

CHARLES M. DAVIDSON**IMPLEMENTING THE ACT IN FLORIDA
FOLLOWING CONGRESS'S CLEAR DIRECTIVES*

At the state level, the decade or so after enactment of the Telecommunications Act of 1996¹ was a time of much confusion vis-à-vis implementing the law's many telephone-related provisions. Justice Scalia's criticisms of the Act, that it was not a "model of clarity" and was in "many important respects a model of ambiguity or indeed even self-contradiction,"² proved to be an enduring truth, as state regulators clashed with the FCC over jurisdictional boundaries and regulatory roles.³ Although a central part of the legislation, the Act's primary focus on creating competition in local telephone markets was quickly undermined by the rapid emergence of more robust IP-enabled competitors like VoIP, the meteoric growth of the wireless sector, and the increased popularity of high-speed Internet connectivity. Unlike many other states at the time, Florida was among the first to recognize the profound importance and enormous potential of these services for consumers and economic development.

Florida was a leader in responding to Congress's bipartisan directive to keep these new services "unfettered" by state regulation.⁴ In 2003, Florida became the first state to explicitly deregulate VoIP, finding that a minimalist regulatory approach for this dynamic service was in the public interest.⁵ It was also among the first to clarify that wireless services were not to be regulated by the state public service commission,⁶ bolstering the certainty provided by the national regulatory framework for mobile that was

* Charles M. Davidson is a Director of the Advanced Communications Law & Policy Institute (ACLP) at New York Law School. Immediately prior to joining the law school, Davidson served in several telecommunications-related roles in Florida state government, including as Executive Director of Governor Jeb Bush's Information Technology Task Force, 2000-2001; Chief of Staff to the Information Technology Committee in the Florida House of Representatives, 2001-2002; Board Member of ITFlorida, 2002-2005; and Commissioner on the Florida Public Service Commission, 2003-2005. Prior to joining state government, Davidson was in private practice where he focused on telecommunications, information technology, and international law and policy issues.

1. Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (codified as amended in scattered sections of 47 U.S.C.).

2. AT & T Corp. v. Iowa Utils. Bd., 525 U.S. 366, 397 (1999).

3. See generally Charles M. Davidson & Michael J. Santorelli, *Federalism in Transition: Recalibrating the Federal-State Regulatory Balance for the All-IP Era*, 29 BERKELEY TECH. L. J. 1131 (2014) (detailing many of these battles and the shifting balance of regulatory federalism before and after the Act).

4. 47 U.S.C. § 230(b)(2) (2012).

5. See Fla. Stat. § 364.01(3).

6. See Fla. Stat. § 364.01(1), (granting the Florida Public Service Commission jurisdiction over "telecommunications companies"); see also Fla. Stat. § 364.02(13)(c) (excluding CMRS (wireless) providers from definition of "telecommunications company").

implemented in the 1990s.⁷ State policymakers also acted in the 2000s to free broadband service of unnecessary state and local regulation, aligning Florida's policy with the federal light-touch "information service" model that was being formalized at the time.⁸ The resulting framework for these advanced communications services—light-touch in nature; supportive of market forces; and consumer-focused in all respects—contributed to the development of a vibrantly innovative and intensely competitive high-tech sector in Florida, positioning it as a rational and effective model for furthering the spirit and letter of the Act.⁹

Despite the considerable successes facilitated by Florida's minimalist regulatory approach to advanced services, many states elected to pursue a decidedly different approach to implementing the Act. Indeed, many state regulators focused primarily on defending their regulatory authority over basic telephony, suing the FCC on numerous occasions in the decade following enactment in an effort to protect what they viewed as the proper balance of regulatory federalism.¹⁰ This created a schism between traditionalist regulators, who focused only on preserving a formal regulatory role, and regulators who were accepting of a more limited regulatory role in order to unleash the true potential of advanced communications services.¹¹ Over time, more states elected to replicate Florida's deregulatory framework for advanced services, but the contours of this clash of regulatory philosophies persist to this day.¹²

In addition, recent actions by the FCC to reinterpret a key provision of the Act relating to regulatory authority over advanced services¹³ and reclassify broadband undermines much of the progress made by forward-looking states like Florida, which acted in response to Congress's clear directive to implement light-touch regulatory frameworks for these services. In sum, it appears that, after 20 years, the sector has come full circle from a

7. See, e.g., Charles M. Davidson & Michael J. Santorelli, *Seizing the Mobile Moment: Spectrum Allocation Policy for the Wireless Broadband Century*, 19 COMM'LAW CONCEPTUS 1, 31-35 (2010) (discussing implementation of national regulatory framework).

8. See, e.g., Fla. Stat. § 364.0361 (clarifying that local governments cannot regulate broadband providers); see also 47 U.S.C. § 153(24) (2012); Inquiry Concerning High-Speed Access to the Internet Over Cable and Other Facilities, *Declaratory Ruling and Notice of Proposed Rulemaking*, 17 FCC Rcd 4798, para. 7 (2002).

9. See generally FLA. PUB. SERVS. COMM'N, REPORT ON THE STATUS OF COMPETITION IN THE TELECOMMUNICATIONS INDUSTRY AS OF DECEMBER 31, 2014 (2015), <http://www.psc.state.fl.us/publications/pdf/telecomm/20150730MasterComp.pdf> (providing supporting data).

10. See *Federalism in Transition*, *supra* note 3, at 1154-1161 (discussing these clashes).

11. Compare Comments of the Nat'l Ass'n of Regulatory Util. Comm'rs, IP-Enabled Services, WC 04-36 (May 28, 2004), <http://apps.fcc.gov/ecfs/document/view?id=6516199621> (advocating for state-level regulatory oversight of VoIP services), with Comments of the Fed'n for Econ. Rational Util. Policy, IP-Enabled Services, WC 04-36 (May 28, 2004), <http://apps.fcc.gov/ecfs/document/view?id=6516200200> (providing contrary view).

12. See generally *Federalism in Transition*, *supra* note 3.

13. See *Verizon Comm'ns, Inc. v. FCC*, 740 F.3d 623 (D.C. Cir. 2014) (discussing at length the FCC's reinterpretation of Section 706 of the Act, 47 U.S.C. § 1302).

regulatory standpoint, an outcome that seemed unthinkable only a few years ago. Looking ahead, now might be the most opportune time for Congress to update the law lest the policies governing this sector become impediments to, rather than enablers of, further investment, innovation, and competition.