

FEDERALISM IN THE FINANCING OF 911 EMERGENCY CALL SERVICES: NATURE OF THE FEDERAL-STATE FUNDING ARRANGEMENT TO FINANCE NEXT GENERATION (NG) 911 SERVICES

James E. Holloway

Elaine Seeman

James Kleckley

ABSTRACT

Next Generation (“NG”) 911 services can receive emergency calls sent by voice, text messages, photographs, videos, and telematics to 911 emergency call centers. States need more 911 funds and, therefore, must collect and acquire more 911 funds to implement and provide NG911 services on an Internet Protocol (IP)-enabled communications network. Inadequate state 911 funds and the past federal Enhanced (E) 911 policy to allocate 911 grant funds raise a subtle federal concern regarding the sharing of regulatory power under a federal-state NG911 funding arrangement. Federal policy-makers need to share regulatory power by permitting state legislatures and regulators to collect 911 funds on communications transactions, devices, and other means and by allocating more federal grant funds to state governments. Other events point to a need to closely examine this collection and allocation of 911 funds. Specifically, the lethargic implementation of E911 and the current lackluster implementation NG911 point to a federal need to ensure a timely and efficient implementation and equitable provision of NG911 services. This federal need to share regulatory power with the states must be weighed in deciding whether Congress should continue the current federal-state 911 funding arrangement or impose more forceful mandates and conditions on a NG911 funding arrangement to ensure a timely, coordinated, and efficient implementation of NG911 services. Congress can allow states to collect more 911 funds and receive more federal 911 grant funds by establishing an enforceable minimum floor of security to efficiently and timely implement and provide NG911 services under a cooperative federal-state NG911 funding arrangement.

INTRODUCTION

State Enhanced (E) 911 systems currently only provide emergency call services to wireline and wireless subscribers who request 911 emergency call (911 call) services by voice calls only from municipal, county and

regional 911 emergency call center.¹ Meanwhile, the wireless or mobile telephones can send data, video, photographs, and text messages to 911 emergency call centers that cannot receive text messages and other nonvoice calls.² This technology requires the immediate implementation and maintenance of an entirely new 911 emergency call services system and communications network infrastructure.³ Collectively, this emergency call services system is the Next Generation (NG) 911 system⁴ that operates on an Internet Protocol (IP)-enabled communications network⁵ infrastructure to provide NG911 services by voice and nonvoice calls.

* Professor, Business Law, Department of Finance, College of Business, East Carolina University, Greenville, North Carolina 27858. B.S., North Carolina Agricultural & Technical State University, 1972; M.B.A., East Carolina University, 1984; J.D., University of North Carolina at Chapel Hill, 1983.

**Associate Professor, Management Information Systems, Department of Decision Sciences, East Carolina University, Greenville, North Carolina 27858. B.A., Indiana University of Pennsylvania, 1973; M.B.A., East Carolina University, 1997; Ph.D., Indiana State University, 2002.

***Research Associate Professor and Director, Bureau of Business Research, College of Business, East Carolina University, Greenville, 27858, B.S., University of South Carolina, 1976; PhD, University of South Carolina, 1984. An earlier version of this article was presented at the Annual Meeting of the Academy of Legal Studies in Business at Kansas City, Missouri, in August 2012. We give a special thanks to our colleagues at the Annual ALSB Meeting for their thoughtful suggestions and comments.

1. See 47 C.F.R. § 20.18(a)-(h) (2010) (requiring commercial mobile radio service (CMRS) providers (wireless carriers and other service provider) to provide PSAPs access to wireless 911 telephone calls and locations of wireless callers); See *Federal Communications Commission Report*, No. 112-96, LEGAL AND REGULATORY FRAMEWORK FOR NEXT GENERATION 911 SERVICES: REPORT TO CONGRESS AND RECOMMENDATIONS 7 (Feb. 22, 2013), http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-319165A1.pdf (The FCC issued a report explaining the current Enhanced (E) 911 legal and regulatory framework and recommending NG911 funding and other policies Congress should consider to implement state Next Generation (NG) 911 systems that would replace E911.) [hereinafter FCC – Legal and Regulatory Framework].
2. See *Text-to-911 Further Notice of Proposed Rulemaking*, FCC, ¶¶ 2-3, (Dec. 12, 2012), <http://www.fcc.gov/document/text-911-further-notice-proposed-rulemaking> [hereinafter FCC Text-to-911] (The FCC proposed rulemaking for text-to-911 and text message bounce back requirements and acknowledged a voluntary agreement to provide text-to-911 services.).
3. FCC – Legal and Regulatory Framework, *supra* note 1, at 3.
4. Next Generation 9-1-1 Advancement Act, 47 U.S.C. § 1401(22) (2012) [hereinafter NG911 Advancement Act]. The NG911 Advancement Act defines NG 911 services as follows:
5. See NATIONAL EMERGENCY NUMBER ASSOCIATION (NENA), *Next Generation Partner Program, A Policy Maker Blueprint for Transitioning to the Next Generation 9-1-1 System: Issues and Recommendations for State and Federal Policy Makers to Enable NG9-1-1*, 1-2, (Sept. 2008), http://www.nena.org/resource/collection/B6781C63-012C-4E90-939B-001733976BBC/Policy_Maker_Blueprint_for_Transition_to_NG9-1-1.pdf,

Despite the rapid expansion of personal and commercial wireless technologies, a lack of state 911 funds will restrict the immediate implementation and maintenance of state NG911 systems.⁶ Simply put, state E911 funding schemes do not collect the amount of 911 funds (either in the form of E911 or NG911 funds) that is needed to implement the state NG911 systems and IP-based network communications infrastructure required at both the state and local government level to provide adequate NG911 services.⁷ Therefore, states need to replace their less effective E911 funding schemes with state new NG911 funding schemes. Such funding schemes must collect and use more 911 funds and may need more federal grant funds where both grant and 911 funds could be subject to more federal conditions and mandates.

Against this backdrop, the lack of sufficient 911 funding raises a significant federalism concern regarding the nature of the federal-state NG911 funding arrangement to share federal regulatory power with the states to collect and use 911 funds and use federal 911 grant funds. This

[hereinafter NENA Policy-Maker Blueprint] (explaining that the IP-enabled or based system of a state NG911 system may consist of one or more emergency service networks, or ESInets); *see also* NATIONAL E9-1-1 IMPLEMENTATION COORDINATION OFFICE (ICO), *A National Plan for Migrating to IP-Enabled 9-1-1 Systems*, 1-2 (Sept. 2008), http://www.e-911ico.gov/NationalNG911MigrationPlan_sept2009.pdf. “An ESInet is a managed IP network that is used for emergency services communications, and which can be shared by all public safety agencies. . . . ESInets may be interconnected at local, regional, state, federal, national and international levels to form an IP-based inter-network (network of networks).” NENA, NENA Master Glossary of 9-1-1 Terminology, at 50 (Sept. 9, 2013) [hereinafter NENA Glossary].

6. *See* FCC – Legal and Regulatory Framework, *supra* note 1, at 33 (The FCC found that telecommunication carriers and others agreed that the federal-state E911 funding arrangement should be revised to raise more 911 funds and impose financial obligations on more parties). The FCC states ““that current 911 funding mechanisms “may not adequately account for new services that offer emergency communications in a NG9-1-1 environment.” . . . We also asked whether Congress should authorize or require 911 fee contributions by all service providers, such as VoIP or IP-enabled service providers, and not just those providing network access.”*Id.* In addition, a corporate attorney employed by a telecommunications service provider in the 911 industry has recognized the need for cooperative federal-state NG911 funding partnership or arrangement. *See* Craig W. Donaldson, *Next Generation 9-1-1 Cooperative Governance* 2 (2010), <http://www.intrado.com/documents/Intrado%20NG911%20Cooperative%20Governance.pdf> (stating that “[u]nlike consumer and commercial markets, where the legal/regulatory framework is increasingly focused on federal jurisdiction, emergency services by their local nature require that federal, state and local oversight is recalibrated into a cooperative model of governance.”).
7. *See* FCC – Legal and Regulatory Framework, *supra* note 1, at 35. The FCC finds that “[t]here appears to be a strong consensus that the existing user fee-based regime is inadequate both with respect to the ability to fund the initial and ongoing expenses associated with NG911” *Id.*

concern involves the need to finance state NG911 services under a federal communications framework⁸ that must enable state legislators and regulators to make and implement state NG911 funding policies⁹ to implement and manage NG911 services.¹⁰ Federal communications policy currently permits the states to collect and manage 911 funds to implement and maintain E911 systems.¹¹ However, states' need broader federal power to impose different or more 911 taxes, surcharges, or fees on wireline and wireless subscriber lines and other means of communications in interstate commerce where such means have been or may be used to request E911 emergency call services.¹² The few federal conditions imposed on the collection and use of 911 funds and federal 911 grant funds demonstrate a

-
8. See James E. Holloway & Elaine Seeman, *How Non-Voice Access Technology Is Driving the Creation of Federal and State NG911 Service and IP-Enabled Communications Network Policies*, 31 TEMP. ENVTL. L. & TECH. J. 59, 83-91 (2012) (analyzing the NG911 Advancement Act and other provisions of the Middle Class Tax Relief Act); see *infra* Part V (examining the recent federal law pertaining to the implementation of NG911 services){hereinafter Holloway & Seeman}.
 9. See, e.g., N.C. GEN. STAT. § 62A-46 (2011) (describing the structure of North Carolina E911 funding); see *infra* Part IIV.B and accompanying notes (discussing the North Carolina E911 legislative funding scheme and the need to revise this scheme in 2010, but not to include a specific NG911 funding mechanisms). See James E. Holloway, Elaine Seeman, James Kleckley, & Frederick Niswander, *The First Step In Modernizing Our 911 Emergency Call Centers: Revising The State Enhanced (E)911 Legislative Funding Scheme To Efficiently Distribute 911 Funds*, 2012 U. ILL. J. L. TECH. POL'Y 289 (2012) (studying E911 funding, analyzing North Carolina's E911 funding legislation, and proposing revised funding legislation and administrative recommendations); NENA Policy-Maker Blueprint, *supra* note 6, at 5 (Each state has enacted E911 legislative acts that show diversity among the states in the policy-making and management approach to the implementation of Enhanced 911 and its evolution to NG911 policies).
 10. See FCC – Legal and Regulatory Framework, *supra* note 1, at 35-36 (discussing the states' financial responsibilities in implementing the NG911 services); Donaldson, *supra* note 6, at 2 (discussing the need for Congress to develop a workable legal framework to guide states in implementation).
 11. See New and Emerging Technologies 911 Improvement Act of 2008, 47 U.S.C § 615a-1(f) (2012) (creating an exception to the Communications Act of 1934, and allowing states to collect, use, and manage state 911 funds under E911 legislative funding schemes).
 12. See *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, 42-43 (1996) [hereinafter E911 First Report and Order] (codified in 47 C.F.R § 20.18 (2010)) (“[N]othing in the record persuades us that, as a general matter, all state and local E911 cost recovery mechanisms are necessarily permissible, or necessarily barred, under the Communications Act. Whether a particular state or local tax or fee would constitute rate regulation under Section 332(c) [Regulatory Treatment of Mobile Services, 47 U.S.C. § 332(c)], and therefore be preempted, would depend on the specifics of the tax or fee at issue”); see also 47 U.S.C § 615a-1(f) (2012) (States 911 legislative schemes are not preempted but granted an exception to collect state 911 funds to implement 911 and E911 systems.).

cooperative federal-state E911 funding arrangement.¹³ E911 funding scheme will not provide enough 911 funds to establish state NG911 systems, acquire an Internet-Protocol (IP)-enabled communications network, and phase out of E911 services.¹⁴ Congress must consider enacting federal NG911 legislation that permits states to collect more 911 funds from new and old communications sources to implement NG911 services.¹⁵ To this end, federal policy-makers must decide whether a revision of the current federal-state E911 funding arrangement is required to share more federal regulatory power. This revision will permit states to collect and use more 911 funds and broaden the use of federal grant funds to finance implementation of NG911 services.

This Article examines the current state of federal communications or NG911 legislation to determine the federal-state NG911 funding arrangement needed to collect and use 911 funds to implement and maintain state NG911 systems, phase out E911 systems, and acquire access to IP-enabled communications network. This Article consists of four parts. Part I outlines the need for federal policy-makers to ensure a federal NG911 regulatory framework embodying cooperative federalism (federal-state arrangement) to ensure 911 funds for state NG911 systems. Part II describes the nature and kinds of cooperative federalism that one should consider to establish a federal-state arrangement to finance appropriate NG911 services. Part II also identifies the nature of federal-state arrangement needed to avoid conflict on the collection and use of 911 funds by the states to implement NG911 services.¹⁶ Part III describes federal and state E911 funding policies used to collect and allocate 911 funds to support local governments providing E911 services and implementing NG911 systems. Part III also analyzes federal-state arrangements to share the regulatory power to collect 911 funds and manage federal E911 grant funds.¹⁷ Part IV describes recent federal

-
13. See 47 U.S.C § 615a-1(f) (2012).
 14. See FCC, REPORT TO CONGRESS ON STATE COLLECTION AND DISTRIBUTION OF 911 AND ENHANCED 911 FEES AND CHARGES 5-6 (Dec. 21, 2012), available at http://transition.fcc.gov/Daily_Releases/Daily_Business/2013/db0114/DOC-318391A1.pdf [hereinafter FCC Fee Collection 4th Report].
 15. See FCC – Legal and Regulatory Framework, *supra* note 1, at 35 (discussing methods to increase state funding).
 16. James E. Holloway, Elaine Seeman, Margaret O’Hara, & Arno Forst, *Regulation and Public Policy in the Full Deployment of the Enhanced Emergency Call System (E-911) and Their Influence on Wireless Cellular and Other Technologies*, 12 B.U. J. SCI. & TECH. L. 93, 124-125 (2006) (advocating a regulatory scheme for E-911 that “embodies cooperative federalism between federal and state governments”).
 17. See Philip J. Weiser, *Federal Common Law, Cooperative Federalism, And The Enforcement Of The Telecom Act*, 76 N.Y.U. L. REV. 1692, 1733-1746 (2001) (analyzing the cooperative federalism and dual federalism that existed under the Communications Act of 1934 (47 U.S.C. § 151) and Telecommunications of Act of 1996, (Pub. L. No. 104-104, 110 Stat. 56 (1996) codified as amended in scattered sections of 47 U.S.C.), to determine their effects on state authority to

communications or NG911 policies to establish a national broadband network, build a public safety communications network, and analyze the status of state NG911 policies and federal NG911 policies to implement NG911 services. Finally, this note concludes that in order for a federal NG911 funding mechanism to be viable, it must continue to be structured as a cooperative federal-state funding arrangement that permits the state to collect and use 911 funds, and to use federal grant funds to provide NG911 services. Furthermore, such a funding mechanism must establish an enforceable floor of NG911 services accessible to all citizens.

I. FEDERALISM AND STATE AND LOCAL NG911 POLICIES AND POLICY-MAKING

Any revisions to the current federal-state E911 funding arrangement must continue to permit states to collect, use, and manage 911 funds and use federal grant funds under federal regulatory power. We first examine the current federal-state E911 funding arrangement to determine whether any problem or conflict in the states' collection and use of 911 funds and use of federal 911 grant funds. We also ask whether a federal NG911 regulatory mechanism that supports timely acquisition of a state IP-enabled communications network, implementation of a state NG911 system, and termination of the state E911 system must substantially alter the cooperative nature of the current and past federal-state E911 funding arrangement.

A. *Need for a Cooperative Federal-State Arrangement to Finance NG911 Services*

In order for the federal government to provide more federal 911 grant funds and allow states to collect more 911 funds, one must consider federal-state NG911 funding arrangements in revising NG911 funding policies. Both state and federal NG911 funding schemes must show a balanced federal-state NG911 funding arrangement that allows states to implement NG911 systems and protect national NG911 and other objectives. The federal-state arrangement must adapt to the growth of personal access technologies, local Public Safety Answering Points¹⁸ ("PSAP") and other first responder needs, telecommunications carriers, and other commercial situations to share NG911 funding obligations and responsibilities.¹⁹ A balanced federal-state NG911 funding arrangement

enact and enforce state ratemaking and other legislation) [Hereinafter Weiser - Federal Common Law].

18. 47 C.F.R. § 20.3 (2012) (defining 'Public Safety Answering Point' as "a point that has been designated to receive 911 calls and route them to emergency service personnel.").
19. See FCC – Legal and Regulatory Framework, *supra* note 1, at 5 (The FCC urges Congress to encourage states to provide more 911 funds and provide financial incentives that are can be used for 911 purposes only.).

allows states to share enough federal regulatory power to collect, use, and manage state 911 funds and use federal grant funds to implement NG911 systems. The ultimate effect of the failure of the current federal-state NG911 funding arrangement is to delay and hinder the exercise of federal regulatory power to provide NG911 services.

The need to finance NG911 services is complicated by the need to address state E911 funding policies that may not fit smoothly into a revised federal-state NG911 funding arrangement. The concern here is whether a federal regulatory mechanism will require states to rethink their arrangements with telecommunications carriers, commercial vendors, and municipal and county governments. For example, some states reimburse telecommunication carriers for the cost of communications services provided PSAPs that need these services to provide E911 services. The FCC, however, has chosen not to require that states reimburse telecommunications carriers that installed developed technologies and equipment to provide E911 services under FCC regulations.²⁰ Thus, before states can provide effective NG911 services, the federal-state NG911 funding arrangement must address whether the states should continue to spend public funds to reimburse telecommunications carriers for developing new technology to provide communications services to PSAPs when these services are similar to performing statutory obligations.²¹ The forcefulness of statutory and regulatory conditions and mandates that will be imposed on the collection and use of 911 funds and use of federal grant funds will determine the nature of the federal-state NG911 funding arrangement.

B. Nature of the Policy or Regulation Regarding NG911 Funding

When PSAPs cannot receive all emergency calls,²² PSAPs and other first responders²³ lose critical time, information, and opportunities to limit

-
20. *Revision of the Commission's Rules to Ensure Compatibility with Enhanced 911 Emergency Calling Systems*, 12 F.C.C.R. 22665, 22734-35 (Dec. 23, 1997) [hereinafter E-911 FCC First Memorandum and Order] (refusing to provide a cost recovery mechanism for carrier); see *infra* Part IV.C (examining a judicial decision that involves telecommunications carriers and others challenging a FCC order refusing to provide a these carriers a cost recovery mechanism).
 21. *See* Holloway et al., *supra* note 16, at 122-23 (finding that cost is a major economic concern for carriers deploying new technologies to provide E911 services and that FCC allows state to decide whether to provide cost recovery to wireless carriers for implementing new technologies to provide E911 services); *Revision of the Commission's Rules to Ensure Compatibility with Enhanced 911 Emergency Calling Systems*, 11 F.C.C. Rcd. 18676, 8 (July 26, 1996) (requiring cost recovery mechanism to be in place but not requiring a specific mechanism and recognizing a negative impact on implementation of an inflexible federal mechanism); *Revision of the Commission's Rules to Ensure Compatibility with Enhanced 911 Emergency Calling Systems*, 14 F.C.C. Rcd. 20850, 42 (Dec. 8, 1999) [hereinafter E-911 FCC Second Memorandum and Order] (finding that carrier cost recovery could become an obstacle to implementation of E-911).
 22. 47 U.S.C. §1401(13) (2010) (The NG911 Advancement Act states that “‘emergency call’ refers to any real-time communication with a public safety

personal injury and property damage and connect with other first responders providing emergency medical and other services.²⁴ State governments that rely on state E911 funding schemes²⁵ must begin to find other sources of 911 funds to design, implement, and manage state NG911 systems. Although the federal government has authorized NG911 grant funds to provide E911 and NG911 services, much uncertainty surrounds the nature of federal-state arrangement under a federal NG911 regulatory mechanism sharing regulatory power.

A federal NG911 funding mechanism affects state NG911 funding schemes that share federal regulatory power to collect and use NG911 fees, surcharges, and taxes. A federal NG911 funding mechanism can restrict the sharing of federal regulatory powers by imposing federal preemptions, mandates, and conditions on state NG911 funding schemes.²⁶ These conditions limit any federal regulatory power that has been shared with the states.²⁷ Federal policy-makers who are driven by the need to protect national security and other objectives must decide how to design federal regulatory mechanism that allows state to collect 911 funds and provides federal funds to further both national and state objectives.

Forceful federal mandates, strict conditions, and broad preemptions on state NG911 funding policies will substantially alter the nature of the current federal-state E911 funding arrangement. The breadth of the NG911 regulatory field or 911 emergency services field would require the federal government to regulate telecommunications carriers, state 911 regulators, and municipal and county PSAPs to provide NG911 services. Some states have just begun to fully manage E911 funds used by PSAPs to provide NG911 services,²⁸ but they must eventually establish interoperability

answering point or other emergency management or response agency, including . . . through voice, text, or video and related data; and . . . nonhuman-initiated automatic event alerts, such as alarms, telematics, or sensor data, which may also include real-time voice, text, or video communications.”).

23. Next Generation 911 Advancement Act, 47 U.S.C. § 1401(22) (F) (2012) (stating that NG911 service “provides broadband service to public safety answering points or other first responder entities.”).
24. See FCC Text-to-911, *supra* note 2, at ¶¶ 2-3 (discussing the shortfalls of the current system).
25. See Elaine Seeman, James E. Holloway, James Kleckley, & Frederick Niswander, *Findings and Recommendations on 911 Costs and Funding Model for the North Carolina 911 System: An Additional Report for the NC 911 Board*, (Apr. 9, 2010) [hereinafter NC E911 Funding Study Final Report], <http://www.ncleg.net/documentsites/committees/hscu911f/april%2019,%202010/april-2010-911-ecureport-final.pdf>; see *infra* Part IV.B and accompanying notes (discussing revisions to the North Carolina E911 funding scheme to manage the use of 911 funds).
26. 47 C.F.R. § 400.1 (2010) (discussing the state requirements to receive funding).
27. *Id.*
28. N.C. GENERAL ASSEMBLY REPORT TO THE 2010 SESSION OF THE 2009 GENERAL ASSEMBLY HOUSE SELECTION COMMITTEE ON THE USE OF 911 FUNDS 2 (2010) available at <http://ncleg.net/Library/studies/2010/st11818.pdf> [hereinafter 911

among PSAPs, fire and rescue, and other emergency services, manage cooperation and coordination among first responders, find sources of more 911 funds, and delegate authority to local governments operate and manage PSAPs.²⁹ Thus, closely related federal and state NG911 objectives and broad federal regulatory power do not support a stringent federal NG911 funding mechanism in light of the public scope and technological complexity of implementing state NG911 systems and overseeing local governments to provide NG911 services.

C. Nature of Federal-State Relations of E911 Funding Arrangement

The current federal-state E911 funding arrangement shares federal regulatory power with state governments to finance the implementation E911 services and continues to provide 911 funds to maintain E911 services. The willingness of the federal government to share power with state governments may be self-serving, with the federal government actually using the states to further federal E911 objectives.³⁰ Federal NG911 legislation that includes regulatory power furthers federal communications, information technology, national security, transportation safety, national security, and public safety interests.³¹ Currently, federal

Funds Committee Report] (North Carolina began to fully manage E911 funds in 2010). *See* FCC Fee Collection 4th Report, *supra* note 14, at 5-6 (detailing how states manage E911 funds).

29. *See* FCC – Legal and Regulatory Framework, *supra* note 1, at 20 (The FCC states that “[o]ne of the critical steps in the transition to NG911 is the deployment by 911 authorities of IP-based networks that are capable of receiving emergency communications via voice, text, video, and data. These networks, commonly referred to as Emergency Services IP Networks (ESInets), will be the primary platform for receipt of incoming NG911 traffic from commercial networks to PSAPs as well as other public safety authorities data communications streams . . .”).
30. *See* ENHANCE 911 Act, 47 U.S.C. § 942 (2012) (setting forth federal findings and objectives on the collection, use, and management of 911 funds by state and local governments.)
31. *Id.* (stating that “Congress should facilitate the exercise of authority over NG911 by such federal agencies as the Commission, the 911 Implementation and Coordination Office, the National Highway Traffic and Safety Administration, the National Telecommunications and Information Agency, and the Department of Homeland Security, so that they are better able to support the NG911 transition and to coordinate with one another more effectively in these efforts.”). The FCC is one of three federal agencies involved in the transition and migration of NG911. These agencies investigate NG911 issues and propose and implement federal 911 legislative policies. FCC – Legal and Regulatory Framework, *supra* note 2, at 13-15. Currently, the FCC regulates wireless and wireline carriers that provide communications services to 911 emergency call centers. *Id.* at 14. The FCC has initiated the implementation of NG911 policies by making recommendations on a national broadband network, seeking information to implement NG911 services, and improving the accuracy of location information. *Id.* The United States Department of Transportation (USDOT) supports the implementation of NG911 by conducting research on the transition and migration to NG911. *Id.* at 15. Within the USDOT, the National Highway Traffic Safety

communications law permits state governments to operate in the communications field by allowing the states to collect and use 911 funds and manage E911 systems subject to a few federal mandates and conditions on E911 regulatory funding schemes.³² Congress possesses regulatory power under the Commerce Clause³³ to regulate communications and information technology fields, but slowly delegated regulatory power to the Federal Communications Commission (FCC) to impose 911, E911, and NG911 obligations on telecommunications carriers³⁴ and service

Administration (NHTSA) manages the National 911 Program (911 Program). *Id.* The 911 Program “seeks to provide Federal leadership and coordination in supporting and promoting optimal 911 services.” *Id.* The 911 Program also seeks to “coordinat[e] the efforts of states, technology providers, public safety officials, 911 professionals and other groups, seeks to ensure a smooth, reliable and cost-effective transition to a 911 system that takes advantage of new communications technologies to enhance public safety nationwide.” *Id.* Finally, the National Technology Information Administration (NTIA) of the United States Department of Commerce “oversaw the Public Safety Interoperable Communications (PSIC) grant program . . . [to advance] communications infrastructure projects nationwide. . . .” *Id.* at 16. Some PSIC grants were used to “improve the communications infrastructure of Public Safety Answering Points (PSAPs) or emergency 911 call center.” *Id.* The PSIC grant program was not permanent and made one-time awards. *Id.*

32. See NET 911 Act, 47 U.S.C. § 615a-1(f) (2012) (stating that “[n]othing in this Act, the Communications Act of 1934[47 U.S.C. 151], the New and Emerging Technologies 911 Improvement Act of 2008, or any Commission regulation or order shall prevent the imposition and collection of a fee or charge applicable to commercial mobile services or IP-enabled voice services specifically designated by a State, political subdivision thereof, Indian tribe, or village or regional corporation serving a region established pursuant to the Alaska Native Claims Settlement Act, as amended [85 Stat. 688] for the support or implementation of 9-1-1 or enhanced 9-1-1 services, provided that the fee or charge is obligated or expended only in support of 9-1-1 and enhanced 9-1-1 services, or enhancements of such services, as specified in the provision of State or local law adopting the fee or charge. For each class of subscribers to IP-enabled voice services, the fee or charge may not exceed the amount of any such fee or charge applicable to the same class of subscribers to telecommunications services.”); see FCC Fee Collection 4th Report, *supra* note 14, at 5-6 (stating that “[s]tates use a variety of methods to collect and distribute 911/E911 fees.”); FCC, REPORT TO CONGRESS ON STATE COLLECTION AND DISTRIBUTION OF 911 AND ENHANCED 911 FEES AND CHARGES 5 (2011), *available at* http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-310873A1.pdf [hereinafter FCC Fee Collection 3rd Report] (stating that “[b]ased upon the information gathered from the responding states and territories, this Report describes how states and other entities collected 911/E911 funds in calendar year 2010, how much they collected, and how they oversaw the expenditure of these funds. The Report then describes the extent to which states spent the collected 911/E911 funds on programs other than those that support or implement 911/E911 services.”).
33. U.S. CONST. art. I, § 8, cl. 3 (providing that “Congress has regulatory powers under the commerce clause).
34. A “Carrier [is] [a] function provided by a business entity to a customer base, typically for a fee. Examples of carriers and associated services are; PSTN service by a Local Exchange Carrier, VoIP service by a VoIP Service Provider, email

providers,³⁵ such as mobile cellular service and cable companies, and coordinate state implementation of E911 and NG911.³⁶ Congress has not allowed the FCC to impose a federal obligation that would require state, municipal, or county governments to use 911 funds to provide 911, E911, or NG911 services.³⁷ Most importantly, Congress has not prohibited states from imposing 911 fees, surcharges, or taxes on communications services³⁸ that wireless and wireline users use to make 911 emergency calls to PSAPs.³⁹ Yet, Congress uses the carrot and stick approach to influence states not to misappropriate or misuse 911 funds by later denying access to

service provided by an Internet Service Provider.” NENA Glossary, *supra* note 5, at 28. A “Local Exchange Carrier (LEC) is [a] Telecommunications Carrier (TC) under the state/local Public Utilities Act that provide local exchange telecommunications services.” *Id.* at 74. The LECs are “[a]lso known as Incumbent Local Exchange Carriers (ILECs), Alternate Local Exchange Carriers (ALECs), Competitive Local Exchange Carriers (CLECs), Competitive Access Providers (CAPs), Certified Local Exchange Carriers (CLECs), and Local Service Providers (LSPs).” *Id.* The PSTN is the Public Switched Telephone Network (PSTN) that is a “network of equipment, lines, and controls assembled to establish communication paths between calling and called parties in North America.” *Id.* at 102.

The FCC refers to wireless telecommunications carriers and 911 service providers as Commercial Mobile Radio Service (CMRS) Providers that “(1) Offer real-time, two way switched voice service that is interconnected with the public switched network; and (2) Utilize an in-network switching facility that enables the provider to reuse frequencies and accomplish seamless hand-offs of subscriber calls. These requirements are applicable to entities that offer voice service to consumers by purchasing airtime or capacity at wholesale rates from CMRS licensees.” 47 C.F.R. § 20.18.1 (a)(1)–(2).

35. A “Service Provider [is] [a]n entity providing one or more of the following 9-1-1 elements: network, CPE, or database service.” NENA Glossary, *supra* note 5, at 112. CPE is the Customer Premise Equipment that is the [c]ommunications or terminal equipment located in the customer’s facilities – Terminal equipment at a PSAP.” *Id.* at 39.
36. See E911 First Report and Order, *supra* note 13, at 5 (providing examples of when the FCC began to impose 911, E911, and NG911 obligations on telecommunications carriers and providers and coordinate state implementation of E911).
37. NET 911 Act, 47 U.S.C. § 615a-1(f) (2012).
38. *Id.* See FCC Fee Collection 3rd Report, *supra* note 32, at 5 (stating that “[b]ased upon the information gathered from the responding states and territories, this Report describes how states and other entities collected 911/E911 funds in calendar year 2010, how much they collected, and how they oversaw the expenditure of these funds. The Report then describes the extent to which states spent the collected 911/E911 funds on programs other than those that support or implement 911/E911 services.”).
39. See FCC – Legal and Regulatory Framework, *supra* note 1, at 31 (noting that “While certain grant programs exist at the federal level, today 911 service is funded primarily at the state and local level, generally through monthly 911-specific line-item charges on wireline and wireless customers’ bills.”).

grant funds,⁴⁰ but still closely monitors the use of accountability of these funds by state and local governments.⁴¹ Congress has not sought to impose stringent conditions on the use of 911 funds or flatly preempt specific 911 uses of state 911 or E911 funding schemes or mechanisms.

II. NATURE AND STATE OF FEDERALISM AND COOPERATIVE FEDERALISM

Federalism raises a constitutional issue regarding the nature of state and federal arrangements to share federal power with the states in a federal regulatory field. The overlap of federal and state interests demands the federal-state arrangement to share federal power. For example, national communications, information technology, homeland security, emergency management, and transportation safety fields overlap with state public safety, emergency services, telephone services, emergency management, and information technology fields. This particular federal-state overlap of regulatory fields means that a federal-state E911 funding arrangement must concurrently advance state and federal objectives but not unduly restrict state policy-making for management of 911 funds to provide NG911 services. The states must establish state NG911 funding schemes that a federal NG911 funding mechanism would impose conditions upon. This necessary balance in the use of federal power between federal and state government points to a cooperative arrangement to finance NG911 systems.⁴² This cooperative federal-state NG911 funding arrangement includes federal NG911 funds and minimum standards, and it allows states to establish NG911 funding schemes that impose fees on communications services to implement NG911 services.

A. *Federalism in the Regulation of State and Federal Regulatory Fields*

American federalism protects the exercise of state police and other powers that the states retain to ensure and further public welfare, order, and safety.⁴³ Federal NG911 and other policies could create uniformity, but a

40. 47 C.F.R. § 400.1 (2010) (granting power to the FCC).

41. See FCC Fee Collection 3rd Report, *supra* note 32, at 5 (providing details of how the government monitors state spending).

42. See Sarah C. Rispin, *Cooperative Federalism and Constructive Waiver of State Sovereign Immunity*, 70 U. CHI. L. REV. 1639, 1642-43 (2003) (explaining that cooperative federalism may include a surrender of state sovereignty).

43. DAVID SKOVER, *Powers of and Restraints on "Our Federalism," in STATE CONSTITUTIONS IN THE FEDERAL SYSTEM: SELECTED ISSUES AND OPPORTUNITIES FOR STATE INITIATIVES* (1989) (stating that cooperative federalism is the opposite of dual federalism that establishes distinct separation of federal and state powers and strict limits on the sharing of federal powers). See also Joseph F. Zimmerman, *National-State Relations: Cooperative Federalism in the Twentieth*, 31 *PUBLIUS: J. FEDERALISM* 15, 17-18 (describing the difference between cooperative and dual federalism in the American government).

one-size-fits-all federal-state arrangement may prove unworkable among the states, thus creating the need for a flexible, forward-looking federal-state NG911 funding arrangement. Some states delegate authority to local governments to impose different 911 taxes, surcharges, and fees.⁴⁴ Other states allocate and distribute 911 funds to operate state 911 boards and support municipal and county PSAPs operations.⁴⁵ The sheer number of PSAPs and complexity of a NG911 system, as compared to an E911 or 911 system, points to a need for a federal NG911 funding mechanism that ensures the states share regulatory power to collect and manage 911 funds to implement NG911, phase out E911 services, and acquire access to an IP-enabled communications network.

The states can exercise this federal regulatory power that is delegated to the federal government to protect public safety, which best fits a cooperative federal-state NG911 funding arrangement. Federal legislation can preempt state policies to protect national interests in a regulatory field.⁴⁶ Those powers are delegated to the federal government, but the states need to exercise them to protect public safety, thus requiring federal-state cooperation. As stated above, states have exercised this power to

-
44. See FCC Fee Collection 3rd Report, *supra* note 32, at 5 (stating that “States use a variety of methods to collect and distribute 911/E911 fees. Table 1 provides an overview of whether 911/E911 funds are collected by the state (or equivalent jurisdiction), by local jurisdictions, or through a combination of the two.”); FCC Fee Collection 4th Report, *supra* note 14, at 5-6 (noting that “States use a variety of methods to collect and distribute 911/E911 fees . . . funds are collected by the state (or equivalent jurisdiction), by local jurisdictions, or through a combination of the two.”); *infra* notes 88-89 and accompanying text (describing the nature of E911 legislative schemes that states use to collect or delegate authority local governments to collect 911 funds).
45. See FCC Fee Collection 3rd Report, *supra* note 32, at 5 (“States use a variety of methods to collect and distribute 911/E911 fees. Table 1 provides an overview of whether 911/E911 funds are collected by the state (or equivalent jurisdiction), by local jurisdictions, or through a combination of the two.”); FCC Fee Collection 4th Report, *supra* note 14, at 5-6 (noting that “Twelve states allow counties and other local jurisdictions to establish funding mechanisms for 911 and E911 purposes, subject to state statutory requirements.”).
46. See U.S. CONST. art. IV, cl. 2 (providing that the Supremacy Clause permits federal law to supersede state law); see, e.g., 29 U.S.C. § 1144(a) (2012) (allowing federal employee benefit law to supersede state laws relating to employee benefits). See also James E. Holloway, *ERISA, Preemption and Comprehensive Federal Health Care: A Call for “Cooperative Federalism” to Preserve the States’ Role in Formulating Health Care Policy*, 16 CAMPBELL L. REV. 405 (1994) (presenting an analysis of preemption of state health care law relating to employee benefits and stating that “[t]he United States Supreme Court has consistently given a broad interpretation to ERISA’s preemption clause. In some instances, this interpretation allows federal courts to invalidate much state common law and public policy, for example health care law and policy.”); James E. Holloway, *Revisiting Cooperative Federalism in Mandated Employer-Sponsored Health Care Programs under the ERISA Preemption Provision*, 8 QUINNIPIAC HLTH. L.J. 239 (2005) (presenting examples of preemption of state regulations in health care).

impose surcharges on communications services in the federal communications field.⁴⁷ Obviously, Congress is permitting states to use federal regulatory power to impose 911 surcharges and taxes on communications devices and subscriber lines in the interstate communications field.⁴⁸ These devices include mobile cellular telephones and other wireless technologies that can send emergency calls by text messages, videos, photographs, and data to request NG911 services.⁴⁹ The need for PSAPs to receive, respond to, and transfer to dispatchers' or first responders' emergency calls points to the need for states to collect and distribute 911 funds or permit local governments to collect and manage 911 funds to operate PSAPs.

Another federalism concern is the nature of the federal-state NG911 funding arrangement that must provide federal 911 funds and the need for NG911 service mandates to timely implement state NG911 systems. The starting points are the essential federal and state objectives that must be advanced by implementing a NG911 system. On one hand, the NG911 funding arrangement must not undermine critical national security, emergency management, communications, or information management and technology interests directly affected by state NG911 systems. On the other hand, the NG911 funding arrangement must also permit states to govern essential commercial, public safety, communications, emergency management, and information management and technology interests and objectives needed to provide NG911 services. The federal-state NG911 funding arrangement must balance federal and state regulatory needs by ensuring the power of the federal government to provide 911 funds to advance federal objectives and allowing state governments to use enough federal regulatory power to collect and use 911 funds to provide NG911 services. The federal-state NG911 funding arrangement must show mutual respect⁵⁰ for federal and state NG911 policies and allow the federal and

47. See NET 911 Act, 47 U.S.C § 615a-1(f) (2012) (stating that “Nothing in this Act . . . the New and Emerging Technologies 911 Improvement Act of 2008, or any Commission regulation or order shall prevent the imposition and collection of a fee or charge applicable to commercial mobile services or IP-enabled voice services specifically designated by a State . . .”).

48. See *id.* (delegating authority to the states to collect and use 911 funds).

49. See FCC – Legal and Regulatory Framework, *supra* note 1, at 8-10 (stating that the “Chairman’s plan called for the Commission to initiate rulemaking proceedings on NG911 location accuracy and enabling the public to transmit emergency communications to PSAPs via text, data, and video in addition to voice.”).

50. See Robert F. Rich, et al., *The State Children’s Health Insurance Program: An Administrative Experiment in Federalism*, 2004 U. ILL. L. REV. 107, 109-10 (2004) (“This new approach to cooperative federalism suggests that the federal and state levels of government both bring important resources and capacity to intergovernmental programs. They may have different areas of strength, but the two levels of government agree to work together on a given problem or issue. There is recognition and respect for the statutory authority and resources that each level of government can bring to a mutual problem-solving process. The federal

state government to share financial burden and responsibility⁵¹ to transition from E911 services to NG911 services.

B. Federalism and a Balance in the Federal and State Arrangement

The federal-state NG911 funding arrangement must balance the federal and state governments' exercise of federal regulatory power to provide 911 funds for NG911 services. This arrangement may fit the newer model of establishing cooperative federalism. In this model, the federal government exercises federal regulatory power to fund the programs, develops a regulatory scheme for the programs, and establishes minimum performance and other standards.⁵² State governments are delegated the regulatory power to design the program so as to further its objectives and respond to public needs.⁵³ This cooperative arrangement permits the state and federal government to share in policy-making as well as the administration and implementation of programs. This model of cooperative federalism establishes a minimum floor of security through rights and benefits that states cannot deny to their citizens.⁵⁴ Therefore, this floor of security allows both federal and state governments to exercise regulatory power to fund, design, and implement programs to meet their respective public objectives.

The floor of security would also include federal NG911 funding and provide minimum federal guidance and standards to implement NG911 services. The federal NG911 funding mechanism would also create a minimum floor of 911 services that must be provided by the states through their PSAPS. Currently, the federal government imposes little or no E911 funds, performance standards, and technical guidance on state or local governments to collect and manage 911 funds. States would design and implement NG911 legislative funding schemes to advance NG911 and

and state levels of government each have distinct competencies, and within a given policy framework, each level has its responsibilities and duties.”).

51. *Id.* at 111 (Health care regulations where “[t]he national government finances between 50% and 80% of program operations and each state provides between 20% and 50%, depending upon its size and wealth.”).
52. *Id.* at 107, 109 (providing that “SCHIP represents a new form of cooperative federalism where the federal government provides the primary financing, formulates the basic framework for the program, and sets a minimum set of performance standards (a floor) that the states must meet. State governments, in turn, have the flexibility and discretion to tailor a program that best meets their needs and to respond to the target group (i.e., uninsured children). State government is a full partner in this intergovernmental relationship and possesses policy-making, not just administrative or implementation, authority.”).
53. *Id.* at 109.
54. See SKOVER, *supra* note 43, at 19 (stating that “Inherent in cooperative federalism is an expectation that the federal Constitution will furnish a “floor of security” for the interests of life, liberty, and property below which the states cannot fall in ordering their policy priorities through state law, including state constitutional law.”).

other public safety objectives. Currently, several states collect or allow local governments to collect 911 funds subject to few federal mandates or conditions to further communications, national security, and transportation safety objectives.⁵⁵ A federal floor of security establishes a federal objective to provide basic NG911 services and identifies a specific set of public services that state governments must provide to all citizens requesting them through PSAPs or 911 emergency call centers.

C. Federalism and Dominant Federal Power in the Federal-State Arrangement

Another federal-state arrangement represents the traditional model of cooperative federalism. The traditional model would permit the federal government to provide federal funds to further federal objectives that state 911 policy-makers and regulators can implement.⁵⁶ In this model, the federal government to assert the dominant authority and impose conditions on federal program services and impose limitations on the states' exercise of federal authority.⁵⁷ State governments are voluntary participants that willingly accept federal mandates and conditions to receive federal funds.⁵⁸

55. See NET 911 Act, 47 U.S.C. § 615a-1(f) (2012) (“Nothing in this Act, the Communications Act of 1934 [47 U.S.C. 151], the New and Emerging Technologies 911Improvement Act of 2008, or any Commission regulation or order shall prevent the imposition and collection of a fee or charge applicable to commercial mobile services or IP-enabled voice services specifically designated by a State, political subdivision thereof, Indian tribe, or village or regional corporation serving a region established pursuant to the Alaska Native Claims Settlement Act, as amended (85 Stat. 688) for the support or implementation of 9-1-1 or enhanced 9-1-1 services, provided that the fee or charge is obligated or expended only in support of 9-1-1 and enhanced 9-1-1 services, or enhancements of such services, as specified in the provision of State or local law adopting the fee or charge. For each class of subscribers to IP-enabled voice services, the fee or charge may not exceed the amount of any such fee or charge applicable to the same class of subscribers to telecommunications services.”); 47 C.F.R § 400.1 (2010) (providing that “[t]his part establishes uniform application, approval, award, financial and administrative requirements for the grant program authorized under the Ensuring Needed Help Arrives Near Callers Employing 911 Act of 2004.”); 47 C.F.R. § 400.4 (2010) (requiring that a State application for funds for the E-911 grant program contain a State 911 Plan that “details the projects and activities proposed to be funded for the implementation and operation of Phase II E-911 services or migration to an IP-enabled emergency network , .”); 47 C.F.R § 400.7 (2010) (providing that “[g]rant funds awarded under this part may be used only for the acquisition and deployment of hardware and software that enables the implementation and operation of Phase II E-911 services, for the acquisition and deployment of hardware and software to enable the migration to an IP-enabled emergency network . . .”).

56. Rich, *supra* note 50, at 109-10.

57. *Id.* (“SCHIP represents a new form of cooperative federalism where the federal government provides the primary financing, formulates the basic framework for the program, and sets a minimum set of performance standards (a floor) that the states must meet.”).

58. *Id.*

The traditional model of cooperative federalism is effective when states do not have the funds to provide services and benefits needed by their citizens.⁵⁹

The traditional model of cooperative federalism is not consistent with the current federal-state arrangement to collect and use 911 funds. Congress has not enacted an E911 funding mechanism to provide 911 funds.⁶⁰ Congress once authorized an E911 and NG911 incentive grants that required states to comply with eligibility requirements to apply for the grants.⁶¹ The current federal-state E911 arrangement does not require states to mandate that municipal and county governments provide 911 services, or to voluntarily participate in another federal program to collect and use 911 funds.⁶² The traditional model of cooperative federalism may not maintain federal-state relations in that state and local governments⁶³ would lose much discretion in the collection and management of state 911 funds.

Federal NG911 funding policies and programs should provide NG911 funds and guidance and establish minimum performance and technical standards. A federal funding mechanism should create a federal floor of NG911 services and provide related technical guidance and performance standards. In light of the two models of cooperative federalism, the policy concern is whether the current federal and state E911 legislative schemes give any indication of the likely nature of federal-state NG911 funding arrangement under a federal NG911 regulatory mechanism that provides federal grant funds and regulates the collection and use of 911 funds. We answer this question Parts III and IV.

III. NATURE OF FEDERAL-STATE RELATIONS ON E911 FUNDING ARRANGEMENT

Many states must address the threat to life, property, and safety of their citizens when these citizens can only make 911 calls using voice to request emergency assistance. Wireline technology can send 911 calls only by voice, but the wireless cellular technologies can send 911 calls by text messages, videos, photographs, and data as well as locate the wireless

59. *Id.*

60. *See* 47 C.F.R. § 615a-1(f) (2012) (deciding not to preempt state E911 funding schemes to collect and use 911 funds).

61. *See* 47 C.F.R. § 400.1 (2010) (setting forth federal regulations to implement a federal 911 grant program).

62. *See* 47 C.F.R. § 615a-1(f) (2012) (deciding not to preempt state E911 legislative schemes and choosing not to prohibit state from delegating funding responsibility and accountability to county and municipal governments).

63. Nestor M. Davidson, *Cooperative Localism: Federal-Local Collaboration in an Era of State Sovereignty*, 93 VA. L. REV. 959, 965-66 (2007) (discussing how cooperative federalism can cause direct federal and local interaction to be irrelevant).

caller.⁶⁴ The wireless technologies create the need to replace the circuit-switched networks with IP-enabled communications networks.⁶⁵ States must establish new NG911 legislative funding schemes to support the implementation of NG911 systems, establish an IP-enabled communications network infrastructure, and phase out outdated E911 services.

A. Current Nature of Federal 911 Legislation and its Funding Scheme

The FCC established the federal-state E911 arrangement under the Communications Act of 1934⁶⁶ to adjust to changes in wireless cellular technology and public safety needs.⁶⁷ As part of this Act, the FCC imposed 911 obligations on wireless carriers to provide automatic number identification (“ANI”) and automatic location information (“ALI”) to PSAPs.⁶⁸ Many PSAPs were not prepared to use ALI and ANI, but the FCC still mandated that wireless carriers provide location information for use by these PSAPs when they request it.⁶⁹ However, the FCC chose not to mandate or force states to mandate that wireless carriers pay for the costs of implementing ANI, ALI, and other technologies.⁷⁰ The FCC also did not require the state or local governments to provide E911 services, but it

64. See FCC – Legal and Regulatory Framework, *supra* note 1, at 10 (explaining the current E911 legal and regulatory framework and recommending NG911 funding policies Congress should consider to support the implementation of state NG911 systems).

65. See *id.* (“With the transition to NG911, the circuit-switched architecture of legacy 911 will eventually be entirely replaced by IP-based technologies and applications that provide all of the same functions as the legacy 911 system as well as new capabilities.”).

66. 47 U.S.C. § 151 (1996) (discussing the creation of the FCC).

67. See E911 First Order and Report, *supra* note 12, at 5 (providing that “[o]ne of the Commission’s statutory mandates under the Communications Act is ‘promoting safety of life and property through the use of wire and radio communication.’”). Recognizing this responsibility, the Commission has expressed increasing concern regarding the inability of wireless customers to benefit from the advanced emergency capabilities of E911 systems that are available to most wireline customers.

68. See 47 C.F.R. § 20.18(a)-(f) (2010) (The FCC established a five-year, two-phase plan to implement wireless 911 or E911).

69. See New and Emerging Technologies 911 Improvement Act of 2008, Pub. L. No. 110-283, 122 Stat. 2620 (discussing the availability of PSAP information).

70. See E-911 FCC Second Memorandum and Order, 14 F.C.C. Rcd. 20850, 20885-86 (Dec. 8, 1999) (finding that carrier cost recovery could become an obstacle to implementation of E-911); E-911 FCC First Memorandum and Order, 12 F.C.C. Rcd. 22665, 22734-35 (Dec. 23, 1997) (refusing to provide a cost recovery mechanism for carrier).

did impose ALI, ANI, and other obligations on wireless carriers and 911 service providers.⁷¹

The FCC imposes obligations on wireless carriers and wireless service providers to maintain and develop the current federal-state E911 arrangement. Federal 911, E911, and NG911 legislative acts include the Wireless Communications and Public Safety Act of 1999⁷² (“Wireless Communications Act”), Ensuring Needed Help Arrives Near Callers Employing 911 Act of 2004⁷³ (“ENHANCE Act”), and the New and Emerging Technologies 911 Improvement Act of 2008⁷⁴ (“NET Improvement Act”).⁷⁵ Most importantly, Congress delegated regulatory authority under these legislative acts to the one the one hand, FCC and other agencies to support and assist states’ coordination and implementation of effective state E911 and NG911 systems.⁷⁶ Other agencies promulgated communications regulations to implement a federal incentive grant program that obligates state governments to comply with E911 planning and other eligibility requirements to receive federal grants.⁷⁷ The FCC has imposed obligations on wireless and wireline, and other communications service providers.⁷⁸ On the other hand, Congress explicitly prohibits the FCC from regulating the collection and use of state 911 and E911 fees, surcharges, and taxes.⁷⁹ Although Congress has not authorized the FCC to regulate these funds, Congress requires the FCC to account for and report annually on the use of 911 funds by states and their political subdivisions.⁸⁰ Thus, the FCC and other agencies have no

71. See E-911 FCC Second Memorandum and Order, 14 F.C.C. Rcd. 20850, 20885-86 (Dec. 8, 1999); E-911 FCC First Memorandum and Order, 12 F.C.C. Rcd. 22665, 22734-35 (Dec. 23, 1997).

72. Pub. L. No. 106-81, 113 Stat. 1286 (1999) (codified as amended in multiple sections of 47 U.S.C.).

73. Pub. L. No. 108-494, 118 Stat. 3986 (2004) (codified as amended in multiple sections of 47 U.S.C.).

74. Pub. L. No. 110-283, 122 Stat. 2620 (2008) (codified as amended in multiple sections of 47 U.S.C.).

75. See Philip J. Weiser, *Cooperative Federalism And Its Challenges*, 2003 MICH. ST. L. REV. 727, 728 (2003) (analyzing cooperative federalism) (stating that “[t]his essay explains the nature of the Act’s cooperative federalism strategy and how it can help the FCC and the state agencies devise solutions to nettlesome regulatory problems.”); Philip J. Weiser, *Towards A Constitutional Architecture For Cooperative Federalism*, 79 N.C. L. REV. 663, 666 (2001) (proposing that “a constitutional architecture for cooperative federalism that reconciles the rhetoric of current judicial doctrine and the reality of modern political practice while safeguarding the value of state autonomy.”).

76. See ENHANCE 911 Act, 47 U.S.C. § 942 (2012); Wireless Communications and Public Safety Act of 1999, Pub. L. No. 106-81, 113 Stat. 1286 (1999).

77. *Id.* at § 400.1.

78. 47 C.F.R. § 20.18 (2010)

79. See 47 U.S.C. § 615a-1(f) (1)(2012).

80. See 47 U.S.C. § 615a-1(f)(2).

authority to alter the current federal-state E911 funding arrangement, but the FCC must account for the use of 911 funds by states and their subdivisions.

Congress chose not preempt or allow federal agencies to regulate the collection and use of 911 funds to implement state E911 systems but requires annual reporting on the use of 911 funds by states and their subdivisions to implement E911 and NG911 services.⁸¹ The current federal-state E911 funding arrangement permits states to collect E911 funds to further both state and federal E911 objectives and to provide timely E911 services. This arrangement demonstrates that federal policy-makers did not impose burdensome mandates and conditions on the collection or use of 911 funds. For example, the federal 911 incentive grants included less stringent eligibility requirement.⁸² This program required states to prepare a state 911 plan,⁸³ stated specific uses of grant funds,⁸⁴ and prohibited the diversion of 911 funds to other uses.⁸⁵ In fact, the incentive program's eligibility requirement prohibited states from making applications, if they had misused 911 funds 180 days before their application to this program.⁸⁶ Yet in other instances, when Congress was made aware of the misuse of 911 funds, it took no action. Congress requires the FCC to account for and report to it the use and misuse of E911 funds,⁸⁷ and the FCC has reported to Congress that a few states have used 911 funds for non-911 purposes.⁸⁸ Other than prohibiting applications to incentives programs, Congress has taken no action to punish or prohibit misuse of 911 funds. Thus, federal E911 policies have not made the federal-state E911 funding arrangement less flexible by imposing stringent mandates on the collection or use of 911 funds.

B. Current Nature of State E911 Legislative Funding Scheme

State E911 funding schemes permit state 911 boards and commissions to collect and use 911 funds or permit municipal and county governments to collect 911 funds. The current federal-state E911 funding arrangement includes E911 funding schemes and few NG911 funding schemes to collect, allocate, and distribute 911 funds.⁸⁹ Although federal regulations

81. See 47 U.S.C. § 615a-1(f)(1)-(2) (2012).

82. Net Improvement Act, 47 U.S.C. § 942(b)(1) (2012).

83. 47 C.F.R. § 400.4(a)(1).

84. *Id.* at § 400.7.

85. *Id.* at § 400.4(a)(5)(i).

86. *Id.* at § 400.4(a)(5)(i).

87. See 47 U.S.C. § 615a-1(f)(1)-(2) (2012).

88. See, e.g., Government Accountability Office (GAO), STATES' COLLECTION AND USE OF FUNDS FOR WIRELESS ENHANCED 911 SERVICES, GAO 06-338, 1-2 (Mar. 2006), available at <http://www.gao.gov/new.items/d06338.pdf>.

89. See NENA, 911 Surcharge-User Fees by State (July 10, 20110, available at <http://www.nena.org/?page=911RateByState&hhSearchTerms=state+and+fundin>

impose no stringent mandates or conditions on the states' collection and use of 911 funds or on the local governments' collection of 911 funds, the states may still experience difficulties in the management of 911 funds under state E911 legislative funding schemes.

One pertinent example of this is the 2008 North Carolina E911 funding scheme, which included a flawed funding provision governing the use of 911 funds by local governments operating PSAPs.⁹⁰ This provision required local governments to submit 911 expenditure reports that listed state eligible expenditures for equipment, services, and other items purchased with state 911 funds.⁹¹ However, local governments had no obligations to spend all of the 911 funds at that time, so they saved the 911 funds, approximately \$91 million, for later 911 and non-911 uses.⁹² In 2009, the North Carolina 911 Board sponsored a North Carolina E911 Funding Study to determine the E911 cost, propose a funding model, and make recommendations to support revisions⁹³ to the North Carolina E911 legislative funding scheme to prevent the accumulation of 911 funds.⁹⁴ In June 2010, the North Carolina General Assembly revised the 2008 E911 funding scheme to ensure equitable distributions and effective management of 911 funds to prevent unnecessary accumulations of 911 funds.⁹⁵ Unfortunately, the North Carolina General Assembly did not design these revisions to gain access to an IP-enabled infrastructure, implement NG911 services, or phase out E911 services. North Carolina and other states have

g; FCC - Legal and Regulatory Framework, *supra* note 2, at 36. The FCC states the following:[S]tates differ in how they treat NG911 under their relevant funding statutes. Thirty-three states reported to the Commission that funding of NG911 programs is permitted under their funding statutes, with sixteen of these states reporting the actual allocation of 911 funds for NG911 services in 2011. Three states indicated that their funding mechanisms do not permit the allocation of 911 funds to NG911 programs”.

90. *See, e.g.*, Service Charge for 911 Service, N.C. GEN. STAT. at § 62A-43 (2010) (providing that the NC 911 Board collects funds and distributes to local governments operating PSAPs); Telecommunications Service Excise Tax, ARIZ. REV. STAT. ANN. § 42-5252 (1)–(3) (2013) (providing that the state collects tax and distributes to local governments); MO. REV. STAT. § 190.305 (2013) (providing that municipal or county governments levy and collect a tax tariff local service rate or access line); KY. REV. STAT. ANN. § 65.760 (3)-(5) (2013) (providing that municipal or county governments may levy and collect a special tax on telephone lines). Other states use various 911 and E911 legislative schemes to collect and distribute or to delegate to county and municipal governments to collect 911 funds for the purpose of providing E911 services. FCC Fee Collection 4th Report, *supra* note 14, at 6.
91. N.C. GEN. STAT. at § 62A-46(e)(2) (2010) (discussing service charges for 911 services).
92. 911 Funds Committee Report, *supra* note 28, at 2.
93. NC E911 Funding Study Final Report, *supra* note 25, at 2.
94. 911 Funds Committee Report, *supra* note 28, at 8.
95. N.C. GEN. STAT. §§ 62A-40-53 (2010) (establishing a 911 board to manage and distribute 911 funds).

enacted E911 funding schemes to collect 911 funds or permit local governments to collect 911 funds to operate PSAPs.⁹⁶ Thus, the federal-state NG911 funding arrangement should continue to allow states to collect 911 funds and to adopt NG911 funding policies consistent with federal objectives.

C. Nature of Judicial Role to Decide Federal Mechanisms

The public financing of state NG911 services demands a flexible federal-state NG911 funding arrangement that shares federal regulatory power to collect and use 911 funds to implement state NG911 systems, acquire access to an IP-enabled communications network, and phase out state E911 systems. This sharing of federal regulatory power can raise statutory, regulatory, and other issues, and may require federal courts to address those issues affecting the federal-state NG911 funding arrangement.⁹⁷ For example, the implementation of E911 services raised a legal issue regarding the authority of the FCC to deny cost recovery to telecommunications carriers and other service providers.⁹⁸ A federal court was called upon to decide this issue.⁹⁹ The federal courts must interpret statutes and review administrative regulations and agency orders to determine the nature of the regulatory power that states may share under the federal-state NG911 funding arrangement.

The federal-state NG911 funding arrangement may be similar to the federal-state E911 funding arrangement and raise policy concerns and legal issues regarding service provider costs and funding. The E911 arrangement initially included a federal cost recovery requirement that was later withdrawn. Telecommunications carriers or service providers had to depend on voluntary state cost-recovery programs to recover the cost of providing communications services to PSAPs that requested location and number identification services to provide E911 services.¹⁰⁰ In *U.S. Cellular*

96. See, e.g., FCC Fee Collection 4th Report, *supra* note 14, at 6 (referring to a table of state estimates of collected 911/E911 funds for 2011); FCC Fee Collection 3rd Report, *supra* note 32, at 4 (stating that the “Bureau received information from 47 states and the District of Columbia”).

97. See Weiser – Federal Common Law, *supra* note 16, at 1726 (stating that “the emergence of cooperative federalism will test the federal courts’ ability to respect congressional and agency decisions, as opposed to interposing a policy judgment in favor of a unitary federal regime.”).

98. See *supra* Part II.A (discussing the effects of the federal-state NG911 funding arrangement on the recovery of costs by the telecommunications carriers developing and acquiring to new technologies to provide NG911 services).

99. See *U.S. Cellular Corp. v. FCC*, 254 F.3d 78 (D.C. Cir. 2001) (resolving the issue of whether the FCC could deny the cost of recovery to telecommunication carriers); *infra* Part IV.C and accompanying notes (explaining the federal court’s role in deciding the validity of federal-state E911 funding arrangement under FCC regulations and orders).

100. See E-911 FCC Second Memorandum and Order, 14 F.C.C. Rcd. 20850, ¶ 42 (Dec. 8, 1999) (finding that carrier cost recovery could become an obstacle to implementation of E-911); First E-911 FCC Memorandum and Order, at 143-46

Corp. v. FCC,¹⁰¹ the telecommunications carrier challenged the FCC order denying cost recovery by arguing that the cost of implementing E911 should not be imposed on it when it did not cause the cost in the first place.¹⁰² The District of Columbia Circuit addressed the cost-causation issue and concluded that the cost of implementing E911 was imposed under a FCC order to protect public safety, and the telecommunications carriers must bear the cost so that PSAPs can implement E-911 service.¹⁰³ The court also found that the FCC obligated wireless carriers to provide ALI and ANI to PSAPs that need this information to identify persons requesting emergency assistance,¹⁰⁴ and telecommunication carriers may impose the cost on their subscribers who are beneficiaries of the information.¹⁰⁵ The FCC found that reinstating the carrier cost-recovery mechanism in place during Phase I of E911 implementation did not expedite Phase I and would serve as an obstacle to implementing Phase II.¹⁰⁶ The FCC had also found that PSAPs were governmental entities that provided a public service and were not cost causers¹⁰⁷ for the

(Dec. 23, 1997) (refusing to provide a cost recovery mechanism for carriers); *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. Rcd. 18676, 18678 (July 26, 1996) (requiring cost recovery mechanism to be in place but not requiring a specific mechanism and recognizing a negative impact on implementation of an inflexible federal mechanism).

101. See Holloway et al., *supra* note 16, at 122-24 (analyzing *U. S. Cellular Corp v. FCC* and explaining its impact on the implementation of Phase II of E911).
102. *U.S. Cellular*, 254 F.3d at 83 (stating that “Petitioners here argue that neither they nor their customers caused the E911 costs, and therefore *Comptel* prohibits the Commission from requiring them to pay for the cost of implementation.”); see Holloway et al., *supra* note 16, at 122-23 (stating that the United States Court of Appeals for the District of Columbia Circuit had established and articulated the cost causation principle in *Competitive Telecommunications Ass'n v. FCC*, 87 F.3d 522, 529 (D.C. Cir. 1996)).
103. *U.S. Cellular*, 254 F.3d at 85 (stating that “The fact remains that the Commission has imposed upon wireless carriers an obligation to implement a service in the public interest . . . it has no obligation to compensate carriers for their cost.”).
104. *Id.* at 80 (stating that the Commission “proposed requiring wireless carriers to make both ANI and ALI information available to PSAPS.”).
105. *Id.* at 84-85 (concluding that “under the Commission’s Order, it is the beneficiaries of these services who ultimately pay most if not all of the cost of wireless E911 implementation.”).
106. *Id.* at 82; See E-911 FCC Second Memorandum and Order, 14 F.C.C. Rcd. 20850, ¶ 42 (Dec. 8, 1999) (finding that “a prerequisite that there be a carrier cost recovery mechanism has not expedited the delivery of E911 service, and if anything, has become and will continue to be an impediment to the implementation of E911 service.”).
107. *U.S. Cellular*, 254 F.3d at 85. In *U.S. Cellular*, the District of Columbia Circuit explains that Commission cannot set a rate differential that was not caused by the carriers. In *Comptel*, the District of Columbia Circuit had “held that when the Commission sets rates, it “must . . . specifically justify any rate differential that

implementation of E911 services.¹⁰⁸ The District of Columbia Circuit held the FCC had a sufficient rationale not to reinstate the cost-recovery mechanism to implement Phase II of E-911.¹⁰⁹ Thus, the federal-state NG911 funding arrangement may share regulatory power with state policy-makers and regulators, but the federal courts may eventually decide whether the federal-state NG911 funding arrangement may impose costs and burdens on telecommunications carriers and other service providers under federal law.

Other issues may arise from the design of a federal-state E911 funding arrangement that could require courts and federal agencies to adjudicate issues affecting the implementation of NG911 services. The states' exercise of federal regulatory power to use limited state 911 and federal grant funds must be subject to closer scrutiny, which could lead to forceful mandates and conditions on the federal-state E911 funding arrangement in existence for a number of years. One instance leading to a mandate could be an exercise of federal regulatory power to unduly maintain an outdated circuit-switched (non IP-based) communication infrastructure that allows telecommunications carriers to recover the cost of using a less effective communications infrastructure to provide E911 services.¹¹⁰ Although the federal government provided few 911 funds to implement state E911 systems, the FCC mandated telecommunications carriers and other service providers to provide communications services to PSAPs to implement E911 services.¹¹¹ Congress or the FCC may take the same or a similar approach to incrementally expand NG911 services, beginning with telecommunication carriers and other service providers voluntarily agreeing to provide NG911 text-messaging services.¹¹² But NG911 services must eventually include telematics applications, videos, photographs, data, and other services.¹¹³ As a public policy concern,

does not reflect cost.” *Competitive Telecommunications Association v. FCC*, 87 F.3d 522, 529 (D.C. Cir. 1996) (“*Comptel*”). The District of Columbia Circuit concluded that “the attempt to recover costs from [long distance carriers] that did not cause those costs to be incurred would impart the wrong incentives” *Comptel*, 87 F.3d at 530-31

108. *U.S. Cellular*, 254 F.3d at 84 (stating that “on no plausible theory are PSAPs the cost causers.”).
109. *Id.* at 87.
110. *See FCC – Legal and Regulatory Framework*, *supra* note 1, at 36 (stating that “[t]hirty-three states reported to the Commission that funding of NG911 programs is permitted under their funding statutes, with sixteen of these states reporting the actual allocation of 911 funds for NG911 services in 2011”).
111. *See* 47 C.F.R. § 20.18(j) (2010).
112. *Id.* at 10 (Verizon is one such provider that voluntarily provides NG911 services).
113. *See FCC – Legal and Regulatory Framework*, *supra* note 1, at 10 (calling “for the Commission to initiate rulemaking procedures on NG911 location accuracy and enabling the public to transmit emergency communications to PSAPs via text, data, and video in addition to voice.”).

NG911 services may suffer the same fate as the implementation of E911 services that were delayed by a lack of 911 funding by state and local governments,¹¹⁴ and by telecommunications carriers that could not provide communications services to PSAPs in a timely manner.¹¹⁵ The federal courts must interpret federal communications law to avoid grossly undermining the nature of cooperative federal-state NG911 funding arrangements that permit states to design NG911 funding schemes but recognize federal intervention to ensure timely and efficient implementation of federal NG911 objectives.

IV. POLICIES TO MAINTAIN A COOPERATIVE FEDERAL-STATE APPROACH

Recent federal legislation strongly indicates that Congress may want to modify the federal-state E911 funding arrangement, but only to ensure that states implement NG911 systems using timely and cost-effective means that continue to share federal regulatory power. The most recent federal legislation indicates that Congress wants federal agencies to lay the groundwork and rethink the current elements of federal-state 911 and E911 funding arrangement.¹¹⁶ Still, the current NG911 legislation continues the basic nature of the federal-state E911 funding arrangement but pushes states firmly toward implementing NG911 services by authorizing more NG911 and network infrastructural funds and seeks more information on NG911 costs, expenses, and funding mechanism.

A. *Federal Funds of the Federal-State NG911 Funding Arrangement*

The Middle Class Tax Relief and Job Creation Act of 2012¹¹⁷ (“Act”) authorizes and delegates regulatory power to federal agencies to establish a “national, interoperable public safety broadband network.”¹¹⁸ The Act authorizes and appropriates funds or proceeds from a federal spectrum sale¹¹⁹ to establish and implement a national broadband network.¹²⁰ The

114. See Dale N. Hatfield, A REPORT ON TECHNICAL AND OPERATIONAL ISSUES IMPACTING THE PROVISION OF WIRELESS ENHANCED 911 SERVICES ii-iii (Oct. 2002), available at <http://fjallfoss.fcc.gov/ecfs/document/view?id=6513296239> (discussing the results of a FCC sponsored study of the implementation of E911).

115. *Id.* at 8.

116. See *infra* Part V.B and accompanying notes (examining reporting requirements imposed on federal agencies to provide more information to Congress on the legal and regulatory framework and cost specifications).

117. Middle Class Tax Relief and Job Creation Act of 2012, Pub. L. No. 112-96, 127 Stat. 156 (2012) (codified in multiple sections of the United States Code)..

118. *Id.* § 6202(a) (to be codified at 14 U.S.C. § 1421 and stating that “[t]he First Responder Network Authority shall ensure the establishment of a nationwide, interoperable public safety broadband network.”).

119. *Id.* § 6401(c)(4) (to be codified at 47 U.S.C. § 1451).

120. *Id.* § 6413(a)(2) (to be codified at 47 U.S.C. § 1451).

Act established a grant program “to assist state . . . and [other] jurisdictions . . . to utilize and integrate the infrastructure, equipment, and other architecture associated with the nationwide public safety broadband network.”¹²¹ The Act includes a specific NG911 title that is referred to as the Next Generation 9-1-1 Advancement Act of 2012 (“NG911 Advancement Act”).¹²² The NG911 Advancement Act appropriates funds from the federal spectrum sale to the states to fund a grant program to implement NG911 services.¹²³ It also requires federal regulators to study and recommend conditions to establish a federal NG911 funding mechanism.¹²⁴ The NG911 Advancement Act continues the basic nature of the federal-state E911 funding arrangement that pushes states toward implementing NG911 services, though more funds are still needed to ensure full NG911 services.

The federal-state NG911 funding arrangement must include a sustainable source of 911 funds to acquire and thereafter continue access to an IP-enabled communications network so that PSAPs can eventually provide NG911 services. Congress and state legislatures must provide funds to make an IP-enabled public safety network accessible to municipal, county, and regional governments operating PSAPs (emergency 911 call centers). Local PSAPs must connect to an IP-based communications network to provide NG911 services.¹²⁵ The Act requires the FCC to reallocate “700 MHz D block spectrum for use by public safety entities”¹²⁶ States may choose either to participate in a nationwide broadband network or to establish a state radio access network (RAN).¹²⁷ If they choose to establish a RAN, these states must submit a state plan to the FCC to construct, maintain, and operate a RAN.¹²⁸ Moreover, the Act requires First Responder Network Authority (“FirstNet”),¹²⁹ a federal agency, to consult with state governments on the distribution of federal funds to

121. *Id.* § 6302(a) (to be codified at 47 U.S.C. § 1442).

122. *Id.* § 6503.

123. *Id.* § 6503(b)

124. *Id.* §§ 6504, 6505, 6508, 6509.

125. *Id.* § 6505(e)(5) (stating that “‘Next Generation 9–1–1 services’ means an IP-based system comprised of hardware, software, data, and operational policies and procedures that provides broadband service to public safety answering points or other first responder entities.”).

126. *Id.* § 6001(2) (defining ‘700 MHz D block as “the portion of the electromagnetic spectrum between the frequencies from 758 megahertz to 763 megahertz and between the frequencies from 788 megahertz to 793 megahertz.”).

127. *Id.* § 6302(e)(2).

128. 47 U.S.C.A. § 1442(e)(3)(A) (2012).

129. *Id.* § 1424(a) (“There is established as an independent authority within the NTIA [National Telecommunications and Information Administration], the ‘First Responder Network Authority’ or ‘FirstNet.’”).

construct the national broad network and perform other duties.¹³⁰ Finally, the Act establishes a State and Local Implementation Fund¹³¹ that provides federal broadband network implementation grants to support states implementing a broadband network.¹³² These implementation grants assist state governments “to utilize and integrate the infrastructure, equipment, and other architecture associated with the nationwide public safety broadband network.”¹³³ The Act supports a cooperative federal-state arrangement by providing funds to assist states to establish a broadband or compatible communications network and requiring federal agencies to work with states to establish a state broadband or IP network. However, states will need a sustainable source of funds to continue PSAP connectivity or access to an interoperable, IP-enabled emergency services network.

B. Mandates and Conditions Affecting NG911 Federal-State Relations

Congress currently maintains a cooperative federal-state NG911 funding arrangement to provide federal grant funds and allow states to govern 911 funds distributed to local governments providing E911 services. Congress does not impose stringent operational or technical mandates on the collection of 911 fees and the use of federal grant funds.¹³⁴ The NG911 Advancement Act establishes a matching grant program to support eligible entities.¹³⁵ This program supports entities that adopt and implement NG911 services, migrate to an IP-enabled infrastructure, and train public safety personnel and other individuals.¹³⁶ The matching grant program mandates that eligible entities certify that, among others, they have performed particular obligations, like coordinating the grant application programs among PSAPs.¹³⁷ The NG911 Advancement Act prohibits eligible entities from diverting, designating, or eliminating state or local 911 taxes, fees or other funds.¹³⁸ Congress uses the NG911

130. *Id.* § 1426(c)(2)(A) (stating that “In developing requests for proposals and otherwise carrying out its responsibilities under this Act, the First Responder Network Authority shall consult with regional, State, tribal, and local jurisdictions regarding the distribution and expenditure of any amounts required to carry out the policies established under paragraph (1)[Establishment of Network Policies] . . .”).

131. *Id.* § 1441(a).

132. *Id.* § 1442(a)-(b).

133. *Id.* § 1442(a).

134. *See id.* § 942(e)(3)(A)-(C) (identifying requirements and conditions imposed on the eligibility for or receipt of federal NG911 grant funds).

135. *Id.*

136. *Id.* § 942(b)(1) (providing authority for the authorization of grants to eligible entities).

137. *Id.* § 942(b)(3).

138. *Id.* § 942 (b)(2)-(3).

Advancement Act to provide federal funds to support the implementation of NG911 services but imposes few forceful conditions that do not undermine the nature of the federal-state E911 funding arrangement.

The NG911 Advancement Act includes agency analytical and study mandates that aid federal policy-makers to rethink the federal-state NG911 arrangement by examining the likely NG911 regulatory framework, performance standards, and costs. First, the Advancement Act required the Government Accounting Office (“GAO”) to examine the nature and use of “taxes, fees, or other charges that were imposed by [s]tates or political subdivisions of [s]tates to fund 911 and E911 services.”¹³⁹ The Comptroller General submits to the House and Senate Committees the findings, conclusions, and recommendations.¹⁴⁰ Next, the NG911 Advancement Act mandates that the 9-1-1 Implementation Office (“Office”) consults with other federal agencies to prepare a NG911 cost study report that analyzes the detailed costs of NG911 service requirements and specifications.¹⁴¹ The Office prepares and submits the cost study report to Congress.¹⁴² Congress then may use this report to consider creating a national NG911 funding mechanism to implement NG911 services.¹⁴³ The report covers the costs of PSAPs and other NG911 service providers, the state of NG911 services, a cost study of different delivery platforms, and an assessment of NG911 architecture.¹⁴⁴ Finally, the NG911 Advancement Act requires the FCC and other agencies to submit to Congress a report containing recommendations on the proposed legal and statutory framework for NG911 services.¹⁴⁵ The NG911 Advancement Act requires federal agencies to consult on an examination of NG911 funding needs and concerns that affect the nature of the current federal-state E911 funding arrangement but do not indicate a substantial change to the cooperative nature of the federal-state E911 funding arrangement.

C. Recognizing and Addressing Funding Concerns of Cooperative Federalism

A cooperative federal-state NG911 funding arrangement requires state and federal governments to know state and local NG911 costs and to share

139. Middle Class Tax Relief and Job Creation Act of 2012, Pub. L. No 112-96, § 6505(a)(1), 127 Stat. 156, 242 (2012).

140. *Id.* § 6505.

141. *Id.* § 6508(a).

142. *Id.*

143. *Id.* § 6508(c).

144. *Id.* (“The report required under sub-section (a) shall include the following: (1) How costs would be broken out geographically and allocated among public safety answering points, broadband service providers, and third-party providers of Next Generation 9–1–1 services . . .”).

145. *Id.* § 6509. *See* FCC – Legal and Regulatory Framework, *supra* note 1, at 1 (describing the FCC’s report on the legal and regulatory framework for NG911 services).

federal regulatory power to collect and manage 911 funds. These expenses include gaining access to an IP-enabled infrastructure, providing NG911 services, and phasing out E911 services. The federal-state NG911 funding arrangement must cover the costs and expenses of planning, acquisitions, implementation, operations, and maintenance of state NG911 systems.¹⁴⁶ The total costs are unique to each state and require state funding and cost studies of NG911 infrastructure, facilities, administration, and operations.¹⁴⁷ The FCC has conducted studies to address the cost and 911 funds needed to provide NG911 services. The FCC conducted a cost study to determine the nationwide cost of “network connectivity and call routing between . . . [PSAPs] and commercial service providers,” but the FCC cost study did “not address other costs that PSAPs or carriers may incur in migrating to [a] NG911 [system].”¹⁴⁸ The FCC cost study focused primarily on communication network infrastructural costs that network service providers and PSAPs incur.¹⁴⁹

A more recent FCC study examined the legal and regulatory framework that included 911 funds to implement NG911 services. Generally, the FCC issued a report to federal policy-makers on the FCC’s findings, conclusions, and recommendations on the study or examination of the federal NG911 legal and regulatory framework.¹⁵⁰ The FCC report addressed specific NG911 funding concerns that included conditions and mandates to urge the timely implementation of NG911 services.¹⁵¹ One can use this report to determine the extent of the revisions to the federal-state E911 funding arrangement, and, in fact, the report urges federal policy-makers to consider new sources of 911 funds where personal access technologies, vehicles relying on telematics,¹⁵² and business and personal

146. NATIONAL E9-1-1 IMPLEMENTATION COORDINATION OFFICE, *A National Plan for Migrating to IP-Enabled 9-1-1 Systems*, 1-1, 1-2 (Sept. 2009), http://www.e911ico.gov/NationalNG911MigrationPlan_sept2009.pdf.

147. Pat Amodio, et al., WHITE PAPER: A NEXT GENERATION 911 COST STUDY: A BASIS FOR PUBLIC FUNDING ESSENTIAL TO BRINGING A NATIONWIDE NEXT GENERATION 911 NETWORK TO AMERICA’S COMMUNICATIONS USERS AND FIRST RESPONDERS 3 (2011), <http://www.fcc.gov/document/pshsb-next-generation-911-cost-study>.

148. *Id.*

149. *See id.* (“Emergency calls are delivered to an Emergency Services Internet Protocol Network (ESInet), which can receive calls from a variety of different networks and types of networks. The ESInet then forwards the call to the appropriate PSAP . . .”).

150. *See* FCC – Legal and Regulatory Framework, *supra* note 1, at 4 (FCC sets forth its recommendations and their grounds to establish a regulatory framework for NG911.).

151. *See id.* at 33-36 (giving findings and making conclusions and recommendations to update state and federal funding mechanisms).

152. *See* NENA GLOSSARY, *supra* note 5, at 122 (defining ‘Telematics’ as “[t]he mechanisms that support the acquisition of telemetry data and action based upon it. ‘Telemetry is a technology that allows the remote measurement and reporting of information of interest to a system designer or operator; e.g., doctor monitoring pacemaker functionality.’”); Middle Class Tax Relief and Job Creation Act of

security systems can now send requests for emergency assistance.¹⁵³ Emphatically, the report provides that state and federal policy-makers can no longer ask wireline telephones and mobile cellular telephones to absorb the costs of NG911 services.¹⁵⁴ The examination of federal-state E911 funding arrangements does not justify the need to substantially alter the cooperative nature of the federal-state E911 funding arrangement. NG911 funding mandates, which include minimum performance and technical standards, should only be added to establish a minimum floor of available and accessible NG911 services for all American citizens.

CONCLUSION

Federal and state governments need to share the federal regulatory power that will be used to collect, use, and manage 911 funds and use grant funds. They also need a cooperative federal-state NG911 funding arrangement to share federal regulatory power to finance the implementation of NG911 services. On one hand, the federal government must establish a minimum floor of state NG911 services and impose minimum technical and performance standards. The NG911 arrangement must provide enough 911 funds to adequately support municipal and county PSAPs that must gain access to an IP-enabled communications network. These technical and performance standards will impose new mandates and conditions, but federal policy-makers and regulators must take care not burden states with unfunded liabilities, unusual technical obligations, and burdensome administrative guidelines. On the other hand, state policy-makers and regulators must establish state NG911 legislative funding schemes and impose PSAP technical, performance, maintenance and other programs. State regulators must use federal grant funds to support PSAPs to efficiently terminate E911 services and implement NG911 services with an IP-enabled communications network. State NG911 funding schemes must fit within the cooperative a federal-state NG911 funding arrangement to further state NG911, public safety, and other objectives. Therefore, federal and state governments must share federal regulatory power so that states can collect and manage NG911 funds and use federal grant funds to further federal and state NG911, communications, and public safety objectives.

2012, Pub. L. No. 112-96, § 6503(e)(4), 127 Stat. 156, 241 (2012) (stating that Emergency calls include “nonhuman-initiated automatic event alerts, such as alarms, telematics, or sensor data, which may also include real-time voice, text, or video communications.”).

153. FCC – Legal and Regulatory Framework, *supra* note 1, at 10; 47 U.S.C.A § 942(e)(4) (2012).

154. Middle Class Tax Relief and Job Creation Act of 2012, Pub. L. No. 112-96, § 6509, 127 Stat. 156, 244-45 (2012).