ny Corporate Member must submit a proposal of its proposed amendment with supporting documentation to the ERCOT [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.”[[48]](#footnote-48)

ERCOT’s only departure from the amendment procedures in ERCOT Bylaws § 13.1 was in 2021 to “[t]o conform to the legal requirements imposed by [SB 2].” Accordingly, “[n]o changes beyond those required to conform with [SB 2] [were] included in the proposed amendment.” ERCOT also noted “the differences between the instant case in which the Bylaws conflict with existing law and recent past Bylaws amendments, which were not proposed to conform with existing law and followed the typical process set forth in Bylaws Section 13.1.”[[49]](#footnote-49)

1. **If the proposed amendments to the ERCOT Bylaws are adopted, will they conflict with Texas law or the ERCOT governing documents?**
2. **Questions regarding TBOC and Texas case law.**

The proposed amendments to the ERCOT Bylaws, if passed, will limit Corporate Member voting rights to the election of ERCOT TAC Segment Representatives and eliminate the right of Corporate Members to vote on any proposed changes to ERCOT’s governing documents. TBOC § 22.102(b) provides that a nonprofit corporation’s bylaws can provide for the “regulation and management of the affairs of the corporation that are consistent with law and the [COF].”

Under TBOC § 22.164(b)(1), a nonprofit corporation may only approve a fundamental action, including an action to amend its COF, if “at least [2/3] of the votes that members present in person or by proxy are entitled to cast at the meeting at which the action is submitted for a vote, *if the corporation has members with voting rights*” (emphasis added). TBOC § 22.105(a) more specifically addresses the procedures to amend ERCOT’s COF— “to amend the [COF] of a corporation with members having voting rights, the [Board] of the corporation must adopt a resolution specifying the proposed amendment and directing that amendment to be submitted to a vote at an annual or special meeting of the members having voting rights.”

TBOC § 22.107(b) also provides exceptions that a board of directors may take without seeking member approval, which may also be relevant to the Board’s consideration of the proposed amendments. “Except as otherwise provided by the [COF], the [Board] of a corporation with members having voting rights may, without member approval, adopt amendments to the COF to” adopt administrative changes such as extending the duration of the corporation, deleting the names and addresses of directors, or changing the corporate name. The Board should consider these provisions both separately and together for their implications on members’ voting rights with regard to the ability to vote on any proposed amendment to the COF.

Texas case law provides several important precedents that the ERCOT Board should consider. For instance, Texas courts have looked to the plain meaning of “non-voting” in finding that stockholders with limited voting rights did not violate a corporation’s prohibition on issuing non-voting stock.[[50]](#footnote-50)

Further, Texas courts have held that the relationship between certain entities and their members are contractual relationships.[[51]](#footnote-51) As such, courts interpret an organization's governing documents using ordinary principles of contract construction. Therefore, an entity’s governing documents, including its bylaws and COF, must comport to and comply with the law.[[52]](#footnote-52) In Texas, parties cannot contract around a statutory requirement. A contract is illegal if it seeks to undertake an act that is prohibited in the place where the act will occur.[[53]](#footnote-53) An illegal contract is void and not enforceable.[[54]](#footnote-54) In addition, any attempts to contract around a statutory requirement will likely be deemed as against public policy.[[55]](#footnote-55) Contracts with provisions that are against public policy cannot be enforced.[[56]](#footnote-56)

The ERCOT Board should ensure that consideration of the proposed amendments will not deny Corporate Members’ right to vote on fundamental actions, including the right to vote on amendments to the COF.

1. **Do the proposed amendments to the ERCOT Bylaws conform with SB 2?**

The ERCOT Board should discuss and determine whether statutory changes to PURA in SB 2 provide for amendments to the ERCOT Bylaws, and whether SB 2 provides that any such changes be implemented without “an affirmative vote by at least four of the seven [Corporate Member] Segments” under ERCOT Bylaws § 13.1(d). While the Legislature made detailed changes to the ERCOT Board selection and qualification process in SB 2, the only change to the ERCOT Bylaws that SB 2 mandated is that the ERCOT Bylaws “must require that every member of the governing body be a resident of this state and must prohibit a legislator from serving as a member.”[[57]](#footnote-57) These changes were already implemented in 2021.[[58]](#footnote-58) The text of SB2 does not specifically mention changes to the amendment process for the ERCOT Bylaws. Therefore, Joint Commenters ask the ERCOT Board to consider whether the language of SB 2 demonstrates that the Legislature intended for the ERCOT Board to modify the ERCOT Bylaws amendment process, and if so, to clearly document its legal analysis.

**Conclusion**

Joint Commenters recommend that the ERCOT Board reject the proposed amendments to the ERCOT Bylaws as far as they remove or restrict voting rights of the Corporate Members. Further, the Joint Commenters respectfully request that the ERCOT Board adhere to the established amendment process in the ERCOT Bylaws and submit any Board-approved amendments to the Corporate Members for the required vote. Joint Commenters look forward to discussing these comments and to continuing to work with the ERCOT Board for balance in governing documents that best maintains and enhances the health and reliability of the ERCOT market.

**Appendix A**

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| **Name** | **E-mail Address** | **Company** | **Market Segment** |
| Caitlin Smith | [Caitlin.smith@jupiterpower.io](mailto:Caitlin.smith@jupiterpower.io) | Jupiter Power LLC | Independent Generator |
| Bill Barnes | [Bill.Barnes@nrg.com](mailto:Bill.Barnes@nrg.com) | Reliant Energy Retail Services LLC | Independent Retail Electric Provider |
| Bryan Sams | [Bryan.Sams@calpine.com](mailto:Bryan.Sams@calpine.com) | Calpine Corporation | Independent Generator |
| Ian Haley | [Ian.haley@vistracorp.com](mailto:Ian.haley@vistracorp.com) | Luminant Generation Company LLC | Independent Generator |
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1. Mark Dreyfus for City of Eastland joining on behalf of 134 municipalities participating as Corporate Members in the Small Commercial Consumer and Large Commercial Consumer Segments. [↑](#footnote-ref-1)
2. Tenaska Energy, Inc., an Associate Member of the Independent Generator Segment also joins these comments. [↑](#footnote-ref-2)
3. Joint Comments are also supported by the Texas Competitive Power Advocates (“TCPA”). TCPA is a trade association, not an ERCOT Corporate Member itself, but represents 11 member companies, many of which are Corporate Members who have signed on to these comments. TCPA members are Calpine, Cogentrix, Constellation, EDF Energy Trading North America, Luminant, NRG, Shell, Talen Energy, Tenaska, TexGen Power, and WattBridge. They are members of the Independent Generator and Independent Power Marketer segments, with almost 53,000MW of generation in ERCOT and many billions of dollars invested in the ERCOT market. [↑](#footnote-ref-3)
4. See <https://www.ercot.com/services/comm/mkt_notices> (last visited Sept. 30, 2022). [↑](#footnote-ref-4)
5. *See* <https://www.ercot.com/mktrules> (last visited Sept. 27, 2022) (emphasis added). [↑](#footnote-ref-5)
6. *See* <https://www.ercot.com/committees> (last visited Sept. 27, 2022) (emphasis added). [↑](#footnote-ref-6)
7. ERCOT Nodal Protocols, Section 1.1(1), Summary of the ERCOT Protocols Document (Aug. 1, 2022), <https://www.ercot.com/files/docs/2022/08/01/01-080122_Nodal.docx> (emphasis added). [↑](#footnote-ref-7)
8. *Id.* Section 1.1(2) (emphasis added). [↑](#footnote-ref-8)
9. 16 TAC § 25.361(b); *see also* PURA § 39.151. [↑](#footnote-ref-9)
10. CAISO, *Amended & Restated Bylaws of California Independent System Operator Corporation* art. IX, § 3(a) (Nov. 3, 2021), <http://www.caiso.com/Documents/ISO-Corporate-Bylaws-amended-and-restated.pdf>. [↑](#footnote-ref-10)
11. *Id.* art. III, § 4.1. [↑](#footnote-ref-11)
12. *Id.* art. IX, § 3(b). [↑](#footnote-ref-12)
13. *Id.* art. IV, § 2. [↑](#footnote-ref-13)
14. *Id.* art. IV, § 1(a)-(b). [↑](#footnote-ref-14)
15. *Id.* art. IX, § 3(b)(iii). [↑](#footnote-ref-15)
16. *See* 16 U.S.C. § 824e. [↑](#footnote-ref-16)
17. MISO, *Bylaws of the Midcontinent Independent System Operator, Inc.* § 9.1 (Feb. 27, 2017), <https://cdn.misoenergy.org/MISO%20TOA%20(for%20posting)47071.pdf>. [↑](#footnote-ref-17)
18. NYISO, *By-laws of the New York Independent System Operator, Inc.* art. X (May 18, 2017), <https://www.nyiso.com/documents/20142/1399438/By_Laws_NYISO_2017.pdf/ec19049e-f8f3-f72d-6460-699f8db53251>. [↑](#footnote-ref-18)
19. MISO, *Bylaws of the Midcontinent Independent System Operator, Inc.* §§ 4.1, .3 (Feb. 27, 2017). [↑](#footnote-ref-19)
20. *Id.* § 4.2. [↑](#footnote-ref-20)
21. *Id.* § 6.1. [↑](#footnote-ref-21)
22. *Id.* § 4.3. [↑](#footnote-ref-22)
23. NYISO, *By-laws of the New York Independent System Operator, Inc.* art. II, §§ 2-3 (May 18, 2017). [↑](#footnote-ref-23)
24. *Id.* art. II, § 3. [↑](#footnote-ref-24)
25. PJM, *Amended and Restated Operating Agreement of PJM Interconnection, L.L.C.* § 18.6 (Feb. 18, 2020), <https://www.pjm.com/directory/merged-tariffs/oa.pdf> (emphasis added). [↑](#footnote-ref-25)
26. *Id.* § 1. [↑](#footnote-ref-26)
27. *Id.* § 8.1.1. [↑](#footnote-ref-27)
28. *Id.* § 7.1. [↑](#footnote-ref-28)
29. [↑](#footnote-ref-29)
30. [↑](#footnote-ref-30)
31. [↑](#footnote-ref-31)
32. [↑](#footnote-ref-32)
33. *See* ERCOT Bylaws § 13.1(d)(4). [↑](#footnote-ref-33)
34. TBOC § 22.102(c)(1). [↑](#footnote-ref-34)
35. *Id.* § 22.102(c)(3). [↑](#footnote-ref-35)
36. *Id.* § 22.102(c)(1). [↑](#footnote-ref-36)
37. ERCOT COF art. 9; *see also Keating v. K-C-K Corp*., 383 S.W.2d 69, 71 (Tex. Civ. App.—Houston 1964, no writ) (“Whereby statute, or by charter provision, certain formal procedures are prescribed for the enactment, or amendment, of by-laws they must be substantially followed.”). [↑](#footnote-ref-37)
38. ERCOT Bylaws art. 3. [↑](#footnote-ref-38)
39. ERCOT Bylaws § 13.1. [↑](#footnote-ref-39)
40. *Id.* § 3.2. [↑](#footnote-ref-40)
41. *See Sullivan v. Abraham*, 488 S.W.3d 294, 297 (Tex. 2016) (quoting *Spradlin v. Jim Walter Homes, Inc.*, 34 S.W.3d 578, 580 (Tex. 2000)) (“a qualifying phrase . . . must be confined to the words and phrases immediately preceding it to which it may, without impairing the meaning of the sentence, be applied.”); *see also Samano v. Sun Oil Co.*, 621 S.W.2d 580, 581–82 (Tex. 1981) (noting that that “the correct rule” is that “modifiers are intended to refer to the words closest to them in the sentence”). [↑](#footnote-ref-41)
42. Tex. Gov’t Code § 311.016(1). [↑](#footnote-ref-42)
43. ERCOT Bylaws § 13.1(d) (emphasis added). [↑](#footnote-ref-43)
44. *Id.* § 13.1(d) (emphasis added). [↑](#footnote-ref-44)
45. *Application of the ERCOT ISO for Certification as the Independent Organizations to Perform Transmission and Distribution Access, Reliability, Information Exchange, and Settlement Functions*, Docket No. 22061, Final Order (Feb. 2, 2001); *Petition of the Electric Reliability Council of Texas (ERCOT) for Approval of Governance Changes*, Docket No. 24932, Final Order (Dec. 17, 2001); *Petition of the Electric Reliability Council of Texas (ERCOT) for Approval of Governance Changes*, Docket No. 26861, Final Order (Dec. 9, 2002); *Petition of the Electric Reliability Council of Texas for Approval of Amended and Restated Bylaws*, Docket No. 32025, Final Order (May 15, 2006); *Petition of the Electric Reliability Council of Texas for Approval of Amended and Restated Bylaws*, Docket No. 34427, Final Order (Sept. 18, 2007); *Petition of the Electric Reliability Council of Texas for Approval of Amended and Restated Bylaws*, Docket No. 37852, Final Order (Apr. 16, 2010); *Petition of Electric Reliability Council of Texas, Inc. for Approval of Bylaws Amendments*, Docket No. 41761, Final Order (Oct. 17, 2013); *Petition of Electric Reliability Council of Texas, Inc. for Approval of Bylaws Amendments*, Docket No. 42548, Final Order (Sept. 11, 2014); *Petition of the Electric Reliability Council of Texas, Inc. for Approval of Bylaws Amendment*, Docket No. 44741, Final Order (Aug. 17, 2015); *Petition of Electric Reliability Council of Texas, Inc. for Approval of Amendments to Articles of Incorporation and Amended and Restated Bylaws*, Docket No. 48677, Final Order (Jan. 17, 2019); *Petition of Electric Reliability Council of Texas, Inc. for Expedited Approval of Bylaws Amendment*, Docket No. 50918, Final Order (Jul. 31, 2020); *Petition of the Electric Reliability Council of Texas, Inc for Expedited Approval of Bylaws Amendment*, Docket No. 52683, Final Order (Oct. 20. 2021). [↑](#footnote-ref-45)
46. Docket No. 32025, Interim Order (Dec. 20, 2005). [↑](#footnote-ref-46)
47. Docket No. 32025, Reply of the Electric Reliability Council of Texas to Comments of Commission Staff and Shannon McClendon at 8–9 (Nov. 9, 2005). [↑](#footnote-ref-47)
48. *Petition of Electric Reliability Council of Texas, Inc. for Approval of Bylaws Amendments*, Docket No. 41761, Petition at 1 (Aug. 13, 2013). [↑](#footnote-ref-48)
49. *Petition of the Electric Reliability Council of Texas, Inc for Expedited Approval of Bylaws Amendmen*t, Docket No. 52683, Petition at 4 (Oct. 20. 2021). [↑](#footnote-ref-49)
50. *Highland Crusader Offshore Partners, L.P. v. Andrews & Kurth, L.L.P.*, 248 S.W.3d 887, 891–92 (Tex. App. 2008) (“Giving the phrase ‘non-voting stock’ a literal interpretation maximizes the board's options in defining voting rights and gives the board clear guidance as to what is forbidden.”). [↑](#footnote-ref-50)
51. See *Calvert v. Capital Southwest Corp.*, 441 S.W.2d 247 (Tex. Civ. App.—Austin 1969, writ ref'd n.r.e.) (the relation between a corporation and its shareholders is contractual in nature); *Milton v. Aransas Shrimp Cooperative*, 668 S.W.2d 735, 740 (Tex. App.—Corpus Christi 1983) (“As for a corporation and its shareholders, the relation between a cooperative and its stockholders is contractual in nature.”); *Austin v. Strong*, 117 Tex. 263, 268, 1 S.W.2d 872, 874 (Comm'n App. 1928) (“The relation of stockholders to the corporation whose stock they hold is that of contract.”); *High Rd. on Dawson v. Benevolent & Protective Order of Elks of the United States of Am., Inc.*, 608 S.W.3d 869, 880 (Tex. App.—Houston [14th Dist.] 2020, pet. denied) (explaining that voluntary association's bylaws are contract between association and its members). [↑](#footnote-ref-51)
52. *See Dipprey v. Double Diamond, Inc.*, 637 S.W.3d 784, 794 (Tex. App.—Eastland 2021, no pet.). [↑](#footnote-ref-52)
53. *See Ralston Purina Co. v. McKendrick*, S.W.2d 629, 638 (Tex. App.—San Antonio 1993, writ denied). [↑](#footnote-ref-53)
54. *Denson v. Dallas City Credit Union*, 262 S.W.3d 846 (Tex. App. —Dallas 2008, no pet.). [↑](#footnote-ref-54)
55. *See e.g., Leonard v. Paxson*, 654 S.W.2d 440, 441 (Tex. 1983) (holding that a contract containing a provision related to venue was deemed void as against public policy because the venue provision conflicted with an express venue provision under Texas law). [↑](#footnote-ref-55)
56. *Sacks v. Dallas Gold & Silver Exch.*, 720 S.W.2d 177, 180 (Tex. App.—Dallas 1986, no writ.). [↑](#footnote-ref-56)
57. Act of May 31, 2021, 87th Leg, R.S., ch. 425, § 3, 2021 Tex. Gen. Laws \_\_\_\_, \_\_\_\_ (codified at Tex. Util. Code § 39.151(g-1)), <https://lrl.texas.gov/scanned/signedBills/87-0/SB2.pdf>. [↑](#footnote-ref-57)
58. *Governing Document Amendment Proposals Reports: All Amendment Proposals*, ERCOT, <https://www.ercot.com/committees/board/proposals/report/all> (last visited Sept. 28, 2022). [↑](#footnote-ref-58)
59. Mark Dreyfus for City of Eastland joining on behalf of 134 municipalities participating as Corporate Members in the Small Commercial Consumer and Large Commercial Consumer Segments. [↑](#footnote-ref-59)