

**DISSENTING STATEMENT OF
COMMISSIONER JESSICA ROSENWORCEL**

Re: *Accelerating Wireless Broadband Deployment by Removing Barriers to Infrastructure Investment*, WT Docket No. 17-79

A wireless revolution is underway. The shift to fifth generation—or 5G—wireless is much more than incremental change. It will foster a whole new world of mobile connectivity—and no matter who you are or where you live you will need access to have a fair shot at 21st century success.

Let's be frank: It is not a sure thing that the United States will lead the world in 5G wireless. In fact, the available evidence is that we're falling behind.

If we want to lead in 5G, we unconditionally need a spectrum auction this year. South Korea, Germany, Australia, the United Kingdom, and Romania are now leading the way with definitive plans for wireless auctions in 2018. We do not do that here.

If we want to lead in 5G, we need policies to encourage deep fiber investments. Our wireless facilities will need to be connected to millions of miles of fiber, requiring creative thinking about everything from permitting to securing access to rights of way. We do not do that here.

If we want to lead in 5G, we need serious policies to address our equipment supply chain challenges. That means developing a real plan rather than relying on opaque decisions issued from behind the closed doors of the Committee on Foreign Investment in the United States. We do not do that here.

If we want to lead in 5G, we need to modernize our approach to wireless infrastructure. We need to streamline the process for the deployment of small cells because over the next eight years we will require as many as 800,000 of them. That's daunting. At the same time, we need to modernize our approach to larger wireless facilities—and that's daunting, too. A solution to this infrastructure challenge is long overdue—and while today's decision purports to be one—it misses the mark. It runs roughshod over the rights of our Tribal communities and gives short shrift to our most basic environmental and historic preservation values. Moreover, too much of its policy and legal analysis is lacking the heft necessary to support the result.

What we have here will not help us lead—or even be 5G ready. Our work deserves a delay so we can fix these deficiencies and move forward together. Because we do not take the time to remedy these problems—when we can and should—I dissent.

This decision takes three main actions. All three have problems.

First, this decision cuts Tribal authorities from their rightful role reviewing wireless facilities. While I believe this process would clearly benefit from modernization, in this decision we fail to fulfill our federal trust relationship with respect to 5G deployment. We have 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. This responsibility is memorialized in the FCC's Policy Statement on Establishing a Government-to-Government Relationship with Indian Tribes. But we do not honor it here. While the decision lists every minor contact this agency has had with Tribal authorities remember this: Not a single Tribe has expressed support for today's action.

Second, this decision removes small cells from the purview of the National Historic Preservation Act and National Environmental Policy Act. This approach has both policy and legal frailties.

With respect to policy, it's no secret that rural and low-income communities trail our urban areas when it comes to broadband access. But not a single comment in this proceeding has suggested that the root of that problem is our historic or environmental review process. Rather, it's simple economics—these communities are difficult to serve because they do not provide the return on investment that supports build out. We don't tackle that hard truth here—or seek commitments to ensure deployment in hard to serve areas. But we should.

With respect to the law, the problems with our small cell analysis are real. For starters, this decision asserts that a federal undertaking under the National Historic Preservation Act is the same as a “major federal undertaking” under the National Environmental Policy Act. But this interpretation is not right. In fact, the Advisory Council on Historic Preservation—the body entrusted with interpreting the law—has said as much in their comments to this agency. We shouldn't ignore them. We should work with them.

In addition, our interpretation of the National Historic Preservation Act is flawed—and likely to have messy consequences for future wireless deployment. The law defines an “undertaking” as a “project, activity, or program funded in whole or part under the direct or indirect jurisdiction of a Federal agency, including those carried out by or on behalf of a Federal agency; those carried out with Federal financial assistance; and those requiring a Federal permit, license, or approval.” Count them—there are three elements to that definition: projects carried out by a Federal agency; those carried out with Federal financial assistance; and those requiring a Federal permit, license, or approval. But today's decision addresses only the first and last elements.

In effect, the FCC reads “projects carried out with Federal financial assistance” out of the law. Yet going forward, it is highly likely that small cells are going to be deployed using federal financial assistance—for example, using the Mobility Fund. That's the universal service fund that will support updated wireless service in rural areas—to the tune of \$4.53 billion. That's not a small amount and we won't improve 5G deployment in rural areas by sweeping this legal problem under the rug. This is especially true when there are different paths we can take. For instance, even if small cell deployment is determined to be an undertaking, the FCC has authority to find, consistent with the Advisory Council on Historic Preservation's rules, that it “has no further obligations under section 106” if deployment has no more than a de minimis impact on historic properties. In short, there are other ways to address these issues. I wish we could explore them here.

Third, and finally this decision removes many larger wireless facilities from environmental oversight. If our environmental assessment process is too complex or too lengthy, we should fix it. But tossing this process out is unsupported by the record. In fact, there is so little discussion of the consequences of this change in our docket, the White House Council on Environmental Quality wrote us a letter on this subject that is devoid of any substantive analysis and offers only the most superficial support. We should do better than this.

In sum, this decision does not clear the way for 5G. It does not make us 5G ready. It only guarantees that a messy series of legal challenges will follow in its wake. I regret that we did not delay today's vote to fix these problems. I can only hope that with this crude effort we do not further risk our leadership in 5G as a result.