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Municipal Utilities Need to Be Smart When Implementing a Smart Meter Program.

The United States Court of Appeals for the Seventh Circuit (the "Seventh Circuit") recently decided the case of *Naperville Smart Meter Awareness v. City of Naperville*, 900 F.3d 521 (7th Cir. 2018). The suit brought by Naperville Smart Meter Awareness ("NSMA") alleged that the collection of smart meter energy-consumption data by the City of Naperville, Illinois, (the "City") constituted an unreasonable search under the Fourth Amendment of the U.S. Constitution and should be prohibited.[1] The Seventh Circuit made two important holdings in the case. First, it held that the collection of smart meter data is, in fact, a search under the Fourth Amendment. Second, it held that under the specific facts of the case, the City's smart meter program constitutes a reasonable search and thus does not violate customers' Fourth Amendment rights.

[1] NMSA also brought state constitutional claims under the Illinois constitution that are not addressed here.

The Seventh Circuit's ruling in *Naperville* represents a significant precedent for how courts will consider challenges to the collection of smart meter data by government owned utilities throughout the Seventh Circuit (including Indiana). Indiana communities with municipally owned electric utilities would be well-served to consider the intricacies of the *Naperville* decision when planning, designing, and implementing smart meter systems. The case may also share applicability to municipally owned water utilities implementing smart meter programs.

Facts

The City received an $11 million federal grant to update its municipally owned electric utility and create a smart grid, including the installation of smart meters for every customer. Smart meters collect customers' energy-consumption data more frequently than traditional meters and store that data for extended periods of time. In this case, data was collected every 15 minutes and stored for up to three years. The municipally owned electric utility monitors the data and uses it to reduce utility costs, provide cheaper power, encourage energy efficiency, and increase grid stability. The City's municipally owned electric utility presented the only feasible option for the City's residents to obtain electricity, and customers were not allowed to opt out of the smart meter program.

NSMA's Argument

NSMA claimed that the frequency at which the smart meters collect data – in 15-minute intervals – amounted to an unreasonable government search of the customers of the municipally owned electric utility, thus violating their Fourth Amendment rights. The Fourth Amendment protects, among other things, people against unreasonable searches of their home and person by government entities. A municipally owned utility equates to a government entity for Fourth Amendment purposes.

Data Collection Constitutes a Fourth Amendment Search

Although no physical entry to the home occurs, the court determined that the collection of smart

meter data is, in fact, a search because the frequency at which the data is collected can reveal the happenings inside the home by analyzing energy consumption patterns and appliance load signatures for individual homes. The Seventh Circuit noted that courts have held that thermal mapping constituted a search subject to the Fourth Amendment in other cases.

Search Reasonable under Unique Facts of City's Smart Meter Program

The Seventh Circuit determined, however, that the facts surrounding the City's smart meter program did not rise to the level of an unreasonable search. In making that determination, the court weighed the privacy interests of customers against the City's interest in the data. According to the court's analysis, in this specific instance, the government's interest in the data was substantial, and the customers' privacy interest was minimal. Therefore, the collection of data by smart meter was reasonable and did not violate customers' Fourth Amendment rights.

The court held that the collection of smart meter data by a municipally owned electric utility served a legitimate government interest because it can be used to reduce utility costs, provide cheaper power, encourage energy efficiency, and increase grid stability, which all serve to promote a significant public good. Furthermore, the search is minimally invasive and unlikely to result in corollary criminal consequences for customers because the City guaranteed that no data would be given to third parties, including law enforcement.

Conclusion

The *Naperville* decision provides a road map for any municipally owned electric utility, especially those in the Seventh Circuit, considering a smart meter program. The Seventh Circuit expressly limited its determination that the City's search was reasonable to the facts of the case. Accordingly, a municipally owned utility looking to implement a smart meter program should examine the details and circumstances of the *Naperville* case to avoid running afoul of customers' Fourth Amendment rights. Furthermore, it is likely that *Naperville's* application is broader than municipally owned electric utilities. It likely extends to any municipally owned utility employing highly technical devices to obtain more frequent data collection from consumers, such as smart meters for water consumption data.

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