BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO

GWENDOLYN TANDY,	)	
	)	
Complainant,	)	
	)	
v.	)	Case No. 14-686-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. Reasonable grounds do not exist to litigate or decide these claims again. A Memorandum in Support is attached.

Dated: May 7, 2014

Respectfully submitted,

/s/ Andrew J. Campbell

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MEMORANDUM IN SUPPORT

I. INTRODUCTION

This is a repeat complaint. Just over a year ago, 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. Now she is back, and she is challenging the same things: the transfer of balances, the accounting of payments, and her eligibility for energy assistance.

This complaint must be dismissed. The doctrine of res judicata exists for situations just like this: a complaining party who will not accept the tribunal's decision. Every single claim raised in Ms. Tandy's latest complaint either was directly and expressly resolved by the Commission's prior order or could have been raised but was not. For these reasons, as discussed in detail below, the Commission should dismiss this complaint.

II. PROCEDURAL HISTORY

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;
- *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 ultimately disconnected on September 24, 2013.

This leads to the present case, *Tandy II*. Ms. Tandy's 131-page complaint covers the same issues resolved in *Tandy I*:

- *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 10 ("If it wasn't for the illegal transfer I would have a credit [at 1439 Sulzer]")[1] *and id*. at 15 (referring to "illegal transfer [on] 2/17/2012").

- *Accounting of Payments:* She again alleges that CEI did not properly account for payments made on her account dating from January 2011 (and earlier) to the time she filed the complaint.

  - *See, e.g.*, *id*. at 6 (listing rows of payment dates and repeatedly asserting "not late"); *id*. at 8 ("I haven't missed a payment in four years that I didn't make up"); *id*. at 15–35 (providing commentary on series of bills all implying that CEI did not properly account for her payments).

- *Eligibility for Energy Assistance*: She again alleges that she was improperly denied energy assistance, challenging the "termination of [her] participation in PIPP" on the basis of "fraud."

  - *See, e.g.*, *id.* at 105 (denying her lack of eligibility for fuel funds based on her PIPP termination and asserting that "being accused of fraud is not the same as fraud").

In addition to these issues, *Tandy II* also raises several allegations regarding events occurring in July 2012 and earlier, such as another balance transfer (*see, e.g.*, *id.* at 2) and bills from 2009 (*see id*. at 113–24 (contesting bills dating from January through December 2009).

Finally, *Tandy II* also alleges that her September 2013 disconnection was unlawful because she did not owe the underlying balance: "My service was turned off . . . because I refused to pay a company that acts like gangsters strong arming clients to pay money they don't owe." (*Id*. at 9 (emphasis sic).)

III. ARGUMENT

Res judicata bars this complaint. All of the claims raised in *Tandy II* have already been resolved by *Tandy I*. Most of *Tandy II*'s claims were directly raised and resolved in the earlier case. And the remaining claims either could have been raised in *Tandy I* or pertain to the

[1] Here, and throughout this document, CEI has taken liberty to correct obvious typos 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.

necessary consequences of the Commission's prior decision. For these reasons, the Commission should dismiss *Tandy II* 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 II*" and the entire complaint was dismissed. *Id.* at 4. This case is the same and the Commission, like it did in *Malloy 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 II* are barred by the doctrine of *res judicata* and should be dismissed.

Applying these principles, *Tandy II* should be dismissed in its entirety. *Tandy I* was litigated and resolved by a final order. *Tandy II* involves the same parties, and every claim raised in the new complaint either was or could have been raised in the first. And the only claim that postdates *Tandy I*, regarding her September 2013 disconnection, is solely directed to whether she owed the underlying balance—which was the core issue resolved in *Tandy I*.

Accordingly, the entire complaint should be dismissed.

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

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

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*, the propriety of these balance transfers again forms the predominant theme of *Tandy II*. Ms. Tandy again alleges that there was an "illegal transfer" to her account, and she again alleges that it came from her property at 1441 Sulzer Ave. (*See, e.g.*, Complaint at 2 (noting requested investigation for account at "1441 Sulzer Ave"); *see, e.g.*, *id*. at 10 ("If it were not for the illegal transfer . . . I would have had zero past due balance"); *id*. at 12 ("If it wasn't for the . . . illegal transfer, I would have a credit at [1439 Sulzer]"); *id*. at 57 ("illegal balance" was "transferred from my rental 1441 Sulzer to my home 1439").)

She again questions her responsibility for the account, presenting an array of documents to show that she rented 1441 Sulzer Avenue when the balance on the account was incurred. (*See id*. at 37; *see also, e.g.*, *id*. at 40–92 (providing leases, bills from 1441 Sulzer, balance history, judgment entries, and general narrative regarding rental of 1441 Sulzer to Tinsley McCreary).)

She again alleges that that an illegal transfer occurred on February 17, 2012, and she repeatedly identifies the approximate amount as being $269.00. (*See, e.g.*, *id*. at 37; *see also id*. at 15 (referring to "illegal transfer [on] 2/17/2012"); *id*. at 45 ("on February 17, 2012 the Illuminating Co. decided to get rid of my credit [and] transfer a fictitious amount"); *id*. at 56 (referring to "1439 transfer 2/17/2012"); *id*. at 57 ("the $269.00 illegal balance should have

followed the tenant"); *id*. at 59 (CEI "created a fictitious transfer of $269.08").) All of these citations are merely illustrative; there are many, many more.

These balance-transfer issues are not just similar to those raised in *Tandy I*; they are identical. Res judicata bars her attempt to relitigate these issues.

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

Tandy II also alleges numerous times that CEI has failed to properly account for her payments.

Despite having been disconnected for non-payment, Ms. Tandy asserts, "I haven't missed a payment in four years." (Complaint at 8.) In support, she provides a series of bills and handwritten commentary. (*See id*. at 14–35.) This commentary discloses that Ms. Tandy believes herself to be liable only for *new* consumption, not for the *total* account balance. For example, the bill on page 14 shows a current amount due of $372.33; Ms. Tandy asserts that she only owed $33.58. Likewise, the bill on page 19 of her complaint shows a balance due of $415.92; she asserts only "$24.04 owed." Ms. Tandy plainly believes 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 is also barred.

c. *Tandy I* expressly resolved the denial of energy assistance.

Ms. Tandy also (and again) argues that she has been improperly denied energy assistance. Posing herself the question, "Did Ms. Tandy receive the Fuel Fund of $300.00," she emphatically answers, "No! I did not receive the Fuel Fund." (Complaint at 4.) She asserts that she was denied energy assistance because CEI "accused me of fraud which was untrue and the proof is attached." (*Id*.; *see also, e.g.*, *id*. at 36 ("I never committed fraud, and I didn't fill out, an energy help application for PIPP Plus."); *see id.* at 105 (denying that she is ineligible for energy assistance based on her PIPP termination: "being accused of fraud is not the same as fraud").)

But again, this issue was determined in *Tandy I*. Ms. Tandy was not just "accused" of committing fraud. A letter from the Commission is attached to her complaint at page 105, and it reveals that Ms. Tandy is "not eligible to receive the fuel funds due to the termination of your participation in PIPP Plus by the Integrity Unit of the Office of Community Assistance." And *Tandy I* recognized that "Ms. Tandy's participation in the PIPP Plus program was terminated" under the rules governing "Removal from PIPP for fraudulent enrollment." *Tandy I*, Order at 7 (citing Ohio Adm. Code 122:5-3-02(I)).

Ms. Tandy was not just "accused" of fraud; she was terminated from PIPP based on it. And to whatever extent the Commission was or is the proper agency to review this issue, it was already raised in *Tandy I*.

In sum, all three of these issues—the propriety of the balance transfer from 1441 Sulzer Ave., CEI's accounting of her payments, and her eligibility for energy assistance—were expressly resolved in *Tandy I*.

2. Other claims raised in *Tandy II* pertain to events occurring July 2012 and earlier and thus could have been raised in *Tandy I*.

Tandy II also raises numerous claims that could have been raised in *Tandy I*. 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 July 2012. (*See, e.g.*, Complaint at 2 ("I have attached evidence that's proof of an illegal $450 transfer on 7/17/12"); *id*. at 5 (referring to the "$450.00 transfer" as an "act of theft and fraud" from an account where "the tenant couldn't be located" and "there is no evidence it was in my name").) And the complaint is otherwise replete with allegations regarding billing and events predating the 2012 filing of *Tandy I*. (*See, e.g.*, *id*. at 113–24 (contesting bills dating from January through December 2009).)

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 illegal transfer occurred on July 17, 2012, which is the same date as the first installment of Ms. Tandy's original complaint, and months before she filed the last installment (in November). 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 specifically the balance transfers to that account.

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

3. Although Ms. Tandy's disconnection postdates *Tandy I*, her sole complaint is that she did not owe the underlying balance—which was resolved in *Tandy I*.

Finally, Ms. Tandy also appears to contest her September 24, 2013 disconnection for non-payment. (*See, e.g.*, Complaint at 9.) CEI recognizes that the disconnection occurred after the order in *Tandy I*. But Ms. Tandy's only complaint regarding that disconnection is that she did not owe the underlying balance—and this was the central issue resolved in *Tandy I*.

She says it most clearly on page 9: "My service was turned off . . . because I refused to pay a company that acts like gangsters strong arming clients to pay money they don't owe." (Emphasis sic.) What money does she claim not to owe? The 2012 balance transfers that were (or could have been) challenged in *Tandy I*: "If it were not for the illegal transfer . . . I would have had a zero past due balance." (*Id*. at 10.) She draws this connection between the balance transfer and her failure to pay again and again. (*See, e.g.*, *id*. at 12 ("If it wasn't for the . . . illegal transfer, I would have a credit at [1439 Sulzer]"); *id*. at 99 (admitting that "the transfer balance" from "Feb. 17, 2012" was "still affecting my balance as of Jan. 2014"); *id*. at 112 ("Would you pay . . . a company that you've been disputing an illegal transfer . . . since February of 2012. . . . Why would I pay a company that . . . [is extorting] money that I don't owe by disconnecting my services illegally?").

In short, the sole basis for her complaint regarding disconnection is that her account balance is too high because of an "illegal" transfer—and once again, *Tandy I* already resolved this issue. *See Tandy I,* Order at 7–8. Thus, even though her disconnection postdates the *Tandy I* Order, her complaint in response only raises issues that were or could have been resolved in *Tandy I*.

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.

Now she has returned, with an initial filing of 131 pages of documents, again covered with handwritten notes, exclamations, and other commentary, all requiring pain-staking review to professionally respond to. That review has disclosed that there is nothing new in this case.

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

IV. CONCLUSION

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

Dated: May 7, 2014

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 7th day of May to the following:

Gwendolyn Tandy
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/s/ Gregory L. Williams
One of the Attorneys for
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Summary: Motion to Dismiss and Memorandum in Support electronically filed by Mr. Gregory L. Williams on behalf of The Cleveland Electric Illuminating Co.