

FILE

BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO

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Debbie J. Malloy
5326 C Camelot Drive
Fairfield, OH 45014

Complainant,

v.

Duke Energy Ohio, Inc.

Respondent

Case No. 11-1947-EL-CSS

**RESPONDENT DUKE ENERGY OHIO, INC.'S
MOTION TO DISMISS**

Pursuant to OAC 4901-9-01(C), Respondent Duke Energy Ohio, Inc. respectfully moves that the Commission dismiss this Complaint ("Malloy II") because it fails to set forth reasonable grounds for complaint and Complainant's claims are barred by res judicata and collateral estoppel in connection with the Commission's final ruling in favor of Respondent in Case No. 10-158-EL-CSS, *In the Matter of Debbie Malloy v. Duke Energy Ohio* (Opinion and Order, March 9, 2011) ("Malloy I").

Respectfully Submitted,



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MEMORANDUM OF LAW

The Complaint in Malloy II is Complainant's second bite at the same proverbial apple. It involves the identical parties (Complainant and Respondent) and identical issues of fact and law as in Malloy I. The Commission need only review the Complaints in Malloy I and Malloy II, as well as the Opinion and Order from Malloy I dated March 9, 2011, to readily confirm the identical nature of these actions. In light of the uncontested identity of parties, facts and legal claims and issues, Complainant's Complaint in Malloy II is barred by the doctrines of res judicata and collateral estoppel. Therefore, the Commission must dismiss the Complaint in this action aka Malloy II.

It is both routine and appropriate for the Commission and, for that matter, courts throughout Ohio and the United States, to dismiss cases when litigants try to re-litigate that which has already been litigated to a final judgment or decision. The Commission has dealt with these issues in the past. See, e.g., *In the Matter of the Complaint of Warren Jay Yerian v. Buckeye Rural Electric Cooperative, Inc.* (Aug. 24, 2005), Case No. 05-886-EL-CSS, 2005 Ohio PUC LEXIS 456 (copy attached). In *Yerian*, the Commission analyzed the doctrines of res judicata and collateral estoppel when that complainant improperly tried to file the same claims against the same public utility. Respondent cannot improve upon that analysis here and, therefore, directs the Commission to the following excerpts from the decision in *Yerian* :

According to the Supreme Court of Ohio, as well as numerous other authorities, *res judicata* or, as it is described in modern language, claim preclusion, stands for the proposition that "a valid, final judgment rendered upon the merits bars all subsequent actions based upon any claim arising out of the transaction or occurrence that was the subject matter of the previous action." *Grava v. Parkman Tshp.*, 73 Ohio St. 3d 379 (1995) (syllabus). In *Grava*, the court defined a single transaction or occurrence as one that is "based on a claim arising from a nucleus of facts that was the subject matter of his first application." *Grava* at 383. This doctrine has also been defined by the United States Supreme Court as providing that "a final judgment on the merits bars further claims by parties or their privies based on the same cause of action." *Montana v. United States*, 440 U.S. 147, 153

(1979). "This bar upon re-litigation applies even to instances in which a party is prepared to present new evidence or new causes of action not presented in the first action, or to seek remedies or forms of relief not sought in the first action." *American Home Products Corporation v. Roger W. Tracy*, 152 Ohio App. 3d 267 (Ct. Apps., 10th Dist., 2003). See also, *Ron Thomas, Sr. v. Restaurant Developers Corp.*, 1997 Ohio App. LEXIS 3062 (1997).

Collateral estoppel, on the other hand, prevents the relitigation of an issue that has been "actually and necessarily litigated and determined in a prior action. . . ." *New Winchester Gardens, Ltd. V. Franklin Cty. Brd. of Revision*, 80 Ohio St. 3d 36 (1997). "When an issue of fact or law is actually litigated and determined by a valid and final judgment, and the determination is essential to the judgment, the determination is conclusive in a subsequent action between the parties, whether on the same or a different claim." *Restatement of the Law, Second, Judgments, Section 27*.

The Ohio Supreme Court has confirmed that "where an administrative proceeding is of a judicial nature and where the parties have had an ample opportunity to litigate the issues involved in the proceeding, the doctrine of collateral estoppel may be used to bar litigation of issues in a second administrative proceeding." *Superior's Brand Meats, Inc. v. Lindley*, 62 Ohio St. 2d 133 (1980) (syllabus). The same applies with regard to the similar doctrine of *res judicata*. *Office of Consumers' Counsel v. Pub. Util. Comm.*, 16 Ohio St. 3d 9 (1985).

Id. at *4-6.

Here, *Malloy II* is nothing but a rehash of *Malloy I*. Complainant continues to contest her obligation to pay Respondent for the identical utility bills which now total \$853.20 and which had accrued over time and were directly at issue in *Malloy I*. Complainant continues to debate in *Malloy II* Respondent's right to disconnect her utility services for her nonpayment of the identical bills at issue in *Malloy I*. *Malloy II* arises out of the same set of operative facts as were at issue in *Malloy I*.

As evidence, the Commission need only look at the utility bill attached to the Complaint in *Malloy II* and which has a due date of April 5, 2011. That invoice reflects a balance of \$733.20 having been transferred from Account #61802171-15 to Complainant's current account. As the Commission well knows from *Malloy I* and as even further confirmed by the last invoice attached to the Complaint in *Malloy II*, Account #61802171-15 is the identical utility account at issue in *Malloy I*, meaning it was the same account for which the Commission found in favor of

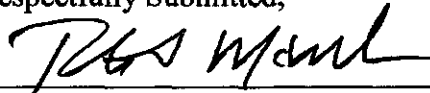
Respondent and rejected Complainant's claim that Respondent had improperly disconnected her services for nonpayment. That same balance from *Malloy I* is now at issue in *Malloy II* because Complainant again refuses to pay her bills and again refuses to recognize that Respondent is permitted to transfer unpaid electric bills from one residential account to another electric account at which the customer also receives electric services.

Malloy II is nothing but another attempt by Complainant to avoid having to pay for her utility services in a timely manner or be subject to disconnection in accordance with applicable regulations and Respondent's tariff on file with the Commission. As such, the Commission should dismiss *Malloy II* on res judicata and collateral estoppel grounds.

Finally, *Malloy II* should be dismissed because the Complaint, on its face, does not set forth reasonable grounds for complaint. Complainant does not even allege what Respondent has done wrong in her newest Complaint. She simply attaches bills and a lease and the states in her Complaint that Respondent may disconnect her services for nonpayment. At no point in time does Complainant state that Respondent's actions are improper, that Respondent is not complying with a rule or regulation, or that Respondent has failed to act in accordance with its tariffs on file with the Commission. Those omissions are obvious—Respondent has done exactly what it is supposed to do, as ratified by the Commission's decision in *Malloy I*. Either way, Complainant has not states any claim against Respondent in *Malloy II* and, therefore, her Complaint must be dismissed.

WHEREFORE, Respondent Duke Energy Ohio, Inc. requests that the Commission dismiss the Complaint in these proceedings with prejudice; and grant Respondent such other, further or different relief as the Commission deems just and proper.

Respectfully Submitted,



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Attorney for Respondent,

Duke Energy Ohio, Inc.

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the foregoing document was served on Complainant by first class U.S. Mail, postage prepaid, on this 21st day of April, 2011.

Debbie J. Malloy
5326 C Camelot Drive
Fairfield, OH 45014



Robert A. McMahon

Exhibit A

Rookwood Loan Documents

See attached copy of the Rookwood Promissory Note and the Security Agreement.



2 of 17 DOCUMENTS

In the Matter of the Complaint of Warren Jay Yerian, Complainant,
v.
Buckeye Rural Electric Cooperative, Inc., Respondent

Case No. 05-886-EL-CSS

PUBLIC UTILITIES COMMISSION OF OHIO

2005 Ohio PUC LEXIS 456

August 24, 2005, Entered

PANEL: [*1] Alan R. Schriber, Chairman; Ronda Hartman Fergus; Judith A. Jones; Donald L. Mason; Clarence D. Rogers, Jr.

OPINION: ENTRY

The Commission finds:

(1) On October 3, 2002, Warren Jay Yerian filed a complaint against Buckeye Rural Electric Cooperative, Inc. (Buckeye), regarding his electric service from Buckeye (*In the Matter of the Complaint of Warren Jay Yerian v. Buckeye Rural Electric Cooperative, Inc.*, Case No. 02-2548-EL-CSS) (*Yerian I*). The Commission considered the complaint in *Yerian I* and, on October 15, 2003, issued an opinion and order. Following various inspections and reports, rehearing was denied on May 19, 2004. In *Yerian I*, the Commission, *inter alia*, declined to find that Buckeye had failed to furnish adequate facilities to meet the reasonable needs of Mr. Yerian or that Buckeye was not rendering or proposing to render physically adequate service to Mr. Yerian. Therefore, pursuant to the provisions of *Section 4933.83, Revised Code*, the Commission did not authorize another electric supplier to furnish electric service to Mr. Yerian.

(2) On July 11, 2005, Mr. Yerian filed the above-captioned, second complaint against [*2] Buckeye (*Yerian II*). In the *Yerian II* complaint, Mr. Yerian states that a letter from Buckeye's counsel to counsel for American Electric Power (AEP) was not entered in the docket of *Yerian I* and was, therefore, not considered by the Commission. According to Mr. Yerian, that letter offered him a release from Buckeye's service. (AEP's response to the letter was docketed and reflects AEP's unwillingness to serve Mr. Yerian's property.) In light of the undocketed letter from Buckeye, purportedly offering his release to AEP, and on the basis of other information in the record of *Yerian I*, Mr. Yerian argues that the Commission should order the modification of the certified territories of Buckeye and AEP, thereby allowing him to be served by AEP.

(3) On July 26, 2005, Buckeye filed an answer to the complaint in *Yerian II*, as well as a motion to dismiss the *Yerian II* complaint. In its answer, Buckeye states, *inter alia*, that Mr. Yerian has failed to set forth reasonable grounds upon which it is able to respond and that the complaint is barred by the doctrines of *res judicata* and *collateral estoppel*. In its motion to dismiss the complaint, Buckeye argues that [*3] *Yerian II* is an attempt to reopen the *Yerian I* case and that the doctrines of *res judicata* and *collateral estoppel* bar the litigation of *Yerian II*, as the evidence has already been considered by the Commission and the issues have been determined. In addition, Buckeye indicates that the complaint is deficient in its setting forth the basis of the claim. Finally, Buckeye asserts that, as the Commission has determined that the electric service from Buckeye is physically adequate, this cannot be the basis for Mr. Yerian's request for a modification of the certified territory. Buckeye claims that Mr. Yerian has no standing to request certified territory modification on any other basis.

(4) On August 1, 2005, Columbus Southern Power Company and Ohio Power Company (Columbus Southern and Ohio Power) filed an answer to the complaint. In that answer, Columbus Southern and Ohio Power note, initially, that, although the complaint was forwarded to them by the Commission, with instructions to respond, they are not named as

respondents. They also argue that the complaint should be dismissed on the ground that it is merely a request to review the information in *Yerian I* and, as [*4] such, is a late-filed application for rehearing in that prior docket. In addition, Columbus Southern and Ohio Power note that the letter to which Mr. Yerian makes reference in the complaint was explicitly referred to in the docketed reply and that Mr. Yerian was well aware of its existence at the time.

(5) On August 22, 2005, Mr. Yerian filed various documents, in opposition to the motion to dismiss.

(6) The Commission finds that the complaint in *Yerian II* is barred by both *res judicata* and collateral estoppel. The application of each of these doctrines to this proceeding will be discussed briefly.

(7) According to the Supreme Court of Ohio, as well as numerous other authorities, *res judicata* or, as it is described in modern language, claim preclusion, stands for the proposition that "a valid, final judgment rendered upon the merits bars all subsequent actions based upon any claim arising out of the transaction or occurrence that was the subject matter of the previous action." *Grava v. Parkman Tshp.*, 73 Ohio St. 3d 379 (1995) (syllabus). In *Grava*, the court defined a single transaction or occurrence as one that is "based on a claim arising [*5] from a nucleus of facts that was the subject matter of his first application." *Grava* at 383. This doctrine has also been defined by the United States Supreme Court as providing that "a final judgment on the merits bars further claims by parties or their privies based on the same cause of action." *Montana v. United States*, 440 U.S. 147, 153 (1979). "This bar upon re-litigation applies even to instances in which a party is prepared to present new evidence or new causes of action not presented in the first action, or to seek remedies or forms of relief not sought in the first action." *American Home Products Corporation v. Roger W. Tracy*, 152 Ohio App. 3d 267 (Ct. Apps., 10th Dist., 2003). See also, *Ron Thomas, Sr. v. Restaurant Developers Corp.*, 1997 Ohio App. LEXIS 3062 (1997).

(8) Collateral estoppel, on the other hand, prevents the relitigation of an issue that has been "actually and necessarily litigated and determined in a prior action. . . ." *New Winchester Gardens, Ltd. V. Franklin Cty. Bd. of Revision*, 80 Ohio St. 3d 36 (1997). "When an issue of fact [*6] or law is actually litigated and determined by a valid and final judgment, and the determination is essential to the judgment, the determination is conclusive in a subsequent action between the parties, whether on the same or a different claim." *Restatement of the Law, Second, Judgments, Section 27*.

(9) The Ohio Supreme Court has confirmed that "where an administrative proceeding is of a judicial nature and where the parties have had an ample opportunity to litigate the issues involved in the proceeding, the doctrine of collateral estoppel may be used to bar litigation of issues in a second administrative proceeding." *Superior's Brand Meats, Inc. v. Lindley*, 62 Ohio St. 2d 133 (1980) (syllabus). The same applies with regard to the similar doctrine of *res judicata*. *Office of Consumers' Counsel v. Pub. Util. Comm.*, 16 Ohio St. 3d 9 (1985).

(10) In the present complaint, Mr. Yerian requests that the Commission modify the service territories of Buckeye and AEP, such that his property would be served by AEP. Mr. Yerian indicates that a letter from Buckeye's counsel to AEP's [*7] counsel, offering to release him from its service territory, was not entered in the record of his first complaint proceeding. Mr. Yerian does admit, however, that the response to this letter was a part of the record in *Yerian I*. He suggests that the Commission should review the information in *Yerian I*, in order to "understand his problem." In *Yerian I*, Mr. Yerian similarly requested that the Commission modify service territories so that he could be served by AEP rather than Buckeye. With the exception of the letter indicated by Mr. Yerian, no new evidence is proposed to be considered. *Yerian II* is based on the same claim and the same nucleus of facts as was alleged, considered, and determined by this Commission in *Yerian I*. Even the submission of an additional item of evidence, if it were relevant to the issue determined by the Commission and if it were needed in light of the docketing of the reply to that letter, would not change the outcome. As the Commission specifically addressed Mr. Yerian's requested modification of the certified territory in *Yerian I*, the claim in *Yerian II* was fully litigated in *Yerian I*. *Yerian, supra*, Entry (March 30, 2004). [*8] Therefore, *res judicata* applies to bar the relitigation of this claim. Collateral estoppel also applies here, as the main underlying issue goes to the existence of physically adequate service. This issue was fully litigated between these two parties, and was determined by the Commission, in *Yerian I*.

(11) Therefore, the Commission finds that, pursuant to the doctrines of collateral estoppel and *res judicata*, this case should be dismissed and closed of record.

It is, therefore,

ORDERED, That this case be dismissed and closed of record. It is, further,

ORDERED, That a copy of this entry be served upon all parties of record.

THE PUBLIC UTILITIES COMMISSION OF OHIO

Alan R. Schriber, Chairman

Ronda Hartman Fergus

Judith A. Jones

Donald L. Mason

Clarence D. Rogers, Jr.

Entered in the Journal

August 24, 2005

Legal Topics:

For related research and practice materials, see the following legal topics:

Administrative Law Agency Adjudication Decisions Collateral Estoppel Administrative Law Agency Adjudication Decisions Res Judicata Energy & Utilities Law Administrative Proceedings Rehearings