

Public Utility Commission of Texas

Commissioner Memorandum

TO: Commissioner Will McAdams
Commissioner Lori Cobos
Commissioner Jimmy Glotfelty
Commissioner Kathleen Jackson

FROM: Chairman Peter M. Lake

DATE: November 9, 2022

RE: November 10, 2022 Open Meeting – Item No. 3
Project No. 52933, *CY 2022 Reports of the Electric Reliability Council of Texas*

This memo responds to the ERCOT board’s formal request for Commission input on the proposed bylaws filed in this project on November 8, 2022. Having reviewed the proposed changes, I am satisfied that the bylaws proposal captures the right balance between director governance and continued market participant representation in the Technical Advisory Committee (TAC). I also want to expand on why the proposed bylaws are consistent with the objectives set forth in PURA,¹ as most recently amended in Senate Bill 2 in the 87th Legislature.

To serve as a check and balance on ERCOT governance activities, PURA requires that we approve ERCOT bylaws and that they reflect our input.² These requirements were added in 2005, at a time when market participants and industry segment representatives comprised a majority of ERCOT’s board.³ The Sunset Advisory Commission Report leading into the 2005 session acknowledged that this board composition had the potential to “create an environment that focuses more on balancing the specific needs of different market participants rather than the best interests of the public or the ratepayers that fund the system.”⁴ To mitigate this risk, Sunset Staff recommended changing the ERCOT board to an independent board that was unaffiliated with the ERCOT market.⁵ While the Legislature did not adopt this recommendation at that time, it did enhance public accountability by requiring the Commission to exercise greater oversight authority over ERCOT. This included the requirement that ERCOT bylaws be approved by the Commission and that they reflect the input of the Commission. The reasonable inference is that the Commission would function as a check to ensure that ERCOT’s market-affiliated directors would act to advance public interests rather than industry interests.

In the wake of Winter Storm Uri, the Legislature took further action to secure ERCOT’s public accountability by moving to a fully independent board.⁶ Representatives of private industry would

¹ Public Utility Regulatory Act (PURA), Tex. Util. Code §§ 11.001–66.016.

² PURA § 39.151(g-1).

³ Act of September 1, 2005, 79th Leg., R.S. ch. 797 (SB 408), Sec. 9.

⁴ Sunset Advisory Commission Staff Report on the Public Utility Commission of Texas, at 10 (April 2004).

⁵ *Id.* at 12.

⁶ Act of June 8, 2021, 87th Leg., R.S., ch. 425 (SB 2), Sec. 3.

no longer make up ERCOT's governing body. Instead, a selection committee representing state leadership would identify qualified directors. Importantly, these new directors could not serve if they had a fiduciary duty to an ERCOT market participant or owned assets dedicated to a competitive enterprise in the ERCOT electricity market.⁷ Again, the Legislature's message was plain: ERCOT's governance should not be entrusted to those who stand to profit from ERCOT policy decisions.

This brings us to ERCOT's current bylaws proposal, which removes the corporate members' ability to approve ERCOT bylaws changes. This amendment is undoubtedly consistent with Senate Bill 2's restructuring of the ERCOT board because it recognizes that ERCOT governance decisions should rest solely with independent directors who are removed from any profit incentive that might result from their own policy decisions. Accordingly, the proposed bylaws properly eliminate the procedure allowing corporate members to approve bylaws amendments that the independent ERCOT board deems necessary. This recognizes that the ERCOT board is solely empowered to amend its bylaws, and the only entity that should hold approval power over bylaws amendments is the one expressly authorized to do so in PURA—this Commission.

At the same time, I very much recognize the significant value that private industry brings to the table when developing ERCOT market rules. TAC has been an invaluable asset to the establishment of market functions that have promoted reliable and affordable power delivery in ERCOT. So I entirely support proposed bylaws section 13.1(a), which solidifies the role of stakeholder development of ERCOT market rules by prohibiting the ERCOT board from eliminating TAC without specific direction from the Commission. This amendment rightly acknowledges that market participant input has benefitted us in the past and will continue to do so in the future.

Given these considerations, I wholeheartedly support ERCOT's proposed bylaws changes. I also believe it's critical to fulfill our statutory obligation to provide input to ERCOT on how it should amend its bylaws. Accordingly, at tomorrow's meeting, I propose that we offer guidance to ERCOT by memorializing our input in written form. I would offer the following as a basis for our statement of input:

- PURA requires that the ERCOT bylaws reflect the input of this Commission;
- As the governing body of the independent organization certified under Chapter 39 of PURA, the ERCOT board is empowered to amend its bylaws without obtaining the affirmative vote of the corporate members;
- It is necessary for ERCOT to amend its bylaws such that the ERCOT board of directors has the sole authority to change the bylaws, subject only to the approval of the Commission; and
- It is necessary for ERCOT to preserve the role of market participant input in the development of ERCOT market functions by amending the bylaws such that the ERCOT board cannot eliminate TAC without specific direction from the Commission.

I look forward to discussing this matter with you at the open meeting.

⁷ PURA § 39.151(g-3).