

Before The  
Federal Communications Commission  
Washington, D.C. 20554

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FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF THE SECRETARY

In the Matter of )  
)  
Revision of the Commission's Rules )  
To Ensure Compatibility With ) CC Docket No. 94-102  
Enhanced 911 Emergency Calling Systems )  
)  
Request for an Emergency Declaratory )  
Ruling Regarding Wireless Enhanced ) DA 98-1504  
911 Rulemaking Proceeding )

**Comments of  
Omnipoint Communications, Inc.**

Omnipoint Communications, Inc., by its attorney, files these comments in response to the Request for an Emergency Declaratory Ruling of the State of California 9-1-1 Program Manager.<sup>1</sup> While Omnipoint has no licenses for PCS service in California, the issue of immunity from liability associated with E911 service is very significant in its current systems operating in the New York, Philadelphia, Boston, and Miami area markets.

Omnipoint believes that the lack of adequate carrier immunity is a serious roadblock to full deployment of wireless E911 service. Omnipoint's comments below are presented to provide its responses to the three specific questions raised by the Public Notice.

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1 See Public Notice, DA 98-1504, CC Dkt. No. 94-102 (rel. July 20, 1998).

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**1. Do carriers have an obligation to deploy wireless E911 service (Phase 1) in California despite the fact that State statutes do not provide immunity from liability for E911 service provided?**

Omnipoint believes that a carrier is not obligated to provide E911 service unless the state law immunizes the carrier from negligence tort causes of action, or otherwise limits or indemnifies the carrier's liability. Section 20.18(f) of the Commission's Rules, 47 C.F.R. § 20.18(f), provides that wireless carriers have no Phase I E911 obligations until "a mechanism for recovering the cost of the [E911] service is in place." The potential liability from state causes of action associated with the provision of wireless E911 service is an *enormous* cost issue that must be resolved by state authorities.

Wireless carriers simply cannot assume the risk of massive tort liability stemming from E911 service, and remain a competitive, low-cost service. Omnipoint strongly believes, however, that wireless E 911 is a socially vital service that should be implemented by carriers, and promoted by states and the Commission, in a reasonable and timely manner. Wireless E911 provides a vital connection to safety, emergency, and police help for many customers -- E911 can save callers' lives. Wireless E 911 is also uniquely critical vis-a-vis wireline E 911 service, to meet public goals behind Good Samaritan laws, crime reporting, reporting drunk and reckless driving, etc. However, wireless carriers cannot afford to underwrite the social costs that also come with the overriding benefits of wireless E911 service.

Nor is it fair, or consistent with principles of robust competition and regulatory parity, to force wireless carriers to assume unlimited liability when states have historically held wireline carriers immune from the same liability. Good public policy of wireline services has found that carriers should not be forced to both serve the public with emergency service and then assume

the massive risk of liability for carrying out that public service.<sup>2</sup> The same state immunity policies should now apply to wireless carriers and, until such time, E911 service deployment will undoubtedly suffer -- liability protection, or associated insurance costs, are a reality of the business and a true cost of providing E911 service.

Some states have recognized this public policy issue, and are working to amend state law to extend immunity, indemnification, or limitations on liability to CMRS carriers offering 911 services. For example, in May, 1998, the State of Florida amended Sections 365.71(14) & (15) of the Florida statutes to provide 911 indemnification and liability limitations, previously reserved for wireline carrier, to include wireless carriers. Omnipoint is also actively participating with the State of New Jersey to formulate appropriate wireless 911 legislation. These state efforts confirm that States around the country recognize liability issues as part of the cost recovery mechanism that should be established before carriers are obligated to deploy E911. It is also a recognition of the fact that disparate liability protection under state law can hamper the market growth of competitive wireless services.

While the Commission has declined to federally preempt state tort actions stemming from wireless 911,<sup>3</sup> it surely can appreciate that such liabilities and costs are a significant part of the cost recovery mechanism. In fact, the Commission has acknowledged that carriers will likely need some form of state indemnification or protection, either through contract law or through

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<sup>2</sup> See Los Angeles Cellular Tel. v. Sup. Ct., 76 Cal. Rptr. 2d 894 (Cal. 1998) (regulatory obligations bring an "equitable trade-off" that "requires a concomitant limitation on liability" for the provision of E911 service).

<sup>3</sup> *Revision of the Commission's Rules To Ensure Compatibility with Enhanced 911 Emergency Calling Systems*, Report and Order, CC Dkt. No. 94-102, 11 FCC Rcd. 18676, 18727-28 (1996); Memorandum Opinion and Order, 12 FCC Rcd. 22665, 22728-34 (1997).

state tariffing laws limiting liability,<sup>4</sup> or through state legislation directly limiting state tort causes of action. It seems appropriate, therefore, for states to provide carriers with complete explanations or mechanisms, under state law, by which carriers may limit tort liability associated with E911 service. Where state law does not provide the wireless carrier with a clear limitation on liability, the carrier should be entitled to full recovery of the costs of insurance through the state's cost recovery mechanism.

Alternatively, while the Commission has expressed reluctance to preempt state tort law,<sup>5</sup> Omnipoint would ask for the Commission to give the issue further consideration. State laws are not uniformly providing for essential protections to carriers' businesses. Omnipoint and other carriers recognize the importance of 911 service to the public and understand the Commission's interest in implementing a federal obligation for the service, but wireless carriers cannot be expected to bear the risk of total business collapse due to the call drop of even a single wireless call to 911. No wireless system in the country can ensure with absolute certainty that every call it handles will be transmitted without error. Indeed, it is the nature of wireless technology and a mobility offering that some calls will be disconnected, and every commercial system will experience this phenomenon.<sup>6</sup>

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<sup>4</sup> See Los Angeles Cellular, Tel. v. Sup. Ct., 76 Cal. Rptr. 2d 894 (Cal. 1998) (state tariffing of liability limitation is valid in state tort action for dropped 911 call). We note that it is completely unsettled whether every state in the country provides for limitations on liability through tariffing, or whether such states permit all carriers, not just cellular operators, to limit liability in that manner. The burden should be on the states, as part of its cost recovery mechanism, to offer wireless carriers a number of functional options limiting liability.

<sup>5</sup> *Supra*, n. 3.

<sup>6</sup> In addition, Omnipoint asks that the Commission clarify in this proceeding the wireless carrier's E911 obligations to route ANI data to the appropriate PSAP when a user with a non-initialized handset obtains network access by dialing "911." As the Commission is aware, ANI data for a user of a wireless GSM-based system is not created until after the user calls the carrier

*(Footnote continued to next page)*

The liability costs of even a single dropped 911 call imperil the FCC's and Congressional CMRS objectives by: (1) forcing carriers to over-build their networks with massive additional site and equipment costs paid for through higher consumer prices; (2) discouraging the rapid deployment of wireless services, as carriers avoid all but the most lucrative markets; (3) raising barriers to entry into a particular state or market; (4) diminishing local telecommunications wireless-wireline competition; and (5) precluding small businesses from participation in CMRS services, as small businesses would be completely "wiped out" by such tort liability (47 U.S.C. § 309(j)(3)(B)). Omnipoint submits that the 1996 Act provides the Commission with at least two separate mechanisms to preempt state laws that constitute a regulatory barrier to entry (47 U.S.C. §§ 332(c)(3)(A), 253), which should be explored. For example, the discriminatory nature of state immunity laws, which cover wireline carriers but not wireless carriers, would appear to violate the Section 253(b) principle that state laws to "protect public safety and welfare" must be "competitively neutral."<sup>7</sup>

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*(Footnote continued from previous page)*

to initialize service and obtain a unique MSISDN. 911 calls prior to that initialization will have no associated ANI data.

<sup>7</sup> See *Silver Star Telephone Company, Inc. Petition for Preemption and Declaratory Ruling, Memorandum Opinion and Order*, 12 FCC Rcd. 15639, 15658 (1997) (state laws that subject carriers to significant disparity violate "the requirement of competitive neutrality [of Section 253(b)] and undermine[] the pro-competitive purposes of the 1996 Act.") (footnotes omitted); *New England Public Communications Council Petition for Preemption Pursuant to Section 253, Memorandum Opinion and Order*, 11 FCC Rcd. 19713, 5 Communications Reg (P&F) 625, 630 (1996) (state law is not competitively neutral under Section 253(b) if it "significantly affects" the ability of one class of providers to compete in the market by "substantially rais[ing] the costs and other burdens . . . , thus deterring the entry of potential competitors.").

**2. If carriers are obligated to deliver Phase I service without immunity from liability (either statutory or contractual), is the State required under the cost recovery rules to reimburse carriers for the cost of insurance policies covering their provision of wireless E 911 service?**

Yes. As stated above, in the absence of state laws limiting wireless carrier liability, such carriers are likely to engage in significant risk management strategies, including insurance, to minimize the risk of liability. The costs of premiums to maintain such insurance are a direct result of the carrier's 911 obligations and should be recovered through the state's cost recovery mechanism.

In fact, insurance premium costs could be one of the most significant costs that a carrier would incur as a consequence of its 911 obligations. As the California 9-1-1 Program Manager pointed out, the costs of insurance in California could be "at least \$50 million annually for statewide, commercial reimbursement to wireless carriers for the insurance aspect only."<sup>8</sup> Omnipoint submits that this enormous premium reflects the exponentially higher liability which could be incurred in a tort action. The high premium also demonstrates that the underlying societal cost of E911 service should not be foisted on the carrier, and that state tort law should be amended to immunize carriers from such liability. However, this high cost of insurance premiums is also, undeniably, a cost recovery issue that must be adequately resolved before carriers bear E911 obligations. The Commission has committed to recovery of all the costs of its E911 obligations,<sup>9</sup> and it cannot be avoided that risk management costs for carriers operating without immunity is an actual and direct cost of the regulatory program.

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<sup>8</sup> Letter of Leah A. Senitte to Chairman William Kennard, at 2 (July 20, 1998).

<sup>9</sup> Report and Order, 11 FCC Rcd. at 18722.

**3. Regarding selective routing, what is meant in the Commission's E 911 First Report and Order by the reference to "appropriate PSAP"?**

As Omnipoint understands it, 911 calls should be accepted and transmitted to emergency services in accordance with instructions from the appropriate PSAP,<sup>10</sup> and on a par with the transmission of 911 calls on the wireline network.

Respectfully submitted,

  
Mark J. O'Connor

Piper & Marbury L.L.P.  
1200 19th Street, N.W.  
Suite 700  
Washington, D.C. 20036  
(202) 861-3900

Attorney for Omnipoint Communications, Inc.

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<sup>10</sup> Memorandum Opinion and Order, 12 FCC Rcd. at 22713 ("the responsible local or state entity has the authority and responsibility to designate PSAPs that are appropriate to receive wireless 911 calls), and, id. at 22714 ("Until the relevant state or local governmental entities develop a routing plan for wireless 911 calls within their jurisdictions, therefore, the covered carriers can comply with our rules by continuing to route 911 calls to their incumbent wireless PSAPs.").