BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO

GWENDOLYN TANDY,	)	
	)	
Complainant,	)	
	)	
v.	)	Case No. 15-396-GA-CSS
	)	
THE EAST OHIO GAS COMPANY D/B/A DOMINION EAST OHIO,	)	
	)	
Respondent.	)	

THE EAST OHIO GAS COMPANY D/B/A DOMINION EAST OHIO'S
MOTION TO DISMISS AND MEMORANDUM IN SUPPORT

In accordance with Ohio Adm. Code 4901-1-12, The East Ohio Gas Company d/b/a Dominion East Ohio (DEO 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 adjudicated on the merits—not once, but twice. Reasonable grounds do not exist to litigate these claims a third time. A Memorandum in Support is attached.

Dated: March 16, 2015

Respectfully submitted,

/s/ Andrew J. Campbell

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MEMORANDUM IN SUPPORT

I. INTRODUCTION

This is a repeat of a repeat complaint. In 2013, the Commission dismissed Gwendolyn Tandy's first complaint against DEO with prejudice after she failed to prosecute her case at any of three separate hearings, not even showing up for the latter two. Under Ohio law, this dismissal operated as an adjudication on the merits. *See Chadwick v. Barba Lou, Inc.*, 69 Ohio St.2d 222, 226 (1982). Notwithstanding that dismissal, Ms. Tandy returned with a second complaint last year, raising the same claims that had previously been resolved. The Commission rightly dismissed that second complaint. But now Ms. Tandy is back a third time and is again raising the very same claims she has raised (and forfeited) twice before.

The Commission should not allow it. The doctrine of res judicata exists for situations just like this: a complaining party who will not accept a final order. Every single claim raised in Ms. Tandy's latest complaint was either expressly resolved in the prior complaints or is the direct consequence of the dismissal of those complaints. For these reasons, as discussed in detail below, the Commission should dismiss this complaint, too.

II. PROCEDURAL HISTORY

A. *Tandy I*

In the summer of 2012, Gwendolyn Tandy filed her first complaint (*Tandy I*) against DEO, supplementing it numerous times as late as January 11, 2013. *See* Case No. 12-2103-GA-CSS. The Commission noted that at least 18 different allegations had been raised in *Tandy I*, *see Tandy I* Entry at 2–4 (Mar. 27, 2013), including the following issues:

- *Accounting of Payments:* whether DEO properly accounted for charges to and payments made on her account dating from May 2006 to the time she filed the complaint (*id*. ¶ (5)(a–c, i–j, l));

- *Summary of Account:* whether DEO properly provided her with a summary of her account (*id*. ¶ (5)(p));

- *Collection of Past-Due Balances*: whether DEO properly attempted to collect certain past-due balances (*id*. ¶ (5)(g–h)); and

- *Disconnection of utility service:* whether DEO properly disconnected her service for non-payment in May 2011 (*id*. ¶ (5)(f)).

The Commission held three separate hearings in *Tandy I*, but she failed to prosecute any of them. The first hearing was held on January 15, 2013, but her tardiness and lack of preparation required it to be rescheduled. But she then failed to appear for the rescheduled hearing on February 6, and again for the re-rescheduled hearing on February 28. *Id.* at 9. As a result, the Commission dismissed *Tandy I* for failure to prosecute—with prejudice—which effectively resolved all issues in DEO's favor. *Id.* 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.

Ms. Tandy never paid her bills in full, and on April 15, 2013, her service was disconnected and the past-due balance turned over to a collections agency. On December 9, 2013, however, Ms. Tandy availed herself of the Commission's Winter Reconnect Order, and her service was reconnected under a different account number, which continued to include the outstanding past-due amount from *Tandy I*. Since that time, DEO has continued its efforts to collect these past-due balances, and Ms. Tandy has continually failed to timely pay her bills.

B. *Tandy II*

In April 2014, Gwendolyn Tandy filed her second complaint (*Tandy II*) against DEO. *See* Case No. 14-795-GA-CSS. It covered the same issues dismissed in *Tandy I*:

- *Accounting of Payments:* whether DEO properly accounted for charges to and payments made on her account dating from May 2006 to the time she filed *Tandy I*;

- *Summary of Account:* whether DEO properly provided her with a summary of her account;

- *Disconnection of utility service:* whether DEO properly disconnected her service for non-payment in May 2011.

Tandy II, Entry at 1-2 (July 30, 2014). In addition to these issues, *Tandy II* also presented allegations regarding several actions that resulted from the dismissal of *Tandy I*: the April 15, 2013 disconnection for nonpayment; the issuance of bills in 2013 reflecting the challenged past-due balances; DEO's continued attempts to collect these past-due amounts; and the assignment of a new account number following the termination of service of her prior account.

DEO moved to dismiss on the basis of res judicata, and the Commission granted DEO's motion to dismiss on July 30, 2014. In doing so, the Commission noted that Ms. Tandy had "previously filed a complaint against Dominion which asserted identical and similar issues" in a case that had been dismissed with prejudice for lack of prosecution. Entry at 4. The Commission found that Ms. Tandy's complaints were barred under the doctrine of res judicata, dismissed the complaint and closed the matter. Entry at 6.

C. *Tandy III*

This leads to the present case. Ms. Tandy is back for a third time, and while her 155-page complaint is more than three times as long as her last one, it again covers the same issues dismissed in *Tandy I*:

- *Accounting of Payments:* She again alleges that DEO did not properly account for charges to and payments made on her account dating from May 2006 to the time she filed *Tandy I*.

    - *See, e.g.*, Complaint at 3 (claiming that "even though I paid my total current amounts in full and on time, Dominion would randomly add illegal charges"[1]); *see also, e.g., id.* at 28, 30, 94-99, 129-137 (providing

[1] Here, and throughout this document, DEO has taken liberty to correct obvious typos and grammatical errors in the complaint, to increase the readability of her allegations. It has only

handwritten commentary on series of bills from 2009, 2011 and 2012 that include hand-written notations about alleged improper accounting); *id*. at 34 (claiming "I did not have a balance only a credit"); *id*. at 70 (alleging Dominion "has been stealing from me since day 1, 2006").

- *Summary of Account:* She again alleges that DEO did not properly provide her with a summary of her account.
    - *Id.* at 29 (claiming that DEO did not properly provide her with a summary of her account explaining a 2009 transfer); *id.* at 88 (requesting an explanation for charges between April 2012 and April 2013).
- *Disconnection of utility service:* She again questions whether DEO properly disconnected her service for non-payment in May 2011. (*Id*. at 8.)

In addition to these issues, *Tandy III* also raises similar allegations to those raised in *Tandy II*, regarding actions that resulted from the dismissal of *Tandy I*: the April 15, 2013 disconnection for nonpayment; the issuance of bills from 2013 to the present reflecting the challenged past-due balances; DEO's continued attempts to collect these past-due amounts; and the assignment of a new account number following each of the two terminations of service of her prior account.

III. ARGUMENT

Res judicata bars this complaint. Most of the claims raised in *Tandy III* have already been resolved by *Tandy I*. The remaining claims, nearly all of which were also raised and dismissed in *Tandy II*, pertain to the necessary consequences of actions approved in *Tandy I.* For these reasons, the Commission should dismiss *Tandy III* in its entirety.

A. Res judicata bars relitigation of claims that were 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*

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done so when there was no reasonable doubt as to the intended meaning. DEO has noted "[sic]" where the intended meaning was not beyond doubt.

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 and internal quotations omitted).

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 II*" and the entire complaint was dismissed. *Id.* at 4.

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

Also, 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 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.

3. Res judicata applies to cases that are dismissed with prejudice under Civil Rule 41, which governs dismissals for non-prosecution.

Finally, res judicata also applies to claims that were or could have been raised in complaints dismissed for failure to prosecute.

Ohio Supreme Court case law makes this clear. Ohio Civ. R. 41 is the rule governing dismissals for failure to prosecute, and it provides that such a dismissal "operates as an adjudication upon the merits unless the court . . . otherwise specifies." *Id*. 41(B)(3). In *Chadwick v. Barba Lou, Inc.*, the Supreme Court of Ohio held, "If the dismissal [under Rule 41] is with prejudice, the dismissed action in effect has been adjudicated upon the merits, and an action based on or including the same claim may not be retried. Thus, an action dismissed with prejudice is vulnerable to the defense of *res judicata*." 69 Ohio St.2d 222, 226 (1982) (internal quotations omitted); *cf. In re Complaint of The East Ohio Gas Company*, Case No. 86-2327-GA-CSS, 1989 Ohio PUC LEXIS 350 at *4 (1989) ("[T]he dismissal of this complaint *without prejudice* means that the issues raised by this complaint may still be the subject of another complaint . . . .") (emphasis added). These authorities, which inform Commission practice, show that res judicata acts to bar cases that have been dismissed with prejudice for non-prosecution.

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. The same would hold if res judicata did not prevent relitigation of claims dismissed with prejudice for non-prosecution. Such a dismissal would *not* be with prejudice—the litigant could simply refile the same complaint and restart the litigation process. 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. The claims in *Tandy I* were litigated up to the point of the hearing, and then adjudicated on the merits against Ms. Tandy when she failed to prosecute. *Tandy II* was then dismissed because it consisted only of issues that had been dismissed in *Tandy I*, that could have been raised but were not, or that arose out of the consequences of the earlier decision. *Tandy III* involves the same parties and the same issues as in *Tandy I* and *Tandy II*. Moreover, what few issues postdate *Tandy II* either implicate the same issues raised (and dismissed) in the earlier cases or are the necessary consequences of those dismissals. Accordingly, *Tandy III* should be dismissed in its entirety.

1. The complaint predominantly concerns issues expressly resolved in *Tandy I*.

Most of *Tandy III* expressly seeks to relitigate issues resolved in *Tandy I*. Ms. Tandy alleges that DEO illegally added charges to her account from January 2009 until December 2013 (Complaint at 28, 113-114) and improperly accounted for payments dating back to 2006 (*see id.* at 3-5, 63). Specifically, Ms. Tandy alleges that DEO has failed to properly account for a June 2006 deposit (*id.* at 70-71) and November and December 2006 payments (*id.* at 4-5). She alleges that DEO did not provide her a summary of account "explaining" a transaction in early 2009. (*Id*. at 20, 29.) She alleges that DEO improperly disconnected her service for non-payment in spring 2011.[2] (*See, e.g., id.* at 1, 9, 24, 93-94, 128.)

All of these issues, however, were either expressly raised or could have been raised in *Tandy I*, and all of these claims were dismissed with prejudice. *See Tandy I*, Entry at 2–4, 9 (noting claims regarding accounting of payments, provision of account summary, and May 2011

[2] In her complaint, Ms. Tandy refers to this disconnection as happening both in April and May 2011.

disconnection). This dismissal constituted an adjudication *on the merits*, *Chadwick*, 69 Ohio St.2d at 226, and thus these claims are barred by res judicata.

2. Although certain credit actions and bills postdate *Tandy I*, the sole complaint regarding these items is that she did not owe the underlying balance—which *was* resolved by *Tandy I*.

Ms. Tandy also seems to contest her April 2013 disconnection for non-payment (Complaint at 1, 62–63), DEO's subsequent attempts to collect the outstanding amount (*id.* at 56, 69), and the assignment of a new account number (*id.* at 138–141). Her complaint materials also include several bills from 2013, 2014, and early 2015. (*See id*. at 4–9, 12–16.) DEO recognizes that these events and bills post-date the filing of *Tandy I* and some post-date *Tandy II*. But the only argument she raises against these credit actions is that she did not owe the underlying balance. And this issue—whether she was responsible for the balance of her account entering 2013—was not only the central subject matter of *Tandy I*, but her responsibility for these balances was expressly settled in *Tandy II* as a consequence of the decision in the first case.

In short, these are not new claims, but repetitions of claims raised before.

a. Her only claim regarding the post-*Tandy I* bills is that she is not responsible for balances carried forward from 2012.

Regarding the bills Ms. Tandy received starting in 2013, the narrative accompanying those bills shows that she believes she has received harassing disconnection notices since 2009 (*id*. at 57), that she is owed refunds from previous bills (*id*. at 72), and that the charges constitute "theft and fraud" (*id*. at 76).

A review of the bills themselves, however, confirms that *Tandy III* is simply reiterating the claims from *Tandy I*. The notations on all of the 2013 bills repeatedly suggest that she is paid up, cannot be charged late fees or deposits, or should not be served with disconnection notices.

And all of this confirms that Ms. Tandy is continuing to deny her responsibility for the large account balance that carried forward from 2012.

But this claim—the she was not responsible for the 2012 account balance—was the central claim in *Tandy I*. It was resolved against her on the merits then, and it is barred now.

b. Her claim regarding collection efforts again solely concerns her responsibility for the underlying balance.

Regarding DEO's collection efforts, her only complaint (besides an apparent, unsupportable, and preposterous allegation of "racus [sic] behavior" that was "retaliation for making complaints to the PUCO") is the allegedly "illegal" balance for collection. (*Id*. at 69, 84.) But as just discussed, this balance is none other than the balance challenged in *Tandy I*. This claim is now barred.

c. Her claim regarding the assignment of a new account number is also barred.

Finally, her claim regarding the assignment of a new account number after each disconnection, in addition to lacking any possible claim of prejudice, is also barred by *Tandy I*. New account numbers are assigned when service has been terminated for a certain period of time. As DEO just explained, the termination of her service was the necessary consequence of the non-payment of the balances that were effectively upheld in *Tandy I.*

In short, all of the claims in *Tandy III*, even those post-dating *Tandy I* and *Tandy II*, point back to and were settled in the earlier cases. *Tandy III* is simply an attempt to breathe life back into *Tandy I*, but it is far too late. The sole basis for her complaint regarding 2013 and 2014 bills, subsequent collection attempts, the April 2013 disconnection, and the assignment of new account numbers is that Ms. Tandy did not owe the balance because DEO had improperly accounted for charges and payments on her account dating back to May 2006. But these issues were resolved by *Tandy I*, and therefore are barred now.

d. Her only claim that postdates *Tandy II* is that she does not owe the balances being asked of her.

Finally, Ms. Tandy disputes her entire balance due as of February 2015. (*See id*. at 1.) She claims she does not owe her present account balance. (*See e.g., id*. at 32, 59–61, 112.) But once again, the balances being asked of her arise out of nonpayment of previous bills, which was the central issue raised and dismissed in *Tandy I* and again in *Tandy II*.

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 tried again in *Tandy II,* but failed to raise any new issues. Now she has returned, alleging all the same things in *Tandy I* and *Tandy II*, each of which the Commission dismissed. Both the Commission and the Company have limited resources, and the two previous cases 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 opportunity to prosecute these issues and neglected to do so. *Tandy III* should be dismissed.

IV. CONCLUSION

Accordingly, DEO respectfully requests that the Commission grant its motion to dismiss with prejudice.

Dated: March 16, 2015

Respectfully submitted,

/s/ Andrew J. Campbell

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ATTORNEYS FOR THE EAST OHIO GAS COMPANY D/B/A DOMINION EAST OHIO

CERTIFICATE OF SERVICE

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

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/s/ Rebekah J. Glover
One of the Attorneys for The East Ohio Gas Company d/b/a Dominion East Ohio

Summary: Motion to Dismiss and Memorandum in Support electronically filed by Ms. Rebekah J. Glover on behalf of The East Ohio Gas Company d/b/a Dominion East Ohio