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## THE “POWER” OF SOCIAL MEDIA: LEGAL ISSUES & BEST PRACTICES FOR UTILITIES ENGAGING SOCIAL MEDIA

*by Carolyn Elefant\**

**SYNOPSIS:** Once Web 2.0 luddites, more and more utilities are now adopting social media. Whether it’s a company profile and job postings on LinkedIn, a Facebook page with tips about energy efficiency, or a Twitter stream disseminating information about recent outages, utilities are undeniably serious about adding digital real estate to their service territory.

Yet even as the utility march towards Web 2.0 gathers momentum, the heavily regulated nature of the utility industry presents challenges in the naturally free-flowing world of social media. In addition to the traditional issues that all businesses face when engaging social media — from workplace concerns related to employee abuses of social media and appropriate discipline to copyright and IP protection — utilities must also ensure that their participation in social media does not run afoul of affiliate codes of conduct, SEC regulation, and a host of other compliance issues. This article provides an exhaustive summary of the legal and regulatory issues potentially implicated by utility engagement in social media, and proposes best practices and guidelines for development of a social media policy that reduce the risks of social media for utilities.

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#### THE POWER OF SOCIAL MEDIA

Increasingly, utilities are harnessing the power of social media for a variety of business purposes, including educating consumers, implementing regulatory initiatives like demand response and smart grid, coordinating stakeholder proceedings, and communicating power outages and safety issues to the public. Yet even as utilities hop aboard the social media bandwagon, they remain subject to the same regulatory and legal requirements that apply to their traditional activities. Though social media changes the media for communicating with consumers or carrying out a required function, it does not change the message. Thus, commonly prohibited activity like utility endorsement of an affiliate is not transformed into permissible conduct merely because that endorsement comes in the form of a 140-character tweet.

This article describes the regulatory and legal issues potentially triggered by a utility's use of social media. Part I briefly defines what social media is, and describes the ways that utilities currently use social media. Part II describes the distinct legal issues triggered by utility use of social media from the perspective of the utility as (1) an employer, (2) a corporate entity, (3) a regulated entity, and (4) for public power, a government body. Part III highlights best practices for utility use of social media, with emphasis on development of a formal social media policy.

## I. OVERVIEW OF UTILITY ENGAGEMENT OF SOCIAL MEDIA

### A. *What Is Social Media and Why Does It Matter?*

Part of the new generation of Web 2.0 applications, social media is a catch phrase that describes technology that facilitates interactive information, user-created content and collaboration.<sup>1</sup> Social media sites are growing fast and furiously, becoming indispensable to consumers. In August 2010, for the first-time, Facebook surpassed Google as the number one site where internet users spend the majority of their online time — 41 million hours for Facebook users versus 39.9 million hours for Google. A recent Nielsen report showed that overall, users spend a quarter of their online time using social media applications.<sup>2</sup> And it's not just kids, either: a Pew Research report released in August 2010 showed that social media use of sites like Facebook and LinkedIn by adults aged fifty to sixty-four grew by a whopping 88% between April 2009 and May 2010.<sup>3</sup> Bottom line: if a company seeks to get a customer's attention online, a social media presence is indispensable.

Given the dozens of social media platforms available (with new ones emerging each year), it's best to categorize social media tools in terms of the functions that they serve. The chart below lays out categories of social media, along with some of the best-known examples correlated with their respective functions, and potential utility use:

**Table 1.**

Category	Functions	Examples	Utility Use
Directories	Resume type listing with ratings by clients and colleagues	LinkedIn	Advertising employment, creation of "company" page
Communication	Disseminates writings and information on an ongoing or real time basis	Blogs, Twitter	Describe new programs or policy commentary (blogs), crisis communication (via Twitter)

1. *Core Characteristics of Web 2.0 Services*, TECHPLUTO, <http://www.techpluto.com/web-20-services/> (last visited Feb. 23, 2011).

2. Mark Walsh, *ComScore: Facebook Takes Lead In Time Spent*, MEDIAPOST NEWS (Sept. 9, 2010), [http://www.mediapost.com/publications/?fa=Articles.showArticle&art\\_aid=135476](http://www.mediapost.com/publications/?fa=Articles.showArticle&art_aid=135476).

3. Mary Madden, *Older Adults and Social Media*, PEW INTERNET (Aug. 27, 2010), <http://www.pewinternet.org/Reports/2010/Older-Adults-and-Social-Media.aspx>.

Communities & Ratings Sites	Collegial or less formal interaction at closed site	Facebook, Facebook Fan Page, Foursquare, Yelp	Promote events, share company photos and physical location. May also be subject of rating
Archiving & Sharing Sites	Stores, shares and redistributes video, slides and documents with opportunity for feedback	YouTube, Slideshare, Docstoc, Scribd, Flickr	Share educational video, presentations, photos, copies of regulations and tariffs

### B. Utility Use of Social Media: Slow but Emerging

Though the utility sector lags behind other industries in adopting social media, interest is on the rise. A 2009 Social Media Benchmark Survey conducted by Exelon found that 83% of the thirty utilities polled are interested in social media.<sup>4</sup> At least one industry publication predicts that in 2011, utility interest in social media will convert into actual implementation.<sup>5</sup>

Several utilities are already employing social media for a variety of purposes ranging from crisis communication to customer education to brand awareness.<sup>6</sup> Examples include:

**Crisis communication:** Both PSNH and Pepco have received media coverage on their use of Twitter to communicate information on outages to customers.<sup>7</sup> Likewise, at least eight utilities of thirty surveyed in Exelon's 2009 Benchmark survey reported using social media for crisis communication.<sup>8</sup>

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4. Kristen Wright, *Do Utilities Need Social Media?*, ELECTRIC LIGHT & POWER, Jan. 2010, at 46, available at [http://www.elp.com/index/display/article-display/7864762152/articles/electric-light-power/volume-88/issue-1/sections/do-utilities\\_need.html](http://www.elp.com/index/display/article-display/7864762152/articles/electric-light-power/volume-88/issue-1/sections/do-utilities_need.html).

5. Mark Burlingame, *What Does 2011 Hold in Store for the Utility Industry*, COMMODITIES NOW, Jan. 12, 2011, <http://www.commodities-now.com/news/power-and-energy/4604-what-does-2011-hold-in-store-for-the-utility-industry.html> ("Look for increased utilization of social media to educate customers and for customers to use for energy management and cost containment.").

6. See, e.g., Jorge Echeverria, Teddi Davis & Andrea Fabbri, *Energy Utilities Have Much to Gain by Using Social Media*, 26 NAT. GAS & ELEC. 1, 1 (Apr. 2010) (summarizing utility use of social media, including outage communication, and energy conservation); John R. Johnson, *Reaching Out NES, DUKE, SDG&E GET MORE SOCIAL*, INTELLIGENT UTIL. MAG., July/Aug. 2009, at 26, available at [http://www.intelligentutility.com/magazine/article/reaching-out?quicktabs\\_6=2](http://www.intelligentutility.com/magazine/article/reaching-out?quicktabs_6=2) (describing utilities' varied use of social media for multiple outreach and educational functions).

7. *The Promise of More Sales Prompt Some Firms to Make That Social Media Position Full Time*, MARKETINGVOX (Aug. 23, 2010), <http://www.marketingvox.com/the-promise-of-more-sales-prompt-some-firms-to-make-that-social-media-position-full-time-047586/> (describing PEPCO's use of Twitter during outages); Jon Udell, *A Conversation with @psnh About the Ice Storm, Social Media, and Customer Service*, JON UDELL BLOG (Jan. 12, 2009, 7:59 AM), <http://blog.jonudell.net/2009/01/12/a-conversation-with-psnh->

**Public & Customer Relations:** For several years, critics of utility policies and practices have been using social media; opponents of utility policies effectively use social media to organize protests or otherwise mobilize support for their cause.<sup>9</sup> Utility customers also turn to social media, either to vent frustration over slow utility response times<sup>10</sup> or to highlight disasters like fires and explosions.<sup>11</sup>

Rather than ignoring this negative publicity, utilities are using social media to send a positive message. In response to frequent criticism, one utility, Avista, “decided to get serious about using social media” and use it to publicize its policies to encourage renewables and energy efficiency, and to promote safety.<sup>12</sup>

Other companies use social media proactively to build strong relationships with customers. In October 2010, Xcel Energy launched a social media platform, with a blog to educate consumers about energy efficiency, a Facebook Page with polls on energy consumption, a service map with contact information for each of Xcel Energy’s eight states, and several Twitter feeds.<sup>13</sup> As Xcel’s vice president, Beth Willis, explained in the press release, “We take very seriously our responsibility to be a good energy partner for our customers . . . . We recognize the tremendous potential that social media offers to connect with our customers personally and directly.”<sup>14</sup>

Utility regulatory commissions have also started to recognize the value of social media to engage customers and address their needs. In September 2010, the Kentucky Public Service Commission approved a training seminar for a water district on the use of new technology and social media to serve and inform water utility customers.<sup>15</sup>

**Customer education:** South Carolina Energy & Gas created a blog, [www.sceg-energywise.blogspot.com](http://www.sceg-energywise.blogspot.com), to provide energy efficiency tips to customers. The site supports comments, where readers can ask questions or

about-the-ice-storm-social-media-and-customer-service/ (discussing PSNH use of social media); *Preparing for a Power Outage*, WESTAR ENERGY, <http://www.westarenergy.com/wcm.nsf/content/prepare> (last visited Feb. 23, 2011) (describing that utility will use social media channels such as Twitter and Facebook to communicate about outages).

8. Scott Johnson, *Weathering the Storm*, CHARTWELL’S INDUSTRY INSIGHTS (Jan. 19, 2011), <http://blog.chartwellinc.com/2011/01/19/weathering-the-storm-social-media-mobile-sites-help-utilities-improve-customer-contact-2/> (summarizing electric utility use of social media sites to communicate outages).

9. *Considering Social Media in 2010? Join the Conversation*, PRIORITY RESULTS, available at <http://priorityresults.com/files/whitepapers/Priority%20Integrated%20Marketing%20-%20Utilities%20Social%20Media.pdf> (last visited Feb. 23, 2011) (describing customer use of social media to protest utility practices).

10. *Echeveria, Davis & Fabbri, supra* note 6, at 4.

11. Mark Gabriel, *You Tube, iPhone Apps, Kindle and the Utility Franchise*, INTELLIGENTUTILITY, Feb. 4, 2010, [http://www.intelligentutility.com/article/10/02/youtube-iphone-apps-kindle-and-utility-franchise?quicktabs\\_11=1](http://www.intelligentutility.com/article/10/02/youtube-iphone-apps-kindle-and-utility-franchise?quicktabs_11=1) (“There are . . . fewer than 1,000 when ‘electric utility’ is searched. Even then, 98 percent have nothing to do with electric utilities but cover areas such as explosions, fires, . . .”).

12. *Considering Social Media in 2010? Join the Conversation, supra* note 9, at 4.

13. Press Release, Xcel Energy, Xcel Energy Launches Comprehensive Online Customer Communications Platform (Oct. 4, 2010), <http://tinyurl.com/2u27vt8>.

14. *Id.*

15. *In the Matter of: Accreditation and Approval of a Public Service Commission Water Personnel Training Seminar as a Water District Commissioner Training Program*, No. 2010-00350, 2010 Ky. PUC LEXIS 1071 (Ky. Pub. Serv. Comm’n Sept. 8, 2010).

contribute tips of their own. North Carolina utility Progress Energy publicized its “Save the Watts” demand-side management/energy efficiency program by disseminating energy efficiency tips on Twitter and received rate approval for costs associated with these efforts.<sup>16</sup> Nebraska Public Power District (NPPD) operates a YouTube channel, with information for consumers on topics such as recycling and renewable energy.<sup>17</sup>

Co-ops have also started using social media for consumer education. Ozarks Electric Cooperative Corp., for example, provides energy tips and outage reports through its Facebook Page.<sup>18</sup> Delaware Electric Cooperative uses both a Facebook<sup>19</sup> Page and a Twitter account<sup>20</sup> to spread the word about its own demand-side management/energy efficiency program<sup>21</sup> as well as to share company-related news and provide general information about outages.<sup>22</sup>

**Customer Choice Programs:** In jurisdictions with retail competition, electric suppliers are integrating social media campaigns with more expensive conventional advertising such as radio, television, and billboards, to attract customers.<sup>23</sup> For incumbent utilities competing with new suppliers, social media takes on a more significant role – not so much for marketing but for customer retention.<sup>24</sup>

**Promoting Green Power and Carbon Offsets:** Social media plays a significant role in promotion of green power and carbon offset programs, particularly to younger demographics, which are more inclined to support these programs. In seeking approval of a voluntary green power and carbon credit rider, Duke Energy Indiana described its plan to use social networking, such as Facebook ads, “to drive traffic from a younger demographic.”<sup>25</sup> Similarly,

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16. *In the Matter of Application by Carolina Power & Light Co., d/b/a Progress Energy Carolinas, for Approval of Demand Side Management and Energy Efficiency Cost Recovery Rider Pursuant to G.S. 62-133.9 and Commission Rule R8-69*, No. E-2, SUB 951, 2009 N.C. PUC LEXIS 1787, at \*16 (N.C. Utils. Comm’n Nov. 25, 2009) (finding that A&G costs for DSM/EE education programs, including social networking, are justified).

17. Neb. Pub. Power Dist., *NPPDTV’s Channel*, YOUTUBE, [www.youtube.com/nppdtv](http://www.youtube.com/nppdtv) (last visited Feb. 23, 2011).

18. *Ozarks Electric Coop. Corp.*, FACEBOOK, <http://www.facebook.com/OzarksElectric> (last visited Feb. 23, 2011).

19. *Del. Electric Coop.*, FACEBOOK, [http://www.facebook.com/delawareelectric?v=app\\_2309869772](http://www.facebook.com/delawareelectric?v=app_2309869772) (last visited Feb. 23, 2011).

20. *Del. Electric Coop.*, TWITTER, <http://twitter.com/DEElectricCoop> (last visited Feb. 23, 2011).

21. *Del. Electric Coop.*, BEAT THE PEAK, <http://www.beatthepeak.coop/> (last visited Feb. 23, 2011).

22. *Del. Electric Coop.*, *supra* note 19; *Del. Electric Coop.*, *supra* note 20.

23. Julie Wernau, *Illinois Customers Now Have Four Choices for Electricity*, CHI. TRIB., Jan. 27, 2011, [http://articles.chicagotribune.com/2011-01-27/business/ct-biz-0126-electricity-20110126\\_1\\_alternative-suppliers-david-kolata-come](http://articles.chicagotribune.com/2011-01-27/business/ct-biz-0126-electricity-20110126_1_alternative-suppliers-david-kolata-come) (noting that alternative suppliers will use “tons” of social media campaigns and other tools to get the word out about their services).

24. See, e.g., Josh Struve, *Harnessing Network Effects: A Web 2.0 Primer for the Insurance Industry*, J. OF INS. OPERATIONS, Oct. 1, 2010, <http://www.jiops.com/10/2009/harnessing-network-effects-a-web-2-0-primer-for-the-insurance-industry/> (describing importance of social media presence to insurance companies’ ability to retain customers).

25. *Verified Petition of Duke Energy Indiana for Approval of a Voluntary Green Power and Carbon Credit Rider*, No. 43617, 2009 Ind. PUC LEXIS 258, at \*17 (Ind. Util. Regulatory Comm’n July 16, 2009).

PSNH proposed to market a renewable energy service option through media sites, “such as its blog and Twitter.”<sup>26</sup>

**Rate Cases:** Social media has found its way into utility rate cases. In approving a double-digit rate increase proposed by Avista, the Idaho Public Utilities Commission highlighted the company’s efforts to mitigate the impact of the proposed rate increase on customers, including communicating the reasons for the increase to customers through various social media platforms (including a company blog and Twitter).<sup>27</sup> In one rate case, intervenors are also seeking discovery of a utility’s online communications on social media sites like Facebook and MySpace.<sup>28</sup>

**Recruitment:** Several utilities use social media to recruit employees and publicize positions. Ameren has a careers page on Facebook,<sup>29</sup> while a number of utilities, including Southern California Edison, Xcel Energy, and Progress Energy maintain LinkedIn company profiles that advertise available positions.

**Branding:** In an interview with Energy Insight (Nov/Dec. 2009), NPPD representatives explained that it created a Facebook page to use for branding purposes.<sup>30</sup>

**Stakeholder Engagement:** Duke Energy (DE) created a website to engage stakeholders in dialogue over clean energy and energy efficiency issues,<sup>31</sup> and DE is currently advertising for a social media expert who can aid the company in, among other things, engaging stakeholders through social media.<sup>32</sup>

**Smart Grid:** While utilities have already started to adopt social media, a major push is expected to accompany the move towards smart grid.<sup>33</sup> Responding to a Department of Energy Request for Information on Smart Grid, the Edison Electric Institute described the anticipated role of social media: “In addition to proactive communication and outreach efforts in advance of smart meter deployment, utilities should engage customers throughout the deployment period through innovative media channels, including social media outlets,

26. *Proposed Renewable Default Service Energy Rate Order Approving Partial Settlement Agreement*, DE 09-186, 210 N.H. PUC LEXIS 19, at \*11 (N.H. Pub. Utils. Comm’n Mar. 2010).

27. *In the Matter of the Application of Avista Corporation DBA Avista Utilities for Authority to Increase Its Rates and Charges for Electric and Natural Gas Service in Idaho*, Nos. AVU-E-10-01, AVU-G-10-1, 2010 Idaho PUC LEXIS 201, at \*17 (Idaho Pub. Utils. Comm’n Sept. 2010).

28. *In Re: Application of Tega Cay Water Service for Adjustment of Rates and Charges and Modifications to Certain Terms and Conditions for the Provision of Water and Sewer Service*, No. 2009-473-WS, 2010 S.C. PUC LEXIS 184 (S.C. Pub. Serv. Comm’n May 14, 2010) (requesting all on-line communications, “including wall to wall or other chats on My Space [sic], Facebook or any other social utility network”).

29. *Ameren Careers*, FACEBOOK, <http://www.facebook.com/AmerenCareers>.

30. *Social Media and You!*, 2 ENERGY INSIGHT, Oct./Nov./Dec. 2009, at 8, available at [http://www.nppd.com/EnergyInsight/oct\\_dec09.pdf](http://www.nppd.com/EnergyInsight/oct_dec09.pdf).

31. *DTE Energy Co.*, CAREERBUILDER, [http://www.careerbuilder.com/JobSeeker/Jobs/JobDetails.aspx?job\\_id=J8E8GR68TC3NR0CCJNS](http://www.careerbuilder.com/JobSeeker/Jobs/JobDetails.aspx?job_id=J8E8GR68TC3NR0CCJNS) (last visited Feb. 23, 2011).

32. *Id.*

33. Katie Fehrenbacher, *It’s Come to This: Citizens Against Smart Meters*, GIGAOM, Mar. 19, 2010, <http://gigaom.com/cleantech/its-come-to-this-citizens-against-smart-meters/> (describing utility exploration of ways to use social media to support smart grid).

Internet-based energy consumption tools, and email/text notification programs to reach consumers.<sup>34</sup>

Already, a few companies have launched applications to spread the word about smart grid<sup>35</sup> and to facilitate its use.<sup>36</sup> Some players are going beyond use of social media as an educational tool, employing it instead as a conduit for sharing data on energy consumption. The University of Mississippi has installed smart meters and will soon broadcast its energy consumption on Facebook and Twitter, while German utility Yello Strom is developing a Twitter application for its smart meter system that will enable customers to share energy usage data.<sup>37</sup>

**Interaction with Regulators:** It's not just utilities that are developing a presence online, but also the agencies that regulate them. Within the past few years, both FERC and a number of state regulatory commissions have established a presence on twitter and Facebook.<sup>38</sup> Thus far, these regulators have limited followers and "friends," and they use Twitter and Facebook much in the same way as they currently use their static websites: to disseminate information about meetings and events. As social media gains more use in the energy industry, the FERC and utility commissioners may use it more actively to engage regulated entities and the public.<sup>39</sup>

### C. *The Future of Utilities and Social Media*

By necessity, utility use of social media will accelerate in the next two years. The reason? Because of recent FERC and complimentary state policies to

34. Comment from Edison Electric Institute to DOE, Office of Electric Delivery and Energy Reliability, *Re: Smart Grid RFI: Addressing Policy and Logistical Challenges to Smart Grid Implementation*, 12 (Nov. 1, 2010), available at <http://www.eei.org/whatwedo/PublicPolicyAdvocacy/TFB%20Documents/101101OwensDoeSmartGridRFI.pdf>.

35. Colleen Coplick, *GE Gets Social Media*, EVERYJOE, Mar. 10, 2009, <http://everyjoe.com/work/ge-gets-social-media/> (describing GE's neat hologram on smart grid and snappy You Tube video created with the intent of making GE's site go viral); GE, GET PLUGGED IN, [http://ge.ecomagination.com/smartgrid/#/get\\_plugged\\_in](http://ge.ecomagination.com/smartgrid/#/get_plugged_in) (information on smart grid technologies and alternative energy) (last visited Feb. 23, 2011).

36. Dennis Smith, *Texas Collaboration Produces Unique Website*, CHARTWELL'S INDUS. INSIGHTS (May 24, 2010), <http://blog.chartwellinc.com/2010/05/24/texas-collaboration-presents-a-unique-website/> (reporting on collaborative website set up by Texas electric distribution companies within ERCOT allowing users to view energy data from Smart Grid online); SMART METER TEX., <https://www.smartmetertexas.com/CAP/public/> (last visited Feb. 23, 2011).

37. John Gartner, *Green IT: Buildings Are Now Twittering Their Energy Consumption*, CLEAN TECHIES (Aug. 27, 2009), <http://blog.cleantechies.com/2009/08/27/green-it-buildings-twittering-energy-consumption/>.

38. See, e.g., <http://www.twitter.com/FERC>; <http://www.twitter.com/californiaapuc>; <http://www.twitter.com/NYSDPS>; <http://www.twitter.com/njcleanenergy>; <http://www.twitter.com/KYPSC>; <http://www.twitter.com/PUCTX>; <http://www.twitter.com/pucmn>; and <http://www.facebook.com/FERC.gov>; <http://www.facebook.com/pages/California-Public-Utilities-Commission/113118882034828?ref=ts>; <http://www.facebook.com/#!/pages/Missouri-Public-Service-Commission/144739882238794>; <http://www.facebook.com/#!/pages/Delaware-Public-Service-Commission/122194837802518>.

39. Use of social media by government regulators raises its own set of legal concerns, including potential for ex parte communication, waiver of deliberative privilege, and violation of Administrative Procedure Act requirements for on-the-record proceedings; but a more extensive discussion of the legalities related to regulators' use of social media is beyond the scope of this article.

promote and expedite implementation of demand response programs and smart grid.<sup>40</sup>

The success of both smart grid and demand response requires that utility customers transform from passive consumers of a default service to informed participants who make proactive, strategic choices about energy usage. Modifying customer behavior requires pervasive, persistent, and trustworthy customer education about the benefits and cost savings of smart grid and demand response programs.

That's where the role of social media is significant. As discussed in Part I.A, consumers are spending more and more of their time online at social media sites. To capture their attention and communicate information, utilities must engage some customers through social media. A recent decision by the California Public Utilities Commission on Southern California Edison (SCE)'s application for a demand response program noted the utility's study showing that customers expressed a preference for web-based customer outreach.<sup>41</sup> As Jerry Thomas, Microsoft Power & Utilities Industry Market Development Manager for the western U.S., observed, "Utilities can have the niftiest Web-based analysis tools, but they won't deliver the intended results if the customer never logs on into the new web-based portal because they prefer to be contacted on social media instead of the Web."<sup>42</sup>

Social media has become so pervasive that courts in Australia, New Zealand, and Canada have allowed service of a lawsuit via Facebook, with one commentator predicting that the United States will soon follow suit.<sup>43</sup> In this context, regulatory requirements that utilities provide customer information through social media are a logical step.

Other features of social media make it a natural medium for educating consumers about smart grid and demand response. Social media is cheap and multi-dimensional — it supports videos, slide presentations, and articles — so utilities can get the most bang for the buck and devise a variety of approaches best tailored to different types of customers. Social media is also collaborative and interactive: in the words of one social media guru, "it's a fancy word for the millions of conversations taking place every day."<sup>44</sup> Thus, social media enables customers to share their experiences with smart grid and demand response

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40. Policy Statement, *Smart Grid Policy*, 128 F.E.R.C. ¶ 61,060 (2009) (setting out FERC policy for implementation of smart grid), available at [www.ferc.gov/whats-new/comm-meet/2009/071609/E-3.pdf](http://www.ferc.gov/whats-new/comm-meet/2009/071609/E-3.pdf); Supplemental Notice of Proposed Rulemaking, *Demand Response Compensation in Wholesale Energy Markets*, 132 F.E.R.C. ¶ 61,094 (2010) (seeking additional comment on just and reasonable cost allocation for demand response).

41. *Application of Southern California Edison Company (U338E) for Approval of Demand Response Programs, Goals and Budgets for 2009-2011 and Related Matters*, No. 09-08-027, 2009 Cal. PUC LEXIS 428, at \*378 (Cal. Pub. Utils. Comm'n Aug. 24, 2009).

42. *Increasing Customer Intimacy Will Be Key Success Factor for Smart Grid*, MICROSOFT POWER AND UTILITIES BLOG (Aug. 5, 2010, 10:10 AM), <http://blogs.msdn.com/b/mspowerutilities/archive/2010/08/05/increasing-customer-intimacy-will-be-key-success-factor-for-smart-grid.aspx>.

43. John Browning, *Served Without Ever Leaving the Computer: Service of Process Via Social Media*, 73 TEX. BAR J. 180 (2010).

44. Marta Kagan, *What the F\*\*k Is Social Media: One Year Later*, <http://www.slideshare.net/mzkagan/what-the-fk-is-social-media-one-year-later>.

programs, ask questions, and learn together, all of which will facilitate adoption by non-users.

Finally, more than any other communication tool, social media matches the message that drives smart grid and demand response. Just as social media is considered Web 2.0 technology because users can customize their experience by creating profiles and content, smart grid and demand response could be termed “Wires 2.0” because they allow customers to control and personalize their electric usage. Consumers who understand and value the benefits of social media will likewise “get” smart grid and demand response. As such, engaging social media to target smart grid and demand response participants promises to be an effective and successful strategy for utilities.

## II. LEGAL AND REGULATORY ISSUES

Because utility adoption of social media trails that in other industries, many utilities may be tempted to borrow directly from successful campaigns in other industries. Don’t. Though the use of social media poses legal risks for all companies, regulated entities are subject to additional and more stringent rules. For example, utilities must comply with regulatory requirements (such as affiliate codes of conduct and SEC disclosure requirements) that are far more stringent than requirements for other industries. Similarly, a utility’s use of social media for certain purposes may have consequences for ratemaking and the utility’s ability to recover certain costs. Failure to consider regulatory requirements in devising a social media strategy may expose utilities to liability, regulatory penalties, and lost revenue if the costs of social media campaigns are excluded from rates.

Though daunting, legal and regulatory challenges are no reason for utilities to avoid social media. By employing best practices, and developing a robust Social Media Policy, as described in Part III, utilities can inoculate themselves against any potential risks posed by social media.

### A. *The Utility’s Different Hats*

Utilities function in several different capacities: as employers, corporate businesses, and regulated entities. Use of social media in each of these capacities raises unique legal issues, many of which involve questions of first impression and remain unresolved. While public power utilities face many of these same legal issues, because they are also government entities, they deal with additional restrictions unique to public bodies. These sections identify the potential legal issues raised by each of a utility’s functions.

### B. *Utility as Employer*

Let’s say that a utility extends an offer to a potential employee, then rescinds it after learning through her Facebook profile that she’s pregnant. Does the action violate pregnancy discrimination laws? What if a group of employees plan over lunch to form an “I hate [insert nationality]” group on Facebook but set up the page on personal time? Does the activity create a hostile work environment? Or say an employee, eager to curry favor, monitors blogs for mention of criticism about the utility, then posts anonymous comments in its

defense without disclosing that he works for the utility. Is that a deceptive practice subject to civil penalty?

These are the sorts of questions that all employers, utilities included, are facing with the emergence of social media.<sup>45</sup> Specific concerns follow.

## 1. Social Media and Hiring Practices

### a. Discrimination in Recruitment and Employment Ads

Social media may be different from traditional media, but the same rules prohibiting discriminatory conduct still apply. By now, most companies are aware that federal law prohibits expression of hiring preferences based on gender, race, national origin, religion, or age in traditional print ads.<sup>46</sup> The same holds true for jobs posted online at sites like Craig's List,<sup>47</sup> and there is no reason to expect that employment ads posted online at a company's Facebook or LinkedIn page would be treated any differently.

Selective recruitment practices – such as placement of employment ads in male-oriented publications in order to prevent women from learning about the position – may also violate anti-discrimination laws.<sup>48</sup> Here, social media cuts both ways. At a site like Linked-In, persons of color are underrepresented in comparison to the broader population: just 5% of Linked-In members are African-Americans (compared with 12.8% of the overall population) while 2% are Hispanics (compared with 15.4% of overall population). Thus, a company relying primarily on Linked-In for recruiting purposes might be accused of unlawfully attempting to keep job opportunities off limits to African Americans and Hispanics.<sup>49</sup>

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45. Richard Paul & Lisa Hird Chung, *Brave New Cyberworld: Employer's Legal Guide to the Interactive Internet*, 24 LAB. L. 109 (2008-09) (providing overview of range of issues faced by employers as a result of employee use of social media); Ben Kerschberg, *Why Corporate Counsel Must Own Social Media Policy*, FORBES ONLINE, Feb. 1, 2011, [http://blogs.forbes.com/benkerschberg/2011/02/01/why-corporate-counsel-must-own-social-media-policy\\_consero/](http://blogs.forbes.com/benkerschberg/2011/02/01/why-corporate-counsel-must-own-social-media-policy_consero/) (identifying unresolved questions relating to social media related employment matters).

46. *Prohibited Employment Policies/Practices*, EEOC, <http://www.eeoc.gov/laws/practices/index.cfm> (“It is illegal for an employer to publish a job advertisement that shows a preference for or discourages someone from applying for a job because of his or her race, color, religion, sex (including pregnancy), national origin, age (40 or older), disability or genetic information. For example, a help-wanted ad that seeks ‘females’ or ‘recent college graduates’ may discourage men and people over 40 from applying and may violate the law.”).

47. In May 2010, the EEOC filed a lawsuit in federal court against Orkin, a pest control company, alleging that the company's Craig's List ads seeking a recruiter “to assist in hiring LDS [returned] missionaries for seasonal employment” were illegal because they showed a preference for candidates of a certain religion (Mormons) and age (returned missionaries tend to be in their 20s). Press Release, EEOC, Orkin Pest Control Sued by EEOC for Age and Religious Discrimination in Hiring and Advertising (May 20, 2010), available at <http://www.eeoc.gov/eeoc/newsroom/release/5-20-10a.cfm>.

48. EEOC, *supra* note 46; see also EEOC Decision No. 70-62, *Training Systems Discourages Negroes from Advancing to Traditionally All-White Jobs*, Employment Practices (CCH) ¶ 6048 (1969) (relying on word-of-mouth applicants or “drop-ins” when the only applicants likely to drop-in are members of the majority group amounts to unlawful discrimination).

49. Fay Hansen, *Discriminatory Twist in Networking Sites Puts Recruiters in Peril*, WORKFORCE MGMT., Sept. 2009, <http://www.workforce.com/section/recruiting-staffing/feature/discriminatory-twist-networking-sites-puts-recruiters-in/index.html> (describing that recruitment tools like Twitter or Linked-in exclude certain groups and use of these tools may be vulnerable to challenge); Robert Schepens, *Social Media*

The customizable nature of a social media platform like Facebook can either compound potential discrimination problems – or assist companies in diversifying the pool of potential applicants as recommended by the EEOC Compliance Manual.<sup>50</sup> Facebook includes a feature that allows users to specify the demographics of the groups they seek to target, and Facebook will place those ads at the sidebar of pages whose demographics match the selected criteria.<sup>51</sup> Thus, a utility seeking to increase the number of women in management level positions could choose the appropriate educational and gender categories, and the utility’s ad would run on those targeted pages. Still, utilities must tread cautiously in using Facebook’s customizable features, limiting their use for the permissible purpose of opening opportunities and diversifying the work force,<sup>52</sup> rather than to exclude certain groups from consideration.<sup>53</sup> Facebook generates fairly detailed reports of the demographic criteria selected for ads,<sup>54</sup> which companies should retain as documentation of compliant recruitment practices.

#### b. Legal Issues Related to Reliance on Social Media Profiles in Hiring Decisions

While social media does not affect the content of employment ads, what it does change is the scope of information about job applicants that is accessible by employers, which in turn raises novel legal questions. A job applicant’s Facebook profile or Twitter stream includes a wealth of clues — often in plain view — about the applicant, such as race, family status, drug use, poor work ethic, or negative feelings about previous employers.<sup>55</sup> Can utility employers base a hiring decision on information gleaned from a social media profile?

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*Recruiting: Compliance Issues*, CHAMPION, Apr. 29, 2010, <http://championjobs.com/243/social-media-recruiting-compliance-issues/> (quoting Jessica Roe, Minneapolis attorney: “Sourcing from professional network sites such as LinkedIn carries a risk that the method can be challenged on discrimination grounds. . . . I anticipate more race and age claims over the next two years, and a significant portion will be from sourcing through social networking sites . . .”).

50. EEOC, EEOC COMPLIANCE MANUAL 15-31, ON RACE AND COLOR DISCRIMINATION (2011), available at <http://www.eeoc.gov/policy/docs/race-color.html> (“Title VII permits diversity efforts designed to open up opportunities to everyone. For example, if an employer notices that African Americans are not applying for jobs in the numbers that would be expected given their availability in the labor force, the employer could adopt strategies to expand the applicant pool of qualified African Americans such as recruiting at schools with high African American enrollment.”).

51. *Facebook Ads*, FACEBOOK, [http://www.facebook.com/advertising/?campaign\\_id=402047449186&placement=pf&extra\\_1=0](http://www.facebook.com/advertising/?campaign_id=402047449186&placement=pf&extra_1=0) (Facebook does not include demographics on race, but it can be used to pinpoint potential applicants by gender, age, educational levels, and interests).

52. EEOC, *supra* note 50 (“Title VII permits diversity efforts designed to open up opportunities to everyone.”).

53. For example, using Facebook’s features to limit job postings to 30-something men would likely constitute a discriminatory recruitment practice. EEOC, *supra* note 50.

54. *Facebook Ads Case Studies*, FACEBOOK, [http://www.facebook.com/advertising/?campaign\\_id=402047449186&placement=pf&extra\\_1=0](http://www.facebook.com/advertising/?campaign_id=402047449186&placement=pf&extra_1=0) (describing features of information reports provided).

55. Renee M. Jackson, *Social Media Permeate the Employment Life Cycle*, NAT’L L.J., Jan. 11, 2010, <http://www.law.com/jsp/nlj/PubArticleNLJ.jsp?id=1202437746082&slreturn=1&hblogin=1>.

Just as employers may not ask questions that would allow them to screen applicants based on impermissible factors under discrimination laws, likewise, they may not use social media to uncover clues about an applicant's race or sexual preference and deny employment based on these impermissible factors.<sup>56</sup> To do so may expose them to charges of discriminatory hiring practices,<sup>57</sup> as in a recent case, *Gaskell v. University of Kentucky*.<sup>58</sup> There, a federal district court set for trial the question of whether the University of Kentucky discriminated based on religious views when it declined to hire Dr. Martin Gaskell, the search committee's top ranked candidate, after an Internet search uncovered the candidate's personal website where he expressed a pro-creationist position. Significantly, the court did not regard the committee's Internet search in and of itself as improper, but rather the committee's use of the fruits of its search – Dr. Gaskell's religious views as expressed on his website – as a factor in the decision-making process.<sup>59</sup> Thus, *Gaskell* would not bar employers from reviewing publicly accessible online information about job applicants,<sup>60</sup> but simply reaffirms that consideration of impermissible factors in the employment process, irrespective of how that information was discovered, will violate anti-discrimination laws.

### c. Prohibition of Searches for Genetic Information

While *Gaskell* does not bar Internet background searches of job applicants, a new EEOC regulation, effective in January 2011, implementing the Genetic

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56. Robert Sprague, *Rethinking Information Privacy in an Age of Online Transparency*, 25 HOFSTRA LAB. & EMP. L.J. 395, 399 n.38 (2007-2008) (citing EEOC, *EEOC Guide to Pre Employment Inquiries*, 8A [Fair Empl. Pracs. Manual] LAB. REL. REP. (BNA) No. 695, at 443:65-66 (2002)) (describing that employers may not use social media to obtain information that they could not otherwise acquire through traditional screening process); Robert Sprague, *Googling Job Applicants: Incorporating Personal Information into Hiring Decisions*, 23 LAB. LAW. 19, 28 (2007-2008).

57. *Id.*

58. *Gaskell v. Univ. of Ky.*, No. 09-244-KSF, 2010 U.S. Dist. LEXIS 124572 (E.D. Ky. Nov. 23, 2010).

59. On January 12, 2011, the University settled the lawsuit with Dr. Gaskell for \$125,000. David Klinghoffer, *The Martin Gaskell Case: Not an Isolated Incident*, NAT'L REV., Feb. 3 2011, <http://www.nationalreview.com/corner/258892/martin-gaskell-case-not-isolated-incident-david-klinghoffer>.

60. Several commentators have attempted to craft an argument that background internet searches of publicly accessible information performed without notice to, or consent of, an employee or applicant may violate their privacy rights, though as yet, none have been adopted by courts. See, e.g., Sprague, *Rethinking Information Privacy in an Age of Online Transparency*, *supra* note 56, at 410 (suggesting that users who post personal information on blog or social media profile may have the intent and expectation that it will be shared with friends, and prospective employer's access is "tantamount to electronic eavesdropping, and therefore an invasion of privacy.") (also citing Lior Jacob Strahilevitz, *A Social Networks Theory of Privacy*, 72 CHI. L. REV. 919, 968-69, 969 n.197 (analogizing information on social media sites to conversations in a noisy bar, which are public, but where eavesdropping is viewed as improper)); Donald Carrington Davis, *My Space Isn't Your Space: Expanding the Fair Credit Reporting Act to Ensure Accountability and Fairness in Employer Searches of Online Social Media*, 16 KAN. J.L. & PUB. POL'Y 237, 248 (2006-2007) (arguing that while the physical boundaries between employers and employees have disappeared, privacy expectations have not); *but see* Moreno v. Hanford, 91 Cal. Rptr. 3d 858, 862 (Cal. Ct. App. 2009) (finding that plaintiff who published critical post about her hometown on her public MySpace Journal had no reasonable expectation of privacy regarding the published material, and thus could not sue newspaper that republished the post for invasion of privacy). However, as discussed *infra* Part II.B.1.c., p. 14, EEOC regulations implementing the Genetic Information Nondiscrimination Act of 2008, prohibit employers from conducting internet searches to discover whether an employee may have a genetic disease. Genetic Information Nondiscrimination Act of 2008, Pub. L. No. 110-233, 122 Stat. 881.

Information Nondiscrimination Act (GINA) prohibits employers from using the Internet or social media to search for genetic information about job applicants or employees.<sup>61</sup> Thus, employers who acquire genetic information by conducting an Internet search for the name of a job applicant and a particular genetic marker, or who visit an employee's Facebook page to see whether they belong to support groups for individuals with certain genetic illnesses, may face liability for violating GINA.<sup>62</sup> Because the EEOC's GINA regulations are the first employment regulations to explicitly prohibit online searches for genetic information, employers should review existing policies for screening job applicants and update them as necessary to ensure that they comply with GINA's new regulations.

i. Judgment and Lifestyle Choices

A more difficult issue is whether companies can consider a social media profile when it reflects on an applicant's judgment or ability to do the job — for example, drunken photos or profanity-laced tweets might show an applicant's lack of discretion and make him a poor choice for employment. On the one hand, failure to consider information gleaned through social media can expose a utility to negligent hiring claims. On the other hand, considering off-duty activities in hiring decisions may trigger claims under state lifestyle or "off duty" statutes.

Utilities that hire an unfit employee — for instance, an alcoholic lineman who drinks on duty and runs down a pedestrian while out in the field performing repairs — may be liable for negligent hiring if they knew, or with proper screening, should have discovered the lack of fitness before extending a job offer.<sup>63</sup> In light of the duty to pre-screen, an employer may even argue that it is legally obligated to Google job applicants,<sup>64</sup> which may serve as a low-cost, DIY (do it yourself) substitute to a formal background check by a professional investigator.

Yet, a utility's interest in avoiding negligent hiring claims does not extend *carte blanche* to comb through applicants' blogs, Facebook pages, and Twitter feeds for personal information. Twenty-nine states have adopted lifestyle statutes which vary in scope, but generally restrict employers from considering off-duty activities, ranging from drinking or smoking to overeating and personal relations, in hiring or termination decisions so long as the off-duty activities have no employment-related consequences.<sup>65</sup> Most likely, a lifestyle statute would

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61. *Gaskell*, No. 09-244-KSF, 2010 U.S. Dist. LEXIS 124572; Final Rule, Regulations Under the Genetic Information Nondiscrimination Act of 2008, 75 Fed. Reg. 68,912 (2010) (to be codified at 29 C.F.R. pt. 1635) (the acquisition of information provisions cover both employees and job applicants).

62. 29 C.F.R. 1635.8 (Acquisition of Information). Employers who inadvertently stumble across genetic information about employees or applicants through publicly available sources — e.g., a newspaper article or blog — are exempt from liability.

63. Robert Sprague, *supra* note 56, at 398-400 ("A negligent hiring claim will arise where there is an actual injury to a third party which could have been prevented had the employer not put the employee in a position to cause that harm."); Rodolfo Camacho, *How to Avoid Negligent Hiring Litigation*, 14 WHITTIER L. REV. 787, 790 (1993) (discussing elements of negligent hiring claims).

64. *Id.* at 398.

65. Jean M. Roche, *Why Can't We Be Friends? Why California Needs A Lifestyle Protection Discrimination Statute to Protect Employees from Employment Actions Based on Off-Duty Behavior*, 7

prevent a utility from rejecting a top-ranked candidate for a busy management position on the assumption that he could not handle the responsibilities after learning about his ten children through his Facebook page. By contrast, protection may not be available for applicants who engage in off-duty activities such as blogging critically about their existing employer and work colleagues or posting pictures of themselves drinking excessively. Arguably, these activities relate to a utility's business concerns and thus fall within the exception to lifestyle statutes because they betray either a lack of discretion or a poor attitude, either of which make the applicant a poor fit for the position.<sup>66</sup>

Even though lifestyle protection laws do not offer protection for activities that impact a company's business, a utility should still adopt best practices regarding social media in the hiring process to further minimize any risk of liability. For example, companies that wish to check applicants' social media presences should stick to researching applicants' skills or background relevant to the positions for which they have applied.<sup>67</sup> Thus, a utility hiring an in-house attorney to advise on social media would be fully justified in perusing candidates' online profiles or blogs to determine whether they possess hands-on experience with, or follow issues related to, social media. By contrast, a hiring manager who checks a social media site merely to satisfy curiosity about an applicant's race or marital status could open the company up to liability.

Other best practices include assigning review of applicants' social media presence to a neutral party or human resources staffer who is uninvolved in the hiring decision.<sup>68</sup> And while companies do not need permission to conduct a social media background check, obtaining an applicant's consent avoids the impression of "sneaking around," or intruding on an applicant's privacy, which can undermine trust even if the applicant is eventually hired.<sup>69</sup>

Utilities should also document non-discriminatory reasons for rejecting an applicant. Bear in mind that social media makes it easier for spurned applicants

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HASTINGS BUS. L.J. 187, 199-202 (Winter 2011) ("29 states have . . . statutory protection for lifestyle discrimination . . . [which] protect a variety of activities, including smoking, drinking, diet, weight, political or civic activities, leisure activities, moonlighting, personal relations, and other legal activities."); Sprague, *supra* note 56, at 412-15 (discussing off-duty statutes, noting that some prohibit discriminating against applicants and employers for off-duty use of lawful consumable products like alcohol or cigarettes, while others go further, and prohibit consideration of a range of off-duty activities).

66. Sprague, *supra* note 56, at 416 (contending that lifestyle statutes provide little protection for employees whose outside activities are discovered through social media because employers can characterize many of these activities as relevant to business concerns); Roche, *supra* note 65, at 202 (noting that Colorado and New York lifestyle statutes are ambiguous with regard to scope of occupational requirement exception); Paul Secunda, *Blogging While Publicly Employed: First Amendment Implications*, 47 LOUISVILLE L. REV. 679 (2009) (opining that employee bloggers who write about workplace issues unlikely to find protection in lifestyle discrimination statutes since their off-duty conduct impacts employers' business concern and thus, falls within "business rationale" exception to lifestyle discrimination statutes).

67. Sprague, *supra* note 56, at 416.

68. Jonathan Stoler & James R. Hays, *The Social Media Revolution: Recent Developments and Guidelines for Employers to Consider*, NAT'L L. REV., Dec. 12, 2010, <http://www.natlawreview.com/article/social-media-revolution-recent-developments-and-guidelines-employers-to-consider>.

69. Randi W. Kochman, *Employers - Are You Aware of the Potential Pitfalls in Using the Internet and Social Networking Sites?*, EMP'T L. MONITOR, Dec. 23, 2009, <http://www.employmentlawmonitor.com/2009/12/articles/employment-policies-and-practi/employers-are-you-aware-of-the-potential-pitfalls-in-using-the-internet-and-social-networking-sites/>.

to check the veracity of employers' claims that a position was eliminated or a more experienced candidate was desired. Since LinkedIn profiles include a user's job history (including place of employment and position) by running a search of a utility's name, it may be possible to determine: (a) who left a given position; (b) whether that same position was filled; and, if so (c) the new hire's qualifications.

Finally, though not related directly to hiring practices, utility management should refrain from providing testimonials on LinkedIn to current employees. If an employee who belongs to a protected class is subsequently terminated purportedly for poor performance, evidence of a prior glowing review on LinkedIn will cast doubt on the employer's rationale.<sup>70</sup>

## 2. Limits on Employer Responses to Employee Social Media Use

### a. Privacy Issues

Employers can monitor employees' use of social media on work-issued equipment without concern about invasion of privacy when employees are made aware that their online communications are subject to oversight.<sup>71</sup> In the absence of notice, however, courts are conflicted on whether employees have a reasonable expectation of privacy in communications that take place on work equipment.<sup>72</sup> In addition, with or without a monitoring policy, employers' monitoring must comply with applicable law: employers risk liability under the Stored Communications Act (SCA), if they hack into an employees' account to access password-protected materials.<sup>73</sup>

Utilities have a strong interest in monitoring on-the-job employee use of social media. Many utility employees spend time in the field, and utilities may face liability where, for example, employees Twitter while driving in company vehicles. Likewise, many employees have access to critical energy infrastructure information (CEII), trade secrets, or other confidential materials which may be transmitted via social media, even inadvertently, and compromise a utility's

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70. *Id.*

71. *Ontario v. Quon*, 130 S. Ct. 2619 (2010) (holding that police officer employee has no expectation of privacy in personal text messages transmitted on police department phone where officer was aware of department policy of monitoring employee email), *but cf.*, *Stengart v. Loving Care Agency*, 990 A.2d 650, 659 (2010) (finding employee has expectation of privacy in personal email accessed on work machine where company policy did not "warn employees that the contents of [personal, web-based emails] are stored on a hard drive and can be forensically retrieved and read."); Kelly Schoening & Kelli Kleisinger, *Off-Duty Privacy: How Far Can Employers Go?*, 37 N. KY. L. REV. 287, 302-306 (2010) (recommending that employers implement monitoring policy for online communication to dispel any reasonable expectation of privacy by employees.).

72. *See generally* Cicero H. Brabham, Jr., *Curiouser and Curiouser, Are Employers the Modern Day Alice in Wonderland? Closing the Ambiguity in Federal Privacy Law As Employers Cyber-Snoop Beyond the Workplace*, 62 RUTGERS L. REV. 993, 1016, n.179 (summarizing circuit split regarding employee expectation of privacy in electronic communications facilitated by use of employer's equipment).

73. *Konop v. Hawaiian Airlines*, 302 F.3d 868 (9th Cir. 2002) (finding employer liable under SCA when supervisor broke into employee's private, password protected website where he complained about the company); *Pietrylo v. Hillstone Rest. Group*, Civil Case No. 06-5754, 2009 WL 3128420 (D.N.J. Sept. 25, 2009) (finding violation of SCA where employer coerced employees to provide password to another employee's MySpace chatroom for discussing the "crap/drama and gossip" of the workplace which had been created during non-work hours.).

intellectual property or system security. Utilities should therefore develop strict monitoring policies and most importantly, ensure that all employees are made aware of these restraints.<sup>74</sup>

b. Discharge for Off-Duty Social Media Use

Can an employer discipline or discharge an employee when social media usage takes place outside of work but interferes with productivity, compromises internal information, or reflects poorly on the employer's reputation? Relying largely on the employment-at-will doctrine,<sup>75</sup> companies have terminated employees both for making negative comments about their employers and co-workers in their personal blogs,<sup>76</sup> or for writing a sex blog which the employer believed would reflect negatively on its reputation if discovered.<sup>77</sup> Lifestyle discrimination laws offer minimal protection since they contain exceptions allowing employers to take adverse action against an employee where off-duty activities impact the employer's business concerns.<sup>78</sup> Employees of public power utilities have slightly more protection from termination when their off-duty social media use involves First Amendment protected speech, but even the First Amendment will not shield public employees from discharge for inappropriate conduct or speech that damages or interferes with workplace relationships.<sup>79</sup>

Still, a recent National Labor Relations Board (NLRB) decision suggests that employees who criticize their employers on blogs or other social media sites may have some protection from termination. Moreover, the NLRB recently took the position in *American Medical Response of Connecticut, Inc. v. International Brotherhood of Teamsters, Local 443* that company blogging and Internet policies that bar employees from making disparaging remarks when discussing the company with other employees may violate the National Labor Relations Act (NLRA) because they interfere with a protected "concerted activity."<sup>80</sup>

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74. See *infra* Part III (discussing best practices).

75. At will employment permits companies to terminate employee with or without cause unless the termination is discriminatorily motivated or otherwise violates public policy. Tracie Watson & Elisabeth Piro, *Bloggers Beware: A Cautionary Tale of Blogging and The Doctrine of At Will Employment*, 24 HOFSTRA LAB. EMP. L.J. 333, 338 (2007).

76. One of the best known cases involving a company's termination of a blogger involved Heather Armstrong, who started a personal blog, Dooce.com, in February 2001 and was fired from her job a year later because she had written stories that included people in the workplace. Today, Armstrong's advice to similarly situated bloggers is "BE YE NOT SO STUPID." [http://en.wikipedia.org/wiki/Heather\\_Armstrong](http://en.wikipedia.org/wiki/Heather_Armstrong); see generally Watson & Piro, *supra* note 75, at 333 (describing various cases of terminated bloggers, including Starbucks supervisor who complained about work on his blog and a Delta flight attendant who was fired for including a photo of herself in uniform at her blog, which offered a fictionalized account of her experiences).

77. See generally Catharine Smith & Bianca Bosker, *Fired Over Twitter: 13 Tweets That Got People CANNED*, HUFFINGTON POST, [http://www.huffingtonpost.com/2010/07/15/fired-over-twitter-tweets\\_n\\_645884.html#s113032](http://www.huffingtonpost.com/2010/07/15/fired-over-twitter-tweets_n_645884.html#s113032) (describing non-profit's firing of employee who maintained a private "sex blog" separate from work life, explaining that "We simply cannot risk any possible link between our mission and the sort of photos and material that you openly share with the online public.").

78. See discussion, *infra* Part II.B.1.c.i (discussing lifestyle statutes in context of hiring decisions).

79. Secunda, *supra* note 66 (discussing First Amendment issues related to public employees who blog).

80. Complaint, *Am. Medical Response of Conn., Inc. v. Int'l Brotherhood of Teamsters, Local 443*, Case No. 354-CA-12576 (NLRB Region 34, Oct. 27, 2010). The NLRA protects employees' rights to "self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their

The social media policy at issue in *American Medical Response* prohibited employees from (among other things) “making disparaging, discriminatory or defamatory comments when discussing the Company or the employee’s superiors, co-workers and/or competitors.”<sup>81</sup> The employee whose Facebook posts precipitated the NLRB action referred to her supervisor using several expletives as well as the company’s term for “psychiatric patient.”<sup>82</sup> A decision sustaining the NLRB’s position will significantly expand the scope of protected concerted activity, which traditionally has been limited to criticizing management in order to improve certain conditions of employment.<sup>83</sup> The outcome of this case (which was heard in January 2011) will apply to both union and non-union employees, both of which are covered by the NLRA.<sup>84</sup>

A recent NLRB advice memo indicates that a more carefully crafted social media policy than the one involved in *American Medical Response* might pass muster under the NLRA.<sup>85</sup> The social media policy at issue in that advice memo prohibited “[d]isparagement of [the] company’s . . . executive leadership, employees, strategy, and business prospects” but did so in the context of a list of “plainly egregious conduct,” such as employee conversations involving the employer’s proprietary information, explicit sexual references, disparagement of race or religion, obscenity or profanity, and references to illegal drugs.<sup>86</sup> It was also preceded by a preamble explaining that the policy’s purpose was to protect the employer and its employees rather than to “restrict the flow of useful and appropriate information.”<sup>87</sup> The NLRB concluded that, based on this context, a reasonable employee would understand that the policy did not prohibit complaints about the employer or working conditions, which are protected under section 7 of the Act.<sup>88</sup>

### 3. Liability for Employee Conduct

An employee’s use of social media sites to harass fellow employees with offensive or derogatory comments, or in violation of FTC disclosure laws,<sup>89</sup> could put an employer on the hook for resulting liability or civil penalties. Given prospects for liability, some companies simply block employee access to

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own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection.” National Labor Relations Act (NLRA), 29 U.S.C. § 157 (2006).

81. Complaint, *Am. Medical Response of Conn., Inc. v. Int’l Brotherhood of Teamsters, Local 443*, Case No. 354-CA-12576 at ¶ 7.

82. Stoler & Hays, *supra* note 68.

83. *Id.*

84. It will not, however, apply to supervisors (i.e., individuals with the authority to “hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority . . . requires the use of independent judgment.”) 29 U.S.C. § 152(3), (11).

85. Memorandum from Barry J. Kearney, Associate General Counsel, Nat’l Labor Relations Bd., Office of Gen. Council, to Marlin O. Osthus, Regional Director, Region 18, Case 18-CA-19081 (Dec. 4, 2009), available at <http://www.nlr.gov/case/18-CA-019081#activity> (select “Documents” link at the bottom of the page).

86. *Id.* at 3, 6.

87. *Id.* at 2.

88. *Id.* at 6.

89. See generally *infra* Part II.C.5.a.i.

social media sites entirely or prohibit their use during the workday even from employees' own devices. This is an unsatisfactory solution, not to mention an exercise in futility.

Most social media sites like Twitter or Facebook — which may seem frivolous on the surface — offer access to news or events that can assist employees on the job. In fast-changing industries like the utility business, companies should encourage employees to stay abreast of, and participate in, conversations about new developments. Moreover, the advent of mobile applications enables employees experiencing “social media withdrawal” during the work day to simply circumvent employers' rules by getting their fix on their personal cell phones during the lunch hour, or worse, while driving out of the office on company business, which could expose employers to liability for an accident. Rather than outright bans, utilities should adopt clear social media policies to provide guidance to employees regarding appropriate use while on the job.

### *C. Utility as a Business Entity*

Like other businesses, utilities use social media to establish an online brand, engage and educate consumers, and build trusted relationships with customers and the community at large. And, not surprisingly, utilities face the same general legal issues in connection with social media use that other businesses face. These issues include intellectual property protection, defamation, and deceptive practices.

#### 1. Intellectual Property Issues

##### a. Copyright

##### i. Protecting Copyright

As utilities engage in social media, particularly for customer education purposes, they will invest considerable resources in creating a variety of content, including e-books, blog posts, presentations, and videos. This content may become a valuable company asset, and utilities should take steps to safeguard their copyright without discouraging widespread dissemination.

Fortunately, copyright law makes it easy for content creators to protect copyright. Utilities don't need to do anything to create a copyright in their materials other than commit a work with some originality to a fixed medium. Registering a work will assist in protecting or litigating a copyright, but it is not necessary to create a copyright. Though registering a copyright for every presentation on an emerging regulatory policy is overkill, utilities might consider registration for blogs or extensive written materials. Frequently, utilities outsource preparation of customer education materials or advertising copy to third party consultants, who will hold the copyright unless a written agreement specifies otherwise.<sup>90</sup> To protect a work's copyright while at the same time encouraging its dissemination, utilities should prominently label material as copyrighted and explain how third parties may use it. For example, many online

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90. JOY BUTLER, *THE CYBER CITIZEN'S GUIDE THROUGH THE LEGAL JUNGLE* 36-38 (2010).

e-books include a copyright notice that allows others to re-post the materials as long as they are posted in their entirety with full attribution. Utilities can also monitor the internet for unauthorized use of copyrighted materials.

## ii. Avoiding Infringement

Just as utilities must protect their own copyright, so too, must they avoid infringing copyrights held by others. Generally speaking, copyright law doesn't prohibit companies from linking to other sites without permission. In addition, because works created by the U.S. government (such as statutes, court decisions, regulations, and orders) do not qualify for copyright protection, utilities may freely disseminate these materials (many state government created works are similarly exempt from copyright protection).

However, copyright law does prohibit the use of protected content without permission, except where the terms of the copyright or license provide otherwise. So consider the following rules of thumb:<sup>91</sup>

**Uploading or archiving documents:** Utilities that upload documents or video to an archiving site (like YouTube or Scribd.com) must have rights to these materials. Don't upload an interesting report prepared by another group or a journal article without first obtaining permission.

**Blogs:** Bloggers sometimes republish the text of entire news articles within a blog post, based on an incorrect belief that attribution will ward off copyright claims. Though offering a snippet of an article would fall within permissible fair use, a wholesale reprint would likely raise copyright concerns.<sup>92</sup> In addition, many utilities have access to for-fee industry news reports whose publishers vigorously defend copyright interests. Use of materials from these publications on a website or blog would inevitably invite a lawsuit.

**Copyright on Facebook and Twitter:** Most tweets (i.e., status updates on Twitter) are not protected by copyright because they're purely factual in nature, and do not involve any original or creative process.<sup>93</sup> On the other hand, photographers often hold a copyright interest in photos, so taking photos from Facebook, or even from a photo sharing site like Flickr, and using them without permission raises copyright issues. In *Agence France Presse v. Morel*, a federal district court denied a motion to dismiss a copyright infringement claim brought by a photographer against a news agency that redistributed the pictures uploaded by the photographer to Twitter.<sup>94</sup> The news agency contended that it had an express license to use the photos because under Twitter's terms of service

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91. This section focuses on the potential for a utility or its employees to violate copyright directly. In addition, in limited circumstances, a website host may face liability for content posted by users that infringes on copyright. The issues of liability for user-generated copyright or trademark violations are discussed *infra* Part II.C.

92. See generally Joe Mullin, *Briefing.com Admits It Broke Copyright Laws, Pays Dow Jones*, PAIDCONTENT.ORG (Nov. 15, 2010), <http://paidcontent.org/article/419-briefing-com-admits-it-broke-copyright-laws-pays-dow-jones-to-end-lawsu/> (reporting on settlement between Dow Jones and Briefing.com, which reprinted 107 news articles from the Wall Street Journal and Dow Jones newswire in violation of copyright law).

93. Kyle-Beth Hilfer, *Tweet, Tweet, Can I Copyright That?*, LAW TECH. NEWS (Jan. 19, 2010), <http://www.law.com/jsp/lawtechnologynews/PubArticleLTN.jsp?id=1202438916120&slreturn=1&hbxlogin=1>.

94. *Agence France Presse v. Morel*, No. 1:10-cv-02730 (WHP), 2011 U.S. Dist. LEXIS 5990, at \*31-32 (S.D. N.Y. Jan. 14, 2011).

(TOS)<sup>95</sup>, the photographer conveyed a non-exclusive license to use the photos when he uploaded them to the site.<sup>96</sup> The court disagreed, finding that Twitter's TOS, by its express terms, granted a license to use only to Twitter and not to any other users.<sup>97</sup> Companies must realize that users do not forfeit copyright protection merely by uploading photos or other creative works to public sites – and must caution their employees against appropriating these materials without consent.<sup>98</sup>

#### b. Trademark

Since utilities are already familiar with trademark protection issues, this article does not explain those general concepts. Suffice it to say that social media does not change or dilute trademark rights, but simply provides yet another means for potential infringement.

Social media does raise at least one unique trademark issue, specifically, whether the creation of a “counterfeit” Facebook or Twitter account using another company's corporate identity violates trademark law.<sup>99</sup> Fake profiles created for the purpose of parody are permissible, while those set up with the intent to create confusion may constitute infringement.

At least one counterfeit profile case emerged last year in the utility industry. In September 2009, Oneok, a natural gas distribution company, sued Twitter for allowing an anonymous user to create an account under the name “Oneok.”<sup>100</sup> After Twitter shut down the fake account, Oneok quickly dropped the suit.

Utilities should monitor social media sites for evidence of a misappropriated corporate identity. Most social media sites have policies and procedures that allow trademark holders to seek removal or shut down of fake profiles. It is generally more effective — not to mention less costly — to use those procedures than to file a lawsuit.<sup>101</sup>

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95. Twitter's terms of service (TOS) provided that by submitting content, users grant Twitter a non-exclusive license to redistribute it. TWITTER, *Terms of Service*, <http://twitter.com/tos> (last visited Mar. 12, 2011). See also *infra*, Part II.C.8 (describing need for companies to read TOS of third party social media platforms).

96. *Id.* at \*\*13-17.

97. *Id.*

98. Flickr lets users search for photos that photographers have made available for use through a creative commons license, which grants users consent to use photos so long as they provide attribution.

99. See generally Lisa P. Ramsey, *Brandjacking on Social Networks: Trademark Infringement by Impersonation of Markholders*, 58 BUFF. L. REV. 851 (2010) (analyzing applicability of federal trademark infringement laws to trademark impersonators or “brandjackers”); Jillian Bluestone, *La Russa's Loophole: Trademark Infringement Lawsuits and Social Networks*, 17 VILL. SPORTS & ENT. L.J. 573 (2010) (overview of potential laws applicable to infringement claims and brandjacking on social networks); Andrew Moshirnia, *Brandjacking on Social Media Networks*, July 15, 2009, <http://www.citmedialaw.org/blog/2009/brandjacking-social-networks-twitter-malicious-ghost-writing-and-corporate-sabotage>.

100. See generally G. Ross Allen & Francine D. Ward, *Things Aren't Always As They Appear: Who Really Owns Your User-Generated Content*, LANDSLIDE (Nov. 2010) at 7 (discussing Oneok claims); *Oneok, Inc. v. Twitter, Inc.*, No. 09-CV-00597, 2009 WL 3146140 (N.D. Okla. Sept. 15, 2009); Stan Schroeder, *Oneok Sues Twitter for Trademark Infringement [Update: Dropped]*, MASHABLE.COM, <http://mashable.com/2009/09/17/oneok-sues-twitter/>.

101. See generally *La Russa v. Twitter, Inc.*, <http://www.citmedialaw.org/threats/la-russa-v-twitter-inc> (noting that Twitter removed fake “TonyLaRussa” profile within hours after St. Louis Cardinals manager Anthony La Russa filed trademark infringement suit; La Russa eventually voluntarily dismissed the action).

c. Trade Secrets

A trade secret may consist of any formula, pattern, device, or compilation of information which is used in one's business and which gives one an opportunity to obtain an advantage over competitors who do not know or use it. It may be a formula for a chemical compound, a process of manufacturing, treating, or preserving materials, a pattern for a machine or other device, or a list of customers.<sup>102</sup> As with trademark, utilities already have longstanding experience with trade secret protection. But what utilities may underestimate when it comes to social media is the ease with which employees may inadvertently disclose trade secrets, and the way in which the overall public nature of social media can destroy trade secret protection.

The general informality of social media sites like Twitter or Facebook encourages employees to let their guard down and casually share information without thinking twice. For example, a utility employee might briefly mention on Twitter "tough day gearing up for the XYZ launch on Friday," without realizing that he may have let slip confidential information. While utilities can certainly discipline employees for accidental disclosures after the fact, such discipline will not necessarily undo the damage the disclosure has wrought; it is better to avoid most such disclosures by using their social media policies to teach employees about the consequences of revealing trade secrets or other confidential information.<sup>103</sup>

Because of the open nature of social media, some types of information, such as customer lists or investor contacts once classified as trade secrets, may now lose that protection. In *Sasqua Group, Inc. v. Courtney*,<sup>104</sup> an executive search firm for the financial services industry, argued that its contacts list, which identified decision-makers at financial services firms and traders who might be looking to change jobs, was a trade secret.<sup>105</sup> The defendants (Sasqua's former employee and her new employer) demonstrated at an evidentiary hearing that the information could be tracked down in only a few minutes by obtaining the names of potential customers (financial institutions) from Google searches, then using LinkedIn and other social networking sites such as Bloomberg and Facebook to locate relevant individuals at those companies.<sup>106</sup> The court held that, although the information in Sasqua's database might have been a protectable trade secret in the past, the ease of obtaining the same information over the internet meant that it did not qualify as a trade secret today.<sup>107</sup>

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102. RESTATEMENT (FIRST) OF TORTS § 757 (1939).

103. Michael Schmidt, *Social Media Advisor - The Need for Employer Vigilance with Privacy*, E-DISCOVERY L. REV., Sept. 17, 2010, <http://www.ediscoverylawreview.com/tags/social-media-and-trade-secrets/>.

104. *Sasqua Group, Inc. v. Courtney*, No. CV 10-528 (ADS)(AKT), 2010 WL 3613855, at \*1 (E.D. N.Y. Aug. 2, 2010) (report and recommendation adopted); *see also* *Sasqua Group, Inc. v. Courtney*, No. 09-CV-528 (ADS)(ETB), 2010 WL 3702468 (E.D. N.Y. Sept. 7, 2010).

105. *Sasqua Group, Inc.*, No. CV 10-528 (ADS)(AKT), 2010 WL 3613855, at \*3.

106. *Id.* at \*\*12-14.

107. *Id.* at \*22; a similar case, *TEKSystems, Inc. v. Hemmerinick*, 10:cv-00819-PJS-SRN (D. Minn. Mar. 16, 2010) involved a company's lawsuit against a former employee alleging unlawful solicitation of company contacts and misappropriation of trade secrets when employee communicated company's former employees through Linked-In and other social media tools. The suit was quickly settled.).

## 2. Attorney-Client Privilege

Even attorneys are not immune from the risks of social media, and can jeopardize attorney-client privilege or violate a court confidentiality order through irresponsible use. In a recent high-profile case involving resolution of the lawsuit against Facebook founder Mark Zuckerberg that was the subject of the Oscar-nominated movie, *The Social Network*, a partner at Quinn Emmanuel sent a tweet via Twitter exclaiming that “payday cometh,” with a link to the court order awarding the firm \$13 million in fees against the Winklevoss twins, its former client.<sup>108</sup> Trouble was, the court had sealed its order in its opinion. The court subsequently hauled the partner back into court to “explain his actions,” and considered, though eventually declined, tossing out the fee award.<sup>109</sup> Even though the firm was not sanctioned, the resulting online publicity did not help the firm’s reputation. In another case, a public defender who blogged about the details of her clients case (and received a sixty day suspension for violating confidentiality).<sup>110</sup> Many times, even seemingly benign Tweets or Facebook updates about a lawyer’s whereabouts – for example, a trip to a particular city or recovery from an all night meeting – might inadvertently reveal a lawyer’s participation in a major deal that have been kept confidential. For that reason, social media lawyer Brad Shear recommends that lawyers simply avoid discussing anything related to their professional activities on social media.<sup>111</sup>

## 3. Defamation

Defamation is the communication of a statement that makes a factual claim that may give an individual or company a negative image. Defamation cases have spread to social media. For example, a landlord sued a tenant for posting to Twitter allegedly defamatory statements about the condition of his apartment building.<sup>112</sup> Though the suit has since been dismissed,<sup>113</sup> utilities should warn employees of the potential consequences of defamatory posts about others.

## 4. Liability for User Generated Content or IP Violations

As utilities adopt social media, more often than not, they will find themselves serving as a host for user-generated content rather than generating content themselves. Where a utility serves as a host for content – such as

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108. Nate Raymond, *Facebook Foes Claim Lawyer Linked to Sealed Opinion in Twitter Post*, DAILY BUS. REV., Jan. 5, 2011, <http://www.dailybusinessreview.com/PubArticleDBR.jsp?id=1202476939482&hbxlogin=1>.

109. *Id.*

110. Steven Seidenberg, *Seduced: For Lawyers the Appeal of Social Media Is Obvious. It Is Also Dangerous*, ABA J., Feb. 1, 2011, [http://www.abajournal.com/magazine/article/seduced\\_for\\_lawyers\\_the\\_appeal\\_of\\_social\\_media\\_is\\_obvious\\_dangerous](http://www.abajournal.com/magazine/article/seduced_for_lawyers_the_appeal_of_social_media_is_obvious_dangerous); Steven Bennett, *Ethics of Lawyer Social Networking*, 73 ALB. L. REV. 113, 117-20 (2009) (discussing confidentiality issues related to lawyer use of social media).

111. Interview with Brad Shear, Shearlaw.com (Jan. 14, 2011).

112. Meg Marco, *Twitter Defamation Lawsuit Dismissed*, THE CONSUMERIST (Jan. 21, 2010), <http://consumerist.com/2010/01/twitter-defamation-lawsuit-dismissed.html>.

113. Andrew L. Wang, *Twitter Apartment Mold Libel Suit Dismissed*, CHI. BREAKING NEWS CTR. (Jan. 21, 2010), <http://archive.chicagobreakingnews.com/2010/01/twitter-mold-libel-defamation-suit-dismissal-cook-county-court.html>.

operating a Facebook page where others post comments or running a video contest – will it face liability for defamation or IP violations if a contest participant uploads a video copied from somewhere else? A brief analysis of the law regarding host liability for user-generated content follows.

a. Defamation and Communications Decency Act

As a general rule, section 230 of the Communications Decency Act (CDA) immunizes web hosts – including bloggers, online forum hosts, and website owners – from liability for defamation, harassment, or charges of discrimination stemming from user-generated content.<sup>114</sup> Immunity remains available to website hosts which exercise editorial changes over content, removing objectionable materials, selecting content for publication, or even leaving content up on a site after receiving notice of its defamatory nature.<sup>115</sup>

Still, immunity under section 230 is not without limit. Though a website host has no obligation to remove defamatory user-generated content, it may face liability where it expressly promises to make changes – for example, a personal assurance that offensive content will be removed – and fails to do so.<sup>116</sup> By contrast, maintaining a website or a blog policy instructing users that defamatory or offensive content will be removed does not trigger section 230 liability when the host fails to enforce the policy. In addition, liability for content may attach where a host substantially and materially alters user generated content, or requires users to submit defamatory or discriminatory content through use of a submittal form.<sup>117</sup>

b. IP Infringement and Digital Millennium Copyright Act

Section 230 of the CDA does not immunize hosts from liability for user-generated content that infringes on intellectual property. Here, Section 512 of the Digital Millennium Copyright Act (DMCA) provides a safe harbor for service providers when they store, at the direction of a user, copyright-infringing materials.<sup>118</sup> To qualify for the safe harbor under the DMCA, a host must (1) maintain a designated agent to receive notice of infringement and provide an

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114. Catherine R. Gellis, *The State of the Law Regarding Website Owner Liability for User Generated Content*, 66 BUS. LAW. 243 (Nov. 2010) (providing overview of immunity for user generated content under CDA and DMCA); *Citizens Media Law Project, Online Guide to Immunity for User Generated Content Under CDA*, <http://www.citmedialaw.org/legal-guide/immunity-online-publishers-under-communications-decency-act> (comprehensive summary and case links on CDA immunity).

115. Gellis, *supra* note 114, at 1-2, n.9-10; *Citizen's Media Online Guide*, <http://www.citmedialaw.org/legal-guide/online-activities-covered-section-230> (listing activities protected by section 230).

116. *Barnes v. Yahoo!, Inc.*, 570 F.3d 1096, 1107-09 (9th Cir. 2009) (finding liability for defamation based on theory of promissory estoppel when Yahoo supervisor assured woman that she would personally remove the nude photos and lewd comments that the woman's boyfriend posted on his Yahoo site); Gellis, *supra* note 114.

117. *Compare Fair Hous. Council of San Fernando Valley v. Roomates.com, LLC*, 521 F.3d 1157, 1162-63 (9th Cir. 2008) (finding website owner liable for housing discrimination where form requires users to identify sexual preferences) *with* *Dart v. Craigslist, Inc.*, 665 F. Supp. 2d 961, 966-67 (N.D. Ill. 2009) (granting section 230 immunity to Craigslist because users were not required to submit discriminatory preferences via submittal form).

118. Gellis, *supra* note 114, at 3; Allen & Ward, *supra* note 100 (discussing copyright and trademark issues related to user generated content and liability for infringement).

address, phone number, and email of the agent to the Register of Copyrights<sup>119</sup> and (2) remove content as soon as it receives actual knowledge of infringement.<sup>120</sup>

## 5. Deceptive Practices

### a. General

#### i. Disclosure in Connection with Online Endorsements

FTC guidelines released in December 2009 mandate disclosures for online endorsements where a material relationship exists between the endorser and the provider of the product or service being promoted.<sup>121</sup> Moreover, employers face liability for violations of these disclosure rules by employees on social media sites, even if the employer had no actual knowledge that the statements were being made.<sup>122</sup> One example from the Endorsement Guides specifically contemplates liability in cases where an employee casually endorses an employer's product without mentioning the employment relationship:

An online message board designated for discussions of new music download technology is frequented by MP3 player enthusiasts. They exchange information about new products, utilities, and the functionality of numerous playback devices. Unbeknownst to the message board community, an employee of a leading playback device manufacturer has been posting messages on the discussion board promoting the manufacturer's product. Knowledge of this poster's employment likely would affect the weight or credibility of her endorsement. Therefore, the poster should clearly and conspicuously disclose her relationship to the manufacturer to members and readers of the message board.<sup>123</sup>

In addition, companies may not hire individuals to post comments that convey the false impression that the employee is actually a customer. The New York Attorney General's Office recently brought an action against a company that used employees to pose as satisfied customers and post reviews on a number of websites.<sup>124</sup>

Utilities must educate employees and third-party contractors about FTC disclosure requirements. Employees may not realize that raving about their utility's new smart grid program in an industry forum without noting that they also work for or developed the program may violate the FTC rules and expose their employers to liability.

### b. Environmental Marketing Claims

Of specific interest to the utility industry, on October 6, 2010, the FTC proposed updating its "Guides for the Use of Environmental Marketing

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119. DCMA, 17 U.S.C.A § 512(c)(2) (2010).

120. *Id.* § 512(g); *Viacom Int'l, Inc. v. YouTube, Inc.*, 718 F. Supp. 2d 514 (S.D. N.Y. 2010).

121. *FTC Guide Concerning the Use of Endorsements and Testimonials in Advertising*, 16 C.F.R. pt. 255 (2009).

122. *Id.*

123. *Id.* § 255.5, ex. 8.

124. Lisa Thomas & Robert Newman, *Social Networking and Blogging: The New Legal Frontier*, 9 J. MARSHALL REV. INTELL. PROP. L. 500, 515 (2009) (citing Jennifer Peltz, *Phony Online Reviews Draw FTC Scrutiny*, ORLANDO SENTINEL, July 31, 2009, at A22).

Claims”<sup>125</sup> to include guidance on claims related to renewable energy and carbon offsets, and on the use of certifications and seals of approval.<sup>126</sup> The guidelines advise marketers to avoid unqualified use of the term “renewable energy” if fossil fuels were used as an energy source in production or provision of a service and to disclose the source of renewable energy used to provide the service.<sup>127</sup> The guidelines also define as deceptive those claims that purchase of carbon offsets will fund reductions in emissions where the purchases are already required by law.<sup>128</sup>

The guidelines concerning the use of certifications and seals of approval to communicate environmental claims directly impact utility use of social media in two ways. First, they emphasize that third-party certifications and seals constitute endorsements covered by the FTC Endorsement Guides.<sup>129</sup> Second, they provide that marketers should qualify seals of approval or certifications to prevent deception, with qualifying language that is “clear and prominent and [that] convey[s] that the seal of approval or certification applies only to a specific and limited benefit.”<sup>130</sup>

Because some social media tools have strict limits on the length of a post or update, a utility using such tools to inform the public about a seal of approval or certification it has received must be careful to ensure that it also conveys the specific and limited nature of the seal or certification. The limitations of the medium, however, may make it difficult to do so.<sup>131</sup>

This issue has arisen in the context of drug regulation. In July 2010, the Food & Drug Administration (FDA) issued an untitled letter to pharmaceutical manufacturer Novartis concerning its use of a Facebook Share widget on the website for its drug Tasigna.<sup>132</sup> The widget allows visitors to the Tasigna website to post information about the drug on their own Facebook profiles and to share the information with other Facebook users.<sup>133</sup> By design, the Facebook Share widget displays only website links and brief descriptions.<sup>134</sup> Although the shared content did not explicitly disclose risk information, it directed users to click on links to Tasigna websites that contained complete risk information for the

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125. *Federal Trade Commission Proposes Revised “Green Guides,”* FED. TRADE COMM’N (2010), <http://www.ftc.gov/opa/2010/10/greenguide.shtm> [hereinafter *Green Guides*].

126. Proposed Rulemaking, *Guides for the Use of Environmental Marketing Claims*, 75 Fed. Reg. 63,552 (2010) (to be codified at 16 C.F.R. pt. 260).

127. *Id.* at 63,591-92.

128. *Id.* at 63,596-97.

129. *Id.* at 63,566.

130. *Id.* at 63,567.

131. *But see* Brian Solis, *In Social Media, The SEC Protects Investors and Companies by Removing “Relations” from IR*, @BRIAN SOLIS (May 4, 2009), <http://www.briansolis.com/2009/05/in-social-media-sec-protects-investors/> (reporting that, when an Ebay company blogger “live-tweeted” an investor conference call reporting Q4 2008 earnings, his tweets included a series of 140-character disclosure statements prepared by the company’s legal team).

132. Kellie B. Combs, *FDA Social Media Warning Letter: A Fragmented Approach to a Comprehensive Problem*, WASH. LEGAL FOUND. (Oct. 29, 2010), available at [http://www.wlf.org/Upload/legalstudies/legalopinionletter/10-29-10CombsILegal\\_Opinion\\_Letter.pdf](http://www.wlf.org/Upload/legalstudies/legalopinionletter/10-29-10CombsILegal_Opinion_Letter.pdf).

133. *Id.*

134. *Id.*

drug.<sup>135</sup> Nevertheless, the FDA stated that Novartis had misbranded the drug by omitting risk information, broadening the indication, and making an unsubstantiated superiority claim.<sup>136</sup> It is easy to imagine the FTC employing similar reasoning when addressing required disclosures by utilities.

As discussed in Part I, social media is a popular platform for green marketing campaigns, with companies setting up online communities and Facebook groups to promote green products and practices. Accordingly, understanding and complying with the FTC's new Green Guides will take on added importance.

## 6. Privacy

By creating and using social media sites, utilities have greater access to customers and information about them. The opportunity to collect additional information may carry risks. As discussed in the next section, state laws and regulations may subject utilities to heightened requirements for protection of customer data. But general privacy rules also apply to how companies may use harvested data.

For example, the CAN-SPAM Act<sup>137</sup> prohibits companies from sending mass marketing emails without allowing consumers to opt out of future mailings.<sup>138</sup> Although many social media sites include "in-mail" features (i.e., the ability to email other users through the site) email sent through these site-based messaging systems may not contain the opt-out language mandated by the Act. At least two courts have held that messages sent over social media site-based email systems are subject to the CAN-SPAM Act, and thus, must comply with the Act's requirements.<sup>139</sup>

Other privacy issues, such as appropriate privacy policies for utility-sponsored sites, are discussed in Part II.C. Privacy concerns that arise when a utility establishes a presence on a third-party platform are discussed below in the context of TOS issues.

## 7. Americans with Disabilities Act Issues

Currently, private companies and state and local governments are encouraged, but not required to make websites accessible to the disabled. However, in July 2010, the Department of Justice (DOJ) issued an Advanced Notice of Proposed Rulemaking (ANOPR) which seeks input on accessibility requirements that would govern websites.<sup>140</sup> Barriers identified in the ANOPR

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135. *Id.*

136. *Id.*

137. Controlling the Assault of Non-Solicited Pornography and Marketing Act of 2003, 15 U.S.C. §§ 7701-7713 (2006).

138. *Id.* § 7704(a)(3)(A)(i); see also *The CAN-SPAM Act: A Compliance Guide for Business*, FED. TRADE COMM'N (2009), <http://business.ftc.gov/documents/bus61-can-spam-act-compliance-guide-business>.

139. The law notwithstanding, spamming members of a Facebook or Linked-In group contravenes generally accepted social media "netiquette," and for that reason, is a practice that companies and their public relations agents should avoid.

140. Advance Notice of Proposed Rulemaking, Nondiscrimination on the Basis of Disability; Accessibility of Web Information and Services of State and Local Government Entities and Public Accommodations, 75 Fed. Reg. 43,460 (2010) (to be codified at 28 C.F.R. pts 35, 36).

include websites that don't allow users with visual disabilities to change fonts, websites that require users to respond in a certain amount of time but do not have an option for more time, websites that don't use captions with their images, and websites that use CAPTCHA's (the distorted text that users fill out to avoid spam).

Any requirements adopted would apply to websites and presumably blogs, which are similar to websites except that content is generated more frequently. Thus, utilities that are just now developing blogs may want to conform them to existing, voluntary best practices for accessibility - since these may form the basis of a DOJ rule.

As for social media sites, the ANOPR seeks input on whether noncommercial, user-generated content should be exempt from ADA requirements:

[T]he Department is considering proposing explicit regulatory language that makes clear that Web content created or posted by website users for personal, noncommercial use is not covered, even if that content is posted on the website of a public accommodation or a public entity. This would include individual participation in popular online communities, forums, or networks in which people upload personal videos or photos or engage in exchanges with other users.<sup>141</sup>

Thus, customers could post comments on utility sites or on Facebook pages without concerns about the ADA because these are non-commercial communications. On the other hand, the utility's Facebook pages or Twitter stream - which are also user-generated (i.e., by the utility) - are commercial and would be subject to ADA requirements. So, if Facebook or Twitter did not make their sites ADA compliant (because of the exemption for personal use), a utility might be precluded from using these platforms. This outcome seems unlikely since Facebook, Twitter, and other platforms have a strong interest in retaining commercial users and will likely ensure that the platforms comply with the ADA if so required under a final rule.

#### 8. Terms of Service (TOS) Issues

Once upon a time, TOS issues didn't much matter to companies looking for an online presence. Back in the days of Web 1.0, a utility might create a website in-house and on its own servers, and therefore maintain complete control over user registration and access. Utilities can still keep that same level of control over at least one Web 2.0 technology — blogs — which can be developed and set up on the utility's site.

But for most other popular social media platforms, such as YouTube, LinkedIn, Facebook, or Twitter, a utility seeking to set up a branded presence is, in many respects, a captive customer, dependent upon the default terms of service for use of those sites. Terms of service for each social media site vary, but generally cover privacy ; monitoring and removal of postings; procedures for reporting copyright or trademark infringement or other abuse; and choice of law.

As discussed below,<sup>142</sup> the federal government has been able to negotiate terms of service with social media providers, but most private companies lack

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141. *Id.* at 43,465.

142. *See generally infra* Part II.E.4.

similar leverage. The best that companies can do is familiarize themselves with a particular platform's TOS, educate employees about compliance, and offer notice and appropriate disclaimers to site visitors that the utility's branded site is hosted by a third party.<sup>143</sup>

#### 9. Social Media Contests

Utilities may want to use social media to hold contests to generate customer enthusiasm for new programs like energy efficiency. For example, NPPD ran a contest open to junior high and high school students to develop a video to encourage energy efficiency.<sup>144</sup> Energy savings contests are also being held by rival cities,<sup>145</sup> and utilities might consider similar contests for their energy efficiency programs. But social media participants also use contests for another reason: to generate more friends or fans for their sites.

Because online contests have been around for more than a decade, the basic legal issues are fairly well established.<sup>146</sup> Companies must avoid operating an illegal lottery, which generally involves payment of an entry fee, a winner chosen by random chance, and prize awarded. However, companies can permissibly run a sweepstakes, which is a drawing for a prize by chance alone, or contests that require some kind of skill, judging, and an entry fee. Contests must have official rules that specify eligibility requirements and disclose restrictions on receiving the prize.

Contests conducted on social media platforms like Facebook and Twitter include an added twist. Not only must companies holding contests comply with the general rules just discussed, they must also adhere to the social media platform's contest policies. Failure to comply with these policies can result in removal of promotion materials or disabling of an account.

Twitter's contest guidelines are fairly simple and straightforward<sup>147</sup>: contest sponsors should encourage entrants to use Twitter conventions (@ sign to signify a reply and a hashtag(#) showing a subject) to communicate with each other, and discourage them from tweeting multiple entries. Finally, both the contest sponsor and participants are expected to abide by Twitter's use guidelines.

Facebook's contest rules are subject to frequent revision (the last revision was December 1, 2010) and are far more complicated.<sup>148</sup> Facebook users are prohibited from using their wall or other pages to create a contest; instead, they

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143. *Id.*

144. *Energy Efficiency Video Contest Winners*, NPPD, <http://www.nppd.com/videochallenge/> (last visited Mar. 30, 2011).

145. Ian Cummings, *Kansas Communities to Compete in Energy Efficiency Contest*, KANSAN, Jan. 27, 2011, <http://www.kansan.com/news/2011/jan/27/sixteen-kansas-communities/>.

146. Antone F. Johnson, *Legal Compliance Guide for Online Contests and Sweepstakes*, AVVO, <http://www.avvo.com/legal-guides/ugc/legal-compliance-guide-for-online-contests-and-sweepstakes-1> (last visited Mar. 30, 2011); *Legal Compliance Issues Governing Online Sweepstakes*, AKIN, GUMP, STRAUSS, HAUER & FELD, L.L.P., Feb. 2001, available at [www.akingump.com/docs/publication/179.pdf](http://www.akingump.com/docs/publication/179.pdf).

147. *Guidelines for Contests on Twitter*, TWITTER, <http://support.twitter.com/entries/68877-guidelines-for-contests-on-twitter> (last visited Mar. 30, 2011).

148. *Promotions Guidelines*, FACEBOOK (Dec. 1, 2010), [http://www.facebook.com/promotions\\_guidelines.php](http://www.facebook.com/promotions_guidelines.php).

must set it up through an application on the Facebook platform.<sup>149</sup> Users can enter the promotion only via the application or a tab created on the Facebook page. The promotion must include certain disclosures. Facebook also sets rules on what contest sponsors can ask of entrants. A sponsor can require an entrant to like a page as a condition of entry, but cannot require any other action such as uploading a photo or writing a post or comment.

Social media platforms have potential to excite customers about utility programs, and contests are an even better way to build the buzz. Facebook's rules do not prohibit contests, but at the same time, they impose limited restrictions which complicate the process of sponsoring a contest.

#### 10. Social Media and Netiquette

Although understanding legal issues related to social media is critical, some of the biggest PR nightmares stem not from violations of the law but gross violations of netiquette – or the prevailing mores of conduct, such as transparency, authenticity, and respect—that most users abide when engaging social media. Consider a recent incident involving a PG&E executive, William Devereaux, who, using various pseudonyms, infiltrated several online groups created by opponents of PG&E's smart grid program.<sup>150</sup> Devereaux's ruse was discovered when the moderator of one of the groups recognized Devereaux's email address and identified him as a PG&E representative.<sup>151</sup> Devereaux admitted to using fake names to gain access to the opponents' forum, claiming that his participation was “to better understand [smart grid opponents'] concerns.”<sup>152</sup> Not surprisingly, Devereaux's explanation did little to quell growing criticism and he resigned. The California Public Utilities Commission (CPUC) has launched an investigation of the incident.<sup>153</sup>

Most likely, Devereaux would never have dreamed of showing up in person to a small meeting of smart grid opponents and introducing himself as “Ralph,” the pseudonym he used online. Not only would Devereaux have been more likely to be discovered since he might be recognized, he and most others would view this type of face-to-face deception as crossing an ethical line. The same values apply in the social media context.

Rules of netiquette for social media are no different from ordinary rules of etiquette in the offline world. Just as a utility employee wouldn't show up at a PTA meeting to hand out leaflets to meeting attendees, that same sense of propriety and restraint should kick in before spamming members of the company Facebook page with daily emails and sales pitches. Just as an employee would not loudly insult his supervisor in the workplace without expecting repercussions, so too he should realize that sitting at his desk and posting insults

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149. A Facebook contest application creates a microsite for your contest, with built-in Facebook integration that allows entrants to share their entries with their friends on their own pages or to become a fan and “Like” your company's Fan Page. There are commercial companies, such as Wildfire, which can offer affordable contest solutions.

150. Felicity Barringer, *Utility Official Suspended for an E-Mail Masquerade*, N.Y. TIMES (Nov. 9, 2010), [http://www.nytimes.com/2010/11/10/science/earth/10meter.html?\\_r=1](http://www.nytimes.com/2010/11/10/science/earth/10meter.html?_r=1).

151. *Id.*

152. *Id.*

153. *Id.*

about his employer on his Facebook page during work may meet with a similar reaction.

As new generations raised on social media enter the workforce, many of these netiquette issues will naturally resolve. Until that time, however, utilities will need to train employees and executives on appropriate use, and back up this training with sound, clear social media policies.

#### *D. Utility as Regulated Entity*

As regulated entities, utilities are subject to a host of laws and regulations that may impact their participation in social media. These issues are discussed below.

##### 1. SEC Issues

Many utility companies are publicly held and, as such, subject to securities laws and SEC (Securities and Exchange Commission) regulation. Below are some of the securities law issues raised by utility use of social media.

##### a. Securities Fraud

Publicly held utilities may face liability for securities fraud for material misstatements either made through a company sponsored blog or social media site, or on a company's behalf at a third-party site. What's more, the utility will face liability whether statements about the company's past performance are communicated by the utility CEO at the website, by a lowly staffer playing around on Twitter, or by a third-party consultant engaged in marketing on the utility's behalf. The SEC has made clear that: "companies are responsible for statements made by the companies, or on their behalf, on their web sites or on third party web sites, and the antifraud provisions of the federal securities laws reach those statements."<sup>154</sup>

Moreover, utility employees cannot insulate the utility from liability by purporting to blog, comment, or tweet in their individual capacity only. Disclaimers notwithstanding, the SEC treats employees who blog or participate in third-party fora on utility matters as representatives of the company, and attributes statements made by employees to the company.

##### b. Selective Disclosure

SEC Regulation FD (Reg FD) governs public disclosure of material information, requiring that such information be disseminated by methods reasonably designed to provide broad, non-exclusionary distribution of information to the public.<sup>155</sup> Revealing material information through a Facebook group or Twitter might be deemed a prohibited selective disclosure since the information would be immediately available only to "friends" or "followers."

Although the SEC has yet to offer guidance on whether communication through some of the newest social media channels might constitute a public

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154. *SEC Release No. 34-58288*, U.S. SEC. & EXCH. COMM'N (Aug. 1, 2008) (codified at 17 C.F.R. pts. 241 & 271), available at <http://www.sec.gov/rules/interp/2008/34-58288.pdf>.

155. *Fair Disclosure, Regulation FD*, U.S. SEC. & EXCH. COMM'N (last modified 08/30/2004), <http://www.sec.gov/answers/regfd.htm>.

disclosure, its August 2008 guidance<sup>156</sup> on the use of company websites to satisfy Reg FD addressed the use of two interactive website features: blogs and “electronic shareholder forums.”<sup>157</sup> In this context, the SEC instructed:

While blogs or forums can be informal and conversational in nature, statements made there by the company (or by a person acting on behalf of the company) will not be treated differently from other company statements when it comes to the antifraud provisions of the federal securities laws. Employees acting as representatives of the company should be aware of their responsibilities in these forums, which they cannot avoid by purporting to speak in their “individual” capacities.<sup>158</sup>

The SEC further noted that “[a] company is not responsible for the statements that third parties post on a web site the company sponsors, nor is [it] obligated to respond to or correct misstatements made by third parties.”<sup>159</sup>

Although the specific features of various social media tools differ, the most significant characteristic of both blogs and “electronic shareholder forums,” on one hand, and other social media tools (Twitter, Facebook, and the like) on the other is that all allow real-time (or near real-time) interaction between company representatives and the public. Since the SEC explicitly supports the use of interactive tools on a company’s own website,<sup>160</sup> there is no reason to believe it would take a different approach with respect to other social media tools.<sup>161</sup>

### c. Gun-Jumping

Gun-jumping refers to attempts to generate public interest in a new securities issuance while the company is still in the registration process with the SEC, in advance of release of a prospectus. Statements by utility management or employees hyping the company on a company-sponsored blog or social media page might constitute gun-jumping in violation of securities law.

The scenario is not far-fetched. In July 2009, following announcement of a secondary offering, Ruby Tuesday CEO Sandy Beall tweeted: “In [N]ew York raising approximately 70 million in equity to further strengthen our brand.”<sup>162</sup> Beall’s quote came to light when a reporter who followed Beall on Twitter picked up on the information and included it in an article. Securities law experts suggested that Beall’s quote came close to constituting impermissible gun jumping, but did not cross the line.<sup>163</sup> Although the tweet hyped a pending offering, it did not disclose information that hadn’t already been included in the initial prospectus.<sup>164</sup>

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156. SEC Release No. 34-58288, *supra* note 154.

157. *Id.* at 42.

158. *Id.* at 42-43.

159. *Id.* at 43.

160. *Id.* at 42 (stating that SEC wants to promote growth of blogs and electronic shareholder forums as “important means for companies to maintain a dialogue with their various constituencies”).

161. Solis, *supra* note 131.

162. Neil Stewart, *Tweeting During a Quiet Period*, INSIDE INVESTOR RELATIONS, IR MAGAZINE (2009), <http://www.insideinvestorrelations.com/articles/15378/tweeting-during-quiet-period/>.

163. *Id.*

164. *Id.*

## 2. Utility Regulatory Issues

As discussed at the outset, regulatory initiatives promoting smart grid, green power, or demand response will likely drive much of a utility's social media activity. Utilities have already started seeking recovery of social media costs in rate cases,<sup>165</sup> and compliance with traditional regulatory requirements is critical so that utilities can maximize rate recovery and avoid enforcement proceedings.

A discussion of the general regulatory concepts that may apply to social media follows. Requirements vary from state to state; this section highlights those principles and red flags that are generally applicable in many jurisdictions.<sup>166</sup>

### a. Rate Making

Presumably, most utilities will seek to maximize recovery of costs associated with social media in rates. Generally, utilities may recover the cost of consumer education and outreach programs that convey useful information to consumers.<sup>167</sup> By contrast, expenses associated with political advertising or

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165. As discussed previously, the North Carolina Public Utility Commission approved costs associated with a company's use of social media to educate consumers about demand side management and energy efficiency programs. *In the Matter of Application by Carolina Power & Light Company for Approval of Demand Side Management and Energy Efficiency Cost Recovery Rider*, 2009 N.C. PUC LEXIS 1787, at \*16 (N.C. Utils. Comm'n Nov. 25, 2009).

166. Although, to date, neither the FERC nor any state commissions have indicated that they will issue guidance or regulations concerning utilities' use of social media, at least one federal agency is expected to issue such guidance in the near future. In 2009, the FDA's Division of Drug Marketing, Advertising, and Communications solicited public input through hearings and comments concerning what the FDA's approach should be to the use of social media by manufacturers of FDA-regulated medical products. Mark Senak, *Breaking – It[']s Official – FDA Delaying Social Media Guidance Until at Least Q1 2011*, EYE ON FDA (Dec. 21, 2010), [http://www.eyefonda.com/eye\\_on\\_fda/2010/12/breaking-its-official-fda-delaying-social-media-guidance-until-at-least-q1-2011.html](http://www.eyefonda.com/eye_on_fda/2010/12/breaking-its-official-fda-delaying-social-media-guidance-until-at-least-q1-2011.html). Although the agency initially indicated that it would issue a guidance (or at least partial guidance) by the end of 2010, as of this writing, the first partial guidance is now expected in the first quarter of 2011. *Id.*

167. See, e.g., *Order Instituting Investigation to Consider Policies to Achieve the Commission's Conservation Objectives for Class A Water Utilities*, No. 07-03-006, 2009 Cal. PUC LEXIS 249 (Cal. Pub. Util. Comm'n May 7, 2009) (approving costs for customer education and outreach on conservation); *In the Matter of Union Electric Company to Increase Its Annual Revenues for Electric Service*, No. ER-2008-0318, 2009 Mo. PSC LEXIS 71 (Mo. Pub. Serv. Comm'n Jan. 27, 2009) (allowing recovery for ads for tree removal service if they convey useful information); *Order, Application of CenterPoint Energy Houston Electric for Approval of Deployment Plan and Request for Surcharge for an Advanced Metering System* (Pub. Util. Comm'n of Tex. Dec. 22, 2008), available at <http://www.centerpointenergy.com/staticfiles/CNP/Common/SiteAssets/doc/AMS%20Final%20Order.pdf> (including customer education programs in rates); *DPUC Determination of the United Illuminating Company's Standard Offer – 2004 Reconciliation of CTA and SBC*, No. 99-03-35RE11, 2005 Conn. PUC LEXIS 298 (Conn. Dep't of Pub. Util. Control Dec. 19, 2005) (recovery of costs allowed for utility's customer outreach programs); *Northeast Utilities Serv. Co.*, 105 F.E.R.C. ¶ 61,089 at P 25 (2003) (“With respect to expenses incurred for recovery of public education and outreach expenses, we generally allow recovery in wholesale transmission rates of expenses to educate the public on matters of reliability and quality of service resulting from the construction of grid upgrades.”); *Application of Idaho Power Company for Authority to Use Revenue Sharing Balance to Fund Idaho Power Company's Payments to the Northwest Energy Efficiency Alliance*, No. IPC-E-98-12, 1999 Idaho PUC LEXIS 16 (Idaho Pub. Utils. Comm'n Jan. 1999) (“[Customer education] efforts sometimes fail to satisfy traditional cost-effectiveness tests. They can be, nonetheless, inherently worthwhile for ratepayers in the long term.”).

promotional materials designed to build brand, enhance the utility's reputation, create goodwill,<sup>168</sup> or encourage power consumption<sup>169</sup> are disallowed.<sup>170</sup>

Where do social media tools fall on the continuum between education on one hand and advertising and brand building on the other? Using Twitter to convey information about power outages, or Flickr to upload photos of post-storm wires as a warning, benefits consumers by informing them about safety-related issues. But what if a utility CEO decided to start a blog entitled "reflections on the energy industry" or if the utility asked employees to tweet about topics like "day in the life of a line-man?" In contrast to brazen advertising, these communications have educational components, but they also serve to build brand and enhance the utility's reputation.

There is also a question of how much a utility should be permitted to recover when content is largely customer-created. Consider the example of a utility that sets up a customer group on Facebook to provide information on smart grid. The utility disseminates links to on-line articles, news and reports on smart grid, as well as updates on its own program. At the same time, the utility encourages consumers to share with each other "how much money I saved today" and pass along tips for best times to use power to enhance savings. The customer exchanges quickly become the group's most popular feature, with hundreds of customers checking in, contributing ideas, and inviting friends to join.

Here, the utility spent money setting up the site and inviting participants. But the site's real draw is created by customers, not the utility. As such, the utility derives real benefits from customer participation on the site. In this situation, is it just and reasonable to require customers to pay the full costs of an

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168. See, e.g., *In the Matter of an Investigation into the 2000 Revenue Requirement and Cost of Service Studies Filed by Enstar Natural Gas Company and Alaska Pipeline Company*, No. U-00-88, 2002 Alaska PUC LEXIS 364 (Regulatory Comm'n of Alaska Aug. 8, 2002) (citing ALA. ADMIN. CODE r. 3-1-50.500 (2010)) ("Neither an electric utility nor a gas utility may recover through rates any direct or indirect expenditure by the utility for promotional, political, or goodwill advertising."); ARK. CODE ANN. § 23-4-207 (2010) (prohibiting utility from recovering promotional and political advertising charges in rates); CONN. GEN. STAT. § 16-19d (2010) (prohibiting recovery of promotional advertising from ratepayers); Final Order, *In the Matter of the Verified Petition of Jersey Central Power & Light Company for Increase to Rates*, Nos. ER02080506, ER02080507, EO02070417, ER02030173, ER95120633, 2004 N.J. PUC LEXIS 192, at \*158 (N.J. Pub. Util. Comm'n May 17, 2004) ("[T]he Board has held that expenses associated with informational advertising should be reflected in rates and that the expenses associated with institutional and/or promotional advertising should be disallowed for ratemaking purposes."); *Central Illinois Public Service Company: Application for Authority to Enter into an Agreement and Plan of Exchange*, No. 86-0256, 1989 Ill. PUC LEXIS 204, at \*15 (Ill. Pub. Util. Comm'n Apr. 5, 1989) (recognizing that "advertising designed to enhance the utility's reputation is not recover[able] from ratepayers").

169. CAL. PUB. UTIL. CODE § 796 (2010) ("The commission shall disallow, for purposes of setting the rates to be charged by any electrical, gas, or heat corporation for the services or commodities furnished by it, all expenses for advertising which encourage increased consumption of such services or commodities.").

170. Utility commissions may also disallow costs related to improper subsidization of impermissible joint marketing activities with affiliates. See, e.g., *Application of California Water Service Company*, 2001 Cal. PUC LEXIS 1249 (Cal. Pub. Util. Comm'n Sept. 10, 2001) (excluding recovery of costs for joint marketing between utilities, including links between affiliate and utility sites); *Resolution E-3539*, 1998 Cal. PUC LEXIS 1066 (Cal. Pub. Util. Comm'n Sept. 17, 1998) (holding that reference or links to affiliate at websites is "tantamount to joint marketing" and prohibited by affiliate rules). Issues related to affiliate conduct, including associated rate disallowances, are discussed in the next section.

education program where customers themselves are providing the bulk of the value?

Whether a utility can recover the costs of social media programs in rates is an issue of first impression. As utilities devise social media programs, they should keep in mind regulatory requirements to maximize cost recovery. Meanwhile, regulators must educate themselves about the hybrid “education/branding” nature of social media to offer companies appropriate guidance and make cost recovery decisions that are just and reasonable in today’s wired world.

## b. Affiliate Codes of Conduct

### i. Undue Preference and Joint Marketing

The FERC bars utilities from giving undue preference to affiliates, as does virtually every state. Preference may take many forms, from the obvious (such as paying more for power purchased from an affiliate than a non-affiliate generator) to the more discrete, such as posting a limited-time offer, available for only thirty minutes, on a public website but giving advance communication of the posting to an affiliate.<sup>171</sup> Other affiliate regulations prohibit joint marketing, shared logo use,<sup>172</sup> links to affiliate websites,<sup>173</sup> and disparagement of non-affiliate providers.<sup>174</sup> Consequences for violation of affiliate rules may range from enforcement penalties to rate disallowances for improper joint marketing activities.<sup>175</sup>

Because social media introduces new ways for participants to communicate and interact, traditional affiliate rules and utility codes of conduct may no longer provide adequate guidance. For example, while many utility regulations and commission orders prohibit a utility from linking to an affiliate’s website,<sup>176</sup>

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171. *Communications of Market Information Between Affiliates*, 87 F.E.R.C. ¶ 61,012, at p. 61,028 (1999).

172. *In re: Petition of Infinite Energy, Inc. to Enforce the Provisions of O.C.G.A. § 46-4-153.1*, No. 30446, 2010 Ga. PUC LEXIS 57 (Ga. Pub. Util. Comm’n Feb. 2, 2010) (allowing utility to place inserts in regulated affiliate’s bills but only upon paying fair market value for benefit); *Order Instituting Rulemaking Concerning Relationship Between California Energy Utilities and Their Holding Companies and Non-Regulated Affiliates*, 2006 Cal. PUC LEXIS 460 (Cal. Pub. Util. Comm’n Dec. 14, 2006) (prohibiting utilities from participating in joint marketing or offering advertising space to affiliates in customer bills along with prohibiting shared logos).

173. 16 TEX. ADMIN. CODE § 25.272(h)(2)(B) (2011) (“A utility shall not engage in joint marketing, advertising, or promotional activities . . . with those of a competitive affiliate in a manner that favors the affiliate. Such . . . activities include . . . providing links from a utility’s Internet web site to a competitive affiliate’s Internet web site.”); *see also Permanent Standards of Conduct Pursuant to 66 Pa. C.S. § 2209(b)*, Nos. L-00030162 & M-00991249 F0004, 2005 Pa. PUC LEXIS 17 (Pa. Pub. Util. Comm’n Oct. 27, 2005) (prohibiting promotion of link to affiliate’s services from utility’s website unless links are provided to nonaffiliated companies); *Application of California Water Service Company*, 2001 Cal. PUC LEXIS 1249; *Resolution E-3539*, 1998 Cal. PUC LEXIS 1066.

174. *Illinois Commerce Commission on Its Own Motion*, Nos. 98-0147 & 98-0148, 2002 Ill. PUC LEXIS 26 (Ill. Commerce Comm’n Jan. 24, 2002) (prohibiting utility employees from disparaging quality of alternative supplier’s service).

175. *Application of California Water Service Company*, 2001 Cal. PUC LEXIS 1249; *Resolution E-3539*, 1998 Cal. PUC LEXIS 1066.

176. *See, e.g.*, 16 TEX. ADMIN. CODE § 25.272(h)(2)(B); *Permanent Standards of Conduct Pursuant to 66 Pa. C.S. § 2209(b)*, Nos. L-00030162 & M-00991249 F0004, 2005 Pa. PUC LEXIS 17.

these rules are not directly applicable to social media, because they do not address the possibility that a customer may link to, or recommend affiliate products on, a third-party platform (such as Facebook) over which the utility has no control.

Likewise, existing regulatory rules governing static affiliate links on a utility's website do not encompass the new and more dynamic variants of connecting through social media, such as "retweets" (RTs)<sup>177</sup> on Twitter or the "like" function of Facebook.<sup>178</sup> Consider, for example a utility code of conduct that specifies that the utility may not selectively endorse the services of affiliate providers. In light of this rule, the CEO of XYZ Utility would understand that complimenting XYZ Service Affiliate during a news conference for its repair work during a recent snowstorm violates the code of conduct. But what about a situation where an XYZ Service Affiliate tweets throughout the day about his efforts to repair the heating system at a Senior Center during the snowstorm, and the CEO re-tweets the messages. Would the RT, without any additional commentary, constitute an endorsement? In a similar vein, if an affiliated company set up a Facebook Fan page, could a utility employee become a "fan?" Or would this also be viewed as a tacit endorsement?

Facebook may give rise to several other affiliate issues as well. For example, if a utility sets up a fan page, must it accept both affiliate and non-affiliate employees as friends? In addition, Facebook includes a feature that allows a user to block friends from access to certain information. If the utility uses its Facebook page to communicate information about price or other policies, then limiting access to non-affiliates would be discriminatory, just as it is discriminatory for a utility to tip off an affiliate in advance to a website posting.

The notion that "retweeting" or "friending" may constitute endorsements finds support in the securities industry, another heavily regulated field. A regulatory guidance document on social media issued by the Financial Industry Regulatory Authority (FINRA) holds that NASD (National Association of Securities Dealers) Rule 2210's prohibition on non-deceptive communications with the public applies to registered representatives participating in social networking sites such as Twitter or Facebook.<sup>179</sup> While investment firms are not liable for deceptive information posted by third parties at a site, they face exposure if they endorse this information.<sup>180</sup> Several experts suggest that functions like retweeting a third party comment, "liking" a page on Facebook, or offering a testimonial on LinkedIn are likely to be considered endorsements

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177. An RT or retweet is a function that enables users to pass along a tweet that they have received to their followers.

178. Facebook's "like" feature can be used to signify approval of a post on a Facebook user's wall or to show support for a corporate page created on Facebook.

179. *Social Media Web Sites: Guidance on Blogs and Social Networking Web Sites*, FIN. INDUS. REG. AUTH., INC. (Jan. 2010), available at <http://www.finra.org/web/groups/industry/@ip/@reg/@notice/documents/notices/p120779.pdf> (holding that NASD Rule 2210 may require registered representatives to obtain prior approval from a principal).

180. *Id.* at 7-8.

under the FINRA guidelines<sup>181</sup> and will trigger liability for content generated by third parties.

With respect to utilities, endorsement of an affiliate through a retweet or “liking” a page would not trigger any type of liability for the communication. However, utility endorsement of affiliates through Twitter or Facebook could violate rules on joint marketing and confer an impermissible and discriminatory advantage to the utility’s affiliate. In the financial industry, investment firms are advised to de-activate interactive social media functions like “retweets” and “likes,” for certain employees to avoid the possibility of mistakenly endorsing another user’s comment or information.<sup>182</sup> Implementing a similar policy for certain utility conduct would likewise prevent utilities from inadvertently stumbling into impermissible joint marketing activities with affiliates.

Utilities face one final scenario that might give rise to an appearance of affiliate joint marketing. Both Facebook and LinkedIn allow companies to create ad campaigns based on a variety of demographics, including age, gender, profession, location, and interests of the desired target.<sup>183</sup> It is possible that an affiliate could create an ad that might wind up displayed on a utility’s page given the similarities in customer demographics. Even where the ad placement is determined by a computer algorithm, could the mere placement of an affiliate ad on a utility-branded Facebook page be viewed as joint advertising or an implicit endorsement? To avoid any possibility of the appearance of violating affiliate rules, utilities should include appropriate disclaimers on their Facebook pages, clarifying that ad placement is random, and that the company does not endorse any of the companies, products, or services promoted through advertisements that appear on the utility’s Facebook page.

## ii. Separation of Function

To prevent utilities from exercising market power or discriminating in favor of power-marketing affiliates to the detriment of captive customers, the FERC requires: (a) a functional separation between a utility’s transmission function employees and market function employees;<sup>184</sup> and (b) corporate separation between employees of a utility with captive customers and employees of a market-regulated power-sales affiliate.<sup>185</sup> The FERC has described these two standards, and the rationale for its different approaches as follows:

Applying the corporate separation approach in the market-based rate affiliate restrictions context is more appropriate than applying the employee functional approach used in the Standards of Conduct. This is because the market-based rate

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181. ACTIANCE WHITE PAPER, FINRA: COMPLIANCE GUIDE SOCIAL NETWORKS, WEB 2.0 AND UNIFIED COMMUNICATIONS (2011) (discussing retweets, “likes,” and testimonials as endorsements).

182. *Id.* at 8.

183. Louise Rijk, *See, e.g., LinkedIn DirectAds – B2B Social Network Advertising System with Unique Ad Targeting Options*, ADVANCED MEDIA PROD., INC. (Jan. 3, 2011), <http://www.advmediaproductions.com/blog/linkedin-directads-b2b-social-network-advertising-system-with-unique-ad-targeting-options/>.

184. *Standards of Conduct for Transmission Providers*, 125 F.E.R.C. ¶ 61,064 (2008) (replacing concept of shared employees with employee functional approach for purpose of regulating relationship between utility’s transmission and marketing employees).

185. *Market-Based Rates for Wholesale Sales of Electric Energy, Capacity and Ancillary Services by Public Utilities*, 119 F.E.R.C. ¶ 61,295 (2007) (discussing market-based separation of functions).

affiliate restrictions are intended to ensure separation of functions and restrict the sharing of market information between separate corporate entities: a franchised public utility with captive customers and its market-regulated power sales affiliates. The purpose of this separation of functions and the restrictions on the sharing of market information in the market-based rate affiliate restrictions is to guard against the potential for a franchised public utility with captive customers to interact with its market-regulated power sales affiliate in ways that transfer benefits to the affiliate's stockholders to the detriment of the *captive customers*. By contrast, the purpose of the Standards of Conduct is to prevent transmission providers from giving *undue preference* to their wholesale merchant and/or marketing functions (as well as separate, affiliated corporate entities) over *non-affiliated customers*.<sup>186</sup>

Under FERC regulations, “a transmission provider’s transmission function employees must function independently from its marketing function employees.”<sup>187</sup> These rules, however, do not preclude the use of social media. Rather, the separation of function rules merely prohibit transmission employees from conducting marketing functions, and prohibit marketing employees from accessing the control center in a manner different from other customers. Because social media is not likely to be used for transmission or wholesale power marketing, personal interaction between transmission and marketing employees through social media would not result in a violation of separation of function rules.

Social media may complicate compliance with the no-conduit rule, which provides that “[a] transmission provider is prohibited from using anyone as a conduit for the disclosure of non-public transmission function information to its marketing function employees.”<sup>188</sup> In addition, “[t]he No Conduit Rule requires that any [Affected] Employee [that is not a Transmission Function employee] may not act as a ‘conduit’ to provide non-public Transmission Function Information to a Wholesale Merchant Function [employee if a Transmission Function employee could not provide that same information directly].<sup>189</sup>

Social media potentially increases the risk that an employee might inadvertently act as a conduit for conveying non-public transmission information to a wholesale market function employee. Consider, for example, a situation where a transmission employee sends a “direct message” via Twitter to another employee about non-public transmission information. This is not unusual, since many Twitter users employ the “DM” function to convey a quick text. However, the employee could then (either intentionally or inadvertently) send that information on to a market function employee. The problem is compounded where the utility has an “official” twitter account that transmission and market employees are able to access, thereby enabling them to read any private direct messages.

The FERC’s corporate separation requirements for market affiliates prohibit franchised public utilities with captive customers from sharing market

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186. *Order on Request for Clarification*, 131 F.E.R.C. ¶ 61,021 at P 33 (2010) (citing Order No. 717, *Standards of Conduct for Transmission Providers*, F.E.R.C. STATS. & REGS. ¶ 31,280 at P 23 (2008)).

187. 18 C.F.R. § 358.2.

188. *Id.* § 358.6.

189. BETTY L. COLEMAN, XCEL ENERGY, STANDARDS OF CONDUCT IMPLEMENTING GUIDELINES FOR THE XCEL ENERGY TRANSMISSION PROVIDERS 12 (Jan. 10, 2011), available at [http://www.rmao.com/xfpp/xcel\\_sf\\_postings/FERC-TPSOC-SOC-Compliance-Guidelines.pdf](http://www.rmao.com/xfpp/xcel_sf_postings/FERC-TPSOC-SOC-Compliance-Guidelines.pdf) (citing 18 C.F.R. § 358.6) (emphasis omitted).

information with unregulated market affiliates. Market information includes “non-public information related to the electric energy and power business including, but not limited to, information regarding sales, cost of production, generator outages, generator heat rates, unconsummated transactions, or historical generator volumes. Market information includes information from either affiliates or non-affiliates.”<sup>190</sup> Although the FERC’s market affiliate rules prohibit information sharing, they allow a franchised public utility with captive customers to share support employees, field and maintenance employees, and senior officers and boards of directors with market regulated power-sales affiliates.<sup>191</sup> Sharing employees increases the risk for improper sharing of market information through social media platforms. Public utility employees and affiliate employees may, for example, share access to social media accounts or exchange information informally through social media groups without realizing that some of this information cannot be shared. A market affiliate employee might, for example, post an offhand comment about a generator outage (“ugh, stressed out about recent outage”) on a Facebook page that is limited to view by friends. If the market affiliate’s “friends” include employees of the affiliated public utility, this casual comment might run afoul of information-sharing prohibitions.

### c. Privacy of Customer Data

State regulatory requirements vary with respect to utilities’ obligations to safeguard the privacy of customer data. Most privacy laws or regulations prohibit utilities from disclosing to third parties customers’ personal information or level of power consumption.<sup>192</sup>

However, when a utility sets up a branded social media site on a third-party platform, it no longer has control over customer data. A customer who signs up to become a “fan” of a utility’s Facebook page, or for a subscription to its YouTube channel, must first register to use the third-party site, which may not be subject to the same disclosure restrictions as the utility. At a minimum, utilities setting up a Facebook or YouTube page should make clear to site users that the privacy policies of the particular social media platform will govern use of information supplied.

Some may argue that a utility’s use of a third-party platform inherently violates customer privacy laws because the utility absolves itself of responsibility to protect data, even as it reaps the benefits of creating an online presence to interact with customers. These arguments are not likely to pass muster; after all, government entities, which are also subject to stringent privacy regulations, are employing social media platforms with impunity through use of disclaimers. Nevertheless, public utilities commissions may want to issue guidance about the extent of a utility’s obligation, if any, to protect consumer data on third-party platforms outside of the utility’s control.

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190. 18 C.F.R. § 35.36(a)(8) (2009).

191. Coleman, *supra* note 189.

192. DEP’T OF ENERGY, DATA ACCESS AND PRIVACY ISSUES RELATED TO SMART GRID TECHNOLOGIES (Oct. 5, 2010), available at [http://www.gc.energy.gov/documents/Broadband\\_Report\\_Data\\_Privacy\\_10\\_5.pdf](http://www.gc.energy.gov/documents/Broadband_Report_Data_Privacy_10_5.pdf) (referencing various state statutes that prohibit utilities from sharing or selling customer information or identifying data to third parties).

In addition, utilities should also bear in mind that social media, particularly locational tools like Foursquare or the location features on Twitter or Facebook, makes inadvertent disclosures much easier. Consider, for example, a utility service provider employee who responds to a customer tweet about an outage, noting “we’ll take care of it” and subsequently tweets “earlier problem solved” and indicates his location. This series of interchanges may not give away a customer’s direct address, but comes close.

Finally, as utilities move towards implementation of smart grid programs, privacy concerns could potentially increase as utilities and/or third-party providers consider adopting tools that link smart meter data to social media (such as the Yellow Strom application described *supra* Part I.B). These types of applications carry a type of “gee-whiz” appeal, and consumers may sign on without fully considering the repercussions of allowing access to this type of data. To the extent that utilities consider sponsoring or offering these types of programs, they will need to fully warn consumers of the privacy concerns implicated by their consent to participate in sharing their energy consumption data through social media platforms.

#### d. Recordkeeping

##### i. Regulatory Transactions

Both federal and state regulations require utilities to retain records for various purposes, including documenting advertising expenses for ratemaking,<sup>193</sup> resolving billing disputes,<sup>194</sup> and tracking affiliate transactions.<sup>195</sup> In addition to these regulatory requirements, public power companies may face additional records retention requirements under open-records laws, as discussed in more detail *infra* Part II.E.2.

Certain social media communications may be relevant to compliance audits or rates. For example, a utility accused of showing undue preference towards affiliate customers by accepting their “friend” requests, but declining those of non-affiliate customers would want to retain access to its Facebook activities log

193. See generally 18 C.F.R. § 125.3(42) (2004) (imposing two-year retention requirement on copies of advertisements by or for the company on behalf of itself in newspapers, magazines, and other publications, including costs and other records relevant thereto); ARK. PUB. SERV. COMM’N, AFFILIATE TRANSACTION RULES – ELECTRIC RULE 3.05(C), available at [http://www.apscservices.info/Rules/superseded/affiliate\\_transaction\\_rules\\_electric.pdf](http://www.apscservices.info/Rules/superseded/affiliate_transaction_rules_electric.pdf) (allowing utility to participate in joint advertising with competitive affiliate if the utility maintains complete and detailed records accounting for all associated costs and assigns those costs to the affiliate).

194. See, e.g., OR. ADMIN. R. 860-021-0015 (2011) (requiring utility to keep a record of billing disputes); N.M. CODE R. § 17.5.410.25 (2011) (providing that utility shall maintain records of disputes registered with the utility and of settlement agreements).

195. See generally ARK. PUB. SERV. COMM’N, AFFILIATE TRANSACTION RULES – ELECTRIC RULE 4.03, available at [http://www.apscservices.info/Rules/superseded/affiliate\\_transaction\\_rules\\_electric.pdf](http://www.apscservices.info/Rules/superseded/affiliate_transaction_rules_electric.pdf) (requiring utility to maintain records of transactions with affiliates for at least three years, including identity of affiliate, date of the transaction, narrative description of the transaction, and sufficient information to allow for audit of the transaction for purposes of ensuring compliance with affiliate rules); see generally U.S. GOV’T ACCOUNTABILITY OFFICE, GAO-08-752T, UTILITY REGULATION: OPPORTUNITIES EXIST TO IMPROVE OVERSIGHT 9 (2008) available at <http://www.gao.gov/new.items/d08752t.pdf> (noting that a majority of states have books and records authority over utilities to review affiliate transactions, though they may lack this power over utility holding companies).

to dispute these contentions. Similarly, an intervenor may seek to disallow all of a utility's costs associated with social media in a rate case, arguing that the social media activity built the utility's brand and provided no substantive information. To rebut, the utility would need access to all of its blog postings.

As utilities begin to roll out Twitter accounts and Facebook pages, many consumers will use these platforms to lodge complaints about billing or lack of responsiveness to outages. These communications may take on relevance if a consumer files a complaint, alleging that a utility provided inaccurate information in response to a complaint via social media, or that the utility never responded to a complaint when, in fact, it did.

Increasingly, many companies engaged in social media are recognizing the value of keeping records of social media usage to defend against legal claims for defamation or discrimination or to comply with regulatory requirements.<sup>196</sup> The New York Times reported recently on the emergence of new technologies to help companies manage their social media presence by archiving business communications or managing individual employee posts on sites like Twitter or Facebook.<sup>197</sup>

As social media gains traction, state regulatory bodies may provide additional guidance on recordkeeping requirements. Until that time, utilities should err on the side of caution, institute a recordkeeping protocol for social media interactions, and include these in a social media policy.<sup>198</sup>

## ii. Recordkeeping and E-Discovery

The 2006 Federal Rules of Civil Procedure (FRCP) allow parties to request in discovery "electronically stored information" that is "within the possession, custody, or control of the responding party."<sup>199</sup> That a utility creates a Facebook page or Twitter account on a third-party platform does not absolve it of the obligation to retain and produce those materials in response to e-discovery requests in litigation. E-discovery of social media materials is an evolving field, raising questions not only related to records-keeping requirements, but also the extent to which a company can be required to produce personal emails or Facebook messages sent by an employee while on the job and potentially preserved in the company's records. These issues are beyond the scope of this article.<sup>200</sup>

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196. Tanzina Vega, *Tools to Help Companies Manage Their Social Media*, N.Y. TIMES, Nov. 15, 2010, <http://www.nytimes.com/2010/11/15/business/media/15social.html> (describing need for companies to keep records to defend against false advertising claims or comply with securities regulations).

197. *Id.*

198. *See generally infra* Appendix.

199. Fed. R. Civ. P. 34(b)(1); Francis G.X. Pileggi, *Electronic Discovery and Social Networking Sites*, INNS OF COURT (Nov./Dec. 2010), <http://www.innsocourt.org/Content/Default.aspx?Id=5500>; Meredith L. Williams, *eDiscovery & Social Media*, NAT'L LAW FORUM (Nov. 29, 2010), <http://nationallawforum.com/2010/11/29/ediscovery-social-media/>.

200. For additional information on e-discovery obligations and social media, *see generally* L. Thomas, *Social Networking in the Workplace: Are Private Employers Prepared to Comply with Discovery Requests for Posts and Tweets*, 63 SMU L. REV. 1373 (2010); Michelle Sherman, *E-Discovery Rules Applied to Social Media: What This Means in Practical Terms for Businesses*, SOCIAL MEDIA L. UPDATE BLOG (Jan. 8, 2011), <http://www.socialmedialawupdate.com/2011/01/articles/ediscovery/ediscovery-rules-applied-to-social-media-what-this-means-in-practical-terms-for-businesses/>.

e. Safety Requirements

Most utilities are required to provide information for reporting outages and safety concerns and to have personnel available to respond to calls. As utilities begin to use platforms like Twitter or Facebook to disseminate safety warnings or information about outages, consumers may come to believe that tweeting the utility or posting a message on its Facebook page will suffice as notice of an emergency. While Twitter and Facebook are useful supplements to traditional means of communicating with a utility, utilities should still make clear that customers with dire emergencies must contact the utility by other means — either phone or dedicated email — to ensure an immediate response.

f. Regulatory Proceedings

Utility companies are frequently involved in or impacted by federal and state regulatory proceedings. Social media may raise legal issues related to regulatory proceedings, but can also create potential opportunities for increasing participation.

i. Ex Parte Communications

Ex parte communications are communications made off the record and out of the presence of other participants to influence a decision-making official. A number possible uses of social media by utilities raise potential ex parte issues.

(a) One-to-One or Small Group Contacts Between Utility Employees and Regulators

Social media potentially raises ex parte issues because it presents opportunities for utility employees to engage in communications with decision-making officials on a one-to-one basis, or within the context of a small and defined group. The legal profession — which is also subject to prohibitions against ex parte communications — has dealt with this issue in different ways. Fear of potential ex parte communication and the appearance of impropriety led the Florida judiciary, in November 2009, to ban lawyers from “friending” judges on Facebook.<sup>201</sup> By contrast, South Carolina allows judges to be members of Facebook and to be friends on the site with law enforcement officers, so long as they do not discuss anything related to the judge’s position.<sup>202</sup>

In both federal and state practice, the regulatory community is small and collegial. Given that many utility personnel, regulatory commissioners, and administrative law judges (ALJs) know each other in one way or another, interacting on Facebook is in many ways no more than an extension of chatting at a bar or industry cocktail hour. Indeed, in some respects, social media offers even more transparency when regulatory officials post comments on their public Facebook page or Twitter stream.

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201. FLA. SUP. CT., JUDICIAL ETHICS ADVISORY, <http://www.jud6.org/LegalCommunity/LegalPractice/opinions/jeacopinions/2009/2009-20.htm>.

202. S.C. JUD. DEP’T, ADVISORY COMMITTEE ON STANDARDS OF JUDICIAL CONDUCT OPINION, No. 17-2009 (Oct. 2009), <http://www.judicial.state.sc.us/advisoryOpinions/displayadvopin.cfm?advOpinNo=17-2009>.

Utilities and regulators should proceed thoughtfully when entering social media, cognizant of ex parte constraints and the appearance of impropriety. But ultimately, they should realize that social media changes only the medium for communication, not the message. Thus, a utility's attempt to influence a commissioner's decision in a critical case is not any less unlawful when the communication takes place using Facebook's private messaging feature than when it occurs in a smoky back room.<sup>203</sup> By the same token, the pleasantries that utility personnel and regulators exchange at industry events are not transformed into inappropriate interactions because they take place in a virtual, rather than real life, forum.

#### (b) Utility Industry Blogs

In April 2009, a now widely-circulated student law review note suggested that blogs that cover pending Supreme Court cases, either analyzing the issues or advocating a particular outcome, might constitute ex parte communications because of the potential to influence the Court's decision.<sup>204</sup> The note did not go so far as to endorse a ban on blogging about live cases, but suggested that judges might avoid reading blogs discussing pending cases. Most bloggers disagreed with note, arguing that blogs are no different than case analyses or op-ed pieces contained in newspapers.

A recent comment by Supreme Court Justice Anthony Kennedy should eliminate any doubt about ex parte concerns related to blogs. In a recent speech, Kennedy acknowledged in passing that when he cannot find any law review commentary on a given case, he does "what [his law] clerks do" and reads blogs.<sup>205</sup>

Blogs are classified as a type of social media because most offer readers the ability to engage in conversation, both with the writer and with other readers, by commenting on individual posts. However, merely maintaining a blog that a regulator might read and comment on is a far cry from engaging in a one-to-one or small group conversation with a decision-making official. In this regard, regulatory entities' own social media policies will hopefully ensure that their employees do not use the comments section of utilities' blogs to initiate ex parte communications.

#### ii. Stakeholder Proceedings

Regulation today is dominated by stakeholder proceedings. A wide group of stakeholders are routinely engaged in proceedings ranging from project siting to the development of rules on cost allocation or transmission planning. Yet stakeholder proceedings are time-consuming and costly for both utilities and participants.

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203. N.C. JUD. STANDARDS COMM., PUBLIC REPRIMAND B. CARLTON TERRY, JR. DISTRICT COURT JUDGE, INQUIRY NO. 08-234 (Mar. 25, 2009), available at <http://www.aoc.state.nc.us/www/public/coa/jsc/publicreprimands/jsc08-234.pdf>.

204. Rachel Lee, Note, *Ex Parte Blogging: The Legal Ethics of Supreme Court Advocacy in the Internet Era*, 61 STAN. L. REV. 1535 (Apr. 2009).

205. Orin Kerr, *Justice Kennedy on Blogs*, THE VOLOKH CONSPIRACY (Sept. 3, 2010 6:05 PM), <http://www.volokh.com/2010/09/03/justice-kennedy-on-blogs/>.

Although it is too early to determine whether using social media platforms to communicate and interact with stakeholders (for example, using a Facebook page to disseminate company filings in a siting proceeding or obtaining input on a plan via Twitter) might completely substitute for face-to-face meeting and interaction, the experiences of two federal agencies indicate that social media is a promising supplement. At the same time, they also demonstrate that a number of issues are yet to be resolved.

(a) Federal Communications Commission

The Federal Communications Commission (FCC) has been aggressive in its adoption of social media and, as a result, has started to grapple with the issues that will inevitably confront the FERC and state regulatory commissions. The FCC maintains a blog to which the public and “interested parties” can post in lieu of filing comments with the Commission.<sup>206</sup> Decisionmakers can look to the blog in addition to filings to glean where the public stands on a particular issue. The Commission also uses Myspace, Facebook, Twitter, RSS feeds, YouTube, the Open Internet Blog, and other web-based forums.<sup>207</sup> These mediums are extremely useful in framing and facilitating the conversation between the public and the Commission. They are also extremely valuable for outreach purposes — working as a two-way street with the Commission gathering helpful information from the population, while keeping the public informed of happenings at the FCC.

However, it is difficult to square this increased openness with the disclosure requirements of the Administrative Procedure Act.<sup>208</sup> When employing a medium that allows such a massive inflow of communications with government, government must adapt to manage and disclose these contacts. Some are concerned with the ability of federal agencies to accurately record and attribute comments found on agency blogs in the official Record, while others allude to an “information overload” as a result of increased ex parte communications. Moreover, there are concerns regarding anonymous posting to the FCC Blog and other social media sites. If comments are not attributed to their writer, how can the Commission be expected to properly disclose the communication or give notice in the Record? Finally, there is the reality that “anonymous” posters can really be stakeholders in disguise, posing as members of the general public. Ultimately, the FCC decided that incorporating comments made on the FCC blog and other social media sites into the record of decision would be “impractical” due to the potential volume of comments, as well as lack of notice of availability of these comments to other parties.<sup>209</sup>

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206. See generally FCC Blog, <http://www.reboot.fcc.gov/blog>.

207. See generally Notice of Proposed Rulemaking, *Amendment of the Commission's Ex Parte Rules and Other Procedural Rules*, No. 10-43 (Fed. Commc'ns Comm'n Feb. 18, 2010) [hereinafter *Ex Parte NPRM*].

208. The APA also mandates that all ex parte contacts made during an agency proceeding be disclosed and placed in the agency's record. 2 U.S.C. § 556(e) (2006).

209. Report and Order and Further Notice of Proposed Rulemaking, *Amendment of the Commission's Ex Parte Rules and Other Procedural Rules*, No. 10-43, at P 31. (Fed. Commc'ns Comm'n Feb. 2, 2011).

(b) National Institute of Science and Technology

Last year, the National Institute of Science and Technology (NIST) experimented with use of social media, including a collaborative website for user-generated content on specific issues<sup>210</sup> and a blog “to solicit views on questions pertaining to the consumer interface to the nation’s evolving smart . . . grid.”<sup>211</sup> NIST published notice of the blog in the Federal Register.<sup>212</sup> The site attracted widespread comment and participation and was presumably far less expensive than routine travel to stakeholder meetings.

The likely result of social media use by government agencies is increased informality and a rise in less cautious, conscientious comments on social media sites — something that does not necessarily have a place in the administrative record or official notices, but can be extremely valuable in preliminary stages of a proceeding and information-gathering from the public.

*E. Additional Unique Issues for Public Power Utilities*

As government entities, public power utilities must consider additional legal issues unique to public bodies, including First Amendment considerations, open meeting laws, records retention laws, and privacy laws. A brief discussion of each issue follows.

1. First Amendment

Where the government makes available a public forum, the First Amendment prohibits restrictions on speech within that forum unless the restriction is narrowly tailored and intended to achieve a compelling government interest. A California court found that a city’s website was a closed communication vehicle and not a public forum.<sup>213</sup> The Third Circuit reached a similar conclusion with respect to a town’s email newsletter.<sup>214</sup> In both cases, the courts held that the governmental entity had no obligation to provide those with differing views with access to its communication vehicle.<sup>215</sup>

By contrast, because of their interactive features, social media sites like blogs, YouTube channels, and Facebook pages are, by definition, open to the public. Though a government social media site would most likely be considered a “limited” public forum because it is open to specific topics, the First Amendment will prevent content-based restraints unless they are narrowly tailored and serve a compelling government interest.

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210. Bill Mocrief, *SGIP Help Wanted*, NIST SMART GRID COLLABORATION SITE (Mar. 9, 2011), <http://collaborate.nist.gov/twiki-sggrid/bin/view/SmartGrid/SGIPHelpWanted>.

211. See Marty Burns, *Appendix: Actual Comments Received*, NIST SMART GRID COLLABORATION SITE (May 7, 2010), <http://collaborate.nist.gov/twiki-sggrid/bin/view/SmartGrid/OSTPBlogAppendix> (internal quotation marks omitted).

212. Notice, *Consumer Interface with the Smart Grid*, 75 Fed. Reg. 7526 (2010) (Office of Science and Technology Policy inviting comments via email, traditional mail, and online blog-style forum).

213. *Vargas v. City of Salinas*, 205 P.3d 207, 230 n.18, 46 Cal. 4th 1, 37 n.18 (2009) (holding that city has no obligation to open access to its website).

214. *Hogan v. Township of Haddon*, 278 F. App’x 98, 101-02 (3d Cir. 2008) (rejecting town official’s claim that she had a First Amendment right to publish articles in town newsletter).

215. *Vargas*, 46 Cal. 4th at 37, n.18; *Hogan*, 278 F. App’x at 101-02 (3d Cir. 2008).

Thus, a public power utility that operates a blog promoting energy efficiency programs could not restrict a commenter who abides by the blog's terms of use but takes the position that all customers should increase their consumption of fossil fuel or criticizes officials responsible for implementing efficiency programs. By contrast, the utility might be justified in removing defamatory comments, or blocking a commenter who continuously complains about the temperature of the town pool if these rude or off-topic remarks violate the utility's blog comment policy. Though blocking all comments is certainly one solution, the better approach is to develop a robust policy that lays out the business purpose for the blog, and specifies non-content based criteria for removal of comments or commenters.

## 2. Open Meeting Laws

Most public power utilities are subject to state open meeting statutes, which prohibit government bodies from conducting meetings in secret. Officials cannot use technology to circumvent open meeting requirements. Thus, communications between officials to deliberate public business, whether in person, by phone, or electronically may be subject to open meeting requirements.

The rise of social media raises new issues with respect to open meeting laws.<sup>216</sup> For example, are communications between public officials through social media platforms such as Facebook subject to open meeting rules? In a number of states, use of serial emails between officials to deliberate public business violates open meeting laws.<sup>217</sup>

But in *Beck v. Shelton*, the Supreme Court of Virginia found that emails between public officials over a period of weeks did not violate open meeting laws because there was a significant delay between sending the emails and their receipt.<sup>218</sup> As such, the court determined that the emails were the functional equivalent of letters which, because of the lack of immediacy in the exchange, do not rise to the level of a gathering or assembly to which open meeting laws apply.<sup>219</sup> However, the court stated that the outcome of the case would have been different if the communications had taken place in a chat room or via instant messaging.<sup>220</sup>

The Virginia Supreme Court's rationale suggests that many forms of communication via social media are potentially subject to open meeting requirements. Social media interchanges are constant, with participants often

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216. *Silence of the Lambs*, VOICE OF SANDIEGO.ORG, [http://www.voiceofsandiego.org/government/article\\_5bd95d8e-b6f6-11df-adfd-001cc4c03286.html](http://www.voiceofsandiego.org/government/article_5bd95d8e-b6f6-11df-adfd-001cc4c03286.html) (discussing emerging issues).

217. *See generally* Johnston v. Metro. Gov't of Nashville, 320 S.W.3d 299 (Tenn. Ct. App. 2009) (serial emails by zoning board members violate Tennessee Open Meeting Act); John F. O'Connor & Michael J. Baratz, *Some Assembly Required: Application of State Open Meeting Laws to Email*, 12 GEO. MASON L. REV. 719 (2004) at n. 27 (compiling state open meeting laws that include email communications within definition of meeting or gathering); *also see generally* *Open Government Guide*, THE REPORTERS COMMITTEE FOR FREEDOM OF THE PRESS, <http://www.rcfp.org/ogg/index.php> (online database of state open meeting and public records laws).

218. *Beck v. Shelton*, 593 S.E.2d 195, 199 (Va. 2004).

219. *Id.* at 198-200.

220. *Id.*

checking in several times a day on their mobile devices, if not on their computers.

State attorneys general are beginning to issue guidance, albeit contradictory, on social media and open meetings. In Florida, the state attorney general opined that the City of Coral Springs could establish a Facebook page, provided that it adheres to all requirements of the state's public records and disclosure laws.<sup>221</sup> By contrast, a Fort Lauderdale City Attorney issued a memo stating that his office "discourages the City's participation in . . . Facebook . . . or any similar interactive communication" in light of the challenges of complying with public records laws.<sup>222</sup> As social media gathers momentum and proves an effective tool for communication, it is unlikely that most states will adopt similarly restrictive policies. Since the law is still in flux, public power utilities seeking to engage social media should continually review their respective state's open meeting laws to ensure that their usage complies with those laws.

### 3. Records Retention and Disclosure

Every state has some version of a public records law under which government bodies must retain public records and make them available to the public.<sup>223</sup> Most public bodies already have procedures in place for retaining information posted on platforms controlled by the agency, such as self-hosted websites or blogs. But social media raises questions under public records laws because content is posted to third-party sites. For example, are tweets by a public official made during a public meeting subject to records retention requirements? What about user-generated content, such as criticism about a public power company's decision to retain a lobbying firm, that is posted on the company's Facebook page?

As public records laws play catch-up with technology, public entities are adopting different approaches. Some attempt to exclude social media content hosted on third-party platforms from the definition of public records by characterizing it as outside the custody of the agency. Others are implementing protocols to save all content, whether posted on a public agency's website or a platform like Twitter or Facebook. In this regard, the agency may want to include disclaimers to participants at its social media site, notifying them that their comments (including information in their user profiles) may be subject to public records and disclosure laws. As with open meeting laws, public power companies should consult with counsel and keep close watch on changes in public records requirements to avoid violations.

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221. ATT'Y GEN. OF FLA., *Advisory Legal Opinion, AGO 2009-19 Re: Records, Municipal Facebook Page* (April 23, 2009), <http://www.myfloridalegal.com/ago.nsf/Opinions/25F14F90483F3901852575A2004E46CB>.

222. Brittany Wallman, *Lauderdale City Attorney Tells Politicians: Stay Off Facebook*, SUNSENTIAL.COM, [http://weblogs.sun-sentinel.com/news/politics/broward/blog/2009/05/lauderdale\\_city\\_attorney\\_tells.html](http://weblogs.sun-sentinel.com/news/politics/broward/blog/2009/05/lauderdale_city_attorney_tells.html).

223. All 50 state statutes available online and searchable at <http://www.rcfp.org/ogg/>.

#### 4. Privacy

In addition to regulatory requirements for protection of customer data,<sup>224</sup> public power utilities may also be subject to state privacy laws, which may require notice to users of potential disclosure of user-created comments that are subject to public records laws. On behalf of federal government agencies, the General Services Administration (GSA) has, with varying degrees of success, negotiated special terms-of-service agreements with social media platforms that limit use of cookies, or restrict the social media site from placing ads on government-sponsored pages.<sup>225</sup>

### III. BEST PRACTICES AND SOCIAL MEDIA POLICY

#### A. *Banning Social Media Is Not a Social Media Policy!*

In light of all of the potential pitfalls described in this article, many utilities may be inclined to simply not participate in social media and to prohibit their employees from doing the same, at least on the job. Avoidance, however, is both counterproductive (because utilities will lose out on a valuable suite of tools to engage customers and build trusted relationships) and an exercise in futility, because social media isn't going away any time soon. Utilities should heed the warnings of legal futurist Richard Susskind, who described the sea-changes that social media will bring to the legal profession — which, like the utility industry, is slow to embrace new trends:

Finally, there are those who say that all the various techniques and technologies [including social media] are no more than passing fads . . . . I simply cannot see how major changes in the way we communicate, collaborate, network, and trade are somehow irrelevant for lawyers and their clients. Nor, given the sheer scale of the systems and the levels of their usage, can I conceive that this is a passing fad.<sup>226</sup>

Moreover, prohibiting employees from using social media may negatively impact employee morale, and a ban is difficult to monitor and enforce.<sup>227</sup>

Rather than waste resources in an effort to quash social media usage, utilities would do better by exploring these new technologies and adopting best practices and policies for their use. Too many companies jump impulsively into social media, without considering their business goals. For most companies, a poorly planned social media campaign wastes money; for utilities the stakes are higher since haphazard or undisciplined use of social media can result in compliance violations or denial of rate recovery for certain costs. To avoid these outcomes, utilities should employ certain best practices in adopting social media, and should develop a social media policy.

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224. See *supra* Part II.D.2.c.

225. *Privacy and Government Contracts with Social Media Companies*, EPIC.ORG, <http://epic.org/privacy/socialnet/gsa/>.

226. RICHARD SUSSKIND, *THE END OF LAWYERS? RETHINKING THE NATURE OF LEGAL SERVICES* 82 (Rev. ed. 2010).

227. RANDY L. DRYER, *ADVISING YOUR CLIENTS (AND YOU!) IN THE NEW WORLD OF SOCIAL MEDIA: WHAT EVERY LAWYER SHOULD KNOW ABOUT TWITTER, FACEBOOK, YOUTUBE, & WIKIS*, 23 *Utah B.J.* 16, 18 (May/June 2010).

### B. *Best Practices*

Many of the best practices for employing social media serve double duty. Best practices facilitate compliance with applicable legal and regulatory requirements and, further, force utilities to consider their goals and overall strategy in engaging social media upfront, thereby enabling them to maximize their return on investment.<sup>228</sup>

#### 1. Identify the Social Media Tools to Be Used

Utilities should avoid spreading themselves too thin in adopting social media. Although a range of free and inexpensive platforms abound, setting up a presence on several sites and failing to use them reflects poorly on the utility and aggravates customers who might visit a site in search of content and leave empty-handed.

How to choose between platforms? First, consider what types of sites your customers are likely to be using, and have the ability to easily access. With 500 million users and growing, Facebook is always a good bet, as is LinkedIn for recruitment purposes. Next, consider costs and value. For example, while a YouTube channel is impressive, creating videos for the site may be too complicated and costly to justify stocking a YouTube site with video.

#### 2. What Are the Utility's Goals in Engaging Social Media?

With so much buzz about social media, a utility may jump headfirst into participating, without a strategy or goals, only to find that it doesn't achieve the anticipated results. Moreover, a utility's failure to specify goals for particular social media programs may result in all of the programs being classified generically as "branding" or marketing, thus depriving the utility of an opportunity to recover the costs of the programs in rates.

Above all, utilities must define their reasons for engaging in social media. Do they want to educate consumers about smart grid and change usage habits? Communicate information about outages or repairs? Engage customers and build closer relationships? Facilitate internal discussion and exchange of ideas between employees? By defining the reasons for social media use and the goals to be accomplished, utilities can more accurately measure the usefulness of these tools, as well as ensure recovery of permissible costs in rates.

#### 3. What Team Will Implement the Social Media Strategy?

Once a utility establishes a social media presence, it must identify the department responsible for monitoring social media sites. The reason for designating a team is two-fold. First, in order to maximize the effectiveness of social media, a utility must assign the appropriate staff to engage consumers. For example, since many customers use utility Facebook pages or Twitter to lodge complaints about poor service or give notice of outages, assigning responsibility for these platforms to a customer service department with trained

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228. Stephen Baker, *Beware Social Media Snake Oil*, BLOOMBERG BUS. WK. (Dec. 3, 2009), [http://www.businessweek.com/magazine/content/09\\_50/b4159048693735.htm](http://www.businessweek.com/magazine/content/09_50/b4159048693735.htm) (describing that buzz over social media drives companies to invest in systems without preparing staff for implementing them or understanding their purpose).

representatives will ensure that complaints are addressed in a timely and appropriate manner. By contrast, using sales personnel to engage disgruntled customers on Facebook or Twitter might irritate them further, while failing to assign any specific personnel to monitor these platforms could result in no response at all, which would agitate consumers even more. Second, as discussed above,<sup>229</sup> using social media for certain functions (such as consumer education or resolving billing disputes) may trigger recordkeeping obligations, which are best handled by the department responsible for those particular matters.

Utilities must also consider whether to invest money to train in-house staff to manage social media engagement and monitoring, or whether to outsource these responsibilities to contractors.<sup>230</sup> To the extent that contractors are involved, utilities must ensure contractors' familiarity and compliance with the utility's social media policy, codes of conduct, and regulatory obligations.

#### 4. Distinguish Between Official Employee Use and Other Uses of Social Media

As Coca-Cola's three-page social media policy succinctly states, "[t]here's a big difference in speaking 'on behalf of the Company' and speaking 'about' the Company."<sup>231</sup> Thus, utilities should develop different guidelines for: (1) employees authorized to use social media on behalf of the company; and (2) all other employees who use social media for personal, unofficial, or internal conversations. While all employees are required to comply with a company's code of conduct, employees using social media for official purposes may be subject to additional obligations, including obtaining certification<sup>232</sup> or management-level approval<sup>233</sup> as a pre-requisite, as well as monitoring social media activity and recordkeeping. The utility's social media policy should spell out the different requirements for these different categories of use.

#### 5. Privacy Policy and Website Disclaimers

By now, most utilities have likely developed and implemented privacy policies for their websites that contain fairly boiler-plate terms governing collection, use, and disclosure (if any) of personal information,<sup>234</sup> use of cookies,

229. See generally *supra* Part II.D.2.d.

230. CONVERSEON, <http://converseon.com>.

231. *Online Social Media Principles*, COCA-COLA CO. (Dec. 2009), available at [http://www.thecocacolacompany.com/socialmedia/TCCC\\_online\\_social\\_media\\_principles.pdf](http://www.thecocacolacompany.com/socialmedia/TCCC_online_social_media_principles.pdf).

232. *Id.* at 2.

233. SOCIAL MEDIA POLICY RULE 4.1, ENTERGY SYSTEM POLICIES & PROCEDURES (Sept. 9, 2009), [http://www.entergy.com/about\\_entergy/entegrity](http://www.entergy.com/about_entergy/entegrity) (requiring Vice President of Communications to determine those employees authorized to engage in external social media).

234. *Disclosure: Website Terms of Use*, PAC. GAS & ELECTRIC CO. (Jan. 2005), <http://www.pge.com/about/company/disclosure>; *PG&E Website Privacy Policy*, PAC. GAS & ELECTRIC CO. (APR. 2010), <http://www.pge.com/about/company/privacy/website/>; *Privacy Policy*, ENTERGY CORP. & AFFILIATES (Mar. 5, 2010), [http://www.entergy.com/privacy\\_legal/privacy.aspx](http://www.entergy.com/privacy_legal/privacy.aspx); *Northeast Utilities Privacy Statement*, <http://www.nu.com/contact/privacy.asp> (last visited Mar. 14, 2011); *Privacy Policy*, DUKE ENERGY (Nov. 2009), <http://www.duke-energy.com/privacy.asp>; *Terms of Use and Privacy Policy*, TEX. GAS SERV., <http://www.texasgasservice.com/PrivacyPolicy.aspx> (last visited Mar. 14, 2011); *Privacy Statement*, LAKE CNTY., OHIO, DEPT. OF UTILS.,

disclaimers for responsibility for the accuracy of links to third-party sites,<sup>235</sup> and damages arising out of reliance on information posted on the website.<sup>236</sup> A utility sponsoring a blog can link to or incorporate its website privacy policy at its blog. In addition, because of their interactive nature, blogs should also include a posting policy that describes rules for user participation, respectful commentary (no harassing, obscene, or discriminatory content), as well as grounds for removal or rejection of comments.<sup>237</sup> To avoid possible violation of affiliate rules prohibiting endorsements or joint marketing, a utility might either reserve the right to reject comments which, in the utility's discretion, do not comply with its code of conduct, or alternatively, clarify that views expressed in the comments reflect the views of the writer and not the utility. Some utilities have adopted rules of engagement for their Facebook pages as well.<sup>238</sup>

Clear, firm posting and removal policies are particularly important for public power companies as a way to maintain decorum without infringing on the First Amendment speech rights of site users.<sup>239</sup>

## 6. Review of Terms of Service

When utilities create a presence on third-party sites like LinkedIn, Facebook, or Twitter, they no longer control the site's privacy policies or other terms of service. Before setting up accounts on these sites, utilities should familiarize themselves with applicable terms of service to determine whether they contain any objectionable provisions. In contrast to GSA, which had the

<http://www.lakecountyohio.org/UtilitiesHome/tabid/314/ctl/Privacy/Default.aspx> (last visited Mar. 14, 2011); *Columbia Utilities Privacy Policy*, <http://www.columbiautilities.com/privacy.cfm> (last visited Mar. 14, 2011).

235. See generally *Green Electric Solutions San Diego Electrical Privacy Policy*, <http://www.sandiegoelectrical.us/privacypolicy.php> (last visited Mar. 14, 2011); FREE PRIVACY POLICY.COM, <http://freeprivacypolicy.com> (last visited Mar. 14, 2011) (tool for creating standard privacy terms for website).

236. See generally *Terms and Conditions*, ROCHESTER PUB. UTILS., [http://www.rpu.org/terms\\_conditions](http://www.rpu.org/terms_conditions).

237. See generally *Posting Policy*, XCEL ENERGY, <http://blog.xcelenergy.com/posting-policy/>.

238. See generally *AEP Facebook Rules of Engagement*, [http://www.facebook.com/americanelectricpower#!/note.php?note\\_id=420174410977](http://www.facebook.com/americanelectricpower#!/note.php?note_id=420174410977).

239. See generally *City of Seattle Blogging Policies*, <http://www.seattle.gov/pan/BloggingPolicy.htm>. Among its provisions, the City of Seattle's blog includes this policy on comment posting and removal:

- The City reserves the right to restrict or remove any content that is deemed in violation of this blogging policy or any applicable law.
- Each City of Seattle blog shall include an introductory statement which clearly specifies the purpose and topical scope of the blog.
- City of Seattle blog articles and comments containing any of the following forms of content shall not be allowed for posting:
  1. Comments not topically related to the particular blog article being commented upon;
  2. Profane language or content;
  3. Content that promotes, fosters, or perpetuates discrimination on the basis of race, creed, color, age, religion, gender, marital status, status with regard to public assistance, national origin, physical or mental disability or sexual orientation;
  4. Comments that support or oppose political campaigns or ballot measures;
  5. Sexual content or links to sexual content;
  6. Solicitations of commerce;
  7. Conduct or encouragement of illegal activity;
  8. Information that may tend to compromise the safety or security of the public or public systems; or
  9. Content that violates a legal ownership interest of any other party.

leverage to compel changes in the terms of service for several social media sites,<sup>240</sup> a single utility lacks the bargaining power to negotiate exceptions.

Thus, utilities may need to include disclaimers or additional information on social media sites to avoid compliance violations<sup>241</sup> or customer confusion about privacy policies.<sup>242</sup>

#### 7. Monitoring and Recordkeeping

Social media is a process, not a destination. Creating a social media presence is just the start; once launched, a utility's social media engagement requires ongoing oversight and documentation. Utilities should monitor employee use of social media as well as comments by customers and other third-party users about the utility. And utilities should designate personnel to follow up with customer complaints or inquiries and address comments about the utility.

As discussed above,<sup>243</sup> utilities are also subject to recordkeeping requirements for ratemaking, affiliate transactions, billing disputes, and SEC compliance, while public power utilities are subject to open records laws as well. Moreover, retaining records of social media interactions is prudent for purposes of defending against discrimination, wrongful termination, and defamation claims.

New technology is facilitating monitoring and recordkeeping, making these tasks less onerous and costly. Several commercial services, both free and fee-based, are available to monitor a company's social media interaction, while other services for retaining records for litigation and compliance purposes are also emerging.<sup>244</sup>

#### 8. Review and Update

Social media policies require constant review and updates, particularly in these fluid times. Social media is itself a rapidly changing medium, with companies continuing to introduce new versions and features. In addition, companies' use of different social media tools also continues to evolve as they gain more experience and customer feedback. Laws and regulatory policy governing social media, and related concerns such as customer privacy, are also in flux. Finally, as social media use increases, utility regulatory commissions may issue guidance to utilities on matters like *ex parte* communications, recordkeeping, and compliance with codes of conduct.

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240. See generally *supra* Part II.E.4.

241. For example, as discussed at p. 38, *supra*, sites like LinkedIn or Facebook may run randomly generated ads on a utility's site, with selection based on demographics and user data. A utility should make clear in notes or its social media profile that ads are posted randomly and the utility does not endorse any of the products or services advertised.

242. Because utilities have traditionally been subject to state laws requiring protection of customer data, customers may erroneously assume that these policies extend to a utility's social media pages and might post their account numbers, addresses, or other personal information on public pages viewable by anyone. Utilities should emphasize that they have no control over privacy policies at third-party sites, and should link to the social media site's privacy policy.

243. See generally *infra* Part II.D.2.d.

244. See generally Vega, *supra* note 196.

## 9. Cyber-Insurance

Even after undertaking these best-practices, a utility may still face liability for social media use. Before engaging social media, utilities should review existing liability policies to determine whether coverage for any social-media related liability for defamation or IP infringement is available under existing policies. Utilities should also explore cyber-insurance policies, which will offer broad coverage for social media related liability.<sup>245</sup>

### C. Social Media Policy

This section briefly outlines the key features of an effective social media policy. Sample policies abound online; one expert has even created searchable database of social media policies.<sup>246</sup> At least one utility social media policy (for Entergy System) is available online.<sup>247</sup>

**General guidance:** Social media brings an immediacy that is hard to resist. Thus, it's easy to get caught up in the heat of the moment and post something stupid. A social media policy should advise employees to exercise care with social media. Just as most people would not blurt out "Your tie is hideous" at a cocktail party, they should similarly exercise restraint on social media.

**Distinction between differing uses:** A social media policy should distinguish between different uses — for example, employee use of social media for personal reasons (during work and off hours) and employee use of social media for business. The policy should also clarify employees' obligations even when off the clock: for example, some utilities prohibit employees from using a company email for public posting on personal time. Others caution employees about making comments that could reflect poorly on the utility (though the NLRB has challenged the legality of these provisions).<sup>248</sup> Utilities should also give notice to employees that their social media communications on the job are subject to monitoring.

**Disclosure requirements:** A social media policy should remind employees of FTC rules prohibiting endorsements of products or services where the endorser fails to disclose a material connection with the product or service recommended. These rules apply even when an employee blogs on his own time.

**Confidentiality:** Disclosure of confidential information carries many consequences, including potential violation of SEC fair disclosure rules or privacy. A social media policy should explain the concept of confidentiality to users.

**Discrimination and harassment:** A social media policy should give guidance to hiring personnel on appropriate factors for inclusion in background checks and should emphasize that employers may not rely on impermissible

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245. Kathleen Ellis, *The Growing Risks of Social Media*, INS. J., July 12, 2010, <http://www.insurancejournal.com/news/national/2010/07/12/111494.htm>.

246. *Policy Database*, SOC. MEDIA GOVERNANCE, <http://socialmediagovernance.com/policies.php>.

247. *Entergy System Policy & Procedures*, available at SCCENET, <http://community.corporatecompliance.org/> (select "Resources" tab; then enter "Entergy" in the "Search" box).

248. See generally *supra* Part II.B.2.

factors when making hiring decisions, even if this information is available at publicly accessible sites. Likewise, a social media policy should direct employees to use good judgment and avoid disparaging, discriminatory, or profane comments.

**Regulatory requirements:** The social media policy should remind employees that regulatory codes of conduct continue to apply in social media, so employees must ensure that their use comports with these codes of conduct. Where issues are unclear (for example, if it's unclear whether "friending" an employee in the transmission unit or becoming a fan of an affiliate page violates the code of conduct) the social media policy should provide additional guidance to employees.

**Regulatory process:** A social media policy should state that traditional rules on ex parte communication may apply in social media. Though these rules do not necessarily preclude "friending" or following a utility commissioner or other government official with decisional authority over the utility, employees should steer clear of using social media, particularly features like DM (direct messages on Twitter) or in-site messaging to influence pending decisions or advocate for a particular outcome.

**Records retention:** Utilities should remind employees of applicable records retention requirements when using social media. Employees should not delete accounts or remove documents from a site without appropriate authorization.

**Making the policy understandable:** Companies should aim to maximize employee participation in social media. Though companies may choose to adopt a formal policy for legal and compliance purposes, they should also develop a user-friendly social media policy, with a checklist of employee dos and don'ts (see Appendix), frequently asked questions, and a list of "red flags" related to different platforms.

**Opportunities for questions:** Because social media is evolving, many new issues are likely to arise on which employees will seek guidance. A social media policy should provide ways for employees to seek clarification, either through an internal hotline (if the company has one) or email. The utility should maintain a running list of questions and responses to supplement its social media policy.

**Reporting information:** The social media policy should provide a phone number or email address for employees to report perceived violations and ask questions.

**Consistency with other requirements:** As regulated industries, utilities already have codes of conduct, protocols for records retention, workplace harassment policies, and website privacy policies. There's no need to reinvent the wheel with a social media policy: utilities can simply reference these documents to the extent applicable.

#### IV. CONCLUSION

Social media is here to stay and offers an exciting opportunity for utilities to inform and educate customers, alert them to safety problems, and ultimately build trusted relationships with them. Though a variety of potential legal issues create challenges for utilities that seek to adopt social media policy, a robust

social media policy, combined with a little common sense, can clear the way for utilities to fully participate in the Web 2.0 world.

V. APPENDIX: EMPLOYEE CODE OF CONDUCT POLICY FOR SOCIAL MEDIA

1. Do identify yourself and your role at the Company when participating on the Company's social media sites and/or discussing the Company. If you are not authorized to speak on behalf of the Company, please qualify remarks about the Company with a caveat that the views expressed represent your own personal position, and do not reflect the views of the company.
2. Do ask for guidance if you are unclear about a course of action.
3. Do make statements that reflect your honest beliefs, opinions, or experiences.
4. Do comply with the posting guidelines and Terms of Use on any site on which you post content on behalf of Company.
5. Do comply with any specific additional guidelines provided by Company, including Codes of Conduct, Privacy Policies, and others.
6. Do not make deceptive or misleading claims about our products or services, or our competitors' products or services to consumers.
7. Do not make any claims about Company's products or services, or Company's competitors' products or services, that are not substantiated, and exercise due diligence to evaluate the claims.
8. Do not engage in any communication that is defamatory or infringes upon the intellectual property, or privacy and publicity rights of others. For example, do not post content (photos/videos) without written permission from the person who owns the photo or video, as well as any persons depicted in the photo or video.
9. Do not offer for sale, or solicit, products or services on behalf of the company.
10. Do not make offensive comments that have the purpose or effect of creating an intimidating or hostile environment, including telling lies or spreading rumors about Company or its other Employees, officers, directors, shareholders, or competitors.
11. Do not use ethnic slurs, personal insults, obscenity, or other offensive language.
12. Do not make any comments or post any content that in any way promote unsafe activities that could lead to an unsafe situation involving Company's customers or other individuals.
13. Do retain copies of records in accordance with records management policy.