Before the
Federal Communications Commission
Washington, D.C. 20554

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

To the Commission:

COMMENTS OF THE SCOTTSBORO ELECTRIC POWER BOARD

Scottsboro (Alabama) Electric Power Board ("SEPB") files these comments in response to the Commission's Notice of Inquiry of June 25, 2001. In the Notice, the Commission observed that Congress and the Commission have since 1992 sought to establish a "pro-competitive de-regulatory national policy framework" in the communications field by, among other things, removing legal and other barriers to entry by competitive providers of video programming. Notice of Inquiry at ¶ 5. The Commission also recognized that gaps may exist in its arsenal of weapons to combat barriers to entry, and it invited interested parties to submit comments on "any remaining, or impending, statutory or regulatory barriers to new entrants in the video market." *Id*.

SEPB files these comments to inform the Commission of serious anticompetitive practices by Charter Communications that require prompt and effective agency action. As detailed below, Charter has been using its vast revenues from its 6.3 million customers nationwide to subsidize predatory pricing and other unfair business practices in Scottsboro that are clearly intended to drive Scottsboro's municipal cable system out of the market. Charter apparently also wishes to send potential entrants in other markets the message that Charter has the resources and the will to price its services at a loss as long as necessary to destroy their ability to compete and that the Commission is helpless to do anything about this. Unfortunately, as the article attached as Exhibit A shows, Charter's chilling message is beginning to

have its intended effect in some communities. These are strong words, but as the Commission will see below, they are warranted by what is occurring in Scottsboro.

In a recent speech to the National Cable Television Association, Chairman Michael Powell noted that these are very good times for the cable industry, but he pointedly warned the industry that efforts to thwart consumer access to competitive prices, choices and quality "will amplify calls for government intervention, as it has so often." Chairman Powell's warning appears to have been lost on Charter. Evidently, the Commission needs to state, in clear and unmistakable language that no one can ignore or misconstrue, that the Commission does indeed have both the authority and the commitment to take forceful action against anticompetitive conduct such as Charter's in Scottsboro. In particular, as shown below, the Commission should make clear that it has ample authority under Section 628(b) of the Communications Act to protect small, locally-based cable systems such as SEPB's from predatory practices by major, multisystem cable operators.

At the very least, if the Commission believes that the Act does not go far enough to authorize the Commission to protect small competitors from anticompetive practices by major cable operators, the Commission should request that Congress grant the Commission explicit statutory authority to do so. Of course, as the Commission knows, the federal legislative process can be highly complex and time-consuming. Delaying action until Congress passed new legislation could, therefore, result in incalculable and irreparable injury to hundreds, if not thousands, of communities in which competition does not exist. Thus, SEPB submits, the Commission should seek new legislation only as a last resort.

THE ESSENTIAL ROLE OF ENTITIES OF LOCAL GOVERNMENT IN PROVIDING OR FACILITATING COMPETITION IN THEIR COMMUNITIES

As the Commission has frequently recognized, municipal overbuilds can result in numerous benefits to the public. For example, in its last report on the status of competition in the cable industry, the Commission found:

> During 1999, the Bureau examined a number of cases where the incumbent cable operator faced "head-to-head" competition from one of a variety of new entrants *including municipalities*, LECs, public utilities, and DBS operators. In communities where head-to-head competition is present, the incumbent cable operator has responded to competitive entry in a variety of ways, such as by lowering prices, providing additional channels at the same monthly rate, improving customer service, or adding new services including high speed Internet and telephone services.

In the Matter of Annual Assessment of the Status of Competition in Markets for the Delivery of Video Programming, FCC 99-418, *Sixth Annual Report*, CS Dkt. No. 99-330, ¶ 215 (rel. January 14, 2000) (emphasis added).

The Commission has also repeatedly observed that municipal overbuilds can advance the pro-competitive goals of the Telecommunications Act of 1996 and accelerate the deployment of advanced communications services and capabilities to all Americans, particularly in rural communities. The Commission discussed these points at length in paragraphs 139-151 of its report entitled *In the Matter of Inquiry Concerning the Deployment of Advanced Telecommunications Capability to All Americans in a Reasonable And Timely Fashion, and Possible Steps To Accelerate Such Deployment Pursuant to Section 706 of the Telecommunications Act of 1996*, FCC 00-290, *Second Report*, CC Dkt. No. 98-146 (rel. August 21, 2000). Furthermore, while finding that it cannot, without more explicit direction from Congress, preempt state laws that prohibit municipal entities from offering telecommunications services, the Commission unanimously found that municipalities can play an essential role in enabling their communities to obtain prompt and affordable access to the full benefits of the Information Age:

> [M]unicipally-owned utilities and other utilities have the potential to become major competitors in the telecommunications industry. In particular, we believe that the entry of municipally-owned utilities can further the goal of the 1996 Act to bring the benefits of competition to all Americans, particularly those who live in small or rural communities. We emphasized this fact in our August 2000 report on the deployment of advanced services. In that report, we presented a case study detailing advanced services deployment in Muscatine, Iowa where the municipal utility competes with other carriers to provide advanced services to residential customers.... Our case study is consistent with [the American Public Power Association's] statements in the record here that municipally-owned utilities are well positioned to compete in rural areas, particularly for advanced telecommunications services, because they have facilities in place now that can support the

> provision of voice, video, and data services either by the utilities, themselves, or by other providers that can lease the facilities.

In the Matter of The Missouri Municipal League; The Missouri Association of Municipal Utilities; City Utilities of Springfield; City of Columbia Water & Light; City of Sikeston Board of Utilities; Petition for Preemption of Section 392.410(7) of the Revised Statutes of Missouri, FCC 00-443, *Memorandum Opinion and Order*, ¶ 10, 2001 WL 28068 (rel. January 12, 2001). To underscore the forgoing findings, three of the five commissioners filed separate statements in the Missouri case. Commissioner Susan Ness's succinct statement is particularly noteworthy:

> I write separately to underscore that today's decision not to preempt a Missouri statute does not indicate support for a policy that eliminates competitors from the marketplace. In passing the Telecommunications Act of 1996, Congress sought to promote competition for the benefit of American consumers.
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> In the Telecommunications Act, Congress recognized the competitive potential of utilities and, in section 253, sought to prevent complete prohibitions on utility entry into telecommunications. The courts have concluded, however, that section 253 is not sufficiently clear to permit interference with the relationship between a state and its political subdivisions.
>
> Nevertheless, municipal utilities can serve as key players in the effort to bring competition to communities across the country, especially those in rural areas. In our recent report on the deployment of advanced telecommunications services, we examined Muscatine, Iowa, a town in which the municipal utility was the first to deploy broadband facilities to residential consumers. The telephone and cable companies in Muscatine responded to this competition by deploying their own high-speed services, thereby offering consumers a choice of three broadband providers. It is unfortunate that consumers in Missouri will not benefit from the additional competition that their neighbors to the north enjoy.

For the reasons that the Commission expressed in the reports and orders cited above, SEPB submits that the Commission should interpret its authority under the Communications Act in the light of the strong public interest in prompt and effective action by the Commission to protect municipal overbuilders from anticompetitive practices such as those described in the next section.

CHARTER'S ANTICOMPETITIVE CONDUCT IN SCOTTSBORO

Before 1997, the people of Scottsboro were very dissatisfied with their cable provider, Falcon Cablevision, which had continually raised its rates while offering a limited choice of cable programming and delivering wretched service. In response, the residents of Scottsboro overwhelmingly supported the creation of a new municipally-owned cable system, to be operated by SEPB. Construction of the new system occurred in 1998-99. Once fully operational, the system captured approximately 90 percent of the cable market in Scottsboro.

In late 1999, Charter acquired Falcon's cable system, and in March 2000, Charter began to operate the system. Since then, Charter has offered various "special deals" that have thus far succeeded in inducing approximately 36 percent of SEPB's customers to shift their accounts to Charter.

As Exhibit B shows, Charter currently charges $24.95 a month in Scottsboro for expanded-basic service.[1] This includes 200 channels, of which 16 are educational channels, 16 are premium movie channels, 45 are digital music channels, and 14 are pay-per-view channels. Subscribers also obtain a digital receiver with remote and Charter's on-screen guide. In addition, Charter offers to pay each SEPB customer a bounty of $200 to switch cable television service and an additional $200 to switch to Charter's Internet service. Charter has also established an "Amnesty Program" under which it forgives SEPB customers' old debts to Falcon or Charter.

In Exhibit C, we have put Charter's rate for expanded-basic service in Scottsboro into context. As that exhibit shows, Charter offers expanded-basic service in four nearby communities. In three of these communities, Charter charges from $72.90 to $77.90 a month for approximately 150 channels, and in the fourth community, Charter charges $49.95 a month, again for approximately 150 channels. Thus,

[1] In April 2000, Charter offered a special rate of $19.95 a month for a year. In May 2000, Charter added to that special one month of service free. Charter has also allowed at least some customers who signed up for the $19.95 special rate to renew at the same rate for a second year.

where destroying competition is not its goal, Charter charges two to three times the rate that it charges for in Scottsboro for 200 channels.

In Exhibit D, we have estimated the economic effect of Charter's predatory prices for cable television service. Because we do not have detailed information about Charter's costs, our calculations are necessarily imprecise. Furthermore, our estimates of Charter's losses are conservative, as we had no way of taking into account either the debts that Charter has forgiven under its amnesty program or the losses that Charter has incurred as a result of selling cable television services to a potentially sizable number of subscribers for up to two years at its special rate of $19.95 a month.

Utilizing Charter's 10Q Report to the Securities and Exchange Commission dated March 31, 2001, we have calculated that Charter's monthly rate of $24.95 for expanded-basic service in Scottsboro is $0.87 *less* than its nationwide average monthly operating expense of $25.82 per subscriber. When one adds to this loss the economic effect of Charter's payments of $200 to each SEPB customer that switches its cable television account to Charter, the result is a loss of $210.47 per subscriber on a one-year agreement.

Charter's losses on cable television service are exacerbated by its pricing practices for Internet service. As shown in Exhibit E, Charter's payments of $200 per SEPB subscriber to switch to Charter's Internet service results in a further loss of $111.07 per subscriber under a one-year agreement. Because we had no data with which to estimate Charter's incremental costs for providing Internet service, we conservatively assumed that its costs were $0. Thus, Charter's actual loss per subscriber should be considerably greater than $111.07.

In summary, Charter loses at least $210.47 on every former SEPB subscriber of cable television service and at least an additional $111.07 on every former SEPB subscriber of Internet service. Charter is apparently subsidizing these losses from its profits in other markets, such as the four markets discussed above in which it charging $72.90 - $77.90 a month. Furthermore, it is highly unlikely that Charter

would ever recoup these losses through sales in Scottsboro itself – at least as long as Charter had to engage in head-to-head with SEPB. Of course, Charter would have little difficulty in recovering these losses if it succeeded in driving SEPB out of the market. This is the essence of predatory pricing.

THE COMMISSION HAS AMPLE AUTHORITY TO CURB CHARTER'S ANTICOMPETITIVE CONDUCT

Charter's "special deals" are targeted to SEPB customers and are not available to all potential subscribers in Scottsboro, and its ultimate goal is to hinder significantly or preclude SEPB's ability to provide satellite cable programming or satellite broadcast programming to subscribers in Scottsboro. Thus, Charter's pricing practices arguably violate two provisions of the Cable Act, Sections 623(d) and 628(b). SEPB recognizes that the Commission has interpreted Sections 623(d) and 628(b) in ways that may make it awkward for the Commission to rely on them to address Charter's misconduct in Scottsboro. SEPB submits, however, that the Commission should take a fresh look at these provisions.

Section 623(d) provides as follows:

> UNIFORM RATE STRUCTURE REQUIRED.-- A cable operator shall have a rate structure, for the provision of cable service, that is uniform throughout the geographic area in which cable service is provided over its cable system. This subsection does not apply to (1) a cable operator with respect to the provision of cable service over its cable system in any geographic area in which the video programming services offered by the operator in that area are subject to effective competition, or (2) any video programming offered on a per channel or per program basis. Bulk discounts to multiple dwelling units shall not be subject to this subsection, except that a cable operator of a cable system that is not subject to effective competition may not charge predatory prices to a multiple dwelling unit. Upon a prima facie showing by a complainant that there are reasonable grounds to believe that the discounted price is predatory, the cable system shall have the burden of showing that its discounted price is not predatory.

While the first sentence of Section 623(d) clearly covers Charter's failure to charge uniform rates in Scottsboro, the exception in the second sentence for franchising areas in which "effective competition" exists could be read to deprive SEPB of the potential benefits of Section 623(d). That is so because Section 623(l)(B)(i) defines the term "effective competition" as including franchising areas in which two unrelated cable operators, such as Charter and SEPB, each offer comparable video programming to at

least 50 percent of the households, and because Section 623(l)(C) defines that term as including franchising areas in which a franchising authority, such as the City of Scottsboro, itself offers video programming to at least 50 percent of the households in the franchise area.

Furthermore, in *In the Matter of Armstrong Communications, Inc*., 2001 WL 43378, ¶ 10 n.34, the Commission recently held that it lacks authority under Section 623(d) to remedy pricing practices that would be considered "predatory" under the antitrust laws:

> Citizens Cable also alleges that Armstrong is engaging in predatory pricing through its non-uniform pricing and asks that the uniform rate requirement be enforced for this reason. Citizens Cable Ex Parte Presentation at 5-6. Section 623(d) of the Communications Act, 47 U.S.C. § 543(d), exempts bulk discounts to multiple dwelling units from the uniform rate requirement but provides that cable systems not subject to effective competition may not charge predatory prices to a multiple dwelling unit. It does not provide for broader Commission review of allegations of predatory pricing. Section 76.984 on which Citizens Cable relies implements this statutory provision. It does not provide for the broader antitrust review of Armstrong's rates that Citizens Cable seeks.

SEPB submits that the concept of "effective competition," as defined in the Act and interpreted in *Armstrong*, does not fit the facts presented here. By using that term throughout Section 623, Congress intended to ensure that the market, rather than federal, state or local regulation, would govern the rates charged by competitive providers of video programming services. Congress did not intend to preclude the Commission from finding that "effective competition" does not exist in certain markets, even if they meet the criteria set forth in Section 623(l). Nor did Congress intend to allow giant multisystem cable operators, such as Charter, to hide behind the statutory definitions of "effective competition" while using revenues from outside a franchising area to destroy competition by small, locally-based cable systems within the area.[2]

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[2] The Commission should also consider whether it can effectively address this problem through its general authority under Section 4(i) of the Communications Act, 47 U.S.C. § 154(i), to "perform any and all acts, make such rules and regulations, and issue such orders, not inconsistent with this Act, as may be necessary in the execution of its functions."

SEPB further submits that Section 628(b) may offer an even more promising vehicle for effective agency action. That provision states as follows:

> PROHIBITION. – It shall be unlawful for a cable operator, a satellite cable programming vendor in which a cable operator has an attributable interest, or a satellite broadcast programming vendor to engage in unfair methods of competition or unfair or deceptive acts or practices, the purpose or effect of which is to hinder significantly or to prevent any multichannel video programming distributor from providing satellite cable programming or satellite broadcast programming to subscribers or consumers.

Although the Commission has thus far applied Section 628(b) only to unfair methods of competition "in the sale of satellite cable and satellite broadcast programming," *see, e.g., Cross Country Cable, Inc. v. C-TEC Cable Systems of Michigan, Inc.*, ¶ 16, 12 FCC Rcd 2538, 1997 WL 90991, there is nothing in the language or legislative history of Section 628(b) that compels such a narrowing construction. To the contrary, when a cable operator attempts to drive a competitor out of the market, the cable operator's purpose is "to hinder significantly or to prevent [a] multichannel video programming distributor from providing satellite cable programming or satellite broadcast programming to subscribers or consumers." Moreover, in implementing ə 628(b) of the Act, the Commission has specifically recognized the potential expansive breadth of this provision, stating:

> This provision is a clear repository of Commission jurisdiction to adopt additional rules or to take additional actions to accomplish the statutory objectives should additional types of conduct emerge as barriers to competition and obstacles to the broader distribution of satellite cable and broadcast video programming. In this regard it is worth emphasizing that the language of 628(b) applies on its face to all cable operators.

In the Matter of Implementation of Sections 12 and 19 of the Cable Television Consumer Protection and Competition Act of 1992, Development of Competition and Diversity in Video Programming Distribution and Carriage, 8 FCC Rcd. 3359 (April 1, 1993).

Rather than wait for the lengthy legislative process to produce new federal legislation to clarify the Commission's authority to counteract anticompetitive practices such as Charter's, during which countless potential competitors may be destroyed or discouraged from even attempting to enter new markets, the Commission should use the full scope of its authority to protect competition today.

CONCLUSION

As indicated, SEPB recognizes that the Commission has in the past issued narrow interpretations of its authority under Sections 623(d) and Section 628(b). Nevertheless, the Commission not only has the power to reconsider and reinterpret its prior positions in the light of evolving circumstances, but it has an affirmative duty to do so. At a minimum, the Commission should call the problems that SEPB is encountering in Scottsboro to Congress's attention and request that Congress give the Commission clear and unambiguous statutory authority to prevent Charter and other major multisystem operators from utilizing their growing national resources and clout to undermine the pro-competitive purposes of the Cable Act of 1992 and Telecommunications Act of 1996.

Respectfully submitted,

Jim Baller

James Baller
Sean A. Stokes
The Baller Herbst Law Group, P.C.
2014 P. Street, N.W., Suite 200
Washington, D.C. 20036
(202) 833-5300 (phone)
(202)833-1180 (fax)
jim@baller.com (Internet)

Counsel for Scottsboro Electric Power Board

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