

**In The
Supreme Court of Ohio**

In the Matter of the Complaint of : Case No. 11-1758
Cameron Creek Apartments, :
 :
Appellee, : On appeal from the Public Utilities
 : Commission of Ohio, Case No. 08-
 : 1091-GA-CSS, *In the Matter of the*
v. : *Complaint of Cameron Creek*
 : *Apartments vs. Columbia Gas of Ohio*
Columbia Gas of Ohio, Inc., : *for Alleged Safety Issues and to Keep*
 : *Columbia from Taking Action to*
Appellant. : *Interrupt the Supply of Gas.*

**MERIT BRIEF
SUBMITTED ON BEHALF OF APPELLEE,
THE PUBLIC UTILITIES COMMISSION OF OHIO**

Eric B. Gallon (0071465)
Counsel of Record

Mark S. Stemm (0023146)
Porter, Wright, Morris & Arthur
41 South High Street
Columbus, OH 43215-6194
614.227.2000 (telephone)
614.227.2100 (fax)
egallon@porterwright.com
mstemm@porterwright.com

Charles McCreery (0063148)
Columbia Gas of Ohio, Inc.
1700 MacCorkle Avenue, S.E.
P.O. Box 1273
Charleston, WV 25325-1273
304.357.2334 (telephone)
304.357.3206 (fax)
cmccreery@nisource.com

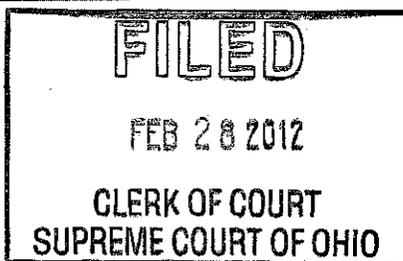
Michael DeWine (0009181)
Ohio Attorney General

William L. Wright (0018010)
Section Chief

Thomas W. McNamee (0017352)
Counsel of Record

Devin D. Parram (0082507)
Assistant Attorneys General
Public Utilities Section
180 East Broad Street, 6th Fl
Columbus, OH 43215-3793
614.466.4397 (telephone)
614.644.8764 (fax)
william.wright@puc.state.oh.us
thomas.mcnamee@puc.state.oh.us
devin.parram@puc.state.oh.us

**Counsel for Appellee,
The Public Utilities Commission of Ohio**



Stephen B. Seiple (0003809)
Brook Leslie (0081179)
Columbia Gas of Ohio, Inc.
200 Civic Center Drive
P.O. Box 117
Columbus, OH 43216-0117
614.460.4648 (telephone)
614.460-6986 (fax)
sseiple@nisource.com
bleslie@nisource.com

**Counsel for Appellant,
Columbia Gas of Ohio, Inc.**

Brian M. Zets (0066544)
Counsel of Record
Thomas L. Hart (0062715)
Wiles, Boyle, Burkholder & Bringardner
300 Spruce Street, Floor One
Columbus, OH 43215-1173
614.221.5216 (telephone)
614.221.4541 (fax)
bzets@wileslaw.com
thart@wileslaw.com

**Counsel for Intervening Appellee,
Cameron Creek Apartments**

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v.	:	
Columbia Gas of Ohio, Inc.,	:	
Appellant.	:	

**MERIT BRIEF
SUBMITTED ON BEHALF OF APPELLEE,
THE PUBLIC UTILITIES COMMISSION OF OHIO**

INTRODUCTION

The Public Utilities Commission of Ohio (Commission) determines when it is proper for a utility to terminate service to a customer. In the case below, a customer filed a complaint alleging that a utility threatened to terminate natural gas service because of a claimed safety threat. The Commission held a lengthy hearing, weighed the evidence presented and, as a factual matter, determined there was no safety threat and, therefore, pursuant to a tariff, service should continue. The customer equipment was safe when it was installed and it is safe today. It complies with the National Fuel Gas Code. The case below exemplifies the Commission simply doing its statutory duty and the decision should be affirmed.

STATEMENT OF THE FACTS AND CASE

Cameron Creek Apartment Complex (Cameron Creek) is a 240-unit apartment complex located in the City of Columbus (the City).¹ Appellant's Brief at 2. Columbia Gas of Ohio, Inc. (Columbia) supplies gas service to Cameron Creek. *Id.* In 1997, the City approved the configuration of the gas appliances at Cameron Creek and determined that Cameron Creek complied with the applicable building codes. *Id.* Since it was constructed, the structure and configuration of Cameron Creek's gas appliances have not undergone any significant modifications. Tr. I at 258-260, Supp. 12-14; Cameron Creek Ex. 2 (Roahrig Letter), Supp. at 54. *Complaint Case* Order at 20, Appellant's App. at A20. Furthermore, Cameron Creek is still in compliance with all local building code requirements. *Id.*

In 2008, Columbia threatened to disconnect service for Cameron Creek because it believed Cameron Creek was not complying with certain provisions of the NFG Code. Appellant's Brief at 6. Cameron Creek filed a complaint with the Commission regarding Columbia's attempt to disconnect Cameron Creek's gas. Appellant's Brief at 7. After a three-day hearing on the matter, the Commission determined, based upon the facts, that Columbia should not disconnect Cameron Creek's gas. *In the Matter of the Complaint of Cameron Creek Apartments v. Columbia Gas of Ohio, Inc.*, Case No. 08-1091-GA-CSS

¹ Cameron Creek presented current and former City employees as witnesses who testified regarding the City's process of inspecting, reviewing, and approving of the configuration of the gas appliances at Cameron Creek. Although the City was not a party to the case, these witnesses testified extensively. They presented a substantial amount of evidence showing that the City reviewed and approved of the configuration of the gas appliances at Cameron Creek.

(*Complaint Case*) Order at 23 (June 22, 2011), Appellant's App. at A23. Columbia then filed an Application for Rehearing, which was denied by the Commission. Appellant's Brief at 10. Columbia now brings this appeal.

ARGUMENT

Proposition of Law No. I:

The Public Utilities Commission may prescribe any rule or order that it finds necessary for protection of the public safety. Ohio Rev. Code Ann. § 4905.06 (West 2012), App. at 4.

Columbia fundamentally misunderstands the nature of safety regulation in the public utility industry. Columbia believes it is the final arbiter of what sort of equipment may be attached to the gas system. This belief is wrong. The Commission is the arbiter of all the terms and conditions of the relationship between the utility and its customers. Safety is a condition of that relationship and is entirely within the Commission's control.

Columbia is a natural gas company pursuant to R.C. 4905.03(A)(6). As such it is a public utility pursuant to R.C. 4905.02. The Commission is charged to regulate safety issues for public utilities. The law is perfectly clear and provides:

The public utilities commission has general supervision over all public utilities ... and may examine such public utilities and keep informed as to ... the safety and security of the public and their employees ... The power to inspect includes the power to prescribe any rule or order that the commission finds necessary for protection of the public safety. ...

Ohio Rev. Code Ann. § 4905.06 (West 2012) (in pertinent part), App. at 4. This power is very broad. As this Court has noted:

In issuing the order, the commission relied on R.C. 4905.06. That section gives the commission general supervisory authority over utilities; among other things, it provides the commission with the “power to inspect” public utilities, which “includes the power to prescribe any rule or order that the commission finds necessary for protection of the public safety.” The fact that only one string is attached to this power—the commission must find the rule or order necessary—implies a generous grant of discretion to issue safety-related orders. *See Akron v. Pub. Util. Comm.* (1948), 149 Ohio St. 347, 359, 37 O.O. 39, 78 N.E.2d 890 (recognizing the commission's “broad” authority under various statutes “to protect and safeguard the interests of the public, particularly in respect to health, safety and welfare”). Thus, if the order was related to the “protection of the public safety,” the commission acted within its powers.

Utility Serv. Partners, Inc. v. Pub. Util. Comm’n, 124 Ohio St. 3d 284 (2009).

The Commission can exercise this broad power in a variety of ways including, as in the case below, through the adoption of a tariff. Public Utilities are statutorily required to follow such tariffs. Ohio Rev. Code Ann. § 4905.54 (West 2012), App. at 5. The General Assembly established a process through which any entity may file a complaint against a public utility when it appears that a utility is not following its obligations:

Upon complaint in writing against any public utility ... that any service ... cannot be obtained, ...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. ...

Ohio Rev. Code Ann. § 4905.26 (West 2012), App. at 4-5. This process occurred in the case below. Cameron Creek filed a complaint alleging that Columbia threatened to terminate service to its apartment due to an alleged safety issue involving a customer’s equipment. Columbia claimed that it had a right to terminate service pursuant to its tariff.

This case presented a safety issue squarely within the Commission's jurisdictional authority. The Commission took evidence and made its decision, just as the General Assembly contemplated. Appellant's notion that it is the unilateral decision maker in this regard simply has no basis in law and must be rejected.

That the Commission can decide what sort of customer equipment the natural gas public utility must serve is not new. This Court long ago answered that question. As early as 1948 this Court upheld a Commission order barring a natural gas public utility from serving customer owned space heating equipment due to a supply shortage. *City of Akron v. Pub. Util. Comm'n*, 157 Ohio St. 574 (1948), *Cincinnati Gas & Elec. Co. v. Pub. Util. Comm'n*, 157 Ohio St. 574 (1952). Indeed this Court has found that the Commission can, in proper circumstances, *bar a natural gas public utility from accepting any new customers at all*. *Inland Steel Development Corp. v. Pub. Util. Comm'n*, 49 Ohio St. 2d 284, 361 N.E.2d 240 (1972).

The Commission's exercise of this authority does not conflict with the powers of municipalities to enforce building codes. Natural gas consumers are subject to municipal building codes and must comply with whatever rules are properly enforced. Natural gas public utilities are subject to regulatory control by the Commission and must comply with the Commission's decisions. To ensure that there is solid co-ordination between these two parallel regulatory structures, the Commission weighed the decisions of the City that the Cameron Creek installations were compliant with the relevant safety code very heavily in reaching its decision. Barring an emergency situation as in *Akron*, *Cincinnati Gas*

& Elec. Co., and *Inland, supra*, there will not be a divergence between the two. There will be no confusion.

Columbia claims that the Commission's decision will create confusion for its service employees. This is nonsense. Columbia's field staff should apply the safety code as it is written, exactly as they had done prior to this situation. The dispute herein arises because of a change *on Columbia's part*. Columbia has created an entirely artificial dispute here. In the past Columbia recognized that the safety code it claims to be enforcing has always provided that, if an installation was safe under the code when installed, it remains acceptable until the installation is altered, even if the code changes. *Complaint Case* (Direct Testimony of Joseph Busch at [unnumbered] 5) (July 2, 2009), Supp. at 21. In the past Columbia worked with the city inspectors and customers to resolve concerns. *Id.* Columbia's behavior has inexplicably changed and caused this entirely unnecessary dispute. Columbia's selective application of the NFG Code creates conflict, while simply applying the NFG Code as written avoids it.

In sum, Columbia's belief that it is the governing body for gas safety matters has no basis in law. The Commission is the body charged by statute with controlling the safety aspects of the utility/customer relationship and determining whether public utilities are correctly enforcing their tariffs. That authority was properly invoked below. The Commission took evidence and reasonably concluded that Cameron Creek's gas appliances did not violate the NFG Code. This reasonable outcome avoids any conflict between the Commission's authority and that of the City and any confusion on the part of customers. Any confusion on the part of Columbia's employees is a creation of

Columbia and it can be readily resolved by training those employees to read the entire code as they had previously done for many decades.

Proposition of Law No. II:

Where the Commission found, as a matter of fact, that the configuration of the gas appliances at a customer's premises does not pose a safety hazard that warrants a disconnection of service by a natural gas utility, the Ohio Supreme Court will not reverse or modify the Commission decision where Commission's determination is not manifestly against the weight of the evidence and is not so clearly unsupported by the record as to show misapprehension, mistake or willful disregard of duty. *Elyria Foundry Co. v. Pub. Util. Comm'n*, 118 Ohio St. 3d 269, 271, 888 N.E.2d 1055, 1058 (2008).

Columbia bears a heavy burden in challenging the Commission's Order.

Columbia must show that "the commission's decision is against the manifest weight of the evidence or is clearly unsupported by the record." *Sunoco, Inc. (R & M) v. Toledo Edison Co.*, 129 Ohio St. 3d 397, 412, 953 N.E.2d 285, 298 (2011). The Court will not "reverse or modify a decision of the commission as to a question of fact where there is sufficient probative evidence to show that the commission's decision is not against the manifest weight of the evidence and is not so clearly unsupported by the record as to show misapprehension, mistake, or willful disregard of duty." *AK Steel Corp. v. Pub. Util. Comm'n*, 95 Ohio St. 3d 81, 85-86, 765 N.E.2d 862, 867 (2002).

The Commission was tasked with making a factual determination - that being, whether or not it was reasonable for Columbia to disconnect service for Cameron Creek. After a three-day hearing and testimony from numerous witnesses, the Commission determined that there is no safety hazard presented at Cameron Creek that warrants dis-

connection of Cameron Creek's service. *Complaint Case Order* at 23, Appellant's App. at A23. In its Opinion and Order, the Commission identified various points in the record that support its decision.

A. The Commission's determination that Cameron Creek does not currently pose a hazardous condition is reasonable and supported by the record.

The Commission relied primarily on two factors when it determined that Cameron Creek does currently pose a safety hazard: (1) Cameron Creek is in compliance with the NFG Code because the City approved an alternative method of ensuring safety, which is specifically allowed for under the NFG Code; and (2) the NFG Code explicitly prohibits the type of retroactive renovation Columbia is demanding. *Complaint Case Order* at 20, 21, Appellant's App. at A20, A21. Each one of these factors, as discussed below, was fully developed in the record and show that the configuration of the gas appliances at Cameron Creek does not constitute a safety hazard as a matter of fact.

i. Cameron Creek is in compliance with the NFG Code because the City approved Cameron Creek's "alternative" method of ensuring safety, which is allowed for under the NFG Code.

Columbia insists that there is only one way to ensure safety. Columbia is wrong. The NFG Code itself allows for alternative forms of compliance. The City, as the "authority having jurisdiction" under the NFG Code, determined that Cameron Creek was safe and constructed in a manner that met the City's requirements. Based upon this evi-

dence, the Commission determined that Cameron Creek is safe and in compliance with the NFG Code.

- a. **Over a decade ago, the City approved the construction design of Cameron Creek and determined that Cameron Creek was safe for occupancy.**

In determining whether Cameron Creek poses a hazardous condition, the Commission gave considerable weight to the City's determination regarding the safety of Cameron Creek. Prior to being constructed, Cameron Creek was required to submit building plans and specifications for the proposed apartment complex to the City. *Complaint Case* (Direct Testimony of Robert Schutz at 13, RJS-2) (July 2, 2009), Supp. at 30, 39-48. Cameron Creek's expert witness, Robert Schutz, testified regarding the City's process of approving the configuration of the gas appliances at Cameron Creek. Mr. Schutz is a professional engineer with substantial experience interpreting building standards and codes, as well as examining building plans. *Id.* at 2-4, Supp. at 24-26.

Based upon his examination of the original plans for Cameron Creek, Mr. Schutz concluded that the City's building department approved the plans for Cameron Creek conditioned upon receipt and approval of engineering calculations regarding the adequacy of the combustion air for gas appliances. *Complaint Case* (Direct Testimony of Robert Schutz at 13-14) (July 2, 2009), Supp. at 30-31. The City also requested that 4-inch fresh air supply ducts be included in the plans before the plans were fully approved. *Id.* The purpose of the 4-inch fresh air supply ducts was to bring outdoor air into each mechanical room. *Complaint Case* Order at 13, Appellant's App. at A13. Cameron

Creek added the 4-inch fresh air ducts to the mechanical drawings and a licensed professional engineer submitted the additional calculations requested by the City. *Complaint Case Order* at 13, Appellant's App. at A13; *Complaint Case* (Direct Testimony of Robert Schutz at 13-14) (July 2, 2009), Supp. at 30-31. The City then fully approved Cameron Creek's plans and removed the conditional status of the plans. *Complaint Case Order* at 13-14, Appellant's App. at A13-14; Appellant's Brief at 2.

Cheryl Roahrig, a mechanical inspection supervisor with the City's Building Department, also testified regarding the City's approval of the addition of the 4-inch air supply ducts. Ms. Roahrig testified that the inclusion of the 4-inch fresh air supply ducts met the combustion air requirements of the applicable mechanical code at the time of construction. Tr. I at 217-218, 252, Supp. at 9-9, 10; Tr. II at 300-301, Supp. at 16-17; Cameron Creek Ex. 25 at 3, Supp. at 61. She also testified that the 4-inch air supply ducts bring fresh air directly into the mechanical rooms, aid combustion of the gas appliances, and provide fresh air ventilation into the HVAC system. *Complaint Case* (Opinion and Order at 7) (June 22, 2011) (*Complaint Case Order*), Appellant's App. at A7; Tr. I at 254, Supp. at 11; Tr. II at 324, Supp. at 19. Based upon this testimony, it is indisputable that the City inspected the gas appliance configuration at Cameron Creek prior to construction and approved the construction plans under the applicable building codes. Furthermore, the City viewed the inclusion of the 4-inch air supply ducts as a solution to any potential combustion or ventilation air issue. This evidence supports the Commission's decision that the City accepted an alternative method to ensure safety, which ultimately satisfies the requirements of the NFG Code.

b. The City still approves of the “alternative” method used by Cameron Creek and still views Cameron Creek as safe today.

Not only did the City determine that Cameron Creek was safe when it was initially constructed, but the City concluded that Cameron Creek was still safe in 2007 and 2008. Ms. Roahrig personally inspected the gas appliances at Cameron Creek in late 2007 and confirmed that air combustion and ventilation at Cameron Creek were adequate. Tr. I at 258-260, Supp. 12-14; Cameron Creek Ex. 2 (Roahrig Letter), Supp. at 54; *Complaint Case Order* at 11, Appellant’s App. at A11. She testified that because Cameron Creek had not performed any alterations and was properly maintaining the gas appliances, the City had no basis to order Cameron Creek to renovate its installations. Tr. I at 260, Supp. at 14; *Complaint Case Order* at 11, Appellant’s App. at A11. Columbia knew Ms. Roahrig came to this conclusion but continued to push this issue with the City. Despite Columbia’s insistence, the City continued to state that Cameron Creek was safe and the City Attorney eventually informed Columbia that he was “puzzled” how “something ... approved as safe when it was constructed and put in use” could later be determined to be unsafe. Cameron Creek Ex. 6, Supp. at 55-59.

The fact that the City approved the plans for Cameron Creek and continues to view Cameron Creek as safe is substantial evidence that Cameron Creek does not currently pose a safety hazard.

c. Columbia is not the “authority having jurisdiction” under the NFG Code and, thus, has no statutory authority to determine what constitutes a reasonable “alternative” or “engineered solution.”

Columbia does not dispute the fact that the City approved the 4-inch fresh air supply ducts installed at Cameron Creek. Appellant's Brief at 2. It also does not dispute that the City believes the inclusion of the 4-inch fresh air supply ducts provides for adequate combustion and ventilation air. *Id.* Tr. I at 258-260, Supp. 12-14; Cameron Creek Ex. 2 (Roahrig Letter), Supp. at 54; *Complaint Case Order* at 11, Appellant's App. at A11. Columbia claims, however, that it still has the right to force Cameron Creek to perform at least \$360,000 in renovation work because it is the "authority having jurisdiction" under the NFG Code. *Complaint Case Order* at 5, Appellant's App. at A5; Direct Testimony of Robert Schutz at 5 (July 2, 2009), Supp. at 27.² This argument fails for a number of reasons. First, Columbia ignores essential language in the definition of "authority having jurisdiction." 1996 NFG Code defines "authority having jurisdiction" as follows:

The organization, office, or individual responsible for approving equipment, an installation or procedure. NOTE: The phrase 'authority having jurisdiction' is used in this Code in a broad manner since jurisdictions and approval agencies vary as do their responsibilities. Where public safety is primary, the authority having jurisdiction may be a federal, state, local, or other regional department or individual, such as a fire chief, fire marshal, chief of a fire prevention bureau, labor department, health department, building official, electrical inspector, or others having statutory authority.

² The \$360,000 amount is the approximate cost to install 7 inch combustion air feed ducts in all the units, which is in part the renovation proposed by Columbia. *Complaint Case Order* at 5, Appellant's App. at A5; Direct Testimony of Robert Schutz at 5 (July 2, 2009), Supp. at 27. But once this proposed renovation is performed, Cameron Creek would then be obligated to make other changes as well in keeping with current building codes and be forced to perform even more extensive renovation work. *Id.* Thus, Columbia's proposed renovation could ultimately cost Cameron Creek much more than \$360,000.

Tr. III at 672, Appellant's Supp. at 186 (emphasis added). Clearly, an "authority having jurisdiction" is a governmental entity, such as a "federal, state, local or other regional authority." This contradicts Columbia's argument that it, a private company, should be the final arbiter as to when and how the NFG Code applies. Furthermore, the definition indicates that an "authority having jurisdiction" is an entity with "statutory authority" to approve the equipment, installation, and procedures related to the construction of buildings. Columbia has no "statutory authority" to implement and enforce the NFG Code. At most, Columbia has the right, pursuant to its tariff, to disconnect service after gas appliances at customers' premises are determined to be "defective" or "in such a condition as to constitute a hazard." Tariffs, Appellant's Supp. at 193, 195, 197, 199.

The Commission acknowledged in its Opinion and Order that it is reasonable for Columbia to use and refer to the NFG Code to ensure safe service. *Complaint Case Order* at 18-19, Appellant's App. at A18-A19. But nothing in Columbia's tariffs or the Commission's Opinion and Order gives Columbia the unfettered right to disconnect a customer's service based upon its own interpretation of the NFG Code. The Commission always retains the ability to determine whether a hazardous condition actually exists and whether a public utility's threat of disconnection is reasonable. *State ex rel. Duke Energy Ohio, Inc. v. Hamilton Cty. Court of Common Pleas*, 126 Ohio St. 3d 41, 46, 930 N.E.2d 299, 304 (2010) (R.C. 4905.26 confers exclusive jurisdiction on the commission to determine whether any service rendered by a public utility is in any respect unjust, unreasonable, or in violation of law). The Commission determined, based upon the facts, that there is no verifiable hazardous condition at Cameron Creek and the City approved an alterna-

tive method of ensuring safety. Thus, Commission correctly determined that Columbia's decision to disconnect service was unreasonable and inconsistent with the NFG Code.

Columbia's claim that it is the "authority having jurisdiction", if accepted by this Court, would mean public utilities have authority to second-guess and override the decisions of local building authorities. This would mean that public utilities, throughout their service territories, have the right to demand that retroactive renovation be performed on structures that local building authorities have already determined to be safe and in compliance with applicable building codes. Columbia's argument leads to an implausible conclusion and should be rejected by this Court.

d. Columbia misconstrues the intent of Section 1.2 of the NFG Code which allows for "alternative" or "engineered solutions" such as the 4-inch fresh air supply ducts.

Columbia's claim that 4-inch fresh air supply ducts cannot constitute an "alternative" solution under Section 1.2 is wrong. The expert commentary regarding Section 1.2 states:

This paragraph allows the authority having jurisdiction to require evidence to substantiate and claims and, with that evidence, to permit installation using an *alternative or new method or procedure*.

Tr. III at 674 (emphasis added), Appellant's Supp. at 188.

The inclusion of a 4-inch air supply duct is clearly an "alternative" solution that satisfied the City. *Complaint Case* Order at 7-8, 21, Appellant's App. at A7-8, A21; Tr. I at 254, Supp. at 11; Tr. II at 323, Supp. at 18; *Complaint Case* (Direct Testimony of

Robert Schutz at 14-15) (July 2, 2009), Supp. at 31-32. Section 1.2 of the NFG Code clarifies that local building authorities can adopt certain provisions of the NFG Code without losing their ability to accept alternative solutions. This is the more sensible reading of Section 1.2, and is consistent with the purpose of the NFG Code. The final decision of the local building authority should control regarding what constitutes an acceptable construction method, not a particular provision of an unadopted model code. If Columbia's argument is accepted, that would mean that a jurisdictional authority that has adopted certain portions of the NFG Code could not accept an alternative solution, no matter how effective that alternative solution may be, unless the solution involved some type of "new technology" or "newly developed practice." This argument is simply unreasonable. In fact, the NFG Code states that users of the model code, such as Columbia, must defer to state and local laws where a conflict arises:

Users of this document should consult applicable federal, state and local laws and regulations. [The drafters of the NFG Code] do not, by publication of this document, intend to urge action that is not in compliance with applicable law, and this document may not be construed as doing so.

Cameron Creek Ex. 39, RJS-8 at [unnumbered] 1, Supp. at 49.

This provision clearly shows that the drafters of the NFG Code intended local building authorities to be the final arbiter regarding building construction, not private entities that use the model code.

- e. **Cameron Creek's "non-tight" construction design allows a sufficient amount of outdoor air to infiltrate the apartment complex and complies with the applicable building codes.**

Another reason the installation at Cameron Creek constitutes an alternative way of achieving safety is because Cameron Creek is not “tightly constructed.” *Complaint Case* Order at 21, Appellant’s App. at A21. When Cameron Creek was built, buildings were often more loosely constructed, which allows more outside air to infiltrate the building. Because many buildings were “loosely” or “non-tightly” constructed at the time Cameron Creek was built, the City did not always require a more direct supply of outside air. *Complaint Case* (Direct Testimony of Joseph Busch at [unnumbered] 6) (July 2, 2009), Supp. at 22. Mr. Busch, Chief Building Official for the City, testified that Cameron Creek does not constitute “unusually tight construction” as defined by the OBC-1995 and is constructed in a manner that allows an adequate amount of outside air to infiltrate the building. *Id.*

Mr. Schutz confirmed that the “non-tight” construction of Cameron Creek provides for an adequate amount of air infiltration by performing “blower door” tests.³ *Complaint Case* (Direct Testimony of Robert Schutz at 9, 15, 20, Supp. at 28, 32, 35. Mr. Schutz performed the “most restrictive [blower door] test with all exhaust openings closed off and the exhaust fans operating in full competition with the indoor air.” *Id.* at 20, Supp. at 35. The test showed that the dwelling units of Cameron Creek are not “tight construction” or “unusually tight construction” and provide sufficient air to meet the applicable building code requirements. *Id.* at 21, Supp. at 36.

³ A blower door test is accomplished by replacing the door of a structure with a device which covers the entire opening and has a powerful fan installed in it. When the fan is run, the air pressure inside the structure can be measured to assess the amount of air leakage that occurs. This provides an objective measurement of air infiltration.

f. The installation of hard-wired carbon monoxide detectors helps ensure that Cameron Creek is safe.

Another factor showing that Cameron Creek has an alternative way of achieving safety is the presence of carbon monoxide detectors. *Complaint Case Order* at 21, Appellant's App. at A21. It is undisputed that Cameron Creek installed hard-wired carbon monoxide detectors in every apartment unit. *Tr. I* at 151, *Supp.* at 5. Columbia, however, states that these detectors cannot prevent Cameron Creek's residents from being exposed to carbon monoxide. Appellant's Brief at 20-21. Columbia, in essence, wants an absolute guarantee that no resident of Cameron Creek will ever be exposed to any amount of carbon monoxide. Although the Commission is concerned when any individual is exposed to carbon monoxide, Columbia's demands are simply unreasonable. Especially since Columbia is asking Cameron Creek to pay for this absolute guarantee.

Many of Columbia's concerns appear to be based upon one incident where a resident intentionally disabled a detector. *Tr. I* at 151, 154, *Supp.* at 5, 6. It is true one resident unwisely chose to disable a carbon monoxide detector. Regardless, the detectors help prevent exposure to carbon monoxide. Furthermore, Cameron Creek immediately remedied this situation once it was discovered. Once she learned that the detector was removed, the property manager for Cameron Creek immediately reinstalled the detector and instructed the tenant not to remove it again. *Id.* at 151, 176, *Supp.* at 5, 7.

Columbia bases its entire position on worst-case scenarios and contends that detectors do not provide a sufficient level of safety. But the carbon monoxide detectors make Cameron Creek safer. The Commission was tasked with weighing the potential

hazard of carbon monoxide exposure and the numerous factors that mitigated any potential exposure. The Commission did so and, based upon the evidence, it determined that the presence of carbon monoxide detectors was one of the many factors that proved that Cameron Creek was safe.

- ii. **The NFG Code explicitly prohibits the same type of retroactive enforcement that Columbia attempting to pursue.**

Another factor that the Commission relied upon in making its decision is that the NFG Code prohibits the retroactive enforcement. Section 1.3 of the NFG Code states:

Retroactivity. Unless otherwise stated, the provisions of this Code shall not be applied retroactively to existing systems that were in compliance with the provisions of the Code in effect at the time of installation.

Cameron Creek Ex. 39, RJS-8 at [unnumbered] 3, Supp. at 50.

Columbia admits that the City did not enforce the NFG Code when Cameron Creek was constructed. Appellants Brief at 17-18. Furthermore, Columbia did not enforce NFG Code requirements regarding appliance hookups until 2002 when the Commission's Minimum Gas Standards went into effect. *Complaint Case Order* at 19, Appellant's App. at A19; Tr. I at 78-79, Supp. at 2-3; Appellant's Brief at 6. Therefore, Columbia's attempt to retroactively enforce certain provisions of the NFG Code today is contrary to the explicit terms of the NFG Code.

Based upon the terms of the NFG Code, Columbia has no authority to demand that retroactive renovations be performed at Cameron Creek.

B. Columbia failed to prove that a hazardous condition currently exists at Cameron Creek that warrants disconnection of Cameron Creek's service.

The evidence presented by Columbia was called into question and, thus, the Commission determined that the evidence weighed in Cameron Creek's favor. To support its claim that Cameron Creek poses a carbon monoxide hazard, Columbia relied largely on two carbon monoxide related incidents that occurred over a ten year period. In one case, a water heater and gas vent needed service. *Complaint Case* (Direct Testimony of Robert Schutz at 36) (July 2, 2009), Supp. at 38. In the other, a water heater failed due to age and use. *Id.* Both issues were immediately remedied by Cameron Creek. *Id.* More importantly, neither incident occurred due to improper configuration or installation of the gas appliances. *Id.* at 35-36, Supp. at 37-38. Water heaters and furnaces require maintenance, adjustment, and replacement over time and it is not unnatural for service issues to arise, especially at a large apartment complex. *Id.* at 35, Supp. at 37. The Commission is undoubtedly sensitive to any incident involving carbon monoxide exposure. But Columbia failed to prove that these incidents were caused by improper configuration of the gas appliances or violations of the NFG Code.

Despite this evidence, Columbia resorts to scare tactics, alleging that Cameron Creek cannot be trusted to maintain its gas appliances. Columbia points to several service invoices in support of its position. Appellant's Brief at 23; Invoices, Appellant's Supp. 65-73. But Columbia fails to mention that each one of these invoices specifically state that absolutely *no carbon monoxide* was detected during these service calls, and no signs of improper combustion or ventilation were discovered. Invoices, Appellant's

Supp. 65-73. In short, the same evidence Columbia relies upon *proves that there is currently no carbon monoxide issue at Cameron Creek.*

The Commission determined that, with proper maintenance and timely equipment replacement, Cameron Creek will be able to ensure the safety of its residents. *Complaint Case Order* at 21, 27, Appellant's App. at A21, A27; *Complaint Case* (Entry on Rehearing at 4 (¶¶ 7, 8), 10 (¶ 20) (August 17, 2011), Appellant's App. at A52, A58. This solution is much more reasonable than forcing Cameron Creek to completely renovate all 240 of its units. This is a fact-based decision and the record fully supports the Commission's decision.

Columbia's errors do not end there. Columbia also inadequately tested for carbon monoxide and, instead, simply red-tagged appliances based upon Cameron Creek's alleged non-compliance with the NFG Code. *Complaint Case Order* at 20, Appellant's App. at A20; *Complaint Case* (Direct Testimony of Robert Schutz at 17) (July 2, 2009), Supp. at 33. Columbia's own policies require its field staff to test open living areas. *Complaint Case* (Direct Testimony of Robert Schutz at 17, RJS-3B (Carbon Monoxide Investigations Training Materials and Operation Guideline) at 3,13, Supp. at 33, 52, 53. Columbia's technicians performed carbon monoxide readings before red-tagging appliances on only a few occasions. *Id.* at 17, Supp. at 33. Furthermore, the few times Columbia's technicians actually performed carbon monoxide readings at the wrong place. They tested for carbon monoxide at the "lower door" of gas appliances. *Id.* at 18, Supp. at 34. Columbia's carbon monoxide testing policies provide that testing at the "lower door" location should be avoided because these tests are inaccurate. *Id.*

In violation of its own policies, Columbia demanded that Cameron Creek perform major renovation work throughout every unit based solely upon its incorrect interpretation of the NFG Code. Columbia was unable, however, to produce substantive evidence that carbon monoxide levels at Cameron Creek were actually unsafe or hazardous. Therefore, the Commission determined that Columbia's decision to disconnect service for Cameron Creek was unreasonable.

CONCLUSION

It is up to the Commission to determine whether a utility customer's facilities are safe enough to be connected to the utility service. As a matter of fact, Cameron Creek's facilities are safe. The evidence says so. They were safe when they were installed, and they are safe today. They are safe because of the style of construction used, the presence of carbon monoxide detectors, the use of additional air ducts, and compliance with the City of Columbus' inspection requirements and compliance with the NFG code. The Commission so found and its decision should be affirmed.

Respectfully submitted,

Michael DeWine (0009181)
Ohio Attorney General

William L. Wright (0018010)
Section Chief



Thomas W. McNamee (0017352)
Counsel of Record

Devin D. Parram (0082507)
Assistant Attorneys General

Public Utilities Section

180 East Broad Street, 6th Fl

Columbus, OH 43215-3793

614.466.4397 (telephone)

614.644.8764 (fax)

william.wright@puc.state.oh.us

thomas.mcnamee@puc.state.oh.us

devin.parram@puc.state.oh.us

**Counsel for Appellee,
The Public Utilities Commission of Ohio**

PROOF OF SERVICE

I hereby certify that a true copy of the foregoing **Merit Brief**, submitted on behalf of appellee, the Public Utilities Commission of Ohio, was served by regular U.S. mail, postage prepaid, or hand-delivered, upon the following parties of record, this 28th day of February, 2012.



Thomas W. McNamee
Assistant Attorney General

Parties of Record:

Eric B. Gallon
Mark S. Stemm
Porter, Wright, Morris & Arthur
41 South High Street
Columbus, OH 43215-6194

Charles McCreery
Columbia Gas of Ohio, Inc.
1700 MacCorkle Avenue, S.E.
P.O. Box 1273
Charleston, WV 25325-1273

Brian M. Zets
Thomas L. Hart
Wiles, Boyle, Burkholder & Bringardner
300 Spruce Street, Floor One
Columbus, OH 43215-1173

Stephen B. Seiple
Brook Leslie
Columbia Gas of Ohio, Inc.
200 Civic Center Drive
P.O. Box 117
Columbus, OH 43216-0117

APPENDIX

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4905.02 Public utility defined.

As used in this chapter, “public utility” includes every corporation, company, copartnership, person, or association, the lessees, trustees, or receivers of the foregoing, defined in section 4905.03 of the Revised Code, including any public utility that operates its utility not for profit, except the following:

- (A) An electric light company that operates its utility not for profit;
- (B) A public utility, other than a telephone company, that is owned and operated exclusively by and solely for the utility’s customers, including any consumer or group of consumers purchasing, delivering, storing, or transporting, or seeking to purchase, deliver, store, or transport, natural gas exclusively by and solely for the consumer’s or consumers’ own intended use as the end user or end users and not for profit;
- (C) A public utility that is owned or operated by any municipal corporation;
- (D) A railroad as defined in sections 4907.02 and 4907.03 of the Revised Code;
- (E) Any provider, including a telephone company, with respect to its provision of any of the following:
 - (1) Advanced services as defined in 47 C.F.R. 51.5 ;
 - (2) Broadband service, however defined or classified by the federal communications commission;
 - (3) Information service as defined in the “Telecommunications Act of 1996,” 110 Stat. 59, 47 U.S.C. 153(20);
 - (4) Subject to division (A) of section 4927.03 of the Revised Code, internet protocol-enabled services as defined in section 4927.01 of the Revised Code;
 - (5) Subject to division (A) of section 4927.03 of the Revised Code, any telecommunications service as defined in section 4927.01 of the Revised Code to which both of the following apply:
 - (a) The service was not commercially available on the effective date of the amendment of this section by S.B. 162 of the 128th general assembly.
 - (b) The service employs technology that became available for commercial use only after the effective date of the amendment of this section by S.B. 162 of the 128th general assembly.

4905.03 Public utility company definitions.

As used in this chapter:

(A) Any person, firm, copartnership, voluntary association, joint-stock association, company, or corporation, wherever organized or incorporated, is:

(1) A telephone company, when engaged in the business of transmitting telephonic messages to, from, through, or in this state ;

(2) A motor transportation company, when engaged in the business of carrying and transporting persons or property or the business of providing or furnishing such transportation service, for hire, in or by motor-propelled vehicles of any kind, including trailers, for the public in general, over any public street, road, or highway in this state, except as provided in section 4921.02 of the Revised Code;

(3) An electric light company, when engaged in the business of supplying electricity for light, heat, or power purposes to consumers within this state, including supplying electric transmission service for electricity delivered to consumers in this state, but excluding a regional transmission organization approved by the federal energy regulatory commission;

(4) A gas company, when engaged in the business of supplying artificial gas for lighting, power, or heating purposes to consumers within this state or when engaged in the business of supplying artificial gas to gas companies or to natural gas companies within this state, but a producer engaged in supplying to one or more gas or natural gas companies, only such artificial gas as is manufactured by that producer as a by-product of some other process in which the producer is primarily engaged within this state is not thereby a gas company. All rates, rentals, tolls, schedules, charges of any kind, or agreements between any gas company and any other gas company or any natural gas company providing for the supplying of artificial gas and for compensation for the same are subject to the jurisdiction of the public utilities commission.

(5) A natural gas company, when engaged in the business of supplying natural gas for lighting, power, or heating purposes to consumers within this state. Notwithstanding the above, neither the delivery nor sale of Ohio-produced natural gas by a producer or gatherer under a public utilities commission-ordered exemption, adopted before, as to producers, or after, as to producers or gatherers, January 1, 1996, or the delivery or sale of Ohio-produced natural gas by a producer or gatherer of Ohio-produced natural gas, either to a lessor under an oil and gas lease of the land on which the producer's drilling unit is located, or the grantor incident to a right-of-way or easement to the producer or gatherer, shall cause the producer or gatherer to be a natural gas company for the purposes of this section.

All rates, rentals, tolls, schedules, charges of any kind, or agreements between a natural gas company and other natural gas companies or gas companies providing for the supply of natural gas and for compensation for the same are subject to the jurisdiction of the public utilities commission. The commission, upon application made to it, may relieve any producer or gatherer of natural gas, defined in this section as a gas company or a natural gas company, of compliance

with the obligations imposed by this chapter and Chapters 4901., 4903., 4907., 4909., 4921., and 4923. of the Revised Code, so long as the producer or gatherer is not affiliated with or under the control of a gas company or a natural gas company engaged in the transportation or distribution of natural gas, or so long as the producer or gatherer does not engage in the distribution of natural gas to consumers.

Nothing in division (A)(5) of this section limits the authority of the commission to enforce sections 4905.90 to 4905.96 of the Revised Code.

(6) A pipe-line company, when engaged in the business of transporting natural gas, oil, or coal or its derivatives through pipes or tubing, either wholly or partly within this state;

(7) A water-works company, when engaged in the business of supplying water through pipes or tubing, or in a similar manner, to consumers within this state;

(8) A heating or cooling company, when engaged in the business of supplying water, steam, or air through pipes or tubing to consumers within this state for heating or cooling purposes;

(9) A messenger company, when engaged in the business of supplying messengers for any purpose;

(10) A street railway company, when engaged in the business of operating as a common carrier, a railway, wholly or partly within this state, with one or more tracks upon, along, above, or below any public road, street, alleyway, or ground, within any municipal corporation, operated by any motive power other than steam and not a part of an interurban railroad, whether the railway is termed street, inclined-plane, elevated, or underground railway;

(11) A suburban railroad company, when engaged in the business of operating as a common carrier, whether wholly or partially within this state, a part of a street railway constructed or extended beyond the limits of a municipal corporation, and not a part of an interurban railroad;

(12) An interurban railroad company, when engaged in the business of operating a railroad, wholly or partially within this state, with one or more tracks from one municipal corporation or point in this state to another municipal corporation or point in this state, whether constructed upon the public highways or upon private rights-of-way, outside of municipal corporations, using electricity or other motive power than steam power for the transportation of passengers, packages, express matter, United States mail, baggage, and freight. Such an interurban railroad company is included in the term "railroad" as used in section 4907.02 of the Revised Code.

(13) A sewage disposal system company, when engaged in the business of sewage disposal services through pipes or tubing, and treatment works, or in a similar manner, within this state.

(B) "Motor-propelled vehicle" means any automobile, automobile truck, motor bus, or any other self-propelled vehicle not operated or driven upon fixed rails or tracks.

4905.06 General supervision.

The public utilities commission has general supervision over all public utilities within its jurisdiction as defined in section 4905.05 of the Revised Code, and may examine such public utilities and keep informed as to their general condition, capitalization, and franchises, and as to the manner in which their properties are leased, operated, managed, and conducted with respect to the adequacy or accommodation afforded by their service, the safety and security of the public and their employees, and their compliance with all laws, orders of the commission, franchises, and charter requirements. The commission has general supervision over all other companies referred to in section 4905.05 of the Revised Code to the extent of its jurisdiction as defined in that section, and may examine such companies and keep informed as to their general condition and capitalization, and as to the manner in which their properties are leased, operated, managed, and conducted with respect to the adequacy or accommodation afforded by their service, and their compliance with all laws and orders of the commission, insofar as any of such matters may relate to the costs associated with the provision of electric utility service by public utilities in this state which are affiliated or associated with such companies. The commission, through the public utilities commissioners or inspectors or employees of the commission authorized by it, may enter in or upon, for purposes of inspection, any property, equipment, building, plant, factory, office, apparatus, machinery, device, and lines of any public utility. The power to inspect includes the power to prescribe any rule or order that the commission finds necessary for protection of the public safety. In order to assist the commission in the performance of its duties under this chapter, authorized employees of the motor carrier enforcement unit, created under section 5503.34 of the Revised Code in the division of state highway patrol, of the department of public safety may enter in or upon, for inspection purposes, any motor vehicle of any motor transportation company or private motor carrier as defined in section 4923.02 of the Revised Code. In order to inspect motor vehicles owned or operated by a motor transportation company engaged in the transportation of persons, authorized employees of the motor carrier enforcement unit, division of state highway patrol, of the department of public safety may enter in or upon any property of any motor transportation company, as defined in section 4921.02 of the Revised Code, engaged in the intrastate transportation of persons.

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.

4905.54 Compliance with orders.

Every public utility or railroad and every officer of a public utility or railroad shall comply with every order, direction, and requirement of the public utilities commission made under authority of this chapter and Chapters 4901., 4903., 4907., 4909., 4921., and 4923. of the Revised Code, so long as they remain in force. Except as otherwise specifically provided in sections 4905.83, 4905.95, 4919.99, 4921.99, and 4923.99 of the Revised Code, the public utilities commission may assess a forfeiture of not more than ten thousand dollars for each violation or failure against a public utility or railroad that violates a provision of those chapters or that after due notice fails to comply with an order, direction, or requirement of the commission that was officially promulgated. Each day's continuance of the violation or failure is a separate offense. All forfeitures collected under this section shall be credited to the general revenue fund.