

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

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.

Docket No:
11-CV-0252 (LDW)

ANSWER

Defendant THE VILLAGE OF WESTHAMPTON BEACH, by and through its attorneys,
SOKOLOFF STERN, LLP hereby answers plaintiffs' Complaint (the "complaint") as follows:

1. Denies knowledge or information sufficient to form a belief as to the truth of the allegations set forth in paragraph "1" of the complaint.
2. Denies the allegations set forth in paragraph "2" of the complaint.
3. Denies the allegations set forth in paragraph "3" of the complaint.
4. Denies the allegations set forth in paragraph "4" of the complaint.
5. Denies the allegations set forth in paragraph "5" of the complaint, and refers all questions of law to the Court for adjudication.
6. Denies the allegations set forth in paragraph "6" of the complaint, and refers all questions of law to the Court for adjudication.
7. Denies the allegations set forth in paragraph "7" of the complaint, and refers all questions of law to the Court for adjudication.
8. Denies knowledge or information sufficient to form a belief as to the truth of the allegations set forth in paragraph "8" of the complaint.

9. Denies knowledge or information sufficient to form a belief as to the truth of the allegations set forth in paragraph “9” of the complaint.
10. Admits the allegations set forth in paragraph “10” of the complaint.
11. Admits the allegations set forth in paragraph “11” of the complaint.
12. Admits the allegations set forth in paragraph “12” of the complaint.
13. Denies knowledge or information sufficient to form a belief as to the truth of the allegations set forth in paragraph “13” of the complaint.
14. Denies knowledge or information sufficient to form a belief as to the truth of the allegations set forth in paragraph “14” of the complaint.
15. Denies the allegations set forth in paragraph “15” of the complaint.
16. Denies knowledge or information sufficient to form a belief as to the truth of the allegations set forth in paragraph “16” of the complaint.
17. Denies knowledge or information sufficient to form a belief as to the truth of the allegations set forth in paragraph “17” of the complaint.
18. Denies knowledge or information sufficient to form a belief as to the truth of the allegations set forth in paragraph “18” of the complaint.
19. Denies knowledge or information sufficient to form a belief as to the truth of the allegations set forth in paragraph “19” of the complaint.
20. Denies the allegations set forth in paragraph “20” of the complaint.
21. Denies the allegations set forth in paragraph “21” of the complaint.
22. Denies the allegations set forth in paragraph “22” of the complaint.
23. Denies the allegations set forth in paragraph “23” of the complaint.
24. Denies the allegations set forth in paragraph “24” of the complaint.

25. Denies the allegations set forth in paragraph “25” of the complaint.
26. Denies the allegations set forth in paragraph “26” of the complaint.
27. Denies knowledge or information sufficient to form a belief as to the truth of the allegations set forth in paragraph “27” of the complaint.
28. Denies knowledge or information sufficient to form a belief as to the truth of the allegations set forth in paragraph “28” of the complaint.
29. Denies knowledge or information sufficient to form a belief as to the truth of the allegations set forth in paragraph “29” of the complaint.
30. Denies knowledge or information sufficient to form a belief as to the truth of the allegations set forth in paragraph “30” of the complaint.
31. Denies knowledge or information sufficient to form a belief as to the truth of the allegations set forth in paragraph “31” of the complaint.
32. Denies knowledge or information sufficient to form a belief as to the truth of the allegations set forth in paragraph “32” of the complaint.
33. Denies knowledge or information sufficient to form a belief as to the truth of the allegations set forth in paragraph “33” of the complaint.
34. Denies knowledge or information sufficient to form a belief as to the truth of the allegations set forth in paragraph “34” of the complaint.
35. Denies knowledge or information sufficient to form a belief as to the truth of the allegations set forth in paragraph “35” of the complaint.
36. Denies knowledge or information sufficient to form a belief as to the truth of the allegations set forth in paragraph “36” of the complaint.

37. Denies knowledge or information sufficient to form a belief as to the truth of the allegations set forth in paragraph “37” of the complaint.

38. Denies the allegations set forth in paragraph “38” of the complaint.

39. Denies the allegations set forth in paragraph “39” of the complaint.

40. Denies the allegations set forth in paragraph “40” of the complaint.

41. Denies knowledge or information sufficient to form a belief as to the truth of the allegations set forth in paragraph “41” of the complaint.

FIRST CLAIM FOR RELIEF

42. Defendant repeats, reiterates, and realleges the responses set forth in paragraphs “1” through “41” of this answer as if fully set forth herein.

43. Denies the allegations set forth in paragraph “43” of the complaint.

44. Denies the allegations set forth in paragraph “44” of the complaint.

45. Denies the allegations set forth in paragraph “45” of the complaint.

46. Denies the allegations set forth in paragraph “46” of the complaint.

47. Denies the allegations set forth in paragraph “47” of the complaint.

48. Denies the allegations set forth in paragraph “48” of the complaint.

SECOND CLAIM FOR RELIEF

49. Defendant repeats, reiterates, and realleges the responses set forth in paragraphs “1” through “48” of this answer as if fully set forth herein.

50. Denies the allegations set forth in paragraph “50” of the complaint.

51. Denies the allegations set forth in paragraph “51” of the complaint.

52. Denies the allegations set forth in paragraph “52” of the complaint.

53. Denies the allegations set forth in paragraph “53” of the complaint.
54. Denies the allegations set forth in paragraph “54” of the complaint.
55. Admits the allegations set forth in paragraph “55” of the complaint.

THIRD CLAIM FOR RELIEF

56. Defendant repeats, reiterates, and realleges the responses set forth in paragraphs “1” through “55” of this answer as if fully set forth herein.

57. Denies the allegations set forth in paragraph “57” of the complaint.
58. Denies the allegations set forth in paragraph “58” of the complaint.
59. Denies the allegations set forth in paragraph “59” of the complaint.
60. Denies the allegations set forth in paragraph “60” of the complaint.

AS AND FOR A FIRST AFFIRMATIVE DEFENSE

1. The complaint fails to state a claim upon which relief may be granted.

AS AND FOR A SECOND AFFIRMATIVE DEFENSE

2. Plaintiffs lack standing to assert some or all of the claims set forth in the complaint.

AS AND FOR A THIRD AFFIRMATIVE DEFENSE

3. Defendant has not violated any rights, privileges or immunities under the Constitution or laws of the United States or the State of New York or any political subdivision thereof, nor have they violated any Act of Congress providing for the protection of civil rights.

AS AND FOR A FOURTH AFFIRMATIVE DEFENSE

4. Defendant has not violated any rights, privileges or immunities under the Constitution or laws of the United States or the State of New York or any political subdivision thereof, nor has it violated any Act of Congress providing for the protection of civil rights.

AS AND FOR A FIFTH AFFIRMATIVE DEFENSE

5. At all times relevant to the acts alleged in the complaint, defendant, its agents and officials, acted reasonably, properly, and in the lawful exercise of their discretion.

AS AND FOR A SIXTH AFFIRMATIVE DEFENSE

6. Verizon and LIPA lack authority to issue licenses for the attachment of lechis to public utility and telephone poles in the Village of Westhampton Beach.

AS AND FOR A SEVENTH AFFIRMATIVE DEFENSE

7. The attachment of lechis to public utility and telephone poles in the Village of Westhampton Beach would expose the Village to liability under the First Amendment's prohibition against the establishment of religion.

**VILLAGE OF WESTHAMPTON BEACH
COUNTERCLAIMS AGAINST VERIZON AND LIPA**

**The East End Eruv Association, Verizon, and LIPA Seek to Use
Public Resources to Create a Purely Religious Boundary**

1. The East End Eruv Association (“EEEE”) seeks to establish an eruv in the Village of Westhampton Beach.

2. The EEEA claims that an eruv is a religious boundary which allows certain observant religious Jews to carry objects to the Sabbath and Yom Kippur, where they otherwise would be prohibited by their religion from doing so.

3. The eruv or eruvin the EEEA claims that it seeks and which Verizon and LIPA have agreed to help establish are to be created by, *inter alia*, attaching lechis (long plastic strips) to telephone and utility poles in the Village of Westhampton Beach.

4. These lechis are visible to people who are on or are traversing the public roads abutting the poles on which they are attached.

5. Both the lechis and the poles to which plaintiffs and the EEEA seek to attach them are located exclusively on public property.

6. Eruvin and the lechis from which they are made are religious symbols that communicate a religious message. To observant Jews, they communicate the demarcation of an area and imbue that area with religious meaning. To these observant Jews, lechis signify an area set apart, where they may carry objects and perform other tasks otherwise prohibited on the Sabbath in areas that are not enclosed by the eruv.

7. The religious symbol and its religious message is known to the general public, as well.

8. By virtue of earlier public discussions by Orthodox Jews about the nature of an eruv, and by virtue of this litigation, and earlier litigation in the New York Metropolitan Area, the religious meaning of an eruv has been a part of the local public discourse for several years. Upon information and belief, the majority of local residents, residents of adjoining towns, and visitors to those municipalities are familiar with the religious message conveyed by an eruv.

9. To reasonable observers, including atheists, agnostics, non-Jews, non-observant Jews, and observant Jews who do not share EEEA members' beliefs with regard to eruvim, the existence of an eruv in Westhampton Beach (and its lechis) on public property would communicate the message that the municipality or municipalities in which the lechis are situated has endorsed and put its official stamp of approval on one particular set of Jewish beliefs. In addition, the affixing of a lechi, a religious symbol, on public property would communicate that the Village government has cordoned off a religious area, in the manner of a religious ghetto, using public property and resources to create a purely religious boundary.

Verizon Poles on Dune Road are Subject to Franchise Agreements

10. Verizon intends to issue licenses to the EEEA to allow the EEEA to affix lechis to telephone and utility poles within the Village of Westhampton Beach for the purpose of creating an eruv.

11. A number of the poles for which Verizon intends to issue licenses are located on Dune Road in the Village of Westhampton Beach.

12. Verizon's poles on Dune Road in the Village are subject to franchise agreements that do not permit diversion to private use.

13. In November 1938, two months after the 1938 hurricane destroyed most of the homes and other structures on Dune Road in the Village,¹ the United States Coast Guard, a federal agency, in recognition of the Village's jurisdiction over Dune Road, requested a franchise agreement with the Village to construct poles on Dune Road in order to maintain the circuits for the Coast Guard.

14. The Village granted the Coast Guard a franchise ("1938 Franchise") to construct the poles.

15. In granting the franchise to the Coast Guard, the Village imposed several conditions, including a limitation on the entities that could use the poles.

16. The 1938 Franchise limited the use of the poles to the Coast Guard, New York Telephone Company and Long Island Lighting Co.

17. The 1938 Franchise makes no mention of any other entity authorized to use the poles, including any private entity for private purpose.

18. In 1952, at the request of the New York Telephone Company, the Village granted New York Telephone Company a franchise ("1952 Franchise") to take over and operate the poles on Dune Road.

19. The 1952 Franchise did not give New York Telephone any additional or greater rights beyond those rights originally granted to the Coast Guard.

20. Nothing in the 1938 or 1952 Franchise Agreements with the Village permits Verizon, now, to enter into the sublicense agreement at issue, *i.e.*, one that allows the EEEA, a private entity, to attach anything to the Verizon utility poles for private purposes.

¹ The 1938 hurricane (which occurred before official forecasters gave hurricanes human names) was the sixth most costly hurricane in 1998 dollars. See www2.sunysuffolk.edu/mandias/38hurricane.

New York Transportation Corporation Law § 27 Does Not Apply to Poles on Dune Road

21. Verizon, through its counsel, has indicated that it believes that N.Y. Transportation Corporations Law § 27 (“Section 27”) gives it the authority to grant the EEEA licenses to attach items to their poles.

22. Section 27, however, does not apply to the Dune Road Franchise Agreements with the Village.

23. The 1938 Franchise Agreement between the Coast Guard and the Village was not subject to Section 27, since the Coast Guard is not subject to the provisions of the law.

24. Section 27 provides in part:

Any such corporation may erect, construct and maintain the necessary fixtures for its lines upon, over or under any of the public roads, streets and highways... and may erect, construct and maintain its necessary stations, plants, equipment or lines upon, through or over any other land, subject to the right of the owners thereof to full compensation for the same.

25. The utility poles on Dune Road are outside the reach of this statute. The Coast Guard, not Verizon or any of its predecessors, erected, constructed, and maintained by facilities pursuant to a separate franchise granted by the Village. Section 27 did not alter that agreement or create any further legal rights.

26. When, in 1952, the Village granted New York Telephone Company (now, Verizon) the franchise in 1952 to take over the poles on Dune Road, New York Telephone Co. assumed the obligation of the Coast Guard under the 1938 franchise agreement, which, in turn, was not subject to the provisions of § 27.

LIPA’s Poles in the Village are Subject to Franchise Agreements

27. LIPA lacks authority to issue licenses to the EEEA for the attachment of lechis to utility poles in the Village of Westhampton Beach.

28. Transportation Corporation Law § 11(3) (“§ 11(3)”) 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.

29. Additionally, like Verizon, LIPA’s telephone poles in the Village are subject to franchise agreements.

30. In 1910, the Town of Southampton granted a franchise (“1910 Franchise”) to Riverhead Electric Light Company (“Riverhead”) to erect and maintain poles for the purpose of supplying electricity to the town residents west of Quantuck Creek.

31. Nothing in the 1910 Franchise Agreement permitted Riverhead or its successors to sublicense its utility poles to private entities, such as the EEEA, for private purposes.

32. Riverhead was subsequently acquired by LILCO, which, in turn, was acquired by LIPA.

33. LIPA is bound by the 1910 Franchise Agreement with Riverhead, and it does not have the authority to grant a sublicense to EEEA.

34. Additionally, in 1911 the Town of Southampton granted a franchise to Patchogue Electric Light Company, with the easterly boundary being the Speonk River and the westerly boundary being the westerly boundary of the Town of Southampton. The franchise granted to Patchogue is the same as granted to Riverhead, except the covered area was the western end of the Town of Southampton.

35. These franchise agreements are still in existence with the utilities, and these agreements do not allow the utilities to sublicense the use of the poles for private purposes.

AS AND FOR A FIRST COUNTERCLAIM

36. Defendant repeats and realleges each and every allegation of paragraphs 1 through 35, inclusive, as though fully set forth herein.

37. Verizon has indicated that it intends to issue licenses to the EEEA for the attachment of lechis to certain utility poles located on public property on Dune Road in the Village of Westhampton Beach.

38. Verizon maintains that it has authority under New York State Law to issue licenses for the attachment of lechis to those utility poles located on Dune Road.

39. Verizon lacks any such authority.

40. In, fact, if Verizon issues licenses to the EEEA for the attachment of lechis to utility poles on Dune Road, Verizon will act outside its authority under state law, will exceed its authority under the 1938 and 1952 Franchise Agreements with Westhampton Beach, and will interfere with Westhampton Beach's right and responsibility to exercise exclusive control and supervision of its streets and highways pursuant to N.Y. Village Law § 6-602.

41. If Verizon issues licenses to the EEEA for the attachment of lechis, it will be acting *ultra vires*.

42. By virtue of this disagreement, there exists an actual, justiciable controversy between Verizon and Westhampton Beach relating to their respective legal rights, duties, and obligations under state and local law, which controversy is ripe for adjudication pursuant to 28 U.S.C. § 2201.

AS AND FOR A SECOND COUNTERCLAIM

43. Defendant repeats and realleges each and every allegation of paragraphs 1 through 35, inclusive, as though fully set forth herein.

44. LIPA intends to issue licenses to the EEEA for the attachment of lechis to certain utility poles on public property located on Dune Road in the Village of Westhampton Beach.

45. LIPA maintains that it has authority under New York State Law to issue licenses for the attachment of lechis to those utility poles located on Dune Road.

46. LIPA lacks any such authority.

47. In fact, if LIPA issues licenses to the EEEA for the attachment of lechis to utility poles on Dune Road, LIPA will act outside its authority under state law, will exceed its authority under the 1910 and 1911 Franchise Agreements, and will interfere with Westhampton Beach's legal requirement to exercise exclusive control and supervision of its streets and highways pursuant to N.Y. Village Law § 6-602.

48. If LIPA issues licenses to the EEEA for the attachment of lechis, it will be acting *ultra vires*.

49. By virtue of this disagreement, there exists an actual, justiciable controversy between LIPA and Westhampton Beach relating to their respective legal rights, duties, and obligations under state and local law, which controversy is ripe for adjudication pursuant to 28 U.S.C. § 2201.

AS AND FOR A THIRD COUNTERCLAIM

50. Defendant repeats and realleges each and every allegation of paragraphs 1 through 35, inclusive, as though fully set forth herein.

51. The attachment of lechis to utility and telephone poles on public property in the Village of Westhampton Beach would subject the Village of Westhampton Beach to liability for violation of the First Amendment's Establishment Clause.

52. The attachment of lechis to utility and telephone poles on public property in the Village of Westhampton Beach would put the Village in the position of promoting and/or affiliating and/or endorsing the religious concept of an eruv or the religious faith that seeks its benefits.

53. The Establishment Clause prohibits a government from appearing to take a position on questions of religious belief. The permanent placement of an eruv on public property would put the Village of Westhampton Beach in the position of appearing to take a position on questions of religious belief.

54. The Establishment Clause prohibits a government from making adherence to a religion relevant in any way to a person's standing in the political community. The permanent placement of an eruv on public property would create the only such religious symbol on public property within the Village and would convey the message that those Orthodox Jews who secured the permanent placement of their religious symbol on public property have an enhanced standing in community.

55. Since N.Y. Village Law § 6-602 charges the Village with exclusive control and supervision of its streets and highways, if an eruv is created through the attachment of lechis to telephone and utility poles in the Village of Westhampton Beach, the public will conclude that

the Village government has authorized the placement of such lechis, thereby creating a religious boundary, endorsing the Jewish faith over the faiths of others, and endorsing one particular set of Jewish religious beliefs.

56. Verizon and LIPA should be barred from issuing licenses for the attachment of lechis to telephone and utility poles in the Village of Westhampton Beach because the issuance of such licenses and attachment of such lechis would expose the Village to liability for violation of the Establishment Clause of the First Amendment of the United States Constitution.

AS AND FOR A FOURTH COUNTERCLAIM

57. Defendant repeats and realleges each and every allegation of paragraphs 1 through 35 inclusive, as though fully set forth herein.

58. LIPA is a corporate municipal instrumentality and political sub-division of the State of New York. As such, LIPA is a state actor, subject to the strictures of the United State Constitution, including the First Amendment's Establishment Clause.

59. LIPA's issuance of licenses for the permanent attachment of lechis to utility poles in the Village of Westhampton would violate the First Amendment's Establishment Clause in that it would divert public property to a purely religious purpose and place LIPA's imprimatur on the establishment of a purely religious boundary. Based on the issuance of such licenses, together with LIPA's efforts in coordinating with the EEEA and Verizon to bring the instant action against the Westhampton Beach, it is reasonable for the public to conclude that there was collusion between LIPA and the Village of Westhampton Beach and that LIPA seeks to advance the goals of one religious group over others and over those with no religious beliefs.

WHEREFORE, defendants respectfully demand judgment against plaintiffs as follows:

A. Dismissing plaintiffs' Complaint;

B. Declaring that Verizon and LIPA are barred from issuing licenses for the attachment of lechis to telephone and utility poles on public property on Dune Road in the Village of Westhampton Beach;

C. Permanently enjoining Verizon and LIPA from issuing licenses for the attachment of lechis to telephone and utility poles on public property on Dune Road in the Village of Westhampton Beach;

D. Declaring that LIPA is barred from issuing licenses for the attachment of lechis to utility poles on public property in the Village of Westhampton Beach;

E. Declaring that the placement of lechis on utility poles on public property is an *ultra vires* act by the utilities responsible for the poles;

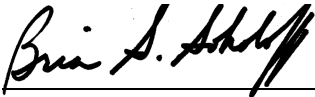
F. Permanently enjoining LIPA from issuing licenses for the attachment of lechis to utility poles on public property in the Village of Westhampton Beach;

G. In the alternative, granting such other declarations as to the applicability of the First Amendment, New York State laws, local laws, ordinances and regulations, and of the rights and obligations of Verizon New York and LIPA under the First Amendment, New York State laws, local laws, ordinances and regulations, as may be appropriate; and

H. Granting such other and further relief as the Court may deem just and proper.

Dated: Westbury, New York
July 9, 2012

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Attorneys for Westhampton Beach
Defendants

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