

**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
v.)	Commission of Ohio,
)	Case No. 08-1091-GA-CSS
Columbia Gas of Ohio, Inc.,)	
)	
Appellant.)	

**REPLY BRIEF OF APPELLANT
COLUMBIA GAS OF OHIO, INC.**

Eric B. Gallon (0071465), Counsel of Record
 Mark S. Stemm (0023146)
 PORTER WRIGHT MORRIS & ARTHUR LLP
 41 South High Street
 Columbus, Ohio 43215-6194
 Tel: (614) 227-2000
 Fax: (614) 227-2100
 Email: egallon@porterwright.com
 mstemm@porterwright.com

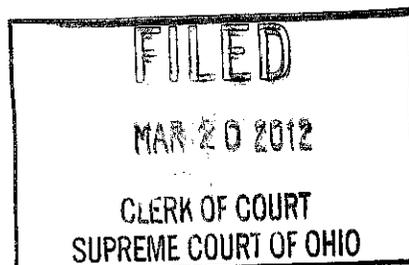
Charles McCreery (0063148)
 1700 MacCorkle Ave. SE, P.O. Box 1273
 Charleston, West Virginia 25325-1273
 Tel: (304) 357-2334
 Fax: (304) 357-3206
 Email: cmcCreery@nisource.com

Stephen B. Seiple, Asst. Gen. Cnsl. (0003809)
 Brooke Leslie, Counsel (0081179)
 200 Civic Center Drive, P.O. Box 117
 Columbus, Ohio 43216-0117
 Tel: (614) 460-4648
 Fax: (614) 460-6986
 Email: sseiple@nisource.com
 bleslie@nisource.com

Attorneys for Appellant
 COLUMBIA GAS OF OHIO, INC.

Michael DeWine (0009181), Ohio Attorney
 General
 William L. Wright (0018010), Section Chief
 Thomas W. McNamee (0017352), Counsel of
 Record
 Devin D. Parram (0082507)
 OHIO ATTORNEY GENERAL'S OFFICE
 Public Utilities Section
 180 East Broad Street, 6th Floor
 Columbus, Ohio 43215-3793
 Tel.: (614) 466-4397
 Fax.: (614) 644-8764
 Email: william.wright@puc.state.oh.us
 thomas.mcnamee@puc.state.oh.us
 devin.parram@puc.state.oh.us

Attorneys for Appellee
 PUBLIC UTILITIES COMMISSION OF
 OHIO



Brian M. Zets (0066544), Counsel of Record
Thomas L. Hart (0062715)
WILES, BOYLE, BURKHOLDER & BRINGARDNER
Co., LPA
300 Spruce Street, Floor One
Columbus, Ohio 43215-1173
Tel.: (614) 221-5216
Fax: (614) 221-4541
Email: bzets@wileslaw.com
thart@wileslaw.com

Attorneys for Intervening Appellee
CAMERON CREEK APARTMENTS

TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

LAW AND ARGUMENT 1

 I. INTRODUCTION 1

 II. LAW AND ARGUMENT 3

 A. Columbia’s Approved Tariff Authorizes Columbia To Set “Reasonable Requirements” For Its Customers’ Appliance Venting, Which Are Embodied In The NFG Code That The Commission Authorized Columbia To Enforce.3

 B. Columbia Has Applied The National Fuel Gas Code Upon Connecting And Reconnecting Service Since 1990.....7

 C. Cameron Creek’s Gas Appliance Installations Violated The National Fuel Gas Code In Place When They Were Installed.....8

 D. The City of Columbus’s Approval of Cameron Creek Apartments’ Building Plans Did Not Constitute Approval Of An “Alternative Method” Under The National Fuel Gas Code.....10

 E. Neither the City Nor the Commission Demonstrated Cameron Creek Is Safe.13

 F. Neither the Commission Nor Cameron Creek Has Explained How Columbia Can Reasonably Apply The Commission’s Order and Entry Below.16

 III. CONCLUSION..... 19

TABLE OF AUTHORITIES

CASES

Anthony Carlin Co. v. Hines, 107 Ohio St. 328, syllabus (1923).....5

F. Enterprises, Inc. v. Kentucky Fried Chicken, 47 Ohio St.2d 154, 351 N.E.2d 121
(1976)4

Osai v. A&D Furniture Co., 68 Ohio St.2d 99, 101, 428 N.E.2d 857 (1981)4

Vorhees v. Jovingo, 4th Dist. Nos. 04CA16, 04CA17, 04CA18, 2005-Ohio-49485

STATUTES

R.C. 4903.095

R.C. 4903.105

R.C. 4903.115

R.C. 4903.125

ADMINISTRATIVE RULES

Ohio Adm.Code 4901:1-13-057

MISCELLANEOUS

App.R. 3(C)(1).....4

Wolff, Brogan & McSherry, *Anderson's Appellate Practice and Procedure in Ohio*
(2010)4

Tariff, P.U.C.O. No. 2, Original Sheet No. 8, §§30-31 (eff. Dec. 3, 1991).....5
Tariff, P.U.C.O. No. 2, First Revised Sheet No. 8, §§30-31 (eff. Sept. 18, 1996).....5
Tariff, P.U.C.O. No. 2, Second Revised Sheet No. 8, §§31-32 (eff. Jan. 16, 2008)5
Tariff, P.U.C.O. No. 2, Third Revised Sheet No. 8, §§31-32 (eff. June 30, 2008)5

LAW AND ARGUMENT

I. INTRODUCTION

The following facts are undisputed. The apartment complex run by appellee Cameron Creek Apartments (“Cameron Creek”) is over a decade old. “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.” (PUCO Brief at 19.) In the year before Cameron Creek filed its complaint before appellee the Public Utilities Commission of Ohio (“PUCO” or “Commission”), there were two incidents in which Cameron Creek needed to service or replace a water heater. (*See id.*; *see also* Cameron Creek Brief at 6-7.) Those “problems * * * were typical for appliances of [that] age and usage pattern.” (Appx. 20.) In both instances, the water heaters produced carbon monoxide. (PUCO Brief at 19.) And, because Cameron Creek did not comply with the edition of the National Fuel Gas Code (“NFG Code”) that was effective when Cameron Creek installed its gas appliances, the carbon monoxide produced by those malfunctioning water heaters was able to enter the living space of the affected apartments.

The primary issue in this case is whether appellant Columbia Gas of Ohio, Inc. (“Columbia”) may act to protect Cameron Creek’s residents from future exposures to carbon monoxide when the complex’s gas appliances inevitably fail again. The secondary issue is whether Columbia may act to ensure the safety of its customers at other apartment complexes and residences, when violations of past NFG Code editions threaten their safety. Implicit in both these questions is whether the Commission, which has no experience enforcing the NFG Code or any other code regulating gas appliance installations, has justified its decision to override the decisions of Columbia, which has applied the NFG Code since 1990 (Columbia Supp. 50-51) and whose service technicians each enforce its provisions hundreds of times a month (*id.* 3).

The Commission's and Cameron Creek's merit briefs refuse to confront the safety issues at the core of this case, calling Columbia's discussions of the potential for carbon monoxide poisoning at Cameron Creek "inflammatory and unnecessary" (Cameron Creek Brief at 13) or "scare tactics" (PUCO Brief at 19). The appellees also refuse to confront the arguments in Columbia's merit brief, or the actual evidence presented and orders entered below. The Commission had previously acknowledged that Columbia applied and enforced the 1996 NFG Code at the time it established service to Cameron Creek. (*See* Appx. 4, 14, 18.) Now, the appellees paint a scenario in which Columbia approved Cameron Creek's gas appliance installations before Columbia began applying the NFG Code, then changed its mind in 2006 and began harassing Cameron Creek to come into compliance with the 2006 NFG Code. (PUCO Brief at 6, 18; Cameron Creek Brief at 2-3, 9-11.) Both appellees also now argue that Columbia has no authority to enforce the NFG Code where the local building authority has already approved the appliance installation (*see* PUCO Brief at 14, Cameron Creek Brief at 12) – a position the Commission previously rejected (*see* Appx. 10-11, 19) and that Cameron Creek did not assert in any cross-appeal to this Court. Otherwise, the appellees repeat the Commission's holding below that Cameron Creek's installation of fresh-air supply ducts to its mechanical rooms somehow qualified as an "alternative" solution under the 1996 NFG Code, and that carbon-monoxide detectors and drafty walls keep Cameron Creek's residents safe enough.

The appellees' description of events is contradicted by the Commission's orders below and the manifest weight of the evidence. The appellees' new position that Columbia may not enforce the NFG Code is not properly raised for the first time on appeal and, in any event, is as unworkable as the Commission's prior position. And, the appellees have failed to address the flaws in the Commission's orders outlined in Columbia's merit brief.

For the reasons more fully explained below, neither the Commission nor Cameron Creek has demonstrated that the Commission's decision to override Columbia's application and enforcement of the NFG Code at Cameron Creek was lawful, reasonable, or supported by the manifest weight of the evidence.

II. LAW AND ARGUMENT

A. **Columbia's Approved Tariff Authorizes Columbia To Set "Reasonable Requirements" For Its Customers' Appliance Venting, Which Are Embodied In The NFG Code That The Commission Authorized Columbia To Enforce.**

In its orders below, the Commission approved Columbia's application of the NFG Code "prior to connection or reconnection of gas service" as consistent with Columbia's tariff and "just and reasonable." (Appx. 18-19.) The Commission held, however, that Columbia may "require retrofits" on existing structures only when "older structures cannot demonstrate prescriptive NFG [Code] compliance or the existence of a specially engineered solution with an appropriate professional engineering verification," and only when the retrofits comport with "a rule of reason." (*Id.* 21, 22.) The problems with this contradictory position were discussed in Columbia's merit brief, and are discussed further below.

Cameron Creek goes beyond the Commission's position below, however, and argues that Columbia lacks the authority to enforce the NFG Code at all. According to Cameron Creek, Columbia has no authority "over the design and construction requirement[s] for gas appliances" and cannot "dictate and then approve specific construction changes inside a dwelling." (Cameron Creek Brief at 11, 12.) Instead, Cameron Creek argues, only the local building department has exclusive jurisdiction over design and construction requirements for gas appliances. (*Id.* at 11, citing Ohio Adm.Code 4101:8-1-04 and R.C. 3781.10.) Cameron Creek argues that this conclusion is necessary to prevent a "conflict" from arising between Columbia and the local building department and creating confusion. (*Id.* at 12.)

Surprisingly, the Commission appears to agree, announcing for the first time that “public utilities have [no] authority to second-guess and override the decisions of local building authorities” or “demand that * * * renovation be performed on structures that local building authorities have already determined to be safe and in compliance with applicable building codes.” (PUCO Brief at 14.) This effectively means that Columbia may not enforce the NFG Code *at all* in existing structures, unless there is no local building authority or the gas appliances were not installed as required by the approved plans. This also means that, in most cases, the Commission would bar Columbia from acting to protect its customers from foreseeable harm.

If Cameron Creek seeks a ruling from this Court that Columbia has no authority to enforce the NFG Code at all in existing structures, its arguments are not properly raised here. A notice of cross appeal must be filed if an appellee seeks a change in a final judgment or order. *See* App.R. 3(C)(1) and Staff Note. “The Supreme Court is without authority to grant affirmative relief to an appellee by modification of the judgment * * * where no cross appeal has been taken by appellee by the filing of a notice of appeal * * * [.]” *F. Enterprises, Inc. v. Kentucky Fried Chicken*, 47 Ohio St.2d 154, 351 N.E.2d 121, paragraph five of the syllabus (1976); *Osai v. A&D Furniture Co.*, 68 Ohio St.2d 99, 101, 428 N.E.2d 857 (1981) (same; quoting *F. Enterprises, Inc.*). The rule as stated in *F. Enterprises, Inc.* has long been a black-letter law of appellate practice in Ohio. Wolff, Brogan & McSherry, *Anderson's Appellate Practice and Procedure in Ohio*, Section 5.01[5] (2010 ed.) (“You must file a notice of cross-appeal if you are dissatisfied with the judgment and want it reversed or modified.”) Because Cameron Creek did not file a cross-appeal, this Court cannot reverse the Commission’s rulings below that Columbia has authority, under its tariff, to apply and enforce the NFG Code.

The Commission's new position also is not properly before this Court. "In all contested cases heard by the public utilities commission," the Ohio Revised Code requires the Commission to "file * * * findings of fact and written opinions setting forth the reasons prompting the decisions arrived at[.]" R.C. 4903.09. If a party files an application for rehearing and the Commission grants that application, the Commission may "abrogate or modify" its original order. R.C. 4903.10. If the Commission does not grant the application for rehearing, the party may appeal the Commission's order to this Court. *See* R.C. 4903.11, 4903.12. Nothing in the Ohio Revised Code permits the Commission to modify its orders, or otherwise change its position, after a party has appealed its order to this Court.

Even if the appellees had properly raised their new arguments, however, they are mistaken. Columbia's tariff does, in fact, "allow[] it to dictate and then approve specific construction changes inside a dwelling." (Cameron Creek Brief at 11.) At all times relevant to this matter, Columbia's Commission-approved tariff has authorized Columbia to set "reasonable requirements" for appliance venting and, where appliances are in a hazardous condition, "discontinue the supply of gas * * * until such * * * condition has been rectified * * * in compliance with the reasonable requirements of the Company." (Columbia Supp. 193, 195, 197, 199.) Each of these tariff provisions has the force and effect of law. *See Vorhees v. Jovingo*, 4th Dist. Nos. 04CA16, 04CA17, 04CA18, 2005-Ohio-4948, ¶46, citing *Anthony Carlin Co. v. Hines*, 107 Ohio St. 328, syllabus (1923) (other citation omitted).

That does not mean, and Columbia has not argued, that the Commission has no authority to review Columbia's conclusions. The Commission's lengthy defense of its right to review Columbia's decision to disconnect natural gas service at Cameron Creek Apartments (*see, e.g.*, PUCO Brief at 3-5) is unnecessary. Columbia agrees that "[t]he Commission always retains the

ability to determine whether a hazardous condition actually exists and whether a public utility's threat of disconnection is reasonable." (Citation omitted.) *Id.* One of the issues in this appeal is whether the Commission's conclusion, that the particular NFG Code violations at issue here are not hazardous conditions that Columbia may require a customer to remediate, is lawful and reasonable. Columbia submits that the Commission's holdings do not hold up to scrutiny. And, where the public safety is at issue, there is no room for error.

Columbia also agrees with the Commission's statement that the Commission's supervision of public utilities' decisions to disconnect service "does not conflict with the powers of municipalities to enforce building codes." (PUCO Brief at 5.) Both the local building authorities and the Commission have jurisdiction. As the Commission recognized below, the Ohio Building Code "do[es] not limit any of the powers of the public utilities commission * * *." R.C. 3781.16 (cited in Appx. 18).

Contrary to Cameron Creek's assertion, allowing both local building authorities and public utilities to impose requirements on gas appliance installations does not "create confusion." (Cameron Creek Brief at 12.) Columbia's tariffs already state that a customer's "service line, house lines, fittings, valve connections and appliance venting * * * [must] meet [Columbia's] reasonable requirements" *and* pass an inspection by the "local building code authority or other appropriate governmental entity," if there is one. (Columbia Supp. 197, 199.) (This is the part of Columbia's tariff that, per Cameron Creek, "states that [Columbia] must defer to the local authority pursuant to building and construction inspections and permitting." (Cameron Creek Brief at 11, quoting Cameron Creek Exh. 7.)) And, Columbia acknowledges that the NFG Code requires Columbia to "defer to state and local laws where a conflict arises[.]" (PUCO Brief at 15.) Columbia witness Mr. Ramsey explained:

We work with the city of Columbus to enforce their codes and our codes which are essentially the same, and were there any differences, you know, if they have * * * a more restrictive requirement, then we would enforce their more restrictive requirement, or if they have a different requirement, something that's not necessarily in the [NFG] code, we again would comply with their need for that different requirement.

(Columbia 2d. Supp. 12, Tr. Vol. I. 50.) Neither Cameron Creek nor the Commission has argued that Cameron Creek cannot comply with both the NFG Code and the local building code.

Thus, Columbia's exercise of its tariff authority and the local building authority's exercise of jurisdiction under the Ohio Building Code creates no conflict or confusion. Cameron Creek's arguments against Columbia's authority to enforce the NFG Code are contrary to the Commission's entries, the evidence introduced below, and the law and should be rejected.

B. Columbia Has Applied The National Fuel Gas Code Upon Connecting And Reconnecting Service Since 1990.

Appellees' next argument is that Columbia was not justified in attempting to enforce the NFG Code at Cameron Creek between 2006 and 2008 because Columbia did not enforce that Code when Cameron Creek was constructed. Cameron Creek asserts that Columbia "admits it did not apply the NFGC to Cameron Creek when it established service." (Cameron Creek Brief at 11.) The Commission similarly claims "Columbia did not enforce NFG Code requirements regarding appliance hookups until 2002 when the Commission's Minimum Gas Standards went into effect." (PUCO Brief at 18.) Appellees misinterpret the evidence on this point.

Columbia has enforced the NFG Code since 1990. (*See* Columbia Supp. 51.) When "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 * * *." (Appx. 14.) After the Commission passed its Minimum Gas Standards (currently found at Ohio Adm.Code 4901:1-13-05), Columbia's practices changed. Under those

Standards, Columbia may not establish service at a new residence until the house lines and at least one appliance drop are installed. (*Id.*)

Because the Commission's Minimum Gas Standards had not yet been adopted in 1996-1998 (*see* PUCO Brief at 18), Columbia's written policies at that point did not require gas appliances to be "in place and operational" before gas meters could be set and service established, as Cameron Creek incorrectly asserts. (Cameron Creek Brief at 2.) Columbia's policy at the time stated: "if the service is not to begin at the time of pressure testing the customer or building must call afterwards to have the meter set and gas turned on." (Columbia 2d. Supp. 9-10, Tr. Vol. I 17-18.) The policy did not state, however, nor should it be interpreted to mean, that the meter could not be set, and service could not begin, before the appliances were installed and operational.

Thus, Columbia did apply the NFG Code when it established service at Cameron Creek. Cameron Creek's appliances simply were not yet installed at that time, so that Columbia could not determine in 1997 that those appliance installations were in violation of the NFG Code.

C. Cameron Creek's Gas Appliance Installations Violated The National Fuel Gas Code In Place When They Were Installed.

Next, both the Commission and Cameron Creek accuse Columbia of forcing its customer to apply brand-new code requirements to appliances that have been in place for years. The appellees argue that, when Columbia directed Cameron Creek in 2008 to remediate its NFG Code violations, Columbia was attempting to enforce the then-current NFG Code retroactively. (*See* Cameron Creek Brief at 11 and 15; PUCO Brief at 18.) Both appellees argue that the NFG Code prohibits the application of the Code's requirements "retroactively to existing systems that were in compliance with the provisions of the Code in effect at the time of installation." (PUCO Brief at 18 and Cameron Creek Brief at 9, quoting 1996 NFG Code § 1.3.)

The NFG Code's retroactivity provision does not apply, however, because Columbia was not trying to enforce new requirements on Cameron Creek. Cameron Creek was not "in compliance with the provisions of the [NFG] Code in effect at the time of installation." (*Id.*) As the Commission previously acknowledged, the venting requirements that Cameron Creek violated were in the 1996 NFG Code, which was the Code edition in place when Cameron Creek was constructed. (*See* Appx. 4-5, n. 1 and n. 2.) The Commission wrote below:

In 1997, Columbia, through its tariff, enforced the NFG Code, which, to this day, requires that multi-stored dwellings [where appliances on different floors are vented through a common vent] obtain all combustion air from outdoors * * *, and that gas appliances placed in bathroom closets have weather-stripped solid doors with a self-closing device [and obtain all combustion air from the outdoors].

(Appx. 18; *see also* Columbia Supp. 21, 22.) Even Columbia's first correspondence to Cameron Creek regarding the complex's violations cited "sections 7.6.4 and 6.30.1 [of] the 1996 NFGC that was in effect when the apartment complex was constructed[.]" (Columbia Supp. 136.) Columbia did not apply a newer edition of the NFG Code to Cameron Creek retroactively.

Cameron Creek asserts that, if Columbia is permitted to apply new NFG Code requirements retroactively as the NFG Code is updated, "every structure built in Ohio before 1996 will be subject to immediate, extensive, and expensive gas appliance and venting upgrades" and "building owners will struggle to stay in compliance." (Cameron Creek Brief at 12.) This will not happen, however, because Columbia generally does not apply new NFG Code requirements retroactively. Columbia will only apply new NFG Code requirements to an existing appliance installation if the NFG Code specifies that the newer requirements should be applied retroactively. Otherwise, Columbia will apply the NFG Code requirements that were in effect at the time of the appliance installation. (Columbia 2d. Supp. 16, Tr. Vol. I 61.) The appellees' retroactivity arguments are misplaced.

D. The City of Columbus's Approval of Cameron Creek Apartments' Building Plans Did Not Constitute Approval Of An "Alternative Method" Under The National Fuel Gas Code.

Next, appellees argue that Cameron Creek actually complied with the NFG Code. In its entries below, the Commission held that Columbia customers in existing structures who cannot demonstrate "prescriptive NFG [Code] compliance" may, instead, "demonstrate * * * the existence of a specially engineered solution with an appropriate professional engineering verification[.]" (Appx. 21.) The Commission further held that when "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, * * * this constituted a specially engineered solution to provide an adequate supply of air for combustion, ventilation, and dilution of gases," pursuant to Section 5.3.4 of the 1996 NFG Code. (*Id.*) Columbia's merit brief explained why this section of the NFG Code is inapplicable. (*See* Columbia Initial Brief at 16.)

The Commission and Cameron Creek now appear to agree, because neither appellee's brief makes any mention of Section 5.3.4. Instead, the Commission switched to its other finding, that Columbus's approval of the fresh air supply ducts constituted approval of an "alternative method" of ensuring safety at Cameron Creek, pursuant to Section 1.2 of the 1996 NFG Code. (PUCO Brief at 8-10, 14-15.) That section stated, in relevant part: "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." (Columbia Supp. 162-163, Tr. Vol. III 501-502.)

Columbia has explained why the City of Columbus's approval of the fresh air supply ducts at Cameron Creek could not constitute approval of an "alternative solution" by an "authority having jurisdiction" under the NFG Code. Among other reasons, the City did not

apply the NFG Code when it approved Cameron Creek's plans; there is no evidence the City considered the Code's appliance venting requirements, or the safety policies behind those requirements, when it approved the modifications to Cameron Creek's plans; and there is no evidence that bringing more air into an appliance closet solves the problem that is caused by having appliances take their combustion, ventilation, and dilution air from inside a residence's living space – namely, that such an arrangement allows carbon monoxide produced by the appliances to enter the living space. (Columbia Initial Brief at 17-18.) Columbia's expert witness on the NFG Code, Stephen Erlenbach, agreed that Section 1.2 provided no justification for Cameron Creek to disregard the Code's requirements for appliances installed in bathroom closets or connected to multi-unit, multistory vents. (Columbia Supp. 190.)

The Commission's brief ignored these points. Instead, the Commission focused on the meaning of "alternative" and argued that it should mean something akin to different. (See PUCO Brief at 14-15.) To support its argument, however, the Commission cut off the first half of the expert commentary explaining the meaning of that provision. That commentary states, in full:

The intent of the National Fuel Gas Code committee is not to prohibit safe practices in the installation of gas piping and equipment that have not been developed yet, nor to prohibit new technology. This paragraph allows the authority having jurisdiction to require evidence to substantiate any claims and, with that evidence, to permit an installation using an alternate or new method or procedure.

(Tr. Vol. III 675, Supp. 189.) This commentary makes clear that Section 1.2 of the NFG Code was not intended to allow the approval of just any deviation from the Code's requirements. Instead, it was intended to allow deviations only to reflect newly developed practices or technology. Columbia believes it is reasonable to prohibit local building authorities that follow the NFG Code from selecting an option that the Code's drafters had concluded was not the best practice for a given situation without evidence that a new practice or technology is equally safe.

Under either interpretation of “alternative,” however, the Commission has not shown that installing fresh air supply ducts to the mechanical closets at Cameron Creek was an “alternative method” under Section 1.2 of the NFG Code. Again, no evidence was offered at the hearing in this matter that 4-inch air supply ducts were a newly developed safe practice or new technology. Additionally, no evidence was offered that the City even considered whether installing 4-inch air supply ducts was a safe alternative to compliance with the NFG Code requirements that Cameron Creek violated. The Commission’s conclusion that the City approved the air supply ducts as an “alternative method” of complying with the 1996 NFG Code lacks any support in the NFG Code or the actual history of the approval of Cameron Creek’s construction.

The Commission and Cameron Creek also argue that the local building authority – here, the City of Columbus – is the only “authority having jurisdiction” allowed to authorize “alternative methods” under the NFG Code. In support of this argument, Cameron Creek asserts that “Columbia Gas acknowledges the City of Columbus is the authority having jurisdiction.” (Cameron Creek Brief at 11, citing Tr. at 494, 637.) Again, Cameron Creek misinterprets the evidence. One of the two pieces of testimony Cameron Creek cites is from its own witness, Mr. Schutz, and the second piece actually states that the City of Columbus is the “local authority” for “building and construction inspections and permitting” – not the “authority having jurisdiction” under the NFG Code. (Cameron Creek Supp. 69, 74, Tr. Vol. II at 494, 637.)

The Commission, in turn, argues that only “a governmental entity” with “‘statutory authority’ to approve the equipment, installation, and procedures related to the construction of buildings” can be an “authority having jurisdiction[.]” (PUCO Brief at 13.) But, the NFG Code does not say that. The 1996 NFG Code states that “[t]he phrase ‘authority having jurisdiction’ is used in this Code in a broad manner[.]” (PUCO Brief at 12, quoting Columbia Supp. 186, Tr.

Vol. III 672.) The NFG Code further defines “authority having jurisdiction” as “[t]he organization, office, or individual responsible for approving equipment, an installation or procedure.” (*Id.*) Because the Commission has approved Columbia’s use of the NFG Code “to ensure safe service” (PUCO Brief at 13), Columbia is clearly an “authority having jurisdiction.”

Regardless, this debate is irrelevant. Again, there is no evidence the City considered the NFG Code when approving Cameron Creek’s plans, or made the conscious decision that installing fresh air supply ducts was an “alternative method” of keeping carbon monoxide out of the apartments’ living spaces. Whatever the meaning of “authority having jurisdiction,” the City of Columbus’s approval of Cameron Creek’s plans, with modifications, was not and could not have been the approval of an “alternate method” under the NFG Code.

E. Neither the City Nor the Commission Demonstrated Cameron Creek Is Safe.

Alternatively, the appellees argue that Cameron Creek is safe because it is not tightly constructed and has hard-wired carbon monoxide detectors. (*See* PUCO Brief at 16-17; Cameron Creek Brief at 13-14.) Columbia’s initial brief explained why the manifest weight of the evidence contradicts that conclusion. Cameron Creek never offered any testimony or other evidence to support its contention that non-tight construction and adequate outside air infiltration keeps Cameron Creek’s residents safe. Carbon monoxide poisoning was a concern well before tighter construction practices became common. (*See* Columbia Brief at 22; Appx. 39.) And, contrary to the Commission’s argument, carbon monoxide detectors do not “help prevent exposure to carbon monoxide.” (PUCO Brief at 17.) At best, if the carbon monoxide detectors are working – if they have not been disabled, if there is no power outage, and if the detectors’ batteries have been replaced as needed – they will notify residents that they are being exposed to carbon monoxide. But even then, if carbon monoxide builds up in a closed bathroom, the alarm may not go off in time to prevent exposure or even death. (*See* Columbia Brief at 21.)

Cameron Creek adds that its furnaces have several safety devices, including a high-limit switch, a flame safeguard, and a pressure sensor that shuts down the furnace if the exhaust vent is blocked. (Cameron Creek Brief at 7-8.) However, Cameron Creek's witness Cheryl Roahrig, a Mechanical Inspection Supervisor for the City of Columbus, testified that the furnace pressure sensor may not activate in the event of a vent blockage because the products of combustion would be spilling out of the water heater's open draft hood. (Columbia 2d. Supp. 32, Tr. Vol. II 347.) Moreover, Cameron Creek does not say that its water heaters have any safety devices.

The Commission acknowledges that there were "two carbon monoxide related incidents" at Cameron Creek (PUCO Brief at 19) in 2007-2008 – both of which involved water heaters (*see* Cameron Creek Brief at 6). Cameron Creek suggests that no carbon monoxide was detected during the September 2007 incident (*see id.*), but this is incorrect. The customer reported carbon monoxide symptoms and said she took her daughter to the hospital, where she was diagnosed as having carbon monoxide in her system. (Cameron Creek Supp. 21-22.) Moreover, Columbia's service technician testified that he checked for carbon monoxide and obtained a reading of 42 parts per million. (Columbia Supp. 175-176, Tr. Vol. III 554-555.) A different Columbia service technician testified at deposition that during the second incident, in June 2008, the customer's carbon monoxide detector sounded an alarm and the technician obtained a carbon monoxide reading over 20 parts per million in the unit's living room. (Supp. 24, citing Loudermilk deposition.) Cameron Creek has cited no contrary evidence, and the Commission acknowledged these two incidents "involv[ed] carbon monoxide exposure." (PUCO Brief at 19.)

Instead, the Commission pointed out that an HVAC technician detected no carbon monoxide "and no signs of improper combustion or ventilation" when it tested 12 of Cameron Creek's 240 mechanical rooms in October 2008. (*Id.*, citing Columbia Supp. 65-73). The

Commission also argues that, on occasions other than the two incidents discussed above, Columbia failed to test, or to test properly, for carbon monoxide. (PUCO Brief at 20.) This argument is based on the testimony of Cameron Creek witness Bob Schutz (*see id.*), which the Commission misinterpreted. Mr. Schutz did not testify that “Columbia’s technicians performed carbon monoxide readings before red-tagging appliances [at Cameron Creek] on only a few occasions” and “performed [those] * * * readings at the wrong place.” (*Id.*) He testified that he had reviewed over 50 “red tags” left at Cameron Creek by Columbia’s service technicians, and that only two of those tags listed carbon monoxide readings, which were relatively low readings at the “lower door” of the gas appliances. (Columbia Supp. 57-58.) Lastly, the Commission repeats its argument that the incidents in 2007-2008 occurred because the appliances failed or needed maintenance, not because of any “violations of the NFG Code.” (PUCO Brief at 19.)

As explained in Columbia’s merit brief, these arguments miss the point entirely. The fact that carbon monoxide was not detected in twelve Cameron Creek units on one day in October four years ago, or in fifty other units on fifty other days, does not mean the appliances never produce carbon monoxide. Both appellees agree that Cameron Creek’s appliances will inevitably fail and produce carbon monoxide. The Commission and Cameron Creek acknowledge that the two carbon monoxide incidents in 2007-2008 “were a direct result of mechanical failures.” (Cameron Creek Brief at 13; *see also* PUCO Brief at 19.) The Commission has further acknowledged that “the problems that occurred were typical for appliances of [that] age and usage pattern.” (Appx. 20.) And neither appellee disputes that, if (or rather, when) Cameron Creek’s appliances fail and produce carbon monoxide, that carbon monoxide will float into the apartments, because those appliances are not completely separated from the habitable space of those apartments. (Columbia Supp. 21-22.)

Cameron Creek asserts that requiring it to comply with the 1996 NFG Code “will not assure a safer living environment” or “guarantee an absolute safe, carbon monoxide-free environment.” (Cameron Creek Brief at 14.) But Cameron Creek offered no evidence to support that argument at the hearing, and offers no explanation to support that argument here. The purpose of “many of the provisions of the [NFG] Code,” is “to prevent safety hazards from occurring even when gas appliances are not operating properly.” (Columbia Supp. 23-24.) Columbia witness Mr. Erlenbach testified that compliance with the 1996 NFG Code would have prevented carbon monoxide from entering the living spaces of the apartments where the 2007-2008 carbon monoxide incidents took place. (Columbia Supp. 23-26.) Cameron Creek offered no testimony to counter Mr. Erlenbach’s opinion.

Given that service issues with the gas water heaters and furnaces at Cameron Creek will inevitably arise, that those service issues may cause the gas appliances at Cameron Creek to produce carbon monoxide, that carbon monoxide is a poisonous gas that can cause sickness or even death, and that the appliance configurations at Cameron Creek will allow that carbon monoxide to float into the living spaces of the complex’s apartments, the Commission’s conclusion that Cameron Creek is safe is contradicted by the manifest weight of the evidence.

F. Neither the Commission Nor Cameron Creek Has Explained How Columbia Can Reasonably Apply The Commission’s Order and Entry Below.

Although the safety of Cameron Creek Apartments is the most important issue in this case, it was not the only issue before the Commission below. The Commission also set forth a standard for Columbia to follow for existing appliance installations from this point forward:

[If] prescriptive compliance with the NFG Code * * * 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. * * * 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 [continues to have the ability to require retrofits that are necessary to ensure a reasonable margin of safety but] should balance any requirements for extensive retrofits with a rule of reason. * * * [A] reasonable safety margin can be provided by a combination of structural elements and monitoring that warns occupants of developing risks.

(Appx. 50-51.) Columbia's merit brief explained the numerous ambiguities inherent in that standard and the significant administrative burdens that attempting to follow it would impose.

(Columbia's Initial Brief at 25-27.) The Commission and Cameron Creek ignore the practical difficulties created by the Commission's orders. Indeed, the appellees' briefs completely ignore the standard previously imposed by the Commission for existing appliance installations.

Instead, as discussed above, the appellees offer a new standard. The Commission's merit brief announces for the first time that Columbia should not be allowed to "demand that * * * renovation be performed on structures that local building authorities have already determined to be safe and in compliance with applicable building codes." (PUCO Brief at 14.) This effectively means that Columbia may not enforce the NFG Code *at all* in existing structures, unless there is no local building authority or the gas appliances were not installed as required by the approved plans. Cameron Creek argues for a similar conclusion. (*See* Cameron Creek Brief at 12.) The appellees also return to their "retroactivity" argument, asserting that Columbia's problems would be solved if it stopped trying to impose current NFG Code requirements on existing structures and simply worked with the local building inspector and customers to resolve any concerns. (*See id.* at 15; PUCO Brief at 6.)

The new standard that the appellees are endorsing is unworkable. A Columbia service technician visiting a customer's residence would not necessarily know whether the appliance installation he or she is inspecting is the same installation that the local building authority approved. (Columbia's 2d. Supp. 2) As Columbia's witness Mr. Ramsey explained, the

appliance “could have been altered since it was installed, or it could have been installed in a manner inconsistent with the approved building plans.” (*Id.*) Moreover, Cameron Creek’s own attempts to prove their case below illustrate the practical difficulties that would be created by their proposal. Cameron Creek’s counsel could not get copies of the complex’s plans from the City of Columbus. (Columbia 2d. Supp. 23, Tr. Vol. II 285.) The only available copy of the plans was so water-damaged that parts of it could not be read. (*Id.*) And, Cameron Creek was unable to authenticate the document purportedly showing the City’s final approval of the plans. (Columbia 2d. Supp. 26-29, Tr. Vol. II 293-296.) If Cameron Creek had that much difficulty demonstrating that its appliances were installed in accordance with plans approved by the City of Columbus, after filing a complaint with the Commission and taking upon itself the burden of proving its case, it would be impossible for every Columbia service technician to undertake the same burden every time it might be necessary to disconnect a residential customer’s gas service for safety reasons.

The appellees’ remaining counter-arguments about Columbia’s ability to apply the Commission’s decisions below ignore the record. As explained above, Columbia does not impose new NFG Code requirements on existing structures (unless the NFG Code specifies that the new requirements are to be applied retroactively) and did not do so at Cameron Creek. Moreover, Columbia did work cooperatively with Cameron Creek to try to resolve the NFG Code violations. As the Commission concluded below, “[t]he parties had discussions [in 2008] 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[.]” (Appx. 3.) In fact, Cameron Creek’s counsel acknowledged at hearing that “the only party that was trying to seek funding for Cameron Creek * * * was Columbia Gas * * * [.]”

[Cameron Creek's] position during that whole time was that the changes weren't needed and that it was up to code so it didn't need funding." (Columbia 2d. Supp. 35, Tr. Vol. II at 372.)

Columbia's efforts to work with Cameron Creek to resolve their NFG Code violations were rebuffed. And, unless this Court supports Columbia's authority to insist that its customers' gas appliance installations be safe before service is connected or reconnected, there is no reason to believe Columbia's other customers will be any more willing than Cameron Creek to "work together" with Columbia "to ensure that there is a safe hazard-free environment." (Appx. 59.) In sum, while the Commission's new standard is clearer than the one it enumerated before, it is no more workable than the prior standard and should be rejected by this Court.

III. CONCLUSION

This case is about the safety of Columbia's customers. Because Cameron Creek's gas appliances were not installed in compliance with the then-current edition of the NFG Code, Cameron Creek's residents may be exposed to carbon monoxide whenever those appliances need to be repaired or replaced. Multiple residents have already been exposed to carbon monoxide due to Cameron Creek's failure to properly install or maintain its gas appliances. Yet, Cameron Creek has insisted that carbon monoxide detectors and drafty walls keep their residents safe enough, and the Commission has held that Columbia can do nothing to prevent similar occurrences from happening at Cameron Creek again. The Commission below set out a vague, inconsistent, and ultimately unworkable standard to regulate Columbia's application of the NFG Code to existing appliance installations at other residences. On rehearing, the Commission refused to clarify that standard, suggesting only that Columbia apply a "rule of reason" and try to work with its customers to find a safe solution. And now, the Commission asks this Court to tie Columbia's hands completely, arguing that Columbia cannot require NFG Code compliance at an installation that the local building authority has already approved.

The Commission's Opinion and Order and Entry on Rehearing are unreasonable because the orders jeopardize public safety. Columbia therefore requests that this Court act to protect the public safety. For the reasons provided above and in Columbia's initial merit brief, 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 both new and existing structures, consistent with its approved tariff.

Stephen B. Seiple, Asst. General Counsel
(0003809)
Brooke Leslie, Counsel (0081179)
200 Civic Center Drive
P.O. Box 117
Columbus, Ohio 43216-0117
Tel: (614) 460-4648
(614) 460-5558
Fax: (614) 460-6986
Email: sseiple@nisource.com
bleslie@nisource.com

Charles McCreery (0063148)
1700 MacCorkle Ave. SE
P.O. Box 1273
Charleston, West Virginia 25325-1273
Tel: (304) 357-2334
Fax: (304) 357-3206
Email: cmccreery@nisource.com

Respectfully submitted,



Eric B. Gallon (0071465), Counsel of Record
Mark S. Stemm (0023146)
Porter Wright Morris & Arthur LLP
Huntington Center
41 South High Street
Columbus, Ohio 43215
Tel: (614) 227-2190
(614) 227-2192
Fax: (614) 227-2100
Email: egallon@porterwright.com
mstemm@porterwright.com

Attorneys for Respondent
COLUMBIA GAS OF OHIO, INC.

CERTIFICATE OF SERVICE

I hereby certify that a true and accurate copy of the foregoing Reply Brief of Appellant Columbia Gas of Ohio, Inc. was served by electronic and U.S. Mail on this 20th day of March, 2012, upon the following counsel for Intervening Appellee Cameron Creek Apartments:

Brian M. Zets
Thomas L. Hart
Wiles, Boyle, Burkholder and Bringardner, Co. LPA
300 Spruce Street, Floor One
Columbus, Ohio 43215-1173
bzets@wileslaw.com
thart@wileslaw.com

and upon the following counsel for Appellee Public Utilities Commission of Ohio:

Thomas W. McNamee
Devin D. Parram
Ohio Attorney General's Office
180 East Broad Street, 6th Floor
Columbus, Ohio 43215
thomas.mcnamee@puc.state.oh.us
devin.parram@puc.state.oh.us



Eric B. Gallon