

BILL ANALYSIS

Senate Research Center

S.B. 1580
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Business & Commerce
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Enrolled

AUTHOR'S / SPONSOR'S STATEMENT OF INTENT

S.B. 1580 provides electric cooperatives the option to utilize the financial tool of securitized financing to fund the unprecedented impact of Winter Storm Uri.

Cooperatives are consumer-owned, non-profit structures, and therefore these entities' cost of service is borne entirely by their ratepayers. The extraordinary costs incurred during the winter freeze will be built into the rates of electric co-op members entirely. Securitization of these costs would enable electric cooperatives to manage the impact of the storm in a least-cost fashion, without any cost to the state.

The mechanism to do this is the issuance of rate reduction bonds. Long-term debt instruments that will be paid back over many years rather than being built into customer bills all at once.

Securitization offers a path to long-term financing that the worst hit cooperatives may not have at all, absent this mechanism. Securitization is by no means unprecedented in either the utility industry at large or for electric cooperatives. Investor-owned utilities have used this mechanism to fund the cost of weather-related disasters such as hurricanes, and cooperatives were authorized by the legislature to use it back in the late 1990s as an option to recover any stranded investments resulting from utility deregulation.

Securitization provides a market-based vehicle for access to the lowest cost and otherwise unavailable financing and allows a cooperative's members to spread these costs over a broad horizon to minimize the impact on their pocketbooks in the near-term.

In the absence of this legislation, it is unlikely many cooperatives will be able to finance the costs of the storm, and their consumers would have serious difficulty bearing the costs if they were simply passed on. This is the best option for cooperatives to continue taking care of their own costs.

(Original Author's / Sponsor's Statement of Intent)

S.B. 1580 amends current law relating to the use of securitization by electric cooperatives to address certain weather-related extraordinary costs and expenses and to the duty of electric utility market participants to pay certain amounts owed.

RULEMAKING AUTHORITY

Rulemaking authority is expressly granted to the secretary of state in SECTION 1 (Section 41.159, Utilities Code) of this bill.

SECTION BY SECTION ANALYSIS

SECTION 1. Amends Chapter 41, Utilities Code, by adding Subchapter D, as follows:

SUBCHAPTER D. MARKET PARTICIPATION AND SECURITIZATION

Sec. 41.151. PURPOSE. (a) Provides that the purpose of this subchapter is to enable electric cooperatives to use securitization financing to recover extraordinary costs and

expenses incurred due to the abnormal weather that occurred in this state in the period beginning 12:00 a.m., February 12, 2021, and ending at 11:59 p.m., February 20, 2021. Provides that this type of debt will reduce the cost of financing the extraordinary costs and expenses relative to the costs that would be incurred using conventional electric cooperative financing methods. Requires that the proceeds of the securitized bonds be used solely for the purposes of financing or refinancing the extraordinary costs and expenses, including costs relating to consummation and administration of the securitized financing. Requires the board of directors of each electric cooperative (board) involved in the financing to ensure that securitization provides tangible and quantifiable benefits to its members, greater than would have been achieved absent the issuance of securitized bonds. Requires each board that chooses to securitize under this subchapter to ensure that the structuring and pricing of the securitized bonds are consistent with market conditions and the terms of the financing order. Authorizes this subchapter to be used by a group of electric cooperatives to issue securitized bonds in a combined securitization transaction.

(b) Requires a cooperative that owes the independent organization certified under Section 39.151 (Essential Organizations), Utilities Code, for the Electric Reliability Council of Texas (ERCOT) power region amounts incurred as a result of operations during the period beginning 12:01 a.m., February 12, 2021, and ending at 11:59 p.m., February 20, 2021, to:

(1) use all means necessary to securitize the amount owed the independent organization, calculated solely according to the protocols of the independent organization in effect during the period of emergency promulgated subject to the approval of the Public Utility Commission of Texas (PUC); and

(2) fully repay the amount described by Subdivision (1) immediately upon receipt of the securitized amount along with any additional amounts necessary to fully satisfy the amount owed.

Sec. 41.152. DEFINITIONS. Defines "assignee," "board," "combined securitization transaction," "extraordinary costs and expenses," "financing order," "financing party," "qualified costs," "period of emergency," "securitized bonds," "securitized charges," and "securitized property."

Sec. 41.153. FINANCING ORDERS; TERMS. (a) Requires the board to adopt a financing order to recover the electric cooperative's qualified costs consistent with the standards in Section 41.151.

(b) Requires that the financing order detail the amount of qualified costs to be recovered and the period over which the nonbypassable securitized charges are required to be recovered, which period is prohibited from exceeding 30 years.

(c) Requires that securitized charges be collected and allocated among customers in the manner provided by the financing order.

(d) Provides that a financing order becomes effective in accordance with its terms, and the financing order, together with the securitized charges authorized in the order, after it takes effect, is irrevocable and not subject to denial, rescission, reduction, impairment, adjustment, or other alteration by further action of the board or by action of any regulatory or other governmental body of this state, except as permitted by Section 41.157. Provides that a financing order issued under this subchapter has the same force and effect of a financing order issued under Chapter 39 (Restructuring of Electric Utility Industry).

(e) Authorizes a financing order to be reviewed by appeal by a member of the electric cooperative to a district court in the county where the electric cooperative is domiciled, filed not later than the 15th day after the date the financing order is adopted by the board. Authorizes the judgment of the district court to be reviewed

only by direct appeal to the Supreme Court of Texas filed not later than the 15th day after the date of the entry of judgment. Requires that all appeals be heard and determined by the district court and the Supreme Court of Texas as expeditiously as possible with lawful precedence over other matters. Requires that review on appeal be based solely on the financing order adopted by the board, other information considered by the board in adopting the resolutions, and briefs to the court and be limited to whether the financing order conforms to the constitution and laws of this state and the United States and is within the authority of the board under this subchapter.

(f) Authorizes the board or, in a combined securitization transaction, the boards of all participating electric cooperatives, to adopt a financing order or financing orders providing for retiring and refunding securitized bonds on making a finding that the future securitized charges required to service the new securitized bonds, including transaction costs, will be less than the future securitized charges required to service the securitized bonds being refunded. Requires the board, after the indefeasible repayment in full of all outstanding securitized bonds and associated financing costs, to adjust the related securitized charges accordingly.

Sec. 41.154. PROPERTY RIGHTS. (a) Requires that the rights and interests of an electric cooperative or its subsidiary, affiliate, successor, financing party, or assignee under a financing order, including the right to impose, collect, receive, and enforce the payment of securitized charges authorized in the financing order, be only contract rights until the property is first transferred or pledged to an assignee or financing party, as applicable, in connection with the issuance of securitized bonds, at which time the property becomes securitized property.

(b) Requires that securitized property that is specified in the financing order constitutes a present vested property right for all purposes, including, for purposes of Sections 16 (Bills of Attainder; Ex Post Facto or Retroactive Laws; Impairing Obligation of Contracts) and 17 (Taking Property for Public Use; Special Privileges and Immunities; Control of Privileges and Franchises), Article I, Texas Constitution, Section 10, Article I (Bill of Rights), United States Constitution, and the Fifth Amendment to the United States Constitution, and the laws of this state and the United States, even if the imposition and collection of securitized charges depend on further acts of the electric cooperative or others that may not have yet occurred.

(c) Requires that securitized property exist regardless of whether securitized charges have been billed, have accrued, or have been collected and notwithstanding the fact that the value or amount of the property is dependent on the future provision of service to customers by the electric cooperative or its successors or assigns.

(d) Provides that, on the issuance of the securitized bonds and the financing order, and when the requirements of Section 41.159 are met, the securitized charges, including their nonbypassability, are irrevocable, final, nondiscretionary, and effective without further action by the electric cooperative or any other person or governmental authority. Requires that the financing order remain in effect and the property continue to exist for the same period as the pledge of the state described in Section 41.160.

(e) Requires that all revenue, collections, claims, payments, money, or proceeds of or arising from or relating to securitized charges constitute proceeds of the securitized property arising from the financing order.

Sec. 41.155. NO SETOFF. Provides that the interest of an assignee or pledgee in securitized property and in the revenues and collections arising from that property are not subject to setoff, counterclaim, surcharge, recoupment, or defense by the electric cooperative or any other person or in connection with the bankruptcy of the electric

cooperative or any other entity. Requires that a financing order remain in effect and unabated notwithstanding the bankruptcy of the electric cooperative, its successors, or assignees.

Sec. 41.156. NO BYPASS. (a) Requires that a financing order include terms ensuring that the imposition and collection of securitized charges authorized in the order is required to be nonbypassable and apply to all customers connected to the electric cooperative's system assets and taking service, regardless of whether the system assets continue to be owned by the electric cooperative.

(b) Provides that the electric cooperative, its servicer, any entity providing electric transmission or distribution services, and any retail electric provider providing services to a retail customer in the electric cooperative's certificated service area as it existed on the date of enactment of this subchapter are entitled to collect and are required to remit, consistent with this subchapter and any financing order adopted under this subchapter, the securitized charges from the retail customers and from retail customers that switch to new on-site generation. Provides that such retail customers are required to pay the securitized charges.

Sec. 41.157. TRUE-UP. (a) Requires that a financing order be reviewed and adjusted promptly if after its adoption there are additional charges, reductions, or refunds of extraordinary costs and expenses, to:

(1) ensure that there is not an over-collection or an under-collection of extraordinary costs and expenses; and

(2) ensure that collections on the securitized property will be sufficient to timely make all periodic and final payments of principal, interest, fees, and other amounts and to timely fund all reserve accounts, if any, related to the securitized bonds.

(b) Requires that a financing order also include a mechanism requiring that securitized charges be reviewed by the board and adjusted at least annually, not later than the 45th day after the anniversary date of the issuance of the securitized bonds, to:

(1) correct over-collections or under-collections of the preceding 12 months; and

(2) ensure the expected recovery of amounts sufficient to timely provide all payments of debt service and other required amounts and charges in connection with the securitized bonds.

(c) Authorizes the electric cooperatives that are members of a generation and transmission cooperative to include in their financing orders the ability to allocate any true-up amounts over the retail customers of all electric cooperatives that are members of the same generation and transmission cooperative.

(d) Authorizes each generation and transmission cooperative, in a combined securitization transaction, to calculate all adjustments and determinations relevant to each true-up by each electric cooperative member of the generation and transmission cooperative participating in the securitization transaction, with the adjustments being allocated across the electric cooperatives in the manner agreed to by all of the participating electric cooperatives under their financing orders.

(e) Prohibits a governmental authority from disapproving of or altering any adjustments made or proposed to be made under this subchapter other than to correct computation or other manifest errors.

Sec. 41.158. TRUE SALE. Provides that an agreement by an electric cooperative or assignee to transfer securitized property that expressly states that the transfer is a sale or other absolute transfer signifies that the transaction is a true sale and is not a secured transaction and that title, legal and equitable, has passed to the entity to which the securitized property is transferred. Requires that the transaction be treated as an absolute sale regardless of whether the purchaser has any recourse against the seller, or any other term of the parties' agreement, including the seller's retention of an equity interest in the securitized property, the fact that the electric cooperative acts as the collector of securitized charges relating to the securitized property, or the treatment of the transfer as a financing for tax, financial reporting, or other purposes.

Sec. 41.159. SECURITY INTERESTS; ASSIGNMENT; COMMINGLING; DEFAULT.

(a) Provides that securitized property does not constitute an account or general intangible under Section 9.106 (Control of Investment Property), Business & Commerce Code. Provides that the transfer, sale, or assignment, or the creation, granting, perfection, and enforcement of liens and security interests in securitized property are governed by this section and not by the Business & Commerce Code. Requires that securitized property constitute property for all purposes, including for contracts securing securitized bonds, regardless of whether the securitized property revenues and proceeds have accrued.

(b) Authorizes a valid and enforceable transfer, sale, or assignment, or lien and security interest, as applicable, in securitized property to be created only by a financing order and the execution and delivery of a transfer, sale, or assignment, or security agreement, as applicable, with a financing party in connection with the issuance of securitized bonds. Requires that the transfer, sale, assignment, or lien and security interest, as applicable, attach automatically from the time that value is received for the securitized bonds and, on perfection through the filing of notice with the secretary of state (SOS) in accordance with the rules prescribed under Subsection (d), be a continuously perfected transfer, sale, and assignment or lien and security interest, as applicable, in the securitized property and all proceeds of the property, whether accrued or not, have priority in the order of filing and take precedence over any subsequent judicial or other lien creditor. Requires that the transfer, sale, or assignment, or security interest, as applicable, if notice is filed before the 10th day after the date value is received for the securitized bonds, be perfected retroactive to the date value was received. Requires that the transfer, sale, or assignment, or security interest, as applicable, otherwise, be perfected as of the date of filing.

(c) Requires that transfer, sale, or assignment of an interest in securitized property to an assignee be perfected against all third parties, including subsequent judicial or other lien creditors, when the financing order becomes effective, transfer documents have been delivered to the assignee, and a notice of that transfer has been filed in accordance with the rules prescribed under Subsection (d). Provides that, however, if notice of the transfer has not been filed in accordance with this subsection before the 10th day after the delivery of transfer documentation, the transfer of the interest is not perfected against third parties until the notice is filed.

(d) Requires SOS to implement this section by establishing and maintaining a separate system of records for the filing of notices under this section and prescribing the rules for those filings based on Chapter 9 (Secured Transactions), Business & Commerce Code, adapted to this subchapter and using the terms defined in this subchapter.

(e) Provides that the priority of a lien and security interest perfected under this section is not impaired by any later modification of the financing order under Section 41.157 or by the commingling of funds arising from securitized charges with other funds, and any other security interest that is authorized to apply to those funds is required to be terminated when they are transferred to a segregated account for the assignee or a financing party. Requires that any proceeds of

securitized property, if that property has been transferred to an assignee, be held in trust for the assignee.

(f) Requires that securitized bonds be secured by a statutory lien on the securitized property in favor of the owners or beneficial owners of securitized bonds. Requires that the lien automatically arise on issuance of the securitized bonds without the need for any action or authorization by the electric cooperative or the board. Requires that the lien be valid and binding from the time the securitized bonds are executed and delivered. Requires that the securitized property be immediately subject to the lien, and that the lien immediately attach to the securitized property and be effective, binding, and enforceable against the electric cooperative, its creditors, their successors, assignees, and all others asserting rights therein, regardless of whether those persons have notice of the lien and without the need for any physical delivery, recordation, filing, or further act. Provides that the lien is created by this subchapter and not by any security agreement, but is authorized to be enforced by any financing party or their representatives as if they were secured parties under Chapter 9, Business & Commerce Code. Authorizes a district court in the county where the electric cooperative is domiciled, on application by or on behalf of the financing parties, to order that amounts arising from securitized charges be transferred to a separate account for the financing parties' benefit.

(g) Provides that the statutory lien is a continuously perfected security interest and has priority over any other lien, created by operation of law or otherwise, that may subsequently attach to that securitized property or proceeds thereof unless the owners or beneficial owners of securitized bonds as specified in the trust agreement or indenture have agreed in writing otherwise. Provides that the statutory lien is a lien on the securitized charges and all securitized charge revenues or other proceeds that are deposited in any deposit account or other account of the servicer or other person in which securitized charge revenues or other proceeds have been commingled with other funds.

(h) Provides that the statutory lien is not adversely affected or impaired by, among other things, the commingling of securitized charge revenues or other proceeds from securitized charges with other amounts regardless of the person holding those amounts.

(i) Requires that the electric cooperative, any successor or assignee of the electric cooperative, or any other person with any operational control of any portion of the electric cooperative's system assets, whether as owner, lessee, franchisee, or otherwise, and any successor servicer of collections of the securitized charges be bound by the requirements of this subchapter and perform and satisfy all obligations imposed under this subchapter in the same manner and to the same extent as did its predecessor, including the obligation to bill, adjust, and enforce the payment of securitized charges.

(j) Authorizes the financing parties or their representatives, if a default or termination occurs under the securitized bonds, to foreclose on or otherwise enforce their lien and security interest in any securitized property as if they were secured parties under Chapter 9, Business & Commerce Code, and on application by the electric cooperative or by or on behalf of the financing parties, a district court in the county where the electric cooperative is domiciled is authorized to order that amounts arising from securitized charges be transferred to a separate account for the financing parties' benefit, to which their lien and security interest are required to apply. Requires a district court in the county where the electric cooperative is domiciled, on application by or on behalf of the financing parties, to order the sequestration and payment to them of revenues arising from the securitized charges.

Sec. 41.160. PLEDGE OF STATE. Provides that securitized bonds are not a debt or obligation of the state and are not a charge on its full faith and credit or taxing power. Provides that the state pledges, however, for the benefit and protection of assignees, financing parties, and the electric cooperative, that it will not take or permit, or permit any agency or other governmental authority or political subdivision of the state to take or permit, any action that would impair the value of securitized property, or, except as permitted by Section 41.157, reduce, alter, or impair the securitized charges to be imposed, collected, and remitted to financing parties, until the principal, interest and premium, and any other charges incurred and contracts to be performed in connection with the related securitized bonds have been paid and performed in full. Provides that any party issuing securitized bonds is authorized to include this pledge in any documentation relating to those bonds.

Sec. 41.161. TAX EXEMPTION. Provides that transactions involving the transfer and ownership of securitized property and the receipt of securitized charges are exempt from state and local income, sales, franchise, gross receipts, and other taxes or similar charges.

Sec. 41.162. NOT PUBLIC UTILITY. Prohibits an assignee or financing party from being considered to be a public utility, electric cooperative, or person providing electric service solely by virtue of the transactions described in this subchapter.

Sec. 41.163. SEVERABILITY. Provides that, effective on the date the first securitized bonds are issued under this subchapter, if any provision in Title 2 (Public Utility Regulatory Act) or portion of Title 2 is held to be invalid or is invalidated, superseded, replaced, repealed, or expires for any reason, that occurrence does not affect the validity or continuation of this subchapter, or any other provision of Title 2 that is relevant to the issuance, administration, payment, retirement, or refunding of securitized bonds or to any actions of the electric cooperative, its successors, an assignee, a collection agent, or a financing party, which are required to remain in full force and effect.

SECTION 2. Amends Section 39.002, Utilities Code, to provide that Chapter 39, other than certain sections, including Sections 39.159 and 39.160, does not apply to a municipally owned utility or an electric cooperative.

SECTION 3. Amends Subchapter D, Chapter 39, Utilities Code, by adding Sections 39.159 and 39.160, as follows:

Sec. 39.159. CHARGES FOR CERTAIN MARKET PARTICIPANTS. Prohibits any default or uplift charge or repayment, notwithstanding any other law, from being allocated to or collected from a market participant that:

- (1) otherwise would be subject to an uplift charge solely as a result of acting as a central counterparty clearinghouse in wholesale market transactions in the ERCOT power region; and
- (2) is regulated as a derivatives clearing organization, as defined by the Commodity Exchange Act (7 U.S.C. Section 1a).

Sec. 39.160. DEFAULT OF MARKET PARTICIPANT. (a) Requires the PUC to require that all market participants pay or make provision for the full and prompt payment of amounts owed calculated solely according to the protocols in effect during the period of emergency to the independent organization certified under Section 39.151 for the ERCOT power region to qualify, or to continue to qualify, as a market participant in the ERCOT power region.

- (b) Requires the independent organization, if a market participant has failed to fully repay all amounts calculated solely under the protocols in effect during the period of emergency of the independent organization certified under Section 39.151 for the ERCOT power region, to report the market participant as in default to the PUC. Prohibits the PUC from allowing the independent organization to

accept the defaulting market participant's loads or generation for scheduling in the ERCOT power region, or allowing the defaulting market participant to be a market participant in the ERCOT power region for any purpose, until all amounts owed to the independent organization by the market participant as calculated under the protocols are paid in full.

(c) Requires the PUC and the independent organization certified under Section 39.151 for the ERCOT power region to pursue collection in full of amounts owed to the independent organization by the defaulting market participant.

SECTION 4. Effective date: upon passage or September 1, 2021.