No. 16-3766

United States Court Of Appeals

FOR THE SEVENTH CIRCUIT

NAPERVILLE SMART METER AWARENESS,

Plaintiff-Appellant,

v.

CITY OF NAPERVILLE,

Defendant-Appellee.

Appeal from the United States District Court, Northern District of Illinois
Eastern Division, District Court No. 1:11-CV-09299
Honorable John Z. Lee, United States District Judge

BRIEF OF PLAINTIFF-APPELLANT NAPERVILLE SMART METER AWARENESS

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Corporate Disclosure Statement

Appellant Naperville Smart Meter Awareness does not have a parent corporation, nor does any publicly held company own 10% or more of its stock. Two law firms have appeared for Appellant in this case: on appeal, it is represented by Thompson Coburn LLP; and in the trial court, it was represented by Doug E. Ibendahl, Attorney at Law.

Request for Oral Argument

Appellant believes oral argument is appropriate because this case presents important constitutional issues relating to government's ability to compel revealing data from within the home. The district court appears to have based its decisions on misunderstandings and assumptions contrary to the claims alleged in the pleadings, and oral argument will help prevent misunderstandings in this Court.

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Jurisdictional Statement

The court below had federal-question subject-matter jurisdiction. *See* 28 U.S.C. §§ 1331, 1343. Plaintiff Naperville Smart Meter Awareness ("NSMA") raised claims against Defendant City of Naperville (the "City") pursuant to 42 U.S.C. § 1983 for deprivations of NSMA members' rights under the Fourth Amendment's prohibition against unreasonable searches, the Fifth Amendment's Takings Clause, and the Fourteenth Amendment's Due Process and Equal Protection Clauses. (A042-46; A108-13.[1]) NSMA also raised claims under the Americans with Disabilities Act, *see* 42 U.S.C. § 12132, and the Public Utility Regulatory Policies Act (as amended by the Energy Policy Act of 2005), *see* 16 U.S.C. §§ 2601–45.[2] (A040-41; A113-15.)

This Court has jurisdiction over this appeal pursuant to 28 U.S.C. § 1291 because NSMA is appealing from a final decision of the district court. The court entered final judgment against NSMA and in favor of the City on September 26, 2016. (A353.) NSMA filed no post-judgment motions and timely filed its notice of appeal within thirty days after entry of judgment, on October 26, 2016. (Dkt.# 182.)

Although NSMA is appealing as a matter of right from the district court's final judgment, this appeal focuses on the court's earlier decisions disposing of NSMA's Data Privacy Claims: its grants of the City's motions to dismiss NSMA's first and second amended complaints and its denial of NSMA's request to raise claims under the

[1] All record citations are to pages of the Joint Appendix ("A__"), or, for materials not within the Joint Appendix, the district court docket number ("Dkt.#__").

[2] While the court's diversity jurisdiction was not invoked, pursuant to Circuit Rule 28(a)(1), NSMA states that it is an Illinois not-for-profit corporation with its principal place of business in Illinois and the City is an Illinois municipal corporation.

Fourth Amendment and the Illinois Constitution in its third amended complaint. (A48-71, A116-34, and A333-44.) This Court has jurisdiction to review these antecedent orders because they were neither final nor appealable until the entry of final judgment. *Weiss v. Cooley*, 230 F.3d 1027, 1031 (7th Cir. 2000); *Badger Pharmacal, Inc. v. Colgate-Palmolive Co.*, 1 F.3d 621, 626 (7th Cir. 1993).

Issue Presented

Whether a claim under the Fourth Amendment or article I, section 6 of the Illinois Constitution is sufficiently alleged by facts showing that a city government, through compelled use of electricity "smart meters," is collecting detailed electricity usage data that can reveal intimate information about residents' personal lives within their homes, is using the data for purposes other than electricity service, including law enforcement, and is sharing the data with third parties.

Statement of the Case

NSMA is a non-profit organization formed to educate, engage, and empower residents of Naperville, Illinois, about smart meters. (A144.) Smart meters are a new digital technology that some electric utilities are using to replace traditional analog usage meters. (A37-38; A49-50; A77-78; A147-48.)

NSMA sued the City to challenge its then-nascent smart-meter program. (Dkt.# 1.) All Naperville residents receive their electricity from the City-owned and -operated Department of Public Utilities-Electric (the "DPU-E"). (A145.) The City began replacing residents' analog meters with smart meters in January 2012. (A026.) Residents cannot obtain electricity from alternative suppliers, and the City refused to allow NSMA members to opt out of smart-meter usage. (A145; A168–71.)

While NSMA challenged the City's smart-meter program on a number of grounds, this appeal concerns only one issue: the propriety of the dismissal of NSMA's claims that the City's collection of in-home data through smart meters constitutes an illegal search and invasion of privacy under the Fourth Amendment and article I, section 6 of the Illinois Constitution (the "Data Privacy Claims").

I. Procedural History

NSMA's Data Privacy Claims were raised in three complaints. The court dismissed the first two and refused to allow the third. The first two complaints raised Data Privacy Claims under the Fourth Amendment via 41 U.S.C. § 1983. The third sought to add a parallel state-law claim.

NSMA first raised its Data Privacy Claims in its first amended complaint, filed March 27, 2012. (A043-45.) The court dismissed those claims without prejudice on March 22, 2013. (A065-71.)

NSMA's second amended complaint, filed April 6, 2013, repleaded its Data Privacy Claims in greater detail. (A076-85, A98-100, A110-12.) The court dismissed them on September 25, 2014. (A126-28.)

On December 10, 2014, NSMA requested leave to file a third amended complaint, (A135-84), which included the Data Privacy Claims under both the Fourth Amendment (Count I) and Illinois Constitution (Count II). (A177-82.) On July 7, 2015, the court denied NSMA's request to replead those claims. (A333-44.)

On September 26, 2016, the court granted the City summary judgment on NSMA's remaining claim and entered judgment for the City. (A345-53.) NSMA filed its notice of appeal October 26, 2016. (Dkt.# 182.)

II. NSMA's Data Privacy Claims

NSMA's three pleadings in issue—the first, second, and proposed third amended complaints—raised the Data Privacy Claims with increasing amounts of detail. This summary of those allegations, and the court's rulings, is supplemented in the relevant argument sections.

A. First Amended Complaint

In this pleading, NSMA alleged that Naperville's compulsory smart-meter program was a "search" that violated the Fourth Amendment based on the qualitative differences between the data-collection capabilities of traditional analog meters and smart meters:

- Unlike analog meters, smart meters collect "historical data about energy usage," that "can be accessed remotely" and reveal information "about occupant behavior." (A043.)
- While analog meters collect only "the total consumption of electricity" measured in kilowatt hours per month, smart meters "allow tracking of time patterns associated with occupants of a dwelling unit" and thus "provide rich knowledge about intimate details of a customer's life." (A044.)

NSMA alleged that collection and storage of "private customer information" by smart meters allows the City "to obtain a highly detailed picture of activities within a home" without "customer consent or control." (A043-44.)

B. Second Amended Complaint

NSMA's second amended complaint added allegations about the functions and technical capabilities of smart meters, including that the City's smart meters collect and retain energy usage data from each home every fifteen minutes, how this level of data collection fundamentally differs from that of analog meters, and details about the privacy invasions created by the forced disclosure of this data to the City. (A076-85, A098-100, A110-12.) The second amended complaint included reference to scientific and government studies about the privacy risks posed by smart meters, a chart illustrating the differences in data collection between smart meters and analog meters on a household basis, and specific allegations regarding the use of smart-meter data by Naperville police and the vulnerability of the data to cyber-attacks. (A083, A098-99.)

C. Proposed Third Amended Complaint

NSMA's proposed third amended complaint built upon the detailed allegations in its earlier complaints but added additional factual detail and citations to technical authorities, reports, and articles, in part to address questions raised in the court's prior rulings and at oral argument. (A145-65, A177-82.) The Data Privacy Claims, as set forth most comprehensively in the third amended complaint, included detailed allegations on key issues related to smart meters' privacy impacts:

Smart-meter capabilities

- Unlike analog meters, smart meters "allow for real-time two-way communications between the City and its electric customers" and collect "Interval Data," which consists of "granular, fine-grained, high-frequency . . . energy usage measurements." (A148-49.)
- Smart meters thus create a "constant conversation" between the City and smart-metered homes, which is not possible using analog meters. (A155.)

City's data-collection practices

- The City's smart meters are programmed to collect Interval Data every fifteen minutes, and the City has the capability—unilaterally, remotely, and without installing new equipment—to increase this frequency to five minutes. (A149.)
- The Interval Data "includes real power in kWh and reactive power in kVARh, and is unlike analog meter readings which reflect only aggregated energy data (total kilowatt hours used over an entire month)." (A149.)

- The City also retains other "Customer Information"—personal identification and billing information, including participation in optional energy efficiency and rate programs. (A151.)

Revealing nature of smart-meter data

- The City's collection and retention of Interval Data "reveal[s] intimate personal details" of residents' lives, "such as when people are home and when the home is vacant, sleeping routines, eating routines, specific appliance types in the home and when used, and charging data for plug-in vehicles that can be used to identify travel routines and history." (A155.)
- The U.S. Department of Energy has recognized that smart meters could be used to reveal such personal information, such as peoples' daily schedules and whether they have alarm systems, expensive electronics, or certain medical equipment in their homes. (A160.)
- Combined with other Customer Information, Interval Data "provides the City"—and any other parties with access to this data—"with a treasure trove of detailed personal information of NSMA members which was not possible when an analog meter was utilized." (A155.)
- NSMA provided specific examples—obtained through Freedom of Information Act ("FOIA") requests—of individual customer data collected by the City and the personal information obtainable from that data "[e]ven without special software or other analytical tool[s]." (A157-60.)

Disaggregation capabilities

- Addressing the concern that smart-meter data was merely "aggregate," NSMA alleged that "[n]ew 'energy disaggregation' software technology allows for the breakdown of Interval Data collected via a smart meter into appliance-level itemized consumption." (A156.)
- Running Interval Data through such software—without any "additional hardware"—allows "an even more intrusive search of the intimate details of NSMA members' in-home activities," including more detailed information about "home occupancy, personal behaviors, and appliance usage." (A156, A160.)
- "Hourly data can be used to determine occupancy and major appliance categories," while "[m]inute-by-minute data can be used to determine up to 10 different appliance loads." (A160.)

Lack of adequate privacy protections

- NSMA noted the City's smart-meter data-collection practices do not comply with the National Institute of Standards and Technology's recommendations that "only the minimum amount of data for services, provisioning, and billing should be collected." (A154 (emphasis omitted).)
- NSMA alleged the City retains all Customer Information and Interval Data "for a period of up to ten years," and archives it indefinitely. (A151.)
- The City does not limit use of Interval Data to its electric utility, DPU-E, or even to City employees. (A164.) By ordinance, the City also gives access to

"private customer information" to "individuals or entities under contract with the City," so long as it is for the purpose of "performance of City operations." (A164 (emphasis omitted).)

- Smart meters have significant security vulnerabilities, as recognized by various federal agencies. (A164-65.) These vulnerabilities heightened privacy concerns based on a cyber-attack against the City in October 2012. (A165.)

Use of data by City police

- NSMA also included allegations about the City's use of Interval Data as a surveillance tool, noting that City police have "unfettered access to utility records and highly detailed Interval Data without a warrant."[3] (A164.)
- Further, the City retains "its customers' detailed Interval Data . . . for the purpose of assisting the City's law enforcement personnel in criminal and regulatory investigations." (A153.)
- "Interval Data harvested by the City via smart meters allows the City's police force to unreasonably search and access private information regarding the intimate activities of electric customers inside their homes and without a warrant." (A153.)
- At a public forum, a Naperville police detective "addressed the City's use of Interval Data" harvested through smart meters and "how it would assist" police. (A153-54.)

[3] Indeed, in addition to allegations about using smart meters for surveillance, NSMA included allegations about the City's use of other surveillance methods, including private investigators, to target NSMA members. (A176.)

Excessive data collection

- Anticipating a defense that the City has a special need to collect Interval Data, NSMA noted that its collection "far exceeds what is necessary for customer billing purposes and account management." (A151.)
- All the City needs for billing purposes is a single "data point measured per month of energy usage in kWh (delivered)" for each customer, making Interval Data superfluous for customers using traditional fixed-rate pricing (the default for all customers). (A151.)

Pretextual justifications

- NSMA also asserted that the City's only explanations for its use of Interval Data in its provision of electricity was to "accommodate ePortal features" which would allow customers to access their "energy use information online" and for its "Demand Response Program." (A151-52.)
- The Demand Response Program is a "voluntary" program that would allow the City to adjust a participating customer's thermostat temporarily "to reduce air conditioning load" and to have appliances "automatically cycled off" during periods of high energy demand. (A152.)
- The City collects and retains Interval Data for all residents regardless of participation in the Demand Response Program or use of "ePortal" features. (A152.)

Lack of consent

- NSMA pleaded that its members had not consented to the "arbitrary" collection and retention of their Interval Data, which "far exceeds" the data previously collected via analog meters. (A154-55.)
- Indeed, NSMA pleaded specific facts about the City's forced installation of smart meters in its members' homes and pursuit of criminal charges against them for their attempts to observe and record the installations. (A171-74.)

D. District Court Rulings

The court's rulings dismissing the first two complaints, and refusing to allow the third one, were contained in three different orders, (A048-71, A116-34, A333-44), but each was based on one or more of the following conclusions:

1. The City collected "only total usage" data, "aggregate residential power usage in fifteen-minute intervals," "and no further details," and Naperville residents had no reasonable expectation of privacy in that data. (A127; *accord* A067, A339.)

2. It "is not possible" to infer from NSMA's allegations that smart-meter data "conveys any information in which residents have a reasonable expectation of privacy" because its allegations rely upon inferences made from raw data, which the district court dismissed as "imagined explanation[s]" and "nothing more than guesses and assumptions." (A127; *accord* A341.)

3. No protected private information "has been recorded or obtained," and the City's "mere capability" of gathering such information does not support a Fourth Amendment claim. (A127, A340.) Specifically, even if smart meters

could collect data more frequently and even if energy disaggregation software permits the City to examine appliance-level consumption, setting aside consent, in order to state a claim, NSMA still would have to show that the City is actually and purposefully employing smart meters to glean more detailed information about residents' personal lives. (A340; A068-69.)

4. Naperville residents consent to acquisition of their data by accepting electrical service at their homes. (A341-42; A067, A126, A070.)

Summary Of Argument

This case involves data privacy, today's signature privacy issue, regarding data obtained from within the home, a special place of sanctity under the Fourth Amendment. Through the compelled use of smart meters, the City is collecting data that can reveal intimate details of peoples' activities in their own homes.

NSMA made detailed allegations of serious invasions of privacy by the City through its use of smart meters. NSMA went well beyond notice pleading, even including citations to supportive evidentiary materials and technical research, and clearly stated a claim that it could develop and prove. (Section I.A.) In dismissing the Data Privacy Claims, the district court ignored these well-pleaded allegations, improperly made contrary findings and inferences, and used reasoning directly contrary to the Supreme Court's Fourth Amendment precedents. (Section I.B.)

At a minimum, the Data Privacy Claims were sufficient to state a claim under article I, section 6 of the Illinois Constitution, which provides even broader privacy protection than does the Fourth Amendment. (Section II.)

For all these reasons, and because NSMA's Data Privacy Claims raised a serious and emerging issue of broad public importance, the claims should have been fully explored and tested in litigation, not summarily dismissed. (Section III.)

Standard Of Review

This Court reviews the Rule 12(b)(6) dismissal of the Data Privacy Claims *de novo*. *Vinson v. Vermilion Cty., Ill.*, 776 F.3d 924, 928 (7th Cir. 2015); *Porter v. DiBlasio*, 93 F.3d 301, 305 (7th Cir. 1996). The decision to deny NSMA the opportunity to replead the Data Privacy Claims in its third amended complaint is also reviewed *de novo* because it was based on futility grounds. *Adams v. City of Indianapolis*, 742 F.3d 720, 734 (7th Cir. 2014) (quoting *Cohen v. Am. Sec. Ins. Co.*, 735 F.3d 601, 607 (7th Cir. 2013)).

Under *de novo* review, this Court must accept NSMA's well-pleaded allegations as true and draw all reasonable inferences in NSMA's favor. *Volling v. Kurtz Paramedic Servs., Inc.*, 840 F.3d 378, 382 (7th Cir. 2016). "To survive a motion to dismiss, the complaint must 'state a claim to relief that is plausible on its face.'" *Id.* (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id.* (quoting *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009)). The district court's rejection of the Data Privacy Claims can be affirmed only "if it appears beyond doubt that [NSMA] cannot prove *any* set of facts that would entitle it to relief." *First Ins. Funding Corp. v. Fed. Ins. Co.*, 284 F.3d 799, 804 (7th Cir. 2002) (emphasis added).

Argument

I. The District Court Improperly Dismissed NSMA's Data Privacy Claims Under the Fourth Amendment.

The City of Naperville has coercively placed a black box at every resident's home, and is using it to take multiple measurements every hour that, when analyzed, will reveal intimate details of life within their homes. Each key element of this case—the new technology, the home setting, and the rich digital data that Naperville will hold and control indefinitely—raises serious privacy concerns that the district court inexplicably shielded from the testing grounds of discovery and litigation.

A. The Data Privacy Claims alleged significant unjustified invasions of privacy through smart meters collecting data that reveals intimate details of NSMA members' in-home activities.

The allegations in the Data Privacy Claims were more than sufficient to state a claim for relief under the Fourth Amendment that could survive Rule 12(b)(6) scrutiny because they alleged clearly and in detail that the City's compulsory use of smart meters collects highly revealing data from within residents' homes. It is evident that NSMA stated a viable claim under the Fourth Amendment.

1. The Data Privacy Claims implicate the special Fourth Amendment protections that apply to information from inside the home.

NSMA clearly stated a viable claim that the City's compulsory smart-meter program was an unreasonable and illegal warrantless "search" and "seizure." NSMA alleged those violations with specificity, including details about the personal nature of the data acquired *from inside the home*, the lack of reasonable limitations on the use of smart-meter data, and the compulsory nature of the City's smart-meter program.

Homes are special, and government intrusions into the home invoke the protections of the Fourth Amendment. Accordingly, NSMA's allegations that the City compelled data from within residents' homes clearly stated a Fourth Amendment claim. A person's right to "to retreat into his own home and there be free from unreasonable government intrusion" stands "[a]t the very core" of the Fourth Amendment. *Kyllo v. United States*, 533 U.S. 27, 31 (2001) (quoting *Silverman v. United States*, 365 U.S. 505, 511 (1961)). The Fourth Amendment specifically emphasizes home privacy: "The right of the people to be secure in their persons, *houses*, papers, and effects, against unreasonable searches and seizures, shall not be violated." U.S. Const. amend. IV (emphasis added). In *Wilson v. Layne*, 426 U.S. 603 (1999), the Supreme Court recalled centuries-old precedents and unanimously recognized that "the right of residential privacy" lies "at the core of the Fourth Amendment." *Id*. at 612; *see also Payton v. New York*, 445 U.S. 573, 589 (1980) ("In none is the zone of privacy more clearly defined than when bounded by unambiguous physical dimensions of an individual's home … .").

New technologies do not strip homes of their special constitutional protection. Indeed, the Supreme Court has emphasized that Fourth Amendment protection must be applied to new technologies if they intrude into the home. In *Kyllo*, the Supreme Court refused to allow the "technological enhancement" of heat-sensing devices "to shrink the realm of guaranteed privacy" in the home. 533 U.S. at 33–34. The Court found that "obtaining by sense-enhancing technology any information regarding the interior of the home that could not otherwise have been obtained without physical 'intrusion into a constitutionally protected area' constitutes a search," at least where

the technology is not in general public use. *Id*. at 34 (citation omitted). The search in question was found unreasonable because it revealed signs of "intimate details of a home." *Id*. at 36. Indeed, the Court stressed that "[i]n the home, our cases show, *all* details are intimate details, because the entire area is held safe from prying government eyes." *Id*. at 37. This includes, for example, facts as seemingly trivial as "how warm—or even how relatively warm—Kyllo was heating his residence." *Id*. at 38; *see Minnesota v. Carter*, 523 U.S. 83, 99 (1998) (Kennedy, J., concurring) ("Security of the home must be guarded by the law in a world where privacy is diminished by enhanced surveillance and sophisticated communications systems.").

Because of the special status of the home, the Court in *Kyllo* held that there is no need to engage in a "reasonable expectation of privacy" analysis with respect to materials or information obtained from inside the home; a person's expectation of privacy with respect to such materials is *inherently* reasonable. *Kyllo*, 533 U.S. at 34 (noting that for a "search of the interior of homes," a "minimal expectation of privacy … *exists*" and is "acknowledged" by the law "to be *reasonable*"). Accordingly, the test established in *Katz v. United States*, 389 U.S. 347 (1967)—under which courts first inquire as to whether a reasonable expectation of privacy exists in the location or material searched—is not applicable to in-home searches, whether carried out physically or technologically, because a reasonable expectation of privacy automatically attaches to information from the home. *Kyllo*, 533 U.S. at 34–35.

Moreover, the Supreme Court has applied the Fourth Amendment to protect citizens from increasingly sophisticated types of technological surveillance. *See Silverman*, 365 U.S. 505 (warrantless use of microphone to eavesdrop on conversations

in home); *Katz*, 389 U.S. 347 (warrantless eavesdropping on phone-booth conversation); *United States v. Karo*, 468 U.S. 705 (1984) (warrantless monitoring of a beeper in private residence); *Kyllo*, 533 U.S. 27 (warrantless use of thermal imaging technology to measure heat inside home); *United States v. Jones*, 565 U.S. 400, 132 S. Ct. 945 (2012) (warrantless long-term monitoring of GPS device placed on vehicle); *Riley v. California*, 134 S. Ct. 2473 (2014) (search of cell-phone data incident to arrest).

Each of these decisions recognized that new technologies create new invasion-of-privacy risks. Three of them—*Silverman*, *Karo*, and *Kyllo*—stressed that homes especially must be protected from technological intrusions. *E.g.*, *Karo*, 468 U.S. at 716 ("Indiscriminate monitoring of property that has been withdrawn from public view would present far too serious a threat to *privacy interests in the home* to escape entirely some sort of Fourth Amendment oversight." (emphasis added)). All of these decisions recognized that technological data collection constitutes a "search" subject to the Fourth Amendment. And the most recent decision, *Riley*, broadly recognized that modern technologies implicate "the privacies of life," and that government collection of digital data requires new, tailored legal approaches and special protection because digital data collection has both qualitative and quantitative differences from traditional physical searches. *Riley*, 134 S. Ct. at 2489, 2495.[4]

Riley distinguished cell phones from other items because of the data they contain. Smart-meter data is similar to the cell-phone data that the Court protected in

[4] The Court has also left open the possibility that it would explicitly recognize a constitutional right precluding government entities from unwarranted disclosure of accumulated private data. *See Whalen v. Roe*, 429 U.S. 589 (1977).

Riley. When police come across a cigarette pack or wallet in a search incident to an arrest, they may or may not find valuable (but definitely limited) information in it. But cell phones are different, the Court found, because they are full of data. Similarly, data is not incidental to smart meters; data collection is their purpose. As one commentator has noted, smart meters—like the cell phones at issue in *Riley*—"are designed to collect vast amounts of digital data." Natasha H. Duarte, *The Home Out of Context: The Post-Riley Fourth Amendment and Law Enforcement Collection of Smart Meter Data*, 93 N.C. L. Rev. 1140, 1161 (2015). And like the heat sensors used in *Kyllo*, their data-collection capabilities are targeted directly at in-home activities, but the data collected "is even more revealing." *Id.* Smart meters "combine the newer digital mosaic concerns raised in *Riley* with the time-tested privacy of the home as enshrined in the Fourth Amendment's history," breaking down the "physical barriers" that once protected our personal, in-home behaviors and activities. *Id.*

Against the background of the special sanctity of the home and the dangers of government capture and inspection of detailed data about people's personal lives, NSMA's allegations more than sufficiently alleged a Fourth Amendment violation. Among other things, both NSMA's second amended complaint and its proposed third amended complaint cited statements from a Naperville police detective about how the City's police were using, or would be using, smart-meter data in law-enforcement investigations. (A098; A153-54.) NSMA also cited scholarly articles, news accounts, and federal government studies, and it included data acquired from the City through FOIA requests showing the granularity of the smart-meter data the City had already acquired from within certain *individual residences*, and how that data could be used to

reveal private activities within these particular homes. (A157-60.) NSMA set forth its Data Privacy Claims in sufficient detail to state a Fourth Amendment claim that was "plausible on its face," and indeed far beyond the pleading requirements of Rule 8(a), *Iqbal*, and *Twombly*. *Twombly*, 550 U.S. at 570; *see* Fed. R. Civ. P. 8(a); *Iqbal*, 556 U.S. at 678. Undoubtedly, NSMA's pleadings show that it could prove *some* set of facts that would entitle it to relief. *See First Ins.*, 284 F.3d at 804.

2. NSMA could and would have presented and further developed strong evidence to support its Data Privacy Claims.

If the district court had allowed the case to proceed beyond the pleadings stage, as it should have, NSMA would have not only presented the strong evidence it already had, but also could have developed additional significant evidence as to the substantial privacy harms that Naperville residents face because of the City's smart-meter program. Publicly available research confirms many of these risks. Additionally, discovery into the particulars of the smart-meter program would have allowed NSMA to develop evidence of the particular privacy, security, and other dangers of that program. Some key issues, such as the dangers to residents' privacy based on how the City stores and shares smart-meter data and how it protects (or does not protect) the data from security risks, were only capable of development through discovery.

a. NSMA pleaded, and would have proven, significant privacy dangers caused by the City's compelled smart-meter data collection.

First, many reports, studies, and analyses, some of which were specifically referenced in NSMA's pleadings, reveal significant risks created by the massive,

ongoing data collection integral to the City's smart-meter program.[5] Smart meters collect data that is quantitatively and qualitatively different from that collected by traditional analog meters. (A147-50.) As noted in NSMA's proposed third amended complaint, because analog meters only record total monthly kilowatt-hours used, they reveal hardly anything about home life. (A148.) By replacing the analog meter's one monthly reading with collection of thousands of interval data points per month, however, smart meters focus a surprisingly penetrating eye on the activities occurring inside the home.[6]

Research, cited in NSMA's proposed third amended complaint, (A164), shows that smart-meter data can provide detailed information about personal activities within the home being monitored: "By examining smart meter data, it is possible to identify which appliances a consumer is using and at what times of the day, because each type of appliance generates a unique electric load 'signature.'" CRS Report 4. One study revealed that data collected at fifteen-minute intervals—the frequency at which the City currently collects data from Naperville residents, (A149)—"can by itself pinpoint the use of most major home appliances." *Id.* In another study, researchers were able to

[5] Authorities recognize that smart meters implicate various privacy risks (as alleged by NSMA in its Data Privacy Claims), including police surveillance, data security, and data sharing. *See* Congressional Research Service, *Smart Meter Data: Privacy and Cybersecurity* 5, 7(2012) (hereinafter, CRS Report); National Institute of Standards and Technology, *Guidelines for Smart Grid Cybersecurity: Volume 2 - Privacy and the Smart Grid* 8–21 (2010), *available at* http://dx.doi.org/10.6028/NIST.IR.7628r1.

[6] The second amended complaint alleged that Naperville's smart meters would collect "approximately 30,000 points of data per month." (A081.) This computation is based on the multiple values taken at each fifteen-minute interval (*e.g.*, energy delivered to the customer in kWh, voltage, reactive power, energy received from the customer, etc.). For simplicity and conservatism, however, this brief refers hereafter primarily to the approximately 3,000 readings per month (4/hour x 24 hours/day x 30 days/month = 2,880).

identify the use of individual heavy-load appliances with "90% accuracy" using fifteen-minute interval data. *Id.* Another study, again examining the fifteen-minute interval data that Naperville collects, found that data revealing of home life is collected with an "alarmingly high accuracy":

> By analyzing [a] smart meter's data, it is possible to perform 'consumer profiling' with an alarmingly high accuracy. Examples range from how many people live in the house, duration of occupancy, type of appliances, security and alarming systems, to inferring special conditions such as medical emergencies or [a] new born baby.
>
> Profiling allows extracting residents' behavior even without utilization of sophisticated algorithms and computer aided tools. [Studies] have shown that it is possible to identify the use of major appliances in a house, by analyzing only a 15 min[ute] interval cumulative energy consumption data. [Others] have shown that with the current general statistical schemes it is possible to identify the usage pattern from [advanced metering infrastructure] data even without the detailed signatures of appliances or previous training.

Ramyar Rashed Mohassel et al., *A survey on Advanced Metering Infrastructure*, 63 Int'l J. Electrical Power & Energy Systems 473, 478 (2014), *available at* http://www.sciencedirect.com/science/article/pii/S0142061514003743.

Furthermore, by "combining appliance usage patterns," someone with access to this data can discern intimate details of peoples' in-home behaviors and activities:

> For example, the data could show whether a residence is occupied, how many people live in it, and whether it is occupied by more people than usual. … [S]mart meters may be able to reveal occupants' daily schedules (including times when they are at or away from home or asleep), whether their homes are equipped with alarm systems, whether they own expensive electronic equipment such as plasma TVs, and whether they use certain types of medical equipment.

CRS Report 8 (footnotes and internal quotation marks omitted).

As smart meters and data-analysis tools become more advanced, the data collected by smart meters will almost certainly become more detailed and more invasive. A recent German study tested a cutting-edge smart-meter model capable of revealing not only the periods of time "when [a] TV was turned on," but also "which stations the TV was tuned to" and what specific programs or films were being viewed. U. Greveler et al., *Hintergrund und experimentelle Ergebnisse zum Thema 'Smart Meter und Datenschutz'*, Fachhochschule Müenster, Univ. Applied Scis. (Sept. 2011), *available at* https://www.semanticscholar.org/paper/Hintergrund-Und-Experimentelle-Ergebnisse-Zum-Daten/214903099dfef70471192fe8f43962ed6c55978d. The article notes, "It could be determined after the fact which households, for example, watched a film that had not yet been released on DVD." *Id.* Our quotations are based on our translation of the German original, and the article's included English abstract confirms these conclusions: "Our research shows that the analysis of the household's electricity usage profile does reveal what channel the TV set in the household was displaying." *Id*.

Such capabilities are especially troubling because intellectual activities—what people read, view, listen to, discuss, and otherwise attend to within their homes—are among the most sensitive in-home activities protected by the Fourth Amendment. *See, e.g.*, *Stanley v. Georgia*, 394 U.S. 557 (1969) (prohibiting prosecution for possession of obscene material within the home); Video Privacy Protection Act, 18 U.S.C. § 2710 (specially protecting video-rental records from subpoenas and searches due to privacy concerns); Neil Richards, *Intellectual Privacy: Rethinking Civil Liberties in the Digital Age* 95 (2015) ("[I]ntellectual privacy is the protection from surveillance or unwanted interference by others when we are engaged in the process of generating ideas and

forming beliefs—when we're thinking, reading, and speaking with confidants before our ideas are ready for public consumption.").

Smart-meter data risks will be heightened with the ongoing expansion of Big Data, which provides companies, and governmental entities, with a "welter of incentives to capture more [data], keep it longer, and reuse it often." Victor Mayer-Schönberger & Kenneth Cukier, *Big Data: A Revolution that Will Transform How We Live, Work and Think* 152 (2013) (using smart-meter data as a quintessential example of Big Data, since "a household's energy use" as captured by smart meters "discloses private information, be it the residents' daily behavior, health conditions or illegal activities").

If the case had proceeded, NSMA would have probed these issues under the City's smart-meter program. Because the case was dismissed, however, the City never had to provide any information or answers as to how its program dealt with the many serious privacy issues identified by numerous government agencies and experts, such as data security, data sharing with third parties, use of the data for law-enforcement purposes, and intellectual privacy.

b. NSMA pleaded, and would have proven, that smart-meter data combined with other data creates enhanced privacy risks.

In any government data collection, one of the key privacy risks involves analysis of the data through combining the data collected (*i.e.*, smart-meter data from Naperville residents) with data from other sources or databases (*e.g.*, data concerning the electricity usage signals and patterns associated with particular activities, appliances, and even television shows). NSMA highlighted these data-combination

concerns in its pleadings. (A153-54, A155, A164.) In discovery, NSMA would have probed the extent to which Naperville smart-meter data would and could be analyzed by police or others to determine personal activities within smart-metered homes.

Plaintiff would have also probed the possible sharing of Naperville smart-meter data with third parties who may analyze it and use it for their own purposes. Because the City claims exemption from the Illinois Electric Service Customer Choice and Rate Relief Law of 1997, the possibility exists of the City sharing smart-meter data with third parties, and use and analysis of that data by the third parties. *See* 220 Ill. Comp. Stat. 5/16-108.6(c), (d) (protecting against disclosure by private utilities of electricity measurements without customer consent).[7] This is another level of privacy concern, and indeed the Supreme Court has found serious problems in government sharing with third parties of information that it compels from citizens in their homes. *See Wilson*, 426 U.S. at 611 (finding police exceeded scope of search warrant by allowing journalists to view and photograph search).[8]

[7] Although the court below indicated this law protected residents from disclosure by the DPU-E, (A069-70), the DPU-E does not qualify as a "participating utility" for purposes of the law's privacy protections. *See* 220 Ill. Comp. Stat. 5/16-108.5(b), 5/16-108.6; *see also* 220 Ill. Comp. Stat. 5/17-100.

[8] Big Data's greatest dangers often arise from unanticipated collateral uses—uses that occur because of the emerging Big Data industry and the value that industry produces by combining different datasets, obtained for different purposes. *See* Mayer-Schönberger & Cukier, *supra*, at 153 ("With big data, the value of information no longer resides solely in its primary purposes. As we've argued, it is now in secondary uses.").

c. NSMA pleaded, and would have proven, that the City's claimed reasons for its data collection were unjustified and did not outweigh the privacy harms of its smart-meter program.

Had NSMA been permitted to proceed with discovery, it would have probed the City's stated justifications for its smart-meter program. NSMA questioned these justifications in its pleadings, (A151-52), and believes that discovery would show that the City has not implemented the programs it used to justify smart-meter installation—the Demand Response and "ePortal" programs. (*See* A151-52.) Since privacy is often balanced against governmental interests, the absence or weakness of the City's justifications for the program could be key issues in determining the ultimate merits of the Data Privacy Claims.

d. NSMA pleaded, and would have proven, the security risks from smart-meter data collection.

NSMA would have explored in discovery the risks it alleged that its members' smart-meter data can be hacked and exploited by outsiders, revealing their personal in-home activities.[9] NSMA alleged that the City has already suffered a major successful hacking attack, so its computer systems are clearly vulnerable to hacking. (A165.) "Internet of Things" devices, like smart meters, are highly susceptible to hacking attacks, meaning that the data they collect, and even the functions they control, can be commandeered by criminals and others.[10] In a world in which hacking can reach even

[9] A U.S. Department of Energy report stated that in the absence of adequate cyber protections, deployment of smart technologies in the electric system "could increase system vulnerabilities." U.S. Department of Energy, *Transforming the nation's electricity system: The Second Installment of the QER* at 4-36–37 (Jan. 2017).

[10] *See* Mohassel, *supra*, at 478 ("As the number of smart meters increase exponentially, security issues … grow substantially from within the system as well as outside. Detailed information of customers' consumption is critical as it can reveal their life style. Transmission

the emails of the Democratic National Committee and former Secretary of State Colin Powell, hacking risks are real, and frightening to those whose data is at risk.

e. Experts could have explained the particular risks and dangers pleaded by NSMA concerning the City's collection, use, sharing, and retention of smart-meter data.

Had the case proceeded, NSMA would have retained experts able to analyze and probe the existing Naperville smart meters and data-collection practices, and develop further evidence supporting the privacy invasion represented by the City's compelled use of smart meters. Experts could have tested the City's assertions regarding how much data it collects and is capable of collecting, how it uses the data, the security of its data archives, and other issues. They could have tested or rebutted the City's assertions (contrary to NSMA's well-pleaded allegations) that the district court heard at an initial hearing and appeared to believe. (*Compare* A251-54 (statements by City attorney and employee at hearing, claiming that smart-meter data could not reveal specific device usage and is not used for non-electricity usages), *and* A081, A111, A155-60, A164, A178 (contrary allegations by NSMA), *with* A127 & A340-41 (court's decisions, accepting City's position that smart-meter data is not revealing and is not used improperly by the city).) As noted above, expert analyses of other smart-meter systems have shown in some cases that the systems gather so much information that analysts are able to determine particular television shows being viewed. If that, or something comparable, were found to be true of Naperville's system, it would raise

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of data over long distance as well as storing the data in various places for re-transmission or analysis can also create vulnerabilities in terms of data theft or manipulation.").

serious issues of intellectual privacy. *See supra* Section I.A.2.a. Experts may also be able to identify less-restrictive means to satisfy the City's purported purposes for employing smart meters. If, for example, the City showed it had some need for "aggregate" electrical usage data even at fifteen-minute intervals, transformer-level (neighborhood) aggregate data may satisfy that need. Other less-restrictive means may come to light through discovery and expert analysis.

* * *

In sum, based on the home privacy intrusion that is inherent in smart-meter data collection; the additional risks created by data combination; the special dangers of third-party use of smart-meter data, which is possible under City policies; the threat of hacking and criminal use of smart-meter data; and expert testing and analyses of the operations and capabilities of the City's system, NSMA could have, and would have, created a strong case against the City's compelled acquisition of smart-meter data from inside its members' homes.

B. The district court ignored well-pleaded allegations, relied upon contrary facts and assumptions, and flawed legal analysis.

1. The court erred in finding that NSMA members had no reasonable expectation of privacy in the data collected by smart meters.

a. The court erred in ignoring the inherent privacy expectation in data from inside the home.

As a matter of law, NSMA members have a reasonable expectation of privacy in data compelled from inside their homes. *Kyllo* held that because of the special sanctity of the home, residents automatically have a reasonable expectation of privacy in all material and data inside their home. *Kyllo*, 533 U.S. at 34. Yet the district court

ignored this fundamental Fourth Amendment principle, embarked on its own inquiry, and concluded that smart-meter data was *not* subject to a reasonable expectation of privacy, as a matter of law. (A126; A338-42.) This was clearly erroneous.

The smart-meter data here cannot be distinguished from the information that was held private in *Kyllo*. Indeed, in *Kyllo*, the Court specifically recognized that details as seemingly innocuous as "how warm—or even how relatively warm" a person heats his home are private and personal, and therefore subject to Fourth Amendment protection. *Id*. at 38. And apart from the similarity of heating use in *Kyllo* to the electricity use at issue in this case, the Court in *Kyllo* laid down a clear line of protection for information from inside the home: "In the home, our cases show, *all* details are intimate details, because the entire area is held safe from prying government eyes." *Id*. at 37; *accord Silverman*, 365 U.S. at 512 (noting any invasion within the home, "by even a fraction of an inch," invades the Fourth Amendment's zone of protection).

Because NSMA members have a reasonable expectation of privacy in the data collected by smart meters as a matter of law, the court's ruling was in error.

b. The court ignored well-pleaded allegations in finding smart-meter data does not reveal private activity within the home.

Even apart from the fact that smart-meter data from inside the home carries an inherent expectation of privacy, the district court's characterization of the data as non-private is based on findings that (1) contravened Rule 12's mandate that the court accept all well-pleaded allegations as true, and (2) are demonstrably incorrect.

The court relied significantly on its assumption or understanding that the information that the City collects via smart meters is inconsequential and that, as mere electricity usage data, it would not reveal any personal, intimate, or private activities of residents. Specifically, the court relied on an inappropriately limited view of the data collected—which it described as "aggregate measurements of their electrical usage," "only total usage and no further details than that," "aggregate usage measurements," and "aggregate data measured in fifteen-minute intervals." (A126-28, A339.) Such aggregated measurements, it held, invade "no reasonable expectation of privacy." (A126.)

The phrases the court used, emphasizing "aggregate" measurements, do not come from NSMA's complaints, which do not characterize the data collected as "aggregate data"; rather, they characterize it as detailed, rich, and numerous. (*E.g.*, A027 ("detailed"), A043-44 ("system of data collection" that "provide[s] rich knowledge"), A078 ("not an aggregate number"), A081 ("30,000 points of data per month").)

The court's characterization of the data as mere "aggregate" data appears to come from statements by the City's attorney at an initial hearing, on September 21, 2012, where the City asserted that it collected only "aggregate" electricity usage figures, that those figures could not be used to reveal intimate details of life within the home, and that it would never analyze the data for any use other than electricity provision and billing. (*See* A244 (City: "aggregate energy consumption data in 15-minute increments"); A246-47 (City: "all that we're reporting is consumption information on an aggregate basis"); A247 (City, as to appliance-level data: "we would never collect it"

and "are not going to collect it"); A248 (City, in response to question if "even theoretically" it could develop detailed usage data: "We are not compiling or even receiving that information at this juncture. We are only receiving aggregate energy consumption data. … It is the total extent of the information we are collecting.").)

NSMA's complaints alleged the opposite of what the City claimed at the hearing—that "the City's collection of this new electric usage data is not an aggregate number," (A078), that the thousands of monthly data points can reveal particular device usages, (A078-79), that this data reveals "intimate personal details" and "provides the City with a treasure trove of detailed personal information," (A155), that going beneath the figures to determine device usage is simple and can be done with readily available tools, (A156), that the data "will be utilized in pursuit of the City's police function," (A111, A178), and that the City provides smart-meter data to outsiders, (A164). In short, the Data Privacy Claims clearly alleged, with support from government and outside research reports, that the smart-meter data measurements carry with them significant additional information beyond aggregate usage. (A157-60.)

Moreover, understanding the significance of data goes beyond a lay person's ordinary understanding and thus the court had no basis for making its own determination that the 3,000/month fifteen-minute aggregate electricity usage measurements were insignificant, contrary to NSMA's allegations. *See* Mayer-Schönberger & Cukier, *supra*, at 77, 94 (even tiny bits of information, in one instance relating to how people sit, can become incredibly valuable); Hannes Grassegger & Mikael Krogerus, *The Data That Turned the World Upside Down*, Motherboard, Jan. 28, 2017 (data from smart phone motion sensors can reveal how quickly a person

moves and how far he or she travels, which correlates with emotional instability). The court thus erred in ignoring or discounting the authorities cited in the Data Privacy Claims.

The court may have assumed that "aggregate" means that the individual data bits have been totally subsumed into a new material, just as sand, gravel, and a cementing agent make cement. But studies of anonymization and aggregation have shown, in dramatic fashion, how private information can be derived from allegedly anonymized and aggregated data. *See* Executive Office of the President, *Big Data: Seizing Opportunities, Preserving Values* 8 (May 2014); Federal Trade Commission, *Protecting Consumer Privacy in Era of Rapid Change: Recommendations For Businesses and Policymakers* 18 (March 2012); CRS Report 6; Arvind Narayanan & Vitaly Shmatikov, *Robust De-anonymization of Large Datasets (How To Break Anonymity of Netflix Prize Dataset)*, University of Texas at Austin (Nov. 22, 2007), *available at* https://arxiv.org/pdf/cs/0610105.pdf. In a study of anonymized Netflix viewership data, the researchers were able to identify a specific woman in Connecticut who regularly watched movies about lesbians. Narayanan & Shmatikov, *supra*. And again, the Data Privacy Claims clearly alleged that the City could readily go beneath the raw "aggregate" smart-meter readings to uncover activities within the home.

While disclosure of true *monthly* aggregate power-use quantities have at times been held not to involve an invasion of privacy, courts have noted that the monthly numbers generated by analog meters tell very little about a household, and do not reveal intimate details of life inside. *See State v. Kluss,* 867 P.2d 247, 254 (Idaho App. 1993) (finding monthly aggregate power usage figures "do not reveal discrete

information about Kluss's activities"); *Sampson v. State*, 919 P.2d 171, 173 (Alaska App. 1996) (Mannheimer, J., concurring) (agreeing that no reasonable expectation of privacy exists in gross monthly electrical usage figures because such figures "reveal no details of the activities that consumed the electricity"). In contrast, here, the City generates 3,000 readings/month of quarter-hour Interval Data (clearly, "discrete information") which can reveal details as to "the activities that consumed the electricity."

Put another way, the court seemed to accept the City's position that 3,000 monthly "aggregate" data points were no different from the monthly "aggregate" usage figure collected by analog meters. But as the Supreme Court noted in *Riley*, robust digital data collection can be qualitatively and quantitatively different from what has gone before. Those 3,000 "aggregate" data points, viewed together, paint a vivid picture of life within the home—something no monthly analog reading could ever do.

Moreover, one of the City's current practices is to save all data essentially forever. (A151.) Such long-term governmental data monitoring and record-retention, particularly of information from within the home, by itself raises significant privacy concerns. *See Jones*, 565 U.S. at 961 (Alito, J., concurring) (identifying long-term tracking and monitoring as a great concern); *see also Whalen*, 429 U.S. at 605. The creation and maintenance of long-term government databases, even when they are not currently used, raises great public concern.[11] In the case of smart meters, once the government has long-term data, it can, by comparing different days over time, develop

[11] This was illustrated recently in the public outcry over the federal government's acquisition of huge telephone metadata databases from Verizon.

revealing profiles of residents' behavior in the home, and identify changes in that behavior—*i.e.*, when something "suspicious" occurs. That, essentially, is what the Naperville detective predicted, when he explained the police force's difficulty in finding drug violations, and said, "[s]mart grid is going to fix all that for us." (A098 (emphasis omitted); *accord* A154.) The court's decision ignored this long-term collection and retention of data, which was specifically raised in the Data Privacy Claims. (A150-54.)

In sum, the district court's privacy analysis was deeply flawed because it assumed or concluded, contrary to NSMA's allegations, that the City's smart-meter data collection was not privacy invasive.

2. The court's refusal to consider the behavioral information apparent from the collected data contravened existing law and is inconsistent with any meaningful data privacy protection.

Perhaps recognizing that its focus only on the "aggregate measurements" collected did not address NSMA's allegations that the data is capable of revealing intimate details of residents' home lives, the court took the position that "inferences" and "educated guesses" from the data were irrelevant. It held that a Fourth Amendment violation occurs only when the data on its face reveals intimate activities. (A127; A340-41.) Essentially, the court gave the City free rein to obtain highly personal information from within residents' homes, so long as this information is revealed only through *interpretation* of raw data. This conclusion, however, directly contravenes Supreme Court precedent and ignores the realities of digital data.

The Supreme Court held in *Kyllo* and *Karo* that government collection of data violates the Fourth Amendment even if the personal revelations arise *only* as inferences from the data. Indeed, in *Kyllo*, the majority dismissed as "extraordinary" the dissent's

position "that anything learned through an 'inference' cannot be a search." *Kyllo*, 533 U.S. at 36. Similarly, in *Karo*, the police inferred activities within the home from beeper signals. *Id*. ("[T]he novel proposition that inference insulates the search is blatantly contrary to *United States v. Karo* . . . where the police 'inferred' from the activation of a beeper that a certain can of ether was in the home."). Moreover, even the dissent in *Kyllo* would have viewed the capture *and analysis by inference* of data from *inside* the home as violative of Fourth Amendment rights; the dissent viewed the inferences in *Kyllo* as insufficient to support a Fourth Amendment claim only because those inferences were based on data available from *outside* of the house. *See id.* at 41 (Stevens, J., dissenting).

All data-privacy claims involve interpretation of raw data; adoption of the district court's rationale would exclude practically all data mining from Fourth Amendment protection. Digital data consists of binary strings (mere sequences of 0s and 1s) that are incomprehensible to humans, without interpretive tools. Even when converted to human-comprehensible language, such as a quantity of electricity used, that measurement standing alone means little. It must be coupled with other data to become meaningful. For example, it must be coupled with a fee schedule, a name, and an address even to allow the City to generate a bill. Raw data is never meaningful by itself; it only takes on meaning when connected to other data points, whether billing information (to generate a bill), appliance electricity-use patterns (to determine what people were doing within the house at certain times), or other databases (to develop robust surveillance dossiers). Indeed, this is the special danger of digital data collection, because digital data can readily and relatively inexpensively be connected to many

different pieces of data, and analyzed and understood in myriad ways for countless different purposes.

While the district court at one point considered how electricity usage data could reveal activities within the home, it improperly dismissed those revelations as no more than what could be determined by a passerby looking at the outside of a house. (A127.) Homeowners have no reasonable expectation of privacy, the court concluded, in such readily observable information and obvious conclusions. (A127.) But reliance on such analog-world analogies contravenes Supreme Court precedent, and would be bad policy for digital data privacy.

First, analog-world analogies are often inappropriate for digital data collection. In *Riley*, Chief Justice Roberts, writing for a unanimous court, decisively rejected the government's contention that just because a billfold, wallet, or cigarette pack found in a suspect's pocket can be searched incident to an arrest, so can a cell phone. The digital data contained on a cell phone made a search of it qualitatively and quantitatively different from a search of those physical objects. *Riley*, 134 S. Ct. at 2489. The Chief Justice readily dismissed the government's analogies to the analog world: "That is like saying a ride on horseback is materially indistinguishable from a flight to the moon. Both are ways of getting from point A to point B, but little else justifies lumping them together." *Id*. at 2488.

Similarly, in *Kyllo*, the Supreme Court rejected an analogy to naked-eye surveillance of a home, because technological surveillance is different.[12] Indeed, in

[12] For example, unlike information stored in a human brain, machines can store data accurately for long periods of time, which is easily combined with other data to paint a highly-detailed portrait of a suspect's activities. Brad Turner, *When Big Data Meets Big Brother: Why*

Kyllo, the Court issued a rule for technological searches that expressly disapproved of warrantless use by the government of new technologies to discern activities within the home:

> We think that obtaining by sense-enhancing technology any information regarding the interior of the home that could not otherwise have been obtained without physical 'intrusion into a constitutionally protected area' constitutes a search—at least where (as here) the technology in question is not in general public use.

Kyllo, 533 U.S. at 34 (citations omitted). The majority in *Kyllo* strongly disapproved of the argument that the information obtained there instrumentally wasn't private because it could have been discerned by an observer outside the home.

One of the reasons that analog-world analogies don't work for digital data is because, as many past Fourth Amendment decisions recognized, the "ordinary checks that constrain abusive law enforcement practices," such as "'limited police resources and community hostility,'" do not apply to digital data. *Jones*, 132 S.Ct. at 956 (Sotomayor, J., concurring) (quoting *Illinois v. Lidster*, 540 U.S. 419, 426 (2004)). Justice Alito has similarly stressed the qualitative difference between traditional surveillance (where limited resources provided "practical" protection) and technological surveillance, which "make[s] long-term monitoring relatively easy and cheap." *Id*. at 963–64 (Alito, J., concurring). Justice Alito concluded (referring to the GPS surveillance at issue in *Jones*) that because of these significant differences, the Court should conclude that long-term technological surveillance violates reasonable privacy expectations. *Id*.

Courts Should Apply United States v. Jones to Protect People's Data, 16 N.C. J.L. & Tech. 377, 407 (2015).

Next, to the extent that the district court's analog-world analogy was meant to suggest that any revelations about what occurred inside the house were inoffensive—essentially, non-private facts such as when the lights were turned off or the curtains drawn—the analogy is flawed because details of life within the home are inherently private.[13] In *Kyllo*, although the dissent viewed mere heat emanations from the house as non-private, the majority found that "in the home … all details are intimate details, because the entire area is held safe from prying government eyes." *Kyllo*, 533 U.S. at 37. The Court in *Kyllo* noted that even "the detail of how warm—or even how relatively warm—Kyllo was heating his residence" was private and personal. *Id*. at 38. Indeed, if it could be determined through instrumental data "at what hour each night the lady of the house takes her daily sauna and bath," that would be a clear intrusion into personal privacy within the home. *Id*. The smart-meter data here can reveal just such intimate details—*e.g.*, internal home heating levels, and the times when residents take their baths, saunas, meals, and other activities.

3. The court erred in concluding that no Fourth Amendment violation occurs until information has actually been used improperly.

The district court's conclusions that a Fourth Amendment violation requires improper use, not just collection, of data, and that NSMA never alleged such use, are both incorrect. (A340-41.)

[13] The analogy does not work on a practical level either. If a homeowner waives privacy about when he turns his lights on by making that action visible to passersby, no such waiver occurs when he covers his windows with opaque drapes or plantings or constructs a home with no visible windows. Yet such homeowners would still have those details of their home life collected and monitored by smart meters.

First, the Data Privacy Claims clearly alleged that the City currently uses smart-meter data to determine what was happening within the monitored homes. NSMA specifically alleged that smart-meter data is currently available for use by the City's police and "allows the City to observe human behavior within a home that is not knowingly exposed to the public, and that would ordinarily require an invasive physical presence." (A153.) The complaints quoted a City police detective whose comments clearly suggest that the City currently uses smart-meter data for law enforcement investigations. (A098, A153-54.) Particularly since any ambiguities were required to be resolved in NSMA's favor, the Data Privacy Claims sufficiently alleged that the City was using smart-meter data for inferring behavioral activities within the homes of Naperville residents.

Second, as a matter of law, the Fourth Amendment covers warrantless *collection* of data, regardless of whether or how that data is later analyzed or used. Warrantless collection of data without consent is a "search." Just as police cannot walk into a home and collect things, the government may not intrude into a home and collect data without a warrant or consent.

In *Kyllo*, the mere acquisition through instrumentation of heat measurements from within the home constituted an illegal search; the use that the police later put that information was not the issue. Indeed, the Court propounded a rule that clearly focuses on the acquisition of "any information" and includes no reference to analysis or use of that information: "We think that obtaining by sense-enhancing technology any information regarding the interior of the home that could not otherwise have been obtained without physical 'intrusion into a constitutionally protected area' constitutes

a search—at least where (as here) the technology is not in general public use." *Kyllo*, 533 U.S. at 34 (citation omitted).

In *Karo,* the Court recognized that the mere receipt by police of a ping from a beeper attached to a can constituted an illegal search there, even apart from what that ping meant. In doing so, the Court acknowledged that data monitoring at times may be less intrusive than physical searches, but nonetheless held that *any* acquisition of data from within a house constitutes a search under the Fourth Amendment. *Karo*, 468 U.S. at 716.[14] Allowing any kind of data monitoring from within the home "would present far too serious a threat to privacy interests in the home to escape entirely some sort of Fourth Amendment oversight." *Id*. Recall, again, that in *Kyllo*, the Supreme Court held that because of the special sanctity of the home, residents have an automatic reasonable expectation of privacy to all material and data inside their home. *Kyllo*, 533 U.S. at 34. *See also supra* section I.A.1.

Third, the court's assumption that a Fourth Amendment violation accrues only after the government does something nefarious with the data collected ignores the practical reality that smart-meter programs are evolving. Neither data collection nor data uses are static in smart-meter programs (as the district court apparently assumed). Over time, more data may be collected and different data combinations and modes of

[14] The Court found a search occurs where "the Government surreptitiously employs an electronic device to *obtain* information that it could not have obtained by observation from outside the curtilage of the house." *Id.* at 715 (emphasis added). Three concurring justices viewed the attachment of the beeper to the can as a "seizure" subject to the Fourth Amendment because, through the attachment, the government "infringes that exclusionary right; in a fundamental sense it has converted the property to its own use." *Id.* at 729 (Stevens, J., concurring in relevant part). This analysis also finds a Fourth Amendment violation upon initial intrusion, regardless of any use of the resulting data.

analysis are likely to be explored and exploited. The trend is for collecting smart-meter data more frequently. Elias Leake Quinn, *Smart Metering and Privacy: Existing Law and Competing Policies: Report for the Colorado Public Utilities Commission*, at A-1 n.11 (2009); *see also* CRS Report 3 (noting privacy problems are likely to evolve with the technology"). As smart-meter programs develop, more and more discrete data will be collected. Accordingly, the court's incorrect assumption that a Fourth Amendment search does not occur upon collection of data would effectively immunize the City's smart-meter program by cutting off litigation before NSMA can use the discovery process to learn more about the City's use of the vast smart-meter data it is collecting.

The cases cited by the City below provide no support for the proposition that the government may take data from a home so long as it does not use it immediately. In *Laird v. Tatum*, 408 U.S. 1 (1972), the data at issue came from public sources, and plaintiffs could not show that the government was surveilling them. And *Crenshaw-Logal v. City of Abilene, Tex.*, 436 F. App'x 306, 309 (5th Cir. 2011), decided on standing grounds, simply held that a plaintiff had no standing when she merely speculated that a City's search of a third party's computer might produce communications with plaintiff that the City might use to her detriment at some point in the future. There is no speculation in NSMA's claims; data is admittedly being taken from inside NSMA's members' homes, under compulsion, on a 24/7 basis.

4. The court erred in equating use of electricity with consent to smart-meter data surveillance.

The court also erred in concluding that residents "are deemed to have consented" to collection and use of their data by a government-run electricity provider

merely "through their usage of electricity services knowingly supplied by the City." (A341.) The well-pleaded allegations that the district court was bound to honor clearly stated that NSMA members specifically objected to the smart-meter data collection.[15] (A044; A111; A178-79.) Indeed, some NSMA members were even arrested when they tried to stop the City from installing smart meters on their property. (A171-74.) Consent cannot be found in a Rule 12(b)(6) setting when the allegations state that residents (1) gave notice that they do not want the meters, (2) posted signs telling the City not to enter their property to install the meters, and (3) tried to stop the installation so vigorously that they were arrested and taken away so that City workers could forcibly enter their property and install the meters. (A171-74.)

Moreover, a "consent" justification is absurd under the circumstances since electricity is a basic necessity of modern life and the DPU-E is a government monopoly, which permits residents no other choice for their electricity needs. *See In re Personal Restraint Petition of Maxfield*, 945 P.2d 196, 200–01 (Wash. 1997) (en banc)

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[15] In the first amended complaint, NSMA asserted that its members had not consented to the disclosure of such detailed data as is collected by smart meters; they had consented only "to the basic delivery of electricity to their homes." (A044.)

In the proposed third amended complaint, NSMA alleged that its members had not consented to the collection and retention of their Interval Data, which "far exceeds" the data previously collected and retained by the City via analog meters. (A154-55.) It alleged NSMA members never "voluntarily provided their Interval Data to the City," but instead are forced to provide it through smart meters, with the only alternative being to forgo home electricity service. (A161.) Its members "have only consented to the basic delivery of electricity" and do not "wish to allow the City to seize intimate details about their personal lives and living habits." (A178.) They "have no meaningful choice" as to whether the City obtains these details, the collection of which "far exceeds reasonable expectations" of privacy in relation to receiving electricity. (A179.) Indeed, NSMA alleged the City refused to allow NSMA members to opt out of smart-meter usage. (A168-69, A171-74.) While residents can request to use wireless-disabled smart meters, this alternative is provided only on punitive terms, and without any difference in the amount or type of Interval Data collected. (A170-71.)

("Electricity, even more than telephone service, is a 'necessary component' of modern life, pervading every aspect of an individual's business and personal life: it heats our homes, powers our appliances, and lights our nights."); *see also Memphis Light, Gas & Water Div. v. Craft*, 436 U.S. 1, 18 (1978) ("Utility service is a necessity of modern life; indeed, the discontinuance of water or heating for even short periods of time may threaten health and safety."). Smart-meter use is not optional in Naperville's program. Although NSMA members sought permission to continue to have their electricity metered by a traditional analog meter, the City refused them. The only alternative offered by the City was to allow residents to use a smart meter that did not wirelessly transmit its data to the City—but which collected and internally stored the same Interval Data, which is later collected by the City manually. (A170.) Because the DPU-E is a monopoly, and residents are not allowed to acquire electricity from other utilities, the City's smart-meter program gave residents only two alternatives: use smart meters or give up electricity.

The district court improperly relied on cases addressing consent in a much different context—where information is first provided to a private third party, who subsequently provides it to the government. In *United States v. McIntyre*, 646 F.3d 1107 (8th Cir. 2011), which the court relied on, the utility involved was a non-profit electrical utility, which was treated as a private entity subject to the third-party doctrine.[16] In private utility cases, court have long held, under the third-party doctrine,

[16] It appears from independent research that the company in *McIntyre*, the Cedar-Knox Public Power District, may have been a political subdivision of the state. But the Eighth Circuit and district court decisions treat it as, for example, "the power company, a third party." Unlike *McIntyre*, this case was not litigated under the third-party doctrine, and it makes no sense to apply it in a governmental data collection situation. Moreover, the doctrine is clearly

that residents consent to the data collection, or waived their privacy expectations, by allowing the data to be collected by a private, third-party entity. Because the government in these cases collects the data from the third party, not the resident, no Fourth Amendment interest is implicated because of the resident's presumed consent in sharing the information with the private utility. There is considerable doubt whether the third-party doctrine will continue to be applied, particularly in data-privacy cases.[17] But at the very least, this is not a third-party situation. Here, the data is obtained directly by the government, with *no* resident consent, presumed or otherwise.[18]

Additionally, *McIntyre* did not involve the highly granular data collected by smart meters. In *McIntyre*, the utility turned over a "single sheet of electrical usage for the past three years." *Id.* at 1110. The sheet only provided information on monthly usage and even combined data from certain months. The data collected by Naperville's smart meters is qualitatively different as it is collected in fifteen-minute intervals. New technologies have to be evaluated differently in the Fourth Amendment context. *See Riley*, 134 S. Ct. at 2488–90; *see also supra* Section I.A.

Consent, moreover, inherently raises factual issues. Consent to a government search depends on many circumstances, including any coercive aspects of the situation.

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inapplicable here, where no legal separation exists between the utility and other City departments, including police. No credible argument can be made that residents, by requesting electricity, knowingly consent to sharing intimate, personal details with Naperville police.

[17] *See Jones*, 132 S. Ct. at 957 (Sotomayor, J., concurring) (suggesting reconsideration of the third-party doctrine because it "is ill suited to the digital age").

[18] The two cases that the court cited in finding NSMA did not have an expectation of privacy in electrical-use records likewise involved utility information turned over to *private* companies. *See United States v. Hamilton*, 434 F. Supp. 2d 974, 978–80 (D. Or. 2006); *United States v. Porco*, 842 F. Supp. 1393, 1398 (D. Wyo. 1994).

79 C.J.S. Searches § 160 (consent to a government search must not be the result of duress or coercion). In assessing consent, one must know the disclosures made, how accurately or fully they describe actual practices, and the options provided to consumers.[19] None of these facts were, or could have been, before the court at the pleadings stage and thus the court had no adequate foundation for determining consent. The court's dismissal of the Data Privacy Claims should be reversed because, by erroneously finding NSMA members had consented to using smart meters and making its other errors regarding their expectations of privacy in their homes, the relevance of inferences drawn from the smart-meter data, and the City's use of the data, the court ignored NSMA's well-pleaded allegations and the Supreme Court's controlling Fourth Amendment precedents.

II. The District Court Improperly Disposed of NSMA's Data Privacy Claims Under the Privacy Clause of the Illinois Constitution.

The district court also erred in denying NSMA leave to include a claim for invasion of privacy under the Illinois Constitution in its third amended complaint, regardless of the viability of NSMA's claims under the U.S. Constitution. (A342-43.) NSMA stated a valid claim under the privacy clause of the Illinois Constitution, which

[19] The district court probed some of those issues at oral argument—asking the City's attorney, for example, what contracts or written disclosures were made in connection with new electrical service. Its questions pointed to the inherent factual nature of consent. (*See* A265.) Significantly, the City attorney essentially admitted that residents never saw or signed any agreement as to smart-meter data collection, use, or sharing. Rather, the City appears to *presume* consent for everything it does, just because a resident asks for electricity service. (*See* A265.) The City's presumption, contrary to NSMA's pleadings, cannot be accepted at the pleading stage.

was designed specifically to protect against government invasions of privacy through new, invasive technologies like smart meters.

Article I, section 6 of the Illinois Constitution, adopted in 1970, in *addition* to barring unreasonable searches and seizures, explicitly prohibits unreasonable invasions of privacy. It states: "The people shall have the right to be secure in their persons, houses, papers and other possessions against unreasonable searches, seizures, *invasions of privacy* or interceptions of communications by eavesdropping devices or other means." Ill. Const. art. I, § 6 (emphasis added). The privacy and the interception-of-communications clauses were new to the 1970 constitution; the previous provision, from 1870, simply tracked the Fourth Amendment. *People v. Caballes*, 221 Ill. 2d 282, 851 N.E.2d 26, 32–34 (2006). The Illinois Supreme Court has recognized that, through the privacy clause, "the Illinois Constitution goes beyond the Federal constitutional guarantees by expressly recognizing a zone of personal privacy," the protection of which is "stated broadly and without restrictions." *In re May 1991 Will Cty. Grand Jury*, 152 Ill. 2d 381, 604 N.E.2d 929, 934 (1992); *see also State Journal-Register v. Univ. of Ill. Springfield*, 2013 IL App (4th) 120881, ¶ 35, 994 N.E.2d 705, 715 (noting that the privacy clause "extends" the right to privacy secured by the Fourth Amendment "with a broad, unrestrictive provision that recognizes a 'zone of personal privacy'").[20]

NSMA stated a valid claim for relief under the privacy clause of the Illinois Constitution, and the court's disposal of it on futility grounds under Rule 12(b)(6) was

[20] Because "[t]he privacy clause is unique to the Illinois Constitution" and has "no cognate" in the U.S. Constitution, courts "interpret [it] without reference to a federal counterpart." *Hope Clinic for Women, Ltd. v. Flores*, 2013 IL 112673, ¶ 42, 991 N.E.2d 745, 756.

erroneous.[21] The privacy clause was designed to protect against government dragnet collection and retention of citizens' personal information, as the city has done here using smart meters. It was added to the Illinois Constitution to prevent "infringements on individual privacy" that arise "as technological developments offer additional or more effective means by which privacy can be invaded." *Caballes*, 851 N.E.2d at 47. The clause's drafters, foreseeing concerns about both data collection and intellectual privacy, recommended its adoption because it is "essential to the dignity and well being of the individual that every person be guaranteed a zone of privacy in which his thoughts and highly personal behavior [are] not subject to disclosure or review." *Id.* The chairman of the committee that introduced the clause to the constitutional convention stated that it was intended to cover, for example, "devices that could 'penetrate walls and can view what's going on' inside a person's home, revealing 'bedtime intimacies and private conversations.'" *Id.* at 48. An amendment to remove the clause failed, evincing the convention's desire for this special additional protection. *Id.*

Thus, the privacy clause "creat[ed] an additional right to privacy," in response to "a concern that the government might use *newly available technology* to develop 'a general information bank' that would *collect and monitor personal information*." *Id.* at 47 (emphasis added); *accord Schmidt v. Ameritech Corp.*, 115 F.3d 501, 506 (7th Cir. 1997); *People v. Nesbitt*, 405 Ill. App. 3d 823, 938 N.E.2d 600, 604–05 (Ill. App. Ct.

[21] There has been dispute about the availability of an independent right of action under the privacy clause. *Compare Newell v. City of Elgin*, 34 Ill. App. 3d 719, 340 N.E.2d 344 (Ill. App. Ct. 1976), *with S.J. v. Perspectives Charter Sch.*, 685 F. Supp. 2d 847, 862–63 (N.D. Ill. 2010). The cases questioning the availability of the cause of action are distinguishable because, if NSMA's Fourth Amendment claim is rejected, it has no alternative remedy under another law. The City also has forfeited any such argument by not raising it below.

2010) (noting the privacy clause has "no definition limiting the types of privacy intended to be protected").

Illinois courts employ a two-step process for determining whether a government action violates the privacy clause. *Caballes*, 851 N.E.2d at 48–49. First, the court must determine whether the government action implicates a "right to privacy" as protected by the clause. *Id.* The right to privacy is implicated by government efforts "to obtain access to personal documents and records or the information contained therein," as well as efforts "to engage in 'close scrutiny of [the] personal characteristics' of an individual." *Id.* at 50 (quoting *Will Cty. Grand Jury*, 604 N.E.2d at 934–35). Second, once the right to privacy is established, the court determines "whether the state's invasion of individual privacy is reasonable," *id.* at 49, which is "determined by balancing the need for official intrusion against the constitutionally protected interest of the private citizen," *Will Cty. Grand Jury*, 604 N.E.2d at 935.

The privacy clause claim as pleaded in NSMA's proposed third amended complaint clearly alleged sufficient factual material to state a claim that the City's smart-meter program is unreasonable. *See supra* Section I. The district court, however, did not even address the specific requirements of the Illinois constitutional right of privacy that NSMA alleged. Rather, it erroneously treated the privacy-clause claim as an afterthought and as identical to the Fourth Amendment claim, which it clearly is not. (A342-43.) The disposal of this claim was in error and should be reversed.

III. NSMA's Data Privacy Claims, Which Raised an Emerging Issue of Broad Public Importance, Should Have Been Fully Explored and Tested, Not Summarily Dismissed.

Smart meters raise many serious privacy questions, especially with respect to government-run utilities like Naperville's, where government data collection invokes "Big Brother"-like surveillance concerns. Issues such as these deserve full exploration in the courts, not summary dismissal.

The district court perhaps fell into the common technological fallacy of equating technological advances with progress. The Fourth Amendment, however, elevates the sanctity and privacy of home life above any optimistically expected blessings of technological advances, and above the government's assurances that it can be trusted with potentially invasive new technologies.

Cases like this need to proceed, with the discovery, analysis, and probing of the litigation process, so that privacy-invasive technologies like smart meters are assessed on the basis of facts, not fallacies. Adversary-process probing is particularly needed with respect to law enforcement use of smart-meter data, an issue squarely raised by the Data Privacy Claims but totally ignored by the court below. "With smart meters, police will have access to data that might be used to track residents' daily lives and routines while in their homes, including their eating, sleeping, and showering habits, what appliances they use and when, and whether they prefer the television to the treadmill, among a host of other details." CRS Report 7 (citing Jack I. Learner & Deirdre K. Mulligan, *Taking the "Long View" on the Fourth Amendment: Stored Records and the Sanctity of the Home*, 2008 Stan. Tech. L. Rev. 3, ¶ 3 (2008)).

The Fourth Amendment and other provisions of the Bill of Rights are meant to check government overreach, which smart meters can clearly facilitate. As privacy scholar Gary Marx of the Massachusetts Institute of Technology noted in a 1989 article, specifically foreseeing the dangers of smart-meter data:

> In repressive societies it is easy to imagine how opening a home to those (literally) with the power is undesirable. Analysis could reveal a forbidden printing press, home computer, copy machine, electric typewriter or VCR. Even in our society, one can imagine controversial uses for the data: checking if welfare recipients possess electronic items to which they were entitled or claimed not to have (*e.g.* a color TV), tax agents might compare electric power profiles to assure that taxes had been paid on luxury items, persons with unusual energy consumption patterns (either in the type of device or the time they were used) might become subjects for more intensive investigation, persons found to be using energy inefficiently or high energy consuming devices might be subjected to higher rates or special taxes, and private health problems could be revealed by noting the use of machines associated with particular diseases. Such devices and reveal information that an individual has the right to keep confidential and other context.

Gary T. Marx, *Privacy and Technology*, The World and I, Sept. 1990. Similarly, the Electronic Frontier Foundation has noted,

> Without strong protections, this information can and will be repurposed by interested parties. It's not hard to imagine a divorce lawyer subpoenaing this information, an insurance company interpreting the data in a way that allows it to penalize customers, or criminals intercepting the information to plan a burglary. Marketing companies will also desperately want to access this data to get new intimate new insights into your family's day-to-day routine—not to mention the government, which wants to mine the data for law enforcement and other purposes.

Lee Tien, Electronic Frontier Foundation, *New "Smart Meters" for Energy Use Put Privacy at Risk* (Mar. 10, 2010), https://www.eff.org/deeplinks/2010/03/new-smart-meters-energy-use-put-privacy-risk.

Government surveillance of individuals in their homes carries many dangers—it chills the exercise of civil liberties, and affects the power dynamic between the watcher and the watched, leading to harms and fears of blackmail, persuasion, and discrimination. *See* Neil M. Richards, *The Dangers of Surveillance*, 126 Harv. L. Rev. 1934 (2013). The most likely *governmental use* of smart-meter data—for law enforcement purposes—may well subject citizens to loss of liberty for activities within their homes that would otherwise go undetected. The use of the data *in the marketplace*, as is likely inevitable, will lead to unwanted marketing communications, as well as the collateral harms that will arise when commercially available data gets into the hands of criminals, fraudsters, and other wrongdoers.[22]

Finally, the overall social context here cannot be ignored. In today's data-rich world with millions of persons, companies, and government entities engaged in intense data analysis, smart-meter data is even more subject to misuse than it would have been in isolation. Data obtained for one purpose may have great value in collateral ("by-product") uses, meaning that data collected from one source may be used in a much different, and unexpected, manner. *See* Alan Lewis & Dan McKone, *To Get More Value from Your Data, Sell It*, Harv. Bus. Rev., Oct. 21, 2016, *available at* https://hbr.org/2016/10/to-get-more-value-from-your-data-sell-it. Essentially, secrets about individuals, which they often do not even know are being collected, are being linked with vast amounts of other data, and offered for sale, use, and further analysis.

[22] In addition to issues directly raised by the Data Privacy Claims, NSMA believes other smart-meter privacy issues may arise in the litigation. Naperville admitted it claims ownership of the data it collects from residents, which raises additional concerns for those whose personal lives are revealed in data "owned" by the City forever, including NSMA members and the general public.

By cutting off the case at the outset, the district court foreclosed the possibility of implementing "strong protections" that could potentially resolve and reconcile the City's needs relating to electricity management and NSMA members' and the public's needs with respect to personal privacy. NSMA's preferred remedy is the ability of residents to opt out of smart-meter usage. But if the case progresses, other remedies are likely to be explored as well, including limitations on the City's ability to collect, use, analyze, and/or distribute sensitive data.

These important issues need to be fully explored. The district court's preemptory cutoff of the Data Privacy Claims prevented discovery and probing about the City's current data collection and use, about the implications of its long-term accumulation and retention of that data, and about less intrusive alternatives for satisfying the City's professed smart-grid needs.

Conclusion

The district court's dismissal of the Data Privacy Claims was erroneous because the Data Privacy Claims were fully and properly alleged under both the Fourth Amendment and the Illinois Constitution, and raised serious and important issues both to NSMA members and the public at large. The portions of the decisions below dismissing NSMA's second amended complaint and refusing to allow NSMA to include the Data Privacy Claims in its third amended complaint should be reversed and the case remanded so that those claims can be fully litigated.

Respectfully submitted,

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Certificate of Compliance

I certify, pursuant to Fed. R. App. P. 32(g) and Circuit Rule 32, that this brief complies with the type-volume limitations of the rules. Specifically, the body of the brief, from the Jurisdictional Statement through the Conclusion, contains 13,936 words, according to Microsoft Word's word-count function. The body of the brief is set in 12-point Kuenst480 BT (with some larger headings) and the footnotes are set in 11-point Kuenst480 BT.

/s/ Mark Sableman

February 21, 2017

One of the attorneys for Plaintiff-Appellant Naperville Smart Meter Awareness

Certificate of Service

A copy of the foregoing was filed electronically with the Clerk of Court to be served by operation of the Court's electronic filing system upon the following persons this 21st day of February 2017.

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No. 16-3766

United States Court Of Appeals

FOR THE SEVENTH CIRCUIT

NAPERVILLE SMART METER AWARENESS,

Plaintiff-Appellant,

v.

CITY OF NAPERVILLE,

Defendant-Appellee.

Appeal from the United States District Court, Northern District of Illinois
Eastern Division, District Court No. 1:11-CV-09299
Honorable John Z. Lee, United States District Judge

APPELLANT'S CIRCUIT RULE 30 APPENDIX (Part A)

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Part A. Circuit Rule 30(a) materials (bound with Appellant's brief)

Part B. Circuit Rule 30(b)(6) materials (separately bound)

Local Rule 30(d) Certification

I hereby certify that this Circuit Rule 30 Appendix includes all materials relevant by parts (a) and (b) of Circuit Rule 30.

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IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

NAPERVILLE SMART METER AWARENESS, an Illinois not-for-profit Corporation, MARGARET MARY WOOD, SCOTT J. DERENGOWSKI, KIMBERLEY ELLS HAMILTON, JO MALIK, JENNIFER STAHL, TOM GLASS, KIM BENDIS, GLENN A. MENDOZA, and AMANDA RYKOV,	)	**11 C 9299**
Plaintiffs,	)	**Judge John Z. Lee**
v.	)	
CITY OF NAPERVILLE,	)	
Defendant.	)	

MEMORANDUM OPINION AND ORDER

Naperville Smart Meter Awareness ("NSMA"), an Illinois not-for-profit corporation, and several of its members have sued the City of Naperville ("the City") pursuant to 42 U.S.C. § 1983 for violating federal rights under the Public Utility Regulatory Policies Act of 1978 ("PURPA"), 16 U.S.C. §§ 2601-45, as amended by the Energy Policy Act of 2005, 16 U.S.C. § 2621(d)(14)(A) and (C) (Count I), as well as their rights to due process and liberty in bodily integrity under the Fourteenth Amendment (Count II), to be free from unreasonable search under the Fourth Amendment (Count III), and to be free from government takings under the Fifth Amendment (Count IV). Plaintiffs move for a preliminary injunction. For its part, Defendant has moved to dismiss the complaint pursuant to Federal Rule of Civil Procedure ("Rule") 12(b)(1) and 12(b)(6). For the reasons set forth in this Memorandum Opinion and Order, the Court grants the motion to dismiss and denies the motion for preliminary injunction as moot.

Facts[1]

This case is about smart meters. A smart meter is a device that has the ability to collect aggregate, as well as detailed, measurements of a customer's electrical power usage and to communicate those measurements via wireless radio frequency ("RF") to the electric utility provider. (1st Am. Compl. ¶ 39.) The measurements are sent via RF waves from a customer's meter to a wireless repeater that is typically located on a nearby utility pole. (*Id.* ¶ 40.) The measurements are then relayed to the utility provider via a series of wireless repeaters. (*Id.*) Installation of a smart meter obviates the need for a meter reader to visit the customer's house or business. (*Id.*) Smart meters support two-way communication between the customer and utility provider, which permits the utility provider to upgrade a customer's smart meter with future innovations easily. (*Id.*) While analog meters provide data regarding total consumption of electricity that typically is collected on a monthly basis, smart meters permit remote measurements on a daily or more frequent basis. (*Id.* ¶ 139.)

NSMA is a corporation that was formed to educate, engage, and empower families, friends, and neighbors to advocate for a fiscally responsible and safe utility meter alternative in Naperville, Illinois. (*Id.* ¶ 9.) All NSMA members, including Plaintiffs, reside in Naperville, purchase electric utility service from Defendant's Department of Public Utilities, and have been required to have a smart meter installed at their home or business. (*Id.*) Electricity for all residential and commercial consumers within the incorporated city limits of Naperville, Illinois, is supplied by the City's Department of Public Utilities-Electric, a utility entirely owned and operated by the City. (*Id.* ¶ 21.)

[1] Unless otherwise noted, the facts are taken from the First Amended Complaint and attachments thereto.

Smart meters are now becoming more prevalent, at least in Naperville, because the American Recovery and Reinvestment Act of 2009 provided the U.S. Department of Energy ("DOE") with approximately $4.5 billion in federal funding to modernize the nation's electric power grid. (*Id.* ¶ 24.) Of that amount, $3.4 billion was allocated to the Smart Grid Investment Grant Program for the purpose of funding competitively selected projects including Naperville's Smart Grid Initiative ("NSGI"). (*Id.*)

In April 2010, Naperville's City Counsel, after a vote, executed a grant agreement with the DOE ("DOE Agreement"), whereby Naperville and the DOE each provide $10,994,110.00 towards the $22 million investment in the NSGI. (*Id.* ¶ 26.) The grant agreement provides for the full-scale installation of smart meters in all homes in Naperville by April 2014. (*Id.* ¶¶ 27, 29, 31.) Plaintiffs allege that Naperville provided no notice and conducted no public proceedings prior to its consideration and approval of the NSGI. (*Id.* ¶ 121.)

NSGI has three primary goals. First, NSGI accelerates the modernization of Naperville's electric transmission, distribution, and delivery systems and promotes investment in smart grid technologies that increase flexibility, functionality, interoperability, cyber security, situational awareness, and operational efficiency. (*Id.*, Ex. A., DOE Agreement, Attachment E, Statement of Project Objectives, ¶ A.) Second, NSGI reduces emissions, lowers costs, increases reliability, and offers greater security and flexibility to accommodate new energy technologies, including renewable, intermittent and distributed sources. (*Id.*) Third, NSGI collects information from customers, distributors, and generators in order to understand how smart grid technology may lead to reductions in demands and costs, as well as increases in energy efficiency, and optimal allocation and match of resources to meet that demand, and increases in the reliability of the grid. (*Id.*)

The DOE Agreement provides that Naperville "will provide customer-level data in a mutually agreed upon format and media to DOE, or an entity designated by DOE (*e.g.*, a national laboratory)." (*Id.*, Attach. B, Federal Assistance Reporting Checklist and Instructions, ¶ C.2.) The DOE Agreement specifies, however, that "[t]he identity of specific customers shall not be included with the data. To protect customer confidentiality, masked customer identifiers shall be provided for individual customers." (*Id.*) With regard to commercially valuable Smart Grid technical data and information, Naperville is required to provide the following designation on any such data: "Unless compelled by a court of competent jurisdiction, there may be no public release of this data to the public without written consent of the Recipient [Naperville] and DOE. Aggregate data that does not identify company-specific impact metric information may be released as set forth in the grant." (*Id.*, Attach. C, Intellectual Property Provisions Nonresearch and Development, ¶ b.)

On February 15, 2011, the City adopted the Naperville Smart Grid Customer Bill of Rights. (*Id.* ¶ 50 (citing http://www.naperville.il.us/emplibrary/Smart_Grd/NSGI-CBoR-web.pdf).) The bill of rights states that "[p]ersonal information will not be connected to usage data released to any third parties" and "[d]isclosure of energy usage data to any third party, such as in the case of a court order, is subject to federal, state and local laws." (*Id.*) The bill of rights provides each customer the right to file a privacy violation complaint with the Public Utilities Advisory Board ("PUAB"), an entity that serves in an advisory capacity to the City Council, City Manager, and the Public Utilities Director in matters relating to rates, budgets, and capital improvements for the electric system. (*Id.* ¶ 52.) The PUAB consists of one Council member and five residents or persons with their primary employment in Naperville. (*Id.* ¶ 23.)

On October 4, 2011, the City Council adopted Ordinance 11-144 that allows for a non-wireless meter alternative ("NWMA") option. (*Id.* ¶ 84.) Plaintiffs allege that an NWMA is not a true opt-out option because even customers who choose an NWMA must have a smart meter installed, albeit with the radio frequency ("RF") transmitter turned off. (*Id.* ¶¶ 154-55.) Such smart meters still collect the same data, but that data is not transmitted wirelessly to the utility throughout the day. (*Id.*) Any customer requesting the NWMA option will be subject to a one-time charge of $68.35 and an additional monthly charge that has not yet been specified. (*Id.* ¶ 85.)

On November 15, 2011, Naperville citizens (aided by NSMA) filed a petition with 4,209 signatures in order to place the following question on the March 20, 2012, General Primary Election ballot within the City: "Shall the City of Naperville immediately and permanently stop the implementation of the $22 million smart meter project and dismantle all related equipment?" ("Advisory Referendum") (*Id.* ¶ 67.) Plaintiffs allege that the City recruited an objector to the Advisory Referendum, who filed an objection on December 27, 2011. (*Id.* ¶ 70.) On January 12, 2012, the City's Municipal Officers Electoral Board (comprised of the Mayor, the City Clerk and one member of the City Council) ruled that the Advisory Referendum was ineligible for the ballot. (*Id.* ¶ 71.) On January 24, 2012, the Circuit Court of DuPage County upheld the Electoral Board's ruling, and an appeal was filed. (*Id.* ¶¶ 73, 75.) On March 6, 2012, the Illinois Appellate Court dismissed the appeal as moot because the absentee ballots could not be accommodated to reflect the Advisory Referendum. (*Id.* ¶ 78.)

On January 4, 2012, Naperville began installing smart meters in customers' homes. (*Id.* ¶ 87.) Plaintiffs allege that the commencement of the installation has deprived Plaintiffs of the opportunity to weigh their options and alternatives. (*Id.* ¶ 87.)

Plaintiffs are concerned that the RF waves utilized by smart meter technology present a health concern to such a degree that it violates their Fourteenth Amendment right to liberty in bodily integrity. (*Id.* ¶ 131.) In January 2011, during an interview with *The New York Times*, California State Representative Jared Huffman stated, in pertinent part, "Whether or not you believe RF exposures from smart meters are harmful, it's only fair that consumers who are concerned about health effects be given complete technical information and the choice of another technology for devices that are installed at their homes." (*Id.* ¶ 42.) Plaintiffs allege that "[t]he California Council on Science and Technology ('CCST') stated in their report released in April, 2011, 'that no additional standards are needed to protect the public from smart meters.' However, CCST also stated: 'Not enough is currently known about potential non-thermal impacts of radio frequency emissions to identify or recommend additional standards for such impacts. . . . It is not scientifically confirmed whether or what the non-thermal effects on living organisms, and potentially, human health might be." (*Id.* ¶ 43.)

Finally, Plaintiffs allege that the City's installation of smart meters is an unconstitutional taking because customers suffer a permanent occupation of their homes by Defendant's smart meters. (*Id.* ¶ 148.) Plaintiffs also allege that, in certain instances, the City has demanded the removal of plants, landscaping, and other property to accommodate the installation of smart meters. (*Id.* ¶ 157.)

Plaintiffs seek to enjoin Defendant from installing smart meters until reasonable safeguards are in place and until satisfactory alternative options for all customers are made available. (*Id.* ¶ 3.)

Discussion

I. Subject Matter Jurisdiction as to NSMA's Claims and Count IV

A. NSMA Satisfies the Requirements of Associational Standing

As an initial matter, Defendant moves to dismiss the First Amended Complaint as to Plaintiff NSMA for lack of subject matter jurisdiction, arguing that NSMA lacks standing to bring this case on behalf of its members. With regard to this facial attack on jurisdiction, the "allegations are taken as true and construed in a light most favorable to the complainant." *Cedars-Sinai Med. Ctr. v. Watkins*, 11 F.3d 1573, 1583 (Fed. Cir. 1993). To obtain associational standing, an organization must satisfy the three-prong test of *Hunt v. Washington State Apple Advertising Commission*:

> [A]n association has standing to bring suit on behalf of its members when: (a) its members would otherwise have standing to sue in their own right; (b) the interests it seeks to protect are germane to the organization's purpose; and (c) neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit.

432 U.S. 333, 343 (1977). Thus, "[t]he standing of an organization is derivative of its members' standing . . . ." *Rockford League of Women Voters v. U.S. Nuclear Regulatory Comm'n*, 679 F.2d 1218, 1221 (7th Cir. 1982).

Defendant does not argue that NSMA members do not have standing to sue in their own right for the constitutional violations alleged herein. Nor does Defendant contend that the interests NSMA seeks to protect are not germane to its purpose, or that the claim or relief requested requires the participation of individual members in the lawsuit. Simply put, NSMA's allegations satisfy the three-prong test for associational standing. First, the individual members' federal claims are not so "completely devoid of merit as not to involve a federal controversy." *See Owasso Indep. Sch. Dist.*

No. I-011 v. Falvo, 534 U.S. 426, 431 (2002) (holding that, when it is an open question whether a federal statute provides private parties with a cause of action enforceable under section 1983, there is a sufficient controversy to support jurisdiction). Second, the interests NSMA seeks to protect are germane to the organization's purpose of "empower[ing] families, friends and neighbors to advocate for a fiscally responsible and safe utility meter solution in Naperville, Illinois." (1st Am. Compl. ¶ 9.) Third, although some of the individual NSMA members are Plaintiffs in this case, neither the claims asserted nor the injunctive relief requested requires their participation in this lawsuit. (*Id.* ¶¶ 115-59; *id.*, Prayer for Relief.)

Instead, Defendant relies on *N.A.A.C.P. v. Alabama*, 357 U.S. 449, 458-60 (1958), and argues that NSMA has failed to establish associational standing because it has not alleged that smart meter installation adversely affects its members' associational ties to NSMA. In that case, the Supreme Court held that the N.A.A.C.P. had standing to assert the constitutional rights of its members in resisting the production of the organization's membership lists. *Id.* at 459. In reaching this decision, the Court found that the interests of the association and its members were identical because the association was created to express its members' views more effectively. *Id.* The Court also noted that if production of the association's membership list were compelled, it would be reasonably likely that the association would lose membership and financial support. *Id.* at 459-60.

As in *N.A.A.C.P.*, this Court holds that NSMA has standing to assert the constitutional rights of its members in resisting the installation of smart meters because the association was created to advocate its members' views on this matter. (1st Am. Compl. ¶ 9.) Furthermore, if it is determined by a court that installation of smart meters is constitutionally permissible, it is reasonably likely that NSMA would lose membership because one of NSMA's primary goals of challenging the

constitutionality of the smart meters will have been thwarted. Thus, the Court holds that NSMA has standing to sue on behalf of its members.

B. The Court Lacks Jurisdiction As to the Takings Claim

Defendant also argues that this Court lacks jurisdiction with respect to Plaintiffs' claim that Defendant violated the Fourteenth Amendment of the U.S. Constitution through a violation of the Fifth Amendment's Takings Clause because the claim is unripe. As part of this claim, Plaintiffs allege that they suffer a permanent occupation of their homes by Defendant's smart meters and a loss of property without compensation in instances where Defendant demanded the removal of plants, landscaping, and other property to accommodate the installation of smart meters. (1st Am. Compl. ¶¶ 148, 157.)

The Takings Clause states: "nor shall private property be taken for public use, without just compensation." U.S. Const. amend. V. In *Williamson County Regional Planning Commission v. Hamilton Bank of Johnson City*, 473 U.S. 172, 186 (1985), the Supreme Court established a two-pronged ripeness test applicable to federal takings claims. Under *Williamson County*, a takings claim is not ripe until "(1) the regulatory agency has had an opportunity to make a considered definitive decision, *and* (2) the property owner exhausts available state remedies for compensation." *Forseth v. Vill. of Sussex*, 199 F.3d 363, 368 (7th Cir. 2000) (emphasis added); *see Williamson County*, 473 U.S. at 186. However, a plaintiff may be excused from the exhaustion requirement if he demonstrates that "the inverse condemnation procedure is unavailable or inadequate." *Williamson County*, 473 U.S. at 197. "[W]hen considering a motion that launches a factual attack against jurisdiction, the district court may properly look beyond the jurisdictional allegations of the complaint and view whatever evidence has been submitted on the issue to determine whether in fact

subject matter jurisdiction exists." *Apex Digital, Inc. v. Sears, Roebuck & Co.*, 572 F.3d 440, 444 (7th Cir. 2009) (quotation and alterations omitted).

Plaintiffs have failed to establish that they have exhausted available state remedies for compensation or that any attempt to exhaust such remedies would have been futile. Plaintiffs outright concede that they have not exhausted their available administrative remedies for compensation. (Pls.' Br. Pursuant Ct. Order 9/21/12 at 12-13.) However, Plaintiffs argue that any attempt to raise the takings claim with Defendant's City Council would have been futile because the City Council is the entity that authorized the smart grid project in the first place. Even if the Court were to assume that this were true, Plaintiffs fail to explain why they did not avail themselves of the other available state law remedies, such as a lawsuit for damages, an injunction, or declaratory relief based on the Illinois Constitution, the inverse condemnation statute, or Illinois common law. "Illinois provides ample process for a person seeking just compensation." *Muscarello v. Ogle Cnty. Bd. of Comm'rs*, 610 F.3d 416, 422 (7th Cir. 2010); *see* Ill. Const. art. I, sec. 15 (prohibiting a taking or a damage to private property for public use without just compensation); 735 Ill. Comp. Stat. 30/10-5-5 (creating statutory inverse condemnation where private property is taken for public use without just compensation); *Zeitz v. Vill. of Glenview*, 710 N.E.2d 849, 851-52 (Ill. App. Ct. 1999) (noting that damages, as well as declaratory and injunctive relief, are available in cases alleging inverse condemnation and improper taking); *Patzner v. Baise*, 552 N.E.2d 714, 717 (Ill. 1990) (stating a remedy is available in the Illinois Court of Claims against a public authority for damaged property); *LaSalle Nat'l Bank & Tr. Co. v. City of Chi.*, 470 N.E.2d 1239 (Ill App. Ct. 1984) (recognizing that injunction is a proper remedy when an unlawful appropriation of land is attempted for use by a public corporation which has not acquired this right by condemnation or otherwise).

Because Plaintiffs were given an opportunity to, but did not, show that they have exhausted all of their state law remedies or that resort to all such available remedies would have been futile, the Court holds that Plaintiffs' § 1983 takings claim is unripe. The Court grants Defendant's motion to dismiss Count IV, which is dismissed without prejudice.

II. Defendant's Motion To Dismiss for Failure To State a Claim

Next, Defendant moves to dismiss the first amended complaint for failure to state a claim. For the purposes of a Rule 12(b)(6) motion to dismiss, "a court must accept as true all of the allegations contained in the complaint." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). To survive a motion to dismiss, a complaint must contain sufficient factual matter to "'state a claim to relief that is plausible on its face.'" *Id.* at 663 (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). Factual allegations must be sufficient to raise a right to relief above the speculative level. *Twombly*, 550 U.S. at 555.

Section 1983 provides a federal remedy for "the deprivation of any rights, privileges, or immunities secured by the Constitution and laws." 42 U.S.C. § 1983. This includes the deprivation of "federal statutory as well as constitutional rights." *Golden State Transit Corp. v. City of Los Angeles*, 493 U.S. 103, 105 (1989).

> A determination that § 1983 is available to remedy a statutory or constitutional violation involves a two-step inquiry. First, the plaintiff must assert the violation of a federal right. Section 1983 speaks in terms of "rights, privileges, or immunities," not violations of federal law. In deciding whether a federal right has been violated, we have considered whether the provision in question creates obligations binding on the governmental unit or rather "does no more than express a congressional preference for certain kinds of treatment." The interest the plaintiff asserts must not be "too vague and amorphous" to be "beyond the competence of the judiciary to enforce." We have also asked whether the provision in question was "intend[ed] to benefit" the putative plaintiff.

Id. at 106 (citations omitted).

A. Counts I & II: Plaintiffs' § 1983 Claim Based on the Public Utility Regulatory Policies Act

In support of Counts I and II, Plaintiffs allege that the Public Utility Regulatory Policies Act of 1978 ("PURPA"), Pub. L. No. 95-617, 92 Stat. 3117 (codified at 16 U.S.C. §§ 2601-45), as amended by the Energy Policy Act of 2005, Pub. L. No. 109-58, 119 Stat. 594 (codified as amended in various sections of the U.S.C.), creates a federal right. "In order to seek redress through § 1983, . . . a plaintiff must assert the violation of a federal *right*, not merely a violation of federal *law*." *Blessing v. Freestone*, 520 U.S. 329, 340 (1997). "A court's role in discerning whether personal rights exist in the § 1983 context should . . . not differ from its role in discerning whether personal rights exist in the implied right of action context." *Gonzaga v. Doe*, 536 U.S. 273, 285 (2002).

> We have traditionally looked at three factors when determining whether a particular statutory provision gives rise to a federal right. First, Congress must have intended that the particular statutory provision benefit the plaintiff. Second, the plaintiff must demonstrate that the right assertedly protected by the statute is not so "vague and amorphous" that its enforcement would strain judicial competence. Third, the statute must unambiguously impose a binding obligation on the States. In other words, the provision giving rise to the asserted right must be couched in mandatory, rather than precatory, terms.

Blessing, 520 U.S. at 340-41.

"[W]here the text and structure of a statute provide no indication that Congress intends to create new individual rights, there is no basis for a private right suit, whether under § 1983 or under an implied right of action." *Gonzaga*, 536 U.S. at 286. "Once a plaintiff demonstrates that a statute confers an individual right, the right is presumptively enforceable by § 1983." *Id.* at 284. Defendant may rebut the presumption by showing that Congress "specifically foreclosed a remedy under §

1983." *Id.* at 285 n.4 (quotation omitted). "Congress may do so expressly, by forbidding recourse to § 1983 in the statute itself, or impliedly, by creating a comprehensive enforcement scheme that is incompatible with individual enforcement under § 1983." *Blessing*, 520 U.S. at 341.

PURPA was enacted by Congress to respond "to the energy crisis of the 1970s" and "to lessen the dependence of electric utilities on fossil fuels by encouraging the development of alternative power sources." *N. Am. Natural Res., Inc. v. Strand*, 252 F.3d 808, 809 (6th Cir. 2001). Congress enacted the Energy Policy Act of 2005 "to ensure jobs for our future with secure, affordable, and reliable energy" by expanding the nation's interstate electric grid. Energy Policy Act of 2005, Pub. L. No. 109-58, 119 Stat. 594; Drew Thornley, *The Federal Government's Authority To Site Interstate Electric Transmission Lines: How The Meaning of "Withheld" Is Withholding Clarity for Transmission Development*, 6 Tex. J. Oil, Gas, & Energy L. 385, 396 (2010-11).

Here, Plaintiffs allege that 16 U.S.C. §§ 2621(d)(14)(A) and (C) and 2631 create a federal right. § 2621(d)(14)(A) provides:

> Not later than 18 months after August 8, 2005, each electric utility shall offer each of its customer classes, and provide individual customers upon customer request, a time-based rate schedule under which the rate charged by the electric utility varies during different time periods and reflects the variance, if any, in the utility's costs of generating and purchasing electricity at the wholesale level. The time-based rate schedule shall enable the electric consumer to manage energy use and cost through advanced metering and communications technology.

In turn, § 2621(d)(14)(C) provides: "Each electric utility subject to subparagraph (A) shall provide each customer requesting a time-based rate with a time-based meter capable of enabling the utility and customer to offer and receive such rate, respectively." However, PURPA adds that "each State regulatory authority shall . . . issue a decision whether it is appropriate to implement the standards set

out in subparagraphs (A) and (C)." § 2621(d)(14)(F).

Given that Congress explicitly granted discretion to the state regulatory authority to implement § 2621(d)(14)(A) and (C), these statutory provisions fail to create obligations binding on Naperville and does not create a private right of action for the Plaintiffs in this case. These statutory provisions do no more than express Congress' intent that the State regulatory authority consider the suggested standards. Thus, because the Court holds § 2621(d)(14)(A) and (C) are not couched in mandatory terms, they fail to create a federal right upon which a § 1983 claim can be based.

Although not raised by Plaintiffs, § 2631(a) of PURPA does provide a cause of action under certain circumstances. But they are not applicable here. The statute states:

> In order to initiate and participate in the consideration of one or more of the standards established by subchapter II or other concepts which contribute to the achievement of the purposes of this chapter, . . . any electric consumer of an affected electric utility may intervene and participate as a matter of right in any ratemaking proceeding or other appropriate regulatory proceeding relating to rates or rate design which is conducted by a State regulatory authority . . . or by a nonregulated electric utility.

However, the statute later states:

> Notwithstanding any other provision of law, no court of the United States shall have jurisdiction over any action arising under any provision of subchapter I or II or of this subchapter except for . . . (1) an action over which a court of the United States has jurisdiction under subsection (b) or (c) (2) of this section; and (2) review of any action in the Supreme Court of the United States in accordance with sections 1257 and 1258 of Title 28.

16 U.S.C. § 2633(a).

Because Plaintiffs' claim falls within subchapter II, *see* Ch. 46-Public Utility Regulatory Policies (table indicating that § 2621 is within Subchapter II), this Court lacks jurisdiction over such

a claim unless it fits within one of the enumerated exceptions. The Court addresses each exception below.

Turning first to subsection (b), subsection (b)(1) allows the Secretary to bring an action in "any appropriate court of the United States to enforce his right to intervene." § 2633(b)(1). Because Plaintiffs are not the Secretary, § 2633(b)(1) does not apply.

Second, subsection (b)(2) provides that:

> If any electric utility or electric consumer having a right to intervene under *section 2631(a)* of this title is denied such right by any State court, such electric utility or electric consumer may bring an action in the appropriate United States district court to require the State regulatory authority or nonregulated electric utility to permit such intervention and participation, and such court shall have jurisdiction to grant appropriate relief.

§ 2633(b)(2) (emphasis added). Although Plaintiffs could have sought to intervene in any proceeding that they thought was occurring behind closed doors and could have then sought relief in state court to review any such denial, Plaintiffs concede that they did not do so. (*See* 1st Am. Compl. ¶¶ 121-22.) Because no state court has ever denied Plaintiffs the right to intervene under § 2631(a), § 2633(b)(2) does not apply.

As to subsection (c), subsection (c)(2) provides that:

> Any person (including the Secretary) may obtain review in the appropriate court of the United States of any determination made under subchapter I or II or this subchapter by a Federal agency if such person (or the Secretary) intervened or otherwise participated in the original proceeding or if otherwise applicable law permits such review. Such court shall have jurisdiction to grant appropriate relief. Any person (including the Secretary) may bring an action to enforce the requirements of subchapter I or II or this subchapter with respect to any Federal agency in the appropriate court of the United States and such court shall have jurisdiction to grant appropriate relief.

§ 2633(c)(2). Because this case does not involve any determination by a federal agency, § 2633(c)(2) does not apply.

Lastly, § 2633(a)(2) provides that federal courts have jurisdiction to "review of any action in the Supreme Court of the United States in accordance with sections 1257 and 1258 of Title 28." That exception is also inapplicable.

Because § 2633(c)(2) expressly bars Plaintiffs' PURPA claims from federal court and its exceptions do not apply, the Court holds that Congress did not intend to create a federal right that benefits Plaintiffs in this case via these statutory provisions. Accordingly, the Court grants Defendant's motion to dismiss Plaintiffs' § 1983 claim based on PURPA, and this claim is dismissed with prejudice.

B. Count II: Plaintiffs' § 1983 Due Process Claim Based on Liberty Interests in Bodily Integrity

In Count II, Plaintiffs contend that Defendant violated their right to due process based on their liberty interest in bodily integrity and self-determination arising from the Due Process Clause itself. Specifically, Plaintiffs allege that the Defendant did not provide its citizens with notice and an opportunity to be heard before forcing the installation of smart meters in their homes that purportedly expose citizens to harmful RF waves.

"The Fourteenth Amendment prevents the state from depriving any person of liberty or property without due process of law." *Eichman v. Ind. State Univ. Bd. of Trs.*, 597 F.2d 1104, 1109 (7th Cir. 1979). "[T]here can be no claim of a denial of due process, either substantive or procedural, absent deprivation of either a liberty or a property right." *Id.* On a motion to dismiss, "[f]actual allegations must be enough to raise a right to relief above the speculative level." *Twombly*,

550 U.S. at 555. "[T]he pleading must contain something more . . . than . . . a statement of facts that merely creates a suspicion [of] a legally cognizable right of action." *Id.* (citation and quotation omitted). For these reasons, courts need not accept "unreasonable inferences or unwarranted deductions of fact." *Mid-America Reg'l Bargaining Ass'n v. Will Cnty. Carpenters Dist. Council*, 675 F.2d 881, 883 (7th Cir. 1982) (quotation omitted). Plaintiffs' allegations in Count II do not satisfy *Twombly*.

As an initial matter, the Court notes that Plaintiffs themselves have acknowledged that Defendant offers the option of installing a smart meter with a disabled radio transmitter. (1st Am. Compl. ¶¶ 154-55.) Thus, it is within Plaintiffs' control whether radio frequencies are emitted from the smart meter installed in their home. Plaintiffs' concern that Defendant would leave radio transmitters active in blatant disregard of Plaintiffs' requests that they be turned off is pure speculation and requires an unreasonable inference. This alone provides a basis to grant Defendant's motion to dismiss Count II of Plaintiffs' First Amended Complaint.

Assuming, *arguendo*, however, that there were no option of deactivating the radio transmitter in smart meters, this claim nevertheless would not survive a motion to dismiss. Plaintiffs allege that "[i]n January of 2011, during an interview with *The New York Times*, California State Representative Jared Huffman stated, in pertinent part, 'Whether or not you believe RF [radio frequency] exposures from smart meters are harmful, it's only fair that consumers who are concerned about health effects be given complete technical information and the choice of another technology for devices that are installed at their homes." (*Id.* ¶ 42.) Plaintiffs also allege:

> The California Council on Science and Technology ("CCST") stated in their report released in April, 2011, "that no additional standards are needed to protect the public from smart meters." However, CCST also stated: "Not enough is currently known about potential non-thermal impacts of radio frequency emissions to identify or

> recommend additional standards for such impacts. . . . It is not scientifically confirmed whether or what the non-thermal effects on living organisms, and potentially, human health might be."

(*Id.* ¶ 43.)

It is abundantly clear that Plaintiffs' due process claim is premised upon a theory that the radio waves emitted from the smart meters, together with other RF-wave-emitting devices in the environment, have the potential to be harmful. Plaintiffs allege that certain doctors believe that over time the public's cumulative exposure to low-level RF from devices such as cell phones, radio towers, and smart meters may pose health risks, such that more accurate guidelines and standards regarding the safety of RF exposure are necessary. However, Plaintiffs do not allege that Defendant's smart meters, in and of themselves, deprive any particular plaintiff in this case of a liberty interest in bodily integrity or self-determination. Indeed, nowhere do Plaintiffs actually allege that smart meters are causing harm to residents or that they would do so. The bare allegation that it is unknown whether Plaintiffs are actually being harmed by the level of RF waves emitted from one smart meter is insufficient to satisfy *Twombly*. Accordingly, the Court grants Defendant's motion to dismiss and dismisses Plaintiffs' due process claim based on a deprivation of their liberty interest in bodily integrity and self-determination without prejudice.

C. Count III: Plaintiffs' § 1983 Claim Based on Unreasonable Search under the Fourth Amendment

The Fourth Amendment guarantees that "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated." U.S. Const. amend. IV. But "[w]hat a person knowingly exposes to the public, even in his own home or office, is not a subject of Fourth Amendment protection." *Katz v. United States*,

389 U.S. 347, 351 (1967). The Supreme Court "uniformly has held that the application of the Fourth Amendment depends on whether the person invoking its protection can claim a justifiable, a reasonable, or a legitimate expectation of privacy that has been invaded by government action." *Smith v. Maryland*, 442 U.S. 735, 740 (1979) (quotations omitted).

> This inquiry . . . normally embraces two discrete questions. The first is whether the individual, by his conduct, has exhibited an actual (subjective) expectation of privacy – whether . . . the individual has shown that he seeks to preserve [something] as private. The second question is whether the individual's subjective expectation of privacy is one that society is prepared to recognize as reasonable – whether . . . the individual's expectation, viewed objectively, is justifiable under the circumstances.

Id. (citations and quotations omitted). "[A] person has no legitimate expectation of privacy in information he voluntarily turns over to third parties" because he "'assume[s] the risk" of disclosure'." *See id.* at 743-44; *see United States v. Flores-Lopez*, 670 F.3d 803, 807 (7th Cir. 2012) ("[B]y subscribing to the telephone service the user of the phone is deemed to surrender any privacy interest he may have had in his phone number."). "[N]o Fourth . . . Amendment claim can prevail where . . . there exists no legitimate expectation of privacy . . . ." *Couch v. United States*, 409 U.S. 322, 335 (1973).

Naperville provides electricity service to Plaintiffs, which necessarily involves measuring their electricity usage for billing purposes.[2] Plaintiffs do not, and cannot, contend that they have a

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2 The Municipal Code of Naperville, Illinois provides: "All energy supplied to a customer shall be metered, except when the consumption is temporary and authorized in writing by the City Manager. All meters shall be supplied by the Department of Public Utilities to its customers and the City shall hold title to such meters. The Department of Public Utilities shall maintain all meters or replace same if beyond repair at no expense to the customer. Electric meters shall be under the control and supervision of the Department of Public Utilities and may be exchanged or removed at any time for testing." Naperville Municipal Code 8-1A-4. By receiving electric service and power from Defendant, Plaintiffs agree to:

> conform to and abide by all the ordinances, rules and regulations of the City, as now in force or hereafter altered or amended, pertaining to the design, approval, installation, inspection and acceptance of on-site electrical

subjective expectation of privacy in the aggregate measurements of their electricity use. Indeed, Plaintiffs do not argue that Defendant violated their constitutional rights when it sent meter readers to their homes over these many years to read their analog meters. That smart meters enable Defendant to read the aggregate measurements remotely and more frequently does not permit Plaintiffs to re-capture their already-surrendered privacy interest in the aggregate measurement of their electricity usage (whether that aggregate usage is measured monthly, weekly, daily, hourly, or in fifteen-minute increments).

In this way, the Supreme Court's decision in *Smith v. Maryland*, 442 U.S. 735, 742 (1979), is instructive. In that case, the Court held that by subscribing to the telephone service, the user of the phone is deemed to surrender any legitimate privacy interest he may have had in his phone number. (*Id.*) Other cases, relying on *Smith*, have similarly held that by subscribing to electricity service, the electricity user is deemed to surrender any privacy interest in the electricity usage records for the user's residence. *United States v. McIntyre*, 636 F.3d 1107, 1111 (8th Cir. 2011); *United States v. Porco*, 842 F. Supp. 1393, 1398 (D. Wyo. 1994).

Plaintiffs attempt to distinguish *Smith* and its progeny by arguing that in those cases, the information at issue was conveyed to third parties whereas, here, Defendant is not a third party. This reasoning is unpersuasive. Plaintiffs have knowingly conveyed the aggregate measurements of their electricity usage directly to the party from which they wish to keep it a secret. Their expectation of

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> distribution facilities, the government and regulation of electrical energy customers, the standards of installation and maintenance of service drops, electric wiring, apparatus, appliances and fixtures in the premises served, and the payment for electric service supplied the customer in accordance with such rate schedule as may be in effect from time to time.

Id. 8-1A-2.

privacy, to the extent any exists, is certainly less than those of the proponents in *Smith* and the cases that follow.

In addition, Plaintiffs allege that a smart meter has the capability of capturing extremely detailed information about their electricity usage above and beyond aggregate measurements, such as remote daily tracking of time patterns and power loads associated with a customer's power usage. (1st Am. Compl. ¶ 139.) From this data, Plaintiffs fear Defendant can ascertain many personal details of an individual's private life. Plaintiffs argue that because a smart meter technically has such capabilities, it is reasonable to infer that such detailed information is currently being measured and collected by Defendant. The Court disagrees.

Even assuming that a smart meter is technically able to measure electrical usage and load to such minute detail and one were able to ascertain personal details about a resident's life from such data, the mere existence of such a capability does not reasonably lead to an inference that it is actually being employed. For instance, traditional analog meter readers have the ability to observe whether a resident's air conditioning unit is running or whether lights are shining through the resident's windows. That such individuals have the capability of ascertaining such details about one's electrical use does not lead to a reasonable inference that they then relay the information to Defendant. Similarly, that smart meters are capable of measuring such detailed information does not lead to a reasonable inference that such information is being relayed to Defendant or that Defendant would collect such information without Plaintiffs' consent. In fact, Plaintiffs have not alleged that the installed smart meters are presently relaying any such detailed, nonaggregate information about their electricity usage to the City or that the Defendant's capture of such information is imminent. Absent such an allegation, Plaintiffs' assertions do not support a reasonable inference that the type of

nonaggregate information purportedly capable of being collected by smart meters is actually being captured by Defendant in this case.

The Court finds Plaintiffs' reliance on *Kyllo v. United States*, 533 U.S. 27 (2001), and *United States v. Jones*, 132 S. Ct. 945 (2012), unavailing. In *Kyllo* and *Jones*, the criminal defendants did not consent to the government's monitoring of the heat emanating from Kyllo's home or movement in the position of Jones' wife's Jeep. *Kyllo*, 533 U.S. at 33 (distinguishing *Smith*, 442 U.S. at 743-44); *Jones*, 132 S. Ct. at 952 (distinguishing *United States v. Knotts*, 460 U.S. 276, 278 (1983), and *United States v. Karo*, 468 U.S. 705, 712 (1984), in which the criminal defendants consented to the presence of a container with a beeper that enabled government to monitor the container's location). It is the consent, not the nature of the technology being used, that distinguishes this case from *Kyllo* and *Jones*.

Furthermore, precautions are in place to prevent the unwarranted disclosure of Plaintiffs' measurements of electricity usage without their consent. The Illinois Electric Service Customer Choice and Rate Relief Law of 1997 ("Electric Service Customer Act"), as amended, provides that "no specific billing, usage or load shape data shall be provided . . . unless authorization to provide that information is provided by the customer." 220 Ill. Comp. Stat. 5/16-122(b), (c). In addition, each public utility using Smart Grid technology is required by law to have a Smart Grid Advanced Metering Infrastructure Deployment Plan ("AMI Plan") that "secure[s] the privacy of the customer's personal information." 22 Ill. Comp. Stat. 5/16-108.6(d). "'Personal information' for this purpose consists of the customer's name, address, telephone number, and other personally identifying information, as well as information about the customer's electric usage." *Id.* "Electric utilities, their contractors or agents, and any third party who comes into possession of such personal information by

virtue of working on Smart Grid technology shall not disclose such personal information to be used in mailing lists or to be used for other commercial purposes not reasonably related to the conduct of the utility's business." *Id.*

Plaintiffs have no reasonable expectation of privacy in the aggregate measurements of their electricity usage because they have consented to such aggregate measurements and they have not alleged that Defendant is currently collecting more detailed information about their electricity usage beyond the aggregate measurements without their consent. Therefore, the Court grants Defendant's motion to dismiss Plaintiffs' Fourth Amendment claim, as pleaded, without prejudice.

In sum, the Court grants Defendant's motion to dismiss Counts I through III for failure to state a claim. Because the Court has dismissed the complaint, it denies Plaintiffs' motion for a preliminary injunction and motion to supplement the record of the motion for preliminary injunction as moot. *See, e.g., Hanover Ins. Group v. Singles Roofing Co., Inc.*, No. 10 C 611, 2012 WL 2368328, at *2 (N.D. Ill. June 21, 2012).

Conclusion

For the reasons provided in this Memorandum Opinion and Order, the Court grants the Defendant's motion to dismiss [22] and denies Plaintiffs' motion to supplement the record of the motion for preliminary injunction [39] and motion for preliminary injunction as moot [18]. The Court grants Plaintiffs leave to file a Second Amended Complaint within fourteen days of the date of the entry of this Memorandum Opinion and Order to cure the deficiencies outlined herein as to Counts II through IV. Defendant's pending motion for sanctions under Rule 11 [29] is stricken without prejudice with leave to re-file or amend within ten days after the above deadline.

SO ORDERED **ENTER:** March 22, 2013.

JOHN Z. LEE
U.S. District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

NAPERVILLE SMART METER AWARENESS, an Illinois not-for-profit corporation,	)	
Plaintiff,	)	**11 C 9299**
v.	)	**Judge John Z. Lee**
CITY OF NAPERVILLE,	)	
Defendant.	)	

MEMORANDUM OPINION AND ORDER

Naperville Smart Meter Awareness ("NSMA"), an Illinois not-for-profit corporation, has sued the City of Naperville ("the City") pursuant to 42 U.S.C. § 1983, alleging violations of its members' rights to due process and liberty in bodily integrity and self-determination under the Fourteenth Amendment (Count I), freedom from unreasonable search under the Fourth Amendment (Count II), and equal protection of the laws under the Fourteenth Amendment (Count III). NSMA also alleges discrimination on the basis of disability in violation of Titles II and III of the Americans with Disabilities Act of 1990 ("ADA"), 42 U.S.C. § 12101 *et seq.* (Count IV). The City has moved to dismiss the Second Amended Complaint pursuant to Federal Rule of Civil Procedure ("Rule") 12(b)(1) and Rule 12(b)(6). The City has also moved for sanctions pursuant to Rule 11(c)(2). For the reasons set forth herein, the Court grants in part and denies in part the City's motion to dismiss. The Court also denies the City's motion for sanctions.

Factual Background[1]

In Naperville, Illinois, all residential electrical utility services are provided by the Department of Public Utilities-Electric, a company owned and operated by the local city government. 2d Am. Compl. ¶ 16. In 2012, the Naperville Department of Public Utilities-Electric began replacing its customers' analog electricity meters with smart meters as part of a local program called the Naperville Smart Grid Initiative. *Id.* ¶¶ 25, 73. The Naperville Smart Grid Initiative is funded in part by the U.S. Department of Energy, which received $4.5 billion of federal tax dollars under the American Recovery and Reinvestment Act of 2009 for the purpose of modernizing the nation's electrical power grid. *Id.* ¶ 25. The objectives of the Naperville Smart Grid Initiative include increasing energy efficiency, reducing emissions, and lowering electricity consumption costs. *Id.* Ex. A, Attach. E, Statement of Project Objectives.

Like analog meters, smart meters measure customers' total residential electricity usage for monthly billing purposes. *Id.* ¶ 35. Unlike analog meters, however, smart meters are equipped with wireless radio transmitters that, when activated, send usage data via radio-frequency waves to nearby neighborhood "network access points," which then relay usage data to Naperville's Department of Public Utilities-Electric. *Id.* ¶¶ 41–42. The functionality of smart meters thus obviates the need for the City to send in-person meter readers to residents' homes. *See id.* Another difference is that, while analog meters are capable of measuring only total accumulated electricity consumption, smart meters measure aggregate electricity usage much more frequently, in intervals of fifteen minutes. *Id.* ¶¶ 33, 35.

[1] The following facts are taken from NSMA's Second Amended Complaint and the exhibits attached thereto, which the Court may consider as part of the pleadings without converting this motion to dismiss into a motion for summary judgment. *See* Fed. R. Civ. P. 10(c); *Miller v. Herman*, 600 F.3d 726, 733 (7th Cir. 2010). The Court must accept these facts as true when reviewing the City's motion to dismiss and draw all possible inferences in NSMA's favor. *See Tamayo v. Blagojevich*, 526 F.3d 1074, 1081 (7th Cir. 2008).

As an alternative to having new smart meters installed in their homes, Naperville residents may opt to have their old analog meters replaced with "non-wireless meters." *Id.* ¶ 177. These "non-wireless meter alternatives" are essentially smart meters with their radio transmitters deactivated so that they emit no radio-frequency waves and must be read manually by a meter reader each month. *See id.* ¶¶ 179–80. Residents who choose the non-wireless meter alternative must pay a one-time installation fee of $68.35, plus an additional monthly fee of $24.75. *Id.* ¶ 181.

NSMA is an Illinois not-for-profit corporation whose stated mission is to "educate, engage and empower families, friends and neighbors to advocate for a fiscally responsible and safe utility meter solution in Naperville, Illinois." *Id.* ¶ 8. NSMA alleges that the radio-frequency waves that smart meters emit present health risks to Naperville residents. In support, it claims that radio-frequency waves have been "proven to cause headaches, ringing in the ears, anxiety, sleep disorders, depression, and other symptoms, particularly in individuals who suffer from electromagnetic sensitivity." *Id.* ¶ 99. Furthermore, because smart meters are capable of taking data measurements in frequent, discrete time increments, NSMA alleges that they present privacy risks that analog meters do not. Specifically, NSMA claims that a home's smart-meter data history is capable of revealing "intimate details about residents' personal lives and living habits" and that "[a]n inspector of this detailed history can determine at what time residents are home, and . . . could even make reasonable assumptions regarding particular appliances and lighting presently in use." *Id.* ¶¶ 38, 235.

NSMA now brings a number of constitutional and federal claims in connection with its various objections to the implementation of the Naperville Smart Grid Initiative. First, NSMA claims that the City has deprived its members of their right to bodily integrity and self-

determination under the Fourteenth Amendment by installing unsafe smart meters without first giving residents an opportunity to oppose the Naperville Smart Grid Initiative at a public hearing or through the referendum process. *Id.* ¶¶ 217–20. NSMA also alleges that the City's collection of detailed smart-meter data constitutes an unreasonable search of information under the Fourth Amendment. *Id.* ¶ 229. Next, NSMA alleges that the City has violated its members' right to equal protection, both by charging fees for the non-wireless meter alternative as well as by denying requests by NSMA members to retain analog meters for medical reasons while granting similar requests made by non-members. *Id.* ¶¶ 240–42. Finally, NSMA claims that imposing fees on residents who opt for the non-wireless meter alternative discriminates against certain disabled residents who are especially threatened by health risks related to smart meters. *Id.* ¶¶ 251–54. NSMA seeks an injunction ordering the City to make analog meters and non-wireless meters available at no additional cost upon customer request. *Id.*, Prayer for Relief ¶ 2.

Earlier in this litigation, the Court granted the City's motion to dismiss NSMA's First Amended Complaint with leave to amend some of the counts therein. NSMA has since filed a Second Amended Complaint. The City now moves to dismiss the Second Amended Complaint pursuant to Rules 12(b)(1) and 12(b)(6).

Discussion

I. Subject Matter Jurisdiction

As a preliminary matter, the City moves to dismiss NSMA's claims for lack of subject matter jurisdiction pursuant to Rule 12(b)(1). In particular, the City asserts that NSMA lacks standing to bring its claims and that this case is moot. The Court will address these two arguments in turn, taking as true all facts alleged in the Second Amended Complaint and drawing

all reasonable inferences in NSMA's favor. *See Miller v. F.D.I.C.*, 738 F.3d 836, 840 (7th Cir. 2013); *Long v. Shorebank Dev. Corp.*, 182 F.3d 548, 554 (7th Cir. 1999).

A. NSMA Has Associational Standing

The City first argues that NSMA lacks standing to bring this case. Although the City already raised, and the Court analyzed, this issue in the City's first motion to dismiss, the City has emphasized slightly different arguments in its second motion to dismiss, and so the Court will address the issue of standing—and the question of subject matter jurisdiction—anew. *Vill. of Bellwood v. Dwivedi*, 895 F.2d 1521, 1525 (7th Cir. 1990).

The doctrine of standing stems from Article III of the United States Constitution, which limits the scope of judicial authority to the adjudication of actual cases and controversies. *See Lac Du Flambeau Band of Lake Superior Chippewa Indians v. Norton*, 422 F.3d 490, 495 (7th Cir. 2005) (citing *Warth v. Seldin*, 422 U.S. 490, 498 (1975)). To establish standing, an individual plaintiff must allege an injury in fact, a causal relationship between the injury and the defendant's acts, and redressability of the injury. *See Lac Du Flambeau*, 422 F.3d at 495 (citing *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992)). Although the alleged injury must be "concrete and particularized," an injury that is merely threatened, rather than immediate, may suffice to establish standing. *See Hunt v. Washington State Apple Advertising Comm'n*, 432 U.S. 333, 342 (1977) (requiring "immediate or threatened injury as a result of the challenged action" to establish standing (quoting *Warth*, 422 U.S. at 511)); *Lac Du Flambeau*, 422 F.3d at 498 ("[T]he present impact of a future though uncertain harm may establish injury in fact for standing purposes.").

An association has standing to bring suit as a representative of its members, even absent an injury to the association itself, when: "(a) its members would otherwise have standing to sue

in their own right; (b) the interests it seeks to protect are germane to the organization's purpose; and (c) neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit." *Hunt*, 432 U.S. at 342–43; *see Sw. Suburban Bd. of Realtors, Inc. v. Beverly Area Planning Ass'n*, 830 F.2d 1374, 1380 (7th Cir. 1987).

When reviewing a facial challenge to standing, "allegations are taken as true and construed in a light most favorable to the complainant." *Cedars-Sinai Med. Ctr. v. Watkins*, 11 F.3d 1573, 1583 (Fed. Cir. 1993). Under this standard, NSMA's allegations have satisfied the requirements for associational standing with regards to all four of its claims. First, NSMA has shown that its members would have standing to bring each claim in their own right because it alleges that its members face various redressable injuries, immediate or threatened, that result from the City's actions. Namely, NSMA claims that the City has violated its members rights to substantive due process by forcing them to either accept installation of allegedly harmful smart meters or pay "penalty fees," 2d Am. Compl ¶¶ 99, 177–82; that the City's collection of smart-meter data invades its members' privacy, *id.* ¶¶ 149–50, 229–31; that the City has violated its members' right to equal protection by imposing fees for installation of non-wireless meters and by treating members less favorably than non-members who have been allowed to retain analog meters for medical reasons, *id.* ¶¶ 125–26, 242; and that the City's smart-meter program discriminates against disabled NSMA members, *id.* ¶ 251. Second, the interests NSMA seeks to protect are relevant to its stated organizational mission to "educate, engage and empower families, friends and neighbors to advocate for a fiscally responsible and safe utility meter solution in Naperville, Illinois." *Id.* ¶ 8. The third requirement of associational standing is also satisfied because NSMA's claims and the injunctive relief it seeks do not require individual members of the association to participate in this lawsuit. *See Local 194, Retail, Wholesale &*

Dep't Store Union v. Standard Brands, Inc., 540 F.2d 864, 865 (7th Cir. 1976) (finding the third requirement for associational standing satisfied with respect to the plaintiff's claims for injunctive and declaratory relief, on the grounds that such relief inherently does not require participation by individual members); *Nat. Org. for Women, Inc. v. Scheidler*, 897 F. Supp. 1047, 1069–70 (N.D. Ill. 1995) (finding the third requirement for associational standing satisfied when the plaintiff sought only injunctive relief, even when it might have been necessary for some association members to testify in the case).

For these reasons, the Court finds that NSMA has associational standing to bring all claims in this case. The Court thus denies the City's motion to dismiss for lack of standing.

B. NSMA's Claims Are Not Moot

Next, the City argues that this case should be dismissed as moot on the grounds that "NSMA has asked this Court to halt the [smart meter] project and order the City to allow residents to retain their analog meters," when the City has by now substantially completed the smart-meter installation process. Def.'s Mem. Supp. Mot. Dismiss 5.

A case becomes moot when the original dispute between the parties ceases to exist or when one of the parties ceases to have a personal interest in the outcome of the case. *See Banks v. National Collegiate Athletic Ass'n*, 977 F.2d 1081, 1085 (7th Cir. 1992) (citing *United States Parole Comm'n v. Geraghty*, 445 U.S. 388, 396 (1980)). NSMA contends that the injuries caused by smart meters adversely affect its members on an ongoing basis. For this reason, NSMA seeks injunctive relief "requiring the City to uninstall, upon an electric customer's request, such requesting customer's smart meter and to replace said smart meter with an analog meter at no additional cost . . . and to make available to its electric customers with disabilities[ ]

an analog meter or NWMA at no additional cost." 2d Am. Compl. ¶¶ 227, 237, 247; *id.* Prayer for Relief ¶¶ 1-2.

Given this statement from NSMA's prayer for relief, it is clear that the City's mootness argument relies entirely on a mischaracterization of the remedy NSMA seeks: NSMA asks not for smart-meter installation to be enjoined, but for smart meters to be replaced with alternative types of meters upon Naperville residents' request. *See id.* Prayer for Relief. As such, given the alleged injuries underlying this case and the form of relief sought, the Court finds that the original dispute between the parties continues to exist. The Court therefore concludes that this case is not moot and denies the City's motion to dismiss pursuant to Rule 12(b)(1).

II. Motion to Dismiss for Failure to State a Claim

The City also moves to dismiss NSMA's claims under Rule 12(b)(6). To survive a motion to dismiss pursuant to Rule 12(b)(6), NSMA's complaint must "state a claim to relief that is plausible on its face." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). The factual allegations in the complaint must at least "raise a right to relief above the speculative level." *Bell Atl. Corp.*, 550 U.S. at 555. In reviewing the City's motion to dismiss, the Court must accept as true all well-pleaded allegations in the complaint and draw all possible inferences in NSMA's favor. *See Tamayo*, 526 F.3d at 1081.

A. Due Process Claim

NSMA first claims that the City's installation of smart meters violates NSMA members' due process rights to bodily integrity and self-determination under the Fourteenth Amendment. More specifically, NSMA claims that the City did not provide Naperville residents with notice and an opportunity to be heard before installing smart meters in their homes, and that radio

frequency waves emitted by smart meters in the homes of its members and its members' neighbors pose health risks. 2d Am. Compl. ¶¶ 216–20.

The Fourteenth Amendment provides that the government shall not "deprive any person of life, liberty, or property without due process of law." U.S. Amend. XIV. But "there can be no claim of a denial of due process, either substantive or procedural, absent deprivation of either a liberty or a property right." *Eichman v. Ind. State Univ. Bd. of Trs.*, 597 F.2d 1104, 1109 (7th Cir. 1979). Furthermore, the right to "substantive due process is 'very limited,'" *Viehweg v. City of Mount Olive*, 559 F. App'x 550, 552 (7th Cir. 2014) (quoting *Tun v. Whitticker*, 398 F.3d 899, 900 (7th Cir. 2005)), and the Due Process Clause "does not purport to supplant traditional tort law in laying down rules of conduct to regulate liability for injuries that attend living together in society." *Collins v. City of Harker Heights, Tex.*, 503 U.S. 115, 228 (1992) (internal citations omitted). Furthermore, to survive a motion to dismiss a claim for deprivation of substantive due process, a plaintiff must allege facts tending to suggest that the government's action was arbitrary. *See Jeffries v. Turkey Run Consol. Sch. Dist.*, 492 F.2d 1, 3–4 (7th Cir. 1974).

NSMA's due process claim fails because its allegations do not identify an arbitrary deprivation of a recognized liberty or property interest. At most, even assuming as true that radio frequency waves emitted by smart meters are capable of causing harm, NSMA's allegations suggest only that the City negligently increased a risk of injury. Allegations of such risk exposure are insufficient to state a claim for deprivation of bodily integrity under the Fourteenth Amendment. *See Upsher v. Grosse Pointe Pub. Sch. Sys.*, 285 F.3d 448, 453–54 (6th Cir. 2002) (public school employees' Fourteenth Amendment rights were not violated when school officials exposed employees to asbestos-contaminated materials under carpeting, because the officials had not "engaged in arbitrary conduct intentionally designed to punish the

[employees]"); *Hood v. Suffolk City Sch. Bd.*, 469 F. App'x 154, 159 (4th Cir. 2012) (public school teacher's liberty interest in bodily integrity was not violated when the school board knew of dangerous conditions in the school where she worked caused by excessive mold and bacteria growth); *Lewellen v. Metro. Gov't of Nashville & Davidson Cnty., Tenn.*, 34 F.3d 345 (6th Cir. 1994) (city, county, and board of public education's choice to build a school building beneath a dangerous high-voltage conductor line was merely a tort, not a constitutional violation of bodily integrity); *Goss ex rel. Goss v. Alloway Twp. Sch.*, 790 F. Supp. 2d 221, 227–28 (D.N.J. 2011) (school board's decision to cut costs by designing a cement playground, rather than a safer, non-cement playground, was not a deprivation of the liberty interest in bodily integrity). NSMA cites no cases, from the Seventh Circuit or elsewhere, that indicate otherwise.

Moreover, even if, assuming *arguendo*, NSMA's complaint had identified a deprivation of a cognizable liberty or property interest, its due process claim still could not survive a motion to dismiss, because NSMA has also failed to allege facts showing that the City's decision to implement the Naperville Smart Grid Initiative was arbitrary. Rather, the Naperville Smart Grid Initiative is part of a nationwide effort to modernize the electrical power grid, and the program's goals include increasing energy efficiency, reducing emissions, and lowering electricity consumption costs. *See* 2d Am. Compl., Ex. A, Attach. E, Statement of Project Objectives. Far from being arbitrary, the Naperville Smart Grid Initiative appears to be rationally and appropriately based on energy policy decisions within the purview of local government, and nothing in NSMA's complaint tends to suggest otherwise.

Because NSMA has identified neither a deprivation of a recognized liberty or property interest nor an arbitrary government action, NSMA has failed to state a due process claim under the Fourteenth Amendment arising from the City's decision to install smart meters through the

Naperville Smart Grid Initiative. The Court accordingly grants the City's motion to dismiss Count I of NSMA's Second Amended Complaint.

B. Fourth Amendment Claim

In Count II, NSMA alleges that the City's installation of smart meters capable of measuring the aggregate electricity usage of an individual home in fifteen-minute intervals constitutes an unreasonable search and an invasion of privacy under the Fourth Amendment. The Fourth Amendment provides that "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated," and it has been held to guarantee individual privacy from some forms of government intrusion. U.S. Amend. IV; *see Katz v. United States*, 389 U.S. 347, 350 (1967). The Fourth Amendment, however, only protects privacy interests when a person has both an objectively and subjectively reasonable expectation of privacy. *See Smith v. Maryland*, 442 U.S. 735, 740 (1979). It is well established that "a person has no legitimate expectation of privacy in information he voluntarily turns over to third parties." *Id.* at 743–44; *see Katz*, 389 U.S. at 351 ("What a person knowingly exposes to the public, even in his own home or office, is not a subject of Fourth Amendment protection."). This remains true even if information is provided to another on only a limited or confidential basis. *See United States v. Miller*, 425 U.S. 435, 443 (1976).

As this Court has held previously, NSMA members have no reasonable expectation of privacy in the aggregate measurements of their electrical usage. *See Naperville Smart Meter Awareness*, No. 11-C-9299, 2013 WL 1196580, at *12 (N.D. Ill. Mar. 22, 2013); *see also United States v. McIntyre*, 646 F.3d 1107, 1111–12 (8th Cir. 2011) (holding that there is no reasonable expectation of privacy protected by the Fourth Amendment in residential electricity usage records); *United States v. Hamilton*, 434 F. Supp. 2d 974, 979 (D. Or. 2006) (also holding that

there is no reasonable expectation of privacy in residential electricity records); *United States v. Porco*, 842 F. Supp. 1393, 1398 (D. Wyo. 1994) (same). Data from the City's smart meters shows only total usage and no further details than that. *See* 2d Am. Compl. ¶¶ 35, 39. Because there is no reasonable expectation of privacy in that data as a matter of law, the data is not entitled to protection under the Fourth Amendment.

NSMA nevertheless insists that data showing aggregate residential power usage in fifteen-minute intervals reveals "intimate details about [residents'] personal lives and living habits" and that an inspector of this data could make "assumptions regarding particular appliances and lighting presently in use." 2d Am. Compl. ¶¶ 38, 235. It is not possible, however, to infer from NSMA's allegations that smart-meter data conveys any information in which residents have a reasonable expectation of privacy. For example, suppose a graph displaying a Naperville resident's total power usage for one day shows a peak in usage around 7:00pm. *See id.* ¶ 39 (providing such a graph as an illustrative example). Any imagined explanation for the peak necessarily relies on nothing more than guesses and assumptions, because the electrical usage data itself does not provide any information confirming how many or what types of household appliances or devices are in use at any time. At most, someone inspecting the data might guess that at least one resident had been home at 7:00 pm. But that same guess could also be reasonably made by any member of the public walking by the residence who notices a car in the driveway or lights in the windows—that is not information that can be reasonably expected to remain private.

Additionally, NSMA cannot state a claim under the Fourth Amendment based on an unreasonable search of protected information when the allegations show that no such information has been recorded or obtained. Because NSMA has not alleged that the City is collecting any

information that is more detailed than aggregate usage measurements, or that is otherwise entitled to protection under the Fourth Amendment, NSMA has failed to state a claim for unreasonable search and seizure. The Court accordingly grants Defendant's motion to dismiss Count II of NSMA's Second Amended Complaint.

C. Equal Protection Claim

In Count III, NSMA alleges that the City violated its members' rights to equal protection under the Fourteenth Amendment in two ways. First, NSMA claims that the fees imposed on the class of Naperville residents opting for non-wireless meters impermissibly penalize that class with no rational basis. 2d Am. Compl. ¶ 240. Second, NSMA claims that the City has discriminatorily retaliated against NSMA members by granting requests by non-members to retain analog meters for medical reasons while denying similar requests made by NSMA members. *Id.* ¶ 242.

The Equal Protection Clause of the Fourteenth Amendment provides that government actors may not "deny to any person . . . the equal protection of the laws." U.S. Const. Amend. XIV, § 1. "Local governing bodies can be sued directly under § 1983 . . . where, as here, the action that is alleged to be unconstitutional implements or executes a policy statement, ordinance, regulation, or decision officially adopted and promulgated by that body's officers." *Monell v. Dep't of Social Servs. of City of New York*, 436 U.S. 658, 690 (1978). To state a claim against the City for a violation of equal protection, NSMA must "plead factual content that allows the court to draw the reasonable inference that the City maintained a policy, custom, or practice of intentional discrimination." *McCauley v. City of Chi.*, 671 F.3d 611, 616 (7th Cir. 2011) (internal quotations omitted). Such factual content must be independent of allegations that merely state legal conclusions or recitations of the cause of action. *See id.* at 617–18. If the

factual allegations give rise to an "obvious alternative explanation" for the allegedly discriminatory conduct, then the complaint must be dismissed for failure to state a plausible claim to relief, rather than a merely possible claim. *Id.* at 616 (citing *Iqbal*, 556 U.S. at 682; *Twombly*, 550 U.S. at 557, 567).

Under this analytical framework, to the extent that NSMA's equal protection claim is based on the fees accompanying non-wireless meters, NSMA has failed to state a plausible equal protection claim. Although NSMA asserts that the fees accompanying non-wireless meters are "penalty fees" that "impermissibly create two unequal classes customers . . . without rational basis," *see, e.g.*, 2d Am. Compl. ¶ 240, these are bare legal conclusions that do not alone state a plausible claim for relief. *See McCauley*, 671 F.3d at 617–18 (finding that bare allegations that a city government "has an unwritten custom, practice and policy to afford lesser protection" or has a discriminatory policy that has "no rational basis" are mere legal conclusions that do not suffice to state a claim). Furthermore, NSMA alleges facts that give rise to an obvious alternative explanation for the City's imposition of fees: the one-time $68.35 installation fee corresponds to the increased cost of activating non-wireless meters, and the $24.75 monthly fee covers the additional costs the City incurs by sending a manual meter-reader to read non-wireless meters each month for utility billing purposes. 2d Am. Compl. ¶¶ 178, 181. Because NSMA has not otherwise alleged facts tending to suggest that these fees are a form of intentional discrimination, NSMA has failed to state a plausible equal protection claim arising from the City's imposition of these fees. *See McCauley*, 671 F.3d at 619 (holding that an equal protection claim based on allegations of local government action "entirely consistent with lawful conduct" was properly dismissed at the motion-to-dismiss stage).

The same cannot be said, however, of NSMA's allegations that the City has intentionally discriminated against its members by refusing their requests to retain analog meters for medical reasons, while simultaneously granting similar requests by similarly situated non-members. 2d Am. Compl. ¶ 242. Here, NSMA supports its equal protection claim with specific factual allegations of a practice of dissimilar treatment that has no obvious alternative explanation. *Id.* Additionally, NSMA alleges that representatives of the City undertook these discriminatory acts out of improper personal motives and ill-will towards NSMA, and NSMA supports these allegations with numerous factual examples. *See id.* ¶¶ 198–212. Thus, NSMA has sufficiently stated an equal protection claim based on the City's disparate treatment of members and non-members requesting to retain analog meters for medical reasons. *See Nettles-Bey v. Cars Collision Center, LLC*, No. 11-C-8022, 2013 WL 317047, at *9 (N.D. Ill. Jan. 25, 2013) (denying a motion to dismiss an equal protection claim when plaintiff alleged at least some specific facts "rais[ing] a reasonable expectation that discovery [would] reveal evidence supporting his claim") (internal quotations omitted).

For these reasons, the Court grants the City's motion to dismiss NSMA's equal protection claim to the extent that it is based on the City's decision to charge fees to residents opting to receive non-wireless meters. The Court denies the City's motion to dismiss with respect to the equal protection claim arising from the unfavorable treatment of NSMA members relative to non-members who have been allowed to retain analog meters for medical reasons.

D. ADA Claims

Finally, NSMA claims that the City violated both Titles II and III of the ADA by implementing an electricity services program that discriminates against disabled residents and

failing to accommodate disabled residents with free analog or non-wireless meters. The Court will address each of these claims in turn.

Title II of the ADA provides that "no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity." 42 U.S.C. § 12132. To state a claim under Title II, a plaintiff must allege that (1) he is disabled under the ADA, (2) he is qualified for the benefits he sought, (3) he was denied those benefits or otherwise discriminated against on account of his disability, and (4) the defendant is a public entity. *See Hale v. Pace*, No. 09-C-5131, 2011 WL 1303369, at *4 (N.D. Ill. Mar. 31, 2011); *Torrence v. Advanced Home Care, Inc.*, No. 08-CV-2821, 2009 WL 1444448, at *3 (N.D. Ill. May 21, 2009); *Yates v. John Marshall Law Sch.*, No. 08-C-4127, 2008 WL 4358313, at *4 (N.D. Ill. Sept. 22, 2008); *Herdman v. Univ. of Ill.*, No. 96-C-8025, 1998 WL 774684, at *6 (N.D. Ill. Oct. 28, 1998).

NSMA rests its Title II claim on its allegations that the City denied qualified disabled members the benefits of safe electricity services by denying their requests to retain analog meters and failing to give them a non-wireless meter alternative at no cost. 2d Am. Compl. ¶¶ 252–54. But NSMA has pleaded itself out of its Title II claim by also alleging that disabled NSMA members were denied such benefits not on the basis of disability, but on the basis of NSMA membership.[2] *Id.* ¶ 242. *Cf. Glick v. Walker*, 272 F. App'x 514, 521 (7th Cir. 2008) (holding that the plaintiff had pleaded himself out of his Title II ADA claim when he alleged that he was denied access to group therapy not because of any disabilities, but because of his security status); *Torrence*, 2009 WL 1444448, at *3 (holding that the plaintiff had plead herself out of her Title II

[2] The allegation that the City discriminated against NSMA members on the basis of their membership itself is, in fact, the foundation of NSMA's equal protection class-of-one claim, discussed *supra* in Part II.C.

ADA claim when she alleged that she was denied home healthcare benefits not because of any disabilities, but because of her complaints that a healthcare provider had sexually harassed her). Because NSMA has pleaded itself out of its Title II claim, the claim must be dismissed.

NSMA has similarly pleaded itself out of its Title III claim. Title III of the ADA only applies to prohibit discrimination by private entities, and not by public entities. *See* 42 U.S.C. §§ 12181–89. As a unit of local government, the City is a public entity. *See* 2d Am. Compl. ¶¶ 13, 15; 42 U.S.C. § 12181(6) ("The term 'private entity' means any entity other than a public entity (as defined in section 12131(1) of this title)."); 42 U.S.C. § 12161(1)(A) ("The term 'public entity' means any State or local government."). Therefore, NSMA cannot bring a claim against the City under Title III of the ADA. *See Baaske v. City of Rolling Meadows*, 191 F. Supp. 2d 1009, 1013 (N.D. Ill. 2002) (holding that Title III of the ADA does not apply to public entities, including city governments).

For these reasons, NSMA has failed to state a claim in Count IV by pleading itself out of court with regard to its Title II and Title III ADA claims. The Court accordingly grants the City's motion to dismiss Count IV pursuant to Rule 12(b)(6).

III. Motion for Sanctions

The City has also moved for sanctions against NSMA pursuant to Rule 11. Rule 11(b) provides that, by signing or filing any court paper, an attorney certifies that the paper "is not being presented for any improper purpose," that the claims "are warranted by existing law or by a nonfrivolous argument for extending, modifying, or reversing existing law," and that "the factual contentions have evidentiary support." Fed. R. Civ. P. 11(b)(1)–(3). The City contends that NSMA violated Rule 11 by filing a Second Amended Complaint for an improper purpose, advancing unwarranted legal arguments, and failing to allege facts with evidentiary support.

"[A]n attorney need not advance a winning argument to avoid Rule 11 sanctions." *LaSalle Nat. Bank of Chi. v. Cnty. of DuPage*, 10 F.3d 1333, 1338 (7th Cir. 1993). "Sanctions do not inevitably flow from being wrong on the law." *Harlyn Sales Corp. Profit Sharing Plan v. Kemper Fin. Servs., Inc.*, 9 F.3d 1263, 1270 (7th Cir. 1993). Furthermore, a district court has "considerable discretion . . . in analyzing the case, the behavior of the attorneys, and the applicable law[ ] to determine if the requirements of Rule 11 have been met." *Id.*

Nothing in the proceedings thus far indicates that this lawsuit has been filed for an improper purpose within the meaning Rule 11(b)(1). Rather, the stated purpose of the suit—to obtain injunctive relief aimed at increasing the number of alternatives to smart-meter installation in Naperville homes—appears legitimate, given NSMA's stated organizational purpose "to advocate for a fiscally responsible and safe utility meter solution in Naperville, Illinois." 2d Am. Compl. ¶ 8. Furthermore, although the Court finds that many of the claims in NSMA's Second Amended Complaint are insufficient for purposes of Rule 12(b)(6), as discussed *supra* in Part II, NSMA's claims present many unusual or novel questions of law and are not merely frivolous claims warranting sanctions under Rule 11(b)(2). *Cf. LaSalle*, 10 F.3d at 1338 (affirming the district court's decision to deny a motion for sanctions at the motion-to-dismiss stage when "the case was factually complex and implicated legal theories in which the law, if not unsettled in terms of the basic doctrine, was not susceptible to easy application"). NSMA's Second Amended Complaint also satisfies the requirements of Rule 11(b)(3) because its factual allegations arguably had evidentiary support as shown by the inclusion of over two hundred substantive paragraphs and more than a dozen attached exhibits. *See generally* 2d Am. Compl.

Accordingly, the Court finds that NSMA has not violated the requirements of Rule 11 by filing its Second Amended Complaint. The Court therefore denies the City's motion for sanctions.

Conclusion

For the reasons provided herein, the Court grants in part and denies in part the City's motion to dismiss pursuant to Rule 12(b)(6) [77]. The Court grants the City's motion to dismiss Counts I, II, and IV of NSMA's Second Amended Complaint. The Court denies the City's motion to dismiss Count III to the extent that it alleges an equal protection violation based on the unfavorable treatment NSMA members have received relative to non-members who have been allowed to retain analog meters for reasonable medical reasons. In all other respects, Count III of NSMA's Second Amended Complaint is dismissed. The Court also denies the City's motion for sanctions [84].

SO ORDERED **ENTER:** 9/25/14

JOHN Z. LEE
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

NAPERVILLE SMART METER AWARENESS, an Illinois not-for-profit corporation,	)	
Plaintiff,	)	**11 C 9299**
v.	)	**Judge John Z. Lee**
CITY OF NAPERVILLE,	)	
Defendant.	)	

MEMORANDUM OPINION AND ORDER

Naperville Smart Meter Awareness ("NSMA"), an Illinois not-for-profit corporation, has sued the City of Naperville ("the City") over the installation of smart meters in its members' homes. NSMA has moved for leave to file its Third Amended Complaint for Injunctive Relief in accordance with Federal Rule of Civil Procedure 15(a)(2). NSMA reasserts its claims pursuant to 42 U.S.C. § 1983, alleging violations of its members' rights to freedom from unreasonable search under the Fourth Amendment (Count I), and equal protection of the laws under the Fourteenth Amendment (Count III). NSMA also alleges violations of its members' rights to privacy and freedom from unreasonable search under the Illinois Constitution (Count II). For the following reasons, the Court grants in part and denies in part NSMA's motion for leave to file its Third Amended Complaint.

Factual Background

What follows is a brief summary of the allegations set forth in the proposed Third Amended Complaint.

NSMA is an Illinois not-for-profit corporation whose stated mission is to "educate, engage and empower families, friends and neighbors to advocate for a fiscally responsible and safe utility meter solution in Naperville, Illinois." 3d Am. Compl. ¶ 8. In Naperville, all residential electrical utility services are provided by the Department of Public Utilities-Electric, a company owned and operated by the local city government. *Id.* ¶ 16. In January 2012, the Naperville Department of Public Utilities-Electric began replacing its customers' analog electricity meters with smart meters as part of a local program called the Naperville Smart Grid Initiative. *Id.* ¶¶ 25, 155. The Naperville Smart Grid Initiative is funded in part by the U.S. Department of Energy, which received $4.5 billion of federal tax dollars under the American Recovery and Reinvestment Act of 2009 for the purpose of modernizing the nation's electrical power grid. *Id.* ¶ 25.

Like analog meters, smart meters can measure customers' total residential usage for monthly billing purposes. *Id.* ¶¶ 46–47. Unlike analog meters, smart meters are also equipped with wireless radio transmitters that, when activated, send usage data via radio-frequency waves to nearby neighborhood "network access points," which then relay usage data to Naperville's Department of Public Utilities-Electric. *Id.* ¶¶ 41–42. While analog meters are capable of measuring only total accumulated consumption of energy ("total kilowatt hours used over a month"), smart meters measure aggregate electricity usage much more frequently—in intervals of fifteen minutes that "include real power in kWH and reactive power in kVARh." *Id.* ¶¶ 31, 40. Smart meters have the ability to collect data consisting of "granular, fine-grained, high-frequency type of energy usage measurements" (so-called "Interval Data") totaling to "over thousands of intervals per month." *Id.* ¶¶ 35, 43.

NSMA alleges that Interval Data allows the City to collect more than just the aggregate data necessary for billing purposes previously available through analog meters. *Id.* ¶¶ 35, 44. The

City also collects Interval Data from participants who voluntarily choose to partake in the Demand Response Program, which promotes the use of less electricity during periods of high demand. *Id.* ¶ 58.

As an alternative to having new smart meters installed in their homes, Naperville residents may opt to have their old analog meters replaced with "non-wireless meters." *Id.* ¶ 148. These "non-wireless meter alternatives" are essentially smart meters with their radio transmitters deactivated so that they emit no radio-frequency waves and must be read manually by a reader meter each month. *See id.* ¶ 149. Non-wireless meters are able to collect "the same highly detailed Interval Data" as smart meters. *Id.* Residents who choose the non-wireless meter alternative must pay a one-time installation fee of $68.35, plus an additional monthly fee of $24.75. *Id.* ¶ 150. NSMA describes the non-wireless meters as a "marginally lesser harm from among the two unsatisfactory alternatives." *Id.* ¶ 152.

NSMA asserts a number of concerns arising from the implementation of smart meters. Most notably, because smart meters are capable of taking data measurements in frequent, discrete increments, NSMA alleges that the smart meters present privacy risks that analog meters do not. *Id.* ¶ 73. Specifically, NSMA claims that a home's smart meter data history is capable of revealing "intimate details about the personal lives and living habits of NSMA members" and that an inspector of this detailed history can determine "when [residents] are away from home or asleep . . . and [when they are using] different appliance[s]." *Id.* ¶¶ 74, 88, 90. NSMA posits that through the use of mechanisms such as "energy disaggregation software" and "intuitive observation," the City—and by extension law enforcement personnel—is capable of conducting an "intrusive search of the intimate details of NSMA members' in-home activities" that goes beyond assumptions or guesses. *Id.* ¶¶ 64, 78, 81. NSMA also alleges that the radio-frequency waves that

smart meters emit present health risks to Naperville residents. In support, it claims that radio-frequency waves have been "known to cause headaches, heart palpitations, ringing in the ears, anxiety, sleep disorders, depression, and other symptoms, particularly in individuals who suffer from electromagnetic sensitivity." *Id.* ¶ 123.

Earlier in this litigation, the Court granted the City's motion to dismiss NSMA's First Amended Complaint with leave to amend some of the counts therein. After so amending, the City again moved to dismiss the claims in the Second Amended Complaint. The Court granted in part and denied in part the City's second motion to dismiss NSMA's Second Amended Complaint.

NSMA now moves for leave to file a Third Amended Complaint. In Count I, NSMA alleges the City's collection of detailed smart meter data constitutes an unreasonable search of information under the Fourth Amendment. *Id.* ¶ 197. In Count II, NSMA also alleges that the City's collection of detailed smart meter data constitutes an unreasonable search and invasion of privacy under Article I, § 6 of the Illinois Constitution of 1970. *Id.* ¶¶ 214–15. In Count III, NSMA alleges that the City has violated its members' right to equal protection both by singling out NSMA members for an additional level of unequal treatment stemming from retaliatory motives, as well as by denying requests by NSMA members to retain analog meters for medical reasons while granting similar requests made by non-members. *Id.* ¶¶ 227–28. NSMA seeks an injunction ordering the City to make analog and non-wireless meters available at no additional cost upon customer request. *Id.* Prayer for Relief ¶ 1. Because the City does not oppose the motion with regard to Count III, the Court will solely address Counts I and II.

Legal Standard

Under the Federal Rules of Civil Procedure, a party may amend a complaint "with the opposing party's written consent or the court's leave," which "should [be] freely give[n]" when

"justice so requires." Fed. R. Civ. P. 15(a)(2); *see Soltys v. Costello*, 520 F.3d 737, 743 (7th Cir. 2008). Although Rule 15 provides for a liberal pleading standard, a district court may deny leave to amend for undue delay, bad faith, dilatory motive, prejudice, or futility. *See Foman v. Davis*, 371 U.S. 178, 182 (1962).

"A district court does not abuse its discretion in denying leave to amend if the proposed repleading would be futile . . . ." *Garcia v. City of Chi.*, 24 F.3d 966, 970 (7th Cir. 1994) (internal citations omitted); *see also Tribble v. Evangelides*, 670 F.3d 753, 761 (7th Cir. 2012) ("District courts have broad discretion to deny leave to amend . . . where the amendment would be futile."). Futile repleadings include restating the same facts using different language, reasserting claims previously determined, and the inability to survive a motion to dismiss. *See Garcia*, 24 F.3d at 970 (internal citations omitted); *Bower v. Jones*, 978 F.2d 1004, 1008 (7th Cir. 1992). The Court may also deny leave to amend for repeated failure to cure deficiencies by amendments previously allowed—such as failing to state a cognizable claim for relief. *See Foman*, 371 U.S. at 182; *Adams v. City of Indianapolis*, 742 F.3d 720, 734 (7th Cir. 2014) (denial of motion to amend due to futility where the amended complaint was still "pleaded in wholly conclusory terms" and failed the "plausibility threshold.").

When the basis for denial is futility, the Court applies Rule 12(b)(6) to determine whether the proposed amended complaint fails to state a claim for relief. *See Gen. Elec. Capital Corp. v. Lease Resolution Corp.*, 128 F.3d 1074, 1085 (7th Cir. 1997). Under the federal notice pleading standard, a "plaintiff's complaint need only provide a short and plain statement of the claim showing that the pleader is entitled to relief, sufficient to provide the defendant with fair notice of the claim and its basis." *Tamayo v. Blagojevich*, 526 F.3d 1074, 1081 (7th Cir. 2008) (internal quotations omitted). The Court must accept as true all well-pleaded allegations in the complaint

and draw all possible inferences in NSMA's favor. *Id.* Mere legal conclusions, however, "are not entitled to the assumption of truth." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). NSMA's Third Amended Complaint must "'state a claim to relief that is plausible on its face . . . [and] above the speculative level.'" *Id.* at 678 (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555, 570 (2007)).

Analysis

I. Fourth Amendment Claim (Count I)

In the proposed Third Amended Complaint, NSMA seeks to remedy the defects that had caused the Court to dismiss the past two attempts to allege Fourth Amendment violations. "District courts may refuse to entertain a proposed amendment on futility grounds when the new pleading would not survive a motion to dismiss." *McCoy v. Iberdrola Renewables, Inc.*, 760 F.3d 674, 685 (7th Cir. 2014) (quoting *Gandhi v. Sitara Capital Mgmt., LLC*, 721 F.3d 865, 869 (7th Cir. 2013)) (internal quotations omitted).

In its prior order granting the City's motion to dismiss NSMA's First Amended Complaint, the Court held that NSMA members have no reasonable expectation of privacy under the Fourth Amendment in the aggregate measurements of their electrical usage—regardless of whether that aggregate usage is measured monthly, weekly, daily, hourly, or in fifteen-minute increments. *See Naperville Smart Meter Awareness*, No. 11-C-9299, 2013 WL 1196580, at *12 (N.D. Ill. Mar. 22, 2013). The Court found that NSMA's "assertions [did] not support a reasonable inference that the type of nonaggregate information purportedly capable of being collected by smart meters [was] actually being captured by [the City]." *Id.* at *13. NSMA, nevertheless, in its Second Amended Complaint, insisted that data showing aggregate residential power usage in fifteen-minute intervals reveals "intimate details about [residents'] personal lives and living habits." *Naperville*

Smart Meter Awareness, No. 11-C-9299, 2014 WL 4783823, at *6 (N.D. Ill. Sept. 25, 2014). The Court, however, in granting in part and denying in part the City's motion to dismiss NSMA's Second Amended Complaint, held, once again, that the aggregate data measured in fifteen-minute intervals is not entitled to protection under the Fourth Amendment. *See id.* The Court found that "[a]ny imagined explanation for [a] peak [in total power usage] necessarily relies on nothing more than guesses and assumptions, [as] the electrical usage data itself does not provide any information confirming how many or what types of household appliances or devices are in use at any time." *Id.*

NSMA now alleges the availability of new "energy disaggregation" software technology "allows for the breakdown of Interval Data collected via a smart meter into appliance-level itemized consumption," enabling the City to garner information beyond the aggregate data to which its members have consented. 3d Am. Compl. ¶ 75. NSMA further asserts that, while the City has chosen to collect data on the 15-minute interval, the smart meter is capable of collecting Interval Data in 5, 15, 30, or 60-minute intervals. *Id.* ¶ 38. Therefore, at least according to NSMA, because smart meters can now accumulate "a history of energy, power, and reactive power over thousands of intervals per month . . . , there is far more information here than an analog meter is capable of providing via its single monthly reading of energy." *Id.* ¶ 43. With these additional allegations, NSMA again alleges that the installation and use of smart meters by the City amounts to an unreasonable search of its members' homes under the Fourth Amendment.

The Fourth Amendment provides that "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated," and it has been held to guarantee individual privacy from some forms of government intrusion. U.S. Amend. IV; *see Katz v. United States*, 389 U.S. 347, 350 (1967). However, "a

person has no legitimate expectation of privacy in information he voluntarily turns over to third parties." *Smith v. Maryland*, 442 U.S. 735, 743–44 (1979); *see also United States v. McIntyre*, 646 F.3d 1107, 1111–12 (8th Cir. 2011) (holding that there is no reasonable expectation of privacy in residential electricity usage records). To state a Fourth Amendment violation, NSMA must allege—beyond mere capability—that the City has gathered more than just aggregate measurements of electrical usage.

After reviewing the proposed Third Amended Complaint, the Court concludes that NSMA still falls short of alleging a legally cognizable Fourth Amendment claim. Even if smart meters are capable of capturing more than the aggregate data previously presented, as NSMA alleges, NSMA still has not alleged that the City is *actually* collecting and using the data in a way that would amount to an unreasonable search or invasion of privacy. Put another way, the purported ability of smart meters to provide a "constant conversation," *see* 3d Am. Compl. ¶ 72, between the City and its customers does not establish beyond mere "speculation" that the City has or will "plausibly" use such information in an unconstitutional manner. *See Adams*, 742 F.3d at 734.

In an attempt to fill this lacuna, NSMA claims that, using "disaggregation algorithms" currently available in the marketplace, the City could ascertain the level of detail that NSMA fears. 3d Am. Compl. ¶ 81. NSMA alleges there is "no restriction . . . to prevent the City from utilizing a disaggregation service . . . [which] would allow an even more intrusive search of the intimate details of NSMA members' in-home activities." *Id.* ¶ 78. But the fact that the City theoretically could employ this technology (if indeed it can) to glean more detailed information about a user's personal life does not in and of itself constitute an allegation—or lead to a reasonable inference—that the City is doing that here. In the same way, NSMA alleges the City's collection of Interval Data exceeds "what is necessary for customer billing purposes" without

pointing to any new information that suggests that the City is disaggregating and analyzing the information to do so. *Id.* ¶ 49.

For the same reasons, NSMA's reliance upon the "electrical power consumption" graphs is unavailing. The graphs presented by NSMA merely restate that smart meters are capable of capturing discrete details of behavior. *See id.* ¶¶ 83, 85–86. In explaining the graphs, NSMA alleges that the "[i]ncreased granularity of Interval Data provides more than ample detail for determining home occupancy, personal behaviors, and appliance usage." *Id.* ¶ 88. But here too NSMA incorrectly equates possibility with plausibility. *See Iqbal*, 556 U.S. at 678 ("The plausibility standard is not akin to a probability requirement, but it asks for more than a sheer possibility that a defendant has acted unlawfully.") (internal quotations omitted).

NSMA's attempt to hinge a Fourth Amendment claim on theoretic possibilities without presenting any allegations about what the City is actually doing with the data is futile. Because NSMA has failed to allege that smart meters are relaying detailed information beyond aggregate data about members' electricity usage to the City and that the City is disaggregating the data to analyze the private lives of its residents, there is no cognizable claim upon which relief can be granted.

Some final points, NSMA's claim that its members have not consented to the "two-way, real-time communication between NSMA members and the City through use of smart meters" is a moot point. *Id.* ¶¶ 91–105. NSMA members are deemed to have consented through their usage of electricity services knowingly supplied by the City. *See Smith*, 442 U.S. at 743–44; *see also United States v. Flores-Lopez*, 670 F.3d 803, 807 (7th Cir. 2012) ("[B]y subscribing to the telephone service the user of the phone is deemed to surrender any privacy interest he may have had in his phone number."). And, although NSMA claims that it has no "meaningful choice" in

the matter, *see* 3d Am. Compl. ¶¶ 152, 204, this presupposes that the City's deployment of smart meters violates the constitutional rights of its citizens—a claim that NSMA's current allegations do not support. Lastly, the City's Demand Response Program does not change the above finding of consent as it is solely a voluntary program, and does not collect any information beyond Interval Data measurements. *Id.* ¶¶ 56–58.

For these reasons, the Court concludes that NSMA has failed to satisfy the Rule 12(b)(6) pleading requirements with respect to the Fourth Amendment claim (Count I), and thus the motion for leave to file the Third Amended Complaint with respect to that claim is denied.

II. Article I § 6, Illinois Constitution Claim (Count II)

NSMA also alleges that the City's installation of smart meters capable of capturing Interval Data constitutes an unreasonable search and invasion of privacy under the Illinois Constitution of 1970. Article I, § 6 of the Illinois Constitution provides that: "The people shall have the right to be secure in their persons, houses, papers and other possessions against unreasonable searches, seizures, invasions of privacy or interceptions of communications by eavesdropping devices or other means." Ill. Const. art. I, § 6. NSMA alleges that, because the Illinois Constitution contains an express privacy clause, it should not be considered co-extensive with the Fourth Amendment claim. 3d Am. Compl. ¶ 210.

NSMA's Fourth Amendment and Illinois Constitution claim, however, both hinge on the same factual core: that the information gathered and analyzed by the City through smart meters is more than just the aggregate measurements of electricity usage. *See id.* ¶ 7 ("The addition of a count under the Illinois Constitution . . . does not raise any completely new . . . cause of action, but rather is intended to compliment and bolster [the] claim under the Fourth Amendment."). Whether this information is used to allege an invasion of privacy or unreasonable search claim does not

change the fact that they depend on the same means of proof. Because the NSMA has failed to point to any new valid factual allegations to support that there has been a search of its members' homes or an impermissible invasion of privacy through the City's use of smart meters, NSMA's motion to file leave to assert a claim under the Illinois Constitution likewise is denied.

III. Motion for Leave to File Counts I and II Is Denied with Prejudice

This now is NSMA's fourth attempt to state legally cognizable claims under the Fourth Amendment (Count I) and Illinois Constitution Claim (Count II). NSMA's proposed Third Amended Complaint echoes the allegations in the First and Second Amended Complaints without advancing new substantive facts sufficient to withstand a motion to dismiss.

Where "the plaintiff has repeatedly failed to remedy the same deficiency, the district court [does] not abuse its discretion by dismissing the claim with prejudice." *Airborne Beepers & Video, Inc. v. AT&T Mobility LLC*, 499 F.3d 663, 667 (7th Cir. 2007) (internal quotations omitted); *see also Looper Maint. Serv. Inc. v. City of Indianapolis*, 197 F.3d 908, 914 (7th Cir. 1999) (holding that, where a plaintiff was given three opportunities to amend his complaint, and was still unable to state a claim for relief, the district court did not abuse its discretion in denying leave to amend); *Runnion ex rel. Runnion v. Girl Scouts of Greater Chi. & Nw. Ind.*, No. 14-1729, 2015 WL 2151851, at *5 (7th Cir. May 8, 2015) ("Where it is clear that the defect cannot be corrected so that amendment is futile, it might do no harm to deny leave to amend and to enter an immediate final judgment . . . ."). Because the new iteration of the complaint, like the First and Second Amended Complaint, fails to move the unreasonable search and invasion of privacy claims across the plausibility threshold, the Court denies NSMA's motion for leave to file a Third Amended Complaint with regard to Counts I and II with prejudice.

Conclusion

The Court grants in part and denies in part NSMA's motion for leave to file a Third Amended Complaint [102]. NSMA's motion for leave to file a Third Amended Complaint asserting an unreasonable search and invasion of privacy claim under the U.S. Constitution (Count I) and the Illinois Constitution (Count II) is denied with prejudice. Because the City did not oppose the motion with regard to NSMA's equal protection claim, the Court grants the motion solely as to Count III.

SO ORDERED **ENTER:** 7/7/15

JOHN Z. LEE
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE
NORTHERN DISTRICT OF ILLINOIS

Naperville Smart Meter Awareness,

Plaintiff(s),

v.

City of Naperville,

Defendant(s).

Case No. 11-cv-9299
Judge John Z. Lee

JUDGMENT IN A CIVIL CASE

Judgment is hereby entered (check appropriate box):

☐ in favor of plaintiff(s)
and against defendant(s)
in the amount of $,

which ☐ includes pre–judgment interest.
☐ does not include pre–judgment interest.

Post-judgment interest accrues on that amount at the rate provided by law from the date of this judgment.

Plaintiff(s) shall recover costs from defendant(s).

☒ in favor of defendant(s) City of Naperville
and against plaintiff(s) Naperville Smart Meter Awareness

.

Defendant(s) shall recover costs from plaintiff(s).

☐ other:

This action was *(check one)*:

☐ tried by a jury with Judge presiding, and the jury has rendered a verdict.
☐ tried by Judge without a jury and the above decision was reached.
☒ decided by Judge John Z. Lee on a motion for summary judgment.

Date: 9/26/2016

Thomas G. Bruton, Clerk of Court

Carmen Acevedo , Deputy Clerk

Certificate of Service

A copy of the foregoing was filed electronically with the Clerk of Court to be served by operation of the Court's electronic filing system upon the following persons this 21st day of February 2017.

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Deputy Legal Director
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/s/ *Mark Sableman*