

1 Mark E. Graham  
P.O. Box 1823  
2 Elk Grove, CA 95759  
3 530-902-4428  
4

5 Mark E. Graham, IN PRO PER  
6  
7

8 SUPERIOR COURT OF THE STATE OF CALIFORNIA  
9 FOR THE COUNTY OF SACRAMENTO  
10

11 Mark E. Graham,	)	Case No.: 34-2016-00188891
12	)	
13 Plaintiff,	)	MEMORANDUM OF POINTS AND
14	)	AUTHORITIES IN OPPOSITION TO
15 vs.	)	DEFENDANTS' DEMURRER TO FIRST
16	)	AMENDED COMPLAINT
17 Sacramento Municipal Utility District,	)	
18	)	Unlimited civil case (reclassified on May 23,
19 SMUD Board of Directors,	)	2016)
20	)	
21 SMUD Management and Staff,	)	Date: August 26, 2016
22	)	Time: 2:00 p.m.
23 Arlen Orchard,	)	Department: 53
24	)	
25 John DiStasio, and	)	Reservation number: 2172136
26	)	
27 Does 1-100	)	Action filed: January 8, 2016
28	)	Trial date: None
	)	
	)	
	)	
	)	
	)	
	)	
	)	

---

25 Plaintiff opposes Defendants' Demurrer and respectfully asks the Court to overrule it for the reasons  
26 set forth herein.  
27  
28

1  
2 Table of Contents

- 3 A) Introduction  
4 B) Standard for review of a demurrer  
5 C) Authority to make policy decisions regarding smart electric meters  
6 1) Choice is the dominant theme of the Energy Policy Act of 2005  
7 a) Congress offered the Time-Based Metering and Communication Standard to each  
8 State regulatory authority and to each nonregulated utility in Section 111(a) of  
9 PURPA, as amended  
10 b) Through the Standard a utility offered time-based meters to customer classes and  
11 individual customers. The key element was customer choice.  
12 i) Section 111(d)(14)(A) of PURPA, as amended  
13 ii) Section 111(d)(14)(C) of PURPA, as amended  
14 2) Per the Municipal Utility District Act (MUD Act) only the Board of Directors has the  
15 authority to make policy decisions for SMUD. SMUD Management and staff have no  
16 such authority; they are to implement policy decisions that the Board makes.  
17 3) Pursuant to the Energy Policy Act of 2005 the Board had a mandatory duty to make a  
18 Determination on the Standard  
19 4) Independent of the Energy Policy Act of 2005 the Board had the authority to adopt  
20 voluntary and mandatory load management programs  
21 D) How the Board of Directors adopted a voluntary load management program  
22 1) In Resolution 07-08-10 the Board adopted and approved a Determination on the Time-  
23 Based Metering and Communication Standard  
24 2) The Determination was that the Standard was appropriate for use by the District at the  
25 present time  
26 3) The Standard guaranteed customers the right to choose whether to keep their analog meter  
27 or accept a smart meter. (See C)1)b).)  
28 4) Resolution 07-08-10 was the adoption of a voluntary load management program  
5) SMUD Management, probably CEO and General Manager John DiStasio, acted in excess  
of authority granted to SMUD by Resolution 07-08-10 and usurped the policy making  
power of the Board in making and implementing his own smart meter policy  
E) Attachment E to Resolution 07-08-10 gave SMUD limited authority to act  
1) It contained two determinations: a determination on the Board's process and a  
determination on the Time-Based Metering and Communication Standard  
2) The Board did not adopt and approve the Findings; therefore the Findings are irrelevant  
and are not Board policy  
3) The AMI Business Case in Finding 3 referred to the Time-Based Metering and  
Communication Standard, an opt in or voluntary smart meter program  
4) Finding 4 described, in thirteen words, an opt in or voluntary smart meter program  
a) It was a statement of intent for future Board action that the Board never acted on  
b) It contained no details  
c) It contained vague, ambiguous and undefined terms  
i) "Rollout", which is not a verb, could easily mean "to offer"

- 1                   ii) “AMI network solution” could easily mean a voluntary or opt in smart meter
- 2                                   program or an option or choice for the customer
- 3           d) Only the Plaintiff has offered reasonable definitions of the key terms in Finding 4
- 4           e) Finding 5 suggests that SMUD was still gathering data and evaluating options and the
- 5                   Board was not yet ready to make a final policy decision
- 6           f) The “AMI network solution” does not require 100% participation
- 7   5) Any electric meter policy not contained in a resolution adopted by the Board was not
- 8                   authorized

9   F) Section 12825 of the Public Utilities Code does not authorize the District’s smart meter

10           program

- 11   1) It does not change the existing law
- 12   2) The existing law said that only the Board can make policy decisions for SMUD.
- 13           Management cannot implement a policy unless the Board adopts it.
- 14   3) The term “adoption” refers to Board action
- 15           a) In the context of several Board resolutions on smart meters
- 16                   b) In the context of the Government Code
- 17                   c) In the context of the Public Utilities Code
- 18   4) Resolution 07-08-10 authorized a “voluntary load management program”
- 19   5) Doing “all things necessary or convenient” means necessary or convenient to the policy
- 20           adopted by the Board
- 21   6) The Board determined it was necessary or convenient to do the things described in the
- 22           Time-Based Metering and Communication Standard
- 23   7) Management cannot change this (referring to the previous point 6)
- 24   8) To implement a voluntary load management program it was necessary to ensure and
- 25           protect the right of customers to choose

26   G) Section 818.2 of the Government Code does not provide immunity

- 27   1) The District didn’t do what the Board authorized and did what the Board had not
- 28           authorized. That is the source of the problems.
- 29   2) Government Code Section 818.2 quoted
- 30   3) Section 818.2 does not apply by the definition of an “enactment”
- 31   4) The Law Revision Commission Comment does not expand the definition of “enactment”
- 32           to include a “resolution”.
- 33   5) Mandatory vs discretionary duty is the key to immunity under section 818.2
- 34           a) Courts look to whether the act of the public entity was mandatory or discretionary.
- 35                   Immunity is for discretionary acts only.
- 36           b) The District had a mandatory duty According to the 2<sup>nd</sup> paragraph of Resolution 07-
- 37                   08-10
- 38           c) The District had a mandatory duty According to the Energy Policy Act of 2005,
- 39                   PUBLIC LAW 109–58—AUG. 8, 2005
- 40           d) SMUD fulfilled its mandatory duty and made clear policy.
- 41           e) The Board of Directors had other options but never exercised them.
- 42           f) If SMUD had actually done what Resolution 07-08-10 said it would not be liable.
- 43   6) Old Town does not apply here because that case involved a discretionary duty

1 H) As an alternative to sustaining the demurrer Plaintiff requests leave to amend the Complaint  
2 to allege violation of his due process right protected by the California Constitution  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

1  
2 Table of Authorities

3 Federal laws

4 Energy Policy Act of 2005, PUBLIC LAW 109–58—AUG. 8, 2005

5 Public Utilities Regulatory Policies Act of 1978 (16 U.S.C. 2621(d)) as amended

6  
7 California laws

8 Municipal Utility District Act (part of the Public Utilities Code)

9 Section 818.2 of the Government Code

10 Section 820.2 of the Government Code

11 Section 12825 of the Public Utilities Code

12 Sections 11883 – 11885 of the Public Utilities Code

13  
14 Cases

15 *Alcorn v. Ambro Engineering, Inc.* (1970) 2 Cal.3d 493, 496.

16 *Committee on Children’s Television, Inc. v. General Foods Corp.* (1983) 35 Cal.3d 197, 213-14

17 *Elson v. Public Utilities Commission* (1975, Cal App 2d Dist) 51 Cal App 3d 577, 124 Cal Rptr 305,  
18 1975 Cal App LEXIS 1397, limited, *Reid v. United States* (1976, E.D. Cal.) 421 F. Supp. 1244, 1976  
19 U.S. Dist. LEXIS 12861.

20 *Guzman v. County of Monterey* (2009, 6th Dist) 178 Cal App 4th 983, 100 Cal Rptr 3d 793, 2009 Cal  
21 App LEXIS 1725, review denied, *Guzman (Javier R.) v. County of Monterey* (2010, Cal.) 2010 Cal.  
LEXIS 1761.

22 *Monterey Peninsula Water Management District, Petitioner, v. Public Utilities Commission,*  
23 *Respondent, California–American Water Co., Real Party in Interest.*, No. S208838., |62 Cal.4th 693,  
24 Supreme Court of California, Jan. 25, 2016.

25 *Old Town Development Corp. v. Urban Renewal Agency*, 249 Cal. App. 2d 313, 334 (Cal. App. 1st  
26 Dist. 1967)

27 Papers

28 *Deciding on ‘Smart’ Meters, The Technology Implications of Section 1252 of the Energy Policy Act  
of 2005*, by Plexus Research, Inc. on behalf of the members of the Edison Electric Institute.”

1  
2 A) Introduction

3 This case is about accountability. Can the District's management exceed the authority granted to it  
4 by the Board of Directors, make and implement a policy that conflicts with the Board's policy?  
5 California law gives public entities and their employees limited immunity but none that applies here.  
6 Plaintiff will focus on the First, Second and Eleventh causes of action in the First Amended  
7 Complaint and Defendants' legal arguments against the same.  
8

9 B) Standard for review of a demurrer

10 We are concerned here only with the legal basis for each of the causes of action in the First Amended  
11 Complaint. All facts alleged in the First Amended Complaint are taken to be true.  
12 "A demurrer tests only the legal sufficiency of the pleading." (*Committee on Children's Television,*  
13 *Inc. v. General Foods Corp.* (1983) 35 Cal.3d 197, 213-14, superseded by statute on other grounds.)  
14 "[A] general demurrer admits the truth of all material factual allegations in the complaint." (*Alcorn*  
15 *v. Ambro Engineering, Inc.* (1970) 2 Cal.3d 493, 496.) In ruling on a demurrer, a court does not  
16 consider a "plaintiff's ability to prove these allegations, or the possible difficulty in making such  
17 proof." (*Ibid.*)  
18  
19

20 C) Authority to make policy decisions regarding smart electric meters

21 1) Choice is the dominant theme of the Energy Policy Act of 2005

22 a) Congress offered the Time-Based Metering and Communication Standard to each

23 State regulatory authority and to each nonregulated utility in Section 111(a), PURPA

24 Section 111(a) of PURPA, as amended by the Energy Policy Act of 2005 says;

25 "Nothing in this subsection prohibits any State regulatory authority or nonregulated electric  
26 utility from making any determination that it is not appropriate to implement any such  
27 standard, pursuant to its authority under otherwise applicable State law."

28 (First Amended Complaint at 41)

1 Congress was not heavy handed about the Standard. In this section Congress offered the Standard to  
2 each State regulatory authority or nonregulated electric utility, which could accept or reject the offer.

3 b) Through the Standard a utility offered time-based meters to customer classes and  
4 individual customers. The key element was customer choice.

5 i) Section 111(d)(14)(A) of PURPA, as amended

6 ii) Section 111(d)(14)(C) of PURPA, as amended

7 For convenience Plaintiff will quote both sections together.

8 The Energy Policy Act of 2005, Sec. 1252. SMART METERING. Said:

9 (a) IN GENERAL. -- Section 111(d) of the Public Utilities Regulatory Policies Act of 1978 (16  
10 U.S.C. 2621(d)) is amended by adding at the end the following:

11 “(14) Time-Based Metering and Communications.--

12 “(A) Not later than 18 months after the date of enactment of this paragraph, each electric  
13 utility shall *offer each of its customer classes, and provide individual customers upon*  
14 *customer request*, a time-based rate schedule under which the rate charged by the electric  
15 utility varies during different time periods and reflects the variance, if any, in the utility’s  
16 costs of generating and purchasing electricity at the wholesale level. The time-based rate  
17 schedule shall enable the electric consumer to manage energy use and cost through advanced  
18 metering and communications technology.”

19 (B) [This section is not quoted here. It contained details about the type of time-based rate  
20 schedules that the utility can offer, details that are not disputed in this action.]

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

24 Emphasis added. Paragraph (C) guaranteed each individual customer’s choice over whether to keep  
25 his analog meter or receive a smart meter.

26 (First Amended Complaint at 41-42 and 85-86)

27 2) Per the Municipal Utility District Act (MUD Act) only the Board of Directors has the  
28 authority to make policy decisions for SMUD. SMUD Management and staff have no  
such authority; they are to implement policy decisions that the Board makes.

California Public Utilities Code

1 11883: The board is the legislative body of the district and determines all questions of policy.

2  
3 11884: All matters and things necessary for the proper administration of the affairs of the  
4 district which are not provided for in this division shall be provided for by the board.

5 11885: The board shall supervise and regulate every utility owned and operated by the  
6 district, including the fixing of rates, rentals, charges, and classifications, and the making and  
7 enforcement of rules, regulations, contracts, practices, and schedules, for or in connection  
8 with any service, product, or commodity owned or controlled by the district.

9 3) Pursuant to the Energy Policy Act of 2005 the Board had a mandatory duty to make a  
10 Determination on the Standard

11 The Energy Policy Act of 2005 amended Section 111(a) of the Public Utilities Regulatory Policies  
12 Act of 1978 (PURPA), to say:

13 “(a) CONSIDERATION AND DETERMINATION.—Each State regulatory authority (with  
14 respect to each electric utility for which it has ratemaking authority) and each nonregulated  
15 electric utility shall consider each standard established by subsection (d) and make a  
16 determination concerning whether or not it is appropriate to implement such standard to carry  
17 out the purposes of this title.”

18 The District is a nonregulated electric utility subject to this section.

19 (First Amended Complaint at 85)

20 4) Independent of the Energy Policy Act of 2005 the Board had the authority to adopt  
21 voluntary and mandatory load management programs

22 This authority is found in section 12825 of the Public Utilities Code, which says in relevant part:

23 (a) “A district furnishing light, heat, or power may engage in activities to reduce wasteful,  
24 uneconomical or unnecessary uses of energy, including, but not limited to, . . . the adoption of  
25 voluntary and mandatory load management programs, . . . and may do all things necessary or  
26 convenient to the full exercise of the powers herein granted.”

27 (b) “This section does not constitute a change in, but is declaratory of, the existing law.”

28 D) How the Board of Directors adopted a voluntary load management program

1) In Resolution 07-08-10 the Board adopted and approved a Determination on the Time-  
Based Metering and Communication Standard

That resolution said:



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

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

5           (Exhibit 1)

6           As will be discussed later Attachment E contained several parts: a Summary, a Statement of Facts, a  
7           Determination on the Board’s deliberative, policy making process that it had followed, the Standard  
8           Under Consideration, 5 Findings, and a DETERMINATION BY THE SMUD BOARD. It is very  
9           easy to tell when looking at Attachment E which part is which because each part is labeled. There is  
10          no ambiguity on Attachment E. There is some ambiguity in Resolution 07-08-10 because it refers to  
11          the Standard and then says, “substantially in the form of Attachment E.” But once a person looks at  
12          Attachment E there is no more ambiguity as to what the Board adopted and approved: only the  
13          Determination on the Standard, not the Findings.

14                           2) The Determination was that the Standard was appropriate for use by the District

15   “III. DETERMINATION BY THE SMUD BOARD: The Standard is appropriate for use by  
16   the District at the present time, except for the lighting customer class. District staff should  
17   continue to evaluate advanced metering technology and alternative rate options through the,  
18   ‘Compact with the Customer’ process.”

19           (Exhibit 2, page 3)

20                           3) The Standard guaranteed customers the right to choose whether to keep their analog meter  
21   or accept a smart meter.

22           See C)1)b), the quotation from the Time-Based Metering and Communications Standard. It’s very  
23           simple. If a customer requested a time-based rate the utility was to give him a time-based meter.  
24           There is no other circumstance described in the Standard under which the utility would give the  
25           customer a time-based meter. The default action was no action; in other words the customer did not  
26           have to do anything to keep his analog meter. He only had to do something if he wanted a time-based  
27           meter. This doesn’t mean that the Board couldn’t have made a different policy, such as one that  
28

1 called for taking out all customers' analog meters and giving all customers smart meters. The Board  
2 could have made such a policy, but it didn't. The Standard was not such a policy.

3 4) Resolution 07-08-10 was the adoption of a voluntary load management program

4 The term "voluntary load management program" is found in Public Utilities Code 12825, cited  
5 earlier. What makes this program in the Time-Based Metering and Communications Standard  
6 voluntary are the provisions that allow the customer to choose whether to keep his analog meter.  
7

8 5) SMUD Management, probably CEO and General Manager John DiStasio, acted in excess  
9 of authority granted to SMUD by Resolution 07-08-10 and usurped the policy making  
10 power of the Board in making and implementing his own smart meter policy

11 We know that somebody in SMUD management made this decision but it was informal and hidden  
12 from the public. Dennis Huston alluded to this decision in an email to Eric Windheim (Exhibit 33,  
13 First Amended Complaint at 60).

14 It is only reasonable to assume that DiStasio, the CEO and General Manager, made it. We already  
15 saw in C)2) that under Public Utilities Code sec 11883 – 11885 DiStasio did not have the authority to  
16 make and implement his own smart meter policy. Only the Board can make policy for SMUD.

17 (First Amended Complaint at 35)

18 DiStasio controlled the Board.

19  
20 "On information and belief, the nature of the working relationship between DiStasio and the  
21 Board was that DiStasio ruled the Board. The Directors looked up to DiStasio as if he knew  
22 everything, as if he were a god. DiStasio would tell the Board what he wanted and the Board  
23 would do it or authorize DiStasio to do it."

24 (First Amended Complaint at 81)

25 The nature of this working relationship establishes DiStasio's liability. He was not merely an  
26 employee of SMUD, answering to the higher authority of the Board. He was the higher authority and  
27 the Board answered to him. He had the elected officials in the palm of his hand, with their consent,  
28 and the customers / constituents of SMUD were effectively without representation.

1 E) Attachment E to Resolution 07-08-10 gave SMUD limited authority to act  
2 Defendants argue that Plaintiff is not entitled to a declaratory judgment “because he has failed to  
3 raise any controversy regarding the interpretation of Resolution No. 07-08-10 . . . .” (Demurrer at 2).  
4 Plaintiff did in fact raise such a controversy (or in other words argued for his own interpretation of  
5 that Resolution and against Defendants’) on pages 168 through 184, inclusive, of the First Amended  
6 Complaint. Plaintiff reiterates those arguments as if fully set forth in this Memorandum. Defendants  
7 have not addressed Plaintiff’s arguments about the meaning and interpretation of that resolution.  
8 Plaintiff does not argue that the Board of Directors did anything inadvertent in Resolution 07-08-10.  
9 To the contrary the Board clearly and deliberately established a voluntary load management program.  
10

- 11  
12 1) It contained two determinations: a determination on the Board’s process and a  
13 determination on the Time-Based Metering and Communication Standard

14 It is important to take a close look at Attachment E. Attachment E, which was Exhibit 2, included, in  
15 order, a Summary, a Statement of Facts, a Determination on the Board’s consideration of the  
16 Standard, the Standard under Consideration, Findings, and the DETERMINATION BY THE SMUD  
17 BOARD.

18 At the top of page 2 appears the word “Determination”. At first look one might think that everything  
19 that follows was, in fact, the Determination that section 1252 of the Energy Policy Act of 2005 and  
20 Resolution 07-08-10 refers to. However it’s not. This determination says:

21  
22 “The Board has determined that its consideration of the Time-Based Metering and  
23 Communication Standard, and the determinations made with respect thereto, are in accord  
24 with the provisions of the Sacramento Municipal Utility District Act . . . .”

25 (Exhibit 2, page 2)

26 The Board is describing its determination as to the deliberative, policy making process it has  
27 followed. But this is not the Determination that the Energy Policy Act of 2005 required the Board to  
28 make. The actual Determination made with respect to the Standard is found at the bottom of page 3

1 of Attachment E. It is clearly delineated from the “Standard Under Consideration” and the  
2 “Findings” by the Roman numeral “III” and in capital letters the label “DETERMINATION BY THE  
3 SMUD BOARD”.

- 4           2) The Board did not adopt and approve the Findings; therefore the Findings are irrelevant  
5           and are not Board policy

6 We saw this in D)1), Exhibit 1. Resolution 07-08-10 makes no mention of the Findings. It refers  
7 solely to the “Board Determination on the Time-Based Metering and Communication Standard”. It  
8 makes no mention of the Board’s determination on its deliberative, policy making process.

- 9           3) The AMI Business Case in Finding 3 referred to the Time-Based Metering and  
10           Communication Standard, an opt in or voluntary smart meter program

11  
12 For example the “Plexus team” (Mr. Abbott, Mr. Hadden and Mr. Levesque of Plexus, Research, Inc.  
13 in Boxborough, MA, which prepared the AMI Business Case for SMUD) had collectively 60 years of  
14 direct experience in metering technologies, etc. and more than 90 years experience in utility energy  
15 systems. (AMI Business Case at ii) Plexus Research had recently authored, *Deciding on ‘Smart’*  
16 *Meters, The Technology Implications of Section 1252 of the Energy Policy Act of 2005*, on behalf of  
17 the members of the Edison Electric Institute.” (AMI Business Case at 12-13) Plexus must have  
18 assumed, therefore, that SMUD would implement an opt in system where each individual customer  
19 had the choice. The AMI Business Case is Exhibit 61.

20  
21 (First Amended Complaint at 171-172)

22  
23 SMUD Board members specifically said that they intended to adopt a policy consistent with the  
24 Energy Policy Act of 2005. This means consistent with the Time-Based Metering and  
25 Communication Standard. This was a voluntary, opt-in program. There is no mention of forcing any  
26 customer to accept a smart meter.  
27

1 Page 2 of the report says, “The Board expressed opinions [at a January 17, 2007 committee  
2 meeting] supporting an AMI system that will enable TOU pricing options consistent with the  
Energy Policy Act of 2005 (EPAAct 2005).”

3 The AMI Business Case used the word “offer”, further signifying that customers would have choice

4 On page 8 of the report one of the purported benefits of the AMI system is “Ability to offer  
5 rate alternatives, including time-based rates espoused by EPAAct 2005.”

6 The AMI Business Case contemplated participation rates, which signifies an intent to offer a  
7 voluntary, opt in program to customers and give them the choice whether to keep their analog meter.

8 Page 9 says, “An AMI system provides more flexible ways to enable time-based rates, which  
9 will likely result in higher participation rates.”

10 Each of these quotes ties the Plexus “AMI Business Case Evaluation” to the Time-Based Metering  
and Communication Standard.

11 (First Amended Complaint at 173)

12 For the purpose of Defendants’ demurrer, the above shows that there is a legal basis for the First  
13 Amended Complaint and there is no legal basis for believing that Resolution 07-08-10 authorized a  
14 mandatory smart meter program or mandatory load management program.  
15

16 4) Finding 4 described, in thirteen words, an opt in or voluntary smart meter program

17 Defendants make multiple references in their demurrer to Finding 4, quoting it correctly (on the top  
18 of page 4) and incorrectly, substituting “smart meters” for “an AMI network solution” and thus  
19 significantly changing the meaning of the (altered) sentence, at least seven times:  
20

21 No matter how many times Defendants say it, it’s not true. The actual wording of Finding 4 was, “4.  
22 SMUD intends to rollout an AMI network solution to all of its customers.” Obviously the Court will  
23 look at the actual text of Finding 4.  
24

25 a) It was a statement of intent for future Board action that the Board never acted on

26 This thirteen word look into the future raises far more questions than it answers. WHEN did SMUD  
27 intend to do this? What would the AMI network solution look like? Who would be offered a smart  
28

1 meter? Whatever the answers were (in the Board’s minds) that would have been a subsequent  
2 resolution.

3 There is a big difference between saying that one intends to do something and actually doing it.

4 The fact that the Board never acted on its stated intention in Finding 4 is not a problem, because it  
5 DID act on the Standard, making the Determination that the Standard was appropriate. Where  
6 Finding 4 is very brief, vague, and ambiguous the Standard is much longer and crystal clear.  
7

8 b) It contained no details

9  
10 Wouldn’t a Director on the SMUD Board of Directors want to know what he or she was voting for  
11 when asked to vote for a \$360 million program? Thirteen words does not a policy proposal make.

12 Plaintiff also showed for comparison three formal smart meter policy decisions by the California  
13 Public Utilities Commission and noted that these were 77 pages, 206 pages, and 85 pages long  
14 respectively. Viewed in this context the thirteen word (not thirteen pages but thirteen words) Finding  
15 4 cannot reasonably be interpreted as an actual policy decision.  
16

17 On pages 162-164 of the First Amended Complaint Plaintiff presented and identified a long list of  
18 considerations from the tables of contents of three actual smart meter policy documents from the  
19 California Public Utilities Commission. Smart meter policy is complicated. Finding 4 was not.  
20

21 c) It contained vague, ambiguous and undefined terms

22 i) “Rollout”, which is not a verb, could easily mean “to offer”

23 The term “rollout” is not defined in Resolution 07-08-10 or in the Public Utilities Code (including the  
24 MUD Act). It is a vague, ambiguous and undefined term and insufficient to serve as a legal basis for  
25 Defendants’ demurrer. The American Heritage Dictionary of the English language, 3<sup>rd</sup> edition, has 2  
26 definitions of “rollout” as a noun but no definition of “rollout” as a verb. What does “rollout” mean?  
27  
28

1 Nobody really knows. Smart meters do not roll. They are attached to the side of a home or business  
2 and remain there for years.

3 Defendants claim, “SMUD did precisely this when it determined, as confirmed in Resolution 07-08-  
4 10, to roll out smart meters to all of its customers.” (Demurrer at 6) SMUD never determined that.  
5 This is one of many places in the Defendants’ memorandum in support of their demurrer that they  
6 make essentially the same claim. It is wrong every time. SMUD never determined it would “roll out  
7 smart meters to all of its customers”.

9 There is strong basis for interpreting “rollout” to mean “to offer” or “to make available”; namely, that  
10 this would make Finding 4 consistent with the Standard. Plaintiff respectfully argues that the Court  
11 cannot sustain the demurrer based on the uncertain meaning of this vague and ambiguous and  
12 actually undefined term “rollout”.

14 ii) “AMI network solution” could easily mean a voluntary or opt in smart meter  
15 program or an option or choice for the customer

16 This is another vague, ambiguous and undefined term. We have seen under E)3), the discussion of  
17 the AMI Business Case in Finding 3, the strong factual basis that that case was recommending, and  
18 the Board members wanted, a voluntary, opt in smart meter program as described by the Standard.  
19 Defining this term this way makes Resolution 07-08-10 internally consistent, that is, consistent with  
20 itself. To argue that this phrase “AMI network solution” meant forcing a smart meter onto every  
21 customer, even against his wishes, is arbitrary and without a basis. Such a definition or interpretation  
22 also leaves Resolution 07-08-10 overtly in conflict with itself; at once ensuring customer choice (in  
23 the Standard) and also taking away that choice (using Defendants’ definition or interpretation). The  
24 fact that the sentence ended with “to all its customers” still leaves room for this term to mean a  
25 voluntary, opt in smart meter program. SMUD could have offered such a program “to all its  
26 customers” with the expectation that some would accept the offer and others would reject it.  
28

1 Statutory construction requires defining terms (that are unclear) according to their context.

2  
3 But as this court has repeatedly emphasized, statutory language cannot be read in isolation;  
4 like all language, statutory language takes its meaning from the context in which it appears.  
5 (See, e.g., *People v. Leiva* (2013) 56 Cal.4th 498, 506, 154 Cal.Rptr.3d 634, 297 P.3d 870;  
6 see also *Deal v. United States* (1993) 508 U.S. 129, 132, 113 S.Ct. 1993, 124 L.Ed.2d 44 [it is  
7 a “fundamental principle of statutory construction (and, indeed, of language itself) that the  
8 meaning of a word cannot be determined in isolation, but must be drawn from the context in  
9 which it is used”].)

10 MONTEREY PENINSULA WATER MANAGEMENT DISTRICT, Petitioner, v. PUBLIC  
11 UTILITIES COMMISSION, Respondent; California–American Water Co., Real Party in Interest.,  
12 No. S208838., |62 Cal.4th 693, Supreme Court of California, Jan. 25, 2016.

13 In this case the context of Finding 4 is the Determination on the Time-Based Metering and  
14 Communication Standard and the Standard itself, the latter of which guarantees customer choice. For  
15 this reason the Court should accept Plaintiff’s interpretation and reject Defendants’ and should not  
16 use Defendants’ as a basis for sustaining the demurrer.

17 The context is also Resolution 07-08-10 and its specific statement that the Board adopted and  
18 approved the Board Determination on the Standard, and Attachment E with its distinct and clearly  
19 labeled parts, where the Findings are separate and distinct from said Determination. This context  
20 shows that the Board did not adopt and approve the Findings. The Resolution and Attachment E  
21 must be interpreted this way. Therefore the Findings are not SMUD policy.

22 d) Only the Plaintiff has offered reasonable definitions of the key terms in Finding 4

23 For purposes of this demurrer Plaintiff has just provided (and provided in the First Amended  
24 Complaint) a legal, contextual basis for his definitions and interpretation of the key terms “rollout”  
25 and “AMI network solution”. Plaintiff respectfully suggests that the Court accept these definitions  
26 and interpretation. Defendants have not provided any definition. Absent definitions with a legal,  
27 contextual basis the Court should not accept Defendants’ interpretation of Finding 4.



1 e) Finding 5 suggests that SMUD was still gathering data and evaluating options and the  
2 Board was not yet ready to make a final policy decision

3 Finding 5 suggests that SMUD was still engaged in research and gathering data on several options it  
4 wished to consider and, as such, the Board was not yet ready to make a final policy decision.

5 Finding 5 in attachment E said:

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

9 SMUD needed the results, the data and information, that it was expecting to get through the Compact  
10 with the Customer process before it could make final policy decisions on what it wanted to do.

11 SMUD was considering many options. We have seen from the 3 CPUC smart meter policy  
12 documents that smart meter policy and demand response is complicated.

13 Finding 5, which describes an ongoing and not yet complete “Compact with the Customer” process,  
14 provides context that supports the idea that Finding 4 was not a policy decision but rather was a  
15 statement of intention of a future policy decision to be made based on the results and data obtained  
16 through the “Compact with the Customer”.

17  
18 f) The “AMI network solution” does not require 100% participation

19 SMUD could have easily had an “AMI network solution”, if that term meant use of smart meters by  
20 some but not all customers, with a voluntary, opt in program.

21 An AMI network can function without 100% of the homes and businesses having a smart meter. The  
22 reason is that smart meters are capable of communicating over long distances, sometimes up to 0.5  
23 miles. As long as there is another smart meter within 0.5 miles of it a given smart meter can transmit  
24 all the data that it has back to the utility or its corporate partners. Considering that most houses are  
25 30 feet apart or closer there is NO problem with an AMI network functioning very well without  
26 100% participation.  
27  
28

1 Plaintiff alleged the long range of smart meters in the First Amended Complaint at 18-19. Because  
2 this and all allegations of fact are taken to be true for the purpose of the demurrer this allegation  
3 provides a factual basis for accepting Plaintiff's interpretation of the phrase "AMI network solution"  
4 and Plaintiff's definition that that phrase meant a choice, an option for the consumer.  
5

6 5) Any electric meter policy not contained in a resolution adopted by the Board was not  
7 authorized

8 Defendants make a key mistake in their analysis of the authority to act given by the Board to SMUD  
9 Management and Staff via Resolution 07-08-10. Defendants are unable to see the key element of  
10 consumer choice in Section 111(d)(14)(C) of PURPA, as amended, as we saw in C)1)b).

11  
12 "(C) Each electric utility subject to subparagraph (A) shall provide each customer requesting a  
13 time-based rate with a time-based meter capable of enabling the utility and customer to offer and  
14 receive such rate, respectively."

15 The point is, this is the ONLY circumstance in which the Board authorized SMUD to give any  
16 customer a time-based meter. There is no other sentence in the Standard that authorizes SMUD to  
17 give any customer a time-based meter. If the customer requests a time-based rate, he was to be given  
18 a time-based meter. Simple. Defendants may be trying to split hairs where there is nothing to split.  
19 A time-based rate schedule goes along with a time-based rate, obviously. If you wanted a time-based  
20 rate you would need a time-based meter and a time-based schedule. If you didn't have a time-based  
21 meter, you wouldn't be able to take advantage of the time-based rate. This is assuming that a time-  
22 based rate provides ANY non-negligible benefit to consumers anyway. Plaintiff claimed in the first  
23 Amended Complaint that he has repeatedly asked the Board, in writing and in person at Board  
24 meetings, to quantify the savings to consumers from the smart meter program, and that the Board has  
25 utterly refused to even acknowledge the question. Neither the Board nor SMUD has offered any data  
26 on the amount of electricity, time, or money saved by the SMUD smart meters.  
27  
28

1 But back to the Standard, we know that the Board has sole authority to make policy decisions for  
2 SMUD and that Management and staff lack that authority. Plaintiff claimed in the First Amended  
3 Complaint at 74-75 that SMUD General Counsel wrote a letter to Plaintiff dated October 13, 2014,  
4 which described the series of resolutions by which SMUD authorized, in Ms. Lewis' (and SMUD's)  
5 opinion, the smart meter program. Plaintiff also claimed that he spoke with Ms. Lewis briefly by  
6 phone about that letter in early November, 2014. In both the letter and phone call Ms. Lewis told  
7 Plaintiff that Resolution 07-08-10 was the ONLY resolution ever passed by the Board of Directors  
8 that authorized placing a smart meter on a customer's home. Plaintiff has also said that he never  
9 requested either a time-based rate, time-based rate schedule, or a time-based meter, nor did the  
10 previous owner of his house. The Board had the authority to make a different policy, either a  
11 mandatory load management program or to determine that the Standard was NOT appropriate for the  
12 District, but the Board never did either of those. The Board had many options but did not exercise  
13 them. That is the point of the communication between Plaintiff and Ms. Lewis.

14 Defendants write, "It (the Standard) says only that SMUD must provide smart meters to those who  
15 request a time-based rate. It is otherwise silent on the matter." (Memorandum of Points and  
16 Authorities in Support of Demurrer to Plaintiff Mark E. Graham's First Amended Complaint,  
17 hereinafter "Demurrer", at 7) That's true. As this section is titled, Resolution 07-08-10 gave limited  
18 authority for SMUD to act. The fact that policy decisions can ONLY be authorized by the Board,  
19 that the Board has SOLE policy making power for SMUD, means that there was no authorization for  
20 SMUD to give a smart meter to anyone OTHER than a customer who requested a time-based rate. If  
21 there had been other resolutions Ms. Lewis would have told Plaintiff about them and SMUD would  
22 have disclosed them to Plaintiff through his Public Records Act requests as described in the First  
23  
24  
25  
26  
27  
28

1 Amended Complaint. The first such request was May 23, 2014 and was described in Plaintiff's  
2 Claim for damages, page 6, Exhibit 3.

3 F) Section 12825 of the Public Utilities Code does not authorize the District's smart meter  
4 program

5 1) It does not change the existing law

6 This section says in relevant part:

7  
8 "(a) A district furnishing light, heat, or power may engage in activities to reduce wasteful,  
9 uneconomical or unnecessary uses of energy, including, but not limited to, . . . the adoption of  
10 voluntary and mandatory load management programs, . . . and may do all things necessary or  
11 convenient to the full exercise of the powers herein granted."

12 "(b) This section does not constitute a change in, but is declaratory of, the existing law."

13 2) The existing law said that only the Board can make policy decisions for SMUD.  
14 Management cannot implement a policy unless the Board adopts it.

15 What is "the existing law" to which section (b) refers? At least it is sections 11883 – 11885 of the  
16 Public Utilities Code. Sections 11883 and 11884 were enacted in 1951. Section 11885 was enacted  
17 in 1965. In other words section 12825 did not change the fact that the Board has the sole power to  
18 make policy decisions for SMUD.

19 We have seen this already in C)2), the quotations of Sections 11883 – 11885 of the Public Utilities  
20 Code. The way the district (SMUD) adopts any program is that the Board of Directors adopts a  
21 resolution. This cannot be overemphasized. By law this is the way SMUD makes policy.

22 SMUD does not adopt programs through the actions of management. Management only (is only  
23 supposed to) implement(s) the programs adopted by the Board.

24 Section 11884 says, "All matters and things necessary for the proper administration of the affairs of  
25 the district which are not provided for in this division shall be provided for by the board."  
26  
27

1 But is a “You don’t have a choice” or mandatory smart meter program really provided for “in this  
2 division”? No. The division is Division 6, MUNICIPAL UTILITY DISTRICT ACT [11501 -  
3 14403.5]. Section 12825 says that the district “may engage in activities to reduce wasteful,  
4 uneconomical or unnecessary uses of energy . . . including, but not limited to, . . . the adoption of  
5 voluntary and mandatory load management programs,” but until the Board adopts such a program or  
6 authorizes such activities they are only a thought. The District cannot engage in a voluntary or  
7 mandatory load management program until and unless the Board adopts it.

9 3) The term “adoption” refers to Board action

10 Once again we must determine the meaning of the word “adoption” from its context. In this case the  
11 context is several Board resolutions on smart meters and literally hundreds of sections of the  
12 Government Code and the Public Utilities Code which contain the words “Board” and “adopt” within  
13 5 words of each other.

14 By using the phrase “adoption of voluntary and mandatory load management programs” section  
15 12825 makes it clear that a district can do such a program but it must “adopt” the program first.  
16 What does it mean for SMUD to adopt a program? See F)2), the preceding paragraph. There is a  
17 factual basis for knowing that “adoption” of a program refers to action by the Board of Directors.

18 a) In the context of several Board resolutions on smart meters

19  
20 When the SMUD Board passes acts on a Resolution to make a policy decision for the District, the  
21 text of the Resolution says that it is “adopted and approved” and gives the date and the vote of each  
22 Director. The CEO and General Manager or his staff do not have any authority to “adopt” a program.  
23 Therefore none of them get to vote on proposed resolutions. Only the Board members vote.  
24 For example look at the text of certain smart meter related resolutions.

1 Resolution 07-08-10 said, “The Board Determination on the Time-Based Metering and  
2 Communication Standard is hereby adopted and approved, substantially in the form of Attachment  
3 E.” (Exhibit 1)

4 Resolution 12-03-09 said,  
5 “WHEREAS, by Resolution No. 11-08-06, Section 20, adopted August 4, 2011, this Board  
6 adopted parameters for a smart meter opt out fee that would include the upfront and monthly  
7 fees intended to recover the costs of the installation of alternative metering solutions, meter  
8 reading, billing and related administrative costs; and . . . .”

and

9 “BE IT RESOLVED BY THE BOARD OF DIRECTORS OF THE SACRAMENTO  
10 MUNICIPAL UTILITY DISTRICT: That this Board hereby adopts the Residential Customer  
11 Smart Meter Opt Out Policy and Payment Schedule, substantially in the form of Attachment  
12 E. Adopted: March 1, 2012” (both quotes are from Exhibit 9)

13 Resolution 13-03-08 said, “Section 2. Resolution No. 12-03-09 adopted March 1, 2012, is superseded  
14 in its entirety.” (Exhibit 7)

15 Resolution 13-08-11 said in relevant part, “Section 2. This Board finds that: i) the fee structure  
16 parameters for the smart meter opt-out option were adopted as part of a valid rate proceeding; . . . .”  
17 (Exhibit 6)

18 Every one of these resolutions by the SMUD Board of Directors shows, by its use of the word  
19 “adopted”, that section 12825 of the Public Utilities Code as applied in this case refers to action by  
20 the SMUD Board of Directors. There is no mention in SMUD resolutions of SMUD management (or  
21 Mr. John DiStasio or his agent) ever adopting a program.

22  
23 b) In the context of the Government Code

24 A search on Lexis advance research for “California Government Code ‘board’ w/5 ‘adopt’”, in other  
25 words sections that contain the words “board” and “adopt” within 5 words of each other and the  
26 words “California” “government” “code” returns 299 sections within the category “statutes and  
27 legislation”. Many of these are of the form “The Board shall adopt . . . .” or “adopted by the Board”.  
28

1 This suggests that in this Code the term “adopt” refers to Board action, a formal decision by the  
2 Board.

3 c) In the context of the Public Utilities Code  
4

5 The same search but using “Public Utilities Code” in place of “Government Code” returns 101  
6 sections within the category “statutes and legislation”. This too suggests that in the context of the  
7 Public Utilities Code (of which the MUD Act is a part) the term “adopt” refers to action by the board.  
8 Defendants also misinterpret the “all things necessary or convenient” clause of section 12825 of the  
9 Public Utilities Code.  
10

11 The same search but substituting “management” for “board”, in other words “California public  
12 utilities code ‘management’ w/5 ‘adopt’” returns only 14 sections, none of which use the term  
13 “management” as in “SMUD management and staff”. The sections are talking about management of  
14 a certain program or in some cases the words “management and “adopt” are within 5 words of each  
15 other but are in 2 different sentences or phrases each of which describes a power.  
16

17 4) Resolution 07-08-10 authorized a “voluntary load management program”

18 We have already seen this in C)1)b), the quotations from 111(d)(14)(A) and 111(d)(14)(C) of  
19 PURPA, as amended by the Energy Policy Act of 2005. There is no conflict here between Section  
20 12825 of the Public Utilities Code and Plaintiff’s interpretation of Resolution 07-08-10 and  
21 Attachment E. The key concept was consumer choice.  
22

23 5) Doing “all things necessary or convenient to the full exercise of the powers herein  
24 granted” means necessary or convenient to the policy adopted by the Board

25 In this case doing “all things necessary or convenient” meant doing “all things necessary and  
26 convenient” to implement the policy adopted by the Board in Resolution 07-08-10, the voluntary, opt  
27 in load management program described by the Time-Based Metering and Communication Standard.  
28

1 To implement this policy it was necessary to recognize, assure and honor each individual customer's  
2 right to choose. If the customer chose to keep his analog meter or did not request a time-based meter  
3 or rate it was necessary to honor that choice. It was necessary to NOT force a smart meter onto  
4 somebody's home if they said, "No thank you" when offered a smart meter.

5  
6 The "necessary or convenient" clause does not give policy making authority to SMUD management  
7 or take it out of the hands of the Board of Directors. We already saw this in F)2), that only the Board  
8 can make policy decisions for SMUD. This clause must be interpreted in light of Sections 11883-  
9 11885 of the Public Utilities Code and the rest of the existing law.

10 Remember that section 12825 does not constitute a change in but is declaratory of the existing law  
11 (per section 12825(b)). That clause does not give SMUD the authority to implement a mandatory  
12 load management program where the Board of Directors only authorized a voluntary load  
13 management program. But that is what happened. There is no legal basis for Defendants' attempt to  
14 characterize the "all things necessary or convenient" clause as a carte blanche for unaccountable  
15 decisions by either Management or the Board or to interpret this out of context.

16  
17 To put it differently IF the Board had adopted a mandatory load management program, this clause  
18 would have given the District the power to do all things necessary or convenient to the  
19 implementation of that policy. But as we have seen the Board adopted a voluntary, opt in program.  
20

- 21           6) The Board determined it was necessary or convenient to do the things described in the  
22           Time-Based Metering and Communication Standard

23 Those things, as we have seen, were to  
24

25 "... offer each of its customer classes, and provide individual customers upon customer request, a  
26 time-based rate schedule under which the rate charged by the electric utility varies . . . ." and to "...  
27  
28



1 provide each customer requesting a time-based rate with a time-based meter capable of enabling the  
2 utility and customer to offer and receive such rate, respectively.” (As described earlier in C)1)b)).

3 Through Resolution 07-08-10 the Board determined that in was that it was either necessary or  
4 convenient to do those things.

5 7) Management cannot change this (referring to the previous point 6)

6 We have already seen this in C)2), Sections 11883-11885 of the Public Utilities Code. If

7 Management wanted another policy it had to discuss it with the Board and recommend a new  
8 resolution.

9 8) To implement a voluntary load management program it was necessary to ensure and  
10 protect the right of customers to choose

11 This follows logically. It’s not a voluntary load management program if customer wishes and  
12 choices are not ensured, protected, honored, etc. Customer choice is the key element of the Time-  
13 Based Metering and Communication Standard, which is a voluntary load management program.

14 G) Section 818.2 of the Government Code does not provide immunity

15 Although Plaintiff addressed this section of the Government Code and the possibility of immunity in  
16 his First Amended Complaint Defendants do not respond to most of Plaintiff’s legal arguments.

17 1) The District didn’t do what the Board authorized and did what the Board had not  
18 authorized. That is the source of the problems.

19 As we have seen the Board adopted and approved, in Resolution 07-08-10, a voluntary, opt in load  
20 management program which guaranteed customer choice over keeping the analog meter or accepting  
21 a smart meter. Management then made and implemented its own policy, a mandatory, “You don’t  
22 have a choice” smart meter policy imposing or forcing a smart meter onto every customer. This is  
23 not the kind of thing that section 818.2 protects.  
24  
25  
26  
27  
28

1           2) Government Code Section 818.2 quoted

2           “A public entity is not liable for an injury caused by adopting or failing to adopt an enactment or by  
3 failing to enforce any law.”

4           3) Section 818.2 does not apply by the definition of an “enactment”

5           4) The Law Revision Commission Comment does not expand the definition of “enactment”  
6           to include a “resolution”.

7           A comment of the California Law Revision Commission carries not much legal significance.

8           It is basically legislative history which can be used if the statute at issue is vague. The statute is  
9 actually crystal clear in its definition of an “enactment”.

10           5) Mandatory vs discretionary duty is the key to immunity under section 818.2

11           a) Courts look to whether the act of the public entity was mandatory or discretionary.  
12           Immunity is for discretionary acts only.

13           Negligence claim alleging a county’s breach of a mandatory duty to review water quality  
14 monitoring reports was not barred by *Gov C §§ 818.2, 821* because a nondiscretionary act was  
15 alleged. *Guzman v. County of Monterey (2009, 6th Dist) 178 Cal App 4th 983, 100 Cal Rptr*  
16 *3d 793, 2009 Cal App LEXIS 1725*, review denied, *Guzman (Javier R.) v. County of Monterey*  
17 *(2010, Cal.) 2010 Cal. LEXIS 1761*.

18           *Gov C § 818.2*, providing that a public entity is not liable for an injury caused by adopting or  
19 failing to adopt an enactment or by failing to enforce any law, relates to discretionary  
20 activities, and does not provide immunity to a governmental entity for its failure to perform a  
21 mandatory duty. *Elson v. Public Utilities Commission (1975, Cal App 2d Dist) 51 Cal App 3d*  
22 *577, 124 Cal Rptr 305, 1975 Cal App LEXIS 1397*, limited, *Reid v. United States (1976, E.D.*  
23 *Cal.) 421 F. Supp. 1244, 1976 U.S. Dist. LEXIS 12861*.

24           b) The District had a mandatory duty according to Resolution 07-08-10

25           The 2nd paragraph of Resolution 07-08-10 said:

26           “WHEREAS, Section 1252(a) of EPACT adds Section 111(d)(14) to PURPA, which requires  
27 the District to consider a new proposed regulatory standard relating to time-based metering  
28 and communication (Time-Based Metering and Communication);”

1 The key word here is “requires” the District.

- 2 c) The District had a mandatory duty According to the Energy Policy Act of 2005,  
3 PUBLIC LAW 109–58—AUG. 8, 2005

4 There are two requirements in section 112(b)(4) of PURPA as amended by the Energy Policy Act of  
5 2005. These were quoted on page 210 of the First Amended Complaint.  
6

- 7 d) The Board fulfilled its mandatory duty and made clear policy.

8 However, following that SMUD had a mandatory duty to actually do what the Board had authorized.  
9 It continued to have a duty to not make and implement its own policies because it lacks the statutory  
10 authority to do so.

- 11 e) The Board of Directors had other options but never exercised them.  
12

13 The Board could have reversed its Determination and made a new Determination (as long as it did so  
14 within the time limits in the Energy Policy Act of 2005) that the Time-Based Metering and  
15 Communication Standard was NOT appropriate for the District. The Board also could have adopted  
16 and approved a new resolution authorizing SMUD to remove and replace the analog meter of every  
17 customer with a smart meter – the very opt out policy that SMUD actually implemented. The Board  
18 never did so.  
19

- 20 f) If SMUD had actually done what Resolution 07-08-10 said it would not be liable.

21 Or more specifically, if SMUD had done what the Board authorized and ONLY what the Board  
22 authorized then it would not be liable. That is the kind of situation that section 818.2 applies to.  
23

- 24 6) Old Town does not apply here because that case involved a discretionary duty

25 The Court wrote in Old Town, “The agency cannot be held liable for the consequential results of the  
26 adoption of the resolution finding that the proposal of Custom House Associates is the only qualified  
27 proposal.” (Old Town Development Corp. v. Urban Renewal Agency, 249 Cal. App. 2d 313, 334  
28

1 (Cal. App. 1st Dist. 1967))  
2

3 The preceding sentence clearly describes a discretionary act. We have seen in the preceding  
4 discussion that SMUD had a mandatory duty to make a Determination on the Standard, which it did  
5 when it adopted and approved Resolution 07-08-10, Attachment E.  
6

7 Section 820.2 of that Code provides: "Except as otherwise provided by statute, a public employee is  
8 not liable for an injury resulting from his act or omission where the act or omission was the result of  
9 the exercise of the discretion vested in him, whether or not such discretion be abused."

10 Furthermore neither DiStasio nor Orchard nor any other member of SMUD Management and Staff  
11 has or had the discretion or discretionary authority to fail to implement the opt in voluntary load  
12 management program adopted by the Board (per the Standard) or to create and implement his own  
13 mandatory program.  
14

15 H) As an alternative to sustaining the demurrer Plaintiff requests leave to amend the Complaint  
16 to allege violation of his due process right protected by the California Constitution

17 Plaintiff sincerely hopes the Court will rule in his favor and overturn the demurrer, if not as to all  
18 causes of action then as to some of them. However in the event that the Court sustains the demurrer  
19 Plaintiff respectfully asks for leave to amend the complaint one more time in order to allege that the  
20 Defendants or some of them(at least SMUD) violated Plaintiff's right, protected by the California  
21 Constitution, to not be deprived of life, liberty or property without due process of law. In this case it  
22 was property. Plaintiff believes that Defendants or some of them have charged the smart meter opt  
23 out charges to Plaintiff without ever having properly authorized the smart meter program and this  
24 constitutes a violation of Plaintiff's constitutional right to due process.  
25  
26

27 Conclusion  
28

1 Plaintiff opposes Defendants' Demurrer and respectfully asks the Court to overrule it for the reasons  
2 set forth herein.

3 DATED: August 15, 2016  
4

5 

---

Mark E. Graham  
6 In Pro Per  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28