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Before the
Federal Communications Commission
Washington, DC 20554

In the Matter of Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming	CS Docket No. 01-129

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

To: The Commission

REPLY COMMENTS OF CHARTER COMMUNICATIONS, INC.

On August 3, 2001, the Scottsboro (Alabama) Electric Power Board ("SEPB") filed "Comments" asking the Commission to insulate it from effective competition from Charter Communications, Inc. ("Charter") in Scottsboro. Until recently, SEPB had the luxury of competing as an arm of the municipality, with easy access to every citizen's mailbox through its parent electric utility and other cooperative arms of the municipality, with wide public support and an artificially low cost of capital, against an existing system that needed attention and improvement. Charter acquired that system, invested in a state-of-the-art upgrade, added cable modem service and digital programming (which SEPB does not offer), and improved customer service – all at competitive rates. This is precisely the type of competitive response that Congress hoped to foster.[1] SEPB has found that "better than Falcon" is suddenly not good enough, and has turned to the Commission for protection against lower rates and customer "win back" campaigns.

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[1] *Annual Assessment of the Status of Competition in Markets for the Delivery of Video Programming*, Sixth Annual Report, 15 FCC Rcd 978 ¶ 215 (2000).

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Charter's competitive offerings are neither unusual nor unlawful. Customer "win back" campaigns are widespread.[2] The uniform pricing rules do not apply to cable operators who, like Charter in Scottsboro, are subject to effective competition. 47 U.S.C. § 543(d); 47 C.F.R. § 76.984(c)(2); *see Armstrong Communications, Inc.*, 16 FCC Rcd 1039 (2001). This exception was mandated by Congress, as part of its preference for competitive market forces rather than administrative rate-setting restrictions. *See Time Warner Entertainment Co. v. FCC*, 56 F.3d 151, 191 (D.C. Cir. 1995). SEPB's half-hearted effort to demonstrate "predatory pricing" misses the mark by far: it has lumped into the supposed "costs" in Scottsboro a wide array of fixed costs that have no place in applicable FCC or antitrust analysis—such as overhead management costs, marketing, advertising, and even the cost of stock options. *Implementation of Cable Act Reform Provisions of the Telecommunications Act of 1996*, Report and Order, 14 FCC Rcd 5296 ¶ 111 (1999). *See* 3 PHILLIP E. AREEDA AND HERBERT HOVENKAMP, ANTITRUST LAW ¶ 735b3 (1996) ("AREEDA").

As the Commission has held, "The presence of deep discounts alone does not necessarily indicate that the discounted prices are below average variable cost ... Low prices that are above cost are procompetitive," *See PanAmSat Corp. v. Comsat Corp.*, 12 FCC Rcd 6952 ¶ 24 & n.60 (1997) ("*PanAmSat*"). A rational firm sets prices at their profit-maximizing rate in each market, depending on local circumstances. AREEDA ¶ 745b ("The price that maximizes profits in one market is quite independent of the price that maximizes profits in a different market"). Essentially, SEPB suggests that the FCC should intervene in this municipal-overbuild market

[2] *See* Seth Sutel, "*Cable, Satellite Battle for Viewers*," ASSOCIATED PRESS, Business News (Aug. 8, 2001); Jennifer Pendleton, *"Cable Puts Emotion Into Its Satellite Fight; Dishes Win the First Round, But Digital Feeds Make Cable Attractive,"* ADVERTISING AGE S3 (Apr. 16, 2001); Mike Farrell, "*Digital-Sub Gains Propel Charter in 2Q*," MULTICHANNEL NEWS 38 (Aug. 6, 2001). This is routinely reported to FCC as part of the vigorous competition for subscribers between cable, DBS, and other multi-channel

and institute compulsory rate increases so that Charter's prices match SEPB's. But the antitrust laws and the pro-competitive provisions of the Communications Act were designed to protect consumers, not competitors. *See PanAmSat* ¶ 19; *Brooke Group Ltd. v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209, 223-25 (1993); *Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, Seventh Annual Report, 22 Comm. Reg. 1414 ¶ 235 (2001) ("The case studies of communities where the Commission has found 'effective competition' suggest that subscribers have benefited from 'head-to-head' competition. Generally, in the communities studied, subscribers have seen decreased monthly charges for services and equipment.").

SEPB is not a victim here. It is one of several MVPDs attempting to win consumer loyalty through better prices and services. SEPB's suggestion that the Commission use its authority under Section 628(b) to protect SEPB from competition would upend the Act and the FCC's role. The Commission has consistently confined the scope of that provision to its original purpose, rather than transforming it into a "mini-FTC Act," under which all claims of supposed "unfair methods of competition" would be adjudicated at the FCC. *See Implementation of the Cable Television Consumer Protection and Competition Act of 1992: Development of Competition and Diversity in Video Programming Distribution and Carriage*, Memorandum Opinion and Order on Reconsideration of the First Report and Order, 10 FCC Rcd 3105 ¶¶ 40-41 (1994); *Dakota Telecom, Inc. v. CBS Broadcasting, Inc.*, 14 FCC Rcd 10500 ¶ 8 (1999); *DirecTV, Inc. v. Comcast Corp.*, 22 Comm. Reg. 898 ¶ 10 (2000). Nothing in the competition for Scottsboro customers would "have the purpose or effect of ... significantly hinder[ing] or prevent[ing] [SEPB] from providing satellite cable programming or satellite broadcast

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video programming providers. *See Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, Seventh Annual Report, 16 FCC Rcd 6005 ¶ 74 (2001).

programming to subscribers or consumers." SEPB may earn lower profits, it may have to become more efficient, and it will almost certainly lose some market share. But that is simply competition. SEPB has identified nothing but its parochial desire to be free of a vigorous competitor, and has offered nothing meriting wholesale overhaul of law.

Respectfully submitted,

CHARTER COMMUNICATIONS, INC.

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