

BILL ANALYSIS

C.S.H.B. 4492
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State Affairs
Committee Report (Substituted)

BACKGROUND AND PURPOSE

Winter Storm Uri, which hit Texas in February of this year, caused electric generation assets to trip off-line, thus paralyzing the state's electric grid and causing millions of Texans to spend upwards of a week without power during record cold temperatures. This led to many wholesale market participants incurring extraordinary costs in attempts to get generation back online and restore service for end consumers. C.S.H.B. 4492 seeks to ensure that this one-time event does not have lasting ramifications on the state's wholesale electric market by enabling the independent organization certified by the Public Utility Commission of Texas to perform certain essential market functions for the ERCOT power region to use securitization financing to fund substantial balances that would otherwise be uplifted to the wholesale market as a result of market participants defaulting on amounts owed after this extreme pricing event, thus allowing wholesale market participants to be paid in a more timely manner while allowing the balance to be repaid over time at a low carrying cost.

CRIMINAL JUSTICE IMPACT

It is the committee's opinion that this bill does not expressly create a criminal offense, increase the punishment for an existing criminal offense or category of offenses, or change the eligibility of a person for community supervision, parole, or mandatory supervision.

RULEMAKING AUTHORITY

It is the committee's opinion that rulemaking authority is expressly granted to the secretary of state in SECTION 4 of this bill.

ANALYSIS

C.S.H.B. 4492 amends the Utilities Code to establish provisions for the securitization of certain costs incurred by the independent organization that is certified by the Public Utility Commission of Texas (PUC) to perform certain essential market functions for the ERCOT power region that would otherwise be uplifted to the wholesale market.

Texas Electric Securitization Corporation

C.S.H.B. 4492 creates the Texas Electric Securitization Corporation as a special purpose public corporation and instrumentality of the state for the essential public purpose of providing a lower-cost financing mechanism for the securitization of eligible costs incurred by the independent organization. An entity authorized to securitize those costs under the bill's provisions may request that the corporation conduct the financing on the entity's behalf. The bill provides the following with respect to the administration and operation of the corporation:

- the corporation has a legal existence as a public corporate body and instrumentality of the state but is separate and distinct from the state;

- the corporation has the powers, rights, and privileges provided for a nonprofit corporation organized under state law, subject to the express exceptions and limitations provided by the bill;
- an organizer selected by the executive director of the PUC is required to prepare the corporation's certificate of formation under the Business Organizations Code in a manner consistent with applicable bill provisions;
- the corporation is subject to PUC regulation but is expressly not a public utility;
- the corporation is governed by a board of five directors appointed by the PUC for two-year terms and is required to exercise its powers through that board;
- an official action of the corporation's board requires the favorable vote of a majority of the directors present and voting at a meeting of the board;
- regarding the funding of the corporation:
 - the corporation must be self-funded and its assets may not be considered part of any state fund;
 - the state may not budget for or provide any state money to the corporation;
 - the corporation's debts, claims, obligations, and liabilities may not be considered to be a debt of the state or a pledge of the state's credit; and
 - the corporation may, before imposing charges to recover securitized amounts, accept and expend money received from any source for certain prescribed purposes relating to its operations;
- state officers and agencies may render services to the corporation, within their respective functions, as requested by the PUC or the corporation;
- the corporation's board may employ or retain persons as necessary to perform the duties of the corporation; and
- the corporation must prepare and submit an annual operating budget to the PUC for approval and, if requested by the PUC, prepare and submit an annual report containing the corporation's annual operating and financial statements and any other appropriate information.

C.S.H.B. 4492 authorizes the corporation to do the following:

- acquire, sell, pledge, or transfer property as necessary to effect the purposes for which the corporation is created 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, for the following purposes:
 - to acquire property and to pledge such property, and any other collateral, to either:
 - secure payment of bonds issued by the corporation, together with payment of any other qualified costs, as specified by the bill; or
 - secure repayment of any borrowing from any other issuer of bonds; or
 - to sell the property to another issuer, which may 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;
- issue bonds on terms and conditions consistent with a financing order;
- borrow funds for initial operating expenses;
- 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;
- sue or be sued in its corporate name;
- intervene as a party before the PUC or any court in Texas in any matter involving the corporation's powers and duties;
- negotiate and become a party to contracts as necessary, convenient, or desirable to carry out applicable bill provisions; and
- engage in corporate actions or undertakings that are permitted for nonprofit corporations in Texas and that are not prohibited by, or contrary to, the bill's provisions.

C.S.H.B. 4492 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 that entity's related bond issuances.

C.S.H.B. 4492 requires adequate protection and provision to be made for the payment of any outstanding bonds in the event of any rehabilitation, liquidation, or dissolution of the corporation and specifies the manner in which corporation assets must be applied in such an event, with priority given to payment of the corporation's debts, liabilities, and obligations. The bill establishes prohibitions against the corporation filing a voluntary petition under federal bankruptcy law or becoming a debtor under that law 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. These restrictions expressly will not be limited or altered by the state and are part of the contractual obligation that is subject to a certain state pledge.

C.S.H.B. 4492 sets out provisions relating to the issuance of a financing order by the PUC under the bill's provisions relating to the corporation. The bill establishes the applicability of related state law to the PUC's issuance of the order and requires the corporation and any issuer to be a party to the PUC proceedings that address the issuance of the order along with the entity requesting securitization. The bill requires the order to do the following:

- require the sale, assignment, or other transfer to the corporation of certain specified property created by the 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 the bill's provisions;
- authorize the following:
 - 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
 - the acquisition of specified property from the entity requesting securitization by the corporation financed in the following ways:
 - by a loan by an issuer to the corporation of the proceeds of bonds, net of issuance costs; or
 - 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 loans or bonds, as applicable; and
- 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.

C.S.H.B. 4492 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. Bonds issued pursuant to the financing order are secured only by the related property and any other funds pledged under the bond documents, and no assets of the state or the entity requesting securitization are subject to claims by the bondholders. Following assignment of the property, the entity requesting securitization expressly does not have any beneficial interest or claim of right in such charges or in any property.

C.S.H.B. 4492 requires the corporation, in each instance subject to PUC prior authorization, to participate in the financial transactions authorized by the bill. The corporation may not engage in business activities except those activities specified by the bill and those ancillary and incidental thereto. The corporation or an issuer may not apply 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 such purpose in the order, or to a purpose in contravention of the order. The bill authorizes the corporation or an issuer to retain professionals, financial advisors, and

accountants as considered necessary to fulfill the corporation's or issuer's duties and determine the duties and compensation of a person retained, subject to PUC approval.

C.S.H.B. 4492 establishes that bonds issued under the bill's provisions relating to the corporation are 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. Those bonds are nonrecourse to the credit or any assets of the state and the PUC.

C.S.H.B. 4492 does the following with respect to the bill's provisions regarding the corporation:

- establishes the purpose and provides for the severability of those provisions; and
- defines "issuer" as the corporation or any other corporation, public trust, public instrumentality, or entity that issues bonds approved by a financing order.

Securitization for the Independent Organization

Financing Orders

C.S.H.B. 4492 authorizes the PUC, on application of the independent organization, to adopt a financing order to recover the costs of a substantial default balance of qualified costs resulting from a significant pricing event that occurred during a period of emergency beginning 12:00 a.m., February 12, 2021, and ending 11:59 p.m., February 20, 2021, on making a finding that such financing is needed to preserve the integrity of the wholesale market and the public interest after considering the following:

- the interests of wholesale market participants who are owed balances; and
- the potential effects of uplifting those balances to the wholesale market without a financing vehicle.

The bill requires the PUC to issue the order not later than the 90th day after the date the independent organization files the request for the order. The bill requires the order to detail the amounts to be recovered and the period over which the nonbypassable default charges must be recovered, which the bill caps at 30 years. The bill provides for the order to include an adjustment mechanism requiring the independent organization to adjust its default charges in a certain manner if an amount detailed in the order is subject to litigation at the time of the securitization proceeding.

C.S.H.B. 4492 requires nonbypassable default charges to be collected from and allocated among wholesale market participants using the same methodology under which the charges would otherwise be uplifted under the protocols of the independent organization in effect on March 1, 2021. The rate associated with the nonbypassable default charges must be assessed on all wholesale market participants and may be based on updated transaction data to prevent market participants from engaging in behavior designed to avoid the nonbypassable default charges.

C.S.H.B. 4492 establishes that the financing order becomes effective in accordance with its terms and that the order, together with the default charges authorized in the order, are irrevocable and not subject to reduction, impairment, or adjustment by further action of the PUC after the order takes effect. A financing order is not subject to rehearing by the PUC but may be reviewed by appeal by a party to the proceeding to a Travis County district court. The bill sets out additional provisions relating to such judicial review.

C.S.H.B. 4492 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 charges required to service the new bonds, including transaction costs, will be less than the future default charges required to service the bonds being refunded. The bill requires the PUC to issue the order not later than the 90th day after the date the independent organization files the request. On the retirement of the refunded bonds, the PUC must adjust the related default charges accordingly.

C.S.H.B. 4492 requires a financing order to include the following:

- terms ensuring that the imposition and collection of default charges authorized in the order are nonbypassable; and
- a mechanism requiring that default 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 do the following:
 - correct over-collections or under-collections of the preceding 12 months; and
 - 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.

Pledge of State

C.S.H.B. 4492 provides the following:

- 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;
- the state pledges, however, 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 property, or reduce, alter, or impair the default 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; and
- any party issuing bonds may include the state's pledge in any documentation relating to those bonds.

Property Rights

C.S.H.B. 4492 provides that the rights and interests of the independent organization or its successor under a financing order are only contract rights until they are first transferred to an assignee or pledged in connection with the issuance of bonds, at which time they become default property. Default property constitutes a present property right for purposes of contracts concerning the sale or pledge of property, even though the imposition and collection of default charges depends on further acts of the independent organization or others that have not yet occurred. The financing order remains in effect and the property continues to exist for the same period as the pledge of the state. All revenues and collections resulting from default charges constitute proceeds only of the default property arising from the financing order.

Interest Not Subject to Setoff

C.S.H.B. 4492 establishes that the interest of an assignee or pledgee in default 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. A financing order remains in effect and unabated notwithstanding the bankruptcy of the independent organization, its successors, or assignees.

Security Interest

C.S.H.B. 4492 establishes that a valid and enforceable lien and security interest in default property may 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 the bonds. The bill provides for the process by which such a lien and security interest attaches and is perfected. The bill sets out provisions relating to the perfection of a transfer of an interest in default property to an assignee.

C.S.H.B. 4492 establishes that the priority of a lien and security interest that are perfected is not impaired by any later modification of the financing order or by the commingling of funds arising from default charges with other funds. The bill requires that any other security interest that may apply to those funds be terminated when they are transferred to a segregated account for the assignee or a financing party. If default property has been transferred to an assignee, any proceeds of that property must be held in trust for the assignee.

C.S.H.B. 4492 authorizes the financing parties to a bond that is defaulted on or terminated or their representatives to foreclose on or otherwise enforce their lien and security interest in any property as if they were secured parties under Uniform Commercial Code--Secured Transactions. The PUC may order that amounts arising from default charges be transferred to a separate account for the financing parties' benefit, to which their lien and security interest apply. The bill requires a district court of Travis County, on application by or on behalf of the financing parties, to order the sequestration and payment of revenues arising from the default charges.

C.S.H.B. 4492 establishes that default property does not constitute an account or general intangible under certain Uniform Commercial Code provisions governing the control of investment property. The creation, granting, perfection, and enforcement of liens and security interests in default property are governed by these applicable bill provisions and not by the Business & Commerce Code. The bill requires the secretary of state to implement the provisions of the bill regarding security interests by establishing and maintaining a separate system of records for the filing of notices those provisions and adopting the rules for those filings based on Uniform Commercial Code--Secured Transactions, adapted to the bill and using terms defined by the bill.

Tax Exemption

C.S.H.B. 4492 exempts transactions involving the transfer and ownership of default property and the receipt of default charges from state and local income, sales, franchise, gross receipts, and other taxes or similar charges.

General Provisions

C.S.H.B. 4492 does the following:

- prohibits an assignee or financing party from being considered to be a public utility or person providing electric service solely by virtue of applicable transactions related to securitization for the independent organization;
- establishes the purpose and provides for the severability of the bill's provisions providing for that securitization;
- requires the proceeds of bonds issued for securitization for the independent organization to be used solely for the purpose of financing default balances that otherwise would be or have been uplifted to the wholesale market;
- 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;
- 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; and
- requires that the present value calculation use a discount rate equal to the proposed interest rate on the bonds.

Definitions

C.S.H.B. 4492 defines, among other terms, "default charges" as nonbypassable amounts to be charged on all wholesale market transactions administered by the independent organization, approved by the PUC under a financing order to recover qualified costs, that are collected by

the independent organization, its successors, an assignee, or other collection agents as provided by the financing order.

New ERCOT Participants

C.S.H.B. 4492 prohibits 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.

EFFECTIVE DATE

On passage, or, if the bill does not receive the necessary vote, September 1, 2021.

COMPARISON OF ORIGINAL AND SUBSTITUTE

While C.S.H.B. 4492 may differ from the original in minor or nonsubstantive ways, the following summarizes the substantial differences between the introduced and committee substitute versions of the bill.

The original established a securitization process for certain extraordinary costs incurred by electric utilities in an effort to reduce costs and provide rate relief to customers. The substitute similarly seeks to provide financial relief but to participants in the wholesale market rather than to electric utility customers by instead establishing a securitization process for the independent organization that is certified by the PUC to perform certain essential market functions for the ERCOT power region. The securitization process established in the substitute is substantially similar in part to the process that was established in the original but updated to reflect that change in purpose. Additionally, the substitute makes certain changes to that process, including by doing the following:

- specifying that the costs for which securitization is being made available are those that were incurred during the period beginning 12:00 a.m., February 12, 2021, and ending 11:59 p.m., February 20, 2021, whereas the original did not provide an exact period for the eligible costs;
- making the PUC the entity responsible for issuing financing orders, whereas in the original the PUC was not involved in the issuance of these orders;
- capping the period over which applicable nonbypassable charges may be recovered under a financing order at 30 years, whereas the original did not specify a maximum period of recovery; and
- revising the pledge of the state regarding the bonds issued as part of the securitization process.

The substitute includes provisions absent from the original creating the Texas Electric Securitization Corporation as a special purpose public corporation and instrumentality of the state to assist in the securitization process for the independent organization.

The substitute includes a provision absent from the original prohibiting 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.

The substitute changes the bill's effective date from September 1, 2021, as in the original, to on passage or, if the bill does not receive the necessary vote for immediate effect, September 1, 2021.