PREPARED TESTIMONY OF SCOTT THOMPSON
BEFORE THE OHIO SENATE PUBLIC UTILITIES COMMITTEE
MARCH 22, 2018

Chairman Beagle, Vice Chairman McColley, and Honorable Members of the Committee:

My name is Scott Thompson. I am a partner in the national law firm Davis Wright Tremaine LLP. I have been practicing telecommunications law for just shy of 25 years with a specialization in the application of federal law to the deployment of telecommunications facilities in local public rights of ways. I have litigated over fifty cases seeking preemption of local government regulation of telecommunications facilities under the Communications Act.

I have been asked by Crown Castle to explain why the current definition of "Small cell facility operator" proposed in H.B. 478 violates Section 253 of the federal Communications Act.

The details of my testimony are set forth in the memorandum that was submitted to the Committee in support of my testimony. In light of timing constraints, my discussion today necessarily will be at a higher level.

HB 478 Effectively Prohibits Crown Castle From Providing Telecommunications Services

As currently drafted, H.B. 478 allows only "small cell facility operators" to apply for a permit and deploy small wireless facilities in the public rights of way. H.B. 478 also makes deployment of small wireless facilities a permitted use that is not subject to zoning review or approval. H.B. 478 § 4939.031(A).

Yet, the Bill severely limits the definition of a small cell facility operator to:

> ***a wireless service provider***, or its designated agent, ***or cable operator***, or its designated agent, ***or a video service provider***, or its designated agent, that operates a small cell facility and provides wireless service. . . .

H.B. 478, § 4949.01(R).

Crown Castle is not a "wireless service provider," "cable operator" or "video service provider" nor does it provide "wireless service." Consequently, Crown Castle is excluded from the bill's definition of "small cell facility operator" and it cannot deploy small wireless facilities in the right-of-way under H.B. 478.

I understand that some people argue that Crown Castle can deploy as a "designated agent" of a wireless provider. But Crown Castle is not merely an agent of the wireless carrier. Rather, Crown Castle is *itself* a facilities-based telecommunications provider.

The Current Version Of H.B. 478 Violates And Is Preempted By Federal Law

As explained in detail in my memo, H.B. 478 violates and would be preempted by Section 253 of the federal Communications Act.

Section 253(a) of the Communications Act provides that "[n]o 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." 47 U.S.C. § 253(a) (emphasis added).

Most notably in this situation, as explained in my memo, the FCC and courts have held that Section 253 prohibits States from enacting laws that grant one group of providers preferential access to public rights of way versus others.

To violate Section 253(a), H.B 478. need not create an absolute or "insurmountable" barrier. In its *California Payphone* Order, the FCC held that a law effectively prohibits the provision of telecommunications services in violation of Section 253(a) if it "materially inhibits or limits the ability of any competitor or potential competitor to compete in a fair and balanced legal and regulatory environment." *California Payphone Assoc.*, 12 FCC Rcd. 14191, ¶ 31 (1997).

The current version of H.B. 478 does just that. By excluding Crown Castle from the definition of an "operator," H.B. 478 inhibits Crown Castle's ability to compete in a fair and balanced legal and regulatory environment and, therefore, effectively prohibits it from providing telecommunications service.

Some people may argue that Crown Castle could still apply for access to the public rights of way under regulations other than under H.B. 478 and therefore there is no "prohibition." That argument has been repeatedly rejected by the FCC and courts. Section 253(a) does not apply only to absolute prohibitions or requirements that are "insurmountable."

It also mischaracterizes the Bill, Section 4939.03(C)(1) provides that "no person shall occupy or use the public way without first obtaining, under this section or section 1332.24 [addressing video services] or 4939.031, any requisite consent of the municipal corporation. . . ." Thus, the H.B. 478 process is the only permit process for deploying small cells.

Likewise, arguments that Crown Castle does not compete directly with wireless providers is inaccurate and irrelevant. H.B. 478 is not limited to wireless providers; under a late addition to the Bill, it also allows video service providers, such as Cincinnati Bell, to deploy small wireless facilities. Cincinnati Bell directly competes with Crown Castle and can easily use this process to deploy the exact same facilities that Crown Castle seeks to deploy.

But precise competition is ultimately not the issue. The FCC has made clear that a state law violates Section 253(a) if it "restrict[s] the means or facilities through which a party is permitted to provide service." *Texas PUC Order*, 13 FCC Rcd. 3460, ¶ 13 (1997). Congress wanted new technologies and new types of services to be able to emerge, and therefore preempted preferential treatment for incumbent or established provider models. Local governments cannot declare that they are comfortable with the established providers and will give them preferential access as a result.

H.B. 478 conflicts with these established precedents and would be preempted in its current form.