ORIGINAL



**BEFORE**
**THE SUPREME COURT OF OHIO**

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| In the Matter of the Complaint of Cameron Creek Apartments, | ) | Case No. 2011-1758 |
| Appellee, | ) | |
| v. | ) | Appeal from the Public Utilities Commission of Ohio, Case No. 08-1091-GA-CSS |
| Columbia Gas of Ohio, Inc., | ) | |
| Appellant. | ) | |

# MERIT BRIEF OF APPELLANT COLUMBIA GAS OF OHIO, INC.

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## INTRODUCTION

The approved tariff of Appellant Columbia Gas of Ohio, Inc. ("Columbia") states that customers must install the venting for their gas-burning appliances "with materials and workmanship that meet the reasonable requirements of the Company." Where supplying gas service would create a safety hazard, Columbia's tariff authorizes Columbia to discontinue service until the hazard is remediated per Columbia's "reasonable requirements." For over twenty years, Columbia has looked to the National Fuel Gas Code ("NFG Code") for its "reasonable requirements." The issue in this case is whether Columbia may continue to safeguard the health of its customers by requiring that gas-burning appliances in existing structures be installed and vented in compliance with the NFG Code.

The Public Utilities Commission of Ohio ("Commission") held below that "the number one priority when it comes to the provision of natural gas service is that all possible measures are taken to ensure the health and safety of the public." (Appx. 18.) Yet, the Commission held that, in existing structures like the apartment complex run by Intervening Appellee Cameron Creek Apartments ("Cameron Creek"), Columbia may not always insist on compliance with the NFG Code. The Commission's orders endanger public safety. Moreover, the Commission failed to lay out a clear, workable alternative that will allow Columbia to ensure its customers' safety. Instead, the Commission's rulings replace Columbia's existing bright-line policy with an ambiguous and subjective "reasonable margin of safety" standard that would endanger customers and hamper Columbia's ability to provide safe natural gas service. And, the Commission ignored the plain language of the NFG Code and plain logic in its rush to excuse Cameron Creek's NFG Code violations. For these reasons, as further explained below, Columbia respectfully asks this Court to reverse the Commission's orders in this matter.

## STATEMENT OF FACTS

### A. Columbia's Service To The Cameron Creek Apartments

Cameron Creek is a 240-unit apartment complex in Galloway, Ohio, on the southwest side of Columbus. Columbia supplies gas service to Cameron Creek's residents. (Supp. 150, Tr. Vol. I 168.) None of those residents were parties to the Commission proceeding, and Cameron Creek did not represent them at that proceeding. Columbia also supplies gas service to Cameron Creek's owner for any vacant units at the complex and for the complex's clubhouse/rental office. (Supp. 149-150, Tr. Vol. I 167-168.)

The apartment buildings at Cameron Creek are two stories tall. Each apartment is a flat. (Supp. 11.) In the one- and two-bedroom units, the units' gas water heaters and furnaces were installed in closets in the bathrooms. The side walls of these closets have two air grilles in them (one high and one low) that open up to the units' main living areas. In the three-bedroom units, the gas furnaces and water heaters were installed in utility closets in internal hallways. Those utility closet doors also have two air grilles in them. In each apartment building, the gas appliances in the first-story apartments share gas vents with the apartments above them. (Supp. 11-15.)

The plans for Cameron Creek were approved by the City of Columbus ("the City") in January 1997. (Supp. 160, Tr. Vol. II 327.) The building permit for Cameron Creek was issued in 1997, and the final occupancy permit was issued in 1998. (*Id.*) And, when Cameron Creek's owners installed the gas water heaters and furnaces at Cameron Creek, those installations complied with the City's then-current building code.

### B. The Requirements Of The National Fuel Gas Code

The installations did not, however, comply with the then-current edition of the NFG Code, which "is a model code written by a private organization" that sets out "recommended

general standards for installations and operations of gas piping and appliances." (Supp. 60.) Columbia has continuously used the NFG Code as its reference standard for evaluating the safety of customer house lines and appliance installation and venting since 1990. (Supp. 51.) Columbia's service technicians apply the NFG Code every time they establish or re-establish gas service. (Supp. 2.) Generally speaking, Columbia applies whatever edition of the NFG Code is effective at the time of inspection, although Columbia will apply the edition that was current when the appliances were installed if it is aware that the requirements have changed and those changes were not meant to be retroactive. (Supp. 52.)

The 1996 NFG Code was the edition of the Code in effect when Cameron Creek was constructed. (*See* Supp. 16.) That edition contained the following guidelines for installation of water heaters in bathrooms:

> Water heaters shall not be installed in bathrooms, bedrooms, or any occupied rooms normally kept closed. * * *
>
> *Exception No. 1: Direct-vent water heaters.*
>
> *Exception No. 2: Water heaters shall be permitted to be installed in a closet located in a bathroom, bedroom, or any occupied room normally kept closed where the closet is used exclusively for a water heater, where the enclosed space has a weather-stripped solid door with a self-closing device, and where all combustion air is obtained from the outdoors.*

(Supp. 18, 41.) Columbia witness Stephen E. Erlenbach, a professional engineer with experience in both designing and investigating HVAC systems and in investigating carbon monoxide poisonings (Supp. 8-9), explained that the purpose of these restrictions was to protect persons in bathrooms, bedrooms, or other occupied rooms from carbon monoxide poisoning:

> The purpose of this requirement is to protect occupants in particularly vulnerable situations, such as those who are sleeping or taking a bath, from being affected by any spillage of combustion products, including carbon monoxide, from the water heater draft hood opening. In a small, closed room, the concentration of

> carbon monoxide can rise more quickly than it would in a larger, unenclosed space. * * * Even if the residence had a carbon monoxide alarm outside its bathrooms and that alarm was powered on and functional, carbon monoxide could rise to hazardous levels in a closed bathroom before carbon monoxide levels had risen high enough in the remainder of the residence to set off an alarm.

(Supp. 22.)

The 1996 NFG Code also contained the following guidelines for using common vents for gas appliances installed on different stories:

> A single or common gas vent shall be permitted in multistory installations to vent Category I gas utilization equipment located on more than one floor level * * *.
>
> All gas utilization equipment connected to the common vent shall be located in rooms separated from habitable space. Each of these rooms shall have provisions for an adequate supply of combustion, ventilation, and dilution air that is not supplied from habitable space.

(Supp. 16-17, 42.) The same requirements had been in place since at least the 1992 edition of the NFG Code. (*See* Supp. 17, 31.) The purpose of these restrictions, as explained by Mr. Erlenbach, was to ensure that blockages of a common vent would not cause potentially deadly combustion products (such as carbon monoxide) to enter living spaces on one or both floors connected to the vent:

> If the common vent becomes blocked at any level (or if the outlet is blocked), products of combustion from any appliance operating below the blockage will spill through the upper draft hood opening on the water heater rather than out through the vent outlet above the roof. In the manner the appliances are situated currently, once the products of combustion (including carbon monoxide) spill from the water heater draft hood, they are free to enter the habitable space. Moreover, depending on the location of the blockage, the products of combustion could enter the habitable space of both the top and the bottom apartment units.

(Supp. 21-22.)

### C. Cameron Creek's Noncompliance With The National Fuel Gas Code and the Dangers Caused Thereby

The gas appliance installations at Cameron Creek do not comply with the requirements of the NFG Code. (Supp. 16-19.) The water heaters in the one- and two-bedroom units are not direct-vent water heaters and are in bathroom closets whose doors are not weather-stripped or self-closing. (Supp. 18-19.) Moreover, the water heaters and furnaces, which are "Category 1 equipment" for purposes of the NFG Code, share common vents with appliances on other floors, but are not in rooms separated from habitable space; instead, they are in closets with air grilles that open up to the units' main living spaces. (Supp. 17.) ("Category I" equipment is equipment that operates with a non-positive vent static pressure and with a vent gas temperature that avoids excessive condensate production in the vent. *Id.*) Those appliances obtain combustion, ventilation, and dilution air from inside the apartments. (*Id.*)

Failure to perform maintenance on a gas appliance can cause incomplete combustion, which can produce carbon monoxide. (Supp. 20, 24.) Exposure to carbon monoxide initially causes flu-like symptoms, but further exposure can cause decreased blood pressure, loss of muscular control, convulsions, and death. (Supp. 21.) Compliance with the NFG Code provisions at issue here would prevent the residents of Cameron Creek from being exposed to carbon monoxide when the complex's gas appliances malfunction, by insuring that any carbon monoxide is vented to the outdoors, rather than into the apartments. (*See* Supp. 25.) Because Cameron Creek did not install its gas appliances in compliance with the NFG Code, any carbon monoxide produced by the water heaters and gas furnaces at Cameron Creek would enter the habitable space of those apartments through the closets' air grilles and, for the appliances installed in bathroom closets, potentially through the undercut at the bottom of the closet doors. (Supp. 21-22, 26.)

## D. Columbia's Efforts To Achieve Compliance By Cameron Creek

In 1997 or 1998, Columbia did not know that Cameron Creek's gas appliances violated the NFG Code, because those appliances were not yet installed when Columbia first established gas service to the property. At the time Columbia established service at Cameron Creek, Columbia's procedure was to establish gas service to whatever facilities were installed when gas service was established. If gas appliances had not yet been installed, Columbia would simply install the service line and the meter set and establish gas service up to the back side of the meter. (Supp. 145, Tr. Vol. I 78.)

In 2006 and 2007, Columbia service technicians tagged (*i.e.*, shut off the supply of gas to) appliances at several Cameron Creek units for violations of the NFG Code. (*See generally* Supp. 77-133.) In January of 2008, Columbia informed Cameron Creek that Columbia had been "made aware that combustion ventilation air is being utilized from spaces adjacent to the water heating and gas furnace closet" in Cameron Creek's apartments in violation of "sections 7.6.4 and 6.30.1 [of] the 1996 NFGC * * * ." (Supp. 136.) Columbia told Cameron Creek that it would have to remediate these violations "as soon as possible to ensure tenant safety." (*Id.*) Several months of additional correspondence and meetings between the parties' representatives followed, but the parties were unable to resolve their dispute.

Ultimately, in August 2008, Columbia's counsel informed Cameron Creek's counsel that Columbia would disconnect gas service to Cameron Creek if Cameron Creek did not "produce a complete remediation plan for Columbia's review" within a month and bring Cameron Creek's units into compliance with the NFG Code "before colder weather arrives." (Supp. 137.) When Cameron Creek did not produce a remediation plan, Columbia informed Cameron Creek's residents that Columbia would have to disconnect their gas service in mid-October. Columbia assured Cameron Creek's residents that "[s]ervice will be restored to each apartment as soon as

the necessary modifications are made so that [NFG Code] requirements are met and safety is ensured." (Supp. 138.) Two days later, Cameron Creek filed a complaint at the Public Utilities Commission of Ohio ("PUCO" or "Commission"), requesting, *inter alia*, that the Commission temporarily and permanently enjoin Columbia from terminating gas service to Cameron Creek or communicating with residents about terminating the complex's gas service.

On October 8, 2008, the Commission issued an Entry staying disconnection of gas service at Cameron Creek during the pendency of the case, except in the case of a "presently or imminently hazardous situation, such as a natural gas leak or a dangerous build-up of carbon monoxide[.]" Entry at 3 (Oct. 8, 2008). The Commission modified and expanded the stay on April 24, 2009. After extensive written discovery and several depositions, a hearing was held in this matter from July 15 to July 17, 2009, and post-hearing briefing was completed on September 14, 2009.

### E. The Commission's Opinion and Order

More than a year and a half later, the Commission issued the Opinion and Order at issue in this appeal. The Commission noted that "[b]oth parties in this case agree that the NFG Code is an acknowledged compilation of standards[.]" (Appx. 18.) The Commission thus held that "Columbia has not violated its tariff by applying the NFG Code, and its practice of referencing and enforcing of the most recent NFG Code is just and reasonable." (Appx. 19.) The Commission held, nonetheless, that Columbia could not require Cameron Creek to come into compliance with the NFG Code. (Appx. 23.)

The Commission held, first, that Cameron Creek's violations of the NFG Code were not evidence of a "verifiable hazardous condition" – a term the Commission apparently invented – but merely indicated "the potential for a hazardous situation[.]" (Appx. 19.) The Commission held, moreover, that evidence of carbon monoxide exposure and "two reports of alleged CO

difficulties" at Cameron Creek in the prior decade also were not evidence of an "actual serious" carbon monoxide hazard, because "those situations resulted because the equipment needed maintenance, repair, and/or replacement" and "were typical for appliances of this age and usage pattern." (Appx. 19-20.) Next, the Commission held that when "Cameron Creek modified its building plans [before construction] to add a 4-inch fresh air supply duct" that brought more combustion air into the buildings, and the City of Columbus approved those plans, that addition constituted a "specially engineered solution * * * approved by the appropriate jurisdictional authority," which the Commission held was an "alternative compliance method[ ] allowed in the 1996 NFG Code." (Appx. 21.) Lastly, the Commission held that, "where older structures cannot demonstrate prescriptive NFG [Code] compliance or the existence of a specially engineered solution with an appropriate professional engineering verification," Columbia may "require retrofits [as] necessary to ensure a reasonable margin of safety[,]" although "Columbia should balance any requirements for extensive retrofits with a rule of reason." (Appx. 21, 22.) In this instance, the Commission held that Cameron Creek's installation of hard-wired CO detectors after Columbia first contacted Cameron Creek about its NFG Code violations (*see* Supp. 153, Tr. Vol. I 174); compliance with the City of Columbus's building code at the time of construction; and demonstration that its buildings had "nontight construction" and "significant outside air infiltration" were proof that Cameron Creek had "provid[ed] a reasonable margin of safety for its occupants." (Appx. 21.)

The Commission acknowledged, however, that Cameron Creek could not be kept "safe and hazard-free" unless Cameron Creek's management and maintenance staff conducted "continued and diligent maintenance and repair of the gas appliances, ventilation system, and CO detectors" and replaced "the appliances when necessary." (*Id.*) The Commission held that

where "prescriptive compliance with the NFG Code * * * is economically or practically unreasonable, * * * a program of maintenance and monitoring should be enforced, subject to review by the Commission's Staff[.]" (*Id.*)

Columbia filed an application for rehearing on July 22, 2011, warning that the Commission's ruling would endanger Cameron Creek's residents and Columbia customers throughout Ohio. (*See* Appx. 26-48.) The application explained that the addition of four-inch fresh air supply ducts to the building plans for Cameron Creek could not, for multiple reasons, have been a "specially engineered solution" approved by the "authority having jurisdiction." First, the City of Columbus was not acting under the NFG Code because it did not apply that Code in 1996. Second, the section of the NFG Code on which the Commission relied allows for special solutions only to ensure an adequate supply of combustion, ventilation, and dilution air to gas-burning appliances; Cameron Creek's violations had nothing to do with the *quantity* of air being supplied *to* Cameron Creek's furnaces and water heaters. Columbia also explained that relying on Cameron Creek's maintenance staff to keep the complex's residents safe was bound to fail, as the Commission had no statutory authority to exercise on-going oversight over Cameron Creek's maintenance activities and Cameron Creek had historically failed to diligently maintain its gas appliances. Next, Columbia explained why Cameron Creek's "nontight" construction and new carbon monoxide detectors were not sufficient to keep the complex's residents safe.

Columbia also explained that the Commission's Opinion and Order had left Columbia with an unclear and subjective standard that could not practically be enforced for Columbia's other customers. The Commission's Opinion and Order did not clearly explain when Columbia may require a customer to remediate a NFG Code violation; what it may require the customer to do; whether and how the customer's past maintenance and repair practices should factor into that

determination; what the customer's burden of proof is; how much time a customer must be given to provide the necessary evidence; and whether Columbia must provide service while the customer is gathering that evidence. Columbia further explained that the Commission's new standard would impose significant recordkeeping requirements on Columbia. Columbia would now be required to document not just customers' NFG Code violations, but also Columbia's conclusions as to how "hazardous" each violation was, what Columbia concluded should be done to correct it, and any evidence provided by the customer to support a contrary remediation plan. Columbia would also be required to make all of this information instantaneously available to its service technicians, for their use when visiting customer sites.

On August 17, 2011, however, the Commission denied Columbia's application for rehearing. (Appx. 59.) The Commission asserted that Columbia had failed to support its argument that it was the "authority having jurisdiction" to approve specially engineered solutions, for purposes of the 1996 NFG Code (Appx. 53), and otherwise reiterated its prior findings. Columbia now appeals the Commission's June 22, 2011 Opinion and Order and August 17, 2011 Entry on Rehearing.

## LAW AND ARGUMENT

### A. Standard of Review

The Ohio Revised Code states that "any person, firm, or corporation" may bring a complaint in writing before the Public Utilities Commission of Ohio ("Commission") asserting that "any * * * practice affecting or relating to any service furnished by the public utility, or in connection with such service, is, or will be, in any respect unreasonable [or] unjust[.]" R.C. 4905.26. "[I]f it appears that reasonable grounds for complaint are stated, the commission shall fix a time for hearing[.]" *Id.* If the Commission concludes, after hearing, "that the * * * practices of any public utility with respect to its public service are unjust or unreasonable, * * *

the commission shall determine the * * * practices * * * to be * * * observed * * * and shall fix them and prescribe them by order[.]" R.C. 4905.37.

However, the Revised Code prohibits the Commission from "mak[ing] any order requiring the performance of any act which is unjust, unreasonable, or in violation of any law of this state or the United States." *Id.* Ohio law further directs this Court to reverse, vacate, or modify any final order of the Commission that is "unlawful or unreasonable." R.C. 4903.13.

For questions of fact, the Court may "reverse or modify a PUCO decision" when the appellant demonstrates that the Commission's "decision is against the manifest weight of the evidence or is clearly unsupported by the record." *Martin Marietta Magnesia Specialties, L.L.C. v. Pub. Util. Comm.*, 129 Ohio St.3d 485, 2011-Ohio-4189, 954 N.E.2d 104, ¶ 20, *citing Monongahela Power Co. v. Pub. Util. Comm.*, 104 Ohio St.3d 571, 2004-Ohio-6896, 820 N.E.2d 921, ¶ 29. If the Commission's ruling lacks record support, it "is an abuse of discretion and reversible error." *In re Application of Columbus S. Power Co.,* 128 Ohio St.3d 512, 2011-Ohio-1788, ¶29. For questions of law, this Court has "complete and independent power of review * * *." *Ohio Edison Co. v. Pub. Util. Comm.*, 78 Ohio St.3d 466, 469, 678 N.E.2d 922 (1997). (Citations omitted.)

The Commission's Opinion and Order (Appx. 1) and Entry on Rehearing (Appx. 49) in this matter fail to meet the standards of R.C. 4905.37 or 4903.13. The Commission's orders will endanger public safety. The Commission's conclusion that Cameron Creek complied with the NFG Code is contradicted by the plain language of the NFG Code, the uncontroverted intentions of the NFG Code's drafters, and the actual history of Cameron Creek's building plan approval. The Commission's conclusion that Cameron Creek's drafty construction and installation of hard-wired carbon monoxide detectors sufficiently safeguards the complex's residents is against the

manifest weight of the evidence and defies logic. Moreover, the Commission's orders replace Columbia's safety standard for existing structures – a bright-line standard based on a national model safety code – with an ambiguous and poorly defined "reasonable safety margin" standard that fails to describe with sufficient precision the practices that Columbia must instead observe. For each of these reasons, as further explained below, the Court should reverse the Commission's orders.

## B. The Commission's Orders Endanger Public Safety

### 1. Proposition of Law No. I:

**The Commission's Orders are unlawful and unreasonable because their conclusion that a violation of the National Fuel Gas Code's safety requirements is not a hazardous condition is unsupported by the evidence.**

The Commission's primary error in this case lies in its conclusion that a violation of the NFG Code is not a "verifiable hazardous condition" or an "actual serious CO hazard." (Appx. 19; Appx. 20.) This conclusion is contradicted by the Commission's conclusion that the NFG Code is "an acknowledged compilation of standards" "that is in keeping with the most current safety standards enforced by the gas industry." (Appx. 18.) It is further contradicted by the Commission's own acknowledgement that two carbon-monoxide incidents occurred in the year before Cameron Creek filed its Complaint because Cameron Creek failed to proactively maintain, repair, or replace its residents' aging gas appliances. (*See* Appx. at 12, 19-20.) The conclusion that these incidents are not evidence of a "verifiable safety hazard" completely miscomprehends the purposes that the relevant NFG Code provisions were meant to serve.

The first incident occurred in September 2007 at the Cameron Creek apartment at 5587 Red Carnation Drive. Columbia service technician Jeffrey Prachar checked for carbon monoxide and obtained a reading of 42 parts per million. (Supp. 175-176, Tr. Vol. III 554-555.) (Any amount of carbon monoxide in the ambient air in a residence is a concern. (Supp. 14.)) The

renter at that address told Mr. Prachar that her daughter had gone to the hospital and that the hospital said the daughter had carbon monoxide in her system. (Supp. 173-183, Tr. Vol. III 552-562.) That same day, a company called Starner's Heating and Cooling came out to the apartment and found that the hot water tank was "not drafting properly" and that "heat [was] rolling out [the] front of [the] tank." (Supp. 134.) Columbia witness Mr. Erlenbach testified that "flame roll-out" from the front of a hot water tank "can produce carbon monoxide[.]" (Supp. 26.) Cameron Creek's witness concluded that the water heater had "likely failed due to age and use * * *." (Supp. 61.)

The second incident occurred in June 2008 at the Cameron Creek apartment at 5744 Red Carnation Drive. When Columbia service technician Sean Loudermilk arrived at the location, the unit's carbon monoxide detector was sounding an alarm. Mr. Loudermilk obtained a carbon monoxide reading over 20 parts per million in the living room of the unit. (Supp. 24.) After further testing, he turned off the gas supply to the water heater and instructed the resident to contact Cameron Creek's maintenance staff. (*Id.*) Two days later, Rescue Rooter came out to the unit to examine the appliances. The Rescue Rooter technician found a "down draft" on the hot water heater, which means that the air was descending through the flue and into the unit rather than rising up and venting outside. (Supp. 135.) The invoice also said that the thermocouple on the water heater needed replacing and that the burner assembly, pilot assembly, and the inside of the flue passage were "very dirty." (*Id.*)

The Commission concluded that these carbon monoxide incidents did not demonstrate a "verifiable hazardous condition" for two reasons. Both of those reasons, however, are contrary to the manifest weight of the evidence.

First, the Commission adopted Cameron Creek's argument that these incidents did not "suggest an inherent, overall problem with the installation [or] configuration * * * of the gas appliances." (Appx. 20.) Instead, the Commission agreed "those situations resulted because the equipment needed maintenance, repair, and/or replacement." (Appx. 19-20.) Yet, the fact that Cameron Creek's residents can be exposed to potentially deadly carbon monoxide if their gas appliances malfunction *is the very reason Cameron Creek's NFG Code violations are hazardous*, and why remediation of those violations is so important. The purpose of NFG Code requirements like those at issue here is "to prevent safety hazards from occurring even when gas appliances are not operating properly" or "appliance venting become[s] obstructed." (Supp. 23, 24.) If Cameron Creek had installed its water heaters in compliance with the NFG Code, those Cameron Creek residents would never have been exposed to carbon monoxide. (*Id.*) For example, in the second incident, "[i]f the bathroom closet had been properly sealed and had obtained all of its combustion air from outdoors, the down draft would have forced the carbon monoxide outdoors, rather than into the living space of the apartment." (Supp. 25.) Cameron Creek's refusal to comply with the NFG Code puts the complex's residents at a risk of carbon monoxide exposure that compliance with the Code would obviate.

Second, the Commission incorrectly found that the "CO readings for the alleged CO incidents * * * were [not] taken at appropriate and objective locations in the dwellings[.]" (Appx. 54, *citing* Supp. 58-59.) While the Commission describes the evidence on this issue as "unrequited," *id.*, it is mistaken. Columbia witness Mr. Erlenbach testified that the carbon monoxide reading of 20 parts per million for the 2008 incident was taken in the apartment's living room. (Supp. 24.) Moreover, the source that the Commission relied upon for its assertion that the carbon monoxide readings for the two alleged CO incidents were not taken at

appropriate and objective locations in the dwellings – pages 18 and 19 of Cameron Creek witness Mr. Schutz's pre-filed testimony – says nothing of the sort. Those pages say nothing about the 2007 and 2008 carbon monoxide incidents described above. (*See* Supp. 58-59.)

Yet, even if the two carbon monoxide incidents described above had never happened, that would not disprove that Cameron Creek's NFG Code violations were hazardous. "Evidence that over a period of many years there has been no accident or death resulting from a condition * * *, which condition is claimed to be dangerous, is not conclusive that such condition is not dangerous." *Co-op. Legislative Commt. of the Transp. Bhds. v. Pub. Util. Comm.*, 150 Ohio St. 270, 80 N.E.2d 846 (1948), paragraph two of the syllabus. It is uncontroverted that gas appliance malfunctions can cause incomplete combustion of national gas, which produces carbon monoxide. (*See* Supp. 5-6, 20, 25, 26; Appx. 11; *see also* Supp. 159, Tr. Vol. II 312.) Carbon monoxide is a colorless, odorless, and poisonous gas that, with sufficient exposure, can cause sickness and death. (Supp. 20.) It is also uncontroverted that the installation configuration of the gas water heaters and gas furnaces at Cameron Creek allows any carbon monoxide produced by those appliances to *float into the living spaces of the apartments*. (*See* Supp. 21-22, 25, 26.) "Hazard" is defined as "a thing or condition that might operate against success or safety : a possible source of peril, danger, duress, or difficulty * * *." *Webster's Third New International Dictionary* 1041 (1981). (Supp. 200-201.) A venting configuration that allows carbon monoxide to float into an apartment resident's living spaces whenever a gas appliance incompletely burns natural gas is clearly "a possible source of peril [or] danger." The Commission therefore erred in concluding that Cameron Creek's venting configurations were not a "verifiable hazardous condition."

2. **Proposition of Law No. II:**

**The Commission's Orders are unlawful and unreasonable because their conclusion that the National Fuel Gas Code permits persons to avoid compliance with the Code's venting requirements by supplying additional air to the appliances is contradicted by the plain language of the Code and the other evidence.**

The Commission's secondary, and equally fundamental, error was its conclusion that Cameron Creek's addition of 4-inch fresh air supply ducts to its building plans, with the approval of the City of Columbus, was a permissible alternative to the venting requirements discussed above under the NFG Code. The Commission held:

> Cameron Creek modified its building plans to add a 4-inch fresh air supply duct and submitted to the City engineering calculations from a licensed professional engineer verifying that combustion air was adequate for gas appliances. Mr. Schultz [*sic*], a professional engineer and former member of the Ohio Board of Building Standards, testified that this constituted a specially engineered solution to provide an adequate supply of air for combustion, ventilation, and dilution of gases, which was approved by the appropriate jurisdictional authority when, in 1996, the City approved the Cameron Creek building plan. As a result, we find that the record indicates that Cameron Creek complied with the alternative compliance methods allowed in the 1996 NFG Code.

(Appx. 21.) In its Entry on Rehearing, the Commission reiterated that the City's approval of Cameron Creek's plans "constitutes an alternative and/or engineered solution pursuant to the NFG Code." (Appx. 50.) This holding is manifestly against the weight of the evidence, for at least four reasons.

First and foremost, the provision in the 1996 NFG Code that allowed for "specially engineered solutions" is irrelevant to Cameron Creek. Section 5.3.4 of the 1996 Code was a standard that allows special engineering approved by the authority having jurisdiction to provide an adequate supply of air for combustion, ventilation, and dilution of flue gases. (Supp. 162, Tr. Vol. II 501.) But, Cameron Creek's Code violations had nothing to do with the adequacy of the amount of air supplied to the complex's appliances. The problem with the gas appliance

installations at Cameron Creek is that any carbon monoxide produced by those appliances will float into the apartments, rather than being vented outside. If the gas appliances at Cameron Creek are not properly maintained and produce carbon monoxide, the fact that there is adequate combustion, ventilation, and dilution air in the apartments at Cameron Creek will not prevent that carbon monoxide from wafting into the residents' living spaces.

Second, the provision in the NFG Code that allows for "alternative" solutions is also irrelevant. That provision, Section 1.2 of the 1996 Code, stated: "The provisions of this code are not intended to prevent the use of any material, method of construction, or installation procedure not specifically prescribed by this code provided any such alternate is acceptable to the authority having jurisdiction." (Supp. 185, Tr. Vol. III 671.) The purpose of that section, as explained in the official commentary from the committee that put together the 1996 NFG Code, was to allow the use of newly developed safe practices or new technology, if the "authority having jurisdiction" approved. (*Id.*; Supp. 187-189, Tr. Vol. III 673-675.) Cameron Creek introduced no testimony to demonstrate that 4-inch fresh air supply ducts were a new technology, or that installing such ducts was a newly developed safe practice. Cameron Creek also offered no testimony explaining why bringing in more air for the gas appliances would be a safe alternative to venting the appliances so as not to expose Cameron Creek's residents to carbon monoxide. Cameron Creek's purported "alternative" solution does not solve the problem that Cameron Creek's NFG Code violations created.

Third, the Commission's conclusion that the City of Columbus's approval of Cameron Creek's building plans constituted approval of an "alternative and/or engineered solution" under the NFG Code is revisionist history. It is undisputed that the City of Columbus did not apply the NFG Code at the time it approved Cameron Creek's plans. (Appx. 18.) It is also undisputed

that, unlike the 1996 NFG Code, the building code that the City applied "did not require that all combustion air be obtained from outdoors, allowed for multi-storied dwellings to utilize one gas vent, and permitted the placement of gas appliances in bathroom closets that did not have weather-stripped solid doors with self-closing devices." (*Id.*) There is no evidence that the City of Columbus was even conscious of the NFG Code, or its requirements for venting multi-story appliances or gas water heaters in bathroom closets, when it approved Cameron Creek's plans. Thus, it is nonsensical to interpret the City of Columbus's approval of Cameron Creek's design as approval of "an alternative and/or engineered solution pursuant to the NFG Code." (Appx. 53.) The City had no reason to approve an "alternative" to venting requirements that were not in its building code to begin with, and there is no evidence that the City even considered whether bringing more combustion, ventilation, and dilution air into Cameron Creek was a safe alternative to preventing carbon monoxide from entering the apartments' living spaces.

Fourth, the City of Columbus was not an "authority having jurisdiction" for purposes of the alternative compliance provisions on which the Commission relied. The 1996 NFG Code defined "authority having jurisdiction" as "[t]he organization, office, or individual responsible for approving equipment, an installation or procedure." (Supp. 186, Tr. Vol. III 672.) The City of Columbus was not the "authority having jurisdiction" under the 1996 NFG Code because, again, it was not "responsible for approving equipment [or] an installation" under the NFG Code during the relevant time period. On the contrary, as explained in greater detail below, Columbia is the "authority having jurisdiction" to approve variations from the NFG Code's requirements.

For each of these four reasons, the Commission's holding that the City of Columbus's approval of Cameron Creek's plans constituted approval of an alternative or specially engineered solution by an authority having jurisdiction is factually unsupported and logically impossible.

3. **Proposition of Law No. III:**

**The Commission's Orders are unlawful and unreasonable because their conclusion that Columbia Gas is not the "authority having jurisdiction" to approve variations from the National Fuel Gas Code's venting requirements is contradicted by Columbia Gas's approved tariff.**

In its Entry on Rehearing, the Commission held for the first time that Columbia is not an "authority having jurisdiction" for purposes of the NFG Code. (Appx. 53) The Commission argued that Columbia had not pointed to "any record evidence, or any codified rule" giving Columbia "the unequivocal right" to approve alternatives under the NFG Code. (*Id.*) This is, again, manifestly against the weight of the evidence and legally incorrect.

Columbia's Commission-approved tariff specified both in 1997-1998 and 2008 that customers' "appliance venting shall be installed with materials and workmanship which meet the reasonable requirements of the Company." Tariff, Original Sheet No. 8, §30 (eff. Dec. 3, 1991), *available at* http://dis.puc.state.oh.us/ViewImage.aspx?CMID=CZBBO03MALRJXQKW (accessed Jan. 9, 2012) (Supp. 191-193); First Revised Sheet No. 8, §30 (eff. Sept. 18, 1996), *available at* http://dis.puc.state.oh.us/ViewImage.aspx?CMID=E$KEK87()OTXE9MHF (Supp. 194-195); Second Revised Sheet No. 8, §31 (eff. Jan. 16, 2008), *available at* http://dis.puc.state.oh.us/ViewImage.aspx?CMID=A1001001A08A16A91310H43338 (accessed Jan. 9, 2012) (Supp. 196-197); Third Revised Sheet No. 8, §31 (eff. June 30, 2008), *available at* http://dis.puc.state.oh.us/ViewImage.aspx?CMID=A1001001A08G01A85524F14944 (accessed Jan. 9, 2012) (Supp. 198-199). Columbia's tariff further specified that Columbia was authorized to discontinue the supply of gas to any gas appliances that were "in such condition as to constitute a hazard" until the hazardous condition was "rectified by the customer or the Company in compliance with the reasonable requirements of the Company." Tariff, Original Sheet No. 8, §31 (eff. Dec. 3, 1991) (Supp. 193); First Revised Sheet No. 8, §31 (eff. Sept. 18, 1996) (Supp.

195); Second Revised Sheet No. 8, §32 (eff. Jan. 16, 2008) (Supp. 197); Third Revised Sheet No. 8, §32 (eff. June 30, 2008) (Supp. 199). Columbia's "reasonable requirements" for "[t]he installation and venting of appliances on customers' premises" are those set forth in the NFG Code. (Supp. 50-51.) And, the Commission ruled that Columbia's application of the NFG Code was "just and reasonable" and consistent with Columbia's tariff. (Appx. 19.)

Because Columbia has authority under its tariff for approving equipment installations, and because Columbia applies the NFG Code as its reference standard for approving such installations, Columbia is clearly an "authority having jurisdiction" to approve alternative or specially engineered solutions under the NFG Code.

4. **Proposition of Law No. IV:**

**The Commission's Orders are unlawful and unreasonable because their conclusion that installing carbon monoxide detectors provides a reasonable margin of safety in drafty buildings constructed in violation of the National Fuel Gas Code's appliance venting safety requirements is unsupported by the evidence.**

Although Cameron Creek's gas appliances are installed and vented in an unsafe manner that allows any carbon monoxide they produce to float into the living spaces of Cameron Creek's apartments, the Commission concluded that Cameron Creek "is providing a reasonable margin of safety for its occupants." (Appx. 21.) The Commission based this conclusion on the fact that Cameron Creek had installed hard-wired carbon monoxide detectors, complied with the building code that the City of Columbus enforced when Cameron Creek was constructed, and had "nontight construction" and "significant outside air infiltration." (*Id.*) Columbia has already described how Cameron Creek's compliance with the applicable building code does not protect Cameron Creek's residents from exposure to carbon monoxide. The Commission further erred by concluding that hard-wired carbon monoxide detectors or drafty buildings will keep Cameron Creek's residents safe.

Carbon monoxide detectors cannot, of course, prevent Cameron Creek's residents from being exposed to carbon monoxide. At best, they can warn the residents of "developing risks," as the Commission acknowledges. (Appx. 22.) Carbon monoxide detectors could be effective, however, only if they are working. There are several reasons why the carbon monoxide detectors might not work properly when they are most needed. First, as the Commission has concluded, the carbon monoxide detectors require "diligent maintenance and repair" if Cameron Creek is to be safe. (Appx. 21.) Cameron Creek introduced no evidence that it had maintained its carbon monoxide detectors since it installed them in 2008. Second, residents can silence the alarms by pulling them out of the ceiling, disconnecting them, and taking the battery out. (Supp. 154, Tr. Vol. I 175.) At least one resident has already done so. (*Id.*) Similarly, if the carbon monoxide alarm's battery were dead, the alarm would be useless in a power outage. Cameron Creek's gas water heaters, on the other hand, would still be working during a power outage – and potentially producing carbon monoxide – because they are powered internally. (Supp. 22.) And even if the carbon monoxide detectors were working, "carbon monoxide could rise to hazardous levels in a closed bathroom before carbon monoxide levels had risen high enough in the remainder of the residence to set off an alarm." (*Id.*) Thus, Cameron Creek's installation of carbon monoxide detectors did not "mitigate" the carbon monoxide hazard at that complex, as the Commission suggested. (Appx. 55.) Cameron Creek's carbon monoxide detectors will not ensure the residents' safety, particularly without proper maintenance, during power outages, or in closed bathrooms.

Having "non-tight construction" or "significant outside air infiltration" (*i.e.*, keeping the units at Cameron Creek drafty and energy inefficient) also will not keep the residents of Cameron Creek safe. Treating "non-tight construction" and "significant outside air infiltration"

as multiple factors is somewhat disingenuous, given that they are different ways of saying the same thing. Regardless, the "nontight construction" practices of that period and prior decades clearly did not provide protection from carbon monoxide poisoning. The *Columbus Dispatch* ran five articles in 1996 alone on the topic of carbon monoxide poisoning in homes, three of which discussed illnesses and deaths in central Ohio caused by carbon monoxide. (*See* Appx. 39.)

Ohio courts have also considered several lawsuits involving carbon-monoxide-related deaths or injuries to apartment tenants in the 1990s and before. *E.g.*, *Andersen v. Highland House Co.*, 93 Ohio St.3d 547, 757 N.E.2d 329 (2001) (an insurance coverage dispute arising from the 1997 death of a woman from "inhaling carbon monoxide fumes from a faulty heating unit inside * * * a multiunit [apartment] complex"); *Owners Ins. Co. v. Singh*, 5th Dist. No. 98-CA-108, 1999 WL 976249, *1 (Sept. 21, 1999) (involving a carbon monoxide incident in March 1997); *Grieser v. Huntington Natl. Bank of Columbus, Ohio*, 176 Ohio St. 291, 199 N.E.2d 556 (1964) (involving the death of an apartment tenant in 1958 from carbon monoxide fumes). If drafty construction were enough to prevent tenants or homeowners from the dangers of carbon monoxide poisoning, none of these opinions or articles would have been written. The fact that they were written is proof that non-tight construction is insufficient to protect Cameron Creek's residents from carbon monoxide poisoning. The fact that the 1996 NFG Code did not contain a "non-tight construction" exception to the appliance venting requirements at issue is further proof that drafty construction does not protect residents from carbon monoxide exposure. The Commission's conclusion to the contrary is erroneous and unreasonable.

Indeed, the Commission itself has acknowledged that Cameron Creek's carbon monoxide detectors, drafty buildings, and existing gas appliance installations are not sufficient to ensure the safety of Cameron Creek's residents. To the contrary, the Commission held that "the key to

sustaining a safe and hazard-free complex at Cameron Creek is continued and diligent maintenance and repair of the gas appliances, ventilation system, and CO detectors, as well as the replacement of the appliances when necessary." (Appx. 21.)

Yet, leaving the safety of Cameron Creek's residents in the hands of the complex's maintenance staff (rather than requiring compliance with a model code designed to protect residents) is unreasonable. The Commission has no control over Cameron Creek's maintenance program. The Commission originally held that "a program of maintenance and monitoring should be enforced, subject to review by the Commission's Staff, in order to ensure that the same level of safety espoused by the NFG Code is achieved." (*Id.*) After Columbia pointed out that the Commission has no legal authority to supervise Cameron Creek's maintenance staff (Appx. 37), the Commission simply said that it would be "necessary for Cameron Creek to develop an ongoing maintenance and monitoring program[.]" (Appx. 55.)

But, Cameron Creek's maintenance history is spotty at best. Even the Commission attributes the carbon monoxide events at Cameron Creek in 2007 and 2008 to the fact that the gas appliances involved in those incidents "needed maintenance, repair, and/or replacement" because of their "age and usage pattern." (Appx. 19-20.) And, evidence submitted by Cameron Creek's own witness, Mr. Schutz, showed that the gas appliances at Cameron Creek were in need of maintenance. Three weeks after Cameron Creek filed its complaint, Cameron Creek hired a company to inspect just 5 percent of its gas appliances. The company determined that each furnace inspected from this small sample group was dirty and needed a new air filter. (Supp. 63-74.) More troubling, it found that more than half of the utility closets were not receiving fresh air into the closets' air returns like they should be. (*Id.*) Some furnaces also needed repairs, maintenance, or parts replaced. (*E.g.,* Supp. 65 ("[i]nducer motor needs replaced, cooling wheel

is broken").) Given this undisputed history, and the Commission's inability to supervise Cameron Creek's future maintenance activity, it was unreasonable for the Commission to assume that Cameron Creek had provided a reasonable margin of safety to its residents. The only reliable way to safeguard those residents is to permit Columbia to insist on uniform compliance with its reasonable safety requirements in the form of the NFG Code.

## C. The Commission's Orders Are Unworkable

### 1. Proposition of Law No. V:

**The Commission's Orders are unlawful because they provide Columbia with no clear guidance on how it may apply the National Fuel Gas Code in other existing residential structures.**

The Commission's Opinion and Order and Entry on Rehearing are also unreasonable because they leave Columbia without any understanding of how it is to proceed with regard to ensuring the safety of the more than one million Ohio customers who do not live at Cameron Creek.

The Commission's rules authorize a natural gas utility company to disconnect service to residential customers "[w]hen supplying * * * natural gas creates a safety hazard to consumers or their premises" and instructs the company "not [to] restore service until the hazardous condition(s) has been corrected." Ohio Adm.Code 4901:1-18-03(D). Columbia witness Mr. Ramsey explained that, "The benefit of using the National Fuel Gas Code as a safety standard is that it provides a bright-line test – if an appliance installation or venting violates the National Fuel Gas Code, it is a safety problem." (Supp. 53.) The Commission's rulings replace that bright-line test with a murky and muddled "reasonable margin of safety" standard that will be utterly impractical to apply.

The Commission held that, "[W]hen there is a verifiable safety hazard, Columbia has the right * * * to disconnect gas service and require customers to address the safety issue." (Appx.

20.) If "prescriptive compliance" with the NFG Code "is economically or practically unreasonable," the Commission held, "a program of maintenance and monitoring should be followed in order to ensure that the same level of safety espoused by the NFG Code is achieved." (Appx. 50.) "[I]n the absence of prescriptive NFG Code compliance or a specially engineered solution that is compliant with the building code and supported by a professional engineering verification of adequacy," the Commission concluded, "Columbia continues to have the ability to require retrofits that are necessary to ensure a reasonable margin of safety." (Appx. 22.) The Commission added, "[A] reasonable safety margin can be provided by a combination of structural elements and monitoring that warns occupants of developing risks." (*Id.*)

In Columbia's application for rehearing to the Commission, Columbia noted that the Commission's Opinion and Order had failed to answer several important questions and define several key terms. First, what does the Commission mean by the phrase "verifiable safety hazard," which the Commission makes a necessary predicate to a disconnection of service? For all of the reasons described in detail above, Columbia believes that an appliance venting configuration that allows carbon monoxide to float freely into an apartment's living spaces (like the configuration present at Cameron Creek) *is* a verifiable safety hazard. The Commission apparently believes otherwise. Must Columbia wait to act until a resident has been exposed to carbon monoxide, or is there any kind of foreseeable danger that Columbia may act to prevent? These crucial questions are left unanswered by the Commission's Opinion and Order and Entry on Rehearing.

Second, when can Columbia require "prescriptive compliance" with the NFG Code? The Commission's orders suggest, but do not say, that maintenance and monitoring are unnecessary if compliance with the NFG Code is economically and practically reasonable. (*See* Appx. 50

(holding that "a program of maintenance and monitoring should be followed" if Code compliance "is economically or practically unreasonable").) Does this mean that Columbia may require prescriptive compliance with the NFG Code if compliance would be economically and practically reasonable? Are there any other circumstances in which Columbia may require compliance with the NFG Code in existing structures? Again, the Commission does not say.

Third, when should Columbia apply the "specially engineered solution" exception? The NFG Code applies this exception only to special engineering approved by the authority having jurisdiction to provide an adequate supply of air for combustion, ventilation, and dilution of flue gases. (Supp. 162, Tr. Vol. II 501.) The Commission, however, used the "specially engineered solution" exception to excuse non-compliance with venting standards that had nothing to do with the supply of air to Cameron Creek's gas appliances. Must Columbia excuse any and all NFG Code violations if the customer can provide proof of a specially engineered solution supported by a professional engineering verification, no matter what hazards the relevant Code requirements were intended to prevent?

Fourth, if Columbia can demonstrate a "verifiable safety hazard," noncompliance with the NFG Code, and no "specially engineered solution," then what "structural elements" must Columbia accept as providing a "reasonable safety margin" when paired with a carbon monoxide detector? Is non-tight construction/significant outside air infiltration, combined with a carbon monoxide detector, always sufficient? What other "structural elements" does the Commission believe provide a reasonable margin of safety?

Fifth, given the Commission's admission that "continued and diligent" maintenance, repair, and replacement are "the key" to ensuring resident safety (Appx. 21), how should maintenance factor into Columbia's determinations? Must Columbia interrogate its customers

about the age and maintenance histories of their gas appliances? If Columbia becomes aware that a customer is not properly maintaining its gas appliances, may Columbia then mandate prescriptive compliance with the NFG Code?

The Commission refused, or was unable, to provide the guidance Columbia requested. Instead, it simply held that, "Every situation is unique," suggested that Columbia use "a rule of reason," and encouraged Columbia to work with owners and occupants "to ensure that there is a safe hazard-free environment." (Appx. 58-59.) But, a "rule of reason" is really no rule at all. If Columbia is to ensure that its customers have a "safe hazard-free environment" (*id.*), Columbia cannot replace the NFG Code on the fly with an amorphous "rule of reason" that, unlike the NFG Code, is not grounded in practical experience. It cannot apply a "reasonable margin of safety" standard in the over one million residences in its service area and ensure that its customers are treated equally and consistently. And, it cannot apply the vague and ambiguous holdings in the Commission's Opinion and Order and Entry on Rehearing when it does not know what those holdings mean and the Commission refuses to explain their meaning. Because the Commission's orders do not fix the practices that Columbia is required to observe, those orders violate R.C. 4905.37 and should be reversed.

2. **Proposition of Law No. VI:**

**The Commission's Orders are unlawful and unreasonable because applying the vague and subjective standards in those orders to Columbia's other customers would impose an enormous administrative burden.**

Even if Columbia understood the amorphous and fact-specific standards that the Commission has directed it to apply, applying those standards on a day-to-day basis would be administratively unworkable. Columbia's service technicians disconnect hundreds of appliances each month for NFG Code violations. (Supp. 3.) Under the Commission's rulings, Columbia could quickly develop a backlog of customers contesting the enforceability of the NFG Code,

each of which Columbia would be required to track until the process of demonstrating a "reasonable margin of safety" was completed. This process could take months. Cameron Creek, for example, did not install hard-wired carbon monoxide detectors until after Columbia first contacted the complex in January 2008 to discuss Cameron Creek's NFG Code violations. (*See* Appx. 3.) Cameron Creek did not supply evidence that the City of Columbus had approved the installation of four-inch fresh air supply ducts in the complex's units until approximately eighteen months later. (*See* Supp. 56.) Cameron Creek also did not perform a "blower door" test to demonstrate outside air infiltration until two weeks before the hearing in this matter. (*See* Appx. 13.) If Columbia is required to wait a year and a half each time it finds an NFG Code violation at an existing residence, so that the owners may hire the necessary personnel to install hard-wired carbon monoxide detectors or otherwise try to demonstrate a "reasonable margin of safety," then Columbia's personnel will be overwhelmed – and the residents' safety compromised in the lengthy meantime.

Because of the ambiguous and subjective nature of the test that the Commission would apply to determine "safety" in the absence of prescriptive NFG Code compliance, the amount of evidence that could be required to meet the customer's burden of proof, and the length of time that the process of proof may take, moreover, the Commission's Opinion will impose significant record-keeping requirements on Columbia. For each residence at which Columbia locates an NFG Code violation, the technician visiting the residence will have to document not just the violation, but his or her thoughts on how hazardous the violation is and what should be done to correct it. If Columbia concludes that the situation is hazardous, and the customer contests that conclusion, the technician may need to return on multiple occasions to collect evidence to support the customer's positions, such as proof of maintenance or evidence of new carbon

monoxide detectors. Because Columbia's service technicians tag hundreds of appliances each month for NFG Code violations, the technicians' supervisors would need to make as many, if not more, subjective decisions each month regarding the dangers presented by particular appliance installations and the most reasonable means of addressing the problem. And, Columbia will need to store any evidence relating to the customer's arguments, any evidence relating to the customer's actions to ensure a "reasonable safety margin" for her and/or her residents, and Columbia's decision regarding the most "reasonable" means of addressing NFG Code non-compliance.

Moreover, Columbia will need to make this information instantaneously available to its technicians, so that they can determine when they arrive at a given residence what determinations have previously been made regarding the customer's compliance with the NFG Code and the measures that Columbia may require to address any noncompliance. Columbia's service technicians have computers in their trucks, but they currently can access only the data fields required for their service calls and input information regarding the results of those calls. (Supp. 171-172, Tr. Vol. III 533-534.) Modifying this system, to include all of the additional information that implementing the Commission's orders would require, will require extensive and expensive changes to Columbia's computer system and impose unworkable new requirements on technicians' visits.

Thus, even if Columbia could interpret and consistently apply the Commission's orders in this matter, doing so will be a time-consuming and costly administrative nightmare. For this reason as well, the Commission's orders are unreasonable and should be reversed.

## CONCLUSION

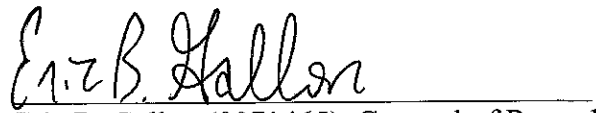
In its Opinion and Order, the Commission held:

> [T]he number one priority when it comes to the provision of natural gas service is that all possible measures are taken to ensure the health and safety of the public. To that end, the Commission believes it is necessary that, prior to connection or reconnection of gas service, Columbia must apply a standard of review that is *in keeping with the most current safety standards enforced by the gas industry*.

(Appx. 18.) (Emphasis added.) The "most current safety standards enforced by the gas industry" are those embodied in the NFG Code. Nonetheless, the Commission has acted to prevent Columbia from applying the NFG Code at Cameron Creek and, in other, vaguely defined circumstances, at any other existing structure in the State of Ohio. As demonstrated above, the Commission's orders are manifestly against the weight of the evidence on the record and are so clearly unsupported by the record as to show misapprehension or mistake. *See Canton Storage & Transfer Co. v. Pub. Util. Comm.*, 72 Ohio St.3d 1, 4, 647 N.E.2d 136 (1995) (describing the grounds for reversing a Commission order). The Commission's orders also fail to provide Columbia with adequate or workable instructions for ensuring the safety of its Ohio customers in existing structures.

For all of these reasons, and in order to ensure the safety of Ohio's citizens, Columbia respectfully requests that this Court reverse the Commission's Opinion and Order and Entry on Rehearing and hold that Columbia is entitled to rely on the NFG Code as the source for its reasonable requirements for gas appliance installation and venting at existing structures, consistent with its approved tariff.

Respectfully submitted,



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Attorneys for Respondent
COLUMBIA GAS OF OHIO, INC.

**BEFORE**
**THE SUPREME COURT OF OHIO**

| | | |
|---|---|---|
| In the Matter of the Complaint of Cameron Creek Apartments, | ) | |
| | ) | Case No. 2011-1758 |
| Appellee, | ) | |
| | ) | Appeal from the Public Utilities Commission of Ohio, |
| v. | ) | Case No. 08-1091-GA-CSS |
| Columbia Gas of Ohio, Inc., | ) | |
| Appellant. | ) | |

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**APPENDIX TO**
**MERIT BRIEF OF APPELLANT**
**COLUMBIA GAS OF OHIO, INC.**

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BEFORE

THE PUBLIC UTILITIES COMMISSION OF OHIO

| | | |
|---|---|---|
| In the Matter of the Complaint of Cameron Creek Apartments, | ) | |
| Complainant, | ) | |
| v. | ) | Case No. 08-1091-GA-CSS |
| Columbia Gas of Ohio, Inc., | ) | |
| Respondent. | ) | |

OPINION AND ORDER

The Commission, considering the complaint, the evidence of record, the arguments of the parties, and the applicable law, hereby issues its opinion and order.

APPEARANCES:

Wiles, Boyle, Burkholder, and Bringardner Co., LPA, by Thomas L. Hart and Brian M. Zets, 300 Spruce Street, Floor One, Columbus, Ohio 43215, on behalf of the complainant, located in Galloway, Ohio, Cameron Creek Apartments.

Porter, Wright, Morris & Arthur LLP, by Eric B. Gallon and Mark S. Stemm, Huntington Center, 41 South High Street, Columbus, Ohio 43215, on behalf of the respondent, Columbia Gas of Ohio, Inc.

OPINION:

I. HISTORY OF THE PROCEEDINGS

Columbia Gas of Ohio, Inc. (Columbia or the company), is a natural gas company, as defined in Section 4905.03(A)(5), Revised Code, and a public utility as defined in Section 4905.02, Revised Code. Cameron Creek Apartments (Cameron Creek or the complainant), which is an apartment complex with 240 units, is a customer of Columbia.

On September 17, 2008, Cameron Creek filed a complaint against Columbia. Cameron Creek is located in Galloway, Ohio, provided natural gas by Columbia, and subject to the building codes established by the city of Columbus, Ohio (City). In its complaint, Cameron Creek alleges, among other things, that Columbia has demanded major structural retrofitting of the ventilation to the gas appliances for all 240 units in the

complex. According to the complainant, if such retrofitting is not done, Columbia threatened to shut off the gas service to all of the units. By entry issued October 1, 2008, the attorney examiner, *inter alia*, scheduled a settlement conference in this proceeding for October 10, 2008.

On October 8, 2008, the attorney examiner, in accordance with Rule 4901-9-01(E), Ohio Administrative Code (O.A.C.), ordered that Columbia shall not terminate service to the apartment complex, unless disconnection to any individual unit in the complex is necessary in order to prevent or resolve a presently or imminently hazardous situation. By entry issued April 24, 2009, the attorney examiner granted Columbia's motion to modify the directive in the October 8, 2008, entry, such that the company may disconnect service "when Columbia has detected unsafe levels of carbon monoxide in the ambient air that are attributable to that apartment's gas appliances, even if Columbia attributes the build-up of carbon monoxide to the combustion/ventilation/dilution air configurations at Cameron Creek." In addition, the examiner found that, if Columbia disconnects a unit during the pendency of this case, Columbia should file notice of the disconnection in this docket within three calendar days. Columbia has filed several notices of disconnection or denial of reconnection in this docket, in accordance with the examiner's directives; however, none of them pertained to the issues raised in this complaint case.

In the April 24, 2009, entry, the attorney examiner established the procedural schedule in this matter and set the hearing to commence on July 8, 2009. By entry issued May 12, 2009, the hearing was rescheduled to July 15, 2009. The hearing was held on July 15 through July 17, 2009, at the offices of the Commission. Briefs and reply briefs were filed by the parties on August 31, 2009, and September 14, 2009, respectively.

## II. APPLICABLE LAW

The complaint in this proceeding was filed pursuant to Section 4905.26, Revised Code, which provides, in relevant part, that the Commission will hear a case:

> [u]pon complaint in writing against any public utility . . . that any rate . . . charged . . . is in any respect unjust, unreasonable unjustly discriminatory, unjustly preferential, or in violation of law . . . or that any . . . practice . . . relating to any service furnished by the public utility . . . is . . . in any respect unreasonable, unjust, . . . unjustly discriminatory, or unjustly preferential.

It should be noted that, in complaint cases before the Commission, the complainant has the burden of proving its case. *Grossman v. Public Utilities Commission* (1966), 5 Ohio St.2d 189, 190, 214 N.E.2d 666, 667. Thus, in order to prevail, the complainant must prove the allegations in its complaint, by a preponderance of the evidence.

## III. DISCUSSION AND CONCLUSIONS

### A. Background

The Cameron Creek apartment complex received its building permit in 1997 and its final occupancy permit in 1998 (Tr. II at 327). The complex consists of 240 multi-storied, apartment units. There are 20 buildings in the complex, each containing 12 one-, two-, or three-bedroom units. There are 40 one-bedroom units, 124 two-bedroom units, and 76 three-bedroom units. The apartments are two-storied flats, with each second-floor apartment directly above a first-floor apartment. The roof of each building has only one gas appliance vent for each pair of first- and second-floor apartments. (CCA Ex. 39 at 11; CCA Ex. 42; CGO Ex. 6 at 3-4, Atts. 2-8).

Both a one-bedroom and a two-bedroom apartment were described on the record and each had the gas furnace and water heater in a closet accessible by a door, which had a gap between the door and the floor, inside the bathrooms. In addition, the walls of the closets had two air grilles that open up into the unit's main living room. The furnace's four-inch vent connection and the water heater's three-inch vent connector tied together into either a five-inch or six-inch vent. The five- or six-inch vent from the first-floor appliances was tied together with the second-floor appliances and vented through the roof with single stacks. There are hard-wired combination smoke detector and carbon monoxide (CO) alarm in the main living area of each apartment. The three-bedroom apartment is similar to the one- and two-bedroom apartments, but its appliances are located in a closet accessible by a full door and a half door from the hallway, not the bathroom. (CGO Ex. 6 at 6-8.)

On January 14, 2008, and February 14, 2008, Columbia sent Cameron Creek letters stating that it was aware that combustion ventilation air is being utilized in the units from indoor spaces adjacent to the closets housing the gas water heaters and furnaces, in violation of the National Fuel and Gas Code (NFG Code), and that remedial measures would need to be done to ensure tenant safety (CCA Exs. 14A, 15). The parties had discussions and shared communications in an attempt to resolve the situation, including efforts to find funding to help Cameron Creek retrofit its units; however, they were unable to reach a resolution (CGO Br. at 4; CCA Exs. 3-5, 7-8, 17). On August 13, 2008, Columbia informed Cameron Creek's counsel that it would disconnect gas service to the units if Cameron Creek did not rectify its violations of the NFG Code by October 13, 2008. Cameron Creek's attorney responded stating that the units complied with all relevant codes at the time of construction and that CO detectors had been installed; if gas service was refused, the response indicated that Cameron Creek would pursue legal remedies. (CCA Exs. 8, 35; Complaint Ex. T.)

On September 15, 2008, Columbia sent a letter to the residents of Cameron Creek informing them that Columbia would have to disconnect their gas service, due to Cameron Creek's refusal to fix the NFG Code violations, which could lead to serious illness or death. The letter further stated that Columbia was going to terminate service to Cameron Creek at the end of October 2008, if the problem was not resolved. According to Cameron Creek witness Kauffman, the property manager for the complainant, after they received the letter, residents were concerned and some even withheld rent payments. (CCA Exs. 35, 36 at 3-4.)

According to Ms. Kauffman, Columbia began red tagging gas appliances because of their locations at Cameron Creek in 2006, citing violations of the NFG Code. The witness states that she became aware of the situation when residents, who were being reconnected after having been disconnected for nonpayment, brought to her attention that Columbia would not relight the pilot light. The witness estimates that, between early 2006 and October 2008, approximately 100 red-tag events occurred. She explains that Columbia would red tag the gas appliance, not the meter, and then a licensed vendor would inspect and restart the appliances. (CCA Ex. 36 at 1-2.)

As further detailed below, the positions of the parties are as follows:

(1) Columbia: The company asserts that the location and configuration of Cameron Creek's gas appliances violate the NFG Code and cause a hazardous condition in the following respects:

(a) The water heaters in the one- and two-bedroom units violate the NFG Code because they do not obtain all combustion air from outdoors and are installed in bathroom closets, the doors of which are not weather-stripped and self-closing; thus, these water heaters take combustion air from the apartments' habitable spaces.[1]

(b) The apartments are located in multi-storied buildings, and the water heaters and furnaces in both the first-story and second-story apartments share common vents that go through the roofs of the buildings, and impermissibly obtain combustion, ventilation, and dilution air from

1 *See* Section 6.30(a), National Fuel Gas Code (1996 Edition); and Section 10.28.1(1), National Fuel Gas Code (2006 and 2009 Editions) (CGO Ex. 6, Atts. 9, 11).

habitable space.[2] (CGO Br. at 14-16.) Therefore, Columbia believes that seven-inch combustion air feed ducts must be installed in all utility rooms and all post exhaust vents/chimneys must be separated (CCA Ex. 37 at 10).

(2) Cameron Creek: The complainant requests that Columbia be prohibited from terminating service, by unilaterally declaring a safety hazard under the NFG Code, 10 years after construction was approved and completed under the code adopted by the city of Columbus, and that Columbia be prohibited from requiring expensive remedial construction. Cameron Creek estimates that it would cost a minimum of $1,500 per unit to complete Columbia's demand for seven-inch ducts to all utility closets and to separate the venting of gas appliance exhaust air from multiple apartment units, so that all units have a dedicated exhaust vent (CCA Ex. 39 at 22; Atts. 4A, 4B).

B. Cameron Creek's Position

Cameron Creek presented four witnesses for direct examination and called two witnesses for direct examination, as-on-cross. Robert Schultz, a professional engineer, former staff member of the Ohio Board of Building standards, former local building code official in Powell, Ohio, and consultant in areas including building codes, mechanical codes, and fuel gas codes, testified on behalf of Cameron Creek (CCA Ex. 39 at 2-5). Joseph Busch, registered architect, former State Architect for the state of Ohio, and retired chief building official for the City, also testified on behalf of Cameron Creek. Cheryl Roahrig, a mechanical inspection supervisor with the City's Building Department, who is also a fire protection inspector, building inspector, residential building inspector, and holds numerous licenses, was called by Cameron Creek to testify (Tr. I at 221-222). Melissa Kauffman, the property manager for Cameron Creek, testified for Cameron Creek (CCA Ex. 36 at 1). In addition, the two witnesses Cameron Creek called for direct examination, as-on-cross, were Jeffery Prachar, a service technician with Columbia, and Charles McCreery, in-house counsel for NiSource Corporation Services (NiSource) (Tr. III at 529, 612).

2 *See* Section 7.6.4, National Fuel Gas Code (1996 Edition); and Section 12.7.4, National Fuel Gas Code (2006 and 2009 Editions) (CGO Ex. 6, Atts. 10-11).

1. Code and Tariff Provisions

Mr. Schultz explains that the Ohio Building Code and the Ohio Mechanical Code (Mechanical Code) were adopted as general law in Ohio and have been approved by the City as comprehensive laws covering all aspects of residential and commercial construction. They are adopted and written to be enforced by local building departments under the authority of the state Board of Building Standards and Chapters 3781 and 3791, Revised Code. (CCA Ex. 39 at 23-24.) In 1996, when Cameron Creek was constructed, the City applied the 1995 Ohio Basic Building Code (1995 Building Code) (CCA Ex. 37 at 1-2). The 1995 Building Code was in effect until 1998 (CCA Ex. 39 at 12). Furthermore, the International Fuel Gas Code (IFG Code) was adopted by the Mechanical Code in 2002 (Tr. I at 237).

Mr. Schultz explains that the NFG Code, applied in this situation by Columbia, is a national model code, which constitutes a recommended general standard for installation and operation of gas piping and appliances. The NFG Code is written by a private organization, the National Fire Prevention Association, for fire prevention, rather than a building code. According to the witness, the NFG Code requirements for combustion air for gas appliances were not included in the 1995 Building Code. (CCA Ex. 39 at 13, 23-24, 34; Att. 1.) Mr. Schultz submits that, despite the fact that Columbia's training materials require its employees to ensure compliance with the NFG Code and local codes, consideration of local codes and the original approval seems to have been ignored (CCA Ex. 39 at 32).

Mr. Busch states that, at the time Cameron Creek was approved and issued its certificates of occupancy in 1996, the witness oversaw all aspects of the building department for the City. With regard to the NFG Code, Mr. Busch states that, when evaluating and approving combustion air requirements for gas appliance operations for Cameron Creek in 1996, the City would have only used the NFG Code as references in the Mechanical Code or the 1995 Building Code. (CCA Ex. 37 at 2-3.)

Cameron Creek witnesses Busch and Schultz agree that the 1995 Building Code allowed for the combination of indoor and outdoor air to feed the combustion of gas appliances, as is the situation at Cameron Creek, because the 1995 Building Code recognized that construction at that time was not "tight" with regard to air infiltration and allowed for greater outside air infiltration. In addition, the witnesses affirm that the 1995 Building Code allowed for the construction and installation of multi-story vents to serve the gas appliances from multiple units, such as the ones as Cameron Creek. (CCA Exs. 37 at 1-2, 39 at 12.) Likewise, Mr. Schultz notes that the 2006 IFG Code, allows for multi-story post-exhaust venting of gas appliances of multiple units (CCA Ex. 39 at 11).

Ms. Roahrig offers that the Mechanical Code in effect in 1996 allowed for the use of indoor air and outdoor air for combustion purposes. It also allowed for direct connection mechanical ventilation to be used. Ms. Roahrig testified that there are various ways to meet the section of the code pertaining to combustion air other than with outside air and points out that the four-inch ducts at Cameron Creek do bring fresh outdoor air to provide ventilation, make up air, and combustion air into the units. (CCA Br. at 4; Tr. I at 254; Tr. II at 301, 323.)

Mr. Busch testified that, during his tenure as the City's chief building official, and Ms. Roahrig confirms that, in the late 1990s, there were thousands of buildings approved under the 1995 Building Code and Mechanical Code that allowed for combustion for gas appliances to be obtained from indoor and outdoor air sources. Ms. Roahrig offers that, at that time, it was common practice to locate gas appliances in bathrooms or interior utility closets supplied with indoor combustion air similar to Cameron Creek. In addition, Mr. Busch and Ms. Roahrig agree that there were also many complexes that had multi-story exhaust vents for gas appliances utilizing combination air that served multiple dwelling units. Since 1996, Mr. Busch explains that dwellings have become more tightly constructed and requirements have been changed to require more direct supply of outside air to the appliance. In his opinion, the apartments at Cameron Creek are not "unusually tight" construction as defined by the building codes; thus, they allow for an adequate amount of air infiltration into all living areas and interior rooms based on the construction practices in the mid-1990s. In Ms. Roahrig's opinion, these buildings are still safe today. (CCA Ex. 37 at 6; Tr. I at 266-267.)

According to Cameron Creek, the fact that the gas appliance operations and configurations at Cameron Creek in 1997 were approved by the City under the 1995 Building Code and Mechanical Code, proves that Cameron Creek complied with safety requirements of Ohio law. However, Cameron Creek notes that Columbia did not reach the same conclusion, because it utilized different standards than the City, by ignoring the City's approval procedures and failing to consider the four-inch outside air ducts that bring fresh air into each utility closet to aid combustion. (CCA Br. at 5.) Cameron Creek asserts that the safety status of its older buildings will not change and they do not become "less safe" because tighter construction methods are required for newer buildings as code standards evolve (CCA Br. at 13).

The NFG Code allows for an "engineered solution," which Mr. Schultz states occurred in 1996, when the City approved the building plan after a four-inch fresh air supply duct was added to bring in outdoor air to the return air plenum in each apartment's mechanical room. Mr. Schultz states that Sections 1.2, 5.3.4, and 6.30.1 of the 1996 NFG Code, considered together, permit other measures and special engineering to provide an adequate supply of air for combustion, ventilation, and dilution of gases that is approved by the authority having jurisdiction; thus, the witness asserts that the sections of

the NFG Code cited by Columbia as being violated could be ignored. Therefore, it is the witness' opinion that the manner in which Cameron Creek was approved by the City in 1996 is the exact same procedure that Columbia is attempting to force Cameron Creek to perform again in 2008. (CCA Ex. 39 at 13-14; CCA Br. at 3-4; Tr. II 408, 491-493, 501.)

Mr. Busch and Mr. Schultz agree that Columbia's request for the placement of seven-inch combustion air feed ducts to all utility rooms and the separation of all post exhaust vent/chimneys would constitute building alterations and a renovation; thus, it would require current compliance with the building code for the whole heating, venting, and air conditioning (HVAC) system. (CCA Exs. 37 at 10, 39 at 21.) Mr. Busch believes that Columbia's request that the complex be brought up to current building code requirements is excessive, unless there is proof that the systems are malfunctioning based on the code used to approve them when they were built. Mr. Busch asserts that, if Columbia is allowed to regulate the configuration and placement of gas appliances in buildings, a major conflict will arise between the City, which has the authority to enforce building codes, and Columbia. In the opinion of Mr. Busch, the Ohio Board of Building Standards should have final approval authority over construction and gas appliance operations and configuration. (CCA Ex. 37 at 10-11.)

Mr. Busch further explains that, when the building code is updated or a new building code is adopted, as long as an older building is maintained pursuant to the building code in effect at the time it is built and there is no change to the use of the building, the City still considers the building to be in an approved condition, and it is not considered unsafe or in violation of the building code. Only if there is a serious hazard, as determined by the chief building official of the City, are changes to the building required. Mr. Busch and Mr. Schultz affirm that the City operates under a "like for like" policy that allows the replacement of certain household components, such as old water heaters and furnaces, without triggering the application of the new code, as long as a permit is pulled. According to Mr. Busch, a state-certified building department can not apply building codes 12 years later that it had not applied at initial approval. Mr. Busch does not recall Columbia ever attempting to retroactively apply building regulations or construction standards to gas appliances. According Mr. Busch, in the past, when there has been a disagreement between the City's jurisdiction and enforcement of a building code issue and Columbia's concern over the same issue, the two entities have worked together to resolve the issue. (CCA Exs. 37 at 3-5, 9; 39 at 28.)

Cameron Creek believes that Columbia is mistaken about which codes and standards applied to gas appliances at Cameron Creek. The complainant points out that Mr. McCreery, in-house counsel for NiSource, testifying as-on-cross, acknowledged that he communicated the opinion to complainant's counsel that the appliance configurations violated the 1996 NFG Code. However, Cameron Creek notes that the NFG Code has never been adopted by the state of Ohio and was not enforced by the City when the plans

were approved. (CCA Br. at 14; Tr. III at 618.) Furthermore, Cameron Creek points out that Columbia was aware of Ms. Roahrig's conclusions regarding the safety of the complainant's appliance operations, as set forth in her January 22, 2008, letter (CCA Br. at 15; CCA Ex. 2; Tr. III at 614). The complainant notes that Columbia recognized the City as the authority having jurisdiction to interpret and enforce building and mechanical codes and to approve Cameron Creek as compliant with those codes (CCA Br. at 15; CCA Ex. 40; Tr. III at 615). According to Cameron Creek, despite such recognition and because of Columbia's concern about liability, Columbia continues its demand for remedial construction changes at Cameron Creek. (CCA Br. at 15; CCA Ex. 5; Tr. III 624.) Cameron Creek goes on to note that Mr. McCreery appealed to the City officials again regarding Cameron Creek by contacting City Attorney Rick Pfeiffer, stating that the City currently follows the IFG Code which prohibits this type of installation, unless it falls within some narrow exceptions, at Cameron Creek. After reviewing the matter, Mr. Pfeiffer responded that the City saw no problem and stated that he was "puzzled how something could be approved as safe when it was constructed and put in use, and now be viewed as not being so." Cameron Creek believes that this response should have been reason enough for Columbia to reassess its conclusions on safety, review the code and the City's approval process, and given Columbia pause on applying new standards retroactively to past approval. (CCA Br. at 15-16; CCA Ex. 6; Tr. at 630.)

Cameron Creek contends that Columbia is not following its tariff stating that Columbia did not actually find and document physical evidence of a safety issue related to gas appliance configurations, rather Columbia red tagged gas service in support of its agenda regarding the NFG Code. Furthermore, Columbia did not follow its tariff and simply disconnect service and allow the alleged dangerous condition to be corrected as the Commission's Rule 4901:1-18-03(D), O.A.C., requires. According to Cameron Creek, Columbia conferred with the local building authority on the situation and then ignored the City's opinion and attempted to unilaterally assert authority and dictate substantial remedial construction. (CCA Reply Br. at 2.)

Cameron Creek points out that Mr. McCreery acknowledged in a communication that Columbia's tariff requires that Columbia "must defer to the local authority pursuant to building and construction inspections and permitting" (CCA Br. at 16; CCA Ex. 7). The complainant argues that, as recognized in Columbia's tariff, under Chapters 3781 and 3791, Revised Code, as well as Section 104.1 of the Ohio Building Code, local, state certified building departments have the exclusive authority to regulate construction, arrangement, and erection of buildings or parts thereof (CCA Br. at 16-17; Columbia Tariff at Fourth Revised Sheet No. 8, Section 8). According to Cameron Creek, when Columbia attempted to enforce the NFG Code on buildings approved under a different code and dictate remedial actions on previously approved appliance installations, Columbia was attempting to regulate construction, arrangement and erection, in violation of its tariff and Chapters 3781 and 3791, Revised Code. In addition, when Columbia tried to enforce the

NFG Code combustion air standards on Cameron Creek 10 years after buildings were approved and service was established without the application of such regulations, Columbia violated its tariff and the spirit and intent of Section 3781.21(C), Revised Code, and its specific prohibition on the retroactive enforcement of standards not effective at the time of initial approval. Cameron Creek submits that Columbia's tariff does not allow the company to condition gas service on major remedial construction when the local jurisdiction finds no safety or code issue. Cameron Creek contends that Columbia acted unilaterally and unreasonably in demanding that the whole apartment complex be substantially retrofitted under Columbia's code interpretation within an impossible timeframe and conditioned service termination with this demand. (CCA Br. at 18, 23.)

Cameron Creek recommends that Columbia continue to approach these types of issues in the field as it has been, stating that, when such issues are not based solely on the interpretation or application of a code by Columbia, the complainant recognizes Columbia's authority to shut off gas service. After service interruption, however, Columbia should not unilaterally opine on compliance methods or dictate specific remedial construction standards. Rather, the building owner should achieve compliance and safety based on compliance with local building codes. Where the safety question is less clear and conflicts on codes are evident, Columbia should confer with and defer to the local building department. (CCA Br. at 20.)

Cameron Creek points out that Columbia's own policy and tariffs, which were in effect in 1997, require that the company not allow meter setting and gas service establishment for buildings that are not service ready with gas appliances in place and operational. However, Cameron Creek asserts that Columbia witness Ramsey contradicted this policy and the tariff by surmising that, in 1997 at Cameron Creek, Columbia set the meters and established service without inspecting the house lines or appliances. (CCA Br. at 2-3; Tr. I at 78-79; CCA Ex. 22.) Cameron Creek asserts that, either Columbia applied the 1996 NFG Code to Cameron Creek when it supplied gas to the apartments after finding them compliant and safe, or Columbia did not apply the 1996 NFG Code to Cameron Creek in 1997 and is just now attempting to do so for the first time. If the latter is the case, Cameron Creek argues that Columbia would be violating Chapter 3781, Revised Code, and the Ohio Building Code against retroactivity. (CCA Reply Br. at 6; CCA Ex. 39, Att. 5.) Cameron Creek insists that, under state law, only building officials can apply new codes to older approval, and this is only after a finding of a serious safety issue under the building code (CCA Reply Br. at 7).

Cameron Creek points out that the NFG Code preface requires users of the code, such as Columbia, to defer to state and local laws. Cameron Creek submits that consulting state and local laws would have been a recognition that only state-certified building departments can interpret codes and regulate building construction. Columbia's actions

amounted to regulation of construction under Chapters 3781 and 3791, Revised Code, and the Ohio Building Code. (CCA Ex. 39, Att. 8; CCA Reply Br. at 3).

2. Inspections and Alleged Incidents

Ms. Roahrig testified that, if there was a serious safety issue, the building would have to either be brought back to the original condition when the building plan was approved or it would need to be brought up to the current requirements, in order to abate the serious hazard. She states that, when she visited Cameron Creek in 2008, she performed combustion air calculations on indoor air, found proper ventilation, appropriate efficiency ratings of appliances, and adequate air changes from outside to inside air; she did not find a serious hazard. Ms. Roahrig explains that the systems at Cameron Creek were being maintained and she did not see that any alterations had been made; thus, there was nothing that the complainant did to bring the building codes into play. Therefore, Ms. Roahrig could not tell the owner to bring things up to current code and she could not apply the current code retroactively. (Tr. I at 256, 259-260, 264, 319; CCA Ex. 2; CCA Br. at 9-10, 18.)

Cameron Creek points out that it has operated safely for the past decade. Moreover, Cameron Creek states that no evidence was presented on the record to indicate any credible CO incidents other than those related to conventional equipment failure, replacement, or maintenance needs. According to the complainant, Columbia based its actions to shut down Cameron Creek on two alleged CO incidents; however, Columbia did not document or conduct follow up investigations to determine the cause of these alleged incidents. Complainant notes that there is no evidence that suggests that equipment configuration/location or the volume of combustion air feeding the appliances is problematic. In addition, the complainant points out that, while two incidents were reported, since the water heaters were replaced or serviced in the two units, they have operated safely. (CCA Br. at 6; CCA Exs. 8, 17.) The Cameron Creek property manager, Ms. Kauffman, states that she is not aware of any time that a vendor, when inspecting and restarting an appliance, found an actual operational problem with an appliance. During the winter months of 2008 and 2009, Ms. Kaufmann notes that no CO alarm went off in an apartment at Cameron Creek and no other safety issue related to the gas appliances occurred (CCA Ex. 36 at 1-2, 6).

In reviewing Cameron Creek's maintenance and service records with regard to how the complainant responded to Columbia's red tagging for allegations of CO problems, Mr. Schultz notes that the complainant took appropriate action and asked licensed mechanical contractors and plumbers to test and inspect the appliances. When evidence of problems were found, Cameron Creek hired licensed technicians to replace the appliances. According to Mr. Schultz, the records show typical and expected issues for appliances of this age and use pattern. The records do not show, and there is no physical evidence to

suggest an inherent, overall problem with the installation, configuration, surrounding construction, utilization, or condition of the gas appliances. (CCA Ex. 39 at 34-35; Att. 11.)

As stated previously, there were two alleged CO incidents reported by Columbia at Cameron Creek. When asked about the June 16, 2008, occurrence at 5744 Red Carnation Drive at Cameron Creek when a CO detector went off, Mr. Busch opines that either the mist from the shower or a gas problem could have tripped the detector. He does not believe that the theory that humidity inhibits safe combustion inside gas appliances is necessarily true and believes that there are more factors that would need to be known before the cause could be determined. Based on his review of records after that incident, he also believes that the failure could have been due to lack of maintenance on that equipment. (CCA Ex. 37 at 7-8.) In Mr. Schultz's opinion, the incident resulted because the water heater needed service and the gas vent was not drafting properly (CCA Ex. 39 at 36; CCA Br. at 7).

With regard to the incident documented at 5587 Red Carnation Drive at Cameron Creek, Mr. Schultz states that the record reveals that the gas water heater likely failed due to age and use, and it was replaced. He further expects that, due to the placement and sensitivity of the CO detectors that have been wired into each apartment at Cameron Creek, the gas appliances will experience more attention. (CCA Ex. 39 at 36-37.)

In Mr. Busch's opinion, with the proper maintenance and the identification and resolution of serious hazards by building officials, Cameron Creek is in compliance with state and local building codes. Furthermore, as long as no source of the design air supply has been blocked or eliminated, Mr. Busch contends that combination combustion air, from both inside and outside the buildings, is adequate for safe gas appliance operations. (CCA Ex. 37 at 9-10.) Mr. Schultz believes that Columbia's position that the four-inch air supply vents currently used by Cameron Creek do not provide any combustion air, just return air, is wrong. He points out that the outside air does reach the combustion area and, under the 1995 Building Code, is counted toward total combustion air requirements. (CCA Ex. 39 at 31.) Furthermore, Ms. Roahrig notes that the furnaces installed at Cameron Creek have a draft safeguard switch, which is a safety device that permits the safe shutdown of the furnace during blocked vent conditions or if there is a power outage (CCA Br. at 11; CCA Reply Br. at 17; Tr. II at 335). Cameron Creek maintains that the only way to prevent blockage of exhaust vents is maintenance and vigilance. While vents may become blocked, the complainant offers that safety devices on furnaces, CO detectors, adequate ventilation air under the building codes, and constant fresh air exchanges protect residents. (CCA Br. at 12.)

Mr. Schultz reviewed over 50 red tags left by Columbia and notes that only two reflected CO readings; those readings were relatively low and were taken at the lower door of the gas appliances near the combustion chamber where CO is expected to be found

prior to safe venting. Furthermore, the witness notes that Columbia's CO testing policies call for written documentation of CO readings and strongly emphasizes that the testing for CO be done in the ambient air of the dwelling, which are the rooms that are typically occupied. Mr. Schultz believes that either Columbia was not following its written procedures when red tagging or Columbia had not documented actual CO findings that would evidence inadequate combustion air. (CCA Ex. 39 at 18-19.)

Mr. Schultz explains that CO is created when combustion air is inadequate and natural gas is not burning clean. He submits that the combustion air feeding gas appliances at Cameron Creek was adequate at the time it was approved in 1996 and is adequate today. (CCA Ex. 39 at 6, 17, 35.) Based on combustion air calculations he performed on July 1, 2009, Mr. Schultz states that it is adequate for gas appliance operations at Cameron Creek. He asserts that the calculations show that indoor air alone is sufficient and in accordance with the plans approved in 1996 and the requirements at the time of construction. Moreover, he offers that the existing, as-built condition wherein both indoor and outdoor combination air is available and supplied to the gas appliance provides an even better situation than is required. Mr. Schultz also points out that the blower door tests he conducted on July 1, 2009, show outdoor air infiltration into the building; thus, demonstrating that the units are neither "tight construction" nor "unusually tight construction," as defined in the Mechanical Code and Rule 4101:2-2, O.A.C. Thus, they provide sufficient air to meet the requirements at the time of construction and under current code requirements. Furthermore, Mr. Schultz notes that the units have all had interconnected and hardwired combination smoke/CO detector alarms installed. (CCA Ex. 39 at 9, 15, 20-21, 30; Atts. 3C, 3D, 6). During his evaluation of the property on at least four site visits, Mr. Schultz conducted a smoke test of the furnace unit in the heating mode with the dryer and bathroom exhaust fans operating and all doors and windows closed. He states that he observed a positive draft flow of the water heater and a clean burning flame at the furnace with no visible draft or combustion air difficulties for the gas appliances. In addition, Mr. Schultz reviewed tests and inspections that were performed by licensed heating and plumbing contractors in October 2008 on furnaces and water heaters in 11 units; these tests revealed no excessive CO production from gas appliances and there was no evidence that combustion air was inadequate to support safe operations of the appliances (CCA Ex. 39 at 16-17, Att. 3A). Furthermore, the witness offers that, if excessive CO was being produced at Cameron Creek based on inadequate combustion air, symptoms would have be presented in humans, pets, and plants over the last decade (CCA Ex. 39 at 19; CCA Br. at 9). Cameron Creek believes that, based on Mr. Schultz's tests, the apartment construction allows for sufficient air infiltration from the outside to insure the adequate supply of combustion air to gas appliances (CCA Br. at 11).

C. Columbia's Position

Columbia called four witnesses for direct examination. Stephen Erlenbach, a project engineer with SEA, Inc., testified on behalf of Columbia (CGO Ex. 6 at 1). In addition, Michael Ramsey, Operations Compliance Manager for NiSource in Ohio and a professional engineer, testified on behalf of Columbia (CGO Ex. 1 at 1). Dawn Bass, a former service technician and technical trainer, and current program specialist with NiSource, also testified on behalf of the company. (CGO Ex. 2 at 1).

1. Code and Tariff Provisions

Mr. Erlenbach explains that the NFG Code is a consensus document that is co-sponsored by the National Fire Protection Associations and the American Gas Association and is intended to promote public safety by providing requirements for the safe and satisfactory utilization of gas. (CGO Ex. 6 at 2.) Columbia explains that, while the gas appliances at Cameron Creek comply with the building code enforced by the City at the time of installation, the appliances were not installed in compliance with the NFG Code in effect at the time of installation, which is the reference standard the company uses for evaluating the safety of customer house lines and appliance installation and venting (CGO Br. at 2). Mr. Ramsey explains that, at the time service was established at Cameron Creek in 1997, the gas appliances were not yet installed and, consistent with the company's policy at that time, Columbia simply established gas service to the meter and did not inspect the appliance installations. The witness further offers that, under the current rules of the Commission, Rule 4901:1-13-05(A)(3), O.A.C., Columbia is required to establish service only after the house lines and one appliance drop are installed. (Tr. I at 78-79.)

Columbia points out that the NFG Code is essentially the same fuel gas code that the state of Ohio and the City are currently applying, the IFG Code, which was first adopted in 1998. Therefore, Columbia argues that, if the state of Ohio found the IFG Code to be a reasonable reference for the safety of gas appliances and appliance venting, then Columbia's adoption of the similar NFG Code as its safety reference cannot be unreasonable. (CGO Br. at 12.)

Columbia considers violations of the NFG Code to be significant safety hazards and a threat to human life (CGO Ex. 1 at 4; CGO Br. at 19). Columbia believes that Cameron Creek's violation constitutes a safety hazard and argues that the Commission's rules and Columbia's approved tariff permit the company to disconnect residential service in the case of a safety hazard and to withhold service until the hazard is remedied. According to Columbia, its tariff permits it to require a customer to install appliance venting or rectify a hazardous condition, in accordance with the "reasonable requirements" of the company. Columbia asserts that its reasonable requirements for appliance installation and venting are the requirements set forth in the NFG Code, citing for support Rule 4901:1-18-03(D),

O.A.C.[3]; and Columbia Tariff P.U.C.O No. 2, Third Revised Sheet No. 4, Section 15(B)(4) and Fourth Revised Sheet No. 8, Sections 8-9. Columbia affirms that both the Commission's rules and the company's tariff were in effect prior to the construction of Cameron Creek. (CGO Br. at 7-9.) Columbia insists that neither its policies or its tariff in 1997 required it to inspect appliance installations before establishing gas service (CGO Reply Br. at 11).

Mr. Ramsey explains that Columbia has a policy that requires a service technician to turn off the gas supply, attach a red tag to a customer's gas appliance, if it is in an unsafe condition, and explain to the customer what must be done to correct the problem. The customer is told not to use the appliance until a qualified repairman makes the repairs. According to Mr. Ramsey, Columbia considers violations of the NFG Code to be significant safety hazards and a threat to human life that would warrant a red tag. Mr. Ramsey explains that Columbia adopted, as part of the company's policy, the NFG Code to be the reference standard for safety in evaluating customer house lines and appliance installation and venting. This policy was in effect in 1996 and is still in effect. (CGO Ex. 1 at 3-6; Att. 1, 2; CGO Br. at 7.) He further states that the company applies the most current NFG Code in place at the time of inspection. Mr. Ramsey notes two situations where Columbia applies something other than the currently-effective NFG Code: Columbia would apply the code in effect at the time of installation if the particular appliance installation or venting configuration was in compliance with the NFG Code at the time it was installed, but the code was subsequently changed and it did not state that the change was retroactive; and it will apply the local building code if Columbia is aware that the local building code contains a requirement that is different or more restrictive than the NFG Code. (CGO Ex. 1 at 7; CGO Br. at 10; Tr. I at 50-51.)

Ms. Bass agrees with Mr. Ramsey that it would not be feasible for Columbia's technicians to red tag only those appliances that have been altered since the building plans were approved or those that do not comply with the codes in effect at the time the plans were approved. The witnesses point out that the technicians would not know when the particular plans were approved or whether the appliance had been altered since it was installed. Furthermore, Mr. Ramsey states that Columbia does not have the staffing necessary to call the local building authorities to ensure that the municipality agrees that appliance installation is a safety hazard. Ms. Bass believes that such a process would increase the record-keeping burden on the service technicians. Mr. Ramsey asserts that Cameron Creek's proposal in this case would create uncertainty and have a negative effect on public safety because it would be more difficult for Columbia to identify a hazardous situation. In addition, Ms. Bass offers that the technicians would not be able to ascertain

[3] Effective November 1, 2010, Chapter 4901:1-18, O.A.C., was amended. Therefore, throughout this order, we will refer to the rule number that is currently in effect, Rule 4901:1-18-03(D), O.A.C., which is identical to Rule 4901:1-18-02(F), O.A.C., which was in effect at the time of the filing of this complaint and is the rule cited by Columbia.

what would be required to fix a problem; thus, Cameron Creek's request that Columbia not be allowed to red tag an appliance, if the remedy would be expensive, does not make sense. According to Mr. Ramsey, the benefit of using the NFG Code is that it provides a bright-line test if an appliance installation or venting is in violation it is a safety problem. Finally, Ms. Bass notes that, just because there has never been a CO incident in the past, a violation of the NFG Code could cause a CO incident in the future, as conditions in the apartment change. (CGO Ex. 1 at 8-10; CGO Ex. 2 at 6-9.)

Ms. Bass explains that she was trained in 1993 on the requirements of the NFG Code, including how to calculate combustion/ventilation air. She states that, even though the NFG Code and the training materials have been updated since 1993, the training has not changed substantially. The witness offers that, any time a new edition of the NFG Code is released, the service technicians receive a summary of the differences between the prior edition and the new one; if the changes are more than minor, the technicians are brought in for a one-day review. According to Ms. Bass, Columbia service technicians apply the NFG Code any time they are establishing or reestablishing gas service. Before a technician can put gas into a dwelling, they must perform testing and inspections, including inspections of the appliances and piping inside, and the facilities outside of the dwelling. Ms. Bass explains that, in the field, if a technician sees that an existing appliance or installation was in violation of the current NFG Code, but the resident or owner could show that it was in compliance with the NFG Code at the time it was installed, then Columbia would apply the NFG Code that was in effect at the time of installation. If a Columbia technician finds that an appliance is in violation of the NFG Code, he is to turn off the gas to the appliance and red tag it. If the technician visits the dwelling multiple times and finds the same violation to the NFG Code, he is to disconnect service to the dwelling. (CGO Ex. 2 at 2-5.) Columbia requests that the Commission permit it to enforce the NFG Code at Cameron Creek because, even if Cameron Creek or any Columbia customer fails to maintain their gas appliances properly, Columbia can minimize the chances of harm occurring from CO (CGO Reply Br. at 19).

Columbia disagrees with Cameron Creek witness Schultz's statement that the NFG Code provisions for alternate materials, equipment, and procedures, found in Section 1.2 of the 1996 NFG Code, allow for the installations at Cameron Creek that are at issue in this case. According to Columbia witness Erlenbach, the purpose of Section 1.2 of the 1996 NFG Code is to allow the authority having jurisdiction to approve the use of newly developed practices and technology. (CGO Br. at 18; Tr. III at 671, 675.) Moreover, Columbia asserts that, converse to what Cameron Creek believes, for purposes of the Commission's rules and Columbia's tariff and policies, Columbia is the "authority having jurisdiction" under these NFG Code sections; thus, because Columbia has not approved the appliance installations, Cameron Creek has not shown that its appliance installations are acceptable to the authority having jurisdiction (CGO Br. at 19).

Columbia points out that Section 3781.16, Revised Code, provides, in part, that Sections 3781.06 to 3981.18, Revised Code, do not limit the powers of the Commission; thus, Columbia derives its authority to terminate service when there is a safety hazard from the Commission's rules and Columbia's tariff, and the Ohio Building Code is not an impediment According to Columbia, the statute explicitly affirms the Commission's co-equal authority to govern such things as appliance installations and venting, where necessary. (CGO Reply Br. at 4, 7).

2. Inspections and Compliance

Columbia witness Erlenbach inspected the gas appliances at Cameron Creek and reviewed their compliance with the NFG Code (CGO Ex. 6 at 2). Mr. Erlenbach states that the utility closets were not isolated from the habitable space inside the apartments and that all air combustion was not being supplied directly from outdoors. (CGO Ex. 6 at 6-8.) According to Columbia, even if the four-inch vents did bring in some outside air directly into the bathroom closets, which Columbia submits they do not, the NFG Code would still be violated because the closets are still connected to the living space (CGO Reply Br. at 9).

When inspecting the Cameron Creek apartments, Mr. Erlenbach consulted the 1996, 2006, and 2009 editions of the NFG Code. During his inspection, the witness found the following violations of these code editions. First, he states that each two-story building uses a common gas vent to vent the appliances in both the first-story and second-story apartment, while relying on habitable space volume inside to provide combustion, ventilation, and dilution air. Mr. Erlenbach asserts that the use of a common vent for both stories creates a dangerous living environment because, if the common vent becomes blocked, the products of combustion, including CO, from any appliance below the blockage, will spill through the upper draft hood opening on the water heater and are free to enter the habitable space, rather than through the roof vent. Second, he points out that the one- and two-bedroom apartments had water heaters in closets in the bathrooms without weather-stripped solid doors with a self-closing devices and without obtaining all combustion air from outdoors. The witness attests that the purpose of the requirement that water heaters not be in bathrooms, bedrooms, or any occupied room normally kept closed, unless the closet door is weather-stripped, has a self-closing device, and all combustion air is supplied directly from outside, is to protect occupants from any spillage of combustion products from the water heater draft hood opening. He points out that CO alarms are not required by code and, in any event, they are vulnerable to power outages or battery failure. In addition, even if an alarm is outside the bathroom, the CO within the bathroom could rise to a hazardous level without setting off the alarm. (CGO Ex. 6 at 9-15.) Based on these concerns, Mr. Erlenbach disagrees with the City's position, as stated by Ms. Roahrig's statement that there is no safety issue at Cameron Creek, because "the mechanical equipment appeared to be in good condition and there was not evidence that the mechanical systems or structure has been altered from its original approval." Mr.

Erlenbach points out that, if a person is exposed to enough CO for a sufficient period of time, it can cause death. (CGO Ex. 6 at 13, 16).

CONCLUSION:

At the outset, the Commission acknowledges that the IFG Code, which is similar to the NFG Code enforced by Columbia, was adopted into Ohio law as part of the Mechanical Code in 2002, and these codes are treated by the City in conjunction with the Building Code, and the Ohio Plumbing Code. Thus, in this case, we need only to consider Columbia's application of the NFG Code to Cameron Creek, because it was approved prior to 2002 when the City adopted the IFG Code.

In 1997, Cameron Creek received its building permit from the City and Columbia initiated gas service at the complex. At that time, the City enforced the 1995 Building Code, which did not reference the NFG Code. It was not until 2002 that the City's Mechanical Code began referencing and enforcing the IFG Code, which is similar to the NFG Code. The 1995 Building Code did not require that all combustion air be obtained from outdoors, allowed for multi-storied dwellings to utilize one gas vent, and permitted the placement of gas appliances in bathroom closets that did not have weather-stripped solid doors with self-closing devices. In 1997, Columbia, through its tariff, enforced the NFG Code, which, to this day, requires that multi-storied dwellings obtain all combustion air from outdoors and not utilize one gas vent, and that gas appliances placed in bathroom closets have weather-stripped solid doors with a self-closing device. At the time it initiated gas to Cameron Creek, Columbia did not inspect the gas appliances to determine if they were in compliance with the NFG Code, it just turned the gas on at the meter.

Initially, the Commission would note that neither party contests the fact that Section 3781.16, Revised Code, which is the section of the Ohio building standards pertaining to the effect of the standards on state authorities, does not limit the Commission's powers under Title 49, Revised Code. This case is before the Commission for the purpose of determining whether certain provisions of Columbia's tariff, and its policies and procedures with respect to the disconnection or refusal to connect/reconnect service, are just and reasonable.

The first question the Commission must address is whether Columbia's current policy of enforcing the NFG Code, as referenced in the tariff, is just and reasonable. There is no doubt that the number one priority when it comes to the provision of natural gas service is that all possible measures are taken to ensure the health and safety of the public. To that end, the Commission believes it is necessary that, prior to connection or reconnection of gas service, Columbia must apply a standard of review that is in keeping with the most current safety standards enforced by the gas industry. Both parties in this case agree that the NFG Code is an acknowledged compilation of standards; in fact, the

City, in 2002, adopted reference to the similar IFG Code in the building code that it enforces. Therefore, the Commission finds that, with regard to this initial question, the complainant has not sustained its burden of proving that Columbia's tariff is unjust or unreasonable, in accordance with Section 4905.26, Revised Code. Columbia has not violated its tariff by applying the NFG Code, and its practice of referencing and enforcing of the most recent NFG Code is just and reasonable.

Having determined that Columbia's current practice is appropriate, the Commission now turns to the overriding question posed in this case by the complainant: whether Columbia has properly applied the NFG Code to the facts in this matter. The question is, if Columbia believes that there is a potentially hazardous condition in a dwelling that was approved for occupancy in prior years, pursuant to City codes that were in effect at the time of such approval, and the construction in that dwelling has not been altered such that the City code would require that it be brought up to current code, can Columbia require that the dwelling be retrofitted in order to bring it into compliance with the current NFG Code before Columbia will connect or reconnect gas service.

The Commission is mindful of the fact that, while Columbia's tariff applied the NFG Code in 1997 when gas service was initially turned on at Cameron Creek, it appears that Columbia did not begin enforcing the NFG Code requirements regarding appliance hookups until 2002 when required to do so by the Commission's rules. While Columbia's practice and the Commission rule requiring the company to inspect the appliances before turning the gas on may be more recent than 1997, that leaves older dwellings that were approved by the City building authority in accordance with the City code enforced at an earlier date in a difficult situation. However, the Commission notes that these dwellings were approved under the City code in effect at the time of construction and were deemed safe in accordance with those requirements. The Commission believes that, absent a verifiable hazardous condition in an individual dwelling, for Columbia to now cite the potential for a hazardous situation and mandate that older dwellings must now update their ventilation for gas appliances to conform to current NFG Code requirements is not a reasonable resolution to these situations. Under this process, thousands of dwellings, that were approved prior to the City including the IFG Code in the City building code requirements, not just Cameron Creek, would be required to potentially expend over $1,000 per unit to bring the ventilation system up to current code or risk having their gas service disconnected. In addition, as the record reflects, once the dwellings alter their construction from the one that was initially approved by the City, there is a great possibility that the dwelling will also be subject to additional code requirements; thus, having to incur more expense.

Over the last decade, Columbia had two reports of alleged CO difficulties at the Cameron Creek apartments. However, Cameron Creek's experts attest that those situations resulted because the equipment needed maintenance, repair, and/or

replacement. Evidence was submitted by Columbia regarding CO exposure. However, Cameron Creek's expert Schultz confirms that the problems that occurred were typical for appliances of this age and usage pattern. The witness further notes that there is no physical evidence to suggest an inherent, overall problem with the installation, configuration, surrounding construction, utilization, or condition of the gas appliances. Moreover, Cameron Creek's assertion that the water heaters that were replaced or serviced in the two units reported have since then operated safely was not refuted on the record. Columbia did not substantiate that either of those situations were an indication that there was an actual serious CO hazard either in the dwelling at question or at Cameron Creek in general. Since 1997, Cameron Creek indicates it has operated safely with no evidence of CO in the apartments' ambient air. Moreover, there has been no reported problem related the health of humans, animals, or plants.

Cameron Creek's experts established on the record that, because Cameron Creek was constructed in the 1990s, its construction was less "tight" than what is the standard for current construction. The inspections and tests, including the blower door test, conducted by one of Cameron Creek's experts showed that, with the less tight construction of Cameron Creek, there was adequate outside air infiltration for the gas appliances. Furthermore, Cameron Creek effectively called to question the sufficiency of the CO tests performed by Columbia, pointing out that the only CO readings taken by Columbia were at the lower combustion doors of appliances, which is where CO is expected to be present. The record reflects that, if the apartments were built today with the tighter construction perimeters, the type of ventilation present at Cameron Creek would not result in an adequate supply outdoor air for combustion air purposes. However, Cameron Creek was not tightly constructed and it has not undergone any renovations; thus, the Cameron Creek experts agree that there is adequate outdoor air combustion. As attested to by both the former and present City officials, Cameron Creek has not altered its construction since its inception in 1997, such that it is required under the City codes to bring its buildings up to the current building code standards.

In these difficult economic times it is hard to justify imposing additional costs on consumers and property owners in a situation where there is no record evidence that there was a verifiable hazardous condition. There is no question that, when there is a verifiable safety hazard, Columbia has the right, under its tariff and the Commission's rules, to disconnect gas service and require customers to address the safety issue. However, there is no evidence in this case that there is a hazardous safety issue at Cameron Creek; rather, Columbia is threatening to disconnect service due to the potential for a hazardous situation that is not documented on the record and is not verified. Therefore, the Commission agrees that Columbia's attempt to force retrofitting, at this time, when there is no verifiable safety hazard, essentially equates to retroactive enforcement of standards that Columbia did not seek to enforce in 1997 when service was initially established.

Cameron Creek witnesses testified that, as long as proper maintenance and repair is required, and hazards are identified and addressed, Cameron Creek is in compliance with state and local building codes and there is no imminent safety threat at the Cameron Creek apartments. In Cameron Creek's situation, it has attempted to mitigate the concerns raised by Columbia by installing interconnected and hardwired combination smoke/CO detectors in each apartment. The Commission agrees that the key to sustaining a safe and hazard-free complex at Cameron Creek is continued and diligent maintenance and repair of the gas appliances, ventilation system, and CO detectors, as well as the replacement of the appliances when necessary. Cameron Creek has a full-time management and maintenance staff to cover these duties and it is the responsibility of Cameron Creek to ensure that these items continue to operate safely.

As we stated previously, we find that it is reasonable for Columbia, in accordance with its tariff, to rely on the most current NFG Code to determine if supplying gas service to a customer is safe. However, the Commission finds that the NFG Code specifically provides for alternative and engineered solutions, which Columbia did not take into account in the application of the NFG Code to the facts of this case. In this situation, Cameron Creek modified its building plans to add a 4-inch fresh air supply duct and submitted to the City engineering calculations from a licensed professional engineer verifying that combustion air was adequate for gas appliances. Mr. Schultz, a professional engineer and former member of the Ohio Board of Building Standards, testified that this constituted a specially engineered solution to provide an adequate supply of air for combustion, ventilation, and dilution of gases, which was approved by the appropriate jurisdictional authority when, in 1996, the City approved the Cameron Creek building plan. As a result, we find that the record indicates that Cameron Creek complied with the alternative compliance methods allowed in the 1996 NFG Code.

The Commission considers prescriptive compliance with the NFG Code to be a safe harbor for customers; however, if compliance is economically or practically unreasonable, we find that a program of maintenance and monitoring should be enforced, subject to review by the Commission's Staff, in order to ensure that the same level of safety espoused by the NFG Code is achieved. In this case, the Commission finds that the complainant demonstrated that it is providing a reasonable margin of safety for its occupants. Among the specific factors shown by the Cameron Creek are: the presence of a hard-wired CO detector adjacent to the air vents to the appliance closet; compliance with venting requirements in the applicable building code when built; nontight construction and a lack of material changes to the building since constructed; and demonstration through a blower door test of significant outside air infiltration. The Commission believes that, where older structures cannot demonstrate prescriptive NFG compliance or the existence of a specially engineered solution with an appropriate professional engineering verification, Columbia should balance any requirements for extensive retrofits with a rule of reason. While it is essential that a facility remains safe even when reasonably foreseeable maintenance,

repair, or replacement of equipment might be needed, a reasonable safety margin can be provided by a combination of structural elements and monitoring that warns occupants of developing risks. With regard to Cameron Creek's situation, Columbia appears to have given limited weight to the installation of CO monitors, an important step taken by Cameron Creek, and to the engineering studies provided by the complainant.

Thus, since the city of Columbus, as the local jurisdiction having building code authority, approved Cameron Creek's design at the time of the construction, we find that such approval, in this case, constitutes an alternative and/or engineered solution pursuant to the NFG Code. However, in the absence of prescriptive NFG Code compliance or a specially engineered solution that is compliant with the building code and supported by a professional engineering verification of adequacy, Columbia continues to have the ability to require retrofits that are necessary to ensure a reasonable margin of safety. Therefore, because Cameron Creek has demonstrated compliance with the City building code regulations at the time the dwelling was built, as well as the NFG Code, and because the 1995 Code took into account the necessary combustion features to assure safety, there have been no renovations or alternations (this does not include the replacement of gas appliances) that called into play the City building code requirement that the dwelling be brought up to current code, and there is no known safety issue, Columbia cannot require retrofitting.

Accordingly, the Commission finds that the complainant has sustained its burden of proof, such that Columbia may not disconnect or refuse reconnection of service citing potential unsubstantiated hazard conditions due to noncompliance with the NFG Code. However, pursuant to the City building code requirements, if the Cameron Creek dwellings are altered, as determined by the City building code, then the dwellings must be brought up to current City building code standards and Columbia may then enforce the NFG Code in effect at that time. Moreover, the Commission notes that any future CO tests taken by Columbia must be taken in an appropriate and objective location in the dwelling, consistent with Columbia's policy that testing for CO be done in the ambient air of the dwelling. Having made these determinations, the Commission strongly encourages Cameron Creek and Columbia to continue to communicate and work with the City building authority regarding the construction relating the gas appliances at Cameron Creek, and to consider potential upgrades that may gradually bring the complex up-to-date with current standards.

FINDINGS OF FACT AND CONCLUSIONS OF LAW:

(1) Columbia is a natural gas company, as defined in Section 4905.03(A)(5), Revised Code, and is a public utility as defined by Section 4905.02, Revised Code.

(2) On September 17, 2008, Cameron Creek, which is a customer of Columbia with 240 apartment units, filed a complaint against Columbia.

(3) On October 8, 2008, as modified on April 24, 2008, the attorney examiner ordered that, during the pendency of this proceeding or until otherwise ordered by the Commission, Columbia shall not terminate service to the apartment complex, subject to the exception set forth in the entry.

(4) The hearing in this matter was held on July 15 through July 17, 2009.

(5) Briefs and reply briefs were filed by the parties on August 31, 2009, and September 14, 2009, respectively.

(6) The burden of proof in a complaint proceeding is on the complainant. *Grossman v. Public Utilities Commission* (1966), 5 Ohio St.2d 189, 214 N.E.2d 666.

(7) Columbia has not violated its tariff and its practice of referencing and enforcing of the most recent NFG Code is just and reasonable.

(8) The complainant has sustained its burden of proof, to the extent set forth in the conclusion of this order, such that Columbia may not disconnect or refuse reconnection of service citing potential unsubstantiated hazardous conditions due to noncompliance with the NFG Code.

ORDER:

It is, therefore,

ORDERED, That the complainant has sustained its burden of proof, to the extent set forth herein. It is, further,

ORDERED, That a copy of this opinion and order be served upon all parties of record.

THE PUBLIC UTILITIES COMMISSION OF OHIO

Todd A. Snitchler, Chairman

Paul A. Centolella

Steven D. Lesser

Andre T. Porter

Cheryl L. Roberto

CMTP/vrm

Entered in the Journal
JUN 22 2011

Betty McCauley
Secretary

BEFORE

THE PUBLIC UTILITIES COMMISSION OF OHIO

| | | |
|---|---|---|
| In the Matter of the Complaint of Cameron Creek Apartments, | ) | |
| Complainant, | ) | |
| v. | ) | Case No. 08-1091-GA-CSS |
| Columbia Gas of Ohio, Inc., | ) | |
| Respondent. | ) | |

CONCURRING OPINION OF COMMISSIONER STEVEN D. LESSER

I concur with the decision in this case that Cameron Creek has met the requirement of an engineered solution in lieu of prescriptive compliance with the NFG Code, but I believe that compliance should include an ongoing maintenance and monitoring program to ensure the safety of the tenants. The evidence of record of incidents demonstrates the need for vigilance in the care of the fresh air supply, and the placement and testing of the carbon monoxide devices. The occupants of the apartments deserve some ongoing review that ensures that a system that does not meet the current prescriptive requirements of the NFG Code remains comparably safe.

Steven D. Lesser, Commissioner

Entered in the Journal
JUN 22 2011

Betty McCauley
Secretary

**BEFORE**
**THE PUBLIC UTILITIES COMMISSION OF OHIO**

| | | |
|---|---|---|
| In the Matter of the Complaint of Cameron Creek Apartments, | ) | |
| Complainant, | ) | |
| v. | ) | Case No. 08-1091-GA-CSS |
| Columbia Gas of Ohio, Inc. | ) | |
| Respondent. | ) | |

## APPLICATION FOR REHEARING OF COLUMBIA GAS OF OHIO, INC.

Pursuant to Section 4903.10, Revised Code, and Rule 4901-1-35, Ohio Administrative Code, Columbia Gas of Ohio, Inc. ("Columbia") files this Application for Rehearing of the Commission's June 22, 2011, Opinion and Order ("Opinion"). The Commission's Opinion is unreasonable and unlawful in the following respects:

1. The Commission's Opinion is unreasonable because it incorrectly concluded that the addition of fresh air supply ducts to Cameron Creek's units was an "alternative compliance method" or "engineered solution" under the National Fuel Gas Code (NFGC) and thus excused from the NFGC's appliance venting requirements.

2. The Commission's Opinion is unreasonable and unlawful because its conclusion, that Cameron Creek has provided its residents a reasonable margin of safety, requires Cameron Creek to adequately maintain its gas appliances, an obligation that the complex has not performed consistently in the past and that the Commission has no authority to enforce.

3. The Commission's Opinion is unreasonable because its conclusion that carbon monoxide detectors will keep Cameron Creek's residents safe is not supported by the evidence.

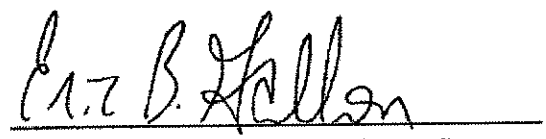
4. The Commission's Opinion is unreasonable because its holding that non-tight construction justifies noncompliance with the NFGC is not supported by the evidence and will discourage participation in utility demand-side management programs.

5. The Commission's Opinion is unreasonable because it is unclear how Columbia is supposed to enforce the Commission's new "reasonable margin of safety" test at other customers' residences.

6. The Commission's Opinion is unreasonable because putting the Commission's holdings into effect for all of Columbia's residential customers would be unduly burdensome.

A Memorandum in Support of this Application for Rehearing is attached.

Respectfully submitted,



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**COLUMBIA GAS OF OHIO, INC.**

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**MEMORANDUM IN SUPPORT OF APPLICATION FOR REHEARING OF COLUMBIA GAS OF OHIO, INC.**

## 1. Introduction

Pursuant to § 4903.10, Ohio Rev. Code, and § 4901-1-35, Ohio Admin. Code ("O.A.C."), Columbia Gas of Ohio, Inc. ("Columbia") files this Application for Rehearing of the Commission's June 22, 2011, Opinion and Order ("Opinion") on the grounds that the Opinion is unreasonable and unlawful. The Opinion reflects an admirable attempt to protect the health of Columbia's customers at Complainant Cameron Creek Apartments ("Cameron Creek") while at the same time protecting their pocketbooks. Unfortunately, the Opinion does not achieve that goal.

The safety code that Columbia has adopted, the National Fuel Gas Code (NFGC), requires Cameron Creek to obtain the combustion, ventilation, and dilution air for its apartment units' water heaters and gas furnaces directly from outside those apartments and put weather-stripping on the doors of the bathroom closets where many of those appliances are located. Complying with these requirements would ensure that Cameron Creek's residents are protected even if their appliances produce carbon monoxide and the appliance vents are blocked.

The Commission decided that providing this protection to the tenants would be too expensive. Instead, the Commission held that Cameron Creek's alternative efforts to reduce the likelihood of, lessen the effects of, or warn their residents about exposure to carbon monoxide provide a reasonable margin of safety.

Unfortunately, the measures that Cameron Creek adopted to avoid compliance with the NFGC do not provide the same kind or level of protection that compliance with the NFGC would provide. If the appliances at Cameron Creek produce carbon monoxide, the measures Cameron Creek has taken to try to avoid NFGC applicability – installing hard-wired carbon monoxide detectors and adding ducts to bring more air into each unit, and thus *in*directly to the gas appliances – will not protect the complex's residents. At best, the carbon monoxide detectors will let the residents know that they are in danger. At worst – if carbon monoxide builds up in a confined room away from the detector, or if the power is out and the detector's battery is dead – the detectors will be no help at all. And, as Commissioner Lesser's concurring opinion seems to recognize, none

of Cameron Creek's efforts is sufficient to protect the complex's residents without an ongoing maintenance and monitoring program. (Opinion, Lesser Opinion, at p. 1.) Ensuring that such an ongoing review takes place, however, is beyond the power or authority of this Commission. Ultimately, the safety of Cameron Creek's residents will depend on the diligence of Cameron Creek's maintenance staff. The history of carbon monoxide incidents at Cameron Creek, coupled with the evidence of the pre-hearing condition of Cameron Creek's gas appliances, demonstrates that it may be unwise to rely on this level of diligence as a solution to the problems at Cameron Creek.

Columbia's current safety code is the NFGC, a clear, unambiguous safety standard that Columbia currently trains its service technicians to enforce statewide. If the Commission upholds its Opinion on rehearing, it will be replacing the NFGC with an ambiguous, subjective policy that will introduce inconsistency and uncertainty and put customer safety at risk. Failure to grant rehearing will also impose huge administrative burdens on Columbia. For the reasons provided below, Columbia respectfully requests that the Commission grant Columbia's application for rehearing and uphold Columbia's application of the NFGC at Cameron Creek and throughout Columbia's area of service.

## 2. Law and Argument

### 2.1. The Commission's Opinion is unreasonable because it will endanger the health of Cameron Creek residents and natural gas customers throughout Ohio.

The provisions of the National Fuel Gas Code (NFGC) that are at issue in this proceeding were designed to protect Columbia's customers from carbon monoxide poisoning even if the customers' gas appliances malfunction and the appliance venting becomes obstructed. (*See* Columbia Ex. 6, Erlenbach Testimony, at p. 16, lines 10-12.) The first requirement at issue, found in § 6.30.1(a) of the 1996 NFGC, required that any water heater installed in a bathroom be kept in a "closet . . . [with] a weather-stripped solid closet door with a self-closing device" where all combustion air is supplied directly from the outdoors. (*Id.* at p. 10, lines 19-22.) This section was intended to "protect occupants in particularly vulnerable situations from being affected by any spillage of . . . carbon monoxide[ ] from the water heater draft hood opening." (*Id.* at p. 15, lines 9-14.) As Columbia's expert witness Stephen Erlenbach noted, "[i]n a small, closed room, the concentration of carbon monoxide can rise more quickly than it would in a larger, unenclosed space." (*Id.* at p. 15, lines 14-16.)

The second NFGC requirement at issue, found in § 7.6.4 of the 1996 NFGC, required that any appliances on different floors sharing a common vent "be completely separated from the habitable space" and obtain combustion, ventilation, and dilution air from outside the occupiable space. (*See id.* at p. 9, line 22, to p. 10, line 2; p. 14, lines 17-18.) That second section is designed to prevent a blockage in the common vent from sending combustion products (such as carbon monoxide) back down the vent into two residences. (*Id.* at p. 13, lines 3-6; p. 14, line 17, to p. 15, line 3.)

Thus, these two NFGC requirements provide a second line of defense for Columbia's customers. "[E]ven when gas appliances are not operating properly" and/or appliance venting is obstructed, these provisions "prevent safety hazards" and protect human health. (*Id.* at p. 16, lines 24-25.)

The Commission's Opinion takes away this second line of defense. In its place it leaves the addition of a 4-inch fresh air supply duct to each unit at Cameron Creek (but not directly to the gas appliances) to provide additional combustion, ventilation, and dilution air, which the Commission erroneously concludes was an "alternative compliance method[ ]" under the NFGC. It leaves an unreliable first line of defense – maintenance – that the Commission cannot control or enforce. It leaves a potentially unreliable warning system – carbon monoxide detectors – for when the first line of defense fails. And it leaves an escape hatch – "nontight construction" – if the first line of defense and warning system both fail. As explained below, none of these alternative compliance methods provides a "reasonable margin of safety" for Cameron Creek's occupants. (Opinion at p. 21.)

#### 2.1.1. The Commission's Opinion is unreasonable because it incorrectly concluded that the addition of 4-inch fresh air supply ducts to the Cameron Creek units was an "alternative compliance method" or "engineered solution" for purposes of the NFGC.

The Commission's first error lay in its conclusion that the addition of 4-inch fresh air supply ducts to the units at Cameron Creek constituted an "alternative compliance method[ ]" under the NFGC. (Opinion at p. 21.) The Commission held that, "since the city of Columbus, as the local jurisdiction having building code authority, approved Cameron Creek's design at the time of construction, . . . such approval . . . constitutes an alternative and/or engineered solution

pursuant to the NFG[C]." (*Id.* at p. 22.) The evidentiary record contradicts this conclusion in several ways.

First, the City of Columbus's actions in "approv[ing] Cameron Creek's design at the time of . . . construction" with the added air supply ducts cannot "constitute[ ] an alternative and/or engineered solution pursuant to the NFG[C]" because the City had no authority under the NFGC in 1996. (*Id.*) The provision of the 1996 NFGC that permitted alternative solutions was § 1.2. (*See* Tr., Vol. III, at p. 501, line 19, to 502, line 3.) Section 1.2 of the 1996 NFGC states:

> The provisions of this code are not intended to prevent the use of any material, method of construction, or installation procedure not specifically prescribed by this code *provided any such alternate is acceptable to the authority having jurisdiction.* (See section 1.7, Definitions). The authority having jurisdiction shall require that sufficient evidence be submitted to substantiate any claims made regarding the safety of such alternatives.

(Tr., Vol. III, at p. 671, lines 10-22 (emphasis added).) Thus, the 1996 NFGC required an alternate solution to be approved by the "authority having jurisdiction." (*Id.*)

"Authority having jurisdiction" is defined as "[t]he organization, office, or individual responsible for approving equipment, an installation or procedure." (*Id.* at p. 672, lines 6-9.) The City of Columbus was not the "authority having jurisdiction" when it approved Cameron Creek's design because the City of Columbus did not apply the NFGC in 1996. (*See* Opinion at p. 18.) Accordingly, the City of Columbus could not have been acting under the NFGC when it approved Cameron Creek's design.

For similar reasons, the addition of 4-inch fresh air supply ducts to the units at Cameron Creek was not an "*engineered* solution" under the 1996 NFGC, because the City of Columbus did not apply the NFGC in 1996, and Cameron Creek did not undertake the project at Columbia's request or for Columbia's approval. The addition of those ducts might have qualified as an "engineered solution" under the 1996 NFGC had the owners of Cameron Creek come to Columbia for approval of the installation. But even if it would qualify as an "engineered solution," that is irrelevant to Cameron Creek's violations of the appliance venting requirements at issue in this proceeding.

The Commission's conclusion that the NFGC "specifically provides for alternative and engineered solutions" (Opinion at p. 21) appears to have been based on Cameron Creek witness Mr. Schutz's testimony regarding § 5.3.4 of the 1996 NFGC. Section 5.3.4 "is a standard that allows special engineering approved by the authority having jurisdiction to provide an adequate supply of air for combustion, ventilation, and dilution of . . . flue gases[.]" (Tr., Vol. II, at p. 501, lines 1-13.) Ensuring an adequate supply of combustion, ventilation, and dilution air is not the purpose of the appliance venting requirements that Cameron Creek violated. The purpose of those requirements was to ensure that any carbon monoxide spilling out of gas appliance draft hoods vents to the outside, rather than entering residences' living areas. (*See supra.*) Consequently, even if Cameron Creek's installation of 4-inch fresh air supply ducts could be considered an "engineered solution" for purposes of § 5.3.4 of the 1996 NFGC, that would just mean that it had provided additional combustion, ventilation, and dilution air. It would not excuse or negate the venting violations at issue here.

Third, and again similarly, the addition of the 4-inch fresh air supply ducts could not have been an "*alternate* solution" for purposes of the 1996 NFGC because the air supply ducts served an entirely different purpose than the venting configuration requirements that Cameron Creek violated. Section 1.2 permitted the use of an alternate "material, method of construction, or installation procedure" so long as the authority having jurisdiction accepted that the alternative solution was safe. (Tr., Vol. III at p. 671, lines 10-22 (emphasis added).) The drafting committee's official commentary for the 1996 NFGC explained that the intent of § 1.2 was to allow "safe practices in the installation of gas piping and equipment that have not been developed yet" and "new technology." (*Id.* at p. 675, lines 1-11.)

Cameron Creek presented no evidence that 4-inch fresh air supply ducts were a newly developed technology in 1996. Regardless, those air ducts solved a different problem than Cameron Creek's improperly vented gas appliances caused. The purpose of the four-inch fresh air supply ducts was to "provide an adequate supply of air for combustion, ventilation, and dilution of gases" (Opinion at p. 7; *see also* CCA Ex. 39, Schutz Testimony, at p. 13, lines 4 to 18), which helps prevent the production of carbon monoxide when natural gas is burned (*see* CCA Ex. 39, Schutz Testimony, at p. 17, lines 12-14; Columbia Ex. 6, Erlenbach Testimony, at p. 13, line 25). In other words, the 4-inch fresh air supply ducts were intended to help prevent carbon monoxide production. The appliance venting requirements, on the other hand, were intended to ensure that any carbon monoxide produced by the gas appliances would not jeopardize residents'

health and safety. The ducts and the venting requirements do not serve the same purpose. Or, as Cameron Creek witness Mr. Schutz put it, the indoor and outdoor combustion air requirements are a "totally different" subject from the venting requirements that Cameron Creek violated. (Tr. Vol. II at p. 435, line 20, to p. 436, line 3.)

Saying that the air supply ducts were an "alternate solution" to the NFGC's venting requirements would be like saying that effective brakes are an "alternate solution" to Ohio's seatbelt requirements. Brakes and seatbelts are not alternatives. The law requires both, and for good reason. Allowing Cameron Creek to install more effective brakes (4-inch fresh air supply ducts) so that it will not have to install seatbelts (proper appliance vents) will not keep Cameron Creek's residents safe.

#### 2.1.2. The Commission's Opinion is unreasonable and unlawful because it relies on Cameron Creek to adequately maintain its gas appliances, and the Commission cannot enforce any requirement to do so.

The Commission has further held that "the key to sustaining a safe and hazard-free complex at Cameron Creek is continued and diligent maintenance and repair of the gas appliances, ventilation system, and CO detectors, as well as the replacement of the appliances when necessary." (*Id.* at p. 21.) But Cameron Creek's maintenance crew also should not be relied upon to keep the complex's residents safe. Cameron Creek's historical failure to maintain and repair diligently its gas appliances indicates that the Commission cannot rely on maintenance as a fall-back alternative to NFGC compliance.

As the Commission's Opinion notes, there were two reports of "alleged CO difficulties" at Cameron Creek in recent years. In one incident, a Columbia service technician tested the ambient air in the unit's living room and found carbon monoxide readings above 20 ppm.[1] The maximum allowable concentration for continuous exposure to carbon monoxide in a living area is 9 ppm, although any measurable ambient carbon monoxide in a residence may be an indication of a problem. (Columbia Ex. 6, Erlenbach Testimony at p. 14, lines 7-12.) Rescue Rooter came out to examine the gas appliances and found that the burner assem-

[1] Contrary to the testimony of Cameron Creek witness Mr. Schutz, this carbon monoxide reading was indeed "taken in an appropriate and objective location in the dwelling, consistent with Columbia's policy that testing for CO be done in the ambient air of the dwelling." (Opinion at p. 22.)

bly, pilot assembly, and flue passage of the water heater were very dirty, that the thermocouple needed replacing, and that air was descending through the flue rather than rising up and venting out. (*Id* at p. 17, line 19, to p. 18, line 2.) In the other incident, one of Cameron Creek's residents took her daughter to the hospital for evaluation of carbon monoxide symptoms. Starner's Heating and Cooling examined the unit's gas appliances and found that heat/flame was rolling out of the front of the water heater and that the heater needed immediate replacement. (*Id.* at p. 18, line 16, to p. 19, line 1.) Cameron Creek's own witnesses opined that those incidents occurred "because the equipment needed maintenance, repair, and/or replacement." (Opinion at pp. 19-20.) Cameron Creek's witness Mr. Schutz testified, moreover, that "the problems that occurred were typical for appliances of this age and usage pattern." (*Id.* at p. 20.)

The Commission accepted the evidence of these incidents as proof that there is no "inherent, overall problem with the installation [or] configuration . . . of the gas appliances." (*Id.*) In fact, the evidence of these incidents shows the exact opposite. Cameron Creek's failure to properly maintain the gas appliances in these units led to reported carbon monoxide exposure. Had the appliances at Cameron Creek been vented in the manner that the NFGC requires, the carbon monoxide would have been vented to the outside of the units.

The Commission also accepted Mr. Schutz's opinion that "there is no physical evidence to suggest an inherent, overall problem with the . . . condition of the gas appliances." (*Id.*) The records of Cameron Creek's own maintenance efforts in advance of the hearing in this proceeding, however, show otherwise. Three weeks after Cameron Creek filed its complaint, Cameron Creek hired a company called American Air Comfort Tech to inspect 5% of its gas appliances. The company determined that each furnace was dirty and needed a new air filter, and one-third of the furnaces needed repairs, maintenance, or parts replaced. (CCA Ex. 39, Schutz Testimony, at Ex. RJS-3A.) More troubling, American Air Comfort Tech found that more than half of the utility closets were not receiving fresh air into the closets' air returns like they should be. (CCA Ex. 39, Schutz Testimony, at Ex. RJS-3A.)

The Commission appears to acknowledge the potential harm that could result if safekeeping the health of Cameron Creek's residents were left up to the complex's maintenance staff. The Commission's Opinion states that "if compliance [with the NFGC] is economically or practically unreasonable, . . . a program of maintenance and monitoring should be enforced, subject to review by the Commission's Staff, in order to ensure that the same level of safety espoused

by the NFG Code is achieved." (Opinion at p. 21.) Commissioner Lesser, separately, recommends "an ongoing maintenance and monitoring program to ensure the safety of the tenants" at Cameron Creek. (Lesser Opinion at p. 1.)

But the Commission's proposal to exercise on-going authority of the maintenance and monitoring activities of Cameron Creek, or natural gas utilities' customers more broadly, is *ultra vires*. The Commission has "the power and jurisdiction to supervise and regulate public utilities and railroads[.]" Ohio Rev. Code § 4905.04; *see also* §§ 4905.05 ("The jurisdiction, supervision, powers, and duties of the public utilities commission extend to every public utility and railroad, the plant or property of which lies wholly within this state") and 4905.06 ("The public utilities commission has general supervision over all public utilities within its jurisdiction"). Nothing in the Ohio Revised Code gives the Commission supervisory authority over apartment complexes or their maintenance staffs. Nor does the Commission have the staffing or internal expertise to exercise such authority.

The Commission may tell Cameron Creek that it is its "responsibility . . . to ensure that [the complex's gas appliances] continue to operate safely." (Opinion at p. 21.) However, the Commission has no power to ensure that Cameron Creek, or any other apartment complex owner or natural gas customers, will do what they should. Consequently, the Commission cannot assume that a program of regular maintenance by an apartment complex's maintenance staff is a sufficiently safe alternative to prescriptive NFGC compliance.

#### 2.1.3. The Commission's Opinion is unreasonable because carbon monoxide alarms are not guaranteed to keep Cameron Creek's residents safe.

A third factor that the Commission considered in concluding that Cameron Creek was providing its residents a "reasonable margin of safety" was Cameron Creek's installation of hard-wired carbon monoxide detectors in 2008, after Columbia first raised the issue of the complex's NFGC violations. (*See* Opinion at p. 21.) The Commission concluded that carbon monoxide monitors can help provide "a reasonable safety margin" by "warn[ing] occupants of developing risks." (*Id.* at p. 22.)

As Columbia witness Steve Erlenbach testified, however, carbon monoxide detectors cannot be relied upon to guarantee resident safety either. Even when the carbon monoxide detectors are working, "carbon monoxide could rise to hazardous levels in a closed bathroom before carbon monoxide levels had ris-

en high enough in the remainder of the residence to set off an alarm." (Columbia Ex. 6, Erlenbach Testimony at p. 15.) And in a power outage, a carbon monoxide alarm with a dead battery would be useless. Cameron Creek's gas water heaters, on the other hand, would still be working – and potentially producing carbon monoxide – because they are powered internally. (*See id.*) Lastly, as the Commission has concluded, the carbon monoxide detectors require "diligent maintenance and repair" if Cameron Creek is to be safe. (Opinion at p. 21.) But Cameron Creek introduced no evidence that it had maintained its carbon monoxide detectors since it installed them in 2008. And, as explained above, the Commission has no ability to ensure that Cameron Creek will maintain those detectors. There is, therefore, no guarantee that the hard-wired carbon monoxide detectors at Cameron Creek will be working when residents need them most.

#### 2.1.4. The Commission's Opinion is unreasonable because the holding that non-tight construction is an alternative to NFGC compliance is belied by the evidence and will discourage participation in utility energy efficiency programs.

The Commission considered one last factor in concluding that Cameron Creek had "demonstrated that it is providing a reasonable margin of safety for its occupants" (Opinion at p. 21): "nontight construction" and "significant outside air infiltration." (*Id.*) Cameron Creek expert Mr. Schutz conducted a "blower door test" that, he said, "showed that, with the less tight construction of Cameron Creek, there was adequate outside air infiltration for the gas appliances." (Opinion at pp. 13, 20.) Cameron Creek witnesses Mr. Busch and Ms. Roahrig testified that gas appliances in bathrooms, or appliances sharing multistory common vents, were not required to obtain their combustion air from outside in 1996 because dwellings were not so "tightly constructed" 15 years ago. (*Id.* at p. 7.) The Commission added that, "if the apartments were built today with the tighter construction perimeters, the type of ventilation present at Cameron Creek would not result in an adequate supply [of] outdoor air for combustion air purposes." (*Id.* at p. 20.)

Cameron Creek's argument, that looser construction standards for homes built in the 1990s or earlier allow such homes to safely obtain combustion, dilution, and ventilation air from inside the residence, is belied by the NFGC itself. The 1996 NFGC – the safety code that was in effect when Cameron Creek was constructed – already prohibited the appliance venting configurations present at Cameron Creek. (*See* Columbia Ex. 6, Erlenbach Testimony, at p. 19.) Indeed, the 1992 NFGC was in some respects even stricter. The prohibition on multi-story

venting of gas appliances, unless such gas appliances are in rooms separated from habitable space and obtain combustion, ventilation, and dilution air from outside the habitable space, was set forth in the 1992 NFGC. (*Id.* at p. 10, line 4.) And, the 1992 NFGC altogether prohibited the installation of gas water heaters in bathrooms, unless the heaters were directly vented (*i.e.*, obtained all combustion air from, and discharged all flue gas to, the outside). (*See id.* at p. 11, lines 20-24.) If tighter construction standards after the 1990s were the true impetus for the NFGC's stricter appliance venting requirements, those requirements would not have been in the 1992 and 1996 NFGC.

Moreover, if nontight construction for homes constructed in the 1990s made it unnecessary to properly vent gas appliances in such homes, one would not expect to see reports of carbon monoxide poisoning in homes in the mid-1990s. Of course, there were such reports. At Cameron Creek alone there were two such reports in recent years. (*See* Opinion at p. 19.) And, the *Columbus Dispatch* ran five articles in 1996 alone on the topic of carbon monoxide poisoning in homes. (*See* James Dulley, *Detector Sounds if Gas is Present*, COLUMBUS DISPATCH (Jan. 7, 1996); Associated Press, *4 Overcome by Carbon Monoxide*, COLUMBUS DISPATCH (Jan. 21, 1996); *Around Ohio – Elderly couple found dead of carbon monoxide poisoning*, COLUMBUS DISPATCH (Feb. 13, 1996); Joe Blundo, *City Law Does Not Require Carbon-Monoxide Detector*, COLUMBUS DISPATCH (May 12, 1996); Felix Hoover, *Sickened Family Alert to Deadly Gas*, COLUMBUS DISPATCH (Oct. 7, 1996)). Thus, even if homes constructed in the 1990s and earlier have nontight construction, and even if that nontight construction allows for more air infiltration, that extra air infiltration clearly is not enough to prevent carbon monoxide poisoning.

Lastly, if the Commission concludes that "nontight construction" and "significant outside air infiltration" are factors that weigh against requiring prescriptive NFGC compliance, the Commission will greatly discourage participation in Columbia's Demand Side Management (DSM) programs. As Columbia reported last year, Columbia's Home Performance Solutions ("HPS") program is Columbia's most popular new program. (*In the Matter of the Application of Columbia Gas of Ohio, Inc. for the Modification of its Demand Side Management Programs for its Residential and Commercial Customers*, Case No. 10-2480-GA-UNC, Application of Columbia Gas of Ohio, Inc. to Modify Current Demand Side Management Programs for Residential and Commercial Customers, at p. 2 (Nov. 2, 2010). The program provides low-cost energy audits and rebates to help offset the cost of energy efficiency improvements. The most-used energy efficiency improvements under the HPS program are insulation and air sealing, which are also the two measures the deliver the most energy savings in many existing homes. (*Id.*) Just

last week, the Commission authorized Columbia to shift between $2.5 and $3.5 million from its under-performing DSM programs into HPS, and more funds in the future as necessary, "to meet the demand for HPS audits and rebates." (*In the Matter of the Application of Columbia Gas of Ohio, Inc. for the Modification of its Demand Side Management Programs for its Residential and Commercial Customers*, Case No. 11-3570-GA-UNC, Finding and Order (July 15, 2011).) Yet, if the Commission stands by its opinion that customers can avoid prescriptive NFGC compliance by keeping their homes drafty, not only will those customers be unsafe, but customers may well stop participating in Columbia's HPS program. In that way, the Commission's Opinion could actually cost customers money.

### 2.2. The Commission's Opinion is unreasonable because it does not leave Columbia with a workable, practical way to ensure a safety code.

As explained above, a policy that allowed Cameron Creek to avoid prescriptive NFGC compliance by installing additional air supply ducts and carbon monoxide detectors and keeping its apartments drafty would not ensure the safety of Cameron Creek's residents. It would also be unworkable as a practical matter when applied to other Columbia customers.

#### 2.2.1. The Commission's Opinion is unreasonable because it gives Columbia little guidance for enforcing its safety code at other customers' residences.

The biggest practical difficulty presented by the Commission's Opinion is that it fails to provide Columbia any concrete guidance about how to enforce the NFGC from this point forward. As Columbia Gas testified, "The benefit of using the National Fuel Gas Code as a safety standard is that it provides a bright-line test — if an appliance installation or venting violates the National Fuel Gas Code, it is a safety problem." (Columbia Ex. 1, Ramsey Testimony at p. 10, lines 15-17.) The Commission's ruling introduces significant uncertainty.

One section of the Commission's Opinion holds that, "when there is a verifiable safety hazard, Columbia has the right, under its tariff and the Commission's rules, to disconnect gas service and require customers to address the safety issue." (Opinion at p. 20.) However, the Commission failed to define "verifiable hazardous condition" (or, to use the Commission's other variation on the phrase, "verifiable safety hazard"). (*Id.*) Columbia believes that a violation of a NFGC requirement that is meant to protect residents from carbon monoxide exposure is

a verifiable safety hazard. The Commission's Opinion suggests that it believes otherwise.

The Commission also failed to explain what "requir[ing] customers to address the safety issue" may entail. (*Id.*) Does it mean maintaining, repairing, or replacing the appliance that is causing the immediate safety issue (*e.g.*, carbon monoxide)? Or does it mean retrofitting the residence to comply with the NFGC? The Commission does not say.

In another section of the Opinion, the Commission states that "in the absence of prescriptive [NFGC] compliance or a specially engineered solution that is compliant with the building code and supported by a professional engineering verification of adequacy, Columbia continues to have the ability to require retrofits that are necessary to ensure a reasonable margin of safety." (Opinion at p. 22.) This leaves multiple questions unanswered.

First, what qualifies as a "specially engineered solution"? Must Columbia assume that a structure is safe if the local building code authority approved the plans for the building, or must there be some approved modification to the plans that directly addresses combustion air, as in this instance? Does it matter if the adequacy of combustion, ventilation, and dilution air is irrelevant to the specific NFGC violation at issue?

Second, assuming Columbia can demonstrate a "verifiable safety hazard," "the absence of prescriptive [NFGC] compliance," and no "specially engineered solution," what retrofits may Columbia mandate? May it require the customer to come into compliance with the NFGC? Or must it consider other options?

Third, the Commission's statement that Columbia may require retrofits in certain circumstances appears to conflict with the Commission's holding that "a reasonable safety margin can be provided by a combination of structural elements and monitoring that warns occupants of developing risks." (Opinion at p. 22.) If Columbia can demonstrate a "verifiable safety hazard," noncompliance with the NFGC, and no specially engineered solution, may it require the customer to come into compliance with the NFGC? Or may the customer opt to take other options, such as increasing the supply of combustion, ventilation, and dilution air and installing hard-wired carbon monoxide detectors? What "structural elements" must Columbia accept as providing a "reasonable safety margin"?

Yet another section of the Opinion states, "the key to sustaining a safe and hazard-free complex at Cameron Creek [and, presumably, at other Columbia Gas customers' residences] is continued and diligent maintenance and repair of the gas appliances, ventilation system, and CO detectors, as well as the replacement of the appliances when necessary." (*Id.* at p. 21.) If this is the case, how should appliance and carbon monoxide detector maintenance factor into Columbia Gas's determinations? Must Columbia interrogate its customers about the age of their appliances and the appliances' maintenance and repair histories? If Columbia becomes aware that a customer is not properly maintaining, repairing, or replacing its gas appliances, may Columbia then mandate compliance with the NFGC?

Because the Opinion fails to provide a clear, unambiguous answer to these questions, it does not answer the ultimate question at issue here: under what circumstances, if any, may Columbia insist that an older dwelling come into compliance with the NFGC? Without clearer guidance, Columbia will, as a practical matter, be unable to apply the Commission's Opinion at the millions of other residences in its service area in any consistent way.

#### 2.2.2. The Commission's Opinion is unreasonable because the policy laid out in the Commission's Opinion cannot practically be put into place for Columbia Gas's other residential customers.

The final problem created by the Commission's Opinion is that it would be administratively unworkable. Two factors will necessarily complicate any effort to put the Commission's Opinion into practice: the time and evidence required for Columbia's customers to demonstrate that they qualify to avoid prescriptive NFGC compliance, and the recordkeeping required for Columbia to keep track of those customers who are excused from such compliance.

As discussed above, the Commission's Opinion states that "that "in the absence of prescriptive [NFGC] compliance or a specially engineered solution that is compliant with the building code and supported by a professional engineering verification of adequacy, Columbia continues to have the ability to require retrofits that are necessary to ensure a reasonable margin of safety." (Opinion at p. 22.) The Commission also held that the installation of hard-wired carbon monoxide detectors, compliance with the applicable building code at the time of construction, and nontight construction (with significant outside air infiltration) were factors demonstrating a reasonable margin of safety. (*Id.* at p. 21.)

But the Opinion does not discuss the mechanism by which a customer may prove that his or her residence was "specially engineered" in a way that complies with the local building code and is supported by an engineer's verification. The Commission also does not discuss the mechanism by which a customer may demonstrate that his or her residence has a "reasonable margin of safety," despite its NFGC violations. Columbia's experience with Cameron Creek indicates that this may be an impossibly time-consuming task.

Columbia first contacted Cameron Creek to discuss the apartment complex's NFGC violations in January 2008. (*Id.* at p. 3.) Cameron Creek did not install hard-wired carbon monoxide detectors until after these initial conversations. (Opinion at p. 3; Tr. Vol. I at p. 174, lines 13-14.) Cameron Creek did not come up with evidence that the installation of four-inch fresh air supply ducts in the complex's units was a "specially engineered solution" (for purposes of the City of Columbus's building code) until approximately eighteen months later, practically on the eve of the hearing. (*See* CCA Ex. 39, Schutz Testimony, at p. 14, lines 20-22.) Cameron Creek's witness also did not perform a "blower door" test until two weeks before the hearing in this matter – again, approximately eighteen months after Columbia first contacted Cameron Creek on these issues. (*See* Opinion at p. 13.) And Cameron Creek *never* located a legible copy of the apartment complex's construction plans. Attorney Examiner Pirik noted that the plan sheets produced by Cameron Creek, including the plan sheets that purportedly showed the four-inch fresh air supply ducts, were "basically impossible to read." (Tr. Vol. II at p. 285, line 2.) Cameron Creek also never produced an authenticated copy of a document showing the City's final approval of those plans. The only copy of that sheet was admitted "for the purpose of [showing] the process . . . and not for the truth of the matter therein." (Tr. Vol. II at p. 296, line 24, to p. 297, line 1.)

In short, even though Cameron Creek was motivated enough to hire multiple attorneys and file a formal complaint with this Commission, Cameron Creek and its counsel could not come up with a complete set of the relevant plans and records and took a year-and-a-half to develop much of the evidence that was most central to the Commission's decision. Must Columbia give each of its customers eighteen months to demonstrate their entitlement to avoid proscriptive NFGC compliance? May Columbia Gas terminate (or refuse to connect) natural gas service immediately, and then give the customer time to provide the necessary evidence? Or must it allow the customer to keep operating its (unsafe) gas appliances in violation of the NFGC until it can be determined, *e.g.*, whether the appliance installation was approved by the local building jurisdiction and

that there have been no "material changes to the building since constructed"? (Opinion at p. 21.) The Commission's Opinion offers no answers to these questions.

Columbia's service technicians red-tag (*i.e.*, disconnect) hundreds of appliances each month for NFGC violations. (*See* Columbia Ex. 2, Bass Testimony, at p. 5, lines 22-26.) If the Commission does not reconsider its Opinion, Columbia could quickly develop a backlog of customers contesting the enforceability of the NFGC, each of which Columbia would be required to track and communicate with until the process of demonstrating safety was completed. And the delay in red-tagging the appliances and remediating the NFGC violations would increase the risk of harm to Columbia's customers. (Columbia Ex. 1, Ramsey Testimony, at p. 11, lines 4-5.)

Additionally, because of the ambiguous and subjective nature of the test that the Commission would apply to determine "safety" in the absence of prescriptive NFGC compliance, the amount of evidence that could be required to meet the customer's burden of proof, and the length of time that the process of proof may take, the Commission's Opinion will impose significant record-keeping requirements on Columbia.

For each residence at which Columbia locates an NFGC violation, the technician visiting the residence will have to document not just the violation, but his or her thoughts on how "hazard[ous]" the violation is and what should be done to correct it. If Columbia concludes that the situation is hazardous, and the customer contests that conclusion, the technician may need to return on multiple occasions to accept evidence to support the customer's positions. Because Columbia's service technicians red-tag hundreds of appliances each month for NFGC violations, the technicians' supervisors may need to make hundreds or thousands of subjective decisions each month regarding the dangers presented by particular appliance installations and the most "reason[able]" (Opinion at p. 21) means of addressing the problem. Columbia will need to store any evidence relating to the customer's arguments, any evidence relating to the customer's actions to ensure a "reasonable safety margin" for her and/or her residents, and Columbia's decision regarding the most "reason[able]" means of addressing NFGC non-compliance.

Moreover, Columbia will need to make this information instantaneously available to its technicians, so that they can determine when they arrive at a given residence what determinations have previously been made regarding the cus-

tomer's compliance with the NFGC and the measures that Columbia may require to address any noncompliance. In other words, Columbia's service technicians will need to know, for each address they visit, whether the NFGC still applies at that location. Columbia's service technicians have computers in their trucks that provide information regarding the purpose of their service calls and allow them to input information regarding the results of those calls. (Tr. Vol. III at p. 533, lines 11-13, and p. 534, lines 10-16.) Modifying this system to include all of the additional information that implementing the Commission's Opinion would require will require extensive and expensive changes to Columbia's computer system and impose unworkable new requirements on technicians' visits.

Most importantly, such a system would endanger customer health and safety. As Columbia's Operations Compliance Manager for Ohio and Kentucky, Michael Ramsey (*see* Columbia Ex. 1, Ramsey Testimony at p. 1, lines 4-6), testified with regard to a slightly different remedy requested by Cameron Creek:

> Cameron Creek's requested ruling would introduce significant uncertainty. A Columbia service technician would not know which set of requirements applied to a particular appliance installation and therefore could not easily determine whether the appliance posed any safety concerns. And, Columbia cannot train its service technicians to apply different rules at each residence they visit. There is no practical way for Columbia to have multiple definitions of what is safe and still ensure customer safety.
>
> It would also take much longer for Columbia to address a hazardous situation. . . . It would . . . require repeat trips to residences at which apparent safety violations were discovered – one to discover the apparent violation, and another to red-tag the appliance installation after the necessary research had been completed and the necessary approval had been granted. *This delay in red-tagging the appliance and remediating the violation would increase the risk of harm to Columbia's customers.*

(*Id.* at p. 10, line 17, to p. 11, line 5) (emphasis added).

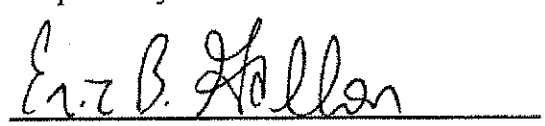
### 3. Conclusion

The policy that the Commission's Opinion puts into place is well-intentioned. But allowing Cameron Creek to avoid the NFGC's appliance venting requirements by installing carbon monoxide detectors, bringing more combustion air into the apartment units, and keeping the units drafty will not keep the residents safe. When carbon monoxide is present in those units, the increased

fresh air supply will not guarantee the residents' safety, particularly when the residents are in confined spaces (like bathrooms) or their units' multistory vents are blocked. The carbon monoxide detectors will not work if the power is out and their batteries are dead, and may not alert residents in confined spaces in time. Encouraging Cameron Creek to keep its apartments drafty will unnecessarily run up energy usage and discourage participation in Columbia's DSM programs. And the one action that the Commission concluded is "key to sustaining a safe and hazard-free complex at Cameron Creek [ – ] continued and diligent maintenance and repair of the gas appliances, ventilation system, and CO detectors" (Opinion at p. 21) – is something the Commission has no authority to supervise or control. Moreover, the policy established by the Commission's opinion is too ambiguous and subjective for Columbia to apply easily or consistently; would significantly delay the remediation of harmful conditions in Columbia's customers' residences; and would impose a significant and unreasonable record-keeping burden on Columbia's service technicians.

For all of these reasons, the Commission's Opinion is unreasonable. Columbia Gas of Ohio, Inc. respectfully requests that the Commission grant Columbia's application for rehearing and hold that Columbia acted lawfully and reasonably when it sought to compel Cameron Creek Apartments to remediate its National Fuel Gas Code violations.

Respectfully submitted,



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## CERTIFICATE OF SERVICE

I hereby certify that a true and accurate copy of the foregoing Application for Rehearing was served by electronic and regular mail on this 22nd day of July, 2011, upon the following counsel for Complainant Cameron Creek Apartments:

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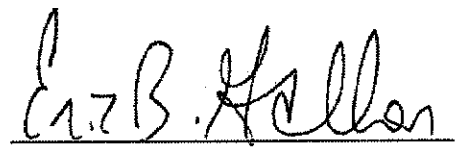

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COLUMBUS/1594533v.2

BEFORE

THE PUBLIC UTILITIES COMMISSION OF OHIO

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| In the Matter of the Complaint of Cameron Creek Apartments, | ) | |
| Complainant, | ) | |
| v. | ) | Case No. 08-1091-GA-CSS |
| Columbia Gas of Ohio, Inc., | ) | |
| Respondent. | ) | |

ENTRY ON REHEARING

The Commission finds:

(1) On September 17, 2008, Cameron Creek Apartments (Cameron Creek or the complainant) filed a complaint against Columbia Gas of Ohio, Inc. (Columbia). Cameron Creek is located in Galloway, Ohio, provided natural gas by Columbia, and subject to the building codes established by the city of Columbus, Ohio (City). In its complaint, Cameron Creek alleges, among other things, that Columbia demanded major structural retrofitting of the ventilation to the gas appliances for all 240 units in the complex. According to the complainant, if such retrofitting is not done, Columbia threatened to shut off the gas service to all of the units. On October 8, 2008, Columbia filed its answer to the complaint denying all material allegations in the complaint.

(2) On June 22, 2011, the Commission issued its order stating that the question posed in this case was: if Columbia believes that there is a potentially hazardous condition in a dwelling that was approved for occupancy in prior years, pursuant to the building code (City Code) established by the City that was in effect at the time of such approval, and the construction in that dwelling had not been altered such that the City Code would require that it be brought up to current code, can Columbia require that the dwelling be retrofitted in order to bring it into compliance with the current National Fuel Gas (NFG) Code before Columbia will connect or reconnect gas service. Initially, the Commission determined that Columbia had not

violated its tariff, and that Columbia's practice of referencing and enforcing the most recent NFG Code is just and reasonable. However, the Commission further concluded that the complainant had sustained its burden of proof such that Columbia may not disconnect or refuse reconnection of service citing potential unsubstantiated hazardous conditions due to noncompliance with the NFG Code.

In reaching this conclusion, the Commission noted that, while prescriptive compliance with the NFG Code is a safe harbor for customers, if compliance is economically or practically unreasonable, a program of maintenance and monitoring should be followed in order to ensure that the same level of safety espoused by the NFG Code is achieved. In considering the facts in this case, the Commission concluded that the complainant demonstrated that it is providing a reasonable margin of safety for its occupants, including: the presence of a hard-wired carbon monoxide (CO) detector adjacent to the air vents to the appliance closet; compliance with venting requirements in the applicable building code when built; nontight construction and a lack of material changes to the building since it was constructed; and demonstration through a blower door test of significant outside air infiltration. Where older structures cannot demonstrate prescriptive NFG Code compliance or the existence of a specially engineered solution with an appropriate professional engineering verification, the Commission determined that Columbia should balance any requirements for extensive retrofits with a rule of reason. The Commission further stated that, while it is essential that a facility remains safe even when reasonably foreseeable maintenance, repair, or replacement of equipment might be needed, a reasonable safety margin can be provided by a combination of structural elements and monitoring that warns occupants of developing risks.

In this case, since the City, as the local jurisdiction having building code authority, approved Cameron Creek's design at the time of the construction, the Commission determined that such approval constitutes an alternative and/or engineered solution pursuant to the NFG Code. However, in the absence of prescriptive NFG Code compliance or a specially engineered solution that is compliant with the City Code and supported by a professional engineering verification of adequacy, the

Commission found that Columbia continues to have the ability to require retrofits that are necessary to ensure a reasonable margin of safety. Therefore, because Cameron Creek demonstrated in this case that it was in compliance with the City Code regulations at the time the dwelling was built, as well as the NFG Code, and because the 1995 Ohio Basic Building Code (1995 Code) enforced by the City took into account the necessary combustion features to assure safety, there have been no renovations or alternations that called into play the City Code requirement that the dwelling be brought up to current code, and there was no known safety issue, the Commission concluded that Columbia cannot require retrofitting.

(3) Section 4903.10, Revised Code, states that any party who has entered an appearance in a Commission proceeding may apply for rehearing with respect to any matters determined in the proceeding by filing an application within 30 days after the entry of the order upon the journal of the Commission.

(4) On July 22, 2011, Columbia filed an application for rehearing of the Commission's June 22, 2011, opinion and order in this matter. As discussed in further detail below, Columbia set forth six grounds for rehearing.

(5) Cameron Creek filed a memorandum contra Columbia's application for rehearing on August 3, 2011, arguing that Columbia made no new argument that had not already been considered in the order in this case. Cameron Creek's arguments are further delineated below.

(6) In its first assignment of error, Columbia asserts that the order is unreasonable because it incorrectly concluded that the addition of four-inch fresh air supply ducts to Cameron Creek's units was an alternative compliance method or engineered solution under the NFG Code and, thus, excused Cameron Creek from the NFG Code's appliance venting requirements (Columbia App. at 3).

Quoting Section 1.2 of the 1996 NFG Code, Columbia contends the Commission misconstrued the statement, "[t]he provisions of the code are not intended to prevent the use of any material, method of construction, or installation procedure not

specifically prescribed by this code *provided any such alternate is acceptable to the authority having jurisdiction"* (emphasis added). Columbia argues that, contrary to the Commission's finding that the City is the local jurisdiction having building code authority, Columbia, and not the City, is the "authority having jurisdiction" referenced in the 1996 NFG Code. Columbia reasons that the City could not have been the "authority having jurisdiction" at the time Cameron Creek was built, because the City did not apply the NFGC in 1996. Thus, Columbia asserts that the addition of the four-inch fresh air supply ducts to the units at Cameron Creek was not an "engineered solution" under the 1996 NFG Code "because the City of Columbus did not apply the NFGC in 1996, and Cameron Creek did not undertake the project at Columbia's request or for Columbia's approval." According to Columbia, the addition of the ducts might have qualified as an "engineered solution" under the 1996 NFG Code had Cameron Creek come to Columbia for approval of the installation. (Columbia App. at 3-4.)

Furthermore, Columbia maintains that the four-inch fresh air supply ducts could not have been an "alternative solution" because they were not a newly developed technology in 1996 and because the air ducts solved a different problem than Cameron Creek's improperly vented gas appliances caused. According to Columbia, the four-inch fresh air supply ducts were intended to help prevent CO production; while the appliance venting requirements were intended to ensure that any CO produced by the appliance would not jeopardize residents. Thus, the ducts and the venting requirements do not serve the same purpose. (Columbia App. at 4-6.)

(7) In reply, Cameron Creek notes that Columbia continues to argue that it should be allowed to retroactively apply the most recent version of the NFG Code to the complainant, regardless of the fact that the building department originally approved the structure as safe and in compliance with the then-existing code (CCA Memo Contra at 2).

(8) Initially, the Commission notes that it is unrefuted on the record that Sections 1.2, 5.3.4, and 6.30.1 of the 1996 NFG Code, considered together, permit other measures and special engineering to provide an adequate supply of air for combustion, ventilation, and dilution of gases that is approved

by the authority having jurisdiction. Furthermore, Cameron Creek presented expert testimony from a professional engineer and building code expert that supports the fact that the addition of the four-inch fresh air supply ducts to the units, which was approved by the City, conforms to these provisions (CCA Ex. 39 at 13-14). Columbia contests whether the City is the "authority having jurisdiction." Instead, Columbia continues to argue that it has been vested as the "authority having jurisdiction," regardless of the fact that Columbia has failed to reference any record evidence, or any codified rule or statute that supports Columbia's assertion that it is the "authority" that has "jurisdiction" over dwellings. The Commission believes Columbia's reasoning that it is the jurisdictional authority, because it adopted and applied the NFG Code in 1996, which is not a codified document, rather than a governmental entity formed for the purpose of enforcing codified building standards in Ohio, is erroneous. While the Commission agrees that it is necessary for Columbia to interpret and apply the standards, such as the NFG Code, that it utilizes in its day-to-day business, such necessity does not grant Columbia the unequivocal right to claim that it is the "authority having jurisdiction" over acceptable alternatives. As we determined in our order, based upon the facts in this case, the City, as the local building code authority, approved the design of Cameron Creek at the time of construction and such approval by the City constituted an alternative and/or engineered solution pursuant to the NFG Code. With respect to Columbia's first assignment of error, the Commission finds that Columbia has raised nothing new that was not thoroughly considered and addressed by the Commission in its order. Therefore, Columbia's first assignment of error is without merit and should be denied.

(9) For its second assignment of error, Columbia maintains that the order is unreasonable and unlawful because the conclusion that Cameron Creek provided its residents a reasonable margin of safety requires Cameron Creek to adequately maintain its gas appliances, an obligation that the complex has not performed consistently in the past and the Commission has no power to enforce. Columbia points out that, had the appliances at Cameron Creek been vented in the manner required by the NFG Code, the CO detected in the two incidents noted on the record, where there was improper maintenance of the

appliances, would have been vented to outside the units. (Columbia App. at 6-8.)

(10) In response, Cameron Creek submits that Columbia continues to spread fear that the current gas appliance ventilation system places residents in danger, despite the lack of any legitimate verified CO issues at Cameron Creek. The complainant points out that Columbia even cites in its application for rehearing to five newspaper articles printed in 1996 to scare everyone into believing the Commission erred and the only solution is to retroactively apply the NFG Code. Moreover, Cameron Creek notes that, as the record reflects, at the time Cameron Creek was built, it was common practice to locate gas appliances in bathrooms or interior utility closets and to utilize indoor combustion air. Extensive building retrofitting is not required simply because the code is updated or a new code is adopted; changes are only required if there is a documented serious safety hazard. Cameron Creek offers that, according to the record, the apartments were safe when they were built and they are still safe today. (CCA Memo Contra at 2-3, 5.)

(11) As noted in the order, the Commission believes that the number one priority in the provision of natural gas service is to ensure that all possible measures are taken to ensure the health and safety of the public. The Commission based its decision in this case on the evidence presented on the record pertaining to Cameron Creek's situation and Columbia's application of its tariff and the NFG Code to the facts in this matter. On rehearing, it appears that Columbia is attempting to incite further review by the Commission based solely on events that have no relation to the issues in this case. Furthermore, we note that, in support of its second assignment of error, Columbia also attempts to justify its CO readings for the two alleged CO incidents that were reported in the last decade at Cameron Creek by footnoting that the tests were taken at appropriate and objective locations in the dwellings (Columbia App. at 6 FN 1); however, the unrequited evidence of record clearly shows that such was not the case (CCA Ex. 39 at 18-19). The bottom line is that Columbia did not substantiate on the record that there was an actual serious CO hazard at Cameron Creek. Therefore, the Commission concluded that Columbia's attempt to force retrofitting at Cameron Creek, when there is no verifiable safety hazard, essentially equates to retroactive

enforcement of standards that Columbia did not seek to enforce in 1997 when service was initially established. The Commission acknowledges Columbia's diligent efforts to ensure the safety of its customers and the public. Once any safety issue is resolved or mitigated, it is the responsibility of the property owners and occupants to follow through and maintain the safety of the dwellings. In this case, Cameron Creek sustained its burden of proving that any CO hazard had been mitigated; therefore, the maintenance responsibility now lies with Cameron Creek and the occupants. Therefore, in order to ensure the continued safety of the occupants, it is necessary for Cameron Creek to develop an ongoing maintenance and monitoring program to ensure that the alternative and/or engineered solution continues to be comparably safe to the prescriptive requirements in the NFG Code. Cameron Creek's program should include maintenance and monitoring of the CO detectors and other safety devices. Accordingly, the Commission finds that Columbia has raised no new issue on rehearing and its second assignment of error should be denied.

(12) The third assignment of error cited by Columbia states that the order is unreasonable because the conclusion that CO detectors will keep Cameron Creek's residents safe is not supported by the evidence. Columbia submits that the record indicates that, even when the CO detectors are working, the CO could rise to dangerous levels in a closed bathroom and that a power outage would render a CO detector with a dead battery useless. Moreover, Columbia notes that Cameron Creek did not present evidence that, since the CO detectors were installed, it has maintained them. (Columbia App. at 8-9.)

(13) According to Cameron Creek, Columbia wants the Commission to declare an approach that can guarantee safety; however, this cannot be done. Cameron Creek avers that no gas appliance configuration, even under the current NFG Code, can guarantee absolute safety and no CO. Instead, Cameron Creek asserts that the hard-wired CO detectors, maintenance plan, and safety devices on the furnaces provide residents with ample safety, and the residents must trust in the fact that the City issued occupancy permits and Columbia has been providing service since 1996. (CCA Memo Contra at 4-5.)

(14) Contrary to Columbia's assertion, as thoroughly discussed in our conclusion in the order, this case did not turn merely on the fact that the complainant installed hard-wired CO detectors with battery back-ups. While the CO detectors were one mitigating factor that Cameron Creek presented in this case, the record, in total, reflected other factors as well, including Cameron Creek's compliance with venting requirements in the applicable building code when built, nontight construction and a lack of material changes to the building since constructed, and the demonstration through a blower door test of significant outside air infiltration. Columbia appears to have taken our order out of context by focusing in on one factor. As we stated previously, in light of the fact that Cameron Creek has sustained its burden of proof in this case, the responsibility to ensure that the necessary maintenance continues rests with Cameron Creek and the occupants of the complex, and it is expected that Cameron Creek will employ a thorough maintenance and monitoring program to ensure the continued safety of the occupants. Accordingly, the Commission finds that Columbia's third assignment of error is without merit and should be denied.

(15) In its fourth assignment of error, Columbia contends that the order is unreasonable because it holds that nontight construction justifies noncompliance with the NFG Code, which is not supported by the evidence and will discourage participation in utility demand-side management (DSM) programs. Columbia asserts that the complainant's arguments that looser construction standards for homes built in the 1990s or earlier allow such homes to safely obtain combustion, dilution, and ventilation air from inside the residence is belied by the NFG Code itself, since the 1996 NFG Code prohibited the appliance venting configurations present at Cameron Creek. (Columbia App. at 9-10.)

(16) In response, Cameron Creek points out that, when the complex was approved in 1996, the City utilized the state building code and the mechanical code to approve safe operations at Cameron Creek and such codes: recognized that adequate combustion air could reach gas appliances from several sources; allowed for multi-story vents to service the appliances for multiple units; and recognized the construction at Cameron Creek was not tight with regard to air infiltration, which

allowed for greater outside air infiltration. Thus, Cameron Creek reasons that, whether the latest version of the NFG Code requires different appliance configuration does not mean older buildings, such as Cameron Creek, are less safe or noncompliant. Furthermore, Cameron Creek states that Columbia's assertion that customers will no longer take advantage of Columbia's energy efficiency DSM program does not mean that the Commission's decision is unreasonable or unlawful. (CCA Memo Contra at 4-5.)

(17) The Commission's role in this case was to review the facts and evidence of record, in concert with the applicable statutes and rules, to determine if the complainant sustained its burden of proof. Columbia has drawn a definitive line and refuses to consider the facts presented in this case that support our finding that Cameron Creek complied with the alternative compliance methods permitted by the 1996 NFG Code. As we articulated in our order, where older structures cannot demonstrate prescriptive NFG Code compliance or the existence of a specially engineered solution with an appropriate professional engineering verification, Columbia should balance any requirements for extensive retrofits with a rule of reason. We believe that a reasonable safety margin can be provided by a combination of structural elements and monitoring that warns occupants of developing risks. Finally, contrary to Columbia's comment, the Commission disagrees that our determinations in this complaint case, which are based on the evidence of record, will in any manner effect or discourage continued progress and participation in DSM programs. Accordingly, the Commission concludes that Columbia's fourth assignment of error is without merit and should be denied.

(18) Columbia argues, in its fifth and sixth assignments of error, that the order is unreasonable because it does not leave Columbia with a workable, practical way to ensure safety. Furthermore, Columbia maintains that it is unclear how Columbia is to enforce the Commission's new reasonable margin of safety test at other customers' residences and the order is unreasonable because putting the Commission's holdings into effect for all of Columbia's residential customers would be unduly burdensome. Columbia questions whether it can terminate, or refuse to connect, natural gas service

immediately, and then give the customer time to provide the necessary evidence mentioned by the Commission in the order, or whether it must allow the customer to keep operating in violation of the NFG Code, until it can be determined whether the appliance installation was approved by the local building authority and that there have been no material changes to the building since construction. Furthermore, Columbia asserts that, because of the ambiguous and subjective nature of the test that the Commission would apply to determine safety, in the absence of prescriptive NFG Code compliance, the amount of evidence to meet the customer's burden of proof, and the length of time for the process, would impose significant record-keeping requirements on Columbia. Columbia believes that such a system would endanger customers' health and safety. (Columbia App. at 11-16.)

(19) In reply, Cameron Creek submits that, for Columbia, it would be easier to retroactively apply the NFG Code than to train Columbia's technicians on which code legally can be applied. While Columbia would like the Commission to offer precise guidance on how the company should conduct its business, legally apply the NFG Code, and comply with the Commission's order, Cameron Creek asserts that such answers are for Columbia to determine and are not an appropriate ground for rehearing. Whether Columbia must interpret the Commission's decision and determine how best to avoid retroactively and improperly applying the NFG Code does not make the order unlawful and unreasonable. (CCA Memo Contra at 2, 6.)

(20) Columbia would like for there to be a clear bright-line test that would unequivocally signify when compliance with a reasonable safety code has been met; for Columbia, that bright line is achieved through strict adherence to the NFG Code. While the Commission commends Columbia's efforts, as proven by Cameron Creek on the record in this case, a bright-line test is not sustainable where the governing building code authority has deemed the dwelling safe for occupancy, and the complex management has attested that a program of maintenance and monitoring is being imposed to ensure the same level of safety espoused by the NFG Code. Every situation is unique and the Commission is confident that the close relationship that Columbia has with its customers will

enable the company to balance any requirements for extensive retrofits with a rule of reason. There is no doubt that it behooves all stakeholders, Columbia, owners, and occupants, to work together to ensure that there is a safe hazard-free environment. Accordingly, the Commission finds that Columbia's fifth and sixth assignments of error are without merit and should be denied.

It is, therefore,

ORDERED, That Columbia's application for rehearing be denied in its entirety. It is, further,

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

THE PUBLIC UTILITIES COMMISSION OF OHIO

Todd A. Snitchler, Chairman

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Steven D. Lesser

Andre T. Porter

Cheryl L. Roberto

CMTP/vrm

Entered in the Journal

AUG 17 2011

Betty McCauley

Betty McCauley
Secretary

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**BEFORE**
**THE SUPREME COURT OF OHIO**

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| In the Matter of the Complaint of Cameron Creek Apartments, | ) | Case No. 11-1758 |
| Appellee, | ) | |
| v. | ) | Appeal from the Public Utilities Commission of Ohio, Case No. 08-1091-GA-CSS |
| Columbia Gas of Ohio, Inc., | ) | |
| Appellant. | ) | |

# NOTICE OF APPEAL BY COLUMBIA GAS OF OHIO, INC.


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COLUMBIA GAS OF OHIO, INC.

## NOTICE OF APPEAL

Pursuant to R.C. 4903.11 and R.C. 4903.13, Columbia Gas of Ohio, Inc. ("Columbia Gas") hereby gives notice that it is appealing the Public Utilities Commission of Ohio's ("Commission") Opinion and Order and Entry on Rehearing in *In the Matter of the Complaint of Cameron Creek Apartments v. Columbia Gas of Ohio, Inc.*, Case No. 08-1091-GA-CSS ("*Cameron Creek*"). A copy of the Opinion and Order, dated June 22, 2011, and the Entry on Rehearing, dated August 17, 2011 (collectively, "Orders"), is attached.

What is at issue in *Cameron Creek* is the safety of Columbia Gas's residential customers. For decades, the Commission's rules and Columbia Gas's approved tariff have authorized Columbia Gas to disconnect natural gas service to a customer's premises when supplying gas would create a safety hazard. For decades, Columbia Gas has used the National Fuel Gas Code ("Code") as Columbia Gas's yardstick for evaluating the safety of customer house lines, appliance installations, and appliance venting. In the *Cameron Creek* Orders, the Commission concluded that Columbia Gas's "practice of referencing and enforcing" the National Fuel Gas Code "is just and reasonable." (Opinion and Order at 19.) Yet, the Commission also reached the contradictory conclusion that a violation of the National Fuel Gas Code is not a safety hazard. To reach that conclusion, the Commission effectively rewrote the Code to render its requirements voluntary for existing residential buildings.

The Commission's Orders in *Cameron Creek* threaten the safety of not only the residents of Complainant/Appellee Cameron Creek Apartments ("Cameron Creek"), but all of Columbia Gas's residential customers. Cameron Creek is a 240-unit apartment complex constructed in 1997-1998. The venting for Cameron Creek's gas water heaters and furnaces (*i.e.*, the pipes that bring in air for the appliances and the pipes that vent the products of combustion from the

appliances) does not comply with the National Fuel Gas Code that was in effect in 1997-1998. The appliances were, and still are, vented such that any carbon monoxide they produce can float into the living space of the apartments, rather than being vented outside like the Code requires.

Instead of upholding Columbia Gas's position that Cameron Creek must correct these safety violations, the Commission misconstrued the National Fuel Gas Code to excuse Cameron Creek from compliance. The Code allows the "authority having jurisdiction" to approve "alternate" solutions that incorporate new technology or newly developed safe practices. Another provision allows the "authority having jurisdiction" to approve special engineering to ensure an adequate supply of combustion, ventilation, and dilution air to the appliances. The Commission decided that when the City of Columbus approved a modification to Cameron Creek's building plans in 1996 to add a 4-inch fresh air supply duct to each unit, that constituted approval of an "alternate" solution, even though 4-inch air ducts were not a new technology. The Commission alternatively concluded that the addition of 4-inch fresh air supply ducts was a "specially engineered solution," even though the problem that solution purportedly solves (the initial inadequacy of the expected air supply *to* Cameron Creek's gas appliances) is different than the problem caused by Cameron Creek's venting configuration (the residents' potential exposure to carbon monoxide *from* Cameron Creek's gas appliances). The Commission also concluded that the City of Columbus was the "authority having jurisdiction" to approve this "alternate" or "specially engineered" solution, even though the City was not acting under the National Fuel Gas Code in 1997-1998. Finally, the Commission cited the happenstance of Cameron Creek's "less tight" construction, resulting in apartment units more vulnerable to infiltration of outside air, and Cameron Creek's decision to install carbon monoxide detectors after Columbia Gas expressed its concerns about the complex's Code violations. For these reasons, the Commission concluded

that Cameron Creek did not need to comply with the Code's appliance venting requirements. Instead, the Commission concluded that Cameron Creek had provided a "reasonable margin of safety" for its residents by installing carbon monoxide detectors and keeping its buildings drafty.

The Commission's Orders reflect the following errors:

(1) The Commission's Orders are unreasonable because their conclusion that a violation of the National Fuel Gas Code's safety requirements is not a hazardous condition is unsupported by the evidence.

(2) The Commission's Orders are unreasonable because their conclusion that the National Fuel Gas Code permits persons to avoid compliance with the Code's requirements for venting combustion products *from* gas appliances by supplying additional air *to* the appliances is unsupported by the plain language of the Code and the other evidence presented at hearing.

(3) The Commission's Orders are unlawful because their conclusion that Columbia Gas is not the "authority having jurisdiction" to approve variations from the National Fuel Gas Code's venting requirements is contradicted by Columbia Gas's approved tariff.

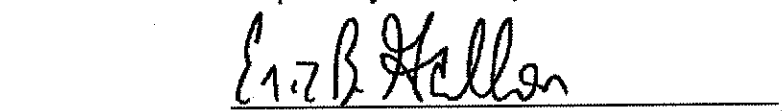
(4) The Commission's Orders are unreasonable because their conclusion that installing carbon monoxide detectors provides a reasonable margin of safety in drafty buildings constructed in violation of the National Fuel Gas Code's appliance venting safety requirements is unsupported by the evidence.

(5) The Commission's Orders are unreasonable because they provide Columbia Gas with no clear guidance on how it may apply the National Fuel Gas Code in other existing residential structures.

(6) The Commission's Orders are unreasonable because applying the vague, self-contradictory, and subjective standards in the *Cameron Creek* orders to Columbia Gas's other customers would impose an enormous administrative burden.

For each of these reasons, as will be further explained in Appellant's Brief, Appellant Columbia Gas of Ohio, Inc. respectfully requests that this Court reverse the Commission's Orders and remand for further proceedings as necessary.

Respectfully submitted,



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COLUMBIA GAS OF OHIO, INC.

# 4903.13 Reversal of final order - notice of appeal.

A final order made by the public utilities commission shall be reversed, vacated, or modified by the supreme court on appeal, if, upon consideration of the record, such court is of the opinion that such order was unlawful or unreasonable. The proceeding to obtain such reversal, vacation, or modification shall be by notice of appeal, filed with the public utilities commission by any party to the proceeding before it, against the commission, setting forth the order appealed from and the errors complained of. The notice of appeal shall be served, unless waived, upon the chairman of the commission, or, in the event of his absence, upon any public utilities commissioner, or by leaving a copy at the office of the commission at Columbus. The court may permit any interested party to intervene by cross-appeal.

Effective Date: 10-01-1953

# 4905.26 Complaints as to service.

Upon complaint in writing against any public utility by any person, firm, or corporation, or upon the initiative or complaint of the public utilities commission, that any rate, fare, charge, toll, rental, schedule, classification, or service, or any joint rate, fare, charge, toll, rental, schedule, classification, or service rendered, charged, demanded, exacted, or proposed to be rendered, charged, demanded, or exacted, is in any respect unjust, unreasonable, unjustly discriminatory, unjustly preferential, or in violation of law, or that any regulation, measurement, or practice affecting or relating to any service furnished by the public utility, or in connection with such service, is, or will be, in any respect unreasonable, unjust, insufficient, unjustly discriminatory, or unjustly preferential, or that any service is, or will be, inadequate or cannot be obtained, and, upon complaint of a public utility as to any matter affecting its own product or service, if it appears that reasonable grounds for complaint are stated, the commission shall fix a time for hearing and shall notify complainants and the public utility thereof. The notice shall be served not less than fifteen days before hearing and shall state the matters complained of. The commission may adjourn such hearing from time to time.

The parties to the complaint shall be entitled to be heard, represented by counsel, and to have process to enforce the attendance of witnesses.

Amended by 128th General Assembly File No. 43, SB 162, § 1, eff. 9/13/2010.

Effective Date: 09-29-1997

# 4905.37 Commission may change rules and regulations of public utilities.

Whenever the public utilities commission is of the opinion, after hearing had upon complaint or upon its own initiative or complaint, served as provided in section 4905.26 of the Revised Code, that the rules, regulations, measurements, or practices of any public utility with respect to its public service are unjust or unreasonable, or that the equipment or service of such public utility is inadequate, inefficient, improper, insufficient, or cannot be obtained, or that a telephone company refuses to extend its lines to serve inhabitants within the telephone company operating area, the commission shall determine the regulations, practices, and service to be installed, observed, used, and rendered, and shall fix and prescribe them by order to be served upon the public utility. After service of such order such public utility and all of its officers, agents, and official employees shall obey such order and do everything necessary or proper to carry it into effect. This section does not give the commission power to make any order requiring the performance of any act which is unjust, unreasonable, or in violation of any law of this state or the United States.

Effective Date: 10-01-1953

# 4901:1-18-03 Reasons for disconnecting residential electric, gas, or natural gas service.

Electric, gas, or natural gas utility companies under the jurisdiction of the commission may disconnect service to residential customers only for the following reasons:

(A) When a customer/consumer uses electricity, gas, or natural gas in a manner detrimental to the service to other consumers.

(B) When providing service is in conflict or incompatible with any order of the commission, court of law, laws of the state of Ohio or any political subdivision thereof, or of the federal government or any of its agencies.

(C) When the customer has moved from the service location, and the property owner is subject to notice under paragraph (A)(3)(d) of rule 4901:1-18-06 of the Administrative Code.

(D) When supplying electricity, gas, or natural gas creates a safety hazard to consumers or their premises, the public, or to the company's personnel or facilities or where, because of conditions beyond the consumer's premises, disconnection of the supply of electricity, gas, or natural gas is reasonably necessary. The company shall not restore service until the hazardous condition(s) has been corrected.

(E) When a customer, consumer, or his/her agent does any of the following:

(1) Prevents utility company personnel from reading the meter for a year or more.

(2) After notice and a reasonable period of time, prevents utility company personnel from calibrating, maintaining, or replacing the utility company's meter, metering equipment, or other utility company property used to supply service.

(3) Resorts to any fraudulent act to obtain electric, gas, or natural gas service, is the beneficiary of the fraudulent act, or tampers with the utility company's meter, metering equipment, or other property used to supply the service. If the customer does not contest the disconnection, under the circumstances stated in this paragraph the company need not restore service until the consumer or customer has completed each of the following:

(a) Given satisfactory assurance that the fraudulent or tampering act has been discontinued.

(b) Paid to the utility company an amount estimated by the company to be reasonable compensation for unauthorized usage obtained and not paid for at the time of disconnection.

(c) Paid for any damage to property of the utility company including any cost to repair the damage.

(d) Paid all other fees and charges authorized by tariff resulting from the fraudulent act or tampering.

(F) For repairs, provided that notice to customers is given prior to scheduled maintenance interruptions in excess of six hours.

(G) Upon the request of the customer. If the customer is a landlord, then the provisions of paragraph (K) of rule 4901:1-18-08 of the Administrative Code, shall also apply.

(H) For nonpayment of regulated services provided by the utility company, including nonpayment of security deposits.

(I) For good cause shown.

Replaces: 4901:1-18-02

Effective: 11/01/2010

R.C. 119.032 review dates: 11/30/2013

Promulgated Under: 111.15

Statutory Authority: 4905.04

Rule Amplifies: 4905.06, 4905.22, 4905.30, 4933.17, 4933.12, 4933.121, 4933.122

Prior Effective Dates: 7/27/80, 6/13/81, 7/1/99, 9/1/04, 4/6/06

## CERTIFICATE OF SERVICE

I hereby certify that a true and accurate copy of the foregoing Merit Brief of Appellant Columbia Gas of Ohio, Inc. was served by electronic and U.S. Mail on this 10th day of January, 2012, upon the following counsel for Intervening Appellee Cameron Creek Apartments:

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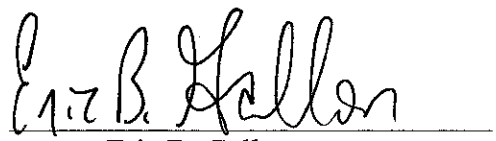

Eric B. Gallon

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