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,

CV-11-0252 (LDW)(ETB)

Plaintiffs,

-against-

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

Defendants.

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REPLY MEMORANDUM OF LAW IN FURTHER SUPPORT OF DEFENDANT WESTHAMPTON BEACH'S MOTION TO DISMISS THE COMPLAINT

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

PRELIMINARY STATEMENT

Verizon and LIPA's opposition to Westhampton Beach's ("the Village" or "WHB") motion to dismiss attempts to cast plaintiffs – their status as plaintiffs notwithstanding – as disinterested parties caught in the midst of an argument between WHB and the East End Eruv Association ("the EEEA"). That is a false light. In reality, Verizon and LIPA contracted with the EEEA to allow the EEEA to attach "lechis" to their public telephone and utility polls for a private purpose. They did so in the absence of any legal authority and, when Verizon and LIPA refused to carry out those very same agreements, they drew legal threats from the EEEA. Rather than acknowledging the lack of authority for the agreements, Verizon, LIPA, and the EEEA colluded to sue the Village, a nonparty to the contract, which played no role until it was dragged into this suit. The suit is premature and does not present a viable case or controversy. What is more, plaintiffs lack authority under state law to grant license agreements to EEEA for the purpose of attaching lechis. The Court should dismiss this case in its entirety.

ARGUMENT

POINT I: PLAINTIFFS LACK STANDING TO ASSERT THEIR CLAIMS

"[S]tanding is to be determined as of the commencement of suit." Lujan v. Defenders of Wildlife, 504 U.S. 555, 571 (1992); see also Keene Corp. v. United States, 508 U.S. 200, 207, 113 S.Ct. 2035, 124 L.Ed.2d 118 (1993) ("[T]he jurisdiction of the Court depends on the state of things at the time of the action brought."). Here, plaintiffs filed suit at a time when they lacked standing to sue. As set forth fully in defendants' moving papers, the Complaint does not allege any official Village action in opposition to the eruv. See Def. Memo, pp. 6-10. There is just no standing hook on which plaintiffs can hang their complaint. Neither the alleged campaign statements of some Village officials nor the Village letter stating what the Village believes

Verizon's position to be, all occurring before plaintiffs contracted with the EEEA, create standing. Plaintiffs have no case law to suggest that public statements by individual officials and an "I think that you think" letter of this sort can create a lawsuit.

Indeed, to the extent plaintiffs now argue that they have standing because they have changed their conduct (refused to issue licenses) on account of Village officials' public statements, see Pl. Memo., p. 10, and the 2008 letter from Village, their arguments fail. To establish standing this way, a plaintiff must show that he has altered or ceased conduct as a reasonable response to the challenged statute or conduct. Amnesty Int'l USA v. Clapper, 638 F.3d 118, 140-41 (2d Cir. 2011). Plaintiffs have not identified any official Village statute or conduct that predates the Complaint, See Def. Memo, pp. 6-10. They thus lack standing.

Since plaintiffs cannot cobble a justiciable case or controversy from any Village action before they filed the Complaint, they turn to the Village's subsequent defense of this action and its *inaction* – its refusal to take a position on the issue in the midst of a federal suit – as evidence that there is some justiciable opposition or controversy. The Supreme Court's holding in Lujan, however, prohibits courts from looking to post-Complaint facts that to establish standing. See Fenstermaker v. Obama, 354 F. App'x 452, 455 (2d Cir. 2009) (refusing to examine documents reflecting facts that arose after suit was filed where those facts were submitted to argue for standing); Comer v. Cisneros, 37 F.3d 775, 791 (2d Cir. 1994) (issue of whether plaintiff has a current desire to live outside the City of Buffalo is irrelevant because standing is measured as of the time the suit is brought).[1]

[1] See also Robidoux v. Celani, 987 F.2d 931, 938 (2d Cir. 1993) (For a plaintiff to have standing to request injunctive or declaratory relief, the injury alleged must be capable of being redressed through injunctive relief "at that moment."); Rothe Dev. Corp. v. Dep't of Def., 413 F.3d 1327, 1334 (Fed. Cir. 2005) (post-complaint evidence--including events that occurred between the filing of the original and amended complaint – is irrelevant to the standing issue); Park v. Forest Serv. of U.S., 205 F.3d 1034, 1038 (8th Cir. 2000) (injury-in-fact cannot be established after the suit is filed, and the adoption of post-Complaint rules is irrelevant to standing).

Because standing is measured at the time the action is filed, it is entirely irrelevant to the standing inquiry that the Village is defending this lawsuit, that the Village now argues Verizon and LIPA lack authority to place lechis on its poles, or that counsel for the Village has refused to speculate about how the Village might react should plaintiffs. In other words, plaintiffs cannot bring an action without standing and then attempt to create standing, as plaintiffs have here, by goading defense counsel in court, over the telephone, and through letters into saying something that might create a controversy. As the Seventh Circuit put it, "It is not enough for [the plaintiff] to attempt to satisfy the requirements of standing as the case progresses. The requirements of standing must be satisfied from the outset."[2] Perry v. Vill. of Arlington Heights, 186 F.3d 826, 830 (7th Cir. 1999). Plaintiffs failed to meet the standing requirement from the outset.

POINT II: PLAINTIFFS' OPPOSITION CONFIRMS THAT THEY SEEK AN ADVISORY OPINION

Plaintiffs' reply consistently conflates "disagreement about the law" with "active controversy" or "case and controversy." It attempts to reframe the case or controversy requirement as simply a question of whether "there is an issue to be decided." Pl. Memo., p. 5. Framed this way, any plaintiff could create standing by telling a federal judge "I wonder what law applies to my situation." A ticket into federal court is not so cheap. Plaintiffs must present a "real and substantial controversy admitting of specific relief through a decree of a conclusive

[2] Plaintiffs also argue that there is a case or controversy because the Village has "refused to disclaim an intent to take action." Pl. Memo., pp. 5-6. This argument is likewise unavailing. Plaintiffs have attempted to create a case or controversy where none existed *after* they filed the lawsuit without one. The argument also fails because it depends on a misreading of the cited case law. In the pre-enforcement cases plaintiff cites, plaintiff's fear of action by the municipality is based on already-existing statute that it alleges is unconstitutional. Babbitt v. United Farm Workers Nat. Union, 442 U.S. 289, 302 (1979) (fear of criminal prosecution under an allegedly unconstitutional statute); City of Auburn v. Qwest Corp., 260 F.3d 1160, 1171-73 (9th Cir. 2001) (challenge to local ordinances); Virginia v. Am. Booksellers Ass'n, 484 U.S. 383, 392-93 (1988) (challenge to newly enacted law). The cases stand for the unremarkable proposition that, where there is an allegedly unconstitutional ordinance or statute, plaintiffs need not always wait until there are prosecuted under thereunder to bring an action. Here, there is no such challenged ordinance or other official action.

character," not "an opinion advising what the law would be upon a hypothetical state of facts." F.X. Maltz, Ltd. v. Morgenthau, 556 F.2d 123, 125 (2d Cir.1977).

Plaintiff's opposition only confirms that they seek an advisory opinion from this Court on hypothetical facts. Plaintiffs' list of the "three issues that need resolution" does not implicate any dispute between plaintiffs themselves and the Village. Instead, it cites three legal contentions of the EEEA (not plaintiffs) that it believes require resolution. Pl. Opp., pp. 4-5. They present no real dispute between plaintiffs and the Village. Plaintiff's complaint presents a series of theoretical questions for the Court to answer, precisely the sort banned by the rule against advisory opinions.[3]

POINT III: PLAINTIFFS HAVE NOT ALLEGED ANY MUNICIPAL ACTION TO SUPPORT § 1983 LIABILITY

Plaintiffs argue that they have sufficiently alleged municipal action to support a Monell claim against the Village because the Trustees and Mayor Teller are policymakers for WHB and their decisions "represent government policy." See Gronowski v. Spencer, 424 F.3d 285, 296 (2d Cir. 2005). This is true as a general principle, but the problem is precisely that plaintiffs have not actually alleged any actual "decisions" by the Trustees and Mayor Teller. Therefore, by the terms of their own legal argument, plaintiffs have not alleged any "government policy" or action.

POINT IV: AS A MATTER OF STATE LAW, PLAINTIFFS LACK AUTHORITY TO CARRY OUT THEIR PURPORTED LICENSE AGREEMENTS

Since the filing of the Complaint in this action, defendants have taken the legal position that Verizon and LIPA lack legal capacity to carry out their license agreements. As argued above, the fact that defendants disagree with Verizon and LIPA on this point does not create a

[3] It is also telling that plaintiffs are willing to put their case on hold while the factual record develops with regard to the EEEA and the other municipalities. That is not the kind of request by a party with a live, justiciable controversy.

justiciable case or controversy in this action, because such disagreement only arose after plaintiffs filed this action. In fact, the disagreement undermines plaintiffs' claims to standing; without the legal authority to carry out their agreements, plaintiffs cannot present a ripe case for adjudication and this Court cannot offer redress. See Def. Memo., pp. 11-14.

Further, since the ultimate relief plaintiffs and EEEA seek hinges on Verizon and LIPA's ultimate capacity under state law to comply with their license agreements (which plaintiffs lack standing to litigate in this case), it may be appropriate for the Court to dismiss the case under the Pullman abstention doctrine. Wilbur v. Harris, 53 F.3d 542, 545 (2d Cir. 1995) (Pullman abstention "applies where state law is uncertain, and a state court's clarification of the uncertain law could obviate the need for a federal constitutional ruling")

A. Verizon Poles on Dune Road are Subject to Franchise Agreements

To the extent the Court decides that plaintiffs have standing and the Court has jurisdiction to consider this matter, the Court should dismiss the action because Verizon's poles on Dune Road in the Village are subject to franchise agreements that do not permit diversion to private use. The eruv cannot exist without use of those poles.

In November 1938, two months after the fierce 1938 hurricane destroyed most of the homes and other structures on Dune Road in the Village,[4] 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. The Village granted the Coast Guard a franchise to construct the poles, and, in doing so, it imposed several conditions, including a limitation on the entities that could use the

[4] The 1938 hurricane (which occurred before official forecasters gave hurricanes human names) was the sixth most costly hurricane in 1998 dollars and not some "storm" as characterized by Verizon's counsel in his April 5, 2012 letter. See www2.sunysuffolk.edu/mandias/38hurricane.

poles.[5] See Sokoloff Decl., Ex. A. This franchise limited the use of the poles to the Coast Guard, New York Telephone Company and Long Island Lighting Co. The agreement makes no mention of any other entity authorized to use the poles, including any private entity for private purpose.

In 1952, at the request of the New York Telephone Company, the Village granted New York Telephone Company a franchise to take over and operate the poles on Dune Road. See Sokoloff Decl., Ex. B. Nothing in this agreement gave additional or greater rights to New York Telephone beyond the rights originally granted to the Coast Guard.[6] 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.

B. Section 27 Does Not Apply to Poles on Dune Road

Verizon's sole argument for allowing the EEEA to attach items to their poles is that N.Y. Transportation Corporations Law § 27 ("Section 27") gives it this authority. Section 27, however, does not apply to the Dune Road franchise agreements with the Village. The 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.

[5] Verizon has submitted the Wiles Declaration containing several letters between Verizon's attorney and the attorney for the Village, together with three agreements with the Village. Verizon has conveniently excluded from these documents the franchise agreements between the Village and Verizon, as well as the franchise agreements between the Village and LIPA, all of which were part of the March 20, 2012 letter from defense counsel to Verizon's attorney. Since neither utility has seen fit to apprize the court of the franchise agreements they have with the Village, the documents are attached to the declaration of Brian Sokoloff. At the outset of this litigation defendants demanded that Verizon and LIPA produce of all franchise and licensing agreements with the Village. Verizon refused to produce any such agreements on the basis that the provisions of Section 27 of the New York Transportation Corporation Law (hereinafter referred to "Section 27") applied. LIPA also refused to produce any such agreements by claiming that it was too cumbersome. If Verizon and LIPA had complied with the demand for these agreements, and produced them when requested, they would have been introduced into the hearing before this Court in June. It is only because both utilities failed to comply with the demand for these agreements that these documents are being produced at this point in time. They are germane to this motion.

[6] It is interesting to note that the Federal Government recognized the jurisdiction of the Village over its road yet Verizon refuses to recognize such jurisdiction.

As plaintiffs point out, 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.

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.

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. Notably, if § 27 applied to the Dune Road poles, as Verizon now claims, New York Telephone Company would have had no reason to seek a franchise from the Village to take over the poles in 1952. It would have recognized, as Verizon now claims, that its rights spring from the statute, not the Village. The contemporaneous legal documents at the time govern this matter, not Verizon's revisionist history.

The holding in New York Tel. Co. v. Town of North Hempstead, 41 N.Y.2d 691 (N.Y. 1977), is inapplicable, as well.[7] Indeed, in North Hempstead, the Court of Appeals specifically distinguished the facts of that case (where the State granted the franchise at issue) from the facts of this case (where the municipality grants the franchise at issue). Specifically, referring to and distinguishing the Supreme Court's decision in Western Union Tel. Co. v. Richmond, 224 U.S. 160 (1922), the Court of Appeals stated:

[7] Verizon's reliance in its memorandum to the lower court's decision in New York Tel. Co. v. North Hempstead, 86 Misc. 2d 487 (N.Y. Sup. Ct. Nassau Co. 1975), aff'd 52 A.D.2d 934 (2d Dep't 1976), modified by 41 N.Y.2d 691(1977), is misplaced and does not apply to the instant case. The lower court's decision was modified on appeal. The language plaintiff quotes was not affirmed.

> [Western Union] then stands for the proposition that when a municipality grants utilities a franchise or right to erect and maintain utility poles on the public streets it may reserve a right to limited use of such poles for municipal purposes. On two grounds that holding is not pertinent to the case now before us -- first, there was no such express reservation in the original grant to the Telephone Company of the right to erect and maintain poles in the public streets and highways of the Town of North Hempstead, and second, the grant of such right came from the State of New York and not from the Town of North Hempstead (Transportation Corporations Law § 27). The assent of the town was in no wise required to authorize the Telephone Company to erect its poles, and thus there was no grant from the town to which a reservation in its favor could have been attached.

North Hempstead, 41 N.Y.2d at 698.

In this case, the Village – not the State - granted the Coast Guard a franchise, which was subsequently assumed by New York Telephone Company. Dune Road is a Western Union situation; as the Court of Appeals recognized in North Hempstead, the Village *was entitled* to impose limits on the use of the poles. The Village, in fact, did so; it limited the use of the poles to the Coast Guard and the two utilities. Nothing in the franchise agreement permits Verizon to grant a sublicense to the EEEA or any other private entity to use the poles for private purposes.[8]

Verizon's claim that § 27 broadly permits a sublease its poles to private entities for private purposes fundamentally misreads § 27. In New York Tel. Co. v. City of Binghamton, 18 N.Y.2d 152, 162 (N.Y. 1966), the New York Court of Appeals held, citing § 27, that "… the telephone company had a mere privilege or permit to use part of the street for a special purpose…." Section 27 has clear limits; it does not give Verizon the right or power to sublease its telephone poles to a private entity for a private, much less a religious one.

Additionally, 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

[8]As Judge Cardozo stated in his dissent in a Holmes Elec. Protective Co. v. Williams, 228 N.Y. 407, 447 (1920), "The principal, however, is fundamental that 'every public grant of property or of privilege or franchise, if ambiguous, is to be construed against the grantee and in favor of the public….'"

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, then, Verizon must be acting as a "telephone corporation" and for the purpose of providing telephone services, not for the purpose of lending those poles out for private use.

C. LIPA's Poles in the Village are Subject to Franchise Agreements

LIPA similarly lacks authority to issue the licenses. First, 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.

Second, like Verizon, LIPA's telephone poles in the Village are subject to franchise agreements. In 1910, the Town of Southampton granted a 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. See Sokoloff Decl., Ex. C. Nothing in the 1910 franchise agreement permitted Riverhead or its successors to sublicense its utility poles to private entities for private purposes, such as the EEEA. Riverhead was subsequently acquired by LILCO, which, in turn, was acquired by LIPA. LIPA is bound by the franchise agreement with Riverhead and it does not have the authority to grant a sublicense to EEEA.

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. See Sokoloff Decl., Ex. D.[9]

[9] The franchise granted to Patchogue is the same as granted to Riverhead , except the area was the western end of the Town of Southampton.

These franchise agreements are still in existence with the utilities, and these agreements do not allow the utilities to sublicenses the use of the poles for private purposes.[10]

Verizon's claim that the Mayor's execution of certain agreements establishes Verizon right to allow the EEEA to attach lechis has no factual or legal basis. The agreements were for a public as opposed to a private purpose.[11] In addition the agreements that the Mayor signed did not relate to polls on Dune Road, where specific franchise agreements constrained Verizon's capacity to sublicense.

CONCLUSION

For all the foregoing reasons, this Court should grant defendants' motion to dismiss, pursuant to Fed. R. Civ. P. 12(b)(1) and 12(b)(6), and dismiss the complaint in its entirety, with costs, disbursements, and such other and further relief as to this Court is just, proper, and equitable.

Dated: Westbury, New York
April 26, 2012

SOKOLOFF STERN LLP
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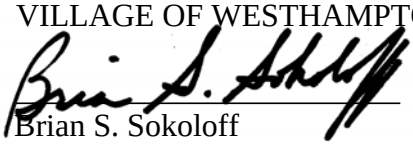

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[10] In Filarsky v. Delia, 132 S. Ct. 1657 (2012), decided on April 17, 2012, the Supreme Court, in finding that a private attorney retained by a municipality has the same qualified immunity as a municipal employee, stated, "Understanding the protections the common law afforded to those exercising government power in 1871 requires an appreciation of the nature of government at that time." This Court also should appreciate the nature of government in 1910 when the Riverhead franchise was executed and in 1939 and 1952 when the New York Telephone franchise was executed. The municipal concern, when these franchises were created (and thus limited the rights of the franchisees), was: (a) that the utilities' facilities be used only for utility purposes and (b) that the facilities not be used for private, non-utility purposes.

[11] In addition, since the agreements related to the use of the Village streets, any agreement with respect to them needed the approval of the Village Board of Trustees pursuant to Village Law § 4-412. See North Hempstead, 41 N.Y.2d at 697 ("The Town Law requires formal approval by the town board of town contracts and the execution thereof by the town supervisor.)