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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA  
THIRD APPELLATE DISTRICT  
(Sacramento)

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MARK E. GRAHAM,

Plaintiff and Appellant,

v.

SACRAMENTO MUNICIPAL UTILITY DISTRICT  
et al.,

Defendants and Respondents.

C083712

(Super. Ct. No.  
34201600188891CUMCGDS)

Plaintiff Mark E. Graham appeals from a judgment of dismissal after the sustaining of defendants' demurrer to his first amended complaint without leave to amend. As he concedes, the basic premise of his complaint is that the Board of Directors (Board) for defendant Sacramento Municipal Utility District (SMUD) only authorized the installation of "smart meters"<sup>1</sup> for customers who requested time-based rates, and

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<sup>1</sup> As the trial court explained, "the Court understands that a smart meter is a device that records consumption of electric energy in intervals of an hour or less and communicates

because neither he nor the previous owner of his home made such a request, SMUD was not authorized to install one, and he should not have been charged for replacing his smart meter with an analog meter. The Board resolution Graham relies upon is not susceptible to his interpretation. In fact, it authorized the universal installation of smart meters. Accordingly, Graham's operative complaint does not state a cause of action, and he has not established a reasonable probability he can cure this defect with an amendment. We shall affirm the judgment.

## **I. BACKGROUND**

SMUD is a municipal utility district established under the Municipal Utility District Act (Pub. Util. Code, § 11501 et seq.).<sup>2</sup> SMUD is governed by a board of directors. (§ 11801.) "The board is the legislative body of the district and determines all questions of policy." (§ 11883.) It may provide "[a]ll matters and things necessary for the proper administration of the affairs of the district which are not provided for in this division." (§ 11884.) "The board shall supervise and regulate every utility owned and operated by the district, including the fixing of rates, rentals, charges, and classifications, and the making and enforcement of rules, regulations, contracts, practices, and schedules, for or in connection with any service, product, or commodity owned or controlled by the district." (§ 11885.) "The acts of the board shall be expressed by motion, resolution, or ordinance." (§ 11909.)

SMUD "may engage in activities to reduce wasteful, uneconomical or unnecessary uses of energy, including, but not limited to . . . the adoption of voluntary and mandatory

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that information at least daily back to the utility for monitoring and billing. Smart meters enable two-way communication between the meter and the central system. Such an advanced metering infrastructure (AMI) differs from traditional automatic meter reading (AMR) in that it enables two-way communications with the meter."

<sup>2</sup> Undesignated statutory references are to the Public Utilities Code.

load management programs, . . . , and may do all things necessary or convenient to the full exercise of the powers herein granted.” (§ 12825.)

Graham’s action turns on the interpretation of Resolution 07-08-10, which was adopted by the Board in 2007:

“**WHEREAS**, the Energy Policy Act of 2005 (EPACT) was signed into law on August 8, 2005; and

“**WHEREAS**, Section 1252(a) of EPACT adds Section 111(d)(14) to [The Public Utility Regulatory Policies Act of 1978 (PURPA)], which requires the District to consider a new proposed regulatory standard relating to time-based metering and communication (Time-Based Metering and Communication);

“**WHEREAS**, through Board Resolution 06-08-02 the Board commenced consideration of the Time-Based Metering and Communication; **NOW, THEREFORE,**

**“BE IT RESOLVED BY THE BOARD OF DIRECTORS OF THE  
SACRAMENTO MUNICIPAL UTILITY DISTRICT:**

“The Board Determination on the **Time-Based Metering and Communication Standard** is hereby adopted and approved, substantially in the form of **Attachment E.**”

Attachment E states, in relevant part, the following under the heading “Determination”:

“I. Standard Under Consideration:

“TIME-BASED METERING AND COMMUNICATIONS.

“ ‘Section 111(d)(14)(A) . . . [E]ach electric utility shall offer each of its customer classes, and provide individual customers upon customer request, a time-based rate schedule under which the rate charged by the electric utility varies during different time periods and reflects the variance, if any, in the utility’s costs of generating and purchasing electricity at the wholesale level. The time-based rate schedule shall enable the electric consumer to manage energy use and cost through advanced metering and communications technology.

“ ‘(B) The types of time-based rate schedules that may be offered under the schedule referred to in subparagraph (A) include, among others-

“ ‘(i) time-of-use pricing whereby electricity prices are set for a specific time period on an advance or forward basis . . .

“ ‘(ii) critical peak pricing whereby time-of-use prices are in effect except for certain peak days . . .

“ ‘(iii) real-time pricing . . .

“ ‘(iv) credits for consumers with large loads who enter into pre-established peak load reduction agreements that reduce a utility’s planned capacity obligations.

“ ‘(C) Each electric utility subject to subparagraph (A) shall provide each customer requesting a time-based rate with a time-based meter capable of enabling the utility and customer to offer and receive such rate, respectively.’

“II. Findings

“1. SMUD currently provides time-based rate options for all customers with the exception of lighting customers and substantially complies with the Time-Based Metering and Communication Standard under PURPA.

“2. SMUD’s time-based rates are designed to account for the variance in the costs of purchasing and generating electricity.

“3. SMUD has conducted a comprehensive Advanced Metering Infrastructure (AMI) Business Case, which determined that installation of an AMI network will create opportunities for additional demand response, time-based rates, and effective load management.

“4. SMUD intends to rollout an AMI network solution to all of its customers.

“5. SMUD is currently engaged in a public process called the, ‘Compact with the Customer,’ in which new rate options and programs directed at increased energy efficiency, demand response and peak reduction will be considered.

“III. DETERMINATION BY THE SMUD BOARD:

“The standard is appropriate for use by the District at the present time, except for the lighting customer class. District staff should continue to evaluate advanced metering technology and alternative rate options through the, ‘Compact with the Customer’ process.”

In 2008, the Board issued a request for proposal for supplying the AMI system and related project management services. In June 2009, the Board authorized the execution of a \$81,700,000 purchase agreement for the AMI “Metering Endpoint” and a separate \$8,150,000 purchase agreement for the AMI system and related project management services.

Graham alleges that between late 2009 and early 2011, SMUD removed existing analog meters and replaced them with so-called “smart meters.” In March 2011, before Graham purchased his home, a smart meter was installed despite the lack of a request by the owner for a time-based rate or a time-based meter.

In March 2012, the Board adopted a resolution setting forth a smart meter opt-out policy that permitted certain customers to replace their smart meter with a non-communicating digital meter by paying specified charges. In March 2013, the Board adopted a resolution amending the policy to permit customers to receive an analog meter. In August 2013, the Board further amended the smart meter opt-out policy and payment schedule.

Graham purchased his home in March 2013 and requested an analog meter in October 2013. He paid SMUD \$127 for the new analog meter and continues to pay \$14 per month for opting out of having a smart meter.

In 2016, Graham filed this action against SMUD, its Board, and its officers and staff, including both the former and current Chief Executive Officer and General Manager. Graham’s first amended complaint purports to state 11 separate causes of action against the same defendants.

The trial court sustained defendants' demurrer to Graham's first amended complaint without leave to amend. The court explained that the entire complaint "is premised on [Graham]'s contention that SMUD was not authorized to roll out the smart meters and instead that SMUD adopted an opt-in policy for installation. He bases his contention on his interpretation of SMUD Resolution 07-08-10." The court found that the resolution "makes clear that SMUD adopted a policy that all its customers would be receiving smart meters." The court also explained the standard SMUD considered did not place any restrictions on whether SMUD could provide smart meters to all of its customers rather than just those who requested it. Further, SMUD had the power to adopt a policy rolling out smart meters to all of its customers and to adopt an opt-out policy.

The trial court entered a judgment of dismissal, and Graham timely appealed.

## **II. DISCUSSION**

### *A. Standard of Review*

"It is well established that a demurrer tests the legal sufficiency of the complaint. [Citations.] On appeal from a dismissal entered after an order sustaining a demurrer, we review the order de novo, exercising our independent judgment about whether the [complaint] states a cause of action as a matter of law. [Citations.] We give the [complaint] a reasonable interpretation, reading it as a whole and viewing its parts in context. [Citations.] We deem to be true all material facts that were properly pled. [Citation.] We must also accept as true those facts that may be implied or inferred from those expressly alleged. [Citation.] We may also consider matters that may be judicially noticed, but do not accept contentions, deductions or conclusions of fact or law. [Citation.] ¶ If the [plaintiff] has stated a cause of action under any possible legal theory, we will order that the demurrer be overruled. [Citation.] However, if no liability exists as a matter of law, we affirm the trial court's order sustaining the demurrer." (*City*

*of Morgan Hill v. Bay Area Air Quality Management Dist.* (2004) 118 Cal.App.4th 861, 869-870; accord *Blank v. Kirwan* (1985) 39 Cal.3d 311, 318.)

“If the court sustained the demurrer without leave to amend, as here, we must decide whether there is a reasonable possibility the plaintiff could cure the defect with an amendment. [Citation.] If we find that an amendment could cure the defect, we conclude that the trial court abused its discretion and we reverse; if not, no abuse of discretion has occurred. [Citation.] The plaintiff has the burden of proving that an amendment would cure the defect.” (*Schifando v. City of Los Angeles* (2003) 31 Cal.4th 1074, 1081; accord *Blank v. Kirwan*, *supra*, 39 Cal.3d at p. 318.)

*B. SMUD’s Installation of Smart Meters Was Properly Authorized by Its Board*

Graham appeals the dismissal of his complaint as to his first, second and eleventh causes of action. His first cause of action alleges SMUD and its management and staff violated SMUD’s smart meter policy as described in Resolution 07-08-10 because that policy is a smart meter opt-in policy. Graham alleges the Board never approved removal and replacement of analog meters at all customers’ homes.

The second cause of action alleges SMUD and its management and staff exceeded the authority given to them by the Board under Resolution 07-08-10 or that could have been given to them by the Board because it cannot delegate policy making authority.

The eleventh cause of action alleges SMUD management and staff violated Public Utilities Code sections 11883-11885, and usurped the Board’s power, by circumventing the smart meter policy in Resolution 07-08-10 and making a different policy that they had no authority to make.

Graham admits the Board had the authority to approve the mandatory installation of smart meters. As his claims indicate, central to his complaint is Graham’s contention that Resolution 07-08-10 in fact authorized the installation of smart meters only upon the request of a customer. Graham’s argument is based on the fact that the standard SMUD was considering required only that a customer requesting a time-based rate receive a

time-based meter, and SMUD determined that standard was appropriate for its use. However, the standard does not prohibit SMUD from providing a smart meter to all customers. Indeed, SMUD complies with the standard because all customers received a time-based meter. Moreover, Graham's argument ignores the Board's findings. The Board determined the standard was appropriate for its use because it was already "substantially compl[ying]" with it because SMUD was providing time-based rate options for all customers other than lighting customers and intended to rollout an AMI network solution to *all* customers. We disagree with Graham's suggestion that we may read these findings out of the Board's resolution. The applicable law requires that the Board's acts be expressed by motion, ordinance or resolution. (§ 11909.) It places no requirements on the form of resolutions, nor does it suggest that any portion of a resolution may be disregarded. Graham cites no authority to the contrary. Even if the resolution is imperfect, the critical point is it approved the installation of smart meters for all customers.

Graham contends the Board's findings do not constitute such an approval because an "AMI network solution" is actually the voluntary smart meter policy described in the standard, and that when the Board indicated it intended to "rollout an AMI network solution to all of its customers," that did not include the installation of smart meters. The findings are not susceptible to this interpretation: "SMUD has conducted a comprehensive Advanced Metering Infrastructure (AMI) Business Case, which determined that installation of an AMI network will create opportunities for additional demand response, time-based rates, and effective load management. [¶] . . . SMUD intends to rollout an AMI network solution to all of its customers." SMUD defined AMI to mean "Advanced Metering Infrastructure" and explained that *installation of an Advanced Metering Infrastructure network* would create opportunities for additional time-based rates and load management. (Thus, when SMUD stated that it "intends to rollout an [Advanced Metering Infrastructure] network solution to all of its customers," it



was referring to the infrastructure that permits communication between the meters and the central system, including so-called “smart meters,” and not an abstract or optional policy.

Moreover, even if the resolution was ambiguous, it is not clear that the installation of smart meters by itself required a Board resolution. Graham relies on the broad requirement that the Board determine questions of policy. (§ 11883.) Neither the statute nor any case law defines what qualifies as a policy under this statute. Other statutes specifically require SMUD to act through a Board resolution. (See, e.g., §§ 11823 [fixing boundaries of wards for purposes of electing directors], 11886 [creating employment positions including establishing salary], 11895 [changing district’s name].) As it pertains to this case, the Public Utilities Code provides that SMUD “may engage in activities to reduce wasteful, uneconomical or unnecessary uses of energy, including, but not limited to . . . *the adoption of voluntary and mandatory load management programs, . . . and may do all things necessary or convenient to the full exercise of the powers herein granted.*” (§ 12825.) As the Board’s findings indicate, a reasonable interpretation is that the time-based rates were the policy the Board adopted pertaining to load management, and installing smart meters for all customers was necessary or convenient to the adoption of that policy. The opt-out policy and the purchase of the smart meters for installation, as set forth above, were authorized by the Board. It is not clear that actual installation required its own authorization by the Board. Regardless, as we have already explained, we have determined that any necessary Board approval occurred. This conclusion means that Graham’s complaint has failed to state a claim and the demurrer was properly sustained.

*C. No Leave to Amend*

Graham seeks leave to amend to allege that, prior to the Board meeting that approved Resolution 07-08-10, SMUD decided to create a smart meter policy. He speculates this decision was not made by the Board and was therefore illegal.

Nonetheless, the Board approved mandatory smart meter installation prior to the time that Graham alleges his meter was installed. Graham also seeks leave to amend to add additional legal arguments that we have already considered in deciding he has not stated a cause of action under any possible legal theory. He has thus failed to demonstrate that any of his proffered amendments would cure the defects in his pleading.

### III. DISPOSITION

The judgment is affirmed. Respondents shall recover their costs on appeal. (Cal. Rules of Court, rule 8.278(a)(1) & (2).)

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RENNER, J.

We concur:

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ROBIE, Acting P. J.

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MURRAY, J.