

Federal Appeals Court Upholds Dismissal of Lawsuit Seeking to Prevent Village's Acquisition of Utility Assets

By: Dave Scriven-Young, Attorney at Peckar & Abramson, P.C.

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The U.S. Court of Appeals for the Seventh Circuit recently issued [*an opinion in Rock Energy Cooperative v. Village of Rockton, No. 10-1106*](#), which concerned a dispute over the ownership of assets used by natural gas and electric utilities.

Rock Energy is a consumer-owned utility that provides gas and electricity to its members on a cost-of-service, nonprofit basis. In 2004, Alliant Energy announced that it would take bids for the sale of assets held by a subsidiary company. The announcement caught the attention of both Rock Energy and the Village of Rockton, Illinois. Rock Energy submitted a bid for the Alliant assets, and the Board of Trustees of Rockton passed an ordinance on January 18, 2005, authorizing the Village to acquire the assets by purchase or condemnation.

On June 30, 2005, the Village and Rock Energy entered into a Memorandum of Understanding (the "MOU"), in which they expressed their "mutual intent to explore the feasibility of Rockton[']s acquiring the local utility assets" from Rock Energy. In the MOU, Rock Energy agreed to sell the assets to the Village if certain conditions were satisfied, including the completion by the Village of a feasibility analysis addressing topics such as finance, safety, reliability, and operations; the parties also needed to come to an agreement on the price that the Village would pay. The next day, Rock Energy entered into a contract with Alliant to purchase the assets; for reasons that are not explained, it took another year and a half for that transaction to close. After that, the Village told Rock Energy on more than one occasion that it wanted to acquire the assets, as contemplated by the MOU. The Village has also threatened to condemn the assets, using its power of eminent domain.

On May 11, 2009, Rock Energy filed a complaint in federal court seeking a declaratory judgment stating that "the Village of Rockton has not met the requirements of Illinois law to acquire electric and gas utility assets from Rock Energy Cooperative."

The trial court dismissed the complaint, and the 7th Circuit appellate court affirmed. The appellate court held that, although the Village threatened to do certain things, the Village actually took no action to acquire the utility assets. Therefore, Rock Energy did not have standing to sue:

"We begin with Rock Energy's eminent-domain theory. The company would like us to believe that its Alliant assets are likely to be taken by the Village at any moment. As we held in *Shannon*, it continues, it is 'no bar to ripeness if the government has only threatened enforcement, rather than actually brought a lawsuit.' . . . But this record is startlingly devoid of evidence that the Village is waiting to pounce with an eminent domain

action. The ordinance about which Rock Energy complains was passed five years ago; Rock Energy has had a contractual right to own the assets for the same five years; and it has actually held them for more than three years. That does not sound like imminence to us."

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