

BILL ANALYSIS

C.S.H.B. 3544
By: Holland
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 resulted in many of the electric cooperatives that operate throughout Texas incurring extraordinary costs in attempts to continue providing service for end consumers. C.S.H.B. 3544 seeks to ensure that this one-time event does not have lasting ramifications on the state's electric cooperatives by enabling cooperatives to use securitization financing to recover the extraordinary costs and expenses incurred due to the storm over a 30-year period.

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 1 of this bill.

ANALYSIS

C.S.H.B. 3544 amends the Utilities Code to set out provisions enabling an electric cooperative to use securitization financing to recover extraordinary costs and expenses incurred due to the abnormal weather events that occurred in Texas in the period beginning 12:00 a.m., February 12, 2021, and ending at 11:59 p.m., February 20, 2021, for purposes of reducing the cost of financing the extraordinary costs and expenses relative to the costs that would be incurred using conventional electric cooperative financing methods. This securitization financing method may also be used by a group of electric cooperatives to issue securitized bonds in a combined securitization transaction.

Financing Orders

C.S.H.B. 3544 requires an electric cooperative's board to adopt a financing order approving the issuance of securitized bonds and the creation of securitized charges for the recovery of qualified costs consistent with the standards prescribed by the bill. The bill requires the order to detail the amount of qualified costs to be recovered and the period over which the nonbypassable securitized charges must be recovered, which the bill caps at 30 years. The bill requires the securitized charges to be collected in the manner provided by the order.

C.S.H.B. 3544 establishes the following with respect to a financing order:

- the order becomes effective in accordance with its terms;

- after it takes effect, the order, together with the authorized securitized charges, 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 the state; and
- the order has the same force and effect of a financing order issued under statutory provisions relating to the restructuring of the state's electric utility industry.

C.S.H.B. 3544 authorizes an order to be reviewed by appeal by a member of the electric cooperative to a district court in the county where the cooperative is domiciled, filed not later than the 15th day after the date the order is adopted by the board. The bill sets out additional provisions relating to such judicial review, including with respect to review of the district court's judgment by the Texas Supreme Court.

C.S.H.B. 3544 authorizes the board or, in a combined securitization transaction, the boards of all participating electric cooperatives, to adopt of an order or 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 must adjust the related securitized charges accordingly.

Pledge of State

C.S.H.B. 3544 provides the following:

- 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 the bill, reduce, alter, or impair the securitized charges until the charges and contracts related to the bonds have been paid and performed in full; and
- any party issuing securitized bonds may include this pledge in any documentation relating to those bonds.

Property Rights

C.S.H.B. 3544 provides that the rights and interests of an electric cooperative or its subsidiary, affiliate, successor, financing party, or assignee under a financing order are 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. The bill establishes that securitized property that is specified in a financing order constitutes a present vested property right for all purposes, 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.S.H.B. 3544 provides that securitized property exists 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. On the issuance of the securitized bonds and the financing order, and when applicable requirements 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 remains in effect and the property continues to exist for the same period as the pledge of the state. The bill requires all revenue, collections, claims, payments, money, or

proceeds of or arising from or relating to securitized charges to constitute proceeds of the securitized property arising from the financing order.

No Setoff

C.S.H.B. 3544 establishes 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. A financing order must remain in effect and unabated notwithstanding the bankruptcy of the electric cooperative, its successors, or assignees.

No Bypass

C.S.H.B. 3544 requires a financing order to include terms ensuring that the imposition and collection of securitized charges authorized in the order are 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. The cooperative, its servicer, any entity providing electric transmission or distribution services, and any retail electric provider providing services to a retail customer in the cooperative's certificated service area as it existed on the bill's effective date are entitled to collect and must remit, consistent with the bill's provisions and the financing order, the securitized charges from the retail customers and from retail customers that switch to new on-site generation. The bill requires those retail customers to pay the securitized charges.

True-Up

C.S.H.B. 3544 requires a financing order to be reviewed and adjusted promptly if after its adoption there are additional charges, reductions, or refunds of extraordinary costs and expenses to ensure the following:

- that there is not an over-collection or an under-collection of extraordinary costs and expenses; and
- 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.

The bill requires the order to 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 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 securitized bonds.

C.S.H.B. 3544 authorizes 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. 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 cooperatives in the manner agreed to by all of the participating electric cooperatives under their financing orders.

C.S.H.B. 3544 prohibits a governmental authority from disapproving of or altering any adjustments made or proposed to be made to a financing order other than to correct computation or other manifest errors.

True Sale

C.S.H.B. 3544 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. The transaction must 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.

Security Interests, Assignment, Commingling, and Default

C.S.H.B. 3544 establishes that 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 bill provides for the process by which such a transfer, sale, or assignment, or lien and security interest, as applicable, attaches and is perfected and sets out provisions relating to the perfection of a transfer, sale, or assignment of an interest in securitized property to an assignee.

C.S.H.B. 3544 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 securitized 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 securitized property has been transferred to an assignee, any proceeds of that property must be held in trust for the assignee.

C.S.H.B. 3544 provides that securitized bonds are secured by a statutory lien on the securitized property in favor of the owners or beneficial owners of securitized bonds. With respect to the lien, the bill provides the following:

- the lien automatically arises on issuance of the securitized bonds without the need for any action or authorization by the electric cooperative or the board;
- the lien is valid and binding from the time the securitized bonds are executed and delivered;
- the securitized property is immediately subject to the lien, and the lien immediately attaches to the securitized property and is 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 a statutory lien and is not created by any security agreement, but the lien may be enforced by any financing party or their representatives as if they were secured parties under Uniform Commercial Code--Secured Transactions;
- 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;
- the 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 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; and
- the 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.

C.S.H.B. 3544 provides 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 and any successor servicer of collections of the securitized charges are bound by the requirements of the bill and must perform and satisfy all obligations imposed under the bill 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.

C.S.H.B. 3544 authorizes the financing parties to a securitized bond that is defaulted on or terminated, or the parties' representatives, to foreclose on or otherwise enforce their lien and security interest in any securitized property as if they were secured parties under Uniform Commercial Code--Secured Transactions. 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 apply. The bill requires such a district court, on application by or on behalf of the financing parties, to order the sequestration and payment of revenues arising from the securitized charges.

C.S.H.B. 3544 establishes that securitized property does not constitute an account or general intangible under certain Uniform Commercial Code provisions governing the control of investment property. The transfer, sale, or assignment, or the creation, granting, perfection, and enforcement of liens and security interests in securitized property are governed by applicable bill provisions and not by the Business & Commerce Code. Securitized property constitutes property for all purposes, including for contracts securing securitized bonds, regardless of whether the property revenues and proceeds have accrued. The bill requires the secretary of state to implement the bill's provisions relating to security interests, assignment, commingling, and default by establishing and maintaining a separate system of records for the filing of notices under those provisions and prescribing 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. 3544 exempts transactions involving the transfer and ownership of securitized property and the receipt of securitized charges from state and local income, sales, franchise, gross receipts, and other taxes or similar charges.

General Provisions

C.S.H.B. 3544 does the following:

- 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 securitization transactions under the bill;
- requires the proceeds of securitized bonds to be used solely for the purposes of financing or refinancing the applicable extraordinary costs and expenses;
- requires the board of each electric cooperative involved in the securitization 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 to ensure that the structuring and pricing of the securitized bonds are consistent with market conditions and the terms of the financing order; and
- provides for the severability of the bill's provisions.

Definitions

C.S.H.B. 3544 defines "qualified costs" and "extraordinary costs and expenses" as follows:

- "qualified costs" means up to 100 percent of the following costs of an electric cooperative:

- extraordinary costs and expenses;
- 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
- any costs of retiring and refunding the 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; and
- "extraordinary costs and expenses" means:
 - costs and expenses incurred by an electric cooperative for electric power and energy purchased during the applicable 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;
 - costs and expenses incurred by the 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
 - any charges imposed on the cooperative or on a power supplier to the cooperative that were passed on to the 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.

C.S.H.B. 3544 provides for the meaning of "assignee," "board," "financing order," "financing party," "period of emergency," "securitized bonds," "securitized charges," and "securitized property." The bill defines "combined securitization transaction" to mean the issuance of securitized bonds under this subchapter in a transaction involving at least two electric cooperatives acting together.

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. 3544 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 substitute revises the securitization process established by the original to do the following:

- specify that the costs and expenses 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;
- cap 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;
- includes a definition for "combined securitization transaction";
- provide for the issuance of securitized bonds in a combined securitization transaction by a group of electric cooperatives in addition to bonds for an individual cooperative, whereas the original was limited only to providing bonds for an individual cooperative;
- replace the original's references to "transition property" and "transition charges" with references to "securitized property" and "securitized charges";

- change the venue for judicial action related to a financing order from a Travis County district court, as in the original, to a district court in the county where the applicable electric cooperative is domiciled;
- include provisions not in the original that:
 - entitle an 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 to collect securitized charges from the retail customers and from retail customers that switch to new on-site generation;
 - require the charges to be remitted; and
 - require such retail customers to pay the charges;
- include a provision absent from the original authorizing 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 applicable retail customers;
- include a provision absent from the original relating to a generation and transmission cooperative's calculation of adjustments and determinations relevant to each true-up in a combined securitization transaction; and
- omit provisions of the original requiring an electric cooperative's board to ensure that the structuring and pricing of securitized bonds result in the lowest securitized bond charges and prohibiting the amount securitized from exceeding the present value of the revenue requirement over the life of the proposed securitized bonds associated with the extraordinary costs and expenses being financed.

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.