



**Former
Congressman Rick Boucher**

**The Energy Policy Act of 2005 Does Not Vest in Electricity Consumers a Right to
Opt Out of the Deployment of Time-based Meters or Other Automated
Metering Infrastructure**

**By
Rick Boucher**

The author served in the United States House of Representatives for 28 years, and for 25 of those years, was a member of the House Committee on Energy and Commerce and its subcommittee having responsibility for energy, including the electric power sector.

At the time of the adoption of The Energy Policy Act of 2005 (EPACT 05), he was the ranking Democratic member of the Subcommittee on Energy and Air Quality of the House Committee on Energy and Commerce. The subcommittee was the point of origination for the House of Representatives' version of EPACT 05. The author was the sponsor of the language described in this paper relating to time-based meters, generally referred to as "smart meters", and automated infrastructure, which enables electric utilities to utilize information from premises-based smart meters and to have continuous real-time observation of the condition and operation of the electricity distribution system. His language was adopted during Energy and Air Quality Subcommittee deliberation of EPACT 05, and the language is contained in the final version of the legislation which was signed into law.

Some opponents of advanced metering infrastructure, the term this paper will use to describe smart meters and other automated metering technology, are incorrectly arguing that electric utilities, states and municipalities are illegally requiring consumers to accept advanced metering infrastructure in violation of the terms of EPACT 05. They maintain that a provision in the Act extends to individual customers the right to choose whether or not to be included in advanced metering infrastructure deployments.

This paper explains the legislative history of the provisions in question and demonstrates why the claims of opponents of advanced metering infrastructure are not well founded.

**Sidley Austin
1501 K. Street, NW
Washington, D.C. 20005
202-736-8290
rboucher@sidley.com**

The advent of premises-based meters that provide granular, time-varying pricing information to electricity consumers and enable them to schedule energy using functions within the home during times when electricity prices are lower, and the corresponding arrival of information technology enabling electric utilities to determine in real time the status and functioning of all aspects of the electricity distribution system offer to electricity consumers and the utilities that serve them numerous reliability improvements and cost-saving advantages.

The savings to electricity consumers from the use of advanced meters can be substantial. With the information smart meters provide, consumers that are on time-varying rates can shift energy consuming functions such as the use of clothes and dishwashers and vacuum cleaning to less expensive off-peak hours. When time of use pricing is applied in electricity rates, consumers' electricity charges during off-peak hours can be orders of magnitude less than charges during more expensive periods when overall electricity demand is high.

To the extent that consumers develop a pattern of shifting their electricity consumption to off-peak hours, electric utilities more fully utilize their existing generation capacity and can avoid the costs associated with the construction of some new generating facilities to serve peak demands.

Moreover, electric utilities through the use of new automated infrastructures have constant monitoring of the condition of the electricity distribution system. With older technology, when an outage occurred, utilities would have to receive calls from customers and then have to conduct a physical examination of distribution lines to determine where the exact outage was occurring. Today's smart technology enables utilities to spot weaknesses in the distribution system before outages occur and effect repairs with a consequent dramatic improvement in distribution system reliability. When outages do occur, with smart technology their location can be detected in the central office immediately, and repair crews can be dispatched in a far more timely way than the older technology allowed.

Through numerous hearings and other fact-finding in advance of the adoption of EPACT 05, our subcommittee became well-informed of the cost-saving and system reliability enhancing benefits that derive from advanced metering infrastructure, including premises-based smart meters, and the upstream utility applications. In an effort to promote both enhanced system reliability and electricity cost savings for consumers and the electric utilities that serve them, we decided to include in EPACT 05 statutory provisions designed to encourage states to permit cost recovery through electricity rates for the deployment of premises-based smart meters and other automated infrastructure. The language we drafted appears today as 16 U.S.C. Section 2621.

In drafting section 2621, we were respectful of the traditional sole authority of the states to regulate retail electricity rates. Therefore, rather than mandating that the states permit cost recovery for the deployment of premises-based smart meters and other advanced metering infrastructure, in section 2621(a) we directed each state public utility regulatory authority to conduct a proceeding for the purpose of determining whether to adopt in whole or in modified form each of several standards for utility rates and operations. The state regulatory authorities, while required by the federal statute to undertake a proceeding, remained completely free to decide not to permit cost recovery for the deployments, to adopt the standards for cost recovery suggested in section 2621, or to adopt modified standards which differed from those suggested in section 2621 in accordance with the utility regulatory authority's view of how the best interests of the state's electricity consumers and utilities would be served.

Some opponents of the provision of cost recovery for the deployment of advanced automated infrastructure, are arguing that section 2621(d), a suggested standard under which electric utilities would provide to individual customers, upon customer request, a time-based rate schedule and a time-based meter capable of enabling the utility and the customer to offer and receive such rate respectively, constitutes a federal mandate under which electricity consumers may opt out of the receipt of smart meters without financial penalty. This section does not and was not intended to provide such an opt out right.

Initially, the provision of such a mandated opt out right would not have been consistent with our subcommittee's view that decision-making responsibility over retail electricity rates is the sole province of the state public utility regulatory authorities. In drafting section 2621, we were observant in all respects of the prerogative of each state to make cost recovery determinations. Any interpretation of section 2621(d) that it constitutes a mandate under which states must permit electricity consumers to opt out of smart meter deployments would be wholly inconsistent with the subcommittee's determination to leave all decisions with respect to cost recovery to each state's public utility regulatory authority.

Secondly, it is important to understand that the sole requirement imposed under section 2621 is contained in section 2621(a) which simply directs the states to consider permitting cost recovery for advanced metering infrastructure. As a part of that consideration, each state regulatory authority remained free to make any decision it deems to be in the public interest, including permitting cost recovery for all smart meter deployments, adopting some or all of the standards contained in section 2621(d), rejecting those standards and adopting different standards, or deciding not to permit cost recovery for advanced metering infrastructure. In fact, in the states that have conducted proceedings, one sees versions of each of these approaches.

As the author of the smart meter provisions of EPACT 05, as reflected in section 2621, I was and remain convinced of the great value that consumers, utilities and the nation as a whole will derive from widespread deployment of automated metering infrastructure and associated technologies that are helping to modernize the grid in various regions of the United States today. These technologies are both proven and safe. I have no doubt that they will be widely embraced as consumers gain greater awareness of the benefits they can realize in terms of increased reliability, greater efficiencies and their ability to make wiser energy saving choices.