

# Dial 911 and Report a Congressional Empty Promise: The Wireless Communications and Public Safety Act of 1999

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## I. INTRODUCTION

On Thanksgiving Day 1997, Greg and Luann Bertaux were traveling from their Kansas home to Eureka Springs, Arkansas, when they observed a nearby green minivan darting dangerously in and out of traffic along U.S. 71 near Carthage, Missouri.<sup>1</sup> Thinking that the driver was inebriated, Mrs. Bertaux picked up her cellular phone and dialed 911 to alert Missouri police.<sup>2</sup> Her call succeeded in reaching the Joplin Police Department, but shortly after connecting, a recorded message instructed her to hold for an attendant who never answered the phone.<sup>3</sup> Bertaux tired of waiting for an operator in Joplin and dialed information in an attempt to learn the phone number for an approaching town's police department.<sup>4</sup> Again, she failed to reach the proper authorities.<sup>5</sup> Her third attempt to alert emergency personnel of the minivan's dangerous driver finally reached local police officers. By the time officials could set up a roadblock, however, the green minivan had already smashed head-on with another automobile and killed three people, including a two-year-old child.<sup>6</sup>

Sadly, had Mrs. Bertaux reached Missouri police on her first attempt, these deaths might have been avoided.<sup>7</sup> Yet neither the Bertaux couple nor the majority of Missourians surveyed at that time were aware that “\*55” was the official cellular number to dial in that state for emergency assistance—not “911”.<sup>8</sup> This avoidable tragedy was but one of the more significant considerations driving Missouri Congressman Roy Blunt and Congresswoman Pat Danner's push for legislation to establish 911 as the

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1. *Travelers with Cellular Phone Unable to Prevent Collision That Killed Three*, ST. LOUIS POST DISPATCH, Nov. 30, 1997, at C4. See also 145 CONG. REC. H9858, 9861 (daily ed. Oct. 12, 1999) (statement of Rep. Danner).

2. *Travelers with Cellular Phone Unable to Prevent Collision That Killed Three*, *supra* note 1, at C4.

3. *Id.*

4. *Id.*

5. *Id.*

6. *Id.*

7. See 145 CONG. REC. H9858, *supra* note 1, at 9861.

8. Lori Winter & Chris Hoag-Apel, *A Ballot Proposition That Will Save Lives*, ST. LOUIS POST DISPATCH, Apr. 1, 1999, at B7. In 1999, over twenty different wireless emergency numbers were used in the United States, such as “Star 999” in Illinois and “Star DUI” in Ohio. S. REP. NO. 106–138, at 2 (1999).

nationwide telephone number for emergency assistance.<sup>9</sup> Members of both the House and the Senate drafted similar measures to accomplish this objective during the 106th Congress, and Senators John McCain of Arizona and Conrad Burns of Montana introduced the bill that eventually became the Wireless Communications and Public Safety Act of 1999 (the 911 Act) on April 14, 1999.<sup>10</sup> After the House approved the Senate's version of the Act by a vote of 424-2, President Clinton signed the measure into law on October 26, 1999.<sup>11</sup>

Designed to promote the prompt deployment of a seamless emergency services infrastructure to meet the nation's safety needs, the 911 Act not only instructs the Federal Communications Commission ("FCC") to assign the abbreviated dialing code 911 for use as the universal emergency telephone number, but also directs the FCC to establish appropriate transition periods for compliance in areas without 911 service. Furthermore, the 911 Act supports individual states' efforts to develop comprehensive emergency communications.<sup>12</sup> Although improving the 911 system and saving lives by developing an end-to-end emergency communications network are commendable goals, this Note argues that the anemic 911 Act is an important first step, but accomplishes little beyond merely establishing 911 as the universal emergency telephone number. Part II of this Note addresses the history and background of the 911 calling system while Part III presents, in detail, the Act itself. Part IV evaluates the 911 Act's potential ability to meet the nation's safety needs in light of its weaknesses. Finally, Part V asserts the specific changes and improvements needed for the 911 Act to adhere to its promise of enhanced public safety.

## II. HISTORY AND BACKGROUND OF 911 TECHNOLOGY

Great Britain developed the first three-digit emergency telephone number in 1937 to provide its citizens with an avenue to notify the appropriate authorities quickly and easily in an emergency.<sup>13</sup> At the urging

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9. See Winter & Hoag-Apel, *supra* note 8, at B7. Rep. Blunt co-sponsored H.R. 438, the House of Representative's version of the Wireless Communications and Public Safety Act of 1999. See H.R. 438, 106th Cong. (1999). In March 1997, Rep. Danner introduced legislation to standardize state cellular emergency numbers. See 145 CONG. REC. H9858, 9861 (daily ed. Oct. 12, 1999) (statement of Rep. Danner).

10. See generally H.R. 438, 106th Cong. (1999); S. 800, 106th Cong. (1999); S. REP. NO. 106-138, at 3 (1999).

11. Chuck Holt, *911 Legislation Becomes Law—Finally*, WIRELESS REV., November 15, 1999, at 12.

12. Implementation of 911 Act, *Fourth Report and Order and Third Notice of Proposed Rulemaking*, 15 F.C.C.R. 17079, para. 1, 20 Comm. Reg. (P & F) 489 (2000) [hereinafter *911 Act Report and Order*].

13. Bertram A. Maas, Comment, "911" Emergency Assistance Call Systems: Should

of the President's Commission on Law Enforcement, AT&T pioneered the United States' 911 system in the late 1960s and employed it in Haleyville, Alabama.<sup>14</sup> With help from the Law Enforcement Assistance Administration, other local governments and municipalities soon followed Haleyville's lead, and today some configuration of 911 service is available on more than eighty-nine percent of the nation's wirelines.<sup>15</sup> Picking up the telephone is now most Americans' first instinct when faced with an emergency as 911 has become synonymous with emergency assistance.<sup>16</sup>

A 911 emergency system includes two fundamental components: (1) Public Safety Answering Points ("PSAPs") replete with the personnel and equipment necessary to receive 911 calls; and (2) switching and signaling equipment provided by telecommunications carriers that recognizes the 911 abbreviated dialing code and relays emergency calls to the PSAPs.<sup>17</sup> Local exchange carriers ("LECs") route the typical 911 emergency call to centrally located PSAPs staffed by trained, professional operators who help callers in need of assistance and convey details of the caller's situation to

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*Local Governments Be Liable for Negligent Failure to Respond?*, 8 GEO. MASON U. L. REV. 103, 103 n.1 (1985).

14. *Id.*; see also *911 Act Report and Order*, *supra* note 12, para. 9. The Alabama Speaker of the House, Rankin Fite, made the first 911 call on February 16, 1968 from a room in the Haleyville city hall. The call was answered by Congressman Tom Bevill on a bright red telephone located in the police department. See also Alabama Chapter of NENA, *World's First 911 Call*, at [http://www.al911.org/first\\_call.htm](http://www.al911.org/first_call.htm) (last updated Sept. 12, 2001).

15. T.J. Yung and B.K. Yamaoka, *A National Directory of 911 Systems*, Bureau of Justice Statistics, U.S. Department of Justice, 1 (1980); Revision of the Commission's Rules to Ensure Compatibility with Enhanced 911 Emergency Calling Systems, *Notice of Proposed Rulemaking*, 9 F.C.C.R. 6170, para. 3 (1994) [hereinafter *E-911 Notice of Proposed Rulemaking*]. Although this statistic is seven years old, not all American communities have put 911 service into effect yet. While many localities have implemented access via 911 to a PSAP, "[o]n the opposite end of the spectrum, some communities may not use 911 or any other abbreviated dialing code, may not have PSAPs in place, and may provide access to . . . emergency services by dialing a seven or ten-digit telephone number." Implementation of 911 Act; the Use of N11 Codes and Other Abbreviated Dialing Arrangements; Compatibility with 911 Emergency Calling Systems, 65 Fed. Reg. 56752, 56752 (Sept. 19, 2000) (to be codified at 47 C.F.R. pt. 20) [hereinafter *911 Act Proposed Rules*]. For the purposes of this Note, "wireline" refers to the traditional, nonmobile form of telephone service offered by Local Exchange Carriers.

16. See *911 Act Report and Order*, *supra* note 12, para. 3; Revision of the Commission's Rules to Ensure Compatibility with Enhanced 911 Emergency Calling Systems, *Report and Order and Further Notice of Proposed Rulemaking*, 11 F.C.C.R. 18676, para. 3, 3 Comm. Reg. (P & F) 967 (1996) [hereinafter *1996 FCC Report*]. In fact, Congress declared September 11 as National 911 Day in 1987. *12th Annual 911 Day Celebrates Final Congressional Push For 911 Throughout United States; House and Senate Provide Overwhelming Bipartisan Support to Improve 911 Emergency Response to Over 70 Million Wireless Telephone Users*, PR NEWSWIRE, Sept. 10, 1999.

17. *911 Act Proposed Rules*, *supra* note 15, para. 3.

the appropriate emergency personnel.<sup>18</sup>

Traditionally, the emergency operator receiving the 911 call at the PSAP gathered information about the nature and location of the emergency by asking the caller precise questions.<sup>19</sup> Interrogating callers wastes valuable time as more states and municipalities have upgraded their 911 systems and PSAPs to enhanced 911 (“E-911”) over the past decade.<sup>20</sup> A wireline 911 call placed today in a region with E-911 capability transmits both the caller’s telephone number and address to the PSAP. This capability allows the operator to relay that information to emergency personnel quickly and enables emergency crews to respond rapidly, even if a caller cannot convey his or her location.<sup>21</sup>

Not all 911 calls, however, are placed from wireline telephones; wireless 911 is becoming increasingly crucial in alerting public safety agencies to an emergency.<sup>22</sup> In 1999, when Congress passed the 911 Act, roughly 68 million Americans subscribed to a wireless telephone service.<sup>23</sup> These subscribers placed 43 million wireless 911 calls that year—double the amount of similar calls made in 1996—and in 2001, experts predict that the total number of cellular calls placed in the United States will exceed all wireline calls.<sup>24</sup> PSAPs are inundated with more than eighty calls per minute, and fueled by the explosion in the number of cellular subscribers, an exponentially increasing number of these calls are placed from wireless phones.<sup>25</sup>

Although the public’s reliance on cellular phones in emergencies is expanding, “Congress found that, despite the important steps taken by the Commission, few areas in the country were served by wireless systems operating under our E911 requirements and that E911 service currently is not deployed on many wireless systems.”<sup>26</sup> In 1996, the FCC adopted rules in a *Report and Order and Further Notice of Proposed Rulemaking* that

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18. 1996 FCC Report, *supra* note 16, para. 3.

19. *Id.* para. 4.

20. *Id.*

21. *Id.*

22. Commissioner Gloria Tristani, Address at the Association of Pub. Safety Comm. Officials-Int’l (Aug. 14, 2000) available at <http://www.fcc.gov/Speeches/Tristani/2000/spgt010.html> [hereinafter *Tristani’s Address*]; 1996 FCC Report, *supra* note 16, para 7; see also H.R. REP. NO. 106–25, at 7–8 (1999).

23. 145 CONG. REC. H728, 732 (daily ed. Feb. 24, 1999) (statement of Rep. Green).

24. *Id.*; *Tristani’s Address*, *supra* note 22; Matthew Mickle Werdegar, Note, *Lost? The Government Knows Where You Are: Cellular Telephone Call Location Technology and the Expectation of Privacy*, 10 STAN. L. & POL’Y REV. 103, 104 (1998).

25. *Tristani’s Address*, *supra* note 22; Werdegar, *supra* note 24, at 104; 1996 FCC Report, *supra* note 16, para. 6.

26. 911 Act Report & Order, *supra* note 12, para. 6.

required wireless carriers to deliver their customers' 911 calls to PSAPs and obligated them to implement and deploy enhanced 911 features that report the location of wireless emergency calls.<sup>27</sup>

The Commission scheduled its E-911 requirements to occur in two phases.<sup>28</sup> Phase One obligated carriers to transmit the phone number of the wireless handset making the call and the location of the phone's cellular base station to the designated PSAP.<sup>29</sup> Phase Two requires more precise location technology; certain wireless carriers must achieve the capability to identify the latitude and longitude of the wireless phone making the call.<sup>30</sup> Without a doubt, wireless E-911 will allow emergency workers to reach thousands of cellular callers more quickly and will save thousands of lives in the process.<sup>31</sup> Nonetheless, wireless corporations have delayed in comporting with the Commission's requirements and have requested that the FCC relax the scheduled dates for compliance.<sup>32</sup>

Congress accordingly passed the 911 Act to establish 911 as the official, universal emergency number for wireline and wireless telephone service. Additionally, the Act would spur lagging E-911 implementation and beget the nationwide improvements in wireless emergency communication systems mandated by the Commission's E-911 Requirements.<sup>33</sup>

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27. Revision of the Commission's Rules to Ensure Compatibility with Enhanced 911 Emergency Calling Systems, *Fourth Memorandum Opinion and Order*, 15 F.C.C.R. 17442, para. 7, 22 Comm. Reg. (P & F) 3 (2000) [hereinafter *E-911 Fourth Memorandum*].

28. *Id.* para. 7. Covered carriers were required to comply with Phase I by April 1, 1998, or within six months of a request by the designated PSAP, whichever is later. Wireless carriers are required to provide Automatic Location Identification (ALI) as part of Phase II E-911 implementation beginning October 1, 2001. Fact Sheet, *FCC Wireless 911 Requirements*, at [http://www.fcc.gov/e911/factsheet\\_requirements\\_012001.txt](http://www.fcc.gov/e911/factsheet_requirements_012001.txt) (Jan. 2001).

29. *E-911 Fourth Memorandum*, *supra* note 27, para. 7.

30. *Id.*

31. ComCARE Alliance, *A Need For Automatic Crash Notification: Actual Stories*, at <http://www.comcare.org/research/news/stories.html> (2001). Tragedies such as the following may be averted. In 1998, a Florida woman who called 911 on her cell phone after being shot under a bridge overpass, passed out before she could relay her location to the operator. Seven hours later, emergency workers arrived and found her dead—six minutes away from the nearest hospital. The medical examiners performing her autopsy said she probably survived an additional two hours after placing her call to 911. Had wireless E-911 technology been in place, she might have survived.

32. *E-911 Fourth Memorandum*, *supra* note 27, para. 13; *Tristani's Address*, *supra* note 22.

33. H.R. REP. NO. 106-25, at 7-8; *911 Act Report & Order*, *supra* note 12, para. 6.

### III. THE WIRELESS COMMUNICATIONS AND PUBLIC SAFETY ACT OF 1999: A PROMISE TO PROMOTE AND ENHANCE PUBLIC SAFETY

Designed to promote public safety “by making 9-1-1 the universal emergency assistance number, by furthering deployment of wireless 9-1-1 capabilities and related functions, and by encouraging construction and operation of seamless, ubiquitous, and reliable networks for wireless services,”<sup>34</sup> the 911 Act has four principal directives. First, it replaces the confusing codes and alternative numbers that wireless networks previously used by instructing the Commission to designate 911 as the universal emergency number for all forms of telephone service.<sup>35</sup> Second, the Act charges the FCC with the task of supporting the states in implementing a comprehensive end-to-end emergency communications network and working with the states to administer wireless E-911.<sup>36</sup> Third, it equalizes the liability protection from transmission errors or other technical failures that a given state confers upon wireless telecommunications users and providers of 911 with that of wireline users and providers.<sup>37</sup> Fourth, the 911 Act protects wireless users’ privacy by requiring carriers to obtain a customer’s express prior authorization before disclosing any location information other than in emergencies.<sup>38</sup>

The Act consists of six sections, the first of which simply identifies its short title as the “Wireless Communications and Public Safety Act of 1999” and the last of which merely provides definitions for the words and phrases Congress employed in the legislation.<sup>39</sup> The true substance of the 911 Act is contained in sections two through five. This analysis begins with the former, which contains both Congress’s findings and the stated purpose of the law.<sup>40</sup>

#### A. *Section Two—Assigning a Purpose*

Section two of the 911 Act illustrates the general “importance of establishing and maintaining an end-to-end communications infrastructure

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34. S. REP. NO. 106–138, at 1; Wireless Communication and Public Safety Act of 1999, Pub. L. No. 106–81, 113 Stat. 1286 (1999).

35. 145 CONG. REC. H728, 729–30 (daily ed. Feb. 24, 1999) (statement of Rep. Tauzin); 145 CONG. REC. H9858, 9862 (daily ed. Oct. 12, 1999) (statement of Rep. Ford).

36. 145 CONG. REC. H728, 729–30 (daily ed. Feb. 24, 1999) (statement of Rep. Tauzin).

37. *Id.*; S. REP. NO. 106–138, at 3.

38. 145 CONG. REC. H728, 729–30 (daily ed. Feb. 24, 1999) (statement of Rep. Tauzin); 145 CONG. REC. H9858, 9861 (daily ed. Oct. 12, 1999) (statement of Rep. Markey).

39. 47 U.S.C. § 609 (Supp. V 1999); 47 U.S.C. § 615(b) (Supp. V 1999).

40. 47 U.S.C. § 615 note (Supp. V 1999).

for emergency services.”<sup>41</sup> Congress highlighted six particular factual findings as the cornerstone for its passage of the 911 Act, beginning with its determination that an end-to-end emergency communications infrastructure would reduce emergency response times and thus save both thousands of lives and billions of dollars in health care costs.<sup>42</sup> To accomplish these objectives and to deploy this emergency telecommunications service swiftly, Congress found that it was necessary to encourage statewide coordination among emergency service providers, establish funds for technology development and deployment, integrate emergency communications with traffic control and management systems, and charge the FCC with designating 911 as the nation’s official emergency number.<sup>43</sup>

Congress’s findings also presented several collateral factors that influenced its decision to pass this legislation. Prominent among these factors was the importance of emerging technologies, such as E-911, in reducing emergency response times and providing appropriate care, meeting public health objectives of various government groups, and realizing the improvement in emergency care systems that would result from the “prompt notification of emergency services when motor vehicle crashes occur . . . .”<sup>44</sup> Advancing new technology is central to the 911 Act’s purpose. The House Committee on Commerce found that encouraging investment in emergency communications systems was important in equipping states and localities to address public safety challenges.<sup>45</sup>

In concurrence with these findings, Congress pronounced that it enacted the 911 Act “to encourage and facilitate the prompt deployment throughout the United States of a seamless, ubiquitous, and reliable end-to-end infrastructure for communications, including wireless communications, to meet the Nation’s public safety and other communications needs.”<sup>46</sup> The convoluted language of the Act’s official purpose belies its legislative intent. Simply put, Congress passed the 911 Act to establish one important rule: any person should be able to dial 911 and receive assistance, no matter where he or she is in America.<sup>47</sup>

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41. S. REP. NO. 106–138, at 5.

42. 47 U.S.C. § 615 note (Supp. V 1999).

43. *Id.*

44. *Id.*

45. H.R. REP. NO. 106–25, at 8 (1999).

46. 47 U.S.C. § 615 note (Supp. V 1999). “End-to-end” refers to “the integration of wireless telecommunications services, intelligent highway systems including automatic crash notification technology, and PSAP services.” H.R. REP. NO. 106–25, at 14.

47. 145 CONG. REC. H9858, 9859 (daily ed. Oct. 12, 1999) (statement of Rep. Tauzin). Rep. Tauzin’s original language was a little more colorful: “The rule in America ought to be



*B. Section Three—Establishing a Universal Emergency Service Number*

The 911 Act's third section adds two provisions to the United States Code.<sup>48</sup> The first calls on the FCC to establish 911 as the nation's universal emergency telephone number by amending the portion of the Communications Act of 1934 that grants the FCC the authority and jurisdiction to administer telecommunications numbering in the United States.<sup>49</sup> The second requires the FCC to play a more assertive role in encouraging and supporting individual state efforts to deploy comprehensive emergency communications infrastructure and programs, including wireless E-911 service, by adding § 615 to Title 47.<sup>50</sup>

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simple. If one is on a highway, a byway, bike path or a duck blind in Louisiana where someone calls 9-1-1, they ought to get help. S. 800 will provide that help . . .” *Id.*

48. 47 U.S.C. § 251(e)(3) (Supp. V 1999) (establishing October 26, 1999 as the date of enactment of the Wireless Communications and Public Safety Act of 1999); 47 U.S.C. § 615 (Supp. V 1999).

49. 47 U.S.C. § 251(e)(3) (Supp. V 1999). The full text of the paragraph added to § 251(e) of the Communications Act of 1934 reads as follows:

**(3) Universal emergency telephone number**

The Commission and any agency or entity to which the Commission has delegated authority under this subsection shall designate 9-1-1 as the universal emergency telephone number within the United States for reporting an emergency to appropriate authorities and requesting assistance. The designation shall apply to both wireline and wireless telephone service. In making the designation, the Commission (and any such agency or entity) shall provide appropriate transition periods for areas in which 9-1-1 is not in use as an emergency telephone number on October 26, 1999.

*Id.*

50. 47 U.S.C. § 615 (Supp. V 1999); H.R. REP. NO. 106–25, at 7. The full text of the new § 615 added to Title 47 reads as follows:

**Support for universal emergency telephone number**

The Federal Communications Commission shall encourage and support efforts by States to deploy comprehensive end-to-end emergency communications infrastructure and programs, based on coordinated statewide plans, including seamless, ubiquitous, reliable wireless telecommunications networks and enhanced wireless 9-1-1 service. In encouraging and supporting that deployment, the Commission shall consult and cooperate with State and local officials responsible for emergency services and public safety, the telecommunications industry (specifically including the cellular and other wireless telecommunications service providers), the motor vehicle manufacturing industry, emergency medical service providers and emergency dispatch providers, transportation officials, special 9-1-1 districts, public safety, fire service and law enforcement officials, consumer groups, and hospital emergency and trauma care personnel (including emergency physicians, trauma surgeons, and nurses). The Commission shall encourage each State to develop and implement coordinated statewide deployment plans, through an entity designated by the governor, and to include representatives of the foregoing organizations and entities in development and implementation of such plans. Nothing in this section shall be construed to authorize or require the Commission to impose obligations or costs on any person.

When taken together, these two provisions are meant to ensure that all American jurisdictions can “offer seamless networks for prompt emergency service.”<sup>51</sup> By requiring the FCC to exert its exclusive numbering authority and designate 911 as “the universal emergency telephone number . . . within the United States for reporting an emergency to appropriate authorities and [for] requesting assistance,”<sup>52</sup> the Senate Committee on Commerce recognized that the 911 Act was asking many PSAPs to make technological changes that they could not afford to carry out immediately.<sup>53</sup> Thus, in areas where 911 was not in use as an emergency number on the date of the Act’s enactment, Congress directed the FCC to furnish entities and localities with appropriate transition periods and to work with state and local officials in developing coordinated statewide implementation plans.<sup>54</sup>

Realizing that cooperation between the private sector and state and local governments would ease the transition to a national 911 system, Congress suggested that the FCC generate statewide deployment procedures through entities designated by state governors that include both emergency service providers and representatives from the telecommunications and automotive industries.<sup>55</sup> To make such plans effective, the Commerce Committee suggested the governor-designated entities include all parties affected by the 911 Act.<sup>56</sup>

### C. Section Four—Equalizing Liability for Wireless and Wireline Service Providers

Section four gives to wireless carriers the same immunity or protection from liability for transmission errors and other technical failures enjoyed by wireline carriers by adding § 615a to the United States Code.<sup>57</sup>

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47 U.S.C. § 615 (Supp. V 1999).

51. *911 Act Report & Order*, *supra* note 12, para. 1.

52. H.R. REP. NO. 106–25, at 12; 47 U.S.C. § 251(e)(3) (Supp. V 1999).

53. S. REP. NO. 106–138, at 6.

54. 47 U.S.C. § 251(e)(3) (Supp. V 1999); S. REP. NO. 106–138, at 6.

55. 47 U.S.C. § 251(e)(3) (Supp. V 1999); S. REP. NO. 106–138, at 6.

56. S. REP. NO. 106–138, at 6.

57. 47 U.S.C. § 615a (a)-(d) (Supp. V 1999). The 911 Act adds § 615a to Title 47 of the U.S. Code. The full text of this addition provides:

**(a) Provider parity**

A wireless carrier, and its officers, directors, employees, vendors, and agents, shall have immunity or other protection from liability in a State of a scope and extent that is not less than the scope and extent of immunity or other protection from liability that any local exchange company, and its officers, directors, employees, vendors, or agents, have under Federal and State law (whether through statute, judicial decision, tariffs filed by such local exchange company, or otherwise) applicable in such State, including in connection with an act or omission involving the release to a PSAP, emergency medical service provider or

This section extends liability parity to wireless carriers for both 911 and non-911 calls and obviates the need for any carrier to “file tariffs, or take other affirmative action to secure equivalent liability protection.”<sup>58</sup> The section also preempts any state law that establishes a different standard of liability for wireless and wireline users and providers.<sup>59</sup>

Acknowledging wireless companies’ concerns about their potential exposure to lawsuits for trying to improve the safety of their systems and citing the “compelling case” made by wireless providers showing how liability parity would enhance public safety, Congress included this protection to ensure that “wireless technology develops and matures to provide greater services.”<sup>60</sup> Section four only extends the current liability protection from transmission errors or other technical failures that exist for wireline carriers to wireless carriers; the bill was not intended to grant wireless providers greater protection or to alter the rules for land lines.<sup>61</sup> Liability parity exists to facilitate the deployment of wireless 911 technology by preserving the existence of a competitive market and by removing the possibility that a community might not have 911 service because of a wireless corporation’s litigation fears.<sup>62</sup>

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emergency dispatch provider, public safety, fire service or law enforcement official, or hospital emergency or trauma care facility of subscriber information related to emergency calls or emergency services.

**(b) User parity**

A person using wireless 9-1-1 service shall have immunity or other protection from liability of a scope and extent that is not less than the scope and extent of immunity or other protection from liability under applicable law in similar circumstances of a person using 9-1-1 service that is not wireless.

**(c) PSAP parity**

In matters related to wireless 9-1-1 communications, a PSAP, and its employees, vendors, agents, and authorizing government entity (if any) shall have immunity or other protection from liability of a scope and extent that is not less than the scope and extent of immunity or other protection from liability under applicable law accorded to such PSAP, employees, vendors, agents, and authorizing government entity, respectively, in matters related to 9-1-1 communications that are not wireless.

**(d) Basis for enactment**

This section is enacted as an exercise of the enforcement power of the Congress under section 5 of the Fourteenth Amendment to the Constitution and the power of the Congress to regulate commerce with foreign nations, among the several States, and with Indian tribes.

*Id.*

58. *Id.*; S. REP. NO. 106–138, at 6.

59. S. REP. NO. 106–138, at 3.

60. 145 CONG. REC. H9858, 9863 (daily ed. Oct. 12, 1999) (statement of Rep. Bliley); *Id.* at 9859 (statement of Rep. Tauzin).

61. *Id.* at 9859 (statement of Rep. Tauzin); S. REP. NO. 106–138, at 6.

62. 145 CONG. REC. H9858, 9863 (daily ed. Oct. 12, 1999) (statement of Rep. Bliley); S. REP. NO. 106–138, at 6; 145 CONG. REC. H728, 730 (daily ed. Feb. 24, 1999) (statement

Enacted to enforce the Fourteenth Amendment's guarantee of equal protection and as an exercise of Congress's commerce power,<sup>63</sup> this portion of the 911 Act also provides PSAPs with the same immunity or protection from liability that their wireline counterparts enjoy with respect to 911 calls.<sup>64</sup>

*D. Section Five—Requiring E-911 Capability and Protecting User's Privacy*

The last substantive provision of the 911 Act is section five, which requires wireless providers to transmit call location information and bolsters personal privacy by making three notable amendments to section 222 of the Communications Act of 1934—the provision concerning the privacy of customer information.<sup>65</sup> Most importantly, in terms of the 911 Act's efforts to bring wireless emergency communication systems in line with the Commission's E-911 requirements, this legislation first adds § 222(g) to address the problem of emergency service personnel not receiving information indicating the phone number or location of callers who dial 911 from a wireless phone.<sup>66</sup> The 911 Act's section five mandates that a telecommunications carrier providing telephone exchange service furnish subscribers' information to providers of emergency services, thereby enhancing the ability of emergency service personnel to locate and respond to wireless phone calls for assistance.<sup>67</sup>

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of Rep. Tauzin).

63. 47 U.S.C. § 615a(d) (Supp. V 1999).

64. *Id.* § 615a(b)-(c) (Supp. V 1999).

65. 911 Act, sec. 5, 113 Stat. 1286, 1288 (codified generally throughout 47 U.S.C. § 222 (Supp. V 1999)); 145 CONG. REC. H9858, 9860 (daily ed. Oct. 12, 1999) (statement of Rep. Markey); S. REP. NO. 106-138, at 7.

66. S. REP. NO. 106-138, at 8; 47 U.S.C. § 222(g) (Supp. V 1999). The full text of the amendment:

**(g) Subscriber listed and unlisted information for emergency services**

Notwithstanding subsections (b), (c), and (d) of this section, a telecommunications carrier that provides telephone exchange service shall provide information described in subsection (i)(3)(A) (including information pertaining to subscribers whose information is unlisted or unpublished) that is in its possession or control (including information pertaining to subscribers of other carriers) on a timely and unbundled basis, under nondiscriminatory and reasonable rates, terms, and conditions to providers of emergency services, and providers of emergency support services, solely for purposes of delivering or assisting in the delivery of emergency services.

*Id.*

67. S. REP. NO. 106-138, at 8. At the time the 911 Act was passed, only six to seven percent of wireless subscribers lived in regions where PSAPs had been upgraded to accept wireless E-911. 145 CONG. REC. H728, 729 (daily ed. Feb. 24, 1999) (statement of Rep. Tauzin).

Second, to allow carriers to release this information, section five modifies the exceptions to the general rule contained in the Communications Act of 1934 that telecommunications carriers have a duty to protect the confidentiality of customers' proprietary information.<sup>68</sup> As amended, § 222 now states that nothing prohibits a telecommunications carrier from using proprietary network information obtained from its customers to provide call location information to either emergency service providers, members of the user's immediate family, or database management services.<sup>69</sup>

The third and final amendment to § 222 includes provisions to protect personal privacy.<sup>70</sup> Incorporated in the 911 Act with the knowledge that the location of all wireless phones will eventually be traceable, section five declares that unless it is an emergency or unless a customer expressly authorizes a disclosure of call location information, no person has the authority to use wireless location information.<sup>71</sup> This final amendment, an opt-in for consumer privacy, limits the disclosure of location information to specific instances.<sup>72</sup>

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68. 47 U.S.C. § 222(d)(4) (Supp. V 1999). The full text of the 911 Act amendment: (4) to provide call location information concerning the user of a commercial mobile service (as such term is defined in section 332(d) of this title)—

(A) to a public safety answering point, emergency medical service provider or emergency dispatch provider, public safety, fire service, or law enforcement official, or hospital emergency or trauma care facility, in order to respond to the user's call for emergency services;

(B) to inform the user's legal guardian or members of the user's immediate family of the user's location in an emergency situation that involves the risk of death or serious physical harm; or

(C) to providers of information or database management services solely for purposes of assisting in the delivery of emergency services in response to an emergency.

*Id.*

69. 47 U.S.C. § 222(d) (Supp. V 1999).

70. 145 CONG. REC. H9858, 9860 (daily ed. Oct. 12, 1999) (statement of Rep. Markey).

71. 47 U.S.C. § 222(f) (Supp. V 1999); 145 CONG. REC. H9858, 9862 (daily ed. Oct. 12, 1999) (statement of Rep. Ford). The full text of the 911 Act amendment reads:

**(f) Authority to use wireless location information**

For purposes of subsection (c)(1) of this section, without the express prior authorization of the customer, a customer shall not be considered to have approved the use or disclosure of or access to—

(1) call location information concerning the user of a commercial mobile service (as such term is defined in section 332(d) of this title), other than in accordance with subsection (d)(4) of this section; or

(2) automatic crash notification information to any person other than for use in the operation of an automatic crash notification system.

47 U.S.C. § 222(f) (Supp. V 1999).

72. 145 CONG. REC. H9858, 9860 (daily ed. Oct. 12, 1999) (statement of Rep. Markey); 145 CONG. REC. H9858, 9862 (daily ed. Oct. 12, 1999) (statement of Rep. Ford).

*E. The 911 Act's Fiscal Impact—Estimating the Legislation's Costs*

The Congressional Budget Office (“the CBO”) estimated that the 911 Act would cost less than \$500,000 for the federal government to execute and would have no significant impact on the federal budget.<sup>73</sup> The CBO also estimated that the 911 Act would not impose any significant costs on state, local, or tribal governments.<sup>74</sup> While the Act’s impact on governmental budgets might be slight, it does “impose a new private-sector mandate on local phone companies and wireless carriers that provide telephone exchange service.”<sup>75</sup> Because these companies are the entities required to provide subscriber identification information to providers of 911 emergency services and to providers of certain emergency support services, the CBO calculated that the 911 Act would require local phone companies and wireless carriers to spend less than \$100 million.<sup>76</sup> The CBO estimate does not mention the costs of improving infrastructure that come along with providing the United States with a seamless 911 blanket and the resulting costs that local phone companies and wireless carriers will pass along to consumers.

#### IV. WHY THE 911 ACT CANNOT KEEP ITS PROMISE

An end-to-end communications infrastructure designed to reduce the response time of emergency care providers could save thousands of lives, save billions of dollars in health care costs, and furnish every American with the possibility of receiving assistance from any telephone by simply dialing 911. Nonetheless, before the 911 Act can fulfill its promise to promote and enhance public safety, Congress and the FCC must first address the Act’s defects, the most prominent of which are neglecting to mandate the implementation of 911 service, providing liability parity to wireless providers equivalent to that already bestowed upon wireline service providers for omissions and technical failures, and excluding the issue of cellular tower siting.

*A. The Act Does Not Compel Any Entity to Establish 911 Service*

Congress did not require the FCC to force any state, locality, or telecommunications provider to establish an emergency service system where 911 was not currently in operation. Rather, it only instructed the

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73. S. REP. NO. 106–138, at 3 (1999).

74. *Id.*

75. *Id.*

76. *Id.*

FCC to encourage 911 deployment.<sup>77</sup> Although section three is dedicated to fulfilling the promise of “seamless, ubiquitous, reliable wireless telecommunications networks and enhanced wireless 9-1-1 service,”<sup>78</sup> Congress contradicted all of its provisions, calling for the FCC to aid state compliance with the deployment of nationwide 911 service by stipulating that “[n]othing in this subsection shall be construed to authorize or require the Commission to impose obligations or costs on any person.”<sup>79</sup> The Commission interpreted this statement literally and concluded that, under the 911 Act, it cannot compel a state or locality to establish 911 service or obligate a wireless carrier to transmit 911 calls to any local agency if state and local authorities have not established a PSAP.<sup>80</sup>

Therefore, the FCC only complied with those portions of the Act requiring it to establish 911 as the universal emergency services number within the United States and has not yet discharged the remainder of its section three requirements.<sup>81</sup> Obligated to establish appropriate transition periods for areas in which 911 is not currently used as an emergency number and to help states deploy the comprehensive emergency communications systems demanded by the Act, the Commission has only sought comment on how to proceed, tentatively concluding that without imposing either costs or obligations or interfering with the balance of responsibilities, it could advance universal 911 service “through guidelines, fact sheets, meetings, or other information-sharing measures . . . . [such as] perform[ing] the function of a ‘clearinghouse’.”<sup>82</sup>

Nothing in the legislative history indicates why the Senate drafters inserted the clause stating that the 911 Act does not authorize or require the FCC to impose obligations or costs on any entity. The House version included no such language; that bill intended the Commission to require wireless and wireline carriers to offer 911 to their subscribers, suggesting that it “choose to determine that a requirement on the carriers to offer 911 service . . . would serve the public interest . . . . [and] thereby permit a user in any location in the United States to dial 911 . . . and be connected to the local PSAP.”<sup>83</sup> As opposed to its Senate counterpart, the House version of the Act would have put 911 into effect where it did not currently exist and would have promoted public safety by endowing the United States with a

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77. 47 U.S.C. § 615 (Supp. V 1999).

78. *Id.*

79. *Id.*

80. *911 Act Report & Order*, *supra* note 12, para. 11; *911 Act Proposed Rules*, *supra* note 15, para. 8.

81. *911 Act Report & Order*, *supra* note 12, para. 2.

82. *Id.* at 17081, 17088-89.

83. H.R. REP. NO. 106-25, at 13.

seamless 911 blanket in the process.

While not specified in its reports or hearings, the most probable reason for the Senate's reluctance to require the FCC to impose costs or obligations was fear of a reprisal of the debate that raged around the Commission's rules requiring a cost recovery mechanism to be in place before a wireless carrier was obligated to provide E-911 service. The wireless industry asserted that the cost recovery prerequisite caused delays in the deployment of E-911 Phase I, and the FCC agreed—it eventually removed the cost recovery requirement.<sup>84</sup> Perhaps to simplify the 911 Act's execution and to preempt and avoid similar difficulties, the Senate drafters removed any chance that the Commission's imposition of costs or obligations might delay the wireless industry's compliance with the Act.

Regrettably, those drafters might also have synchronously removed any possibility that the 911 Act would fulfill its vision of a ubiquitous emergency communications network. A clearinghouse cannot directly benefit public safety. Measures like the 911 Act will not live up to their billed purpose unless Congress commands their nationwide application, and the 911 Act cannot live up to its promise of saving lives and meeting the nation's public safety needs without saddling providers and municipalities with some costs or obligations.

Some might argue that, instead of directly interfering with the statute's goals, the fact that the 911 Act does not impose costs or obligations on any party makes it advantageous for smaller communities because it does not force expenditures on those localities who cannot afford to develop 911 service. This reasoning overlooks the fact that private sector corporations and their consumers, who pay a small fee on each monthly bill for the service, bear most of the direct costs of 911—not localities and municipalities. Apart from establishing a PSAP, municipalities would not have made any substantial expenditures because providers and subscribers essentially fund the service. While not forcing a local governmental body to invest any money in a seamless 911 service might be expedient for a smaller community's tax base, no community, not even those on the smaller side, can benefit from a 911 service that does not exist.

Besides the fact that the 911 Act does not require any entity to establish 911 in areas without service, the Act's liability parity provisions are another source of weakness.

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84. Revision of the Comm'n's Rules To Ensure Compatibility with Enhanced 911 Emergency Calling Sys., *Second Memorandum Opinion and Order*, 14 F.C.C.R. 20850, paras. 1, 2, 18 Comm. Reg. (P & F) 1077 (1999).



*B. The Act's Liability Parity Provisions Give Too Much Away to the Wireless Industry*

“Consumer advocates, public-safety groups and the [telecommunications] industry all welcomed the national emergency number;” still, not everyone was pleased at the Act’s passage.<sup>85</sup> Some critics labeled it a “sucker punch to consumer rights,” because Congress passed the Senate’s version of the 911 Act in lieu of an earlier House bill that would have allowed states to enact separate protections against transmission errors or other technical failures committed by wireless providers.<sup>86</sup> As enacted, however, the 911 Act bars states from awarding monetary consequential damages of their own and provides wireless carriers the same liability protection that individual states provide wireline carriers, both of which are stipulations that the Wireless Consumers Alliance has labeled as an attempt by the industry to assemble total immunity.<sup>87</sup> In essence, the liability provisions of the 911 Act favor the wireless industry by equating wireless providers with unaccountable public utilities, depriving individual states the ability to establish separate, unique wireless 911 liability laws on their own,<sup>88</sup> and failing to address the current inconsistencies in state 911 liability laws.<sup>89</sup>

Such criticism of the 911 Act’s liability provisions is countered with a simple economics argument: these “protections are necessary to help

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85. Holt, *supra* note 11, at 12.

86. Chuck Holt, *E-911 Rumbles Through 4Q99*, WIRELESS REV., Jan. 1, 2000, at 10 [hereinafter *E-911 Rumbles*]. The House 911 Act, H.R. 438, included the following clause:

**(c) Exception for state legislative action**

The immunity or other protection from liability required by subsection (a)(1) shall not apply in any State that, prior to the expiration of 2 years after the date of enactment of this Act, enacts a statute that specifically refers to this section and establishes a different standard of immunity or other protection from liability with respect to an act or omission involving development, design, installation, operation, maintenance, performance, or provision of wireless service (other than wireless 911 service). The enactment of such a State statute shall not affect the immunity or other protection from liability required by such subsection (a)(1) with respect to acts or omissions occurring before the date of enactment of such State statute.

Wireless Communications and Public Safety Act of 1999, H.R. 438, 106th Cong. § 4(c) (1999).

87. Holt, *supra* note 11, at 12; *E-911 Rumbles*, *supra* note 86, at 10. See 47 U.S.C. § 615a (a)-(d) (Supp. V 1999).

88. Michele C. Farquhar, *Developments in Wireless Telecommunications Policy and Regulation: A Review of the Past Year and Insights into the Year Ahead*, in 17th Annual Institute on Telecomm. Policy & Regulation 73, 91 (PLI Patents, Copyrights, Trademarks, and Literary Prop. Course, Handbook Series No. G0-0089, 1999).

89. See William J. Sill & Heidi C. Pearlman, *When Parity Is Inadequate*, WIRELESS REV., June 1, 1999, at 56.

ensure that the wireless technology develops and matures to provide greater services” because wireless companies are stalling the deployment of location technology out of liability and litigation concerns.<sup>90</sup> Claiming that monetary judgments from state courts might force carriers to raise consumer rates, the wireless industry asserted that liability parity would not only expedite the deployment of wireless 911 technology but also hinder rate increases.<sup>91</sup> Congress found this reasoning compelling; the House Committee on Commerce reported that extending protection from liability to wireless carriers “[would] facilitate filling in . . . dead zones [in wireless coverage] and the provision of emergency wireless services, thereby enhancing public safety.”<sup>92</sup>

Yet, before Congress passed the 911 Act, the FCC was reluctant to displace the jurisdiction of state courts over tort suits for wireless carriers’ negligence and was “unable to find that [a] general exemption from liability [was] essential to achieving the goals of the Communications Act.”<sup>93</sup> Noting that provisions contained in state-filed tariffs define local exchange carrier immunity, the FCC was not persuaded by the argument that it “should provide wireless carriers the same broad immunity from liability that is available to landline local exchange carriers.”<sup>94</sup> Congress then passed the 911 Act and did just that at the behest of the wireless industry.<sup>95</sup> Now endowed with the same level of protection accorded to wireline carriers as public utilities, wireless providers are nearly unaccountable for service failures. For example, the Indiana Bell Telephone Company’s tariff filed with the Indiana Utility Regulatory

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90. 145 CONG. REC. H9858, 9859 (daily ed. Oct. 12, 1999) (statement of Rep. Tauzin); 145 CONG. REC. H9858, 9863 (daily ed. Oct. 12, 1999) (statement of Rep. Bliley). Indeed, a spokesman for the 911 Act’s sponsor, Rep. Burns, stated that “[w]ithout liability parity, there is no incentive for cellular providers to offer comprehensive wireless E-911 service.” *E-911 Wireless Liability Protection Bill Heads for White House*, 9 GLOBAL POSITIONING & NAVIGATION NEWS, Oct. 20, 1999, available at <http://www.lexis.com>.

91. Holt, *supra* note 11, at 12.

92. H.R. REP. NO. 106-25, at 4-5 (1999).

93. 1996 FCC Report, *supra* note 16, at para. 100.

94. *Id.* at para. 99. The Commission also stated that, instead of providing blanket liability protection:

E-911 wireless carriers wish[ing] to protect themselves from liability for negligence [could] attempt to bind customers to contractual language, require public safety organizations to hold them harmless for liability . . . or, if the liability is caused by the rulings of the Commission, argue that the actions complained of were caused by acts of public authority.

*Id.*

95. See 145 CONG. REC. H9858, 9863 (daily ed. Oct. 12, 1999) (statement of Rep. Bliley) (“Wireless carriers have made a compelling case as to why liability parity is justified in this limited instance and how public safety will be enhanced if it is enacted.”); 47 U.S.C. § 615a (a)-(d) (Supp. V 1999).

Commission caps the company's damages for any claim, other than for willful misconduct, at "the proportionate part of the monthly recurring charge for the service for the period during which the service was affected."<sup>96</sup> The 911 Act accords wireless carriers operating in Indiana this same level of protection—even if their technologically new service may not be as proven and reliable as their wireline counterparts.

The Act also removes a particular state's ability to enact new wireless 911 liability laws of its own.<sup>97</sup> Both the Senate and the House developed 911 legislation during the 106th Congress, but the two versions differed in respect to the liability parity provisions.<sup>98</sup> While the House bill would have bestowed protection from liability to wireless providers equal to that which local wireline carriers received in any given state, subject to a two-year period during which a state could choose to legislate a separate wireless liability statute, the liability protection provisions of the enacted 911 Act are self-executing and immediate.<sup>99</sup> By usurping a state's opportunity to hold wireless providers to a different liability standard, the Senate's 911 Act may have just helped the industry in assembling total immunity and "sucker punched" consumer rights in the process.<sup>100</sup>

The final flaw of the 911 Act's liability parity provisions is that they fail to address the inconsistencies in state 911 liability law.<sup>101</sup> Most states have indemnification clauses protecting emergency service providers from liability for transmission errors or other technical failures<sup>102</sup> similar to that

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96. Tariff of Indiana Bell Tel. Co., Inc., pt. 2, sec. 2, at 2, available at <http://www1.ameritech.com/corporate/regulatory/indiana/in200202.pdf>. (last visited Oct. 5, 2001).

97. Farquhar, *supra* note 88, at 91.

98. See *E-911 Rumbles*, *supra* note 86, at 10; 47 U.S.C. § 615a (a)-(d) (Supp. V 1999).

99. See *E-911 Rumbles*, *supra* note 86, at 10; *911 Act Report and Order*, *supra* note 12, at para. 7. The other main difference between the two versions is that the House bill makes no mention of PSAPs while the 911 Act offers PSAPs engaging in wireless 911 service the same protection from liability that wireline PSAPs enjoy. See 47 U.S.C. § 615a (a)-(d) (Supp. V 1999); see also H.R. REP. NO. 106-25, at 3 (1999).

100. Holt, *supra* note 11, at 12; *E-911 Rumbles*, *supra* note 86, at 10.

101. See Sill & Pearlman, *supra* note 89, at 56.

102. See generally ALA. CODE § 11-9-89 (Supp. 2000) (willful or wanton misconduct); ALASKA STAT. § 29.35.133(a) (Michie 2000) (intentional acts of misconduct or gross negligence); ARIZ. REV. STAT. ANN. § 12-713(A) (West Supp. 2001) (acted knowingly or failure to act created unreasonable risk of bodily injury with a high probability that substantial harm would result); ARK. CODE ANN. § 12-10-317(a)(3) (Michie 1999) (not liable for any failure of equipment or procedure); COLO. REV. STAT. ANN. § 29-11-105 (West Supp. 2001) (intentionally caused by or resulted from gross negligence); CONN. GEN. STAT. ANN. § 28-30(g) (West Supp. 2001) (wanton, reckless or malicious); FLA. STAT. ANN. § 365.171(14) (West Supp. 2001) (acting with malicious purpose or in a wanton and willful manner); GA. CODE ANN. § 46-5-135 (1992) (willful or wanton misconduct); IDAHO CODE § 31-4812(2) (Michie 1994) (act with malice or criminal intent, or commit reckless, willful and wanton conduct); 50 ILL. COMP. STAT. ANN. 750/15.1 (West Supp. 2001)

enacted by the Indiana legislature.

Notwithstanding any other law, the board, a PSAP, political subdivision, CMRS provider, local exchange company, or an employee, director, officer, or agent of a PSAP, political subdivision, CMRS provider, or local exchange company is not liable for damages in a civil action or subject to criminal prosecution resulting from death, injury, or loss to persons or property incurred by any person in connection with establishing, developing, implementing, maintaining, operating, and providing wireless 911 service in compliance with the requirements established by the FCC order and rules adopted under the FCC order, except in the case of willful or wanton misconduct.<sup>103</sup>

As is the case with Indiana, most states allow civil damage suits and criminal prosecutions against 911 providers for willful or wanton misconduct.

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(willful or wanton misconduct); IND. CODE ANN. § 36-8-16.5-46 (West Supp. 2000) (willful or wanton misconduct); IOWA CODE ANN. § 34A.7(6) (West 1995) (willful and wanton negligence); KAN. STAT. ANN. § 12-5308 (Supp. 2000) (shall not be liable for any form of damages resulting from total or partial failure of any transmission); KY. REV. STAT. ANN. § 65.7637 (Michie Supp. 2000) (negligence, or wanton or willful misconduct, or bad faith); 2001 La. Sess. Law Serv. Act 507 (H.B. 436) (West) (willful or wanton misconduct or gross negligence); MD. CODE ANN., [911 Service Carriers] § 18-106(b) (Supp. 2000) (nothing in this subtitle shall be interpreted to extend any liability to a 911 carrier); MICH. COMP. LAWS ANN. § 484.1604 (West Supp. 2001) (a criminal act or gross negligence or willful and wanton misconduct); MINN. STAT. ANN. § 403.14 (West Supp. 2001) (willful or wanton misconduct); 2001 Miss. Laws Ch. 569, H.B. 469(10) (entitled to receive the limitations of liability as provided to the state, or any agency or local government of the state); MO. ANN. STAT. § 190.307(1) (West Supp. 2001) (willful and wanton misconduct or gross negligence); NEB. REV. STAT. ANN. § 86-1009 (Michie 1999) (failure to use reasonable care or for intentional acts); NEV. REV. STAT. ANN. 707.500(1)(c) (Michie Supp. 1999) (good faith); N.J. STAT. ANN. § 52:17C-10(d) (West 2001) (malicious purpose or a wanton and willful disregard for the safety of persons or property); N.C. GEN. STAT. § 62A-31 (2000) (wanton or willful misconduct); OHIO REV. CODE ANN. § 4931.49(C) (Anderson Supp. 2000) (no liability for telephone company or installer); OKLA. STAT. ANN. tit. 63, § 2817(B) (West Supp. 2001) (gross negligence, recklessness, or intentional misconduct); OR. REV. STAT. § 401.515(1) (1999) (willful misconduct, gross negligence or bad faith); PA. STAT. ANN. tit. 35, § 7021.1 (West Supp. 2001) (local governmental immunity); R.I. GEN. LAWS § 39-21.1-1(b)(10) (1997) (willful or wanton acts of misconduct); S.C. CODE ANN. § 23-47-70(C) (West Supp. 2000) (reckless, willful, or wanton conduct); S.D. CODIFIED LAWS § 34-45-17 (Michie 1994) (willful or wanton negligence or intentional acts); TENN. CODE ANN. § 7-86-319 (1998) (duty no greater than non-commercial mobile radio service provider); TEX. HEALTH & SAFETY CODE ANN. § 771.053(a) (Vernon Supp. 2001) (gross negligence, recklessness, or intentional misconduct); UTAH CODE ANN. § 69-2-8(2) (2000) (intentionally caused by or resulting from gross negligence); VT. STAT. ANN. tit. 30, § 7060 (2000) (gross negligence or an intentional tort); VA. CODE ANN. § 56-484.18(B) (Michie Supp. 2001) (gross negligence or willful misconduct); WASH. REV. CODE ANN. § 38.52.550(2) (West Supp. 2001) (gross negligence or wanton or willful misconduct); W. VA. CODE ANN. § 24-6-8 (Michie 1999) (willful or wanton misconduct); WIS. STAT. ANN. § 146.70(7) (West Supp. 2000) (no liability to any person who uses an emergency number system).

103. IND. CODE ANN. § 36-8-16.5-46 (West Supp. 2000).

Nonetheless, several important differences exist among the fifty states. Kentucky and Oregon, for example, add “bad faith” to the list of conduct that removes a provider’s immunity from liability.<sup>104</sup> Colorado, Michigan, and Missouri are among several states allowing for the imposition of liability upon a showing of “gross negligence.”<sup>105</sup> Nebraska law imposes liability if an emergency provider simply fails to use “reasonable care” and states such as South Carolina and Texas only require “recklessness” before a court could impose liability.<sup>106</sup> Finally, some states, such as Arkansas and Wisconsin, provide blanket protection from liability without exception for emergency service providers while others, like Maine, expressly provide for the civil liability of wireless carriers: a telecommunications provider assisting in the implementation and operation of the statewide E-911 system in that state is subject to tort liability resulting from any defect in the E-911 system caused by the telecommunications provider’s negligent, intentional, willful or reckless acts or omissions.<sup>107</sup> Others, such as California, have no such statute.

All these different state liability provisions point to the complications that might arise in developing a “nationwide, seamless, and ubiquitous” emergency phone system. Conduct that could subject a wireless provider to liability in one state is perfectly acceptable in another, and the 911 Act’s public safety improvements might therefore only occur in the states where a provider is certain that liability can be avoided—states such as Arkansas and Wisconsin that provide blanket protection from liability without exception for emergency service providers.<sup>108</sup> Since the FCC cannot compel a state or locality to establish 911 service if it is not currently used, and cannot obligate a wireless carrier to transmit 911 calls to another local agency if state and local authorities have not established a PSAP, it is likely that 911 service in accordance with the 911 Act will occur in those states where all concerned parties are assured of escaping liability. Citizens of states with a lesser liability standard might remain in the 911 dark ages

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104. See KY. REV. STAT. ANN. § 65.7637 (Michie Supp. 2000); OR. REV. STAT. § 401.515(1) (1999).

105. See ALASKA STAT. § 29.35.133(a) (Michie 2000); COLO. REV. STAT. ANN. § 29–11–105 (West Supp. 2001); 2001 La. Sess. Law Serv. Act 507 (H.B. 436) (West); MICH. COMP. LAWS. ANN. § 484.1604 (West Supp. 2001); MO. ANN. STAT. § 190.307(1) (West Supp. 2001).

106. See NEB. REV. STAT. ANN. § 86-1009 (Michie 1999); S.C. CODE ANN. § 23–47–70(C) (West Supp. 2000); TEX. HEALTH & SAFETY CODE ANN. § 771.053(a) (Vernon Supp. 2001).

107. See ME. REV. STAT. ANN. tit. 25, § 2930 (West Supp. 2000); ARK. CODE ANN. § 12-10-317(a)(3) (Michie 1999); WIS. STAT. ANN. § 146.70(7) (West Supp. 2000).

108. See ARK. CODE ANN. § 12-10-317(a)(3) (Michie 1999); WIS. STAT. ANN. § 146.70(7) (West Supp. 2000).

because wireless carriers in those states could be subject to “potentially large judgments for acts or omissions in the provision of [wireless 911] service . . . .”<sup>109</sup> Without a specific federal liability provision establishing a nationwide norm for 911 provider liability, the bill probably will not have the significant impact on public safety that Congress envisions.

Beyond legislating federal liability provisions, an argument can be made for an amendment to the 911 Act abrogating immunity altogether for any transmission errors or technical failures that might occur in the provision of 911 service. While this argument is beyond the scope of this Note and has also been addressed elsewhere, it proceeds from the opinions of a few courts that have held a municipality liable for failures in furnishing 911 service.<sup>110</sup> If municipalities can be held liable for failing to respond to a 911 call, private liability—for both wireline and wireless carriers—cannot be too far a stretch. Customers fund 911 systems through monthly surcharges, and since consumers are essentially purchasing 911 service, the companies from which they purchase this service should be held to perform their emergency services with reasonable care under the circumstances.

Although the liability protections for the wireless industry are among the most contested of the 911 Act’s provisions,<sup>111</sup> the Act’s silence on the issue of the new wireless towers that will be needed to meet its mandates is also a significant weakness.

### C. *The Act Fails to Address Tower Siting Issues*

Two tower siting issues were dropped from the Act as a political accommodation “[i]n order to get the bill through [Congress] and on to the President’s desk . . . .”<sup>112</sup> Tower siting issues pose a nationwide problem because wireless calls cannot be transmitted in many areas due to the absence of a nearby cellular or personal communications services (“PCS”) antenna.<sup>113</sup> The House Committee on Commerce recognized that “[a] wireless telephone is worthless unless the call goes through,”<sup>114</sup> and hoped that carriers would fill in the existing “holes” and “dead zones” in the

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109. Sill & Pearlman, *supra* note 89, at 57.

110. *See, e.g.,* DeLong v. County of Erie, 457 N.E.2d 717 (N.Y. 1983); Chambers-Castanes v. King County, 669 P.2d 451 (Wash. 1983). *See also* Jeffrey D. Hickman, Note, *It’s Time to Call 911 For Government Immunity*, 43 CASE W. RES. L. REV. 1067 (1993); Maas, *supra* note 13, at 105.

111. *See* Holt, *supra* note 11, at 12.

112. 145 CONG. REC. H9858, 9861 (daily ed. Oct. 12, 1999) (statement of Rep. Tauzin).

113. H.R. REP. NO. 106–25, at 4 (1999); *see also* Malcolm J. Tuesley, Note, *Not in My Backyard: The Siting of Wireless Communications Facilities*, 51 FED. COMM. L.J. 887, 888–89 (1999).

114. H.R. REP. NO. 106–25, at 5 (1999).

wireless network once they were provided protection from liability.<sup>115</sup> This wishful thinking does not provide any immediate solution to the problem; the 911 Act's call for a "seamless, ubiquitous" wireless network requires the FCC to implement a new dimension of wireless service but does not provide for new towers, the necessary infrastructure. The 911 Act cannot improve public safety if wireless 911 calls cannot be transmitted to a PSAP. Moreover, an end-to-end web of emergency communications cannot exist until Congress works to fill the existing holes and gaps in wireless coverage.

Besides failing to provide the infrastructure needed to accomplish its goals, the 911 Act's silence on the tower siting issue might invite litigation. In the coming years, "courts may become the chief venue for resolving tower-siting disputes"<sup>116</sup> and conflicts relating to the location of cellular and PCS towers will only increase as more towers are brought online to meet the needs of an exploding wireless consumer base and the demands of the 911 Act. Congress recognized the potential for fierce disagreement over tower siting but chose not to address the topic, opting instead to remove it from the bill "because it is still a very controversial question that has to do with local jurisdictions and zoning . . ."<sup>117</sup> Instead of issuing peremptory commands in the 911 Act to cope with this issue, Congress chose, in effect, to ignore the issue and leave it for courts to decide.

The final problem raised by the 911 Act's failure to treat tower siting issues is the potential effect it might have on the Telecommunications Act of 1996. The EMR Network, one of several public interest groups, fears that the Act might undermine the planning and zoning rights reserved to municipalities regarding the siting of telecommunications facilities.<sup>118</sup> That group would have preferred that the 911 Act include language preserving the rights accorded to municipalities under the Telecommunications Act of 1996.<sup>119</sup>

## V. CONCLUSION: HOW TO CONVERT THIS EMPTY PROMISE INTO A GUARANTEE OF IMPROVED PUBLIC SAFETY

Although Congress endowed the 911 Act with commendable goals, this legislation will not have the beneficial impact on American public safety that its authors desire. Without specifically and affirmatively

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115. *Id.* at 4.

116. Farquhar, *supra* note 88, at 95.

117. 145 CONG. REC. H9858, 9861 (daily ed. Oct. 12, 1999) (statement of Rep. Tauzin).

118. *Congress Passes, President Signs E-911 Bill*, 7 ANDREWS ELECTROMAGNETIC FIELD LITIG. REP. 7 (1999).

119. *Id.*

mandating the development of 911 emergency service systems in jurisdictions where they are not in operation, the Act leaves open the possibility that some areas may never receive emergency service. To be genuinely effective, Congress should amend the Act by removing the phrase stating that “[n]othing in this section shall be construed to authorize or require the Commission to impose obligations or costs on any person.”<sup>120</sup> That clause barricades the 911 Act’s success.

No important American public safety objective can be accomplished without either a congressional fiscal commitment or a requirement that an executive agency impose spending on third parties. In this competitive corporate climate, it is conceivable that a wireless carrier might decide that, in some areas, implementing 911 service is not worth the expense without a congressional mandate. This possibility frustrates the 911 Act’s goal of allowing an individual to dial 911 and receive assistance from anywhere in America. Congress should allow the FCC to impose costs and obligations on the wireless industry, states, and municipalities.

Congress should also modify the Act’s liability provisions. Instead of providing liability protection equal to that already afforded by a specific state and equating wireless carriers with unaccountable public utilities, Congress should allow individual states to decide whether or not to hold providers or PSAPs liable for breakdowns in 911 transmission. Moreover, Congress should address the current inconsistencies in state liability laws.<sup>121</sup> Without a consistent liability framework, the 911 Act cannot provide a consistent emergency communication network. While the FCC will not author a uniform liability standard, Congress does have the power “to pass legislation that would provide a nationwide, uniform liability limitation for wireless carriers.”<sup>122</sup>

Finally, because additional infrastructure in terms of siting facilities is necessary to implement this Act fully, Congress should provide specific federal land to be used for wireless towers. While this topic is already covered by a:

1995 Presidential memorandum directing Federal agencies to facilitate the placement of wireless antennas on Federal property and section 704(c) of the Telecommunications Act of 1996 (47 U.S.C. 332 note), which directs Federal agencies to make property available for the placement of wireless antennas . . . only the Postal Service and . . . the General Services Administration (GSA) have engaged in any kind of concerted effort to make their properties available for antenna siting.<sup>123</sup>

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120. 47 U.S.C. § 615 (Supp. V 1999).

121. See Sill & Pearlman, *supra* note 89, at 57.

122. *Id.*

123. H.R. REP. NO. 106–25, at 5–6 (1999); see H.R. REP. NO. 106–25, at 19–21 (1999)



Specifying certain tracts of land as future wireless antenna sites would not only improve wireless coverage, but it might also keep states, municipalities, and private citizens from frustrating the goals of the 911 Act by refusing to allow the construction of wireless towers. The 911 Act cannot save lives if 911 calls cannot be relayed to a PSAP because a customer is outside a given service area, and Congress may have limited the Act's impact by ignoring tower siting issues in this legislation.

With the 911 Act, Congress took an important first step. Establishing 911 as the nation's official emergency number and replacing the confusing codes and alternative numbers that wireless networks previously used will allow many Americans to receive emergency assistance instead of the bewilderment they might previously have encountered. But Congress intended the 911 Act to accomplish more than just making 911 the official number where wireless service is already in effect. In order for the 911 Act to live up to its promise of a seamless, ubiquitous, and reliable wireless communication network, Congress should make three changes to the Act: (1) authorize or require the Commission to impose obligations or costs on wireless carriers, states, and municipalities; (2) modify the Act's liability provisions; and (3) provide specific federal parcels of land to be used for wireless towers. Until these changes are made, the 911 Act will remain a Congressional empty promise of enhanced public safety.

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(the National Park Service has also agreed to make an assessment of its policies of allowing wireless antennas inside National Parks).

