By:  Hancock, et al. S.B. No. 1580

(Paddie)

A BILL TO BE ENTITLED

AN ACT

relating to the use of securitization by electric cooperatives to address certain weather-related extraordinary costs and expenses.

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF TEXAS:

SECTION 1.  Chapter 41, Utilities Code, is amended by adding Subchapter D to read as follows:

SUBCHAPTER D. SECURITIZATION

Sec. 41.151.  PURPOSE. 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 events 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. 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. The proceeds of the securitized bonds shall 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. The board of each electric cooperative involved in the financing shall ensure that securitization provides tangible and quantifiable benefits to its members, greater than would have been achieved absent the issuance of securitized bonds. Each board that chooses to securitize under this subchapter shall ensure that the structuring and pricing of the securitized bonds are consistent with market conditions and the terms of the financing order. This subchapter may be used by a group of electric cooperatives to issue securitized bonds in a combined securitization transaction.

Sec. 41.152.  DEFINITIONS. In this subchapter:

(1)  "Assignee" means any individual, corporation, or other legally recognized entity, including a special purpose entity, to which an interest in securitized property is transferred, other than as security.

(2)  "Board" means the governing body of an electric cooperative.

(3)  "Combined securitization transaction" means the issuance of securitized bonds under this subchapter in a transaction involving at least two electric cooperatives acting together.

(4)  "Extraordinary costs and expenses" means:

(A)  costs and expenses incurred by an electric cooperative for electric power and energy purchased during the period of emergency in excess of what would have been paid for the same amount of electric power and energy at the average rate incurred by the electric cooperative for electric power and energy purchased during the month of January 2021;

(B)  costs and expenses incurred by an electric cooperative to generate and transmit electric power and energy during the period of emergency, including fuel costs, operation and maintenance expenses, overtime costs, and all other costs and expenses that would not have been incurred but for the abnormal weather events; and

(C)  any charges imposed on the electric cooperative or on a power supplier to the electric cooperative that were passed on to the electric cooperative by the applicable regional transmission organization or independent system operator, resulting from defaults by other market participants of the regional transmission organization or independent system operator for costs relating to the period of emergency.

(5)  "Financing order" means an order of a board approving the issuance of securitized bonds, which may be through participation in a combined securitization transaction, and the creation of securitized charges for the recovery of qualified costs.

(6)  "Financing party" means a holder of securitized bonds, including trustees, collateral agents, and other persons acting for the benefit of the holder.

(7)  "Qualified costs" means up to 100 percent of an electric cooperative's:

(A)  extraordinary costs and expenses;

(B)  costs of issuing, supporting, repaying, servicing, and refinancing the securitized bonds, whether incurred or paid upon issuance of the securitized bonds or over the life of the securitized bonds or the refunded securitized bonds, whether incurred directly or allocated in a combined securitization transaction; and

(C)  any costs of retiring and refunding the electric cooperative's existing debt securities initially issued to finance the extraordinary costs and expenses including interest accrued on debt securities over their term, whether incurred directly or allocated in a combined securitization transaction.

(8)  "Period of emergency" means the period beginning 12:00 a.m., February 12, 2021, and ending 11:59 p.m., February 20, 2021.

(9)  "Securitized bonds" means bonds, debentures, notes, certificates of participation or of beneficial interest, or other evidences of indebtedness or ownership that are issued by an electric cooperative, its successors, or an assignee of the electric cooperative or group of electric cooperatives under a financing order or financing orders, that have a term not longer than 30 years, and that are secured by or payable, primarily, from securitized property and the proceeds thereof and, in a combined securitization transaction, securitized property contributed by other electric cooperatives. If certificates of participation, beneficial interest, or ownership are issued, references in this subchapter to principal, interest, or premium shall refer to comparable amounts under those certificates.

(10)  "Securitized charges" means nonbypassable amounts to be charged for the use or availability of electric services, approved by the board under a financing order to recover qualified costs, that shall be collected by an electric cooperative, its successors, an assignee, or other collection agents as provided for in the financing order.

(11)  "Securitized property" means the property right created under this subchapter, including the right, title, and interest of the electric cooperative or its assignee:

(A)  in and to the securitized charges established under a financing order, including all rights to obtain adjustments in accordance with Section 41.157 and the financing order;

(B)  to be paid the amount that is determined in a financing order to be the amount that the electric cooperative or its transferee is lawfully entitled to receive under this subchapter and the proceeds thereof; and

(C)  in and to all revenue, collections, claims, payments, money, or process of or arising from the securitized charges that are the subject of a financing order.

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

(b)  The financing order shall detail the amount of qualified costs to be recovered and the period over which the nonbypassable securitized charges shall be recovered, which period may not exceed 30 years.

(c)  Securitized charges shall be collected and allocated among customers in the manner provided by the financing order.

(d)  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, recission, 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. A financing order issued under this subchapter has the same force and effect of a financing order issued under Chapter 39.

(e)  A financing order may 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. The judgment of the district court may 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. All appeals shall be heard and determined by the district court and the Supreme Court of Texas as expeditiously as possible with lawful precedence over other matters. Review on appeal shall 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 shall 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)  The board or, in a combined securitization transaction, the boards of all participating electric cooperatives, may 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. After the indefeasible repayment in full of all outstanding securitized bonds and associated financing costs, the board shall adjust the related securitized charges accordingly.

Sec. 41.154.  PROPERTY RIGHTS. (a) 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, shall 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)  Securitized property that is specified in the financing order constitutes a present vested property right for all purposes, including for purposes of Sections 16 and 17, Article I, Texas Constitution, Section 10, Article I, 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)  Securitized property shall 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)  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. The financing order shall remain in effect and the property shall continue to exist for the same period as the pledge of the state described in Section 41.160.

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

Sec. 41.155.  NO SETOFF. 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. A financing order shall remain in effect and unabated notwithstanding the bankruptcy of the electric cooperative, its successors, or assignees.

Sec. 41.156.  NO BYPASS. (a)  A financing order shall include terms ensuring that the imposition and collection of securitized charges authorized in the order shall 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)  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 must 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. Such retail customers are required to pay the securitized charges.

Sec. 41.157.  TRUE-UP. (a) A financing order shall 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)  A financing order shall 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)  The electric cooperatives that are members of a generation and transmission cooperative may 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)  In a combined securitization transaction, each generation and transmission cooperative may 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)  A governmental authority may not disapprove of or alter 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. 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. The transaction shall 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) Securitized property does not constitute an account or general intangible under Section 9.106, Business & Commerce Code. 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. Securitized property shall constitute property for all purposes, including for contracts securing securitized bonds, regardless of whether the securitized property revenues and proceeds have accrued.

(b)  A valid and enforceable transfer, sale, or assignment, or lien and security interest, as applicable, in securitized property may 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. The transfer, sale, assignment, or lien and security interest, as applicable, shall 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 in accordance with the rules prescribed under Subsection (d), shall 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, shall have priority in the order of filing and take precedence over any subsequent judicial or other lien creditor. If notice is filed before the 10th day after the date value is received for the securitized bonds, the transfer, sale, or assignment, or security interest, as applicable, shall be perfected retroactive to the date value was received. Otherwise, the transfer, sale, or assignment, or security interest, as applicable, shall be perfected as of the date of filing.

(c)  Transfer, sale, or assignment of an interest in securitized property to an assignee shall 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). 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)  The secretary of state shall 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, Business & Commerce Code, adapted to this subchapter and using the terms defined in this subchapter.

(e)  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 may apply to those funds shall be terminated when they are transferred to a segregated account for the assignee or a financing party. If securitized property has been transferred to an assignee, any proceeds of that property shall be held in trust for the assignee.

(f)  Securitized bonds shall be secured by a statutory lien on the securitized property in favor of the owners or beneficial owners of securitized bonds. The lien shall automatically arise on issuance of the securitized bonds without the need for any action or authorization by the electric cooperative or the board. The lien shall be valid and binding from the time the securitized bonds are executed and delivered. The securitized property shall be immediately subject to the lien, and the lien shall 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. The lien is created by this subchapter and not by any security agreement, but may be enforced by any financing party or their representatives as if they were secured parties under Chapter 9, Business & Commerce Code. On application by or on behalf of the financing parties, a district court in the county where the electric cooperative is domiciled may order that amounts arising from securitized charges be transferred to a separate account for the financing parties' benefit.

(g)  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. 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)  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)  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 shall be bound by the requirements of this subchapter and shall 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)  If a default or termination occurs under the securitized bonds, the financing parties or their representatives may 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 may 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 shall apply. On application by or on behalf of the financing parties, a district court in the county where the electric cooperative is domiciled shall order the sequestration and payment to them of revenues arising from the securitized charges.

Sec. 41.160.  PLEDGE OF STATE. 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. 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. Any party issuing securitized bonds is authorized to include this pledge in any documentation relating to those bonds.

Sec. 41.161.  TAX EXEMPTION. 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. An assignee or financing party may not be 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. Effective on the date the first securitized bonds are issued under this subchapter, if any provision in this title or portion of this title 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 this title 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 shall remain in full force and effect.

SECTION 2.  This Act takes effect immediately if it receives a vote of two-thirds of all the members elected to each house, as provided by Section 39, Article III, Texas Constitution. If this Act does not receive the vote necessary for immediate effect, this Act takes effect September 1, 2021.