



# LPI TECH LETTER

LIGHTNING PROTECTION INSTITUTE

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## Lightning Protection Industry Lawsuit In the United States District Court for the District of Arizona

*This is not intended to be a complete review of all items associated with the LPI involvement in the lightning protection industry lawsuit. We are referencing items from the court records dated October 23, 2003 & October 7, 2005 for clarification of various member questions regarding the process. For full wording of the proceedings, please refer to the actual court documents posted on our website under (non-compliant) systems. As the court record states - "This case presents a variety of complex antitrust and false advertising issues in dispute among the parties, all participants in the lightning protection industry."*

### TIMELINE (in Summary)

**1990** - NFPA forms technical committee (the "781 Committee") to investigate lightning protection systems using Early Streamer Emission (ESE) technology. The 781 Committee is to determine appropriateness of a standard for ESE systems. Proponents claim ESE air terminals function differently than conventional air terminals. ESE terminals produce greater levels of ionization at an earlier time before an imminent strike than do conventional air terminals. Other claims and benefits over conventional lightning protection methods are also cited.

**Spring 1993** - The 781 Committee drafted a proposed standard for ESE systems, and circulated for comment.

**November 1993** - A vote of NFPA's general membership meeting in Phoenix took place. Several representatives from the lightning protection industry actively lobbied against adoption of this Standard, including passing out information outside the meeting hall and speaking on the floor. An "overwhelming" vote was made at the general membership meeting to "return the document to committee for further investigation."

**December 1993** - Lightning Preventor of America filed a complaint with the Standards Council of NFPA to reject the vote and issue 781 as a standard.

**January 1994** - The Standards Council issues decision that NFPA rules were not broken, deferring further action pending an independent third-party review.

**Summer 1994** - National Institute of Science & Technology (NIST) conducts independent review, concluding "it is nearly impossible to make quantitatively meaningful statements or judgments about the performance of ESE devices in comparison to conventional Franklin rods." It states, "The precise amount by which this [ESE] enhancement in streamer initiation improves the lightning attraction efficiency of an air terminal remains questionable. There is reason to doubt that it significantly extends the maximum range of protection." NFPA Standards Council reviews this information at its July meeting along with individual comments and issues decision that there was insufficient technical evidence to justify a new standard. 781 Technical Committee is disbanded.

**December 1996** - plaintiffs initiated lawsuit, naming NFPA among defendants.

**October 1998** - plaintiffs settled with NFPA, releasing them from all claims of liability in exchange for a reconsideration of its decision to not issue NFPA

781 NFPA commissions another independent third-party investigation.

**September 1999** - "Bryan Panel" issues a report in September 1999, which is critical of the scientific basis for both ESE technology and conventional systems.

**April 2000** - The Standards Council again issued a decision not to adopt NFPA 781. (Note: In parallel proceedings, plaintiffs attack validity of NFPA 780 before the Standards Council, proposing withdrawal due to lack of supporting scientific evidence. Plaintiffs claimed NFPA used disparate and discriminatory criteria in evaluating 780 & 781. In 1995, the Standards Council denied a request to withdraw 780, but in 2000 they considered withdrawing 780 unless they were provided with "adequate substantiation" of its "scientific validity." NFPA received at least two reports - a Federal Interagency Lightning Protection User Group (the "Interagency Report"), and a report by the Committee on Atmospheric and Space Electricity of the American Geophysical Union ("AGU Report"), and determined to retain NFPA 780.)

**October 2001** - Standards Council issues decision stating: "no disparate treatment of ESE"; "the Council has given the subject of ESE lightning protection lengthy and, indeed, unprecedented consideration, even after the proposed standard for ESE failed to receive the support of the NFPA codes and standards development process"; "claims of vastly superior performance of ESE terminals over conventional terminals simply had not been validated."

**October 2001** - In contrast to above, the council votes to continue its project on conventional lightning protection systems because: "NFPA 780 has repeatedly, unflinchingly, and overwhelmingly received the support of the NFPA codes and standards development process"; "No reasonable or credible arguments have been made to undermine the independent reports and analyses or to cause the Council to question the conclusions of the scientists, engineers and safety experts who authored them." "There has been no disparate treatment."

**October 2005** - Court issues Injunction and Order enjoining and restraining Plaintiffs in areas of advertising and marketing, including "enhancement" claims describing ESE air terminals.

**February 2006** - LPI Executive Board votes to settle LPI portion of lawsuit with Plaintiffs. All parties sign settlement document in May 2006. Confirmation documents received in the LPI office in July 2006.

#### Lawsuit Plaintiffs

- A) Heary Brothers Lightning Protection Co., Inc. ("Heary Bros.")
- B) Lightning Preventor of America, Inc. ("LPA")
- C) National Lightning Protection Corp. ("NLPC")
- D) In or about 2001, LPA merged into and became a division of Heary Bros. ("Heary/LPA")

#### Lawsuit Defendants

- A) Lightning Protection Institute ("LPI")
- A) Thompson Lightning Protection, Inc. ("Thompson")
- B) Allan Steffes ("Steffes") – Chairman and representative of Thompson
- C) East Coast Lightning Equipment, Inc. ("East Coast")
- D) Charles Ackerman ("Ackerman") – President of East Coast
- E) National Fire Protection Association ("NFPA") – settled in October 1998

#### Filed Dec. 20, 1996, the plaintiffs sue defendants on several counts:

- a) Count I – Sherman Act (all defendants)
- b) Count II – Lanham Act (Thompson, Steffes, and East Coast)
- c) Count III – common law claims for unfair competition, product defamation, and civil conspiracy (all defendants)
- d) Count IV – alleges common law interference with contractual relations (East Coast)
- e) East Coast filed a Counterclaim against all plaintiffs alleging violations of the Lanham Act.
- f) The key issues in the dispute became plaintiffs' Sherman Act claim (Count I) and East Coast's Lanham Act Counterclaim.

**IN OCTOBER 2003**, the U.S. District Court ruled that in order to prevail in its claim under the Sherman Act (Count I), the plaintiffs must establish three elements: "1) an agreement or conspiracy among two or more persons or distinct business entities; 2) by which the persons or entities intend to harm or restrain competition; and 3) which actually injures competition."

Plaintiffs identified two sets of allegedly improper actions by defendants at the 1993 NFPA meeting –

distribution of handouts before the vote containing false or misleading statements, and statements by defendants and their allies on the floor during debate that were false or misleading. The Court found that there was insufficient evidence that distribution of handouts, standing alone, so undermines the fairness of a standard-setting process to form the basis for antitrust liability.

Contending that information contained in the handouts was false and misleading, the Court concluded that

plaintiffs identified at most three statements to the Court that were potentially by law false or misleading.

To establish causation for the failure to adopt NFPA 781 the Court held that Plaintiffs must show, 1) that Defendants' actions at the November 1993 meetings actually changed the outcome of the membership vote; and 2) that the 1993 membership vote was the but-for cause of the Standards Council's decision to not issue NFPA 781. The Court concludes that plaintiffs can not establish either saying,

**"Plaintiffs offer no case law to support the argument that a jury could infer causation from improper conduct alone, nor was the Court able to find any. For one, there is no record evidence of any accusative effect at all, merely speculation by the Plaintiffs. Second, there are many other possible contributing factors, including the recorded objections to the 781 Committee Report, as well as the lobbying and arguments made by Defendants before the vote that were not "improper". Indeed, the crux of Defendant's arguments against 781 is that the ESE technology simply does not work as claimed, an argument that even Plaintiffs do not dispute as "improper". In short, Plaintiffs have no evidence that the allegedly improper acts influenced the vote at all, much less evidence to support that Defendants' acts were the but-for cause of the vote.**

The Court ruled that the evi-

dence shows that there are simply too many intervening causes to the Plaintiffs' alleged antitrust injury. The NFPA has repeatedly decided, based on independent reports of lack of scientific proof, to not issue 781, and Defendants are not responsible for the NFPA's actions.... Plaintiffs must show that the NFPA relied upon the "consensus" of the membership vote in order to show causation, even though the NFPA claims it relied on the consensus of the scientific community (i.e., through the availability of scientific proof)."

As to East Coast's Lanham Act Counterclaim against Plaintiffs, the Court held East Coast must prove five elements concerning false statements, deception, and injury to prevail on their claim.

**THE COURT GRANTED** summary judgment on East Coast's allegations in its Counterclaim, finding that:

- Plaintiffs advertise independent testing of their ESE products in a misleading fashion
- Plaintiffs' advertising relies on a misleading "International Standard" for ESE products
- Plaintiffs offer financial guarantees for ESE systems that are misleading and they cannot honor
- Plaintiffs make false statements about East Coast's products
- Plaintiffs promulgate project specifications for ESE products, which are misleading for reasons related to the above allegations

East Coast argued that two particular claims constitute literal false

advertising: 1) ESE devices provide a specific and measurable zone of protection, 2) claims that ESE systems can protect against lightning strikes in open spaces. These two claims are interrelated, because Plaintiffs claim they can protect from lightning strikes in open spaces because the zone of protection extends to cover those spaces.

East Coast relied primarily on the expert report of Dr. Martin Uman as to the issue of unreliability, who concludes: "Based on over 35 years experience in lightning, laboratory spark, and gaseous electronics research, there is no basis for the claim that systems using so-called 'early streamer emission' (ESE) air terminals provide superior lightning protection to the protection provided by a standard Franklin rod system as described in NFPA 780." He also notes that "the ESE theory is rejected by the majority of scientists in the field of lightning physics and protection; three recent papers in peer-reviewed journals by internationally acknowledged experts severely criticize the ESE approach; and the claims and experiments of ESE proponents have not been presented by them for rigorous peer review in appropriate scientific journals." Finally, he indicates "the use of ESE rods based on claims of relatively-long collection distances to protect the recreationists in a large outdoor area invites the death of the recreationists if the ESE claims of protected area are not valid." Finding no admissible evidence to controvert the expert testimony of Dr. Uman, the Court granted summa-

ry judgment in part against the Plaintiffs. The Court ruled that Plaintiffs' claims that their ESE products provide a measurable zone of protection and protect against lightning strikes in open spaces are not supported by tests sufficiently reliable to support those claims, and are "literally false" under the Lanham Act." Plaintiffs originally sued East Coast on Lanham Act claims (Count II), common law unfair competition claims (Count III), and interference with contract (Count IV), and sued LPI on Count III as well. East Coast and LPI moved for summary judgment on these claims, and Plaintiffs conceded all of them, so the Court granted these motions. Thompson & Steffes motion for summary judgment on Count II & III was granted. The Court ordered that Defendant's Motion for Summary Judgment (Count I) No Damages & Lack of Proof of Causation is granted. East Coast is further ordered to submit a proposed form of Judgment regarding the Counterclaim, including a proposed injunction against Plaintiffs.

**In October 2005, the Court issued their Injunction and Order of the Court which enjoins and restrains the Plaintiffs, their successors, officers, agents, employees, dealers, distributors, and attorneys and on all persons, partnerships or corporations in present or future active concert or participation with the Plaintiffs or any other person, partnership or corporation acting on behalf of the Plaintiffs, from**

certain advertising practices surrounding ESE product claims. The term "advertising" shall encompass oral and written statements made in the context of commercial advertisement or promotion of Plaintiffs' ESE air terminal products and systems designed to influence even a single potential customer, or recommend the purchase of such ESE air terminal products and systems.

Plaintiffs are enjoined and restrained from advertising the following with regard to their products:

- Their ESE lightning protection system provides a measurable zone of protection, greater than systems installed in accordance with NFPA 780; and/or that the system can function effectively to protect open spaces.
- They sell an "improved", "enhanced", or "more efficient" lightning protection system utilizing air terminals that rely on calculations of an enhanced range of protection.

Language not allowed with regard to enhanced air terminals marketed, and/or sold by Plaintiffs (including but not limited to the "Early Streamer

Emission" air terminal product, the "Electronically Activated Streamer Emission" air terminal product, so-called "Active" air terminal products, "Radioactive" air terminal products, and "Ionizing" air terminal products):

- a) Is accepted by Underwriters Laboratories (UL), the National Fire Protection Assoc. (NFPA), the Institute of Electrical and Electronics Engineers (IEEE), the International Electrotechnical Commission (IEC), the National Electrical Code (NEC), and/or the Lightning Protection Institute (LPI).
- b) Has been tested and certified by a private testing lab to provide a measurable zone of protection greater than systems installed in conformance with NFPA 780
- c) Is able to protect open areas, including but not limited to amusement parks, golf courses, stadiums, and playing fields.

Plaintiffs were ordered to file with the Court a report setting forth in detail the manner and form in which each Plaintiff has complied with the Order, includ-

ing copies of all advertising and promotional material demonstrating compliance. Plaintiffs were also to post a copy of this Injunction and Order on Plaintiffs websites and other sources of electronic advertising.

#### **Appeal of Arizona Court's Decision**

*The Plaintiffs filed a Notice of Appeal of the Court decision in November 2005. The court had resolved the issues in LPI's favor, and it was determined that nothing further could be accomplished by the organization continuing in the process. The LPI Executive Board voted to settle our portion of the lawsuit with the Plaintiffs, and all parties involved signed a settlement document in May 2006 (confirmation documents received in the LPI offices in July 2006). It is our understanding that Thompson Lightning Protection and Steffes have settled on their portion of the lawsuit. It is our understanding that East Coast and Plaintiffs continue through an Appeal process, based on the decision and Counterclaim and resultant Injunction and Order of the Court regarding the advertising of ESE products.*