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# [***Bristol Tenn. Essential Servs. v. United Tel. Se., LLC***](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:5J47-FXP1-F04F-B20Y-00000-00&context=)

United States District Court for the Eastern District of Tennessee, Greeneville Division

September 30, 2015, Filed

Case No. 2:13-CV-267

**Reporter**

2015 U.S. Dist. LEXIS 176313 \*

BRISTOL TENNESSEE ESSENTIAL SERVICES; BOARD OF PUBLIC UTILITIES OF THE TOWN OF ERWIN, TENNESSEE; and MOUNTAIN ELECTRIC COOPERATIVE, Plaintiffs, v. UNITED TELEPHONE SOUTHEAST, LLC, d/b/a CENTURYLINK, Defendant.

**Prior History:** [*Bristol Tenn. Essential Servs. v. United Tel. Southeast, LLC, 2014 U.S. Dist. LEXIS 186676 (E.D. Tenn., Feb. 3, 2014)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:5K2S-TR01-F04F-B14P-00000-00&context=)

**Core Terms**

Providers, attachment, rates, pole, parties, alleges, settlement agreement, pole attachments, rights-of-way, ***antitrust***, mutual release, utility pole, back-billing, motion to dismiss, telecommunications, negotiate, rentals, fraud claim, charges, lawsuit, private right of action, counterclaim, limitations, violations, telephone, costs, terms, unjust enrichment, cause of action, municipality

**Counsel:** **[\*1]**For Bristol Tennessee Essential Services, Town of Erwin, Tennessee, Mountain Electric Cooperative, Plaintiffs, Counter Defendants: Jimmie C Miller, Joseph Bernard Harvey, LEAD ATTORNEYS, William C Bovender, Hunter, Smith & Davis - Kingsport, Kingsport, TN.

For United Telephone Southeast, LLC, doing business as CenturyLink, Defendant, Counter Claimant: Gary C Shockley, LEAD ATTORNEY, Baker, Donelson, Bearman & Caldwell - Nashville, Nashville, TN; John G Calender, LEAD ATTORNEY, PRO HAC VICE, Baker, Donelson, Bearman, Caldwell & Berkowitz, PC(D.C.), Washington, DC; Misty S Kelley, LEAD ATTORNEY, Baker, Donelson, Bearman, Caldwell & Berkowitz (Chatt), Chattanooga, TN.

**Judges:** J. RONNIE GREER, UNITED STATES DISTRICT JUDGE.

**Opinion by:** J. RONNIE GREER

**Opinion**

**MEMORANDUM AND ORDER**

**I. Introduction**

The instant civil case arises out of an ongoing dispute between Bristol Tennessee Essential Services ("BTES"), Board of Public Utilities of the Town of Erwin, Tennessee ("Erwin"), and Mountain Electric Cooperative ("Mountain"), three Northeast Tennessee power providers (collectively the "Power Providers"), counter-defendants here, and United Telephone Southeast, doing business as CenturyLink ("CenturyLink"), the counter-plaintiff,**[\*2]** over utility pole attachment rates. In response to a diversity claim filed in 2013 against CenturyLink alleging breach of contract and unjust enrichment, [Doc. 1], CenturyLink filed a counterclaim that alleges various violations of the Federal Telecommunications Act, Sherman ***Antitrust*** Act, Tennessee statutory law, unjust enrichment, breach of contract, and fraud. [Doc. 42]. The Power Providers have filed a Motion to Dismiss pursuant to [*Rule 12(b)(6) of the Federal Rules of Civil Procedure*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:5GYC-1WP1-6N19-F0YW-00000-00&context=). [Doc. 46]. For the reasons set forth herein, this motion is **GRANTED** in part and **DENIED** in part.

**II. Background**

**A. Factual Background**

CenturyLink's current controversy stems from agreements its predecessor-in-interest, United Inter-Mountain Telephone Company, entered into on July 1, 1980, with seven Northeast Tennessee power providers including BTES, Erwin, and Mountain. [Doc. 42-3]. Because the Power Providers controlled an existing network of electric utility poles, the 1980 Agreement between the Power Providers and CenturyLink outlined a mutually beneficial arrangement whereby CenturyLink would be entitled to attach to the Power Provider's utility poles for a fee, and vice versa. The culmination of this agreement was that CenturyLink would construct**[\*3]** its own poles, and eventually pole ownership would even out. Indeed, Article VII of the 1980 Agreement required each party to own approximately 50% of the utility poles within the relevant areas. However, at the time the Agreement was executed, CenturyLink owned approximately 20% of the utility poles, while the Power Providers owned approximately 80%. This ownership scheme remained approximately the same, despite the terms of the agreement, and was the subject of much controversy, not relevant for purposes of this Motion to Dismiss. [Doc. 42-11].

Over the years, CenturyLink and the Power Providers executed five amendments to the 1980 Agreement with the general changes summarized as follows:

(1) Amendment No. 1 (1980) specified that the $7.40 per pole attachment fee would become effective for the 1981 calendar year.

(2) Amendment No. 2 (1982) raised the attachment fee rate to $9.25 per pole.

(3) Amendment No. 3 (1995) raised CenturyLink's attachment fee rates as follows:

(1994) - $18.25 per pole

(1995) - $21.00 per pole

(1996) - $23.00 per pole

(1997) - $25.00 per pole

From 1998 forward, rates will be automatically increased each year based on the Handy Whitman Index for public utility construction.

Electric rates for attachment on**[\*4]** CenturyLink poles will be $0.50 more than the rate CenturyLink pays.

(4) Amendment No. 4 (2009) added several additional fees included as follows:

- A $15 per pole fee for CenturyLink service drops (CenturyLink lines from the pole to the customer location)

- A $15 application fee for each pole attachment or service drop

- A $75 penalty for each unauthorized attachment, plus a penalty of $25 per day following notice of unauthorized attachment until the application fee and penalty is paid.

(5) Amendment No. 5 (2010) changed CenturyLink's attachment fee rate for 2010 to $32 per pole, lowered the electric attachment fee to $27 per pole, and provided that from 2015 forward, the rates would be automatically increased each year based on the Handy Whitman Index.

[Docs. 42, 42-4, 42-5, 42-6, 42-7, 42-8].

The 1980 Agreement set out guidelines for joint review and revision of the utility pole attachment rates every three years. [Doc. 42-3].The Agreement provides that if the parties cannot agree upon a revision to the attachment rates within 90 days of a request for review and revision, the default rate will be 50% of the then average annual total cost per pole, based on the average in-plant cost factors**[\*5]** of providing and maintaining the poles covered by the agreement.

CenturyLink claims that the Power Providers have conspired to fix anticompetitive rates for CenturyLink attachments that far exceed the 50% average cost contemplated by the 1980 Agreement. Moreover, CenturyLink alleges that the attachment rates and terms imposed upon it are unfair and unreasonable. CenturyLink's allegations of anticompetitive conduct revolve around the Power Provider's insistence on negotiating with CenturyLink on pole attachment rates as a group or "cartel" instead of negotiating individually. [*See, e.g.*, Docs. 42-10, 42-12, 42-13, 42-15, 42-19].

In 2009, disagreements between CenturyLink and the Power Providers came to a head when the parties failed to come to an agreement on the attachment rates that CenturyLink was paying. [Doc. 42-43]. CenturyLink attempted to negotiate an attachment rate of $33 and a default rate of $40 down to $23.53. [Doc. 42-43]. Though the parties failed to come to an agreement on attachment rates, they settled all other non-rate operational issues and agreed on a pole attachment inventory that was to determine the unauthorized pole attachments and charge back rental for said**[\*6]** attachments. [Doc. 42-36]. The 2009 Settlement provided that CenturyLink's predecessor would pay the sum of $23.71 per pole which the Power Providers would accept under protest, and the attachment rate would be subject to further negotiation as the parties could not come to an agreement on attachment rates. [Doc. 42-36]. The outstanding rate issues were to be determined within sixty days by an amendment to the 1980 Agreement (Amendment No. 4), but no such agreement on attachment rates was reached though Amendment No. 4 added other fees not related to pole attachments. [Doc. 42-7].

In March 2010, the Power Providers filed suit against CenturyLink in this Court demanding that CenturyLink pay the default rate of approximately $40. The parties participated in mediation in August 2010, the result of which was the 2010 Settlement Agreement and Amendment No. 5 to the 1980 Agreement. [Docs. 42-1, 42-8]. Importantly, the parties signed a mutual release as part of the 2010 Settlement which is quoted as follows:

In consideration of the covenants, performances and payments set forth above, the Parties mutually agree as follows:

(a) Effective as of the execution of this Settlement Agreement and the payment of sums discussed in Section 3 above,**[\*7]** the Parties hereto do hereby release and discharge each other and their respective affiliates, parents, related corporations, agents, employees, heirs, representatives, successors and assigns from any and all claims, claim for relief, lines, charges, right of action, suits and demands whatsoever, whether known or unknown, arising out of or in any manner related to adjustment payments due through third quarter, 2010, including without limitation, any claims, counterclaims, charges, rights-of-action, suits and demands which were or could have been asserted in said Lawsuit. This release and discharge does not encompass, however, any debts, charges, claims or obligations arising on behalf of either party as a result of Amendment No. 4 to the agreement, Amendment No. 4 being made EXHIBIT 3 to this Settlement Agreement.

(b) The Parties hereby warrant that they execute this Settlement Agreement knowingly and voluntarily, without compulsion from any person, after having been fully advised of their rights by legal counsel of their choosing.

[Doc. 42-1].Thereafter, the parties executed Amendment No. 5 which provided for pole attachment rates of $32.00 per annum from CenturyLink to the Power Providers**[\*8]** and $27.00 per annum from the Power Providers to CenturyLink with the rates put in effect January 1, 2010. [Doc. 42-8]. For the period of 2015-2019, the rates were to be escalated based on the Handy-Whitman Index of Public Utility Construction Costs of the year immediately preceding the year for which the rate is being calculated divided by the Handy-Whitman Index published for July 1, 2013 multiplied by $32.00 - the base attachment rate.

In June 2013, the Power Providers sent invoices to CenturyLink dating back to 1980 and totaling $3.7 million for back-rental for the unauthorized pole attachments shown in the inventory ordered by the 2009 Settlement Agreement. When CenturyLink refused to pay the invoices, the Power Providers filed suit against CenturyLink alleging breach of the 1980 Agreement. [Doc. 1]

The parties dispute whether back-billing was to be limited to five years pursuant to the 1980 Agreement which is quoted as follows:

At intervals not exceeding five (5) years an actual inventory of attachments shall be made by representatives of the parties. If there is any difference in the number of attachments found by the inventory and the number arrived at by tabulating those reported,**[\*9]** correction will be made by retroactive billing for any attachments identified as being responsible for the difference, and any remaining difference will be spread evenly over the years since the last inventory, and billing will be adjusted accordingly.

With respect to the named Power Providers in this case, no inventories were ever conducted until after the 2009 Settlement Agreement was executed, with the apparent exception of Erwin. [Doc. 42-2]. The Power Providers and CenturyLink each interpret the quoted provision of the 1980 Agreement differently to favor their own interests.

Additionally in support of its counterclaims, CenturyLink alleges that one of the Power Providers, BTES, has been using CenturyLink's network interface devices (NIDs) and subloops to connect to their own customers without CenturyLink's permission and without payment to CenturyLink. [Doc. 42, 42-49]. CenturyLink makes its NIDs available to competitors for lease, and BTES has used these NIDs without permission from or payment to CenturyLink. CenturyLink claims that these actions are in furtherance of its illegal conspiracy with the Power Providers to inhibit CenturyLink's ability to compete.

**B. Procedural History [\*10]**

CenturyLink filed a [*Rule 12(b)(6)*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:5GYC-1WP1-6N19-F0YW-00000-00&context=) Motion to Dismiss, [Doc. 9], for failure to state a claim with respect to the Power Providers' initial complaint. [Doc. 1]. CenturyLink argued that the Power Providers' claims had been released by the 2010 Settlement Agreement. The Court determined, however, that the Power Providers' cause of action had not accrued until after the parties executed the 2010 Settlement Agreement. [Doc. 27]. Because Tennessee law prohibits releases from operating prospectively, the motion was denied.

CenturyLink has filed an Answer and Counterclaim, [Doc. 31], and on Amended Answer and Counterclaim, [Doc. 42], to which the Power Providers responded with a 12(b)(6) Motion to Dismiss. [Doc. 46]. The issues have been thoroughly briefed, and this matter is ripe for disposition.

**III. Analysis**

**A. 12(b)(6) Standard**

[*Rule 8(a)(2) of the Federal Rules of Civil Procedure*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:5GYC-1WP1-6N19-F0YK-00000-00&context=) requires "a short and plain statement of the claim showing that the pleader is entitled to relief." [*Fed. R. Civ. P. 8(a)(2)*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:5GYC-1WP1-6N19-F0YK-00000-00&context=). A claim that fails to state a claim upon which relief can be granted may be dismissed pursuant to [*Rule 12(b)(6) of the Federal Rules of Civil Procedure*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:5GYC-1WP1-6N19-F0YW-00000-00&context=). In order to show that the pleader is entitled to relief, a pleading must contain more than "labels and conclusions[, and] a formulaic recitation of the elements of a cause of action**[\*11]** will not do." [*Ashcroft v. Iqbal, 556 U.S. 662, 678, 129 S. Ct. 1937, 173 L. Ed. 2d 868 (2009)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:4W9Y-4KS0-TXFX-1325-00000-00&context=) (quoting [*Bell Atl. Corp. v. Twombly, 550 U.S. 544, 555, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007))*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:4NSN-8840-004C-002M-00000-00&context=). Thus, "a complaint must contain sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face." *Id.* For purposes of a 12(b)(6) Motion to Dismiss, the court must accept as true all of the factual allegations contained in the complaint and must determine whether the factual content gives rise to "the reasonable inference that the defendant is liable for the misconduct alleged." *Id.*

**B. Mutual Release**

The Power Providers vigorously argue that most of CenturyLink's claims are barred by the Mutual Release contained within the 2010 Settlement Agreement between the parties. In opposition, CenturyLink argues that the 2010 Mutual Release was not "mutual" if it does not bar the Power Providers' claims while simultaneously barring CenturyLink's claims. If the Release is not mutual, then it is unenforceable, CenturyLink argues further. CenturyLink's argument fails to take into account that this Court merely determined that the cause of action accrued after the 2010 Settlement Agreement and Mutual Release was executed, and, therefore, the Power Providers' cause of action was not barred. The Court did not determine, as CenturyLink argues,**[\*12]** that the release is unenforceable under Tennessee law.

As a preliminary matter, "[a] copy of a written instrument that is an exhibit to a pleading is a part of the pleading for all purposes." [*Fed. R. Civ. P. 10(c)*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:5GYC-1WP1-6N19-F0YR-00000-00&context=); *see* *Mengel Co. v. Nashville Paper Prods. & Specialty Workers Union,* [*No. 513, 221 F.2d 644, 647 (6th Cir. 1955)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4W-X5F0-003B-01B5-00000-00&context=). Because CenturyLink has attached a voluminous number of documents, including all relevant Agreements, Amendments, and Settlements, to its counterclaim, the Court considers these documents as a part of the pleading for all purposes.

Under Tennessee law, which applies in this diversity case, "[a] settlement agreement . . . is a contract between the parties, and as such, contract law governs disputes concerning the . . . enforceability of the settlement agreement." [*Waddle v. Elrod, 367 S.W.3d 217, 222 (Tenn. 2012)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:55GJ-6P81-F04K-901T-00000-00&context=). "Under general principles of contract law, a contract must result from a meeting of the minds of the parties in mutual assent to the terms." [*Sweeten v. Trade Envelopes, Inc., 938 S.W.2d 383, 386 (Tenn. 1996)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3RT3-GT90-003F-904C-00000-00&context=). Though the cardinal rule of contract construction is to ascertain the intent of the parties, "[w]hen the language of the contract is plain and unambiguous, the court must determine the parties' intention from the four corners of the contract, interpreting and enforcing it as written." [*Int'l Flight Ctr. v. City of Murfreesboro, 45 S.W.3d 565, 570 (Tenn. Ct. App. 2000)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:410D-6340-0039-40P7-00000-00&context=).

A release is also a contract, and all foregoing rules apply to the construction of releases. *See* [*Richland Country Club, Inc. v. CRC Equities, Inc., 832 S.W.2d 554, 557 (Tenn. Ct. App. 1991)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S3K-4NN0-003F-91VN-00000-00&context=). "A general release covers all claims between the parties**[\*13]** which are in existence and within their contemplation." *Id.* (citing [*Cross v. Earls, 517 S.W.2d 751 (Tenn. 1974))*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3RRJ-40B0-003V-D2W8-00000-00&context=). Tennessee law does, however, prohibit releases from operating prospectively. [*Watson Carpet & Floor Covering, Inc. v. Mohawk Indus., 648 F.3d 452, 460 (6th Cir. 2011)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:82J2-W1J1-652R-4006-00000-00&context=) (citing [*Sherman v. Am. Water Heater Co., 50 S.W.3d 455, 459 (Tenn. Ct. App. 2001))*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:42FY-NFD0-0039-4044-00000-00&context=).

Here, CenturyLink and the Power Providers signed the 2010 Settlement Agreement containing a mutual release clause that released any and all claims related to adjustment payments due through third quarter, 2010, "which were or *could have been* asserted in said Lawsuit."[Doc. 42-1] (emphasis added). With the recognition that a release cannot operate prospectively, CenturyLink's counter-complaint attempts to set out numerous claims arising from pre-2010 Settlement Agreement conduct on the part of the Power Providers. Such claims would have been available to CenturyLink and could have been asserted in the 2010 lawsuit. However, some of CenturyLink's claims involve rates that it has been paying since 2010 and do not relate to adjustment payments due through third quarter, 2010. In this context, each of CenturyLink's claims will be examined in turn.

**C. Violations of Federal Telecommunications Act (FTA)**

**1. Violation of** [***47 U.S.C. 253(a)***](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:4YF7-GKV1-NRF4-43KY-00000-00&context=) **- Count 2**

CenturyLink has alleged violations of [*47 U.S.C. 253*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:4YF7-GKV1-NRF4-43KY-00000-00&context=), commonly known as the FTA. The relevant statutory provisions are as follows:**[\*14]**

(a) In general. No State or local statute or ***regulation***, or other State or local legal requirement, may prohibit or have the effect of prohibiting the ability of any entity to provide any interstate or intrastate telecommunications service.

. . . .

(c) State and local government authority. Nothing in this section affects the authority of a state or local government to manage the public rights-of-way or to require fair and reasonable compensation from telecommunications providers, on a competitively neutral and nondiscriminatory basis, for use of public rights-of-way on a nondiscriminatory basis, if the compensation required is publicly disclosed by such government.

[*47 U.S.C. § 253(a)*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:4YF7-GKV1-NRF4-43KY-00000-00&context=), [*(c) (2012)*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:4YF7-GKV1-NRF4-43KY-00000-00&context=). The Sixth Circuit has yet to decide whether [*§ 253(a)*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:4YF7-GKV1-NRF4-43KY-00000-00&context=) confers a private right of action. *See* [*TCG Detroit v. City of Dearborn, 206 F.3d 618 (6th Cir. 2000)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3YRN-16K0-0038-X3SG-00000-00&context=).

In *TCG Detroit*, the district court determined that [*§ 253(c)*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:4YF7-GKV1-NRF4-43KY-00000-00&context=) granted a private right of action, but failed to determine whether [*§ 253(a)*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:4YF7-GKV1-NRF4-43KY-00000-00&context=) likewise granted a private right of action. *See* [*TCG Detroit v. City of Dearborn, 977 F. Supp. 836 (E.D. Mich. 1997)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3RR5-XDM0-00B1-F1HB-00000-00&context=). In affirming the district court, the appellate court relied on the district court's analysis "of the Supreme Court's four-factor test in [*Cort v. Ash, [422 U.S. 66, 78, 95 S. Ct. 2080, 45 L. Ed. 2d 26 (1975)]*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4X-BGX0-003B-S21S-00000-00&context=), which provides guidance in determining whether a Congressional statute creates an implied right of action." [*TCG Detroit, 206 F.3d at 623*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3YRN-16K0-0038-X3SG-00000-00&context=). Importantly,**[\*15]** the appellate court noted that "the Supreme Court has become more restrained in its willingness to find an implied private right of action." *Id.* (citing [*Touche Ross & Co. v. Redington, 442 U.S. 560, 578, 99 S. Ct. 2479, 61 L. Ed. 2d 82 (1979))*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4X-81G0-003B-S144-00000-00&context=).

Persuading this Court that [*§ 253(a)*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:4YF7-GKV1-NRF4-43KY-00000-00&context=) does not grant an implied private right of action is [*§ 253(d)*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:4YF7-GKV1-NRF4-43KY-00000-00&context=), which pointedly refers to [*§ 253(a)*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:4YF7-GKV1-NRF4-43KY-00000-00&context=) as allowing the Federal Communications Commission ("FCC") to "preempt the enforcement" of the legal requirement at issue to correct the violation of the FTA. [*47 U.S.C. § 253(d) (2012)*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:4YF7-GKV1-NRF4-43KY-00000-00&context=); *see* [*TCG Detroit, 206 F.3d at 623*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3YRN-16K0-0038-X3SG-00000-00&context=). The language of [*§ 253(d)*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:4YF7-GKV1-NRF4-43KY-00000-00&context=), coupled with its specific reference to [*§ 253(a)*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:4YF7-GKV1-NRF4-43KY-00000-00&context=) and pointed omission of reference to [*§ 253(c)*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:4YF7-GKV1-NRF4-43KY-00000-00&context=), compels the conclusion that Congress did not intend to create an implied private right of action for [*§ 253(a)*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:4YF7-GKV1-NRF4-43KY-00000-00&context=); instead Congress intended for the FCC to enforce [*§ 253(a)*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:4YF7-GKV1-NRF4-43KY-00000-00&context=), while telecommunications providers may enforce [*§ 253(c)*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:4YF7-GKV1-NRF4-43KY-00000-00&context=). Moreover, nearly every other court confronted with the issue has held that [*§ 253(a)*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:4YF7-GKV1-NRF4-43KY-00000-00&context=) does not grant an implied private right of action. *See, e.g.,* [*Sw. Bell Tel., LP v. City of Houston, 529 F.3d 257, 261 (5th Cir. 2008)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:4SJR-GR40-TXFX-72SR-00000-00&context=); [*BellSouth Telecomms. v. Town of Palm Beach, 252 F.3d 1169, 1191 (11th Cir. 2001)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:434H-4XC0-0038-X0B5-00000-00&context=); [*Pac. Bell Tel. Co. v. City of Hawthorne, 188 F. Supp. 2d 1169, 1175 (C.D. Cal. 2001)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:45WR-22G0-0038-Y11N-00000-00&context=). Thus, the motion to dismiss Count 2 of CenturyLink's counter-complaint is granted.

**2. Violation of** [***47 U.S.C. 253(c)***](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:4YF7-GKV1-NRF4-43KY-00000-00&context=) **- Count 1**

CenturyLink has also claimed that the Power Providers' utility pole attachment rates are violative of [*§ 253(c)*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:4YF7-GKV1-NRF4-43KY-00000-00&context=) because the compensation the Power Providers require for attachment to utility poles is unfair, unreasonable,**[\*16]** and not competitively neutral. CenturyLink alleges that the rates and terms the Power Providers have demanded, including attachment fees, application fees, service drop fees, inventory requirements, average group and individual default rates, payment terms, and back-billed amounts, amount to unfair and unreasonable compensation for access because the Power Providers were charging CenturyLink attachment rates that were between 50%-125% greater than the average rates paid by other telecommunications companies in other regions of Tennessee.

*TCG Detroit*, in which the Sixth Circuit recognized a private right of action for violations of [*§ 253(c)*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:4YF7-GKV1-NRF4-43KY-00000-00&context=), involved a case where a city required a telecommunications provider to pay a franchise fee for the privilege of laying cable within the city limits. The court held that a city ordinance requiring a fee of 4% the telecom provider's gross revenues, a $50,000 one-time fee, and reimbursement of the City's administrative cost was fair and reasonable compensation within the meaning of [*§ 253(c)*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:4YF7-GKV1-NRF4-43KY-00000-00&context=). *See* [*TCG Detroit, 206 F.3d at 624-25*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3YRN-16K0-0038-X3SG-00000-00&context=). Like *TCG Detroit*, all cases of which this court is aware that construe [*§ 253(c)*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:4YF7-GKV1-NRF4-43KY-00000-00&context=) involve management of the public rights of way in the form of ordinances or franchise agreements.**[\*17]** *See, e.g.,* [*Level 3 Commc'ns, L.L.C. v. City of St. Louis, 477 F.3d 528 (8th Cir. 2007)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:4N0B-7T20-0038-X4FT-00000-00&context=) (involving a license agreement that ***regulated*** a telecom providers occupation of streets and public rights-of-way within the City); [*P.R. Tel.Co. v. Municipality of Guayanilla, 450 F.3d 9 (1st Cir. 2006)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:4K4H-9MK0-0038-X2V1-00000-00&context=) (challenging ordinance imposing a monthly charge on telecom providers of 5% gross revenue); [*Qwest Commc'ns Corp. v. Md. Nat'l Capital Park & Planning Comm'n, 598 F. Supp. 2d 704 (D. Md. 2009)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:4VNJ-FMC0-TXFR-135F-00000-00&context=) (involving a license agreement to build a conduit in a right-of-way alongside a road).

CenturyLink's allegations make clear that it equates the Power Providers' poles which happen to be in public rights-of-way as being public rights-of-way in themselves. In CenturyLink's line of reasoning, because poles constitute public rights-of-way, the attachment rates the Power Providers charge for use of its poles are unfair, unreasonable, and not reasonably related to the maintenance and management of the poles. This court is unaware of any cases construing [*§ 253(c)*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:4YF7-GKV1-NRF4-43KY-00000-00&context=) that equate utility poles with public rights-of-way. Nowhere in CenturyLink's complaint does it allege that the municipalities charge it unfair and unreasonable rates for its own poles that occupy the public rights-of-way. Only when CenturyLink's position is taken do any of the Amendments to the 1980 Agreement become plausibly violative of [*§ 253(c)*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:4YF7-GKV1-NRF4-43KY-00000-00&context=). The Court declines to extend the definition of public rights-of-way**[\*18]** to poles owned by the Power Providers; CenturyLink's claim for relief under [*§ 253(c)*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:4YF7-GKV1-NRF4-43KY-00000-00&context=) must be dismissed.

**D. *Antitrust* Claims - Counts 3-11**

**1. Mutual Release**

CenturyLink vigorously asserts that its ***antitrust*** claims are not barred by the mutual release contained within the 2010 Settlement Agreement. *Inter alia*, it argues that "agreements attempting to release claims for future violations of ***antitrust*** laws are void as against public policy." [Document 59, page 8]. CenturyLink is only partially correct. Prospective releases for claims not within the contemplation of the parties *are* unenforceable as a matter of policy; however, "[r]eleases of ***anti-trust*** claims are treated the same as releases of other claims. There is no public policy against the release of any ***anti-trust*** claim." [*Schott Enters., Inc. v. Pepsico, Inc., 520 F.2d 1298, 1300 (6th Cir. 1975)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4X-2NY0-0039-M4YS-00000-00&context=). The *Schott Enterprises* court was confronted with allegations that the ***antitrust*** plaintiff was coerced into signing a mutual release. *Id.* In finding no merit to the argument, the court found persuasive the fact that the plaintiff was at all times acting under the advice of counsel. *Id.*

Here, CenturyLink has not alleged that it was not acting under the advice of counsel. Its allegations that it was coerced into signing five amendments**[\*19]** to the 1980 Agreement or that it was also coerced into signing the 2010 Settlement Agreement should be accorded no weight as whether a party was coerced is a legal conclusion, and CenturyLink has not alleged factual matter that lends plausibility to its conclusion that it was coerced. Indeed, the Mutual Release of the 2010 Agreement states that "[t]he Parties hereby warrant that they execute this Settlement Agreement knowingly and voluntarily, without compulsion from any person, after having been fully advised of their rights by legal counsel of their choosing." Simply stated, CenturyLink desired access to the Power Providers' utility poles and was willing to pay for that access. It was also willing to release any and all claims relating to the fees for utility pole attachments through the third quarter, 2010. Accordingly, to the extent that CenturyLink alleges ***antitrust*** violations of which it was aware stemming from pre-2010 conduct, those claims - Counts 3-11 - are dismissed.

**2. Statute of Limitations**

Alternatively, the Power Providers argue that CenturyLink's ***antitrust*** claims are time barred, while CenturyLink just as vigorously argues that the claims are not barred. CenturyLink attempts**[\*20]** to set forth three examples of new and continuing acts by the Power Providers' alleged conspiracy that inflicted new and accumulating ***antitrust*** injury on CenturyLink within the limitations period. CenturyLink correctly points out that "[g]enerally a motion under [*Rule 12(b)(6)*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:5GYC-1WP1-6N19-F0YW-00000-00&context=), which considers only the allegations in the complaint, is an inappropriate vehicle for dismissing a claim based upon a statute of limitations." [Doc. 59, p. 20]. However, the fully-quoted language concludes: "[b]ut, sometimes the allegations in the complaint affirmatively show that the claim is time-barred. When that is the case . . . dismissing the claim under [*Rule 12(b)(6)*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:5GYC-1WP1-6N19-F0YW-00000-00&context=) is appropriate." [*Cataldo v. U.S. Steel Corp., 676 F.3d 542, 547 (6th Cir. 2012)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:55D5-KRF1-F04K-P01S-00000-00&context=).

The relevant limitations period is set forth in [*15 U.S.C. § 15b*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:4YF7-GKV1-NRF4-43V6-00000-00&context=) which states that "[a]ny action to enforce a cause of action [under the Sherman Act] shall be forever barred unless commenced within four years after the cause of action accrued." [*15 U.S.C. § 15b (2012)*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:4YF7-GKV1-NRF4-43V6-00000-00&context=). It is well established that an ***antitrust*** cause of action accrues and the limitation period commences each time a defendant commits an act that injures the plaintiff's business. [*Zenith Radio Corp. v. Hazeltine Research, Inc., 401 U.S. 321, 338, 91 S. Ct. 795, 28 L. Ed. 2d 77 (1971)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4X-DRC0-003B-S48H-00000-00&context=). The Sixth Circuit has formulated "two discrete rules" which refine the *Zenith* standard. "First, when a continuing ***antitrust*** violation is alleged, a cause**[\*21]** of action accrues each time a plaintiff is injured by an act of the defendants." [*Peck v. General Motors Corp., 894 F.2d 844, 849 (6th Cir. 1990)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4X-7380-003B-52TS-00000-00&context=) (alterations omitted) (quoting [*Barnosky Oils, Inc. v. Union Oil Co. of Cal., 665 F.2d 74, 81 (6th Cir. 1981))*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4W-XPS0-0039-W17S-00000-00&context=). "Second, in the context of a continuing conspiracy, the statute of limitations runs from the commission of the act that causes the plaintiff's damage." [*Id.*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4X-7380-003B-52TS-00000-00&context=) (quoting [*Chiropractic Coop. Ass'n of Mich. v. American Med. Ass'n, 867 F.2d 270, 275 (6th Cir. 1989))*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4X-D950-003B-50V6-00000-00&context=).

More importantly, "a newly accruing claim for damages must be based on some injurious act actually occurring during the limitations period, not merely the abatable but unabated inertial consequences of some pre-limitations action." [*Z Technologies Corp. v. Lubrizol Corp., 753 F.3d 594, 600 (6th Cir. 2014)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:5C8C-9N91-F04K-P009-00000-00&context=) (quoting [*Barnosky Oils, 655 F.2d at 81*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4W-XPS0-0039-W17S-00000-00&context=)). "Even when a plaintiff alleges a continuing violation, an overt act by the defendant is required to restart the statute of limitations." [*DXS, Inc. v. Siemens Medical Systems, Inc., 100 F.3d 462, 467 (6th Cir. 1996)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3RHD-J9D0-006F-M0H1-00000-00&context=) (quoting [*Peck, 894 F.2d at 849*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4X-7380-003B-52TS-00000-00&context=)). "An overt act . . . is characterized by two elements: (1) it must be a new and independent act that is not merely a reaffirmation of a previous act; and (2) it must inflict new and accumulating injury on the plaintiff." [*Id.*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3RHD-J9D0-006F-M0H1-00000-00&context=)

Here, CenturyLink proffers three post-limitations period actions by the Power Providers which it argues constitute overt acts that serve to restart the limitations period. First, CenturyLink points to the Power Provider's demand for back-billed pole attachment fees in June 2013. Second, it points to**[\*22]** the institution of the present lawsuit to recover those fees; third, it points to BTES's unauthorized use of CenturyLink's NIDs which was discovered within the limitations period.

Assuming, *arguendo*, that the Power Providers were involved in a conspiracy to fix prices, the cause of action would have accrued when the Power Providers refused to negotiate separately because that is when the Power Providers would have caused the ***antitrust*** injury. CenturyLink would have suffered ***antitrust*** injury, if any, when it was unable to negotiate separately with each individual Power Provider for a rate reduction. Both a demand for back-billed pole attachment fees and the institution of a lawsuit to recover said fees are not new and independent acts but merely an affirmation of the contract between the parties.

The third act by the Power Providers, specifically BTES's unauthorized use of NIDs, does not even remotely come within the ambit of a continuing ***antitrust*** conspiracy. CenturyLink makes conclusory allegations that such conduct was in furtherance of a conspiracy to injure its ability to compete, but does not explain how unauthorized use of CenturyLink's NIDs constitutes an overt act in furtherance**[\*23]** of a conspiracy. In fact, it only alleges that one of the counter-defendants engaged in such behavior. Though BTES's conduct may give rise to a claim for damages under another theory, the Court will not engage in speculation for purposes of this Motion to Dismiss. The factual allegations in the complaint fail to give rise to a plausible claim for relief from ***antitrust*** violations, and for the foregoing reasons, the ***antitrust*** claims must be dismissed.

**E. State Law Claims**

Before addressing CenturyLink's state law claims, this Court, sitting in diversity, must heed the caution against "adopting substantive innovation in state law" "[a]bsent some authoritative signal from the legislature or courts of [Tennessee]." [*Combs v. International Ins. Co., 354 F.3d 568, 578 (6th Cir. 2004)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:4BD7-0VD0-0038-X0MH-00000-00&context=). Moreover, in construing statutes, the intent of the Tennessee General Assembly is of paramount importance. *See* [*Lee Med., Inc. v. Beecher, 312 S.W.3d 515, 526 (Tenn. 2010)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:7YJ3-6C61-2RHS-C00V-00000-00&context=). When the statutory language is clear and unambiguous, the court must interpret the statute according to its text in order to give full effect to the General Assembly's intent. *See id.* The Court must review the sufficiency of CenturyLink's complaint with regards to Tennessee statutory claims in this light.

**1. Violation of** [***Tenn. Code Ann. § 65-21-103***](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:4X8K-V0H0-R03K-J1K6-00000-00&context=) **- Count 12**

CenturyLink alleges that Erwin and BTES have**[\*24]** violated [*Tennessee Code Annotated § 65-21-103*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:4X8K-V0H0-R03K-J1K6-00000-00&context=) by charging CenturyLink rates for use of the public rights-of-way which it labels as unreasonable and discriminatorily imposed. Moreover, CenturyLink attempts to characterize Erwin and BTES's utility poles as public rights-of-way in themselves.

A telephone company has a right to construct a "telephone line and erect the necessary fixtures along, or over, or under any [public rights-of-way]." [*Tenn. Code. Ann. § 65-21-101*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:4X26-FSN0-R03J-V0JD-00000-00&context=) (2014); *see also* [*Tenn. Code Ann. § 65-21-201*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:4X8K-V0H0-R03K-J1KN-00000-00&context=) (2014). [*Section 65-21-103*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:4X8K-V0H0-R03K-J1K6-00000-00&context=) states:

Any village or city within which such line may be constructed shall have all reasonable police powers to ***regulate*** the construction, maintenance, or operation of the line within its limits, including the right to exact rentals for the use of its streets and to limit the rates to be charged; provided, that such rentals and limitations as to rates are reasonable and imposed upon all telephone and telegraph companies without discrimination.

[*Tenn. Code Ann. § 65-21-103*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:4X8K-V0H0-R03K-J1K6-00000-00&context=) (2014).

Here, CenturyLink has attempted to characterize the Power Providers' utility poles (with the exclusion of Mountain) as being public rights-of-way to which CenturyLink is entitled to attach its necessary fixtures. However, the plain language of the referenced statutes indicates two things. First, [*§ 65-21-101*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:4X26-FSN0-R03J-V0JD-00000-00&context=) grants telephone**[\*25]** companies the authority to construct a telephone line on any public rights-of-way; second, the construction, maintenance, or operation of such telephone lines may be ***regulated*** by the city's reasonable police power which includes the right to exact rentals for the use of its streets. Pole attachment fees are not implicated in the statute.

The leading Tennessee state court opinion construing [*§ 65-21-103*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:4X8K-V0H0-R03K-J1K6-00000-00&context=) involved an ordinance requiring a telecom provider to enter into a franchise agreement and to pay the defendant city an amount equal to 5% of gross revenues each quarter for use of the city's rights-of-way. [*BellSouth Telecommunications, Inc. v. City of Memphis, 160 S.W.3d 901, 907 (Tenn. Ct. App. 2004)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:4CV9-KBJ0-0039-41XN-00000-00&context=). There is no such ordinance requiring CenturyLink to attach to the Power Providers' utility poles in the present case.

CenturyLink's claim requires the Court to read too much into the language of the statute. Specifically, the limitation on the right to exact rentals applies to rentals for the use of streets or public rights-of-way and not rentals for the use of utility poles. [*Section 65-21-103*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:4X8K-V0H0-R03K-J1K6-00000-00&context=) is inapplicable to the facts of this case, and CenturyLink's claim fails to show a plausible entitlement to relief. Count 12 must be dismissed.

**2. Tenn. Code Ann. §§ 7-52-405, -603 - Counts 13-14**

CenturyLink also contends that both BTES and Erwin have**[\*26]** violated [*Tennessee Code Annotated §§ 7-52-405*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:4X8J-DJ90-R03N-74FW-00000-00&context=) and [*-603*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:4X8J-DJ90-R03N-74G8-00000-00&context=). It seeks both declaratory and injunctive relief for these alleged violations. [*Section 7-52-405*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:4X8J-DJ90-R03N-74FW-00000-00&context=) states as follows:

For ***regulatory*** purposes, a municipality shall allocate to the costs of providing any of the services authorized by § 7-52-401:

(1) An amount for attachments to poles owned by the municipality equal to the highest rate charged by the municipality to any other person or entity for comparable pole attachments; and

(2) Any applicable rights-of-way fees, rentals, charges, or payments required by state or local law of a nongovernmental corporation that provides the identical services.

[*Tenn. Code Ann. § 7-52-405*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:4X8J-DJ90-R03N-74FW-00000-00&context=) (2014). [*Section 7-52-603*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:4X8J-DJ90-R03N-74G8-00000-00&context=) currently provides that "[a] municipal electric system shall charge or allocate as costs to the division the same pole rate attachment fee as it charges any other franchise holder providing the same service." [*Tenn. Code Ann. § 7-52-603(d)*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:4X8J-DJ90-R03N-74G8-00000-00&context=) (2014). The services referenced in the statute include cable, internet, and telecommunications. The referenced language may be summarized as follows: A municipality providing cable, internet, or telecommunications services may not charge its own divisions that provide such services a lower attachment rate than it charges other companies that provide the same services. *See* [*Tenn. Code Ann. §§ 7-52-405*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:4X8J-DJ90-R03N-74FW-00000-00&context=), [*-603(d)*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:4X8J-DJ90-R03N-74G8-00000-00&context=) (2014).**[\*27]**

In support of its claim, CenturyLink alleges "[u]pon information and belief, the rates and terms [BTES and Erwin impose] on [their] own telecommunications and/or cable/internet divisions for attachment to [their] electric utility poles are significantly less burdensome than the rates and terms [they have] imposed on CenturyLink . . . ." [Doc. 42 p. 90-91]. Such a claim is conclusory, and CenturyLink alleges no facts in support of this claim beyond its allegations that the attachment rates it pays are unreasonable. A claim that fails to plead sufficient facts that give rise to the plausible inference that the pleader is entitled to relief must be dismissed. Accordingly, Counts 13 and 14 are dismissed.

**3. Unjust Enrichment - Count 15**

In the alternative to CenturyLink's other breach of contract claims, it claims that the Power Providers have been unjustly enriched by the "excessive" pole attachment rates.

Unjust enrichment is a quasi-contractual theory or is a contract implied-in-law in which a court may impose a contractual obligation where one does not exist. Courts will impose a contractual obligation under an unjust enrichment theory when: (1) there is no contract between the parties or a contract**[\*28]** has become unenforceable or invalid; and (2) the defendant will be unjustly enriched absent a quasi-contractual obligation.

[*Whitehaven Cmty. Baptist Church v. Holloway, 973 S.W.2d 592, 596 (Tenn. 1998)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3T52-GCT0-0039-407S-00000-00&context=) (internal citations omitted) (citing [*Paschall's Inc. v. Dozier, 219 Tenn. 45, 407 S.W.2d 150, 154-55 (Tenn. 1966))*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3RRJ-45W0-003V-D44C-00000-00&context=).

Here, there are valid contracts between the Power Providers and CenturyLink which makes the remedy of unjust enrichment unavailable to CenturyLink. Count 15 must be dismissed because CenturyLink has failed to plausibly plead the nonexistence of an enforceable contract.

**4. Breach of Contract**

CenturyLink alleges that the Power Providers have breached both the terms of the 2010 Settlement Agreement and the 1980 Agreement. In Tennessee, "[t]he essential elements of any breach of contract claim include (1) the existence of an enforceable contract, (2) nonperformance amounting to a breach of the contract, and (3) damages caused by the breach of the contract." [*ARC LifeMed, Inc. v. AMC-Tennessee, Inc., 183 S.W.3d 1, 26 (Tenn. Ct. App. 2005)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:4GT1-8YR0-0039-41JJ-00000-00&context=).

**a. 2010 Agreement - Count 16**

CenturyLink alleges that the Power Providers lawsuit seeking to recover pre-2010 adjustment payments breached the terms of the 2010 Settlement. However, as this Court has already determined, the Power Provider's cause of action did not accrue until after the 2010 Settlement Agreement was executed. Because Tennessee law does not allow releases to operate**[\*29]** prospectively, the Power Provider's cause of action was not barred. *See* [*Watson Carpet & Floor Covering, Inc. v. Mohawk Indus., 648 F.3d 452, 459-60 (6th Cir. 2011)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:82J2-W1J1-652R-4006-00000-00&context=). The Power Providers' lawsuit cannot be a breach of the 2010 Settlement Agreement because the cause of action accrued after the execution of the 2010 Settlement Agreement, and thus, the 2010 Settlement Agreement is inapplicable to the Power Providers' claim. Accordingly, Count 16 must be dismissed.

**b. 1980 Agreement - Count 17**

CenturyLink alleges that the Power Providers breached the 1980 Agreement and subsequent amendments thereto by back-billing CenturyLink for the full thirty-plus year period. For purposes of a [*Rule 12(b)(6)*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:5GYC-1WP1-6N19-F0YW-00000-00&context=) Motion to Dismiss, CenturyLink's counterclaim contains sufficient well-pled facts that give rise to a plausible entitlement to relief. First, neither party contests that the 1980 Agreement is enforceable though CenturyLink takes issue with attachment rates and other fees set forth in subsequent amendments. Second, CenturyLink plausibly alleges that the 1980 Agreement limits back-billing to five years. In support, CenturyLink points to other Northeast Tennessee utilities operating under identical agreements which have limited their back-billing to five years. Thus, if the three Power Providers here demand**[\*30]** back-billed pole attachment rental for the past thirty years when the terms of the contract limit such demands to five years, the Power Providers' conduct could be characterized as breach of the 1980 Agreement. Third, assuming that the contract was breached, CenturyLink has suffered damage as a result. They have been forced to defend a lawsuit, and are potentially liable for millions of dollars for back-billed pole rentals. The Court finds that CenturyLink has plausibly pled a claim for breach of contract. The Motion to Dismiss Count 17 will be denied.

**6. Fraud - Count 18**

CenturyLink attempts to set forth a fraud claim by stating four separate representations that the Power Providers made to CenturyLink. The allegation is quoted as follows:

254. During the negotiations with CenturyLink in 2008 through 2010, in the communications detailed in [the counterclaim] above, BTES, Erwin, and Mountain made repeated false, material representations to CenturyLink regarding the following:

• The annual pole costs of each TN 7 member;

• The TN 7 members' intent to negotiate promptly and in good faith as to rates and the other terms that remained unresolved following the 2009 settlement agreement, and**[\*31]** to execute a final agreement, including mutual releases, within 60 days of signing the 2009 agreement;

• The TN 7 members' intent to limit retroactive backbilling to 5 years, per the parties' contract, course of dealing, and recognized industry standards; and

• The TN 7 members' intent to release "all claims, claims for relief, liens, charges, rights of action, suits and demands whatsoever, whether known or unknown, arising out of or in any manner related to adjustment payments due through third quarter, 2010."

A fraud claim must contain "facts supporting the following essential elements: (i) the defendant made a representation of an existing or past fact; (ii) the representation was false when made; (iii) the false representation was made either knowingly or without belief in its truth or recklessly; (v) plaintiff reasonably relied on the misrepresented material fact; and (vi) plaintiff suffered damage as a result of the misrepresentation. [*Diggs v. Lasalle Nat. Bank Ass'n, 387 S.W.3d 559, 564 (Tenn. Ct. App. 2012)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:55S6-5F41-F04K-70HD-00000-00&context=).

**a. The Annual Pole Costs of each TN 7 Member**

CenturyLink's complaint fails to plead a plausible claim for relief specifically with respect to the reasonable reliance element. CenturyLink claims that the Power Providers' representations as to annual**[\*32]** pole costs constitutes fraud; however, the facts that CenturyLink alleges in support of this claim at most show disagreement between the parties as to the default pole attachment rate. Indeed, the 1980 Agreement provides that if the parties fail to agree upon a rate revision, the pole attachment rate is to be 50% of the "average annual total cost per pole, based on average in-plant cost factors, of providing and maintaining the joint poles covered by this agreement."

Disregarding the numerous legal conclusions that CenturyLink interposes to obfuscate the issue, CenturyLink and the Power Providers were in disagreement as to the proper calculation of the default rate. In fact, CenturyLink calculated the default rate as being less than the then current pole attachment rate so it would stand much to gain if the parties adopted its calculation of the annual pole costs. Because the alleged misrepresentation occurred during negotiation and disagreement as to default pole attachment rates, CenturyLink does not plausibly allege that it reasonably relied on any misrepresentation. Just the opposite, CenturyLink gathered its own statistics and proposed its own version of the default rate that it**[\*33]** believed it should be paying. There are no well-pled facts showing reasonable reliance on the misrepresented fact, and CenturyLink's fraud claim fails with respect to the annual pole costs of the Power Providers.

**b. The Power Providers' Intent to Negotiate Outstanding Issues from 2009 Settlement Agreement**

CenturyLink's fraud claim with respect to this allegation also fails. Both CenturyLink and the Power Providers intended to negotiate all outstanding issues as evidenced by Article VII, Section 7.5 of the 2009 Settlement Agreement which stated that "[i]t is the intent of the parties to resolve all outstanding issues and differences and enter into a final Untied [sic] Amendment No. 4 and mutual releases within sixty (60) days of the Effective Date of this Agreement." Though the Power Providers claim that CenturyLink was equally at fault in failing to resolve the outstanding issues which eventually resulted in the 2010 lawsuit, a false statement on the part of the Power Providers could, in fact, support a fraud claim, but CenturyLink has failed to plead facts - not legal conclusions - that the Power Provider's statement of intent was false when made.

**c. The Power Providers' Intent to Limit Back-billing to Five Years [\*34]**

A fraud claim with respect to the Power Providers' intent to limit back-billing to five years must also fail. CenturyLink alleges that its course of dealing with other Northeast Tennessee utilities indicates a representation of intent to limit back-billing. However, BTES, Erwin, and Mountain have never made any representations about their intent to limit back-billing, and no such factual allegations appear in the counter-complaint or attached documents. A fraud claim requires a representation of a past or existing fact; as no such representation exists with respect to this allegation, the claim must fail.

**d. The Power Providers' Intent to Enter Into a Mutual Release**

A fraud claim that gives rise to an entitlement to relief must factually allege that the defendant made a representation about a past or existing fact. Moreover, the representation must have been false when made. This Court has previously decided in this case that the Power Providers' cause of action accrued after the Mutual Agreement was executed. Accordingly, the representation concerning the Power Provider's intent to enter into a mutual release was not false when made. This fraud claim also fails. Count 18 must be dismissed.**[\*35]**

**IV. Conclusion**

Based upon the foregoing reasons, it is hereby **ORDERED** that the Counter-Defendants' Motion to Dismiss for failure to state a claim upon which relief can be granted under [*Rule 12(b)(6)*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:5GYC-1WP1-6N19-F0YW-00000-00&context=) is **GRANTED** as to counts 1 - 16, and 18 and those counts are dismissed. The Motion to Dismiss is **DENIED** with respect to Count 17.

/s/ J. RONNIE GREER

UNITED STATES DISTRICT JUDGE

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