

# DISSECTING TEXAS'S UTILITY LENDING RULES

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**ABSTRACT**

Texas has two sets of statutory rules that aim to ease the burden of making public lien filings against utility debtors. Very little has been written about these rules, even though large secured transactions often rely on them. This article dissects these rules and offers proposed changes.

## I. INTRODUCTION

Since 1951, Texas has had a stand-alone utility lending statute that establishes an alternate filing system for mortgages and other instruments that create a security interest in a utility's property.<sup>1</sup> The current version of this statute is codified in Chapter 261 of the Texas Business & Commerce Code (Chapter 261).<sup>2</sup> In addition, since 2001, Chapter 9 of the Texas Business & Commerce Code (Chapter 9) has contained separate utility lending rules for so-called "transmitting utilities."<sup>3</sup> This article describes, compares, and analyzes Texas's utility lending rules. The reader should note that this article assumes that the reader has a basic understanding of security interest attachment and perfection requirements for non-utility debtors under Texas's general real property law and Chapter 9.<sup>4</sup>

## II. CHAPTER 261'S PROVISIONS

Chapter 261 provides an alternate filing system whereby, among other things, mortgages and other instruments that create a security interest in a utility's Texas real property may be filed with the Texas Secretary of State (the Texas SoS) rather than in the counties where the real property is located. More specifically, under Chapter 261, filing a utility security instrument (a USI),<sup>5</sup> which is generally a deed of trust, mortgage, or trust indenture, with the Texas SoS perfects a security interest granted by a utility<sup>6</sup> in: (1) real property located in Texas and fixtures on that

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1. TEX. REV. CIV. STAT. ANN. art. 1438a (West 1952) (repealed 1967).

2. TEX. BUS. & COM. CODE ANN. §§ 261.001–261.012 (West 2016).

3. TEX. BUS. & COM. CODE ANN. §§ 9.102(a)(81), 9.501(b), 9.513(d), 9.515(f), 9.525(b)(3) (West 2016).

4. Although the terms "perfection" and "security interest" are Chapter 9 terms and are usually associated with personal property security, this article also uses them in the real property context. For purposes of this article, the term "security interest" is interchangeable with the term "lien," which is traditionally used in real estate transactions. The word "perfection," in the context of discussions of real property in this article, means the notice given and priority typically obtained under Texas law by recording a deed of trust.

5. TEX. BUS. & COM. CODE ANN. § 261.001(a)(2) (West 2016) Under Chapter 261, "utility security instrument" means: (A) a mortgage, deed of trust, security agreement, or other instrument executed to secure payment of a bond, note, or other obligation of a utility; or (B) an instrument that supplements or amends an instrument described by Paragraph (A), including a signed copy of the instrument."

6. TEX. BUS. & COM. CODE ANN. § 261.001(a)(1) (West 2016). Under Chapter 261, "utility" means a person engaged in [Texas] in: (A) generating, transmitting, or distributing and selling electric power; (B) transporting, distributing, and selling, through a local distribution system, natural or other gas for domestic, commercial, industrial, or other use; (C) owning or operating a pipeline to transmit or sell natural or other gas, natural gas liquids, crude oil, or petroleum products to another pipeline company or to a refinery, local

real property, then owned or thereafter acquired by the utility,<sup>7</sup> and (2) personal property located in Texas including any goods that are or will become fixtures, then owned or thereafter acquired by the utility, “in which a security interest may be perfected by filing under Chapter 9.”<sup>8</sup> This article occasionally refers to non-utility Texas deeds of trust and other real property security instruments as mortgages. Note that, while Chapter 261 is not explicit, a USI also likely perfects a security interest in as-extracted collateral and timber to be cut located in Texas. This is because as-extracted collateral and timber to be cut satisfy the requirements in clause (2) above: they are personal property<sup>9</sup> in which a security interest may be perfected by filing under Chapter 9<sup>10</sup> and may be located in Texas and owned by a utility. Note that Chapter 261 defines a utility as an entity that is “engaged” in Texas acting as a utility.<sup>11</sup> As a result, an entity does not need to be organized in Texas to qualify as a “utility” under Chapter 261.

A centrally filed USI (a USI filed with the Texas SoS) under Chapter 261 satisfies any requirement of filing a county

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distribution system, municipality, or industrial consumer; (D) providing telephone or telegraph service to others; (E) producing, transmitting, or distributing and selling steam or water; (F) operating a railroad; or (G) providing sewer service to others.”

7. TEX. BUS. & COM. CODE ANN. § 261.004(a)(2) (West 2016) (“[T]he filing with the secretary of state of a utility security instrument executed by a utility . . . : (2) if the instrument is proven, acknowledged, or certified as otherwise required by law for the recording of real property mortgages, serve as notice to all persons of the existence of the instrument and the security interest granted by the instrument in any real property, or in any fixture on or to be placed on the property, that: (A) is located in this state; and (B) was owned by the utility when the instrument was executed or is to be acquired by the utility after the instrument is executed . . . .”); TEX. BUS. & COM. CODE ANN. § 261.004(b)(3) (West 2016) (If the USI covers after-acquired property, the USI must “state conspicuously on its title page: “This Instrument Contains After-Acquired Property Provisions.”).

8. TEX. BUS. & COM. CODE ANN. § 261.004(a)(1) (West 2016) (“[T]he filing with the secretary of state of a utility security instrument executed by a utility . . . : (1) constitute perfection of a security interest created by the instrument in any personal property: (A) in which a security interest may be perfected by filing under Chapter 9, including any goods that are or will become a fixture; (B) that is located in this state; and (C) that was owned by the utility when the instrument was executed or is to be acquired by the utility after the instrument is executed.”); TEX. BUS. & COM. CODE ANN. § 261.004(b)(3) (West 2016) (If the USI covers after-acquired property, the USI must “state conspicuously on its title page: “This Instrument Contains After-Acquired Property Provisions.”).

9. See, e.g., TEX. BUS. & COM. CODE ANN. § 9.102(a)(44) (West 2016) (“standing timber to be cut under a conveyance or contract for sale” is included in the definition of “goods,” as a type of personal property).

10. TEX. BUS. & COM. CODE ANN. § 9.501(a)(1)(A) (West 2016) (providing rules for filing against timber to be cut and as-extracted collateral).

11. TEX. BUS. & COM. CODE ANN. § 261.001(a)(1) (West 2016).

mortgage<sup>12</sup> or a central financing statement<sup>13</sup> covering the types of property described in the preceding paragraph. Perfection of a security interest in real property under a filed USI, however, is contingent upon the secured party filing a “notice of utility security instrument affecting real property” in each county in which real property covered by the USI is located.<sup>14</sup> That notice must state the name of the utility and indicate that a USI executed by the utility covering real property in that county is on file with the Texas SoS.<sup>15</sup> Any amendment to a USI must be filed with the Texas SoS; however, Chapter 261 does not appear to require any further county filings when a USI is amended.<sup>16</sup>

Chapter 261 is permissive, meaning that a utility and a secured party may opt-in to the alternate filing regime available under Chapter 261 (i.e., filing a USI with the Texas SoS),<sup>17</sup> or they can ignore Chapter 261 and agree to file mortgages and financing statements as they would in a non-utility transaction. To opt-in, the USI must simply state conspicuously on its title page: “This Instrument Grants A Security Interest By A Utility.”<sup>18</sup> And, of course, the debtor must be a utility (as defined in Chapter 261) and the USI must be filed with the Texas SoS.<sup>19</sup> Chapter 261 does not contain priorities or remedies provisions related to security

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12. TEX. BUS. & COM. CODE ANN. § 261.004(c) (West 2016) (“A filing under this section satisfies any requirement of: (1) a filing of the utility security instrument or a financing statement in the office of a county clerk if that filing would otherwise be necessary to perfect a security interest; and (2) a recording of the utility security instrument in the office of a county clerk if that recording would otherwise make the instrument effective as to all creditors and subsequent purchasers for valuable consideration without notice.”).

13. TEX. BUS. & COM. CODE ANN. § 9.311(a)(2) (West 2016) (“[T]he filing of a financing statement is not necessary or effective to perfect a security interest in property subject to . . . Chapter 261 . . .”).

14. TEX. BUS. & COM. CODE ANN. § 261.011 (West 2016).

15. TEX. BUS. & COM. CODE ANN. § 261.011(a)(1)–(3) (West 2016).

16. TEX. BUS. & COM. CODE ANN. § 261.001(a)(2)(B) (West 2016) (indicating that “an instrument that supplements or amends “a mortgage, deed of trust, security agreement, or other instrument executed to secure payment of a bond, note, or other obligation of a utility” filed as a USI is also itself a USI); TEX. BUS. & COM. CODE ANN. § 261.002 (West 2016) (indicating that a USI is considered filed when it is filed with the Texas SoS); TEX. BUS. & COM. CODE ANN. § 261.011 (West 2016) (stating that a notice of utility security instrument affecting real property “is sufficient to provide notice of any other security instrument filed with the secretary of state that: (1) was executed by the utility; and (2) grants a security interest in any real property located in the county in which the notice was recorded or in any fixture on the property.”).

17. TEX. BUS. & COM. CODE ANN. § 261.003 (West 2016) (“A utility is subject to the requirements and entitled to the benefits of this chapter: (1) only if the utility files with the secretary of state a utility security instrument that states conspicuously on its title page: ‘This Instrument Grants A Security Interest By A Utility’; and (2) only with respect to collateral covered by a utility security instrument filed by the utility in accordance with Subdivision (1).”).

18. TEX. BUS. & COM. CODE ANN. § 261.003(1) (West 2016).

19. TEX. BUS. & COM. CODE ANN. §§ 261.002–261.004(a) (West 2016).

interests perfected under Chapter 261.<sup>20</sup> However, Chapter 9's priorities and remedies provisions apply to security interests in *personal property*, including fixtures, covered by a USI.<sup>21</sup> Although Chapter 261 does not say, presumably, Texas law governing priority and remedies in *real property* applies to security interests in real property covered by a USI.

A USI does not lapse, meaning it is effective until it is released.<sup>22</sup> If the utility changes its name, consolidates, or merges, the secured party and the utility must file a written statement signed by both parties, identifying the original USI by filing number, and indicating the utility's name after the name change, merger, or consolidation.<sup>23</sup> If the parties fail to file that written statement within four months after the name change, the secured party's security interest will not be perfected as to collateral acquired by the utility more than four months after the name change.<sup>24</sup>

To illustrate how Chapter 261 works at the beginning of a transaction, consider a utility organized in Texas with intangible personal property and with real property, tangible personal property, and fixtures located across several counties in both Texas and Oklahoma. By filing a USI, a secured party can perfect a security interest in: (1) all real property and fixtures located in Texas and owned by the utility, then owned or thereafter acquired, and (2) all personal property collateral in which a security interest may be perfected by a filing with the Texas SoS under Chapter 9 (as it could even if the debtor was not a utility), but only to the

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20. TEX. BUS. & COM. CODE ANN. § 261.006 (West 2016) ("The provisions of Chapter 9 relating to priorities and remedies apply to security interests in personal property, including fixtures, perfected under Section 261.004.").

21. *Id.*

22. TEX. BUS. & COM. CODE ANN. § 261.005 (West 2016) ("The perfection and notice provided by the filing of a utility security instrument under Section 261.004 take effect on the date of filing and remain in effect without any renewal, refile, or continuation statement until the interest granted as security is released by the filing of a termination statement, or a release of all or a part of the property, signed by the secured party.").

23. TEX. BUS. & COM. CODE ANN. § 261.007(a) (West 2016) ("A utility that changes its name or merges or consolidates after filing a utility security instrument under Section 261.004 shall promptly file with the secretary of state a written statement of the name change, merger, or consolidation. The written statement must: (1) be signed by the secured party and the utility; (2) identify the appropriate utility security instrument by file number; and (3) state the name of the utility after the name change, merger, or consolidation.").

24. TEX. BUS. & COM. CODE ANN. § 261.007(b) (West 2016) ("Unless a written statement is filed under Subsection (a) not later than four months after the effective date of the name change, merger, or consolidations, the filing of a utility security instrument before the name change, merger, or consolidation does not constitute perfection or serve as notice under Section 261.004 of a security interest in property acquired by the utility more than four months after the name change, merger, or consolidation.").

extent the utility owns the collateral, the collateral is possessory collateral, and the collateral is located in Texas.<sup>25</sup> To perfect its security interest in the real property and fixtures located in Oklahoma, Oklahoma law would govern (and would presumably require county mortgage filings, assuming Oklahoma does not have a utility lending statute that is similar to Chapter 261); to perfect its security interest in other personal property (i.e., personal property that is not owned by the utility, possessory, and located in Texas), Chapter 9's rules applicable to non-utility debtors would govern and require the filing of a Texas SoS financing statement based on the debtor's location in Texas.<sup>26</sup>

As another illustration, consider a utility organized in Delaware with intangible personal property and with real property, tangible personal property, and fixtures located across several counties in Texas. By filing a USI, a secured party can perfect a security interest in all real property and fixtures located in Texas and owned by the utility, then owned or thereafter acquired.<sup>27</sup> As to personal property, however, the filing of a USI with the Texas SoS only constitutes perfection of a security interest created by the USI in personal property "in which a security interest may be perfected by filing under Chapter 9" (i.e.,

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25. TEX. BUS. & COM. CODE ANN. § 261.004(a)(2) (West 2016) ("[T]he filing with the secretary of state of a utility security instrument executed by a utility . . . (2) if the instrument is proven, acknowledged, or certified as otherwise required by law for the recording of real property mortgages, serve as notice to all persons of the existence of the instrument and the security interest granted by the instrument in any real property, or in any fixture on or to be placed on the property, that: (A) is located in this state; and (B) was owned by the utility when the instrument was executed or is to be acquired by the utility after the instrument is executed . . ."); TEX. BUS. & COM. CODE ANN. § 261.004(a)(1) (West 2016) ("[T]he filing with the secretary of state of a utility security instrument executed by a utility . . . : (1) constitute perfection of a security interest created by the instrument in any personal property: (A) in which a security interest may be perfected by filing under Chapter 9, including any goods that are or will become a fixture; (B) that is located in this state; and (C) that was owned by the utility when the instrument was executed or is to be acquired by the utility after the instrument is executed."). If the USI covers after-acquired property, the USI must state conspicuously on its title page: "This Instrument Contains After-Acquired Property Provisions."; TEX. BUS. & COM. CODE ANN. § 261.004(b)(3) (West 2016). See *supra* notes 7 and 8 and accompanying text.

26. TEX. BUS. & COM. CODE ANN. §§ 9.501(a)(2), 9.301(1), 9.307(e) (West 2016) (requiring filing of a Texas SoS financing statement to perfect a security interest in most personal property of a debtor organized under Texas law).

27. See TEX. BUS. & COM. CODE ANN. § 261.004(a)(2) (West 2016) ("[T]he filing with the secretary of state of a utility security instrument executed by a utility . . . (2) if the instrument is proven, acknowledged, or certified as otherwise required by law for the recording of real property mortgages, serve as notice to all persons of the existence of the instrument and the security interest granted by the instrument in any real property, or in any fixture on or to be placed on the property, that: (A) is located in this state; and (B) was owned by the utility when the instrument was executed or is to be acquired by the utility after the instrument is executed . . ."). See *supra* note 7 and accompanying text.

Texas's Chapter 9).<sup>28</sup> Filing under Chapter 9 will not perfect a security interest in personal property of an entity located in Delaware, because, as a general rule, filings against a Delaware entity must be made with the Delaware Secretary of State under Delaware's Article 9.<sup>29</sup> Therefore, a USI filed with the Texas SoS probably does not perfect a security interest in personal property (not including fixtures) of a utility that is organized under the laws of another state. As a result, a secured party would perfect its security interest in personal property of the entity by filing with the Delaware Secretary of State.<sup>30</sup>

### III. CHAPTER 9'S TRANSMITTING UTILITY PROVISIONS

Like Chapter 261, Chapter 9 also provides an alternate filing system for utility debtors.<sup>31</sup> Note that the transmitting utility provisions in Chapter 9 are in the model Uniform Commercial Code and have been adopted in other states.<sup>32</sup> Compare this to Chapter 261, which is not part of a model code (although at least one other state, Nevada, has a similar statute).<sup>33</sup> Also note that Chapter 261 and the transmitting utility rules in Chapter 9 stand apart: neither system contemplates the other's existence. In fact, the two statutes do not even have the same definition of the entity that qualifies to benefit under their provisions. Chapter 261 refers to the entity as a "utility," while Chapter 9 refers to the entity, with a slightly different definition, as a "transmitting utility."<sup>34</sup>

Chapter 9 contains only a handful of provisions covering transmitting utilities.<sup>35</sup> The provisions provide two benefits: (1) they allow secured parties to perfect a security interest by filing a fixture filing covering a transmitting utility's rights in fixtures located in Texas by filing centrally (i.e., in Texas, with the Texas

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28. TEX. BUS. & COM. CODE ANN. § 261.004(a)(1) (West 2013).

29. DEL. CODE ANN. tit. 6 § 9-501(a)(2) (West 2013).

30. *Id.*

31. TEX. BUS. & COM. CODE ANN. § 9.501(b) (West 2016) ("The office in which to file a financing statement to perfect a security interest in collateral, including fixtures, of a transmitting utility is the office of the [Texas SoS]. The financing statement also constitutes a fixture filing as to the collateral indicated in the financing statement which is or is to become fixtures.").

32. *See generally* U.C.C. § 9-501(b) (West 2016); *see, e.g.*, DEL. CODE ANN. tit. 6 § 9-501(b) (West 2013).

33. *See* NEV. REV. STAT. §§ 105.010–105.080 (2013).

34. TEX. BUS. & COM. CODE ANN. § 9.102(a)(81) ("'Transmitting utility' means a person primarily engaged in the business of: (A) operating a railroad, subway, street railway, or trolley bus; (B) transmitting communications electrically, electromagnetically, or by light; (C) transmitting goods by pipeline or sewer; or (D) transmitting or producing and transmitting electricity, steam, gas, or water.").

35. TEX. BUS. & COM. CODE ANN. §§ 9.102(a)(81), 9.501(b), 9.513(d), 9.515(f), 9.525(b)(3) (West 2016).



SoS) in the state where the fixtures are located<sup>36</sup> (as compared to a non-utility fixture filing, which must be filed in each county where fixtures are located<sup>37</sup>), and (2) they allow secured parties to file financing statements against transmitting utilities that do not lapse<sup>38</sup> (as compared to non-utility financing statements, which generally lapse five years after filing<sup>39</sup>).

To get these benefits, only two things are needed: (1) the debtor must be a transmitting utility, and (2) the filed financing statement must indicate that the debtor is a transmitting utility.<sup>40</sup> The second part is easy: field 6a. of Texas's UCC Financing Statement form has a box that can be checked to indicate that: "A Debtor is a Transmitting Utility."<sup>41</sup> This article calls a financing statement that indicates that the debtor is a transmitting utility a "transmitting utility filing" or a "TUF." It should be noted that a TUF also has the same effect as a normal financing statement and that the other rules applicable to normal financing statements (regarding amendments, termination, and the like) apply to a TUF.<sup>42</sup> A TUF, however, should also be thought of as a super financing statement, because it does not lapse and it serves as a

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36. TEX. BUS. & COM. CODE ANN. § 9.501(b) (West 2016) ("The office in which to file a financing statement to perfect a security interest in collateral, including fixtures, of a transmitting utility is the office of the [Texas SoS]. The financing statement also constitutes a fixture filing as to the collateral indicated in the financing statement which is or is to become fixtures.").

37. TEX. BUS. & COM. CODE ANN. § 9.501(a)(1)(B) (West 2016) ("[T]he office in which to file a financing statement to perfect the security interest . . . is . . . the office designated for the filing or recording of a record of a mortgage on the related real property, if . . . the financing statement is filed as a fixture filing and the collateral is goods that are or are to become fixtures . . .").

38. TEX. BUS. & COM. CODE ANN. § 9.515(f) (West 2016) ("If a debtor is a transmitting utility and a filed initial financing statement so indicates, the financing statement is effective until a termination statement is filed."); TEX. BUS. & COM. CODE ANN. § 9.513(d) (West 2016) ("[T]he filing with the filing office of a termination statement relating to a financing statement that indicates that the debtor is a transmitting utility also causes the effectiveness of the financing statement to lapse.").

39. TEX. BUS. & COM. CODE ANN. § 9.515(a) (West 2016) ("Except as otherwise provided in Subsections (b)–(g), a filed financing statement is effective for a period of five years after the date of filing.").

40. See TEX. BUS. & COM. CODE ANN. § 9.515(f) (West 2016) ("If a debtor is a transmitting utility and a filed initial financing statement so indicates, the financing statement is effective until a termination statement is filed."); see TEX. SEC'Y OF STATE, UCC FORMS, available at <http://www.sos.state.tx.us/ucc/uccforms.shtml> (last visited Feb. 4, 2017) (The UCC Financing Statement form UCC1 (revised April 20, 2011) (which has the box in field 6a. to indicate that "A Debtor is a Transmitting Utility") and the instructions thereto ("[i]f . . . a Debtor is a Transmitting Utility, check the appropriate box in item 6a.)) [<http://perma.cc/H5QV-VZVE>].

41. *Id.*

42. TEX. BUS. & COM. CODE ANN. § 9.501(b) (West 2016); TEX. BUS. & COM. CODE ANN. § 9.515(f) (West 2016) (referring to "financing statement" that indicates that the debtor is a transmitting utility).

fixture filing when filed centrally, which are two features that do not exist in a normal financing statement.<sup>43</sup> Note that a TUF may also likely perfect a security interest in as-extracted collateral and timber to be cut when the TUF is filed centrally in the state where the as-extracted collateral or timber to be cut is located (as compared to a normal as-extracted collateral filing or a timber to be cut filing, which must be filed locally),<sup>44</sup> because Chapter 9 indicates that the Texas SoS is the office in which to file a financing statement to perfect a security interest in “collateral” (which would include as-extracted collateral and timber to be cut) of a transmitting utility.<sup>45</sup> Unlike Chapter 261, which applies only to property located in Texas, the transmitting utility rules apply in any state that has adopted the same transmitting utility provisions as those of Chapter 9.<sup>46</sup> Chapter 9 does not contain any other substantive provisions concerning transmitting utilities.<sup>47</sup>

To illustrate how Chapter 9’s transmitting utility provisions work, consider a transmitting utility organized under Texas law, with fixtures collateral located across several counties in both

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43. TEX. BUS. & COM. CODE ANN. § 9.501(b) (West 2016); TEX. BUS. & COM. CODE ANN. § 9.501(a)(1)(B) (West 2016); TEX. BUS. & COM. CODE ANN. § 9.515(f) (West 2016); TEX. BUS. & COM. CODE ANN. § 9.515(a) (West 2016).

44. TEX. BUS. & COM. CODE ANN. § 9.501(a)(1)(A) (West 2016) (“[T]he office in which to file a financing statement to perfect the security interest or agricultural lien is: (1) the office designated for the filing or recording of a record of a mortgage on the related real property, if: (A) the collateral is as-extracted collateral or timber to be cut . . .”).

45. TEX. BUS. & COM. CODE ANN. § 9.501(b) (West 2016) (“The office in which to file a financing statement to perfect a security interest in *collateral* . . . of a transmitting utility is the office of the [Texas SoS]” (emphasis added)); *see also* W. Rodney Clement Jr. & Baxter Dunaway, *Revised Article 9 and Real Property*, 36 REAL PROP. PROB. & TR. J. 511, 554 (2001–2002).

Revised Article 9 require[s] central filing for all collateral of a transmitting utility, including fixtures. Because no exception to this rule is made for timber to be cut or as-extracted collateral of a transmitting utility, presumably a secured party with a security interest in timber to be cut or as-extracted collateral of a transmitting utility must also file its financing statement centrally rather than in the local real estate records in order to have a perfected security interest. Thus, a secured creditor could possibly have a perfected security interest in fixtures, timber to be cut, or as-extracted collateral of a transmitting utility without any indication of that interest appearing in the real estate records.

46. *See supra* note 32.

47. TEX. BUS. & COM. CODE ANN. § 9.102(a)(40) (West 2016) (The term “transmitting utility” is only used substantively in Chapter 9 (without including the transition provisions for the 2001 Amendments and the 2013 Amendments to Chapter 9) in: (a) Section 9.102(a)(40) (“[F]ixture filing” means the filing of a financing statement covering goods that are or are to become fixtures and satisfying Sections 9.502(a) and (b). The term includes the filing of a financing statement covering goods of a transmitting utility that are or are to become fixtures.”)); *id.* at § 9.102(a)(81) ((b) Section 9.102(a)(81) (the definition of “transmitting utility,” quoted in note 34 *supra*); *id.* at § 9.501(b) (c) Section 9.501(b), quoted in note 36 *supra*); *id.* at § 9.513(d) ((d) Section 9.513(d) (regarding termination of TUF)); *id.* at § 9.515(f) ((e) Section 9.515(f), quoted in note 38 *supra*).

Texas and Oklahoma. A secured party may file a TUF to perfect a security interest in all personal property collateral in which a security interest may be perfected by a filing with the Texas SoS under Chapter 9 (as it could even if the debtor was not a transmitting utility), as well as all fixtures located in Texas.<sup>48</sup> To perfect its security interest in fixtures located in Oklahoma, because Oklahoma's Uniform Commercial Code has the same transmitting utility provisions as Texas's Chapter 9, the secured party would need to file a central TUF in Oklahoma.<sup>49</sup> Neither of these filings would lapse.<sup>50</sup> Compare these fixture filing rules with the rules applicable to non-transmitting utility debtors, under which the secured party must file in each county in which the fixtures are located.<sup>51</sup>

As another illustration, consider a transmitting utility organized in Delaware, with fixtures collateral located across several counties in Texas. Because a TUF acts as a regular financing statement, a secured party may file a TUF to perfect a security interest in all personal property collateral in which a security interest may be perfected by a filing with the Delaware Secretary of State under Delaware's Uniform Commercial Code (as it could even if the debtor was not a transmitting utility).<sup>52</sup> To perfect its security interest in fixtures located in Texas, the secured party would need to file a central TUF with the Texas SoS.<sup>53</sup> Neither of these filings would lapse.<sup>54</sup>

#### IV. DISTINGUISHING UTILITY SECURITY INSTRUMENTS AND TRANSMITTING UTILITY FILINGS

To illustrate the difference between Chapter 261's provisions and Chapter 9's transmitting utility provisions, the following chart describes the types of collateral in which a security interest may be perfected by filing a USI and/or by filing a TUF, in each case with the Texas SoS:

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48. See *supra* notes 36, 42 and accompanying text.

49. OKLA STAT. tit. 12A, § 1-9-501(b) (2016).

50. OKLA STAT. tit. 12A, § 1-9-515(f) (2016); *supra* note 38 and accompanying text.

51. See *supra* note 37 and accompanying text.

52. DEL. CODE. ANN. tit. 6, §§ 9-501(b), 9-515(f) (2013) (referring to "financing statement" that indicates that the debtor is a transmitting utility).

53. See *supra* note 45 and accompanying text.

54. See DEL. CODE. ANN. tit. 6, § 9-515(f) (2013); *supra* note 38 and accompanying text.

Type of Collateral	Perfected by USI?	Perfected by TUF?
Real property located in Texas.	Yes, but potentially only if owned by the utility (the ownership issue is discussed in Part VII.B. of this article). <sup>55</sup>	No. <sup>56</sup>
Real property not located in Texas.	No. <sup>57</sup>	No. <sup>58</sup>
Personal property in which a security interest may be perfected by filing with the Texas SoS under Chapter 9.	Yes, but only if it is possessory collateral owned by the utility and located in Texas. Also likely limited to debtors organized (located) in Texas. <sup>59</sup>	Yes, assuming filing is made with the central filing office in the state where the debtor is located. <sup>60</sup>
Fixtures located in Texas.	Yes. <sup>61</sup>	Yes. <sup>62</sup>
As-extracted collateral and timber to be cut located in Texas.	Probably. <sup>63</sup>	Probably. <sup>64</sup>
Fixtures, as-extracted collateral, and timber to be cut not located in Texas.	No. <sup>65</sup>	No (but may file a TUF centrally in other state assuming other state has adopted the same transmitting utility provisions as Chapter 9). <sup>66</sup>

55. See *supra* note 7 and accompanying text.

56. See *supra* notes 36 and 37 and accompanying text.

57. See *supra* note 7 and accompanying text.

58. See *supra* notes 36 and 37 and accompanying text.

59. See *supra* note 8 and accompanying text.

60. See *supra* notes 36 and 42 and accompanying text.

61. See *supra* notes 7–8 and accompanying text.

62. See *supra* note 36 and accompanying text.

63. See *supra* notes 9–10 and accompanying text.

64. See *supra* note 45 and accompanying text.

65. See *supra* notes 7–8 and accompanying text.

66. See *supra* notes 48–54 and accompanying text.

As indicated by the foregoing chart, the only thing that a USI can do that a TUF cannot do (or, as discussed below, cannot do better), is perfect a security interest in Texas real property owned by a utility.

The Texas State Bar Committee previously published a comment (the “Bar Comment”) to Section 9.311 of the Texas Business and Commerce Code that explains Chapter 261’s purpose and its relationship to Chapter 9’s transmitting utility rules.<sup>67</sup> The Bar Comment states in part:

Utilities are a special class of debtor for which the ordinary filing rules may be a problem, especially where the collateral is fixtures such as pipelines or power lines. Requiring a local filing in each county where such fixtures may be located would be cumbersome and needlessly expensive. The Texas statutory scheme for such utilities has been to permit such security instruments to be filed in one “central” office, and that is also the approach of revised Chapter 9 Section 9.501(b). In Texas these arrangements are made in part in nonuniform fashion by the provisions of Chapter [261].<sup>68</sup>

It is true, as the Bar Comment notes, that the ordinary filing rules of Chapter 9 may be a problem for utility debtors with property in multiple counties.<sup>69</sup> As discussed in Part VI. of this article, that is the reason for Chapter 261 and for Chapter 9’s transmitting utility rules. But, as to fixtures (assuming that a debtor is both a “utility” under Chapter 261 and a “transmitting utility” under Chapter 9), Section 9.501(b) (Chapter 9) addresses this problem by permitting a secured party to perfect a security interest in fixtures located in Texas by filing a TUF with the Texas SoS.<sup>70</sup> A TUF is an easier way to perfect a security interest in fixtures of a utility than a USI for two modest reasons. First, a TUF is only one page<sup>71</sup> plus exhibits, whereas a USI is likely to be a much longer mortgage document. Second, a TUF is easier to create and maintain, because all that is required to create one is to check the “A Debtor is a Transmitting Utility” box on the form, and the Chapter 9 maintenance rules that apply to it are well

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67. TEX. BUS. & COM. CODE ANN. § 9.311 (O’Connor 2015) (State Bar Committee Comment).

68. *Id.*

69. TEX. BUS. & COM. CODE ANN. § 9.311 (O’Connor 2015) (State Bar Committee Comment); *see* TEX. BUS. & COM. CODE ANN. § 9.501(a)(1)(B) (West 2016).

70. *See supra* note 36 and accompanying text.

71. *See* TEX. SEC’Y OF STATE, UCC FORMS, available at <http://www.sos.state.tx.us/ucc/uccforms.shtml> (last visited Jan. 29, 2017) [<http://perma.cc/H5QV-VZVE>].

defined—e.g., rules on amendment, termination, and the like.<sup>72</sup> Creating a USI, on the other hand, requires that the filer understand both how to draft and file a USI with the applicable opt-in language on the cover page of the USI (two seemingly simple requirements that, as mentioned in Part IX.A. of this article, occasionally get mishandled). And, maintaining a USI is more difficult than maintaining a TUF, because, as discussed in Part IX.C. of this article, Chapter 261’s maintenance rules—e.g., rules on amendment, termination, and the like, etc.—are not as well-defined as those in Chapter 9. As noted above, Chapter 261’s benefit is that its rules can be used to perfect a security interest in *real property* located across multiple counties without the expense of filing lengthy mortgages in each county. The Bar Comment does not mention this benefit.<sup>73</sup>

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72. See *supra* note 41 and accompanying text.

73. I have discussed the prior Bar Comment herein to show a common source of confusion around the interplay between Chapter 261 and Chapter 9. However, William H. Henning and I, both current members of the Texas State Bar Committee, recently revised the Bar Comment. The revised Bar Comment should be published in a forthcoming version of the O’Conner publication of Chapter 9. Our revised Bar Comment reads as follows:

The filing of a utility security instrument (which includes a mortgage, deed of trust, and security agreement) is governed by Texas Business & Commerce Code, Chapter 261 if the utility elects to subject itself to those provisions. It does so by placing on the title page of the security instrument the following conspicuous statement: “This Instrument Grants A Security Interest By A Utility.” Section 261.003(1). The utility security instrument’s contents must satisfy the requirements of Section 261.003 and it must be filed in the office of the Secretary of State. Section 261.004(a).

A utility is a special class of debtor for which the ordinary filing rules may be a problem, especially if the collateral constitutes real property or fixtures such as pipelines or power lines. Requiring either a local mortgage or fixture filing in each county in which such real property or fixtures may be located would be cumbersome and needlessly expensive. Chapter 261 permits a security instrument in which a utility grants a security interest in real property and/or fixtures to be filed in one “central” office (the Secretary of State).

The utility rules in Chapter 261 and the transmitting utility rules in Chapter 9 are separate and distinct, but the benefits of each set of rules may be used in the same transaction. As with Chapter 261, the transmitting utility rules in Chapter 9 permit a transmitting utility to make a “central” filing as to all collateral, including fixtures, and the filing constitutes a fixture filing for purposes of that chapter. Section 9.501(b).

Section 9.311(a)(2) provides that the filing of a financing statement is not necessary or effective to perfect a security interest in property subject to Chapter 261. However, Chapter 261 is purely permissive and exists only to benefit utilities and their lenders, and a secured party may elect to perfect its security interest under Chapter 9. Because Chapter 261 only governs the perfection of a security interest in tangible personal property located in Texas and owned by a utility, resort to Chapter 9 will be necessary to perfect a security interest in personal

Because there is no interplay between Chapter 261 and the transmitting utility rules in Chapter 9, filings under each statute must be made according to that statute's rules. This does not mean, however, that a USI and a transmitting utility filing should not be filed in the same transaction. In transactions where the parties have opted-in to Chapter 261, filing both a USI (to perfect a security interest in real property) and a TUF (to perfect a security interest in personal property and fixtures) is the most efficient way to perfect a security interest in assets that can be perfected by making those filings.

## V. CHAPTER 261'S HISTORY AND PROVISIONS

Having distinguished USIs and TUFs, the remainder of this article discusses Chapter's 261's key rules and certain issues that arise in applying those rules. A brief review of the history of Texas's utility lending statutes will be helpful to develop theories about why certain provisions of Chapter 261 are written as they are, and what they mean, today.

### A. *Texas's Utility Lending Statutes*

Texas enacted its original utility lending statute, the predecessor to Chapter 261, in 1951 and codified it as Texas Revised Civil Statutes Annotated Article 1438a (the 1951 Version).<sup>74</sup> In 1967, the Texas legislature moved the 1951 Version to Chapter 35 of the then newly-enacted Texas Business and Commerce Code (the Original 1967 Version of Chapter 261).<sup>75</sup> The Original 1967 Version of Chapter 261 was amended in 1974 (the 1974 Amendments to Chapter 261),<sup>76</sup> 1981 (the 1981

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property that is: i) not owned by the utility, ii) not tangible, or iii) located elsewhere.

A note of caution is in order. Under Section 9.301(3)(b), the law governing perfection as to fixtures is the local law of the jurisdiction in which the fixtures are located. If a transmitting utility has fixtures in a state other than Texas, a central filing in that state will be necessary.

It is also worth noting that if the debtor is a transmitting utility a filed financing statement is effective until a termination statement is filed. Continuous perfection must be accomplished by checking the appropriate box on the initial financing statement and may not be accomplished by an amendment. Section 9.515(f).

74. TEX. REV. CIV. STAT. ANN. art. 1438a (West 1952) (repealed 1967).

75. TEX. BUS. & COM. CODE ANN. §§ 35.01-35.08 (West 1968) (repealed 2009); H.R. 293, 60th Leg., Reg. Sess. (Tex. 1967) (the 1967 Legislation). *See generally* Millard H. Ruud, *The Texas Legislative History of the Uniform Commercial Code*, 44 TEX. L. REV. 597 (1965).

76. TEX. BUS. & COM. CODE ANN. §§ 35.01-35.09 (West 1978) (repealed 2009); S. 131, 63rd Leg., Reg. Sess. (Tex. 1973).

Amendments),<sup>77</sup> 1987 (the 1987 Amendments),<sup>78</sup> and 1989 (the 1989 Amendments)<sup>79</sup> (this article calls the Original 1967 Version, as so amended, the 1967 Version), and it remained in Chapter 35 until April 1, 2009, when it was moved to Chapter 261 (the Original 2009 Version).<sup>80</sup> The 2009 Version was amended effective June 19, 2009 (the June 2009 Amendments)<sup>81</sup> (references in this article to “Chapter 261” mean the Original 2009 Version, as amended by the June 2009 Amendments).

### *B. Provisions in Texas’s Historical Utility Lending Statutes*

Under the slim 1951 Version, a security instrument<sup>82</sup> executed by a utility<sup>83</sup> and filed in the county records (rather than with the Texas SoS) was sufficient to perfect a security interest in property located in that county, then owned or thereafter acquired.<sup>84</sup> The 1951 Version also had a provision for name changes, mergers, or consolidations by a utility that required the utility to file an affidavit or other evidence of such change of name

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77. S. 684, 67th Leg., Reg. Sess. (Tex. 1981).

78. S. 892, 70th Leg., Reg. Sess. (Tex. 1987).

79. S. 132, 71st Leg., Reg. Sess. (Tex. 1989).

80. H.R. 2278, 80th Leg., Reg. Sess. (Tex. 2007).

81. S. 1592, 81st Leg., Reg. Sess. (Tex. 2009).

82. TEX. REV. CIV. STAT. ANN. art. 1438a § 2 (West 1952) (repealed 1967) (Unlike Chapter 261, the 1951 Version did not have a defined term for “utility security instrument,” but instead referred to a “mortgage, deed of trust, or other security instrument hereafter executed by any corporation referred to in Section 1 of this Act . . .”).

83. TEX. REV. CIV. STAT. ANN. art. 1438a § 1 (West 1952) (repealed 1967) (Unlike Chapter 261, the 1951 Version did not have a defined term for “utility,” but instead referred to: “(a) corporations engaged in this State in the generation, manufacture, transmission, distribution and sale of electric energy and power to the public, (b) corporations engaged in this State in the transportation, distribution and sale through local distribution system or systems of natural gas to the public for domestic, commercial, industrial or any other use, and (c) corporations owning or operating in this State any gas pipe line or lines for the transportation and sale of natural gas to other pipe line companies or to local distribution systems or to municipalities, or to industrial consumers for their own use.”).

84. TEX. REV. CIV. STAT. ANN. art. 1438a § 2 (West 1952) (repealed 1967) (“Any mortgage, deed of trust, or other security instrument hereafter executed by any corporation referred to in Section 1 of this Act, which by its terms subjects to the lien thereof property then owned, and property to be acquired by the corporation subsequent to the execution by it of such mortgage, deed of trust, or other security instrument, upon the deposit thereof for record in the proper recording office of any county shall constitute notice of the lien of such mortgage as to the property situated in such county and specifically described in the said mortgage, deed of trust, or other security instrument, and upon compliance with the provisions of Section 3 of this Act shall also constitute notice of the lien of such mortgage, deed of trust, or other security instrument as to the property in such county acquired by the corporation subsequent to the execution and deposit for record in such county of such mortgage, deed of trust, or other security instrument.”).



or merger or consolidation for continued perfection after the name change.<sup>85</sup>

The Original 1967 Version officially defined the terms “utility”<sup>86</sup> and “security instrument”<sup>87</sup> for the first time. It retained the county (rather than the Texas SoS) as the proper place to file a security instrument that created a security interest in property owned by the utility and located in that county, then owned or thereafter acquired.<sup>88</sup> The Original 1967 Version also had a rule that a security instrument perfecting a security interest in personal property and goods which were fixtures or were to become fixtures lapsed ten years after filing unless a proper continuation statement was filed.<sup>89</sup> Finally, the Original 1967 Version carried

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85. TEX. REV. CIV. STAT. ANN. art. 1438a § 4 (West 1952) (repealed 1967) (“Any corporation of the class referred to in Section 1 of this Act which has executed and filed for record in this State a mortgage, deed of trust or other security instrument meeting the requirements of this Act with respect to the lien thereof covering after-acquired property of such corporation, which shall, subsequent to the execution and filing for record of such mortgage, deed of trust or other security instrument, change its corporate name or theme or consolidate with another company or corporation, shall promptly file for record in each county in this State wherein is situated any property of said corporation, an affidavit or other evidence of such change of name or merger or consolidation which shall set forth the corporate name of said corporation which it will have immediately after such change of name, merger or consolidation; and such mortgage, deed of trust, or other security instrument shall not constitute notice as to property acquired by the corporation succeeding the mortgagor until such affidavit or other evidence of a change in the name of the mortgagor has been filed as required by this section.”).

86. TEX. BUS. & COM. CODE ANN. § 35.01(a)(2) (West 1968) (repealed 2009) (“[U]tility means a person engaged in this state in the (A) generation, transmission, or distribution and sale of electric power; (B) transportation, distribution and sale through a local distribution system of natural or other gas for domestic, commercial, industrial, or other use; (C) ownership or operation of a pipeline for the transportation or sale of natural gas, crude oil, or petroleum products to other pipeline companies, refineries, local distributing systems, municipalities, or industrial consumers; (D) provision of telephone or telegraph service to others; (E) production, transmission, or distribution and sale of steam or water; or (F) operation of a railroad.”).

87. TEX. BUS. & COM. CODE ANN. § 35.01(a)(1) (West 1968) (repealed 2009) (“[S]ecurity instrument’ means a mortgage, deed of trust, security agreement, or other instrument executed to secure the payment of a bond, note, or other obligation of a utility.”).

88. TEX. BUS. & COM. CODE ANN. § 35.02 (West 1968) (repealed 2009) (“[D]eposit for record in the office of the county clerk of a security instrument executed by a utility constitutes notice to third parties of the lien granted by the security instrument on property (1) owned by the utility when the security instrument was executed; (2) located in the county; and described in the security instrument.”); TEX. BUS. & COM. CODE ANN. § 35.03 (West 1968) (repealed 2009) (“Deposit for record in the office of the county clerk of a security instrument executed by a utility which grants a lien on property to be acquired by the utility after execution of the security instrument constitutes notice of the lien granted by the security instrument on property located in the county and acquired by the utility after execution of the security instrument if it (1) states conspicuously on its title page: ‘This Instrument Contains After-acquired Property Provisions’; and (2) contains an affidavit of the president, vice president, treasurer, or secretary of the utility that executed it that it was executed by a utility.”).

89. TEX. BUS. & COM. CODE ANN. §§ 35.04, 35.05 (West 1968) (repealed 2009).

forward in similar form the 1951 Version's requirement for a filing after a utility's name change, merger, or consolidation.<sup>90</sup>

The 1974 Amendments substantially rewrote the 1967 Version. First, the 1974 Amendments made the Texas SoS, rather than the county, the place to file a security instrument.<sup>91</sup> The legislative history behind the later 1981 Amendments explains this change as follows:

The Business and Commerce Code provides a procedure for the public filing of a security instrument to give advance notice to other creditors that certain property is already being used as collateral for a loan. The Code generally provides for the instrument to be filed in the county where the collateral is located. In [1973]<sup>92</sup> the Legislature provided that security instruments required in connection with the financing of utilities must be filed with the Secretary of State which allows large utilities to avoid the high cost of multiple filings.<sup>93</sup>

The 1974 Amendments also added substantially the same rule that remains in Chapter 261, which required a secured party to file notices of the security instrument on file with the Texas SoS

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90. TEX. BUS. & COM. CODE ANN. § 35.06 (West 1968) (repealed 2009).

91. TEX. BUS. & COM. CODE ANN. § 35.02 (West 1974) (repealed 2009) (“(a) . . . deposit for filing in the office of the Secretary of State of a security instrument executed by a utility which states conspicuously on its title page: “This Instrument Grants A Security Interest By A Utility” shall, subject to the provisions of Subsection (b) of this section (1) constitute perfection of a security interest created by the security instrument in any personal property (including goods which are, or are to become, fixtures) in which a security interest may be perfected by filing under Chapter 9 of this code, located in this state, and owned by the utility when the security instrument was executed or to be acquired by the utility after execution of the security instrument; and (2) be taken and held as notice to all persons of the existence of such security instrument and the interest granted therein, as security, in any real property (or fixtures thereon, or to be placed thereon) located in this state and owned by the utility when the security instrument was executed or to be acquired by the utility after the execution of the security instrument; provided that the security instrument shall first be proven, acknowledged or certified as otherwise required by law for the recording of real property mortgages. (b) For perfection or notice to be effective as to a particular item of property, the filed security instrument must (1) identify the property by type, character, or description if it is presently owned personal property (including fixtures); provided that for such purposes, any description of personal property or real estate is sufficient whether or not it is specific if it reasonably identifies what is described; (2) provide a description of the property if it is presently owned real property; and (3) state conspicuously on its title page: “This Instrument Contains After-Acquired Property Provisions” if the property is to be acquired after the execution of the security instrument.”)

92. See S. 684, 67th Leg., Reg. Sess. House Committee on State Affairs Bill Analysis, Background Information (Tex. 1981) (The Bill Analysis’ Background Information actually states the date “1967” in the brackets. It appears that the House Committee on State Affairs actually meant 1973, which is the year the legislation creating the 1974 Amendments (that required the security instrument to be filed with the Texas SoS rather than the county) was passed.)

93. *Id.*

in each county where real property covered by the security instrument was located.<sup>94</sup> Regarding name changes, mergers and consolidations, the 1974 Amendments added the rule that is substantially the same rule that remains in Chapter 261: that a written statement, signed by the utility and the secured party, must be filed with the Texas SoS within four months of the name change, merger, or consolidation to perfect a security interest in collateral acquired more than four months after the name change, merger, or consolidation.<sup>95</sup>

The 1981 Amendments added express opt-in language which stated that a utility would only be subject to the requirements and entitled to the benefits of the 1967 Version if it opted-in by so electing on the face of its security instrument filed with the Texas SoS; if it did not opt-in, other customary state law pertaining to security instruments would apply.<sup>96</sup> The 1987 Amendments simply changed a section number.<sup>97</sup> The 1989 Amendments expanded the definition of utility.<sup>98</sup>

The Original 2009 Version, which is substantially the same version that is in effect today and is discussed more fully in Part II of this article, retained in material part the principal provisions of the 1974 Amendments.<sup>99</sup> The June 2009 Amendments are not relevant to the topics covered in this article.

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94. TEX. BUS. & COM. CODE ANN. § 35.07 (West Supp. 1978) (repealed 2009).

95. TEX. BUS. & COM. CODE ANN. § 35.04(b) (West Supp. 1978) (repealed 2009).

96. S. 684, 67th Leg., Reg. Sess. (Tex. 1981). The legislation states: "this bill will require a borrower to elect to be considered a utility in order to be covered by Chapter 35 Business & Commerce Code. Since this chapter is primarily for the convenience of utilities, those who wish to have the benefits of a single, statewide filing will elect to be covered. Others, who are not aware of their possible status as a "Utility" or to whom [sic] this provision would not be a benefit, will file their security instruments in the traditional manner. The election to be considered a utility for purposes of a particular transaction is made simply by filing the security instrument with the Secretary of State . . . Section 1: Amends Chapter 35, Subchapter A, Business & Commerce Code by providing: (1) that a person shall not be considered [sic] a "utility" under this section unless he meets the definition in Section 35.01(a)(2) and he filed a security instrument with the Secretary of State; (2) that an election to be considered a "utility" applies only to the collateral covered by the security instrument filed with the Secretary of State; (3) that other law pertaining to security instruments will apply if no election is made.

97. S. 892, 70th Leg., Reg. Sess. (Tex. 1987).

98. S. 132, 71st Leg., Reg. Sess. (Tex. 1989); TEX. BUS. & COM. CODE ANN. § 35.01(a)(2)(C) (West 2007) (repealed 2009) (establishing that a person engaged in Texas in the "ownership or operation of a pipeline for the transmission or sale of...natural gas liquids . . ." constituted a utility).

99. TEX. BUS. & COM. CODE ANN. § 261.001-261.011 (West 2009).

## VI. HISTORICAL AND PRESENT BENEFITS OF UTILITY LENDING STATUTES

### A. *After-Acquired Property*

The 1951 Version stated clearly that security instruments filed under its rules covered after-acquired property.<sup>100</sup> Seemingly, the sole purpose of the 1951 Version was to give certainty that such security instruments covered after-acquired property. The legislature's intent is reflected both in the 1951 Version's title, which was simply: "Mortgages covering after-acquired property,"<sup>101</sup> and in the legislation creating the 1951 Version, which stated:

The fact that the securities of [utilities] are being, or may be, discriminated against because of investors questioning the effectiveness of after-acquired property clauses contained in mortgages, deeds of trust, and other security instruments executed by such corporations, and the fact that this operates, or may operate as a handicap to the fair and proper financing of such corporations create an emergency and an imperative public necessity that [this Act be enacted].<sup>102</sup>

The name change rules in the 1951 Version make sense when viewed as part of the after-acquired property problem the legislature was trying to solve. The name change rules stated that the "security instrument shall not constitute notice as to property acquired by the [utility] . . . until [an] affidavit or other evidence of a change in the name of the [utility] has been filed as required by this section."<sup>103</sup> This makes sense because, if a utility acquired after-acquired property in a different name than the one indicated on the filed security instrument, the filed security instrument would fail to give constructive notice that the after-acquired property was subject to the security interest under that filed security instrument (i.e., if a third party searched for encumbrances under the utility's new name, they would not find the security instrument unless a name change document had been filed).

Historically, whether a mortgage could perfect a security interest in a utility's after-acquired property has been an important question for utilities and their lenders (and still is). As alluded to in the Bar Comment, discussed in Part IV of this article, more so than non-utility borrowers, utility borrowers acquire land,

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100. TEX. REV. CIV. STAT. ANN. art. 1438a (West 1952) (repealed 1967).

101. TEX. REV. CIV. STAT. ANN. art. 1438a (West 1952) (repealed 1967).

102. S. 68, 52nd Leg., Reg. Sess. 195, § 4 (Tex. 1951).

103. TEX. REV. CIV. STAT. ANN. art. 1438a § 4 (West 1952) (repealed 1967).

easements, rights of way, and the like that, giving effect to the desires of utilities and their lenders, need to be covered by earlier filed mortgages.<sup>104</sup> In the 1950s and 1960s, the question of whether a mortgage could perfect a security interest in a debtor's after-acquired property was unsettled. In his article *After-Acquired Title in Texas*, published in 1966, Professor Richard W. Hemingway wrote that Texas courts had applied, in after-acquired title cases about property conveyed by *deed*, a “grab-bag’ rational, i.e., a theoretical basis suited to the achievement of a just result in a particular case.”<sup>105</sup> Hemingway continued, “[i]t is apparent that after-acquired title will pass under mortgages and deeds of trust in the same manner as deeds, although few cases in point are found in Texas. Even these few seem to be divided as to the basis upon which after-acquired title will be held to pass.”<sup>106</sup> The 1951 Version (as well as all later versions of Texas’s utility lending statute, including Chapter 261) was clear that security instruments filed under its provisions covered after-acquired property.<sup>107</sup>

Today, commentators frequently cite the rule that an after-acquired title provision in a regular (non-utility) Texas mortgage, if clearly drafted, creates and perfects a security interest in after-acquired property.<sup>108</sup> This consensus is slightly incongruous with the history discussed in the preceding paragraph, given that the cases those modern commentators frequently cite for this proposition were decided in the 1950s and 1960s (or earlier)<sup>109</sup> during which, at the very least, Professor Hemingway and, according to the legislature that passed the 1951 Version, investors in utilities, had concerns about whether after-acquired

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104. TEX. BUS. & COM. CODE ANN. § 261.004(a)(2) (West 2016); *see also* TEX. BUS. & COM. CODE ANN. § 261.004(a)(1) (West 2016).

105. Richard W. Hemingway, *After-Acquired Title in Texas* (pt. I), 20 SW. L.J. 97, 100 (1966).

106. Richard W. Hemingway, *After-Acquired Title in Texas* (pt. II), 20 SW. L.J. 310, 316 (1966) (citations omitted).

107. *See supra* note 101 and 102 and accompanying text.

108. 2 TEX. PRAC. GUIDE REAL TRANS. § 10:28 (“[W]here the mortgagor warrants the title, a title or interest that, subsequent to the execution of the mortgage, has been acquired by the mortgagor inures to the benefit of the mortgagee.”) (citing *Simon v. State Mut. Life Assur. Co.*, 126 S.W.2d 682 (Tex. Civ. App.—Dallas 1939, writ ref’d); 42 ROCKY MTN. MIN. L. FOUND. J. NO. 2 429, 432 (2005) (“Texas courts have clarified that the after-acquired title doctrine applies to deeds of trust (and mortgages) . . . (citations omitted)” (citing *Shields v. Donald*, 253 S.W.2d 710, 712 (Tex. Civ. App.—Fort Worth 1952, writ ref’d n.r.e.), *Galloway v. Moeser*, 82 S.W. 1607, 1069 (Tex. Civ. App.—Eastland 1935, no writ), and *Logue v. Atkeson*, 80 S.W. 137, 140 (Tex. Civ. App. 1904, writ denied)); *see generally* Scott C. Petry, *Revisiting After-Acquired Title Revisited*, STATE BAR OF TEXAS, 30th ANNUAL ADVANCES OIL, GAS AND ENERGY RESOURCES LAW COURSE (October 18–19, 2012).

109. *Id.*

title provisions in standard Texas mortgages were effective. However, according to the modern commentary, there seems to be certainty today that, under Texas law, after-acquired title provisions in regular Texas mortgages are enforceable.<sup>110</sup> If so, Chapter 261's rule that a USI covers after-acquired property does not offer a benefit that the parties to a utility lending transaction could not otherwise get by filing traditional mortgages. In other words, the fact that a USI perfects a security interest in after-acquired property of a utility may be more of a historical benefit than a present one.

### B. Lapse

Since the Original 1967 Version became effective, Texas's utility lending statutes have had rules extending perfection of a security interest in certain property under a utility security instrument for a longer period than its non-utility counterpart instrument. As discussed in Part V. of this article, under the Original 1967 Version, perfection of a security interest in personal property and fixtures by filing a security instrument lapsed after ten years,<sup>111</sup> whereas, under Chapter 9 (as it was in effect at the same time), a financing statement covering the same collateral lapsed after five years.<sup>112</sup> Further, the 1974 Amendments changed the Original 1967 Version to state that perfection of a security interest in personal property and fixtures by filing a security instrument does not lapse, which is the same rule in effect today under Chapter 261.<sup>113</sup> Because utility lending transactions tend to have longer durations than other lending transactions, it makes sense that utility security instrument filings should not lapse, either at all or as in the same period as other filings.<sup>114</sup> However, as argued in the following paragraphs, nothing in Chapter 261 offers a benefit that the parties to a utility lending transaction could not otherwise get under other Texas law.

First, as to real property, a regular Texas mortgage does not lapse unless the statute of limitations on the note secured by the mortgage has expired.<sup>115</sup> Further, a mortgage filed as a fixture

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110. *Id.*

111. TEX. BUS. & COM. CODE ANN. § 35.04 (West 1968) (repealed 2009).

112. TEX. BUS. & COM. CODE ANN. § 9.403(b) (West 1968) (amended 2001).

113. TEX. BUS. & COM. CODE ANN. § 35.03 (West 1974) (repealed 2009); § 261.005 (West 2016).

114. TEX. BUS. & COM. CODE ANN. § 9.515 cmt. 2 (West 2016) (explaining that Section 9.515 gives longer duration to financing statements filed in transactions that "typically extend well beyond the standard, five-year period.").

115. *Cadle Co. v. Butler*, 951 S.W.2d 901, 909 (Tex. App.—Corpus Christi 1997, no writ).

filing does not lapse.<sup>116</sup> Thus, a regular mortgage and a USI are the same regarding lapse of perfection of a security interest in real property and fixtures: perfection does not generally lapse under either instrument.

Second, as to personal property and fixtures, regular financing statements and fixture filings lapse five years after filing unless continued.<sup>117</sup> However, as discussed more fully in Part III. of this article, under Chapter 9, a TUF, which does not lapse, may perfect a security interest in personal property and fixtures (as a fixture filing) of a transmitting utility. Therefore, Chapter 261 and Chapter 9 both offer a mechanism that secured parties may use to fully perfect a security interest without lapse in personal property and fixtures of a utility (assuming that the debtor is both a “utility” under Chapter 261 and a “transmitting utility” under Chapter 9).

From 1974 (when the Original 1967 Version was amended by the 1974 Amendments to state that USIs do not lapse) until 2001 (when Chapter 9 adopted its transmitting utility provisions), Chapter 261 had a key benefit as to lapse, because a USI was the only available option to perfect without lapse in certain personal property of a Texas utility. Now, however, Chapter 261 does not offer any benefit as to lapse of perfection that cannot be obtained under other Texas law.<sup>118</sup>

### C. Cost Savings

As discussed in Part V.B. of this article, the 1974 Amendments moved the filing location for the security instrument from the county to the Texas SoS.<sup>119</sup> This remains the rule today.<sup>120</sup> As a result, under Chapter 261, rather than being required to file full USIs in each county where property of a utility is located, a secured party may file one USI with the Texas SoS and a short notice of the USI in each county where the real property covered by the USI is located.<sup>121</sup> Additionally, because a USI may perfect a security interest in certain personal property, in transactions where filing a USI with the Texas SoS is sufficient to perfect a security interest in that personal property, the secured party does not need to file a financing statement with the Texas SoS (however, as discussed in Part VII. of this article,

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116. TEX. BUS. & COM. CODE ANN. § 9.515(g) (West 2016).

117. TEX. BUS. & COM. CODE ANN. § 9.515(a) (West 2016). *Id.*

118. TEX. BUS. & COM. CODE ANN. §§ 261.001–012 (West 2016).

119. TEX. BUS. & COM. CODE ANN. § 35.02 (West 1974) (repealed 2009); *see supra* text accompanying note 91.

120. *See supra* note 7 and accompanying text.

121. *Supra* notes 7 and 14.

Chapter 261's limitations make it unlikely that a USI would be sufficient in most transactions to perfect a security interest in all intended personal property collateral of a utility). These reduced filing obligations result in recording cost savings, which can be substantial, given that counties typically charge for recording on a per-page basis.

To illustrate the cost savings, as of a recent inquiry, the standard mortgage recording fee in Dallas County, Texas,<sup>122</sup> was \$26.00 for the first page and \$4.00 for each additional page. That additional page fee appears to be consistent with the fee charged by other counties.<sup>123</sup> The first \$26.00 must be spent whether the parties have opted-in to Chapter 261 or not, because Chapter 261 still requires the simple notice filing (which may be a single page) in each county where property is located. Considering a hypothetical USI that is 100 pages, the recording fee savings to a utility that has opted-in to Chapter 261 would be \$396.00 (\$4.00 per page x 99 pages) per county, less the one-time \$25.00 USI filing fee charged by the Texas SoS.<sup>124</sup> Additional cost savings accrue if a USI is amended and the amendment is filed with the SoS (rather than in each county, as a mortgage amendment typically would be), because Chapter 261 does not require county notice filings in connection with USI amendments.<sup>125</sup>

## VII. LIMITATIONS IN CHAPTER 261

To illustrate certain limitations in Chapter 261, consider as an example a garden variety non-utility financing secured by substantially all personal property and Texas real property and fixtures (including as-extracted collateral and timber to be cut) of a debtor organized under Texas law. Generally: (1) the secured party's security interest in the Texas real property will be perfected by filing a mortgage in each county where the real property is located; (2) the secured party's security interest in the personal property filing collateral will be created in an unfiled

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122. Dallas County Clerk Recording Fees, DALLASCOUNTY.GOV, <http://www.dallascounty.org/department/countyclerk/feesrecording.php> (last visited Jan. 22, 2017) [<http://perma.cc/6Z8Q-894B>].

123. See, e.g., HUNT COUNTY TEXAS, COUNTY CLERK, COUNTY CLERK FEES AS OF JANUARY 1, 2016, <http://www.huntcounty.net/index.aspx?NID=760> (last visited Jan. 22, 2017) (providing a charge of \$4 for each additional page) [<http://perma.cc/N6VL-C63L>]; see also TEXAS LOCAL GOV'T CODE § 118.011(a) ("A county clerk shall collect the following fees for services rendered to any person: . . . (2) Real Property Records Filing (Sec. 118.013): for the first page \$5.00 [and] for each additional page or part of a page on which there are visible marks of any kind \$4.00.").

124. See TEX. BUS. & COM. CODE ANN. § 261.008(d) (West 2016).

125. See *supra* note 16 and accompanying text.



security agreement and perfected by filing an “all assets” type financing statement with the Texas SoS; and (3) the lender’s security interest in fixtures, as-extracted collateral, and/or timber to be cut, will be perfected by filing a mortgage in each county where such collateral is located and/or by filing a fixture filing, as-extracted collateral filing, or timber to cut filing,<sup>126</sup> as the case may be, in the county where such collateral is located.

Assuming the same collateral as in the preceding paragraph, in a utility lending transaction under Chapter 261: (1) the secured party’s security interest in the Texas real property will be perfected by filing a USI with the Texas SoS and county notice filings in the county where the real property is located; (2) the secured party’s security interest in the personal property filing collateral will be created in the USI and perfected by filing the USI with the Texas SoS; and (3) the lender’s security interest in fixtures, as-extracted collateral, and/or timber to be cut, will probably be perfected by filing the USI with the Texas SoS.<sup>127</sup> However, as discussed in Part II. of this article, filing a USI with the Texas SoS may not perfect a security interest in certain collateral that ordinarily would be perfected by filing a mortgage under part (1) of the preceding paragraph and filing a financing statement under part (2) of the preceding paragraph. This is because Chapter 261 states that filing a USI with the Texas SoS constitutes perfection of: (a) a security interest created by the USI in real property *owned* by the utility when the instrument was executed or that is to be acquired by the utility after the instrument is executed, and (b) a security interest created by the USI in any personal property: (I) in which a security interest may be perfected by filing under Chapter 9 including any goods that are or will become a fixture; (II) that is *located in Texas*; and (III) that was *owned* by the utility when the instrument was executed or that is to be acquired by the utility after the instrument is executed.<sup>128</sup> This language raises the following two issues: (x) location of collateral, and (y) ownership of collateral.

#### A. Location of Collateral

Since 2001, Chapter 9 has established that a secured party may perfect a security interest in personal property of a debtor

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126. A fixture filing is merely a UCC-1 filing that also satisfies the requirements of Section 9.502(b) of Chapter 9. An as-extracted collateral filing or a timber to be cut filing is the same, except that the filing must indicate that it covers as-extracted collateral or timber to be cut. See TEX. BUS. & COM. CODE ANN. § 9.502(b) (West 2016).

127. See *supra* notes 7–10 and accompanying text.

128. TEX. BUS. & COM. CODE ANN. § 261.004(a)(1) (West 2016).

that is a registered organization by filing a financing statement (assuming the collateral is of a type in which a security interest may be perfected by filing, which this article calls Chapter 9 Filing Collateral) where the debtor is organized, or “located” in Chapter 9 parlance, regardless of the location of the collateral.<sup>129</sup> For example, for an entity organized in Texas, filing a financing statement with the Texas SoS is typically sufficient to perfect a security interest in all personal property of the debtor in Article 9 Filing Collateral, regardless of the location of the collateral.<sup>130</sup> In contrast, it appears that a USI filed with the Texas SoS under Chapter 261 can only perfect a security interest in collateral located in Texas.<sup>131</sup> Thus, if a Texas-organized utility has either (a) non-possessory collateral, such as accounts and general intangibles which cannot, by reason of their intangible nature, be located somewhere,<sup>132</sup> or (b) personal property collateral located outside of Texas, it appears that a security interest in that personal property collateral may only be perfected by filing a financing statement with the Texas SoS.<sup>133</sup> Presumably, the collateral location limitation is in Chapter 261 to ensure that third parties have notice of the security interest created by a USI.

The location limitation in Chapter 261 does not work well with Chapter 9’s rules. Unlike under Chapter 9, under Chapter 261 the location of the utility is not relevant. As discussed in Part II. of this article, Chapter 261 defines a utility as an entity that is “engaged” in Texas acting as a utility.<sup>134</sup> As a result, it appears that either an entity organized in Texas (a “Texas utility”) or an entity organized in another state (a “non-Texas utility”) may be a “utility” under Chapter 261, so long as it is engaged in the utility activities defined in Chapter 261.<sup>135</sup> If the utility is a Texas utility, a third party searcher would have a reason to search the Texas SoS for security interests in Article 9 Filing Collateral,

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129. TEX. BUS. & COM. CODE ANN. § 9.301(1) (West 2016); TEX. BUS. & COM. CODE ANN. § 9.307(e) (West 2016).

130. TEX. BUS. & COM. CODE ANN. § 9.501(a)(2) (West 2016).

131. TEX. BUS. & COM. CODE ANN. § 261.004(a)(1)(B) (West 2016).

132. See, e.g., TEX. BUS. & COM. CODE ANN. § 9-103:1 Official Code Comment, 8A Anderson U.C.C. § 9-103:1 (3d. ed.) (indicating that rules of the pre-2001 Chapter 9 which required a consideration of the location of collateral, “could not be applied to certain types of intangible collateral which have no location in any realistic sense . . . . For accounts and general intangibles there is no indispensable or symbolic document which represents the underlying claim . . . .”).

133. TEX. BUS. & COM. CODE ANN. § 261.004(a)(1)(B); TEX. BUS. & COM. CODE ANN. § 9.301(1) (West 2016); TEX. BUS. & COM. CODE ANN. § 9.307(e) (West 2016).

134. TEX. BUS. & COM. CODE ANN. § 261.001(a)(1) (West 2016) (“(a) In this chapter: (1) ‘Utility’ means a person engaged in this state in: . . .”).

135. TEX. BUS. & COM. CODE ANN. § 261.001(a)(1) (West 2016).

because, as noted in the preceding paragraph, the Texas SoS is the proper place to file a financing statement to perfect a security interest in Article 9 Filing Collateral of an entity organized in Texas.<sup>136</sup> In searching the Texas SoS, the searcher would locate any properly filed USI, because searches for financing statements also retrieve USIs (as well as TUFs).<sup>137</sup> The location limitation in Chapter 261 does not do anything to assist searchers looking for encumbrances on assets of Texas utilities. Searchers will locate the security interest filing regardless of the collateral's location, because the Texas SoS is the proper place to file under both Chapter 9 and Chapter 261.

As to a non-Texas utility, a searcher would only have reason to search the central filing records of the state where the entity was organized for security interests in Article 9 Filing Collateral, because the debtor's location is also the central filing location.<sup>138</sup> For example, if a non-Texas utility was organized in Oklahoma, the searcher would generally only search the Oklahoma central filings for security interests in Article 9 Filing Collateral.<sup>139</sup> Nothing in Article 9 of Oklahoma's Uniform Commercial Code puts the searcher on notice that she should be searching the Texas SoS for security interests in Article 9 Filing Collateral of the non-Texas utility.<sup>140</sup> As a result, for a non-Texas utility, the location limitation in Chapter 261, coupled with Chapter 261's apparent application to non-Texas utilities, could be a problem. Searchers who are unaware of Chapter 261 have no reason to check the Texas SoS for filings against a non-Texas utility's Article 9 Filing Collateral. To solve this problem for transmitting utilities, Official Comment 5 to Section 9.501 states that "filing in the filing office of more than one state may be necessary to perfect a security interest in fixtures collateral of a transmitting utility by filing a fixture filing" and that "[t]he nature of the debtor will inform persons searching the record as to where to make a search."<sup>141</sup> As

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136. TEX. BUS. & COM. CODE ANN. § 9.501(a)(2).

137. 1 TEX. ADMIN. CODE § 95.602(b) (West 2016) ("Search requests and reports are conducted pursuant to §261.009, Texas Business and Commerce Code and as described in §§ 95.500–95.505 of this title (relating to Search Requests and Reports [for financing statements]).").

138. U.C.C. § 9-501(a)(2) (2016).

139. OKLA. STAT. tit. 12A § 9-501(a)(2) (West 2016).

140. OKLA. STAT. tit. 12A §§ 9-101–9-809 (West 2016).

141. TEX. BUS. & COM. CODE ANN. § 9.501 cmt. 5 (West 2016). This occurs by operation of Section 9.301(3)(A) of Chapter 9, which states that the local law of the jurisdiction where the fixtures are located governs perfection. For example, if fixtures are located in Texas, Texas law governs, and Texas law indicates that perfection of a security interest in fixtures of a transmitting utility may be achieved by filing with the Texas SoS regardless of the "location" of the debtor. However, because location of the fixtures determines the governing law, such a central filing would need to be made in each state where fixtures are located

a result, a searcher looking for encumbrances on fixtures of a transmitting utility would have reason to search the central filing records of the state where the fixtures are located. But no such warning exists in Article 9 that a USI may be filed with the Texas SoS encumbering Article 9 Filing Collateral. Searchers who are unaware of Chapter 261 would not have a reason to check the Texas SoS USIs.

This article proposes that, to fix these issues: (1) Chapter 261 should apply only to Texas utilities (which solves the search problem for non-Texas debtors), and (2) the location limitation in Chapter 261 should be eliminated and replaced with a rule that a USI perfects a security interest in all Article 9 Filing Collateral covered by the USI (rather than only Article 9 Filing Collateral located in Texas).

### *B. Rights in Collateral*

Chapter 9 requires that the debtor have “rights in the collateral” for a security interest to attach.<sup>142</sup> Under Chapter 9, a filed financing statement will perfect a secured party’s security interest in those rights.<sup>143</sup> In contrast, Chapter 261 states that a filed USI is only sufficient to perfect a security interest in property owned by the utility.<sup>144</sup> The result seems to be that, if a Texas utility does not own certain personal property collateral but merely has some other rights in it sufficient to permit attachment of a security interest under Chapter 9 (such as a lease or license), a security interest in that collateral may only be perfected by filing a financing statement with the Texas SoS. This is not a huge issue, because the problem can be easily addressed by filing a financing statement.

The same problem potentially exists for real property collateral. Chapter 261 states that a filed USI perfects a security interest in real property owned by a utility.<sup>145</sup> This language is,

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(assuming each such state has adopted the same transmitting utility provisions as Texas’s Chapter 9).

142. TEX. BUS. & COM. CODE ANN. § 9.203(b)(2) (West 2016).

143. TEX. BUS. & COM. CODE ANN. § 9.310(a) (West 2016) (“Except as otherwise provided...a financing statement must be filed to perfect all security interests . . .”).

144. TEX. BUS. & COM. CODE ANN. § 261.004(a)(1)(C) (West 2016).

145. TEX. BUS. & COM. CODE ANN. § 261.004(a)(2)(B) (West 2016). Specifically, subsection (B) states that a USI perfects a security interest in real property: “owned by the utility when the instrument was executed or is to be acquired by the utility after the instrument is executed.” The word “acquire” is, of course, different from the word “owned,” but it seems that the proper reading of the quoted language is “owned by the utility when the instrument was executed or is to be acquired and owned by the utility after the instrument is executed” (underlined text added). It would not make sense for a USI to perfect a security interest only in property owned by the utility at the time of filing, and

perhaps, too narrow to cover leases, easements, and other real property rights and interests that are not fee simple interests.<sup>146</sup> The effect is important for any utility that has collateral such as real property leases, easements, and the like. If a USI filed with the Texas SoS does not perfect a security interest in that type of collateral because it is not real property “owned” by a utility, the only way to perfect a security interest in that collateral is by filing the USI in the real property records of the county where that collateral is located (as would be the case under Texas mortgage law). This would obviate Chapter 261’s benefit of alleviating parties of the obligator to file county mortgage filings.

Texas’s utility lending statutes have always used the term owned as to property covered by a security instrument filed under the statute.<sup>147</sup> Nothing in the legislative history of Texas’s historical utility lending statutes explains this limitation. Chapter 9, on the other hand, has, since its enactment in 1967, required that the debtor have “rights” as a pre-requisite to attachment of a security interest.<sup>148</sup> This article proposes that Chapter 261 should be amended to state that a filed USI perfects a security interest in a utility’s rights (rather than merely “ownership” rights) in both personal and real property collateral.

#### VIII. RELATIONSHIP BETWEEN CHAPTER 261 AND CHAPTER 9

Chapter 261 is referenced once in Chapter 9.<sup>149</sup> That reference is in Section 9.311(a)(2) of Chapter 9, which states in relevant part:

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also a greater set of rights in real property (such as a lease or easement) acquired by the utility after filing.

146. 59 TEX. JUR. 3D PROPERTY § 6 (“The plain meaning of ‘owner’ contemplates someone with legal or rightful title to the real estate in question. Ownership of property contemplates the holder’s exclusive control over the property.”); *see also* State Nat’l Bank of El Paso v. United States, 509 F.2d 832, 835 (5th Cir. 1975) (“[A] lease is a transfer of an interest in and possession of property for a prescribed period of time in exchange for an agreed consideration, called ‘rent.’”); *see also* Lakeside Launches, Inc. v. Austin Yacht Club, Inc., 750 S.W.2d 868, 871 (Tex. App.—Austin 1988, writ denied) (“[A]n easement does not convey the property itself.”).

147. TEX. REV. CIV. STAT. ANN. art. 1438a § 2 (West 1952) (repealed 1967); TEX. BUS. & COM. CODE ANN. § 35.02 (Vernon 1968 Supplement) (repealed 2009); TEX. BUS. & COM. CODE ANN. § 261.004 (West 2016).

148. TEX. BUS. & COM. CODE ANN. § 9.204(a) (West 1968) (amended 2001); TEX. BUS. & COM. CODE ANN. § 9.203(b)(2) (West 2016).

149. TEX. PROP. CODE ANN. § 9.311(a)(2) (West 2016). Note that the Texas Property Code also refers to Chapter 261. It states that “if [an instrument relating to real property] grants a security interest by a utility as defined in Section 261.001, Business & Commerce Code, the instrument may be recorded as required by Sections 261.004 and 261.006 of that code, and if such instrument is so recorded, the lien and the secured interest created by such instrument shall be deemed perfected for all purposes.”

The filing of a financing statement is not *necessary or effective* to perfect a security interest in property subject to:  
... (2) . . . a certificate of title statute of this state . . . or Chapter 261, relating to utility security instruments . . . .<sup>150</sup>

Further, Section 9.311(b) states in relevant part: “a security interest in property subject to a statute, regulation, or treaty described in Subsection (a) may be perfected only by compliance with those requirements . . . .”<sup>151</sup>

The construction of Sections 9.311(a)(2) and (b) may lead to confusion. Under the Texas Certificate of Title Act (Chapter 501 of the Texas Transportation Code, which is referred to herein as Chapter 501) and Chapter 9, subject to limitation exceptions,<sup>152</sup> a security interest in a motor vehicle titled under Texas law *must* be perfected by recording the security interest on the certificate of title of the vehicle.<sup>153</sup> In other words, as the above referenced language of Section 9.311(a)(2) of Chapter 9 states, filing a financing statement is generally not effective to perfect a security interest in a motor vehicle titled under Texas law; Chapter 501’s certificate of title perfection requirements are mandatory. Additionally, under Chapter 501 and Section 9.311(b), subject to limited exceptions, the Chapter 501 requirements are exclusive: the secured party must record its security interest on the certificate of title to perfect its security interest.<sup>154</sup> The reference to Chapter 261 in the same sentence as Chapter 501 is potentially misleading because Chapter 261, unlike Chapter 501, is optional. Further, in a transaction in which all or substantially all of the assets of a utility serve as collateral, a secured party *must* file a financing statement under Chapter 9 to fully perfect its security interest, because, as discussed in Part VII. of this article, it appears that a USI will not perfect a security interest in personal property that is not located in Texas or that a utility does not own.

Given the phrasing of Section 9.311(a)(2), it is worth clarifying that Chapter 261 is, in fact, optional. Section 261.003 states that “[a] utility is subject to the requirements and entitled to the benefits of this chapter: . . . only if the utility files with the secretary of state a utility security instrument that states conspicuously on its title page: “This Instrument Grants A Security

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150. TEX. BUS. & COM. CODE ANN. § 9.311(a)(2) (West 2016) (emphasis added).

151. TEX. BUS. & COM. CODE ANN. § 9.311(b) (West 2016).

152. TEX. BUS. & COM. CODE ANN. § 9.311(d) (West 2016) (relating to motor vehicles held as inventory).

153. TEX. TRANSP. CODE ANN § 501.111(a) (West 2016).

154. *Id.*

Interest By A Utility.”<sup>155</sup> The implication, while not entirely clear, is that the utility and its lender must opt-in to the Chapter 261 filing regime. The Bar Comment (mentioned in Part IV. of this article) lends additional clarity. It states that security instruments *may* be governed by Chapter 261 if the title page contains the conspicuous language mentioned above.<sup>156</sup> Most compelling, perhaps, is that prior versions of Texas’s utility lending statute were much clearer that the utility lending statute was optional. The 1967 Version, for example, stated that a person that meets the definition of “utility” shall “nevertheless not be considered to be a utility and subject to the requirements and benefits of Subchapter A of this chapter, unless and until such person files a security instrument with the secretary of state which states conspicuously on its title page: “This Instrument Grants A Security Interest By A Utility.”<sup>157</sup> This provision was added as part of the 1981 Amendments, the sole purpose of which was to clarify that the statute was optional.<sup>158</sup> Although the Original 2009 Version changed this language, its legislative history indicates that “[t]he legislature did not intend for the change in the statute to be substantive,”<sup>159</sup> meaning that the legislature still intended Chapter 261 to be optional. The original version of Chapter 9 (enacted in 1967) also made clear that Chapter 261 was optional. Section 9.302(e) (the predecessor to current Section 9.311) of the original version of Chapter 9 stated: “where the debtor is a utility as defined in Section 35.01 of the code, a security interest granted by or on behalf of the debtor *may be* perfected by filing in the place and matter described in Section 35.02 or 35.03 of this code.”<sup>160</sup>

This article proposes that either, or both, of the provisions in Section 9.302(e) of original version of Chapter 9, or the type of

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155. TEX. BUS. & COM. CODE ANN. § 261.003 (West 2016). The fact that the statute says the utility is subject to the benefits of the chapter (rather than the lender) is odd. But, as this article discusses, Chapter 261’s benefit is the decreased cost of local filings. As filing costs are customarily the utility’s obligation, it is probably correct for the statute to state that the utility receives the benefit of Chapter 261.

156. TEX. BUS. & COM. CODE ANN. § 9.311 (West 2016) (State Bar Committee Comment) (stating that “[t]he filing of utility security instruments (which includes mortgages, deeds of trust, and security agreements) *may be* governed by [Chapter 261]. In order to be subject to those provisions the utility must elect to subject itself by making certain that the title page of the security instrument contains a conspicuous statement: “This Instrument Grants A Security Interest By A Utility.” (emphasis added)).

157. TEX. BUS. & COM. CODE ANN. § 35.015 (West 2007) (repealed 2009).

158. *See supra* note 96 and accompanying text.

159. H.B. 2278, 80th Leg., Reg. Sess., ch. 885, House Research Organization Bill Analysis (2007) (“H.B. 2278 makes nonsubstantive revisions to certain laws concerning business and commerce, including conforming amendments.”).

160. TEX. BUS. & COM. CODE ANN. § 9.302(e) (Vernon 1968 Supplement) (amended 2001) (emphasis added).

provision in the 1967 Version of Chapter 261, both of which are referenced in the preceding paragraph, if added to the applicable statute, would clearly establish the optional nature of Chapter 261.<sup>161</sup>

## IX. USI FILING CONSIDERATIONS

Chapter 261 lacks provisions regarding filing, the debtor's name, and other provisions that are central to Chapter 9 (generally, those provisions are in Subchapter 5 (Filing) of Chapter 9).<sup>162</sup> Chapter 261 also does not expressly import those filing rules from Chapter 9. Nevertheless, because USIs are filed in the financing statement records of the Texas SoS, and searched for using the exact methodology in which financing statements are searched for,<sup>163</sup> it only makes sense that Chapter 9's filings rules would apply to USIs to the extent applicable. This section discusses USI filing issues and Chapter 9 Filing Collateral rules that appear to apply to USIs.

### A. Initial Filing Format

A USI may only be a “mortgage, deed of trust, security agreement, or other instrument executed to secure payment of an obligation of a utility, and an instrument that supplements or amends one of the foregoing.”<sup>164</sup> By exclusion, it cannot be a financing statement. In addition, a utility may only receive Chapter 261's benefits if the instrument filed with the Texas SoS as a USI satisfies the USI criteria in the preceding sentence and states conspicuously on its *title page*: “This Instrument Grants A Security Interest By A Utility.”<sup>165</sup> Chapter 261 *does not* state that a mortgage filed as a USI should ever be filed behind a UCC financing statement. Rather, it contemplates the opposite: that the USI will be a security instrument with a cover page upon which the above-referenced statutorily-required conspicuous language can be written. These rules are important given certain mistakes that have appeared in several purported USIs filed with the Texas SoS. The mistake is that the filer, intending to file a USI, utilizes a UCC financing statement form (UCC-1) (or a transmitting utility filing) as a cover page for the USI. The Texas SoS will generally, and properly should, index a USI filed behind a financing

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161. See *infra* text accompanying note 174 (clarifying this matter).

162. Compare TEX. BUS. & COM. CODE ANN. § 261.004 (West 2009), with TEX. BUS. & COM. CODE ANN. § 9.311(a)(2) (West 2013).

163. See *supra* note 137 and accompanying text.

164. TEX. BUS. & COM. CODE ANN. § 261.001(a)(2) (West 2009).

165. TEX. BUS. & COM. CODE ANN. §§ 261.001(a)(2), 261.003 (West 2009).



statement as a financing statement, or as a TUF if the financing statement indicates that the debtor is a transmitting utility, rather than a USI.<sup>166</sup> In other words, the Texas SoS should not index as a USI a financing statement with an otherwise proper USI attached. A contrary policy would require the Texas SoS to consider whether every financing statement submitted for filing is actually a USI.

In some of those purported USIs mentioned above, the Texas SoS has, following a filer's request, re-indexed the filing and changed the nature of the filing from a financing statement to a USI. There have been filings in which the Texas SoS has done this several years after the initial filing. This is a problem because, as discussed in this article, USIs and financing statements perfect security interests in different collateral. Consequently, a change by the Texas SoS in a filing type, especially years after the initial filing, subjects a later creditor who relied on the initial filing as being a financing statement rather than a USI to the risk of losing priority following a change by the Texas SoS to the type of the filing. For example, if a USI was erroneously filed behind a UCC financing statement, it is a financing statement and cannot perfect a security interest in real property or in fixtures as a fixture filing, whereas a properly filed USI could perfect those security interests. Filing number 04-0064946376 with the Texas SoS illustrates the points discussed in this Part IX.<sup>167</sup> That filing was submitted to the Texas SoS as a TUF with a USI attached, and the Texas SoS originally and properly indexed the filing as a TUF.<sup>168</sup> In a filing officer statement filed over six years after the initial filing under filing number 10-00343677, the Texas SoS stated: "Customer requested that the filing type of [filing number 04-0064946376] be changed from 'Transmitting Utility' to 'Utility Security Instrument.'" Customers [sic] intent as for the filing to be filed as a Utility Security Instrument be [sic] received incorrect information on how to do this."<sup>169</sup> Because a filing officer statement is seemingly effective to change the type and indexing

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166. See TEX. SEC'Y OF STATE, GOLDEN SPREAD ELECTRONIC COOPERATIVE, INC. UCC FINANCING STATEMENT, Filing No. 04-0059836934 (2004); TEX. SEC'Y OF STATE, GOLDEN SPREAD ELECTRONIC COOPERATIVE, INC. UCC FINANCING STATEMENT, Filing No. 04-0064946376 (2004); TEX. SEC'Y OF STATE, BRAZOS TELECOMMUNICATIONS, INC. UCC FINANCING STATEMENT, Filing No. 07-0036818578 (2007); TEX. SEC'Y OF STATE, INDUSTRY TELEPHONE COMPANY UCC FINANCING STATEMENT, Filing No. 08-0002411238 (2008) (examples of similar occurrences).

167. TEX. SEC'Y OF STATE, GOLDEN SPREAD ELECTRONIC COOPERATIVE, INC. UCC FINANCING STATEMENT, Filing No. 04-0064946376 (2004).

168. *Id.*

169. TEX. SEC'Y OF STATE, GOLDEN SPREAD ELECTRONIC COOPERATIVE, INC. UCC FINANCING STATEMENT, Filing No. 10-00343677 (2010).

of a filing,<sup>170</sup> this filing is now indexed as a USI.<sup>171</sup> As noted, a priority problem could arise with respect to any creditor who relied on this filing being a TUF rather than a USI during the six-plus year period before the Texas SoS re-indexed the filing.<sup>172</sup>

In sum, a USI filed behind a financing statement is a financing statement, not a USI (and Chapter 261, ideally, should say as much). Further, the Texas SoS should not change the status of a properly filed instrument.

### B. Common Debtor Name Errors

A common debtor name error in a normal financing statement occurs when superfluous information is added in the debtor's name field of the financing statement.<sup>173</sup> There are two types of this error. The first type occurs when the debtor's name includes the debtor's formation state and entity type following the debtor's name.<sup>174</sup> For example, if a Texas corporation was named "ABC Electric Corporation", this type of error occurs if a financing statement describes the debtor as "ABC Electric Corporation, a

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170. 1 TEX. ADMIN. CODE § 95.311 (West 2012) ("A filing officer statement affects the status of parties and of the relevant financing statement as provided in the corrective action described as having been taken in the filing officer statement."). While "[t]he filing office may correct data entry and indexing errors of filing office personnel in the UCC information management system at any time." 1 TEX. ADMIN. CODE § 95.400 (West 2012). This article argues that filings such as 04-0064946376 and the other filings noted in note 167 *supra* should not have been corrected, since the initial indexing of such filings appears to have been proper.

171. TEX. SEC'Y OF STATE, GOLDEN SPREAD ELECTRONIC COOPERATIVE, INC. UCC FINANCING STATEMENT, Filing No. 04-0064946376. While it is likely not fatal, the mortgage does not satisfy the exact language requirements of Chapter 261. The mortgage states "This Instrument Grants A Security Interest In A Transmitting Utility" rather than Chapter 261's language "This Instrument Grants A Security Interest By A Utility."

172. Note that a financing statement cannot be amended to become a transmitting utility filing. TEX. BUS. & COM. CODE ANN. § 9.515(f) (West 2016); *see also* Harry C. Sigman, *Improvements (?) to the UCC Article 9 Filing System*, 46 GONZ. L. REV. 457, 487 (2011) ("The question has occasionally arisen whether a secured party is entitled to correct its failure to indicate transmitting utility status of the debtor in the initial financing statement by a subsequent amendment. The statute did not specifically forbid this; on the contrary, section 9-512(a)'s broad reference is to 'otherwise amend.' [Footnote omitted]. However, because some filing offices designed their systems in such a manner that such a later amendment would create operational difficulties to modify the previously set lapse date, IACA sought an amendment to expressly require that transmitting utility status, and the resulting perpetual effectiveness, be established exclusively by the content of the initial filing. Amended section 9-515(f), by the addition of the word 'initial', accommodates this request.").

173. *See* Matt Crockett, *An Analytical Approach to Discovering and Curing Ineffective UCC Filings* 58 S. TEX. L. REV. 29, 43–44 (2016).

174. TEX. BUS. & COM. CODE ANN. § 9.503 cmt. 2 (West 2013).

Texas corporation.”<sup>175</sup> The second type occurs when the debtor’s name includes d/b/a, f/k/a, or other similar information about the debtor after the debtor’s name.<sup>176</sup> For example, using the entity described above, if the entity had a d/b/a name of “Easy Electricity”, this type of error occurs if the financing statement describes the entity as “ABC Electric Corporation d/b/a Easy Electricity.” The two types of debtor name errors discussed in this paragraph are not unusual.<sup>177</sup> More importantly, normal filings with these types of errors are ineffective under Texas law and the law of many other states, with the result being that the secured party making such filing has an unperfected security interest in the collateral described therein.<sup>178</sup> The Texas SoS has consistently indexed the debtor’s name exactly as it is written in Field 1 (the debtor name field) of a financing statement (that is, if the debtor’s name is incorrectly shown as “ABC Electric Corporation, a Texas corporation” in the financing statement, the Texas SoS has indexed the name as “ABC Electric Corporation, a Texas corporation”).<sup>179</sup> In other words, the Texas SoS has not unilaterally corrected the filing for the filer. This approach follows the mandate of the Texas Administrative Code, which requires the Texas SoS to

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175. TEX. BUS. & COM. CODE ANN. § 9.503(a)(1) (West 2013) (The name to be used in the case of a registered organization is “the name that is stated to be the registered organization’s name on the public organic record . . .”).

176. See 1 TEX. ADMIN. CODE § 95.503(1)(E) (West 2012) (The words “a”, “Texas”, “d/b/a”, “Easy”, and “Electricity” would not be disregarded in a search, which is what causes the error.).

177. See TEX. SEC’Y OF STATE, RAYBURN COUNTRY ELECTRIC COOPERATIVE, INC., A TEXAS COOPERATIVE CORP. UCC FINANCING STATEMENT, Filing No. 10-0035140155 (2010). A specific example of an active filing (as of a Oct. 1, 2016), is filing number 10-0035140155 on file with the Texas SoS, which is a TUF with a formation state/entity type error.

178. See TEX. BUS. & COM. CODE ANN. § 9.506(c) (West 2001) (While a comprehensive analysis of debtor name errors is outside the scope of this article, UCC filings with these two types of errors are ineffective because they fail to satisfy Chapter 9’s requirements for effectiveness, which is that a Texas SoS search under the debtor’s correct name (“ABC Electric Corporation” in the above examples) would not disclose a financing statement naming the debtor as either “ABC Electric Corporation, a Texas corporation”, or “ABC Electric Corporation d/b/a Easy Electricity”); see also 1 TEX. ADMIN. CODE § 95.503(1)(E) (West 2012) (providing a list of noise words that are disregarded in a such search; the words “a”, “Texas”, “d/b/a”, “Easy”, and “Electricity” would not be disregarded in a search). See also *In re Jim Ross Tires, Inc.*, 379 B.R. 670 (Bankr. S.D. Tex. 2007) (holding a filing ineffective when the debtor’s name was inputted on the filing as “Jim Ross Tires, Inc. dba HTC Tires & Automotive Centers” rather than the debtor’s correct name “Jim Ross Tires, Inc.”).

179. This author has not found an occasion where the Texas SoS has indexed a financing statement containing a formation state/entity type error or a DBA type error under the debtor’s correct name. In other words, each such financing statement has been properly indexed by the Texas SoS with the formation state/entity type error or a DBA type error included.

enter filing data exactly as received, superfluous information included.<sup>180</sup>

Under the Texas Administrative Code, USIs are filed with the Texas SoS using the same filing rules applied to financing statements.<sup>181</sup> And, search requests and reports for USIs are conducted in the same manner as search requests and reports for financing statements—by the debtor’s correct name under Section 9.503 of the Texas UCC.<sup>182</sup> Therefore, the debtor’s name is extremely important in USI filings, and practitioners filing USIs should apply the same rules and precautions that must be applied to filing financing statements.

Not surprisingly, the aforementioned debtor name errors are also made in USIs. These errors actually appear to be more prevalent in USIs, likely because best practice in drafting loan documents, including USIs, dictates that a complete description of the debtor—that is, one that mentions the debtor’s state of formation and entity type and/or the debtor’s d/b/a—is better than a less complete description.<sup>183</sup> Accordingly, a mortgage with ABC Electric Corporation as the debtor is likely to describe the entity as “ABC Electric Corporation, a Texas corporation” or as “ABC Electric Corporation d/b/a Easy Electricity.” When the Texas SoS receives a USI for filing, the clerk must determine the debtor’s name from the USI. This is a task generally reserved for county clerks, who receive various types of real property documents for recording and must determine the grantor’s and grantee’s

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180. See 1 TEX. ADMIN. CODE § 95.200 (West 2016) (“The duties and responsibilities of the filing officer with respect to the administration of the UCC are ministerial. In accepting for filing or refusing to file a UCC record pursuant to these sections, the filing officer does not determine the legal sufficiency or insufficiency of the UCC record, determine that information in the record is correct or incorrect, in whole or in part, or create a presumption that information in the UCC record is correct or incorrect in whole or in part.”); see also 1 TEX. ADMIN. CODE § 95.401(b) (2016) (explaining that “[d]ata are entered into the UCC information management system exactly as provided in the UCC record, without regard to apparent errors.”).

181. TEX. BUS. & COM. CODE ANN. § 261.004 (West 2009). See also 1 TEX. ADMIN. CODE § 95.602(a) (2016) (“A separate notice is submitted for each utility security instrument and is filed and indexed within the UCC information management system.”). See also 1 TEX. ADMIN. CODE § 95.600 (West 2016) (“[R]ecords of liens maintained by the filing office created pursuant to statutes other than the UCC...are treated by the filing officer in a manner substantially similar to UCC records and are included with the reports described in § 95.505 of this title (relating to Search Responses [for financing statements].”).

182. See TEX. BUS. & COM. CODE ANN. § 9.506(c) (West 2001).

183. See e.g., Kenneth A. Adams, *A Manual of Style for Contract Drafting*, A.B.A. Sec. Bus. Law at 9 (2013) (instructing that when drafting the introductory provision of a contract, “[a]fter the name of each legal-entity party, state its jurisdiction of organization and what kind of entity it is. . .use, for example, a *Delaware corporation*”).

name.<sup>184</sup> If the Texas SoS indexes a USI with the debtor's state of formation and entity type and/or the debtor's d/b/a as part of the debtor's name, the USI will not be retrieved in a Texas SoS search under the debtor's correct name.<sup>185</sup> The Texas SoS has consistently indexed the debtor's name exactly as it is written in the debtor name field of a financing statement. However, the Texas SoS has been inconsistent in indexing the debtor's name under USIs. The following filings illustrate this inconsistency:

(1) In filing number 09-0032993772, the debtor is described on the cover page of the USI as "San Bernard Electric Cooperative, Inc., a Texas cooperative corporation."<sup>186</sup> The Texas SoS has indexed the debtor's name as both "San Bernard Electric Cooperative, Inc., a Texas cooperative corporation" and as "San Bernard Electric Cooperative, Inc." in its filing system.<sup>187</sup>

(2) In filing number 15-0030855693, the debtor is described on the cover page of the USI as "Crystal Springs Water Co., Inc., a Texas corporation."<sup>188</sup> The Texas SoS has indexed the debtor's name only as "Crystal Springs Water Co., Inc., a Texas corporation" in its filing system.<sup>189</sup> As could be anticipated, a Texas SoS UCC search under the debtor's correct name, "Crystal Springs Water Co., Inc.",<sup>190</sup> does not locate this filing.<sup>191</sup>

(3) In filing number 02-0028530303, the debtor is described on the cover page of the USI as "Tecon Water Company, L.P., a Texas limited partnership").<sup>192</sup> The Texas SoS indexed the debtor's name as both "Tecon Water Company, L.P., a Texas

184. Opinions differ as to whether a significant number of county-level offices have any type of standard search logic. See Kenneth C. Kettering, *Standard Search Logic Under Article 9 and the Florida Debacle*, 66 U. MIAMI L. REV. 907, 915 (2012).

185. See *supra* note 178 and accompanying text.

186. See TEX. SEC'Y OF STATE, SAN BERNARD ELECTRIC COOPERATIVE, INC. UCC FINANCING STATEMENT, Filing No. 09-0032993772 (2009).

187. *SOSDirect*, TEX. SEC'Y OF STATE, <http://www.sos.state.tx.us/Corp/sosda/index.shtml> (last visited August 15, 2016). Test search conducted on filing number 09-0032993772.

188. See TEX. SEC'Y OF STATE, CRYSTAL SPRINGS WATER CO., INC., a Texas Corporation UCC FINANCING STATEMENT, Filing No. 15-0030855693 (2015).

189. *SOSDirect*, TEX. SEC'Y OF STATE, <http://www.sos.state.tx.us/Corp/sosda/index.shtml> (last visited August 15, 2016). Test search conducted on filing number 15-0030855693.

190. See TEX. SEC'Y OF STATE, CRYSTAL SPRINGS WATER CO., INC., a Texas Corporation ARTICLES OF INCORPORATION, Filing No. 15-0030855693 (2015) (evidencing its name pursuant to Section 9.501(a)(3) of Chapter 9, are on file with the Texas SoS).

191. *SOSDirect*, TEX. SEC'Y OF STATE, <http://www.sos.state.tx.us/Corp/sosda/index.shtml> (last visited August 15, 2016). Test search conducted under the name Crystal Springs Water, Inc.

192. See TEX. SEC'Y OF STATE, TECON WATER COMPANY, L.P. UCC FINANCING STATEMENT, Filing No. 02-0028530303 (2002).

limited partnership” and as “Tecon Water Company, L.P.” in its filing system.<sup>193</sup>

The filings described in paragraphs (1) and (3) above demonstrate the Texas SoS’s willingness to index a USI under two distinct debtor names, even absent a reason to do so based on the title page of the USI. This is unusual because, as discussed above, if the debtor’s name set forth in those USIs was submitted as the debtor’s name on a financing statement, it would likely be indexed by the Texas SoS only under the exact name given. The filing described in paragraph (2) above demonstrates that the Texas SoS is not always consistent in indexing a USI under two distinct debtor names, as such filing was indexed only under the version of the debtor name that has the formation state/entity type error included. Applying the rules given to filing financing statements, the filings described in paragraphs (1) and (3) above should have been indexed like the filing in paragraph (2) above, which would have made all three seriously misleading under Chapter 9 because a search under the entity’s correct name would not locate the filing. While nothing in Chapter 261 indicates that the Chapter 9’s seriously misleading standard should apply, it is really the only logical standard considering all the name variations a searcher would need to consider absent the seriously misleading standard.<sup>194</sup>

This article proposes that the Texas SoS should index debtor names exactly as they are written (superfluous information included) the *first time* the debtor name appears on a USI. This approach is consistent with the manner in which the Texas SoS indexes financing statements.<sup>195</sup> For practitioners, this means that the name of the utility, at least as it appears the first time in the USI, must indicate only the exact and correct name of the utility, nothing more.

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193. *Id.*

194. *SOSDirect*, TEX. SECRETARY ST., <http://www.sos.state.tx.us/Corp/sosda/index.shtml> (last visited August 15, 2016). Test search conducted on filing number 02-0028530303.

195. 1 TEX. ADMIN. CODE § 95.401(b) (West 2016) (“Data that meets the guidelines in subsection (a) of this section are entered into the UCC information management system exactly as provided in the UCC record, without regard to apparent errors.”); 1 TEX. ADMIN. CODE § 95.200 (West 2016) (“The duties and responsibilities of the filing officer with respect to the administration of the UCC are ministerial. In accepting for filing or refusing to file a UCC record pursuant to these sections, the filing officer does not determine the legal sufficiency or insufficiency of the UCC record, determine that information in the record is correct or incorrect, in whole or in part, or create a presumption that information in the UCC record is correct or incorrect in whole or in part.”).

### C. Amendments

This Part IX.C. discusses amendments: namely, debtor name changes, amendments to USIs (which are considered their own USIs under Chapter 261), and releases of USIs. For the same reasons given in Part IX.A. of this article, amendment USIs should not be filed behind UCC-3 Amendments, but should instead be filed in the actual form of the amendment to the original USI, with appropriate language referencing the initial USI being amended and its filing number. In the same way that the UCC-1 does not have a role in filing a USI, the UCC-3 Amendment form does not have a role in amending a USI. Further, as this Part IX.C. argues, UCC forms should not have a role in any filing under Chapter 261.

#### 1. Name Changes, Mergers, and Consolidations

As discussed in Part II of this article, Chapter 261 has a rule for name and entity changes which states that if the utility changes its name, consolidates, or merges, the secured party and the utility must file a written statement signed by both parties, identifying the original USI by filing number, and indicating the utility's name after the name change, merger, or consolidation. If the parties fail to file such name change statement, the secured party will be perfected as to collateral acquired by the utility before and within four months after the name change, but not collateral acquired by the utility more than four months after the name change.<sup>196</sup>

Because USIs are filed and searched for with the Texas SoS in the same manner as financing statements,<sup>197</sup> it makes sense to consider how Chapter 261's name change, merger, and consolidation rules compare to Chapter 9's name change, merger, and consolidation rules. Chapter 9's rules are contained in Sections 9.507 (name changes), and Section 9.508 (mergers and consolidations). For ease, this article considers only name changes under Section 9.507. Three issues are in play. The first is the actual filing of the name change amendment; the second is the extent to which a late-filed amendment perfects a security interest in after-acquired property; and the third is the extent to which Chapter 261 requires a name change filing in cases where Chapter 9 does not.

Under Chapter 9, name change amendments may be authorized by the secured party (and do not need to be signed),<sup>198</sup>

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196. TEX. BUS. & COM. CODE ANN. § 261.007(b) (West 2009).

197. See *supra* note 163 and accompanying text.

198. TEX. BUS. & COM. CODE ANN. § 9.509(d)(1) (West 2001).

and thus, may be filed by the secured party without any involvement of the debtor. Chapter 261, as noted, requires the utility's signature on such an amendment. Chapter 261, it seems, should operate in the same way as Chapter 9. Requiring the filing of notice of a name change in Chapter 261 makes sense for the same reason it makes sense in Chapter 9 (to permit searchers to find filings against debtors), but such a filing should not require the debtor's signature. As the Official Comments to Chapter 9's pre-2001 Section 9.402 correctly stated: "[T]he secured party should not be penalized for failure to make a timely filing by reason of difficulty in procuring the signature of a possibly reluctant or hostile debtor."<sup>199</sup>

The four month portion of Chapter 261's name change provision is similar to Chapter 9, which states that a secured party must file a name change amendment to perfect a security interest in collateral acquired more than four months after the name change of the debtor, if the name change renders the secured party's UCC filing seriously misleading.<sup>200</sup> What if, under Chapter 261 or Chapter 9, the secured party neglects to file an amendment or name change statement within four months after the change, but does file one later (say, eight months after the name change)? The Official Comments to Section 9-507 clarify that such a filing would be effective to perfect a security interest in collateral acquired from and after the date of the filing.<sup>201</sup> While the Official Comments to Chapter 9 do not apply to Chapter 261, it seems equitable for the same rule to apply under Chapter 261.

Finally, when compared to Chapter 9, Chapter 261's name change rules are probably too broad. Chapter 9 does not require an amendment for every debtor name change, but only those where the debtor's name changes in a manner that makes the financing statement seriously misleading, meaning that a search under the debtor's correct new name would not locate the financing statement filed under the debtor's old name.<sup>202</sup> Chapter 261 requires the filing of written statements regardless of

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199. TEX. BUS. & COM. CODE ANN. § 9.402 cmt. 4 (West 1998) (amended 2001).

200. TEX. BUS. & COM. CODE ANN. § 9.507(c) (West 2013).

201. TEX. BUS. & COM. CODE ANN. § 9.507 cmt. 4 (West 2016) ("If an amendment that provides a sufficient name is filed more than four months after the change, the financing statement as amended would be effective also with respect to collateral acquired more than four months after the change, but only from the time of the filing of the amendment.")

202. TEX. BUS. & COM. CODE ANN. § 9.506(c) (West 2001) ("If a search of the records of the filing office under the debtor's correct name, using the filing office's standard search logic, if any, would disclose a financing statement that fails sufficiently to provide the name of the debtor in accordance with Section 9.503(a), the name provided does not make the financing statement seriously misleading.").



the nature of the name change.<sup>203</sup> Chapter 261 probably should not require the secured party to file a name change amendment if the change to the utility's name would not cause the original USI to become seriously misleading under Chapter 9's rules.

## 2. Releasing USIs

Chapter 261 states that “[t]he perfection and notice provided by the filing of a utility security instrument . . . remain in effect without any renewal, refileing, or continuation statement until the interest granted as security is released by the filing of a termination statement, or a release of all or a part of the property, signed by the secured party.”<sup>204</sup> The references to a “continuation statement” and a “termination statement” in this provision are misleading given that, by their Chapter 9 definitions, continuations statements and termination statements are “amendments to financing statements.”<sup>205</sup> As discussed in Part IX.A., USIs are not financing statements. Because USIs (including amendments thereto) should take the form of real property filings and not financing statements, releases of USIs should also take the form of real property release documents, not as “amendments to financing statements.” This article proposes that Chapter 261 should be amended to require only a typical Texas mortgage release, executed and acknowledged by the secured party only, to release a USI, as it would be under Texas real property law. It does not make any sense to introduce a UCC-3 termination statement into a USI filing chain.

## X. CONCLUSION AND SUMMARY OF PROPOSED CHANGES

As discussed in Part VI. of this article, the current benefits of Chapter 261 are seemingly limited to the costs savings and associated filing convenience that it offers relative to comparable rules governing real property filings. That benefit, which can be substantial, is seemingly enough to justify Chapter 261's continued existence. However, to facilitate easier use of Chapter 261, this article proposes the following changes to Texas law:

1. As proposed by Part VII.A. of this article, amend Chapter 261 to apply only to Texas-organized utilities.
2. As proposed by Part VII.A. and B. of this article, amend Chapter 261 to permit a USI to perfect a security interest in all property (real, personal, fixtures, as-extracted collateral,

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203. See *supra* note 163 and accompanying text.

204. TEX. BUS. & COM. CODE ANN. § 261.005 (West 2009).

205. TEX. BUS. & COM. CODE ANN. §§ 9.102(27), 9.102(80) (West 2013).

and timber to be cut) in which a utility has rights and in Article 9 Filing Collateral in which a security interest could otherwise be perfected by filing a financing statement with the Texas SoS.

3. As proposed by Part VIII. of this article, amend Chapter 261 and/or Chapter 9 to expressly state that Chapter 261 is optional.

4. As proposed by Part IX. of this article, amend Chapter 261 to expressly state that USIs (including amendments thereto) should not be filed with UCC forms as cover pages.

5. As proposed by Part IX.A. of this article, amend the Texas Administrative Code to prohibit the Texas SoS from filing a filing officer statement with respect to a filing intended as a USI that was properly indexed as a financing statement or TUF.

6. As proposed by Part IX., amend Chapter 261 of the Texas Administrative Code to require the Texas SoS to index a utility's name exactly as it is written on the first page of a USI.

7. As proposed by Part IX.B. and Part IX.C.1. of this article, amend Chapter 261 to import Chapter 9's "seriously misleading" standard as it relates to debtor name errors and name changes.

8. As proposed by Part IX.C.1. of this article, amend Chapter 261 to establish that name change statements filed more than four months after the utility's name change perfect a security interest in collateral acquired by the utility after the name change statement is filed.

9. As proposed by Part IX.C.1. of this article, amend Chapter 261 to permit written statements of a utility's name change to be filed by the secured party without execution by the utility.

10. As proposed by Part IX.C.2. of this article, amend Chapter 261 to require that a USI be released by the filing with the Texas SOS of a traditional real property security instrument release, signed and notarized by the secured party.