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U.S. CONSUMER PRODUCT SAFETY COMMISSION

WASHINGTON, D.C. 20207

February 3, 1978

James H. Moss, Esquire
Moss, Carter, Branton & Bailey, P.A.
1501 North Street
Beaufort, South Carolina 29902

Dear Mr. Moss:

This letter is in response to your correspondence of November 18, 1977, and December 29, 1977, in which you request the Consumer Product Safety Commission to require public utilities throughout the United States not to place overhead power lines over the tops of mobile homes and houses. As we understand it, your request refers solely to the transmission lines and not to service drop lines that actually bring power to individual homes.

The Commission has the authority under section 7 of the Consumer Product Safety Act, 15 U.S.C. 2056, to promulgate safety standards for consumer products. Such standards may consist of requirements as to the performance, composition, contents, design, construction, finish or packaging of the product. It is the view of the Office of the General Counsel that the Commission would not have the authority under the Consumer Product Safety Act to establish requirements concerning where such overhead power lines must be located.*/

*/ The Consumer Product Safety Act defines the term consumer product to mean any article or component part thereof, produced or distributed for sale to or for the personal use, consumption or enjoyment of a consumer in or around a permanent or temporary household or residence, a school, in recreation, or otherwise; the term does not include any article which is not customarily produced or distributed for sale to or use or consumption or enjoyment of, a consumer. 15 U.S.C. 2052(a)(1). There is a question whether overhead power lines fall within the definition of the term "consumer product". However, it is not necessary to resolve that issue at this time.

ADVISORY OPINION

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This conclusion is based on our analysis of the Consumer Product Safety Act. A memorandum concerning this issue raised in the context of a standard for swimming pool slides is enclosed for your information.

In view of the foregoing, we are unable to treat your request as a petition under the Consumer Product Safety Act.

As you are aware, The Commission has proposed warning and instruction requirements for outside TV antennas, CB base station antennas, and their supporting structures. (42 Federal Register 57134). The Commission is also investigating the feasibility of a consumer product safety standard for these antennas that would eliminate or reduce the hazard of electric shock caused by contact with electric lines. The Commission also plans to conduct an information and education program on hazards associated with these antennas. These actions of the Commission address the risk of injury posed by contact between overhead power lines and antennas in a manner consistent with the Commission's jurisdiction.

Thank you for your interest in product safety.

Sincerely,

Theodore J. Garrish
General Counsel

Enclosure

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1501 North Street - Beaufort, South Carolina 29902
P. O. DRAWER 499 - 803 524-3373

December 29, 1977

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CONSUMER PRODUCT SAFETY COMMISSION

Richard E. Rapps, Secretary
Consumer Product Safety Commission
Washington, D. C. 20207

Dear Mr. Rapps:

Enclosed is a letter from C. R. Miller, Secretary for the American National Standards Institute Incorporated, which basically indicates that the American National Standards Institute and the Utility Industry are going to do nothing concerning the recent authorization of placing high tension wires over the tops of homes.

I, therefore, would request your commission to take some action in this area as you have done with television antennas and CB antennas. If a formal petition is needed, please forward the necessary application to me, and I will petition your Council and appear there to present the evidence which I have in this matter.

With kindest personal regards, I am

Sincerely,

MOSS, CARTER, BRANTON & BAILEY, P. A.

James H. Moss

James H. Moss

JHM:cas
Enclosure

RECEIVED
JAN 6 1978
Consumer Product Safety Commission
Office of the General Counsel

american national standards institute, inc.

address reply to:
IEEE Standards Office
345 East 47th Street
New York, N.Y. 10017
(212) 644-7960

1977 December 21

Mr. James H. Moss
Moss, Carter, Branton & Bailey, P.A.
P. O. Drawer 499
Beaufort, SC 29902

Dear Mr. Moss:

Thank you for your letters of November 8 and November 18; we especially appreciate the attachments.

For NESC purposes, parked mobile homes are considered as buildings.

Lines running by or over the top of buildings, though permitted by the NESC if appropriate clearances are maintained, may also be subject to the easement granted to the utility for the construction of its lines over private property. You do not appear to have considered this latter aspect in your letter.

Please note that previous editions of the National Electrical Safety Code have dealt with conductors passing by or over buildings. In the third edition (October 1920) of the NESC there were clearances for power conductors in the vicinity of buildings. The immediate prior rule was 234C4(a) of the 1973 edition of the Code, which was a reprint of the National Bureau of Standards Handbook 81, dated November 1961. The 1977 edition of the NESC expanded somewhat on this rule. In many cases it requires additional clearances between the conductors and the building or sign, etc., because it now requires an allowance for conductor sag under high temperature operation and an allowance for conductor blowout under wind loading conditions.

However, there are situations where it is simply impossible to move lines further away. Our clearances subcommittee has given much consideration to this problem but short of requiring all conductors to be either buried or fully insulated, could find no real solution to the problem of carelessness on the part of amateur antenna erectors. Underground burial or fully insulating the overhead conductors are economically impractical. If they could be performed, the resulting cost to ratepayers without antennas would be discriminatory. The clearances subcommittee believes the best solution, and the only practical one, is an educational approach similiar to the Consumer Product Safety Communication proposal for warning notices.

In the reports attached to your letter of November 8, it appears that while installing or maintaining the antennas, adequate precautions against accidental contact with the existing power line were not considered by the workers prior to undertaking the job. Unfortunately, no Code can be an absolute safeguard against occasional lapses in common sense.

We also call to your attention, article 810 (especially 810-13 and 810-16b) of the 1978 edition of the National Electrical Code.

Your comments have been forwarded to the NESC subcommittee on clearances for its information and consideration in connection with the next revision of the NESC.

We appreciate your sharing our concern on this problem.

Sincerely,

C. R. Muller
Secretary, C2

CRM:hm

cc: R. H. Lee
E. W. Glancy
J. M. McCutchen
W. D. Johnson
A. L. Clapp

OFFICE OF THE SECRETARY - TRANSMITTIAL SLIP

FOR

GENERAL COUNSEL ACTION

RE: Letter from James H. Moss, Moss, Carter, Branton & Bailey, with attachment.

Date: Nov. 23, 1977

SUBJECT: Possible petition to require public utilities not to place wires in accessible areas and to comply with Sect. 211 of the National Electrical Safety Code, which requires that these companies reduce hazards - ANTENNAS

For your review and recommendations. Please return to the Office to the Secretary by CLOSE OF BUSINESS Dec. 8, 1977.

LAW OFFICES
MOSS, CARTER, BRANTON & BAILEY, P.A.

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1501 North Street - Beaufort, South Carolina 29902
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November 18, 1977

Richard E. Rapps, Secretary
Consumer Products Safety Commission
Washington, D.C. 20207

Re: COMMUNICATION ANTENNAS

Dear Mr. Rapps:

I have been an active, practicing attorney in the products field and most particularly, with regard to electrical injuries, for some time. I think that your Commission should be aware of what is going on in the utility industry concerning CB and TV antennas. I enclose a letter concerning Part II of the National Electrical Safety Code, and as you can see, while the Consumer Products Safety Commission is trying to protect individuals from injuries by requiring manufacturers to place warnings on their products, the utility industry is changing their safety standards so as to allow power lines to go directly over the tops of mobile homes and houses. I quote for you section 234(c-7) which was recently enacted in the 1977 ediction of the National Electrical Safety Code:

> "Unguarded or accessible supplies of wires, conductors and cables may be run either beside or over buildings or other installations and any projections therefrom. Minimum basic vertical and horizontal clearances are given in Table 234-1."

In other words, the substance of my argument is that the CSPC is making great strides in protecting individuals from antenna injuries and deaths which are numerous in this country. Meanwhile, the utility industry, retaining a monopoly for the supply of electricity, is in fact, lowering their safety standards so as to allow affirmatively in their

Code, the placing of lines over the tops of these structures. Heretofore, the industry has not made such an affirmative statement.

Therefore, I should like this letter to be considered as a Petition requiring public utilities throughout this country not to place wires in these accessible areas and to comply with Section 211 of the National Electrical Safety Code which requires that these companies reduce hazards as far as practicable. If a formal Petition is required, I would appreciate your forwarding to me a copy of the correct format and I shall have the same prepared and filed with your Commission. I, frankly, think that the right hand should know what the left hand is doing and, from what I have seen of the activity of the public utility industry, they care little for consumer safety.

If you need additional information from my area, I will be glad to forward you the same. With kindest regards, I am

Very truly yours,

MOSS, CARTER, BRANTON & BAILEY, P.A.

James H. Moss

James H. Moss

JHM:dll
Enclosure

cc: Stephen Lemberg, Assistant General Counsel
Carl W. Blechschmidt, Office of Program Management

LAW OFFICES
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LOUIS O. DORE
THOMAS C. JENSEE

1501 North Street - Beaufort, South Carolina 29902
P. O. DRAWER [illegible]

November [illegible], 1977

American National Standards Committee
Institute of Electrical & Electronics Engineers
3405 East 47th Street
New York, New York 10017

Re: PART 2 OF NATIONAL ELECTRIC SAFETY CODE

Dear Sirs:

I received a copy of the 197[illegible] edition of the National Electric Safety Code, and was most concerned to see no reference to mobile homes or to the use of high powered lines ([illegible] and 13,8KV) over the top of mobile homes. Additionally, I was most concerned about the changes made in Section 234, [illegible], which now provides as follows:

> Unguarded or accessible supplies of wires, conductors and cables may be run either beside or over buildings or other installations, and any projections therefrom. Minimum basic vertical and horizontal clearances are given in Table 234-1.

In my opinion, you have now given the electrical utility industry a license to cause many serious burns and even deaths to individuals as a result of the lines being run over the top of, and exceptionally close to residential and commercial establishments, including mobile homes, if buildings are to considered as mobile homes. We have had many cases in Beaufort County, where individuals have erected antennas over the top of their mobile homes, either TV or CB, and have been electrocuted by the high tension wires that run directly over the top of their mobile homes. I enclose a list of ten such accidents that have happened since 197[illegible], in Beaufort County, and adjoining areas. Additionally, I could forward reams of paper to you concerning antenna injuries and deaths throughout this country. The National Consumer Product Safety Council is now beginning to get into this area, and has numerous recorded accidents involving CB and TV antennas.

As you are probably aware, we are at this time, trying to get our Courts to extend to electrical utility companies, the law of Strict Liability, and when I see the Code

Committee allowing unguarded and accessible supply conductors to run over the top of buildings, and I must assume this includes mobile homes, as the code does not specify this in any other section, I can only think that you are condoning and encouraging the many deaths and injuries which will occur. How, for instance, does this go along with the FCC Regulation 95.3703, which allows antenna heights of up to 60 feet, especially when the companies know, or should know from all of the numerous injuries and deaths, that people cannot and do not know the extent of danger involved. These companies know, or should know, that individuals are going to erect these antennas over the top of their homes.

Additionally, I see Section 291 has been changed so that it is no longer mandatory, and need not be done unless the company decides that it is practical to do so. I would, therefore, request that the American National Standards Committee consider these matters and the great numbers of deaths that are occurring from what appears to be a practice which the National Electrical Safety Code would say is alright.

I would be more than happy to appear before the committee in regards to any additional revisions, and could forward much additional information to substantiate my position. I believe that the committee should immediately do something affirmative in the area of CB and TV antenna contacts with high tension wires, and that this, frankly, is a committee which should take that initiative. This code is the code that governs all minimum practices by utilities throughout the United States, and the consumers deserve affirmative protection as well as the industries.

I appreciate your help and consideration, and will welcome your comments.

With kindest regards, I am

Very truly yours,

MOSS, CARTER, BRANTON & BAILEY, P. A.

James H. Moss

:gde
Enclosure

Schoem

UNITED STATES GOVERNMENT

Memorandum

U.S. CONSUMER PRODUCT SAFETY COMMISSION
WASHINGTON, D.C. 20207

TO : Commission

DATE:

THRU : Sadye E. Dunn, Secretary

THRU : Margaret A. Freeston, Assistant General Counsel

FROM : Alan H. Schoem, OGC

AHS

SUBJECT: Swimming Pool Slides- Authority to Regulate Directly the Place of Installation of Swimming Pool Slides Around a Pool.

One of the issues raised in the comments to the proposed swimming pool slide standard is whether the CPSC has the authority to regulate the place of installation of swimming pool slides in a mandatory standard issued under the Consumer Product Safety Act. Before discussing this issue we believe it is helpful to discuss how pool slides are marketed.

Generally, manufacturers of swimming pool slides sell the slides to swimming pool builders and dealers, who in turn sell the slides to consumers as part of a package plan for the construction of a swimming pool. In some cases, manufacturers supply pool slides to stock distributors who supply the slides to pool builders or retailers. At least one above ground pool slide company has sold its slides directly to a retailer for sale to consumers through catalogues.

A pool slide generally is delivered in several parts and is assembled at a pool site. Most below ground pool slides are installed permanently by constructing the deck around the slide.

It is the view of the Office of the General Counsel that, in general, the Commission lacks the authority to directly regulate the installation of a consumer product as part of a mandatory standard. However, we believe that the Commission must decide on a case by case basis whether the installation of a particular consumer product is a part of the manufacture or assembly of the product and whether it is part of one or more of the types of requirements listed in section 7(a)(1) of the Act. If the installation of a particular product can be considered part of one of these other activities, we believe the Commission would have authority to regulate the installation of the particular product.

As to swimming pool slides, we believe the installation is not part of the manufacture or assembly and that installation is not part of any of the other types of requirements enumerated in section 7 of the Act. If this is correct, we believe that the Commission cannot directly regulate installation of swimming pool slides in the standard.

This memorandum sets out for your consideration the basis for this office's views on the Commission's authority to regulate directly the installation of swimming pool slides. The Bureau of Compliance and one commenter disagree with OGC's conclusion and they present arguments that the Commission should consider. Another commenter agrees with the OGC's conclusion. These other views are attached at the end of this memorandum for your consideration.

DISCUSSION

In analyzing its authority under the CPSA, the Commission should construe the act as a whole and interpret each section in a manner that is harmonious with the intent and purport of the Act (section 46.05, Southerland, Statutory Construction, 4th ed.) The definition of the term "consumer product" in section 3 of the Act delimits the jurisdictional reach of the act; section 7 specifies the types of requirements the Commission must include in consumer product safety standards; and section 19 lists various prohibited acts.

In order for a product to be regulated by the Commission, it must be a product that is manufactured or distributed for sale to or for the personal use, consumption or enjoyment of a consumer in or around a household or residence, a school, in recreation or otherwise. [section 3(a)(1)]

Section 7(a) of the Act sets forth the types of requirements of which consumer product safety standards issued under the Act must consist. These types of requirements are:

"(1) Requirements as to performance, composition, contents, design, construction, finish, or packaging... of a consumer product.

(2) Requirements that a consumer product be marked with or accompanied by clear and adequate warnings or instructions, or requirements respecting the form of warnings or instructions."

A safety standard issued under section 7 of the CPSA must be applicable to a consumer product and it must consist of one or more of the types of requirements indicated in section 7(a)(1) or (2). When the act is read as a whole it is also logical to conclude that standards issued under section 7 must be enforceable under section 19(a) of the Act which makes it unlawful to "manufacture for sale, offer for sale, distribute in commerce, or import into the United States any consumer product which is not in conformity with an applicable consumer product safety standard...."

A. TYPES OF REQUIREMENTS (SECTION 7(a))

It appears clear that installation of swimming pool slides is not part of the composition, contents, design, finish or packaging of the product. It must then be determined by the Commission, whether authority to regulate installation of a pool slide could be included within a requirement under section 7 for "performance" or "construction" of the product.

1. Performance Requirement

The Commission is authorized by section 7(a)(2) to include requirements in a standard as to "performance" of a consumer product. A performance standard is generally one that requires a product and/or its component parts to perform or behave in a particular manner once it is manufactured, regardless of its design or construction. The legislative history of the Act indicates that Congress expressed a preference for performance standards in the recognition that such standards permit industry to make the fullest use of its technological resources in meeting safety requirements.

While the manner or place of installation of a swimming pool slide may affect that product's performance, that fact alone does not provide the Commission with the authority to mandate installation requirements for a product.

The requirements of a standard apply to products that are manufactured or distributed. If the Commission determines that the installation of a slide is not part of the manufacture or distribution of the product, requirements for the installation of the slide, as part of a consumer product safety standard, would appear to be beyond the authority of the Commission. 1/

The Commission could, however, require that slides be installed in a particular manner or location for testing purposes to ensure that properly assembled and installed slide would comply with particular performance requirements included in a standard.

2. Construction Requirements

Section 7(a)(2) of the Act also authorizes the Commission to establish requirements as to "construction" of consumer products. OGC believes installation of swimming pool slides is not part of their construction. The term construction is not defined in the Act or the legislative history of the Act. Black's Law Dictionary defines the term as meaning in relevant part: 2/

> "The creation of something new, as distinguished from the repair or improvement of something already existing.... The act of fitting an object for use or occupation in the usual way, and for some distinct purpose.... See Construct." (Black's Law Dictionary, 4th ed. 386)

Construct is defined as:

> To build; erect; put together; make ready for use.... To adjust and join materials, or parts of, so as to form a permanent whole.... To put together constituent parts of something in their proper place and order...." (Black's Law Dictionary, 4th ed. 386).

1/ This analysis is discussed in greater detail below under section B, Manufacture of The Product.

2/ These definitions are the same used by the Bureau of Compliance in its memo at Tab C of the Briefing Package.

Installation is defined in relevant part, as:

> "Installation of machinery means to place in position where it will reasonably accomplish purposes for which it is set up...." (Black's Law Dictionary, 4th ed. at 939).

In view of the foregoing definitions, BCM concludes in Tab C of the Briefing Package, that the Commission has jurisdiction over the installation of pool slides. BCM states:

> "Construction includes the building, the putting together, the making ready for use and the putting together of constituent parts of something in their proper place and order -- the installation. Therefore, in the case of swimming pool slides "construction" includes "installation."

We believe that the definitions of "construction," "construct" and "installation" can be interpreted to support the conclusion that installation is not part of the construction of a swimming pool slide. The definition of "construction" and "construct" concern the building of the product - the act of fitting an object for use. We submit this means ensuring, for example, that Part A of the product is attached to Part B and B is connected to C. The installation of the product, however takes place subsequent to the construction of the product-the placing of the product in position to accomplish the purpose for which it is set up [(or constructed)]

B. Manufacture of the Product.

Any consumer product safety standard issued under the CPSA is enforced in part through the provisions of section 19(a)(1) which makes it unlawful for any person to "manufacture for sale, offer for sale, distribute in commerce, or import into the United States any consumer product which is not in conformity with an applicable consumer product safety standard" under the Act.

The legislative history of section 19(a)(1) indicates that the language of that section is intended to insure that the act may apply to each stage of the process followed

in the manufacture and distribution of consumer products. (H.R. Rep. No. 92-1153, 92d. Cong. 2d Sess 45-46 (1972)) The term "manufacture" is defined in section 3(a)(8) of the Act as including "to manufacture, produce or assemble." OGC believes that installation of swimming pool slides is not part of the manufacture of such slides.

The terms "manufacture," "produce" and "assemble" are not further defined in the Act. Black's Law Dictionary defines these terms as follows:

> manufacture (v) - "the process of making products by hand or machinery."
>
> > (n) "The process or operation of making wares or any material produced by hand, by machinery or by other agency; anything made from raw materials by the hand, by machinery or by art."
>
> produce - "to bring forward; to show or exhibit."
>
> assemble - "when applied to a machine, 'assemble' means to collect or gather together the parts and place them in their proper relation to each other to constitute the machine."

Webster's International Dictionary defines these terms similarly as:

> manufacture - "something made from raw materials by hand or by machinery."
>
> produce - "to give being, form or shape to: make often from raw materials."
>
> assemble - "to bring together as (a) to put or join together...in an orderly way with logical selection or sequence (b) to fit together various parts of so as to make into an operative whole."

In view of the foregoing definitions, we believe the term manufacture does not include the installation of swimming pool slides. Further the term manufacture as defined in the CPSA and in dictionaries does not specifically include

"to install" as part of the definition. Similarly, the term "distribute in commerce" as defined in the Act does not include the installation of a swimming pool slide. In addition, the offering for sale of a slide would not in our view, include the installation of a swimming pool slide. Installation of the slide is in essence a service and the Commission does not appear to have the authority to regulate directly the sale of a service. Rather, the Commission's authority in the context of a consumer product safety standard, is restricted to the regulation of the swimming pool slide. Regulation of the installation of the slide is an area that has inherently been regulated by the states under their general police powers rather than by the Federal Government under its commerce clause powers. Nevertheless, the Commission should decide whether it believes the installation of swimming pool slides is part of the manufacture of the product or part of the construction or performance of the product.

In order for a product to be in violation of a safety standard under the CPSA it must be in violation of the standard when it is manufactured for sale, offered for sale, or distributed in commerce or imported into the United States. If the installation of a swimming pool slide occurs subsequent to its being manufactured for sale, offered for sale, distributed in commerce or imported into the United States, failure to comply with an installation requirement would not appear to be a violation of section 19 of the Act.

If the Commission agrees that it has no authority to directly regulate the installation of swimming pool slides in this standard, we suggest the language in the Preamble, pages 4-8 discussing this issue be slightly changed. We believe the language is too broad in saying the Commission never has authority to regulate installation of consumer products in mandatory safety standards. There may be some cases in which CPSC is able to set requirements as to installation; for example, when the Commission finds that the installation of a the product is a part of the manufacture of the product.