

**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA**

EILEEN WALDEN DANIELS,	:
	:
<i>Plaintiff,</i>	: CIVIL ACTION
	:
v.	: NO. 98-CV-1524
	:
PA PUBLIC UTILITY COMMISSION,	:
	:
<i>Defendant.</i>	:

ORDER

AND NOW, this 15th day of July, 1998, upon consideration of the Motion to Dismiss filed by the Pennsylvania Public Utility Commission (doc. # 3), and the plaintiff's response thereto, it is hereby **ORDERED** that the motion is **GRANTED**. The plaintiff's complaint is **DISMISSED**, and the Clerk shall mark this case **CLOSED**.

BY THE COURT:

BRUCE W. KAUFFMAN, J.

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<i>Plaintiff,</i>	: CIVIL ACTION
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v.	: NO. 98-CV-1524
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PA PUBLIC UTILITY COMMISSION,	:
	:
<i>Defendant.</i>	:

MEMORANDUM & ORDER

Bruce W. Kauffman, J.

July 15, 1998

Eileen Walden Daniels, proceeding *pro se*, brings this action against the Pennsylvania Public Utility Commission (the “Commission”). Daniels challenges a regulation of the Philadelphia Suburban Water Company (the “Water Company”) requiring certain customers to permit the installation of a device that relays a reading of the customer’s water meter to the Water Company via the customer’s telephone line. Before the Court is the Commission’s motion to dismiss the complaint on the ground, *inter alia*, that a final judgment by the Pennsylvania Commonwealth Court bars Daniels’s claims asserted here. For the reasons set forth below, the motion is granted.

I. Background

The Water Company is a public utility doing business within Pennsylvania, *see* 66 PA. CONS. STAT. § 102 (1978 & Supp. 1997), and is subject to the supervision of the Commission, 66 PA. CONS. STAT. § 501 (1979). The rules and regulations of the Water Company, filed as part of its “tariff,” govern the manner in which water service is provided to its

customers. *See* 66 PA. CONS. STAT. § 102. The tariff provisions are reviewed by the Commission, and, once approved, are legally binding on the Water Company and its customers.

See Brockway Glass Co. v. Public Utility Comm'n, 437 A.2d 1067, 1070 (1981).

Tariff Rule 27 provides that:

A meter shall be installed on each domestic and on each fire service line owned by the customer. The company reserves the right to determine the size and type of meter to be installed in the customer's property including whether such meter shall be a manual read meter or a meter that can be read remotely from outside the building being served or automatically using TV cable, telephone, or similar lines or radio signal communications. . . . [I]n the case where the meter is to be read over the telephone lines . . . the customer must provide the company with the current telephone number used or to be used for meter reading purposes at the property, including any such number that may be unlisted in which event the company shall keep that number confidential. . . .

Philadelphia Suburban Water Company Tariff Rule 27 (June 1994). [Compl., Exhibit "A".] The Water Company may terminate service to any customer who refuses to allow a Water Company representative "reasonable access to property for purposes of inspecting or for reading, caring for, removing, or installing meters, including remote and automatic meters and the associated wiring and connections to the customer's telephone line." Philadelphia Suburban Water Company Tariff 53 (June 1994). [Compl., Exhibit "B".]

In January 1995, the Water Company notified Daniels of its intent to install in her home a "teleread," an automatic meter that would relay readings to the Water Company over her telephone line. Daniels scheduled a March 18, 1995 appointment to allow the installation, but then canceled the appointment and requested proof that the teleread could not invade her privacy. In response, the Commission provided her with "information on how the system works and

answers to 11 common questions concerning its operation or installation [and] numerous publications and letters which assure that the teleread system cannot, and will not, transmit voice communications, and therefore, prevents the teleread device from becoming any type of a surveillance device.” [Compl., Exhibit “D”.] Daniels informed the Commission that she “remained skeptical because of the lack of concrete proof that the teleread could [not] be used as a surveillance device.” [Compl., Exhibit “D”.]

Sometime shortly thereafter, the Water Company threatened to terminate Daniels’s water service if she refused to allow the installation, and advised her of her right to file a complaint challenging its actions. In an Informal Complaint dated March 22, 1995, Daniels advised the Commission and a representative of the Water Company that “based on [her] reading of the 14th Amendment to the Constitution,” she did not think that the Commission had the authority to require the installation of a device that would use her private telephone line. [Compl., Exhibit “C”.] After investigating Daniels’s Informal Complaint, an investigator from the Commission’s Bureau of Consumer Services determined that the teleread device “complies with the safeguards set in the National Fuel Gas Distribution Corp. decision,” and thus “adequately addresses an invasion of privacy contention.”¹ [Compl., Exhibit “D”.] On May 4,

¹ In *Re National Fuel Gas Distribution Corp.*, P-860135, 66 Pa. P.U.C. 507 (Pa. Pub. Utility Comm’n Mar. 17, 1988), the Commission ordered that when implementing a device that may use a customer’s telephone line (an “RMD”), utilities must ensure:

1. that an RMD relinquish control of the customer's telephone line when other customer equipment is activated;
2. that no RMD capable of transmitting voice communications is allowed unless specific permission is obtained from this Commission prior to installation; and
3. that the customer should be given reasonable notice (at least 72 hours) of the proposed RMD installation prior to the actual

1995, Daniels's Informal Complaint was dismissed.

On June 12, 1995, Daniels filed a Formal Complaint with the Commission questioning the "authority of the Public Utility Commission (PUC) to authorize Philadelphia Suburban Water Company (PSW) to commandeer [her] private telephone line for water meter linkage," and alleging that the teleread violated her rights under the United States Constitution. [Compl., Exhibit "E".] The Formal Complaint was referred to the Water Company and then consolidated with six other complaints that similarly objected to installation of the teleread.²

On July 6, 1995, the Water Company moved to dismiss the consolidated complaints. An Administrative Law Judge notified Daniels that the motion to dismiss her Formal Complaint would be discussed at a prehearing conference scheduled to occur on July 28, 1995. Daniels did not object to the scheduled conference, and in a letter dated July 27, 1995, she responded to the Water Company's motion to dismiss. As scheduled, a prehearing conference was held in the Philadelphia State Office Building before the Administrative Law Judge. Daniels

installation.

4. that a utility implementing a RMD program may include in its tariff the requisite notice provision and a rule whereby the customer must permit the utility access and space for the purpose of installing and utilizing an automated meter reading device.

Re National Fuel Gas Distribution Corp., P-860135, 66 Pa. P.U.C. 507 (Pa. Pub. Utility Comm'n Mar. 17, 1988).

² See 55 PA. CODE § 5.81 ("Consolidation. (a) The Commission or presiding officer, with or without motion, may order proceedings involving a common question of law or fact to be consolidated. The Commission or presiding officer may make orders concerning the conduct of the proceeding as may avoid unnecessary costs or delay.").

failed to appear or otherwise participate.³ On December 5, 1995, the Administrative Law Judge issued an Initial Decision dismissing Daniels's Formal Complaint. *Daniels v. Philadelphia Suburban Water Co.*, F-00268958 (Pa. Public Utility Commission, Initial Decision, filed Dec. 5, 1995).⁴

On December 7, 1995, Daniels filed several exceptions to the Initial Decision. On March 28, 1996, in an Opinion and Order signed by Commission Secretary John G. Alford, the Commission denied Daniels's exceptions, adopted the Administrative Law Judge's decision, and ordered that Daniels's Formal Complaint against the Water Company be dismissed with prejudice. *Daniels v. Philadelphia Suburban Water Co.*, F-00268958 (Pa. Public Utility

³ Complainants who so requested were permitted to participate by telephone or to have matters pertaining to their claims discussed at a later date. Daniels made no such request.

⁴ In the Initial Decision, the Administrative Law Judge determined that the mandatory installation of automated meter reading devices is a reasonable condition of service, that the installation does not constitute an invasion of privacy, and that the Water Company's tariff permits the installation. The Judge also found that although Daniels provided a written response to the Water Company's motion to dismiss, she "chose not to take advantage of the opportunity to respond orally," and thereby "waived her opportunity to participate pursuant to 66 Pa. C.S. §332(f) and 52 Pa. Code §5.246." *Daniels v. Philadelphia Suburban Water Co.*, F-00268958, at 19 (Pa. Public Utility Commission, filed Dec. 5, 1995).

Title 66 PA. CONS. STAT. § 332(f) provides that:

Any party who shall fail to be represented at a scheduled conference or hearing after being duly notified thereof, shall be deemed to have waived the opportunity to participate in such conference or hearing, and shall not be permitted thereafter to reopen the disposition of any matter accomplished thereat, . . . unless the presiding officer shall determine that failure to be represented was unavoidable and that the interests of the other parties and the public would not be prejudiced by permitting such reopening

66 PA. CONS. STAT. § 332(f) (1979); *see also* 52 PA. CODE §§ 5.222(d), 5.245(a).

Commission, Opinion and Order, entered April 1, 1996).

Following an appeal to the Pennsylvania Commonwealth Court, the court determined that because she failed to raise her claims during the administrative proceedings, Daniels had waived her right to have them heard on appeal. *Daniels v. Philadelphia Public Utility Comm'n.*, No. 1167 C.D. 1996 (Pa. Cmmw. filed January 23, 1997); *see* PA. R. APP. P. 1551(a). The Pennsylvania Supreme Court denied Daniels's Application for Allocatur. *Daniels v. Philadelphia Public Utility Comm'n.*, No. 0269 M.D. Allocatur Docket 1997 (Pa. filed December 31, 1997).

Daniels instituted this action on March 23, 1998, alleging that installation of the teleread violates her federal constitutional rights under the Contracts Clause of Article 1, the Due Process Clause of the Fourteenth Amendment, and the Takings Clause of the Fifth Amendment. U.S. CONST. art. I, § 10, amends. V, XIV. She seeks permanent injunctive relief and costs.

II. Standard

The Commission argues, *inter alia*, that Daniels's claims are barred by application of res judicata and should be dismissed pursuant to FED. R. CIV. P. 12(b)(6).⁵ In deciding whether to dismiss a complaint pursuant to FED. R. CIV. P. 12(b)(6) on the ground that the claims raised therein are barred by the res judicata effect of an earlier lawsuit, the Court considers only the complaint, including any exhibits attached thereto, and matters of public record. *See Oshiver v. Levin, Fishbein, Sedran & Berman*, 38 F.3d 1380, 1384 n.2 (3d Cir. 1994); *Pension Benefit*

⁵ “The rule in this circuit is that affirmative defenses, such as the statute of limitations and res judicata, can be asserted on a motion to dismiss.” *Adams v. Gould Inc.*, 739 F.2d 858, 870 n.14 (3d Cir. 1984) (citing *Williams v. Murdoch*, 330 F.2d 745, 749 (3d Cir.1964)).

Guar. Corp., 998 F.2d 1192, 1196 (3d Cir. 1993) (citing 5A CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 1357, at 299 (2d ed. 1990)); *see also Iacaponi v. New Amsterdam Cas. Co.*, 258 F.Supp. 880 (W.D. Pa. 1966) (dismissing action on basis of res judicata after taking judicial notice of state court proceedings), *aff'd*, 379 F.2d 311, 312 (3d Cir. 1967).

III. Discussion

The Full Faith and Credit Act provides that the “judicial proceedings” of any State “shall have the same full faith and credit in every court within the United States . . . as they have by law or usage in the courts of such State . . . from which they are taken.” 28 U.S.C. § 1783 (1994). “The Act thus directs all courts to treat a state court judgment with the same respect that it would receive in the courts of the rendering state.” *Matsushita Elec. Indus. Co. v. Epstein*, 516 U.S. 367, 373 (1996). Accordingly, “[t]o fulfill their § 1738 obligation, federal courts must look to relevant state (here Pennsylvania) res judicata and estoppel law in determining the effect of state court judgments.” *Sullivan v. City of Pittsburgh*, 811 F.2d 171, 181 (3d Cir. 1987); *see also Kremer v. Chemical Constr. Corp.*, 456 U.S. 461, 481-82 (1982) (“It has long been established that § 1738 . . . commands a federal court to accept the rules chosen by the State from which the judgment is taken.”).⁶

⁶ “Although different preclusion rules apply in some circumstances to *unreviewed* findings of administrative proceedings, . . . section 1738 by its own terms applies when administrative findings have been reviewed by state courts of general jurisdiction.” *Clements v. Airport Auth. of Washoe County*, 69 F.3d 321, 326-27 (9th Cir. 1995); *see, e.g., Ivy Club v. Edwards*, 943 F.2d 270, 281 (3d Cir. 1991) (finding that § 1738 did not bar federal court’s adjudication of plaintiff’s federal claim where New Jersey state court appeared to have acquiesced to plaintiff’s express reservation of its right to litigate its federal claims in federal court, and plaintiff’s constitutional claims therefore had “not been adjudicated other than at the state administrative level”); *see also Swineford v. Snyder County Pa.*, 15 F.3d 1258, 1266 (3d

Under Pennsylvania law, the doctrine of res judicata provides that “a final valid judgment upon the merits by a court of competent jurisdiction bars any future suit between the same parties or their privies, on the same cause of action.” *Delaware River Port Auth. v. Pennsylvania Pub. Utility Comm’n*, 182 A.2d 682, 685 (Pa. 1962); see *Dempsey v. Cessna Aircraft Co.*, 653 A.2d 679, 680-81 (Pa. Super.), *appeal denied*, 663 A.2d 684 (1995). “A judgment is deemed final for purposes of res judicata or collateral estoppel unless or until it is reversed on appeal.” *Shaffer v. Smith*, 673 A.2d 872, 874 (Pa. 1996). When the final disposition of an action is invoked as a bar to a subsequent action, Pennsylvania courts apply the doctrine of res judicata only if the two actions share an identity of the: (1) thing sued upon or for; (2) cause of action; (3) persons and parties to the action; and (4) capacity of the parties to sue or be sued. *Official Court Reporters of Court of Common Pleas of Phila. County v. Pennsylvania Labor Relations Bd.*, 467 A.2d 311, 319 (Pa. 1983). “The test of the identity of causes of action for the purpose of determining the question of res judicata is the identity of the facts essential to their maintenance.” *Long v. Stout*, 157 A. 607, 609 (Pa. 1931); see also *Philadelphia Fraternal Order of Correctional Officers v. Rendell*, 701 A.2d 600, 607 (Pa. Cmmw. 1997) (“Causes of action may be considered identical when, in both the current and prior proceedings, the subject matter and the ultimate issues are the same.”).

The pleadings and public record show that the Commonwealth Court’s judgment involved the same parties, thing sued for, cause of action, and capacity of the parties that are involved in the action presently before this Court. Daniels nevertheless argues that res judicata

Cir. 1994) (“Traditionally, the Supreme Court has favored application of common-law preclusion doctrines ‘to those determinations of administrative bodies that have attained finality.’” (quoting *Astoria Fed. Sav. & Loan Ass’n v. Solimino*, 501 U.S. 104 (1991))).

does not bar her claims because “[t]he complaint as presented to Defendant for adjudication was not litigated. Neither the issue of nonconsensual access and use of personal property recognizing U.S. Constitutional Amendment 14, nor Defendant’s authority to so mandate and deny due process were considered in either decision by Defendant or the State Court.” [Daniels Reply to Mot. to Dismiss at 3.]

“Res judicata applies not only to claims actually litigated, but also to claims which could have been litigated during the first proceeding” *Balent v. City of Wilkes-Barre*, 669 A.2d 309, 313 (Pa. 1995) (citing *Allen v. McCurry*, 449 U.S. 90, 94 (1980)). Had she not waived her right to pursue her constitutional claims, Daniels could have litigated those claims before the Administrative Law Judge and the Commonwealth Court. The Court therefore concludes that under the doctrine of res judicata, the final judgment by the Pennsylvania Commonwealth Court bars Daniels’s claims in this lawsuit.

An appropriate Order accompanies this memorandum.