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

NAPERVILLE SMART METER AWARENESS, an Illinois not-for-profit corporation,	)	
Plaintiff,	)	Case No. 11-cv-9299
v.	)	Honorable John Z. Lee
CITY OF NAPERVILLE,	)	
Defendant.	)	

REPLY TO DEFENDANT'S MEMORANDUM IN RESPONSE TO PLAINTIFF'S MOTION FOR LEAVE TO FILE THIRD AMENDED COMPLAINT

For the reasons set forth below, Naperville Smart Meter Awareness's ("NSMA") Motion for Leave to File Third Amended Complaint (the "Motion") should be granted.

ARGUMENT

The City of Naperville's (the "City") Memorandum in Response to Plaintiff's Motion for Leave to File Third Amended Complaint (the "Response") does not provide this Court with any legally-sound reason to deny leave to amend. The City fails to sufficiently demonstrate the presence of any of the recognized "adverse factors" required to successfully oppose leave to amend pursuant to Rule 15(a)(2) of the *Federal Rules of Civil Procedure* such as: undue delay, bad faith, repeated failure to cure deficiencies, prejudice to the defendant, or futility of the amendment. *Foman v. Davis*, 371 U.S. 178, 182 (1962); *Thompson v. Ill. Dep't of Prof'l Regulation*, 300 F.3d 750, 759 (7th Cir. 2002); *Arreola v. Godinez*, 546 F.3d 788, 796 (7th Cir. 2008).

The City argues that leave to amend should be denied because the proposed Third Amended Complaint ("Amended Complaint"): (i) fails to cure deficiencies in the previous

amendments; (ii) is futile for its failure to withstand a motion to dismiss; and (iii) shows "dilatory conduct" resulting in undue delay. For the reasons set forth below, NSMA's cause of action against the City, as set forth in the Amended Complaint, is proper and the Motion should be granted.

I. THE PROPOSED AMENDED COMPLAINT PROVIDES SUBSTANTIAL ADDITIONAL FACTS WHICH ADDRESS THE DEFICIENCIES IDENTIFIED BY THIS COURT WITH RESPECT TO NSMA'S FOURTH AMENDMENT CLAIM

The proposed Amended Complaint reflects NSMA's diligent and good faith effort to fully incorporate this Court's guidance and to thereby further focus its cause of action on those claims NSMA believes have the best reasonable probability for success based on this Court's prior rulings. In that spirit, NSMA does not seek to reassert in the Amended Complaint a right to due process claim under the Fourteenth Amendment, nor a discrimination claim under the Americans with Disabilities Act of 1990. NSMA does seek to reassert its Fourth Amendment claim which this Court dismissed without prejudice by its Memorandum Opinion and Order, entered September 25, 2014 ("Opinion and Order"). The Opinion and Order made it abundantly clear to NSMA that this Court reasonably required further clarification and facts regarding smart meters and their analysis under the Fourth Amendment. The City suggests NSMA has "repeatedly failed to cure deficiencies," but this is, at best, disingenuous. Both this Court and NSMA are addressing new technology, and to the extent there may be confusion reflected in the record, this is owing almost entirely to the confusion sown by the City regarding the true capabilities of their smart meters, as well as regarding the extent of the City's capture and retention of personal data via its smart meters.

Far from repeatedly failing to cure deficiencies as the City asserts, what NSMA has in fact done is cut through the inconsistent representations made by the City regarding their smart meters.

NSMA has added clarification and facts in its Amended Complaint on technical matters involving technology where the City has been less than forthcoming. The proposed complaint represents NSMA's third amendment which surely cannot be deemed unreasonable or entirely unexpected in light of the first impression nature of this case and the complexity of the technology at issue. In any case, the City wholly fails to establish how NSMA's progress in this litigation could satisfy the high bar for denial of amendment as set forth in *Foman* and its progeny.

A. The Amended Complaint Makes Clear That The Subject Personal Information Is Not In Fact Voluntarily Turned Over To A Third Party

The Opinion and Order states that it is well established that "a person has no legitimate expectation of privacy in information he voluntarily turns over to third parties." (Opinion and Order, Dkt. #92, p. 11), quoting *Smith v. Maryland*, 442 U.S. 735, 743-44 (1979). NSMA does not dispute that holding, but does argue it is inapplicable in the instant case. As an initial clarification, the City is not a "third party" as defined in *Smith v. Maryland* and other cases. Here, the City is both the utility and the police force without separation, making this case unique with respect to the principal Fourth Amendment cases cited by both parties and the Court. In other words, while NSMA argues that recent cases such as *United States v. Jones*, 132 S.Ct. 945 (2012) and *Riley v. State of California*, 134 S.Ct 2473 (2014) are directly on point and quite helpful to NSMA, the facts here establish an even stronger case for Fourth Amendment protection given the unique aspect of a utility and police force being one and the same. Neither the third-party doctrine nor the "business record" exception is applicable here. See e.g., *In re Grand Jury Proceeding*, 842 F.2d 1229, 1234 (11th Cir. 1998) (citing *United States v. Miller*, 425 U.S. 435 (1976)). This is a key fact which the City has never addressed. Moreover, as alleged in the Amended Complaint, NSMA members have not "voluntarily" turned over to the City the personal detailed information obtained via smart meters. The City holds a monopoly on electric service in the City of Naperville and its

contract with its customers is truly one of adhesion since foregoing electric service is not a realistic option. The Amended Complaint further clarifies that the City's current collection and retention of data far exceeds the data previously collected and retained by the City, and NSMA members have never given their lawful consent for such collection and retention. (Am. Compl., Dkt. # 102-1, ¶¶ 71, 91, 92, 97, 104, 178-180, 197-204, 215, 220-223).

Additionally, at the time NSMA members applied for electric service from the City, only an analog meter was envisioned - a meter which is only capable of displaying and reporting accumulated consumption of energy, in other words, total kilowatt hours used over an entire month. (Am. Compl., Dkt. # 102-1, ¶¶ 31, 40). The City has replaced those analog meters with smart meters, devices which collect data consisting of granular, fine-grained, high-frequency type of energy usage measurements ("Interval Data"). The analog meters NSMA members voluntarily agreed to accept had no such capability. (Am. Compl., Dkt. # 102-1, ¶¶ 35-36). Further, the Amended Complaint alleges that only the City's electric customers who choose to enroll in the City's Demand Response Program have consented to the City's collection and retention of their Interval Data. (Am. Compl., Dkt. # 102-1, ¶ 62).

B. The Amended Complaint Pleads Additional Facts Demonstrating How The Subject Smart Meters Harvest And Retain Personal Details Which Far Exceed Merely Measurement Of Total Electric Usage

The Opinion and Order states that "[d]ata from the City's smart meters shows only total usage and no further details than that." (Opinion and Order, Dkt. # 92, p. 12). The Amended Complaint alleges that all of the City's smart meters collect the highly detailed Interval Data. (Am. Compl., Dkt. #102-1, ¶ 35). The Interval Data collected and retained by the City contains "more than aggregate electricity usage, and such data shows far more than total electric usage by its customers" which "far exceeds what is necessary for delivery of electric service to its electric

customers." (Am. Compl., Dkt. #102-1, ¶¶ 47-48). Further, the Interval Data collected in 15-minute intervals by the City's smart meters includes real power in kWh and reactive power in kVARh, and is unlike analog meter readings which reflect only aggregated energy data (total kilowatt hours used over an entire month). (Am. Compl., Dkt. #102-1, ¶ 40).

Further, the Amended Complaint further clarifies that the City's collection and retention of Interval Data is only necessary in order to gather information appropriate for the City's Demand Response Program. The level of detail obtained by the City far exceeds what is necessary for delivery of electric service and for billing purposes, the only activities to which NSMA members voluntarily consented. (Am. Compl., Dkt. #102-1, ¶¶ 46-51; 54-63). The Amended Complaint now clarifies that Interval Data collected and retained by the City is the same data necessary for its Demand Response Program which the City admits provides more details than just "aggregated energy use." *Id.* The Amended Complaint also remedies the confusion and mischaracterizations sown by the City in proceedings before this Court on September 21, 2012. (See EXHIBIT A, *Report of Proceedings of September 21, 2012* ("ROP"), attached hereto and made a part hereof). NSMA sought to do so in its Second Amended Complaint, but to the extent any confusion remains, the Amended Complaint provides additional clarity.

For example, during the September 21, 2012 proceeding, this Court asked the City about the data it collects via smart meters which NSMA argued is "very detailed information" which will be used to reveal personal details about NSMA members' behavior within the home:

> THE COURT: Is the [City] gathering any of that data?
>
> MS ELY: No. Can I respond a little bit further on that? That would be a demand-response program. [. . .]
>
> THE COURT: And my questions goes to the following concern, which is, it's one thing to gather the information. It's another thing to mine it. Okay? And so I want to be clear on what the city is and is not doing. Okay? So what you are saying is that the information that

> the smart meters gather is limited to the aggregate kilowatt hour every 15 minutes, period, and does not contain the information that the city could -- even theoretically someone could later use to develop the level of detail that would be available in the demand-response program.
>
> MS ELY: That is correct. We are not compiling or even receiving that information at this juncture. We are only receiving aggregate energy consumption data. And along with that we find out amperage and voltage on an aggregate basis to run our municipal utility in a reliable and efficient manner.
>
> THE COURT: And is that the total extent of the information that you are collecting?
>
> MS ELY: It is the total extent of the information that we are collecting.

(EXHIBIT A, ROP at page 8, lines 23-25; page 11, lines 2-23).

However, at that same proceeding the City's senior electrical engineer Cyrus Ashrafi confirmed that the Interval Data currently collected and retained by the City is the "type of additional detailed information that would be the source of information" required for the Demand Response Program:

> THE COURT: [. . .] is it technically possible for the smart meters that are installed in the homes to gather the type of additional detailed information that would be the source of information in the demand and response program? [. . .]
>
> MR. ASHRAFI: [. . .] With respect to the demand response, it uses the same aggregate 15-minute interval information.

(EXHIBIT A, ROP at page 14, lines 14-17; page 15, lines 6-13).

The Amended Complaint now more clearly alleges - through the graphical analysis utilizing the Interval Data obtained from the City - that even without the use of any special software or other analytical tool, a disturbing level of detail regarding the personal behavior of NSMA members is being captured and retained by the City, and that's true whether or not the subject customer participates in the Demand Response Program. (Am. Compl., Dkt. #102-1, ¶¶ 82-87). The City of course seeks to downplay the latest graphical analysis, but in fact the analysis and graphs in the Amended Complaint are substantively different and much more detailed than the

presentation contained in NSMA's Second Amended Complaint. The Court described the earlier graph as an "imagined explanation." (Opinion and Order, Dkt. #92, p. 12). The Amended Complaint addresses the Court's concern, and the graphs in the Amended Complaint were generated utilizing actual Interval Data of a current City electric customer. (Am. Compl., Dkt. #102-1, ¶¶ 82-87)

C. The Amended Complaint Further Makes Clear The Allegation That Interval Data Collected By The City Is The Type Of Personal Information For Which A Resident Would Have A Reasonable Expectation Of Privacy

The Opinion and Order held it was not possible "to infer from NSMA's allegations that smart-meter data conveys any information in which residents have a reasonable expectation of privacy." (Opinion and Order, Dkt. #92, p. 12). And further, "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." *Id.*

NSMA addresses this deficiency in the proposed amendment which now clearly alleges that Interval Data harvested and retained by the City via smart meters allows the City to observe human behavior within a home that is not voluntarily exposed to the public – information which would in fact ordinarily require an invasive physical presence. (Am. Compl., Dkt. #102-1, ¶ 65).

D. NSMA Has Properly Alleged That The City Is In Fact Already Engaging In An Unreasonable Search Of Personal Information Protected By The Fourth Amendment

The Amended Complaint more clearly alleges that the City is conducting constant surveillance of NSMA members by collecting and retaining Interval Data which reveals intimate details of behavior within a home. (Am. Compl., Dkt. #102-1, ¶¶ 71-74). The Amended Complaint better clarifies that the Interval Data collected, used and retained by the City (see, e.g., Am.

Compl., Dkt. #102-1, ¶¶ 35-36, 40) is not comparable to the residential electric usage record considered in *United States v. McIntyre*, 646 F.3d 1107, 1109-10 (8th Cir. 2011) (a single sheet of electrical usage reflecting total monthly readings). The Amended Complaint also further clarifies that such search and seizure of constitutionally protected information has been, and continues to be done, absent proper consent or warrant. (Am. Compl., Dkt. # 102-1, ¶¶ 71, 91, 92, 97, 104, 178-180, 197-204, 215, 220-223).

E. The Amended Complaint Makes Clear The Allegation That The City Does In Fact Obtain And Record Information Which Is Entitled To Protection Under the Fourth Amendment

The Opinion and Order states that "NSMA cannot state a claim under the Fourth Amendment based on an unreasonable search of protected information when the allegations show that no such information has been recorded or obtained." (Opinion and Order, Dkt. #92, p. 12). The analysis in Sections A-D above explains how the Amended Complaint now makes clearer the allegation that the City does in fact "obtain and record" information which is entitled to protection under the Fourth Amendment. The fact that NSMA was able to prepare the Amended Complaint's graphical analysis based on a customer's information obtained from the City is further proof that the City is in fact obtaining and saving all Interval Data for all of its customers. Other noted deficiencies in the Second Amended Complaint are addressed in the proposed amendment by the addition of Count II – State Constitution claim.

II. NSMA'S PROPOSED AMENDED COMPLAINT IS NOT FUTILE

A. NSMA's Proposed Amended Complaint Is Not A "Repackaged Version" Of Its Second Amended Complaint As The City Flippantly Claims

The City's Response uses the word "repackaged" (or "repackaging") no less than seven times in referring to the proposed Amended Complaint. While the City's Response is loaded with condescension, it is woefully lacking in serious analysis. In fact the proposed Amended Complaint

reflects a large number of substantive revisions which specifically address the deficiencies previously identified by this Court.

For example, the City claims the Amended Complaint's graphical analysis is "repackaged," but this is incorrect. (Response, p. 5). As discussed above, the graphs presented in the Amended Complaint are qualitatively different from that contained in the Second Amended Complaint. The City also asserts the new allegations fail to address how the Interval Data collected and retained by the City is more intrusive and revealing than what could be obtained from "any member of the public walking by the residence who notices a car in the driveway or lights in the window." (Response, p. 6). However, even if the City were to physically station its law enforcement personnel outside of a resident's home 24 hours a day, 7 days a week, recording movements within the home which are discernable from the street, such observations would not approach the level of knowledge provided by the Interval Data the City collects and retains. As just one obvious example, occupant activity in the back of the home or basement would in no case be discernable from the street. Interval Data by contrast provides constant surveillance in all parts of the home. It is also reasonable to assume it would be impractical for the City's police force to perform constant physical street surveillance of every home in the municipality even if it wanted to. But with smart meters they can. The present case involves a government trespass directly into the home, a fact bringing smart meters under the strictest scrutiny under both the Fourth Amendment and the Illinois Constitution. *United States v. Jones*, 132 S.Ct. 945 (2012). "When it comes to the Fourth Amendment, the home is the first among equals. . . . [The Fourth Amendment] would be of little practical value if the State's agents could stand in a home's porch or side garden and trawl for evidence with impunity; the right to retreat would be significantly

diminished if the police could enter a man's property to observe his repose from just outside the front window." *Florida v. Jardines*, 133 S. Ct. 1409, 1414 (2013).

B. Count I Of The Amended Complaint Sufficiently States A Claim Under Rule 12(b)(6)

In assessing "futility" of an amendment, courts have applied the same standard of legal sufficiency as applies under Rule 12(b)(6). *Shane v. Fauver*, 213 F.3d 113, 115 (3d Cir. 2000), citing, 3 *Moore's Federal Practice, supra §* 15.15[3], at 15-47 to -48 (3d ed.2000). Under this standard, NSMA must provide only "enough detail to give the defendant fair notice of what the claim is and the grounds upon which it rests, and, through his allegations, show that it is plausible, rather than merely speculative." *Tamayo v. Blagojevich*, 526 F.3d 1074, 1083 (7th Cir. 2008). To that end, this Court must "accept all factual allegations as true, construe the complaint in the light most favorable to the plaintiff, and determine whether, under any reasonable reading of the complaint, the plaintiff may be entitled to relief." *Albany Bank & Trust Co. v. Exxon Mobil Corp.*, 310 F.3d 969, 971 (7th Cir. 2002). Here, NSMA's allegations in the Amended Complaint are sufficient to withstand a motion to dismiss under Rule 12(b)(6), and the Response fails to establish otherwise as a matter of law. This is especially true with the addition of a new Count II – State Constitution claim – which incorporates the fact Illinois recognizes specific right to privacy protection which is not found in the text of the Fourth Amendment. *In re May 1991 Will County Grand Jury*, 152 Ill.2d 381, 390, 604 N.E. 2d 929 (1992).

C. This Court Does Have Supplemental Jurisdiction To Consider NSMA's Illinois Constitution Claim

This Court may in fact consider NSMAs Illinois Constitutional claim. The City's assertion to the contrary is frivolous. The City argues it would be improper for this Court "to retain jurisdiction" over NSMA's added claim. The City is mistaken. Under 28 U.S.C. § 1367(a),

NSMA's accompanying state claim falls within this Court's supplemental jurisdiction as it is "so related to [the federal] claims ... that they form part of the same case or controversy." 28 U.S.C. § 1367(a). This supplemental jurisdictional statute codifies the principle that "the federal courts' original jurisdiction over federal questions carries with it jurisdiction over state law claims that `derive from a common nucleus of operative fact,' such that `the relationship between [the federal] claim and the state claim permits the conclusion that the entire action before the court comprises but one constitutional case.'" *City of Chicago v. International College of Surgeons,* 522 U.S. 156, 164-65 (1997)(quoting *United Mine Workers v. Gibbs,* 383 U.S. 715, 725 (1966)); see also, *Groce v. Eli Lilly and Company*, 193 F.3d 496, 500 (7th Cir. 1999); *Murphy v. Village of Hoffman Estates,* 959 F. Supp. 901, 907 (N.D. Ill. 1997) (arguing that amended complaint relating to post-termination violation under Illinois Medical Health Act is within the court's supplemental jurisdiction). The facts involved in the state claim need only be loosely connected to the federal claim in order to satisfy the common nucleus of operative fact requirement. *Ammerman v. Sween,* 54 F.3d 423, 424 (7th Cir.1995); *Channell v. Citicorp,* 89 F.3d 379, 385 (7th Cir.1996). While a state claim need only be "loosely connected" to the federal claim, here NSMA's Illinois Constitution claim is closely connected and arises out of the same set of facts as its federal claim, specifically NSMA's allegations that the forced installation of smart meters unreasonably burdens NSMA members' right to keep intimate details of their activities private and protected from unreasonable search.

The City further asserts that NSMA's Illinois Constitution claim is "both novel and complex" because "[n]o Illinois court has ever ruled that under Article I, Section 6 of the Illinois Constitution, an individual has an expectation of privacy in the aggregated or disaggregated electricity usage data obtained by a smart meter." (Response, p. 11). Putting aside the obvious truth that this

case is one of first impression with regard to smart meters, the City misconstrues the "novel or complex" language of 28 U.S.C. § 1367(c)(1), and beyond a conclusory assertion, the City makes no attempt to explain the clause's applicability here. The City does not, and cannot, dispute that Illinois courts have previously held that Article I, Section 6 of the Illinois Constitution affords legal protection to an individual's telephone and bank records. See e.g., *People v. DeLaire,* 240 Ill.App 3d 1012, 1020, 610 N.E.2d 1277 (2nd Dist. 1993); *People v. Nesbitt,* 405 Ill.App. 3d 823, 938 N.E.2d 600 (2nd Dist. 2010); *People v. Jackson,* 116 Ill.App.3d 430, 435, 452 N.E.2d 85, 89 (1st Dist. 1983)(*"*we reject the idea set out in *Miller* that a citizen waives any legitimate expectation in her financial records when she resorts to the banking system"). The City instead merely infers, without support, that telephone records and bank records are somehow fundamentally dissimilar, for purposes of constitutional analysis, to Interval Data collected by a smart meter. (Response, p. 11). However, as stated in the Amended Complaint, even one of the City's own publications asserts: "similar to phone companies that record the time and duration of customers' phone calls for billing purposes" smart metering provides the City with "information of interval usage of power." (Am. Compl., ¶ 110). Clearly, Plaintiff is not asking this Court to "venture beyond the frontiers marked out by state courts themselves." *Shields Enterprises, Inc. v. First Chicago Corp.,* 975 F.2d 1290, 1298 (7th Cir. 1992). NSMA respectfully suggests that the Fourth Amendment alone provides an adequate basis for NSMA to achieve the relief it seeks. However, NSMA has added the State Constitution claim at this juncture for the simple reason that after giving full consideration to all of this Court's well-reasoned guidance and concerns on the matter, NSMA has the good faith belief that the Illinois Constitution and court rulings with respect to its greater privacy protections, will be helpful not only to NSMA's cause of action but also with respect to this Court's analysis of information alleged to be worthy of constitutional protection.

III. THE CITY'S CLAIM OF DELAY OR "DILATORY CONDUCT" BY NSMA IS COMPLETELY MERITLESS

A. The City Fails To Even Argue It Would Be Unduly Prejudiced By NSMA's Proposed Amended Complaint

Nowhere in the Response does the City even try to claim it would be unduly prejudiced by the new complaint. Undue prejudice exists where the amendment "brings entirely new and separate claims, adds new parties, or at least entails more than an alternative claim or a change in the allegations of the complaint and where the amendment would require expensive and time-consuming additional discovery." *Lanigan v. LaSalle Bank*, 108 F.R.D. 660, 662 (N.D. Ill. 1985). Absent such circumstances, "a defendant must make a specific showing of prejudice" to defeat a motion to amend. *Dugan v. Selco Indus., Inc.*, No. 96 C 8404, 1997 WL 701336, at *3 n.2 (N.D. Ill. Nov. 6, 1997) (citing *Xerox Fin. Svcs. Life Ins. Co. v. Salomon Bros.*, No. 92 C 1767, 1993 WL 78721, at *1 (N.D. Ill. Mar. 18, 1993)). The non-moving party bears the burden of showing undue prejudice as a result of a proposed amendment. *Id.* Here, the City provides no showing of undue prejudice, and none of the indices of undue prejudice cited in *Lanigan* are present here. NSMA's Amended Complaint requires no additional discovery and the theories of this case have not changed. Although Count II of the proposed Amended Complaint – a violation of right to privacy and unreasonable search and seizure under Article I, Section 6 of the Illinois Constitution – was not in previous complaints, the substance of the allegations in Count II is neither new nor complicated. NSMA has alleged throughout this litigation that the City has unlawfully infringed upon the right of NSMA members to be safe within their homes from unreasonable search**.** NSMA has alleged sufficient facts to bring this claim, and substantially the same legal theories pertaining to Count II have been at issue since the beginning of this case. *See Xerox*, 1993 WL 78721, at *2 (amendment to complaint does not cause prejudice to defendant where it "merely puts a slightly

different spin on legal theory and conduct" already alleged in the complaint, and where defendant was "on fair notice" of the legal theory). Absent prejudice to the nonmoving party, "[i]f the underlying facts or circumstances relied upon by a plaintiff may be a proper subject of relief, he ought to be afforded an opportunity to test his claim on the merits." *Forman*, 371 U.S. at 182.

B. There Is No Undue Or Unexplained Delay By NSMA In Asserting Its State Law Claim

The City opposes the Amended Complaint as unduly delayed, adding that NSMA's Illinois Constitution claim comes "three years after the filing of the original complaint." (Response, p. 12). As an initial matter, NSMA of course disputes the very notion that it has delayed this litigation in any way. More importantly, there is no evidence to support such a claim. Further, if this litigation has taken longer than expected, NSMA respectfully maintains that has much to do with the confusion and some less than credible claims the City has inserted in the record, as detailed above. However, even assuming *arguendo* the City's unsubstantiated conclusion, "delay is an insufficient basis for denying a motion to amend unless this delay results in undue prejudice to the opposing party." *Tragarz v. Keene Corp.*, 980 F.2d 411, 432 (7th Cir. 1992) (citing *Textor v. Bd. of Regents*, 711 F.2d 1387, 1391 (7th Cir. 1983)*;* see also, *Dubicz v. Commonwealth Edison Co.*, 377 F.3d 787, 793 (7th Cir. 2004)("[D]elay by itself is normally an insufficient reason to deny a motion for leave to amend.")(citing *Perrian v. O'Grady*, 958 F.2d 192, 194 (7th Cir.1992)). Again, the City makes absolutely no mention as to how the "delay" it alleges would result in undue prejudice.

C. The City Misconstrues The Amended Complaint And Misrepresents The History And Usage of Disaggregation Algorithms

The City argues that NSMA's Motion "impliedly asserts that energy disaggregation algorithms did not exist at the time of Plaintiff's original complaint." (Response, p. 13). In fact

NSMA has made no such contention. What NSMA does allege in its Amended Complaint is that "sophisticated algorithms now exist which identify how much electricity even small appliances are using, and which require only Interval Data collected and retained via a smart meter without the need for any additional hardware." (Am. Compl., ¶ 80). The City further argues that "energy disaggregation algorithms are not new at all and have existed since at least the time Plaintiff filed the initial compliant herein." (Response, p. 13). For support the City merely attaches to its Response a Stanford Junior University document to indicate at least one resource has been available since 2011. (Response, p. 13; Ex. A). The City's claim is unpersuasive because while the subject disaggregation tools may indeed have been located within academia going back as far as 2011, it is undisputed that it is only very recently that such disaggregation algorithm tools have been made readily available to utilities.

CONCLUSION

WHEREFORE, for the reasons identified above, NSMA respectfully requests that this Court grant its motion for leave to file, and instruct the Clerk of Court to docket, the Third Amended Complaint for Injunctive Relief.

Dated: January 28, 2015

Respectfully submitted,

By: s/Doug E. Ibendahl

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CERTIFICATE OF SERVICE

I hereby certify that on this 28th day of January, 2015, I caused to be electronically filed a true and correct copy of *Reply to Defendant's Memorandum in Response to Plaintiff's Motion for Leave to File Third Amended Complaint* with the Clerk of the U.S. District Court of the Northern District of Illinois, Eastern Division, 219 South Dearborn Street, Chicago, Illinois, using CM/ECF, which will send electronic notification of such filing to the following:

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