MINUTES

MONTANA SENATE
51st LEGISLATURE - REGULAR SESSION

COMMITTEE ON JUDICIARY

Call to Order: By Vice Chairman Al Bishop, on March 10, 1989, at 10:00 a.m. in Room 325.

ROLL CALL

Members Present: Vice Chairman Al Bishop, Senators Tom Beck, Mike Halligan, Bob Brown, Joe Mazurek, Loren Jenkins, R. J. "Dick" Pinsoneault, John Harp, and Bill Yellowtail

Members Excused: Chairman Bruce Crippen

Members Absent: None

Staff Present: Valencia Lane, Staff Attorney and Rosemary Jacoby, Secretary

Announcements/Discussion: There were none.

HEARING ON HOUSE BILL 349

Presentation and Opening Statement by Sponsor:
Representative Bill Strizich of Great Falls representing District 41 said that House Bill 349 was drafted at the request of the Great Falls police department. Law enforcement officials have the power to seize vehicles which have been determined to be involved in the marketing of dangerous drugs. When this occurs in conjunction with arrest and conviction, under current law the police in cities and county are required to dispose of the property through the sheriff in the respective county. This bill allows the property to be disposed of by the respective city government.

List of Testifying Proponents and What Group they Represent:
Larry Renman, Detective Sergeant, Great Falls Police Department

List of Testifying Opponents and What Group They Represent:

There were none.

Testimony:
Larry Renman said his duties were to conduct investigations, at which time seizures of property were sometimes involves. Montana codes 44-12-206, regarding disposition of property requires that all proceeds derived from the forfeiture are directed into a city drug forfeiture fund and anything seized in the county is directed into the county fund. The legislature has seen fit to separate the two funds. The problem is that in section 44-12-103 and 44-12-205 which dictates that seized property has to go the sheriff, who is responsible for holding auctions to dispose of the property. It causes a delay and places a burden on the sheriff, he said, requiring manpower and funds. The bill will separate the auction requirement requiring the city to dispose of property seized in city and the county to dispose of property seized in the county. He submitted letters from Patrick Paul, Cascade County Attorney, (see Exhibit 1) and from Barry Michelotti, Cascade County Sheriff (see Exhibit 2) supporting the bill.

Questions From Committee Members: Senator Yellowtail asked why the bill changed "must" to "may" on page 3, line 18. Rep. Strizich said that had been done on the advice of the council.

Senator Yellowtail said the original statute states "must be sold at auction". Sheriff O'Reilly said the language would allow an enforcement agency to maintain some items to use on display.

Senator Mazurek asked if the sheriff would have any objection to rewording the section to say that, if an item was to be sold, it would be sold at public auction rather than a private means. Sheriff O'Reilly said he had no objection to that.

Senator Jenkins said that the old language on line 18 states that the property " must be sold", but on line 23, it states that the property "may be returned". He wondered if there was any discretion in the statute. Sheriff said there was.

Closing by Sponsor: Rep. Strizich closed the hearing saying Senator Van Valkenburg had offered to carry the bill in the Senate.

HEARING ON HOUSE BILL 350

Presentation and Opening Statement by Sponsor: Rep. Bill Strizich of Great Falls, representing District #40, opened the hearing, saying House Bill 350 was brought at the request of the Montana Probation Association. It is to provide for the convicted person paying the cost of supervising the payment of restitution for property damage occurring during thefts. Currently no such fee is authorized, which means that the costs incurred come out of the budget of the probation department. He thought restitution was important for both the convicted person and the victim. And, he explained the administering of it was costly, as it included dealing with insurance companies, setting up of payment schedules and detailed records kept. The restitution would be paid before a 10% fee would be collected for the supervision of the restitution. He urged passage of the bill to help statewide. He submitted a letter to the committee from the Cascade County Attorney supporting the bill (Exhibit 3).

List of Testifying Proponents and What Group they Represent:

Mona Jamison, Montana Juvenile Probation Association
Dick Boutilier, Eighth Judicial Youth Court
Wallace Jewell, Montana Magistrates Association

List of Testifying Opponents and What Group They Represent:

There were none.

Testimony: Mona Jamison stated that the bill was an association bill and she urged support. She called attention to the bill on line 14 and the wording "may require", stating that the district courts would have discretion on whether or not they would want to require restitution. She reiterated the points of the bill as stated by Rep. Strizich. She also pointed out that line 17 provided the method of determining the amount costs to be paid. She said she believed the bill would encourage courts to require restitution because the supervising costs would be paid by the perpetrator of the crime. She felt that restitution benefited both the victim and the perpetrator.

Dick Boutilier said that, in Cascade County, all supervising of restitution is done through the youth court budget or the district court budget at a great cost of staff, mailing and time spent in monitoring

cases. He felt it would no longer be a burden if the offender were required to pay both restitution and the supervising costs.

Wallace Jewell read a letter in behalf of the Montana Magistrates Association (Exhibit 3).

Questions From Committee Members: Senator Bishop asked at what part of the process the amount of restitution was determined. Rep. Strizich said the determination would be done prior to disposition of the case. The probation officer studies insurance claims, estimates of repair or replacement of property, actual damage. The judge then determines the restitution and the 10% would be added onto that, he said.

Senator Halligan wondered why the 10% fee wasn't collected at the same time as the restitution, instead of setting two payment schedules. It was set up the other way at the suggestion of the clerk of district court.

Senator Mazurek said he sponsored a bill with the same subject matter (SB 338) that dealt also with unlocatable victims. He asked if the restitution would be done through the clerk of court. At one time it was, but a cutback of funds transferred the job to the probation office. He thought the collection process could be much more efficient.

Senator Mazurek asked if Rep. Strizich had had any conversations with the Crime Victims Compensation people. He said they had been concerned about double recovery during the hearing of his bill. He urged a conference to see if the bills could somehow merge. He talked about people collecting insurance settlements and also restitution which he felt was wrong.

Closing by Sponsor: Rep. Strizich said he had talked to Senator Mazurek about carrying the bill on the floor of the senate. He said he would, in addition, have a conference on the similarity of his and Senator Mazurek's bills. He closed.

HEARING ON HOUSE BILL 351

Presentation and Opening Statement by Sponsor: Representative Strizich of Great Falls, representing District 41, said the bill was drafted at the request of the Great Falls police department. He said it would

bring Montana law in line with federal law regarding sawed-off shotguns. He said that local officials were frustrated because dangerous offenders were not being prosecuted by federal authorities when presented with arrest based on this law. He said he was shocked about that and also with the fact that Montana law does not address these dangerous weapons which have no sporting or personal protection use. They are designed for one purpose, he stated, and that was killing human beings.

List of Testifying Proponents and What Group they Represent:

Lieutenant Jim Sharp, the Great Falls police department
Sheriff Chuck O'Reilly, Lewis and Clark County

List of Testifying Opponents and What Group They Represent:

There were none.

Testimony:

Lt. Sharp urged support for the reasons explained by Rep. Strizich. He said these weapons were discovered with more and more frequency -- four to six times a year, in connection with drug dealers. He brought some of the weapons and showed them to the committee. The first was a River 10-22. He said it could be fitted with a 50-round magazine. The second was a 20-gauge sawed-off shotgun with no sights, a 13" barrel, with an overall length of 16" or 17". The third was a bolt-action 410 shotgun and the last was a 12 gauge with no sights. He said it would be very dangerous to shoot. The guns, he said, had been confiscated in connection with the arrest of a drug dealer. When this occurs, he told the committee, the local officers contact the feds and are told to handle it on the state level. There are few federal officers and this is not a high priority with them, according to Lt. Sharp. Presently, there is no authority to do that, he said. He gave letters of support from the Cascade County Sheriff and County Attorney (Exhibits 4 and 5).

Sheriff Chuck O'Reilly urged support for the bill for the reasons explained by Lt. Sharp, he said.

Questions From Committee Members: Senator Jenkins asked if the weapons shown had all started out as shotguns. Lt. Sharp answered in the affirmative.

Senator Jenkins had a problem with language in the bill regarding "originally manufactured" as a shotgun and thought it should read "that somebody has altered". Senator Bishop called his attention to (c) on line 20.

Lt. Sharp said that some shotguns had been manufactured at less than standard requirements. They were not considered a curio, but a legally-possessed firearm and requires a $5 tax stamp. We do not, he said, wish to make that type of curio a violation. He also knew of a shotgun that was manufactured that was not designed as a shoulder-fired weapon with less than normal length. There are still some currently manufactured with a minimum overall length and are legal under statute.

Senator Jenkins asked if the weapons used by the police department would be legal and Lt. Sharp said, yes, that most of them were 18" or 20" barrels, with an overall length of 26".

Senator Beck said he thought that there was already a law prohibiting anyone in Montana from owning a sawed off shotgun. Lt. Sharp said it was a federal statute under the Bureau of Alcohol, Tobacco and Firearms. Local officers can make arrest, but prosecution has to be through the federal court system. Of the several cases he has had in the last several years, not one has been federally prosecuted, he said.

Senator Pinsoneault said, from his reading of the bill, it appeared the judge had no discretion but to fine $1000, give 5 years or both. Lt. Sharp said he read it the same way.

Senator Bishop said he knew that some of the 44 magnums, like the Contender can be bored out to shoot a shotgun shell. What would the status of that gun be, he asked. Lt. Sharp said that weapon was not manufactured as a shoulder-fired weapon, but as a handgun and that they would not be affected by this bill.

Senator Yellowtail wondered if (b) was necessary. Lt. Sharp said that, normally, they would not be. That part of the bill was plagiarized from the Concealed Weapons statute for continuity. He did understand that the FBI and Secret Service did use some weapons that might be in this category.

Senator Yellowtail called attention to page 2, lines 7 and 8, and asked, if a person had a sawed-off weapon and was called to aid an officer, would he be liable to arrest. Lt. Sharp said that wasn't the intention of the bill. He stated that in a very special, unique circumstance, a person might be called on for aid and issued a weapon. He mentioned a highway patrolman who had been shot and had issued a shotgun to a citizen for aid.

Senator Jenkins asked if there was a definition for "shot from the shoulder" and Lt. Sharp said there wasn't.

Senator Jenkins asked if target pistols would fall under this law and Rep. Strizich said he had been in close contact with the NRA regarding this bill. He said they wouldn't show up as proponents but, he felt, that their absence indicated that they weren't opposing the bill. In one of his discussions with NRA people, he said, those weapons were used for silhouette competition, and were remanufactured weapons. He said that John McMaster who drafted the bill felt that part of what was being done by the bill was legislating intent. He feels the bill addresses custom-build firearms, not rebuilt weapons which were not chopped guns. McMaster's opinion was that the target pistols would be exempt. However, he said, we would have to rely on reasonable judgement of law enforcement, judges and juries. He also asked that this part of the hearing be transcribed verbatim so that the NRA people would be comfortable with the hearing.

Senator Jenkins asked if the testimony (?) would cover the shoulder weapons. Rep. Strizich said it was John McMaster's opinion that they are defined. Senator Jenkins asked if they were defined in the codes and Senator Mazurek said the codes didn't define every word.

Senator Mazurek said he didn't see anything in the bill about confiscating the weapons, but he assumed they were because they were contraband.

Closing by Sponsor: Rep. Strizich closed the hearing saying he urged the committee's support of the bill.

HEARING ON HOUSE BILL 598

Presentation and Opening Statement by Sponsor:
Representative Bill Strizich of Great Falls, representing District 41, said the bill was drafted upon the request of the Peace Officers Standards and Training Council in conjunction with the Montana . About a year ago, the Sheriffs and Peace Officers

Association asked that the board study the development of minimum employment and training standards for local jail personnel and suggested they be similar to those used in the state police officer candidates program. A committee was put together and a determination was made that it should be done. He said there were 175 full time and 55 part-time jailers working in 45 county jails. The committee recommended that this bill be drafted, he said, and, if it passes, the committee's recommendations would be placed into law. A good training program is already in place and is presented annually by the Montana Law Enforcement Academy, he said. They are done regionally, and also, on-site at the jails, he said.

List of Testifying Proponents and What Group they Represent:

Clayton Bain, Montana Board of Crime Control
Sheriff Chuck O'Reilly, Lewis and Clark County

List of Testifying Opponents and What Group They Represent:

There were none.

Testimony:

Clayton Bain said his main responsibility was administering the training program. He reiterated the opening statement of the sponsor regarding the development of minimum standards. He said also that the Sheriffs and Peace Officers Association received a grant from the National Institutions and Corrections to develop the training program at the academy and also a regional training program to provide on-site training. He felt that by incorporating this with the program already in place that there would be very little additional cost. Most of the people are already sworn officers and their records are on file, he indicated. He thought it would take a minimal amount of money to include those civilians who were not sworn. He said it was similar to a program the legislature enacted two years ago regarding coroners training. When that program was instituted, he said, it was discovered that 80% of the 175 coroners were peace officers and that Crime Control already had their records so there was little cost. He felt the program proposed would be similar. He said the program would mitigate the liability factors regarding jailers who previously had not been adequately trained.

Sheriff Chuck O'Reilly, said he would like to enlarge on the area of liability. He said that one of the fastest growing areas for law suits originated from problems that developed in jails. One of the reasons, he said, was that the suits had been extremely successful. And, he added, one of the reasons they have been successful was that jailers had not been adequately trained. Passage of this bill will allow state-wide training and will allow local officers to contact the Academy for updated training. He urged passage of the bill.

Questions From Committee Members: Senator Beck asked if this would require additional FTEs, and Rep. Strizich said no, because the training system is in place, and that the same people would be doing the job. He also said the fiscal impact would be negligible. Clayton Bain agreed.

Senator Jenkins said the local departments complained when training took personnel away from their jobs in small, rural counties. Clayton Bain said there presently was a 40-hour basic training course at the academy, as well as 16-hour, on site training programs which is available to all 45 jails in the state. There would only be lost time if the jailer went to the academy for training, and that on-site training was only done in 16 and 24 hour segments.

Closing by Sponsor: Rep. Strizich said he didn't have a sponsor, but would obtain one. He closed.

HEARING ON HOUSE BILL 651

Presentation and Opening Statement by Sponsor: Representative Gary Spaeth of Joliet, representing District 84, opened the hearing. He said there would be quite a few people testifying, including many lawyers. He said it was not necessarily a lawyers bill, and that it makes good, common sense to have the bill in front of the committee to gain a non-legal viewpoint as it was important for the operation of the utility industry in the state of Montana. It appears primarily, he said, as a result of the Martel Decision which was handed down about a year ago, he said. That decision, he stated, overturned the law that established the National Safety Code as standards. He

said there would be strong opposition and a couple of amendments would be offered by the Montana Trial Lawyers, which he would oppose. Rep. Spaeth said that he had a short amendment he would propose (Exhibit 6). He called attention to the underlined language on page 1, and 2. He said the National E.S.C. was important in establishing standards. If the bill was not passed, the thrust of the Martel Decision would continue, resulting in additional liability for the utility industry. While electricity is a semi-dangerous commodity, he stated, for the most part, people had learned to be cautious. In cases where injury occurred, he indicated that more care could have been taken. However, concerns had been raised, he said. He said he had sued in behalf of the state of Montana, the Montana Power Company for problems resulting in the Pattee Canyon fire. It seemed there was violation of the N.E.S.C. was settled out of court. He had a problem with line 1 on page 2, and suggested inserting at the end of the sentence "alleging a code violation". He thought that would place some limits on the scope and application of the bill. (See Exhibit 6)

List of Testifying Proponents and What Group they Represent:

Bob O'Leary, attorney for the Montana Power Company
John Alke, Montana Dakota Utilities
Ted Neuman, Council of Coops and Montana Petroleum Marketers
Jay Downen, Cooperative Electric, NECA/Montana
H. S. Hanson, Montana Technical Council
Barry Hjort, U. S. West Communications
James Nelson, Glacier Electric Coop
Gene Phillips, Pacific Power and Light and Northwestern Telephone
Bert Holmes, Sidney Electric Cooperative

List of Testifying Opponents and What Group They Represent:

Eric Thueson, self
Robert Peterson, self
Michael Sherwood, Montana Trial Lawyers Association

Testimony:
Bob O'Leary said this bill was an attempt to balance claimants and utility companies through use of the National Electrical Safety Code. The amendment would do what simple justice would require, he said. The Martel decision held that the N.E.C.A. code provisions apply, not only to construction standards, but also to maintenance and design

standards. He said there were many unique holdings in the Martel Decision, some of which were favorable to the plaintiffs bar associates requiring the court to advise and instruct the jury on comparative negligence.
The Martel Decision arose out of a young man who was out on a party, having a few beers with some of his buddies when he climbed up the lattice work of a tower near Whitehall, MT in 1982 or 1983. The tower had been an old Milwaukee Railroad 100 KV line, he said. The young man reached out, perhaps didn't touch it, but electricity probably arced and he received an electrical shock. He was wearing a polyester-celanese type of shirt which melted on his body causing severe injury to the upper part of his body. The power company's defense was that the N.E.C.A. safety code was implacable only as far as far as negligence per se was concerned to construction. The power company hadn't built the line but had acquired it from the Milwaukee Railroad, he said. The reason the power company took that defense was because of a case called Barmeier vs. the Montana Power Co. in 1983 which arose out of the Pattee Canyon fire near Missoula in the late 70s. In that case, the Supreme Court held that the NECA safety code was a construction standard only, didn't apply to maintenance and design and that the violation of the code for construction was negligence per se. In Martel, the jury found in favor of the defendant, the Montana Power Company, on comparative negligence. They found Martel 75% negligent and the Montana Power 25% negligent, he said. Pete Strong of Great Falls, the attorney, did an excellent job when the case was heard in January 1988 and it was an extension of the Martel case in March 1988. The court held that the NECA code applied not only to construction, but also to maintenance and design. It held that violation was negligence per se, provided that the violation of the code was the approximate cause of the injury to the plaintiff. So the court expanded the decision of the Barmeier case; it expanded the history of the NECA code which had been part of Montana law since 1917 and it closed the standard that any violation of the code or any of its provisions would constitute negligence per se. The court went one step further in the Barmeier case, he continued, in saying that if the circumstances are dangerous beyond requirements of the code that the court should instruct the jury that that, also, constituted negligence. The result of the Martel case, as far as the industry was concerned, was that nobody could define whatever additionally should be done in any given case whether it was the overhead lines, substation installation, grounding, underground line. The uncertainty of the Martel decision renders the utility defenseless in any given case, he stated. Maybe lines are 20 feet high, two feet higher than code, he said, but somebody might decide they should be 24 feet high. He felt the industry was entitled to some

certainty, and he thought the Spaeth amendment would grant that. The first one passed by the House, said that

compliance with the NECA safety code constituted due care in defense of any negligence actions and the second amendment proposed the day of the senate hearing said that any negligence action alleging code violations replaces the code. Usually, he said, actions mention other common law theories of negligence, and all these will remain intact. He said the code was drawn up by representatives of business, labor, utility industry, all kinds of government agencies and is revised every three years, the next being the 1990 edition. He urged a do pass recommendation of the bill.

John Alke said he would like to start out with an example to illustrate the problem. If a small power line was constructed across farm land and some young children were playing with a piece of culvert pipe, touched the power line and were electrocuted. If the accident were caused by the some fault of the power line design, the power company would be held liable. However, if the power company is not at fault in construction of that line, the fact that the children were injured, should not be grounds for damages. In this area the NECA safety code has assumed a fairly important role defining what should have been done. In the example case, he said, the code would specify the minimum distances the power line should be above the ground. If the power company had failed to have the lines above the minimum, we would have no dispute saying the company was at fault and should pay damages, he said. On the other hand, if the power company had complied with the code when it built that line, the question would arise why then, if that was the issue in the case, should the company be liable. Remember, in the construction business, not just the power industry, you must know the standards. If you know and comply with the standards, and if someone is injured, shouldn't the standard be assessed, he questioned. He suggested assuming there was a status quo in light of the Martel Decision. The plaintiff, he assured the committee, would find an expert who would testify regardless of how high the lines were above the ground, that the lines were not a reasonable height. If the status quo prevailed in the hypothetical case, he said, the mere fact that the plaintiff could find an expert who would say it should be higher will allow the case to go to jury. A jury, then, would determine after the fact, because of the battle of great experts, that the power lines should have been higher off the ground. But, at the time the line the power lines were constructed, the power company would have had no knowledge of this expert's theory. So, the forewarning is critically important, he said. He had been taught, he said, the legislative standard, which was one of the things he wanted to address. The reason for the minimum standard, if this

body decided to make the standards higher, there would be an exception to the code, he said. That would be the judgement of the legislature, and would also give advance warning to the power company that this state required different standards. An after-the-fact expert statement should not be allowed. It would assess fault, he felt. Only if the power line was improperly constructed, should the power company be considered at fault, he said. But if the power line construction follows the only published standard available, it should be held not at fault. As to the amendments of the Montana Trial Lawyers, he suggested that they were disingenuous, he said. Acceptance of the Trial Lawyers amendments were the same as killing the bill, he added, as they were the standards in place at present. Now, it was a one-way door, according to Mr. Alke, with the plaintiff claiming a violation of the code, and the power company claiming no violation. The amendment that Rep. Spaeth proposed, he said, was to address the concern that the power companies were looking for was an excuse --that the bill pursuant to the code, there was no possible cause of action that can be raised against the power company. That is not the intent of the bill, he stated. It only attempted to address the issue of code compliance. He said in working on the bill, he found there were other cases, such as a power line having been built across the Missouri River. The power lines had been constructed in compliance with electrical safety code, but it had been constructed without the necessary permit from the Corps of Engineers. They (the Corps) are required to look at the extra special circumstances such as recreational use. He agreed that would be a reasonable complaint. The power line had not been properly permitted and would make the power company liable, he said. All that the bill was attempting to do, he said was, for a rule that would permit the power companies to build a power line in accordance with applicable standards granting some sort of protection against "should the lines have been X number of feet". He asked for the committee's favorable report.

Ted Neuman said the bill proposed a common sense approach to the issue. If construction meets the standards, then the company should not be liable, he said, and should be able to use that for defense. He thought there was too much litigation in this country now. He urged adoption of the bill.

Jay Downen said he represented about 300,000 rural Montanans served by 40 small businesses around the state. He said his electric coop has about 80,000 miles of line and had great concern with the issue. He said his company had to buy their insurance, and was subject to the whims of the insurance companies. He said they badly needed the legislation to assure some predictability of insurance

rates. They were willing to abide by the NECA standards, but asked that they at least have them to abide by. NECA provides safety training, he stated, and his budget for providing safety services has nearly doubled in the last 4 years. Their budget for public awareness and public liability has jumped from 5% to 50% and they have 8 inspectors working for them. He felt the industry deserved a right of redress. He urged support of the bill.

H. S. Hansen said that the designers have to stamp the plans that are turned out to certify that they meet the codes. He thought there should be some protection for the designers.

Barry Hjort said he wanted to indicate that input from several sources had been given in drawing up the codes, not just the construction industry. He urged support of the bill.

James Nelson said his coop serves, farmers, ranchers and Indian reservations. He said the Martel case caused a raise in insurance which had to be passed on to the customers who could ill afford it. He said the new code which will come out next year will eliminate references to minimum standard, but will say basic standard. He felt that utilities who follow that should have a right to protection.

Gene Phillips asked for support of the bill in the name of his utility company.

Bert Holm, manager of a rural electric cooperative in Sidney, said they have 1800 miles of line, serving 4,000 consumers. He said they have the oldest energizing property in the state, dated 1935. The company has used the REA specifications. He told of an accident occurring when an oil company employee was injured in attempting to move power lines out of the way without asking for help from the cooperative. He was afraid that, without protection, their company would be liable for the injury.

Eric Thueson appeared as the first opponent to the bill. He presented written testimony to the committee (Exhibit 7). He also called attention to the highlighted language included in the exhibit and concluded by urging the committee to give a Do Not Pass recommendation.

Robert Peterson presented his testimony to the committee and submitted a written copy (see Exhibit 8). He said that the electrical industry is setting standards for themselves. He called attention to a booklet whose forward said that the American national standard could be revised or withdrawn at any time. He felt this meant that the industry would always be in a state of flux.

Michael Sherwood read written testimony into the record (see Exhibits 9, 10 and 11). He said that electricity was dangerous and that allowing the electrical industry to control its own fate. He submitted proposed amendments (see Exhibit 12). He suggested changing wording on line 4 of the amendments from " charge of negligence" to "liability for". He said this was the "black letter law" cited by Mr. Thueson, found in the American Encyclopedia of Law, and is the general law throughout the United States at present. Martel adopted this law, he said.

Questions From Committee Members: Senator Halligan asked why not use the Sherwood amendments. Rep. Spaeth said he thought they were nearly the same as the Martel Decision, and didn't think they struck a balance at all.

Senator Pinsoneault asked if the code addressed the hypothetical playground situation mentioned in Mr. Theuson's testimony. Mr. Thueson said he didn't think so, but felt there had to be a recognition that the power company had experts and should know how to guard against injuries. Senator Pinsoneault felt there wouldn't be a barred recovery unless that situation was specifically covered by the code. Mr. Theuson said the way the bill was originally written was unclear and the amended version was ambiguous. He suggested saying "this is not a barred recovery if all the circumstances indicate negligence on the part of the electrical company".

Senator Jenkins referred to the hypothetical school and asked if the school was there first or the power lines. Mr. Thueson said he didn't see the difference, as they should immediately decide whether changes were needed to constitute "reasonable care".

Senator Jenkins asked what was the responsibility of the school and Senator Mazurek said he thought that "accepted good practice given the local conditions" was addressed in the code, and already provided the exemption suggested by the Mr. Thueson. Mr. Thueson said the legislature would have to establish what "reasonable care" was and not the power company. He said that the codes were subject to revision. Senator Mazurek said that part of the codes allowed lawyers to raise a question.

Senator Harp asked Mr. O'Leary to comment on the testimony that the power company was eroding the standards and the industry was setting the standards. Mr. O'Leary said that every revision actually makes the standards more stringent.

He also said it was erroneous that the 1987 revision eliminated the protection granted by the 1977 code. They were actually eliminated in 1981, '84 and '87. In 210, he said, they included every definition of references to other safety code, references to safety codes and grounding methods. In section 211, the code committee said, if the '87 edition made it mandatory that Section 1, 2, General Rules of the '87 edition, all electrical installations "shall be" designed, constructed and maintained to meet the requirements of the rules. As to the writing of the codes, he said the Electrical Association of Electrical Inspectors, the Brotherhood of Electrical Workers, all of the government agencies, electrical contractors, National Safety Council Edison Electric Institute and all of the state regulatory commissions were represented on the code committee. He said the codes established a balance, and that they didn't eliminate liability from negligence.

Closing by Sponsor: Rep. Spaeth thanked the committee for a good hearing. He said no one was trying to overturn good law, he was just trying to give the utility companies some degree of certainty, to return what had previously been given them. Martel does represent a major change in Montana law, he stated. He said it presents a new cause of action for the plaintiffs bar. But, because of the quality of the plaintiffs bar, he felt they would continue to be successful without the advantage of Martel. The code has been a standard for many years and should continue. He called attention to the amendment added in the house and called attention to the last part, behind the comma, where the important part occurs. He said the legislature should say "no, we don't want to go in the direction of absolute liability in the area of utilities". He urged the state to continue as they had for 100 years and urged passage of the bill. He closed.

ADJOURNMENT

Adjournment At: 12:20 p.m.

SENATOR BRUCE D. CRIPPEN,
Chairman

BDC/rj
minrj.310

ROLL CALL

JUDICIARY COMMITTEE

51st LEGISLATIVE SESSION -- 1989 Date 3-10-89

NAME	PRESENT	ABSENT	EXCUSED
SENATOR CRIPPEN			✓
SENATOR BECK	✓		
SENATOR BISHOP	✓		
SENATOR BROWN	✓		
SENATOR HALLIGAN	✓		
SENATOR HARP	✓		
SENATOR JENKINS	✓		
SENATOR MAZUREK	✓		
SENATOR PINSONEAULT	✓		
SENATOR YELLOWTAIL	✓		

Each day attach to minutes.

SENATE JUDICIARY
EXHIBIT NO. 1
DATE 3-10-89
BILL NO. HB 349

Cascade County

State of Montana

TELEPHONE: (406) 761-6700

Office of the County Attorney
PATRICK L. PAUL

Courthouse
Great Falls, Montana 59401

Ma rch 9, 1989

Honorable Representatives

Re: House Bill 349

I would like to express my support to the proposed amendment to Sections 44-12-103, MCA, and 44-12-205, MCA, which would allow law enforcement agencies to conduct a public auction of the property they seize as a result of a violation to Title 45, Chapter 9. I see no reason why the Sheriff's Department should be saddled with the burden of being auctioneer in a case where they have not seized any property and are receiving no proceeds from the forfeiture.

Sincerely,

PATRICK L. PAUL
CASCADE COUNTY ATTORNEY

PLP/mb

SENATE JUDICIARY
EXHIBIT NO. 2
DATE 3-10-89
BILL NO. HB 349

CASCADE COUNTY SHERIFF CORONER

BARRY C. MICHELOTTI

CASCADE COUNTY
325 Second Avenue North
Great Falls, Montana 59401
(406) 761-6842

March 9, 1989

Honorable Representatives

Re: House Bill 349

I support the proposed amendment to Sections 44-12-103, MCA and 44-12-205, MCA, which would allow city police departments to conduct a public auction of property seized as a result of a violation to Title 45, Chapter 9.

Very truly yours,

Barry Michelotti

BARRY C. MICHELOTTI
Cascade County Sheriff/Coroner

BCM:jbs

SENATE JUDICIARY
EXHIBIT NO. 3
DATE 3-10-89
BILL NO. HB 350

Montana Magistrates Association

10 March 1989

Testimony offered in support of HB350, a bill for an act entitled: "An act allowing a sentencing court to order an offender who is required to make restitution to pay the cost of supervising the making of restitution."

Given by Wallace A. Jewell on behalf of the Montana Magistrates Association representing the judges of courts of limited jurisdiction of Montana.

The judges of the limited jurisdiction courts support this measure as it allows the court to hold responsible the parties making the restitution and to pass some of the costs of administering the programs along to those parties. Also, since the proposed legislation is permissive, it would only be applicable in those instances where the defendant making the restitution could afford to pay the administrative costs.

The courts of limited jurisdiction urge you to give HB350 a do concur recommendation.

Wallace A. Jewell.

SENATE JUDICIARY
EXHIBIT NO. 4
DATE 3-10-89
BILL NO. HB 351

CASCADE COUNTY
SHERIFF
CORONER

BARRY C. MICHELOTTI

CASCADE COUNTY
325 Second Avenue North
Great Falls, Montana 59401
(406) 761-6842

February 8, 1989

To: Honorable Representatives

Re: House Bill 351
An act creating the criminal offense of possession of a sawed off rifle or shotgun

Current state statute does not address the possession of a sawed off rifle or pistol. The possession of such a weapon serves no legitimate purpose such as hunting or shooting events.

This department has confiscated sawed off shotguns during drug arrests and drug related search warrants.

I support the intent of House Bill 351 and urge passage of this bill.

Sincerely,

Barry C. Michelotti, Sheriff

SENATE JUDICIARY
EXHIBIT NO. # 5
DATE 3-10-89
BILL NO. HB 351

Cascade County

State of Montana

TELEPHONE: (406) 761-6700

Courthouse
Great Falls, Montana 59401

Office of the County Attorney
PATRICK L. PAUL

February 8, 1989

TO WHOM IT MAY CONCERN:

I support House Bill No. 351. There is no sporting or self-defense purpose for cutting down a rifle or shotgun. The only reason for doing so is to make it more concealable and more menacing in appearance than a handgun.

Sincerely,

PATRICK L. PAUL
Cascade County Attorney

PLP/nls

SENATE JUDICIARY
EXH 6
DATE 3-10-89
BILL NO. HB 651

Amendments to House Bill 651
Requested by Rep. Spaeth
For the Senate Judiciary Committee

1. Page 2, line 1.
Strike: "."
Insert: "alleging a code violation."

MTLA

SENATE JUDICIARY
EXHIBIT NO. 7
DATE 3-10-89
BILL NO HB 651

POSITION PAPER RE: HB NO. 651

By Erik B. Thueson

I. OVERVIEW

House Bill 651 would allow negligence actions against electrical companies to be resolved simply by resort to the standards set forth in the National Electric Safety Code. It provides:

> Proof of compliance with the requirements of applicable National Electric Safety Code standards establish due care in the defense of a negligence action.

This legislation should be opposed as it is not in the public interest. Specifically:

(1) The finite number of standards set forth in the National Electric Safety Code cannot possibly cover all situations. As a result, if this bill passes, mere compliance with the Code will absolutely protect an electrical company from responsibility for injury -- even though its conduct has been unreasonable under all of the pertinent circumstances.

(2) It is universally recognized that electricity is an extremely dangerous commodity. As a result, electrical companies are held to an extremely high standard of care to prevent injury. If this bill passes, an electrical company's responsibility to protect people and property will be greatly reduced, because it will only have to comply with the minimum standards of the NESC no matter how dangerous the situation.

(3) Montana already has comprehensive and fair laws governing the legal responsibilities of electrical companies.

These points are discussed separately below.

II. POSITION

A. ADOPTION OF THE NATIONAL ELECTRIC SAFETY CODE AS A DEFENSE NEGLIGENCE WOULD CREATE DANGEROUS HAZARDS.

By definition, negligence is a failure to act reasonably and prudently under all of the circumstances.[1] For this reason, it is impossible to reduce the duty of negligence to a finite set of written standards, such as those found in the National Electric Safety Code.

In other words, there will always be situations having unique circumstances where compliance with the minimal safety standards of the National Electric Safety Code simply will fall far short of what is reasonable and prudent. Unfortunately, if House Bill 651 passes with its rule that the NESC standards "establish due care," a person who is injured or has his property destroyed in one of these situations will be denied justice, since the electrical company will escape the duty to compensate him even though under the unique circumstances, its conduct was, in fact, negligent.

Because of the inability to reduce negligence to a finite set of standards, virtually all of the states of the union have rejected attempts to establish the National Electric Safety Code as the standard of negligence. The rule is accurately stated in

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[1] See e.g., Prosser on Torts, §32.

one of the leading legal encyclopedias as follows:

> An electrical company may be negligent even though it complied with the National Electric Safety Code, if it can be shown that something more ought to have been prudently done by the company. It has been held that although compliance with the minimum standards of such Code relieves the electrical company from a charge of negligence per se, such compliance is not conclusive where the particular circumstances justified a finding of lack of due care. Whether the company is negligent, even though it complied with the Code, is usually a question to be determined by the jury under proper instructions by the court.[2]

Attached hereto are some instances where courts have observed this rule. For instance, in Mississippi Power & Light Co. v. Walters,[3] a man was electrocuted when his oil drilling equipment came into contact with a power line. The line complied with the ground clearance requirements of the National Electric Safety Code, but the power company knew that the area was frequented by oil drilling equipment, which was much higher than the size of equipment anticipated by the Code. The power company argued that its compliance with the National Electric Safety Code established its duty of care and therefore, it was not negligent as a matter of law. As the court stated:

> The fact that the power lines had a basic clearance of approximately 20 feet, which was the minimum height prescribed by the National Electric Safety Code for terrain accessible to vehicle traffic, did not, in our opinion, necessarily indicate that the lines were so placed the company would have no reasonable cause to

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[2] 26 AM.JUR.2d ELECTRICITY, §45, p. 254 (emphasis added). A copy of this authority is attached as Attachment 1.

[3] 158 So.2d Rptr. 2 (see Attachment 2).

> anticipate that people working near or under the wire would come in dangerous proximity to them. Proof of compliance with the standards furnished by the National Electric Safety Code was not conclusive on the question of due care by the power company. Actionable negligence exists even though the utility involved has complied with the requirements of the Safety Code.[4]

Yet, under House Bill 651, the electrical company would be able to avoid responsibility for electrocuting a man, even though it knew the drilling equipment used in the vicinity of the line created a severe hazard. Certainly, this would not be justice.

Other examples where the National Electric Safety Code was simply inadequate to constitute reasonable conduct are given in the Mississippi Power & Light Co. case. Still another example appears in Cronk v. Iowa Power & Light Co.,[5] where the electrical company knew that a construction crew was working in the vicinity of their high voltage unprotected lines for several months, but did nothing to protect them or warn them.

It is easy to see how Montana citizens can be injured, even though there is compliance with the National Electric Safety Code. For instance, there obviously will be instances where men will be working with large items of farming equipment in the vicinity of high voltage power lines. If a power company is aware of that, it

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[4] Id. at 18.

[5] 138 N.W.2d 843 (see Attachment 3). Some other cases include Adam v. T.I.P. Rural Elec. Co-Op, 271 N.W.2d 896 (Iowa 1978); Rotramel v. Pub. Serv. Co., 546 P.2d 1015 (Okla. 1975); City of Elizabethton v. Sluder, 534 S.W.2d 115 (Tenn. 1976).

may be necessary for them to construct their lines higher or in such a way that the farming equipment does not come into contact with the lines even though the protection is greater than that dictated by the NESC. Another example would be power lines and towers in the vicinity of an elementary school. The lines might be in full compliance with the National Electric Safety Code, but further protection might be needed because of the number of small children in the area that would be attracted to the lines. Again, passage of House Bill 651 would allow the electrical company to escape responsibility for its negligence or lack of due care, simply because it complied with the National Electric Safety Code.

In summary, the inability of the standards of the National Electric Safety Code to cover all situations requires that this Bill be defeated in order to protect the people of Montana.

B. ESTABLISHING THE NESC AS THE MAXIMUM STANDARD OF CARE IS TOTALLY INAPPROPRIATE ON THE SUBJECT OF ELECTRICITY.

The National Electric Safety Code merely sets the minimum standard for construction and maintenance of electrical lines. It would be totally contrary to the public interest to legislatively decree that they should not become the maximum standards and that compliance with them would allow an electrical company to escape its responsibility for failing to use reasonable care. This is because electricity is recognized to be one of the most dangerous commodities known to mankind and therefore, greater care and prudence must be exercised by those who deal with it.

"Distribution of electrical energy is an inherently dangerous enterprise and power companies are required to exercise a high degree of care to see that their wires are properly placed and insulated." Dealing with the commodity of electricity is analogous to "operation of a fire range or handling of explosives."[6] A set standard of care, such as the written standards of the National Electric Safety Code should not become the maximum standard required by an electrical company because of these high dangers. This is because as the "danger increases, so does the degree of care increase which is required of persons who are handling" electricity.[7]

If House Bill 651 passes, electrical companies will not have to observe the fact that they have a high standard of care because they deal with a dangerous commodity. They need only refer to the National Electric Safety Code and will be immune from liability for highly dangerous situations caused by the environment or social situations, simply because they complied with the written rules. As such, provisions of House Bill 651 are not in the public interest.

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[6] Spence v. Commonwealth Edison Co., 340 N.E.2d 550, 556 (Ill. 1976).

[7] Bourke v. Butte Elec. & Power Co., 33 Mont. 267, 83 P. 470

C. CURRENT RULES FOR ESTABLISHING THE NEGLIGENCE OF AN ELECTRICAL COMPANY ARE ADEQUATE.

The current rules of law governing the negligence of an electrical company are fair and adequate.

First, the current rules recognize that if an electrical company's conduct falls below the standards set forth in the National Electric Safety Code, their conduct will be deemed negligence as a matter of law and the injured party need only prove the extent of his or her damages.[8] This is a fair rule. Electrical companies should be found responsible if their conduct does not comply with the minimum standards of their industry.

Second, Montana law also recognizes that there are situations were mere compliance with the National Electric Safety Code is not enough and because of the dangerous nature of electricity, an electrical company may be required to do more in order to act reasonably and prudently and thus, escape liability for negligence.[9] Thus, the law recognizes that there are instances where the National Electric Safety Code will not allow a power company to escape negligence.

At the same time, Montana law does not place an impossible standard upon electrical companies. They are not considered insurers of public safety, and therefore, cannot be found

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[8] Martel v. Mont. Power Co., 752 P.2d 140 (Mont. 1987).

[9] E.g., Ogden v. Mont. Power Co., 747 P.2d 201 (Mont. 1986).

responsible for damages unless it can be proved they acted unreasonably. As stated in a recent case, "reasonable care is all that is required. But this must be proportionate to the risk to be apprehended and guarded against."[10]

Thus, Montana law is comprehensive. It recognizes that reasonable care has to be decided in light of all of the circumstances. It cannot be decided by a standard set of rules as set forth in the National Electric Safety Code.

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[10] Id.

unless such practice is consistent with due care.[14] Thus, conformity by an electric company to the general custom of power companies with relation to the manner of maintaining power lines in rights-of-way does not excuse the company from liability from its acts unless the practice is consistent with due care.[15] The effect of compliance with other standards or customs in the installation and care of electric wires and equipment is discussed in subsequent subdivisions of this article.[16]

An electric company may be negligent even though it complied with the National Electrical Safety Code, if it can be shown that something more ought to have been prudently done by the company.[17] It has been held that although compliance with the minimum requirements of such code relieves the electric company from a charge of negligence per se, such compliance is not conclusive where the particular circumstances justified a finding of lack of due care.[18] Whether the company is negligent, even though it complied with the code, is usually a question to be determined by the jury under proper instructions by the court.[19]

The question of the existence of a usage or custom which is relied upon to rebut a charge of negligence is for the jury where it depends upon oral testimony.[20] If the evidence of conformity to usual custom and practice in regard to a particular duty of the electric company is accepted and believed

Annotation: 68 ALR 1409, 1435.

In determining whether a company engaged in the transmission of electricity has met the degree of care required, it is proper to consider the use by such company of the methods customarily used in the industry, but the use of such methods is not a complete defense to a charge of negligence, but may be shown as demonstrating that the company used the degree of care which prudent men engaged in the industry would use under similar circumstances. Murphy v Central Kansas Electric Co-op. Asso. 178 Kan 210, 284 P2d 591.

Where a heavily charged electric wire broke, not under unusual circumstances, and the plaintiff came in contact therewith, the doctrine of res ipsa loquitur being held to apply, it was ruled that a verdict for the plaintiff could not be disturbed upon mere proof that the defendant had employed usual and modern methods and that its wire was standard and good. Simmons v Commonwealth Edison Co. 203 Ill App 367.

14. Chase v Washington Water Power Co. 62 Idaho 298, 111 P2d 872.

15. Irelan-Yuban Gold Quartz Mining Co. v Pacific Gas & Electric Co. 18 Cal 2d 557, 116 P2d 611.

16. §§ 104 et seq., infra.

17. Johnson v Monongahela Power Co. 146 W Va 900, 123 SE2d 81.

18. Galloway v Singing River Electric Power Asso. 247 Miss 308, 152 So 2d 710.

Compliance with valid rules and regulations of the state public service commission, which incorporated and adopted certain minimum requirements of the National Electrical Safety Code with regard to the external installation of electrical equipment, would meet the standard of care and duty required, unless other circumstances appear which would require additional care in order to comply with the requirement to use ordinary care in the attendant circumstances. Johnson v Monongahela Power Co. 146 W Va 900, 123 SE2d 81.

19. Johnson v Monongahela Power Co. 146 W Va 900, 123 SE2d 81.

An instruction that if the power company maintained its wire at a height in compliance with the requirements of the state public service commission and the National Safety Code and in such a height and manner that the power company in the exercise of the highest degree of care could not reasonably have anticipated that persons would come in contact with the wires, verdict must be for the power company, was held not prejudicial as telling the jury that by compliance therewith the power company had discharged its duty, because the instruction as given required the jury to find more than compliance with the height requirements of the public service commission and the safety code, and in view of the fact that a further instruction was given that such requirements were minimum standards and that the defendant was required to exercise the highest degree of care under the circumstances. Gladden v Missouri Public Service Co. (Mo) 277 SW2d 510.

20. Fox v Keystone Teleph. Co. 326 Pa 420, 192 A 116, 110 ALR 1182.

Safety Code, which had been approved as the standard of construction by the Mississippi Public Service Commission; that the wires had a basic clearance of approximately 20 feet, which was the minimum height prescribed by the National Electrical Safety Code for terrain accessible to vehicular traffic; and that there was no requirement in the Safety Code that distribution lines be insulated under the conditions which prevailed at the oil well site. And the appellant's attorneys cite in support of their contention on that point the cases of Tullier v. Gulf States Utilities Company (Dist.Ct.La.1963), 212 F.Supp. 613, and Reed v. Duquesne Light Company (1946), 354 Pa. 325, 47 A.2d 136.

But the decision of the court in each of those cases was based upon a state of facts entirely unlike the facts in the case that we have here. In the Tullier case the record showed that a billboard maintenance crew member was injured when a metal ladder held by him touched the power company's high voltage wire which passed overhead at a height of 32 feet. The complainant admitted that he knew the wires were there, but "just paid no attention to them." The Court held that this was negligence causing the accident and injuries complained of, and the complainant's demands were therefore denied. In the Reed v. Duquesne Light Company case the record showed that the plaintiff's decedent was an employee of the American Bridge Company, who was killed on May 29, 1943. The high-tension lines involved in that case had been installed by the Light Company in May 1942 over the property of the Bridge Company on orders from the latter and for its service. When the lines were installed the Bridge Company specified the land over which they were run as an inactive area as indeed it was. The ground was waste land with no building or structure of any kind erected thereon and unused for any purpose. The high-tension lines were elevated on poles at a height of 36 feet above the ground. The plaintiff's decedent was killed by electrocution on May 29, 1943, while helping to remove some telephone which were lying on the ground in proximity to the power lines. The which was being used in removing th phone poles was the property of the Br Company and under the control of i ployees. There was no suggestion th Light Company had actual knowledg the use being made by the Bridge Com of its land lying underneath the powe at the time the fatal accident occurred Court simply held that the facts in the afforded "no basis for fictionally imp to the Light Company notice of the d created by the cranes."

[5] The fact that the appellant's p lines in this case had a basic clearance approximately 20 feet at the time of t plaintiff's injury, which was the mini height prescribed by the National Elect Safety Code for terrain accessible to veh ular traffic, did not, in our opinion, ne sarily indicate that the lines were so pl that the company would have no reasonab cause to anticipate that people workin near or under the wires would come dangerous proximity to them. Proof compliance with the standards furnished b the National Electrical Safety Code v not conclusive on the question of due c by the Power Company. Actionable negli gence may exist even though the utility in volved has complied with the requireme of the Safety Code.

In Galloway v. Singing River Electric Power Association, Inc., supra, this Cou held that a utility's compliance with th minimum safety requirements of the National Electrical Safety Code with respect power lines relieves it of the charge of neg ligence per se, but compliance is not conclusive on the question of due care when the particular circumstances justify a find ing of lack of due care. In its opinion i that case the Court said: "The National Electric Safety Code contains minimum re quirements and constitutes guiding princi ples in the construction and maintenance of electric power lines. It is not conclusive on

ATTACHMENT "2"

the question of due care by the utility. Compliance with the safety code is a relevant fact on the question of due care. If appellee had failed to comply with the minimum requirements of the National Electric Safety Code it would probably be chargeable with negligence per se, and compliance relieves the utility of that charge. We hold that compliance with the minimum standards contained in the National Electric Safety Code is not conclusive on the question of due care when the particular circumstances justify a finding of lack of due care. Elliott v. Black River Electric Cooperative, 233 S.C. 233, 104 S.E.2d 357, 74 A.L.R.2d 907; Anno. 69 A.L.R. 127, et seq. Whether a utility is negligent despite compliance with the Safety Code is ordinarily a question for the jury. Johnson v. Monongahela Power Co. (W.Va.), 123 S.E.2d 81."

In Kingsport Utilities, Inc. v. Brown, supra, a judgment for the plaintiff was upheld although it appeared that the original installation of the defendant's wires was in accordance with the National Electrical Safety Code, the court stating that the fact that the line when constructed was in accordance with the minimum standards of the electrical code did not necessarily indicate that it would be safe under changed conditions, and concluding that at least a question of fact about which reasonable men might differ was presented as to whether the utility was negligent in view of the growing nature of the area.

The courts in numerous cases have held the power company liable for damages on the theory that its uninsulated high-tension wires were not maintained at a sufficient height under all the circumstances. McGinnis v. Delaware, L. & W. R. C. (1922), 98 N.J.L. 160, 119 A. 163; Neumann v. Interstate Power Co. (1929), 179 Minn. 46, 228 N.W. 342; Mississippi Power & Light Co. v. Whitescarver (1934), (C.A. 5th Miss.), 68 F.2d 928; Sandeen v. Willow River Power Co. (1934), 214 Wis. 166, 252 N.W. 706; Southwestern Gas & Electric Co. v. Hutchins (1934), Tex.Civ.App., 68 S.W.2d 1085; Walpole v. Tennessee Light & Power Co. (1935), 19 Tenn.App. 352, 89 S.W.2d 174; Lozano v. Pacific Gas & Electric Co. (1945), 70 Cal.App.2d 415, 161 P.2d 74; Chatfield v. New York State Gas & Electric Co. (1944 Sup.), 57 N.Y.S.2d 406; Beck v. Monmouth Lumber Co. (1948), 137 N.J.L. 268, 59 A.2d 400; Pike v. Consolidated Edison Co. (1951), 303 N.Y. 1, 99 N.E.2d 885, revg. 277 App.Div. 1120, 10 N.Y.S.2d 892; Northern Virginia Power Co. v. Bailey (1952), 194 Va. 464, 73 S.E.2d 425; Southern Pine Electric Power Ass'n. v. Denson (1952), 214 Miss. 397, 57 So.2d 859; Elliott v. Black River Electric Co-op. (1958), 233 S.C. 233, 104 S.E.2d 357, 74 A.L.R.2d 907; Rogers v. Chattanooga (1954), supra; 4-County Electric Power Ass'n. v. Clardy, supra; Grice v. Central Electric Power Ass'n. (1957), supra.

In the case of Southern Pine Electric Power Ass'n. v. Denson, supra, this Court held that it was a question for the jury whether it was actionable negligence for the power company to string its uninsulated high voltage power line only 25 feet from the water well and within 3 to 6 feet of being immediately above the well hole, when as a result thereof the plaintiff's decedent was electrocuted in withdrawing the pump line from the well. The Court in that case said: "Electricity is a highly dangerous agency, and it must be denominated negligence to erect so close to the well a high voltage line, unless insulated, or unless, in the exercise of the highest degree of care, it was strung high enough off of the ground reasonably to prevent injury to him." In 4-County Electric Power Association v. Clardy, supra, which was an action for damages for personal injuries sustained by the plaintiff, a well driller and repairer, as a result of the plaintiff coming in contact with the defendant Power Association's high voltage lines, the Court held that the evidence was sufficient to sustain a finding that the defendant had been negligent in constructing and maintaining its lines almost directly over a drilled well and only 25 feet from the ground.

decedent was rolling over and his feet hung over the bank of the creek. He further testified the boom was pretty close to the wires, but it didn't look like it made contact and his best judgment was that the boom did not touch the wire.

Defendant's transmission lines were located in the street south of the traveled portion thereof; decedent was lawfully in this right of way installing the water main.

This evidence would warrant a finding that "under favorable physical, weather and atmospheric conditions current will arc or jump from a line transmitting electricity to an object in close proximity to it but which is not in actual contact with it. In such a case the object becomes energized and anyone coming in contact with it will, if grounded, receive an electric shock. The court finds that this is what happened on September 12, 1957, when the decedent lost his life. The projecting arm or boom of the crane, although not in actual contact with the wire, became energized as a result of the arcing or jumping of the current and when the decedent pushed the bucket the electricity passed through his body."

The court further found that "* * * in the exercise of ordinary care the defendant could not ignore the right of Des Moines Water Works and the employees or servants to lay water mains in the streets * * in proximity to the defendant's transmission lines. An ordinarily careful and prudent person engaged in the business of producing and transmitting electricity would, *under the circumstances existing in this case,* have protected its wires or cables in the area where the accident in this case occurred with an insulating material which would have prevented electricity from arcing or jumping from them. This was not done and because of such failure the decedent lost his life." (Emphasis supplied)

The court then concluded "* * * under the circumstances * * * an ordinarily careful and prudent person would have protected his transmission lines or cables at the place where the accident occurred by insulating them with such material as would have prevented current from escaping by means of arcing or jumping and that the defendant * * * failed so to do. Such failure constitutes negligence."

Exhibit 10 indicates the lower set of defendant's transmission lines were elevated 20 feet 9 inches.

Plaintiff alleged six specifications of negligence in paragraph seven, stating: "That the defendant was negligent in the construction, maintenance and operation of the said power transmission line *in the said location* in the following particulars:" (Emphasis supplied). The question of insulation was raised in subparagraphs (b) "in not properly grounding and protecting the said overhead wires" and (f) "in failing to construct, maintain and operate said transmission line in conformity with accepted standards of care and prudence observed in the industry, and required by law." The court determined the other grounds of negligence asserted could not be sustained.

Specifications for materials to be used for insulating wires carrying heavy electrical current had not been approved by the city council of Des Moines prior to September 12, 1957, as required by section 18–58 of the Municipal Code.

[3] Aside from any provision in the city ordinance it was the duty of defendant to use reasonable care to prevent the escape of electricity from its lines in such way as to cause injury to persons who might lawfully be in the area of danger incident to the escape of electricity from such lines. Knowlton v. Des Moines Edison Light Co., 117 Iowa 451, 455, 90 N.W. 818, 819.

[4] It is the duty of a person or corporation that maintains and controls wires or cables for the furnishing of electricity to others, to carefully and properly insulate

their wires at all places where there is a likelihood or reasonable probability of human contact by persons whose business or duty, or rightful pursuit of mere diversion or pleasure brings them without contributory fault on their part into the zone of danger. However, in the absence of statute or municipal ordinance, this duty does not compel the company to insulate or adopt safeguards for their wires everywhere but only at places where people may legitimately go for work, business or pleasure—that is, where they may reasonably be expected to come in proximity to them. Knowlton v. Des Moines Edison Light Co., 117 Iowa 451, 455, 90 N.W. 818; Toney v. Interstate Power Co., 180 Iowa 1362, 1368, 163 N.W. 394; Graves v. Interstate Power Co., 189 Iowa 227, 232, 178 N.W. 376; 29 C.J.S. Electricity, § 44, page 1086; 18 Am. Jur., Electricity, section 97, pages 491, 492; Curtis on Law of Electricity, section 510.

[5] The law is well settled in this state that one furnishing electricity, while not an insurer, is held to the highest degree of care consistent with the conduct and operation of the business. The defendant had the duty to use reasonable care commensurate with the danger to prevent the escape of electricity from its lines. Walters v. Iowa Electric Co., 203 Iowa 471, 474, 212 N.W. 884; Evans v. Oskaloosa Traction and Light Co., 192 Iowa 1, 5, 181 N.W. 782.

I. Appellant asserts in support of its first assignment of error as a brief point, "The duty of a utility company to insulate its wires is not absolute nor does it extend to all parts of the system; being limited to places where people in the exercise of ordinary care may be reasonably expected to go for work, business or pleasure," and in written argument states, "* * * the proposition we urge—against *total* insulation, but requiring it where people might be reasonably expected to go in their business, work, as incidental pursuits * * *"

This is all the trial court found. In its tenth finding and first conclusion the words, "under the circumstances existing in this case" are used. Plaintiff in paragraph seven alleged "in the said location".

Adams testified on cross-examination he was familiar with exhibit 11, the National Electrical Safety Code, and shortly after the tragedy occurred studied the installation in question, comparing it with the applicable provisions of the code, and found no violation in defendant's construction.

[6–8] Compliance with the safety code is a relevant fact on the question of due care. Proof of compliance with the standards furnished by the National Electrical Safety Code was not conclusive on trier of the fact on question of defendant's due care. Actionable negligence may exist even though the utility involved has complied with the requirements of the safety code. It is not conclusive on the question of due care by the utility. Whether a utility is negligent despite compliance with safety code is ordinarily a question for the jury or trier of fact. Mississippi Power & Light Company v. Walters, 248 Miss. 206, 158 So.2d 2, 160 So.2d 908; 29 C.J.S. Electricity § 68, page 1167.

[9] We have stated what we believe to be defendant's duty. The trier of fact found under the circumstances existing in this case in the area in question, defendant had not exercised ordinary care in performance of that duty; therefore, defendant was negligent.

From the facts detailed herein, such findings were justified.

[10–12] II. Negligence to be actionable must be a proximate cause of the injury. Proximate cause is any cause which in natural and continuous sequence, unbroken by any efficient intervening cause, produces the result complained of and without which the result would not have occurred. It is a primary moving cause or predominating cause from which the injury flows as a natural, direct and immediate consequence and without which it would

MTLA

SENATE JUDICIARY
EXHIBIT NO. 8
DATE 3-10-89
BILL NO. HB 651

OPPOSITION TO HOUSE BILL 651

By Robert M. Peterson, Attorney at Law

There are many reasons that House Bill 651 should be opposed. The one foremost in my mind is that it is class legislation, which allows electrical companies to, in essence, write their own rules, which may be totally unreasonable.

It is axiomatic that the law must be "the same for all persons, since the law can have no favorites." The problem with House Bill 651 is that it indicates that electrical companies are a favorite under the law. The conduct of all other citizens in the State of Montana is judged by whether or not they acted reasonably and prudently under all of the circumstances. They are not allowed to resort to a fixed set of standards set forth in a book and claim that compliance with the minimum standards excuses their unreasonable conduct. If House Bill 651 passes, however, electrical companies will be given this privilege.

The dangers of House Bill 651 are particularly grievous, since electrical companies have a great deal of influence over what the standards will be as set forth in the National Electric Safety Code. Can anyone believe that the electrical industry will be unbiased and will set stringent safety rules against itself? Yet, House Bill 651 will allow the electrical industry to write its own laws regarding negligence.

In summary, the "standard of conduct which the community demands must be an external and objective one, rather than the

Ex #8
3/10/89

individual judgment, good or bad, of the particular actor." The danger of House Bill 651 is that it allows the "particular actor" -- in this case the electrical industry -- to determine its own standard of care. No one else has this right. It puts power companies in a very privileged class.

SENATE JUDICIARY
EXHIBIT NO. 9
DATE 3-10-89
BILL NO. HB 651

Testimony of Michael I. Sherwood, MTLA
OPPOSING House Bill No. 651

Jury

Electricity is dangerous. Statistics from a June 5, 1987 study by the Consumer Product Safety Commission indicate that:

In 1984 approximately 240 people per year were electrocuted in or around their homes.

In 1985 electricity contributed to 174,000 residential structural fires attended by fire services. These fires resulted in an estimated 950 civilian deaths, 5,500 civilian injuries and $1.2 billion dollars in property losses. This accounts for one in every four residential fires.

The number of civilian deaths in 1985 was up by nearly 200 over 1984. Fires in installed wiring were the only major contributor to the overall fire death increase. In 1984 110 people were killed in fires resulting from installed wiring. In 1984 this number had risen to 170.

The National Fire Prevention Association(NFBA) reports that from 1982 to 1986 440 people were killed in industrial fires caused by electricity , 1800 people were injured and a damage loss of $779.2 million dollars was incurred. The total number of fires was 73,400.

ex. #9
p92
3/10/89

industry code to establish by reference, a standard of dangerous for two reasons:

stry code sets only minimum standards. Paragraph 010. of the Introduction to the Code sets forth the purpose,

EY CONTAIN MINIMUM PROVISIONS CONSIDERED
RY FOR THE SAFETY OF EMPLOYEEES AND THE PUBLIC."

slation of this kind encourages those responsible for arguably acts to lobby for changes in the code which erode its This is exactly what has happened to the National Safety Code. In 1977 two very specific provisions which o all aspects of the code were present:

ection 21, Paragraph 210: All electric supply and nication lines and equipment shall be of suitable design and ction for the service and conditions under which they are to erated.

Section 21, Paragraph 211: All electric supply and unication lines and equipment shall be installed and ined so as to reduce hazards to life as far as is practical.

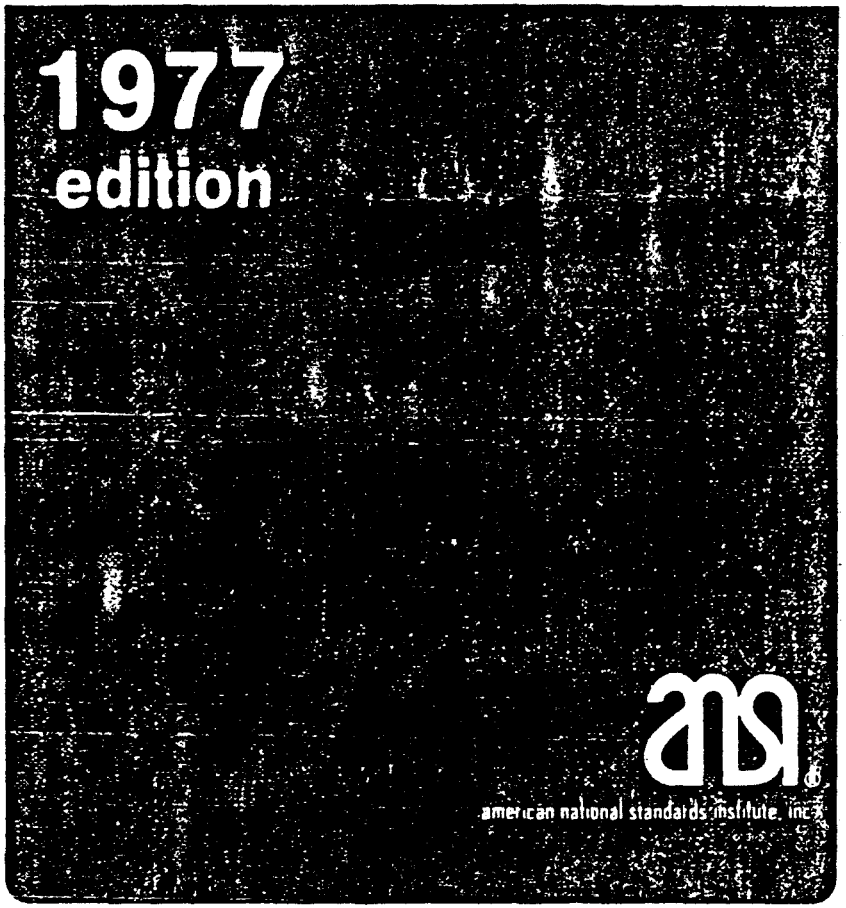
e provisions were more than reasonable in light of the danger nted to workers, homeowners, farmers, ranchers, and ordinary ens when around electrical transmission lines. The need for e general provisions is especially acute because the code does not y to all conceivable types of electrical installations and ations. By 1987, however, both provisions had been deleted from code.

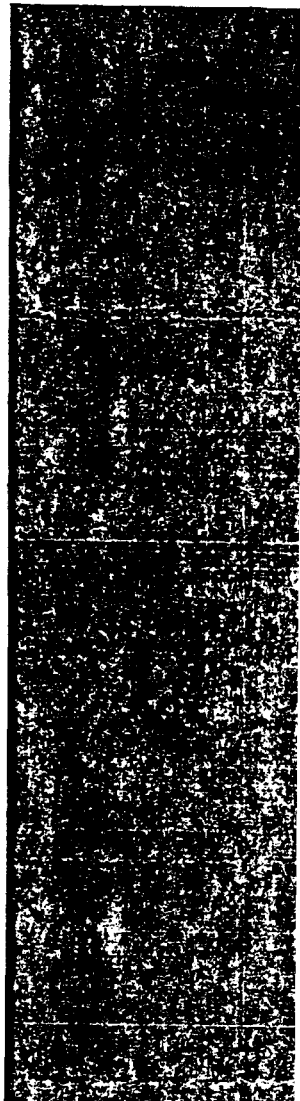
MTLA

SENATE JUDICIARY
EXHIBIT NO. 10
DATE 3-10-89
BILL NO. HB 651

American National Stand

national electri safety code





Feb 28, 1977

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3. Dead ends of busway shall be closed.
4. Busways should be marked with the voltage and current rating for which they are designed, in such manner as to be visible after installation.

B. Isolated Phase Bus

1. The minimum clearance between an isolated-phase bus and any magnetic material shall be the distance recommended by the manufacturer to avoid overheating of the magnetic material.
2. Non-magnetic conduit should be used to protect the conductors for bus alarm devices, thermocouples, space heaters, etc if routed within the manufacturer's recommended minimum distance to magnetic material and parallel to isolated-phase bus enclosures.
3. When enclosure drains are provided for isolated-phase bus, necessary piping shall be provided to divert water away from electrical equipment.
4. Wall plates for isolated-phase bus shall be non-magnetic, such as aluminum or stainless steel.
5. Grounding conductors for isolated-phase bus accessories should not be routed through ferrous conduit.

Section 19. Surge Arresters

190. General Requirements

If arresters are required, they shall be located as close as practical to the equipment they protect.

191. Indoor Locations

Arresters, if installed inside of buildings shall be enclosed or shall be located well away from passageways and combustible parts.

192. Grounding Conductors

Grounding conductors shall be run as directly as possible between the arresters and ground and be of low impedance and ample current-carrying capacity (see Section 9 for methods of protective grounding).

193. Installation

Arresters shall be installed in such a manner and location that neither the expulsion of gases nor the arrester disconnector is directed upon live parts in the vicinity.

PART 2. Safety Rules for the Installation and Maintenance of Overhead Electric Supply and Communication Lines

Section 20. Purpose, Scope, and Application of Rules

200. Purpose

The purpose of Part 2 of this code is the practical safeguarding of persons during the installation, operation, or maintenance of overhead supply and communication lines and their associated equipment.

201. Scope

Part 2 of this code covers supply and communication conductors and equipment in overhead lines. It covers the associated structural arrangements of such systems and the extension of such systems into buildings. The rules include requirements for spacing, clearances, and strength of construction. They do not cover installations in electric supply stations.

202. Application of Rules

The general requirements for application of these rules are contained in Rule 013. However, when a structure is replaced, the arrangement of equipment shall conform to the current edition of Rule 238C.

Section 21. General Requirements

210. Referenced Sections

The Introduction (Section 1), Definitions (Section 2), References (Section 3) and Grounding Methods (Section 9) shall apply to the requirements of Part 2.

211. Number 211 not used in this edition.

MTLA

SENATE JUDICIARY
EXHIBIT NO. 12
DATE 3-10-89
BILL NO. HB 651

Proposed Amendments to House Bill No. 651
Michael Sherwood, MTLA

Page 1, Line 23:

Strike: "Proof of"
Insert after "commission": "Although"

Page 1, Line 25 and Page 2, Line 1:

Strike: "establishes due care in the defense of a negligence action."
Add, after "standards": "relieves a party from a charge of negligence per se, such compliance is not conclusive where the particular circumstances justify a finding of lack of due care."

So that the last sentence of the bill would read:

~~Proof of~~ Although compliance with the requirements of applicable national electrical safety code standards ~~establishes due care in the defense of a negligence action~~ relieves a party from a charge of negligence per se, such compliance is not conclusive where the particular circumstances justify a finding of lack of due care."

B. Application of Rules

1. New Installations, Reconstructions, and Extensions
These rules shall apply to all new installations, reconstructions, and extensions except where they may be waived or modified by the proper administrative authority when shown to be impractical or when equivalent or safer construction can be more readily provided in other ways. Methods of construction and installation other than those specified in the rules may be used experimentally to obtain information if done where proper supervision is provided.

2. Existing Installations.
Existing installations, including maintenance replacements, which comply with prior editions of this code need not be modified to comply with these rules except as may be required for safety reasons by the proper administrative authority. A replacement for a supporting structure, however, shall conform to the current edition of Rule 238C.

C. Waiver
The person responsible for the installation may modify or waive certain rules in cases of emergency, temporary installations, or installations which are soon to be discarded or reconstructed, but shall promptly notify all parties directly concerned.

Section 21. General Requirements

210. Design and Construction
All electric supply and communication lines and equipment shall be of suitable design and construction for the service and conditions under which they are to be operated.

211. Installation and Maintenance
All electric supply and communication lines and equipment shall be installed and maintained so as to reduce hazards to life as far as is practical.

212. Induced Voltages
Rules covering supply line influence and communication line susceptiveness have not been detailed in this code. Cooperative procedures are recommended in the control of voltages induced from proximate facilities. Therefore, reasonable ad- ... of other

21[illegible]

...ring opera- ...authorized ...ces, work- ...ween con-

214. A. ...t ...e safety ... from time to ... has shown to be

3. Te... necess... ...uipment shall ...e required

...ealed ...ball ...e

215. A. M...

Section 1. Introduction to the National Electrical Safety Code

010. Purpose

The purpose of these rules is the practical safeguarding of persons during the installation, operation, or maintenance of electric supply and communication lines and their associated equipment. They contain minimum provisions considered necessary for the safety of employees and the public. They are not intended as a design specification or an instruction manual.

011. Scope

These rules cover supply and communication lines, equipment, and associated work practices employed by an electric supply, communication, railway, or similar utility in the exercise of its function as a utility. They cover similar systems under the control of qualified persons, such as those associated with an industrial complex.

They do not cover installations in mines, ships, railway rolling equipment, aircraft, or automotive equipment, or utilization wiring except as covered in Parts 1 and 3.

012. General Rules

All electric supply and communication lines and equipment shall be designed, constructed and maintained to meet the requirements of these rules. For all particulars not specified in these rules, construction and maintenance should be done in accordance with accepted good practice for the given local conditions.

013. Application

A. New Installations and Extensions

1. These rules shall apply to all new installations and extensions, except that they may be waived or modified by the administrative authority. When so waived or modified, equivalent safety shall be provided in other ways, including special work methods.

VISITORS' REGISTER

_____ COMMITTEE

BILL NO. 204 DATE 3/9/89

SPONSOR Rep Cobb

NAME (please print)	RESIDENCE	SUPPORT	OPPOSE
Erich Merdinger	SRS-	✓	

IF YOU CARE TO WRITE COMMENTS, ASK SECRETARY FOR WITNESS STATEMENT FORM.

PLEASE LEAVE PREPARED STATEMENT WITH SECRETARY.

CS-33

DATE March 10, 1989

COMMITTEE ON Senate Judiciary

VISITORS' REGISTER

NAME	REPRESENTING	BILL #	Check One: Support	Check One: Oppo
DICK BOTTOLFER	8th JUD. YOUTH CT	350	X	
H S HANSON	MT TECHNICAL COUNCIL	H-651	X	
Clayton Bain	Montana Board of Crime Control	HB 598	X	
BARRY L LIGHT	USWC	HB651	X	
GENE PHILLIPS	PACIFIC POWER & LIGHT NORTHWESTERN TEL	HB651	X	
JAMES C. NELSON	GLACIER CUT BANK Electric Coop	HB 651	X	
Robert T. O'Leary	Mt Power - Butte	"	X	
TIM SHANKS	Great Falls Police Dept	HB349	X	
LARRY RENMAN	GREAT FALLS POLICE DEPT	HB 349	X	
Mona Jamison	Mt. Juvenile Probation Assn	350	X	
Tim Shanks	Great Falls Police Dept	HB 351	X	
John Strapp	" "	HB 351	X	
Chuck O'Reilly	Mt Sheriff's & Peace Officers	H 351 H 598	X	
VERNE ROLAND	LOWER YELLOWSTONE RURAL ELEC & SIDNEY	HB651	X	
Ted NEUMAN	COUNCIL OF COOPS MT PETROLEUM MKTRS	HB651	X	
Erik Thueson	Self	HB651		X
Robert Peterson	Self	HB651		X
Michael Sherwood	MTLA	HB651		X
JAY DOWNEN	MECA / MTA	HB651	X	
~~Phyllis Gleason~~				
John Alke	MDU	HB651	X	

(Please leave prepared statement with Secretary)