

Nos. 11-1545 & 11-1547

IN THE
Supreme Court of the United States

CITY OF ARLINGTON, TEXAS, *et al.*,
Petitioners,

v.

FEDERAL COMMUNICATIONS COMMISSION, *et al.*,
Respondents.

**On Writ of Certiorari to the
United States Court of Appeals
for the Fifth Circuit**

**BRIEF FOR PCIA—THE WIRELESS
INFRASTRUCTURE ASSOCIATION AS AMICUS
CURIAE IN SUPPORT OF RESPONDENTS**

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STATEMENT OF INTEREST¹

PCIA—The Wireless Infrastructure Association respectfully submits this brief as *amicus curiae*.

PCIA is the trade association representing the wireless telecommunications infrastructure industry. PCIA's members include the nation's leading wireless carriers and infrastructure providers. Those members develop, own, manage, and operate more

¹ No party or counsel for a party authored this brief in whole or in part. No party, counsel for a party, or person other than *amicus curiae*, its members, or counsel made any monetary contribution intended to fund the preparation or submission of this brief. All parties have consented to the filing of this brief.

than 125,000 telecommunications towers and antenna structures used as sites for wireless service. Through advocacy and educational initiatives, PCIA seeks to facilitate the widespread deployment of communications networks across the country. It thus seeks to advance the Federal Communications Commission's key mission under the Telecommunications Act of 1996: "encourag[ing] the deployment on a reasonable and timely basis of advanced telecommunications capability to all Americans" by "remov[ing] barriers to infrastructure investment." 47 U.S.C. § 157 nt.

PCIA and its members have an abiding interest in this case because the Commission's order below was a major step forward for wireless broadband. It helped remove a roadblock—siting delay—that is preventing broadband service and reliable wireless voice service from reaching all Americans. The Commission's order was a paradigmatic, and proper, use of its delegated authority.

SUMMARY OF ARGUMENT

This Court does not "leave [its] common sense at the doorstep when [it] interpret[s] a statute." *Price Waterhouse v. Hopkins*, 490 U.S. 228, 241 (1989). That is why it is important to recognize that the Commission's order in this case solved a communications-infrastructure problem of national importance, in exactly the fashion Congress would have expected.

The Commission found that access to wireless broadband Internet and phone service is crucial for all Americans. It found that local siting-approval delays were blocking wireless providers from expanding their infrastructure, thus keeping reliable wireless service out of reach for many. And it found that

while Congress had tried to solve that problem by enacting 47 U.S.C. § 332(c)(7), the statute’s silence on timing issues was rendering it ineffective; wireless providers could not tell when localities had “fail[ed] to act” under Section 332(c)(7)(B), and thus could not make use of the statutory provisions allowing providers to turn to courts and the Commission for relief. The Commission accordingly “use[d] its discretion to determine how best to implement [Congress’s] policy[.]” *United States v. Haggart Apparel Co.*, 526 U.S. 380, 393 (1999).

That sort of implementation is just what Congress authorized when it instructed the Commission to “prescribe such rules and regulations as may be necessary in the public interest” to carry out the Act’s provisions, 47 U.S.C. § 201(b), and to “take immediate action to accelerate deployment of [broadband] capability by removing barriers to infrastructure investment,” *id.* § 1302(b). The Commission plainly had delegated authority to do what it did. And nothing in Section 332(c)(7)(A) stripped that authority away. The Court can, and should, affirm the decision below on the ground that the Commission’s authority to act was clear and unambiguous.

ARGUMENT

I. THE FEDERAL COMMUNICATIONS COMMISSION’S ORDER IN THIS CASE HELPED SOLVE A PROBLEM OF NATIONAL SIGNIFICANCE.

A. Wireless Siting Delays Hamper The Broadband Rollout And Thus The U.S. Economy.

1. “Broadband,” or high-speed, Internet service is not a luxury. It is vital for “economic * * * competitiveness and a better way of life.” FCC, *Connecting America – The National Broadband Plan* xi (2010)

(“*Broadband Plan*”).² Broadband Internet service “can expand access to jobs and training [and] support entrepreneurship and small business growth.” *Id.* at xiv. It “help[s] businesses improve internal productivity and reach customers.” *Id.* at 16. It opens doors “to jobs in information and communications technology,” which “is growing 50% faster than * * * other sectors.” *Id.* at 3. It spurs educational improvements by giving educators and students—especially those with fewer financial resources—access to a vastly expanded array of learning tools. *Id.* at 223-227. And the buildout of the broadband network itself is a major job creator. One study demonstrated that “the investments and innovation entailed in the transition from 2G to 3G wireless technologies and Internet infrastructure spurred the creation of some 1,585,000 new jobs from April 2007 to June 2011.” R. Shapiro & K. Hassett, *The Employment Effects of Advances in Internet & Wireless Technology: Evaluating the Transitions from 2G to 3G & from 3G to 4G* at 1 (Jan. 2012).³

The bottom line: Broadband deployment “is critical for economic development, growth, jobs, education, telemedicine and other data-centric services, and for the United States to remain competitive with other countries.” C. Dingwall, *Rural Broadband: Miles to Go Before We Sleep*, *WirelessWeek*, July 16, 2010.⁴ Congress has recognized as much. It found in 2008 that broadband “has resulted in enhanced economic

² Available at <http://download.broadband.gov/plan/national-broadband-plan.pdf>

³ Available at http://www.sonecon.com/docs/studies/Wireless_Technology_and_Jobs-Shapiro_Hassett-January_2012.pdf

⁴ Available at <http://www.wirelessweek.com/News/Feeds/2010/07/wireless-rural-broadband-miles-to-go-before-we-sleep>

development and public safety for communities across the Nation, improved health care and educational opportunities, and a better quality of life for all Americans.” 47 U.S.C. § 1301(1). It further found that “[c]ontinued progress in the deployment and adoption of broadband technology is vital to ensuring that our Nation remains competitive and continues to create business and job growth.” *Id.* § 1301(2). And it has placed responsibility squarely on the Commission to spur that progress. The Commission is directed by statute to “ensure that all people of the United States have access to broadband capability.” *Id.* § 1305(k)(2). Moreover, Congress has mandated that if the Commission finds that broadband is not being deployed to all Americans in a timely fashion, it “*shall take immediate action to accelerate deployment of such capability by removing barriers to infrastructure investment and by promoting competition in the telecommunications market.*” *Id.* § 1302(b) (emphases added).

The nation has made great strides in recent years in making broadband available to all citizens. Yet millions of Americans still lack access to this technology. In 2011 the Commission found that as many as 26 million Americans live in areas unserved by broadband. *Inquiry Concerning the Deployment of Advanced Telecommunications Capability to All Americans*, Seventh Broadband Progress Report & Order on Recon., 26 FCC Rcd 8008, ¶ 1 (2011). Those millions of people lack reasonable access to everything from banking services to educational opportunities to the capacity to apply for jobs. *Inquiry Concerning the Deployment of Advanced Telecommunications Capability to All Americans*, Eighth Broadband Progress Report & Order on

Recon., 27 FCC Rcd 10342, ¶ 120 & n.280 (2012) (“*Eighth Broadband Report*”).

2. Wireless networks have a central role to play in solving this problem. The Commission in 2010 announced, as one of its primary goals, that “the United States should lead the world in mobile innovation, with the fastest and most extensive wireless networks of any nation.” *Broadband Plan* at xiv. The agency made that a centerpiece of its push toward universal broadband because “[m]obile broadband”—that is, high-speed Internet provided to smartphones and other devices without the need for wireline connections—“is growing at unprecedented rates. From smartphones to app stores to e-book readers to remote patient monitoring * * * , mobile services and technologies are driving innovation and playing an increasingly important role in our lives and our economy.” *Id.* at 9. As President Obama recently observed:

Few technological developments hold as much potential to enhance America’s economic competitiveness, create jobs, and improve the quality of our lives as wireless high-speed access to the Internet. Innovative new mobile technologies hold the promise for a virtuous cycle—millions of consumers gain faster access to more services at less cost, spurring innovation, and then a new round of consumers benefit from new services.

The White House, *Presidential Memorandum: Unleashing the Wireless Broadband Revolution*, at 1 (June 28, 2010).⁵ The technology is particularly

⁵ Available at <http://www.whitehouse.gov/the-press-office/presidentialmemorandum-unleashing-wireless-broadband-revolution>

important as a tool to close the “digital divide”—the gap in Internet access and adoption rates between higher-income and lower-income Americans. Studies show that “use of wireless Internet has grown fastest amongst lower income households,” in part because of the lower cost of mobile devices compared to PCs and laptops. S. Andes & D. Castro, *Opportunities & Innovations in the Mobile Broadband Economy* (Sept. 14, 2010).⁶ Wireless broadband thus is “reducing the digital divide and expanding access to technology to all segments of the population.” *Id.*

Of course, the importance of wireless devices goes well beyond Internet access. As of December 2011, there were 331.6 million wireless subscriber connections in the United States—an increase of nearly 100 million during the previous five years alone. CTIA, *Wireless Quick Facts* (2012).⁷ The majority of those users rely on mobile phones. CNN, *Survey: U.S. Mobile Web Access Growing Fast* (July 8, 2010).⁸ Indeed, “[a]s of the second half of 2011, one in three U.S. households (34%) had only wireless telephones.” S. Blumberg *et al.*, *Wireless Substitution: State-level Estimates From the National Health Interview Survey, 2010–2011*, Nat’l Health Statistics Reports No. 61 (Oct. 12, 2012).⁹ That makes reliable wireless service especially important. “[C]arriers need to be able to provide a strong, high-quality signal in resi-

⁶ Available at <http://www.itif.org/publications/opportunities-and-innovations-mobile-broadband-economy>

⁷ Available at http://www.ctia.org/media/industry_info/index.cfm/AID/10323

⁸ Available at http://articles.cnn.com/2010-07-08/tech/mobile.internet.access.pew_1_cell-phone-users-feature-phones-mobile-internet?_s=PM:TECH

⁹ Available at <http://www.cdc.gov/nchs/data/nhsr/nhsr061.pdf>

dential areas so that wireless users can be protected in case of an emergency.” *Id.* Without a strong signal, users may not be able to dial 911. And without a strong signal, “E911” service—an innovation that allows first responders to identify a caller’s precise location when he or she dials 911—cannot operate. For these reasons a comprehensive wireless network is more than an economic boon; it is “a crucial public safety necessity.” *Id.*

3. As with any communications technology, the wireless network requires infrastructure. Wireless providers use radio transmitters and other electronic equipment to convey signals from phone to phone and from wireless devices to the Internet. To allow for clear signals over a broad coverage area, that equipment often must be placed high in the air. Sometimes that means attaching the equipment to a support structure for cellular facilities. *See Comments of PCIA—The Wireless Infrastructure Association & The DAS Forum*, WC Docket No. 11-59 at 11 (FCC July 18, 2011) (“*PCIA Broadband Comments*”). Other times it means “collocating” equipment, *i.e.*, placing it on an existing structure. *Id.* Providers sometimes collocate by adding equipment to an existing communications support structure that already hosts several other providers’ equipment. *Id.* Other times, providers obtain permission to place equipment on another type of tall structure, such as a roof or water tank.

Wireless industry participants continuously explore these options (and more) in localities across the country because the need for infrastructure is vast and growing. “Both new construction of wireless antenna structures and the availability of existing structures for purposes of collocating additional

antennas have been, and will continue to be, integral to wireless buildout.” *Acceleration of Broadband Deployment: Expanding the Reach and Reducing the Cost of Broadband Deployment*, Notice of Inquiry, 26 FCC Rcd 5384 (2011). Indeed, an estimated 40,000 towers are needed to expand mobile broadband to virtually all Americans. See Prepared Remarks of Chairman Julius Genachowski, Federal Communications Commission, Broadband Acceleration Conference, Washington, D.C. (Feb. 9, 2011).¹⁰ And that is only one facet of a much broader industry investment in new infrastructure. “Industry analysts anticipate the U.S. wireless industry as a whole will invest * * * \$23 billion to \$53 billion in 4G network deployment between 2012 and 2016.” *Eighth Broadband Report* ¶ 33.

These sorts of infrastructure investments are, of course, necessary for wireless service to reach new markets. But they are no less critical in areas that already have service. That is so for two reasons. First, overall wireless traffic has exploded in recent years—global mobile data traffic grew *133 percent* in 2011 alone—and the growth rate shows no signs of slowing. See *Cisco Visual Networking Index: Global Mobile Data Traffic Forecast Update, 2011–2016* at 1 (Feb. 14, 2012).¹¹ The only way for providers to keep up with that growth, and continue offering reliable service and high speeds, is to deploy additional infrastructure in high-use areas. Second, the industry constantly must upgrade and replace infrastructure as wireless technology advances. To offer just

¹⁰ Available at http://www.fcc.gov/Daily_Releases/Daily_Business/2011/db0209/DOC-304571A1.pdf

¹¹ Available at http://www.cisco.com/en/US/solutions/collateral/ns341/ns525/ns537/ns705/ns827/white_paper_c11-520862.pdf

one example: Wireless carriers have been upgrading their networks to use “LTE,” the shorthand name for a wireless communication standard that offers substantially increased capacity and speed. *See* Prepared Remarks of Chairman Julius Genachowski, Federal Communications Commission, “The Global Internet at a Crossroads,” at the Council on Foreign Relations, Washington, D.C., 2012 WL 5879188, at *2 (Nov. 20, 2012) (LTE “will allow us to enjoy broadband speeds on the go comparable to what we’re used to from our Wi-Fi connections at home”). But LTE uses a different radio interface and different core network components than previous technologies. The LTE rollout thus requires infrastructure upgrades. Residents in a given community cannot take advantage of this exciting new technology unless and until the wireless industry can put the necessary hardware in place.

4. In short, consumers want expanded wireless access, public safety agencies need it, and providers stand ready to offer it. But there is a logjam in this otherwise robust market: localities’ sometimes lengthy delays in granting siting approvals.

Wireless providers seeking to upgrade existing facilities, build new tower-mounted facilities, or collocate their facilities on existing structures typically must obtain zoning approvals, use permits, or other siting authorizations from the relevant locality. *See, e.g., PCIA Broadband Comments* 18-19; *ATC Realty, LLC v. Town of Kingston*, 303 F.3d 91, 93 (1st Cir. 2002). Some localities process those requests efficiently. Others, however, do not. As a result, “personal wireless service providers have often faced lengthy and unreasonable delays in the consideration of their facility siting applications”—

delays that the Commission found were “impeding the deployment of advanced and emergency services.” Pet. App. 97a.

These delays are sometimes egregious. Evidence before the Commission indicated that at the time the proceeding began, there were “more than 3,300 pending personal wireless service facility siting applications before local jurisdictions. Of those, approximately 760 [were] pending final action for more than one year. More than 180 such applications [were] awaiting final action for *more than 3 years*.” Pet. App. 98a (emphasis in original).

That is an extraordinary delay for any approval. But the evidence also demonstrated that “almost 350 of the 760 applications that were pending for more than one year were requests to collocate on existing towers, and 135 of those collocation applications were pending for more than three years.” Pet. App. 98a. That is particularly unreasonable because “collocation involves simply sharing an existing facility rather than building a new one. * * * There is no legitimate local interest in taking a year—much less three—to decide a collocation application.” CTIA Br. in Opposition 6 n.5. Indeed, the evidence before the agency indicated that efficient localities process collocation applications in as little as a week. *Petition for Declaratory Ruling* 16, WT Docket No. 08-165 (FCC July 11, 2008). That means some wireless providers wait more than *150 times* longer than others for approval simply to modify an existing facility, or to place additional radio equipment at a location where other facilities are already installed.

The Commission received evidence that delays were widespread. One provider reported that “the

typical processing times for personal wireless service facility siting applications range from 28 to 36 months in several California communities.” Pet. App. 98a. Another reported that “in Southern California, 25 applications took more than two years to be approved, with 52 taking more than a year, and 93 taking more than 6 months.” *Id.* 99a. A third showed that it was experiencing “delays of 10 to 25 months for its proposals to place facilities in public rights-of-way”—even when all it wanted to do was replace old equipment. *Id.*

For localities with existing wireless coverage, siting delays can mean inability to take advantage of new high-speed technologies like LTE. Delays can also mean persistent gaps in coverage and dropped calls—including emergency calls. But for localities *without* existing coverage, those same delays keep residents in the dark altogether. In Montana, for example, a cell tower company sought approval to build a tower along a highway so a provider could offer service to the town of Ovando. C. Moy, *Cell tower rejected at Trixi’s Antler Saloon; no service for Ovando*, *The Missoulian*, Mar. 13, 2010.¹² But “[d]ebate over the proposed tower * * * r[an] nonstop for over two years.” *Id.* With no end in sight, a company representative suggested he was giving up: “It’s been going on for so long now that there’s not the feeling of urgency that there was two years ago[.] * * * People have started * * * pursuing other opportunities.” *Id.* Meanwhile, the town remained without any wireless broadband—or even cell phone—coverage. One resident said she had “no doubt that

¹² Available at http://missoulian.com/news/local/article_81eb56ce-2e6d-11df-8093-001cc4c002e0.html

cell phone service in the Ovando area is inevitable.” *Id.* The question was when.

Nor are these sorts of problems new. The Commission observed in rules issued to implement the Telecommunications Act that “zoning approval for new wireless facilities is * * * a major delay factor in deploying wireless systems.” *Amendment of the Commission’s Rules to Establish Part 27, the Wireless Communications Service*, 12 FCC Rcd 10,785, 10,833 ¶ 90 (1997). That observation is now nearly 16 years old. And yet the Commission’s findings in this proceeding make clear that not much had changed.

B. Section 332(c)(7)(B)’s Silence On Timing Issues Was Allowing Siting Delays To Persist.

Localities do not have free rein to sit on wireless siting applications indefinitely or to arbitrarily deny permit requests. Section 332(c)(7) forbids any state or local government from “prohibit[ing] or * * * effect[ively] * * * prohibiting the provision of personal wireless services.” 47 U.S.C. § 332(c)(7)(B)(i)(I)-(II). It requires localities to respond to wireless siting requests “within a reasonable period of time * * * taking into account the nature and scope of such request.” *Id.* § 332(c)(7)(B)(ii). It limits their discretion to deny requests, providing that a locality may not issue a denial “on the basis of the environmental effects of radio frequency emissions” so long as the provider is complying with Commission regulations on that subject. *Id.* § 332(c)(7)(B)(iv). And it gives these new safeguards teeth by making them enforceable in federal court: “Any person adversely affected by any final action or failure to act by a State or local government or any instrumentality

thereof that is inconsistent with this subparagraph may, within 30 days after such action or failure to act, commence an action in any court of competent jurisdiction.” *Id.* § 332(c)(7)(B)(v).

Congress added these provisions to the Telecommunications Act of 1996 to spur competition and kick-start the nation’s wireless buildout. *See City of Rancho Palos Verdes v. Abrams*, 544 U.S. 113, 115 (2005). Section 332(c)(7)’s legislative history demonstrates that Congress was concerned about the “inconsistent and, at times, conflicting patchwork” of state and local zoning requirements, believing that this patchwork threatened “the deployment” of wireless communications. H.R. Rep. No. 104-204, pt. 1 at 94 (1995). Congress thus created a statutory framework that would “speed deployment and the availability of competitive wireless telecommunications services which ultimately w[ould] provide consumers with lower costs as well as with a greater range and options for such services.” *Id.* As this Court has observed, Section 332(c)(7)(B)’s primary purpose was to “reduc[e] * * * the impediments imposed by local governments upon the installation of facilities for wireless communications, such as antenna towers.” *City of Rancho Palos Verdes*, 544 U.S. at 128.

The safeguards, however, proved insufficient to ward off delay. The petition that launched the proceeding now on review identified one reason why: The statute lacked specifics regarding what constituted a “reasonable time” for action on an application, 47 U.S.C. § 332(c)(7)(B)(ii), and what constituted a locality’s “failure to act,” *id.* § 332(c)(7)(B)(v). *See* Pet. App. 93a. Absent details on what those terms mean, localities could spend months or even

years shuttling a siting application through various application and hearing processes, and providers would be hard-pressed to obtain relief. They had no way to know when a “reasonable time” had elapsed and when the locality had failed to act. And conversely, “an aggrieved party wishing to challenge a State or local government’s failure to act could miss the 30-day statute of limitations through no fault of its own.” Pet. App. 93a. Indeed, even where a locality was holding up a siting application for obviously unlawful (and preempted) reasons such as debunked emissions concerns—a not uncommon occurrence¹³—wireless providers could have trouble remedying the delay. After all, Section 332(c)(7) provided no guidance on when the locality’s intransigence ripened into a “failure to act.” 47 U.S.C. § 332(c)(7)(B)(v). And without action or a failure to act, the statute’s remedies were not triggered.

C. The Commission’s Action Alleviated Siting Delays By Implementing The Act.

1. Alerted to the adverse effects this statutory silence was producing, the Commission took action. It requested public comments in 2008 and received hundreds of them, with “[i]ndustry commenters generally support[ing] the Petition in all respects.” Pet. App. 79a. It found that “[w]ireless services are central to the economic, civic, and social lives of over 270 million Americans” and that “[w]ithout access to mobile wireless networks * * * consumers cannot

¹³ See, e.g., B. Sandrick, *Parma officials uncertain about future of cell phone antennae placement*, Parma Sun Post, Apr. 7, 2010 (Ohio locality “tabled” a provider’s plan to collocate radio antennae on a roof, expressing concern about ‘radiation coming from the antennae’). Available at http://blog.cleveland.com/parmasunpost/2010/04/parma_officials_uncertain_abou.html

receive voice and broadband services from providers.” *Id.* 71a. It found “that the record shows that unreasonable delays” in local processing of siting requests “are occurring in a significant number of cases.” *Id.* 98a. And it found that “[d]elays in the processing of personal wireless service facility siting applications are particularly problematic as consumers await the deployment of advanced wireless communications services, including broadband services, in all geographic areas in a timely fashion.” *Id.* 102a.

In a carefully constrained decision, the Commission determined to “lend clarity” to the statutory terms by “interpreting the limits Congress already imposed on State and local governments.” *Id.* 111a, 90a. The Commission decided that delays longer than 90 days to process collocation requests and 150 days to process other siting requests were presumptively “unreasonable” under Section 332(c)(7)(B)(ii), and that when a locality did not act within those time frames it had “failed to act” under Section 332(7)(B)(v). *Id.* 115a. Those determinations gave the wireless industry clarity, for the first time, about what Section 332(c)(7)(B) means. The Commission recognized as much. It observed that “because an ‘action or failure to act’ is the statutory trigger for seeking judicial relief, our clarification of these terms will give personal wireless service providers certainty as to when they may seek redress for inaction on an application.” *Id.* 106a. And yet by establishing presumptive as opposed to hard-and-fast deadlines, the Commission left the courts wide latitude in determining whether delays beyond the presumptive deadlines are reasonable under the facts of a specific case.

2. The Commission’s action helped solve a problem of national significance. And it did so by doing precisely what agencies are *supposed* to do: It “use[d] its discretion to determine how best to implement [Congress’s] policy in those cases not covered by the statute’s specific terms.” *Haggar Apparel*, 526 U.S. at 393. That is what Congress had in mind when it broadly authorized the Commission to “execute and enforce the provisions” of the Communications Act, 47 U.S.C. § 151, to “prescribe such rules and regulations as may be necessary in the public interest to carry out the provisions of th[e] Act,” *id.* § 201(b); *accord* §§ 154(i), 303(r), and to “encourag[e] the deployment on a reasonable and timely basis of advanced telecommunications capability to all Americans” by “remov[ing] barriers to infrastructure investment,” *id.* § 157 nt. The Commission acted consistently with the goals Congress set for it in 47 U.S.C. § 157 nt. when it invoked its general authority under other provisions to interpret and give effect to Section 332(c)(7)(B).

II. THE COMMISSION CLEARLY HAD AUTHORITY TO ISSUE THE RULING UNDER REVIEW.

For the reasons above, the Commission acted well within its delegated authority in issuing its ruling in this case. The only question is whether something in Section 332(c)(7) stripped away that delegated authority. The answer is no. There was no jurisdictional ambiguity for the Commission to resolve. The Court can and should affirm the decision below without resolving the *Chevron* question at the heart of Petitioners’ argument.

A. The Commission Has Authority To Interpret The Communications Act, And Nothing In Section 332(c)(7) Withdrew That Authority.

1. Congress delegated to the Commission the authority to “execute and enforce” the Communications Act, 47 U.S.C. § 151, and to “prescribe such rules and regulations as may be necessary in the public interest to carry out the provisions” of the Act, *id.* § 201(b). In *AT&T Corp. v. Iowa Utilities Board*, 525 U.S. 366 (1999), this Court addressed the reach of Section 201(b). It explained that that provision gives the Commission jurisdiction over all matters that are within the “substantive reach” of the Communications Act. *Id.* at 380. Thus any “expansion of the substantive scope of the [Communications] Act” necessarily means a “*pari passu* expansion of Commission jurisdiction”; whatever Congress adds to the Communications Act, the Commission may implement. *Id.* That includes the provisions of the Telecommunications Act of 1996, the Court explained, because “Congress expressly directed that the 1996 Act * * * be inserted into the Communications Act of 1934.” *Id.* at 377.

Section 332(c)(7) was enacted as part of the Telecommunications Act of 1996. That means Section 332(c)(7) is now part and parcel of the Communications Act. And that in turn means, under *Iowa Utilities Board*, that Section 332(c)(7) is within the Commission’s jurisdiction. As with all Communications Act provisions within the Commission’s jurisdiction, “Congress would expect the agency to be able to speak with the force of law when it * * * fills a space in the enacted law.” *Global Crossing Telecommc’ns, Inc. v. Metrophones Telecommc’ns, Inc.*, 550 U.S. 45, 57 (2007) (quoting *United States*

v. *Mead Corp.*, 533 U.S. 218, 229 (2001)). That is just what the Commission did. The agency’s interpretative exercise was within its authority unless something else in the Act withdrew that authority from it.

2. Petitioners say that that “something else” is Section 332(c)(7)(A). They overread the provision.

Subsection 332(c)(7)(A) is part of the same paragraph as the provisions discussed above—those mandating that localities process siting applications in a reasonable time. It states that “[e]xcept as provided in this paragraph, nothing in this [Act] shall limit or affect the authority of a State or local government * * * over decisions regarding the placement, construction, and modification of personal wireless service facilities.” 47 U.S.C. § 332(c)(7)(A). There is nothing ambiguous about that language. The “except as provided in this paragraph” clause means by necessary implication that the provisions of Section 332(c)(7), including the “reasonable time” limitation, *can* limit localities’ siting authority, and it says nothing to limit the Commission’s administrative authority. Absent more, the Commission would be able to interpret and enforce Section 332(c)(7). Petitioners’ argument therefore must rest on the “nothing in this Act” clause. But that clause speaks only to the rest of the Act *outside* of Section 332(c)(7). It says nothing at all about, and imposes no limits on, what the Commission may do under the auspices of Section 332(c)(7) itself.

The Commission’s usual authority to interpret the Communications Act thus stands unimpeded; it may implement Section 332(c)(7)(B)’s new restrictions on local siting authority. The import of Section

332(c)(7)(A), as the court below correctly recognized, is merely that the Commission would not have been able to “impos[e] restrictions or limitations that *cannot* be tied to the language of [Section] 332(c)(7)(B).” Pet. App. 41a (emphasis added). The Commission made no attempt to do so. Section 332(c)(7)(A) is not triggered.

B. When Congress Intends To Withdraw The Commission’s Authority, It Does So Clearly.

The Commission’s authority to issue its ruling in this proceeding is clear on the face of Section 332(c)(7). But if further confirmation were needed, a comparison to Section 2(b) of the Communications Act provides it. That provision states that, with certain exceptions, “nothing in this [Act] shall be construed to apply *or to give the Commission jurisdiction* with respect to” certain matters that are reserved to the states. 47 U.S.C. § 152(b) (emphasis added). The italicized language restricts both the reach of the Act *and* the Commission’s jurisdiction. In other words, it does exactly what Petitioners want Section 332(c)(7)(A) to do. And yet the difference in the statutory language is striking: Section 2(b) limits the Commission’s jurisdiction expressly, while Section 332(c)(7) says nothing about the Commission at all.

“The contrast between these two paragraphs makes clear that Congress knows how to impose express limits” on the Commission’s authority to implement the Communications Act when it wants to do so. *Hardt v. Reliance Standard Life Ins. Co.*, 130 S. Ct. 2149, 2156 (2010). Congress’s failure to impose those same limits in Section 332(c)(7)(A) is fatal to Petitioners’ case. After all, “when Congress includes

particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion.” *Barnhart v. Sigmon Coal Co.*, 534 U.S. 438, 452 (2002) (internal quotation marks omitted). The Court should reject Petitioners’ effort to import jurisdiction-stripping language into a provision that clearly lacks it.¹⁴

¹⁴ Other congressional enactments similarly suggest that Congress did not intend to divest the Commission of authority to interpret Section 332(c)(7)(B). For example, Congress recently provided that localities must approve requests for collocation and infrastructure replacement “that do[] not substantially change the physical dimensions” of the structure—and Congress gave the Commission authority to enforce that provision. Pub. L. No. 112-96, §§ 6003(a), 6409. As the government points out in its merits brief (at 43 n.13), it is difficult to imagine why Congress would have wanted the Commission to have this authority and yet to be completely excluded from authority over the closely related requirements of Section 332(c)(7)(B).

CONCLUSION

For the foregoing reasons, the decision below should be affirmed.

Respectfully submitted,

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