

5-28-2013

## Municipal Energy Benchmarking Legislation for Commercial Buildings: You Can't Manage What You Don't Measure

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### Recommended Citation

Sara Mattern, *Municipal Energy Benchmarking Legislation for Commercial Buildings: You Can't Manage What You Don't Measure*, 40 B.C. Envtl. Aff. L. Rev. 487 (2013), <http://lawdigitalcommons.bc.edu/ealr/vol40/iss2/8>

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# MUNICIPAL ENERGY BENCHMARKING LEGISLATION FOR COMMERCIAL BUILDINGS: YOU CAN'T MANAGE WHAT YOU DON'T MEASURE

SARA MATTERN\*

**Abstract:** Across the United States, the energy used to power commercial buildings represents a sizeable portion of overall energy consumption and resulting greenhouse gas emissions. Until recently, building owners and managers did not have an easy way to compare the efficiency of their buildings. Through the ENERGY STAR program, the Environmental Protection Agency and Department of Energy created a tool to evaluate a building's relative efficiency, a process called benchmarking. Recently, a growing number of cities have passed legislation requiring commercial building owners to track energy performance, as a way to help the cities meet their own climate goals. This Note examines three cities' benchmarking legislation amidst the complex web of energy regulatory authority at the local, state, and federal levels and suggests that a successful energy benchmarking program must carefully coordinate with state regulators and local utility companies.

## INTRODUCTION

Energy efficiency enables businesses and consumers to save money by lowering utility bills and reducing pollution.<sup>1</sup> Policy makers and climate scientists see energy efficiency initiatives as a non-controversial way to reduce greenhouse gas ("GHG") emissions.<sup>2</sup> The Environmental Protection Agency ("EPA") notes that energy efficiency is a sizeable yet relatively inexpensive way to achieve carbon emission reduction goals.<sup>3</sup>

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\* Executive Articles Editor, BOSTON COLLEGE ENVIRONMENTAL AFFAIRS LAW REVIEW, 2012-2013.

<sup>1</sup> See JOHN LAITNER ET AL., AM. COUNCIL FOR AN ENERGY-EFFICIENT ECON., THE LONG-TERM ENERGY EFFICIENCY POTENTIAL: WHAT THE EVIDENCE SUGGESTS, at vii (2012), available at <http://www.aceee.org/sites/default/files/publications/researchreports/e121.pdf>; Ann E. Carlson, *Energy Efficiency and Federalism*, 1 SAN DIEGO J. CLIMATE & ENERGY L. 11, 12 (2009).

<sup>2</sup> See Carlson, *supra* note 1, at 11.

<sup>3</sup> NAT'L ACTION PLAN FOR ENERGY EFFICIENCY, ENERGY EFFICIENCY AS A LOW-COST RESOURCE FOR ACHIEVING CARBON EMISSIONS REDUCTIONS, at ES-4 (2009) [hereinafter EMISSIONS REDUCTIONS].

Thus, these initiatives can lower the overall cost of meeting climate goals.<sup>4</sup>

Improving energy efficiency in existing buildings is one way to reduce overall GHG emissions.<sup>5</sup> By measuring the energy performance of a building through benchmarking, building owners and operators can compare actual performance against expected performance.<sup>6</sup> A benchmark is a comparison point that allows evaluation of relative performance across related entities.<sup>7</sup> A building energy benchmark allows for a comparison of the efficiency of the whole-building energy use against other similar buildings.<sup>8</sup> Municipalities can collect energy performance information to prioritize improvements and cut waste.<sup>9</sup> Reducing energy demand in existing buildings is an essential part of achieving energy efficiency and emissions reduction goals.<sup>10</sup>

Federal and state governments have differing and exclusive responsibility for electricity, including generation and transmission.<sup>11</sup> Additionally, states can empower local governments to regulate building energy use within their jurisdictions.<sup>12</sup> Further, there may be split incentives between building owners and tenants to improve efficiency when owners pay for equipment but tenants pay utility bills. Thus, the legal landscape for creating a successful building energy efficiency program can suffer from competing jurisdictions and interests.<sup>13</sup> Despite

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<sup>4</sup> *Id.* at ES-1.

<sup>5</sup> See Katherine A. Trisolini, *All Hands on Deck: Local Governments and the Potential for Bidirectional Climate Change Regulation*, 62 STAN. L. REV. 669, 698–99 (2010).

<sup>6</sup> 2. *Benchmarking*, ENERGY STAR, [http://www.energystar.gov/index.cfm?c=business.EPA\\_BUM\\_CH2\\_Benchmarking](http://www.energystar.gov/index.cfm?c=business.EPA_BUM_CH2_Benchmarking) (last visited May 20, 2013).

<sup>7</sup> *Step 2.3 Benchmark*, ENERGY STAR, [http://www.energystar.gov/index.cfm?c=assess\\_performance.benchmark](http://www.energystar.gov/index.cfm?c=assess_performance.benchmark) (last visited May 18, 2013).

<sup>8</sup> NAT'L ASSOC. OF STATE ENERGY OFFICIALS, PUBLIC BUILDINGS MANUAL 18 (2004), [http://www.naseo.org/committees/buildings/documents/NASEO\\_Public\\_Buildings\\_Manual.pdf](http://www.naseo.org/committees/buildings/documents/NASEO_Public_Buildings_Manual.pdf).

<sup>9</sup> See Trisolini, *supra* note 5, at 698.

<sup>10</sup> RENEWABLE & APPROPRIATE ENERGY LAB., GUIDE TO ENERGY EFFICIENCY & RENEWABLE ENERGY FINANCING DISTRICTS FOR LOCAL GOVERNMENTS 5 (2009).

<sup>11</sup> See *New York v. Fed. Energy Regulatory Comm'n (New York v. FERC)*, 535 U.S. 1, 27–28 (2002).

<sup>12</sup> NAT'L ACTION PLAN FOR ENERGY EFFICIENCY, BUILDING CODES FOR ENERGY EFFICIENCY 4, [www.epa.gov/cleanenergy/documents/suca/buildingcodesfactsheet.pdf](http://www.epa.gov/cleanenergy/documents/suca/buildingcodesfactsheet.pdf) (last visited May 18, 2013).

<sup>13</sup> See EMISSIONS REDUCTIONS, *supra* note 3, at 4-1 to 4-2. A split incentive occurs where tenants pay utility bills but building owners purchase equipment and make decisions about which efficiency level is desirable. PLANYC, *A Model Energy Aligned Lease Provision* 1 (2011), [http://www.nyc.gov/html/planyc2030/downloads/pdf/111212\\_dcas\\_cal\\_narrative\\_language.pdf](http://www.nyc.gov/html/planyc2030/downloads/pdf/111212_dcas_cal_narrative_language.pdf). Thus, building owners do not receive the benefits of the more efficient equipment and might be less likely to make a more efficient purchase. *Id.*

federal support for building energy efficiency, a successful municipal benchmarking program is limited to the extent a state's regulatory regime protects energy data.<sup>14</sup> Motivating building owners and tenants to report data requires education and outreach about how to benchmark and its usefulness in meeting climate change goals.<sup>15</sup>

This Note examines the unique challenges posed to local governments seeking to reduce GHG emissions and overall energy consumption through commercial building energy efficiency benchmarking legislation. Part I reviews the current energy use landscape in the United States and divisions of regulatory authority over energy use between federal and state actors.<sup>16</sup> Part II of this Note examines the structure of and issues confronting municipal benchmarking legislation, such as coordination with state privacy policies for energy data.<sup>17</sup> Part III provides a review of Austin, Seattle, and New York City's approach to benchmarking, both locally and within their state's legislative schema.<sup>18</sup> Part IV analyzes these approaches, and suggests that a combination of aggregation of building data, direct reporting from the utilities, and messaging the importance of compliance to owners and tenants can bolster program success in reducing energy use.<sup>19</sup>

## I. BUILDING ENERGY EFFICIENCY AS A POLICY GOAL

Energy efficiency both reduces the need for additional power plants by reducing consumer demand and decreases GHG emissions.<sup>20</sup> Despite relatively low-cost benefits, energy efficiency initiative investment remains below the level needed to maximize the reduction of GHG emissions.<sup>21</sup> Commercial building energy efficiency improvements present one avenue for marked reductions in current energy use.<sup>22</sup> As energy efficiency initiatives become more prominent, under-

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<sup>14</sup> See DEP'T OF ENERGY, DATA ACCESS AND PRIVACY ISSUES RELATED TO SMART GRID TECHNOLOGIES 5 (2010).

<sup>15</sup> See NAT'L ACTION PLAN FOR ENERGY EFFICIENCY, UTILITY BEST PRACTICES GUIDANCE FOR PROVIDING BUSINESS CUSTOMERS WITH ENERGY USE AND COST DATA, at ES-I (2008) [hereinafter UTILITY BEST PRACTICES].

<sup>16</sup> See *infra* notes 20–87 and accompanying text.

<sup>17</sup> See *infra* notes 88–146 and accompanying text.

<sup>18</sup> See *infra* notes 147–225 and accompanying text.

<sup>19</sup> See *infra* notes 226–331 and accompanying text.

<sup>20</sup> See EMISSIONS REDUCTIONS, *supra* note 3, at 1-1, 2-5; Mariel S. Dator, Note, *Green Building Regulations: Extending Mandates to the Residential Sector*, 37 B.C. ENVTL. AFF. L. REV. 393, 400 (2010).

<sup>21</sup> EMISSIONS REDUCTIONS, *supra* note 3, at 7-1.

<sup>22</sup> Piet Eicholtz et al., *The Economics of Green Building 1* (Univ. of Cal. Ctr. for Energy & Envtl. Econ., Working Paper No. 002, 2011).

standing the baseline from which to measure success can help establish a market for efficiency and quantify improvements.<sup>23</sup>

#### A. Energy Consumption in U.S. Buildings

The United States consumed 18.7% of the world's total energy in 2010, the second highest of any nation or region.<sup>24</sup> Through residential, commercial, industrial, and transportation uses, Americans consumed ninety-eight quadrillion British Thermal Units ("BTU")<sup>25</sup> of energy in 2010.<sup>26</sup> Energy production and use cause eighty-seven percent of U.S. GHG emissions, due to the prominence of fossil fuels in energy generation.<sup>27</sup> Fossil fuel use creates ninety-nine percent of the carbon dioxide emissions in the United States, with coal and petroleum the primary contributors.<sup>28</sup> Reducing use of these fuels—through more efficient consumption or use of alternative, renewable fuels—will reduce overall GHG emissions.<sup>29</sup> Although a total transition from a fossil fuel-based energy generation sector would reduce GHG emissions more substantially, a suite of energy efficiency policies and programs can achieve more immediate emissions reductions.<sup>30</sup>

<sup>23</sup> EMISSIONS REDUCTIONS, *supra* note 3, at 5-4.

<sup>24</sup> *Building Energy Data Book Chapter 1: Buildings Sector*, DEP'T OF ENERGY, <http://buildingsdatabook.eren.doe.gov/ChapterIntro1.aspx> (last updated Mar. 2012). China was first with 20%; Russia was fifth, consuming 5.7% of the world's energy. See *Buildings Energy Data Book Table 1.1.13: World Primary Energy Consumption and Population, by Country/Region*, DEP'T OF ENERGY, <http://buildingsdatabook.eren.doe.gov/TableView.aspx?table=1.1.13> (last updated Mar. 2012).

<sup>25</sup> One BTU is "the quantity of heat required to raise the temperature of 1 pound of liquid water by 1° F at the temperature that water has its greatest density (approximately 39° F)." *Energy Units and Calculators Explained: British Thermal Units (Btu)*, U.S. ENERGY INFO. ADMIN., [http://www.eia.gov/energyexplained/index.cfm?page=about\\_btu](http://www.eia.gov/energyexplained/index.cfm?page=about_btu) (last updated Apr. 23, 2012). One quadrillion BTUs—a "quad"—of energy is equivalent to "172 million barrels of oil (8 to 9 days of U.S. oil use), 50 million tons of coal (enough to generate about 3% of annual U.S. electricity use), or about 1 trillion cubic feet of natural gas (equal to 4% of annual U.S. natural gas use in 2010)." *What Are the Major Sources and Users of Energy in the United States?*, U.S. ENERGY INFO. ADMIN., [http://www.eia.gov/energy\\_in\\_brief/major\\_energy\\_sources\\_and\\_users.cfm](http://www.eia.gov/energy_in_brief/major_energy_sources_and_users.cfm) (last updated May 18, 2012).

<sup>26</sup> *U.S. Energy Facts Explained*, U.S. ENERGY INFO. ADMIN., [http://www.eia.gov/energyexplained/index.cfm?page=us\\_energy\\_home](http://www.eia.gov/energyexplained/index.cfm?page=us_energy_home) (last updated Oct. 15, 2012).

<sup>27</sup> U.S. GLOBAL CHANGE RES. PROGRAM, *GLOBAL CLIMATE CHANGE IMPACTS IN THE UNITED STATES* 53 (2009).

<sup>28</sup> *Energy and the Environment Explained: Greenhouse Gases' Effect on the Climate*, U.S. ENERGY INFO. ADMIN., [http://www.eia.gov/energyexplained/index.cfm?page=environment\\_how\\_ghg\\_affect\\_climate](http://www.eia.gov/energyexplained/index.cfm?page=environment_how_ghg_affect_climate) (last updated July 10, 2012).

<sup>29</sup> INTERGOVERNMENTAL PANEL ON CLIMATE CHANGE, *RENEWABLE ENERGY SOURCES AND CLIMATE CHANGE MITIGATION 7* (2012), available at [http://srren.ipcc-wg3.de/report/IPCC\\_SRREN\\_Full\\_Report.pdf](http://srren.ipcc-wg3.de/report/IPCC_SRREN_Full_Report.pdf).

<sup>30</sup> Carlson, *supra* note 1, at 14.

Energy efficiency initiatives can operate as initial low-cost ways to reduce emissions and lower the overall cost of meeting climate change goals.<sup>31</sup> Such initiatives reduce both overall dollar expenditures and emissions by energy consumers because savings from energy efficiency typically outweigh the costs of investments.<sup>32</sup> Greater energy efficiency can also reduce the total load growth for utilities, thus delaying the need for additional power plants.<sup>33</sup>

The Energy Information Administration (“EIA”), part of the Department of Energy (“DOE”), collects and develops national data on energy consumption in the United States.<sup>34</sup> The EIA is an independent provider of energy data, established by the Department of Energy Organization Act in 1977.<sup>35</sup> Every four years, the EIA conducts the Commercial Buildings Energy Consumption Survey (“CBECS”), a national survey that assesses the characteristics, consumption, and expenditures of the commercial building population.<sup>36</sup>

Energy use within the U.S. commercial building sector comprises nineteen percent of total energy use in the United States.<sup>37</sup> These buildings consumed roughly 18.5 quadrillion BTUs of energy in 2010.<sup>38</sup> Given the amount of energy consumed by the commercial buildings sector, the GHG emissions related to building operation are corre-

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<sup>31</sup> EMISSIONS REDUCTIONS, *supra* note 3, at 1-1.

<sup>32</sup> *Id.*

<sup>33</sup> Benjamin K. Sovacool, *Running on Empty: The Electricity-Water Nexus and the U.S. Electric Utility Sector*, 30 ENERGY L.J. 11, 39 (2009). Load growth covers the anticipated additional demand in electricity from consumers. EMISSIONS REDUCTIONS, *supra* note 3, at 2-5, 2-8. Duke Energy found that energy efficiency improvements could cause a potential reduction of 32% of projected load and the Western Governors’ Association found California could mitigate 70% of expected load growth through efficiency. *Id.* at 2-5 to 2-6.

<sup>34</sup> *Mission and Overview*, U.S. ENERGY INFO. ADMIN., [http://www.eia.gov/about/mission\\_overview.cfm](http://www.eia.gov/about/mission_overview.cfm) (last visited May 18, 2013).

<sup>35</sup> *Id.* Congress founded the EIA *In response* to the growing concerns over energy security after the oil supply shocks of the mid-1970s. *Id.*

<sup>36</sup> *About the Commercial Buildings Energy Consumption Survey*, U.S. ENERGY INFO. ADMIN., <http://www.eia.gov/emcu/cbecs/contents.html> (follow “About the CBECS” hyperlink under “Background Information”) (last visited May 18, 2013).

<sup>37</sup> *Building Energy Data Book Chapter 1: Buildings Sector*, *supra* note 24.

<sup>38</sup> U.S. ENERGY INFO. ADMIN., ANNUAL ENERGY REVIEW 2010, at 3 (2011), *available at* <http://www.eia.gov/totalenergy/data/annual/archive/038410.pdf>. Of building types, retail and service buildings consume 20% of energy (the highest), followed by offices at 17%, educational facilities at 13%, healthcare at 9%, and lodging spaces with 8%. *Use of Energy in the United States Explained: Energy Use in Commercial Buildings*, U.S. ENERGY INFO. ADMIN., [http://www.eia.gov/energyexplained/index.cfm?page=us\\_energy\\_commercial](http://www.eia.gov/energyexplained/index.cfm?page=us_energy_commercial) (last updated July 22, 2011).

spondingly high.<sup>39</sup> The commercial sector created over one billion metric tons of carbon dioxide in 2010, with about eighty percent of those emissions attributable to electricity consumption.<sup>40</sup>

### B. *The ENERGY STAR Program*

The EPA and DOE's joint program, ENERGY STAR, promotes energy efficiency to American consumers and businesses.<sup>41</sup> The EPA created the ENERGY STAR Buildings program in 1995,<sup>42</sup> and established a national building energy performance rating system for commercial buildings in 1999.<sup>43</sup> The rating system creates a benchmark<sup>44</sup> to help building owners and managers understand how efficiently their building uses energy compared to similar buildings in the United States.<sup>45</sup>

The EPA allows anyone to access this rating system through an interactive online tool managed by the EPA called Portfolio Manager.<sup>46</sup> Building managers and owners can create a password-protected account and input their commercial building's energy use and space characteristics.<sup>47</sup> Users can enter the data directly into their account based on monthly utility statements or upload bulk data for many properties.<sup>48</sup> The account users have access to the building data added

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<sup>39</sup> U.S. ENERGY INFO. ADMIN., *supra* note 38, at 318; Stephen R. Miller, *Commercial Green Leasing in the Era of Climate Change: Practical Solutions for Balancing Risks, Burdens, and Incentives*, 40 ENVTL. L. REP. NEWS & ANALYSIS 10,487, 10,489 (2010).

<sup>40</sup> U.S. ENERGY INFO. ADMIN., *supra* note 38, at 320.

<sup>41</sup> *History of ENERGY STAR*, ENERGY STAR, [http://www.energystar.gov/index.cfm?c=about.ab\\_history](http://www.energystar.gov/index.cfm?c=about.ab_history) (last visited May 18, 2013). Over eighty percent of the American public is aware of the ENERGY STAR brand. ENVTL. PROT. AGENCY, ENERGY STAR AND OTHER CLIMATE PROTECTION PARTNERSHIPS: 2010 ANNUAL REPORT 9 (2011), *available at* <http://www.energystar.gov/ia/partners/publications/pubdocs/2010%20CPPD%20Annual%20Report.pdf?39de-14f4>.

<sup>42</sup> *Major Milestones*, ENERGY STAR, [http://www.energystar.gov/index.cfm?c=about.ab\\_milestones](http://www.energystar.gov/index.cfm?c=about.ab_milestones) (last visited May 18, 2013).

<sup>43</sup> ENVTL. PROT. AGENCY, THE POWER OF PARTNERSHIPS: ENERGY STAR AND OTHER VOLUNTARY PROGRAMS 16 (2000), *available at* [http://www.energystar.gov/ia/partners/annual\\_reports/annual\\_report\\_2000.pdf?319a-7c2e](http://www.energystar.gov/ia/partners/annual_reports/annual_report_2000.pdf?319a-7c2e).

<sup>44</sup> A building energy benchmark allows for a comparison of the efficiency of a building's energy consumption against other similar buildings. *Step 2.3 Benchmark*, *supra* note 7.

<sup>45</sup> ENERGY STAR, ENERGY STAR PERFORMANCE RATINGS TECHNICAL METHODOLOGY 2 (2011), [http://www.energystar.gov/ia/business/evaluate\\_performance/General\\_Overview\\_tech\\_methodology.pdf?1862-2fae](http://www.energystar.gov/ia/business/evaluate_performance/General_Overview_tech_methodology.pdf?1862-2fae).

<sup>46</sup> *See Portfolio Manager Overview*, ENERGY STAR, [http://www.energystar.gov/index.cfm?c=evaluate\\_performance.bus\\_portfoliomanager](http://www.energystar.gov/index.cfm?c=evaluate_performance.bus_portfoliomanager) (last visited May 18, 2013).

<sup>47</sup> *See id.*

<sup>48</sup> *Earn the ENERGY STAR for Your Hotel Properties!*, ENERGY STAR (Apr. 2010), [http://www.energystar.gov/ia/business/hospitality/Benchmarking\\_Fact\\_Sheet.pdf](http://www.energystar.gov/ia/business/hospitality/Benchmarking_Fact_Sheet.pdf).

to their portfolio and can share this information with other Portfolio Manager users.<sup>49</sup>

A third way to upload information to Portfolio Manager is through an “automated benchmarking system” (“ABS”).<sup>50</sup> Through ABS, a company creates an electronic interface with Portfolio Manager to directly upload data into a user’s account.<sup>51</sup> A growing number of utilities offer ABS, which allows the utility to directly upload a customer’s energy consumption data into a user’s Portfolio Manager account with the user’s permission.<sup>52</sup> ABS reduces the burden on building owners to keep their accounts current because the information is automatically uploaded each month.<sup>53</sup>

In developing Portfolio Manager, the EPA created a system for commercial building owners and operators to compare their energy performance against similar buildings.<sup>54</sup> Primarily based on CBECS, the rating system evaluates a building based on its type, space attribute data, location, and energy consumption by fuel type.<sup>55</sup> Portfolio Manager provides a 1–100 rating for a building’s energy performance in a given year.<sup>56</sup> A score of 50 represents the average and a 75 or higher represents superior performance.<sup>57</sup> A score of 1 signifies the lowest pos-

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<sup>49</sup> *Portfolio Manager Overview*, *supra* note 46. Portfolio Managers users wishing to share data can set the level of privacy for each building’s data, such as sharing only certain metrics or allowing another user to review and change the information. *Sharing and Transferring Facility Data*, ENERGY STAR 2, available at [http://www.energystar.gov/ia/business/comm\\_real\\_estate/downloads/help\\_sheet\\_sharing\\_access11\\_23.pdf?a3eb-0f87](http://www.energystar.gov/ia/business/comm_real_estate/downloads/help_sheet_sharing_access11_23.pdf?a3eb-0f87).

<sup>50</sup> See CLIMATE PROT. P’SHIP DIV., ENVTL. PROT. AGENCY, *Automated Benchmarking System (ABS): User’s Guide (version 2.5)* 1 (2012), available at [http://www.energystar.gov/index.cfm?c=spp\\_res.pt\\_host\\_preview\\_doc](http://www.energystar.gov/index.cfm?c=spp_res.pt_host_preview_doc) (follow “User’s Guide” hyperlink under section 2).

<sup>51</sup> *Id.* at 2.

<sup>52</sup> See UTILITY BEST PRACTICES, *supra* note 15, at 2-3; *Automated Benchmarking for Utilities*, ENERGY STAR, [http://www.energystar.gov/index.cfm?c=ci\\_program\\_sponsors.ci\\_program\\_sponsors\\_automated\\_benchmarking](http://www.energystar.gov/index.cfm?c=ci_program_sponsors.ci_program_sponsors_automated_benchmarking) (last visited May 18, 2013).

<sup>53</sup> See *Automated Benchmarking Services (ABS) User’s Guide (version 2.5)*, *supra* note 50, at 4.

<sup>54</sup> *How the Rating System Works*, ENERGY STAR, [http://www.energystar.gov/index.cfm?c=evaluate\\_performance.pt\\_neprs\\_learn](http://www.energystar.gov/index.cfm?c=evaluate_performance.pt_neprs_learn) (last visited May 18, 2013). Just as consumers can compare vehicle miles per gallon ratings, the national building rating system provides a quick indicator of relative performance. *Step 2.3 Benchmark*, *supra* note 7.

<sup>55</sup> ENERGY STAR, *supra* note 45. For office buildings, the first rating model released, Portfolio Manager users enter square footage information, space attribute data, ZIP code, and a year’s worth of monthly energy data to generate a numerical rating. See *id.* at 12; *Space Type Definitions*, ENERGY STAR, [http://www.energystar.gov/index.cfm?c=eligibility.bus\\_portfoliomanager\\_space\\_types](http://www.energystar.gov/index.cfm?c=eligibility.bus_portfoliomanager_space_types) (last visited May 18, 2013). Space attribute data includes “information on distinct operating characteristics of each type of space is needed to accurately assess the energy use of a building.” *Space Type Definitions*, *supra*.

<sup>56</sup> *How the Rating System Works*, *supra* note 54.

<sup>57</sup> *Id.* Buildings scoring a seventy-five or above are eligible for recognition for superior energy performance and can receive the ENERGY STAR label. ENVTL. PROT. AGENCY, *supra*

sible energy performance, and each additional point represents a one percentile improvement.<sup>58</sup>

ENERGY STAR created models for fifteen building types, including retail stores, courthouses, hospitals, supermarkets, and hotels that generate a score from 1–100.<sup>59</sup> The tool provides both a comparison against the national average and a weather normalized energy use intensity (“EUI”) metric, calculated as the kBtu per square foot consumed over a year.<sup>60</sup> Building owners and managers can assess a building’s performance and identify buildings that need improvements.<sup>61</sup> Portfolio Manager accepts data for any commercial building type and will generate an EUI based on twelve months of data.<sup>62</sup> Although a robust data sample does not exist nationally for some space types—including multifamily buildings—the EUI can help building owners and managers track progress over time.<sup>63</sup> Portfolio Manager also tracks GHG emissions for all registered buildings, providing owners and managers with a way to demonstrate the emission reductions that result from improved energy efficiency over time.<sup>64</sup>

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note 41, at 23. By 2010, over 14,000 commercial buildings earned the ENERGY STAR label, representing over two billion square feet of building space. ENERGY STAR, ENERGY STAR SNAPSHOT: MEASURING PROGRESS IN THE COMMERCIAL AND INDUSTRIAL SECTORS 6 (Fall 2011), available at [http://www.energystar.gov/ia/business/downloads/ENERGY\\_STAR\\_Snapshot\\_Fall\\_2011.pdf?4b22-9ce4](http://www.energystar.gov/ia/business/downloads/ENERGY_STAR_Snapshot_Fall_2011.pdf?4b22-9ce4).

<sup>58</sup> ENERGY STAR, *supra* note 45, at 11–12.

<sup>59</sup> *Criteria for Rating Building Energy Performance*, ENERGY STAR, [http://www.energystar.gov/index.cfm?c=eligibility.bus\\_portfoliomanager\\_eligibility](http://www.energystar.gov/index.cfm?c=eligibility.bus_portfoliomanager_eligibility) (last visited May 18, 2013). Other building types include: medical office building, bank, residence hall, warehouse, senior care facility, K-12 school, municipal wastewater treatment plant, house of worship, and data center. *Id.*

<sup>60</sup> *Id.*; *What Is EUI?*, ENERGY STAR, <http://www.energystar.gov/index.cfm?fuseaction=buildingcontest.eui> (last visited May 18, 2013). Average EUIs vary across building types, thus the average hospital EUI of 468 reflects the intensity of its operation, compared with the K-12 school average EUI of 169 and the office buildings average EUI of 193. *Id.* Scores are normalized in order to account for regional variations in weather across the country. ENERGY STAR, *supra* note 45, at 7–9.

<sup>61</sup> ENERGY STAR, *supra* note 45, at 2.

<sup>62</sup> ENERGY STAR, PORTFOLIO MANAGER QUICK REFERENCE GUIDE: BUILDINGS THAT CANNOT RECEIVE A 1–100 RATING 2 (2008), [http://www.energystar.gov/ia/business/QRG\\_NonRatable.pdf?14c7-fb10](http://www.energystar.gov/ia/business/QRG_NonRatable.pdf?14c7-fb10).

<sup>63</sup> *Portfolio Manager Overview*, *supra* note 46; ENERGY STAR, PORTFOLIO MANAGER QUICK REFERENCE GUIDE: MULTIFAMILY HOUSING 2 (2010) [http://www.energystar.gov/ia/business/multifam\\_housing/QRG\\_Multifamily\\_Housing.pdf?920c-d89f](http://www.energystar.gov/ia/business/multifam_housing/QRG_Multifamily_Housing.pdf?920c-d89f).

<sup>64</sup> ENERGY STAR, PORTFOLIO MANAGER METHODOLOGY FOR GREENHOUSE GAS INVENTORY AND TRACKING CALCULATIONS 1 (2011), [http://www.energystar.gov/ia/business/evaluate\\_performance/Emissions\\_Supporting\\_Doc.pdf?7b90-0498](http://www.energystar.gov/ia/business/evaluate_performance/Emissions_Supporting_Doc.pdf?7b90-0498). The EPA estimates that commercial building improvements tracked through Portfolio Manager achieved reductions of over eighty-one million metric tons of carbon dioxide equivalent, or the approximate

### C. *The Local and National Character of Energy*

Electricity fills our homes, businesses, and communities with a flip of a switch.<sup>65</sup> Electricity also spans the nation through interconnected grids and interstate sales.<sup>66</sup> As a result, state, local, federal, and private interests impact all levels of electricity generation, transmission, and delivery.<sup>67</sup> The division of authority between federal and state agencies can create a patchwork of policies and programs, as the federal government does not directly regulate end-user energy consumption.<sup>68</sup> Therefore, creating a comprehensive energy policy requires coordination across all levels of government.<sup>69</sup>

Historically, states oversaw the transmission and delivery of electricity and natural gas within their borders.<sup>70</sup> In 1935, Congress passed the Federal Power Act, vesting direct authority over the transmission and sale “of electric power in interstate commerce” in the federal government.<sup>71</sup> Under the modern division of authority in the electric energy sector, the federal government oversees interstate transactions of electric energy, and states oversee intrastate transactions.<sup>72</sup> The federal government provides policy advice and best practices through programs like ENERGY STAR and regulates wholesale energy transactions through the Federal Energy Regulatory Commission.<sup>73</sup> States, on the other hand, oversee retail sales to end users through utility commissions.<sup>74</sup>

States have authority over retail energy sales, and federal authority cannot preempt this right.<sup>75</sup> Because a public utility’s sales to customers occur entirely within one state, state public utility commissions retain

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equivalent of over fifteen million vehicles’ annual emissions. *See* ENVTL. PROT. AGENCY, *supra* note 41, at 9.

<sup>65</sup> *See Electricity Explained: Electricity*, U.S. ENERGY INFO. ADMIN., [http://www.eia.gov/energyexplained/index.cfm?page=electricity\\_home](http://www.eia.gov/energyexplained/index.cfm?page=electricity_home) (last updated Feb. 27, 2013).

<sup>66</sup> *Electricity Explained: Factors Affecting Electricity Prices*, U.S. ENERGY INFO. ADMIN., [http://www.eia.gov/energyexplained/index.cfm?page=electricity\\_factors\\_affecting\\_prices](http://www.eia.gov/energyexplained/index.cfm?page=electricity_factors_affecting_prices) (last updated Aug. 13, 2012).

<sup>67</sup> *See What FERC Does*, FED. ENERGY REGULATORY COMM’N, <http://ferc.gov/about/ferc-does.asp> (last updated Feb. 3, 2013).

<sup>68</sup> *See* 16 U.S.C § 824 (2006).

<sup>69</sup> *See* Trisolini, *supra* note 5, at 693–94.

<sup>70</sup> *New York v. FERC*, 535 U.S. at 5.

<sup>71</sup> 16 U.S.C. § 824; *see New York v. FERC*, 535 U.S. at 7; *Gulf States Utils. Co. v. Fed. Power Comm’n*, 411 U.S. 747, 758 (1973).

<sup>72</sup> *See New York v. FERC*, 535 U.S. at 6–7, 28.

<sup>73</sup> *See id.* at 6–7; ENVTL. PROT. AGENCY, *supra* note 43.

<sup>74</sup> *What FERC Does*, *supra* note 67.

<sup>75</sup> *See* Pub. Utils. Comm’n of R.I. v. Attleboro Steam & Elec. Co. 273 U.S. 83, 90 (1927); 18 C.F.R. § 35.27 (2011).

exclusive jurisdiction to review and approve rates for retail customers.<sup>76</sup> State commissions can incorporate energy efficiency into ratemaking and rate allocation across customer groups.<sup>77</sup> Such changes in rates can spur customers to become more aware of energy consumption and take active steps to improve efficiency.<sup>78</sup> Thus, state commissions can incentivize customers to improve their energy efficiency by increasing the cost of inefficient energy consumption.<sup>79</sup>

Many states have made public and statutory commitment to pursuing energy efficiency.<sup>80</sup> States can also impose requirements for additional programs, such as energy efficiency support programs.<sup>81</sup> Furthermore, the development of utility infrastructure investments, demand-side management efforts, and customer awareness campaigns can aid customer energy efficiency.<sup>82</sup>

States regulating public utilities also often establish customer safeguards.<sup>83</sup> Many states recognize a privacy right in customer utility data.<sup>84</sup> For example, Texas state law acknowledges a right to “privacy of customer consumption” information for all retail utility customers.<sup>85</sup> However, other states, such as New York, do not protect electric consumption data.<sup>86</sup> With jurisdiction over retail sales, states have discretion to choose the level of privacy required for consumption data.<sup>87</sup>

<sup>76</sup> *What FERC Does*, *supra* note 67. In most ratemaking scenarios, utilities submit a request for a proposed rate, and the state commission provides a review, subject to political and legal action by interested stakeholders. See NAT'L ACTION PLAN FOR ENERGY EFFICIENCY, CUSTOMER INCENTIVES FOR ENERGY EFFICIENCY THROUGH ELECTRIC AND NATURAL GAS RATE DESIGN 17 (2009) [hereinafter CUSTOMER INCENTIVES].

<sup>77</sup> CUSTOMER INCENTIVES, *supra* note 76, at 1. Ratemaking is an intricate and laborious process where the commission assesses a utility's assets, expenses, and approves a rate of return establishing the amount of revenue a utility is entitled to earn. See *id.* at 6. State commissions must also consider fairness to customers, fostering economic growth, and efficiency goals in setting this rate. See *id.* Rate allocation is the process by which utilities set the rates each customer group will pay. *Id.*

<sup>78</sup> See *id.* at 5.

<sup>79</sup> See *id.* at 1.

<sup>80</sup> See, e.g., N.Y. GEN. MUN. LAW § 119-cc (McKinney Supp. 2012); TEX. UTIL. CODE ANN. § 39.905 (West 2007); WASH. REV. CODE ANN. § 19.260.010 (West 2007).

<sup>81</sup> See CUSTOMER INCENTIVES, *supra* note 76, at 1–2.

<sup>82</sup> See, e.g., *Smart Energy*, BALT. GAS & ELEC., <http://www.bge.com/smartenergy/pages/default.aspx> (last visited May 18, 2013); *Energy Efficiency: Targeted Demand Side Management*, CONEDISON, <http://www.coned.com/energyefficiency/targetedDSM.asp> (last visited May 18, 2013).

<sup>83</sup> See UTILITY BEST PRACTICES, *supra* note 15, at 4–5.

<sup>84</sup> See *id.*

<sup>85</sup> TEX. UTIL. CODE ANN. § 17.004(a) (West 2007).

<sup>86</sup> See N.Y. PUB. SERV. LAW § 65(7) (McKinney 2011) (prohibiting only the “sale [of] any list of names of” customers by gas or electric companies).

<sup>87</sup> See DEP'T OF ENERGY, *supra* note 14, at 16.

## II. MUNICIPAL ACTION: BENCHMARKING LEGISLATION

### A. *Municipal Action and Home Rule*

Traditionally, municipalities existed only at the will of the state legislature, and thus lacked inherent authority to self-regulate.<sup>88</sup> Over time municipalities demanded, and states granted, more autonomy.<sup>89</sup> “Home rule” provisions in state constitutions confer a right to manage local affairs to these municipalities.<sup>90</sup> Almost all states have some kind of home rule provision, although the level of conferred autonomy differs.<sup>91</sup>

The shift toward home rule provisions allows municipalities to initiate local activities generally free from state oversight or influence.<sup>92</sup> With higher levels of autonomy, municipalities under home rule have wide latitude to develop laws and requirements in the jurisdiction, including zoning and building codes.<sup>93</sup> Municipalities are limited to passing laws that do not directly contradict state laws, but their initiatory authority can be quite broad.<sup>94</sup> Therefore, municipalities can set and achieve policy goals above and beyond general state law.<sup>95</sup>

Municipal governments can play a key role in developing effective environmental regulations.<sup>96</sup> For those municipalities granted broad home rule authority, improving the energy efficiency of consumers can be a way to improve environmental quality.<sup>97</sup> Many municipalities have specific energy code requirements for commercial buildings designed

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<sup>88</sup> WILLIAM D. VALENTE ET AL., CASES AND MATERIALS ON STATE AND LOCAL GOVERNMENT LAW 226 (5th ed. 2001); Frayda S. Bluestein, *Do North Carolina Local Governments Need Home Rule?*, 84 N.C. L. REV. 1983, 1988 (2006).

<sup>89</sup> David J. Barron, *Reclaiming Home Rule*, 116 HARV. L. REV. 2255, 2290–91 (2003).

<sup>90</sup> See, e.g., N.Y. CONST. art. IX, § 1; VALENTE ET AL., *supra* note 88, at 265.

<sup>91</sup> Bluestein, *supra* note 88, at 1990–91.

<sup>92</sup> See *Avery v. Midland Cnty.*, 390 U.S. 474, 481 (1968) (stating that “not infrequently, the delegation of power to local units is contained in constitutional provisions for local home rule which are immune from legislative interference”); Barron, *supra* note 89, at 2290; cf. Trisolini, *supra* note 5, at 695 (discussing the role of “local general-purpose” governments” in addressing U.S. climate change).

<sup>93</sup> Barron, *supra* note 89, at 2261; Trisolini, *supra* note 5, at 701.

<sup>94</sup> See, e.g., N.Y. CONST. art. IX, § 1; TEX. CONST. art. 11, § 5; Bluestein, *supra* note 88, at 1990.

<sup>95</sup> See Randall E. Kromm, *Town Initiative and State Preemption in the Environmental Arena: A Massachusetts Case Study*, 22 HARV. ENVTL. L. REV. 241, 248–49 (1998).

<sup>96</sup> See Michelle Bryan Mudd, *A “Constant and Difficult Task”: Making Local Land Use Decisions in States with a Constitutional Right to a Healthful Environment*, 38 ECOLOGY L.Q. 1, 3 (2011).

<sup>97</sup> NAT’L ACTION PLAN FOR ENERGY EFFICIENCY, *supra* note 12, at 2.

to improve overall energy efficiency.<sup>98</sup> Further, many municipalities that have adopted stringent energy codes adopt “beyond code” provisions.<sup>99</sup> One common beyond code initiative requires benchmarking of energy performance to gauge the overall efficiency of the local building stock.<sup>100</sup>

### B. Benchmarking Legislation Passed in U.S. Municipalities

A growing number of jurisdictions have passed laws requiring commercial building benchmarking.<sup>101</sup> More than five major U.S. cities impose some sort of benchmarking requirement on commercial buildings, including Austin, Seattle, and New York.<sup>102</sup> These laws require both benchmarking of commercial buildings and some form of information disclosure to the local government or prospective buyers.<sup>103</sup> Benchmarking and corresponding disclosure improves awareness of energy consumption through increased transparency, thus locally-mandated benchmarking and information disclosure can help municipalities understand and value energy efficiency.<sup>104</sup>

Mandatory benchmarking and disclosure complements energy codes by requiring that existing commercial building owners and operators assess energy efficiency.<sup>105</sup> Through use of benchmarking tools—most often ENERGY STAR’s Portfolio Manager—users can track building performance over time using actual data.<sup>106</sup> Further, laws requiring public disclosure create a market for energy efficiency information, ideally increasing demand for energy efficient buildings.<sup>107</sup>

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<sup>98</sup> See NAT’L ACTION PLAN FOR ENERGY EFFICIENCY, ENERGY EFFICIENCY ADMINISTRATORS AND BUILDING ENERGY CODES 6–7 (2009); Trisolini, *supra* note 5, at 696.

<sup>99</sup> *Going Beyond Code*, DEP’T OF ENERGY, <http://www.energycodes.gov/resource-center/ACE/overview/beyondCode> (last visited May 18, 2013). “Beyond code” programs promote greater building energy efficiency than required by basic energy codes. *Id.*

<sup>100</sup> See generally ENERGY STAR, FEDERAL, STATE, AND LOCAL GOVERNMENTS LEVERAGING ENERGY STAR 1–4 (providing a list of various jurisdictions’ energy efficiency policies).

<sup>101</sup> See *id.*

<sup>102</sup> N.Y.C., N.Y., ADMIN. CODE § 28-309 (2009); AUSTIN, TEX., CODE ch. 6-7 (2011); SEATTLE, WASH., CODE ch. 22.920 (2010). Other cities with benchmarking legislation include Washington, D.C., Philadelphia, and San Francisco. See ENERGY STAR, *supra* note 100, at 1–2.

<sup>103</sup> See ANDREW BURR ET AL., INST. FOR MKT. TRANSFORMATION, BUILDING ENERGY TRANSPARENCY: A FRAMEWORK FOR IMPLEMENTING U.S. COMMERCIAL ENERGY RATING AND DISCLOSURE POLICY 3, 6 (2011).

<sup>104</sup> See *id.* at 3.

<sup>105</sup> See *id.* at 2, 3.

<sup>106</sup> See *Step 2.3 Benchmark*, *supra* note 7.

<sup>107</sup> See BURR ET AL., *supra* note 103, at 3.

Although municipalities can structure benchmarking legislation in various ways, these laws often specify the categories of buildings covered, when and how to disclose data, and the purpose of the data collection.<sup>108</sup> Each municipality's benchmarking law applies to a limited set of buildings, with many jurisdictions using square footage to identify buildings that must participate.<sup>109</sup> Variations also exist based on the timing of disclosure.<sup>110</sup> Further, some laws require building owners to report numerous metrics, while others require only one data point.<sup>111</sup> Legislation also may differ on the required role of utilities in facilitating benchmarking by providing energy consumption information, such as through an Automated Benchmarking System ("ABS").<sup>112</sup>

In many sectors of the commercial building market, building owners and managers rent space to tenants.<sup>113</sup> Although some types of buildings may be owner-occupied, others—such as office, retail, and multifamily buildings—are lease arrangements.<sup>114</sup> Further, many leases stipulate that tenants set up accounts directly with the local utility.<sup>115</sup> Thus, many owners have no knowledge of or access to tenant energy consumption.<sup>116</sup> To facilitate compliance with municipal benchmarking legislation, building owners need a mechanism to obtain customer utility data.<sup>117</sup> Although leases that require tenant energy consumption disclosure to building owners are not commonplace, a growing number of organizations recognize their usefulness.<sup>118</sup>

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<sup>108</sup> See, e.g., N.Y.C., N.Y., ADMIN. CODE § 28-309 (2009); SEATTLE, WASH., CODE ch. 22.920 (2010).

<sup>109</sup> See, e.g., N.Y.C., N.Y., CODE § 28-309.2; AUSTIN, TEX., CODE § 6-7-31 (2011); SEATTLE, WASH., CODE § 22.920.030.

<sup>110</sup> See, e.g., N.Y.C., N.Y., CODE § 28-309.4; AUSTIN, TEX., CODE § 6-7-32; SEATTLE, WASH., CODE § 22.920.080.

<sup>111</sup> See, e.g., AUSTIN, TEX., CODE § 6-7-32; SEATTLE, WASH., CODE § 22.920.030.

<sup>112</sup> See, e.g., N.Y.C., N.Y., CODE § 28-309.5; AUSTIN, TEX., CODE ch. 6-7; SEATTLE, WASH., CODE §§ 22.920.050–.070.

<sup>113</sup> See Miller, *supra* note 39, at 10,487–88; *Energy Use Data Acquisition*, BLDG. OWNERS & MANAGERS ASS'N INT'L, <http://www2.boma.org/Advocacy/FederalLegislativeRegulatoryIssues/Energy/Pages/EnergyUseDataAcquisition.aspx> (last visited May 20, 2013).

<sup>114</sup> See BURR ET AL., *supra* note 103, at 50.

<sup>115</sup> See Miller, *supra* note 39; *Current Tenants: In an Existing Lease*, ENERGY STAR, [http://www.energystar.gov/index.cfm?c=tenants\\_guidebook.tenants\\_guidebook-current\\_tenant](http://www.energystar.gov/index.cfm?c=tenants_guidebook.tenants_guidebook-current_tenant) (last visited May 18, 2013).

<sup>116</sup> See *Energy Use Data Acquisition*, *supra* note 113.

<sup>117</sup> See BURR ET AL., *supra* note 103, at 50; *Energy Use Data Acquisition*, *supra* note 113.

<sup>118</sup> See Miller, *supra* note 39, at 10,487–88; Press Release, Bldg. Owners & Managers Ass'n Int'l, *New BOMA Green Lease Guide Offers Solutions for Writing Sustainability into Lease Agreements* (June 22, 2008), available at <http://www2.boma.org/Resources/news/pressroom/Pages/press062208-3.aspx>.

Municipalities seeking to enlist local utilities to help improve compliance with benchmarking legislation can encourage a utility to provide ABS services.<sup>119</sup> Currently, a number of energy service organizations offer ABS to commercial customers, incorporating the service into their suite of energy information tools.<sup>120</sup> Utilities can also provide ABS to consumers by developing the technical reporting infrastructure needed to access Portfolio Manager.<sup>121</sup> ABS providers report data directly to Portfolio Manager, which building owners can then see in their own accounts.<sup>122</sup>

After an ordinance's passage, the legislation often provides time for building owners to comply with requirements to obtain data.<sup>123</sup> In addition, Portfolio Manager requires at least twelve months of energy data to compute a benchmark.<sup>124</sup> Thus, despite passage several years ago, many municipalities have only received one year of benchmarking information, making it difficult to draw conclusions on performance.<sup>125</sup> Without reported data it is impossible to measure effectiveness of these efforts, however, a structural analysis of the laws offers insight into likely success.

### C. Conflicts and Congruence with State Law

State laws regulate and define the scope of a utility's obligations because the operations of retail utilities fall under state jurisdiction.<sup>126</sup> In addition, some states protect the privacy of a consumer's utility energy consumption.<sup>127</sup> Thus, municipal laws cannot directly contradict state laws and policies as required by state home rule provisions.<sup>128</sup> Al-

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<sup>119</sup> See N.Y.C., N.Y., ADMIN. CODE § 28-309.5.1 (2009).

<sup>120</sup> *Service Providers Offer Automated Benchmarking*, ENERGY STAR, [http://www.energystar.gov/index.cfm?c=spp\\_res.pt\\_spps\\_automated\\_benchmarking](http://www.energystar.gov/index.cfm?c=spp_res.pt_spps_automated_benchmarking) (last visited May 18, 2013).

<sup>121</sup> CLIMATE PROT. P'SHIP DIV., *supra* note 50, at 2. Organizations offering ABS must connect to Portfolio Manager through XML schemas to conduct a data exchange with the EPA. *Id.*

<sup>122</sup> See *id.*

<sup>123</sup> See, e.g., N.Y.C., N.Y., ADMIN. CODE § 28-309.8; SEATTLE, WASH., CODE §§ 22.920.030–.040 (2010); Press Release, City of Austin, Council Approves Amendments to Energy Audit/Rating Ordinance (Apr. 22, 2011), *available at* <http://www.austinenergy.com/about%20us/environmental%20initiatives/ordinance/ECADpressReleases.pdf>.

<sup>124</sup> ENERGY STAR, *supra* note 45, at 12.

<sup>125</sup> See PLANYC, NEW YORK CITY LOCAL LAW 84 BENCHMARKING REPORT 5 (2012).

<sup>126</sup> See 16 U.S.C. § 824(a) (2006); *New York v. Fed. Energy Regulatory Comm'n*, 535 U.S. 1, 28 (2002).

<sup>127</sup> See TEX. UTIL. CODE ANN. § 17.004(a)(6) (West 2007); UTILITY BEST PRACTICES, *supra* note 15, at 4-5.

<sup>128</sup> See, e.g., *Dallas Merchs.'s & Concessionaire's Ass'n v. City of Dallas*, 852 S.W.2d 489, 491 (Tex. 1993) (“an ordinance of a home-rule city that attempts to regulate a subject

though municipalities have expansive authority over local affairs, laws conflicting with state statutes or constitutions will likely fail as impermissible.<sup>129</sup>

Access to electricity is a fundamental part of modern life.<sup>130</sup> Commercial consumers often see a need to protect energy consumption data, as it can reveal proprietary or sensitive information.<sup>131</sup> Some states explicitly protect the records of that access as private through statutory or common law.<sup>132</sup> Numerous states protect retail electric utility data.<sup>133</sup> Some states with protections of customer data provide exceptions for law enforcement and some governmental purposes.<sup>134</sup>

Utilities, states, and other organizations increasingly debate the privacy implications of disclosing consumer consumption data in the context of smart grid initiatives.<sup>135</sup> “Smart grid” refers to a system of remote-controlled computer technologies that allow utilities and consumers to access immediate information about energy use.<sup>136</sup> The policy debate about the uses of customer data will continue as smart grid

matter preempted by a state statute is unenforceable to the extent it conflicts with the state statute.”); Trisolini, *supra* note 5, at 695.

<sup>129</sup> See, e.g., Colo. Mining Ass’n v. Bd. of Cnty. Comm’rs, 199 P.3d 718, 724 (Colo. 2009) (“If a conflict exists and the state statute contains a specific provision addressing the matter, the state statute controls over the statutory county’s general land use authority.”); 1000 Friends of Wash. v. McFarland, 149 P.3d 616, 621 (Wash. 2006) (“The sovereignty of the people of individual localities gives way to the people of the State’s greater sovereignty.”).

<sup>130</sup> See, e.g., 16 U.S.C. § 824 (“It is declared that the business of transmitting and selling electric energy for ultimate distribution to the public is affected with a public interest . . . .”); N.Y. ENERGY LAW § 3-101 (McKinney’s 2004); EXEC. OFFICE OF THE PRESIDENT OF THE UNITED STATES, A POLICY FRAMEWORK FOR THE 21ST CENTURY GRID: ENABLING OUR SECURE ENERGY FUTURE 1 (2011).

<sup>131</sup> DATA ACCESS AND PRIVACY, *supra* note 14, at 12. The DOE report notes that “studies conducted by utilities and consumer advocates have consistently shown that privacy issues are of tremendous import to consumers of electricity.” *Id.* at 2.

<sup>132</sup> See, e.g., 16 TEX. ADMIN. CODE § 25.272(b) (2012), available at [http://info.sos.state.tx.us/pls/pub/readtac\\$ext.viewtac](http://info.sos.state.tx.us/pls/pub/readtac$ext.viewtac) (follow “Title 16” hyperlink; then follow “Part 2” hyperlink; then follow “Chapter 25” hyperlink; then follow “Subchapter K” hyperlink; then follow “§ 25.272” hyperlink); UTILITY BEST PRACTICES, *supra* note 15, at 4-5.

<sup>133</sup> See, e.g., TEX. UTIL. CODE ANN. § 17.004(a)(6); *In re Maxfield*, 945 P.2d 196, 201 (Wash. 1997) (“[B]oth this state’s case law and statutes recognize a privacy interest in electric consumption records which the citizens of this state are entitled to hold free from governmental trespass.”).

<sup>134</sup> See, e.g., 16 TEX. ADMIN. CODE § 25.472(b) available at [http://info.sos.state.tx.us/pls/pub/readtac\\$ext.viewtac](http://info.sos.state.tx.us/pls/pub/readtac$ext.viewtac) (follow “Title 16” hyperlink; then follow “Part 2” hyperlink; then follow “Chapter 25” hyperlink; then follow “Subchapter R” hyperlink; then follow “§ 25.472” hyperlink).

<sup>135</sup> DEP’T OF ENERGY, *supra* note 14, at 3-5.

<sup>136</sup> *Smart Grid*, DEP’T OF ENERGY, <http://energy.gov/oe/technology-development/smart-grid> (last visited May 18, 2013).

programs such as advanced metering become more commonplace.<sup>137</sup> Although benefits of smart grid programs include increased efficiency, reliability, and flexibility, the potential threats to consumer privacy present major concerns for large-scale deployment of these technologies.<sup>138</sup>

Smart grid technologies often include advanced metering systems that allow consumers and utilities to access specific and timely information about energy consumption.<sup>139</sup> These metering systems can create and collect data on detailed aspects of energy consumption in a building, giving rise to privacy concerns.<sup>140</sup> In contrast, Portfolio Manager benchmarking through manual data input or ABS requires only aggregate monthly energy consumption data.<sup>141</sup> Thus, whole building benchmarking allows building owners to develop a general understanding of a building's energy consumption and make overall comparisons against the national average, a less intrusive metric.<sup>142</sup>

Restrictions to third-party access to electricity data consumption can also protect utility customers.<sup>143</sup> State laws can treat a customer's utility data as protected between the customer and utility.<sup>144</sup> The building owner and the city are thus third parties without access to the information. Yet in many building relationships, the owner, who is most affected by municipal benchmarking legislation does not control or have access to the tenant's utility data, hindering the ability to easily comply with the law.<sup>145</sup> As local energy efficiency laws increasingly require access to commercial building energy consumption data, solutions for addressing this information gap must not run afoul of state law.<sup>146</sup>

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<sup>137</sup> EXEC. OFFICE OF THE PRESIDENT OF THE UNITED STATES, *supra* note 130, at 48.

<sup>138</sup> DEP'T OF ENERGY, *supra* note 14, at 6–7.

<sup>139</sup> *Id.* at 7.

<sup>140</sup> *Id.* at 9.

<sup>141</sup> See *Earn the ENERGY STAR for Your Hotel Properties!*, *supra* note 48; *Portfolio Manager Overview*, *supra* note 46.

<sup>142</sup> See *Portfolio Manager Overview*, *supra* note 46.

<sup>143</sup> See, e.g., 16 TEX. ADMIN. CODE, § 25.472(b) (2012), available at [http://info.sos.state.tx.us/pls/pub/readtac\\$ext.viewtac](http://info.sos.state.tx.us/pls/pub/readtac$ext.viewtac) (follow “Title 16” hyperlink; then follow “Part 2” hyperlink; then follow “Chapter 25” hyperlink; then follow “Subchapter R” hyperlink; then follow “§ 25.472” hyperlink); *In re Maxfield*, 945 P.2d at 201.

<sup>144</sup> See, e.g., 16 TEX. ADMIN. CODE, § 25.472(b); *In re Maxfield*, 945 P.2d at 202.

<sup>145</sup> See BURR ET AL., *supra* note 103, at iii, 50.

<sup>146</sup> See, e.g., N.Y.C., N.Y. ADMIN. CODE § 28-309 (2009); AUSTIN, TEX., CODE § 6-7-31 (2011); SEATTLE, WASH., CODE ch. 22.920 (2010); Trisolini, *supra* note 5, at 695.

### III. MUNICIPAL BENCHMARKING LEGISLATION IN A STATE CONTEXT: AUSTIN, SEATTLE, AND NEW YORK

Municipalities that initiate benchmarking and disclosure legislation take a proactive step toward transparency in building energy use.<sup>147</sup> These laws promote increased understanding of local energy use that will encourage building owners and managers to take measures to reduce consumption.<sup>148</sup> By improving the availability of energy use information for local buildings, local governments can reduce barriers to achieving energy efficiency and corresponding emissions reductions.<sup>149</sup> Further, these municipalities can set their own goals for city-wide reductions and identify areas for improvement.<sup>150</sup>

#### A. *Austin, Texas: 2008 Energy Conservation Audit & Disclosure Ordinance*

With an official goal to be carbon neutral by 2020, the city of Austin, Texas is a leader in green initiatives to reduce greenhouse gas (“GHG”) emissions and improve energy efficiency.<sup>151</sup> Under Austin’s 2007 Climate Protection Plan, the city prioritized disclosure of historical energy use data and efficiency improvements at the point of sale.<sup>152</sup> Aiming to “reinforce the market value of energy efficiency,” the city passed the Energy Conservation Audit & Disclosure (“ECAD”) ordinance in 2008.<sup>153</sup> Developed by the city, real estate professionals, and the community, ECAD requires commercial facilities over ten thousand square feet to benchmark energy use.<sup>154</sup> In 2011, Austin amended ECAD to stagger the timeline for reporting based on building size, allowing smaller buildings more time to comply.<sup>155</sup>

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<sup>147</sup> See BURR ET AL., *supra* note 103, at 3; Matt Johnston, *Transparency Forum Explores Building Energy Disclosure Across Local Markets*, URBAN LAND INST. (Oct. 12, 2011), <http://urbanland.uli.org/Articles/2011/September/JohnstonEDiscl>.

<sup>148</sup> See, e.g., CITY OF SEATTLE, SEATTLE GREEN BUILDING CAPITAL INITIATIVE 9 (Apr. 2009); *Austin Climate Protection Plan*, AUSTIN ENERGY, <http://www.austinenergy.com/about%20us/Environmental%20Initiatives/accp.pdf> (last visited May 18, 2013).

<sup>149</sup> See Trisolini, *supra* note 5, at 700.

<sup>150</sup> See CITY OF SEATTLE, *supra* note 148; *Austin Climate Protection Plan*, *supra* note 148.

<sup>151</sup> CITY OF AUSTIN, OFFICE OF SUSTAINABILITY, CLIMATE ACTION REPORT 2010–2011, at 1, 6 (2011).

<sup>152</sup> *Austin Climate Protection Plan*, *supra* note 148.

<sup>153</sup> Press Release, City of Austin, *supra* note 123.

<sup>154</sup> AUSTIN, TEX., CODE ch. 6-7 (2011); Press Release, City of Austin, *supra* note 123.

<sup>155</sup> See AUSTIN, TEX., CODE § 6-7-31; AM. COUNCIL FOR AN ENERGY-EFFICIENT ECON., CASE STUDY—AUSTIN ENERGY CONSERVATION AUDIT AND DISCLOSURE (ECAD) ORDINANCE 4 (2011), available at <http://aceee.org/sector/local-policy/case-studies/austin-energy-con>. Buildings over 75,000 square feet must submit their score by June 2012, whereas build-

To meet ECAD requirements, commercial building owners must report an energy use rating to the city.<sup>156</sup> Austin Energy, the local utility, approved Portfolio Manager as the preferred rating tool.<sup>157</sup> Thus, building owners must provide a building's 1–100 ENERGY STAR rating—or energy use intensity (“EUI”) if a rating is unavailable.<sup>158</sup> The public will not have access to a building's ENERGY STAR rating or EUI.<sup>159</sup> ECAD, however, requires disclosure of the energy rating calculation to any prospective purchasers before the sale of a commercial building.<sup>160</sup>

In contrast, multifamily building owners are not required to benchmark, but must perform an energy audit once a building is ten years old.<sup>161</sup> The city requires any multifamily buildings using more than one hundred and fifty percent of the average multifamily energy use to reduce energy consumption by twenty percent.<sup>162</sup> Thus, multifamily properties are not exempt from tracking energy use, but must perform only one assessment.<sup>163</sup>

The Austin ordinance contains no provisions on how commercial building owners should obtain data from tenants in order to comply with ECAD.<sup>164</sup> Although ECAD requires a commercial building owner to disclose a score, it does not provide a mechanism allowing owners to petition tenants for utility data.<sup>165</sup> Austin Energy's guidance documents instruct owners on how to manually report data to the city through Portfolio Manager.<sup>166</sup> The utility has no automated benchmarking sys-

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ings between 30,000 and 75,000 square feet must report in June 2013 and buildings between 10,000 and 30,000 square feet have until June 2013 to comply. AUSTIN, TEX., CODE § 6-7-31.

<sup>156</sup> AUSTIN, TEX., CODE § 6-7-31.

<sup>157</sup> *Energy Conservation Audit and Disclosure (ECAD) Ordinance for Owners of Commercial Buildings*, AUSTIN ENERGY, <http://www.austinenergy.com/About%20Us/Environmental%20Initiatives/ordinance/commercial.htm> (last visited May 18, 2013).

<sup>158</sup> *Id.*; see *Energy Conservation Audit and Disclosure (ECAD) FAQs*, AUSTIN ENERGY, <http://www.austinenergy.com/About%20Us/Environmental%20Initiatives/ordinance/faq.htm> (last visited May 18, 2013).

<sup>159</sup> *Energy Conservation Audit and Disclosure (ECAD) FAQs*, *supra* note 158.

<sup>160</sup> AUSTIN, TEX., CODE § 6-7-32.

<sup>161</sup> *Id.* § 6-7-21.

<sup>162</sup> *Id.* § 6-7-23.

<sup>163</sup> See *id.* § 6-7-21.

<sup>164</sup> See *id.* § 6-7-31.

<sup>165</sup> See *id.*

<sup>166</sup> AUSTIN ENERGY, HOW TO BENCHMARK YOUR BUILDING/FACILITY 13 (2011), <http://www.austinenergy.com/About%20Us/Environmental%20Initiatives/ordinance/howToBenchmarkYourBuilding.pdf>.

tem (“ABS”), and commercial tenants must sign a “Release of Information Authorization” form for owners to obtain tenant data directly.<sup>167</sup>

Austin’s initiatives to reduce energy consumption reflect a state goal of promoting energy efficiency.<sup>168</sup> Texas law promotes utility action to improve energy efficiency through multiple avenues, but does not directly address benchmarking.<sup>169</sup> The Texas legislature established its commitment to energy efficiency in 1999, amending the Utilities Code to add a “Goal for Energy Efficiency.”<sup>170</sup> Through this statute, Texas commanded utilities to offer efficiency incentive programs to retail customers.<sup>171</sup>

In addition, Texas recognizes a right to privacy in utility information and has enumerated a number of customer safeguards for electric utilities.<sup>172</sup> Texas guarantees “privacy of customer consumption and credit information.”<sup>173</sup> Texas’s protection of customer electric utility data also extends to any information compiled by a utility that “makes possible the identification of any individual customer” through a variety of data points, including past electric usage and billing records.<sup>174</sup> The Texas Administrative Code also establishes a right of privacy in individual customer information.<sup>175</sup> With the backdrop of this state privacy protection for energy consumption information, the Austin ECAD ordinance places few significant reporting requirements on building owners and contains no ABS provisions.<sup>176</sup>

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<sup>167</sup> AUSTIN, TEX., CODE § 6-7-31 (2011); CITY OF AUSTIN, COMMERCIAL ENERGY USE WORKSHEET 1 (2013), available at <http://www.austinenergy.com/About%20Us/Environmental%20Initiatives/ordinance/commercialEnergyUseWorksheet.pdf>.

<sup>168</sup> See TEX. UTIL. CODE ANN. § 39.905 (West 2007).

<sup>169</sup> See *id.*

<sup>170</sup> *Id.*

<sup>171</sup> *Id.* § 39.905(a).

<sup>172</sup> *Id.* §§ 17.004(a)(6), 39.101(a)(2).

<sup>173</sup> *Id.* § 39.101(a)(2).

<sup>174</sup> 16 TEX. ADMIN. CODE § 25.272(c)(5) (2012), available at [http://info.sos.state.tx.us/pls/pub/readtac\\$ext.viewtac](http://info.sos.state.tx.us/pls/pub/readtac$ext.viewtac) (follow “Title 16” hyperlink; then follow “Part 2” hyperlink; then follow “Chapter 25” hyperlink; then follow “Subchapter K” hyperlink; then follow “§ 25.272” hyperlink).

<sup>175</sup> 16 TEX. ADMIN. CODE § 25.472(b) available at [http://info.sos.state.tx.us/pls/pub/readtac\\$ext.viewtac](http://info.sos.state.tx.us/pls/pub/readtac$ext.viewtac) (follow “Title 16” hyperlink; then follow “Part 2” hyperlink; then follow “Chapter 25” hyperlink; then follow “Subchapter R” hyperlink; then follow “§ 25.472” hyperlink).

<sup>176</sup> See AUSTIN, TEX., CODE § 6-7-31; *Energy Conservation Audit and Disclosure (ECAD) FAQs*, *supra* note 158.

### B. *Seattle, Washington: Energy Benchmarking and Reporting Program*

On Earth Day 2009, Seattle's Green Building Task Force announced a plan to reduce emissions and energy use from the city's commercial and residential buildings by twenty percent: the Energy Benchmarking and Reporting Program.<sup>177</sup> Ordinance 123,226 requires the use of Portfolio Manager to benchmark commercial buildings over 10,000 square feet, but was amended to exclude buildings under 20,000 square feet in 2012.<sup>178</sup> The ordinance also applies to multifamily properties, requiring benchmarking in Portfolio Manager.<sup>179</sup> Seattle's law mandates benchmarking of about four thousand buildings' energy performance in total.<sup>180</sup>

Building owners authorize the city of Seattle to receive energy performance data generated by Portfolio Manager, including overall energy consumption, 1–100 ENERGY STAR score, and EUI.<sup>181</sup> The city links its Portfolio Manager account with local buildings' accounts to obtain energy use data.<sup>182</sup> To address information gaps where tenants pay utility bills and owners are unaware of total building energy consumption or space use characteristics, the ordinance requires tenants to provide non-identifying data upon the owner's request.<sup>183</sup> Further, the ordinance requires the local utility to upload building energy data directly to Portfolio Manager within thirty days of an owner's request.<sup>184</sup> Utilities must release tenant data to a building owner's Portfolio Manager account for the purpose of complying with the ordinance.<sup>185</sup>

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<sup>177</sup> News Release, Office of the Mayor, Green Building Initiative: Saving Energy for Homes and Businesses (Apr. 22, 2009), available at [http://www.seattle.gov/environment/documents/GBCI\\_Press\\_Release.pdf](http://www.seattle.gov/environment/documents/GBCI_Press_Release.pdf); *Energy Benchmarking & Reporting*, CITY OF SEATTLE, <http://www.seattle.gov/dpd/GreenBuilding/OurProgram/EnergyBenchmarkingDisclosure/Overview/> (last visited May 18, 2013). References to "the ordinance" include both the original Ordinance 123226 (2010) and Ordinance 123,993 (2012).

<sup>178</sup> SEATTLE, WASH., CODE ch. 22.920.030 (2010); see *Seattle Energy Benchmarking & Reporting*, *supra* note 177. In 2012, the City passed Ordinance 123,993, which made a number of changes to the benchmarking requirements, including increasing the minimum square footage triggering the benchmarking requirement and increasing fines for noncompliance. Seattle Wash. Ordinance 123,993 (Sept. 24, 2012).

<sup>179</sup> SEATTLE, WASH., CODE § 22.920.040.

<sup>180</sup> See *Seattle's Large Buildings Reporting Energy Use*, CITY OF SEATTLE (Feb. 5, 2013), <http://greenspace.seattle.gov/2013/02/seattles-large-buildings-reporting-energy-use/>.

<sup>181</sup> See SEATTLE, WASH., CODE § 22.920.030, City of SEATTLE, *supra* note 148, at 10.

<sup>182</sup> CITY OF SEATTLE, DIRECTOR'S RULE 6-2011, at 15–17 (2011), available at <http://www.seattle.gov/environment/documents/EBR-rule-6-2011.pdf>. Users can share building data with the city through Portfolio Manager. See *Portfolio Manager Overview*, *supra* note 46.

<sup>183</sup> SEATTLE, WASH., CODE § 22.920.050.

<sup>184</sup> SEATTLE, WASH., CODE § 22.920.060 (2010).

<sup>185</sup> DIRECTOR'S RULE 6–2011, *supra* note 182, at 13–14.

The ordinance also requires disclosure of energy performance information to interested parties.<sup>186</sup> Within seven days of a request, owners must provide relevant energy use data to current and prospective tenants, prospective building purchasers, and potential lenders.<sup>187</sup> By allowing these parties to access energy performance data, the city hopes to facilitate better management practices, reduce waste, and lower overall energy costs to owners and tenants.<sup>188</sup>

Washington has established a state-wide priority to improve energy efficiency in buildings.<sup>189</sup> The state was proactive in ensuring the availability of energy consumption data.<sup>190</sup> Seattle's ordinance expands on Washington state law requiring both utilities to maintain energy data for nonresidential customers for at least twelve months in a format compatible with Portfolio Manager, and commercial benchmarking by building owners and operators.<sup>191</sup> Washington law even requires utilities to engage in automated benchmarking at a building owner or operator's request, thus enabling the direct uploading of building energy data into Portfolio Manager.<sup>192</sup> The law requires that "upon the . . . authorization of a nonresidential building owner or operator, a qualifying utility shall upload the energy consumption data for . . . a building to the [the EPA's ENERGY STAR Portfolio Manager] in a form that does not disclose personally identifying information."<sup>193</sup> The Seattle ordinance goes beyond Washington's law by requiring benchmarking of multifamily buildings.<sup>194</sup>

Washington courts have recognized a privacy right in personal utility consumption data in some circumstances.<sup>195</sup> For example, in 1997, in *In re Maxfield*, the Washington Supreme Court found that the state's constitutional guarantee that "no person shall be disturbed in his private affairs" extended to residential electricity consumption information.<sup>196</sup> The court found that the personal privacy interest in electric consumption records required "authority of law" to permit disclo-

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<sup>186</sup> See SEATTLE, WASH., CODE § 22.920.080. The ordinance does not require public disclosure. *Seattle's Large Buildings Reporting Energy Use*, *supra* note 180.

<sup>187</sup> *Id.*

<sup>188</sup> *Energy Benchmarking & Reporting*, *supra* note 177.

<sup>189</sup> See WASH. REV. CODE ANN. § 19.260.010 (West 2007).

<sup>190</sup> See *id.* § 19.27A.170.

<sup>191</sup> See *id.*; DIRECTOR'S RULE 6-2011, *supra* note 182, at 4.

<sup>192</sup> See WASH. REV. CODE ANN. § 19.27A.170(2).

<sup>193</sup> *Id.*

<sup>194</sup> DIRECTOR'S RULE 6-2011, *supra* note 182, at 5-6.

<sup>195</sup> See WASH. CONST. art. 1, § 7; *In re Maxfield*, 945 P.2d 196, 201 (Wash. 1997).

<sup>196</sup> *In re Maxfield*, 945 P.2d at 198, 201.

sure.<sup>197</sup> Through a statutory requirement for automated benchmarking of commercial buildings, Washington state law sets a policy in favor of disclosure for benchmarking purposes.<sup>198</sup>

### C. New York City, New York: Local Law 84

In New York City, buildings produce seventy-five percent of the city's total GHG emissions.<sup>199</sup> Increasing the energy efficiency of the city's building stock is a central effort of PlaNYC, the city's coordinated effort to "prepare the city for one million more residents, strengthen [New York's] economy, combat climate change, and enhance the quality of life for all New Yorkers."<sup>200</sup> As part of that effort, the City has focused on improving energy efficiency through more stringent energy codes and mandated benchmarking.<sup>201</sup>

Local Law 84 of 2009, passed as part of the city's "Greener, Greater Buildings Plan," mandates benchmarking of city buildings over 10,000 square feet.<sup>202</sup> The city has already benchmarked over 2700 municipally-owned buildings and publicly reported their energy performance.<sup>203</sup> New York City will use this data to prioritize retrofits, audits, and other improvements.<sup>204</sup>

Non-public buildings over 50,000 square feet must also benchmark.<sup>205</sup> Due to the city's stock of large commercial buildings, about 16,000 buildings fall under the law's scope.<sup>206</sup> Local Law 84 requires building owners and managers to work with their tenants to obtain energy use data and requires use of Portfolio Manager.<sup>207</sup> The law addresses the split incentive barrier to improving energy efficiency between building owners who lease space and the tenants who pay utility bills by requiring tenants to disclose energy consumption data to the

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<sup>197</sup> *Id.* at 202.

<sup>198</sup> See WASH. REV. CODE ANN. §§ 19.27A.170, .260.010 (West 2007).

<sup>199</sup> CITY OF NEW YORK, PLANYC: A GREENER, GREATER NEW YORK 104 (2011), available at [http://nytelecom.vo.llnwd.net/o15/agencies/planyc2030/pdf/planyc\\_2011\\_planyc\\_full\\_report.pdf](http://nytelecom.vo.llnwd.net/o15/agencies/planyc2030/pdf/planyc_2011_planyc_full_report.pdf).

<sup>200</sup> *The Plan*, NEW YORK CITY, <http://www.nyc.gov/html/planyc2030/html/theplan/the-plan.shtml> (last visited May 18, 2013).

<sup>201</sup> See CITY OF NEW YORK, *supra* note 199, at 107.

<sup>202</sup> N.Y.C., N.Y., ADMIN. CODE § 28-309 (2009); *The Plan*, *supra* note 200.

<sup>203</sup> CITY OF NEW YORK, ENERGY BENCHMARKING REPORT FOR NEW YORK CITY MUNICIPAL BUILDINGS 2 (2011).

<sup>204</sup> *Id.* at 1.

<sup>205</sup> N.Y.C., N.Y., ADMIN. CODE § 28-309.2, .4.

<sup>206</sup> See CITY OF NEW YORK, *supra* note 199, at 107. This figure include publicly and privately owned buildings. *Id.*

<sup>207</sup> N.Y.C., N.Y., ADMIN. CODE § 28-309.

owners who upload the data into Portfolio Manager.<sup>208</sup> The city has further attempted to address the split incentives between owners and tenants for making energy efficiency upgrades by creating a model “energy aligned lease.”<sup>209</sup> These lease provisions allow tenants and owners to share the cost and benefit of energy efficiency improvements.<sup>210</sup>

Further, the law encourages utilities to upload building information directly to Portfolio Manager, thus bypassing the additional step of manual benchmarking by the building owner.<sup>211</sup> Through such automated benchmarking by the utility directly into the building owner’s account, the city can better ensure compliance with the law.<sup>212</sup>

Finally, the law allows for public disclosure of energy consumption data via the Internet.<sup>213</sup> In accordance with a staggered calendar for disclosure, city building energy data became available in 2011, and the city released commercial data in 2012.<sup>214</sup> The required data to be made available includes energy performance data, comparisons against the average performance, and the EUI.<sup>215</sup>

In September 2012, New York City posted its first report containing benchmarking results for private commercial buildings over 50,000 square feet.<sup>216</sup> The report includes data for over 1.7 billion square feet of space—the largest collection of building energy data for any single jurisdiction.<sup>217</sup> The report contains a trove of information about the city’s largest buildings, including comparison of highest and lowest performers, energy use across building types, and overall energy efficiency.<sup>218</sup> The data enables comparison of buildings by geographic area, age, fuel mix, and other factors that can influence how to promote energy efficiency initiatives.<sup>219</sup> In analyzing the data, the city can

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<sup>208</sup> *Id.*

<sup>209</sup> PLANYC, *supra* note 13.

<sup>210</sup> *Id.* at 1–2.

<sup>211</sup> See N.Y.C., N.Y., ADMIN. CODE § 28-309.5 (2009).

<sup>212</sup> See *id.*; *Service Providers Offer Automated Benchmarking*, *supra* note 120.

<sup>213</sup> N.Y.C., N.Y., ADMIN. CODE § 28-309.8.

<sup>214</sup> *Id.*; *Benchmarking Scores & Reports*, NEW YORK CITY, [http://www.nyc.gov/html/gbee/html/plan/1184\\_scores.shtml](http://www.nyc.gov/html/gbee/html/plan/1184_scores.shtml) (last visited May 18, 2013).

<sup>215</sup> *Benchmarking Scores & Reports*, *supra* note 214.

<sup>216</sup> *Id.*

<sup>217</sup> PLANYC, *supra* note 125.

<sup>218</sup> *Id.* at 14. For example, multifamily buildings make up 80% of total properties reported, but only consume 50% of the total energy of all buildings reported. *Id.* In contrast, office buildings comprised only 11% of properties, but 25% of energy consumption. *Id.* Thus, the city can obtain greater efficiency gains by targeting energy use in office properties. See *id.*

<sup>219</sup> *Id.* at 18–21.

prioritize how to achieve energy efficiency gains.<sup>220</sup> Through this disclosure, owners, tenants, and the city are able to identify poor performers and pursue upgrades which the city estimates will reduce emissions by five percent from 2005 levels by 2030.<sup>221</sup>

New York has established a statewide policy promoting energy efficiency through numerous initiatives, including a state energy research authority, development of “green jobs,” and promoting municipal energy efficiency loan programs.<sup>222</sup> Although New York’s state energy policy does not enumerate benchmarking as an official goal, the policy promotes energy efficiency through conservation efforts in existing buildings.<sup>223</sup> In line with New York’s promotion of energy efficiency programs, the state does not explicitly protect the privacy of consumer electrical consumption data.<sup>224</sup> Instead, New York protects consumers by prohibiting the sale of customer lists.<sup>225</sup>

#### IV. DATA DISCLOSURE FOR BENCHMARKING LEGISLATION: ACHIEVING PROGRAM SUCCESS

Initiatives that aim to reduce energy consumption in commercial buildings can reduce greenhouse gas (“GHG”) emissions and reduce overall energy demand.<sup>226</sup> The corresponding reduction in utility bills also promotes the business case for improving efficiency.<sup>227</sup> Local authority over buildings allows municipal governments to target buildings for efficiency improvements as part of a climate change action plan.<sup>228</sup> Benchmarking programs allow a municipality to assess and identify areas for progress.<sup>229</sup> Implementing a successful benchmarking program, however, requires careful consideration of the state’s privacy policy regarding energy data and proactive outreach to building owners and tenants to comply.<sup>230</sup>

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<sup>220</sup> *Id.* at 16.

<sup>221</sup> See CITY OF NEW YORK, *supra* note 199, at 107.

<sup>222</sup> See, e.g., N.Y. PUB. AUTH. LAW §§ 1875, 1892 (McKinney 2011); N.Y. GEN. MUN. CODE § 119-ee.

<sup>223</sup> See N.Y. ENERGY LAW § 3-101.

<sup>224</sup> See N.Y. PUB. SERV. LAW § 65(7).

<sup>225</sup> *Id.*

<sup>226</sup> See BURR ET AL., *supra* note 103, at 3; Miller, *supra* note 39.

<sup>227</sup> *Portfolio Manager Overview*, *supra* note 46.

<sup>228</sup> See PLANYC, *supra* note 125, at 5; Trisolini, *supra* note 5, at 698.

<sup>229</sup> PLANYC, *supra* note 125, at 8.

<sup>230</sup> See BURR ET AL., *supra* note 103, at 51; Miller, *supra* note 39, at 10,499.

Municipalities developing a benchmarking initiative must navigate state laws on utilities and energy efficiency.<sup>231</sup> As states regulate retail energy sales and utilities, states set the requirements for a utility's services and the privacy of the energy data the utility collects.<sup>232</sup> Austin, Seattle, and New York City offer three examples of municipalities navigating the state statutory structures for utilities and energy to collect information about building energy performance.<sup>233</sup> Ultimately, any municipality adopting such legislation will face a unique state statutory scheme and thus must work with the state to develop the regulatory channels to facilitate data reporting.<sup>234</sup> New York City, in particular, offers an example of an aggressive program that maximizes the opportunities of state laws.<sup>235</sup>

#### A. *Austin, Seattle, and New York City: A Comparison*

Austin, Seattle, and New York City all took steps to improve municipal understanding of building energy performance through thorough benchmarking requirements for building owners.<sup>236</sup> Each city's legislation is a reflection of the city's capacity to collect and utilize energy consumption data, subject to state limitations.<sup>237</sup> The laws create both a municipal understanding of energy performance of the city's building stock by requiring annual reporting and a transactional market for energy consumption data.<sup>238</sup> All three ordinances allow the municipalities to both track consumption and promote consideration of energy performance in real estate transactions, which has been shown to be increase rent premiums.<sup>239</sup>

As benchmarking laws help municipalities understand the energy performance of the local building stock, high rates of compliance are

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<sup>231</sup> See BURR ET AL., *supra* note 103, at 51.

<sup>232</sup> See DEP'T OF ENERGY, *supra* note 14; UTILITY BEST PRACTICES, *supra* note 15, at 4–5.

<sup>233</sup> See *supra* notes 151–225 and accompanying text.

<sup>234</sup> See BURR ET AL., *supra* note 103, at 51.

<sup>235</sup> See PLANYC, *supra* note 125, at 14–22.

<sup>236</sup> See CITY OF NEW YORK, *supra* note 199, at 107; CITY OF SEATTLE, *supra* note 148, at 9; *Austin Climate Protection Plan*, *supra* note 148.

<sup>237</sup> See BURR ET AL., *supra* note 103, at 51; DATA ACCESS AND PRIVACY, *supra* note 14, at 5.

<sup>238</sup> See, e.g., AUSTIN, TEX., CODE § 6-7 (2011); N.Y.C., N.Y., ADMIN. CODE § 28-309 (2009); SEATTLE, WASH. CODE ch. 22.920 (2010).

<sup>239</sup> See AUSTIN, TEX., CODE ch. 6-7; N.Y.C., N.Y., ADMIN. CODE § 28-309; SEATTLE, WASH., CODE ch. 22.920; Eicholtz et al., *supra* note 22, at 4. Office buildings that have achieved a “green rating” command higher rent premiums compared to other buildings. Eicholtz et al., *supra* note 22, at 4. Further, ENERGY STAR buildings can sell for roughly sixty one dollars more per square foot than non-ENERGY STAR qualified buildings. Stuart D. Kaplow, *Does a Green Building Need a Green Lease?*, 38 U. BALT. L. REV. 375, 378 (2009).

necessary to develop a meaningful baseline.<sup>240</sup> From this baseline, a city can develop goals to improve overall energy performance and target the worst performers.<sup>241</sup> Thus, annual reporting should be a part of any municipal benchmarking legislation.<sup>242</sup> Transactional reporting requirements alone, while increasing the visibility of energy performance between private parties, do not help a municipality in its purpose of developing meaningful goals.

The success of any municipal benchmarking legislation ultimately depends on the ability of building owners to access energy consumption data and the city's outreach efforts to facilitate compliance.<sup>243</sup> Seattle addresses data access issues by requiring utilities to maintain data in a form compatible with Portfolio Manager, thus facilitating the ease of compliance.<sup>244</sup> New York City encourages utilities to develop automated benchmarking system ("ABS") capabilities.<sup>245</sup> In contrast, Austin's legislation is silent on ABS.<sup>246</sup> Seattle's leveraging of the state's commitment to benchmarking will likely result in the greatest compliance rates, as the state mandate compels the action of state-regulated utilities.<sup>247</sup>

The Seattle and New York City ordinances address both commercial and multifamily buildings.<sup>248</sup> In contrast, Austin's Energy Conservation Audit & Disclosure ("ECAD") ordinance exempts multifamily buildings from benchmarking requirements.<sup>249</sup> The complexities surrounding access to multifamily tenant data, such as high turnover and potentially increased privacy protections make obtaining data difficult.<sup>250</sup> Although Austin's exemption for multifamily properties may reduce the difficulties of obtaining customer data, a potentially large component of Austin's building energy use is unreported as a result.<sup>251</sup>

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<sup>240</sup> See BURR ET AL., *supra* note 103, at 46.

<sup>241</sup> See PLANYC, *supra* note 125, at 14–22.

<sup>242</sup> See BURR ET AL., *supra* note 103, at 46.

<sup>243</sup> See *id.* at 50; PLANYC, *supra* note 125, at 6.

<sup>244</sup> See SEATTLE, WASH., CODE ch. 22.920 (2010).

<sup>245</sup> N.Y.C., N.Y., ADMIN. CODE § 28-309 (2009).

<sup>246</sup> See AUSTIN, TEX., CODE ch. 6-7 (2011).

<sup>247</sup> See WASH. REV. CODE. ANN. § 19.27A.170 (West 2007).

<sup>248</sup> AUSTIN, TEX., CODE ch. 6-7; N.Y.C., N.Y., ADMIN. CODE § 28-309.

<sup>249</sup> AUSTIN, TEX., CODE § 6-7-21; See *Energy Conservation Audit and Disclosure (ECAD) Ordinance for Multifamily Properties*, AUSTIN ENERGY, <http://www.austinenergy.com/About%20Us/Environmental%20Initiatives/ordinance/multifamily.htm> (last visited May 18, 2013).

<sup>250</sup> CITIES OF BERKELEY, OAKLAND, & EMERYVILLE, INCREASING ENERGY EFFICIENCY IN EXISTING MULTIFAMILY BUILDINGS 17, 25–28 (2011), *available at* <http://www.icleiusa.org/action-center/learn-from-others/BEES2011FINALfillWeb-1.pdf>.

<sup>251</sup> See AUSTIN, TEX., CODE § 6-7-21 (2011); CITIES OF BERKELEY, OAKLAND, & EMERYVILLE, *supra* note 251, at 20.

Austin's ordinance does require an audit of multifamily buildings, but only when a building is ten years old.<sup>252</sup> Audits are one way to avoid such data collection issues, as hands-on assessments of the building yield valuable information.<sup>253</sup> Only requiring one audit, however, limits the opportunity for continued improvement.<sup>254</sup>

Cities should prioritize collecting energy consumption data on multifamily properties, given the information it can provide the city. Indeed, eighty percent of the properties that disclosed data consumption under New York City's Local Law 84 were multifamily buildings.<sup>255</sup> Still, there is no national database of multifamily properties from which to establish a relative comparison of energy performance.<sup>256</sup> Collecting this information, however, could help the EPA develop a national rating system and allow for comparison among a city's buildings.<sup>257</sup>

New York City's legislation takes the further step of making benchmarking information publicly available.<sup>258</sup> Unlike Seattle or Austin, New York City's law attempts to create a public market for energy performance.<sup>259</sup> Such an effort comes the closest to achieving transparency in energy efficiency, for a building owner or tenant can compare performance and seek out successes.<sup>260</sup> Although such disclosure could raise privacy concerns, New York state law does not appear to prevent disclosure of this energy information.<sup>261</sup>

A comparison of these three ordinances would be incomplete without the context of state laws on energy efficiency and privacy of utility data, as state law influences their structures.<sup>262</sup> Home rule jurisprudence holds that municipal laws contrary to state law are unenforceable.<sup>263</sup> Thus, the success of a municipal ordinance challenged in

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<sup>252</sup> See AUSTIN, TEX., CODE § 6-7-21 (2011).

<sup>253</sup> See CITIES OF BERKELEY, OAKLAND, & EMERYVILLE, *supra* note 251, at 27–28; *Energy Audits, Benchmarking, and Disclosure Policies*, *supra* note 101.

<sup>254</sup> See Alyssa Quarforth, *What Being Green Really Means*, SCOTSMAN'S GUIDE, Sept. 2009, at 1, 2.

<sup>255</sup> PLANYC, *supra* note 125, at 14.

<sup>256</sup> See PLANYC, *supra* note 125, at 27.

<sup>257</sup> See *id.*

<sup>258</sup> See N.Y.C., N.Y., ADMIN., CODE § 28-309 (2009).

<sup>259</sup> See CITY OF NEW YORK, LL84 BENCHMARKING DATA DISCLOSURE 1 (2012); CITY OF NEW YORK, *supra* note 199, at 107.

<sup>260</sup> See BURR ET AL., *supra* note 103, at 55; CITY OF NEW YORK, *supra* note 199, at 107.

<sup>261</sup> See N.Y. PUB. SERV. LAW § 65 (McKinney 2011). As New York state law does not explicitly protect the privacy of energy consumption data, New York City is ideally positioned to use this information to further its emissions reductions goals. See *id.*; CITY OF NEW YORK, *supra* note 259.

<sup>262</sup> See DEP'T OF ENERGY, *supra* note 14.

<sup>263</sup> See Bluestein, *supra* note 88, at 1994.

court will depend on whether the purpose of the law does not run afoul of established state law.<sup>264</sup> As discussed below, it appears that these three ordinances were not written broadly, but instead were carefully limited to the extent of state allowance.<sup>265</sup>

Seattle and Washington state policy toward energy efficiency are unified by a commitment to energy efficiency and benchmarking through ENERGY STAR Portfolio Manager, in particular.<sup>266</sup> Despite case law demonstrating a right to privacy of customer data in certain instances,<sup>267</sup> the structure of state policy likely protects Seattle's disclosure requirements from a privacy challenge.<sup>268</sup> The municipal and state mandates for utilities to report information directly to Portfolio Manager has helped the city achieve high compliance rates, as the city collected data for eighty-seven percent of commercial properties covered by the Energy Benchmarking and Reporting Program.<sup>269</sup>

In Texas, a state commitment to the privacy of consumer utility consumption and identification data could conflict with mandated disclosure in Austin.<sup>270</sup> Austin's ECAD ordinance, however, only requires commercial building owners to report a 1–100 ENERGY STAR score.<sup>271</sup> Thus, Austin will only collect information on relative, not actual, performance.<sup>272</sup> Texas protects any proprietary customer information, but allows release of this data when required by law; however, such a state law requiring disclosure for benchmarking purposes does not exist.<sup>273</sup> Because the information disclosure required by the law is limited, Texas's protection of customer information is not likely implicated.<sup>274</sup>

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<sup>264</sup> See *id.* (“[M]any home rule provisions require that the exercise of local government authority must not conflict with general state laws.”).

<sup>265</sup> See *infra* notes 266–287 and accompanying text.

<sup>266</sup> See WASH. REV. CODE § 19.27A.170 (West 2007); *Energy Benchmarking & Reporting*, *supra* note 177.

<sup>267</sup> See *In re Maxfield*, 945 P.2d 196, 201 (Wash. 1997).

<sup>268</sup> See DIRECTOR'S RULE 6-2011, *supra* note 182, at 4 (describing the ordinance's compatibility with Washington state law promoting benchmarking).

<sup>269</sup> See *Seattle's Large Buildings Reporting Energy Use*, *supra* note 180 (indicating that Seattle collected 2011 energy data for “more than 87% of commercial and multifamily buildings 50,000 sq. ft. or larger”).

<sup>270</sup> See TEX. UTIL. CODE ANN. § 39.101 (West 2007); AUSTIN, TEX., CODE ch. 6-7 (2011).

<sup>271</sup> *Energy Conservation Audit and Disclosure (ECAD) Ordinance for Owners of Commercial Buildings*, *supra* note 157.

<sup>272</sup> See *id.* The ENERGY STAR score provides a metric of relative performance against expected performance. ENERGY STAR, *supra* note 45. Thus, only reporting a score allows Austin to assess whether a building performs better than anticipated, but does not allow the city to assess how much energy a building actually uses. See *id.* at 11.

<sup>273</sup> 16 TEX. ADMIN. CODE § 25.272 (2012).

<sup>274</sup> See TEX. UTIL. CODE ANN § 39.101 (West 2007); AUSTIN ENERGY, *supra* note 166.

In contrast, New York State's lack of protection of energy consumption information should permit the city to achieve its aggressive reporting and disclosure goals without challenge.<sup>275</sup> Although the city does not directly regulate local utilities, the city has actively worked with stakeholders to prioritize energy efficiency.<sup>276</sup> Despite the presence of fines for noncompliance, the ordinance's success could be limited by the technical challenges of manual data collection.<sup>277</sup> Developing ABS capabilities is one way to address such an issue, but will require the state agency to compel utility action.<sup>278</sup> Indeed, in its 2012 benchmarking report, the city identified automatic updating as one way to improve compliance and data gathering.<sup>279</sup>

In sum, each municipality's benchmarking legislation is informed by the state limitations on data access. In Seattle, where the state commitment to benchmarking requires utilities to provide ABS services, Ordinance 116,731 has the full weight of state backing.<sup>280</sup> Seattle's government can thus prioritize educational outreach about the law to encourage owner participation.<sup>281</sup> In contrast, the Texas state regulatory structure protecting privacy of consumption data actively hinders Austin's ability to meet energy efficiency goals.<sup>282</sup> By requiring the reporting of a 1–100 ENERGY STAR rating, Austin will gain information about buildings' national performance; however, without the energy use intensity ("EUI") or actual consumption information, the city cannot fully understand how much energy its commercial buildings truly use.<sup>283</sup>

New York City offers the best example for municipalities lacking permissive state legislation such as Washington's benchmarking law. Without state support for benchmarking, New York City has set requirements for tenant reporting to building owners, imposed fines for

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<sup>275</sup> See N.Y. PUB. SERV. LAW § 65(7) (McKinney 2011); CITY OF NEW YORK, *supra* note 199, at 110–11.

<sup>276</sup> CITY OF NEW YORK, *supra* note 199, at 106.

<sup>277</sup> See N.Y.C., N.Y., ADMIN. CODE § 28-309.4 (2009); PLANYC, *supra* note 125, at 25.

<sup>278</sup> See UTILITY BEST PRACTICES, *supra* note 15, at 2–3.

<sup>279</sup> PLANYC, *supra* note 125, at 25.

<sup>280</sup> See WASH. REV. CODE. ANN. § 19.27A.170 (West 2007); DIRECTOR'S RULE 6-2011, *supra* note 182, at 4.

<sup>281</sup> See, e.g., *Making Green Building Standard Practice*, CITY OF SEATTLE, <http://www.seattle.gov/dpd/greenbuilding> (last visited May 18, 2013); *Seattle Energy Benchmarking & Reporting: Education and Training Support*, CITY OF SEATTLE, <http://www.seattle.gov/dpd/GreenBuilding/OurProgram/EnergyBenchmarkingDisclosure/EducationalResources/default.asp> (last visited May 18, 2013).

<sup>282</sup> See 16 TEX. ADMIN. CODE. § 25.272 (2012); CITY OF AUSTIN, *supra* note 167.

<sup>283</sup> See *How the Rating System Works*, *supra* note 54.

noncompliance, and targeted the buildings with the highest impact on GHG emissions.<sup>284</sup> The law also encourages local utilities to develop ABS services, facilitating information reporting.<sup>285</sup> New York City has also leveraged state laws regarding energy privacy and established public disclosure of energy performance.<sup>286</sup> The reported information will be yearly aggregate data; thus, it will not likely contain proprietary or sensitive information, but rather will create a public venue for comparing energy efficiency in commercial buildings.<sup>287</sup>

### B. Addressing Obstacles to Successful Benchmarking Legislation

The limits to achieving a successful benchmarking program come from both the state and private consumers.<sup>288</sup> First, a municipality must consider potential state privacy protections that could limit collection of energy data.<sup>289</sup> Secondly, municipalities should work with utilities to develop ABS capacity, thus reducing the burden on building owners to manually upload data each month.<sup>290</sup> Lastly, a municipality must work with building owners and tenants who know a building's particular space attributes to provide and update correct information in Portfolio Manager.<sup>291</sup> Thus, a successful program will depend on achieving buy-in from these groups.<sup>292</sup>

#### 1. State Privacy Protections

For municipalities to develop strong municipal benchmarking programs with high compliance rates, coordination with states to ensure data availability is essential.<sup>293</sup> Although utility data have often been guarded as private, the increased prevalence of energy performance disclosure could erode that protection.<sup>294</sup> Laws that mandate re-

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<sup>284</sup> See N.Y.C., N.Y., ADMIN. CODE § 28-309 (2009); PLANYC, *supra* note 125, at 5–7.

<sup>285</sup> See N.Y.C., N.Y., ADMIN. CODE § 28-309.

<sup>286</sup> See N.Y. PUB. SERV. LAW § 65(7) (McKinney 2011); N.Y.C., N.Y., ADMIN. CODE § 28-309.

<sup>287</sup> See CITY OF NEW YORK, *supra* note 199, at 107; CITY OF NEW YORK, *supra* note 259.

<sup>288</sup> See BURR ET AL., *supra* note 103, at 50.

<sup>289</sup> See *infra* notes 293–308 and accompanying text.

<sup>290</sup> See *infra* notes 309–318 and accompanying text.

<sup>291</sup> See *infra* notes 319–331 and accompanying text.

<sup>292</sup> See, e.g., BURR ET AL., *supra* note 103, at 50; City of SEATTLE, *supra* note 148; UTILITY BEST PRACTICES, *supra* note 15, at 4–5.

<sup>293</sup> See DIRECTOR'S RULE 6-2011, *supra* note 182, at 4; DEP'T OF ENERGY, *supra* note 14, at 5.

<sup>294</sup> See DEP'T OF ENERGY, *supra* note 14, at 15–16; UTILITY BEST PRACTICES, *supra* note 15, at 4–5.

porting of aggregate data are less likely to raise privacy concerns, but some municipalities could threaten privacy rights by requiring extensive data about energy consumption.<sup>295</sup> As utilities struggle to comply with data requests, commercial tenants and people in multifamily buildings could resist this seeming invasion.<sup>296</sup> Thus, the protections afforded by state laws may impact how successful local benchmarking ordinances will be in collecting and using energy performance data.

Further, legislation requiring benchmarking of multifamily properties poses a unique challenge because of the rapid pace at which individual units turn over to new tenants—and the corresponding difficulty of getting approval to share energy consumption data with the building owner.<sup>297</sup> Although some office building owners and managers have developed “green leases” that include an energy consumption disclosure provision, leases for multifamily buildings typically do not contain such authorization.<sup>298</sup> With disclosure already often protected by state law, and the added difficulty of managing the volume of multifamily units in a municipality with benchmarking legislation, compliance in the multifamily sector may be most problematic.<sup>299</sup> If obtaining tenant data and benchmarking in Portfolio Manager proves too difficult for multifamily owners, an audit program like Austin’s could be effective, if done with more frequency for tracking changes over time.<sup>300</sup>

States have authority over retail energy transactions and set requirements for utilities to operate within the states.<sup>301</sup> Thus, states committed to energy efficiency could require utilities to report building energy consumption data directly to municipalities.<sup>302</sup> Direct disclosure to municipalities could avoid concerns of tenant authorization and compliance by owners through manual benchmarking in Portfolio

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<sup>295</sup> See BURR ET AL., *supra* note 103, at 52.

<sup>296</sup> See DEP’T OF ENERGY, *supra* note 14, at 12; CITIES OF BERKELEY, OAKLAND, & EMERYVILLE, *supra* note 251, at 17; UTILITY BEST PRACTICES, *supra* note 15, at 4–5.

<sup>297</sup> See CITIES OF BERKELEY, OAKLAND, & EMERYVILLE, *supra* note 251, at 16, 27–28.

<sup>298</sup> See Kaplow, *supra* note 239, at 375; PLANYC, *supra* note 13, at 1.

<sup>299</sup> See, e.g., DIMITRIS KAPSIS, AM. UTIL. MGMT., INC., MULTIFAMILY ENERGY BENCHMARKING FOR REDUCED ENERGY EXPENSE 2 (2012), available at [https://www.aum-inc.com/docs/default-document-library/benchmarking-1\\_11\\_12.pdf](https://www.aum-inc.com/docs/default-document-library/benchmarking-1_11_12.pdf); Chris Wood, *Multifamily Energy Benchmarking Reports Reveal Challenges*, MULTIFAMILY EXEC. (July 28, 2011, 3:00 PM), <http://multifamilyexecutive.com/energy-efficiency/multifamily-energy-benchmarking-reports-reveal-challenges.aspx>.

<sup>300</sup> See CITIES OF BERKELEY, OAKLAND, & EMERYVILLE, *supra* note 251, at 27; *Energy Conservation Audit and Disclosure (ECAD) Ordinance for Multifamily Properties*, *supra* note 249.

<sup>301</sup> See *New York v. Fed. Energy Regulatory Comm’n*, 535 U.S. 1, 28 (2002).

<sup>302</sup> See CITIES OF BERKELEY, OAKLAND, & EMERYVILLE, *supra* note 251, at 28; UTILITY BEST PRACTICES, *supra* note 15, at 4–5.

Manager.<sup>303</sup> Instead of placing the onus of action on building owners to comply, utilities could share energy consumption information directly with municipalities. Obtaining building energy data is both the largest obstacle and highest priority for benchmarking programs.<sup>304</sup> To enact such a regime, states would have to authorize utilities to disclose the information to municipalities.<sup>305</sup>

Through direct reporting, municipalities would have insight into general energy performance.<sup>306</sup> Under such a scheme, however, space attribute data must still be gathered to fully understand relative energy performance.<sup>307</sup> Thus, a thorough benchmarking scheme must ensure building owners comply with reporting requirements.<sup>308</sup> Reducing the number of metrics to report through ABS may lighten the load on building owners.

## 2. Automated Benchmarking Systems

Developing a utility's capability to offer ABS may enable municipalities to avoid data privacy and compliance issues.<sup>309</sup> Direct reporting through ABS both limits the lag time between the issuance of a bill and its inclusion in Portfolio Manager, and reduces the workload for building owners to gather and input consumption data.<sup>310</sup> Utilities would be able to associate tenant accounts with the Portfolio Manager accounts of building owners, but provide aggregate data would mask the individual consumption information.<sup>311</sup> In the aggregate, the data will enable the building owner to understand the building's energy performance, make comparisons, and identify possible areas for improvement.<sup>312</sup> Although ABS can be expensive and require capital investment from utilities, state utility commission policies that encour-

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<sup>303</sup> See BURR ET AL., *supra* note 103, at 50.

<sup>304</sup> See *id.* at 55; UTILITY BEST PRACTICES, *supra* note 15, at 2–3.

<sup>305</sup> See Michael Dworkin et al., *Revisiting the Environmental Duties of Public Utility Commissions* (2006), 7 VT. J. ENVTL. L. 1, 47, 65 (2006).

<sup>306</sup> See ENERGY STAR, *supra* note 45, at 6–7 (noting the filters applied to energy data to provide a more accurate model).

<sup>307</sup> See BURR ET AL., *supra* note 103, at 55; ENERGY STAR, *supra* note 45, at 5–8.

<sup>308</sup> See UTILITY BEST PRACTICES, *supra* note 15, at 4–5.

<sup>309</sup> See *id.*; CITIES OF BERKELEY, OAKLAND, & EMERYVILLE, *supra* note 251, at 28.

<sup>310</sup> *Review Automated Benchmarking Technical Resources*, ENERGY STAR, [http://www.energystar.gov/index.cfm?c=spp\\_res.pt\\_host\\_preview\\_doc](http://www.energystar.gov/index.cfm?c=spp_res.pt_host_preview_doc) (last visited May 18, 2013).

<sup>311</sup> See ENERGY STAR, *TRANSITIONING FROM AUTOMATED BENCHMARKING SERVICES (ABS) 2.5*, at 2 (2012).

<sup>312</sup> *Review Automated Benchmarking Technical Resources*, *supra* note 310.

age development of these services can help municipalities meet their goals.<sup>313</sup>

Municipalities should prioritize working with both state public utility commissions and state legislatures to acknowledge the importance of benchmarking by mandating that utilities provide ABS services.<sup>314</sup> Through state approval of energy consumption disclosure, a municipality can better safeguard against home rule preemption and resistance from tenants with privacy concerns.<sup>315</sup> In developing such a statutory structure, states could address privacy concerns through the use of aggregate, building-wide data.<sup>316</sup> Further, in states such as Texas, where the right to privacy in electric consumption records is explicit, utilities could mask data reported to the municipality.<sup>317</sup> Such a scheme would require utilities to act as an intermediary between the municipality and the building owner. In order to preserve privacy, however, such a system would keep energy consumption and consumer information within the utility.<sup>318</sup>

### 3. Private Data Authorization

Benchmarking legislation requires building owners to report actual energy consumption, but commercial buildings are often occupied by third-party renters.<sup>319</sup> Traditionally, building owners have been uninterested in tenant energy consumption, and these metrics have not been shared between owner and renter.<sup>320</sup> Through benchmarking legislation, tenants leasing space must report their energy use to facilitate disclosure to the municipality.<sup>321</sup> Tenants may be wary of sharing energy consumption data, be delayed in complying, or otherwise hinder a

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<sup>313</sup> See, e.g., WASH. REV. CODE ANN. § 19.27A.170 (West 2007); *Automated Benchmarking for Utilities*, *supra* note 52.

<sup>314</sup> See, e.g., PAC. GAS & ELEC., AUTOMATED BENCHMARKING SERVICE 1 (2010); SEATTLE OFFICE OF SUSTAINABILITY & ENV'T, SEATTLE BENCHMARKING & REPORTING: HOW TO GUIDE 2-9 (2012), <http://www.seattle.gov/environment/documents/EBR-how-to-guide.pdf>; *Automated Benchmarking for Utilities*, *supra* note 52.

<sup>315</sup> See, e.g., TEX. CONST. art. 11, § 5; WASH. CONST. art. 11, § 4; WASH. REV. CODE § 19.27A.170 (West 2007).

<sup>316</sup> See UTILITY BEST PRACTICES, *supra* note 15, at 4-5; *New York Local Law 84—Aggregate Building Consumption Data*, CONEDISON, [http://www.coned.com/energyefficiency/city\\_benchmarking.asp](http://www.coned.com/energyefficiency/city_benchmarking.asp) (last visited May 18, 2013).

<sup>317</sup> See 16 TEX. ADMIN. CODE § 25.272(c) (5) (2012).

<sup>318</sup> See AUTOMATED BENCHMARKING SYSTEM (ABS) USER'S GUIDE, *supra* note 50, at 2-5.

<sup>319</sup> See Miller, *supra* note 39, at 10,487-88.

<sup>320</sup> See *id.* at 10,499.

<sup>321</sup> See, e.g., N.Y.C., N.Y., ADMIN. CODE § 28-309 (2009); Kaplow, *supra* note 239, at 406.

building owner's efforts to comply with benchmarking legislation.<sup>322</sup> Further, even with ABS services, tenants and owners must provide space attribute data.<sup>323</sup> Portfolio Manager needs space attribute data to correctly calculate a 1–100 rating.<sup>324</sup> Therefore, a successful program must provide a mechanism for obtaining data within the tenant's space.<sup>325</sup>

The relationship between tenants and building owners is contractual.<sup>326</sup> Leases are private contracts between the tenant and the owner or managing company setting the parameters of a tenant's occupations of a commercial space.<sup>327</sup> So long as a state requires consumers to consent to the third-party use of energy data, the need for disclosure authorization will always present a challenge for municipalities adopting benchmarking legislation.<sup>328</sup> Local and state governments should incentivize utilization of "green leases" that account for the need to disclose energy consumption data.

To truly achieve a successful municipal benchmarking scheme, building owners must achieve buy-in from tenants.<sup>329</sup> Without a systematic way to authorize disclosure, such as through disclosure clauses in leases, municipalities must allocate resources to ensuring compliance from building owners, who could pass blame to deficient tenants. Including energy disclosure clauses into commercial leases as a standard operating procedure would allow building owners to access tenant data.<sup>330</sup> Although industry support for green leases is growing, such disclosure clauses are far from commonplace.<sup>331</sup> Municipalities pursuing benchmarking programs should thus work with local industry to draft language that allows building owners to more easily comply with the legislation.

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<sup>322</sup> See BURR ET AL., *supra* note 103, at 50.

<sup>323</sup> See *Automated Benchmarking for Utilities*, *supra* note 50.

<sup>324</sup> See *Portfolio Manager Overview*, *supra* note 46.

<sup>325</sup> See BURR ET AL., *supra* note 103, at 50.

<sup>326</sup> See RESTATEMENT (SECOND) CONTRACTS § 1 (1981); Miller, *supra* note 39, at 10,496–97.

<sup>327</sup> See Kaplow, *supra* note 239, at 375; Miller, *supra* note 39, at 10,496–98.

<sup>328</sup> See Miller, *supra* note 39, at 10,501.

<sup>329</sup> See BURR ET AL., *supra* note 103, at 51–55; AUSTIN ENERGY, *supra* note 166, at 17.

<sup>330</sup> See Kaplow, *supra* note 239, at 406; Miller, *supra* note 39, at 10,991.

<sup>331</sup> See Steven A. Teitelbaum & Bryan J. Dardis, *Current Developments in Green Leasing*, AM. BAR ASS'N 1, 8–11 (2010), available at [http://www.americanbar.org/content/dam/aba/events/real\\_property\\_trust\\_estate/symposia/2010/1945.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/events/real_property_trust_estate/symposia/2010/1945.authcheckdam.pdf).

## CONCLUSION

Building benchmarking initiatives present a way for municipalities to understand the energy performance of the local building stock. Local governments can directly address climate change issues by developing programs that reduce energy consumption in buildings, which are responsible for a sizable portion of U.S. GHG emissions. There is no single solution or system for developing an effective benchmarking scheme. Municipalities must understand and work with individual state laws regarding the accessibility and disclosure of energy consumption data. Allowing for automatic reporting by the utilities to building owners or even directly to the municipality can make reporting easier. Nevertheless, space use data is only known by tenants and no automated system can initially provide this information. Thus, a successful benchmarking effort will be a group effort: a municipal program for compiling the data; a state structure that allows access to the data; and private party willingness to contribute.

