

BEFORE

THE PUBLIC UTILITIES COMMISSION OF OHIO

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

ENTRY ON REHEARING

The Commission finds:

- (1) On September 17, 2008, Cameron Creek Apartments (Cameron Creek or the complainant) filed a complaint against Columbia Gas of Ohio, Inc. (Columbia). Cameron Creek is located in Galloway, Ohio, provided natural gas by Columbia, and subject to the building codes established by the city of Columbus, Ohio (City). In its complaint, Cameron Creek alleges, among other things, that Columbia demanded major structural retrofitting of the ventilation to the gas appliances for all 240 units in the complex. According to the complainant, if such retrofitting is not done, Columbia threatened to shut off the gas service to all of the units. On October 8, 2008, Columbia filed its answer to the complaint denying all material allegations in the complaint.
- (2) On June 22, 2011, the Commission issued its order stating that the question posed in this case was: if Columbia believes that there is a potentially hazardous condition in a dwelling that was approved for occupancy in prior years, pursuant to the building code (City Code) established by the City that was in effect at the time of such approval, and the construction in that dwelling had not been altered such that the City Code would require that it be brought up to current code, can Columbia require that the dwelling be retrofitted in order to bring it into compliance with the current National Fuel Gas (NFG) Code before Columbia will connect or reconnect gas service. Initially, the Commission determined that Columbia had not

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

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

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

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

- (3) Section 4903.10, Revised Code, states that any party who has entered an appearance in a Commission proceeding may apply for rehearing with respect to any matters determined in the proceeding by filing an application within 30 days after the entry of the order upon the journal of the Commission.
- (4) On July 22, 2011, Columbia filed an application for rehearing of the Commission's June 22, 2011, opinion and order in this matter. As discussed in further detail below, Columbia set forth six grounds for rehearing.
- (5) Cameron Creek filed a memorandum contra Columbia's application for rehearing on August 3, 2011, arguing that Columbia made no new argument that had not already been considered in the order in this case. Cameron Creek's arguments are further delineated below.
- (6) In its first assignment of error, Columbia asserts that the order is unreasonable because it incorrectly concluded that the addition of four-inch fresh air supply ducts to Cameron Creek's units was an alternative compliance method or engineered solution under the NFG Code and, thus, excused Cameron Creek from the NFG Code's appliance venting requirements (Columbia App. at 3).

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

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

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

- (7) In reply, Cameron Creek notes that Columbia continues to argue that it should be allowed to retroactively apply the most recent version of the NFG Code to the complainant, regardless of the fact that the building department originally approved the structure as safe and in compliance with the then-existing code (CCA Memo Contra at 2).
- (8) Initially, the Commission notes that it is unrefuted on the record that Sections 1.2, 5.3.4, and 6.30.1 of the 1996 NFG Code, considered together, permit other measures and special engineering to provide an adequate supply of air for combustion, ventilation, and dilution of gases that is approved

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

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

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

- (10) In response, Cameron Creek submits that Columbia continues to spread fear that the current gas appliance ventilation system places residents in danger, despite the lack of any legitimate verified CO issues at Cameron Creek. The complainant points out that Columbia even cites in its application for rehearing to five newspaper articles printed in 1996 to scare everyone into believing the Commission erred and the only solution is to retroactively apply the NFG Code. Moreover, Cameron Creek notes that, as the record reflects, at the time Cameron Creek was built, it was common practice to locate gas appliances in bathrooms or interior utility closets and to utilize indoor combustion air. Extensive building retrofitting is not required simply because the code is updated or a new code is adopted; changes are only required if there is a documented serious safety hazard. Cameron Creek offers that, according to the record, the apartments were safe when they were built and they are still safe today. (CCA Memo Contra at 2-3, 5.)
- (11) As noted in the order, the Commission believes that the number one priority in the provision of natural gas service is to ensure that all possible measures are taken to ensure the health and safety of the public. The Commission based its decision in this case on the evidence presented on the record pertaining to Cameron Creek's situation and Columbia's application of its tariff and the NFG Code to the facts in this matter. On rehearing, it appears that Columbia is attempting to incite further review by the Commission based solely on events that have no relation to the issues in this case. Furthermore, we note that, in support of its second assignment of error, Columbia also attempts to justify its CO readings for the two alleged CO incidents that were reported in the last decade at Cameron Creek by footnoting that the tests were taken at appropriate and objective locations in the dwellings (Columbia App. at 6 FN 1); however, the unrequited evidence of record clearly shows that such was not the case (CCA Ex. 39 at 18-19). The bottom line is that Columbia did not substantiate on the record that there was an actual serious CO hazard at Cameron Creek. Therefore, the Commission concluded that Columbia's attempt to force retrofitting at Cameron Creek, when there is no verifiable safety hazard, essentially equates to retroactive

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

- (12) The third assignment of error cited by Columbia states that the order is unreasonable because the conclusion that CO detectors will keep Cameron Creek's residents safe is not supported by the evidence. Columbia submits that the record indicates that, even when the CO detectors are working, the CO could rise to dangerous levels in a closed bathroom and that a power outage would render a CO detector with a dead battery useless. Moreover, Columbia notes that Cameron Creek did not present evidence that, since the CO detectors were installed, it has maintained them. (Columbia App. at 8-9.)
- (13) According to Cameron Creek, Columbia wants the Commission to declare an approach that can guarantee safety; however, this cannot be done. Cameron Creek avers that no gas appliance configuration, even under the current NFG Code, can guarantee absolute safety and no CO. Instead, Cameron Creek asserts that the hard-wired CO detectors, maintenance plan, and safety devices on the furnaces provide residents with ample safety, and the residents must trust in the fact that the City issued occupancy permits and Columbia has been providing service since 1996. (CCA Memo Contra at 4-5.)

- (14) Contrary to Columbia's assertion, as thoroughly discussed in our conclusion in the order, this case did not turn merely on the fact that the complainant installed hard-wired CO detectors with battery back-ups. While the CO detectors were one mitigating factor that Cameron Creek presented in this case, the record, in total, reflected other factors as well, including Cameron Creek's compliance with venting requirements in the applicable building code when built, nontight construction and a lack of material changes to the building since constructed, and the demonstration through a blower door test of significant outside air infiltration. Columbia appears to have taken our order out of context by focusing in on one factor. As we stated previously, in light of the fact that Cameron Creek has sustained its burden of proof in this case, the responsibility to ensure that the necessary maintenance continues rests with Cameron Creek and the occupants of the complex, and it is expected that Cameron Creek will employ a thorough maintenance and monitoring program to ensure the continued safety of the occupants. Accordingly, the Commission finds that Columbia's third assignment of error is without merit and should be denied.
- (15) In its fourth assignment of error, Columbia contends that the order is unreasonable because it holds that nontight construction justifies noncompliance with the NFG Code, which is not supported by the evidence and will discourage participation in utility demand-side management (DSM) programs. Columbia asserts that the complainant's arguments that looser construction standards for homes built in the 1990s or earlier allow such homes to safely obtain combustion, dilution, and ventilation air from inside the residence is belied by the NFG Code itself, since the 1996 NFG Code prohibited the appliance venting configurations present at Cameron Creek. (Columbia App. at 9-10.)
- (16) In response, Cameron Creek points out that, when the complex was approved in 1996, the City utilized the state building code and the mechanical code to approve safe operations at Cameron Creek and such codes: recognized that adequate combustion air could reach gas appliances from several sources; allowed for multi-story vents to service the appliances for multiple units; and recognized the construction at Cameron Creek was not tight with regard to air infiltration, which

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

- (17) The Commission's role in this case was to review the facts and evidence of record, in concert with the applicable statutes and rules, to determine if the complainant sustained its burden of proof. Columbia has drawn a definitive line and refuses to consider the facts presented in this case that support our finding that Cameron Creek complied with the alternative compliance methods permitted by the 1996 NFG Code. As we articulated in our order, where older structures cannot demonstrate prescriptive NFG Code compliance or the existence of a specially engineered solution with an appropriate professional engineering verification, Columbia should balance any requirements for extensive retrofits with a rule of reason. We believe that a reasonable safety margin can be provided by a combination of structural elements and monitoring that warns occupants of developing risks. Finally, contrary to Columbia's comment, the Commission disagrees that our determinations in this complaint case, which are based on the evidence of record, will in any manner effect or discourage continued progress and participation in DSM programs. Accordingly, the Commission concludes that Columbia's fourth assignment of error is without merit and should be denied.
- (18) Columbia argues, in its fifth and sixth assignments of error, that the order is unreasonable because it does not leave Columbia with a workable, practical way to ensure safety. Furthermore, Columbia maintains that it is unclear how Columbia is to enforce the Commission's new reasonable margin of safety test at other customers' residences and the order is unreasonable because putting the Commission's holdings into effect for all of Columbia's residential customers would be unduly burdensome. Columbia questions whether it can terminate, or refuse to connect, natural gas service

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

- (19) In reply, Cameron Creek submits that, for Columbia, it would be easier to retroactively apply the NFG Code than to train Columbia's technicians on which code legally can be applied. While Columbia would like the Commission to offer precise guidance on how the company should conduct its business, legally apply the NFG Code, and comply with the Commission's order, Cameron Creek asserts that such answers are for Columbia to determine and are not an appropriate ground for rehearing. Whether Columbia must interpret the Commission's decision and determine how best to avoid retroactively and improperly applying the NFG Code does not make the order unlawful and unreasonable. (CCA Memo Contra at 2, 6.)
- (20) Columbia would like for there to be a clear bright-line test that would unequivocally signify when compliance with a reasonable safety code has been met; for Columbia, that bright line is achieved through strict adherence to the NFG Code. While the Commission commends Columbia's efforts, as proven by Cameron Creek on the record in this case, a bright-line test is not sustainable where the governing building code authority has deemed the dwelling safe for occupancy, and the complex management has attested that a program of maintenance and monitoring is being imposed to ensure the same level of safety espoused by the NFG Code. Every situation is unique and the Commission is confident that the close relationship that Columbia has with its customers will


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

It is, therefore,

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

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


THE PUBLIC UTILITIES COMMISSION OF OHIO


Todd A. Snitchler, Chairman


Paul A. Centolella


Steven D. Lesser

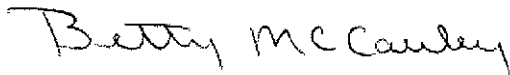

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Betty McCauley
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