

2011 APPA Legal Seminar

REGULATING THE “SMART” IN  
SMART METERS

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## Regulating the “Smart” in Smart Meters

As the national push for smart grids and smart meters to go with them intensifies, a backlash is emerging. It centers around the as yet unproven but sincerely felt concern that gathering all this data from our electric meters will compromise personal information and invade the privacy of electric consumers. It is a growing and serious problem.

One of its manifestations is emerging in the use of a form letter being circulated on the Internet that is intended for consumers to send to their retail electric utility for purposes of preventing the installation of smart meters. The grounds cited in the form letter are as follows: (1) invasion of privacy; (2) domestic security rights violations; (3) third party interception by criminals; (4) unauthorized data sharing; (5) recording personal habits as an invasion of privacy; (6) unauthorized data access; (7) violation of federal and state wiretapping laws; (8) analysis of data to reveal other personal information; and (9) failure to disclose the recording and transmission capabilities of smart meters.

These issues are put forth in this form letter as rationales for refusing to have a smart meter installed at the consumer’s house or place of business.

Not much has been written about any definitive solution and the courts have yet to squarely take up these issues. The three articles I was able to find that underpin my analysis of the current status of this problem all point out that no one has yet devised a satisfactory solution to the tension between privacy rights and the need to increase the sophistication of electricity service.<sup>1</sup>

One solution that has been employed, at least by California and Maine public utility commissions, is to allow consumers to opt out of smart meter installation because utilities in those states have rights of access ingrained in the system. Part of the problem, of course, is the public utility commissions generally don’t regulate public power electric utilities, with the one exception of which I am aware, which is Wisconsin. Thus, both public utility commissions and legislatures would have to enact the same provisions in order to have uniform treatment of the subject.<sup>2</sup> The chance of that happening in this environment seems to fall between slim and none.

Along the way, the discussion centers on whether certain existing federal or state laws could be interpreted to cover this situation. The general conclusion seems to be “no”. Lots of theories abound but they only result in acknowledgement that the theories are yet untried. These include application of the Federal Wiretap Act<sup>3</sup> or similar state laws, the Fourth Amendment prohibition against unlawful search and seizure and whether gathering information is in fact a “seizure”<sup>4</sup>, or

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<sup>1</sup> The Smart Grid: The Complexities and Importance of Data Privacy and Security, 19 *CommLaw Conspectus* 297, H. Russell Frisby, Jr. and Jonathan P. Trolta, Catholic University, 2011 (hereafter “Frisby”); Privacy Implications of Smart Meters, 86 *Chi.-Kent Law Review* 161, Cheryl Dankey Balough, 2011 (hereafter “Balough”); Protecting Progress and Privacy: The Challenges of Smart Grid Implementation, 6 *I/S: J.L. & Poly for Info. Soc’y* 629, Student Notes, Adam Shira, Summer 2011 (hereafter “Shira”).

<sup>2</sup> Some states are beginning to act, albeit not in tandem. Frisby, pp.326-8; Balough, pp.168, 173-4.

<sup>3</sup> 18 U.S.C. §§ 2510-2522.

<sup>4</sup> Compare: *United States v. Karo*, 468 U.S. 705 (1984) – barring warrantless monitoring of beeper inside a house, with *U.S. v. Starkweather*, 972 F.2d 1347 (9<sup>th</sup> Cir. 1992) – voluntary submission of electric utility data waives 4<sup>th</sup> Amendment rights.

the thermal imaging decision in *Kyllo*,<sup>5</sup> extension of decisions concerning privacy such as *Whalen v. Roe*<sup>6</sup> invoking the Stored Communications Act<sup>7</sup>, the Computer Fraud and Abuse Act<sup>8</sup> or even the Federal Trade Commission Act.<sup>9</sup>

Complicating the situation is the parallel debate over who owns the data.<sup>10</sup> A few states have declared that the consumer owns the data.<sup>11</sup> Most states and virtually all utilities believe that the data belongs to the utility under whatever theory works at the moment.<sup>12</sup> This debate can derail the whole process because it raises issues of personal ownership of one's information. This debate alone could block progress on solving this problem for the next decade.

What we have are actually two problems. We have a privacy issue and we have a security issue, and they are not the same.<sup>13</sup> Recently, a colleague experienced the uncomfortable situation of having a client be asked, under the relevant state public records law, for a study done for the client that basically outlined the smart meter system thereafter being installed by that client. Obviously, such data and specifics, if it fell into the wrong hands, could provide insights that could be used for all sorts of criminal mischief including identity theft, timing of burglaries, etc. Thus, not only does the consumer have to worry about what information is going into the electronic firmament, public power utilities themselves need to worry about what legitimate protections they can provide their consumers and their systems under their state public records laws and, if they deal with federal agencies, as many do, what the implications are to protecting data under the federal Freedom of Information Act (FOIA).<sup>14</sup>

What I am personally led to is the conclusion that there is a need for a standardized approach to these issues. We need to relieve consumers of fears that more personal data is being collected than is necessary to provide electric service and that whatever data is being collected is being managed in a careful and protective fashion. On the utility side, we need to fashion a policy that defines and protects information that is deserving of protection while not doing violence to national and state public policy about openness of public records.

If it were up to me, I would draft a model state law that:

1. Standardizes smart meter capabilities (and limits thereof);
2. Provides uniform standards for data handling and sharing somewhat akin to the Federal Privacy Act of 1974;
3. Standardizes contract provisions between utilities and consumers concerning smart meter data, which hopefully would additionally bypass the issue of who owns the data; and

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<sup>5</sup> *United States v. Kyllo*, 533 U.S. 27 (2001).

<sup>6</sup> 429 U.S. 589 (1977).

<sup>7</sup> 18 U.S.C. §§ 2701-2709.

<sup>8</sup> 18 U.S.C. § 1030.

<sup>9</sup> 15 U.S.C. § 45.

<sup>10</sup> Frisby, pp.331-2; Balough, pp.173-4

<sup>11</sup> Balough, pp.173-4.

<sup>12</sup> Balough, pp.173-4.

<sup>13</sup> See the discussion in Balough, pp.167-8.

<sup>14</sup> 5 U.S.C. § 552.

4. Provides a uniform treatment of system information and data to prevent FOIA or state public records laws from allowing improper access to data worthy of protection.

I realize that what I have outlined is a tall order. It is, however, a current and urgent problem or set of problems concerning smart meter installation and use and the concern seems to be growing significantly. Not facing it or facing it in a piecemeal fashion is likely to be time-consuming, expensive, and unhappy in outcome.

The first three elements of my proposal are common to all retail electric utilities. The fourth is, in part, a specific problem associated with us. In order to make sure that this last issue is covered correctly, it is my view that we need to get engaged on the solution up front.

Having identified the problems, I can safely say I have no solution, at least not yet. I do think that public power utility attorneys need to band together and share their respective experiences and knowledge in their states to move toward a suggested template that can be provided to state public utility commissions and legislatures. I have no doubt that more legislation will be introduced in many states in the not-too-distant future, especially in an election year. I am sure that APPA will be happy to take on this additional task. After all, isn't this the proper subject for the next ListServ?