

**BEFORE  
THE PUBLIC UTILITIES COMMISSION OF OHIO**

GWENDOLYN TANDY,	)	
	)	
Complainant,	)	
	)	
v.	)	Case No. 15-395-EL-CSS
	)	
THE CLEVELAND ELECTRIC	)	
ILLUMINATING COMPANY,	)	
	)	
Respondent.	)	

**THE CLEVELAND ELECTRIC ILLUMINATING COMPANY’S  
MOTION TO DISMISS AND MEMORANDUM IN SUPPORT**

In accordance with Ohio Adm. Code 4901-1-12, The Cleveland Electric Illuminating Company (CEI or the Company) respectfully requests that the Commission dismiss the complaint in this case with prejudice. Complainant’s allegations have already been litigated and her claims decided multiple times. Reasonable grounds do not exist to litigate or decide these claims yet again. A Memorandum in Support is attached.

Dated: March 16, 2015

Respectfully submitted,

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ELECTRIC ILLUMINATING COMPANY

## **MEMORANDUM IN SUPPORT**

### **I. INTRODUCTION**

This is a repeat of a repeat complaint. In 2013, the Commission dismissed Gwendolyn Tandy's first complaint against CEI. That complaint alleged that CEI improperly transferred a balance to her account; that it improperly accounted for her payments; and that she had been improperly denied energy assistance. She lost on all counts. Last year, Ms. Tandy returned to the Commission a second time raising the same complaints in a new proceeding. The Commission rightly dismissed her claims once more. Ms. Tandy is back now for the third time with the same grievances: improper transfer of balances, accounting of payments, and illegal disconnection.<sup>1</sup>

This complaint must be dismissed. The doctrine of res judicata exists for situations like this: a complaining party who repeatedly refuses to accept the tribunal's decision. Every claim raised in Ms. Tandy's most recent complaint was directly and expressly resolved by the Commission's original order, could have been raised but was not, or arose as a consequence of the previous decisions. For these reasons, as discussed in detail below, the Commission should dismiss this complaint.

### **II. PROCEDURAL HISTORY**

#### **A. *Tandy I***

During the summer and fall of 2012, Gwendolyn Tandy filed her first complaint (*Tandy I*) against CEI. *See* Case No. 12-2102-EL-CSS. *Tandy I* boiled down to four issues:

- *Balance Transfers*: whether CEI properly transferred an account balance from her account at 1441 Sulzer Avenue to her account at 1439 Sulzer Avenue;

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<sup>1</sup> Although this complaint is the *third* one raising the same issues, it is actually Ms. Tandy's *fourth* complaint against CEI overall. Her third complaint, also meritless, did pertain to different issues, and was dismissed on December 10, 2014. *See* Case No. 14-1241-EL-CSS.

- *Accounting of Payments*: whether CEI properly accounted for payments made on her account dating from January 2011 to the time she filed the complaint;
- *Eligibility for Energy Assistance*: whether CEI properly considered her ineligible for the PIPP Plus program; and
- *Summary of Account*: whether CEI properly provided her with a summary of her account.

*Tandy I*, Entry at 1 (Nov. 1, 2012). The Commission heard her complaint on January 15, 2013, and about two months later dismissed it. *See Tandy I*, Order at 9 (Mar. 6, 2013). The Commission resolved all four issues in CEI's favor.

*First*, the balance transfer was proper: "CEI properly transferred the accrued residential service charges from the account for 1441 Sulzer Avenue to Ms. Tandy's active residential account for service at 1439 Sulzer Avenue...including the February 17, 2012 transfer of charges." *Id.* at 7-8.

*Second*, CEI properly accounted for her payments: "nothing in the record supports the claims that CEI has failed to correctly reflect her PIPP installments or other payments made on her account at 1439 Sulzer Avenue." *Id.* at 8.

*Third*, the denial of energy assistance was proper: Ms. Tandy was "no longer eligible for PIPP" under the rules governing fraudulent enrollment. *Id.* at 7 (citing Rule 122:5-3-02(I)).

*Finally*, CEI's account summary was *not* unreasonable: "Ms. Tandy has failed to sustain her burden to demonstrate . . . that the Summary of Statement is unreasonable or a violation of a rule, Commission order or Ohio law." *Id.* at 8.

Ms. Tandy sought rehearing on April 5, which the Commission denied on May 1. *Tandy I*, Entry on Rehg. at 3 (May 1, 2013). The decision in *Tandy I* thus became final. Nevertheless, despite the Commission's validation of her account balance, Ms. Tandy never paid her bills in full and was disconnected on September 24, 2013.

**B. *Tandy II***

In April 2014, Ms. Tandy filed her second complaint (*Tandy II*) against CEI. *See* Case No. 14-0686-EL-CSS. The complaint raised the same issues resolved in *Tandy I*:

- *Balance Transfers*: whether balance transfers from her account at 1441 Sulzer Avenue to her account at 1439 Sulzer Avenue were proper;
- *Accounting of Payments*: whether CEI properly accounted for payments made on her account dating from January 2011 (and earlier) to the time she filed the complaint;
- *Eligibility for Energy Assistance*: whether she was impermissibly enrolled in the Percentage of Income Payment Plan (PIPP) Plus program, and whether she was denied assistance from the Fuel Fund grant program.

*Tandy II*, Entry at 1 (July 30, 2014). In addition to these issues, *Tandy II* also alleged that her September 2013 disconnection was unlawful because she did not owe the underlying balance. *Id.* Then, later in the proceeding, she also challenged the propriety of a pending May 30, 2014 disconnection. (*See Tandy II*, Correspondence (June 3, 2014).)

CEI moved to dismiss *Tandy II* on the basis of res judicata, and the Commission granted CEI's motion on July 30, 2014. The Commission found that Ms. Tandy was "precluded from raising the same issues . . . that were previously decided by the Commission" in *Tandy I*, under the doctrine of res judicata. Entry at 4. Additionally, the Commission found that the September 24, 2013 disconnection of service was a consequence of the previous decision, and therefore that claim was also barred. *Id.* at 6. The Commission also found that CEI's denial of assistance to Ms. Tandy through the Fuel Fund program was based on a determination of fraud by the Ohio Development Services Agency, which falls outside the Commission's jurisdiction. *Id.* at 7. Finally, the Commission also took note of the fact CEI had disconnected Ms. Tandy's service on May 30, 2014, without questioning the propriety of the disconnection. *Id.* at 3–4. The Commission dismissed the case and closed the matter.

**C. Tandy III**

Now, for a third time, Ms. Tandy has filed another complaint raising the same claims, *Tandy III*. She has submitted 49 pages in which she yet again raises the same issues resolved twice before:

- *Balance Transfers*: She again alleges that balance transfers from her account at 1441 Sulzer Avenue to her account at 1439 Sulzer Avenue were unjust and unreasonable.
  - *See, e.g., id.* at 3-4 (“\$43.00 payment was stolen” by CEI to “create an illegal deficit”)<sup>2</sup> and *id.* at 7 (claiming CEI “added a transfer of \$269.08” which “represents theft and fraud”).
- *Accounting of Payments*: She again alleges that CEI did not properly account for payments made on her account dating from 2009 to 2013.
  - *See, e.g., id.* at 5-6 (“6 \$36.00 payments were made but there were no dates” shown on bills as to when the payments were received); *id.* at 14-29, 35-36, 38-46 (providing commentary on series of bills from January to July 2009, September to November 2009, and all of 2013 (except July), implying that late payments were improper and that credits should be applied).
- *PIPP Plus Enrollment*: She again alleges that CEI enrolled her in the PIPP Plus program without her permission.
  - *See, e.g., id.* at 10 (claiming that on November 1, 2010, CEI converted her PIPP account to PIPP Plus, in violation of PIPP guidelines).
- *Illegal Disconnection*: She again disputes the legitimacy of the disconnection of service on September 24, 2013, as well as the disconnection on May 30, 2014.
  - *See, e.g., id.* at 44 (claiming CEI charged her to disconnect service while she had a credit on her account); *id.* at 48 (calling May 2014 disconnection “unwarranted”).

Ms. Tandy has also requested that the Company not be allowed to disconnect her service until the Commission has resolved this complaint. (*Id.* at 1, 12.)

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<sup>2</sup> Here, and throughout this document, CEI has taken liberty to correct obvious typographical and grammatical errors in the complaint, to increase the readability of her allegations. It has only done so when there was no reasonable doubt as to the intended meaning.

### III. ARGUMENT

Once again, res judicata bars this complaint. All of the claims raised in *Tandy III* have already been resolved by *Tandy I* and *Tandy II*. Most of *Tandy III*'s claims were directly raised and resolved in the earlier cases. Any remaining claims either could have been raised in the prior cases or pertain to the necessary consequences of the Commission's prior decisions. For these reasons, the Commission should dismiss *Tandy III* in its entirety.

**A. Res judicata bars relitigation of claims that were or could have been raised in an earlier proceeding.**

Res judicata "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 Twp.*, 73 Ohio St.3d 379, 382 (1995). Under the doctrine, "an existing final judgment or decree between the parties to litigation is conclusive as to all claims which were *or might have been* litigated in a first lawsuit." *Id.* (emphasis sic) (internal quotations omitted). This means that a plaintiff *must* "present every ground for relief in the first action, or be forever barred from asserting it." *Id.*

In addition to court proceedings, res judicata "applies to administrative proceedings that are of a judicial nature and where the parties have had an ample opportunity to litigate the issues involved in the proceeding." *Id.* at 380 (internal quotations omitted). The rule specifically governs Commission proceedings. *See, e.g., Office of Consumers' Counsel v. Pub. Util. Comm'n*, 16 Ohio St. 3d 9, 11 (1985). The Commission has applied res judicata to dismiss *pro se* complaints such as this one. *See In re Complaint of Debbie Malloy*, Case No. 11-1947-EL-CSS, Entry at 1 (July 6, 2011); *In re Warren Jay Yerian*, Case No. 05-886-EL-CSS, Entry at 3 (Aug. 25, 2005); *In re Complaint of David Wellman*, Case No. 00-1136-TP-CSS, Entry at 3–4 (Feb. 8, 2001).

**1. Res judicata also prohibits challenges to actions taken to implement the decision from the prior case.**

Res judicata not only prohibits claims that were actually litigated, but also challenges to a utility's actions that necessarily followed from the prior decision. The case of *In re the Complaint of Debbie Malloy* is particularly instructive.

In *Malloy I*, Case No. 10-158-EL-CSS, the complainant alleged that her electric bill was “excessively high.” *Malloy I*, Opin. & Ord. at 1 (Mar. 9, 2011). The Commission, however, found that she had not met her burden and ruled in favor of the utility. *Id.* at 8.

*Malloy II* was filed about a month later. *See* Case No. 11-1947-EL-CSS. Ms. Malloy alleged that the EDU “asserted that her bills are unpaid” and “notified her of imminent disconnection.” *Malloy II*, Entry at 1 (July 6, 2011). The challenged balance comprised two elements:

- (1) the original balance that was upheld in *Malloy I*, and
- (2) a security deposit that was not reviewed in *Malloy I* but that was charged based on the balance approved in the first complaint.

*Id.* at 3. That the first element required dismissal was obvious—it had already been expressly litigated—but what about the second? The charging of the security deposit had not been litigated in *Malloy I*. Indeed, it could not have been: the deposit *postdated* the complaint and the original order.

Nevertheless, the Commission dismissed the *entire* complaint: “it is apparent that *Malloy II* is based on the same claim and the same nucleus of facts as were alleged, considered, and determined by the Commission in *Malloy I*.” *Id.* And having upheld her underlying balance, the Commission specifically noted that the utility was entitled to “assess a deposit.” *Id.* Thus, “res judicata applie[d] to bar relitigation of Ms. Malloy’s claim in *Malloy IP*” and the entire complaint

was dismissed. *Id.* at 4. This case is the same and the Commission, like it did in *Malloy II*, and likewise did in *Tandy II*, should dismiss Ms. Tandy’s complaint.

**2. Res judicata also prohibits claims that could have been litigated in previous proceedings—even if they were not.**

Finally, as noted in *Grava*, res judicata bars “claims which were *or might have been* litigated in a first lawsuit.” 73 Ohio St.3d at 382 (emphasis sic).

The Commission has recognized and applied this very point. *See In re the Complaint of Warren Jay Yerian*, Case No. 05-886-EL-CSS (*Yerian II*). In *Yerian II*, the Commission recognized that res judicata “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.” *Yerian II*, Entry at 3 (Aug. 24, 2005) (internal quotations omitted). There, the Commission found that “*res judicata* applies to bar the relitigation of this claim. . . . This issue was fully litigated between these two parties, and was determined by the Commission, in *Yerian I*.” *Id.* at 4.

These rules make sense. If res judicata did not reach such claims—that is, those that could have been raised but were not, and those that simply challenge the implementation of an earlier litigation—the doctrine would be toothless. No case or controversy would ever become final, and the prevailing litigant (not to mention the adjudicator) would potentially be doomed to relitigate the same dispute *ad infinitum*.

**B. The claims alleged in *Tandy III* are barred by the doctrine of *res judicata* and should be dismissed.**

Applying these principles, *Tandy III* should be dismissed in its entirety. *Tandy I* was litigated and resolved by a final order. *Tandy II* involved the same parties, and every claim raised in the new complaint either was or could have been raised in the first. The Commission then rightfully dismissed that complaint. And now, the only claim that postdates the filing of *Tandy II*

goes solely to whether she owed the underlying balance—which was the core issue resolved in *Tandy I* and dismissed in *Tandy II*.

Accordingly, the entire complaint should be dismissed.

**1. The vast majority of the complaint concerns issues expressly resolved in *Tandy I* or *Tandy II*.**

The bulk of the complaint expressly seeks to relitigate issues resolved in *Tandy I* and dismissed in *Tandy II*.

**a. *Tandy I* expressly resolved the legality of transfers from 1441 Sulzer to 1439 Sulzer.**

As noted above, *Tandy I* specifically held that “CEI properly transferred the accrued residential service charges from the account for 1441 Sulzer Avenue to Ms. Tandy’s active residential account for service at 1439 Sulzer Avenue.” *Tandy I*, Order at 7–8. And it specifically noted the date (“February 17, 2012”) and amount (“\$269.08”) of a particular transfer that was challenged but approved. *Id.* at 8.

Although resolved by *Tandy I*, Ms. Tandy once again questions the propriety of these balance transfers in *Tandy III*. She alleges that an “illegal transfer” occurred on “February 17, 2012,” and she identifies the amount as being \$269.08. (Complaint at 7–8.) She again alleges that it came from her property at 1441 Sulzer Avenue, and that the transfer “represents theft and fraud.” (*Id.*) She claims that before the transfer, she had a zero balance, and that the Company never acknowledged her complaints or offered solutions. (*Id.*)

Once again, these balance-transfer issues are identical to those raised in *Tandy I* and *Tandy II*. Res judicata bars Ms. Tandy’s attempt to relitigate these issues a third time.

**b. *Tandy I* expressly resolved the propriety of CEI’s accounting of her payments.**

*Tandy III* also alleges numerous times that CEI has failed to properly account for her payments. Throughout the complaint, Ms. Tandy notes instances where she believes she had a credit on her account. (*See, e.g., id.* at 14 (“\$53.44 credit missing”); *id.* at 18 (“where is my credit?”); *id.* at 23 (claiming “I have a credit” in response to a bill stating she is legally responsible for her account balance).) The complaint contains pages of billing statements ranging from January to July 2009, September to November 2009, and all of 2013 (except July), on which Ms. Tandy has written commentary regarding what she owes versus what she is being asked to pay. (*Id.* at 14-29, 35-36, 38-46.)

All of these bills predate the decision in *Tandy II*. And they confirm that Ms. Tandy continues to believe that she is only required to pay for current consumption. But once again, this precise issue was raised and resolved in *Tandy I*:

Although, the record demonstrates that Ms. Tandy consistently made a payment of at least \$30.00 each month . . . , her actual outstanding balance remained approximately \$400 through the bill issued December 7, 2012. Despite the complainant’s allegations, nothing in the record supports the claims that CEI has failed to correctly reflect her . . . payments made on her account at 1439 Sulzer Avenue.

*Tandy I*, Order at 8. *Tandy I* already held that Ms. Tandy must pay the entire balance due; she cannot ignore past-due balances and merely pay for current consumption. Her attempt to relitigate this issue—indeed, to relitigate these very bills—is also barred.

**c. *Tandy II* settled the legality of both the September 24, 2013 and May 30, 2014 disconnections.**

Ms. Tandy also challenges the disconnection of service on two separate occasions, September 24, 2013, and May 30, 2014. Both disconnections postdate the Order in *Tandy I*. But Ms. Tandy raised both issues in *Tandy II*. In her complaint, she claimed her service was turned

off in September 2013 because she “refused to pay a company that acts like gangsters strong arming clients to pay money they don’t owe.” (*Tandy II*, Complaint at 9.) Then after her complaint, but before the Order, she also challenged the May 2014 disconnection. (*See Tandy II*, Correspondence (June 3, 2014).)

The Commission dismissed that complaint in its entirety, and specifically upheld CEI’s right to disconnect her service. “[T]he disconnection of Complainant’s electric service was a consequence of the Commission’s decision in *Tandy CEI I* and therefore, this claim is also barred.” Entry at 6. Although the Commission specifically noted the May 30, 2014 disconnection, *see id.* at 3–4, it did not question its legality in any way.

The fact that the Commission has already addressed both disconnections in prior orders conclusively settles their legality. Moreover, Ms. Tandy’s only complaint regarding these disconnections is that she did not owe the underlying balances—and this was the central issue expressly resolved in *Tandy I*. Both disconnections were warranted by the Commission’s Order in *Tandy I*, and both were before the Commission in *Tandy II*. Her attempt to relitigate these issues is also barred.

**2. Other claims raised in *Tandy III* could have been raised in *Tandy I* or *Tandy II*.**

Finally, *Tandy III* also raises numerous other claims that could have been raised in either of the prior two cases. Such claims are also barred by res judicata. *See, e.g., Grava*, 73 Ohio St.3d at 382 (1995) (“[A]n existing final judgment or decree between the parties to litigation . . . conclusive as to all claims which were *or might have been* litigated in a first lawsuit.”) (emphasis sic) (internal quotations omitted).

For example, Ms. Tandy asserts that another illegal transfer occurred in April 2011. (*See, e.g., Complaint* at 3-4 (“On April 4, 2011, my \$43.00 payment was stolen by the Illuminating

[Co], sending that \$43.00 payment to 1441 Sulzer, my rental” and claiming CEI refused to correct the error so it could create an “illegal deficit”).) The complaint also contains multiple allegations that Ms. Tandy’s PIPP status was adjusted without her consent from 2009 to 2011 (*See, e.g., id.* at 2, 6, 9 (claiming CEI converted her account from PIPP to PIPP Plus without her authorization).)

But because these claims predate *Tandy I* and pertain to the same parties and issues, res judicata still applies. These claims could have been raised; whether they were or were not is irrelevant. For example, the allegedly stolen payment occurred on April 4, 2011, more than a year before the filing of Ms. Tandy’s original complaint in July 2012. And all of these claims involve the same parties and same nucleus of facts and transactions as *Tandy I*: CEI’s accounting of billing and payments on her electric service account at 1439 Sulzer Avenue, and the validity of charges to that account.

Thus, Ms. Tandy was required to raise these issues in *Tandy I* or *Tandy II*. Her failure to do so then means that she is barred from raising them now.

**C. Ms. Tandy has been given more than a fair opportunity to litigate her case; this dispute must be permitted to come to an end.**

In *National Amusements, Inc. v. City of Springdale*, the Supreme Court of Ohio explained, “The doctrine of res judicata encourages reliance on judicial decisions, bars vexatious litigation, and frees the court to resolve other disputes. . . . Its enforcement is essential to the maintenance of social order; for, the aid of judicial tribunals would not be invoked for the vindication of rights of person and property, if . . . conclusiveness did not attend the judgments of such tribunals.” 53 Ohio St.3d 60, 62 (1990) (internal quotations omitted).

This case is a textbook example of why res judicata exists. In *Tandy I*, the Commission gave Ms. Tandy a more-than-ample opportunity to litigate her case: she filed 99 pages of

complaint material; submitted seven packets of “additional information” totaling roughly 140 pages; received a live, transcribed hearing before an attorney examiner; and presented a post-hearing brief and a *de facto* application for rehearing. She lost.

In *Tandy II*, she returned with the same grievances that had already been heard and resolved. Her claims were rightfully held barred by res judicata.

Now she has returned with the *same* claims a *third* time, replete with another filing of dozens of pages, again covered with handwritten notes, exclamations, and other commentary, again requiring pain-staking review to enable a professional response. And once again, that review has disclosed that there is nothing new in this case.

Both the Commission and the Company have limited resources. *Tandy I* and *Tandy II* have already consumed a disproportionate share of those resources. No good purpose would be served by permitting a third complaint on the same issues to go forward. Ms. Tandy has already had her day—or days—in court. *Tandy III* should be dismissed.

#### **IV. CONCLUSION**

Accordingly, CEI respectfully requests that the Commission grant CEI’s motion to dismiss with prejudice.

Dated: March 16, 2015

Respectfully submitted,

/s/ Andrew J. Campbell

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**CERTIFICATE OF SERVICE**

I hereby certify that a copy of the foregoing Motion to Dismiss was served by U.S. mail  
this 16<sup>th</sup> day of March, 2015, to the following:

Gwendolyn Tandy  
1439 Sulzer Ave.  
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/s/ Rebekah J. Glover  
\_\_\_\_\_  
One of the Attorneys for  
The Cleveland Electric Illuminating Company

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Summary: Motion to Dismiss and Memorandum in Support electronically filed by Ms. Rebekah J. Glover on behalf of The Cleveland Electric Illuminating Co.