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Putting Politics over Policy at the FCC

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[Geoffrey A. Manne](#), [Gus Hurwitz](#) and [Kristian Stout](#)

FCC Commissioner Rosenworcel penned an [article](#) this week on the doublespeak coming out of the current administration with respect to trade and telecom policy. On one hand, she argues, the administration has proclaimed 5G to be an [essential part](#) of our future commercial and defense interests. But, she tells us, the administration has, on the other hand, imposed tariffs on Chinese products that are important for the development of 5G infrastructure, thereby raising the costs of roll-out. This is a sound critique: regardless where one stands on the reasonableness of tariffs, they unquestionably raise the prices of goods on which they are placed, and raising the price of inputs to the 5G ecosystem can only slow down the pace at which 5G technology is deployed.

Unfortunately, Commissioner Rosenworcel's fervor for advocating the need to reduce the costs of 5G deployment seems animated by the courageous act of a Democratic commissioner decrying the policies of a Republican President and is limited to a context where her voice lacks any power to actually affect policy. Even as she decries trade barriers that would incrementally increase the costs of imported communications hardware, she staunchly *opposes* FCC proposals that would *dramatically* reduce the cost of deploying next generation networks.

Given the opportunity to reduce the costs of 5G deployment by a factor far more significant than that by which tariffs will increase them, her preferred role as Democratic commissioner is that of resistance fighter. She acknowledges that "we will need 800,000 of these small cells to stay competitive in 5G" — a number significantly above the "the roughly 280,000 traditional cell towers needed to blanket the nation with 4G". Yet, when she has had the opportunity to join the Commission on speeding deployment, she has instead dissented. Party over policy.

In this year's "[Historical Preservation](#)" Order, for example, the Commission voted to expedite deployment on non-Tribal lands, and to exempt small cell deployments from certain onerous review processes under both the National Historic Preservation Act and the National Environmental Policy Act of 1969. Commissioner Rosenworcel [dissented](#) from the Order, claiming that that the FCC has "long-standing duties to consult with Tribes before implementing any regulation or policy that will significantly or uniquely affect Tribal governments, their land, or their resources." Never mind that the FCC engaged in extensive consultation with Tribal governments prior to enacting this Order.

Indeed, in adopting the Order, the Commission found that the Order did nothing to disturb

deployment on Tribal lands at all, and affected only the ability of Tribal authorities to reach *beyond* their borders to require fees and lengthy reviews for small cells on lands in which Tribes could claim merely an “interest.”

According to the Order, the average number of Tribal authorities seeking to review wireless deployments in a given geographic area nearly doubled between 2008 and 2017. During the same period, commenters consistently noted that the fees charged by Tribal authorities for review of deployments increased dramatically.

One environmental consultant [noted that fees](#) for projects that he was involved with increased from an average of \$2,000.00 in 2011 to \$11,450.00 in 2017. Verizon’s fees [are \\$2,500.00 per small cell site](#) just for Tribal review. Of the 8,100 requests that Verizon submitted for tribal review between 2012 and 2015, just 29 (0.3%) resulted in a finding that there would be an adverse effect on tribal historic properties. That means that Verizon paid over \$20 million to Tribal authorities over that period for historic reviews that resulted in statistically nil action. Along the same lines, Sprint’s fees are so high that [it estimates that](#) “it could construct 13,408 new sites for what 10,000 sites currently cost.”

In other words, Tribal review practices — of deployments *not* on Tribal land — impose a substantial tariff upon 5G deployment, increasing its cost and slowing its pace.

There is a similar story in the Commission’s adoption of, and Commissioner Rosenworcel’s partial dissent from, the recent [Wireless Infrastructure Order](#). Although Commissioner Rosenworcel offered many helpful suggestions (for instance, endorsing the [OTARD proposal](#) that Brent Skorup has championed) and nodded to the power of the market to solve many problems, she also dissented on central parts of the Order. Her dissent shows an unfortunate concern for provincial, political interests and places those interests above the Commission’s mission of ensuring timely deployment of advanced wireless communication capabilities to all Americans.

Commissioner Rosenworcel’s concern about the Wireless Infrastructure Order is that it would prevent state and local governments from imposing fees sufficient to recover costs incurred by the government to support wireless deployments by private enterprise, or from imposing aesthetic requirements on those deployments. Stated this way, her objections seem almost reasonable: surely local government should be able to recover the costs they incur in facilitating private enterprise; and surely local government has an interest in ensuring that private actors respect the aesthetic interests of the communities in which they build infrastructure.

The problem for Commissioner Rosenworcel is that the Order explicitly takes these concerns into account:

[W]e provide guidance on whether and in what circumstances aesthetic requirements violate the Act. This will help localities develop and implement lawful rules, enable providers to comply with these requirements, and facilitate

the resolution of disputes. We conclude that aesthetics requirements are not preempted if they are (1) reasonable, (2) no more burdensome than those applied to other types of infrastructure deployments, and (3) objective and published in advance

It neither prohibits localities from recovering costs nor imposing aesthetic requirements. Rather, it requires merely that those costs and requirements be *reasonable*. The purpose of the Order isn't to restrict localities from engaging in reasonable conduct; it is to prohibit them from engaging in *unreasonable*, costly conduct, while providing guidance as to what cost recovery and aesthetic considerations are reasonable (and therefore permissible).

The reality is that localities have a [long history](#) of using cost recovery — and especially “soft” or subjective requirements such as aesthetics — to extract significant rents from communications providers. In the 1980s this slowed the deployment and increased the costs of cable television. In the 2000s this slowed the deployment and increase the cost of fiber-based Internet service. Today this is slowing the deployment and increasing the costs of advanced wireless services. And like any tax — or tariff — the cost is ultimately borne by consumers.

Although we are broadly sympathetic to arguments about local control (and other 10th Amendment-related concerns), the FCC's goal in the Wireless Infrastructure Order was not to trample upon the autonomy of small municipalities; it was to implement a reasonably predictable permitting process that would facilitate 5G deployment. Those affected would not be the small, local towns attempting to maintain a desirable aesthetic for their downtowns, but large and politically powerful cities like New York City, where the fees per small cell site can be more than [\\$5,000.00 per installation](#). Such extortionate fees are effectively a tax on smartphone users and others who will utilize 5G for communications. According to the Order, it is estimated that capping these fees would stimulate over \$2.4 billion in additional infrastructure buildout, with widespread benefits to consumers and the economy.

Meanwhile, Commissioner [Rosenworcel cries “overreach!”](#) “I do not believe the law permits Washington to run roughshod over state and local authority like this,” she said. Her federalist bent is welcome — or it would be, if it weren't in such stark contrast to her anti-federalist preference for preempting states from establishing rules governing *their own internal political institutions* when it suits her preferred political objective. We are referring, of course, to Rosenworcel's support for the previous administration's FCC's decision to preempt state laws prohibiting the extension of municipal governments' broadband systems. The order doing so was plainly illegal from the moment it was passed, as every court that has looked at it has held. That she was ok with. But imposing reasonable federal limits on states' and localities' ability to extract political rents by abusing their franchising process is apparently beyond the pale.

Commissioner Rosenworcel is right that the FCC should try to promote market solutions like

Brent's OTARD proposal. And she is also correct in opposing dangerous and destructive tariffs that will increase the cost of telecommunications equipment. Unfortunately, she gets it dead wrong when she supports a stifling regulatory status quo that will surely make it unduly difficult and expensive to deploy next generation networks — not least for those most in need of them. As Chairman Pai noted in his [Statement on the Order](#): “When you raise the cost of deploying wireless infrastructure, it is those who live in areas where the investment case is the most marginal — rural areas or lower-income urban areas — who are most at risk of losing out.”

Reconciling those two positions entails nothing more than pointing to the time-honored Washington tradition of Politics Over Policy. The point is not (entirely) to call out Commissioner Rosenworcel; she's far from the only person in Washington to make this kind of crass political calculation. In fact, she's far from the only *FCC Commissioner* ever to have done so.

One need look no further than the previous FCC Chairman, Tom Wheeler, to see the hypocritical politics of telecommunications policy in action. (And one need look no further than Tom Hazlett's masterful book, [The Political Spectrum: The Tumultuous Liberation of Wireless Technology, from Herbert Hoover to the Smartphone](#) to find a catalogue of its long, sordid history).

Indeed, Larry Downes has [characterized](#) Wheeler's reign at the FCC (following a lengthy recounting of all its misadventures) as having left the agency “more partisan than ever”:

The lesson of the spectrum auctions—one right, one wrong, one hanging in the balance—is the lesson writ large for Tom Wheeler's tenure at the helm of the FCC. While repeating, with decreasing credibility, that his lodestone as Chairman was simply to encourage “competition, competition, completion” and let market forces do the agency's work for it, the reality, as these examples demonstrate, has been something quite different.

The Wheeler FCC has instead been driven by a dangerous combination of traditional rent-seeking behavior by favored industry clients, potent pressure from radical advocacy groups and their friends in the White House, and a sincere if misguided desire by Wheeler to father the next generation of network technologies, which quickly mutated from sound policy to empty populism even as technology continued on its own unpredictable path.

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And the Chairman's increasingly autocratic management style has left the agency more political and more partisan than ever, quick to abandon policies based on sound legal, economic and engineering principles in favor of bait-and-switch proceedings almost certain to do more harm than good, if only unintentionally.

The great irony is that, while Commissioner Rosenworcel's complaints *are* backed by a legitimate concern that the Commission has waited far too long to take action on spectrum issues, the criticism should properly fall not upon the current Chair, but — you guessed it — his predecessor, Chairman Wheeler (and *his* predecessor, Julius Genachowski). Of course, in true partisan fashion, Rosenworcel was fawning in her praise for her political ally's spectrum agenda, lauding it on [more](#) than one [occasion](#) as going "to infinity and beyond!"

Meanwhile, Rosenworcel has taken virtually every opportunity to chide and castigate Chairman Pai's efforts to get more spectrum into the marketplace, most often criticizing them as too little, too slow, and too late. Yet from any objective perspective, the current FCC has been addressing spectrum issues at a breakneck pace, as fast, or faster than any prior Commission. As with spectrum, there is an upper limit to the speed at which federal bureaucracy can work, and Chairman Pai has kept the Commission pushed right up against that limit.

It's a shame Commissioner Rosenworcel prefers to blame Chairman Pai for the problems she had a hand in creating, and President Trump for problems she has no ability to correct. It's even more a shame that, having an opportunity to address the problems she so often decries — by working to get more spectrum deployed and put into service more quickly and at lower cost to industry and consumers alike — she prefers to dutifully wear the hat of resistance, instead.

But that's just politics, we suppose. And like any tariff, it makes us all poorer.

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