UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK
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VERIZON NEW YORK, INC., and LONG ISLAND LIGHTING COMPANY d/a/a LIPA,

Plaintiffs,

-against-

THE VILLAGE OF WESTHAMPTON BEACH, THE VILLAGE OF QUOGUE and THE TOWN OF SOUTHAMPTON,

Defendants.
----------X

CV11-0252

(LDW)
(AKT)

DEFENDANT VILLAGE OF QUOGUE'S CONCLUSIONS OF LAW

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POINT I

LIPA LACKS THE AUTHORITY TO ENTER INTO AGREEMENTS ALLOWING THE ATTACHMENT OF LECHIS TO ITS POLES BECAUSE SUCH AN AGREEMENT WOULD BE BEYOND ITS LIMITED POWERS AS SET FORTH IN ITS ENABLING STATUTE, PUBLIC AUTHORITIES LAW TITLE I-A, SECTION 1020.

LIPA was established by Title 1-A of the Public Authorities Law ("LIPA Act") as a publicly owned power authority. The legislature declared, among other things, that:

> Constantly escalating and excessive costs of electricity in the counties of Suffolk and Nassau and that portion of the county of Queens served by the Long Island lighting company (hereinafter referred to as the "service area") pose a serious threat to the economic well-being, health and safety of the residents of and the commerce and industry in the service area.
>
> There is a lack of confidence that the needs of the residents and of commerce and industry in the service area for electricity can be supplied in a reliable, efficient and economic manner by the Long Island lighting company (hereinafter referred to as "LILCO").
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> Such excessive costs and lack of confidence have deterred commerce and industry from location in the service area and have caused existing commerce and industry to consider seriously moving out of the service area.
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> * * *
>
> For all of the above reasons, a situation threatening the economy, health and safety exists in the service area.
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> * * *
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> Such matters of state concern best can be dealt with by replacing such investor owned utility with a publicly owned power authority. Such an authority can best accomplish the purposes and objectives of this title by implementing, if it then appears appropriate, the results of negotiations between the state and LILCO. In such circumstances, such an authority will provide safe and adequate service at rates which will be lower than the rates which would otherwise result and will facilitate the shifting of investment into more beneficial energy demand/energy supply management alternatives, realizing savings for the ratepayers and taxpayers in

> the service area and otherwise restoring the confidence and protecting the interests of ratepayers and the economy in the service area. Moreover, in such circumstances the replacement of such investor owned utilities by such an authority will result in an improved system and reduction of future costs and a safer, more efficient, reliable and economical supply of electric energy. The legislature further finds that such an authority shall utilize to the fullest extent practicable, all economical means of conservation, and technologies that rely on renewable energy resources, cogeneration and improvements in energy efficiency which will benefit the interest of the ratepayers of the service area.

Public Authorities Law §1020-a.

LIPA's purpose is to provide safe and adequate service at lower rates to provide an improved system, reduction of future costs and a safer, more efficient, reliable and economical supply of electric energy. Public Authority Law §1020-a. LIPA's authority is limited to "all the powers necessary or convenient to carry out the purposes and provisions of the Long Island Power Authority Act." Public Authority Law §1020-f.

Those powers include:

> "h) To make and execute agreements, contracts and other instruments necessary or convenient in the exercise of the powers and functions of the authorities under this title,
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> * * *
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> (p) To negotiate and enter into agreements with trustees or receivers appointed by United States bankruptcy courts or federal district courts or in other proceedings involving adjustment of debts and authorize legal counsel for the authority to appear in any such proceedings;
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> * * *
>
> (r) To enter into agreements to purchase power from the power authority of the State of New York, the state, any state agency, any municipality, any private entity, or any other availabl3e source at such price or prices as may be negotiated;
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> * * *
>
> (s) To enter into management agreements for the operation of all or any of the property or facilities owned by the authority;

* * *

> w) To enter into agreements to pay annual sums in lieu of taxes to any municipality. . .”
>
> Public Authorities Law §1020-f

As a creature of statute, LIPA lacks powers that are not granted to it by express or necessarily implicated legislative delegation. Matter of Flynn v. State Ethics Comm., 87 N.Y.2d 199, 202, 638 N.Y.S.2d 418, 661 N.E.2d 991 (1995)(The Court of Appeals declined to extend the Ethics Commission’s authority to include the imposition of a fine as a penalty as beyond the powers granted to this narrowly invested entity.) ; Abiele Contracting, Inc. v. New York City School Construction Authority, 91 N.Y.2d 1, 666 N.Y.S.2d 970, 689 N.E.2d 864 (1997)(The New York City School Construction Authority exceeded its authority to determine legal issues and to bind a contracting agency.).

The Construction Authority (SCA) in Abiele, like LIPA, acts pursuant to Public Authorities Law enabling statutes that give the SCA power to “make and execute contracts” (Public Authorities Law Section 1728) and to also “do any and all things necessary or convenient to carry out and exercise the powers given and granted by this section” (Public Authorities Law Section 1728(17)). The New York State Court of Appeals determined that this enabling language was a narrow grant of power to make and execute contracts and that the general exhortation to “do all that is necessary or convenient to carry out and exercise the powers given” did not extend the agency’s powers to include the authority to disqualify firms from bidding on its contracts. Abiele, supra, 91 N.Y.2d at 11, 666 N.Y.S.2d at 974, 689 N.E.2d 868.

The LIPA Act contains nearly identical language, “. . . the authority shall have all of the powers necessary or convenient to carry out the purposes and provisions of this title.” As the Court of Appeal held in Abiele, supra, this language is construed narrowly. Contrary to LIPA’s

contention, as a publicly owned authority created by statute, it solely has the powers necessary to provide safe, adequate and economical electric services within its service area. LIPA lacks the authority to enter into contracts to attach lechis to its utility poles since such contracts are not granted by express statutory provisions nor are they implicated by the enabling statute, since the contracts are not related to LIPA's purpose to provide efficient, reliable and economical electricity. 2007 Op. Atty. Gen. 31, 2007 WL 2966815.; Abiele, supra. It is an uncontradicted and stipulated fact that **"the lechis proposed to be attached to Verizon's and LIPA's poles do not contribute to the generation or physical distribution of electricity, cable, telephone, internet, or other utility or communications service."** (Joint Stipulation, No. 17).

Actions not related to LIPA's powers, duties or purposes to provide a more efficient, reliable and economical supply of electricity fall outside of LIPA's authority. Public Authorities Law Section 1020-a; 2007 N.Y. Op. Atty. Gen. 31 (Financial contributions to charities not directly related to one of LIPA's powers, duties or purposes are not authorized). See also: Flynn, supra, 87 NY.2d 199, 204, 638 N.Y.S.2d 418, 421.

LIPA's agreement to attach lechis to its utility poles is *ultra vires* and must be set aside. Application of 2222 Management Corp./Katz Realty Management v. City of New York, 5 Misc.3d 1032(A), 799 N.Y.S.2d 165 (2004).

POINT II

IN ADDITION TO LACKING THE AUTHORITY TO ENTER INTO AGREEMENTS NOT RELATED TO PROVIDING EFFICIENT, RELIABLE AND ECONOMICAL ELECTRICITY BECAUSE IT IS BEYOND ITS STATED AND IMPLIED POWERS, LIPA ALSO LACKS THE AUTHORITY TO ALLOW LECHI ATTACHMENTS UNDER THE TRANSPORTATION CORPORATIONS LAW §11.

New York State Transportation Corporations Law §11 states the following, in pertinent part:

> 3. An electric corporation and a gas and electric corporation shall have **power to generate, acquire and supply electricity for heat or power in cities, towns and villages within this state, and to light the streets**, highways and public places thereof, and the public and private buildings therein; and to make, sell or lease all machines, instruments, apparatus and other equipment **therefor**, and for transmitting and distributing electricity, to lay, erect and construct suitable wires or other conductors, with the necessary poles, pipes or other fixtures in, on, over and under the streets, avenues, public parks and places in such cities, towns or villages, with the consent of the municipal authorities thereof, and in such manner and under such reasonable regulations, as they may prescribe.
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> * * *
>
> 3-b. The construction, use and maintenance by an electric corporation of transmission, distribution and service lines and wires in, over or under any street, highway or public place and the construction, use and maintenance by a gas corporation of transmission, distribution and service pipes, conduits, ducts or other fixtures in, over or under any trees, highway or public place, **as may be necessary for its corporate purposes, are hereby declared to be public uses and purposes**.

Transportation Corporations Law §11 (McKinney, Volume 62, 2013)

LILCO, was an electric corporation that was granted a right or privilege to erect and maintain its utility poles in the Village of Quogue rights of way for the public purpose of delivering electricity to the residents of Quogue. Transportation Corporations Law §11. LIPA's privilege which was derived from Transportation Corporations Law Section 11 is akin to a license to be able to perform certain acts upon the land without possession of an interest therein. Kohman v. Rochambeau Realty and Development Corp., 17 A.D.3d 151, 153 (1st Dept. 2005). LIPA's privilege or franchise is limited to the provisions of Transportation Corporations Law §11.

Transportation Corporations Law §11 did not grant to LILCO the privilege to construct, use or maintain its lines for a purpose other than for transmitting and distributing electricity.

Transportation Corporations Law §11. Clearly, when the statute was enacted by the state legislature in 1909 it was not intended to permit the utilities to license portions of the poles that were erected and maintained on public land for private use. The purpose of the franchise was to enable the distribution of electricity to the public, not to hang banners and devices for private use.

POINT III

VERIZON DOES NOT HAVE THE AUTHORITY TO ALLOW ATTACHMENTS OF PRIVATE OBJECTS TO UTILITY POLES WHEN THE OBJECTS (LECHIS) ARE NOT NECESSARY OR RELATED TO THE DELIVERY OF TELEPHONIC/ TELECOMMUNICATIONS SERVICES.

Verizon is a telephone corporation as defined by New York Transportation Corporations Law §25. New York Transportation Corporations Law §25 defines a "telephone corporation" as "a corporation organized to construct, own, use and maintain a line or lines of electric telephone wholly within or partly without the State, or to acquire and own any interest in any such line or lines, or any grants therefor or for any or all of such purposes."

Verizon claims that its authority to enter into pole attachment agreements arises out of Transportation Corporations Law §27. New York State Transportation Corporations Law §27 states that

> "Any such corporation may erect, construct and maintain its necessary stations, plants equipment or lines"

Verizon's authority under Transportation Corporations Law, like LIPA's limited authority under Transportation Corporations Law Section 11, does not extend to contracting to attach objects that are not necessary to its delivery of telephonic services. Verizon has no authority to enter into agreements for the attachment of lechis to poles erected on public land pursuant to Transportation Corporations Law §27, because lechis are not necessary to Verizon's

ability to provide telephonic services. Transportation Corporations Law §27 merely grants Verizon a license to maintain its telephonic facilities in the streets of Quogue. New York Telephone Co. v. Town of North Hempstead, 41 N.Y.2d 699-700; Rochester Telephone Corp. v. Village of Fairport, 84 A.D.2d 455, 456 (4th Dept. 1982).

The provisions contained within New York State Transportation Corporations Law must be strictly construed against Verizon and LIPA. Franchises are construed to operate as a surrender of no more sovereignty than is expressly granted therein. Syracuse Water Co. v. City of Syracuse, 116 N.Y. 167, 22 N.E. 381 (1889). Accordingly nothing passes by implication except what is necessary to carry into effect the obvious intent of the grant and what is reasonably necessary to the exercise of the franchise. Union Railway Co. of New York City v. New York City, 238 N.Y. 289, 144 N.E. 585 (1924). All reasonable doubt or ambiguity is construed against the grantee. People v. Broadway Railroad Company of Brooklyn, 126 N.Y. 29, 37, 26 N.E. 961 (1981); Rhinehart v. Redfield, 93 A.D. 410, 412, 87 N.Y.S. 789, 790 (2d Dept. 1904)(An act of conveying franchises or special privileges is to be construed most favorably to the people, all reasonable doubts in construction must be solved against the grant.), aff'd 179 N.Y. 569, 72 N.E. 1150 (1904); Holmes Electronic Protective Co. v. Williams, 228 N.Y. 407, 447 (1920) ("Every public grant of property or of privileges or franchises, if ambiguous is to be construed against the grantee and in favor of the public").

No interpretation of Sections 11 or 25, or 27 of the Transportation Corporations Law even hint at permitting the utilities to allow private entities to attach private objects that do not contribute to the generation or physical distribution of electricity, cable, telephone, internet or other utility or communications services (See Stipulated Fact, "17"). The Utilities cannot and have not cited any case that supports their position that they have authority to affix private

objects to their utility poles on public land that are not necessary to the maintenance or distribution of electricity or telephone communications.

The attached examples of agreements with other organizations to allow temporary attachments of private objects to LIPA poles which are not located on the streets of the Village of Quogue lack any probative value. The fact that those agreements exist, does not support that they are legal or that LIPA has the authorization to enter into such agreements.

POINT IV

NEITHER LIPA NOR VERIZON CAN ATTACH OBJECTS THAT ARE NOT RELATED TO THEIR PUBLIC PURPOSE WITHOUT PERMISSION FROM THE VILLAGE OF QUOGUE.

Under Village Law § 6-602, the streets and public grounds of the village are under exclusive control and supervision of the Board of Trustees. Village Law, § 6-602 (McKinney, 2012). Village Law § 6-602 provides that:

> The streets and public grounds of the village constitute a separate highway district and are under exclusive control and supervision of the board of trustees…

Village Law, § 6-602 (McKinney, 2011).

The Utilities currently possess a right or privilege to erect and maintain their poles in the Village rights of way for the public purpose of delivering electricity and telephonic services, respectively, to the residents of Quogue. New York Telephone Company v. Town of North Hempstead, 41 N.Y.2d 691, 698 (1977); Transportation Corporation Law §§ 11, 25 and 27 (McKinney, 1996, 2011).

When LIPA chooses to erect a pole necessary to its authority to generate, acquire and supply electricity within a municipality, it can only do so with the consent of the municipal

authorities. Transportation Corporations Law §11(3), Long Island Lighting Co. v. Simonson, 272 A.D. 943, 72 N.Y.S.2d 52 (2d Dept. 1947). When Verizon chooses to erect a pole necessary to its authority to construct, own, use and maintain electric telephone lines within a village, it can only do so after having obtained permission from the trustees of the villages. Transportation Corporations Law §§25, 27. The Village has authority to regulate the manner in which telephone lines are to be constructed and maintained. City of Rochester v. Bell Telephone Co., 52 A.D. 6, 64 N.Y.S. 804 (4th Dept. 1900). Ultimately, the Village has paramount control of its streets, and an unauthorized use of them by individuals is illegal. Green v. Miller, 249 N.Y.88 (1928).

The Board of Trustees may grant rights and franchises or permission to use the streets, for any specific purpose upon such terms and conditions as it may deem proper and as may be permitted by law. Village Law, § 4-412(3)(6) (McKinney, 2012). Section 4-412(3)(6) specifically grants the board of trustees the power to:

> ". . . Grant rights and franchises or permission to use the streets … [and] public places or any part thereof or the space above or under Them . . . for any specific purpose upon such terms and conditions as it may deem proper and as may be permitted by law"

Section 158 of the Quogue Village Code provides the following:

> **§ 158-1 Encroachments and projections not allowed.**
>
> No encroachment or projection upon, into or over any public road or street in the Village of Quogue shall be made or maintained.
>
> **§ 158-2 Definitions.**
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> As used in this article, the following terms shall have the meanings indicated:
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> ENCROACHMENT
>
> Any private use of any portion of a public right-of-way through any structure or device, whether upon, above or

> under said right-of-way; but nothing herein contained shall be construed to apply to any vehicle or any easement now legally owned by any public service corporation. The term "encroachment" also includes any private use of any portion of a public right-of-way for the display and sale of any products, goods, wares or merchandise.
> [Amended 7-20-2000 by L.L. No. 3-2000]
>
> PROJECTION
> Any part of any building, structure or devise erected upon private property or attached to any structure or device erected upon private property.
>
> PUBLIC ROAD OR STREET
> The area between the extreme lines of any public right-of-way in this Village, including any state or county road or highways as well as a Village road or street.

The East End Eruv Association ("EEEA") filed an application with the Quogue Village Board dated January 16, 2012 to allow the placement of lechis on certain utility poles located in the public rights of way. By decision dated May 18, 2012, the board of trustees unanimously denied the association's application. (See Decision, Exhibit J). The EEEA was required to appeal this decision by means of an Article 78 Proceeding within 60 days of the decision. To date the EEEA has not appealed this decision.

The Utilities cannot allow the EEEA to attach lechis to their utility poles because the Village board of trustees, which has exclusive control and supervision of its streets, has denied the EEEA application. Even the examples of agreements for attachment of private objects to LIPA poles have municipal approval.

CONCLUSION

For all of the reasons stated hereinabove, LIPA and Verizon lack the authority to enter into agreements to allow the attachment of lechis to their utility poles in Village Quogue streets.

Respectfully submitted,

/S/

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