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BEFORE THE STATE CORPORATION COMMISSION
OF THE STATE OF KANSAS

IN THE MATTER OF A COMPLAINT AGAINST WESTAR BY DANIEL F. SMALLEY	Docket No. 18-WSEE-209-COM

LEGAL MEMORANDUM

All I submit here are in reference to my Pleading on 01-08-2019

Human rights violations are among the root **causes** of every form of insecurity and instability. Failure to ensure good governance, the equitable rule of law and inclusive social justice and development can trigger conflict, as well as economic, political and social turmoil.

Human rights violations occur when actions by state (or non-state) actors abuse, ignore, or deny basic **human rights** (including civil, political, cultural, social, and economic **rights**)

Human Right # 12. The **Right** to Privacy. No one shall be subjected to arbitrary interference with his privacy, family, home or correspondence, nor to attacks upon his honour and reputation. Everyone has the **right** to the protection of the law against such interference or attacks.

United Nations High Commissioner for Human Rights (OHCHR)

International Covenant on Civil and Political Rights

Adopted and opened for signature, ratification and accession by General Assembly resolution 2200A (XXI) of 16 December 1966

entry into force 23 March 1976, in accordance with Article 49

PART II *Article 2*

3. Each State Party to the present Covenant undertakes:

(a) To ensure that any person whose rights or freedoms as herein recognized are violated shall have an effective remedy, notwithstanding that the violation has been committed by persons acting in an official capacity;

(b) To ensure that any person claiming such a remedy shall have his right thereto determined by competent judicial, administrative or legislative authorities, or by any other competent authority provided for by the legal system of the State, and to develop the possibilities of judicial remedy;

(c) To ensure that the competent authorities shall enforce such remedies when granted.

The **U.S. ratified the ICCPR** in 1992. Upon **ratification, the ICCPR** became the "supreme law of the land" under the Supremacy Clause of the **U.S.** Constitution, which gives acceded treaties the status of federal law.

The **right to privacy** is in the Fourth Amendment to the US Constitution, which states, "The **right** of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath

Natural rights are those that are not dependent on the laws or customs of any particular culture or government, and so are universal and inalienable (they cannot be repealed or restrained by **human** laws). ... The concept of **natural** law is related to the concept of **natural rights**.

The Civil Rights Act of 1871 is a federal statute, numbered 42 U.S.C. § **1983**, that allows people to sue the government for civil rights violations. It applies when someone acting "under color of" state-level or local law has deprived a person of rights created by the U.S. Constitution or federal statutes.

To prevail in a **claim** under **section 1983**, the plaintiff must prove two critical points: a person subjected the plaintiff to conduct that occurred under color of state law, and this conduct deprived the plaintiff of rights, privileges, or immunities guaranteed under federal law or the U.S. Constitution.

"**Interference with personal liberty**" means committing or threatening physical abuse, harassment, intimidation or willful deprivation so as to compel another to engage in conduct from which she or he has a **right to** abstain or to refrain from conduct in which she or he has a **right to** engage.

What is predatory behavior?

Overt **behavior** is **behavior** on a plan. A person decides he or she is going to do something and then does it. ... The third kind of **behavior** is opportunistic and could even be

described as **predatory**. With this kind of **behavior**, the individual sees an opportunity to take advantage of a person or a situation and then does so.Sep 7, 2012

While both the 2005 and 2007 faux energy bills were codified into public laws, NO part of them creates a federal law pertaining to individual consumers or dictating that the public must be forced to comply with provisions of SMART Grid

Westar by their own admission, stated that the KCC granted tariffs by order for recovery for the said smart meters. That is in clear violation of the 2005 ENERGY POLICY ACT where it is clearly stated these meters were to be free of charge.

66-101b. Electric public utilities; efficient and sufficient service; just and reasonable rates. Every electric public utility governed by this act shall be required to furnish reasonably efficient and sufficient service and facilities for the use of any and all products or services rendered, furnished, supplied or produced by such electric public utility, to establish just and reasonable rates, charges and exactions and to make just and reasonable rules, classifications and regulations. Every unjust or unreasonably discriminatory or unduly preferential rule, regulation, classification, rate, charge or exaction is prohibited and is unlawful and void. The commission shall have the power, after notice and hearing in accordance with the provisions of the Kansas administrative procedure act, to require all electric public utilities governed by this act to establish and maintain just and reasonable rates when the same are reasonably necessary in order to maintain reasonably sufficient and efficient service from such electric public utilities.

History: L. 1911, ch. 238, § 10; R.S. 1923, 66-107; L. 1985, ch. 225, § 13; L. 1988, ch. 356, § 219; L. 1995, ch. 10, § 1; July 1.

In the MOTION TO DISMISS OF WESTAR ENERGY, INC. Docket No. 15-WSEE-211-COM 3. None of the allegations made by Ms. Reihm constitute a violation of any law, regulation, or Westar's Electric Tariffs (Tariffs). There is no provision in Westar's Tariffs that prevent Westar from utilizing an AMI meter instead of a standard meter. Westar is simply required to provide electric service to any customer in its territory that requests service. In fact, the Commission has

approved Westar's recovery of the costs associated with the AMI meters thereby finding that Westar's installation of the AMI meters was reasonable and prudent. See Docket No. 12-WSEE-112-RTS (Westar's last general rate case where costs associated with SmartStar Lawrence were included in rates) and Docket No. 11-WSEE-610-ACT (order approving accounting authority order allowing Westar to defer costs associated with SmartStar Lawrence for recovery in rates).

In the Matter of the Complaint Against Kansas City Power & Light Company by Keith S. Carpenter. Docket No. 15-KCPE-474-COM , The Commission also ordered that this Complaint be consolidated with the complaints under Docket Nos. 15-KCPE-265-COM and 15- WSEE-211-COM. That includes WESTAR

ANSWER AND MOTION TO DISMSS OF KANSAS CITY POWER & LIGHT COMPANY

The utility states that "The new AMI meter is not capable of communicating with any devices inside the residence or measuring usage from any individual equipment inside the residence."

♣ The new AMI meter will allow transmission of energy usage data in the same manner as Complainant's current AMR meter, deployed in the mid-1990s. ♣ Complainant's current AMR meter has a CellNet AMR module installed that transmits usage via RF signals to the Company's wireless network. The new AMI meter has similar capability; however, it can also receive signals from the Company's RF network for limited purposes. This two-way communication enables the Company to have better outage management information than with the CellNet system. ♣ The new AMI meter is not capable of communicating with any devices inside the residence or measuring usage from any individual equipment inside the residence. The primary purpose of the meter remains transmission of total customer energy usage data to the Company.

National Center for Biotechnology Information;

https://www.ncbi.nlm.nih.gov/pmc/articles/PMC3571813/

PubMed Central® (PMC) is a free full-text archive of biomedical and life sciences journal literature at the U.S. National Institutes of Health's National Library of Medicine (NIH/NLM)

Sensors (Basel). 2012 Dec; 12(12): 16838–16866.

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PMID: 23223081

Abstract

Appliance Load Monitoring (ALM) is essential for energy management solutions, allowing them to obtain appliance-specific energy consumption statistics that can further be used to devise load scheduling strategies for optimal energy utilization.

According to Electronics Weekly.com

An article By Steve Bush 12th October 2017

https://www.electronicsweekly.com/news/products/sensors-products/smart-meter-identifies-household-appliance-harmonics-2017-10/

Smart meter identifies household appliance by harmonics

UK consultancy 42 Technology is identifying household appliances through their mains harmonics and time-domain behavior – the technique is good enough to tell if a vacuum cleaner is full or empty.

Evidence shows that said utility(s) violated, K.S.A. 66-101 b

By false or misleading statements concerning smart meters. This information was known as early as 2012 proving this fact. The said utility(s) committed an unreasonable, unfair and unjust act.

66-101b. Electric public utilities; efficient and sufficient service; just and reasonable rates. Every electric public utility governed by this act shall be required to furnish reasonably efficient and sufficient service and facilities for the use of any and all products or services rendered, furnished, supplied or produced by such electric public utility, to establish just and reasonable rates, charges and exactions and to make just and reasonable rules, classifications and regulations. Every unjust or unreasonably discriminatory or unduly preferential rule, regulation, classification, rate, charge or exaction is prohibited and is unlawful and void. The commission shall have the power, after notice and hearing in accordance with the provisions of the Kansas administrative procedure act, to require all electric public utilities governed by this act to establish and maintain just and reasonable rates when the same are reasonably necessary in order to maintain reasonably sufficient and efficient service from such electric public utilities.

History: L. 1911, ch. 238, § 10; R.S. 1923, 66-107; L. 1985, ch. 225, § 13; L. 1988, ch. 356, § 219; L. 1995, ch. 10, § 1; July 1.

Specifically, the Commission is granted broad authority to review formal complaints. See K.S.A. 66-101 e ("Upon a complaint in writing made against any electric public utility governed by this act that any of the rates or rules and regulations of such electric public utility are in any respect unreasonable, unfair, unjust, unjustly discriminatory or unduly preferential, or both, or that any regulations, practice or act whatsoever affecting or relating to any service performed or to be performed by such electric public utility for the public, is in any respect unreasonable, unfair, unjust, unreasonably inefficient or insufficient, unjustly discriminatory or unduly preferential, or

that any service performed or to be performed by such electric public utility for the public is unreasonably inadequate, inefficient, unduly insufficient or cannot be obtained, the commission may proceed with or without notice, to make such investigation as it deems necessary."). 10 K.S.A. 66-lOlh. 11 Kaufman v. State Dep't of Soc. & Rehabilitative Servs., 248 Kan. 951, 954, 811P.2d876, 879 (1991).

66-117. (f) Has been violated by the said utility(s) and the state by not reducing the tariff for tax after the 2018 Federal tax savings of 14%, going from 35% to 21%, equaling 74 million dollars**.**
But the state did not adjust the tariff, so I am still paying the 35% tax-based tariff. Thereby enriching the said utility(s) unfairly.

66-117. Change of rates or schedules; procedure; effective date; higher rates of return in certain cases; hearing; property tax surcharge authorized.

(f) Whenever, after the effective date of this act, an electric public utility, a natural gas public utility or a combination thereof, files tariffs reflecting a surcharge on the utility's bills for utility service designed to collect the annual increase in expense charged on its books and records for ad valorem taxes, such utility shall report annually to the state corporation commission the changes in expense charged for ad valorem taxes. For purposes of this section, such amounts charged to expense on the books and records of the utility may be estimated once the total property tax payment is known. If found necessary by the commission or the utility, the utility shall file tariffs which reflect the change as a revision to the surcharge. Upon a showing that the surcharge is applied to bills in a reasonable manner

and is calculated to substantially collect the increase in ad valorem tax expense charged on the books and records of the utility, or reduce any existing surcharge based upon a decrease in ad valorem tax expense incurred on the books and records of the utility, the commission shall approve such tariffs within 30 days of the filing. Any over or under collection of the actual ad valorem tax increase charged to expense on the books of the utility shall be either credited or collected through the surcharge in subsequent periods. The establishment of a surcharge under this section shall not be deemed to be a rate increase for purposes of this act. The net effect of any surcharges established under this section shall be included by the commission in the establishment of base rates in any subsequent rate case filed by the utility.

USEnergyPolicyActof2005
H.R.6—373
(f) FEDERAL ENCOURAGEMENT OF DEMAND RESPONSE DEVICES.—It is the policy of the United States that time-based pricing and other forms of demand response, whereby electricity customers are provided with electricity price signals and the ability to benefit by responding to them, shall be encouraged, the deployment of such technology and devices that enable electricity customers to participate in such pricing and demand response systems shall be facilitated, and unnecessary barriers to demand response participation in energy, capacity and ancillary service markets shall be eliminated. It is further the policy of the United States that the benefits of such demand response that accrue to those not deploying such technology and devices, but who are part of the same regional electricity entity, shall be recognized.

This tell me that the utility(s) can consent as to whether they want to participate or not.

But the utility(s) and the state tell me I don't have the same legal authority.

Article VI - U.S. Constitution

All Debts contracted and Engagements entered into, before the Adoption of this Constitution, shall be as valid against the United States under this Constitution, as under the Confederation.

This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any state to the Contrary notwithstanding.

The Senators and Representatives before mentioned, and the Members of the several State Legislatures, and all executive and judicial Officers, both of the United States and of the several States, shall be bound by Oath or Affirmation, to support this Constitution; but no religious Test shall ever be required as a Qualification to any Office or public Trust under the United States.

Annotation 2 - Article VI

The Operation of the Supremacy Clause

When Congress legislates pursuant to its delegated powers, conflicting state law and policy must yield. Although the preemptive effect of federal legislation is best known in areas governed by the commerce clause, the same effect is present, of course, whenever Congress legislates constitutionally. And the operation of the supremacy clause may be seen as well when the authority of Congress is not express but implied, not plenary but dependent upon state acceptance. The latter may be seen in a series of cases concerning the validity of state legislation enacted to bring the States within the various programs authorized by Congress pursuant to the Social Security Act. 8 State participation in the programs is voluntary, technically speaking, and no State is compelled to enact legislation comporting with the requirements of federal law. Once, however, a State is participating, its legislation, which is contrary to federal requirements, is void under the supremacy clause.

Obligation of State Courts Under the Supremacy Clause

The Constitution, laws, and treaties of the United States are as much a part of the law of every State as its own local laws and constitution. Their obligation "is imperative upon the state judges, in their official and not merely in their private capacities. From the very nature of their judicial duties, they would be called upon to pronounce the law applicable to the case in judgment. They were not to decide merely according to the laws or Constitution of the State, but according to the laws and treaties of the United States--'the supreme law of the land'." 18 State courts are bound

then to give effect to federal law when it is applicable and to disregard state law when there is a conflict; federal law includes, of course, not only the Constitution and congressional enactments and treaties but as well the interpretations of their meanings by the United States Supreme Court. 19 While States need not specially create courts competent to hear federal claims or necessarily to give courts authority specially, it violates the supremacy clause for a state court to refuse to hear a category of federal claims when the court entertains state law actions of a similar nature. 20 The existence of inferior federal courts sitting in the States and exercising often concurrent jurisdiction of subjects has created problems with regard to the degree to which state courts are bound by their rulings. Though the Supreme Court has directed and encouraged the lower federal courts to create a corpus of federal common law, 21 it has not spoken to the effect of such lower court rulings on state courts.

Federalism and Enumerated Federal Powers

The federal government has broad powers under the Supremacy Clause to create, regulate, and enforce the laws of the United States. The concept of federalism, or that of federal power, has a long-standing history dating back to the late 1700's, during the time in which the nation's founding fathers signed the U.S. Constitution. Among those powers, the federal government has certain *express* (or "enumerated") powers which are specifically spelled out in the U.S.

Constitution, including the right to regulate commerce, declare war, levy taxes, establish immigration and bankruptcy laws, and so on.

Not only does the federal government have *express* powers under the U.S. Constitution, it also has *implied* powers, or powers not specifically mentioned in the Constitution. This was the decision in the landmark Supreme Court case of *McCulloch v. Maryland*. For example, the Constitution does not expressly mention the right to privacy, or the right of people to adopt, or seek an abortion, however, these rights can be *inferred* by the Constitution itself, or from the later amended Bill of Rights.

McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316 (1819), was a U.S. **Supreme Court** decision that established that the "Necessary and Proper" Clause of the U.S. Constitution gives the federal U.S. government certain implied powers that are not explicitly enumerated in the Constitution.

U.S. Constitution - Article 1 Section 8

Article 1 - The Legislative Branch

Section 8 - Powers of Congress

The Congress shall have Power To lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defense and general Welfare of the United States; but all Duties, Imposts and Excises shall be uniform throughout the United States;

The United States Constitution Article 4 Section 1,

Article 4 - The States

Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State. And the Congress may by general Laws prescribe the Manner in which such Acts, Records and Proceedings shall be proved, and the Effect thereof.

Section 1 - Each State to Honor all Others

Naperville Smart Meter Awareness v. City of Naperville, No. 16-3766 (7th Cir. 2018)

In the United States Court of Appeals For the Seventh Circuit _____

No. 16-3766 NAPERVILLE SMART METER AWARENESS, Plaintiff-Appellant, v. CITY OF NAPERVILLE, Defendant-Appellee. _____

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division. No. 11 C 9299 — John Z. Lee, Judge. _____

ARGUED MARCH 27, 2018 — DECIDED AUGUST 16, 2018 _____

Before WOOD, Chief Judge, and BAUER and KANNE, Circuit Judges. KANNE, Circuit Judge. The City of Naperville owns and operates a public utility that provides electricity to the city's residents. The utility collects residents' energy-consumption data at fifteen-minute intervals. It then stores the data for up to three years. This case presents the question whether Naperville's collection of this data is reasonable under the Fourth

Amendment of the U.S. Constitution and Article I, § 6 of the Illinois Constitution. I. BACKGROUND The American Recovery and Reinvestment Act of 2009 set aside funds to modernize the Nation's electrical grid. The Act tasked the Department of Energy with distributing these funds under the Smart Grid Investment Grant program.

Through this program, the City of Naperville was selected to receive $11 million to update its own grid. As part of these upgrades, Naperville began replacing its residential, analog energy meters with digital "smart meters." Using traditional energy meters, utilities typically collect monthly energy consumption in a single lump figure once per month. By contrast, smart meters record consumption much more frequently, often collecting thousands of readings every month. Due to this frequency, smart meters show both the amount of electricity being used inside a home

and when that energy is used. This data reveals information about the happenings inside a home. That is because individual appliances have distinct energy-consumption patterns or "load signatures." Ramyar Rashed Mohassel et al., A Survey on Advanced Metering Infrastructure, 63 Int'l J. Electrical Power & Energy Systems 473, 478 (2014). A refrigerator, for instance, draws power differently than a television, respirator, or indoor grow light. By comparing longitudinal energy-consumption data against a growing library of appliance load signatures, researchers can predict the appliances that are present in a home and when those appliances are used. See id.; A. Prudenzi, A Neuron Nets Based Procedure for Identifying Domestic Appliances Pattern-of

No. 16-3766 3

Use from Energy Recordings at Meter Panel, 2 IEEE Power Engineering Soc'y Winter Meeting 941 (2002). The accuracy of these predictions depends, of course, on the frequency at which the data is collected and the sophistication of the tools used to analyze that data. While some cities have allowed residents to decide whether to adopt smart meters, Naperville's residents have little choice. If they want electricity in their homes, they must buy it from the city's public utility. And they cannot opt out of the smart-meter program.1 The meters the city installed collect residents' energy-usage data at fifteen-minute intervals. Naperville then stores the data for up to three years. Naperville Smart Meter Awareness ("Smart Meter Awareness"), a group of concerned citizens, sued Naperville over the smart-meter program. It alleges that Naperville's smart meters

reveal "intimate personal details of the City's electric customers 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." (R. 102-1 at 14.) The organization further alleges that collection of this data constitutes an unreasonable search under the Fourth Amendment of the U.S. Constitution as well

1 Residents may request that Naperville replace their analog meters with "non-wireless" smart meters. But these alternatives are smart meters with wireless transmission disabled. They collect equally rich data. The difference is that the data must be manually retrieved. (R. 117 at 3.)

as an unreasonable search and invasion of privacy under Article I, § 6 of the Illinois Constitution.2 The district court dismissed two of Smart Meter Awareness's complaints without prejudice. Smart Meter Awareness requested leave to file a third, but the district court denied that request. It reasoned that amending the complaint would be futile because even the proposed third amended complaint had not plausibly alleged a Fourth Amendment violation or a violation of the Illinois Constitution. Smart Meter Awareness appealed. Because the district court denied leave to amend on futility grounds, we apply the legal sufficiency standard of Rule 12(b)(6) de novo to

determine if the proposed amended complaint fails to state a claim. See, e.g., Gen. Elec. Capital Corp. v. Lease Resolution Corp., 128 F.3d 1074, 1085 (7th Cir. 1997). II. ANALYSIS The Fourth Amendment of the U.S. Constitution protects "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures." Similarly, Article I, § 6 of the Illinois Constitution affords people "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." We can resolve both the state and federal constitutional claims by answering the following two questions.3 First, has 2 Smart Meter Awareness challenged the smart-meter program on a number of other grounds that are not relevant to this appeal. 3 The Illinois Supreme Court applies "a 'limited lockstep' approach when interpreting cognate provisions of [the Illinois] and federal constitutions." See, e.g., City of Chicago v. Alexander, 89 N.E.3d 707, 713 (Ill. 2017)

the organization plausibly alleged that the data collection is a search? Second, is the search unreasonable? For the reasons that follow, we find that the data collection constitutes a search under both the Fourth Amendment and the Illinois Constitution. This search, however, is reasonable. 4 A. The collection of smart-meter data at fifteen-minute intervals constitutes a search. "At the [Fourth Amendment's] very core stands the right of a man to retreat into his own home

and there be free from unreasonable government intrusion." Silverman v. United States, 365 U.S. 505, 511 (1961). This protection, though previously tied to common-law trespass, now encompasses

(citing People v. Caballes, 851 N.E.2d 26, 35–36 (Ill. 2006)).

Under this approach, the Illinois Supreme Court will interpret a provision of the Illinois Constitution in the same way as a similar provision in the Federal Constitution absent certain exceptional circumstances. See Caballes, 851 N.E.2d at 31–46 (tracing the development and application of the limited lockstep approach). Here, our analysis focuses on two terms: "searches" and "unreasonable." These terms appear in both documents in analogous fashion. Neither party has "made a case for an exception to the lockstep doctrine." Id. at 46. And we see no reason for an exception. Thus, our analysis of Smart Meter Awareness's claim under the Fourth Amendment also resolves its claim under Article I, § 6 of Illinois Constitution. 4 Smart Meter Awareness also claims that smart meters are an invasion of privacy under Article I, § 6 of the Illinois Constitution. It's certainly possible that this is the case. But the Illinois Supreme Court conducts reasonableness balancing for the invasion of privacy under the same framework as searches under the Fourth Amendment. In re May 1991 Will Cty. Grand Jury, 604 N.E.2d 929, 934–35 (Ill. 1992). Even were we to find that the data collection was an invasion of privacy as well as a search, our reasonableness

analysis for both claims would be the same. We therefore decline to conduct the additional analysis.

6 No. 16-3766

searches of the home made possible by ever-more sophisticated technology. Kyllo v. United States, 533 U.S. 27, 31–32 (2001). Any other rule would "erode the privacy guaranteed by the Fourth Amendment." Id. at 34.

"Where … the Government uses a device that is not in general public use, to explore details of the home that would previously have been unknowable without physical intrusion, the surveillance is a 'search.'" Id. at 40. This protection remains in force even when the enhancements do not allow the government to literally peer into the home. In Kyllo, for instance, the intrusion by way of thermal imaging was relatively crude—it showed that "the roof over the garage and a side wall of [a] home were relatively hot compared to the rest of the home and substantially warmer than neighboring homes in the triplex." Id. at 30. The device "did not show any people or activity within the walls of the structure" nor could it "penetrate walls or windows to reveal conversations or human activities." Id (quoting Supp.App. to Pet. for Cert. 39–40). Nevertheless, the Supreme Court held that law enforcement had searched the home when they collected thermal images. Id.

at 40. The technology-assisted data collection that Smart Meter Awareness alleges here is at least as rich as that found to be a search in Kyllo. Indeed, the group alleges that energy-consumption data collected at fifteen-minute intervals reveals when people are home, when people are away, when people sleep and eat, what types of appliances are in the home, and when those appliances are used.5 (R. 102-1 at 14.) By contrast, 5 Smart Meter Awareness directed the court to academic studies demonstrating the revealing nature of smart-meter data collected at fifteen-minute intervals, see, e.g., Ramyar Rashed Mohassel et al., supra at No. 16-3766 7 Kyllo merely revealed that something in the home was emitting a large amount of energy (in the form of heat). It's true that observers of smart-meter data must make some inferences to conclude, for instance, that an occupant is showering, or eating, or sleeping. But Kyllo rejected the "extraordinary assertion that anything learned through 'an inference' cannot be a search." Id. at 36 (quoting id. at 44 (Stevens, J., dissenting)). What's more, the data collected by Naperville can be used to draw the exact inference that troubled the Court in Kyllo. There, law enforcement "concluded that [a home's occupant] was using halide lights to grow marijuana in his house" based on an excessive amount of energy coming from the home. Id. at 30. Here too, law enforcement could conclude that an occupant was using grow lights from incredibly high meter readings, particularly if the power was drawn at odd hours. In fact, the data collected by Naperville could prove even more intrusive. By analyzing the energy consumption of a home over time in concert with appliance load profiles for grow lights, Naperville law enforcement could "conclude" that a resident was using the lights with

more confidence than those using thermal imaging could ever hope for. With little effort, they could conduct this analysis for many homes over many years. Under Kyllo, however, even an extremely invasive technology can evade the warrant requirement if it is "in general public use." Id. at 40. While more and more energy providers are encouraging (or in this case forcing) their customers to 478; A. Prudenzi, supra, and to commercially available products that can identify what appliances are used in a home and when they are used based on smart-meter data. See Disaggregation, Ecotagious, https://www.ecotagious.com/disaggregation/ (last visited July 25, 2018). 8 No. 16-3766 permit the installation of smart meters, the meters are not yet so pervasive that they fall into this class. To be sure, the exact contours of this qualifier are unclear—since Kyllo, the Supreme Court has offered little guidance. But Kyllo itself suggests that the use of technology is not a search when the technology is both widely available and routinely used by the general public. See id. at 39 n.6 (quoting California v. Ciraolo, 476 U.S. 207, 215 (1986) ("In an age where private and commercial flight in the public airways is routine, it is unreasonable for respondent to expect that his marijuana plants were constitutionally protected from being observed with the naked eye from an altitude of 1,000 feet.")). Smart meters, by contrast, have been adopted only by a portion of a highly specialized industry. The ever-accelerating pace of technological development carries serious privacy implications. Smart meters are no exception. Their data, even when collected at fifteen-minute intervals, reveals details about the home that would be otherwise unavailable to government officials with a physical search. Naperville therefore "searches" its

residents' homes when it collects this data. Before continuing, we address one wrinkle to the search analysis. Naperville argues that the third-party doctrine renders the Fourth Amendment's protections irrelevant here. Under that doctrine, a person surrenders her expectation of privacy in information by voluntarily sharing it with a third party. See Carpenter v. United States, 138 S. Ct. 2206, 2216 (2018) (citing Smith v. Maryland, 442 U.S. 735, 743–744 (1979) and United States v. Miller, 425 U.S. 435, 443 (1976)). Thus, when a government authority gathers the information from the third No. 16-3766 9 party, it does not run afoul of the Fourth Amendment. Id. Referencing this doctrine, Naperville argues that its citizens sacrifice their expectation of privacy in smart-meter data by entering into a "voluntary relationship" to purchase electricity from the city. This argument is unpersuasive. As a threshold matter, Smart Meter Awareness challenges the collection of the data by Naperville's public utility. There is no third party involved in the exchange.6 Moreover, were we to assume that Naperville's public utility was a third party, the doctrine would still provide Naperville no refuge. The third-party doctrine rests on "the notion that an individual has a reduced expectation of privacy in information knowingly shared with another." Carpenter, 138 S. Ct. at 2219. But in this context, a choice to share data imposed by fiat is no choice at all. If a person does not—in any meaningful sense—"voluntarily 'assume the risk' of turning over a comprehensive dossier of physical movements" by choosing to use a cell phone, Carpenter, 138 S. Ct. at 2220 (quoting Smith, 442 U.S. at 745), it also goes that a home occupant does not assume the risk of near constant monitoring by choosing to have electricity in her home. We therefore

doubt that Smith and Miller extend this far. 6 This alone renders Naperville's reference to the Eighth Circuit's decision, United States v. McIntyre, 646 F.3d 1107 (8th Cir. 2011), irrelevant. Whereas here residents contest the utility's initial collection of the data, McIntrye challenged law enforcement's subsequent warrantless collection of traditional meter readings from the utility. 10 No. 16-3766 B. The data collection is a reasonable search. That the data collection constitutes a search does not end our inquiry. Indeed, "[t]he touchstone of the Fourth Amendment is reasonableness." Florida v. Jimeno, 500 U.S. 248, 250 (1991). Thus, if Naperville's search is reasonable, it may collect the data without a warrant. Since these searches are not performed as part of a criminal investigation, see Riley v. California, 134 S. Ct. 2473, 2482 (2014), we can turn immediately to an assessment of whether they are reasonable, "by balancing its intrusion on the individual's Fourth Amendment interests against its promotion of legitimate government interests." Hiibel v. Sixth Judicial Dist. Court, 542 U.S. 177, 187–88 (2004) (quoting Delaware v. Prouse, 440 U.S. 648, 654 (1979)). Although in this case, our balancing begins with the presumption that this warrantless search is unreasonable, see Kyllo, 533 U.S. at 40, Naperville's smart-meter ordinance overcomes this presumption. Residents certainly have a privacy interest in their energy consumption data. But its collection—even if routine and frequent—is far less invasive than the prototypical Fourth Amendment search of a home. Critically, Naperville conducts the search with no prosecutorial intent. Employees of the city's public utility—not law enforcement—collect and review the data. In Camara v. Municipal Court, the Supreme Court

noted that this consideration lessens an individual's privacy interest. 387 U.S. 523, 530 (1967). And though the Court held that a warrantless, administrative, home inspection violated the Fourth Amendment in that case, it did so based on concerns largely absent from this one. Id. at 530–31. Indeed, unlike the search in Camara, Naperville's data collection reveals details No. 16-3766 11 about the home without physical entry. See id. at 531 (highlighting the "serious threat to personal and family security" posed by physical entry). Moreover, the risk of corollary prosecution that troubled the court in Camara is minimal here. See id. (noting that "most regulatory laws, fire, health, and housing codes are enforced by criminal process."). To this court's knowledge, using too much electricity is not yet a crime in Naperville. And Naperville's amended "Smart Grid Customer Bill of Rights" clarifies that the city's public utility will not provide customer data to third parties, including law enforcement, without a warrant or court order. Thus, the privacy interest at stake here is yet more limited than that at issue in Camara. Of course, even a lessened privacy interest must be weighed against the government's interest in the data collection. That interest is substantial in this case. Indeed, the modernization of the electrical grid is a priority for both Naperville, (R. 120-1, Smart Meter Agreement between Naperville and the Department of Energy), and the Federal Government, see Smart Grid, Federal Energy Regulatory Commission (Apr. 21, 2016), https://www.ferc.gov/industries/electric/indusact/smart-grid.asp. Smart meters play a crucial role in this transition. See id. For instance, they allow utilities to restore service more quickly when power goes out precisely because they provide energy-consumption data at regular

intervals. See, e.g., Noelia Uribe-Pérez et al., State of the Art and Trends Review of Smart Metering in Electricity Grids, 6 Applied Sci., no. 3, 2016, at 68, 82. The meters also permit utilities to offer time-based pricing, an innovation which reduces strain on the grid by encourag- 12 No. 16-3766 ing consumers to shift usage away from peak demand periods. Id. In addition, smart meters reduce utilities' labor costs because home visits are needed less frequently. Id. With these benefits stacked together, the government's interest in smart meters is significant. Smart meters allow utilities to reduce costs, provide cheaper power to consumers, encourage energy efficiency, and increase grid stability. We hold that these interests render the city's search reasonable, where the search is unrelated to law enforcement, is minimally invasive, and presents little risk of corollary criminal consequences. We caution, however, that our holding depends on the particular circumstances of this case. Were a city to collect the data at shorter intervals, our conclusion could change. Likewise, our conclusion might change if the data was more easily accessible to law enforcement or other city officials outside the utility.

III. CONCLUSION Naperville could have avoided this controversy—and may still avoid future uncertainty—by giving its residents a genuine opportunity to consent to the installation of smart meters, as many other utilities have. Nonetheless, Naperville's warrantless collection of its residents' energy-consumption data survives our review in this case. Even when set to collect readings at fifteen-minute intervals, smart meters provide Naperville rich data. Accepting Smart

Meter Awareness's well-pled allegations as true, this collection constitutes a search. But because of the significant No. 16-3766 13 government interests in the program, and the diminished privacy interests at stake, the search is reasonable. We therefore AFFIRM the district court's denial of leave to amend.

U.S. Constitution - Article 1 Section 10

Article 1 - The Legislative Branch
Section 10 - Powers Prohibited of States

No State shall enter into any Treaty, Alliance, or Confederation; grant Letters of Marque and Reprisal; coin Money; emit Bills of Credit; make any Thing but gold and silver Coin a Tender in Payment of Debts; pass any Bill of Attainder, ex post facto Law, or Law impairing the Obligation of Contracts, or grant any Title of Nobility.

Infringe

infringe vb [Latin infringere] 1: violate, transgress 2: encroach, trespass

Dated this 12-01-2019

Daniel F. Smalley