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February 6, 1998

**VIA AIRBORNE EXPRESS**

Ms. Blanca S. Bayo, Director  
Division of Records & Reporting  
Florida Public Service Commission  
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**Re: Docket Number: 97-1317-TP  
Order Number: PSC-98-0121-PCO-TP  
Issued: June 22, 1998  
Our Client: Nationwide Communications of Michigan, Inc.**

Dear Ms. Bayo:

Enclosed please find Nationwide Communications of Michigan, Inc.'s Response to the Order to Show Cause and Notice of Proposed Agency Action issued under the above-captioned matter. Please note that the response does contain a demand for a formal hearing.

ACK \_\_\_\_\_ Thank you for your anticipated cooperation in this regard.

AFA \_\_\_\_\_

APP \_\_\_\_\_

GAF \_\_\_\_\_

CMU   I  

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LEG   I  

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LIN \_\_\_\_\_ Enclosures

OPC   cc   Mr. Richard Makens (w/enclosures)

RCH \_\_\_\_\_ Jeffrey A. Ishbia, Esq. (w/enclosures)


SEC   I  

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WAS \_\_\_\_\_  
OTH   ADM/Lake  

Very truly yours,

ISHBIA & GAGLEARD, P.C.



Philip Cwagenberg

DOCUMENT NUMBER-DATE

02029 FEB-98

FPSC-RECORDS/REPORTING

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Initiation of show cause proceedings against Nationwide Communications of Michigan, Inc., for apparent violation of Rule 25-24.630, F.A.C., Rate and Billing Requirements, Rule 25-4.043, F.A.C., Response to Commission Staff Inquiries, and Rule 25-4.0161, F.A.C., Regulatory Assessment Fees

Docket No. 971317-TP  
Order No. PSC-98-0121-PCO-TP  
Issued: January 22, 1998

**RESPONSE OF NATIONWIDE COMMUNICATIONS OF MICHIGAN, INC.  
TO THE ORDER TO SHOW CAUSE AND NOTICE OF PROPOSED  
AGENCY ACTION ORDER DIRECTING CERTIFICATED  
INTEREXCHANGE TELECOMMUNICATIONS PROVIDERS TO  
DISCONTINUE SERVICE**

NOW COMES RESPONDENT Nationwide Communications of Michigan, Inc. (hereafter referred to as "NCI") by and through its attorneys and counsel, ISHBIA & GAGLEARD, P.C. and in response to the *Order to Show Cause and Notice of Proposed Agency Action Order Directing Certificated Interexchange Telecommunications Providers to Discontinue Service* (hereafter the "Order") provides as follows:

**FORMAL HEARING**

Nationwide Communications of Michigan, Inc. hereby requests a formal hearing on this Order to Show Cause.

**ALLEGATIONS AGAINST CERTIFICATES 3549 AND 3950**

Within Certificate 3549 NCI is charged with violations of Rule 25-4.0161 (requiring the payment of regulatory assessment fees) Rule 25-24.630 (charging end users no more than the Commission approved end user rate for intrastate calls) and Rule 25-4.043 (requiring timely responses to staff inquiries). The Order provides that

the proposed fines for the asserted rules violations are as follows:

Rule 25-4.0161	\$ 500.00
Rule 25-24.630	\$ 250.00
Rule 25-4.043	\$1,500.00

Within Certificate 3950 NCI is charged with violation of Rule 25-4.0161 (requiring the payment of regulatory assessment fees). The Order provides that a proposed fine of \$500.00 be assessed for this asserted violation. As will be shown NCI contends that the proposed actions and penalties are not justified for reasons that include, but are not limited to: (1) that all regulatory fees, inclusive of interest and penalties have been paid; (2) that any purported actions by NCI that may have resulted in charging end users more than Commission approved end user rates, if any occurred or existed, were unintentional, accidental, and not on account of any plan or design to violate Commission rules; (3) that any purported actions by NCI that may have resulted in charging end users more than Commission approved end user rates, if any occurred or existed, have been investigated and resolved; (4) that any purported actions by NCI where it is asserted that staff inquiries were not responded to, if any at all, resulted from simple misunderstandings, rather than any design or plan to ignore staff, or be non-responsive.

It is the contention of the Respondent that all reasonable efforts have been taken by it to comply with the rules of the Commission and respond to Staff inquiries, The sanctions proposed by Staff are not proportional to the asserted violations, and would be punitive in nature.

## RULE 25-4.0161

Rule 25-4.0161, F.A.C., in pertinent part, provides as follows:

### **“25-4.0161 Regulatory Assessment Fees; Telecommunications Companies.**

(1) As applicable and as provided in s. 350.113, F.S. s. 364.336, F.S., and s. 364.337, F.S., each company shall remit a fee based upon its gross operating revenue as provided below. This fee shall be referred to as a regulatory assessment fee, and each company shall pay a regulatory assessment fee in the amount of 0.0015 of its gross operating revenues derived from intrastate business. For the purpose of determining this fee, each interexchange telecommunications company and each pay telephone company shall deduct from gross operating revenues amounts paid for use of the local network to a telecommunications company providing local service. Regardless of the gross operating revenue of a company, a minimum annual regulatory assessment fee of \$50 shall be imposed.

(2) Telecommunications companies that owed gross regulatory assessment fees of \$10,000 or more for the preceding calendar year shall pay the fee and remit the appropriate form twice a year. The regulatory assessment fee and appropriate form shall be filed no later than July 30 for the preceding period of January 1 through June 30, and no later than January 30 of the following year for the period of July 1 through December 31. Telecommunication companies that owed gross regulatory assessment fees of less than \$10,000 for the preceding calendar year shall pay the fee and remit the appropriate form once a year. The regulatory assessment fee and appropriate form shall be filed no later than January 30 of the subsequent year for the current calendar year operations.

(3) If the due date falls on a Saturday, Sunday, or legal holiday, the due date is extended to the next business day. If the fees are sent by registered mail, the date of the registration is the United States Postal Service's postmark date. If the fees are sent by certified mail and the receipt is postmarked by a postal employee, the date on the receipt is the United States Postal Service's postmark date. The postmarked certified mail receipt is evidence that the fees were delivered. Regulatory assessment fees are considered paid on the date they are post marked by the United States Postal Service or received and logged in by the Commission's Division of Administration in Tallahassee. Fees are considered timely paid if properly addressed, with sufficient postage, and postmarked no

later than the due date.

(4) Commission Form PSC/CMU 25 (07/96), entitled "Communication Company Regulatory Assessment Fee Return," applicable to local exchange telecommunications companies; Form PSC/CMU 26 (07/96), entitled "Pay Telephone Service Provider Regulatory Assessment Fee Return"; Form PSC/CMU 34 (07/96), entitled "Shared Tenant Service Provider Regulatory Assessment Fee Return"; Form PSC/CMU 153 (07/96), entitled "Interexchange Company Regulatory Assessment Fee Return"; and Form PSC/CMU 1 (07/96), entitled "Alternative Access Vendor Regulatory Assessment Fee Return"; and Form PSC/CMU 7 (07/96), entitled "Alternative Local Exchange Company Regulatory Assessment Fee Return" are incorporated into this rule by reference and may be obtained from the Commission's Division of Administration.

(5) Each telecommunications company shall have up to and including the due date in which to submit the applicable form and: (a) Remit the total amount of its fee or (b) Remit an amount which the company estimates is its full fee. (6) Where the company remits less than its full fee, the remainder of the full fee shall be due on or before the 30th day from the due date and shall, where the amount remitted was less than 90 percent of the total regulatory assessment fee, include interest as provided by subsection (8)(b) of this rule.

(7) A company may request from the Division of Administration a 30-day extension of its due date for payment of regulatory assessment fees or for filing its return form. (a) The request for extension must be written and accompanied by a statement of good cause. (b) The request for extension must be received by the Division of Administration at least two weeks before the due date. (c) Where a telecommunications company receives an extension of its due date pursuant to this rule, the telecommunications company shall remit a charge in addition to the regulatory assessment fees, as set out in s. 350.113(5), F.S. (d) The return forms may be obtained from the Commission's Division of Administration. The failure of a telecommunications company to receive a return form shall not excuse the company from its obligation to timely remit the regulatory assessment fees.

(8) The delinquency of any amount due to the Commission from the telecommunications company pursuant to the provisions of s. 350.113, F.S., and this rule, begins with the first calendar day after any date established as the due date either by operation of this rule or by an extension pursuant to this rule. (a) A penalty, as set out in s. 350.113, F.S., shall apply to any such delinquent amounts. (b) Interest at the rate of 12 percent per annum shall apply to any such delinquent amounts."

As alleged by Staff, applicable regulatory fees for 1996 revenues were not paid by NCI on, or before, January 30, 1997, due to a simple oversight. NCI's was not consciously aware of Florida's regulatory fee requirements; payments were not made as prescribed in the rules.

This payment oversight was brought to NCI's conscious attention with its receipt of a Case Assignment and Scheduling Record ("CASR") in November, 1997. Thereafter, working with Staff, including obtaining forms necessary to provide relevant information, NCI has now paid its regulatory fees for 1996. Further, given its awareness of the regulatory fees, NCI timely paid its regulatory fees for 1997.

The regulatory fees paid by NCI, for 1996 and 1997, are as follows:

	<u>1996</u>	<u>1997</u>
<b>Pay Telephone Service Provider Regulatory Assessment Fee</b>		
Fee	\$ 50.00 <sup>1</sup>	\$ 52.88
Penalty	12.50	
<u>Interest</u>	<u>7.50</u>	<u>          </u>
Total	\$ 70.00	\$ 52.88
<b>Interexchange Company Regulatory Assessment Fee</b>		
Fee	\$352.25	\$112.47
Penalty	88.06	
<u>Interest</u>	<u>128.44</u>	<u>          </u>
Total	\$568.75	\$112.47

At this juncture, with the payment of all outstanding fees, inclusive of interest and penalties, there is nothing more to accomplish by assessing NCI the \$500.00 penalty

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<sup>1</sup> NCI's actual revenues required it to pay an amount less than the minimum fee of \$50.00 imposed by the rules.

proposed by Staff. Penalties have already been paid; the account has been brought current.

**Rule 25-24.630**

Rule 25-24.630, F.A.C., provides in pertinent part, as follows:

“25-24.630 Rate and Billing Requirements.

(1) An operator services provider shall:

(a) charge and bill end-users no more than the Commission-approved rate for intrastate calls;

(b) have current rate information readily available and provide this information orally to end-users upon request prior to connection;

(c) require that its certificated name or the name of its certificated billing agent appear on any telecommunications company's bill for regulated charges;

(d) require all calls are to be individually identified on each bill from a telecommunications company to an end-user bill, including the date and start time of the call, call duration, origin and destination (by city or exchange name and telephone number), and type of call; and

(e) provide a toll-free number for customer inquiries on the bill and maintain procedures adequate to allow the company to promptly receive and respond to such inquiries; and

(f) charge only for conversation time as rounded according to company tariffs.

(2) An operator services provider shall not:

(a) bill or charge for uncompleted calls in areas where answer supervision is available or knowingly bill or charge for uncompleted calls in areas where answer supervision is not available;

(b) bill for any collect call that has not been affirmatively accepted by a person receiving the call regardless of whether the call was

processed by a live or automated operator;

(c) bill for calls in increments greater than one minute;

(d) bill or collect a surcharge levied by any entity, either directly or through its billing agent, except Commission-approved charges for pay telephone providers.

Specific Authority: 350.127(2), F.S. Law Implemented: 364.01, 364.3376, F.S. History: New 9/6/93.”

The origin of this alleged violation was a consumer complaint made to the Florida Public Service Commission from an end user of a hotel/motel telephone. The user, apparently, was billed \$13.78 for a 9 minute call, or the average of \$1.53 per minute.

As it has been explained to Staff, following investigation of the complaint it appears that the cause of the amount charged was a computer virus, and/or corrupted data file in NCI's database. Once the problem was identified the situation was resolved on an expedient basis.

The action of charging an end user in excess of Commission approved rates was an unintentional, isolated, action. At no time did NCI plan to assess rates in excess of Commission approved rates. At no time did NCI intend to violate any rules promulgated by the Commission, or enacted by the Florida legislature.

As the problem was an isolated incident, to NCI's knowledge related to a single rate file, and that the problem was promptly identified and resolved, there should be no basis to sanction NCI. Any sanction imposed for this purported violation of Rule 25-24.630 would send the following message -- NCI you are being sanctioned because you



did not prevent the random, unanticipatable, occurrence of a computer virus and/or corrupted data file. NCI would be sanctioned on the basis of *strict liability*, when there is no statutory or regulatory basis to do so. The purported sanction is excessive and unwarranted.

**Rule 25-4.043**

Finally, Staff recommends that NCI be sanctioned \$1,500.00 for a purported violation of Rule 25-4.043, F.A.C. In pertinent part, that rule provides as follows:

“25-4.043 Response to Commission Staff Inquiries.

The necessary replies to inquiries propounded by the Commission's staff concerning service or other complaints received by the Commission shall be furnished in writing within fifteen (15) days from the date of the Commission inquiry. Specific Authority: 364.20, F.S. Law Implemented: 364.28, F.S. History: New 12/1/68, formerly 25-4.43.”

It is the recommendation of Staff that NCI be sanctioned in the amount of \$1,500.00 for a purported violation of this rule. NCI responds that, both subjectively and objectively, it responded to Staff's inquiry, and the imposition of the penalty proposed by Staff is unjustified.

At issue is Staff's inquiry into the scope of the purported over-charging. The inquiry made by Staff addressed the scope of the purported problem. The inquiry was reasonably interpreted by NCI to ask about the breadth of the problem on a system-wide basis. NCI's response, because of the number of telephones it had under ownership and management, and due to the nature of the problem, a computer virus and/or corrupted data file, it was logistically impossible to respond to Staff's inquiry.

However, subsequent to the initial exchange between Staff and NCI's

representative, NCI has come to learn that Staff's inquiry concerned the scope of the problem with the specific telephone number at issue, and not with NCI's entire network. To that end, NCI has prepared and provided to Staff a history of intrastate telephone traffic on the telephone at issue. As NCI, subjectively and objectively, understands Staff's inquiry, all information requested to date has been provided.

In reviewing the actions of NCI the Commission must find that it, subjectively and objectively, did respond to Staff's inquiry, and that no violation of Rule 25-4.043 occurred. To find any other way places the entire burden of interpreting the scope of Staff's inquiry on the service provider, and, unfairly, relieving Staff of all obligations of providing clear instructions.

For all appearances, this purported violation of Rule 24-4.043 amounts to nothing more than a misunderstanding. Clearly there is insufficient scienter, or bad conduct, present to support the imposition of sanctions.

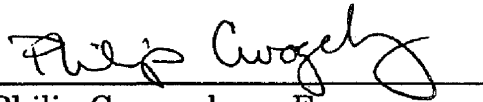
### **Conclusion**

At all times relevant herein, NCI comported itself as an appropriate member of the telecommunications industry. At no time did NCI intend any disrespect for the Florida Public Service Commission, its Staff, or the rules promulgated. Accordingly,

NCI would ask this Commission to appropriately evaluate its conduct in light of the explanations provided above, and dismiss all charges and waive all sanctions proposed.

Respectfully submitted,

Ishbia & Gagleard, P.C.



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Dated: February 6, 1998

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