UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

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VERIZON NEW YORK INC. and LONG ISLAND LIGHTING COMPANY d/b/a LIPA,

Plaintiffs,

-against-

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

Defendants.

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CV-11-0252 (LDW)(AKT)

VILLAGE OF WESTHAMPTON BEACH PROPOSED CONCLUSIONS OF LAW AS TO VERIZON'S AND LIPA'S LACK OF AUTHORITY TO ENTER INTO LICENSE AGREEMENTS FOR THE ATTACHMENT OF LECHIS

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LIPA AND VERIZON LACK THE AUTHORITY TO ISSUE LICENSES TO A PRIVATE ENTITY TO ATTACH ITEMS TO THE UTILITY POLES FOR PRIVATE PURPOSES

The Long Island Power Authority ("LIPA") and Verizon have entered into agreements to allow East End Eruv Association ("EEEA"), a private entity, to attach items to utility poles in Westhampton Beach for the EEEA's private purposes. See Stipulation of Undisputed Facts, ¶¶ 2-5, 10-12. These agreements violate New York State law, which provides that the streets in Westhampton Beach can only be used for public or municipal purposes and for the benefit of the general public. Additionally, the poles are constrained by license agreements that prohibit Verizon and LIPA from sublicensing their poles for a private purpose. And even if Verizon or LIPA were not limited by such franchise agreements, they would lack authority the statutory authority to allow the attachments of lechis to their poles. New York Transportation Law § 27 and Public Authorities Law §§ 1020–a, *et seq.* (the "LIPA Act") permit Verizon and LIPA to use their property – here, the utility poles – only to serve their respective purposes, their *raisons d'etre*. The attachment of large plastic lechi strips to telephone and utility poles does not facilitate the transmission of telephone signals, Verizon's purpose, or the transmission of electricity, LIPA's purpose. See Stip., ¶ 17. The proposed LIPA and Verizon agreements with the EEEA are both statutorily and contractually *ultra vires*. For these reasons, the utilities may not grant a sublicense to the EEEA allowing that private group to attach permanent items to their utility poles for private and religious purposes.

POINT I: VERIZON AND LIPA UTILITY POLES ARE UNDER THE CONTROL AND SUPERVISION OF WESTHAMPTON BEACH, WHICH MAY NOT ALLOW THEM TO BE DIVERTED TO PRIVATE USE

LIPA and Verizon have placed poles and other utility structures within the street right-of-way of the Village of Westhampton Beach. Because of its location, this hardware is under the jurisdiction and control of the Village. The government's power to regulate the streets originated in early English common law. In harmony with the ancient rules, New York State, through its Constitution and laws, has delegated to all villages in the State the exclusive control and jurisdiction of the streets and public grounds located within a village pursuant. See Article IX, § 2(c)(6) of the New York State Constitution, § 10 of the Municipal Home Rule Law, and § 6-602 of the Village Law[1]. See New York State Pub. Employees Fed'n, AFL-CIO by Condell v. City of Albany, 72 N.Y.2d 96, 100-101 (1988). The trustees of a village " … hold the fee of streets for the benefit of the whole people, it follows that residents of a particular area … do not possess and cannot be granted proprietary rights to the use of the highways … in priority to or exclusion of use by the general public." People v. Grant, 306 N.Y. 258, 262 (1954). The "public right" to use the streets is "absolute and paramount." See New York State Pub. Employees Fed'n, 72 N.Y.2d at 101.

In City of New York v. Rice, 198 N.Y. 124, 128 (1910), in affirming the lower court's injunction directing the defendant to remove decorative structures located in the street, the New York Court of Appeals held that the city held the public streets in trust. "The trust is *publici juris*, that is for the whole People of the state . . . There is no right in the city to use its property therein, as it might corporate property, nor otherwise than as the legislature may authorize for some public use, or benefit." Id.; see also Lyman v. Vill. of Potsdam, 228 N.Y. 398, 404 (1920)

[1] The state has delegated to villages the exclusive control and supervision of the streets and public grounds since at least 1897. Hungerford v. Vill. of Waverly, 125 A.D. 311, 315 (3rd Dep't 1908).

(finding temporary obstructions located within village streets were permissible only " … provided … the obstructions are not in the nature of permanent structures or encroachments upon and appropriations of the land of the street for private benefit or use.").

Similarly, in Cohen v. City of New York, 113 N.Y. 532, 536 (1889), in finding a municipality had no power to grant a license or permit to an individual for the private use of the street, the Court of Appeals instructed, "a party cannot eke out the inconvenience of his own premises by taking in the public highway." In Thompson v. Orange & Rockland Elec. Co., 254 N.Y. 366, 369 (1930), the Court of Appeals again held that when a municipality owned the fee to the streets "… such municipality may grant the use of the highway for any public or municipal purposes…"

In accordance with these precedents, the Attorney General in 1953 N.Y. Op Att'y Gen 35 found that a village could not allow receptacles in a street right-of-way to be used for bank deposits to a private bank. In its opinion, the Attorney General invoked the well established rule, "The general rule of law is that streets and public highways are held in trust for the public use. Accordingly, a municipality cannot convey or otherwise divert the same." Id.

New York's Village Law also bars the LIPA/Verizon lechi (encroachment) agreements with the EEEA. The Verizon and LIPA utility poles covered by the agreements are within the Village's public streets and rights of way, as the term "streets" is defined in Village Law § 6-600. See Stip., ¶ 16; Donnelly v. Vill. of Perry, 88 A.D.2d 764, 765, 451 N.Y.S.2d 494 (4th Dep't 1982). The poles are, therefore, subject to Village control under Village Law § 6-602, which provides that, "The streets and public grounds of a village … are under the exclusive control and supervision of the board of trustees …." N.Y. Village Law § 6-602.

Since Westhampton Beach has exclusive control and supervision of the streets, it cannot permit them to be diverted to private purposes, and has a right to impose reasonable restrictions upon the use of the utility poles on those streets by LIPA and Verizon. In New Union Tel. Co. v. Marsh, 96 A.D. 122 (3d Dep't 1904), the Third Department stated:

> That the right by a telephone company to use the public streets and highways for its purposes is subject to the reasonable control, supervision and regulation by the authorities of the municipality in which such streets and highways are located, by virtue of and as part of the general police power is well settled.

Id.; see also New York Tel. Co. v. Town of N. Hempstead, 41 N.Y.2d 691, 696 (1977).

In New York Tel. Co. v. Town of N. Hempstead, both New York Telephone Company (Verizon's predecessor) and the Court of Appeals acknowledged that the Town's police power allowed for reasonable regulations. Id. In the case before it, the Court of Appeals held that the Town's police power did not include the right to be a free rider on the utility poles by demanding that the Town's electric street lights be put on the poles without cost. Id.

New York Tel. Co. v. Town of N. Hempstead does not validate the utilities' EEEA agreements. The Court of Appeals addressed nothing remotely close to the situation in this case.

POINT II: VERIZON'S AND LIPA'S AUTHORITY IS LIMITED BY FRANCHISE AGREEMENTS THAT GOVERN THE UTILITY POLES IN WESTHAMPTON BEACH

Verizon and LIPA's utility poles are subject to specific franchise agreements that limit their use of the public right-of-way for utility purposes only. These agreements do not permit the utilities to enter into sublicensing agreements with the EEEA to attach religious objects to the utility poles in Westhampton Beach for private purposes.

LIPA's poles are subject to franchise agreements dating back to 1910. Pursuant to the Transportation Corporation Law, in 1910, the Town Board of the Town of Southampton granted a franchise agreement to Riverhead Electric Light Company for the area west of Quantuck

Creek. See Stip., ¶ 25; Ex. R. In 1911, the Town Board of the Town of Southampton granted to Patchogue Electric Light Company a franchise for the area west of the Speonk River. See Stip., ¶ 26; Ex. S. Based upon these franchises, Riverhead Electric Light Company's franchise covers the area of Westhampton Beach, and that part of the Town of Southampton that is proposed to be part of the *eruv*. See Stip., ¶¶ 25, 26, 32. Thus, some or all of the poles that are proposed to be used for the *eruv* fall within the areas described in the Patchogue and Riverhead franchise agreements. See Stip., ¶ 32. Both agreements provided that the franchise could not be transferred without consent of the Town Board. See Stip., ¶¶ 25, 26.

In 1912, the Southampton Town Board consented to the transfer of the franchise from Riverhead Electric Light Company to either the Patchogue Electric Light Company or Suffolk Light Heat and Power Co. See Stip., ¶ 27; Ex. T. In 1917, the Town Board approved the assignment of the franchise to the Long Island Lighting Company ("LILCO"). See Stip., ¶ 28; Ex. U. In 1964, the Town Board approved the transfer of the franchise from Patchogue Electric Light Company to LILCO. See Stip., ¶ 29; Ex. V.

In 1997, LIPA acquired all the common stock of LILCO and became the owner of LILCO's transmission and distribution facilities *and all of LILCO's electric franchises.* See Stip., ¶ 31; Public Authorities Law § 1020–g[n]; County of Suffolk v. Long Island Lighting Co., 14 F. Supp. 2d 260, 270 (E.D.N.Y. 1998) ("LIPA, has assumed responsibility for discharging the preexisting contractual and judgment obligations of LILCO."); Suffolk County v. Long Island Power Auth., 177 Misc. 2d 208, 214 (Sup. Ct. 1998). LIPA thus acquired the franchise originally granted to Riverhead Electric Light Company.

This franchise – the one originally granted to Riverhead Electric Light Company and eventually transferred to LIPA – sets forth with specificity the authorization for the franchise. It

states that the franchise is for the "… the privilege and right to erect and maintain poles for the support of cross-arms, fixtures and wires and construct and maintain necessary pole lines for supplying electricity for heat, light and power to the inhabitants of said Town … ." See Stip., ¶¶ 25, 30; Ex. R. Both sides agree that *lechis* do not facilitate in any way the generation or physical distribution of electricity. See Stip., ¶ 17. The controlling franchise agreement, therefore, does not permit – and, in fact, bars – the utilities from entering into agreements that allow the EEEA to attach *lechis* to the utility poles. LIPA's agreement with the EEEA is *ultra vires*.

Verizon's authority is similarly limited. Verizon's poles are either subject to agreements that were never executed (and thus provide Verizon with no authority), or, as with LIPA, provide Verizon with limited authority that does not permit attachment of *lechis*. In November 1938, two months after the 1938 Hurricane destroyed most of the homes and other structures on Dune Road in Westhampton Beach,[2] the United States Coast Guard requested and received from the Village of Westhampton Beach a franchise to construct poles on Dune Road for the purpose of maintaining the circuits for the Coast Guard. See Stip., ¶ 33; Ex. W. The franchise agreement had conditions, among them "… (2) Joint use of such poles by the New York Telephone Company and the Long Island Lighting Company shall be permitted by the Coast Guard." See id.[3]

In 1952, at the request of the New York Telephone Company, the Village's Board of Trustees granted New York Telephone Company a franchise to take over and operate the poles on Dune Road. See Stip., ¶ 34; Ex. X. The 1952 Village Board resolution approving the transfer of the franchise indicates that it was subject to the Village Mayor's execution of a franchise

[2] The hurricane was the sixth most costly hurricane in 1998 dollars. See www2.sunysuffolk.edu/mandias/38hurricane

[3] Notably, by seeking out and entering into this agreement, the Coast Guard recognized Westhampton Beach's jurisdiction over the Dune Road location of the poles.

agreement. N.Y. Village Law § 4-406, however, requires that the grant of a franchise to a public service corporation, like the 1952 grant, must to be executed and filed with the village clerk and "… such franchise shall not be operative for any purpose until so executed and deposited." A copy must also be filed in the county clerk's office. Neither Verizon, nor the Village, have located a signed or executed copy of the agreement. See Stip., ¶ 34. Since New York Telephone Company never filed the franchise agreement with the Village, Verizon has no right to or interest in the utility poles on Dune Road and cannot enter into an agreement with the EEEA for the private use of the utility poles on Dune Road. See W. Side Elec. Co. v. Consol. Tel. & Elec. Subway Co., 110 A.D. 171, 177 (1st Dep't 1905) aff'd sub nom. People ex rel. W. Side Elec. Co. v. Consol. Tel. & Elec. Subway Co., 187 N.Y. 58 (1907).

To the extent that Verizon has any right in the utility poles on Dune Road, this right comes from § 27 of the Transportation Corporation Law or from the franchise agreement between the Village and the Coast Guard. Accordingly, Verizon's rights to use the utility poles must be strictly construed and are limited to utility purposes only. Verizon cannot claim any rights under the Coast Guard franchise to use of the utility Dune Road poles for private purposes.

POINT III: VERIZON AND LIPA MAY NOT "SUBLICENSE" THEIR UTILITY POLES FOR PRIVATE PURPOSES

As a general matter, Verizon and LIPA cannot "sublicense" their utility poles. The maintenance of telephone or light poles in a municipal street is mere a license or privilege, not a grant of an interest in real property or an appurtenance to real property. New York Telephone Company v. Town of North Hempstead, 41 N.Y.2d 691 (1977). See also New York Telephone Company v. City of Binghamton, 18 N.Y.2d 152, 272 N.Y.S.2d 359 (1966) and Matter of Consolidated Edison Co. v. Lindsay, 24 N.Y.2d 309, 300 N.Y.S.2d 321 (1969). A license is "a

mere personal privilege to use another's property for a particular purpose." Bruce and Ely, The Law of Easements and Licenses in Land (1988) at § 10.01. Absent an express grant of a power to assign, a licensor may not sublicense or assign its license. Maffetone v. Micari, 205 Misc. 459, 127 N.Y.S.2d 756 (Mun.Ct. 1954). Here, the franchises contain no express power to assign or "sublicense" for any purpose. Thus, Verizon and LIPA lack authority to do so.

Even if the franchises can be "sublicensed," they cannot be sublicensed for private – rather than public – purposes. In Rhinehart v. Redfield, 93 A.D. 410, 414 (2d Dep't 1897) aff'd, 179 N.Y. 569 (1904), the Second Department stated:

> A franchise is a special privilege conferred by government … which does not belong to the citizens of a country generally by common right. … The grant of a franchise presupposes a benefit to the public and an equal right on the part of every member of such public … to participate in this benefit ….

In this case, the franchise granted to LIPA in 1910, the franchise granted to Verizon by Transportation Law § 27, and the 1938 franchise granted to the Coast Guard were for the public benefit of providing electricity and telephone services to the residents of Westhampton Beach. The utilities now propose to enter into sublicensing agreements with the EEEA to confer a private benefit on a private entity, *i.e.*, to confer the benefits of their interest in the public property to a few select members of a private religious group, as opposed to the residents in general, to use the public streets. See Stip., ¶¶ 1-4.

The law requires that the franchise agreements from which the utilities derive their power must be strictly construed. In Syracuse Water Co. v. City of Syracuse, 116 N.Y. 167, 178 (1889), the New York Court of Appeals, holding that the water company did not have an exclusive right to supply water to the city, stated that, "public grants are to be so strictly construed as to operate as a surrender by them of the sovereignty no further than is expressly

declared by the language employed for the purpose of their creation. . . . The grantee takes nothing in that respect by inference." The Court stated that "such exclusive right in the grant of a public franchise cannot rest upon inference, presumption or doubtful construction." Id. at 185. See also W. Union Tel. Co. v. Elec. Light & Power Co. of Syracuse, 178 N.Y. 325, 331 (1904), ("The franchise 'is to be construed in the interest of the public, and hence in favor of the grantor and not, as in ordinary cases, in favor of the grantee'. . . . The plaintiff took nothing by its grant but what was expressly given…").

LIPA's authority to provide electric service in Westhampton Beach is based upon the 1910 franchise agreement with Riverhead Electric Company. Article 5 of the Public Authorities Law, which created LIPA, cannot alter or amend the 1910 franchise agreement, and the State legislation creating LIPA cannot divest Westhampton Beach of its rights under the 1910 franchise agreement. See Skaneateles Waterworks Co. v. Vill. of Skaneateles, 161 N.Y. 154, 166 (1899) aff'd, 184 U.S. 354 (1902).

Additionally, in construing the agreements and § 27 of the Transportation Corporation Law, the Court must consider the context in which the electric easement was issued in 1910, and the context for the Coast Guard franchise in 1938. See Filarsky v. Delia, 132 S. Ct. 1657 (2012).[4] At the turn of the century, the local municipalities were interested in providing electric and telephone service to their residents. There is no evidence to show that the municipal franchises were intended to allow the utility poles to be used by the utility poles for anything else. In the case of LIPA, the grant was specific and limited, allowing LIPA only "to erect, maintain poles for the support of cross-arms, fixtures and wires and construct and maintain

[4] In Filarsky v. Delia, __U.S.__, 132 S. Ct. 1657 (2012), the Supreme Court, in finding that a private attorney retained by a municipality has the same qualified immunity as a municipal employee, stated, "Understanding the protections the common law afforded to those exercising government power in 1871 requires an appreciation of the nature of government at that time." This Court should appreciate the nature of government in 1910 when the Riverhead franchise was executed and in 1938 and 1952 when the New York Telephone franchise was executed.

necessary pole lines for supplying electricity for heat, light and power to the inhabitants of the Town." A *lechi* is none of these. Since this is the same language used by the Southampton Town Board one year later in 1911 when it granted the franchise to Patchogue Electric Light Company, there is nothing ambiguous in the grant, and it does not allow or permit LIPA to enter into a sub-license agreement with EEEA, a private entity to subvert the utility poles for private purposes.

As to Verizon, the law granted to telephone corporations the authority to "… erect, construct and maintain the necessary fixtures for its lines … and … erect, construct and maintain its necessary stations, plants, equipment or lines …." Transportation Corporation Law § 27. A *lechi* is none of them. More generally, there is nothing in this section that permits a private entity for private purposes to attach private items to the utility poles. Section 27 cannot be construed to allow either *lechis* or any private items for a private purpose. The statute allows only attachments "necessary" to achieve Verizon's purpose, *i.e.*, providing telecommunications service to the public at large.

The Village issued the 1938 franchise agreement to the Coast Guard when Dune Road had been destroyed by a hurricane and the Coast Guard sought to reestablish communication. Again, there is nothing in this franchise agreement that would permit the Coast Guard or New York Telephone to allow a private entity for private purposes to attach private items to the utility poles. In addition, this agreement contained specific conditions, including "(2) Joint use of such poles by the New York Telephone Company and the Long Island Railroad Company shall be permitted by said Coast Guard." Westhampton Beach had the right and authority to impose such a limitation upon the grant of the franchise. See W. Union Tel. Co. v. City of Richmond, 224 U.S. 160, 168 (1912); Long Island Lighting Co. v. Shields, 274 A.D. 803 (2d Dep't 1948) aff'd,

299 N.Y. 562 (1949). Not only does § 4-406 of the Village Law prevent Verizon from entering into a sublicensing agreement with EEEA, the limits set forth in the 1938 franchise prevent Verizon from entering into a sub-license agreement with EEEA, a private entity, to attach private items for private purposes on Dune Road.

The clear language of the governing statutes and franchise agreements limits the utilities to use their facilities for utility purposes only, to provide a public benefit for all residents. The utilities may not enter into sublicensing agreements to divert their facilities to a private benefit not shared by all residents. The franchise agreement with Riverhead Electric Light Company dates back over 100 years, the provisions of the Transportation Corporation Law date back over 100 years, and the franchise agreement with the Coast Guard date back over 54 years. They clearly and unequivocally express the limits on the grants given to the utilities, and the utilities and EEEA are now precluded and estopped from attempting to reinterpret them in a way that would allow them to attach *lechis* to their poles for a purely private purpose. See Vickery v. Vill. of Saugerties, 106 A.D.2d 721 (3d Dep't 1984) aff'd, 64 N.Y.2d 1161 (1985).

Based upon the foregoing, Verizon and LIPA's agreements with the EEEA violate the franchise granted to the utilities and are unenforceable.

POINT IV: TRANSPORTATION CORPORATIONS LAW § 27 DOES NOT TRUMP EXISTING FRANCHISE AGREEMENTS AND DOES NOT PROVIDE VERIZON AUTHORITY TO ISSUE LICENSES FOR LECHI ATTACHMENT, A PRIVATE USE

Verizon claims that, franchise agreements notwithstanding, its authority to enter into the sublicensing agreement stems from Transportation Corporation Law § 27, which states, "Any such corporation may erect, construct and maintain the necessary fixtures for its lines … and may erect, construct and maintain its necessary stations, plants, equipment or lines … ." There is

nothing in § 27 that permits Verizon to enter into a sublicense agreement with the EEEA, a private entity, to permit the EEEA to attach items to Verizon's utility poles for private purposes.

Indeed, Verizon's authority under § 27 must be read consistently with the definition of "telephone corporation" under N.Y. Transportation Corporations Law § 25 ("§ 25"), *i.e.*, "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." To exercise authority under § 27, Verizon must act as a "telephone corporation" and for the purpose of providing telephone services, not for the purpose of lending those poles out for private use.

To the extent Verizon relies on Vill. of Carthage v. Cent. New York Tel. & Tel. Co., 185 N.Y. 448 (1906) for the proposition that its authority to issue licenses stems solely from § 27 and that § 27 provides authority for the unlimited use of its poles, this reliance is misplaced. Not only does Carthage not support Verizon's position, but the Court of Appeals subsequently criticized this decision twenty years later in New York Tel. Co. v. Bd. of Educ. of City of Elmira, 270 N.Y. 111, 118 (1936). In addition, the Carthage court found that the former Village Law § 89 - Village Law § 4-412 – permitted "… villages to regulate the erection of telegraph, telephone or electric poles." New York Telephone Company acknowledged its limited authority by, on several occasions, requesting permission from Westhampton Beach to install utility poles in the Village. See Stip., ¶ 2; Exs. L, M.

Verizon also cannot rely on the lower court decision in New York Tel. Co. v. North Hempstead, 86 Misc. 2d 487 (N.Y. Sup. Ct. Nassau Co. 1975) to argue that its authority to divert utility poles to private religious use springs from § 27. This decision addressed whether the attachment by the town of light fixtures to the telephone poles constituted a taking. It did not

address what, if anything else, New York Telephone Company could do with its facilities. Verizon's incredible interpretation of § 27 - that it authorizes *any* conceivable use of its facilities for *whatever* purpose - is against both New York State and United States Supreme Court decisional law governing public franchise grants.

As far back as 1878, the United States Supreme Court in Nw. Fertilizing Co. v. Vill. of Hyde Park, 97 U.S. 659, 666 (1878), a case concerning a state grant of an exclusive right to a corporation stated:

> The rule of construction in this class of cases is that it shall be most strongly against the corporation. Every reasonable doubt is to be resolved adversely. Nothing is to be taken as conceded but what is given in unmistakable terms, or by an implication equally clear. The affirmative must be shown. Silence is negation, and doubt is fatal to the claim. This doctrine is vital to the public welfare. It is axiomatic in the jurisprudence of this court.

Id., accord Pearsall v. Great N. Ry. Co., 161 U.S. 646, 664 (1896). This Supreme Court decision is consistent with the decisional law in New York that the grant by the government of a right to a private entity must be strictly construed against the grantee. Construing § 27 against Verizon, as the Court must, there is no interpretation that would permit Verizon to allow private entities for private purposes to attach private objects to utility poles.

What is more, whatever help Verizon thinks it gets from § 27 is unavailable for the proposed *eruvin* on Dune Road poles. Section 27 by its terms, only applies to the *construction* and the *installation* of equipment by Verizon or its predecessor in interest, New York Telephone Company. The utility poles on Dune Road were constructed and installed by the United States Coast Guard in 1938 pursuant to a franchise granted to the Coast Guard by the Village, and the equipment was transferred to New York Telephone Company in 1954. Although the Village authorized the transfer of the equipment to New Your Telephone Company, no franchise

agreement was ever executed and filed with the Village Clark as required by § 4-406 of the Village Law. Verizon obtained no rights with respect to these utility poles under the 1938 franchise agreement with the Coast Guard. Even if Verizon can claim any rights under the 1938 franchise agreement with the Coast Guard, the use and operation of the utility poles on Dune Road was subject to the limitation in the 1938 franchise agreement that they were to be used only by the Coast Guard, New York Telephone Company, and Long Island Lighting Company. This limitation, the courts instruct, must be construed against Verizon and in favor of the Village. Accordingly, the language in the 1938 franchise agreement prevents Verizon from entering into licensing agreements with the EEEA and renders the current agreements *ultra vires* and void.

Pursuant to its police power over the streets and utility poles in the Village, Verizon can only use its facilities only for the purposes authorized by § 27, which only grants to Verizon a license to maintain its facilities in the streets of Westhampton Beach. See New York Tel. Co. v. Town of N. Hempstead, 41 N.Y.2d at 699-700; New York Tel. Co. v. City of Binghamton, 18 N.Y.2d 152, 162 (1966); Rochester Tel. Corp. v. Vill. of Fairport, 84 A.D.2d 455, 456 (4th Dep't 1982) ("the privilege, authorized by [§ 27 of the Transportation Corporations Law and Village Law § 4-412] grants the utility no property interest in the right of way, only a license to maintain its facilities there"). Since Verizon received only a license to construct its facilities in Westhampton Beach, the terms of § 27 have to be strictly construed against Verizon. See Holmes Elec. Protective Co. v. Williams, 228 N.Y. 407, 447 (N.Y. 1920) ("The principle … is fundamental that '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'"). Section 27 does not authorize sublicensing agreements with the private organizations to permit the placement of private objects on utility poles for private purposes. Therefore, Verizon has no authority to enter into such

agreements, and Westhampton Beach, under its police power, has the right to insure that Verizon complies with the strict terms and conditions of § 27.

POINT V: UNDER THE LIPA ACT, LIPA LACKS STATUTORY AUTHORITY TO ISSUE LICENSES FOR LECHI ATTACHMENT, WHICH ARE NOT RELATED TO THE SUPPLY OF ELECTRICITY

LIPA lacks the statutory authority to issue licenses for private attachments to its utility poles that do not further its purpose in providing electrical services to its customers.

"In 1986, the New York State Legislature created …. [LIPA] to replace the privately-owned Long Island Lighting Company and provide an adequate supply of electricity in a reliable, efficient, and economic manner to consumers in Nassau County, Suffolk County, and a portion of Queens County." In re Long Island Power Auth. Ratepayer Litig., 47 A.D.3d 899, 850 N.Y.S.2d 609 (2008) citing Public Authorities Law §§ 1020–a, 1020–b[17]. See also Town of Islip v. Long Island Power Auth., 301 A.D.2d 1, 4, 752 N.Y.S.2d 320, 322 (2002). LIPA then acquired LILCO – and its Riverhead Electric Light Company franchise – for the sole purpose of providing electric utility service for the residents of the Village. As a creature of statute, LIPA lacks powers not granted it by express or necessarily implicated legislative delegation. See Abiele Contracting, Inc. v. New York City Sch. Const. Auth., 91 N.Y.2d 1, 2, 689 N.E.2d 864 (1997). All actions by LIPA must serve the purpose for which LIPA was created, i.e., to "provide an adequate supply of electricity in a reliable, efficient, and economic manner."

In 2007, the New York State Attorney General issued an opinion to the Chairman of LIPA advising that it was illegal for LIPA to make financial contributions to local not-for-profit organizations and civic and business entities. 2007 N.Y. Op. Atty. Gen. 31. The financial contributions program had been started by LILCO, but LIPA kept it going in order to "enable LIPA to participate appropriately in the enhancement of the well being of the Long Island

community, and to preserve and promote customer good will." The Attorney General found that there is "nothing in the powers, duties, or purposes of LIPA that renders improving community goodwill or the well-being of the community unrelated to the provision of electrical services as part of LIPA's mission." The opinion continued, "[I]ncreased goodwill is neither necessary nor convenient for complying with the provisions of or achieving the purposes of the LIPA Act." "Indeed, the beneficial corporate public relations generated by the largesse made in the name of public utilities essentially advances predominately the private interests of the utility corporations .... and are too peripheral to the service interests of the ratepayers." Cahill v. Public Service Com'n, 76 N.Y.2d 102, 114 (1990) (emphasis in original).

Lechi attachments, like private charitable donations, are "neither necessary nor convenient for. . . achieving the purposes of the LIPA Act," and are "peripheral to the service interests of the ratepayers." The EEEA, a private organization, seeks to have these lechis erected on LIPA poles for the benefit of the EEEA members, see Stip., ¶¶ 1-4. Both sides agree 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. See Stip., ¶ 17. LIPA's diversion of its property and resources to this use contravenes its purpose and, therefore, unauthorized.

In addition, LIPA's actions regarding the EEEA application for lechi attachments run contrary to its purpose. LIPA, to the detriment of its ratepayers, is expending substantial financial and human resources in its cooperation with the EEEA to enter into lechi attachment agreements and in its subsequent aggressive litigation of this suit, which seeks to vindicate only the interests of the EEEA members. LIPA is under State investigation for its recent failures to perform its core function to provide electricity to the residents of Long Island. The diversion of

its concentration and its treasury to support the non-electricity-related religious interests of a small group is just as anathema to its reason for being the non-profit donations struck down by the Court of Appeals in Cahill. In short, LIPA exists to provide electricity, not to curry favor with EEEA members. Its entire EEEA-related conduct both before and during this litigation is *ultra vires* and should be part of the State's investigation.

LIPA also lacks authority to divert its poles to private use under Transportation Corporations Law § 11 (3), which provides that an electric corporation can lay, erect, and construct wires, etc. in, on, and over the streets of towns and villages with the consent of the municipal authorities – here, Westhampton Beach. Long Island Lighting Company, LIPA's predecessor, has acknowledged the authority of Westhampton Beach, including by seeking a resolution by the Village's Board of Trustees authorizing the construction of an aerial power crossing over Quogue Canal and Jessup Lane. See Stip., ¶ 21; Ex. K. LILCO did not just erect the aerial power crossing because it claimed it had some inherent right to do so. Instead, it went to the Trustees of the Village and sought the authorization that the law requires. Somehow, LILCO's offspring, LIPA, has lost sight of who controls the streets.

Additionally, there is nothing in the LIPA enabling legislation that allows or permits LIPA to impair valid contracts entered into by its predecessors. There is no dispute that the franchise agreements covering the subject poles existed for over 80 years before the legislation creating LIPA was enacted, and LIPA's claim that it does not have to comply with these contracts is contrary to the established contract law.

In Fletcher v. Peck, 10 U.S. 87, 3 L. Ed. 162 (1810), Chief Justice Marshall held that the State of Georgia's attempt to rescind a prior grant of land violated the Constitution's prohibition

on laws that impair contractual obligations.[5] In Ohio Life Ins. & Trust Co. v. Debolt, 57 U.S. 416, 429, 14 L. Ed. 997 (1853), the Supreme Court instructed, "When the contract is made, the Constitution of the United States acts upon it, and declares that it should not be impaired, and makes it the duty of this court to carry it into execution. That duty must be performed."

In New Orleans Gas-light Co. v. Louisiana Light & Heat Producing & Mfg. Co., 115 U.S. 650, 672-73 (1885), Justice Harlan, in declaring that a subsequent franchise granted by the state to Louisiana Light Company impaired a prior franchise agreement granted by the state, stated:

> That change of policy, although manifest by constitutional enactment, cannot affect contracts which when entered into, were within the power of the State to make, and which, consequently, were protected against impairment, in respect of their obligations, by the Constitution of the United States. A State can no more impair the obligations of a contract by her organic law than by legislative enactment; for her Constitution is a law within the meaning of the contract clause of the National Constitution … And the obligation of her contracts is as fully protected by that instrument against any impairment by legislation as a contract between individuals exclusively.

Section 11(1) of the New York Transportation Corporation Law, which granted to electric corporations the right to construct electric facilities subject to local municipal approval, was adopted in 1909. In 1910 and 1911, pursuant to the provisions of this law, the Town of Southampton granted to Riverhead Lighting and Patchogue Lighting franchises to construct electric facilities within that portion of the Town set forth in the franchise agreements. Part of the area granted to Riverhead Lighting is located within the area that became the Village of Westhampton Beach when it was incorporated in 1928. Upon its incorporation, the Village assumed the rights and obligations under the franchise agreement with Riverhead Lighting. The subsequent legislation creating LIPA did not change -- and constitutionally could not have

[5] Chief Justice Marshall further enunciated this principle in Trustees of Dartmouth Coll. v. Woodward, 17 U.S. 518, 519 (1819), when he held that the State of New Hampshire's legislation changing the terms of a grant to the Trustees of Dartmouth College impaired the original contract, similarly violating Constitutional protection against just that.

changed -- the status of, or the terms and conditions of, the 1910 franchise agreement. That franchise agreement remains in full force and effect.

Since LIPA may only allow its facilities to be used for general public purposes, the Village, under both its general police power and its right as franchisor, can enforce the franchise agreement and ensure that LIPA does not allow the private use of its facilities. See id. at p. 671.

Dated: Carle Place, New York
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