

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE NORTHERN DISTRICT OF TEXAS
FORT WORTH DISTRICT

IN RE:	§	CASE NO. 02-40665-DML-11
	§	
DENTON COUNTY ELECTRIC	§	(JOINTLY ADMINISTERED)
COOPERATIVE, INC. d/b/a	§	
COSERV ELECTRIC, et al.,	§	
	§	
Debtors.	§	
<hr/>		
DENTON COUNTY ELECTRIC	§	ADVERSARY NO. 02-4135
COOPERATIVE, INC. d/b/a	§	
COSERV ELECTRIC,	§	
	§	
Plaintiff,	§	
	§	
v.	§	
	§	
ELDORADO RANCH, LTD.,	§	
	§	
Defendant.	§	

MEMORANDUM OPINION

Before this court is Denton County Electric Cooperative, Inc. d/b/a CoServ Electric’s [sic] Motion for Summary Judgment on Declaratory Judgment Complaint (the “Motion”) filed by Plaintiff (sometimes referred to herein as “CoServ”) in the above styled and numbered adversary proceeding. The court heard oral argument on the Motion on December 16, 2002. It has carefully reviewed CoServ’s Complaint for Declaratory Judgment (the “Complaint”), Defendant’s Original Answer (the “Answer/Counterclaim”) filed by Eldorado Ranch, Ltd. (“Defendant” or “Eldorado”), Plaintiff’s reply to the Answer/Counterclaim (the “Reply”), the Motion, Defendant’s response to the Motion (the “Response”), the briefs filed prior to oral argument by the parties, the Affidavit of Cary L. Cobb (the “Cobb Affidavit”) submitted by

Defendant, the Affidavit of Curtis Trivitt (the “Trivitt Affidavit”) and Reply Affidavit of Curtis Trivitt (the “Trivitt Reply”), post-argument submissions,¹ the exhibits submitted by the parties and identified below (together, the “Summary Judgment Evidence”) and the applicable case law. In addition, the court has studied its prior decision in this matter regarding jurisdiction² and selected pleadings previously filed in connection with this adversary proceeding.

I. Background

This adversary proceeding involves a dispute over which of the parties should bear the cost of the infrastructure required to provide electric service to a portion of a real estate development in Frisco, Texas, known as Gray Hawk (“Gray Hawk” or the “Development”). The case is before this court because of CoServ’s status as a chapter 11 debtor. CoServ filed for chapter 11 relief on February 1, 2002.

Eldorado began developing Gray Hawk in 2001. The Development originally consisted of eight phases, but phases IV and V were sold. CoServ, a Texas cooperative corporation founded in 1937 to provide electrical services to its members, is the sole certificated provider of electric services (see § 37.060 of the Texas Utilities Code (the “TUC”)) in certain areas, including that part of Frisco where Gray Hawk is located. Thus, Eldorado had no choice but to contract with CoServ for the provision of electric services to the Development. On August 6, 2001, CoServ and Eldorado executed an agreement by which they divided the costs of infrastructure needed to service Gray Hawk phases I – III (Exhibit E to the Complaint; by its terms, this agreement applies only to phases I-III (§§ 2.1, 3.1)). Eldorado has paid to CoServ its

¹ At oral argument the court invited the parties to submit additional authorities (but not briefs). CoServ submitted additional authorities. Eldorado submitted a brief (the “Post-hearing Brief”). Though the court had not anticipated additional briefs, it has reviewed and considered the Post-hearing Brief.

² See *Denton County Electric Cooperative, Inc. v. Eldorado Ranch, Ltd.*, 281 B.R. 876 (Bankr. N.D. Tex. 2002).

share of infrastructure costs as required and CoServ has constructed the infrastructure for phases I-III.

The division of costs for the infrastructure for phases I-III was governed by a tariff (the “Tariff”) approved and proposed by CoServ in January 2001 and effective later that year. Trivitt Affidavit, ¶¶ 8 and 11.³ In accordance with applicable provisions of the TUC, CoServ gave notice of its proposal of the Tariff to its customers and the City of Frisco. As Eldorado was not then a customer of CoServ, it did not receive the notice, but affiliates of Eldorado, including its general partner, were sent the notice, and notice of implementation of the Tariff was subsequently sent directly to Cary Cobb, a principal of Eldorado. Trivitt Affidavit, ¶¶ 9 and 11. CoServ also held public meetings respecting the Tariff and took all other steps prescribed by the TUC (*see* §41.061, TUC) preliminary to its implementation. On March 1, 2001, the Tariff became effective. Under the TUC, a party could have objected to the Tariff up until 90 days after it became effective. TUC §41.061(f). No party (including Eldorado, its affiliates and the City of Frisco) objected to the Tariff as permitted under applicable law. Under the Tariff, with respect to extensions of service, such as that required for the Development, CoServ is obligated to pay \$1,800 per lot of the cost of infrastructure and the customer is required to absorb remaining charges. (Tariff, Exhibit B to the Complaint, ¶ 305.5(B)).⁴

³ The Trivitt Affidavit states that the reason for the Tariff, which replaced a 1997 tariff (the “1997 Tariff”), was to raise rates to protect CoServ’s financial health.

⁴ By way of comparison, the 1997 Tariff required periodic recalculation of CoServ’s share per lot of the cost of line extensions. However, once fixed by formula, that number operated much the same as the \$1,800 amount under the Tariff, fixing CoServ’s per lot contribution for infrastructure, with any balance to be paid by the developer. Immediately prior to implementation of the Tariff, the amount paid by CoServ per lot under the 1997 Tariff was apparently approximately \$2,700 (December 16 argument). The reduction in CoServ’s share of the cost (and concomitant increase in the cost to developers) evidently did not trouble Eldorado or its affiliates. Not only was no objection made to adoption of the Tariff, but Eldorado did not challenge its application to phases I – III of Gray Hawk.

In July 2001, the City of Frisco amended its controlling ordinance to require that electric infrastructure in new developments be placed underground. Frisco Subdivision Regulation Ordinance No. 94-08-19, as amended by Ordinance 01-07-51 (the “Ordinance”),⁵ did not apply to the extension of service to Gray Hawk phases I - III, but it would govern installation of infrastructure for future phases. Underground line extensions are considerably more expensive than the above-ground type used in phases I – III.

When Eldorado began preparing phases VI – VIII for development, CoServ, as required by the Tariff (§ 305.5(B)(1)), estimated the cost of extending service to phases VI – VIII. CoServ then called upon Eldorado to pay its share of the estimated cost in advance of any construction (*see* Tariff, § 305.5(B)(2), providing for such payment). Because of the substantial increase in the costs of line extension over that for phases I – III, Eldorado challenged the amount it was invoiced by CoServ and, ultimately, this litigation ensued, in which the court is asked to address whether Eldorado is entitled to relief on various bases.

This matter initially was brought before the court through a motion for relief from the stay imposed by section 362(a) of the Bankruptcy Code filed by Eldorado seeking leave to sue CoServ in state court. CoServ filed the Complaint before Eldorado’s motion was disposed of, and Eldorado then moved the court to abstain from hearing the matter under 28 U.S.C. § 1334(c). *See Denton County Electric Cooperative Inc. v. Eldorado Ranch, Ltd.*, 281 B.R. 876 (Bankr. N.D. Tex. 2002).

Eldorado has not filed a formal proof of claim in CoServ’s chapter 11 case. However, following the court’s prior decision respecting jurisdiction, but before confirmation of CoServ’s plan of reorganization, Eldorado filed the Answer/Counterclaim. In the counterclaim portion of

⁵ TXU, Inc, according to a newspaper clipping appended to the Post-hearing Brief, apparently has challenged a similar ordinance of the City of Allen as unconstitutional.

the Answer/Counterclaim, Eldorado asserts various claims against CoServ.⁶ Shortly thereafter, on August 26, 2002, Eldorado and CoServ executed an agreement (the “August 26 Agreement”) for constructing the infrastructure for phases VI – VIII (Trivitt Affidavit, ¶ 28; Exhibit S to Trivitt Affidavit). In the August 26 Agreement, the estimate of infrastructure cost (and, thus, Eldorado’s share of the costs) was somewhat reduced. As provided by the August 26 Agreement, Eldorado has commenced paying its share of costs of construction in conformance with the Ordinance, as calculated under the Tariff, and presumably the parties are acting to provide electric service to phases VI – VIII.

II. Issues

- A. Does the bankruptcy court have jurisdiction to enter judgment as requested by the Motion?
- B. With respect to the merits of this adversary proceeding, is Plaintiff entitled to summary judgment that:
 - 1. It did not violate the terms of that certain franchise agreement with the City of Frisco dated December 20, 1977 (the “Franchise Agreement”);
 - 2. It is in compliance with the Tariff and Eldorado is barred from challenging the Tariff;
 - 3. It has not unlawfully used its state-authorized position as the sole provider of electric service;
 - 4. It has not unconstitutionally taken Eldorado’s property;
 - 5. There was/is no special relationship between it and Eldorado;
 - 6. It did not force Eldorado to enter into an agreement by economic duress; and
 - 7. It did not cause Eldorado to be injured through detrimental reliance on Plaintiff.

⁶ The Answer/Counterclaim was filed on July 19, 2002. The counterclaims are, broadly speaking, the mirror image of those claims on which CoServ seeks declaratory relief. In the Reply, CoServ states that all but two of Eldorado’s claims fail to state claims on which relief can be granted. As to Eldorado’s claim that CoServ breached a duty of good faith and exercised economic duress, CoServ both pleads the statute of limitations and, essentially, that the claim lacks adequate basis. The remaining claim is for attorneys’ fees.

III. Jurisdiction

Although in its prior decision the court determined, at least on a preliminary basis, that its core jurisdiction extended to this adversary proceeding, Defendant at oral argument again urged that the court lacks jurisdiction to resolve the issues before it. Defendant also argued that the court's prior decision requires that it either wholly dispose of this adversary proceeding in a summary fashion or abstain rather than adjudicating some, but not all, of the causes of action articulated in the Complaint and Answer/Counterclaim. Finally, Defendant has suggested that confirmation of CoServ's plan of reorganization eliminated any reason for this court to continue to exercise jurisdiction in this adversary proceeding. For the reasons stated below, the court concludes Defendant's arguments that the bankruptcy court lacks or should not exercise jurisdiction are without merit and holds that it may hear and enter final judgment in this adversary proceeding.⁷

A. The Adversary Proceeding is Core in Nature.

In its prior opinion, the court concluded that Defendant's claims, though partly grounded in state law, amount to an attack on CoServ's ordinary manner of conducting its business. *See Denton County Electric*, 281 B.R. at 883. Because the manner in which a chapter 11 debtor conducts its business is at the very heart of the reorganization process, the bankruptcy court's

⁷ Defendant argues it is entitled to a jury trial. Because the court concludes that Defendant is pursuing a dischargeable claim against CoServ (see III.B, below), Defendant is not entitled to a jury trial on its claims. *See, e.g., In re Jensen*, 946 F.2d 369 (5th Cir. 1991); *Travellers Int'l AG v. Robinson*, 982 F.2d 96 (3rd Cir. 1992); *Billing v. Ravin, Greenberg & Zackin, P.A.*, 22 F.3d 1242 (3rd Cir. 1994). *Billing*, like the instant case involved waiver by a counterclaim. *Jensen*, which allowed a jury trial, specifically did so because the claims allowance process was not implicated.

core jurisdiction to oversee “administration of the estate”⁸ and the chapter 11 itself is clearly implicated. In the instant case, the initial filings led the court to suspect that, in its dealings with Eldorado, CoServ conducted itself strictly in accordance with applicable law. The court declined, therefore, to abdicate its authority and abstain from hearing this adversary proceeding on the basis of general allegations of dubious merit that might give rise to a cause of action Eldorado could assert against CoServ.

After reviewing the law, exhibits and affidavits, the court is even more convinced that this adversary proceeding is properly before it. The costs about which Defendant complains were assessed pursuant to a tariff validly established under Texas law and, if excessive, appear to be so solely because of an ordinance enacted by the City of Frisco, presumably in accordance with ordinary municipal procedures (no allegations have been made suggesting otherwise). Though clearly consistent in all respects with all instruments that govern CoServ’s conduct – the TUC, the Ordinance and the Tariff – Eldorado asserts that, somehow, CoServ is guilty of violating the antitrust laws, breaching of its “duty” of fair dealing, breach of contract, breach of promise and an improper taking under the state and federal constitutions.

⁸ 28 U.S.C. § 157(b)(2)(A). *See also*, 28 U.S.C. §959, which requires a debtor in possession to operate its business in accordance with applicable law (§ 959(b)), and subjects a debtor to suit, but gives the supervising court equitable authority to exercise control over any such suit (§ 959(a)). The court finds in these provisions, taken together with section 1108 of the Bankruptcy Code, a clear congressional intent that the bankruptcy court be the forum to police its fiduciaries’ compliance with the law in the conduct of their businesses. *See, generally*, Commercial Financial Services, Inc. v. Jones (*In re* Commercial Financial Services, Inc.), 251 B.R. 397 (Bankr. N.D. Okla. 2000); 1 Collier on Bankruptcy ¶¶ 10.02 and 10.03 (15th ed. rev. 2003) (especially the reference in ¶ 10.02 to the bankruptcy court’s consideration of the burden on the non-debtor of litigating a claim in bankruptcy court – here, no burden at all). Core jurisdiction is not limited to the matters enumerated in section 157(b)(2), which provides that core proceedings “include but are not limited to” the matters listed. The Supreme Court has stated that “[t]he jurisdiction of bankruptcy courts may extend more broadly in [chapter 11 cases] than in [chapter 7 cases].” *Celotex Corporation v. Edwards*, 514 U.S. 300, 115 S. Ct. 1493, 1500 (1995). This court believes the case at bar, intertwined as it is with CoServ’s ordinary course of business, is precisely the sort of case Chief Justice Rehnquist had in mind when writing for the Court in *Celotex*.

As discussed below, the court either finds no merit in or harbors serious doubt about Defendant's positions. The causes of action asserted by Defendant are based on arguments that CoServ, by carrying out its business strictly in accordance with applicable law and as it does with all customers, nevertheless acted so as to give Eldorado, as a customer, actionable claims. The bankruptcy court cannot help but have an interest in whether the manner in which a chapter 11 debtor conducts its business, albeit facially legal, is improper. The court must have the authority to dispose of such a contention if it is to have any hope of supervising such a debtor's reorganization.

B. Any Claim Eldorado Asserts Will be Discharged.

At the time the court first considered the issue of jurisdiction, Eldorado had no claim in CoServ's chapter 11 case. The claims articulated as Eldorado's by Plaintiff in the adversary proceeding had arguably not even matured. Eldorado had not, at that point, entered into a contract with CoServ respecting phases VI – VIII and so had not yet been "harmed" by the operation of the Tariff and the Ordinance. That changed when the parties executed the August 26 Agreement by which CoServ would construct the infrastructure to provide electric service to the remaining phases of Gray Hawk. Since a chapter 11 plan discharges "the debtor from any debt that arose before the date of . . . confirmation. . ." (section 1141(d)(1)(A) of the Bankruptcy Code), and since any "debt" CoServ may have incurred to Eldorado arose before confirmation of CoServ's plan on September 11, 2002, the claims of Eldorado must be discharged.

Moreover, since the court's prior decision, Eldorado asserted its claims in the Answer/Counterclaim. The Answer/Counterclaim was filed on July 19, 2002. The counterclaim portion of the Answer/Counterclaim is certainly sufficient to protect Eldorado's rights, if any, to

participate in distributions under the chapter 11 plan.⁹ It contains all the elements of an informal proof of claim. *See Nikoloutsos v. Nikoloutsos*, 199 F.3d 233, 236 (5th Cir. 2000). *See also In re Reliance Equities, Inc.*, 966 F.2d 1338, 1335 (10th Cir. 1992). It thus forms a basis for amendment by a formal proof of claim¹⁰ and receipt by Eldorado of consideration under the plan.¹¹ While as a general rule an informal proof of claim may be an insufficient basis upon which to premise jurisdiction,¹² where, as here, the issue is whether the bankruptcy court has jurisdiction to determine and quantify the debtor's liability on the claim itself, the court's authority is self-evident. Put another way, whatever liability Eldorado may be able to claim against CoServ must be resolved in the chapter 11 case or lost by Eldorado forever. Thus, this adversary proceeding also falls within the court's core jurisdiction under 28 U.S.C. § 157(b)(2)(B) and (O).

C. The Court is not Committed to Full Disposition of the Adversary Proceeding

In light of the foregoing, it is questionable whether there is any need to reconsider abstention in this adversary proceeding. But even if it is committed to review its retention of jurisdiction under certain circumstances, the court, in its prior decision, did not promise, as Defendant would have it, that either the entire adversary proceeding would be disposed of summarily or the court would abstain. Rather the prior ruling suggested that “the adversary

⁹ Though the bar date for filing claims in CoServ's chapter 11 case was past, the bar date fixed pursuant to Fed. R. Bankr. P. 3003(c)(3) cannot apply to a claim that accrues after commencement of the case but before confirmation of the plan. If the bar date were so applied the effect could be to discharge a claim which could not be allowed because its proof could not be timely filed.

¹⁰ Amendment may include articulation of new theories for recovery based on the same facts. *See* COLLIER ON BANKRUPTCY ¶ 3001.04 (15th ed. rev. 2003).

¹¹ As a post commencement, pre confirmation claim, any claim Eldorado might have would ordinarily require analysis under section 503(b)(1) of the Code to determine its status as a cost of administration or a general unsecured claim. In the instant case, since under CoServ's plan unsecured claims are to be paid in full, the distinction is one without a difference.

¹² *See* COLLIER ON BANKRUPTCY ¶ 3001.05 et. seq. (15th ed. rev. 2003).

proceeding should be susceptible to disposition, *at least in large part*, by a motion for failure to state a claim. . . or summary judgment” (281 B.R. at 882; emphasis supplied). In light of its continuing concern about the merits of Eldorado’s claims, even if the court were relying on premises for jurisdiction identical to those existing at the time of its prior opinion, it would not forfeit control of this adversary proceeding.

D. The Plan’s Confirmation Does Not Affect Jurisdiction

At oral argument Defendant urged that the court’s interest in this matter ended upon confirmation of CoServ’s plan of reorganization. However, if Defendant has a claim, it may only be paid in accordance with the plan. Just as confirmation does not relieve the bankruptcy court of the duty to consider claim objections, so, too, in the instant case this court must make the determination of whether Eldorado has a claim to be satisfied.

In addition, CoServ’s plan resulted in its transfer as a going concern. The transferee acquired CoServ in reliance on its methods of doing business. The plan specifically provided that the court retained jurisdiction over pending litigation (including this adversary proceeding). The new operators of CoServ’s business have every reason to expect this court to decide whether Eldorado has presented a valid objection to CoServ’s well-established course of dealing with real estate developers.

IV. The Merits

A. Lack of Discovery

Defendant, in the Post-hearing Brief, argues that summary judgment is inappropriate at this time because it has not had an opportunity to conduct discovery. Presumably relying on an

exchange between its counsel and the court,¹³ Defendant suggests that it was *prevented* by the court from conducting discovery.

Neither the court's prior opinion nor the order entered implementing the opinion precludes discovery. Certainly the court has never acted pursuant to Fed. R. Civ. P. 26(c) (adopted in cases under title 11 by Fed. R. Bankr. P. 7026) to preclude or limit discovery. In the comments quoted above, the court rather was emphasizing its intent that motions dispositive of this adversary would be considered quickly. As events transpired, almost five months passed between the filing of the Answer/Counterclaim and argument – ample time for discovery sufficient to support Eldorado's claims. Had Defendant any doubts about its ability to conduct discovery and had it perceived that discovery would allow it to flesh out its case, it could have approached the court for clarification. The court has been readily accessible to any party wishing a hearing, even on an expedited basis, in connection with all aspects of CoServ's chapter 11 case. Instead, Eldorado took no action, choosing to wait until after oral argument to complain of the

¹³ The court announced its earlier ruling on abstention in a telephone conference on July 9, 2002. The relevant portion of the transcript of the conference follows:

THE COURT: . . . If it would be helpful to you to have a status conference or anything like that in terms of getting your ducks in a row on motion practice, I will be more than happy to work with you on that. I recognize that from your perspective, both – well, both of you have an agenda here, and I will promise you this; that if we can get the motions to me on time, or in a timely fashion, I will have a decision for you by confirmation as I've indicated. Does that help you?

MS. O'NEIL: Yes. Thank you, Your Honor.

MR. TUCKER: Yes. I will just make a comment. I think in terms of any kind of summary disposition of this, you know, we think discovery is needed, and I don't think we're going to be able to get there for a summary disposition, but I realize that's what the Court is kind of inviting –

THE COURT: What I'm saying is if it proves true, if the debtor is correct about how clear it is –

MR. TUCKER: Uh-huh.

THE COURT: -- then you should be wrong about that, and if they file a motion to dispose of this, you should be able to point out to me where they're wrong on it.

MR. TUCKER: Sure.

THE COURT: That, it seems to me, is the whole point, if it turns out that this is going to involve twelve depositions and a three day trial, I am not going to have that trial.

MR. TUCKER: Okay.

THE COURT: It's going to – if it's something that is summarily disposable, then I think I can do that. So that was essentially what I was trying to convey in my decision.

lack of opportunity to seek facts in support of bare-bones allegations. The court is frankly not sympathetic, though it has taken account of Defendant's argument on this point in its disposition of the specific claims alleged.

B. Context for Application of the Law

In part because of Defendant's complaint that it has been denied the opportunity for discovery and in part to provide its present perception of the viability of Defendant's purported causes of action, the court will begin by assessing the conduct of CoServ that Eldorado asserts has damaged it. This will explain the court's concern that Defendant's position is very likely untenable as a matter of law.

As Defendant admits (Post-hearing Brief, pp 8-9), CoServ's Tariff is not subject to challenge on its face. Indeed, all that the court has before it confirms the Tariff was established in accordance with the procedures set forth in TUC §§ 41.001 *et seq.* Though Eldorado itself may theoretically not have had notice of the Tariff, it is clear that its affiliates, including Cary L. Cobb (who signed both Exhibit E to the Complaint and Exhibit S to the Trivitt Affidavit on behalf of Eldorado) had notice of the Tariff before or immediately after its implementation. Notice to Mr. Cobb in one capacity constituted notice in all capacities. *See e.g. Erickson v. Federal Land Bank of Omaha*, 101 B.R. 124, 128 (D. Neb. 1989). Eldorado therefore had notice of the Tariff in ample time to challenge it. *See* TUC §41.061(f), permitting challenges to a tariff up to 90 days after its implementation.

Next, the Tariff does not single out Eldorado. Rather it is intended for uniform application to all of CoServ's developer customers.¹⁴ Any developer requiring line extension services would be treated the same manner—excess costs of infrastructure above \$1,800 per lot would be paid by the developer. The Tariff, on its face, does not distinguish developers based on the type of infrastructure provided.¹⁵ Moreover, the Tariff (except for the amount of the allowance to be paid by CoServ) operates no differently than did the 1997 Tariff.

Defendant produced no evidence that CoServ is taking advantage of the Tariff (and its status as a sole-certificated provider) to extort a premium price for the infrastructure for Gray Hawk phases VI – VIII (or for above-grade infrastructure materials or installation). Indeed, Defendant has not even alleged such conduct. On the other hand, Eldorado and CoServ executed (and began performing) the August 26 Agreement and that agreement was apparently negotiated to Eldorado's benefit. Trivitt Affidavit, ¶¶ 27 and 28.

Defendant *does* contend the underground infrastructure required for phases VI – VIII can be used to extend services to future developments. Thus, Defendant argues it should not be required to bear the entire cost (above the \$1,800 per lot allowance). However, Defendant names no entity that will benefit vicariously from the infrastructure, and there has been no allegation that CoServ either purposefully chose equipment of greater capacity than what was necessary for the Development or intends to earn further profit by assessing future developers the costs already paid to it by Eldorado. Furthermore, Eldorado paid the charges due under the Tariff for the infrastructure for phases I – III. Though that infrastructure was above-ground, the court has no

¹⁴ Defendant's contention that it is not a "retail customer" and so is entitled to non-tariff treatment is without merit. Any customer that does not purchase electric services wholesale (i.e., as a PUC certified utility for resale) is a retail customer. TUC §31.002(15).

¹⁵ Eldorado offers no reason why CoServ should be required to provide different rates to developers depending on infrastructure. The court has found no support for such a proposition, and Eldorado's contention that CoServ's allowance to it in connection with the Development should be greater is offered without any basis.

reason to infer that above-ground infrastructure first installed for one developer may be less readily utilized in providing services to future developers than would its underground equivalent. Whatever reason may exist for distinguishing, for purposes of determining Eldorado's cost, between the two types of infrastructure eludes the court.

Eldorado is in search of a remedy for a situation beyond CoServ's control. The increase in infrastructure cost to Eldorado resulted from adoption of the Ordinance by the City of Frisco. No allegation has been made that CoServ conspired with Frisco to achieve passage of the Ordinance.¹⁶ The court finds no basis for concluding CoServ was somehow bound for the benefit of Eldorado to prevent enactment of the Ordinance or to attack it. There is nothing in the Tariff, the Ordinance or the TUC that could be read to require CoServ to bear an increased portion of the costs of the infrastructure mandated by the Ordinance.

At oral argument, the court expressed serious misgivings about the lack of a remedy for a customer of CoServ who was improperly overcharged under the Tariff. CoServ argued that the only challenge that could be made to rates set pursuant to the Tariff (including any future cost to a developer) had to be made under TUC § 41.061(f), within 90 days of implementation. After study, the court questions CoServ's interpretation of the law. Section 41.061(e) of the TUC requires that rates be "just and reasonable [and] not unreasonably preferential" The Tariff (which is incorporated in the August 26 Agreement at ¶ 3.3), provides that charges above the \$1,800 per lot allowance that must be paid by a developer will be determined from a cost estimate "based on current unit material and labor costs for the same type of construction in the most recent data available" (Tariff, ¶ 305.5(B)(1)). The agreement of the parties also addresses construction of infrastructure (article 7).

¹⁶ Such an allegation without a secure foundation would risk sanction under FED. R. BANKR. P. 9011.

In sum, if CoServ were to abuse its Tariff and its authority to self-regulate rates under TUC § 41.061, the aggrieved customer would have a contractual basis to seek relief. In any event, in the case at bar, there is nothing that suggests CoServ abused its position. Eldorado's problems grow out of the Ordinance—the proposal and enactment of which any competent developer would presumably have been fully aware of and would have monitored.

The court cannot help but suspect that Eldorado, caught in a economic trap that was not of CoServ's making, and which may have resulted from Eldorado's own negligence, nevertheless now seeks leverage to cause CoServ to underwrite a greater part of the economic burden. The remaining questions, therefore, are whether the law allows Eldorado to so escape its trap. Some of these questions may be easily disposed of at this time. While an opportunity for Eldorado to conduct discovery is appropriate in the case of some claims, absent a showing of greater substance, they, too, will be subject to summary disposition.

C. Summary Judgment

Summary judgment is proper when no genuine issue of material fact exists and the moving party is entitled to judgment as a matter of law.¹⁷ It is appropriate only if “the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any,” when viewed in the light most favorable to the non-moving party, “show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law.”¹⁸ Summary judgment is inappropriate when conflicting inferences and interpretations

¹⁷ FED.R.CIV.P. 56(c) incorporated into FED. R. BANKR. P. 7056. *Jenkins v. Chase Home Mortg. Corp.*, 81 F.3d 592, 595 (5th Cir. 1996).

¹⁸ *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247, 91 L. Ed. 2d 202, 106 S. Ct. 2505 (1986).

may be drawn from the evidence.¹⁹ A dispute about a material fact is “genuine” if the evidence is such that a reasonable jury could return a verdict for the non-moving party.²⁰

In making its determination, the court must draw all justifiable inferences in favor of the non-moving party.²¹ Once the moving party has initially shown “that there is an absence of evidence to support the nonmoving party’s case,”²² the non-movant must come forward with significant probative evidence showing a triable issue of fact.²³ Conclusory allegations and denials, speculation, improbable inferences, unsubstantiated assertions, and legalistic argumentation are not adequate substitutes for specific facts showing that there is a genuine issue for trial.²⁴ To defeat a properly supported motion for summary judgment, the non-movant must present more than a mere scintilla of evidence.²⁵ Rather, the non-movant must present sufficient evidence upon which a jury could reasonably find in the non-movant’s favor.²⁶

Because the parties have woven a rather confusing web of claims and counterclaims, the court must try to sort out what is before it for disposition. CoServ initially sought in the Complaint declaratory judgment to the effect that (i) there was no contract of adhesion between it and Eldorado, (ii) CoServ had not violated the Texas Constitution, (iii) CoServ had not

¹⁹ Askanase v. Fatjo, 130 F.3d 657, 665 (5th Cir. 1997); James v. Sadler, 909 F.2d 834, 836-37 (5th Cir.1990).

²⁰ Anderson, 477 U.S. at 247.

²¹ Id at 255.

²² Celotex Corp. v. Catrett, 477 U.S. 317, 325, 91 L. Ed. 2d 265, 106 S. Ct. 2548 (1986).

²³ FED. R. CIV. P. 56(e); State Farm Life Ins. Co. v. Gutterman, 896 F.2d 116, 118 (5th Cir. 1990).

²⁴ Douglass v. United Servs. Auto. Ass’n, 79 F.3d 1415 (5th Cir. 1996) (*en banc*); SEC v. Recile, 10 F.3d 1093, 1097 (5th Cir. 1993).

²⁵ See Anderson, 477 U.S. at 251.

²⁶ Id.

unlawfully used its state-authorized position as the sole utility provider in the applicable area, and (iv) CoServ did not violate the Franchise Agreement, Tariff or Ordinance.

In the Answer/Counterclaim, Eldorado first denied nearly all of CoServ's assertions in the Complaint (other than admitting CoServ was immune from antitrust liability under the state action doctrine).²⁷ Eldorado then set out as counterclaims against CoServ that (i) CoServ had misused its "monopolistic" position in violation of Section 1 of the Sherman Act, the Clayton Act, Chapter 15 of the Texas Business Code²⁸ and the Texas Constitution (Article I, Section 26), (ii) CoServ had caused Eldorado "economic duress", (iii) CoServ had breached the duties of good faith and fair dealing through its treatment of Eldorado, (iv) CoServ had breached "city franchise ordinances and agreements" in its dealings with Eldorado, (v) CoServ was barred from taking unspecified actions under a promissory estoppel theory, and (vi) CoServ's actions violated the Fifth Amendment of the United States Constitution and Article I, Section 17 of the Texas Constitution.

In the Motion CoServ seeks summary judgment on the following issues: (i) that Eldorado was not capable of establishing a basis for detrimental reliance; (ii) that CoServ did not force Eldorado by economic duress to enter into a contract; (iii) that there was no special relationship between CoServ and Eldorado;²⁹ (iv) that CoServ had not unlawfully used its position as the sole provider of electric services;³⁰ (v) that CoServ has not unconstitutionally taken Eldorado's

²⁷ See Answer/Counterclaim at ¶26. Eldorado later asserted that CoServ did not qualify for immunity under the state action doctrine. The court assumes the initial admission was an oversight, and will therefore consider below the later assertion of ineligibility.

²⁸ Having been unable to locate a Texas Business Code, the court assumes Eldorado intended to allege a violation of Section 15 of the Texas Business and Commerce Code.

²⁹ The court assumes CoServ has asserted this point in response to Eldorado's allegations that CoServ has breached the duties of good faith and fair dealing.

³⁰ In support of its request for summary judgment, CoServ alleges that Eldorado failed to establish a cause of

property; (vi) that CoServ was in compliance with, and that Eldorado was barred from challenging, the Tariff; and (vii) that CoServ has not violated the Franchise Agreement. As CoServ has requested summary judgment on seven issues, the court will address each issue separately. Unfortunately, the relief sought in the Motion is not precisely coextensive with that requested in the Complaint or with the claims asserted in the Answer/Counterclaim. Similarly, the arguments in the Reply and the various briefs do not match exactly what the Plaintiff asks in the Motion. The court has done its best to fit the various pieces before it in the format established by the Motion – perhaps, however, with no better than mixed success.

1. Detrimental Reliance/Promissory Estoppel

In the Answer/Counterclaim, Eldorado alleges it acted to its detriment in reasonable reliance upon the communications and conduct of CoServ (presumably, Eldorado is alleging detrimental reliance in support of a claim based on promissory estoppel).³¹ The elements of promissory estoppel are: (1) a promise, (2) foreseeability of reliance on the promise by the promisor, and (3) substantial detrimental reliance by the promisee.³² The doctrine of promissory estoppel assumes no contract exists, and, when properly invoked, if injustice cannot otherwise be avoided, serves to make enforceable an otherwise unenforceable promise that the promisor should have reasonably expected to induce action or forbearance of a definite and substantial character on the part of the promisee, and which does induce such action or forbearance.³³

action under Section 1 of the Sherman Act, that CoServ had not violated Section 2 of the Sherman Act (although Eldorado had not alleged such a violation) and that CoServ was immune from liability under the Sherman Act pursuant to the state action doctrine.

³¹ See Answer/Counterclaim at 10.

³² English v. Fischer, 660 S.W.2d 521, 524 (Tex.1983).

³³ Subaru of Am. v. David McDavid Nissan, Inc., 84 S.W.3d 212, 226 (Tex. 2002); Wheeler v. White, 398 S.W.2d 93, 96-97 (Tex. 1965).

Eldorado has failed, however, to identify any promise by CoServ. It has not offered any detail as to how it was harmed, the extent, foreseeability or reasonableness of its reliance, or the nature of the communications and conduct allegedly relied upon.³⁴ Further, in the Response Eldorado did not adequately address (or even acknowledge) CoServ’s request for summary judgment on this issue.

Here, even when drawing all justifiable inferences in favor of Eldorado, the court is convinced there is an absence of evidence supporting Defendant’s counterclaim of “detrimental reliance”. The Summary Judgment Evidence indicates that the Franchise Agreement and Tariff (and their respective terms) were in effect when Eldorado commenced development in CoServ’s single certificated area. Moreover, it appears the Tariff and Franchise Agreement (and, later, the August 26 Agreement) embody the entire relationship between the parties, and that there were no promises outside of these documents upon which Eldorado could have foreseeably relied to its detriment.³⁵ The Summary Judgment Evidence supports no inference, and Eldorado has not alleged, that CoServ (either impliedly or explicitly) promised to alter, amend, ignore, or otherwise act contrary to the terms of the Tariff or Franchise Agreement. Indeed, by failing to address the issue after raising it in the Answer/Counterclaim, Eldorado has not even produced the conclusory allegations, speculation, or unsubstantiated assertions that the *Douglas* court warns are not adequate substitutes for “significant probative evidence”.³⁶

³⁴ Any facts that might be presented in support of Eldorado’s position would have to have been within Eldorado’s knowledge. Thus, Eldorado cannot argue it is unable to bolster its position because it was unable to conduct discovery.

³⁵ In the Answer/Counterclaim, Eldorado alleges CoServ promised to provide full electric service to the Development. As CoServ was required by the Franchise Agreement and Tariff to provide these utility services, and did, in fact, offer to provide full utility services (albeit on terms distasteful to Eldorado), the court is unable to imagine a scenario in which this particular “promise” could support a claim of detrimental reliance or promissory estoppel.

³⁶ *See Douglas*, 79 F.3d at 1429.

In sum, the Summary Judgment Evidence properly supports CoServ's request for summary judgment on Eldorado's counterclaim of promissory estoppel (assuming, for purposes of the Answer/Counterclaim and Motion, that promissory estoppel was properly pleaded). Eldorado has failed to support a necessary element (i.e. the existence of a promise upon which it foreseeably relied) of its counterclaim. Accordingly, the court will grant the Motion with respect to Defendant's counterclaim of detrimental reliance.³⁷

2. Economic Duress

In the Answer/Counterclaim, Eldorado alleges CoServ's actions amounted to economic duress such that Eldorado was forced to enter into a contract with CoServ. The Fifth Circuit Court of Appeals has held that under Texas law the tort of economic duress exists only if the following factors are shown: (1) there is a threat to do something which the threatening party has no legal right to do; (2) there is some illegal exaction or some fraud or deception; *and* (3) the restraint is imminent and such as to destroy free agency without present means of protection.³⁸ Moreover, the party against whom the economic duress claim is lodged must have been responsible for the financial distress.³⁹

Here, even when drawing all justifiable inferences in favor of Eldorado, the court is convinced the Summary Judgment Evidence undercuts Eldorado's counterclaim of economic duress. Eldorado has produced no evidence that CoServ threatened to do anything it did not

³⁷ See *Celotex*, 477 U.S. at 322-23.

³⁸ See *Beijing Metals & Minerals v. American Business Ctr.*, 993 F.2d 1178, 1184-85 (5th Cir. 1993) (quoting *Deer Creek Ltd. v. North Am. Mortgage Co.*, 792 S.W.2d 198, 203 (Tex. App. -- Dallas 1990, *no writ*)); see also *Brown v. Cain Chemical, Inc.*, 837 S.W.2d 239, 244 (Tex. App. -- Houston [1st Dist.] 1992, *writ denied*); *Tower Contracting Co. v. Burden Bros., Inc.*, 482 S.W.2d 330, 335 (Tex. Civ. App. -- Dallas 1972, *writ ref'd n.r.e.*).

³⁹ See *Beijing Metals*, 993 F.2d at 1185. See also *Brown*, 837 S.W.2d at 244 (citing *First Texas Sav. Ass'n of Dallas v. Dicker Center*, 631 S.W.2d 179, 186 (Tex. App. -- Tyler 1982, *no writ*)).

have a legal right to do.⁴⁰ Rather, CoServ has shown that it merely established rates in accordance with the Tariff and the TUC, as made necessary by Frisco's passage of the Ordinance, and so acted under, at least, the color of law. Further, the Summary Judgment Evidence supports the conclusion that any financial distress suffered by Eldorado is more properly attributed to the Ordinance's new requirements rather than CoServ's charges for abiding by the new development restrictions. In the face of the foregoing, Eldorado has failed to support two elements of its counterclaim of economic duress. The court will grant the Motion with respect to Defendant's counterclaim of economic duress.⁴¹

3. Duties of Good Faith and Fair Dealing

In the Answer/Counterclaim, Eldorado alleges CoServ, as a public utility, established a special relationship with Eldorado and that this special relationship created a duty of good faith and fair dealing. Eldorado further alleges that CoServ breached its duties of good faith and fair dealing by requiring Eldorado to prepay 100% of the allocable development costs⁴² and deed to CoServ title to the utility lines at issue.

Under Texas law, parties to a contract generally deal with one another at arms-length and not as fiduciaries.⁴³ Moreover, a duty of good faith and fair dealing does not exist absent a special relationship prior to, and apart from, the agreement made the basis of the suit.⁴⁴ CoServ has cited to the court *DeWitt County Electric Cooperative, Inc. v. Parks*⁴⁵ for the proposition that

⁴⁰ Again, Eldorado would obviously know of any such threat.

⁴¹ *See Celotex*, 477 U.S. at 322-23.

⁴² Actually, under the August 26 Agreement, Eldorado is to pay its share over time.

⁴³ *Todd v. Liberty Mut. Ins. Co.*, 2001 U.S. Dist. LEXIS 16302, *9 - *10 (N.D. Tex. 2001).

⁴⁴ *Id.*

⁴⁵ 1 S.W.3d 96 (Tex. 1999).

“there is no fiduciary or special relationship between an electric utility and its customers.”⁴⁶

Presumably, the lack of a special relationship” would preclude the creation of the duties of good faith or fair dealing. Eldorado, on the other hand, contends that the holding in *Parks* was limited to the relationship between a utility and an end retail user rather than the relationship between a utility and a developer.⁴⁷

Notwithstanding whether *DeWitt* establishes as a matter of law the absence of a special relationship between a utility and its customer,⁴⁸ it was Eldorado’s burden to affirmatively establish the existence of a special relationship between itself and CoServ⁴⁹ as an element of its causes of action for breach of the duties of good faith and fair dealing. Eldorado has not carried this burden. Therefore, the court will grant the Motion with respect to Defendant’s counterclaims for breaches of the duties of good faith and fair dealing.⁵⁰

⁴⁶ *Id* at 104.

⁴⁷ The court does not read *Parks* to support either position. First, it is not clear that *Parks* supports or undercuts the proposition for which CoServ cites it. The case which *Parks* cites to support its statement that an electric utility does not have a special relationship with its customers specifically notes that, in light of looming changes in the Texas utility regulatory regime, “the relationship among the PUC, utilities, and their customers will dramatically change over the next few years.” *Houston Lighting & Power Co. v. Auchon USA, Inc.*, 995 S.W.2d 668, 675 (Tex. 1999). Assuming, *arguendo*, that *Parks* and *Auchon* stand for the proposition CoServ asserts, it is not clear that the dramatic changes of which the *Auchon* court was cognizant could not have given rise to a special relationship between electric utilities and their customers.

⁴⁸ And, assuming for purposes of summary judgment that *DeWitt* does not stand for the proposition advocated by CoServ.

⁴⁹ Yet more facts that should be within Eldorado’s knowledge. It is noteworthy that it is undisputed that Eldorado was not even a customer of Coserv prior to obtaining services for the Development. This fact surely belies the allegation of a special relationship.

⁵⁰ *See Celotex*, 477 U.S. at 322-23.

4. **Unlawful Use of State-Authorized Position**

The court will address separately the various theories under which CoServ has sought summary judgment that it did not unlawfully use its position as the sole provider of electric utility services in the implicated area of Denton County.

a. **Section 1 of the Sherman Act**

A claim under Section 1 of the Sherman Act requires proof of three elements: that the defendant (1) engaged in a conspiracy (2) that restrained trade (3) in a particular market.⁵¹ To prove conspiracy or “concerted action”, the plaintiff must prove that two or more persons⁵² acted with a “conscious commitment to a common scheme designed to achieve an unlawful objective.”⁵³ Here, Eldorado failed to demonstrate the first element of a violation of Section 1 of the Sherman Act. More specifically, suspicions of a conspiracy among the State of Texas, the City of Frisco and CoServ⁵⁴ do not, without more detail, satisfy Eldorado’s burden to establish the essential element of two or more persons acting pursuant to a common scheme to achieve an unlawful objective. Accordingly, the court will grant the Motion with respect to Eldorado’s counterclaim under Section 1 of the Sherman Act,⁵⁵ but it does so without prejudice to Eldorado’s repleading the claim in proper detail if it may do so in good faith.

⁵¹ Spectators’ Comm. Network, Inc. v. Colonial Country Club, 253 F.3d 215, 220 (5th Cir. 2001); Stewart Glass & Mirror, Inc. v. U.S. Auto Glass Discount Centers, Inc., 200 F.3d 307, 312 (5th Cir. 2000).

⁵² O’Dell v. GMAC, 122 F.Supp.2d 721, 728 (E.D. Tex. 2000); City of College Station v. Bryan, et al., 932 F.Supp. 877, 885 (S.D. Tex. 1996).

⁵³ Monsanto Co. v. Spray-Rite Serv. Corp, 465 U.S. 752, 768, 79 L. Ed. 2d 775, 104 S. Ct. 1464 (1984).

⁵⁴ As noted above, *allegations* of such a conspiracy would, unless well founded, subject Eldorado to sanction.

⁵⁵ Because the Summary Judgment Evidence does not support a violation of Section 1 of the Sherman Act, the court declines to discuss whether CoServ qualifies as a “state actor” that is exempt from the Sherman Act’s restraints on anticompetitive behavior.

b. Section 2 of the Sherman Act

In the Motion, CoServ contends it is not liable under Section 2 of the Sherman Act because (i) it is immune under the state action doctrine; and (ii) Eldorado failed to establish a violation of Section 2 of the Sherman Act under the essential facilities doctrine. Immunity under the state action doctrine is discussed in the immediately following section. The court agrees that Eldorado has failed to state a cause of action under Section 2 of the Sherman Act. In fact, at the time of the Motion, Eldorado (at least as far as the court can discern) had not even sought relief under Section 2 of the Sherman Act (but see Response, p.7). It is also unclear from the Complaint that CoServ actually sought declaratory judgment on this issue.⁵⁶ The court is, therefore, unwilling to grant summary judgment on a matter that is probably not before it. Accordingly, the Motion is denied with respect to Section 2 of the Sherman Act.

c. State Action Doctrine

In the Motion, CoServ raised the state action doctrine as a general defense to liability under the Sherman Act. As an initial matter, state action immunity is disfavored.⁵⁷ A two-part test applies to instances where private parties participate in a price-fixing regime to determine whether the restraint of trade is immune under the “state action” doctrine. First, the challenged restraint must be one clearly articulated and affirmatively expressed as state policy; second, the policy must be actively supervised by the state itself.⁵⁸

The active supervision requirement of the “state action doctrine” providing immunity to private parties engaging in a restraint of trade mandates that the state exercise ultimate control

⁵⁶ The Complaint’s treatment of CoServ’s use of its monopolistic position focused, instead, on a general exculpation under the state action doctrine.

⁵⁷ *Lafayette v. Louisiana Power & Light Co.*, 435 U.S. 389, 398-399, 55 L. Ed. 2d 364, 98 S. Ct. 1123 (1978).

⁵⁸ *FTC v. Ticor Title Ins. Co.*, 504 U.S. 621, 631 (1992).

over the challenged anticompetitive conduct.⁵⁹ The mere presence of some state involvement or monitoring does not suffice.⁶⁰ State officials must have and exercise power to review particular anticompetitive acts of private parties and to deny approval of those that fail to accord with state policy.⁶¹ The mere potential for state supervision is not an adequate substitute for an actual decision by the state.⁶² Absent a sufficient program of supervision, there is no assurance that a private party's anticompetitive conduct promotes state policy, rather than merely the party's interests.⁶³ Where prices or rates are set as an initial matter by private parties, subject only to a veto if a state chooses to exercise it, a party claiming state action immunity must show that state officials have undertaken the necessary steps to supervise the rate-setting scheme.⁶⁴

Having granted summary judgment with respect to Section 1 of the Sherman Act and having declined to consider at this time Section 2 of the Sherman Act (and CoServ having raised the state action doctrine in the Motion only with respect to the Sherman Act), the court recognizes that its consideration of the state action doctrine may have little practical effect. In the interest of completeness, however, the court will address each of the requests set forth in the Motion. Because of the general disfavor towards private party immunity under the state action doctrine and doubt regarding whether the "active supervision" test has been met,⁶⁵ to the extent

⁵⁹ *Id* at 634-35.

⁶⁰ *Id* at 638.

⁶¹ *Apani Southwest, Inc. v. Coca-Cola Enters.*, 128 F. Supp. 2d 988, 998 (N.D. Tex. 2001).

⁶² *Ticor*, 504 U.S. at 638.

⁶³ *Id* at 634 (quoting *Patrick v. Burget*, 486 U.S. 94, 101 (1988)). The court notes that promulgation of the Tariff was motivated by CoServ's economic needs. *See* note 3, above.

⁶⁴ *Id* at 638.

⁶⁵ The court does not consider CoServ's status as a cooperative, whose member-customers govern its conduct, a substitute for state supervision as Plaintiff urges.

CoServ seeks an affirmative declaration that it qualifies for immunity under the state action doctrine the Motion is denied.

5. Compliance with the Franchise Agreement

In the Complaint, CoServ seeks a declaration that it acted in compliance with the Franchise Agreement in its dealings with Eldorado. The Franchise Agreement bestowed upon CoServ certain rights and privileges related to the construction and operation of an electric power and transmission system in Frisco, Texas. The Franchise Agreement also established a mechanism for CoServ to establish new rate schedules. The Summary Judgment Evidence, even when viewed in the light most favorable to Eldorado, supports a conclusion that CoServ acted in accordance with the Franchise Agreement in its dealings with Eldorado. Moreover, Eldorado has failed to come forward with probative evidence that CoServ violated or acted in contravention of the Franchise Agreement. In light of the foregoing, the Motion is granted with respect to CoServ's request for a declaration that it did not violate the Franchise Agreement.

6. Compliance with the Tariff

In the Complaint, CoServ seeks a declaration that it acted in compliance with Tariff in its dealings with Eldorado. The TUC empowered CoServ to change its rate structure by (1) adopting a resolution approving the proposed change; (2) mailing notice of the proposed change to each affected customer whose rate would be increased by the proposed change at least 30 days before implementation of the proposed change; and (3) holding a meeting to discuss the proposed rate changes with affected customers if the change was expected to increase total system annual revenues by the greater of more than \$100,000 or one percent.⁶⁶

⁶⁶ TUC § 41.061(b).

The Summary Judgment Evidence shows that CoServ (1) adopted a resolution to change its rate structure; (2) mailed notice of the proposed rate changes to its affected customers; and (3) held public meetings to discuss the proposed rate changes with affected customers. Eldorado has not come forward with any evidence that CoServ failed to perform these acts or in any other way violated the Tariff. Accordingly, the Motion is granted with respect to CoServ's request for a declaration that it did not violate the Tariff, provided however that summary judgment with respect to CoServ's compliance with the Tariff shall be without prejudice to Eldorado repleading its claim in proper detail⁶⁷ if it can do so in good faith. The court would note that it would expect any such claim to be based either on clearly unnecessary material charges to Eldorado or a material, quantifiable benefit to CoServ at Eldorado's expense.

7. Inverse Condemnation

In the Answer/Counterclaim, Eldorado alleges that CoServ's actions have amounted to an uncompensated inverse condemnation of Eldorado's property. CoServ answers this claim in the Motion by asking for summary judgment to the effect that it has not unconstitutionally taken Eldorado's property. Bearing in mind the standard for summary judgment and the associated burdens, the court does not find that the Summary Judgment Evidence shows there is no genuine issue of material fact such that CoServ is entitled, as a matter of law, to summary judgment that it did not violate the "takings" clauses of the United States or Texas Constitutions.⁶⁸ Accordingly, the Motion is denied with respect to CoServ's and Eldorado's competing takings claims without prejudice to renewal after an opportunity for discovery.

⁶⁷ As will be set forth in more detail below, the court declines at this time to declare that Eldorado is barred from challenging application of the Tariff. In light of Eldorado's purported inability to conduct necessary discovery, the court further declines to determine Eldorado incapable of alleging a set of facts that could support a claim that CoServ violated the Tariff in some way other than in setting rates or that Coserv is in breach of the August 26 Agreement.

⁶⁸ But see discussion in section IV.B above.

V. Conclusion

The Motion is GRANTED as set forth above. In all other respects, the Motion is DENIED. As a result, the following issues remain outstanding in this adversary proceeding:

- A. Whether there is/was a contract of adhesion between Eldorado and CoServ.
- B. Whether, under the Clayton Act, Chapter 15 of the Texas Business & Commerce Code or Article I, Section 26 of the Texas Constitution, CoServ has unlawfully used its position as the sole utility provider.
- C. Whether CoServ's actions violated the Fifth Amendment to the United States Constitution or Article I, Section 17 of the Texas Constitution.

It is, therefore,

ORDERED that Plaintiff prepare and submit a Partial Summary Judgment conforming to this opinion; and it is further

ORDERED that the parties shall immediately comply with the requirements of Fed. R. Bankr. P. 7016 and shall appear at a conference with the court pursuant to such Rule at 1:30 p.m. on March 18, 2003; and it is further

ORDERED that, provided there is compliance with FED. R. BANKR. P. 9011, Eldorado may amend the Answer/Counterclaim at any time within the next 30 days, and thereafter may amend the Answer/Counterclaim with leave of the court.

Signed this _____ day of February 2003.

DENNIS MICHAEL LYNN
UNITED STATES BANKRUPTCY JUDGE