

BILL ANALYSIS

Senate Research Center

H.B. 4492
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Business & Commerce
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Engrossed

AUTHOR'S / SPONSOR'S STATEMENT OF INTENT

ERCOT receives and issues payments to market participants. If a market participant is unable to pay for the transaction, there remains a short-paid invoice. There is a market uplift mechanism that allows for participants to pay off those debts, but it is limited to \$2.5 million per month.

After February's winter storm, the amount of short-paying invoice recipients and estimated cumulative aggregate short pay amount grew to an amount that would not allow ERCOT to uplift these costs to the market in a reasonable amount of time.

H.B. 4492 would create the Texas Electric Securitization Corporation (corporation) to provide a lower cost financing mechanism for securitizing unpaid and short-paid invoices to ERCOT. The bill would allow the securitization corporation to issue bonds. The corporation would be incorporated as a nonprofit corporation of the state, and its duties would be limited to financing costs associated with unpaid invoices to ERCOT.

The corporation would be self-funded, and the state would not appropriate any funds to pay for it. The financing corporation would be governed by a board of directors consisting of five members appointed by the Public Utility Commission.

The issuance of the bonds must be used solely for the purposes of financing default balances that would otherwise be uplifted to the ERCOT wholesale market, and the Public Utility Commission will ensure that securitization provides financial benefits to wholesale market participants, greater than would have been otherwise achieved without this financing mechanism.

H.B. 4492 amends current law relating to securitizing costs associated with electric markets and grants authority to issue bonds.

RULEMAKING AUTHORITY

Rulemaking authority is expressly granted to the secretary of state in SECTION 4 (Section 39.608, Utilities Code) of this bill.

SECTION BY SECTION ANALYSIS

SECTION 1. Amends Chapter 31, Utilities Code, by adding Subchapter C, as follows:

SUBCHAPTER C. SECURITIZATION CORPORATION

Sec. 31.101. PURPOSE. (a) Provides that the purpose of this subchapter is to create a corporation dedicated to financing costs that are eligible for securitization as provided by Subchapter M, Chapter 39 (Restructuring of Electric Utility Industry), to securitize costs not securitized under Subchapter D, Chapter 41 (Electric Cooperatives and Competition). Authorizes an entity authorized to securitize costs under Subchapter M, Chapter 39, subject to any other requirements applicable to the authorization, to request that the Texas Electric Securitization Corporation (corporation) conduct the financing on behalf of the entity.

(b) Provides that the corporation is created under this subchapter as a special purpose public corporation and instrumentality of the state for the essential public purpose of providing a lower-cost financing mechanism for securitization in the manner provided by this subchapter.

(c) Provides that bonds issued under this subchapter will be the obligation solely of the issuer and the corporation as borrower, if applicable, and will not be a debt of or a pledge of the faith and credit of the state.

(d) Requires that bonds issued under this subchapter be nonrecourse to the credit or any assets of the state and the Public Utility Commission of Texas (PUC).

Sec. 31.102. DEFINITIONS. Defines "corporation" and "issuer."

Sec. 31.103. CREATION OF CORPORATION. (a) Provides that the corporation is a nonprofit corporation and instrumentality of this state, and is required to perform the essential governmental function of financing eligible costs in accordance with this subchapter. Provides that the corporation:

(1) is required to perform only functions consistent with this subchapter;

(2) is required to exercise its powers through a governing board;

(3) is subject to the regulation of the PUC; and

(4) has a legal existence as a public corporate body and instrumentality of the state separate and distinct from the state.

(b) Prohibits assets of the corporation from being considered part of any state fund. Prohibits the state from budgeting for or providing any state money to the corporation. Prohibits the debts, claims, obligations, and liabilities of the corporation from being considered to be a debt of the state or a pledge of its credit.

(c) Requires the corporation to be self-funded. Authorizes the corporation, before the imposition of charges to recover securitized amounts, to accept and expend for its operating expenses money that is authorized to be received from any source, including financing agreements with the state, a commercial bank, or another entity to finance the corporation's obligations until the corporation receives sufficient property to cover its operating expenses as financing costs and to repay any short-term borrowing under any such financing agreements.

(d) Provides that the corporation has the powers, rights, and privileges provided for a corporation organized under Chapter 22 (Nonprofit Corporations), Business Organizations Code, subject to the express exceptions and limitations provided by this subchapter.

(e) Requires an organizer selected by the executive director of the PUC to prepare the certificate of formation of the corporation under Chapters 3 (Formation and Governance) and 22, Business Organizations Code. Requires that the certificate of formation be consistent with the provisions of this subchapter.

(f) Authorizes state officers and agencies to render services to the corporation, within their respective functions, as is authorized to be requested by the PUC or the corporation.

(g) Authorizes the corporation or an issuer to:

(1) retain professionals, financial advisors, and accountants the corporation or issuer considers necessary to fulfill the corporation's or issuer's duties under this subchapter; and

(2) determine the duties and compensation of a person retained under Subdivision (1), subject to the approval of the PUC.

(h) Provides that the corporation is governed by a board of five directors appointed by the PUC for two-year terms.

(i) Provides that an official action of the board requires the favorable vote of a majority of the directors present and voting at a meeting of the board.

Sec. 31.104. POWERS AND DUTIES OF CORPORATION. (a) Requires the corporation, in each instance subject to the prior authorization of the PUC, to participate in the financial transactions authorized by this subchapter. Prohibits the corporation from engaging in business activities except those activities provided for by this subchapter and those ancillary and incidental to those activities. Prohibits the corporation or an issuer from applying proceeds of bonds or charges to a purpose not specified in a financing order, to a purpose in an amount that exceeds the amount allowed for the purpose in the order, or to a purpose in contravention of the order.

(b) Authorizes the board of the corporation, under the provisions of this subchapter, to employ or retain persons as are necessary to perform the duties of the corporation.

(c) Authorizes the corporation to:

(1) acquire, sell, pledge, or transfer property as necessary to effect the purposes of this subchapter and, in connection with the action, agree to such terms and conditions as the corporation deems necessary and proper, consistent with the terms of a financing order:

(A) to acquire property and to pledge such property, and any other collateral to secure payment of bonds issued by the corporation, together with payment of any other qualified costs or to secure repayment of any borrowing from any other issuer of bonds; or

(B) to sell the property to another issuer, which is authorized to in turn pledge that property, together with any other collateral, to the repayment of bonds issued by the issuer together with any other qualified costs;

(2) issue bonds on terms and conditions consistent with a financing order;

(3) borrow funds from an issuer of bonds to acquire property, and pledge that property to the repayment of any borrowing from an issuer, together with any related qualified costs, all on terms and conditions consistent with a financing order, or borrow funds for initial operating expenses;

(4) sue or be sued in its corporate name;

(5) intervene as a party before the PUC or any court in this state in any matter involving the corporation's powers and duties;

(6) negotiate and become a party to contracts as necessary, convenient, or desirable to carry out the purposes of this subchapter; and

(7) engage in corporate actions or undertakings that are permitted for nonprofit corporations in this state and that are not prohibited by, or contrary to, this subchapter.

(d) Requires the corporation to maintain separate accounts and records relating to each entity that collects charges for all charges, revenues, assets, liabilities, and expenses relating to the entity's related bond issuances.

(e) Prohibits the board of the corporation from authorizing any rehabilitation, liquidation, or dissolution of the corporation and prohibits a rehabilitation, liquidation, or dissolution of the corporation from taking effect as long as any bonds are outstanding unless adequate protection and provision have been made for the payment of the bonds pursuant to the documents authorizing the issuance of the bonds. Requires that the assets of the corporation, in the event of any rehabilitation, liquidation, or dissolution, be applied first to pay all debts, liabilities, and obligations of the corporation, including the establishment of reasonable reserves for any contingent liabilities or obligations, and requires that all remaining funds of the corporation be applied and distributed as provided by an order of the PUC.

(f) Prohibits the corporation, before the date that is two years and one day after the date that the corporation no longer has any payment obligation with respect to any bonds, including any obligation to an issuer of any bonds outstanding, from filing a voluntary petition under federal bankruptcy law and prohibits any public official nor any organization, entity, or other person from authorizing the corporation to be or to become a debtor under federal bankruptcy law during that period. Provides that the state covenants that it will not limit or alter the denial of authority under this subsection or Subsection (e), and the provisions of this subsection and Subsection (e) are hereby made a part of the contractual obligation that is subject to the state pledge set forth in Section 39.609.

(g) Requires the corporation to prepare and submit to the PUC for approval an annual operating budget. Requires the corporation, if requested by the PUC, to prepare and submit an annual report containing the annual operating and financial statements of the corporation and any other appropriate information.

Sec. 31.105. COMMISSION REGULATION OF CORPORATION. Requires the PUC to regulate the corporation as provided by this subchapter. Provides that, notwithstanding the regulation authorized by this section, the corporation is not a public utility.

Sec. 31.106. FINANCING ORDER. (a) Provides that this section applies to the PUC's issuance of a financing order under this subchapter.

(b) Provides that, except as otherwise specifically provided by this subchapter, the provisions of Subtitle B (Electric Utilities) that address the PUC's issuance of a financing order under other provisions of this subtitle also apply to the PUC's issuance of a financing order under this subchapter.

(c) Requires the corporation and any issuer to be a party to the PUC's proceedings that address the issuance of a financing order along with the entity requesting securitization.

(d) Requires that a financing order issued under this subchapter, in addition to the other applicable requirements of this subtitle:

(1) require the sale, assignment, or other transfer to the corporation of certain specified property created by the financing order and, following that sale, assignment, or transfer, require that charges paid under any financing order be created, assessed, and collected as the property of the

corporation, subject to subsequent sale, assignment, or transfer by the corporation as authorized under this subchapter;

(2) authorize:

(A) the issuance of bonds by the corporation secured by a pledge of specified property, and the application of the proceeds of those bonds, net of issuance costs, to the acquisition of the property from the entity requesting securitization; or

(B) the acquisition of specified property from the entity requesting securitization by the corporation, financed by a loan by an issuer to the corporation of the proceeds of bonds, net of issuance costs, or financed by the acquisition by an issuer from the corporation of the property and in each case the pledge of the property to the repayment of the loan or bonds, as applicable; and

(3) authorize the entity requesting securitization to serve as collection agent to collect the charges and transfer the collected charges to the corporation, the issuer, or a financing party, as appropriate.

(e) Requires the corporation, after issuance of the financing order, to arrange for the issuance of bonds as specified in the financing order by the corporation or another issuer selected by the corporation and approved by the PUC.

(f) Provides that bonds issued pursuant to a financing order under this section are secured only by the related property and any other funds pledged under the bond documents. Provides that no assets of the state or the entity requesting securitization are subject to claims by the holders of the bonds. Provides that following assignment of the property, the entity requesting securitization does not have any beneficial interest or claim of right in such charges or in any property.

Sec. 31.107. SEVERABILITY. Severability clause.

SECTION 2. Amends Section 39.002, Utilities Code, as follows:

Sec. 39.002. APPLICABILITY. Provides that Chapter 39, other than Subchapter M and certain sections, including Section 39.151 (Essential Organizations), does not apply to a municipally owned utility or an electric cooperative.

SECTION 3. Amends Section 39.151, Utilities Code, by adding Subsection (j-1), as follows:

(j-1) Prohibits the independent system operator in the Electric Reliability Council of Texas (ERCOT), notwithstanding Subsection (j) (relating to requiring all electric providers and utilities to observe all rules established by the independent system operator in ERCOT), from reducing payments to or charging uplift short-paid amounts from a municipally owned utility that becomes subject to the jurisdiction of the independent system operator in ERCOT on or after June 1, 2021, and before December 30, 2021, related to a default on a payment obligation by a market participant that occurred before June 1, 2021.

SECTION 4. Amends Chapter 39, Utilities Code, by adding Subchapter M, as follows:

SUBCHAPTER M. SECURITIZATION FOR INDEPENDENT ORGANIZATION

Sec. 39.601. PURPOSE; USE OF PROCEEDS; BOND CHARGES. (a) Provides that the purpose of this subchapter is to enable the independent organization certified under Section 39.151 for the ERCOT power region to use securitization financing to fund substantial default balances that would otherwise be uplifted to the wholesale market as a result of market participants defaulting on amounts owed after an extreme pricing event

and extraordinary ancillary service and reliability deployment price adder charges that were uplifted on a load ratio share basis. Provides that securitization will allow wholesale market participants who are owed money to be paid in a more timely manner, while allowing the balance to be repaid over time at a low carrying cost. Provides that this subchapter and Subchapter D, Chapter 41, do not change, alter, or reduce the obligation of a market participant to timely and fully pay the debts or obligations of the market participant to the independent organization.

(b) Requires that the proceeds of bonds issued for the purpose described by Subsection (a) be used solely for the purpose of financing default balances that otherwise would be or have been uplifted to the wholesale market and uplift balances that were allocated to all load-serving entities on a load ratio share basis as a result of usage during the period of emergency. Requires the PUC to ensure that securitization provides tangible and quantifiable benefits to wholesale market participants, greater than would have been achieved absent the issuance of bonds.

(c) Requires the PUC to ensure that the structuring and pricing of the bonds result in the lowest bond charges consistent with market conditions and the terms of the financing order. Requires that the present value calculation use a discount rate equal to the proposed interest rate on the bonds.

(d) Requires the PUC to require that all market participants, including market participants not otherwise subject to this subchapter, pay or make provision for the full and prompt payment to the independent organization certified under Section 39.151 for the ERCOT power region of all amounts owed to the independent organization to qualify, or to continue to qualify, as a market participant in the ERCOT power region. Requires the PUC and the independent organization to pursue collection in full of amounts owed to the independent organization by any market participant to reduce the qualifying costs that would otherwise be borne by other market participants or their customers.

Sec. 39.602. DEFINITIONS. Defines "assignee," "default charges," "financing order," "financing party," "independent organization," "load-serving entity," "period of emergency," "qualified costs," and "uplift charges."

Sec. 39.603. FINANCING ORDERS; TERMS. (a) Authorizes the PUC, on application of the independent organization, to adopt a financing order to recover the costs of a substantial default or uplift balance of qualified costs resulting from a significant pricing event on making a finding that such financing is needed to preserve the integrity of the wholesale market and the public interest after considering the interests of wholesale market participants who are owed balances and the potential effects of uplifting those balances without a financing vehicle.

(b) Requires that the financing order detail the amounts to be recovered and the period over which the nonbypassable default or uplift charges are required to be recovered. Prohibits the period from exceeding 30 years. Requires the financing order, if an amount determined under this section is subject to judicial review of a PUC order, a bankruptcy proceeding, or another type of litigation at the time of the securitization proceeding, to include an adjustment mechanism requiring the independent organization to adjust its default or uplift charges in a manner that would refund, over the remaining life of the bonds, any overpayments resulting from securitization of amounts in excess of the amount resulting from a final determination after completion of all appellate reviews. Prohibits the adjustment mechanism from affecting the stream of revenue available to service the bonds. Prohibits an adjustment from being made under this subsection until all appellate reviews have been completed, including appellate reviews following a PUC decision on remand of its original orders, if applicable.

(c) Requires that nonbypassable default charges be collected and allocated among wholesale market participants using the same allocation methodology described in

the protocols of the independent organization, as they existed on March 1, 2021. Requires that the rate associated with the nonbypassable default charges be assessed on all wholesale market participants, including market participants who are in default but still participating in the wholesale market, and be based on updated transaction data to prevent market participants from engaging in behavior designed to avoid the nonbypassable default charges.

(d) Prohibits nonbypassable default charges, notwithstanding another provision of this subchapter, from being collected from or allocated to a market participant that:

(1) would otherwise 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).

(e) Requires that nonbypassable uplift charges be allocated to all load-serving entities on a load ratio share basis, excluding the load of entities that have opted out under Subsection (f).

(f) Requires the PUC to develop a process that allows a load-serving entity and any customer whose demand is greater than one megawatt and is served by a retail electric provider to opt out of the uplift charges by paying in full all invoices owed for usage during the period of emergency. Prohibits load-serving entities and individual customers that opt out from receiving any proceeds from the uplift bonds.

(g) Provides that a financing order becomes effective in accordance with its terms and requires that the financing order, together with the default or uplift charges authorized in the order, be irrevocable and not subject to reduction, impairment, or adjustment by further action of the PUC after it takes effect.

(h) Requires the PUC to issue a financing order not later than the 90th day after the date the independent organization files a request for the financing order under Subsection (a) or (j).

(i) Provides that a financing order is not subject to rehearing by the PUC. Authorizes a financing order to be reviewed by appeal by a party to the proceeding to a Travis County district court filed not later than the 15th day after the date the financing order is signed by the PUC. Authorizes the judgment of the district court to be reviewed only by direct appeal to the Supreme Court of Texas (supreme court) 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 as expeditiously as possible with lawful precedence over other matters. Requires that review on appeal be based solely on the record before the PUC 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 PUC under this chapter.

(j) Authorizes the PUC, at the request of the independent organization, to adopt a financing order providing for retiring and refunding the bonds on making a finding that the future default or uplift charges required to service the new bonds, including transaction costs, will be less than the future default or uplift charges required to service the bonds being refunded. Requires the PUC, on the retirement of the refunded bonds, to adjust the related default or uplift charges accordingly.

Sec. 39.604. PROPERTY RIGHTS. (a) Requires that the rights and interests of the independent organization or its successor under a financing order, including the right to

impose, collect, and receive default or uplift charges authorized in the order, be only contract rights until they are first transferred to an assignee or pledged in connection with the issuance of bonds, at which time they will become default or uplift property, as described by Subsection (b).

(b) Requires that default or uplift property constitute a present property right for purposes of contracts concerning the sale or pledge of property, even though the imposition and collection of default or uplift charges depends on further acts of the independent organization or others that have not yet occurred. Requires that the financing order remain in effect and that the property continue to exist for the same period as the pledge of the state described by Section 39.609.

(c) Requires that all revenues and collections resulting from default or uplift charges constitute proceeds only of the default or uplift property arising from the financing order.

Sec. 39.605. INTEREST NOT SUBJECT TO SETOFF. Provides that the interest of an assignee or pledgee in default or uplift property and in the revenues and collections arising from that property are not subject to setoff, counterclaim, surcharge, or defense by the independent organization or any other person or in connection with the bankruptcy of a wholesale market participant or the independent organization. Requires that a financing order remain in effect and unabated notwithstanding the bankruptcy of the independent organization, its successors, or assignees.

Sec. 39.606. DEFAULT AND UPLIFT CHARGES NONBYPASSABLE. Requires that a financing order include terms ensuring that the imposition and collection of default or uplift charges authorized in the order are required to be nonbypassable, other than uplift charges paid under Section 39.603(f).

Sec. 39.607. TRUE-UP. Requires that a financing order include a mechanism requiring that default or uplift charges be reviewed and adjusted at least annually, not later than the 45th day after the anniversary date of the issuance of the bonds, to correct over-collections or under-collections of the preceding 12 months and to 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 bonds.

Sec. 39.608. SECURITY INTERESTS; ASSIGNMENT; COMMINGLING; DEFAULT. (a) Provides that default or uplift property does not constitute an account or general intangible under Section 9.106 (Control of Investment Property), Business & Commerce Code. Provides that the creation, granting, perfection, and enforcement of liens and security interests in default or uplift property are governed by this section and not by the Business & Commerce Code.

(b) Authorizes a valid and enforceable lien and security interest in default or uplift property to be created only by a financing order and the execution and delivery of a security agreement with a financing party in connection with the issuance of bonds. Requires that the lien and security interest attach automatically from the time that value is received for the 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 lien and security interest in the default or uplift property and requires that 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 security interest, if notice is filed before the 10th day after the date value is received for the default bonds, be perfected retroactive to the date value was received. Requires that otherwise the security interest be perfected as of the date of filing.

(c) Requires that transfer of an interest in default or uplift 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 adopted under Subsection (d). Provides that 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 adopting the rules for those filings based on Chapter 9 (Secured Transactions), Business & Commerce Code, adapted to this subchapter and using the terms defined by 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 39.607 or by the commingling of funds arising from default or uplift charges with other funds, and requires that any other security interest that is authorized to apply to those funds be terminated when they are transferred to a segregated account for the assignee or a financing party. Requires that, if default or uplift property has been transferred to an assignee, any proceeds of that property be held in trust for the assignee.

(f) Authorizes the financing parties or their representatives, if a default or termination occurs under the bonds, to foreclose on or otherwise enforce their lien and security interest in any property as if they were secured parties under Chapter 9, Business & Commerce Code, and authorizes the PUC to order that amounts arising from default or uplift 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 of Travis County, on application by or on behalf of the financing parties, to order the sequestration and payment to them of revenues arising from the default or uplift charges.

Sec. 39.609. PLEDGE OF STATE. Provides that default 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 for the benefit and protection of financing parties and the independent organization that it will not take or permit any action that would impair the value of default or uplift property, or reduce, alter, or impair the default or uplift 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 bonds have been paid and performed in full. Authorizes any party issuing bonds under this subchapter to include this pledge in any documentation relating to those bonds.

Sec. 39.610. TAX EXEMPTION. Provides that transactions involving the transfer and ownership of default or uplift property and the receipt of default or uplift charges are exempt from state and local income, sales, franchise, gross receipts, and other taxes or similar charges.

Sec. 39.611. NOT PUBLIC UTILITY. Prohibits an assignee or financing party from being considered to be a public utility or person providing electric service solely by virtue of the transactions described in this subchapter.

Sec. 39.612. SEVERABILITY. Severability clause.

Sec. 39.613. CUSTOMER CHARGES. Requires all load-serving entities that receive offsets to specific uplift charges from the independent organization under this subchapter to adjust customer invoices to reflect the offsets for any charges that were or would otherwise be passed through to customers under the terms of service with the load-serving entity, including by providing a refund for any offset charges that were previously paid. Prohibits an electric cooperative, including an electric cooperative that elects to receive offsets, from otherwise becoming subject to rate regulation by the PUC

and provides that receipt of offsets does not affect the applicability of Chapter 41 to an electric cooperative.

SECTION 5. Provides that this Act takes effect on the date on which Senate Bill No. 1580, House Bill No. 3544, or other similar legislation of the 87th Legislature, Regular Session, 2021, relating to the use of securitization by electric cooperatives to address weather-related extraordinary costs and expenses becomes law.