

the extent that current leases, licenses and other arrangements respecting goods and services used by KCPL and one or more associate companies cannot be reasonably transferred to GPES, or in situations in which KCPL is the predominant user of such goods and services, or in the event Missouri Public Service Commission approval of the proposed asset transfer is not obtained before the establishment of GPES, KCPL may make available a portion of the associated goods and services to associate companies through leases, licenses or similar arrangements. All such goods and services will be provided to associate companies in accordance with rules 87, 90 and 91. To the extent such matters do not fall within the exception provided in rule 87(a)(3), Applicants request authorization for KCPL to engage in such activities.

KCPL may have responsibility for GPES's compliance under assigned leases, licenses, and other arrangements. In situations where KCPL makes available goods and services to associate companies under leases, licenses, or other arrangements between KCPL and third parties, KCPL may have responsibility for those associate companies' compliance with such leases, licenses, or other arrangements. To the extent such responsibility is deemed to be an extension of credit or guaranty by KCPL under section 12(b) of the Act, Applicants request authority for KCPL to incur such responsibility.

2. WCNOG

Applicants request authorization for WCNOG, as a nonutility subsidiary of KCPL, to provide services and goods to the owners of Wolf Creek Generating Station at cost under existing agreements (as attached in S.E.C. File No. 70-10064, Exhibit B-3) ("WCNOG Existing Agreements"). Applicants also request authorization for KCPL to provide goods and services to WCNOG at cost under WCNOG Existing Agreements. WCNOG, KCPL, and Kansas Gas and Electric Company (an owner of Wolf Creek Generating Station) also have entered into a service reciprocity agreement dated June 20, 1986 (as attached in S.E.C. File No. 70-10064, Exhibit B-6) ("Service Reciprocity Agreement"), providing for the recognition of pension service credits earned by employees who transfer to or from WCNOG. To the extent the Service Reciprocity Agreement may be deemed jurisdictional, Applicants request authorization for KCPL and WCNOG to continue with such agreement.

D. Request for an Exemption From At Cost

Applicants request that GPES and all other nonutility subsidiaries of GPE be authorized to enter into agreements to provide construction, goods or services to certain associate companies enumerated below at fair market prices determined without regard to cost, and request an exemption (to the extent that rule 90(d) of the Act does not apply) under section 13(b) from the cost standards of rules 90 and 91:

- A foreign utility company ("FUCO") or foreign exempt wholesale generator that derives no part of its income, directly or indirectly, from the generation, transmission or distribution of electric energy for sale within the United States;
- An exempt wholesale generator (EWG) that sells electricity at market-based rates which have been approved by the Federal Energy Regulatory Commission ("FERC"), provided that the purchaser is not KCPL;
- A "qualifying facility" ("QF") within the meaning of the Public Utility Regulatory Policies Act of 1978, as amended ("PURPA") that sells electricity exclusively (i) at rates negotiated at arms' length to one or more industrial or commercial customers purchasing the electricity for their own use and not for resale, and/or (ii) to an electric utility company at the purchaser's "avoided cost" as determined in accordance with the regulations under PURPA;
- A domestic EWG or QF that sells electricity at rates based upon its cost of service, as approved by FERC or any state public utility commission having jurisdiction, provided that the purchaser is not KCPL; or
- A rule 58 subsidiary or any other nonutility subsidiary that (i) is partially-owned, directly or indirectly, by GPE, provided that the ultimate purchaser of such goods or services is not KCPL (or any other entity that GPE may form whose activities and operations are primarily related to the provision of goods and services to KCPL), (ii) is engaged solely in the business of developing, owning, operating and/or providing services or goods to nonutility subsidiaries described in clauses (a) through (e) immediately above, or (iii) does not derive, directly or indirectly, any material part of its income from sources within the United States and is not a public utility company operating within the United States.

For the Commission, by the Division of Investment Management, pursuant to delegated authority.

Margaret H. McFarland,
Deputy Secretary.

[FR Doc. 02-27807 Filed 10-31-02; 8:45 am]

BILLING CODE 8010-01-P

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-46729; File No. S7-24-89]

Joint Industry Plan; Order Granting Partial Temporary Approval of Amendment No. 13 of the Reporting Plan for Nasdaq-Listed Securities Traded on Exchanges on an Unlisted Trading Privilege Basis, Submitted by the National Association of Securities Dealers, Inc., the Boston Stock Exchange, Inc., the Chicago Stock Exchange, Inc., the Cincinnati Stock Exchange, Inc., the Pacific Exchange, Inc., the American Stock Exchange LLC, and the Philadelphia Stock Exchange, Inc.

October 25, 2002.

I. Introduction

On May 31, 2002, the Cincinnati Stock Exchange, Inc. ("CSE") on behalf of itself and the National Association of Securities Dealers, Inc. ("NASD"), the American Stock Exchange LLC ("Amex"), the Boston Stock Exchange, Inc. ("BSE"), the Chicago Stock Exchange, Inc. ("CHX"), the Pacific Exchange, Inc. ("PCX"), and the Philadelphia Stock Exchange, Inc. ("PHLX") (hereinafter referred to collectively as "Participants"),¹ as members of the operating committee ("Operating Committee" or "Committee")² of the Plan submitted to the Securities and Exchange Commission ("SEC" or "Commission") a proposal to amend the Plan, pursuant to Rule 11Aa3-1 and Rule 11Aa3-2³ under the Securities Exchange Act of 1934 ("Act" or "Exchange Act"). The proposal represents the 13th amendment ("13th Amendment") made

¹ The CSE was elected chair of the Operating Committee for the Joint Self-Regulatory Organization Plan Governing the Collection, Consolidation and Dissemination of Quotation and Transaction Information for Nasdaq-Listed Securities Traded on Exchanges on an Unlisted Trading Privilege Basis ("Nasdaq UTP Plan" or "Plan") by the Participants.

² Among other things, the 13th Amendment proposes to add the Nasdaq Stock Market, Inc. ("Nasdaq") as a Participant. The Committee is made up of all the Participants. As discussed below, the Category 1 amendments of the 13th Amendment propose adding Nasdaq as a Participant and this approval order does not take action with respect to the Category 1 amendments.

³ 17 CFR 240.11Aa3-1 and 17 CFR 240.11Aa3-2.

to the Plan and reflects changes unanimously adopted by the Committee. Notice of the proposed 13th Amendment was published in the **Federal Register** on July 5, 2002.⁴

Through the 13th Amendment Notice, the Commission granted temporary summary effectiveness to a portion of the 13th Amendment, granted an exemption under Rule 11Aa3-2(f)⁵ from compliance with Section VI.C.1. of the Plan as required by Rule 11Aa3-2(d),⁶ and published the 13th Amendment Notice to solicit comments from interested persons. The Commission received one comment on the proposed 13th Amendment.⁷

As discussed in the 13th Amendment Notice, proposed amendments to the Plan have been segregated into four categories: (1) Category 1, "Effective Upon Nasdaq's Exchange Registration;" (2) Category 2, "Effective Upon Launch of the Internal SIP;" (3) Category 3, "Effective Upon End of Parallel Period—Elimination of the Legacy SIP;" and (4) Category 4, "Timing Not An Issue." The amendments detailed in Category 2 were granted summary effectiveness through the 13th Amendment Notice so as to allow the target launch date for the new Internal Securities Information Processor ("SIP") data feeds to be met.⁸ The summary effectiveness expires on October 26, 2002.⁹

In addition, the Commission granted partial temporary approval to the 13th Amendment only with respect to extension of the expiration date of the Plan itself. The partial temporary approval extended the expiration date of the Plan through August 19, 2003.¹⁰ As explicitly noted in the Date Extension Approval Order, the Commission was not approving the Category 1, 2, 3, or 4

amendments, but would address such amendments through separate action.

This order approves the amendments detailed in Categories 2, 3, and 4 on a pilot basis through August 19, 2003 to be coterminous with the expiration date set by the Date Extension Approval Order. In addition, this order continues the exemption under Rule 11Aa3-2(f)¹¹ from compliance with Section VI.C.1. of the Plan as required by Rule 11Aa3-2(d),¹² which exemption was granted through the 13th Amendment Notice.

This order does not approve those amendments detailed in Category 1. The Commission intends to address those amendments detailed in Category 1 through separate action when the Commission acts on the Nasdaq exchange registration application.¹³

II. Background

The Plan governs the collection, consolidation, and dissemination of quotation and transaction information for Nasdaq/National Market ("Nasdaq/NM") and Nasdaq SmallCap securities listed on Nasdaq and traded on an exchange pursuant to unlisted trading privileges ("UTP").¹⁴ The Plan provides for the collection from Plan Participants, and the consolidation and dissemination to vendors, subscribers and others, of quotation and transaction information in "eligible securities." The Plan contains various provisions concerning its operation, including: Implementation of the Plan; Manner of Collecting, Processing, Sequencing, Making Available and Disseminating Last Sale Information; Reporting Requirements (including hours of operation); Standards and Methods of Ensuring Promptness, Accuracy and Completeness of Transaction Reports; Terms and Conditions of Access;

Description of Operation of Facility Contemplated by the Plan; Method and Frequency of Processor Evaluation; Written Understandings of Agreements Relating to Interpretation of, or Participation in, the Plan; Calculation of the Best Bid and Offer ("BBO"); Dispute Resolution; and Method of Determination and Imposition, and Amount of Fees and Charges.

The Commission originally approved the Plan on a pilot basis on June 26, 1990.¹⁵ The parties did not begin trading until July 12, 1993, accordingly, the pilot period commenced on July 12, 1993. The Plan has since been in operation on an extended pilot basis.¹⁶

III. Description and Purpose of the Category 2, 3, and 4 Amendments

The complete text of the Plan, as amended, was published in the **Federal Register**.¹⁷ The following is a summary of the changes made by the 13th Amendment to the Plan by the Category 2, 3, and 4 amendments. As discussed above, only those amendments described in Categories 2, 3, and 4 are being approved on a pilot basis by this order.

Category 2 Amendments: Effective Upon Launch of the Internal SIP

1. Section III.I. of the Plan, which defines "UTP Quote Data Feed," is amended to reflect that the Processor will replace the Level 1 Service as it currently exists. In its place, the

¹⁵ See Securities Exchange Act Release No. 28146, 55 FR 27917 (July 6, 1990) ("1990 Plan Approval Order").

¹⁶ See Securities Exchange Act Release Nos. 34371 (July 13, 1994), 59 FR 37103 (July 20, 1994); 35221 (January 11, 1995), 60 FR 3886 (January 19, 1995); 36102 (August 14, 1995), 60 FR 43626 (August 22, 1995); 36226 (September 13, 1995), 60 FR 49029 (September 21, 1995); 36368 (October 13, 1995), 60 FR 54091 (October 19, 1995); 36481 (November 13, 1995), 60 FR 58119 (November 24, 1995) ("November 1995 Extension Order"); 36589 (December 13, 1995), 60 FR 65696 (December 20, 1995); 36650 (December 28, 1995), 61 FR 358 (January 4, 1996); 36934 (March 6, 1996), 61 FR 10408 (March 13, 1996); 36985 (March 18, 1996), 61 FR 12122 (March 25, 1996); 37689 (September 16, 1996), 61 FR 50058 (September 24, 1996); 37772 (October 1, 1996), 61 FR 52980 (October 9, 1996); 38457 (March 31, 1997), 62 FR 16880 (April 8, 1997); 38794 (June 30, 1997), 62 FR 36586 (July 8, 1997); 39505 (December 31, 1997), 63 FR 1515 (January 9, 1998); 40151 (July 1, 1998), 63 FR 36979 (July 8, 1998); 40896 (December 31, 1998), 64 FR 1834 (January 12, 1999); 41392 (May 12, 1999), 64 FR 27839 (May 21, 1999) ("May 1999 Approval Order"); 42268 (December 23, 1999), 65 FR 1202 (January 6, 2000); 43005 (June 30, 2000), 65 FR 42411 (July 10, 2000); 44099 (March 23, 2001), 66 FR 17457 (March 30, 2001); 44348 (May 24, 2001), 66 FR 29610 (May 31, 2001); 44552 (July 13, 2001), 66 FR 37712 (July 19, 2001); 44694 (August 14, 2001), 66 FR 43598 (August 20, 2001); 44804 (September 17, 2001), 66 FR 48299 (September 19, 2001); 45081 (November 19, 2001), 66 FR 59273 (November 27, 2001).

¹⁷ See 13th Amendment Notice, *supra* note 4.

⁴ Securities Exchange Act Release No. 46139 (June 28, 2001 [sic]), 67 FR 44888 ("13th Amendment Notice").

⁵ 17 CFR 240.11Aa3-2(f).

⁶ 17 CFR 240.11Aa3-2(d).

⁷ See letter from Sam Guidetti, Senior Vice President & Chief Compliance Officer, BrokerageAmerica, to Jonathan Katz, Secretary, Commission, dated September 17, 2002.

⁸ In November of 2001, Nasdaq began implementing the "Internal SIP" project. The Internal SIP is a separate technology infrastructure within Nasdaq that will perform the functions of the SIP for Nasdaq-listed securities. When the Internal SIP is in place, Nasdaq will be able to separate its functions as a stock market from its functions as a SIP for the Plan.

⁹ Pursuant to Rule 11Aa3-2(c)(4), 17 CFR 240.11Aa3-2(c)(4), summary effectiveness granted to national market system plans (or provisions thereof) may not exceed 120 days in length.

¹⁰ Securities Exchange Act Release No. 46381 (August 19, 2002), 67 FR 54687 (August 23, 2002) ("Date Extension Approval Order").

¹¹ 17 CFR 240.11Aa3-2(f).

¹² 17 CFR 240.11Aa3-2(d).

¹³ Pursuant to Rule 11Aa3-2(c), 17 CFR 240.11Aa3-2(c), the Commission must take action within 120 days of the date of publication of notice of filing of amendment in the **Federal Register** unless the sponsors of such amendment consent to an extension. The Commission notes that the sponsors of the 13th Amendment have given such consent with respect to amendment Category 1 based upon the Category 1 amendments being contingent upon a subsequent trigger event. See letter from Jeffrey T. Brown, Chairman, Operating Committee, to Jonathan G. Katz, Secretary, Commission, dated May 30, 2002 ("13th Amendment Filing").

¹⁴ Section 12 of the Act generally requires an exchange to trade only those securities that the exchange lists, except that Section 12(f) of the Act permits UTP under certain circumstances. For example, Section 12(f) of the Act, among other things, permits exchanges to trade certain securities that are traded over-the-counter ("OTC/UTP"), but only pursuant to a Commission order or rule. For a more complete discussion of the Section 12(f) requirement, see November 1995 Extension Order, *infra* note 16.

Processor will disseminate a data feed containing the National Best Bid and Offer quotations, size and market center identifier, as well as the Best Bid and Offer quotations, size and market center identifier from each individual Participant in Eligible Securities.

2. Section III.N. of the Plan defines the "OTC Montage Data Feed," which will be launched as a new data feed for the dissemination of NASD ADF Participant quotations with the launch of the Internal SIP. However, as stated above in Category 1.7, NQDS will not be fully eliminated as a data feed disseminated by the Processor until Nasdaq is registered as an exchange.

3. Section III.K. of the Plan changes the name of the Nasdaq Last Sale Information Service to "UTP Trade Data Feed," but makes no changes to the data elements contained in that data feed. While this change was effective upon launch of the Internal SIP, the Processor continues to disseminate the current Nasdaq Last Sale Information Service for a three-month parallel period to enable market data vendors to have a smooth transition to the new feed.¹⁸

4. Section III.R. of the Plan, which defines "Quotation Information" is amended to reflect that the NASD ADF will send individual market participant information to the Processor. It is also amended to clarify that only displayed quotation sizes are included in the definition and that market center identifiers are also included.

5. Section VI.B. (Collection and Consolidation of Information) has been amended to clarify the devices available for sending information to the Processor and the data feeds which the Processor shall disseminate, for as long as Nasdaq remains the Processor. While this change was effective upon launch of the Internal SIP, the Processor will continue to disseminate the legacy data feeds for a three-month parallel period to enable market data vendors to have a smooth transition to the new feed.¹⁹

6. Section VI.C. (Dissemination of Information) has been amended to identify the data feeds that the Processor shall disseminate. While this change was effective upon launch of the Internal SIP, the Processor continues to disseminate the current data feeds to enable market data vendors to have a smooth transition to the new feed.²⁰ In addition, the Processor will continue to disseminate Nasdaq individual market center quotes until Nasdaq registers as an exchange.

7. Section VI.C.1. (Best Bid and Offer) is amended to change the method of calculating the national best bid and offer from price/time/size to price/size/time and to establish a precise methodology for calculation.

8. Section VI.C.3. is renamed "Quotation Data Stream," and amended to reflect the change in definition of the UTP Quote Data Feed contained in Section III.I. of the Plan. While this change was effective upon launch of the Internal SIP, the Processor continues to disseminate the current Level 1 service ("Legacy SIP") to enable market data vendors to have a smooth transition to the new feed.²¹

9. Section VI.C.4. (Transaction Reports) is amended to reflect the change in name of the UTP Trade Data Feed contained in Section III.K. of the Plan.

10. Section XI (Hours of Operation) has been amended to change the reporting procedures for Participants that execute transactions in Eligible Securities outside of the normal trading hours of 9:30 a.m. to 4:00 p.m. EST.

Category 3: Effective Upon End of Parallel Period—Elimination of the Legacy SIP

1. Section VI.C.1. is amended to reflect that the Processor shall no longer carry quotation information from one trading day to the next, and that the Processor shall not calculate the best bid and offer for any individual Participant, including the NASD.

2. Section VI.C.1. is also amended to reflect that the Processor shall disseminate an internally locked or crossed quotation submitted by a single Participant.

3. Section XVIII.D.3, regarding Price Checks, is eliminated to reflect the Operating Committee's agreement that the Processor should no longer perform these functions.

4. Plan Exhibit 1, Paragraph 3(d)(5) is eliminated to reflect that MarketWatch costs are no longer eligible Processor Operating Costs, contingent upon the elimination of the Processor's ability to perform price checks on Participant's trade reports.

Category 4: Timing Not an Issue

1. Section III.S. of the Plan, which defines "Regulatory Halt," is amended to include halts that are called for regulatory problems relating to an Eligible Security that should be clarified before trading therein is permitted to continue.

2. Section IV.A. (Operating Committee: Composition) has been

amended to permit entities that are actively pursuing registration as a national securities exchange to participate in Operating Committee meetings in limited capacities.

3. Section IV.C. (Operating Committee: Voting) has been amended to eliminate references to events and contingencies that occurred when the Plan was first adopted. It also is clarified to reflect the Participants' agreement that neither the Plan nor the Operating Committee shall have authority in any respect over any Participant's proprietary systems.

4. Section IV.D. (Operating Committee: Meetings) will permit the Operating Committee to waive the advance notice requirement contained therein.

5. Section IV.E. has been added to establish an Advisory Committee and to define its composition and authority.

6. Section V.A. (Selection and Evaluation of the Processor: Generally) has been amended to eliminate references to events and contingencies that occurred when the Plan was first adopted.

7. Section VI.C. is amended to eliminate references to agreements between the NASD and certain foreign exchanges.

8. Section VI.D. (Immediate Hard Copy Confirmations) is eliminated and the remaining subsections of Section VI. are re-lettered.

9. Section VIII.B. (Transaction Reports) is amended to clarify that this Section applies only to transactions between Plan Participants pursuant to the Plan, and to eliminate reference to shared computer-to-computer interfaces.

10. Section X. is amended to include halts that are called for regulatory problems relating to an Eligible Security that should be clarified before trading therein is permitted to continue and to state that during a halt the Processor shall collect and disseminate Transaction Information but shall cease collection and dissemination of all Quotation Information.

11. Section XI.C. is amended to reflect that late trades can be reported between the hours of 8:00 a.m. and 6:30 p.m. on the same trading day that the transaction occurred.

12. Section XI.E. governing changes to operating hours, is eliminated.

13. Section XIII (Undertakings by NASD) is eliminated, and subsequent sections re-numbered.

14. Section XXI (Depth of Book Display) is added to reflect the Operating Committee's determination that the entity that succeeds Nasdaq as the Processor, upon certain specific conditions being met through a further

¹⁸ See note 24 *infra*.

¹⁹ *Id.*

²⁰ *Id.*

²¹ *Id.*

Plan amendment should have the ability to collect, consolidate, and disseminate quotations at multiple price levels beyond the best bid and best offer from any Participant that voluntarily chooses to submit such quotations. Section XXI states that implementing the depth of book display functionality will require a plan amendment that addresses all pertinent issues.

15. Within the body of the 13th Amendment, there are numerous "house-keeping" corrections, including punctuation and renumbering changes.

IV. Summary of Comments

The Commission received one comment letter on the 13th Amendment from BrokerageAmerica ("BA").²² BA raised several concerns regarding the current Plan-mandated access requirements for Nasdaq market makers attempting to access the quotes of exchange specialists trading Nasdaq securities pursuant to UTP. BA generally stated its belief that exchange specialists trading Nasdaq securities pursuant to UTP should be required to provide the same level of connectivity as that provided among Nasdaq market makers—electronic auto-execution. To support that main point, BA noted five reasons why the Plan-mandated connectivity dichotomy is deficient.

First, BA stated that the connectivity dichotomy between Nasdaq market makers and exchange specialists causes fragmentation and inefficiencies that conflict with Congress' intent in establishing the national market system ("NMS"). Second, BA argued that the dichotomy results in unfair and disorderly functioning of the NMS with respect to Nasdaq securities. Third, BA averred that the use of multiple execution functionalities for the trading of Nasdaq securities (*i.e.*, the Plan-mandated telephone access and Nasdaq's proprietary system, SuperSOES) conflicts with the unification of the NMS as desired by Congress. Fourth, BA argued that the human element in the auction market format causes delays in quote updating, which increase Nasdaq market makers' market exposure. Finally, BA contended that exchange specialists that trade pursuant to UTP are not consistently subject to the Firm Quote Rule.²³ Further, BA argued that, because such specialists are not subject to automatic execution, they will act in a manner that disrupts the fair and orderly market for trading NNM securities by causing extended locked and crossed markets. BA generally states that such specialists

have the capacity to and as a matter of rational market behavior will act in such a disruptive manner.

V. Discussion

The Commission finds that the Category 2, 3,²⁴ and 4 amendments of the 13th Amendment are consistent with the requirements of the Act and the rules and regulations thereunder, and, in particular, Section 11A(a)(1)²⁵ of the Act and Rules 11Aa3-1 and 11Aa3-2 thereunder.²⁶ Section 11A of the Act directs the Commission to facilitate the development of a national market system for securities, "having due regard for the public interest, the protection of investors, and the maintenance of fair and orderly markets," and cites as an objective of that system the "fair competition . . . between exchange markets and markets other than exchange markets."²⁷ When the Commission first approved of the Plan on a pilot basis, it found that the Plan "should enhance market efficiency and fair competition, avoid investor confusion, and facilitate surveillance of concurrent exchange and OTC trading."²⁸

The Commission finds that amending the Plan to incorporate the amendments detailed in Categories 2, 3, and 4 above furthers these goals. The Commission believes the Category 2 and 3 amendments should, among other things, further the satisfaction of requirements of the SuperMontage approval order²⁹ by establishing an Internal SIP that is distinct from Nasdaq's other proprietary systems.

The SuperMontage Approval Order imposed certain requirements upon the Participants in order for the Commission to extend the Plan. Specifically, the Participants were charged with engaging in good faith negotiations to revise the Plan to provide for (i) a fully viable alternative

exclusive SIP for all Nasdaq securities, or (ii) a fully viable alternative non-exclusive SIP.

Moreover, the Commission imposed a presumption that, if the revised Plan provided for an exclusive consolidating SIP, such SIP should not be a Plan Participant. The Commission stated that, if a Plan Participant were selected to operate such exclusive SIP, there should be a further presumption that the Participant-operated SIP must operate completely separate from any order matching facility operated by that Participant. Such an order matching facility must interact with the exclusive SIP on the same terms and conditions as any other market center trading Nasdaq listed securities.

The Commission understands that the Participants are negotiating to select a non-Participant technology vendor to serve as an alternative exclusive SIP. In the event that a non-Participant technology vendor is selected, the Commission notes that the Plan may require further amendment.

The Commission also believes that the Category 4 amendments further the goals of the Act by making clarifying changes, deleting provisions that no longer apply, and making certain "house-keeping" corrections. Moreover, the Commission believes that the Category 4 amendments should further the satisfaction of requirements of the SuperMontage approval order by establishing an Advisory Committee. Finally, the Commission believes that the Depth of Book Display provision added by the Category 4 amendments is a beneficial addition to the Plan as it would increase the amount of data disseminated by the SIP for the benefit of investors generally.

The Commission has carefully considered all the issues raised by the sole commenter, BA, and is not persuaded. BA essentially argued the point that there are fundamental differences between the trading of Nasdaq securities by Nasdaq market makers and by human exchange specialists trading pursuant to UTP in the traditional auction format. BA generally argued that exchange specialists trading Nasdaq securities pursuant to UTP should be required to provide the same level of connectivity as that provided among Nasdaq market makers—electronic automatic execution. To support its main argument, BA described why it perceives the Plan-mandated telephone connectivity as being deficient and detrimental to the operation of the NMS.

The Commission notes that a market participant providing automatic execution against that market

²⁴ Nasdaq plans to sunset the current SIP application ("Legacy SIP"), which will trigger specific technical changes in the operation of the Internal SIP and the resulting data feeds. At such time, the Legacy SIP will no longer function and the Internal SIP will be the sole remaining SIP. See 13th Amendment Filing. This order approves the Category 3 amendments, but such amendments will not be effective and operative until such time as the Legacy SIP is no longer operative and the Internal SIP becomes the sole remaining SIP. The Commission understands that Nasdaq expects to end the parallel period no later than January 5, 2003.

²⁵ 15 U.S.C. 78k-1(a)(1).

²⁶ 17 CFR 240.11Aa3-1 and 17 CFR 240.11Aa3-2.

²⁷ 15 U.S.C. 78k-1(a).

²⁸ 1990 Plan Approval Order, *see supra* note 17.

²⁹ Securities Exchange Act Release No. 43863 (January 19, 2001), 66 FR 8020 (January 26, 2001) (File No. SR-NASD-99-53) ("SuperMontage Approval Order").

²² See note 7 *supra*.

²³ 17 CFR 240.11Ac1-1.

participant's quote is not (and has never been) a requirement for exchanges to trade Nasdaq issues. Moreover, the Commission has not required competitors to participate in a Nasdaq trading facility or required Nasdaq to provide access to its trading facilities to its competitors. Each of the UTP participants has independently decided whether to participate in Nasdaq's automatic execution facility. The Commission also notes that providing automatic executions—rather than operating an auction market—is not a precondition to competing in Nasdaq securities. The very essence of UTP is to permit competition among markets and market structures. Requiring one market structure for trading Nasdaq securities would defeat this purpose.

BA argued that the trading of Nasdaq securities pursuant to UTP by exchange specialists causes inconsistent application of the Firm Quote Rule, 11Ac1-1.³⁰ While compliance with the Firm Quote Rule is easier to monitor in an automatic execution environment, the Firm Quote Rule does not require market participants to be subject to automatic execution. Indeed, the Firm Quote Rule has always applied to exchange trading as well as over-the-counter trading, and exchanges must monitor and enforce compliance with the Firm Quote Rule.

BA also argued that the delay in updating quotes by human UTP exchange specialists causes UTP exchange specialists' quotes to be "not real" when compared to the quotes of Nasdaq market makers that are subject to automatic execution and electronic quote updating. The Commission notes that UTP exchange specialists must comply with the Firm Quote Rule. It may take longer to receive a fill from an exchange specialist trading pursuant to UTP and for such specialist's quote to be updated than it takes to receive a fill from a Nasdaq member that is subject to automatic execution and for the Nasdaq member's quote to be updated. This does not, however, make trading pursuant to UTP under the Plan impermissible under the Act and the rules and regulations thereunder.

VI. Conclusion

It is therefore ordered, pursuant to Section 11A of the Act³¹ and paragraph (c)(2) of Rule 11Aa3-2,³² thereunder, that those amendments to the Plan detailed in Category 2, Category 3, and Category 4 above be, and hereby are, approved on a pilot basis until August

19, 2003. The Commission also has determined to continue the exemption from Rule 11Aa3-2,³³ regarding the dissemination of multiple BBOs from a single Plan Participant³⁴ until such time as Nasdaq is registered as a national securities exchange.³⁵

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.³⁶

Margaret H. McFarland,

Deputy Secretary.

[FR Doc. 02-27806 Filed 10-31-02; 8:45 am]

BILLING CODE 8010-01-P

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-46719; File No. SR-CBOE-2002-41]

Self-Regulatory Organizations; Notice of Filing and Order Granting Accelerated Approval of a Proposed Rule Change and Amendment No. 1 Thereto by the Chicago Board Options Exchange, Inc. Relating to an Interpretation of Paragraph (b) of Article Fifth of Its Certificate of Incorporation and an Amendment to Rule 3.16(b)

October 25, 2002.

Pursuant to section 19(b)(1) of the Securities Exchange Act of 1934 ("Act"),¹ and Rule 19b-4 thereunder,² notice is hereby given that on July 29, 2002, the Chicago Board Options Exchange, Inc. ("CBOE") filed with the Securities and Exchange Commission ("Commission") the proposed rule change as described in Items I and II below, which Items have been prepared by the CBOE. On September 20, 2002, the CBOE filed an amendment to the proposed rule change.³ The Commission is publishing this notice to solicit

³³ 17 CFR 240.11Aa3-2.

³⁴ See 13th Amendment Notice for a more detailed discussion of the referenced exemption.

³⁵ The Commission notes that it is not continuing the exemption provided under Rule 11Ac1-2, 17 CFR 240.11Ac1-2, regarding calculation of the BBO in the 12th Amendment approval order because the 13th Amendment has converted the method of calculation of the BBO by the Plan SIP from price/time/size to price/size/time methodology consistent with Rule 11Ac1-2, 17 CFR 240.11Ac1-2.

³⁶ 17 CFR 200.30-3(a)(27).

¹ 15 U.S.C. 78s(b)(1).

² 17 CFR 240.19b-4.

³ See letter from Arthur B. Reinstein, Deputy General Counsel, CBOE, to Elizabeth King, Associate Director, Division of Market Regulation, Commission, dated September 19, 2002 ("Amendment No. 1"). Amendment No. 1 designates the proposed rule change as filed pursuant to Section 19(b)(2) of the Act. 15 U.S.C. 78s(b)(2). The CBOE also requests that the proposed rule change be given accelerated effectiveness, pursuant to 19(b)(2) of the Act. 15 U.S.C. 78s(b)(2).

comments on the proposed rule change from interested persons, and to approve the proposed rule change, as amended, on an accelerated basis.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The proposed rule change consists of an interpretation of paragraph (b) of Article Fifth of the Certificate of Incorporation of the CBOE ("Article Fifth (b)") pertaining to the right of 1,402 full members of the Board of Trade of the City of Chicago ("CBOT") to become members of CBOE without having to purchase a CBOE membership (the "Exercise Right"). This provision has previously been interpreted by the CBOE, including an interpretation reflected in an agreement between the CBOE and CBOT dated September 1, 1992 (the "1992 Agreement").⁴ The interpretation provided, among other things, that in order to become a member of the CBOE pursuant to the Exercise Right, a full member of the CBOT must be in possession of all the trading rights and privileges appurtenant to a CBOT full membership.

It has recently come to the attention of the CBOE that starting in 1999, the CBOT implemented expedited membership approval procedures applicable only to those individuals who wished to become CBOE members pursuant to the Exercise Right, but did not wish to trade as members on the CBOT itself. Under the rules of the CBOT, individuals approved for CBOT membership pursuant to these expedited procedures do not have any rights to trade as members on the CBOT, and thus the CBOE believes that these individuals do not satisfy the interpretation reflected in the 1992 Agreement as described above.

On April 17, 2002, the CBOE informed the CBOT that individuals approved for CBOT membership pursuant to these expedited procedures are not entitled to become exerciser members of the CBOE. In response, on April 22, 2002, the CBOT began advising applicants for membership on the CBOT for the purpose of becoming exerciser members of the CBOE that such individuals must complete regular CBOT membership approval procedures. All individuals exercising since that date have complied with this requirement. The CBOE represents that during the several years that CBOT's

⁴ The CBOE believes that the 1992 Agreement and an amendment to Rule 3.16 referring to the 1992 Agreement were approved by the Commission. See Securities Exchange Act Release No. 32430 (June 8, 1993), 58 FR 32969 (June 14, 1993).

³⁰ 17 CFR 240.11Ac1-1.

³¹ 15 U.S.C. 78k-1.

³² 17 CFR 240.11Aa3-2(c)(2).