

**PENNSYLVANIA  
PUBLIC UTILITY COMMISSION  
Harrisburg, PA 17120**

Public Meeting held November 10, 2022

Commissioners Present:

Gladys Brown Dutrieuille, Chairman  
Stephen M. DeFrank, Vice Chairman  
Ralph V. Yanora  
Kathryn L. Zerfuss  
John F. Coleman, Jr.

PAETEC Communications, Inc. Supplement No. 49 to Tariff Telephone- PA P.U.C. No. 3	R-2022-3031945
Business Telecom, LLC dba EarthLink Business III Supplement No. 30 to PA Local Resale Tariff No. 3	R-2022-3031936
US LEC of Pennsylvania LLC dba PAETEC Business Services Supplement No. 49 to Tariff Telephone- PA P.U.C. No. 1	R-2022-3031952
American Telephone Company, LLC Supplement No. 6 to Tariff Telephone- Pennsylvania P.U.C. No. 1	R-2022-3031933
Broadview Networks, Inc. Supplement No. 91 to Tariff Telephone- PA P.U.C. No. 1	R-2022-3031934
Cavalier Telephone Mid-Atlantic LLC Supplement No. 50 to Tariff Telephone -PA P.U.C. No. 1	R-2022-3031939
Choice One Communications of Pennsylvania, Inc. Supplement No. 75 to Tariff Telephone- PA P.U.C. No. 1	R-2022-3031941
CTC Communications Corp. dba EarthLink Business Supplement No. 47 to Tariff Telephone- PA P.U.C. No. 2	R-2022-3031942
MassComm, LLC Supplement No. 10 to Tariff Telephone- PA P.U.C. No. 1	R-2022-3031944
Earthlink Business, LLC Supplement No. 13 to Tariff Telephone- PA P.U.C. No. 5	R-2022-3031943
Talk America, LLC Supplement No. 53 to Tariff Telephone- PA P.U.C. No. 2	R-2022-3031947
Windstream Communications LLC Supplement No. 15 to Tariff Telephone- PA P.U.C. No. 2	R-2022-3031953
Windstream D&E Systems, Inc. Supplement No. 14 to Tariff Telephone- PA P.U.C. No. 5	R-2022-3031954

**ORDER**

**BY THE COMMISSION:**

**I. Background**

Before us for disposition are tariff supplements filed by PAETEC Communications, Inc.; Business Telecom, LLC d/b/a EarthLink Business III; US LEC of Pennsylvania LLC d/b/a PAETEC Business Services; American Telephone Company, LLC; Broadview Networks, Inc.; Cavalier Telephone Mid-Atlantic, LLC; Choice One Communications of Pennsylvania Inc.; CTC Communications Corp. d/b/a EarthLink Business; MassComm, LLC; Earthlink Business, LLC; Talk America, LLC; Windstream Communications LLC; and Windstream D&E Systems, Inc. (collectively, the Companies). The Companies are all certificated in Pennsylvania as Competitive Local Exchange Carriers (CLECs). In addition, the Companies are all subsidiaries of Windstream Holdings, Inc.

The instant tariff supplements again introduce the TDM Connectivity Charge (TDMCC). The TDMCC was previously proposed in tariff supplements that were filed on various dates between October 18, 2021, and November 30, 2021. In those tariff supplements, the TDMCC was generally described thusly:

All Business Service options may be assessed a TDM Connectivity Charge. This is a monthly recurring charge assessed on services that rely on Time Division Multiplexing (“TDM”) equipment and facilities in areas where an alternative Internet Protocol (“IP”) based service exists. The amount of the charge is dependent upon the bandwidth capacity in use at a service location. The bandwidth capacity will be classified as 64kbps or 1.544Mbps.

	Monthly Recurring Charge
Per Circuit with 64kbps Bandwidth Capacity	\$50.00
Per Circuit with 1.544Mbps Bandwidth Capacity	\$300.00

Data requests to solicit information about the TDMCC were issued on December 2, 2021, and December 20, 2021. The Companies timely responded to those data requests.

In response to data requests, the Companies proffered operational and financial reasons for the imposition of the TDMCC. Operationally, the Companies indicated that its TDM networks are nearing the end of life and that replacement parts are no longer available in certain instances when systems fail. Further, the Companies explained that TDM network related outages account for the most customer outage hours across all products and services sold by the Companies.<sup>1</sup> In addition, Companies averred that the FCC's 2017 Broadband Data Services (BDS) order<sup>2</sup> deregulated TDM services in 48 of the 67 counties in Pennsylvania. According to the Companies, the vast majority of its Pennsylvania customers are located in those 48 counties.<sup>3</sup> The Companies further averred that they would incur average expense increases ranging from 25% to 175% assessed by the carriers from which they purchase a significant percentage of the TDM network used in serving its customers.<sup>4</sup>

The description of the TDMCC raised concerns with the ability to determine the exact circumstances under which a customer would be assessed the TDMCC. The initial description of the TDMCC indicated that it would be assessed "in areas where an alternative Internet Protocol ("IP") based service exists." The tariff supplements did not contain any information regarding exactly what would qualify as an alternative IP-based service. Further, the tariff supplements did not contain any information regarding the classification criteria used to determine if an alternative IP-based service exists within a given customer's area.

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<sup>1</sup> Companies' December 13, 2021 Response to Data Request Set I, TUS-12.

<sup>2</sup> *Business Data Services in an Internet Protocol Environment, Technology Transitions, Special Access for Price Cap Local Exchange Carriers, and AT&T Corporation Petition for Rulemaking to Reform Regulation of Incumbent Local Exchange Carrier Rates for Interstate Special Access Services*, WC Docket Nos. 16-143 and 05-25, GN Docket No. 13-5, RM-10593, FCC 17-43 (rel. Apr. 28, 2017) (2017 BDS order).

<sup>3</sup> Companies' December 22, 2021 Response to Data Request Set II, TUS-15.

<sup>4</sup> *Supra*, note 1.

In response to data requests, the Companies stated that it considered its Office Suite and Dynamic IP products to be alternative IP based services.<sup>5</sup> In addition, the Companies stated that the Office Suite and Dynamic IP products are available to all business customer locations in the Commonwealth.<sup>6</sup>

If the only exclusions to the application of the TDMCC were based on the lack of availability of products that are universally available, then it appeared that there were no exclusions to the application of the TDMCC.

While the description of the TDMCC as initially proposed coupled with the Companies' data request responses raised concerns for many reasons, the tariff supplements initially proposing the TDMCC were rejected by Commission Order entered January 13, 2022,<sup>7</sup> due to the Companies failure to comply with 52 Pa. Code § 53.59(c)(3).

The instant tariff supplements were filed April 18, 2022, and include the TDMCC with a slightly modified description:

All Business Access Service options may be assessed a TDM Connectivity Charge. This is a monthly recurring charge assessed on services that rely on Time Division Multiplexing ("TDM") equipment and facilities; this charge

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<sup>5</sup> Companies' December 13, 2021 Response to Data Request Set I, TUS-1.

<sup>6</sup> Companies' December 13, 2021 Response to Data Request Set I, TUS-2.

<sup>7</sup> See PAETEC Communications, Inc. Supplement No. 46 to Tariff Telephone- PA P.U.C. No. 3; Business Telecom, LLC d/b/a EarthLink Business III Supplement No. 29 to PA Local Resale Tariff No. 3; US LEC of Pennsylvania LLC d/b/a PAETEC Business Services Supplement No. 46 to Tariff Telephone- PA P.U.C. No. 1; American Telephone Company, LLC Supplement No. 3 to Tariff Telephone- Pennsylvania P.U.C. No. 1; Broadview Networks, Inc. Supplement No. 8-8 to Tariff Telephone- PA P.U.C. No. 1; Cavalier Telephone Mid-Atlantic, LLC Supplement No. 49 to Tariff Telephone -PA P.U.C. No. 1; Choice One Communications of Pennsylvania Inc. Supplement No. 72 to Tariff Telephone- PA P.U.C. No. 1; CTC Communications Corp. d/b/a EarthLink Business Supplement No. 44 to Tariff Telephone- PA P.U.C. No. 2; Lightship Telecom, LLC Supplement No. 16 to Tariff Telephone- PA P.U.C. No. 1; MassComm, LLC Supplement No. 7 to Tariff Telephone- PA P.U.C. No. 1; Earthlink Business, LLC Supplement No. 12 to Tariff Telephone- PA P.U.C. No. 5; Talk America, LLC Supplement No. 52.to Tariff Telephone- PA P.U.C. No. 2; Windstream Communications LLC Supplement No. 14 to Tariff Telephone- PA P.U.C. No. 2; and Windstream D&E Systems, Inc. Supplement No. 12 to Tariff Telephone- PA P.U.C. No. 5, Docket Nos. R-2021-3029138; R-2021-3029460; R-2021-3029314; R-2021-3029312; R-2021-3029380; R-2021-3029501; R-2021-3029516; R-2021-3029526; R-2021-3029575; R-2021-3029580; R-2021-3029554; R-2021-3029686; R-2021-3029698; and R-2021-3029720 (Order entered January 13, 2022).

will not be assessed on alternative Internet Protocol (“IP”) based services. The amount of the charge is dependent upon the bandwidth capacity in use at a service location. The bandwidth capacity will be classified as 64kbps or 1.544Mbps.

	Monthly Recurring Charge
Per Circuit with 64kbps Bandwidth Capacity	\$50.00
Per Circuit with 1.544Mbps Bandwidth Capacity	\$300.00

## II. Discussion

Despite the modified description, the TDMCC remains concerning and problematic for several reasons.

First, the exact circumstances under which the TDMCC would be applied remain nebulous at best. The description of the TDMCC states that, “All Business Access Service options may be assessed a [TMCC]” and that “[t]he amount of the charge is depended upon the bandwidth in capacity in use at a service location. The bandwidth capacity will be classified as 64kbps or 1.544Mbps.” It is unclear what (if any) TDMCC would apply to services with bandwidths that are not exactly 64kbps or 1.544Mbps, such as Data Port 56K service<sup>8</sup> or DS3 service.<sup>9</sup> Further, it is unclear which and how many TDMCCs would apply for fractionalized channels. For example, would a fractionalized T1 be charged a single 1.544Mbps TDMCC or multiples of the 64kbps TDMCC dependent upon the chosen configuration?

We recognize that the TDMCC applies only to business customers. We further recognize that business customers are frequently sophisticated purchasers of telecommunications services and have a plethora of service providers from which to choose.<sup>10</sup> Nonetheless, it cannot reasonably be expected that a more than miniscule percent of business customers would understand the difference between TDM and

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<sup>8</sup> See US LEC of Pennsylvania LLC d/b/a PAETEC Business Services Tariff No. 1, Section 6, Page 4.

<sup>9</sup> See US LEC of Pennsylvania LLC d/b/a PAETEC Business Services Tariff No. 1, Section 6, Page 11.

<sup>10</sup> As of October 28, 2022, there are 156 CLECs authorized to provide telecommunications services in the Commonwealth of Pennsylvania.

IP-based services let alone know the bandwidth capacity of the services to which they subscribe. The information on the draft bill insert notwithstanding, very few business customers would be able to accurately determine if the services to which they subscribe would be subject to the TDMCC. This is especially concerning given the potential for massive rate increases both on a percentage and dollar basis that could result from the application of the TDMCC.

Second, the Commission has not generally sanctioned the indiscriminate use of multiple line-item charges on telephone bills for the recovery of “pass-through” charges or other separately identifiable costs relating to the provision of service. The use of line items is normally restricted to charges for optional services as well as taxes and surcharges that have been specifically mandated by this Commission or the Federal Communications Commission. In this regard, 66 Pa.C.S. § 1509 states, in pertinent part, that “All bills shall be itemized to separately show amounts for basic service, Federal excise taxes, applicable State sales and gross receipts taxes, to the extent practicable, fuel adjustment charge, if any, State tax adjustment charge or other similar components of the total bill as the commission may order.” (Emphasis Added). A carrier could conceivably identify any number of separate costs relating to its provision of service to customers and could propose to recover any or more of these costs in separate line items on its bills. However, multiplying rate elements on a bill without a specific regulatory mandate or any other obvious reason may unnecessarily complicate the bill, and could serve to confuse rather than enlighten a customer as to the true cost of purchasing service from a carrier.

The Companies explain that individual product and service descriptions may not contain reference to a product being TDM. According to the Companies, this is due to products being sold under branded names over the years.<sup>11</sup> The Companies reason that imposing the TDMCC as a separate line item rather than increasing existing rates for the affected services allows customers to explicitly understand that a TDM circuit is being

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<sup>11</sup> Companies’ December 22, 2021 Response to Data Request Set II, TUS-14

used to provide their service and it is directly resulting in an additional charge.<sup>12</sup> The Companies justification falls short as it assumes an unreasonable level of sophistication and knowledge with regards to telecommunications technologies amongst its business customers.

Third, while the revised TDMCC description no longer includes the seemingly superfluous exception language, it does still read that “All Business Access Service options may be assessed a TDM Connectivity Charge.” In response to data requests questioning exclusions to the TDMCC, the Companies stated that, “Exclusions are not determined by IP based product availability and are instead driven by individual customer contract terms. The Companies have negotiated customer contracts in place with its business customers and there are agreements which contain price lock or price guarantee verbiage. In these situations the Companies are not contractually allowed to raise rates.”<sup>13</sup> This response raises concerns that the TDMCC, its application, and exceptions to its application may be at odds with 66 Pa.C.S. § 1303, which states:

No public utility shall, directly or indirectly, by any device whatsoever, or in anywise, demand or receive from any person, corporation, or municipal corporation a greater or less rate for any service rendered or to be rendered by such public utility than that specified in the tariffs of such public utility applicable thereto. The rates specified in such tariffs shall be the lawful rates of such public utility until changed, as provided in this part. Any public utility, having more than one rate applicable to service rendered to a patron, shall, after notice of service conditions, compute bills under the rate most advantageous to the patron.

Finally, the while Companies indicate that their Office Suite and Dynamic IP products are available throughout the Commonwealth, they do not acknowledge that broadband internet connections of suitable bandwidth to reasonably utilize their Office Suite and Dynamic IP products may not be as ubiquitous, especially in rural areas. This

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<sup>12</sup> *Id.*

<sup>13</sup> Companies’ December 22, 2021 Response to Data Request Set II, TUS-13.

fact raises concerns that exclusions to the application of the TDMCC may potentially violate 66 Pa.C.S. § 1304, which states, in pertinent part, that:

No public utility shall, as to rates, make or grant any unreasonable preference or advantage to any person, corporation, or municipal corporation, or subject any person, corporation, or municipal corporation to any unreasonable prejudice or disadvantage. No public utility shall establish or maintain any unreasonable difference as to rates, either as between localities or as between classes of service.

### **III. Conclusion**

Upon analysis, the Companies' revised TDMCC appears that it may be unlawful, unjust, unreasonable, or contrary to the public interest. We shall therefore direct the Companies to file supplements removing the TDMCC from its tariffs; **THEREFORE,**

#### **IT IS ORDERED:**

1. That, within 30 days of the date of entry of this order, the Companies are directed to file tariff supplements removing the TDMCC as included in PAETEC Communications, Inc. Supplement No. 49 to Tariff Telephone- PA P.U.C. No. 3; Business Telecom, LLC d/b/a EarthLink Business III Supplement No. 30 to PA Local Resale Tariff No. 3; US LEC of Pennsylvania LLC d/b/a PAETEC Business Services Supplement No. 49 to Tariff Telephone- PA P.U.C. No. 1; American Telephone Company, LLC Supplement No. 6 to Tariff Telephone- Pennsylvania P.U.C. No. 1; Broadview Networks, Inc. Supplement No. 91 to Tariff Telephone- PA P.U.C. No. 1; Cavalier Telephone Mid-Atlantic, LLC Supplement No. 50 to Tariff Telephone -PA P.U.C. No. 1; Choice One Communications of Pennsylvania Inc. Supplement No. 75 to Tariff Telephone- PA P.U.C. No. 1; CTC Communications Corp. d/b/a EarthLink Business Supplement No. 47 to Tariff Telephone- PA P.U.C. No. 2; MassComm, LLC Supplement No. 10 to Tariff Telephone- PA P.U.C. No. 1; Earthlink Business, LLC Supplement No. 13 to Tariff Telephone- PA P.U.C. No. 5; Talk America, LLC Supplement No. 53 to Tariff Telephone- PA P.U.C. No. 2; Windstream Communications LLC Supplement No. 15 to Tariff Telephone- PA P.U.C. No. 2; Windstream D&E

Systems, Inc. Supplement No. 14 to Tariff Telephone- PA P.U.C. No. 5; and Windstream D&E Systems, Inc. Supplement No. 7 to Tariff Telephone- PA P.U.C. No. 9.

2. That upon filing of the tariff supplements effectuating the removal of the TDM Connectivity Charge from the Companies' tariffs, the cases shall be marked closed.

**BY THE COMMISSION,**



Rosemary Chiavetta  
Secretary

(SEAL)

ORDER ADOPTED: November 10, 2022

ORDER ENTERED: November 10, 2022