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

# BRIEF OF DEFENDANT-APPELLEE CITY OF NAPERVILLE

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**APPEARANCE & CIRCUIT RULE 26.1 DISCLOSURE STATEMENT**

Appellate Court No: 16-3766

Short Caption: Naperville Smart Meter v City of Naperville

To enable the judges to determine whether recusal is necessary or appropriate, an attorney for a non-governmental party or amicus curiae, or a private attorney representing a government party, must furnish a disclosure statement providing the following information in compliance with Circuit Rule 26.1 and Fed. R. App. P. 26.1.

The Court prefers that the disclosure statement be filed immediately following docketing; but, the disclosure statement must be filed within 21 days of docketing or upon the filing of a motion, response, petition, or answer in this court, whichever occurs first. Attorneys are required to file an amended statement to reflect any material changes in the required information. The text of the statement must also be included in front of the table of contents of the party's main brief. **Counsel is required to complete the entire statement and to use N/A for any information that is not applicable if this form is used.**

[ ] **PLEASE CHECK HERE IF ANY INFORMATION ON THIS FORM IS NEW OR REVISED AND INDICATE WHICH INFORMATION IS NEW OR REVISED.**

(1) The full name of every party that the attorney represents in the case (if the party is a corporation, you must provide the corporate disclosure information required by Fed. R. App. P 26.1 by completing item #3):

City of Naperville

(2) The names of all law firms whose partners or associates have appeared for the party in the case (including proceedings in the district court or before an administrative agency) or are expected to appear for the party in this court:

N/A

(3) If the party or amicus is a corporation:

i) Identify all its parent corporations, if any; and

N/A

ii) list any publicly held company that owns 10% or more of the party's or amicus' stock:

N/A

Attorney's Signature: s/ Michael DiSanto Date: November 10, 2016

Attorney's Printed Name: Michael DiSanto

Please indicate if you are *Counsel of Record* for the above listed parties pursuant to Circuit Rule 3(d). **Yes** ____ **No** X

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ii) list any publicly held company that owns 10% or more of the party's or amicus' stock:

N/A

Attorney's Signature: s/ Kristen Foley Date: November 10, 2016

Attorney's Printed Name: Kristen Foley

Please indicate if you are *Counsel of Record* for the above listed parties pursuant to Circuit Rule 3(d). **Yes** ____ **No** X

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ii) list any publicly held company that owns 10% or more of the party's or amicus' stock:

N/A

Attorney's Signature: s/ Robert Wilder Date: November 10, 2016

Attorney's Printed Name: Robert Wilder

Please indicate if you are *Counsel of Record* for the above listed parties pursuant to Circuit Rule 3(d). **Yes** ____ **No** X

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## STATEMENT OF JURISDICTION

Plaintiff's Jurisdictional Statement is complete and correct.

## STATEMENT OF THE ISSUES

1. Whether the district court correctly dismissed Plaintiff's Fourth Amendment claim based upon the principle that customers of an electric utility who have voluntarily contracted for services have no reasonable expectation of privacy in their aggregate electricity usage information, whether recorded once per month using a traditional meter, or once every 15 minutes using a more modern advanced meter.

2. Whether the district court correctly dismissed Plaintiff's Fourth Amendment claim on the basis that the claim was based on hypothetical and speculative assertions that the utility could share or sell the information, or that the information could be stolen but did not allege that the information was actually shared, sold, stolen or used for any purpose other than for the operation of an electric utility.

3. Whether the recording of electricity usage information by a municipal-owned electric utility operating in a proprietary capacity and not in a regulatory capacity implicates the Fourth Amendment – assuming *arguendo*, that the information recorded by the electric meter records private information.

## STATEMENT OF THE CASE

### I. Background Factual Information

The City of Naperville is an Illinois home rule municipal corporation which operates its own electric utility. (A023-24[1]) In 2010, the City applied for and was accepted by the Department of Energy (DOE) to participate in the Smart Grid Investment Grant program, a program created by the American Recovery and Reinvestment Act of 2009. (A025-26)

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

In April 2010, the City entered into an agreement with the DOE, pursuant to which the City and the DOE contributed a total of $22 million to upgrade the City's electric grid, including the installation of advanced meters. (A026) The goals of the City's agreement with the DOE included acceleration of the modernization of the City's electric transmission, distribution, and delivery systems; promotion of investment in smart grid technologies that increase flexibility, functionality, interoperability, cyber security, situational awareness, and operational efficiency; reducing emissions, lowering costs, and increasing reliability. (SA001, A050)

Pursuant to the agreement, the City's electric utility modernized its grid infrastructure, including the installation of modern advanced meters. (A026) The City held numerous public meetings related to its decision to upgrade the utility's infrastructure and the installation of the advanced meters was the subject of much public scrutiny. (A032-34, A174, A272-273)

## II. Procedural History

As evidenced by the variety of claims contained in Plaintiff's complaints, almost immediately after the City entered into its agreement with the DOE, the City's electric utility encountered objections from a coalition of individuals opposing the program for disparate reasons. (Dkt. # 1) Some individuals opposed the modernized infrastructure because of an alleged health risk associated with utilization of wireless technology. (A021) Others feared that the meters posed a risk of fire, and some individuals opposed the modernization on privacy grounds. (A043-44, A096)

In December 2011, prior to the installation of the new advanced meters, Plaintiff filed the instant lawsuit seeking to enjoin the utility's installation of the meters. (Dkt. # 1) The original compliant purported to state claims based on a violation of the Energy Policy Act of 2005, violation of the Fourteenth Amendment Due Process Clause, violation of the Fifth Amendment prohibition against takings without just compensation, and violation of the Fourth Amendment. (Dkt. # 1)

### A. The First Amended Complaint

The City moved to dismiss Plaintiff's original complaint pursuant to Rule 12(b)(6), but on March 27, 2012, Plaintiff filed its First Amended Complaint before the district court ruled on the City's motion. (A021) The First Amended Complaint asserted the same nominal claims, but modified the allegations supporting each claim. (A021) The City moved to dismiss the First Amended Complaint pursuant to Rule 12(b)(6). (Dkt. # 22) On March 22, 2013, the district court dismissed each of Plaintiff's claims without prejudice. (A048-71)

In dismissing Plaintiff's Fourth Amendment claim, the court specifically found that Plaintiff did not and could not contend that its members had an objectively reasonable expectation of privacy in the aggregate measurements of their electricity use, particularly given that aggregate measurements had been read and collected by the City for years through analog meters. (A066-67) The court further held the fact that the advanced meters enabled reading aggregate measurements remotely and more frequently "does not permit Plaintiffs to recapture their already-surrendered (through consent to be metered) 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)." (A066-67) The court concluded that "Plaintiffs have not alleged that the smart meters are presently relaying detailed nonaggregate information about electricity usage or that the City's capture of such information is imminent." (A068) As such, the court determined that absent such an allegation, Plaintiff's 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." (A068-69)

### B. The Second Amended Complaint

In April 2013, Plaintiff filed its Second Amended Complaint, which refined the allegations in support of the previous claims, and purported to add new claims, including an alleged violation of the Americans with Disabilities Act (ADA) and a claim that the City's treatment of NSMA members violated the Equal Protection Clause. The City again moved to dismiss (Dkt. # 77) and on July 7, 2014, the district court dismissed all of Plaintiff's claims except the Equal Protection claim (A116-134).

In again dismissing Plaintiff's Fourth Amendment claim, the court relied on the same analysis it applied in its prior dismissal, finding that the City's smart meters show "only total usage and no further details than that." (A127) As such, the court held that "[b]ecause NSMA has not alleged that the City is collecting 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."[2] (A126-128)

[2] The court dismissed all claims except the Equal Protection claim. (A134)

### C. The Proposed Third Amended Complaint

In December 2014, Plaintiff advised the district court that additional factual allegations and new case law supported refiling its purported Fourth Amendment claim, and Plaintiff requested leave to file a Third Amended Complaint. (A135) The district court permitted Plaintiff to submit a proposed Third Amended Complaint, and it was submitted on December 10, 2014. (A143-183)

On July 7, 2015, the district court rendered its decision denying Plaintiff leave to amend the purported Fourth Amendment claim and to add the Illinois Constitution privacy claim.[3] (A333-344) In analyzing these claims, the court repeated its conclusions that the City's utility's advanced metering collected only aggregate electricity usage, and that there is no Fourth Amendment expectation of privacy in that information. (A338-342)

The court then considered Plaintiff's new allegations related to the existence of "energy disaggregation software" which Plaintiff alleged allows a breakdown of the data into "appliance-level itemized consumption," finding them to be mere "speculation." (A339-340) The court held that Plaintiff'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." (A340-341) Accordingly, the court denied leave to amend the Fourth Amendment claim and denied leave to add the Illinois Constitution privacy claim.[4] (A344)

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[3] The court found the Fourth Amendment and Illinois Constitution privacy claims relied upon the same "factual core" and that Plaintiff admittedly filed the Illinois Constitution claim to compliment and bolster the Fourth Amendment claim, not to assert a new cause of action. (A342)

[4] The court did allow Plaintiff to file a Third Amended Complaint, containing only a "class of one" Equal Protection claim and the parties engaged in additional discovery specifically related to that claim. The district court subsequently granted the City's motion for summary judgment as to the Equal Protection claim. (A353)

**D. Discovery in the District Court**

Plaintiff had the opportunity to conduct, and did in fact conduct, discovery throughout the nearly five-year duration of this litigation. The district court never entered any order limiting, restricting, or impeding Plaintiff's ability to engage in discovery related to the Fourth Amendment claim and therefore Plaintiff was free to discover any information on this claim it deemed appropriate. (*See* A318)

For example, on September 21, 2012, after the litigation had been pending for approximately nine months, the district court held a hearing related to Plaintiff's effort to obtain preliminary injunctive relief and related to the viability of Plaintiff's Fourth Amendment claim. (A238-319) During that hearing, the district court expressly acknowledged that discovery was then ongoing and acknowledged the need for Plaintiff to perform further discovery related to the Fourth Amendment claim. (A241, A242, A249, A317) At the end of the hearing, the City's attorney requested that the district court stay discovery and the district court denied that request. (A318)

The district court did not stay discovery at that time, and the record contains no indication that Plaintiff ever made the court aware of any issues or difficulties in obtaining discovery related to the Fourth Amendment claim. The record reveals that throughout the lengthy duration of the litigation, the parties filed only four discovery motions: 1) an "Agreed Motion" filed by the City to extend discovery deadlines (SA027-28); 2) the City's motion to compel production of a list of Plaintiff's members related to Plaintiff's Equal Protection claim (SA042-52); 3) the City's motion to stay deposition discovery related to the Equal Protection

claim (SA053-56); and 4) Plaintiff's motion to compel production of certain documents related to the Equal Protection claim. (SA057-67) None of the motions involved limiting Fourth Amendment discovery.

## SUMMARY OF ARGUMENT

"It would be a dubious service to the genuine liberties protected by the Fourth Amendment to make them bedfellows with spurious liberties improvised by farfetched analogies. . . ." *On Lee v. United States*, 343 U.S. 747, 754 (1952).

It is well established that no objectively reasonable expectation of privacy exists for information which is provided to others voluntarily. This is true of electricity usage information metered by an electric utility for purposes of providing electric service to a customer. The district court properly applied this third-party doctrine to dismiss Plaintiff's multiple attempts to plead a viable Fourth Amendment claim.

Plaintiff's arguments that this Court should overturn the long standing and firmly established third-party doctrine on the basis that the doctrine is outdated and inapplicable in a digital age of "Big Data" are unavailing and have been rejected by this and several other Courts of Appeal.

Plaintiff instead urges this Court to ignore the third-party doctrine and to apply *Kyllo v. United States*, 533 U.S. 27 (2001), *United States v. Karo*, 468 U.S. 705 (1984), and *United States v. Jones*, 565 U.S. 400 (2012). Those cases, however, arose in a law enforcement surveillance context, rendering Plaintiff's reliance on them misplaced.

Plaintiff tacitly admits that it cannot state a Fourth Amendment claim under the facts, and therefore, asserts several hypothetical circumstances, which by Plaintiff's own admissions have not occurred and may never occur, whereby the electricity usage information *could* be used for some purpose other than for the operation of an electric utility. The district court correctly determined Plaintiff's assertions to be hypothetical, speculative and therefore not actionable allegations constituting a viable Fourth Amendment claim.

In addition to the foregoing bases by which the district court correctly dismissed Plaintiff's Fourth Amendment claim, the district court could have also dismissed the claim pursuant to the line of Supreme Court cases which hold government to a lesser standard of scrutiny when it acts in a proprietary capacity. Assuming *arguendo* that advanced meters collect "private" information, the Supreme Court's decision in *NASA v. Nelson*, 562 U.S. 134 (2011), holds that when government acts in a proprietary capacity, it may obtain "private" information from individuals without violating any constitutionally protected privacy interest if it is reasonable for government to obtain the information and if government takes reasonable measures to protect against unwarranted disclosures of the information it obtains.

In this case, the City meets those tests. The advanced meters were installed in conjunction with the federal government's program to achieve goals related to modernization of the nation's electric grid and reducing total energy usage and cost. The City's advanced meters record virtually identical information as the advanced meters utilized by the City's private industry counterparts, such as ComEd. Further, the City takes appropriate measures to protect electricity usage information from disclosure through its Customer Bill of Rights ordinance which, among other things, prohibits the City's electric utility from providing advanced meter

usage information to any third parties (including any law enforcement) in the absence of a warrant, a court order, or customer consent. This ordinance not only satisfies the privacy element of the *NASA* holding, but also renders Plaintiff's hypothetical assertions moot.

Lastly, Plaintiff in its brief makes incorrect, unsupported, and unsupportable assertions that the district court either prohibited discovery or somehow restricted or limited Plaintiff's ability to engage in the discovery necessary to support or bolster a Fourth Amendment claim. Plaintiff filed its case in December 2011 and it remained pending until September 2016. The record reflects that the parties engaged in significant discovery, including the exchange of thousands of pages of documents. At no time did the district court limit, restrict or otherwise impede discovery related to the Fourth Amendment claim.

## ARGUMENT

### I. The District Court Correctly Decided That Plaintiff Did Not State An Actionable Fourth Amendment Claim.

It is well established that the factual allegations in a complaint must be enough to raise a right to relief above the speculative level and that a complaint must contain allegations plausibly suggesting, not merely consistent with, an entitlement to relief. *McCauley v. City of Chicago*, 671 F.3d 611 (7th Cir. 2011), citing *Bell Atl. Corp. v. Twombly*, 550 U.S. 544 (2007).

The district court correctly dismissed each iteration of Plaintiff's purported Fourth Amendment claim pursuant to Rule 12(b)(6), and correctly denied Plaintiff leave to file a fourth iteration of the claim on the basis that further amendment, as manifested in Plaintiff's proposed Third Amended Complaint, would be futile. The court correctly determined that

under all relevant precedent, electricity usage information provided by a customer to the electricity vendor is not information in which a person has a reasonable expectation of privacy. Additionally, the district court correctly determined that Plaintiff's claims regarding how the electricity usage information *could* be disaggregated into more detailed information were hypothetical and speculative and, as such, failed to state a claim upon which relief could be granted.

### A. The Fourth Amendment is not implicated by an electric utility's metering of electricity usage.

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." U.S. Const. amend. IV. It is well established, however, that "[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. U.S.*, 389 U.S. 347, 351 (1967)) and that if government conduct does not violate a reasonable expectation of privacy, it has not engaged in an unconstitutional search. *Smith v. Maryland*, 442 U.S. 735, 740 (1979).

Thus in *Couch v. United States*, 409 U.S. 322 (1973), the Supreme Court held that a person who turns over tax-related documents to his accountant has no reasonable expectation of privacy in those documents. In *United States v. Miller*, 425 U.S. 435 (1976), the Supreme Court held that one does not have a protected privacy interest in banking records. Likewise, in *Smith*, the Court established that an individual does not have a reasonable expectation of privacy in the phone numbers that he dials. 442 U.S. at 740. These cases set forth the third-party doctrine as it relates to expectation of privacy.

Further and specific to the case at hand, this doctrine was applied to electricity usage information in *U.S. v. McIntyre*, 646 F.3d 1107, 1111-1112 (8th Cir. 2011). In *McIntyre*, the court held that because the defendant used power in his home, he voluntarily conveyed that information to the utility and, as a result, he had no reasonable expectation of privacy in his power records. *See also United States v. Thomas*, 662 Fed.Appx. 391, 397 (6th Cir. 2016) ("As with banking and phone records, there is no Fourth Amendment privacy interest in the number of kilowatt hours one uses").

In an attempt to evade the clear and on-point rulings in *Miller* and *Smith* regarding the third-party doctrine, and its application in *McIntyre* that electricity usage information is not protected by the Fourth Amendment, Plaintiff argues that these decisions should be revisited based upon perceived distinctions between analog and digital data. Plaintiff's argument is without merit because, as set forth more fully below, it relies on cases that are factually and legally distinguishable from the instant case.

Moreover, as Plaintiff candidly acknowledges, electricity usage data is, by itself, meaningless data – even in a "digital" format. (Pl. Br. 36) Thus, even accepting Plaintiff's arguments that "digital" information poses greater *potential* privacy risks than "analog" information, those risks, as asserted in Plaintiff's Fourth Amendment claim, were purely hypothetical. By Plaintiff's own admission, the electricity usage information, even in a digital form, must be combined with something more for the data to provide meaningful information to an observer. (Pl. Br. 36) The electricity usage information must be disaggregated, or it must be shared, sold, or stolen, and then combined with some other data or software program before it yields any meaningful information. Plaintiff's Fourth Amendment claim failed to allege

that the City's electric utility has actually shared or sold the electricity usage information, or that electricity usage information has been hacked or stolen, or that the City's electric utility (or any other entity) employed disaggregation algorithms. But because Plaintiff only alleged that those circumstances are potentially possible, the district court dismissed each version of the claim as mere speculation.

### 1. *Kyllo*, *Karo*, and *Jones* are not controlling precedent.

The Supreme Court has held that "[a]s an initial matter, judicial review of the Government's challenged inquiries must take into account the context in which they arise." *NASA v. Nelson*, 562 U.S. 134, 148 (2011); *see also United States v. Carpenter*, 819 F.3d 880, 888 (6th Cir. 2016) ("[w]hether a defendant had a legitimate expectation of privacy in certain information depends in part on what the government did to get it"); *Sanchez v. Cty. of San Diego*, 464 F.3d 916, 922 (9th Cir. 2006) (purpose of home inspection by government agents determines whether it constitutes a search under the Fourth Amendment). Plaintiff 's argument that the City's use of advanced meters to record electricity usage violates the Fourth Amendment relies, virtually entirely, on *Kyllo v. United States*, 533 U.S. 27 (2001), and, to a lesser extent on *United States v. Karo*, 468 U.S. 705 (1984), and *United States v. Jones*, 565 U.S. 400 (2012). Those cases are not controlling precedent because those cases arose in an entirely different and legally distinguishable context.

In *Kyllo*, federal law enforcement agents were suspicious that Kyllo was growing marijuana in his home, and used a thermal-imaging device to scan the home specifically to determine if the amount of heat emanating from it was consistent with the high-intensity lamps

typically used for growing marijuana. The scan showed that the garage roof and a side wall were relatively hot compared to the rest of his home and substantially warmer than neighboring homes. Based partly on this information, agents obtained a search warrant. The Supreme Court held that evidence obtained through the search warrant must be suppressed because the thermal image scan by law enforcement constituted a warrantless search in violation of Kyllo's Fourth Amendment rights. *Kyllo*, 533 U.S. at 27.

Similarly, in *Karo*, federal drug enforcement agents placed a tracking device within a canister of ether and then surreptitiously caused the canister to be in the suspect's possession in an effort to obtain evidence to support the prosecution of the suspect on various criminal charges. The Court held that tracking of the device while it was inside the suspect's home without a warrant violated the suspect's Fourth Amendment rights. *Karo*, 468 U.S. 705 (1984).

Likewise, in *Jones*, law enforcement agents suspected Jones of drug trafficking and surreptitiously attached a GPS tracking device to his vehicle and recorded data regarding his whereabouts, to obtain evidence useful in prosecuting the suspect. The Court held that the surreptitious and warrantless attachment of the device to Jones' vehicle constituted a Fourth Amendment violation, although not on the basis that attaching the device violated the suspect's reasonable expectation of privacy, but rather on the basis that the attachment of the device constituted a common law trespass. *Jones*, 565 U.S. 400 (2012).

*Kyllo*, *Karo*, and *Jones* are inapposite and distinguishable from the instant case. Those cases involved investigative techniques employed by law enforcement, and, more specifically, involved conduct by law enforcement purposefully designed to obtain evidence useful

and necessary to prosecute criminal conduct; in other words, the purpose was "[t]o look over or through for the purpose of finding something." *Kyllo*, 533 U.S. at 33 n.1. Further, those cases involved a surreptitious and involuntary relationship between the suspect and law enforcement agents.

Just as Plaintiff does here, the defendant in *McIntyre* argued that the *Kyllo* decision mandates a conclusion that electricity usage information is information about an individual's conduct within the home and therefore, government violated the Fourth Amendment when it obtained such without a warrant. The Eighth Circuit correctly rejected that argument, based primarily on the legally significant contextual differences in the law enforcement conduct in obtaining the information. As the court noted, although the information obtained in *Kyllo* was similar to the information obtained in *McIntyre*, in *Kyllo*, the information was obtained by means of surreptitious surveillance using an advanced law enforcement technology whereas in *McIntyre*, the defendant provided the information voluntarily to his utility and law enforcement then simply requested the information from the utility. *McIntyre*, 646 F.3d at 1111.

The same holds true here. Even making the unwarranted assumption that the information obtained by law enforcement in *Kyllo* may be similar to the electricity usage information recorded by the City's electric utility, the means of obtaining the information and the purpose for obtaining the information are completely different. As the Supreme Court in the *NASA* decision has instructed, those differences are crucial in determining whether government conduct violates a constitutionally protected privacy interest. *NASA*, 562 U.S. 134 (2011).

**a. The City's purpose for and manner in which it collects information is legally distinguishable from law enforcement conduct in *Kyllo, Karo*, and *Jones*.**

Plaintiff could not and did not plausibly allege that the advanced meters were installed for a regulatory or law enforcement purpose, or that the purpose of the advanced meters was to "find" something, such as evidence of criminality as in *Kyllo*. Rather, as the district court correctly noted, the recurring theme in each version of Plaintiff's claim is that its members are concerned and suspicious of the hypothetical and potential possibility that the City *might* utilize the meters for some other purpose. As such, the district court correctly determined that "the purported ability of smart meters to provide a 'constant conversation' 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." (A340)

Unlike the conduct of law enforcement in *Kyllo*, *Karo*, and *Jones*, the utility's purpose in recording electricity usage information is completely unrelated to any law enforcement purpose. The utility measures electricity usage for the purpose of billing its customers, and the new advanced meters are used to achieve this and other goals related to the operation of an electric utility, as part of the federal government's expansive program to overhaul the nation's electric grid, for the purpose of making the grid more efficient and reliable. (SA001, A050)

The pleadings and supporting documents of record disclose that the City's electric utility installed advanced meters to modernize its infrastructure and to obtain electricity usage information with greater precision to increase the efficiency of the electric grid (A050), not to

conduct surveillance. The record contains nothing to the contrary, despite Plaintiff's unfettered ability to engage in discovery.

Further, the advanced meters were installed in an open manner, not surreptitiously. The utility's decision to upgrade its infrastructure and install advanced meters was, unlike law enforcement's conduct in *Kyllo*, *Karo*, and *Jones*, the subject of much public scrutiny and numerous public meetings (A032-34, A174, A272-273), rendering those cases inapplicable.

**b. Plaintiff's members engaged in a voluntary relationship with a municipal-operated electric utility.**

The district court correctly noted that in contrast to *Kyllo* and *Jones*, the relationship between the customer and the utility here is voluntary rather than involuntary: "[i]n *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." Here, by contrast, the district court found that Plaintiff's members are "deemed to have consented through their usage of electricity services knowingly supplied by the City." (A341) *Miller*, *Smith* and their progeny establish that when an individual enters into a voluntary relationship with another party, where the vendor provides a service such as electricity or telephone, and the customer understands that to utilize the service the customer must provide certain information to the vendor, the customer loses his expectation of privacy in the information provided to the vendor. This is true even where the customer may not fully appreciate (or expressly agree to) the breadth of information provided, or even if the customer makes no affirmative step to provide the information to the vendor, such as in the case of cell site location information (CSLI). *See, e.g., United States v. Graham*, 824 F.3d 421 (4th Cir. 2016).

Plaintiff counters this well-settled principle by arguing a "consent justification is absurd under the circumstances since electricity is a basic necessity of modern life" and that Plaintiff's members have no "meaningful choice." (Pl. Br. 43; Pl. Br. 43, n.15) Plaintiff's argument ignores that courts have rejected identical arguments time and time again.

In *Graham*, the defendant made and the Fourth Circuit rejected a virtually identical argument that when a cell phone user provides CSLI to the cell phone provider, it is not done voluntarily because "cell phone use is so ubiquitous in our society today that individuals must risk producing CSLI or 'opt out of modern society' " and that "[l]iving off the grid . . . is not a prerequisite to enjoying the protection of the Fourth Amendment." 824 F.3d at 432-433.

The City respectfully submits that this Court should rule in the same manner as the *Graham* court did when it rejected that argument, explaining:

> the dissenting justices in *Miller* and *Smith* unsuccessfully advanced nearly identical concerns. Dissenting in *Miller*, Justice Brennan contended that "the disclosure by individuals or business firms of their financial affairs to a bank is not entirely volitional, since it is impossible to participate in the economic life of contemporary society without maintaining a bank account." And dissenting in *Smith*, Justice Marshall warned that "unless a person is prepared to forgo use of what for many has become a personal or professional necessity," i.e., a telephone, "he cannot help but accept the risk of surveillance." It was, in Justice Marshall's view, "idle to speak of 'assuming' risks in contexts where, as a practical matter, individuals have no realistic alternative." The Supreme Court has thus twice rejected Defendants' theory. Until the Court says otherwise, these holdings bind us.

*Graham*, 824 F.3d at 433 (internal citations omitted).

**c. Measurement of electricity usage by a utility is not surveillance.**

When law enforcement agents in *Kyllo*, *Karo*, and *Jones* conducted the surreptitious surveillance of criminal suspects, they were doing so in an effort to obtain evidence of criminal wrongdoing for the purpose of prosecution. In this case, although Plaintiff's Fourth Amendment claim suggests that an advanced meter "*allows* for surveillance" (A081 (emphasis added)), this allegation is hypothetical and falls short of alleging that the City's electric utility (or anyone else in the City) actually surveils anyone by the use of an advanced meter.

The district court correctly determined, based on Plaintiff's own allegations, that without using some other technology, such as "disaggregation algorithms," the recorded electricity usage information visually depicted in charts supplied by Plaintiff (which included Plaintiff's commentary on usage) in paragraphs 83, 85 and 86 of the proposed Third Amended Complaint does not record or reveal what appliances are being used and therefore does not reveal intimate details of the inside of the home. (A338-341) In order for Plaintiff to plausibly allege a Fourth Amendment violation, Plaintiff would need to allege that the City actually disaggregates the information in order for it to "see" the activities inside the home. (A068-69, A127, A340) The district court correctly concluded that because Plaintiff did not allege that the City used such algorithms, but only that the algorithms exist, any interpretation of the electricity usage information would necessarily rely on guesses and speculation and the "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." (A127)

Accordingly, unlike *Kyllo*, where law enforcement's use of the infrared imaging device provided law enforcement with "details of the home that would previously have been unknowable without physical intrusion," the electricity usage information in this case provides nothing more than could be observed by any member of the public walking by the residence.

**2. The district court correctly applied the third-party doctrine to determine that Plaintiff's members do not have a reasonable expectation of privacy in electricity usage information.**

Although privacy advocates have criticized the third-party doctrine, contrary to Plaintiff's arguments, it remains on firm legal footing in this and other Courts of Appeals. In *United States v. Caira*, 833 F.3d 803 (7th Cir. 2016), this Court rejected the petitioner's call to overturn the third-party doctrine in the digital age:

> Caira criticizes the third-party doctrine and he is by no means alone in that criticism. Justice Sotomayor wrote that the doctrine 'is ill suited to the digital age, in which people reveal a great deal of information about themselves to third parties in the course of carrying out mundane tasks.' The critique advanced by Caira, Justice Sotomayor, and others, is not new. It was made in both *Miller* and *Smith* – in dissent. So it is true that at least one Justice believes 'it may be necessary' to reconsider the third-party doctrine. But it is also true that '[t]he Supreme Court has . . . twice rejected [Caira's critique]. Until the Court says otherwise, these holdings bind us.'

833 F.3d at 809 *(internal citations omitted)*.

In addition to this Court and the Fourth Circuit in *Graham*, the Fifth, Sixth and Eleventh Circuits have all recently rejected arguments by privacy advocates for abrogation of the third-party doctrine. The Fifth Circuit in *In re U.S. for Historical Cell Site Data*, 724 F.3d 600 (5th Cir. 2013), held that cell site location data is not information in which an individual has a reasonable expectation of privacy because it is information conveyed by the individual to the cell phone service provider when a user places cell phone calls.

The Sixth Circuit came to the same conclusion in *United States v. Carpenter*, 819 F.3d 880 (6th Cir. 2016), which involved cell phone location data obtained from defendant's cell phone service provider. The court rejected the ACLU's argument that "*Jones* liberates us to" not apply the third-party doctrine. Distinguishing *Jones*, the Sixth Circuit noted that "the government action in this case is very different from the government action in *Jones*. That distinction matters: in applying *Katz*, 'it is important to begin by specifying *precisely the nature of the state activity that is challenged*.' " *Carpenter*, 819 F.3d at 888 (emphasis in original), quoting *Smith*, 442 U.S. at 741.

The Eleventh Circuit reached the same conclusion in *United States v. Davis*, 785 F.3d 498 (11th Cir.), *cert. denied*, 136 S. Ct. 479 (2015), holding that when law enforcement obtained "telephone subscriber records" and "phone toll records," including the "corresponding geographic location data (cell site)," pursuant to the Stored Communications Act, no search occurred under the Fourth Amendment because the information was provided voluntarily by Davis to his telephone company. The *Davis* court further rejected the argument that the concurring opinions in *Jones* weaken or undermine the third-party doctrine, noting that "[n]othing Justice Alito says contravenes the third-party doctrine. His concurring opinion does not question, or even cite, *Smith*, *Miller*, or the third-party doctrine in any way." *Davis* at 514.

Based on the foregoing, it is clear that Plaintiff's doubts about the continuing vitality of the third-party doctrine in the digital age are completely unfounded. When the district court here applied the doctrine to the allegations of Plaintiff's Fourth Amendment claim, it correctly concluded that Plaintiff's members do not possess a reasonable expectation of privacy

in their electricity usage information because when an individual voluntarily enters into an agreement to purchase electricity from an electricity vendor, knowing that the usage is monitored by the vendor, it is not reasonable to expect privacy in that information. (A067, A126)

Moreover, the fact that the City's electric utility is a department of a municipal government does not negate applicability of the third-party doctrine. When an individual engages with, and provides information to someone other than himself, it is irrelevant whether the other party is a private party or government. Arguably, entering into a voluntary relationship directly with government by which government agrees to sell electricity to the individual only serves to diminish even a subjective expectation of privacy in the usage information. As Plaintiff concedes in its opening brief, the Eighth Circuit's decision in *McIntyre* applied the third-party doctrine to electric utility records where the electric utility itself was a governmental entity. (Pl. Br. 44, n.1) Accordingly, implicit in the Eighth Circuit's decision is the conclusion that the third-party doctrine is equally applicable when the third party is a private entity or government.

### 3. Plaintiff concedes that the City, as an electricity vendor, has the right to meter and measure an individual's electricity usage.

Plaintiff does not dispute, and there is no question, that the City's electric utility has the right to measure an individual's electricity usage. (*See* A079, A111, A150-151, A178) Therefore, Plaintiff's objection to the City's electric utility measuring electricity usage digitally in fifteen minute increments is not one of principle, but rather one of frequency. The decisions holding that an individual has no objectively reasonable expectation of privacy in information provided to others, including digital cell phone location data, are not based on how little or

how much the information reveals. Rather, they are based on the principle that when an individual places certain information outside of the realm of the strictly private, there can be no objectively reasonable expectation of privacy under the Fourth Amendment. As such, Plaintiff's reliance on the frequency of the information collected as the basis for the alleged Fourth Amendment violation contravenes well established Fourth Amendment principles, including the *Kyllo* decision on which plaintiff places so much reliance: "The Fourth Amendment's protection of the home has never been tied to measurement of the quality or quantity of information obtained." *Kyllo*, 533 U.S. at 37.

Applying this principle, if, as Plaintiff impliedly concedes, a municipal electricity vendor does not violate the Fourth Amendment when it measures electricity usage once per month, there is no principled reason why more frequent measurements violate the Fourth Amendment. Because the Fourth Amendment is not concerned with the "quality or quantity of information obtained," and because an intrusion into the home by even a "fraction of an inch" constitutes a search, (*Kyllo*, 533 U.S. at 37, citing *Silverman v. United States*, 365 U.S. 505 (1961)), a determination that advanced metering of electricity usage violates the Fourth Amendment would also mean that *any* metering of electricity usage, no matter how minimally intrusive, would not pass constitutional muster.

**4. The Fourth Amendment is not a privacy panacea.**

In his concurring opinion in *Jones*, Justice Alito observed that "[d]ramatic technological change may lead to periods in which popular expectations are in flux and may ultimately produce significant changes in popular attitudes. New technology may provide increased

convenience or security at the expense of privacy, and many people may find the tradeoff worthwhile. And even if the public does not welcome the diminution of privacy that new technology entails, they may eventually reconcile themselves to this development as inevitable." 565 U.S. at 427. Therefore, "[i]n circumstances involving dramatic technological change, the best solution to privacy concerns may be legislative. A legislative body is well situated to gauge changing public attitudes, to draw detailed lines, and to balance privacy and public safety in a comprehensive way." *Id.* at 429-430 (Alito, J., concurring in the judgment).

After the Supreme Court decided *Smith*, Congress enacted the Pen Register and Trap and Trace Devices Statute (18 U.S.C. 3121-3127) which makes it a crime to install a pen register without a court order, subject to some exceptions. *See* Orin S. Kerr, *The Case for the Third-Party Doctrine*, 107 Mich. L. Rev. 561, 596 (2009). After the Supreme Court decided *Miller*, Congress enacted the Right to Financial Privacy Act (12 U.S.C. 3401-3422), which limits government access to information contained in the financial records of any customer from a financial institution. 107 Mich. L. Rev. at 596

The fact that the City's utility's use of advanced meters does not implicate the Fourth Amendment does not mean that Plaintiff is without any means to mitigate its fears or concerns. As Plaintiff notes in its opening brief, the Illinois legislature imposed restrictions on what a privately held electric utility can and cannot do with advanced metering information. Similarly, the City enacted an ordinance limiting dissemination of electric usage information. (Naperville Municipal Code, Title 8, Chapter 1, Article B-2) If Plaintiff is dissatisfied with this level of protection from information dissemination, it is free to advocate for its cause with either the Illinois legislature or the Naperville City Council.

### B. The district court's dismissal of Plaintiff's purported Fourth Amendment claim is based on a careful and thorough analysis and correct application of relevant precedent.

Plaintiff complains that the district court, in its ruling, "ignored well-pleaded allegations, relied upon contrary facts and assumptions, and flawed legal analysis." (Pl. Br. 29) This assertion finds no basis in the record. To the contrary, the district court engaged in a careful and thorough analysis, correctly applied all relevant Fourth Amendment precedent, and gave appropriate weight to Plaintiff's conclusory, hypothetical, and speculative allegations when it dismissed each version of Plaintiff's purported Fourth Amendment claim.

#### 1. Plaintiff's allegations that advanced meters reveal private activity and behavior within the home are hypothetical and speculative.

Contrary to Plaintiff's argument that "[t]he court ignored well-pleaded allegations in finding smart-meter data does not reveal private activity within the home," the district court squarely addressed that allegation and correctly determined that no version of Plaintiff's purported Fourth Amendment claim plausibly alleged that advanced meters reveal private activity or behavior within the home. To understand the district court's ruling, it is helpful to review the actual allegations within each version of Plaintiff's complaints.

Plaintiff's original and First Amended Complaints relied on the conclusory allegation that "[s]mart meters provide rich knowledge about intimate details of a customer's life and serious *concerns* exist regarding *access* to personal data gleaned from the devices." (A044 (emphasis added)) In the Second Amended Complaint, in an effort to bolster the conclusion asserted in the First Amended Complaint, Plaintiff included a graphical depiction of the type of information recorded by an advanced meter. (A079) After the district court determined that

the graphical depiction of the electric usage information in the Second Amended Complaint did not cure the deficiencies in the Fourth Amendment claim (A127), Plaintiff included three graphical depictions of the electrical usage information in the proposed Third Amended Complaint. (A157-159)

According to the proposed Third Amended Complaint, these graphical depictions are alleged to be that of a "representative electric customer," and include commentary apparently inserted by Plaintiff purporting to explain what was going on inside the home at various times of the day. Plaintiff alleged that anyone could infer the following from the chart depicted in paragraph 86: "the persons within the home were asleep during the early morning hours of July 26, 2013, until about 4:45 a.m. when there is then a spike in energy usage. The persons within the home were not using air conditioning due to the reasonably cool summer weather experienced during the subject time period. Ceiling fans were instead used for night-time air movement and cooling. The persons within the home arose to go through a morning routine of bathing and getting dressed, etc., and were out of the house by 7:30 a.m." (A157-159)

If the graphical depiction of electricity usage so clearly revealed the intimate details of activities within the home, as Plaintiff argues, an interpretative play-by-play explanation would not have been necessary. The district court understood this, and that Plaintiff's preferred conclusion that the electric usage information recorded by an advanced meter reveals intimate details of the home simply is not plausible, reiterating 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." (A339)

Plaintiff also added to the proposed Third Amended Complaint a number of allegations regarding the *potential* use of "disaggregation algorithms," and allegations that future hypothetical technological advances and higher resolution meters "could reveal personal details about the lives of consumers, such as their 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." (A160)

Like the added "play-by-play" explanation added to the graphical depiction of electricity usage, these new allegations regarding the existence of "disaggregation algorithms" and other future technologies and their hypothetical and potential use by the City's electric utility are self-defeating. By adding these allegations, Plaintiff tacitly conceded that the district court correctly determined that electricity usage information, by itself, was meaningless, and that to derive some meaning from the information, the utility would need to take some other step.

The district court further recognized that Plaintiff's "disaggregation algorithm" allegations were hypothetical and speculative: "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 itself constitute an allegation – or lead to a reasonable inference – that the City is doing that here." (A340)

**2. The district court correctly determined that Plaintiff's allegations establish that advanced meters provide no more information about the inside of the home than can be determined from the outside of the home.**

In dismissing the Second Amended Complaint, the district court noted that any attempt to determine the activities within a home, based on the graphical depictions of electricity usage included in that complaint, relied on nothing more than guesses and speculation:

> For example, suppose a graph displaying a Naperville resident's total power usage for one day shows a peak in usage around 7:00pm. . . . 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.

(A127)

Relying on *Riley v. California*, 134 S. Ct. 2473 (2014), Plaintiff takes issue with the court's analogy, arguing that "reliance on such analog-world analogies contravenes Supreme Court precedent, and would be bad policy for digital data privacy." (Pl. Br. 37)

If Plaintiff's reliance on *Kyllo*, *Karo*, and *Jones* is attenuated, its effort to extract applicable precedent from the holding in *Riley* strains credulity. Although the *Riley* court discussed digital data, it otherwise has no commonality with the instant case because, like *Kyllo*, *Karo*, and *Jones*, it arises in a law enforcement context. Moreover, the *Riley* holding is based on the historic rationale for the search incident to arrest doctrine. The Court held the doctrine to be inapplicable because information on a smart phone cannot be a weapon and the need to preserve the contents of a smart phone as evidence is easily achieved by non-intrusive means;

therefore, law enforcement's need to search the contents of a smart phone carried virtually no weight in balancing against the arrestee's privacy interests.

The district court's real world analogy, that a reviewer of graphically depicted advanced meter electricity usage information is in no better position to know the activities inside a home than a passerby, is not only appropriate and fitting, it comports with the corollary to the *Karo* court's observation that the Fourth Amendment is violated when 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*." *Karo*, 468 U.S. at 715 (emphasis added).

### 3. "Bad" digital privacy policy does not equate to a Fourth Amendment violation.

Plaintiff's argument that the district court's "reliance on such analog-world analogies" would be "bad policy" for digital data privacy misses the point. The district court was not charged with making good digital data privacy policy, it was charged with applying Fourth Amendment precedent to the allegations in the complaint. To be sure, the holding in *Smith v. Maryland* arguably constituted "bad policy" for telephonic privacy advocates, but that does not mean it was wrongly decided. Policy considerations are best left to the legislative process. As more fully discussed in Section I.A.4, *supra*, where Fourth Amendment jurisprudence falls short of providing expansive privacy protections, legislative solutions are available to fill the gap.

### C. Plaintiff's asserted concerns regarding "enhanced security risks," information sharing, and long-term data storage are hypothetical and speculative and do not state a cognizable claim.

Much of Plaintiff's opening brief is devoted to raising hyperbolic fears about "Big Data," "enhanced security risks," "data-combination concerns," and "long-term" data retention. Those fears and concerns, as expressed in each version of the complaint, were and are hypothetical and speculative and do not state or support a cognizable Fourth Amendment claim.

#### 1. Plaintiff's concerns of "enhanced security risks" are hypothetical and speculative.

To the extent Plaintiff's Fourth Amendment claim purported to be based on the alleged existence of "enhanced security risks," those allegations were hypothetical and speculative, and the district court appropriately treated them as such. The original Complaint and the First Amended Complaint relied on speculative assertions that "smart meters can be accessed remotely and contain an uncertain amount of data about occupant behavior" which "*could* facilitate threats to a customer's physical security and property interests," that "[t]he *potential* exists to collect, store and share private customer information without customer consent or control," that "serious *concerns* exist regarding access to personal data gleaned from the devices," and that "[a]ccess *may* also be obtained by accidental breach or cyber attack." (A044 (emphasis added))

Likewise, the proposed Third Amended Complaint relied on generalized truisms such as that "[t]he City has admitted it never guaranteed, and can never guarantee, smart meters present no risk of harm to NSMA members' privacy and security" and "[w]ithout securely designed systems, utilities would be at risk of attacks occurring undetected." (A165)

Despite Plaintiff's unfettered ability to engage in discovery, Plaintiff did not allege that any of its concerns ever came to fruition and no version of Plaintiff's Fourth Amendment claim alleged that electricity usage information of any individual had actually been compromised, stolen or otherwise exploited by outsiders. Moreover, no version of the Fourth Amendment claim even alleged that the City's security protocols regarding advanced meter usage information are inadequate or insufficient. At best, Plaintiff alleged that the City *may have* created a circumstance that *might potentially* be or become problematic. These assertions fall well short of even suggesting that any security intrusion into the City's electric utility information is imminent or has ever occurred.

Plaintiff's concerns echo those of the petitioner in *NASA*, which the Supreme Court rejected: "[c]iting past violations of the Privacy Act, respondents note that it is possible that their personal information could be disclosed as a result of a similar breach. But data breaches are a possibility any time the Government stores information. As the Court recognized in *Whalen*, the mere possibility that security measures will fail provides no 'proper ground' for a broad-based attack on government information-collection practices." *NASA*, 562 U.S. at 158.

Plaintiff's concerns about the hypothetical possibility of data breaches and hacking of advanced meter electricity usage information in the era of "Big Data" are not based on any

actual or imminent occurrence and to the extent any version of the Fourth Amendment claim was based on those concerns, they do not plausibly state a cognizable claim.

**2. Plaintiff's concerns regarding data sharing and long-term storage of advanced meter electricity usage information are hypothetical and speculative.**

Although Plaintiff's Second and proposed Third Amended Complaints raised the specter of law enforcement access to advanced meter usage information, those allegations were couched in hypothetical language and relied on unreasonable inferences.

For example, the Second Amended Complaint alleged that the electricity usage information "allows for surveillance of NSMA members" (A081) and the proposed Third Amended Complaint alleged that it "allows the City's police force to unreasonably search and access private information." (A153) These allegations are hypothetical and speculative and do not state a cognizable claim. Plaintiff never plausibly alleged that the City's electric utility shared advanced meter electricity usage information with law enforcement or anyone else.

Recognizing this deficiency, Plaintiff places unwarranted emphasis on an alleged statement by one of the City's police officers, arguing that his "comments clearly suggest that the City currently uses smart-meter data for law enforcement." (Pl. Br. 40) Plaintiff's conclusion is implausible and requires unreasonable inferences. As set forth in the complaint, a City police officer discussed marijuana grow operations, stating that they use "a ton of energy" and that "smart meter is going to fix all that for us." (A153-154) First, this statement does not plausibly lead to a conclusion that the City's electric utility has in fact shared advanced meter

electricity usage information with the City's police department. Second, the officer did not state or even imply that advanced meter electricity usage information is available to law enforcement in the absence of a warrant or court order. Third, Plaintiff had ample opportunity to discover whether advanced meter electricity usage information was ever shared or whether the City had actually adopted an express, formal policy to freely share advanced meter information with law enforcement. If Plaintiff had learned such information through discovery, as it was free to do, it certainly would have alleged this in its complaints. Fourth and lastly, Plaintiff did not and could not allege that the police officer was a policy maker for the City, so his words do not create policy, nor are they binding on the City. *See*, *e.g.*, *Ball v. City of Indianapolis*, 760 F.3d 636, 643 (7th Cir. 2014).

Plaintiff's assertions about the risks of long term data storage are similarly linked to the police officer's statement. Plaintiff argues that long term data is of concern, because law enforcement might, hypothetically, employ data analysis techniques in the future, to determine trends and identify changes in behavior. (Pl. Br. 34-35) Like Plaintiff's fears and concerns regarding sharing and hacking, Plaintiff's concerns about the potential future misuse of long term data are hypothetical and speculative. Despite Plaintiff's access to discovery, it was never able to allege actual use or misuse of long term data by law enforcement or anyone else.

**D. The district court correctly concluded there is no Fourth Amendment violation until information is actually improperly used.**

Plaintiff's arguments that the district court erred in concluding that no Fourth Amendment violation occurs until information has actually been used improperly (Pl. Br. § I.B.3) are unavailing, internally inconsistent, and should be disregarded.

Ignoring that its allegations were couched in patently hypothetical language, Plaintiff first argues that because it "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," it stated a cognizable Fourth Amendment claim. (Pl. Br. 39-40) However, examination of these allegations reveals that they merely assert hypothetical and speculative scenarios. For example, paragraph 64 merely asserts that the smart meter information "*allows* the City police to unreasonably search and access private information" (A153) (emphasis added)) but does not allege that the police have actually done this, rendering the assertion purely hypothetical and speculative.

Likewise, in paragraph 65, Plaintiff contends that "smart meters *allow* the City to observe human behavior in the home not knowingly exposed to the public." (A153) Once again, there is no allegation that the City is actually doing what Plaintiff claims that the meters *allow*. Plaintiff in paragraph 66 then relies on the statements of a City police officer regarding marijuana grow activity. (A153) For the reasons argued in Section C above, this allegation does not support a plausible inference that the City is actually sharing the information with law enforcement.

Plaintiff's next argument, that the metering of electricity usage in itself constitutes an unlawful search, even if it is never "used improperly," must be rejected because it is based entirely on *Kyllo* and *Karo.* As discussed more extensively in Section I.A, *supra*, Plaintiff's reliance on these cases is misplaced because it ignores the legally significant contextual distinctions between those cases and the instant case: that the purpose and manner of the acquisition of information are completely different.

Plaintiff's next point on this issue is somewhat opaque and difficult to decipher. Plaintiff appears to argue that the district court's determination that "a Fourth Amendment violation accrues only after the government does something nefarious with the data" is wrong because it "ignores the practical reality that smart-meter programs are evolving" and because "[n]either data collection nor data uses are static." Therefore, according to Plaintiff, the ruling "effectively immunize[s] 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." (Pl. Br. 41-42)

Plaintiff appears to argue that the district court erred in preventing Plaintiff from discovering information about how the utility uses the electricity usage information, thereby preventing Plaintiff from stating a claim. This argument is not supported by the facts regarding Plaintiff's ability to conduct discovery but also undermines and contradicts Plaintiff's position that the mere obtaining of information, rather than the manner in which the information is used, constitutes the constitutional violation. If, as Plaintiff argues, the mere obtaining of electricity usage information is itself the constitutional violation, then Plaintiff would not need the discovery that it incorrectly claims it was "cut off" from, in order to state a claim.

**E. Plaintiff's assertions that advanced meters invade an individual's "intellectual privacy" do not appear in the complaint(s) and should be disregarded.**

For obvious reasons, Plaintiff prefers not to stand on the Fourth Amendment claims rejected by the district court, and instead places significant emphasis on newly raised and unsupportable assertions that advanced meters permit government to invade an individual's "intellectual privacy," including "what people read, view, listen to, discuss, and otherwise attend to within their homes." (Pl. Br. 24) This Court must reject Plaintiff's "intellectual privacy" assertions because there is no allegation in any of the complaints below that even hint or suggest that the utility's advanced meters are *capable* of determining any intellectual activity such as what movie an individual is watching, what book they are reading, or their sexual preference – let alone that the City is actually utilizing the meters for any such purpose. "It is a basic principle that the complaint may not be amended by the briefs . . . on appeal." *Thomason v. Nachtrieb*, 888 F.2d 1202, 1205 (7th Cir. 1989).

Moreover, even if Plaintiff had made such allegations, they would not meet the plausibility test. Any suggestion that electricity usage of 500 watts in a 15-minute time period leads to a conclusion that an individual is reading "War and Peace" or "The Anarchist Cookbook," plotting to overthrow the government, or simply making toast, is fanciful at best, and cannot be taken seriously. Indeed, as Plaintiff candidly concedes, the measurement of the "quantity of electricity used" . . . "standing alone means little." (Pl. Br. 36) The fact that an individual consumed 500 watts of electricity in a 15-minute time period yields no information other than that the individual consumed 500 watts of electricity in a 15-minute time period. In the era of automation, such information does not even yield an inference that a home is occupied.

### F. The district court correctly dismissed Plaintiff's purported Illinois Constitution privacy claim.

#### 1. The district court correctly concluded that the proposed Third Amended Complaint failed to state a claim under Article I, § 6 of the Illinois Constitution.

In its proposed Third Amended Complaint, Plaintiff attempted for the first time to state a privacy claim pursuant to the Illinois Constitution. The district court correctly denied Plaintiff's motion for leave to add the claim, holding:

> 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. 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.

(A342-343)

#### 2. Federal courts are not the appropriate forum for novel and complex interpretations of state constitutions.

In any event, it would have been improper for the court to retain jurisdiction over the claim. Under 28 U.S.C. § 1367, a "district court may decline to exercise supplemental jurisdiction over state claims if the claim raises a novel or complex issue of State law . . . " 28 U.S.C. § 1367(c)(1). "Under the federal system, federal courts do not interpret state constitutions, though they may apply *settled interpretations* of a state constitution established by state courts." *Smith v. Carrasco*, 334 F. Supp. 2d 1094, 1099 (N.D. Ind. 2004) (emphasis added). "Federal courts are not the appropriate forum for venturing beyond the frontiers marked out by state courts themselves." *Roe v. City of Milwaukee*, 26 F. Supp. 2d 1119, 1123 (E.D. Wis.

1998), citing *Shields Enterprises, Inc. v. First Chicago Corp.*, 975 F.2d 1290, 1298 (7th Cir. 1992).

The Illinois Constitution claim in the proposed Third Amended Complaint requested a declaration from the district court that the installation of an advanced meter which records electricity usage information in 15 minute increments violates the privacy provision of the Illinois Constitution. There is, however, no controlling precedent in Illinois jurisprudence for this purported claim. Because no Illinois court has ever ruled that under Article I, Section 6 of the Illinois Constitution, an individual has an expectation of privacy in electricity usage information, the question was both novel and complex and it would have been inappropriate for the district court to exercise supplemental jurisdiction over the claim. Therefore, the district court was correct when it denied Plaintiff leave to file that claim on the basis of futility, not only for the reasons the court provided, but for the reasons stated above.

## II. Operation Of An Electric Utility Is Proprietary Conduct And Is Not Subject To The Same Scrutiny As Regulatory Conduct.

Although the district court correctly dismissed Plaintiff's Fourth Amendment claim on the basis that Plaintiff's members did not have an objectively reasonable expectation of privacy in electricity usage information, the claim also fails pursuant to the proprietary conduct doctrine. Under this doctrine, because the City's electric utility operates in a proprietary capacity and not in a governmental regulatory capacity, its business decisions regarding the type of meters it uses and the precision with which it measures electricity usage are treated essentially the same as the decisions of its private industry counterparts.

### A. The operation of an electric utility is proprietary rather than regulatory conduct.

It is well established under Illinois law that a municipality providing utility services to its residents does so in a proprietary capacity, rather than in a governmental capacity. *Illinois Power & Light Corp. v. Consol. Coal Co. of St. Louis*, 251 Ill. App. 49, 69 (1928); *Conner v. City of Elmhurst*, 28 Ill.2d 221 (1963); *Nordine v. Illinois Power Co.*, 48 Ill. App. 2d 424 (1964), *rev'd on other grounds*, 32 Ill. 2d 421 (1965); *Inland Real Estate Corp. v. Vill. of Palatine*, 107 Ill. App. 3d 279 (1982).

### B. When government acts in a proprietary capacity, its actions are not subject to the same scrutiny as when it acts as a regulator.

It is also firmly established that, "[w]here the state acts as a proprietor, rather than a regulator, 'its action will not be subjected to the heightened review to which its actions as a lawmaker may be subject' and that 'government has a much freer hand', when it operates in a proprietary mode rather than as a regulator." *Wisconsin Interscholastic Athletic Ass'n v. Gannett Co.*, 658 F.3d 614, 622 (7th Cir. 2011), citing *International Soc. for Krishna Consciousness v. Lee*, 505 U.S. 672, 678 (1992); *see also, e.g., United States v. Kokinda*, 497 U.S. 720 (1990) (plurality); *Lehman v. City of Shaker Heights*, 418 U.S. 298 (1974) (plurality); *Ridley v. Massachusetts Bay Transp. Auth.*, 390 F.3d 65 (1st Cir. 2004); *Cafeteria & Restaurant Workers v. McElroy*, 367 U.S. 886 (1961).

Pursuant to the proprietary capacity doctrine, when, for example, government breaches a contract when acting in its proprietary capacity, such a breach does not constitute a taking under the Fifth Amendment. *Sun Oil Co. v. United States*, 215 Ct.Cl. 716, 572 F.2d 786, 818 (1978); *see also Hughes Communications Galaxy, Inc. v. U.S.*, 271 F.3d 1060, 1070 (Fed. Cir.

2001) ("Taking claims rarely arise under government contracts because the Government acts in its commercial or proprietary capacity in entering contracts, rather than in its sovereign capacity").

Under the proprietary capacity doctrine, the Supreme Court has upheld a municipality's ban on political advertisements in city-operated transit vehicles. *Lehman v. Shaker Heights*, 418 U.S. 298 (1974). Additionally, the Supreme Court has applied the doctrine to permit a school district to limit access to an internal mail system used to communicate with teachers employed by the district. *Perry Ed. Assn. v. Perry Local Educators' Assn.*, 460 U.S. 37 (1983).

The decision in *NASA v. Nelson*, 562 U.S. 134 (2011) constitutes the Supreme Court's most recent and germane application of the proprietary capacity doctrine. In *NASA*, the Supreme Court rejected the privacy challenge by non-civil servant contract employees of NASA's Jet Propulsion Lab (operated by the California Institute of Technology) to pre-employment screening by NASA. The government screening requested highly personal and sensitive information related to the employee's "citizenship, selective-service registration, and military service"; asked whether the employee has "used, possessed, supplied, or manufactured illegal drugs" in the last year; requested that references opine regarding "suitability for employment or a security clearance" and "honesty or trustworthiness"; requested any adverse information concerning the employee's " 'violations of the law, 'financial integrity,' 'abuse of alcohol and/or drugs,' 'mental or emotional stability,' [and] 'general behavior or conduct.' " 562 U.S. at 142.

The Court first noted:

> judicial review of the Government's challenged inquiries must take into account the context in which they arise. When the Government asks respondents and their references to fill out SF-85 and Form 42, it does not exercise its sovereign power 'to regulate or license.' Rather, the Government conducts the challenged background checks in its capacity 'as proprietor' and manager of its 'internal operation.' Time and again our cases have recognized that the Government has a much freer hand in dealing 'with citizen employees than it does when it brings its sovereign power to bear on citizens at large.'

*NASA*, 562 U.S. at 148, quoting *Cafeteria & Restaurant Workers v. McElroy* at 896 and *Engquist v. Oregon Dept. of Agriculture*, 553 U.S. 591, 598 (2008).

Central to the *NASA* court's decision are the prior "informational privacy" cases of *Whalen v. Roe*, 429 U.S. 589 (1977), and *Nixon v. Administrator of General Services*, 433 U.S. 425 (1977), which established that statutes compelling government possession of "accumulated private data" did not violate constitutional privacy protections where the statutes provided security provisions against unwarranted disclosures of the private information.

In *Nixon*, the Court upheld a statute requiring the former President to turn over his Presidential papers and tape recordings for archival review and screening, concluding that the Act at issue had protections against "undue dissemination of private materials." *Nixon*, 433 U.S. at 458. In *Whalen*, the Court upheld a New York statute requiring the collection of names and addresses of persons prescribed dangerous drugs, finding that the statute's "security provisions," which protected against "public disclosure" of patient information, were sufficient to protect a privacy interest "arguably . . . root[ed] in the Constitution." *Whalen*, 429 U.S. at 605.

Applying the *Whalen* and *Nixon* "informational privacy" holdings to the proprietary capacity doctrine, the *NASA* court held that even assuming *arguendo* government conduct intrudes upon constitutionally protected privacy interests, the intrusion does not violate any constitutional privacy protections where: a) government is acting in its proprietary capacity; b) government's conduct is reasonable in that it is similar to that employed by private industry; c) the government has an interest in engaging in the conduct; and d) government employs reasonable measures to prevent re-disclosures to others. *NASA*, 562 U.S. at 155-156.

Thus, in *NASA*, the Court upheld government's collection and storage of information regarding highly private conduct because similar inquiries were "part of a standard employment background check of the sort used by millions of private employers"; because "the Government has an interest in conducting basic employment background checks"; and because "[l]ike the protections against disclosure in *Whalen* and *Nixon*, [the protections provided by the Privacy Act] 'evidence a proper concern' for individual privacy." *NASA*, 562 U.S. at 156.

The same principles apply to the City's electric utility in this case. The City's electric utility is no different than a city-operated transit system or the employer in *NASA*, and it must be permitted to operate its electric utility in essentially the same manner as a privately-owned electric utility. It must be permitted to make decisions regarding the efficient operation of its utility, including the deployment of useful new technologies like advanced meters. Just as NASA is permitted to collect and store intimate and personal details of a contractor's life without violating any constitutionally protected privacy interests, the City's electric utility must be permitted to install advanced meters for the purpose of the operation of the utility

even assuming, *arguendo*, the meters record information which constitutes protected private information.

The City's electric utility satisfies each of the tests set forth in *Whalen* and *NASA* because: 1) the use of advanced meters unquestionably involves acting in a proprietary capacity; 2) the use of advanced meters is the same as that of ComEd, its regional private-industry counterpart; 3) the City's electric utility unquestionably has an interest in utilizing advanced meters to achieve more efficient distribution of electricity to its customers and to achieve the goals of the federal government's Smart Grid Investment Grant (SGIG) program; and 4) the City takes reasonable measures to protect unwarranted disclosures of the electricity usage information which evidence a proper concern for individual privacy.

Regarding the first test, as set forth above, under Illinois law, when government provides utility services, it does so in its proprietary capacity rather than in its governmental capacity.

Regarding the second test, the utility's installation of advanced meters is identical to what private utilities across the country have been doing for the past several years. In this region, privately held ComEd has installed three million advanced meters and plans to complete the installation of another one million advanced meters by the end of 2018. ComEd, *Smart Meters for Your Home*, *available at* https://www.comed.com/SmartEnergy/SmartMeterSmartGrid/Pages/ForYourHome.aspx.

Ameren, another regional privately held electric utility, was approved in 2016 by the Illinois Commerce Commission to install advanced meters at all of its 1.3 million customer

locations. Ameren, *News Release – Ameren Illinois to accelerate upgrades to electricity grid* September 23, 2016, *available at* http://ameren.mediaroom.com/news-releases?item=1491.

Regarding the third test, the City's electric utility unquestionably has an interest in utilizing advanced meters. The City upgraded its electric grid infrastructure as part of the American Recovery and Reinvestment Act of 2009 (Recovery Act). The Recovery Act included measures to modernize the county's energy and communication infrastructure and enhance energy independence and provided the DOE with $4.5 billion to modernize the electric power grid. Under the largest program, the SGIG program, the DOE and the electricity industry jointly invested $8 billion in cost-shared projects involving more than 200 participating electric utilities and other organizations to modernize the electric grid, strengthen cybersecurity and improve interoperability. U.S. Dept. of Energy, *Recovery Act: Smart Grid Investment Grant (SGIG) Program*, *available at* https://energy.gov/oe/information-center/recovery-act-smart-grid-investment-grant-sgig-program.

According to the DOE, the goals of the SGIG program include "increased wide-area visibility and faster situational awareness in the transmission system to prevent local disturbances from cascading into major regional blackouts, fewer and shorter outages . . . improved grid resilience to extreme weather events . . . more accurate outage location identification . . . more effective equipment monitoring and preventative maintenance that reduce operating costs and the likelihood of equipment failures . . . lower peak demand . . . and improved customer control to manage electricity consumption." U.S. Dept. of Energy, *Smart Grid Investment Grant Program Final Report, Executive Summary*, *available at*

https://energy.gov/sites/prod/files/2017/03/f34/Final%20SGIG%20Report%20-%20Executive%20Summary.pdf.

Regarding the fourth test, the City has adopted an ordinance known as the "Naperville Smart Grid Customer Bill Of Rights." The Bill of Rights ordinance protects advanced meter usage information from unwarranted disclosures by prohibiting disclosure to third parties (including law enforcement) in the absence of a warrant, a court order or customer consent. The Bill of Rights further provides that the City will provide a cyber-security plan to protect against threats to data security. The ordinance provides,[5] in relevant part:

> The City of Naperville has outlined the core rights of utility customers as it relates to the Naperville Smart Grid Initiative (NSGI). The City developed these rights based on customer feedback and input, the goals of the overall NSGI, and current national and State guidelines and policies for smart grid projects. Customers of the Naperville electric utility are entitled to responsible and transparent utility operations that include the right to be informed; the right to privacy; the right to options; and the right to data security.
>
> 1. The Right To Be Informed:
>
> ****
>
> • Customers' electric usage readings will not be taken more frequently than in 15-minute intervals.
>
> 2. The Right To Privacy:
>
> • Customers' personal information will not be connected to usage data released to any third parties. Third Parties is defined as any person or entity other than employees of the City of Naperville's Department of Public Utilities – Electric, Finance Department, or Legal Department, or any other entity contractually bound to the City to provide billing or collection services for electric utility accounts. For purposes of the Section, City of Naperville employees in all other City of Naperville

[5] Although the City's amended ordinance does not appear in the record, it is well established that "[f]ederal courts must take judicial notice of the statutory and common law of any state. . . . The rule applies with equal force to 'matters of public record such as state statutes, city charters, and city ordinances.' " *Toney v. Burris*, 829 F.2d 622, 626-27 (7th Cir. 1987).

> Departments shall be considered third parties and usage data connected to personal information shall not be shared with them.
>
> • The purpose of any collection, use, retention, and sharing of energy consumption data shall be made public in a clear and transparent manner.
>
> • Customers will be informed of the available choices and consent options regarding the collection, use, and disclosure of energy consumption data.
>
> • Disclosure of energy usage data will not be made to any third-party absent a warrant, court order or written consent from the customer.
>
> ****
>
> 4. The Right To Data Security:
>
> • All customers have the right to a functioning electric meter and customer web portal that will provide secure, confidential, and accurate electricity consumption data.
>
> • A utility cyber security plan, designed to protect the smart grid's critical computer infrastructure that may be a potential target of criminal threats, terrorism acts, industrial espionage and/or politically motivated sabotage, will guide and govern all security policies and practices that apply to user and energy information. A summary of this plan can be provided upon request.
>
> • Customers' electric usage interval data shall be kept for three years, and thereafter annually purged and destroyed.

Naperville Municipal Code, Title 8, Chapter 1, Article B-2, "Naperville Smart Grid Customer Bill Of Rights," *available at* https://www.municode.com/library/il/naperville/codes/code_of_ordinances?nodeId=TIT8PUUT_CH1EL_ARTBSERUPO_8-1B-2NASMGRCUBIRI.

Accordingly, pursuant to *Whalen* and *NASA*, the City did not violate any purported privacy rights because: its electric utility is acting in a proprietary capacity in its use of advanced meters and not in a regulatory capacity; the City's use of the advanced meters is the same as that of private-industry counterparts; the utility has an interest in utilizing advanced meters, in order to achieve the goals of the SGIG program; and the utility takes reasonable measures to protect against unwarranted disclosures of electricity usage information. The foregoing

constitutes sufficient additional grounds to affirm the district court's decision denying Plaintiff leave to amend its Fourth Amendment claim and to add an Illinois Constitution privacy claim.

## III. Recent Amendments To The City's Code Render Plaintiff's Hypothetical Fourth Amendment Claim Moot.

The City's Customer Bill of Rights not only supports the conclusion that the proprietary act of obtaining electricity usage information by the City's electric utility passes constitutional muster because it protects against unwarranted disclosures, the ordinance also renders Plaintiff's claim moot, or partially moot. "[A] case is moot when the issues presented are no longer 'live' or the parties lack a legally cognizable interest in the outcome." *Powell v. McCormack*, 395 U.S. 486, 496 (1969). Where a plaintiff seeks only injunctive relief to prohibit allegedly improper governmental conduct, cessation or modification of the challenged conduct causes the claim to be moot. *Chicago United Indus., Ltd. v. City of Chicago*, 445 F.3d 940, 947 (7th Cir. 2006); *see also Ragsdale v. Turnock*, 841 F.2d 1358 (7th Cir. 1988). Additionally, comity, "the respect or politesse that one government owes another, and thus that the federal government owes state and local governments – requires [courts] to give some credence to the solemn undertakings of local officials." *Chicago United Indus., Ltd.*, 445 F.3d at 947.

The essence of Plaintiff's Fourth Amendment claim is that in the absence of any positive prohibition, certain hypothetical events, such as the sharing of electricity usage information, may occur in the future. Although the City disputes that Plaintiff's concerns about hypothetical future events amount to a Fourth Amendment claim, the City has recently amended its

"Smart Grid Customer Bill of Rights" to clarify that the City's electric utility will not provide advanced meter electricity usage information to any third parties without a warrant or court order. The ordinance also clarified that "third parties" in this context includes anyone other than the electric utility itself, the City's finance department employees, the City's legal department, and third parties engaged by the City for collection purposes. Accordingly, the utility cannot share the information with any third party, including law enforcement, in the absence of a warrant, a court order, or consent.

Further, Plaintiff's opening brief places significant emphasis on hypothetical future technologies, arguing, for example, that "[n]either data collection nor data uses are static." The amendments to the City's Code address these purported concerns and clarify that the advanced meters record electricity usage information in 15-minute increments, and that the City will not modify the time increments to a smaller number.

Finally, Plaintiff also places great significance on the allegation that "the City retains all Customer Information and Interval Data 'for a period of up to ten years,' and archives it indefinitely," arguing that the "long-term accumulation and retention of that data" constitutes a "key element of this case." (Pl. Br. 9, 16, 53) The amendments to the City's Code modify the previous practice and now provide that on an annual basis the City's electric utility will destroy all electricity usage information more than three years old.

## IV. The District Court Never Limited, Restricted Or Otherwise Impeded Discovery Related To Plaintiff's Fourth Amendment Claim And The Claim Was Not Summarily Dismissed.

Plaintiff persistently argues in its opening brief that the district court summarily dismissed Plaintiff's Fourth Amendment claim before Plaintiff could conduct adequate discovery. Different iterations of this unjustified and unfounded "lack of discovery" claim are woven throughout Plaintiff's brief, including:

- that "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," (Pl. Br. 21); and
- "[i]f the case had proceeded, NSMA would have probed these issues under the City's smart-meter program" but "[b]ecause 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." (Pl. Br. 25)

In all, Plaintiff argues in no fewer than 10 sections in its opening brief that the district court erred when it refused or cut short Plaintiff's effort to engage in the discovery necessary to state or bolster its Fourth Amendment claim, and that the district court's "summary dismissal" of the Fourth Amendment claim before discovery "immunizes" the City's advanced metering program.

The record clearly contradicts these claims. Between December 2011 and December 2014, Plaintiff was afforded four opportunities to state a viable Fourth Amendment claim. During that time, the court did not restrict, limit, or otherwise impede discovery related to that claim. Plaintiff was free to discover any information it deemed appropriate or necessary

to learn any information it needed to assert a viable Fourth Amendment claim. Despite being given this opportunity, Plaintiff failed to do so.

Significantly, Plaintiff cites to no motion or order limiting discovery in any way related to the Fourth Amendment claim. Indeed, when, in September 2012, the City orally requested that discovery be stayed pending resolution of its motion to dismiss, the district court denied the request (A318) and the parties then engaged in significant discovery. The parties exchanged interrogatories and responses (*see* SA011, n.1[6]; SA014[7]), requests for admissions and responses (Dkt. # 45), as well as several thousands of pages of documents; (SA027[8]; SA030[9]).

Similarly, throughout the lengthy litigation, Plaintiff never moved to compel, nor otherwise advised the court that it was denied access to discoverable information related to the Fourth Amendment claim.

Moreover, Plaintiff acknowledged in the lower court that "prior to filing their complaint, Plaintiffs worked diligently for over a year to obtain documents from Defendant through the

[6] Plaintiff's brief in support of its motion for preliminary injunction argued: "in response to Plaintiffs' recent Interrogatory, Defendant admits it has never and will never guarantee the absolute health, privacy and security of its customers."

[7] Plaintiff's brief in support of its motion for preliminary injunction argued: "in response to Plaintiffs' recent Interrogatory requesting that Defendant '[s]pecify the manner (including the dates(s)) in which you caused documents and/or communications addressing the health, safety, security, and privacy related risks' . . . Defendant answered in pertinent part, 'that it had no legal obligation to provide any information addressing health, safety, security, and privacy risks'. . . ."

[8] The parties' agreed motion to extend discovery deadlines states: "the parties have exchanged thousands of documents."

[9] Plaintiff's response to the City's motion to dismiss the First Amended Complaint boasts that, "[a]s this litigation has progressed, and with additional evidence obtained through discovery, Plaintiffs' claims have only been bolstered."

Freedom of Information Act," and argued that "Defendant's own documents refute defendant's claims of smart meter non-invasiveness." (SA023)

Plaintiff's assertion that the dismissal of Plaintiff's claims in the absence of discovery will "effectively immunize" the City's smart-meter program is thus meritless. The City was subject to significant discovery throughout the litigation, and cannot be considered "immune."

Not only is Plaintiff's argument that it was not permitted to engage in discovery demonstrably false, it contravenes the well-established principle that discovery is for the purpose of proving viable allegations made in good faith, not for determining whether a viable allegation can be made. *Crenshaw-Logal v. City of Abilene, Texas*, 436 Fed. Appx. 306, 309 (5th Cir. 2011).

Plaintiff's misstatements regarding the unavailability of discovery and information during the trial court proceedings are significant. Plaintiff claims it is simply asking this Court for an opportunity to litigate its Fourth Amendment claim. In actuality, Plaintiff has already litigated the claim, and is now asking this Court for an opportunity to *re-litigate* its dismissed Fourth Amendment claim.

## CONCLUSION

For the foregoing reasons, the district court's orders dismissing Plaintiff's purported Fourth Amendment claim and denying Plaintiff leave to file a fourth iteration of that claim and denying Plaintiff leave to add an Illinois Constitution privacy claim should be affirmed.

Respectfully submitted,

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**CERTIFICATE OF COMPLIANCE**
**WITH TYPE-VOLUME LIMITATION**

1. This Brief complies with the type-volume limitation of Rule 32(a)(7)(B) of the Federal Rules of Appellate Procedure because, according to the "word count" function of Microsoft Word 2013, the Brief contains 13,803 words, excluding the parts of the Brief exempted from the word count by Rule 32(a)(7)(B)(iii) of the Federal Rules of Appellate Procedure.

2. This Brief complies with the typeface requirements of Rule 32(a)(5) and the typestyle requirements of Rule 32(a)(6) of the Federal Rules of Appellate Procedure because the Brief has been prepared in a proportionally spaced typeface using Microsoft Word 2013 in 12-point Century Schoolbook font, with footnotes in 11-point Century Schoolbook font.

Dated: May 15, 2017

/s Andy Cockle
Cockle Legal Briefs

**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 15th day of May 2017.

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