

**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:

**SCOTTSBORO ELECTRIC POWER BOARD’S ANSWER TO
THE REPLY COMMENTS OF CHARTER COMMUNICATIONS, INC.**

In its opening submission, the Scottsboro (Alabama) Electric Power Board (SEPB) showed that Charter Communications has mounted an economically irrational campaign of below-cost predatory pricing in Scottsboro that can have no purpose other than to destroy competition from SEPB and send out a chilling message to prospective competitors in other markets. SEPB also discussed various ways in which the Commission could act forcefully to stop Charter’s anti-competitive efforts. Alternatively, SEPB urged the Commission to seek any additional authority that it may believe that it needs to prevent and punish conduct such as Charter’s.

In its reply, Charter does not contest *any* of the facts that SEPB has presented. Rather, Charter makes three arguments: (1) “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 and management costs, marketing, advertising, and even cost of stock options,” Charter’s Reply at 2; (2) Charter’s practice of offering “deep discounts” in Scottsboro is part of a “rational” market-by-market pricing campaign, and it is “simply competition” that benefits consumers, *Id.* at 2-4; and (3) the Commission is helpless to do anything about Charter’s practices because “[t]he Commission has consistently confined the scope of [Section 628(b) of the Communications Act] 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 by the FCC.” *Id.* at 3.

SEPB has addressed Charter’s third point and will stand on what it has already said. SEPB does, however, wish to respond to Charter’s other two points.

First, in preparing in its opening comments, SEPB used national average cost data taken from Charter’s published statements because that is all that was available to SEPB. To be sure, this data may include some costs that would not be usable in a formal anti-trust case. For several reasons, however, Charter’s losses in Scottsboro are likely to be far greater than Scottsboro conservatively estimated using these national data.

First, in determining whether discounts to multi-dwelling units (MDUs) are predatory, the FCC considers “whether a cable operator’s price to an MDU recovers at least the incremental costs of serving that MDU, including any new costs from constructing or upgrading its physical facilities in order to offer the bulk service agreed to with the building’s owner or manager, and whether the cable operator has a reasonable prospect of recouping its investment in below cost prices in the MDU.” *In the Matter of Implementation of Cable Act Reform Provisions of the Telecommunications Act of 1996*, ¶ 108. 14 FCC Rcd. 5296, 1999 WL 169592 (F.C.C.).¹ As applied to Scottsboro, Charter has incurred substantial new construction and upgrade costs to be able to offer many of the premium services at issue, so Charter’s costs per subscriber in Scottsboro are likely to be considerably higher than its average costs per subscriber nationwide.

Second, in its zeal to drive SEPB out of the market, Charter has mounted at least six door-to-door marketing campaigns in many of Scottsboro’s neighborhoods over the last two years. The costs of these efforts, too, are likely to be much higher than Charter’s marketing costs nationwide.

¹ SEPB cites this language not for its specific application to MDUs, but for the general principle that it embodies.

Third, while there may be room to debate whether certain costs should be included in determining whether Charter's prices in Scottsboro are predatory, there can be no question that it is appropriate – indeed, essential – to consider Charter's programming costs. Because SEPB does not have access to Charter's programming costs, it has estimated them by using the rates that the National Cable Television Cooperative (NCTC) charges for the same services to operators that collectively serve approximately 12 million subscribers. Since has Charter's 6.3 to 7.0 million subscribers, its costs are not likely to be much lower than NCTC's rates – if they are lower at all.

As the attached spreadsheet indicates, Charter's cost would be \$36.85 per month for the programming that it offers in Scottsboro for \$24.95 or \$19.95 a month, depending on when the subscriber began to receive service.² That amounts to a loss of \$11.90 for customers paying \$24.95 a month and \$16.90 for customers paying \$19.95 a month. These losses, moreover, do not take into account (1) any of Charter's other operating and maintenance costs attributable to the Scottsboro market; (2) Charter's payments of \$200 to induce SEPB's customers to switch to Charter's cable and an additional \$200 to induce SEPB's customers to switch their high-speed Internet service; and (3) the principal and interest on the past debts that Charter forgiven under the amnesty program that Charter has mounted to put additional pressure on SEPB's customers to switch.

Thus, by any measure, Charter is losing money in Scottsboro “by the bucket,” and it cannot have any reasonable expectation of recovering these losses while SEPB is active in the market. Of course, if SEPB fails, there will be nothing to stop Charter from raising its rates to the \$72.90 - \$77.90 levels that it is charging in nearby communities. That is not “rational” or “simply competition,” as Charter claims. It is the essence of predatory pricing.

² SEPB does not know precisely what the customers it lost to Charter are paying. It is possible that as many as two-thirds of the 1778 customers that SEPB has lost to Charter since March 2000 are paying \$19.95 a month.

If you have questions or need additional information, please do not hesitate to contact me by letter or telephone.

Respectfully submitted,

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