

## Comments

<b>Title</b>	Comments on ERCOT's September 9, 2022 Board-Proposed Bylaws Amendment
<b>Date</b>	September 30, 2022

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<b>Comments</b>
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### Introduction

Bandera Electric Cooperative, Inc. (Bandera EC), Fayette Electric Cooperative, Inc. (Fayette EC), Golden Spread Electric Cooperative, Inc. (Golden Spread EC), Guadalupe Valley Electric Cooperative, Inc. (Guadalupe Valley EC), Pedernales Electric Cooperative, Inc. (PEC), Rayburn Country Electric Cooperative, Inc. (Rayburn EC), South Texas Electric Cooperative, Inc. (STEC), Southwest Texas Electric Cooperative, Inc. (Southwest Texas EC), Victoria Electric Cooperative, Inc. (Victoria EC), Wharton County

## Comments

Electric Cooperative, Inc. (Wharton County EC), and Texas Electric Cooperatives, Inc. (TEC) (together, the Cooperative Commenters) appreciate the opportunity to provide comments on the proposed amendment to the Amended and Restated Bylaws of the Electric Reliability Council of Texas, Inc. (ERCOT Bylaws) discussed in ERCOT Market Notice M-EO90922-01 issued on September 9, 2022. The Cooperative Commenters respectfully submit these comments to assist the ERCOT Board of Directors (ERCOT Board) in its consideration and adoption of the proposed amendment.

In submitting these comments, the Cooperative Commenters note the broad market consensus among the Joint Commenters and the significance of stakeholder consensus in the request for further consideration of the proposed Bylaws amendment.

The Cooperative Commenters support the legal analysis outlined in Section II of the comments submitted by the Joint Commenters. However, the Cooperative Commenters find that the statutory provisions governing the authority of the ERCOT Board affirmatively require that any proposed amendment to the ERCOT Bylaws must be approved by the Corporate Members. As such, the Cooperative Commenters are concerned that proceeding with approval of the proposed Bylaws without a vote by the Corporate Members could subject the ERCOT Board's decision to legal challenge.

The Texas Business Organizations Code (TBOC) Section 22.105(c) allows a board of directors to amend or repeal the bylaws, or adopt new bylaws, unless:

- 1) this chapter or the corporation's certificate of formation wholly or partly reserves the power exclusively to the corporation's members;
- 2) the management of the corporation is vested in the corporation's members; or
- 3) in amending, repealing, or adopting a bylaw, the members expressly provide that the BOD may not amend or repeal the bylaw.

As discussed further below, this language requires the express approval by the Corporate Members before any proposed amendment to the ERCOT Bylaws can take effect.

**ERCOT falls under exception (c)(1) because the Certificate of Formation reserves the exclusive power to amend the Bylaws.**

ERCOT's Certificate of Formation (COF), Article 9 states that 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." As noted by the Joint Commenters, the phrase "if allowed" modifies the words and phrases immediately preceding it, ie., "by the Members." Therefore, when the ERCOT Bylaws provided for the existence of Corporate Members (i.e., when ERCOT became certified as the independent system operator for the ERCOT Region), exclusive authority to amend the ERCOT Bylaws vested with the Corporate Members. Because Article 9 of the COF reserves the power to amend the Bylaws exclusively to ERCOT's Corporate Members, the ERCOT Board may not amend the Bylaws without approval from the Corporate Members.

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### **ERCOT falls under exception (c)(3) because the Corporate Members adopted Bylaws that do not allow the Board to amend without Corporate Member approval.**

In adopting the ERCOT Bylaws, the Members adopted Article 13 thereof, which lays out the method for amending the ERCOT Bylaws. The Members wrote and approved ERCOT Bylaws that do not allow the Board to amend or repeal the Bylaws, thereby reserving that power to the Members.

ERCOT Bylaws §13.1 expressly and consistently sets out the requirement for Member approval of any amendments to the Bylaws. Bylaws §13.1(a) states that “these Bylaws may be amended, altered, or repealed *by voting Segments*” through the process established in Bylaws §13.1(b)-(d). Subsection (b) sets out the process for proposing amendments, which requires that a Corporate Member submit amendment proposals to the CEO. Under subsection (c), if the Board approves a proposed amendment, the “Board *shall place the proposal* on the agenda of the next Annual Meeting of the Corporate Members” or seek Corporate Member approval at a special called meeting or through the procedures set out in §3.7, which allows approval by Corporate Members without a called meeting. Importantly, the Board has no discretion on whether to seek approval from the Corporate Members; instead, the Bylaws unequivocally provide that the Corporate Members must approve an amendment to the Bylaws.

Finally, ERCOT Bylaws §13.1(d)(4) clearly requires “[a]n affirmative vote of at least four of the seven [Corporate Member] Segments *shall be necessary* to amend these Bylaws.” Although “expressly” is not defined in the TBOC, the dictionary definition (which courts would use to determine the meaning of undefined terms) supports this position. Black’s Law Dictionary defines “express” as “clearly and unmistakably communicated; stated with directness and clarity.” The ERCOT Bylaws clearly, directly, and unmistakably provide that any Board-approved amendments to the ERCOT Bylaws must be voted on by the Corporate Members.

### **Amending the ERCOT Bylaws without Corporate Member approval will leave the Board action subject to challenge.**

The language in Article 9 of the COF and Section 13 of the ERCOT Bylaws provide strong evidence that the ERCOT Board must seek Corporate Member approval of any proposed amendments to the ERCOT Bylaws. The Cooperative Commenters therefore raise the concern that approving an amendment to the ERCOT Bylaws without Corporate Member approval will subject the ERCOT Board’s decision to legal challenge. The Cooperative Commenters recognize that the ERCOT Board has approved a Bylaws amendment on one occasion, the October 2021 approval of amendments to conform to the requirements of Senate Bill 2 (the “SB2 Bylaws Amendment”), without legal challenge.<sup>1</sup> However, the adoption of the SB2 Bylaws Amendment differs from the potential adoption of the currently proposed amendments without Corporate Member approval.

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<sup>1</sup> *Petition of the Electric Reliability Council of Texas, Inc for Expedited Approval of Bylaws Amendment*, Docket No. 52683, Pet. at 1 (Oct. 20. 2021), [https://interchange.puc.texas.gov/Documents/52683\\_2\\_1157859.PDF](https://interchange.puc.texas.gov/Documents/52683_2_1157859.PDF).

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Unlike the SB2 Amendment, revisions in the current proposed Bylaws amendment fundamentally alter the membership rights of Corporate Members. Corporate Members from multiple market segments have submitted comments urging the ERCOT Board to use caution when considering this approach or to outright forego approving the proposed amendment. The volume of comments demonstrates that this is a controversial proposal with a much greater risk of legal challenge than the SB 2 Amendment, especially in light of the express language found in Section 22.105(c) of the Texas Business Organizations Code.

Additionally, the SB 2 Amendment was required to be adopted by ERCOT prior to September 1, 2021 or face potential decertification from the PUC.<sup>2</sup> In contrast, the current revisions are under no similar required timeframe. ERCOT has the ability to follow the proper processes for amending the Bylaws.

### **The PUCT and ERCOT have previously acknowledged that Corporate Member approval is required to amend the Bylaws.**

As described more fully in comments filed by the Joint Commenters, with the lone exception of the approval of the SB2 Amendment, the ERCOT Board has consistently followed the procedures set out in Section 13 when seeking to amend the ERCOT Bylaws.<sup>3</sup> The requirement for Corporate Member approval has long been recognized by both ERCOT and the PUCT. In 2005, ERCOT and the PUCT directly addressed the issue in response to stakeholder concerns that ERCOT had not properly followed the procedures for amending the ERCOT Bylaws.<sup>4</sup> In seeking PUCT approval of the amended Bylaws, ERCOT described the requirement for Corporate Member approval of a Bylaws amendment:

Section 12.1 of the current ERCOT Bylaws requires amendments to the Bylaws to follow an orderly process. First, the Board approves the amendments; then, the Corporate Members vote on the amendments. *The amendments must be approved by the requisite number of member Segments (four) to take effect.* ERCOT followed this procedure without deviation as evidenced in its Petition.<sup>5</sup> (Emphasis added.)

ERCOT unequivocally recognized that Corporate Member approval is required to amend the Bylaws. The PUCT affirmed the requirement in its analysis of the stakeholder procedural concern, which dealt with whether the Corporate Member vote could be held without a meeting. In finding that the Bylaws “were amended in accordance with applicable procedures in the bylaws,” the Commission reasoned that “no party asserted

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<sup>2</sup> Tex. S.B. 2 at Section 5, 87th Leg., R.S. (2021).

<sup>3</sup> *Petition of the Electric Reliability Council of Texas for Approval of Amended and Restated Bylaws*, Docket No. 32025, Reply of ERCOT to Comments of Commission Staff and Shannon McClendon at 9 (Dec. 9, 2005). (Note: Sec. 12.1 of the then existing ERCOT Bylaws are identical to the current provisions in Sect. 13.)

<sup>4</sup> *Id.*

<sup>5</sup> *Id.*

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the requisite number of corporate members did not...vote in favor of the bylaws.”<sup>6</sup> Thus, the Commission’s decision of whether the amendment was properly adopted hinged on the fact that the appropriate number of Corporate Members had voted to approve the amendment.

Adopting a Bylaws amendment without Corporate Member approval is a deviation from the practices and procedures that have been considered and approved by the Commission.

### **Conclusion**

The Cooperative Commenters respectfully urge the ERCOT Board to follow the procedures for amendment of the ERCOT Bylaws as they are set out in Section 13 of the Bylaws. Amending the Bylaws without the necessary approval from the Corporate Members is prohibited by the TBOC and will result in increased risk that the Board’s action will be challenged and invalidated.

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<sup>6</sup> *Petition of the Electric Reliability Council of Texas for Approval of Amended and Restated Bylaws*, Docket No. 32025, Interim Order at 4 (Dec. 20, 2005).